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Validation of a Model Examining the Six Primary Methods of Influencing Lawyer's Professionalism Behaviour

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Declaration

I confirm that this is my own work and the use of all material from other sources has been properly and fully acknowledged.

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Abstract

This thesis seeks to examine the relative effect of the licensing requirements related to professionalism for the practice of law and the six behaviour influences that have been identified by the literature as being used in the context of that regulation to positively direct lawyers' professionalism behaviour. There are four direct licensing requirements and two aspects of delivery identified by the literature. Professionalism for law practice as the dependent variable has been defined for the research question as the acceptance or rejection of a client retainer in circumstances considering conflict of interest. A questionnaire and score for professionalism was created using ten questions and scoring responses as correct if the decision was consistent with court cases used to develop the questions.

An empirical study using the survey method was selected for the research. The survey was distributed across the US and Canada to lawyers and law students in available legal professional associations and law firms. The survey research and resulting data was designed and used to test hypothesis developed from the literature using two models illustrating how the six influences relate to each other and to the dependent variable of professionalism. This study was developed to specifically address the literature-identified gap of a lack of empirical research into the effect of the six influences on professionalism behaviour.

My results show that the six influences are collinear and as such, independent effects of each on the dependent variable cannot be established consistently in a single model. Rather, I show that each of the six behaviour influences impact the dependent variable of professionalism in separate estimations.

There are contributions from the research to research methodology, scale development and suggestions of more efficient management techniques. The data and analysis also provided a basis for concluding that lawyers tend to favour professional appearance over economic advantage. A lack of effect from personality and demographics was also a significant finding.

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1. Introduction

1.1 The research focus

Law firms and individual lawyers need to develop effective ways of managing for required levels of practice standards, balancing professionalism standards with efficiency in cost and access to legal services. The problem that drove the research is the recognition of the need to develop more effective and efficient means of managing for professionalism compliance in the legal profession. This led to the recognition that a better understanding of the relative effect of behaviour influences for lawyers is needed to reorient management focus and resources for this result. The maintenance of professional practice standards is a requirement for a lawyer to be licenced to provide legal services. Professionalism requires education regarding required behaviour and then ongoing management of that behaviour. This is a behaviour management challenge that requires identification of the most effective and efficient means of ensuring that legal professionals are aware of, abide by and promote the delivery of legal services in the manner required. Management techniques can only be well developed and are most effective when there is a clear understanding of how each of the behaviour modifiers available for use affects the intended behaviour and the extent to which each affects that behaviour. Developing this understanding should allow law firm management to tailor its behaviour control methods, including education, sanction, licensing and regulation, based on accentuating the more effective and minimizing the use of less effective methods. This would allow law firm management to focus available resources on the more effective methods resulting in development of programs that will best assist the lawyers to effectively deliver legal services.

The aim of the thesis is to bridge a long-standing well-recognized gap in the study of lawyers and professionalism by investigating the factors influencing professionalism behaviour and the decision-making practices of lawyers in an empirical manner. It is hoped that this aim will facilitate the start of the creation of a framework for the development of more effective law firm management techniques for the management of the risks and related costs arising from those factors which are the behaviour control measures imposed by society and the legal profession to guide appropriate professional decision making. This aim starts with creating a measurable basis for assessing effect and relative effect of the six influences on behaviour which are the factors by which professional conduct is influenced used for this study (liability, insurance, internal regulation, external regulation, reputation, professional training).

The objectives to reach this goal commence with the obtaining of a statistically supportable set of data that defines the factor measures and provides an assessable reporting standard as to the

effect of the factors affecting professionalism behaviour. This is supplemented by obtaining a statistically acceptable assessment of lawyers' perception of the effect of those influences in a manner intended to assist in management technique development by creating an understanding of the view frame of legal professionals on this issue. I also had an objective of generally assessing demographic effect with the intention of starting to develop a base for providing guidance to managers as to the relevance of, and therefore the need for consideration of, demographic characteristics in the development of management techniques, including hiring decisions and discipline or training methods.

1.1.1 Purpose

The intention of this thesis is to use the understanding developed from the data analysis as to the relative effect of the six influences (four regulatory required aspects of behaviour and two aspects of delivery of those requirements) as factors identified in the literature as being the key influences used to positively direct professional decisions to start the development of concepts to focus management recommendations and techniques on those having maximum effect with less cost. By reducing the use of less effective management techniques and increasing use of more effective management techniques, the cost to the legal profession and the cost of loss of access to effective legal services for clients can be reduced resulting in more economically efficient methods of managing for desired professional conduct. The aim of identifying and recommending the implementation of the more effective methods to manage professionalism by maximizing the use of more effective behaviour influences is to assist law practice managers and regulators to reach the societally optimum balancing of the cost, effect and benefit of the use of the factors designed to influence lawyers to behave in accordance with enunciated professional standards.

The research and understanding of the effect of professionalism conduct factors can assist in the development of law firm management, particularly as to risk management, policies and practices on a more effective basis (Davis 2008).

The research study focuses on the underpinnings of the decisions involved in undertaking the practice of law in accordance with the standards imposed by the profession. It is a study of the influences used to direct professional behaviour, with a focus on the decision of whether to accept or reject a client retainer based upon considerations of conflict of interest. This is a key decision which uses professionalism requirements but the requirement to consider professional compliance is also one with significant business ramifications. Behaviour of lawyers is guided by a set of professional standards and requirements, which require lawyers, law firms and the

profession to ensure that conduct in providing legal services meets those standards. To manage effectively for professional compliance, an understanding of the methods that are required to be used to guide and influence, force and direct, professional conduct is needed.

The management issue for law firms and the legal profession is to balance societal dictates for professionalism in legal practice with increasing demands for access to legal services, more cost-effective pricing and increased competition. Management of professionalism is an expensive aspect of legal practice and one not well understood in the terms of cost and effect. The thesis ultimately aims to improve the understanding of relative effect of behaviour influences to allow better balancing of management techniques.

1.2 Context of the research

The legal profession has been experiencing rapid change effecting the delivery of legal services, including changing ways of delivering legal services, rapid growth of law firm size and geographic scope, increased competition from paraprofessionals and technology, among others. The issues facing the profession have been consistently identified in academic literature and in public press and political process in both Canada and the United States allowing the thesis review to be conducted using sources from both countries. The legal system and basis for professionalism regulation is essentially identical in these two countries, as can be seen from a review of the professional codes included as Appendix B. While the legal systems and regulation is also consistent in most countries this review focused on Canada and the United States and recommendation is later made for geographic expansion of the study on the basis that it can be done in a consistent manner in many, if not most, jurisdictions. This can be explained by a review of books and articles on comparative law, such as Menski (2006).

> "In little more than four decades, the field of American legal ethics has been transformed from an unimportant backwater into a mighty river of legal principles that drives the practice of law in countless respects. Today, this complex matrix of substantive provisions and enforcement mechanisms ensures, to a great extent, that clients are protected from unnecessary harm, that lawyers are safeguarded from improper accusations, and that the provision of legal services is consistent with the public interest."
>
> "The current model of American legal ethics is animated by three important assumptions, each of which is now under attack. The first is that legal services are ordinarily provided only by fully licensed lawyers. The second is that lawyers are members of an exclusive profession which is subject to special obligations both to clients and the public. And the third is that entry into the legal profession requires

> extensive educational preparation during which all new lawyers are introduced to fundamentals, including the rules of professional responsibility."
>
> *(Johnson 2013)*

In order to ground the research in an understandable, definable context, conflict of interest decisions, a key element of professionalism in legal practice, was selected for study. It is a factor in professional behaviour well recognized, constantly exercised and discussed extensively in the literature such as by Shapiro (2002) and the professional codes included as Appendix B. The research and understanding of the effect of professionalism conduct factors can assist in the development of law firm management techniques, particularly as to risk management, policies and practices on a more effective basis (Davis 2008).

> "To be sure, conflict rules are at the core of the lawyer-client relationship and have always been central in lawyers' ethics."
>
> *(Whelan & Ziv 2012,)*

This key tenet of professional standards, being avoidance of conflict of interest, is of current interest in the profession because the need for avoidance of conflicted retainers is being questioned by the literature as to need and cost. The legal profession and individual lawyers accept the premise that a lawyer should not act on a retainer in circumstances where they have a conflict of interest, either among clients or as to personal interest with a client (Painter 2001). Accepting a retainer when in conflict is at odds with the requirement that the lawyer be in a position of being able to fully and freely provide independent advice and zealous advocacy. The profession has continuously accepted this as a cornerstone of professionalism and lawyer's professionalism requirement in ethics of duty, aspiration and personal conscience (Hamilton & Monson 2012). Despite this recent questioning of need, this thesis does not question the requirement for this professional tenet but, because of the growing focus on need for increased access to legal services at accessible cost, examines whether the behaviour influence methods by which the decision making for this decision has been managed to provide the most efficient and effective result, positively affecting decisions for the profession, society and for individual practitioners. There are six behaviour influences identified by the literature as is discussed in detail in Chapter 2: Literature Review and Chapter 3 at 3.3 The Variables as Concepts and Measurements. The most extensively discussed is the use of personal liability for professional error. The literature, in particular "law and economics," has identified that use of personal liability as being economically inefficient for controlling desired behaviour (Schwartz 1985, Wolfram 1997, Williams 1992). It is therefore important to understand whether that imposition of liability has such a benefit in terms of controlling the delivery of professional services as to

justify maintaining that inefficiency or whether the other of the six methods deliver as effective a result on a more efficient basis.

These six identified behaviour influence methods are extensively and clearly discussed in the literature as outlined in the Chapter 2: Literature Review and consist of the following:

- Exposure to personal liability,
- Cost and availability of insurance coverage,
- Regulation external to the profession through courts and administrative bodies,
- Regulation internal to the profession through its regulatory bodies,
- The desire to preserve professional reputation for firms and individuals, and
- Training in professionalism.

If the intention of the factors, particularly that of imposing liability risk on professionals, is to influence ethical and management decisions within law firms and encourage a better decision-making process, it is important to understand how those professional services firms are managed and how and why lawyers react to liability risk relative to other regulators of behaviour.

The nature of the discussion of the literature in the three disciplines is such that the hypothesis of each needed to be developed from the statements of conclusion as to the relative effect of the influences. The statements of hypothesis that follow were developed using the key statements of the leading authors in the discipline and coalescing them to a hypothesis statement.

The three conflicting hypotheses that were developed from analysis of the literature are stated as follows, the literature basis for the development of the hypothesis identification and development follow in the detailed literature discussion in Chapter 2 and particularly in Table 2.1 that links the focus of the literature for each discipline with the predominant conclusions:

1. Law and Professionalism: Hypothesis: The imposition of personal liability and the requirements of insurance are the most effective factors positively influencing lawyer professionalism decisions. See Table 2.1
2. Law and Economics: Hypothesis: The use of regulation, by the profession and external bodies (courts, administrative bodies), are the most effective factors positively influencing lawyer professionalism decisions. See Table 2.1
3. Behavioural Economics and Law: Hypothesis: The personal factors of concern for reputation and the effect of training and peer influence are the most effective factors positively influencing professionalism decisions. See Table 2.1

Introduction

I developed my hypothesis by evolving a nuanced and contextual analysis of the literature, extensive pilot and discussion with experts and then the results of this research. It recognizes the effect among influences and reads as:

Each of the six behaviour influences has a significant effect on the other which must be understood before the effect of each on the dependent variable, the professionalism decision, can be assessed.

The research undertaken for this thesis is a behavioural study. It is a study of the influences used in the regulation of the legal profession both as formal regulation and as the result of the interpretation of the standards set for licensing and concern for being a member of in the profession. The influences are variously discussed in the literature, and in the professional standards, public press and regulation guidance, as methods, means or regulation when describing the same requirements for professional conduct. I have used the expression influences to be most consistent with more general social science examination of similar means of directing behaviour. The "influences" have been defined as the independent "factors" for this study (Miniard & Cohen 1983). The definition of the influences as factors was done with a focus on the professionalism of the business decision of whether to accept or reject a retainer based upon considerations of conflict of interest. The behaviour studied is the decisions involved in undertaking the practice of law in accordance with professional standards using the conflict decision, which is one made at the time of client intake and therefore is a decision considered effectively daily in legal practice (Chambliss & Wilkins 2002, Richmond 2019). The behaviour related to conflict of interest choices is guided by a set of professional standards and requirements that require lawyers, law firms and the profession to ensure that the conduct of legal practice meets those standards. In order to manage for that effect of compliance, it is useful to understand the influences and resulting methods that are used to guide and influence, force and direct, professional conduct. The academic literature on the topic of professional compliance says the methods are the six independent variables that are examined in this research. See Chapter 2 and the extensive discussion of the literature on this point. Effective management of behaviour for compliance requires that each of those six influences are understood as to their purpose, how they work in application and the relative effect of each. Failing to understand the influences and resulting methods in this way will result in inefficiency in management of lawyers, law firms and the interface of lawyers with the profession, courts, administrative bodies, clients and related businesses.

There are three disciplines of study actively and directly looking at lawyers' professionalism and behaviour influences on professionalism of lawyers, each field generally reaching conflicting

conclusions as to the effect and relative effect of each factor, which is recognized to be flawed by the absence of empirical studies and quantitatively tested results. See Table 2.1. The result has been a debate without empirical support, and therefore without an examination of quantified results underlying the speculation of each of the disciplines of academic study as to the relative effect of the influences on professionalism. More recent writing on the management of legal professional conduct in the three disciplines is bringing together the previously differing views now suggesting a more forward-looking training-based management approach (Fortney 2016). This supports both the behavioural economics and law perspective but needs the assessment of the relative effect of the factor influences to do so in a validated manner.

By examining the quantitative data collected from the survey, and its analysis, this study sought to test the models developed to explain the theories of these three disciplines. The model best supported by the data from the study results demonstrates that each of these three disciplines in academic research has validity and support as to their identification of primary influences that affect professional behaviour and choices. However, the research results indicate that none of the three disciples fully and accurately assess the relative effect of the factors nor how lawyers react to these behaviour influences. There is also no discussion of the effect of how lawyers' self perceive those influences as affecting their professional choices. The data and analysis indicate that the theories of the three disciplines have validity in this era of modern legal practice, but that each requires modification to take into account the reality of personal responses by lawyers in their professional environment, which results in behavioural economics discussion best reflecting the reality of lawyers' response to the behaviour factors.

1.2.1 Other professions

The enquiry of the research is specifically as to the requirements for licencing and professional standards to practice law in North America and their effect on professionalism in the legal profession. A person may not deliver legal services in any jurisdiction in North America without holding a licence issued by the provincial (Canada) or state (United States) authority governing lawyers and law practice, reference should be had to the materials of each state and province law society or bar association for the specifics in each jurisdiction as to the licencing requirements and professional standards but it is noted these are highly consistent (Robbenholt & Sternlight 2013). The American Bar Association for United States practicing lawyers (Model Rules of Professional Conduct, current version 2020 and adopted as uniform law in all states) and the Canadian Bar Association for Canadian practicing lawyers (CBA Code of Professional Conduct, current version 2019, adopted by the Federation of Law Societies and all provinces have adopted in substantial compliance) have each provided nationally consistent

professional codes of conduct and standards that have been adopted as the requirements for professional conduct across all of the jurisdictions in those countries, demonstrating a consistency of required conduct and regulation (relevant extracts are included at Appendix B).

Other professions, such as accounting, medicine, engineering, and dentistry, have professional standards and requirements, however, the nature of the professional services for each dictates very different standards and behaviour requirements and influences, each has its own and differing code of conduct with standards applicable to the interaction of that profession with its clients and societal interactions (Robbenholt & Sternlight 2013). The existence of general concepts of education, training, concern for clients does not translate to a conformity of standards or behaviour requirements. The enquiry of this thesis is a focused study directly on an identified gap in the literature looking at the specific behaviour influences of interest to law firm managers, as is discussed in 2.6 Noting and Defining the Gap. The existing empirical work in general behaviour modification would not contribute to the clearly defined interest in the six well identified and described influences which have not been studied empirically as such, see also 2.6. The limited empirical work in other professions, such as accounting, addresses very different aspects of a very different professional services. As an example, the principal precept of bioethics taken as a professional requirement of physicians "first do no harm" has at best a vague general connection to the concepts of client (patient) first concerns and do not translate to the same, or even similar, specific requirements which are based on the nature of the professional services. The empirical studies in accounting, the closest of the learned professions conceptually to law, do not touch on the behaviour influences of concern to law management because accounting is based on reporting for reliance by third parties creating a different duty from the client advocacy duty of lawyers. An example is discussion of accountants and ethical issues in that profession by Ward, Ward & Deck (1993) which includes comment that accountants often perceive that they are, as practitioners, more ethical than their peers and the requirements of the American Institute of Public Accountants Code of Professional Conduct. The decision was made to explore the area of interest, well defined by literature and law firm management, in a specific to law manner as best addressing the management concerns of providing professional services balanced with cost and access for legal services needs. Exploration of work in accounting and medicine did not provide useful insight to the enquiry because of the inquiry is as to a very specific interest in matters unique to law practice and law firm management and those commentaries recognizing the very different context for the delivery of the professional services.

1.3 The theoretical background of the study

Lawyers are required to practice, undertake their profession and business, under licence in a regulated environment and in a business structure that imposes personal liability (Painter 2001, Fortney 2012, Wolfram 2001–2002, Stephen, Love & Rickman 2012). These requirements add cost for lawyers and for society with much of that cost coming from ethics requirements, with conflict of interest restrictions being foremost (Macey & Miller 1997, Dari-Mattiacci & Parisi 2003, Kaplow 1992). Further, the risks and costs of regulating for compliance using influences such as liability is recognized as increasing and becoming increasingly inefficient (Zacharias 2002).

The academic literature on the topic of lawyer professional compliance identifies these six key influences that are foundational to this research. This thesis examines the relative effect of the six influences as factors used to influence professionalism and ethics behaviour and therefore decisions for lawyers, this is discussed in detail in Chapter 2.

Effective management of behaviour for compliance requires that each of the six influences and then the resulting methods are understood as to their purpose, how they work in application and the relative effect of each. The literature increasingly identifies the concern that failing to understand the influences in this way results in inefficiency in management of lawyers, law firms and the interface of lawyers with the profession, courts, administrative bodies, clients and related businesses.

Increasingly, recent research hypothesizes that some of the methods used to influence and regulate lawyer conduct are economically inefficient and increasingly imposed in an overlapping manner with several regulatory requirements being used to control the same behaviour (Hadfield 2010).

Therefore, each influence may be less effective than a better forward intervention. An extensive literature review with a focus on three disciplines looking at lawyer's professional behaviour decisions was developed and undertaken, as presented in Chapter 2. Each of three academic disciplines looks directly at this enquiry, of "Law and Professionalism," "Law and Economics" and "Behavioural Economics and Law." Each has identified a debate about the value of liability as a regulator of legal professional conduct, with comparisons to the other conduct influences, but without empirical study of the effect or effectiveness of any of the six methods used for influencing lawyer behaviour.

The decision to focus on these three academic disciplines was the identification of these three, and only these three, as holding a direct discussion of lawyer's professional requirements and the way in which the requirements are influenced and regulated.

Introduction

Professionalism for this research has been defined using conflict of interest assessment and acceptance to provide a reasonable proxy for professionalism. This attribute of professionalism was selected for a number of reasons. The extensive discussion of this professional decision in the literature highlighted its importance and interest. Conflict of interest is the leading cause of liability claims against lawyers, including specifically lack of professionalism-based claims (Booth-Perry 2012). Avoidance of conflict of interest is one of the primary professionalism requirements of legal practice making it a suitable proxy for professionalism as a general concept.

The literature reviews the several methods of influence and regulatory control over professional behaviour and provides an extensive and robust debate as to the effectiveness and value of the influences used. Regulation of the legal profession is designed to ensure that education and constrained behaviour will remain key aspects of professionalism and have positive effects as behaviour modifiers (Barton 2001). There is a negative effect and cost to professional regulation that uses tort liability as the sanction to both clients and society, coupled with an emerging perceived reduction in the need for such regulation. This evolution in thinking is increasingly being recognized as creating a need to understand the economic effect of liability sanction-based regulation (Bruck & Canter 2008).

The business management concern is that a method used to influence behaviour, such as liability, may actually not be an effective or efficient modifier of behaviour adding cost without commensurate benefit. In that case, the use of that influence with an attendant high societal and business cost should be adjusted in favour of other management methods that would likely provide a better result at more effective cost. The influence most often identified by the discipline of Law and Economics as being more effective than the others is using regulation and by Behavioural Economics and Law is the behaviour concern of reputation and to a significant extent also the personal desire to behave with professionalism. If a factor, such as liability, does operate as an effective influence on behaviour then the best extent and basis for application of the influence needs to be determined to balance the cost with the benefit. Each of the six factors considered as an influence on behaviour should be focused where it has most effect and law firm processes for managing the conduct could be designed to reflect this using different levels of application of education, policy, and degree of supervisory responsibility among other means of creating efficiency. This thesis aims to develop a better understanding of the behaviour influences on lawyer professional decisions and to thereby assist in improving law firm management techniques toward improved professionalism compliance at more effective cost.

1.4 The research design

The study was initially to be focused on interest in the problem of the cost, in multiple aspects, of the use of liability to "regulate" lawyer professional conduct. The problem had long been identified by the legal profession and the legislators regulating the profession (Manzer 1994). Early research indicated a very real need for research in this area, Cardi, Penfield and Yoon (2012) note that the literature in Law and Economics to date has largely pursued only two aims, to describe tort law as a tool to reduce tortious injuries to an efficient level and to prescribe the most effective means by which courts might achieve that end. Cardi, Penfield & Yoon (2012) specifically state, as to the shortcomings of the theories developed in this field:

> "But underneath each economic model and projection of cost and benefit lies a basic yet grossly undertested assumption — that the threat of common law tort liability in fact deters tortious conduct."
>
> *(Cardi, Penfield & Yoon 2012, p. 567)*

As further literature review was undertaken it became clear that examining only one aspect of lawyer regulation would not provide a study of best value to starting the development of management techniques for effective and efficient management of professionalism compliance. The literature mentioned, and in some cases examined more fully, other influences on lawyer behaviour that could and likely does affect the effect of liability. A very extensive literature review found six such influences discussed and debated, but no others than the six emerged in the literature as being key influences of lawyer behaviour. This is discussed in Chapter 2. The further finding from the literature review directing the evolution of the research design was a consistent theme in the academic literature, from all three of the disciplines directly and extensively considering the influences on lawyer professionalism, is that there has not been empirical study as to the effectiveness of any of the six factors used for influencing professional behaviour, despite each of the three disciplines debating the relative effect of the factors used to promote positive lawyer professional behaviour. Statements have been made, particularly by academics in Law and Professionalism, that it is not reasonably possible to complete an empirical study for reasons ranging from an inability to obtain a sizable sample to the concern that response rates and the nature of responses will not support an empirical study (Fortney 2009).

Therefore, this study addresses an identified and significant gap in the literature by using quantitative techniques to answer the following basic research question needed to start a discussion of the effect and effectiveness management techniques for encouraging best professional behaviour:

"What is the relative effect of the six identified influences acting on lawyers' professionalism behaviour and how to manage for best use?"

The aim of the thesis is to bridge this recognized gap in the study of the management of lawyer professionalism by completing an empirical study of the six factors the literature recognizes as influencing lawyer professionalism behaviour and thereby professional decision-making practices of lawyers. This is supplemented by the use of models to test hypotheses developed from the literature which the literature recognizes lack empirical study and comparative analysis. The obtaining of empirical data by the research allows the development of models to test the validity of conflicting hypotheses suggested by the literature. The application of the results of the empirical assessment of the relative effect of the six factors to an assessment of management techniques will ground further research intended to lead to recommended improvements to the management of professionalism in the legal profession (Jolls, Sunstein & Thaler 1998).

This method of study of lawyer professionalism is one that has not been identified in the literature and has been done in the face of extensive academic commentary that it may not be reasonably possible to do. See Chapter 2 at 2.6 Noting and Defining the Gap. The literature notes the lack of empirical study and speculates such study may be hampered, or even made impossible, by an inability to survey lawyers. The quantitative aspects of study completed in connection with this research, using a broadly distributed survey, has shown the academic assessments as to the inability to undertake an empirical study on this enquiry to be incorrect. An empirical study has been completed as the research and an assessment of the relative effects as a behaviour influence of the methods of regulating lawyer professional behaviour has been made in a quantitative manner with pertinent statistical results.

The three disciplines of study examining lawyer professionalism conduct, and the influences for controlling that conduct, identify the six factors which are used to control professional behaviour of lawyers to a societally determined norm as: liability, insurance requirements, regulation by the profession, regulation external to the profession, training and reputation effect. Identifying those six factors and then determining how lawyers practicing in the legal profession perceive those as relative influencers of behaviour leads to the basis for this thesis study which is done using hypothesis testing by quantitative data testing of models. The literature suggests there is a need for the use of survey-based data to identify which of the six factors has a more effective influence on the behaviour of lawyers.

Using the assumption that lawyers need to be regulated for professionalism and that there is importance in assisting providers of legal professional services to do so in a societally acceptable manner, this thesis examines the ways in which lawyers' professional behaviour is

influenced and the relative effect of those influences on professional choices and therefore behaviour. The intention is to achieve an understanding of the various methods of influencing professional behaviour and choices to provide guidance as to management of lawyers for the most economically and societally efficient means of regulating professional conduct to meet societal goals. In order to best identify the more effective influences and resulting methods of encouraging, regulating or forcing suitable professional behaviour it is necessary to understand which of the influences used has the most pronounced desired effect relative to the other influences acting on professional conduct. Therefore, this thesis has undertaken an empirical study to fill a gap, well recognized by literature, that there has not been to date an empirical study of the relative impact of influences and resulting methods of professionalism regulation for the legal profession.

1.5 My connection to the research

The manner of my development of an interest in the research adds context to the need for and importance of the research. I have practiced law in Ontario, Canada for over 40 years and have added extensive professional organization and academic involvement to the business of legal practice. Two key inflection points grounded an understanding of the problem being researched. The first inflection point in my career enhancing my interest in a study of the legal aspects and issues of professional practice and liability came with the failure of the sizeable law firm I was partner in, a sudden and very real exposure to the legal consequences of the liability influence for controlling professional behaviour. As a consequence, I was offered and accepted the invitation of a legal publisher to write a book, now the leading book in Canada, heavily cited as authority in the courts, on the legal aspects of partnership including materials on the use and risk of liability as a control of behaviour. A second inflection point expanding my interest to the law firm management of professionalism behaviour in legal practice came from writing and researching the topic of liability for professionals during a period of intense uncertainty for professionals in private practice created by the failure of the Arthur Anderson accounting firm as a result of the liability damage claims arising from the Enron audit failure in 2001. Attention was turned in many sectors throughout North America, and for that matter beyond to a global review and concern, to the liability requirement imposed on lawyers and accountants giving rise to intense political and professional review and study. I represented the Canadian Bar Association preparing for and testifying during the political review of the issue by the Senate of Canada and was a member of the joint committee formed with the Canadian Institute of Chartered Accountants to review and recommend legal changes to the liability regime. Those efforts resulted in the ability to form and use limited liability partnerships rather

than partnerships for practice, a partial shield from the effects of liability and a significant enhancement of my understating of the use and cost of liability sanction for professionals. That involvement, and the research and preparation for attending as witness at the hearings, brought to light that many aspects of the issues faced in making management of professionalism decisions were not properly understood. The materials we could prepare showed an understanding of the risks, costs and consequences of liability exposure and demonstrated the greatly increasing number and size of the damage awards in an increasingly litigious and complex arena for legal and accounting practice. What did not exist was an assessment of the effectiveness of the sanction of liability which was being examined. At best an assessment of the consequences of liability imposed on professionals could be drawn from the research and materials to that date. My personal view was at that time limited to legal cases and their financial consequences. The context for the research was my recognition of the need to develop an understanding of the behaviour aspects of the sanction to properly develop management solutions to a growing problem for the legal profession.

