Adapt, Improvise and Overcome:
Engaging with Conflict of Interest in the Bush.

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Declaration

I declare that the ideas, results, analysis and conclusions reported in this thesis are my own effort, and where I have been informed by the work of others, I acknowledge that contribution. I have not previously submitted this work for any other award. The tools and processes offered to assist lawyers in the process of ethical decision making in Chapter VI *Discussion* have been previously published in Chapter 5 of '*The Place of Practice. Lawyering in Rural and Regional Australia*' edited by Patricia Mundy, Amanda Kennedy and Jennifer Nielsen 2017 The Federation Press.

Ethics Clearance

This doctoral research was conducted in accordance with the Australian National University Human Research Information Enterprise System (ARIES) Human Ethics protocol (Approved 28 June 2012 ref 2011/571).

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voraciously consuming my energy. Using their strategic project management skills we developed the thesis completion plan. They continuously ‘checked in’ on my progress through our WhatsApp PhD support group.

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Critical direction throughout the research project has come from my legal colleagues, including academics and country lawyers who provided and shared their diverse experiences and insights with me. This research has been shaped by that input. The regulators, the insurers and the ethicists at the law societies and Law Council of Australia have supplied information, statistics and suggestions and have reviewed my emerging ideas and provided feedback. My legal colleagues include participants within the National Rural Law and Justice Alliance and the presenters at the three Rural, Regional Law and Justice Conferences (Warrnambool in 2010, Coffs Harbour in 2013 and Orange in 2015). These national conferences have facilitated the evolution of scholarly attention to the challenges facing country law practice and these researchers have generated a series of articles in academic journals which in turn enlighten and inform the legal ethics discussion.

I also received critical direction through the Australian National University ‘research in progress’ seminars which provide a forum for emerging researchers to test our ideas. I have benefited from the discourse and discovery offered through conversations with colleagues at the biennial gatherings of the legal ethics research community at the Australian and New Zealand Legal Ethics Colloquium and the International Legal Ethics Conferences. I am grateful to the founders and champions of this legal ethics professional community of practice who have cultivated this research community.

My final thanks to the country lawyers who agreed to be interviewed. They told me how they identify and respond to conflicts of interest and consequently provided the data upon which this thesis emerges. I am grateful to Karen Bowley, Karen Keegan and Sarah Rodgers, my colleagues at the Albury-Wodonga-based Hume Riverina Community Legal Service who have accompanied me on this research journey and provide the opportunity to consider 'praxis', the conversion of theory into practice and practice into theory. They are responsible for the title of this thesis. These community lawyers seek to 'adapt, improvise and overcome' and deliver broad based justice to a dispersed population of 308 169 people across 78 517 square kilometres of regional, rural and remote Australia. They give practical expression to Lon Fuller's insistence that lawyering is a purposive endeavour.

Survival tips and practical strategies for completion have come from Dr Inger Mewburn, the Director of Research Training at the Australian National University (ANU) and author of the 'thesis whisperer' blog and facilitator of 'thesis boot camps'. Inger introduced me to the concept of social writing and the use of timed writing sessions or 'pomodoros' which reduce the angst and isolation of the PhD process. Social writing has sustained me. What began at the ANU coastal campus at Kioloa writing retreats, continued at the Albury-Wodonga and Beechworth 'shut up and write' groups where I have written with sister researchers from Charles Sturt University, La Trobe University, The University of Melbourne and the Australian Catholic University in coffee shops, wine bars, honey shops and libraries. I give special mention to my researcher colleague Dr Fiona Tito Wheatland who created the online, private virtual writing community group quaintly called 'OWLS: Older Wiser Learners'. Far from the city campus, OWLS uses social media to connect a virtual community of PhD scholars.

This research journey has provided me with an opportunity to participate in a national conversation about the influence of regulation on fostering ethical acuity. The experience has fostered my belief that the practice of law is strengthened through reflection and discourse. This thesis argues that such reflection and discourse can and should be fostered within professional communities of practice which ideally bring together practising lawyers, regulators and researchers.

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ABSTRACT

The evolution of the Australian legal ethics regulatory system towards a principles-based approach presents an opportunity for lawyers to cultivate an ethical acuity which transcends prescriptive obedience to promulgated rules. Lawyers are invited to use their professional judgment to discern a response appropriate to both the ethical situation and to the distinctiveness of their law practice. However, as professional regulation moves from a command and control system to a decentred approach which empowers the situated lawyer to be 'purposive' in their practice of law, there is a gap in the knowledge as to how lawyers' professional judgment should be monitored, moderated and maintained.

Informed by exploratory empirical work, this thesis proposes a normative prescription for supporting lawyers' ethical acuity. It argues that justice delivery requires lawyers to develop an adaptive ethical stance to respond effectively to the context of their law practice, and this adaptive practice should be moderated by professional peers through participation within professional communities of practice.

The research site of inquiry focuses on how country lawyers identify and respond to conflicts of interest. A conflict of interest exists when multiple interests or duties are incompatible. The possibility of conflict of interest increases in country communities when lawyers have multiple and overlapping roles. In addition, lawyer scarcity in geographically remote areas means there are fewer referral options if a disqualifying conflict occurs. This ubiquitous ethical dilemma creates structural strain within country law practices. On the one hand, country lawyers' practice must reflect the established ethical standard, whilst on the other hand as a justice professional they are the personification of the rule of law in their community and must respond to that context.

This research considers the processes country lawyers use to navigate the intermediary space between the requirements of the regulatory system and their practice context. The theoretical framework developed from decentred regulatory theory, the natural law theory of legal ethics and the concept of professional communities of practice collectively inform the research design and data analysis.

The hypothesis shaping the research asserts '*That geographic location affects the way that lawyers identify and respond to conflicts of interest.'* Fifty-two country lawyers were interviewed and their responses were coded to a measure of geographic remoteness, then analysed for common themes. This research contributes both explanatory and normative theory to legal ethics. Some country lawyers unconsciously exhibit purposive professionalism and this conduct is consistent with a principles-based, decentred regulatory paradigm. There is evidence that country lawyers' ethical acuity is shaped through participation within professional communities of practice. The thesis concludes with the normative prescription that '*For ethical legal practice, lawyers need to participate in a community of practice.*'

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Word Count: 79,040 (excluding footnotes, bibliography and appendices)

GLOSSARY

This glossary clarifies the intended meaning around words and technical terms used in the thesis. This meaning may differ to their common usage and is derived from case law and the scholarly literature.[1] Where necessary, the terms are considered in more detail within the text.

Access to justice is the availability of suitable arrangements or processes for people to claim justice, not just to use the law. Access includes a comprehensive range of justice options, ascending through increasing stages of formality.[2]

Adaptive practice is a term I coined to refer to lawyers' ability to respond to the practice context and to apply their professional skills in a manner which respects and responds to that context. Taking an adaptive approach to practising law reflects the iterative accumulation of skill through experience, rather than the noun form 'practice' with the connotation of established form.

Administration of justice refers to the systems and services which support legal processes within the courts, tribunals and associated services.[3] When seeking to define the professional duty to the 'administration of justice' the academic author Gino Dal Pont commented that 'As a participant in the administration of justice and the legal system, the lawyer must foster respect for the law and its administration.'[4] In the

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1 This thesis adopts the Australian Guide to Legal Citation (AGLC) style guide. Melbourne University Law Review Association Inc and Melbourne Journal of International Law Inc, *Australian Guide to Legal Citation* (Melbourne University Law Review Association Inc, Third Edition ed, 2010). The preferred AGLC dictionary is the online version of the *Australian Law Dictionary*. See Trischa Mann, *Australian Law Dictionary (online version)* (Oxford University Press, 2nd ed, 2015).

[2] Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999). Christine Parker's definition of 'access to justice' acknowledges that the justice system includes formal and informal institutions and processes, as well as proactive access to information and advice to prevent the deterioration of disputes. Parker's framing of access to justice has informed the Australian Attorney General's Department, *A strategic framework for access to justice in the federal civil justice system. Report by the Access to Justice Taskforce* (September 2009); See also Australian Government Productivity Commission, *Access to Justice Arrangements. Productivity Commission Inquiry Report Volume 1 and Volume 2 (Number 72)* (5 September 2014).

[3] Richard Coverdale, *Postcode Justice. Rural and Regional Disadvantage in the Administration of Law in Victoria* (Deakin University, Centre for Rural Regional Law and Justice, July 2011), 9.

[4] G E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5th ed, 2013) 615; See also Dal Pont's reference 382, *Re B* [1981] 2 NSWLR 372 (Moffitt P) ('*Re B*').

commentary and case law, this duty to the administration of justice has been confined to the curial context and the lawyers' duties to the court and their client. In *The Queen v Rogerson*[5] the court ruled that when the term is limited to the exercise of jurisdiction by courts and tribunals, then police investigations do not, of themselves, form part of the course of justice.[6]

Bar norms are the tacit, hidden regulatory influences within localised legal cultures which shape lawyers' practice. Bar norms contribute to maintaining, or conversely undermining, the 'paper norms' (the explicit, posited professional conduct rules promulgated and enforced by the professional regulator).

Chinese Walls refer to a structural device within a law practice which operate to quarantine information so that unauthorised people can not access that information. The preferred term used in Australia and in this thesis is 'effective information barriers'. See further discussion below under 'established ethical standard'.

Client is any person who 'engages' a law practice to provide a 'legal service'.[7]

Cluster refers to the co-location of more than one law practice in the same geographic location (as opposed to an 'outpost', see below).

Community of practice is a concept developed by Jean Lave and Etienne Wenger which refers to a group of people, united by a common purpose, who gather to share the development of their tacit practice skills.[8]

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[5] *The Queen v Rogerson* (1991) 174 CLR 268.

[6] Ibid; See also *Legal Services Commissioner v Douglas John Winning* [2008] LPT 13.

[7] This definition is from the Glossary to the *Australian Solicitors Conduct Rules*. These rules are promulgated in different forms according to the jurisdiction which adopts them. In this thesis, I refer to the rules which are adopted by Victoria and New South Wales under the *Legal Profession Uniform Law* and are known as Legal Services Council, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (2015). For a full description of the professional conduct rules in each Australian jurisdiction refer to Appendix E *Australian Regulatory Structure*. As the glossary to the Victorian and New South Wales rules is not itemised, in this Chapter I refer to the commentary from the Queensland Law Society, *The Australian Solicitors Conduct Rules 2012 in Practice: A Commentary for Australian Legal Practitioners* (Queensland Law Society, 2014). See 117 [44.10].

[8] Jean Lave and Etienne Wenger, *Situated Learning: Legitimate Peripheral Participation* (Cambridge University Press, 1991) ch 4. The concept was further developed by Etienne Wenger, *Communities of Practice; Learning, Meaning, and Identity.* (1998).

Conflict of duties refers to the realisation that several concurrent professional duties cannot be discharged simultaneously, for example, when a lawyer has a duty to two clients whose interests are incompatible. The conflict arises because on the one hand there is a duty to keep one client's information confidential and on the other hand there is a duty to disclose all relevant information to assist the second client.

Conflict of interest refers to the position when multiple interests are unable to be reconciled. Multiple interests can be 'aligned' when the holders of those interests want the same outcome in which case there is no conflict. A conflict occurs when the two sets of interests are adverse and the holders of those interests seek different outcomes. Some lawyers believe that a 'conflict of interest' can sit along a spectrum of escalating seriousness. At one end of the spectrum are a perceived conflict, an inchoate possible, or potential conflict, escalating to more serious actual, direct or material conflict at the other end.

Conflict of interest and duty arises when the lawyer's interests conflict with their professional duty to their client. For example, the private sector lawyer's financial interest in obtaining a personal profit from the law practice may conflict with their fiduciary duty not to make an unauthorised profit out of their professional relationship with their client.[9] This possible conflict is managed through disclosure and the negotiation of a retainer agreement.

Continuing professional development (CPD) refers to the activities undertaken by lawyers to maintain professional competence. Terms such as 'continuing legal education' (CLE) and 'mandatory continuing legal education' (MCLE) are used interchangeably to refer to this activity. Within the Australian regulatory systems all lawyers are mandated to undertake a minimum of ten units of CPD activity every year.[10] One unit equates to one hour attendance at a seminar or webinar, watching a video, relevant postgraduate studies, or delivery of content at a seminar, two hours participating in a professional committee, or writing an article of 1000 words.[11] At least one unit must be completed in each of the following fields: ethics and professional

[9] Dal Pont, above n 4, 70 [6.05], 225 [6.105].

[10] Law Council of Australia and Legal Services Council, 'Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015' (18 November 2016) Rule 6.

[11] Ibid r 9.

responsibility, practice management and business skills, professional skills and substantive law.[12]

Core refers to settled law, that is, case law and posited legislation which provide a clear legal direction. Core is used in juxtaposition with the word 'penumbra' which refers to the uncertainty and open texture of the context in which law is practised. The complementary terms are used by H L A Hart in his writing on *The Concept of Law*.[13]

Country refers to the geographic areas and communities outside the major cities of Australia. Historically the terms regional, rural and remote (abbreviated to the acronym RRR) are used to indicate increasing geographic remoteness. This thesis uses the Australian Bureau of Statistics *Australian Statistical Geography Standard Remoteness Areas Structure* (ASGS-RA) as a measure of geographic remoteness to disaggregate the interview data.[14]

Current client conflict means the law practice has been asked to provide legal services to two or more clients whose interests are adverse. Current client conflicts are also called 'concurrent conflicts'.

Dialectic activity refers to a conversation, interaction or discursive activity between people or opposing ideas, which creates knowledge. The dialectic method is attributed to the philosophical method of Socrates, Kant and Hegel. The dialectic concept is that through discussion, reason and logic, truth can be discovered.

Duty arises from a formal obligation, often created through codes of conduct, common law or statute, and enforced through censure or disciplinary action. Professional duties can be enforced through the law of ethics, contract and tort.

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[12] Ibid r 6.

[13] HLA Hart, 'Positivism and the Separation of Law and Morals ' (1957) 71 *Harvard Law Review*, 593 as quoted in Gerald J Postema, 'Positivism and the Separation of Realists from their Sceptism' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing, 2010) 259, 261–2, 264. See also HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994).

[14] This thesis uses the *Australian Bureau of Statistics Australian Statistical Geography Standard Remoteness Areas* (ASGS-RA) as a measure of geographical remoteness. See Australian Bureau of Statistics, 'Australian Statistical Geography Standard (ASGS): Volume 5 - Remoteness Structure. ' (July 2011) 1270.0.55.055 . Hereafter referred to as ASGS-RA 2011. Refer to Appendix A *Chronology of Australian Statistical Geography.*

Established ethical standard refers to the expected conduct informed by the contemporary common law and professional conduct rules and overseen by the regulators. For example, Rules 10.2.2 and 11.4.2 of the *Australian Solicitors Conduct Rules* allow law practices to act for clients in a possible conflict of duties situation if they have informed client consent and 'effective information barriers'. This established ethical standard which permits these barriers, references the common law of *Prince Jefri Bolkiah v KPMG (a firm)*[15] and *Asia Pacific Telecommunications Limited v Optus Networks Pty Ltd*[16] and prescriptive detail promulgated by the law society guidelines.[17]

Ethical acuity refers to clarity, an ability to consider various perspectives before making an informed ethical judgment which can be explained and justified as appropriate conduct to professional peers.

Ethical agency is a term deriving from Lon Fuller[18] and David Luban's[19] concept of the 'purposive professional', although neither use the term 'ethical agency' in their work. In this thesis ethical agency refers to the individual lawyer's appreciation of their professional autonomy and discretion whilst being bound to comply with the established ethical standard. Whilst lawyers' ethical conduct is subject to regulatory review, they have a large measure of autonomy (or ethical agency) to discern what is the right thing to do in a practice context.

Ethical principles refer to the overarching principles which guide professional conduct.[20]

Engagement is when a lawyer provides legal services to a client.[21]

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[15] *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222.

[16] *Asia Pacific Telecommunications Limited v Optus Networks Pty Ltd* [2007] NSWSC 350.

[17] The Law Society of New South Wales, 'Information Barrier Guidelines' (16 March 2006). The law societies in the Australian Capital Territory, New South Wales, Queensland and Victoria have promulgated Effective Information Barrier guidelines. The Rules commentary by the Queensland Law Society above n 7 adds these guidelines 'should be followed in the strictest terms' 38 [10.2.7], 137–158.

[18] Lon L. Fuller, *The morality of law* (Yale University Press, 2nd ed, 1969).

[19] David Luban, *Legal ethics and human dignity* (Cambridge University Press, 2007), 108-109.

[20] Ethical principles are considered in detail in Chapter II A 2. Refer to Appendix B *Comparative Ethical Principles.*

[21] Queensland Law Society, above n 7. See Glossary 119 [44.19].

Eunomics is a concept coined by Lon Fuller in 1954 to refer to his theory of good order and workable arrangements. Eunomics involves the study of basic processes of social ordering and their corresponding forms of law. According to Fuller eunomics is 'a concrete and highly practical enterprise' addressed to the 'legal realisation of social ends'.[22] Eunomics derives from 'eudaimonia', an ancient Greek philosophical word meaning 'human flourishing'.

Fiduciary duty is a professional obligation between the lawyer as fiduciary and the client as the principal, whereby the lawyer must put their client's best interests first. The fiduciary duty includes the duty of loyalty and trust. Financial loss arising from a breach of the duty may be quantified, and compensated.[23]

Former client conflict means that there is a conflict between the professional duty to retain the confidential character of information obtained from a former client, with a parallel professional duty to disclose all relevant 'material' information to another current client. The conflict of duties occurs as the lawyer has a simultaneous professional duty to both the former and the current client. Without the informed consent of the former client, that client's confidential information cannot be disclosed to the current client. Former client conflicts are also called 'successive conflicts'.

Fullerian analysis refers to David Luban's application of Lon Fuller's dialectic method which goes beyond formal obedience to a principle or rule to inquire into the functional purpose that rule or principle is designed to address.[24] There are three steps to the Fullerian analysis. The first step is to inquire into the purpose of the professional principle in fulfilling the lawyer's role. The second step requires insight into the 'is – ought' relationship and consideration as to how best to give practical expression to that intrinsic purpose. What should (ought) be the practical outcome or 'impact' when that professional principle is applied? Lastly, Luban suggests the lawyer should 'reason out

[22] Robert S Summers, *Lon L Fuller,* Jurists: Profiles in Legal Theory (Stanford University Press, 1984) 8, 74 fn 2–3, 163. See also Kenneth I Winston, *The Principles of Social Order. Selected Essays of Lon L Fuller* (Hart Publishing, 2001) ch 1.

[23] To read more about this focus on financial loss see Ewan McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Oxford University Press, 1992), 205 [6.045]. For a critique of the limitation of the fiduciary duty to financial interests see Lisa Zhou, 'Fiduciary Law, Non-Economic Interests and Amici Curiae' (2008) 32 *Melbourne University Law Review* 1158.

[24] David Luban, 'Rediscovering Fuller's Legal Ethics' (1998) 11 *Georgetown Journal of Legal Ethics* 801.

what restraints must be observed if those purposes are to be achieved'.[25] This third step reflects the dialectic process which explores the relationship between the means required to achieve an end.

Geographic location describes the physical place in which law is practiced. Words such as 'country' or 'regional, rural and remote' describe localities or places outside the major cities. In this research geographic location is described by remoteness areas as defined by the *Australian Statistical Geography Standard Remoteness Areas Structure* (ASGS-RA).[26]

Interest refers to the factors, including financial and non-financial, which inform and motivate behaviour. An example of a financial interest is a private lawyer's motivation to ensure their law practice is sustainable. An example of a non-financial interest is lawyers' desire to protect their family and intimate personal relationships from harm.

Justice is described by Christine Parker as an arrangement by which people can (successfully) make claims against individuals and institutions to achieve shared public ideals of social and political life. She notes that justice is broader than 'legal justice' or 'justice according to law' which are subsets of that universal justice category.[27]

Law practice is defined in section 6 of the *Legal Profession Uniform Law* as:

> (a) a sole practitioner; or
> (b) a law firm; or
> (c) a community legal service; or
> (d) an incorporated legal practice; or
> (e) an unincorporated legal practice. [28]

A similar definition, with a slight variation is used in the glossary to the *Australian Solicitors Conduct Rules*:

> (a) an Australian legal practitioner who is a sole solicitor;
> (b) a partnership of which the solicitor is a partner;
> (c) a multi-disciplinary partnership; or
> (d) an incorporated legal practice. [29]

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[25] Ibid. For more discussion on a Fullerian analysis see Chapter V D I b.

[26] Australian Bureau of Statistics, (ASGS-RA), above n 14. The Australian Bureau of Statistics reviews these classifications every five years after the Housing and Population census.

[27] Parker, above n 2, 43.

[28] Note the *Legal Profession Uniform Law* is a schedule to the *Legal Profession Uniform Law Application Act 2014* (Vic). See s 6 of the *Uniform Law*.

[29] Queensland Law Society, above n 7, 120 [44.26].

(See also **practising law** below).

Lawyer is a generic term used to refer to a legal professional. In this thesis, lawyer is used in preference to the alternative terms of Australian legal practitioner, solicitor or barrister. (Note, I am not using the definition of 'lawyer' used in the *Legal Profession Uniform Law*.[30])

Legal assistance sector refers to the four publicly funded law practices tasked with providing free legal information and legal services to disadvantaged Australians. Although public law practices differ between jurisdictions, they organise on a national basis. The four sectors are the Legal Aid Commissions, the Aboriginal and Torres Strait Islander Legal Services, the Community Legal Centres and the Family Violence Prevention Legal Services.

Legal ethics refers to the characteristic of professional judgment which transcends prescriptive rule following and reflects the expected standard of conduct for lawyers. The academic author Gino Dal Pont prefers to use the term 'professional responsibility' instead of legal ethics.[31]

Legal services mean work done, or business transacted, in the ordinary course of law practice.[32]

Natural law: the concept of natural law dates back to antiquity. In the 1946 publication *Reason and Fiat in Case Law* Lon Fuller observes that:

> [T]he term 'natural law'… means that there are external criteria, found in the conditions required for successful group living, that furnish some standard against which the rightness of … decisions should be measured.[33]

Outpost refers to a single law practice in a geographic location, as opposed to a 'cluster' (see above).

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[30] Note definitions of 'lawyer' in ss 219 and 261 of the *Legal Profession Uniform Law Application Act 2014* (Vic).

[31] Dal Pont, above n 4, 3-5, [1.05]–[1.10].

[32] The Rules commentary by the Queensland Law Society above n 7, 120 [44.29].

[33] Lon L. Fuller, 'Reason and Fiat in Case Law' (1946) 59 *Harvard Law Review* 376–379.

Paper norms are the explicit professional conduct rules promulgated and enforced by the professional regulator. Paper norms complement 'bar norms' which are the tacit, hidden regulatory influences within localised legal cultures which also shape lawyers' practice.

Participants are country lawyers who were approached and agreed to participate in this research.[34]

Penumbra refers to the uncertainty and 'open texture' of the context in which law is practised. Penumbra is used in juxtaposition with the 'core' of settled law, that is case law and posited legislation which provide a clear legal direction. These two complementary terms are used by H L A Hart in his writing on *The Concept of Law*.[35]

Phronesis or **practical wisdom** is situationally sensitive judgment acquired through experience, which is recognised by colleagues as appropriate and consistent with the established ethical standard. The term derives from ancient Greek Aristotelian ethics. (See **situated learning** and **situated lawyer** below.)

Practising (law) (Australian English spelling) is the verb form and in this thesis refers to the lawyering activity that involves calculated ethical decisions, which are not reified and replicated, but are sophisticated and contextual exercises of professional judgment.

Principles-based practice is a hallmark of decentred regulation. It refers to a regulatory system where overarching aspirational ethical principles are the touchstone for ethical conduct. Principles enable the nuanced application of law to practice, ensuring that both regulator and regulatee are focused on the shared outcome. Both 'principles' and 'outcomes' contrast with 'bright line' posited, prescriptive rules which dictate obedience.

Professional community of practice is both a community of identity and a learning community.[36]

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[34] See Chapter III D 3 b for more information about the selection of the cohort of participant lawyers.

[35] Hart, above n 13 as quoted in Postema, above n 13, 261–2, 264.

[36] See Chapter V E for further discussion.

Post admission experience: In Australia, a lawyer becomes a lawyer on 'admission' to the Supreme Court and, after obtaining their annual practising certificate, practises law 'post admission' or 'post qualification'. A lawyer's experience is measured in years of 'post admission experience' or 'post qualification experience'. In this research, post admission experience is categorised as 'early career' and 'master'. The Australian law societies refer to lawyers with less than five years' post admission experience, the novice or early career lawyer, as a 'young lawyer'. The term 'master' is not commonly used, but is used in this research to refer to lawyers with ten or more years of practice experience. These categories reflect the craft metaphor used by Westwood who suggests that as lawyers develop their practice skill, they transition from novice, to journeyman to master.[37]

Purposive professional was defined by David Luban in his revisiting of Lon Fuller's natural law theory of legal ethics in which the lawyer is 'defined by the function they serve in fulfilling their purpose'.[38] The concept of a purposive professional is both aspirational and evaluative.

Regulator is the organisation created by the legal profession statute to license lawyers, receive and respond to consumer and disciplinary complaints and, if necessary, to sanction lawyers.

Sector of employment. In this research participant responses are coded according to either their public or private 'sector' of employment. Both public and private sector law practices must nominate a 'principal' as the person responsible for that practice. In the private sector a law practice may have several principals who financially benefit from the business profit. Although private sector lawyers may have hybrid law practices and do public sector work as pro bono volunteers, and legal aid work, they are nevertheless classified in this research as private sector. In public law practice, usually there is one principal. Public sector law practices are 'not for profit' and are funded by government. They provide legal services to eligible clients for free or with a minimum payment (see **legal assistance sector** above).

[37] Fiona M Kay Westwood, *Developing Resilience. The key to professional success* (Matador, 2010) 85.
[38] Luban, above n 19, 108–109.

Situated lawyer refers to the dynamic relationship between the lawyer and the place in which they practise law. The concept references the iterative process whereby the legal practice context informs the lawyer's professional judgment. (see **situated learning** below.)

Situated learning is a concept described by Jean Lave and Etienne Wenger which reflects the 'relational character of knowledge and learning … the negotiated character of meaning and … the concerned (engaged, dilemma-driven) nature of learning activity of the people involved.'[39] The concept involves the comprehensive understanding of the 'whole person rather than "receiving" a body of factual knowledge about the world; on activity in and with the world; and on the view that the agent, activity and the world mutually constitute each other.' [40]

Structural strain is a concept discussed by Donald Landon in his research into country law practice.[41] It describes the lawyer's adaptive practice in response to the circumstances of their practice and their obligation to achieve professional standards.

The Bush is a colloquial term referring to geographical areas outside the major cities of Australia.[42]

Threshold screening is an administrative process which involves conducting a 'conflict check' of new clients and new matters against the client data held within the law practice. The process assists the law practice to discern if it has a conflict of interests.

Turn away is a colloquial term referring to the law practice's refusal of service to a client.[43] Occasionally a 'turn away' is supplemented with a 'warm transfer' (see definition below) when the law practice creates an opportunity for the refused person to

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[39] Lave and Wenger, above n 8.

[40] Ibid.

[41] Donald D Landon, *Country Lawyers. The Impact of Context on Professional Practice* (Praeger, 1990) ch 8, 119–146.

[42] 'The bush is where some Australians live and where others will never go'. Don Watson, *The Bush. Travels in the heart of Australia.* (Hamish Hamilton. Penguin Books, 2014), 70.

[43] National Association of Community Legal Centres, *National Census of Community Legal Centres 2016 National Report*, (August 2017) 10 n 1. In the Census a 'turn away' was defined as 'any person your CLC had to send away because you were unable to assist them within the needed timeframe or because of a lack of resources, lace of centre expertise or your centres' eligibility policy'.

obtain legal help from an alternative law practice. Some law practices provide written scripts for their workers to follow to ensure that no confidential information is disclosed during this 'turn away' process.[44]

Triage is a process typically used in a medical context to assign degrees of priority to competing emergency patients and to decide the order of treatment. In this thesis the term refers to the process of assessing multiple concurrent, possibly conflicting matters to determine which client or matter will be accepted for legal services. The assumption is that the triage assessment is conducted according to a pre-determined set of criteria.[45]

Unbundled legal services means a discrete, single session of legal help without the expectation of ongoing casework or case management. Unbundling requires an explicit limited scope retainer to limit the fiduciary relationship to a discrete issue. See *Fortune v Peter Curtiss Bevan (Trading as Bevan and Griffin)*[46] and *Sharon Minkin v Lesley Landsberg (Practising as Barnet Family Law)*.[47]

Warm transfer is a colloquial expression referring to the process whereby the law practice, which is disqualified from providing a legal service, immediately makes another appointment for that person with another law practice. This is usually done whilst the refused person is present and whatever intake processes required by the alternative legal service are managed at the time. Warm transfers are based on established referral protocols between law practices with scripts to alert the next service that the referral is due to a disqualifying conflict.

Work around is a colloquial term referring to processes within the law practice to avoid a barrier which would otherwise prevent the law practice providing a service. For example, undertaking a triage assessment followed by a limited retainer to avoid an actual conflict of interest is a work around process.

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[44] See Appendix C Scripts for 'Turn Away'.

[45] Refer to the discussion in Chapter IV C 2 for a comprehensive description of the triage assessment, and to Appendix D *Five Step Triage Assessment Process.*

[46] *Fortune v Peter Curtiss Bevan (Trading as Bevan and Griffin)* [2000] QSC 460.

[47] *Sharon Minkin v Lesley Landsberg (Practising as Barnet Family Law)* [2015] EWCA Civ 1152.

PROLOGUE

This prologue sets the scene for the thesis by explaining my motivation and personal connection to the ethical issue of conflict of interest. This prologue, and the subsequent interviewing of research participants, is a 'nod' to the emerging genre of 'legal life writing' which offers a lens to contextualise socio-legal scholarship.[48] The genre inquires into the influences which shape the lives of legal 'actors'. In describing these factors a richer picture, beyond the 'promulgation of conventional views [or] the experiences and voices of authoritative subjects' develops.[49] The detailed accounts of the largely untold stories of how country lawyers make ethical decisions can become a 'dangerous supplement' to black letter, socio-legal and historical legal scholarship.[50] Occasionally this perspective of marginalized actors ' requires a fundamental rethinking of what constitutes authoritative subjects, methods and sources'.[51] Geographic remoteness may place country lawyers at the boundaries of law and the legal system. Their stories have the potential to produce 'radically different accounts of law's empire and legal phenomena' and to 'disrupt existing orthodoxies of how lawyers are, and ought to be'.[52] I consider these stories in the Discussion Chapter and suggest ways which they add to our understanding. Through the use of a theoretical framework, the focus is on seeking to understand the meaning and effect of those stories.

This research scratches a professional 'itch' which has accompanied my practice of law over 37 years. Do my professional peers agree with my judgment? That itch, seeking validation from my professional peers, is identifying and responding to possible conflicts of interest. It is difficult to know if my zone of tolerance, for either accepting or disqualifying the law practice, is aligned with the mainstream or is more of an outlier. But lawyers are a competitive cohort skilled in the adversarial process and in my experience we rarely explore our curiosities or share our vulnerabilities.

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[48] Linda Mulcahy and David Sugarman '*Introduction: Legal Life Writing and Marginalized Subjects and Sources*' Journal of Law and Society (42) 1 March 2015, 1-6.

[49] Ibid 1.

[50] Ibid 6.

[51] Ibid 2

[52] Ibid.

Personal conflicts of interest between my personal and professional selves shadow my legal career. My father found my first job for me. He was at the Corowa Picnic races in 1980 and he came across the local lawyer. Dad knew that despite many approaches to the local law practices, I had been unable to secure my articles of clerkship. He asked the lawyer if he could give me a job. Fortunately the articled clerk the lawyer had lined up had recently withdrawn and there was a position available. When I interviewed for the role, the lawyer made it clear to me that I would have to 'bring in the work'. During my three years in his small law practice, I understood that the measure of my worth was how many new clients I brought into the business. My personal conflict of interest was the pressure I felt to turn my informal personal networks of family and friends into a client base for the local law practice. Each month we reviewed my billings to discern if I was 'making budget' and meeting the aspirational financial targets. I began to see my personal relationships as a means to make money for my boss. This experience awakened a nascent interest in legal ethics. How to manage friendships without seeing them as potential clients? What was the right thing to do? Were the other early career lawyers in my community experiencing a similar pressure to grow their boss' business?

Living and working in a small, country community means that on a regular basis I experience a possible conflict of interest between former and current clients. For example, historical clients from former law practices in which I worked may end up being the 'other party' to current clients. I do not have access to that historical client data, although frequently the 'other party' will make the connection. ('Remember you acted for me in my family law matter?') During my career as a country lawyer I have worked in five private law practices, two public sector law practices, and four universities. I am currently the principal legal director in an incorporated law practice in my small rural community in Beechworth in north-east Victoria. I continue to seek moderation of my professional decisions. However personal conduct can be difficult to discuss with colleagues.

Ethical legal practice requires knowing the right thing to do. Learning how other lawyers establish personal and professional boundaries remains an area of interest. Whilst the posited law provides rules and guidelines, my role is to apply that fixed law to the new situation. This dynamic between static and applied knowledge plays out in this thesis project as I vacillate between the form of the word practice/practise. In Australian English 'practice' is the noun and implies a fixed, replicated event. We have

a law practice. In contrast, ‘practise’ is the verb. It refers to an activity which is iterative and evolving. In practising law, I am frequently confronted with new situations demanding learning. In discerning what is the right thing to do I feel that I am making it up as I go. How far can I go when applying the law to new situations? How do I moderate my idiosyncratic judgment? How can I assuage my doubts in a profession which I experience as characterised by professional isolation and adversarial posturing?

The pink ribbon/string metaphor helps me explain my ethical line. Along this pink line is a continuum of choices which blend the fixed practice of law with my everyday practise of law. The picture below shows a pink legal ribbon and pink hayband. The pink legal ribbon reminds me that I am an advocate for the rule of law. First I must know and apply the law. The pink hayband, which is carried around by farmers to fix ubiquitous broken things, encourages me to see how the law can be used to adapt, improvise and overcome the problems and injustices within my community. The pink ribbon and string reflect my professional duty and private aspiration. In scratching my professional itch, this thesis endeavours to engage in the ongoing eunomic study of good order.

[Photo: My blue briefcase with a pink legal ribbon and pink hayband tied at one end.]

The future is not a result of choices among alternative paths offered by the present, but a place that is created - created first in the mind and will, created next in activity. The future is not some place we are going, but one we are creating. The paths are not to be found, but made. And the activity of making them changes both the maker and the destination.

John H Schaar [53]

25 September 2018

[53] John H Schaar, *Legitimacy in the Modern State* (Routledge, 1981) 32.

I INTRODUCTION

> If the morality of duty reaches upward beyond its proper sphere the iron hand of imposed obligation may stifle experiment, inspiration and spontaneity. If the morality of aspiration invades the province of duty men may qualify obligation by standards of their own.[1]

This study is situated within the discipline of legal ethics, specifically the relationship between positivist law and contextual morality. Within everyday legal practice, lawyers need to be skilled in discerning, interpreting and applying the law to their clients' issues. In discerning an answer to the normative question 'What is the right thing to do?' the lawyer's decision should reflect aspirational values of justice, not just rote obedience to promulgated law. This is the core argument of the natural law ethicists Lon Fuller and David Luban whose work is considered in this thesis. They argue that lawyers must be 'purposive professionals' tasked not only to provide advice to their clients consistent with the stated law, but also to use their ethical agency to give practical expression to the law's implicit aspirational purpose.[2] On this view, lawyers personify the rule of law as they navigate between law's explicit purpose and implicit aspiration and give practical expression to law.[3]

A *Aim and Scope of this Research*

The aim of this thesis is to discern the factors which influence the ethical acuity of a particular group of lawyers—country practitioners. Using a theoretical framework drawn from Fuller and Luban and others I explain various elements of country lawyers' ethical practice. This knowledge is drawn from original empirical data and other sources. Informed by this research data and using the tool of theoretical analysis, the thesis offers an explanation for lawyers' conduct and suggests an extension to normative theory to moderate lawyers' ethical conduct. A model for professional practice emerges through this process of observation and analysis. This model responds to the distinctive ethical challenges within country legal practice whilst cultivating lawyers' ethical acuity 'in the bush'.[4]

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[1] Lon L Fuller, The Morality of Law (Yale University Press, 2nd ed, 1969), 27–28.

[2] David Luban, *Legal ethics and human dignity* (Cambridge University Press, 2007), 19.

[3] Ibid 99, 100 –101, 141.

[4] The concept of 'the bush' suggests remote geographical areas with few resources where country people make do with less.

B *Research Problem*

It is asserted that lawyers have different understandings of their ethical obligations according to the context of the law practice. This is all the more so when the locale of practice varies. The ethical cultures within country law practices also differ widely. A city lawyer in a large commercial practice may rarely be exposed to a conflict of interest, whereas for a lawyer working in a remote Aboriginal Legal Service, navigating conflicts will be a daily reality.[5] These differences can lead to disagreement between lawyers as to where the line for ethical conduct should be drawn. Within the discipline of legal ethics, views differ as to the extent which the lawyer's own moral agency shuold shape their practise of law.[6]

Regardless of the differences in practice context or culture, there are established ethical standards against which lawyers' conduct must be assessed. These standards are reflected in the combination of the common law, the statutory schema of the Legal Profession Acts[7] and ancillary professional conduct rules. Common to all three elements, and explicitly expressed in the professional conduct rules, is the general mandate that lawyers' paramount duty is to the administration of justice. Lawyers must also be 'competent and diligent' in meeting that standard.[8] Colleagues may differ in their understanding of the standard for competence. There is a growing body of empirical research which examines the role of professional colleagues in monitoring, moderating and maintaining these standards.[9]

Existing regulatory approaches give scant regard to the social learning dimensions of ethical decision making. There is little or no attempt to provide resources that cultivate situational ethical judgment beyond simply promulgating rule-based standards. This research aims to redress that deficit by developing a tool box of self-regulating

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[5] Jonathon Hunyor, *CPD: Conflicts of Interest* (Northern Australia Aboriginal Justice Agency (NAAJA), 13 February 2014).

[6] See Discussion in Chapter II A for an overview of these differences.

[7] I use the term Legal Profession Acts as a generic term. For a full description of the current Australian Legal Profession Statutes refer to Appendix E Australian Regulatory Structure.

[8] Within this thesis I refer to the *Australian Solicitors' Conduct Rules 2015* as promulgated by the Legal Services Council, Legal Profession Uniform Law *Australian Solicitors' Conduct Rules 2015* (2015). r 4.1.3.

[9] Refer to Appendix F for a chronology of this work.

processes which are responsive to the context of country legal practice. Not only does this research seek explanatory insights into country lawyers' conduct, it extends normative theory by considering the influence of professional peers.

C *Research Context*

This research occurs at a time of regulatory change in the Australian legal profession. Over the last decade the regulatory focus has been moving away from a centred command and control regulatory paradigm to one that aims to foster a principles-based approach to regulation.[10] The intention to devolve responsibility to the law practice, was first apparent with the introduction of a requirement for 'appropriate management systems' for newly incorporated legal practices in the preceding Legal Profession Acts.[11] This evolution towards decentred regulation is evident in the introduction of high level and less prescriptive *Australian Solicitors Conduct Rules.*[12] As a consequence of this shift, there is scope for the regulation of ethical conduct to move away from the didactic promulgation of prescriptive obedience to 'bright line' rules, and move towards a regulatory regime that permits the cultivation of situational ethical conduct. While the regulatory change has not been consistent across all jurisdictions, the locale of country legal practice in Australia, with its vast differences in degrees of remoteness, makes this site of inquiry ripe for the cultivation of this decentred approach, whilst remaining alert to the risks of professional isolation.

The research site of inquiry is deliberately limited in two ways. The first is the selection of a subset of country lawyers as the research cohort.[13] The second is the selection of 'conflicts of interest' as a discrete ethical issue. In asking of this cohort '*How do*

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[10] At least this rhetoric has informed regulatory reform in Australia. See Linda Haller, 'When shall the Twain Meet? Correspondent's report from Australia' (2011) 14 *Legal Ethics* 257; However I acknowledge that the implementation of this decentred approach may be falling short of the aspiration. For a critical view see Reid Mortensen, 'Australia: The Twain (and Only the Twain) Meet - The Demise of the Legal Profession National Law' (2013) 16 *Legal Ethics* 219.

[11] Legal Profession Act (Qld) s117 (3) with similar provisions in the now repealed New South Wales and Victorian Legal Profession Acts.

[12] *Australian Solicitors' Conduct Rules 2015*. This limited approach (ie a reluctance to add prescriptive detail to the rules) is endorsed in the February 2018 Law Council of Australia review of the Australian Solicitors Conduct Rules. The Law Council suggests more 'commentary' to supplement the rules.

[13] 'Country lawyers' is a convenience term which refers to lawyers outside the major cities of Australia. Historically the terms regional, rural and remote (abbreviated to the acronym RRR) are used to indicate increasing geographical remoteness. This thesis uses the *Australian Bureau of Statistics Australian Statistical Geography Standard Remoteness Areas (ASGS-RA)* as a measure of geographical remoteness to disaggregate the geographic location data.

country lawyers identify and respond to conflict of interests?' the study seeks to provide a description of their ethical conduct more generally. The research methodology builds on previous socio-legal studies which consider the influence of the practice context on lawyers' ethical judgment. For the purposes of this study, fifty-two open ended, semi-structured interviews were conducted with public and private sector lawyers practising law across regional, rural and remote Australia. The theoretical framework developed for this research, is used to gather the data and explain the factors and processes which guide ethical decision making in country practice.

D Thesis outline

In this Introduction, I outline the research aim, scope and significance of the study. Then follow five substantive Chapters. These Chapters explain the research context and the methodology used to gather and analyse the data. After summarising the empirical findings, I offer a set of conclusions which include a conceptual model for developing situational ethical decision making in country legal practice.

Chapter II *The Research Context* is the first of the substantive Chapters. It is a necessarily lengthy Chapter as it provides an overview of legal ethics theory before introducing two components which define the site of inquiry. The regulatory structure establishes the ethical standards to guide lawyers' decisions regarding conflicts of interest. The standard reflects the common law, the statutory schema of *Legal Profession Acts* and ancillary professional conduct rules. The site of the study is country lawyers. I begin by reviewing studies of how professionals and others deliver services to country communities. These studies have identified the blurring of personal and professional boundaries and the consequent need for responsive service design. Then I consider the concept of 'country' more generally and the more nuanced geographic classification system of 'remoteness areas'. These classifications assist in both data collection and analysis. Finally, using current demographic data, I construct a profile of Australian country lawyers that gives a snapshot to inform and explain the subsequent methods used for selection of the participant research cohort.

My methodology and the methods used in the research design are explained in Chapter III *Methodology*. I begin by raising a research hypothesis then I outline the literature on which the theoretical framework that guides the research design is built. Three

perspectives are used to develop this framework: decentred regulatory theory, the natural law theory of legal ethics, and the concept of professional communities of practice. The remainder of the Chapter describes the research design in detail, including the recruitment methods and the development of the interview schedule used to assist in the collection of data. Finally I explain the method used for coding and analysing the interview data.

In the following two Chapters, I describe and analyse the interview data gathered from research participants. In the first of these, Chapter IV *The Story Told,* I use the theoretical framework as a means to identify and group emergent themes. Using a largely inductive, qualitative method, I code the data to degrees of remoteness in order to discern if geographic location affects the way lawyers identify and respond to conflicts. In the next Chapter V *The Story Understood,* I use the hypothesis raised and the theoretical framework developed to analyse the research data. This analysis will identify a consistent phenomenon that many country lawyers display, which is a high tolerance for working within situations in which conflicts of interest may occur. The lawyers' tolerance is nuanced and arguably an appropriate response in principle-based terms. This adaptive practice has not been previously recognised.

In Chapter VI *Discussion,* I develop four research conclusions. Each conclusion is founded on the seminal influence of professional peers familiar with the context of country legal practice. The conclusions are also based on the existing and potentially wider scope for professional peers to monitor, moderate and maintain ethical standards. I consider how this influence could be nurtured and expanded through the fostering of professional communities of practice within the current regulatory environment. I conclude the discussion by suggesting a model to foster social learning as a means to cultivate the development of ethical acuity in country legal practice more organically. This model incorporates and further develops tools and processes harvested through the research study.

Finally in Chapter VII *Conclusion* I return to the research aims set out here and review those aims in the light of the research results.

II THE RESEARCH CONTEXT

The research context is provided in three parts. The first part provides an overview of contempoary ethics theory in general and reviews two seminal studies which considered how lawyers deal with a conflict of interest. The second part sets the scene for the specific study into contemporary legal ethics by considering how the Australian regulatory structure shapes the normative ethical standard. I begin with a consideration of how decentred regulation is informed by the overarching aspirational ethical principles. Regulation is also shaped by the posited professional conduct rules and the nuances of the common law. Drawing upon this foundation I offer a classification of the various types of conflicts of interest and review the tests for discerning what is ethical. In the third part of this Chapter I disaggregate the generic term 'country' into more nuanced descriptors of geographic location before reviewing research on what is known about country service delivery in general and country law practice in particular. I then describe the characteristics of country communities and how those characteristics shape legal service delivery. This Chapter establishes the foundation for the research design which follows in Chapter III *Methodology*.

A. Overview of contemporary ethics theory and research into conflict of interest

Although legal ethics occurs within a regulated profession, ethical legal practice requires professional autonomy. Lawyers learn how to be ethical through the practise of law and the consequences arising from their decisions. Their professional autonomy is moderated by external forces which include guidance by the established ethical standard and regulatory oversight. In this section I provide an overview of the legal ethics research and literature which offers concepts and typologies to explain these factors which influence ethical legal practice.

Nelson, Trubek and Solomon suggest that lawyers' behaviour is shaped within 'arenas of professionalism'.[1] In their view, lawyers construct their understanding of appropriate conduct from interaction with lawyers in their workplace, disciplinary enforcement by the regulators, their professional associations and lessons gleaned from their law

[1] Nelson, Robert, David Trubek and Rayman Solomon 'Arenas of Professionalism: The professional ideologies of lawyers in context' in the book *'Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession*' (Cornell University Press, (1992) 177-214.

schools. Other researchers caution that this influence of colleagues in the workplace, or practice community, is not necessarily beneficial to ethical conduct. To the contrary. The workplace can foster unethical conduct. Kirkland explained that within larger law practices with multiple partners and practice areas, junior lawyers are exposed to a 'choice of norms'.[2] These norms differ within the same law practice and lawyers' conduct is shaped according to their supervision. Levin studied the conduct of immigration lawyers and observed how proximity of unethical colleagues, influences others.[3] Rostain has written about the powerful 'imprinting' which occurs in the early career phase.[4] Collegial culture may not be conducive to ethical legal practice.

In addition to the literature which explains how external forces shape lawyers' conduct, there is a canon of legal ethics literature on normative prescriptions as to how lawyers 'should' behave. Ethicists differ as to how, if at all, these normative prescriptions should include lawyer's professional autonomy. In an effort to summarise these diverse views, Parker and Evans offer a typology of four ethical stances, frameworks or 'critical role moralities'.[5] Their typology is derived from applied ethics scholarship and the 'folk practices' of lawyers. These four types are the adversarial advocate, the responsible lawyer, the moral activist and the lawyer guided by an ethics of care. Parker and Evans offer these stances as a 'predictor' or a starting point for an ethical decision. They suggest that, rather than a lawyer being positioned into a particular type, the typology offers a process as each type can guide lawyers through diverse ethical choices.

The adversarial advocate is aligned with the historical 'standard conception of the lawyer's role' which Dare and Wendel argue should be the threshold role morality.[6] Within this stance there is no encouragement for a lawyer's moral autonomy. Positivists argue that role morality dictates that the lawyer must be morally neutral when acting as client advocate and not allow their own views to influence that role. This strand of

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[2] Kimberley Kirkland, 'Ethics in Large Law Firms: The Principle of Pragmatism' *University of Memphis Law Review* (2005) 35, 631.

[3] Leslie C Levin, 'Specialty Bars as a site of professionalism: The Immigration Bar example' (2011) 8 *St Thomas Law Journal* 194.

[4] Tanina Rostain, 'Waking Up from Uneasy Dreams: Professional Context, Discretionary Judgment and the Practice of Justice' (1998) 51 *Stanford Law Review* 955.

[5] Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 3rd edition 2018) 36.

[6] Tim Dare, '*The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role*' (Ashgate, 2009); Bradley W Wendel, '*Lawyers and Fidelity to Law'* (Princeton University Press, 2010).

lawyering aligns with a rule book approach to ethical practice. Dare uses the devise of the fictional country lawyer 'Atticus Finch' to consider if it is ever justified to depart from the rule of law, because the lawyer believes their judgment is better.[7] This view contrasts sharply with an 'ethics of care' or 'moral activist' stance which incorporates considerations of general morality into ethical decision making. Adopting this stance requires the lawyer to question 'what is the right thing to do?'. Fuller and Luban, whose theories are considered in greater detail below, are proponents of this approach which includes a 'natural law' ethos of lawyering.

If we accept there are a range of views as to how the lawyer should act, a focus on how lawyers construct the fiduciary duty provides a framework to explore this diversity. The issue of a conflict of interest arises from the fiduciary duty and is explained by Hazard as follows:

> The concept of 'conflict of interest' is a reflexive definition of this fundamental characteristic [referring to the fiduciary duty], for it implicitly identifies those other interests that the professional must recognize. Accordingly, to analyse the problems of a profession's conflicts of interest is to probe the essence of the profession itself.[8]

The need to avoid a conflict, is a nuanced aspect of the fiduciary duty which requires recognition of the various interests, and application of the lawyers' professional judgment. Two seminal studies (Griffiths – Baker and Shapiro) have chartered this ethical terrain.

Janine Griffiths Baker interviewed lawyers, clients and barristers in the United Kingdom about their knowledge of, and application of, the law society conflict of interest rules.[9] She found that 'most approached conflicts with a belief that it was not practical to function entirely within the rules and so they attempted to work within the spirit rather than the letter of the law'.[10] Her respondents revealed that their decision was informed by 'commercial realities' and 'consideration of long term profitability.'

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[7] Dare above n 6.

[8] Shapiro, Susan P *Tangled Loyalties. Conflict of Interest in Legal Practice* (University of Michigan Press, 2002) 3-4 quoting Geoffrey C Hazard, Jnr 'Conflict of interest in the classic professions' In Conflicts of Interest in Clinical Practice and Research ed Roy G Spence, Jr, David S Shimm and Allen E Buchanan. New York. (Oxford Uni Press1996, 85).

[9] Janine Griffiths - Baker, *Serving Two Masters. Conflict of Interest in the Modern Law Firm* (Hart Publishing, 2002).

[10] Ibid 140.

Griffiths – Baker identified a culture within smaller law practices of 'pious provincials' who exhibited varying degrees of understanding of, and compliance, with the law society rules. Respondents assured her of their compliance with the rules (pious stance) and she coded their stance from the 'truly pious' (who vigilantly followed the law society code) to the 'blindly pious' (who complied without knowing the code) to the 'outwardly pious' (who asserted compliance but had no procedures in place).[11] She also undertook a comparative study of how conflicts were handled across the Commonwealth jurisdictions, with an interesting discussion of the blending of the common law and the professional conduct rules in Australia.[12]

In a subsequent reflection on the regulatory reform occurring in the United Kingdom, Griffiths-Baker reflects that 'lawyers are not good at seeing the wood for the trees on ethical issues [and that] the more detailed the rules, the less lawyers will exercise their ethical judgement appropriately.'[13] In reflecting on the 'delicate balancing act' required by regulation to guide but not hinder ethical judgment she quotes Shapiro:

> [A] narrow legalistic conception competes with and frequently precludes realising alternative extra-legal notions of loyalty or responsibility. Strategies that allow law firms to manoeuvre through the minefields of their fiduciary obligations often create a formulaic adversariness, a kind of stripping away or cleansing of social networks and ties of familiarity, a distancing between lawyer and client that collide with lay conceptions of loyalty or a commitment to looking out for what is truly in the best interests of one's clients.[14]

In Susan Shapiro's 2002 published research she explores the construction of fiduciary relationships. Her empirical study explored how lawyers in Illinois (USA) working in different practice contexts, handle conflicts of interest. Her research provided 'a panoramic window on the social world of legal practice'[15] as she observed an 'ubiquitous thicket of clashing client interests'.[16]

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[11] Ibid 139

[12] Ibid 88-90

[13] Griffiths Baker 'Ethics in Practice' Legal Ethics Vol 6, No 2, 131.

[14] Ibid 132 fn 5 quoting Shapiro, Susan P Conflicting Responsibilities: Manoeuvring Through the Minefield of Fiduciary Obligations (Chicago, American Bar Foundation, 1995) at 46-47. Also referenced in Shapiro above, n 8, 457

[15] Shapiro above, n 8, 461

[16] Ibid 444.

Shapiro observes that blind compliance with a prescriptive rule may impede justice:

> Clients, the intended beneficiaries of many of these reforms, bear many of their costs. …Discouraging lawyers from acting on behalf of 'situations' or families or multiple business interests increases the need for multiple lawyers and, thereby, the cost of resolving disputes or facilitating transactions. Sometimes the increased cost results in the denial of legal representation entirely for particular clients. Often the hordes of lawyer required tend to escalate the dispute, inflame adversariness, and reduce the likelihood of a conciliatory resolution. [17]

Shapiro's comments take us back to considerations of the lawyer's ethical role first mentioned at the beginning of this part. If 'adversariness is inflamed' when 'hordes of lawyers' argue - there is a likelihood that the dispute which brings people to lawyers, is escalated. This 'narrow legalistic conception' of the lawyer's role undermines alternative constructions of client loyalty and responsibility which may preference low level dispute resolution and relationship maintenance. Adversarial positioning strips away social networks and familiarity. In a perverse way this approach is detrimental to both the client and their community and arguably undermines what truly is in the client's best interests. In the next part of this chapter a window of ethical opportunity is opened as I explain how the Australian regulatory structure has evolved to facilitate more lawyer discretion. This opportunity, which is embedded in decentred regulation, has potential to move the lawyer into other ethical modes such as 'responsible lawyering' and the 'ethics of care'.

B Regulatory Structure

In this part I consider four aspects of the contemporary Australian regulatory structure that influence country lawyers' conduct. I begin by considering the change in regulatory approach from a centred 'command and control' model, to a decentred 'principles' or 'outcomes'-based regulatory model. Next I describe how a normative ethical standard is established through a combination of aspirational principles, prescriptive rules and common law. This overview of the ethical standard is particularised with a focus on the avoidance of conflicts of interest. The third aspect is suggesting a typology of conflicts. This discussion includes a review of the recommended approach to discerning if there is a disqualifying conflict and an introduction to how some lawyers 'work around' the possibility of conflicts. The fourth aspect in this consideration of the regulatory structure is recent case law where country lawyers have been sanctioned for their

[17] Ibid 457.

conflict of interest, followed by a discussion of the frequency of conflicts of interest arising within country law practice.

1 Change in Regulatory Approach: Principles-based Regulation

The ethical standards that guide lawyers' conduct necessarily evolve over time through the process of regulatory review. Regulatory review may occur as part of the legislative process (as in the recent adoption of the *Legal Profession Uniform Law* in some jurisdictions[18]) or through a regulator's inquiry in response to complaints from clients, courts or colleagues. This review process occasionally produces regulatory change. As Australia is a common law jurisdiction, regulatory review also occurs when cases are brought before the courts in response to disciplinary matters, or for injunctions for civil relief. In this way, case law precedents can also shape the established ethical standard.

Despite jurisdictional diversity within the Australian legal system, the eight state and territory jurisdictions[19] share similar ethical principles and professional conduct rules about conflicts of interest. Over the last thirty years there was a movement to 'harmonise' the Australian statutory schema with all jurisdictions (with the exception of South Australia) adopting variations of the national model *Legal Profession Act* and professional conduct rules.[20] Some idiosyncrasies between jurisdictions remain despite a recent movement towards uniformity and alignment.

Legislative review has created recent changes in the Australian regulatory approach. The Law Council of Australia continued its advocacy for a uniform approach that is now reflected in the *Legal Profession Uniform Law* and the *Australian Solicitors Conduct Rules*. At the time of writing, the legal profession in New South Wales and Victoria had adopted the *Legal Profession Uniform Law* whilst Queensland, South Australia and the Australian Capital Territory have joined these two states in adopting the *Australian Solicitors Conduct Rules*. The remaining jurisdictions, Western Australia

[18] As at 26 September 2018 the Legal Profession Uniform Law has been adopted in New South Wales and Victoria.

[19] The eight jurisdictions are the Australian Capital Territory, New South Wales, Northern Territory, South Australia, Tasmania, Queensland, Victoria and Western Australia.

[20] To see more on history of the harmonisation movement see Law Council of Australia, *COAG National Legal Profession Reform* <http://lawcouncil.asn.au/lawcouncil/legal-practice-division/coag-national-legal-profession-reform>.

the Northern Territory and Tasmania are continuing with their versions of their own regulatory systems arising from the earlier 'harmonised' statutes and model rules.

Although her work is within the context of the United Kingdom, Julia Black argues the intention of the regulatory change to principles based practice is to decrease the number, and detail, of rules of professional conduct.[21] The Solicitors Regulation Authority in England and Wales is an early adopter and promoter of principles-based regulation which encourages lawyers to implement an approach to achieve regulatory outcomes which are 'appropriate to the size and complexity of the law practice and the nature of the work undertaken'.[22] If the lawyer is satisfied that they have been guided by the ethical principles, the assumption is that they have a strong defence to any subsequent inquiry into their conduct.

A corollary of this shift away from technical obedience to prescriptive, detailed rules towards encouraging lawyers to achieve a set of identified aspirational principles, liberates lawyer discretion. The 'principles-based approach' encourages lawyers to discern what is 'appropriate' conduct according to their practice circumstances. The rationale is that through a focus on principles, complexity is reduced and the everyday expression of ethics moves to the forefront of legal practice as each lawyer and law practice discerns how they should practise law. In other words, the shared outcomes (such as acting in a client's best interests, and the administration of justice) provide a goal and the overarching principles establish the foundation for reaching that goal. Consequently, ethical practice requires each lawyer to turn their mind to the achievement of shared principles, rather than simply to find and follow rules. Both the *Legal Profession Uniform Law* and the *Australian Solicitors Conduct Rules* are informed by the decentred regulatory mode of principles-based regulation.[23] There is a sustained endeavour to avoid prescription.

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[21] Julia Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World' (2001) 54(1) *Current Legal Problems,* 103.

[22] Solicitors Regulation Authority, *SRA Code of Conduct (version 18)* (1 November 2016) <https://www.sra.org.uk/solicitors/handbook/code/content.page> Outcome 3.2, ch 3. The regulatory system in the United Kingdom recognises that 'size and complexity' of the law practice can and should dictate system design.

[23] The provenance of this influence is attested to by two previous legal regulators Steve Mark and John Briton who participated the regulatory review process. Steve Mark et al, 'Preserving the ethics and integrity of the legal profession in an evolving market: A comparative regulatory response.' (2010) *ANU College of Law Research Paper* 6; Steve Mark, *Assuring Competence in a Changing Legal Services Market - The New Regulatory Context,* LETR Symposium (10-11 July 2012) 9; John Briton and Scott

This change in the Australian regulatory approach to a principles based approach was foreshadowed by the former New South Wales Legal Services Commissioner, Steve Mark, and the former Queensland Legal Services Commissioner, John Briton. Both Commissioners have written about the introduction of decentred regulation as integral to this regulatory change. In his 2010 paper, Mark states that an outcomes-based regulatory model informed the inclusion of 'appropriate management systems' and 'legal practitioner directors' as part of the regulatory framework in the *Legal Profession Act 2004* (NSW):

> The requirement that a legal practice appoint a legal practitioner director on incorporation ensures that a legal practitioner maintains a direct interest and accountability in the management of legal services of the practice. Similarly, the requirement that an appropriate management system be implemented and maintained ensures that the legal practice considers and implements measures that support and encourage ethical and client-focused behaviour. The combination of these two measures, thus, assists practices to preserve the integrity of legal practice and legal ethics.[24]

Similarly, in his 2012 paper to the United Kingdom *Legal Education Training Review Symposium*, Mark opined that a principles-based approach to regulation was informing the national regulatory reform:

> The new legislation [referring to the *Legal Profession Act 2004* (NSW)]…paved the way for a move away from proscription to that of principles and outcomes-based regulation. The *Legal Services Act 2007* (UK) contains principles or high level, broadly stated rules or principles to set the standards by which regulated practitioners and firms need to practice. Similarly, legislation introduced in Australia after the statutory review contained a number of provisions, particularly in relation to incorporated legal practices, that used principles, rather than proscription. A preference for principles-based regulation has also recently seen a complete review of Australian legal profession regulation. A draft Legal Profession National Law that is purely principles-based is now being considered for adoption by all States and Territories within Australia.[25]

Mark recognises that it is 'principles rather than proscription' which defines decentred regulation. Arguably the Australian Legal Profession Uniform Law, the associated Australian Solicitors Conduct Rules and comprehensive commentary offer with a

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McLean, 'Lawyer Regulation, consciousness-raising and social science' (15-17 July 2010) Stanford Law School *International Legal Ethics Conference IV* 9.

[24] Mark et al, above n 23.

[25] Mark, above n 23, 9.

hybrid model. In his address to the *4th International Legal Ethics Conference* in 2010, John Briton explained the regulatory culture change occurring in Queensland. Although this is a long quote, it explains well the ideal of a co-regulatory relationship.[26]

> Furthermore those of us who've been responsible for administering the compliance auditing regime that currently applies to incorporated legal practices have forsaken any traditional and prescriptive approach in favour of a principles or outcomes-based approach. We have always sought to engage their legal practitioner directors with problem-solving how they might best develop and continually improve their management systems and processes and workplace cultures to better support and sustain high standards of conduct, and have left them free to decide the systems and processes that best fit the circumstances of their particular practice. We have always understood and respected the fact that 'firms and their managements are better placed than regulators to determine what processes and actions are required within their business to achieve a given regulatory objective. So regulators, instead of focusing on prescribing the processes or actions firms must take, should step back and define the outcomes they require firms to achieve. Firms and their managements will then be free to find the most efficient way of achieving the outcome required.'[27]

In summary, over the last decade, there has been a regulatory movement away from prescription towards the liberation of situational discretion which allows the practicing lawyer to express the ethical principle. Whilst the Australian rules do not go as far as the United Kingdom system, there is a great deal of discretion in the rules.

2 Aspirational Ethical Principles

Ethical principles are a guide to ethical conduct without cataloguing the many ways this behaviour can occur, nor necessarily the behaviour that should be avoided. The expression of a principle foregrounds the aspirational behaviour and necessarily invites the lawyer to discern how best to give expression to that principle. As the regulator of the legal profession in the United Kingdom, the Solicitors Regulation Authority states that the absence of prescriptive detail facilitates situational ethical judgment.[28] In contrast to descriptive, prescriptive and proscriptive professional conduct rules, the ethical principles are 'broad, general and purposive'.[29] The pervasive influence of ethical

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[26] Briton and McLean, above n 23, 9.

[27] This quote at the end of Briton's quote references Julia Black, Martin Hopper and Christa Band, 'Making a Success of Principles-Based Regulation', *Law and Financial Markets Review* (2007) 1(3) 192.

[28] Solicitors Regulation Authority, *SRA Handbook* <https://www.sra.org.uk/handbook/> See SRA Principles Part 2 'General Provisions' 6.1.

[29] Andrew Hopper and Gregory Treverton-Jones, *Outcomes Focused Regulation. A Practical Guide* (The Law Society (UK), 2011) 11.

principles is manifest in their inclusion in a variety of statutory instruments, professional conduct rules and codes of ethics throughout the world.[30]

Australia's movement to principles-based regulation is not unusual. However, I have been unable to find a primer to explain this fundamental change in Australian regulatory focus. Despite the absence of explicit regulatory discourse promoting principles as the touchstone for ethical conduct, principles are embedded in the *Australian Legal Profession Uniform Law*.[31]

The aspirational principles that inform the *Legal Profession Uniform Law* are stated in Section 3. These principles include the establishment and maintenance of 'high ethical and professional standards' and the promotion of 'the administration of justice' through 'effective and proportionate' regulation.

> Section 3. The objectives of this Law are to promote the administration of justice and an efficient and effective Australian legal profession, by – providing and promoting interjurisdictional consistency in the law applying to the Australian legal profession; and
>
> - ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services; and
> - enhancing the protection of clients of law practices and the protection of the public generally; and
> - empowering clients of law practices to make informed choices about the services they access and the costs involved; and
> - promoting regulation of the legal profession that is efficient, effective, targeted and proportionate; and
> - providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained.

Elsewhere in section 423(2) of the *Legal Profession Uniform Law* these statutory regulatory objectives, which embed high ethical standards, are given further expression:

> Section 432 (2). Without limitation, the Legal Profession Conduct Rules may include provisions with respect to what Australian legal practitioners, Australian-registered foreign lawyers and law practices must do, or refrain from doing, in order to—
> (a) uphold their duty to the courts and the administration of justice, including rules relating to—
> (i) advocacy; and

[30] See Appendix B Comparative Ethical Principles.

[31] The Legal Profession Uniform Law (*Uniform Law*) is included as a schedule to the implementation Act, the *Legal Profession Uniform Law Application Act 2014* (Vic). Reference to Section 3 is to the scheduled Act, not the implementation Act.

(ii) obeying and upholding the law; and
(iii) maintaining professional independence; and
(iv) maintaining the integrity of the legal profession; and
(b) promote and protect the interests of clients, including—
(i) rules relating to client confidentiality; and
(ii) rules for informing clients about reasonably available alternatives to fully contested adjudication of cases; and
(c) avoid conflicts of interest.

The principles of professional conduct are incorporated into, and reflected within the explicit professional conduct rules.[32] Some ethical principles are expressed as 'rules' and often the two terms (principles and rules) are used interchangeably. Across the eight Australian jurisdictions, different professional conduct rules apply. [33]

The *Australian Solicitors Conduct Rules* were developed before the implementation of the *Legal Profession Uniform Law* however they have been incorporated into the regulatory framework. These rules have regulatory power through their status as delegated legislation. Rules 3 and 4 of the *Australian Solicitors Conduct Rules* set out the overarching aspirational ethical principles that provide the context for the subsequent professional conduct rules. The overarching principles state that the paramount duty is to the administration of justice. Then follow the lawyers' fiduciary duties to their clients (which include obligations of loyalty and the cultivation of trust) and the duty to maintain the confidentiality of client information. The paramount duty that the lawyers' duty to the court and to the administration of justice prevails to the extent of inconsistency with any other duty – is reflected in the first substantive rule of professional conduct.[34] Rule 4 sets out the 'other fundamental duties' to act in the best interests of the client, to be honest, courteous, competent, diligent and to practice law with integrity and independence.

> Rule 3. Paramount duty to the Court and the administration of justice
> A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

[32] Within the Australian system, the term 'principles of professional conduct' is used rather than 'ethical principles'. In this thesis the term 'ethical principles' is preferred.

[33] Each jurisdiction has adopted the *Australian Solicitors' Conduct Rules* at their own pace, in their own way. For example, although the Law Council of Australia developed the *Australian Solicitors' Conduct Rules* in 2011, they were adopted by South Australia (25 July 2011), Queensland (1 June 2012), the Legal Services Council, Victoria and New South Wales (1 July 2015). Refer to Appendix E *Australian Regulatory Structure* for an overview of which jurisdictions have adopted *the Australian Solicitors Conduct Rules*. Within this thesis the version I refer to is the Legal Services Council, Legal Profession Uniform Law *Australian Solicitors' Conduct Rules 2015* (2015).

[34] Ibid r 3.1.

> Rule 4. Other fundamental ethical duties
> 4.1 A solicitor must also:
> 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;
> 4.1.2 be honest and courteous in all dealings in the course of legal practice;
> 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;
> 4.1.4 avoid any compromise to their integrity and professional independence.

These rules express principles that are both aspirational and prescriptive. Each lawyer must work out how to achieve the principle's purpose or outcome and implement measures within their law practice to ensure ethical conduct.[35] Consequently there is a large measure of professional discretion involved in implementing the rules. This practical expression of the ethical principle should be informed by the lawyer's practice wisdom and the discrete circumstances of their law practice. Occassionally the rules include more prescriptive measures which codify elements of the common law and more explicitly define the ethical standard. As dicussed below, the inclusion of the terms 'effective information barriers' in Rules 10 and 11 of the Australian Solicitors Conduct Rules is an example of this. A breach of the rules may constitute unsatisfactory professional conduct or professional misconduct under Section 298(b) of the *Legal Profession Uniform Law*.[36]

The terms 'unsatisfactory professional conduct' and 'professional misconduct' incorporate common law tests of public perception as to what 'the public' expect as the 'standard of competence and diligence' for a 'reasonably competent' lawyer. The terms also incorporate a peer review test used to assess if the conduct shows 'substantial or consistent failure' and if the person is 'fit and proper' to engage in legal practice. The common law tests are codified in Sections 296 and 297 of the *Legal Profession Uniform Law*.

> Section 296 Unsatisfactory professional conduct includes conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

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[35] Although there are no prescriptive measures promulgated within the legal profession as to how this should be done, the current regulatory system in the United Kingdom suggests such measures should be appropriate to the 'size and complexity' of each law practice. See Solicitors Regulation Authority *Code of Conduct* above n 9, Outcome 3.2 and *Handbook* above n 10, Principle 1B (4.1).

[36] Legal Profession Uniform Law, above n 13.

> Section 297 professional misconduct includes—
> 1(a) unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
> 1(b) conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.
> (2) For the purpose of deciding whether a lawyer is or is not a fit and proper person to engage in legal practice as referred to in subsection (1)(b), regard may be had to the matters that would be considered if the lawyer were an applicant for admission to the Australian legal profession or for the grant or renewal of an Australian practising certificate and any other relevant matters.

The common law and codification of these two ethical tests in the *Uniform Law* make it clear that there is an objective assessment of lawyers' conduct according to the established ethical standard.

Regardless of the move to decentred regulation and principles-based practice, the proscription against acting when there is a conflict of interest nonetheless remains. This proscription derives from the ethical principle that the lawyer must act in the client's best interests. Although the proscription is comprehensive, there is a qualification in the rules 'unless otherwise permitted'. These exceptions authorise the lawyer to continue to act in certain circumstances (when 'permitted by law', the rules or client authorisation) however these exceptions rely on the lawyer's ethical acuity. In discerning what is appropriate ethical conduct, the lawyer is called on to navigate both the duty to act in the client's best interests and the exceptions to that duty. How country lawyers conduct this navigational exercise is considered throughout this thesis and particularly through the research results in Chapter IV *The Story Told*.

