Is the Market Redefining the Meaning of Professionalism in Australia?

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TOPIC:

Is the market redefining the meaning of professionalism in Australia?

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SYNOPSIS

The thesis attempts to address some of the gaps between the literature that theorises and critiques the function of the professions and what practitioners actually do in practice. This disparity between the claims in the literature and the practice reality is identified by Nelson and Trubek. These authors assert that very little is known about the professional ideologies of lawyers and other professionals or what individual practitioners think about their role.

While the study is modest in that it focuses on only a small number of participants and is geographically concentrated in South-East Queensland, the findings give some indication of the views of the broader body of people in both accounting and law (a) studying to become professionals and (b) graduates (both new entrants and those more experienced) already in the practice environment. However, it should be noted that this thesis is particularly focussed on the views of those in the legal profession.

A: *What Does the Literature Say?*

The literature on professionalism does not present a united front. For instance there are two particular contemporary understandings of professionalism. Traditional professionalism claims that lawyers have expert knowledge, autonomy, and use their skills to advance the good of the public. The other professionalism paradigm assumes that the service ideal or the performance of a task for the public good no longer describes what professionals actually do. It advocates that professionals simply aim to do their jobs well or expertly. This model, referred to in the thesis as commercialised professionalism, concentrates on technical ability, managerial skill (the ability to balance budgets, manage the firm and satisfy clients) and entrepreneurial skills (the ability to bring in business).

The sociological literature also subscribes to different understandings of professionalism. While structural/functionalists believe that lawyers aim to provide a "service to the public", the conflict theories (i.e. market control, knowledge/power, and Marxism) see professionalism as a means of professionals controlling the provision of their expertise. These theories examine the professions at a macro level, describing what they believe the professional bodies or lawyers do collectively. Alternatively, two micro theories, interactionism and cultural theory, examine the conduct of individual lawyers' approach to lawyering. Given one of the findings uncovered in the data, namely that there is quite a different perspective of professionalism held by the two year legal graduates and experienced legal practitioners, the study also draws on some social psychology literature as an aid to interpretation and explanation.

B *What Does This Study Have to Add?*

This study recognises that much of the literature on professionalism fails to take account of practising professionals' perceptions of what it means to be a professional. The thesis has sought to address this and in doing so has arrived at some tentative findings:

1. Students see professionalism as an ideal reflecting traditional professionalism ideas;
2. Graduates of two years in accounting appear to have been socialised into the reality of practice, while those in legal practice are experiencing dissonance. The latter group are endeavouring to act in accordance with their idealistic understanding of professionalism, while, at the same time, wishing to obtain the approval of their peers and superiors in the firms.
3. The experienced practitioners, in both law and accounting, see their practice as a business reflecting commercialised professionalism ideas.
4. The experienced legal practitioners see their role as a managerial one that includes primarily responsibility for socialising new entrants to the firm into its culture.
5. Firm culture is a very influential factor that can cause individuals to comply but perhaps more seriously to conform to a way of thinking about lawyering that does not align with their morals and values.

The study examines the possible implications of these findings and poses questions that interested parties of both the legal and accounting professions may need to consider. In brief these include:

- Are the legal and accounting professional bodies misrepresenting the nature of professional work?
- If there is value in the recommendations proposed by the thesis that a professional's practices ought to include moral considerations, will law and accounting firms be open to accommodate these?
- Given that there is a certain amount of scepticism that attaches to the view that firms will enthusiastically embrace a discussion of ethics and morals, should law and accounting schools at universities warn students of the dangers of workplace culture and provide techniques to help them cope with workplace pressures?

Statement of authorship

I confirm that I am the sole author of this thesis. The findings are the subject of research carried out by me. This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Lillian Corbin

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I would like to acknowledge some people who have provided assistance to me during the writing of this thesis. I am indebted to my supervisors for the guidance they provided. My principal supervisor, Assoc. Prof. Michael Robertson, was ever-present to talk over content issues and helped enormously in guiding my thoughts about how to structure the thesis. Prof. Chris Guilding's guidance with respect to the issues surrounding the validity and presentation of empirical work was invaluable. Both also provided editorial comments along with the services of Colleen Davis. Justin Carter provided much hard work in ensuring the referencing elements of the thesis are presented in their correct format.

Of course there would be no thesis without the participation of the students, both law and accounting, the graduates of both elements who have been practising for two years, and the experienced legal and accounting practitioners. All of these people gave of their time and thoughts very generously. The thesis has also benefited from the comments of the conference delegates of the three major international conferences at which I presented papers. I particularly appreciated the comments of Adrian Evans, Andy Boon, John Flood, Kim Economides, Julian Webb, and Donald Nicolson.

Throughout the years of writing this thesis, I have deepened my understanding of this topic from attending relevant seminars hosted by the Socio-Legal Research Centre attached to the Griffith Law School, and through general discussions with particular colleagues such as Prof. R. Lee, Prof. Richard Johnstone, Prof. Rosemary Hunter and Kieran Tranter.

Two articles I have published have direct links with this thesis. The article, Corbin, L, 'Professionalism Redefined – more than ethics' (2001) 26 (No 3) *Alternative Law Journal,* 137, was written in the early stages of the writing of the thesis. However, the paper published in *Legal Ethics* in 2005 has come directly from the analysis of the data collected for this thesis - Corbin, L., 'How "Firm" are lawyers' perceptions of professionalism?', (2005) 8 (2) *Legal Ethics,* 265-290.

INTRODUCTORY COMMENTS

It is a widely held perception that the role of the professions is changing,[1] and many authors suggest that this is not a positive development.[2]

> Something has gone wrong with the professions … Where law, medicine, and the other venerable "learned professions" once served as models of useful knowledge in service in the community, today's entrants to these fields find them beset by cynicism and disillusionment bred of a narrow commercialism. We no longer look to the successful lawyer or doctor for community leadership and public service. Today we worry whether their malpractice premiums are paid up.
> …
> We all sense that both the general public and many professionals themselves have lost faith in the inherent value of what they do, beyond its immediate cash reward. Market values of unrestrained competition and profit-maximization have for some time been corrupting the professional conscience and eroding professional loyalties.[3]

A former High Court judge was one of the first to express negative views in Australia about what he believes is the industrialisation[4] of the legal profession. To counter this, he called for lawyers to uphold the social trust element of their role.[5]

> It is upon the use of the term "legal services market" to describe legal practice that I want to comment. The particular terminology does not matter. What is important is the idea of the profession being carried on as an industry, selling its product to consumers for whose custom the members of the profession openly compete. … My purpose is not to criticise the use of these words … Nevertheless, the new emphasis upon the marketplace and marketing techniques is not just a shift in language; it reflects a fundamental change in the way in which the profession is practised. This ought to be recognised, if possible without nostalgia, in order to understand where the profession now stands and the direction in which it is heading. The fundamental change of which I speak is not, of course, confined to the legal

[1] A number of authorities could be referred to here but an often cited reference is that of Marc Galanter and Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (1991) 2 – 'Today there is a palpable anxiety and dismay within the legal profession concerning the commercialization and the concomitant decline of professionalism in the setting of the big law firm."

[2] Much has been written on this topic but generally see – Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993).

[3] W.M. Sullivan, 'Experts and Citizens: Rethinking Professionalism' (1996) 11 *Tikkun* 15, 15-16.

[4] The view that law and accounting are industries was reflected in the documents published by the Australian Bureau of Statistics (ABS), in 2000, categorising the professions of both law and accounting as the "Legal and Accounting Services Industry": see Australian Bureau of Statistics, *Australia Today* <http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/C7FE8671660370A1CA2570B000368E56?opendocument> at 24 April 2000. Since then the ABS has 'industry' characterisation from its category: see Australian Bureau of Statistics, *Legal and Accounting Services* <http://abs.gov.au/AUSSTATS/abs@.nsf/DOSSbyTopic/86D11D2179F26C70CA256E110082205D?OpenDocument> at 11 August 2006.

[5] Sir Daryl Dawson, 'Legal Services Market' (1996) 5 *Journal of Judicial Administration* 147, 147-148.

> profession. It has affected most of the professions. … Traditionally the aim of a profession was to promote the purpose for which it existed. The primary aim of … professional practice involved the use by practitioners of the knowledge which they acquired through their education, not in the conduct of an enterprise intent on acquiring the largest market share and making the most profits, but as individuals serving their clients, and through them, the community. [6]

In a similar vein Justice Kirby suggests that Australian lawyers are drifting towards commercialism and asks "… whether the ascendancy of economics, competition and technology, unrestrained, will snuff out what is left of the nobility of the legal calling and the idealism of those who are attracted to its service." [7]

The literature abounds with claims that the professions, including law and accounting, have discarded the service element of their role and that the meaning of professionalism is changing,[8] yet there is very little empirical research to support these declarations. There are, in the literature, some studies that report on the entry process to being a professional, the backgrounds of professionals, the structure of legal firms in terms of their specialisations, and the professional/client relationship,[9] but these studies do not specifically ask practitioners about their understandings of professionalism and how those understandings affect the way that they practice. Reference will be made to some of these studies but the thesis will mainly focus on the findings of the empirical work associated with this study.

The thesis takes the view that the words "profession" and "professionalism" "are not 'things' out in the world to be defined correctly or accurately" but are concepts that are socially constructed.[10] Therefore, it reports on individual practitioners' views of professionalism – what they think it is and how their perceptions translate into the service they provide. The thesis is based on the premise that only those who are actually practising can reveal what is happening in the practice environment. Nelson and Trubek make this point:

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[6] Ibid.
[7] Michael Kirby, 'Legal Professional Ethics in Times of Change', speech given at the St James Ethics Centre, Forum on Ethical Issues, Sydney, 23 July 1996.
[8] The idea that professionalism can change is accepted by Richard Abel. He sees professionalism "as a process, not a set of traits or a static achievement to be won once and for all (or lost irrevocably and mourned)." See Richard L. Abel, *English Lawyers Between Market and State: The Politics of Professionalism* (2003) xv.
[9] Much of the empirical work that does exist will be referred to in this thesis.
[10] Robert Dingwall, 'Accomplishing Profession' (1976) 24 *Sociological Review* 331 cited in Lynn Mather, Craig A. McEwen and Richard J. Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (2001) 277.

> [W]e know relatively little about the professional ideologies of lawyers and other professionals. … We do not know how lawyers in various organizational and institutional locations throughout the profession see the contexts in which they operate, define the interests they pursue, and perceive obligations they must honor. Do professional education, canons of professional ethics, work organizations, and community context produce the world views of practicing professionals? Does professional ideology inform and reflect the nature of professional work? How, for example, do the professional ideologies of lawyers shape and reflect the decision-making processes of the legal institutions and organizational contexts in which they practice?[11]

The thesis seeks to address the concerns documented by Nelson and Trubek and others.[12] The main objective of the thesis is to determine whether the meaning of professionalism, as understood by individual legal practitioners in private practice, equates to the definitions of professionalism contained in the literature. More specifically, it questions whether the representations that the professional bodies make about professionalism reflect what the ordinary practitioners in firms believe. To this end, the thesis reports on the views expressed by practitioners during individual interviews. While the thesis is primarily concerned with discovering what individual legal practitioners think about professionalism, the views of a smaller cohort of persons studying and practising accounting have also been reported, mainly to provide a point of comparison.

It might be argued that the medical profession could have been used as a comparator, but a number of factors directed the author to choose accounting. First, it is the author's view that the regulation and operational conduct of the medical profession is too similar

[11] Robert L. Nelson and David M. Trubek, 'Introduction: New Problems and New Paradigms in Studies of the Legal Profession' in Robert L. Nelson, David M. Trubek, and Rayman L. Solomon (eds) *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (1992) 1, 3. Jeffrey Fitzgerald also notes the lack of sociological research about lawyers in Australia and on p. 48 proposes "that the prime focus for sociological research upon the legal profession in Australia should be upon *lawyers' actual behaviour* in their day-to-day work": 'A Sociologist Looks at Research on the Legal Profession' in Roman Tomasic (ed), *Understanding Lawyers: Perspectives on the Legal Profession in Australia* (1978) 45, 48.

[12] This point has been made before by Cogan (1955) – 'Very little attention has been given to problems of individual … professionalism. Is professionalism inevitably a group phenomenon or may it be achieved individually?' See Morris L. Cogan, 'The Problem of Defining a Profession' (1955) *The Annals of the American Academy* 105, 105-111; George Ritzer, 'Professionalism and the Individual' in Eliot Friedson (ed) *The Professions and Their Prospects* (1971) 60-61. Some authors in the accounting literature also make this point: Steven S. Lui, Hang-Yue Ngo, and Anita Wing-Ngar Tsang, 'Socialized to Be a Professional: A Study of the Professionalism of Accountants in Hong Kong' (2003) 14(7) *International Journal of Human Resource Management* 1192, 1193; L.P. Kalbers and T.J. Fogarty, 'Professionalism and Its Consequences: A Study of Internal Auditors' (1995) 14 *Auditing* 64; W.E. Shafer, L.J. Park and W.M. Liao, 'Professionalism, Organization – Professional Conflict and Work Outcomes: A Study of Certified Management Accountants' (2002) 15 *Accounting, Auditing & Accountability Journal* 46 – but these are studies on accountants and auditors.

to be useful as a comparator. For example, the professional/client relationship in medicine operates within similar client confidentiality constraints. Second, there is a sense in which the medical professional provides a service that aims to totally care for the client. Technically, this is quite a different relationship to that between both lawyers and accountants and their clients. The latter two professions act, for the most part, as representatives of their clients with third parties. Third, the literature on professions reveals a high level of criticism and disapproval for what is considered to be their focus on the pursuit of profit and other commercial practices. Therefore, accounting was considered the most appropriate comparative profession, particularly as it is often identified (by leading academic authors like Hanlon), as the prototype of the new commercialised professionalism environment. Therefore, other professions can be evaluated according to how near or how far they are located from this ideal type.[13]

In effect, the thesis initially endeavours to produce an understanding of professionalism from the perspective of practitioners. It attempts to interpret their claims about the realities of practice[14] and subsequently compare these claims with the ideas of professionalism that emerge from the literature on legal professionalism. It seeks to determine how individuals express their view of professionalism and how that view is applied in practice.[15] To the extent that there are different perspectives, it explores why this might be so. The thesis, therefore, reports on the understanding of professionalism of individual practitioners - what they think it is and how this understanding translates into their practices.

The data referred to in the thesis are drawn from the perceptions of:

1. prospective professionals, i.e. final year students in law and accounting;

[13] Gerard Hanlon, '"Casino Capitalism" and the Rise of the "Commercialised" Service Class – An Examination of the Accountant' (1996) 7 *Critical Perspectives on Accounting* 339.
[14] Nelson, et al., above n 11, 23. The studies conducted by Mather, et al., also proceed on this premise and refer to it as 'professionalism in practice': see Mather, et al., above n 10, 6.
[15] Similar to another empirical study conducted by Douglas N Frenkel, Robert L Nelson and Austin Sarat and referring to the work of David Wilkins, this study attempts 'to inject an element of realism into the current discussion of professionalism'. See David B. Wilkins, 'Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics' in Austin Sarat, Marianne Constable, David Engel Valerie Hans, and Susan Lawrence (eds), *Everyday Practices and the Trouble Cases* (1998) 71 cited in Douglas N. Frenkel, Robert L. Nelson and Austin Sarat, 'Introduction: Bringing Legal Realism to the Study of Ethics and Professionalism' (1998) 67 *Fordham Law Review* 697, 698.

2. current practitioners, in each of these professions, who are comparatively new to practice (in that they have only been working for two years); and
3. experienced practitioners, in each of those professions, who have been practising for more than 15 years.

This thesis has taken a micro approach by examining the perceptions of those working in the practice environment and those preparing to practice. To a certain extent it has relied on some assumptions propounded by the social theory of Interactionism,[16] although it does not adopt an interactionist approach as such. This sociological approach assumes that we can only understand why someone does something when we know what their views are concerning themselves and the context in which the action takes place.[17] Interactionism implicitly accepts that an individual has some choice regarding his or her behaviour and consequently recognises that roles can be renegotiated and "constructed in ongoing interaction situations".[18] There is some support by Nelson and Trubek for this approach.[19] They assert that "lawyer professionalism is not a fixed, unitary set of values, but instead consists of multiple visions of what constitutes proper behaviour by lawyers."[20] These authors, in accepting that the culture of the institution affects the professionalism practised by the individuals within them, also recognise that there is "considerable room for manoeuvre by the individual and collective actors who participate in any given domain of the legal system."[21]

Speaking of a "domain", or a practice environment, it is important to explain the inclusion of the word "market" in the topic of the thesis. The dictionary meaning of "market" includes trade and commerce in a specific service or commodity; and as a

[16] This theory is explained in Chapter 1, see p.33.
[17] Michael Haralambos and Martin Holborn, *Sociology: Themes and Perspectives* (2000) 15.
[18] Ibid 16.
[19] Although they do say – "… we see the social production of professionalism as a complex process of interaction occurring in many arenas": see Robert L. Nelson and David M. Trubek, 'Arenas of Professionalism: The Professional Ideologies of Lawyers in Context' in Nelson et al, above n 11, 177, 180.
[20] Ibid 179. This view appears to agree with those expressed by Mather, et al. – they speak of "communities of practice" in Mather, et al., above n 10, 178.
[21] Nelson, et al., above n 11, 23-24. The effect of culture and the claim that individual practitioner's still retain a certain amount of autonomy, is discussed below in Parts C and D of Chapter III, The Practice Environment.

region where one can buy or sell.[22] For the purposes of this thesis the word "market" is used in both of these senses. It acknowledges that due to the recent altered position of the professions in Australia brought about by changes in regulation, the once "anti-market orientations" associated with professionalism,[23] have to a large extent disappeared leaving the professions subject to the usual economic parameters that impact on all those who sell services. But more particularly the thesis will define "market" as the environment where the service is provided i.e., the practice environment or culture within which those who provide the service operate.

The thesis asks ordinary practitioners to consider whether the meaning of professionalism, particularly with respect to the practice of law, includes altruistic ideals. In so doing, it questions whether they believe the meaning of professionalism has changed, thereby challenging the claim that they make a contribution to society and "put their clients' needs ahead of their own, and hold themselves accountable to standards of competence and morality. … [or whether they serve] themselves at the expense of their clients, ignoring their obligations to public service …".[24]

In particular, the thesis will consider the responses of participants in light of the sociological theories of professionalism, the contemporary labels given to professionalism, and the different conceptions of lawyering currently being proffered. It is organised as follows:

Part I – Literature Review

Chapter I: Conceptions of Professionalism

Chapter II: Conceptions of Lawyering

Chapter III: The Practice Environment

Part II – Data and Analysis

Chapter IV: Methodology

Chapter V: Findings I: An Evolutionary Understanding of Professionalism

Chapter VI: Findings II: An Analysis of the Data

Part III - Concluding Remarks and Recommendations

[22] Funk & Wagnalls Standard Desk Dictionary (1983 edition) Dun & Bradstreet Corporation.
[23] Austin Sarat, 'Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation', (1998) 67 *Fordham Law Review*, 809 at 810.
[24] Donald A. Schon, *The Reflective Practitioner: How Professionals Think in Action* (1983) 11-12.

The study can be seen to adopt an interdisciplinary approach in a number of respects. First, in recognition of the insights of Hanlon mentioned above, participants from the accounting profession have been included in the study. This allows a comparison to be made of practitioners in both law and accounting with respect to their views of professionalism and what that means in relation to how they practise. Second, the study makes use of sociological insights into the meaning of professionalism. It refers to theories developed by sociologists who have attempted to determine why practitioners group together in professional bodies. Third, the thesis uses psychological theories to explain the different perspectives found to be manifested by the different groups of participants. In particular, these theories appear to provide an explanation for the difference in understandings that were demonstrated by the legal graduates and the experienced practitioners.

The thesis will demonstrate that the practice reality of the participating lawyers and accountants[25] is business oriented. It will argue the traditional understanding of professionalism is no longer reflected in the practice reality, although it will be reported, paradoxically, that students and law graduates aspire to these values. In addition, the thesis will highlight the different perspectives operating in the legal practice environment with respect to both recent graduates and experienced practitioners, and suggest that individual conceptions of professionalism tend to vary depending on the practitioner's level of appointment within the firm in which s/he is employed.

[25] The empirical study focussed on a select group of law and accounting practitioners from south-east Queensland, Australia. See Chapter IV "Methodology' for a more complete description of the participants.

PART I – LITERATURE REVIEW:
PROFESSIONALISM AND ITS PRACTICE ENVIRONMENT

I CONCEPTIONS OF PROFESSIONALISM

The word "professionalism" is used extensively in everyday language and yet it has been referred to as "an elastic concept the meaning and application of which are hard to pin down."[26] Professionalism has also been likened to "melted butter or silly putty" that can be appropriated by opposing members of a debate to serve different purposes.[27]

This chapter will initially seek to define the concepts of "profession", "professional" and "professionalisation". In summary the word "profession" is used to describe groups of professionals, i.e. those people who possess particular skills gained through prolonged periods of study, provide a service to clients and the value of their service is recognised by the public. Whereas "professionalisation" is the process during which groups achieve the attributes considered by the public as distinguishing them from mechanical, trade or manual labour. However, the main focus of this chapter concerns an examination of the meaning of "professionalism" with reference to both sociological theories and contemporary understandings. While these are dealt with separately, they are by no means distinct concepts. In fact, the contemporary labels normally used to describe the way professionals conduct themselves are based in sociological theories. For instance, the sociological theories of structural/functionalism appear to inform the traditional understanding of professionalism while commercialised professionalism has its roots in the market control theories.

A *Profession/Professional*

The word "professional" is used prolifically during everyday speech but it has a number of meanings. It variously describes an athlete who is no longer an amateur and therefore receives a commercial reward for participating in sport, and also a person who has performed his/her work to an excellent standard by doing a "professional job".

[26] American Bar Association Commission on Professionalism, *"…In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism* (1986) 10 cited in Jerry van Hoy, 'Intraprofessional Politics and Professional Regulation' (1993) 20 *Work & Organisations* 96,101.
[27] Peter Gerhart, 'The Future of the Legal Profession: The Challenge is Not Public Relations, It is Human Relations' (Speech delivered at the City Club of Cleveland, Cleveland, OH, 28 January 1994), <http://lawwww.cwru.edu/faculty/gerhart/speech.html> at 28 December 2000.

However this high praise does not of itself make the person a member of a profession. The true designation of "professional" is usually reserved for those who are members of a group of people with technical expertise,[28] who apply abstract knowledge, some say altruistically, while controlling the relationship they provide to the client.[29]

In general these groups enjoy the prestige accorded to a high-status job/position (as opposed to a mechanical trade or manual labour). Originally only the three traditional learned professions of law, medicine (physic) and the ministry (divinity)[30] were given this status, mainly due to their association with church-dominated universities.[31] During the heyday of the British Empire, the military was elevated to the status of a profession[32] and as late as 1921 in Australia the Commonwealth Statistician defined professionals as those who were "mainly engaged in the government and defence of the country, and in satisfying the moral, intellectual, and social wants of its inhabitants". [33] Many other groups, such as engineers and accountants, have since joined the ranks of recognised professions.

In considering the definition of "profession" it needs to be noted that the professions in Europe have a very close association with states, state bureaucracies and administrations.[34] Therefore the professions in Europe are more hierarchical[35] as opposed to the Anglo-American practice of being organised as experts shaping their own system in a collegial manner. The professions in Australia follow the Anglo-American model,[36] and are therefore usually defined to include the following attributes:[37]

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[28] J.N. Behrman, *Essays on the Ethics in Business and the Professions* (1988) 104.
[29] H.M. Kritzer, 'The Professions are Dead, Long Live the Professions: Legal Practice in a Post-Professional World' (1999) 33 *Law & Society Review* 713.
[30] W. Prest, 'Why the History of the Professions Is Not Written' in G.R. Rubin and D. Sugarman, *Law, Economy and Society, 1750-1914: Essays in the History of English Law* (1984) 309.
[31] T. Parsons, 'Professions' (1968) 12 *International Encyclopaedia of the Social Sciences* 536 cited in Nancy J. Moore, 'Professionalism Reconsidered' (1987) *American Bar Foundation Research Journal* 773, 780-781.
[32] Behrman, above n 28, 98.
[33] P. Boreham, A. Pemberton and P. Wilson, *The Professions in Australia: A Critical Appraisal* (1976) 44.
[34] J. Evetts, 'Professionalisation and Professionalism: Issues for Interprofessional Care' (1999) 13 *Journal of Interprofessional Care* 119.
[35] A. Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (1988) 3-4.
[36] More specifically, Weisbrot, in 1990, suggests that professions in Australia are more closely aligned to those in the UK. For instance he says that American jurisprudence, having its foundation in the writings of Roscoe Pound, sees law as more open and affected by its social environment i.e. having its judgements influenced by moral, economic and other considerations, whereas the British are more prone to seeing law as a closed system in the positivist tradition. See David Weisbrot, *Australian Lawyers* (1990) 9.
[37] J. Kultgen, *Ethics and Professionalism* (1988) 60 cited in M.A. Reynolds, 'Professionalism, Ethical Codes and the Internal Auditor: A Moral Argument' (2000) 24 *Journal of Business Ethics* 115, 117.

1. A profession involves skills based on theoretical knowledge.
2. The skill requires extensive and intensive training and education.
3. The professional must demonstrate competence by passing a test.
4. The profession is organized and it is represented by associations of distinctive character.
5. Integrity is maintained by adherence to a code of conduct.

Although the word "profession" is illusive, Nieuwenhuysen and Williams-Wynn have attempted to describe what members of professions would like the public to think of them:[38]

1. Professions must be distinguished from trades.
2. Professions are not engaged in 'selling' but in providing a service.
3. Professions consider the client's (not the customer's) welfare first: professions are not primarily money makers.
4. Members of the profession are loyal to the group.
5. Members do not compete with colleagues by price cutting.
6. Members do not tout for business.
7. A member will usually not accept business offered which s/he knows or, with ordinary care could have ascertained, was in the hands of another member.
8. Members do not associate in practice with 'unqualified' persons.
9. Members conduct their personal and business life in ways reflecting no discredit on the profession.
10. Members submit to disciplinary procedures which in extreme cases may ruin them as professional persons.

The practice of accounting is generally referred to as a profession, yet the particular work undertaken has been said to position it squarely within commercial society,[39] owing its very existence to the growth in business practises.[40] Both "shrewd social

[38] J. Nieuwenhuysen and M. Williams-Wynn, *Professions in the Marketplace: An Australian Study of Lawyers, Doctors, Accountants and Dentists* (1982) 2.
[39] Abbott, above n 35, 3.
[40] T. Lee, 'The Professionalization of Accounting History of Protecting the Public Interest in a Self-Interested Way' (1995) 8 *Accounting, Auditing and Accountability Journal* 48. This account points to the conclusion that accounting professional organisations were created for purely economic reasons. There are other accounts that argue that the commercialised paradigm is a recent occurrence. For instance, Wyatt records the introduction of non-accounting personnel who eventually became partners as the

manoeuvring"[41] and technical effectiveness in accomplishing the requirements of the public[42] have been identified as primarily responsible for establishing accounting as a profession, rather than any claims of altruism.

Public accountancy's over-commercialised approach has drawn criticism that suggests it is more aligned to an industry than a profession.[43] A president of the Institute of Chartered Accountants in Australia said "[t]he most telling feature that distinguishes a profession from a trade is its active promotion and implementation of a Code of Ethics".[44] In accordance with the view that ethics is "the heart of the profession" the Australian Society of Certified Practising Accountants and the Institute of Chartered Accountants have now produced a common code of conduct.[45]

A similar dichotomy exists within the legal profession and finds expression around a debate that questions whether the practice of law is a business or a profession.[46] A recent discussion paper published by the Law Council of Australia states that there is a substantial "difference between a profession and a 'mere' business" and proceeds to refer to the attributes identified by Gleeson CJ:[47]

- they involve the exercise of some special skill not held by the general public, based on an organised body of learning, imparted systematically by an institution;
- members usually enjoy some form of exclusive right to provide their services to the public for reward;
- the profession avows obligations of service to the community, and the community accepts that such obligations constrain their pursuit of self interest;
- they are permitted, and actively pursue, a substantial degree of self regulation.

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problem that has produced this result. This changed the focus of the firms to commercial interests – See Arthur R. Wyatt, 'Accounting Professionalism – They Just Don't Get It!' (2004) *Accounting Horizons* 45.

[41] The work of West also appears to support this. See George J Staubus, 'On Brian P. West's Professionalism and Accounting Rules' (2004) 40 *Abacus* 139, 141.

[42] Ibid 140.

[43] E. Mason, 'Public Accounting - No Longer a Profession?' (1994) *CPA Journal Online* <http://www.nysscpa.org/cpajournal/old/15611645.html> at 24 February 2000. This certainly accords with the Australian Bureau of Statistics understanding.

[44] Gael McDonald and Terry Reid, 'Looking Towards Change' (1999) *Chartered Accountants Journal of New Zealand* 12, 12.

[45] Tony Ferrers, 'Ethics - The Heart of the Profession' (1998) *Chartered Accountants Journal of New Zealand* 63, 63.

[46] Austin Sarat, 'Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation' (1998) 67 *Fordham Law Review* 809, 811.

[47] Murray Gleeson, 'Are the Professions Worth Keeping?' (Speech delivered at the Greek Australian International Legal and Medical Conference, published at http://www.hcourt.gov.au/speeches/cj/cj_areprofe.htm , 31 May 1999) cited in Law Council of Australia, *2010: A Discussion Paper: Challenges for the Legal Profession* (2001) 120.

However, members of the judiciary and professional bodies have expressed differing opinions on what it means to be a member of a profession. At a recent Queensland admission ceremony (to admit new solicitors into the legal profession), Chief Justice de Jersey appealed to new practitioners to avoid being caught up in the "busy-ness of modern practice, an unfortunate preoccupation with so-called 'billable hours', and the intensely competitive nature of the contemporary profession, [which] can shift the focus from measured professionalism to out and out commercialism."[48] Kirby J in similar terms stated that "[t]he bottom line is that law is not just a business. Never was. Never can be so. It is a special profession. Its only claim to public respect is the commitment of each and every one of us to equal justice under law.". [49] Hayne J, another member of the current High Court, acknowledged the commercial aspects to the practice of law but stated: [50]

> Both elements have always been present in the practice of the law - the self-abnegating pursuit of some higher ideal and the pursuit of commercial success. We cannot for a moment delude ourselves into thinking that the commercial element of practising law has emerged only recently. It has always been there. But the balance appears to have changed.

In contrast, members of the professional body, such as former presidents of the Queensland Law Society, appear to be more accommodating in their understanding of a profession. They seem to acknowledge that the elements of both a profession and a business feature equally. One former Queensland Law Society president is of the view that just because someone is a businessperson does not preclude them from being described as a professional.[51] Another former president said the "practice of law is both a business from which a profit must be turned and a profession dedicated to ideals of disinterested service."[52] It is a widely supported opinion that the practice of law is in reality both a business and a profession.[53]

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[48] Paul de Jersey, 'Admissions Ceremony', 10 November 2003, <http://www.courts.qld.gov.au/publications/articles/speeches/2003/dj101103.pdf> at 11 August 2006.
[49] Michael Kirby, 'Law Firms and Justice in Australia' (Speech delivered at the Australian Law Awards, Sydney, 7 March 2002) <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_award.htm>.
[50] K.M. Hayne, 'Lessons From the Rear-View Mirror' (2002) 22 *Australian Bar Review* 1.
[51] Anonymous, *Proctor* (1995) July 'Lawyers as Business People' 19.
[52] Jeff Mann, 'The Protection of Service' (1997) 17 *Proctor* 2.
[53] For instance this is the view of the Legal Services Commissioner for New South Wales – Steven Mark, 'Harmonization or Homogenization? The Globalization of Law and Legal Ethics – An Australian Viewpoint' (2001) 34 *Vanderbilt Journal of Transnational Law* 1173, 1174 and the Australian Law Council President for 2002, Law Council of Australia, 'New Law Council President … the Power and the

Yet it must be noted that all of these comments are coming from the higher echelon of the professions, from people in leadership positions of professional bodies or members of the judiciary. This does not really say much about what ordinary practitioners think. In fact, in an Australian survey of legal practitioners in New South Wales, Tomasic found that lawyers consider themselves as primarily conducting a business.[54]

> …regardless of the rhetorical flourishes from legal societies, lawyers are more interested in business orientation and not service orientation. …Social justice and public service are the least of their worries. They see these social values as unrealistic goals.[55]

A more recent Law Council of Australia discussion paper attempted to summarise the views of practitioners in Australia, but appears to mainly report statistical data rather than give an insight into the views of the practitioners themselves.[56] As previously mentioned, this study adopts Gleeson CJ.'s definition of a profession[57] but it is interesting to note it makes the point that the profession is becoming increasingly polarised in that suburban practitioners cater to the personal needs of their clients whereas larger firms mainly focus on commercial issues.[58] This appears to suggest that the internal workings of firms of different sizes and areas of interest may differ.[59]

Empirical studies conducted in the United Kingdom and United States of America have found large firms dealing with corporations take a different approach to lawyering compared with lawyers servicing individual clients.[60] Hanlon, in particular, concludes that practitioners in large firms rely on entrepreneurial and managerial skills and totally identify with the commercial interests of their clients, suggesting that "[t]hese are the values of business rather than the professions …" whereas small firm lawyers "appear to want to retain at least elements of the older form of professionalism."[61]

On the other hand, Posner seems to ignore differences in size and specialisation as a determinant for whether law is considered to be a business or a profession. He suggests

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Passion', 16 September 2002, <http://www.lawcouncil.asn.au/read/2002/2246478259.html> at 11 August 2006.
[54] Tomasic quoted in Nieuwenhuysen, et al., above n 38, 6.
[55] Ibid.
[56] Law Council of Australia, above n 47.
[57] See above n 47.
[58] Law Council of Australia, above n 47, 354-357.
[59] More will be discussed on this in Chapter III under "clients" at p. 83.
[60] See John P. Heinz and Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (revised ed, 1982); Gerald Hanlon, 'A Profession in Transition? – Lawyers, The Market and Significant Others' (1997) 60 *Modern Law Review* 798, 799.
[61] Hanlon, above n 59, 820-821.

that law's claim to professional status derives from those who believe it has specialised knowledge.[62] So it is public perception [63] that determines the acceptance of one group over another.[64] This is also reflected in Gleeson C.J's definition that "the profession avows obligations of service to the community, and the community accepts that such obligations constrain their pursuit of self interest."[65] Therefore, acceptance by the public is important[66] - the status of profession is awarded only to those who gain the recognition of the public.[67] It is this process that will now be examined.

B *Professionalisation*

When speaking of the struggle of an occupation to be recognised as a profession, the terms "professionalism" and "professionalisation" are, confusingly, used interchangeably. However Prest helps distinguish their meaning by suggesting that "professionalisation" is "the process by which proto-quasi- and would-be professions [draw] steadily closer to full professional status or 'professionalism' by acquiring more of the variously-denominated attributes of a profession."[68] The thesis will adopt these meanings,[69] but more specifically the term "professionalism" will refer to the end result of the professionalisation process and to the conduct expected of its members in applying the attributes considered necessary to label the occupation as a profession.

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[62] Richard A. Posner, 'Professionalisms' (1998) 40 *Arizona Law Review* 1.
[63] Rosalie Silberman Abella, 'Professionalism Revisited', (speech delivered at Benchers' Retreat, Hockley Valley, Ontario, 14 October 1999) <http://www.ontariocourts.on.ca/court_of_appeal/speeches/professionalism.htm> at 8 December 2000 – "The public is our audience, the people for whom we perform the justice play … if they stop clapping, we are in deep trouble."
[64] Although some commentators would suggest that the criteria by which the public judge whether or not practitioners meet the standard the public demands is questionable. Clients tend to have different expectations, namely 'competence and diligence' – see Leslie Griffin, 'A Clients' Theory of Professionalism' (2003) 52 *Emory Law Journal* 1088.
[65] Gleeson cited in Law Council of Australia, above n 47, 120.
[66] This concept is discussed further below in Chapter 1, 'Traditional Professionalism' p.38.
[67] Nieuwenhuysen, et al., above n 38, 1.
[68] Prest, above n 30, 301. Birkett and Evans use similar definitions. For instance, in 'The process of professionalisation is theorised as the establishment and maintenance of the *conditions* that give rise to the exercise of control, power and ideology by an occupational association so that it can move towards, or attain the end-state of professionalism': W.P. Birkett and Elaine Evans, 'Theorising Professionalisation: A Model for Organising and Understanding Histories of the Professionalising Activities of Occupational Associations of Accountants' (2005) 10 *Accounting & Tax Periodicals* 99, 102.
[69] Professionalisation is also considered a process by Terence J. Johnson, *Professions and Power* (1972) 22.

Generally speaking, sociological theories attempt to describe the process that "differentiates professional occupations from nonprofessional occupations".[70] This is the process of professionalisation. These theories try to explain the phenomenon of "professionalism" - the organisation of those occupational groups that have met particular criteria. Theorists normally do this as external observers.[71] To avoid repetition, these theories are discussed in the section below on professionalism.

C *Professionalism*

The Macquarie Dictionary defines professionalism as "a distinctive doctrine, theory, system or practice".[72] More specifically, it is the end result of the professionalisation period, the recognised institutional form, the acquired state. A vocation is recognised by the public as a profession when it exhibits all the necessary attributes as outlined by sociologists. Professionalism also refers to the practices of the profession's members when they act in accordance with those attributes.[73] Both meanings of professionalism are implied in the thesis. Therefore, the thesis will attempt to conceptualise how members of professions conduct themselves by referring to both the writings of the sociologists and those who describe what they believe are contemporary understandings of professionalism.

[70] Ritzer, above n 12, 60.
[71] M. Berends, 'An Elusive Profession? *Lawyers in Society'* (1992) 26 *Law & Society Review,* 161, 164.
[72] The Macquarie dictionary 3rd ed. (2001)
[73] See "Sociological theories" below, p. 23.

1 *Sociological Theories*

Most of the definitions of professionalism owe their origins to the work of sociologists who claim the professions formed at the time of the Industrial Revolution. Prior to that time, the professions were "subservient to the aristocratic values of their elite patrons" and so "possessed no ideology of their own, and certainly no sense of self-worth based on the importance of their work".[74] Professional bodies were formed as a result of the warnings of writers like Durkheim who argued that the new economic life advanced by industrialisation was a danger to the public.[75] Therefore, professions were organised to provide a service to the public to counter the destructive effects of industrialisation.[76]

However there are some who question this perspective. Prest suggests it is too narrow. He maintains that a fuller understanding of the beginning of professions would be achieved if the practice of viewing the subject through the lens of sociological theory is abandoned.[77] He particularly draws on anecdotal evidence to establish that lawyers in earlier societies saw themselves as fulfilling a particular function that contributed "to their prince and commonwealth". [78] In other words, Prest argues that these early lawyers believed that they were providing a service to the sovereign and the community in general. Many lawyers saw their vocation as a calling and thought they had a duty to serve the public. Some elements of these virtues feature in the historical accounts reported by Pound.[79]

There are others who believe that professions, as we know them, only really evolved in the 1930's.[80] In fact Hanlon argues that the writings of the early sociologists like

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[74] Prest, above n 30, 312.
[75] Emile Durkheim, *Professional Ethics and Civic Morals* (1957) cited in W. Pue, '"Trajectories of Professionalism?": Legal Professionalism after Abel' (1991) 19 *Manitoba Law Journal* 384, 387.
[76] Pue, above n 75, 387.
[77] Prest, above n 30, 306. Other writers also support this view – Roscoe Pound, *The Lawyer from Antiquity to Modern Times: With Particular Reference to the Development of Bar Associations in the United States* (1953); and Rubin, et al., above n 30. Also see W. Wesley Pue, 'Rethinking "Professionalism": Taking The Professions in Early Modern England Seriously' (1989) 4 *Canadian Journal of Law & Society* 175.
[78] Wilfrid R. Prest, *The Rise of the Barristers: A Social History of the English Bar 1590-1640* (1991) 318-319.
[79] Pound, above n 77, 41-55.
[80] Alan A. Paterson, 'Professionalism and the Legal Services Market' (1996) 3 *International Journal of the Legal Profession* 137 and Gerard Hanlon, 'Professionalism as Enterprise: Service Class Politics and the Redefinition of Professionalism' (1998) 32 *Sociology* 43. Patterson in particular examines two supposed core elements of the sociologists' definition of professionalism of "public protection" and "restricted competition" in the United Kingdom. In relation to "public protection" Paterson traces the history of the introduction of ethical rules, complaints and discipline procedures, a compensation fund and separate accounts for client money and found that they were not implemented until after 1930. In fact a compensation fund for the City of London Solicitors' Company was not mandated until 1942. He also

Parsons, Goode, Hughes and Wilensky, were based on the views of Marshall who wrote about a 'new' professionalism that commenced in the UK in the 1930s – 'social service' professionalism.[81] This approach to professionalism developed as a result of a social consensus called Fordism which aimed to implement an expansion of the welfare state whereby citizens were guaranteed certain rights.[82] The professionals became a party to this approach as they were able to deliver some of those rights.[83] Hanlon states that the professionals were not being altruistic, but they "were willing to provide a service to people on the basis of need provided they were adequately reimbursed by the state" in the form of control over certain aspects of the legal service and self-regulation.[84] However Hanlon argues this arrangement is quite different to the previous practice model of 'individualistic professionalism' where professionals were "servicing those people who could pay and on being a 'gentleman'".'[85] This earlier brand of professionalism "was characterised by a hostility to any state interference and by service to the individual client."[86]

Even though these authors question the assumption that the professions date from the Industrial Revolution, it is the sociological account that prevails. Sociological theories present disparate understandings of the professions, yet they do make very valuable contributions to explaining relationships within society. As one writer puts it, "Sociology is concerned with values, interaction patterns, and ideologies that underlie the basic structural arrangements in a society."[87]

Sociologists generally take one of two possible approaches to analysing professionalism: "Either they start out from the properties which are thought to characterize professionalism and professionals or from the types of collective action on which the groups of professionals rely."[88]

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examines the rules against touting and advertising, scale fees, and the rules on fee-sharing with unqualified persons and professional monopolies under the banner of 'restricted competition' and reveals that these too were not introduced until after 1930.

[81] T.H. Marshall, 'The Recent History of Professionalism' (1939) 5 *Canadian Journal of Economics* 325 cited in Hanlon, above n 80, 49.

[82] Hanlon, above n 80.

[83] Ibid.

[84] Ibid.

[85] Marshall, above n 81.

[86] Hanlon, above n 13, 340.

[87] Steven Vago, *Law and Society* (5th ed, 1997) 2-3.

[88] Rolf Torstendahl, 'Essential Properties, Strategic Aims and Historical Development: Three Approaches to Theories of Professionalism' in Michael Burrage and Rolf Torstendahl (eds) *Professions in Theory and History: Rethinking the Study of the Professions* (1985) 44.

Structural functionalists are characterised by the former approach. They claim that occupations or vocations became professions for functional purposes because society needed professional expertise.[89] Neo-Weberians, on the other hand, also called conflict theorists, maintain that occupations became professions to create a monopoly over the provision of their services in order to gain market control[90] of their particular service area, and these theorists concentrate on examining the collective action of the professions. Perhaps the two different approaches can be distinguished simply by suggesting that the functionalist approach[91] concentrates on what it is that professionals should do, which is really a normative value approach, whereas the conflict theorists[92] focus on what they believe is the practice reality and the dangers associated with the privileges that this reality creates.[93]

The thesis will discuss the macro theories of structural-functionalist and conflict. It also considers two micro theories that focus more directly on the conduct of individuals within the professions. Obviously the latter theories focus on actions, as do the conflict theories, but it could be argued that they reflect a more accurate picture of what happens in reality because they consider the actions of individuals as opposed to the actions of professions as a whole.

[89] These theories assume that the professions have altruistic objectives.
[90] Abbott, above n 35, 13. Abel considers there are three theoretical traditions, Weberian, Marxist and structural-functional. R.L. Abel, *The Legal Profession in England and Wales* (1988) 4. This paper will group the Weberian and Marxist approach under Conflict theories. However even more importantly there are a number of authors who evince elements that could include them in a number of theories. For instance Larson's work is focussed on economics and included usually in market control theory and yet her writings are closely related to Marxist material.
[91] The structural or trait model commonly lists a set of attributes that are said to represent a profession's core features and the functionalist model suggests that the profession as a whole or the professional-client relationship plays a particular part in society (i.e., to meet certain needs – "to achieve rationality and justice.") Nelson, et al., above n 11, 3.
[92] It views the functions of the professions from an economic perspective and focuses on control of the distribution of legal services within a market environment. These theories suggest that members of powerful occupational groups maintain their positions in the 'free market' by constructing a monopoly through their organisation training and control of their members. Berends, above n 71, 169.
[93] Julia Evetts, 'The Sociological Analysis of Professionalism: Occupational Change in the Modern World' (2003) 18 *International Sociology* 395, 399.

(a) Macro Theories

(i) Structural-Functionalist

Parsons coined the phrase "structural-functionalist".[94] This phrase describes both the structural or trait model that lists a set of attributes representing a profession's core features, and the functionalist model that suggests that the profession as a whole or the professional-client relationship plays a particular part in society "to achieve rationality and justice".[95] They are included as one theory since the functionalists rely quite heavily on the existence of structure to assert there are "relationships between members of society … organized in terms of rules".[96]

Both of these models originate from the views of Durkheim.[97] He believed industrialism replaced what was then an homogenous social life and argued there was a need for a moral force to act for the community to maintain social order. He saw the professions as having the ability to be able to suppress their own desires for self-interest to fulfil this function.[98]

The structural model is also known as the "trait" approach because it lists traits that act as a "score-card" to determine whether occupations can be classified as professions.[99] However there is very little agreement between proponents of this model on which are the essential traits.[100] Abbott discusses the different criteria used by these theorists to determine whether the professionalisation process has occurred.[101] He records that Wilensky uses a particular sequence of events; Caplow talks of a number of stages; and Millerson believes that political concerns eventually determine an occupation's acceptance as a profession. Millerson suggests that there could be a variety of reasons why certain professions became organised, including the social and educational climate of the time.[102]

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[94] Berends, above n 71, 168.
[95] Nelson, et al., above n 11, 15.
[96] Haralambos, et al., above n 17, 9.
[97] Berends, above n 71.
[98] Boreham, et al., above n 33, 17.
[99] Pue, above n 75, 388.
[100] Johnson, above n 69, 23.
[101] Evetts, above n 93.
[102] Abbott, above n 35, 10-13.

Functionalism examines an institution or an organisation to determine "its contribution to the maintenance of the social system."[103] The functionalism group of theorists argue that the professions were developed to meet certain needs present in society and, in fact, were promoted as "an alternative to both the market and the state."[104] These theorists include Carr-Saunders, Wilson, and Parsons.

The functionalist theorists assert that the organisation of professions encourages service to the public rather than just pursuing profit.[105] This theory sees professions as modelled on *Gemeinschaft* – the German term for community that had a common tradition, values and commitment to service.[106] In this context, the professions are regarded as occupying a special position in society and so are considered to be exempt from the rules that usually pertain to businesses under capitalism or social democracy.[107] The monopoly that results is granted "as a sort of *quid pro quo"* for the service ideal.[108] Parsons stresses the altruistic motivations of the professions to minimise the business features that were becoming more prevalent.[109]

Carr-Saunders and Wilson describe the worth of professions as "stabilizing elements in society."[110] They assert that the professions "engender modes of life, habits of thought, and standards of judgement which render them centres of resistance to crude forces which threaten steady and peaceful evolution."[111] The professionals are said to do tasks that have "a history and reputation as privileged work with altruistic objectives."[112] Carr-Saunders and Wilson suggest that a "professional man who gave a lower standard of service in necessitous cases, where his remuneration was little or nothing, would be regarded as an unworthy colleague by his professional brethren."[113] So functionalism "emphasize[s] the importance of value consensus in society …"[114] and therefore assumes that "individuals socialized into professional roles take on the appropriate ideological value orientation."[115]

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[103] Haralambos, et al., above n 17, 9.
[104] Nelson, et al., above n 19, 180.
[105] Pue, above n 75, 387.
[106] Berends, above n 71, 168.
[107] Pue, above n 75, 387.
[108] Ibid.
[109] T. Parsons, 'The Professions and the Social Structure' in T. Parsons (ed) *Sociological Theory* (1964) 34 cited in Boreham, et al., above n 33, 17.
[110] A.M. Carr-Saunders and P.A. Wilson, *The Professions* (1933) 497.
[111] Ibid.
[112] Lee, above n 40, 49.
[113] Carr-Saunders, et al., above n 110, 471.
[114] Haralambos, et al., above n 17, 11.
[115] Nelson, et al., above n 11, 15.

The structural-functional models are criticized for being idealistic. It is argued that these theorists too quickly accept that "the professions are unequivocally beneficial for society",[116] having "fallen into the error of accepting the professionals' own definitions of themselves".[117] There are also suggestions that a major flaw of the trait model is that it is ahistorical – "it ignores variations in the historical conditions" surrounding or causing the process towards professionalism.[118]

These are strong criticisms, but perhaps the most worrying critique is that which suggests that these models tend to describe the organisation of the profession but pay no regard to what the members, the actors in the role, actually do and what motivates them.[119] Professions as a corporate body often claim to aspire to a service ethic but "it is not so clear that practitioners are necessarily so motivated."[120] Using theories that focus on the actions of individuals may be much more enlightening. Therefore a discussion of the interactionist[121] and culture theories are included below.

(ii) Conflict Perspectives

While the structural-functionalists emphasise consensus as the organising element, believing that conflict only arises temporarily in a social system, the conflict theorists contend that social organisation results through conflict.[122] These include Marxism, market control and the knowledge/power theories.

Marxism arranges people or vocational groups into particular classes,[123] allocating them a position in society in relation to the state.[124] In the main it sees society divided between the bourgeoisie and proletariat or, in more simple terms, the ruling class and the subject class i.e. the workers. Marx did not specifically discuss the professions as he believed that 'they were not significant participants in the class conflicts of capitalist

[116] Boreham, et al., above n 33, 18. See also Richard L. Abel, 'Taking Professionalism Seriously' (1989) *Annual Survey of American Law* 41.
[117] Johnson, above n 69, 26.
[118] Ibid 30.
[119] T.J. Fogarty, 'Structural-Functionalism and Financial Accounting: Standard Setting in the US' (1994) 5 *Critical Perspectives on Accounting*, 205, 206.
[120] Johnson, above n 69, 25.
[121] This is the model upon which this thesis is based and this is the approach taken by FitzGerald, above n 11, 59-60.
[122] Haralambos, et al., above n 17, 11.
[123] Torstendahl, above n 88, 44.
[124] Keith M. Macdonald, *The Sociology of the Professions* (1995) 22.

societies'.[125] Yet using his writings to analyse professions can produce two observations. Marxism emphasises the relations of production[126] and teaches that within the superstructure of production there are situations of "exploitation of one social group by another … in capitalist society, employers exploit their employees."[127] In other words, there is a potential class conflict. Therefore this theory suggests that the ruling class (the partners owning the means of production), possess the power and therefore control the production of those less powerful than themselves (the non-owning lawyers within each firm) and pursue capitalist aspirations of self-interest and money.

Further, it could be argued that it is difficult to determine where the professions fit within society as it could be argued that they belong to the petty bourgeoisie, the higher middle strata, or even "specific functionaries of capital".[128] However, on the whole, those who ascribe to Marxism view the professions with some cynicism and suspicion.[129] Therefore this theory suggests that the professions have tried to align themselves with the captains of capitalism to carve out a lucrative niche for themselves.

Like the structural-functionalist models, market control theories do not examine the practices of the individuals involved, but look collectively at the organisation of the professions. These theorists view the professions from an economic perspective and focus on control of the distribution of legal services within a market environment. This approach commenced in the 1970s. Probably the most notable of its theorists is Abel whose work followed on from that of Weber, Johnson and Larson.[130]

Weberian theory suggests that members of powerful occupational groups maintain their positions in the "free market" by constructing a monopoly through their organisation, training and control of their members.[131] Weber's philosophy contends that certain occupational organisations are cartels or organisations that have achieved "market closure" – "the process by which given social collectives seek to regulate market conditions in their favour, in face of actual or potential competition from

[125] Michael Burrage, 'Introduction: The Professions in Sociology and History' in Michael Burrage and Rolf Torstendahl (eds) *Professions in Theory and History: Rethinking the Study of the Professions* (1985) 1.
[126] Michael Saks, 'Removing the Blinkers? A Critique of Recent Contributions to the Sociology of Professions' (1983) *The Sociological Review* 1, 11.
[127] Haralambos, et al., above n 17, 11.
[128] Thomas Brante, 'Professional Types as a Strategy of Analysis' cited in Torstendahl, above n 88, 80.
[129] Saks, above n 126, 11-12.
[130] Pue, above n 75, 390.
[131] Berends, above n 71, 169.

outsiders, by restricting access to specific opportunities to a limited group of eligibles".[132]

Larson's theory stems from the Weberian perspective, but her thesis argues that the professions are market organisations established to dominate discrete areas of service to the community in order to achieve a certain status and therefore empowerment. Larson argues that for an occupation to attain the status of profession it needs to achieve social recognition of its expertise. The training and standards required lend credibility to this claim.[133] So Larson sees the professions as working steadily towards "elite status".[134]

Abel, who formulated a market control model, posits that the promotion of self-interest, as opposed to service to the community, was the motivation for the formation of the professions.[135] This model appears unable to accommodate any claims that members of the profession have ideological views concerning their role. In fact it tends to "reduce ideology to little more than a mystification trick deliberately designed to dupe outsiders into acquiescence in their own exploitation."[136] Abbott sums up the "monopoly school" as he calls it. He says that it acknowledges that structural developments can be used to found the organisation of the professions, but attributes their development not to "natural growth" but to strategies designed to produce dominance and authority.[137] His view of professions is that they claim to possess specialist knowledge and altruistic commitment to the public in order to retain what he calls their "heartland jurisdiction". In other words, they appear to recognise that they need to justify to the community that they are worthy of the unique role afforded to them.[138]

This market control model also has its critics. Some argue it is not really accurate in its analysis of professionals since there was a role for the state in their creation.[139] The model also fails to consider the role of the community in requiring their establishment to fulfil a perceived need.[140] Pue suggests that the model does not examine the history

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[132] Saks, above n 126, 5-6.
[133] Berends, above n 71, 172.
[134] Magali Larson, *The Rise of Professionalism: A Sociological Analysis* (1977) cited in Abbott, above n 33, 13.
[135] Pue, above n 75, 390.
[136] Ibid 406.
[137] Abbott, above n 35, 15. In discussing the ambiguities of professionalism, W. Bradley Wendel categorised this approach as an Oligopoly – W. Bradley Wendel, 'Morality, Motivation, and the Professionalism Movement' (2001) 52 *South Carolina Law Review* 557, 561.
[138] Abbott, above n 36.
[139] Pue, above n 75, 405. This argument seems to fit with the Marxist approach – mentioned above.
[140] Ibid 405-406.

surrounding certain exclusion rules. It does not acknowledge the attempts of professions to ensure that certain consequences, detrimental to social order or politics do not occur.[141] It might also be suggested that this model is defective in explaining the current climate for professions where the State is intervening to quite an extent to position the professions in the market place along with other providers of services.[142] More importantly, this model does not examine the individual actions of the professionals, again assuming that they are socialised into the ideals of the professional body.

It is commonly understood that knowledge or expertise can lead to power[143] for those who possess it, and it is common to associate "power" with "profession".[144] One's ability to exert power over another quite often depends on the particular position that one is in.[145] Generally those who possess a measure of power can influence behaviour either coercively or non-coercively.[146] The police or military are ready examples of coercive influence, but it can also apply to the employer/employee relationship, particularly where employees care about their jobs.[147] Owners of firms and policy makers also use power in this way.[148]

The professions probably influence behaviour in a more non-coercive way. For instance, lower-level practitioners can be influenced to tailor their practices to mirror those of their superiors, even if they believe that this conduct does not achieve the standard they really wish to attain. Used in this way, power tends to have negative affects.

