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such a hybrid approach, different solutions explain different kinds of reasons that the lawyer's role generates. Hybrid accounts offer powerful explanations for other aspects of our normative world, such as how promises can generate reasons.[103] A hybrid approach would also suggest that normative significance of roles is complex, as some philosophers have argued.[104] Thus, I suspect that many theories of legal ethics are right about something, even if none is right about everything.

CONCLUSION

Every theory of legal ethics rests on an implicit solution to the generative problem. A viable solution offers a plausible account of the mechanism by which the lawyer's role generates reasons, and the effect of this role on the reasons that lawyers have. These solutions can and should be empirically verified. None of the major theories of legal ethics is based on a fully satisfactory solution to the generative problem, and some are structurally deficient. Future work in legal ethics should aim to address or resolve these structural issues, as well as to verify these empirical hypotheses and assumptions.

The generative method introduced here has at least two important implications. First, this method avoids problems of theoretical disagreement that plague current debates about legal ethics. What is the main point of theorising about legal ethics? Different theories answer this question differently. Some see the point as offering a moral justification of the lawyer's role-actions. Others see the point as providing a political justification for these actions. Still others see it is a matter of finding agent-relative justifications for the lawyer's role-actions, which does not 'reduce[] to generic moral or political theory'.[105] Because these answers are both incompatible and outcome-determinative, this disagreement threatens to create an impasse. The generative method allows us to avoid this impasse, providing a way to discuss legal ethics that does not presuppose what the point of legal ethics is (or if there is one). We can reject any theory that is based on an implausible account of how roles generate reasons, regardless of what kinds of reasons (moral, political, or first-personal) should be the currency of the realm of legal ethics.

Further, the generative method highlights a fundamental continuity in discussions of professional ethics. We can use essentially the same tools to analyse questions about the special reasons of lawyers, physicians, managers, or soldiers. Each of these debates asks how our reasons are related to our roles, as well as how we may discharge conflicting commitments in an imperfect world. The generative method can therefore help distinguish questions that are unique to the lawyer's situation from those that are more fundamental to the human condition.

103 See Ruth Chang, 'Voluntarist Reasons and the Sources of Normativity' in Sobel and Wall (n 11) 243, 260–3; Kolodny & Wallace (n 10).

104 Judith Andre, 'Role Morality as a Complex Instance of Ordinary Morality' (1991) 28 *American Philosophical Quarterly* 73, 79.

105 Daniel Markovits, 'Three Issues in Legal Ethics' (2010) 60 *University of Toronto Law Journal* 1003, 1010.

Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers

Vivien Holmes, Tony Foley, Stephen Tang and Margie Rowe*

INTRODUCTION

Professionalism means different things to different lawyers. For some, being professional denotes more than just being technically proficient in their practice of law. Rather, professionalism implies independent work to high standards of ethics and public service. But for other lawyers, the 'traditional' ideals of professionalism (autonomy, collegiality, public service) have all but disappeared. Many scholars report that a narrower, more technical view of professionalism, which focuses on the mastery of highly specialised knowledge, predominates in the new, technology based, global economy. They conclude that this is so despite repeated rhetorical calls by professional bodies for lawyers to uphold the public service ideal.[1]

Law graduates who make the transition to legal 'professional' begin to construct for themselves a professional identity. Whether that new identity reflects the traditional ideals of professionalism, or a more technical approach to lawyering, will depend partly on the models of 'professionalism' that new lawyers encounter in their first workplace. This article reports on a pilot project designed to gain empirical insights into the transition from law graduate to legal professional—an overview gained by following a group of new lawyers through their first year of practice. It explores how the work 'situation' in which a new lawyer finds herself might influence the professional identity she constructs for herself.

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1 See eg Council of the International Bar Association, 'Resolution on Professionalism versus Commercialism' (2000), www.ibanet.org/Document/Default.aspx?DocumentUid=D6FB6535–32E0–4FB1-A669-91EDC9586F56.

NOTIONS OF PROFESSIONALISM[2]

It is useful to sketch a set of 'traditional' indicia of professional work in some detail, to provide a reference point for our discussion about professionalism. The literature identifies several attributes of professional work as traditionally[3] understood: autonomy, task variety competence, collegiality and public service orientation. For lawyers, these attributes are in turn guided by two overriding duties (to the court and to the client), which make for a particular ethical overlay to legal practice:[4]

Primary Duty to the Court and the Administration of Justice

Legal professional work takes place within an ethical framework which has fidelity to law at its core. The new Australian Solicitors' Conduct Rules express it thus: 'A lawyer's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.'[5] As Lord Hunt emphasises in his *Review of the Regulation of Legal Services* in the United Kingdom, the primary professional relationship for a lawyer should be with the law itself.[6] This relationship requires a lawyer to be guided by professional norms of behaviour and to follow established procedures, even where to do so is disadvantageous to a client. This means that legal processes and procedures cannot be jettisoned simply

2 Though we sketch only two broad notions of legal professionalism in this paper, there are clearly more than this. Richard Abel, for instance, does not view professionalism as 'a set of standards of competence and ethical behaviour' nor as practice which stresses 'technical expertise' *per se*. Instead he sees 'the professional project' as simply one where an occupation strives to maintain market control under capitalism through restricting supply (entry to the profession) and creating demand (maintaining technical complexity): Richard L Abel, 'The Decline of Professionalism' (1986) 49 *Modern Law Review* 1, 1; Richard L Abel, *English Lawyers between Market and State: The Politics of Professionalism* (Oxford University Press, 2003).

3 We term this the 'traditional' view of professionalism to differentiate it from a more narrow, technical view of what it means to be a professional. Historically, though, in the United States at least, both views have held sway at different times: see William M Sullivan, *Work and Integrity: The Crisis and Promise of Professionalism in America* (Jossey-Bass, 2005).

4 Jean E Wallace and Fiona M Kay, 'The Professionalism of Practicing Law: A Comparison Across Two Work Contexts' (2008) 29 *Journal of Organizational Behaviour* 1021, 1027. This is hardly a universally accepted list of attributes, nonetheless there is considerable consistency that these factors do provide one formulation of what it means to be a professional. Friedman's particular 'professional package' sees these and other attributes as operating as 'institutional mechanisms' designed to function as correctives to practitioners' natural (economic) bias in favour of clients (or themselves) rather than the public good: Lawrence M Friedman, *A History of American Law* (Simon and Schuster, 1973); Lawrence M Friedman, *Total Justice* (Russell Sage Foundation, 1985). Freidson saw professionalism as a conceptual construct by which a specialist occupation might organise its own work through similar means of ensuring competency, assuring trustworthiness, maintaining collegiality and facilitating contributions to the public good: Eliot Freidson, 'Professionalism as Model and Ideology' in Robert L Nelson, David M Trubek and Rayman L Solomon (eds), *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Cornell University Press, 1992).

5 Law Council of Australia, 'Australian Solicitors' Conduct Rules' (June 2011), www.lawcouncil.asn.au/programs/national_profession/conduct-rules.cfm, rule 3.

6 Lord Hunt of Wirral, 'The Hunt Review of the Regulation of Legal Services' (Law Society, 2009), www.lawcentres.org.uk/uploads/Legal_Regulation_Report_October_2009.pdf.

to appease individual client interests. It also requires a lawyer to give a client independent and informed advice that is in line with established applicable law rather than with her own or her client's view of what the law should be.[7] Expressions of legal ethics provide values, practices and principles designed to give legal practitioners guidance in answering the question 'how ought I to act', in a way which remains consistent with this overriding duty to the law.[8]

Fiduciary Fidelity to a Client

The lawyer-client relationship places lawyers in a position of considerable power and control over (many of) their clients.[9] In recognition of this, the law imposes strict fiduciary duties on the lawyer, so as to militate against any temptation to abuse this position of power for one's own advantage.[10] Lawyers are required to act in utmost good faith and in the best interests of a client.[11]

Within the overarching framework of these two duties, lawyers' professional work as traditionally understood involves the following attributes:

Autonomy

There are two ways in which autonomy is characteristic of professional practice.[12] First, professionals exercise their own (autonomous) judgement or discretion in selecting relevant knowledge, or appropriate techniques, for performing the task at hand.[13] Of course, lawyers remain subject to their clients' instructions, as well as to external constraints of legality and procedure, and to the need to abide by shared professional norms.[14] As well, most lawyers in practice are subject to varying degrees of supervision by superiors. Nonetheless a lawyer uses her own discretion in performing her work.