1.6 Chapter summary

This research aims to contribute to the existing body of knowledge on the study of lawyer professionalism related to the factors influencing legal professionalism behaviour and the decision-making practices of lawyers. This was achieved by investigation of the relative effect of the six identified influences on lawyers' professionalism behaviour using a survey-based research design. Research in this area is important for development of management techniques to use the influences on professional conduct, including direct regulation and the imposition of liability, to promote effective practices. This goal can be achieved only if the influences and their management application creates the intended reaction at a firm and individual practitioner level. The relative reaction of the professionals to the influences and resulting methods of regulating behaviour has not previously been studied empirically (qualitatively or quantitatively) leaving the current academic and professional debate on the use of liability as a behaviour modifier for lawyers without a solid foundation (Wilkins 1996).

The literature in the disciplines looking at law and professional services identified the research need of starting to develop a suitable foundation for considering the effectiveness of the multi-factor models identified, including liability as a primary influence, or proposing change to a more regulatory or education based professional environment. Schneyer (2005) suggests that it is necessary to examine if the use of liability as a behaviour tool is effective for promoting ethical conduct as compared to other behaviour modifiers.

Cost effective and broadly available delivery of legal services is essential to the future of the law profession largely because societal requirements for legal assistance have been increasing in recent years. See Chapter 2 at 2.3 Regulatory Based Behaviour Influences — Law and Economics. Creating management efficiency and a base to improve access to chosen legal assistance is key to safeguarding access to justice and also for success for practitioners in the legal profession. Regulation and liability risk for lawyers from their professional decisions imposes a cost on delivery of legal services which is passed on to persons seeking access to justice and is therefore a cost on society. It is important to know if this cost is merited which would only be the case if it properly influences lawyers to the desired behaviour set for legal professionals on a reasoned cost-benefit basis, this is particularly discussed in law and economics literature and outlined in 2.3 of this thesis.

In order to contribute to both theory and practice, the intention of this thesis is to use understanding developed from the data analysis as to the relative effect of the six factors identified that influence lawyer professional decisions and to develop concepts for management recommendations and techniques on those having maximum effect with less cost. By reducing the use of less effective management techniques and increasing use of more effective management techniques, the cost to the legal profession, and the cost of loss of access to legal services, can result in more economically efficient management methods for desired lawyer professional conduct. The aim is to reach the societally optimum balancing of the cost, effect and benefit of the use of the behaviour influence factors.

Research to improve understanding of the effect of professionalism conduct factors can assist in the development of better law firm management, particularly as to risk management, policies and practices on a more effective basis. This will assist law firms in reaching management choices that promote compliance in a cost-efficient manner, emphasizing and putting resources to reputation awareness and training for reputation effect while allowing a reduction of the focus on sanction avoidance (Davis 2008).

In summary, this study is concerned with:

- Exploring and synthesizing the literature on lawyer's professionalism behaviour influences of liability, insurance, profession regulation, court and administrative body regulation, reputation effect and training, then using that synthesis to identify how they are used concurrently for influence and control of lawyer professional decisions;

- Investigating how these behavioural influencers work together to understand their relative effect and interaction as it affects the conflict of interest retainer decision on professionalism behaviour in an empirical study;
- Identifying and recommending law firm management approaches to the use of the behaviour influences; and
- Developing a basis for determining the effect of demographic influences and self-perception on the relative effect of the behaviour influences.

1.7 Structure of the thesis

This thesis has been developed and organized in a traditional manner. Initially, there is an examination of the literature relevant to the study to review both seminal and current thinking around the subject so as to frame the key research questions. The review focused on an active academic debate regarding the relative effect of behaviour influences on lawyer professional behaviour and the clearly noted gap of a lack of empirical foundation for the debate and the hypothesis emerging from that debate. These questions, and associated variables, led to the exploration of a suitable research design appropriate for gathering the data needed to answer the research questions. These data were then analyzed using multiple statistical methods, following with a presentation and discussion of the findings. This thesis concludes with a summary of the conclusions, along with recommendations for both research and practice, along with a proposed theoretical and managerial contribution. A discussion of future research and the limitations of the study are provided.

Chapter 1: Introduction — This chapter has provided an overview of the research, including the context and theoretical background.

Chapter 2: Literature Review — This chapter examines the literature associated with this study. In this case it involves an examination of three disciplines actively engaged in intensive academic discussion and debate on point, law and professionalism, law and economics and behavioural economics and law. At the conclusion of the chapter, the research questions are set out as derived from the academic discussion noted gap and future research opportunities outlined in the literature. A particular focus on emerging literature direction is provided.

Chapter 3: The Concepts of the Factors and the Models (variable) — This chapter examines the development of the definition of the factors identified by the literature and used for the assessment of the relative effect of those influences and resulting methods by which professional behaviour is managed and controlled by firms, individuals, professional organizations and society. The independent variables, the six factors, were accordingly defined

using the concepts from the literature. Chapter 3 reviews the development of these concepts and how they were translated for scales and survey.

Chapter 4: Methodology — This chapter outlines the research methodology and the manner in which the questions, survey and survey results were developed and utilized. It also examines the basis of the sample selection, providing justification for the survey methodology.

Chapter 5: Quantitative Results and Analysis — This chapter provides the analysis and discussion of the data. It reviews the results and provides an analysis of the relative effect of each of the identified six factors. This chapter discusses the basis for analysis of this data and results across several aspects of investigation. A fulsome consideration of self-perception, demographics and application of management techniques is included.

Chapter 6: Conclusions, Limitations and Future Research — This chapter develops conclusions and recommendations for both management techniques for law firm and concepts of application to the legal profession. The contributions to academic research are also reviewed. The limitations of the study are presented as providing opportunities for future research.

Chapter 7: Personal Reflections — This chapter looks at my development as a researcher and reporter of research results in a traditional manner of reviewing the Doctorate involvement as a development journey.

2. Literature review

2.1 Introduction and overview of the literature review and background

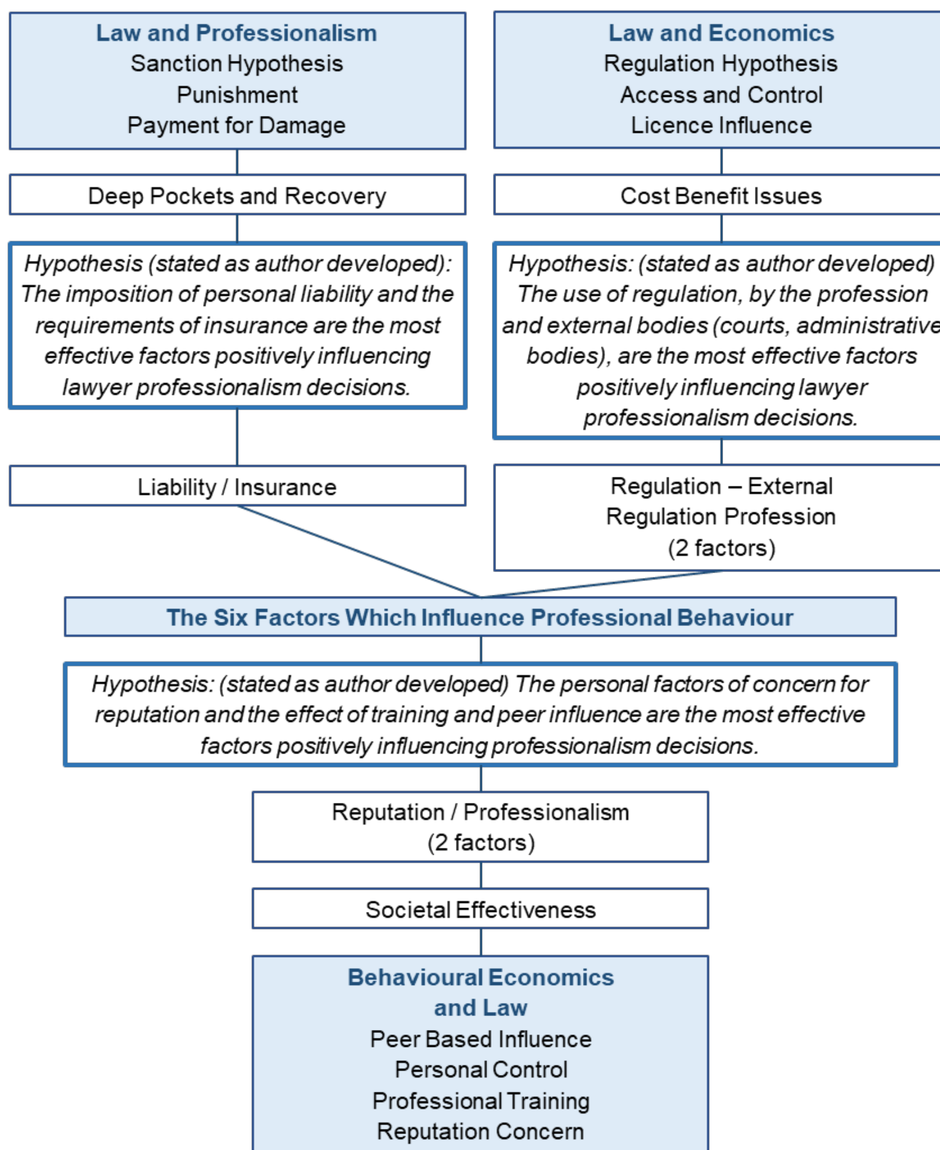
2.1.1 Introduction to the literature

There are three academic disciplines which research and write with a focus on lawyers and professionalism; these provide the hypotheses and concepts for the enquiry of this thesis. Each discipline identifies the need for quantitative research to support the favoured hypothesis by the discipline and to provide a better supported rationale for an analysis of behaviour influence factors on lawyer professional decisions. The identification, definition and basic interest of each of these disciplines is discussed later in this Chapter 2 at 2.1.2 for Law and Professionalism, 2.1.3 for Law and Economics and 2.1.4 for Behavioural Economics and Law which discusses the make up of the discipline and the sources for identifying the disciplines. The first discipline draws from the legally oriented academic research looking at issues of legal professionalism and the regulation of lawyers' professional and ethical conduct, this has been labelled "law and professionalism." The second discipline looks at issues of lawyer's behaviour and conduct in the context of considering economic consequences of the influences encouraging societally set appropriate professional behaviour, this is "law and economics." Law and economics is an economics based research discipline which looks at lawyer professional behaviour from an economic viewpoint, assessing the likely effect of economic theory on the factors affecting lawyers' professional conduct. The broader discipline of law and economics looks at the effects of law on societal behaviour using an economics lens. The sub-discipline examining law as a lawyer's interface with delivery of legal services is a robust sub-discipline with an extensive body of literature. This is discussed in the explanation of the discipline in this Chapter 2 at 2.1.3 Law and Economics. The third discipline of academic review looking at lawyer professional behaviour is "behavioural economics and law." Behavioural economics introduces the consideration of more personal influences on professional behaviour generally being the influence of peers, society acceptance, firm culture of professionalism, client reaction and training. Behavioural economics and law considers the concepts of the other two disciplines of enquiry, law and professionalism and law and economics, but introduces concepts distinct from each of those. In similar concept to law and economics, behavioural economics and law in general examines the effect of law on societal behaviour but there is a sub-discipline examining lawyers as deliverers of legal services in a profession which provides a robust discussion on lawyer behaviour as a sub-discipline. This is discussed in this Chapter 2 at 2.1.4 Behavioural Economics and Law. The debate of these three academic disciplines and the development of hypothesis by analysis of

this debate is explained in some detail later in this Chapter. The discussion in each considers professionalism as the broader topic than “ethics.” Ethics and considerations of that moral personal concept can form part of professionalism but professional behaviour and the resulting decision making is broader in concept and forms the basis for most of the academic discussion.

The following sketch is my conceptualization of the fit of the academic focus of each of these three disciplines with each other and is intended to indicate that while there is discussion of concepts from each to the others, there is little overlap in the conclusions reached as to the most effective means of influencing a lawyer’s professional behaviour in a societally required manner.

Figure 2.1: The three disciplines examining control and influence on professional conduct



(Source — Author’s Conceptualization, this does not attempt to reflect directionality of effect rather it simply sorts the three disciplines by key characteristics and predominant hypothesis)

Each of these three areas of academic interest examines the same issues and societal concerns about the delivery of legal professional services to a market which it has been believed cannot be governed by usual market forces as a consequence of an information friction between the professional delivering the services and the persons retaining the services (Hadfield 2008, Levin 1998, Richmond 2007, Levin 2007, Levin 2012, Salyzyn 2017). Societal response has been to formulate several means of influencing the professionalism standards and behaviour of lawyers. Professionalism is the broad concept of competent and honest delivery of legal services. Ethics, and its moral concepts, form part of this broader concept, but only part. Professionalism includes the requirement for competent delivery of legal services with the key concepts of independence of advice, advocacy and confidentiality. Many of the same practice requirements exist in any of the "learned professions" including accounting, medicine, dentistry and law (Levine 2012) particularly competence but many are unique by profession. This thesis examines the legal profession only, despite the background and requirements for a monopoly, license based, learned profession for the delivery of highly skilled and knowledge-based services, which is similar in each of these professions, the key tenets of independence and advocacy are unique to law. There are separate bodies of literature looking at the professional requirements and challenges for the accounting profession and medicine which provide some additional understanding for the conclusions reached by the literature and this thesis on professionalism for the legal profession, where there has been less study, but that literature provides little direct, on point, commentary. The specifics of the thesis enquiry being management of lawyers and law firms resulted in the decision to limit the focus of the study to lawyers and the legal profession, a study of more than enough scope and interest and the subject of extensive academic debate which calls for direct empirical study (Samuelson & Fahey 1990, Schwartz 1994, Fortney & Hanna 2001).

Each of the three academic disciplines examining the influence and control of professional conduct in the legal profession considers the concepts, ideas and conclusions of the others. However, each discipline reaches quite a different conclusion as to what factors provide the more effective base for influencing the behaviour of legal professionals in their interactions with society, courts, administrative bodies, each other and, primarily, their clients. This is examined and authors noted and cited in Table 2.1 that sources these concepts from examination of the literature. As illustrated in Figure 2.1 and detailed in Table 2.1, law and professionalism examines the factors used to influence behaviour and concludes that the more effective way of controlling professional behaviour is to use sanction approaches, using punishment and a requirement to pay damages as being the most overall effective means of

promoting the delivery of legal services in a professional manner. Law and economics looks at the issues from a regulation theory concept, and considering the economic basis of cost benefit, concludes that regulation, both by the profession and by bodies external to the profession is, overall, more effective than sanction. This is effectively a licensing means of control. Behavioural economics and law considers the sanction and regulation based behaviour control methods and concludes that those methods need to be viewed with consideration of personal influences including personal interaction between the professional and those they interact with in the context of the market for legal services. Behavioural economics and law uses peer influence based theory, considering the influence and effect of peer behaviour using personal reward and sanction, the development of personal control through experience and the desire to maintain reputation and professional training are considered the more significant influences on behaviour. Each of these conceptual statements is discussed in detail later in this Chapter with extensive citation to the literature and explanation of the development of the conclusions. These concepts develop from the intersection of several authors over many articles and several years, citation have to be concept by concept and this is developed in the detail of each of the relevant sections. References for the citations and the explanation linking articles to the identified the hypothesis should be had to the detailed discussion of each of 2.2 Sanction Based Behaviour Influences — Law and Professionalism, 2.3 Regulatory Based Behaviour Influences — Law and Economics and 2.4 Professional and Personal Behaviour Influences — Behavioural Economics and Law.

Effectively, this means that the focus of the three academic sub-disciplines which directly examine the factors influencing lawyer professional behaviour reach three quite different conclusions as to which factor is the more effective; one being a punishment, deep pockets and recovery approach; the second being a cost benefit driven assessment of the use of licensing regulation and the third using societal effectiveness of peer and societal influences. See Figure 2.1 for the conceptual map and Table 2.1 for the detailed mapping of the literature on the concepts stated. Each discipline's area of focus considers, and to some extent both accepts and dismisses as being less effective, the influences discussed by the others. The academic discussion and conclusion is, however, fairly consistent within each discipline, as is outlined and cited in the relevant section of this Chapter.

Each of the disciplines is looking at the same fundamental issue, that society continues to impose control over the behaviour of legal professionals on the hypothesis that professional behaviour cannot be controlled using market influences and other controls are needed to ensure

that the quality, effectiveness and honesty of the delivery of legal services is maintained to societally required standards (Levine 2012).

The three academic disciplines are consistent in stating that there has been little empirical study as to the relative effectiveness of each of the six factors they identify as influencing lawyers' professional behaviour. The writing of each of these disciplines observes there has been effectively no properly completed empirical study, particularly by quantitative analysis, of the effect of the six factors that are identified as being used for lawyer professional behaviour influence and control. While there have been some recent empirical studies by academics on limited aspects of the enquiry, the three disciplines recognize that no extensive and on point quantitative, empirically based, study of the relative effect of the influences they discuss has been completed (Fortney 1997, Cardi Penfield & Yoon 2012). This is developed as a focus for the research using the identification of the specific noted reasons in the literature for a general lack of empirical study in the study of lawyer behaviour response, as discussed in 2.6 Noting and Defining the Gap and is used to underpin the concepts of the research design particularly to limit potential shortcomings as described in Chapter 4 Methodology.

The academic discussion identifies a challenge facing the legal profession, and the practitioners within the profession, around the requirement to deliver quality, effective and honestly delivered legal services to their clients in the context of the primarily sanction based means used for behavioural control. For lawyers and the legal profession to most economically and efficiently manage the requirement for meeting professional standards, the disciplines identify a need for a better understanding of how the factors affecting behaviour of lawyers, identified by the three disciplines, relatively positively affect the desired behaviour. Each behaviour influence factor requires a very different method of management and each has a very different economic effect for the profession, its practitioners and for society and the clients seeking to access legal services. An empirical examination of the relative effect of these factors influencing professional behaviours and then how to manage for them is overdue (Iacobucci & Trebilcock 2013).

The view that conduct regulation for lawyers is required remains prevalent, but there is increasing discussion and the emergence of varying views about the general economic efficiency of many of the overlapping influences and resulting methods being used (Iacobucci & Trebilcock 2013).

The recognition of a need to introduce efficiency to conduct control has been recognized. That the three disciplines continue to examine and discuss the need for an understanding of the behaviour influences on lawyers and the need for study seeking to determine the most effective

means of ensuring quality and honest delivery of legal services, indicates that the best balancing and management of professional behaviour has not yet been achieved or even properly studied. That is the aim of this thesis, to study in the gap identified by the relevant literature.

2.1.2 Law and professionalism — summary

The discipline of law and professionalism examines the aspects of the practice of law that rest on the concepts of appropriate professional conduct considered in its definition which places professionalism in the context of legal practice, its effect on the behaviour of lawyers and the business of the practice of law. The discipline self identifies the difficulty of defining professionalism, differentiating it from morality and ethics and examining the changing context for its consideration in how lawyers engage in their profession (Rhode 2003, Hamilton & Monson 2011). The discussion oriented to lawyers and professionalism fits in the broader discipline of professionalism and the "learned professions" more broadly considered, including all of the learned occupations but with a very significant focus on the health professions. While this broader body of literature provides useful insight into the attributes forming the concept of professionalism, the very significant difference in the delivery of these other professional services and the application of those attributes accordingly mean the broader body of literature provides little direct assistance in examining the defined problem which fits in the more narrow examination of law and professionalism.

My focus and interest fit best in the large but specific body of literature looking at the issues of professionalism for lawyers, which brought into consideration professionalism in the context of legal practice and the relationships inherent in the standards for professionalism for lawyers. There is a large body of literature considering the application of external means to guide and influence the conduct of lawyers which is required by professionalism standards. The focus on the standards for lawyers and the means to influence that behaviour as a professionalism matter is extensively discussed in law and professionalism with the focus of interest providing a well-grounded basis to assess lawyer professionalism hypothesis in the context intended.

The discussion in the discipline of "law and professionalism" coalesces to the hypothesis that sanction based behaviour influences are the primary means of encouraging appropriate professionalism behaviour for lawyers. The sanction-based influences directed by the legal profession are licence based and consist of the imposition of legal personal liability and the requirement to carry insurance and the resulting rules imposed for availability of coverage (*Ribstein 1998*). These requirements are discussed in 2.2 Law and Professionalism and

illustrated by the inclusion of sample professional coded which establish practice requirements and sanctions for failure to comply what are attached as Appendix B.

2.1.3 Law and economics — summary

There is a sub-discipline of law and economics that examines the application of economic hypothesis to the practice aspects of law practice as a profession. The literature and resultant theories of this sub-discipline develop the concept that the tools of economic reasoning provide a base for justified and consistent standards for legal practice. Law and economics is formulated in the context of examining the application and effect of jurisprudence generally on society and involves the application of economic hypotheses to analysis of law with the intention that the examination will assess the rules of law for economic efficiency and to allow the promulgation of legal rules accordingly.

The sub-discipline of interest to this thesis is one of the branches of law and economics which focuses on an institutional analysis of both law practice and legal institutions with a focus on economic and social outcomes. The area of specific interest for this thesis is the study of law and economics in this context of the practice of law. This focus promotes the consideration of the practice of law as it is affected by the influences intended to promote efficient, as well as professionally sound, legal services. The lens given by the orientation of the law and economics discipline is strongly on regulation and the use of legal rules directed to legal practice.

The result of this focus is the development of the hypothesis that regulation of lawyers is the more economically and socially efficient method of positively influencing behaviour of lawyers in their practice toward the socially defined standards for professionalism.

2.1.4 Behavioural economics and law — summary

A useful definition of behavioural economics for this thesis can be taken from the OECD publication of its OECD Regulatory Policy Committee. The essence of the discipline is that behavioural economics aims to improve outcomes without using traditional command and control mechanisms by understanding the way citizens and business actually behave rather than the way economics assumes that they behave using the relationship between psychology and economics. It looks to use behavioural science to direct people to better choices (Lunn 2014).

Behavioural economists use observations to derive principles of economic behaviour contrasting this inductive approach with the deductive approach of economists. Behavioural economics is a scientific sub-discipline and the understanding of nudges (in this thesis called

influences) is the way to apply the findings of the study to policy designed to direct people toward better choices (Micklitz 2018).

Hans Micklitz helpfully considered the need to place behavioural law and economics into context. The overall argument of this discipline is that it is economic efficiency that stands predominantly behind behavioural law and economics. Behavioural law and economics seeks to formulate a critical theory on the behavioural analysis of law that reduces law to economic efficiency and cognitive psychology, forgetting about the sociology of law. This forms part of the overall discipline of behavioural economics as it considers application of a combination of economics and psychology to the effect of and reaction to law. The influences discussed in this thesis are a form of "law" applying to lawyers as it is an externally imposed set of requirements for conduct designed to guide and change behaviour.

There is a sub-discipline of behavioural economics and law that considers the behaviour and choices of lawyers in their practice of law and uses the concepts of the discipline generally as its lens on this specific enquiry. The literature then examines, in a focused way, the effect that the imposed "nudges" of the six influences have on lawyers' reaction in making professionalism decisions considering the integration of both economic hypothesis and psychology.

The result is the development of the hypothesis as to the effect of behaviour influences that adjusts the hypothesis of law and professionalism and law and economics, discussed previously. The hypothesis developed from the discussion of Behavioural Economics and Law is based in the concept that lawyers' reactions meld a psychological desire for professionalism manifested through reputation and appearance with the economic realities of the business of the practice in a nuanced way. The observation from the research results, discussed later in this thesis, is lawyers will favour a response to those influences which create a positive view of reputation and training over the more sanction-based influences much of the literature has theorized to have more influence as is discussed through Chapter 2.

2.1.5 The research gap

The three disciplines examining the concepts and hypothesis relevant to the identified problem of understanding lawyers' reaction to the behaviour influences acting on professionalism discuss the same six influences imposed on lawyers' professionalism behaviour but to three different conclusions. They to varying degrees examine and agree what the six influences are but the three disciplines differ in their relative assessment of the importance and effect of each. What the three disciplines consistently agree on is the gap as being the lack of empirical examination and evidence as to the relative effect of the six influences.

2.1.6 Overview of the chapter

This literature review discusses and highlights the three disciplines examining lawyer professionalism and includes with the presentation of the literature assessment of the gap and need for research as to the problem which I identified. This problem, the interest I developed and the gap all created the frame for the research of this thesis study.

The literature review is presented by review of the three disciplines examining lawyer professionalism as influenced behaviour and the emphasis and hypothesis of each. This review was necessary to identify and define the concepts that underlie the problem. It is first necessary to understand the six influences that are imposed on lawyers for professionalism behaviour. It is also necessary to understand the debate and lack of a hypothesis that brings resolution as to the relative effect of those influences, because understanding that is needed for effective management of the use and risk of the six influences. The literature has self defined a gap of a lack of empirical research and that definition of a need for better understanding the relative effect completes the basis for the review. This sets the stage for the philosophy underpinning the research and then the construct of the variables as concepts and then measurable factors.

The leading authors in each discipline are reviewed and organized as against both discipline and hypothesis of the relative the effect of sanction, regulation and behavioural elements. A broader study of professional services was considered and done as background to developing the research question but the identification that the problem needed a directed review of the specifics of the influences in the context of legal practice resulted in not using this broader examination for furthering the objectives. Similarly, the broader examination of the disciplines outside of legal practice did not contribute focus and further understanding, and it did not provide hypotheses, models, constructs or scales relevant for the problem and the objectives. The literature in the disciplines examining specifically the application of the concepts of the discipline on professionalism in legal practice provided a large body of literature and a solid base for the research and the research design.

2.2 Sanction based behaviour influences — law and professionalism

> “…the threat of disciplinary action and the possibility that ethical rules may provide standards of conduct in liability actions give ample incentives for lawyers to adhere to ethical rules. Accordingly, it is not surprising that supervisory liability is provided for in many professional corporation and LLP statutes.”
>
> *(Ribstein 1998)*

Hypothesis developed by the author from summation and analysis of the literature: The imposition of personal liability and the requirements of insurance are the most effective factors positively influencing lawyer professionalism decisions.

2.2.1 Defining the discipline of law and professionalism

The International Bar Association posts on their web site as their definition of professionalism for lawyers an article that defines professionalism as:

> "Dedication to serving the public interest, improving the law, and improving the profession. Devotion to honesty, integrity, and good character. Passion for excellence. Practice in context. Maintenance of competence in a specialised body of knowledge and skills, which are freely shared with other professionals."
>
> *(McCallum 2009)*

It is a broader interest than ethics for lawyers. Ethics are the stated standards for the selected areas of practice concern; whereas

> "Professionalism describes the important elements of an ethical professional identity into which the profession should socialize both law students and practicing lawyers. This approach to professionalism connects the public purpose, core values, and ideals of the profession with the goal of fostering an ethical professional identity within each lawyer."
>
> *(Hamilton 2007)*

As a result, writers in the discipline of Law and Professionalism take an approach of considering conduct, and the effects of conduct in matters of ethics, but also on a more all-encompassing basis looking at professional conduct in areas such a legal malpractice, the legal profession and insurance aspects of practice. A good example of writing in this discipline would be Fortney, an academic writer that I reviewed and used as a resource extensively, I list some of her articles selected to show the range of the writing of both the author and the discipline and to illustrate the range of interest by looking at her exploration of topics such as Ethics Counsel's Role in Combating the Ostrich Tendency (2002), Law as a Profession: Examining the Role of Accountability (2012), Preventing Legal Malpractice and Disciplinary Complaints: Ethics Audits as a Risk-Management Tool (2015), Designing and Improving a System of Proactive Management based Regulation to Help lawyers and Protect the Public (2016), among many others. The Law and Professionalism discipline takes the issues facing legal practitioners in their requirements for ethics and professionalism conduct and explores what effect that has on law firm culture and management, and then on the profession and public. The focus of the discipline is illustrated by the Literature Overview table 2.1.