The element of power is also evident in sociological theories already discussed. While the functionalist theory uses power to get things done, power in terms of Marxism and the market control models might be considered to be potentially damaging.[149] Foucault couples power and knowledge to frame a theory that has the

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[141] Ibid 414.
[142] Wendel makes this point. He says that this model 'is difficult to square with the loss of market control experienced by lawyers over the past ten or twenty years': Wendel, above n 137, 562. While Wendel is referring to the situation in the USA, Chapter 3 of this thesis outlines the current climate in Australia that would draw similar criticisms of the market control theory.
[143] Eliot Freidson, *Professionalism, Empowerment and Decision-Making* (1987) National Education Association <http://itsa.ucsf.edu/~eliotf/Professionalism,_Empowerme.html> at 8 December 2000.
[144] Ibid.
[145] Ibid.
[146] Ibid.
[147] Ibid.
[148] Ibid.
[149] Margaret Sargent, *Sociology for Australians* (2nd ed, 1992) 196.

potential for both negative and positive outcomes.[150] In terms of the professions, his theory suggests that those who wish to govern or to be recognised as experts need to produce knowledge to be accepted as legitimately qualified to hold those positions.[151] Foucault sees power as a tool to initiate knowledge.[152] In the same way that the trial of Oscar Wilde educated onlookers about homosexuality,[153] lawyers have the opportunity to educate the public and political leaders of their worth.[154] So in this sense power can enable people to do things, but only if they have the freedom to make a choice and resist demands made on them.[155]

Perhaps the cultural theory of Bledstein, also aligns with this idea. Bledstein appears to suggest the professions need to sell their worth to the public. Abbott writes in a similar vein. He suggests that occupational groups that achieve control over their knowledge and skill are considered to be professions. He mentions that having "an abstract system of knowledge" allows the professions the opportunity to "redefine its problems and tasks, defend them from interlopers, and seize new problems … [and] enables survival in the competitive system of professions."[156] So in this sense the professions' continued proclamations that they have a particular expertise ensures continued acceptance of a role for the professions in society.

Foucault also believed that all individuals have some degree of free will to be the person they want to be. However their individuality is constantly "open to change and reconstruction" as a result of the influence of others around them, and sometimes their freedom is limited because of dominant forces.[157]

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[150] Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (Colin Gordon, Leo Marshall, John Mephan, and Kate Soper trans, 1980 ed) 119.
[151] Michel Foucault, 'Governmentality' 6 *Ideology and Consciousness* (1979) 5-21.
[152] Freidson, above n 143.
[153] Jennifer Wilkinson, 'Lecture 5 – The Philosophy of Michel Foucault', 5 March 2003, <http://journalism.uts.edu.au/subjects/ppc1_2000/PPC00/transcript5.html> at 11 August 2006.
[154] Freidson, above n 143.
[155] Haralambos, above n 17, 637.
[156] Abbott, above n 35, 9. See also Burton J. Bledstein, *The Culture of Professionalism: The Middle Class and the Development of Higher Education in America* (1978).
[157] Ken McPhail, 'The Threat of Ethical Accountants: An Application of Foucault's Concept of Ethics to Accounting Education and Some Thoughts on Ethical Education for the Other' (1999) 10 *Critical Perspectives on Accounting* 833, 853.

(b) Macro Theories

(i) Interactionism

The majority of the above approaches concentrate on explaining the professions as organisations within society (macro-theories) but there are those who criticise this approach. Burrage and Torstendahl suggest "the Durkheimian, Weberian and Marxist approaches … exaggerate the unity of professionals, tending to regard them too much as a homogenous group."[158]

One theory that highlights the disunity within a group of professionals is interactionism. This theory is often referred to as the "sociology of everyday life"[159] because it is primarily concerned with "the manner through which human beings go about the task of assembling meaning: how we define ourselves … our behaviours and acts; how we define the situations we are in … and how these meanings are handled, modified, transformed, and hence evolve through encounters."[160] It endeavours to understand "action between individuals … [contending] that an understanding of action requires an interpretation of the meanings that the actors give to their activities."[161]

The most frequently cited explanation of interactionism is that provided by Blumer who suggests that the theory has three main premises:

> The first premise is that human beings act toward things on the basis of the meanings that things have for them … The second premise is that the meaning of such things is derived from, or arises out of, the social interaction that one has with one's fellows. The third premise is that these meanings are handled in, and modified through, an interpretative process used by the person in dealing with the things he encounters.[162]

This theory is different from the other theories discussed in the thesis because it does not expound a specific view of professionalism but "waits for its substance through

[158] Michael Burrage and Rolf Torstendahl (eds) *Professions in Theory and History: Rethinking the Study of the Professions* (1985) 80.
[159] P.A. Adler, P. Adler, and A. Fontana, 'Everyday Life Sociology' (1987) 13 *Annual Review of Sociology* 217.
[160] Ken Plummer, 'Symbolic Interactionism in the Twentieth Century: The Rise of Empirical Social Theory' in Bryan S. Turner (ed) *The Blackwell Companion to Social Theory* (1996) 223-224.
[161] Haralambos, et al., above n 17, 14.
[162] H. Blumer, *Symbolic Interactionism: Perspective and Method* (1969) cited in Plummer, above n 158, 231.

the empirical work it demands."[163] It recognises that individuals have "considerable choice as to how they behave …".[164] It also acknowledges that an individual's choices are influenced by the meanings they apply, depending on their own self-concept;[165] that the "context in which the interaction takes place" is important;[166] and that an individual's role can be renegotiated and "constructed in ongoing interaction situations."[167] This leads to the conclusion that "[s]ocial roles are not therefore fixed or unchanging; in reality they are constantly being modified in the course of interaction."[168]

Mead, who is usually acknowledged as the originator of this theory,[169] asserts that, while individuals are often shaped by their social environment, they can actively create it too.[170] They still have a choice as to how they behave.[171] This seems to imply that individuals, depending on how they are influenced by their own culture, shape their own understanding of professionalism.

It has been suggested that Hughes, Becker and Freidson have employed the interactionist approach.[172] Interactionism could be categorised as a micro-sociological endeavour, because of its quite narrow focus on individuals.[173] As previously mentioned, Nelson and Trubek appear to subscribe to the premises advocated by intereactionism. For instance, they state:

> … lawyer professionalism is not a fixed, unitary set of values, but instead consists of multiple visions of what constitutes proper behaviour by lawyers. Conceptions of lawyer professionalism reflect "the arenas" in which they are produced, that is, the particular institutional settings in which groups construct, explicitly or implicitly, models of the law and of lawyering. The arenas perspective allows for the possibility that different groups will develop different versions of the professional ideal in response to a variety of political, ideological, and situational concerns.[174]

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[163] Ibid 244.
[164] Haralambos, et al., above n 17, 1058.
[165] This is a picture of themselves as others see them - Ibid 15.
[166] Ibid.
[167] Ibid 16.
[168] Ibid 1058.
[169] Ibid 1056. Although this is contested by Plummer, above n 160, 225.
[170] Haralambos, et al., above n 17, 1058.
[171] Ibid.
[172] Macdonald, above n 124, 4.
[173] Saks, above n 126, 4.
[174] Nelson, et al, above n 21, 179. This view appears to agree with those expressed by Mather, et al., above n 10. She speaks of "communities of practice". Although it could also be referring to the effect of culture and suggesting that each firm has its own understanding of professionalism, as opposed to groups of practitioners practising a particular area of law.

These authors, in accepting that the culture of the institution can influence the type of professionalism practised by the individuals within them, also recognise that there is "considerable room for manoeuvre by the individual and collective actors who participate in any given domain of the legal system."[175]

As it has been noted, sociological research refers to the professions collectively. There is very little work that examines the understandings of individual practitioners.[176] The thesis seeks to make some effort to rectify this by interviewing individuals and analysing the data collected. [177] Therefore, this thesis is taking a qualitative approach. In some respects it relies on some of the elements associated with interactionism, but it stops short of adopting interactionist methodology.

(ii) Cultural

Another theory that looks at individuals is that proffered by Bledstein.[178] His view emphasises the formulation of the professions as a cultural demand that resulted in the middle class being able to achieve cultural control and social status while serving society.[179] In this aspect the theory is similar to the market control theory discussed above, yet it focuses on the actions of individuals rather than professions as organizations. However, it also asserts that members of professions use their expert knowledge to solve the problems facing the community.[180] It suggests that lawyers are:

> self-reliant, independent, ambitious, and mentally organised. … the professional person absolutely protected his precious autonomy against all assailants, not in the name of an irrational egotism but in the name of a special grasp of the universe and a special place in it. In the service of mankind – the highest ideal – the professional resisted all corporate encroachments and regulations upon his independence, whether from government bureaucrats, university trustees, business administrators, public laymen, or even his own professional associations. The culture of professionalism released the creative energies of the free person who was usually accountable only to himself and his personal interpretation of the ethical standards of his profession.[181]

[175] Nelson, et al, above n 11, 23-24.
[176] Many of the students that have been conducted will be referred to in the appropriate sections.
[177] The Methodology Chapter, Chapter IV explains this approach in more detail.
[178] Bledstein, above n 156.
[179] Ibid ix.
[180] Pue, above n 75, 406-408.
[181] Bledstein, above n 156, 92.

While this, at first glance, might appear to be a theory that espouses altruism, and therefore has a similar focus to structural-functionalism, Bledstein notes in the preface to his book that the driving force behind the decisions made by the individual professional is "structuring society according to a distinct vision – the vertical one of career. … improving his worldly lot as he offered his services to society …".[182] Therefore, according to this theory, individuals make choices but they are shaped by what they believe is important. According to Bledstein's analysis, for professionals it is the desire to promote their own career prospects.

Both interactionism and cultural theories show that there is a role for individuals in determining how they conduct themselves. While interactionism suggests that individual practitioners ought to be consulted, culture theory asserts that individuals will act according to their own interests.

(c) Summary of Sociological Theories

As noted, most sociological theories that examine the professional body make assumptions about the behaviour of the individual members. So, professionalism for these theorists is the developed state of certain vocations and implicit within this is an expectation that the professions as a whole and their individual members will conduct themselves in a particular way. Some assert that the professions use professionalism to legitimate their existence in an effort to pursue wealth. On the other hand, others claim that professionalism ensures that the public interest is served.

More specifically though, there are other sociological accounts, particularly interactionism and cultural theory, that recognise the resulting type of professionalism that is practised is not dependent on the professional body at all but entirely driven by the ideological or philosophical perspective of each individual professional.

Table 1 sets out the different sociological theories as they relate to professionalism.

[182] Ibid ix-x.

Table 1 - Summary of Sociological Theories (noting, however, that many of these authors can be classified under a number of theories.)

Theory	Focus	Theorists	Professionalism
Structural/Trait	Professions as organisations	Wilensky, Caplow, Millerson	A list of attributes that represent the core features needed to provide a qualitative service to the public – serving the public interest.
Functional	Professions as organisations	Carr-Saunders, Wilson and Parsons	Providing a service altruistically to the community that only professionals can fulfil (this approach relies on the attributes identified by the structural/trait theory.)
Marxism	Professions as organisations	Marx	The professions aligning themselves with the state in an effort to protect their position in society and use their power / authority to control others and promote self-interest.
Market Control	Professions as organisations	Weber, Larson, Abel and Abbott	Professions creating a monopoly over services to promote self-interest.
Knowledge / Power	Professions as organisations but some explanatory power for individual action	Foucault, Freidson and Abbott	Professions using position / power to produce knowledge to legitimise position.
Interactionism	Individual professionals	Mead, Hughes, Becker and Freidson	Points to the need to empirically determine what individuals in professions believe. Individuals then construct meaning from their interactions with others and consequently determine how they should behave, thereby constructing their own individualistic idea of professionalism.
Cultural	Individual professionals	Bledstein	Individuals providing a service to the community but for their own career advance.

2 *Contemporary Labels*

Although the literature does not expressly link the sociological theories to the contemporary understandings of professionalism, it could be argued that traditional professionalism advances the ideals implicit in the structural/functionalist theories in that it claims to describe what professionals ought to be doing - achieving a service ideal. On the other hand, commercialised professionalism may be a description of the reality that the social conflict theorists describe – a reality where practitioners make every effort to ensure the ongoing reliance of the community on their services for their own self-preservation.

Society recognises the qualifications necessary to become a professional[183] and that these qualifications form the basis of the professional's relationship with clients, but the claims that being a professional includes a service element to society[184] are treated with suspicion or disbelief. Kultgen has tried to articulate what is meant by professional service in terms of this relationship:[185]

1. Professional service is altruistic.
2. The professional assumes responsibility for the affairs of others.
3. Professional service is indispensable for the public good.
4. Professionals are licensed, so their work is sanctioned by the community.
5. Professionals are independent practitioners, serving individual clients.

Scepticism concerning professionalism centres particularly on whether professionals really strive to attain this 'service ideal' that supposedly translates into 'public interest' needs being met.[186] Krtizer suggests that whatever the professional rhetoric, "few professionals are selfless actors seeking solely to advance their professional horizons or the well-being of humankind; professionals are workers who are engaged in an activity to earn a living. Professionals, like other workers, are concerned about both the size and the security of their livelihoods.".[187] A number of accounting commentators, including

[183] Society generally accepts that these qualifications distinguish a vocation from a profession. See the "Professionalisation" section above, p.21.
[184] Kultgen, above n 37.
[185] Ibid.
[186] William M. Sullivan, 'Markets vs. Professions: Value Added?' (2005) 134 *Daedalus* 19.
[187] Herbert M. Kritzer, 'The Dimensions of Lawyer-Client Relations: Notes Toward a Theory and a Field Study' (1984) 2 *American Bar Foundation Research Journal* 409, 413.

those who have conducted empirical studies, also state that accountants claim to be serving the public interest in an effort to protect their economic self-interest.[188]

Traditional professionalism claims that the professions act in the interests of the public, but this has been questioned. Do those in the professions believe that they are operating under the traditional professionalism paradigm? Does the service ideal form part of their practice or are they really conducting themselves in accordance with what might be called 'commercialised professionalism'? Both the traditional and the commercialised professionalism paradigms will now be discussed.[189]

(a) Traditional Professionalism

The most cited definition of professionalism is that articulated by Roscoe Pound:

> A profession is a group … pursuing a learned art as a common calling in the spirit of public service….[190]

Some authors agree that professionals can feel "a sense of calling",[191] but irrespective of that claim, the core values implicit in this definition are that professionals have expertise or knowledge, autonomy,[192] and that service to the public is of prime importance. Expressed in another way, the traditional professionalism paradigm is based on the premise that professionals will altruistically use their specialised knowledge and skills to advance the good of the community in preference to their own self-interest and in exchange they are given the privilege of self-regulation

[188] Lee, above n 40. A recent Canadian study has come to this conclusion – C. Grey, 'On Being a Professional in a "Big Six" Firm' (1998) 23 *Accounting, Organizations and Society* 569. This is the view of the Australian author L.D. Parker, 'Professional Accounting Body Ethics: In Search of the Private Interest' (1994) 19 *Accounting, Organizations and Society* 507 cited in Lee, above n 38, 61. Another Canadian study also concludes that claims to public service ring hollow – Dean Neu and R. T'Aerien, 'Remembering the Past: Ethics and the Canadian Chartered Accounting Profession, 1911-1925' (2000) 11 *Critical Perspectives on Accounting* 192, 209. Although there are other accounts that argue that the commercialised paradigm is a recent occurrence. For instance, Wyatt records the introduction of non-accounting personnel who eventually became partners as the problem that has produced this result. This changed the focus of the firms to commercial interests – See Wyatt, above n 40, 45.

[189] The interactionist and cultural theories, that focus on the individuals involved, will feature more predominantly in the discussion below on the explanation that psychology can offer to account for "difference within the practice environment.

[190] Pound, above n 77, 5.

[191] William M. Sullivan, *Work and Integrity: The Crisis and Promise of Professionalism in America* (2005) 36-40. Kronman also believes that a calling is part of professionalism: see Anthony T. Kronman, 'Legal Professionalism' (1999) 27 *Florida State University Law Review* 1.

[192] Rayman L. Solomon, 'Five Crises or One: The Concept of Legal Professionalism, 1925-1960' in Nelson et al, above n 11, 146.

(autonomy).[193] Gleeson CJ's definition contained in the Law Council of Australia's report takes a similar approach i.e., that professionals should seek to provide a service to the community.[194]

Traditional definitions of professionalism focus primarily on the conduct that professionals should exhibit when dealing with their clients, and in acknowledgement, more will be said below about this relationship, but it should also be noted that there is a more recent trend for professional rules to include some references to how lawyers, in particular, should act when dealing with other members of their profession. For instance, the section on "Communications" in the *Legal Profession (Solicitors) Rule* 2007 calls for lawyers to ensure that they uphold "the integrity and reputation of the legal profession by ensuring that the solicitor's communications are courteous and that the solicitor avoids offensive or provocative language or conduct."[195]

The definitions framed by legal academics are even more explicit with respect to the kind of conduct expected of professionals when interacting with other practitioners.[196] Terrell and Wildman speak of "A Respect for Other Lawyers and their work".[197] Heubner in particular refers to a form of etiquette[198] when he says that a "practitioner should possess a spirit of loyalty to fellow practitioners of helpfulness to the common cause they all profess, and should not allow any unprofessional acts to bring shame upon the entire profession".[199] Tremblay also makes the point that it is important that lawyers' practices are respected by other lawyers because he believes they have a desire to believe in the goodness of their daily work lives.[200] In recognition of the importance of maintaining a good relationship with other lawyers, Hutchinson acknowledges that practitioners consider their role as mentor to new entrants to the firm as their most important task and that they often equate professional etiquette rules with ethics.[201]

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[193] Russell G. Pearce, 'The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar' (1995) 70 *New York University Law Review* 1229.
[194] This is the definition of Gleeson, above n 47, 120.
[195] Queensland Law Society, *Legal Profession (Solicitors) Rule 2007*. See the Statement of general principle and paragraph 21.
[196] Anonymous, 'IADC Tenets of Professionalism' (2005) 72 *Defense Counsel Journal* 225. The International Association of Defense Counsel express what they believe are the highest ideals of professionalism in 13 tenets and included in these are statements about practitioners dealing with others.
[197] Timothy P. Terrell and James H. Wildman, 'Rethinking "Professionalism"' (1992) 41 *Emory Law Journal* 403.
[198] Wendel, above n 137, 571.
[199] Solomon S. Heubner cited in Ronald Duska, 'Professionalism Is More Important as the Market Changes' (1999) 103 *National Underwriter, Life & Health Financial Services* 13.
[200] Paul R. Tremblay, 'Moral Activism Manque' (Research Paper No 15, Boston College Law School, 2004) 18.
[201] Allan C. Hutchinson, *Legal Ethics and Professional Responsibility* (1999) 4.

It is interesting to note that the *Legal Profession (Solicitors) Rule* 2007 includes in a Statement of general principle under the heading "Relations with other practitioners" that solicitors ensure that their dealings are "consistent with the public interest."[202]

At a more theoretical level, and more in line with the traditional definitions of professionalism that concentrate on describing the professional/client relationship, a number of commentators have referred to this as a relationship that resembles a contract between the profession and society.[203]

> Perceiving a social need, and the profession's competence to handle it, the society negotiates a deal with the profession: the society will confer the benefits and privileges of a legal monopoly upon the group in return for a promise of public service, i.e., a promise to carry on professional practice in accordance with high standards of performance, for the public good.[204]

In accordance with the contractual concept, Paterson suggests that both parties have their expectations and obligations. For instance the profession (the lawyers' side) expects to be given high status, reasonable rewards, restraints on competition and autonomy.[205] The monopolistic situation that results is granted "as a sort of *quid pro quo*" with the profession providing competence, access to the legal system, a service ethic and public protection (the clients' side).[206] While describing the relationship between lawyers and society as contractual, Paterson asserts that there is "no assumption in this analysis that the balance between the two sides was a fair one, or that the parties to the 'contract' were equally matched, or that the profession gave good measure for what it received in terms of the 'bargain'".[207]

However, it is argued that society no longer acknowledges the arrangement[208] because the legal profession is breaching the agreement by focusing on serving clients

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[202] Queensland Law Society, *Legal Profession (Solicitors) Rule 2007*, 29. In fact the phrase "consistent with the public interest" features twice. Yet this may not be significant. This phrase may simply be reflecting the object of the Rule included on p. 5 that prescribes that each solicitor in serving the interests of justice must not be dishonest, act prejudicially to the administration of justice or act in a manner likely to diminish public confidence in the legal profession, the administration of justice or otherwise bring the legal profession into disrepute.

[203] An Australian academic calls the relationship a "compact" – a bargain with society. Simon Longstaff, 'The Lawyer's Duty to the Community' St James Ethics Centre, <http://ethics.org.au/things_to_read/articles_to_read/law_and_justice/article_0092.shtm> at 1 October 2003.

[204] L. Newton, 'Professionalization: The Intractable Plurality of Values' in W. Robinson, , M. Pritchard, and J. Ellin, (eds) *Profits and Professions* (1983) 34.

[205] Paterson, above n 80, 140.

[206] Ibid.

[207] Ibid.

[208] Pearce, above n 193.

to the detriment of protecting the public interest.[209] This possibly means that the traditional paradigm no longer reflects the reality of the practice of law. [210]

There are primarily two responses to this proposition. Kelly writes of these as narratives i.e., two different ways of interpreting what is happening. He suggests that one sees the adoption of business practices as renovating and improving the profession, while the other laments the professions' diminishing efforts to pursue the public good.[211] With respect to the latter narrative, Kronman warns that a decline in professionalism will result in the legal profession "losing its soul".[212] Rhode more recently claims that many practitioners believe they have lost quality of life by virtue of the billable hour requirements,[213] and feel that they have been short-changed in terms of their experience.[214] The common complaints include an inability to perform *pro bono* services, be involved in civic activities, and loss of family time.[215] In Australia, the Law Council too reports that "[a] number of recent studies portray today's legal workplace as characterised by long hours and dissatisfied workers. Many practitioners express regret in their career choice. A significant percentage, it is reported, are intending to leave their current position."[216] Schiltz's study in the US found that the "unrelenting pressure to bill hours" makes lawyers miserable.[217]

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[209] Simon Longstaff, 'Ethics Drive Needed to Restore Profession's Legitimacy' (1994) 32 *Law Society Journal* 29.
[210] Pearce, above n 193.
[211] Michael J. Kelly, *Lives of Lawyers: Journeys in the Organizations of Practice* (1994) 2-3.
[212] Kronman, above n 2, 1.
[213] Deborah L. Rhode, 'The Professionalism Problem' (1998) 39 *William & Mary Law Review* 283. Schiltz states that the 'unrelenting pressure to bill hours' makes lawyers miserable – Patrick J. Schiltz, 'Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney' (1998) 82 *Minnesotta Law Review* 705, 725.
[214] Krieger writes about his experiences teaching law students and discusses Maslow's hierarchy of human needs. The writings of Rhode and others appear to be describing situations where practitioners have been precluded from attaining the higher human needs of self-esteem and self-actualization, thereby affecting their growth motivation. See Lawrence S. Krieger, 'The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness' (2005) 11 *Clinical Law Review* 425, 427ff.
[215] Rhode, above n 213. Also see Patrick J. Schiltz, 'On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession' (1999) 52 *Vanderbilt Law Review* 871.
[216] Law Council of Australia, above n 47, 129. This report also refers (at 409) to a number of independent studies. One study published in 1999 by the Victorian Women Lawyers Association reported 'that up to 30% of private practitioners are considering leaving their current position.' Another study (at fn 410) by Lucinda Schmidt "shows that 44% of Sydney and Melbourne lawyers are considering leaving their present firm." The paper also reports (at fn 411) that "[a] senior legal recruiter has also stated that he believes that the majority of Queensland lawyers are unhappy at work and biding their time for the next 'plum job'." Whether these studies represent the situation for the whole of Australia is questionable since the Law Council discussion paper also reports (at fn 412) on a "survey conducted by the Law Society of South Australia in 2000 [which] showed that almost 80% of respondent practitioners were either satisfied or extremely satisfied with being a lawyer. 72% of respondents were also either satisfied or extremely satisfied with their current job." The report also reports that "Respondents to the Law Society of New South Wales Family Responsibilities Study queried (at fn 425) whether current practices were 'an honest

In response to a general recognition of these concerns, the American Bar Association established a commission that recommended[218] that lawyers dedicate themselves to pursuing "principle" over "profit" and "professionalism" over "commercialism".[219] The report also recommends that lawyers, as 'officers of the system of justice', strive for wealth only as an incidental outcome to their practices - in other words to serve the public.[220] The ABA is encouraging its members to "go beyond the incentives of the market and beyond the requirements of the professional rules - to seek justice, to be more honest and tolerant, to be less adversarial and selfish, and to give more of their time and resources to the poor."[221]

As a result, a number of American states have legislatively defined professionalism as distinct from ethical rules.[222] For instance the Minnesota State Bar Association states that professionalism relates "to the character and integrity of lawyers…the aspirational aspects of the practice of law -- how we ought to behave in our relations to each other…".[223] It continues by asserting that professionalism "deals with how we should behave even if there are no formal institutional sanctions, while legal ethics rules deal with how we must behave in order to avoid disciplinary sanctions."[224] The Florida Bar provides an analogy to illustrate:

> The Rules Regulating the Florida Bar are the **floor** that supports our status as a lawyer in good standing. Whereas professionalism is the **ceiling** or higher standard that all lawyers should aspire to.[225]

The same guidelines suggest that misconduct is the focus of ethics whereas professionalism means "helping, caring, protecting, counselling, and setting a good

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way to practise law.'". The report also refers to the Victorian Governor's warning (at fn 426) of a "'profound disenchantment' among young practitioners and stated that he believed that the profession was heading for a crisis." It makes the conclusion that "… today's young solicitors are often attracted to pro bono work. Firms are reportedly increasing their level of pro bono work as a means of attracting and retaining young idealistic practitioners."

[217] Schiltz, above n 215, 725.

[218] American Bar Association Commission on Professionalism, above n 26.

[219] American Bar Association Commission on Professionalism, above n 26, 1.

[220] Ibid 774-5.

[221] Robert Cochran Jr., 'Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternate Sources of Virtue' (2000) 14 *Notre Dame Journal of Law, Ethics & Public Policy* 305.

[222] See, for example, Supreme Court of Louisiana, *Rules for Continuing Legal Education*, r 3(c).

[223] Minnesota State Bar Association Professionalism Committee, 'Reports to the General Assembly', <http://www2.mnbar.org/Duluth98/gareport.html> at 31 March 2000.

[224] Ibid. Ciolino discusses the distinction between ethics and professionalism and states that the professional norms only deal with what lawyers shall and shall not do, whereas professionalism is concerned with the "shoulds" and the "should nots" – Dane S. Ciolino, 'Redefining Professionalism as Seeking' (2003) 49 *Loyola Law Review* 229, 233.

[225] Florida Bar Association Center for Professionalism, *CLE Guidelines*, <http://www.flabar.org/newflabar/profssionalism/cleguide.html> at 16 February 2000.

example."[226] The ideals and goals in the guidelines are not meant to be imposed on members but it is hoped that individual members will see their worth and strive to achieve them.[227]

A number of authors believe that a return to traditional professionalism can provide a solution to this malaise within the ranks of the legal profession. Gordon and Simon describe professionalism as having both "an institutional element and a moral element." Autonomy is the institutional element and the moral element falls to the individual professionals to contribute to the goals of society.[228] Therefore, it is argued that the re-establishment of the traditional professionalism paradigm would allow practitioners the scope to believe that they are answering a professional call in becoming lawyers and this could provide a cure for lawyer demoralization and depression.[229]

There is also an argument that a revitalised understanding of professionalism would bring economic rewards for the profession as a whole. For instance, one author commented "…some lawyers are realising that professionalism can be a selling point: best practice as good business."[230]

> … profit improvement can occur without sacrificing professionalism, when viewed over the long term. Short-term profit maximisation almost always requires a sacrifice of professional values. … Leaders need to reiterate continuously commitments to professional values, act accordingly, and never sacrifice professionalism for profit.[231]

There is also an increasing literature about corporate social responsibility which at its most general level conjures up visions of firms interested in using the gains of their business for the improvement of society. Corporate social responsibility is defined as "the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large."[232] Issues included in corporate

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[226] Ibid.
[227] Ibid.
[228] Robert W. Gordon and William H. Simon, 'The Redemption of Professionalism?' in Nelson et al, above n 11, 234.
[229] Carl T. Bogus, 'The Death of an Honorable Profession' (1996) 71 *Indiana Law Journal* 911 – He then goes on to propose that that this has to begin at law schools.
[230] John Heilemann, 'A Survey of the Legal Profession: On Trial' (1992) *The Economist* (London, UK), 18 July 1992, S3.
[231] Ward Bower, 'Legal Economics and Professionalism' (2002) Autumn *Australian Law Management Journal* 15, 16.
[232] Sally Hick, 'Ethics: Morals Maketh the Money' (2000) May *Australian CPA* 72, 72.

social responsibility are "human rights, worker rights, environmental impact, community involvement and supplier relations."[233]

During an interview about corporate philanthropy and the legal profession, a managing partner of one of Sydney's law firms, Gary Flowers, stated that "social responsibility, staff morale and business profits are not mutually exclusive as some economists affirm. … Financial profits are enhanced when a firm's social responsibility is given attention. This is for a range of reasons – morale, profile, and productivity. … when a firm takes its social responsibility seriously and thinks it through, the flow-on effects both to staff, profit and the community are better. There's no conflict."[234] Similar sentiments were expressed by Sally Hick when she encouraged accountants to seriously consider social responsibility, advocating that it would add more to the bottom line.[235]

Some law and accounting firms do give cash donations and/or align themselves with particular non-profit institutions. Some may suggest that these kinds of activities come within the concept of *pro bono*.[236] Conferences[237] and academic literature encourage professionals to participate in *pro bono* work, arguing that it generates a certain amount of public benefit. Although this positive view is presented, it also raises certain questions – for example, does this type of activity promote the firm's financial performance? Do the firms partake in these activities for that purpose? Boon and Abbey state that many large firms in the UK are using *pro bono* activities to re-establish their integrity in the eyes of the public.[238] Although Abel cynically suggests that these services "allow elite lawyers conspicuously to enact independence on behalf of vulnerable clients".[239] He quotes two partners from high profile firms concluding that providing these services "enables the firm to obtain a higher business profile" and that

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[233] Ibid.
[234] Lucy Limbers, 'Social Conscience – A Legal Responsibility' (2002) 27 *Alternative Law Journal* 29, 30.
[235] Hick, above n 232.
[236] Terrell and Wildman suggest that the call to provide *pro bono* services as a way of achieving professionalism is misguided. He argues that it is based on an assumption that lawyers need to provide a service to the poor because they have a monopoly over legal services, when in fact this monopoly no longer exists. See Terrell and Wildman, above n 197, 420-421.
[237] For example The Second National Pro Bono Conference: Transforming Access to Justice was held in Sydney in October 2003. See http://www.nationalprobono.org.au/conference/index.html
[238] Andrew Boon and Robert Abbey, 'Moral Agendas? Pro Bono Publico in Large Law Firms in the United Kingdom' (1997) 60 *Modern Law Review* 631. See also Cynthia Fuchs Epstein, 'Stricture and Structure: The Social and Cultural Context of Pro Bono Work in Wall Street Firms' (2002) 70 *Fordham Law Review* 1689, 1693-1694, where she argues that law firms advance their own self interest by performing pro bono work.
[239] Abel, above n 8, 495.

these practices are "part of the normal career progression", presumably undertaken by assistant solicitors, who have to make "a sacrifice of spare time and family time" (never firm time).'[240] Granfield and Koenig's study supports these comments finding that firms use participation in *pro bono* activities to bring in new clients.[241]

Some literature has found a limited correlation with profit enhancement for corporations participating in these activities.[242] However, another author states that corporations operate within neoclassical economic theory that requires all activities to be justified economically. This implies that "corporate socially responsible behaviour will simply cease when it becomes uneconomic, regardless of the impact on interrelated systems which in turn will re-impact the business realm."[243] Therefore it is questionable whether professionalism can produce profit. In this regard Sarat categorically states that there is "no market for ethics."[244]

An attempt to revitalise professionalism is one approach to the proposition that the practice of law no longer reflects the traditional understandings of professionalism. However, there is another narrative, as Kelly has recognised:[245] the assertion that there is now a new understanding of professionalism i.e., commercialised professionalism.

(b) Commercialised Professionalism

There is broad acceptance by some authors that increased competition and informed consumers are forcing professionals to offer services that are efficient, commercially aware, and economically profitable to clients.[246] This signifies a shift in the professions' goal from "performing a task for the 'public good' towards the concept of somebody

[240] Ibid 496.
[241] Robert Granfield and Thomas Koenig, '"It's Hard to Be a Human Being and a Lawyer": Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice' (2003) 105 *West Virginia Law Review* 495, 519.
[242] Satya Menon and Barbara E. Kahn, 'Corporate Sponsorships of Philanthropic Activities: When Do They Impact Perception of Sponsor Brand?' (2003) 13 *Journal of Consumer Psychology* 316; Bruce Seifert, Sara A. Morris, and Barbara R. Bartkus, 'Comparing Big Givers and Small Givers: Financial Correlates of Corporate Philanthropy', (2003) 45 *Journal of Business Ethics* 195; Homer H. Johnson, 'Does It Pay to Be Good? Social Responsibility and Financial Performance' (2003) November/December *Business Horizons* 34.
[243] Flora Stormer, 'Making the Shift: Moving from "Ethics Pays" to an Inter-Systems Model of Business' (2003) 44 *Journal of Business Ethics* 279, 279.
[244] Austin Sarat, 'Ethics in Litigation: Rhetoric of Crisis, Realities of Practice' in Deborah L. Rhode, 'Ethics in Practice' (Working Paper No 2, Stanford Public Law and Legal Theory Working Paper Series, 1999) 4.
[245] Kelly, above n 211, 2-3.
[246] Hanlon, above n 13, 345.

doing their job 'well or expertly'…"[247] and that these professionals are totally committed to the paying client as opposed to social service.[248] Authors writing of accounting assert this is the epitome of the new 'business' or commercialised professionalism paradigm.[249]

Hanlon advocates that professionals should acknowledge that they[250] now practice within 'commercialised professionalism', as he calls it.[251] He states that the skills for success within this paradigm are (a) technical ability; (b) managerial skill (the ability to balance budgets, manage the firm and satisfy clients);[252] and (c) entrepreneurial skills (the ability to bring in business).[253] He examines these skills to uncover the real aims of professionals. He shows that the ability to bring in new business is more highly regarded than the others, since this skill has a direct correlation to the creation of profit and concludes that "personal professional success is related to profitability, not to serving clients in need."[254] The pursuit of profit gives "the client a powerful voice in the creation of the professional service", and skews the service towards powerful clients "rather than the needs of all clients or the profession".[255] Hanlon continues by suggesting that new entrants to firms, through the socialisation process, are introduced to these attributes of professionalism and are particularly advised that those who are "commercially aware" may one day "make it to partner …"[256] Therefore, commercialised professionalism emphasises profit rather than service; it takes direction from clients rather than providing solutions; and even the managerial and entrepreneurial skills take precedence over technical ability.[257]

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[247] Ibid 346.
[248] Ibid 348.
[249] Lee, above n 40; Hanlon, above n 80, 50; Michael Clarke, 'The Professionalisation of Financial Advice in Britain' (1999) 48 *Sociological Review* 58.
[250] Particularly the corporate firms. Although Hanlon argues for a redefinition of professionalism towards a commercial-entrepreneurial approach, he still acknowledges that firms "serving individual, non-influential clients and markets" are trying to adhere to the traditional understanding of professionalism i.e., one that is more social service minded: Hanlon, above n 58, 799.
[251] Hanlon, above n 80, 50.
[252] See the discussion on managerialism in Chapter III, p. 87ff.
[253] Hanlon, above n 80.
[254] Ibid 50.
[255] Ibid.
[256] Hanlon, above n 13, 349. It has been suggested that it is now naïve to consider technical skills as the determinant that defines merit for promotional purposes – See Donald C. Langevoort, 'Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit, and the Corporate Promotion Tournament' (2004) 61 *Washington & Lee Law Review* 1615, 1625. This author suggests that there are other factors that can be more highly valued but ultimately the person who is promoted is one who is recognises what is valued and accommodates those characteristics into his work practices.
[257] Hanlon, above n 80.

In acknowledging that legal practice requires business efficiencies, some authors have attempted to accommodate these. Pearce argues that the professionalism paradigm is outdated and that the legal profession should openly acknowledge it now practices in a "business paradigm". However, his model seems to accommodate some social service aspects in that he maintains that it is still important to "provide clients with high quality services and … to promote the common good …" and that they should be regulated by a professional body.[258] Therefore Pearce is suggesting what he calls a "middle range" course that distinguishes the practice of law from "ordinary" businesses.[259]

Trilling asserts that "from the average lawyer's perspective, clients themselves do not immediately appear all that important to the process. A client has a legal matter which he or she may not understand and cannot resolve without a lawyer, who then takes over and fervently wishes that from this point forward the client would just go away until the bill is prepared."[260] Trilling proposes that lawyers, the court system, law schools and in-house counsel should adopt business methods into their practices and that this would improve their service in terms of quality and produce client satisfaction,[261] even for clients who cannot pay. He is not advocating that lawyers should completely focus on profit but should use the disposable time that efficiencies of time and labour produce to serve clients less fortunate than their paying clients:[262]

> Being more efficient and/or more productive for the same number of work hours offers higher profits for the lawyer and lower costs for the client. Lawyers could devote more time to pro bono efforts; courts could stretch their limited resources farther; and law schools could produce graduates prepared for the business of law.

While both Pearce and Trilling accommodate the use of business strategies, on closer examination they are not promoting a commercialised paradigm as described by Hanlon. In fact Stempel calls Pearce's "middle range" course "an impoverished version of the professionalism paradigm, or wishful thinking about modern business ethics."[263]

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[258] Pearce, above n 193, 1268.
[259] Ibid.
[260] Frederick L. Trilling, 'The Strategic Application of Business Methods to the Practice of Law' (1998) 38 *Washburn Law Journal* 13, 53.
[261] Ibid 16.
[262] Ibid 20, 78. This is Pearce's argument too. He argues that this paradigm will 'enable the development of a moral vision of the role of the legal services provider,' and that the reduced costs would allow more people to have access to justice - Pearce, above n 193.
[263] Jeffrey W. Stempel, 'Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession' (1999) 27 *Florida State University Law Review* 25, 60.

Commercialised professionalism positions the provision of legal services in the market with other providers.[264] The criticisms of this result are best summarised by the remarks of Spiegelman J. in comparing the traditional understanding of professionalism to the activities of the market. He suggests that a profession values historical traditions, whereas "a market wakes up every morning with a completely blank mind … a profession has an ethical dimension and values justice, truth and fairness. The market recognises self-interest and self-interest alone. … the operation of a market gives absolute priority to a client's interest. A profession gives those interests substantial weight, but it is not an absolute weight."[265]

As suggested in the introduction, there has been very little empirical work associated with the professions, and even the work that has been undertaken narrowly focuses on what happens in the lawyer/client relationship in terms of who has the authority or control. Yet although these studies do not ask individual practitioners about their understandings of professionalism specifically, they do provide some useful insights.

Hanlon concludes that large firms function within commercialized professionalism whereas solo or small firms appear to espouse a social service ethos.[266] However, he also suggests smaller firms do this for survival purposes, realizing a total shift to a market position would force them to "standardise their working practices" and make them vulnerable to other non-legal competitors.[267] This view appears to be substantiated by the findings of Gray et al from interviews with Sydney suburban law firms.[268] They report that the participating practitioners stress the "importance of retaining professionalism while adapting to changes … [and] to remain professional as opposed to 'just a business'". Yet these comments are quickly followed by statements that imply that their keenness to retain elements of professionalism is generated by their desire to distinguish themselves from their competition from within the profession itself

[264] In Australia the new regulatory system supports this approach. See Chapter III below.
[265] Justice Spiegelman, 'The Value of an Independent Bench and Bar' (1998) 17 *Australian Bar Review* 105, 106.
[266] Hanlon, above n 60, 821. Hanlon believes that the distinction arises around the differing levels of sophistication of the clients. Ibid 813.
[267] Ibid 821.
[268] John Gray, Philip King and Robin Woellner, 'Facing Up to Change' (1998) 36 *Law Society Journal* 44. It also seems possible that this study was conducted in response to the debate over the acceptance of multi-disciplinary practices particularly since the authors conclude "There is marked tension between professionalism and managerialism …", therefore their use of the word professionalism could simply be a reference to retaining partnership as the desired structure for law practices.

and increasingly, from accounting firms and international legal firms, in attracting clients.[269]

The work of Heinz and Laumann emphasises the divide between large firms dealing with the corporate world and those who service individual clients, yet their conclusions about professionalism centre on who holds the power in the lawyer/client relationship. They find that the "more prestigious" the firm, the "less independent" they are, recognizing that corporate clients dictate what they want the lawyers to do, yet the lawyers who service individual clients are considered to have the authority in the relationship.[270] The claim that lawyers dominate the lawyer/client relationship is also a finding of Mather et al[271] but in terms of professionalism i.e., how lawyers conduct themselves, they find that divorce lawyers look to their "communities of practice" for guidance on how to make their decisions.[272]

Interestingly, a very recent study that was primarily researching the relationship between student learning and perceptions of working as legal professions found that the law students they interviewed believed that their role would be one of "'helping people' to take part 'positively' in legal situations … as a way to contribute to the orderly working of society".[273] This belief appears to set these future practitioners apart from the reality described above.

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[269] Ibid. It also seems possible that this study was conducted in response to the debate over the acceptance of multi-disciplinary practices particularly since the authors conclude 'There is marked tension between professionalism and managerialism …', therefore their use of the word professionalism could simply be a reference to retaining partnership as the desired structure for law practices.

[270] Heinz and Laumann, above n 60, 171. Other studies also recognise the control that corporate clients have over large firms. See Robert L. Nelson, 'Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Firm' (1985) 37 *Stanford Law Review* 503 and Herbert M. Kritzer, 'Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship' (1998) 23 *Law & Society Inquiry* 795, 812.

[271] Lynn M. Mather, Richard J. Maiman, and Craig A. McEwen, '"The Passenger Decides on the Destination and I Decide on the Route": Are Divorce Lawyers "Expensive Cab Drivers?"' (1995) 9 *International Journal of Law and the Family* 286. Rosenthal found similarly with respect to personal injury matters – Douglas E. Rosenthal, *Lawyers and Client: Who's in Charge?* (1974). Abel would also agree – Richard Abel, *American Lawyers* (1989) 204. Although another well respected study sees dominance as fluctuating – William L.F. Felstiner and Austin Sarat, 'Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions' (1992) 77 *Cornell Law Review* 1447.

[272] Mather, et al., above n 10. The communities of practice included the firm within which they are working but these authors particularly highlighted that practitioners are also influenced by other practitioners practising in the same category of law. These other colleagues are particularly important for the participants in this study since it focussed on solo and small firm lawyers with 28% practising alone, 53% in firms of two to 5 and only 12% in firms where there were more than 10 lawyers: ibid 57. In the work of Mather et al this was Family Law. The work of Mather et al will again feature in the discussion of "culture" in Chapter III, pp. 90ff.

[273] Anna Reid, Vijaya Nagarajan and Emma Dortins, 'The Experience of Becoming a Legal Professional' (2006) 25 *Higher Education Research and Development* 85, 94.

One researcher in the accounting field refers to the fact that the meaning of professionalism can be determined by examining the practices of members of professions.[274] To determine what it is to be a professional or to possess professionalism Grey conducted a case study of one of the "Big Six" accounting firms in the United Kingdom. He found that these professionals equate professionalism with technical competence but he also recognised that other characteristics of aggressiveness in business dealings, being competitive, and hardworking, along with other behavioural factors, like dress codes,[275] are important to their firms.[276] Grey also found that professionals need to cultivate the right kind of friendships. To be too friendly with colleagues of a lower status might inadvertently portray them as being comfortable with the "boffins" or the lower level workers, damaging their promotional prospects.[277]

D *Conclusion*

This chapter has described the manner in which sociological theories attempt to explain why certain vocations are accepted as professions. Some of these theories are normative in nature, claiming that professions should provide a service to the public, whereas others describe the professions as organisations intent on carving out a niche for themselves in the market, ensuring that there will be a demand for their services. To a certain extent, the tenets of these sociological theories resonate in two contemporary labels that are commonly used to define professionalism. It is suggested that the traditional professionalism paradigm aligns with the structural/functional theory that suggests professionals ought to aspire to a service ideal, and the reality of practice implied by the conflict theorists, and on an individual level the cultural theory share some common views with the commercialised professionalism paradigm.

Both the sociological and contemporary understandings of professionalism are based on the behaviour of those in the professions. Interactionism does not express a specific view on how members of professions will act, and so does not propound a particular corporate version of professionalism for the professions. It sees value in determining the thoughts of individuals in practice to determine what model of professionalism is

[274] Grey, above n 188, 577.
[275] Some interviewees expressed the view that women had to be careful how they dressed because if a woman failed to conform to the expected dress code she would be portrayed as unprofessional and a "bimbo".
[276] Ibid.
[277] Ibid.

being applied, which in turn allows a determination to be made about an individual's conception of lawyering.

The thesis, while not taking an interactionist approach in the sense in which this approach is commonly understood, makes use of some of its insights to seek answers to the many questions surrounding professionalism. In particular, what do individual practitioners think of professionalism? Assuming that professions claim that they are operating under the traditional professionalism paradigm, is this claim justified? Does the service ideal form part of the practice reality? What conception of lawyering guides the behaviour of legal practitioners in practice? The next chapter provides the theoretical background drawn on to address this last question.

II CONCEPTIONS OF LAWYERING

The discussion in the previous chapter suggests, as does Interactionist theory in particular, that a practical understanding of professionalism invites an examination of the conduct of those who are members of the professions and what shapes this conduct. A number of theories try to describe the role of the lawyer. These are commonly referred to as conceptions of lawyering. While the standard conception of laywering is the dominant theory, alternative views have been proposed.

The standard conception of lawyering encourages lawyers to determine their conduct by considering their duties. While this model emphasises the clients' interests, it also recognises that lawyers owe duties to the court and to the administration of justice generally. These duties to the client, the court and the administration of justice are often collectively referred to as lawyers' ethical responsibilities. In practical terms they guide lawyers on how they "ought" to act. However, this implicitly seems to suggest that there is a choice to be made, and consequently there is much confusion about what it means to be "ethical". Generally the debate turns on whether ethical considerations can be determined simply by referring to rules (ethical codes) developed by professional bodies to guide lawyers in dealing with situations that they will encounter, or by conscience.[278]

In America these duties are generally recorded in ethical codes, yet in Australia, while there are various guidelines like the Legal Profession (Solicitors) Rule 2007 in Queensland, case law and statutes also dictate how lawyers should act. It is interesting to note that there is an increasing trend in Australia to codify what is expected of lawyers, and this codification often reflects what has been decided in cases. For instance, the Legal Profession (Solicitors) Rule 2007 in 12.1 attempts to define what might be thought to be a standard conception of lawyering. It emphasises a distinct role for the lawyer in advocacy situations:

> 12.1 A practitioner must seek to advance and protect the client's interests to the best of the practitioner's skill and diligence, uninfluenced by the practitioner's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the practitioner

[278] This thought is drawn from the short play featuring Socrates and law students - James R. Elkins 'Lawyer Ethics: A Pedagogical Mosaic' (2000) 14 *Notre Dame Journal of Law Ethics and Public Policy*, 117. Of course, it is also the case that the law of lawyering is determined by statutes and the common law, and the principles of the cases are often used as the basis upon which the rules are created.

> or any other person, and always in accordance with the law including these Rules.

As noted below, the standard conception of lawyering is the predominant model in America, yet in recent years American theorists have suggested other theoretical conceptions of lawyering. These alternative models focus on providing other frameworks within which lawyers should make decisions when confronted with professional or ethical questions, particularly in dealing with their clients. These models require them to rethink the assumptions that underlie the conventional understanding of what it means to be a lawyer and conduct a moral inquiry into the service they are providing.

This chapter will initially consider the effectiveness of ethical codes as guides to lawyering. It will then discuss the standard conception of lawyering theory more specifically before reflecting on the claims in the alternative theories.

A *Ethical Codes*

It is often the case that ethical expectations, perhaps originally identified in case law, are outlined in a written ethical code. Codes of conduct/ethics form the basis of behaviour that is generally of a higher standard than that required by law. The Greek word *ethos* (character), and the Latin word *mores* (customs), form the basis of the word ethics which, taken together, prescribe the way that people interact with others i.e., determine their responsibilities and duties to others.[279] In professional settings this is referred to as how they "practise" i.e., "the kinds of things he [or she, the lawyer] does, the kinds of clients he has, the range of cases he is called upon to handle."[280] Professional bodies, it is sometimes suggested, tend to endorse the view that their behaviour is founded in codes or on principles usually expressed in codes as a means for assuring the public that they are competent and act with integrity.[281] However, some commentators see such

[279] Legal Information Institute, *Ethics: An Overview* (1999) <http://www.lawcornell.edu/topics/ethics.html> cited in Susan M. Anstead, 'Law Versus Ethics in Management' July 6, 1999. Available at SSRN: http://ssrn.com/abstract=255298, 3.
[280] Schon, above n 24, 60.
[281] Nicola Higgs-Kleyn and Dimitri Kapelianis, 'The Role of Professional Codes in Regulating Ethical Conduct' (1999) 19 *Journal of Business Ethics* 363.

codes as purely public relations documents that "are self-serving in that they protect the economic interests of the profession rather than the public good …".[282]

It is thought that "professional codes are supposed to help lawyers choose among two or more legal courses of conduct."[283] However, it is widely recognised that they are incapable of providing definitive answers in difficult situations.[284] It is also suggested that the principles underlying ethics are less clear than principles that enunciate the substantive areas of law.[285] Terrell, states that students and lawyers are often perplexed by the unsatisfactory guidance given for professional behaviour. He disagrees, however, with the view that principles that guide the substantive areas of law are clearer. He believes these too are sometimes vague, but notes that students and lawyers are less concerned about this eventually. He suggests that there is an acceptance because there is a need for differing options to be available to them in representing their clients. However, they find it difficult to accept the ambiguity surrounding the principles that guide their personal behaviour.[286]

Empirically there are differing views on the effectiveness or usefulness of such codes. Some researchers have found that the participants in their studies place very little reliance on ethical codes.[287] Zacharias notes:[288]

> The codes do not tell lawyers how to reconcile conflicts between their personal sense of ethics and the rules … they do not establish that moral individuals should be willing to participate in the role-differentiated system. Nor do the codes speak to the issue of how participating lawyers should act, as moral individuals, when they believe the system is flawed.

Daicoff finds that "attorneys appear to approach ethical decisionmaking on a case-by-case basis," and do "not rely on laws, rules and regulations as the reasons for their

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[282] K. Jamal and N.E. Bowie, 'Theoretical Considerations for a Meaningful Code of Professional Ethics' (1995) 14 *Journal of Business Ethics* 703 cited in Higgs-Kleyn, et al, above n 280, 710.
[283] F.C. Zacharias, 'Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics' (1993) 69 *Notre Dame Law Review* 223, 231.
[284] The difficulties surrounding the application of principles stated in codes have been mentioned by Australian text writers such as Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (3rd ed, 2001) 198 and Julian Disney, *Lawyers* (2nd ed, 1986) 598.
[285] Ross, above n 284, 198.
[286] Timothy P. Terrell, 'Turmoil at the Normative Core of Lawyering: Uncomfortable Lessons from the "Metaethics" of Legal Ethics' (2000) 49 *Emory Law Journal* 87.
[287] Leslie C. Levin, 'The Ethical World of Solo and Small Law Firm Practitioners' (2004) 41 *Houston Law Review* 309, 318. See also Margaret Ann Wilkinson, Christa Walker and Peter Mercer, 'Do Codes of Ethics Actually Shape Legal Practice?' (2000) 45 *McGill Law Journal* 645, whose study included practitioners from a variety of settings; and Mather, et al above n 10.
[288] Zacharias, above n 283, 288.

decisions."[289] She also finds that "lawyers' ethics codes seem to function as minimum standards for ethical behaviour" suggesting that this supports the view that "ethics codes fail to promote professionalism"[290] in that they do not provide adequate guidance in establishing optimal behaviour.[291]

Yet other studies suggest that lawyers, who are mostly categorised as "thinkers" according to the Myers-Briggs type indicator,[292] make decisions primarily on rules, as opposed to considerations of what is morally right and wrong.[293] It is suggested that lawyers have "thinking" personalities, which means that they prefer to bring a matter logically and orderly to a close using rules, as opposed to being influenced by their own personal values as would those people who are categorised as having a "feeling" personality style. [294]

Gordon's findings suggest that lawyers believe that trying to engage in a moral argument, particularly with business clients, would be considered preaching. They suggest that if they think there is a moral point to make, they will couch it in the instrumental terms of risk analysis. For instance, they might suggest to the client, "If we do this, there is a risk the judge will sanction us by dismissing our cross-complaint".[295] These lawyers also appear to be concerned about their own reputations.[296]

There is very little literature that focuses on the ethical understandings of students. Tranter interviewed first year students and found that their understanding of legal ethics to be very vague. He concluded that students regarded ethics as the private, subjective realm of morality.[297] Evans interviewed students in their final year of study about their

[289] Susan Daicoff, '(Oxymoron?) Ethical Decisionmaking by Attorneys: An Empirical Study' (1996) 48 *Florida Law Review* 197, 201.
[290] Ibid 292.
[291] Ibid 247.
[292] Vernellia R. Randall, 'The Myers-Briggs Type Indicator, First Year Law Students and Performance' (1995) 26 *Cumberland Law Review* 63, 91.
[293] Lawrence J. Landwehr, 'Lawyers as Social Progressives or Reactionaries: The Law and Order Cognitive Orientation of Lawyers' (1982) 7 *Law and Psychology Review* 39, 50-51 cited in Daicoff, above n 289, 217.
[294] Susan J. Bell and Lawrence R. Richard, 'Anatomy of a Lawyer: Personality and Long Term Career Satisfaction' in Susan J. Bell (ed) *Do You Really Want to be a Lawyer?* (2nd ed, 1992) 149, 152 cited in Daicoff, above n 289, 218.
[295] Robert W. Gordon, 'The Ethical Worlds of Large-Firm Litigators: Preliminary Observations' (1998-1999) 67 *Fordham Law Review* 709, 733.
[296] Ibid.
[297] Kieran Tranter, '"Ethical, ooh, Yeah Ethical is Yeah, What's Right Yeah": A Snapshot of First Year Law Students' Conception of Legal Ethics' (2004) 7 *Legal Ethics* 85. Tranter's thesis centres on accountability to the good and probably agrees with the views of Strassberg and more particularly Levine.

values. He found that their ethical decisions were shaped by their views of justice and gender issues, amongst other values.[298]

As noted previously,[299] the ABA and other American State bars have stated that simply adhering to ethical rules is not enough to satisfy the traditional professionalism paradigm,[300] even though they were originally introduced to support the idea that lawyers should objectively serve the client in a way that achieved public interest aims. According to the ABA, professionalism means providing a service that goes beyond the required rules. However, there is an acknowledgement that statements like this are vague:[301]

> [C]oncluding that professionalism is "something extra" over and above what is mandated by disciplinary rules provides no guidance regarding *what* this "something extra" is, *how we are to deliver that which is more "broadly expected" of us, and* who exactly is "expecting" whatever it is he is expecting.

Legal ethics is defined as both the "so-called self-regulatory system out of which the legal profession's codes emerge" and "in the quite different sense of applied moral philosophy in the field of legal service."[302] Luban and Rhode acknowledge the importance of codes but they state that "legal ethics" is "a special case of ethics in general, as ethics is understood in the central traditions of philosophy and religion," must also be part of a lawyer's ethical analysis.[303] In this view "a code might well be a part of legal ethics, but it is not the end of it."[304] O'Dair has made a study of the effects of regulation including ethical codes and concludes that:[305]

> … there are distinct limits to what can be achieved by regulatory control of the legal profession. Put another way, rules accompanied by the threat of sanctions are likely to be relatively ineffective as a means of controlling

[298] Adrian Evans, 'Australian Law Students' Perception of Their Values: Interim Results in the First Year – 2001 – of a Three-Year Empirical Assessment' (2002) 5 *Legal Ethics* 103, 105; Adrian Evans, 'Lawyers' Perceptions of Their Values: An Empirical Assessment of Monash University Graduates in Law, 1980-1998' (2001) 12 *Legal Education Review* 209, 260-261.
[299] Chapter I, pp. 43ff.
[300] Chapter I, p. 43.
[301] Ciolino, above n 224, 234.
[302] Charles W. Wolfram, *Modern Legal Ethics* (1996) v cited in Gregory N. Smith, 'Ethics v Professionalism and the Louisiana Supreme Court' (1998) 58 *Louisiana Law Review* 539, 549.
[303] Deborah L. Rhode and David Luban, *Legal Ethics* (4th ed, 2004) 3.
[304] Smith, above n 301, 550.
[305] Richard O'Dair, *Legal Ethics: Text and Materials* (2001) 5. O'Dair suggests that the mechanisms in place to deal with misbehaviour by lawyers suffer from agency and externality problems and render them inefficient.