The second relevant aspect of autonomy is closely related to the two overriding duties described above: duty to the law and to a client. A lawyer must not only master knowledge of the law and its practice so as to be able to work autonomously, but must also realise the

7 See W Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton University Press, 2010); David J Luban, 'Tales of Terror: Lessons for Lawyers from the "War on Terrorism"' in Kieran Tranter *et al* (eds), *Reaffirming Legal Ethics: Taking Stock and New Ideas* (Routledge, 2010). Compare the situation where established law is challenged before a court, eg in a test case.

8 Duncan Webb and Christine Parker, 'Editorial: The Politics and Everyday Practice of Legal Ethics' (2009) 12 *Legal Ethics* iii.

9 We recognise that some corporate clients may be (or seem to be) the powerful party in the relationship.

10 Hilary Sommerlad, 'Researching and Theorizing the Processes of Professional Identity Formation' (2007) 34 *Journal of Law and Society* 190, 192.

11 See a judicial expression of this duty in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96–97 (Mason J).

12 Wendel (n 7) 31–32.

13 Wallace and Kay (n 4) 1024; Gloria V Engel, 'Professional Autonomy and Bureaucratic Organization' (1970) 15 *Administrative Science Quarterly* 12.

14 Wallace and Kay (n 4) 1024; Robert L Nelson and David M Trubek, 'Arenas of Professionalism: The Professional Ideologies of Lawyers in Context' in Nelson, Trubek and Solomon (n 4).

necessary independence (autonomy) from a client's wishes in order to comply with her paramount duty to the law. In fulfilling her duty to the client, the lawyer must learn its qualification—that she is not simply the client's agent and that her role is not merely to seek and satisfy a client's wishes. In these two senses, autonomy is an important element of legal professionalism.

Task Variety Competence

Much of the work that professionals do is complex, uncertain and irreducible to any definable set of routine procedures. Professionals are required to deal with issues, problems and uncertainties that arise in a wide variety of situations.[15] Specifically, lawyers are often required to resolve legal issues, to creatively document transactions, to consider rapidly changing areas of law or to conduct complex litigation.[16] Even routine and repetitive legal work carries with it a wide variety of task requirements, including writing, negotiating, legal research, drafting documents, interviewing and working effectively with diverse clients and other lawyers. All such work involves varying degrees of discretion, challenge, skill and expertise in order for the transaction to be completed.[17] Thus, competence in a large variety of tasks is a further indicator of legal professionalism.

Collegiality

Professionalism is also traditionally marked by collegial and cooperative working relationships between individuals involved in the profession. While lawyers may often perform complex tasks alone, effective working relationships remain essential to the myriad of legal transactions and processes in which they are involved.[18] Such collegial relationships may begin to form in law school, but develop 'more fully through informal communications and mentoring by more senior lawyers'.[19] This is true as much for sole practitioners as for those in large firms; successful sole practitioners rely on a network of professional acquaintances with expertise in different legal fields who can be called on for assistance.[20]

15 Wallace and Kay (n 4) 1026.

16 Thornton emphasises the importance (albeit in a critical context) of the 'new knowledge skills' in lawyers (seen as 'essential to devise innovative contracts and ways of circumventing regulatory obstacles') as an additional requirement of legal professionals: Margaret Thornton, 'The Law School, The Market and The New Knowledge Economy' (2007) 17 *Legal Education Review* 1, 2.

17 Wallace and Kay (n 4) 1027.

18 Robert L Nelson, *Partners with Power: The Social Transformation of the Large Law Firm* (University of California Press, 1988).

19 Wallace and Kay (n 4) 1025.

20 'Flying Solo: The Rise of the Sole Practitioner' *Lawyers Weekly*, 7 October 2009, www.lawyersweekly.com.au/blogs/slide_show/archive/2009/10/27/flying-solo-the-rise-of-the-sole-practitioner.aspx. The internet is also a tool for establishing supportive professional relationships among sole practitioners, eg Solicitor Sole Practitioners Group, established for solicitors in England and Wales who practise with no partners: www.spg.uk.com. Leslie Levin noted that these networks of assistance were a factor of the shared space accommodation that sole practitioners in New York State had, similar in this respect to the way the independent Bar operates in the UK and other common law countries. Leslie C Levin, 'Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners' (2001) 70 *Fordham Law Review* 874.

A sense of collegiality is another indicator of legal professionalism.

Public Service Orientation

Roscoe Pound famously described a profession as 'a group … pursuing a learned art as a common calling in the spirit of *public service*—no less a public service because it may incidentally be a means of livelihood'.[21] 'Public service' involves an orientation toward the service of others, in the sense that the work makes a potentially valuable contribution to society in some way.[22] So, lawyers' pursuit of personal interest needs to be modified by the acceptance of responsibilities, to the public and to the court.[23] An orientation towards public service is our fourth indicator of (legal) professionalism.

Thus, on this traditionally conceived view, lawyers' professional work involves autonomy, task variety competence, collegiality and public service orientation, occurring within a framework of two overriding duties.[24] These skills and behaviours together comprise the core of legal professionalism as traditionally understood: they are at the centre of the lawyer's professional identity. But many argue that the reality of lawyers' work today reflects few of these characteristics. Rapid economic changes of recent years have been the catalyst for radical changes to notions of professionalism. As national economies globalise and a new, technology-based global economy emerges, traditional categories of knowledge and traditional ways of organising work have disintegrated.[25] The relationship between society and the legal profession has changed in ways which, according to Moorhead and colleagues, are characterised by a significant decline in altruism: 'professionalism' has been 'renegotiated'.[26] Webb has traced similar declines in legal professionalism, which he sees as accelerated as a consequence of the shift from individual to entity regulation of legal practices.[27] Flood points to the growing stratification of the legal profession as a result of the dominance in legal marketplaces of global professional services firms, whose new managerial structures have propelled a move away

21 Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (West, 1953) 5 (emphasis added).

22 Jean E Wallace, 'Explaining Why Lawyers Want to Leave the Practice of Law' in Jerry Van Hoy (ed), *Sociology of Crime, Law and Deviance—Legal Professions: Work, Structure and Organization* (Elsevier, 2001).

23 Chief Justice Murray Gleeson, speech at the Australian Academy of Law Launch, Brisbane, 2007, www.hcourt.gov.au/speeches/cj/cj_17jul07.pdf.

24 Wallace and Kay (n 4) 1027.

25 This issue was a key theme at Plenary 1A at the Fourth International Legal Ethics Conference, Stanford University, 16–18 July 2010: Vivien Holmes and Kath Hall, 'International Legal Ethics Conference IV: The Legal Profession in Times of Turbulence' (2010) 13 *Legal Ethics* 209.

26 Richard Moorhead, Alan Paterson and Avrom Sherr, 'Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales' (2003) 37 *Law and Society Review* 765.

27 Julian Webb, 'The Dynamics of Professionalism: The Moral Economy of English Legal Practice—and Some Lessons for New Zealand' (2008) 16 *Waikato Law Review* 21.

from traditional values to an increasingly narrow emphasis on delivering 'quality' for clients.[28] In short, scholars argue that highly competitive marketplaces have encouraged a 'technical' view of professionalism that focuses more narrowly on the possession and control of specialised knowledge and skills.[29]

In contrasting 'traditional' with technical views of professionalism, we are of course describing two polarities. There are in fact multiple versions of professionalism along the 'traditional professional' vs 'technical expert' continuum, multiple 'visions of what constitutes proper behaviour by lawyers'.[30] Nelson and Trubek posit that differing concepts of professionalism reflect the differing arenas in which those concepts operate. From their sociological perspective, legal professionalism is not a single or unitary body of ideas or practices, but rather a set of questions about which lawyers and others argue.

The workplace is a key site for the formation of lawyers' ideals of professionalism. As Nelson and Trubek note, while the historical and practical circumstances of lawyers' work may influence professional ideals, they do not *determine* them. Rather, professional ideals are 'formed and reformed by the lawyers' themselves, as they work and as they ask themselves how they should act.[31] Our research seeks to discover what ideals of professionalism new lawyers form in their first year in 'the workplace' and how they construct for themselves a professional identity in the light of to those ideals. We ask, 'is their version of professionalism broad or narrow?'

THE CURRENT REALITY OF LEGAL PROFESSIONALISM

Earlier research suggests that law graduates choosing their career path may find that the reality of practice today is at odds with traditional notions of legal professionalism. It seems that many lawyers who enter the profession expecting to make a contribution to the community experience dissatisfaction when their work does not allow for that possibility.[32] Simon posits that 'no social role encourages such ambitious moral aspirations as the lawyer's and no social role so consistently disappoints the aspirations it encourages'.[33]

Becoming aware of a more circumscribed professional future can cause 'a considerable level of disquiet'[34] for those entering legal practice today. Evans and Palermo's study of Australian law students suggested that while the championing of 'truth and justice' by law

28 John Flood, 'The Re-Landscaping of the Legal Profession: Large Law Firms and Professional Re-Regulation' (2011) 59 *Current Sociology* 507.