2.2.2 Liability as a behaviour influence

Liability, that is the ability of clients and third parties to sue lawyers for professional errors, lies in tort law. Tort law is intended to reduce injury by deterring unsafe behaviour and the basis for tort lability is designed for setting standards for behaviour. The support for the effectiveness of liability as a behaviour modifier arises as a consequence of economic analysis which uses the assumption that people pursue the goal of wealth maximization. If the cost of liability outweighs the benefit, the behaviour will be moderated based on this analysis. This reasoning underlies the concepts which continue to support the use of liability to moderate and influence lawyers' professionalism behaviour. The difficulty is that liability will only be effective for this purpose under deterrence theory where it will provide a clear and understandable standard of behaviour (Shuman 1994). Deterrence theory goes on to provide that negligence liability works where it gives providers of goods and services an incentive to take cost justified precautions (Williams 1992). Where tort liability will only partially correct behaviour the result is likely not to be societally optimal.

Lawyers are required to engage in their professional activities as individuals or, where more than one lawyer is involved, using a partnership or in some jurisdictions a limited liability partnership, as the business relationship form. While a corporation can be used for some specified business aspects of legal practice, personal liability for the results of legal services remains a reality for lawyers, essentially globally. The consequence of being required to practice in a partnership arrangement (or its equivalent) is the imposition of personal liability, including aspects of vicarious liability, on the partners for the errors, omissions and malpractice of themselves and to a large extent also of their partners and employees (Xu, 2017).

The assessed potential of impact from the consequences of personal liability results in the hypothesis that liability is the primary means of causing correct professional behaviour being extensively supported and discussed in the law and professionalism literature. This hypothesis has been frequently enunciated in law and professionalism by Fortney including where she states:

> "The unlimited liability shared by partners encourages the partners to participate actively in firm affairs in an effort to control their own personal liability exposure. Active participation takes a number of forms, including acting as supervising attorneys or serving on various committees, such as opinion review or peer review committees. Such monitoring and consultation promises to improve the quality of services delivered, to control liability losses and to enhance the human capital of the partners."
>
> *(Fortney 1997).*

Literature review

The writing in law and professionalism is located in legal literature but looks at professionalism issues and has a focus on the practice of law as a profession considering the means of ensuring the standards of the profession are maintained. Because law practice is a profession there are guiding principles for delivery of legal services that do not exist for other service businesses. The enforcement of adherence to those principles is considered by law and professionalism to be needed to be provided by influences other than market reaction which is usually used to cull bad behaviour or poor service. The primary influence the academic writers writing with a focus of law and professionalism promote as best effecting lawyer behaviour is liability.

Fortney's view, often stated, is that requiring partners to bear personal tort liability and, in a law partnership often to bear the vicarious liability for the actions of all partners and employees, improves the delivery of professional services, including improving the quality of service delivered, enhanced professionalism and adherence to ethics (Fortney 1997). This conclusion has been often debated and suggestions have been made by other authors that the use of personal professional liability to sanction behaviour, particularly using vicarious liability within the legal partnership, has had its day and is no longer required as a matter of regulating professional conduct. This is often stated in the literature of law and economics, see discussion at 2.3. The debate of both law and professionalism and law and economics has extended to consideration of other influences and resulting methods of regulating the legal profession, with many authors suggesting that there are more effective methods for ensuring appropriate compliance with professional standards as is discussed in behavioural economics and law, this is discussed in 2.4 of this thesis.

The risk and cost of personal liability for lawyers is of significant concern in the management of practice in the professional partnership, particularly the larger partnerships which have been emerging in recent years (Carr & Matthewson 1990; Ribstein 1998). The imposition of personal liability imposes significant costs on the law firm, exacerbated by the practical impossibility of regulating conduct where there are many, often far flung, partners participating in the partnerships. The spectre of liability in the context of increasing complexity of legal practice, particularly for the conduct and actions of others, is well recognized in the law and economics literature which suggests a need for a significant level of governance on the practice of law but finds that liability is a possibly unjustified cost to the legal profession, law partnerships and the public accessing the legal services (Baker & Krawiec 2005). As a consequence, it is vital to the appropriate regulation of the legal profession that there be an understanding of the effectiveness of the use of liability as a regulator of professional conduct, an understanding that does not appear to have been achieved in the academic research and writing to date.

The expansion of the concepts of sanction-based hypothesis is that the selection of tort liability rules results in a choice between optimally deterring unreasonable risk and optimally insuring against it. Non-pecuniary losses create confusion, with the concepts underpinning the tort liability rules ideally taking account of the level of deterrence necessary to motivate investment in precautions that effectively and fully account for the harm (Rosenberg 2002). There is growing recognition that the result is that a system relying on liability and sanction is unlikely to reach an efficient level of precaution and, given that the additional costs of control is usually paid by the injurer and its principal as a consequence of monitoring costs and precaution costs, with victims paying no additional costs, the balancing is not achieved (Jolls, Sunstein & Thaler 1998).

Observations have been made by writers in law and professionalism that factors other than liability need to be taken into account in looking at controls on the behaviour of lawyers in relation to decision making for professionalism. An example is the recognition that the protection of a firm's reputation is a strong incentive to prevent malpractice by others (Fortney 1997; Lawrence 1995). While reputational risk forms part of the liability regime, it is also part of the effective promotion of the business of the practice of law which is not dependent upon the imposition of liability. The delivery of quality legal services and the reputational capital it engenders is such that the limitation of liability should not alter the interest in providing quality legal services and therefore the necessity of the use of liability as a behaviour modifier is brought into question (Lawrence 1995). Ribstein echoes these comments when noting that it takes time and money to develop a good reputation, that reputation amounts to a bond and the premium that is attributed to a good reputation in the market that should exceed any possible payoff for malpractice (Ribstein 1998, Karlan 1998). This effectively recognizes that market tools can be as effective as the disciplinary tools such as the imposition of liability.

These comments are contrary to the promotion of the hypothesis that the use of liability is the primary moderator of lawyer behaviour which is stated in much of law and professionalism and the scepticism of value is supplemented by the stated concept that clients will generally not choose a law firm based on the personal wealth of the owners. It is rather a personal relationship and the choices of who to retain are made for reasons other than the ability to access the personal wealth of the partners, which is the underlying concept of imposing joint and several vicarious liability for professional conduct (Kalish 1987). The concept that reputation is a key to controlling agency costs and social issues associated with legal services, as a preferential regulator is echoed by Schneyer (1998). This is somewhat supported by the concepts that have been stated that the mere existence of a hostile relationship between the lawyer and the client, the potential loss of future retainer and the time spent in resolving the

disputes, together with the risk of adverse publicity that can grow out of the dispute, is an effective modifier of professional behaviour (Davis 2008).

Recognizing these contrasting views, many academic legal commentators in law and professionalism still provide the view that the adoption of malpractice avoidance measures and law practice management programs arising from those measures, are such that peer review acts as the effective internal control with liability exposure continuing to act as the external control (Fortney 1995). Commentators, such as Schneyer, state that law firms, particularly the large law firms, have a substantial incentive to screen out dishonest or disreputable clients because they can send a powerful reputational signal and those firms can afford to refuse clients because the large client base cushions the financial shock of losing a client (Schneyer 1998). This contributes to the discussion which starts to bring in the concepts enunciated by behavioural economics and law reviewed later in this Chapter.

The other sanction factor discussed by law and professionalism is the use of insurance which is known to both mitigate liability risk and act as a behaviour effect. Recognition of the effect of insurance requirements has been becoming more prevalent in recent years. Many jurisdictions require insurance as a requirement of licensing to practice law. This has caused some speculation that insurance would reduce the effect of liability (Fortney 2016, Fortney 2018(a), Fortney 2018(b)). There has been relatively little economic analysis, backed by quantitative data, looking at vicarious liability, secondary liability and the impact of mandatory insurance. The economic issue being who should bear the cost of monitoring and what becomes the equilibrium levels of precaution which would be dictated under liability rules. It needs to be recognized that tort law is designed to induce potential injurers to take the societally optimal level of precaution, this balances out the possibility that the tort system may not create sufficient incentive and therefore there must be additional systems to assist in balancing to the societally optimum level (Levin 1998, Swisher 2014, Kaplow 1992, Twitchell 1987).

2.2.3 Insurance as an influence

The assessment of the effect of liability is confused by the increasing use of professional liability insurance. It is postulated that professional liability insurers have become de facto regulators of law practice (Davis 1996). Insurers will include provisions in the policy of insurance that supplement the definitions and application of prohibited conduct and will have provisions in the policy of insurance that exclude certain conduct from coverage. In many instances there are prohibitions against lawyers accepting or continuing representation in the face of a conflict of interest because insurance may not pay out where that is present as a result

of policy exclusions in the commonly available liability coverage (Davis 1996, Wilkins 1996). This aspect of professional liability as an additional regulator supplements the direct effect of liability potentially indicating that effective regulation may include liability and adds the consequences of the involvement of liability insurers as regulators (Davis 1996). These comments recognize what is viewed as the four models generally accepted for the regulation of lawyers as professionals: (i) disciplinary control, (ii) liability control, (iii) institutional control and (iv) legislation control (Wilkins 1992).

> "By focusing their gaze on the relationship between insurance and shareholder litigation, they unfortunately overlook other elements of the regulatory landscape. A broader focus and a more robust sociology of regulation suggest that we are seeing in D&O insurance is no longer really insurance but, instead, one part of a regulatory veneer."
>
> *(Hemier 2013)*

D&O insurance is a reference to the insurance coverage for liability claims arising from the actions and omissions of corporate directors and officers, and other similar actors such as lawyers when carrying out similar functions, in the undertaking of their duties. Insurance is properly characterized as a factor directly influencing professional decisions, as a consequence of the need to maintain access and minimize cost, but it also affects the reaction of professionals to the other variables, most particularly liability. Conceptually, insurance should be merely a modifier of the liability variable, however, where insurance is required for lawyers to practice, as is a mandated requirement of licensing in most jurisdictions, and accordingly the ability to access insurance in sufficient levels and the cost of that insurance has a direct influence on professional decisions and the delivery of professional services, the insurance requirements are a direct influence on professional behaviour. While insurance may reduce liability effect it also contributes its own independent effect (Salyzyn 2017). Law and professionalism discusses insurance as an influence indicating that insurance may influence (and significantly influence) the effect of liability but this discussion is without the depth of explanation and understanding of behavioural economics on this topic. Behavioural economists look at insurance and directly discuss its effect and the discussion of that literature is used for the non-empirical discussion of the analysis of insurance as a variable as is discussed later in this Chapter.

> "… there are two ways Insurers seek to regulate attorneys which directly relate to the regulatory schemes contained in the ethics codes. The first is through policy provisions that supplement or clarify the definition of prohibited conduct beyond the terms and requirements of the standard ethical constraints. The second is through policy provisions prohibiting or restricting, that is excluding from

> coverage, permitted conduct or conduct not expressly or clearly forbidden by the ethics codes."
>
> "In other words, the codes start out with blanket prohibitions against lawyers accepting or continuing representations where conflict exists — the closed door."
>
> "The problem arises with the "open door" which follows when the rule continues with language providing that notwithstanding the prohibition, lawyers may act in such situations provided that they meet certain specified requirements."
>
> *(Davis, 1996, p. 209)*

Conclusions have been reached by other writers considering the liability factor that the issue of insurance does not eliminate the concern of liability risk and therefore does not take away from the effectiveness of liability as a regulator. Lawyers have to pay for their insurance, the amount and level of insurance will increase the perception of increased liability. Insurers will monitor and add additional requirements for the extension of coverage, premiums will increase with losses as a consequence of liability claims and there will be deductibles and maximum liability for the insurer resulting in the continuation of professional liability as an effective behaviour influence (Iacobucci & Trebilcock 2013).

While the law and professionalism discussion continues to support the use of liability as a primary factor to influence lawyers' professional behaviour there are indications of changing views. Recognition of the effect of insurance and reputation is increasingly being included in the analysis (Davis 1996, Heimer 2013, Salyzyn 2017). There is also discussion of concerns that liability is becoming increasingly used but for purposes unrelated to professional standards and with increasing inefficiency is creating a dissonance in the discussion because the use of liability is being distorted as a behaviour influence (Lawrence 1995).

Much of the academic literature in law and professionalism supports the hypothesis that liability is "a" if not "the" most significant influence on professionalism behaviour. However, confusing the premise, the literature observes that notwithstanding the imposition of professional ethics and standards by court sanction and liability, lawyers continue to violate conflict of interest rules (Davis 1996, Richmond 2006). To explain this observation considerations of economic concepts in the discussion is emerging concluding that, economically, both the client and the lawyer may have incentives to continue to breach conflict of interest rules for a variety of reasons that underpin why individuals wish to retain specific legal counsel (Zacharias 2002). Specific note is made by some authors that formal ethics rules, and enforcement through legal profession discipline, tend to have little effect on day to day conduct, this questions the value of the continued imposition of liability and raises concerns

about the potential effectiveness of liability rather than discipline in controlling the desired conduct, in this case assessment and acceptance or rejection of conflict of client interest (Chambliss 2005).

2.3 Regulatory based behaviour influences — law and economics

Hypothesis developed by the author from summation and analysis of the literature: The use of regulation, by the profession and external bodies (courts, administrative bodies), are the most effective factors positively influencing lawyer professionalism decisions.

2.3.1 Defining the discipline of law and economics

Law and economics is the application of economic hypothesis (specifically microeconomic hypothesis) to the analysis of law that began with scholars from the Chicago school of economics. Economic concepts are used to explain the effects of law. The aspect of the discipline of interest to this literature review is with the intention of assessing which and how legal rules are economically efficient. The two branches are an application of the methods and theories of neoclassical economics to the positive and normative analysis of the law and the institutional analysis of law and legal institutions, with a broader focus on economic, political, and social outcomes. This second branch of law and economics is the one providing writing in the sub-discipline of law and economics as it relates to the regulation of the legal profession as an institution. This aspect of Law and Economics considers economic causes and consequences of specific legal rules as well as the impact of the broader legal system as it encompasses the behaviour of firms and individuals, and considers property rights, deterrence, and the effects of law enforcement, in this sub-discipline as it examines lawyers in legal practice.

2.3.2 Debate as to liability influence

Academic writers in the field of law and economics are increasingly questioning the market need for the continuation of liability as the primary leveller of the information friction perceived to exist in the market (Schwartz 1995; Wolfram 1997). Clients, particularly in the corporate environment, are increasingly sophisticated and have in-house counsel well capable of monitoring and controlling professionalism of the legal practitioners which they work with reducing the need for liability and sanction to substitute for market control (Barton 2001). The lack of clear insight as to the effectiveness of disciplinary control (which is considered unlikely to affect lawyers in large firms) and civil liability and disqualification for conflict as opposed to internal monitoring and sanctioning to protect institutional interests and reputation, makes it impossible to know which of liability and regulation may be the more cost effective and

effective in result (Hazard & Schneyer 2002). This lack of effectiveness is also raised in statements that conventional malpractice liability, particularly when imposed vicariously, rarely results in an ability to directly consider the impact of that liability. The court decisions will rarely delineate the controls that law firms should have used, and did not use, to prevent the malpractice issue. Lawsuits often will base a claim in conflict of interest in the hope of getting a finding that there was a failure to create and maintain reasonable controls, significantly diluting the potential effect of the imposition of joint liability (Schneyer 1997). This confusion is noted by Schneyer to be increasing where some limitation of liability is made available, primarily through limited liability partnerships which reduce full vicarious liability but preserve personal and supervisory vicarious liability. The confusion arises because committee participation, which could be an effective means of promoting internal monitoring and increased control and care, largely as a consequence of reputational effect, can be undermined by the unwillingness of partners to participate in such supervisory roles in the face of disproportionate liability as a consequence of the supervision liability from that committee participation (Baker & Krawiec 2005, Woodward 1983, Fortney 1997).

Law and economics brings basic economic hypotheses into that discussion of influences on lawyers' professionalism putting a focus on cost-benefit analysis and cost efficiency in the delivery of legal services. This is an area of economics which looks specifically at the economic effect of law on legal practice. The discussion in this sub-discipline as to law relating to lawyers has focused on the use of regulation as an alternative to liability as the primary factor to influence lawyerly behaviour.

> "From a theoretical perspective, we can employ Julia Black's definition of regulation as "the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard setting, information — gathering and behavior — modification."
>
> *(Whelan & Ziv 2012,)*

The economic hypothesis being enunciated is that liability, to the extent that it causes avoidance measures on the part of professionals, auditors or lawyers, should be such that the liability reflects usual economic deterrence rationales which requires a balancing such that the liability should induce care to the point where there is a balancing of the value of care up to the point that the marginal cost of taking care does not exceed the marginal cost of the expected damage (Jolls, Sunstein & Thaler 1998). These writers observe that this balancing does not seem to be reached for the legal profession when using liability as a primary influence on

behaviour. The simple fact is that law practice as a profession and business is regulated (Hadfield 2008, Levin 1998, Richmond 2007, Levin 2007, Levin 2012, Salyzyn 2017). A cornerstone concept of law and economics looking at regulation is cost and inefficiency:

> "The way in which our law societies and bar associations regulate the provision of legal services is the single biggest determinant of the high cost of law, which is the single biggest determinant of the lack of access that the vast majority of people have to legal help"
>
> *(Hadfield 2010).*

2.3.3 Regulation as a dual influence — internal and external

Looking at regulation as a behaviour influence on the legal profession, it is necessary to recognize that there are two different bodies of regulation. One is regulation internal to the profession. As a licence-based profession, the bodies that administer and control licencing will have a very significant regulatory influence. These are the rules of the applicable law societies or associations which govern the delivery of legal services in the jurisdiction. Most legal jurisdictions have such a regulatory body and throughout North America the provision of legal services is governed by provincial law societies and state bars. These internal regulatory mechanisms involve an extensive code of conduct dealing with the quality of legal services, the maintenance of the primary professionalism requirements (including conflict of interest requirements) and include sanctions for failure to adhere to the expressed codes. The most onerous of the sanctions, in addition to the possibility of financial penalty, is loss of the licence to practice. Other sanctions involve supervision over the practice and the withdrawal of the right to manage trust accounts, among others.

> "… the practice of law in America is now, as with many other contemporary areas of corporate or personal economic endeavor, a regulated industry. That is true in the sense that much of what a lawyer might choose to do or not do is regulated by legal prescriptions requiring certain action. The breach of such a regulation by the lawyer subjects her to a significant threat of sanctions that both courts and specialized administrative tribunals and agencies are empowered to administer and indeed will and do administer in an energetic way."
>
> "…factor deals with the emergence of courts as the regulators of lawyers and their continuation in that unchallenged role. Courts have both legitimized lawyers' modern professional organizations and much of their work. Courts, however, have become highly active in recent decades in creating law and enforcing it, primarily through tort recoveries, and ultimately in enforcing lawyers' own law against lawyers."
>
> *(Wolfram 2001–2002)*

> "The regulation of lawyers' professional conduct draws on rules and norms from a variety of sources. Attorneys are, of course, regulated by the rules of professional conduct adopted in their own jurisdiction. These rules typically cover, for example, conflicts of interest, veracity, confidentiality, advertising, billing, trust funds, and sex with clients sometimes set out in statutes or regulations."
>
> *(Robbenolt & Sternlight 2013)*

External regulatory oversight of the legal profession has been increasing in recent years, as a consequence of the expanding jurisdiction of administrative boards governing a large selection of business activities which involve legal representation with increased power over the business activities and lawyers that appear before them (Robbenolt & Sternlight 2013, Levin 1998, Swisher 2014).

Courts and administrative boards provide a form of external regulation for lawyers because they set the rules for the ability to appear before them and the conduct that has to occur when appearing before them. "Court rules regarding evidence, discovery, and other matters provide additional regulation" (Robbenolt & Sternlight 2013). These rules include conflict of interest, regulating in those proceedings the avoidance of conflict of interest as a requirement consistent with the requirements of the professional rules of the law societies and bars. There is also a significant list of other behaviours that have standards that are required to be met in order to have the ability to appear before the court or board, those set requirements as to conduct when appearing. This sets up an extensive set of enforceable regulatory requirements. The primary enforcement is denial of the right to appear before the court or administrative body, which greatly reduces the ability to practice law in the area. The secondary one is the ability to impose fines, and in some instances to impose criminal type sanctions, including jail time. This can be imposed by the courts based in contempt of court and by administrative bodies where they have those sanctions provided by statute.

2.3.4 Regulation as a behaviour influence alternative to liability

The way that factors such as regulation are enforced can affect their effectiveness. Regulation used in a manner where punishment becomes the key method of delivery and regulation used in a manner to guide behaviour and encourage appropriate behaviour have very different effects. It can mean the difference between a race to the bottom for the first and a desire for superior performance for the second. It affects the manner in which the factor is used, differing between monitoring and threats to training and feedback using peer influence and reputation. Sanction and the fear of sanction is very different from training and avoidance. Behavioural economics recognizes this effect and brings the important element of the manner in which we

interpret the relative effect of the variables which will change how we make recommendations for management delivery of each of the six variables (Jolls, Sunstein & Thaler 1998; Kalish 1997; Chambliss 2005; Robbenolt & Sternlight 2013).

Law and economics literature most commonly expresses the view that it is not universally accepted that the imposition of liability will lead to increased monitoring and therefore achieve a more efficient form of deterrence. It has been suggested that the benefits of mandatory supervisory liability are unclear largely because liability does not eliminate lawyer's incentives to act in their own self-interest. Articles looking at the adjustment of liability to partial limited liability from full liability are inconsistent and some have noted that partial limited liability may reduce monitoring resulting in lower monitoring than a complete limited liability regime with no liability for the performance of others (Schreyer 2005; Iacobucci & Trebilcock 2013). This arises because lawyers who could become liable because of supervisory liability may attempt to reduce the risk by avoiding such supervision or monitoring activities. It may also result in an avoidance of certain types of practice, reducing access to effective legal services, particularly legal services with effectively capitalized lawyers that have assets to pay on a litigation recovery (Ribstein 1998). These observations of law and economics writers add confusion to advocating liability as an effective performance influence and promote use of regulation as more directed and effective.

An issue in measuring the relative effect of behaviour influence factors is the uncertainty of the value of strict adherence to the professionalism standards. There is particularly an inability to measure cost and effect results from the conflict of interest rules, which may forbid clients from retaining the lawyers of their choice even if that client is capable of an informed consent and, accordingly, an effective waiver of the conflict. Also, it may not be that the clients are better off receiving non-conflicted representation where they are not able to hire the lawyer of their choice, who may have a better background or superior skills. These concerns are raised in academic commentary that considers that discipline working to deter professional misconduct is inherently questionable (Zacharias 2002). These concepts are agreed with by Wilkins (1996) where he indicates that increasing specialization and diversification results in the lawyer-client relationship not being capable of a single image or the traditional implicit image. Recognizing the potential requirements of clients may result in practicing in circumstances of recognized, controlled and consented to, conflicts which may result in increased access to justice and better legal services (Wilkins 1996).

These thoughts are important to the observation of law and economics that in the large law firm it makes little sense for liability to be an effective firm-wide tool because the individual

lawyers making the decisions are not in control of either the process or the practices of the partners for which they remain vicariously liable (Barnhizer 2003–2004). The recognition that liability rules create both costs and benefits and therefore may not always be beneficial, is a suitable recognition that liability rules may play little or no role in creating incentives for positively compliant conduct. Behaving in a more risk averse manner while appearing to better meet professional standards may increase the cost of legal services because of a greater cost of delivery and unnecessarily conservative self-protective advice because of the liability rules, often in circumstances where they may not otherwise be necessary (Fischel & Bradley 1985).

The questioning of the overall effectiveness of liability is a common focus of law and economics. Liability controls giving injured clients, and some third parties, the right to sue lawyers under statutory and common law theories have become inseparably intertwined as a source of payment for victims of malpractice and for the discipline of lawyers. This has resulted in the concept adopted by some writers that making it easy, or easier, for clients and third parties to sue lawyers, results in compliance gains that are more than offset negatively by the increase in defensive lawyering. In the case of conflict of interest this would result in increased costs of assessment and potential reduction in access to legal representation of the client's choice by more conservative conflict decisions (Wilkins 1992). Wilkins notes that lawyers may be incented to overinvest in excessive safety precautions at the client's expense, and that the fear of liability can result in a disinterest or refusal to undertake steps or actions that could benefit the client as a consequence of fear of liability rather than respecting the best interests of the client.

A concern that has also been expressed by academic writers is that the cost of using liability as regulation may be increased because liability often becomes a standard-based approach rather than a rules-based approach. Rules may be more costly to create but standards are more costly to effect as a consequence of the difficulty of individuals to interpret and determine precisely how to act. Professional and ethics rules for lawyers are standards-based; which likely increases the economic inefficiency of liability as a regulatory tool (Kaplow 1992).

Other writers believe that the fundamental premise that the market is subject to information asymmetry and that substandard lawyers cause irremediable harm is not an effective regulatory justification because it lies on faulty assumptions (Barton 2001). Barton notes that regulation dealing with conflict of interest may be a justifiable attempt to protect the interest of clients, thereby appearing to favour the regulatory model rather than the liability model (other than liability for abuse of process, malicious prosecution, fraud or misrepresentation). Notwithstanding that these concerns are expressed by many academic writers, it has been

noted that malpractice liability is increasing, new causes of action are being found and at the same time regulatory standards are being increased and imposed in other sectors undermining the concepts of regulation of professionals by the profession (Zacharias 2003).

2.4 Professional and personal behaviour influences — behavioural economics and law

Hypothesis developed by the author from summation and analysis of the literature: The personal factors of concern for reputation and the effect of training and peer influence are the most effective factors positively influencing professionalism decisions.

2.4.1 Defining the discipline of behavioural economics and law

The more recent sub-discipline to emerge and look at the topic of professional conduct for lawyers and the behaviour influences intended to lead to compliance with legal practice standards is in the area of behavioural economics and law. This is an area of academic review looking at the effect of psychology and behaviour influence on lawyers in their practice decisions, an area of academic interest emerging only in the last couple of decades. Behavioural economics in this sub-discipline adds to the debate the concept of the personal nature of the delivery of legal services. Lawyers bring to the delivery of legal services the very human concerns of acceptance and sanction of behaviour, the desire to achieve success (a particularly high concern for lawyers and similar professionals) and the personal and business needs of maintaining a desired reputation (McCallum 2009). By adding behavioural economics theory to that of law and professionalism and law and economics, a more fulsome understanding of the influences on professional behaviour was able to be developed.

2.4.2 View of liability as an influence

Behavioural economics considers the use of liability and regulation as a form of behaviour influence as a deterrent effect. The concept is that the more common approaches to controlling professional conduct are oriented toward deterring conduct which would be contrary to expressed professional standards. Therefore, behavioural economics states it is necessary to consider the effect of matters that would affect that deterrence effect. The literature considers that the imposition of behavioural regulators such as liability and regulation will not have a simple and direct effect. Rather the literature suggests that there may be other matters which would affect the way in which professionals react to deterrence signals (Robbenolt & Sternlight 2013).

> "Some have suggested that lawyers behave badly because they are inherently "bad" or "stupid," because they are susceptible to undue pressure from their clients, because they are under-regulated, or even because they are over-regulated."
>
> *(Robbenolt & Sternlight 2013)*

2.4.3 The influences viewed from behavioural economics

The factors which behavioural economics introduces arise from a consideration of the more personal reaction of a person's interface with their personal ethical and moral standards, the reactions of their peers, the reactions of society, the impact of reactions of potential clients, among others. The literature in this discipline also introduces consideration of the influences introduced by the law practice realities of larger practice groups in law firms and corporate counsel departments, noting that bureaucratic effects primarily influence behaviour by using supervisory policies and routines focused on liability avoidance and reputation (Hazard & Schneyer 2002). The literature in this discipline indicates that taking those additional factors into account results in the variables of reputation and professional training having a very significant effect on the behaviour of professionals (Hamilton & Monson 2012; Hazard & Schneyer 2002).

Behavioural economics introduces these additional factors to the debate resulting in six factors being identified by the literature; law and professionalism primarily considering liability and insurance, law and economics looking at formal regulation, both external and internal, and behavioural economics introduces the remaining two of reputation and professional training. In each discipline the effect of other factors than that primarily examined is recognized but without identifying the extent of the inter-relationships. Behavioural economics is the discipline providing the most recognition of the combined effect of the factors in this research. The writing in behavioural economics commences with the recognition of complex interrelationships of factors is based in deterrence theory which started the development of the theories of psychology informing economic behaviour (Gibbs 1968; Grasmick & Green 1980; Lott & Mustard 1997).

