LAWYERS MEET THE SOCIAL CONTEXT: UNDERSTANDING CULTURAL COMPETENCE

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Lawyers in Canada are practising in increasingly diverse social contexts. This paper identifies the need for cultural competence, and asks how cultural competence, which reflects the knowledge, skills and values demanded by the public interest, might be measured by tracing the characteristics of the culturally competent Canadian lawyer. Such a lawyer (1) values an awareness of humans, and oneself, as cultural beings who are prone to stereotyping; (2) acknowledges the harmful effects of discrimination upon human interaction; and (3) acquires and performs the skills necessary to lessen the effect of these influences in order to serve the pursuit of justice.

Au Canada, les avocats exercent leur métier dans des contextes sociaux de plus en plus diversifiés. Cet article met en évidence la nécessité pour les avocats de posséder des compétences culturelles. Il soulève également la question de savoir s'il est possible d'évaluer les compétences culturelles des avocats canadiens, notamment leurs connaissances, leurs qualifications et leurs valeurs essentielles pour bien servir l'intérêt du public, tout en définissant les caractéristiques que doit posséder tout avocat canadien culturellement compétent. À cet égard, un tel avocat devrait (1) être conscient que tous les êtres humains, y compris lui-même, sont des êtres culturels ayant tendance à former des stéréotypes; (2) reconnaître les conséquences néfastes de la discrimination dans le cadre des interactions humaines, pour enfin (3) acquérir et exercer toutes les compétences nécessaires pour diminuer l'effet de ces influences, afin de mieux servir la cause de la justice.

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I. Foreword

Lawyers in Canada are practising in increasingly diverse social contexts, due to both demographic changes and the evolution of the practice itself. On both counts, there is a growing need for lawyer competence to include cultural competence. In order to practise law in a culturally competent manner, I believe that we must (1) value an awareness of humans, and oneself, as cultural beings who are prone to stereotyping; (2) acknowledge the harmful effects of discriminatory thinking and behaviour upon human interaction; and (3) acquire and perform the skills necessary to lessen the effect of these influences in order to serve the pursuit of justice. I have developed this working definition through thinking about scholarship related to diversity, professionalism and legal education, while teaching in a law school legal aid program. After fruitlessly searching for universal guidelines grounded in ethical norms which could assist me and my students to accurately measure competence in changing social contexts, I decided to develop my own. This paper represents the first part of that process, in which I identify the need for cultural competence and begin to trace the characteristics of the culturally competent member of the Canadian legal profession, in order to build a framework for lawyer competence which reflects the knowledge, skills and values demanded by the public interest.

II. Introduction

The ability of the Canadian legal profession to match the pace of social change has become the subject of considerable scholarly and professional attention in recent years.[2] Reports, articles and texts have been produced

[2] Much of the literature coming out of studies commissioned by professional bodies is referenced in Fiona Kay, "Integrity in a Changing Profession: Issues of Diversity and Inclusion" (Paper presented to the Fifth Colloquium of the Chief Justice of Ontario's Task Force on Professionalism, October 2005), online: The Law Society of Upper Canada <http://www.lsuc.on.ca/media/kaydiversityintegrity.pdf>. See Michael Ornstein, Director of the Institute for Social Research of York University, *Lawyers in Ontario: Evidence from the 1996 Census, A Report for the Law Society of Upper Canada* (Toronto: Law Society of Upper Canada, January 2001); F. M. Kay, C. Masuch, and P. Curry, "Diversity and Change:

from historical,[3] sociological,[4] economic[5] and philosophical[6] perspectives, which have interpreted the legal profession's past and present, and

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The Contemporary Legal Profession in Ontario" A Report to the Law Society of Upper Canada, September 2004, online: Law Society of Upper Canada, <http://www.lsuc.on.ca/equity/pdf/oct2604_diversity_and_change.pdf> (hereinafter *Diversity and Change*); F. M. Kay, C. Masuch, and P. Curry, *Turning Points and Transitions: Women's Careers in the Legal Profession, A Report to the Law Society of Upper Canada* (Toronto: Law Society of Upper Canada, September 2004); Disability Research Working Group, "Lawyers with Disabilities: Overcoming Barriers to Equality" (Vancouver: The Law Society of British Columbia, 2004), online: The Law Society of British Columbia <http://www.lawsociety.bc.ca/publications_forms/report-committees/docs/DisabilityReport2004.pdf>; Working Group on Racial Equality in the Legal Profession, "The Challenge of Racial Equality: Putting Principles into Practice" 1999, online: Canadian Bar Association <http://www.cba.org/CBA/Racial/PDF/ReportRacialEquality.pdf>; and F. M. Kay, "Transitions in the Ontario Legal Profession, A Survey of Lawyers Called to the Bar Between 1975 and 1990" (Toronto: The Law Society of Upper Canada, 1991).

[3] See Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: The Osgoode Society, 1991) at 293, ch. 10; Constance Backhouse, "Gender and Race in the Construction of 'Legal Professionalism': Historical Perspectives," presented to the 1st Colloquium of Chief Justice of Ontario series**,** on line: The Law Society of Upper Canada <http://www.lsuc.on.ca/news/pdf/constance_backhouse_gender_and_race.pdf>; Joan Brockman, "Exclusionary Tactics: The History of Women and Visible Minorities in the Legal Profession in British Columbia" in Hamar Foster and John McLaren, eds., *Essays in the History of Canadian Law: British Columbia and the Yukon* vol. 6 (Toronto: The Osgoode Society, 1995) at 508; and Wesley Pue, "In Search of Better Myth: Lawyers' Histories and Histories of Lawyers" (1995) 33 Alta. L. Rev. (No. 4) 730.

[4] See Fiona M. Kay, "Crossroads to Innovation and Diversity: The Careers of Women Lawyers in Quebec" (2002) 47 McGill L.J. 699; Fiona M. Kay, "Balancing Acts: Career and Family among Lawyers" in S.B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997); Fiona M. Kay, "Flight From Law: A Competing Risks Model of Departures from Law Firms" (1997) 31(2) Law and Society Review 301; and Carrie Menkel-Meadow, "The Comparative Sociology of Women Lawyers: The 'Feminization' of the Legal Profession" (1986) 24 Osgoode Hall L. J. 897.

[5] This includes "ethinomics" as advanced by Randal N.M. Graham, "Morality and Markets: An Economic Account of Legal Ethics" (2005) 8 Legal Ethics 87, and Randal N.M. Graham, *Legal Ethics: Theories, Cases and Professional Regulation* (Toronto: Emond Montgomery Publications, 2004), and critiqued in Alice Woolley, "Can the Dismal Science Save the 'Dog of the Curriculum'" (2005) 8 Legal Ethics 148.

[6] See Joan Brockman, Denise Evans, and Kerri Read, "Feminist Perspectives for the Study of Gender Bias in the Legal Profession" (1992) 5 CJWL 37; J. Brockman, *Gender in the Legal Profession: Fitting or Breaking the Mould* (Vancouver: UBC Press, 2001); J. Brockman, "Leaving the Practice of Law: The Wherefores and the Whys" (1994) 32 Alta. L. Rev. 116; J. Brockman, "'Resistance by the Club' to the Feminization of the Legal Profession" (1992) 7:2 C.J.L.S. 47; J. Brockman, "The Use of Self-regulation to Curb Discrimination and Sexual Harassment in the Legal Profession" (1997) 35 Osgoode Hall L.J. 209; F.M. Kay and J. Brockman, "Barriers to Gender Equality in the Canadian Legal

considered how its future might be shaped by this knowledge. One important strand of this discourse focuses upon the relationship between the core values of the legal profession, equality and justice, and recognizes the challenges posed by the prevalent understandings of the role of the lawyer,[7] which tend to prioritize zealous protection and maximization of client interests and to either ignore or minimize the importance of justice and equality as foundational precepts.[8]

Locating cultural competence within legal ethics is necessary to trace its normative roots, and also to underscore the obligation of this self-regulating profession to promote understandings of lawyer competence

Establishment" (2000) 8 Feminist Legal Studies 169; Mary Jane Mossman, "'Invisible' Constraints on Lawyering and Leadership: The Case of Women Lawyers" (1988) 20 Ottawa L. Rev. 567; and Mary Jane Mossman, "Lawyers and Family Life: New Directions for the 1990's" (1994) 2 Feminist Legal Stud. 61 and (1994) 2:2 Feminist Legal Stud. 159; "Gender Equality Education and the Legal Profession" (2000) 12 Supreme Court L.R. (2d) 187. There is also a considerable body of work from abroad; see H. Sommerlad, "The Myth of Feminisation: Women and Cultural Change in the Legal Profession" (1994) 1 Int'l J. Legal Prof. 31; H. Sommerlad, "Women Solicitors in a Fractured Profession: Intersections of Gender and Professionalism" (Paper presented to the W.G. Hart Legal Workshop, Institute of Advanced Legal Studies, 27 June 2001); Hilary Sommerlad and Peter Sanderson, *Gender, Choice and Commitment: Women Solicitors in England and Wales and the Struggle for Equal Status* (Aldershot: Ashgate/Dartmouth, 1998); M. Thornton, *Dissonance and Distrust: Women in the Legal Profession* (New York: Oxford University Press, 1996); Susan P. Sturm, "From Gladiators to Problem-Solvers: Constructing Conversations about Women, the Academy, and the Legal Profession" (1999) 4 Duke J. Gender L. & Policy 119; and Elizabeth G. Thornburg, "Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System" (1995) 10 Wis. Women's L.J. 225.