29 William Sullivan and Patricia Benner, 'Challenges to Professionalism: Work Integrity and the Call to Renew and Strengthen the Social Contract of the Professions' (2005) 14 *American Journal of Critical Care* 78, 80.

30 Nelson and Trubek (n 14) 179.

31 *Ibid*, 211.

32 Andrew Boon, 'From Public Service to Service Industry: The Impact of Socialisation and Work on the Motivation and Values of Lawyers' (2005) 12 *International Journal of the Legal Profession* 229.

33 William H Simon, *The Practice of Justice* (Harvard University Press, 1998) 1.

34 Richard Moorhead and Fiona Boyle, 'Quality of Life and Trainee Solicitors: A Survey' (1995) 2 *International Journal of the Legal Profession* 217, 218.

schools may help foster a career orientation towards altruism, such an orientation may be setting up graduates for professional disappointment.[35] Sommerlad notes that even lawyers working in practices with a conscious public service orientation, such as legal aid, may be disappointed when they find that the provision of aid is restricted and that they must at times act as little more than 'agents of the state … rationing justice'.[36]

This starker reality of practice has been well captured in research by Boon, who tracked the experience of a group of new practitioners in the United Kingdom.[37] He found considerably varied experience amongst graduates, dependent upon the type of practice they entered (whether they were in a 'high street', city commercial, regional or legal aid practice). Those working in under-resourced and marginal smaller firms felt pressured and relatively poorly rewarded, and also found it difficult to derive satisfaction from their work.[38] By contrast, graduates working in what Boon describes as 'secure, solid and defensible public service type roles'[39] in private practice (undertaking work such as employment law and family law) were much more positive about their work and professional role. The experiences of new lawyers in larger commercial law practices were different again—they often found that the strong emphasis on 'client satisfaction' meant that the lawyer-client relationship had become commercially, rather than professionally, focused.[40] Their reality of practice was dominated by heavy workloads and billing pressures, and any exposure to clients that did occur was often experienced as 'consumer service' rather than professional advising.[41]

Boon found nonetheless that a 'public service' orientation remained important to new graduates in practice. For some, the idea of 'public service' had 'morphed' into doing their particular legal tasks to the best of their ability rather than being specifically engaged in work with a clear public utility. Thus, 'public service' became re-cast as using their legal skills and capabilities as a service which in itself had intrinsic public good.[42] On this construction, even unglamorous, routine legal work can be seen as providing a public service, because it means that citizens can order their affairs and resolve disputes 'without the need for force or the exercise of personal influence, such as money, power or family or clan influence'.[43]

Empirical research in North America confirms similar shifts in notions of legal professionalism. Wallace and Kay's research focused on whether 'solo' practitioners and large law

35 Adrian Evans and Josephine Palermo, 'Australian Law Students' Perceptions of their Values: Interim Results in the First Year—2001—of a Three-Year Empirical Assessment' (2002) 5 *Legal Ethics* 103. See also Martin EP Seligman, Paul R Verkuil and Terry H Kang, 'Why Lawyers are Unhappy' (2005) 10 *Deakin Law Review* 49; Patrick J Schlitz, 'On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy and Unethical Profession' (1999) 52 *Vanderbilt Law Review* 871.

36 Hilary Sommerlad, 'The Implementation of Quality Initiatives and the New Public Management in the Legal Aid Sector in England and Wales' (1999) 6 *International Journal of the Legal Profession* 311.

37 Boon (n 32).

38 *Ibid*, 253.

39 *Ibid*.

40 *Ibid*, 245.

41 *Ibid*, 247.

42 Anthony T Kronman, *The Lost Lawyer* (Belknap Press, 1995) 366; see Boon's discussion (n 32) at 253–4.

43 James Allsop, 'Professionalism and Commercialism: Conflict or Harmony in Modern Legal Practice?' (2010) 84 *Australian Law Journal* 765.

firm lawyers differ in their sense of professional responsibility. They concluded that different 'versions' of professionalism could exist dependent upon the nature of the legal work done and the extent to which the profit motive was paramount.[44] Solo practitioners retained greater autonomy and public service orientation, but this was often at the expense of collegiality and task variety aspects of practice. By contrast, large firm lawyers found substantial restrictions on their autonomy and on their capacity to make a public service contribution, but they could thrive on the variety offered by complex and exciting work for major clients.[45] For many large firm lawyers, the professional ideal had altered to 'accommodate the importance of being businesslike in a highly competitive marketplace'.[46]

Wallace and Kay concluded that, while a sense of professionalism may still be reflected in the work of different groups of lawyers, no particular section of legal practice embodied all the hallmarks of the archetypal professional.[47] This is consistent with Sommerlad's findings that different groups of lawyers may 'produce' a differentiated profession for themselves by '[re-]constructing' the traditional characteristics of legal professionalism to fit within the mode of practice in which they find themselves.[48] It is also consistent with Solbrekke's findings in Norway that, after their first year of work, many law graduates will have renegotiated their (pre)conceptions of professional responsibility, with their new conceptions being significantly influenced by their work context.[49]

Professional life confronts graduates with 'multiple responsibilities'[50] (to the client, society, employer, colleagues, and to one's own family and personal wellbeing) and some renegotiation of one's ideals is a necessary part of dealing successfully with these complexities. Recognising this, Solbrekke nonetheless remains concerned that new lawyers seem to 'get caught up in their local tasks and responsibility for their client(s), while the societal dimension of their professional responsibility … comes under jeopardy'.[51] He discerns a tendency in new lawyers to simply equate 'professional responsibility' with the ability to live up to formal rules of conduct with no accompanying emphasis on the need for broader moral and societal responsibility.[52] We surmise that a broader sense of professional responsibility may yet develop as the new lawyer begins to feel more competent in their work and better able to see it in a larger social context. During the first year of practice when one is 'learning the ropes', a focus on the detail of rules and tasks may well be necessary.

Our project is designed to fit within the body of research just described. We aim to gain some empirical insights into how new lawyers make sense of 'professionalism' in forming their own professional identity.

44 Wallace and Kay (n 4) 1043.
45 *Ibid*, 1042.
46 *Ibid*, 1040.
47 *Ibid*, 1043.
48 Sommerlad (n 10) 192.
49 Tone Dyrdal Solbrekke, 'Professional Responsibility as Legitimate Compromises: From Communities of Education to Communities of Work' (2008) 33 *Studies in Higher Education* 485.
50 *Ibid*, 496.
51 *Ibid*.
52 *Ibid*, 497.

RESEARCHING THE CULTIVATION OF A PROFESSIONAL IDENTITY

Our specific contribution is to examine whether (and how) the traditional attributes of professionalism (autonomy, task variety competence etc) and broader notions of societal responsibility are still significant for new practitioners, or whether a narrower view of professionalism which prioritises technical proficiency has come to prevail.

A Conceptual Framework

There is extensive research to support the view that the practice norms and habits of lawyers are formed in large part through interaction with the legal community in which they practise.[53] For example, Levin places such 'situational factors' higher than disposition-based choices as the key to the development of ethically sound (or ethically problematic) behaviour.[54] She notes that the longer a lawyer is a member of a firm, government office, legal service clinic or corporate legal department, the more the lawyer's behaviour will conform to the ethical climate of that practice:

> Lawyers learn from other lawyers. … [They] draw upon their observations of their professional communities for their understanding of their role as lawyers and for guidance concerning how to practice law. These professional communities not only help them learn the basic skills needed to practice law, but they communicate the formal rules and informal norms that guide lawyers in their decisionmaking in practice.[55]

To acquire the skills of 'lawyering', a new lawyer must combine theoretical knowledge with knowledge that can only come from practising the law, or from what Schön calls the 'doing-in-action with the aid of knowledge-in action'.[56] This process requires 'interactions with others as much as, if not more than, the knowledge [found] in texts'.[57] Within this context, mentors and other colleagues who are encountered early in practice convey lessons about appropriate behavioural norms that will influence a lawyer's decision making long after any initial collegial relationship has ended.[58]

53 Milton C Regan, Jr, 'Moral Intuitions and Organizational Culture' (2006) 51 *Saint Louis University Law Journal* 941. Elsewhere Regan makes the point that any account of professionalism 'must be attentive to law firms not simply as collections of lawyers, but as social forms that play an important role in constructing and expressing the values of the legal profession': Milton C Regan, Jr, 'Law Firms, Competition Penalties and the Values of Professionalism' (1999) 13 *Georgetown Journal of Legal Ethics* 1, 5. See also Kimberly Kirkland, 'Ethics in Large Law Firms: The Principle of Pragmatism' (2005) 35 *University of Memphis Law Review* 631.
54 Leslie C Levin, 'Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock' (2009) 22 *Georgetown Journal of Legal Ethics* 1549, 1553.
55 Leslie C Levin, 'Lawyers in Cyberspace: The Impact of Legal Listservs on the Professional Development and Ethical Decisionmaking of Lawyers' (2005) 37 *Arizona State Law Journal* 589, 589.
56 Donald A Schön, *The Reflective Practitioner* (Basic Books, 1983) 141.
57 John Flood, 'Doing Business: The Management of Uncertainty in Lawyers' Work' (1991) 25 *Law and Society Review* 41, 68.
58 Levin (n 54) 1557.