While there have been some attempts to conduct empirical research to assess theories proposed as to the basis and effect of some of the behaviour influence factors used for behaviour regulation of professionalism for lawyers, including regulation by the imposition of malpractice liability, there is little quantitative research supporting the theories in the literature (Fortney 1997, Cardi, Penfield & Yoon 2012, Eisenberg & Engel 2016, Angelova, Attanasi & Hirat 2012).

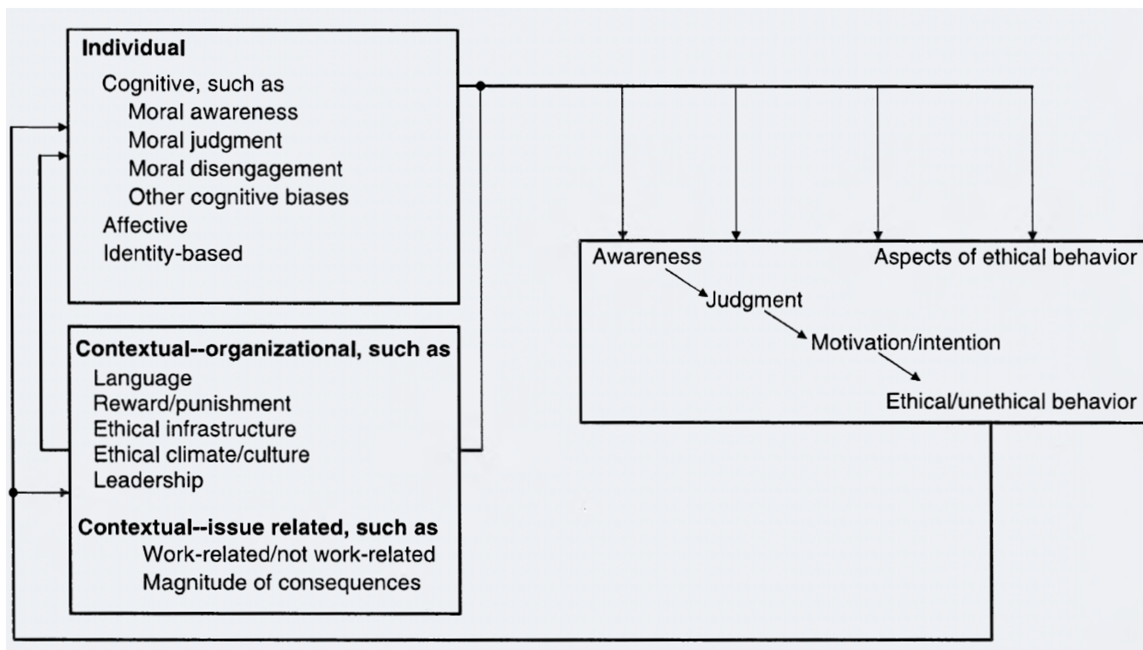
> "Also, there are not many experiments on liability rules. King & Schwartz (1999, 2000) and Dopuch & King (1992) study the special case of liability rules for

> auditors. Dopuch, Ingberman & King (1997) explore liability rules applied to the multi-defendant case, namely proportionate versus joint and several liability rules. Wittman et al. (1997) investigate the learning of liability rules."
>
> *(Angelova, Attanasi & Hirat 2012)*

The literature in behavioural economics and law recognizes the difficulty in balancing the many influences on behaviour that come into play in lawyers' professional decisions. Each of the six independent variables identified as key to influencing behaviour for this study is designed to have an effect on professional behaviour, guiding behaviour to that which has been determined by governmental policy, professional regulation, regulation and professional ethics as suitable behaviour. A nuance which is introduced by the discussions in behavioural economics is that it is necessary to recognize that there are significant personal influences which will modify the four sanction and regulation influence factors and create the influence personal behaviour factors. The literature in behavioural economics supports the concept that there are six primary factors that influence professional behaviour, these being the six independent variables identified for this study but advocates a need to recognize the effect of human behaviour and the resultant departure from standard economic models (Jolls, Sunstein & Thaler 1998).

Behavioural economics tells us that it is also necessary to recognize that behaviour influences arise in a business context, and the need to generate business, client requirements and perceptions and recognition of societal needs significantly influence the behaviour of professionals. Reputation and professional training are the primary factors considered by behavioural economics and law as the personal reaction factors for lawyers affecting behaviour. The articles in this field recognize reputation is influenced by additional considerations such as the need to generate business and client and societal reactions (Ribstein 19989; Schneyer 1998; Karlan 1998). The need to protect reputation as a firm's most valuable asset is discussed as a key behaviour control factor (Fortney 2013). This is tied into the literature concepts of the desire to appear honest and principled (Jolls, Sunstein & Thaler 1998). A chart showing categories of influences on behavioural ethics outcomes prepared by Trevino, Weaver and Reynolds (2006) is a useful review of the complexities introduced by the human elements which behavioural economics recognizes.

Figure 2.2: Categories of influences on behavioural ethics outcomes



Source: Reproduced from Trevino, Weaver and Reynolds (2006)

2.4.4 Influences context in behavioural economics

Behavioural economics and law examines and expands the concepts which have been reviewed by law and professionalism and law and economics by adding a behavioural lens. Rules of professional standards which apply to professions, including the legal profession, set the basis and standards for behaviour from professionals in a number of key areas. In legal practice this is mainly focused on the core elements of confidentiality, advocacy and independence of advice, which are explained elsewhere in this Chapter and in Chapter 3 in the explanation of the dependent variable, conflict of interest. Law and behavioural economics introduces, in more explicit discussion, the concept raised by law and professionalism and law and economics that nuances are introduced by the personal and human reactions of legal professionals, who function in a business and societal environment that has an influence on their professional behaviour (Trevino, Weaver, Gibson & Toffler 1999; Trevino, Weaver & Reynolds 2002; Robbenolt & Sternlight 2013).

Behavioural economics uses classic economic theory as its base but nuances the analysis that derives from classic economics with the overlay of recognizing that complex behaviour develops from societal effects, training and other factors. Behavioural economics considers that reputation and the perceived need and desire to preserve reputation, together with training as to the expected standards to professionalism, are dominant factors in how professionals react to the guidelines of their professional rules and standards (Jolls, Sunstein & Thaler 1998).

> "Economic analysis of law usually proceeds under the assumptions of neo-classical economics. But empirical evidence gives much reason to doubt these assumptions; people exhibit bounded rationality, bounded self-interest and bounded willpower."
>
> *(Jolls, Sunstein & Thaler 1998).*

While not directly looking at the effect of behavioural influences on professionalism, the discussion in behavioural economics and law as to the effect of human reactions on the effectiveness of legal rules and sanctions is useful. Behavioural economics has identified that behavioural issues that arise from training, societal influences and other factors will have a definitive influence on how much economic concepts, in this context including regulation, will affect the desired behaviour.

> "The absence of sustained and comprehensive economic analysis of legal rules from a perspective informed by insights about actual human behaviour makes for a significant contrast with many other fields of economics, where such "behavioural" analysis has become relatively common. This is especially odd since law is a domain where behavioural analysis would appear to be particularly promising in light of the fact that nonmarket behaviour is frequently involved."
>
> *(Jolls, Sunstein & Thaler 1998).*

Behavioural economics literature contributes detailed discussion and analysis of how behavioural factors come into play in influencing professional behaviour. It examines, in some detail, the psychological factors which have an impact on the influence of the other behaviour modifying factors. While the examination of these influences covers all of the six independent variables being examined, behavioural economics examines more particularly the effects of the desire to preserve reputation and the impact of professional training, these being the factors most manifested by human psychological behaviour as influences which need to be considered in examining the reaction of professionals to guidance as to behaviour (Robbenolt & Sternlight 2013).

2.4.5 Influences and effect in behavioural economics

Behavioural economics states that these types of more personal, and internal, behaviour influences are likely to have a significant effect. Behavioural economics writers state that sanction, "a stick," is not the only way in which behaviour is influenced. The concept that influence is also effectively delivered from culture and peer influence and that influence has a significant effect (Chambliss 2005). Behavioural economics hypothesis on the topic postulates that the discussions and debates of law and economics and law and professionalism are flawed because they fail to recognize the human elements that also have an influence on behaviour,

particularly as to conflict of interest decisions because it is a key tenet of professionalism (Zacharias 2002). Behavioural economics allows a translation from the complex psychological influences that it postulates affect behaviour, to advocating concern for preservation of reputation and adherence to professional training as significant influences. This is used as a proxy for the more ephemeral aspects of human reaction and behaviour.

Behavioural economics looking at influences on professional behaviour, recognizes that professional behaviour occurs in a complex social environment. The social environment includes peer, professional and client reaction, which creates an emotional environment for the professional. Professionals react with emotion to the encouragements and sanctions of each of the six factors which are being reviewed (Chambliss 2005).

In reviewing the empirical results and assessing those results against the intended recommendations for management of professional decision making, it is necessary to recognize the environment in which professionals operate. This thesis study augmented the behavioural economics and behavioural modification literature discussion by adding a statistical review of a self-assessment of the six factors and looking at the effect of personality traits. The assessment of the effect of personality traits was done by using the dependent variable as a measure of professionalism and statistically considering whether there was a difference in performance as to correctly responding to the conflict enquiry inherent in that dependent variable by personality type. Behavioural economics discussion led to the determination that consideration of personality, and therefore professional approach, was an important additional statistic review to be undertaken as part of the study. The intention of the personality section of the empirical study is an attempt to start an assessment of the social and emotional environmental affects that are presented by behavioural economics literature as affecting the reaction to the identified variables.

While lightly recognized in the other two disciplines, behavioural economics brings into the discussion the effect of some of the demographic elements, most particularly age and experience. Behavioural economics considers the development of a professional career over time, and the change in the capability of making sound professional and moral judgements (Hamilton & Monson 2012). These tie into the concepts of the importance of the two variables, reputation and professional training. Professional training does not consist only of law school and formal continuing legal education but also includes the practice development of peer contribution and development in the context of experience. Law and economic writers have stated that age and stage of practice will affect professional judgement, further supporting behavioural economics focus on reputation development and maintenance and professional

training as being key variables affecting professionalism of lawyers (Westfahl & Wilkins 2011, Fortney 2016, Trevino, Weaver & Reynolds 2006).

2.4.6 Perception and influences

Behavioural economics introduces, primarily in the context of reputation, the idea that a perception of fairness of behaviour and of decision making will be of importance. Behavioural economics states that reputation development and maintenance comes from the reaction of peers, professional counterparties and clients, and that the projection of an approach of fairness in the making of professional decisions is key to the development of that reputation. This adds complexity to the variable "reputation," in that it brings in concepts of fairness and the effect of fairness in a business and social environment.

> "People will often behave in accordance with fairness considerations even when it is against their financial self-interest and no one will know."
>
> *(Jolls, Sunstein & Thaler 1998)*

These concepts encourage a focus on training and peer-based influence on professional behaviour.

> "According to Paine, a compliance approach focuses primarily on preventing, detecting, and punishing violations of the law, while a values-based approach aims to define organizational values and encourage employee commitment to ethical aspirations. She asserts that the values-based approach should be more effective than a compliance-based approach because a values-based approach is rooted in personal self-governance and is more likely to motivate employees to behave in accordance with shared values."
>
> *(Trevino, Weaver, Gibson & Toffler 1999,)*

Behavioural economics accordingly introduces the inter-factor relationships between many of the variables such as insurance which has a direct and strong modifier effect on several of the other variables, most particularly liability (Fortney 2019). The literature in this discipline does not, however, provide empirical evidence as the extent or how the relationships between the variables are affected by these inter-actions. Behavioural economics does expand the discussion of the direct variable influences on each other to look at the influence of psychological reaction to those variables but without empirical assessment of the extent of the influences.

The majority of the literature in behavioural economics supports the idea that when bringing in cultural theory then psychology and behavioural reaction, education and management,

reputation and professional training, become key influences of professional behaviour to support the enunciated standards for professional practice.

> "While classic law and economics emphasizes the extrinsic incentive created by the obligation to pay, interpreted as a monetary sanction, a potential tortfeasor might also be dissuaded from committing a tort by the moral intuition of not harming a third person, by the tendency to adhere to a norm, or by the desire to avoid blame. In the field, all these factors are conflated."
>
> *(Eisneberg & Engel 2016,)*

Law and professionalism states that it is the fear of liability that causes partners and partnerships to monitor and control the behaviour of their partners, particularly around professionalism, as discussed earlier. Behavioural economics contends that it is corporate culture that is the primary incentive for partners to monitor and manage the behaviour of others. There is expressed the concept that the fear of loss of reputation, personal morality, perceived judgements of other people and the personal concern about a breach of professional standards and requirements is a substantial effect that drives the behaviour of monitoring and management, a desirable effect because it increases the likelihood of compliance with required standards (Sunstein 1996, Baer 2014). This is consistent with the behavioural economics contention that professional training and reputation are very important influences on the behaviour of lawyers, including, the peer monitoring and management of the behaviour of others and potentially should be preferred over sanction (Fehr Kamm & Jager 2014). Law and professionalism and the cultural theory of behavioural economics both lead to the conclusion that within a legal organization there are incentives for partners to ensure that the behaviour of others is maintained to the required standards from several causes.

The legal profession is a profession and, while a business, it remains a profession. Lawyers are in a service industry but the service is one which demands duties, responsibilities and recognition of relationships that do not necessarily exist in other businesses (Levine 2016). Behavioural economics writers such as Levine discuss the complications of the factors that drive professional behaviour and decisions by human responses to matters such as success and the measure of success. Lawyers work in an environment where success is necessary for economic achievement and where the majority of the persons involved are driven by the measuring and assessment of their success. Success includes a recognition of the meeting of appropriate professional standards in the majority of contexts. Lawyers therefore will likely respond to the six behaviour factors and the decisions which are affected by the factors, as indicated in the models of the study, but bring to it the very personal responses that arise from the desire to succeed and to be seen to succeed.

This complicates the analysis of the relative effect of the influences. These influences are not easily empirically measured although the behavioural economics literature introduced the need to assess, even if only anecdotally, these desires and their effects on the decision-making process of lawyers (Jolls Sunstein & Thaler 1998).

2.4.7 The consequences of a behavioural economics lens

There is also a significant focus in behavioural economics on the need, and current lack, for professional training and development as a means of communicating knowledge as to what the appropriate professional standards are (Barnhizer 2003, Hamilton & Monson 2012). Absent a knowledge of suitable professional behaviour, it is not possible for the professional to react and behave in the manner intended. Logically, professional training must underpin, as a first step, all reactions to professional requirements. It is not possible for a professional to make the appropriate decisions with regard to matters such as conflict of interest without understanding the basis, purpose, effect and impact of the choice made. Professionalism training is the first fundamental step towards reaching an ability for a lawyer to react to the other factors. Knowledge of appropriate professional behaviour is required for any of the other five factors to have the intended effect (Heminway 2017, Levine 2012, Salyzyn 2017, Westfahl & Wilkins 2017).

Behavioural economics proposes that firm culture is a very significant influencer of professional behaviour. This being the case, influence using the social concepts of behavioural economics and particularly behavioural ethics becomes a potentially more efficient and cost-effective tool enhancing appropriate professional decision making. Behavioural economics writers propose in several articles that creating an appropriate firm culture will, in and of itself, do much of the work in influencing appropriate behaviour (Baer 2014, Robbenolt & Sternlight 2013). This is a low-cost method of management delivery of professionalism factors, it devolves from leadership, role models and the statements guiding professional responsibilities coming from top to bottom in the law firm.

> "Leadership was a key ethical culture factor—one of the most important factors in the study. Where employees perceived that supervisors and executives regularly pay attention to ethics, take ethics seriously, and care about ethics and values as much as the bottom line, all of the outcomes were significantly more positive."
>
> *(Trevino, Weaver, Gibson & Toffler 1999)*

Behavioural economics, differing from the other two areas of academic review considered in this thesis, looks heavily at training, leadership and peer influence as being significant in the influencing of personal and professional behaviour. It recognizes that these elements will affect

the reception of the delivery of sanction and regulatory-based methods of influencing behaviour and themselves provide a direct influence on behaviour. That influence is delivered through a focus on concern for reputation and professional training, using the factors identified for this study. The writing in the areas of leadership and peer influence supports the importance of reputation, professional training and the development of an appropriate cultural environment through leadership and peer influence (Fortney 1996, Robbenolt & Sternlight 2013, Trevino, Weaver, Gibson & Toffler 1999, Kirkland 2005, Stempel 2012).

The behavioural economics literature recognizes the foregoing elements and implies there is significant difficulty in translating regulation into an effective behaviour code. The expressed view of the behavioural economists is that it will take a multi-faceted approach to disseminating and supporting the influences in some mix of the six factors which have been identified for study in this research. It is not sufficient, in the stated view of behavioural economics authors, to simply ensure that liability and insurance are available as sanctions and that regulation is restrictive and enforced, the concept put forward is that a more nuanced approach of integrating and bringing in training as well as recognition of a professional's desire to be, and appear to be, professional will be of importance.

> "… is an architectural approach… it also draws on norms-based strategies. It seeks not only to educate but also to strengthen already nascent impulses to resist temptations to violate the law."
>
> *(Baer 2014)*

> The use and effect of regulation is increasingly being recognized as complex. None of these responses adequately addresses the psychological susceptibilities that we identify here, nor are they likely to build ethical resilience."
>
> *(Robbenolt & Sternlight 2013)*

> "These findings have clear implications for behavioral ethics in organizations. If most adults' thinking about right and wrong is highly susceptible to external influence, then the management of such conduct through attention to norms, peer behavior; leadership, reward systems, climate, culture, and so on becomes important."
>
> *(Trevino, Weaver, Gibson & Toffler 1999)*

> "A key finding of this study is the importance of designing an ethics program that is perceived by employees to be first and foremost about shared organizational values and about guiding employees to act on their ethical aspirations."
>
> *(Trevino, Weaver, Gibson & Toffler 1999)*

2.5 Hypothesis development

The three hypotheses developed for the hypothesis testing used the summation of the focus of the literature from each discipline as set out in this following table:

The following illustrates the key writers and their orientation, time of writing and fit with the sub-disciplines and concepts.

Table 2.1: Literature overview

Discipline	Focus and Predominant View	Authors
Law and Professionalism	(i) Liability as Effective Influence (Pro and Con) Summation: The predominant view expressed, based in my analysis of the literature in this discipline and discussed in the detailed section 2.2.1 is that liability is the predominant positive influence on lawyers' professional behaviour particularly as to conflict of interest decisions.	(i) Fortney and others (various) 1997 to date; Westfahl Williams 2017; Salyzyn 2017; Carr Matthewson 1990; Rosenberg 2002; Schwartz 1999; Baker Krausec 2005Woodward 1983; Fortney 1998; Williams 1992; Shuman 1993; Xu 2017; Wolfram 1997, 2001; Dari-Mattiacci Parisi 2004
	(ii) Insurance as Modifier and Influence Summation: The predominant view expressed based on my analysis of the literature in this discipline and discussed in 2.2.2 is that insurance has a mixed influence as a modifier of liability and some influence on its own but is not a primary influence.	(ii) Iacobucci Trebilcock 2013; Davis 1996; Hemier 2013; Salyzyn 2017
	(iii) Sanction Effect in a Changing Environment Summation: The predominant view expressed based on my analysis of the literature in this discipline is that changes in the business and social environment in which legal practice is undertaken is resulting in changes to the assessments as to the effect of the influences.	(iii) Alfieri 2005; Ribstein 1998; Barton 2001; Kirkland 2005
	(iv) Behaviour Effects Summation: The predominant view expressed based on my analysis of the literature in this discipline is that there is growing recognition that behaviour based influences identified primarily in Behavioural Economics is changing the perception of the effectiveness of sanction based influences.	(iv) Chambliss Wilkins 2002; Williams 1992; Chambliss 2012

Discipline	Focus and Predominant View	Authors
Law and Economics	(i) Balancing Influence Effect and Quality Signaling Summation: The predominant view expressed based on my analysis of the literature in this discipline is that the influence of regulatory interference is confused by the sanction effect of enforcement and the adverse reputation effect of that sanction.	(i) Hazard Schneyer 1998, 2002; Stephen Love 2000; Lawrence 1995
	(ii) Economic Effect in Changing Environment Summation: The predominant view expressed based on my analysis of the literature in this discipline is that there is a growing recognition of the changing business and social environment in which legal services are provided and this effects the economist view of the effect and results of the influences.	(ii) Guttenberg 2012
	(iii) Mixed Concepts — Lack of Evidence re Liability Summation: The predominant view expressed based on my analysis of the literature in this discipline is that the economic analysis recognized that there are mixed and overlapping influences with a lack of evidence as to the effectiveness of the liability influence.	(iii) Schneyer 1998, 2007, 2008; Cardi Penfield Yoon 2012
	(iv) Need to Balance with Cost Summation: The predominant view expressed based on my analysis of the literature in this discipline is that the economist view is that the result of the regulation of lawyers has not been but needs to be a balancing of cost and benefit to the use of the influences.	(iv) Baker Kausec 2005; Hadfield 2008, 2016; Levin 1998, 2007, 2012; Richmond 2006; Salyzyn 2017; Chapman 1992
	(v) Causes of Inefficiency Summation: The predominant view expressed based on my analysis of the literature in this discipline is that the economist view is that the use of the sanction influences is a primary cause of inefficiency in the cost of and access to legal services.	(v) Levin 1998; Swisher 2014; Kaplow 1992; Twitchell 1987

Discipline	Focus and Predominant View	Authors
Behavioural Economics and Law	(i) Reputation and Economic Benefit Summation: The predominant view expressed based on my analysis of the literature in this discipline is that there is a growing recognition that a good reputation is a positive business aspect for legal practice enhancing its effect as an influence.	(i) Hamilton Monson 2012; Westfield Wilkins 2012; Fortney 2016; Trevino Weaver Reynolds 2006; Karlan 1998; Pearce Wald 2013
	(ii) Human Values Reputation and Professional Concern Summation: The predominant view expressed based on my analysis of the literature in this discipline is that lawyers display a positive reaction to the more human professional values of appearing to be professional and have a good reputation as a result.	(ii) Jolls Sunstein Thaler 1998; Kalish 1997; Chambliss 2005; McCallum 2009; Trevino Weaver Gibson Toffler 1999; Trevino Weaver Reynolds 2006; Short 2013; Eisenberg Christophe 2016; Trevino Youngblood 1990; Bandua 1997; Robbenholt Sternlight 2013; Zacharias 2002, 2003 with Jett 2002, 2009
	(iii) Deterrence Hypothesis Summation: The predominant view expressed based on my analysis of the literature in this discipline is that aspects of deterrence hypothesis should be considered when looking a influences on lawyer behaviour but none have a consistent application adding value to the discussion.	(iii) Gibbs 1968; Grasnick Green 1980; Braithwaite 1989; Lott Mustard 1997; Rosenberg 2002; Shuman 1993; Williams 1992; Ball 2014
The Gap — Lack of Empirical Study	(i) No Quantitative Support of Assumptions Summation: The predominant view expressed based on my analysis of the literature in the three disciplines is that there is a demonstrable lack of empirical research.	(i) Samuelson Joffe 1990; Chambliss Wilkins 2002; Cardi Penfield Yoon 2012; Eisenberg Engel 2016
	(ii) Lack of Suitable Methodology Summation: The predominant view expressed based on my analysis of the literature in the three disciplines is that there is a demonstrable lack of methodology that addresses the empirical research gap and presents several postulated reasons,	(ii) Van Kestell Micklitz 2011, 2014; Fortney 2009; Angelova Attanasi Hral 2012
	(iii) Need to Understand Overlapping Influences Summation: The predominant view expressed based on my analysis of the literature in the three disciplines is that the lack of empirical study is a true gap that	(iii) Iacobucci Trebilcock 2013; Samuelson Fahey Jaffe 1990; Davis 2008

Discipline	Focus and Predominant View	Authors
	needs addressing to further the development of the discussion and debate in literature and the application to management issue and solutions.	

(Source: Author Prepared for Literature Review;
*** This table was developed for illustrative purposes, detailed discussion and validation of the analysis summation is included in each relevant section that preceded.)*

The development of hypothesis from literature analysis was possible because of existence of the extensive body of literature in three disciplines that consistently discussed the factors that influence the behaviour of lawyers, with the discussion being essentially limited to the six factors subject to this research, debating relative effect only conceptually and not the nature of those factors. The ability to summate a position by discipline as to relative effect while holding on to the concepts of the six factors and both the need for and extent of effect allowed for a summative based hypothesis. The gap identified of a serious and long-standing lack of empirical evidence as to the extent and relative nature of effect resulted in hypothesis rather than theory, there is no ability to ground the statement in observation where none had been done.

2.6 Related social science literature

2.6.1 Other licenced professions

Serious consideration was given to expanding the literature review and research to the broader sector of licenced professional services as a general business sector in the early stages of review and design. This was not consistent with the specific business problem and management requirements of interest to me but merited consideration. An extensive literature search and review was completed looking into academic writing on the professions of accounting, engineering and several professions in health care. All, except accounting, were quickly dismissed as not being relevant because none had an equivalent liability and regulatory context. The aspects of those professions being regulated derive from very different societal concerns about the control of professional standards, quite simply the nature of the professional service and therefore the interaction with client, society and peers is different as a result of the different nature and responsibility of each profession. These different aspects require different specifics in the control of the professional conduct. The research of this thesis is focused directly and with specificity on the management challenges presented by the specific conduct requirements for the practice of law.

This view is supported by the observation that the ethics rules applicable to other professions may share many of the characteristics of those for lawyers but the analytical approach of lawyers may interact with the nature of the rules to make the characteristics more problematic. This reduces the value of an examination of other professions on the topic (Robbenholt & Sternlight 2013).

Some of the key areas of professional standards addressed for lawyers are as follows, there are of course many aspects of each that create the Codes of Professional Conduct (see Appendix B Sample Codes of Professional Conduct), the following is from the Canadian Bar Association:

1. Confidentiality and Advocacy: A lawyer should preserve the confidences of a client and must represent the client as advocate. ...
2. Competence: A lawyer must represent a client with the utmost competence and quality.
3. Professional Judgement: A lawyer should exercise independent professional judgement on behalf of a client. This is the basis for the rules against taking client retainers where there is a conflict of interest.

Whereas those for medicine are as follows, on a selected summary basis for illustration and taken from the Canadian Medical Association Code of Ethics and Professionalism:

1. Commitment to the well-being of the patient.
2. Commitment to respect for persons.
3. Commitment to professional integrity and competence.
4. Commitment to professional excellence.
5. Commitment to self-care and peer support.
6. Commitment to enquiry and reflection.

To further explore and understand this difference in professions, the very real difference in the need for and application of conflict of interest decisions needs to be noted. The aspects of conflict of interest for lawyers is fully explained in Chapter 3 and relates to the aspects of confidentiality, advocacy and the ability to provide independent representation. This is an entirely different from the expressed concerns in the Canadian Medial Association materials on ethics which discuss conflict of interest in the different manifestation of medical care intersecting with competing roles and duties. The issues underlying, for example privacy and confidentiality have an entirely different purpose, for the lawyer it relates to advocacy and the diminishment of the ability to advocate if confidences are broken whereas for the doctor it is set in the context of personal rights to privacy. The reason for the rules, the context for the rules and the basis for enforcement of the rules is completely different. Conflict of interest for

a lawyer has strict and enforceable sanctions, essentially the four of the imposed influences, whereas, to quote the Canadian Medical Association, conflict for the doctor leads to "inquiry, reflection and decision making." The lawyer faces sanction from four of the influences, the doctor does not, their liabilities and sanction from conditions on or of loss of licence lies only on a lack of medical professional competence, malpractice and professional misconduct and not conflicts decisions, the Health Professions Acts of relevant jurisdictions sets this out. This is a fundamental difference in what is needed and used to influence behaviour, as to conflict the lawyer has influence as to the decision itself but the doctor only if there is a malpractice result from the decision. It is a different problem, a different social concern and a different set of influences needed for the behaviour.