[7] See David M. Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada (2005) 28 Dal L.J. 28 (in which a "justice seeking ethic" is proposed as a replacement for zealous advocacy); and Rosemary Cairns Way, "Reconceptualizing Professional Responsibility: Incorporating Equality" (2002) 25 Dal. L.J. 27 (in which an "equality seeking ethic" is proposed). The notion that "core values" of the Canadian legal profession are otherwise largely unexplored may be drawn from Adam Dodek, "Canadian Legal Ethics: A Subject in Search of Scholarship" (2000) U.T.L.J.115; and Harry Arthurs, "Why Canadian Law Schools Do Not Teach Legal Ethics" in Kim Economides, ed., *Ethical Challenges to Legal Education & Conduct* (Oxford and Portland: Hart Publishing, 1998).

[8] Changing professional culture requires more than knowledge: it also calls upon values and attitudes, as seen in other areas of reform that are also underway, such as the move toward alternative dispute resolution. See Moira McConnell, *Attitudes, Skills, Knowledge: Recommendations for Changes to Legal Education to Assist in Implementing Multi-option Civil Justice Systems in the 21st Century, A Report of the CBA Joint Multi-disciplinary Committee on Legal Education* (Ottawa: Canadian Bar Association, August 2000) at ii, in which the Chair, Dr. Moira McConnell, acknowledged that shifting the legal profession toward alternative dispute resolution "will require a more reflective and self-conscious stance on the part of lawyers in considering their personal responsibility for affecting the process of settlement."

which accord with both the letter and spirit of codified rules of professional conduct,[9] and which serve the public interest.[10]

I suggest that the public interest demands that the profession, and its members, must therefore understand contemporary social contexts, and appreciate the need to acquire the knowledge and skills that make competent practice within them possible.

III. The Social Context of Lawyering

In order to effectively discern the goals and needs of clients, advise them of their options and help them to achieve their goals,[11] lawyers of today must be capable of communicating effectively, and be able to go beyond what may be stated by the client in the initial interview in order to understand what may be motivating the client,[12] and appreciating the social contexts in which clients live, and in which they are seeking legal services.

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[9] "Whatever the nature of practice, it is now fair to say that understanding equality is a core competence for every legal professional. Just as the equality value is changing the law, so should it change our notions of what lawyers do and what professional responsibility requires." Cairns Way, *supra* note 7 at 29.

[10] The principle that codes of professional conduct are primarily concerned with the protection of the public interest is articulated in the rules of all Canadian jurisdictions: see, for example, Canadian Bar Association, *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 2006) as adopted by Council, August 2004 and February 2006) [*CBA Code*], online: Canadian Bar Association, <http://www.cba.org/CBA/activities/code>, which states in its preface that in cases of gaps, ambiguities and apparent inconsistencies in practical application, "the principle of protection of the public interest will serve to guide the practitioner to the applicable principles of ethical conduct and the true intent of the Code."

[11] This articulation of "what lawyers do" does not mean to suggest that legal practice is to be viewed primarily as a means to maximizing client goals; rather, to my way of thinking, it is more about helping to solve client problems through ascertaining their needs and interests, developing goals with the client which are meritorious, and acting ethically to achieve these goals on behalf of the client.

[12] The practice of leaping to conclusions and purporting to provide legal advice based upon the client's bald statements has been condemned as incompetent for years. See a still compelling meditation on "what clients want" in Warren Lehman, "The Pursuit of a Client's Interest" (1979) 77 Mich. L. Rev. 1078 at 1080-1081. Lehman wrote:

> The client may say, to take an obvious example, "I want a divorce." That goal of the client is a result, usually of his [sic] feeling trapped, hurt, and hopeless of any other way of coming to terms with his wife. It is not in any profound sense what he wants. …The best that can be said of a divorce is that it is not what the client wants, but only that which at the moment seems to him most likely to move him toward that interior state of comfort or satisfaction that all of us ultimately seek.

Social or cultural contexts are not capable of being reduced to checklists of sets of practices, beliefs or meanings.[13] Instead, they may be seen as a combination of these things, together with cultural identifications, life experiences and histories. This multiplicity of influences on thinking, communicating and interacting with others also

[13] See Robert J. Smith, "Culture as Explanation, Neither All nor Nothing" (1989) 22 Cornell Int'l. L.J. 425 at 428, who warns against the trap of regarding culture in this way, and instead suggests that culture "may best be thought of as a moving target rather than a fixed entity." The checklist approach may still be useful for some purposes: see Orlando L. Taylor, "The Effects of Cultural Assumptions on Cross-Cultural Communication" in *Crossing Culture in Mental Health* (D.R. Koslowe & E.P. Salett eds. 1989), 18-27, at table I, rpt. in Michelle S. Jacobs, "People from the Footnotes: The Missing Element in Client-Centered Counselling" (1997) 27 Golden Gate U.L. Rev. 345 at 413, table 1, appendix.

Blacks	Whites (Anglo-Saxon)
1. Touching of one's hair by another person is often considered as offensive	1. Touching of one's hair by another person is a sign of affection.
2. Preference is for indirect eye contact during listening and direct eye contact during speaking as signs of attentiveness and respect.	2. Preference is for direct eye contact during listening and indirect eye contact during speaking as signs of attentiveness and respect.
8. Use of expression "you people" is seen as pejorative and racist.	8. Use of "you people" is tolerated

Hispanics	Whites (Anglo-Saxon)
1. Hissing to gain attention may be acceptable.	1. Hissing is considered impolite and indicates contempt.
2. Touching is often observed between two people in conversation.	2. Touching is usually unacceptable, and may carry sexual overtones.
3. Avoidance of direct eye contact is sometimes a sign of attentiveness and respect; sustained direct eye contact may be interpreted as a challenge to authority.	3. Direct eye contact is a sign of attentiveness and respect.
5. Official or business conversations are preceded by lengthy greetings, pleasantries, and other talk unrelated to point of business.	5. Getting to the point quickly is valued.

Asians/Vietnamese	Whites (Anglo-Saxons)
4. It is not customary to shake hands with persons of the opposite sex.	4. It is customary to shake hands with persons of the opposite sex.

informs how clients approach legal problems, make decisions and how they relate to the legal system and lawyers.[14]

Current Canadian society includes aboriginal peoples, recent immigrants from all over the world,[15] as well as long-standing communities of people from many racialized[16] groups and cultures. "Culture" is now understood to refer not only to religious, racial, or ethnic customs, beliefs, values and institutions, but also to social groups created by disability,[17]

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[14] *Ibid.* at 191. Common to the experiences of people from racialized communities, immigrants, refugees, people with disabilities, and those living in poverty, is the experience of inequality, due to racism, sexism, able-ism, and other forms of injustice: see Ann Curry-Stevens, "Expanding the Circle" (Toronto, Centre for Social Justice, 2005) at 14, online: Centre for Social Justice <www.socialjustice.org>.

[15] Recent immigrants tend to be from different areas of the world than Canada's traditional sources of immigration. Census data shows that the group of immigrants who arrived during the late 1990s came from different nations, and spoke different languages, than those of the late 1960s. See Statistics Canada, *Explaining the Deteriorating Entry Earnings of Canada's Immigrant Cohorts: 1966 to 2000* (Ottawa: Statistics Canada, 2004), online: Statistics Canada <http://www.statcan.ca/Daily/English/040517/d040517a.htm>.

See also, "[b]etween 1965 and 1969, 70% of Canada's immigrant men were born in the United States or Northern, Western or Southern Europe, and only 21% in Eastern Europe, Africa or Asia. By the late 1990s, these proportions had almost reversed." In Windsor and Essex County, for example, census data analysed by United Way Windsor noted that "[t]he growth in the visible minority [sic] population in Essex County was 40%, and 42.5% in Windsor between 1996–2001." (*Fact Sheet: Immigrant Populations in Windsor and Essex County,* July 2003, on file with author; raw data Statistics Canada, *2001 Community Profiles* (Ottawa: Statistics Canada, 2002), online: Statistics Canada <http://www12.statcan.ca/english/Profil01/BP01/Index.cfm&Lang=E> (accessed June 19, 2006)). These relatively rapid and recent dem ographic changes are believed to account in part for the "gap" between lived realities of racialized groups and beliefs and values of mainstream Canadians.