This emphasis on situational factors and on interactions provides the theoretical framework to guide our empirical inquiry. We have sought to understand how the situational experiences of new lawyers during their first year of practice may have influenced the professional identity they construct for themselves. To assist our exploration, we have developed a methodology designed to provide empirical insights into the experience of a group of 'entry level lawyers'.

Methodology: The 'Lived Experience' of Entry-Level Lawyers

The situated and process-based model of identity acquisition that we adopt in this paper cannot be measured directly. Questioning lawyers about their professionalism and professional development would produce only responses related to their *attitudes* and *reason-based beliefs*, which may have very little or no relationship with actual practice and behaviour.[59] Moreover, such a top-down approach treats professionalism as a quantifiable entity—as if professionalism were a discrete lawyering skill on a competency checklist, alongside interviewing clients and drafting contracts— rather than being an integrated part of identity and everyday practice.

With this in mind, we adopted a bottom-up research approach which involved gathering information about the lived experience of entry-level lawyers. This involved exploring the daily activities, professional relationships, learning opportunities and the organisational environment in which new lawyers are immersed—and how this changed over the first 12 months of practice. Using this method allowed us to observe indicia of professionalism and professional identity which emerged out of this formative period of time.

To focus our attention on the kinds of things we wanted to observe in the work of a new lawyer, we conducted a review of the empirical literature on legal practice. This body of research suggested that there was a range of particular factors that were important in the work of a (new) lawyer. These included:

- the types of activities in which they engage;[60]
- the confidence and competency they bring to these activities;[61]
- their opportunities for workplace learning (both formal and informal);[62]

59 See eg Paschal Sheeran, 'Intention-Behaviour Relations: A Conceptual and Empirical Review' in Wolfgang Stroebe and Miles Hewstone (eds), *European Review of Social Psychology* vol 12 (Wiley & Sons, 2001).

60 Avrom Sherr, 'Solicitors and their Skills: A Study of the Viability of Different Research Methods for Collating and Categorising the Skills Solicitors Utilise in their Professional Work', Research Study No 6 (Law Society, 1991).

61 Janis E Clark, 'Transition Education: One Step in a Lifetime of Learning for Lawyers' (2006) 40 *Valparaiso University Law Review* 427; Avrom Sherr, 'Do Lawyers Do Any Good?', International Legal Aid Group Conference, Killarney, 2005.

62 Victoria J Marsick and Karen E Watkins, 'Informal and Incidental Learning' (2001) 89 *New Directions for Adult and Continuing Education* 25; Sveinung Skule, 'Learning Conditions at Work: A Framework to Understand and Assess Informal Learning in the Workplace' (2004) 8 *International Journal of Training and Development* 8.

- the types of occupational culture to which they are exposed;[63]
- their sense of personal well being;[64] and
- their own particular hopes and expectations from this transitionary period.

We then constructed a multi-method qualitative procedure that sought to elicit information about these factors, which would in turn highlight emerging patterns of professionalism. Broadly speaking, our research methodology builds on similar research in the United Kingdom which followed law graduates during their trainee year of legal practice.[65] We tracked new lawyers for 12 months in the context of their day-to-day practice post-admission. We used a range of qualitative methods intended to provide a detailed picture of their 'lived experience' over this first year.

First, we interviewed the participants as close to the beginning of their post-admission legal career as possible. We used a semi-structured interview schedule which was broadly divided into six sections:

1 work environment and activities;
2 competence and confidence about work;
3 formal and informal learning opportunities;
4 organisational culture and ethical practice;
5 personal wellbeing; and
6 anticipated outcomes at the end of the first year of practice.

Each section of the interview began with one or more open questions which invited each participant to share their reflections about their experiences in an unfettered narrative. This was followed by specific questions on topics addressing the themes raised in the existing literature. We also asked participants about specific experiences which they saw as assisting or impeding their effective transition to practice.

A follow-up interview was conducted with participants towards the end of their first year of practice, with a focus on changes that had taken place over the intervening period. Each participant's supervisor was separately interviewed about their perspectives on the development of the new lawyer(s) within their organisation. A site visit or half-day observation exercise was also conducted with most participants (subject to their practice's approval) in order to provide information about the physical work environment, organisational culture and interpersonal dynamics. We also asked participants to keep a timesheet of their daily tasks and experiences at work (including idle time, social contact and other 'informal' and non-billable activities) for at least one working week using a custom-designed online interface.

63 Schlitz (n 35); William J Wernz, 'The Ethics of Large Law Firms: Responses and Reflections' (2002) 16 *Georgetown Journal of Legal Ethics* 175; Josephine Palermo and Adrian Evans, 'Australian Law Students' Values: How they Impact on Ethical Behaviour' (2005) 15 *Legal Education Review* 1.

64 Schlitz (n 35).

65 Sherr (n 60); Kim Economides and Jeff Smallcombe, 'Preparatory Skills Training for Trainee Solicitors', Research Study No 7 (Law Society, 1991).

Participants and Recruitment

The 11 participants in our pilot project (4 males and 7 females) include newly admitted lawyers in private and public practice. All participants were practising in the Australian Capital Territory (ACT).[66] The participants were attached to a range of different legal practices, including small (1–2 working principals) and medium (3–5 working principals) firms,[67] public practice (government legal departments), and legal aid and community legal practices. The median age of our participants was 25 years.

The participants were identified through a convenience sample that involved contacting a number of firms within the jurisdiction, as well as targeting new lawyers directly through notices in ACT Law Society publications. The ACT Law Society endorsed and supported the project. We also used contacts with graduating students (who had completed the practical legal training course in which three of us teach) and professional connections with law firms, government practices and community legal centres as a means of recruitment. Some of the participants provided introductions to others willing to participate. Participants were assured that all data would be de-identified and we signed confidentiality agreements with the practices that required them. Data collection for the study began in 2009 and concluded at the beginning of 2011.

We recorded all but two of the 30 interviews conducted[68] and subsequently analysed the de-identified interview data using QSR International's NVivo 8 software.[69] Each interview was initially coded by at least two of the authors working independently. A discussion of the themes that emerged led to revisions and refinement in coding. The preliminary analysis that follows draws on interview data and on our observations of the lawyers.[70]

It is important to note that our sample is too small to claim that the experiences of our participants are representative of the experience of other new lawyers. Our participants elected to participate in the study after agreement from their supervisors, so legal practices not confident about their own standards of professionalism may have simply declined involvement. At this pilot stage of the study, we have not sought to survey the prior ethical education of participants,[71] nor analysed what they brought to practice by way of personality or prior ethical disposition. Neither have we objectively surveyed the legal practices' ethical infrastructure[72] or training programs; such measures may be included in our future research. Nonetheless, through our detailed observations of our participants' everyday practice, our data do give a valuable window into how a new lawyer's professional identity might develop.

66 The Australian Capital Territory is a separate jurisdiction in the Australian federal system centred on one city, Canberra, the national capital. The ACT has a population approaching 350,000 and approximately 1,400 practising lawyers in private, government and community practice.

67 The Australian Bureau of Statistics makes a distinction between solicitor practices with 1–2 working principals, 3–5 working principals, and 10 or more working principals, though it does not refer to these specifically as small/medium/large firms: Australian Bureau of Statistics, '8667.0—Legal Practices, Australia, 2001–02' (2003), www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8667.0Main+Features12001–02.

68 Two interviews were not recorded due to technical difficulties. In these cases, detailed notes taken by the interviewer were used for the purposes of (qualified) coding and analysis.

69 NVivo is a qualitative data management and analysis software package. See www.qsrinternational.com.

70 We have used pseudonyms when referring to participants in this article.

71 To be admitted to practise in Australia, students must have completed a postgraduate legal ethics course as part of their Practical Legal Training (PLT) requirements and most also study Legal Ethics as undergraduates in law school.