In the enquiry for this thesis the differences in the required conduct, the societal reasons for determining to control the conduct, and the regulatory tools used for that control are far more significant than the commonality of professional issues such as confidentiality or conflict issues. These differences are reflected in the manner in which ethics and professionalism are dealt with as an aspect of professional training (Egan, Parsi & Ramirez 2004).

Accounting was more extensively reviewed than other professions to determine if the writing looking at ethics and professionalism for accountants would yield useful insight and assistance with the research design, variable and scales because there is a similarity of the liability regime and conflict of interest requirements. However, professionalism requirements and particularly the conflict of interest "rules" for accountants exist for very different reasons and purpose than those for lawyers such that the review indicated little contribution to the topic of interest. The regulatory structure and requirements for the accounting profession, while having some similarities, arises from fundamentally different issues and concepts.

The imposition of liability for accountants was the only element of study considered to have sufficient similarity to merit further review. Articles looking at the profession of accounting have looked at liability in the context of auditing and have considered the effect of imposing of legal liability on auditors and the effect on audit quality. The concept discussed is that if legal liability is effective the larger the size of the damage award the higher will be the audit quality and accordingly the higher the benefits of audit. The issue which is identified is the inability to identify the socially optimal audit quality. The economic concept is that an auditor will increase audit quality to balance legal liability with an adverse effect on the direct cost of undertaking the audit, generally ignoring the costs borne from a misleading audit report. Using legal liability to balance this out, the legal liability needs to be commensurate with the investor costs, which should affect the socially optimal audit quality (Lee 1997). Similar observations

were reached by Fafatas (2006) where he indicated that studies suggest that higher levels of financial risk in litigation are associated with greater audit effort and note was made that this also results in increased costs and accordingly fees. His observation was that the most direct way auditors reflect their perception of litigation and risk exposure is by increasing their risk aversion in their decisions whether to accept or continue to represent clients. The note was made that risk aversion varies over time and is stronger where there are heightened concerns with regard to litigation.

Different than the conclusions as to the fully costed effect on audit quality, are the concepts for the legal profession that unlimited liability, on a joint and several basis, can have benefits as a quality signal and accordingly may be embraced by certain firms because the statement that a partner is willing to risk his or her wealth on the competence and professionalism of other partners is a strong market signal of competence (Stephen & Love 2000). This is a thought effectively echoed by Hamilton and Monson where they state that high professionalism contributes to high effectiveness in the practice of law and therefore should contribute to sustainable profits, with a corollary that high professionalism will not undermine sustainable profits (Hamilton & Monson 2010). These differences between legal and accounting practice and the lack of direct study in accounting on the issue of concern resulted in not further exploring literature looking at accounting regulation.

To understand the key difference in the professionalism requirement at interest, avoidance of conflict of interest, it is necessary to recognize the main difference in the societal concern that underlies the conflict rules for each. The conflict of interest rules for lawyers, together with the confidentiality rule, is to protect the rights of the client to impendence of representation and zealous advocacy whereas for the accountant it is to protect independence for reliance by others on the results of the audit work. This results in management measures appealing to different core values (Davis & Johnston 2009). The very specific nature of the intended enquiry meant that those differences resulted in a conclusion to that enquiry specific to the legal profession as merited. This fit with the suggestions of the literature in the disciplines reviewing the influences on lawyer professionalism behaviour and the suggestion for a directed and specific empirical study (Robbenholt & Sternlight 2013).

2.6.2 Professional services literature — behaviour modification

I considered whether using more general behaviour modification theory would be of value. The result was a recognition that the professional standards and influences for compliance in the professions were not sufficiently focused upon in general behaviour studies as to the

problem and research question with none of the general theories on behaviour modification providing sufficient focus on the enunciated management problem.

The concepts which underlie the behavioural economics and law articles looking at sanction and considering it as policing provide a few useful thoughts on the relationship between law and professionalism with its focus on sanction through liability and law and economics with its focus on the classic economics theories and support of regulation. The premise is that the behavioural economics discussion of law in general, and policing in particular, has direct application to analyzing the effect of sanction-based behaviour influences, these being liability and insurance (Baer 2014, Robbenholt & Sternlight 2013, Fehr Kamm & Moritz 2014). Behavioural economics discusses sanction as deterrence and then interfaces with the more subtle concepts of social reaction on the part of the lawyer. Deterrence hypothesis forms a significant cornerstone of behavioural economics and law, it provides the foundation on which much of the discussion of the effect of behaviour modifiers on response to societal expectations is constructed (Baer 2014, Eisenberg & Engel 2014, Schwartz 1997, Shuman 1993).

As a consequence of the prevalence of deterrence theory in behavioural economics and law, it is important to understand where deterrence theory fits with the research of this thesis. It is important to recognize that deterrence hypothesis provides some very fundamental concepts that underlie response to sanction-based variables but adds additional concepts such as the effect of timing and scope of punishment to the discussion. It is intuitive that timing and size of sanction will have an effect on the effectiveness of that sanction, particularly relative to other influences on behaviour and this could be an area of supplemental interest in further research.

> "… the deterrence and agency-cost literature represents an attempt to devise and identify those mechanisms that most effectively move individuals from the "bad" (undesirable) end of the spectrum to good side, and to expel from business organizations (and society itself) those individuals who remain at the opportunistic end, despite all these efforts."
>
> *(Baer 2014)*

Law and professionalism, although looking at liability as an effective behaviour influencer for lawyers, does not discuss these additional aspects that are added by behavioural economics. The limited empirical research available does not take account of these additional attributes in the delivery of deterrence or sanction-based influences in analyzing the overall effect (Rosenberg 2002; Shuman 1993–1994; Williams 1992–1993). If the use of management techniques to appropriately deliver, monitor and control the desired behaviour are to be best delivered, these subtleties need to be taken into account. The conclusion was that deterrence

theory could be useful in assessing delivery of factors through management techniques but did not add to the direct discussion of interest which was well canvassed in the literature directly looking at lawyers and professionalism.

The concepts that underlie the behavioural economics discussion of deterrence and the difference between policing and an architectural compliance system were another area of general examination of behaviour modification considered. These concepts fit with the concepts that are being considered from law and professionalism and law and economics, using different terminology and concepts. The fundamental difference between policing and an architectural system is that one is directly sanctions based, that would include in this case liability, insurance and regulation both internal and external, all of which effectively monitor, police and sanction behaviour. The architectural approach clearly encompasses the concepts of reputation and professional training, each of which requires change through training, education and peer focus on an important aspect of practice. It is suggested that these provide more of an architectural approach to the application of the behaviour modifiers. The intention behind expanding the research to review and consider the effect of management delivery systems for the variables is intended to provide a more thorough understanding of an architectural approach by allowing law firms and the profession to use information regarding the relative importance of factors to create an environment that promotes and encourages the appropriate professional behaviour.

> A policing approach attempts to reduce fraud by identifying and sanctioning risky people. An architectural approach focuses on identifying and changing risky structures, in part through the encouragement and promulgation of pre-commitment devices.
>
> *(Baer 2014)*

The essence of behavioural economics and law is to look at social and psychological aspects of the lawyer and for this study to assist in understanding the person who is being acted on by the six identified factors. This tends to fit in the literature map as being promotion of the reputation and professional training factors, as these are the factors that most focus on, recognize and work with the professional, personal and social reactions and relationships of the lawyer being asked to perform in a stated manner. The concepts of behavioural economics in looking at moral, ethical and psychological aspects of the lawyer, in the context of the effect of the factors, do affect the debate which initially was between the law and professionalism and law and economics, both of which looked at the consequences of the application of the variables without taking into account the social, psychological and emotional environment in which those variables are being applied.

Behavioural economics categorizes these into dimensions of effect. These dimensions of effect will affect reception and reaction to the six factors. While not tested in this research, the recognition of the behavioural economics discussion of these additional dimensions has been taken into account in analyzing and reviewing the management recommendations for the delivery of the six factors and their relative effect on professional behaviour. The scope of examination directly as to legal professions was considered a better examination of the general concepts of policing and architectural models for behaviour management.

The use of codes of conduct as a method of providing training and guidance for legal professional conduct was also considered as a broader behaviour modification study. The use of codes, however, has been researched with very mixed results as to whether there is a positive effect on behaviour.

> "In fact, the research on the effects of codes of conduct alone has yielded mixed results. A recent meta-analysis concluded that the "existence of a code of conduct had trivial connection with unethical choice." Gary S. Weaver & Linda K. Treviňo, Compliance and Values Oriented Ethics Programs. Influence on employees' Attitudes and Behavior, 9 BUS. ETHICS Q. 315, 316- 8 (1999) (finding, however, a "strong negative link...between code enforcement and unethical choice"). Other research has found that having a code of conduct or other set of ethical strictures at the forefront of one's mind when making a decision can lead to more ethical decision making."
>
> *(Robbenolt & Sternlight 2013)*

Loder (1987–88) makes an argument that ethical codes are unnecessary because the potential for impact on a person's behaviour is minimal. Concern is also raised by some authors that rules create a minimum standard of behaviour deterring lawyers from reaching beyond moral mediocracy, fostering undesirable customs and habits. Wilkinson, Walker & Mercer (2000) examined the nature of ethical codes in the legal profession, concluding that the research they undertook demonstrates a lack of reliance on professional codes for the purpose of resolving ethical issues by the majority of lawyers practicing in Ontario. The study undertaken by Wilkinson et al (2000) involved interviewing 180 lawyers in Ontario, conducted in 4 centres, each a different size, with a sampling strategy designed to mirror the proportional practice shares of lawyers practicing in private firms of various sizes in Ontario. This was effectively an interview-based empirical study. The objectives of the study were to discover what types of problems lawyers referred to the handbook for guidance on resolution. The second objective was to look behind the language used by each interviewed lawyer to determine whether the handbook was considered to be a useful tool. The final objective was to determine whether ethical codes

preclude ethical decision making. Conclusions of the study included that very few lawyers found the handbook, that is the Code of Ethics, to be useful in resolving specified ethical issues. The use of codes as a behaviour modifier, while recognized to form part of training and forming the basis for standards, was accordingly not further explored (Nicolson 2005).

2.6.3 Theories of decision-making

The choice of the problem to be researched led to a specific need to understand the environment for influence on professionalism behaviour of lawyers. The social and profession issue for the legal profession had been identified and discussed for decades — what best influences lawyers to adhere to the standards of professionalism to allow regulation and licensing, other legal intervention and profession and firm management to operate most efficiently. The literature in the areas of direct interest was describing an evolution in practice environment that was bringing the decades old questions of what worked best into new and more urgent focus, an answer as to effect and efficiency is needed. The inflection of the early 2000's made the focused enquiry suitable. There was a large body of work entirely on point and the clear statement that none empirically assessed the issue addressed the underlying issue and the basis of my enquiry — what is the effect and relative effect of each influence on a lawyer's behaviour imposed by professionalism standards (Jolls, Sunstein & Thaler 1998, Wilkins 1996, Schwartz 1994, Chambliss & Wilkins 2002, Cardi, Penfield & Yoon 2001, Schwartz 2002).

There is literature in behavioural ethics and behavioural economics and law (Trevino 2006; Robbenholt & Sternlight 2013) that have begun to apply behaviour principles to the practice of law. Using the general study of judgement, problem solving and decision-making writers have started to consider decision making for both non-ethical and ethical decisions in law practice (O'Grady 2015). The discussion in one article brings "System 1" and System 2" thinking (Kahneman 2011) and brings in concepts of intuition and behavioural effect. These add understanding to thinking and decision making as a concept and those behavioural aspects do appear to have an influence on the professionalism decision of interest, as is well discussed in the discussion of the behavioural economics and law discipline and made part of the research enquiry. However, the understanding that aspects of decision making such as heuristics affect the decision-making process does not add to the enquiry as to the effect of the specifically identified influences. Those are internal influences that will affect a decision and while possibly significantly do not add to understanding the effect of the externally imposed influences desired to be studied. The work in behavioural legal ethics is part of behavioural economics and law and was not only canvassed but taken into the assessment of the contribution of the area of legal professionalism study as having effects on the reputation and

training and peer influence factors. This literature has been well canvassed and reviewed (O'Grady 2015; Robbenholt & Sternlight 2013, Prentice 2015) but does not provide empirical support for the discussion as has been discussed in 2.7 looking at the gap.

2.6.4 Conclusions on professional services behaviour theories and scales

My early interest in the specific issues of management for professionalism behaviour requirements in a law firm meant the research was intended, from commencement, to be direct and focused on a well-recognized and enunciated problem for the legal profession. Notwithstanding this clear objective, I undertook a solid enquiry into the similar issues for the closest of the professions in practice activity and environment, accountants where there is some work which has been done on somewhat similar enquiry, although none on point directly. Most work in accounting looks at a limited review of litigation liability and audit quality, which is a very different enquiry. Further the factors used for influence of accountants' behaviour while superficially similar are very different in enunciation and effect, including the nature of the professional decision making and practice they influence (Davis & Johnston 2009).

My purpose was to operationalize very specific elements of behaviour influences applicable to legal practice that were clearly and thoroughly identified and discussed by academic literature, as well as political, professional and press sources and the gap of empirical study has been frequently and clearly noted. A general social enquiry into motivations and behaviour in professional practice would not have addressed my objective of a management-based assessment of the balancing of influences, four from sources external to the affected legal professional. Four of the six influences are not an internal behaviour or internally influenced decision making at all but an externally imposed set of requirements and the other two arise from external reaction to the behaviour. Examination of general internally generated behaviour influences, such as deterrence, capability, opportunity motivation was not the intention for this research although articles in these fields were read and considered. The general application of theories of decision making did not address the objective or the gap, which was the very specific consideration of very specific externally imposed behaviour influences on professionalism decisions. The focused area of interest on the six influences that led to recognizing the problem is a well-recognized and extensively reviewed area of academic interest with a clearly defined gap of empirical knowledge specific to those phenomena, that is what I intended to research and the design was developed for that purpose.

The very specific review and focus was merited by the identified problem, academically recognized research gap and supported heavily by academic discussion as being a needed but

absent focus. The use of more general behaviour enquiries, even on professional services, would not further the intended enquiry which drove from the recognition of the issue and the consistent and constant comment of the literature for lawyers. Most research in ethical decision making and lawyers use qualitative techniques which does not address the gap of developing quantitative empirical study to validate hypotheses, the literature clearly noting the gap and calling for a means to undertake empirical study, preferably with quantitative methods, see 2.7 (Gunz & Gunz 2008). The body of work on mindfulness and legal decision making also failed to yield the desired empirically supported theory or scale (Sheer 2002). Neither did the growing body of work in behavioural theories of judgement and decision making, not oriented to the professionalism decision under consideration but to the broad brush of needed decisions in legal context, provide insight into empirically supported research (Langevoort 1998). Rather, specific note is made of the need for, and lack of, more general empirical study as to decision making influences such as bias (Rubin 1996; Langevoort 1998). The growing body of work in decision making in professional firms assists with furthering the concepts and support of complex behaviour affecting the constructed environment of law firm norms, standards, assumptions and codes of conduct but again does so without empirical, and certainly without quantitative, support for the analysis of the decision making routine. This again results in no assistance for the development of an empirical study on matters of immediate and important management issues for law firms (Morris, Greenwood & Fairclough 2010).

In addition to those broadly considered approaches to finding literature and precedent studies, consideration was given to using general work on behaviour change to determine if theory or scales could be found and used for adaptation to this research. This proved not to be the case for an enquiry into my specifically defined problem. Although, there are many behaviour theories describing both behaviour change and behaviour maintenance. One of the key areas of discussion is the difference between the ease of change and the difficulty of maintenance of that change which adds the interest of study into the influences as means to maintain behaviour change (Kwasnicka, Dombrowski, White & Sniehotta 2016). The Kwasnicka study did a systematic review of the theories and found that the vast majority related to health care issues and almost all were looking at specific behaviours. The themes from this literature are that behaviour change and maintenance theories have the five basics of motives, self-regulation, resources, habits and contextual influences. While there are aspects of behaviour theory that may be very useful in studies following and expanding from this one, that could add nuance to management techniques they do not define the primary response pattern of interest. This is because much of the professionalism behaviour of lawyers is directed by essentially external

influences, the six studied, and not the internal influences these theories relate to, as the primary drivers of the behaviour of interest. Individual response within the more general effect of the six influences, as there certainly will be, could be affected by these behaviour theories and concepts. None of the studies reviewed have quantitative empirical studies in support.

As an example, after reviewing the literature, I determined that considering approaches such as the COM-B model, a widely used model of behaviour to identify what needs to change in order for behaviour change intervention to be effective (Michie, van Stralen & West 2011), would add no insight to the enquiry on the problem and the gap of interest. The COM-B model is designed to illustrate the observation that at any given moment, a particular behaviour will occur only when the person concerned has the capability and opportunity to engage in the behaviour and is more motivated to enact that behaviour than any other behaviours. Secondly, it demonstrates that both capability and opportunity will often influence a person's motivation to enact a behaviour. Thirdly, behaviour creates feedback both positive and negative. The COM-B model of behaviour provides a basis for developing behaviour change interventions but as a general concept model and providing guidance on broad intervention strategy only. No aspect of these general behaviour concepts, models and approach such as this addressed the specific problem or the enquiry as to the specific literature recognized gap in legal professionalism literature.

Behaviour studies such as Rapoport (2014) have looked at nudging behaviour in law firms using incentives. This is a study of management techniques that does merit review and consideration but it does not provide assistance with the assessment of the six influences that law firms have to manage as a result of regulatory requirement in the profession pursuant to the licensing regime. Also the study is without quantitative evidence and does not touch on whether incentives would affect the professionalism behaviour of interest, it is heavily focused on behaviour such as billing practices and pro bono contributions.

Using key word search techniques, a wide net was cast during the literature review looking for areas of research in professional services and theories of decision making that could add insight and further the enquiry. This was done in the context of having found and analyzed a large and rich body of literature directly on point, as reviewed earlier in this chapter. Some of the areas of social science research that were searched and returned articles which were reviewed as potentially providing value included. Each area for review was identified by authors who also wrote on lawyer professionalism, by reference in articles that did provide valuable insight, by key word searches using law, lawyers, professionalism, liability among others. In each case a search was conducted and several articles reviewed before the academic

focus was determined not to contribute to the problem and the desire for a focused empirical study. Samples of some areas considered and the key articles in some of those areas considered is provided to illustrate the review and basis for not finding the specific theory or study tools of survey or scale for the thesis.

1. Behavioural economics and law generally — this is a study of the effect of human decision making and the foundation for regulation in law through choice architecture. The regulation framework studied does not provide a focus on lawyer behaviour and regulation, although the broad study area gave solid background to the choice of the more focused articles on lawyers and their regulation (Amir & Lobel 2008, Posner 1998);
2. Expressive function of law — was explored because writers on the topic examined had also written in the disciplines examined for this thesis (Sunstein 1996) however, the work in this area was focused on revolutionary reaction to law and its effect without empirical review or consideration of the specific implications for lawyer behaviour;
3. Prospect theory — was considered because it was developed from the assessment of decision making under risk in utility theory and conceptually had some application to the problem being considered (Kahneman & Tversky 2013), however, the focus in this area on theory or choice and decision weights did not adequately address my focus on the complexity of decision making in the context of professionalism and the external influences that are at play;
4. Legal theory and property rights — initially appeared to have some concepts that could be used in the assessment of the problem examined in this thesis. The focus in this area of study is on the argument that legal factors involving recognition of authority and perceived justice or morality should be understood in the context of motivation in human society with consideration law and economic effect (Hodgson 2015). However, the focus on economic rights for understanding behaviour did not lead to insight on the problem;
5. Deterrence theory and agency cost — was considered because of the extensive discussion of deterrence in the context of enforcing and encouraging appropriate director behaviour for corporate governance enhancement. There is a positon taken in this literature that enhanced and effective enforcement of duties is essential for securing compliance for directors (Akanmidu 2017), however, the focus on criminal law as deterrence and the orientation to clearly enunciated and narrow duties for directors did not give a platform for developing the study on the problem being examined (Sarna 2017);

6. Behavioural legal ethics — was used as part of the broader examination of Law and Professionalism, the authors in this field writing effectively in both Behavioural legal ethics and Behavioural economics and law, with ethics being a part of the broader review in the latter discipline (Elred, T. 2016) but the narrow focus on ethics did not expand to the broader concept of professionalism and therefore the authors in the broader discipline were those chosen to further investigate (Robbennolt & Sternlight 2013);
7. Cognitive consistency theory — has a focus on the notion that a person tends to behave in ways that minimize the internal inconsistency among interpersonal relations, intrapersonal cognition, beliefs and actions initially was considered as a promising area to build understanding. This review did provide some useful base insight but did not coalesce to theory or scales that could provide insight on the specific problem being examined (McGuire, W. 1966). Further there has been more recent assessment that there are flaws in the theory (Kruglanski, Jasko, Milyavsky et al. 2018);
8. Ethics and empirical study — focuses on corporate governance and director behaviour (Singh 2011). The requirements for director performance and the governance regime and the elements of the ethics programs for business and directors, after review, was considered to differ too significantly from the regime for lawyers to provide an effective base of study focus and scales. The focus in this sub-discipline is on the specific methods of business enterprise, such as the use of policies, rather than on what underlies the decision to comply with those policies which is the area of interest for this thesis (Weaver, Trevino & Cochran 2012);
9. Lawyer and Ethics — is an area with extensive literature however there was no empirical approach to the review and discussion and no theory providing insight to the problem being examined. There was no assistance with the desired empirical examination found despite extensive reading in the sub-discipline, the articles examined the effect of regulation on ethics without exploring the specific questions of the effect of those regulatory mechanics on lawyer decision making (Rostain, T. 1997);
10. Ethical decision making and legal compliance — was considered a possible area for finding useable theory and scales, however, the focus on business decisions in the context of business governance ethics and legal compliance management did not provide expandable concepts for examining the decision making of lawyer in a professionalism context. The difference arising from the combined influence of the business outcome, with moral and ethical consideration and externally imposed professional regulatory requirements for lawyers do not exist in such a combination in the business world. Further, the writers in this sub-discipline include many of the same

writers as ethics and empirical study and with the same result (Trevino, Weaver, Gibson, Toffler 1999);

11. Behavioural change — articles considering lawyers in this discipline do not present a view on the problem being studied and the combined internal and external regulation effects for lawyers but rather examine the theory of professions and the four aspects of professionals' view of self as superior competence, superior ethics, superior leadership and superior regulatory practice. The conclusions of these articles focus on the lack of support for the actuality of the common lawyer self views and the effect they have on professional behaviour and thereby do not address the specific influences on lawyer behaviour of interest to this thesis that were chosen because of management impact (Moorhead 2014);
12. Economics of regulation of lawyers- examines concepts such as defining the attorney-client relationship, conflict of interest, lawyer roles in the context of the effect on law firm economics but does not go on to examine the basis on which lawyers make the decisions that underpin the economic effect which is the problem of interest in this thesis (Gillers 2015);
13. Professionalism and regulation — articles are heavily weighted to the medical profession and examinations of patient care; these are professional conduct do not relate to lawyers and the services they render. A small subset of articles reviews lawyers but without empirical study and with a focus on interests such as relational theory which does not assist with the problem focus (Pearce & Wald 2012). There is some work and discussion looking at a lack of change and self regulation in the legal profession as contributing to that lack of advancement to adapt to changing social and business environments (Moliterno 2012). These authors also write in the areas used for this thesis literature review mostly in Behavioural Economics and Law;
14. Law firm management and regulation — this key word search led to the author writing in other areas used particularly Law and Professionalism and so was used in the review under the review in the broader concepts of Law and Professionalism (Davis 1994, Schneyer 2013, Chambliss & Wilkins 2002, Pearce & Wald 2013, Chambliss 2005, Fortney & Gordon 2012).

None of these general areas of enquiry addressed the specifics of the problem, provided a general theory, model or scales that could be adapted to the research and to the extent they reviewed lawyers in the context of the research echoed the more applied areas of review used for the literature study. There was a broad sweep across research on professions in general and

looking at behaviour and decision making without finding meaningful contribution to the concepts or the research problem.

The problem directed the literature research and review. The objectives focused the enquiry within the literature. The gap established the orientation of the technique reviews and search for model and scale development. The literature reported on in this chapter was extensive, created an informative debate, directly on point considering the problem for the legal profession and took the focus in the direction I used for the research philosophy. The objective of understanding the specific externally imposed influences on lawyer behaviour kept the enquiry in the literature directly considering those influences. The gap clearly and repeatedly stated by the literature directed the enquiry to positivist quantitative knowledge, which I confirmed did not exist. The determination was made that general behaviour literature would not address this.

2.7 Finding and defining the gap

In similar fashion, academics in law and professionalism, law and economics, and behavioural economics and law identify a lack of empirical study of the effects of the behavioural modifiers, the six variables, on the conduct of legal professionals. The lack of empirical evidence is clearly identified and stated in the behavioural economics literature, in a similar manner to that of the other two disciplines.

> "It is frequently remarked that law and economics is primarily theoretical or analytical, and rarely empirical. Victory is often declared based on a dataless model. We think that therefore before victory can be declared for either conventional or behavioural law and economics, the fit of the hypothesis with the available evidence must be assessed."
>
> *(Jolls, Sunstein & Thaler 1998)*

While the debate is active, and frequent, as to whether it is preferable to allow limitation of liability or to use liability, whether formal regulation is the best means of regulating professional services delivery and conduct and whether there has been an erosion of professionalism and ethics to the extent that market forces should not be used for such regulation; none of this has been effectively underpinned by an empirical examination as to whether the imposition of liability or the other factors does create an environment for control and change of individual or firm professional conduct. Notwithstanding the debate among the three academic disciplines looking at legal professional conduct as to what they perceive to be the more effective means of influencing the professional behaviour of lawyers, all three disciplines recognize that an empirical study more effectively and quantitatively examining the perception of the effect by

lawyers would add a valuable element to the debate (Jolls, Sunstein & Thaler 1998, Wilkins 1996, Schwartz 1994, Chambliss & Wilkins 2002, Cardi, Penfield & Yoon 2012, Schwartz 2002). The concept developed for the thesis research was to take a direct enquiry to a suitable sample size of lawyers, asking what positively affects their professional behaviour using both questions as to scenario effect and by direct enquiry as to how they see the behaviour influences actually affecting the manner in which they deliver professional services. The result is an empirical analysis allowing the relative effect of each of the six factors used to control professional behaviour to be assessed which specifically identifies the enunciated gap.

> Most articles in the field devoted surprisingly little attention to comparing existing or proposed enforcement mechanisms with others that might be employed. Those commentators that did compare regulatory systems, for example, in the course of condemning Rule 11, often relied on an idealized account of alternative methods of controlling lawyer misconduct, generally the disciplinary system, that bore little relationship to reality.
>
> The dearth of rigorous comparative analysis limited the value of much that was written about professional regulation.
>
> Without critical examination, these assumptions have been allowed to drive policy choices in ways that may not serve the goal of creating a workable and effective system for regulating lawyers.
>
> *(Wilkins 1996–1997)*

The academic literature discusses the lack of suitable methodology for an examination of lawyers and the legal profession in many of the reviews of legal regulation (vanGestell & Micklitz 2011, Fortney 2009, Wilkins 1996–1997). Articles looking at the regulation of lawyers have been noted to play surprisingly little attention to comparing the existing or proposed enforcement mechanisms with other types of regulation that might be employed. The commentators that do review regulatory systems, it was noted, often rely on "an idealized account of alternate methods of controlling lawyer misconduct, generally the disciplinary system, that bore little relationship to reality" (Wilkins 1996). Wilkins goes on to note that there is a dearth of comparative analysis which limits the value of much that has been written about professional regulation. He notes that without critical examination of the assumptions which have been relied upon in the work to date, reliance on those findings which have been allowed to drive policy choices may not serve the goal of creating workable and effective systems for regulating lawyers.