> unethical behaviour. One reason for this is that so much of the work done by lawyers takes place in private settings and is unobservable by regulators. … As a result everything will depend on the ethical sensitivity and commitment of the practitioners involved.

O'Dair concludes that an individual practitioner's conduct is shaped by their commitment to their own philosophical perspective. However, this also raises questions about the role of the individual lawyer dealing with clients. Should a lawyer give prominence to the client or the legal system?[306] Are the means of giving the service more important than the consequences of that service?[307] What about situations where the lawyer sees the client as immoral? What happens when there is a difference between what a client wants a lawyer to do and what the lawyer believes is the 'right' thing to do? For instance, it has been stated that "… lawyers routinely do things for clients that harm third parties and would therefore be immoral, even in the lawyers' eyes, if done for themselves or for non-clients."[308]

Hazard argues that there are "relevant others" whose interests need to be considered along with the relevant rules and regulations involved.[309] While the parties to the matter are the actor (the lawyer involved), the client, and the opposing party, he argues that there are two other players, the alternative person who could have been serviced by the lawyer and the political authority - the person to whom the lawyer is accountable in the organisation.[310]

How do individual practitioners make decisions about matters where their understanding of professionalism causes them to feel ill at ease with the client's instructions or with the firm's view of practice? As Hutchinson notes:[311]

> A crucial ethical dilemma that is understated by most commentators is the real-world problem of what young lawyers are to do about ethical qualms they have about what they are asked to do by older, supervising lawyers.

[306] Terrell, above n 286, 89-90.
[307] Ibid.
[308] Ted Schneyer, 'Moral Philosophy's Standard Misconception of Legal Ethics' (1984) *Wisconsin Law Review* 1529, 1532.
[309] Geoffrey C. Hazard Jr, 'Dimensions of Ethical Responsibility: Relevant Others' (1993) 54 *University of Pittsburgh Law Review* 965.
[310] Ibid 970-971.
[311] Hutchinson, above n 201, 55.

These ethical misgivings are not necessarily "big" problems concerning directions that would require practitioners to forge documents for example, but often relate to practitioners' beliefs they are expected to inflate pad bills or misrepresent facts. [312]

A growing body of literature suggests that lawyers need to consider both the law and its consequences when making decisions. Rhode asserts that lawyers must accept greater responsibility for the consequences of their professional actions; for the performance of the legal system; and for the effectiveness of bar regulatory processes. [313] This is a teleological approach. It recognises that:[314]

> Ethics, like law, links persons and actions to social consequences and helps us evaluate the harm that follows from choices, decisions, and actions made with too little regard for others.

A teleological approach is one that is ends-based/consequentionalist. It encourages lawyers to do whatever is right, whatever achieves the greatest amount of good.[315] This includes focussing on public policies that enhance society as a whole,[316] or tangible outcomes, such as ideals of fairness.[317] These lawyers will want to get a "good" result, a moral product, one that enforces rights but not at the expense of harmful consequences.[318]

Yet the standard conception of lawyering, which encourages lawyers to take a deontological approach - one that requires lawyers to do what their duty demands, regardless of the outcome[319] - remains dominant. This model will be discussed initially, followed by an examination of some alternative models.

B *Standard Conception of Lawyering*[320]

[312] Schiltz, above n 213, 714.
[313] Deborah L. Rhode, 'Law, Lawyers, and the Pursuit of Justice' (2001-2002) 70 *Fordham Law Review* 1543.
[314] Elkins, above n 278, 220.
[315] Donald Nicolson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (2000) 21.
[316] Terrell, above n 286, 102-103.
[317] Nicolson and Webb, above n 315.
[318] Ibid, 13, 20.
[319] Terrell, above n 286, 133. Yet the distinction is not as clear as this, since some authors like Luban and Rhode who note that there are some deontologists who believe that consequences can be considered in defining rights – Rhode and Luban, above n 303, 10.
[320] This term originated with Gerald J. Postema, 'Moral Responsibility in Professional Ethics' (1980) 55 *New York University Law Review* 63, 73.

The prevailing model for lawyering in most common law countries is the "standard conception".[321] It encourages lawyers to act zealously for their clients. It advocates that lawyers are simply playing a role that effectively separates them from the consequences of a client's actions.

The principles of this model are variously described[322] as "role morality";[323] role differentiation;[324] the libertarian approach,[325] the lawyer's amoral ethical role,[326] and the robust differentiation paradigm.[327] This model condones lawyers encouraging and supporting clients in the pursuit of lawful goals that they personally would consider unethical.

The model essentially ascribes to the view that 'there are certain moral duties and responsibilities which change as we move between roles. So duties or responsibilities which attach to special roles may conflict with those acceptable by reference to ordinary roles.'[328] Wolgast puts this more bluntly: "A framework is thus created where moral considerations are blocked from view, where people allow themselves to do what they might otherwise shrink from".[329]

This concept is founded upon two principles, neutrality (or sometimes referred to as nonaccountability) and partisanship. O'Dair defines these as follows:[330]

> **The Principle of Neutrality**: the lawyer may (and if no other lawyer is willing to represent a potential client *must)* represent people who wish to employ the lawyer's services regardless of the lawyer's opinion of the justice of the cause. In so doing, however, the lawyer is absolved of any moral responsibility for acts done in the name of the client.

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[321] William Simon, 'The Ideology of the Advocacy System: Procedural Justice and Professional Ethics' (1978) *Wisconsin Law Review* 29, 36. Whelan compares the situation in the UK and the USA and suggests that there is a much stronger collegial influence in the UK than the USA – Christopher J. Whelan, 'Ethical Conflicts in Legal Practice: Creating Professional Responsibility' (2001) 52 *South Carolina Law Review* 697. This concept features in the current Legal Profession (Solicitors) Rule 2007 (Qld) see para 12.1 and the objects clauses on p. 7.

[322] See Samuel J. Levine, 'Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation' (2003) 37 *Indiana Law Review* 21 for a more complete list of names.

[323] David Luban (ed) *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (1983).

[324] Postema, above n 320.

[325] William H. Simon, 'Ethical Discretion in Lawyering' (1988) 101 *Harvard Law Review* 1083, 1084-1085.

[326] David Luban, *Lawyers and Justice: An Ethical Study* (1988) 109.

[327] Alvin Esau, 'Professional Ethics and Personal Ethics' (Speech delivered at the Murray Fraser Lecture on Professional Responsibility, University of Victoria, 1 March 1989) <http://www.umanitoba.ca/Law/Courses/esau/lppr/ethics.htm> at 16 August 2006.

[328] Margaret Blackburn and Peter McGhee, 'Talking Virtue: Professionalism and Virtue Ethics' (2004) 5 *Global Virtue Ethics Review* 90.

[329] Elizabeth Wolgast, *Ethics of an Artificial Person: Lost Responsibility in Professions and Organisations* (1992) 89.

[330] O'Dair, above n 305, 134. Perlman suggests that lawyers simply 'follow their clients' wishes' – Andrew M. Perlman, 'A Career Choice Critique of Legal Ethics Theory' (2001) 31 *Seaton Hall Law Review* 829, 845.

> **The Principle of Partisanship**: the lawyer is permitted and required to do everything to further the client's interests provided only that it is neither technically illegal nor a clear breach of a rule of conduct. The principle holds even when it clearly thwarts the aims of the substantive law.

Esau calls this model "robust differentiation" and suggests that it requires a separation of professional and personal values:[331]

> Here we have the notion of entering into a different world, acting out a role according to a given script, marching to the beat of different institutions and ideologies than our own. In short, we move from the world of common interpersonal morality to the world of special institutional morality.[332]

Pepper defends the standard conception in his formulation of the first-class citizenship model.[333] He suggests that if morality is introduced into the equation it is by the client[334] who draws on religion, community or family.[335] The lawyer is simply an amoral technician applying the law, perhaps manipulatively.[336] This model is based on libertarian views that if the law gives someone a right to do something with their property then they should be free to do so and they should not be constrained by the consequential effects or the lawyer's morals. Therefore this approach is founded on client autonomy, restrained only "by the limits of law".[337] However, Pepper does acknowledge that "[i]f one cannot rely on the client or an alternative social institution to provide that guide, to suggest a moral restraint on that which is legally available, then what the lawyer does may be evil: lawyers in the aggregate may consistently guide clients away from moral conduct and restraint."[338]

Dare, an ardent supporter of role-differentiation, argues that it allows lawyers to take pride in their role as they serve a particular function in a pluralist society, applying the law that has been established to achieve 'neutrality between the reasonable views

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[331] Esau, above n 327.
[332] Ibid.
[333] Stephen L. Pepper, 'The Lawyer's Amoral Ethical Role: A Defence, a Problem, and Some Possibilities' (1986) 11 *American Bar Foundation Research Journal* 613.
[334] Ibid 627.
[335] Ibid.
[336] Ibid 626.
[337] Stephen L. Pepper, 'Counselling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering' (1995) 104 *Yale Law Journal* 1545, 1599. Pepper's approach is really based on that of Charles Fried. Fried's approach is based on loyalty to the client as a friend. It advocates the furthering of a client's interests as both legally and morally right. See Charles Fried, 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation' (1976) 85 *Yale Law Journal* 1060.
[338] Pepper, above n 333, 627.

represented in the communities to which they apply.'[339] Therefore when a lawyer relies on individual judgment s/he ignores the appropriateness of the public decision to decide on that law in the first place.[340] Dare also argues that it is inappropriate to encourage lawyers to rely on their own morals since clients will not know what these morals are. Instead he argues that the "promulgation of a distinct professional morality is a way of publicising the ethical stances of the profession", and therefore the client will know the values that "govern the professional's conduct in the relationship".[341]

The codes, when viewed positivistically, are often considered literally and thereby categorise any "morally-motivated conduct not expressly permitted by them" as impermissible disobedience.[342] This is a deontological approach to rules or codes which assumes "that it is possible to identify principles that make behaviour right or wrong."[343] In practical terms, those who find it difficult to divorce their personal morals or values are faced with the possibility any refusal to act on their part may attract penalties,[344] if the disciplinary body deems their behaviour unprofessional.[345]

Whelan's explanation of the standard conception model recognises that it has a practical application in the adversarial system:[346]

> … a lawyer's role is to put aside personal views and to abide by the client's decisions concerning the objectives of representation. Representation of a client does not constitute approval of the client's views or activities. An advocate's duty is to argue; it is for the court to decide the outcome. Lawyers are expected to do the best they can for the client, so that "[t]he client's case should receive from the adviser the same level of care and attention as the client would himself exert if he had the knowledge and the means". In so doing the lawyer will give priority to clients' interests.

[339] Tim Dare, 'Virtue Ethics and Legal Ethics' (1998) 28 *Victoria University of Wellington Law Review* 141, 148. In this argument Dare is also answering the concerns of Kronman, by suggesting that instead of opposing the role-differentiated principles lawyers need to recognise that their role is significant and that they should take pride in the social role they play.
[340] Ibid.
[341] Ibid 153.
[342] Maura Strassberg, 'Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics' (1995) 80 *Iowa Law Review* 901, 901.
[343] Andrew Boon and Jennifer Levin, *The Ethics and Conduct of Lawyers in England and Wales* (1999) 37.
[344] Strassberg, above n 342, refers to the work of Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (1993) 304. She calls this 'civil disobedience'. In this respect Wendel points out that lawyers who adopt the alternative models suggested, may in fact be limiting their clients ability to access their legal entitlements. W. Bradley Wendel, 'Professionalism as Interpretation' (2005) 99 *Academic Research Library* 1167, 1200.
[345] Strassberg, above n 342.
[346] Whelan, above n 321, 701.

He also notes that practices within the adversarial system reinforce this model. The wearing of wigs and gowns and the adherence to the "cab-rank" rule, that dictates that barristers cannot refuse cases that are within their expertise, symbolically emphasise that the participants are performing a professional role as opposed to a personal one and therefore that their actions should not be "identified with the client or the cause".[347]

Empirical studies on lawyers' work raise questions about the application of the standard conception model to the practice of lawyering. The work of Granfield and Koenig reports that graduates are not prepared for the realities of practice. For example, one graduate said she had not realized how committed she was expected to be to clients, even the ones that she had moral doubts about such as large industrial organizations and tobacco firms.[348] The young practitioners recounted how they use role morality to appease their moral doubts. For instance they said they "hold to the letter of the code, believing that technical compliance absolves them of any blame".[349]

The participants in Sarat's study all appear to subscribe, although to varying degrees, to the standard conception model of lawyering.[350] In practical terms, they see their adherence to this model as "being 'tough' and being ready to fight" for their clients, suggesting professional responsibility rules govern their conduct, not morality.[351] Moral issues were acknowledged by a number of Granfield and Koenig's respondents but most said that they resolved these 'by viewing litigation as a self-contained contest and ignoring the social consequences of their actions.'[352] Interestingly some minimise the potential effect of these practices on their consciences by comparing their activities favourably to some extreme examples they studied in their law degrees, or by consoling themselves in the belief that they are not hurting anyone.[353]

In recognising there are inevitable problems with the adversarial system, some of Sarat's participants attempted to shift any responsibility from them personally.[354] In particular, Sarat noted that associates "blame others for 'forcing' them to be more

[347] Ibid 703.
[348] Granfield and Koenig, above n 241, 509.
[349] Ibid 513.
[350] Sarat, above n 46, 818.
[351] Ibid 819.
[352] Granfield and Koenig, above n 241, 515.
[353] Ibid 516.
[354] Frenkel, et al, above n 15, 703.

aggressive"[355] and the "partners believe that associates sometimes go too far in the direction of aggressiveness early in their careers".[356]

While the standard conception of lawyering invites an examination of how the lawyer acts, most of the discussion about its effectiveness revolves around its application to the lawyer/client relationship as a whole. Shaffer and Cochrane have used metaphors to describe the roles that lawyers play. They say the standard conception of lawyering can bring about a "godfather" and "hired gun" approach to lawyering, both of which have no place for morality for lawyers. The godfather lawyer seeks to gain victory for clients[357] and involves the lawyer controlling "all aspects of the legal representation"[358] even to the point of "attacking others irrespective of the wishes of the client."[359] A godfather lawyer[360] "acts without regard to the harm his action causes to other people."[361] Clients with godfather lawyers defer moral considerations to them and in turn the lawyers defer to their 'role as advocates'.[362] Lawyers as hired guns seek to "maximise the client's autonomy" and so make every effort to "ensure that the client makes the decision …"[363] The morals of the client determine the actions of the lawyers.[364] Lawyers in this category aim "to act on behalf of the clients to realize their interests and aspirations" and in doing so treat "all clients exactly the same, in the sense that they are citizens who have had their rights infringed and want relief or vindication."[365] This approach assumes that the client can direct the lawyer's action even if it means harming others. However, not all clients are capable of articulating their wishes i.e. acting as the boss.[366] These lawyering roles illustrate a libertarian

[355] Sarat, above n 46, 820.
[356] Ibid 821.
[357] M.A. DiPippa, 'Jacob's Blessing: A Review of Shjaffer's and Conchran's Model of Moral Counselling' (1995) 18 *University of Arkansas at Little Rock Law Journal* 85, 87.
[358] Ibid.
[359] Cochran, above n 221, 313.
[360] This category appears to equate with Pepper's First Class Citizenship Model since he focuses primarily on client autonomy doing whatever the client wants as long as it is within the limits of the law, although Pepper refutes this claim – see Pepper, above n 333. Terrell suggests that the academic, Monroe Freedman, adheres to this client-centred approach: Terrell, above n 286, 118. However Freedman asserts that he agrees that clients ought to be able to choose their own goals and the lawful means by which they are achieved but morality does form part of a lawyer's role because there is a choice to be made with respect to which client to represent and in this respect the lawyer should be held morally accountable. See Monroe H. Freedman, 'The Lawyer's Moral Obligation of Justification' (1995) 74 *Texas Law Review* 111, 116-117.
[361] Thomas L. Shaffer and Robert F. Cochran Jr, *Lawyers, Clients, and Moral Responsibility* (1994) 8.
[362] Ibid 14.
[363] O'Dair, above n 305, 326 seems to be quoting from Shaffer.
[364] Shaffer and Cochran, above n 361, 29; DiPippa, above n 356, 88.
[365] Hutchinson, above n 201, 19.
[366] Shaffer and Cochran, above n 361, 7.

approach by lawyers – giving prominence to the client's rights thereby perceiving "their role as being the maximisation of their client's freedom from the restraints of the law."[367] However, lawyering practices that give prominence to the protection of a client's autonomy[368] and emphasise the service role of practitioners can be interpreted as being too client-centred.[369]

Another metaphor used by Shaffer and Cochrane is the guru role which, they argue, draws on the traditional role of the lawyer. This role aims to achieve client rectitude – that the client will do the right thing. However in this role it is the lawyers who determine their clients' matters purely by their own morality and can be labelled elitist. Shaffer and Cochrane maintain these lawyers "ignore the possibility that this person I am serving might be a source of morals for me."[370] As has been alluded to, there are many who criticise the standard conception of lawyering suggesting that it produces a "potentially dangerous" condition causing lawyers to have "moral tunnel vision",[371] that allows them to exclude society from their considerations when determining how they should act.[372] For instance Postema categorises the standard conception of lawyering as a detachment strategy which, he argues, causes lawyers to deceive themselves into believing that they are not responsible for the consequences of their professional activities.[373] This, in turn, tends to produce "a simplified moral world; often … an amoral one; and more than occasionally, perhaps an overtly immoral one."[374]

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[367] O'Dair, above n 305, 5.
[368] Perlman, above n 330, 851.
[369] Paul R. Tremblay, 'Practiced Moral Activism' (1995) 8 *St. Thomas Law Review* 9. Although Tremblay does not discuss the work of Binder, Bergman and Price in this article, the term "client-centred" is a well-known approach advocated by these authors and Tremblay is an adherent to that theory. See David Binder, Paul Bergman and Susan Price, *Lawyers as Counsellors: A Client-Centred Approach* (1991). However, this approach can be criticised as focussing completely on the consequences to the client and ignoring the importance of others affected by the action of the client – See Robert F. Cochran, Jr., Deborah L. Rhode, Paul R. Tremblay and Thomas L. Shaffer, 'Symposium: Client Counselling and Moral Responsibility' (2003) 30 *Pepperdine Law Review* 591, 597. Although Tremlay defends client-centred lawyering, he maintains that regardless of how well the lawyer believes he knows the client and the whole situation, "she literally can never know it as well as the client can". This, he argues, lessens the intervention of the lawyer into directing the action that should be taken – again, leaving the client in charge of choosing what course s/he should take.
[370] Shaffer and Cochran, above n 361, 37.
[371] Rob Atkinson, 'Beyond the New Role Morality for Lawyers' (1992) 51 *Maryland Law Review* 853, 857.
[372] Pepper, above n 333, 616-617.
[373] Gerald J. Postema, 'Self-Image, Integrity, and Professional Responsibility' in David Luban (ed) *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics*, (1984) 289.
[374] Richard Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 *Human Rights* 1, 2.

Menkel-Meadow provides a very thought-provoking illustration of "role morality". She refers to the book and film by Ishiguro entitled *The Remains of the Day*[375] which follows the life of Stevens the butler who unquestioningly follows every command of his employer, a British gentleman very closely connected to the German Nazi regime, during a time when close associations of this kind were viewed suspiciously. Eventually Stevens realises "that by performing his acts reflexively, one after another, as a person puts one foot before another, he has lost himself in the high quality of his professional performance," seemingly resulting in a person unreflectingly performing tasks at the direction of others. A Sydney psychiatrist, after hearing an explanation that a lawyer acting as an advocate "is neither legally, professionally, nor morally accountable for the means used or the ends achieved",[376] concluded that this kind of a practice "sounds like psychopathy" explaining that psychopaths have no conscience.[377]

Yet the result might be more accurately one of tension. Schon suggests that practitioners who take a positivist approach and simply give advice by reference to professional knowledge alone "find themselves caught in a dilemma."[378] In response to the recognition that individual practitioners often experience a sense of "moral disquiet … toward claimed role justifications"[379] or in more practical terms, a conflict between the ethical standards emanating from their own 'individual conscience, on the one hand, and the dictates of public standards, of professional role and of law, on the other,"[380] a growing number of theorists assert that a lawyer's conduct must be directed by more than just ethical codes.

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[375] Carrie Menkel-Meadow, 'Can They Do That? Legal Ethics in Popular Culture: Of Characters and Acts' (2001) 48 *University of California Los Angeles Law Review* 1305. Menkel-Meadow says in 'Both the novel and the movie The Remains of the Day (Columbia Pictures & TriStar Studies 1993) based on the novel are now commonly taught to raise issues of professional ethics and loyalty to clients of objectionable goals': ibid n 49. See also Rob Atkinson, 'How the Butler Was Made to Do It: The Perverted Professionalism of *The Remains of the Day*' (1995) 105 *Yale Law Journal* 177; David Luban, 'Steven's Professionalism and Ours' (1996) 38 *William and Mary Law Review* 297.

[376] Evan Whitton, 'Client Versus Ethics: No Legal Contest', *The Age* (Melbourne, Vic.), 21 June 2002, < http://www.theage.com.au/articles/2002/06/21/1023864498558.html> at 20 September 2002.

[377] Ibid.

[378] Schon, above n 24, 42.

[379] Esau, above n 327.

[380] Atkinson, above n 371, 867.

C *Alternative Conceptions of Lawyering*

Aristotle argued that ethics deal with the practicalities of living.[381] The alternative conceptions of lawyering similarly recognise that lawyering takes place within all the eventualities of life. They therefore call for lawyers to be accountable for all their decisions, both personal and those made when advising clients.

As discussed previously, there is broad agreement that the ethical codes do not provide clear guidance for all situations.[382] Theorists who offer alternative conceptions of lawyering take this as their starting point and suggest that other factors influence the decisions of lawyers. Some call on lawyers to expressly declare how their decisions are made.

1 *Moral Activism - Luban*

Luban criticises role morality as amounting "to an institutional excuse from the requirements of common morality".[383] He refuses to believe that people are just the "sum" of their roles.[384] He maintains that there is a moral self "behind the social mask".[385] Acknowledging that there will be times when an individual's common morality will conflict with role morality, he asserts that common morality should prevail.[386] He describes this as "as a clash between consequences and duty,'[387] and defines common morality as 'morality concerned with how persons behave".[388]

Luban believes that lawyers need to be personally and morally accountable for their actions, guided by common or ordinary morality.[389] He advocates that individuals

[381] Aristotle, *The Nicomachean Ethics* (trans. J.A.K. Thomson, 1953) 64-64 [1094a-1094b].
[382] See the discussion of "ethical codes" above p. 54ff.
[383] David J. Luban, 'Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice' (1990) 49 *Maryland Law Review* 424, 426; Luban, above n 326.
[384] Ibid 111.
[385] Ibid 112.
[386] Ibid.
[387] Luban, above n 383, 426. He elaborates on this by saying that there is often a tension between consequential moral theories like utilitarianism and deontological moral theories that emphasise a person's obligations or duties: ibid 428-429.
[388] Luban, above n 326, 110.
[389] While Luban particularly advocates for moral activism in civil matters, he takes a more traditional view how lawyers should act for their clients in criminal proceedings: ibid 157.

ought to be moral activists,[390] who should operate in a way that accepts that role morality is a presumption that can be rebutted.[391]

2 *Ethical Discretion in Lawyering (Contextual View) - Simon*

In criticising the jurisprudence of the standard conception model as positivist, Simon also concludes that the disciplinary rules are "rebuttable presumptions".[392] Simon blames the rule-bound thinking on the part of lawyers for what he sees as a failure to achieve justice. He believes that lawyers are practising formalistically. His alternative model is based on the assumption that lawyers are experts in legal issues and therefore need to be responsible to promote justice.[393]

Simon claims lawyers are failing to face their responsibilities. He argues that they should use their discretion in performing their duties.[394] Simon critiques the standard conception model. With respect to the lawyer's duty to the client and the court:

> … the lawyer has little or no discretion to consider whether there might be legal reasons why a particular course of action should not be pursued or a particular claim not enforced, even though the course is legally permissible or the claim potentially enforceable.[395]

The style of lawyering he advocates is modelled on what is now a commonly accepted judicial method[396] – recognition that formalism should be avoided.[397] Essau supports

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[390] Ibid 160-161.
[391] Esau continues his analysis of Luban's approach by classifying it as 'restricted differentiation' in that partisanship on behalf of clients is limited by common moral obligations and instead of pure nonaccountability, moral activism is encouraged. This requires lawyers to employ moral counselling in dealing with their clients. Esau, above n 327.
[392] Simon, above n 325, 1132.
[393] Ibid 1083-84.
[394] Ibid.
[395] Ibid 1086.
[396] Ibid. See, for example, Justice Kirby, 'Judging: Reflections on the Moment of Decision' (Paper delivered at the Fifth National Conference on Reasoning and Decision-Making, Charles Sturt University, Wagga Wagga, 4 December 1998); Justice McHugh, 'The Judicial Method' (Paper delivered at the Australian Bar Association Conference: 'Democracy and the Law', London UK, 5 July 1998); Justice Gleeson, 'Judicial Legitimacy' (Paper delivered at the Australian Bar Association Conference, New York NY, 2 July 2000).
[397] Esau supports this approach and expresses his surprise that practices that are accepted in the role of judges are not applied to lawyers: Esau, above n 327. Quite a number of authors recently argue along similar lines. For instance Stephen Parker and Charles Sampford, *Legal Ethics and Legal Practice: Contemporary Issues* (1995) 3; Terrell, above n 285, 92; David B. Wilkins, 'Legal Realism for Lawyers' (1990) 104 *Harvard Law Review* 468, 469-470. Vischer elaborates on this approach. He says that there is a "failure to account fully for lawyer's discretionary power … the formalist paradigm denies the relevance of context …": Robert K. Vischer, 'Pluralism and Professionalism: The Question of Authority' (Paper presented at the First International Conference on Lawyers' Ethics, University of Exeter, 6-7 July 2004) 3.

this[398] and expresses his surprise that practices accepted in the role of judges are not applied readily to lawyers.

Simon suggests that, in using their discretion, lawyers need to look to external norms, but these are not to be found in common morality. It is his view that the external norms are those provided for in legal principles or values that achieve the aim of legal justice. He believes there are competing legal norms[399] and it is in this realm that lawyers need to make discretionary judgements. The application of this discretion takes place in two areas, assessing the merits of a client's claims relative to others involved and confronting and resolving the competing factors that bear on the internal merits of the client's goals and claims.[400] The first is based on the acknowledgement "that most people are unable to enforce most of their rights most of the time" since there is a lack of resources such as legal services.[401] This requires lawyers to evaluate the client's claims in relation to:

(i) Whether the claim is grounded in law;

(ii) Importance of interests involved; and

(iii) Extent to which representation would contribute to equalization of access to the legal system.[402]

The second requires lawyers to consider the conflicting legal principles. Simon suggests that "legal reasoning provides firmer guidance to lawyers than do appeals to conscience."[403] When lawyers are required to judge between legal principles in order to achieve justice they should do so by finding them "in the norms and practices of the surrounding legal culture."[404] In simple terms, Simon believes that the decision made by the lawyer should have legal merit.[405]

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[398] Esau, above n 327. However there are quite a number of authors recently who argue along similar lines. For instance Parker and Sampford, above n 397, 3; Terrell, above n 286, 92; Wilkins, above n 397, 469-470.

[399] Atkinson suggests that "[t]this law is most typically in the form of lawyer regulatory codes promulgated by the highest courts of the states. It also takes the form of rules of procedure and evidence, statutes dealing with such matters as subornation of perjury, and, in deed, any aspect of the civil or criminal law that applies to lawyers *qua* lawyers." Atkinson, above n 371, 861-862.

[400] Simon, above n 325.

[401] Ibid.

[402] Ibid 1093.

[403] David Luban, 'Reason and Passion in Legal Ethics' (1999) 51 *Stanford Law Review* 873, 897.

[404] Simon, above n 325, 1120.

[405] William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (1998) 16-17.

Simon acknowledges that he has been influenced by the writings of Dworkin.[406] For Dworkin, moral principles that have "institutional support"[407] form part of the decision-making process. However, Simon does not believe that morals play a part and he dismisses morality as irrelevant,[408] placing his complete faith in the ability of legal principles to provide answers. In fact he maintains that what is commonly described as a law/morals conflict can be restated as a law/law conflict in that the supposed moral alternative is grounded in legal values.[409] In essence Simon encourages lawyers to violate the rules as "an act of principled commitment to legal values more fundamental than those that support the rule."[410]

Wendel, another contemporary theorist, essentially takes this approach but emphasises that the authority of law "derives its moral force from the reasons that confer legitimacy upon legal directives".[411] Therefore Wendel does not contemplate a role for the moral considerations of individual lawyers.[412] Their role is to simply interpret the law.[413]

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[406] Ibid 247.

[407] Ronald Dworkin, *Taking Rights Seriously* (1997) 40. According to Dworkinian theory: (i) law's justification is internal rather than external; (ii) law consists of "rules" and "principles" but not "policy"; (iii) whatever forms part of an interpretation or account of the law which best "fits" and morally "justifies" the community's legal record as a matter of political morality counts as "law" and is consistent with the judicial obligation to decide according to law; (iv) in that sense, judges are confined to "law" in their decision-making and never justifiably use "non-law"; and (v) there is always "one right answer" in adjudication according to the "rules" and "principles" of the settled law. See, for example, Bryan Horrigan, 'How Do I Put Theory and Criticism from My Legal Research When I'm Dead Scared of Them?', <http://www.canberra.edu.au/__data/assets/pdf_file/37651/theory-criticism.pdf> at 17 August 2006, and Ronald Dworkin, *Law's Empire* (1986). It is interesting to note that Luban views Dworkin as having "assumed the anti-positivist mantle that Fuller once held" and pursuing similar goals – David Luban, 'Rediscovering Fuller's Legal Ethics' (1998) 11 *Georgetown Journal of Legal Ethics* 801, 804.

[408] Simon, above n 325, 1113-1119.

[409] Ibid 1114. Simon does admit that there may be a small number of instances in which law and morals conflict.

[410] Simon, above n 405, 164.

[411] W. Bradley Wendel, 'Civil Obedience' (2004) 104 *Columbia Law Review* 363, 364.

[412] He says that professionalism 'does not mean that the lawyer's responsibility is to do right on an all-things-considered basis.' See Wendel, above n 344, 1232-1233. However he does envisage a possibility for lawyers to consider other factors if the rules allow this. See Wendel, above n 411, 364, where he notes that Model Rule 2.1 of the *Model Rules of Professional Conduct* (2003) allows a lawyer to include moral, political, economic or social factors in counselling clients.

[413] See Wendel, above n 344, 1232-1233.

3 *Model of Interpretive Integrity - Strassberg*

Like Simon, Strassberg encourages lawyers to use a degree of ethical discretion. Dworkin's jurisprudence forms the basis of Strassberg's model of interpretive integrity.[414] She recognises the shortcomings of the positivist standard conception of lawyering. Instead of abandoning or reframing the ethical rules of conduct, she supplements it with moral principles. She argues that "legal ethics requires a jurisprudence which views morality as a constitutive element of legal obligation."[415] She uses Dworkin's argument that law includes principles like justice and fairness and argues that these should be used in ethical decision making.[416] In doing so, she stresses that the "[i]nterpretive principles must be 'embedded' in the existing law of legal ethics in order to be seen as legitimate"[417] and then provides an example of the application of her model that calls for lawyers to uphold the preservation of human life.[418] She therefore posits "integrity as an ethical virtue" that recognises that moral principles underlie legal ethics.[419] In a similar vein, Postema advocates an integration strategy that encourages lawyers to factor responsibly into their moral life a consideration of all the obligations, values and commitments that relationships demand.[420] He concludes that this requires lawyers to take full moral responsibility for their actions.[421]

4 *Deliberative Model - Levine*

Levine argues that Strassberg's model may not have any real effect on lawyers since it simply allows, but does not require, lawyers to "engage in ethical deliberation".[422] He proposes a more proactive approach. The deliberative model mandates that lawyers "exercise ethical discretion through ethical deliberation".[423] It also maintains that it is essential the lawyer be required "to justify the ethical quality of the decision, through an

[414] Strassberg, above n 342.
[415] Ibid 928.
[416] Ibid 933.
[417] Ibid 937
[418] Ibid 941.
[419] Ibid 934.
[420] Postema, above n 373, 290.
[421] Ibid 310.
[422] Levine, above n 322, 43.
[423] Ibid 54. In discussing the deliberative model, Levine does not directly refer to what might be the source of ethical deliberation but his earlier work does canvass religious and other personal values – See Samuel J. Levine, 'Responding to the Problems of Ethical Schizophrenia' (1998) 38 *Catholic Lawyer* 146.

articulable demonstration of ethical deliberation supporting the decision."[424] Levine defends this model as one that aims to ensure lawyers "take ethical discretion seriously". He suggests this expectation is not unusual as "complex legal reasoning" is nothing more than the norm already pervading the practice of "virtually all other areas of law."[425]

5 *Collaborative Approach – Schaffer and Cochrane*

While the models discussed thus far focus mainly on how lawyers ought to approach situations that present ethical considerations, none appear to be greatly concerned about involving clients in lawyers' deliberations. Shaffer and Cochrane take this step with their collaborative approach. They encourage lawyers to see clients as collaborators in the good,[426] both helping each other to become better people. Lawyers should care about which clients they represent and "the type of person the client is becoming".[427] Shaffer also places an emphasis on lawyers justifying their decisions to clients and others.

It would seem that this approach to lawyering, with its focus on the role of the client and the mutual interaction between clients and lawyers, goes some way to answering the criticisms raised by Dare earlier.[428] Shaffer states: "Ethics is thinking about morals, and beyond that, explaining one's thought to others … It is about explaining one's reaction to a moral impulse and listening to the reactions of others."[429]

In summary, these alternative models promote the idea that lawyers have a certain amount of discretion in their decision-making. Apart from Simon, the theorists make reference to morals. However, generally speaking, there is a reluctance to acknowledge that people are influenced by sex, age, race, nationality, circumstances of birth and

[424] Levine, above n 322, 52. This model appears to have quite a bit in common with Schon's reflective practitioner approach. Schon believes a reflective practice is one where a practitioner has a relationship with the client that revolves around a conversation. This approach acknowledges that clients and practitioners have the capacity to "mean, know, and plan." Schon, above n 24, 295. It also involves a practitioner giving "up his initial claim to authority and sharing the control of the interaction with the client." Ibid 298. This approach aligns then with Levine's model and calls for accountability. Schon states that "the professional is more directly accountable to his client than in the traditional contract." Ibid 297.
[425] Levine, above n 322, 64.
[426] Shaffer and Cochran, above n 361, 47.
[427] Ibid 44.
[428] Ibid 63; Dare, above n 339, 153 – arguing that clients will not be aware of the morals that guide their lawyers in their decisions.
[429] Thomas Shaffer, 'On Tending to the Ethics in Legal Ethics: Two Pedagogical Experiments' (2001) 12 *Legal Education Review* 11, 15.

upbringing, education, family status at any given time, occupation[430] or religious persuasion.[431]

Yet Vischer starts with the assumption that one's personal morality is central to lawyering. He argues:[432]

> Whenever an attorney makes sense of her client's stated intentions, she utilizes an interpretive judgment that is shaped by the attorney's own moral experience, and this same experience, in turn, helps form whatever response the attorney offers to the client.

Essau also believes that "personal moral discretionary judgement by lawyers is actually central to their role …"[433] In recognising that the advice given to the client is affected by the lawyer's own moral perspective, the moral perception of the client, and also by the adoption of the profession's moral perspective, Visher argues that these ought to be "articulated openly and deliberately instead of being left to operate beneath the surface of the attorney-client dialogue."[434]

The direction to lawyers to expressly state their moral position will obviously raise the issue of moral pluralism, the fact that there are different moral perspectives. Kruse uses a scenario where a lawyer is asked to represent a "client *with whom the lawyer fundamentally morally disagrees*" to illustrate the fact that lawyers will find it difficult to separate the service they offer to clients from their own moral beliefs, therefore supporting the view that lawyers ought to expressly state their moral allegiances in dealing with clients.[435] The author considers a situation where lesbians consult a lawyer, who fundamentally disapproves of the morality of their relationship, for advice in starting a family. She claims that individual lawyers assess the justice of their clients' goals, as well as their own personal willingness to represent clients, through their own personal morality.[436] She concludes that a lawyer following the standard conception of lawyering model, but who is influenced by her fundamental disagreement with homosexuality, would focus her advice on legal issues only in an effort to detach her from the situation. Therefore, in an effort to protect her clients from a custodial

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[430] Hazard, above n 309.
[431] Cochrane, above n 221.
[432] Robert K. Vischer, 'Legal Advice as Moral Perspective' (2006) 19 *Georgetown Journal of Legal Ethics* 225, 229.
[433] Esau, above n 327.
[434] Vischer, above n 432, 229.
[435] Kate Kruse, 'Lawyering in the Gap Between Law and Justice' (Research Paper #7, New York Law School) 65.
[436] This basic assumption aligns with the approach taken by Vischer, above n 432.

challenge from the biological father, and contrary to her own values that favour inclusiveness, she would advise them to refrain from maintaining an ongoing relationship with him.[437] With respect to moral activism, the lawyer, in considering herself morally accountable to avoid social injustice, would probably refuse to act for the clients, believing that this course would bring needless harm to an innocent third party, (the baby), and ultimately undermine the social institution of the traditional family.[438] A lawyer operating within the contextual lawyering framework would also refuse to act for the clients though her reason would hinge on what she believes are the underlying principles of law. She would interpret any ambiguity in the legislation as implicitly protecting the child thereby delegitimatising the clients' wishes.[439] The collaborative lawyer would initially accept the lesbians as clients. However, eventually this lawyer/client relationship would end as the lawyer will not be able to persuade the clients to accept her understanding of the good - and decide not to have a baby.[440] In summary, this author argues that "every client is entitled, not merely to a lawyer, but to a lawyer who can sincerely advance legal arguments based on the client's actual values and objectives."[441] Therefore it is important that those involved in the lawyer/client relationship declare their own morality because "moral disagreement impairs lawyering." [442]

Virtue ethicists make similar arguments, emphasising the character of the lawyer and the importance of living the good life to improve the morality of those involved in the lawyer/client relationship.[443] Some have referred to this type of person as the "virtuous lawyer", [444] whose good character shapes her moral decisions.[445]

Although choosing to make one's deliberation evident is important, the decision-making process will not be a simple matter. [446] In recognising the difficulties involved, lawyers are urged to keep to the courage of their convictions:[447]

> We must have character because of that confusion – not so that we can suddenly and magically become morally clear-headed, but so that we can

[437] Kruse, above n 435, 35.
[438] Ibid 39-40.
[439] Ibid 46-47.
[440] Ibid 53-54.
[441] Ibid 61.
[442] Ibid 61.
[443] Nicolson and Webb, above n 315, 30.
[444] Robert S.J. Araujo, 'The Lawyer's Duty to Promote the Common Good: The Virtuous Law Student and Teacher' (1999) 40 *South Texas Law Review* 83, 84.
[445] Nicolson and Webb, above n 315, 31.
[446] Terrell, above n 286, 115.
[447] Ibid 133.

> operate effectively, without shame, within our moral puzzlement. To be troubled by your normative circumstances is, after all, to acknowledge that values matter.

The alternative conceptions of lawyering, tend to alleviate the need for lawyers to have split personalities, a condition that can result from an adherence to the standard conception of lawyering. These models are calling for practitioners to be reflective of their practices[448] and some of them go beyond this, suggesting that they integrate their personalities into the role with "personal consistency".[449] As Hutchinson writes:[450]

> … acting ethically is not about adherence to a code that is resorted to in occasional moments of indecision. Rather, it is about the development of a moral way of living and lawyering that encompasses an organic set of attitudes, dispositions, and values, and that can be incorporated into each lawyer's daily routines and regimen.

Most of the authors advocating alternative conceptions of lawyering identify integrity as the defining feature. Luban describes it as meaning "wholeness or unity of person, an inner consistency between deed and principle".[451] Rhode defines persons of integrity as those "whose practices are consistent with their principles, even in the face of strong countervailing pressures."[452]

Since it is well known that lawyers need to make hundreds of little decisions every day, there will not be much time for thinking, although Schon suggests that even the spontaneous action involves reflection.[453] With this kind of behaviour in mind, Schiltz concludes that people will instinctively make decisions according to their own integrity and that this determines their practice. "What this means then, is that you will not practice law ethically – you *cannot* practice law ethically – unless acting ethically is *habitual* for you."[454]

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[448] Schon, above n 24, 69.
[449] Larry O. Natt Gantt, 'Integration as Integrity: Postmodernism, Psychology, and Religion on the Role of Moral Counselling in the Attorney-Client Relationship' (2004) 16 *Regent University Law Review* 233, 249.
[450] Hutchinson, above n 201, 48.
[451] David Luban, 'Integrity: Its Causes and Cures' (2003) 72 *Fordham Law Review* 279, 279.
[452] Deborah L. Rhode, 'If Integrity is the Answer, What is the Question?' (2003) 72 *Fordham Law Review* 333, 335. See also Markovits, who highlights that lawyers should take responsibility for giving advice to clients, which he explicitly calls the lawyers' own actions and refers to it as a 'relationship of authorship': Daniel Markovits, 'Legal Ethics from the Lawyer's Point of View' (2003) 15 *Yale Law Journal and the Humanities* 209, 227.
[453] Schon labels this kind of activity as 'Reflection-in-Action' suggesting that a person's behaviour is so spontaneous that it appears to be "a kind of knowing which does not stem from a prior intellectual operation": Schon, above n 24, 51.
[454] Schiltz, above n 215, 911.

In other words '[t]here is just one of each of us',[455] and we can only be what we are, whatever that is. This assumes that our professional identity emanates from our personal morality,[456] and as such individuals need to take responsibility for their actions, even when they are simply giving advice to others.

D *Conclusion*

This chapter acknowledges the standard conception of lawyering as the popular working model but recognises that there are a number of criticisms of the consequences of its application. While this model is normative in character, in that it aims to describe how lawyers 'ought' to act, its requirement for strict adherence to ethical duties such as those in codes results in a very positivist reality which totally discourages any consideration of the consequences of decisions made in reliance on rules. While it seeks to achieve lawyer objectivity by prioritising principles of neutrality and partisanship, it fails to achieve what originally was thought to be the spirit of traditional professionalism - conduct that considers the public interest. In an effort to achieve these principles, it was thought that it ensured that the public had access to justice and received an optimal service. However, it has effectively created an institutional excuse for lawyers to ignore the broader interests of the public. An examination of the data collected in Part II supports this assertion.

Therefore, on a practical level, accepting that the standard conception of lawyering is problematic, this chapter has canvassed some alternative models. These call for individuals to look beyond ethical codes in considering how they should conduct themselves and encourages them to be personally responsible and accountable for their conduct in advising and acting for clients. In this respect, it could be concluded that the alternative models more proactively align with the spirit of the traditional professionalism service ideal. They proactively encourage approaches that consider the rights, obligations, and values of all involved or affected, and more broadly recognise that the consequences of all actions have an effect on the community. While the codes do try to guide the practices of individuals, the alternative models call for a much more pro-active role for individuals to justify their conduct. In effect, the alternative models

[455] Daniel R. Coquillette, 'Professionalism: The Deep Theory' (1994) 72 *North Carolina Law Review* 1271, 1272.
[456] Ibid. While this is true, it will be noted in the next chapter, that one's environment or culture can have a very strong influence on a person's conduct.

encourage practitioners to act according to their own integrity and accordingly take responsibility for their actions. The following table summarises the standard model and the alternative models presented in this chapter.

Table 2 - Summary of Conceptions of Lawyering

Theory	Author	Thesis	Comments
Standard Conception of Lawyering		Role morality – representing clients zealously.	Individuals acting in their role do things for clients that they would not personally do. A lawyer is non-accountable for zealously doing anything that is legal or not in breach of a rule of professional conduct.
Moral Activism	Luban	Lawyers do not always need to do what clients want. Role morality can be rebutted. However, the presumption for role morality is very strong in criminal matters.	But what is common morality?
Ethical Discretion in Lawyering	Simon	Legal principles are rebuttable presumptions. Lawyers must choose between the many different legal principles to advance justice. Morals are not relevant.	Dworkinian approach but only using legal principles, not morals.
Interpretive Integrity	Strassberg	In interpreting what should be done, lawyers *may* use morals to supplement the standard conception of lawyering model.	Dworkinian approach acknowledging morals but just allows lawyers to exercise ethical discretion, rather than requiring them to do so.
Deliberative Model	Levine	Lawyers *must* use ethical discretion and be accountable for their decisions.	A proactive approach demanded. They must provide reasons for their advice.
Collaborative Approach	Shaffer and Cochrane	Lawyers engaging in a collaborative approach with their clients with a view to achieving the good.	Lawyers are encouraged to discuss morals with their clients and provide reasons for their advice.

While all of the alternative models advocate individual responsibility, it is recognised that this requires individual lawyers to possess a high level of commitment to the task. It is acknowledged that the standard of integrity demanded may be difficult to achieve given the fact that lawyers prioritise the goal of profit maximization.[457] In this respect the question is: how is one supposed to make a living; to establish a reputation; or to build a practice?[458] The economic rationalist perspective would acknowledge that "[c]lients will not exactly flock to a lawyer who creates obstacles to the achievement of client aims when those aims strike the lawyer as morally objectionable.'[459] A participant in a study conducted by Sarat stated this another way: "I don't want to have a moral dialogue. The client didn't hire me to be a philosopher. If he wants that kind of advice he can go to a priest."[460]

The next chapter examines the influence of the practice environment on an individual lawyer's ability to act according to his/her own initiative. It will be noted that culture can affect individuals by pressuring them to alter their behaviour to fit within that advocated by the practice organisation. Chapter III refers to certain market factors that impact on the provision of legal services. It questions whether the culture of the practice environment dictates how individuals within it will practise, thereby diminishing an individual's attempts at remaining true to their own values.

[457] Sharon Dolovich, 'Ethical Lawyering and the Possibility of Integrity' (2002) 70 *Fordham Law Review* 1629, 1668.
[458] Ibid 1665.
[459] Ibid.
[460] Sarat, above n 46, 819.

III THE PRACTICE ENVIRONMENT

While the preceding chapter considered models of lawyering that might influence lawyers in their practice, there is "a range of external forces … shaping business and society in general …".[461] This chapter will initially discuss some changing environmental factors by referring to regulatory changes instigated by governments of Australia as a result of adopting a National Competition Policy. These changes have effectively made the provision of legal services much like any other service or product available to the public.

At a more practical level, and in accordance with the definition of "market" adopted in this thesis and explained in the introduction, it is accepted that "… the culture or house norms of the agency, department or firm play a dominant role in the way a lawyer practices … [and] profoundly affect the lives of lawyers …".[462] Therefore, this chapter is more concerned with the influence of the working environment or firm culture on how practitioners determine what they should do when presented with choice. In doing so this chapter is particularly interested in the personal reflections of the practitioners when their understandings of professionalism conflict with that of their firms', rather than focussing on the regulatory and economic factors normally considered within discussions of "markets". These latter factors are only really included to the extent that they influence the inter-personal relationships and the work flow aspects of the working environment. In this respect the chapter will canvass aspects of social psychology literature as a way to explain the most striking finding identified by the thesis, that there is a remarkable disparity in the perception of professionalism as it relates to their work practices i.e., how practitioners conduct themselves in dealing with clients and how they prioritise the relationships they develop.

[461] Meredith Hellicar, 'The Future of Law: A Personal Perspective' (Speech delivered at Queensland Women Lawyers Association, Brisbane, 20 September 2000) <http://www.courts.qld.gov.au/publications/articles/speeches/hellicar.htm> at 16 August 2006.
[462] Kelly, above n 211, 18. For an overview of lawyers in Australia, see Law Council of Australia, above n 45. With respect to lawyers in America see Robert L. Nelson, 'The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society' (1994) 44 *Case Western Reserve Law Review* 345.

A *Market Factors Affecting Firms*

A profession is a "cultural product of very specific historical circumstances."[463] It is a "social artefact, not the product of a law of nature"[464] and therefore subject to political change or the vagaries of history.[465] According to Abel:[466]

> Professionalism is a relationship among producers, consumers, and the state, whose distinctive features are highlighted by juxtaposition against the institutional alternatives for producing and distributing expert services: markets and bureaucracies.

States have the prerogative to order the lives of their citizens. In this respect they have the choice of regulating services according to Adam Smith's free market, (capitalism) or in a central bureaucratic fashion (as a social democracy where the state provides some of the services). The latter option has not found favour, arguably because it represents a very oppressive and expensive alternative, particularly in light of liberal ideology.[467] Traditionally, states have taken a middle course and have permitted the professions to offer their services as required by the people of the state, under the protection of the state.[468] This situation allows the professions to be autonomous, although at the state's pleasure.[469]

This relationship began to change in Australia in the 1970s. More citizens became educated consumers who, as voters, increasingly influence the state to legislate for consumer rights.[470] Legal reformers and government regulators joined powerful clients in calling for change.[471] This resulted in the governments of Australia adopting a National Competition Policy which effectively labelled and treated the professions as just another group of businesses whose practices should be reviewed. The policy requires each State and Territory government, on an ongoing basis, to investigate the

[463] Pue, above n 75, 416.
[464] Longstaff, above n 209, 29.
[465] Clarke, above n 249.
[466] Abel, above n 8, xv.
[467] Julia Evetts, 'Professionalism Beyond the National-State: International Systems of Professional Regulation in Europe', (1998) 18(11/12) *International Journal of Sociology and Social Policy* 47, 61 and 65. See also Spiegelman, above n 265; Kronman, above n 2.
[468] Evetts, above n 467, 65. UK - movement by the professions themselves, whereas in Germany and other European States, the State intervened to create them, particularly taking responsibility for their education.
[469] This arrangement affords to the professions a sanction as producers to control their own market of their services. This aligns with the conflict theorists.
[470] Clarke, above n 249.
[471] Mann, above n 52; Heilemann, above n 230.

legislation and regulations relating to professionals in order to assess whether they produce anti-competitive effects.[472] In effect, governments are examining the practices and business structures of the professions to ensure that the professions are like any other business in the market. The aim is to regulate the professions to remove any impediments from the development of a national market in legal services and other efficiency enhancing reforms.[473] In other words the professions are being examined against economic benchmarks such as market efficiency and transparency. This is happening in an effort to ensure that they are not using any anti-competitive practices.[474]

In Australia, the introduction of legislation has provided the means by which legal practitioners can operate with new structures. In this respect, the *Legal Profession Act 2004* (Qld) now allows lawyers to enter into multi-disciplinary partnerships and incorporate,[475] and the *Mutual Recognition (Queensland) Act 1992* and the *Trans-Tasman Mutual Recognition (Queensland) Act 1999* make it possible for practitioners from other States and New Zealand to practise in this State. A study conducted in New South Wales in 1998, which is indicative of the view of practitioners in other states, confirms that "competition is more intense within the profession, from other professions, and potentially, global competitors."[476]

This has changed the focus of the professions from purely servicing the needs of clients, to encompassing managerial, budgetary and entrepreneurial skills[477] into their practices. Previously, these skills were associated only with business enterprises. Consequently, it has been argued that the professions have experienced a "loss of control over quality of service delivery and a move in the direction of business, with a

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[472] Some of these investigations have resulted in reports – Law Society of Western Australia, *Flexible Practice Structures for Lawyers: Discussion Paper* (1999) <http:///www.lawsocietywa.asn.au/public_discuss.htm> at 14 May 1999; New South Wales Attorney General's Department, *National Competition Policy Review of the Legal Profession Act 1987: Final Report* (1998) <http://www.lawlink.nsw.gov.au/agd.nsf/pages/ncpf.toc> at 24 June 1999; and Department of Justice and Attorney General, *Legal Profession Reform: Green Paper* (1998) <http://www.justice.qld.gov.au/ourlaws/papers/legrefrm.pdf> at 16 August 2006.

[473] Robert Baxt, 'Professions and the Challenge of Competition: Why the Hilmer Report and its endorsement create new opportunities for the profession', (1995) 8(1) *Corporate and Business Law Journal* 1, 4.

[474] Anonymous, 'Task Force examines the future regulation of the profession: Hilmer, TPC reports recommend more competition' (1993) 31 (10) *Law Society Journal* 72.

[475] While this provision (s 123 – for multi-disciplinary practices) is now included in legislation regulating the legal profession in Queensland it is not yet in force. See Chapter 2 Part 5 *Legal Profession Act* 2004 (Qld) for incorporation.

[476] Gray, et al, above n 268, 47.

[477] Hanlon, above n 80.

constant emphasis upon cost control and efficiency".[478] Gerhart sees these developments as troubling, suggesting that the legal profession's "reaction has been ambivalent – sometimes denial, sometimes opposition, and often fear".[479] He states that "[o]ur business is being taken away by nonlawyers, do-it-yourself guides, and even computer programs. And we face competition and potential competition from foreign lawyers, and foreign law."[480] He warns that "lawyers appear to have underestimated the extent to which their 'markets' could be invaded by other professionals."[481]

Information technology and artificial intelligence innovations within law firms facilitate the management of mundane tasks and free up lawyers' time allowing them to focus on more complex work.[482] However, not all the outcomes of technology are desirable from the perspective of lawyers. It could be argued that technology actually skills non-lawyer staff to such an extent that they become competitors in the areas within which they become specialists, particularly since they "can deliver quality services at lower cost."[483] Perhaps this is already evident from the deregulation of conveyancing services in some states, although not in Queensland. These staff members are variously called paralegals, legal assistants or legal secretaries.[484]

The increased availability of information through the internet, and the introduction of related technology, enables clients, who are now quite educated consumers, to demand a different relationship with their lawyers. Some lawyers report that clients demand 24 hour accessibility.[485] Lawyers' survival in this new environment depends on their ability to mobilize their "expertise effectively in a way that achieves practical results" by creating a demand for their services.[486] This new environment has brought about changes to the internal practices of firms.

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[478] Clarke, above n 249, 63. However, it should be noted that while this description applies to most professions, "accountancy and accounting techniques prospered" – J. Broadbent and R. Laughlin, '"Accounting Logic" and Controlling Professionals: The Case of the Public Sector' in J. Broadbent, M. Dietrich, and J. Roberts (eds) *The End of the Professions? The Restructuring of Professional Work* (1997) cited in Clarke, above n 249, 63.
[479] Gerhart, above n 27.
[480] Ibid.
[481] Ibid.
[482] Law Council of Australia, above n 47, 33.
[483] Kritzer, above n 29, 729.
[484] Ibid.
[485] Law Council of Australia, above n 47.
[486] Clarke, above n 249, 60.

B *Firm Practices*

1 *Clients*

Traditionally clients had difficulty articulating their rights, evaluating the providers and the service they provided. This allowed lawyers to act autonomously while they were "serving" their clients.[487] However, now clients expect to be treated in a more consultative and collaborative manner in deciding how their matter should be handled, particularly when making choices between a range of solutions available.[488]

The Law Council of Australia's recent discussion paper points out that "[t]he law and legal profession have increasingly faced condemnation and hatred from those it has failed to satisfy."[489] Perhaps this dissatisfaction can be explained to some degree by the fact that people now have different values and goals and therefore approach service providers differently. For instance, the report suggests that the Baby Boomers, who are concerned with security, entered the workforce with a desire to be successful and prosperous and therefore worked hard, often sacrificing quality family life to achieve this aim.[490] Yet "… generally speaking Generation Xers[491] have a different attitude". For them, "career, success, money and stability are less important than happiness. They are said to be focused on outcomes, not process, with structures being unimportant".[492] Therefore, on this analysis, if the desired outcomes are not forthcoming then today's more knowledgeable clients are capable of mounting a challenge to the professionals.[493] This is particularly so if the client employs in-house lawyers.[494] These clients have special insight into the knowledge and practices of lawyers and therefore are well qualified to question the service provided.

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[487] Gerhart, above n 27.
[488] As Gerhart says, "clients are taking charge in a more meaningful way" – determining the type of service they want (or the product) and monitoring the performance of that service: Gerhart, above n 27.
[489] Law Council of Australia, above n 47, 63.
[490] Allison Ashby, 'How to Land, and Retain, the Elusive Generation X', *Business Review Weekly* (Australia), 2 June 2000, 82 cited in Law Council of Australia, above n 47, 54.
[491] Ibid explains that these are generally speaking, children of the Baby Boomer generation, born between the early 1960s and around 1980.
[492] Nicholas Way, 'A New World of People Power', *Business Review Weekly*, 16 June 2000, 65 cited in Law Council of Australia, above n 47, 54.
[493] Evetts, above n 34.
[494] Gerhart, above n 27.