PRELIMINARY FINDINGS

Our method of analysis is guided by a grounded theory approach where the analysis is 'grounded' as far as possible in the words of the participants. In doing so, we acknowledge that we have brought a number of prior values, experiences and expectations as practitioners and legal educators to our preliminary conceptual development process. This may appear to be an important departure from the ideals of grounded theory research, however, our prior knowledge was used subtractively to constrain the scope of our research agenda.

The process of coding and reviewing the data was not driven by specific hypotheses. This permitted open coding of data which admirably suits our purpose of exploration rather than prescription. As Glaser and Strauss suggest,[73] a grounded approach allows the generation of conceptual explanations of change which have potentially wider application than anticipated in the formulation of the initial research agenda.

From the data, we noted factors consistently described by participants as important influences or events. We then generated conceptual explanations as to how a sense of professional identity might be constructed from these experiences. Three significant factors emerged:

- finding a balance between autonomous/independent work and close mentoring and supervision;
- realising that legal practice was not merely a rational and rule-based activity, but one that involved ongoing uncertainty—about the lawyer's role, about the law itself and about the need to deal with real people with real emotions and complex problems; and
- finding a comfortable 'value convergence' between one's own values and those modelled and practised by colleagues.

We discuss the influence of each of these factors in turn.

72 See Elizabeth Chambliss and David B Wilkins, 'Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting' (2002) 30 *Hofstra Law Review* 691; Christine Parker, Adrian Evans, Linda Haller, Suzanne Le Mire and Reid Mortensen, 'The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour' (2008) 31 *University of New South Wales Law Journal* 158.

73 Barney G Glaser and Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine, 1967); Anselm L Strauss and Juliet M Corbin, *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (Sage, 1990).

1. Developing Competence: The Importance of Controlled Exposure to Challenging Learning Events

As we have suggested, the ability to work competently and autonomously in a variety of tasks is one indicator of professionalism. Not surprisingly, participants and their supervisors viewed competence in their area of practice as a baseline professional requirement. Acquiring competence (and with it autonomy) was crucial to their growing sense of professional identity. Those most happy with their development as professionals described two factors seemingly critical to that development:

- exposure to challenging learning experiences in which they felt they were being stretched beyond their comfort zone; and
- a tailored mentoring/supervisory program which acted as a 'safety net' to ensure that experiences were a catalyst for improvement (rather than loss of confidence and with it competence).

Participants spoke of gradually increasing their capacity for autonomous practice while being supervised and supported in their work, especially in relation to difficult and unfamiliar tasks. It seems that, ideally, the first 12 months involved finding a (shifting) point on a continuum between unsupervised practice and excessive hand-holding, where the new lawyer felt safe, but stretched. One supervisor explained the importance of providing this safe space for new lawyers so that they can 'learn without being crucified or being afraid'. He spoke of removing the 'fear barrier',

> … so they have someone to tell their mistakes to as soon as they discover them. … You encourage that by telling them about your mistakes. Because if [a mistake] hides in the dark, it festers, and that's really bad for people … it grinds people down.

Dianne, who was practising in a small commercial litigation firm, described her own experience of a 'safe space' to learn:

> I used to be terrified all the time … when you're learning a job like this. … I don't know if there's a harder learning curve, … you get stuff wrong all the time. They were very gracious; because they would always let me get stuff wrong and learn from my mistakes, and they wouldn't let me do things that were such big mistakes that they were going to be a problem for the firm or for the client. …
>
> I'm pushed at a level where I'm a tiny bit beyond my comfort zone, challenged, trying new things … , but I mean, we'll always have a talk about it beforehand, and then I'll go along and do something they think I'm ready to do, and usually I'm just about ready to say I could do it.

Many participants found they became competent enough to work autonomously in some areas of practice relatively early in their transitional year. They saw this as a positive experience. For example, Fiona, who worked in a small commercial law firm, commented several months after commencing work there:

> It's such a tremendous thing to be able to work independently. … So, it's been really good for me to have areas in which I can do my own work and I know … that I can figure something out, or if I can't that I can deal with it later with [my supervisor's] help. I think that makes me more useful to the firm, and also a better lawyer I guess.

A senior colleague's trust—sometimes implicit rather than expressed—in the new lawyer's work was also a key component of this increasing sense of autonomy. Fiona had a supervisor who gave her a variety of work to 'challenge and stretch' her and who had made a point of giving immediate feedback. Alison, in a medium sized litigation firm, said of her supervisor that, after initial in-depth supervision:

> He only superficially checks my letters and so on these days, because he is happy with what it is I am saying and my style, which is lucky because mostly they are his letters going out in his name.

It is important to note that autonomous/independent practice was not seen to equate to unsupervised practice. Participants said they were able to feel autonomous *as a consequence of* receiving direction and feedback about their work. A typical comment was:

> I'm a lot more autonomous now. I've got this one case that I'm working on which will come up for trial in February which is mine, instead of working with a senior lawyer. I am the lawyer in charge. … [My supervisor] still checks everything, but I suppose there's a lot [fewer] comments back and that's not necessarily because I am doing it exactly the way she would have done it. She'll say 'that's different but it's alright; go and do it that way'. At the start [she would have said] 'this is the way you should do it until you get your feet a bit more'.

This comment nicely illustrates the interactive nature of supervision and autonomy. Participants uniformly recognised the importance to their own learning and development of having an approachable supervisor. Effective supervision promoted effective development. It created a safety net, even when it appeared to conflict with the new lawyer's perceived competence in a particular task. Cecilia, working in a medium sized practice, had recognised this when she had a change of supervisor:

> *Cecilia*: Whereas before I got big ticks over everything, now I am actually getting more scrutiny again.
>
> *Interviewer*: Is that good or bad?
>
> *Cecilia*: Good, really good.
>
> *Interviewer*: But it's making you feel less competent because you're getting more things picked up?
>
> *Cecilia*: Yes, but then I feel like I'm learning more, rather than just flying by the seat of my pants.

Conversely, lack of sufficient mentoring was seen to have a devastating effect on new lawyers. Several supervisors underlined this point in interview. Jane, a supervisor in a small firm that specialises in criminal, family and estate work, commented that

> you do see young lawyers at court [who've] been sent there without instruction, and someone like magistrate 'X', for example, would say 'do you seek bail?' and they've got no idea what they're even being asked. They just haven't been prepared … [I]f you put someone in too quickly at the deep end, you just stress them out, and they end up hating the practice of law. If they're eased in … over a space of 12 months, I think that's the better way to do it, because it's baby steps in that first year really.

David, a supervisor in a medium sized litigation firm, also commented on how incompetence by new lawyers in public can have a detrimental effect on their growing sense of professionalism:

> [Our new lawyers] don't get sent down to the court, without [preparation]. With X, before she went to court, we would practise. … Court can be terrifying, because you've got 30 people watching you, and what you do has ramifications. You can't just go down there and have a go. I'm not a big fan of letting them loose on day one. …
>
> [T]he other important aspect is that it'll also create an impression to the Court and to their peers. It can be sometimes a bit harsh, but I've seen junior solicitors … labelled as 'dills' and they get stuck with it, and it takes a lot of time to reverse that.

If there is too little challenge in the work given to new lawyers and they experience too little autonomy, their professional development is again compromised. As (supervisor) David commented:

> Too often the risk with juniors is that you don't give them something to manage, and therefore they don't have to accept responsibility. … I think it accelerates the learning when they do it more hands on, and it's their file, that they have to manage (with supervision) but they're ultimately responsible for it. So they can't just say 'well, it's not my problem'.

Alison spoke of this from her own experience, comparing a previous supervisor unfavourably in this regard:

> He was a bit more piecemeal. He loathed to hand over a file. This meant that I would always have to go back and check, and I felt that I was never getting the complete picture. Whereas [the new partner] thought that autonomy was important [so that] I could come into my own.

Elspeth's experience was different again. She worked in a small firm, but saw herself as having neither enough support nor enough challenge in her work:

> Unless I've got a specific issue that I have questions about, I don't feel that I've really got a lot of feedback in terms of 'am I progressing to the level that I'm expected to be at?' … It's a little bit concerning, particularly when I don't have any other junior solicitors here that I can compare myself with. I am not completely confident that I have progressed as much as I should have. I don't really know.
>
> It's rare that any of the other solicitors will look at or know about what I'm doing. So I am not really supervised—they are not really aware whether or not I'm doing well. It wouldn't really be that obvious to them.

Several months into her transitional year, Elspeth felt that her learning had plateaued. She grew bored and left the firm. This was regrettable, because her supervisor had years of practice experience and much to offer. However, his supervision had been at best piecemeal and little of his professional wisdom seemed to have been communicated to Elspeth. This deficit was most pronounced when we asked her whether the firm encouraged her to be an ethical practitioner. Her reply, which suggested a narrow and technical interpretation of 'ethical practice', was: 'I don't know that I would go that far … I don't think ethics is really brought up that much.'