Having considered the regulatory change towards principles-based regulation and provided an overview of how these principles are integral to the profession's ethical conduct, I turn now to the third section in this consideration of the regulatory structure which covers the specific professional conduct rules about conflicts of interest.

3 A Typology of Conflict.

The fiduciary duty is the source of the ethical principle that lawyers must act in their clients' best interests. In this section, the focus is on the duties and interests which arise from the lawyer's fiduciary obligations. In order to understand the extent of the

fiduciary duty, the lawyer should be able to identify the various interests which are material to the clients' matters. In law, these interests are classified as either the lawyers' own interests or their clients' interests.[37] The extent of this duty is considered in this section, together with a suggested typology of conflicts of interest. I consider two types of conflicts: clients' conflicts (including former and current clients) and lawyers' own interest conflicts.

The term 'conflict of interests' overlaps with the concept of 'conflict of duties'. This overlap can lead to confusion as the two terms represent different issues. A conflict of duties arises when several concurrent professional duties cannot be discharged simultaneously. For instance, the lawyer's paramount duty to the administration of justice overrides their duty to their client.

There are five professional duties that are relevant to the classification of conflict.[38] The first and paramount duty is the lawyer's duty to the administration of justice followed by the consequential duties that arise through the lawyer's role as an officer of the court. Then there are three duties to their clients: the fiduciary duty, the duty of confidence and the duty to disclose.

The articulation of the lawyer's fiduciary duty is given explicit form in the *Australian Solicitors Conduct Rules*.[39] Rule 9 addresses the lawyer's professional duty to maintain clients' confidential information, followed by a suite of rules proscribing conflicts of interest in Rule 10 (former client conflict), Rule 11 (current client conflict) and Rule 12 (own interest conflicts).[40] The expectation is that each lawyer, and each law practice, must identify relevant interests, and avoid conflicts between the lawyer and current clients (own interest conflict) and between clients (client conflicts). Client conflicts are further classified in the *Australian Solicitors Conduct Rules* according to the type of

[37] This dichotomy is used in the Code of Conduct by the United Kingdom Solicitors Regulation Authority, above n 28, ch 3.

[38] Although I prefer the term 'professional duties' I note that Dal Pont suggests lawyers' professional duties are better defined as 'client interests' which are distinct from the lawyer's 'own interests'. See G E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5th ed, 2013), 107 [405]. This reframing of lawyers' professional duties as 'client interests' is used in the *Australian Solicitors Conduct Rules*, above n 15, rr 10, 11.

[39] See discussion in this Chapter II A 2 on Aspirational Ethical Principles and *Australian Solicitors Conduct Rules* rr 3–4.

[40] See Appendix G for Selected Australian Solicitors Conduct Rules.

client, as either former[41] or current.[42] In the United Kingdom the Solicitors Regulation Authority classify clients' interests as either aligned[43] or adverse.[44]

A former client conflict arises from the lawyer's conflict of duties. In other words, the lawyer's duty to maintain the confidential nature of a former client's information could be compromised by the lawyer's duty to disclose all relevant information to a potential new client. If not managed, this conflict of duties has the potential for the law practice to inadvertently disclose, or be forced to disclose, the former client's confidential information. Separately, the lawyer's conflict of duties can arise between current clients when there are relevant or material interests which should be disclosed. Conflicts become apparent when clients' interests are adverse, that is when two clients are competing for the same objective.

Because the lawyer has a fiduciary duty to act in each client's best interests, conflict occurs when clients' interests differ. Conversely there is no conflict if the clients are not competing for the same objective, but share a substantially common interest (that is, their interests are aligned). In the latter case, with appropriate disclosure and informed client consent, the lawyer may be able to act concurrently for two or more clients.

To identify and to respond to the possibility of such conflicts, ethical acuity requires a proactive stance within the law practice. The lawyer should know who their former clients are, what confidential information is held within their law practice and, in the case of current clients, have a clear scope of work defining expected outcomes. In addition, lawyers need to be aware that their 'own interests' may potentially undermine

[41] This type of conflict is also referred to as a 'successive' conflict.

[42] This type of conflict is also referred to as a 'concurrent' conflict.

[43] See the United Kingdom Solicitors Regulation Authority Code of Conduct, above n 28, 'aligned interests' are called 'substantially common interest': See definition 'For the purposes of Chapter 3 of the SRA *Code of Conduct*, means a situation where there is a clear common purpose in relation to any matter or a particular aspect of it between the clients and a strong consensus on how it is to be achieved and the client conflict is peripheral to this common purpose.' (No pinpoint reference as website document).

[44] Ibid. See definition of adverse interests 'competing for the same objective': 'For the purposes of Chapter 3 of the SRA Code of Conduct means any situation in which two or more clients are competing for an "objective" which, if attained by one client, will make that "objective" unattainable to the other client or clients, and "objective" means, for the purposes of Chapter 3, an asset, contract or business opportunity which two or more clients are seeking to acquire or recover through a liquidation (or some other form of insolvency process) or by means of an auction or tender process or a bid or offer which is not public.'' (No pinpoint reference as website document).

their impartiality, or ability to act in their client's best interests. I now expand on this classification of conflicts of interest in some detail.

(a) The Fiduciary Duty Owed by the Lawyer to the Client

A fundamental ethical principle requires a lawyer to act in the client's best interests because a lawyer is a fiduciary agent to their client.[45] This fiduciary relationship is one of confidence, trust and loyalty. The lawyer must put their client's interests 'first'[46] and above their own interests. The fiduciary relationship recognises that an unequal relationship can exist between clients and lawyers and therefore demands the lawyer's undivided loyalty to each client to foster their client's trust. All clients must be able to rely on the lawyer and the law practice to keep their confidential information safe, not to put the lawyer's own interests above the client's interests, and to share all relevant knowledge with the client to advance their case. In the same way as discussed above, this fiduciary duty is both an aspirational requirement that shapes the lawyer's professional role and is also expressed in the rule proscribing the lawyer from acting when there is a conflict of interest.[47] The fiduciary duty requires the lawyer to put aside any interests (excluding the lawyer's paramount duty to the administration of justice and their duty to the court) which could conflict, or be seen to conflict, with a client's best interests.

A lawyer's fiduciary duty to a client is created when a retainer is established. Depending on the terms of that retainer, the duty has the potential to become longstanding. It is a contested issue as to how long this fiduciary duty between the lawyer and their client continues.[48] The duty to maintain the confidentiality of the former client's information continues after the termination of the retainer. Victorian case law suggests that in addition to the duty to maintain the confidential information,

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[45] This fundamental principle is expressed in Rule 4 *Australian Solicitors Conduct Rules* . See also Appendix B *Comparative Ethical Principles*.

[46] Or at least 'after' the paramount duty to justice. See Rule 3 *Australian Solicitors Conduct Rules* that states that the solicitors duty to the administration of justice is paramount.

[47] Dal Pont, above n 38, 113–117.

[48] For more on this contested view see the commentary on Rule 10 in *The Australian Solicitors Conduct Rules 2012 in Practice: A commentary for Australian Legal Practitioners* (Queensland Law Society, 2014) 34-35 [10.1]; See further commentary at Law Council of Australia, *Review of the Australian Solicitors' Conduct Rules.* (Law Council of Australia, 2018) 53-55.

the lawyers' duty of loyalty to former clients continues beyond the termination of the retainer.[49]

The fiduciary relationship creates a positive duty on the lawyer not to 'profit' at the client's expense. This means that the lawyer must be loyal to their clients' interests, particularly the client's economic interests.[50] The lawyer's fiduciary duty, to protect their clients' financial interests, extends beyond any negotiated contractual scope of the solicitor/client retainer.[51]

Discharging this fiduciary duty requires three ethical steps. The first step is the identification of their client's interests (including financial interests) and the lawyer's own interests. The second step is to avoid doing anything that places them into conflict. The third step allows the lawyer to seek the client's informed consent if there is a possibility that the lawyer may be placed into a conflict.

(b) Recognising Client Interests

Clients have multiple and perhaps competing interests. To manage the professional duty to act in their clients' best interests, the lawyer has a duty to identify all relevant client interests at the threshold of the lawyer-client relationship and throughout the duration of the retainer. Occasionally, client interests are not apparent until those interests arise after the client's matter has commenced. To respond to the evolving interests, ethical legal practice requires the lawyer to use an iterative process of inquiry and vigilance to stay apprised of these interests. After recognising client interests, the lawyer must discern whether to continue to act based on a calculation as to how best to support their clients' interests and how to prioritise between competing interests.

Although the lawyer's fiduciary duty to the client is focused through a financial lens, the lawyer should be aware of their clients' non-financial interests too. Clients' interests

[49] See Justice Brooking in *Spincode Pty Ltd v Look Software Pty Ltd & Others* [2001] VSCA 248, 521-522.

[50] Although the fiduciary duty focuses on the lawyer's duty to protect their client's interests, consequences for breach of that duty are assessed according to financial loss. See *Boardman v Phipps* [1967] 2 AC 46. For a critique of the limitation of the fiduciary duty to financial interests see Lisa Zhou, 'Fiduciary Law, Non-Economic Interests and Amici Curiae' (2008) 32 Melbourne University Law Review 1158.

[51] F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 16th ed, 1996) 193.

depend on the matter which motivates them to seek legal help and are generated from a plethora of life events and circumstances. Clients' interests may be motivated by personal circumstances, such as the desire for personal financial security or the avoidance of a criminal record. Clients' interests may be covert and unknown to anyone else, for example, the ownership of property or an intimate relationship. Whilst it would be unreasonable to expect the lawyer to be aware of covert interests, the lawyer should be aware of their client's interests which are evident from the context of the matter. For example, a purchaser's desire to minimise the purchase price of property, or to avoid foreseeable harm or to protect their reputation. More commonly, the client's interests are explicitly identified during the professional relationship and are addressed in the retainer agreement. Whilst the lawyer's professional duty to act in their client's best interests is an ethical one, under the terms of the legal retainer, this relationship also becomes contractual.

(c) Recognising the Lawyer's 'Own Interests'

As part of their fiduciary duty, lawyers must also avoid conflicts between their own interests and their clients' interests. This prohibition existed in the previous Rule 9 of the Law Council of Australia *Model Rules of Professional Conduct and Practice* and is restated in the current *Australian Solicitors Conduct Rules* Rule 12.1:

> A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this Rule.[52]

When acting in a matter where the lawyer's own interests may be in conflict with the client's interests, the recommended ethical approach is for the lawyer to declare their interests, explain why there is a conflict and withdraw from acting.[53] If a lawyer fails to recognise and to disclose their personal interests, that failure may be perceived as unethical and could result in a complaint and subsequent disciplinary action.[54]

[52] Refer to Appendix G *Selected Australian Solicitors Conduct Rules* for the full Rule 12.

[53] Dal Pont, above n 38, Chapter 6.

[54] Disciplinary action usually only occurs when there is a complaint from an aggrieved party.

Typically, the lawyer's own interests arise from their personal relationships and financial situation. In addition to contributing social capital to their communities, these relationship networks are a referral source of legal work.[55] For example, the lawyer may participate on the governance board of their child's school, volunteer in the fire brigade and have a large circle of family and friends. However, the personal relationships that develop can be a source of professional conflict. Examples of overlapping personal and professional interests include the preparation of wills for family members when the lawyer is the executor or beneficiary. More specifically, a client could ask the lawyer to sue the mechanic who coincidentally services the lawyer's car or to sue the lawyer's doctor in a professional negligence matter.[56] The lawyer may have a personal interest borne of friendship that these actions not be taken.

The lawyer's own interests may be motivated by professional duties or by personal gain either for themselves or for their 'associates' and 'immediate family members'. The terms 'associate' and 'immediate family member' are defined in the Glossary to the *Australian Solicitors Conduct Rules*:

> 'Associate' in reference to a solicitor means:
> (a) a partner, employee, or agent of the solicitor or of the solicitor's law practice;
> (b) a corporation or partnership in which the solicitor has a material beneficial interest;
> (c) in the case of the solicitor's incorporated legal practice, a director of the incorporated legal practice or of a subsidiary of the incorporated legal practice;
> (d) a member of the solicitor's immediate family; or
> (e) a member of the immediate family of a partner of the solicitor's law practice or of the immediate family of a director of the solicitor's incorporated legal practice or a subsidiary of the incorporated legal practice.[57]
>
> 'Immediate family member' means the spouse (which expression may include a de facto spouse or partner of the same sex), or a child, grandchild, sibling, parent or grandparent of a solicitor.[58]

The proscription which cautions lawyers to avoid 'own interest' relationship conflicts has particular expression in the Western Australian professional conduct rules. These rules list relationships which should be avoided. The rules provide 'examples of

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[55] G E Dal Pont, 'The perils of familiarity' (August 2011) *Law Society Journal New South Wales* 42.

[56] These are examples drawn from my professional experience.

[57] Queensland Law Society Commentary, above n 30, Glossary 117 [44.1].

[58] Ibid 120 [44.23]; Dal Pont, above n 38, 210-211 [6.15].

circumstances where a practitioner should not act as counsel for a client because of connections that may affect professional independence or impartial administration of justice.'[59]

In addition to such specific relationships of influence, when the lawyer is acting for a client with whom she has a personal relationship, there is an underlying risk that the lawyer's personal life may be disrupted and the relationship with the client damaged if the lawyer fails to achieve a positive result. The lawyer's friend or family member may be dissatisfied with the quality of the legal work which could lead to a termination of the relationship. For these reasons, legal ethicists encourage lawyers to refer clients, with whom they are in such relationships, to another lawyer as both a matter of ethical and practical protection. [60]

In addition to the broad proscription forbidding own interest conflicts, the rules prohibit the lawyer from securing a financial advantage at their client's expense. The premise for this prohibition is that it will be difficult for a lawyer to be impartial when their own interests are involved in their client's matter. Rule 12 provides:

> 12.2 A solicitor must not exercise any undue influence intended to dispose the client to benefit the solicitor in excess of the solicitor's fair remuneration for legal services provided to the client.
>
> 12.3 A solicitor must not borrow any money, nor assist an associate to borrow money, from:
> 12.3.1 a client of the solicitor or of the solicitor's law practice; or
> 12.3.2 a former client of the solicitor or of the solicitor's law practice who has indicated a continuing reliance upon the advice of the solicitor or of the solicitor's law practice in relation to the investment of money,
> UNLESS the client is:
> (i) an Authorised Deposit-taking Institution;
> (ii) a trustee company;
> (iii) the responsible entity of a managed investment scheme registered under Chapter 5C of the *Corporations Act 2001* (Cth) or a custodian for such a scheme;
> (iv) an associate of the solicitor and the solicitor is able to discharge the onus of proving that a full written disclosure was made to the client and that the client's interests are protected in the circumstances, whether by legal representation or otherwise; or

[59] *Western Australia Professional Conduct Rules 2010* r 33.4 and Schedule 1 lists the compromised relationships. These relationships include when the lawyer is also a member of parliament, a member of a local authority, associated with a company, member of a legal aid committee, an arbitrator, or has a family member who is a judicial officer or a justice of the peace.

[60] Dal Pont, above n 55.

(v) the employer of the solicitor.

Another example of an own interest conflict that may arise during law practice is the lawyer's involvement in an ancillary business which may complement the practice of law.[61] Typical ancillary businesses provide services such as conveyancing, debt collection, investment opportunities, real estate sales, process servers, accounting, business planning and mediation. Although the ancillary business may be a separate legal entity, the lawyer or their associate may have a role in running that business, or may share profit generated through that business.

Lawyers' past failure to avoid a conflict between their 'own interests' and 'client interests' has generated specific provisions in the legal regulatory framework to restrain lawyers with a financial interest in referring clients to their ancillary businesses.[62] On this basis the Australian Securities and Investment Commission has prohibited lawyers from operating mortgage investment companies, although some law practices still offer this service through accreditation under the *Managed Investments Act (1998) Australia.*

In summary, this section has provided a typology of various conflicts of interest. It is clear whilst the ethical principles and the posited rules provide guidance, a significant measure of professional judgment is required to identify and then to respond to a possible conflict of interest. The lawyer and the law practice must be alert to the positive professional duties requiring proactive management and insight. Whilst the settled law, principles and rules provide guidance, the lawyer's ethical acuity and skill will play a significant role. In the next part I consider how the common law assists in this navigational exercise.

4 The Role of Settled Law in Shaping the Ethical Standard

The posited law and the formal institutions which interpret and apply that law, provide the practising lawyer with at least the potential for clarity, prospectivity and to an extent certainty and predictability. However, the settled law is but one of the many factors that

[61] The failure to disclose a financial interest reflects the common law offence of chicanery or champerty. Current rules of professional conduct require full disclosure to clients of the lawyer's own financial interests. *Australian Solicitors Conduct Rules 2015,* above n 33, r 12.

[62] Ibid r 41.

shape lawyers' professional judgment. As situated justice professionals, legal practice is shaped by clients, colleagues and communities. Within the ideal of the rule of law,[63] lawyers ostensibly have freedom to discern what is the right thing to do in the context of their law practice. This creates an underlying tension between posited law and ethical decision making or more simply between law and morality.

The Hart–Fuller debates from 1957 encapsulate the complexity of this tension, albeit not specifically in the context of legal practice.[64] Hart was motivated to develop his concept of the 'core' and 'penumbra' in response to the conundrum of how the ideal of the rule of law could prevail, when lawyers needed to navigate through uncertainty.[65] He was responding specifically to the suggestion by realist critics that the rule of law is undermined by the idiosyncratic conduct of judges subject to personal whims. He explored the paradox within the ideal of the rule of law that, whilst the law rules, people implement that law.[66] In our context this includes lawyers implementing the law. Hart agreed that whilst the forms and systems of law seek to create certainty, they do so only in general terms and those general terms must be applied (by people) to the particular circumstances of everyday life. The lawyer's role is to navigate through this uncertainty— guided by the settled law but also tasked to give practical application to the law's purpose is one such example of this dilemma. Whilst Hart acknowledged there was intrinsic uncertainty in giving expression to the rule of law, he advocated that the settled law should provide guidance through the penumbra of uncertainty. He argued that rather than personal whim, this navigational exercise requires fidelity to the law even within that uncertainty.

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[63] The concept of the 'rule of law' has several contested meanings pivoting on the freedom of the individual to contest the posited law. In this thesis the term refers to the existence of explicit rules which bind society through the power of the state. See discussion in Chapter V D I explaining the natural law theory of legal ethics.

[64] From 1957 HLA Hart and Lon Fuller engaged in a debate on the connection between law and morality. This exchange explored if there was a necessary connection between the two, and the debate polarised with a positivist view of the law (Hart) and a natural law implicit morality view of law (Fuller). See HLA Hart, 'Positivism and the Separation of Law and Morals ' (1957) 71 *Harvard Law Review*, 593 and Lon Fuller 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1957) 71 Harvard Law Review, 630.

[65] HLA Hart Ibid as quoted in Gerald J Postema, 'Positivism and the Separation of Realists from their Sceptism' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing, 2010) 259, 261–2, 264. See also HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994).

[66] Although Hart did not name this relationship between the rule of law and the idiosyncrasies of the people who apply the law as a paradox, I offer this term as a way to understand the relationship. On the one hand, the law is fixed and known. On the other hand, the law depends on its interpretation and application by people. Paradox invites human evolution—eloquently described by F Scott Fitzgerald 'The test for first rate intelligence is the ability to hold two opposed ideas in mind at the same time and still retain the ability to function'. 'The Crack Up' (1936) (February) *Esquire.*

Hart's analysis of the core and penumbra suggests a disciplined practice of 'practical reasoning' to provide an answer.[67] In reviewing Hart's argument, Postema distils this skill of practical reasoning into a four step method. This method is particularly helpful here as it 'unpacks' a process that may be at work in underpinning legal decisions in the zone of uncertainty. Postema articulates a method as follows:

1. **The rules do not cover all.** Understand that the rule of law is a blend between the core with a settled meaning and the penumbra of 'open texture'. The core addresses the general whereas the circumstances to which the law applies often differ in the particulars. Whilst some elements of the rule of law have a settled meaning, other elements do not.
2. **A decision needs to be made.** Recognise the penumbra as the place where meaning is less settled because there is a choice available. (Postema took issue with this limitation and argues that there is also the need for choice and decision in the core.)[68]
3. **Reasoned argument does not eliminate choice**. The gap between choice and decision can be closed through reasoned argument, although choice remains. However, because there is choice in the penumbra, there is also room for disagreement. But disagreement invites argument, and the arguments offered can be assessed with respect to their soundness, even if they are not conclusive. Decisions are judged as correct in so far as they are based on sound arguments informed by the settled law.[69] Uncertainty, not knowing what is the right thing to do in the penumbra, is a normal and natural part of the rule of law.
4. **Dialectic process.** Criteria exist within the settled law in the core that can inform the choice and guide the decision in the penumbra. Guidance comes from the settled law and from being open to the 'ought' of the law. This guided decision making reflects the dialectic process between the general settled law, 'the is', and the application of those criteria to bring the 'ought' into being. Given the status quo what ought the result be? However, choice also leads to

[67] Postema, above n 65, 261–2, 264.
[68] Ibid 262.
[69] Ibid 261.

> argument. (Postema adds another criterion to this process of navigating the penumbra, namely, that this reasoning should be public.)[70]

Although abstractions, Hart's recognition of the penumbra of uncertainty within lawyers' decision making, and Postema's distillation of a method to navigate the uncertainty, do provide a method of understanding what lawyers do in making ethical decisions. This is an important area we will return to in the development of a model to facilitate ethical acuity in Chapter VI *Discussion.*

(a) Common Law

The fundamental ethical principles which emerge from the common law guide prescriptive, posited professional conduct rules.[71] These principles also continue to shape those rules.[72] Case law is part of the canon of settled law and consequently the precedents from the case law provide guidance on how lawyers should identify and respond to conflicts of interest. There is an iterative, constantly evolving nexus between the two.

To resolve daily uncertainty, the lawyer requires both a comprehensive understanding of the settled law, and the ability to apply that law to their context. Realistically this is unlikely. Therefore the ratio and obiter from cases such as *Prince Jefri Bolkiah v KPMG (a firm)*[73] for instance are distilled into prescriptive law society guidelines such as the *Law Society of New South Wales Information Barrier Guidelines*[74] that seek to define the standard for effective information barriers. Whilst these Guidelines are prescriptive,

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[70] Ibid.

[71] Unlike the United States of America, in Australia the codification of professional conduct into explicit rules is a recent phenomenon. Prior to 1977, the Australian legal profession relied on 'the common law of legal ethics' and the Law Society of New South Wales actively campaigned against the codification of professional conduct asserting 'The standards of conduct expected of a solicitor are well known and understood by members of the profession and basically by the public at large'. Author unknown, 'Australian Bar Gazette' (1964) 2 15 quoted in David Weisbrot, *Australian Lawyers* (Longman Cheshire, 1990) 197. The first jurisdiction to adopt 'rules' was New South Wales in 1982. See G E Dal Pont, 'What are Rules of Professional Conduct for?' (1996) July *New Zealand Law Journal* 254; G E Dal Pont, 'Drafting Rules of Professional Conduct' (1996) (August) *New Zealand Law Journal* 313.

[72] See commentary for Rule 2 in Queensland Law Society, above n 30, 4 [2.1] 'If the common law … prescribes a higher standard than these rules, then the solicitor is required by these Rules to comply with the higher standard'.

[73] *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222.

[74] The Law Society of New South Wales,'*Information Barrier Guidelines*' (at 16 March 2006).

they are in the nature of administrative procedures, not law. Adhering to the Guidelines though, are required by Rules 10 and 11 of the *Australian Solicitors Conduct Rules* if lawyer is to act in a position of conflicting duties. Given this, and quite bizarrely, the gladiatorial battle in the English House of Lords between the Sultan of Brunei and KPMG now dictates how the Aboriginal Legal Services establish their civil and criminal law practices in remote Australian communities,[75] and how the Legal Aid Commission of New South Wales establishes its Family Law Early Intervention Unit.[76]

The common law in conflict of interest provides guidance in essentially three situations.

- Firstly, where lawyers have been intransigent through conduct such as failing to apologise or offer restitution to aggrieved clients, being unable to negotiate with colleagues or apologise and withdraw from court hearings. Such intransigence leads to a body of disciplinary case law.
- Secondly, when adversarial parties seek tactical advantage by disqualifying the opposing parties' lawyers. Such tactical strategies may lead to requests for specific judicial rulings as to ethical conduct.
- Finally civil claims for compensation arising from contested issues of perceived negligence when lawyers fail in their professional duty.[77]

The case law that results from these three situations has come to influence the everyday judgment of lawyers going about their transactional work.[78]

The common law offers two objective tests to assist lawyers' conduct in these specific circumstances and more general circumstances. I describe these tests as 'peer review' and 'public perception'. Not only do these two tests provide a measure to assess if the lawyer's conduct meets the ethical standard, the tests are seen as sufficiently flexible to facilitate the evolution of ethical standards. These tests illustrate the usefulness of Hart's dichotomy between the 'core' and 'penumbra' as a frame to enhance the practical

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[75] Queensland Aboriginal and Torres Strait Islander Legal Service, *Policy and Procedure Manual* (2012).

[76] Legal Aid NSW, *Early Intervention Unit* <http://www.legalaid.nsw.gov.au/what-we-do/family-law/family-law-early-intervention-service>.

[77] I acknowledge this typology from Francesca Bartlett, *Identifying and Dealing with Conflicts,* Community Legal Centres Queensland (29 August 2017,).

[78] Fuller makes an interesting comment about this. He says that assisting parties to develop agreements by looking at the case law, is like trying to understand what is marriage by looking at divorce. Lon L. Fuller, 'Mediation-Its Forms and Functions' (1970-1971) 44 *Southern California Law Review,* 305, 330.

application of the rule of law. That is, whilst providing an objective test, they ensure the standard remains flexible and responsive to changing circumstances.

(b) Allinson Test of Peer Review

When regulators review lawyers' conduct, the core test is what would 'competent and diligent' colleagues consider as ethical.[79] This objective peer test which was first established in *Allinson v General Council of Medical Education and Registration*[80] clearly has the flexibility to recognise local practice conditions. That case involved alleged misconduct by a medical practitioner.[81] The House of Lords formulated its test for discerning professional misconduct by relying on the 'regard' of 'professional brethren'.

> If it is shewn that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency.[82]

The *Allinson* test for professional misconduct has been codified within the statutory definition of professional misconduct.[83] It was adopted as a peer test for the legal profession 18 years later in *Re a Solicitor: ex parte Law Society*.[84] This later case concerned a London lawyer's undisclosed financial interest in a debt collection company.[85] In that case, the court applied the *Allinson* peer test to find that the lawyer's failure to make disclosure was 'professional misconduct', that 'professional brethren of good repute and competency' would agree that the lawyer's conduct transgressed the

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[79] The term 'competent and diligent' derives from s296 in the *Legal Profession Uniform Law* (and its predecessors) referring to 'unsatisfactory professional conduct' as occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[80] *Allinson v General Council of Medical Education and Registration* [1894] 1 KB 750 ('Allinson').

[81] The case related to the statutory interpretation of s29 of the Medical Act in the United Kingdom which made an offence of 'guilty of infamous conduct in any professional respect'. The test of deciding what was infamous conduct was developed by the Lord Justice Lopes and then Master of the Rolls, Lord Esher.

[82] *Allinson* above n 80, 760-761, 763.

[83] See s296 *Legal Profession Uniform Law* on unsatisfactory professional conduct and s297 for 'professional misconduct'.

[84] *Re a Solicitor: ex parte Law Society* [1912] KB 302.

[85] The failure to disclose a financial interest reflects the common law offence of chicanery or champerty. Current rules of professional conduct require full disclosure to clients of the lawyer's own financial interests. *Australian Solicitors Conduct Rules 2015*, above n 15, r 12.

established ethical standard.[86] The court observed 'the law society are very good judges of what is professional misconduct of a solicitor'.[87]

Within the Australian common law, this pivotal role of the judgment of peers has been adopted and restated in *Adamson v Qld Law Society*:

> The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.[88]

This *Allinson* common law test of peer review has been adopted into Australian law[89] and since codified in *Legal Profession Acts,*[90] the *Uniform Law* and the various professional conduct rules including the *Australian Solicitors Conduct Rules*.

(c) Test of Public Perception

The second common law test that can assist lawyers to navigate uncertainty, is that of 'public perception'. That is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a lawyer should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.[91] This test is typically used when the courts use their inherent supervisory jurisdiction to review lawyers' conduct. The court assumes the role of professional peer to discern the public perception of lawyer conduct.

This test of public perception can also be used proactively as it invites the lawyer to pause to consider how their decision to act, or to decline to act, would 'look' to the

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[86] Allinson, above n 80.

[87] Re a Solicitor: ex parte Law Society, above n 64, (Darling J) 312.

[88] *Adamson v Queensland Law Society* [1990] 1 Qd R 498, 507 [50] Following *Ex parte Attorney General (Cth); Re Barrister and Solicitor* (1972) 20 FLR 234.

[89] Dal Pont, above n 55, 752 [23.85]; Endorsed by Australian courts on many occasions. *Re A Solicitor* [1960] VR 617 620 (Dean J); *Re Thom* (1962) 80 WN (NSW) 968, 969 FC; *Re Veron* (1966) 84 WN (pt 1) (NSW) 136, 143; *Prothonotary of the Supreme Court of New South Wales v Costello* [1984] 3 NSWLR 201, 203) Glass and Samuels JJA); *Adamson v Queensland Law Society* [1990] 1 Qd R 498, 507 (Thomas J).

[90] See Appendix E *Australian Regulatory Structure* for contemporary versions of 'legal profession acts'.

[91] *Kallinicos v Hunt* (2005) 64 NSWLR 561, 582-3.

public. This test offers an impartial, objective assessment into an otherwise private exercise of professional judgment. Each lawyer, and their colleagues within the law practice, can use this public perception test to review that professional decision.

This test invites an objective assessment of how the lawyer's conduct would be perceived by a 'reasonable person informed of the facts'.[92] This test nicely highlights the third and fourth steps in Postema's method of practical reasoning about normative conduct.

The more recent expositions of this principle come first in the case of *Sent and Primelife Corporation Ltd v John Fairfax Publications Pty Ltd*[93] where the court considered if an injunction restraining the lawyer from acting was necessary to maintain the confidentiality of the client's information.

> A court will restrain a legal practitioner from acting for a party to litigation if a reasonable person informed of the facts might reasonably anticipate a danger of misuse of confidential information to the opponent's detriment, and there is a real and sensible possibility that the interests of the practitioner in advancing the case in the litigation might conflict with the practitioner's duty to keep the information confidential.[94]

The same test of public perception was adopted in *Kallinicos v Hunt.*[95] In that case Justice Brereton considered whether a 'reasonably informed member of the public' would conclude that the lawyer should be disqualified from acting for a client due to the appearance of a conflict of interest.[96]

An example of judicial review of lawyers' conduct is *Law Society of New South Wales v Harvey*[97] which considered the extent of the fiduciary relationship between lawyer and client. There was an intermingling of the lawyer's business with the client's interests without full disclosure and informed consent although the lawyer had obtained personal financial profit at the expense of the client. Justice Hutley said 'An appreciation of that

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[92] Sent and Primelife Corporation Ltd v John Fairfax Publications Pty Ltd [2002] VSC 429, [33].

[93] Ibid.

[94] Ibid [33].

[95] *Kallinicos v Hunt* above n 72.

[96] Ibid [43].

[97] *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154.

[lawyer's fiduciary] duty depends not upon some technical instruction, but upon understanding and applying the ordinary concepts of fair dealing between honourable men'.[98]It is in this way that the principles from the common law can provide practical ethical guidance for lawyers making ethical decisions.

This section began with an explanation of how the Australian regulatory structure which facilitates ethical conduct is in the process of changing to a principles-based approach. Then a series of rules that are drawn from such principles and that regulate lawyers' professional duty to avoid conflicts of interest, was considered in more detail. These rules address three groups of possible conflicts: lawyers' own interest conflicts, former client conflict and current client conflict. In addition to the ethical principles and professional conduct rules, I offered two additional common law tests that invited an objective assessment of lawyer conduct. In this work, the two tests were grouped as 'peer review' and 'public perception'. Together these principles, rules and common law tests help establish the ethical standard. In the next section we move on to consider how lawyers identify and respond to conflicts of interest.

(d) Is there a continuum of risk on which a conflict exists?

Whilst the professional conduct rules are clear in stating that a conflict must be avoided, recent Australian case law has seen an evolution from a high standard of a 'theoretical risk' of a conflict being sufficient to disqualify a lawyer - to a more recent preference for the risk to be 'real'. An example of this change is found in the family law jurisdiction between *McMillan* [2000] FLC 93-048 and *Osferatu* [2015] FamCAFC 177.[99] In both cases the court was asked to restrain a lawyer from acting for a party where there was an allegation that the lawyer was either acting against a former client, or there was a risk of disclosure of confidential client information.

After establishing that there was confidential information which was material to the matter, and that there was a risk that information could be disclosed to the party with an adverse interest, the court engaged in a balancing exercise in considering the extent of that risk. Should a lawyer be restrained if the risk was simply 'theoretical' or was something more substantive required, that is that the risk should be 'real'. In

[98] Ibid 170.

[99] *Osferatu* [2015] FamCAFC 177 [13]

considering the risk of disclosure, and in an aside to the *McMillan* decision, the court in *Osferatu* said 'we find the word "theoretical" unhelpful' and instead preferred a 'continuum of risk from obvious to remote…The consideration should be whether there is a real risk of misuse as opposed to one which is merely fanciful.' [100] In discerning if there is a 'real risk' the court balanced several factors such as:

- The nature of the information held by the lawyer or law practice
- To whom was that information given
- When the information was given
- The relevance of that information to the current proceedings
- The risk of disclosure
- Any proposed protective measures

This line of cases reflects a changing tolerance for working along a continuum of risk by considering the substantive factors. These factors are situation specific and may include the effectiveness of information barriers. The court is more likely to allow the lawyer or law practice to continue to act as there is no 'real risk' of a conflict.

In summary the settled law – for all lawyers regardless of geographic location – rests on the lawyer's fiduciary duty to their client to protect the client's confidential information and to act in their client's best interests. A conflict must be avoided but there is not a universal prohibition preventing a lawyer from acting when there may be a future conflict. Several factors must be considered.

These factors are considered in the case law and contemporary guidance to the relevant case law is provided in the commentary to the Australian Solicitors Conduct Rules.[101]

A duty – duty conflict may exist through an adverse interest conflict (where two or more clients' interests are not aligned) or a confidential information conflict when a lawyer has a client's information, which may be relevant to another client's matter. Over time that information may lose its confidential character. The leading authority in this area is *Mancini v Mancini* [1999] NSWSC 800. In that case Justice Bryson said:

[100] Ibid [39].

[101] Commentary at Law Council of Australia, *Review of the Australian Solicitors' Conduct Rules.* (Law Council of Australia, 2018) 53-55.

Confidential information which once existed may no longer be confidential; it may no longer be available although it was communicated in the past; it may not be material to any use which might now be proposed to be made of information. Without specificity a claim to protection cannot be defended or decided on any fair procedural basis.[102]

Nevertheless, the client as principal, can modify the fiduciary relationship with their lawyer - and the resultant duties of confidence and loyalty – by agreeing to a limited retainer.[103]

The Law Council of Australia suggests[104] that avoiding conflicts involves a prudent combination of:

- accurately defining the scope of the retainer agreement[105]
- obtaining the informed consent of the former client (if feasible);
- establishing effective information barriers[106]
- and establishing appropriate internal arrangements within the law practice[107]

Whether there is a conflict sufficient to disqualify a lawyer or law practice from acting, is an exercise of professional judgment involving a consideration of the relevant factors and a balancing of the evidence.

5 Working With, and Working Around Conflicts

There are two overarching ethical principles on which the lawyers' duty to avoid a conflict of interest is based. The first is the lawyers' paramount duty to the administration of justice followed by the obligation to act in the best interests of the client. As discussed above, such aspirational ethical principles are supplemented with professional conduct rules, guidelines and common law. However, the lawyer must discern how this standard should apply to their everyday legal practice. They must work out how to identify, then to respond to the possibility of a conflict occurring. For many

[102] *Mancini v Mancini* [1999] NSWSC 800 [7]

[103] *Minkin v Lansberg* [2016] 1 WLR 1489.

[104] Law Council of Australia, *Review of the Australian Solicitors' Conduct Rules.* (Law Council of Australia, 2018) 59.

[105] Ibid.

[106] Prince Jefri Bolkiah v KPMG [1999] 2 AC 222.

[107] Bureau Interprofessionnel Des Vins De Bourgogne v Red Earth Nominees Pty Ltd [2002] FCA 588.

country lawyers, where the possibility of a conflict is ubiquitous, they must 'work with' and sometimes 'work around' conflict.

The expression 'work around' is a colloquial term referring to processes within a law practice seen as surmounting a barrier that would otherwise prevent the law practice providing a legal service. The term is ambiguous. On the one hand, a work around exemplifies practical strategies revealing how lawyers navigate uncertainty. In the lawyer's mind, a work around is a legitimate exception which authorises the lawyer to continue to act in certain circumstances. These circumstances clearly include when 'permitted by law', the rules or client authorisation. For example, the professional conduct rules allow certain technical fixes that are intended to obtain the client's informed consent. An illustration of this approach is a proforma consent form for obtaining a client's signature. This form ostensibly provides authority when there is the possibility of a same matter conflict arising in the future.[108] However as indicated in the case of *Law Society of New South Wales v Harvey*[109] (considered above) technical compliance does not equate with the reality of informed consent.[110]

On the other hand, a work around suggests smart, perhaps unorthodox practice. The term connotes a sense of creativity, flexibility or borderline ethicality. The risk is that measures of this kind, whilst technically legal, may fall outside the spirit of ethical principles.

Given its prevalence in country law practice, the work around approach to working with a conflict of interest operates as a touchstone to consider the bigger issue of ethical acuity and is considered in more detail in subsequent Chapters.[111] Developing ethical acuity is primarily a proactive and preventative skill which aids the lawyer to navigate uncertainty. In this context of the work around, ethical acuity requires a thorough knowledge of the settled law combined with the practice wisdom to implement prophylactic measures to limit the chances of falling into ethical error. It is an open

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[108] *(Victorian) Professional Conduct and Practice Rules, 2005,* 49. See Schedule Form 1 Acknowledgment in Accordance with Rule 8.5.

[109] Law Society of New South Wales v Harvey, above n 78.

[110] For specific discussion on this issue in the context of country law practice see *Legal Services Commissioner v Francis (Legal Practice)* [2006] VCAT 581. Hereafter *LSC v Francis*. See below Chapter II Part C 6 a.

[111] See discussion below Chapter IV C 3 and Chapters V and VI.

question considered below in Chapter VI *Discussion*, if these work arounds 'cure' a conflict or are more in the character of preventing conflicts from occurring in the first place, or are in fact ethically unsatisfactory. The final part of this section on the Regulatory Structure turns to the particular issues concerning conflicts of interest in country law practice.

6 Conflict of Interest and Country Law Practice

This part considers the case law where conflicts of interest have occurred in country law practice. The *Australian Solicitors Conduct Rules* make no exception for the geographic location of the law practice. There is no discernible judicial commentary on tolerating a different standard for lawyers due to geographic location of practice. Conversely there is no analysis of Australian complaints or disciplinary data indicating country lawyers are unethical. Kyle and colleagues report that the anecdotal information from regulators is that country lawyers are not over represented within the complaints system for complaints generally.[112] We now consider specific cases illustrating when country lawyers have been disciplined for conflict of interest, and research into the frequency of occurrence of this ethical issue.

(a) Case Law

In the first case, Mark Woods was a former president of the Law Institute of Victoria and practised law in country Victoria. His law practice represented two clients with adverse interests. Woods represented the male defendant against assault charges. Woods' colleague, in another office of the law practice, provided family law services to a female client, who was also the victim and police witness in the alleged assault. In this case, confidential client information was gathered by different lawyers in branch offices and there appeared to be an absence of system design and a lack of sensitivity to the possibility that those duties to multiple clients could conflict.

[112] Louise Kyle, Richard Coverdale and Tim Powers, *Conflicts of Interest in Victorian Rural and Regional Legal Practice* (Deakin University, 2014) 89–90. In analysing the complaints data from the Victorian Legal Services Commissioner, the researchers found that between 1-2% of all complaints relate to possible conflict of interest. In the two years from 2010 to 2012, there was an average of 26 complaints a year arising from alleged 'conflict of interest' outside the metropolitan area.

The police prosecutor cautioned Woods on a possible conflict of interest and asked him to consider withdrawing. Woods declined. The female client complained about the conduct to the (then) regulator, Victorian Legal Ombudsman.

The case *Legal Ombudsman v Woods*[113] illustrates how a conflict of interest arises from the fiduciary duty of client loyalty. The Victorian Legal Practice Tribunal found the country law practice had a conflict of duties and the charge 'misconduct at common law' proven. The Tribunal observed:

> The so called 'loyalty principle' applies in the strongest possible way to the present case, where the actual conflict of interest is of the starkest kind. In our opinion the conflict of duty, and the conflict of loyalty, should have made it plain to the practitioner … that the practitioner and his firm must cease to act for both the female complainant and the accused man.[114]

Despite Woods' extensive involvement on the governing Council of the Law Institute of Victoria and its Ethics Committee, his law practice failed to identify this conflict of interest and when it was brought to his attention, he declined to withdraw. This case revealed the law practice's failure to screen for client interests, and the lawyer's reluctance to respond to collegiate suggestions that there may be a conflict of interest. On recounting evidence that Woods continued to act for the male client despite the caution that the female client believed he was in conflict, the Tribunal observed:

> The statements by [female client] would convey to any sensitive reader a powerful insight as to the likely feelings of a woman … upon hearing that her solicitors were acting for the alleged perpetrator in respect of the charges.[115] …
>
> The cross-examination of the practitioner [showed] a remarkable disregard of the feelings of a female client in all the circumstances of which he knew.[116] …
>
> We regard as significant the lofty if not contemptuous dismissal by the practitioner of the warning and request which he received from the experienced police prosecutor … and the failure of the practitioner to make appropriate enquiries of his partners as to the truth (if he doubted it) of the allegation that [female client] was the firm's client, and the failure of the practitioner to seek any legal advice upon the conclusion of law or ethics implicitly advanced by the policeman, or to make any researches of his own into the relevant law.[117]

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[113] *Legal Ombudsman v Woods* [2000] VLPT 27.

[114] Ibid [42–43].

[115] Ibid [46].

[116] Ibid [49].

[117] Ibid [72].

This case illustrates two common causes of a conflict occurring in country law practice. The first is a practical issue of monitoring clients when the law practice has several lawyers operating in multiple offices. The practice management systems need to be current and searchable to reveal possible conflict. The second issue is the need to be alert to client perceptions of maintaining their confidential information, and their expectations of ongoing loyalty.

Another case that illustrates a country lawyer's failure to identify their conflict of duties is *Hendriks v McGeoch*.[118] The lawyer, Henri Hendriks, took initial instructions from a client who sought advice on the distribution of her property to her two adult sons on her death. Over time, the lawyer had acted as the 'family solicitor' for the two sons. After a partial inter vivos transfer of some of her property, the mother changed her mind about the inheritance arrangement to one son's disadvantage. In hindsight, a conflict of duties was apparent between the lawyer's duty to give effect to the mother's wishes and the lawyer's duty to protect the interests of the disinherited son (McGeoch). This matter came to court as a tortious cause of action in negligence, and the court granted financial compensation in finding the lawyer breached his professional duty. The *Hendricks* case is a significant indicator of a potential source of ethical difficulty in country law practice as it reveals how the country lawyer can see themselves as the 'family lawyer'. Whilst initially clients' interests are aligned, the lawyer may neglect to identify the subsequent diverging of individual interests, thus pushing the lawyer to unethical behaviour.

Another example of a country lawyer's failure to recognise when their own financial interests are in conflict with their client's interests is provided in *Legal Services Commissioner v Francis*.[119] This case also illustrates a concurrent client conflict. In this case Jeff Francis, a country lawyer, acted for both the buyer and seller of real estate. The seller's property had been on the market for some time and eventually a company acting in a trustee capacity bought it. Francis was a shareholder and director of the purchaser trustee company and his wife was a beneficiary. Two weeks after the sale, the trustee company sold the property to an unrelated party for a profit of $140,000. The original seller complained to the Legal Services Commissioner that, in failing to

[118] *Hendriks v McGeoch* [2008] NSWCA 53.
[119] *LSC v Francis,* above n 110.

disclose his interest in the trustee company, Francis had failed to look after his (the original seller's) interests.[120]

Acting for both sides in a conveyancing transaction is allowed under the Victorian rules, provided full disclosure is made to both clients and informed written consent obtained.[121] The Tribunal found that despite the lawyer obtaining the two clients' signed written 'acknowledgement' on the form prescribed in the professional conduct rules, when their own interests were involved, the lawyer had a higher duty of disclosure. The lawyer made a financial profit from his client, without disclosing his material interest in the matter. He breached his fiduciary duty. The Tribunal commented:

> We find such acknowledgement did not authorise Francis to act for both parties where there was, in our view, a material conflict of interest.[122]

The Tribunal found Francis guilty of 'misconduct at common law' and declared:

> In our view for Francis to have acted both for the vendor … and the trustee company of the Trust in which his wife held a beneficial interest as purchaser was a clear example of a conflict of interest in breach of the provisions of the Rules.[123]

Francis argued the proscriptive conflict rule should be relaxed because of the country location of his law practice. The Tribunal rejected the proposition that a different standard should apply in country areas:

> Francis referred to the situation that can confront a country practitioner when approached to act by both parties and the problem that may arise in obtaining independent representation. There can be no relaxation of the Conflict of Interest Rule. The Rule is of equal application for all practitioners wherever placed. Certainly in Wangaratta, a large community with a number of legal firms, there can be no excuse for nor reason to do other than strictly comply with the Rule.[124]

Although the lawyer complied with the formal requirement for a signed 'form', he did not comply with the intention of the rule which was not to profit at his client's expense.

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[120] The complaint was made under s 137 (a) (1) *Legal Practice Act 1996* (Vic).

[121] *(Victorian) Professional Conduct and Practice Rules, 2005,* above n 80. 49–50 . Schedule Form 1 referring to r 8.5.

[122] *LSC v Francis,* above n 110.

[123] Ibid [33].

[124] Ibid [47-49].

The *Francis* case emphasises that technical compliance in following formal process is insufficient for a country lawyer to satisfy the higher duty to be alert to the perception that the lawyer may preference their own interests at the expense of the client's interest.

These three cases provide examples of how country lawyers have fallen into error through failure to identify a conflict of interest. In the *Woods* case, it was a conflict of duties and loyalties. Grievance was caused to the female client who was also the 'other party' in the police prosecution. One suspects that the lawyer's lack of contrition or insight may have exacerbated the grievance. The *Hendriks* case was a breach of duty resulting in the neglect of a client's interests because of concurrent obligations that were not aligned. The *Francis* case was a breach of fiduciary duty which could not be cured by unilateral written (although limited) disclosure.

In each case the lawyer, or their law practice, held confidential information that was relevant to more than one client and if disclosed could be material to the other client's interests. The lawyer's failure to appreciate the relevance and sensitivity of that information whilst representing multiple clients, triggered the complaints. In each case, complaints arose because the client suffered material loss or because of the perception that the lawyer should not be acting. As I discuss later in this thesis, the natural law theory of legal ethics situates lawyers as the corporeal expression of the rule of law in their communities. That is, laws do not govern, it is the people applying the laws who govern and by virtue of lawyer's admission as officers of the court with the paramount duty to the administration of justice, the should be the 'personification' of the rule of law. If one accepts that lawyers are the personification of the rule of law within their community, their actions should promote rather than undermine public confidence in the legal system.

(b) Frequency of Conflicts of Interest in Country Law Practice

In this final section describing the Regulatory Structure which informs the research context I share what is known about the frequency of conflicts of interest occurring in country law practice. Respondents to Roman Tomasic and Cedric Bullard's 1977 survey of the legal profession in New South Wales reported that country lawyers said they were twice as likely to refer clients away due to a conflict of interest compared with city

or suburban solicitors.[125] In discussing these findings in 1979, Ian MacDonald, a Queensland country lawyer, wrote in the *Australian Law Journal* that this finding could be explained as there was a greater likelihood that the country lawyer would be known to many in the community both in personal and professional capacities.[126] More recently in 2011, Richard Coverdale's survey of Victorian country lawyers found that seventy percent of respondents said that the presence of conflicts of interest adversely impacted their ability to provide services to clients.[127] Whilst these responses suggest that country lawyers are aware of the need to avoid conflicts of interest, there has been no research into how the lawyer resolves this issue.

Whilst the ethical duty to avoid conflicts of interest is universal, because of the increased likelihood of disqualifying conflicts occurring in country communities, the consequences of the lawyers' ethical decisions differ. For example, the consequences of a refusal of a legal service in a country community may mean the client has no alternative source of help. For country lawyers the situation is exacerbated as they may believe they facilitate greater access to justice when they have a high tolerance for working in a possible conflict situation. However, this tolerance may also be a blindness to ethical peril. In contrast, more urbanised colleagues may be able to meet the simple possibility of a conflict by disqualifying themselves from acting, comfortable in assuming that there are many alternative law practices available.[128]

These differential consequences for country lawyers have the potential to increase the structural strain within the law practice. To recap, structural strain refers to the necessity to maintain professional standards whilst the circumstances of the law practice differ. These differences could enliven the lawyer's ethical agency to facilitate an appropriate, yet ethical response. Prescriptive guidelines which suit lawyers in well-resourced urban communities may undermine access to justice in more remote, under-resourced communities.

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[125] Roman Tomasic and Cedric Bullard, *Lawyers and their work in NSW* (Law Foundation of NSW, 1978) 81 Table H7.

[126] Ian Macdonald, 'Country Lawyers and their problems' (1979) 53(July) *Australian Law Journal* 399.

[127] Richard Coverdale, Postcode Justice. Rural and Regional Disadvantage in the Administration of Law in Victoria (Deakin University, Centre for Rural Regional Law and Justice, July 2011), 85-88.

[128] This position was advocated by the Victorian Justice PD Cummins 'the phrase "potential conflict of interest" is tautologous' quoted with approval by Adrian Evans, 'The Business of Conflicts: Reflections on the IBA 2000 Debate' (2000) 74(10) *Law Institute Journal* 23.

7 Summary

In this first section of this Chapter which establishes the research context, I have provided an outline of the elements within the Australian regulatory structure. Initially I reviewed how the change to decentred regulation encourages aspirational compliance with the ethical principles. The principle that the lawyer's paramount duty is to the administration of justice and that they must act in their clients' best interests informs the proscription that the lawyer must avoid a conflict of interest. I then offered a typology of conflicts that included lawyers' own interest conflicts, duty conflicts and client conflicts (former and current). Next, I explained how the common law provides guidance on the objective assessment of lawyers' conduct through the tests of peer review and public perception. After explaining the scope for ethical agency in working around a possible conflict, I referred to three cases that illustrated when country lawyers have been disciplined for their failure to avoid a conflict. This section concluded with a description of the frequency of the occurrence of this ethical issue in law practices located in the country. In the next section I review what is known about country service delivery in general and country law practice in particular.

C Country Lawyers

The problem motivating this research is that the context of the law practice may influence lawyers' ethical decisions. To this end, the site of research inquiry is focused on the cohort of country lawyers to discern to what extent, if any, the geographic location affects their judgment. In this section I consider what is known about this particular cohort of the legal profession. I begin by disaggregating the term 'country' into the more nuanced typology of geographic classification defined by 'remoteness areas'. I then review the literature to discern what is known about service delivery to country communities in general and country legal services in particular. This information provides a richer description of the character of the country lawyer and the context in which country law is practised.

1 Defining Country

In contrast to the wealth of research within the health and welfare sectors that uses geographic location to assist in service design, the legal profession lacks a uniform or

consistent approach to the use of geographic data in the design, and delivery of, legal services. In this section I review existing research on the classification of country areas to discern if that typology is useful here. When referring to lawyers practising outside the major cities, the convention is to use the generic term 'country' or 'rural'.[129] Socio-legal research in Australia,[130] the United Kingdom[131] and the United States of America[132] assumes there is an homogeneity to the cohort of country lawyers. Occasionally the terms 'regional, rural and remote' are used to refer to the decreasing population density of Australian country regions, however there has been no underlying statistical definition to accompany these terms. Similarly, the term 'region' refers to a consolidated country area although there is little, if any, alignment between various service providers as to which areas are covered in a region.

Researchers have critiqued the gloss of 'rurality' that masks the heterogeneous character within 'other than urban' communities. Patricia Mundy cautions against reliance on fixed definitions for country communities saying they can be problematic as they conceal 'significant difference between localities'.[133] Her interest is 'the social production of meaning'[134] rather than a measure of 'rurality' defined by a statistical calculation. Mundy uses the lens of 'rural social space' to focus her research. However, she notes that rural social spaces may 'overlap the same geographic area and … shift

[129] But where does the 'city' end and the 'country' begin? Section 29W of the *Sale of Land Act 1962* (Victoria) allows a lawyer to act for both vendor and purchaser on a terms contract of sale when they are in the 'country'. This section implies the boundary is 50 kilometres from the corner of Bourke and Swanson Street in the capital city of Melbourne. A similar demarcation between city and country is revealed in the constitution of the NSW Law Society which suggests that lawyers practising beyond 32 kilometres from the Sydney based NSW Supreme Court, are eligible for membership of 'country' law societies. See Law Society of New South Wales, *Memorandum and Articles of Association* (25 October 2007) 19, Article 12.2.

[130] Roman Tomasic, *Lawyers and the Community*, Law in Society Series (The Law Foundation of New South Wales, 1978) ; Coverdale, above n 127.

[131] Mark Blacksell, Kim Economides and Charles Watkins, *Justice Outside the City: Access to legal services in rural Britain* (Longman Group UK Limited, 1991).

[132] Donald D Landon, Country Lawyers: The Impact of Context on Professional Practice (Praeger, 1990) ch 8, 119−146.

[133] Patricia Karen Mundy, *Place Matters: Women's Lived and Imagined Experience of Legal Practice in Regional, Rural and Remote Communities in Queensland*, Socio-Legal Research Centre, Griffith Law School (Griffith University, 2013), 13.

[134] Ibid. Mundy refers to the work of Marc Mormont, 'Who is Rural? Or How to be Rural? Towards a Sociology of the Rural' in Terry Marsden, Patricia Lowe and Sarah Whatmore (eds), *Rural Restructuring: Global Processes and Their Responses* (David Fulton, 1990) 21, 197.

subtly over time'.[135] Paul Cloke contends that it is problematic to conceptualise 'rurality' as a single phenomenon with an 'overarching ability to engage very different situations under a single conceptual banner'.[136] He maintains that when we 'begin to deconstruct the rural metanarrative' the conceptual strength of the generic term 'dissipates into the nooks and crevices of particular locations, economic processes and social identities'.[137] Rather than use the term 'country' as a descriptor of community, Cloke encourages researchers to inquire more deeply into this 'site of conceptual struggle' to seek understanding of these 'multifarious conditions of vastly differing scales and styles of living'.[138] Inquiring more deeply into rural social space provides the means to generate greater understanding of service design and delivery. The effect of social space on identify formation is particularly apt when the country lawyer must navigate their profession's standards of what is competent and diligent conduct, whilst remaining sensitive to their community context.

This thesis takes up the invitation to delve deeper into the concept of 'country'. The method chosen to define 'country' is the tool of statistical geography that codes locations based on 'remoteness areas'. Statistical geography is commonly used in policy development, service delivery and research to explain observed phenomena and to facilitate a comparison between country communities.[139] Although these geographic classification tools have been developed for the purpose of policy development and service delivery, in this research they are appropriated to consider if increasing remoteness affects the ethical conduct of lawyers.

This method of geographic classification is used to code the location of law practices and research participants. This coding method offers a potentially nuanced and

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[135] Ibid 13-14. Mundy quoting Alexandra Neame and Melanie Heenan, *Responding to sexual assault in rural communities Briefing number 3* (Australian Institute of Family Studies, 2004), and Mormont, above n ; Jo Little and Patricia Austin, 'Women and the Rural Idyll' (1996) 12(2) *Journal of Rural Studies* 101.

[136] Paul J Cloke, 'An index of rurality for England and Wales' (1977) 11(1) *Regional Studies* 31.

[137] Ibid.

[138] Paul Cloke, 'Conceptualizing Rurality', in Paul Cloke, Terry Marsden and Patrick Mooney, *The Handbook of Rural Studies* (SAGE Publications Limited, 2006) ch 2.

[139] For an example of this work see Mark Byrne and Reid Mortensen, 'The Queensland Solicitors' Conveyancing Reservation: Past and Future Development Part 1' (2009) 28(2) *University of Queensland Law Journal* 251.

disaggregated typology to assist in the recruiting of research participants and the subsequent analysis of the effect of geographic location on lawyers' conduct.[140]

Geographic classification systems have a long history. For over 20 years the health and welfare sectors have worked with the Australian Government to develop tools to offer greater precision and clarity to define what is understood by the term 'country'. The intention of this collaboration between government and service providers has been to adopt a standard classification system to assist in the delivery of services and the allocation of resources, across the continent. During this time, there have been four iterations in the development of an Australian geographic classification system in a shared endeavour to provide greater nuance and differentiation.[141] However, the Australian legal profession is yet to adopt a geographic classification tool to capture, analyse or use the available demographic data. Despite recent moves to capture information about the national legal profession in the *National Profile of Solicitors*[142] there has been no movement to disaggregate the data on country lawyers into something more meaningful which could assist in sustainable service delivery.

This research adopts the current standard developed by the Australian Bureau of Statistics, which is the *Australian Statistical Geography Standard Remoteness Areas Structure* (ASGS-RA).[143] This classification system provides a framework for understanding the geography of Australia through five remoteness areas: major city, inner regional, outer regional, remote and very remote areas (and a sixth 'migratory' area). Within this ASGS-RA classification system, an area's degree of 'remoteness' is calculated according to road infrastructure and population size in 'service centres'. The Australian Bureau of Statistics explains the ASGS-RA system:

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[140] See Australian Bureau of Statistics, '1270.0.55.005 Australian Statistical Geography Standard (ASGS): Volume 5 – Remoteness Structure' (2013). I acknowledge the recent thesis of my colleague Caroline Hart, *The Prevalence and Nature of Sustainable Regional, Rural and Remote Legal Practice* (University of Southern Queensland, 2014) which has developed an index to reflect a more nuanced description of country law practice which recognises professional community.

[141] See Appendix A Chronology of Australian Statistical Geography.

[142] From 2011 the Australian law societies have compiled a biannual report on Australian solicitors. Three reports are referred to in this Chapter, the 2011, the 2014 and the 2016. The most recent is the Urbis, *National Profile of Solicitors 2016 Report* (19 June 2017). The series of URBIS National Profiles use the homogenous term 'country'.

[143] Australian Bureau of Statistics, above n 140. The Australian Bureau of Statistics reviews these classifications every five years after the Housing and Population census.

> The concept of remoteness is an important dimension of policy development in Australia. The provision of many government services [is] influenced by the typically long distances that people are required to travel outside the major metropolitan areas. The purpose of the Remoteness Structure is to provide a classification for the release of statistics that inform policy development by classifying into distances to the nearest service centres in 5 categories of population size.[144]

Some stakeholders assert that the ASGS-RA is a flawed tool for the allocation of services.[145] In bemoaning the use of 'remoteness areas' for resource allocation, Professor Leslie Barclay for one observed:

> Urana, a town of 800 people in the Riverina region of New South Wales, Townsville, with around 195,000 people and Darwin, with around 130,000 people are in the same category.[146]

Despite these reservations, at the time of writing the Australian Bureau of Statistics promotes the ASGS-RA as the preferred research and policy tool in terms of comparability and usefulness of data.[147] The Bureau's chief statistician, Brian Pink, encourages policy makers to use these classifications 'to improve the comparability and usefulness of statistics generally'.[148]

At its best, statistical geography offers a classification of the physical location not the social structure in that area. The benefit of using this geographic classification method to code research participants is that it allows a method for comparison, however because coding homogenises geographic areas it also masks great diversity within those areas. Researchers caution against the assumption that people in each area share similar characteristics to their neighbours in other areas with the same classification. Critics of policy formation and resource distribution, complain that relying on physical space as a

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[144] Refer to the Australian Bureau of Statistics website for information on the Methods, Classifications, Concepts and Standards Frequently Asked Questions <http://www.abs.gov.au/websitedbs/D3310114.nsf/home/ Methods,+Classifications,+Concepts+&+Standards?opendocument>.

[145] M R McGrail and J S Humphreys, 'Discussion Paper: Development of a National Index of Access for Primary Health Care in Australia' (Centre of Research Excellence in Rural and Remote Primary Health Care, Monash University School of Rural Health, 2015).

[146] Lesley Barclay, 'Unravelling why geography is Australia's biggest silent killer.' (13 March 2014) *The Conversation* . In response to the limitations of the ASGS-RA for the health sector, the Monash Modified Model was developed as a better indicator for the distribution of scarce medical resources. The Monash Modified Model includes the sizes of towns as a relevant factor within the remoteness areas. This classification system, which is specific to the health sector, is now used to allocate financial support to incentivise medical professionals to move to underserved communities.

[147] Australian Bureau of Statistics, above n 140, vii.

[148] Ibid.

predictor of social structure is unwise. That is because whilst discernible 'patterns' may occur across country communities with similar population size and distance from services, such patterns are not predictive.[149]

It is important therefore to remember that whilst there may indeed be some sharing of characteristics within areas with the same classifications, these classifications do not reflect the service infrastructure within those communities.[150] When 'remoteness' or 'accessibility' classifications are used to assess a community's needs and resources are allocated or refused depending on that classification, the outcomes can be inequitable.[151] This note of caution, that country communities differ, is reiterated again and again in Australian research into service delivery, one researcher quipping 'If you have seen one country town, you have seen only one country town.'[152]

Using remoteness areas to compare law practices is similarly problematic. For example, both Port Lincoln in South Australia and Queenstown in Tasmania are classified as 'remote' under the ASGS-RA. However, there is little similarity between them in terms of access to lawyers. Port Lincoln has a population of 14,000, seven private and two public law practices, an airport and thriving agriculture and fishing industries. By comparison, Queenstown another remote area with a population of 2,000 people has no law practice and residents must travel 164 kilometres to Burnie to see a lawyer.

Whilst adopting the method of geographic classification of remoteness areas in the data collection and analysis, this research is mindful of these inadequacies and proceeds on

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[149] See Mundy above n 133.

[150] This problem of incommensurability within remoteness areas has been addressed by Caroline Hart in her Doctoral research which critiqued the current geographic classification systems in terms of their usefulness for researching the legal profession. Of interest to Hart was the country lawyer's access to colleagues within a local community of practice. The existing geographic classification systems ignore this issue of professional social infrastructure. In refining her research methodology, Hart found that the Accessibility/Remoteness Index of Australia (ARIA) had several anomalies which made that tool inappropriate for her detailed study. Specifically, the ARIA did not reflect access to services or infrastructure. Hart gives the example of the ARIA equating the 'rurality' of the regional centre of Dalby to the state capital of Brisbane which is 'patently false'. Hart, above n 112, 114–123.

[151] John Daley and Annette Lancy, 'Investing in regions: Making a difference' (May 2011) *Grattan Institute* , 17.

[152] A Larson, 'Rural Health's Demographic Destiny' (2006) 6(551) *Rural and Remote Health (online)* 2 quoted in Louise Roufeil and Kristine Battye, 'Effective regional, rural and remote family and relationship service delivery' (2008) *Australian Family Relationships Centre Clearinghouse Briefing* 3.

the basis that any co-relation between 'remoteness area' and observed behaviour about ethical decision making will not necessarily be predictive.

2 Service Delivery to Country Communities

In this section I provide an overview of general service delivery in the country. A particular challenge is the delivery of scarce services across a broad area where the demands are complex and diverse, and the resources limited. These challenges create a distinctive context that shapes the practice of law and echo Landon's concept of structural strain which service providers must surmount.[153]I begin by considering the existing research into the design and delivery of services to rural areas, then consider how workers within those services address diverse and complex issues.[154]

Research reveals that geographic location affects both the people delivering the services and the types of services provided.[155] A suite of personal and professional issues are pertinent to people providing services to country communities that are not as common to workers in the major cities. Similarly, the geographic location of communities co-relates to specific advantages and disadvantages for people living outside the major cities. [156]Knowledge of these advantages and disadvantages establishes the scene for service delivery.

The advantages include a range of social factors. In general terms people in more remote communities register higher rates of subjective wellbeing, social capital and volunteering participation. The comparative high levels of subjective wellbeing were noted in the 2005 *Australian Unity Wellbeing Index* research conducted by Deakin University which observed: '[I]t is the rural areas and very small towns which are most characterised by strong neighbourhood connections and high levels of community

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[153] Although the concept of structural strain is attributed to Landon's work with country lawyers, it is extended here to include the tension which arises between the circumstances of practice and the expectation that the same standards of service will be delivered regardless of context.

[154] Ibid.

[155] John S Humphreys et al, 'The influence of geographical location on the complexity of rural general practice activities' (2003) 179 *Medical Journal of Australia* 416; Coverdale, above n 127; Muriel Mellow, 'The Work of Rural Professionals: Doing the Gemeinschaft-Gesellschaft Gavotte' (2005) 70(1) *Rural Sociology* 50.

[156] Refer to Appendix H *Research into Geographical Advantages and Disadvantages.*

involvement.'[157]Perhaps these characteristics speak to a resourcefulness borne of the need to do more with less.

High levels of community connection in country communities are also reflected in the Australian Government's 2005 *Focus on Regions 4th Report on Social Capital* [158] which was derived from the *Household, Income and Labour Dynamics in Australia* (HILDA) survey and the Australian Bureau of Statistics *General Social Survey*. The researchers analyse statistical data from these two sources to discern the relationship between social capital and the economic and social wellbeing of people living in increasingly remote areas of Australia.[159] Indicators for measuring social capital include two summary measures of 'community involvement' and 'general support'. Community involvement measures volunteering, active membership in organisations, neighbourly activity helping each other out, and general integration within the community. General support refers to more personal effects of feelings of loneliness, health barriers to social participation, and the availability of social and financial support. This *Focus on Regions* report confirmed the *Wellbeing* survey that identified higher prevalence of social capital in rural communities compared to urban areas.[160] This finding suggests a shared characteristic of participation and involvement.

On the other side of the ledger, there is a body of Australian scholarly research that connects geographic remoteness to disadvantage.[161] The Australian Bureau of Statistics' *Socio-Economic Indexes For Areas (SEIFA)* reveals that the more remote a person lives, the greater is their likelihood of disadvantage on a range of social indicators.[162] Outside the capital cities, life expectancy decreases from 81.7 years to 78.1 years; avoidable

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[157] Robert A Cummins et al, 'Australian Unity Wellbeing Index. Special Report on City and Country living' (January 2005) Report 12.1, 118.

[158] Department of Transport and Regional Services. Bureau of Transport and Regional Economics (BTRE) Australian Government, 'Information Paper 55 Focus on Regions No 4: Social Capital' (2005).

[159] Ibid 55.

[160] Cummins et al, above n 157, 115.

[161] Whilst cataloguing this body of work is outside the scope of this thesis, Appendix I *Chronology of Access to Justice Research* summarises findings from recent reports. Consistent reports of rural disadvantage have been generated by the National Rural Health Alliance and the Australian Council of Social Services. More recently the Law Council of Australia and the Law Institute of Victoria have produced reports on specific issues arising from country law practice. Law Council of Australia and Law Institute of Victoria, *Report into the Rural, Regional and Remote Areas Lawyers Survey* (2009) Law Institute of Victoria, 'Regional and Country Recruitment and Retention Solutions Paper' (August 2005).

[162] Australian Bureau of Statistics, 'Socio-Economic Indexes for Areas (SEIFA) (Technical Paper) 2033.0.55.001' (2011) 67.

deaths per 100,000 people increase from 114 to 361; reliance on social security increases; average yearly Medicare visits drop from 5.8 to 3; fewer 16 year olds remain at school, and fewer people have formal qualifications; 45 per cent of country homes in outer regional areas do not have an internet connection compared to 32 per cent of city homes.[163] In summary, despite high levels of social cohesiveness in country communities, wellbeing indicators of health and education are lower than more urban communities.

Arguably country lawyers would need to consider these advantages and disadvantages of rural living when providing legal services to their communities. This need for bespoke design resonates with the approach encouraged in the United Kingdom where law practices are tasked to design practice management systems appropriate to their size and complexity, rather than assuming that one preferred model will work.[164]

Research within the health system has shown that service models designed to meet the needs of closely settled communities may be less effective in remote communities.[165] An oft repeated term is 'one size does not fit all'. That is, rather than impose one model of service delivery on all communities, attention must turn to how best to deliver a bespoke service appropriate to the size and complexity of the community.

The imperative to extend limited resources across sparsely settled areas and to adapt service models to meet the diversity of needs within communities has motivated a history of innovation in rural service delivery.[166] Examples of responsive service system design occurring outside the major cities of Australia were revealed through a

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[163] See Appendix H *Research into Geographical Advantages and Disadvantages*, above n 156.

[164] United Kingdom Solicitors Regulation Authority, *Code of Conduct* above n 28. The current regulatory system in the United Kingdom suggests systems should be appropriate to the 'size and complexity' of each law practice. See Solicitors Regulation Authority, Outcome 3.2 and *Handbook* above n 28, Principle 1B (4.1).

[165] J Wakerman et al, *Primary health care delivery models in rural and remote Australia- a systematic review* (BMC Health Services Research, 2008), 53. At its simplest, service delivered from a 'centre' assumes that its clients have access to transport to travel to that centre. Typically, public transport is limited in remote areas and the cost of private travel can be prohibitive to people receiving social security support.

[166] This challenge has led to innovations such as the Royal Flying Doctor Service, *History of the Royal Flying Doctor Service* <https://www.flyingdoctor.org.au/about-the-rfds/history/ > started by the Rev John Flynn in 1928 and the deployment of paralegal workers in the Regional Alliance West and Geraldton Resource Centre, *Paralegal Outreach* <http://grc.asn.au/events/event/paralegal-outreach-morawa/ >.

comprehensive survey by John Wakerman and colleagues in 2008.[167] The Wakerman research evaluated a range of models used to deliver medical services across the Australian rural health system.

The Wakerman framework calibrated and cross-referenced three factors: the geographic location,[168] the essential service requirements (such as the rationale for the service and the mode of delivery) and the evaluation of the service's effectiveness. From this analysis emerged a typology of five categories of service types: discrete 'one off' services, integrated services, comprehensive services, outreach services, and virtual outreach services. Each service was mapped on a matrix. On one axis was the continuum of increasing geographic remoteness. On the other was a range of environmental 'enablers' and essential service requirements. The environmental enablers that supported effective service delivery included supportive policy, Commonwealth-State relations, community readiness, workforce organisation, and workforce supply. These enablers dictated the essential service requirements such as funding, governance, management and leadership, linkages and infrastructure.