[16] The term "racialized," which conveys the notion that race is a social construction, is preferred, in the Working Group on Racial Equality in the Legal Profession, "Racial Equality in the Legal Profession" (Paper presented to the Council of the Canadian Bar Association, February 1999) at vi, online: Canadian Bar Association <http://www.cba.org/CBA/cba_reports/RacialEquality.pdf>, over terms such as "visible minority" or "racial minority" which "rely on physical appearance to identify members of a group and assume that the group is outside the majority community." The Report adopts the term "people from racialized communities," which "focuses on vulnerability to racism and refers to a community of individuals who may have individual experiences of racism and who are collectively vulnerable to racism because of the way institutions define and treat them."

[17] See ARCH Disability Law Centre, "Providing Legal Services to Persons with Disabilities," online: ARHC Disability Law Centre <http://www.archdisabilitylaw.ca/publications/law/A73_2003_000595/index.asp>, ch. 11 Bar Admission Materials (BAC 2004).

class,[18] nationality, age, "sexual orientation, physical characteristics, marital status, role in family, birth order, immigration status, religion, accent, skin color or a variety of other characteristics."[19] Through these cultural perspectives, individuals "may perceive events and ideas in different ways."[20]

In turn, the legal system and the legal profession must also be recognized as the cultural institutions they are, informed by dominant thoughts, communications, actions, beliefs, and values.[21] While the legal profession itself is much more diverse in 2006 than it has been in the past, it continues to be predominantly comprised of individuals who are privileged in Canadian society, namely: white,[22] male,[23] able-bodied[24] and from middle-class family backgrounds.[25]

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[18] Limited education, reliance on social assistance, subsistence employment, exposure to violence and environmental degradation are some of the "lived realities" of these groups. See *ibid.* at 1.2 ("persons with disabilities are about half as likely to have a university education as persons without disabilities").

[19] Susan Bryant, "The Five Habits: Building Cross-Cultural Competence in Lawyers" (2001) 8 Clinical L. Rev. 33 at 45. For others, including "education, faith tradition, geography, craft, profession and economic status," see Phyllis E. Bernard, "Can Character be Taught? Professionalism When the Going Gets Tough" (Paper presented to the AALS Workshop on Clinical Legal Education, 14-17 May 2003).

[20] See Ellen Hemley, "Representing the Whole Client" in *Poverty Law Manual for the New Lawyer* (Boston: National Center on Poverty Law, 2004) at 191, online: Sargent Shriver National Center for Poverty Law <http://www.povertylaw.org/poverty-law-library/research-guide/poverty-law-manual/hemley.pdf>.

[21] Many of these cultural practices are instilled through legal education, and through practice in particular legal settings. See Rose Voyvodic, "Re-imagining Legal Ethics After Touchstones for Change" in Elizabeth Sheehy and Sheila McIntyre, eds., *Calling for Change: Women, Law and the Legal Profession Ten Years After Touchstones for Change* (Ottawa: University of Ottawa Press, forthcoming); and Rose Voyvodic, "Change is Pain: Ethical Legal Discourse and Cultural Competence" (2005) 8 Legal Ethics 55.

[22] See Michael Ornstein, *supra* note 2, which concludes that the legal profession across Canada is 94.2% white and within Ontario is 92.7% white, as cited in Charles Smith, "Who Is Afraid of the Big Bad Social Constructionists? Or Shedding Light on The Unpardonable Whiteness of The Canadian Legal Profession" (Paper presented to the Fourth Colloquium of the Chief Justice of Ontario's Task Force on Professionalism, 4 May 2005), online: The Law Society of Upper Canada <http://www.lsuc.on.ca/media/fourthcolloquiumsmith.pdf>.

[23] See F. M. Kay, C. Masuch, and P. Curry, *Diversity and Change*, *supra* note 2.

[24] *Ibid.*

[25] The following anecdote is contained in F. M. Kay, C. Masuch, and P. Curry, *Diversity and Change, supra* note 2 at 37: "More attention needs to be paid to the effect of socio-economic class. This is becoming a larger source of problems than racial or sexual discrimination. High tuition fees keep out poorer students or affects ability to do public interest work. Heavy competition for few articling placements of any quality is unfair to

As this demographic reality suggests, lawyers are not representative of the larger Canadian society, and, depending on the type of practice they have, may not share the life experiences of many of their clients. Furthermore, although it is true that many lawyers who are women, members of racialized and ethnic communities, and/or persons with disabilities report having experienced or witnessed harassment or discrimination,[26] it is also true that most lawyers, on the whole, are unlikely to have recognized these events, and therefore have not had direct experience of inequality. Because most lawyers lack this subjective knowledge of the reality of discrimination, they are more likely to believe it is less serious of a problem, or less pervasive, than do their potential clients who are women, members of racialized and ethnic communities, gay, lesbian, poor, unemployed and/or persons with disabilities.[27]

When lawyers and clients come from different cultures, they "face special challenges in developing trusting relationships in which genuine and accurate communication can occur."[28] These challenges can be overcome through the acquisition of skills, such as relaxing the judgmental stance, remaining present with the client through listening and attending, rapport building, working effectively through interpreters, and self-monitoring (to learn from mistakes through reflection), all of which facilitate lawyers' capacities to communicate accurately.[29] However, such skills are not yet specifically enumerated in taxonomies set out in Canadian

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those who lack the connections, and who were barred from volunteer work due to the need to earn money, whose marks were affected by poor diet, poor accommodation, lower ability to afford supplemental study material, and who have less time to study due to the need to earn money. It is extremely difficult to overcome disadvantages of being lower class. Too high a concentration of lawyers from higher classes may affect quality of profession, e.g. willingness or passion with which needs of poorer clients are met." (Case # 4529: male, associate in a small law firm).

[26] *Ibid.* at 62-67.

[27] A 1992 survey of Toronto residents found 15% of respondents to be "non-racist," while another 15% were classified as "openly racist" and the "remainder show various degrees of racial intolerance." Elliot and Fleras, as cited in Alma Estable, M. Meyer & G. Pon, *Teach Me to Thunder* (Ottawa: Canadian Labour Congress, 1997). The *Vancouver Sun* reported, "[m]any Greater Vancouver residents blame certain visible minorities for most of the crimes in their communities, but police and academics say the statistical evidence contradicts such racial stereotypes." Maurice Bridge and Jonathan Fowlie, "Almost two-thirds of respondents blame ethnic groups for crime; police say whites commit the most" *The Vancouver Sun* (16 March 2006), caption.

[28] Bryant, *supra* note 19 at 42.

[29] See Legal Services Training Consortium of New England, *Representing the Whole Client* (Boston: Legal Aid University, 2001) for useful descriptions of cross-cultural communication skills, online: Sargent Shriver National Center for Poverty Law <http://www.povertylaw.org/poverty-law-library/research-guide/poverty-law-manual/hemley.pdf>.

rules of professional conduct.[30] In the next section of this paper, I will demonstrate how it is possible to "read cultural competence in" to these rules as a reflection of the core values of the profession, and as a necessary ingredient of the "skills, attributes and values" of lawyer competence.

IV. Locating Cultural Competence in the Rules of Professional Conduct

Legal ethics education is currently understood to require an approach that "goes beyond the mere learning of ethical rules of the profession and acceptable roles required by the adversarial system."[31] Much of the criticism of a rules-based approach to learning ethics focuses on the vague nature of rules, notwithstanding their unattainable promise of "certainty, predictability and enforceability."[32] Indeed, even in the rare instances where rules of professional conduct *do* contain explicit references to considerations of client "difference," as in the example of Ontario's requirement that appropriate counseling be provided to clients with an impaired decision-making process,[33] there is no specific or "adequate guidance" or even a description of what competent service would look like.[34] This vague treatment brings to mind the oft-quoted notion of rules of conduct being as useful to a lawyer as a Valentine's Day card in an

[30] Neither are they taught in all Canadian law school, bar admission or continuing education courses which address ethics, advocacy and the lawyering process, based on the author's informal survey of such course outlines posted to the internet. There are, however, some notable exceptions, as in the "optional" program offered by the Law Society of Upper Canada through ARCH, *supra* note 17. Some specific learning strategies which might be incorporated in these courses in order to overcome this neglect are addressed in Part VI.

[31] Donald E. Buckingham, "Rules and Roles: Casting Off Legal Education's Moral Blinders for an Approach that Encourages Moral Development" (1996) 9 Can. J. L. & Juris. 111 at 111.