A careful reading of participants' responses indicates that their ability to practise autonomously is sourced from a growing competence in certain areas of practice. For most participants, being competent meant that they felt in control of what they were doing, which was easier with tasks such as the drafting of agreements or affidavits or managing more general correspondence. These are tasks that are planned and not immediately time-critical, and so allow for research, review and reflection. In contrast, participants said that irreversible and 'on your feet' tasks, such as giving ad hoc advice or handling unexpected developments in court, were areas in which they felt less competent and therefore doubted their capacity for autonomy. The question this raised was how participants could develop their competence in areas that went beyond their comfort zone. Of relevance was that almost all participants reported at least one event that was unexpected, and that forced them to engage in a task with which they did not feel comfortable. As Brian, who practises in a small private firm, said:

> Getting up [in court] for the first time just for a mention was good. My first appearance in the Supreme Court was probably a bit of an accelerant 'cause I actually started to feel a little bit confident after that. … That was a terrific day; I got a real buzz out of that.

These 'dramatic learning' experiences were a catalyst for the development of competence and confidence in tasks outside one's comfort zone, but they were insufficient for this end on their own. Reflective practice, engaging in reflective conversations with oneself and a supervisor, was also necessary.[74]

There were fewer comments from participants about the need to develop the capacity to remain autonomous from clients. The most considered response came from Georgia, who was working in public practice and pursuing recovery cases for a government client. For her, the pressure to meet government policy priorities raised interesting tensions around her ability to maintain a measure of autonomy from her client. She said:

> I still sometimes feel uneasy [about this pressure] but I like to think, in terms of the really difficult cases … that I've exerted some influence on my supervisor to make [the department] a little more compassionate. … I have to say that we've had a little bit of a change in the way the client responds and I've learnt that there is a purpose and there is a reason why the government has to do this, even though sometimes it feels a bit difficult. … I think I've now got the autonomy to say to someone, 'I think we should settle this matter, for X, Y & Z reasons'.

74 Schön (n 56).

In summary, it appears that the optimum work environment for developing in new lawyers both competence and the capacity for autonomous practice exhibits two characteristics. First, the new lawyer is exposed to gradual and planned learning which balances the known, safe and comfortable, but which also provides an exposure to the unknown and unfamiliar. Second, the new lawyer is encouraged, and given the opportunity, to reflect on lessons learned from such exposures. The transition to competent, autonomous practice is hampered where this combination of experiences is never created, or is unsustained after an initial period of development. We observed this when new lawyers had only intermittent exposure to immersive learning opportunities. When such exposure was not sustained, participants observed a plateau in their learning and a corresponding decrease in their sense of autonomy at work. This in turn impacted negatively on their developing sense of professional identity.

2. Developing Professional Judgement by Learning to Deal with the Uncertainties of Practice

Professional work is often complex and uncertain. The everyday practice of law is frequently characterised by risk management, novel problems, the cautious and strategic use of words, and constantly changing facts and issues. In this environment, uncertainty is often one of few constants.[75] The transition from law student to legal practitioner therefore necessarily involves the development of skills in managing such uncertainty and complexity. Such skills are an important aspect of professional judgement, that is, the capacity to see constructive options for action in the face of uncertainty. Without this capacity, a lawyer will not be truly competent or be able to work autonomously, because 'the mark of professional expertise is the ability to both act and think well in uncertain situations'.[76]

The ability to manage uncertainty does not come automatically to the new lawyer, who most likely from the first day of law school has been trained to think in terms of applying the law to concrete, well-defined problems. The message often given to law students is 'pick out the issues from the facts, apply the law, and come to a conclusion'. Maharg and Maughan comment that this 'academic stage [of legal preparation] is grounded upon technical rationality [which essentially] engineers out the affective'.[77] In legal practice, by contrast, the dispassionate and detached rationality of appellate judicial decisions will be 'rarely invoked, and … solutions are not always found but often created'.[78]

Legal practice therefore requires a significant change in a new lawyer's orientation to the law. As one supervisor explained about recently graduated lawyers:

75 See Judith Jones, 'Certainty as Illusion: The Nature and Purpose of Uncertainty in the Law' in Gabrielle Bammer and Michael Smithson (eds), *Uncertainty and Risk: Multidisciplinary Perspectives* (Earthscan, 2008).

76 William M Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond and Lee S Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass, 2007) ('Carnegie Report') 9.

77 Paul Maharg and Caroline Maughan, 'Simulation and the Affective Domain', Association of Law Teachers Annual Conference: Making a Difference, Clare College, Cambridge, 2010. See also Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education* (Ashgate, 2011).

78 Flood (n 57) 44.

> The … thing they'll struggle with is … [that] they think that most things are definitive … that there is a solution … and that that solution is to be found either by going through a text or going through a case, and it's not so.

While the rational/logical way of thinking taught in law school remains a critical part of legal practice, it does not prepare new lawyers to deal with the uncertainty of practice. During their period of transition, new lawyers have to learn how to manage uncertainty effectively. That uncertainty arose from three main sources:

a. Uncertainty in Relation to their Roles as Lawyers

A major source of uncertainty for new lawyers is the process of understanding how the minutiae of everyday practice can combine to create the identity and role of a legal professional. Participants in our study first identified specific and often momentary events in which they struggled with gaps in their procedural knowledge—such as how to structure an advice, how to manage a client demanding instant advice over the phone, and how to present oneself in court—which left them puzzling over their role. For example, Alison was uncomfortable with the uncertainly she felt about her role in an urgent interim court hearing conducted over the phone:

> [I] didn't even know how to talk to a registrar. … What do I call you? … How much am I supposed to say to you? Am I allowed to say [the other party is] a jerk? How formal do I be? What's prejudicial and I am not allowed to say it? Am I allowed to state my case over the phone? I just didn't know what I was doing … I had to guess.

This role-based uncertainty went beyond matters of technical proficiency. Hal, a lawyer working in a specialised area of commercial practice, felt that a significant aspect of his development as a lawyer was the growing realisation that technical skill needs to be balanced with business acumen and commercial wisdom. He recounted his experience of making a mistake (on a form) which would have been difficult to rectify using formal, rule-based processes. Hal discussed the mistake with his supervisor, who quickly brought the mistake to the attention of the responsible government agency, and so 'defused' a potentially serious problem.

Hal admired his supervisor's ability to obtain a favourable outcome. However, as a junior lawyer, he also felt somewhat daunted to realise that effective legal practice comprises far more than knowledge of formal rules and procedures. Hal now considers that a significant part of being a successful lawyer will involve cultivating his own network of contacts and acquiring an understanding of unwritten procedures. He recognises that developing his professional judgement is key to his being able to achieve an optimum outcome in any particular case.

b. Uncertainty in Relation to the Content of the Law

New lawyers need to learn how to be comfortable with not knowing all the law, and how to reassure a client that they can find out unknown aspects. When asked whether there were things 'you wish you had known when you first started work as a lawyer', Alison said:

> I wish I'd known how to properly phrase the expression 'I don't know but I can find out'. Because, it's not reasonable to think I'm going to know everything.

Flood has articulated two aspects of this uncertainty—uncertainty due to incomplete *grasp* of legal knowledge, and uncertainty based on the *limits* of current knowledge itself.[79] Both aspects confront new lawyers. They must address the consequences of their ignorance of the law and find a means to reassure themselves, their clients and peers about their lack of knowledge. They must also avoid the temptation to fake this knowledge, and bring judgement to bear as to when their incomplete grasp of the law needs to be rectified before proceeding further, and when technical legal correctness will not advance a solution.

c. Uncertainty as a Consequence of 'Extra-Legal', Inter-Personal Aspects of Practice

Emotions will always play a part in a client's instructions and judgements (even in seemingly unemotional transactional areas of practice) and create situations in which the lawyer's learned rational-and-logical skills set is of limited use. The ability to manage the emotionality of situations (both one's own and others' emotions) is another critical aspect of professional judgement. Hal reflected on his need to learn to deal with the 'nuances' of interpersonal dynamics:

> I guess … now it's the nuances … that I have to learn … how to not rub people up the wrong way or annoy people. [For example, sometimes] you want an insurance lawyer to just respond to [an] offer. [You think:] 'just throw money at me, I'll go away', [so, sometimes] you throw [the matter] into court, but it doesn't always cause them to react in the way that you'd like them to.

When asked what he would like to have learned in 12 months' time, Hal responded:

> I'd like to … feel confident to deal with most … situations and problems as they arise. Not just the legal ones, but also the interpersonal [and] client relationship management, [and] managing relationships with other firms.