While clients are generally expecting more from their lawyers, it is often argued that large corporate clients have different needs to individual/small organizations.[495] Lawyers are expected to be competent, honest, reliable, responsible, confidential, and fair,[496] but individual clients may also expect lawyers to provide value-added advice on the whole of an issue or project, and not just in the traditional legal areas.[497] These individual clients, or small organizations, may want a relationship with the lawyer, whereas larger corporations tend to see their lawyers as service providers.[498] Many clients are large corporations who trade globally and therefore require international knowledge. Hanlon argues that these new conglomerates are governed by non-owners in a managerial structure who take the view that the services of lawyers are treated as a commodity.[499] These corporations, by virtue of their size, can pressure and even bully their lawyers into giving prominence to commercial factors rather than legal concerns.[500] Hanlon suggests that these corporate clients 'shop around' and appoint different lawyers to handle different types of matters. He also quotes a company secretary of a large insurance firm who states that lawyers are evaluated in terms of whether the quality of their advice matches the price they are charging.[501] Therefore, corporate clients are looking for efficient outcomes, rather than long-term relationships and this produces pressure on lawyers to satisfy clients' short-term desires at the expense of other values.'[502]

2 *Specialisation*

In an effort to satisfy clients, lawyers become specialists in particular areas like criminal, family law, litigation, succession and environmental law. While the lawyer in the small town may not have succumbed to this practice, it would be true to say that in

[495] Hanlon, above n 60, 799. This author suggests that firms servicing large corporations are driven by the commercial-entrepreneurial understanding of professionalism, whereas those who act for individuals act in accordance with the social service version of professionalism. See Heinz and Laumann, above n 58; Hanlon, above n 60, 799.
[496] See, generally, G.E. Dal Pont, *Lawyers' Professional Responsibility* (3rd ed, 2006).
[497] Daryl Williams, Untitled (Speech delivered at the 32nd Australian Legal Convention, Canberra, 14 October 2001) <http://www.cript.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Speeches_2001_Speeches_Law_Council_of_Australia_32nd_Australian_Legal_Convention> at 16 August 2006.
[498] Kritzer, above n 29.
[499] Hanlon, above n 60.
[500] John Flood, 'During Business – The Management of Uncertainty in Lawyers' Work' (1991) 25 *Law and Society Review* 1, 41 cited in Hanlon, above n 60, 53.
[501] Ibid.
[502] Rhode, above n 213, 298.

most firms, the professionals do focus on particular categories of the law. This change is mostly attributed to consumer demand for complete knowledge or expertise of a subject matter but there is also a view that the growth and complexity of legislation has driven this phenomenon.[503] This has even caused certain firms to specialize or tailor their services for particular groups; for example, those in the computer industry, healthcare, pharmaceuticals, transportation etc.[504]

The Queensland Law Society supports specialisations by setting in motion a process whereby lawyers go through a period of re-training and are subjected to an examination to become specialists in particular areas of law like family law, personal injury and succession law. While this process aims to produce practitioners who can offer a higher standard of service, it is also being used as a powerful marketing tool by the specialists themselves.

3 *Marketing*

Marketing has grown in importance in law firms in recent years. While the Australian Plaintiff Lawyers Association would probably argue that marketing plays a role in providing access to justice, the general understanding is that marketing is not undertaken for any altruistic reason but simply as a response to increased competition.[505] Marketing is defined as "… the management process responsible for identifying, anticipating and satisfying customer requirements profitably."[506] More specifically, in terms of professional service firms, marketing involves "getting the target client to want a meeting with them."[507]

Pearce notes that historically the traditional professionalism paradigm required lawyers to operate in accordance with what he calls the "Profit Maximizer" (prohibited from advertising, soliciting clients and pursuing large profits) and "Business Servant" prohibitions (serve the public as opposed to being in control of their clients).[508] Pearce

[503] Law Council of Australia, above n 47.
[504] Kritzer, above n 29.
[505] Neil A. Morgan, *Professional Services Marketing* (1991) ix. The Australian Plaintiff Lawyers Association, in arguing that marketing does play a part in informing clients of their rights, recently appealed to the High Court claiming that a ban on advertising with respect to tort was unconstitutional. The court denied the claim. See *APLA Limited v Legal Services Commissioner (NSW)* (2005) 219 ALR 403.
[506] The Chartered Institute of Marketing is quoted by Morgan, ibid 5.
[507] Clifford J. Ferguson, '"Selling" Professional Services: A Practical Approach – Part II' (1996) 34 *Management Decision* 19, 19.
[508] Pearce, above n 193, 1232-3.

further explained that lawyers were governed by the "invisible hand of reputation" rather than efficiency. Any indiscretions by lawyers attracted a call from the professional body to comply and a failure to do so would result in them suffering a slur on their reputation.[509] However many of the prohibited practices now form part of the modern lawyer's everyday conduct.[510] In the seminal USA case of *Bates v State Bar of Arizona,* the court declared that legal services are in a market just like any other service.[511] More recently, there has been a slight retreat from this position. In *Florida Bar v Went for It, Inc.*[512] the court took a more restrictive view of the freedom of lawyers to market their businesses. The *Florida Bar* position has been given statutory force in Queensland. The *Personal Injuries Proceedings Act 2002* prohibits legal firms from advertising in particular places like hospitals.[513]

While this legislation resulted from the public's criticism to proactive marketing by lawyers, there appears to be a resistance from corporate clients in particular to marketing campaigns that are aggressively proactive. Hart and Hogg conducted an empirical study on the usefulness of relationship marketing, the importance of the process and outcome aspects of a corporate legal service relationship between suppliers and clients. Their findings suggest that clients of corporate legal firms are mainly concerned with the quality of the legal advice – the outcome. They are not as interested in the process and the aspect they rated lowest was "proactive contact by the lawyer". Therefore they conclude that if lawyers take a proactive marketing approach then "they are in danger of jeopardising a section of their clients who do not want to be courted."[514]

While advertising and selling are the predominant exercises that come to mind when we think of marketing, other practices can be just as powerful. The very fact that law firms are consolidating their practices draws attention to them and in fact this process

[509] Ibid.
[510] Ibid 1242 ff.
[511] *Bates v State Bar of Arizona* 433 U.S. 350, 368 (US Supreme Court, 1977) - The court in *Bates* considered that a ban on advertising constrained business and hampered consumers from having the knowledge to make informed choices concerning legal services.
[512] *Florida Bar v Went for It, Inc.* 515 US 618 (US Supreme Court, 1995) - In this case the court sought to qualify the limits of solicitation and found that a rule that mandated a 30-day blackout period after an accident in which time lawyers are not at liberty to solicit business from accident victims or relatives, satisfied the regulatory efforts of government. This information was included in Pearce, above n 192, n 108.
[513] Chapter 3, Part 1, ss 62-71. At this point these restraints only apply to matters other than motor vehicle and work related injuries, since separate legislation applies to those.
[514] Susan Hart and Gillian Hogg, 'Relationship Marketing in Corporate Legal Services' (1998) 18 *Service Industries Journal* 55, 65.

can produce 'brand name recognition' by virtue of the size of the firms. The growth in legal press has also contributed to the fact that some firms have almost become household names.[515]

It is also suggested by some that marketing has always been part of the practice of law firms. Morgan maintains that while they may not have been marketing in an overt way, they were marketing themselves implicitly – albeit in a rudimentary way. He says "I have … yet to come across a firm that, at the very least, fails to have a logo on its headed paper and a small information leaflet about what the firm does."[516]

4 *Managerialism*

Managerialism[517] has been defined "as a belief that good management is able to solve the problems of human service organisations, and make them more effective and efficient".[518] The introduction of more sophisticated information technology, human resource departments and marketing practices, has prompted the larger law firms to employ non-legal professionals to manage the firm.[519] This is a significant change, as only twenty years ago managing partners, with no real business expertise, ran Australian firms through partnerships.[520]

The Law Council suggests that in "the next ten years, it is likely that lawyers will be increasingly removed from the management of 'their' businesses and increasingly affected by general management issues …"[521] Irrespective of this, the hierarchical understanding of power presently in use in law firms aligns perfectly with the tenets of managerialism.[522] The senior partners "manage" and it is their wisdom that sets policy for the working practices of the other members of the firm.[523] Therefore accountability is directed upward to the partners in authority.[524]

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[515] Ward Bower, 'Trends in the Legal Profession and Planning Implications for Law Firms' (1998-2000) <http://www.altmanweil.com/> at 20 February 2002 (out of print, held by author).
[516] Morgan, above n 505, 4.
[517] It should be noted that this is one of the elements of the new Commercialised Professionalism paradigm discussed in Chapter I, pp. 46ff..
[518] Jim Ife, *Rethinking Social Work: Towards Critical Practice* (1997) 16.
[519] Hanlon, above n 60.
[520] Law Council of Australia, above n 47, 105.
[521] Ibid.
[522] Ife, above n 518, 42.
[523] Ibid.
[524] Ibid. The authors then suggest that the accountability is upward as opposed to downward to the client or outward to the community.

Some legal practice emphasis has been placed on total quality management, a modern manifestation of managerialism.[525] This approach to management, it is argued, causes professionals to lose control of the work processes and consequently, the "inevitable, progressive deskilling of labour under capitalism…"[526] results in workers performing repetitive tasks that can be managed. [527] Dirks applies managerialism to legal services. He sees lawyers' work as a mechanical process and that the lawyers' practice should "be managed as a business. Each client … is merely the raw material and the finished product is a completed file. It is imperative that the cost of completing the work is reduced to a minimum in order to achieve maximum profit …" [528]

While this ideology may have commendable aims, critics suggest that whatever theorists say managerialism does, in reality it aims to cut costs, improve efficiencies and raise productivity under the pretence of worker "participation and a climate of choosing options that take into consideration the interests of those involved."[529] It has also been suggested that this management structure can be dysfunctional for a number of reasons. Vermaak and Weggeman recognize that for a professional to work with others requires them to "surrender part of his/her independence…'[530] to human resource managers who, to their minds, are 'from outside the professional arena".[531]

At the firm level, some would assert that the real manager of firms is "time costing".[532] Smith reports that there is an "increased pressure to bill hours"; whereas the goal for associates in large firms in the US ten years ago was 1600 to 1800 hours, it is now more like 2000 a year.[533] The Law Council refers to this phenomenon and calls it a "tyranny" yet its criticism focuses on the effect on clients[534] as opposed to recognizing it as a pressure on law clerks and those at the lower levels of firms.

5 *Human Resources*

[525] Hilary Sommerlad, 'Managerialism and the Legal Profession' (1995) 2 *International Journal of the Legal Profession* 159. However, it may be that the legal profession in Queensland are less enchanted with it in recent times.
[526] Ibid 172.
[527] Kritzer, above n 29, discusses this practice in similar terms relying on the work of Krause and Posner.
[528] James Dirks, *Making Legal Aid Pay and Franchising Development* (1994) cited in Sommerlad, above n 524, 172.
[529] H. Braverman, *Labour and Monopoly Capital* (1974) cited in Sommerlad, above n 525, 172.
[530] Hans Vermaak and Mathieu Weggeman, 'Conspiring Fruitfully with Professionals: New Management Roles for Professional Organisations' (1999) 37 *Management Decision* 29.
[531] Ibid 30.
[532] Law Council of Australia, above n 47, n 358.
[533] William Reece Smith Jnr., 'Professionalism and Commercialism in the Practice of Law' (Paper presented at the 9th Commonwealth Law Conference, Auckland NZ, 1990) 53.
[534] Law Council of Australia, above n 47, n 358.

The demands of competition generally and the firms' emphasis on its members to achieve a particular level of billable hours, raises the point that a firm's business strategies have an effect on its human resources.[535] The internal workings of the firm obviously centre on the personalities within the firm. In fact, it is now the case that market mentality extends to assessing potential partners[536] and even to existing partners. Hanlon reports "that partners themselves [are] not immune from such an assessment … partnership is no longer for life".[537] These entrepreneurial and managerial criteria align to business goals. "Potential partners in large firms are now assessed on their capacity to increase the firm's business via selling services."[538] Hanlon identifies four functions that are included in the guidelines set down to evaluate applicants:[539]

> "1. Fee earning – has the candidate for partnership met their billing targets, do they consistently bill more than three times their salary, do they meet and exceed their chargeable hours target, and do they regularly keep on top of their unpaid bills?
> 2. Practice development – has the candidate brought in valuable new clients, do they take part in marketing activities (writing articles, presenting seminars, etc), do they display a positive attitude to client entertainment?
> 3. Management and development of staff – does the applicant get on with and motivate colleagues and staff, do they delegate work, and do they take part in training and evaluating staff?
> 4. Management – does the applicant demonstrate a willingness to participate in management, have they served in any managerial role, do they have any suggestions for improving the firm, do they follow firm procedures or do they act alone?"

[535] See Smith, above n 533.
[536] Lee refers to this as the "tournament for partnership" – See R. Lee, 'From Profession to Business: The Rise and Rise of the City Law Firm' (1992) 19 *Journal of Law and Society* 1.
[537] Hanlon, above n 60, 811.
[538] Ibid 810.
[539] Ibid 810-811.

These business-oriented goals have been blamed for the insecurity and pressure felt by individual practitioners causing a "loss of institutional loyalty in the law firm."[540] It is now common to see practitioners defecting from one firm to another, and in some cases, "the defection… of whole departments or groups …"[541]

All of these factors have changed the way that firms operate and ultimately affect the practitioners working within them, particularly in their dealings with clients. However, competitive pressures alone do not determine the character of an organization; only people do that in their responses.[542] In summary, firms now have very definite management strategies, while profit appears to be their goal. These strategies appear to align with the commercialized professionalism paradigm, but does this explain the way that individual lawyers think and behave? Perhaps the fact that individuals move from one firm to another might suggest dissatisfaction with the way firms operate? With this in mind it is important to look more closely at the way practitioners are required to conduct themselves when providing their services to clients.

C *Culture*[543] *and Individual Responses to Culture*[544]

As described in the following section (Part D "Culture and Social Psychology Literature"), a firm's culture can have a distinctive influence on how practitioners provide their services to clients. Yet, as has been noted in Chapter 2 in Part C, the "Alternative Conceptions of Lawyering" assume that individual practitioners retain a certain amount of discretion or autonomy in how they interact with clients and how they will generally conduct themselves in providing legal services.

The word autonomy traditionally attaches to the profession as a whole. The traditional professionalism paradigm, discussed in Chapter 1 of this thesis, asserts that in return for self-regulation (autonomy) and prestige, members of professions

[540] Smith, above n 533, 53.
[541] Ibid. The empirical work carried out by Frenkel, Nelson and Sarat reported on this phenomenon. See Frenkel, et al, above n 15, 704.
[542] Michael J. Kelly, 'Thinking About the Business of Practicing Law' (1999) 52 *Vanderbilt Law Review* 985.
[543] Kennedy sees culture as the number one lesson for lawyers starting their careers. Dennis Kennedy, 'Twenty Lessons for Lawyers Starting Their Careers' (2005) March *Law Practice Today.* Among the twenty are "Find a mentor and Learn your place in the pecking order" and "Get involved in the firm."
[544] Some of the content of this section was published in Lillian Corbin, 'How "Firm" Are Lawyers' Perceptions of Professionalism?' (2005) 8 *Legal Ethics* 265.

altruistically and collectively use their specialised knowledge and skills to advance the good of the community in preference to their own self-interest.[545] Yet, as recognised by Gordon and Simon, professionalism has both "an institutional element and a moral element."[546] There is still a place for individuals to self-determine their own course of action by making moral choices.

The thesis accepts the view that individual practitioners can use their autonomy i.e., they can decide how they will respond to situations, even though the culture of their practice environment pressures them to act in a particular way. By exercising their own autonomy it is argued that individual practitioners retain their human dignity. It is an exercise of an individual's autonomy that is called into play particularly when practitioners are required to make ethical decisions when challenged by the culture of their working environment. Therefore this thesis speaks of "individual responses to culture" as a way of recognising that an individual's ability to decide how to act aligns more with moral considerations.[547]

Therefore this thesis uses the word "autonomy" to convey the idea that practitioners must decide how they will respond to the cultural environment. This is comparable with the view of Parker and Sampford, which is that individuals must still decide what they should do despite the presence of contextual influences. For instance, as Parker and Sampford note, there are professional and statutory rules and other limitations on a practitioner's conduct, but still "lawyers, individually and collectively, have some moral autonomy."[548] Gerald Dworkin's definition of autonomy is also useful:

> The second order capacity of persons to reflect critically upon their first order preferences, desires, wishes and so forth and the capacity to accept or attempt to change these in the light of higher first order preferences and values. By exercising such a capacity, persons define their nature, give meaning and coherence to their lives and take responsibility for the kind of persons they are.[549]

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[545] Russell G. Pearce, 'The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar' (1995) 70 *New York University Law Review* 1229.
[546] Robert W. Gordon and William H. Simon, 'The Redemption of Professionalism?' in Nelson et al, above n 11, 234.
[547] Robert W. Gordon and William H. Simon, 'The Redemption of Professionalism?' in Nelson et al, above n 11, 234.
[548] Stephen Parker and Charles Sampford, *Legal Ethics and Legal Practice: Contemporary Issues*, (1995) Clarendon Press, Oxford, pp. 3 and 4.
[549] Gerald Dworkin, *The Theory and Practice of Autonomy*, (Cambridge, CUP, 1988) p. 20.

It can be suggested then that practitioners are individuals who decide for themselves how they will act and, of course, this may be to advance the good of the community in the sense contemplated in the traditional professionalism paradigm. So regardless of the constraints within which they work i.e., the culture of the firms, the practitioners are personally accountable for how they interpret what they should do.

Both the effect of culture and the individual responses of practitioners working within the cultural environment will now be discussed. However, from the introductory comments included above, it is obvious that tensions can occur when individual practitioners autonomously determine how they should act and this choice differs from that advocated by the culture of the practice environment. This conflict has been the subject of academic comment.

Tremblay asserts that the philosophical lessons that Luban and others describe "may … have less influence in the actual world of high pressure and factually complicated practice settings than its adherents have hoped."[550] The pressures that Tremblay refers to are not the "market factors" discussed above, (although elements of what was discussed in "managerialism" have some bearing) but are factors much more specific to the practice setting i.e., the culture and practices within firms, brought about because "lawyers are social beings … [who] behave largely in accordance with group norms … in accordance with their social or peer incentive structures."[551] In other words, there is an acknowledgment that an organisation's culture is quite influential in shaping the conduct of its members or, more specifically, demanding conformity. For instance, one commentator asserts that "culture and technique, the etiquette and skill of the profession, appear in the individual as personal traits … the longer and more rigorous the period of initiation into an occupation, the more culture and technique are associated with it, and the more deeply impressed are its attitudes upon the person."[552] Another suggests that "… those fully engaged, indeed submerged, in their professional identities and activities risk displaying what … [could be] described as 'a gregarious

[550] Tremblay, above n 200, 1; Rhode, above n 312, 1547 notes that there are a number of commentators who are sceptical concerning the effectiveness of calls for lawyers to be more morally responsible i.e., Schneyer, Zipursky and Monroe Freedman.
[551] Stempel, above n 263, 27.
[552] Hughes in Ritzer, above n 12, 60.

tolerance for the way things are.'"[553] This, it has been suggested, happens because "[p]eople who share strong occupational identities organize themselves to socialize new members, to formalize shared norms, and to sanction behaviour that violates those norms."[554] Shaffer calls the practice environment "the moral teacher" of the new entrants,[555] and Anderson and Western bluntly claim that "one of the functions of professional socialization is to make realists out of idealists."[556]

There are a number of empirical studies on the effect of the organization on its members.[557] These studies[558] typically conclude that "the legal workplace … [is] central to the life experience of lawyers and the construction of professional visions…"[559] Nelson and Trubek are more specific when they state that "professional values related to organizational policies arise inside the firm and reflect the managerial ideology of the elite in power,"[560] and this is reflected in one of Nelson's participants who said "that they 'bore the imprint' of their firm."[561]

Sarat reports that most of the partners participating in his study adamantly assert that firms have cultures in that new members are socialized into the prevailing culture.[562] However, he also states that there are some associates in the same study who are less certain of the influence of firm culture.[563] Later in the same report, Sarat mentions that these same associates "reported that they learned most by observing senior associates as well as partners, and that the firm most effectively transmitted its values not through formal mechanisms, but through the stories that were told about what happened in a

[553] Said, cited in Andrew Goldsmith, 'Is There Any Backbone in This Fish? Interpretive Communities, Social Criticism, and Transgressive Legal Practice' (1998) 23 *Law and Social Inquiry* 373, 384.
[554] Mather, et al, above n 10, 178.
[555] Thomas Shaffer, 'The Profession as a Moral Teacher' (1986) 18 *St. Mary's Law Journal* 195.
[556] Don S. Anderson, and John Western, 'The Professions: Reason and Rhetoric' cited in Boreham, et al, above n 33, 50.
[557] See, generally, Granfield and Koenig, above n 241; Solomon, above n 192, 176; Mather, et al, above n 10; Levin, above n 287, 318; Sarat, above n 46, 827. Earlier studies also found that the practice setting is very influential in persuading lawyers' conduct – See F. Zemans and V. Rosenblum, *The Making of a Public Profession* (1981) 171-178; J. Carlin, *Lawyers Ethics: A Survey of the New York City Bar* (1966), and J. Handler, *The Lawyer and the Community: The Practicing Bar in a Middle-Sized City* (1967).
[558] Also Granfield and Koenig, above n 241. For example, Zemans and Rosenblum, above n 557, 173 found 60 of the practicing bar rank lawyers in their own offices as among the two most important sources that have contributed to the resolution of questions of professional responsibility in the practice of law.
[559] Nelson et al, above n 11, 176.
[560] Robert L. Nelson, *Partners with Power: The Social Transformation of the Large Law Firm* (1988) 226 cited in Nelson, et al, above n 11, 207.
[561] Robert L. Nelson, 'Uncivil Litigation: Problematic Behavior in Large Law Firms' (1997) 66 *Journal of the Kansas Bar Association* 8, 24.
[562] Sarat, above n 46, 827.
[563] Ibid.

specific case." [564] This seems to establish that both the partners and the associates acknowledge the effect of culture.

While some participants in Gordon's study are sceptical about the effect of culture because of the increasing size of firms and the decentralisation of organisational procedures, Gordon finds most practitioners insist on the strong culture of firms. [565] One participant said "[f]irm culture isn't a luxury: it's our bread and butter, our reputation …"[566]

Gordon's study also reports that some subjects refer to the fact that adherence to ethical practice[567] is used as a formal criterion in promotion and compensation, although he questions how seriously this is taken.[568] Interestingly, Frenkel et al use the fact that there is a "lack of connection between ethicality and the reward system" as one reason to suggest that firm culture is weak and to conclude that a firm's "ideology is not formally transmitted".[569] However, it could be argued that their findings implicitly suggest to those on the lower rungs of the hierarchy that the real culture of the firm does not value ethical considerations.

Mather et al extend the understanding of the practice environment to those with whom family lawyers repeatedly interact when trying to resolve divorce cases, and concludes that many of these, who are mainly solo or small firm practitioners, are influenced by those colleagues who practice in their legal specialty and look to them for guidance in dealing with ethical issues.[570] Levin's study of 41 solo and small firm practitioners in NY City's metropolitan area also finds that their ethical decisions are influenced by those with whom they meet professionally and not by formal Bar rules.[571]

Because this thesis includes references to the perceptions of students, empirical work that reports on the views of law students is also relevant. However, somewhat inconsistent findings emerge from these studies. Some focus on what happens to law students at university, and suggest that students graduate with fewer ethical aspirations

[564] Ibid.
[565] Gordon, above n 295, 716.
[566] Ibid.
[567] Although it is obvious, from the overall observations that Gordon includes in the introduction of the article, that this is simply thought to be an adherence to ethical codes.
[568] Gordon, above n 295, 716.
[569] Fenkel, et al, above n 15, 705. It also might be a factor that the firms studied by these researchers are much larger than the firms featuring in this study.
[570] Mather, et al, above n 10. This is also the conclusion of Ervin Smigel, *The Wall Street Lawyer: Professional Organization Man?* (1964) 195-196 and Eliot Freidson, *Profession of Medicine: A Study of the Sociology of Applied Knowledge* (1970) 366-368, both cited in Frenkel, et al, above n 15, 699.
[571] Levin, above n 287, 318.

than when they entered university,[572] whereas other studies reveal that students become more ethical during their studies.[573] However, more importantly for this thesis is the issue of the effect of the practice environment on these students. A study by Hellman focuses particularly on the experiences of students undertaking an internship and acting as student practitioners.[574] He reports that many students are exposed to unprofessional conduct and that their office mentors are disinterested and sometimes uncomfortable in discussing ethical issues identified by the students. Hellman finds students often deal with situations by developing a tolerance for what they encounter, thereby changing their professional ideals.[575]

Another study involving students compares their responses on ethical issues to those of practising attorneys and finds that the graduating law students are more ethical than the attorneys.[576] An even clearer picture about the effects of culture on graduates may emerge when Evans et al report the findings of a longitudinal study that focuses on the progression of final year law students into the practice environment.[577] Evans' study uses ethical hypotheticals to extract responses from the participants in their last year of law school, and at the end of both their first and second years of practice.

Another relevant study is that carried out by Wilkins and Gulati. They tried to find out "what law students think they know about elite law firms".[578] The findings demonstrate that the students recognise that they need to "fit in".

> When it comes to advancement, students perceive that more is required of them than simply doing a sufficient quantity of excellent work. In addition,

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[572] See Krieger, above n 214, 434; Susan Daicoff, 'Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism' (1997) 46(5) *American University Law Review* 1337; Thomas Willging and Thomas Dunn, 'The Moral Development of the Law Student: Theory and Data on Legal Education' (1981) 31 *Journal of Legal Education* 306; and Kurt M. Saunders and Linda Levine, 'Learning to Think Like a Lawyer', (1994) 29 *University of San Francisco Law Review* 121, 180-82. Although some would question the entry level of ethical understanding – See Tranter, above n 297.

[573] See Steven Hartwell, 'Promoting Moral Development through Experiential Teaching' (1995) 1 *Clinical Law Review* 505; and Wagner Thielens, 'The Influence of the Law School Experience on the Professional Ethics of Law Students' (1969) 21 *Journal of Legal Education*, 587, 590-91.

[574] Lawrence K. Hellman, 'The Effects of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization' (1991) 4 *Georgetown Journal of Legal Ethics* 537.

[575] Ibid 543.

[576] Thielens, above n 573, 590-91.

[577] Some work is currently taking place in Australia to track the development of graduates from law school into their working environment. This study is being conducted by A/P Evans, Prof. Stephen Parker and Ms Palermo of Monash University. Some results have been published - Results of graduating class of lawyers and the Monash graduates were markedly divided on corporate and justice grounds, and according to gender: Evans, above n 297, (2000) and (2001).

[578] David B. Wilkins and G. Mitu Gulati, 'What Law Students *Think* They Know About Elite Law Firms: Preliminary Results of a Survey of Third Year Law Students' (2001) 69 *University of Cincinnati Law Review* 1213.

> students believe that they must be perceived as having star qualities, demonstrate that they fit into the firm's institutional culture, link up with senior mentors, and develop rainmaking skills if they are to thrive in today's competitive law firm environment.[579]

Each of these studies emphasise the importance of an individual's interpretive community as possibly shaping their knowledge and "way of thinking"[580] and may go as far as influencing the person and who s/he is.[581] So it must be acknowledged that the working organisation is a very influential force:

> In its own way, the firm, company or agency is its own little world that rewards compliance with its goals and punishes deviance. … There is a natural tendency to want the approval of your supervisors, even if you reject their premises, especially if you respect their intellects. The organization is a centripetal force, pulling you inward to make you in its image. It is always at odds with your own centrifugal force, which pulls you outward toward independence.[582]

A recent report of an interview with a senior partner of an Australian law firm provides an even stronger statement suggesting that the change can lead to young lawyers abandoning their social ideals:

> I actually think younger lawyers have a strong social conscience. It is not hard to foster volunteerism at all. If anything, they outdo the previous generation in this regard. They are values-driven and easier to motivate – I think this could be the product of a different education system with greater emphasis on environmental and social awareness.[583]

Gillers writes of the effect of culture and concludes that "young lawyers lack ethical concerns … because they go to work in law firms where the senior partners are interested in nothing but making money, where they may be explicitly told that they are not to let ethical concerns get in the way of making money for the firm".[584] This implies that the bureaucratic structure of firms creates a culture where ethics are

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[579] Ibid 1246.
[580] Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) 304.
[581] Wolgast, above n 329, 4.
[582] Stephen Gillers, "*I'd Rather Do It Myself*": *How to Set Up Your Own Law Firm* (1980) 9.
[583] Limbers, above n 234, 30. Boon and Abbey consider the effectiveness of mandating *pro bono* work as a part of continuing professional development schemes and suggest that that new entrants to firms are quite idealistic and therefore would be "willing conscripts" – see Boon and Abbey, above n 238, 649.
[584] Sol M. Linowitz, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (1994) 124. This was also the conclusion of Hellman, above n 574, 543-544. He is writing from the perspective of what happens to students when they begin practising.

"someone else's responsibility".[585] Galanter and Palay also recognise that "the situation of the junior lawyer is more precarious and more pressured",[586] and Gordon's study finds that the associates complain that "pressure for borderline ethical behaviour or hardball comes mostly from mid-level partners". This study found that mid-level partners "fight on every document" and "are much more difficult to deal with on discovery …" yet the partners disputed this.[587] "Partners said clients exerted pressures toward hardball and borderline behaviour; associates said such pressures came from both clients and partners, but particularly from partners".[588] Gordon notes that "the expressed ethics of most of these lawyers were external and instrumental. When they spoke of 'doing the right thing', they tended to define this term as respecting some external source of authority" and "spoke as realists do, about risks of possible damage to reputation".[589]

The associates in Sarat's study remarked that the partners within their firms are less sensitive than they should be to the climate concerning ethics and professionalism: "Partners think everything is fine." Another suggests that partners "do not see that ethics is of inherent value."[590] The Frenkel et al study finds similarly that associates more than partners have a "moral sensitivity beyond the rules".[591] Their findings present quite a stark reality. They find that there are "widely divergent perceptions of senior and junior lawyers about the climate in their firms" and note that firms appear to "cultivate two images simultaneously: tough 'junkyard dogs' to attract clients, but civil and ethical practitioners to please judges and recruit law school graduates."[592]

However, regardless of the proliferation of evidence of the effect of culture, it does not follow that all people experiencing the same influencing factors make the same decisions. Opportunities for individuals to exercise their autonomy or determine their

[585] Andrew M. Francis, 'Legal Ethics, the Marketplace and the Fragmentation of Legal Professionalism' (2005) 12 *International Journal of the Legal Profession* 173, 181. More will be said about this below – avoidance strategies, particularly using the adversarial system. This is particularly so under the Standard Conception of Lawyering model – lawyer's "strategy of detachment" – See Nicolson and Webb, above n 315, 176.
[586] Marc Galanter and Thomas Palay, 'The Transformation of the Big Law Firm' in Nelson et al, above n 11, 31, 60.
[587] Gordon, above n 295, 718.
[588] Ibid 716.
[589] Ibid 732.
[590] Sarat, above n 46, 827.
[591] Frenkel, et al, above n 15, 706. Empirical work with respect to CPAs in large public accounting firms has found similar results. James E Sorensen and Thomas L. Sorensen, 'The Conflict of Professionals in Bureaucratic Organizations' (1974) 19 *Administrative Science Quarterly* 98, 102 found that those in lower positions had more professional orientations than those holding more senior positions.
[592] Frenkel, et al, above n 15, 705.

own responses to culture still remain. In other words, there is an element of free will that causes individuals to respond to the problem that presents itself in accordance with the moral principles they have developed over their life.[593] It follows then that a person's subjective viewpoint can produce different decisions or results.[594]

Eshete acknowledges that people can have different reactions to culture depending on the dictates of their own personal character:[595]

> Persons of good character who resort to the shady means of their trade while managing to maintain a lively picture of the justified, ultimate aims of their vocation will no doubt regret their infidelity to truth and justice as well as their unfairness to particular individuals. Remaining attached both to the ultimate aspirations of their office and to their good character, they cannot serenely undertake the everyday tasks that seem to go against their own personal and social ideals. Such persons would suffer the strain born of the knowledge that living fully and well the kind of life that they have chosen cannot yield a life that is of a piece: their moral integrity is constantly imperilled. Others who have less self-mastery and a less firm attachment to ideals are more likely to lose sight of the more distant justifying aims of the profession. Instead, they shift their attachments to more immediate goods such as the wealth and status with which society rewards the successful exercise of their combative skills. Still different lawyers may acquire unworthy aspirations: they prize the acts of cunning, manipulation, and humiliation for their own sake. For them, the satisfactions of the profession consist in the enjoyment of the spectacle of others being subject to their power.

This indicates that when ethical tensions exist the real question is 'Who should I be?'[596]

> Before we decide *what* we should do in a situation we already have made an explicit or implicit decision about *who* we should be. The decision about who to be precedes the decision about what to do.[597]

Dworkin, too, seems to imply this:

> What must an interpreter believe to believe that his interpretation of materials is better than alternative interpretations of them? … [We must] account to ourselves for our own convictions as best we can, standing ready to abandon those that do not survive reflective inspection.[598]

[593] Hazard, above n 309.
[594] Ibid.
[595] Andreas Eshete, 'Does a Lawyer's Character Matter?' in Luban, above n 373, 275.
[596] Blackburn and McGhee, above n 328. Kelly makes a similar argument – Kelly, above n 542.
[597] Esau, above n 327.
[598] Dworkin, above n 407, 206-222.

Rhode in particular writes about lawyer conduct in relation to dealing with ethical dilemmas,[599] and uses the term "situational pressures" to describe the influences operating on the moral conduct of the individuals within the professional environment.[600] Notably she asserts that "organizational reward structures … are not well constructed to reinforce ethical conduct."[601] Yet she does acknowledge that there is still a role for individuals, and supports her view by referring to psychological research.[602]

Luban[603] examines situationism[604] and maintains that while situations produce pressures or temptations, this does not determine conduct, since individuals still have the ability to resist the pressure and choose the "high road".[605] Wolgast sees an individual's context as very important and acknowledges that this tends to bring about a situation where an individual's "self" is diminished, but she also makes the point that "… people are detachable from some of what are called roles; they can leave or change jobs, for instance. And this detachability points back toward an underlying Me that continues the same."[606]

Some practitioners choose to remove themselves from situations that they find ethically abhorrent. For instance one young man who was part of a team defending cigarette manufacturers 'solved his moral quandary by arranging a transfer to a division that he found less ethically questionable.'[607] However, according to the study conducted by Granfield and Koenig, most of the young lawyers "accepted the ideology of advocacy" as excusing them from conducting themselves in accordance with their own personal values.[608]

Some empirical work found some lawyers resist conformity. Martin and Powell found that "[l]egal staff are self-conscious, reflexive beings who interpret their jobs and

[599] While most think of situations relating to conflicts of interest in relation to ethics, this accepts that some of these ethical dilemmas are as simple as choosing to do or not to do further research on a client's file when budgetary constraints weigh heavily on a person's time.
[600] Deborah L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method* (1994) 7; Rhode, above n 452.
[601] Ibid 335. This assertion is supported by the work of Gordon discussed above. See Gordon, above n 295, 716.
[602] Rhode, above n 600, 6-7.
[603] Luban, above n 451.
[604] It should be noted that the term "situationism" originated with Kurt Lewin. He maintained that "the social context creates potent forces producing or constraining behaviour." Lee Ross and Richard E. Nisbett, *The Person and the Situation: Perspectives of Social Psychology* (1991) 9.
[605] Luban, above n 451.
[606] Wolgast, above n 329, 51.
[607] Granfield and Koenig, above n 241, 508.
[608] Ibid 515.

obligations, make decisions, and deviate from, as well as comply with, organizational rules and routines."[609] However in this study, these dissenters from the system in place tended to be in positions of authority.[610]

D *Culture and Social Psychology Literature*

The findings of this thesis, recorded later, include the conclusion that practitioners at different career stages have different perspectives on professionalism. The thesis particularly notes that firm culture is very influential although it also recognises that some individual practitioners choose to exercise their autonomy i.e., decide how to act in a way that challenges the cultural norm. This raises the question of why some people are acculturated and others are less influenced by their surroundings and the demands of those in charge of the practice environment? Building on a suggestion made by Rhode, this thesis has sought to examine the work of some social psychologists to explain how people make decisions on how to act when there is organisational pressure to conform.[611] The social psychology literature defines culture as the "shared cognitions, values, norms, and expressive symbols" of a particular group.[612] It is to the "organization what personality is to the individual – a hidden, yet unifying theme that provides meaning, direction and mobilization."[613] It is generally considered then that culture encourages conformity, which can be defined as "a change in a person's behaviour or opinions as a result of real or imagined pressure from a person or a group of people."[614]

Goffman's "framework theory"[615] is "about the structure of experience individuals have at moments in their social lives",[616] and holds that the rules of an individual's social setting[617] or culture determine their behaviour or their way of understanding.[618]

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[609] Patricia Yancey Martin and R. Marlene Powell, 'Accounting for the "Second Assault": Legal Organizations' Framing of Rape Victims' (1994) 19 *Law and Society Inquiry* 853, 861.
[610] Ibid 885-888.
[611] As has been shown in the previous section.
[612] Paul DiMaggio, 'Culture and Economy' in Neil Smelser and Richard Swedberg (eds), *The Handbook of Economic Sociology* (1994) cited in Charles R. P. Pouncy, 'The Rational Rogue: Neoclassical Economic Ideology in the Regulation of the Financial Professional' (2002) 27 *Vermont Law Review* 263, 353.
[613] Steven J. Ott, *The Organizational Culture Perspective* (1989) 1 cited by Pouncy, above n 612, 353.
[614] Elliot Aronson, *The Social Animal* (1999) 19.
[615] Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (1986).
[616] Ibid xvi.
[617] Ibid 24.

Framework theory is really a particular type of organisational theory. Organisational theory suggests that an organisation's culture is based on conscious beliefs and assumptions that are unconsciously communicated metaphorically; values that determine its standards for decision-making; and artefacts, such as the way the staff are deployed, that give external indications of the organisation's understanding of itself.[619] This affects the members of the group in the following way: "When the individual is understood to be constructed by her social and cultural environments, both the salience of her individual will and her presumptive ability to make individual and individualistic choices shrinks significantly."[620]

While members of all organisations can be under pressure to conform, it would seem that groups consisting of experts in positions of authority, who practice in common areas with their peers, are quite effective in producing conformity.[621] Therefore we might assume that members of law firms are particularly likely to conform to their firm's culture.

There are social psychologists who argue that not all people will conform to the demands of their peer group or the culture of the firm in which they work. There are three possible forms of behaviour when individuals are in groups. There are those who remain completely independent from group norms; those who because of their context comply with group norms; and those who conform to the norms of the group. [622] There is a qualitative difference between compliance and conformity. "Compliance involves expediently bowing to interpersonal pressure when one is personally publicly accountable. In contrast, conformity involves true subjective change of belief, attitude, or intention."[623]

Abrams analyses the theory of self-awareness to show that when context is added to the realm of private self, a person who is self-aware, as opposed to environmentally or publicly aware, can exhibit different behaviour.[624] In other words, if a person is self-aware in private circumstances they may act in accordance with their own feelings,

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[618] Ibid 27. Martin and Powell, above n 609, 853 use this theory to make sense of why legal officials are unresponsive to claims of rape.
[619] Ott, above n 613, 348.
[620] Pouncy, above n 612, 355.
[621] Aronson, above n 614, 25.
[622] Dominic Abrams, 'Social Self-Regulation' (1994) 20 *Personality and Social Psychology Bulletin* 473, 475 citing S. Prentice-Dunn and R.W. Rogers, "Deindividuation and the Self-Regulation of Behaviour" in P.B. Paulus (ed), *Psychology of Group Influence* (1989).
[623] Abrams, above n 622, 475 – referring to earlier works with both Hogg and Turner.
[624] Abrams, above n 622.

whereas if a person is self-aware but has an audience, then they may choose to act differently and in fact may comply with a group's views. According to this latter distinction it is possible that self-attention can produce compliance but this is not the same as conformity.

Aronson also refers to this possibility. He says "[t]he greater the privacy, the less the conformity."[625] He then suggests that there are certain variables that affect conformity. For instance, if the majority opinion is not unanimous and there is an ally who agrees with the individual, this dramatically reduces the pressure to conform.[626]

A similar argument to that offered by Abrams centres on the importance of a person's self-esteem,[627] and in fact propounds self-esteem as one aspect of self-identity theory. Aronson argues that if individuals have low self-esteem they can probably quite easily be persuaded that the group's opinions have more value than their own, especially if they wish to feel accepted. Alternatively those with high self-esteem will have more confidence in their own opinions. These people are either individualists, or they are quite secure as members of the group[628] and feel they can afford to express a different view without their position being threatened. It is erroneous to conclude that an "individual is simply an automaton, performing pursuant to a script provided by her cultural environments."[629]

So how do individuals decide how they will react? Psychologists maintain that individuals acquire information about themselves and others by engaging "in subjective construals – that the lenses through which they perceive people and events produce pictures heavily affected, and sometimes distorted, by both cognitive and motivational influences."[630]

Abrams explains how people determine who they are and what they will do.[631] He uses social identity and self-awareness theories together to help explain why a person remains independent or succumbs to the demands of a group. Social identity (or self-categorisation) theory considers whether one's personal identity or social identity is salient. Put simply, this theory tries to answer the question "Who am I?" Different psychological and behavioural variations occur depending on a person's salience of

[625] Aronson, above n 614, 23.
[626] Ibid 24.
[627] Ibid 25.
[628] Ibid 26.
[629] Pouncy, above n 612, 355.
[630] Donald C. Langevoort, 'Where Were the Lawyers? A Behavioural Inquiry into Lawyers' Responsibility for Clients' Fraud' (1993) 46 *Vanderbilt Law Review* 75, 97.
[631] Abrams, above n 622, 473.

their self-image. People are more likely to act as a member of a group if their social identity is salient. In other words, these people have a tendency to conform as opposed to those whose personal identity is salient.

Self-awareness (self-attention) theory answers the question "What do I do?" This theory attempts to explain how people express themselves in their behaviour, particularly in relation to the context within which they find themselves. It is generally argued that if a person's focus is on his private self then he will be more independent, being concerned with their feelings and values. Whereas a person who attaches more importance to their public self will be more likely to agree or conform to his reference group and adhere to the standards the group sets.

Although these theories suggest that an individual makes certain choices about who to be and how to act, psychologists suggest that most people fall prey to fundamental attribution error.[632] This means that most people over-estimate the ability of their own personality or disposition to deal with unfamiliar situations and still remain true to their beliefs. In other words, they do not recognise the degree to which they can be influenced by their social setting.

Aronson says that individuals usually have two important goals. They want to do things correctly and also stay in the good graces of other people.[633] Consequently individuals tend to feel a certain amount of tension when faced with situations where their social group requires them to behave in a particular way and this does not align with their own values.[634] This accords with what one legal scholar, Schiltz, asserts:[635]

> If you are going into private practice – particularly private practice in a big firm – you are going to be immersed in a culture that is hostile to the value you now have. The system does not *want* you to apply the same values in the workplace that you do outside of work (unless you're rapaciously greedy outside of work); it wants you to replace those values with the system's values. The system is obsessed with money, and it wants you to be, too.

Festinger[636] initially framed the theory of cognitive dissonance, i.e., the tension that occurs between two cognitions (ideas, attitudes, beliefs or opinions). In recognition that we as individuals do not find this experience pleasant, Festinger suggested that individuals make every effort to reduce it. In effect, Aronson suggests that individuals

[632] Aronson, above n 614, 164.
[633] Ibid 22.
[634] Ibid 13.
[635] Schiltz, above n 217, 912.
[636] L. Festinger, *A Theory of Cognitive Dissonance* (1957).

feel "something akin to physiological discomfort during dissonance arousal."[637] Aronson has reformulated Festinger's dissonance theory, thus:

> Dissonance effects are greatest when (1) people feel personally responsible for their actions and (2) their actions have serious consequences.[638]
>
> This formulation is based on the assumption that most individuals like to think of themselves as decent people who wouldn't ordinarily mislead someone. … To reduce dissonance, she needs to convince herself that the position she advocated is correct. This would allow her to believe that she is a person of integrity. [639]

The need for individuals to ensure that they present as sensible people,[640] and that their actions are logical and reasonable, is a strong motivator for most people.[641] The assumption is that "humans are motivated not so much to *be* right as to *believe* we are right (and wise, and decent, and good)."[642] So there is a need to justify our actions to ourselves. This is the concept of "self-justification". While self-justification could be argued to apply generally, there are many individuals who have laboured long and hard to get to the position that they are in, and it is suggested that these people go to great pains to see their role as a positive and attractive one. Psychologists call this "justification of effort". This theory recognises that when people commit to a course of action and later discover that there may be harmful consequences that might result from that, then the individuals will try to suppress that realisation in some way.[643] This even applies when individuals recognise that certain consequences are inevitable.[644] The acceptance of inevitability causes people to "make the best of things by cognitively minimizing the unpleasantness of the situation."[645]

In an effort to maintain self-esteem and defend ego,[646] the notion of "self-serving bias" seems to suggest that individuals are content to claim successes but attribute

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[637] Aronson, above n 614, 243.
[638] Ibid 212.
[639] Ibid 211. This appears to have been formulated from the writings of R. Abelson, "Psychological Implications" in R. Abelson, G. Aronson, W.J. McGuire, T.M. Newcomb, M.J. Rosenberg, and P.H. Tannnenbaum (eds), *Theories of Cognitive Consistency: A Source Book* (1968) 133. Abelson states: "Thus, at the very heart of dissonance theory; where it makes its clearest and neatest predictions, we are not dealing with just two cognitions; rather, we are usually dealing with the self-concept and cognitions about some behaviour. If dissonance exists it is because the individual's behaviour is inconsistent with his self-concept."
[640] Aronson, above n 614, 175
[641] Ibid 180.
[642] Ibid 177, 185.
[643] Langevoort, above n 630, 100.
[644] Aronson, above n 614, 229.
[645] Ibid 229.
[646] Ibid 175.

failures to the situation they are in.[647] It is also suggested that any questioning of self-esteem can cause individuals to shift the blame for any actions they believe will affect their reputation onto others. The concept of "justification of cruelty" similarly suggests that where a person realises that someone has been harmed by their actions, a rationalisation that the victim was culpable, or deserved what they got, goes a long way to reducing dissonance.[648] As noted previously,[649] associates feel that they are being forced to act in particular ways and partners find the conduct of associates unacceptable, each blaming the other.[650]

The process of deciding how one should act and, in effect, reducing or avoiding dissonance, is a complex one. It involves individuals using a range of avoidance measures to maintain their belief in themselves so that there is no erosion or threat to their self-esteem. It is thought that individuals use these strategies unconsciously.[651]

Individuals make many decisions. It is well-known, for example, that "attorneys are confronted with immense amounts of intellectual stimuli each day and must implicitly or explicitly make thousands of decisions".[652] In light of this, psychologists suggest that individuals try to "conserve … cognitive energy",[653] by using judgmental heuristics.[654] These are short cuts, "rough judgments" or "rules of thumb"[655] that are applied to save time and reduce our decision-making load. Generally, judgmental heuristics are considered to be adaptive,[656] so previous decisions, if they have been effective, are used as the basis for present decisions. It is also assumed that social learning influences an individual's decisions.[657] The adjustment heuristic[658] assumes that individuals adopt the views of others in their social setting. They use the opinions of the group as a reference point. [659] Luban refers to the use of heuristics as individuals rationalising their actions.[660]

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[647] Ibid 173.
[648] Ibid 223.
[649] See Chapter 2, pp. 63 and 64.
[650] Sarat, above n 46, 820-821.
[651] Langevoort, above n 630, 98.
[652] Ibid 99. Also see Schiltz, above n 217, 911.
[653] S.T. Fiske and S.E. Taylor, *Social Cognition* (1991) cited in Aronson, above n 608, 120.
[654] Ibid 134.
[655] Langevoort, above n 630, 98.
[656] Ibid 99.
[657] Ibid 98.
[658] John M.A. Dipippa, 'How Prospect Theory Can Improve Legal Counselling' (2001) 24 *University of Arkansas at Little Rock Law Review* 81, 87.
[659] Langevoort, above n 630, 105 stated that "… an attorney who is new to a situation, especially an inexperienced one, is particularly prone to rely on social learning as the basis for constructing a schema.

Accepting that a person's cognitive or belief system determines how they will act, Kohlberg adopted Piaget's research methods of using hypotheticals that raise moral dilemmas to theorise about moral reasoning.[661] He argued that an individual's belief system or ethical reasoning capacity develops over a period of time as a result of social interactions, and postulates that there are stages of moral development and that people proceed upwards as they mature and do not regress.[662]

Table 3 - Summary of Kohlberg's Stages

Stage	What Is Right	Reasons for Doing It
Pre-conventional level – focus on self		
1	Avoid breaking rules backed by punishment	Avoidance of punishment or harm to self
2	Follow rules if they are in own interest	To serve one's own immediate interest
Conventional level – focus on group		
3	Living up to what is expected by people	Need to be a good person in the eyes of others
4	Fulfilling agreed-to duties and obligations	To keep the social institution going
Post-conventional level – focus on inner self		
5	Upholding non-relative obligations first	Obligations to law before social contracts
6	Following self-chosen ethical principles	Belief in ideal as a rational person

Rest et al explain Kohlberg's table by suggesting that it is 'Six Stages in the Concept of Cooperation' i.e., six conceptions of how to organize cooperation among individuals.[663] The model suggests that a "person's ethical judgement develops in stages and these stages are identified according to the reasons prompting the action of the individuals. At any given point in time, a person is at [a] particular stage of ethical judgment and

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The fact that those more senior and more familiar with the situation are behaving as if there is no problem provides a strong cue."

[660] Luban, above n 451. 285.

[661] Wilson Huhn, 'The Stages of Legal Reasoning: Formalism, Analogy, and Realism' (2003) 48 *Villanova Law Review* 305.

[662] W. Morley Lemon, 'A Question of Ethics' (1996) 129 *CA Magazine* 129.

[663] James R. Rest, 'Background: Theory and Research' in James R. Rest and Darcia Narvaez (eds), *Moral Development in the Professions: Psychology and Applied Ethics* (1994) 5.

then proceeds to the next stage depending upon the person's belief system".[664] In suggesting the post-conventional level as the pinnacle of moral experience, Kohlberg claims that individuals question the purposes of rules, determining whether something is right or wrong 'by evaluating the situation in light of the consequences for everyone concerned and the fundamental values that are at stake.'[665] However, he does not advocate that all people will actually reach this final stage.

Although Kohlberg's model has been used extensively, it has recently drawn some criticism. Some question the use of hypothetical problems;[666] and others the lack of consideration of the emotional nature of morality.[667] However, the most important criticisms concern the "hard" stage model suggesting that this approach categorises individuals as "in" one stage or another.[668] Some researchers consider that many individuals respond differently to different problems, thus aligning these individuals with different stages of thinking depending on the situation.[669]

Rest also criticizes Kohlberg's model as deficient in terms of the psychology of morality.[670] He posits that moral judgment is not everything. Rest notes that something only becomes the subject of moral judgement to a person morally sensitive to the issue, and people will only take action in accordance with their judgement if they are motivated to do so and their moral character is sufficiently strong, tough or courageous enough to allow them to do so.[671] Tsujimoto and Emmons make this point by stating that 'ego strength variables are important determinants of whether intentions are actually translated into moral conduct.'[672]

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[664] C. Richard Baker and Rick Stephan Hayes, 'Regulating the Public Accounting Profession: An International Perspective', <http://panopticon.csustan.edu/cpa96/pdf/baker2.pdf>.
[665] Huhn, above n 661, 329-330.
[666] James R. Rest, *Guide for the Defining Issues Test* (1993). Instead of conducting interviews centred on responses to hypothetical moral dilemmas, this test is multiple choice.
[667] Carol Gilligan has particularly found fault with the fact that Kohlberg's theory takes no account of women's moral reasoning with the result that they score lower than men on the moral development model. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982) cited in Daicoff, above n 289, 206.
[668] Huhn, above n 661, 331. Also James Rest, Darcia Narvaez, Muriel J. Bebeau and Stephen J. Thoma, *Postconventional Moral Thinking: A Neo-Kohlbergian Approach* (1999) 17 ff.
[669] Herbert Ginsburg & Sylvia Opper, *Piaget's Theory of Intellectual Development* (1988) 159 cited in Huhn, above n 661, 331.
[670] Although he points out that Kohlberg himself recognised that there are other elements to achieving moral action. See Rest, above n 666, 22.
[671] Ibid 22-25. Another author refers to this as 'the strength of the individual's conviction' – Blake D. Morant, 'Lessons from Thomas More's Dilemma of Conscience: Reconciling the Clash Between a Lawyer's Beliefs and Professional Expectations' (Working Paper No 03-14, Washington and Lee University, 2003) 7.
[672] In practical terms they found that students did not complete the moral action of volunteering to do a task as they had previously said they would. Richard N. Tsujimoto and Kathy A. Emmons, 'Predicting

Eshete considers that these classifications may change over time and argues that lawyers oscillate between the categories at different stages of their careers. For instance she suggests:[673]

> It is clear, for example, that the first type of character is unstable. Nagging feelings of regret and self-contempt may inhibit these lawyers' adversarial instincts. And since succumbing to these feelings might be entirely incapacitating, they may react by retreating from the ideals that engender them. Such lawyers may decide to throw themselves into the adversarial role, switching their allegiance to its social rewards. Nor are inner collision and instability excluded by the other types of character. For instance, self-deception could arise in the second type of character as a result of what might be called the "halo effect." The halo effect is produced when a person makes himself believe that worldly success in a profession or a way of life is a sure sign of success in other dimensions that are less accessible to public appreciation and appraisal.

All of these social psychology theories offer explanations for behaviour. For instance, they help explain the nature of culture and how it can affect an individual's behaviour. In particular these theories help us understand why some individuals can feel pressured by their social setting to conform (and in effect sacrifice their autonomy) or, at the very least, comply with the wishes of the organisation within which they work. However, there are other theories that assert that some individuals, who possess a very keen sense of their own self-awareness and self-esteem, can resist this pressure. In the meantime, when individuals are placed in a situation where the values of the firm run counter to those of the individual, a sense of dissonance is experienced by the individuals.

Yet Langevoort, a legal academic, cautions that these theories have "been generated largely by laboratory experiments, under pragmatic limitations and research protocols"[674] suggesting they may only offer indications of what is happening. Luban, too, refers to the fact that "dissonance-induced belief change" may fade and vanish after the experiment has concluded.[675] However, he goes on to remind us that individuals working on a day-to-day basis are being confronted and affected unconsciously with

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Moral Conduct: Kholberg's and Hogan's Theories' (1983) 115 *Journal of Psychology* 241, 243-244 cited in Daicoff, above n 289, 220.

[673] Eshete, above n 595, 275.

[674] Langevoort, above n 630, 95.

[675] Luban, above n 451, 301. This is also a point made by Langevoort, above n 624, 98.

group norms over a long period, and so he argues that "it seems overwhelmingly likely that the transitory will become permanent".[676]

E *Conclusion*

Governments are implementing reforms that expose the professional to the forces of the market. These forces have brought about economic pressures and changes to how law firms practice, which, in turn, affect the conduct of the individual practitioners. However, the strongest influence impacting on an individual lawyer's behaviour comes from the culture generated within the firm in which s/he is working. Both the legal and social psychology literature recognise that firm culture can cause individual practitioners to either comply or conform.

It is this influence that is specifically discussed in Part II of this thesis, when the research data are reported and compared to the empirical and theoretical material presented thus far. It will then become evident that the social psychology literature canvassed in this chapter provides some important insights into the behaviour of the participants of this study. It helps provide some explanations for the different perspectives held by law graduates and experienced legal practitioners within the law firms.

[676] Ibid.

PART II – DATA AND ANALYSIS

IV METHODOLOGY

This chapter provides an overview of the methodological approach taken in this study. It also provides a rationale for including the chosen participants and describes some of the limitations encountered.

The literature on professionalism predominantly examines the profession as a whole. There is very little empirical research on the views of professionals in practice. This thesis seeks to present findings on what practitioners recruited for the research actually think and say about their work as accounting and legal professions. This project therefore contributes to the scholarship on the professions. Using a limited sample, this study reports on the perceptions of the participants about what they believe happens in their own practice environments, and interprets, compares and examines these perceptions within the context of theoretical understandings of legal professional practice presented in the relevant literature.

A *Literature Review*

In preparation for the interviews, the author conducted an extensive literature review as a means of determining what the literature says about professions and those working within them. The literature sources that have been consulted are (1) monographs and journal articles that discuss sociological and contemporary theories of professionalism (2) psychology theories and (3) some empirical work that reports on the lawyer/client relationship. However, it was discovered that few, if any, of the latter, ask practitioners about their understandings of professionalism and their conceptions of lawyering.