One conceptual model drawn from Wakerman's typology of services is the 'hub and spoke' model of delivery in the 'outreach service' category. The rationale for this model arises when rural communities are too small to support a discrete stand-alone rural service. This model provides a means to ensure a sustainable workforce in these circumstances. In the Wakerman assessment, success for the hub and spoke model was measured through 'increased occasions of service; increased workforce length of stay; increased referrals; improved cost effectiveness.'[169] An example of this model is where the central service is based in a large regional centre, 'the hub', such as Dubbo in the central west of New South Wales and several outreach locations, 'the spokes' then operate in more remote communities through smaller offices with minimal staff. These spokes could be small townships in the far west of New South Wales (Wilcannia, Bourke, Moree and Broken Hill) within travelling distance from the hub. In this model, core service functions occur in the hub, but workers in the spokes are supported by

[167] Wakerman et al, above n 165.

[168] Ibid. Because Wakerman's research conducted an historical review of the literature, it adopted the categories of 'rural' or 'remote' used in an earlier classification by Australian Institute of Health and Welfare, 'Rural, regional and remote health: A guide to remoteness classifications' (March 2004) . Refer Appendix A *Chronology of Australian Statistical Geography.*

[169] Wakerman et al, above n 165. 5, Table 2.

regular visits from colleagues and supervisors. New workers are oriented into the region through the hub, and then rotate through the spokes. Issues arise as to the suitability of this model for the provision of legal services.

In addition to the design of services fit for the purpose of country communities, other research reveals that common themes are experienced by the workers delivering those services.[170] One of these common themes is a 'blurring' of personal and professional boundaries with workers experiencing 'dual relationships'.[171] Dual relationships refer to the phenomena of people holding multiple roles within the community and the blurring of boundaries between these roles.[172] For example, a qualitative case study of rural medical practice in New Brunswick, Canada by Miedema and colleagues explored reasons for high turnover of doctors in remote areas.[173] The researchers identified that the most important challenge for doctors, above professional isolation and complex patient profiles, was maintaining their professional boundaries. The study identified that some workers had a strong need to establish clear boundaries between their work and personal life, whilst for others the blurring of these roles enhanced their practice. One health practitioner commented:

> What was interesting was the degree to which your care of patients, or your diagnosis, was enhanced by knowing the patient. When I saw my patients in the ER, usually I had some background that other people wouldn't have, as opposed to when I saw other people's patients.[174]

More recently Muriel Mellow's work with rural professionals in Canada also identified that geographic remoteness blurs the line between workers' personal and professional identity.[175] She found that the more geographically remote the service provider, the greater the likelihood that the worker will experience dual relationships. She uses this conceptual dichotomy, of the personal and professional, as a tool to explain the lived experience of professionals working in country communities. She suggests the

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[170] Mellow, above n 155; R Miedema et al, *The challenges and rewards of rural family practice in New Brunswick, Canada: lessons for retention* (18 April 2009). <http://www.rrh.org.au/articles/subviewnew.asp?ArticleID=1141>.

[171] Miedema, above n 170; Landon, above n 132, 123 regarding 'multiplex' relationships.

[172] For an explanation of this phenomena see Mellow, above n 155, 51.

[173] Miedema et al, above n 170.

[174] Ibid 4.

[175] Mellow, above n 155.

challenge of dual relationships requires an ability to fluidly move between both roles as 'rural life problematises notions of professionalism'.[176] Mellow's research with rural professionals also identifies that in comparison to their city colleagues, rural professionals do similar work with fewer resources, and frequently adapt protocols and codes of conduct to better fit with their rural work settings.[177] This research also has particular resonance for country lawyers where similar blurring of boundaries produces ethical risks.

3 Greater Diversity and Complexity of Presenting Matters.

Another relevant issue to service delivery in country communities is that as geographic remoteness increases, there is a co-relation with an increase in both the diversity of matters which present to workers and the level of complexity of those matters.[178] The rural professional practises across a breadth of areas with comparative greater complexity, diversity and responsibility. In a 2002 survey of Australian doctors, John Humphreys and colleagues examined the complexity of activities undertaken in relation to the 'degree of rurality' of the medical practice.[179] They found that the proportion of doctors providing complex services increases with remoteness. The more rural or remote the community, the more likely that the health professional is regularly engaged in complex care, including critical emergency treatment. [180]

The above studies show that geographic location influences both the service design and the demands on the service providers. These findings provide an insight into the working conditions for country lawyers. The implication of these studies into service design and worker identity is that working within country communities differs from working in more urbanised communities. This knowledge has at least two consequences. Firstly, the work environment places personal and professional demands on workers who must adapt their ways of working to ensure they have the stamina and

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[176] Ibid 50.

[177] Ibid 55, 59. Mellow refers to this adaptation as a 'dance'.

[178] Humphreys et al, above n 155 ; See also Kyle, Coverdale and Powers, above n 112, 28, 106.

[179] Humphreys et al, above n 155. This research used the 'Rural, Remote and Metropolitan Areas' (RRMA) geographical classification of remoteness. Refer Appendix A. *Chronology of Australian Statistical Geography.*

[180] Humphreys et al, above n 155, 418.

skills to manage their role.[181] Secondly, rural professionals are expected to manage complexity and diversity with limited resources.

4 Defining the Cohort of Country Lawyers

Despite the recent development of the consolidation of statistics on Australian solicitors in the Urbis *National Profile (the National Profile)*[182] there is still no national data revealing the geographic location of law practices, names of lawyers or their contact details. Fragmented, historical data tell part of the story. Two historical reports incidentally address the issue of the location of lawyers, but these single reports have not been updated. In 2008 the Australian Bureau of Statistics' *Survey of Australian Legal Practices* counted and located lawyers according to 'capital city' and 'other areas'.[183] This survey revealed that in 2008 the total number of Australian barristers and solicitors was 34 587, of which 14.69 per cent (5 083) were based in 'other areas'.

The 2009 Law Council of Australia *Report into the Rural, Regional and Remote Areas Lawyers Survey* summarised a survey that examined country lawyers' plans for passing over their practice to the next generation of lawyers.[184] The survey polled law society members about their succession plans. The number of law society members differs from the number of lawyers as not every lawyer is a member of their jurisdictional law society.[185] The 2009 *Lawyers Survey* identified a cohort of 5 974 (member) country lawyers. However, beyond the generic description of 'country' location, there was no commentary or analysis of results according to the respondents' geographic location.[186] But as a benchmark, these two historical studies suggest that the number of country lawyers in 2008 was in the range of 5 000.

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[181] A Kennedy et al, 'Preparing law graduates for rural and regional practice. A new curriculum based approach' (2013) 93 *Procedia: Social and Behavioral Sciences* 317.

[182] Urbis, above n 142.

[183] There is no further explanation of what or where the 'other area' was, apart from the assumption that it was 'not the capital city'. Australian Bureau of Statistics, *2007-08 8667.0 Legal Services, Australia* (June 2009) 16 Table 3.2 and Total number of lawyers, 17 Table 3.4.

[184] Law Council of Australia and Law Institute of Victoria, above n 161, 7.

[185] Similar reliance on law society membership data informs the 2011 and 2014 Urbis National Profiles, above n 142, which are a much more comprehensive attempt to understand the characteristics of the Australian legal profession.

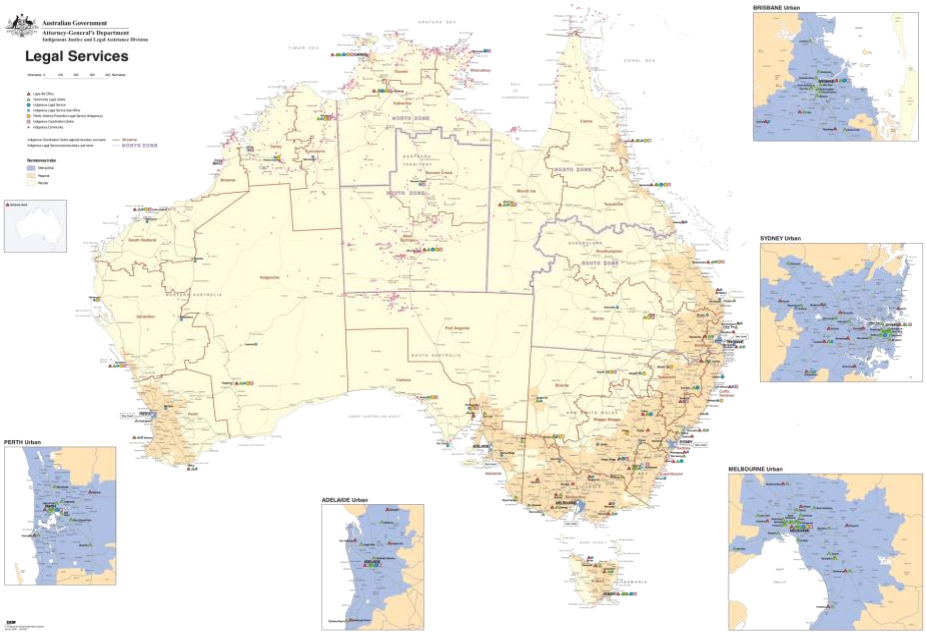
[186] Law Council of Australia and Law Institute of Victoria, above n 161, 7. Participants included members of country law societies as collected from the law society databases, not lawyers holding practising certificates.

In addition to sketchy historical details there is limited statistical information available specifically about public sector law practices, but this information is not coded to geographic location. *Figure 1 Geographic Location of Australian Public Law Practices* below is a map developed in 2006 by the Australian Attorney's General Department to show the location of the four types of publicly funded law practices.[187] This map reveals that public law practices tend to be co-located or clustered in regional centres. For example, in the Northern Territory, the three regional centres of Darwin, Katherine and Alice Springs each had four publicly funded law practices. Whereas the two smaller towns of Tenant Creek and Nhulunbuy had one sub office of an Aboriginal Legal Service. (This phenomenon of co-location or 'clustering' is considered in Chapter V *The Story Understood*.) More current data on the location of public law practices is accessible through the printed *National Association of Community Legal Centres Directory* however this generic information is aggregated at the jurisdictional and sector level.[188]

[187] There are four public law practices in the publicly funded legal assistance sector; the Legal Aid Commission, the Aboriginal Legal Services, the Community Legal Centres and the Family Violence Prevention Legal Services. Sinclair Knight Mertz (SKM), Australian Government Attorney General's Department and Indigenous Justice and Legal Assistance Division, *Legal Services Map*. See this map in larger scale attached to Appendix I *Chronology of Access to Justice Research*.

[188] National Association of Community Legal Centres, *Australian and New Zealand Community Legal Centres Directory 2012* (2012).

Figure 1: Geographic Location of Australian Public Law Practices



Unfortunately no comparable national data exist showing the location of private law practices. Historically, there have been two commercial products purporting to list all Australian law practices in an online directory. However these directories have not been maintained.[189]

Whilst we do not have access to data on the geographic location of law practices, since 2011 data on the number of Australian solicitors has been collated in biannual surveys conducted as a collaborative exercise between the jurisdictional law societies. The data is published in the *National Profile* and includes numbers and details about 'country lawyers' although there is no data standard defining this term.[190]

Whilst this *National Profile* data is not disaggregated to geographic remoteness areas, they are at least usefully analysed to 'workplace location' which refers to 'city',

[189] See Future Media Group Pty Ltd, *Australian Lawyers Directory* <http://www.australianlawyersdirectory.com.au/>; Alan Wood, *Australian Legal Directory* <http://www.australianlegaldirectory.com.au/>.

[190] There is a provision in the *Legal Profession Uniform Law* (section 423) and *General Rules (*rule 109) for the Legal Services Council to develop an Australian Legal Practitioners Register. At the time of writing (September 2018) the Council is working with the Law Society of New South Wales and the Victorian Legal Services Board and Commissioner to develop this Register. Email communication with Bridget Sordo (Project Worker Legal Services Council), Bradley Roberts (Victorian Legal Services Board and Commissioner) Magdalena Malotta Executive Manager Law Society of NSW.

'suburban', 'country/rural', 'interstate' and 'overseas'. *Figure 2 Australian Solicitors by Location* below shows that in 2011 there were a total of 59 280 Australian solicitors. Of these 57.2 per cent were based in the city, 26.7 per cent in the suburbs and 12.8 per cent in the country.[191] These numbers and percentages have changed slightly in the subsequent 2014 and 2016 *National Profile*. In 2014 there were 66 211 practising Australian lawyers.[192] Of this number 12.5 per cent were located in 'country' areas.[193] In 2016 there were 71 509 practising Australian lawyers.[194] Of this number 10.5 per cent (7 690) were located in 'country' areas.[195] Over the five years that the *National Profile* has been produced, the data reveal a national increase of 12 000 lawyers with a falling percentage of country lawyers, down from 12.8 per cent to 10.5 per cent . The population of country lawyers varies from a low of 7 408 in 2011 to a high of 8 436 in 2014.

Figure 2: Australian Solicitors by Location.[196]

	2011	**2014**	**2016**
Total	59 280	66 211	71 509
City	57.2% (30 326)	53.6% (36 279)	52.7% (38 611)
Suburban	26.7% (14 971)	30.6% (20 701)	32.7% (23 976)
Country	12.8% (7 408)	12.5% (8 436)	10.5% (7 690)

Further, the 2016 national data in *Figure 3 Gender Split Nationally and with Early Career Lawyers* below shows that the gender split of all Australian lawyers is 50.1 per cent female and 49.9 per cent male.[197] This split varies in the country, where 47.5 per cent of country lawyers are female and 52.5 per cent male.[198] Looking specifically at the national cohort of early career lawyers (five or less years of post-admission experience) the gender split is 60.5 per cent female and 39.5 per cent male. In comparison with the national gender split, in country areas there are significantly more female early career

[191] Urbis, *2011 Law Society National Profile. Final Report* (2012) 17, Figure 13, Table 10.
[192] Urbis, *2014 Law Society National Profile. Final Report.* (2015), 22-23, Tables 16 and 17.
[193] Ibid.
[194] Urbis National Profile of Solicitors 2016 Report, (2017).
[195] Ibid, iii and Appendices.
[196] Ibid. See also Urbis 2011, above n 191 Section 9.2 Table 13 and Urbis 2014, above n 192.
[197] Urbis 2014, above 192, 32, Figure 30.
[198] Ibid.

country lawyers, 64.3 per cent than 35.7 per cent male.[199] The percentage of early career lawyers in the country (9.4%) is similar to the national percentage of 10.5 per cent.[200]

Figure 3: Gender Split Nationally and with Early Career Lawyers

	Nationally	**Country**
Female	50.1%	47.5%
Male	49.9%	52.5%
Early Career Lawyers	10.5%	9.4%
Early Career Female	60.5%	64.3%
Early Career Male	39.5%	35.7%

This Australian legal profession data, which shows a growing number of women practising law, may have consequences for potential culture change. This observation arises from a gender analysis of disciplinary matters undertaken by Bartlett and Aitken which shows that women are less likely to be the subject to client complaints.[201]

5 Lawyer Scarcity

Lawyer scarcity is associated with professional isolation, lack of referral networks, demand for more generalised competence and the accumulation of confidential information increasing the chance of actual conflict. All of these matters potentially have ethical implications. For the client, scarcity of lawyers limits choice. Better access to data on geographic location improves our understanding of where lawyers are located, which in turn can improve public policy decisions on investing in greater access to legal resources. By targeting areas of high need through the allocation of resources, this information can redress the phenomenon of lawyer scarcity in country Australia.[202]

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[199] Ibid Figure 31

[200] Ibid.

[201] Francesca Bartlett and Lyn Aitken, 'Competence in caring in legal practice' (2009) 16(2-3) *International Journal of the Legal Profession* 241.

[202] For example the foundational work of Suzie Forell, Michael Cain and Abigail Gray, *Recruitment and retention of lawyers in regional, rural and remote New South Wales* (September 2010) informed subsequent service design and delivery by the Legal Aid Commission of New South Wales resulting in the Rural Outreach Clinic Program and the development of the Cooperative Legal Service Delivery programs.

Before the *National Profile* began in 2011, there was limited data on the number or geographic location of Australian lawyers. As mentioned above there were single reports from the Australian Bureau of Statistics and the Law Council of Australia which shed some light on the number of country lawyers. In addition two research reports used statistical geography to build an evidence base to inform policy discussions arising from perceived scarcity of lawyers. In 2008 Kevin McDougall and Reid Mortensen considered the impact of the 'conveyancing reservation' on the sustainability of country law practice.[203] McDougall and Mortensen compared the ratio of country lawyers in New South Wales, who did not have a monopoly on conveyancing services, with the ratio of country lawyers in Queensland who insisted that the maintenance of their conveyancing reservation was essential to their sustainability. They found that 'legal service provision in regional, rural and remote areas of New South Wales appears to be equal or, perhaps, even marginally better than it is in Queensland'.[204] This finding informed later policy decisions on allowing conveyancers to compete with lawyers for that work.

The second research report was undertaken in 2009 and again in 2013 by the New South Wales Law and Justice Foundation. The Foundation surveyed the New South Wales legal profession to assess the position regarding recruitment and retention of lawyers in regional, rural and remote New South Wales.[205] Ratios of lawyers to population are only one measure of service delivery. Using available data from the Law Society of New South Wales, they calculated ratios of one lawyer for every 1 000 residents in the 'inner regional' areas of the state, increasing to one lawyer for every 2 000 residents in 'outer regional' areas and to one lawyer for every 3 000 residents in the 'remote' and 'very remote' areas.[206] Using the geographical data their two surveys identified that the issue was more a shortage of legal positions to service country communities. They identified 19 local government areas that had no resident lawyers.

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[203] Kevin McDougall and Reid Mortensen, 'Bush Lawyers in New South Wales and Queensland: A Spatial Analysis' (2011) 16(1) *Deakin Law Review* 75.

[204] McDougall and Mortensen, above n 175, 102.

[205] Forell et al, above n 174; See also Michael Cain, *Lawyer availability and population change in regional, rural and remote areas of New South Wales* (Law and Justice Foundation of New South Wales,, September 2014).

[206] Forell et al, above n 174, viii.

Beyond the measure of ratios of lawyers to population other models of service delivery provide country people with access to legal services. Examples include the 'fly in – fly out' model used by the Sydney-based Women's Legal Service which visits the remote communities of Wilcannia and Moree monthly.[207] Similarly, the Melbourne-based 'Front Yard' youth community legal services offers legal advice by Skype to young people based in regional Victoria.[208]

6 Characteristics of Country Law Practice

There is no research on a preferred service model which accommodates the characteristics of country law practice. Anecdotally my observation is that in remote Australia, the 'hub and spoke' model seems to be the dominant mode of country law practice. Significantly this model is used by the Aboriginal Legal Services in New South Wales and Western Australia where the need is high and resources are low.[209] This model is also used by centralised private law practices which are based in a large regional centre with satellite branch offices in smaller towns. This model accommodates high rotation of workers whilst maximising the incidences of services.[210] Unfortunately this centralised model also involves an accumulation of confidential client information gathered from a diverse geographic region into one organisation that may affect the lawyer's ethical duties to former and current clients.[211]

There is patchy empirical work in the existing literature describing country legal practice. From the literature which does exist, I have identified five defining characteristics. These are:

1. Multiplex relationships and dual roles
2. Norms of reciprocity, neighbourliness and amiability
3. Complexity and diversity
4. Postcode justice and poor service infrastructure
5. Lower levels of help-seeking behaviour

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[207] Women's Legal Service of NSW, *Indigenous Women's Legal Program Outreach Clinics* <http://www.wlsnsw.org.au/legal-services/indigenous-womens-legal-program/outreach-clinics/>.

[208] Melbourne City Mission and Youthlaw, *Front yard* <http://youthlaw.asn.au/>.

[209] Refer to the service design within the Aboriginal Legal Service of Western Australia Limited, *How does ALSWA Work?* <http://www.als.org.au/about/services/> Aboriginal Legal Service (NSW/ACT), *About Us* <http://www.alsnswact.org.au/pages/civil-law-advice>.

[210] Roufeil and Battye, above n 124, 5.

[211] For discussion about conflict of duties see Section II A 3 Typology of Conflict above.

(a) Multiplex Relationships and Dual Roles

The first characteristic of country law practice is the embedded and overlapping relationships. The seminal work of Donald Landon on country law practice in rural Missouri, USA validates the observations of Miedema and Mellow that there is a blurring of the personal and professional roles in country service delivery. Landon found professional relationships are more complex because 'population density is lower and people encounter each other more frequently'.[212] Landon observed that people's relational ties involve a variety of functions and those relationships involve considerable emotional investment. Landon uses the term 'multiplex relationship' which was coined by Max Gluckman.[213] This term reflects the 'complexity of social connections' in many country communities and contrasts with single-stranded or simplex relationships.[214] A characteristic of multiplex relationships is that the resolution of disputes is future-oriented and designed to service the ongoing relationship:[215]

> Inevitably … many of the disputes … arise not in ephemeral relationships involving single interests, but in relationships which embrace many interests, which depend on similar related relationships, and which may endure into the future. This, at least, is usually the desire of the parties and the hope and desire of the judges and unbiased onlookers [216]

In echoes of Miedema's work, Landon did not see overlapping roles as problematic. To the contrary, Landon suggested these close connections within the rural community enhanced the lawyer's ability to do the best by their client. Landon thought that these overlapping connections enabled the lawyer to serve their client well as '[with] greater knowledge … they are likely to know each client's family, associates, and perhaps even health and finances'.[217]

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[212] Landon, above n 132, 12.

[213] The term multiplex relationship was coined by Max Gluckman in his 1955 study of the judicial processes of the Barotse region in Northern Rhodesia (now known as Zambia). Max Gluckman, *The Judicial process among the Barotse of Northern Rhodesia*, (The Institute of Social Research, the University of Zambia, Manchester University Press,, 2nd ed, 1967) 19.

[214] Ibid 16. Gluckman observed that Lozi people integrated political and kinship roles so that the chief fulfilled a parental role, with councilors as siblings. Gluckman noted that in the Lozi law these relationships served many interests in contrast to single interest linkage.

[215] Ibid 19.

[216] Ibid 20.

[217] Landon, above n 132, 12.

In other words, in small communities, people need to get along with each other: '[t]his attention to amiability appears to be a necessary adjustment to the inevitability of future encounter'.[218]By incorporating this term 'multiplex relationships' into his research on country lawyers, Landon acknowledged the lawyer's dual role. Not only is the lawyer personally enmeshed in complex relationship networks, but their professional role requires them to facilitate and to sustain ongoing relationships. Landon observed that multiplex relationships 'made discrete roles more diffuse'.[219] When assisting clients to resolve disputes, the country lawyer is also aware of the social fabric of their client base.

Landon's research was triggered by a desire to understand how country lawyers understood their professional obligation for 'zealous advocacy'. The then American rules of professional conduct required lawyers to advocate 'zealously' for their clients.[220] Landon observed that in country communities, continual encounters with others are virtually assured and therefore the motivations that apply to each interactional situation tend to narrow down to those that will make the next encounter comfortable. Landon found that in country law practice, whilst advocacy was required, 'excessive zeal becomes deviance'.[221] Consequently, in his view country advocacy was less 'zealous'.[222]

Landon notes the downside of this tendency to cooperate. The 'multiplicity' of overlapping roles may increase the lawyer's vulnerability whilst trying to maintain many relationships. He observed:

> the lawyer experiences considerable cross-pressure…clients are friends, adversaries are acquaintances, disputes often carry community-wide implications and his [sic] independence may be constantly under the pressure of intimacy, familiarity and community scrutiny.[223]

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[218] Ibid 124.

[219] Ibid 13.

[220] Zeal has never been a professional requirement for Australian lawyers. Landon refers to the earlier American Bar Association, *Model Code of Professional Responsibility* (1964) and the subsequent American Bar Association, *Model Rules of Professional Conduct* (1983), Landon, above n 132, 124–125.

[221] Landon, above n 132, 145.

[222] Ibid 143–4.

[223]Ibid.

However, Landon notes that country lawyers' overlapping relationships within their community create higher levels of professional accountability: '[i]f they serve a client poorly, the word gets around quickly'.[224] He contrasts this to the context of city lawyers:

> In a metropolitan setting the lawyer is more likely to be seen as a technical expert. In the smaller setting there may be strong forces transforming the lawyer's identity to that of friend.[225]

As lawyers are residents within these country communities, they are also likely to share the norms of their country communities, and to be influential in maintaining and enforcing these norms.[226] So the first characteristic of country legal practice is one where there is a desire to maintain the norms that flow from the need to preserve multiplex relationships.

(b) Norms of Reciprocity, Neighbourliness and Amiability

Closely connected with the rich relationship networks within country legal practice is the second characteristic of social norms designed to avoid conflict. American socio-legal studies suggest that 'outsiders' who do not understand the local ways, litigate, whereas the acculturated locals in rural communities prefer to resolve differences by negotiation.[227] David Engel and Robert Ellickson's research suggests that small rural communities resolve their differences without resorting to 'law' and the lawyer's role may be more collaborative than adversarial. Engel's 1975 research examined how the lawyer's relationship with their clients in rural 'Sander County' Illinois was shaped by the rural community's reluctance to litigate.[228] Ellickson's 1985 research in 'Shasta County' California noted an 'overarching norm of cooperation'. He found 'informal norms of neighborliness … resolve disputes even when they [the ranchers] knew that their norms were inconsistent with the law'.[229] It is within this practice environment, characterised by a reluctance to litigate and a desire to cooperate, that country lawyers

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[224] Ibid.
[225] Ibid 13.
[226] Landon refers to these norms as the 'containing community'. Landon, above n 132, ch 8.
[227] D M Engel, 'The Oven Bird's Song: Insiders, Outsiders and Personal Injuries in an American Community' (1984) 18 *Law and Society Review* 551; Robert C Ellickson, *Order without Law: How Neighbors settle disputes.* (Harvard University Press, 1991).
[228] Engel, above n 227.
[229] Ellickson, above n 199, viii.

managed their professional role. Landon called this social pressure to co-operate 'the norm of reciprocity' and observed that these norms extended to the culture between country lawyers.

> The formal rules are laid aside, and an ethos of cooperation is substituted that is less determinant. 'Feeling your way along' means that the norm of reciprocity is applied to countless ad hoc transactions between attorneys, each of which is regulated by a shared sense of moral obligation rather than technical rule. [230]

The second characteristic of country legal practice which is identified in the research is that professional workers are subject to normative pressure to facilitate an ethos of cooperation.

(c) Complexity and Diversity

As mentioned earlier by Humphreys and colleagues, another characteristic of country practice is that service providers must manage greater complexity and diverse matters with limited resources. Although their study was defined by health services, their finding has been validated by several studies into country law practice. As early as 1979 the pitfalls of practising in areas of increasing complexity were illustrated in an opinion piece in the *Australian Law Journal*.[231] Macdonald a lawyer from regional Queensland commented:

> A country lawyer has to be a tax specialist at one moment and the next a brilliant criminal lawyer, and then in ten minutes an expert and efficient conveyancer, then a company law expert, then round the day off with some detailed advice on the intricacies of the restrictive trade provisions of the *Trade Practices Act* and some knowledge on the idiosyncrasies of every Family Court Judge. Except for those country practitioners who are non-sleeping wizards it is impossible to live up to this expectation. This aspect is not unique to country lawyers, but it is more common with country lawyers who have few opportunities to enter into a partnership of sufficient size to allow any form of real specialisation. [232]

Recent recognition of the need for the country lawyer to cope with complexity and diversity is provided in the 2013 study of the structural and ethical challenge of conflicts of interest in rural and regional legal practice in Victoria. In that research,

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[230] Landon, above n 132.

[231] Macdonald, above n 126, 40.

[232] Ibid.

Louise Kyle, Richard Coverdale and Tim Powers discovered that with increasing geographic remoteness, lawyers in general law practice were more likely to practise across 'a larger number of primary areas'.[233] Both the study by Kyle and colleagues and 2006 research into the availability of public legal aid in country areas,[234] identify that country law practices felt it necessary to accept a wide range of clients and provide a breadth of services to their communities. Kyle and colleagues' research data revealed that country law practices tended to be more generalist or multi-disciplinary to meet the broader legal needs of their community.

> Regional practitioners have traditionally offered generalist services but the growing complexity of laws is requiring a greater level of specialist expertise. According to a 2006 study, this is placing pressure on practitioners to take on work in areas in which they lack proficiency a problem exacerbated by the fact that, as the conflict of interest survey results found, those who practise in five or more primary areas of practice are more likely to be from more remote areas.[235]

The 2006 TNS research found that country lawyers felt obliged to undertake legal aid work to 'keep the system going'. [236] These lawyers felt 'an extra obligation to provide legal aid services due to the limited supply of lawyers or "deserving" people would not have access to justice'.[237] The country lawyers' perception of pressure to provide legal services in an environment of scarcity is borne out by the phenomenon of 'postcode justice' which is considered in the next section. When lawyers are the gatekeeper to the justice and legal systems, they are the first point of contact for their community. However, this focus can lead to the accumulation of confidential client information. Both service scarcity and concentration of data adds to the structural strain faced by the professionally isolated lawyer. That is, on the one hand they must maintain their professional standards whilst also responding to the circumstances of practice.

The third characteristic suggested by research data is that country lawyers are obliged and expected to take on a broad range of often complex legal work.

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[233] Kyle, Coverdale and Powers, above n 112, 14–15.

[234] TNS Social Research, *Summary of conclusions and implications in study of the participation of private legal practitoners in the provision of legal aid service in Australia.* (December 2006) referred in Kyle, Coverdale and Powers, above n 112.

[235] Kyle, Coverdale and Powers, above n 112, 97.

[236] TNS Social Research, above n 234, viii.

[237] Ibid 40.

(d) Postcode Justice and Poor Service Infrastructure.

Another characteristic of country law practice is the phenomenon of postcode justice and poor service infrastructure. Postcode justice is the connection between geographic location, poor service infrastructure and vulnerable populations. This term, first used in 2005 in the United Kingdom, 'refers to the variations in outcomes likely to be received when participating in the justice system, depending on the location of the court or offence'.[238] In its original sense, postcode justice refers to the perpetuation of disadvantage from harsher sentencing dispositions that flow from judicial contests in the absence of less restrictive alternatives. Less restrictive alternatives refers to the associated justice infrastructure. This term now refers to general issues of access to justice that appear to have a connection with rurality. Over the years several 'access to justice' inquiries have repeated anecdotal observations that geographic remoteness has a disadvantageous impact on justice outcomes for Australians living outside the cities.[239]

The 2014 Australian Productivity Commission report into *Access to Justice Arrangements* observed: '[P]articipants pointed to a number of indicators of unmet legal aid needs [including] a lack of services for people living in rural and remote areas'.[240] The Commission noted that 'socioeconomic disadvantage is linked to geographic isolation (and) geographic isolation itself can represent a barrier in accessing justice.'[241] The Commission's acknowledgement of a differential experience of the justice system due to geographic location is supported with empirical evidence from the 2012 Legal Australia-Wide Survey into legal need (referred to in this thesis as the *LAW Survey*).[242]

The *LAW Survey* identified the same consistent predictors of legal problems across Australia. These predictors include illness, disability, single parent status, rental housing, low income and Indigenous status. To the extent to which people living in country Australia experienced a clustering of these 'predictors', their legal problems

[238] Coverdale, above n 127, 9.

[239] Refer to Appendix I for *Chronology of Access to Justice Research* which notes geographical location as a predictor of disadvantage for justice.

[240] Australian Government Productivity Commission, *Access to Justice Arrangements. Productivity Commission Inquiry Report Volume 1 and Volume 2 (Number 72)* (5 September 2014). 661.

[241] Ibid 674-5.

[242] Christine Coumarelos et al, *Legal Australia-Wide Survey (LAW Survey). Legal Need in Australia* (Law and Justice Foundation of NSW, August 2012).

increase. So, for instance, poverty, accompanied by housing, health and mental health problems, is further compounded when combined with the centralising of services away from those smaller communities.[243] For example, the *LAW Survey* found single parents with a disability were 'especially vulnerable'.[244]

The Commission acknowledged that legal need was exacerbated by the fact that disadvantaged groups such as Indigenous Australians are more highly concentrated in regional, rural and remote areas and that these disadvantaged groups experienced a 'double whammy'. The authors commented:

> Importantly, the problem[s] of distance and poor service infrastructure in RRR [regional, rural and remote] areas are compounded by the fact that disadvantaged groups such as Indigenous Australians are more highly concentrated in RRR areas (Australian Bureau of Statistics (ABS) 2010, 2011). Thus, some RRR areas are microcosms of legal need, embodying the 'double whammy' of poor service infrastructure and populations with high vulnerability to legal problems.[245]

In this setting the country lawyer may be the only visible gateway to the service system in the community. As a consequence, managing conflicts of interest will be one of the most prevalent ethical issues contributing to this structural strain. Closely aligned to Postcode Justice is the likelihood that country lawyers must contend with a poorer service infrastructure relative to larger population centres whilst servicing client communities with a cluster of the predictors of legal need.

Coverdale observes that in comparison to well-resourced city-based legal systems, the lack of general legal and ancillary justice services in country Australia entrenches systemic disadvantage. An example of this disadvantage in criminal justice representation, are the harsher sentencing options Indigenous offenders may face. In 2013 Steve Lawrence, the principal solicitor in the Dubbo New South Wales office of the Aboriginal Legal Service, said:

> In western NSW last year, an Aboriginal child was arrested for stealing a bicycle and taken to court. It was his first offence and he was no threat to

[243] J Brett, 'Fair Share: Country and city in Australia' (2011) 42 *Quarterly Essay* 3.

[244] Coumarelos et al, above n 242, 16.

[245] P Pleasence et al, 'Reshaping legal services: building on the evidence base' (2014) *Law and Justice Foundation of New South Wales* , 32.

> society. A plea of guilty was entered. The magistrate adjourned for several weeks for a report to be prepared and denied bail. The inevitable[246] Supreme Court bail application was lodged in Sydney and three weeks later granted. A frustrated colleague in Sydney later emailed me: 'If this matter came before [city] Children's Court our client would have been sentenced on the spot [and may have received a caution]. Alternatively, the court is likely to have considered dispensing with bail for the matter.'[247]

This experience of differential service provision which depends on the clients' geographic location, is echoed in several Australian research reports that noted the different remand and, sentencing options between the city and the country. In 2006, the New South Wales Parliamentary Standing Committee on Law and Justice inquired into community-based sentencing options for rural and remote areas and disadvantaged populations. The Committee found that offenders sentenced in country locations are more likely to receive a custodial sentence compared with offenders in the metropolitan areas. The Committee considered:

> [i]t inequitable that the full range of community based sentencing options is not more widely available throughout the State. This impacts not only on offenders in rural and remote areas, who are therefore more likely to go to gaol than their metropolitan counterparts, but also on their families and the community.[248]

This stark consequence of postcode justice was noted in a 2010 Victorian report on young people on remand by Matthew Ericson and Tony Vinson which noted:

> The major limitations to current Australian bail support services generally [are] inadequate resource allocations, particularly for Indigenous people and rural and remote residents.[249]

This finding of differential remand options between city and country people was examined in a 2013 report by the Australian Institute of Criminology into bail and remand for young people. The study found 'there is a metropolitan bias and a lack of support for young people in regional, rural and remote areas'.[250] As well as this disparity

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[246] The word 'inevitable' is used in an ironic sense here as the lawyer acting for the juvenile could not (would not/should not) accept that decision as being 'just'.

[247] Steve Lawrence, *The Australian* 18 January 2013 (copy on file with the author).

[248] NSW Standing Committee on Law and Justice, *Community based sentencing options for rural and remote areas and disadvantaged populations (Report 30)* (2006) [3.51].

[249] Matthew Ericson and Tony Vinson, *Young people on remand in Victoria. Balancing individual and community interests* (Jesuit Social Services, 2010), 45.

[250] Kelly Richards and Lauren Renshaw, *Bail and remand for young people in Australia: A national research project,* Research and Public Policy Series (Australian Institute of Criminology, 2013) xi.

in remand and sentencing options, justice infrastructure more broadly in Australian rural areas has been reduced through the broad scale closure of country court houses in a government rationalisation process.[251] Coverdale noted that country communities had a prevailing lack of ancillary human service agencies. Country people involved in the criminal justice systems were unable to access drug and alcohol services, youth services, disability services, domestic violence services, supervised accommodation services, and counselling services.

A consequence of this poor service infrastructure in country communities is that the traditional, mainstream providers, such as lawyers, police and court staff, remain the focal point for entry into the legal system. However, their frame is the adversarial paradigm with a focus on entrenched tertiary responses. Because of the paucity of justice infrastructure, there is a lack of first level, proactive early intervention support. A corollary of this deficit may be that the country lawyers supplement their tertiary responses by offering a clearinghouse and referral service. Although this too depends on their attitude to service delivery. If country lawyers are the main point of contact, it is likely that they will accumulate multiple clients and associated confidential information. If so, this situation exacerbates the structural strain.

(e) Lower Levels of Help-Seeking Behaviour

The final characteristic of country legal practice is that country people are much less likely to seek assistance when faced with a legal need. The *LAW Survey* identified that geographic location affected people's 'problem resolution behaviour'; that is, their awareness of, and access to legal services.[252] When the data from the *LAW Survey* was analysed for factors of geographic remoteness, respondents in more remote areas were found to be less likely to use legal advisors with a reduced likelihood of people 'taking action' and 'seeking professional advice' when faced with a 'legal need'.[253] Survey

[251] Coverdale, above n 127. This report reveals that between the years 1983 to 2000, 119 Victorian court locations were reduced to 65. This attrition of community based infrastructure is evident in other states too. Between 1990 to 1995 rural court closures occurred in New South Wales (73) and Queensland (79). A consequence of the paucity of court infrastructure in country communities means that the specialist courts which deliver 'therapeutic jurisprudence' are more likely to be city based.

[252] Reiny Iriana, Pascoe Pleasence and Christine Coumarelos, *Awareness of legal services and responses to legal problems in remote Australia. A working paper.*, Updating Justice Number 26 (Law and Justice Foundation of New South Wales, July 2013).

[253] Ibid 1.

respondents in 'inner regional' areas report that 17.7 per cent of problems resulted in the use of legal advisors, and only 10.6 per cent of people surveyed in very remote areas used a lawyer. [254] The proportion of problems resulting in 'no action' increased from 17.6 per cent in inner regional areas to 23 per cent in very remote areas'.[255] The researchers wryly explain that the low level of awareness:

> [m]ay to some extent be acting as proxy for the availability of such. Thus, some respondents may have reported that they were 'not aware' of free legal services due to a paucity of such services in their local area.[256]

7 Summary

In this second part of this Chapter we have reviewed what is known about country service delivery in general and country law practice in particular. At the outset, I explained the choice of the Australian Bureau of Statistics geographic remoteness areas as a method to disaggregate the generic term of 'country' into more nuanced descriptors of place. Then we reviewed specific advantages and disadvantages associated with country communities and considered service design and delivery. Next we reviewed what is known about country lawyers, their number, demographic data and characteristics. The literature attributes five characteristics to country law practice. Lawyers themselves are engaged in webs of connected five characteristics relationships (multiplex relationships) and work within community norms of reciprocity, neighbourliness and amiability. Typically the lawyer must have a working knowledge of many areas of law (complexity and diversity). The phenomenon of postcode justice refers to the relationship between geographic location and reduced access to services. There is the 'double whammy' for some populations within country Australia which exhibit high vulnerability to legal problems and poor service infrastructure. These people are less likely to seek legal help.

In conclusion, this Chapter lays the groundwork for the research project. In the first part I considered the ethical issue of a conflict of interest within the contemporary Australian regulatory structure. With a recent move towards principles based regulation there is an

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[254] Ibid.

[255] Reiny Iriana, Pascoe Pleasence and Christine Coumarelos, *Disadvantage and responses to legal problems in remote Australia. A working paper*, Updating Justice No 32 (Law and Justice Foundation of NSW, October 2013) 3.

[256] Ibid, 4, fn vi.

opportunity for the cultivation of situational ethical judgment. Whilst the professional duty to avoid conflicts of interests is informed by the overarching obligation to the administration of justice and requirement to act in their clients' best interests, each lawyer must discern how they will meet the established ethical standard. In the second part I reviewed the existing literature to describe the site in which country lawyers operate – their numbers, their geographical spread and the communities in which they operate. Building on this work, in the next Chapter III *Methodology*, I turn to describing the research design and delivery.

III METHODOLOGY

This Chapter describes the research design. I begin by suggesting an hypothesis to focus the research inquiry. Supplementing this hypothesis is a theoretical framework. Both the hypothesis and the theoretical framework guide the data collection and analysis. I briefly consider the role of empirical research in testing and growing knowledge. The main part of this Chapter explains the methods used in the research design, namely the development and testing of the interview schedule, the construction and recruitment of a research cohort according to geographic location, sector of employment, gender and experience. Finally I explain the method used for the coding and analysis of the interview data. This methodology Chapter sets the scene for the following Chapter on the collection of research data.

A Hypothesis

An hypothesis is a statement that provokes validation. The clarifying provocation of an hypothesis invites the researcher to gather empirical data that can either support or negate a statement. The hypotheses that guides this research is '*That geographic location affects the way that lawyers identify and respond to conflicts of interest.'* This hypothesis responds to the anecdotal belief, prevalent within the Australian legal profession and supported to some extent by prior research, that country legal practice has distinctive ethical challenges as the effect of geographic location changes.[1]

What some commentators have drawn from this difference is that country lawyers should have special rules, evidenced for instance in the submission to the Law Council of Australia by the Aboriginal and Torres Strait Islander Legal Services requesting an exemption to the rule proscribing concurrent conflicts.[2] Others suggest that professional associations should provide targeted professional development for country lawyers.[3] This hypothesis examines whether there is any justification for different treatment for country legal practices.

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[1] Louise Kyle, Richard Coverdale and Tim Powers, Conflicts of Interest in Victorian Rural and Regional Legal Practice (Deakin University, 2014), 107.

[2] They suggested an exemption in Rule 10.2.4 for nonprofit law practices in remote areas. See Professional Ethics Committee Law Council of Australia, *Australian Solicitors' Conduct Rules and Commentary. Consultation with Legal Assistance Services Peak Bodies* (March 2013.)

[3] Kyle, Coverdale and Powers, above n 1.

An hypothesis is usually associated with deductive reasoning and quantitative methodology. Lee Epstein and Andrew Martin contend that quantitative 'testing' of an hypothesis generates statistical information that then reflects indicators of 'significance' of the degree to which the hypothesis is 'provable'.[4] This analytical stance reflects an overarching belief that the veracity of knowledge can be proved or disproved through empirical inquiry. Such a stance aligns with the positivist normative paradigm. In contrast, in qualitative methodology the use of an hypothesis is less common and perhaps less directly useful. In qualitative empirical research, the hypothesis functions more as an hermeneutic device to assist in interpreting data. Nonetheless an hypothesis has been set here to provide clarity and focus to the research project. Specifically, that focus is on the effect of geographic location on ethical conduct. In this context, the hypothesis allows for the emergence of new knowledge through inductive reasoning.

B Theoretical Framework

In this section I briefly introduce three perspectives used in the construction of the theoretical framework.

1. Decentred Regulatory Theory as developed by Julia Black.[5]
2. Natural Law Theory of Legal Ethics as formulated by David Luban[6] in his reappraisal of Lon Fuller's work.[7]

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[4] Lee Epstein and Andrew D Martin, 'Quantitative Approaches to Empirical Legal Research' in Peter Cane and Hebert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (2010), 916.

[5] Julia Black, 'The Rise, Fall and Fate of Principles Based Regulation' (London School of Economics and Political Science, Law Department, 2010); Julia Black, 'Forms and Paradoxes of Principles Based Regulation' (London School of Economics and Political Science, 2008); Julia Black, 'The emergence of risk based regulation and the new public risk management in the UK' (2005) *Public Law* 512; Julia Black, 'Critical reflections on regulation' (2002) 27(1) *Australian Journal of Legal Philosophy*, 1; Black, above n ; Ashley Black, 'Talking about regulation' (1998) Spring *Public Law* 77; Julia Black, *Rules and Regulators* (Clarendon Press, 1997).

[6]David Luban, Legal Ethics and Human Dignity (Cambridge University Press, 2007), 19 ; David Luban, 'Natural law as professional ethics: A reading of Fuller' (2001) Social Philosophy and Policy 176.

[7] Lon L. Fuller, 'Positivism and Fidelity to Law--A Reply to Professor Hart' (1957) (71) *Harvard Law Review* 630; Lon L. Fuller, 'The Philosophy of Codes of Ethics' (1955) 75(10) (October) *Electrical Engineering New York, NY* 916; Lon L. Fuller, 'The Lawyer as an Architect of Social Structure' in Kenneth I Winston (ed), *The Principles of Social Order* (Hart Publishing, 2001) ; Lon L. Fuller, 'Philosophy for the Practicing Lawyer' in Kenneth I Winston (ed), *Principles of Social Order* (Hart Publishing, 2001) ; Lon L. Fuller, *The law in quest of itself* (The Foundation Press, 1940); Lon L. Fuller, *Reply to Professors Cohen and Dworkin, A Symposium: The Morality of Law* (1965) (10) Villanova Law Review 655.

3. The concept of social learning through Communities of Practice described by Jean Lave and Etienne Wenger.[8]

This combination of three perspectives is at the heart of this research. In this section, I explain each perspective then reveal its role in the construction of the questions and the data analysis. These perspectives are considered in greater detail in the analysis of the research data in Chapter V *The Story Understood*.

The unifying element between these perspectives is that they each encourage professional autonomy as a normative good. These perspectives inform my later argument that whilst autonomy facilitates the exercise of ethical judgment, collegial constraint is needed to strengthen ethical acuity. Fundamentally, ethical acuity requires knowledge of the established ethical standard combined with the skill to apply this specialist knowledge to complex situations. However ethical acuity demands more from the lawyer than idiosyncratic judgment. Ethical acuity implies the ability to explain to colleagues why one's decision is ethical, and to receive their affirmation that one's judgment is aligned with accepted and moderated standards for competent and diligent practice. The integration of these perspectives in the construction of this theoretical framework provides a lens to focus on the development and expression of professional autonomy and derivatively, the fostering of ethical acuity.

1 Decentred Regulatory Theory

The first element in the construction of the research framework is Decentred Regulatory Theory. Decentred Regulatory Theory was expounded by Julia Black. She flips the locus of regulatory control away from a command and control approach with power concentrated in the regulatory centre, to engage the regulatee in the shared regulatory endeavour of delivering defined regulatory outcomes. The theory propounds that decentred regulation facilitates the flourishing of context sensitive conduct as the 'situated lawyer', motivated to achieve these shared regulatory outcomes, develops

[8] Jean Lave and Etienne Wenger, Situated Learning: Legitimate Peripheral Participation (Cambridge University Press, 1991), 6; Etienne Wenger, Richard McDermott and William M Synder, *Cultivating Communities of Practice* (Harvard Business Press, 2002). As discussed later in this thesis in Chapter V, the concept of communities of practice is also referenced by Lynn Mather, Craig A McEwen and Richard J Maiman *Divorce Lawyers at Work. Varieties of professionalism in Practice* (Oxford University Press, 2001).

context sensitive, appropriate responses. The term ‘situated lawyer’ refers to the dynamic relationship between the lawyer and the place in which they practise law.[9] The concept references the iterative process whereby the legal practice context informs the lawyer’s professional judgment.

Decentred Regulatory Theory reflects a preference for nuanced, situation specific conduct that reflects and gives pragmatic expression to universal ethical principles. Because of its encouragement of situationally sensitive ethical judgment, this theory has explanatory potential to describe the tacit acceptance of ‘bar’ norms as legitimate conduct. The theory also has normative power to cultivate ethical acuity by devolving a measure of autonomy to the regulatee. In this site of inquiry where the geographically remote participants practise law far from the ‘centre’ of regulatory control, this theory of decentred regulation enlivens the consideration of what regulation is designed to achieve.[10]

The Theory of Decentred Regulation informs a series of interview questions about research participants’ experience of regulation— specifically their contact with the ‘regulator’ and their appreciation of the purpose, clarity and appropriateness of the professional conduct rules to their style of law practice. These questions explore the alignment between the posited ‘paper’ rules and the tacit ‘bar’ norms. The questions seek to discern participants’ sense of a shared regulatory ‘outcome’ which the rules are designed to achieve.

2 Natural Law Theory of Legal Ethics

The second perspective in the research framework makes use of the Natural Law Theory of Legal Ethics. The theory proposes an implicit natural order which can be discerned to guide and encourage ethical agency.[11] David Luban credits Lon Fuller as a modern proponent of this approach.[12] Fuller encouraged lawyers’ professional agency as

[9] Lave and Wenger 1991, above n 8. The term ‘situated lawyer’ derives from Lave and Wenger concept of situated learning.

[10] Kim Economides, 'Centre-periphery tensions in legal theory and practice: can law and lawyers resist urban imperialism' (2012) 1(2) *International Journal of Rural Law and Policy.*

[11] See Luban 2007, above n 6, 100 where he restates Fuller’s natural law theory of legal ethics as ‘the unfamiliar argument of a very familiar book’ focusing on the morality of the lawmakers, not of the law and making an explicit link between the law and human dignity.

[12] Ibid.

a foundational ethical skill dependent on an ability to recognise, and give practical expression to the implicit values which guide social evolution. Lawyers should aspire to achieve fidelity to the law's intrinsic moral purpose.[13] In Fuller's view, if a lawyer constrains their conduct by following an unconsidered pre-determined course of action, they may 'not be practicing [sic] law at all'.[14]

Fuller argued that law practice requires lawyers to be aspirational justice professionals and responsive to their practice environment. Fuller insisted that law required a distinctive aspirational role morality in that lawyers should be 'purposive professionals' commissioned to give tangible expression to the inchoate promise of justice within the law. Applying Fuller and Luban's later interpretations, lawyers should be enlivened by the opportunities to assist in the administration of justice embedded in everyday law practice, rather than fearful of exploring unchartered territory.

Fuller was particularly interested in the relationship between the lawyer's duty to the promulgated law and their aspirational professional role to give effect to the law's moral purpose. However, he cautioned that if aspiration encroaches too far into the territory of duty there is a risk that lawyers 'may qualify obligation by standards of their own'.[15] That is, in giving expression to their own aspiration, the lawyer may diminish or undermine their duty to the law, and depart from what professional colleagues recognise as 'ethical' conduct. Within the constraints of promulgated law, the natural law theory of legal ethics honours lawyers' professional calling to personify the rule of law in their community.

Another tranche of questions informed by the Natural Law Theory of Legal Ethics seeks evidence of purposive professionalism.[16] These questions ask how participants identify and respond to 'conflicts'. They are designed to reveal the nuances of ethical decision making and participants' use of their professional autonomy in discerning an ethical response.

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[13] Luban, above n 6, 110. Luban paraphrased Fuller's argument that whilst managerial direction is a legitimate form of governance, it is 'not the enterprise of subjecting human conduct to the governance of rules' which is the work of the lawyer.

[14] Ibid 107. This point is paraphrased by David Luban.

[15] Lon L Fuller, The Morality of Law (Yale University Press, 2nd ed, 1969), 28.

[16] Fuller's approach to legal ethics is described as 'natural law' as his encouragement of professional agency relies on the lawyer's ability to recognise implicit values which guide social evolution. The concept of natural law has a long history dating back to Aristotle's Nicomachean Ethics and Saint Thomas Aquinas.

3 Communities of Practice

The last perspective used to construct the theoretical framework derives from social learning theory and is referred to as 'communities of practice'. This term is used in this thesis to refer to the beneficial influence which work colleagues have on the development of practice skills. (I acknowledge that this use of the term is a positive but limited one as the term is also used in another context, as an identity construct by Lynn Mather and colleagues, and in that research the term is less intrinsically beneficial.)

The conceptual explanation for a community practice is that, when certain conditions are met, people form themselves into informal groups to produce a learning culture of curiosity and continuous improvement. In a community of practice, information is beneficially exchanged between participants. Simultaneously the knowledge within the cohort evolves as work practices are refined in response to the internal and external environment.

In the professional realm, communities of practice provide an opportunity for collegial discourse with critical friends that facilitates the lawyer's ethical acuity.[17] Collegial discourse assists in the evolution of the ethical standard to ensure that the standard reflects agreed professional conduct whilst also being responsive to the practice context. The influence of professional peers in deciding what is competent and diligent conduct was recognised in *Allinson v General Council of Medical Education and Registration.*[18]

The notion of forming communities of practice has explanatory potential as to how lawyers learn, whilst also offering a normative ideal for the cultivation of collegial professionalism. Combined with decentred regulation and Fuller's purposive professionalism of natural law, collegial professional communities provide a moderating influence over individual, idiosyncratic practice.

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[17] *Ethical acuity* is given its normal meaning. Acuity refers to clarity; an ability to consider various perspectives before making an informed ethical judgment which can be explained and justified as appropriate conduct to others. The term is attributed to A C Tjeltveit, *Ethics and Values in Psychotherapy* (Routledge, 1999) in Mitchell M Handelsman, Samuel Knapp and Michael C Gottlieb (eds), *Chapter 11: Positive Ethics: Themes and Variations.*, The Oxford Handbook of Positive Psychology (2nd ed, 2009), ch 11, 107.

[18] *Allinson v General Council of Medical Education and Registration* [1894] 1 KB 750; See discussion in Chapter II B 4 (b) above.

The concept of professional communities of practice is explored in a series of questions as both an identity construct and as a social learning tool. Participants are asked if they perceive country law practice as different to law practice in the city. Participants' responses reveal their perception of their professional identity. This concept also examines whether participants are involved in any network which has the features of a community of practice and whether such participation guides them in resolving ethical dilemmas.

C Empirical Research

Empirical research involves the rigorous collection of data that is then analysed to discern if that data reveals predictable patterns of behaviour which can enhance our understanding of a social phenomenon. In their *Oxford Handbook of Empirical Legal Research,* Peter Cane and Herbert Kritzer, provide the following definition:

> For our purposes, 'empirical' research involves the systematic collection of information ('data') and its analysis according to some generally accepted method. Of central importance is the systematic nature of the process, both of collecting and analysing the information.[19]

Empirical research provides a means to uncover and describe how lawyers make ethical decisions in everyday legal practice. The participant lawyer is the source of the data and in that sense is actively involved in the research process. Participants' involvement includes:

- testing the early research
- participating in interviews and reviewing transcripts
- approving quotes for publication,
- giving collegial feedback through continuing professional development events.[20]

In this research, a combination of quantitative and qualitative methods are used to collect and analyse the data. The quantitative methods include:

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[19] Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 5.

[20] Throughout this research, participants have collaborated on conference and workshop presentations where the emerging data is discussed and tentative observations shared.

- the calculated selection of a research cohort of country lawyers designed to reflect the socio-demographic characteristics of the national cohort of country lawyers
- the numerical coding and comparison of variables such as employment sector, gender, post admission experience and geographic location.

Qualitative methodology is used as the means to obtain a closer understanding of what lawyers are doing in practice— in the 'field', rather than in an environment constructed by the researcher. Jerome Kirk and Marc Miller offer the following rationale for qualitative research:

> [Qualitative research] fundamentally depends on watching people in their own territory and interacting with them in their own language, on their own terms. As identified with sociology, cultural anthropology, and political science, among other disciplines, qualitative research has been seen to be 'naturalistic', 'ethnographic', and 'participatory'.[21]

Qualitative methods include semi-structured in-depth interviews, thematic analysis and comparative analysis between emergent themes.[22] A number of discrete qualitative methodologies inform the research design:

- Grounded Theory[23]
- Appreciative Inquiry[24]
- Participatory Action Research.[25]

The intuitive approach of Grounded Theory is used to draw out concepts from the data, to organise them and to theorise them, but to do so in a structured and considered fashion.[26] Lisa Webley cautions that Grounded Theory is not designed to discover an

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[21] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 927, Quoting J Kirk and M L Miller, *Reliability and Validity in Qualitative Research* (Sage Publications, 1986) 9.

[22] Ibid.

[23] Kathy Charmaz, 'Chapter 21 Grounded Theory Methods in Social Justice Research' in Norman K Denzin and Yvonna S Lincoln (eds), *The Sage Handbook of Qualitative Research* (Sage, 4th ed, 2011) 359.

[24] Peter F Sorensen and Therese F Yaeger, 'Feedback from the Positive Question. The Integration of Appreciative Inquiry with Survey Feedback from Corporate to Global Cultures. ' in David L. Cooperrider and Michael Avital (eds), *Constructive Discourse and Human Organization (Advances in Appreciative Inquiry, Volume 1,* (Emerald Group Publishing Limited,, 2004) 263

[25] Yolanda Wadsworth, *What is Participatory Action Research?* (1998).

[26] Webley, above n 21, 945.

'objective truth' or 'positivist findings'. [27] Informed by Barney Glaser and Anselm Strauss' explanation for this methodology, Webley asserts that qualitative empirical research is not about testing a hypothesis but 'developing theory as the research proceeds'. Webley explains: '[i]t allows the researcher to seek an understanding of an area, by developing and refining a theory as more is learned about the area. It is pragmatic and yet theoretical.'[28]

An Appreciative Inquiry approach is used to understand the nuanced professional judgment required in diverse practice environments.[29] The intention is to identify examples of good practice, to identify what is working well in order to do more of it. Two assumptions are made – that most lawyers are competent and diligent justice professionals who work collaboratively so that justice can be done, and that lawyers have developed systems that best suit their view about how they can practise ethically. Given these positive assumptions, the stance of the Appreciative Inquiry interview is collegial and curious, rather than overtly critical. I adopt the stance of curiosity: 'Can you help me to understand how you identify and respond to conflicts of interest?'.[30]

The research design also assumes a collaborative research stance, that is, that participants will at least to some degree be engaged and active in the process of inquiry. As such, an Action Research process is used. In Action Research, the researcher is not a disinterested, neutral observer but a colleague who shares the same curiosity to reflect on the current system with an interest in improving the system.[31] In this respect, it complements the Appreciative Inquiry stance as both methodologies are relational. Action Research requires 'reflexive' practice, which means that the researcher should respond to the data that is being shared and use the analysis of the data to work with the participants to consider the implications of the results. In this research I brought my knowledge of the complexities of country practice and the shared professional duty to practise ethically. Despite this intuitive and collaborative approach there is a need to

[27] Ibid.

[28] Ibid 944.

[29] Peter F Sorensen and Therese F Yaeger, 'Feedback from the Positive Question: The Integration of Appreciative Inquiry with Survey Feedback from Corporate to Global Cultures. ' in David L. Cooperrider and Michael Avital (eds), Constructive Discourse and Human Organization (Advances in Appreciative Inquiry, vol 1 (Emerald Group Publishing Limited, 2004) 263.

[30] For example, in the focus group with the Rural Issues Committee of the Law Society of New South Wales there was a lively discussion between myself as researcher lawyer and committee members about the lessons learned about trusting colleagues and the value of trust as a practising professional.

[31] Wadsworth, above n 25, 612.

maintain objectivity in the interviews (all of which the author conducted) and in the analysis of data.

D Research Design

In this section of the methodology Chapter I review the design of the research process and its evolution from a broad inquiry through a series of five iterative stages. These stages are:

- Constructing the interview schedule. This forms the basis for initial research approval by the Human Research Ethics Committee. The schedule guides the interaction between researcher and participant and the process for eliciting data.
- Testing the interview schedule in focus groups and test interviews.
- Recruiting the cohort of research participants, although this work ran concurrently throughout the research. I describe how the research cohort is selected using the available data about Australian country lawyers.
- As country lawyers were being interviewed that interview data is transcribed and coded for emergent themes. These themes inform the remaining interviews. The research questions are crafted and refined throughout the fourth stage.
- The final stage in the design and execution of this empirical research is making sense of the interview data through using a qualitative analytical method of identifying similar issues that emerge as discrete themes. Much data which is not relevant to the focus of this thesis, has been collected and is yet to be analysed.[32]

The research design begins as a 'desk top' exercise projecting an ideal method. Then as the research progresses through the field work, an iterative process adapts that initial design in response to the research experience. An example of this iterative process is the recruitment of a research cohort. Although the research cohort is 'country lawyers' there is no database revealing the geographic location of Australian lawyers. To identify 'remote' lawyers I uses alternative sources and worked backwards to first identify which Australian localities were classified as 'remote' and then to identify which lawyers worked in those areas. I began this process by identifying which Australian

[32] This data includes information on gender, practice type, size and focus, post admission experience, supervision and professional qualifications.

'localities'[33] met the ASGS-RA criteria, then searched for law practices in those towns. As the research progressed, more information such as the *National Profile* became available which in turn informed the research design.[34]

1 Interview Design

Over the four-year period 2012 to 2016 during which the research was designed and the data analysis occurred, the interview schedule was refined. This refinement led to a shortened interview schedule, although all participants answered a core group of questions.[35]

The initial choice of a survey and semi-structured interview as the preferred research method was informed by previous socio-legal research into the examination of lawyers' ethics.[36] Handler's[37] interview schedule, initially developed to survey the ethics of the lawyers in 'prairie city', was used and extended by Carlin who interviewed Chicago[38] then New York[39] lawyers. Carlin modified Handler's interview schedule by probing further into the personal relationships within the law practice. Both Handler and Carlin's interview schedules, up to 129 questions, were reproduced in their texts. Their interview questions collected data about the lawyers' career progression, organisational participation, practice details, legal education, and professional attitudes. Their interview questions were 'closed'; there was one right answer. Lawyers ticked a pre-determined box, or rated themselves on a fixed 'Likert' scale.[40]

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[33] 'Locality' is a generic geographical term which includes city, suburb, town, rural. Australian postcodes are allocated to each locality.

[34] Urbis, 2011 *Law Society National Profile.* Final Report (2012).

[35] The final interview schedule is provided in Appendix J *Schedule of Interview Questions.*

[36] See Joel F Handler, *The Lawyer and His Community. The Practicing Bar in a middle sized city* (University of Wisconsin Press, 1967); John P Heinz and Edward O Laumann, *Chicago Lawyers: The Social Structure of the Bar* (American Bar Foundation, 1982); Leslie C Levin, 'The ethical world of solo and small law firm practitioners' (2004) 41 *Houston Law Review* 309; Donald D Landon, Country Lawyers: The Impact of Context on Professional Practice (Praeger, 1990) ch 8, 119–146.

[37] Handler, above n 36, 206.

[38] Jerome E Carlin, *Lawyers on Their Own. The Solo Practitioner in an Urban Setting* (Austin & Winfield, 1994) see (Appendix B 217 Survey from Chicago Solicitors 1957) .

[39] Jerome E Carlin, *Lawyers' Ethics. A Survey of the New York City Bar* (Russell Sage Foundation, 1966); See interview schedule in Carlin's Appendix D 215. Used by Carlin in 1960 then again in New York 1994.

[40] Rensis Likert, 'A Technique for the Measurement of Attitudes' (1932) 140 *Archives of Psychology.* 1.

The interview schedule was also informed by Leslie Levin's research into the ethical practices of lawyers in New York State.[41] Unlike Carlin and Handler, Levin did not publish her schedule however her results indicate she was interested in lawyers' professional relationships and identifying with whom lawyers discussed difficult ethical issues. Consequently, this social element of practice was included in my interview schedule. Informed by this earlier American socio-legal work, the initial design of the survey and interview schedule sought to capture a wide range of demographic and professional practice data.

The initial interview design included a participant survey.[42] The original intention was to ask participants to complete an online survey prior to their personal interview. The aim was to facilitate the collection of socio-demographic data such as contact details, geographic location, gender, practice type, size and focus, and professional qualifications. The intention was to collect this preliminary quantitative data with a quick 'tick the box' process so that the subsequent interview would be more dynamic and conversational. The original intention was that this online survey was to be followed with a semi-structured interview which allowed for extended discussion about the factors that influenced ethical decision making, including how the lawyer identified and responded to conflicts of interest, which resources they used to resolve ethical dilemmas, participation in regional law societies, and use of screening systems. As discussed below, following feedback in the second stage (focus groups and test interviews) and fourth stage (interviews) the interview schedule continued to evolve.

The integration of the two methods of a survey and semi-structured interviews methods was designed to capture a broad range of information. The survey included a series of identity questions designed to collect information about the participants' practice of law, such as sector of employment, post admission experience and areas of practice. By contrast the interview schedule included questions about professional discretion and ethical judgment. Broadly, the interview questions addressed the effect of the

[41] Levin, above n 36.

[42] The survey is a popular quantitative method due to its generation of simple numerical data which requires a set response from pre-determined fields or 'closed' questions. This approach to collecting data by using an online survey was informed by the contemporary research from Kyle and colleagues. They used an online survey to capture a range of demographic and preferential data about how country lawyers managed 'conflicts'. There was no interaction between the researchers and the respondents. Kyle et al, above n 1.

geographic location on the law practice, the lawyer's participation within a community of practice and the process used to identify and respond to conflicts of interests. [43]

If the interview responses suggested a nexus between geographic remoteness and the way 'conflicts' are managed, two further research propositions were possible. The first proposition, informed by Fuller's theory of the purposive lawyer, explores if lawyers assess their ethical obligations according to the context of their practice. This proposition explores the factors which the country lawyer considers in making an ethical decision and addresses the 'how' question: *How do lawyers assess their ethical obligations?*. This research proposition lead to questions about the systems participants used to identify and respond to conflicts of interests. These questions collected information about the legal practice systems, such as the intake process for new clients. For instance, there was explicit attention to questions such as was intake guided by a computer-based legal practice systems, policies, procedures, internal and external audit? Questions also explored the tacit systems for resolving an ethical dilemma and participants' relationship with the professional regulator. Participants were asked about the frequency with which conflicts arise, and if, and how, their response to conflicts has changed with experience.

The interview schedule included questions that explored the Fullerian concepts of purposive lawyering through inquiring about participants' understanding of the motivating purpose behind the conflict rule. These questions explored the lawyers' discretionary judgment and the extent to which their lawyering activity is informed by a broader purposive agenda. Other questions considered the lawyers' perception of their role within their country community and are informed by Landon's work on the influence of the 'containing community'.[44] This exploration addresses the 'what' question: *What factors influence the lawyer's decision?*. These questions also explored how the lawyer's judgment is shaped through discussion with colleagues and clients and

[43] This suggestion that there is a connection between country lawyers and the increased likelihood of conflicts of interest is addressed above in Chapter II A 6 b. See Landon, above n 36; C J Riordan, 'Country Lawyers and their problems' (1979) 53 *Australian Law Journal* 397. Two reasons given are that there is more 'pressure' to provide a service given a lack of alternative services, and that lawyers have personal relationships with their clients and the 'other parties'.

[44] Landon 1990, above n 36, Chapter 8 119-146. See also Donald D Landon, 'Lawyers and localities: The interaction of community context on professionalism' (1982) *American Bar Foundation Research Journal 459*, 479.

their understanding of the purpose behind the ethical principle to avoid conflict of interest.

Prior to the interviews commencing, Adrian Evans and Helen Forgasz published an 'ethics questionnaire' containing a schedule of 19 statements aimed at assessing the strength of preference for a particular 'ethical type'.[45] Evans' questionnaire invites the lawyer to self-identify a preferred type by responding to a six-point Likert scale (from strongly agree to strongly disagree) as to their preference. For example, the first statement 'achieving what my client wants has to be my main priority' is coded as 'adversarial advocate' for a solicitor who 'strongly agrees'. With Evans's permission, this questionnaire was included in the draft interview schedule. This diagnostic tool seemed a timely addition to the interview design.

Designing the interview schedule to reflect prior research findings and to shape data collection was an essential step to begin the process of obtaining human research ethics approval. Although ultimately two subsequent amendments to the original ethics approval were obtained over the period of the research, this original interview schedule and survey tool formed the basis of the application. Research ethics approval was obtained through the Australian National University Ethics Review Committee.[46] Initial approval for testing the survey and interview schedule within a series of focus groups was provided on 28 June 2012, with feedback from the focus groups leading to changes in the research design. These changes required an amendment to the earlier ethics approval. Approval to amend the research design and to proceed to the second stage of the research, conducting a series of 60 interviews, was obtained on 2 August 2012. Prior to the interviews beginning, a third amendment to approve the use of Adrian Evans' Questionnaire within the interview schedule was obtained on 9 January 2013.[47]

Prior to granting initial Ethics approval, the Ethics Review Committee asked how I would respond 'if the post revelation of a conflict of interest would have a bearing on a legal outcome' and 'if someone reveals the presence of a conflict of interest that has legal ramifications for their further practice'. I responded that, in my view, remedial

[45] Adrian Evans and Helen Forgasz, 'Framing Lawyers' Choices: Factor Analysis of a Psychological Scale to self assess lawyers' ethical preferences' (2013) 16(1) *Legal Ethics* 134.

[46] Research ethics approval provided by the Australian National University Human Research Information Enterprise System (ARIES) Human Ethics Protocol (approved 28 June 2012) Ref 1011/571.

[47] See Appendix K Research Participant Information and Consent.

action on the disclosure of a conflict is the responsibility of the participant lawyer . My response was that I would engage in collegial discussion if there was a revelation. Apart from ongoing discussions with the regulators and ethicists in the law societies, I made no reports about the conduct of participants.

2 Focus Groups and Test Interviews

After drafting the interview schedule and obtaining ethics research approval, the second stage of the research design involved testing the questions in three focus groups and two test interviews with a total of 29 participants.[48] The groups consisted of colleagues recruited from legal practice, academia and legal education. The first focus group was with five members of the Rural Issues Committee of the Law Society of New South Wales. The second focus group was with 12 academic colleagues from the Australian National University Legal Workshop Research Cohort. The third focus group was with eight undergraduate country law students studying law by distance through the University of Sydney Law Extension Committee Legal Practice Admission Board course. One test interview was conducted with a senior solicitor from an inner regional Community Legal Centre and another with a senior solicitor from an outer regional private law practice.

There were three aims informing this second stage of the research design: to obtain feedback on the scope of questions, to understand how to gather data given the sensitivity of the issue of legal ethics, and to receive suggestions on the best way to recruit participants. As a result of this stage of the research design, the proposed survey was removed, although elements of this survey were integrated into a revised interview schedule.

Focus group participants suggested I minimise the burden of participation and that interviews not exceed one hour.[49] Because of this feedback one substantive and one minor change were made to the research design. The substantive change was the removal of the preliminary online survey. Feedback from the focus groups was that this additional step would be a burden for busy solicitors. Instead, participants were invited

[48] The inclusion of the Evans's questionnaire was not trialed in the focus groups or test interviews as it had not been published at that time.