[32] Alvin Esau, "Teaching Professional Ethics and Responsibility at Law School: What, How and Why?" in Roy J. Matas, Deborah J. McCawley, eds., *Legal Education in Canada: Reports and Background Papers of a National Conference on Legal Education held in Winnipeg, Manitoba, October 23-26, 1985* (Montreal: Federation of Law Societies of Canada, 1987) at 317.

[33] See Law Society of Upper Canada, *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, 2005) [*LSUC Code*] at Rule 2.02(6), online: The Law Society of Upper Canada <http://www.lsuc.on.ca/regulation/a/profconduct/rule2/>. This rule requires the lawyer "as far as reasonably possible" to maintain a normal lawyer and client relationship if the client's "ability to make decisions is impaired because of minority, mental disability, or for some other reason."

[34] See Diana A. Romano, "The Legal Advocate and the Questionably Competent Client in the Context of a Poverty Law Clinic" (1997) 35 Osgoode Hall L.J. 737 at 759, where it is argued that the rules should "assist the legal advocate in determining if the client is able to understand their legal situation and what to do where incompetency is suspected." Even where an advocate suspects "incompetency" on the part of the client, s/he may have no knowledge or awareness of the reality of living with a disability, including mental

operating room.[35]

However, an example of a rule and commentary providing useful guidance may be found, interestingly, in those now enacted by the CBA and many provincial and territorial law societies which require that lawyers respect the laws relating to discrimination and harassment "on grounds including, but not limited to, an individual's ancestry, colour, perceived race, nationality, national origin, ethnic background or origin, language, religion, creed or religious belief, religious association or activities, age, sex, gender, physical characteristics, pregnancy, sexual orientation, marital or family status, source of income, political belief, association or activity, or physical or mental disability."[36]

The anti-discrimination, anti-harassment rules, while controversial at the time they were introduced,[37] have certainly resulted in law firms adopting policies and engaging in diversity training.[38] Codified sanctions, however, have not been able to completely eradicate discrimination and harassment of lawyers by law firms, nor always protect clients from diverse communities. The Ontario Discrimination and Harassment Counsel (DHC) reports that members of the public have accounted for

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illness, and may be ill-equipped to determine what "competency" on the part of the lawyer entails. See also Michael L. Perlin, "You Have Discussed Lepers And Crooks: Sanism In Clinical Teaching" (2003) 9 Clinical L. Rev. 683 at 686, where he discusses "sanism," which he describes to be "as insidious as other 'isms' and is, in some ways, even more troubling, because it is largely invisible, to a considerable degree socially acceptable, and frequently practiced (consciously and unconsciously) by individuals who ordinarily take 'liberal' or 'progressive' positions decrying similar biases and prejudices involving gender, race, ethnicity and/or sexual orientation. It is a form of bigotry that 'respectable people can express in public.' Like other 'isms,' sanism is based largely upon stereotype, myth, superstition and deindividualization."

[35] Gavin MacKenzie, "The Valentine's Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession" (1995) 33 Alta. L. Rev. 859.

[36] See CBA Code, *supra* note 10, Chapter XX. For example, the use of "lists" of some frequently encountered types of sexual harassment ("…jokes…leering…sexually degrading words…") is helpful in conveying what sexual harassment is.

[37] One Ontario lawyer infamously submitted, on firm letterhead, the following response to a rule which simply restated the existing legal requirement of the Ontario Human Rights Code: "If you pass this rule, I will not obey it." Carole Curtis, "Alternative Visions of the Legal Profession in Society: A Perspective on Ontario" (1995) 33 Alta. L. Rev. (No.4) 787 at 789.

[38] However, despite these efforts, articling interviews are reported to continue to be "as nightmarish an experience for students from equality-seeking communities as they were twenty years ago. Women are routinely asked about their personal lives, and when and if they intend to have children, while students from racialized communities are routinely asked how they intend to deal with racist clients and whether the likelihood of racist clients should be a bar to their employment." Cairns Way, *supra*, note 7 at 40.

approximately half of the complaints received against Ontario lawyers in the past several years.[39] Those who were clients (only six out of the 15 in the first half of 2005) were all women complaining about discrimination and harassment by their lawyers (three were based on sexual assault, sexist treatment or denial of service based upon sexual orientation, and three were based on failure to accommodate disability). The reports do not indicate how these clients became aware of the DHC. It would seem possible that many clients would either be unaware of the possibility of complaining or feel too overwhelmed or powerless to address this type of treatment.

The nature of the complaints documented in public documents such as the most recent DHC report leaves one with many questions. Are members of the profession who engage in overtly harmful conduct familiar with the duty to respect the laws of the land relating to discrimination and harassment?[40] Furthermore, if these individuals are "bad apples" in an otherwise respectful "barrel," what action can be taken, beyond the many efforts of the equity initiatives staff and bencher volunteers, to eradicate the possibility of conduct of this nature occurring at all? Perhaps an even more difficult question relates to those lawyers and law students who may avoid egregious behaviour but nonetheless engage in stereotyping, knowingly or not, and thus become enmeshed in the equally pernicious reality of systemic discrimination.[41]

Systemic discrimination occurs when erroneous beliefs (which may be unarticulated and unexamined) related to group characteristics result in the legal representative making assumptions (even unconsciously) about the client's needs and interests which do not arise from direct communication or objective proof, and adjusting the level or nature of service accordingly (again this may be unconscious and unintentional). Examples of such assumptions include: stereotyping recipients of welfare benefits as lazy or undeserving; immigrants from certain countries as variously too "aggressive" or "passive"; people over 60 as being "demanding" or

[39] These are mostly employees of lawyers. Clients, and litigants in cases, represented 6 of the total of 15 complaints received during the first half of 2005. See Cynthia Petersen, *Report of Activities of the Discrimination and Harassment Counsel — January 1, 2005 to June 30, 2005* (Toronto: The Law Society of Upper Canada, 2005). See also online: Discrimination and Harassment Counsel Program <http://www.dhcounsel.on.ca/pubs.html> for other annual reports and information about this program.

[40] See Petersen, *ibid.*, at 12-14 for examples of complaints from employees.

[41] See Fiona Kay, "Integrity in a Changing Profession," *supra* note 2 at 32: Racialized lawyers reported experiencing disrespectful remarks by judges and other lawyers, yet they did not identify overt tactics of exclusion and discrimination. Rather, they tended to describe the nature of bias and discrimination as subtler and at times systemic. Not surprisingly perhaps, racialized lawyers reported lower levels of job satisfaction."

"rambling"; people with mental illness as being "difficult clients."[42] Fiona Kay notes that "subtle and systemic forms of discrimination and exclusion are more difficult to isolate and sanction. Yet, their detrimental consequences for legal careers are undeniable."[43]

Systemic discrimination can only be eradicated through a shift in one's knowledge about the groups toward which stereotyping occurs. This in itself requires the desire to avoid stereotyping, which comes through attitude and values. At the heart of this work is the need to develop the skills, knowledge and values, which allow us to understand, appreciate and work competently within a diverse social context. [44]

Before turning to what learning strategies might be employed toward this end, let us first consider whether the Rules of Professional Conduct offer any assistance in articulating standards of cultural competence.

Currently in Canada, lawyer competence tends to be measured according to standards which generally define the abilities that every lawyer is expected to have in relation to legal knowledge, problem solving, advocacy, analysis, intellectual ability and practice management.[45] Because they do not specifically include cultural competence, it is therefore necessary to "read in" the skills, attitudes and values a practitioner would be expected to demonstrate.

One could in fact infer that Canadian lawyers are actually *obliged* to do this "reading in," because the Rules of Professional Conduct either require them to "protect the dignity of individuals" and recognize diversity,[46] or to guide themselves according to "the principle of protection

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[42] This description is derived from my observations of legal practice.

[43] Fiona Kay, "Integrity in a Changing Profession," *supra* note 2 at 34.

[44] The reality of diversity affects each of us (and our clients) differently, and on many different levels; it is contextual, and arises in every relationship and interactions between individuals. The legal system reacts, as do lawyers, toward clients who are "different" in complex ways. Similarly, clients react to us, or toward the legal system in complex ways. Many of these reactions between the lawyer and client are based on perceived similarities and differences, or upon assumptions (stereotypes) deriving from prior experiences (both negative and positive) with individuals who are perceived to share the characteristics of "the other."

[45] See LSUC Code, *supra* note 33, at Rule 2.01, which regulates lawyers in the Province of Ontario, which defines a "competent lawyer" as "a lawyer who has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client…."