It has been noted in a study by Fortney (2009) that although a few researchers have used questionnaires and quantitative analysis most of the studies of the legal profession have relied

on interviews or ethnographic methodologies. Her discussion is that these types of studies may be necessary because practicing lawyers may be unwilling or reluctant to share information with researchers. Lawyers are likely to be particularly reticent to participate in empirical studies involving legal ethics because of a concern related to disclosing information related to client or firm confidences (Fortney 2009). In that article she comments that assurances of anonymity may not provide sufficient comfort to practicing lawyers because the information sought may be highly sensitive. She recommends that researchers should and could formulate a research protocol that is thorough and recognizes best practice for handling and scrubbing data but indicates that such has not been done.

Commentary as to the dearth of interest in empirical studies of law firms and law management was made by Samuelson and Fahey (1990–1991) where they state that management researchers have shown little interest in law firms. It was noted that this is an ironic lapse because lawyers have been struggling throughout the last century to try to resolve the conflict between law as a business and law as a profession, a key element underpinning the issue of conflict of interest. This lack is also noted by Schwartz (1994–1995). Recognition of the need for research and reporting to support ethical infrastructure development for law firms is discussed by Chambliss & Wilkins (2002).

There is some empirical support to the importance of understanding conflict of interest and the effect of conflict errors on liability. Fortney & Hanna (2001) noted in their article that despite their observation that the most significant errors alleged in the largest of the malpractice claims involved conflict of interest the only large study was a straight enumeration of the cases undertaken against law firm for malpractice, undertaken by a malpractice insurer and was deficient in not assessing the influence of conflicts of interest on claims involving other alleged errors. The description of the Harris study by Fortney identified a deficiency this thesis is at least partly trying to rectify by looking at factors influencing behaviour decisions.

Samuelson & Jaffe (1990) stated that no large-scale quantitative analysis of the factors that determine law firm profitability has been published. What is important is that they go on to state that this is largely due to the lack of quantitative data. The lack of quantitative data is stated to arise because law firms are bound by requirements of confidentiality and have traditionally been secretive about client relationships and their own affairs. They have been unwilling to cooperate with researchers. Quantitative analysis is the first step required to make sense of the industry and to move toward a systematic evaluation of law firms as an effective mechanism for the delivery of legal services. The few empirical studies noted in literature

review were mere enumeration studies of the numbers and classes of litigation claims and not a quantitative analysis of the results.

Cardi, Penfield and Yoon (2012) note that the literature to date in law and economics has largely pursued only two aims: to describe tort law as a tool to reduce tortious injuries to an efficient level and to prescribe the most effective means by which courts might achieve that end. Cardi, Penfield and Yoon specifically state "but underneath each economic model and projection of cost and benefit lies a basic set of grossly under tested assumptions — that the threat of common law tort liability in fact deters tortious conduct. Much of the law and economics literature relies on this assumption as if it were true, following from the syllogism that people are generally rational actors choosing their actions out of self-interest." The authors, however, go on to state that the syllogism is an empirical proposition, its efficacy can be tested empirically but it has generally not been to date. They suggest that the final step in the syllogism, the assertion that tort liability serves as a general deterrent, has not been effectively studied. The basic empirical question remains whether the general threat of tort liability in fact deters risky behaviour.

van Gestel and Micklitz (2014) noted that what is missing from research on law and its effectiveness are penetrating or rigorous theories, counter-intuitive hypotheses that are falsifiable but not falsified. Weakness in the legal academic research was described, particularly noting that most American legal scholarship is doctrinal and descriptive, or theoretical and prescriptive, the ultimate purpose generally being to prescribe better outcomes. The deficiencies noted included that the researchers are inclined to begin their research from a societal problem that is not linked to academic debate, tend to assume that the societal problem is a legal problem, do not match their research question with a suitable research design, have a tendency to perceive a law as a more or less neutral means to an end, focus more on expected consequence of legal interventions rather than on explanations as to why problems exist and tend to go beyond presenting the results of their enquiry with explanation to come up with policy recommendations and proposals. They note that most research proposals in the area of law and effect have a strong emphasis on issues concerning effectiveness and efficiency impact influence where they are not operationalized or deal with socio-legal or empirical legal research methods. There is a tendency to mix up normative and empirical questions and methods.

In the three disciplines looking at the influences on lawyer professionalism behaviour many writers admit that in each instance they may be basing their discussion and argument on assumptions that may not necessarily be true, and they clearly recognize the lack of empirical studies to provide evidentiary support for each of their proposals as to the need for, and relative

influence of, behaviour influences for lawyers' professionalism, as noted above. This leads to a starting point for the development of this dissertation study. The literature does not provide empirically supported conclusion as to the effect of the six factors influencing professional behaviour; liability, insurance, regulation internal to the profession, regulation external through courts and administrative bodies, concern for reputation and professional training. It is also clear that there is a debate among the three disciplines working in the area as to the relative effect of each of those factors on professional decisions and on each other as factors. Law and professionalism advocates that the sanction-based influences of liability and insurance are the most significant influences of appropriate professional behaviour. Law and economics recognizes those influences but as a consequence of the application of economic principles looks at a more societally effective influence using regulation. Behavioural economics and law uses more psychological hypothesis, and peer influences, to identify reputation and professional training as being the primary influences on behaviour. Each then touches on inter-factor influences indicating such relationships may exist but without quantification of these as modifying effects or indication of the expected extent of the inter-factor relationships. It was considered likely that the six factors acting as behaviour influences would demonstrate significant influences on each other in the empirical study being proposed, this proved to be true.

2.8 Summary of the literature review

The overall concept of the literature mapping early in this Chapter has law and professionalism primarily theorizing liability and insurance as the primary factors, law and economics primarily theorizing regulation as being an effective factor for professional behaviour and behavioural economics using the concepts of human reactions of bounded behaviour theorize that reputation and professional training will be key factors, in each case positively influencing professionalism behaviour.

Behavioural economics extensively considers the effect of the six factors on each other but none of the disciplines reaches conclusion and hypothesis as to those relative effects.

One of the most important concepts of behavioural economics is that the evolution from the availability and use of sanction-based influences to the methods intended to be a change element for behaviour is complex and requires consideration of the human reaction to sanction. Behavioural economics believes that social meaning and social responses are a very important part of how you translate sanction to methods used to improve behaviour.

> "A firm's approach to ethics and legal compliance management has an enormous impact on employees' attitudes and behaviours. In this study, we found that specific

> characteristics of the formal ethics or compliance program matter less than broader perceptions of the program's orientation toward values and ethical aspirations. What helps us the most are consistency between policies and actions as well as dimensions of the organization's ethical culture such as ethical leadership."
>
> *(Trevino, Weaver, Gibson & Toffler 1999)*

Behavioural economics identifies the complexity of the evolution from sanction and regulation to an effective behavioural code that will be responded to by professionals. It involves the recognition that regulation and professional training are interrelated. Regulation will have less effect if it doesn't translate, through professional training, to the adoption and the desire to act in a professional manner by the lawyers. Effectively, professional training is a means of delivering the concepts of regulation and adding in the influence of a mix of the sanction threat which underlies regulation and the training effect which modifies behaviour through repetition, knowledge and social pressures. Understanding how these influences work together can affect the way in which training and management is developed but has not been adequately studied (Fortney 2016, Zacharias 2009).

> "Professor Luban contends that overly demanding rules actually cause professional behavior to sink "toward its lowest common denominator." According to Professor Luban, even lawyers who believe in the ethical superiority of a certain course of conduct will engage in substandard behavior if they perceive that other lawyers will so behave without sanction. Since lawyers suspect that unrealistically stringent rules will be unenforced, they will act not from a rational assessment of the most ethical behavior, but from fear of professional disadvantage."
>
> *(Loder 1987)*

The literature loosely discusses interactions among the independent variables but does not reach conclusions about the modifying effect or the change to the relative effect of each of those six influences as a result of those interactions. There is also no literature analysis as to how to translate an understanding of those behaviour influences into appropriate management techniques to maximize the balancing between the ethical decisions of professionalism and the economic needs of the business of the practice of law.

The literature does not undertake any significant discussion or study of self-perception of lawyers as to the effect of the influences on behaviour, the effect of demographics or personality. The thorough literature review undertaken did not identify any meaningful discussion or any studies allowing an analysis of these factors, consistent with the general lack of empirical study.

Literature review

The challenges of a study of the nature of this thesis were noted in the literature. Empirical studies on point have not been widely done. No scales exist and hence, for the purposes of this study, it was necessary to find a way to define and score professionalism and define, understand and scale the independent variables which were identified in the literature but not properly defined, quantified or scaled. There is little extrapolation of the discussion of lawyer behaviour influence to management issues and systems in the literature, although there has been a start by Fortney looking at limited liability and management consequences (Fortney 2014).

3. Conceptualization, measurement and model development

3.1 Chapter overview

3.1.1 Introduction

To be able to examine professionalism empirically it is necessary to create a measurable variable. The extensive literature discussion of conflict of interest choices as a primary professionalism tenet meant it was reasonable to choose the acceptance or rejection of the legal client retainers, that create the needed revenue stream for a law practice, to be used to define professionalism conduct. The complexity of making a conflict of interest retainer decision and the personal, economic and reputation effects of the decision is a difficult but constantly considered aspect of lawyer professionalism, the decisions are not easy and the results can be expensive (Richmond 2007).

The three academic disciplines examining the topic of legal professionalism and particularly conflict of interest choices also identify the six factors which influence lawyer behaviour. Law and Professionalism, Law and Economics and Behavioural Economics and Law identify the six factors which are used to influence the professionalism behaviour of lawyers towards more correct professional responses, based on the profession's standards of conduct as:

1. Imposing personal liability for professional error,
2. The requirement to carry insurance,
3. Regulation internal to the legal profession,
4. Regulation from courts and administrative bodies,
5. Reputation concerns, and
6. Professional training and peer influence.

The literature does not provide defined, testable concepts for professionalism as a dependent variable or for the testing of the relative effect of the six independent factors influencing professional decisions identified in the literature. The literature did provide the identification of conflict of interest decisions as a, if not the key, professionalism decision and although without definition or scale, the six behaviour influences that are used by the legal profession to influence and control professional decisions.

The literature in the disciplines discussing lawyer professionalism indicates that definitions of these independent variables both as testable concepts to use as variables and as a scale or score have not been created to date because the articles discussed in the assessment of the gap of

little empirical study includes note of the lack of suitable methodology (von Gestel & Micklitz 2011, Fortney 2009, Wilkins 1996). No empirical studies exist on point and very limited empirical studies as to the legal profession and its management in general exist, as noted in the literature review. It was therefore necessary to develop the concepts for all of the variables, create a means of testing them using appropriate definitions and develop questions to allow for a survey-based enquiry for each of the dependent variable and the six independent variables as factors. A careful review of literature in deterrence theory, motivation and professional services studies did not provide any defined scales to test the specific problem under consideration and of interest. The very specific nature of the problem and enquiry and the clear identification of the factors influencing the behaviour of interest meant those factors needed to be specifically studied as discussed in literature and therefore defined and a scale created.

3.1.2 Defining the variables — general outline

Survey questions were developed to establish a definition and scale for the dependent variable. Ten questions have been developed which are based on brief scenarios derived from review of an extensive panel of court decided legal cases involving conflict of interest and lawyer liability considering conflict of interest. I determined that a multi-faceted enquiry as to the dependent variable would provide a more nuanced and reliable variable than a single enquiry. There are ten questions which together define a single dependent variable. The cases and the scenarios for the questions were selected to include ones where there is liability imposed due to conflict and ones where a liability based in conflict was successfully defended or there was no conflict and no successful liability claim. Each enquiry asks whether the respondent would accept or reject the retainer in that circumstance. A focus group was used to vet the scenarios and questions to assess initially if the questions give a suitable cross section of the intended two aspects of the dependent variable for a balanced response to define the dependent variable:

1. Conflict found — law suit and liability;
2. Conflict not found — law suit and successful defence or no assessed conflict and no law suit.

The result was a scale defined dependent variable for lawyer conflict of interest retainer decisions. This scale would range from 0 to 10, where 0 would denote all incorrect responses (acceptance of client retainer when conflict is found, and rejection of client retainer when no conflict is found) and 10 would denote all correct responses (acceptance of client retainer when no conflict is found, and rejection of client retainer when conflict is found).

The six independent variables were also measured by survey response, each to a panel of four questions for each variable. The questions were all specific to the effect of that independent variable on the conflict of interest decision. Each panel of questions is intended to create an assessment of the extent of effect of that factor on the surveyed lawyers as to their conflict retainer decisions. The questions were developed from the literature discussion of the factors. Using recommended techniques for defining a variable, creating a scale using a four-question technique was selected, this has been supported as a suitable number of items for each variable (Morgado Meireles Neves 2018, DeVellis 2016). There is no existing scale for any variable and so are each newly created to define the variable as effect on the decision to accept or reject the legal retainer. The nature of the problem and decision to use empirical enquiry required that these factors be assessed in this manner. The questions were pilot tested 5 times in substantial pilot runs. The last pilot was assessed for diagnostics. The results showed that the questions are understandable and could be answered in the survey format designed. The results responded well to statistical diagnostics. The pilot studies also supported the assessment that the questions resulted in responses about the variables that are suitable to provide information for the enquiry. This was confirmed by review with experts.

3.1.3 The basic concepts

Some percentage of what leads to a lawyer to accept or reject business (and therefore revenue) where a retainer might be conflicted for professionalism reasons comes from the lawyer considering the effect of each of the six factors based on literature (see Chapter 2). Liability has long been thought to be the primary motivator of professional behaviour but without any identified empirical study of its effectiveness, essentially the dialogue about the need for and effect of liability is speculative. Liability is an expensive and inefficient means of influence on lawyer behaviour leading to a management need to assess the relative effect of more efficient and potentially effective methods of guiding professional behaviour for lawyers. The lack of a clear basis for assessing the relative effect of the influences used from the literature creates a need for a review of relative effect of management methods for professionalism decision making oriented to law firm and legal profession managers (Wilkins 1992, Wilkins 1996, Macey & Miller 1997).

The literature has examined two of the lawyer professional behaviour influences, those of liability and regulation (often combining external and internal to the profession as a single concept of regulation), in more detail than the other four influences. See Chapter 2 at 2.2 Law and Professionalism. More recent writing has shown increased interest in the other four factors, starting to change the assessment of relative effect and therefore relative importance of each.

See Chapter 2 at 2.2 Law and Economics and 2.4 Behavioural Economics and Law. Most recent writing has also identified a view that the behaviour influences have effect on each other that is more significant than previously recognized. The academic conclusion as to relative effectiveness of each of the influences varies by the orientation of the academic discipline presenting the discussion but is evolving in recent years from the more static earlier debate, as outlined in Chapter 2.

3.2 Overview of the variable creation and reasoning

3.2.1 Introduction

As is discussed in Chapter 2 — Literature Review, the variables were identified by the literature discussion and debate which focused on six clearly identified factors that are used to influence lawyer professionalism behaviour. These are effectively externally created imposed influences rather than more personal influences on behaviour such as personality, motivation, attitude or workplace influences such as setting, management style or communication systems. My interest in assessing these factors is because they each present significant management challenges increasing cost of legal services and potential loss of revenue. The statements of the literature that these factors had not been empirically studied led to a positivist philosophy and survey-based research design with a need to define and scale each of the factors to explore the problem. Understanding and then suggesting management techniques for the use of the factors to best result required an assessment of relative effect on behaviour.

Studies in more general social science and the scales used there would not provide the insight that I set out to obtain as to the relative effect of the six clearly identified factors. None of the factors which are discussed in the literature are described as involving or being based in the more general concepts used for academic work in ethics or law firm culture, such as motivation studies. Rather, the literature was clear in stating there is an absence of empirical study on the factors discussed and a resulting lack of scales or definition. The literature notes the need for such a study and therefore definitions and scale. The identified gap and my interest in the use of the factors as management tools were consistent. The development of the factors into a form suitable for empirical study was the identified missing piece, the gap, to the extensive discussion of the factors that influence lawyer professionalism behaviour. This led to the need for this thesis research to develop the factors rather than use existing social science, professional services, concepts and scales; there were quite simply none that furthered the study intended and of interest to me as researcher.

3.2.2 Overview of the core concepts: ethics, professionalism, professional standards

This thesis and the research it entailed is a study in professionalism not in ethics. The difference between professionalism and ethics is somewhat like the difference between methodology and methods, that is a difference best understood by academic researchers. Professionalism and ethics is a difference best understood by lawyers. It is the difference, in effect, between the concepts and ideas of ethical behaviour and the broader concepts which set the way in which those are operationalized. The lawyer, as a professional would, or certainly should, understand the difference between professionalism and ethics in the same way that the academic researcher understands that difference between methodology and method. Ethics may underpin some of the concepts of professionalism but professionalism is a much broader concept involving adherence to the rules, standards and guidance of the codes of conduct as operationalized in practice rather than the narrow ethics concepts that create those. Ethics is important in legal practice and the concepts of ethics form part of professionalism as a moral guidance to some required behaviour but is a part only of the concepts of professionalism.

Defining professionalism can start with the Merriam-Webster dictionary definition of professionalism as “the conduct, aims, or qualities that characterize or mark a profession or a professional person”; and it defines a profession as “a calling requiring specialized knowledge and often long and intensive academic preparation.”

Professionalism is the combination of a number of different attributes that define a professional. These attributes start with specialized knowledge as the key; the professions are often referred to as “learned professions” as has been discussed in the literature review. The members of a profession, for admission, made a commitment to develop and improve their skills and, where appropriate such as lawyers, they have the degrees and certifications that demonstrate the accumulation of this knowledge. The professions such as law require, through their codes of conduct, that the members behave in a manner that exhibits honesty and integrity. The corollary to this is trust and the ability to accept that their word will be honoured. Professionals and professionalism involve personal accountability as an element of honesty and integrity which is directed by the requirements of the professional codes. See Appendix B for sample codes.

Ethics, on the other hand, provides some of the principles and values which act as a guide to proper conduct in the practice of the law. The basic principles covered by ethical standards include independence of advice, honesty in dealing and personal integrity. This is directed to aspects of the lawyer and client relationship and provides some of the structure for the broader

professionalism standards. The application of professionalism drives the requirements for client first service, avoiding conflict of interest, providing confidentiality, dealing honestly with client money, providing fee disclosure and acting with integrity. There are also professional standard requirements such as competence which expands in professionalism to the requirement to maintain and deliver legal services with competence which encompasses academic qualifications, training and meeting practice requirements such as holding a valid licence (Wolfram 2001).

Professionalism dictates the manner in which a lawyer's decisions are made and practice is conducted to meet the standards required for ethical professional practice. These standards are set out in codes of conduct that are established in each legal jurisdiction but are very similar in concept among jurisdictions. This study is one examining professionalism because it studies the effect of the influences on the decision process and does not examine the acceptance of, or concepts related to, ethics principles that may form the foundation for the professionalism requirements. This orientation to the research is explained in the survey discussion and was clearly enunciated to the survey respondents where it was stated that the study is one of effect on professionalism decisions and not one of whether the respondent intends or desires to be professional (that is assumed).

3.2.3 Professionalism and conflict of interest

Avoidance of conflict of interest is one of the primary professionalism requirements of legal practice making it a suitable proxy for professionalism as a general concept and, because it is extensively discussed in the literature of interest as a concept itself.

> "To be sure, conflict rules are at the core of the lawyer-client relationship and have always been central in lawyers' ethics."
>
> *(Whelan & Ziv 2011–12)*

The binary nature of the decision to accept or reject a retainer considering conflict concerns results in a measurable dependent variable to develop a quantitative study. The ability in limited circumstances to accept a conflict with client consent and protection remains a binary accept rather than reject decision.

Table 3.1: Illustration of the conflict of interest decision

	Conflict of Interest Present (and not waivable)	No Conflict of Interest Present (or waivable)
Accept Retainer	Incorrect Decision — expose firm to potential liability, ethics error	Correct Decision
Do Not Accept Retainer	Correct Decision	Incorrect Decision — economic loss to the firm

Source: (Conceptualization by the Author)

A key tenet of professional standards is avoidance of conflict of interest but that tenet is one being increasingly questioned by the literature as to both need and value when considering its cost. The legal profession and individual lawyers accept the premise that a lawyer should not act on a retainer in circumstances where they have a conflict of interest, either among clients or as to personal interest with a client (Painter 2001, Richmond 1999, 2007). Accepting a retainer when in conflict is at odds with the requirement that the lawyer be in a position of being able to fully and freely provide independent advice and zealous advocacy.

The reason conflict of interest was selected as the study aspect of professionalism for this study is that it requires essentially daily consideration, it is well understood, it exists as a consequence of the other key tenets for professionalism effectively encompassing the most important of those and it is measurable. It is not easy to measure other professionalism requirements and there is no effective means of simply testing whether behaviour influences affect these other more amorphous professionalism requirements. Conflict of interest is a binary decision; accept or reject a retainer, which gives something to measure for an empirical study (Richmond 1999, 2005, 2007). It is also the topic of considerable discussion in itself in both law and professionalism and law and economics (Chambliss & Wilkins 2002).

> "In their daily practice of law, many attorneys must determine when they can ethically represent multiple clients who have conflicting interests in the same transaction or proceeding. The current ABA Code states that such multiple representation can be proper if informed consent is obtained, but only if it is "obvious" that the representation will be "adequate." Unfortunately, no disciplinary rules defines "adequate" and the little guidance provided in the Code's ethical considerations is, at best, ambiguous."
>
> "Three of these policy considerations can be readily identified: (1) the need to protect clients from the dangers of multiple representation; (2) the interest of the clients in certain objectives which can best be achieved through multiple

> representation: and (3) the preservation of lawyers' reputations through an avoidance of apparent impropriety."
>
> *(Moore 1982–1983)*

3.3 The Variables as concepts and measurements

3.3.1 The dependent variable — conflict of interest / acceptance or rejection of a legal retainer

It is important for the reader to understand that a conflict of interest decision as to a legal retainer while binary, accept or reject the retainer, is not a "bright line," simple, decision. In many circumstances the existence or the absence of a conflict of interest is clear but there are as many circumstances where it is not. The decision is both professional requirement and fact-based; the professional requirements are relatively clear in statement but the facts in context often are not and this complicates the assessment for conflict. The application of a conflict concept to factual circumstances arises on an essentially daily basis but never becomes sufficiently routine to commoditize the assessment because the fact patterns and solutions to the application of the concept vary widely. It has been noted that the standards for determining whether a matter is conflicted, whether that involves a substantial relation or an interest being adverse, are ambiguous at best (Painter 2001).

> Predicated on the essential elements of loyalty and independent judgment, the principles steer the resolution of conflict of interest problems through a four- step lawyer-directed analysis. The first step requires the clear identification of the client. The second step demands a determination whether a conflict of interest exists. The third step decides whether the representation may be undertaken despite the existence of a conflict. If the conflict proves consentable, then the lawyer proceeds to the fourth step. That final step requires client consultation and informed consent, again confirmed in writing.
>
> …the main thrust of conflicted analysis is risk and harm. Conflict situations require an assessment of the level of risk impinging on the client-lawyer relationship and the degree of harm weighing upon the representation."
>
> *(Alfieri 2008)*

A fundamental problem with the identification and assessment of conflicts is that it is difficult to determine if they exist, or could potentially exist in the future, the extent and nature of the conflict and whether the conflict could affect the professional and ethical requirements of the lawyer. Issues in assessing conflict extend to the difficulty inherent in clearly providing the necessary information to allow other firm members and then a client to assess if there is conflict and to then to enforce or waive the conflict, all needing to be in a manner that will

successfully shield the lawyer from the liability issues which might arise from conflict of interest. The difficulty is particularly acute where, at the time of the client intake, a conflict was not expected but subsequently the conflict arose as the representation continued. The concerns about ambiguity are exacerbated by policy considerations which at times indicate that although clients need to be protected from the perceived shortcomings of multiple representation there may be certain client objectives that can be better achieved by a lawyer with multiple representations in the same matter. Despite the better result for the client in that case, the acceptance of a multiple retainers in a matter is a risk which must be balanced off against the need to preserve lawyers' reputations where that is often best achieved through avoidance of the apparent impropriety (Moore 1982–1983).

Using the facts and judicial decisions from a large-scale review of court cases, questions were developed to reflect the basis the courts used for the identification of conflict and to establish a basis for the correct decision on the facts as to whether to accept or reject a retainer. Correct as to the decision was taken as agreement with the court. This gave a means of defining conflict of interest as a professionalism consideration using acceptance or rejection as the dependent variable and a scoring system developed based on agreement or disagreement with the panel of court decisions. See Appendix G, which outlines the manner in which the response panel was created using these court cases.

The court cases generated the ten questions which were used to define the dependent variable, categorized to create a score by no conflict and able to accept based upon the court decision or a conflict existed and should reject based upon the court decision. As noted previously, it is a binary decision whether to accept or reject a legal retainer and therefore there is no internal scale to each of the questions for this enquiry but only the aggregate scale of the number of times the respondent agreed or disagreed with the court. This was scored for each respondent over the full panel of all the questions to create an overall professionalism score and then separately by the correct decision to reject five questions and the correct decision to accept five questions. The subtlety of the effect of the ability to accept a retainer using techniques (such as confidentiality shields) to allow a retainer despite a conflict was not included because it would add complexity and length that I assessed would reduce the response rate. This can be explored in further research. The frequency of agreement with the court over the ten questions has a variance that allowed scoring and identifiable levels of professionalism as defined for this study.

Table 3.2 provides the distribution of the number of correct answers provided by the sample of 238 respondents. There were no respondents who had none correct and only one person had only one correct answer. However, there was one respondent who only got two correct and

none who got only three correct. The most frequent outcome was by 71 respondents that got seven decisions correct. Only one respondent gave a correct decision all ten times. The respondents at only two correct and all correct were considered outliers and dropped. This was justified because the single number for the responses at extreme ends was considered to be true outlier, the small numbers involved in those responses could not create any statistically significant change in the overall analysis.

Table 3.2: Dependent variable frequency

Score — # of times the respondents correctly agreed with the court as to whether it was correct or incorrect to accept or reject the conflict of interest	Count	Percentage	Cumulative Percentage
0	0	0	0
1	0	0	0
2	1	0.42	0.42
3	0	0.42	0.42
4	9	3.78	4.20
5	32	13.45	17.65
6	56	23.53	41.18
7	71	29.83	71.01
8	54	22.69	93.07
9	14	5.88	99.58
10	1	.042	100
Total	**238**	**100**	**100**

Source: Created by Author From Survey Data

These results were used to assess the variable and its reliability. The decision to use a multiple question scale to create the dependent variable reflected the need to capture the nuance of the decision and thereby to have a consistent, reliable definition for the variable.

There is sufficient variance in the responses for a meaningful assessment and scoring. The curve is a normal curve, based upon the concept that correctness as against the finding of the court is indicative of professionalism. More correct answers indicate a more professional responder. The response to be correct is not simply to reject conflict of interest but is correct to accept the retainer when it professionally can be accepted and to reject when it should not be. The courts have stated in some circumstances a retainer has a non-waivable conflict of interest

and the retainer should be rejected, the correct answer then is to reject. In other cases the court has said while there may appear to be a conflict of interest, it is acceptable for the retainer to be accepted, the correct answer then is to accept the retainer for the economic reason of not losing the business for the lawyer and allowing the lawyer of choice for the client.

A wrong answer to accept when the retainer should be rejected is a serious wrong answer, one where there is a true professionalism issue and the potential for sanction and liability. The choice to reject a retainer when it can be accepted is less serious professionally but has a very real economic effect. Any time that a retainer is rejected it is a loss of revenue for the firm and the loss of a choice of legal counsel for the potential client. Therefore, it is correct to accept the retainer in circumstances where the court has stated that acceptance is permissible. A decision that agrees with the court on acceptance is equated to a more professional response because it more correctly identifies the professionalism needs and then balances those with the business needs of the law firm. A firm cannot effectively and economically function if it is excessively rejecting retainers.

A quantifiable dependent variable was effectively developed for professionalism. That quantifiable dependent variable is capable of being viewed as a score, both as an overall score and separately on the ethical decision to reject a retainer where conflict exists (five questions) and the economic decision of whether to accept a retainer where a conflict does not exist or circumstances allow it to be accepted (five questions). The development of the dependent variable in this manner allowed for a quantifiable variable, a binary decision which could allow regression and other statistical analysis and the potential this definition and scale can start the process of creating a proper professionalism scale for lawyers.