While all of these theories have international and cross-disciplinary application, this study was particularly focused on determining to what extent they apply to law and, to a lesser extent, accounting in Australia. The literature in the review focuses on material authored in the United States of America, the United Kingdom, Canada, New Zealand and Australia.

B *Methodology*

Any methodological approach aims to answer the research question identified, make the data manageable, and take all measures possible to ensure that there is no pre-judging of the outcome.[677] In doing this, the researcher is also endeavouring to take all reasonable steps to engender reliability and validity.

As previously mentioned, the aim of the research was to focus on the understandings of individuals as opposed to the professional bodies to which they belong. It endeavoured to explore the meanings or perspectives behind the practices of individuals.

The researcher attempted to find out how individuals think and understand about what they are doing. Therefore, in the thesis, the researcher tried to determine the thoughts and understandings of those who were about to practise or were practising in their chosen discipline. So a qualitative approach was considered appropriate.[678] Strauss and Corbin define this as:

> Any kind of research that produces findings not arrived at by means of statistical procedures or other means of quantification. It can refer to research about persons' lives, stories, behavior, but also about organizational functioning, social movements, or interactional relationships.[679]

This methodology allows the participant to consider the process that eventually results in a product – the service in this instance. More specifically, qualitative research aims to determine what people are thinking and why they do what they do. It is interested in assumptions, motives, reasons, goals and values.[680]

The interviews were recorded and later transcribed. The interviews were informal and semi-structured, using open questions. They progressed largely in the direction set by the interviewee and took the form of conversations, although the author was using a

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[677] Peter Mercer, Margaret Ann Wilkinson, and Terra Strong, 'The Practice of Ethical Precepts: Dissecting Decision-Making by Lawyers' (1996) 9 *Canadian Journal of Law and Jurisprudence* 141, 145.

[678] While a qualitative approach was taken, the data collected present some opportunities for some quantitative reporting, but this is minimal.

[679] A. Strauss and J. Corbin, *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (1990) 17.

[680] Jack R. Fraenkel and Norman E. Wallen, *How to Design and Evaluate Research in Education* (2nd ed, 1993).

set of pre-determined questions that had been informed by the issues raised in the literature.[681]

Some of the assumptions underlying qualitative research highlight its applicability to this thesis. At the most basic level, there is an assumption in qualitative research that "it is more useful to describe and interpret events rather than controlling them (as in quantitative research) to establish cause and effect." [682] The participants in the interviews were encouraged to describe their situations, their interactions with those with whom the practice. This allowed them to speak freely, as opposed to confining their thoughts to particular interview questions.

The qualitative paradigm assumes "that there are multiple constructed realities (i.e. different people have different perceptions of reality through their attribution of meaning to events, meaning being part of the event not separate from it)."[683] Therefore, the qualitative approach recognises the value in asking individuals what they think about their reality. In this respect, the qualitative approach utilises reflexivity[684]. The interviews sought to determine "how people [the participants] see their own actions, how they perceive that others see their actions, how they interpret this from the actions of others and how then they modify their actions in order to present themselves in the light that they want to be seen."[685] During the interviews, the participants considered how they practise, how others view their efforts, and reflected on their reactions to pressures. In effect, many of the participants recognised that they were essentially thinking about the kind of person they wished to be.

Qualitative research assumes "knowledge is both context and time dependent. While quantitative research searches for generalisations and universal truths, qualitative research searches for a deep understanding of the particular."[686] The work of Schon supports this approach. He asserts that practitioners reflect-in-action in accordance with their "setting", which includes all the "things to which we will attend and *frame* the context in which we will attend to them.".[687] His view is that being in practice involves

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[681] Craig J. Thompson, William B. Locander, and Howard R. Pollio, 'Putting Consumer Experience Back into Consumer Research: The Philosophy and Method of Existential Phenomenology' 16 *Journal of Consumer Research* 133, 138.
[682] Joy Higgs, 'The Context of Qualitative Research' in Joy Higgs, (ed), *Qualitative Research: Discourse on Methodologies, (*1997) Hampden Press, 7.
[683] Higgs, above n 682, 9.
[684] Higgs, above n 682, 20.
[685] Rosemary Cant, 'Why Do Qualitative Research?' in Higgs, above n 678, 20-21.
[686] E. Domholdt, *Physical Therapy Research: Principles and Applications* (1993) cited in Joy Higgs, 'The context of qualitative research' in Higgs, above n 678, 7.
[687] Schon, above n 24, 40.

much more than an application of rules: it requires the practitioner to "define the decision to be made, the ends to be achieved, [and] the means which may be chosen."[688] By doing this he asserts that the problem is "constructed".[689] The interviews, therefore, were semi-structured to allow the participants to express their views as fully as possible, recognising that different participants have different understandings because they are at different stages of their careers and therefore affected by different pressures.

C *Ethics Requirements*

In accordance with the requirements prescribed by the Griffith University Ethics Committee, each interviewee received a letter of explanation that outlined the nature of the topic[690] and, if they agreed to the interview, their consent was obtained in writing.[691] In obtaining their consent, the interviewees were advised that their recorded comments would be kept confidential.

D *The Participants*

An interesting tenet of interactionist theory contemplates that individuals are constructed in an on-going process through their social interactions, implying that a socialisation process ensues. Everett Hughes, who adopts this view, claims that:

> culture and technique, the etiquette and skill of the profession, appear in the individual as personal traits. … In general we may say that the longer and more rigorous the period of initiation into an occupation, the more culture and technique are associated with it, and the more deeply impressed are its attitudes upon the person.[692]

More generally, it has been acknowledged in a recent article disseminated throughout the American legal profession that it takes two years for new practitioners "to get the hang of things".[693] These views suggest the need to include the views of participants practising at different levels of employment in the professions in order to get a more

[688] Ibid.
[689] Ibid. This proposition, therefore, supports the use of qualitative research as outlined in the above paragraphs. The idea that there are constructed realities.
[690] See Appendix A.
[691] See Appendix B.
[692] Everett Hughes, *Men and Their Work* (1958) 36.
[693] Kennedy, above n 543.

complete picture of the reality of practice. Therefore the study includes participants who were "training" (university students); those being "tested" (the graduates) and those who were "tried" (the experienced practitioners).

The university student participants were law and accounting students in their final year of study. Law students were in their fifth year of study at university since they were all undertaking double degrees, whereas the accounting students were in their third and final year. The participants (a) graduates who had been practising either law or accounting in generalist firms for two years and (b) experienced legal and accounting practitioners who had been practising for more than 15 years.

The involvement of many of the student and graduate participants was facilitated by the fact that the author was known to them as having taught them at various times This was certainly the case with the law students, but having taught a course called Introduction to Business Law into the accounting school for a number of years she was familiar to many of those studying to be accountants as well.

There was also little difficulty recruiting legal practitioners, as the profession, in both the Brisbane and Gold Coast areas, are known to be interested in establishing links with the Law School and therefore open to attending social functions and participating in teaching and projects focussing on legal issues. However, soliciting the co-operation of the required number of experienced accounting practitioners was the subject of much correspondence. About fifty letters were sent to accounting firms before the eight practitioners who agreed to be involved were secured.

The following tables represent some statistical characteristics of the participants.

Table 4.1 – 17 Students: Age Distribution by Gender

Age	Male, Law	Female, Law	Male, Accounting	Female, Accounting
23-29	3	2	-	4
> 30	4	-	3	1

Table 4.2 – 16 Graduates: Gender and Firm Size

Firm Size by Partners	Male, Law	Female, Law	Male, Accounting	Female, Accounting
< 4	-	-	1	2
> 4 and < 10	2	-	1	-
> 10	4	2	4	-

Table 4.3 – 16 Experienced Practitioners: Gender and Firm Size[694]

Firm Size – No. of Partners	Male, Law	Female, Law	Male, Accounting	Female, Accounting
< 4	-	-	1	
> 4 and < 10	5 (1 Sen. Ass.)	-	5	-
> 10	3 (1 Sen. Ass.)	-	1	1 (Sen. Ass.)

As table 4.1 shows, there were seventeen (17) student participants, nine (9) law students and eight (8) accounting students. Similarly, Tables 4.2 and 4.3 report that there were sixteen (16) graduates and sixteen (16) experienced practitioners involved in the study. Tables 4.2 and 4.3 relate to the size of the firms, as measured by the number of partners in the firms, from whom the participants were drawn. In terms of firm size and gender of the participants, the author tried to reflect the operational information gathered through surveys from the Australian Bureau of Statistics [ABS].[695] It is these surveys that provide the statistical information used below in this section.

With respect to legal practice, the majority of firms were those owned by sole practitioners i.e. 69.2%. In fact, firms with less than ten principals/partners represent 98.8% of legal firms in Australia. Yet only 43.75% of the participating firms were

[694] These participants were all partners in their firms except those that are identified as senior associates.
[695] Australian Bureau of Statistics 8668.0 - Accounting Practices, Australia, 2001-02 published at http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8668.02001-02?OpenDocument and Australian Bureau of Statistics 8667.0 - Legal Practices, Australia, 2001-02 published at http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8667.02001-02?OpenDocument

drawn from this group with the remainder coming from firms with more than ten principals/partners. The explanation for this is that most graduates were employed by larger firms. Therefore only 25% of these participants came from firms with less than ten principals/partners. A more reflective participant group was achieved in the experienced practitioner category. In that, 62.5% were from firms with less than ten principals/partners. In terms of gender, females represented 23% of the student group and 25% of the graduate group, just falling short of the 33.6% that account for those employed in solicitor practices across Australia.

Interestingly there were no female participants in the experienced practitioner group, even though it is reported that females account for 20.5% of those who are principals/partners of solicitor practices. Perhaps this can be explained by other statistical information. Of the number that are included in the 20.5% mentioned, 23.9% work in firms where there is only one principal/partner (which obviously means that it is their own firm) and 28.4% work in firms that consist of two principals/partners. This shows that a large proportion of the female principals/partners work in firms from which the study did not illicit a participant. Added to this is the fact that less than one-third (30.9%) of all legal practices has a female principal/partner.

With respect to Accounting, the report of the ABS provides a reference point for the size of the firms included and the composition of the participant groups. Out of 9,860 accounting practices, approximately 67% are one principal/partner firms. In relation to the participating firms, 62.5% of the firms from whom the participants were drawn have less than 10 principals/partners, with most of these having less than 6 principals/partners. It is interesting to note that 54.1% of accounting practice employment is female. With respect to the participants, 43.75% of the student and graduate group are female. There was one participating female experienced practitioner and this was in a firm where there were more than 10 principals/partners. The ABS report again supports this proportion of involvement since females represent only 9.1% of the principals/partners of firms with more than 10 principals/partners. Again, it is the smaller practices that have only one or two principals/partners females accounted for 24% of the principals/partners.

E *Interviews*

The researcher conducted the interviews with the students in her office. Recent graduates were interviewed by phone. Interviews with the experienced practitioners took place in their offices. The duration of the interviews ranged between twenty-five and thirty-five minutes.

The approach taken in the interviews was mainly participant directed, but an interview schedule[696] was prepared as a prompt for the researcher. The interview invariably started with an indication that it was the intention of the researcher to cover certain questions, but that it was important that the participants' opinions and perspectives dominate the discussion. The interviews started with simple questions followed by more challenging ones. An attempt was made to arrange the questions in a logical order, but the order ultimately depended on the participants' responses. On many occasions the flow of the conversation obviated the need to ask some of the questions. The questions were open-ended to allow the participants to canvass whatever issues they considered were important to them. This approach allowed them to portray their world as they saw it.[697]

The interviews began with the question "In your opinion, is the practice of law a business or a profession?" Subsidiary questions acted as prompts to encourage the participants to elaborate on the points they were making. For instance, when the participants provided examples, the researcher was able to obtain a much richer understanding of the view expressed. It also became obvious that many of the participants found the questions challenging and therefore they developed or explained their views throughout the course of the interview period.

Gellhorn, Robins and Roth, writing primarily about student lawyers interviewing clients in a clinical class, sounded a warning that is just as real for researchers framing questions:

> Students who do not put questions to clients in a context they understand ("frame" the question), acknowledge client emotions, follow up on client stories, or share floor and topic control (that is, who gets to speak when, and about what) may not realize that these choices are interpretable as efforts to dominate the client and maintain control of the interview. For example, clients may be kept in the dark about lawyers' goals and objectives if a line of questioning is inadequately framed. Consequently, clients are unable to

[696] See Appendix C.
[697] M.Q. Patton, *Qualitative Evaluation and Research Methods* (2nd ed, 1990) 24.

> act as equals in the construction of their own stories; they can only respond to what is asked of them. Similarly, by not following up on information offered by clients, or by controlling the floor and topic, lawyers define the limits of the legal discourse and clients are silenced.[698]

Researchers also need to be careful not to be preoccupied with the next question, ask two questions at once, or be anxious about their own performance. However, the more concerning factor with respect to the researcher's performance, is possible bias. Having previously worked in law firms, the researcher was aware that she needed to be particularly careful that she did not import her understandings into the questioning as this could skew the participants' answers.

The researcher was also very conscious of the fact that interviewing can be a complicated exercise and tried to bear in mind that she was the learner in the situation whose main task was to listen. As Miller and Crabtree stress, it is important that researchers "'bracket' their own preconceptions and enter into the individual's lifeworld and use the self as an experiencing interpreter".[699] The author tried not to fall into the trap of constructing the questions to extract the story that she wanted to hear: [700]

> Reality is seen as multiple and constructed. Qualitative research does not assume that there is one single objective reality. In fact, it recognises subjectivity, and that research cannot be value-neutral: values influence the very questions that we ask.[701]

F *Transcription of Tapes*

While some literature supports the view that researchers should listen to tapes and only transcribe the relevant sections, the researcher made a decision to transcribe the recordings in full. This approach proved invaluable since the relevance of certain comments of the early participants only became evident when considered in the context of the texts of later participants. For instance, it was only when experienced practitioners focussed on the topic of professional etiquette that some of the comments

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[698] Gay Gellhorn, Lynne Robins, and Pat Roth, 'Law and Language: An Interdisciplinary Study of Client Interviews' (1994) 1 *Clinical Law Review* 245, 249.
[699] W.L. Miller and B.F. Crabtree, 'Primary Care Research: A Multimethod Typology and Qualitative Road Map' in B.F. Crabtree and W.L. Miller (eds) *Doing Qualitative Research: Multiple Strategies* (1992) 3-28.
[700] Beverly Campbell, *Phenomenology as Research Method* Victoria University of Technology, <http://www.staff.vu.edu.au/syed/alrnnu/papers/bev.html> at 1 February 2004.
[701] M. Sandelowski, Sandelowski, M. 'Issues in designing qualitative research, presentation at the Whyalla Campus of the University of South Australia, 27 March, 1996 cited in Debra Tedman and Bronwn Ellis, *Ways of Investigating Variables Which Affect Student Learning* (1997) LERN Conference <http://edoz.com.au/cwcc/docs/LERN/papers/tedman.html> at 26 October 2006.

of the graduates, which were gathered earlier, became important. Gellhorn et al make this point:

> By capturing interviews on videotape and transcription, one can revisit the text repeatedly, always treating the familiar as anthropologically strange and worthy of intense attention.[702]

The transcripts include the verbatim text. In other words, the "ums" and other expressions were included as it is believed that these also help the researcher to understand the participant's perspective. Anthropologists use this method, suggesting that this is a much richer representation of the interview.[703]

G *Data Analysis*

Kritzer, a legal researcher, outlines how he sees the data analysis process. He maintains that, in writing up findings, researchers immerse themselves in the data but often find that their analysis raises additional questions that point to the need to collect further data.[704] However, he then goes on to suggest this is a "sanitized description of the messy reality of what happens when researcher meets data."[705] In this thesis, the data set is important in itself but it is also the case that it was noticed, early on in the project, that the collected data caused the researcher to take a more detailed approach when asking questions of a later category of participants.[706]

Campbell also talks about the fact that analysis starts as soon as the researcher starts collecting data.[707] For instance, the comments of the graduates about the constraints that they were experiencing caused the researcher to question the experienced practitioners about their thoughts on the practices of the new entrants to the firms. However, most of the experienced practitioners raised this issue when asked about whether their views on professionalism had changed since starting to practise.

The interviews sought to encourage the participants to talk of their own daily practices. The resulting data made the job of the researcher very challenging since

[702] Gellhorn, et al above n 698, 253.
[703] Ibid 266.
[704] Herbert M. Kritzer, '"Data, Data, Data, Drowning in Data": Crafting the Hollow Core' (1996) 21 *Law and Social Inquiry* 761, 763.
[705] Ibid.
[706] Ibid 786.
[707] Campbell, above n 700.

"every practitioner's experience is unique."[708] The researcher's job is one that tries to make sense of the data, to find patterns and to cluster the data into particular topics.[709] Many people use software tools such as NUDIST for this process but the data collected in this situation was quite manageable and the physical reading of the texts allowed for continued re-examination as opposed to working with the identified passages according to key words.

All the material gathered was then analysed, or perhaps, more correctly interpreted. The word "analysis" seems to suggest a scientific ordering whereas "interpretation" connotes "a human activity that includes intuition, past experience, emotion … the 'pondering,' of data in terms of what people make of it".[710] As a means of trying to more accurately present the views of the interviewees rather than interpret what they mean, the author has made every effort to include direct quotes into the reporting chapters.

The data very clearly reveals that practitioners in firms experience an evolutionary process. Chapter V of this thesis reports on this. Yet, the main aim of this thesis was to compare the views of the participants to those reported in the literature and consequently to try to determine which theories best describe the practices of the individual participants. These chapters, as far as possible, endeavour to reflect the broad themes that emerged from the analysis and many of these feature in the headings of the sections. For instance the question "Have you experienced any difficulties conducting yourself in accordance with your view of professionalism?" drew responses that form the basis of the headings "firm culture" and "individual responses to culture".

While there is a certain amount of description involved in presenting findings from empirical work, the most important part of the analysis of data is critical reflection. However, this step also presents difficulties. For instance, the data can be frustrating to manage when it is realised that the findings do not elaborate on a topic to the depth that one might wish.[711] The interpretive element to the analysis can also be problematic. Researchers recognise that interpretation plays a key role since more often than not the data "seldom presents itself in a clear, unambiguous fashion."[712] Cotterrell also makes this point:

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[708] Mercer, et al above n 677, 146.
[709] Campbell, above n 700; Tedman, et al above n 701.
[710] Harry F. Wolcott, *Writing up Qualitative Research* (2nd ed, 2001) 33-34.
[711] Kritzer, above n 704, 791.
[712] Campbell, above n 700.

> Observation - carried out in the most careful and rigorous manner possible - is merely an essential prerequisite of interpretation: interpretation of the social significance of what is observed, first, in terms of the meaning of the social phenomena for those individuals and groups whose actions and expectations constitute the phenomena, and, secondly, in terms of its significance for the concerns of those whom the researcher seeks to persuade through his or her research.[713]

With respect to interpretation, the findings have undergone a degree of external scrutiny, as the reporting of each stage of the interviews was the subject of conference papers and the researcher benefited greatly from the comments of other academics at these conferences.[714] It is also encouraging that some of the prior empirical work conducted by other researchers supports the conclusions of this study. More importantly, some of the findings, such as those that identify a difference in perspective between the law graduates and the experienced legal practitioners, were the subject of an article published in an international journal in December 2005.[715]

H *Limitations*

It is important to recognise the limitations of any empirical research study. While this research endeavours to contribute to the gap in knowledge concerning the practices of individual practitioners, the sample size is small and the participants come from a very small region of Australia. Therefore, this thesis cannot claim to be representative but simply indicative of the perception of practitioners practising similarly to those in the study.

Other limiting factors require acknowledgment. As described above, the students and the graduates came from the author's University. For practical and other reasons, it would have been extremely difficult to draw student and graduate participants from other universities. Therefore, it needs to be recognised that many of the students and graduates may have only consented to be participants because they knew the researcher.

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[713] Cotterrell, Roger, (1992) *The Sociology of Law: An Introduction*, Butterworths, 14.

[714] Corbin L, invited speaker at the Barrister Association of Queensland Ethics and Advocacy Conference, Noosa April 2005 – 'How "firm" are lawyers' perceptions about their work?'; Corbin L., 'How "Firm" are lawyers' perceptions about their work?', First international conference on lawyers' ethics: New Perspectives on Professionalism: Educating and Regulating Lawyers for the 21st century,, University of Exeter UK, July 2004; and Corbin, L., 'Queensland students' and lawyers' perceptions of professionalism' *Socio-Legal Studies Association* Annual Conference at the Nottingham Trent University, Nottingham UK April 14 - 16, 2003 - Legal Profession Stream.

[715] Some of the content of this section was included in a published article – Corbin, above n 544.

It is therefore possible that some interview responses may have been conditioned by the respondents' senses (inadvertent or not) of what the interviewer wanted to hear. However, it is unlikely that this was commonly the case, given the fact, as mentioned above under 'Interviews' that the discussion was mainly participant directed.

While it was not planned, there was only one woman represented in the experienced practitioner sample. This is hardly a desirable outcome, but it may in fact represent the make-up of the practitioner population (practitioners with more than 15 years experience) that was investigated , given the the ABS data referred to above.

I *Conclusion*

This chapter has sought to present an overview of the approach taken in the thesis and discuss the research method adopted. It has pointed out that this thesis is attempting to address the gap that has been identified between the writings on professionalism already published that mainly postulate on the practices of the professions as a whole and the views and understandings of those in the practice reality.

As discussed above, qualitative research acknowledges, along with interactionism, that an individual's actions are framed by their own understandings. Both also emphasise the importance of the individual's environment as an influencing factor. In acknowledging that a person's environment influences them, it is reasonable to suggest that individuals at different stages of their careers can have differing perspectives. Therefore, the study has included students and, more importantly, practitioners at different levels of practice as potential participants.

Ultimately, the thesis compares the data collected to the existing literature with a view to determining whether the literature provides a fair description of what is happening in reality. The thesis, because of the size of the sample and the narrowly defined geographic area from which the participants are drawn, does not claim to provide definitive answers. However, its findings will provide some insights on how individuals appear to practice in reality, and to what extent these practices support the assumptions and claims made in the normative literature on professionalism.

V FINDINGS I: AN EVOLUTIONARY UNDERSTANDING OF PROFESSIONALISM

As assumed by the interactionist approach,[716] professions steeped in a rigorous culture and technique affect their members more profoundly than others do.[717] The professions of accounting and law fit this description because they require their members to undergo an intensive educational regime before qualifying to practice; undergo specific practical training in the early years of practice; and continually update their knowledge. As noted in Chapter III under 'Managerialism', these professions, in the practice environment, also adhere to a particular hierarchical structure in which early entrants are mentored by more senior staff and the culture of the firm is determined by the partners (i.e., the owners of the firm).

In deference to the acknowledgement, particularly noted by interactionism, that individuals at different stages in the assimilation process have different understandings, individuals at different career stages were included in this study as a way of developing a picture of what they understand by professionalism and determine the extent to which their opinions differ.

This chapter reports on the data collected from the participants. The participants in the study were students (those in their final year at university); graduates (those who had been practising for two years); and experienced practitioners (those who had been practising in their profession for more than 15 years). As mentioned previously, in practical terms, it could be argued that the students were in the *training phase*, acquiring the knowledge and skills for the practice of their future profession. The graduates were operating in the *testing area*, the practice environment that was still quite new to them. The experienced practitioners could be described as the *tried* in that they were well used to their environment and unequivocally accepted their professional role. These terms will feature in the following discussion.

The students who were still at university based their perceptions of professionalism on their expectations about the profession they were entering, although some of the accounting students were working in accounting firms while undertaking their studies. Consequently, these accounting students knew more about practice than other accounting and law students.

[716] The Interactionist approach is described in Chapter I, p. 33.
[717] Plummer, above n 160, 224.

One law graduate made the comment that the values learned throughout life and developed at university are "tested when you start working." The experienced practitioners, on the other hand, believed themselves to be speaking from a position of authority, couching their comments in language that implied that their experience had "tried" them. They credited their experience as qualifying them to have an educated opinion on the topics under examination and justified their criticism of those whom they believed did not fit neatly into their firm's model of behaviour.

Both this chapter and Chapter VI seek to answer the question "How do lawyers and accountants perceive professionalism?" This chapter in essence conducts a cross-sectional analysis of the data gathered. It compares views of participants at different stages in their career, and notes an evolutionary change in the participants' understanding of professionalism. Chapter VI specifically considers the data in light of the literature discussed in Part 1.

The findings in this chapter are recorded under the following headings:[718]

Section A The participants' views of professionalism

Section B Professionalism and the practice environment

The data is analysed by:

(i) comparing the responses of the students, graduates and experienced practitioners and further comparing across the disciplines of law and accounting; and

(ii) comparing the responses of the participants at different levels of development (study or employment) in their specific discipline with particular emphasis being placed on identifying the different perspectives of the law graduates and the experienced legal practitioners.

While some members of the participating groups have different opinions to their group as a whole on some issues, it is the intention of this thesis to attempt to capture the consensus view of each participant grouping. It is also important to note that many questions proved challenging for the participants and therefore they tended to rationalise their views over the course of the interview. This meant that participants often re-expressed or developed their views on an earlier point when considering a later question.

[718] The headings used were created from the questions of the Interview Schedule (Appendix C).

The responses of all the participants are relevant to Section A. However, as Section B considers the practice reality, the remarks of the graduates and experienced practitioners are the main focus.

The following discussion reports on the responses of the participants. However, it must be noted that this is qualitative research. Therefore, there will be very little reference to statistical or quantitative information. Where percentages are presented, it should be borne in mind that these are merely used as illustrations of a point or a trend. It is not the intention to infer that these references represent the views of the broader community of the profession and its members.

A *The Participants' Views of Professionalism*

Because the word "professionalism" is difficult to define, the opening question of the interviews asked the participants to classify the practices of law or accounting as a business or profession as a way of leading to the more difficult concept. Following logically from this question were two sub-questions:

(i) what do you understand by the terms "business" and "profession"? and

(ii) is there a distinction between firms?

In endeavouring to define professionalism, the participants also reflected on

(i) the nature of the relationship between professionalism and ethics and

(ii) whether an adherence to professionalism can enhance profits.

1 *Business or Profession?*

At one level, this seems to be a very simple question and some participants answered it in very definite terms, but most recognised that there were elements of both business and profession in the practices of law and accounting. One law student made an effort to explain the criteria involved in coming to his answer. He stated that a business and a profession represent the opposite ends of a continuum.[719] He described a business enterprise, at one end, selling a product or a service solely for profit and nothing more; and at the other end of the continuum, he positioned a profession whose members he

[719] Ritzer in his writings also suggested the use of a continuum. He said "All occupations may be placed on a continuum ranging from the nonprofessions on one end to the established professions on the other": see Ritzer, above n 12, 61.

said are social trustees. He recognised there are values associated with both a profession and a business. However, he reasoned that a reduction in professional values occurs as a firm or an individual adopts more business values. This study has adopted the use of a continuum as a graphical aid to present the collective understandings of the participants and to facilitate comparisons across the groups.

(a) Students

Two students unremittingly kept to their original opinions throughout their interviews. One was an accounting student who described accounting as a profession and the other a law student who classified the practice of law as a business. The law student, referred to hereafter as LS 8, was quite resolute in his view, which, in effect was quite a different view to his peers. He was a young man who, at the time of the interview, had signed a contract to take up a position in one of the Big 6 law firms in Sydney early the following year. He said a profession is just another way of conducting a business and those who practice as business specialists live a life dedicated to the pursuit of excellence in meeting the demands of the client. In that respect he recognised that this inevitably meant long hours, many in the practitioner's own time, working on clients' cases. However, he rationalised that practitioners gain increased knowledge as a reward for this effort and the firm benefited from increased profit. He claimed that law is the definitive business because it has the ability to bill every aspect of the service to the client.

The bulk of the students recognised that there are elements of both a profession and a business in the practices of law and accounting. Three accounting students, who were currently working in accounting firms, saw the reality of the practice of accounting as a business. These students expressed the view that they personally wished they were entering a profession and spoke of their objections to what they believe is the reality, that accounting firms now have a more business-like orientation than they did previously. In this respect, these students spoke of the complexity of modern business life; the competitive culture that requires accountancy firms to extend their services in order to attract clients; and the consumer approach taken by clients.

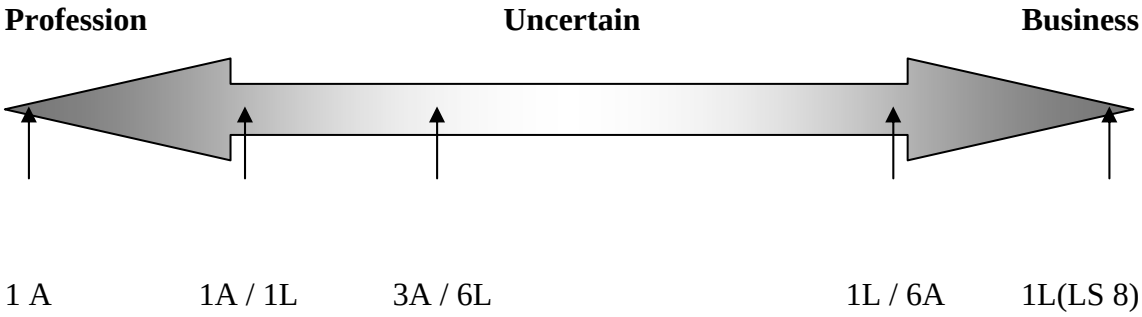
In analysing the responses of the students, it is evident that they stressed the importance of the practitioner remaining independent and providing a quality service; yet they also acknowledged that business objectives must be met to enable an enterprise

to generate enough money to operate. This seems to suggest that they recognised that it is important to attain financial goals. However, they stressed that these should not consume the practitioners. In this regard, the law students repeatedly spoke of their duty to clients but noted that they have an overriding duty to the court. Therefore, these participants are probably positioning accounting and law closer to the profession end of the continuum.

Apart from LS 8 (the law student who nominated the practice of law as a business), the law students provided little comment on business strategies. Only one law student made some comments about the increasing reliance on marketing practices, particularly advertising, suggesting that this had caused a decline in professionalism. His comments were not due to his personal experiences, but drawn from observing the way that his lawyer father had changed his practices over the last couple of years. He compared clients to parts on a manufacturer's continuously moving conveyor belt travelling through the office of the lawyer. Consequently, he concluded that lawyers only fleetingly focus on the needs of clients, thereby providing less than an optimal service to them. Therefore, in his view, law is now something less than the "honourable sort of thing" that it was previously. Therefore, he positioned law closer to the business end of the continuum.

While the term "industry" might generally be used interchangeably with "business", one law student used the word "industry" to describe the practice of law. However, he was not suggesting that law is a business. While he acknowledged that law firms operate to achieve a profit, their practice includes an adherence to ethics and professionalism. He therefore positioned law closer to the profession end of the continuum.

Figure 5.1 – Students' Opinions



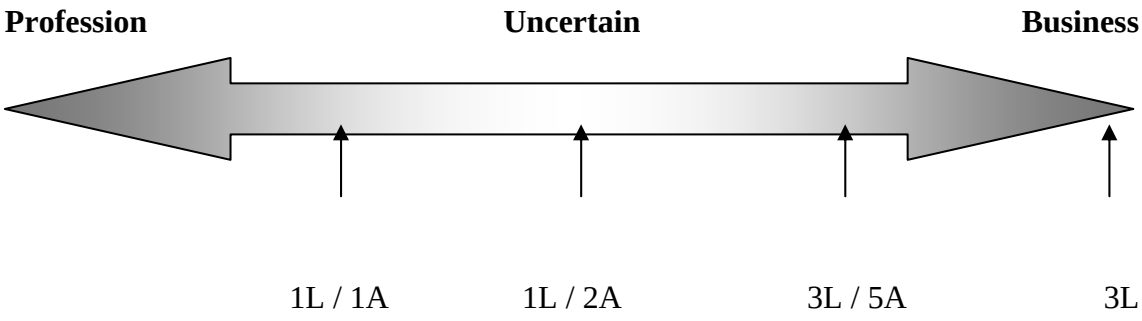
In summary, eight of the nine law students and five of the eight accounting students saw their respective disciplines as operating more like professions than businesses.

(b) Graduates

There was very little indecision on the part of the graduates in describing the practices of law and accounting. None of the graduates considered that the word "profession" accurately described either the practices of law or accounting. Even more revealing is the fact that only five of the 16 participants positioned the practices of law and accounting at the midpoint or above on the continuum: most tended to characterise their disciplines as closer to a business than a profession.

As can be seen from Figure 5.2 below, the profile of the graduates as a whole is quite different from that of the student group, orienting the practices of law and accounting towards the business end of the continuum.

Figure 5.2 – Graduates' Opinions



(c) Experienced Practitioners

Twelve of the 16 experienced practitioners decisively expressed the opinion that their firms were operating as businesses, although they did acknowledge that the public considers their firms as professions. They were generally of the opinion that firms focus on the generation of profit, but believed they are justified in claiming to be a profession because they posses technical or expert knowledge.

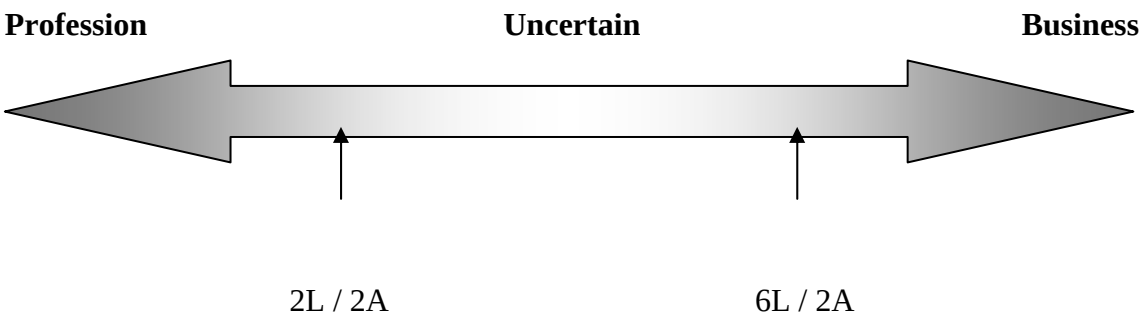
Two accounting participants, one of whom is a senior associate, described accounting as a profession that uses business principles to ensure that the service continues to operate. The senior associate added: "the overriding thing that makes us a

profession is our ethics."[720] The remaining six practitioners considered the practice of accounting to be a business. Typically, they said: "I guess it's a profession, but I treat it as a business. We run this place as a business."

Six of the eight legal practitioners described law as a business whereas the other two considered it a profession using business principles to operate. With respect to the latter, it would appear that their roles within their firms account for their different answers. For instance, one is a senior associate in a national firm who acts as the State Director of the firm's Community Benefits Programme. He is responsible for co-ordinating any donations to worthy causes and the provision of *pro bono* work by staff at his firm. The other practitioner, who is a professional indemnity lawyer, saw his practice as "very much professionally oriented".

Figure 5.3 represents the views of the participants of this group.

Figure 5.3 – Experienced Practitioners' Views



(d) Career Stage Comparisons

The students as a whole positioned both the practices of law and accounting as closely associated with a profession. The graduates started the trend towards categorising both as reflecting business practices and then the experienced practitioners completed the progression to the business end of the continuum. One of the law graduates articulated this eventuality as follows:

> I think like during law school and also in your first few years out in your articles, and your first few years as a lawyer, which is currently the stage that I am at, I think that you still view the practice of law as a profession rather than a business. But then I think you get to more of the point where

[720] In considering the relationship between professionalism and ethics below it will become evident that the accounting graduates are referring to codes. See this Chapter pp. 145-146.

> you are looking to advance your career, then all of a sudden it's basically forced upon you that you look at the practice of law as more a business.

Perhaps the most striking conclusion drawn from the above quote is the contrasting perspectives of the students and the experienced practitioners. Whereas both the law and accounting students considered their respective practices as profession oriented, the experienced practitioners believed them to be business oriented. More specifically, 12 of the 17 students positioned both law and accounting at the midpoint or closer to the profession end of the continuum. Whereas only 5 of the 16 graduates and 4 of the 16 experienced practitioners have this view. Even more significant is the fact that 12 of the 16 experienced practitioners considered the practices of law and accounting as businesses.

These responses, however, do not tell the full story, particularly in relation to the law graduates. While 11 of the 16 participants positioned the practice of law close to the business end of the continuum, the rest of their comments and observations clearly conveyed their disappointment with this reality.

It is particularly interesting to note that the experienced practitioners from both law and accounting appeared to have very similar views on the profession/business orientation. While there are those that differ (two law and two accounting), there are probably reasons why this is so. For instance, one of the law participants is the senior associate who heads up the *pro bono* initiative in his firm and the other law participant is a professional indemnity lawyer who, by virtue of his specialization,[721] considers law to be more closely associated with a profession. With respect to accounting, one of these participants is a senior associate and the other a partner in a firm with less than four partners. These distinctions may account for their difference of opinion.

2 *What is a Profession?*

In order to appreciate the true significance of the participants' answers, they were asked to elaborate on the meaning of "profession". While there was a general consensus about the meaning of "business" as an organisation pursuing the goal of profit, the term "profession" attracted varying definitions.

[721] His practice consists of representing professionals against negligence actions.

(a) Students

The law and accounting students painted quite an idealistic picture of a profession. They expressed the view that a profession's members possess specialized knowledge which they use to provide a service to the public and so perform a particular function in society. One law student explained that it is acceptable to be a professional who possesses business sense but he quickly added that the aim of the professional is to maintain the social trustee status in preference to pursuing profit. The students believed that professions hold a special place in society so that they can provide competent, ethical and knowledgeable service to clients. Some law students mentioned that lawyers have a responsibility to the court.

As mentioned previously, LS 8 identified law as a business. However he was not suggesting that there was any shame attached to this. On the contrary, he felt that lawyers are business specialists who dedicate their lives to meeting clients' needs by providing excellent services. However, he was critical of some of the practices presently used, suggesting that they are inefficient. For instance, he believed billable hours, the aspect of practice that he dubbed the "real" legal work, is not efficient because there is too much opportunity for people to inflate budgetary figures by taking longer than necessary on certain tasks.[722] He also maintained that the review system presently employed by law firms does not effectively deal with these situations, as those undertaking the review have no way of verifying employees' claims

However, he was alone in suggesting that business strategies should have prominence in the operation of a law firm. All the other students considered that professions should resort to business strategies only as a means of supporting the practitioner or the firm in completing their higher duties. Even those who positioned accounting closer to the business end of the continuum expressed disappointment that this is so. Therefore all the students except one expressed the view that there was something distinctive about a profession that set it apart from a business. One of the law students commented:

> And if they are professions yes, they have to make money, and yes they deserve it after all the study they do. But to call themselves professions or professional, money cannot be the only goal. There has to be something given back to society.

[722] Some explanations for this occurrence are included in the discussion below on the relationship between budgets and promotion. See this Chapter, p. 169.

(b) Graduates

The accounting graduates referred to the technical (particularly educational) aspects of a profession. They also emphasised the need for practitioners to provide a quality service to clients: for the service to be performed well and in accordance with ethical standards. Interestingly, four of the eight accounting graduates mentioned that accounting or other professions have elevated status by virtue of public recognition. They also stated that professionals dressing appropriately generated part of this perception.

The law graduates also discussed the need for a prolonged period of training and adherence to an ethical code. But, in addition, they considered that members of a profession have a much broader set of criteria that influence their conduct or, more specifically, the decisions they make. For instance, they suggested that professionals should consider what is in the best interests of the client, the implications of the client's course of action, and the effect of the client's action on society. This contextualised understanding obviously runs counter to the classification of the practice of law as more like a business than a profession. In other words, they believed that most firms are failing to meet these standards, and so are more business-oriented.

A number of these graduates tried to articulate how a professional with their views on professionalism might act. One cited the use of research as a criterion for appraising the degree of professionalism in existence in a firm:

> I consider the profession side of things is lost because you are not spending much time in doing research or doing things on behalf of clients … You are just doing things that you know are commercially viable to do.

(c) Experienced Practitioners

The experienced accounting practitioners had particular difficulty in defining a profession. In fact, this question drew quite a cynical response from one:

> I guess, we've gone through a university degree and we've come out and been told we're professionals. It's as simple as that.

While the public tends to hold this view, this experienced accounting practitioner and others treated this claim with contempt. Some said that the term "profession" generally invites some "high-minded type connotations", and that those who take this attitude are

really suggesting "we're above the rest." Others mentioned that altruism would require members of a profession to "hold themselves back from doing business-like activities so they're conducting it as a charitable service." Nevertheless, it is evident that these participants did not claim to be offering their services altruistically. Some stated that if there are claims of this kind then they are simply attempts at being elitist.

One accounting practitioner, a firm partner, explained that his firm had recently changed its approach to practice. He claimed that his firm is now more professional as they are taking a client-centred approach. He explained that his firm's previous working practice was to work hard and achieve results that were efficient for the client, but apparently without really consulting with the client. He concluded: "So I think we're doing a far more professional approach now providing the client with what they really want."

The lawyers too seemed to be proceeding very cautiously when trying to define the term "profession". They mainly recited the criteria used by sociologists to categorise a vocation as a profession, and mentioned that lawyers have a duty to the court. But these participants were particularly uncomfortable with the idea that it might be thought that any altruistic elements might be expected of them in practice.

> Well, we're certainly a group, we're pursuing a learned art, yeah and as a common calling, but perhaps not so much in the spirit of public service as it used to be. …there's no great evidence of an altruistic approach.

To illustrate that lawyers can no longer give attention to the altruistic nature of what it means to be a profession one respondent referred to the classic case of *Donoghue v Stevenson.*[723] He said – "If Mrs Donohue or whatever came in off the street with a snail in her ginger beer bottle, I'd say, 'Well, have you got any money?'"

(d) Career Stage Comparisons

While there is much consensus between the views expressed by the students and the law graduates, the accounting graduates made no mention of altruism or public interest goals being associated with the practice of accounting. Their focus was on complying with ethical codes and "looking the part".

[723] *Donoghue v Stevenson* [1932] AC 562.

The perspective of the experienced practitioners differed even more dramatically from that of the students. While the experienced practitioners were aware of the common definition of a profession, their responses did not exhibit any evidence of the broad conception of "helping" clients as described by the students and law graduates. They acknowledged that they were providing a technically expert service but there was very little discussion about reflecting on the client's position beyond the parameters of the instructions given. There were also some comments that the client's ability to pay determined whether or not the service would be provided at all.

In discussing this topic it becomes evident that there is a totally different understanding held by the students (both law and accounting) and law graduates (Group A) to the experienced practitioners (both law and accounting) and the accounting graduates (Group B) in terms of how one should practice. These groupings will be used to discuss the findings in the context of the literature in Chapter VI.

3 *Is There a Distinction Between Firms?*

The question: "Does the size or specialization of the practices have anything to do with the perspectives of lawyers and accountants?" arose naturally from the above discussion.

(a) Students

Some of the law students suggested that a firm's specialisation or size dictated how a firm practised and, whether they conduct themselves as a profession or a business. In terms of specialisation, one suggested that:

> Family law is more a profession rather than a business, because there's much more unity among family lawyers, compared to corporate lawyers. … they've got a higher negotiation ethic - the idea to come to a settlement rather than to litigate.

With respect to size, another student thought that lawyers in small firms have more difficulty charging individuals for administrative work, whereas larger firms mainly dealt with representatives and financiers of massive corporations, who accept that there are costs associated with files. This student suggested that the size of the law firm and the type of client were relevant factors that would feature in the deliberations of

practitioners when deciding whether they should act on questionable instructions. If the client represented a substantial part of the firm's work, then the individual lawyer or the firm would have to consider very carefully the decision to terminate its services to that client. An individual would be risking his or her job and the firm risking the loss of a client. The loss of a corporate client would noticeably affect any firm's budget, whereas an individual client would have less effect and therefore a firm may be more forthright in telling an individual client that they no longer wish to provide them a service.

The following statement is representative of the comments of the law students:

> I see the corporate side as more like a business, corporate clients, and maximisation of profit. The corporate client is just this entity - it's artificial, whereas in family law you're dealing with real people in real matters. The relationship is less artificial.

Since these students were in their last year of university, they were in the process of applying for positions of employment for the following year. This prompted one student to comment that most people were aware of the focus of the firms who offer employment and that students choose carefully the firms to which they apply. He believed that those who have a capitalist focus align themselves to commercial law firms, while those who view human rights as important seek out firms or organizations with similar views. This choice, he suggested, comes from their moral beliefs. However, he also recognised that not all students have the luxury of "choice" as there is a lot of competition for positions in law firms.

(b) Graduates

In acknowledging that members of a profession require particular training, two accounting graduates reasoned that the larger firms were more professional than smaller firms because they could provide more opportunities for staff development. Another seemed to suggest that a firm's wealth and resources determined the outcome. She said smaller firms are "less inclined to aspire to professional values because a lot of small places are actually struggling."

An accounting graduate considered that larger firms are more professional because of their ability to pay their employees more. However, another put a counter view, suggesting that "the bigger the organization, particularly nowadays with CEO's and that

type of thing running accounting practices, they're more accountable to the bottom line."

The law graduates stated that a firm's particular practice areas dictated their conduct. They maintained that this had something to do with the type of client involved. They suggested that the areas of estates, crime and family law tend to produce conduct that one would associate with a profession, whereas "… commercial lawyers dealing generally with companies and large organisations tend to lose that perspective – far removed from contact with people."

One noted that a client's ability to pay could distinguish the service. He said that if a large corporation and an individual sought advice on a similar matter, the corporation would receive more thoroughly researched advice purely because they have the money to pay. "It's just … I guess that someone who pays a lot of money to the firm or a good client, would tend to get a lot more added extras in terms of the legal advice and the treatment that they get than someone who's maybe an individual who just comes in with a single problem."

Interestingly the law graduates considered those in charge of the firms as those who ultimately determined the procedures that firms should adopt. They credited the culture of the firm as reflecting the personalities of the partners:

> … talking about the differences between standards of professionalism … I'd say another big influence on it would be just the personality of the people running that firm.[724]

(c) Experienced Practitioners

There was considerable support from the experienced accounting practitioners for the proposition that the size of a firm predetermines its practice as a profession or a business. In recognising that a profession claims to equip its members with specialised training, one accounting participant expressed the view that the larger firms could offer more training for their employees than smaller firms.

Access to resources featured in the comments of several members of this group. For instance, one commented that larger firms have greater resources to be able to generate advices that are "technically not incorrect", as he put it, taking time to construct well-

[724] More discussion on this will be included below. See this Chapter, p. 161.

considered advices, whereas smaller firms have to go with their common sense as they cannot spend the same amount of time on resolving the problems of clients.

There was very little discussion on this point by the experienced legal practitioners. The professional indemnity lawyer stated that his practice area aligned with the tenets of a profession, yet other practice divisions within firms operated as businesses. He went on to explain that he had significant autonomy in advising his clients, whereas the practice of those who practised financial law and acted for banks was driven by the requirements of those financial institutions, even to the point of being required to install specific equipment to accommodate their mortgage practices.

One of the legal senior associates seemed to equate independence and qualities normally associated with professions to smaller practices since it was his view that as a firm became larger, its members lost the ability to foster close relationships. He went on to comment that he believed this would eventually cause him to move to another firm in the near future.

The other senior associate, who had very firm views that a profession is there to serve the community, said that his firm introduced the *pro bono* activities in an effort to regain that vision. He maintained that because of the firm's size and ability to accumulate wealth through their business, they could offer a programme such as this. Therefore, in this sense, he suggested that large firms had more opportunities to consider running the type of programmes that provide services to segments of the community who would not normally have access to legal services.

(d) Career Stage Comparisons

As will be noted later, the accounting graduates and experienced accounting practitioners placed a lot of emphasis on adherence to ethical codes and consequently achieving technical correctness. Therefore, they believed that firms that could provide the best training, developmental opportunities and higher wages, were more professional than others who could not provide these things. Therefore they believed that the size of the firm is important.

There was some agreement between the law students and law graduates, although the graduates ultimately suggested that the personalities of those in charge of the firms, regardless of size or specialisation, are the major influencing factor.

There was no uniform view within the experienced legal practitioner group. One claimed that his area of practice classified him as more professional than those practising in other areas of law. With respect to size, one suggested that those working in smaller firms could exercise greater autonomy in their relationships with clients. Another spoke of the virtues of larger firms having more resources to create opportunities for their staff to undertake community service projects.

4 *What is Professionalism?*

This thesis is seeking to determine the meaning of professionalism as understood by individual professionals. As mentioned in Chapter I, professionalism is defined as both the end-state of the professionalisation process i.e, a vocation that has the requisite attributes, and in terms of the conduct expected of members of a profession. While the data provides general support with respect to the first dimension of this definition, there is less consensus concerning the latter.

(a) Students

Most of the law and accounting students accepted that there are certain professional requirements, such as possessing the requisite knowledge, they found it problematic to articulate what it means to act professionally. They suggested that professionalism meant evaluating the clients' problems and subsequently applying expertise to achieve an optimal outcome. They referred to professionalism as linked to altruistic ideals, being ethical and honest in serving clients, possessing personal integrity, and having a sense of social responsibility. The law students referred to providing access to justice, thinking in a public-spirited manner, and representing people who cannot represent themselves. Interestingly, one law student suggested that professionalism meant getting to know clients in an effort to generate as many options as possible to their problem. Another said that it included alerting clients to the consequences of their actions, and sometimes choosing not to represent them if their instructions are not palatable.

Some of the accounting students who were working in accounting firms while completing their studies recounted examples to articulate their understanding of professionalism. One described her firm's adoption of entrepreneurial accounting as a way of exhibiting professionalism. This approach prompts the firm to recognise the

difficulties that new businesses face and accordingly charge only minimal fees in these early years, with the bill increasing in proportion to the success of the business of the clients over time. The student reported that the female owner of this firm had won the trust of these new businesses because they saw her firm as interested and empathetic. Another explained the total-care approach that features staff collecting a dossier of personal information on clients in an effort to improve client relations. This student said that the firm instructed the staff not to bill for these communications. Although these examples might simply be business strategies, the students themselves believed that they represent real efforts by their firms to provide a complete service and this, in their view, was what professionalism is about.

One accounting student also gave an example of instances that he believed would not be described as professionalism. She commented on clients being charged according to their ability to pay, and of course, accountants can assess this, since they have access to all the financial statements of the clients that they audit. She said that this approach was taken rather than one that reflects the amount of work performed. This student felt so ashamed of this practice that she said she quite often fudged the time sheets in favour of the client.

LS 8 also commented on this type of behaviour with respect to representing large corporations. He said there were people who made every effort to strive for efficiencies as a way of keeping costs down on clients' files. But, in effect, the clients were so big that they expected to pay fairly large costs and therefore would not notice the resulting slight reduction in hours billed. Professionalism, according to LS 8, is nothing more than "a magic trick of some sort of describing a business". In other words he was alluding to the practice of professionals describing their services as achieving professionalism when in reality they are simply aiming to meet business goals. He referred to all the elements that others cited as evidencing professionalism, but emphasised that they are the marks of a business. He went on to comment on an activity that is often considered as exemplifying professionalism. He referred to *pro bono* activities and suggested that even these are undertaken for purely business reasons. He stated:

> Even the public element of the firm, the *pro bono* work is just another way of being more attractive as a business in order to bring in more…. profit. ...It is a marketing exercise. It is good to be seen to be giving back to the community … But, at the end of the day they [the employed lawyers] are not allowed to bill over a certain amount to *pro bono*, there are restrictions.

(b) Graduates

Five of the eight accounting graduates considered professionalism to be conduct measured by the ethical rules/regulations prescribed by the professional bodies. However, their main concern focused on "what the best is for your business…. you do not want to be exposed to legal action."

There were also comments about efficiencies and the need to dress appropriately. Two accounting graduates spoke about the appearance of professionals. One called it "tie professionalism" and the other said professionalism is "a little bit about appearance and that sort of thing as well." With respect to efficiencies, one graduate said: "I think the word professionalism, these days, is more associated with how slick you run your business."

The accounting graduates made no secret of the fact that economic goals are the main focus of firms and it seems that this is the case for the graduates themselves.

> … third, fourth and fifth year people within practices … 70% of them all would go overseas to earn more money so they don't appear to have an obligation to stay here and do good for the community. It's more geared towards where can I earn the most money?

The law graduates described professionalism in similar terms to their student counterparts and so their perceptions were quite idealistic. They very briefly mentioned the professional body and its regulations, as it was their understanding that these naturally underpinned a discussion of this topic. They focused their comments primarily on the lawyer/client relationship. In particular, they stressed that the relationship featured a full service including the provision of well-researched advice that took into account both moral and ethical considerations. Some extended this description to service to the community, using words like diligence and integrity. A typical response was:

> [professionalism is] more focused on the quality of the work that you are doing and more driven towards, your clients and helping the community … and the good of society rather than just trying to get individual clients and poach clients from other firms … more about investigating a client's problem and looking at every possible avenue and giving them every possible option.

Some participants suggested that professionalism paid no regard to the income produced by the service. For instance one said "… you'll do the best you can do for the client at hand irrespective of the remuneration that we'll be able to get out of it."

It is interesting to note that one law graduate commented that professionalism is often difficult for others to recognize. For instance, a number of law graduates spoke of completing tasks to a higher standard than that required generally, but they acknowledged that these matters probably never come to the knowledge of the client. For instance, some spoke of undertaking research beyond the client's specific problem in order to satisfy themselves that their advice was complete. This conclusion is consistent with the statements of LS 8 referred to above.

(c) Experienced Practitioners

Some accountants took exception to the word "professionalism". They rejected its use because they believed some practitioners just used it as a badge to attract clients. A senior associate stated that some firms did some charity work, but concluded: "that isn't professionalism if you're doing it because it's a good way of getting to be known."

Overall, the accountants believed that "professionalism" is only a word that describes how professionals should conduct themselves, which is in a way that is technically competent. In their view, a service that meets the ethical, disclosure and compliance requirements achieves the standards that professionalism implies. One accounting practitioner gave an example of this. He said if a client required him to record his daughter's car as a motor vehicle expense on his business' tax return, he would not comply. He says that the duty he owes as a tax agent precluded him from supporting this claim. He said:

> We have a duty, as much as we dislike it; we have a duty to the Tax Office. Probably it's self-driven because it protects our tax agent's licence which protects our income stream, so there is that coming from a position of self-interest.

The senior legal associate who is the director of his firm's community benefits programme made it clear that professionalism included considerations of what is best for the community. He defined professionalism as "doing a good job, doing an excellent job, and … a sense of working together to help the community and solving injustices." However, there were other references to the provision of *pro bono* services,

but these participants were not of the view that professionalism is the goal of those undertaking these activities. One said *pro bono* cases are simply "part of your business" and another said that they are a way of promoting a firm in the community.

Most of the law participants spoke about providing a quality service. The following is a typical comment:

> I suppose to me professionalism is a way of doing things and it's doing things in a professional manner and in accordance with professional standards.

For one, professionalism is all about technical ability:

> Professionalism for me has overtones of intellectual talent and ability… talent base, to attract solicitors with good expertise…and I suppose legal expertise and proficiency in what you do…

It became evident that the main concern of these practitioners is the conduct shown to other colleagues, for example "[W]hat's considered appropriate conduct … expected by your peers." In fact, one suggested that there were two limbs to the definition of professionalism:

> … there's professionalism in the skill of carrying out your work, and then there's professionalism in how you generally go about your work in your interaction with other lawyers …

(d) Career Stage Comparisons

The law students acknowledged that they had specialised knowledge and therefore, a responsibility to society. They stated that professionalism required them to apply their knowledge to attain the best result possible for clients and that this should occur without the interference of economic constraints. These students saw professionalism in altruistic terms.

The law graduates agreed with the views of the students. However, perhaps because they were actually in practice, they expressed their understanding of professionalism in practice terms. They expressed the view that the lawyer/client relationship should include considerations of morality and require them to act with diligence and integrity, thus providing a full service to clients. It was their view that economic pressures should not limit the required level of research.

Technical competence was by far the main focus of the accounting graduates and experienced accounting practitioners. They were keen to ensure that their actions

avoided liability. Technical competence was also a factor for the experienced legal practitioners, but their main focus was professional courtesy rules. While the law students and graduates failed to link the professional courtesy rules to professionalism, the experienced legal practitioners thought it essential that practitioners adhere to these to achieve professionalism.