[46] See LSUC Code, *supra* note 33, at Rule 1.03(1)(b), which requires Ontario rules to be interpreted in a way that recognizes that lawyers have "special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and

of the public interest" where gaps in coverage appear.[47]

What do phrases such as "dignity," "diversity," or "the public interest" actually mean, and what steps must lawyers take to "protect" or "recognize" them? David Tanovich argues that the evolving meaning of "the public interest" includes the understanding that lawyers must act "in the pursuit of justice." Tanovich defines justice, for the purposes of the lawyering process, as "the correct resolution of legal disputes or problems in a fair, responsible and *non-discriminatory* manner [emphasis added],"[48] and goes on to set out "minimum ethical obligations of lawyers" which include ensuring "…that your competence extends beyond legal skills and knowledge to cultural sensitivity and understanding (i.e. cultural competence)."[49]

Tanovich endorses lawyers' use of "contextual judgment," in which ethical decisions are made based upon a range of relevant factors which influence "the justice of the relevant claim and/or proposed course(s) of action including interests other than those that relate to the client," including "the nature of the client (e.g. individual or corporate entity; privileged or disadvantaged or marginalized)."[50]

This style of thinking requires a high level of cultural competence, including the use of effective self-monitoring and communication skills, to ensure the context in which discretion is being exercised (and the relevant factors) is being accurately assessed and understood. There is no doubt that situations occur in practice within a population as diverse as Canada's where lawyers who self-monitor their performance and/or ask clients or others to provide feedback to assess their own competence might be unsure whether they are sufficiently "culturally sensitive"; it is equally possible that many lawyers do *not* self-monitor their performance, nor ask clients or others to assess their performance. Indeed, lawyer competence is not described in a contextual way in the various Canadian rules for professional conduct, although it may be considered to require

democratic society and in the administration of justice, including *a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario*" [emphasis added].

[47] See *CBA Code*, *supra* note 10, at preface.

[48] Tanovich, *supra* note 7, at note 63. "Correct resolution" is considered by Tanovich to require "assessing the merit of the legal claim as seen through the lens of the law properly interpreted," and a "proper interpretation" ensures that the "provision is consistent with other substantive legal norms such as equality, fairness and harm reduction."

[49] *Ibid.* at note 66.

[50] *Ibid.* at note 135. This notion of contextual judgment is derived from William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge, Mass: Harvard University Press, 1998) at 139-149.

"communicating at all stages of a matter in a timely and effective manner that is appropriate to the age and abilities of the client."[51] However, what is meant by "an effective manner" of communication is left to the discretion (and resources) of the individual lawyer.

It would seem that ensuring the appropriate application of skills, attributes and values would require lawyers to be able to assess client needs and interests accurately through meaningful communication with the client, to plan the case in accordance with needs and interests, and to ensure that the outcome of the case relates to these needs by self-monitoring at the very least, and in some instances checking with the client and others. Yet, while in some jurisdictions Canadian lawyers are encouraged to engage in reflective practice through the use of self-assessment tools,[52] many lawyers are unfamiliar with the benefits of self-reflection, which is not a common learning strategy in Canadian law schools.[53]

Rosemary Cairns Way has traced the potential for critical self-analysis by lawyers to enhance competence on an individual level, and also to advance equality at the social level.[54] She discusses the powerful example of guidelines for lawyer representation of Aboriginal "survivors" of residential schools in widespread litigation against the Canadian government, which ran or funded institutions in which these individuals

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[51] See *LSUC Code*, *supra* note 33, at Rule 2.01 (d). This Rule, by implying that "age and abilities" may require special consideration, goes much further than the Rules of some other jurisdictions. See also, *CBA Code, supra* note 10, at Chapter II, Commentary 7, which provides examples of conduct that does not meet the quality of service required ("failure to keep the client reasonably informed; failure to answer reasonable requests from the client for information, unexplained failure to respond to the client's telephone calls," etc.), but does not suggest that client age or abilities are relevant to determining competent communication.

[52] Law Society of Upper Canada, *Online Self-Assessment Tool* (Toronto: Law Society of Upper Canada, 2006) online: Law Society of Upper Canada <https://www.bestpracticeslaw.ca/Main.cfm?Language=EN>. Note, this is available for review by members only. See also Law Society of Manitoba, *Loss Prevention Self-Assessment Checklist* (Winnipeg: Law Society of Manitoba, 2006), online: Law Society of Manitoba <www.lawsociety.mb.ca/pubdocs/checklist.pdf>, and Lawyers Professional Indemnity Corporation, *Online Coaching Service* (Toronto: Lawyers Professional Indemnity Corporation, 2006), online: LAWPRO <http://www.practicepro.ca/occ /tips.asp>.

[53] As will be discussed *infra* in the text accompanying notes 69-82, clinical legal education programs do encourage self-assessment. In the UK, reflective practice is widely used as a learning tool in legal education generally. See The UK Centre for Legal Education, "Integrating Reflective Practice into the Curriculum," online: University of Warwick <http://www.ukcle.ac.uk/resources/reflection/curriculum.html>.

[54] Cairns Way, *supra* note 7 at 45.

were physically and sexually abused after being removed from their communities and families.[55]

By way of background, in 2000 the Canadian Bar Association passed a resolution calling upon provincial law societies to pass proposed "Guidelines for Lawyers," which articulated professional standards in relation to Aboriginal clients. They called for consideration of the "vulnerability and need for healing," in solicitation of such clients, and making legal services available. They also required that "[l]awyers should recognize that damage to the survivors of Aboriginal residential schools may well include cultural damages from being cut off from their own society, and should endeavour to understand their clients' cultural roots."[56] This resolution has inspired the adoption of Guidelines by the Law Society of Upper Canada[57] that are intended "to educate and provide guidance to the profession on the Rule-based standards...applicable to counsel representing parties in residential school abuse litigation."[58]

As Cairns Way notes:

> These guidelines are exemplary of how ethical practice is informed and transformed by an operationalized equality principle. They particularize the circumstances of the client group that is, they counsel practice which is attentive to context. They locate the lawyer's practice obligations inside a larger social context with respect to the aboriginal community — and characterize the objective of the provision of legal services in a manner which reflects that community. They are attentive to impact. They counsel respect for and inclusion of appropriate community resources. *They contextualize competence and encourage critical self-analysis*. They challenge

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[55] See Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (2000), online <www.lcc.gc.ca/>.

[56] *Guidelines for Lawyers Acting for Survivors of Aboriginal Residential Schools*, CBA National Council Resolution 00-04-A (on file at the CBA National Office, Ottawa), online: <http://www.cba.org/CBA/Sections/Abor/00_04_A.aspx>.

[57] Law Society of Upper Canada, *Guidelines for Lawyers Acting in Cases Involving Claims of Aboriginal Residential School Abuse*, online: <http://www.lsuc.on.ca/media/guideline_aboriginal_res.pdf>. They were the product of a working group of LSUC Benchers Judith Potter (chair), Stephen Bindman, Tom Carey and Avvy Go, and staff of the Equity Initiatives Department. The LSUC reported in October 2003 that "the Yukon Territory has adopted the CBA Guidelines. Nova Scotia posted the CBA guidelines but did not formally adopt them. Newfoundland considered rule amendments but decided they were not needed, as did Alberta. British Columbia reviewed the Saskatchewan rule and consulted with the CBA Aboriginal Law Section, but decided not to amend the rules…". Jim Varro, *Report to Convocation* (Toronto: The Law Society of Upper Canada, 2003) at 44, online: The Law Society of Upper Canada, <http://www.lsuc.on.ca/news/pdf/convsept03_prc.pdf >.

[58] *Ibid.* at 32. The guidelines are careful to note that they are "advisory in nature, and meant to be educational."

> lawyers to learn about and be respectful of the client's community — not only for the lawyer representing the client but for all the lawyers involved. The guidelines model an approach to client service which is broadly applicable, not in the sense that all clients will have these particular needs — but in the sense that they establish a protocol for thinking about client service in a way that has the potential to incorporate equality. It is a protocol that reflects the equality value emphasizing context, impact, critical thinking and systemic analysis.[59] [emphasis added]

Guidelines of this nature also offer professional recognition at an institutional level of the need for enhanced responsiveness to the social context on the part of lawyers.

V. Contextualizing Competence: A Matter of Perspective

I will now consider whether guidelines might be analogized to lawyer competence in general, that is, in contexts other than residential school litigation. The guidelines convey an approach that encourages learning about the client's community, being respectful toward that community, and attending to the need of the client within the context of that community (providing legal services in a manner which *reflects* the community). The guidelines also recognize the cause of the pursuit of justice explicitly, and shape the approach to be taken around that cause.

I suppose the competent lawyer operating according to these guidelines is mindful, in active and conscious ways, of the social context in which the lawyering is being done, and demonstrates respect for and attention to client needs which are both articulated by the client and implicit in the context and the cause of justice which must be understood by the lawyer.

I imagine the client to be a man who was taken from his family and community as a young boy and placed in a residential school worlds away. I imagine that he was made to wear clothes that were unfamiliar, to sit at desks and in rooms unlike anything he had experienced at home, made to speak a new language, have his hair cut and comply with commands or risk physical punishment. I imagine that his emotional upheaval was unspeakably great.