[49] The interviews originally took 90 minutes.

to participate in a single session interview and my role as researcher was to complete much of the demographic data (previously included in the survey) prior to the interview. This socio-demographic data was publicly available or could be captured through the initial telephone call to the lawyer's office when setting up the interview appointment. I pre-filled this information (contact details, size and sector of law practice, location of law practice, post admission experience) on the first part of the final interview schedule. In a positive vein, as well as lightening the burden of participation, I could meet the participant half way by indicating I had done my research and providing an opportunity for the participant to correct the public record.

After the focus group feedback, minor changes were made to the second part of the revised interview schedule that reduced the scope of inquiry. Extraneous questions, not directly relevant to the focus on conflicts of interest were removed[50] and the questions were reframed from 'closed', as used in the Handler, Carlin, and Levin approach, to 'open'. This design encouraged participants to share anecdotes and stories from practice which in turn revealed the richness of their practice experience.

The lawyers, researchers and law students in the focus groups and test interviews offered suggestions on how to recruit research participants. Country lawyers stressed the need to be mindful of the workload of their colleagues. They suggested a good time to approach a country lawyer was on a Friday when they were more likely to be at their desk and to have time to talk. This information and suggestion proved valuable for the selection of the research cohort as most lawyers approached to participate in the research accepted the invitation. During this initial recruitment period a supplementary questionnaire, designed by Adrian Evans to assess ethical preferences, was appended to the interview schedule.[51]

After the first 23 interviews had been conducted and transcribed, and in response to feedback from participants, there was a further change to the research design. The feedback was that the interviews were too long, as the interest of the participants waned towards the end. I needed to shorten the time and refine the focus of the interview. The

[50] The questions which were removed asked about supervision within their first two years of legal practice, relationships within the law practice and their motivation for working in the area. The original intention was to discern the influence between early 'ethical imprinting' as described by Tanina Rostain, 'Waking Up from Uneasy Dreams: Professional Context, Discretionary Judgment and the Practice of Justice' (1998) 51 *Stanford Law Review* 955 and current ethical decision making.

[51] Evans and Forgasz, above n 45, 608.

focus needed to be on understanding how participants experienced regulation within their law practice, their exercise of professional judgment when faced with an ethical decision and the extent to which the participants were involved in collegial learning.

I reduced the scale and scope of the interview schedule and removed Evans' questionnaire. Participants were reluctant to complete Evans' questionnaire and, as it was optional, few did. A series of questions that were extraneous to the three key themes were eliminated. I removed questions about their experience of practice and professional supervision and focused on three factors: their relationships with regulators and colleagues, their decision-making process, and their practice environment including resources which informed their ethical decisions.

3 Research Cohort

The third stage of the research design involved recruiting participants to the research cohort. This involved the design of the ideal research cohort, the identification of actual lawyers to fit that template, and the recruitment of those research participants. As the hypothesis for the research queried the influence of geographic remoteness, the primary factor in recruiting participants was their geographic place of practice and not their jurisdiction. The cohort here were 'country lawyers' in general rather than a representative sample from each jurisdiction. Other factors considered in the selection of participants was their willngess to be interviewed, their sector of employment, gender and post admission experience.

(a) Profiling the Research Cohort

The main source to define the research cohort were the public registers which provide names, locations and contact details for all Australian lawyers. When I began the research in 2011 there was no national database of Australian lawyers, however, subsequently the Urbis *National Profile* has provided three reports in 2012, 2015 and 2017.[52] The *National Profile* compiles demographic data from Australian law societies.

[52] Urbis 2011, above n 34. See also Urbis, 2014 Law Society National Profile. Final Report (2015); Urbis, National Profile of Solicitors 2016 (19 June 2017).

The selection of the research cohort is designed to mirror as far as possible the proportion of lawyers within the various groups of country lawyers as identified in the 2011 *National Profile*.[53] Because the *National Profile* does not disaggregate jurisdictional data beyond 'country', additional information on the demographic characteristics of Australian country lawyers was obtained from several databases. Public sector law practices were identified through the *National Association of Community Legal Centres Directory*.[54] Private law practices were identified through the public registers hosted by the jurisdictional law society and regulatory authorities.[55]

The geographic location of all potential participants was coded to remoteness areas through the 'Doctor Connect' online tool which provides the ASGS –RA classification of remoteness for each Australian locality.[56] These three resources, the public and private directories and the geographic coding tool, provided information about the participants' sector of employment, their contact details and geographic location.

Participants were selected for the research cohort on four variables. Three of these variables (sector of employment, gender, post admission experience) are categories in the Urbis *National Profile*.[57] Sector of employment refers to private, public or government realms. The post admission experience is coded as either 'young lawyer' or 'master'.[58] The fourth variable, not included in the *National Profile* is the geographic location of the law practice.

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[53] Urbis, above n 34 .

[54]National Association of Community Legal Centres, Australian and New Zealand Community Legal Centres Directory 2012 (2012).

[55] Databases differed depending on the jurisdiction. In Western Australia there is the Government of Western Australia and Department of the Attorney General, *Law Almanac* <http://www.lawalmanac.dotag.wa.gov.au/> South Australia has a mobile phone 'app' called 'Law Society of South Australia' but no online public register. New South Wales also has a 'Find a Lawyer App' for mobile phones and an online search facility. Victoria has an online Register run by Victorian Legal Services Board and Commissioner, *Register of legal practitioners and law practices* (22 August 2017) <http://lsbc.vic.gov.au/?page_id=283>.

[56] See the Doctor Connect website and location tool Australian Government and Department of Health, *Doctor Connect* <http://www.doctorconnect.gov.au/>.

[57] Urbis, above n 34 and n 52.

[58] These descriptors are not commonly used within the legal professional although they reflect the framing of acquired skill used by Fiona Westwood, Developing Resilience: The Key to Professional Success (Matador, 2010) 85.

The data in the 2011 *National Profile* shaped the selection of the research cohort. It revealed a national cohort of 7 588 country lawyers.[59] The 'country lawyer' data indicated that 10.8% were early career, 40.2 per cent were female, and 9.7 per cent worked in the public/government sector.[60] The number of participants in each category of the research cohort attempts to mirror the percentage of that cohort as far as possible as described in the 2011 *National Profile*. The combination of these four variables resulted in 12 categories.

Figure 4 Design of Research Cohort below describes the design of the initial research cohort. The original intention was to recruit a specific number of lawyers from each of these 12 categories. However, as the demographic data on the cohort of country lawyers are not disaggregated to sector, gender or post admission experience (PAE), an estimation was made for each category.[61]

Figure 4: Design of Research Cohort

Cohort: Location, Gender, PAE	**Public**	**Private**	**Total**	**Total per location**
Inner regional: Male Master	5	5	10	22
Inner regional: Male Early Career	1	1	2	
Inner regional: Female Master	4	4	8	
Inner regional: Female Early Career	1	1	2	
Outer regional: Male Master	5	5	10	20
Outer regional: Male Early Career	1	1	2	
Outer regional: Female Master	3	3	6	
Outer regional: Female Early Career	1	1	2	
*Remote: Male Master	5	5	10	18
*Remote: Male Early Career	1	1	2	
*Remote: Female Master	2	2	4	
*Remote: Female Early Career	1	1	2	
Total	**30**	**30**	**60**	**60**

(*remote combines very remote and remote due to the small number of law practices in very remote)

[59] Urbis, above n 34. This number of 7 588 is taken from the 2011 data, not the 2014 data used in Figure 111, 7.

[60] Ibid 19.

[61] Ibid.

Having used geographic classification to design the research cohort, I now consider the method of recruiting lawyers to be research participants.

(b) Recruiting Research Participants

After developing the profile for the research cohort, the next step was recruiting those participants. The lack of data on public and private law practices made it difficult to identify the names, locations and contact details of law practices. Participants were instead recruited through personal invitation, law society networks and relationship networks. When I asked lawyers to participate, I sought to establish a shared interest in working together in the legal profession on this ubiquitous ethical issue. In turn my professional colleagues and focus group participants suggested lawyers from different geographic locations who may be interested in participating in the research. This 'word of mouth' method of recruiting research participants is called the 'snowball' method as what starts as a core invitation, expands as participants suggest other lawyers from their networks.[62]

I made the initial approach to a possible participant by phone on a Friday requesting their consent to an interview. If the participant indicated interest, a date and time was settled and this was followed up with an email attaching the participant information and consent forms and a summary of the research questions.[63] At the outset of my relationship with each participant and prior to any publication of the interview data, I obtained each participant's permission for the de-identified use of their responses in this thesis. Interviews lasted between 40 minutes and an hour, and with the participant's consent, were recorded.[64] Although recording of interviews was optional, all 52 participants consented to being recorded. I used a digital voice recorder and each audio file was transferred to my computer, coded, dated and secured by a password-protected system. Depending on the geographic location and timing, some interviews were 'face to face' as I could drive to their offices whilst others were held by telephone or Skype.

[62] Rowland Atkinson and John Flint, 'Accessing Hidden and Hard-to-Reach Populations: Snowball Research Strategies' (2001) (33) *Social Research update* .

[63] Refer to this suite of documents in Appendices J and K.

[64] After the interview, a small gift of Beechworth Honey or Yackandandah Jam and an Australian National University College of Law 'light sabre' pen, were given to the participant. Each interview was followed up with a 'thank-you' letter.

Many interviews with lawyers from the public sector occurred at the 2013 annual conference for the National Association of Community Legal Centres.

During the process of recruiting participants, the selection of the final research cohort evolved. Ultimately the group of participants who agreed to be interviewed constituted a 'convenience' rather than a representative sample. A convenience sample is composed of participants who are willing to be interviewed and are available at the time of the research.

The difference between the initial design of the research cohort and the actual number of participants interviewed is described in *Figure 5 Comparison Between Cohort 'Design' and 'Actual' Variation* below. Six of the 12 categories achieved the full number of desired participants. These six categories were the male and female master lawyers from outer regional areas, and female master lawyers in remote areas. Of the remaining six categories, some categories had fewer participants and others had greater numbers. There were fewer participants in male master and female master participants in inner regional areas. There were also fewer male master participants in remote areas. Conversely, there were more female early career lawyer participants in both inner regional and remote areas.

Figure 5: Comparison Between Cohort 'Design' (D) and 'Actual' (A) Variation (V)

Cohort: Location, Gender, PAE	**Public**		**Private**		**Total**		**V**	**Cohort**		**V**
	D	**A**	**D**	**A**	**D**	**A**		**D**	**A**	
Inner Regional: Male Master	5	3	5	2	10	5	-5	22	14	-8
Inner Regional: Male Early Career	1	1	1	1	2	2	0			
Inner Regional; Female Master	4	1	4	0	8	1	-7			
Inner Regional: Female Early Career	1	3	1	3	2	6	+4			
Outer Regional: Male Master	5	1	5	9	10	10	0	20	21	+1
Outer Regional: Male Early Career	1	2	1	1	2	3	+1			
Outer Regional: Female Master	3	3	3	2	6	5	-1			
Outer Regional: Female Early Career	1	2	1	1	2	3	+1			
Remote/Very Remote: Male Master	5	1	5	3	10	4	-6	18	17	-1
Remote/Very Remote: Male Early Career	1	4	1	0	2	4	+2			
Remote/Very Remote: Female Master	2	1	2	2	4	3	-1			

Remote/Very Remote: Female Early Career	1	5	1	1	2	6	+4			
Total	**30**	**27**	**30**	**25**	**60**	**52**	**-8**	**60**	**52**	**-8**

There are consequences to this convenience approach to selecting a research cohort. There were more participants from New South Wales and Western Australia and no participants from Tasmania or the Australian Capital Territory.[65] A more nuanced analysis of jurisdictional differences and their different regulatory cultures can be examined at another time.

There could be a skewing of the interview data, as only those country lawyers who are confident in their ethical judgment agreed to be interviewed. Perhaps less confident lawyers declined to participate. Similarly, the interview data could be skewed to reflect an ethical approach common within the public sector. Whereas the *National Profile* indicates that nationally only a third of lawyers work in the public sector, just under half of these research participants are from the public sector. Anecdotally and through observation, there are fewer private lawyers and more public lawyers in remote areas. Because this data could be skewed in these respects, any observations which are drawn from the interviews should be treated with caution until a more sizable research cohort can be examined and these tentative observations tested.

4 Data Capture and Analysis

The last two stages of the research design were the conduct of the interviews followed by the transcription and analysis of the data. The interviews were wide ranging, with an interview schedule of 35 questions and interviews averaging one hour in length. Twenty-one interviews were conducted ‘face to face’ and 31 interviews were conducted over the phone or by Skype. The interviews were conducted between January 2013 and June 2014. Each interview was transcribed according to the sequence of the questions in the interview schedule.[66] As the interview transcripts were completed, they were emailed to the participants for review and approval. I asked each participant to inform me of any

[65] Of the fifty-two participants two were from Queensland, six from the Northern Territory, seven from South Australia, seven from Victoria, eleven from Western Australia and nineteen from New South Wales.

[66] I transcribed the interviews. Research colleagues had commented that, although time consuming, the task was rewarding as the researcher gains an insight into the data. Combined with the high cost of transcribing interviews, which placed this option outside the research budget, personal transcription became another research method.

changes to what was transcribed. Unless they notified me of any corrections I presumed that they approved the transcript.

Transcripts were de-identified and coded according to the numerical sequence of the interview, employment sector, gender, post-admission experience and geographic location. An interview key or 'coda' matched the de-identified transcript to the interview participant. The coding is as follows:

M = male

F = female

V = private sector

U = public sector

I = inner regional

O = outer

R = remote.[67]

For example, the 11th interview is identified as being with a male (M) in private practice (V) in an outer regional area (O) and is coded as 11MVO and the 46th interview held with a female (F) in public practice (U) in an inner regional area (I) is coded as 46FUI. The interview data was then entered into an Excel spreadsheet.[68]

In keeping with the Grounded Theory methodology, as I transcribed each interview, discrete themes emerged and I tentatively allocated a 'code' to each theme. Coding is a method used in qualitative empirical research that facilitates the comparison of data and the identification of relationships between data.[69] In her explanation of Grounded Theory, Webley cites Gibbs who explains coding:

> [I]nvolves identifying and recording one or more passages of text or other data items such as the parts of pictures that, in some sense, exemplify the same theoretical or descriptive idea. Usually several passages are identified and they are then linked with a name for that idea—the code. [70]

[67] In this research I have combined the 'remote' and 'very remote' categories of the ASGS-RA as at the time of the research there was only one lawyer working in an Australian very remote zone. Marninwarnitkura Fitzroy Women's Resource Centre, *The legal Unit* <https://www.mwrc.com.au/pages/the-legal-unit>.

[68] This excel spreadsheet is on file with the author.

[69] See Charmaz, above n 23, 367–373.

[70] Webley, above n 21, 941. Citing G R Gibbs, *Analyzing Qualitative Data* (Sage Publications, 2007) 38.

Data analysis occurred at two levels. Data which could be coded numerically such as the geographic remoteness category, gender, employment sector, office management systems, size of practice and post admission experience was entered initially as a number. Frequently, the emergent themes represented a clear 'either/or' choice. That choice was coded and entered into the Excel database in numerical form. An example of attributing a numeric value (1 or 2) was when the participant was part of a collegial cluster (1), or practised in an isolated outpost (2), or if participants used a computer database to conduct threshold screening of new clients (1) or did not (2).

More frequently, participants spoke generally about issues that were not clearly 'either/or' responses but illustrated a particular perception. Through sustained analysis of the transcripts, themes emerged which could be coded using the 'constant comparative' method.[71] The constant comparative method identifies and allocates a code to emergent themes. For example, a code 'participants' recurring use of the term 'turn away' was identified as reflecting a distinct response. When participants expressed views that illustrated these themes, their quotes were gathered into specific collections. For example, the interview explored participants' views about the difference between city and country legal practice (which produced three emergent themes), how they identified conflicts (two emergent themes) and how they responded to a conflict (four emergent themes). Sometimes the participants spoke about their need to go beyond the possibility of conflict to 'delve deeper' into the circumstances of the presenting matters, then to 'work around' the issues which created the conflict. The repeated use of these words suggested a similar approach amongst participants as to their response to conflict of interest.[72]

Coding relies on the subjective recognition of repetitive themes. The use of NVivo, a software program used for data analysis, was considered and rejected as unsuitable for this purpose.[73] Instead simple colour coding was used to identify and collate data on emergent themes. For example, participant responses that referenced the emergent theme of threshold screening to identify a possible conflict of interest at the intake stage, were coded blue throughout the 52 transcripts. These highlighted sections from

[71] Charmaz, above n 23, 367–373.

[72] The description of these coded themes, illustrated by interview data, is explained further in Chapter IV *The Story Told*.

[73] I used the Macintosh platform and NVivo was a Windows product. The purchase of a dedicated Windows computer ($600) and student licence to use the software ($700) was prohibitive.

each transcript were then collected into a unique document collating participant quotes as evidence of that theme. These themes and the relationship between them and participants' geographic location are examined in the following Chapter which summarises the interview data.

In the analysis phase, the interview data was coded to these four variables of sector, gender, post admission experience and geographic location. This coding assisted in exploring if there was a relationship between the lawyers' approach to identifying and responding to a conflict of interest and their sector of practice, gender, post admission experience and geographic location.

E Summary

The design of this research methodology evolved over a four-year period. The initial design adopted and adapted the qualitative empirical methodology used in previous socio-legal studies. This approach allows research participants to describe their lived experience. The first stage in the research design was the development of a survey and interview schedule. These two instruments borrowed from previous socio-legal research including the interview schedules and surveys used by Handler, Carlin, Levin and Kyle and colleagues. This early work on the design of the survey and interview schedule formed the basis for the human research ethics approval in 2012.

The second stage of the research design involved testing the survey and interview in a series of focus groups and test interviews. Because of this testing process and feedback from focus group participants, the survey was omitted and the interview schedule shortened and focused. Participants from these groups offered suggestions on how to recruit lawyers to participate in the research interviews.

The third stage in the research design, which was running concurrently with the first two stages, was the selection of a research cohort, being a group of country lawyers who could be invited to participate in an interview. This selection involved initial research to identify the number, distribution and characteristics of country lawyers. From this data, a cohort of 60 lawyers was constructed representing the two sectors of employment (public and private), gender, post admission experience (master and early career) and

three areas of geographical remoteness (inner regional, outer regional, and the combined 'remote and very remote').

Next, the fourth stage of the research between 2013 and 2014 involved interviewing 52 country lawyers following the designed cohort. During this stage, the experience of interviewing lawyers led to further changes in the research design. To reduce the participation burden, the interview time was reduced to one hour, the Evans questionnaire was removed, and some interviews were conducted remotely by phone and Skype rather than by 'face to face' meetings.

The fifth and final stage was the analysis of the interview data. After the interviews the recording was transcribed into written text, and that text was coded for emergent themes. These themes helped inform the final interviews towards the end of the fourth stage of the research. For example, the interviews became more focused on three areas: the experience of regulation, the resources used to resolve ethical dilemmas, and contact with professional colleagues.

This evolution of the five stages of the research design reflected my own 'situated learning' as an early career researcher and, in this sense, is a parallel process to the situated learning of lawyers in practice. We learn by doing. Whilst researchers and lawyers have access to an extensive body of authoritative texts that recommend how one 'should' conduct their work, it is through the experience of doing the work that clarity emerges. What looks clear on paper may become less clear when applied to the lived experience in the real world. For example, whilst the initial research design relied on existing datasets and historical socio-legal research, the gaps in both these resources, required more foundational research activity. Specifically, the absence of disaggregated data on the cohort of country solicitors and the lack of socio-legal research on Australian country lawyers necessitated the development of a tailored approach and the construction of a specific database.

There is no database that reveals the size and location of Australian law practices. My early work on building this purpose designed database was overtaken by the subsequent work by the Council of Law Societies who commissioned Urbis to create a *National Profile* of the Australian legal profession. This *National Profile* informed the recruitment of the research cohort but it was the interview process which provided the

additional detail that clarified their employment sector and geographic location. As the research evolved so too did the interview schedule. The interview schedule was refined three times to develop a better 'line' between the research question and the data necessary to answer that question. Whilst these five stages clarified the research design, this approach to empirical qualitative research will continue to evolve as more comprehensive data on the Australian legal profession becomes available. Answering the question about the extent to which geographic remoteness affects legal practice is an ongoing endeavour. Themes that emerged from this interview data are considered in the next Chapter *The Story Told* which reports the results of this research.

IV THE STORY TOLD: DATA REPORTING

This Chapter describes the results of the 52 interviews with participant lawyers across regional, rural and remote Australia. The aim of the interviews was to understand the factors which influenced participants' ethical decisions. Using the theoretical framework described in Chapter III *Methodology* participants were questioned about three areas which may influence ethical decision making. These questions explored their perception of the regulatory alignment between the rules and practice (decentred regulation), how they applied those rules to their work (theory of legal ethics), and their participation within a professional community of practice.

Participants' responses were coded to geographic location. This research used the *Australian Statistical Geography Standard Remoteness Areas* (ASGS-RA) to disaggregate the generic 'country' label to a more nuanced description of geographic location. Lawyers who agreed to be interviewed (referred to here as 'participants') were classified as practising in inner regional, outer regional or remote/very remote geographic areas.

The participants' responses provided a rich description of factors which influenced ethical decision making within country law practices. These factors included the reach and influence of regulatory oversight (what the regulators regard as ethically proper and how strongly that is conveyed), the internal culture developed over time within the law practice (what the practice regards as ethically proper) and the lawyer's networks or professional community of practice (what the professional community regards as ethically proper). In addition to these three lenses on ethical decision making, this research considered if there was a correlation between the geographic location of the law practice and participants' perception of what was ethically proper.

The relevance of geographic location on lawyers' ethical conduct was suggested in the 2014 research *Conflicts of Interest in Victorian Rural and Regional Legal Practice* by Kyle, Coverdale and Powers.[1] They found a correlation between country lawyers' sensitivity to the issue of conflict of interest lessened with increasing geographic

[1] Louise Kyle, Richard Coverdale and Tim Powers, Conflicts of Interest in Victorian Rural and Regional Legal Practice (Deakin University, 2014), 15, 48.

remoteness.[2] The researchers query: '[i]s there something unique to rural and regional practice that … helps them [remote lawyers] to deal with these matters … or is their confidence not justified?'.[3]

The interview data was compared to the geographic location to discern if there was a relationship between the place of practice and ethical decisions.. Using the Grounded Theory methodology, I allocated a code representing recurring themes identified from the interview transcripts.[4] These themes were then classified according to the ASGS-RA 'remoteness' categories. Where possible some simple statistical comparisons were included to indicate frequency of recurring themes. Using this two-stage approach, the coding of themes and the comparison of these themes across geographic remoteness categories, tentative observations about the impact of geographic location on ethical decision making are offered. These observations are considered more deeply in the following analysis Chapter V *The Story Understood*.

This Chapter has five sections which reflect the structure of the theoretical framework. The first section summarises themes arising from the series of questions on regulation. These questions explore participants' relationship with the regulators, and their perception of the clarity and appropriateness of the professional conduct rules for their law practice. The second and third sections explain the processes participants use to identify and respond to conflicts of interest. This data assists in understanding if participants seem to exhibit either a positivist or purposive approach. For instance, participants report that a lack of alternative law practices require them to 'delve deeper' into the details of a matter to discern if it is possible to 'work around' the possibility of a conflict. 'Work around' is a much deeper and more nuanced concept than the colloquial words suggest. When participants spoke about this process of delving deeper and working around issues, their stories reveal a judgment process similar to a 'triage' assessment. Triage refers to the weighting attributed to relevant factors such as the time elapsed between clients, the type of matter and the severity of consequences which inform the lawyer's decision to either act in the matter, or to disqualify themselves. The fourth and fifth sections use the concept of communities of practice to give a picture of participants' sense of identity as a country lawyer, and the frequency and purpose of

[2] Ibid 66.

[3] Ibid 48.

[4] Above Chapter III D 4.

social contact with colleagues. Limited geographic location data suggests the phenomenon of either a 'cluster 'or an 'outpost' to refer to the co-location of law practices within a community. This data reveals that regardless of geographic remoteness, some lawyers have personal 'face to face' access to professional colleagues. The emerging themes identified through this data establish the foundation for the subsequent analysis in Chapter V.

A Regulation: Country Law Practice

The first stage of this inquiry explores participants' perception of the alignment between the regulatory framework and how the regulation fits their law practice. This section examines three areas. Firstly, the participants' perception of the purpose of the professional conduct rule which directs lawyers to avoid conflicts of interest is reviewed. Next, I collate the interview data on participants' views about the clarity and applicability of this rule to their style of practice. And lastly, I explain what are participants' views about the appropriateness of this rule to their practice. Participants' answers to these questions reflect how aligned the regulatory purpose is to country law practice.

1 Purpose of the Rule

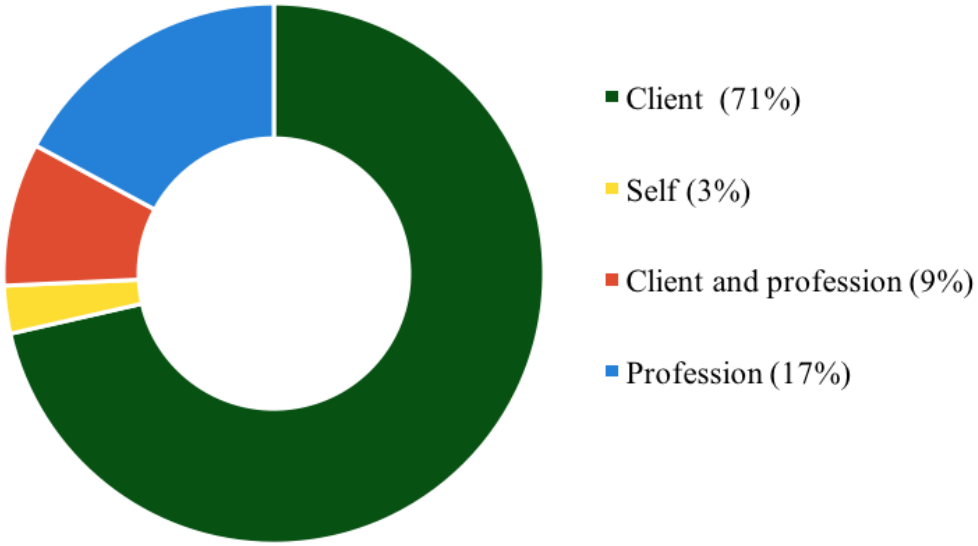
Participants were asked: 'As a general statement, what do you think is the purpose of the professional conduct rules which regulate conflicts of interest?'.[5] *Figure 6 Purpose of the Rule* below summarises their responses. Overwhelmingly, most participants who answered this question[6] (71%) stated that the purpose of the rule is to protect the client and to ensure that the lawyer acted in the client's best interests. Three per cent said[7] the rules are to protect the lawyers. Seventeen per cent said the purpose of the rules is to protect the profession with some saying the rules are to protect the client and the profession (9%).

[5] See Question 26 Appendix J *Schedule of Interview Questions*.

[6] Thirty-two of the 52 participants answered this question.

[7] In this Chapter I use the word 'said' to summarise the themes which emerge from the interviews. The participants did not say 'the purpose of the rule is to protect the client' in simple words but this theme is evident in their answers to the question.

Figure 6: Purpose of the rule



Participants are clear that their fiduciary duty prohibits any compromise on conflicts of interest and the purpose of this rule is to maintain this relationship of trust between them and their client. Selected quotes illustrate their perception of the rule's purpose.

> *For the confidence of your client. I think that is it. They have got to be the centre of all this. I don't give a stuff about our staff or the person sitting in front of me wanting assistance. It is the people that you have represented, that you owe that to. The former clients. 16MUR*[8]

> *The idea is about acting in your client's best interest. You think it would be really awful to say 'Right, I've got some information from another person, and it would be really helpful to you. But I can't use that.' Then I'm not acting in that client's best interest. You're building trust with that person so you can get proper instructions; so you can help them the best you can. And you realise that if you destroy that trust … the whole relationship with your client breaks down if you don't have those ethical rules. 27MUR*

> *To ensure that your client can be confident in the service that they are getting. That it is of a high standard and not influenced by other interests. That they can be sure of the confidentiality that is being applied to their matter. So that you can do the best job for your client unaffected by other things. 40FUO*

> *To protect the client. I think it's important to keep that at your core. So when you are looking at whether or not the conflict of interest is real or perceived or if it's serious, you need to really think 'OK. Is this going to come back to bite my client on the butt?*

[8] As indicated above in the discussion on Data Capture and Analysis in Chapter III D 4 *Methodology*, the code for the country lawyer participants refers to 16 (the chronological number of the person interviewed) M (F female or M male) U (U public sector or V private sector) and R (R remote, O outer regional, I inner regional). This participant is the 16th person to be interviewed, is a male in the public sector and working in a remote area.

> *Or come back to bite the other party on the butt?' I do that really practical scenario in my head. 41FUO*

> *First and foremost, we have an ethical and legal duty to advance our client's best interests as forcefully as we can to secure the best result we can for them. Now if you are in a genuine position of conflict there is either a real or a perceived risk that you will pull punches. That is the main reason. 44MVI*

A small proportion of participants (17%) said that the purpose of the rule is to protect the legal profession from subsequent criticism:

> *[W]ell [the rule has] got to maintain integrity and trust. And integrity of the profession, the integrity of the rule of law. 06FUO*

> *To protect the lawyer from the clients coming back later on and complaining that they were ill-advised or that the lawyers favoured the other party. 35FVO*

Several participants mentioned that the rules protect them within their client community. That is, they use the rule to encourage the community's confidence in lawyers. An example of this is evident for Aboriginal Legal Services who decline legal work which threatens community cohesiveness:

> *As far as conflicts with Aboriginal against Aboriginal, particularly if it's a sexual abuse case, if we do those kinds of things, you can have actual riots on your hands. Violent riots on your hands. The whole community can turn against you. It's not just an ethical issue. It is also a credibility issue as well for the organisation. That's how I see it. It is more 'What is in the interests of the Aboriginal community?' And not to do anything that is against the whole community. 34FUO*

> *With Aboriginals, there is a cultural conflict because [if] a man is charged with assaulting the woman, the woman's Aboriginal, the Aboriginal Legal Service will not represent the man. It's a cultural conflict. And they won't do it. 43MVI*

A small group (9%) commented that the purpose of the rules is to protect both clients and lawyers:

> *Well, any of the Rules about how we conduct ourselves, often are supposed to be about the benefit of the clients. But they're also for our own protection. 07MVO*

> *To instil a sense of confidence and integrity in the profession to a large extent. I think that is the primary purpose of it, so that people can have confidence in their legal representatives. I suppose that's what it's there for – not only to protect the clients but to protect us as well from criticism. I suppose that's a large part of it. 36MVI*

> *I think it is to ensure each party is fairly represented, and to protect us. I know that is a bit self-serving, but ultimately we are the ones who get sued under fairly regular occurrences. So, it is both a balance; to make sure we are protected in our own profession, but also making sure we are doing the best job we can do for a client. 42FVI*

The lawyer's understanding of the underlying purpose of a professional conduct rule was seen to provide a focus for their ethical choices. For instance, if the rule is perceived as being intended to strengthen their relationship with their client, or to protect the profession, that is a strong reason to motivate compliance.[9]

2 Clarity of the Rules Relating to 'Conflict of Interest'

In the second part of this section I consider participants' perception of the alignment between their law practice and the regulatory framework, through their answers to the question: 'Do you think the rules about conflict of interest are clear and easy to apply in practice?'[10] In coding their responses, I was guided by their responses 'yes' or 'no'. Whilst it was clear that although 50 percent disagreed outright, the other 50 percent gave sometimes qualified agreement. For many participants who affirm that the rules are clear, they qualify that response by commenting on the difficulty arising in the application of the rules to practice.[11] This is the case when the conflict is 'perceived', as opposed to an easier to identify and hence more avoidable, 'actual' conflict.

> *I think they are personally but I have been quite alarmed at the lack of understanding that I have seen in other lawyers around conflict of interest. The Rules seem quite simple to me. Applying [them] in practice is fraught with complications and difficulties. Sometimes it gets complicated and difficult to analyse the situation but sometimes I have seen pretty obvious scenarios of conflict that had gone unidentified by other lawyers. 40FUO*

> *I think the Law Society thinks they are! They just say no to everything! But if you ring them, they'll just say 'NO! Can't do it, can't do it!'. Remotely, you can't work like that. Particularly because of the limited number of lawyers. If you dug deep enough you'd be able to find that you've acted for one of the parties. Yeah I feel we've worked it out, morally (laughs), if that makes sense. Yeah, we take into account what the law society says and also how the clients feel about it. 38FVR*

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[9] The rationale for a principles-based regulatory approach is that clarity is enhanced when the purpose of the rule is kept at the forefront of the decision-making process. See clause 2, Solicitors Regulation Authority, SRA Handbook Version 19 (2017) <https://www.sra.org.uk/handbook/> See SRA Principles Part 2 'General Provisions' 6.1:'You should always have regard to the Principles and use them as your starting point when faced with an ethical dilemma'.

[10] Refer to Question 25 Appendix J *Schedule of Interview Questions*.

[11] With the benefit of hindsight this question could have been better broken into two. Are the rules clear? Are the rules easy to apply?

One participant working in a remote area said that she was willing to assume a degree of risk knowing that her decision may fall outside what was an accepted approach to avoiding conflicts:

> *I know the rules really well, because I've made it my business to know. But I also have the experience to know that one needs to sometimes be flexible, with the strict letter of the law. I think the rules are clear. I think if you read them really strictly then you will always fall foul of them. I think if you are practical and sensible about how they apply, then you apply them differently than they might strictly be written. And I understand those duties. I also understand the limits to my insurance, and I do understand that there are times I may be self-insuring by making that decision. But in the end, that is my call. And if I have to make that call on some occasions, then I have to make that call on some occasions. 41FUO*

Some participants say the rules are clear to them, but explaining the rules to the client is difficult:

> *I think the Rules are easy to understand but they are quite difficult to explain to a client. I do not think clients particularly like the idea that you cannot act for them if there is a conflict of interest. I found it quite difficult to explain exactly why we could not act because I could not fully disclose the reason. I found the client getting quite agitated about that. 35FVO*

Of the half of the participants who said the rules are not clear or easy to apply, they were in the main referring to 'grey' areas within the rules. These participants said these grey areas arise through 'perceived' as opposed to 'actual' conflicts:

> *I do not think any rules about conflict of interest are clear. There is a whole lot of greyness there. It is because of these perceived conflicts of interest. Actual conflicts of interest are easy to identify. But perceived conflicts of interest are a different thing. Because one person's perception is different from another person's perception. You might have a feeling that they should have a conflict of interest, and you speak to the client or potential client about it and they do not see an issue at all. Or they might think there is but you do not see it. I think it is very grey and it is a very difficult question at times. 01FV0*

> *No! (laughs) Everything's very grey. And it's just, yeah, on a case-by-case basis. … like the extent of the information that we have, whether or not that affects the case and whether or not we need to disclose that to the client, the impact that has. Also we may have acted back in the 70s, in which case it's … probably not relevant. 39FUR*

Some participants who said the rules are not clear or easy to apply felt they are too regimented or complex.

> *No no. I do not think they are straightforward, especially when there is so much collaboration now, at least with our Centre. Generally, it is a lot easier to come into conflict and they have it made it more difficult or more regimented in what is a conflict and what isn't. 17MUO*

> *No. They are far more complex than what I thought they would be. It is very easy to protect yourself to just say 'No' I guess but [my principal] really wants to assist in any way she can. The balance is not breaching any professional rules but assisting the client as much as possible. 37FUR*

> *No. Look I think like all areas of law, the black and white is one thing, the interpretation and the practice is completely different. It's very difficult, and in a small town, as I said, in theory anybody could say 'Well you shouldn't be acting'. Whilst in the city, the board may say 'Well you definitely shouldn't do that!' if you applied that in the regions, particularly remote regions, no one would have a lawyer! Whether or not enough thought is given to the realities of remote practice, is doubtful in my view. 51FVR*

In summary, participants are evenly divided as to the clarity of the professional conduct rules. Whilst some participants saw the rules as clear and easy to apply, many commented that the practical application of the rules is problematic. This latter group said there are inherent grey areas, especially when there is the perception of a conflict of interest, and the resolution of this issue requires flexibility and local understanding. In the next section I delve further into the issue by seeking participants' views about the appropriateness of the rules to country practice.

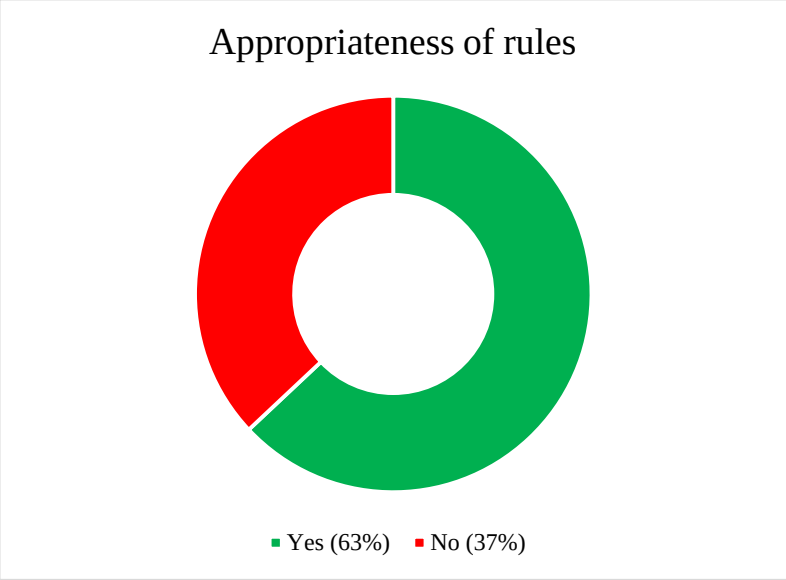
3 Appropriateness of the Rule

Participants are asked 'Do you think the rules about conflict of interest are appropriate for your country practice? Why?'.[12] *Figure 7 Appropriateness of the Rules* below shows the spread of responses. Sixty-three per cent of the participants who responded to this question[13] said that the rules are appropriate for their law practice. Many resist any suggestion that there could or should be different rules based on the geographic location of the law practice. However, the remaining 37 per cent of participants thought the rules are not appropriate for their practice.

[12] Question 27 Appendix J Schedule of Interview Questions.

[13] Twenty-seven of the 52 participants responded to this question.

Figure 7: Appropriateness of the Rules



The participants who said the rules are appropriate for their country practice said the standard should be the same regardless of geographic location. These participants commented that the rules, as they are, provide boundaries which should not be breached.

> *I think they are more important actually. The potential for conflict is much greater, and therefore we have to be more mindful of it. And the ramifications if you're not mindful of it, in a small community are probably greater than just a 'whoopsy' in the city. 02FVO*

> *The rules as they are, are not tailored for country practice. They are just tailored for all practitioners. That is the standard that every practitioner is held to, because that's the standard of the competent professional. They are placeless in that sense. 05MVO*

> *Oh no, the rules are fine. The rules have been developed the way they should be. I just think that they are there to be used appropriately. I don't think there is any problem with the rules. I am instinctively not a fan of making different rules for the bush and the town. We should be raising our standards to meet what is available in the cities not saying 'Oh look OK we can get by with a lesser standard.' 30MUR*

> *Yes. We need to have a boundary that works, so that we can at some point say 'No. We can't go any further' and you can use that rule as the reason because otherwise we just keep pushing ourselves into more and more dangerous situations and eventually something really bad would happen. 32MUR*

One participant working in an outer regional area said the rules were appropriate, but the pressure of work was not. This pressure affected adherence to the rules. As she said, 'mistakes' happen in busy court days with limited resources.

> *I think that they [the rules] are reasonably easy. It is identifying [conflicts] sometimes that's kind of the hard thing, and particularly in a very busy list day where, you know, the other lawyers just swan in, do their one or two cases, swan out again, whereas we've got a list of 20 people waiting for us. Most have drug issues, a lot have mental health issues, a lot of juveniles, a lot of angst, and you're running in and out, in and out, in and out, in and out all the time. Look you can make mistakes. 34FUO*

Some participants who thought the rules were appropriate for country law practice saw the rules as having an inherent flexibility which, in their minds, facilitated a 'robust' approach which allowed them to 'get around' a conflict.

> *I think they are appropriate in the sense I don't have repeated difficulties. I think that we do have flexibility. We have a reasonably robust approach at being able to say 'No. We don't have a conflict because that information was given a long time ago.' I guess insofar as we are able to continue with this robust approach, we are able to get around it. 26FUR*

The remaining 37 per cent of participants took this much further and said the rules are not appropriate for their style of practice and could improve with revision to accommodate the circumstances of their practice.

> *If it is only a very small town and only one law firm in that town, it creates a lot of difficulties for the clients whom you are telling that I cannot see because you are conflicted. That means they cannot see another lawyer and I think that would put them at a great disadvantage. 35FVO*

Participants had two reasons for their objection to universally applied rules. The first is that in their current form, these lawyers are unable to offer discrete, unbundled legal services due to the presumption that information is shared within the law practice. The second objection is that one party could 'conflict out' an opponent by seeking legal advice from all law practices in that community.[14]

[14] Some clients seek to 'corner the market' in legal services to prevent their adversary gaining legal help. They do this by seeking preliminary legal advice from all the local law practices in the locality in a deliberate strategy to 'conflict out' their adversary. Typically, this strategy is used in the family law realm. Some call this strategy the 'beauty show' as it is designed to preference one client over others based on the 'first come-first served' principle. See *Australian Commercial Research and Development Limited v Hampson* [1991] 1 Qd R 508 where the commercial client briefed 14 Queens Counsel.

> *It is harder in the country because if you really follow the Rules, if you took a really strict approach to following the Rules, then you might be conflicted out of acting for quite a lot of people that you might have acted against previously… in a rural area it would have a negative impact on clients in terms of accessibility for legal services. 091FVI*

> *No. I think that in a lot of cases we will get conflicted out of matters where you could provide telephone advice and that may have been sufficient for the client. So I think that there does need to be some change to the laws to acknowledge the role that legal assistance providers provide in remote, rural and regional areas in particular to marginalised people. 20FUX*

One participant working in the public sector was scathing in his rejection of the rule offering the view that he, and his colleagues, believed the rules were 'rubbish'.

> *[My colleague and] I have our best conversations (about conflict rules). We say 'These rules are rubbish. They are not doing anybody any good. All they do is give us fewer clients which gives us a slightly smaller workload.' 27MUR*

Overall participants spoke generally about their capacity to work within the rules seeing them as essential to maintaining professional standards and as such should apply regardless of geographic location. However, there are some frustrations with the consequential restrictions on service delivery and potential access to justice.

4 Participants' Views About Improving the Rules

In this fourth part considering participants' perception of the alignment between the rules and practice, I provide their responses to the question: 'Do you have any suggestions about how the rules could be improved in your practice?'.[15] Some participants seek greater clarity and want the rules to be more 'black and white'. Conversely other participants said the rules would be improved if there is more flexibility. Several participants mentioned that a strict application of the rules would make law practice unworkable in their communities. The following responses illustrate participants' suggestions for greater clarity:

> *If the legal practice rules actually set out what was a conflict 'You can act against a person you have previously represented' if they wanted to go into black-and-white it might make it easier but they leave it to the case law. It's not that easy as we have cases going this way and that way. 15MUO*

[15] Question 28 Appendix J Schedule of Interview Questions.

> *If there's some limitation on the length of time, or – maybe it doesn't need to be in the rules but some sort of guidelines. The law society could publish what best practice would be. Some sort of time period, whether it's different for different sorts of transactions, it would be of assistance. 36MVI*

Other suggestions about how the rules could be improved focus on tangential issues such as more training for lawyers:

> *Everyone interprets things differently. It is not a level field. If everyone had the same idea, it would probably be better. I think perhaps more training could be provided or more clarity. Because at law school I never understood what a conflict [of interest] was. It was never discussed. 16MUR*

> *I think we could create more strategies that would enable us to adapt better. It's a big decision that you have to weigh up on the spot. You know? And it's not something you can go away and think about. (Clicking fingers) It's on the spot. And the advice that these people are seeking, you can't say 'Oh look I have to go and contemplate the rules deeply and do some research and call the law society and wait one second'. 21FUR*

> *I am planning to make our rules clearer for our particular practice and putting that into a visual flowchart form 'If this - then this' sort of thing. 40FUO*

Other suggestions, which may be specific to the lack of resources in remote areas, are to allow lawyers to have greater flexibility in 'bending' the rather than changing the rules based on geographic location. A female public lawyer working in a remote area explained her preference for professional discretion :

> *I'd rather see a situation where we bend the Rules, than the Rules get bent for us … You owe that duty to that client. To bend them is one thing, but to have a looser rule would mean that they would bend even further and you are in dangerous territory I think. 21FUR*

This desire for flexibility is referred to as 'common sense':

> *I think we have got to apply them with some common sense and if you go outside the rules you have got to be prepared to defend your position if something stuffs up. 08FUI*

Another suggestion was to allow more judgment derived from the 'principle' rather than requiring obedience to a 'black and white' rule:

> *I do think they could be improved by being more principles-based rather than actually laying down in black-and-white specific. I think the law generally could be improved that way. It would be a better way to operate. 28FVR*

> *The Americans have a very interesting approach to their conduct rules. The ABA rules say I cannot do X, but [they don't] say I can't do something a little bit like X. They rely on the very narrow definition to exclude conduct that opens up every other conduct. … My preference is for the general approach because it gives scope. And I don't like the idea of the Americans saying 'Look the rule says I can't do X, but I can do XY, XZ, XA, what not, because it's not X!'. I prefer our rules. 49MVO*

In this light, some participants suggested country lawyers be given special consideration in how they apply the rules because of the lack of alternative law practices to refer clients to.

> *Well I think that there should be some looking at the reality of a small town. In the city it's not an issue. It should be really strictly applied because there are so many options. When you haven't got access to a lawyer for thousands of kilometres, it's downright ridiculous …. The trouble is the people who often sit on these committees, making decisions have never actually lived and worked in a remote region and they haven't got a clue. Because until you live and work in these regions and see it for yourself on a daily basis and try to work out how you're going to deal with it in practice, you just wouldn't know. As I say, I would not have been able to answer any of your questions on conflicts when I lived and worked in Melbourne. I'd be able to give you the airy-fairy answer about 'look in the rules' type nonsense, but I wouldn't have been able to tell you how it applied, because it didn't. We all make mistakes. We are human. That's the point. We can't get it right every time and we're working in a very stressful profession, with really difficult conditions across the board. It's a big gig and most of us really do try and do the right thing, but you're not perfect all the time and you can't be. 51FVR*

> *Sometimes you're even pressured by the court to assist. Particularly out at remote circuit courts where matters have continued for a long time and they're keen to get them resolved and get things over and done with. Sometimes you are actually pressured to act in those circumstances, even when you've come in and said to the court you've got a conflict. They'll really drill you on what it is, which I think is inappropriate. I think if you're there as an officer of the court and you're saying 'Your honour, I have a conflict' then that should be taken. I've threatened to withdraw twice with the same magistrate and they then accept it and just start using phrases like 'an abundance of caution' and 'on the court record' (laughs). 39FUR*

Suggestions to improve the system included more lawyers and access to electronic or virtual legal services:

> *Get LawCover to invest in Eservices for remote areas. 52MVO*

> *I think basically we need to have more solicitors in the country. I think that by doing that you would be able to help that situation. Because I've been doing this sort of thing for close to 30 years. You do recognise conflicts and you know when they arise. Having more solicitors would help because then you could have a solicitor for each party. 13MVO*

> *I think if we were in a system where there was access to more lawyers, more of these kids would probably get acquitted … If you had competent counsel with the time, with*

> *the resources then some of these kids could probably beat a couple of these charges. You just know that, if there were more lawyers around, more records of interview might be tested. 30MUR*

In summary, participants offered a variety of suggestions to assist them in their ethical duty. Some want more prescriptive detail in the rules. Others want the regulators to encourage more flexibility on the front line of legal practice, especially when there are fewer law practices to refer conflicted clients to.

5 Frequency and Purpose of Contact with Regulators

This fifth part considers the participants' response to the question 'How often do you have contact with regulators of the legal profession?'.[16] I did not define 'regulator' or 'contact' leaving this to the participant to decide. Depending on the jurisdiction, 'the regulator' provides practising certificates, professional indemnity insurance and professional development.[17] Sometimes this same regulator handles complaints. A contact with the regulator could be a 'live' contact in real time by 'face to face' or over the phone or a passive communication such as a letter, newsletter or email update. My sense from participants' responses was that they were referring to a live interaction with a person from the regulator's office. Although geographically distant, regulators in their various roles are seen as part of the lawyer's professional community of practice. For some participants, the regulator is a source of support. For other participants there is minimal contact.

Perceptions of the regulator's disciplinary oversight influence the country lawyers' collegial relationship with their regulator. The following quote reveals the 'default' stance of fear when contacted by the regulator. When asked about the frequency of contact, the male lawyer from an outer regional area responded:

> *Too frequently, but that's only because of the position I hold with the law society. I'll tell you a story. I was a [junior] counsellor in there 18 months. I received a letter … saying 'Confidential, to be opened by the addressee only' and it said it came from the*

[16] Question 29 Appendix J Schedule of Interview Questions..

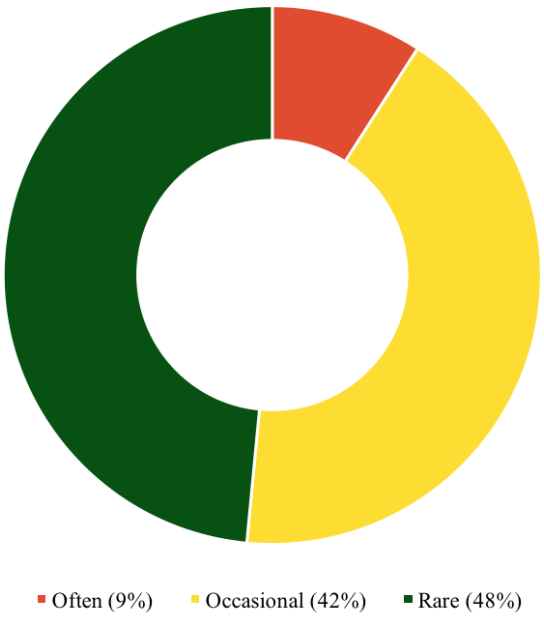
[17] In the interviews I did not define the word 'regulator'. In the Australian regulatory framework, regulator typically refers to the organisation tasked to respond to consumer complaints, to conduct trust account audits, and which may also deliver continuing professional development. See Appendix E *Australian Regulatory Structure* for a table which sets out the multiple Australian jurisdictional regulators and their roles. Some law societies are the regulators and may delegate that role to another body. The law society provides multiple roles such as membership services, continuing professional development, professional indemnity insurance, complaints management for clients.

> *conduct department. This is on the envelope! Took me three days to get the courage to open it. It was an invitation to a cocktail party! 49MVO*

This dichotomy, seeing the regulator as either a 'friend or foe', characterises many participants' feelings about the local regulatory authority. For some, the regulator is a colleague to be consulted. For a more significant proportion, any contact with the regulator, in whatever guise, is unfortunate.

Interestingly, contact with the regulator is relatively scant. This frequency of contact is described in *Figure 8 Frequency of Contact with the Regulator* below with 9 per cent of participants reporting frequent contact with regulators. These participants are participating in the law societies and organisations involved with the governance of the legal profession. Most participants have occasional (42%) or rare (48%) contact with the regulator, which is usually in response to a complaint, or a routine technical compliance issue such as an audit of their mandatory professional development, or a seminar on managing risk.

Figure 8: Frequency of contact with the Regulator



Occasionally the participants' representative role requires them to participate in meetings with the regulator, perhaps in a governance committee. This perception of reciprocity between country lawyers and their law society was explained by a remote private participant:

> *It depends on what context. I'm the country rep for [professional interest group]. I'm also the State rep for the Law Council of Australia, and for the [another professional interest group]. I'm on a number of committees if you like, all of those meet by teleconference. Some of them meet monthly. If I'm in Perth I appear in person, but otherwise I appear on the phone. The other two are quarterly for Law Council of Australia, and bi-monthly for the Law Society Country Practitioners Association.* [HM: what about the insurer?] *As does everybody in WA, you have to attend compulsory risk management, it's par for the course I guess. That's every year. In terms of the Board itself, sometimes I convince them they need to come to [remote town] and do a seminar on trust accounts or whatever. They did that last year. They haven't done it this year and I suspect they won't. Probably every second year we convince them to come up and give us some help. Otherwise, in the regions I have to say we don't really get much assistance. 51FVR*

Participants occasionally contacted ethics counsellors within the law societies, or complaints handlers and insurers to check practice issues or to obtain a second opinion about an ethical issue.

> *Initially I did speak to them. There is actually somebody in the Law Society who is there for practitioners; any assistance on those kinds of issues that would arise. I have spoken with them fairly regularly in the past. Occasionally I do when something comes up and I just want to check it. It never hurts. A second opinion always helps you to think it through. Things you have not thought of, or considered even. You still go with your initial instinct (although) there may be other issues that someone raises that you are alive to. 28FVR*

Used in this way, as a 'sounding board' to discuss ethical dilemmas with, law society ethics counsellors were seen (even if unconsciously) as part of the professional community of practice.

> *Yeah. With the conflict scenario, when [names colleague within the law practice] joined our practice, so he's the other senior lawyer here. He came from the other firm in town that shut down, and then there were matters where we were on either side of. So it was quite difficult to work out. So there was occasion to call Queensland Law Society just to check their opinion on whether we could continue acting or not. 38FVR*

Forty-two per cent of participants had what they termed 'occasional' contact with the regulator for professional development or in response to a complaint.

> *A couple of times we've had training with the Legal Services Commissioner. I've never had the necessity for [contact with] an insurer. No, I haven't had much contact at all. 08FUI*
>
> *Occasionally … put in a complaint for a client or two, but not personally. 19MUI*

> *They are a bit of a sounding board to confirm what you are going to do is correct. The Legal Services give me the heebie-jeebies. They usually contact you if they have had a complaint. 20FUX*

> *Well we do have the law society of WA and the Legal Practice Board of WA, but I doubt any lawyers ring Legal Practice unless they're in trouble. Most of the time the law society [are] doing CPDs, which are compulsory these days. There's a lot of these seminars all the time so you end up attending that. It has very recently, only in the last 18 months or so, some counselling service for lawyers or psychological/mental health for a few. 25MVR*

> *[The law society of the NT] are pretty good, they send out emails about CPDs, professional development all the time … and because the Territory's very small you'll know people within it and of course your colleagues … But yes we do have contact with the law society. And it's not just 'you've got to renew your practising certificate' sort of stuff. 27MUR*

Forty-eight per cent of the participants characterised their contact with the regulator as 'rare'. This infrequent contact is limited to continuing professional development, or to audit the lawyer on their compliance with their mandatory professional development within that cohort. Sometimes the reason for the contact between participant and regulator is in response to a conduct complaint against the lawyer.

> *Rarely. The Law Society attend and do ethics training. I have been to a couple of the ethics seminars. 01FV1*

> *The Legal Practice Board wrote to me last year and said 'Why didn't I advise them about our insurance?' because I ticked the wrong box so I had to write a letter of explanation. That was fine and they do random audits to make sure that I get the 10 CPD points. 14MUI*

> *No they don't contact us. We get our practising certificate once a year, and we've probably contacted them twice in the year that I've been here. And obviously if there's a complaint against you they contact you, but I haven't had one so far– phew! 21FUR*

> *[The law society] have a senior advisory panel. If you are needing some assistance you can contact somebody on that panel. So if you do not have anyone within your own network that you can go to, that is an opportunity there as well. I find that now being part of the Community Legal Centre sector, it is very supportive and even if you do not know, or you do not know anybody to ask, somebody will put you on to somebody. It is very supportive that way. 40FU0*

> *I have had from time to time the occasional 'please explain' which has gone away once it has been explained. In 24 years this happened three times. 44MVI*

In summary, participants' relationships with their professional regulators differ in purpose and frequency. This diversity reflects the different roles of jurisdictional

regulators: membership body, insurer, complaints management. However, contact is mostly occasional or rare.

This section has considered the experience of regulation on this cohort of country lawyers. Participants shared their perceptions about the purpose, clarity and appropriateness of the specific 'conflict' rules. Their responses suggest a relatively strong alignment between the posited rules, the regulatory stance and the participants' ethical decisions. Whilst the majority of participants say the purpose of the conflict rule is to act in the client's best interests, their views differ on the clarity of the rules in achieving this purpose. For some, the present rules are uncertain. They seek either more prescription or conversely more freedom to navigate the spectrum of positions between possible and actual conflict. In the main they advocate for regulatory consistency rather than different rules for country law practice.

By inquiring into the concept of shared regulatory purpose, this interview data sets the scene for the next section which looks at the practical implementation of ethical decision making. This alignment between professional purpose and ethical conduct is seen through the lens of decentred regulation. Diverse approaches to understanding and applying the rules may fall within the decentred regulator's zone of tolerance, provided there is clarity about ethical purpose. Whilst participants are relatively clear about the regulatory purpose of the conflict rule, they differ in the ways they identify and respond to conflicts of interest. In the next two sections I explain what participants say when asked how they resolve this ethical issue.

B Legal Ethics: Identification of Conflicts of Interest

The next two sections of this Chapter explore participants' (self-reported) conduct when assessing if they, or their law practice, have a disqualifying conflict of interest. This section explains the results relating to the identification of a conflict. The following section explains the results relating to the participants' responses to an indication that there may be a conflict. Data is generated in answer to the question: 'Can you explain to me what system your practice uses to identify client conflict at intake?'.[18] My analysis of participants' answers reveals two approaches to the identification of possible conflicts.

[18] Question 19 Appendix J Schedule of Interview Questions..

One approach is proactive threshold screening which involves carrying out a sequence of steps to identify possible conflicts before a legal service is provided. This threshold screening of clients is seen to have a prophylactic purpose; to detect actual conflict and to avoid the possibility of future conflicts. When threshold screening indicates an actual conflict, the lawyer disqualifies themselves and no legal service is provided. The other approach to identifying a disqualifying conflict, which runs parallel with or instead of proactive screening, is more reactive 'ad hoc' sensitivity to the emergence of conflict once a matter begins. The reactive way of identifying a conflict relies on what at times seemed an almost accidental recall of names or recognition of similar facts in the presenting matters. For some participants this reactive recognition of conflicts either complements or replaces the proactive threshold screening.

In making this assessment to act or to refrain from acting in a matter, the lawyer needs to be aware of the diverse range of interests within their law practice. Knowledge of these diverse interests can be both tangible (held in databases) and intangible (held by people working within the law practice). To comply with the professional conduct rules to avoid conflicts of interest, it is expected that the lawyer is able to identify when their own interests could conflict with their clients' interests and when clients' interests are incompatible.

1 Screening to Identify 'a Conflict'

Some participants reported using comprehensive, proactive threshold screening of all new potential clients and matters. In describing how these systems work, these participants described three factors: the 'who, what and when'.

(a) The 'who': People Tasked with Screening

Screening is done by a variety of legal and non-legal workers within the law practice (the 'who'). Depending on the sector and type of law practice, these workers include the field officer (in Aboriginal Legal Services), the practice administrator or receptionist (sometimes described by participants as 'the girls out the front'), and the lawyer. An early career lawyer in an Aboriginal Legal Service described how she relies heavily on her field officer to identify conflicts:

> *Now if it's a conflict, our field officers are the ones who are meant to work out a conflict … If our normal field officer is away … you can get yourself into some hot water. 34FUO*

Some participants explained the tacit accumulation of knowledge, both formal and informal, that their support staff acquire which facilitates threshold screening:

> *The girls [sic] will do it. The girls will just check. 'Have we acted for them before?' and 'is there any conflict in acting for them, now, because we might be acting for the other party?' 4MVO*

Participants reported that their front-line intake workers use a computer database to conduct threshold screening:

> *We have a CLSIS check which is done by our admin managers before the clients even see us, at the time they're making an appointment. 5FUO*

Whilst many participants delegate the screening task to support staff, they reported that they also scan for conflicts. The following quote illustrates the combination of a threshold screening, with a reactive recognition of conflict:

> *Usually that's meant to be done before it gets to me, but it doesn't always happen. And often you can be halfway through something and think 'Oh my god, I think we've got a conflict here', so then you've got to quickly pass them off. 34FUO*

Such participants pride themselves on having personal knowledge, and recall, of their law practice's client base, which facilitates threshold screening:

> *[I have] never had anyone come up as a conflict because we try [very hard to avoid this] and have a very small client base. 52MVO*

But another participant acknowledged that his reliance on practice memory is not fool proof:

> *[W]hat happens here in this town is that I end up seeing people come for one consultation. Like say there's a family law consultation, somebody had five years ago. And then they either patched up or continued the relationship or not … [B]ut with these one-off ones it gets tricky, because you start forgetting people altogether. 25MVR*

This diversity of who makes the assessment of a conflict is considered further in the following analysis Chapter. Arguably, this assessment to disqualify a law practice from

providing a service requires the exercise of professional judgment, especially if the conflict is more nuanced than a direct conflict.

(b) The 'what': The System of Data Collection

The second element in identifying a conflict of interest is the design of the system. That is what data is gathered and which method is used to search through that data. In this part I refer to this element as the 'what' in system design. Participants reported that the collected data includes the clients' personal identification details (name and contact details) and a description of their matter. Historically this data was recorded in a register or card index, although now computer databases are more common. The age of the collected client data varies with some law practices keeping data for two years, seven years or indefinitely.

Threshold screening indicates if there is a similar client name or client matter, which in turn triggers an assessment of whether that similarity is sufficient to disqualify the law practice from acting. Some law practices, such as the Community Legal Centres within the public sector, mandate the practice of screening through explicit policies, professional training and risk management guides. Their compliance with these systems is enforced through audit systems, checklists, and professional supervision.[19]

> *We use a central database called CLSIS. It's a national database where we input all our clients onto it. And we would go in and do a check on our database. So if we type in the name, Susan Thompson. If Susan Thompson has ever been a client or another party to a client of our firm, at any time, that will show. If they're a client, then fine, we can see them again. If they're another party, have been another party in a matter, that is on the face of it a conflict. 19MUI*

In these cases the collection of data may extend beyond clients of the law practice to include clients from other programs within the same organisation. For example, Community Legal Centres are sometimes co-located, or integrated with other community programs such as tenant advocacy, financial counselling and family violence support. Sometimes, one legal organisation is the auspice for all these programs. Often clients are recorded as organisational clients, not as law practice

[19] National Association of Community Legal Centres, *Risk Management and CLC Practice* (NACLC, 2011); National Association of Community Legal Centres, *Risk Management Guide* (2nd ed, February 2017).

clients.[20] Participants from these 'multi-program' organisations explained that they screen for possible conflict against all organisational clients.

> *There are several points that (conflict) gets caught … For the legal centre, it comes through the front desk person ... He gets the name of the client and the other party. Checks CLSIS, checks the DV database. Checks the TAP database. 18MUI*

In multi program organisations confidential client data may be unrelated to the provision of legal advice. A participant explained the way her law practice screens for conflicts using this consolidated data:

> *We put all of our non-legal services on CLSIS as … we are all co-located. We are all open plan. We all [use] the same reception. It is difficult to … construct adequate information barriers. We conflict check across all of our services. 40FUO*

This practice of integrating all client data in the one database also happens in large law practices where one organisation provides legal services across the single jurisdiction. One participant reported that his database included client information from 'head office' as well as branch offices. An example of this system is 'all track' used by the Western Australian Aboriginal Legal Service:

> *There are two 'alltracks'. Within our organisation we can access the entire database for the entire organisation and we can also access the local version of it. We rarely go beyond the local version. 30MUR*

Threshold screening relies on the law practice's client registers. This system could be as simple as data collected on index cards.[21]

> *We just have a file system and I get the girls [sic] in the office to look up. I know that all the other services in town have computer systems where they can check it. We have a client file index and the girls just go on and check the person, if they are a current client or a previous client. 28FVR*

Historical client details are stored in non-automated index cards or a ledger book which must be searched manually:

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[20] Once a person has been accepted by that organisation as a client, they are permitted to access all programs of that organisation.

[21] Participants referred to several common database systems. The CLSIS used by the Community Legal Centres, Content Management Systems and All Track in the Aboriginal Legal Services and LEAP, Open Practice, FilePro, Elite, Excel, Dropbox and Affinity in private legal services.

> *for some years… we had a big ledger book. Like if there's a new client comes in, there would be dates gone in, the full name gone in, what kind of matter and the file number. [This] was very easy, just to pick up that folder and flick through. 25MVR*

More commonly the collection, storage and screening of client data is automated through computer programs, enabling a speedier screening process to check former client data against new clients and matters:

> *Anyone who comes in to make an appointment, their name is immediately put into the database and run a CLSIS check, to check on conflict. If they are another party, even in an unrelated matter, they are conflicted. 14MUI*

One lawyer works across two states and his law practice is funded by two different organisations. He reported that to check for conflict he combines the CLSIS computer system with a hard copy of an Excel spreadsheet, which he takes on outreach.

> *We will use CLSIS, that is pretty much the database. It becomes more of a problem [when working across state borders and organisations.] So we've had to set up our own Excel sheet… you really need to go into detail who the other parties are [to determine] those conflicts. 17MUO*

Participants working in specialist law practices report that threshold screening is more of a technicality with the expectation that a conflict is unlikely to occur. This expectation is common when the law practice acts for the same type of client against standard 'other parties', for example, in a Family Violence Prevention Legal Service dealing mostly with women against male perpetrators, or as a welfare lawyer against the government social security department.

> *We have a database of all current and existing clients which we call 'CMS'. We put those parties' names into CMS and see if we've acted for or against either party. Most of the time, within the welfare rights role, the other parties will be Housing, or Centrelink, or some other sort of commercial entity so most of the time it's not really an issue. 29FUR*

Overall there is no consistency amongst the participants as to the type of client data they keep, where it is kept or for how long it is kept. One law practice has a rule that records are kept for two years; another for seven years. Most participants reported that their law practices keep all client data from the establishment of that practice and they continue to conduct threshold screening against the complete historical client database. This diversity in approaches directly affects the finding of a conflict. The less data stored

within the system, the lower the likelihood of a conflict being identified. This issue is considered further in the analysis in Chapter V.

(c) The 'when': Timing of Screening

The third element in the system used to identify conflict is the timing of the screening (the 'when'). Participants differ as to when the screening activity occurs. This timing is either at the first point of contact or when the inquiry escalates into ongoing casework. Participants in the Community Legal Centre sector are particularly diligent and undertake threshold screening before any service is provided.

> *We do conflict checks before we take the client on. It can be hard when you are out in the bush. …. I use my memory. We use CLSIS. I get my paralegal to do a CLSIS conflict check. You can pick it up. We have heaps of issues about conflict, but picking it up is not one of the problems. No, we generally pick it up. 15MUO*

For participants from Community Legal Centres, threshold screening extends to short-term, single session, unbundled, duty work. These lawyers delay seeing any new client, until that person is screened for a conflict:

> *We do it at every contact, so anytime a person wants to make an appointment at our service we do a conflict check. So, for example, if they come into the duty advice and they're not on our list, we can get some initial details … and then explain to the client that 'We need to do a conflict check, and that I'll do that and I should be able to give them some advice after that.' 46FUI*

In contrast to this level of diligence in the community legal service sector, participants from the private sector, legal aid and the Aboriginal Legal Services deferred screening until a matter progressed from 'minimal assistance' or 'duty work' to 'ongoing casework'.

> *There is a distinction between duty work, duty representation and case, like opening the file. So 'duty' means on the day, and that could mean…. driving charges that are not serious and you just deal with it straight away. It could mean that they're in custody and you try and get them bail on the day … we can't check all that stuff. 32MUR*

Some participants reported that threshold screening does not happen when 'legal information' is given to the person through 'minimal assistance' or a 'one off' meeting, which satisfies the client's needs. If the matter proceeds to 'casework' a conflict screen is then conducted.

> *[C]asework is like an ongoing matter where we will act, as opposed to just giving somebody advice. That's where it's crucial, where you begin to act for a party or you're going to go the next step… 39FUR*

In summary, threshold screening is a systematic and deliberate approach to identifying conflicts of interest. Screening may happen before the law practice provides any service, in the case of Community Legal Centre, or in the case of other law practices, an ongoing service. Participants differ in the 'who', 'what' and 'when' factors within this systematic approach. These differences include which worker conducts the screening, the method of collecting, storing and reviewing client data, and the stage of service delivery at which the screening happens. These differences are sometimes sector specific, such as the Community Legal Centres requiring threshold screening. Differences also emerge in the collection and retention of data which is not specific to the geographic location of the law practice, or the service provided.

2 Reactive Recognition of Conflicting Interests

When participants were asked how they identify a conflict, another method beyond threshold screening was mentioned. I refer to this method as 'reactive recognition' of a conflict. This method either replaces or complements threshold screening. In contrast to the systematic process evident in threshold screening, the reactive recognition of possible conflicts of interest is through ad hoc surveillance or recognition. In these cases, participants reported being almost 'surprised' by the possibility of, or the presence of, actual conflict. One participant reported 'stumbling face first' into conflict.[22] Another reported a monthly review of new files and trust account receipts, which trigger lawyers' ad hoc recognition of possible conflicts.

Sometimes a delay in data entry, or simultaneous client appointments within the law practice, reveal two lawyers within that law practice acting for clients with adverse interests. An extreme example of the potential ineffectiveness of reactive recognition is when the lawyer reaches the stage of cross-examining a witness in a contested matter only to come upon a previous client. One participant revealed that his law practice identifies conflicts retrospectively, on the monthly review of banking receipts:

[22] This realisation echoes *Hendriks v McGeoch* [2001] NSWCA 53 referred to above Chapter II B 6 a.

> *Basically what we do is we circulate at the end of each month, a copy of the trust and office receipts, and the names are all there, and it comes up as a trigger 'We're doing something for so and so. Why is the other side coming in?'. It's as informal as that. 49MVO*

A participant from the private sector uses his intake interview to screen for conflicts and to take the necessary action if a conflict is identified.

> *Well, in a small community it's generally, you know the parties or after you take initial instructions you'll learn who is involved. 24MVR*

In summary, most participants identify conflicts of interest through some form of screening process. Usually, this process involves searching historical client records to identify if the law practice has previously acted for another person, whose interests may conflict with the new client, or matter. In the next part, this approach to identifying conflicts of interest is considered alongside the geographic location of the law practice.