Supervisors can fairly easily prepare new lawyers for some sources of uncertainty. For example, they can suggest how a new lawyer can simultaneously admit 'not knowing' the specifics

79 *Ibid*, 42. Flood draws on notions of uncertainty management developed by Renée Fox who examined the training of doctors for practice: Renée C Fox, 'Training for Uncertainty' in Robert K Merton, George Reader and Patricia Kendall (eds), *The Student-Physician: Introductory Studies in the Sociology of Medical Education* (Harvard University Press, 1957).

of applicable law, while reassuring a client that they can find out. As the supervisor David explained in our earlier quote, preparation for court work can include practising court protocols and preparing to answer questions the court might ask. Preparing new lawyers for dealing with the interpersonal/emotional content of practice is perhaps more complicated and involves encouraging new practitioners to develop their own emotional intelligence; something that will be easier for emotionally intelligent supervisors to facilitate! As to the broader uncertainties of practice, a key element of professional preparation is enabling (future) lawyers 'to make judgements under conditions of uncertainty'.[80] Our participants were honing their judgement by a process of trial and error, observation, imitation and repetition which was unique to each working environment. They recognised that developing such judgement was a key element of the professional competence to which they aspired. Greater attention to this aspect of professional preparation at law school would give them a welcome head start in navigating this challenging aspect of legal practice.[81]

3. Finding a Comfortable Convergence between One's Own Values and those Modelled and Practised by One's Colleagues

> Professional identity is, in essence, the individual's answer to questions such as, Who am I as a member of this profession? What am I like, and what do I want to be like in my professional role? and What place do ethical-social values have in my core sense of professional identity?[82]

Many of our participants were consciously thinking about these questions, and many indicated that feeling comfortable with the values modelled by colleagues was important to them. For example, Dianne, having moved to a small commercial firm, commented unfavourably about a previous job in a government department in which she had experienced no meaningful supervision and a lack of professional commitment by senior colleagues:

> … nobody cared [in government work]. I mean, I cared the most out of anyone and I didn't care that much … Nobody cared if you got it right or wrong. The feedback that you got was almost completely arbitrary. So, you know, if you wrote a document, they would never say, 'Yep. Good' and sign it. It was always some change, then you'd get it back, you do it again, they'd make a different change that they didn't make the first time. It's like a trial. Kafka kind of stuff.

80 Carnegie Report (n 76) 22.

81 Clinical legal education is one obvious training ground for learning to deal with one's own and clients' emotions, and for developing important skills of 'emotional intelligence'. See Colin James, 'Lawyer Dissatisfaction, Emotional Intelligence and Clinical Education' (2008) 18 *Legal Education Review* 123; See also Robin Wellford Slocum, 'An Inconvenient Truth: The Need to Educate Emotionally Competent Lawyers', SSRN Working Paper, 19 July 2011, http://ssrn.com/abstract=1889756. The Carnegie Report suggests that an enriched 'case theory' approach could offer much in the way of developing students' capacity for sound judgement: n 76, 122–5, 198–200. See also Clarke Cunningham and Charlotte Alexander, 'Developing Professional Judgement: Law School Innovations in Response to the Carnegie Foundation's Critique of American Legal Education' in Michael Robertson *et al* (eds), *The Ethics Project in Legal Education* (Routledge, 2010).

82 Carnegie Report (n 76) 135.

By contrast, about her current practice Dianne said:

> I quite enjoy it as a firm, and I quite buy into the culture that they're trying to create. … They're very thoughtful about how they want the firm to be. And it's not about image, entirely, it's more about making it a nice place to work so that emanates out, you know? So people want to have this firm as their lawyers because the culture is good, and I believe that that's sound.

When asked whether the culture encouraged her to be an ethical practitioner, Dianne said:

> Yeah, very much so. So, sometimes, you come up against an opponent who's dragging their feet or delaying, or playing things in a way that is a bit sharp or a bit tricky or something, and I've always been taught by the people I work with to play it straight down the line, do things according to the rules, according to how you would like to be treated, … yes it's something that is explicitly important to them.

Fiona likewise reported that her practice specifically encourages her to be an ethical practitioner:

> Yes absolutely, … the [professional indemnity] work makes me cautious. I want to be an ethical lawyer, money isn't everything and [they] agree—I'm not permitted to take shortcuts.

Fiona also commented disapprovingly on how some practitioners (outside her firm) practise with little regard to the professional conduct rules, and went on to reflect on the poor role models some new lawyers encounter:

> I imagine some young lawyers don't get the example of a good lawyer so it's a bit worrying. I mean, money is not the end of everything, we are in the business of helping people, and I think if you lose that as the main focus then there is probably something wrong. … I don't ever want to be somewhere that doesn't have that in mind.

Cecilia, working in a medium sized litigation firm, was similarly attuned to her firm's ethical culture and outlook and comfortable with her supervisor's insistence that she play by the rule book even when her opponent did not. Here she refers to a matter where she had ensured her affidavits excluded hearsay material, but the court had accepted hearsay evidence in her opponent's documents:

> [My supervising partner] said to me, you just have to recognise that fact, but then still do the right thing and still do your documents properly and not take advantage of the fact that some people are lax.

Cecilia also endorsed her firm's approach to client relationships:

> I noticed that the approach [of another legal practice] … was 'you make the client do what you think is best for the client and the case' and the lawyer runs it. Whereas, we are much more, 'we're your lawyer, we'll tell you that your application is crap but then we'll run it for you if that's really what you want to do'. So, that's a different take on the kind of ethical obligations of a lawyer, but I think it's much more true to what the role is and should actually be.

Overall, Cecilia was very comfortable with the values modelled by her senior colleagues:

> I suppose the firm is very focused on things which I find very important, like ethical integrity, being creative and innovative and learning new things rather than just doing it the same way that everyone has always done it, being very proactive in terms of dealing with clients and dealing with issues. I think there is a distinct approach taken by this firm which isn't necessarily seen by other lawyers around town.

Brian also had thought a lot about his 'fit' with his firm's culture. He described his firm as 'down to earth and results based', dealing with a high volume of criminal work but not over-servicing. In Brian's words, he 'couldn't be a happier fit' with this approach.

In contrast to Dianne's experiences of government practice, Georgia did recognise the public benefit in government legal work, and described her colleagues as 'very professional', taking very seriously their obligations in advising the department and minister and their obligations to the court/tribunal. While reporting that she was happy in her job, she recognised that her own values would probably eventually lead her into the community legal sector. She expressed her discomfort in relation to debt recoveries:

> I don't like being the person that has to write that letter and say 'give us the money back' when, you know, they're only ever recovering money from some poor [person, who they] could probably afford [not to pursue]. And so sometimes writing that letter can be a little bit of a downer on the spirits. … In some matters you know that the person is doing the wrong thing and that they should have to repay the money and other times you just think, 'Oh, this just feels all a bit too mean,' you know? Fortunately that doesn't happen very often, it's not a large part of my practice, but I still think that I would prefer to use my legal skills in the long term in a more community-oriented environment.

Two of our other participants, Jason and Katrina, worked in the community legal sector. Both considered their workplaces to be committed to 'access to justice' and insistent on high ethical standards. This orientation sat well with both of them, who appreciated not having to focus any attention on profit making. Jason described himself as 'very, very happy' in his work. Katrina was slightly less enthusiastic, particularly feeling stressed at times by the high workloads and neediness with which clients presented.

Each of our participants had consciously examined the values professed by their colleagues and was comfortable with what they had found. Alison alone experienced a significant clash between her own values and those of the practice. Her story is particularly interesting because of her insight into this divergence. In the first interview, she had this to say about her firm's ethical culture:

> The culture is team by team. And I have been asked to move to different teams and I've refused because I don't like their culture. Whereas this one is not a very glamorous team, but they are honest and hard working and trying the best for their client without flogging the billing horse.

When asked explicitly whether her firm's general culture encouraged ethical practice, Alison replied:

> I am trying to figure out whether you can be ruthless and ethical or whether they are two separate things. Yes, they encourage you to be ethical by the letter of the law, [but] I have experienced instances where I was treated in a way which I felt was unethical … or I was asked to treat somebody else that way and refused and felt the ire of the [managing partner] because I refused to do it.

Reflecting on the impact the firm's culture has on those joining the firm, Alison (who had spent considerable time pre-admission in the practice as a law clerk) noted that 'the ones who stay adopt it'. She continued:

> *Alison*: There have been some glaring examples of those who haven't and they are no longer with us.
>
> *Interviewer*: They adopt the bad or the good culture depending on which team they are in?
>
> *Alison*: Yes, just to fit in. Some of the people I've watched over the years—the change of personality from the person I met the first time to who I know them to be today is remarkable and very obvious.