This study has found a difference between the perspectives on professionalism of the law graduates and experienced legal practitioners, even though both are operating in the same environment. While law graduates mainly spoke about the lawyer/client relationship, experienced legal practitioners made very few references to the client relationship and, when they did, they spoke about professionalism in terms of expertise as particularly understood by their professional peers. Their responses dwelt mainly on the need for all members of the profession to adhere to unwritten rules which, in this thesis, have been labelled "professional courtesies". The experienced practitioners put great store on these but were mainly concerned with ensuring that graduates accept the importance of upholding these conventions so that the reputation of the firm is not tarnished. This discussion will be continued in Section B below.

5 *Is Professionalism the Same as Ethics?*

Are the words "ethics" and "professionalism" interchangeable terms as far as the interviewees were concerned?

(a) Students

"Ethics" featured in the comments of most participants. They saw ethics as an essential element of professionalism. For instance, an accounting student made it clear that "you can be ethical without being a professional but I am not sure whether you can be a professional without being ethical."

Most believed that there was a distinction between ethics and professionalism and therefore their references to ethics were in fact references to the requirements of ethical codes. However, the word professionalism for them continued to present difficulties. As an example, one law student said:

> When I talk of a profession I'm thinking of the element of ethics and professionalism, whatever that is, is involved in it.

One of the law students considered it mandatory to conduct oneself in accordance with ethical standards, but alluded to their ambiguity.

> I think standards … allow you to be able to say what's right and what's wrong. … Ultimately, you are in a profession because you are accountable to the court and to the law society. And if you do something wrong in order to further your client's cause you're the one that is going to suffer. … So yes ethics are basically a code of conduct even though they're not written out clearly. You have got to juggle your interpretation of that.

The inclusion of the words "even though they're not written out clearly" and "You have got to juggle your interpretation of that …" imply something more is needed and that interpretations of an ethical code can vary. With respect to professionalism, one student suggested "you are never going to have a concrete answer and it is going to always depend upon your make up and cultural background." Others said that the rules are simply the minimum standard and that professionalism requires something more. The "something more" included references to providing "more quality, more time to clients, advising the clients of alternatives", the application of "personal integrity and also the ability to look beyond your own personal gains for the client and for the firm that you are with …". There was also the suggestion that "it's probably more a state of mind" and "ultimately it is going to come back to you as a person and what you believe."

These statements acknowledge the importance of a person's own beliefs. In this respect, one of the law students said that it was really the individual's own approach to a problem that determined whether it became an ethical dilemma. In his words, "ethical challenges … you create them for yourself." In other words this person believed that an ethical dilemma only comes about when a person is torn between two different value systems. He maintained that an individual's judgment determined whether or not circumstances presented as a dilemma.

The students placed a lot of importance on values and recognised that these values shaped their actions. They generally thought that their understanding of professionalism required them to choose to act in a manner that reached a standard beyond that contained in ethical rules. A student put it this way: "[v]alues are something more than the standards. Values are something that professionals can do if they see fit". Another said **"**ethical codes are imposed or put on you, but morals are something that individuals formulate".

Many students agreed that their families, friends and the community had been influential in instilling in them the values that they now hold. However, some acknowledged that these values might change as values change in the community.

The sole dissenter, LS 8, had something to say about the effectiveness of ethical codes. He believed that ethical codes simply dictated how practitioners ought to act i.e., in a business-like manner. If law practitioners did not know the fundamentals stated in an ethical code, then they were in danger of losing money. He believed that ethical codes were a formality and provided legitimacy. It was good for clients to see that there was an ethical code. He said that ethical codes and a regulatory body were there as a form of security for clients. However, he seriously doubted whether the professional bodies could effectively regulate firms.

(b) Graduates

A number of the accounting graduates asserted that ethics and professionalism were basically the same thing. This is probably not surprising since these graduates largely defined professionalism as the rules contained in ethical codes. Therefore, the implication that there is a difference between ethics and professionalism confounded these interviewees.

It is interesting to note that after further thought, one suggested that ethical codes were just a minimum standard and individuals must determine the type of conduct that they believed achieved professionalism. However, most of these accounting graduates reported that if they encountered any ambiguity, they relied heavily on the advice of their mentors. They were keen to provide a technically expert service and spoke of ensuring that their conduct remained beyond reproach.

The law graduates were much more comfortable with this topic. As was seen above, their approach to a definition of professionalism recognized that an adherence to ethical codes does not infer professionalism:

> And I mean no two people are the same so there's incredibly ethical people and then there's people that are a bit questionable but they could both be ethical within the standards and guidelines.

Recent press coverage highlighting maltreatment of clients by one Brisbane law firm[725] attracted one law graduate to remark that an ethical code could not really regulate lawyers effectively. He went on to say that professionalism "comes down to the individual."

These participants believed professionalism included ideals that result in practitioners providing a quality service prompted by conscience, moral judgment, and personal integrity. The law graduates thought the attainment of professionalism depended on the individual lawyer involved and that there are internally driven incentives that caused individuals to go beyond the mere requirements of the codes. Generally, both sets of graduates said their upbringing and educational experience was responsible for their values.

(c) Experienced Practitioners

After speaking about professionalism, most of the accounting practitioners, like the accounting graduates, found it difficult to consider whether there is a distinction between professionalism and ethics. For instance:

> I can see that a profession has some more high-minded type connotations to it, and yet, I don't think I've ever seen that in the sense that we talk a lot about professionalism, we talk a lot about ethics, and making sure that you're doing the right thing, but I think when it's all said and done, we see the whole thing as underpinning a business.

The business goal is definitely the focus of experienced accounting practitioners and therefore they prioritise the service to the client. An accounting practitioner made this point:

> Yes they [clients] want you to be ethical and moral in terms of their company, in terms of your loyalty to them, not to society as a whole, or to the court, or to the ATO, or anybody else, for that matter.

These practitioners are keen to abide by the legal requirements and see a role for ethical codes as the minimal standard required, yet the bottom line for these practitioners appears to revolve around avoiding liability. The following quote is indicative of this:

[725] This student is referring to the allegations that were, at the time of the interview, being made against the principal of the firm of Baker Johnson. For instance, Anonymous, 'Local legal eagle may be downed', *The Gold Coast Bulletin*, 29 September 2005, p. 17; and Cath Hart, 'Abusive, unprofessional solicitor struck off', *The Australian*, 14 October 2005, p. 5.

> Y'know codes are there as a guide. I guess every profession needs to have a guide, but I guess that's the minimum standard and it's up to the individual to apply those, so I think it's necessary to have a code to at least put a floor on what can and can't be done, but then it's up to the individual as to how far he goes with certain things. … I would definitely be making sure that I wasn't advising [clients] to break the law or anything of that nature. I would make sure that my backside was covered.

The senior associate and another accountant mentioned the recent Arthur Anderson, HIH and Enron incidents as examples of situations where those involved failed to keep to the requirements of ethical codes. The following is a typical response to this topic:

> We are very mindful of risk management and these checklists, in relation to the acceptance of clients and engagements, are part of our risk management procedures.

Some mentioned the use of disclaimers for this purpose:

> So if we have to cover ourselves to say, 'Yes I will do that work for you,' we sign that and the clients sign, in the disclaimer, that they have all the documentation to support the claims made ...

It is interesting to note that these practitioners, in discussing the application of their understanding of the required conduct, said that they did not want to judge their clients on moral terms. As one said "I don't know what they've done with their life [i.e. clients], all I can do is tell them the law." Another elaborated on this "I don't believe that we even have the right to even point it [the immorality or consequences of their actions] out to them, because it's not up to me to judge them. … However … if it's a requirement of the law, then that is a different matter." Another commented that "[a]s long as we know it's not a flagrant breaking of the law or fraud or something like that, in a lot of cases we would be prepared to go along with it."

In referring to the word "ethics", most of the legal practitioners referred to ethical codes but they considered them only as guides. They believed an interpretive role was required of individuals. One practitioner noted that sometimes there were situations where it is was difficult to know what to do. He said "[a]lthough there's nothing in the code, it just doesn't seem right" and another said "[y]ou do often come across a situation where you've got to really stop and make yourself think, hang on, is this right, should I be doing this? Sometimes the codes don't help at all."

Some of the participants acknowledged that the professional rules were not often referred to. One participant admitted he was:

> … not, sort of, conscious of what the general rules of practice are. I just know what's appropriate. Well, I feel I do, in terms of your confidentiality and that kind of thing, non-conflict, various modes of practice. And there's also to act in your client's interest and not in your own, or above your own and everyone else's."

Another referred to the penalties that applied to those who exhibited unethical behaviour:

> I don't really care about you so much that I'm going to put myself in a position where I put my income-earning capacity at risk to do something for you which is unethical, I'm not going to do it. It's just not worth it.

These practitioners, like the accounting experienced practitioners, seem to make every effort to keep the personal and professional roles separate. One senior legal associate referred to the use of language as a means of distancing himself from the client's instructions and stated that this was a common strategy employed generally:

> There's nothing wrong, in my opinion, with saying, 'Look my client's position on this is this. … I am very careful when writing to people, in putting to them… in drawing the distinction between what my views are and what my client's views are. I certainly wouldn't in that context, I suppose, express my view as being different to my client's view, but if my client insists that I put a certain position that is not my view, my personal view, I would be framing it in terms of 'my instructions are such and such'…

Another practitioner stated that lawyers are "required to act according to the rules of the profession, really to huge personal detriment" and proceeded to give an account of a situation that illustrates this:

> I had a client on the run, wanted internationally. The federal police came to see me and asked me whether I knew where the fellow was, and instead of saying, 'No, I said, 'Yes, I do.' Well, they threatened me with everything. They threatened to have me struck off, hit me with money laundering charges… I was scared of being framed. And they went to the Law Society and made claims. Scotland Yard made claims. They came out here and made claims to the Law Society. So I went through terrible personal concerns… The simplest thing I could've done was notify as an anonymous thing, and I look back and wish the hell I had, but anyway…

These practitioners see their role as one that provides a technically correct service to the client. However they admitted that they only had a vague knowledge of the ethical concepts of the profession, preferring, it seems, to ensure their conduct complied with

the conventions understood between professionals. They placed a lot of importance on their reputation as understood by their peers and other law firms, and therefore made every effort to educate their staff to respect the "professional courtesies".

Only one respondent - the senior associate who is the director of the *pro bono* activities - remarked that professionalism includes what is best for the community:

> We have ethical obligations if you like, to be upstanding citizens, and to, again, as I said, help the community in any way we can.

The discussion of ethical codes prompted one practitioner to mention his dealings with the Queensland Law Society's complaints system. He said that he found this system to be very thorough, although he was of the opinion that the more serious matters did not attract anyone's attention. He said a Brisbane lawyer had recently been condemned publicly for blatant client mistreatment, but said this person had been successful in avoiding liability for many years prior to this. He also commented that it was his opinion that the recent changes to the complaints system would be just as ineffective in dealing with the real offenders.

(d) Career Stage Comparisons

This topic proved challenging for most of the participants. At first glance, there appeared to be very little difference in the responses of the three law groups in that they all see a distinction between professionalism and ethics and recognise that ethical codes do not always provide an answer for all situations. However, on closer examination, different influences guide their decisions. While there was some recognition by the experienced legal practitioners that they revert to their own personal codes of conduct, as characterised by the standards held by their fellow lawyers, overall, their comments indicate that they separate their personal life from practice. It is evident then that they practice according to the standard conception of lawyering model,[726] simply providing the service required without considering or challenging the clients on the effect of that course of action. Their views differ from the understandings of the students and graduates, who primarily desire to provide advices to clients that take into account the many eventualities that can affect the client and exhibits some element of social obligation.

[726] Postema, above n 320, 73.

The accounting students had similar views to those of the law students and graduates in acknowledging that professionalism requires something more than just ethics. Ethics are a guide only and require interpretation to apply to a situation. The interpretation, in their opinion, is driven by their own values, particularly morals and personal integrity.

The experienced accounting practitioners felt that there was a difference between professionalism and ethics, but found it hard to articulate what that was. They clearly wished to achieve the standard required by ethical codes. They focused their efforts on their clients. They served them unquestioningly as long as their instructions did not require them to do anything illegal. It is interesting to note that the accounting graduates' responses exhibited a high regard for the ethical codes' ability to give direction. Some of these graduates expressed the view that professionalism and ethics were interchangeable terms. While some asserted that they ultimately wanted to do "the right thing", there was a strong sense that ethical codes, coupled with the advice of their mentors, directed that decision. Perhaps the accounting graduates, who at the time were undertaking their year of professional study, were feeling the influence of that experience. Alternatively, the reality of practice over a longer period and perhaps fear of liability had lessened the experienced accounting practitioners' faith in the codes' explanatory powers.

6 *Can Professionalism Enhance Profits?*

In reflecting on the responses to this question, it is again necessary to bear in mind that there are different understandings of professionalism. Therefore, at a general level, there may be some consensus between the different groups about the effect of professionalism on profit, but the differing meanings of professionalism alter the type of conduct that forms the basis of this contention.

(a) Students

In defining professionalism as the provision of quality services, a number of both law and accounting students reasoned that practices meeting this standard might lead to profit enhancement. It is their understanding that the community's perception is very important. Therefore, they considered the practice of professionalism in the sense of

providing a quality service could be a way of gaining the community's trust and loyalty thereby leading to opportunities to increase profits.

(b) Graduates

One accounting graduate, who considered appearance to be an element of professionalism, said "if you don't present well to the public or to the clients, you are not going to generate referrals or things like that." In defining professionalism as meeting ethical responsibilities, another accounting graduate commented that if accountants took their professional responsibilities seriously then the recently published stories of accounting firms acting unprofessionally would not have happened. He was implying that ethical considerations should deter professionals from simply undertaking tasks, although he acknowledged that this kind of attitude does "help to generate some business that's for sure." In other words, he was saying that there are clients who wish to avoid their responsibilities and require professionals to seek out what can be interpreted as legal options that can also be considered to be ethically or morally objectionable activities. Another expressed the view that professionalism was doing something beyond the ethical standards, but added that providing these extra services would only be included in the service if the clients had an ability to pay.

Two of the law graduates felt that professionalism, which they defined as a standard of behaviour superior to that required by ethical codes, could equate to profit in the sense that it developed client loyalty, but then one thoughtfully reasoned that profit can be affected positively or negatively:

> You can have high standards of professionalism and make good money doing it. But … I think that you can make huge profits being completely unethical, unprofessional – not practicing professionalism and being a dirty dog… and at the same time you can become bankrupt doing that …

(c) Experienced Practitioners

This group mainly thought that the provision of a technically correct service constituted professionalism. Some accountants acknowledged that professionalism could increase profits or at least produce satisfied clients, but others were of the view that their understanding of professionalism might require them to reject certain clients. However, some of these participants were aware that a decision to reject a client could mean a

substantial loss of income to the firm and even result in the loss of other clients. One participant said that he had just informed a very lucrative client, whose instructions were questionable in terms of taxation legislation, that his firm would no longer act for him. He went on to reflect that there was every likelihood this man's relatives would also move their business to another accounting firm.

The experienced legal practitioners expressed a range of views as well. One maintained professionalism could lead to increased profits:

> I think professionalism is important and I think at the end of the day if you can stick to your principles of professionalism, you probably do in the long-run enhance the commercial business aspects of the practice in any event, and I think there's no better advertisement for a firm than word of mouth and keeping your clients happy, and the way to do that aside from having a good relationship with them is doing good quality work. So I think in the long-term, certainly having that one happy client who will then continue to refer work to you, is certainly in terms of the business, beneficial.

However, the alternative view was more popular with this group. Some of them said that professionalism "may even hurt you" or "impact … on the commercial aspects of the practice as well." One practitioner suggested that it depended on the client's purposes. He said that sometimes clients really wanted someone to find a solution to help them avoid obligations, possibly by unethical means – which of course was not practising professionalism – and so some would not rush to have these lawyers represent them:

> I suppose when they say, 'I need a good lawyer,' I say, 'No, when you say that, you really want a bad one.'

While most of the legal practitioners considered professionalism to be the provision of expert service, the senior legal associate involved in the *pro bono* activities defined it in terms of community benefit. He was careful to point out that this programme was not a marketing exercise and therefore he would not suggest that the firm would receive increased profit from its activities.

(d) Career Stage Comparisons

There was no uniform view on this proposition. The law and accounting students, who defined professionalism as a quality service for clients that included morals and community considerations, agreed that a firm's profitability might increase. However,

those within the graduate and experienced practitioner groups who had different understandings of professionalism expressed the view that there could also be negative connotations.

7 *Summary*

The data analysed thus far shows it is possible to divide the participants into two distinct groups. There was much agreement between the accounting and law students and the law graduates (Group A) and also between the accounting graduates and the experienced practitioners, both in law and accounting (Group B).

In this respect, it is noteworthy that the accounting students had different opinions from those who are practising. Yet there was general agreement between the accounting graduates and the experienced accounting practitioners. The law students and law graduates were in general agreement, but some tension exists between the perspectives of the law graduates and the experienced legal practitioners. These participants, who are operating within the same practice environment, view things quite differently. For instance, when asked whether law is a business or a profession, the law graduates answered that it is a profession but then expressed the view that this was not what they see happening in reality. The experienced legal practitioners categorically identified the practice of law as a business and appeared to be quite satisfied with that state of affairs. Section B looks more closely at the practice environment and concludes that it has quite a lot of influence on the values and therefore the conduct of the practitioners who work within it.

B *Professionalism and the Practice Environment*

This section will examine the reality or culture of practice in more detail, recognising that the practice environment may have an affect or test a person's values. Because most of the students were still in training, they were not able to comment about the practicalities of being in the work environment, but they did make comments on whether they thought their view of professionalism would change on entering the practice arena. Therefore, their comments will be referred to initially under the heading "Can the professionals' view of professionalism change?" This discussion will be followed by a discussion of "Does the practice environment mould the professionals'

understanding of professionalism?", which presents the graduates' and the experienced practitioners' views of their practice experiences.

1 *Can the Professionals' View of Professionalism Change?*

(a) Students

The students could only speculate about this question, since they were not yet in practice. In discussing their understanding of professionalism, many of the students volunteered comments on whether their views might change once they entered the practice environment. After expressing the view that values are the foundation of ethical decision-making, they were unsure whether they would be able to maintain their level of professionalism when they entered practice. They wondered whether the reality of the workplace might change their views of professionalism; and whether the clients and even those in authority in firms might challenge their views.

An accounting student, who was already working in the field, said that she knew it was going to be very difficult because she had already experienced a stress-induced personality change, brought about by the dictates of those in the workplace. This experience made her very aware that work practices can change someone. Another accounting student said that he hoped not to encounter tensions. He hoped there would not be situations that would create a conflict between the demands of true professionalism and the requirement to be financially successful. Yet another used a practical example to think about this. He wondered whether an offer of an extra $1000 from a client to do something questionable would affect him.

> As a professional, would I accept that? I don't know. At the moment I wouldn't but when I get out into the workforce it might be different.

Two of the law students reported having altered their views on certain topics due to their university experience, and one law student said she was less sensitive after doing work experience in the Magistrates Court's criminal proceedings.

Some of the law students reflected on their university training about ethical dilemmas. One student discussed the problem-solving method normally used in law schools to teach students to apply the legal principles to hypothetical situations. He said

this meant focussing on formulating arguments that best represent the client's interests. This, he said, seemed to ignore things that went against the client being advised, and the fairness of the situation for others. He expressed the view that this "win at all costs" approach was difficult to equate with his definition of professionalism.

Other law students referred to the workings of the adversarial system. One realized there would be times when the legal course that the client wishes to take might conflict with his personal values; for example, when the consequences of that course of action might prove "less equitable for the opposition". However, he rationalised this harsh reality by suggesting "that as long as the other side has some sort of competent representation and if they are trying to further their cause – well it probably balances out." This student appeared to view the adversarial system as providing effective solutions for problems such as this.

The inequity of the situation of the represented client against the unrepresented was the subject of another's comments. He warned that the pursuit of professionalism might require lawyers to be more proactive with respect to such clients. This student had recently completed an assignment on self-help services and unbundling - where a client performs some of the tasks associated with his/her own matter. This student was intending to practice as a family lawyer. He spoke of the Family Court's active encouragement of people doing their own divorces. While he saw this as a good thing, he also saw it as raising access-to-justice issues. He therefore felt that practitioners should be careful how they practised. He warned that the provision of unbundling and self-help by lawyers could be dangerous, as he believed that it created a false belief in people that they could do the legal work themselves. He seemed to be inferring that in these situations it might be incumbent on lawyers to act as coach or check documents even though they were not required to do so under their arrangement with the clients.

Lawyers generally thought that they are playing a particular role, divorced from all other aspects of the lawyer's life. However, one student spoke very strongly against this concept. He stated that "being a lawyer should not change what you would do." He said "if you believe in something then you believe in it all day long not just 16 hours a day at work."

While some students felt they would be able to find ways of dealing with tensions, others reasoned that the only option for them would be to leave a firm that required them to do tasks that ran counter to their own values. One law student was approaching his impending career with a certain amount of scepticism, having decided that he would

not stay in a situation if he was uncomfortable doing the things he was required to do. He did not share the confidence in the adversarial system that other students seemed to exhibit, or see it as a coping mechanism. He said:

> I mightn't be a lawyer in a couple of year's time. If I don't like it and I am not comfortable with it, then I just won't be doing it, it is just that simple. I am going into it expecting, sort of half expecting that there will be things that I will be expected to do that I just won't be prepared to do. So that's my expectation of it, the whole commercial aspect of it tends to make grey, things that are normally black and white, in terms of what is right and wrong and what's ethical and what's not - and I am fairly black and white.

Two accounting students and one other law student were just as adamant that they would reconsider their future employment if it did not measure up to the standards they set for themselves, particularly those that accorded with their own values. Others were less vocal, but it was clear that they wished to be proud of the practices in which they were involved.

(b) Summary

The students, overall, were not practising, yet they hypothesised about what it would be like for them in the practice reality. They were quite wary of the pressures they expected to encounter and the possible consequences. They had quite a lot to say about strategies that might help them cope and their contingency plans if their experience did not come up to the standard expected. With respect to strategies, they discussed the problem-solving method adopted to analyse hypothetical scenarios in law schools; the role morality model; and the adversarial legal system generally, although there were differing opinions on their effectiveness. Some possible options that they would take if they were not satisfied even included leaving the employ of that firm. However, this group was quite idealistic in their opinions as a whole. The practice reality may alter their views.

2 *Does the Practice Environment Mould Professionals' Understanding of Professionalism?*

This question directly related to graduates and experienced practitioners. It questioned what they believed was actually happening – what they were experiencing in practising

their profession. Some of the experienced practitioners responded to this question by referring to the increasing effect that market pressures were having on their working environment, but most of the participants focussed their thoughts on whether their view of professionalism had changed since starting to practice i.e., affected by socialisation or firm culture. The responses will be discussed under the following headings:

1. Market Pressures
2. Firm Culture
3. Role of Budgets and Professional Courtesies
4. Individual Responses to Culture

(a) Market Pressures

The experienced accounting practitioners, perhaps because most of them are owners of their firms, made some comments about external changes that had brought pressure to bear on the economic viability of their practice environment. The following comment is indicative of their concerns.

> One could say that we earned our money a lot easier twenty years ago than we do today, … two reasons … there's more compliance – the government's forced that upon us – and there is definitely price competition to keep a lid on the hourly rate, there's no question. … We're working more hours. … There's certainly more awareness out there that the clients are commercially orientated – they're not prepared to pay over-the-top just because you call yourself a CPA or Chartered.

The experienced legal practitioners also referred to new legislation, increased competition, educated consumers and some effects of technology. In terms of legislation it was noted by some that the *Trade Practices Act* now applies to lawyers[727] and because of this legislation and the new tax collecting regime, it was suggested that the costs of running a law firm office have grown enormously. For instance one said: "We have one and a half full-time people just filling out GST regulations." The new personal injury legislation in Queensland[728] has also had an effect. It has limited advertising and fees for small claims and therefore was considered to have had a detrimental effect on law firms. In fact one practitioner reported that his firm had made

[727] Although one practitioner considered the *Trade Practices Act 1974* (Cth) ineffective in deterring lawyers from influencing their clients to instigate litigation simply to generate fees - in other words in situations where it was not in a client's interests to do so.
[728] See *Civil Liability Act 2003* (Qld) and *Personal Injuries Proceedings Act 2002* (Qld).

an economic decision to remove this arm of their practice altogether. There is also new legislation to regulate lawyers,[729] but at the time of the interviews this had only just been introduced. However, one practitioner commented that the introduction of a new complaints procedure "won't make any difference."

The ever-increasing use of technology was mentioned, including emails and telephone calls from clients and other professionals that constantly interrupt the practitioners' use of time that used to be allocated to working on files. Since, as one suggested, "time is all we've got to sell", these interruptions lessened the time that could be costed in the billing system.

With respect to charging, one practitioner noted that postage and sundries and other charges not able to be explicitly accounted for must be treated carefully since the "public certainly are not fools." In other words, he was suggesting that lawyers needed to be forthcoming with clients about costs or clients would go somewhere else. He said consumers were concerned about costs, and if unsatisfied, they were quite capable of sourcing new providers for their services. This practitioner has, by his own admission, made the most of the general distrust of lawyers and distanced himself from lawyers by including the term "conveyancers" in his firm's name. He even went on to say:

> In fact, we often have a chortle in the house here because we say, 'What say if they clean the profession up?' and I say, 'Well that's the last thing I want because all the marketing edge will be gone!'

Not all practitioners openly embraced marketing as desirable. The senior associate responsible for his firm's *pro bono* efforts made it very clear that his firm wished to keep a clear distinction between this activity and its marketing practices. This firm appears to be aware of the criticisms that pro bono activities attract. For instance, some critics believe these are just marketing ploys, and some of the experienced law practitioners and one accounting experienced practitioner did make remarks along these lines.

While marketing fits squarely within a competitive environment, it is interesting to note that there were very few references to the idea that practitioners are competing for clients. Yet some did imply, when answering the questions posed, that their firm's financial situation was being affected by competition. All practitioners used quite a lot

[729] See *Legal Profession Act 2004* (Qld).

of "market speak". For instance, the participants spoke of clients as "cut and thrust" people. It was said that lawyers are "trying to do a deal" when they work towards a settlement in cases. In explaining to his graduates how to act for clients, one practitioner talked of "adding value", "doing the job efficiently" and being "cost effective" for the client. In fact, most of the legal practitioners spoke of the need to be conscious of costs.

While discussing conveyancing, one participant noted the change of opinion concerning competitive practices. He made the point that competitive behaviour, once considered unprofessional, was now encouraged. For instance, he said "I go back to when it was considered unprofessional conduct to charge less than scale. It was said that was unprofessional conduct unless the liberty of the participant is involved."

There was another implicit reference to competition when a participant reported that his firm was compelled to introduce some new technology at the request of its banking clients. Some consumers are now very knowledgeable and powerful. In this example, it was obvious that if this firm did not comply with purchasing the equipment required by the banks, they would find a firm that would. Another practitioner expressly stated that "sometimes clients will try and push you to do things", by threatening to find other representatives if their requests were not granted.

Because of all the perceived pressures, the experienced legal practitioners believed that changes to the profession had resulted in producing a more money-driven climate. As one practitioner said – "when I started it wasn't so much revenue driven such as it is now… it had more of a character of public service." Another went further and said:

> I have a very strong view that most, certainly legal practitioners - their conduct is quite fraudulent on a daily basis, with the over-charging of outlays and things of this nature.

Another practitioner spoke of financial pressures but expressed his frustration that clients and even staff had no real comprehension of the high costs of running a law firm. This practitioner went on to suggest that some of his peers had left the profession as a result of the increased financial pressures.

The experienced legal practitioners as a whole considered that they were under financial pressure from their staff, particularly the graduates. It was their view that the new entrants/graduates made every effort to obtain for themselves the most financially beneficial position, pressing for top salaries and benefits.

These pressures cause the legal practitioners to experience stress. One practitioner mentioned that the Queensland Law Society had responded by offering stress counselling.

> They actually have counsellors up there, [referring to the Law Society] stress counsellors. And there's a lot of substance abuse which I think is brought about by the heavy demands – there's alcohol and drugs and so forth.

While the experienced practitioners referred to a number of market pressures, the comments concerning socialisation, (or firm culture), were the focus of much of the participants' discussions. It was particularly interesting to note that there was quite a difference in perspective between the legal graduates and the experienced legal practitioners. The following discussion will show that each referred to the other as being the cause of their discontent.

(b) Firm Culture

This section will begin by considering the comments of graduates and experienced practitioners in both law and accounting about whether the working environment has altered their understanding of professionalism and whether their views of professionalism had changed since they started practice. The views of the law graduates and experienced legal practitioners are the main focus of discussion about the effect of budgets on services offered to clients, and graduates' experience in firms' annual reviews and promotional processes.

(i) Graduates

Many of the accounting graduates referred to the fact that each firm had its own core values and a mentoring arrangement. The opportunity to access a mentor to help with technical and ethical issues gave many of this group a feeling of reassurance.

While the practice of mentoring drew some positive comments from law graduates, there were negative comments about the practices of those in authority in firms with respect to their efforts to shape the conduct of the newer entrants. In fact, most of the law graduates expressed feelings of discomfort with the firms' requirements generally, but particularly with respect to budgetary matters. They disliked how the budgetary

goals impacted on their promotional prospects and how they serviced their clients. In an effort to understand the situation in which they found themselves, it became obvious that they welcomed the opportunity to reflect on and talk about their concerns with someone that they knew would be keeping their confidence. Many made negative references to the environment or the internal workings of the firm. There were statements that suggested that each firm had its own identity and that this was fashioned in accordance with the personality and values of the partners as the owners. Participants also believed these owners were responsible for the constraints imposed by budgets.

> I think that underlying all law firms - all efforts of firms is certainly the bottom line, the dollar, and I think reaching budgets and targets is now paramount in the minds of most partners.

There were also many statements that junior staff were being pressured constantly to fit in with their firm's culture, particularly in relation to budgetary issues. For instance one law graduate said:

> … it seems like billable hours and budgets and internal culture of the firm and those sorts of things, probably shape people. … I don't know whether people are noticing or whether it's just I'm aware of it but it seems to just be happening and people are just accepting it and buying into it and it's just scary.

Another commented:

> … if you are at a good reputable firm and these things are being hammered into you from day one, you grow to believe these things and you grow to follow these practices as well. … It's certainly easier if you are in a good environment where professionalism is encouraged and promoted but it still comes down to the individual I think.[730]

The graduates also seemed to recognise that this tension developed because those occupying different levels in firms operated from different understandings. For instance, in elaborating on whether law was a profession or a business, one participant said:

> Your first few years as a lawyer, … you still view it as a profession rather than a business but then I think you get to more of the point where you are looking to advance your career, and then all of a sudden, it's basically forced upon you that you look at the practice of law more as a business.

Others pointed to a difference in what practitioners view as the goal of the service provided.

[730] This comment foreshadows the discussion included under 'Individual responses to culture' below that suggests that practitioners still have a choice in the decisions they make. See this Chapter, p. 176.

> At the lower level, say the junior solicitors, … we think we are helping somebody. But as you become higher up … you have responsibility for your division of the firm to attain certain budgetary amounts.

The following comment is indicative of how the law graduate group viewed the effect of the socialisation process within the working environment:

> Maybe morals are at the heart of professionalism. They are certainly central to an individual's mind when they start off practicing. I think the bottom line does creep up on them as they progress through the ranks and I think a lot of them become disillusioned with law or ignore some of the values they may – might have started out with and they look solely at the dollar return at the end of the day. I think a lot of young lawyers though would start off thinking that they'd like to – like to think that they are in an industry that helps individuals, that it provides service to the community which is generally a good thing, but I think it changes over time.

In summary, the law graduates believed that exemplary service to clients and the community reflected what it meant to practice professionalism. While they accepted that the profession placed importance on rules of courtesy, the graduates generally did not expect the reality of legal practice to be so restrictive, or to encounter an environment that placed such importance on budgetary goals.

(ii) Experienced Practitioners

The experienced practitioners accepted that firms had a particular culture. They also acknowledged that new entrants to both accounting and law firms were learning and so, in most cases, they had very little contact with clients. The following is a typical comment from the accounting practitioners.

> Y'know, we've just put on three graduates but they won't have to make any decisions like that for *years*. They just do what we ask them to do … We've got to make those decisions and at the end of the day it's the partner that takes the responsibility, makes those sorts of decisions.

The cultivation of a culture was definitely an important aim for all these practitioners. One spoke of his firm's programme to develop a high performance culture.

> And to that extent in [firm mentioned] we talk a lot about, and aspire a lot towards what we call 'high performance culture,' and it is moulded around developing people as one of the key planks. The second is achievement, and the third is inspiration.

Acknowledging that each member of the firm needs to fit in, discussion about culture by the accounting practitioners centred on recruitment. Three practitioners mentioned that there was a strong focus on recruitment and that there was a high level of consultation concerning the approval of these appointees. One suggested that the team at his firm was "hand-picked". This person referred to the practice of people being recruited from other firms and said that they "either get trained in our culture or they don't stay. They rarely stay."

Overall, the responses of these accounting practitioners highlight their recognition of their role as authority figures who influence all members of their firms and are therefore responsible for the quality of the service provided.

The legal practitioners emphasised their allegiance to their own firms and acknowledged that "every firm has a culture." They spoke of representing their firms and that a certain amount of behaviour was expected even from partners. Most checked with other members of the firm to ensure they were acting appropriately. While one adamantly stated that he was autonomous, the examples he gave of dealing with poor professional courtesies by members of the firm showed that he was very concerned that other partners agreed with his actions. This practice was evident at all levels of the firm. The senior associate commented "[b]ecause I'm not a principal of the firm, I will speak to one of the partners and say, 'Look, this is what I'm proposing to do, are you happy with that?'" A partner made similar comments. "Partners often come and see me, what about this, what do you think about that?"

The legal practitioners also recognised there was a process of acculturation. A legal experienced practitioner made a comment, which was remarkably similar to one made by the accounting practitioner mentioned above:

> … see, when you come out of law school into practice, there's a period of training where you're just told what to do and you'll do it …They're given a file, given a set of instructions, go do that, and they do that. Well, most of the time.[731]

It was interesting that this practitioner added "[w]ell, most of the time." It is not clear what he was thinking here but it may be that he realised that a certain amount of discretion resides with the individual dealing with a matter, since much of what a legal practitioner does is performed in private.[732]

[731] Note that this quote is very similar to the thoughts of the accounting practitioner mentioned above.
[732] This will be discussed below under 'individual responses to culture'. See this Chapter, p. 176.

The legal practitioners agreed with the graduates that firms often reflected the personalities of the partners. One suggested that he knew that a matter was "going to be a difficult case … by the personalities involved." Another said that members of the profession know the lawyers who follow questionable practices. One of the senior associates suggested he had rejected job offers from firms because of the personalities involved, implying that their personalities would dictate the working environment.

Overall, the experienced practitioners believed that they were creating a positive culture for their staff. For most, this meant creating an environment where mentors help introduce new entrants to the expectations of the firm. More specifically, one participant made every effort to reduce the use of bad language. He said "I don't like people swearing, I think it's unprofessional". For another the firm's *pro bono* programme exemplified its efforts to provide staff with job satisfaction. The senior associate, who was the director of this programme in Queensland, stated that his firm recognised that individuals "go into law … when you're young and idealistic … think[ing] you can make a difference". Therefore they have introduced the community benefits programme as a way of promoting "staff motivation, staff retention, and staff recruitment. … and morale". As he put it:

> I guess … what we're trying to do, which is try not to smother that and crush that too quickly. … a place like [firm mentioned] can tend to do that when you get specialised and you're just doing corporate stuff or whatever, unless you've got a program structured like this where you know there are opportunities to do other stuff - to go to the homeless person's legal clinic or whatever. It can be a bit disheartening and can crush that feeling of being in a profession and being able to make a difference in the community.

(iii) Career Stage Comparisons

Both the graduates and experienced practitioners agreed that firms have particular cultures, but some individuals within these groups saw firm culture as a positive influence and others viewed it negatively.

The accounting graduates viewed mentoring and the authoritative structure as reassuring. The experienced accounting practitioners accepted that new entrants to firms went through a process of socialisation and they, as the senior members of the firms, were the drivers of that exercise. They also believed that they were creating a

positive environment, a place where new entrants could develop skills that would help them fit in with their peers in the firms.

The experienced legal practitioners also acknowledged that there was a socialisation process in firms and fully accepted that it was their responsibility to guide the behaviour of the new entrants. They took their managerial roles quite seriously but in doing so, they experienced some resistance on the part of those they were trying to mentor. The findings of this thesis appear to support their feelings of frustration as it is quite evident that the graduates did not view the culture of the firms as positively as the experienced practitioners. The graduates were feeling pressured into conforming to their firms' culture and this in turn caused them to feel pressured into altering their values. They felt that the firm culture hampered them from developing an understanding of professionalism with respect to servicing clients and they resented the role that budgets played in their performance reviews.

(c) Role of Budgets and Professional Courtesies

The previous discussions show that accounting students were quite idealistic but, as graduates, they quickly become assimilated into the practicing culture. Therefore, the following discussion will report mainly on the law graduates and the experienced legal practitioners.

As was noted earlier, the law graduates and experienced legal practitioners had quite different perspectives on professionalism. The law graduate participants as a group saw professionalism as providing a complete client service. They dwelt on their concerns about the prominence given to budgets, and particularly complained about the importance that the firms put on budgets, on the service they provided to clients and their promotional prospects. The experienced legal practitioners saw professionalism as essentially providing an expert service that effectively promoted and protected their firm's reputation. Therefore, their focus was on what they considered was a lack of respect by the law graduates for the unwritten professional rules of conduct. This thesis will refer to these as "professional courtesies".

The law graduates had concerns about budgetary constraints affecting two particular areas of their practice: the service they wished to provide to clients and their annual reviews/promotional prospects. Alternatively, the experienced legal practitioners were particularly concerned that graduates should adhere to professional courtesies.

(i) Budgets and Clients

Businesses use budgets as a matter of course to set financial targets to produce profits. However, the law graduates had negative views about their firms' insistence that they achieve budgets. They said that it was sometimes difficult to reach the target amount and, in some instances, a bill that reflected the hours worked in providing a quality service would be unacceptable to the client.

Graduates

The accounting graduates spoke about budgetary requirements with a certain amount of tolerance. One said very nonchalantly that "practice" for the individual is all about "billing, productivity and efficiency". Another explained the practice without complaint.

> In our firm especially, they are very time oriented to work in progress and billing, those sorts of things. So there is clearly pressure to meet budgets. Each level of staff have their own budget as to what sort of hours they need to meet and what their annual billings must be.

While recognizing that budget pressures were real, one was keen to point out "it's about being profitable, but certainly not ripping anyone off". Another suggested that there was more pressure on junior employees than those higher up in the firms. He said that they were "a lot more free to engage the clients … and try to figure out the best way to help them and probably do a little more of the professional type work in ascertaining what their needs and wants are."

Some provided some specific details of the billing system. One said "every firm has a percentage target that you are supposed to meet every week. Assuming that you're being … efficient … the standard target I believe is either 80 or 90 percent depending on the practice." Another maintained that "80% of your time in the office had to be billable."

The law graduates accepted that budgets were essential for a firm to survive financially but most expressed their contempt for firms' use of this method. For instance, the loss of a major client caused a partner to suggest that staff had to increase their earning for the month to "eight hours a day instead of seven and a half." More

particularly, most of the graduates mentioned how the emphasis on billing escalated as the end of the month drew nearer. For example, one said:

> [e]veryone hates the end of the month, because that's when the high amount of pressure is placed on you by the more senior solicitors and staff in the firm in relation to how much money is coming in and 'you know guys the firm hasn't brought in enough money this month we've really got to go go go go go and get those bills done.'

The majority believed those at the lower levels of the firm were the most pressured, although one acknowledged that those holding more senior positions were responsible for themselves and those in their department. For instance "[o]nce you are a manager of a department you … have to deal with organising human resources making sure you can cover your payment fees in resources and making sure you're getting, actually making the thing profitable."

The law graduates believed that budgetary constraints detrimentally affect the type of service provided to clients. They mentioned that "the pressure on practitioners is to just get the job done, don't worry about putting all the extras into it." As one said, "But in order to do that, it might take you five hours worth of research. But … you have to constantly be balancing standards of quality and ethics and so forth against practical reality." Another said more clearly "What is best for the business sometimes may outweigh you know sort of what might be best for the client" and may dictate whether or not the firm will act for the client.

While these explanations imply that clients receive a less than optimal service because of budgetary pressures, individual practitioners use other strategies to reach their budget targets. One graduate gave examples of staff padding the number of hours actually worked on a file to achieve budget, and concluded that these individuals simply wanted to "ensure [they] remain part of the business." Another gave an example of a senior practitioner requiring a graduate to take extra steps on a file that the graduate believed were unnecessary. The graduate concluded: "I got to the end of the work and finished the file and couldn't understand why the extra steps were taken".

Experienced Practitioners

Experienced practitioners made little reference to budgets. The accounting senior associate was the only person in the accounting group that spoke of pressures. She was adamant that she would do all that was necessary to achieve a technically correct result

regardless of the fact that the costs might be higher than initially expected. She said she would worry about explaining herself away to the client later, identifying this as "an administrative type issue."

One of the experienced legal practitioners felt the pressure on partners was even more acute than that felt by more junior members of the firms. He said he had the responsibility to ensure that a whole group reached its budget and if this did not happen, "[p]eople will come tapping on your door…"

Another legal practitioner referred with cynicism to the billing system. He commented:

> A friend of mine was having a debate with a journalist in Brisbane. He's a barrister, a good barrister. The journalist was saying, 'You're no good. You don't care.' He said, 'We do. You pay, we care.'

This practitioner believed that the clients and even staff had no real comprehension of the high costs of running a law firm.

> The old days, … you could sit and talk to a person for two hours about children and get to know them as a friend. If you do that now, you've got to charge them for two hours, and they can't accept that.

There was a claim by another legal practitioner that his firm had a culture that did not put pressure on staff about budgets. He reported that his staff were only required to charge what they would be willing to pay for the service. He believed this was conducive to a desirable culture because his firm had a good staff retention rate.

Career Stage Comparisons

The law graduates raised a number of concerns about the effect of budgetary constraints on clients and spoke extensively about them. On the other hand, accounting graduates had comparatively little to say, and seemed to accept the budget practices. More experienced accounting and legal practitioners similarly accepted that budgets are a necessary part of practice. However, some statements of an accounting senior associate seemed to support the law graduates' view that costs would be higher if a more comprehensive service was provided to clients. However, she was not concerned about attracting the disapproval of her firm or clients. Perhaps her level of seniority allowed her some leeway and confidence in her ability to be able to justify the cost to her firm and clients.

Within the law group, there was a distinction between the views of the graduates and the experienced practitioners. This appeared to stem from the graduates' understanding that professionalism requires the offering of a full service to clients and that the constraints of a billing system and requirements to meet budgetary aims operate as limitations or interferences. Overall, the graduates asserted that the budgetary constraints pressured them to choose between providing a quality service to clients and what the firm thought was practical when budgetary criteria were applied. The experienced legal practitioners saw budgets as an inevitable part of practice and, if they did realise there were pressures, they were able to rationalise and justify their existence.

(ii) Budgets and Promotion

While the participants accepted the influence budgets had on their practices, the law graduates were particularly hostile to the use of budgetary performance for yearly reviews or promotion possibilities.

Graduates

Some accounting graduates noted that budgetary requirements played a part in the review process that determined career and promotional prospects. For instance, one commented:

> If you analyse the way that your performance is measured, there is a quality factor there of course, you've got to keep people happy. But there's also, there's a much bigger influence on measuring your performance I think by use of numbers. … There's much more talk, meetings, planning involved in those numbers than there is with any quality considerations.

The law graduates spoke extensively of the impact of budgets on their career prospects. The following sums up their remarks. "It's certainly a very big pressure especially if you want to develop your career. The number one criteria is your ability to meet your budget".

One rationalized that budgetary targets were the only way that firms could measure difference, but he also noted that this could be quite inequitable.

> While it was stated that budgets … were a necessary evil so to speak, at the end of the day there really was only one way to compare people across the firm and that was through their billables, through their budgets, what clients

> they were getting in and what money they were getting in. … The unfortunate thing with that is that some areas are obviously more productive than others depending on who your clients are. And so, someone might be able to bring in a thousand dollars to the firm by only really doing say 10 hours, 10 billable hours worth of work, whereas, the person in the other area might have to do 20 hours billable work to bring in the same amount of money.

One graduate in this context also mentioned the topic of specialisation. He said that if an individual specialised, and he felt that this was definitely encouraged by firms, this indirectly lead to budgetary advantages for the firm and promotional prospects for the individual.

Experienced Practitioners

Some experienced accounting practitioners also made some references to this issue when considering whether the practice of accounting was a business or a profession. One said:

> We think very much in the context of a business. So that when we're talking about our junior people coming through the ranks and, in particular, if you're looking to promote someone to a director position … and moving them from directors to partners, one of the most important things that makes that happen is the business case. … We really very much see the work and the outcomes as being a business.

Another made a similar comment: "I mean, at that point your independence and your professionalism is really not one of the goals and factors for a commercial empire."

These practitioners mentioned it was difficult to retain employees because graduates were not loyal to their firms. The graduates took advantage of every opportunity to secure higher wages. As one said, "they're not so interested in building a career with a particular firm, especially after they've gained their qualification or some experience. They're not averse to flogging it around for a high dime".

The topic of promotion only featured in the comments of the senior legal associate who was responsible for the state's community benefits programme. As a measure of his firm's dedication to making this programme part of their culture, he emphasised that community service was fundamental to lawyering. He said that the firm examined applicants' resumes looking for evidence of an interest in community service. He also stated that it features as one of the key performance indicators on annual reviews.

> I've seen partners, well I've heard of partners, saying to a lawyer, 'What *pro bono* work have you done this year?' and, 'Oh nothing.' 'Well I want to make sure that you've done some by this time next year.'

Career Stage Comparisons

Both groups of graduates referred to the strong focus placed on budgets in performance reviews. While the accounting graduates appeared to accept this, the law graduates found the process objectionable.

It was interesting to note that the experienced accounting practitioners viewed the focus on economic factors in promotional reviews as perfectly legitimate yet they criticised their staff for being similarly motivated. They referred to retention difficulties but put the blame squarely on what they considered the self-centred behaviour of the graduates in wanting to get the best-paid position they could.

The law graduates' focus on this issue again presents an alternative perspective to that of the experienced legal practitioners. The experienced practitioners appeared to be quite oblivious to the concerns expressed by the graduates.

(iii) Professional Courtesies

At first glance, it seems unusual to include this topic as a pressure, but it featured significantly in the discussions of the experienced legal practitioners. In their role as managers of their firms, the experienced legal practitioners suggested that they were constantly monitoring the behaviour of the graduates and other members of the firm. They believed it important for them to do so, as a lack of adherence to these rules of conduct when dealing with other lawyers could result in a loss of reputation as judged by other firms. As will become evident from the responses of the participants, the protection of a firm's reputation was their prime motivator.

Graduates

The experienced legal practitioners perceived the unwritten rules/conventions as creating pressures for them. However, only two graduates, one law and one accounting, referred to them. The accounting graduate just referred to these as additional rules:

> You know less important but probably equally common that you know the rules of sort of etiquette when you are dealing with other professionals. … those sort of secret rules I guess.

The law graduate did not refer to these as onerous, but simply accepted them as part of legal practice.

> There's ways of practicing, there's the written ways – to think you've got rules that are written there but you've also got, you know, unwritten rules if you like, of conduct between practitioners, and one thing springs to mind is undertakings of solicitors.

Experienced Practitioners

There was only one comment by an accounting practitioner who told of his respect for partners when he was a new graduate, emphasising that things had now changed.

> I started … in Brisbane and you treated the partners almost as gods. You had respect. Y'know, you had to carry the senior's briefcase.

The legal practitioners made many references to their role of educating graduates concerning these unwritten standards, which, one practitioner suggested, were part of the definition of professionalism.

> Well, there's various aspects I suppose to conducting things in a professional way. There's ethical issues. There's also I suppose your relationship with those that you're dealing with, whether it's your client or the other side in a matter or whatever.

Much of the discussion reported here related to actions that experienced practitioners considered inappropriate behaviour, as they believed that these actions could have a negative effect on the reputation of their firms. The following quote illustrates the importance of reputation:

> Reputation in the law is very important and if you generally do the right thing, your reputation will hold you in great stead. One, if you do a good job, the other lawyer will always know that you'll do a good job and they're not going to get anything past you. Two, if you're running a case … and you run genuine cases … they're going to respect you more and they're going to respect that and they're not going to take advantage of you or your client, so they tend to be more reasonable.

This person was not suggesting that "you've got to be a nice person. Y'know, around town I'd probably be regarded as tough as nails, y'know never get any money out of

him kind of thing." However, he did stress that "professionalism will mean that we shouldn't be dragging the chain to have court applications so we have to do our side of the work, y'know, professionally, and not incompetently so that people aren't having to bring on applications".

This commentary clearly shows why there is such a strong feeling with respect to other practitioners failing to abide by these unwritten rules - labelled here as "professional courtesies" - since they believe that this kind of behaviour can destroy the reputation of an individual or a firm. It seems that these practitioners equate one's reputation as associated with their level of professionalism. In order to illustrate the importance of respecting professional courtesies, the experienced practitioners gave examples of situations where they believed members of their staff failed to perform as expected. Some of these could even be described as unethical.

One practitioner stated that there was an expectation that younger or junior practitioners should show a certain respect for the more senior practitioners. When there was a need for a conference it was an unwritten rule that it should take place at the office of the senior practitioner. It was also expected that solicitors should treat each other with respect, even those who were acting for clients on the other side of the matter. The general consensus here was that the new graduates needed to be educated about these matters. In other words the experienced practitioners conceded that in some instances, the graduates genuinely thought they were doing the right thing, acting zealously for clients, but according to the accepted conventions within the profession, they were using "dirty tricks".

> Well … some people … I would never employ. Cut and thrust… lose the plot… don't look at the issue globally… not helping their client out…Making it more difficult, making it more expensive, encouraging the client to pursue a grossly exaggerated claim, making it difficult – a nightmare – for everybody to try and solve, taking it through court, wearing people down, and then getting – sort of – a smaller judgment, but spending a fortune in costs.

One of these conventions is respectful contact with solicitors on the other side before making a court application to hurry a matter along. There was an expectation that lawyers would speak to the legal representatives on the other side before making an application to enter judgment. Most of the experienced practitioners could provide examples of where they had had to repair their firm's reputation because of the "rash" actions of the graduates or junior members of their staff.

The examples referred to did not involve lawyers doing anything illegal but were situations where their respect for the unwritten rules of etiquette[733] operating between members of the profession was found wanting. There were also examples of unethical behaviour. The following was an example provided to illustrate how practitioners use inter-firm mechanisms to restore relationships and avoid reputational damage.

> A firm in Brisbane sent us a fax that they meant to send to their client, but it was a contentious matter and the young solicitor who was in his first year out, … sent it out to his client. Now … the other firm sent a letter … saying we've inadvertently sent a letter to you, we've spoken to Mr Such-and-such (the employee at our office – who'd said we're not prepared to destroy the letter) we want an immediate response … or we're going to go to the Law Society. Now, in fact [the first year solicitor], he spoke to his supervising practitioner who wasn't a partner at the time, and another guy who's an old practitioner from New South Wales, and they both thought there wasn't really anything wrong with what he'd done because it was sent to him. It was sent to him, so why shouldn't he send it off to somebody else? But clearly it shouldn't be sent to him. … So I spoke to [name supplied] about it, we got the young lawyer in, said you never should have done that, this is why you should never have done that, and then we called the practitioner from the other big firm from Brisbane who was very threatening in his correspondence saying he's going to go to the Law Society because we were ignoring him, got him on the phone, nice as pie, couldn't have been better, all forgotten.[734]

A further example given by this practitioner also concerned the unethical behaviour of a member of his staff, a young female lawyer, who, when representing a woman in a family law matter, passed on some confidential information to her friend. She told her friend, who was currently dating the female client's ex-husband, that he was violent. Although she warned her friend confidentially, the ex-husband heard of the accusation and confronted the client. When the client complained to the firm, the practitioner reported that he had had to terminate the female lawyer's employment.

Another practitioner reported that he took it upon himself to spread the word about professional courtesies beyond the realms of his own firm at every opportunity. He said that he had made agreements with other firms to refrain from charging for changed conveyancing settlements because he saw these as attempts to increase fees.

> We have a policy… What happens in conveyancing matters is someone might want an extension for a day, and the practitioner on the other side will

[733] Although note the Queensland Law Society, *Legal Profession (Solicitors) Rule 2007* Statement of general principle and paragraph 21 in "Relations with other practitioners"
[734] It is interesting to note that a scenario very similar to this was used by the ABA Ethics Committee: see Coquillette, above n 455.

> say, 'If you want an extension, we want $300.' And in many cases he may even put his interest ahead of the client in the sense that he doesn't ask for interest for his client, which he's entitled to, but insists on payment of the so-called extra legal costs incurred. And the amount they claim bears no relationship to what could possibly be actual costs, and I make it a bit of a crusade to try and stop this practice …

There were some references to the importance of undertakings between members of the legal profession, which are really an aspect of these unwritten rules or professional courtesies. One practitioner spoke of these undertakings as gentlemen's agreements between people who have ongoing relationships. Therefore, he reasoned that these should not feature in dealings with self-represented clients in the Family or Federal Magistrates' Courts.

These participants acknowledged that undertakings were serious statements. They said that no one should provide an undertaking in a situation that was beyond his ability to keep, such as making an undertaking to a judge that a barrister would be available on a certain day.

Career Stage Comparisons

This topic is clearly of importance to the experienced legal practitioners. Perhaps the fact that accountants communicate less regularly with other accountants explains their lack of reference to this. Their work, in the main, revolves around servicing clients and dealing with regulatory agencies.

On the other hand, the legal practitioners were often involved in litigation and civil disputes where other law firms represent their clients' opponents. They are constantly communicating with other firms and it is a fact that a lack of procedural vigilance will result in the court charging them or their clients with the costs of delays and other actions that might be considered by the court to be vexatious. Therefore, they considered it very important that members of their firms conduct themselves in accordance with professional rules in these dealings.

In light of this, it is interesting to note that the law graduates and experienced practitioners held a marked difference in opinion about the importance of these rules, some of which are unwritten. Only one graduate mentioned undertakings, but he certainly did not see them as a pressure, whereas the experienced practitioners did. They reported that they are constantly reminding other members of their firms and, in

particular, the new graduates, of their importance. They see themselves as keepers of their firms' reputations and therefore view any actions of the graduates that called this into question very seriously. They gave many examples of situations where employees exhibited behaviour that failed to meet the professional courtesy standards. They saw a need for mentoring in this area. While it is arguable that the graduates interviewed would not conduct themselves in the way described by the experienced practitioners, it is easy to see how any graduate would be confused over this issue. If their superiors were representing to them that achieving budget targets was important, then submitting applications to the court pointing out that lawyers acting for the opposing party have not filed documents would be seen by them as legitimate costs to clients in litigation. Therefore, it probably came as a surprise to them to find that the senior members of their firms look disapprovingly on these practices.

Interestingly, the experienced legal practitioners in discussing their reputations made very few references to clients. However, they jealously guarded their reputation with respect to other firms.

(d) Individual Responses to Culture

As noted above in Part C of Chapter III, this topic refers to the concept of autonomy – a practitioner's ability to exercise control over his/her conduct in daily tasks – when confronted with the pervading culture of the firms in which they work and particularly when questions of moral complexity are involved. All the participants recognised that firms have cultures. In particular, the law graduates spoke about pressures of budgets and other expectations generally created by the firms in which they were working. The experienced practitioners focussed on the challenges they faced as managers in their firms and highlighted the difficulties they encountered in socialising graduates into their culture.

The graduates opined that problems arose for individual practitioners who felt uncomfortable taking the direction prescribed by the firm. While some used certain "avoidance strategies" to rationalise their conformity to the firms' demands, others asserted that they would maintain their individuality and make every effort to withstand the pressure to conform, especially if their views differed from what was being prescribed.

Graduates

As noted previously, the accounting graduates appreciated the opportunity to discuss difficult issues with their mentors, but they still maintained that they adhered to the dictates of their own conscience. One asserted "I would never go ahead and do something without checking it - something that was borderline. I guess I would have my own opinion on what I should do, but I would want to know what the partner recommended." Another said "I wouldn't compromise my ethics. I pretty much know what I should be doing and what I shouldn't be doing and if someone put me in a position where they want me to compromise then I wouldn't buckle down to them."

These graduates believed being a practitioner involved a certain amount of autonomy and, therefore, no matter what guidance was given to them, the ultimate decision belonged to them. For instance, one said "[t]he firm can only do so much …" and another implied that there might be outward compliance but internal resistance: "But, anyone can just say that they adhere to those standards, yet within themselves they might not do so practically …"

At first glance, it seemed that these graduates were keen to act in accordance with their values. However, their responses within the context of their comments as a whole showed that there was a strong desire on their part to ensure their actions were correct and did not attract censure.