3 Is There a Correlation Between Geographic Location and the Identification of Conflicts of Interest?

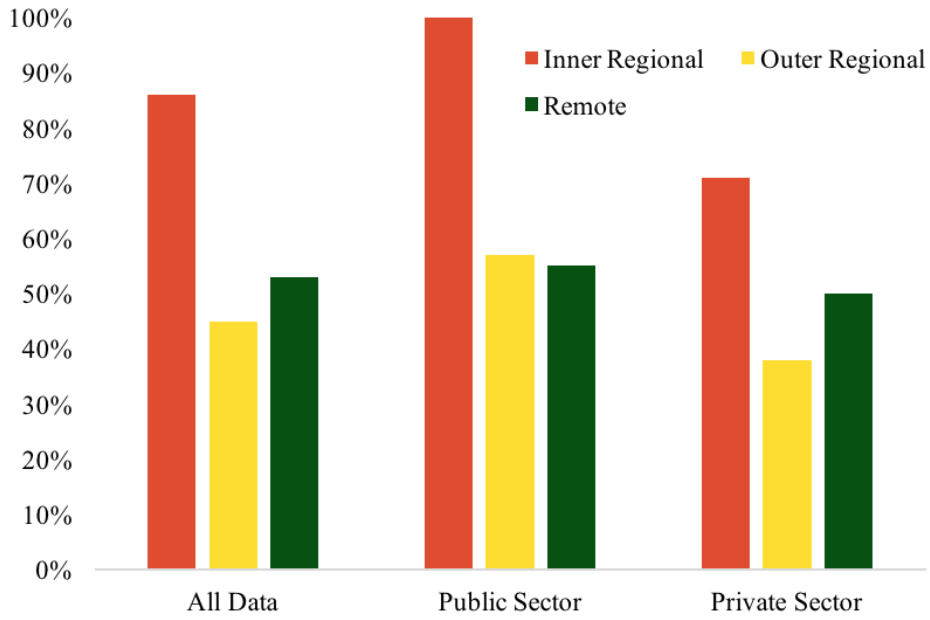
Analysis of the interview data suggests a possible co-relation between participants' use of threshold screening and the geographic location of the law practice. To the extent that it is possible to suggest relationships between these factors, the data suggests that lawyers practising in more remote areas are less likely to use threshold screening. The more geographically remote the participant (the ASGS – RA categories of 'outer regional' and 'remote'), the fewer participants use threshold screening. *Figures 9 and Figure 10 Geographic Location and the Use of Threshold Screening* below describe this difference. Whilst 100 per cent of participants working in the public sector in 'inner regional' areas reported using threshold screening, this number reduces to 55 per cent of lawyers working in 'remote' areas. A similar reduction is reported in the private sector; from 71 per cent of private lawyers working in 'inner regional' areas using threshold screening, the percentage reduces to 50 per cent of private lawyers in 'remote' areas. *Figure 9* provides this information in a numerical table.

Figure 9: Geographic Location and the Use of Threshold Screening (percentage)

ASGS coding	Threshold Screening		
	All Data	**Public Sector**	**Private Sector**
Inner Regional	86%	100%	71%
Outer Regional	45%	57%	38%
Remote	53%	55%	50%

These percentages are expressed in graphical form in *Figure 10* below.

Figure 10: Geographic Location and the Use of Threshold Screening (graph)



This difference may be explained through the type of law practice in remote areas. For example, in the public sector the more remote law practices tend to be the Aboriginal Legal Services. These law practices most often provide 'one off' or limited legal assistance to their client community. Their practice is that screening is not done routinely when minimal assistance is provided. This possible explanation is considered further in the next Chapter on the analysis of the data.

The interviews reveal that participants tend to use less threshold screening as a tool to identify conflicting interests when they are working in more remote areas. Threshold screening identifies both possible and actual conflicts of interest. When applied rigorously, threshold screening should lead to a refusal of service (colloquially called

'turn aways'). However it is possible that a lawyer working in a remote area may perceive that they are the lawyer of last resort and they are therefore reluctant to use threshold screening since it puts them in the situation of a refusal of service. The remote lawyer may be more inclined to be a 'reactive identifier' of conflict and not seek out historical client data which could lead to disqualifying the law practice from acting. Another possible reason why remote lawyers may be reluctant to conduct threshold screening is that the lawyer may have a higher risk threshold and, informed by experience, see themselves as being more tolerant of working with the possibility of emergent conflict. If so, this lawyer may be willing to offer legal services in an environment rich with interconnected relationships but also alive with real and potential conflicts. These possibilities suggest a particular approach to legal ethics which resonate with the concept of purposive lawyering, but an approach that brings further risk with self-regulation. Such possibilities are considered in greater detail in the next Chapter.

C Legal Ethics: Response to Conflicts of Interest

This third section of this results Chapter continues the description of ethical approaches by describing how participants respond when a possible or actual conflict is identified. The participants revealed three levels of response. Whilst not mutually exclusive, each level of response illustrates participants' varying appetites for risk tolerance, or comfort in exploring alternatives to an outright disqualification of that law practice. As described above in Chapter III *Methodology*, participants' responses are coded for similar themes.

These themes emerge through repetition and similarity of approaches. The first response – colloquially called the 'turn away' – is to disqualify that law practice from acting. Participants reported that they respond in this way when there is no perceived capacity to help the person, beyond the provision of legal information and an assisted referral to another law practice. The second response involves more of an analysis of the circumstances. Several factors in this analysis are assessed and weighted, to discern if it is possible to provide a legal service. This second response is in the nature of a 'triage' assessment of the law practice's capacity to act notwithstanding the possibility of a conflict. The third response is a decision to act in the face of a possibility of a conflict, and a resolution to 'work around' the real or apparent problems. This response involves a range of behaviours which, in ethical terms, could be either admirable or foolhardy.

Participants reported that the 'work around' response requires the law practice to 'proceed with caution'. Some participants recruit the client to work with them to ensure the proposed 'work around' is successful in acting in that client's best interests. Participants justify this third 'work around' response through their use of information barriers and informed client consent. Sometimes the work around response is reflected in the creation of a limited retainer – or agreement – to limit the legal service to a discrete or 'unbundled' segment of the needed legal service.

In this third section each response is illustrated through participants' quotes, which reveal their varying appetites for the exploration of alternatives to an outright disqualification of the law practice. These responses are also considered in light of the geographic location of the law practice.

1 The 'Turn Away'

For many participants, when the possibility of a conflict, or an actual conflict is identified, the first response is the 'turn away'. When the person conducting threshold screening decides that their law practice is unable to provide a legal service due to a possibility of, or an actual conflict of interest, the person seeking assistance is 'turned away'.[23] This refusal of service usually happens at the intake level after threshold screening identifies a conflict.[24] This conflict could be an actual conflict, for example, when the law practice already acts for a client whose interests are adverse to those of the new person requesting a service. Or the refusal could happen because of a unilateral assessment that to act for the new person could create a 'possible' or 'perceived' conflict.[25]

[23] The 'turn away' response is a colloquial term used in the Australian Council of Social Service community sector survey to refer to a refusal of service. Australian Council of Social Services (ACOSS), *Australian Community Sector Survey 2011 National Report*, ACOSS (2012). In 2011 the frequency of legal turn away response was identified by ACOSS as 11 percent. This finding was followed up in the inaugural Community Legal Centre census of the National Association of Community Legal Centres, 'National Census of CLCs 2013' (2014) , 11 [2.1.5] which revealed that 74 percent of turn aways were due to a conflict of interest. The subsequent 2016 Census identified 79.8 percent of community legal centres were turning away clients due to a conflict of interest. National Association of Community Legal Centres, 'National Census of CLCs 2016' (2017) , 10 [2.2].

[24] Kyle, Coverdale and Powers, above n 1.

[25] This unilateral assessment of a disqualifying conflict does not engage the client.

One participant described her preference to 'err on the side of caution' when deciding to turn away clients:

> *I prefer to err on the side of caution and move in the direction of a conflict … because I have been involved in matters where a conflict comes up later and it is a nightmare. 8FUI*

Conversely, another participant was irked by what she perceives as her colleagues' low tolerance for conflict which, in her opinion, leads to turning away too many people:

> *[Q]uite often for other legal services, they would just say 'Nup. We've acted for them before.' And I think that is why resources are not being used as effectively as they could ... But that said, it is a judgment call for every individual professional I guess. And some organisations have their own policy on that which they can't get around. 28FVR*

Some participants with more of an appetite to explore alternatives to the 'turn away' said their law practice offers a comprehensive legal information session – instead of a legal advice session. This action responds to the client's immediate need, although drawing a sometimes fine line between 'information' and 'advice'. These participants believe there is a difference between 'legal advice' and 'legal information' and that the provision of legal information does not place them in conflict.[26]

> *[We] give general information which amounts to essentially a brochure and pamphlet. Something that is generically produced; or a referral to another service. That is all [we] are doing. Then that is fine there is no conflict issue that arises then. 08FUI*

Participants described the client's confusion that this threshold refusal of service sometimes causes:

> *We err on the side of incredible safety. Make an appointment. Check CLSIS. If another party we say 'No you are conflicted out'. That causes difficulty for me because people think a conflict is an argument and they do not understand the legal situation. 14MUI*

Participants said it is difficult to explain why they are unable to act for the new person, without breaching their former client's confidence. To assist in this explanation, some law practices follow a script for their intake process.[27] Before conducting threshold

[26] For a discussion about the perceived difference between legal information and legal advice see Sue Scott and Caroline Sage, *Gateways to the Law: An exploratory study of how non profit agencies assist clients with legal problems.* (Law and Justice Foundation of New South Wales, 2001) 55.

[27] Refer to Appendix C *Scripts for 'Turn Away'* for examples of scripts used by the Geraldton Resource Centre and the Legal Aid Commission of New South Wales.

screening, these law practices preface their intake with a description of their process, advising that completing a conflict check is a precondition to accessing legal services. If the conflict check is positive, the new person is told 'I'm sorry, unfortunately we can't take this matter on, due to a conflict of interest'.

> *You say 'Look, before we do anything, we need to do a conflict check. Because solicitors cannot act for two parties in the one matter'. So the client is given that information up front. So that when the front desk person goes back and says, 'I'm sorry, unfortunately we can't take this matter on, due to a conflict of interest'. Some clients will say 'Well does that mean that you've seen whatever?'. I mean, we don't go 'Yes' or 'No' we just say 'There's a conflict of interest'. 8FUI*

This fine line between explaining the nature of a disqualifying conflict without breaching client confidentiality (for instance, disclosing that you already act for a related party) requires skill and contextual sensitivity. When approached by a client to help in her son's criminal matter, one participant explained it as follows:

> *I was trying to explain it to somebody after hours … when they'd called me up to ask me about their son, who was in jail, I had to then say 'Well actually, I can't talk about this'… then I just had a thought and then I said 'Look, crime and civil are poison cousins.' And when I said that, they go 'Ohhhhh, no worries, no worries, that's fine'. And I use that from now on. 39FUR*

As part of this 'turn away' response some law practices, typically within the public sector, offer an assisted referral to another law practice through what they describe as a 'warm transfer'. When there are fewer alternative law practices available locally, sometimes the warm transfer involves establishing a connection through telephone and video links as a substitute for 'face-to-face' advice.

> *What we do [when conflicted out] is a couple of things. We might connect them with NSW or Victorian Legal Aid, or alternatively, we have an MOU in place with [named sister] CLC down along the river. So in other words, if we have a conflict with somebody, we can refer them there... all [the person has] to do when they ring is say 'I've tried to speak with my local CLC, they've told me there's a conflict', then they will get their advice that way. It's a bit like I guess a warm referral. 8FUI*

One participant books an appointment for conflicted clients into an alternative law practice via video conferencing:

> *So whenever there is a conflict the admin person books that person in for a videoconference advice. So it's perfect. And they never have to have anything to do with me. So it is a separate thing. There is no one else here. People need the advice. 17MUO*

Another participant explained a local collaboration which streamlines limited legal services to support conflicted clients:

> *There are two main areas of crime up here. Domestic violence type crime and then there is the property break-ins ... On the domestic violence front we tend to have it sorted between the two services. [We have] basically divided up protagonists, the perpetrators of violence and the victims. 30MUR*

Several participants described the burden of paperwork that some warm transfers require. The following example comes from a referral from a conflicted Aboriginal Legal Service to legal aid:

> *[When I find a conflict] I'll write to the court and I'll tell the court that [the client] came in and has applied for legal aid. I'll write to the police to tell them that we no longer act. So we do all of those processes. Now those processes add onto the really busy practice that we've got. But you know, at the end of the day if we don't … [and] if they come to court again, the magistrate will probably get angry. I'd just rather do that, and then we know that when we've let them go, we've done all that we could for them. 22MUR*

Sometimes, in bush courts or in outpost locations, there are simply no alternative law practices to refer the person to.

> *[T]here's just considerable paperwork to be done, to get the person referred. And you end up in these horrible situations where the matter comes up in the next appearance and neither of you is really representing them. You've recognised the conflict. [You] shouldn't represent them, and yet they haven't completed all the hurdles to get legal aid … And so they're just dumped on their own in this completely foreign environment. They have no idea what's going on. And nobody helps them. 27MUR*

The limited capacity of some clients to navigate towards alternative law practices, combined with the scarcity of alternatives, explains why the 'turn away' response is difficult for some participants.

> *Sometime private lawyers will be brought in to break the conflicts. But it does not happen very often and it is all because of resources. Legal aid does not want to be spending money on a private lawyer on a juvenile, or young offender in a run-of-the-mill break and enter matter. So that does not happen very often. 30MUR*

Participants reported that there are more 'turn aways' when there are alternative law practices. In the absence of alternative law practices, there are fewer turn aways:

> *The major consideration for us is 'What's going to happen if I stop representing this person?' So in most of the remote places there's no one else. We can refer people to*

> *another service, but whether that other service can actually get out there and do anything about it is another matter. So we're then thinking 'Well, if I get rid of this, this person is going to hang around for months potentially with no resolution of their case. They might be better off … it might be in their interests if I just keep doing this.' 32MUR*

When there are clear referral networks, participants seem comfortable with the 'turn away' response as a more acceptable option for the conflicted law practice. However, two other responses– the 'triage' and the 'work around'– move beyond outright disqualification to address the risk of a conflict emerging. These responses are considered in more detail in the following parts.

2 The 'Triage' Assessment Process

The second category of response, which participants use when a possible conflict is identified, is to examine the discrete factors of each matter. This examination is in the nature of a 'triage' assessment.[28] Many participants reported that although their screening systems may indicate a possible conflict, this is a trigger for further inquiry rather than an automatic 'turn away'. Depending on the circumstances and available resources, the participant reported they 'delve deeper' into these factors to discern if there is a disqualifying conflict. The participants described this examination as a forensic endeavour, which involves reviewing existing files and the data held on the system, to assess if that information is sufficient to disqualify their law practice from acting. One participant explains this triage assessment requires professional judgment:

> *Sometimes you've got to delve deeper than 'Joe Bloggs family law issue – Sam Smith family law issue - that must be a conflict!' You've got to delve a bit deeper [because the support staff] does not have the skills [to do this]. 17MUO*

The three factors participants described as relevant to this assessment are:

- the type of information held within the law practice which includes both client data and workers' memory
- the time elapsed since the legal service has been provided

[28] *Triage Assessment* is a process typically used in a medical context to assign degrees of priority to competing emergency patients and to decide the order of treatment. In this thesis, the term refers to the process of assessing multiple concurrent or possibly conflicting matters to determine which client or matter will be accepted for legal services. The assumption is that the triage assessment is conducted according to a predetermined set of criteria. See glossary for a definition of this term. For more discussion about this process and its relevance to ethical decision making refer to Appendix D *Five Step Triage Assessment Process* and discussion in Chapter VI C 1 c below.

- the scope of the previous legal service (minimal assistance or substantive casework).

The main factor participants who undertake a triage assessment consider, is the type of information held about a previous client or matter. This client information is stored on the paper files and documents within the 'hard' office systems, and in the 'soft' tacit personal knowledge of the workers. The assessment involves examining the currency of the information held and the relevance of that information to discern if it is 'material' to the presenting matter. The participants reported that sometimes both the former and current client matters are unrelated. At other times, especially in family law matters, participants reported that if they decide to continue to act, there is a greater likelihood that their duties to their clients will be compromised. This unacceptable compromise arises because of the risk of inadvertent disclosure of confidential client information or through the perception of divided loyalties.

One participant described his triage assessment process:

> *I go through a balancing act of 'What is the information that we hold about this person? Am I likely to have to disclose this information to the new person?' and if the answer is 'No' I then write what I call a 'conflict of interest management file note'. I put that on a bright yellow paper so that it is kind of glowing and you can see it. And I put a copy of that note on each relevant file …'You can give advice to that person but be cautious around going into this area. If you go into this area we will have to stop acting for that person.' 33MUI*

Some participants reported their triage assessment is influenced by the time elapsed since an earlier legal advice:

> *Well we are probably better placed to act for this person now because it's been a longer period since we acted for the other party. 30MUR*

One participant explained that in her law practice they limit their conflict search against the client data to the previous two years:

> *[My] practice leader said that if it was over two years ago, then we don't consider our duty of loyalty to subsist and we're ok. But it also depends on the relevance. So if it was a highly relevant previous matter, we probably wouldn't. In the sense that if we had knowledge that could conflict now, we wouldn't act. But if, for example, we'd previously advised them about a deceased estate, five years ago, we're not going to let that stop us helping a new client. 23FUR*

Another participant who worked as the principal lawyer in a remote public legal service, has a contrary view and insisted on correcting his colleagues' misunderstanding that the duty to avoid conflicts lessens over time:

> *It depends on your staff knowledge of what a conflict is … they get on the phone and say 'Yeah but it was 2002 or a long time ago' and I say 'That is not the issue' or 'We only did that for them' and I say 'That that is still not the issue'. 16MUR*

For some participants, the scope of legal services provided in the past and the anticipated future work influences their decision:

> *[I ask] When did we act for that person and what was the matter about?' and it's on that basis that I decide whether or not there is a conflict of interest … we conflict check all the way back. So anyone who's been a client of this service, we conflict check against. But, that's normally where I exercise my discretion. So if it's been somebody who's seen us a very long time ago about a traffic matter, and the other time they're actually coming in about a child conflict matter now about that other person. I'd be less likely to consider that a conflict of interest and I'd be comfortable acting. 14FUO*

Another participant considers the scope of previous work as relevant to the triage assessment:

> *I suppose it's case-by-case. Sometimes it's absolutely clear and you say 'Yeah, you've got to find somewhere else', or sometimes you say 'Are you pleading guilty or not guilty?' And if they're pleading guilty, there's no issue … I think it's just a case-by-case consideration. 11MVO*

Some participants explained that they are guided by what is in their clients' interests, and how their decision to provide legal advice would be perceived in their community:

> *You have to put your client and the former client at the centre of it and you do not want to breach confidence of the former client … Because that is your primary starting point. Then there is the perception of conflicts. … Perception in the community is important. So you have to have that at the back of your mind. I guess you get a little bit of choice. It is not a cab rank. You can say 'No' to people if you can see that it is going to be a problem in the future. 16MUR*

Another participant uses her triage assessment to discern which course of action is 'good for everybody':

> *We run a practice that advocates looking after everyone's interests, including the other party. Because generally, what I have found is that … what will be best for our client, will likely also be best for the other client. If you can achieve a circumstance that is good for everybody, it will likely be in your client's best interests also. 28FVR*

In summary, the triage assessment allows participants a means of going beyond threshold screening to consider if they should disqualify their law practice from acting. They typically consider three factors: the information held within the law practice, the time elapsed, and the scope of the work. The participants reported that, after conducting this assessment, their next option is to consider how the possibility of a conflict can be managed.

3 The 'Work Around'

When participants are faced with a possible conflict of interest, a third response, after the turn away and the triage assessment, is to accommodate the possibility of conflict rather than to disqualify the law practice. Depending on their own sense of professional autonomy, and what might be seen as 'creativity', participants take action to 'work around' this dilemma. They do not consider these actions as unethical. Rather than an outright refusal of service, the 'work around' is seen as an exercise of professional autonomy which enables them to discern an appropriate, and ethically sound response. A common response is to 'delve deeper' into the circumstances of the presenting matter in order to determine their response. In this category of responses, the lawyer celebrates their autonomy. They reveal how they interpret and apply the rules of professional conduct. This autonomy is shaped by professional standards but nevertheless, also shaped by context.

When participants describe their 'work around' response, they speak about what they perceive as their ability to accommodate two duties; their duty to maintain their former client's confidentiality alongside their duty to provide legal assistance to their potential new client. This response usually follows the previous triage assessment. Some participants described how they discuss this 'work around' option with their clients:

> *So if there is any sort of conflict issue that arises …I will actually go through it with the client … we will always do a written letter to the client on the issue saying 'We have raised this. We are making you aware of this conflict and you have advised us that you are happy to waive your rights in relation to that. You are happy to continue. You are not concerned with any conflict issue.' 28FVR*

For some participants, getting their client's informed consent is little more than a technical matter of having the client sign a form:

> *Most times, the conflict of interest issue comes to mind in conveyancing matters, because we often act for both sides. And you get the clients to sign the appropriate form to do this, and you're OK. I generally explain to them what that form means when they sign it. 10MVO*

Other participants reported writing to their clients setting out the situation and seeking their client's consent to continue to act:

> *I'll usually do up a letter, conflict letter, to address that. So before we start 'This is the transaction and this is who I'm acting for in regards to this, and do you have an [issue if I act]? 24MVR*

When participants explained getting consent from former clients to allow them to act in a related matter, they typically seek consent through their former client's lawyer:

> *[If] we think there is a conflict … we would write to the other side and say 'We saw your client for this purpose on this date … Please advise if your client has any objection to us taking instructions from [the other party] and acting on their behalf.' So then it's up to the client on the other side I suppose. If they say 'No' we don't [act]. 29FVO*

Some participants do not explicitly raise the issue of possible conflicts with former or intended clients. Participants make a unilateral assessment that their clients know there are limited legal resources and their clients do not care if their lawyer has previously acted for other related parties. These participants assume their clients' consent to act in the face of a conflict:

> *[I]t is incredibly rare that anybody will ever turn up and say 'Oh I really don't want you to act for me because you've acted previously for the guy that I have meant to have stabbed.' It's all bets are off. It's all fresh. 30MUR*

The need to work with multiple client interests is seen as achievable with skilful navigation of possible conflicts and occasionally client persuasion.

> *We have had an action against them that relates to say family law and they want to come and see me about a civil matter. [I say] 'Look I act for this person and he's got an action against you for this … but definitely come and see me. The other is a totally separate issue.' 17MUO*

Another remote participant claimed she has developed an intuitive 'feel' for how to navigate working with conflicts of interest to manage situations where conflicts exist.

> *I know that when I speak about these sort of things a lot of lawyers will think what I have thought previously which is 'Whoah! That's scary. Are you serious? Just do not go near that one!' ... The thing is that when you are in the situation, when you are in the town and you know the people, and you know the circumstances, you have dealt with it constantly and continuously, you've managed it, you get a feel for it. You will do more than what you would have done previously I think because you gain more of an understanding of what factors are the real factors as opposed to the theoretical ones that are written down in a book. The actual real ones that are going to cause you problems. 28FVR*

So far in this section I have classified and illustrated three responses that lawyers use when they become aware of a possible conflict of interest. The 'turn away' response disqualifies the law practice from acting further in the matter. Sometimes participants supplement this 'turn away' response with an 'information session' or a 'warm transfer' to another law practice. In addition to this outright disqualification response, participants described two other responses; 'the triage' and 'the work around'. These second and third responses contrast with the first response, as participants do not accept the need for an outright disqualification when the possibility of a conflict is indicated, but regard this indication as an invitation to 'delve deeper'. Often the second and third responses work in tandem. The initial assessment considers various factors such as the time elapsed since first advice, the information held on the previous matter, and the scope of the current work. The lawyer then sketches out a plan which, they believe, can accommodate their professional duty to avoid a conflict of interest.

One example of the 'work around' which lawyers occasionally raise is asking the client to 'sign the form' to enable the lawyer to act for multiple parties. These responses throw up issues about the ethicality of the responses which are analysed in Chapter V. The next section considers if there is a correlation between geographic location and these three responses: turn away, triage, and work around.

4 Is There a Correlation Between Geographic Location and the Response to Conflicts of Interest?

Analysis of the interview data suggests a possible co-relation between participants' use of the turn away response and the triage assessment and the geographic location of the law practice. Again this suggestion is offered with caution as there are small numbers of participants and to test this observation further, additional information on the location of law practices is needed. To the extent that it is possible to suggest relationships between

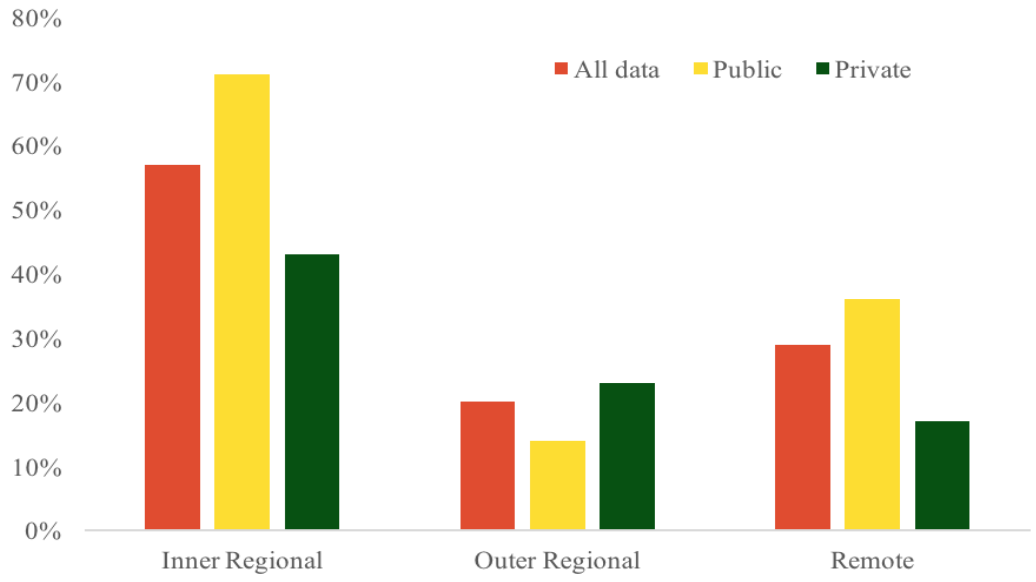
these factors, the data suggest that lawyers practising in more geographically remote areas are less likely to turn away clients (Figures 11 and 12 below) and more likely to engage in the triage assessment process (Figures13 and 14 below).

The interview data indicates that the more geographically remote the law practice, the lower the percentage of participants who report 'turning away' the client if threshold screening reveals a possible conflict. *Figures 11 and 12 Geographic Location and Turn Aways* below shows that 43 per cent of inner regional, private sector participants respond to possible conflicts by turning away clients, compared to 17 per cent of private sector participants in more geographically remote areas. The interview data reveals a similar decrease in the use of the turn away response between public sector participants in inner regional areas compared to more geographically remote participants. Seventy-one per cent of participants from inner regional areas report that they turn away clients, compared to 36 per cent of participants in remote areas.

Figure 11: Geographic Location and Turn Aways (data)

ASGS coding	**Turn Aways**		
	All data	**Public**	**Private**
Inner Regional	57%	71%	43%
Outer Regional	20%	14%	23%
Remote	29%	36%	17%

Figure 12: Geographic Location and Turn Aways (graph)



The interview data suggests a co-relation between geographic remoteness and the participants' use of the triage assessment process. The more geographically remote the law practice, the greater the percentage of participants who report using a triage assessment to discern if there is a disqualifying conflict. *Figures 13 and 14 Geographic Location and Triage Assessment* below show that 100 per cent of remote public sector participants engage in a triage assessment compared to 29 per cent of their inner regional colleagues. This pattern is evident with private sector participants too, although the difference is smaller with 67 per cent of remote, private sector participants using a triage assessment compared to 57 per cent of their inner regional colleagues.

Figure 13: Geographic Location and Triage Assessment (percentage)

ASGS coding	**Triage activity**		
	All data	**Public**	**Private**
Inner Regional	43%	29%	57%
Outer Regional	65%	71%	62%
Remote	71%	100%	67%

This data is presented in graphical form in *Figure 14* below. Significantly more participants in remote areas use the triage assessment to discern if the possibility of a conflict of interest is sufficient to disqualify their law practice.

Figure 14: Geographic Location and Triage Assessment (graph)

Comparing participants' geographic location reveals that lawyers in more geographically remote areas are more likely to go behind the appearance of conflict to engage in a 'triage' assessment to discern the likelihood of an actual conflict occurring. The interview data suggest that when participants perceive that there are few alternative law practices, this triage assessment provides a way to address the legal need.

This revelation of the broad use of the triage assessment in more geographically remote areas complements the observation in the previous section on the identification of conflicts. It reveals that the more geographically remote the law practice, the lower the percentage of participants who report 'turning away' the client if threshold screening reveals a possible conflict. One possibility to explain this data is that the lawyer, working with few referral alternatives, endeavours to respond to the request for legal help. This endeavour contrasts sharply with the more proscriptive 'turn away' response of lawyers in less remote areas.

As indicated above in Section B3, I exercise caution when considering the effect of geographic location on the identification of conflicts. Typically, the law practices in remote areas tend to be Aboriginal Legal Services rather than Community Legal Centres, legal aid or private lawyers. They have a different approach to responding to the possibility of conflicts which arguably preferences service provision. This

comparison, which shows an increase in the triage assessment in more geographically remote areas, may not be due to remoteness per se but to the professional culture within the Aboriginal Legal Service and like-minded services.

The most interesting aspect for the purposes of this study is how these individual or practice-based decisions about the efficacy of responses to such conflicts are formed. The differences in participants' responses suggest that these are individual and practice decisions. There is also the suggestion that respondents may be influenced by the opinions of professional colleagues in various ways. This influence of professional colleagues on decision making is considered in the next section which looks at the interview data to discern whether formal or informal networks exist that might be conceptualised as professional communities of practice.

D Community of Practice: Identity of a Country Lawyer

As indicated earlier in the theoretical framework, the concept of a community of practice offers a way to understand the influence of professional colleagues on the formation of professional judgment. In the literature, the concept describes the identifying characteristics within a discrete cohort of lawyers, and also suggests an approach to collegial learning. In this research participants are asked questions on both dimensions. This section describes the interview data on the identity issue, and the next section describes the interview data on the social learning dimension. These two dimensions reveal how professional colleagues shape the lived experience of the country lawyer. The influence of professional colleagues is considered further in the next Chapter.

Participants were asked 'In general terms do you think you practise in a different way to city solicitors?'[29] The intention was to reveal participants' perceptions of their cohort identity. Participants' responses reveal perceived differences arising from the geographic location of the law practice. The interview data reveals perceptions of two common advantages and one disadvantage.

[29] Question 18 Appendix J Schedule of Interview Questions.

The two perceived advantages arising from participants' identity as a country lawyer are identified here as increased visibility to clients and an increased focus on pragmatic outcomes. The single disadvantage is also a matter of access, but in this case, less access to professional resources. Another dimension to this issue of geographic location (which is considered in the next section) is the co-location of the law practice within cluster communities.[30] Co-locations with colleagues increases the lawyers' collegial support. For other lawyers, who are the only law practice in their community, their status as an outpost is professionally isolating.

1 Visibility and Access

Participants spoke about how living and working in a country community increased their 'visibility'.[31] This theme of visibility refers to the perception of being under surveillance or the lawyer's whereabouts and social habits being known by others within the community. This increased visibility also increases both the participant lawyer's access to their clients and their clients' access to their lawyer. Participants perceive that for city lawyers, there is a distinction between work and private life and less chance of meeting clients outside office hours. Whereas in the country, participants perceive the merging of personal and professional lives:

> *[Y]ou're part of a community. I mean in Adelaide I guess by chance you bump into your clients, but (now) it's wherever you are, you will bump into clients. So whether it's the supermarket or the hospital or the doctor's surgery or the dentist. Or the street. Or a football match or a music concert. You will be visible, and you will be talked about. 6FUO*

Participants reported that a consequence of this increased visibility is the need to maintain boundaries between professional and personal roles:

> *[Sometimes clients] turn up uninvited, without appointments and sometimes I tell them to go away or sometimes I say 'Come up, I've got five minutes'. And if it gets too much I say 'Look you need to make an appointment.'* 48MVI

[30] This concept of 'clusters' and 'outposts' in considered further below in Section E 1.

[31] The word 'visibility' is occasionally used by research participants. It is used here as representative of this commonly recurring experience.

Sometimes, perhaps illustrative of the breadth of interests which can lead a lawyer into a conflict of interest situation, participants' personal boundaries lead them to decline work because of personal interests:

> *[I]f you find yourself in a litigation matter, and someone wants you to sue someone who I'm dealing with daily! That can be difficult. … I say 'I can't possibly act in this. It wouldn't be fair to you or to me'. 50MVR*

Conversely participants reported that increased visibility is an asset in understanding their clients and the context of their clients' matters:

> *[Y]ou probably know more about your client than they think you know… we have the advantage, it is a real advantage, that we probably know our client better before they come in than the suburban or city [lawyer]. 49MVO*

Participants' perception of increased visibility in country law practice in comparison to participants' perception of law practice in the city, is experienced by them as an advantage mainly because of additional transparency and reputational integrity.

Participants commented that one simple indicator of the importance of professional visibility are the clothes they wear. Sometimes participants thought the way they dressed gives a visible cue to their accessibility. If they are wearing a suit, this is a visible cue to their community that they are not in the office, but in court. One participant commented on the difficulties such visibility sometimes presents:

> *If anyone saw me running around in a suit, 'He's going to court or a funeral!' I'm seeing clients everywhere I go. Many people … will blurt out their business … in the middle of the bar of a hotel, in the middle of a shopping expedition. 50MVR*

This increased visibility makes them more accountable to their clients and their community:

> *I think that we are better lawyers for practising regionally … We have to see them in IGA, so we've got to make sure we're not delaying on anything or not being upfront about costs. 38FVR*

Participants reported that this increased visibility has consequences for the 'word of mouth' transfer of knowledge, which helps with referrals but can also damage reputations:

> *[Y]ou're only as good as your last job… maybe a city operator can get away with [poor work] but you can't in a rural community. 24MVR*

However if the country lawyer is able to cultivate a good reputation, participants observed that this increased visibility is important for the sustainability of their law practice:

> *Word of mouth is a lot stronger in the country as well. That impacts on who comes to you … you have… to make sure that they continue to speak well of you when they leave. To tell other people about you. 1FV1*

In summary, participants perceive that a particular characteristic of the cohort of country lawyers is their visibility. This visibility is evident to both their clients and their colleagues. Identity is seen as their professional currency. Participants believe that country lawyers are always visible within their community. They are known by their clothes, by word of mouth, by reputation. The next part considers the second perceived advantage experienced by country lawyers– their pragmatism.

2 Pragmatism Influencing Ethical Decisions

The second advantage participants described as integral to country law practice is their pragmatism. Participants described how their style of practice requires the skill to keep both the client and their community onside. These participants suggested that their focus is on a pragmatic approach benefiting the client, their community and their professional colleagues.

One example of this pragmatic approach to practice comes from a participant who regularly represented clients at a 'bush court' in remote Australia.[32] This participant reported that when they were on remote circuit with limited meeting facilities and the pressure of time, they had to get down to the client's level both literally and figuratively:

> *[I]t's a lot more sitting on the ground under trees talking to people and trying to draw the fine line between keeping family involved but still actually trying to get instructions from the actual client. 27MUR*

[32] A 'bush court' refers to the circuit court, which 'flies in and flies out' to service the legal needs of remote communities. Typically a bush court is at the Magistrates Court level and deals with criminal matters.

This participant recognised that his pragmatism could lead him into difficult ethical terrain:

> *[I]f you want to apply a rule that would work very well in urban Melbourne … it's not going to fit in [remote town]. It doesn't make sense here. 27MUR*

He revealed that the urgency of the presenting issue, and the scarcity of alternative legal resources, in his view requires a pragmatic approach which his city colleagues may regard as bordering on the unethical. Whilst he provides limited legal assistance in a plea in mitigation, a contested hearing disqualifies him as he has to cross examine a witness who is also a client:

> *I said 'Right, if you're pleading guilty to this, I can help you, because I don't have to cross-examine the person who you hit with a bottle. But if you're not pleading guilty to this, then I will pass this on, probably to another [public legal assistance service] practitioner'. And I think, if I was in the city, I wouldn't have come anywhere close to that. I would have [said] 'He's a former client of mine, I can't help you, go find yourself another lawyer'. 27MUR*

Participants appreciate the pragmatism of their country colleagues:

> *[C]ertainly I find if I'm dealing with a country practitioner from an area I haven't dealt with before, and I pick up the phone and talk to them, then they're far more likely to be accommodating and speak to me frankly than a solicitor from Sydney. 36MVI*

Participants indicated that country lawyers consciously seek to cultivate this pragmatic professional demeanour:

> *… our reputations and the way we practise law is very much based around, 'I am somebody you can trust and if I say something, it is something you can take to the bank.' I don't have that relationship with city practitioners. 41FUO*

Some participants perceive that city colleagues have 'extra baggage' that comes with the litigious posturing which is not helpful in resolving legal issues:

> *I think in such a small region… most of the family lawyers know each other really well and can talk quite straight with each other without having the extra baggage. City solicitors who we don't know … deal with us quite differently. 46FUI*

This perception of collegial pragmatism extends beyond litigation to transactional areas of practice. For example, one lawyer reports that when a problem arises after a

conveyancing settlement (when the right to negotiate overlooked aspects is past), remedial action to resolve the issue is far easier if there is a country lawyer on the other side:

> *…if there's an issue…I ring up the solicitor and say 'Oh look this has happened' they say 'Righto we'll fix it up' whereas in Sydney they don't seem to do that, they say 'All conditions merged on completion' and so you don't have any rights. And it's not about their rights, it's about sometimes about their moral duty, I suppose. 13MVO*

Whilst these two themes of increased visibility and pragmatism are seen by participants as positive attributes to country law practice, participants are aware of the limitations which their geographic location has on their access to professional resources. The next section considers these disadvantages.

3 Reduced Access to Professional Resources

A recurring theme which shapes the participants' perception of their identity as a cohort of country lawyers is the difficulty they have in accessing professional resources. On the one hand they report that they value the challenge and increased responsibility that comes their way because of the lack of resources, yet they say they miss the opportunity to specialise in an area of law or to gain exposure to other modes of professional practice.

> *We have to live off our wits in a sense. We don't have the intensity of facilities we have in the cities. As far as continuing legal education goes and camaraderie, as far as bumping into people in courts. We do that between ourselves up here. But you know, there's not that many lawyers up here. You miss out on all of that. You miss out on being members of young lawyers; going along to meetings and asking people things. There's so much you miss out on up here. 34FUO*

This theme of reduced access to professional colleagues is discussed in more detail in the next section when the interview data are considered in terms of social learning in professional communities of practice.

In conclusion, participants perceive a clear and fundamental difference in how they practise law in the country compared to city law practice. Participants say that working in the country increases their visibility to clients, leads to more pragmatic working styles and outcomes, and affects their access to professional resources. They say their increased visibility heightens accountability and can enhance their business viability

through 'word of mouth' referrals. Participants perceive that country lawyers have a pragmatic approach to the practice of law and that often, unlike their city colleagues, their focus is on the most efficient and helpful resolution to a problem. Participants say a disadvantage is their limited access to legal resources, insufficient continuing professional development, and a limited range of experienced lawyers and assistants to work with. The interview data reflect participants' perceptions, nevertheless this belief that country law practice is inherently different to law practice in the city, shapes their cohort identity. Each of these factors has the potential to influence their ethical decision making.

E Community of Practice: Social Learning

This section looks at the social learning dimension of country lawyers' networks. This dimension is explored through two questions which capture data on participants' meeting colleagues and collegial influence on ethical judgment. Participants were asked: 'Can you tell me about meeting with other country solicitors?'[33] and 'When you have a professional dilemma, how do you decide what you ought to do?'.[34] Answers to these questions are coded to themes. These themes include the co-location of the law practice in the same community alongside other lawyers, which is described here as either a cluster community or an isolated outpost. Another theme considers the frequency and purpose of collegial gatherings. Participants mentioned a range of resources used to resolve dilemmas and these are described here as internal to their law practice or as external.

The interview data reveal that for some participants there is a co-relation between the geographic location of the law practice and access to their professional community.[35] This is especially so when their law practice is based in a regional service centre which hosts several law practices.[36] Contact with professional colleagues provides

[33] Question 16 Appendix J Schedule of Interview Questions.

[34] Ibid. Question 17. The word 'dilemma' is used but not explained during the interview.

[35] Whilst 'virtual' or online professional communities of practice which do not rely on face-to-face contact, are a possibility, at the time of this research [September 2018], I had no evidence of their existence for country law practices.

[36] A regional service centre is a country town or provincial city recognised by government as a centre from which services are delivered. The Australian Government has centralised services through regional service centres called MyGov <https://my.gov.au>.

opportunities to explore ethical issues together, to share continuing professional development[37] and to assist clients within a referral network which can help avoid acting in conflicts. Social contact happens within ad hoc groups and through ritualised events. However not all participants experience collegial gathering for professional support. For some, their experience of country law practice is simply lonely and professionally isolating. These isolated participants have scarce resources to sustain them professionally.

1 Geographical Colleagues: Practising Law in a 'Cluster' or in an 'Outpost'

Although there is no national data on the geographic location of country law practices, as was pointed out in Chapter II Research Context, there is some limited data available on the location of public law practices.[38] *Figures 15* and *16 Geographic Clustering of Public Law Practices* below consolidate this data on public law practices across the seven Australian jurisdictions. In this research I use the term 'outpost' when there is only one law practice in that community, and the term 'cluster' when there are several co-located law practices in the same community.

These data show that whilst there are 33 country towns with single public law practices, there are 51 towns which have 'clusters' of multiple co-located practices. For example, of the 18 country towns which have three co-located public law practices, Queensland and New South Wales each have four towns with three public law practices, whereas Tasmania, Northern Territory and South Australia each have one town with three public law practices. These data, on public law practice alone, do not reveal the complete picture as country towns with a single public law practice are likely to also have a private law practice.[39]

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[37] In Australia, each lawyer must undertake a mandatory 10 units each year of 'continuing professional development' or CPD. *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules*, 2015 (New South Wales).

[38] This data is collated from publicly available directories from the jurisdictional law societies, Aboriginal Legal Services, Family Violence Prevention Legal Services and the National Association of Community Legal Centres. Data is unavailable for private law practices.

[39] Due to the lack of data on the location of law practices, it is difficult to develop an accurate description of the 'cluster' and 'outpost' phenomenon. Tangential New South Wales research, focusing on recruitment and retention of country lawyers, reveals that there are 19 local government areas without any resident lawyer. Suzie Forell, Michael Cain and Abigail Gray, *Recruitment and retention of lawyers in regional, rural and remote New South Wales* (September 2010). Geographical mapping of law practices has informed the Legal Aid Commission of New South Wales Regional Outreach Clinic Program Legal Aid NSW, *Regional Outreach Clinic Program* (6 March 2017) < http://www.legalaid.nsw.gov.au/what-

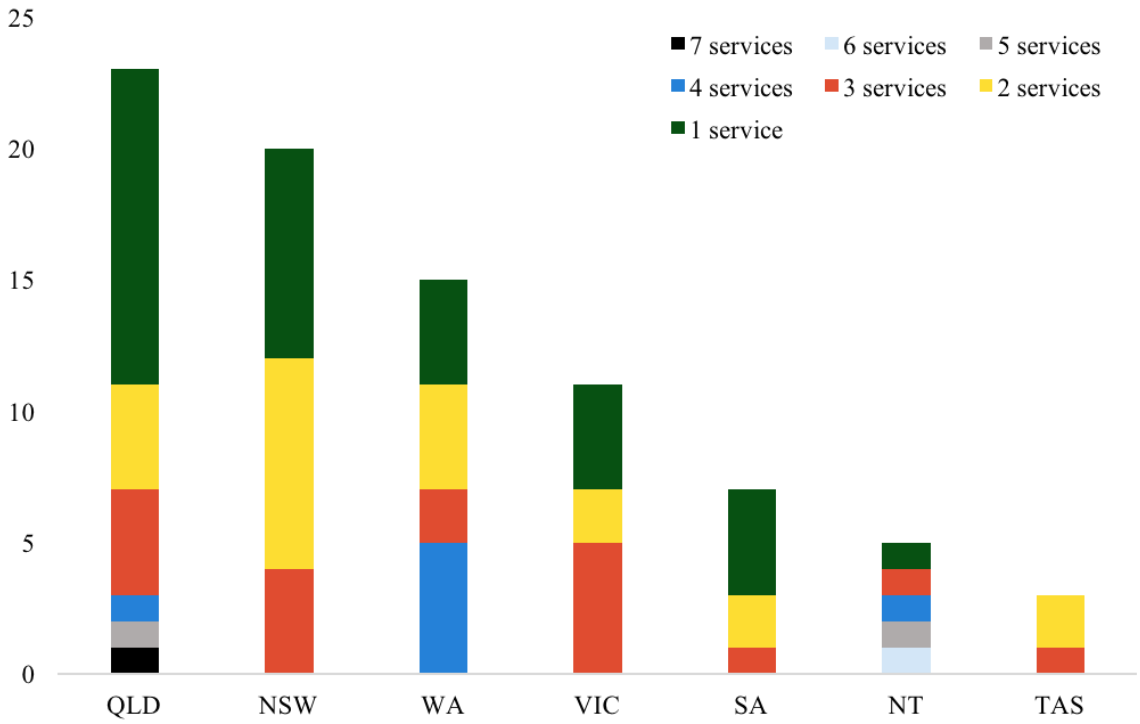
Figure 15: Geographic Clustering of Public Law Practices (data)

Number of services in same town	**QLD**	**NSW**	**WA**	**VIC**	**SA**	**NT**	**TAS**	**Total towns**
7 services	1							1
6 services						1		1
5 services	1					1		2
4 services	1		5			1		7
3 services	4	4	2	5	1	1	1	18
2 services	4	8	4	2	2		2	22
1 service	12	8	4	4	4	1		33

This same data is presented as a bar graph in *Figure 16 Geographic Clustering of Public Law Practices* below. The green bar reflects the number of towns in the jurisdiction which have a single public law practice, the yellow bar represents the numbers of towns with two public law practices and so on. For example, in Queensland, twelve towns have a single public law practice with one town having seven public law practices.

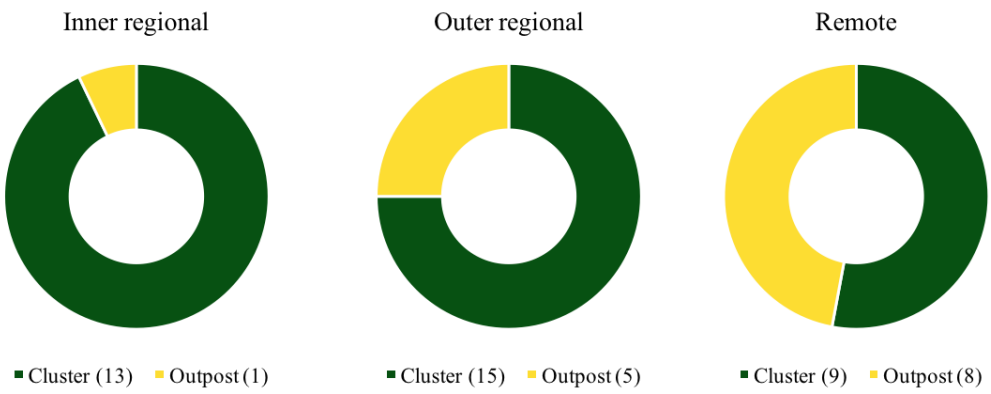
we-do/community-partnerships/regional-outreach-clinic-program> which provides visiting lawyers to country communities without a resident lawyer.

Figure 16: Geographic Clustering of Public Law Practices (graph)



Unsurprisingly, the interview data confirm that as geographic remoteness increases, fewer participants are in a cluster with other law practices. *Figure 17 Percentage of Participants in a Remoteness Area Co-located in a Cluster* below shows that 71 per cent of research participants from inner regional areas are practising law in cluster communities. A similar result of 70 per cent for participants from outer regional areas are in clusters whereas only 53 per cent of remote or very remote participants are co-located with other law practices.

Figure 17: Percentage of Participants in a Remoteness Area Co-located in a Cluster



When lawyers share the same geographic community, there are more opportunities for either 'accidental' professional contact (that is, the unplanned contact with colleagues) or 'designed' contact (that is, more formalised opportunities to gather with colleagues). Co-location or clustering of law practices within a geographic community provides scope and opportunity for participating in both these activities which can be conceptualised as local professional communities of practice. A remote participant described the beneficial effect of practising in a cluster which facilitates the referral of legal work:

> *We have a kind of an unofficial buddy system in some of the firms that we work quite closely with. So if we can't do [a matter] we refer it to this lawyer. If it's criminal, it goes to one of those two big firms. If it's something we can do, but it's something we don't have time for, it goes to this lawyer. 42FVI*

By contrast, participants practising in an isolated 'outpost' community lamented their isolation:

> *One of our awful issues is … you're on your own, you know. I had an opposition [solicitor] here from 1984 to 1994. We were great mates, even though we were in opposition we used to go to the pub, we used to talk behind our hands about our clients. At one stage we were almost saying 'You can have this client and I'll take that client' sort of thing. He unfortunately died of a heart attack prematurely. I still miss [him]. He was someone who was fair, you could bat it off someone. For a long, long time I was by myself… 50MVR*

One participant who relocated to an outer regional area after practising in the city misses the accidental sense of professional community which comes from walking the same street with other lawyers:

> *What I miss about working in the country is the informal way it used to always happen in the street. People go on about Adelaide and about Goodge St being the legal street in Adelaide. I worked there as a lawyer for eight years before I came up here. And it was invisible to me, until I came here and didn't have it anymore. There, on a daily basis you go down the street to get a coffee or get some lunch, and I would run into one or two other solicitors or barristers from other practices that I knew. And I didn't realise until I was here, that that wasn't happening anymore, how good that was. And how much it kept me in touch. 02FV0*

The interview data suggest a connection between the lawyer's location in either an outpost or cluster and their access to professional support and referral networks. A consequence of referral networks is how participants manage conflicts of interests.

When conflicts arise, referrals are easier for some but for others without referral networks, conflicts of interest become problematic.[40]

> *You run across more conflicts overall than you would in the city and there is less referral base to remove that conflict, put it that way – or to satisfy the conflict. 19MUO*

This phenomenon of professional contact is considered below using the interview data to reveal the frequency and purpose of gathering with professional colleagues.

2 Frequency and Purpose of Contact with Professional Colleagues

Many participants did describe frequent and diverse contact with colleagues. This contact is either through ad hoc informal groups, focused on court sitting days, or through formal law society events. Other participants indicated that they desire more collegial contact and are acting to remedy that deficit.

(a) Ad hoc Gatherings

Several participants from cluster communities described how they gather in semi-formal ad hoc events with a specific agenda to discuss service delivery. This happens when that cluster is the regional service centre. The quote below is from a participant practising law in a remote town which functions as a service centre. Her example of collegial gathering closely resembles the archetype professional community of practice. The learning group is self-organising, with a negotiated memorandum of understanding, diverse membership and a specific agenda. This group also functions as a referral network. When a law practice is unable to assist a client, other lawyers within the cluster accept a warm transfer.

> *Obviously you get to know lawyers in the area. Actually in [names her town] it is a fairly friendly close community network. We also run a community legal network where we actually meet monthly or bimonthly to raise any issues that have come up … anything that we can cooperate in. Issues that are coming up in the court – that we want to raise with the court. Issues that are coming up with clients, or how we can better work together. We do have a memorandum of understanding between the local community legal practices where the intent of how we cooperate is laid out very broadly. 28FVR*

[40] For further exploration of the importance of referral networks see the discussion on professional communities of practice in Chapter V *The Story Understood.*

Another participant in a remote community echoed this sentiment that it is useful to gather professionally with colleagues to discuss service issues:

> *Legal Aid has just started an afternoon discussion group and we meet on Friday afternoon once a fortnight or once every three weeks. That is more of a formal setting. We have that aspect but just because it is a small town all the lawyers know each other and socialise together as well. 37FUR*

Although these gatherings are focused on service improvement, another participant from a cluster in a regional service centre spoke about regular Friday lunches when the local lawyers and visitors talked 'shop'.

> *There's lunch most Fridays at the pub. There's a lot of shop talk really. That's what we've got to talk about. It's an open invitation to all the lawyers. We talk about the courts or recent things that have come up. 03MVO*

In both of these examples it is unclear how these ad hoc quasi social, collegial events started, or who is responsible for their maintenance. It is possible that they are self-sustaining and rise or fall on the interest of members. The participants' comments indicate that members value their participation.

(b) Court Events

In addition to ad hoc, self-forming groups, more formal court events provide an opportunity for lawyers to gather and to discuss practice issues. Participants described informal gatherings with colleagues on court sitting days, or at the end of a court circuit week:

> *There is also an unofficial but regular event when the Magistrate visits … One of the local profession invites the Magistrate to share a meal. We invite the prosecution team and the court staff team. So we don't go along and chat with the Magistrate to the exclusion of the prosecution. They are invited. I package it as 'Get to know the region's lawyers' and our 'read' of the region. Shop is talked a little but not too much. 06FUO*

A remote participant working in an isolated outpost said he had monthly professional contact with the public sector lawyers when they visited his town for the court event:

> *Because I do legal aid, I deal with them on an almost weekly basis now. Because there are our two Aboriginal Legal Service solicitors in [names remote regional centre], I see them at [the] local court once a month … In general practice, conveyancing and probate, you see very few lawyers there. 50MVR*

With its calendar of court sitting dates, courts bring lawyers together and host the 'court users' meeting. This meeting provides an opportunity for justice stakeholders to gather to discuss service provision.

> *We have a court users meeting convened from time to time, which doesn't just involve lawyers, the court registrar invites people, like Families SA and the police, and as well as us. 07MV0*

The visiting Magistrates and barristers attending court events are another source of professional support. A participant in private practice in an outer regional area described how the visiting Magistrate organises a professional development event for the lawyers in that town.

> *We have various people come up from time to time. If we have barristers up on a case, often we'll ask them to do a paper while they're here, and invite the other practitioners along. I also organised an ethics CPD through the court system, through the local magistrate. She [organised] a district court judge and most people and the prosecution would get together for those. And then the magistrate put a lot of work in … she had a couple of scenarios that she sent out to people and there was also a question box to put different things in about legal ethics… There's quite a few law firms and there's not the degree of isolation, and some of the senior practitioners, if you have difficulties they don't mind somebody ringing up and discussing the topic with them or whatever, so it's quite good in that regard. 29FVO*

(c) Law Societies

Some participants were active within their regional law society or participate on practice committees within their state law societies which provide more formal opportunities for professional contact. Three jurisdictions, Queensland, New South Wales and Victoria, have regional law societies which foster and support local communities of professional colleagues.

> *The (regional) Law Society is a good law society because it's fairly active. They have meetings every six months and with those meetings they have CLE [continuing legal education] because we need to do 10 units of CLE each year. We have the meeting and then we go out for tea. And it's good because you get to meet, well obviously we know most of them, but we sit down with them and talk to them when you are not in a work-based atmosphere. You get to know them. So if there is an issue that comes up, I can ring up [names a series of colleagues in adjoining towns] because I know them and I chat with them. You can work things out and it's less adversarial. And we'll work towards some sort of solution. I suppose that prevents litigation and saves our clients' money.13MV0*

Whilst South Australia and Western Australia law societies do not offer regional law societies, they have 'country practitioners' committees' as a forum to discuss issues of mutual interests.

> *I have attended a couple of seminars, for example, the law society country seminar, that goes for a couple of days. And also the other country update, there's a few of those and they aim to try and accommodate for what everyone needs, so that includes stuff like legal ethics. … It was a panel and they were working with hypothetical situations and talking about what the best approaches were and they had someone from law claims there and … people from various types of backgrounds in the profession and had real cases with people, de-identified, and then used them as examples of what not to do basically. 5MVO*

Several participants also described bilateral involvement with the law societies. This reciprocal relationship involves receiving 'continuing professional development' and contributing a 'country perspective' to the law society. One private early career lawyer makes the monthly trip to the capital city to represent the views of his local profession and early career lawyer cohort.

> *Once a month … normally leave at midday and have the country lawyers' committee meeting … You see what else is coming up in the other areas of the state. Often it's the same issue. 03MVO*

Occasionally the law societies, or other continuing professional development providers, host professional development events either in the regional centres, or capital cities. The opportunity to take a break from practice and to socialise with professional colleagues can become a fixture on the lawyer's calendar. One example of an annual gathering of country lawyers is *The Armidale Weekend* held at the University of New England in northern New South Wales. For many country lawyers this is an important fixture in their calendar.

> *The Armidale weekend. The primary time to meet is the first weekend in February. Law conference in Armidale. 52MVO*

Many participants revealed that they have access to regular relationships; however, others have not made those connections and they lack local collegial support.

3 Professional Isolation

Several participants recognised professional isolation as a problem. When asked about their contact with colleagues and resources used to resolve ethical dilemmas, their responses reveal that some are taking action to address that isolation. A remote public sector lawyer is the only lawyer in her community and over time has come to appreciate that she needs more connection with colleagues:

> *I am just discussing at the moment with management, ensuring that I have more opportunity to meet with other solicitors [names nearby town] to debrief. … I'm looking at putting those debriefings and supervision in place because I don't feel I am meeting enough of those solicitors. Occasionally I talk on the phone to a couple of other Family Violence Prevention Legal Units, and I meet other lawyers who are on circuit here when they come through once a fortnight, but of course that's only brief. But, yes, I don't get enough contact I think, at the moment, and that's something we're about to change. 31 FUR*

The cost of travel from remote areas to the city can limit professional contact. When asked about contact with colleagues a remote public sector lawyer responded:

> *I don't really. Not really, only if we ever come across to [city], which isn't that often. And we do remote circuit trips and once a month a [city] lawyer will come out.* (HM: So how do you get your CPD?) *That's a really good question. It's really hard out of this office. Generally video link, maybe – it didn't work for about six months. Telephone, which is horrible, worse than video link. And sometimes we go into [city], maybe once a year. 39FUR*

Outside specific events, it is difficult to meet colleagues. One remote participant mourns the loss of his 'buddy'; a colleague matched to him through a professional support scheme offered by the professional indemnity insurer:

> *At one stage, thanks to Law Cover, we had a buddy system, and that worked excellently but I'm afraid all the buddies have all passed on. We had like minds and things, that was very helpful, but unfortunately … that fell by the wayside over the years just through attrition. But I consult a number of people to get assistance. I ring my old boss on occasions. I ring a great old friend of mine who's just retired. And I use an old school friend. He and I often consult when we have problems too difficult to handle. 50MVR*

This interview data touches on the lived experience of participants working in isolated outpost communities. Their professional isolation arises from the accumulating deficit of the cost of travel, limited access to information and poor communication technology

reducing opportunities for continuing professional development, and the absence of formal support systems for supervision and debriefing.

4 Fragmentation Within the Legal Profession

Some participants indicated that although there are other lawyers nearby, they chose not to actively participate in the professional networks with them. This may be because they perceive their colleagues have different interests and there is no shared agenda.

> *We do not get to talk to other lawyers that much. There is a reasonably large community of private solicitors in [regional centre] where we are based. There is a local law society and I am on the email list for that, and I get the emails but we do not actively participate in that network. The times we get to speak to other solicitors is when we are either making or accepting referrals. 33 MUI*

One participant believes there is a difference between the public and private legal sectors. He is not inclined to participate in the regional law society as they have a different world view which is 'commercial'.

> *In this remote area we've got the [regional] law society, but their focus, and I don't mean to sound snobby, their focus is really commercial … I think they have a different world view of things compared to us. We have our own conferences, our own CLE training and all that sort of stuff, but I would not say there is a great network. It is a bit of a shame really. The private and the public don't really talk to each other that much. 22MUR*

One early career lawyer joined the regional law society but is not participating in any events. Her perception is that there are no other 'young' lawyers in her region.

> *I recently joined the [regional] Law Association. They have occasional dinners and conferences, but I have not attended any yet. I did go to the Rural Issues Conference in Sydney last year. I get to know the lawyers that I work with here and the other lawyers that work in [regional town] over the phone but not socially. There are no local young lawyers. 35 FVO*

When asked about meeting with other lawyers, a remote lawyer working in a jurisdiction without a regional law society saw his colleagues as competitors with a short term commercial interest in his community.

> *Every now and again you'll get a mob that will decide that they will descend on [remote town] and I've heard it referred, not by me, but they've been referred to as the seagulls,*

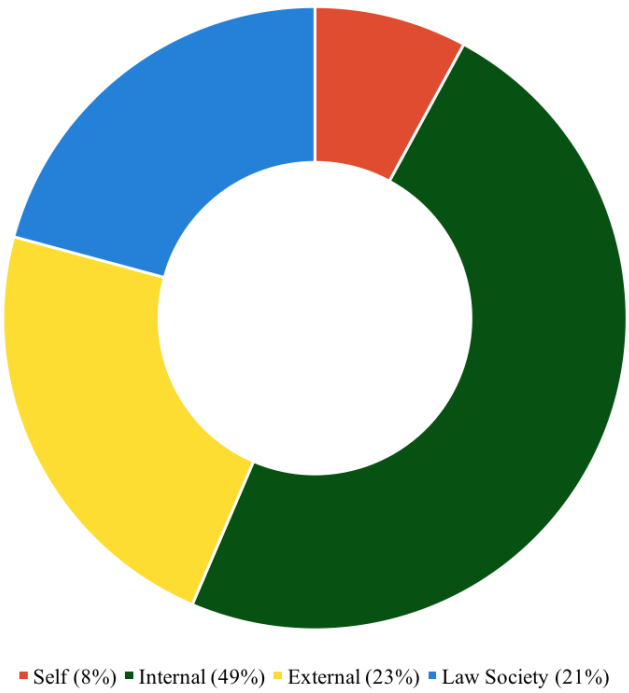
> *who come in and try to do their bit. But it's such a long way, and it's a thin economy and generally they just give up on it because it's economically not viable. 24 MVR*

These data suggest that even when colleagues may be in the same geographic community, that does not automatically mean that they are gathering professionally in a way consistent with the community of practice concept.

5 Resources Used to Resolve Ethical Dilemmas

When asked about the resources used to resolve ethical dilemmas, a small number of participants (8%) reported that they simply made the decisions themselves (see *Figure 18 Resources Used to Resolve a Dilemma* below). Just under half (49%) of the participants discuss ethical issues with colleagues within their law practice.[41] A further 43 per cent of participants use colleagues external to their law practice, sourced through informal networks and law society ethics counsellors. There is an overlap with 12 per cent of participants using both internal and external resources to resolve ethical dilemmas.

Figure 18: Resources Used to Resolve a Dilemma



[41] This option is not available to the sole practitioner and the data are not disaggregated to this level. Six of the 52 participants were sole practitioners.

Perhaps uniquely because of the larger size and collegial culture within their law practice, some participants reported frequent access to colleagues with whom they discuss ethical dilemmas. Responses below reflect a practice culture which normalises the discussion of ethical issues (labelled in the data as 'internal resources'):[42]

> *We have regular practice meetings so all the solicitors attend and then we can take any difficult issues to the practice meeting and that is where it will be discussed and a decision made about what to do. 20FUX*

> *I am still restricted and my supervisor is just in the next office. I am in and out of the office all day just running things past her. 37FUR*

> *Basically I call my managing solicitor … Sometimes I could call her a few times in a week, and then other times it might go a few weeks with no issues. 39FUR*

Internal resources used to resolve ethical dilemmas include support staff and lawyers in other branch offices within the same law practice:

> *I use fellow lawyers in my office and the support staff. A lot of them, even though they are not lawyers, have been in this job a lot longer than I have and they are very knowledgeable, so I will either go to one of the lawyers or I will ask an assistant or support staff. 35FVO*

> *We are the one service for the entire state. We have a concentration of pretty experienced lawyers … who I can turn to. We've also got some senior in-house barrister types that I can go to if I had a dilemma about something. 30MUR*

Twenty-three per cent of participants seek ethical advice from colleagues outside their law practice, labelled here as an 'external resource'. External colleagues include city-based barristers:

> *I use barristers a fair bit. Through our legal connections we know who's good, who's not. We find out who's good from all kinds of perspectives including the bench. 03MVO*

> *At a professional level I have barristers in Perth. If I have any issue I talk to them. Two or three of them I have been dealing with for over 15 years. 25MVR*

[42] Under s 35 of the *Legal Profession Uniform Law* the principal of the law practice is responsible for the professional conduct within the law practice. This provision creates a direct chain of command and control whereby ethical discussions may be more of an imperative now that the principal is responsible for the ethical risk.

External colleagues also include lawyers met through local or state professional networks including the regional law society:

> *Through the contacts [with the regional] Law Society I ring other solicitors and ask their advice or sort of bounce ideas off them. 13MVO*

> *I will ring two lawyers, one in [next country town] with the Community Legal [Centres] and ask their advice, and another one in [another country town] and they've been helpful … outlining what options I would have available. 33FUR*

> *If I have issues relating to [an ethical issue] we have a state [professional indemnity insurance] representative. So I will discuss matters of concern with her. At the end of the day she has a strong recommendation, about how to proceed. We operate in a fairly collegiate way; a consultative way. There was a lawyer, quite a senior lawyer in town who mentored me informally quite a bit when I was a very young lawyer in town. In recent years I have not needed to call on him. In the past I knew that I could always speak to him if I was worried about anything. I have become one of the old grey ones. 40FUO*

Participants also discuss their professional dilemmas with the ethics counsellors in the law societies. Twenty-one per cent of participants reported phoning the ethics counsellors at their respective law societies.

> *I would first call the law society and speak to their ethics people. In my time I have probably called the law society three or four times in the last few years. Maybe once every six months. 33MUI*

Several participants reported using ethics counsellors as their first point of contact on ethical issues.

> *Look honestly, I ring the ethics section of the law society. That's my first instinct. When I have young lawyers they always ask the same question 'How do you deal with ethical issues?' It's really simple. I will ring. I will talk it through with an ethics lawyer. 41FUO*

One participant revealed an ongoing discussion between himself and the law society ethics counsellor about an issue.

> *Well [the name of the law society ethics solicitor] is the first point. He and I have argued for years over [a particular ethical] question …. sometimes I've agreed with him and vice versa. 49MVO*

For other participants, the option of phoning the law society ethics counsellor is their last resort:

> *I have rung the Law Institute. I don't do it too often. I had a problem with a client a few years ago and I rang the Law Institute to see what they would recommend. 10MVO*

> *When you first go into practice … to me it was a lot more black-and-white. It was more like you know 'I cannot touch that. Yeah I can touch that.' Then when I first went into regional practice, I was getting advice all the time from the law society. 28FVR*

Twelve per cent of the participants use several resources simultaneously, consulting both internal and external colleagues. One participant in private practice in an inner regional area said:

> *I would think about it myself. I try and think about what does my gut tell me. If something has prickles on it, my gut will tell me that. I trust my instincts on things. If I am really unsure then I would speak to [my principal]. Alternatively, there is always the law society ethics area to contact. I could contact them and ask them if it was a real doozy. Sometimes it is an issue that does not just affect me, it may affect someone else in the firm. If it was a conflict of interest issue it might be that one of the solicitors has acted for someone I know, or acted against someone I know. I might go and talk to them about that because I could not work it out myself. I am not sure myself whether it is a conflict or not, so I will go and talk to them about that. 01FV1*

Participants explained how they sometimes use more than one resource to help them work through an ethical issue:

> *I'll use two resources at the one time. If I know of someone, I'll go to a senior member of the profession or someone certainly skilled in the area and also use the resources of [names her internal professional colleague] who is a recent graduate who has research skills and the latest of this and that. 06FU0*

Another participant in public practice in an outer regional area said:

> *I talk to the other lawyer [inside his law practice]. I talk to several other senior practitioners in town who have made themselves available or there is a couple in private practice and [there] is one at legal aid so I ask colleagues. That happens maybe once a month, sometimes three times a week. 15MUO*

In summary, the participants use informal professional networks to resolve ethical dilemmas. These networks could be colleagues inside their law practice, or external colleagues known through the regional law society or through broader professional contacts or a combination of each. It is this network of advice sources which will be examined further using the conceptualisation of professional communities of practice.

F Summary

The interview data provide a fine-grained picture of the factors which influence ethical decisions within a country law practice. It is a story of lawyers influenced in their ethical decision making foremost by their workplace colleagues, then by their professional community both in its formal and informal forms, and seldom at the direction of external regulators.

Although initially I assumed the geographic location of the law practice would work essentially as a proxy for professional isolation, the phenomenon of co-location of law practices, even in geographically remote communities, reduces that isolation. Nevertheless, on a simple comparison of data, the degree of remoteness does appear to correlate to what participants regard as ethically proper in their handling of conflicts. As geographic remoteness increases, lawyers in this research are seen as less likely to turn clients away, preferring to engage in a triage assessment of relevant factors and there is a consensus amongst them that these approaches remain ethically sound.

The picture told of country lawyers is one that reveals geographic remoteness affects both the way lawyers see themselves in comparison to their city colleagues and the way they identify and respond to conflicts of interest. The interview data suggest three defining features of that picture. The first feature is that with increasing geographic remoteness participants are less likely to use threshold screening. Next, the more remote the law practice, the lower the percentage of participants who report ‘turning away’ the client if threshold screening reveals a possible conflict. Further, with increasing remoteness the lawyers in this research are more likely to engage in a process of triage assessment to discern if a possible conflict could be ‘worked around’. Although I did not question participants about their motivation for using the triage assessment process, I surmise here that its use maximises service delivery and possibly assists in providing access to justice. The process involves the synthesising and weighting of relevant factors and is a practical example of the nuanced exercise of professional judgment.

These three features offer an insight into the impact of geographic remoteness on ethical legal practice. Any conclusions are necessarily tentative given the size of the research cohort and because this possible relationship between ethical practice and geographic

location is a subjective exercise gleaned through the numerical and qualitative coding of participants' responses.

In the next Chapter V *The Story Understood,* I analyse the interview data using the theoretical framework developed in the Chapter III: *Methodology*. The data reported here is analysed with the theoretical perspective of regulatory theory, natural law theory of legal ethics and the concept of community of practice to see if these lenses assist in explaining and understanding the distinctive approach that country lawyers take in their ethical conduct, particularly in reference to conflicts of interest.

V THE STORY UNDERSTOOD: ANALYSIS OF THE INTERVIEW DATA

In this Chapter I analyse the interview data using the three stated lenses. Initially, my analysis responds to the provocation of the research hypothesis, then I offer a more nuanced analysis of the interview data using the analytical lenses of the theoretical framework. Applying the theoretical framework to the results offers insights into the conclusions which can be drawn from the research. These conclusions are discussed further in the next Chapter VI *Discussion.*

A Does the Data Support the foundational Hypothesis set?