Alison's comments echo wider research findings that most people adapt to the organisational culture in which they find themselves.[83] She also astutely observed that 'ethics' within law firms is 'not just about the way you deal with clients … [but also] the way you deal with other solicitors and your support staff'.

By the time of the second interview six months later, Alison was in a different team and not at all certain that there was a match between her own values and those of the practice, which she saw as being 'manipulative' in the way it treated staff and 'dishonest' in the expectations it engendered in staff. In this environment, Alison's wellbeing and her professional development suffered and she lost faith in her (significant) abilities as a lawyer. She left the firm several months later. Reflecting on her experience, she had some advice for other junior lawyers:

> Be thorough in your vetting process: not only are they hiring you, you are hiring them as your employer, and you have every right to be treated properly and be in an environment that you feel is safe, comfortable and what you're looking for. There's no shame in being a square peg in a round hole. … It's no indictment on you, but you should be paying more attention to what kind of hole you're jumping into. [Finally], I don't think that you have to be a prick to get ahead.

Alison took up one of the several alternative employment offers she had received,[84] with employers whom she described as 'honourable and ethical and kind', traits important to her, but which she had 'lost faith in finding in the legal profession'. Noting that in this more commercially oriented law firm the work may be possibly 'more soulless and less personal' than her previous work, she nonetheless commented that 'it's still helping out … somebody obviously needs help if they are going to a lawyer'. Alison reflected that many law students categorise career pathways as either 'helping the world' by working for 'some kind of non-profit organisation' or 'money and power driven'. Her own view of the profession's contribution to society had become more nuanced, reflective of Solbrekke's findings that the complexity of professional identity becomes more evident to new lawyers as they spend time in the workforce and the strict and simple divisions about public service orientation are not so clear cut.[85]

83 Some of this research is cited at nn 52–58 above.

84 We recognise that Alison's advice will be easier to heed when employment prospects are healthy; cf Boon (n 32) 240: 'The majority of aspiring [legal] trainees had little choice in where they entered a training contract.'

DISCUSSION

Many scholars question whether traditional/broad notions of legal professionalism (characterised specifically by fidelity to the law and fiduciary obligation to a client and, more generally, by indicia such as autonomy, task variety competence, collegiality and public service orientation) are relevant to the reality of legal practice today. Our data suggests that in fact these aspects of professionalism are very salient to new practitioners, and that at least some new lawyers see their attainment as important to the development of their own professional identity.

Firstly, most of our participants clearly understood and could articulate the unique *primary duty lawyers owe to the law* and *the fiduciary duty they owe to their clients*. It was clear that many had begun to grapple with these duties, as they came to terms with the pressures of practice and sought to develop their own ethical sensibility. Such a sensibility did not manifest in terms of a slavish and unthinking adherence to conduct rules (indeed, one participant viewed her practice as encouraging ethics by the rules, while treating people unethically), but rather was demonstrated in terms of everyday practical decisions, expectations and attitudes towards their work.

We note that the 'everydayness' of practice is inextricably concerned with considerations of professional identity, given that unethical or unprofessional behaviour most often occurs in very banal and routine ways.[86] Such behaviour includes failure to communicate well, being satisfied with sloppy work, failing to explain matters to clients adequately, failing to check conflicts, and unthinkingly doing 'what everyone else does' whether it is strictly fair or not.[87] Our participants were alert to these sorts of ethical failings and aimed to avoid them.

Second, we were consistently told about the crucial importance of appropriate supervision and mentoring to a new lawyer's gaining *autonomy* and *task variety competence*.

85 Solbrekke (n 49) 492.

86 Christine Parker, 'What do they Learn when they Learn Legal Ethics?' (2001) 12 *Legal Education Review* 175. See also Sung Hui Kim, 'The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper' (2005) 74 *Fordham Law Review* 983.

87 Parker, *ibid*. See also New Zealand Law Society, *Report on the Exercise of Regulatory Functions and Powers for the Year to 30 June 2010* (2010), www.lawsociety.org.nz/__data/assets/pdf_file/0015/31128/annual-report–2010.pdf, 7. Complaints against solicitors for reasons of 'delay', 'discourtesy', 'failure to follow instructions', 'inadequate reporting/communications', 'negligence/incompetence', 'misleading conduct' and 'unbecoming conduct' add up to a very substantial proportion of overall complaints.

Supervision that provides challenging work, underpinned by a safety net of mentoring and support, greatly assists a new lawyer in developing the core professional attribute of competence. While the importance of good supervision may seem obvious, it is apparent that such supervision is not always the experience of new lawyers. Those without such supervision may be stretched to the point of hating practice, bored to the point of leaving it, or undeservedly labelled as incompetent. Practices that take on new lawyers need to recognise that it is their professional responsibility to supervise them adequately on an ongoing basis.[88]

A good supervisor will provide a 'safe space' in which the new lawyer can learn to successfully negotiate the many uncertainties that arise in legal practice. Our participants were keenly aware of the significant challenges they confronted in learning to deal with uncertainties such as those surrounding the law, the lawyer's role, interpersonal relationships, and informal networks and procedures. They recognised that learning to deal with uncertainty is integral to the development of professional judgement and thus a key ingredient in developing both competence and the ability to work autonomously.

Third, as several participants astutely observed, the way a legal practice treats its staff is an important indicator of its values. Participants were keenly alive to the importance of *collegiality* in this sense and noted the influence of role models and a practice's ethical culture on new entrants. Several commented with disapproval on lawyers they had observed who seemed to be satisfied with sloppy work or underhand tactics. They concurred with Alison's advice that new lawyers should pay particular attention to the kind of culture in which they will be working. Several supervisors and participants commented on the dangers to reputation and career inherent in poorly supervised post-admission positions.

Finally, most participants strove to see their work as intrinsically worthwhile, either by virtue of direct *public service orientation*, or, more amorphously perhaps, by virtue of its contribution to a well functioning legal system. Those working in what Boon calls 'defensible public service type roles'[89] in private criminal, family, personal injury or employment law practice were directly exposed to the orientation of serving others. Those working in the community sector itself had this experience in a way that was openly cognisant of 'access to justice' agendas. These lawyers did not like to see themselves as 'rationing' justice, although at least one of them was affected by the personal stress caused by high workloads with severely needy clients. There was a further group of participants who were not directly exposed to a 'public service' orientation, nonetheless some of these sought to satisfy their desire to make a social justice contribution, often through doing *pro bono* work.

In sum, our participants seemed to be in the process of forming professional identities that did not reflect the narrow technical view of their professional responsibilities which others have described. Rather, they took their cues from broader understandings of legal professionalism. More sceptical eyes may view their behaviour as simply professional naïveté which will be extinguished after more years in practice, but as new lawyers they emanated a real sense of pride in their growing professionalism.

88 As a member of the Canberra Bar quipped, 'A puppy lawyer is not just for Christmas'.
89 Boon (n 32) 253.

CONCLUSION

This pilot study reveals new lawyers grappling with what it means to be a professional. These lawyers sought to do a variety of legal tasks competently and endeavoured to begin to practise autonomously. They were aware of the importance of collegial relationships, including the impact of the role models encountered within and without their practice. They were cognisant that being a lawyer involved public service, although they had varying capacity to achieve this. Most viewed their contribution to their clients' legitimate interests as important work, and viewed their increasing ability to make that contribution without close supervision as a part of their obligation to the administration of justice.

The limited insights provided here into the experience of new lawyers are valuable, particularly because those experiences are largely under-researched, especially in Australia.[90] Our participants' reflections bear out related research findings that professional norms of behaviour are formed in large part through new lawyers' experience of the legal community in which they come to practise. Positively, their stories confirm that many new lawyers are consciously looking to adopt a wider conception of legal professionalism. This is consistent with the Carnegie Report's prescription that for new lawyers to

> incorporate the profession's ethical-social values into their own, they need to encounter appealing representations of professional ideals, connect in a powerful way with engaging models of ethical commitment within the profession, and reflect on their own emerging professional identity in relation to those ideals and models.[91]

This pilot study suggests that new lawyers can and do incorporate the more traditional notions of professionalism into the professional identities they construct for themselves, if they are so guided by the ethical and professional environments in which they practise. Further research examining the resilience of these identities after more years in practice would be a valuable contribution to our understanding of the legal profession.

90 For some interesting research into the meaning of professionalism for lawyers and accountants in the Australian state of Queensland, see Lillian Corbin, 'How "Firm" are Lawyers' Perceptions of Professionalism?' (2005) 8 *Legal Ethics* 265; Lillian Corbin, *Redefining Professionalism in a Legal and Accounting Marketplace* (Lambert, 2010).
91 Carnegie Report (n 76) 135.

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