> Well the sort of thing – the obligations, if I can put it that way, of being in a profession such as law or accounting they tend to impact I think more on the individual rather than on the firm. So for example, you know your ethical obligations, you know your duties to your client in law and in accounting, I think your duty to the law not to be involved in knowingly avoiding taxation for example.

These participants also relied heavily on the advice of their mentors. They appeared to accept totally the budgeting practices and the need to dress appropriately in order to give the right impression. These factors seemed to imply that they ultimately wanted to ensure that their conduct found favour with the authority figures in their firms.

The law graduates recognised the worth of consulting with their seniors, but one said "[b]y the same token that ethical guidance isn't necessarily right and so you are left back with the situation of, 'Well OK, I'll take that on board, but what do I do about it'." In a similar vein, another said "It's a cop out just to say it's a product of environment

…" The law graduates spoke about having a certain amount of discretion in conducting themselves generally and particularly in shaping the type of service given to clients:

> I think a lot of it comes down to your personal views and your personal integrity … So I think while there might be an ethical code, it still comes down to how comfortable the individual solicitor is or the individual person is with doing the different tasks.

Some graduates observed that certain practitioners felt obliged to change firms because of their beliefs. One expressed the view: "I think it's going to be a constant struggle". However, most of the graduates seemed to believe they could successfully pursue their own individual approach to practice in accordance with their understanding of professionalism. For some this meant working longer hours in their own time and sometimes objecting when those in authority asked them to do something against their values.

The law graduates, overall, believed that while they had a certain amount of discretion or choice about whom they represented and how they conducted themselves, they thought they would remain true to their own values and would find a way to provide the type of service their brand of professionalism required. The following statement best summarises their feelings:

> Professionalism then may be defined as being able to keep that set of values and keep using those values in their practice, in the individual's practice of law.

Experienced Practitioners

Since most of the experienced practitioners were partners, it did not occur to them that there could be a different understanding of practice, although two senior associates, one from law and one from accounting, did provide pertinent comments.

The accounting senior associate claimed that she ultimately determined the course of action she pursued but made it clear that she was mainly concerned with ensuring that her conduct was not negligent. Therefore, it appeared that she was not taking this approach for altruistic reasons.

> … but you will do whatever you believe is necessary to achieve the outcome that's needed. … you just can't say, 'Because our fees been set at $50, we will only do $50 worth of work.' Otherwise, our legal cases will skyrocket.

One senior law associate who believed that a person's conduct depended on *who* they are (i.e. their values), recognised the possibility that he might have a different view to that of his firm:

> I don't know what would happen if I said I don't want to work for this client for this particular reason and the partner said, 'Well, we want to take it on.' … It may well be that the solution is as simple as saying… 'Well, I don't want to do it, but someone else, they can go and knock themselves out. That's fine.'

As noted, the other experienced practitioners did not really comment on this, yet some acknowledged the private nature of the lawyer/client relationship and reasoned that some individuals in their employ were probably acting in accordance with their own beliefs, even though they or other senior staff advised them otherwise. One legal practitioner said "you can't be 100% about anything, you don't know what's going on, do you?"

Compliance and Avoidance Strategies

The experienced practitioners had nothing to say about this but it did feature in the comments of the graduates.

In recognising the very strong influence of firm culture, and that there is a tension between their view of professionalism or way of practising from mandated by the firm, many of the law graduates spoke of their coping mechanisms when they found themselves having to comply with the dictates of their superiors. One of the law graduates referred to these as "avoidance strategies". There was evidence of the use of avoidance/coping strategies in the responses of both accounting and law participants.

Some accounting graduates appeared to take advantage of the indemnity clauses included in client agreements and the opportunity to defer responsibility to others more senior. For example,

> I actually find that it is often not the most ethical choice that is taken. … I'm not talking about really bad things but there are manipulations that probably aren't straight down the line sticking to ethics, but clients expect it. I think a lot of that goes on. I don't really have a problem doing it because I think it's expected. … if it was happening under my name and I was signing off on it I'm sure I'd have a different view. But it's not my responsibility so if that's how they want things done well then that's fine.

While this person felt that she was not responsible simply because she was not the person who signed off on the matter, another took refuge in her junior status suggesting it was hard for her to judge the tasks being assigned to her as only those more senior in the firm could see the 'big picture'.

Another graduate referred to the clause that limited their liability for the work they did but stressed that the individual practitioner still must take some responsibility.

> Oh yes, it's a big thing in accounting that they've got to sign a declaration saying they're responsible for what's in there. Even so, you know you can't sort of hide behind that, you've got to be honest in the way that you deal with them, but it's a big protection for accountants, yes.

One law graduate, in particular, spoke extensively of avoidance strategies. It was obvious that he felt confronted by the possibility that there had been situations when he was acting for his clients where the other party involved was detrimentally affected or where the result was one that he considered to be less than honourable. He said "[i]n acting for insurers you are defending, you tend to have to distance yourself from the people's problems, the emotional and human type problems." He endeavoured to avoid feeling personally responsible when he found himself in situations where he was acting for a large corporation against a vulnerable opponent. In other words, he was trying to distance himself from any blame. Yet he rationalised the situation by suggesting:

> If I'm defending an insured for an insurer what I am doing is maybe going against this individual's best interest and this individual quite often has been hurt. There is some liability. But then I suppose you can counter that by saying we work in an adversarial system where you need both sides of the argument in order to come to a middle point or to arrive at a settlement or an area in which this matter or type of matter can be resolved. … I'm just another cog in the machinery and no matter what I do I can't make a difference to what's going to happen to this individual. All I can do is make a difference, well all I can do is keep the machinery going because the machinery at the end of the day will come up with the right answer.

As a junior lawyer, he also rationalised his situation as akin to a cog in the firm's representative team. He said:

> Someone else can see everything from a bigger picture and they may better appreciate whether or not we are doing something that is less than ethical.

Interestingly, this person repeatedly stated that he realised he was just trying to distance himself from any obligations that he felt by acting for a repeat player, like an insurance

company, against an individual who had incurred injuries as a result of negligence or a car accident. He ultimately admitted that "we do have to put a lot of faith in the adversarial system. Maybe we do hide behind the adversarial system as a way of avoiding responsibility for some of the things that we have to do."

Although the other law graduates did not directly refer to particular avoidance mechanisms, it could be suggested, generally speaking, that their objections to the firm's cultural hold on them through budgets, marketing requirements and provision of livelihood, were efforts to find reasons to alleviate their own feelings of discomfort.

Some graduates tried to rationalize the actions of the principals and firms. One law graduate implied that firms ought to be conscious of costs, as "that's the environment that we are operating in now so we don't really have a choice." There were also comments that suggested that large corporate clients dictated the practices of firms.

> But at the end of the day though, I think perhaps the corporations themselves are maybe largely responsible for firms and especially larger firms, larger commercial firms focusing on commercial realities. Bottom line in other words. I think they, they are out there saying we need to do this, we need to do that.

Interestingly, the graduates were keen to rationalise the actions of the experienced practitioners who applied the pressures. For example,

> I think it comes from their environment. I think it comes from perhaps even the male dominated industry. The fact that it is largely driven by middle aged white males who have actually had to come up through the ranks themselves. They've been – they've been endowed with, you know, the need to look at the bottom line. They've been told all the way through their careers that they need to keep their budgets up, that they need to achieve certain targets. This is drummed into them and maybe it becomes second nature so they then in turn pass that along down the line. I think at the time, I think any individual who is constantly bombarded with a need to look at the bottom line and to achieve targets and budgets, I think any individual will start to look at that solely.

3 *Summary*

As noted previously, a firm adopts a partner's way of doing things because partners own the firm. Therefore experienced practitioners, many of whom are owners, do not have much to say about firm culture as they would rarely feel any tension between their own views and that of their firm. Even so, it is obvious that firm culture is quite strong and acknowledged to be so by all groups.

The accounting graduates commented that they recognised that they had some individual responsibility for their actions, but these comments mainly related to them making a conscious effort to provide an expert service to avoid liability and the displeasure of their superiors.

A number of law graduate participants recognised that there would be times when their clients' instructions or the prescriptions of their firms would be unpalatable to them. They did not necessarily suggest that anything illegal was involved, but they were aware that these instructions sometimes produce outcomes that are unfair or unethical. Most of the law graduates asserted that they would withstand pressure to succumb to this and remain true to their individual understanding of professionalism – asserting their autonomy. The privacy of the lawyer/client relationship, acknowledged by some of the experienced practitioners, appeared to provide the space for these individuals to achieve this goal.

However, others acknowledged their limitations and considered it inevitable that they would comply. Their rationalisations about the behaviour of partners and senior members of their firms suggested that they recognise that they may, in the future, conform or at least comply with it. They were keen to justify that behaviour or find a way to make this behaviour acceptable even though they found this conduct unacceptable. In doing so, they made every effort to sidestep their responsibilities by referring to a number of strategies or situations that they believed left them with very little choice about what conduct they should exhibit.

It is obvious that this issue was a significant concern of the law graduates, yet there were two senior associates, one law and one accounting, who recognised they were subject to the dictates of the partners and so liable to experience tensions between what they believed they should do and the wishes of their firms. This again shows the influence of firm culture on those practising at different levels, even though each person has a choice about how s/he will behave.

Some statements from students with respect to whether professionals' ideas of professionalism can change suggested that regardless of any outside influences, they would act according to their own understanding of professionalism. The students also blamed the adversarial system for their compliance with dictates or practices that they found offensive. Therefore, there is a fair degree of consensus between the views of law students and law graduates on compliance and efforts to retain their own integrity.

C *Conclusion*

This chapter has reported on the views of the participants interviewed. While there are some different understandings between the members of each group, it is possible to make some generalizations about the groups as a whole. The chapter has highlighted that at different career levels, lawyers and accountants have distinct perspectives on the issues under examination. This is particularly the case for lawyers. Therefore it can be concluded that if these participants' views are indicative of the views of new entrants entering firms, then there is an evolutionary process taking place, and this can possibly be attributed primarily to the phenomenon of firm culture.

The student group was quite idealistic and they positioned the practices of law and accounting as closer to the professional end of the continuum. Professionalism, in their view, included all the traditional organizational criteria and ethics, but it was something more. The values of individual practitioners form the basis of professionalism and these produce conduct that promotes public-spirited practices. The application of this form of professionalism requires the adherents to provide a service that draws on ethics, morals and other relevant principles. Therefore, the students were quite positive about the profession for which they were training. Even though there were aspects of current practices that displeased them, there was a certain amount of confidence in their own ability to be able to withstand any pressures that might encourage them to deliver a service that was less than the standard of professionalism to which they aspired.

The findings revealed that the law and accounting graduates held diverging opinions. While the accounting graduates were keen to strive for technical accuracy and approval from their superiors, the law graduates were experiencing tensions in the work environment. Law graduates thought the firms' budgeting policies hindered the service they provide. Therefore, they were not able to provide to clients the quality service that was commensurate with their understanding of professionalism. This perspective closely aligned with that of the students. They were also uncomfortable with the emphasis on budgets and the associated practices in their annual staff reviews. This group of participants singled out the partners as the owners of the firm and the source of their discontent.

As could probably be expected, the experienced practitioners mentioned market pressures when asked whether the meaning of professionalism had changed. Most of them were owners of their firms and were therefore well acquainted with the impact of

increased competition, legislation and the new educated consumer on the financial productivity of providing their services.[735]

There was a high level of consensus between the views of the accounting and experienced legal practitioners with respect to the importance of providing an expert service. The accounting graduates were also of this view. However, the experienced accounting practitioners' main aim was to avoid liability, whereas the experienced legal practitioners appeared to be very concerned about their reputation with other law firms. In this respect, they saw their task as managers of their firms as very demanding, particularly in relation to requiring the new graduates to comply with the generally accepted courtesies of the profession.

As has been shown above, the law graduates concentrated on expressing their disenchantment with the budgeting requirements. They saw the emphasis on budgets as negatively affecting the service they offered clients and they were critical of budget targets being used as the main criteria in their performance reviews. The experienced legal practitioners were largely oblivious to these concerns, and if they were aware at all, they rationalised that they would not be able to provide a service if budgets were not met. The lack of respect for professional courtesies was an issue that particularly concerned them. They recognised that a failure to adhere to these conventions affected their reputations. The law graduates had no real objections to the observation of professional courtesies and acknowledged there was a place for partners to formulate the policies and procedures operating in their firms. However, they complained about the efforts of these people to have them conform to principles and conduct that differed from their own philosophy of practice.

The comments of the experienced practitioners, both law and accounting, supported this view. They expected the junior members of the firm to follow their own directions initially, and expected them over time to learn to practise in accordance with the firms' views. There was no mention of teamwork by the experienced practitioners. Their comments underlined their view that they had the right, as owners, to direct the practices of all the members of the firm. The table on the next page summarises the evolutionary analysis findings.

[735] The accounting students also referred to some of these market pressures and blamed them for making the practice of accounting more of a business.

While this chapter has compared the responses of all the participant groups, limited effort has been made to place these observations in the context of the literature. The following chapter will address this. It will again provide an analysis of data; however, it will specifically consider the participant groups’ perspectives on professionalism and appraise the degree to which they concur with theories espoused in the literature.

Table 5.1 – An Evolutionary Analysis

Career Stage	Law	Accounting	Law Compared to Accounting	Accounting Career Stage Comparisons	Law Career Stage Comparisons
Students	Idealistic. Have the idea that they will find a way to achieve their ideals.	Idealistic. Have the idea that they will find a way to achieve their ideals.	Very similar views.		
Graduates	Idealistic yet confused. They believe that their budget targets detrimentally affect their ability to provide a quality service to clients. They are also uncomfortable with their firms' use of budgets to evaluate their worth to the firm. Some recognise that they may comply with the dictates of the firm and are therefore, seeking to rationalise their actions. Others are trying to find ways to achieve their own ideals within the constraints of the firm.	They are socialised into their environment. They are seeking to achieve technical expertise and approval of their superiors.	Accountants are socialised and place emphasis on meeting the ethical standards as a measure of the quality of their work. The law graduates believe that a quality service is one that includes moral and community considerations.	The accounting graduates appear to have succumbed to their practice environment. They are therefore quite at odds with the views of their student counterparts.	The law graduates have similar values to the law and accounting students. However, they are feeling pressured to fit into their firm's culture.

Table 5.1 – An Evolutionary Analysis (continued)

Career Stage	Law	Accounting	Law Compared to Accounting	Accounting Career Stage Comparisons	Law Career Stage Comparisons
Experienced Practitioners	Business oriented. They are convinced that their firms provide a positive environment. They are concerned with management issues. Their concerns revolve around their desire to socialise the new entrants into the firm. In particular, they place importance on ensuring that the graduates respect the conventional professional courtesies when dealing with professionals from other law firms.	Business oriented. They feel that they are in control of their graduates, although they see them as pursuing economic goals as opposed to remaining loyal to their firms. They are very concerned with technical correctness because they want to minimise legal liability.	Both aim to provide a service that is technically correct. However, the accountants mainly operate to minimise liability whereas the lawyers are more concerned with inter-firm reputation issues.	There is much consensus between the graduates and the experienced practitioners. However, the experienced practitioners have less trust in the ability of the ethical codes to provide answers for practice.	Their view of practice is quite different from that described by the students and experienced by the graduates. As managers, they expressly set out to socialise new entrants to the firm's culture. They are completely unaware that the graduates are feeling ill-at-ease as a result of the budgeting arrangements and the associated pressures.

VI FINDINGS II: AN ANALYSIS OF THE DATA

It has previously been pointed out that the lack of research that reports on the perceptions of individual practitioners signifies a gap in the literature on professionalism.[736] The empirical research in this project represents an attempt to address this shortcoming. The findings, reported in Chapter V, shed some light on the views of practitioners in South-East Queensland, Australia. This chapter will now consider these practitioner perceptions in the context of the literature described in Part I of this thesis. The literature can be seen as presenting the views of academics, the judiciary and the professional bodies.

While the findings of the empirical work associated with this study will predominantly inform this chapter, there will also be references to reports already contained in the literature. However, it should be borne in mind that most of the latter deal broadly with the nature of the lawyer/client relationship, as opposed to individual practitioners' views on their understanding of professionalism, i.e., the perspective taken in this study.

The chapter is structured according to the headings used in the previous chapter. It will conclude with an analysis of the data from the perspective of sociological theories; contemporary understandings of professionalism; and conceptions of lawyering documented in the literature. The chapter will draw on the social psychology material referred to in the literature chapters as a framework for considering the different perspectives found in the data between the law graduates and the experienced legal practitioners.

In Chapter V it was noted that the participants fall into two distinct groups. One group consists of accounting and law students and law graduates, and the second comprises the accounting graduates and experienced law and accounting practitioners. The former group, collectively referred to below as Group A, are quite idealistic and tend to conform to the traditional professionalism paradigm that advocates that professionals ought to aspire to a service ideal. The latter group, collectively referred to as Group B, believe that the practices of law and accounting represent the pursuit of business goals and therefore are aligned to the commercialised professionalism paradigm. These collective titles of groups A and B are generally used, but there are

[736] Particularly see Nelson & Trubek, above n 11, 4.

times when it is important to specifically discuss the responses of some of the individual group participants. In other words a more focussed view on what some particular individuals had to say enriches and extends the analysis of the theoretical concepts identified in the literature.

A *The Participants' Views of the Profession*

1 *Business or Profession?*

The main literature on this topic is included under the heading of 'Profession/professional' in Chapter I. In particular, the Australian Bureau of Statistics views law and accounting as businesses,[737] the judiciary and academic commentators from both law and accounting are also convinced that business priorities prevail, and the empirical work, e.g. of Tomasic, Hanlon and Clark in relation to law and Wyatt, Staubus, Lee and Neu in relation to accounting, finds that practitioners themselves believe they are running a business.[738] Overall, the material seems to concur with the responses given by Group B.

This description of accounting and law contained in the literature appears to posit the practice of law within the commercialism professionalism paradigm suggested by Hanlon.[739] This advocates that economic goals persuade professionals to do their job expertly. They are not committed to providing a social service. As another commentator reasons, lawyers are simply using mechanical procedures and therefore their practices can "be managed as a business. Each client … is merely the raw material and the finished product is a completed file. It is imperative that the cost of completing the work is reduced to a minimum in order to achieve maximum profit …" [740]

It is interesting to note that those in the professional organisations of both law and accounting are endeavouring to counter this trend by claiming that there are elements of both business and profession present in the practices of their members, and hence, they

[737] See Chapter I, "Profession/Professional" p. 15.
[738] With respect to law, see Tomasic cited in Nieuwenhuysen, et al above n 38, 6 and with respect to accounting, see Wyatt, above n 40 and Staubus, above n 40, 141. Also see the views of Hanlon and Clark, above n 268 and Lee, above n 40. A recent Canadian study has come to this conclusion: see Grey, above n 188. This is the view of the Australian author L.D. Parker, cited in Lee, above n 40. Another Canadian study also concludes that claims to public service ring hollow: see Neu, above n 188, 209.
[739] See Chapter I, p. 46.
[740] Dirks cited in Sommerlad, above n 525.

call on their members to temper their commercial aspirations.[741] In the legal arena, this approach finds support from Pearce.[742] He describes the practice reality as a business paradigm that aims to accommodate both business and professional goals. Trilling also writes about the practical aspects of taking this approach, suggesting that efficiencies may follow that would allow members to provide a service to clients not ordinarily accommodated.[743] However, as Stemple's analysis suggests, Pearce's model is really an "impoverished version" of traditional professionalism[744] and it could be argued that Trilling too is not advocating a business paradigm, but simply promoting the worth of business attributes to legal practices in an effort to increase their efficiency levels.

Yet it is obvious that the assertions of the representatives of the professional bodies do not reflect the views of the experienced practitioners in the study. One of the experienced legal practitioners scoffs at a statement made by a Queensland Law Society vice-president saying that he does not "want the law society just to be a trade union, we're a profession." Dr. Tomasic, in his report, also anticipates this outcome "…regardless of the rhetorical flourishes from legal societies, lawyers are more interested in business orientation and not service orientation."[745]

This raises the question of why these professional bodies bother to make claims that they know their members do not share. The conflict theorists claim that they do this to further their own or the profession's self-interest, seeing some value in proclaiming that their members aspire to professional ideals. The findings of Gray et al, who examined the practices of Sydney suburban law firms, support this conclusion.[746] Gray's findings appear to recognise that a profession's status can only be maintained if the public accepts that the professions are important.[747]

While many of the writers in the literature conclude that the business paradigm dominates, a more complete examination of their writings show this is not their preferred outcome. Some understandings of the judiciary, for instance, are appealing to

[741] See the comments of Mason in relation to accounting, above n 43. Rob Hill and Jeff Mann from the Queensland Law Society and the Legal Services Commission of NSW and Australian Law Council President in 2002 Ron Heinrich – See Chapter I, "Profession/professional", p. 15.
[742] See Chapter I, "Commercialised Professionalism", p. 46.
[743] Ibid.
[744] Ibid.
[745] Tomasic cited in Nieuwenhuysen, et al above n 38, 6.
[746] Gray, et al above n 268. They concluded that 'There is a marked tension between professionalism and managerialism…' Yet the tension they speak of revolves around practitioners trying to take a managerial approach to their practices while also trying to hold onto professionalism for the purpose of retaining their status in the community.
[747] Nieuwenhuysen, et al above n 38, 1.

lawyers to refocus their practices on professional ideals.[748] The theme strongly emanates from Justice Gleeson's definition of a profession adopted by the Australian Law Council of Australia[749] and the view of the ABA.[750] This way of thinking is consistent with those of Group A. This group sees law and accounting as professions and therefore considers that there are some altruistic elements to its practice. This view aligns with the traditional professionalism paradigm.

2 *What is a Profession?*

The sociological theories included in Chapter I only accord professional status to vocations where certain structural elements exist. Most of the participants acknowledged the existence of these as incontestable,[751] even though a closer examination of the sociological theories reveals different interpretations of what constitutes a profession.[752] Kultgen's general definition of a profession is indicative of the sociologists' perspective[753] and therefore supportive of the criteria that distinguish vocations from professions.

This question drew a discussion of the attributes that practitioners should exhibit by virtue of being members of a profession. In particular, this called into question whether practitioners are committed to a service ideal as articulated by Roscoe Pound: "A profession is a group … pursuing a learned art as a common calling in the spirit of public service …"[754] Therefore the literature referred to in Chapter I under "Professionalism" and, more specifically, the material on "Contemporary labels", is relevant. However, because there is considerable overlap in the material that deals with this question and the definition of professionalism, this section will only briefly discuss comments about the "service ideal", leaving a discussion of the majority of the literature, and for that matter the more detailed responses to professionalism, to the

[748] Chief Justice de Jersey, Justices Kirby and Hayne of the High Court. See Chapter I, "Profession/Professional", p.15.
[749] Gleeson, above n 47.
[750] See ABA, above n 26.
[751] Chapter I deals generally with the sociologists' understanding of a profession which mainly concentrates on structural elements but in more specific terms, it sets out the criteria by which a profession is identified, and endeavours to determine the reason why professions were formed.
[752] The data will be compared to these theories at the end of this chapter – See this Chapter, p. 213.
[753] Kultgen, above n 37. See Chapter I, "Profession/Professional", p. 15.
[754] Pound, above n 77, 41-55.

following topic heading.[755] The literature in Chapter I under "Profession/Professional" is again the primary focus.

Group A express the view that members of a profession should be committed to helping clients. They suggest that they act as social trustees. They see the role of the professional as providing a service expected by society. Their comments show that they believe that the goal of making a profit should not be paramount. This understanding of the role of the profession in society seems to align with the explanation of the traditional professionalism paradigm as a contractual arrangement, as articulated by Paterson and others. This theory advocates that professionals have a particular place in society in exchange for the services that only they can provide to the community.[756] This idea of a role in society is also the thrust of the historical legal account and anecdotal writings on early professionals,[757] as well as the explanation of the professions by functionalist sociologists.

At this point it can be deduced that Group A's understanding of a profession is closely aligned to the traditional professionalism paradigm. These participants would agree that professionals should aspire to a service ideal. More specifically, they should have the expertise required, act autonomously, and recognise that they have obligations to the public, as opposed to advancing their own self-interest.[758]

While the accounting graduates (who are part of Group B) also maintain that service to the client is important, they nominate technical and ethical standards as their criteria for achieving this purpose. This view accords with that of the President of the Institute of Chartered Accountants.[759] The law and accounting experienced practitioners (the other members of Group B) agree with the accounting graduates in terms of the importance of technical ability and the observance of ethical requirements. More specifically, the accounting graduates and experienced accounting practitioners make it clear that they are mainly concerned with achieving technical correctness in order to avoid liability.

Most of the experienced practitioners, and especially those in accounting, see the claims to altruism as elitist and the experienced legal practitioners avoid referring to any service ideal at all. In effect, Group B speak about the need to provide expertise as

[755] See this Chapter, "What is Professionalism?", p. 196.
[756] See Chapter I, "Traditional Professionalism", p. 39.
[757] See Chapter I, "Sociological Theories", p. 23.
[758] Chapter I, "Traditional Professionalism", p. 39.
[759] McDonald, et al above n 44. See Chapter I, "Profession/Professional", p. 15.

opposed to service. There is a distinct lack of consideration of altruistic principles by this group, and very little reference to clients by the experienced legal practitioners.

The accounting literature seems to support the views of its graduates and experienced practitioners. For instance, the American Institute of CPAs and the Australian president of the Institute of Chartered Accountants see the code of ethics as a central and distinguishing feature of a profession to be used to evaluate the service they provide.[760] As expressed in the literature in Chapter I, a recent President of the Institute of Chartered Accountants in Australia stated "The most telling feature that distinguishes a profession from a trade is its active promotion and implementation of a Code of Ethics."[761]

With respect to the experienced legal practitioners, as previously noted, some surveys have shown that lawyers believe they are running a business and that a commitment to society and its values do not feature. Therefore, it is not surprising that the experienced legal practitioners describe their practices as aiming to achieve a technically correct service and that, as practitioners, they give none or very little thought to any altruistic elements. There is support for this view in the literature. Legal professionals are just workers earning a living desiring purely to advance their own careers, not interested in the "well-being of humankind".[762] In fact, they "see … social values as unrealistic goals."[763]

With respect to the cursory mention that legal practitioners make of clients, Trilling states that "legal professionals … tend to focus more upon procedure (and the manipulation thereof) than upon the people whom the system purportedly serves." [764] He concludes that the average lawyer does not see clients as "all that important to the process."[765] This is supported in the data. The experienced practitioners focus on expertise and, as will be noted later, their desire to keep their reputation intact with their peers in their own and other law firms.

Both traditional professionalism and commercialised professionalism require technical ability. However, the traditional professionalism paradigm uses technical ability for the benefit of the public good. Group B aspire to provide an expert service as

[760] See Chapter I, "Profession/Professional", p. 15.
[761] McDonald, et al above n 44. See Chapter I, "Profession/Professional", p. 15.
[762] Kritzer, above n 187, 413. See Chapter I, "Contemporary Labels", p. 38.
[763] Tomasic cited in Nieuwenhuysen, et al above n 38, 16.
[764] Trilling, above n 260, 114.
[765] Ibid 110.

opposed to "performing a task for the 'public good'."[766] Therefore, Hanlon's commercialised professionalism paradigm detailed in Chapter I under "Contemporary labels" appears to describe them accurately. Of course, Hanlon does suggest that managerial and entrepreneurial skills are actually valued more highly than technical skills within this paradigm,[767] but it is apparent in the remarks of the law graduates below under "Role of budgets and professional courtesies", that these are also held in high esteem by the experienced legal practitioners.

3 *Distinction Between Firms?*

This issue is an extension of the foundational question that asks whether the practice of law/accounting is a profession or a business. A number of student and graduate participants, though more in law than accounting, draw a distinction between firms differing in size or specialization. The comments of the experienced legal practitioners tend to contradict each other, with one suggesting that practitioners in small firms have greater autonomy whereas another highlighted that larger firms can more readily use their greater resources to pursue a service ideal. The literature that generally relates to this can be found in Chapter I under "Profession/Professional" and also Chapter III under "Firm Practices" discussed in "Clients" and "Specialisation".

While Group A couch its comments in terms of client service, the accounting graduates and accounting experienced practitioners focus on matters that lead to the provision of an expert service that adheres to ethical standards. With respect to size, the accounting graduates and experienced accounting practitioners maintain that the larger firms are more professional because they can pay higher salaries and offer more training opportunities. It is noticeable that these participants are not interpreting the question in terms of any altruistic behaviour. The reports produced by the Australian Bureau of Statistics show that larger firms have a greater ability to pay their employees than do smaller ones.[768] This appears to support the views of the accounting participants. However, neither the accounting participants nor the ABS reports make any claims that altruism follows. In fact higher salaries and greater training opportunities may create an environment that encourages employees to concentrate on their own promotional

[766] Hanlon, above n 13, 346.
[767] Perkin cited in Hanlon, above n 80.
[768] See Australian Bureau of Statistics cited in Law Council of Australia, above n 47, 23.

prospects rather than aspiring to altruism for their clients. According to the accounting experienced practitioners, this is in fact what the accounting graduates are doing.[769]

The law students and law graduates consider that the size of the firm and the particular specialisation tend to impact on the type of service provided. More specifically, they believe that the larger firms are more business-like in that they are dealing mostly with corporations, whereas the smaller firms deal with individuals in their personal and small business matters and are more inclined to know their clients personally. Some empirical work conducted by Heinz and Laumann and Hanlon[770] and the literature discussed under "Clients" in Chapter III, particularly the report of the Law Council of Australia, offers some support for the argument that there is a polarisation of interests between large and small firms. Those firms that deal with individual clients recognise that their clients expect value-added advice whereas firms servicing larger corporations are merely considered by these corporations as service providers – an impersonal arrangement that can change if the client considers that they are not getting value for money. It is interesting to note, however, that Hanlon qualifies this conclusion by suggesting that small firms may use the social service ethos simply for survival purposes.[771] This tends to undermine a distinction according to size of firm.

The experienced legal practitioner group did not express any uniform opinion, but one of the senior legal associates has an interesting view. He suggests that the very fact that a firm is large signifies it has the resources that provide its members with opportunities to offer some community service to take place i.e. *pro bono* activities. Trilling[772] supports this view but he does not confine it to large firms. He advocates that business efficiencies produce resources and disposable time that can be used by all firms to service clients who are less able to pay. The opportunities available, particularly to large firms, to consider community-minded projects does sound logical, as suggested by the senior legal associate. However, as Boon and Abbey argue,[773] and this was expressed by a couple of the experienced legal practitioners, these activities can be interpreted as a strategy to regain their integrity as opposed to doing this service

[769] Note the comments by the experienced accounting practitioners in Chapter V, "Budgets and Promotion" p. 169.
[770] See Heinz, et al above n 60; Hanlon, above n 60, 799. See Chapter 1, under 'Profession/Professional', p. 15.
[771] Hanlon, above n 60, 821.
[772] Trilling, above n 260, 16. See Chapter I, "Commercialised Professionalism", p. 46.
[773] Boon, et al above n 238. Also see Epstein, above n 238, 1693-94 who argues that law firms advance their own self interest by performing pro bono work.

purely to return to the grass-roots understanding of what it means to be acting as a profession.

While there were some strong statements in support of the view that size and specialization can determine whether or not practice aligns with business aims or those of a profession, it is interesting to note that most of the law graduates conclude that the personalities of those in charge of the firms, regardless of size or specialization, are the major influencing factor. This observation accords with that of Boon and Levin who examine the practices of lawyers in litigation, commercial practice, etc. but in the end recognise that a members' firm or organisation can have a major effect on their conduct.[774] This proposition is developed further in the discussion below on "Firm culture".

4 *What is Professionalism?*

This is the central question of the thesis. It will be discussed initially in general terms, and then considered with respect to its relationship with ethics; as a medium to enhance profit; and finally, in considering how the participants' understanding of professionalism may be affected by the practice environment.

As previously suggested, the term "professionalism" has a number of meanings. It can describe the end-state of a vocation that has attained all the elements identified by sociologists to distinguish it from an ordinary business; and refer to the behaviour expected of those who are members of a profession. The former meaning, as used by the sociologists and included in Chapter I, sets out the criteria or elements that brand a vocation as a profession. The latter meaning does not feature prominently in the participants' discussions, yet their responses do allow for a conclusion concerning the validity of their claims with respect to how professionalism is practised. This chapter will discuss this later. At this stage, it is sufficient to say that all the participants were aware of many of the attributes referred to by the sociologists in explaining their theories.

The meaning of professionalism that concerns the conduct expected of members of a profession was the main topic of discussion in the interviews. Most of the literature relating to this topic is contained in Chapter I under the heading "contemporary labels"

[774] Boon, et al above n 343, 68. See Chapter II, "Standard Conception of Lawyering", p. 59.

and focuses on the relevance of altruism or the service ideal to the practice of the members of a profession.

Group B's general response to this question was that professionalism equates to expertness. A focus on expertness reflects the tenets of the commercialised professionalism paradigm described by Hanlon.[775] The accounting graduates refer to business efficiencies and the importance of a practitioner's appearance. Both of these comments reflect the writings of Grey. Grey's study found that accountants consider that the definition of professionalism requires them to be aware that they are now dealing with educated consumers who demand economic efficiencies and so they need to be competitive and even aggressive in their business dealings. He also found that a number of his participants consider a person's dress code important, particularly for women.[776]

Some of the experienced accounting practitioners went so far as to say that professionalism is simply a "badge" to encourage trust from clients and the community. These participants believe that professionalism is about how professionals conduct themselves in terms of ethical standards and technical quality. By providing this, they consider that they are justifying their fees to clients. This appears to support Lee's conclusion that accountants espouse professionalism to promote their own economic self-interest.[777]

The experienced legal practitioners refer to technical quality and the provision of an expert service, but they also consider that the definition of professionalism includes something about the way that members of a profession interact with other members.

There is a general statement in the Legal Profession (Solicitors) Rule 2007 (Qld) that practitioners ought to act in a manner that is "consistent with the public interest."[778] Some of the more recent definitions of traditional professionalism refer to lawyers' interactions with other lawyers e.g. the definitions of Terrell and Wildman, Heubner, and Wm Reece Smith Jr.[779] Terrell and Wildman write of "[a] respect for other lawyers and their work." Heubner suggests that the definition of professionalism should require practitioners to strive to achieve "a spirit of loyalty to fellow practitioners". Wm Reece Smith maintains that practitioners should be "civil … toward courts and adversaries,

[775] Hanlon, above n 13, 345.
[776] Grey, et al above n 268, 577.
[777] Lee, above n 40.
[778] Queensland Law Society, above n 195, See the statement of general principle and paragraph 21 in "Relations with other practitioners".
[779] See Chapter I, "Traditional Professionalism", 39.

recognizing that the professional lawyer can be both tough and courteous." However, these commentators, in a similar vein to the draft QLS Solicitors rule mentioned above, also emphasise public service ideals and suggest that an adherence to professional courtesies will allow "the system to work efficiently".[780] The experienced legal practitioners do not appear to be concerned about the legal system but have an interest in protecting their reputations as articulated by professionals in other law firms.[781]

The general perspective of Group A is that the practitioner/client relationship should be the focus of professionalism and that the services provided include altruistic ideals. The law graduates are disenchanted with the practical procedures mandated by their firms.[782] They elaborate on the type of conduct that they call professionalism highlighting the constraints they believe hinder this from happening. For the purposes of defining professionalism, they believe that this is the provision of a full service to the client, which includes well-researched opinions that take into account both moral and ethical considerations and that ultimately progress the public interest. Therefore, Group A fits squarely within the traditional professionalism paradigm and the literature of the historians concerning the legal profession included in Chapter I. As will be seen later, some of the alternative models of lawyering that suggest that practitioners ought to look beyond the rules to guide their ethical behaviour outlined in Chapter II, would appeal to these participants.

5 *Is Professionalism the Same as Ethics?*

It might be suggested that this question is really about the extent to which professionalism is about ethics. This question, more than any other, challenged the participants to elaborate on their understanding of professionalism in more specific terms. A number of the participants speak of altruistic ideals, and try to identify them, and what factors cause them to view these as important. In other words, many state that professionalism is about values and try to articulate where these come from. The main literature relevant to this topic is included in Chapter I's discussion of traditional professionalism under the heading "contemporary labels". Chapter II's "conceptions of lawyering" also applies. There are some quite diverse views in relation to this topic.

[780] Terrell and cited in Gerhart, above n 27. This is also the gist of Heubner's definition: ibid.
[781] See Chapter V, "Role of Budgets and Professional Courtesies", p. 165.
[782] Ibid.

While the lawyers are the focus of this discussion, the responses of some of the accounting participants will also feature.

Taken as a whole, Group A is again of the view that ethics are an essential element of professionalism, but professionalism is much more than ethics. In other words, they see ethics as the ethical codes or professional responsibility rules articulated by professional bodies, but recognise that conduct consistent with professionalism requires something more as it includes acting morally, with diligence and integrity. Some recent legislation enacted in a number of states in America supports this understanding. This legislation defines professionalism as something distinct from ethical rules. The Minnesota State Bar Association's publications provide an example of this in the literature.[783] This legislation leaves it up to individuals to choose to achieve proposed standards that are not mandatory or linked to sanctions. As Gordon and Simon state, the morals of the individual dictate the individual's adherence. This appears to be what the participants are also saying when they suggest that the "something else" is the individual practitioner's own value system. On further questioning, most refer to the influence that their families, friends and education had on their morals. In other words, an individual's moral beliefs determine when this kind of judgment needs to be made, or as Rest, a social psychologist states, a person's own moral sensitivity to an issue dictates whether they need to exercise moral judgement.[784] This is the view posited by some of the alternative models discussed in Chapter II, particularly those that suggest that morals play a role in the decision-making process.

While there is very little written on the views of students, the empirical work of Tranter interviewing students in their first year of law studies in Australia found that students regard "ethics as the private, participative realm of morality."[785] Evans interviewed students in their last year of law studies and concluded that students' views on professionalism divide on corporate and justice grounds as well as gender.[786] Similar to the findings made in this thesis, these studies find that students base their ethical understandings on their values. For instance, some of the participating students went so far as to say that "it's probably more a state of mind" and that "ultimately it is going to come back to you as a person and what you believe."

[783] Minnesota State Bar Association Professionalism Committee, above n 223. See Chapter 1, under 'traditional professionalism', p. 39.
[784] Rest, above n 663, 22-25.
[785] See Tranter, above n 297. Tranter's thesis centres on accountability to the Good and probably agrees with the views of Strassberg and more particularly Levine.
[786] Evans (2002), above n 298; Evans (2001), above n 298.

The predominant view of lawyering labelled the "standard conception of lawyering" does not encourage practitioners to refer to morals or other considerations. The Queensland Solicitors' Rules and the proposed model rule also appear to take this approach.[787] Yet Sarat's study confirms that this model is producing practitioners who are "tough" and "ready to fight" for their clients. These practitioners do not let morality interfere with their practices.[788] Therefore Group A's members' perspective on professionalism puts them in conflict with normal practice. There is evidence of this tension for new entrants to the professions in the empirical work of Granfield and Koenig. They clearly show that the practice environment and its procedures dealing with ethical issues come as a shock to new entrants. They also report that graduates who do comply develop certain coping strategies that involve them subscribing to the standard conception approach in an effort to minimise their guilt.[789]

There are some differences of opinion within Group B. The accounting graduates consider ethics and professionalism as interchangeable terms and their comments highlight their reliance on codes. Perhaps this is because they were, at the time, undertaking training courses to become fully-fledged members of professional bodies that emphasise ethical codes. The law and accounting experienced practitioners acknowledge the importance of ethical codes yet they describe them as less than helpful and that they rarely refer to them.

While the work of Landwehr suggests that codes are important,[790] the more popular view is that codes are not very useful.[791] For instance, Australian text writers, Ross[792] and Disney [793] state that ethical requirements are notoriously vague and ineffective in terms of providing real guidance.

A need to comply with regulations and standards to avoid penalties heavily influence the experienced accounting practitioners. They clearly wish to detach themselves from clients who are intent on trying to rort the system. The experienced legal practitioners recognise the need to consider standards other than ethical codes but they repeatedly suggest that the codes are quite unhelpful and some report they do not refer to them at all. There is strong empirical support to suggest that there is very little reliance on

[787] This standard conception of lawyering features in the Queensland Law Society, *Legal Profession (Solicitors) Rule 2007* n 195. See the Statement of general principle and paragraph 21.
[788] Sarat, above n 46, 819.
[789] Granfield, et al above n 241, 509.
[790] Landwehr, above n 293, 50-51.
[791] Daicoff, above n 289, 217.
[792] Ross, above n 284, 198.
[793] Disney, et al above n 284, 598.

ethical codes[794] but some do find that rules are used. However, we should note that the focus of this empirical work is on categorising lawyers' personality types. [795]

The experienced legal practitioners place a lot of importance on the maintenance of unwritten professional courtesy rules.[796] Hutchinson too notes that practitioners emphasise professional etiquette rules and remarks that this is because these people equate them with ethics.[797] It appears that these participants are motivated to ensure that their reputation, as adjudged by other professionals, remains intact. The participants in Gordon's empirical work appear to refer to external sources of authority, like other professionals, in speaking about protecting their reputations, yet they also refer to clients.[798] In other words, his findings seem to suggest that his participants are also concerned about what their clients think. The experienced legal practitioners interviewed for this study place very little importance on the opinions of clients when discussing reputation.

The literature notes that the "something extra" over and above ethical standards is difficult to articulate.[799] Yet it broadly supports the comments of participants who suggest that their own morals guide their decisions in ethical dilemmas. Cochrane argues that the application of a lawyer's own values is more effective than applying the profession's ethical requirements. [800] But the literature is not any clearer on the source of values than the remarks of the participants of this study. More will be discussed concerning this below, under the headings of "firm culture" and "individual responses to culture".

6 *Can Professionalism Enhance Profits?*

If professionalism is a valuable ingredient in the service provided and something to be encouraged, then does it follow that clients desire it and seek out those firms or

[794] Zacharias, above n 283, 288; Daicoff, above n 289, 201.
[795] Landwehr, above n 293, 50-51.
[796] See Chapter V, "Role of budgets and professional courtesies", p. 171.
[797] Hutchinson, above n 201, 4.
[798] Gordon, above n 295, 733.
[799] Ciolino, above n 224, 234. See Chapter I, "Traditional Professionalism", p. 38.
[800] Cochran, above n 221.

practitioners that practice it? In other words, can the pursuit of professionalism produce profits?

Both the law and accounting students quite enthusiastically reason that if practitioners provide a quality service then this would generate client loyalty and therefore increase profits. However, there is a mixed view from the graduates and experienced practitioners. There are some who agree with the students, but the alternative view is also presented, that clients may be seeking a lawyer who will help them avoid their obligations. Therefore, a lawyer who endeavours to approach the client on a moralistic basis may not be very popular and may lose the client.

The literature does canvass this possibility. For instance Dare, in supporting the application of the standard conception of lawyering, warns against lawyers using their morals to influence their decisions. He argues that if lawyers base their decisions and their relationship on their own morals then clients will be unaware of the values upon which they are operating and how they make decisions concerning the service they are providing to them.[801] Dolovich considers the prospect of including moralistic advice into the lawyer's service from an economic rationalist view and concludes that this will not be appreciated.[802] Some empirical work also provides insight on this issue. It suggests that clients may think that the lawyers are preaching,[803] or trying to be philosophers or priests.[804]

The literature referred to in Chapter I under the heading "traditional professionalism" tends to be more supportive of the view that professionalism can be advantageous to the bottom line, but Bower qualifies this in his discussion suggesting that it probably needs to be a long-term approach.[805] The corporate social responsibility literature also sees the enhancement of profit as a possibility.[806] However, there is some scepticism from academics about the motives of corporations. They question whether these corporations will continue these activities if they become uneconomic.[807]

At a more specific level, it could be asked whether a firm that provides community services will achieve increased profit levels. As previously suggested, one senior legal associate describes his firm's *pro bono* activities, but makes it clear that the firm's

[801] Dare, above n 339, 153.
[802] Dolovich, above n 457, 1665.
[803] Gordon, above n 295, 733.
[804] Sarat, above n 46, 819.
[805] Bower, above n 231, 16.
[806] See Flowers in Limbers, above n 234 and Hick, above n 232.
[807] Stormer, above n 243.

intention is not to increase profits, but simply to provide a service. Perhaps all that can be said about this topic is that professionalism can affect a firm's profits, but there is no clear indication whether this will result in a positive or negative financial outcome.

B *Professionalism and the Practice Environment*

The findings reported thus far show that Group A's members exhibit a high degree of consensus. However, their views are markedly different to the collective views of those in Group B. A simple analysis of these groupings suggests that something happens when individuals start practising (after getting their degrees) and that this occurs more quickly in accounting than law. In other words, the groupings suggest that the accounting graduates are assimilated into the practice environment, whereas the law graduates, at the time of the interviews, are still at the stage where they are disagreeing with the views of the experienced legal practitioners concerning their role. This raises the question of whether the culture of one's practice environment has an influence on the beliefs of those who practice within it. In recognition that there is a different perspective of professionalism between legal graduates and legal practitioners, the following discussion will focus on the comments of the legal participants only.

1 *Can the Professionals' Ideas of Professionalism Change?*

As already noted, the issues addressed in this aspect of the thesis required participants who were in practice. The students could only speculate about whether or not their view of professionalism might change. Therefore, the few student responses to this question and any empirical work on students that has some pertinence features only minimally.

2 *Does the Practice Environment Mould the Professionals' Understanding of Professionalism?*

As previously noted, this question drew different interpretations, especially from the experienced practitioners. They considered whether market factors have created a new form of professionalism, and whether the practice reality has altered their understanding

of professionalism. The discussion will report on their responses to both issues, but note that the graduates primarily addressed the latter question.

(a) Market Pressures

The partners, who acknowledge that they are managing businesses, make references to market factors discussed in Chapter III of Part I. The graduates, in their interpretation of the question, make no references at all to market factors, but some of the accounting students who, when considering whether accounting is a profession or a business, state that clients are now consumers, and that business life is very complex and competitive.

The experienced practitioners are concerned about increased costs, competition, consumer knowledge and new technologies. They also mention increased regulatory legislation and the demand for higher salaries by staff with the associated retention concerns.

While most see these factors as changing the profession for the worse, one experienced practitioner, who mainly practices conveyancing, credits marketing as the major factor responsible for his firm's success. He defends the new marketing practices as simply a reshaping of the practices previously used e.g. "discussing one's exploits while eating cucumber sandwiches". Some literature acknowledges that professionals have been using marketing practices for quite some time. Morgan makes this point suggesting that even using logos on headed paper and making brochures available to clients is a form of marketing.[808] However, other practitioners see the introduction of marketing practices as detrimental and this view is now reflected in some recent legislation enacted in Queensland.[809]

With respect to advances in technology, the literature discussed in Chapter III, shows that small firms, in particular, are benefiting by being able to access research sources. However, the Law Council's report does acknowledge that the evolution of email has made professionals more accessible and therefore expected to communicate instantaneously.[810] Some of the experienced legal practitioners refer to this issue. The remarks of one legal practitioner also show how professionals must meet clients' demands in relation to technology in order to retain their business when he refers to the

[808] Morgan, above n 505, 4.
[809] With respect to personal injury litigation, Chapter 3 Part I of the *Personal Injuries Proceedings Act 2002* (Qld) bans certain advertising of personal injury services.
[810] Law Council of Australia, above n 47, 45.

fact that his firm has to comply with the banks' demands so that they can transfer their information to the firm electronically.

Nevertheless, as Kelly has noted, the people of an organisation determine its character, not competitive pressures.[811] This is a significant theme in the data collected.

(b) Firm Culture

Literature on the influence of culture is only recently emerging with respect to the practices of professionals. Some of this literature is included in Part I Chapter III. It acknowledges the very influential effect of culture, but there is also the view that certain individuals remain steadfast to their own principles. Rhode's statement demonstrates these arguments:

> Both historical experience and psychological research make clear that moral conduct is highly situational. Individuals may differ in their responses to temptation, but contextual pressures have a substantial effect on moral conduct independent of any generalized "integrity" or stated principles.[812]

It is noteworthy that one study undertaken to determine "what law students think they know about elite law firms", finds that students recognise that they need to "fit in".[813] This succinctly describes the view of all of the participants of this study.

As previously reported, the graduates perceive a firm's culture as heavily influenced by the personality of the partner. It is their view that this can result in the firm's practices impeding what the graduates believe is the true definition of professionalism. The culture of the firm requires them to evaluate how they provide a service to clients while also trying to meet the demands of the firm in order to enhance their promotional prospects. The work of Hazard makes it very clear that the political authority, i.e., the person to whom the lawyer is accountable in the organisation, has quite an influence on the decision-making role of lawyers.[814] The graduates obviously recognise this and Granfield and Koenig's study clearly shows that graduates are ill-prepared for the practice environment, and particularly the dedication their firms require of them to clients, even when they are morally repelled by the situation. [815]

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[811] Kelly, above n 542.
[812] Rhode, above n 600, 154.
[813] Wilkins, et al above n 578.
[814] Hazard, above n 309, 970-971.
[815] Granfield, et al above n 241, 509.

The experienced practitioners have a different perspective, although they do accept that each firm has a culture. There is no shortage of literature on culture and its influence. Some authors who comment on this are Stemple, Nelson and Trubek, Kelly and Mather.[816] A philosopher, Wolgast, goes as far as saying that the context or culture can shape the person.[817]

Within this culture, there is an expectation that individuals ask for advice and, according to the organisational theory of managerialism,[818] the more senior staff are the authoritative figures in the firms who provide this advice. It is quite evident from the data collected that the experienced practitioners are convinced of the worth of the culture they are creating. In other words, as Said has warned, individuals within a culture eventually accept its views unquestioningly.[819] Vemaak and Weggeman, who study the effects of managerialism, have written in a similar vein, suggesting that a requirement to act within managerialism, and in effect a firm's culture, calls for an individual to "surrender part of his/her independence."[820] The accounting graduates could be characterized as having been acculturated. Yet the tensions reported by the law graduates suggest that they are not yet at this point. Their concerns are discussed under the section on the "role of budgets" below.

The experienced practitioners see their role as socialising the new entrants into the prevailing culture and most of their comments focus on the graduates' lack of respect for professional courtesies in dealing with other colleagues in other firms.[821] Sarat's empirical work supports this. He reports that the partners complain that their associates are too aggressive and go too far. [822]

Hanlon's writings report on the effect of the socialisation process and show that early entrants are encouraged to be more "commercially aware" if they want to become partners.[823] As Anderson and Western bluntly state, the senior practitioners' main aim in this socialisation process is to "make realists out of idealists."[824] Perhaps this leads to the conclusion that the practice of imposing budgetary constraints is in fact succeeding in this respect.

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[816] See Chapter 3, under 'Culture', pp. 90ff.
[817] Wolgast, above n 329 at 51.
[818] See Chapter 3, p. 87ff.
[819] See Chapter 3, under 'Managerialism', p. 87.
[820] Vermaak, et al above n 530.
[821] See also Chapter 2, pp. 90ff
[822] Sarat, above n 46, 820.
[823] Hanlon, above n 13, 349. See Chapter I, "Commercialised professionalism", p.46.
[824] Anderson, above n 556. See Chapter III, "Culture and Individual Responses to Culture", p. 90.

Idealistic is not the word used by the experienced practitioners to describe the graduates. The only participant who spoke of idealism is the senior associate running the *pro bono* programme, who suggests that this programme is his firm's attempt at trying "not to smother that [the graduates idealistic attitudes] too quickly." While he was alone among the participants of this study, Flowers, a senior partner of a national law firm has made similar comments. He maintains that "younger lawyers have a strong social conscience. … They are values-driven and easier to motivate."[825]

(c) Role of Budgets and Professional Courtesies

Overall, the law graduates have an idealistic view of professionalism that includes an altruistic outlook of the service they provide, thereby subscribing to the traditional professionalism paradigm. However, they find the budgetary constraints of the practice reality quite confronting. In their view, these limit the type of service they wish to provide to clients and, much more concerning for them; they believe that budgets are the basis upon which their firms evaluate them for promotion purposes.

Their responses exhibit a certain amount of disillusionment. They appear to be fitting the picture painted by Kronman, Rhode and the Law Council of Australia.[826] Smith's summary of this situation is apt.

> … there appears to be a malaise among members of the profession, particularly the young. Coming out of law school with hopes and high ambitions, associates going into the large firms making the high salaries discover that their lives are nothing but hours on end of tedious and uninteresting work.[827]

It is interesting that the senior legal associate who oversees the *pro bono* activities seems to suggest that his firm acknowledges that this can occur. He comments: "When you go to law school, a lot of people do law … because they want to help. … And I see that in the grads that come in." He maintains that his firm has introduced a programme that intends to address it, but no other experienced practitioners appear to be aware of

[825] Limbers, above n 234, 30. Boon and Abbey consider the effectiveness of mandating *pro bono* work as a part of continuing professional development schemes and suggest that new entrants to firms are quite idealistic and therefore would be "willing conscripts": see Boon, et al above n 238, 649.
[826] Kronman, above n 212; Rhode, above n 2; Law Council of Australia, above n 47, 129.
[827] Smith, above n 533, 54.

the difficulties faced by the graduates. The empirical work of Sarat confirms this. He reports that "partners think everything is fine."[828]

Hanlon, who suggests that the commercialised professionalism paradigm now governs the practice of professionals, states that the socialisation process that new entrants undergo when they enter firms accounts for this feeling of discontent. He maintains that firms inform new entrants that the new entrants must become "commercially aware", acquire managerial and entrepreneurial skills to "make it to partner …"[829] and that "[p]otential partners in large firms are now assessed on their capacity to increase the firm's business via selling services."[830] Therefore the graduates soon recognise, as recorded in the Law Council Report, that "time costing" is the real manager of firms.[831] This is particularly evident in the writings of Smith who shows that there has been a marked increase in billable hours over recent years.[832] Kritzer's comment that most practitioners are primarily concerned with making a living also accords with these understandings.[833]

It is noticeable that the graduates find the billing system, and the practices this requires, oppressive. This finding is supported by Rhode's comment, that organisational structures do not encourage ethical conduct,[834] and Schiltz's investigations into lawyer practices. Schiltz speaks of his participants suggesting that they feel compelled to pad bills or misrepresent facts to meet the requirements of their firms.[835] However, the graduates' concerns centre on their yearly reviews being premised on their success at generating bills. Hanlon has also written on this aspect of professional practice and identifies that fee earning and practice development, which is another way of describing entrepreneurial activities, form the criteria to evaluate the performance of practitioners.[836]

While Grey primarily studies accounting, his findings are relevant here. He found that potential partners need to consider who they are associating with, since it may

[828] Sarat, above n 46, 827.
[829] Hanlon, above n 13, 349. It has been suggested that it is now naïve to consider technical skills as the determinant that defines merit for promotional purposes: see Langevoort, above n 256, 1625. This author suggests that there are other factors that can be more highly valued but ultimately the person who is promoted is one who recognises what is valued and accommodates those characteristics into his work practices.
[830] Hanlon, above n 13, 810.
[831] Law Council of Australia, above n 47, n 358.
[832] Smith, above n 533, 53.
[833] Kritzer, above n 187, 413.
[834] Rhode, above n 451, 335.
[835] Schiltz, above n 213, 714.
[836] Hanlon, above n 60.

suggest their eventual status. He notes that his participants state that if a person associates with lower level workers, the firm might label them unsuitable for management.[837] The participants of this study make no direct reference to this, but the experienced legal practitioners' comments about the importance of collegiality and adherence to the unwritten rules of professional conduct might serve a similar purpose.

In considering the culture within which they find themselves, the law graduates believe that the senior staff, particularly the partners, shape the nature of the working environment, and that they, as new entrants to the firm, must conform. With respect to business structures, the only option for law firms has been partnerships.[838] The partners are therefore the owners. They are the logical policy makers determining how firms should operate which accords with the theory of managerialism.[839] This hierarchical approach advocates that the decision-making power resides with the owners/managers. All other members of staff in the firm are accountable to them. The experienced practitioners do not dispute this understanding. They appear to be well aware that they are creating a particular culture to which they encourage all members of staff to conform.