As discussed in Chapter III *Methodology*, the research hypothesis is '*That geographic location affects the way that lawyers identify and respond to conflicts of interest.'* Crudely put, the research data do not support the hypothesis. The data do not indicate a primary relationship of influence between geographic location per se, and the way that lawyers identify and respond to conflicts of interest. For this hypothesis to be 'true', the data should reveal a causal relationship between the location of law practices in specific remoteness areas and the lawyers in those areas consistently reporting the same approach to identifying and responding to conflicts of interest. A derivative of that hypothesis would be that different ethical approaches are associated with all law practices in specific geographical areas. This assertion is not borne out by the research data.

The data however does disclose a much more complex story than a causal relationship between geographic location and ethical approaches. The interviews reveal that what participants perceive as 'ethical' depends on their practice context, not its location calibrated by degrees of remoteness. There are many factors which influence the context of legal practice. These factors include the geographic location, the lawyer's practice experience, the client community and the presence of colleagues either within the geographical area, or within the lawyer's professional networks.

The following interview extract, describing the experience of a lawyer from the Aboriginal Legal Service providing legal services to a remote community, gives a flavour of the influence of the geographic context combined with the lawyer's

experience, the client community and the absence of referral alternatives, on ethical decision making.[1]

> *Conflicts of interest are intrinsically difficult anyway. There's no escaping it. You have to mentally untangle what the conflict is, and whether you can deal with the matter or you really have to walk away from it. And that's particularly difficult here, because walking away from it has very severe consequences for the client. Because there's nobody else to help them. So, you're really very adverse to walking away from it, and yet you realise that a conflict of interest is a very serious matter. You can't just go 'I'll pretend I don't know about something'. If you do something wrong, that is your practising certificate, that is your organisation's reputation, that will go right in the toilet. And reputation you can't get back; once it's gone, it's gone. (Male lawyer in public sector working in a remote community .27MUR)*

This anecdote illustrates Landon's concept of structural strain[2] whereby the lawyer must resolve a position which reflects the established ethical standard whilst respecting the norms of their containing community. The lawyer's lived experience also illustrates the concept of ethical acuity and their enlivened sense of purpose. On the one hand the lawyer must practise law according to the established ethical standard. On the other hand, the practice context (people, place and community) require a situation specific response. Here is a remote lawyer navigating the intermediary space between the regulatory structure and the context in which law is practised. Whilst the remote geographic location is the focus for this anecdote, there is a clear sense that this lawyer seeks to personify the rule of law.

To what extent does geographic location affect the lawyer's ethical response? The interview data reveal two practice processes which appear to correlate with geographic location. One factor is that as geographic remoteness increases there is a reported decrease in threshold screening as a means of identifying conflicts of interest.[3] The second factor which correlates with geographic location is that with an increase in geographic remoteness, there is the increased use of the triage assessment process.[4] Whilst the interview data reveals that geographically remote lawyers differ in the way they identify and respond to conflicts of interest, in comparison to their colleagues in

[1] This scene is typical for remote lawyers working in Aboriginal Legal Services. Other examples include lawyers working under time pressure as duty lawyers in the Magistrates Court list days, or offering minimal assistance in legal advice clinics.

[2] Donald D Landon, *Country Lawyers. The Impact of Context on Professional Practice* (Praeger, 1990) ch 8, 119–146.

[3] See above Figures 9 and 10 Geographic Location and the Use of Threshold Screening.

[4] See above Figures 13 and 14 Geographic Location and Triage Assessment.

less remote areas, I argue that these differences are better understood by considering the participant's sector of employment and internal law practice culture, rather than geographic location per se.

Some of these differences in ethical approaches can be explained by looking at how I recruited participants for this research. Lawyers working in remote areas are simply more likely to be working with the Aboriginal Legal Services.[5] The other types of law practices (Legal Aid Commission, Community Legal Centres and the private sector) have significantly less of a presence in remote areas.[6] Consequently, the difference in less threshold screening and more triage assessment occurring in more geographically remote law practices, may be more a reflection of the internal culture and practice within the Aboriginal Legal Service, rather than a finding of all lawyers in remote areas avoiding threshold screening or undertaking the triage assessment.

Aboriginal Legal Services provide many services (welfare support, advocacy, counselling) to clients before a conflict check is conducted. Aboriginal Legal Services have fewer prescriptive requirements about the collection and use of data and rely on Aboriginal Field Officers with a deep knowledge of their community to identify conflicts. Arguably the conflicts that do matter, that should be avoided, are not technical data conflicts of interest, but relationship conflicts between clients or between the law practice and its community. Anecdotally, the Field Officers identify and respond best to these more significant conflicts. In addition to relationship screening, the Aboriginal Legal Services take a different approach to the collection and storage of confidential client information. If minimal data is collected and that data is removed after two years, the likelihood of identifying a disqualifying conflict is reduced.

By contrast, lawyers in Community Legal Centres operate very differently. Their mandatory service standards and risk management guidelines require extensive data collection, the retention of that data for seven years, and threshold screening before any legal service is provided.[7] Community Legal Centres rarely use information barriers between their different business units (tenancy advice, domestic violence court support, youth justice, consumer advocacy) and integrate all their client data into the one

[5] See above Figure 1 Geographic location of Australian Public Law Practices.

[6] In this research, the data was not analysed by type of law practice beyond 'public' and 'private'.

[7] National Association of Community Legal Centres, *Risk Management Guide* (2nd ed, February 2017).

database. This concentration of client data across all non-legal ancillary services, combined with mandatory threshold screening, means potential clients seeking early intervention legal assistance are conflicted out of the Community Legal Centre service.

Lawyers in the Aboriginal Legal Service do not have such third party regulatory prompts towards threshold screening and do not undertake it, until the matter progresses to an ongoing case.[8] As a consequence, in contrast to their colleagues in the Community Legal Centres, lawyers in the Aboriginal Legal Service sector provide a high volume of early intervention, and discrete legal services to clients in civil, criminal and family law. This possible explanation for the correlation between geographic location and ethical conduct (namely, that it is the internal law practice culture not the geographic location which influences lawyer conduct) is difficult to verify in the absence of clear data revealing the location and sector of employment of country lawyers. But it does point to the fact that practice type is a stronger influence on ethical behaviour as regards conflict of interest than geographic remoteness per se.

Apart from geographic location, it is clear from the interview data that the most influential factors which shape the way that research participants identify and respond to conflicts of interest are the formal and informal systems within the law practice. These systems are collectively referred to as 'ethical infrastructure'.[9] These forms and processes within each law practice were both implicit and explicit. In *Figure 19 Comparative Approaches to Identifying a Conflict of Interest* below I summarise the diversity of interview responses revealing the 'who', 'what', 'when' and 'how' of the process for identifying conflicts.[10]

[8] This process was explained by a lawyer from the Northern Australian Aboriginal Justice Agency.

[9] For more on this concept see Parker, Christine et al, 'The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour' (2008) 13(1) *University of New South Wales Law Journal* 158.

[10] Distilled from participant interview data in Chapter IV The Story Told.

Figure 19: Comparative Approaches to Identifying a Conflict of Interest

Factors	**Aboriginal Legal Service**	**Community Legal Centre**	**Legal Aid Commission**	**Private**
When is data collected?	When an ongoing case is opened.	At first contact.	When an ongoing case is opened.	When a client matter is opened.
What data is stored within the law practice?	Minimal (Name, contact details)	Everything (name, alias, date of birth, contact details, other party, matter details)	Minimal (name, contact details)	Everything (name, date of birth, contact details, other party, matter details)
Who collects the data?	Field officer or lawyer	Administrator or lawyer	Administrator or lawyer	Administrator or lawyer
Where is the data stored?	Computer database and paper files	Computer database and paper files	Computer database and paper files	Computer database and paper files
Is the database local or jurisdictional?	Local (with option for jurisdiction)	Local	Jurisdiction	Local
How is the data accessed?	Computer data check	Computer data check	Computer data check	Computer data check
How long is the data held?	2 years	Indefinitely (a minimum of seven years)	Indefinitely (a minimum of seven years)	Indefinitely (a minimum of seven years)
When is the screening for conflict done?	When a first contact progresses to an ongoing matter a 'case' is opened.	First contact	When a first contact progresses to an ongoing matter a 'case' is opened.	When a first contact progresses to an ongoing matter a 'case' is opened.
How does the law practice respond when a conflict is identified?	Discretion exists: seek approval of principal legal officer. A limited retainer may be prepared to provide a discrete service.	Law practice is disqualified and declines to act. Will consider a warm transfer to another law practice.	Discretion exists: seek advice from senior lawyer. May cease to act and refer client away. Give client general explanation.	Discretion exists: discuss with a partner. Seek informed written client consent to continue to act. Refer client away.

In conclusion, the influence of geographic location was found to be an inadequate calibrator against which to understand country lawyers' ethical decision making.

Something more nuanced is afoot. The next section uses the theoretical framework as a means to tell this more nuanced story.

B Understanding the Data Using the Theoretical Framework

In this section I expand upon the brief introduction to the three theoretical perspectives introduced in Chapter III *Methodology*. The first perspective considered here is Decentred Regulatory Theory which conceptualises lawyers' ethical agency through a co-regulatory relationship, motivated by a shared purpose, between the centred regulator and the decentred regulatee. The second perspective is the Natural Law Theory of Legal Ethics which casts the lawyer as a purposive professional personifying the rule of law. In this role, the lawyer is seen as seeking to give practical expression to the law's implicit (moral) purpose. The lawyer's role is purposive and depends on the situated lawyer using their ethical agency to discern an appropriate ethical response which expresses that purpose. The third perspective in this framework is the concept of a professional community of practice. This concept conceptualises the moderation of the lawyer's ethical agency through participation within a group of professional peers. Ethical dilemmas can be discussed in a forum which is committed to strengthening service delivery and professionalism. Through the moderating influence of professional colleagues, the ethical standard can evolve to cultivate competent and diligent lawyers committed to the administration of justice.

All components of the theoretical framework share a common thread of seeing ethical agency encouraged through devolving decision making to the situated lawyer responding to their community. Each perspective foregrounds professional autonomy as a normative good.

C Does the Lens of Decentred Regulation Explain What is Occurring?

Decentred regulation not only tolerates different expressions of ethical conduct but, provided there is alignment with the regulatory purpose, encourages diverse expression. The articulation of a shared regulatory purpose unites both regulator and regulatee and devolves responsibility for ethical decision making to the lowest possible level. As a consequence of this devolution of responsibility, there should be an opportunity to foster diversity, professional discourse and evolution of tailored solutions. Understood

in this way, decentred regulation holds the promise of removing the dissonance between bar and paper norms as both the centred regulator and the decentred regulatee share an understanding about professional norms.

The discussion of whether what was observed from the data is explainable in terms of decentred regulation is considered in three parts. I begin by reviewing the theory of decentred regulation. Next I apply that theoretical lens to the interview data which reveals what is happening in everyday law practice. Finally I offer observations about how the theory of decentred regulation used in conjunction with this analysis of the interview data lends itself as a means to assist in the cultivation of ethical acuity.

1 An Explanation of Decentred Regulation

Julia Black's theory of decentred regulation considers other regulatory influences beyond the posited professional conduct rules.[11] Acknowledging that the regulatory effort can be complex and fragmented, Black writes that the key feature of regulation is the 'intentional, systematic attempt at problem-solving'.[12] She suggests that, ideally, this intentional effort is a shared endeavour between regulator and regulatee whereby they work together to deliver identified, shared outcomes. To understand the breadth of regulatory influences which shape conduct, Black suggests the following working definition for the concept of 'regulation':

> [T]he sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.[13]

In offering this broader definition of regulation, Black invites the possibility of 'practical discussions of how regulation might be improved in some way'.[14] These ways

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[11] Julia Black, 'Critical Reflections on Regulation' (2002) 27(1) Australian Journal of Legal Philosophy 1; Consider the second recommendation from the earlier research by Louise Kyle, Richard Coverdale and Tim Powers, Conflicts of Interest in Victorian Rural and Regional Legal Practice (Deakin University, 2014), 19 to *'acknowledge, encourage and facilitate practitioners' use of a "principles-based" approach to matters of conflict of interest, based on an application of professional judgment, which recognises context and individual circumstances when meeting the commitment to professional ethics and the professional practice rules.'*

[12] Black 2002, above n 11, 26.

[13] Ibid 26.

[14] Ibid 25.

include the recognition of regulatory influences in 'previously unsuspected places'.[15] Discovering these places of influence can assist in resolving problems.

> No single actor has all the knowledge required to solve complex, diverse and dynamic problems, and no single actor has the overview necessary to employ all the instruments needed to make regulation effective.[16]

Within this broad domain of regulation, Black differentiates between 'centred' and 'decentred' regulation. She asserts that centred regulation largely fails because of the 'dynamics, complexity and diversity of economic and social life, and in the inherent ungovernability of social actors, systems and networks'.[17] The centred regulator lacks knowledge and information about the problematic conduct and centred sanctions are unsophisticated and often inappropriate.[18] Rather than insist on prescriptive obedience to posited rules, Black argues it is preferable to identify the cause of problems and to become curious about addressing those causes.

Black also argues that decentred regulation is more effective in influencing behaviour as it fosters a collaborative relationship between the regulator and regulatee. The key motivator in a decentred regulatory system is the shared regulatory outcome.[19] A decentred regulatory approach relies on the lawyer/regulatee's motivation to explore their ethical choices independent from, but informed by, the regulator's oversight. In our context, this approach would invite and encourage lawyers to develop tailored 'place-based' responses to ethical issues. In giving effect to the shared ethical purpose, the aim is not to impose a 'one size fits all' model on the lawyer but to facilitate responses which are appropriate to both the size and complexity of their law practice.[20]

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[15] Ibid 10.

[16] Ibid.

[17] Ibid 8.

[18] Ibid 3.

[19] Decentred regulation is also referred to as 'outcomes based regulation'. Andrew Hopper and Gregory Treverton-Jones, Outcomes Focused Regulation. A Practical Guide (The Law Society (UK), 2011) 11.

[20] The current regulatory system in the United Kingdom suggests such responses should be appropriate to the 'size and complexity' of each law practice. See Solicitors Regulation Authority, *SRA Code of Conduct (version 18)* (1 November 2016) <https://www.sra.org.uk/solicitors/handbook/code/content.page> Outcome 3.2 and Principle 1B (4.1) in Solicitors Regulation Authority, SRA Handbook Version 19 (2017) <https://www.sra.org.uk/handbook/>.

The decentred regulatory stance is one of curiosity, where both regulator and regulatee acknowledge that 'information is socially constructed [and] there are no such things as objective social truths'.[21] The essence of decentred regulation is that proactive oversight should come from the lawyer themselves and from peers.[22] In this decentred regulatory environment regulators inform and advise but do not direct conduct unless there is a sanction as a result of a disciplinary matter.[23] Decentred regulation would recruit lawyers to the shared professional purpose of strengthening ethical conduct.

Black's theory on decentred regulation, which has significantly informed regulatory change in the legal profession in the United Kingdom, is characterised by five elements: complexity, fragmentation, interdependencies, ungovernability, and a rejection of clear distinction between public and private.[24] Prescriptive professional conduct rules are replaced with aspirational ethical principles targeted at generating shared outcomes.[25] In the United Kingdom, every regulated law practice must now have a Compliance Officer to ensure the law practice has effective systems, appropriate to its 'size and complexity', which deliver the identified outcomes.[26]

Black's decentred regulatory paradigm also recognises, and embraces the more subtle, social influence of the practice context.

> Seeing the nature and problems of regulation from a decentred perspective can be very stimulating. It can open up the conceptualisation, and thus cognitive frame, of what 'regulation' is, enabling commentators to spot regulation in previously unsuspected places.[27]

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[21] Black 2002, above n 11, 5.

[22] In the United Kingdom each law practice must nominate a Compliance Officer for Legal Practice (COLP) who has a personal obligation to ensure the law practice complies with the regulatory obligations. See Part 4 of the United Kingdom Solicitors Regulation Authority *Handbook,* above n 20; Sundeep Aulakh and Joan Loughrey 'Regulating Law Firms from the Inside: The Role of Compliance Officers for Legal Practice in England and Wales' (2017) Journal of Law and Society.

[23] In this research we used the generic term 'regulator' and participants variously referred to the regulators as the professional indemnity insurers, complaints organisations, law societies.

[24] Black 2002, above n 11, 4.

[25] Hopper and Treverton-Jones, above n 18 . See discussion on 'principles based regulation' and 'outcomes focused regulation' both forms of decentred regulation by Neil Rose, 'New rules for solicitors focus on ends, not means.' (7 April 2011) *The Guardian (Law: The expert view)* < https://www.theguardian.com/law/2011/apr/07/new-rules-solicitors-ends-means1 >.

[26] See Solicitors Regulation Authority *Code of Conduct,* above n 19, Outcome 3.2 and *Handbook*, above n 18, Principle 1B (4.1).

[27] Black 2002, above n 11, 10.

Within this paradigm, the 'unsuspected places' include intra-professional bar norms and the culture within the lawyer's containing community.[28] This suggestion of discovery of those other places which influence lawyer conduct is useful to this analysis. We pursue this invitation by considering how this theory applies to country law practice.

2 Application of Decentred Regulatory Theory to Country Law Practice

Although Donald Landon's conundrum of structural strain in country law practice was formulated decades before Black's articulation of Decentred Regulatory Theory, this theory has potential to resolve the inherent tension he identified. For example, Landon found that obedience to the (American) paper norm of zealous advocacy could be at odds with the client's best interests which may be better served by ensuring sustainable relationships within the community. Rather than the lawyer's prescriptive obedience to zealous advocacy to the exclusion of other factors, a decentred regulatory approach requires nuanced appreciation of the context in which law is practised. Landon's work on the influence of the containing community on the situated lawyer's practice, recognises those previously unsuspected places. In a decentred regulatory paradigm, the lawyer has regulatory permission to engage in conduct to achieve an appropriate, situation specific ethical response.

The foundation to decentred regulation is a shared ethical purpose. Most participants in this research (71%) did share an understanding that the purpose of the 'conflicts' rule is to act in the client's best interests. This principled purpose informs the approach they take to the proscriptive rule. Beyond this shared recognition of the rule's purpose, participants differed when asked about the clarity and appropriateness of the rule. Half the participants said the rule was clear and the other half said the rule was not clear. Sixty-three per cent of participants said the rule was appropriate to their style of law practice although there are difficulties in its implementation. Some participants fear that anything other than strict compliance with what they perceive to be the rule, threatens their practising certificate. That is, they fear that a prima facie breach of the rules could be professional misconduct, resulting in the lawyer being disciplined and, at the

[28] Donald D Landon, Country Lawyers: The Impact of Context on Professional Practice (Praeger, 1990). Chapter 8; See also Donald D Landon, 'Lawyers and localities: The interaction of community context on professionalism' (1982) *American Bar Foundation Research Journal* 459, 479.

extreme, possibly losing their practising certificate and being 'struck from the roll'.[29] It is possible that this fear of sanction, constrains the country lawyers' capacity to think beyond simple obedience. When asked about what could be done to 'improve' the rules, suggestions included more latitude from the regulator including permission to use common sense to 'bend' the rules. This suggestion evokes the strength of Decentred Regulatory Theory which cultivates the regulatory relationship.

Decentred regulation depends on a strong relationship between the regulator and the regulatee. Although the regulators have an influential role in supporting ethical conduct, regulators' contact with these participants is minimal. Only nine per cent of the participants have frequent contact with a regulator; typically, due to their participation within the governance of the legal profession. The balance of participants had 'occasional' (42%) or 'rare' (48%) contact with the regulator. There is scant evidence of a shared narrative empowering lawyers to join the regulatory effort. Consequently, the implicit invitation for a co-regulatory relationship, embedded in the theory of decentred regulation, is languishing.

Rather, the regulatory culture experienced by these participants continues to position the centred regulator as the repository of ethical authority. The interviews revealed a prevailing sense of nonchalance or even aversion to the prospect of regulator contact. This is most likely because the infrequent contact which does occur is usually in response to a complaint, or a technical compliance issue such as auditing professional development points[30] or, slightly less threateningly, a seminar on managing risk. It is possible that the absence of this shared regulatory discourse between regulator and regulatee undermines the potential inherent in decentred regulation. This disconnect between regulator and regulatee is another significant result of this research.

The absence of regulatory discourse between the regulator and regulatee means that country lawyers are possibly operating 'under the radar' or on the periphery of regulation.[31] Whilst these interview results reveal that some country lawyers are

[29] This fear may be founded on the obligation within s35 of the *Legal Profession Uniform Law*.

[30] Refer to continuing professional development rules Law Council of Australia and Legal Services Council, 'Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015' (18 November 2016). See also record keeping r 12.

[31] Kim Economides, 'Centre-periphery tensions in legal theory and practice: can law and lawyers resist urban imperialism' (2012) 1(2) *International Journal of Rural Law and Policy.*

developing innovative responses to resolve ethical tension or structural strain, they appear to do so beyond the regulatory gaze. Such innovation as the triage assessment which responds to the possibility of a disqualifying conflict, is reported as unknown and unrecognised by regulators. Consequently, this mode of response has not gained the regulators' imprimatur. And lawyers using the triage process are unsure if this method is condoned or could be shunned as maverick conduct.

Rather than being encouraged to consider the plethora of ways in which the regulatory purpose can be given ethical expression, it is possible that the absence of regulatory discourse results in the lawyer's judgment being constrained through fear of sanction. In a decentred regulatory system, this fear would be addressed by the regulator who has the power to permit and encourage ethical agency. Reframing the relationship between regulator and regulatee by cultivating a decentred regulatory approach has the power to assuage and allay these fears. The data reveal that at present there is at most an inchoate expression of decentred regulation.

The views of colleagues, including professional regulators, as to what lawyers should do are a powerful arbiter to confirm the alignment or misalignment between the lawyer's decision and the ethical standard.[32]Most participants said that while the rule established the standard for competence, geographic location should not affect that standard. But participants differed in their understanding of how much ethical agency they could bring to their decision. Many participants believe a strict approach to implementing the rule makes service delivery difficult. Others felt there is an inherent flexibility within the rules which allows them to be 'practical', 'sensible' and 'robust'. These words suggest a measure of ethical agency which could be conceptualised as incipient decentred regulation.

Although all participants indicated knowledge of and compliance with the ethical principle to avoid conflicts of interest (paper norms), the interview data reflect variants of localised practice as to how they worked with that principle (bar norms). There is a range of views about what participants think is ethically 'proper' and the alignment between the formal rule and their own style of practice. There is a sense from many participants that they are operating at the frontier of the legal system. For these

[32] See Appendix J Schedule of Interview Questions 16, 17, 29.

participants, the frontier is characterised by service scarcity and they 'do what we have to do' to provide a legal service. This diversity in approaches to identifying and resolving conflicts of interests, which is informed by the local practice context, is a significant result. This result suggests that one of the hidden regulatory places foreshadowed in Black's theory is the expectations and norms within the country lawyers' containing community.

It was clear most participants in this research had moved beyond prescriptive rule following as their sole touchstone for informing the ethical standard of their behaviour. When asked how they resolved an ethical dilemma, participants spoke about exercising their professional autonomy and consideration of other external factors beyond positivist rules to inform a situationally specific response. However there is the suggestion that lawyers' personal discretion, their law practice's internal systems and even their legal community's informal normative standards may be insufficient to support their ethical formation.

Ideally the regulator should participate within these discussions in the 'education towards compliance' strategy which has already been shown to be effective in enhancing ethical acuity.[33] There is an explicit mandate for responsive regulation of this type within the statutory purpose of the *Uniform Law* that regulation is 'efficient, effective, targeted and proportionate'.[34]

Despite an absence of a bilateral decentred regulatory relationship, this research suggests that conditions are nonetheless 'ripe' for fostering this regulatory approach which could cultivate and curate discourse between regulator and regulatee to guide ethical formation and sharpen ethical acuity. Together regulator and regulatee could monitor, moderate and maintain acceptable ethical conduct. As discussed further in Chapter VI *Discussion*, this bilateral regulatory relationship is also at the heart of the professional community of practice.

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[33] See Queensland Legal Services Commissioner promotion of compliance audits of incorporated legal practices under the s130 *Legal Profession Act 2007 (Qld)* 'The education towards compliance approach to regulation is aimed at promoting higher standards (compared to the traditional regulatory approach which is geared to enforcing minimum standards).'. < https://www.lsc.qld.gov.au/compliance/compliance-audits>.

[34] Section 3 (e) Legal Profession Uniform Law.

An enhanced relationship between the regulator and regulatee would go a long way to calming, encouraging and assisting the lawyers reported here to keep their conduct aligned to the normative standard. With appropriate regulatory support, there can be a flourishing of situation specific ethical judgment. In such a decentred regulatory environment, the standard against which ethical conduct is assessed should be sufficiently flexible to facilitate the diverse interpretation and application of the rules. This flexibility will allow professional autonomy, so necessary for the conduct of legal practice within under-resourced communities. The devolution of ethical agency is also encouraged in a different manner through the natural law theory of legal ethics. The facilitative power of this theory is considered next.

D Does the Lens of Natural Law Theory of Legal Ethics Explain What is Occurring?

In this third section of the analysis, I consider how ethical behaviour of country lawyers can be understood through the lens of Fuller and Luban's Natural Law Theory of Legal Ethics. On one view, this theory which preferences ethical agency, offers a plausible explanation for participants' decision making process.

This section is in two parts. I begin by reviewing the Natural Law Theory of Legal Ethics and Fuller's assertion that the role of the lawyer should be to both identify the law's inherent purpose, and to give practical expression to that purpose. This theory of legal ethics which encourages the situated lawyer to discern a tailored ethical response complements Black's emphasis on professional autonomy. They both devolve ethical responsibility to the lawyer and encourage situation specific ethical judgment. In the second part I consider whether this theoretical lens of the purposive lawyer helps us to understand the process country lawyers use to make ethical decisions.

1 The Natural Law Theory of Legal Ethics

In Fuller's view,[35] the lawyer's role is to give expression to the law's implicit moral purpose. In revisiting Fuller's work, Luban recognised a theory of 'substantive natural

[35] Historically Fuller's contribution to legal theory had been confined to debates with Hart about the 'concept of law'. Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1957) (71) Harvard Law Review 630; In revisiting Fuller's work David Luban identified a theory of legal ethics

law' which places legal ethics as central to the perpetuation of the 'rule of law'.[36] Lawyers in this light are 'purposive professionals' who are tasked with discerning the law's implicit purpose, then discerning how best to give that purpose practical expression. [37]In this theoretical explanation, these two tasks are the essence of ethical acuity. The proposition that lawyers' ethics are fundamental to the rule of law seems uncontentious, however what is contentious is the suggestion that the situated lawyer is best placed to personify the rule of law. Luban asks:[38]

> What if [the rule of law] turns out to be a particularly elaborate and technically ingenious form of the rule of (let me say) men and women? What if the rule of law establishes a moral relationship between those who govern and those whom they govern? Furthermore, what if sustaining this relationship requires moral attitudes and virtues on the part of the governors that are not simply disinterested forbearance, and not simply the moral attitudes and virtues required of everyone? In that case, the rule of law would turn out to rely on the specifically professional ethics of the lawmakers.[39]

Luban positions the lawyer as one of the governors and asks what moral attitudes and virtues are required to promulgate the rule of law. Fuller argues that although the lawyer must obey posited rules, ethical practice should also be informed by an inquiry into both the purpose of the professional duty, and the impact of the law on the people and community. A corollary to this natural law stance is the recognition that many ethical situations will arise within legal practice which require a nuanced, crafted response that cannot be completely answered through preconceived rules. So in our context, the Fullerian normative method assumes an inquiry to discern what is the moral purpose which motivates the principle to avoid conflicts of interest.[40] In searching for the moral foundation to this principle, a positivist stance may be simply that it is the rule and

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which he suggests presents a persuasive motivator for lawyers' ethical conduct. David Luban, Legal Ethics and Human Dignity (Cambridge University Press, 2007).

[36] Luban, above n 35. This applied approach to Fuller's theory focuses explicitly on the ethical dimension of professional practice rather than on the wider 'concept of law' debates that Fuller has historically been associated with.

[37] This debate became historically polarised during the Fuller-Hart debates commencing with the 1957-1958 Harvard Law Review series and commentary since. Hart, as a positivist, argued that fidelity to law required giving effect to the law as it existed. Fuller countered this minimalist view with his 'natural law' belief that fidelity to the law required aspirational striving to bring the law into being 'as it ought to be'. See H L A Hart, 'Positivism and the Separation of Law and Morals' (1957) 71 Harvard Law Review, 593 and Fuller, above n 35.

[38] Luban 2007, above n 35.

[39] Ibid 99.

[40] To understand Luban's approach to a Fullerian analysis see David Luban, 'Rediscovering Fuller's Legal Ethics' (1998) 11 Georgetown Journal of Legal Ethics 801.

should be obeyed. However, a Fullerian approach would question the universal application of a rule which may frustrate the law's implied moral purpose.[41] For Fuller, this 'purposive professional' has certain characteristics.

(a) Purposive Lawyers

Fuller developed this concept of purposive lawyers in his seminal work *The Morality of Law*.[42] He described law as a 'purposeful enterprise, dependent for its success on the energy, insight, intelligence and conscientiousness of those who conduct it.'[43] The purposive professional is someone whose actions and values coincide in their work to give consistent expression to their profession's purpose;[44] and for Fuller, the purpose of law practice is a moral purpose.

Fuller suggests that lawyers should be concerned with the 'goodness' of the law's content.[45]Although the concept of 'goodness' is subjective and contextual, in Fuller's view such an exploration is necessary. Somewhat obliquely Fuller describes this moral purpose as 'human achievement':

> It is now explicitly acknowledged on both sides that one of the chief issues is how we can best define and serve the ideal of fidelity to law. Law, as something deserving loyalty, must represent a human achievement; it cannot be a simple fiat of power or a repetitive pattern discernible in the behavior of state officials.[46]

Fuller's use of the word 'fidelity' implies a deep commitment to discerning and implementing the implicit purpose of the law. In Fuller's view, rather than unquestioning 'obedience' to the posited law, a purposive lawyer should aim for 'fidelity' to the law's intrinsic purpose. Fuller criticised the 'essentially sterile nature of

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[41] More recent scholarly attention focused on the 50th anniversary of these debates. Peter Cane (ed), *The Hart-Fuller debate in the Twenty-First Century* (Hart Publishing, 2010).

[42] The concept of 'purposive' work is developed in Fuller's work and is attributed to Kant. Lon L Fuller, The Morality of Law (Yale University Press, 2nd ed, 1969); However David B Wilkins, 'Legal Realism for Lawyers' (1990) 104 *Harvard Law Review* 468 505) attributes the concept of a purposive professional to William Simon, 'The Ideology of Advocacy: Procedural Justice and Professional Ethics' (1978) 29 *Wisconsin Law Review* 36.

[43] Fuller 1969, above n 42.

[44] See an exposition of this concept in Luban, above n 35, 108.

[45] Fuller 1969, above n 42, 90-91.

[46] Fuller 1957, above n 35, 632.

any form of legal positivism which purports to divorce itself from a definite ethical or practical goal'.[47] In the natural law framing of fidelity to law's underlying purpose, the lawyer can and should craft a justice solution.

The nuanced difference between Fuller and the positivist position is the quality of obedience implying 'submission' to external authority, whereas the quality of fidelity instead invites 'accuracy' and loyalty to an embedded principle. In this respect, fidelity can be seen to align with autonomy. Fidelity to the law's purpose necessarily involves endeavour, striving and discovery rather than a rote, unthinking response.

Being slightly more specific, in order to build justice solutions, Fuller encouraged lawyers to strive beyond the law 'as is' and achieve solutions, to what 'ought to be' in moral terms.[48] Fuller likened this lawyering activity as a pursuit to discern the elusive recipe and method for a 'flaky pie crust'.[49] When writing about the lawyer's role, Fuller uses the terms of 'striving' and 'endeavour' which reflect the pursuit of the bespoke justice solution. In this natural law paradigm, lawyers are professionally obligated to bring the law's moral purpose into 'being' and if they fail to do so, they are not practising law at all.[50]

Three guiding principles which are considered next, define Fuller's conception of purposive professionals in more detail. The first guiding principle is that there are complementary moralities of 'duty' and 'aspiration' which both need to be addressed. Next, the lawyering activity must express the law's inchoate promise which in Fuller's terms merges the 'is' and the 'ought'. Finally, the lawyer must engage in a 'dialectic activity' in order to reach a reciprocal adjustment between the 'ends' and the 'means' to achieve those ends. These three guiding principles are discussed further below.

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[47] Ibid.

[48] Lon L Fuller, The Law in Quest of Itself (The Foundation Press, 1940).

[49] Fuller observes that 'for many the term "natural law" still has about it a rich, deep odor of the witches' cauldron'. But all it really means is 'that there are external criteria, found in the conditions required for successful group living, that furnish some standard against which the rightness of…decisions should be measured. …Certainly it would never occur to him [an imaginary judge] to describe the natural law he sought to discover, and felt bound to respect, as a "brooding omnipresence in the skies". Rather for him, it would be a hard and earthy reality that challenged his best intellectual efforts to capture it. The emotional attitude…would not be that of one doing obeisance before an altar, but more like that of a cook trying to find the secret of a flaky pie crust..' Fuller, 'Reason and Fiat in Case Law' (1946) 59 *Harvard Law Review* 376, 379 quoted in Luban 2007, above n 35, 117.

[50] Luban 2007, above n 35, 107.

As will be apparent from this explanation, Fuller's ideas are somewhat obscure and in many ways may appear antiquated and divorced from country law practice. But Luban's reappraisal, which I have included where appropriate, give these ideas strong explanatory power for understanding what may be the foundation for ethical decision making amongst participants.

(i) Dynamic relationship between duty and aspiration

The first principle which informs the casting of the lawyer as a purposive professional is their need to navigate the dynamic relationship between duty and aspiration. Duty is concerned with the conditions essential for human existence with compliance enforced through punishment and encouraged through the 'pervasive bond of reciprocity'.[51] By contrast, aspiration requires the individual to strive for excellence and in so doing, facilitate the evolution of society. It is in the lawyering activity that the lawyer must translate these esoteric principles to achieve the law's purpose.[52] In Fuller's view, the purposive lawyer has to navigate between duty and aspiration in the pursuit of human advancement within their daily professional activities.[53]

To some degree Fuller's morality of aspiration mirrors the Greek philosophy of the pursuit of 'the good life' and includes some elements familiar to virtue ethics, such as the aretaic concept of eunomia.[54] Fuller derivatively coined his own term 'eunomics' to refer to the 'science, theory, or study of good order and workable social arrangements'.[55] Fuller's aim for eunomics was to 'uncover the common thread of insight into the problems of human organisation that run through all of the lawyer's work'.[56] In connecting these values to the lawyer's role, Fuller redirects the theory of legal ethics towards this purposive pursuit of human advancement:

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[51] Fuller, above n 42, 22.

[52] Ibid 12.

[53] Ibid Chapter 1.

[54] Eunomia was a minor Greek goddess of law and legislation. Her name represents 'good order' and governance under good laws. She was the daughter of Themis and Zeus. Her opposite was Dysnomia (lawlessness).

[55] Lon L. Fuller, 'American Legal Philosophy at Mid-Century: A review of Edwin W Patterson's Jurisprudence: Men and Ideas of Law' (1954) 6(4) *Journal of Legal Education* 457, 477.

[56] Kenneth I Winston (ed), The Principles of Social Order (Hart Publishing, 1952), 'Means and Ends', 62. Winston posthumously published a series of Fuller's essays.

> [the] whole of legal philosophy should be animated by the desire to seek out those principles by which men's relations in society may be rightly and justly ordered'.[57]

(ii) Merging the 'is' and the 'ought'

Fuller's second principle, the merging of the 'is' and the 'ought', is likewise esoteric. He conceptualises the lawyering activity as potentially transformational. The lawyer's role is to assist the law to 'become' and the lawyering activity transforms the law's incomplete intention into concrete expression. In bringing the law's purpose into being, the lawyer is responsive to the 'is' of the status quo. Because the lawyer practises with clients often within communities, the lawyer is seen as well placed to appreciate the distinctive circumstances of the 'is'. But in Fuller's casting of the lawyer's role, the lawyer should also be motivated to give effect to the 'ought' which is guided by the intrinsic morality of the law's purpose. The 'ought' of the law are the possibilities of the law's becoming; what could emerge from the purposive application of the law. The context of the law practice informs what the 'ought' could be. The purposive lawyer is expected to have the ability to craft an informed appropriate response. As such, the purposive professional uses their knowledge of the law and the inchoate purpose implied in the law, to design a tailored response that transforms the 'is' of the law into its 'ought'.

(iii) The dialectic process

The question arises as to how the lawyer discerns an appropriate 'ought' response for each occasion. The development of an answer lies within the third Fullerian purposive principle which is the dialectic process. The dialectic process is a conversation in which the lawyer crafts a distinctive response to the invitation embedded in the dynamic between duty – aspiration, and the is – ought. [58] Fuller conceptualises the dialectic process as one of reciprocal adjustment between 'means and ends'.[59]Applying Fuller's 'reciprocal adjustment' method requires the lawyer to modify both ends and means until

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[57] Ibid 'Eunomics'.

[58] The Fullerian 'natural law' method – employing the dialectic dynamic - has been attributed to the philosopher Hegel. Robert S Summers, 'Lon L Fuller's Jurisprudence and the Possibility it Was Much Influenced by G.W.F.Hegel.' (1983-1984) 10 *Cornell Law Forum* 9.

[59] Winston, above n 56, 61-80 'Means and Ends'.

they reach a balance where they are both morally acceptable – until the modified end no longer requires means that are unconscionable.[60] Once again this is a level of abstraction no practising lawyer is likely to envisage. But Luban suggests the dialectic approach can offer a 'plausible process of moral deliberation that can shed genuine light on the problem of role morality'.[61] For instance, a particular outcome (ends) may seem morally attractive until the lawyer becomes aware of the undesirable means required to achieve that end. Similarly, a lawyer's task may seem to be unconscionable although necessary to avoid greater injury. A genuinely purposive lawyer would not constrain their activity to an internal self-referential inquiry. Seen in this way the dialectic approach assumes that other stakeholders, such as clients and colleagues, would have valuable contributions which could enhance both the process and the outcome.

(b) Fullerian Analysis of the Conflict of Interest Principle

Beyond essentially aspirational encouragement, Fuller does not provide a guide to exercising professional judgment in individual cases.[62] But Luban does.[63] Luban's recasting of Fuller's work examines the functional role and impact of the legal profession's foundational ethical principles. Luban argues that entrenched ethical principles (including the proscription against conflicts of interest) deserve a more rigorous analysis than disinterested obedience.[64] He suggests that there needs to be an investigation of the efficacy of these principles to achieve law's purpose. He writes that several principles of law practice, including the proscription against conflicts of interest, may in fact impede the purpose of law in some cases. He invites lawyers to consider what is the 'functional contribution' of these principles.

> The interesting part of the analysis would be an effort to discover an inner morality of the legal profession, that is, a morality that makes law practice possible. The inner morality, professional ethics in the proper sense of the term, would consist of functional virtues and duties. Such prominent features of legal

[60] Luban 1998, above n 40

[61] Ibid 808-810.

[62] By way of an historical footnote, a Fullerian influence was evident in the drafting and design of the 1969 *ABA Model Code of Professional Responsibility*. The design of the Code reflected a combination of the aspirational principles and bright line rules. However, it was criticised as being unworkable 'like playing a three-dimensional game of chess' and was replaced within ten years. Luban 1998, above n 38, 806-7; John M. A. Di Pippa, 'Lon Fuller, the Model Code, and the Model Rules' (1996) 37 *South Texas Law Review* 303.

[63] Luban 1998, above n 40.

[64] Ibid 810.

> ethics as the duties of zealous advocacy, confidentiality, and avoiding conflict of interest, would be delineated and defended by examining their functional contribution to carrying out the work lawyers do.[65]

Luban expands on Fuller's 'means and ends' dialectic to encourage lawyers to explicitly undertake an ethical calculation, which I call a 'Fullerian analysis'. A Fullerian analysis necessarily encourages ethical agency by devolving much of the ethical decision making to the situated lawyer. This analysis requires the lawyer to calculate what should be done to ensure situational, place specific justice is achieved. Luban asserts that standard role morality should 'win' in such an adjustment if the role is sufficiently valuable and the professional principle is sufficiently indispensable to carrying it out.[66] Conversely, the 'ends' should 'win' if, in the particular circumstances under consideration, compliance with the role morality would create a greater harm to society and the individuals involved.[67]

Luban suggests a three-step method for this purposive Fullerian analysis.[68]

- Inquire into the purpose or 'function' of the professional principle in fulfilling the lawyer's role.
- This requires insight into the 'is – ought' relationship and consideration as to how best to express this intrinsic purpose to find the practical outcome or 'impact' of the professional principle.
- Lastly, Luban suggests the lawyer should 'reason out what restraints must be observed if those purposes are to be achieved'. This step reflects the dialectic process which explores the means-end relationship.

Luban provides an example of this Fullerian analysis with the professional principle to keep a client's confidence. He considers the 'staggering variety of confidentiality exceptions' which have historically been allowed and argues that 'none of these exceptions seriously hamper the practice of law'.[69] Therefore exceptions to the prescriptive rule should be allowed. He concludes that occasionally a truncated duty of confidentiality is warranted to prevent a substantial social harm. He suggests:

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[65] Ibid 807.

[66] Ibid.

[67] Ibid.

[68] Ibid.

[69] Ibid 808.

> [T]ry experimenting with various exceptions to the duty of confidentiality, and see whether the modified confidentiality rule discourages so much essential communication that the job of a (lawyer) becomes impossible.[70]

I now provide a similar analysis of the conflict of interest principle which considers both the purpose and the exceptions to the rule.

The first consideration is to discern the implicit purpose of the professional principle not to act in a conflict of interest. As noted earlier, that purpose is to ensure that the lawyer discharges their fiduciary duty to act in the client's best interests.

The second consideration is the blending of the 'is and ought' so that the lawyer acts in the client's best interests. This action depends on the idiosyncratic interests of each client and the particular legal infrastructure within the community. An ideal assessment of what is in the client's best interests arises from the lawyer's knowledge of place (situated lawyer), and through conversation with the client. The client's interests could range from single session unbundled advice on strategy, to bespoke guidance on a gladiatorial, adversarial contest.

The third consideration in the Fullerian analysis requires the lawyer to identify any restraints which need to be implemented to ensure that they act in the client's best interests. This is what Luban means when he writes of the dialectic process as the reciprocal adjustment between ends and means.

2 Application of Natural Law Ethical Theory to Country Legal Practice

Simply because the research participants will not be familiar with the natural law ethical theories of Fuller or Luban does not mean that their behaviour does not reflect some of these concepts. Rather it provides a conceptual tool to understand that behaviour. If one accepts this constructed role of a purposive professional, one way of understanding country lawyers' reported conduct is that they are responding to a clarion 'call to action' for the lawyer to consider a purposive approach and go beyond rote responses to ethical issues which arise during the practise of law.

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[70] Ibid 809.

There was evidence from participant responses that country lawyers are open to such a call. The purposive approach can be seen as empowering each situated lawyer to give nuanced and strong expression to the rule of law as they perceive the administration of that function in their practice context. The lawyer's ethical decision requires an assessment of how best to discharge the various public and private duties. On the one hand, the paramount principle requires the lawyer to participate in 'the administration of justice' (public duty); however, the lawyer must also promote the client's best interests (private duty). Arguably the situated lawyer, conscious of their place within the community and their professional duties, is best placed to discern a situation specific, ethical response. Luban provides one explanation of what is occurring.

The Fullerian analysis provides a useful means to discern how an ethical response such as the triage assessment process is determined. In a practice environment characterised by service scarcity and the increased probability of conflicts occurring, the triage assessment is potentially a purposive, flexible and innovative response. The ostensible aim of the triage process is the provision of more legal services to more clients whilst avoiding actual conflict. However, this triage assessment process has the potential to truncate the lawyer's fiduciary relationship with their former and current clients. To an outsider unfamiliar with the localised bar norms of remote lawyers, the triage assessment process may appear as aberrant behaviour. That is, the lawyer may offer a limited scope retainer for a discrete legal service rather than ongoing, unlimited access.[71]

I use this Fullerian analysis as a tool to understand the process behind triage assessment that many country lawyers use. The Fullerian analysis offers validation for the widely expressed view amongst the research participants that a truncated fiduciary duty is warranted in order to provide legal services to an under-resourced community.

Luban would also see the triage assessment process as being precisely the way a lawyer working with scarce resources ought to act. At its most general, the lawyer's triage assessment is a pragmatic risk management exercise to ensure alignment between their

[71] I go no further with considering a truncated fiduciary duty in this thesis. However I acknowledge the emerging field of ethics developing as a result of the unbundling of legal services. See American Bar Association, *Unbundling Resource Center* American Bar Association <https://www.americanbar.org/groups/delivery_legal_services/resources.html>.

multiple duties to clients and to their community, whilst also acting in the best interests of each and every client. The triage represents the purposive concepts of endeavour and striving to craft a situation specific response to the community's justice needs.

A Fullerian analysis of the triage assessment process which builds on the previous conflict of interest analysis might look like this:

1. Interrogate the situation.[72] How can the lawyer provide a legal service whilst acting in the client's best interests? (Examine the historic data. Consider the presenting issue.)
2. After discussion with the client, be explicit about what success looks like. (Transcend the status quo to achieve the desired, agreed outcome.)
3. Ask what will it take for this to happen? (Informed written consent, limited scope retainer.[73])

The result of this Fullerian analysis of the triage assessment process might provide a conceptual explanation for why occasionally a truncated fiduciary duty is warranted to prevent further limitation of legal services within an environment already characterised by service scarcity.

Applying the Fullerian analysis to the triage assessment offers one plausible rational argument for its ethicality. Assuming the regulator would accept the decentred paradigm which encourages the devolution of the shared ethical purpose to the regulatee, this process may conceivably receive regulatory approval and can be shared with others. This currently covert yet tacitly condoned practice could then be recognised as a legitimate ethical process. Additionally, in a normative way, requiring such a (possibly less abstracted) triage assessment process could foster more explicit lawyers' ethical acuity.

There are examples in the interview data of participants working through what can be certainly be conceptualised as Luban's three step process to provide legal services in

[72] Refer to the 'bright yellow file note' used by participant 33MUI as a form of triage. See above Chapter IV C 2.

[73] Benjamin P Cooper, 'The curious case of advance conflict waivers' (2015) (Vol 18 No 2) *Legal Ethics* 199.

ways which can be seen as generally congruent with the rules' purpose. For example, within the Community Legal Centres, one challenge they face is the high numbers of potential turn aways. The standard pathway reflects a low tolerance for working in a matter if there is the possibility of a future conflict. Some Community Legal Centres use negotiated referral protocols (known as 'warm transfer' pathways) to guide clients, or people seeking services, towards alternative legal services. Conversely when there are no referral pathways, the participants are more likely to work around the barriers to service delivery. Both of these responses seem to speak of a process (albeit unconscious) of reciprocal adjustment between the means and the ends.[74]

Another example of the conceptual usefulness of the purposive professional framing, is a participant lawyer advocating in a 'bush court'. Often the only lawyers in attendance belong to the same law practice. Given the limited resources and time pressures, the implicit purpose in this situation is to offer legal help to the maximum number of people. The lawyer who described the situation is (again unconsciously) focused on the underlying ethical purpose:

> *The pressure of work is really a large aspect of what you do … you do rely a lot on your experience or intuition or whatever, and you have to build the Rules into what you're doing to be able to do things quickly. Because it is about dealing with things quickly. You see people all the time with new lawyers, they turn up and they're slow. And it's not because they're bad. It's because they've not got the hang of the fact that you just need to get through the stuff. Otherwise you're gonna get to 4pm. There'll be people still in custody that nobody's seen, and the magistrate's going to get cranky. They're gonna spend another night locked up in a concrete toilet. Compromises. Other Australians … don't know what goes on here. (27MUR)*

This bush court lawyer's conduct confronts ethical questions which relate to the purposive practise of law.[75] Apart from the ethical dilemma arising from providing legal services in under-resourced communities, there must be a level of professional moderation and oversight to ensure the individual lawyer's response remains consistent with the established ethical standard. It is possible that either this lawyer, or another lawyer in the same law practice may have previously dealt with related parties. However communications between the remote community and the law office may be

[74] See above Chapter IV C 1 on 'The Turn Away' from participant 22MUR27 for an example of a reciprocal adjustment when a conflicted lawyer explained what is involved in undertaking a warm transfer to another lawyer.

[75] A similar anecdote is offered by Justice Frank Vincent, former Aboriginal Legal Service lawyer, then Victorian Supreme Court judge, in recounting his early years working in Alice Springs. Jonathon Faine, *Lawyers in the Alice : aboriginals and whitefella's law* (Federation Press, 1993).

limited and hence difficult to conduct a conflict check. One legitimate conceptual way of understanding what informs their 'compromises' is to think of it in terms of an incipient Fullerian analysis. What might assist this lawyer's ethical decision making is for the regulator to endorse a practical rubric which makes this process explicit.

Of course it will be clear how fraught such a licence could be that allows each country lawyer to be their own purposive professional. The concern is that without some forum to moderate these decisions, ethical compromises may become aberrations. There is evidence for instance from some participants that they are concerned about the questionable practice of their colleagues. Or in the analysis I have just presented, their being their own ethical guides. One participant spoke about the difference in supervision approaches with his former principal legal officer taking perhaps worryingly a more casual approach (to conflicts of interest) compared to his current supervisor.

> *We had a change in the principal legal officer (laughs). So the one prior to the one that we have now was quite, 'Oh it'll be right' type of thing, 'Oh, if we don't' do that, no one will help!' type thing. Whereas the one that's there at the moment, he's very much by the book. I guess in the early days we used to have to flat out refuse and go 'No, I'm not doing it because it's my practising certificate on the line and I don't care if you discipline me. I'd rather be disciplined for that internally than, you know, disciplined for acting for a co-accused' (laughs). Yeah I think it really depends on who's in power at the time, and their methodology of doing things. (39MUR)*

This quote implies that ethical differences might be made simply according to the purview of the principal lawyer. Depending on the regulatory stance, ethical diversity between lawyers and law practices may be rejected, sanctioned, tolerated, condoned or encouraged. However, there is a real risk that tolerating or condoning ethical diversity will compromise or undermine the established ethical standard. That is, the lawyer may respond to client and community imperatives and depart from the contemporary professional ethical norm.[76] Whilst both Fuller and Luban's conceptualisations of a purposive professional provide a means to understand and potentially endorse ethical agency and encourage situation specific ethical responses, neither address or explain how idiosyncratic judgment could or should be moderated. There needs to be some sort of brake or constraint.

[76] This thesis argues that such risk can best be managed when lawyers participate within a professional community of practice.

The interview data reported here suggest that an existing beneficial constraint amongst some but not all participants is derived from the moderating influence of what can be conceptualised as professional communities of practice. This positive moderating influence is particularly apparent in the community legal centres which have a range of oversight strategies to guide workers within that sector.

The potential importance of this beneficial collegial influence is a key finding of this research. However not all collegial moderation can be assumed to be beneficial. Colleagues in some cases may urge more risky behaviour, or after consulting with others, the lawyer may choose to act against that advice.[77] Although not explored in depth, it is also clear from some participants' responses that maverick or deviant subcultures can form within specific worksites.[78]

The informal processes conceptualised here as professional communities of practice have formed organically in some settings through the lawyers' contact with professional peers, including country colleagues, ethics counsellors and regulators. For many participants these referral networks have become well established. Where these communities are strong, lawyers can be seen to defer to their colleagues to inform their ethical autonomy; but where these communities are non-existent or weak, that moderating constraint is absent. The next section explores the link between the exercise of professional autonomy and engagement within this framing of professional communities of practice.

E Understanding Country Legal Practice Through the Lens of Professional Communities of Practice

The final conceptualisation which informs this analysis of the research data is that of professional communities of practice.[79] This conception offers a lens to understand the lawyer's social participation within a collegial cohort and the extent to which those colleagues influence, inform and moderate individual ethical judgment. This conception can again offer some normative direction as to how the ethicality of country lawyers

[77] This was evident in some participants responses about obtaining a second opinion and then doing what they were originally going to do as the former view did not accord with their view.

[78] For example participants' responses in Chapter IV A 3 to the appropriateness of the rules.

[79] A community of practice is a group of people, united by a common purpose, who gather to share the development of their tacit practice skills. See Glossary for a definition of this term.

could be better scaffolded and supported. As such, professional communities of practice could foster ethical acuity. Within this section I focus on the beneficial capacity of such communities, however I also acknowledge that deviant subcultures can develop. As this research was aimed at discovering how lawyers identified and responded to conflict of interest, I did not examine further the indicators that such subcultures existed.

1 An Explanation of the Concept of Communities of Practice

The term 'community of practice' was first coined in 1991 by two American cognitive anthropologists Jean Lave and Etienne Wenger to describe the endeavour of shared learning.[80] Lave and Wenger observed how cohorts of people came together to learn through the sharing of practice skills and wisdom.[81] They defined a community of practice as a group of people, united by a common purpose, who gathered to share the development of their tacit practice skills.

The concept of 'community of practice' is referred to in the literature in two significantly different ways. One way, Lave and Wenger's exposition of the concept, describes how knowledge is generated and shared through social participation.[82] The other way used by Lynne Mather, Craig McEwan and Richard Maiman defines a cohort of practitioners who share a common identity.[83] The latter use of the term refers to groups of people which form more organically and less deliberately. In this sense informal learning may occur through observation of, and comparison to, other lawyers. The two uses of the term are mutually constitutive. Through social learning, the participant's identity as a legitimate member of that cohort develops. Both uses of the term acknowledge the importance of situated learning, however the social learning definition is particularly apt to this research.[84]

The use of the term as an identity cohort featured in the 2001 research by Lynn Mather, Craig McEwan and Richard Maiman to refer to a 'group of lawyers with whom

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[80] Jean Lave and Etienne Wenger, Situated Learning: Legitimate Peripheral Participation (Cambridge University Press, 1991).

[81] Ibid, Chapter 3.

[82] Ibid 6.

[83] Lynn Mather, Craig A McEwen and Richard J Maiman, *Divorce Lawyers at Work. Varieties of Professionalism in Practice* (Oxford University Press, 2001) 6, 41, chapter 3.

[84] The importance of social moderation of lawyers' conduct is promoted by Parker, above n 9.

practitioners interact and to whom they compare themselves and look for common expectation and standards'.[85] Mather and her colleagues conducted empirical research into concepts of professionalism amongst 163 divorce lawyers in the American states of Maine and New Hampshire. Their research explored the way professional communities of lawyers shape desired behaviour and impose sanctions on each other. Leslie Levin also uses the term to refer to a discrete cohort of lawyers bound together by shared interests. Levin's research considers the collegial identity developed through the use of online discussion group (listservs)[86] and the 'specialty bar' such as the American Immigration Lawyers Association.[87]

Lave and Wenger recognise that participants within a community of practice gain a sense of their identity within the cohort whilst also contributing to the evolution of practice.[88] However, unlike Mather's use of the term which focuses on identity, with Lave and Wenger, participants within the cohort share an active, strategic, intentional commitment to generating and sharing knowledge. Through social learning, knowledge evolves and erupts over time. From the ad hoc, indigenous orderings between people who share a cohort identity, there develops a more strategic, nuanced and perhaps purposive response to the challenges of practice.

In Lave and Wenger's construction, a hallmark of a community of practice is transformation—both of the participant's identity as a member within the cohort, and through the learning processes.[89]Lave and Wenger observe that contrary to traditional modes of education which involve a 'didactic caretaker' unilaterally promulgating information,[90] communities of practice rely on participants offering multiple viewpoints. The apprentice can learn from the master. The master can learn from the apprentice. The learning can be explicit or absorbed through tacit peripheral participation. Diversity of views within a community of practice is essential and the possibility of a 'mismatch or conflict among practitioners' viewpoints…become[s] constitutive of the content of

[85] Mather et al, above n 83.

[86] Leslie C Levin, 'Lawyers in Cyberspace: The Impact of Legal Listservs on Professional Development and Ethical Decisionmaking of Lawyers' (2005) 37 *Arizona State Law Journal* 589.

[87] Leslie C Levin, 'Specialty Bars as a site of professionalism: The Immigration Bar example' (2011) 8 *St Thomas Law Journal* 194.

[88] Lave and Wenger, above n 80, 110.

[89] Ibid 113.

[90] Ibid 112.

the learning'.[91] All participants within the community can 'legitimately participate' with their differing views. Lave and Wenger wryly observe that 'knowers come in a range of types, from clones to heretics'.[92]

Activities which could be conceptualised as 'communities of practice' have existed informally throughout civilisation. For example, artisanal guilds were founded on a system of skilling apprentices under a period of supervision with knowledge passed on through stages of immersive or peripheral learning.[93] Participation within a community of practice is deliberate and intended to improve ways of working. Indeed historically Australian lawyers were inculcated into the profession through a period of 'articles of clerkship' requiring them to be apprenticed to a master lawyer. Even today, early career lawyers must undergo a period of supervised legal practice before they can practise on their own.[94]

Lave and Wenger describe how practical knowledge is obtained in these communities through 'situated learning', that is, through immersion into the 'work' combined with a social opportunity to reflect and share. Over time, novices within the community acquire skills through 'peripheral participation' moving from the periphery into the centre of their community as their confidence and competence consolidates.[95] Peripheral participation provides both a social and an educational role as the identity of a novice is shaped, and improvements to the usual way of working are passed around.[96] Through participation, both novice and master members of the community of practice capture and develop tacit knowledge; the knowing 'how' rather than the knowing 'what'.[97]

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[91] Ibid 114.

[92] Ibid 116.

[93] Ibid 62-63 for discussion of historical traditions of craft apprenticeships. This use of the craft metaphor was used by Fiona Westwood, Developing Resilience: The Key to Professional Success (Matador, 2010) 85 who used the terms 'novice' and 'master' practitioners. However knowledge can be shared in a bilateral manner and novices too have perspectives which can expand the master. The concept of the community of practice allows for a multilateral exchange of knowledge.

[94] For an historical overview of the Victorian legal apprenticeship system see Susan Campbell, *Review of Legal Education Report: Pre-Admission and Continuing Legal Education* (Department of Justice (Victoria), 2006).

[95] Lave and Wenger, above n 80, Chapter 1.

[96] Ibid 116-117. 'Learning is never simply a matter of the "transmission" of knowledge or the "acquisition" of skill … participation and knowledge are mutually constitutive.'

[97] This differentiation is attributed to Paul Duguid, 'The Art of Knowing: Social and Tacit Dimensions of Knowledge and the Limits of the Community of Practice' (2005) 21(2) *The Information Society* 109 109-118.

In his later work Wenger refined his understanding of the characteristics which assist in the cultivation of a successful community of practice:

- Each community evolves naturally, setting its own agenda and determining the frequency for gathering.
- Membership includes people with diverse experience yet the focus is on shared activities.
- Communities work through dialogue, exploring old and new knowledge whilst encouraging both private and public discussions.
- Members value their participation.[98]

There is a resonance between the concept of communities of practice and legal professionalism. In Chapter VI *Discussion*, I will argue that this resonance can be developed to strengthen ethical acuity. In Gino Dal Pont's view, law practice is, or should be, collegial. In his text on *Lawyers' Professional Responsibility,* Dal Pont observes that professional collegiality is essential to the administration of justice.

> [C]onfidence, mutual respect and cooperation between lawyers promotes the efficient administration of justice which is beneficial to the client and the legal process, as well as instrumental in fostering the reputation of the profession.[99]

Lawyers gather in professional communities of practice to explore, define and deliver place-based solutions. The normative influence of professional colleagues is also recognised by Christine Parker in her work on lawyer regulation and access to justice.[100] She refers to this influence as the 'collegiality ideal', which is one of the four 'ideals' of lawyering (the other three being the advocacy ideal, the social responsibility ideal and the justice ideal). These professional ideals preserve the justice of law (what she calls the social responsibility ideal) and cultivate respect for each other (the ideal of

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[98] Wenger defined seven actions which cultivate communities of practice. The three remaining characteristics include the development of both private and community spaces, the focus on the value of community, the combination of familiarity and excitement, the development of a regular rhythm to meet, reflect and evolve. Etienne Wenger, Richard McDermott and William M Synder, Cultivating Communities of Practice (Harvard Business Press, 2002).

[99] See G E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5th ed, 2013, 696 [21.145] Of interest to this researcher, given the foundational role that this ideal of collegiality has in terms of self-regulation, is that this concept of collegiality is not defined further in this comprehensive text on professional responsibility. Perhaps the concept is assumed to be well understood, without need for description or tutelage.

[100] Parker, above n 2, Chapter 7.

collegiality).[101] This collegiality ideal includes 'courtesy, collegiality and mutual self-regulation amongst members of the profession'.[102]

Parker refers to the informal social influence of colleagues as 'the indigenous ordering' of regulation upon which the 'pyramid of lawyer regulation' is based.[103] Although she does not define her use of the term 'indigenous', in the context of law practice it suggests a naturally occurring, perhaps localised response. This recognition of the collegial ideal and the associated moderating influence of professional peers can be seen to reflect the *Allinson* principle which establishes the peer review test as the core test for ethical conduct.[104] Parker asserts that socialisation between lawyers creates 'affective bonds' which function to pass on cognitive skills.[105] Parker references David Wilkin's view that:

> By collectively engaging in the process of enacting and enforcing rules of professional conduct, lawyers develop and enforce the disposition for moral decision making.[106]

Parker's regulatory pyramid in *Figure 20 Parker's Pyramid of Lawyer Regulation* below represents the influences which occur informally within professional community, and more formally through professional self-regulation. [107]Ascending from this broad base of professional communities of practice at the lowest level, regulatory influences include 'self-regulation' upwards to the higher level of 'community accountability'.

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[101] Ibid 149.

[102] Ibid 87.

[103] Ibid 87, 147.

[104] *Allinson v General Council of Medical Education and Registration* [1894] 1 KB 750.

[105] Parker, above n 2. Parker attributing this insight to May 1996, 63.

[106] Ibid 151. Quoting David B Wilkins, 'Who should regulate lawyers?' (1992) 105 *Harvard Law Review* 801 863.

[107] Parker, above n 2, 152.

Figure 20: Parker's Pyramid of Lawyer Regulation[108]

Parker suggests that professional ideals are best developed and reinforced when these professional communities span different workplaces. In this respect, her suggestion echoes Lave and Wenger's finding that communities of practice are strengthened when their membership is diverse. Trish Mundy's research on the experience of female country lawyers is relevant in this regard.

> Women in the RRR private sector were more likely to speak of 'outdated', difficult or hostile workplace experience, problematic management and supervision practices, experiences of conflicting professional and personal values in practice and dissatisfaction with salary and conditions of employment. The private sector experience was also particularly marked by views about conservative and 'old school' attitudes including those towards women as well as the place of technology within the workplace. For some women, 'outdated' and 'gendered' were very much connected in their accounts, pointing to the 'old boys club'.[109]

With the increasing percentage of women working in the Australian legal profession, there is a likelihood that not only will there be a change in professional culture, but also the ways of lawyers working together. The 2016 *National Profile* reveals there is now an equal gender divide within the Australian legal profession. In addition, 67 per cent of early career lawyers in country legal practice are female.[110] This gender diversity can

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[108] Ibid 147, Figure 7.1.

[109] Patricia Karen Mundy, 'Engendering 'rural' practice. Women's lived and imagined experience of legal practice in regional, rural and remote communities in Queensland' (2013) 22(481-503) *Griffith Law Review*.

[110] Urbis, National Profile of Solicitors 2016 Report (19 June 2017).

offer an opportunity to review established practices and, if necessary, make improvements to foster ethical acuity.

In their analysis of Queensland disciplinary and complaints data, Francesca Bartlett and Lyn Aitken commented on the impact of the increasing numbers of women in the legal profession. They found 'that women lawyers are over three times less likely than male lawyers to find themselves subject to complaint'. [111] They observed that female lawyers displayed a 'sophisticated application of a caring approach which evaluates the client's needs in the context of the professional role, personal morality and self-care.'[112] They liken this approach to legal practice as 'ethics of care' which 'is a fundamentally context driven idea which eschews absolutist or universal assertions of truth or virtue.'[113] There is a strong alignment between the concept of a professional community of practice and ways of working which are contextual and curious.

This concept of communities of practice has not only explanatory power but also normative potential as it offers a model for the moderation of ethical conduct. The *Allinson* precedent is authority for the powerful and persuasive influence of professional peers in discerning what is competent and diligent conduct.[114] Whilst the moderating role of professional peers is evident at the tertiary end of legal ethics when the regulator reviews questionable conduct, there is scope for proactive input. Professional communities of practice provide this forum.

2 Does this Conceptualisation Help Explain Country Lawyers' Ethical Conduct?

There is evidence from this study that many participants engage in ethical discussions with professional colleagues and that moderation of conduct does occur. Forty-nine per cent of participants said their main resource in resolving ethical dilemmas is discussion with colleagues within their law practice. Their second resource is their legal networks. Within this latter group, the most frequently used external resources are law society ethics advisors with 21 per cent of participants accessing this support.[115] Whilst ethics

[111] Francesca Bartlett and Lyn Aitken, 'Competence in Caring in Legal Practice' (2009) 16(2-3) International Journal of the Legal Profession 241.

[112] Ibid 252.

[113] Ibid.

[114] *Allinson v General Council of Medical Education and Registration* [1894] 1 KB 750.

[115] See Figure 18 Resources Used to Resolve a Dilemma. above.

advisors report that up to a third of inquiries relate to 'conflicts of interest', it is unclear if frequency of inquiry results in any overall change in professional conduct or in the provision of additional support to the practising profession.

Participants cited three recurring examples of ritualised gathering for professional support. The most common form is through involvement with regional or state law societies. The second form of collegial gathering arises more informally in gatherings with colleagues on court sitting days, or through a social event. Both types of collegial gathering provide opportunities for informal but purposive learning, even when the accepted and ostensible purpose of the gathering is social or semi-professional. A third example of collegial gathering is a formal 'buddy' scheme established by the professional indemnity insurer to connect professionally isolated lawyers.

Participants from Community Legal Centres provided two examples of collegial review of lawyer conduct which most clearly align with the social learning communities of practice. Regular intra practice case work discussions occur to check on case load, strategic tactics and to discuss ethical issues.[116] Such case work discussions are deliberative and purposive. They are intended to improve the experience of the legal service for the client and to support the workers within the law practice to deliver a quality service. A second example is the 'annual cross check' audit undertaken by all Community Legal Centres as a condition of their professional indemnity insurance from the National Association of Community Legal Centres.

Other characterisations of social learning communities of practice are developed through the platform of continuing professional development. An example is the 'living ethics' seminars delivered through small group discussions using interactive scenarios by the Law Institute of Victoria.[117]

Nonetheless, many lawyers clearly do not have the benefit of geographically proximate colleagues, or anything approximating these informal or formal communities. For them the existence of such supportive but critical colleagues was seen to be the exception

[116] Research participants from Community Legal Centres explained this process.

[117] See resources available online from the Law Institute of Victoria https://www.liv.asn.au/CPD-Networking/Education/LIVing-Ethics-Private-Practice-16-17.

rather than the norm. This was particularly so for those lawyers practising in isolated outposts.

Although networks characterised as examples of professional communities of practice exist, the research identified that many participants were professionally isolated. Whilst there is evidence that country lawyers are influenced by their professional colleagues, the moderating influence of collegial contact is seen as, at best, ad hoc without deliberative design. From the data there is clearly a paucity of ethical support for most country lawyers. The potential for greater ethical acuity and its moderation from within explicitly formulated professional communities of practice is considered in the next section.

Whilst I acknowledge that some communities of practice may exhibit deviance, this section has focused on the beneficial possibilities which a diverse, inclusive community of practice which constructively engages with the regulator on nuanced and difficult ethical issues has the capacity to monitor, moderate and maintain a mutually agreed ethical standard.

F Conclusions from this Analysis

Three conclusions can be drawn from the analysis of the interview data. These conclusions are discussed in greater detail in the following Chapter VI *Discussion.*

1. What is ethical depends on the practice context.
2. Ethical acuity is strengthened when there is a culture of professional sharing.
3. Professional communities of practice best reflect and respond to the decentred regulatory paradigm.

The moderating influence of professional colleagues reflects Parker's collegiality ideal and her belief that the broadest base to foster ethical acuity is attention to the naturally occurring indigenous orderings of justice. However, as Lave and Wenger observe, colleagues differ in views and include 'traitors and clones'. Suggestions on fostering discursive community amongst diverse participants are offered in the next Chapter.

The three elements of the theoretical framework – the conceptions of decentred regulation, the purposive professional and communities of practice – have been used to better explain and understand the ethics of country lawyers seen through the prism of how to manage conflicts of interest. But as well as this strong explanatory power, this conceptual analysis promises equally strong normative prescriptions. How these can be framed into practical processes is dealt with in the following Chapter.

G Summary

In summary, the story of country legal practice offers an insight into how lawyers navigate the ethical gap between the settled law and the uncertainty of legal practice. The research participants revealed a myriad of ways to identify and respond to the ethical issue of a conflict of interest. However, the country lawyers' individual decisions must still reflect contemporary ethical standards. Whilst diversity per se does not undermine the established standard, the interviews reveal participants' uncertainty, disagreement and sometimes fear in making sense of that diversity of conduct.

To explain and understand the factors which influence this navigational process, we draw upon the three elements of the theoretical framework. Decentred regulation with its focus on principles-based regulation aligns with the purposive professionalism inherent in the natural law theory of legal ethics. The potential negatives of each, find safe anchorage in the social learning support of the professional community of practice. Informed by this focus on country legal practice, the three elements of the framework also suggest a normative framing for devolved regulatory activity to encourage country lawyer's situated ethical judgment. At a conceptual level, the devolution of ethical judgment to the situated lawyer mirrors the practical expression of the purposive pursuit of law.

The literature on contextual ethics notes the dissonance which arises when the practical bar norms differ to the promulgated paper norms. To redress this gap the 'indigenous orderings' of the decentred regulatory systems and processes within law practices should be moderated and reviewed by professional colleagues. These colleagues should include the regulator. Without this moderating influence, there is a risk that unexamined habits are perpetuated and lawyers can fall into ethical peril. As ethical conduct is socially constructed, the moderating influence of professional colleagues needs greater

attention from the regulators. Without collegial moderation, insights and innovations which could strengthen ethical legal practice are not shared.

Informed by the resource of a professional community of practice and the stance of continuous improvement, lawyers can be proactive in designing justice solutions as Fuller's 'architects of social structure'.[118] In the following Chapter the shape of these normative aspirations, and the forms and processes shared by the participants, are harnessed and shaped into a model to foster ethical acuity.

[118] Winston, above n 56.

VI DISCUSSION

In this Chapter I discuss my two contributions to normative, legal ethics theory. These contributions are derived from the research data and developed through the theoretical framework. But first a qualification. The research data simply reports what I was told about how country lawyers identified and responded to a conflict of interest. It is clear that, with the exception of lawyers working in community legal centres, there is scant evidence of the moderating influence of professional colleagues. To the contrary, the evidence indicates professional isolation. In one single case, participants reported regularly gathering to collaborate on local issues affecting the administration of justice.[1] However it is this one powerful example which informs this proposed model.