3.3.2 The independent variables as described in the literature

The independent variables were developed from the behaviour influences identified during the extensive literature review which focused on articles looking at lawyer professional behaviour and the influences on that professional behaviour. The literature review was conducted to the point that was identified as saturation as to what methods are used for the purpose of influencing lawyer professional behaviour. Saturation, meaning for this discussion, those were the factors theorized to influence professionalism behaviour and only the six factors presented as being primary factors in affecting legal professionalism behaviour. This resulted in the six selected independent variables being identified. There was some discussion in the literature of other possible modifying factors but the conclusion of all writing is that it is the six factors which are the primary behaviour influences which can be used and managed for lawyer professionalism.

The literature recognizes there is some modifying affect among the variables but with no assessment of strength and no empirical evidence or quantitative analysis. The effects of the factors are primarily discussed as if the six factors have a linear effect, independently, on the professionalism decision with some recognized, but not developed, modifier effect among them and from others. The factors and then the models were developed accordingly.

3.3.3 Liability

Lawyers are required to practice in a manner where they retain personal liability for the consequences of the delivery of the professional service (Wolfram 2001–2002, Dari-Mattiacci & Parisi 2004, Fortney 2012 and others, Stephen & Love 2012). A court can determine that there has been error and damage has occurred which is required to be compensated and which must be paid on a personal basis by the lawyer making the error of advice or judgment, or in many instances on a basis of vicarious liability by the law firm and all partners for their partners' and employees' errors. Most other businesses do not have this requirement, in other businesses the use of a corporate business structure can ensure that the owners do not have personal liability for the business consequences. This is not possible for lawyers, they must bear personal liability and responsibility for the results of the manner in which they, and others in their firm, practice. This is caused by the required practice format, whereby lawyers must practice as sole practitioners or in a partnership. If corporations are permitted in connection with the practice of law they are permitted for the business aspects only and cannot be used to shield the professional from the personal liability that can be imposed in the event of a mistake or error in judgment (Stephen & Love 2012, Schneyer 1997–1998, Fortney 1997). The liability lies in common law and statute, common law states that the relationship of a lawyer to their client, and potentially others, is such that the client has the right to depend on the advice that is given and the manner in which the advice is given. If there is a mistake and damages arise from the mistake, then the lawyer must personally bear those consequences together, in many instances, with their partners.

> "…negligence liability has three independent, additive effects: it activates normativity, it exposes the plaintiff to reproach, and compensation works as a pecuniary deterrent. These three effects work even if there is no (human) victim, and therefore no reason to activate morality."
>
> *(Eisenberg & Engel 2016)*

If there is an error or omission in the delivery of professional services, either as a result of a professionalism error such as incorrect acceptance of a matter with a conflict of interest or in the provision of the professional advice that leads to damage, then the person who is damaged

can sue the lawyer and their firm. There is no liability protection for the law firm partners or the professional which is unlike a corporate shareholder, or for that matter officers and directors of corporations which have very limited liability exposure and none for errors of business judgement honestly made. The legal professional is fully exposed to the damages caused by an error in the delivery of legal services of their own or in many circumstances their partners or employees.

The profession is known as a "learned" profession, which means that there is a perceived information friction between the lawyer and the persons who are acquiring legal services. As a consequence, it is believed there is no market ability to weed out poor performance by the ability of the consumer of legal services to judge and reject the services as market based choices. Further, as a learned profession which is licensed there is a monopoly in the provision of legal services (Pearce & Wald 2013). One price for that monopoly, and for the information friction which necessarily exists, is the imposition of behaviour controls, such as the sanction of personal liability. The stated purpose for the imposition of liability is to dis-incentivize professionals from sloppy, negligent or deliberate malfeasance in the practice of law. It is intended to provide a sanction for bad behaviour and an access to funds for victim recovery from damages. The intention is to increase care, supervision and good behaviour, as discussed in the literature review.

The issues that are increasingly being recognized as a challenge for the legal profession are the increasing complexity of law and client relations with the lawyer, and among clients, increasing the difficulty of avoiding error. The increase in the size of firms means that it is very difficult to identify all circumstances where liability could arise (Sherer 1995). This is compounded by the increasing basis for finding liability by the courts as the courts expand the reasons for finding liability for lawyers (Davis 1994). There is a significant cost to identifying the circumstances that lead to liability with the practical inability to control behaviour across a very large number of often geographically disbursed professionals. The imposition of liability across a partnership, particularly on a vicarious liability basis, is questioned by the literature as potentially imposing an unfair and unreasonable burden on the legal profession, as reviewed in the literature review.

Defining a scale for liability was done by questioning the effect, and relative effect, of liability on the conflict retainer decision. The imposition of liability on lawyers is fully understood through education and management for all lawyers, it is a universal risk and concern for the legal profession that is constantly considered. Liability is a sanction-based behaviour influence. It is punishment and also a source of recovery.

Using these concepts, liability was defined using questions around the simple statement of how much does the possibility of liability affect a conflict of interest decision using scenarios taken from court cases. Lawyers will understand what comprises liability without a need for explanation, based upon the pilot studies that was a safe observation and consistent with the fact it is an aspect of training for all lawyers.

3.3.4 Insurance

The literature speculates that insurance coverage will affect the liability effect as a consequence of minimizing its cost. The comments of the literature indicated that it is likely that insurance and liability are correlated but without any clarity as to the extent or effect. The literature says that the insurance can affect behaviour but there is no indication of how much it affects the response to liability sanction.

> "Despite the important role insurance plays in regulation, neither regulatory scholars nor those studying insurance have devoted much time to thinking about insurance qua regulation."
>
> *(Heimer 2013)*

Insurance is a behaviour influence factor because of the requirement in most jurisdictions that a lawyer have at least a dictated minimum amount of insurance to cover malpractice claims (Fortney 2012, Abramovsky 2005–2006). Insurance is both a modifier of liability, providing for a source of recovery other than the personal assets of the lawyer and is also a regulator of behaviour because of the requirement to obtain and pay for insurance (Wilkins 1996–1997, Davis 1996, Fortney 2018, 2019). A specified amount of insurance coverage is generally required to be held to practice law in most jurisdictions, other than in some states of the United States where it is not consistently a mandatory licence requirement imposed by the state. In most cases there is at least a minimum level of insurance required, plus optional insurance is often carried for potential professional liability over and above that minimum to protect the lawyers from the consequences of larger damage awards. The intention is that insurance will cover litigation defense costs for the lawyer and pay the damage award (although never fully), which may reduce the effect of liability as an effect on professionalism decisions. The literature does not reach a clear conclusion about the interaction between the two variables of liability and insurance on professional decisions (Davis 1996, Fortney 2018, Salyzyn 2017).

Insurance is not a complete recovery source eliminating cost for the lawyer. Insurance will only partially cover their costs and damages (Fortney & Hanna 2002). Insurance does not cover the provision of advice which is not strictly legal, this is a particular issue where the

liability arises because of conflict of interest which is not strictly the provision of legal advice. Insurance will always have a deductible and there will be exclusions (Fortney & Hanna 2002). Deliberate offending conduct is not covered. The acceptance of a retainer in the face of a conflict of interest could be a deliberate act that is an exclusion from insurance coverage. Time cost and exposure to the difficulties of managing litigation is a cost also not covered by insurance. Oversight, which is necessary to ensure effective prevention of the liability which results in insurance claims and accordingly future insurance cost is also a hidden cost not covered by the insurance (Fortney & Hanna 2002).

> "Insurers have long worried about moral hazard, the shift of incentives that can occur once an insurance contract is in place. An insurance contract transfers much of the cost of risk taking to the insurance company even though control over risk taking remains with the policyholder. With the insurance company now footing the bill for losses, the policyholder may be less careful, and losses may consequently rise."
>
> *(Heimer 2013)*

> "Then only some of the social science literature on insurance addresses regulatory questions, and not always very directly. For the most part, the pieces that do bear on regulatory questions (e.g., Heimer 1985; O'Malley 1991; Baker & Simon 2002; Ericson, Doyle, and Barry 2003)."
>
> *(Heimer 2013)*

The cost of, and access to, insurance, particularly to excess insurance coverage over the insurance required by licencing regulation requirements which is readily available, are direct influencers of behaviour because insurance requirements dictate at least some of the manner in which decisions must be made. Insurers audit for professional conduct, including conflict of interest policies, in determining the level and cost of insurance and a bad claims record has a significant adverse effect. There is, however, significant debate as to the effect of insurance requirements on conduct (Heimer 2013). The interruption of the deterrence mechanism of liability by insurance is considered by some to contribute to poor behaviour and is often not properly priced to support the deterrence intended (Short 2013).

> "… there are two ways Insurers seek to regulate attorneys which directly relate to the regulatory schemes contained in the ethics codes. The first is through policy provisions that supplement or clarify the definition of prohibited conduct beyond the terms and requirements of the standard ethical constraints. The second is through policy provisions prohibiting or restricting, that is excluding from coverage, permitted conduct or conduct not expressly or clearly forbidden by the ethics codes."
>
> *(Davis 1996)*

The literature states that the availability of insurance has a lessening effect on the influence of liability, but it does not eliminate the liability effect (Heimer 2013). The insurance coverage requirement and the literature discussion of insurance as a regulator means it is reasonable to look at insurance as a separate independent variable but one which is likely correlated with liability. Insurance effectively does not eliminate liability risk or cost, it only mediates it and insurance has its own sanctions and effects as a factor influencing behaviour.

The independent variable for insurance was developed recognizing the significant inter-factor effect of insurance on other factors but accepting the concept of insurance as a separate independent variable.

> "…that malpractice insurers also may be important. Like ethics advisors, malpractice insurers are in a position to provide expertise about sources of potential liability and mechanisms for promoting compliance."
>
> *(Chambliss & Wilkins 2002)*

In similar manner to liability the variable was defined using a multi-question approach to creating a scale. Lawyers are all familiar with insurance requirements, cost and access because they must carry insurance. The questions could therefore directly enquire on the effect of that requirement on professionalism behaviour.

3.3.5 Regulation — internal to the profession

> "At the heart of the tensions between commercialism and professionalism lie two key questions: who should regulate the legal profession and why?"
>
> "Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice."
>
> *(Whelan 2008)*

Salyzyn (2017) says the law society equals professional conduct equals discipline.

The legal profession is a licence regulated profession and, as a knowledge-based profession, it is prohibited throughout North America for a person to hold themselves out as a lawyer without being appropriately educated, trained and licenced (Schneyer 1997–1998, Levine 2012). The license requirements include education, professional qualifications, mandated continuing legal education, the maintenance of standards, ethics and professionalism requirements and holding insurance coverage. A breach of any of these requirements will

result in the loss of licensing. The profession's regulator in each jurisdiction has the power to sanction and disbar lawyers. Internal regulation should therefore be a complete, or at least a powerful, influence over professional decisions, including client retainers and conflict of interest. The basic grounds for sanction, and potential disbarment, are failure to comply with the required professional standards, a failure in overall quality of services, evidence of practice impairment, negligence, inability, or breach of professional codes. See Appendix B for sample Codes of Conduct with sanctions.

The literature recognizes that law societies do govern for the public interest and that the regulation can be vigorously enforced particularly for ethics rules (Salyzyn 2017, Richmond 2006-07). Although this view supporting continued profession-based regulation is frequently questioned, it remains a primary factor governing professional behaviour and decisions (Whelan 2008, Hazard & Schneyer 2002). This is despite considerable criticism of the effectiveness of the enforcement practices for this factor (Schneyer 2013).

There are strict standards for professionalism set out in a code of professional conduct for lawyers in each jurisdiction and with little difference in the standards among jurisdictions. It is recognized that lawyers look to the rules to guide their activities (Heminway 2017). Accepting a client retainer when there is a conflict of interest is a prohibited professional activity except in very strictly prescribed circumstances in all North America jurisdictions, and essentially globally, as a part of the licensing and sanction systems (Xu 2017).

The literature, particularly law and professionalism, despite recognizing there is significant influence from regulation on behaviour, questions the effectiveness of internal professional regulation. Discussion in the literature is inconclusive as to the use of regulation as an effective tool because of a lack of consistent enforcement (Pearson 2013, Wilkins 1992, Barton 2001, Dzienkowski & Peroni 2000). The concern is also raised by some authors that the statements of required conduct in the codes of the profession are at best lightly used to guide conduct and this is contrasted with the effect of cultural norms and expectations from institutional theory (Chambliss & Wilkins 2002).

The legal professional's view based on the research results and responses to enquiries made often during the research process is that the effect of internal regulation is very real in influencing professional decisions. Despite the argument that there is light sanction by the relevant regulator, the existence of conduct rules and likelihood of sanction is taken seriously. The results of the survey enquiry support this view. One view of a lawyer responding to this thesis enquiry, consistent with what was discussed with experts available (on an informal basis), is the reason that regulation provides a strong effect on and causes "good behaviour" is

that little is required to be done to create a breach requiring constant vigilance. The stated standards are strict, clear and believed to be effectively enforced with the potential sanctions constituting a huge consequence (Richmond 2006-07). The concern of professionals is most commonly about maintaining professionalism and good standing and not protecting themselves from professional sanction, based on my informal discussions with profession leadership during this research. Punishment is therefore rarely needed because fear of sanction and loss of reputation is a powerful motivator using the response to "social-based" enquiry (to opposite conclusion Fortney 2019).

It should be noted that internal profession regulation and the sanctions made for breach of internal regulation is separate from liability which is a sanction by clients and third parties taking court action based in tort liability, but both can be imposed at the same time and often is. Further, the ability to ground a liability claim in conflict of interest is a use of the standards set by internal regulation to provide a claim in liability, a conflict of interest decision has no other basis in law and arises only from the professional standards. The concept of breach and damages for conflict of interest comes from the internal professional requirements because avoidance of conflict is not a concept of general tort law but only one of contract and the duty created by regulation of the conduct which is needed for the breach to give rise to recovery in liability (Bastedo 1970). While not a modifier effect on conduct, the existence of this internal regulation factor is necessary for a claim in liability based in conflict of interest. It is also separate from insurance requirements although insurance is a requirement to practice licensing for most lawyers, the basis for the insurance variable effect is different. Insurance requirements, in order to maintain cost effective insurance, will overlap the sanctions of regulation but they are independent and separate.

Internal regulation is identified in the literature as being a separate independent variable but with different views among the academic disciplines as to how effective it is as a regulator of professional behaviour. The argument about the effect of internal profession regulation generally focuses on the manner and extent of sanction rather than the effect of the professional's concern about meeting standards and potential sanctions. In much of the literature it is not the enunciation of the required standards it is the enforcement of those standards that is questioned by the literature as to whether it is effective. But see also the studies on the use and effect of professional codes in the research of Wilkinson, Walker & Mercier (2000). A concern expressed is that the effect of internal regulation has not received adequate attention from code drafters or scholars as to whether and when it is enforced through discipline and how it intersects with other law (Zacharias 2009).

Again, lawyers are intimately aware of and understand regulation by the profession. Extensive training is given as to this aspect of practice and the need to ensure compliance. This allowed direct enquiry in the survey as to the extent of the effect of the behaviour influences. A scale using multiple questions exploring aspects of this factor was possible.

3.3.6 Regulation — external (courts, administrative bodies)

> "Public authorities regulate the conduct of American lawyers through at least four different systems: professional discipline; direct judicial regulation of trial and appellate lawyers; direct regulation by some federal administrative agencies of lawyers who advise clients on matters within their jurisdiction; and civil liability, mostly for malpractice. These systems have somewhat overlapping jurisdictions and a common aim—-to deter professional misconduct. Yet, they operate in a largely uncoordinated fashion and differ in the nature of their proceedings against lawyers, the range of misconduct they address, the standards by which they define misconduct, the decision makers who apply those standards, and the sanctions they impose."
>
> *(Schneyer 1997–1998)*

Legal professionals are regulated not only by the bodies internal to the profession but by courts, administrative bodies and tribunals which are separate from the profession (although largely staffed by lawyers) (Wilkins 1996–1997, Schneyer 1997–1998, Levin 1998, Swisher 2014). Administrative entities have rules regarding the conduct of a lawyer, both as they interface with and appear before that body and between the lawyer and the client as it involves that body. Each also has rules involving lawyer-to-lawyer interactions. These rules involve professional conduct and competence, including conflict of interest decisions, based on the same professional concepts and rules as required by the profession.

> "1. Disciplinary Controls. — The reference point for this model is the current disciplinary system, in which independent agencies acting under the supervision of state supreme courts investigate and prosecute violations of the rules of professional conduct."
>
> "2. Liability Controls. — Injured clients, and to a limited extent third parties, have traditionally had the right to sue lawyers under a variety of statutory and common law theories. Although bar leaders and others have tried to separate "malpractice" from "discipline," these efforts have been largely unsuccessful."
>
> "3. Institutional Controls: Lawyers work either directly in, or in the shadow of, state institutions. With increasing frequency, these institutions are expressly taking responsibility for uncovering and sanctioning lawyer misconduct."
>
> *(Wilkins 1992, pp. 799–887)*

Courts, administrative bodies and tribunals can impose sanctions for breach of professional standards, this is not a breach of law but rather a breach of the required practice standards of conduct set by that body. They can create a loss of standing before that body both for an individual matter and in general for periods of time by banning appearance before that body. These entities can require changes in behaviour in order to permit continued involvement in a matter or the right to appear before that body. They can find there is contempt and issue punishment, including jail sentences and fines and can take away the ability of a lawyer to represent a client, which will usually occur as a result of a conflict of interest. These rules and sanctions will be specific to the court, administrative body, or tribunal, and are practice requirements rather than common law or statute but are relatively consistent among jurisdictions and courts or other authorities.

There is no direct or legal overlap between the imposition and enforcement of these rules and sanctions used by these external (to the profession) entities and the internal regulation to the profession. They are separate, despite the rules, particularly as to practice standards and ethics including avoiding conflict of interest, being very similar. This independent variable of external regulation is also separate from liability. While liability can arise as a consequence of a breach of the external regulatory requirements, the rules and breach thereof providing an indication of malfeasance or malpractice, the sanctions of these bodies are usually early in the process, pre-result, with the most common being the loss of standing whereas liability is a sanction for result. This is the practical result of the primary sanction of external regulation being disqualification from acting and therefore the matter is not proceeded with and negligence cannot arise. Liability is a monetary punishment following the result of the matter.

There is not a great deal of discussion in the literature about regulation by the external bodies, the literature mostly seems to ignore this quite separate form of regulation or combine external regulation with the professions' internal regulation. There is discussion of the move of regulation from the profession to the courts and tribunals but without analysis of the consequence of that change (Levin 1998, Woolley & Salyzyn 2019, Richmond 2007). The consequences and effect of external regulation are very different from internal regulations. However, for the persons who need to appear before these bodies and wish to undertake matters involving expertise with these bodies, these sanctions and consequences are significant and equally severe. The additional consequence of reputational damage which can adversely affect the ability to appear successfully before the relevant body should be a strong modifier of behaviour for those who practice in an area requiring appearance before a court or administrative body. The growing and overlapping

intervention from bodies external to the legal profession is now being recognized and questioned as to effect and efficiency (Schneyer 2005).

Deterrence effect is a supporting hypothesis for much of the regulation by government bodies but the literature looking at acceptance of norms and regulatory effect recognizes that conflict between norms and self-interest reduce its effect (Trevino, Weaver & Reynolds 2006). This is a factor which is independent from the other factors, although the professional conduct rules and requirements, particularly around conflict of interest, are very similar between those from the regulation of the profession and those from the regulation by these external bodies.

Lawyers who practice before the courts and administrative bodies are practically familiar with the regulation and its effect. Lawyers who do not practice in these forms have training in this factor. Therefore, it was possible to enquire directly as to its effect on professionalism behaviour using multiple questions to create a scale.

3.3.7 Concern for reputation

Concern about reputation for this study is the response of lawyers to a threat that there could be a perception they are other than fully competent and professional. The literature identifies concern about the maintenance of a good reputation as a significant influence on professional behaviour. Law and professionalism and law and economics consider it as a side discussion, rather than a direct and significant influence but behavioural economics and law states that reputational concern has a key and direct effect on professional behaviour. This is stated to be because the hypothesis is that a lawyer's reputation for skill, quality, service, honesty and professional integrity does affect their ability to attract work and therefore the economics of the business of the practice of law (Hamilton & Monson 2010, Wolfram 1997).

> "The public expectation of effective lawyering presumes a high degree of professionalism. Meeting these expectations reflects positively on a lawyer's profitability. Other lawyers make referrals, and clients are more likely to consistently patronize more professional attorneys."
>
> *(Boothe-Perry 2012–2013)*

Behavioural law and economics clearly supports the view that reputation has an independent and very significant effect on professional conduct. It is not clear if the economic impact of a "good reputation" or moral approval by self, peers and clients is of more importance (Trevino, Weaver & Reynolds 2006). However, lawyers and law firms take it very seriously as a key business asset.

> "To protect their interests, large firms will continue to develop internal controls to curb misconduct that stems from individual-lawyer opportunism. They will also be responsive to complaints from clients (or third parties) that they find justified or worrisome."
>
> *(Hazard & Schneyer 2002)*

One key to obtaining a good reputation is effective compliance with the dictated standards and the avoidance of sanctions. Where there is sanction, imposed or attempted to be imposed, successful or not, that ties reputation to an impression of improper or inappropriate conduct. This is a significant concern with errors in assessing a retainer for conflict of interest. There are very strong discussions about the development, value and maintenance of reputation in Karlan (1998) and Ribstein (1998).

The assumption in these discussions is that the increase in business more than makes up for the increase in cost which arises as a consequence of making the appropriate professional decisions, such as rejecting conflicted retainers, to maintain reputation (Hamilton & Monson 2010). This is considered to be a very strong influence on behaviour and a positive effect. Liability and insurance differ from this, being sanction-based they use the negative influence of increasing cost and risk. The desire to maintain reputation is considered a positive influence, with the reasoning that revenue and practice size is maximized by having a good reputation. Reputation and its influence are delivered initially by training and then by what informal peer-based feedback indicates as to what improves reputation. There is reinforcement, mostly from peer and client reaction, such that that when liability occurs, regulation sanction occurs or professional standards fail, reputation will suffer and reputation suffers, then business falls (Trevino, Weaver & Reynolds 2006).

While lawyers may not fully appreciate what comprises reputation or how it influences behaviour, they are fully aware of its components and importance. While some may choose to ignore or deliberately sacrifice a professional reputation for say one of aggressive success, lawyers know what it is. It was therefore possible to directly enquire as to its relative effect on professional behaviour. A difference in perception as to what is a "good" reputation as to the detail of what that is would not affect the assessment of effect and importance.

3.3.8 Professional training and peer influence

The nature and extent of professional training influences the manner in which lawyers perceive, adopt, adapt and react to professional requirements. Absent professional training and peer-based reinforcement there will not be a base for understanding the rationale and need for

the maintenance of professional standards. Training tells lawyers what the professional standards are and increases acceptance of the stated standards for the profession (Robbenolt & Sternlight 2013). The professional conduct codes and regulations are clearly enunciated and, when they are peer expressed, reinforced and observed, will generally result in acceptance of the need for adherence to those standards.

The importance of training for professional standards may be recognized but many authors argue that it may not be adequately emphasized in practice. The challenges of learning from ethical mistakes affect legal organizations as well as individual lawyers. One study of how ethics were handled in law firms found that "information regarding the nature of the problems or questions, and how they are resolved was rarely, if ever, fed back into the firm. Both associates and partners seemed unaware of the extent of reported (or unreported) problems, questions or violations of ethical standards." (Robbenolt & Sternlight 2013).

More recent articles are clearly identifying the importance of training, on a lifetime basis, and noting a shift in the profession's regulation and management to a forward-looking training based, coaching and mentor, model (Salyzyn 2017, Hadfield & Rhode 2016, Fortney 2019, Westfahl & Wilkins 2017, Fortney 2016). The extensive requirement for professionalism ongoing training in recent years in all North American jurisdictions indicates the growing awareness of the importance of both professionalism and training for it.

There is initial training both in law school and in the bar admission programs. An oath is taken on admission to the bar in all jurisdictions that these professional standards will be accepted and maintained. There is constant feedback from the profession and clients; peer pressure for "good" professional behaviour is essentially always present. Training is both formal and informal, arising from experience, leadership, education and sanctions but there has been little empirical research on its effect on ethics (Trevino, Weaver & Reynolds 2006, Westfahl & Wilkins 2017).

> "These stories and discussions should communicate why ethical rules and practices are important. People seek to make decisions they justify-to themselves and to others-and are more likely to follow rules that they believe in support, than they are to abide by those that they view as an imposition."
>
> "Ethics training must make ethical standards clear and avoid sending mixed signals. Clear rules can result in more ethical behaviour and more willingness to confront ethical misconduct."
>
> *(Robbenolt & Sternlight 2013)*

Professional training enhances the personal commitment that arises from training and the tribal basis within the profession of acceptance and endorsement of professional standards. Conflict

of interest in a retainer is considered unacceptable professional conduct and professional training makes it clear what the parameters are on this decision, although not the complexities of the assessment of fact and context. This is consistent with research which has found education in general to be positively related to moral judgement (Rajeev 2012). The comment has been made that effective training must increase ethics awareness to be effective (Trevino, Weaver, Gibson & Toffler 1999).

While the other factors affect reputation by sanction through “punishment” for breach, professional training affects reputation positively by providing the key elements in the ability of lawyers to understand and accept the conduct necessary for the maintenance of reputation (Robbenolt & Sternlight 2013).

The requirement to know, continue training as to knowing and respecting professional standard would be known to all lawyers. It was possible to enquire directly as to relative effect with assurance the concept would be understood. A multiple question panel was developed to create a scale.

3.4 Higher level constructs

In examining these six independent factors, and while still considering a linear model, the question was considered whether a linear model with each of the six independent variables separately and independently influencing the professional decision on conflict of interest was the most parsimonious or whether there could be an equally effective model using fewer factors. The literature discussion of the factors indicated direct effect of the factors on the conflict decision but also gave some consideration to inter-factor effects among some factors such that higher level constructs could potentially more effectively model the relative effects of the independent variables on professional behaviour. Examination of the literature indicates that there may be three higher level constructs, being sanction of behaviour, regulation of behaviour and professionalism influence. Sanction would consist of the two sanction-based behavioural influences of liability and insurance. The literature has discussed sanctioning systems as including disciplinary controls, liability controls, institutional controls and legislative controls need to be taught, explained and supported by training and influence from peer, superior and firm culture (Wilkins 1996–1997, Lawrence 1995, Barton 2001). It was determined to separate these into sanction and regulation because liability and regulation, which is largely instructive, do differ. Regulation if combined to a higher construct is the simple combination of regulation internal to the profession and regulation external to the

profession. Professionalism would be defined as the combination of reputation and professional training being the two behaviour-based methods.

As a consequence of the pilot survey results indicating that multi-collinearity was profound among all of the independent factors and factor analysis indicating that there was no closer alignment between those identified to combine for sanction, regulation or professionalism, these higher-level constructs were not further examined.

The independent variables similarly would be fully familiar to each respondent forming part of the training and daily aspects of the practice of law. Each of the six factors is a requirement of legal practice that a lawyer is trained to recognize and comply with. Again, no context would be needed for a lawyer to understand the questions or the concepts underlying the enquiry. This was extensively explored and verified in the pilot and expert review process. This study and the survey are unique in that aspect, each respondent would have familiarity and educated knowledge as to all of the factors, lawyers cannot become or continue as lawyers without that knowledge and understanding.

The respondents were answering questions that would have meaning to them and which reflect their daily reality of professional requirements. The direct email outreach from pilot respondents to me made it clear, this was the case. The responses included in the Appendix consistently show the importance of the enquiry, cause for reflection and consideration respondents gave to the survey.

3.5 The models for this study

This thesis was originally designed to assess the relative effect of six independent factors on a dependent variable consistent with the literature discussion of effect from those six factors with the only limited recognition of inter-factor effect. This evolved to a design which explores the validity of three potential models that emerge from the literature review as to the relative effect of these behaviour factors that affect the response of lawyers to professionalism requirements as the inter-factor relationship became clear.