I imagine the lawyer spending adequate time reading, listening, and thinking about residential schools, life as it existed in the family and community the client was taken from, what the client experienced in the residential school and afterward, as well as what resources exist in the community for healing and recovery. Such a lawyer takes an approach that

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[59] *Supra* note 7 at 45.

adopts two related perspectives: the perspective of the client (What happened to him? What does he want to see happen now? What does he want? What is his relationship to his community now?), as well as the "pursuit of justice" perspective (How does the client's story relate to the overall story of residential school abuse? What are the client's "cultural roots"? What does the community need? What can the community do for the client?).[60] Finally, this lawyer reflects on her own role as representative of the client (Am I performing in a competent manner? Do I understand the client's needs?).

The guidelines for lawyers representing survivors contextualize competent client service around the perspective of the client. Similarly, in other practice settings, cultural competence would include: demonstrating respect for diversity and understanding of the social context of the client's community, providing culturally responsive and appropriate services (e.g., openness, sensitivity, recognizing culturally based practices and values, using appropriate translation and interpretation services), and responding to needs regardless of the culture of the client. It would also incorporate critical self-analysis.

Because every lawyer is a product of a society in which stereotyping and assumptions related to cultural attributes are rife, he or she must also assess his or her own needs and interests in this respect, ranging from the need for enhanced education and awareness about diversity, to the need for skill development, to confronting value clashes which may require deeper reflection and conflict resolution in order to ensure readiness and competence to work with members of diverse populations.

Guidelines for cultural competence must recognize the destructive role played by stereotyping, power and privilege in both the lawyer-client relationship,[61] and within the legal system generally, and provide methods to lessen these "pernicious influences."[62]

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[60] This is similar to Tanovich's reconstruction of "contextual judgment" in many respects, discussed in *supra* notes 48-49.

[61] An anecdote the author recalls from a clinic seminar class is offered as an example of how "privilege" is often unrecognized as a source of difference and unwitting assumptions: A clinic student once pointed out to her colleagues why class distinctions cannot be overlooked: she was initially surprised that her self-disclosure to a client struggling with welfare authorities that she herself received public benefits did not enhance rapport, but was instead met with anger from the client, who said "That's great for you — you are a law student and will soon be wealthy. I'm 54 years old and will never get off welfare." The student's attempt to demonstrate to the client that they shared class "realities" ignored the client's perception that her imminent entry to the legal profession conferred a privilege the student was unable, until that moment, to appreciate.

[62] This discussion of power and privilege is derived from Susan Bryant, *supra* note 19

Power and privilege must be acknowledged[63] along with stereotyped thinking as possible influences upon the legal representative's relationship with the client or the client's relationship with the decision-maker or other party to a dispute, and upon the advocate's thinking about case planning.

Knowledge about diversity work, and accompanying skill development, do not appear to be widely regarded as a necessary requisite of legal education or bar admission requirements in Canada. This may be attributable to common perceptions within the profession that it is not necessary because the legal profession is itself becoming more diverse due to increased enrollment in law schools and hiring by firms of women and other previously underrepresented groups.[64]

Another issue is the fact that one's "culture" is viewed narrowly as referring to race, ethnicity or country of origin. In fact, as was noted earlier in this paper, cultural characteristics include many more dimensions.[65] A much broader, more comprehensive understanding would allow every person insight into his or her personal cultural reality, in order to appreciate that each of us is a cultural being, and that cultural differences affect our experiences.[66]

The development of guidelines may be based upon the characteristics of the culturally competent lawyer. I propose that such a lawyer should have the following attributes:

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at 36.

[63] Power and privilege are allocated according to cultural rules, some of which are stated, but many of which are not (e.g. white skin absolutely assures people like the author that she will not be pulled over by police for no reason if she is driving a late model luxury car).

[64] "A widespread perception exists that barriers are crumbling, women and minorities are moving up promotional ladders, and equal opportunity has been substantially achieved. Whatever racial or gender differences remain are therefore attributable to individual variations in preferences and competencies…this 'no problem' problem has itself become a major problem." Fiona Kay, *supra* note 2, "Integrity in a Changing Profession" at 33-34. It may also result from the nature of law, and of the legal profession, in which professional standards (and law school texts and law itself) are written and often read without conscious reference to cultural dimensions (or social context), and tend to be viewed and considered in an acultural manner. "Acultural" does not mean "without cultural bias": many theorists have focussed attention on the myths surrounding judicial and legal neutrality/objectivity. See, for example, Mary Jane Mossman, "Feminism and the Legal Method: The Difference it Makes" (1986) 3 Aust. J. of L. & Soc. 30.

[65] See *supra* notes 18-21.

[66] See Legal Services Training Consortium of New England, *supra* note 29, which states that culture is "everything about you — the way you live, the way you view things, the way you communicate."

KNOWLEDGE: about how "cultural" differences affect client experiences of the legal process as well as their interactions with lawyers;

SKILLS: through self-monitoring, to identify how assumptions and stereotypes influence his/her own thinking and behaviour, as well as the thinking and behaviour of others, and to work to lessen the effect of these influences;

ATTITUDE: awareness of him/herself as a cultural being and of the harmful effects of power and privilege; and the willingness and desire to practise competently in the pursuit of justice.

Guidelines which encourage the development of these attributes would enhance services to the community, by improving the quality of representation, while at the same time providing lawyers with skills they may continue to develop in practice. In addition, they would further the public interest in the pursuit of justice by providing lawyers with cultural competence skills, attitudes and values that will help them to "build a more just legal system."[67]

I now propose that law schools and law societies might adopt such guidelines as a framework in which to shape curriculum, programs and activities, and measurements of success aimed at advancing cultural competence.

VI. Learning Cultural Competence

Other professions, such as social work, nursing and medicine have been leaders in recognizing the role culture plays in effective practice, and in seeking to find ways of teaching specialized communication skills and ensuring competence within their professions, beginning in university programs, and continuing in service coursework professionally, in order to increase the quality of services, and produce better outcomes.[68]

Canadian law schools and law societies have not yet adopted this approach, with the exception of some clinical law programs. There, law

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[67] Bryant, *supra* note 19 at 36.

[68] Health care professional bodies have long recognized the importance of developing skills, attitudes and values in doctors, nurses and therapists which recognize the needs and interests of culturally diverse patients and clients, ranging from securing appropriate translation and interpretation services to understanding cultural practices in order to provide adequate care. See, for example, "Cross-cultural Challenges: Improving the Quality of Care for Diverse Populations" (2004) on the Institute for Healthcare Improvement website for a discussion of the "institutional, interpersonal and intrapersonal" issues which arise in meeting these challenges, online: Institute for Healthcare Improvement, <http://www.ihi.org/IHI/Topics/Improvement/ImprovementMethods/Literature/

students often confront a steep learning curve in relation to both conceptual knowledge about the role of the legal profession in relation to poverty[69] and social justice, as well as the practical realities of their clients' lives, which often demonstrate the limitations of law's power to provide remedies.

Clinical legal education programs may offer guided reflection as a tool for learning through a dedicated seminar in social justice lawyering. Knowledge and skills learned in such a setting introduce students to many issues related to social context which are confronted in a poverty law setting, issues which reflect inequality as a result of gender and/or race and/or disability which are frequently met by students working with clients facing violence, homelessness, discrimination and despair.

Teaching this type of competence has unique challenges for clinic instructors. In addition to mastering multiple new instrumental competencies and knowledge of the substantive law in order to perform casework, the "successful clinical law student" must also quickly develop competence in communicating effectively with clients in crisis, often through interpreters, as well as other professionals.[70] After a "crash" orientation to the substantive and procedural aspects of "clinic law," students meet weekly for a seminar class.

In this class, which must be sandwiched into an already very busy week,[71] assigned readings may include articles focusing upon skills, including cultural competence and ethics,[72] and students are encouraged to

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CrossCulturalChallengesImprovingtheQualityofCareforDiversePopulations.htm> (accessed June 22, 2006).

[69] Student reactions are not to be discounted, whether they involve a feeling of being overwhelmed by the desperate circumstances of the clients ("swallowed by the lack of hope" in the words of one student) or feelings of indifference, anger, frustration and blame. In the first case, students need to be supported emotionally to find a place from which they can do their clinic work without succumbing to despair themselves. In the second case, students need to be reminded of their ethical obligations and exposed to modeled behaviour of "caring" lawyers. See Michelle S. Jacobs, "Full Legal Representation for the Poor: The Clash Between Lawyer Values and Client Worthiness" (2001) 44 Howard L.J. 257.

[70] At Legal Assistance of Windsor, for example, Windsor clinical law students work in an interdisciplinary setting in which lawyers and social workers provide a range of services to low-income people, including advocacy, public education and community development.