> Actually in [remote town] it is a fairly friendly close community network. We also run a community legal network where we actually meet monthly or bimonthly to raise any issues that have come up either to do with… anything to do with that we can cooperate in. Issues that are coming up in the court - that we want to raise with the court, issues that are coming up with clients, or how we can better work together. We do have a memorandum of understanding between the local community legal practices where the intent of how we cooperate is laid out very broadly. 28FVR

> We have a local group the [remote town] legal services network. We meet once a month. If there are issues around we meet more frequently. if there are not issues it might blow out to two months or three between meetings. It is a loose group that stays in touch in terms of meeting times and develops items on an agenda by email. Fridays are usually when the meetings are on in the afternoon as needed. We tend to get together approximately about eight times a year. 30MUR

The first contribution that I derive from the data and theoretical framework is that ethical conduct should be improved when the regulator provides scope for country lawyers to exercise their purposive autonomy. Although the data shows that lawyers are exercising their autonomy, that conduct is unmoderated and happens without regulatory review. The second contribution is that an essential regulatory constraint on lawyers' purposive autonomy occurs when lawyers participate within a community of practice. The single example of lawyers gathering to discuss how to manage conflict within their remote community, effectively constrained errrant conduct.

[1] Remote Western Australian community with participants 30MUR and 28FVR.

These two theoretical contributions are given practical expression in a proposed model for purposive practice. This model is informed by the lived experiences of Australian country lawyers dealing with an ubiquitous ethical dilemma within an environment of service scarcity and professional isolation. Through this discussion of practice informed theory, and theory informed practice I return to the research aim which is to discern the factors which influence lawyers' ethical acuity. The model also provides an artefact of value to the cohort of country lawyers who made this research possible.[2]

Not only is there a symbiotic praxis between theory and practice, there is also a loop between normative and explanatory theory. In this research, explanatory theory seeks to understand discrete events or social activities which shape ethical legal practice, and normative theory recommends how the aspirational 'ought' within legal ethics theory becomes possible. The regulatory scholar John Braithwaite comments on this nexus between normative and explanatory theory as mutually beneficial. He describes normative theory as 'an ordered set of propositions about how the world 'ought' to be' whereas explanatory theory is 'an ordered set of propositions about how the world is'.[3]

> Good normative theory generates concepts that can sharpen the concepts of extant explanatory theory, increasing the explanatory power of such theory. Obversely, good explanatory theory can offer concepts to normative theory that enhances its normative power.[4]

The explanatory theory which informs my contribution to normative legal ethics theory is Fuller's concept of the purposive professional. Focusing the lens of the Natural Law Theory of Ethics with its focus on the purposive pursuit of the ethical principle, on the research data, there is clear endorsement for the country lawyers' purposive autonomy. When a lawyer is purposive, striving to give effect to the law's implicit moral purpose, there is an element of trial and error and discovery. When lawyers' ethical agency is encouraged the question necessarily arises 'How can the lawyer's individual idiosyncratic ethical decisions be moderated to ensure their decisions fit the established ethical standard?'.

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[2] Michael Eraut, *'Understanding Complex Performance Through Learning Trajectories and Mediating Artefacts' Draft (Chapter A7)* Unpublished. http://learningtobeprofessional.pbworks.com/f/CHAPTER+A7.pdf.

[3] John Braithwaite, 'Restorative Justice and Therapeutic Jurisprudence' (2002) 38(2) *Criminal Law Bulletin* 244. Professor Braithwaite was the founder of RegNet (The School of Regulation and Global Governance) at the Australian National University and he has taught, researched and written about 'regulation' for over forty years.

[4] Ibid 257.

Throughout this Chapter, I draw upon the example of the triage assessment process used by many country lawyers who participated in this research, to argue that an adaptive ethical stance which is responsive to the practice context, and is also moderated by professional colleagues, provides the necessary constraint that hones the lawyer's ethical acuity. I argue that moderation of individual ethical conduct can, and should occur within a professional community of practice.

My normative contribution to legal ethics theory is expressed in the prescriptive statement '*For ethical legal practice, lawyers need to engage in a professional community of practice'*. This statement addresses the uncertainty which many lawyers expressed when explaining their actual process for the identification and response of a conflict of interest.[5] (However, based on the interview data, we do not know that lawyers are behaving unethically.) In this prescription I choose the word 'need' to engage rather than 'ought' as there should be an invitation to participate - but the motivation to engage should come from the individual. The professional community of practice is inclusive, and optional, not mandatory. The subtle difference reflects ethical agency. Colleagues can support each other to learn how to do the right thing. Likewise the regulator should provide regulatory scope for country lawyers to do so. Three elements of this prescription (practise, invitation and participation) need to be explained.

The first element addresses the evolving and adaptive activity of 'practising' law, rather than the 'practice' of law (noun) which is an established, replicated, rote response. In focusing on the activity of lawyering I recognise Fuller's argument that the activity of practising law is purposive. Lawyering is an endeavour which involves striving to give effect to the law's implicit moral purpose. The second element in this normative prescription is the invitation. The lawyer is invited to participate. This invitation to engage in the shared regulatory endeavour is embedded in the decentred regulatory paradigm. To work as a normative experience, the regulatee needs to move into this collegial space by choice, not imperative. Through this invitation, the energy in the regulatory space flips from sanction to support. The third element of this prescription is the invitation 'to participate'. This invitation speaks directly to the social learning

[5] See Data reporting in Chapter IV A on the clarity and appropriateness of the rule.

dimension of professional communities of practice. This dimension of participation differs from the passive identity construct which simply defines a cohort of lawyers as a 'community of practice' with shared characteristics, namely, location or areas of practice. When lawyers participate in the professional community of practice, they are involved in a dialectic process which includes an exchange of views. There are many ways to engage in this dialectic process. These modes of professional inquiry and participation support lawyers to navigate through the penumbral zone.

Apart from supporting the ethical practice of law, one benefit of this normative prescription (*For ethical legal practice, lawyers need to engage in a professional community of practice*) is its potential to focus on the administration of justice. Practising law within country communities is challenging. In an environment characterised by the 'double whammy' of fewer resources and concentration of disadvantage, there are fewer law practices to offer help and clients are unaware of the few services which do exist.[6] Through dialogue with local colleagues, each lawyer should be able to define what ethical practice, including the achievement of justice, looks like in their community. This claim, that in order to countenance purposive autonomy, lawyering decisions need to be moderated within professional communities of practice, has potential to enliven the practice of decentred regulation.

The Chapter has three parts. The first part links legal ethics theory to law practice by suggesting a new normative prescription as to how country lawyers purposive autonomy can be fostered and moderated. The second part offers three propositions derived from the research results. The final part of this Chapter describes three components of my proposed model for ethical decision making. This model demonstrates how situational ethical acuity, purposive autonomy, can be fostered in practice.

A Provenance of the Normative Prescription

On admission to legal practice Australian lawyers become bound by the rules of professional conduct with the paramount duty to the administration of justice. Implicit within this professional role is the mandate to work towards the achievement of tangible

[6] P Pleasence et al, 'Reshaping legal services: building on the evidence base' (2014) *Law and Justice Foundation of New South Wales* , 32.

justice, whilst strengthening the systems that inform the practice of law. This professional pursuit of practical knowledge, and inquiry into what works, reflects Fuller's aspirational study of 'eunomics'.[7] Rather than 'disinterested forbearance' of the status quo of the posited law and the legal system as it is, Fuller's aspiration is that lawyers use their 'best intellectual efforts' and strive to give effect to law's purpose. Necessarily, this endeavour requires navigating through uncertainty.

This research reveals a clear link in country legal practice between the aspirational practice of law and the issue of a conflict of interest. This ethical decision, to act or to disqualify the law practice from providing a service when there is an inchoate possibility of a conflict, is both complex and contextual.[8] The prime example of this complexity is a belief, evident in many of the interviews, that the issue of conflicts of interest exists on a spectrum. At the one end, let's call it the lower end, exist the 'perceived, possible and potential' interests which may (or may not) conflict at some future time. At the other end of the spectrum, the higher end, exist the actual, direct or material conflicts of interest where conflict already exists. The lawyer must decide where the 'conflict' which now confronts them, sits on this spectrum. The principle is that conflicts must be avoided, but when does a conflict clarify into grounds for disqualification? This belief that there is a spectrum of positions between possible and actual conflicts has recently been supported by case law[9] although historically some lawyers express the view that the possibility of a conflict, is itself a conflict and the lawyers should not act.[10]

[7] Fuller's term 'eunomics' refers to the 'science, theory, or study of good order and workable social arrangements'. See Kenneth I Winston (ed), The Principles of Social Order (Hart Publishing, 1952), 'Means and Ends', 62. Winston posthumously published a series of Fuller's essays.

[8] Note the use of the word 'complex' which implies the outcome cannot be predicted. A complex system requires constant adaptation in design and action in order to develop and deliver a result. By contrast the word 'complicated' refers to a system with lots of moving parts where the outcome is predictable. I am grateful to my colleague Dr Freudenberger for pointing this out. See also Valerie Strauss, *The difference between 'complex' and 'complicated' - and why it matters in school reform.* The Washington Post, <https://www.washingtonpost.com/news/answer-sheet/wp/2014/08/08/the-difference-between-complex-and-complicated-and-why-it-matters-in-school-reform/?utm_term=.376766481b4e>.

[9] See the discussion ion the settled law in Chapter II A 4 d and *Osferatu [2015] FamCAFC 177.*

[10]This position was advocated by the Victorian Justice PD Cummins 'the phrase "potential conflict of interest" is tautologous' quoted with approval by Adrian Evans, 'The Business of Conflicts: Reflections on the IBA 2000 Debate' (2000) 74(10) *Law Institute Journal* 23. See also the advice of Professor Nahum Mushin 'if in doubt – don't', 'A question of ethics' (2017) (August) *Law Institute Journal* .

Lawyers differ in their views as to where the ethical line should be drawn. Colleagues disagree as to which matters should be avoided, and which matters can be accommodated with some measures in place.[11] Lawyers with a higher tolerance for working with possible conflict may continue to act for clients, and in a matter when there is a perception or possibility of a conflict of interest arising, only ceasing to act when that possibility materialises into an actual or direct conflict. Other lawyers may say that the 'possibility of a conflict' is an oxymoron and that possibility alone is sufficient grounds to disqualify them from acting for that client in that matter.[12]

This concept of the spectrum of conflicts focuses the discussion about the need to support a regulatory response which places a constraint on lawyers' decision making. Does the regulator support the notion that the concept of a spectrum of conflicts offer a legitimate frame to approach a complex ethical issue? The argument that there is a legitimate spectrum of 'conflicts' underpins the triage assessment process. Triage is only possible when the lawyer believes they can work around the nascent ethical issues. When lawyers use the triage process they are operating at the lower end of possibility, and believe they are able to accommodate the possibility of a future conflict. The question remains: Is the triage assessment process a legitimate tool? The normative prescription addresses this question by providing a scaffold for the exercise of country lawyers' purposive autonomy.

One of the consistent themes in the participant interviews is the lawyers' fear of uncertainty. The fears include not knowing enough or perceived by others as unethical. Another fear is the loss of one's practising certificate if found to have acted in a way which the regulator and disciplinary tribunal perceive as professional misconduct.[13] In Kyle, Coverdale and Power's research on identifying conflicts of interest in country law practice, lawyers refer to physical warning signs – 'gut instinct' or the 'sniff test' –

[11] These professional differences are the essence of the discursive ethics seminars held by member law societies. See the continuing professional development offering from the Law Institute of Victoria, *Living Ethics* <https://www.liv.asn.au/Professional-Development/Education-Products/Education-Products-Catalogue> .There are similar offerings from other law societies but they are behind the 'member paywall'. See Queensland Law Society, *What the QLS Ethics Centre does* <http://www.qls.com.au/Knowledge_centre/Ethics/What_the_QLS_Ethics_Centre_does>.

[12] See Evans, above n 7. See also *Kak Loui Chan v Zacharia* [1984] HCA 36 where there is a breach of a fiduciary duty if there is a significant possibility of a conflict.

[13] See s 35 *Legal Profession Uniform Law* which places responsibility for ethical misconduct on the law practice principal.

which alert lawyers to potential unethical conduct.[14] Similarly, there is a common ethical mantra, 'if in doubt – don't!'.[15] However, the triage assessment process suggests any idea of a bright line existing is a false dichotomy and negates the suggestion that doubt equates avoidance. Ethical acuity atrophies if the best ethical advice is to simply shun doubt. The argument of this thesis is that this advice is best moderated through a community of practice, preferably which includes the regulator.

In order to address this inherent uncertainty within law practice, Fuller as we have seen encourages the lawyer to 'strive' on the 'field of human endeavour' and to design a situation specific legal response which reflects the law's moral purpose. Luban suggests that if this purposive endeavour is given practical effect, it should offer ethical comfort.[16] According to Postema, uncertainty about the right course of action can be resolved through a process of transparent, practical reasoning.[17] If lawyers shun the experience of doubt and uncertainty, the opportunity to better develop ethical acuity does not progress.

To gain ethical imprimatur, lawyers need to check their perception of what is ethical with professional colleagues. A regulatory change to principles-based practice must be designed with a tangible foundation that facilitates and encourages aspirational practice. Otherwise lawyers' fear of being 'wrong' in the eyes of others may propel them to risk adverse practice. Provided lawyers have professional collegial support, this regulatory shift to a decentred system can facilitate ethical conduct which is both sensitive to the practice context and reflects the prevailing ethical standard.

Suggesting that country lawyers should be regulated in such a way as to permit autonomy, is the first core finding of this study. The second core finding is that the moderating influence of colleagues must act as a constraint on this autonomy so as to assuage concerns and dissipate fear. When the regulator participates or contributes to

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[14] Louise Kyle, Richard Coverdale and Tim Powers, *Conflicts of Interest in Victorian Rural and Regional Legal Practice* (Deakin University, 2014), 51, 55-7.

[15] See Geoff Bowyer's advice 'Practical rules of thumb can be applied: "If in doubt, don't act" or "If you have to ask yourself if you have a conflict of interest, then you have probably answered your own question', Law Institute of Victoria, *President's Blog. How to avoid a conflict of interest* <https://www.liv.asn.au/LIVPresBlog2014/July-2014/Conflict-of-Interest>.

[16] David Luban, 'Rediscovering Fuller's Legal Ethics' (1998) 11 *Georgetown Journal of Legal Ethics* 801.

[17] Gerald J Postema, 'Positivism and the Separation of Realists from their Sceptism' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing, 2010) 259, 261–2, 264.

that process of practical reasoning inside the community of practice, the ethical standard is maintained.

B Three Propositions

I now turn to a closer consideration of why and how I assert that communities of practice can provide the necessary balance to the exercise of professional autonomy. Three propositions emerge from the research results, which I argue are crucial to the model of professional communities of practice and foundational to collegial moderation.

1 What is Ethical Depends on the Practice Context

The first proposition which derives from the research is that the lawyer must discern what is ethical according to their practice context. This proposition is consistent with the natural law purposive approach to legal ethics. That is because when the lawyer's paramount duty is to the administration of justice, their response to that duty is necessarily dependent on the context. Fuller and Luban's philosophical frames gauge the success (ethicality) of the lawyer's work according to their ability to give practical expression to the law's intrinsic purpose. The lawyer should discern the law's motivating purpose and then reason out how best to give effect to that purpose. However there needs to be regulatory 'permission' to do so.

There are diverse views about how a conflict of interest is understood. Some of those interviewed said that too many people are turned away, unable to obtain legal help. In an environment characterised by service scarcity, the paramount purpose of law should nonetheless be to make the tools of law available to those seeking justice. If we accept that law is a purposive profession, then law's intrinsic purpose is not met when people are refused legal help. The triage assessment process analysed through this research is an attempt to minimise this conundrum. Triage seeks to navigate the gap between the ethical standard and the scarcity of legal services. However the point from this research is that those decisions must always be situated in the discrete practice context. Fuller's core notion of a purposive professional provides a framing that helps explain how this should be conceptualised.

2 Ethical Acuity Is Strengthened When There Is a Culture of Professional Sharing

The second proposition is that purposive autonomy exercised in this way, is strengthened when there is a culture of collegial sharing. Although the ethical dilemmas participants face are complex and situation specific, the interview data in this research reveal systematic attempts at problem solving through the process of reaching out to professional peers. In a number of cases it was clear that individual ethical acuity improved as a consequence.

The *Allinson* case establishes the principle that the lawyer's peers are best placed to decide if conduct is competent and diligent.[18] Although typically reserved for disciplinary procedures, this peer review process is useful at the front end of practice too. A lawyer's peers are those colleagues who are familiar with the practice environment in which the decision is made. For example, the peers for a lawyer servicing a bush court, are those lawyers who have experienced the same practice context.[19] When that lawyer's conduct is reviewed by professional peers, the objective test to discern if that conduct aligns with the established ethical standard is: 'What is competent and diligent in this context?'. Whilst the lawyer may be satisfied they have done the right thing, their judgment should not be validated unless and until there has been input from peers.

A corollary to this second proposition is, that when a lawyer is professionally isolated without contact with peers to help them navigate complex ethical decisions, their ability to maintain ethical conduct will be severely reduced. The model offered later in this Chapter provides the means to overcome isolation.

3 The Community of Practice Model Supports Decentred Regulation

The final proposition informed by the research conclusions is that the model of a professional community of practice supports and justifies a decentred conception of

[18] Allinson v General Council of Medical Education and Registration [1894] 1 KB 750.

[19] See the description by the Melbourne barrister Frank Vincent when he experienced the summary justice of the Alice Springs Magistrate Court. Justice Frank Vincent, former Aboriginal Legal Service lawyer, then Victorian Supreme Court judge, in recounting his early years working in Alice Springs. Jonathon Faine, *Lawyers in the Alice : aboriginals and whitefella's law* (Federation Press, 1993).

regulation. In this time of regulatory change—as the Australian legal profession moves towards a principles-focused decentred regulatory paradigm—the time is ripe to engage lawyers in sharing their accumulated practice wisdom, and to test that tacit knowledge with their peers. By cultivating and curating a discursive community, lawyers can work with their colleagues to monitor, moderate and maintain ethical standards and to discern ways in which the underlying principles can be given practical application.

Although the research reveals a currently weak relationship between regulator and regulatee, the regulator must allow some licence for the country lawyer to be purposive and be encouraged to accept the distinctive situational challenges of country law practice.

This research reveals that although many country lawyers are unconsciously purposive in their approach, the development of their ethical acuity is occurring from an impoverished resource base. At worst, this means that some lawyers are open to 'bending' if not breaking the rules. In the current regulatory arrangements, there is no effective proactive or preventative process for the moderation of improper individual decisions. This thesis offers a practical solution to this absence by offering a model of a community of practice which responds to these propositions.

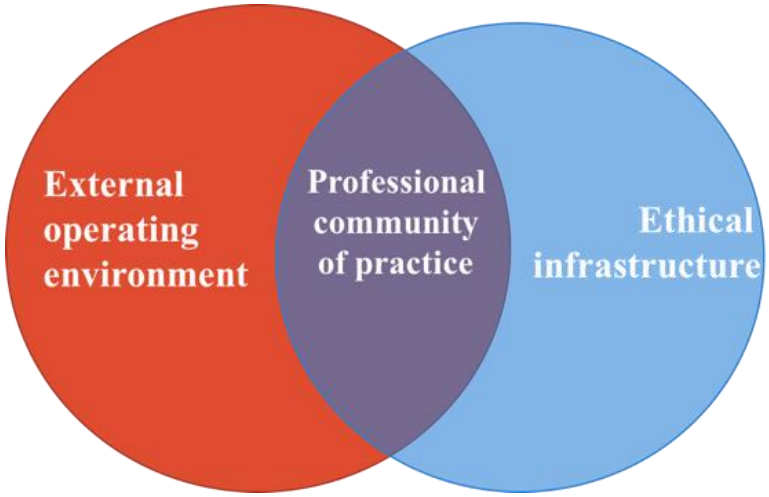
C Model to Identify and Respond to a Conflict of Interest

In this section I explain my model to assist country lawyers to identify and respond to a conflict of interest. This model described in *Figure 21 Professional Community of Practice* below, is intended to foster the development of lawyers' ethical acuity so that their conduct is consistent with the ethical standard. The model consists of two overlapping spheres. One sphere represents the ethical infrastructure within the law practice.[20] This is a toolbox of self regulatory forms and processes collected from research participants. Another sphere references the lawyer's external operating context

[20] These forms and processes are also called 'appropriate management systems' and although the previous *Uniform Legal Profession Act* had an explicit requirement for incorporated legal practices to have such systems and for them to be regularly audited by the regulator; that requirement does not exist in the current *Legal Profession Uniform Law*. See John Briton, *Comments on the Draft Legal Profession National Law: Business Management and Control – the Compliance Audit Power*, Australian Government Attorney Generals Department <http://web.archive.org/web/20110603155534/http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/(9A5D88DBA63D32A661E6369859739356)~John_Briton_Submission_re_the_compliance_audit_power.PDF/$file/John_Briton_Submission_re_the_compliance_audit_power.PDF>.

populated by professional colleagues, clients and norms of the containing community. Between the two spheres is an overlapping zone which represents the social learning possible within a professional community of practice. Within this zone discursive activity focuses on strengthening ethical acuity. Whilst all three parts of the model influence the lawyer's ethical decision making, it is the relationship between them that assists the country lawyer engaging in an ethical dilemma to resolve uncertainty.

Figure 21: Professional Community of Practice



In describing the elements of each sphere, and the discursive activities within the professional community of practice, I consider how this model can be used to guide the country lawyer through ethical uncertainty more broadly.

1 Sphere 1: Ethical Infrastructure

Ethical infrastructure refers to the elements within a law practice, such as forms and processes, which shape the ethical climate.[21] The imperative to develop this infrastructure informs the decentred regulatory system and is foundational to how the exercise of the community of practice oversight is proposed to work. In the United Kingdom, the *Code of Conduct* requires that law practices develop tools and processes which are appropriate to their size and complexity. Likewise under the former New South Wales and Victorian *Legal Profession Acts* it was mandatory for incorporated

[21] Parker, Christine et al, 'The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour' (2008) 13(1) *University of New South Wales Law Journal* 158.

legal practices to have 'appropriate management systems' and for both regulator and regulatee to regularly audit those systems.[22] Whilst this requirement is no longer included in the current *Legal Profession Uniform Law*, the responsibility for ethical conduct remains with each lawyer, and is shared with the principal of the law practice who must take 'reasonable steps' to ensure all lawyers within their law practice meet their professional obligations.[23] The tools within the law practice ethical infrastructure toolbox support the principal to ensure this happens. Importantly for the model presented here, the ethical infrastructure also underpins the community of practice oversight by first requiring the individual law practice to make explicit its ethical decision making processes.

Well-crafted tools and processes support a purposive approach to legal practice and guide the lawyer's discrete exercise of professional judgment. Because of the scarcity of resources within some country law practices, it helps when lawyers collaborate on the design of systems which are appropriate to their circumstances.

Throughout this research, participants shared their various tools and processes. A benefit of this research is the opportunity to share these systems through the model developed here. Specific elements of each aspect of this ethical infrastructure gathered and shared here include:

- registers of data
- decision-making flow charts
- the triage assessment process
- a limited scope retainer
- prototype forms to obtain the client's informed, written consent.

These tools are now used in piecemeal fashion across country law practices. This model is designed to provide a way for their use to be formalised and expanded across a wider region as practical support for the exercise of purposive autonomy. Making use of these tools can help inform the external oversight that localised communities of practice are proposed to exercise.

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[22] In the next iteration of the Legal Profession Acts, some people argued for the extension of this requirement for the development and audit of management systems to all law practices. See Briton above, n 19.

[23] This responsibility is explicit in sections 34 and 35 *Legal Profession Uniform Law* although is assumed under the supervisory culture within other jurisdictions.

Within this sphere representing ethical infrastructure, exist forms and processes for the collection and retention of confidential client information. As discussed next, it is critical that this function is managed carefully.

(a) Reconsidering the Collection of Data

The *Uniform Law General Rules* have a mandatory requirement for a series of specific Registers to record and retrieve practice data.[24] The form of Registers is to be determined by the law practice. All the law practices which were part of this study have systems to store client data and processes to access that data. Storage systems include physical card indexes and register books in small private law practices and computer databases in larger legal practices. Whichever system is used, the law practice is required to include a 'register of interests' which lists both the diverse client interests and the interests of the lawyer and their associates.[25]

An example of a Register of Interests which originates from Geraldton Resource Centre Community Legal Centre in north-west Western Australia and which addresses this requirement for the collection of requisite data is provided in Appendix L.[26] This system provides a tested method for data collection which forms the first ethical infrastructure template in the model. Making use of such registry tools more broadly can help inform the external oversight that localised communities of practice are proposed to exercise.

Country law practices should reconsider the manner and extent of the collection of confidential client information. The collection, and historical accumulation of confidential client data, can contaminate the law practice. Not only does this accumulated data appear when there is threshold screening, usually it can be accessed by all workers within the law practice and hence support the presumption of imputed knowledge.[27] Toxic levels of client data stored within the law practice can conflict out

[24] See Appendix L Law Practice Registers.

[25] Ibid.

[26] Ibid. See also s 107 Disclosure obligations in the *Legal Profession Uniform Law*; Rules 4.1.1 and 12 of the Law Council of Australia, *Australian Solicitors Conduct Rules* (21 June 2011).

[27] For the doctrine of imputed knowledge see G E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5th ed, 2013, 210 [6.15] .

large numbers of future clients. When there is less data within the law practice, more early intervention, unbundled legal services could be provided to clients.[28] Several public law practices have directed lawyers to limit the collection of confidential client data until the client's matter becomes ongoing.[29]

Whilst client data is necessary to effectively provide legal services, there needs to be clarity about when information is collected, what is collected, who has access to it, and for how long that data is stored before it is erased from the system. The law practice must seek, and obtain, the client's informed consent for the collection and use of this data.[30] This consent can be integrated into the client retainer and protocols around its use included in employment contracts for all workers within the law practice. Informed consent ensures that the lawyer complies with their confidentiality duty and duty to act in the best interests of each client.[31]

Conversely, the collection of some client data also assists the law practice to avoid a conflict of interest. The names and associated entities of clients of the law practice provide critical information to ensure client confidentiality is protected subsequent conflicts between the lawyer's own interests and the interests of their clients, are avoided.

(b) Is There a Conflict of Interest Which Must Be Avoided?

Using these practice tools provides a means for the avoidance of an actual conflict of interest.[32] Good practice requires lawyers to conduct a 'conflict of interest' threshold screen of new clients and new matters to discern if the law practice may have acted for the parties in a related matter. The aim is to identify a disqualifying conflict at the

[28] This is an anecdotal observation borne out by the New South Wales Legal Aid Commission early intervention unit.

[29] New South Wales Legal Aid Commission, 'Guidelines for managing conflict of interest within the Legal Aid Commission of NSW' (February 2007).

[30] Law Council of Australia, *Review of the Australian Solicitors' Conduct Rules.* (Law Council of Australia, 2018).

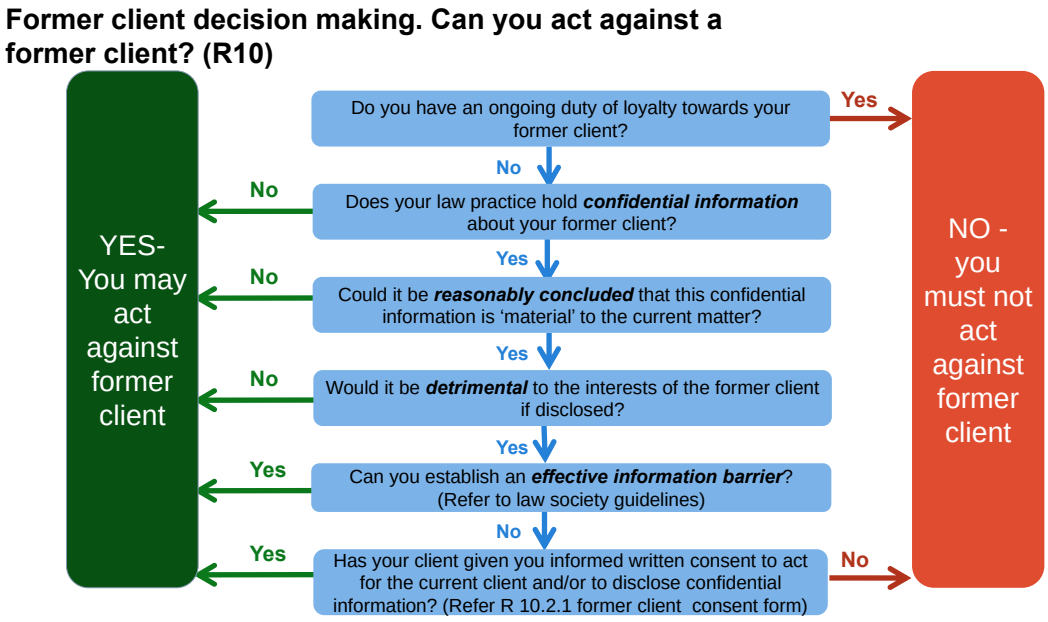
[31] This requirement is considered in some detail in the current Law Council of Australia, *Review of the Australian Solicitors' Conduct Rules.* (Law Council of Australia, 2018). Consider Rule 9.2.1 (allows audit, discussion). Also consider Australian privacy principles which establish the standard for government service providers. Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice (ALRC Report 108)*

[32] This proscription is mandated in Rules 10.1 and 11.1 of the *Australian Solicitors Conduct Rules*.

outset. Threshold screening involves checking the register of interests to identify if the law practice has acted for, or against, a person. Similarly an assessment needs to be made whether the lawyer's own interests within the law practice, including the personal, public, commercial interests of other workers within the practice, are in conflict with the client's interests.[33]

During interviews with country lawyers, many participants described the staged decision making process they used to identify and to respond to conflict. This decision making process has been distilled into two decision-making flow charts—one for deciding if the lawyer can act against a former client and another for deciding if the lawyer can act for two or more clients in a concurrent matter. The first decision-making flowchart in *Figure 22 Former Client Decision Making Flowchart* below reflects the requirements of Rule 10 of the *Australian Solicitors Conduct Rules* to ensure a former client's confidential information is protected.

Figure 22: Former Client Decision Making Flow Chart

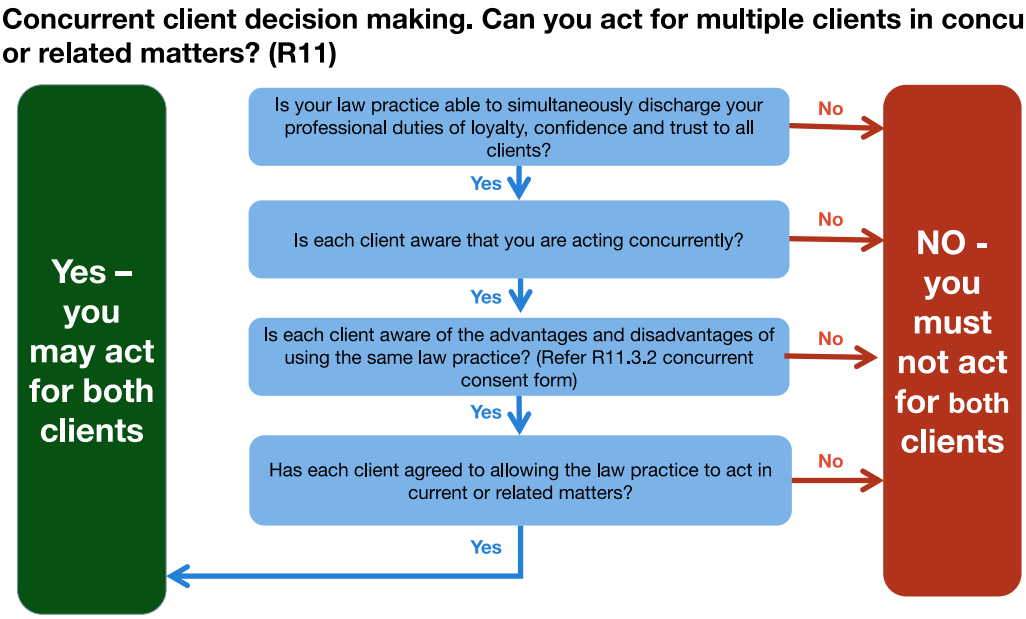


[33] See Appendix L Law Practice Registers.

This flowchart provides a process to guide professional decision making when the law practice is considering acting against a former client.[34] The risk being managed through this process is the inadvertent disclosure of a former client's confidential information.

The second decision-making flow chart in *Figure 23 Concurrent Client Decision Making Flowchart* below reflects the requirements in Rule 11 of the *Australian Solicitors Conduct Rules* to assist the law practice to decide if the law practice can act for multiple clients.

Figure 23: Concurrent Client Decision Making Flowchart



The usefulness of these two decision making flow charts is that they assist law practices to implicitly make a series of necessary professional judgments. Previously this judgment may have been conflated into little more than a 'sniff' test which lacks any sound ethical foundation.[35]

The advantage to using these flow charts is that rather than turning clients away because of uncertainty, the country lawyer's ethical decision making is supported through a series of semi-automated steps. The steps in the flow charts ask:

[34] My thanks to Alison Muller and Alana Daly from the Geraldton Resource Centre in Western Australia who suggested that it would be useful to have a flow chart to explain the process.

[35] Kyle, Coverdale and Powers, above n 14.

- If the lawyer decides that a client's confidential information is held in their law practice, could it be 'reasonably concluded' that this confidential information is 'material' to the current client? This possibility should be 'real and sensible' not 'fanciful'.
- If the lawyer decides that a client's confidential information is held in their law practice, does the lawyer think it would be detrimental to the interests of the former client if disclosed?
- If the lawyer stands in the shoes of a 'reasonable observer', can they anticipate the possible misuse of that client's confidential information? Is there a 'real and sensible possibility' that the duty to the current client will conflict with the duty to keep the former client's confidential information safe?
- Does the law practice have effective information barriers in place?[36] If such effective information barriers are in place, has the law practice obtained the current client's informed consent to a limited retainer that another client's confidential information will not be disclosed to them?
- Will the former client consent to the disclosure of their confidential information to another client? If not, is the lawyer still able to act in the best interests of both clients given the duty-duty conflict?
- Will the current client consent to accept a concurrent (limited) retainer?

In addition to automatically working through these decisions, the lawyer can also consider what it looks like from the client's perspective. That is, regardless of the lawyer's assessment, could it look as if there is a perception of a conflict? The use of these flow charts provides a further element of ethical infrastructure which can assist in community of practice review. The next element is the triage assessment process.

(c) Triage Assessment Process

The collection and management of data within a register of interests and the decision making flow charts are important elements within the ethical infrastructure and support sound decisions around conflict of interest. However once this information is available, an actual decision to act or not to act must be made. That is, should the lawyer act for this client in this matter or must the lawyer disqualify the law practice? This part

[36] Refer The Law Society of New South Wales,'*Information Barrier Guidelines*' (at 16 March 2006).

considers the triage assessment process which is an informal method used by many country lawyers for exercising this professional judgment. This process has emerged from a situation of service scarcity as lawyers in professionally isolated communities seek to do more with less.

Use of the triage assessment process is particularly evident in the public legal assistance sector. The beauty of triage assessment, as it is espoused by some Community Legal Centres, is that consideration of a conflict of interest comes to the fore automatically. Depending on the review and acceptance of this process within a community of practice, the process warrants much wider use.

If the law practice is contemplating taking on a matter, a method of triage focuses consideration on the range of existing interests. This knowledge will have been gathered through the more focused use of the *Register of Interests* and through the decision making process outlined above.

Triage in its essence involves the nuanced exercise of professional judgment and is much more than a simple administrative task of conducting a threshold conflict check against a client database. *Figure 24 Four Step Triage Assessment Process* below suggests a practice model for this to happen. More detail on the triage assessment process is provided in Appendix D.

Figure 24: Four Step Triage Assessment Process

1	Search the register of interests
2	If there is a red flag indicating a possible conflict, retrieve the file and objectively assess the facts
3	Exercise professional judgment (turn away, warm transfer, work around)
4	Consider the consequences of the moral remainder

The questions that are likely to arise through this triage include: Has the law practice acted for, or against this client in the past? Perhaps the law practice has been involved in a related matter which could be relevant to this new matter. In addition, the law practice will need to determine if it has any confidential information from a past client which is

relevant to this new client. If any of these triage assessments 'red flags' an issue, the lawyer will need to physically retrieve the client files and objectively assess how the information contained therein relates to the new matter. If the lawyer decides that 'Yes' the law practice can act for this client, they must obtain the client's informed, written consent. A proforma template for this process is considered in the next part.

Once again the triage process provides the opportunity to discuss the lawyer's decision with professional colleagues and have their judgment moderated. It is clear from this closer analysis just how transparent the ethical decision-making can be made through this 'simple' process. The focus is clearly on the clients' best interests.

The wider benefit of the triage process is that if time is invested in developing the lawyers' assessment skill, and the clients are included in the discussion, lawyers' ethical acuity will be sharpened and the integrity of the process strengthened. In this model I propose that triage assessment should be a compulsory step when the country lawyer is seeking to respond to the possibility of a conflict of interest.

(d) Using a Proforma for Verifying Informed Written Consent

Lawyers must not act when there is an identified conflict of interest, however in some circumstances, for example when there is an inchoate 'possibility' of a conflict, the lawyer can continue to legitimately act if the client has given informed written consent.[37] A form of disclosure to assist lawyers in managing concurrent client matters was included as a schedule in earlier versions of the professional conduct rules[38] however there is now no guidance as to 'form' of client consent in the current *Australian Solicitors Conduct Rules*. Two such forms developed from examples seen in use in interviewed practices, (one for former clients and another for current clients), are included in the Appendix M.

This conscious use of a proforma or automatic approach to obtaining client consent helps ethical acuity in two ways. If the lawyer believes they can act in the best interests

[37] It is worth noting that mere compliance with an instrumental form alone is insufficient to 'cure' an actual conflict of duties .This point is made in *Legal Services Commissioner v Francis (Legal Practice)* [2006] VCAT 581.

[38] *(Victorian) Professional Conduct and Practice Rules, 2005*, 49–50. Form 1 referring to r 8.5, Form 2 referring to r 32.

of concurrent clients, the proforma exercise encourages them to pause and reflect exactly on what is at stake. By including this form as a mandatory step in scoping the client retainer, the process triggers the professional judgment of the lawyer to discern, then to disclose, the advantages and disadvantages of the situation to the clients. Secondly, the form prompts the initiation of a conversation between the lawyer and their client whereby the lawyer must satisfy themselves that the clients are aware of the limitation of the proposed retainer and to ensure that the lawyer is acting in their client's best interests. In addition, the lawyer can use this form to refer their client for independent legal advice and as another basis for oversight discussions within their community of practice.[39] This proforma consent form captures that information as a record of the discussion and decision making process.

These forms provide tool in the ethical infrastructure toolbox within the model. The form and process discussed next aim to assist the country lawyer to identify and respond to a conflict of interest in the development of a limited scope retainer.

(e) Negotiating a Limited Scope Retainer

Some country lawyers reported using the limited scope retainer to manage a possible conflict. When the limited scope of work is adequately defined, the retainer was found to work well as a risk management tool to manage both lawyer and client expectations.[40] The formal document captures client consent to the collection and use of their data whilst also managing both lawyer and client expectations about the scope of work. The retainer was used when the lawyer was acting purposively to provide access to affordable, limited legal help to assist the client to complete discrete legal tasks: to draft affidavits, to provide procedural or tactical advice or to draft the terms of consent orders.

[39] It is difficult to imagine how the independent lawyer would advise the 'referred' client about this matter. On the one hand, they should draw attention to the risks involved when a lawyer acts for multiple parties and on the other hand strive to ensure the client retains their faith in their original lawyer and in the legal system. Case law suggests that only independent legal advice can discharge the obligation to obtain 'informed' consent. See *Clark Boyce v Mouat* [1994] AC 428.

[40] See the discussion on the desirability of limited scope retainers regarding Rule 11 in the current review of the Australian Solicitors Conduct Rules, Law Council of Australia, above n 28, 50-63.

(f) Summary of the tools in the ethical infrastructure toolbox

These six devices or templates described in this sphere of internal infrastructure are commonplace tools in the ethical infrastructure toolbox. They are included in this model as a package of interconnected tools designed to be offered for adoption by country practice. They could be introduced by regulators through targeted continuing professional development seminars. These tools provide a means of managing ethical decision making in many country law practices although it is unlikely that a single law practice adopts them all. In the next section I consider the second sphere of the model which is the external operating environment.

2 Sphere 2: External Operating Environment

The second sphere of my model represents the external operating environment which provides the context in which law is practised and derivatively shapes the practical expression of the rule of law. At its broadest this environment includes clients, regulators and professional colleagues. Colleagues can be co-located geographically, or share an area of professional interest and work elsewhere. Each element within this environment has its own, often tacit, norms which must be experienced to be understood. In addition, the lawyer must have a working knowledge of the requirements of their statutory regulator, professional indemnity insurer, and professional membership body.

Developing the lawyer's awareness of 'place consciousness' requires attention to the geographical, social and professional realms operating within the physical space where the law practice is located.[41] Interestingly, participants said that knowledge acquired in one operating environment was not necessarily relevant to their current situation. Significantly for the model outlined here, participants revealed that colleagues were regularly consulted to assist the lawyer to work through an ethical dilemma. The example of practising in the bush courts illustrates the influence of the external operating environment, when justice had to be done with limited time and limited

[41] Patricia Karen Mundy, Amanda Kennedy and Jennifer Nielsen (eds), *The Place of Practice. Lawyering in Rural and Regional Australia* (Federation Press, 2017) 1.

resources.[42] There needs to be an easily managed way of gaining this practice 'place consciousness'.

For example, the regular site visits to law practices conducted by the Queensland professional indemnity insurer Lexon are intended to support lawyers whilst minimising future risk. Likewise, Community Legal Centres must participate in the annual 'cross check' audit by a professional colleague. These personal visits combine collegiality with oversight of professional standards. In the next part we consider how the overlap between these two spheres can create a professional community of practice. The inclusion of this zone reflects the interview data that research participants explore ethical issues best with colleagues.

3 Overlap Between the Two Spheres: Professional Community of Practice

I now consider the overlapping zone between the ethical infrastructure and the external operating environment. It is within this zone that professional communities of practice occur. There is an element of mutual self-interest when lawyers get together within this zone. Good ideas get shared. Clients get referred. Service systems get discussed. But importantly, oversight occurs.

Participants explained how these communities of practice helped them to identify and to respond to a conflict of interest. Firstly, they spoke of a local ad hoc gathering of geographically proximate lawyers. These local lawyers are available to each other to obtain a quick review of their internally reached decisions regarding conflicts of interest. There are nascent examples of such cohorts in regional law associations and regional justice planning groups in some jurisdictions.

A second way in which a community of practice exists is within the virtual realm, using the online space to gather and to learn together. Examples of virtual social learning include closed Facebook groups[43] and collaborative practice support and referral

[42] A 'bush court' refers to the circuit court, which 'flies in and flies out' to service the legal needs of remote communities. Typically a bush court is at the Magistrates Court level and deals with criminal matters. See quote from 27MUR above Chapter V D 2.

[43] For example, Nest Legal and Albury and District Law Society which operate closed Facebook groups.

groups.[44] In this section I explain how the community of practice provides the necessary oversight to raise ethical issues and to monitor ethical performance.

(a) Oversight, Site Visits and Audit of Management Systems

The essential benefit that a community of practice can provide as a site of decentred regulation is its immediacy and connectedness to country lawyers. The main way it can do this is through informal and collegiate oversight. This can happen in much the same way that some country Community Legal Centres provide an internal oversight function through case management discussions and cross check audits.[45] Exchanging knowledge with peers to build capacity can have a prophylactic effect.[46] Additionally, site visits based on mutual personal visits to each other's law practices, build relationships between professional colleagues.

An example of such an activity is the annual 'cross check' audit undertaken by Community Legal Centres in the public legal assistance sector. These audits are a process to moderate and collaborate on the evolution of good practice. The cross check is a reciprocal arrangement as each law practice is visited by a principal lawyer from a sister service. During this visit all internal law practice management systems are reviewed, clients interviewed and files audited. The annual cross check audit has a formal aspect. The auditing colleague provides a review report to the host law practice, and professional indemnity insurance working group. This collegial review process counteracts any localised tolerance for divergent or idiosyncratic practice.[47]

[44] Law Council of Australia, 'Australian Collaborative Practice Guidelines for Lawyers' (March 2011,); See another example from the United States, American Immigration Lawyers Association, *Mission and Goals* <http://www.aila.org/about/mission>.

[45] National Association of Community Legal Centres, *Risk Management Guide* (2nd ed, February 2017).

[46] Christine Parker and Lyn Aitken, 'Queensland Workplace Culture Check: Learning from Reflection on Ethics inside Law Firms' (2011) 24 *Georgetown Journal of Legal Ethics* 399; Christine Parker, 'Regulating law firm ethics management: An empirical assessment of an innnovation in regulation of the legal profession in New South Wales' (2010) 37 *Journal of Law and Society* 466.

[47] Similarly, the Queensland professional indemnity insurer Lexon conducts site visits to their insured members as part of their risk management protocols. Although Lexon were reluctant to share information about this strategy, anecdotes indicate that for some isolated lawyers this visit provides a rare opportunity to share their professional concerns.

(b) Roundtable Discussions

An additional benefit of a professional community of practice is the delivery of continuing professional development. Collegial sharing through a community of practice elicits diverse views and moderate this diversity through discursive processes. This collegial moderation of ethical conduct is supported by the legislative and regulatory requirements.[48] It helps if this gathering occurs at a physical round table which ensures equal contribution of all participants without an obvious expert. Round table discussions avoid didactic approaches to the promulgation of historic knowledge, and instead cultivate robust yet respectful discussions between colleagues to develop practice management solutions appropriate to their law practice. Round table discussions provide the forum to harness and share the professional wisdom of colleagues. This shared ethical responsibility between regulator and law practice invites the possibility for reflective practice. Research by Christine Parker, Tahlia Gordon and Steve Mark has shown that reflective practice through self-audit results in fewer complaints.[49]

Items for discussion around this table could include the review of the tools and processes developed within the toolbox representing the ethical infrastructure. Agenda items could include the design of appropriate management systems suitable to the size and complexity of the law practice, identifying and responding to conflicts of interest, supervision of workers and other critical issues at the intersection of ethics, law practice structure, and culture.

Participation within this community can be informed by existing models of professional engagement which cultivate ethical acuity. Four methods of a dialectic process come to mind. *The Giving Voice to Values* method developed by Mary Gentile[50] and refined by

[48] See *Legal Profession Uniform Law* s 3 Objectives; s 34 Responsibility of principals; s 39 Undue Influence; Law Council of Australia, *Australian Solicitors Conduct Rules* r 5 Dishonest and disreputable conduct.

[49] Christine Parker, Tahlia Gordon and Steve Mark, 'Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales' (September 2010) 37(3) *Journal of Law and Society* 466466–500.

[50] Mary C Gentile, *Giving Voice to Values. How to speak your mind when you know what's right.* (Yale University Press, 2010).

Vivien Holmes[51] coaches participants to express a considered view, whilst respecting others' differences. The *Giving Voice to Values* discourse is anchored in pursuing an ethical purpose and is enlivened when one's own values are challenged. Reflective practice is the second dialectic method which requires personal insight and the ability to reflect on one's habitual conduct. This method has been further developed and encouraged by Michelle Leering.[52] Reflective practice refers to the iterative process of acting, reflecting, revising and acting again in the light of improved practice. Likewise, the normalising of uncertainty and the encouragement of an adaptive attitude to learning in place, is suggested by Stephen Tang and Tony Foley.[53] In setting an agenda for these communities, and in discerning what is the right thing to do, lawyers' dialogues can be guided by Postema's four step process of practical reasoning,[54] or Luban's three step Fullerian analysis.[55]

(c) Warm Transfers

A professional community of practice can also offer referral pathways between its members. If the lawyer is unable to provide a legal service to their client, because of an actual conflict or the area of law may be outside that lawyer's competence, this model facilitates the warm transfer of that client to another law practice. The warm transfer gives practical expression to the lawyer's paramount duty to the administration of justice, as people are given legal help when they seek it. That is, rather than refuse a service, the first lawyer arranges for their client to be seen by another skilled and capable colleague.

(d) Resourcing the Professional Community of Practice

It is important that if professional communities of practice are accepted as a useful tool to foster the coregulatory relationship, then several logistical issues need to be

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[51] Vivien Holmes, "Giving Voice to Values': enhancing students' capacity to cope with ethical challenges in legal practice.' (2015) 18(2) *Legal Ethics*

[52] Michele Leering, 'Conceptualizing Reflective Practice for Legal Professionals' (2014) 23 *Journal of Law and Social Policy* 83.

[53] Stephen Tang and Tony Foley, 'The Practice of Law and the Intolerance of Certainty' (2014) 37(3) *University of New South Wales Law Journal* 1198, 1225 quoting Stephen Tang and Tony Foley, *The benefit of the doubt: Integrating uncertainty, ignorance and 'thinking like a lawyer'.* Law and Society Annual Meeting (2013); ibid.

[54] See discussion about Postema's process of public practical reasoning above Chapter II B 4.

[55] See discussion about Luban's Fullerian analysis above Chapter V D I b.

addressed. Resources include, time, talent and money. Resources could be 'in kind' with lawyers offering to host gatherings, facilitate meetings and provide secretarial support to ensure communication flows between members. Some regional law societies operate this way, with no financial payment made for honorary positions and a commitment to keeping participation costs low by holding meetings at members' premises. For country lawyers there is also the cost of travel and accommodation for visiting colleagues who may be invited to share their practice wisdom. Money to resource a professional community of practice could be raised through membership subscription[56] or through a grant program.[57]

The sustainability of a professional community of practice is also shaped by the choice of structure. Structure dictates the governance arrangements and accountability to members. The structure could be an unincorporated group or network, rising and falling according to the interest of its members. The structure could have its own legal personhood, as an incorporated association, as a company[58] or a co-operative.[59]

The suggested structure envisaged here negotiates an enhanced role for the regional law societies to broaden their focus beyond membership advocacy to foster localised professional communities of practice. Examples of regional groups developing and embracing such wider justice roles are evident in the interviews with participants. The most frequent gatherings are to discuss service system improvement. In the national public sphere examples include the jurisdictional forums fostered by the National Partnership Agreement on Legal Assistance Services[60] and the Australian Government

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[56] For an example of a self-sustaining professional community of practice see *The Piddington Society* <http://piddingtonsociety.com/> . See also the specialist bar established for the American Immigration Lawyers Association, above n 44.

[57] The Australian Professional Standards Council has offered grants to enhance professional standards. See Professional Standards Council, *Grants Program* <https://www.psc.gov.au/grants>. Although the legal professional regulator manages the grants from the public purpose fund (that is the money gathered as interest from solicitors' trust accounts), this money is not available to the private legal profession. Victorian Legal Services Board, *Grants Program* <http://lsbc.vic.gov.au/?page_id=44>. See Appendix O *Shop Talk* when the author applied to the Victorian Legal Services Board for a grant to develop a professional community of practice (Shop Talk).

[58] The company can be incorporated for profit or not for profit and limited by guarantee.

[59] My thanks to Professor John Flood of the Law Futures Centre at Griffith University who suggested the cooperative model used by Spanish olive growers may be a good fit for the collegial endeavour which characterises the professional community of practice. For an example of such a cooperative see Agro Sevilla, <http://www.agrosevilla.com/en/cooperatives/>.

[60] Commonwealth of Australia, *National Partnership Agreement on Legal Assistance Services* (Council of Australian Governments, 2010).

Attorney-General's Department Family Law Pathways Network discussions.[61] At a jurisdictional level, examples include the regional justice plans facilitated by the Cooperative Legal Services Delivery forums[62] and regulator discussions with the legal assistance sector during the moratorium on the *Australian Solicitors Conduct Rules*.[63] Adding this additional function to existing regional law society purposes should ideally start with a pilot program funded by the regulator.[64]

(e) Limitations

As attractive as this prescription is as an antidote to unethical practice and as a cure to professional isolation, it has its limitations. The first limitation is the assumption that lawyers would be interested in meeting professionally to discuss issues which necessitate a level of curiosity, reflection and vulnerability. Whilst this collaborative culture has been established in the public sector, historically private lawyers are competitors in the market for legal services. Private lawyers may be reluctant to participate in a professional community of practice as they may see themselves as adversaries not colleagues. In addition over time, through the accumulation of scars of conflict, lawyers may have learned not to trust, or to respect their colleagues. I acknowledge this historical framing of law as a competitive adversarial profession. However, the practice of law is evolving.

There has been a growth of an alternative style of collaborative legal practice. An example are practice groups which link law practices for the explicit purpose of sharing knowledge. These groups have a joining fee and require participation as part of their membership.[65] Another example is the collaborative practice – especially in family law- which focuses on how best to develop a win-win for all parties. By necessity collaborative professionals must work with their colleagues and commit to a threshold undertaking to avoid litigation. Consequently, lawyers must work together and use their

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[61] Australian Government Attorney General's Department, *Family Law Pathways Network* <https://www.familylawpathways.com.au/>.

[62] Legal Aid Commission of NSW, *Cooperative Legal Service Delivery Program* <http://www.legalaid.nsw.gov.au/what-we-do/community-partnerships/cooperative-legal-services-delivery-clsd-program>.

[63] Law Council of Australia, Review of the Australian Solicitors' Conduct Rules. (Law Council of Australia, 2018)

[64] See Appendix O 'Shop talk' for an example of a project.

[65] An example is the Law Australasia network which is an association of independent law practices. http://www.lawaustralasia.com.au/

best endeavours to create a mutually satisfactory solution. A necessary part of collaborative practice is to regularly participate in collegial professional development to reflect on their learning and to strengthen relationships. Apart from this requirement for collaborative professionals, collegial professional development is now mandated in all Australian jurisdictions.

Another limitation is the mode used to gather together. Meeting in person is preferred as incidental social contact can enhance the development of relationships and trust. However lawyers who practice far from the major cities may be reluctant to travel to meet with other lawyers. The travel and accommodation costs associated with face to face meetings may be prohibitive for small scale law practices. Although information and communication technologies may offer an alternative mode to gather, its functionality may be limited by internet speeds, mobile phone connections, and user literacy.

A further limitation is that this model of a professional community of practice depends on the lawyer's voluntary motivation to participate. I suspect that the success of the endeavour depends on the lawyer's curiosity – rather than compulsion - and belief that they will receive a dividend from the investment of their time. Perhaps there is a middle ground between voluntarily 'opting in' and mandatory attendance which is covered by incentives. In developing the invitation to participate, attention should be paid to the 'pitch' that is 'what is in it for me?'. For example the professional indemnity insurer for the New South Wales legal profession LawCover, offers a discount on the insurance premium if their insured solicitors participate in risk management seminars.

Perhaps the invitation could include:

- 'points' for professional development which can be counted to their mandatory requirement,
- quality time enjoying beautiful, seasonal food and local wines, away from the office and the intensity of practice,
- reliable learning which directly supports the lawyer in the practice of law.
- fun.

Elements of professional communities of practice already exist within the Australian legal profession, however they are disjointed and tend to didactic presentations. The

limitations identified here should be addressed in the design and delivery of this social learning forum.

D Summary

In summary, within this Discussion Chapter I have used the results of the research to make a contribution to normative theory about the regulation of ethical conduct in the legal profession by setting out a series of normative prescriptions. However this is not the only contribution this thesis makes.

As I set out in the introduction, this has always been a collaborative project with country lawyers, especially those who agreed to be interviewed about their experiences and were most frank about the distinct ethical challenges of their practice. As such, I have also provided a practical model to foster their ethical acuity. The normative prescriptions and the design of the practical model respond to the research question to explain how country lawyers should identify and respond to conflicts of interests.

Three elements are included in the normative prescription: '*For ethical legal practice, lawyers need to participate in a community of practice*'. The elements were developed within a particular practice context of country lawyers. These elements reflect the theoretical constructs of the natural law purposive theory of legal ethics, decentred regulatory theory and the idea of communities of practice. The mandate within this prescription is that the practical expression of the law's purpose needs to be moderated through discussion with professional colleagues. This can meet the requirement for lawyers to participate in the dialectic exchange so that knowledge can be shared and moderated.

Informed by the results, analysis and normative prescription, I offer three propositions deriving from the research conclusions. These propositions highlight the seminal role of professional colleagues in discerning the standard for legal competence and diligence whilst allowing a nuanced approach to ethical conduct informed by the practice context. Intuitively what flows from this is a more practical and tangible means for this role to occur in often isolated practices.

Overall contextual ethics associated with the bar norms peculiar to specific cohorts of lawyers need not be necessarily deviant. Sometimes these localised bar norms reflect considered, situation specific responses which should not be dismissed. However the legitimacy of these responses needs the oversight from decentred regulation through the model of community of practice provided.

VII CONCLUSION

This research occurs at a time of change within the Australian legal profession as the regulatory approach moves away from focusing on prescriptive obedience to promulgated rules, towards a decentred, principles-based approach to fostering ethical acuity. Alongside this period of change, there is a parallel examination of the role morality of lawyers which questions the standard conception of the lawyer's role as the adversarial and zealous advocate. This questioning introduces alternative professional roles such as 'moral activism', 'responsible lawyering' and harnessing the 'ethics of care' whilst working with clients.[1] These latter constructions of professional role morality extend beyond simple obedience to positivist rules. They invite a higher fidelity to broader goals beyond the client's best interests – although this goal remains important.

Rather than being consumed by the parsing, cavilling and smart lawyering of the adversarial, pettifogging, point scoring advocate, these alternative conceptions of the lawyer's role invite the lawyer to be purposive in their work. To be, using Fuller and Luban's words, purposive professionals. In this role the lawyer transcends prescriptive obedience to rules by seeking out, and giving expression to, the implicit purpose informing those rules. As functionaries within the legal system, lawyers' paramount duty to the administration of justice can be understood as a moral calling. And as such, lawyers' ethical judgment must be anchored in a principled, purposive endeavour so that the lawyer personifies the rule of law within their community.

Within this role morality, there is a clear 'call to action' to lawyers to be cognisant of their primary role as justice professionals. Purposive professionalism can provide lawyers with a justification for stepping into the justice space and asking 'What does justice look like in my community?' and 'Have I achieved justice in my work?'. We can see the lawyers interviewed for this study behaving in a way that Fuller and Luban's theorising helps to illuminate. Where the lawyer's sense of professional purpose and ethical agency is strong, where their integration within a professional community of practice is strong and where their sense of connection with the regulator is strong, it is much more likely that the lawyer's ethical decision making will be continually refined

[1] Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 3rd edition 2018), 36-55.

and sharpened. This thesis provides a theoretical and practical contribution to assist lawyers and regulators in this transition. This thesis argues that lawyers' sense of shared professional purpose and connection between the regulator and professional colleagues could either strengthen or undermine their ethical conduct.

This thesis contributes to normative theory by making a connection between the cultivation of lawyers' ethical acuity and their participation in a professional community of practice. In considering how practice can inform theory, I offer a normative prescription '*For ethical legal practice, lawyers need to participate in a community of practice*'. My prescription requires regulatory licence be given to country lawyers to practise as purposive professionals and that, to ensure ethical legal practice, such lawyers need to participate in a professional community of practice. Through this participation, the lawyer's individual, and perhaps idiosyncratic judgment, can be tempered through a process which validates their conduct as situationally appropriate. An effective community of practice fosters the evolution of situationally specific knowledge and provides a safe space for learning through discourse between lawyers with diverse perspectives. Social learning occurs through participation within this community which uses robust collegial discussion to consider everyday examples of ethical issues.

I was curious to understand the factors which inform lawyers' ethical decision making. The research site of inquiry focused on how country lawyers identify and respond to the ethical issue of a conflict of interest. Fifty-two lawyers were interviewed and their responses were coded to a measure of geographic remoteness then analysed for common themes. When faced with the possibility of a conflict and when discerning if they should act, or disqualify their law practice, the research data reveals that some lawyers engage in a complex triage assessment process. Using the triage assessment process, the lawyer discerns what is in their client's best interests and considers what is needed to meet those interests. This process reflects elements of purposive practice. That is, lawyers striving to give practical expression to the underlying motivating principle embedded in the law and professional conduct rules.

However if lawyers adapt too much to the context of their practice, their accommodation to local custom may undermine the established rule of law. Questions arise as to whether the lawyer's contextual response is 'ethical' and consequently to be

encouraged. Is their adaptive response beyond what the mainstream legal profession considers to be ethical legal practice. The research results and these questions are addressed in this thesis. The thesis contribution extends explanatory ethical and normative theory.

As seen within this thesis, the conceptions of decentred regulation and purposive professionalism help to explain much of what occurs in country legal practice. It is clear from the research data, that country lawyers can be conceptualised as acting 'purposively' when faced with the possibility of a conflict of interest. Whilst it is unlikely that these lawyers are aware of Fuller and Luban's theories, their conduct revealed through the triage assessment process, is nonetheless evidence of a pragmatic focus on achieving law's purpose. However, this triage assessment process was found to be largely unmoderated and unrecognised and lacking regulatory imprimatur.

This thesis asserts that regardless of the geographic location of the law practice, lawyers who are professionally isolated will more often lack the moderating influence of professional colleagues. The risk is that professionally isolated lawyers will then feel decision making power is located elsewhere and they are outside the locus of control, even though not geographically remote. Balancing this observation are strong examples of research participants who were similarly geographically remote, but nonetheless participated in supportive, robust and evolutionary communities of practice. These nascent examples of professional communities of practice included many regional law societies and law society practice groups.

This thesis provides a means for a much more embedded practice to support the development of ethical conduct through the use of communities of practice. Informed by the research and analysis of the participant interview data, I offer three propositions seen to be fundamental to the moderation of ethical conduct. Addressing each of these three propositions can provide a normative prescription of how ethical acuity in country legal practice can be improved.

- *What is ethical depends on the practice context:* As the culture and the context of law practice changes, lawyers' appreciation of what is ethical evolves. Lawyers who are alert and responsive to the needs and characteristics of their clients and community may practise law differently from their colleagues with

different clients and communities. In devolving professional judgment to the situated lawyer, the zone of ethical conduct is expanded beyond the historical, normative standard, to allow an iterative, evolutionary response developed to be appropriate to the practice context.

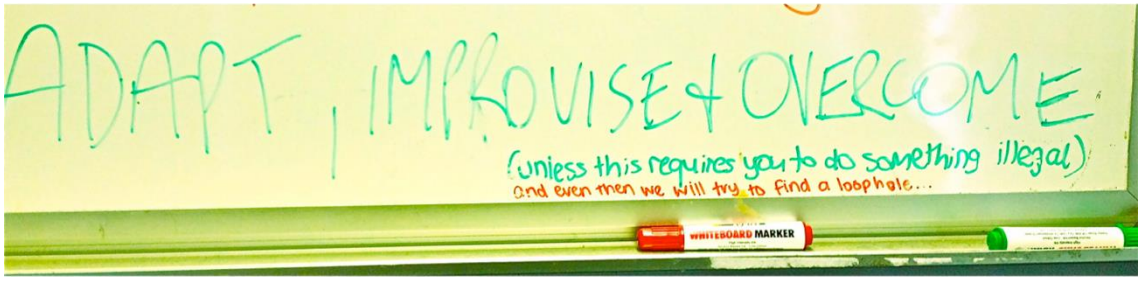
- *Ethical acuity is strengthened when there is a culture of professional sharing:* A lawyer's ability to respond to diverse practice environments needs to be overseen and strengthened through validation by respected professional peers. There must be a regulatory means for the moderation and oversight of potentially idiosyncratic judgment. This moderation and oversight should be provided by colleagues within professional communities of practice.
- *Professional communities of practice best reflect and respond to the decentred regulatory paradigm:* Within properly developed professional communities of practice, lawyers can share their accumulated practice wisdom and test tacit knowledge with their peers. By cultivating and curating a discursive professional community, lawyers can work with their colleagues to monitor, moderate and maintain ethical standards within a decentred regulatory environment.

This method of discursive social learning within a collegial environment is supported by contemporary decentred regulatory theory. Although the research reveals a currently weak relationship between regulator and regulatee in the command and control guise, there is nonetheless a potentially stronger means of ethical standard keeping within decentred regulation which this thesis has discovered and brought to light.

THE END

25 September 2018

ENDNOTE



[Photo of a lunch room white board in an inner regional Community Legal Centre with the words 'Adapt, improvise and overcome (unless this requires you to do something illegal) and even then we will try to find a loophole.']

I saw this phrase when I was conducting a test interview with a senior solicitor from an inner regional Community Legal Centre during the second stage of the research design. My interviewee told me that the principal lawyer in that law practice was a former officer in the Australian Defence Force who used this phrase to motivate her legal team.

This exhortation has remained with me through the research project. It seems to capture a certain spirit of legal practice which many of the research participants displayed when they were sharing their stories of legal practice.

Helen McGowan
25 September 2018

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IX APPENDICES

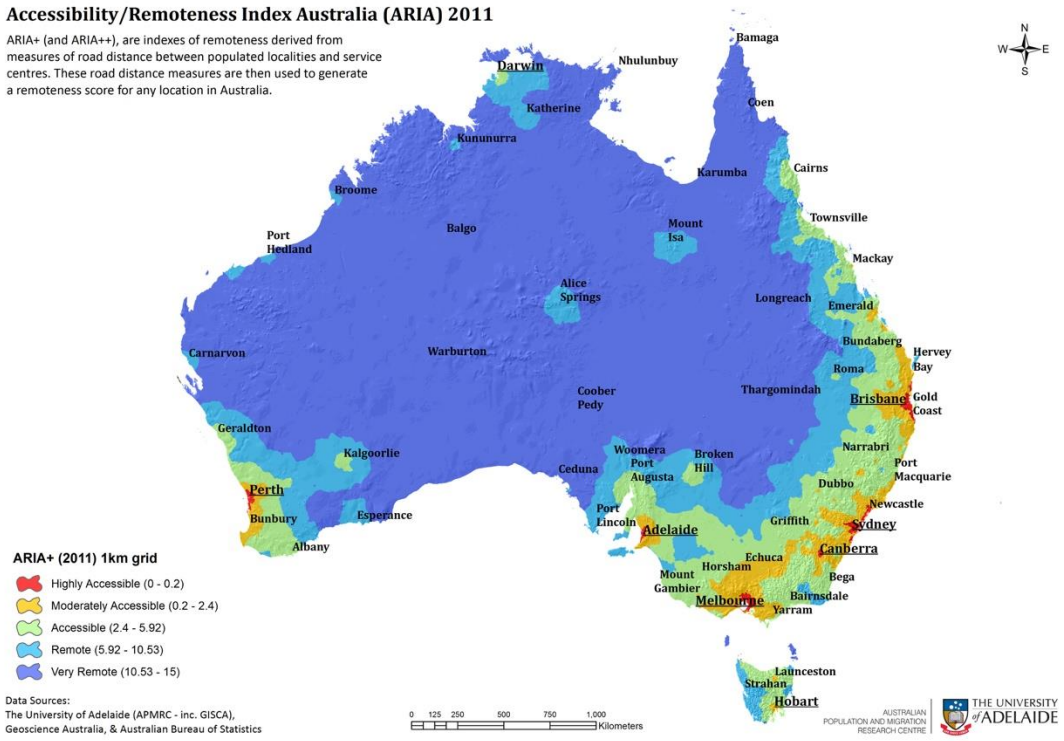
Appendix A: Chronology of Australian Statistical Geography

In the previous 24 years, the Australian government has used statistical geography tools to inform policy, distribute resources and to support rural workers. At the time of writing, the ASGS-RA is the preferred tool. See more on the website of the National Rural Health Alliance http://ruralhealth.org.au/book/geographic-classifications

Year	Classification	Comment
1994	Rural, Remote and Metropolitan Areas classification (RRMA)	This classification was based on population size and ascribed the terms 'metropolitan', 'rural' and 'remote' to communities of decreasing density. The RRMA was used by the Australian Departments of Primary Industry and Human Services and Health. However, in 1998 the Australian government stated 'the degree of geographic remoteness of an area is a better indicator of disadvantage' (than population size).
1997	Accessibility/Remoteness Index of Australia (ARIA)	The Australian Department of Health and Aged Care commissioned research into the development of a geographic measure of remoteness. The ARIA is produced by the Australian Population and Migration Research Centre at the University of Adelaide and is reviewed with each population census. The ARIA used a statistical measure to define five categories ranging from 'highly accessible' areas with a wide range of goods and services and opportunities for social interaction, to 'very remote' areas with little accessibility to services or social interaction. This Index identified then assessed 11,340 localities based on accessibility to, and distance from, 199 designated service centres. The linking of remoteness to accessibility has been contentious as the two factors are seen by some to be incommensurable.
2001	ARIA+	The ARIA was enhanced with the addition of continuous varying index with values ranging from 0 (high accessibility) to 15 (high remoteness). The ARIA+ calculates road distance measurements from over 12,000 populated localities to the nearest Service Centres in five size categories based on population size. The developers of the ARIA+ caution that: 'it is a purely geographic measure of remoteness, which excludes any consideration of socio-economic status, 'rurality' and population size factors. As a comparable index of remoteness that covers the whole of Australia, ARIA provides a measure of remoteness that is suitable for… assisting in service planning, demographic analysis and resource allocation.' (Accessed 19.4.14 APMRC

		<http://www.adelaide.edu.au/apmrc/research/projects/category/aria.html> See ARIA map on following page.
2006	Australian Standard Geographic Classification Remoteness Areas (ASGC-RA)	Incorporation of the ARIA+ within the Australian Bureau of Statistics system.
2011 and 2013	Australian Statistical Geographic Standard Remoteness Areas (ASGS-RA)	This review modified the ASGC system by replacing the threshold unit of Census Collection Districts with regions based on Statistical Area Level 1. The reason for this change was that it allows better alignment with other data systems such as the local government areas, postal areas and urban/locality boundaries.
2015	Modified Monash Model	Developed by Humphreys and McGrail from Monash University using ASGS-RA enhanced by population size of town.

ARIA Map 2011



Appendix B: Comparative Ethical Principles

Ethical principles are high level aspirational statements expressing the motivation which should inform lawyers' ethical conduct. This list of principles shows the alignment between Australian regulation and the United Kingdom Code of Conduct and the International Bar Association.

