



Professional Ethics Education Is All In the Mind

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Example #1 – Children

Children behind a two-way mirror watch Molly, a toddler, hide a toy behind a chair and wander off. While she is out of the room, the researcher moves the toy to a bookshelf. When asked where Molly will look for her toy upon returning, pre-school children predict the new location. Children four and older begin to understand “false belief” and predict Molly will look in her original hiding place.

Example #2 – Lawyers

Zach, a new lawyer, is excited his senior partner, Kim, has asked him to act in a new employment law file after a routine conflicts check. While reviewing the client's papers with Zach, Kim sees a corporate search report for the client's employer ABC Co., listing Kim's best friend on the board of directors. Kim tells the client he will be in good hands with Zach, who will have carriage of the file. She leaves the meeting, believing none will be the wiser.

The school-age child, beginning to understand Molly's false belief, can use this new skill to help her locate the toy. He can also use it to retrieve the toy for himself after Molly gives up the search. Kim's choice, to stay quiet about the potential conflict of interest, involves a similar acquired mental skill. Legal ethics and professionalism are all about choices lawyers make in settings featuring disparity of knowledge.

Lawyers across Ontario are openly questioning the usefulness of the mandatory three-hour annual dose of ethical-professional continuing professional development (CPD). Their scepticism may not be unfounded. Ethics taught badly may not result in good behaviour, and indeed might encourage manipulation or avoidance of the rules. Critics of the Law Society's three-hour requirement do not mean to say we should

not be teaching professionalism and ethics. We in the OBA, as the Bar's leaders, must transform their scepticism into profession-wide interest in the way we teach this subject, both in law school and in CPD.

The purpose of my comparison between the toddler and senior lawyer is to demonstrate how acquired cognition—in this case the ability to distinguish another's honestly-held false belief—is the source of choice-making, i.e. ethics. Ideally, we would derive rules of conduct from experience, and not experience from rules. Behind every important rule of professional conduct is the lawyer's privileged access to information, client property or evidence. (The temporarily displaced toy can also be the analogue of the daylight loan from a lawyer's trust account.) If we simply teach our members to follow rules of eth-



ics, we always find ourselves a step behind the public we serve. If, however, we teach them how to respond thoughtfully to difficult relations and outcomes, we will effectively restore lawyers to the position of society's leaders and trusted advisers. *Voilà!* If only it were that simple.

Lawyers are human, too

We cannot hope to improve our culture of professionalism until we first accept that lawyers' professional failures stem from their humanity. Psychological research pioneered in Ontario suggests most people waver between strict ethical conduct and self-interest, even though they consider themselves ethical and even though they know unethical conduct will usually go unpunished. This is the terrain of most professional conflict in the law. Moreover, it is a thought process that zoologists have documented in Chimpanzees and other higher order animals. Not only are they capable of it, but they also order their conduct based on it. Conversely, animals more dependent on instincts (eg., that of the herd, or of pack hunting), rely more on hierarchy than on independent relation-building. (Indeed, famous examples of unethical behaviour among humans stem from blind following of orders. Rules are not intrinsically good.) The anthropological study of ethical behaviour must be adapted to the legal setting by working outward from the relationships lawyers must navigate. Common to the OBA *Life After Law School* events I have attended is recognition that professionalism is as important to a successful career as legal ability. New lawyers demonstrate a thirst for learning how to behave in the "real world." They would represent a squandered opportunity to develop a new culture of legal ethics, if we heed calls for the abolition of the three-hour requirement. Let's not take the easy way out.

Keen observers of the CBA and Law Society codes know they start with the premise that legal ethics are shaped by the relations lawyers encounter in practice: with clients, with each other, with the courts and with the public. The codes actually reveal a sophisticated theory of mind. The codes have not been plucked out of the ether and should not be taught as we traditionally teach holy scripture. As Canadian law school icon Harry Arthurs told the CBA *National* last year, "Sending people to Sunday school is not a good way to teach them to behave ethically." A better way of teaching ethics is to do so, not by memorizing written codes, but by studying actual or simulated lawyer dilemmas.

The future is bright, practical—and interactive!

In March of this year, U of T Law held a groundbreaking workshop called *Teaching Professionalism*. I was startled to learn there is almost no research and development, from an educational perspective, on training professionalism and ethics specifically with lawyers as learners. But there is no need to reinvent the wheel. We can start with what educators already know about grown-ups. First, the lawyer *qua* learner must displace the client as the focus of the teaching. This done, research-backed general adult education principles apply:

- We want to know the reason for learning something.
- We internalize learning by reference to experience.
- Learning must be relevant to our work or personal interests.
- We learn professionalism through problem-solving rather than content-oriented instruction.

Some will observe that this is similar to the model we had, and gave up, when the Law Society replaced live training with self-study. The cognitive development examples at the outset of this article, and many like them, tell us self-study cannot train minds to think ethically. Ultimately, we learn through experience, whether actual or classroom-based. We owe it to ourselves and to the public to develop and invest in post-call professionalism training. We must make it available to every lawyer in the province. If need be, three hours at a time.

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