[71] At Windsor, students are allowed to take courses in addition to fulltime casework in the full semester program at Legal Assistance of Windsor. In addition, they may have extracurricular obligations including family and even employment.

[72] Decisions of discipline committees of law societies may be examined to highlight the limitations of the rules, on the one hand, and the promise of an ethical style of thinking, on the other. See *Merchant v. Law Society of Saskatchewan*, [2002] S.C.C.A. No. 312. This case, which is a bar disciplinary proceeding, presents a useful learning opportunity to

reflect on their own cases and experiences in the clinic in confronting issues.

In addition, teaching tools have been created in order to both help clinic students acquire the skills they need to develop, and to expose them to issues they encounter in the context of providing services to clients living in poverty. These include videotaped role-playing exercises in a course-long problem designed to engage the student in confronting practical and ethical problems; reflective writing assignments, in which students journal about their actual experiences serving clients in the clinic, as well as their simulated experiences, and in-class "games" designed to introduce the realities of living on social assistance.[73]

A central focus of the seminar course is the client-centred approach to interviewing and counseling,[74] which relates to both the goal of competent service and advancing the cause of justice. It rejects the traditional model of legal counseling in which the client "stand[s] by passively while the lawyer lays out all relevant legal considerations for the decision and indicates what decision he believes, as a matter of his professional judgment, the client ought to make."[75] This approach is a theoretical treatment of "client care" which explicitly seeks to enhance client autonomy and empowerment. It also implicitly challenges the advocate to seek to understand the client's needs and interests, and encourages the development and use of communication skills which can avoid constructing or pre-judging clients, in order to appreciate both the uniqueness of each client's situation, as well as the social context in which

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contrast with the LSUC, *Guidelines for Lawyers Acting in Cases Involving Claims of Aboriginal Residential School Abuse, supra* note 57. In the *Merchant* case, the panel appeared to fail to consider issues relating to cultural sensitivity, and provides an example of the limitations of codes of professional conduct which do not explicitly address cultural competence.

[73] I have used "The Poverty Game," a board game which operates much like *Monopoly*, and is designed to provide the client with the same amount of cash a typical client would receive (either a parent with kids or a single person) and then move them through situations on the board which represent unplanned for contingencies ("hot dog day" at school, requiring $10 to be paid, when there are no groceries left and the food bank is closed, etc.) as well as a similar version designed by Windsor's Taking Action on Homelessness Together, called "The Homelessness Game."

[74] This approach was developed in David A. Binder and Susan Price, *Legal Interviewing and Counseling: A Client-Centered Approach* (St. Paul, Minn.: West Publishing Co., 1979). It is also central to the approach taken in Avrom Sherr, *Client Care for Lawyers,* 2nd ed. (London: Sweet & Maxwell, 1999).

[75] Robert D. Dinerstein, "Client-Centered Counseling: Reappraisal and Refinement," (1990) 32 Ariz. L. Rev. 501 at 518.

the client's problem is located.

"Client-centredness" must also be approached in conjunction with cultural competency in order to avoid replicating cultural stereotyping,[76] by working with techniques which prioritize the perspective of the client[77] and self-reflection on the part of the student, together with "guided" practice (ideally under the close supervision of clinic lawyers who themselves are culturally competent and client-centred) in interviewing, counseling, fact investigation, negotiation and advocacy skills. In this respect, students are exposed to a reflective practicum, in which they are encouraged (and expected) to seek deeper, more nuanced understandings of "competence" than they may acquire elsewhere in traditional legal education, or through experiences in summer jobs and articling in law firms which may lack mentorship or role modeling of cultural competency.

In addition, clinical legal education offers a contextual method of teaching legal ethics. In the clinic, the student appreciates the limitations of memorizing "black letter" rules of the profession and begins to ethically conceptualize the roles required by the adversarial system.[78]

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[76] See Michelle Jacobs, *supra* note 69 at 405, who notes that cultural competence is often ignored in teaching the client-centred approach. She notes, "I propose that in conjunction with client-centered counseling, we engage in cross-cultural lawyer and student self-awareness training (CCLASS). I propose that all students, particularly those who will be working with either indigent or culturally dissimilar people, be taught how to interact with clients who differ from them.... Without that awareness, students will not be able to recognize the interpretive violence they can do [because] to understand adequately any significant cultural problems and influences that their cross-cultural clients are experiencing, attorneys must rely on knowledge previously obtained about a particular minority culture and variations within it. In many cases, attorneys will have gained this 'knowledge' primarily from stereotypes endorsed by and embedded in the dominant culture and conjecture.... Reliance on knowledge derived in this way can create barriers to effective legal counseling and can cause other serious problems."

[77] The way in which "clients" are depicted in law school exam hypotheticals and teaching materials has been critiqued as encouraging students (and future lawyers) to "construct" clients by making assumptions, sometimes based on stereotypes, about client motivation and interests. See Ann Shalleck, "Constructions of the Client Within Legal Education: Symposium on Civic and Legal Education: Panel Three: Clinical Information" (1993) 45 Stanford L. Rev. 1731 at 1737, who notes that clients who appear in ethics courses "are almost always people who want wealth or freedom and have violated or are willing to violate commonly accepted norms of conduct to achieve these goals."

[78] From a cultural competence perspective, the notorious "difficult client" is a wonderful teaching opportunity which can assist a student to uncover assumptions made, based on the client's appearance or tone of voice, which may forestall an effective interviewing approach which is sensitive to issues of difference. In this light, a supervising lawyer might discuss with the student how "withdrawing services," which might be the student's plan of action, may be carried out ethically, in conjunction with "making legal

The goal of developing an ethical style of thinking becomes very important when a student experiences the wide range of "decisions" which lawyers make with respect to a client's case, each of which can be seen to have a direct impact upon the client's life, or tell a student a great deal about the limits of law or the realities of "justice."

One key ethical topic for student consideration in a clinic seminar or ethics course which includes experiential learning is cultural competence. Sue Bryant and Jean Koh Peters have developed "five habits" which they teach to clinical law students. These habits require culturally competent practitioners to:

(1) take note of the differences between the lawyer and the client;
(2) map out the case, taking into account the different cultural understandings of the lawyer and the client;
(3) brainstorm additional reasons for puzzling client behavior;
(4) identify and solve pitfalls in lawyer-client communications to allow the lawyer to see the client's story through the client's eyes; and
(5) examine previous failed interactions with the client and develop pro-active ways to ensure those interactions do not take place in the future.

In her article describing the development of this teaching tool, Sue Bryant notes that learning such habits requires changes in communication style at three major levels: cognitive, affective and behavioural.[79] At a *cognitive* level, a lawyer with a limited or inaccurate knowledge or understanding of the client's culture might fail to test assumptions he or she is making through ignorance or misinformation. These assumptions, or the failure to test them, may also arise from a lawyer's *affective* competence (the extent to which he or she is able to control or manage emotional reactions to dealing with difference). As well, the lawyer may not be capable of the *behaviour*, or possess the skills necessary, to communicate effectively in order to identify the client's goals, or to surface his or her culturally based assumptions.

In my experience, exposure to these habits and the thinking behind them, while challenging, assists students to challenge their own thinking, and tendencies to stereotype clients.[80]

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services available," recognizing the limits of service available to clients who come to clinics, and using Rule 1.03(1)(b) (which prohibits discrimination) as an interpretive tool. See *LSUC Code*, *supra* note 33, at Rule 1.03(1)(b).

[79] *Supra* note 19 at 62.

[80] Bryant, *ibid.* at note 111, recognizes, however, that learning these skills cannot be

Understanding clients' lived realities is important to the lawyer competency that incorporates as a core value respect for the dignity and humanity of *all* clients.[81] Recognizing the challenges faced by and created by the way society and its institutions define and treat *difference,* which may be experienced as actual physical barriers, in the case of persons who use wheelchairs, or may be based upon "policies, procedures, practices and attitudes,"[82] is inherent in the development of skills required to advocate for any client.

VII. Conclusion

In this paper, I have grounded my case for learning cultural competence as an aspect of professionalism on the following premises:

1. Lawyers have the responsibility, as members of a self-regulating profession, to recognize the implications of representing members of a diverse community in a manner which protects their dignity;
2. Lawyer competence incorporates knowledge of equality law, which in turn requires an understanding of the social contexts in which inequality exists;
3. Lawyers are members of a profession which exists in the public interest to advance the cause of justice;
4. Lawyer competence incorporates the requirement that skills, attributes and values are performed capably and appropriately.