The experienced practitioners are quite oblivious to the difficulties that the graduates are experiencing. In fact, they are experiencing pressures and difficulties of their own that relate to the graduates and their role as managers. Some of the practitioners express the view that the graduates are not loyal and that they have a lot more job opportunities available to them. The Law Council report alludes to this reality suggesting that it has something to do with the beliefs of the particular generation. It makes a comparison between those who are now of an age that they would be partners and those just entering the profession. This report suggests that the older generation have a desire to attain stability and security, whereas the newer entrants are less concerned with such things.[840]

When asked whether professionalism has changed, most of the experienced legal practitioners gave responses focussing on the new graduates and the need to constantly reprimand these members with respect to abiding by the accepted professional courtesies. They wish to protect their firm's reputation. While this is the main thrust of

[837] Grey, et al above n 268, 577.
[838] The new legislation in Queensland discussed in Chapter 4 provides for law firms to incorporate and form multi-disciplinary practices, but at the date of writing the parts of the Act allowing these had not been proclaimed. See *Legal Profession Act 2004* (Qld).
[839] In particular see Ife, Jim, *Rethinking Social Work: Towards Critical Practice* (1997) 42
[840] See Chapter III, "Clients", p. 83.

the experienced practitioners' discussion of this point, it is noticeable that only one graduate made any mention of professional courtesies.

The literature acknowledges the importance of an adherence to professional courtesies. A number of more recent definitions of a profession or professionalism, mentioned previously, include criteria that deal with collegiality and civility.[841] In fact, the ABA suggests that a lack of these attributes can produce dissatisfaction in practitioners. They cite this as one of the reasons that prompted their call for the adoption of a revitalised professionalism model.[842]

(d) Individual Responses to Culture

Despite the fact that the law graduates are very aware of the influence of the firm, there is a strongly held view amongst the participants that it is ultimately an individual's choice about how they act i.e., use their autonomy, or, in the language used in this thesis - determine what their individual response should be. They believe that they are able to retain their understanding of professionalism and practice accordingly. With respect to lawyering with integrity, some participants speak about trying to achieve their own standard of professionalism by choosing to do extra work in their own time. One even acknowledges that some people leave firms because they are not comfortable with the tasks required of them. Granfield and Koenig report instances of this,[843] and Smith also recognises that because of pressures to meet budgets and bring in new business, practitioners are opting to defect to other firms.[844] Some commentators critical of managerialism believe it is inevitable that individual professionals will act in accordance with their own views, will lack respect for the views of their colleagues, and only act in their own interests.[845] This is supported by an empirical study that asserts that legal practitioners do make decisions according to their own morals, even when this goes against the dictates of the institution,[846] but it should be acknowledged that those participants held higher level positions than the graduates who participated in this study.

[841] See the definitions of Terrell and Wildman; Heubner; and Wm Reece Smith Jr. in Chapter I, "Traditional Professionalism", p. 39 and the new Queensland legislation for lawyers. These are discussed in this Chapter, "Is Professionalism the same as ethics?", p. 198.
[842] See Chapter I, "Traditional Professionalism", pp. 39ff.
[843] Granfield, above n 241, 508.
[844] Smith, above, n 533,53.
[845] Vermaak et al, above n 530.
[846] Martin, et al above n 609, 885-888.

The participants in this study who maintain they will remain true to their beliefs are effectively using their own moral personalities to determine their professional role. Hutchinson refers to this as the real ethical approach to lawyering.[847] Perhaps it can be suggested that these participants, in advising clients to avoid causing moral harm,[848] are recognising that the advice they give emanates from themselves and that they do this to gain moral satisfaction with their roles. In general, this approach accords with some of the alternative conceptions of lawyering discussed in Chapter II. Historical accounts also seem to acknowledge what Marshall calls "Individualistic professionalism".[849]

A number of arguments provided in the discussion on "Can Professionalism enhance profits?" suggest that clients would not welcome this kind of a service. However, in Chapter III it was noted that many clients are now much more educated and therefore expect a much more collaborative relationship with their practitioner.[850] Justice Williams also states that clients "expect their lawyers to be able to provide value-added advice on the whole of an issue or project, not just the traditional legal areas."[851]

The students express quite strong views on these strategies and in fact lean towards the option of leaving a firm if their views conflict with the firm's expectations. While this may be commendable in that it represents the ultimate action of a principled person, studies on students working as interns in the American system suggest that students may develop a tolerance for what they initially consider unprofessional conduct.[852]

Compliance and Avoidance Strategies

Some in the graduate group recognise the pressures that they are working under and rationalise their compliance by referring to concepts upon which it is said the legal system is built. They speak of the concept of role morality at work within the adversarial legal system and acknowledge their junior status and the need to follow directions from senior members of the firm. They are trying to disassociate themselves

[847] Hutchinson, above n 201, 48.
[848] These are the thoughts of Luban, Rhode and Markovits mentioned in Chapter II, p. 75.
[849] Marshall cited in Hanlon, above n 80. See Chapter I, "Sociological theories", p. 23.
[850] As Gerhart says, 'clients are taking charge in a more meaningful way' – determining the type of service they want (or the product) and monitoring the performance of that service: Gerhart, above n 27.
[851] Williams, above n 497.
[852] Hellman, above n 574, 543.

from being responsible or accountable for unpalatable decisions. Empirical studies show that associates encountering problems try to shift the responsibility from themselves to others,[853] and blame those more senior to them for demanding they act in ways that make them feel uncomfortable.[854] The literature also refers to this result. Eshete acknowledges the inevitability of conformity and compliance with associated discontent,[855] and another author, whose findings suggest that those in firms believe ethics to be "someone else's responsibility", lays the blame for this on the bureaucratic structure of firms.[856]

There was very little comment by the experienced practitioners about situations where their views on professionalism differ to those of the firm. Since the partners own the firm, they determine what the firm requires. However, some of the law partners note that individual practitioners act within a private realm and that, as partners, they do not really know what decisions are being made unless there is a need to investigate when concerns are raised. In this respect O'Dair makes it clear that lawyers' work is carried out in "private settings"[857] which implies that individual practitioners have a certain amount of discretion or autonomy over the decisions that they make.

The senior associates reported that if a tension arises between their individual views and those of the firm, they either try to justify their position or suggest their withdrawal from that particular matter. One of the senior legal associates makes a very important point. He believes that a person's decision depends on *who* they are. This premise is the basis for some of the theories propounded by critics of the currently accepted lawyering model known as the standard conception of lawyering.[858]

C *Theoretical Understandings of the Data*

The earlier part of this chapter compared the data and the literature in general, and provided some links to the theoretical concepts. The next part of the chapter will

[853] Frenkel, et al above n 15, 703.
[854] Sarat, above n 46, 820.
[855] Eshete, above n 595, 275.
[856] Francis, above n 585, 181. More will be said about this below – avoidance strategies, particularly using the adversarial system. This is particularly so under the Standard Conception of Lawyering model – lawyer's "strategy of detachment": see Nicholson, et al above n 315, 176.
[857] O'Dair, above n 305, 5. O'Dair suggests that the mechanisms in place to deal with misbehaviour by lawyers suffer from agency and externality problems and render them inefficient.
[858] See Chapter II, "Alternative Conceptions of Lawyering", pp. 67ff.

consider the collective views of the participants in more detail. The data will be examined in relation to:

1. Sociological theories;
2. Contemporary labels; and
3. Conceptions of lawyering.

It generally follows that that those who are categorised as acting in accordance with one particular sociological theory can be identified with a particular contemporary understanding of professionalism and conception of lawyering. For instance, it has previously been suggested in this thesis that there are links between the structural/functionalist sociological theory and the understandings of the traditional professionalism paradigm. This implies that that these individuals will be persuaded by the claims of some of the alternative conceptions of lawyering.

The chapter will conclude by examining the social psychology material as a way of explaining why the findings indicated that there are differing perspectives between the law graduates and the experienced legal practitioners.

1 *Sociological Theories*

The sociologists are mainly responsible for analysing professions and identifying criteria that classify certain vocations as having reached professional status. However, as noted in Chapter I, various theories define professionalism quite differently.[859] For instance, the structural/functionalists view professionalism as a service to the public, and the market control theorists see professionalism as a vocation in which professionals use their knowledge and status to control the market for their services, which in turn serves their own self-interest.

The approach adopted in this thesis has been influenced by one of the basic premises of interactionism, that individuals who belong to organisations actually create their own reality of professionalism. Finding out how individual members of a profession actually view something produces a much more accurate picture than one objectively gleaned from viewing the profession as a whole from a structural/functionalist or conflict theory perspective. Although the sample in this

[859] See discussion in Chapter I, pp. 23ff.

study is small, this thesis allows some assumptions to be drawn about the way in which the whole population of practitioners in South-East Queensland operate. As noted earlier, the participant groups can be divided into two main categories: Group A consisting of the accounting and law students and the law graduates and Group B consisting of the accounting and law experienced practitioners and the accounting graduates.

(a) Group A: Students and Law Graduates

The participants in this group acknowledge the structural requirements necessary to become a professional and so their views accord with structural theory outlined in Chapter I. However, they primarily emphasise that they view the practices of both law and accounting as professions. These participants view their role as that of a social trustee. They believe that they have expert knowledge and therefore they have an obligation to use that for the benefit of the public. These participants appear to acknowledge their privileged social position given to them on condition that they use their knowledge to better society. This appears to describe the contractual concept particularly articulated by Paterson[860] - the idea that there is an agreement between the professions and the public. This is also the view of functionalism. This theory advocates that the professions exist to meet the needs of society and serve the community. So the understandings of Group A generally align to the structural/functionalist theories.

In acknowledging that they possess expert knowledge, the members of this group seem to recognise that they have a certain amount of power and therefore can exert some control over those who need this knowledge. Foucault,[861] in formulating the knowledge/power theory, refers to the many negative connotations associated with the possession of power, but he also advocates that those in a position of power have the opportunity to educate others about the benefits they can bring to society. Members of this group want to use their knowledge for beneficial purposes. They believe that they can use the lawyer/client relationship positively. They can use their knowledge to influence or educate the community about the benefits of professionalism.

[860] Paterson, above n 80.
[861] Foucault, above n 150, 119.

This attitude would be applauded by the proponents of some of the alternative models of lawyering. In addition to providing a way for lawyers to maintain their integrity and exhibit professionalism, it enhances their service to clients by including a consideration of morals, and the effect on others and ultimately the community, in their decision-making process.

The extended service, as envisaged by these participants, might also be a positive outcome for the firms involved. A number of people in Group A reason that this kind of a service would be welcomed by clients and therefore lead to firm loyalty and consequently profit enhancement. However, some of the law graduate group challenge this assertion, recognising that not all clients would appreciate this approach. They point out that some clients simply want their lawyers to help them gain access to a legal outcome. They believe that the clients are not interested in any moral or community considerations.

The law graduates are already practising and therefore provided their responses from their experiences of that reality. It is obvious that they feel that their ideals are not always achievable. The data collected from these participants reveals an acute sense of dissatisfaction with their lot. They are experiencing pressure from the hierarchy of their firms (the partners and the senior practitioners) to conform to certain practices that they believe curtail their ability to provide the kind of service they want to provide to clients. These pressures also affect the graduates' promotional prospects. In this respect, in Marxist terms, they are experiencing class conflict. The graduates believe the partners who own the means of production control them as the less powerful members of the firm in their efforts to pursue financial profits.

As previously noted, the interactionist theory does not ascribe to any particular understanding of professionalism, yet it does acknowledge the influence of organisations. It also asserts that individuals can create their own environments. In this respect, the knowledge/power theory concurs. Therefore, these theories suggest that individuals in organisations ultimately have a choice about their behaviour. The findings in this study show that many of the participants in Group A believe that they will make every effort to pursue their own ideals, even though the organisation within which they operate encourages conformity. However, some within this group recognise that they will inevitably comply. Overall, this group believes that their role is an interpretive one, which allows them to decide to conform to the policies and practices of

the organisation, or, if there is a conflict between what is required and the values of the individual, to determine for themselves which course to take.

In summary, the structural/functionalist theory aligns with the responses of Group A. Yet the knowledge/power, interactionist and Marxist theories also appear to have some relevance to understanding the views of Group A.

(b) Group B: Accounting Graduates and Experienced Practitioners

At a general level, this group exhibits elements associated with the conflict theories, particularly market control theory. This theory claims that professions use their skills to justify society providing them with their elevated status and sense of autonomy. The accounting graduates in particular acknowledge that they must have the public's recognition in order to maintain their classification as a profession.

In practical terms, this group aims to associate itself with a particular technical expertise as a means of retaining their position in society. For the accounting graduates, this means rigorously applying the ethical codes to all situations with a view to avoiding liability and gaining the approval of those in authority.

All the experienced practitioners consider their role revolves around their managerial tasks of ensuring budget attainment and the generation of new clients. Yet they have quite different goals or interests. The experienced accounting practitioners, like the accounting graduates, wish to ensure that they operate in such a way that they avoid liability and increase their profitability levels. The experienced legal practitioners want their firms' reputations to remain intact as judged by their peers in other firms. This dominant goal shapes their managerial practices. It is interesting that this goal does not feature for accountants, but perhaps this is because they have very few dealings with other accounting firms, tailoring their services predominantly to clients.

Although market theory is concerned with the profession as a whole, it is possible to consider its tenets in relation to how an individual firm operates and how the firm controls the service it provides. These practitioners make very little mention of clients and it is possible to suggest they see themselves as handling the clients' matters or problems in a paternalistic fashion. In other words, they believe that their expertise best qualifies them to know what should happen and that this justifies their control of the service. It is interesting to note that even though some of these practitioners are dealing with large corporations, they are still of the view that their expertise affords them an

authoritative role in the service. These practitioners do not see themselves performing any service to the community. They are simply performing their services expertly in an effort to retain their reputation and consequently retain their position in society, particularly within the professional sphere.

The managerial model referred to in Chapter III, and adopted by many firms, fits within market control theory. There is no doubt that the graduates believe the partners or the senior members of the firms demand respect. Annual reviews with staff support the idea that each firm has quite a tight control over the practices of the staff, ensuring that all members are inculcated with the firm's culture - although there was some acknowledgement that senior staff were not privy to everything the graduates do.

As previously suggested, expertise is important to these participants. One aspect of the knowledge/power theory makes the claim that the attainment of knowledge can lead to power. This theory had its beginnings in the market control theory and so has some similarities. The relationship with clients highlights the fact that a professional can be in a position of power, particularly where clients lack the education or skill to evaluate the service. The employer/employee relationship, as discussed above in relation to the graduates and the firm who employ them, also exhibits these elements.

While Marxist theory can be used to explain the behaviour of the professions as a whole, there is very little evidence now of any special arrangement between the state and the professions, particularly since the adoption by the Australian Government of the National Competition Policy that has effectively positioned the professions in the market with other service providers. However, this theory may have some relevance to what is happening within firms. The ruling group in the firms are the partners or experienced practitioners and it is they who control the production of work in their firms. They continually evaluate more junior members of the firms and make decisions concerning their promotional prospects depending on their view of them as indicated by their budget-based targets. In a sense there is a "class conflict" in these firms.

While the accounting graduates are part of Group B and therefore described by what has been outlined above, another sociological theory has some relevance for them. The cultural theory recognises the influence of one's environment, although it considers this more in terms of what is happening in society as opposed to the influence of a firm. More importantly, it asserts that individuals moderate their behaviour in line with their career aspirations. Some participants in this group speak of individually determining how they should behave, taking their cues from those in authority. This seems to imply

that they believe it is important for them to be seen favourably by their superiors if they wish to advance their careers. These individuals are at the beginning of their working lives and it is evident that their understanding of the terms "profession" and "professionalism" are shaped by their aspirations of building a career for themselves. For instance, they consider the larger firms as more professional because they can provide better training for their employees, pay better wages, and require their members to keep to a particular dress code. Therefore, their interest in adhering to the ethical codes and providing an expert service has more to do with ensuring that they are seen to be performing appropriately by the clients and worthy candidates for promotion by the firm. The accounting practitioners also viewed their graduates in this way.

It is evident that the market control theory predominantly reflects the views of Group B, but the Marxist and knowledge/power theories also have some relevance. This is not surprising since all of these theories are included under the badge of "conflict theories", and therefore have some similar foundational claims. The cultural theory also has some significance for the accounting graduates. Yet this too is quite similar to the market control theory. While cultural theory emphasises that individuals are pursuing career prospects, conflict theories advocate that professions as a whole endeavour to promote themselves.

In summary, Groups A and B have quite different understandings of professionalism and its consequent conduct. The structural/functionalist theory mainly helps describe the views of Group A, whereas Group B aligns with the claims of the market control theory. While Group A wishes to promote altruism and the service ideal, Group B is mainly concerned with self-promotion. These distinctions also arise in considering the contemporary labels of professionalism.

2 *Contemporary Labels*

Since there have been some references to contemporary understandings of professionalism throughout the discussions in the earlier part of this chapter, the following comments will be brief. As suggested in Part I, there are some synergies between different sociological theories and the contemporary understandings of professionalism. It follows that those whose responses align with the structural/functionalist theory have a traditional understanding of professionalism and

those that have been linked to the market control theory can be identified as practising within the commercialised professionalism paradigm.

(a) Group A: Students and Law Graduates

Overall, the members of Group A are quite idealistic. It is clear that they view the role of the professional as providing a particular quality service to clients and the community. Therefore, the understanding of professionalism of these participants aligns with the traditional professionalism model or, more recently, those who wish to revitalise professionalism. In particular, they recognise the limitations of ethical codes and subscribe to the view that professionalism is much more than requiring the achievement of a standard that, if not met, would attract penalties. Professionalism for this group requires practitioners to behave in a way consistent with pursuing aspirational goals. The basis for these aspirational goals is less clear, but the predominant view is that morals determine what people do. In this respect, these participants appear to resist any culture that they believe constrains their ability to pursue their understanding of professionalism. Most maintain they will not conform. Yet there are also participants who acknowledge that they may comply. However, in doing so, it appears that they retain their particular ideals, and try to rationalise their compliance by using certain strategies as a way of feeling good about themselves.

(b) Group B: Accounting Graduates and Experienced Practitioners

Group B sees expertise or technical correctness as its principal goal. However, on closer inspection, the experienced accounting practitioners stress they do this to avoid liability and the experienced legal practitioners believe technical expertise forms the basis of a good reputation. This group appear to fit squarely within the commercialised professionalism paradigm.

While technical skills are also important to the effectiveness of those working within the traditional professionalism paradigm, they do not see these as the overall aim, but simply the means through which to achieve the service ideal. The experienced legal practitioners make some mention of activities that seem to be service oriented, such as *pro bono* activities, yet their comments overall suggest that these are just strategies to gain credibility for commercial purposes.

It is obvious that experienced legal practitioners place considerable store on managerial skills (the ability to balance budgets, manage the firm and satisfy clients) and entrepreneurial skills (the ability to bring in business). They do not overstate the need to meet budget targets, but the emphasis on socialising the graduates into the firm implicitly shows the importance the partners, in particular, place on their role as manager and achieving their goals. All of these findings place this group firmly within the commercialised professionalism paradigm.

Because the members of Group A adhere to the traditional professionalism paradigm, the definition of Pound adopted by the American Bar Association and the recent report of the Law Council of Australia articulates the principles upon which Group A operates. This group believes that practitioners ought to give prominence to "principle" over "profit".

Group B has a commercialised professionalism perspective, as described by Hanlon. This group advocates that technical ability, managerial skill and entrepreneurial skills are the recipe for success if profit is the goal. This conclusion has support in the accounting and legal literature. Typically, Kritzer states:

> Few professionals are selfless actors seeking solely to advance their professional horizons or the well-being of humankind; professionals are workers who are engaged in an activity to earn a living. Professionals, like other workers, are concerned about both the size and the security of their livelihoods.[862]

3 *Conceptions of Lawyering*

Having identified Group A as operating according to the structural/functionalist theory and the traditional professionalism paradigm, and Group B as aligned with the market control theory and the commercialism paradigm, there needs to be some comment on what it means to be a lawyer to show how these theories affect their practice. Therefore, this section focuses on the conceptions of lawyering as outlined in Chapter II, Part I.

It is generally thought that the standard conception of lawyering reflects the practical application of the tenets of the traditional understanding of professionalism. This model of lawyering requires lawyers to serve their clients objectively, suppressing any thoughts of personal gain. However, more recently this model of lawyering has been

[862] Kritzer, above n 187, 413.

criticised as encouraging lawyers to comply zealously with the legally allowable instructions of their clients, even when they personally disagree with the consequences or the morality of the actions. This type of lawyering does not take account of morals. Therefore, there are many who would argue that the standard conception of lawyering is deficient.

A number of alternative models emphasise that individuals personally decide what they ought to do, and do not rely on conduct prescribed generally for members of a profession. The reality of lawyering is in the realm of the personal.

Simon's contextual view recognises that situations arise where lawyers need to choose between legal principles, but he does not advocate that they refer to extra-legal morals. However, Luban, Levine and others do believe that extra-legal morals have an important part to play and they argue there cannot be a separation of the personal from the professional. A number of these models proceed on the premise that decisions made by individuals emanate from 'who' they are. The following discussion will use the word "alternative" to include the moral activism, interpretive integrity, deliberative and collaborative models. Simon's ethical discretion in lawyering will be specifically referred to where it is pertinent.

(a) Group A: Law Students and Law Graduates

The student participants think moral considerations form part of the process through which they determine how they make their decisions. This group is very keen to achieve outcomes that align with their own personal integrity and accord with social responsibility aims. Therefore they believe that the lawyer/client relationship is one in which the service provided includes well-researched advice that presents the broadest possible options to clients while at the same time alerting clients to the consequences of their actions.

These students appear to exhibit the tenets of the alternative models and not the standard conception in deliberating on the question of whether professionalism is the same as ethics and whether their views of professionalism might change once they enter the practice environment. The students demonstrate implicitly that they do not consider the standard conception of lawyering to be an adequate model on which to shape their practices. While they recognise that the role morality model and the goals of the adversarial legal system may provide some avoidance strategies, many of them refer to

the ethical codes as the minimum standard required. It is their view that individual practitioners will need to rely on their own judgment when situations arise that are not clearly referred to in the codes. Some of them even imply that a person's own character determines how they act. One of the law students thoughtfully notes that ethical challenges are really the creation of the individuals themselves. He recognises that individuals react differently depending on their own values. For instance, one person will unquestioningly accept a situation, where another will consider it raises ethical issues. It can be suggested then that the alternative models, other than that of Simon, appear to be describing how the students see things and, in particular, there are some comments that resonate particularly with the collaborative/virtue ethics models.

This is also the understanding of the law graduates. They wish to provide a service that goes beyond the mere requirements of codes. They aspire to providing advice to clients that accords with their own values, thereby allowing them to retain their own personal integrity. This is borne out in the empirical literature. Frenkel et al found, in comparing associates and partners, that "associates have a moral sensitivity beyond the rules".[863]

As has been noted, the practice environment is credited as a major influence on the practices of individual practitioners. Yet this group of participants is keen to suggest that ultimately individuals must choose how they will conduct themselves. Therefore, they are strongly of the view that they will be able to act in accordance with their own beliefs, even if this means working in their own time for clients or, even more drastically, leaving a firm if the restraints on their practice precludes their ability to attain their own level of professionalism.

Therefore, the law members of Group A see the practice of lawyering as including a conversation about morals. However, this kind of conduct may bring these practitioners into conflict with the *Solicitors Rules* and the draft Model Rules in Queensland.[864]

(b) Group B: Experienced Legal Practitioners

By contrast, the experienced legal practitioners in Group B appear to adhere to the standard conception of lawyering. While the experienced accounting practitioners are

[863] Frenkel, above n 15, 698; Wilkins cited in Sarat, et al above n 15.
[864] Queensland Law Society, n 195 above. See the Statement of general principle and paragraph 21.

not the subject of this discussion, it is interesting to note that they do not believe it is their role to raise moral issues.

The experienced legal practitioners very clearly take the view that they are serving clients to the best of their ability and believe it is not incumbent on them to challenge clients on the consequences or effect of those instructions. They are simply providing their expertise as a service to clients. Their approach is one that keeps the personal and professional separate. For instance, one separates himself from the instructions of clients when their view is different to his by including the words "my instructions are such and such …" into correspondence. Another tells of zealously protecting the whereabouts of a client wanted internationally even though he in no way condones the client's behaviour. More specifically another believes that he, as the lawyer, is the expert and that he should determine the parameters of the relationship and that he is only interested in legal issues:

> Well, sometimes a lot of clients say, 'You're not listening to what I'm saying.' I say, 'That's because you're not telling me what I want to hear in regard to what the facts are.' Now, you've got to pull them back, you've got to get them into line.'

Yet even within this group, there is an acknowledgement that ethical codes do not sufficiently guide them in their decisions about some issues. In these situations, some acknowledge that they reflect on their own personal codes of conduct, but they are quick to add that this is very much shaped by the culture within which they work and what is considered acceptable by their peers.

While the standard conception of lawyering appears to be the default position for this group, they do acknowledge that a reliance on ethical codes or rules of professional responsibility do not always provide guidance for their behaviour. However, the alternative models of lawyering offer no explanation for their understanding of practice.

Therefore it can be concluded that although there is presently no knowledge of the proposed alternative models of lawyering, the graduates have some affinity to the kinds of practices they espouse, but the experienced practitioners do not.

D *Social Psychology*

The findings show that, depending on their level of appointment, practitioners appear to have quite different perspectives of the world of the law firm. The graduates are

dealing with the tension between providing the full service that they believe clients deserve, and trying to perform in accordance with the expectations of the firm. By contrast, the practitioners see the firms' practices as clearly set out[865] and their only difficulty centres on ensuring that their staff is meeting the firm's budgets and that the new entrants conform[866] to the practices, or more specifically, the culture of the firm.[867]

As a result of this, the graduates view the firms' culture as restrictive, whereas the experienced practitioners promote it positively. This is not peculiar to this set of participants. Sarat's work finds that associates "blame others for 'forcing' them to be more aggressive"[868] and the "partners believe that associates sometimes go too far in the direction of aggressiveness early in their careers."[869] Therefore, there is often a tension between practitioners at different career stages. The social psychology literature provides some insights into why this tension can arise.

Kohlberg's model[870] would probably position the graduates at the post-conventional level since they appear to adhere to the service ideal and wish to use what discretion they have to promote the wishes of the client and the community. Yet, pressure from within the firms often causes them to comply with the conventional level, where it would seem the experienced practitioners are placed. This result appears to support the view of Eshete, that a person's view can oscillate.[871]

As noted in Chapter III of Part I, an individual's culture is influential in shaping his/her conduct. Chapter V reports that all the participants acknowledge the role of culture in firms. The literature suggests that there is a process of socialisation.[872] Therefore, it is reasonable to find people during the early stages of their experience in a firm grappling with their individual ideals when they find them to be in conflict with their firm's practice. In other words, the graduates are in the process of trying to construct meaning and questioning whether they wish to adapt their understandings to the firm's demands or remain true to their own ideals.

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[865] Robert L. Nelson, 'The Discovery Process as a Circle of Blame: Institutional, Professional, and Socioeconomic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behaviour in Corporate Litigation' (1998) 67 *Fordham Law Review* 773, 794.
[866] Although it needs to be borne in mind that there are those who state that they do not conform, but perhaps only comply. See Chapter V, "Individual Responses to Culture", pp. 176ff.
[867] The reference to new entrants to the firms was also a factor found by Nelson, above n 864, 788 – his partner interviewees negatively viewed new entrants to the firm who did not necessarily share the firm's culture.
[868] Sarat, above n 46, 820.
[869] Ibid 821.
[870] Huhn, above n 661.
[871] Eshete, above n 595.
[872] Mather, et al above n 10.

The graduates claim that the firm's culture is really a reflection of the personality of the partners. This supports Nelson's findings that managerial ideology drives the policies of the firms.[873] The graduates also appear to agree with Wolgast that the context can shape the person.[874] They recognise that there is a close relationship between themselves and their mentors and that this can result in making them into the person they will be in 5, 10 or 15 years' time. However, the graduates exhibit a distinct disenchantment with conformity or compliance. In fact, their remarks reveal that they see these as a form of weakness.[875]

Abrams' discussions of social identity and self-awareness theories[876] imply that the graduates are at the stage of wanting to retain their personal identity as opposed to succumbing to the social identity of the firm. In terms of self-awareness theory, they are trying to consider what they should do by giving attention to self and so remain independent. Nevertheless, the context of the firm is causing them difficulties, creating tensions for them with respect to their desire to provide a full service for their clients, and yet wanting to advance their careers. According to Kohlberg's model of ethical reasoning, it could be argued that once an individual reaches a particular level of moral reasoning then they will not slip back to an earlier level of thinking. However, the work of Rest and others, particularly Eshete, shows that lawyers can oscillate between the different levels of moral thinking.[877] In other words, they can regress to an earlier stage of moral development.

Of course, the graduates' comments reveal that they place more importance on their personal identity than how the public perceives them, but they express these views privately, not in front of superiors.[878] Therefore, in terms of self-awareness theory, the graduates in private circumstances will resolve to act in accordance with their own feelings, whereas if they have an audience they may choose to comply with the firm's view. According to this latter distinction, it is possible that self-awareness can produce compliance but it may not result in conformity. Martin and Powell's empirical work also finds this to be so.[879]

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[873] Nelson, above n 560.
[874] Wolgast, above n 329.
[875] Abrams, above n 622, 13.
[876] Abrams, above n 622.
[877] These authors were discussed in Chapter 3 at pp. 100ff.
[878] Aronson, above n 614, 23 and Abrams, above n 622, 475.
[879] Martin, et al above n 609, 861.

Regardless of whether the graduates are actually conforming or just complying, they are experiencing difficulties servicing clients at the level they believe is appropriate while, at the same time, trying to perform in accordance with the expectations of the firm. Therefore, they are experiencing dissonance.[880] They do not place the same value on budgetary goals, as do their firms. They believe that the budgetary goals, in particular, play an important role in determining their dealings with clients, their priorities in choosing which files to work on, and which attributes and practices to foster in readiness for discussions about their promotional aspirations. It is their view that budgets should not have this level of priority. However, at the same time, they want to be accepted as team players.

While the graduates are keenly aware of the pressures to conform, they remain quite optimistic about their ability to remain true to their values. However, the graduates have only been practising for two years and might be over-estimating their resistance to culture. They might be falling victim to fundamental attribution error. They may, in time, conform or comply with the firms' views to reduce their feelings of dissonance.[881]

Alternatively, the graduates may remain individualists. This would occur, according to Aronson, if they were very secure in their position in the group.[882] In other words, if they have a very high level of self-esteem and therefore have every confidence in their opinions. However, it is not conclusive that the graduates are in this category. While discussing the influence of the firm, one individual in particular spoke of his concerns about firm practices but then referred to a number of reasons that allowed him to distance himself from what he believed were unsatisfactory consequences. He used avoidance strategies in an effort to reduce dissonance and protect his self-esteem.

Although the other graduates did not directly refer to particular avoidance mechanisms as this person did, it could be suggested that their objections to the firm's cultural hold on them through budgets, marketing requirements and provision of livelihood, represent an attempt to alleviate their own feelings of discomfort. So indirectly, they are trying to ensure that their self-esteem remains intact by resorting to blaming the firm for their feelings of dissonance.[883] The justification of cruelty concept might be evident in this conduct.[884]

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[880] Aronson, above n 614, 211.
[881] See the quote by Pouncy, above n 612, 355.
[882] Aronson, above n 614, 24.
[883] Festinger, above n 636, 243 and Aronson, above n 614, 211.
[884] Aronson, above n 614, 223.

Of course, other psychology concepts are also relevant to this kind of behaviour. For instance, in finding fault with the firms, the graduates might be feeding their own "self-serving bias".[885] This concept suggests that individuals need to appear logical, reasonable, and therefore make every effort to separate themselves from consequences that they do not find palatable. In addition, graduates recognise that they have laboured long and hard to get to the position that they are in now and so go to great pains to see their role as a positive and attractive one. This behaviour aligns with the "justification of effort" concept.[886]

The experienced practitioners also recognise the existence of culture and that they make every effort to encourage new entrants to the firms to abide by it. In fact, they look favourably on members of their firms who conform to their policies. They see them as team players.[887] They believe that they are creating a positive culture, although, considering the remarks of the senior associate responsible for the *pro bono* programme, this claim may be less than accurate. If the culture is a positive one, then why would this firm feel a need to sweeten its effect by offering a programme to boost morale?

With respect to Abrams' use of the social identity and self-awareness theories,[888] the experienced practitioners place more importance on social identity (their reputation) as they repeatedly assert that members of their firms ought to comply with the professional courtesies and are convinced about the need for budgetary goals. Since most of the experienced practitioners are indeed "the firm", as they are the owners, they are people who wish to be members of the group and in accordance with self-awareness theory place importance on the public self and choose to adopt the situational norms wholeheartedly. They are totally conformed. There appear to be minimal internal tensions for these practitioners apart from those created by the new graduates who are yet to give their complete allegiance to the firm's culture.

It is evident from the data that the experienced practitioners believe that the graduates ought to alter their behaviour to fit in. This aligns with the literature on this topic. As Goffman suggests in his framework theory, there is an expectation that individuals will adhere to an organisation's culture.[889] The experienced practitioners

[885] Aronson, above n 614, 173.
[886] Langevoort, above n 630, 100.
[887] Abrams, above n 622, 13.
[888] Abrams, above n 622, 473.
[889] Goffman, above n 615.

see conformity as the ideal and they eschew those who do not share this view. Yet they also acknowledge that this happens sometimes.[890] The experienced practitioners make it quite clear that there are negative consequences for nonconformity. They speak of their displeasure when there is a failure to conform to the accepted professional courtesies, and the use of reviews to police the attainment of budgeting targets.

The experienced practitioners' views also reflect the "self serving bias"[891] and the "justification of effort" concept.[892] They have laboured long and hard and so an application of the justification of effort theory could explain their perspective. Since the experienced practitioners have certainly committed to the firm, as they are the owners, they too will want to avoid any thought that questions their culture.

The experienced practitioners also engage in dissonance reduction.[893] They rationalise it is necessary to have budgets, stressing that if firms failed to gain a profit, then the members of the firm would not have a job. Any questioning of their own self-esteem causes them to shift the blame for any actions they consider are affecting the firm's reputation onto newer employees of the firm. This might come under the theory of justification of cruelty.[894] The experienced practitioners do not like to think that they are detrimentally affecting the graduates and so they may be finding fault to make their actions acceptable. A number of the practitioners suggest that the new entrants have lower standards than they did when they entered practice, and one practitioner referred to the graduates as having "lost the plot".

E *Summary*

This chapter has considered the data collected from the participants in light of the literature on professionalism discussed in Part I. While it examines the comments of the accounting participants, it primarily focuses on those of the legal profession. The findings show that all the participants interviewed, both those in law and accounting, acknowledged the firm's strong and quite specific influence on those practising in the working environment. They recognise the firm's attempt to shape the work habits of their members. However, the responses of the legal graduates and the experienced legal

[890] Mather, et al above n 10, 178.
[891] Aronson, above n 614, 175.
[892] Langevoort, above n 630, 100.
[893] Festinger, above n 636, 70, and Aronson, above n 614, 211.
[894] Aronson, above n 614, 223.

practitioners reveal that this does not necessarily result in a uniform understanding of the practice environment, consequently producing differing understandings about how lawyers should behave or work.

The graduates' views are aligned to the traditional understanding of professionalism, which in turn agrees broadly with the structural/functionalist theories. However, the experienced practitioners' evidence characterises the commercialised professionalism paradigm which, it is suggested, has its roots in market control theory in particular. These different foundational understandings produced quite different views on the desirability of the pervading firm culture. The policies of the authoritarian figures of the firm are influential on an individual practitioner's behaviour or conduct.

While the data shows that the accounting graduates are conforming to the firm's culture, the responses of the law graduates show that they are experiencing tension because their view of practice differs from that prescribed by their firms. In other words, the main pressures that affect the conduct of individual legal graduates are those advocated by the firm in which they practice, and in some instances, these cultural pressures undermine the ideals of these individuals.[895] In contrast, the experienced practitioners' perspectives on practice mirror those of their firms. Group B members strongly adhere to their firm's view as the definitive model of conduct. In practical terms the experienced practitioners tend to abide by the standard conception of lawyering whereas the graduates' responses show that the alternative models for lawyering more closely reflect their views.

Overall, the research finds that there is a high degree of conformity in the accounting working environment, yet the law graduates feel pressured and are not at all sure how they should conduct themselves. They feel conforming to the firm's view of practice undermines their conduct based on their understanding of professionalism. The experienced legal practitioners, on the other hand, have a "definite" idea of practice and that view accords with the culture of the particular law firm. The social psychology literature provides some explanation for this occurrence.

[895] Wilkins, above n 397, 489 also suggests this.

The following table summarises the views of the participants in terms of the sociological theories, contemporary labels and conceptions of lawyering.

Table 6.1 – Participants' views and the theories

Group	Sociological theories	Contemporary labels	Conceptions of lawyering
Group A	Structural/Functionalist Knowledge/power Interactionism	Traditional professionalism	Alternative models
Group A – law students and law graduates specifically	Marxism	Traditional professionalism	Alternative models
Group B	Market control Marxism Knowledge/Power	Commercialised professionalism	Standard conception of lawyering
Group B – accounting graduates specifically	Cultural	Commercialised professionalism	Standard conception of lawyering

PART III – CONCLUDING REMARKS AND RECOMMENDATIONS

The thesis attempts to address some of the gaps in the literature that theorises and critiques the function of the professions and what practitioners actually do in practice. A disparity between the claims in the literature and the practice reality has been identified by Nelson and Trubek. These authors assert that very little is known about the professional ideologies of lawyers and other professionals or what individual practitioners think about their role.

The thesis initially refers to the available literature, particularly noting that several researchers state that members of the professions no longer consider the service element an important feature of their practice. They argue that the meaning of professionalism has changed from one that prioritises the service ideal to one that embraces commercial overtones. The thesis then reports on the few empirical findings reported in the literature that deal with associated questions and the findings of the empirical study undertaken as part of this study. This study specifically asks legal and accounting students and practitioners about their understandings of professionalism and how that affects their practice - what it means to be a practitioner interacting with clients and other practitioners' practice reality.

The findings are considered in the context of the sociological theories and contemporary understandings of the professions found in the literature. While the empirical data collected is restricted to a small number of participants and is geographically concentrated in South-East Queensland, the findings give some indication of the likely views of the broader body of those studying to become professionals and graduates (both new entrants and those more experienced) already in the practice environment.

This chapter will briefly refer to the findings and then consider their implications for those who can be categorised as interested parties. These include firms, those administering the respective professional bodies and professional schools in universities that are responsible for preparing students for the professions. Some future research initiatives will also be identified.

A *The Findings*

In summary, the study found that perceptions of professionalism, particularly within the legal participants, vary between the graduates and the experienced practitioners. The

views expressed can be explained by a number of sociological and psychological theories and reflect both the traditional and commercialised understandings of professionalism.

The thesis examined the views of accounting students and practitioners by way of comparison to legal students and practitioners. It was considered important to do this since it appears to be a widely-held view that the accounting profession is extensively commercialised, being primarily concerned with business goals and therefore focussed on economic outcomes. There was a strong correlation between commercialised professionalism and the practice of accounting, even though the accounting students on the whole viewed the profession that they were entering quite idealistically, believing they were going to perform an altruistic service for clients. Accounting graduates in practice for only two years appear to be assimilated into a work environment where experienced practitioners dictate the commercial nature of their practices.

On the other hand, there is a marked difference of opinion on professionalism and what it means to practice as a lawyer between the law students and recent graduates, and those of the experienced practitioners. It is this finding that is particularly interesting, as it seems to be causing tension in the practice environment, particularly for recent graduates. Newer members of the firm, like law students, want to practice according to the traditional professionalism paradigm. However, in reality the experienced practitioners, who are the authority figures in the firms, say that they are running businesses and require their employees to act according to the commercialised professionalism paradigm which prioritises technical ability, managerial skills and entrepreneurial skills. The commercialised professionalism paradigm emphasises profit over service.

B *Implications for Interested Parties*

With respect to ***accounting***, this study shows that different perspectives of professionalism are held by the students and those working in the practice environment. The students have a much more idealistic understanding of what it means to be a professional, believing that professionalism is something more than professional codes, whereas those in practice, both the two-year graduates and the experienced practitioners, rely heavily on professional codes to guide their conduct. Those in authority in the firms create a culture of conformity and promote an allegiance to codes.

Yet it appears they do this to avoid liability rather than for any altruistic reasons. The professional bodies assert that an allegiance to the codes makes accounting practices different to business practices. However, it is not clear whether they are just referring to technical compliance or suggesting that the service that accountants give is one that aims to achieve altruism. If the latter, then there is a real divergence of opinion between what these professional bodies assert and the understandings of practice as seen through the eyes of practising accountants.

At the very least, it could be suggested that universities need to address the disparity in the perspectives of its accounting students and the practice environment. Accounting schools need to acknowledge the students' views on ethics and professionalism and make some effort to prepare them for the reality of the culture of commercialism in the firms. If, in turn, the professional bodies are genuinely seeing the codes as aspirational documents rather than guides to avoid liability, then they need to reinforce this by requiring the university accounting schools to place a greater emphasis on this in their curriculum and they need to support this by also emphasising this approach through any continuing educational forums provided to practitioners in firms.

There was also a divergence of opinion within the ***legal*** participant groups, but this happened at a different career development stage. The students and graduates were in general agreement that professionalism is something beyond the requirements of ethical codes and that it requires individual practitioners to aspire to a service ideal resulting in a quality service that includes a consideration of morals and values.

Of particular interest is the finding that two-year graduates and experienced practitioners, both in the practice environment, hold quite different views on professionalism and what it means in practice. The interviews show that graduates were quite surprised by what they found in practice, particularly the lack of emphasis on the service ideal within their firms. They report that firms are mainly concerned with budgets and protection of their reputation in the professional community. If this is considered to be an acceptable reality then the tension felt by the graduates can be seen as a feature of their socialisation and the new entrants will eventually conform, comply or leave the profession. However, there could be a problem if, as some Australian judges, the American Bar Association, some presidents of the Queensland Law Society and a number of ethicists assert, the public service aspect of lawyers' practices ought to be revitalised. These bodies are calling for a change of focus within the law firms and a shift in emphasis from financial goals to a pursuit of principles that seek justice, honesty

and a public-interest orientation. A number of the alternative models of lawyering, discussed in Chapter II, support this view. They stress that lawyers ought to practise law in a way that includes a consideration of morals and the effect on the community. They particularly assert that lawyers ought not to separate their working role from their personal beliefs – they should act with integrity.

As noted previously, there may be a personal cost involved in individual lawyers holding fast to their own convictions i.e., exercising autonomy. While there is some evidence that individuals find ways to achieve the goals they set for themselves in terms of conduct, individuals entering firms have very little control over their own practices. They are subject to the demands placed upon them by superiors. Budgetary constraints often determine which clients are serviced and the content of that service. It is also the case that early entry lawyers have to be aware of the importance of billing when it comes to their annual reviews and therefore their future employment and promotion.

Can individuals realistically practice in accordance with a paradigm of professionalism or a model of lawyering that asks them to challenge the profit-at-all-costs ethos in their workplace? Is there anything that can be done to sustain these individuals and encourage others to take a similar stand? If, as the alternative conceptions of lawyering propose, practitioners ought to be encouraged to be morally responsible, there is a need to protect the individual's autonomy from becoming assimilated, diffused, and lost in the complexities of organisational institutions.[896]

Perhaps more seriously, do the professional bodies actually know that what they are asking individuals to do runs counter to the operational reality of law firms? If they do know, can they be accused of unethically representing that lawyers act altruistically for clients and the community? Should professional bodies simply accept the reality that they are businesses and devise professional rules that reflect that? Is there a need to recognise that the reality of law practices may not fit within the expectations that the legal system presently assumes?

Rhode notes that "organizational reward structures and regulatory frameworks are not well constructed to reinforce ethical conduct."[897] So is it possible to reform the organisations – the law firms? Langevoort's research specifically considers lawyer complicity with respect to client fraud but it could be argued that the recommendations he makes can have more general application. He recommends that a firm's personnel

[896] Wolgast, above n 329, 143-144.
[897] Ibid.

should be rotated and that in-house education programmes highlight "red flags".[898] While it is obvious that some strategies could be introduced into legal organisations to address these concerns, the psychological literature suggests that it would be difficult to persuade the partners, whose sole motivation is profit, that they are needed. Goldsmith makes a comment about this predicament:

> … those fully engaged, indeed submerged, in their professional identities and activities risk displaying … 'a gregarious tolerance for the way things are.'[899]

Empirical research by Nelson supports this. He interviewed 10 partners and nine associates from five leading law firms in the United States about deviant behaviour. He noted that there was a marked difference in response from partners and associates to a suggestion that firms should introduce strategies to deal with in-house problems.[900] The associates were amazed that the partners were not aware of any concerns.

> I'm struck by the difference in perceptions. We seem to identify more occasions that we thought ethical issues were arising in terms of behaviour and specific issues [that firms might address]. What I'm hearing from their responses is that there really is nothing wrong.[901]

So, requiring institutions to change may prove ineffective. It may be very difficult to effect change in firms where senior members are happy with, and often promote, the status quo.[902]

Recent literature, particularly in the USA, proposes that law schools ought to bear the responsibility for ensuring that future lawyers are aware that they may be lulled into self-deception and conformity with group norms. Langevoort supports this. He thinks that the "cognitive biases" of young lawyers may be successfully altered before they enter firms.[903] Luban is also of this view. He advocates that individuals need to be educated to develop or construct interventionist strategies or "red flags" [904] to alert themselves to the dangers of culture that may undermine their principles.[905] Luban suggests that individuals need to be alerted to make a conscious effort to set themselves

[898] Langevoort, above n 630, 113.
[899] Said in Goldsmith, above n 553, 384.
[900] But partners are not likely to see any concerns – Nelson, above n 865, 794.
[901] Ibid 793.
[902] One of the graduates mentioned the CLE programme but quickly added that even if topics were offered covering these aspects of professional life, the practitioners would not be interested.
[903] Langevoort, above n 630, 114.
[904] Langevoort, above n 630, 113.
[905] Luban, above n 451, 279.

particular limits or "mental tripwires", and to adopt a sceptical approach to how they practice.[906]

These researchers suggest that law schools should take prime responsibility for this task. The literature published on this topic recommends that teaching ethics pervasively across the whole of the law degree may be a way of doing this. However, senior members of law and accounting firms must also take some responsibility. If, as Rhode suggests,[907] it is "a good moment for moralists" and "integrity is in fashion" then it may be that partners ought to be alerted to how influential their firms are within the community, and consider more carefully the effects of that influence.[908] However, it may be that the firms can only be persuaded to think along these lines if there are monetary rewards to be gained. Kim Cull, a former president of the NSW Law Society said that the Enron affair has made the corporate world increasingly more receptive to ethical concerns.

> The challenge for business leaders is one of creating a workplace climate in which ethics is so integral to day-to-day operations that ethical behaviour is an automatic consequence.[909]

She also said: "Corporate responsibility is going to be the 'next big thing'. Soon it will be clever to say there is nothing different about our product or price, but we do behave well."[910]

Foucault's knowledge/power sociological theory supports the view that those in positions of power, like partners in law firms, can persuade or influence others of their worth and perhaps distinguish their services on ethical grounds.

C *New Research Initiatives*

This thesis has made a small contribution to the process of determining what happens in practice. While it provides some findings, it raises many more potential research

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[906] Luban, above n 451, 308.
[907] Rohde, above n 452, 333.
[908] There are some recent indications that morality is becoming more topical. For instance – Lucinda Schmidt, 'Let's Get Ethical' (2002) 9 *Business Review Weekly* 5 reporting on the comments of some senior practitioners after the very public Enron and Anderson episodes; Hugh Mackay, 'Community and Morality: Two Sides of the Same Coin' (Speech delivered at the Griffith Lecture, Brisbane, 13 October 2004) suggesting that morality derives from our sense of community and that both are the subject of most concern aired by Australians at present.
[909] Kim Cull, 'Ethics and Law as an Influence on Business' (2002) 50 [October] *Law Society Journal* 50, 52.
[910] Cull, above n 908, quoting an article published in a 2001 issue of *The Economist*.

questions. At the very least, the questions asked here need to be canvassed with a much larger number of participants across a greater range of practice experience. If legal professional bodies advocate that their members view practice in a way that empirical work does not support, then this needs to be questioned. It could be argued their representations, if found incorrect, are unethical. For instance, can they really say that their members work to promote the public good? Do the ethical codes offer real guidance for their members and therefore support the claim that they provide a public service? It might also be suggested that their assertions misrepresent to students the working environment that they can expect.

If professional organisations believe that their role is one of encouraging practitioners to strive for a version of professionalism that includes a consideration of morals and values, then they will have to acknowledge that the reality of practice is at odds with these ideals. They will need to recognise that young or new practitioners are feeling pressured and possibly being forced to abandon their ethical ideals to survive in practice. Professional organisations will have to devise ways to educate and persuade the firms that it is desirable to operate in this way. Alternatively, the professional bodies need to face up to the reality that law firms are simply businesses. If this is the case then they will need to reformulate the codes to reflect this and set out clearly the role that is expected of the lawyer and consider whether this alters how the legal system as a whole operates.

The law schools will obviously need to think about these questions as well. As part of this study, the participants were asked to comment on whether their university experience prepared them well for practice, and other associated questions about the teaching of ethics. This material does not feature directly in this thesis, but will be published in articles at a later stage. It is the view of the writer that this information will help inform universities of the views of their students as to the effectiveness of their practices and help them to reformulate their teaching practices to better equip students for their future careers. The research with respect to the role of the university has shown that the participants, both graduates and experienced practitioners, were less than satisfied with the preparation they received concerning ethics/professionalism. They suggested that a lot more importance should be placed on the teaching of ethics. They also stressed that those who teach ethics need to be convinced of its worth since their feelings are implicitly portrayed to the students through their treatment of the subject.

There is no way of knowing how the questions raised will be answered or which sector of the profession will lead the way. It can always be argued that the professional schools can do more to prepare students for the practice into which they are entering and that the professional bodies must take their obligations to their members and the public seriously. But ultimately it must be questioned whether the firms, where the practise reality takes place, will be receptive to changing their practices?

D *Conclusion*

This study is a tentative step towards the goal of examining what individual students and practitioners think of professionalism and what that means in practice. It makes some arguments for suggesting that those associated with law and accounting practices have differing views on professionalism and what that means in the practise reality.

Perhaps all that can be said at present is that:

> For some, professionalism requires a lawyer to do whatever the client wants; for others, professionalism requires a lawyer to impose his morals on the client; for others, professionalism requires a lawyer to direct the client to act selfishly. It may be that in a postmodern world, the term 'professionalism' can mean whatever the lawyer wants it to mean.[911]

[911] Cochran, above n 221, 314.

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LEGISLATION

- *Civil Liability Act 2003* (Qld)
- *Legal Profession Act 2004* (Qld)
- *Personal Injuries Proceedings Act 2002* (Qld)
- *Trade Practices Act 1974* (Cth)

APPENDICES

APPENDIX A

Law/Accounting Firm
Address

Date

Dear

Re: PhD Project – interview with [practitioner's name]

I am writing to request that your permission be granted for me to interview a member of your firm in relation to my PhD project - 'Is the market redefining the meaning of professionalism in Australia?' I am endeavouring to determine whether practising lawyers and accountants consider the practice of their discipline a business, profession or an amalgamation of both. With regard to the term 'professionalism' I am interested to know how it is defined by those I interview.

I am attaching an Information sheet that is intended to inform the interviewee of the purpose of the project and provide details of the procedures that will ensure confidentiality. At the beginning of the interview the interviewee will be asked whether they have understood the Information Sheet and whether they are willing to participate. To this end the interviewee will be asked to sign a Consent form to that effect.

Thank you for your consideration in this matter.

Lillian Corbin
Lecturer in Law
School of Law
Gold Coast.
Ph: 07 5552 8809
Email: L.Corbin@griffith.edu.au

Information Sheet

Project Title:
Is the market redefining the meaning of professionalism in Australia?

Chief Investigator(s):	**Lillian Corbin** Griffith University Law School Ph: 555 28809 E-mail: L.Corbin@griffith.edu.au
Supervisors:	**Dr. M.K. Robertson** [*Now Assoc. Prof. M.K.Robertson*] Griffith University Law School

Ph: 555 28516
E-mail: M.Robertson@griffith.edu.au

Assoc. Prof. C. Guilding [*Now Prof. C. Guilding*]
Griffith University School of Accounting and Finance
Ph: 555 28790
E-mail: C.Guilding@griffith.edu.au

This project is the subject of my PhD. The following thoughts informed my choice of topic.

Background for topic

The term 'professionalism' traditionally describes the oganisational form of how lawyers and accountants are regulated and deliver services. The most quoted definition is that articulated by Roscoe Pound

> 'A profession is a group … pursuing a learned art as a common calling in the spirit of public service …' (Pound, Roscoe, *The Lawyer From Antiquity to Modern Times* (West Pub. Co, St. Paul, 1953), p 5.

'Professionalism' has more recently come to be associated with a level or standard of service being provided by lawyers and accountants. The validity of this claim has been criticised. It is argued by many that lawyers and accountants are falling short of the ideals of professionalism. Many consider that the changes to accountants and lawyers' business structures, conduct and general practices have caused professionalism to fall prey to the claims of commercialism. Instead of dedicating themselves to the public that they purport to serve, it is claimed that accountants and lawyers aspire to achieving wealth as evidence of their success. In other words,they are endeavouring to achieve profit at the expense of their principles and so it could be argued that there is a movement from professionalism to commercialisation.

Those who are averse to these new developments claim that lawyers and accountants should aspire to professionalism. However, not too many authors spell out what they mean by professionalism.

In summary, I am endeavouring to ascertain whether practising lawyers and accountants and those training for these professions consider the practice of their discipline a business, profession or an amalgamation of both; whether they claim to aspire to professionalism; and if so what they believe that is.

To this end I am requesting that you give your consent to be involved in an interview which I anticipate will not exceed 1 hour's duration. I must stress that your participation is voluntary and if any of you are students that you realise that this subject

matter does not form part of any curriculum of any course provided by the University. Any participant may withdraw from the interview at any time.

It is my intention that the interviews be taped and this information will only be accessed by myself and an assistant who will be responsible for transcribing them. The transcribed data and the tapes will be stored in a locked filing cabinet in my office at the University and no names or identifying information will be included in the final PhD paper.

It is not anticipated that participants will derive any tangible benefit from this research. Although it is envisaged that at the conclusion of the investigation, the participants will be provided with feedback on the results of the project in the form of a summary, if it is requested by them.

If you have any concerns regarding the research then please do not hesitate to raise the matter with me, contact the supervisors whose details have been provided above, or if you wish to speak to an independent person then you may contact either

> the University's Research Ethics Officer, Office for Research, Bray Centre, Griffith University, Kessels Road, Nathan, Qld 4111, telephone (07) 3875 6618;
>
> or
>
> the Pro Vice-Chancellor (Administration), Bray Centre, Griffith University, Kessels Road, Nathan, Qld 4111, telephone (07) 3875 7343

I would like to thank you for your valuable support and assistance with this research project.

Yours sincerely

Lillian Corbin
Lecturer
Griffith University Law School
Date:

APPENDIX B

Consent Form

Project Title:
Is the market redefining the meaning of professionalism in Australia?

I understand that Lillian Corbin is conducting interviews in relation to her PhD paper and that she is endeavouring to ascertain whether practising lawyers and accountants and those training for those professions consider the practice of their discipline a business, profession or an amalgamation of both; whether they claim to aspire to professionalism; and if so what they believe that is.

I note that the tapes and the transcribed data will be stored in a locked filing cabinet in Ms Corbin's room and that my identity will not be disclosed. I also note that feedback on the results of the project will be provided to me in the form of a lay summary if requested by me.

I have read the information sheet and this consent form. I agree to participate in the project entitled 'Is the market redefining the meaning of professionalism in Australia? and give my consent freely. I understand that the project will be carried out as described in the information statement, a copy of which I have retained. I realise that whether or not I decide to participate is my decision and will not affect my studies, employment or treatment in any way. I also realise that I can withdraw from the interview at any time and that I do not have to give any reasons for withdrawing. I have had all questions answered to my satisfaction.

Signatures:

…….. ……..
Participant Date

……. ……
Investigator(s) Date

APPENDIX C

INTERVIEW SCHEDULE

Part A – What is professionalism?

Is the practice of Law/Accounting a Business or a profession?

- What is a profession?
- Is there a distinction between firms because of specialisation or size?

What is Professionalism?

- Is Professionalism the same as ethics?
- Can the pursuit of professionalism enhance profits?

Part B – Situational Pressures

Can professionalism change? [students]

Has professionalism changed? If so, why? [graduates and experienced practitioners]

- Have you experienced any difficulties conducting yourself in accordance with your view of professionalism?
- To what extent, if any have your views about professionalism been influenced by the need to meet budgetary goals?

Part C - Role of University

What was your experience of ethics/professionalism during your degree?

- Can professionalism be learned?