Acronyms

IBA: International Bar Association
ASCR: Australian Solicitors' Conduct Rules
LCA: Australian 'harmonised' model rules based on the Law Council of Australia National Model Rules of Professional Conduct and Practice.
SRA: Solicitors Regulation Authority SRA Principles (United Kingdom)
LSN SoE: Law Society of New South Wales, Statement of Ethics
LSN PCPR: Law Society of New South Wales, Professional Conduct and Practice Rules 1987 (revised 1995) Four categories preceded by a statement of principle. repealed
VPCPR: Victorian Professional Conduct and Practice Rules 2005 repealed
VLPA: Victorian Legal Practice Act 1996 s64 repealed
LPUL: Legal Profession Uniform Law: Purposes

Principle	**Expression of the principle**	**Reference**
1. Independence	A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation. A lawyer shall exercise independent, unbiased professional judgment in advising a client, including as to the likelihood of success of the client's case.	IBA 1
	A solicitor must also avoid any compromise to their integrity and professional independence; and	ASCR 4.1.4
	Not allow your independence to be compromised.	SRA Principle 3
2. Honesty, integrity and fairness	A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact.	IBA 2
	A solicitor must also be honest and courteous in all dealings in the course of legal practice.	ASCR 4.1.2
	5 Dishonest and disreputable conduct 5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to: 5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice; or 5.1.2 bring the profession into disrepute.	ASCR 5
	We seek to maintain the highest standards of integrity, honesty and fairness in all our dealings.	LSN SoE
	Act with integrity.	SRA Principle 2
	In all of their dealings with other practitioners, practitioners should act with honesty, fairness and courtesy, and adhere faithfully to their undertakings, in order to transact lawfully and competently the business which they undertake for their clients in a manner that is consistent with the public interest.	LSN PCPR Statement of Principles for relations with other Practitioners Rules 25-31A

Principle	Expression of the principle	Reference
	Practitioners should, in the course of their practice, conduct their dealings with other members of the community, and the affairs of their clients which affect the rights of others, according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers and in a manner that is consistent with the public interest.	LSN PCPR Statement of Principles for relations with third parties Rules 32-36
	Serving the interests of Justice and complying with the Law A practitioner must not, in the course of engaging in legal practice, engage in, or assist, conduct which is: (i) dishonest or otherwise discreditable to a practitioner; (ii) prejudicial to the administration of justice; or (iii) likely to diminish public confidence in the legal profession or in the administration of justice or otherwise bring the legal profession into disrepute.	LIV PCPR introduction Boxed text B p 9
3. Conflicts of interest	A lawyer shall not assume a position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's authorisation.	IBA 3
	10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients, except as permitted by Rule 10.2. 11.1 A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule. 12.1 A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this Rule.	ASCR 10 11 12
	We avoid any conflict of interest and duties.	LSN SoE
	Practitioners should serve their clients competently and diligently. They should be acutely aware of the fiduciary nature of the relationship with their clients, and always deal with their clients fairly, free of the influence of any interest which may conflict with a client's best interests. Practitioners should maintain the confidentiality of their clients' affairs, but give their clients the benefit of all information relevant to their clients' affairs of which they have knowledge. Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.	LSN PCPR Relations with clients Rules 1-16
4.Confidentiality/professional secrecy	A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct.	IBA 4

Principle	Expression of the principle	Reference
	9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not: 9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor's law practice; A solicitor may disclose confidential information in specific circumstances (R9.2: client authorises disclosure, solicitor is compelled by law to disclose, disclosed in a confidential setting, disclosed to avoid commission of a serious criminal offence, preventing imminent serious physical harm to the client or to another person; or disclosed to the insurer of the solicitor, law practice or associated entity.)	ASCR 9
	We act confidentially and in the protection of all client information.	LSN SoE
	Practitioners should maintain the confidentiality of their clients' affairs, but give their clients the benefit of all information relevant to their clients' affairs of which they have knowledge.	LSN PCPR Relations with clients Rules 1-16
5. Clients' interest	A lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.	IBA 5
	A solicitor must also: act in the best interests of a client in any matter in which the solicitor represents the client.	ASCR 4.1.1
	We advance our clients' interests above our own.	LSN SoE
	Act in the best interests of each client,	SRA Principle 4
	Practitioners should serve their clients competently and diligently. They should be acutely aware of the fiduciary nature of the relationship with their clients, and always deal with their clients fairly, free of the influence of any interest which may conflict with a client's best interests. Practitioners should maintain the confidentiality of their clients' affairs, but give their clients the benefit of all information relevant to their clients' affairs of which they have knowledge. Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.	LSN PCPR Relations with clients Rules 1-16
6. Lawyers' undertaking	A lawyer shall honour any undertaking given in the course of the lawyer's practice in a timely manner, until the undertaking is performed, released or excused.	IBA 6
	6.1 A solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, unless released by the recipient or by a court of competent jurisdiction. 6.2 A solicitor must not seek from another solicitor, or that solicitor's employee, associate, or agent, undertakings in respect of a matter, that would require the co-operation of a third party who is not party to the undertaking.	ASCR 6

Principle	Expression of the principle	Reference
	Practitioners should be frank in their responses and disclosures to the Court, and diligent in their observance of undertakings which they give to the Court or their opponents.	LSN PCPR Statement of Principles for Practitioners duties to the court Rules 17-24
	In all of their dealings with other practitioners, practitioners should act with honesty, fairness and courtesy, and adhere faithfully to their undertakings, in order to transact lawfully and competently the business which they undertake for their clients in a manner that is consistent with the public interest.	LSN PCPR Statement of Principles for relations with other Practitioners Rules 25-31A
7. Clients' freedom	A lawyer shall respect the freedom of clients to be represented by the lawyer of their choice. Unless prevented by professional conduct rules or by law, a lawyer shall be free to take on or reject a case.	IBA 7
8. Property of clients and third parties	A lawyer shall account promptly and faithfully for and prudently hold any property of clients or third parties that comes into the lawyer's trust, and shall keep it separate from the lawyer's own property.	IBA 8
	Protect client money and assets.	SRA Principle 10
9. Competence	A lawyer's work shall be carried out in a competent and timely manner. A lawyer shall not take on work that the lawyer does not reasonably believe can be carried out in that manner.	IBA 9
	A solicitor must also deliver legal services competently, diligently and as promptly as reasonably possible.	ASCR 4.1.3
	We act competently and diligently in the service of our clients.	LSN SoE
	5. provide a proper standard of service to your clients 7. comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner 8. run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles 9. run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity.	SRA Principles 5, 7, 8, 9
	Practitioners should serve their clients competently and diligently.	LSN PCPR Relations with clients Rules 1-16
	Practitioners, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, should act with competence, honesty and candour.	LSN PCPR Statement of Principles for Practitioners duties to the court Rules 17-24

Principle	Expression of the principle	Reference
10. Fees	Lawyers are entitled to a reasonable fee for their work, and shall not charge an unreasonable fee. A lawyer shall not generate unnecessary work.	IBA 10
	We charge fairly for our work.	LSN SoE
11 Paramount duty to the court and the administration of justice	Uphold the rule of law and the proper administration of justice.	SRA Principle 1
	A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.	ASCR 3 - 3.1
	We primarily serve the interests of justice.	LSN SoE
	We observe strictly our duty to the Court of which we are officers to ensure the proper and efficient administration of justice.	LSN SoE
	Behave in a way that maintains the trust the public places in you and in the provision of legal services.	SRA Principle 6
	Practitioners, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, should act with competence, honesty and candour. Practitioners should be frank in their responses and disclosures to the Court, and diligent in their observance of undertakings which they give to the Court or their opponents.	LSN PCPR Statement of Principles for Practitioners duties to the court Rules 17-24
	Practitioners should, in the course of their practice, conduct their dealings with other members of the community, and the affairs of their clients which affect the rights of others, according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers and in a manner that is consistent with the public interest.	LSN PCPR Statement of Principles for relations with third parties Rules 32-36

Victorian Legal Practice Act 1996 (repealed)

s. 64 The general principles of professional conduct, to be reflected in the practice rules, are that a legal practitioner or firm, in the course of engaging in legal practice, should—

(a) in the service of a client, act—

(i) honestly and fairly in the client's best interests; and

(ii) so as not to engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law; and

(iii) with all due skill and diligence; and

(iv) with reasonable promptness; and

(b) report regularly to a client on the progress of the matter for which the practitioner or firm has been retained to provide legal services; and

(c) maintain a client's confidences; and

(d) avoid conflicts of interest—

(i) between the practitioner or firm and a client; and

(ii) between 2 or more clients; and

(e) refrain from charging excessive legal costs; and

(f) act with honesty and candour in all dealings with courts and tribunals and otherwise discharge all duties owed to courts and tribunals; and

(g) observe any undertaking given to a court or tribunal, the Legal Ombudsman, the Board, an RPA or another practitioner or firm; and

(h) act with honesty, fairness and courtesy in all dealings with other practitioners and firms in a manner conducive to advancing the public interest; and

(i) conduct all dealings with other members of the community and the affairs of clients that affect the interests of others with honesty, fairness and courtesy and in a manner conducive to advancing the public interest.

Legal Profession Uniform Law
s3 Objectives
The objectives of this Law are to promote the administration of justice and an efficient and effective Australian legal profession, by—

(a) providing and promoting interjurisdictional consistency in the law applying to the Australian legal profession; and

(b) ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services; and

(c) enhancing the protection of clients of law practices and the protection of the public generally; and

(d) empowering clients of law practices to make informed choices about the services they access and the costs involved; and

(e) promoting regulation of the legal profession that is efficient, effective, targeted and proportionate; and

(f) providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained.

Appendix C: Scripts for 'Turn Away'

Participants spoke about their difficulty in finding the right words when a conflict of interest meant that they must refuse service to a client. On the one hand they were careful not to disclose that they may already act for a related party in the matter (which would be a breach of their duty to maintain their client's confidential information) and on the other hand they wanted to ensure the client understood this refusal of service was not capricious, but was an ethical matter. Some law practices used scripts to guide this sensitive conversation.

1. Geraldton Resource Centre

I am going to have to refer you to another organisation for assistance with your matter. This is because we are unable to assist you due to a conflict of interest.

GRC has a legal practice as one of its many services and lawyers and legal practices have rules and duties that they are required to follow. Conflict of interest is one of those, as is a duty of confidentiality.

Due to our duty of confidentiality we are legally not allowed to tell you exactly why there is a conflict of interest however I am able to give you a general definition if you would like that.

There are many different types of conflicts of interest and it's very complex to understand but here are the main types of conflicts of interest:

- *We may have assisted the other person that you have a dispute with in the past or present and this could be in relation to any number of issues (not necessarily the one you are inquiring about). Our duties are still intact even if we are not currently assisting that person.*
- *We may have a duty to the court that might conflict with your interests.*
- *We may have information that could benefit you or the other party that would create an ethical difficulty for us.*
- *We may have interests outside the Geraldton Resource Centre that may tempt us to act in a way that may not be in your best interests.*

Conflict of interest is specific to the particular time and issue for which you are seeking our assistance so just because we have a conflict of interest and cannot assist you in this matter does not mean that we can't assist you with other issues you may have in the future. Therefore, if you need help with something different at a different time please feel free to contact us again and we will re-assess your situation then.

Some of the other organisations that may be able to assist you are:

Then provide appropriate referral options for their matter.

2. Legal Aid Commission of New South Wales

A General Guide for Staff on Conflict of Interest Guidelines – 31 May 2006 page 40 (chapter 9.5)

1. If you have to inform a client that we are unable to help them (due to a conflict of interest) you can say:
A check of our records has shown that our lawyers are not able to help you with your legal problem. But we can put you in touch with someone who can help you. LawAccess NSW is a free government telephone service that provides legal information, advice and referrals for people with legal problems.

A) If the person is at a Legal Aid Office say:
What we will do next, is call LawAccess and refer you to one of their trained customer service officers. By transferring you now, you will be able to get some information about your legal problem sooner.

B) If the person has called Legal Aid by phone say:
We will now transfer your call to LawAccess. One of their trained customer service officers will give you some information about your legal problem straight away. If you need a lawyer, LawAccess will connect you to one of their lawyers or give you the names of some lawyers in your area that can help you.

Note: If the person was referred by LawAccess say:
LawAccess has done the right thing in referring you to us, but because they don't have access to our records they didn't know we would not be able to help you. (Then say the words from A or B above)

2. In a situation where the client asks you the reason why Legal Aid cannot help them you can say:
Unfortunately, a legal aid solicitor will not be able to give you legal advice or appear for you in court because of a legal ethical situation that affects Legal Aid.
The Law Society of NSW has rules that tell us when we can and cannot give legal advice to people. Those rules also say that we cannot discuss the reasons why we cannot provide advice.

3. Other referral information you can inform clients about:

- *For free legal information or a referral to a lawyer who can help you, call LawAccess NSW on 1300 888 529 Monday to Friday for the cost of a local call anywhere in NSW.*
- *If you want to speak to someone in your own language call the free Translating and Interpreter Service on 131 450 and ask the interpreter to call LawAccess NSW on 1300 888 529. Do not hang up. You need to stay on the line while they contact LawAccess and interpret for you. The Translating and Interpreter Service is free and confidential.*
- *If you need legal representation and think you are eligible for legal aid you can go to a private lawyer and apply for legal aid though that lawyer. If legal aid is granted the private lawyer will represent you and Legal Aid will pay the costs. You should be aware that in some cases you may have to pay a contribution towards the cost of your legal representation.*
- *The Law Society's Community Referral Service (02 9926 0300) can refer you to private solicitors who do legal aid work.*
- *If you want to check if you are financially eligible for legal aid, you can go to the Commission's website at www.legalaid.nsw.gov.au and use the Means Test Indicator.*

Appendix D: Five Step Triage Assessment Process

The triage assessment process explained here consolidates examples of participants' responses when they explained how they identified and responded to conflict of interest. Note this process refers to five steps, whereas in the text in Chapter VI Discussion (Section C 1 c) I omit step One as it refers to 'own interests' conflicts rather than client conflicts.

The triage assessment provides a process to answer the following questions:

- Is the law practice able to act in the best interests of this client?
- Is the law practice able to act in this matter?

The law practice should **not** act if there is an actual conflict of duties/interests, ie the interests are adverse and cannot be reconciled. The law practice **may be able to act** if there is the possibility of a conflict of duties/interests provided the lawyer discusses this possibility with their client. It may be possible to act with disclosure and informed written consent. What does it look like from the client's perspective? Do they have a perception of a conflict? The lawyer should discuss their decision with professional colleagues and have their judgment moderated.

Step 1: Professional judgment: If the law practice acted in this matter, would the lawyer's own interests within the law practice, including the personal, public, commercial interests of the workers, be in conflict with the client's interests. *(Appendix L: Register of interests.)*

Step 2: Search client register. (*Appendix L: Register of Files Opened* should include names and identifying details for all former/current clients, with a description of the matter.)
Does this search indicate there may be a conflict and the matter may need further examination? If so, these further inquiries include matters of fact and law.

- Fact: Has the law practice acted for this client in the past?
- Fact: Has the law practice acted against this client in the past?
- Fact: Has the law practice acted in a related matter which could be relevant to this new matter?
- Fact: Has the law practice acted for another client in the past whose interests are adverse to this new client?
- Fact: Is the law practice acting for a current client in the same matter?
- Professional judgment: Does the law practice have confidential information from a past client which is relevant to this new client? This assessment includes possession of 'getting to know you' factors.

Step 3: If Step 2 reveals further inquiry is necessary, retrieve the client files and objectively assess the facts.

- Fact: What (soft – online and hard – paper) information is held within the law practice about the former client? Former client includes people/clients from your and your colleagues' former law practice, and anyone who has given the law practice confidential information even if the lawyer was not formally retained and did not render an account.
- Fact: How long ago did the law practice act for this client?
- Fact: Is the person who did the legal work still in the law practice?
- Professional judgment: Does this information still have its 'confidential' character?
- Professional judgment: Is this confidential information relevant to the new client/new matter?

Step 4: If the lawyer feels they need to exercise their professional ethical judgment. (Refer Chapter VI *Discussion*, Figures 22 and 23 for decision making flow chart process for ASCR R10 and R11) Take additional steps to ensure the lawyer is discharging their fiduciary duty to their former/current clients. They should consider the disclosing the possibility or perception of a conflict to their client, obtain their client's informed written consent, and negotiate a limited retainer.

- Fact: Will former client consent to allow the law practice to take on the new client and/or disclose their confidential information *(Appendix M: 2. Former Client Consent Form (Successive Matters), R 10.2.1)* If yes, will current client consent to a limited retainer, that confidential information will not be made available to them?
- Fact: Will current client consent to accept concurrent (limited) retainer (*Appendix M: 1. Current Client Consent Form (Concurrent Matters) R 11.3.1*).
- Professional judgment: If the lawyer decides that confidential information is held in their law practice could it be 'reasonably concluded' that this confidential information is 'material' to the current client? This is not a 'fanciful' but a 'real and sensible' possibility. (The unilateral assessment of principal? Discuss with former client?)
- Professional judgment: If the lawyer decides that confidential information is held in their law practice would it be detrimental to the interests of the former client if disclosed? (The unilateral assessment of principal? Discuss with former client?)
- Professional judgment: Would a 'reasonable observer' anticipate misuse of confidential information? If so is there a 'real and sensible possibility' that the duty to the current client will conflict with the duty to keep the former client's confidential information safe?
- Professional judgment: Does the law practice have effective information barriers in place? (Refer law society guidelines) If so, does the client consent to a limited retainer that confidential information will not be disclosed to them?

Step 5: The moral remainder. What ethical issues remain after the lawyer has made their ethical decision? Strengthen your ethical practice by discussing the scenario within your professional community of practice *(Annexure N: Professional Community of Practice Ethics Roundtable)*

This list of questions was provided to me by a principal lawyer at an outer regional Community Legal Centre. He used these questions as a prompt to discern if he, or his law practice, should disqualify themselves from providing a legal service due to a conflict of interest.
Questions to consider when determining whether there is an actual conflict of interest.

1. Who is the potential client? Who are the potential clients? Do they have divergent interests?
2. Who is the other party? Who are the other parties?
3. Do any of the parties appear in CLSIS? (the client database)
4. What confidential information do we hold about a relevant party?
5. Where is the confidential information held?
6. Are any of the relevant parties current clients? i.e. is your CLC currently doing work for them?
7. Could a former client reasonably perceive that their confidential information is being used to their detriment?
8. What level of service does the potential client require? Information/Advice/Minor Assistance/Advocacy/Representation (service categories listed in CLSIS)
9. How would you manage this situation?
10. What follow up action might you need to take?

Appendix E: Australian Regulatory Structure

List of the various Statutes, Regulations, Rules, Regulators and Professional Indemnity Insurers which make up the Australian regulatory structure.

Italicised text indicates the jurisdiction is part of the *Uniform Law* movement.

Legal Profession Acts

Jurisdiction	Statutes
ACT	Legal Profession Act 2006
NSW	*Legal Profession Uniform Law Application Act 2014*
NT	Legal Profession Act 2006
QLD	Legal Profession Act 2007
SA	Legal Practitioners Act 1981
Tas	Legal Profession Act 2007
Vic	*Legal Profession Uniform Law Application Act 2014*
WA	Legal Profession Act 2008

Legal Profession Regulations

Jurisdiction	Regulations
ACT	Legal Profession Regulations 2007
NSW	*Legal Profession Uniform Regulations 2015*
NT	Legal Profession Regulations 2008
QLD	Legal Profession Regulation 2007
SA	Legal Practitioners Regulations 2014
Tas	Legal Profession Regulations 2008
Vic	*Legal Profession Uniform Regulations 2015*
WA	Legal Profession Regulations 2009

Professional Conduct Rules

Jurisdiction	Rules
ACT	*Legal Profession (Solicitors) Conduct Rules 2015 (based on the Australian Solicitors Conduct Rules*
NSW	*Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015* *Legal Profession Uniform General Rules* *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015* *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015*
NT	Rules of Professional Conduct and Practice 2005
QLD	*Australian Solicitors Conduct Rules*
SA	*Australian Solicitors' Conduct Rules 2011*
Tas	Rules of Practice 1994 (S.R. 1994, No. 229)
Vic	*Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015* *Legal Profession Uniform General Rules* *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015* *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015*
WA	Legal Profession Rules 2009 Legal Profession (Admission) Rules 2009 Legal Profession Conduct Rules 2010

Regulators

Jurisdiction	Regulators	Discipline
ACT	Law Society of the ACT	ACT Civil and Administrative Tribunal
NSW	Legal Services Commissioner	New South Wales Civil and Administrative Tribunal: Occupational Division
NT	Law Society of Northern Territory	Legal Practitioners Disciplinary Tribunal
QLD	Legal Services Commissioner	Queensland Civil and Administrative Tribunal: Occupational
SA	Legal Profession Conduct Commissioner	Legal Profession Disciplinary Tribunal
Tas	Legal Profession Board of Tasmania	Legal Practitioners Conduct Board
Vic	Legal Services Commissioner	Victorian Civil and Administrative Tribunal: Legal Practice List
WA	Legal Practice Board of WA (Legal Profession Complaints Committee)	State Administrative Tribunal: Vocational Regulation

Professional Indemnity Insurers

Jurisdiction	Professional Indemnity Insurer
ACT	LawCover
NSW	LawCover
NT	Marsh Pty Ltd
QLD	Lexon Insurance Pte Limited (Brisbane and south-east Queensland)
SA	Law Claims / Law Guard Management
Tas	(unknown)
Vic	Legal Practitioners Liability Committee
WA	Law Mutual WA

26 September 2018

Appendix F: Contextual Ethics: Chronology of Selected Socio-legal Ethical World Research

This table provides a selection of socio-legal ethical world studies which provide an insight into the context of law practice. Often, earlier research provides the foundation for subsequent studies through the sharing of interview schedules or the development of a language to describe observed phenomena.

Dates	**Author**	**Cohort: salient characteristics**
1957 research 1962 published 1994 refreshed	Carlin	Chicago Bar: 93 interviews in lawyer's office for two hours. Schedule of open ended questions (answers taken down verbatim).
1966	Carlin	New York City Bar: 800 interviews. Published interview schedule.
1964 research 1967 published	Handler	Michigan 'Prairie City' 80,000 population in city, 120,000 in region 118 selected, interviewed 91. Followed Carlin's interview Schedule.
1976 research 1978 published	Hetherton	Victorian practising lawyers.
1974 research 1977published	Fitzgerald	Victorian lawyers and poverty clients. Three surveys of the work patterns and social backgrounds of lawyers.
1977 research 1978 published	Tomasic & Bullard	Selective survey of practising lawyers in New South Wales mail survey, random sample 1000 lawyers. 600 responses 65%.
1982 1995 research 1998 published 2005 published	Heinz & Laumann	Chicago Lawyers.
1984	Engel	
1985 1991	Ellickson	
1990	Landon	Rural lawyers in Missouri. Interviewed 201 lawyers, in 116 communities.
1992	Nelson & Trubek	
1993 research 1996 published	Thornton	Interviewed 100 women across the legal sector. Age range from 20-80 years. Selected via 'snowballing' Taped and transcribed. Guarantee of confidentiality.

Dates	Author	Cohort: salient characteristics
1990-91 Research 2001 published	Mather, McEwan, Maiman	Divorce lawyers from semi- rural areas in Maine, New Hampshire 163 Interviews. Lengthy semi-structured interviews 30 mins – 3 hours. Average 90 minutes. Taped and Transcribed. Promised confidentiality.
2001 research 2004 published	Levin	Sole practitioners in NY state. Random selection of 425 names, Self-selecting participation: 41 agreed, 17 declined, 6 deferred, 36 did not return calls Random sample of 18, Semi-structured interviews 1 hour in lawyer's office.
2004 research 2005 published 2008 published	Kirkland	US large law firms
2008	Parker et al	NSW lawyers
2009 published	Levin	Immigration Lawyers.
2010	Parker and Aitken	Queensland Law Practices
2011	Winter	Bensons
2009-2011 research 2012 Published	Holmes, Foley, Tang & Rowe	ACT 11 early career lawyers in public and private practice. 4 males, 7 females. Median age 25 years. De-identified data. Convenience sample, Confidentiality agreement. ACT law society endorsed and supported the project. Recorded 30 Semi-structured interviews and analysed data using QSR International NVivo 8 software (qualitative data management and analysis). Coded themes.

Appendix G: Selected Australian Solicitors Conduct Rules

This document provides the full text of the various Australian Solicitors Conduct Rules mentioned within this thesis.

9 Confidentiality

9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not:

9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor's law practice, or

9.1.2 a barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,

EXCEPT as permitted in Rule 9.2.

9.2 A solicitor may disclose information which is confidential to a client if:

9.2.1 the client expressly or impliedly authorises disclosure,

9.2.2 the solicitor is permitted or is compelled by law to disclose,

9.2.3 the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations,

9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence,

9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person, or

9.2.6 the information is disclosed to the insurer of the solicitor, law practice or associated entity.

10 Conflicts concerning former clients

10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients, except as permitted by Rule 10.2.

10.2 A solicitor or law practice who or which is in possession of information which is confidential to a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:

10.2.1 the former client has given informed written consent to the solicitor or law practice so acting, or

10.2.2 an effective information barrier has been established.

11 Conflict of duties concerning current clients

11.1 A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule.

11.2 If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the clients' interests are adverse and there is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act, except where permitted by Rule 11.3.

11.3 Where a solicitor or law practice seeks to act in the circumstances specified in Rule 11.2, the solicitor or law practice may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:

11.3.1 is aware that the solicitor or law practice is also acting for another client, and

11.3.2 has given informed consent to the solicitor or law practice so acting.

11.4 In addition to the requirements of Rule 11.3, where a solicitor or law practice is in possession of information which is confidential to a client (the first client) which might reasonably be concluded to be material to another client's current matter and detrimental to the interests of the first client if disclosed, there is a conflict of duties and the solicitor and the solicitor's law practice must not act for the other client, except as follows:

11.4.1 a solicitor may act where there is a conflict of duties arising from the possession of confidential information, where each client has given informed consent to the solicitor acting for another client, and

11.4.2 a law practice (and the solicitors concerned) may act where there is a conflict of duties arising from the possession of confidential information where an effective information barrier has been established.

11.5 If a solicitor or a law practice acts for more than one client in a matter and, during the course of the conduct of that matter, an actual conflict arises between the duties owed to two or more of those clients, the solicitor or law practice may only continue to act for one of the clients (or a group of clients between whom there is no conflict) provided the duty of confidentiality to other client(s) is not put at risk and the parties have given informed consent.

12 Conflict concerning a solicitor's own interests

12.1 A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this Rule.

12.2 A solicitor must not exercise any undue influence intended to dispose the client to benefit the solicitor in excess of the solicitor's fair remuneration for legal services provided to the client.

12.3 A solicitor must not borrow any money, nor assist an associate to borrow money, from:

12.3.1 a client of the solicitor or of the solicitor's law practice, or

12.3.2 a former client of the solicitor or of the solicitor's law practice who has indicated a continuing reliance upon the advice of the solicitor or of the solicitor's law practice in relation to the investment of money,

UNLESS the client is:

(i) an Authorised Deposit-taking Institution,

(ii) a trustee company,

(iii) the responsible entity of a managed investment scheme registered under Chapter 5C of the Corporations Act 2001 (Cth) or a custodian for such a scheme,

(iv) an associate of the solicitor and the solicitor is able to discharge the onus of proving that a full written disclosure was made to the client and that the client's interests are protected in the circumstances, whether by legal representation or otherwise, or

(v) the employer of the solicitor.

12.4 A solicitor will not have breached this Rule merely by:

12.4.1 drawing a Will appointing the solicitor or an associate of the solicitor as executor, provided the solicitor informs the client in writing before the client signs the Will:

(i) of any entitlement of the solicitor, or the solicitor's law practice or associate, to claim executor's commission,

(ii) of the inclusion in the Will of any provision entitling the solicitor, or the solicitor's law practice or associate, to charge legal costs in relation to the administration of the estate, and

(iii) if the solicitor or the solicitor's law practice or associate has an entitlement to claim commission, that the client could appoint as executor a person who might make no claim for executor's commission,

12.4.2 drawing a Will or other instrument under which the solicitor (or the solicitor's law practice or associate) will or may receive a substantial benefit other than any proper entitlement to executor's commission and proper fees, provided the person instructing the solicitor is either:

(i) a member of the solicitor's immediate family, or

(ii) a solicitor, or a member of the immediate family of a solicitor, who is a partner, employer, or employee, of the solicitor,

12.4.3 receiving a financial benefit from a third party in relation to any dealing where the solicitor represents a client, or from another service provider to whom a client has been referred by the solicitor, provided the solicitor advises the client:

(i) that a commission or benefit is or may be payable to the solicitor in respect of the dealing or referral and the nature of that commission or benefit,

(ii) that the client may refuse any referral, and

the client has given informed consent to the commission or benefit received or which may be received,

12.4.4 acting for a client in any dealing in which a financial benefit may be payable to a third party for referring the client, provided the solicitor has first disclosed the payment or financial benefit to the client.

Appendix H: Research into Geographical Advantage and Disadvantage

Through the course of this PhD project, I have collected examples of research data which illustrate the advantages and disadvantages co-related to geographical remoteness. This table is an incomplete list of those data sources.

Acronym
ABS: Australian Bureau of Statistics
ATSI: Aboriginal and Torres Strait Islander
AUWI: Australian Unity Wellbeing Index 2005
BTRE: Bureau of Transport and Regional Economics

ADVANTAGE

Theme	**Result**	**Source**
Subjective wellbeing	The highest level of personal wellbeing is achieved by people who live in rural towns (Accessible and Moderately Accessible). Their personal wellbeing is higher than it is for people who live in Capital Cities and both of the Remote categories.	AUWI 2005
	In terms of satisfaction with safety and community connection, the values for people living in cities is lower than for people living in all other locations. It is evident that high living density produces less interpersonal connection and a diminished sense of safety.	AUWI 2005
High income does not equal happiness	People in the Accessible category have the lowest household income. Clearly, the high wellbeing experienced by this category of people is not being driven by high income.	AUWI 2005
Volunteering	Rates of volunteering. National 18% Regional 29% Major cities 34% 42% in inner regional, 41% in other areas. *Cf General Social Survey 2011 p3 Table 7*	AUWI 2005
Business ownership (income earners receiving income from an unincorporated business) Does not include incorporated businesses	National 1 in 7 Outside the capital cities 1 in 5	ABS Perspectives on Regional Australia: Business Owners in Regions 1011
Social Capital measures	Feel a part of the community, get together with friends/relatives, volunteer in a typical week, active member of a club/association, could raise $2k in an emergency within a week, find someone to help out when needed.	BTRE 2008 Table 8 p 13 Ref HILDA

DISADVANTAGE

Theme	Result	Source
Meta Historical undifferentiated disadvantage	Cheers (1998) in reviewing a number of indicators of disadvantage including income, living costs, housing, health, education and social problems, concludes that rural Australians are disadvantaged in relation to urban Australians.	'Alston 2000 quoting Cheers, Brian 1998 Welfare Bushed: Social Care in Rural Australia, Ashgate, Sydney.
ATSI % of population	Nationally 3% Northern Territory 29.8% Tasmania 4.7%	
Equity in life expectancy	National average: Males 79.7 Females 84.2 Metro areas is 81.7 years North Sydney: Males 83.9 Females 86.5 Regional hubs is 79.3 Rural areas is 78.1 NT outback: Males 72.3 Females 76.1	ABS Deaths Australia 2011 (cat no 3302.0) Barclay
Avoidable Deaths per 100,000	Metro 114, Rural 361 (p14)	In Barclay National Health Performance Authority 2013 p 16 (Medicare Local Data)
Social security income support	Higher levels in country	BTRE 2008 p14 ABS Survey of income and housing
Medicare attendance	Average per annum 5.8 in city 3 in remote areas	Barclay
Domestic Violence (measure number per 1 000)	Reports of DV highest in Very Remote 13.7: Remote 9, OR 3.2, IR 2.5, cities C	BTRE 2008 p11 from AIHW
Lower on all indicators of a healthy lifestyle, eg smoking, alcohol use, sedentary, obese, low fruit intake	Smoking Cities 19.9 (IR) Inner Regional 23, (OR, R, VR) Outer Regional, Remote and Very Remote 26.2	BTRE 2008 Table 25 p 36 ABS Australian Health Survey 2004-5
16 year old at school	Lower than national average Male N 78, VR 35, R 65, OR 74 Female N 81 VR 46 R 68 OR 79	BTRE 2008 Table 22 p 33 from ABS 2006 Census of Population and Housing
Educational qualification	Post Graduate qualification N2.6 IR 1.3, OR 0.9 R 0.9 VR 0.6 Bachelor degree N 1.4 IR 1.2, OR 0.9 R 0.9 VR 0.8	BTRE 2008 p 34 table 23 ABS Census of Population and Housing 2006

Theme	Result	Source
	Educational disadvantage with the number of students completing high school significantly lower in rural Australia and the number of rural young people as a percentage of the overall number of students going on to tertiary studies declining from 25% to 16% between 1989 and 1996.	DPIE and CRSR, 1997; HREOC, 1998), Alston 2000
Unemployment	Sydney 3.5% National 5.6%	ABS Census of Population and Housing 2011
	Some regions recording levels as high as 40%	(DPIE and CRSR, 1997).' Alston 2000
Wage and Salary earners	National Average $51,923 (Male 62,699 female $40 312	2010-2011 (2013 what's new in regional statistics)
Poverty	Rural and regional Australians earn on average 24% less than those in cities (Sydney Morning Herald, 6/8/99) and 33 of Australia's 37 poorest electorates are in rural areas (Lawrence, 1995).	Alston 2000 Lawrence, Geoffrey 1995 Futures for Rural Australia: From Agricultural Productivism to Community Sustainability(Rural Social and Economic Research Centre Central Queensland University).
No internet connection	City 32% VR 60% R 48% OU 45% IR 41%	BTRE 2008 Fig 6 p 31 ABS 2006 Patterns of internet access in Australia

Appendix I: Chronology of Access to Justice Research

This table represents a chronology of the various inquiries held into access to justice in Australia over the previous 44 years, which mention regional, rural and remote communities.

Acronyms
AGPS: Australian Government Printing Service.
ALRC: Australian Law Reform Commission.
A2J: Access to justice
SLACAC: Senate Legal and Constitutional Affairs Committee

Date	Event
1974	Discussion Paper: Legal Aid in Australia: Commissioner for Law & Poverty.
1973–1975	Sackville Royal Commission into Law and Poverty Australian Government Commission of Inquiry into Poverty.
1975	Commission of Inquiry into Law and Poverty in Australia, First Main Report (Professor R F Henderson, Chairman), AGPS, Canberra, 1975.
1975	Law and Poverty in Australia: Second Main report of the Australian Government Commission of Inquiry into Poverty.
1975	Legal Aid in Australia: Commissioner for Law & Poverty, AGPS.
1977	Establishment of the Commonwealth Legal Aid Commission.
1977	Poverty and the Legal Profession in Victoria, research report by Jeffrey M FitzGerald [for the] Commission of Inquiry into Poverty.
1980.	House of Representatives Standing Committee on Aboriginal Affairs (Aboriginal Legal Aid).
1980	M Cass and J S Western, Legal Aid and Legal Need, Commonwealth Legal Aid Commission, 1980.
1981	Establishment of the Commonwealth Legal Aid Council 1981.
1982	NSW Law Reform Commission, First Report on the Legal Profession: General Regulation and Structure, Report 31, 1982,
1983	G G Meredith, Legal Aid : Cost Comparison, Salaried and Private Lawyers, Commonwealth Legal Aid Council, AGPS, 1983.
1986	Establishment of National Legal Aid Representative Council and the National Legal Aid Advisory Committee, 1986.
1987	NSW Legal Profession Advisory Council Inquiry into ss58 to 59 Legal Profession Act 1987 (NSW). 01/01/1988 to 07/12/2006. Ref Parker 1997 p26
1989	National Legal Aid Advisory Committee: Funding, Providing and Supplying Legal Aid Services,1989.
1990	National Legal Aid Advisory Committee: Legal Aid for the Australian community, 1990.
1992	SLACAC: Cost of Legal Services and Litigation – Legal Aid 'For Richer and for Poorer', Discussion Paper No 7, April 1992.
1993	SLACAC: The Cost of Justice – Foundations for Reform, 1993.
	SLACAC: The Cost of Justice – Checks and Imbalances: The Role of Parliament and the Executive (Second Report), 1995.
1993–1994	Access to Justice Advisory Committee: Access to Justice Action Plan 2004 R Sackville.
	Victorian Inquiry into rural service delivery.
1994	Women's Legal Resources Centre NSW, Quarter Way to Equal, A Report on Barriers to Access to Legal Services for Migrant Women (1994)
1994	ALRC: Equality before the law Part III (Access to Justice), Equality before the law: Justice for Women, Report No 69, 1994.
1994	Access to Justice Advisory Committee Access to justice: an action plan, AGPS, 1994.

Date	Event
1995	Access to Justice Advisory Committee, Report of the Access to Justice Advisory Committee, 1995.
1995	The Justice Statement, May 1995 <http://www.austlii.edu.au/austlii/articles/scm/jcontents.html>.
1995	Women's Legal Services, Indigenous Women's Legal Services, Rural Women's Outreach.
March 1996	Howard Government elected. Cut legal Aid (ref Giddings 2002, p68).
1997	Plaintiff's Satisfaction with Dispute Resolution Processes, M Delaney & T Wright Sydney: Justice Research Centre & Law Foundation of NSW, 1997 at 64 (quoted Parker 1997).
1997	ALRC Australian Law Reform Commission Review of the Adversarial System of Litigation: Issues Paper 20, Sydney: Australian Law Reform Commission, 1997, para 1.1.
1997 1998	SLACAC: Australian Legal Aid System: First, Second and Third reports.
1998	Victorian Government Submission to SLACAC (ref Rice letter).
1998	SLACAC: recommended that the Commonwealth sponsor the establishment of a National Legal Aid Council to provide advice on legal aid at the Commonwealth and state/territory level (Recommendation 14).
1998 -99	$11.4 Million 'Rural and Regional Network Enhancement Initiative was announced in the 1998/1999 Federal Budget (ref Giddings 68). Kimberley and South-West regions of Western Australia, the Iron Triangle region of South Australia, the Centre-West region of Queensland, the New South Wales South Coast and the cross-border region of New South Wales and Victoria centred in Albury-Wodonga.
1999-2014	NSW Standing Committee on Law and Justice.
October 1999	Regional Australia Summit See the Report of the Community Well-being and Lifestyle Working (proceedings of the Regional Australia Summit), October 1999, especially Key Priority 2.
2000	First National Pro Bono Conference.
May 2000	Budget: Regional Australia Making a difference. The Summit identified three strategic areas requiring action: equity of services in regional communities, economic and business development, and community empowerment. Making a Difference encapsulates the work being done across the broad range of Commonwealth portfolios to address these three areas fundamental to regional life.
1999 2000	A further five new Community Legal Centres were announced in the 1999/2000 Federal Budget. Far West of New South Wales, Gippsland in Victoria, the Goldfields region of Western Australia and the South-East and Riverland regions of South Australia. See D Williams, 7 February 2000, 'Community Legal Services Boosted in Regional and Rural Australia', accessed at <http://tul.gov.au/iglI'onie/agnews/2000newsag/689_O0.htm>.
	Access to Justice and Legal Needs Research Program conducted by the Law and Justice Foundation of NSW.
2000	ALRC 2000 Managing Justice: A Review of the Federal Civil Justice System. Report 89.
2001	Report of the National Pro Bono Task Force to the Commonwealth Attorney General, June 2001.
2001	Parliament of Victoria, Australia. (2001). Law reform committee: Review of legal services in rural and regional Victoria. Retrieved from: http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/legal_services/final_report.pdf

Date	Event
2003	National Pro Bono Resource Centre, Submission to the Senate Legal and Constitutional References Committee Inquiry into Legal Aid and Access to Justice, 2003, p 8.
June 2004	Senate Legal and Constitutional References Committee SLACAC (Cth), Legal Aid and Access to Justice, June 2004 at [3.23], Recommendation 11.
2004	SLACAC: Legal Aid and Access to Justice, 2004 and Interim report – Legal aid and access to justice, 2004.
2005	Joint Committee of Public Accounts and Audit Title: Report 403: Access of Indigenous Australians to Law and Justice Services, 2005.
2006	NSW Standing Committee on Law and Justice: 2006 Community-based sentencing options for rural and remote areas and disadvantaged populations.
2008	Victorian Law Reform Commission, Civil Justice Review, Report 14, 2008, Ch 4.
2008	Attorney-General's Department, Review of the Commonwealth Community Legal Services Program, 2008. See attached SKM map of publicly funded legal assistance services.
2008 April	2020 Summit: May final report.
2009 December	Senate Legal and Constitutional Affairs References Committee (Cth), Access to Justice, December 2009.
September 2009.	Access to Justice Taskforce, Attorney General's Department (Cth), A Strategic Framework for Access to Justice in the Federal Civil Justice System.
2009	2020 Government response.
2012 mar	NSW Standing Committee on Law & Justice 'Opportunities to consolidate tribunal in NSW'.
2012	Legal Australia-Wide Survey (LAW Survey). Legal need in Australia. Law and Justice Foundation of NSW.
2014	Productivity Commission into A2J.
2016	Access to Justice Review: Victorian Department of Justice and Regulation.
2017	Law Council of Australia, The Justice Project.

Appendix J: Schedule of Interview Questions

This schedule is the final, reduced list of questions asked of research participants.

1.	Name: First, Family
2.	Name of practice
3.	Contact Details: email, phone, mail, street address
4.	Gender
5.	ARIA+ location: Inner Regional, Outer Regional, Remote, Very Remote
6.	Practice entity
7.	Type of practising certificate :Restricted Unrestricted
8.	Qualifications held: LLB JD SAB Other If other, please specify
9.	Law qualification obtained: Distance, Attend in person,
10.	Number of years of post-admission experience (PAE)
11.	Number of workers in practice: Principals Solicitors Paralegals Administrative
12.	How long has this legal practice been in existence?
13.	Are there any family relationships within the legal practice?
14.	Why have you chosen to work in this regional area?
15.	Do you have other professional, community or business interests?
16.	Can you tell me about meeting with other country solicitors?
17.	When you have a professional dilemma, how do you decide what you ought to do?
18.	In general terms, do you think you practise in a different way to city solicitors?
19.	Can you explain to me what system your practice uses to identify client conflict at intake?
20.	How frequently do ‘conflicts’ arise in your legal practice?
21.	What did you learn in your early years of practice about how to recognise and resolve conflicts of interests? Is this information still useful?
22.	Do you use ‘rules of thumb’ to guide you in managing conflicts of interest?
23.	In which circumstances do you act for both parties?
24.	If you are unable to act for both parties due to a conflict of interest, what do you do?
25.	Do you think the rules about conflict of interest are clear and easy to apply in practice?
26.	As a general statement, what do you think is the **purpose** of the professional conduct rules which regulate conflicts of interest?
27.	Taking this issue further, do you think the rules about conflict of interest are appropriate for your country practice? Why?
28.	Do have any suggestions about how the rules could be improved for your practice?
29.	How often do you have contact with regulators of the legal profession?
30.	Thinking about your experience with various clients and areas of work, which parts of legal practice (either clients or type of work) give you the most satisfaction?
31.	Thinking about your own life and career as a country solicitor, what are your personal views about what success looks like?
32.	What, if any, relationship do you see between your work as a country solicitor and access to justice in your community?
33.	Do you call yourself a country lawyer?
34.	What other questions do I need to ask you, in order to understand how country solicitors recognise and resolve conflicts of interest?
35.	Thank you for your time today. Is there anything I can do for you in return?

Appendix K: Research Participant Information and Consent

1. Participant Information: Interviews

Helen McGowan
Doctoral Scholar
ANU College of Law

Canberra ACT 0200 Australia
Telephone: 02 6125 7454
Mobile 0417 245 710
Email: helen.mcgowan@anu.edu.au
Ethics Protocol 2011_571
www.anu.edu.au

Participant Information: Interviews

Period of Research: 1 August 2012 to 31 August 2014

Researcher
My name is Helen McGowan and this research is part of a course of study for my PhD at the Australian National University College of Law. I have practised law in regional Australia for thirty years working in the private profession, community sector and teaching law at regional universities.

Research Aims
The research aim is to gain a better understanding of the professional culture of regional legal practices. The research question is *How do country lawyers recognise and resolve conflicts of interest?* We hope that the findings will benefit the communities lawyers serve, lawyers and the educators of the legal profession.

Research Activities
This research explores how country lawyers recognise and resolve conflicts of interest. The project is in two stages. An initial focus group helped me to refine the proposed survey and interview schedule. This interview is within the second data collection stage. The aim is to collect data through a semi-structured interview, either by phone or face to face. Information collected during the research project will be collated into a written document and then analysed for themes. These themes will inform the findings which will be used to write a final thesis.

Confidentiality
I will keep all the information you give me confidential as far as the law allows. I will seek your permission to record our interview and keep notes of the interview in a book. The interview and notes will be transcribed and I will store them safely. They will be protected by a password only I know, and in a locked filing cabinet. I will not share your personal details or personal views with anyone else.

Some of the information you give me may be published. However, your real name will not be used in relation to any information you have provided me, unless you tell me clearly that you want me to use your real name.

Although I will avoid using information that will allow other people to identify you by what you say, it is still possible that people will be able to guess who you are. You should avoid disclosing information with identifying details. Before I publish any of your statements or views, I will give you the chance to review what I have written.

Participation
You can decide to withdraw from this project at any time without giving me a reason. If you mention anything that you do not want me to publish, please say so and I will follow your request.

Use of information
If you consent, interviews will be recorded using a digital audio recorder. This helps me because I can go back and make sure I have understood what you have said, or might have otherwise missed or forgotten. It is not essential that we record the interview though.

A brief summary of the research findings will be shared with participants after completion.

Queries and concerns
If you have any questions about this research, please contact me on my mobile phone 0417 245 710 or by email helen.mcgowan@anu.edu.au. Alternatively, you can contact my Supervisor, Associate Professor Tony Foley, on 02 6125 0779 or by email tony.foley@anu.edu.au.

Ethics Committee Clearance
The ethical aspects of this research have been approved by the Australian National University Human Research Ethics Committee. If you have any concerns or complaints about how this research has been conducted, please contact:

Ethics Manager
The ANU Human Research Ethics Committee
The Australian National University
Telephone 02 6125 3427
Email Human.Ethics.Officer@anu.edu.au

2. Participant Consent

Helen McGowan
Doctoral Scholar
ANU College of Law

Canberra ACT 0200 Australia
Mobile 0417 245 710
Email: helen.mcgowan@anu.edu.au
Ethics Protocol 2011_571

Consent Form: Interview

1. I have read the information sheet about the research project *How do country lawyers recognise and resolve conflicts of interest?* Did I make things clear? Do you want to ask me any questions about the project?

2. I will keep all the information you give me confidential as far as the law allows. I will keep notes of this interview in a note book and I will transcribe these notes and store them safely. They will be protected by a password only I know, and in a locked filing cabinet. I will not share your personal details or personal views with anyone else. Is that okay?

3. Some of the information you give me may be published. Your real name will not be used in relation to any information you have provided me, unless you tell me clearly that you want me to use your real name. Is that okay? Do you want me to use your real name or should I use a pseudonym?

   Real Name Pseudonym

4. I will avoid using information that will allow other people to identify you by what you say. It is still possible that people will be able to guess who you are. You should avoid disclosing information with identifying details. Is that clear?

   Before I publish any of your statements or views, I will give you the chance to review what I have written. Okay?

5. You can decide to withdraw from this project at any time without giving me a reason. If you mention anything that you do not want me to publish, please say so and I will follow your request. Okay?

6. I would like to record this interview using a digital audio recorder. This is helpful for me because I can go back and make sure I have understood what you have said, or might have otherwise missed or forgotten. It is not essential that we record the interview though. Do you agree to be recorded or not?

   Yes No

7. I could share a brief summary of the findings of the research with you when it is complete. Would you like this?

   Yes No

8. Do you have any further questions? Can we start the interview now?

   Name
   Preferred Form of contact email phone mail
   Best day of week, time of day to contact
   Signature
   Date

Appendix L: Law Practice Registers

The registers listed in this document address the regulatory requirements within the Uniform Law.

Relevant law
Uniform Law. s107 Disclosure obligations
Australian Solicitors Conduct Rules.
R 4.1.1 Fundamental duty: to act in the best interests of the client
R 12 Conflict concerning a solicitor's own interests

The following Rules from the *Legal Profession Uniform General Rules* 2015 specify which Registers must be maintained by law practices and the form and content of those Registers.

1. Rule 59 Register of investments

(1) If a law practice invests trust money for or on behalf of a client, the law practice must maintain a register of investments of trust money that records the following information in relation to each investment:
(a) the name in which the investment is held,
(b) the name of the person on whose behalf the investment is made,
(c) the person's address,
(d) particulars sufficient to identify the investment,
(e) the amount invested,
(f) the date the investment was made,
(g) particulars sufficient to identify the source of the investment,
(h) details of any documents evidencing the investment,
(i) details of any interest received from the investment or credited directly to the investment,
(j) details of the repayment of the investment and any interest, on maturity or otherwise.
(2) This rule does not require particulars to be recorded in the register if the particulars are required to be recorded elsewhere by another rule.

2. Rule 60 Register of powers and estates in relation to trust money

(1) A law practice must maintain a register of powers and estates in respect of which the law practice or an associate of the practice is acting or entitled to act, alone or jointly with the law practice or one or more associates of the practice, in relation to trust money.
(2) Subrule (1) does not apply where the law practice or associate is also required to act jointly with one or more persons who are not associates of the law practice.
(3) The register of powers and estates must record the following:
(a) particulars sufficient to identify each power in respect of which the law practice or an associate of the law practice is acting or entitled to act (alone or jointly with the law practice or one or more associates of the law practice), including the name and address of the donor and date of each power,
(b) particulars sufficient to identify each estate in respect of which the law practice or an associate of the law practice is acting or entitled to act (alone or jointly with the law practice or one or more associates of the law practice), including the name and date of death of the deceased in respect of each estate of which the law practice or associate is executor or administrator.

3. Rule 64 Register of controlled money

(1) If a law practice receives controlled money, it must maintain a register of controlled money for the records of controlled money movements for all its controlled money accounts.
(2) A separate record of controlled money movements must be maintained for each controlled money account.

(3) A record of controlled money movements for a controlled money account must record the following information:
(a) the name of the person on whose behalf the controlled money is held,
(b) the person's address,
(c) particulars sufficient to identify the matter,
(d) any changes to the information referred to in paragraphs (a)–(c).
(4) The following particulars must be recorded in a record of controlled money movements for a controlled money account:
(a) the date the controlled money was received,
(b) the number of the receipt,
(c) the date the money was deposited in the controlled money account,
(d) the name of and other details clearly identifying the controlled money account,
(e) the amount of controlled money deposited,
(f) details of the deposit sufficient to identify the deposit,
(g) interest received,
(h) details of any payments from the controlled money account, including the particulars required to be recorded under these Rules.
(5) Subject to subrule (6), particulars of receipts and payments must be entered in the register as soon as practicable after the controlled money is received by the law practice or any payment is made.
(6) Interest and other income received in respect of controlled money must be entered in the register as soon as practicable after the law practice is notified of its receipt.
(7) The law practice must keep as part of its trust records all supporting information (including ADI statements and notifications of interest received) relating to controlled money.
(8) Within 15 working days after each named month, the law practice must prepare and keep in permanent form a statement as at the end of the named month:
(a) containing a list of the practice's controlled money accounts showing:
(i) the name, number and balance of each account in the register, and
(ii) the name of the person on whose behalf the controlled money in each account was held, and
(iii) a short description of the matter to which each account relates, and
(b) showing the date the statement was prepared.
(9) The statement required to be prepared each month under subrule (8) must be reviewed by a principal of the law practice who is authorised to receive trust money and that review must be evidenced on the statement.

4. Rule 93 Register of files opened

(1) A law practice must maintain a register of files opened.
(2) The register of files opened must, in respect of each matter for which the law practice receives instructions to provide legal services to a person, record the following:
(a) the full name and address of the person,
(b) the date of receipt of the instructions,
(c) a short description of the services which the law practice has agreed to provide,
(d) an identifier.

5. Rule 94 Register of safe custody documents

(1) A law practice must maintain a register of safe custody documents.
(2) The register of safe custody documents must, in respect of each will, deed, document or other valuable property for which the law practice receives instructions to hold the item in safe custody, record the following:
(a) the full name and address of the person who gave the instructions,
(b) a short description of the item,
(c) the date of receipt of the item by the law practice,
(d) the identifier of the safe custody packet, in which the item is held by the law practice.

6. Rule 95 Register of financial interests

(1) A law practice must maintain a register of financial interests.
(2) The register of financial interests must, in respect of each legal practitioner associate of the law practice, record the following:
(a) the full name and address of the associate;
(b) the name and other identifying particulars of any company, partnership, or other entity, in which the associate has a financial interest and which engages in any dealing with trust money received by the associate or the law practice, other than:
(i) companies listed on the Australian Stock Exchange; and
(ii) shelf companies (companies that have already been registered but have not traded) maintained for sale.
(3) A legal practitioner associate of the law practice must cause the details referred to in subrule (2) (b) to be disclosed in the register of financial interests as soon as practicable.

7. Register of interests

Although this register is not listed in the Uniform Law, it offers a format for the collection and recording of the lawyers' own interests.

- To be completed by all workers in the law practice (partner, principal, employee, agent)
- Details of all organisation and people should be entered into client database with appropriate annotation to show 'own interest' within the law practice.

Pre-existing professional relationships (financial, commercial, public) Name of other organisations, businesses, partnerships in which you have an interest. Specify the type of interest (contractual, honorary, shares, position).	
Organisation	**Interest held**
Pre-existing personal relationships Name of person and your relationship to them. List your 'immediate family' means the spouse (includes a de facto spouse or partner of the same sex), a child, grandchild, sibling, parent or grandparent of a practitioner.	
Person	**Relationship**

Appendix M: Proforma Client Consent Forms

These two forms suggest a format to guide lawyers when seeking clients' informed written consent.

1. Current Client Consent Form (Concurrent Matters)
Australian Solicitors Conduct Rule 11.3.2

CONSENT BY CLIENT AUTHORISING LAW PRACTICE TO ACT FOR MULTIPLE CLIENTS IN A RELATED MATTER (CONCURRENT MATTERS)

Do you agree to authorise our law practice to act for you whilst we are also acting for *(name of concurrent client)* in the same matter?

TO: *(name and address of client)*
RE: *(matter or transaction)*
DATE:
ACTION REQUIRED: Please seek independent legal advice, and if you agree that our law practice can act for both clients in this matter, sign and return this form to us.

We are writing to you to seek your informed written consent to allow us to act for *(name of concurrent client)* whilst we are simultaneously also acting for you in the same matter.*

Informed consent means that, before you retain us to act for you in this matter, you are fully aware of the advantages and disadvantages of us acting for concurrent clients. This form discloses the advantages and disadvantages.

We suggest that you obtain independent and skilled advice from an independent advisor to ensure you are fully informed.*

**NB: Prior to using this approach, two issues need to be addressed:*

1. the law practice needs to obtain both clients' consent to disclose their names, and the fact they are seeking legal help from your law practice.
2. the law practice should have an arrangement in place with professional colleagues to refer both clients to, for independent advice, prior to them signing the form.

EXPLANATION AS TO WHY YOUR CONSENT IS NEEDED

DISCLOSURE OF POSSIBLE CONFLICT OF DUTIES
Our law practice has been asked to act for *(name of concurrent client)* whilst also acting on your behalf. It is possible that our law practice may have a conflict of duties as we must act in the best interests of both clients.

We are able to act for you both, so long as your interests are 'aligned' and not 'adverse'. If the scope of the matter, or instructions from either you or *(name of concurrent client)* changes and your interests are adverse, one or both of you will need separate lawyers.

An alternative is for either you, or *(name of concurrent client)* to work with another law practice during this matter.

Disadvantages: why agreeing to our law practice acting for both you and *(name of concurrent client)* **is not a good idea**

Our law practice has a duty to act in our client's best interests. If we act for both of you, there are three possible disadvantages:

1. Because we must act in our client's best interests, it is possible that what is in your best interests, is not in our other client's best interests. If this happens, we would not give legal advice to one client which is contrary to the interests of our other client. This is called a 'conflict of duties'.
2. Because we have a professional duty not to disclose a client's confidential information without their permission, we may not be able to share all information with you, even though that information could be relevant to this matter. On the one hand we need to keep our client's information, confidential. On the other hand, we need to share all relevant information with you. We cannot discharge both duties at the same time. This is also called a 'conflict of duties'.
3. At this stage, we believe that all clients' interests are aligned; that you want the same outcome. However, if your interests differ, that is you both want different outcomes, we must stop acting. This is because your interests are adverse; and we are unable to discharge our duties to both of you. If this happens, you both could agree that one client remains with us, whilst the other client will need to start again with a new lawyer. This can be disappointing, difficult and expensive.

Advantage: why agreeing to our law practice acting for both you and *(name of concurrent client)* **is a good idea**

We will keep your confidential information secure, and we will not share this information with anyone without your consent.

You tell us your interests are aligned with the interests of *(name of concurrent client)* and that you do not expect conflict between you. If this changes, and your interests differ, you tell us you will seek to resolve these differences using other resources (such as the real estate agent). If you reach agreement, you will then give us instructions to proceed based on that resolution of your differences.

There are two advantages to you consenting to our law practice acting for both clients:

1. You are both our clients and we have an established professional relationship of confidence, trust and loyalty with each of you. We are committed to fostering and protecting that relationship. We believe that we can act professionally for both of you. If this was not the case, we could not be asking for your consent, and we would have referred one, or both of you, to another law practice.
2. Because we are acting for both of you, there will be reduced costs and a faster transaction.

Informed consent
In order for us to act for both clients, we need your informed, written consent. Please complete the client acknowledgement and agreement form below and return to us.

signed
[insert name of principal legal director]
Principal Legal Director
Dated

CLIENT ACKNOWLEDGMENT AND AGREEMENT IN ACCORDANCE WITH RULE 11.3.2

YES: I, (name of client) acknowledge that I have read and understood the above advice and I agree that (name of law practice) may act for *(name of concurrent client)* whilst also acting for me in the above transaction.

NO: I, (name of client) acknowledge that I have read and understood the above advice and I do not agree to (name of law practice) acting for *(name of concurrent client)* whilst also acting for me in the above transaction.

I have received independent legal advice from xxxxx.

(signature of client)
(date)

2. Former Client Consent Form (Successive Matters)
Australian Solicitors Conduct Rule 10.2.1

CONSENT BY FORMER CLIENT AUTHORISING LAW PRACTICE TO ACT FOR NEW CLIENT OR TO DISCLOSE CONFIDENTIAL INFORMATION TO A NEW CLIENT IN A RELATED MATTER

1. Do you agree to authorise our law practice to act for (*name of new client*) in this matter? *Before using this approach we need current client's authority to disclose their name and the fact that they are seeking legal advice to former client.*
2. Do you agree to the limited disclosure of your confidential information ? *State the scope/nature of the confidential information which could be relevant to the new client's matter.*

TO: *(name and address of former client)*
RE: Your confidential information
DATE:
ACTION REQUIRED: Please seek independent legal advice, and if you agree *[that our law practice can act for the new client in this matter/limited disclosure of your confidential information]* sign and return this form to us.

We are writing to seek your informed written consent to allow us to *[act for the new client in this matter/limited disclosure of your confidential information]**

Informed consent means that you are fully aware of the advantages and disadvantages of our law practice *[acting for the new client in this matter/limited disclosure of your confidential information]*. This form discloses the advantages and disadvantages.

We suggest that you discuss this decision with another lawyer to ensure you are fully informed.*

**NB: Prior to using this approach, two issues need to be addressed:*

1. the law practice needs to obtain both clients' consent to disclose their names, and the fact they are seeking legal help from your law practice.
2. the law practice should have an arrangement in place with professional colleagues to refer both clients to, for independent advice, prior to them signing the form.

EXPLANATION AS TO WHY YOUR CONSENT IS NEEDED

Our law practice previously acted on your behalf *(date and matter)* and as a result of our work with you, we hold your confidential information.

Confidential information collected during our work together includes details of your personal life, your financial situation, your relationships with other people and your personal likes and dislikes. We have collected your confidential information in three ways:

1. through our personal knowledge of you and your circumstances,
2. through the specific information you share with us so that we can work together, and
3. in the deeds and documents we create together.

Our duty to you, is to maintain the confidential character of your information and not to disclose this information without your informed written consent. This duty continues through your lifetime and after your death.

If we were to accept *(name of new client)* we may have a conflict of duties. On the one hand, we have a duty not to disclose your confidential information, and on the other hand we have a duty to the new client to act in their best interests.

It is possible that your confidential information might be relevant to the *(name of new client)* matter. Specifically (s*tate reason why that information may be relevant).* It is also possible that if your confidential information was disclosed without your consent that disclosure could be detrimental to your interests.

We cannot act for a new client if:

- we are in possession of your confidential information and
- your confidential information might be relevant to the new client and
- if that confidential information is disclosed it could be detrimental to your interests

UNLESS you give our law practice your informed written consent.

Disadvantages: why agreeing to our law practice acting for *(name of new client)* i**s not a good idea.**

If you consent to our law practice offering legal services to *(name of new client)* there is a chance that:

- you could feel that our duty to maintain the confidentiality of your information is compromised
- your confidential information could be disclosed to *(name of new client).* This possibility exists as we are unable to establish 'Chinese walls' or effective information barriers. If there was an inadvertent disclosure of your confidential information it could be detrimental to your interests.

If you fear that the inadvertent disclosure of your confidential information will be detrimental to your interests, you should refuse consent.

Advantages: why agreeing to our law practice acting for *(name of new client)* **is a good idea)**

If you consent to the limited disclosure of specific confidential information, this confidential information may be beneficial to *(name of new client).*

Alternatively, if you do not wish to disclose your confidential information, you could consent to us acting for *(name of new client).* We will continue to protect your confidential information whilst discharging our duty to *(name of new client)* to act in their best interests.

Signed [Principal Legal Director] Dated

FORMER CLIENT ACKNOWLEDGMENT AND AGREEMENT (INFORMED WRITTEN CONSENT) IN ACCORDANCE WITH RULE 10.2.1

YES: I, *(name of former client)* acknowledge that I have read and understood the above advice and I agree that (name of law practice) may:

- act for *(name of new client)* in the above matter and/or
- disclose my confidential information, specifically xxxxx, to *(name of new client)*

NO: I, *(name of former client)* acknowledge that I have read and understood the above advice and I do not agree to (name of law practice)

- acting for (name of new client) in the above matter
- disclosing my confidential information to (name of new client)

I have received independent legal advice from (name of independent lawyer).

(signature of former client) (date)

Appendix N: Professional Community of Practice: Ethics Roundtable

This document sets out suggested criteria for the establishment of a professional community of practice based on single session professional development events.

Ethics Roundtable

The aim of an ethics roundtable is to provide a forum for lawyers to discuss legal ethics, risk management, business tools and management culture. A typical roundtable session features a presentation on an issue, followed by a discussion guided by the presenter. We provide participants with material on the subject prior to the meeting, and distribute additional material at the Roundtable session. This material outlines key issues and suggested practices to strengthen our practice of law. Topics include the design of 'appropriate management systems' to guide our practice of law, identifying and responding to conflicts of interest, supervision of workers and other critical issues at the intersection of ethics, law practice structure, and culture.

Terms of Reference

- Aim: to support the continuous improvement of the administration of justice through collaboration with colleagues. A corollary of this work is the shared endeavour of strengthening professional practice.
- Values: Commitment to continuous improvement of the justice system, Curiosity about one's own practice, Respect for other's views, Collaborative spirit, Safety, Fun.
- Behaviour: forthright engagement, respectful civility, collegiality, respect, responsibility, care for others, friendship and support, care and commonsense, diligence and dignity, skill and sensitivity.

Structure (alternatives)

- Unincorporated working group
- Under the auspices of regional law society/jurisdictional law society
- Incorporated Co-operative
- Business Unit of a law practice; income generation.

Cost

- Free to participate. Currency is participation in discussion.
- Roles of host and facilitator may move around the membership.
- Annual membership fee to cover costs of operational support, venue, communication links, food.

Stages of development

- Proof of concept. Trial of first group. Reflect on good/bad of the experience. Include that learning in the next version. Repeat.
- Research effectiveness of this mode as a practice tool. Consider ethics approval, participant consent, threshold interviews.
- Promulgate. Share our learning with others.

Planning

- Timing: Designed with advance notice of dates/times. Frequent enough to allow people to participate when they can. Friday afternoons in the working week with option of social event afterwards.
- Emphasis on 'real time' connection be it in person or webcast.

Membership

- Inclusive and open to all practising members of the legal profession.
- Diversity: participants from different sizes/types of law practices, lawyers with experience from 'master' to 'early career', regulators, ethics counsellors. Intergenerational learning allowing all to contribute; acknowledgement of phronesis 'practice wisdom' and reverse mentoring.
- Consider potential for self-organising, discrete groups which are managed to address any pre-existing conflict or competition.

Format

- Preference is to offer 'face to face' gatherings supplemented with online connections (Facebook live, Periscope, Zoom, Adobe Connect, Skype, Video conference or teleconference.)
- Sessions timed to accommodate working hours: lunch time, mid-week, late afternoon, Friday afternoons. Preference is to avoid encroaching on participants' personal time.
- Sessions start on time and finish on time.
- Structured part of the meeting runs for one hour (20 minutes presentation, 20 minutes questions and 20 minutes discussion).
- Note taker to capture salient points from the discussion.
- Information pack supports presentation.

Process

- Terms of reference: purpose, membership, dates, resources, overarching 'justice' agenda.
- Provision of foundational resources; Act, Rules, Cases to refer to as guides.
- Provision of threshold demographic data about our local geographical community: population size, diversity, justice indicators.
- Each one hour seminar counts as one CPD unit (ethics or practice management).
- Annual brainstorm of topics to set agenda. Advance notice of the focus, and outcomes expected. Focus on an ethical dilemma/case study.
- Aiming for coherence in approaches and clarification of an agreed standard.
- Iterative process to allow revisiting of salient issues over time.
- Gatherings reflect adult education principles.
- Based on the subsidiarity principle that 'decisions belong at the lowest possible level' and that each participant is an autonomous professional with moral agency.
- Participants are aware of and contribute their preferred 'currency' as to how they can contribute to the shared endeavour of strengthening professional practice.
- Runs as an 'open space' or as a 'world café' with no compulsion to participate but each event depends on who turns up and their individual needs and interests.
- Discourse and resolution.
- Participants assume – and argue - different positions (Consider using De Bono's six hats, Gentile's Giving Voice to Values).
- Strive to create ambient culture of fun, connection, respect and compassion. Serendipitous relationship building through participation. Hospitality, welcome and inclusion are the main themes. (Piddington Society).

Models and funding

- Derived from the model developed by the Georgetown Law School and the ANU College of Law.
- Collaborative communities of practice used by collaborative professionals.
- Resource: <http://www.liv.asn.au/Professional-Practice/Ethics>.
- Kate Hammond's model of ethics workshops (former Victorian Legal Ombudsman).

- Elements of the Women on Farms Gatherings: participant led, narratives celebrated to recognise practice wisdom, field trips to observe other legal practices.
- Professional Standards Councils Australia: Star Grants program <http://www.psc.gov.au/grants/research-grants/previous-projects>.
- Law Society of South Australia: Graeme Jobling.
- Lucie White (pro bono co-ordination).
- World Café; <http://www.theworldcafe.com/key-concepts-resources/world-cafe-method/>.
- Open Space Technology <http://openspaceworld.org/wp2/>
- The Piddington Society (we are here for a fun time, not necessarily a long time) <http://piddingtonsociety.com/>.

Legislative basis

LPUL s3 Objectives

To promote the administration of justice and an efficient and effective Australian legal profession by:

b) ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services

e) promoting regulation of the profession that is efficient, effective, targeted and proportionate.

LPUL s34 Responsibility of principals (de-centred regulation)

(1) Each principal of a law practice is responsible for ensuring that reasonable steps are taken to ensure that-

(a) all legal practitioner associates of the law practice comply with their obligations under this Law and the Uniform Rules and their other professional obligations

(b) the legal services provided by the law practice are provided in accordance with this Law, the Uniform Rules and other professional obligations

(2) A failure to uphold that responsibility is capable of constituting unsatisfactory professional conduct or professional misconduct.

LPUL s39 Undue Influence

A person must not cause or induce or attempt to cause or induce a law practice or a legal practitioner associate of a law practice to contravene this Law, the Uniform Rules or other professional obligations (100 penalty units).

ASCR R5 Dishonest and disreputable conduct

5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practice law, or which is likely to a material degree to:

5.1.1 Be prejudicial to, or diminish the public confidence in, the administration of justice; or

5.1.2 Bring the profession into disrepute.

Appendix O: 'Shop Talk' Professional Community of Practice

Victorian Legal Services
BOARD

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28 June 2017

Ms Helen McGowan
Principal Lead Director
Transition Law Pty Ltd
27 Ford Street
Beechworth Vic 3747

via email: *helen@hallidaysolicitors.com.au*

Dear Helen

Grant Application 2017-GR002
'Talking shop: Collaborating on the development and audit of law practice management systems'

Thanks for waiting so patiently to hear from us about your grant application. For some very particular reasons, your application was unsuccessful through this program. Your proposal remains compelling to the work of the Board and accordingly, I would like to explore other options to undertake this work.

The Grants Committee have informed me there were two principal reasons why it was not recommended. First, it did not carry the necessary assessment components that would allow for measuring of the success of the project. Secondly, it would have involved the Board paying a regulated law firm substantial Public Purpose Funds to deliver the program and acquit the grantee's expenditure obligations. It was considered that this would set an unfortunate precedent for the Grants program which concentrates on funding not for profit entities.

Unfortunately, I was conflicted from participating in the Grants Committee's deliberations over your application, given I was the originator of you making the grant application in the first place. I did not see the application and once received by the Grants staff, the process does not allow work to refine any grant proposal after the closure date. This is necessary to maintain equilibrium between competing applicants.

I feel strongly that your initiative is relevant to the current concerns of the Board. That is: to devise a methodology to support and assist regional and suburban firms to survive and compete in an environment that carries added professional service impediments like isolation, restricted communities of interest, and reduced resources. Your model, involving the creation of a structure for the development and exchange of practice wisdom, and the incorporation of the Board's Management Systems Audit tool seems to be capable of meeting the needs you have identified. I would however, like to explore whether there may be a not for profit entity, other than a private law firm, where the funding of this project could be managed. This is also to avoid any apparent conflict of interest in the event of any other regulatory issue arising between the funded firm and the regulator.

Thus I would like to encourage the Board to consider how it might fund your initiative, possibly through another entity such as a North East Region association, or even through the Law Institute. We should also consider ways we can assist you build in some measures of success. I will call you shortly to set a time aside to explore this further.

Kind Regards

Michael McGarvie
Chief Executive Officer

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