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done in one class, and unless the habits are raised in supervision "students are unlikely to engage in this kind of thinking as a routine matter…. Our experience confirms that of cross-cultural trainers and what we know as clinical teachers: learning requires practice, supervision and reflection." Habit #3 in particular (brainstorming possible reasons for client behaviour) can be used to encourage students to understand clients more fully and recognize how stereotypes can distort interpretations of client behaviour, thereby minimizing instances in which files are closed due to "losing contact with the client" when the actual reason for the client not remaining in contact with the student caseworker resulted from misunderstandings, or even illiteracy or lack of English language skills on the part of a client who may be too embarrassed to admit that the letter requesting instructions cannot be understood.

[81] See Tanovich, *supra* note 7, Part III.

[82] See *Report of the Ontario Legal Aid Review: a blueprint for publicly funded legal services*, online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch4.asp> (accessed June 22, 2006), in which it is noted that, "[u] nlike that of people of means, low-income people's relationship to government administrators and law will determine such things as their income, their housing, their health care, or their conditions of employment. In other words, the legal needs of low-income people extend across a wide range of areas because, while sharing many legal problems encountered by their more affluent counterparts, they also have… 'lives significantly different from that of the traditional consumer of legal services'."

In Canada, there is no question that the demographic reality demands that the profession adapt to an increasingly diverse client population. However, the challenge implicit in Michael Wylie's comment, in 1996, that the topic of cross-cultural legal counseling "has not received a great deal of attention"[83] appears to have been largely ignored.[84] Efforts, however, are being made on several fronts to teach self-reflective practice, in bar admission courses,[85] and in continuing legal education,[86] as well as in the clinical courses described here. This coursework advances the goal of client-centred lawyering and recognizes that self-awareness and understanding of one's own values are an integral part of reflective learning.

As has been decried often, traditional legal education does not include an abundance of experiential learning, much less either "live-client" or simulated practical experience, in which a reflective practice model may be used in teaching, for a variety of reasons.[87] As a result:

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[83] Michael Wylie, "Enhancing Legal Counselling in Cross-Cultural Settings" (1996) 15 Windsor Y.B. Access Just. 47 at 47.

[84] However, in the United States, texts used in clinical legal education that address the teaching of skills have begun to incorporate these ideas by including chapters or references to material relating to cultural competence. See G. Nicholas Herman, Jean M. Cary, and Joseph E. Kennedy, *Legal Counseling and Negotiating: A Practical Approach* (Newark: Matthew Bender & Company, 2001) at 393-406; and Martha R. Mahoney, John O. Calmore, Stephanie M. Wildman, *Social Justice Lawyering* (Minneapolis: West Publishing, 2003). See also Kevin R. Johnson, "Integrating Racial Justice into the Civil Procedure Survey Course On Teaching" (2004) 54 J. of Legal Educ. 242 at 245, who notes, that "it may be tantamount to educational malpractice *not* to touch on issues of race and class when they can be found just below the surface and often are obscured by legal doctrine."

[85] See also Ontario's new model of skills training proposed for the Bar Admission Course: *Professional Development, Competence & Admissions Committee Report to Convocation, January 27, 2005*, which responds to focus groups' ranking of "interviewing to understand problems, issues, context and goals or objectives of the client" and "advising the client about decisions that must be made and options that are available" as #1 priorities in learning how to establish effective client relationships. (See *Taxonomy of Skills,* Appendix B, online: <http://www.lsuc.on.ca/media/convjan05pdcreport.pdf> (accessed June 22, 2006)).

[86] This movement is very well documented on the UK Centre for Legal Education website, which links to many other online resources for inculcating "personal development planning." See, for example, online: <http://www.ukcle.ac.uk/resources/assessment/series.html> (accessed June 22, 2006).

[87] This may relate to a heightened sense of the distinction between the academic legitimacy of law schools as "university faculties" as opposed to "skills trainers," which has shadowed the history of legal education in Canada and continues to plague curriculum developers. See Roy Matas and Deborah J. McCawley, *supra* note 32; H. W. Arthurs, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Education in Law* (Ottawa: Ministry of Supply and Services

> … a high proportion of students graduate from law schools without any genuine exposure to a reflective practicum. In the typical law school, only one skills course is required, and it is generally the most underfunded course in the school (legal writing).[88]

If the "implicit curriculum" does not value professionalism what must be done? Explicit statements, such as mission statements, objectives of law schools or even making ethics courses mandatory may be a first step.[89] Active recognition of the social justice work undertaken by faculty, students and alumni is another.[90]

Other learning opportunities may be modeled upon clinical programs' use of professional role models to demonstrate competent performance of skills in complex practical situations through less intensive, but meaningful activities, which expose learners to lawyers in role. These might include mentorships, job-shadowing and pro bono programs which feature experienced lawyers who consider themselves professionally bound to provide culturally competent services, and who regularly confront practical challenges in doing so.[91]

Canada, 1983); Julie Macfarlane, "What Does the Changing Culture of Legal Practice Mean for Legal Education?" (2001) 20 Windsor Y.B. Access Just. 191; Rose Voyvodic, "Considerable Promise and Troublesome Aspects: Theory and Methodology of Clinical Legal Education" (2001) 20 Windsor Y.B. Access Just. 111.

88 Richard K. Neumann Jr., "Donald Schon**,** The Reflective Practitioner, and The Comparative Failures of Legal Education" (2000) 6 Clinical L. Rev. 401 at 424. Neumann is speaking in the context of U.S. accreditation standards. (Canada has no similar requirement that law school teach legal research and writing or any other skills-based courses, and while some legal research and writing instructors may actively use a reflective practice approach in their teaching, this may not be consistent even in a particular law school.) He is comparing law school to medical school (where 30-40% of students' education is dedicated to clinical work).

89 See, for example, the Objectives of the University of Windsor Faculty of Law, which include: To provide opportunities for the development of social consciousness and self-awareness by students, and to examine and develop ethical and social values… ; and in particular, to instill in…students a sense of social responsibility in the practice of law and the need for examination of social structures with a view to contributing to such changes as may ensure social justice." From an ethical standpoint, and closely related to the adoption of the law school's access to justice theme, clinical projects, both advocacy and mediation based, engage students in service-related academic settings and at the same time significantly contribute to the law school's community initiatives to address legal needs and to the student's orientation toward justice.

90 At Windsor, in 2005, students who complete a clinic placement for academic credit will be recognized, alongside competitive mooters, for their contribution to the school's community service.

91 It is important to accompany such observations with guided reflection so that the learning experience is maximized.

These learning opportunities would provide a more contextualized vision than the traditional approach to lawyering, in which, as Allan Hutchinson notes,

> The lawyer-as-hired-hand treats all clients exactly the same, in the sense that they are citizens who have had their rights infringed and want relief or vindication. Advocacy and action tend to be standardized and routinized. Insofar as lawyers and clients are from different cultures and classes, lawyers are expected to bridge the gap by personal empathy and professional solidarity.[92]

Even if "personal empathy and professional solidarity" were considered to be the appropriate means through which to bridge these cultural gaps, they are not subjects of study that are well covered by traditional legal education.[93] Indeed, while this deficiency in all aspects of legal education has frequently been decried,[94] change toward assuming the responsibility for shaping professional values is exceedingly slow.[95] The many studies which have been done to date, while useful as providing proof that action is needed, are, in the words of Fiona Kay, "long on policy recommendations while short on strategies for enacting effective policies or monitoring levels of progress."[96]

One strategy which may be implemented immediately is a pledge on the part of law schools and law societies to fostering the knowledge, skills and attitudes of a culturally competent practitioner among law students and lawyers in Canada today. As we have seen, a plea made to the Canadian Bar Association by Aboriginal elders resulted in the development of comprehensive provincial guidelines dealing with a specific area in which

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[92] Allan Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, 1999) at 29.

[93] See Deborah L. Rhode, "Legal Education: Professional Interests and Public Values Symposium: Law Schools and the Legal Profession: A Conference" (2000) 34 Ind. L. Rev. 23 at 36, who notes that law schools, while claiming to teach students to "think like a lawyer" in fact teach students to think like law professors, "in a form distanced and detached from human contexts."

[94] Margaret Barry, John C. Dubin, and Peter A. Joy, "Clinical Education for this Millennium: The Third Wave" (2000) 7 Clinical L. Rev. 1 at 32-38, note the potential for such an approach to encourage diversity amongst clinical educators. See Jean Koh Peters, "Habit, Story, Delight: Essential Tools for the Public Service Advocate; Access to Justice: The Social Responsibility of Lawyers" (2001) 7 Wash. U. J.L. & Pol'y 17, and Bryant, *supra* note 19.

[95] In some areas, professional leaders are taking up this challenge. See, for example, the papers arising from the Chief Justice of Ontario's Colloquia on the Legal Profession, online: <http://www.lsuc.on.ca/news/a/hottopics/committee-on-professionalism/papers-from-past-colloquia/>.

[96] *Supra* note 2 at 34.

cultural competence was needed to promote justice and equality for clients and the community in general. It is time for the lessons learned on that front to be advanced into all areas of practice, for all people.