While the literature recognizes that there are modifying effects among these six factors, the literature continues to indicate a direct influence of each of the six factors on the dependent variable. This could indicate support for a linear model for the six independent variables each having an effect on the dependent variable with limited modifier effect. It was thought that the continued exploration of this possible linear model was a valid concept for this thesis. It would either give support for the model indicating direct influence despite modifier effect or show an extensive modifier effect, both of which are useful for developing management systems and

techniques for managing conflict of interest professional decision making. A sketch of the initial linear model follows below, as Figure 3.1.

Figure 3.1: Conceptual model of the six factors of influence

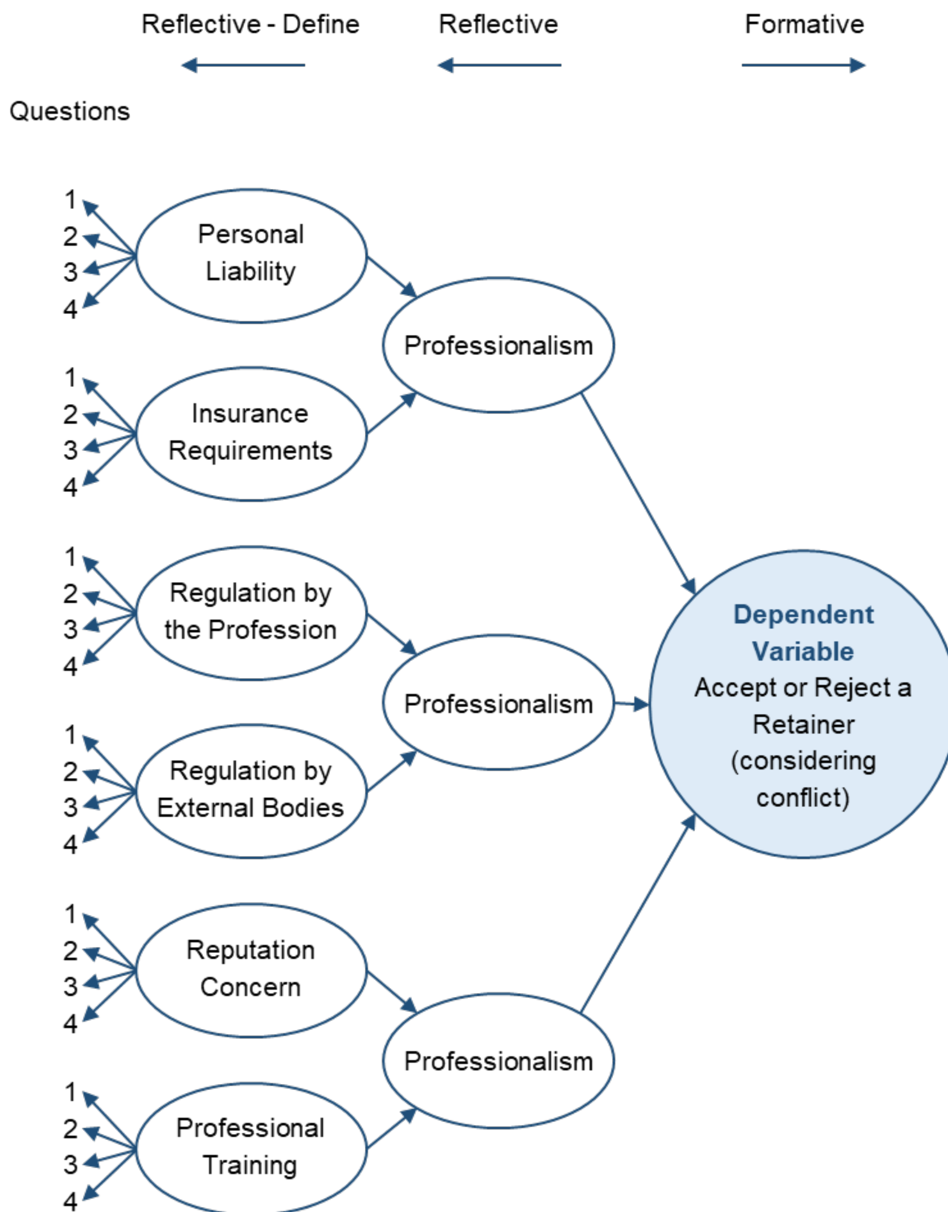
(Source: Author's conceptualization)

The survey questionnaire was originally designed to test the relative effect of the six factors on the basis of this linear model, with the questions for the six independent factors being designed to investigate their effect directly and independently on the dependent variable. Further analysis indicated that it may be preferable to combine the six factors into three higher level variables for a more parsimonious model. This arose as a consequence of the identification of a potential higher construct by each of law and professionalism which discusses the influence of

insurance on liability to create a combined constructed factor of sanction; law and economics indicating there is sufficient overlapping effect of regulation by the profession and by external bodies, creating a higher combined construct of regulation; and behavioural economics which discusses reputation concern with a concept of learned behaviour through professional training giving the potential for a combined factor of learned professionalism.

The extent and nature of the influences among the independent variables are only peripherally discussed in the literature and the conclusions as to inter-factor effect are not clear. The most that could be drawn from the literature discussion are the possible combinations for the higher-level constructs and some discussion of reputation concerns as a modifier. Although these are indications of correlative effects and modification among the six factors that would not be fully reflected even in this higher-level construct model which only includes effects between selected pairs of factors which are specifically discussed. However, the literature indicates that combining liability and insurance independent variables to a single higher-level variable of sanction, combining the internal regulation to the profession and the external regulation from the courts to form a higher-level variable of regulation and combining the effect of concern for reputation and professional training to a higher-level construct of professionalism is supported by the concepts explored in the literature. As discussed in Chapter 5, this idea of a model using combined constructs was not explored because the data did not indicate more effect between the suggested pairs of influence than the influences among and from the other influences. The following is provided merely to show the thinking derived from the literature, not proven by the data results and so reflected as a model before testing. This model was not further explored.

Figure 3.2: A concept examined but rejected as a model



(Source: Author's conceptualization)

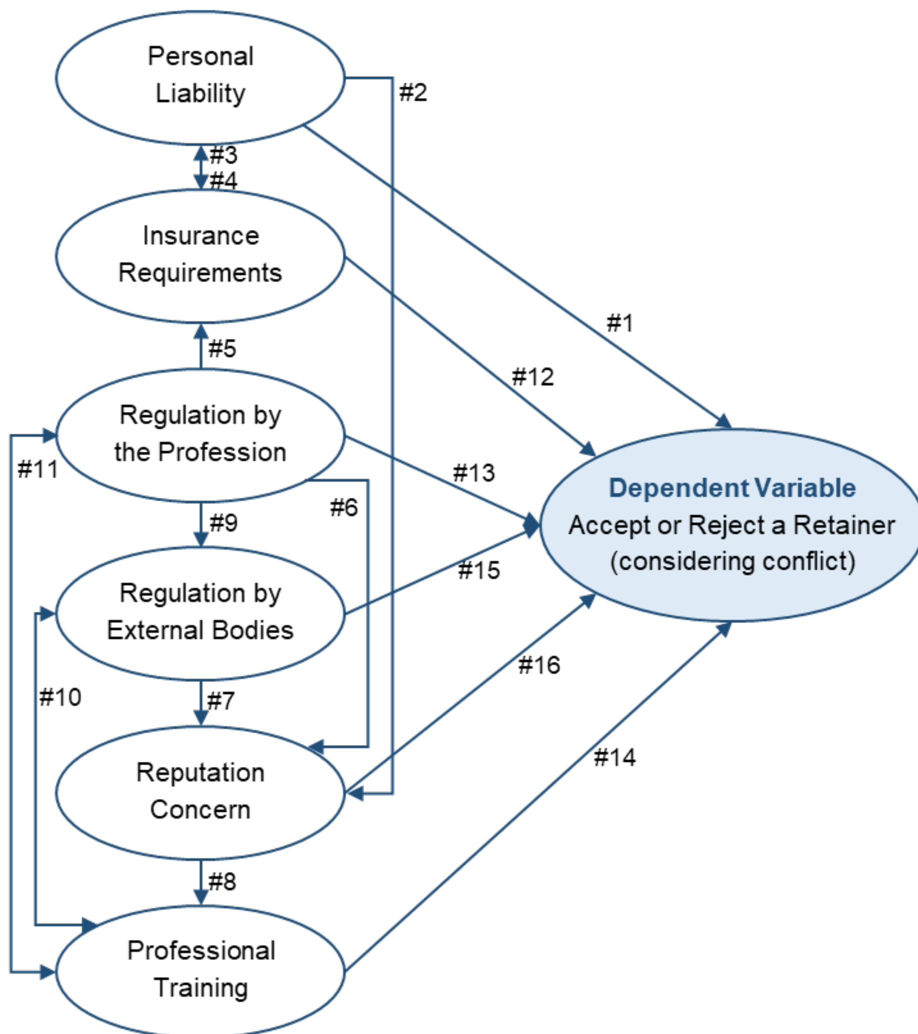
A more nuanced view of the literature, discussion within the profession in pilot study and personal discussion with lawyers, including as part of presentations of the study and adding personal, extensive, experience in the management of lawyer's professional behaviour, resulted in the development of a potential model with extensive influence among the factors. This moderated model is not explicitly identified in any of the literature reviewed but has support from a more nuanced review of the literature about the potential for other factors affecting the primary six independent variables. The moderated model has been drawn to reflect the potential of moderating effects between each of the six independent variables, the factors

intuitively, and supported by experience, having an effect on each other. Chambliss and Wilkins (2002) identified some of the interactions among the factors and the management techniques used to deliver the factors. These comments were used to formulate some of the factor linkages (Chambliss & Wilkins 2002). Further, Lawrence (1995) discusses the relationship of malpractice and liability with reputation suggesting both an importance of reputation and a look to liability indicating reputation is the more important. The complexity of the relationship between liability, regulatory sanction and reputation, equated to success, is discussed by Stempel again supporting concepts of this model (Stempel 2012).

The possibility of a more extensive relationship among the independent factors was considered from the literature discussion, although scattered and not direct, but more so from experience and discussion, informally, with many lawyers. A model to reflect the relationships considered possible from these sources was developed.

The sketch of the moderated inter-factor related model considered is shown as follows, in Figure 3.3. In each of the following figures from 3.3(a) to 3.3(f) the individual factor on factor relationship are shown and discussed:

Figure 3.3: Moderated model



(Source: Author's conceptualization)

The following explanation for each indicated relationship (noted by number) is taken from the literature, as fully discussed earlier, and is simplified for the purpose of illustrating the potential complexity of the inter-factor relationships. An explanation on a factor by factor basis follows.

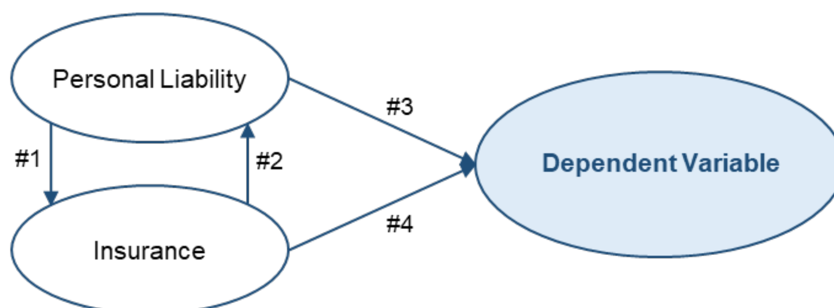
1. Liability can arise from lack of professional behaviour (particularly conflict) so its threat should directly affect professionalism decisions. Liability would have a direct effect on retainer decisions although moderated by insurance (decreasing its effect, as per literature).
2. A finding of liability often creates an adverse effect on reputation so its threat effects the concern for reputation, reputation therefore influencing the liability threat effect.
3. A finding of liability adversely affects access to and cost of insurance so managing for liability affects insurance and vice versa.

4. Insurance decreases the financial consequences of liability and so reduces the threat of liability modifying the liability effect.
5. Internal regulation requires insurance and because of the mandatory requirement provides some access to insurance through professional associations which affects cost and terms for insurance.
6. An adverse regulatory (internal) finding can adversely affect reputation and therefore has an effect on the reputation effect.
7. An adverse regulatory (external) finding can adversely affect reputation and therefore has an effect on the reputation effect.
8. Adherence to professional standards is an important part of maintaining reputation but training is required to know the required professional standards so training has an effect on reputation effect.
9. The standards and requirements of regulation are very similar for the two types (internal and external), mainly varying by the type of sanction and so might be effectively one factor or at least have a significant effect on each other.
10. External regulation of the profession by courts and tribunals is based on professional standards, these form the basis for professional training and professional training is how lawyers become knowledgeable about the standards they meet, each must affect the other.
11. Regulation by the profession is based on professional standards, these form the basis for professional training and professional training is how lawyers become knowledgeable about the standards they meet, each must affect the other.
12. The requirement to carry insurance and the explicit standards for practice, including coverage exclusions where the lawyer has incorrectly accepted a conflicted retainer, set by the insurers has a direct effect on professionalism and the conflict of interest choice.
13. Regulation and the enforcement of that regulation directly dictates the requirements for professionalism including conflict of interest therefore having a direct effect on the decision.
14. Professional training is the means by which the requirements of the professional standards are taught and enforced as a behaviour response thereby having a direct effect on professionalism.
15. Regulation by the profession and the enforcement of that regulation directly dictates the requirements for professionalism including conflict of interest therefore having a direct effect on the decision.

16. Regulation by the external bodies of the courts and tribunals and the enforcement of that regulation directly dictates the requirements for professionalism in that context including conflict of interest therefore having a direct effect on the decision.

The individual relationships among the factors in this model are presented as follows to simplify understanding, each is an explanation of a relationship between a more limited sub-set of the factors and is presented using the numbers identified in each subset of the model. The concept of the following is to make the conceptualization of the hypotheses as to factors relationships, which appear to operate in a very complex inter-factor related manner, more understandable on a factor by factor basis. These relationships were initially identified by considering general concepts throughout the literature and were expanded by personal experience and comments and discussion with many lawyers during the pilot phase and survey development phase. Each of the described relationships has been previously described in the literature review and formed part of the discussed hypotheses. In the interest of clarity and consistency there is repetition of the descriptions (with apologies to those that work through each and all).

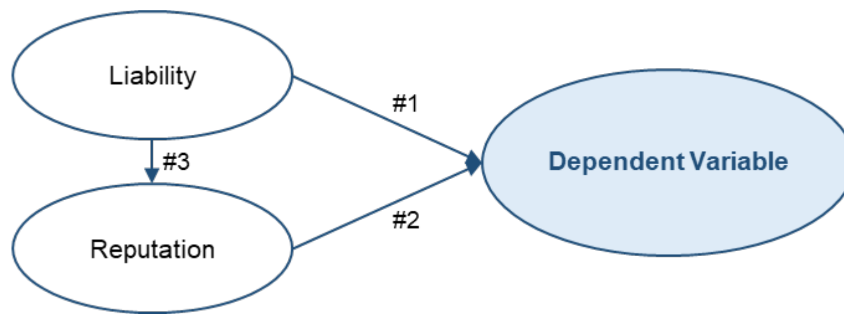
Figure 3.3 (a): Liability and insurance



(Source: Author's conceptualization)

1. The performance of a lawyer in their professional practice, including the avoidance of legal action taken on the basis of conflict of interest, affects the availability and cost of insurance which is required for licencing.
2. Insurance is required for legal practice licencing and the requirements for the necessary coverage will influence a lawyer's professional performance and professionalism decisions.
3. Personal liability is one of the keys influences used to affect the performance of a lawyer including their professionalism decisions.
4. The requirement for insurance coverage and the requirements of insurance coverage that include the requirement to abide by conflict of interest professional standards is a direct influence on professionalism behaviour.

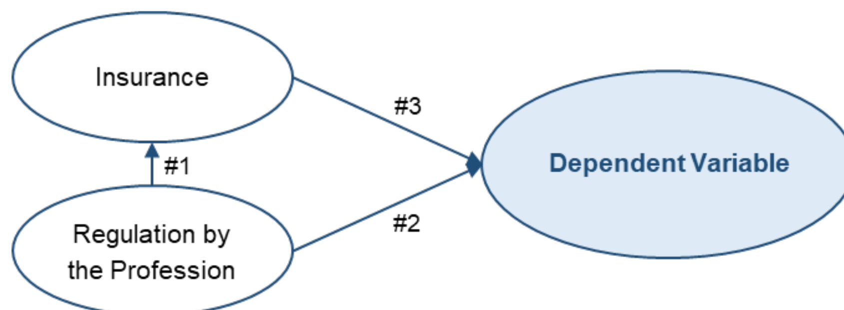
Figure 3.3 (b): Liability and reputation



(Source: Author's conceptualization)

1. Personal liability is one of the keys influences used to affect the performance of a lawyer including their professionalism decisions
2. Reputation and the concern to maintain a good professional reputation, for many reasons, is a direct influence on professionalism and choices including conflict of interest.
3. A finding of liability often creates an adverse effect on reputation so its threat effects the concern for reputation, reputation therefore influencing the liability threat effect.

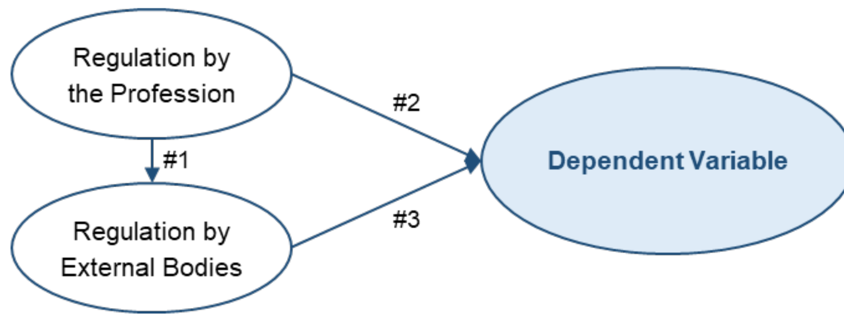
Figure 3.3 (c): Insurance and regulation



(Source: Author's conceptualization)

1. Internal regulation requires insurance and because of the mandatory requirement provides some access to insurance through professional associations which affects cost and terms for insurance.
2. Regulation by the profession and the enforcement of that regulation directly dictates the requirements for professionalism including conflict of interest therefore having a direct effect on the decision.
3. The requirement to carry insurance and the explicit standards for practice, including coverage exclusions where the lawyer has incorrectly accepted a conflicted retainer, set by the insurers has a direct effect on professionalism and the conflict of interest choice.

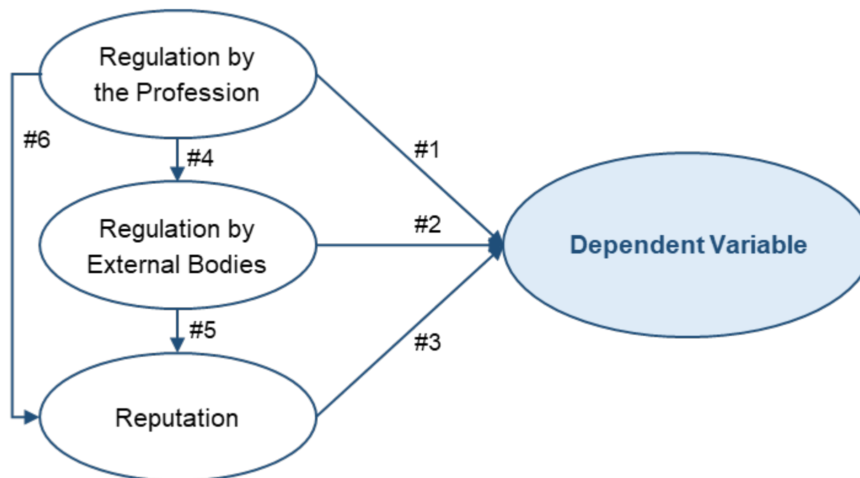
Figure 3.3 (d): Regulation by profession and regulation by external bodies



(Source: Author's conceptualization)

1. The professional standards set by the profession guide the requirements established for professional conduct for interaction with the external bodies of courts and tribunals, and among the participants in those proceedings.
2. Regulation by the profession and the enforcement of that regulation directly dictates the requirements for professionalism including conflict of interest therefore having a direct effect on the decision.
3. Regulation by the external bodies of the courts and tribunals and the enforcement of that regulation directly dictates the requirements for professionalism in that context including conflict of interest therefore having a direct effect on the decision.

Figure 3.3 (e): Regulation and reputation

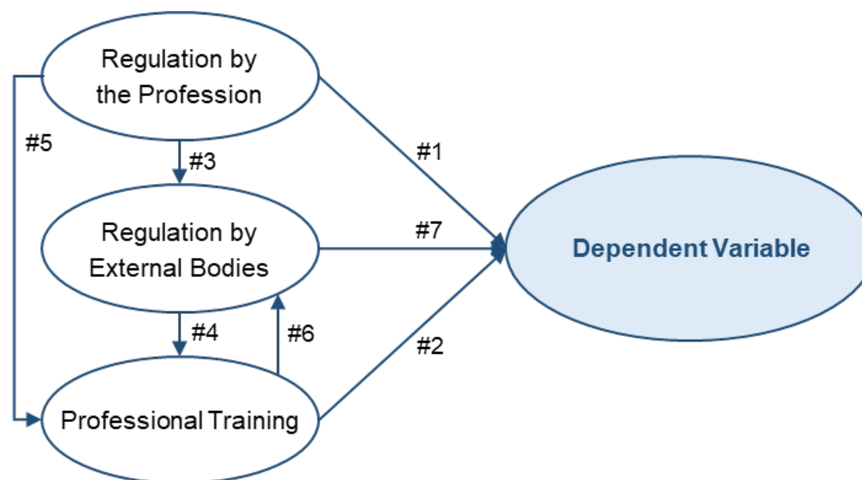


(Source: Author's conceptualization)

1. Regulation by the profession and the enforcement of that regulation directly dictates the requirements for professionalism including conflict of interest therefore having a direct effect on the decision.

2. Regulation by the external bodies of the courts and tribunals and the enforcement of that regulation directly dictates the requirements for professionalism in that context including conflict of interest therefore having a direct effect on the decision.
3. Reputation and the concern to maintain a good professional reputation, for many reasons, is a direct influence on professionalism and choices including conflict of interest.
4. The professional standards set by the profession guide the requirements established for professional conduct for interaction with the external bodies of courts and tribunals, and among the participants in those proceedings.
5. Regulation by the external bodies of the courts and tribunals and the enforcement of that regulation directly dictates the requirements for professionalism in that context including conflict of interest therefore having a direct effect on the decision.
6. An adverse regulatory (internal) finding can adversely affect reputation and therefore has an effect on the reputation effect.

Figure 3.3 (f): Regulation and professional training

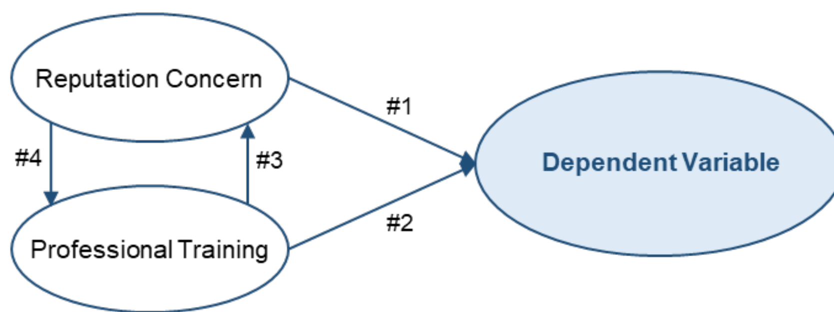


(Source: Author's conceptualization)

1. Regulation by the profession and the enforcement of that regulation directly dictates the requirements for professionalism including conflict of interest therefore having a direct effect on the decision.
2. Professional training is the means by which the requirements of the professional standards are taught and enforced as a behaviour response thereby having a direct effect on professionalism.
3. The professional standards set by the profession guide the requirements established for professional conduct for interaction with the external bodies of courts and tribunals, and among the participants in those proceedings.

4. Regulation by the profession is based on professional standards, these form the basis for professional training and professional training is how lawyers become knowledgeable about the standards they meet, each must affect the other.
5. Regulation by the profession is based on professional standards, these form the basis for professional training and professional training is how lawyers become knowledgeable about the standards they meet, each must affect the other.
6. Regulation by the profession is based on professional standards, these form the basis for professional training and professional training is how lawyers become knowledgeable about the standards they meet, each must affect the other.
7. Regulation by the external bodies of the courts and tribunals and the enforcement of that regulation directly dictates the requirements for professionalism in that context including conflict of interest therefore having a direct effect on the decision.

Figure 3.3 (g): Reputation and professional training



(Source: Author's conceptualization)

1. Reputation and the concern to maintain a good professional reputation, for many reasons, is a direct influence on professionalism and choices including conflict of interest.
2. Professional training is the means by which the requirements of the professional standards are taught and enforced as a behaviour response thereby having a direct effect on professionalism.
3. Professional training is the means by which the requirements of the professional standards are taught and enforced as a behaviour response, appropriate professionalism responses are considered key to a good reputation and professional training is used to inform the requirements for reputation.
4. The need for an informed reaction to professionalism for development and preservation of reputation directs the focus of the professional training.

The other concepts relevant to this model include:

- Only reputation is acted on by four of the others (excluding insurance) but does not act on them with cause and effect to directly affect those other factors.
- Regulation (both internal and external), it acts only on the dependent variable, the standards for compliance with conflict rules and has consequences for failure and therefore must have an effect, whether combined or separately because it sets the requirements.
- Each of the factors has an effect on the accept or reject decision but with no real clarity as to how much effect because of the very strong effects among factors.

3.6 Quality and rigor in the scale development

The recommendations of de Vaus (2014) to use a six-step method to construct a scale were used to provide concepts that contributed rigor in the process used to develop the scales. During the pilot process and diagnostics for the survey data assessment for uni-dimensionality was done using correlation and then factor analysis as well as Cronbach’s alpha, which will be presented in Chapter 5 of this study. Both tested acceptably based on the established criteria indicating reliability and suitability for inclusion in the scale.

The factor definitions that led to the scale development was directed by the literature identification of the factors stated to influence the behaviour of interest. The concepts were fully and clearly enunciated allowing for definition for each concept. The scale development required an understanding of the theories being investigated and then the creation of questions that provided multidimensional insight into the concept.

The theories being considered are stated as (See Chapter 2 for Hypothesis Development and source):

1. Law and professionalism (Sanction): The influences that most positively affect lawyers’ professionalism decisions to the enunciated professional standard are those of sanction, being liability and insurance requirements.
2. Law and economics (Regulation): The influences that most positively affect lawyers’ professionalism decisions to the enunciated professional standard are those of regulation, being regulation imposed by the profession and by court and administrative tribunals.
3. Behavioural economics and Law (Reputation and Training and Peer): The influences that most positively affect lawyers’ professionalism decisions to the enunciated professional standard are those of training and peer influence, being reputation effect and education.

4. Author's Addition: Each of the influences on lawyers' professionalism decisions to the enunciated professional standard may have some effect on the others.

The literature fully and consistently states that there is no adequate empirical study to allow these statements to be made with any valid foundation as to the needed assumptions.

The selection of the six independent variables was made directly from the literature and these theories. The questions were developed to create a multidimensional unweighted scale for each using key characteristics of the factor as described in the literature and in the management guidance available for the legal profession as to the application of each (such as codes of conduct and the rules of procedure for the legal profession). The validation using factor analysis completed the selection of the questions and the validity of the scale.

The dependent variable was developed using court decisions on topic and a selection of questions that arose from the court findings as to the correctness of the decisions reflecting professionalism. The extensive review of the literature, of both the variables and related methodological research supported the creation of a scale that validly and consistently reflected the intended concept in a manner understandable to the respondents.

3.7 Chapter summary

Chapter 3 introduced the variables for model testing, drawing on key theories in the literature that posit that the professionalism conduct of lawyers is based on decisions made in a very complex and complicated environment but influenced by six factors, namely:

1. Liability
2. Insurance
3. Regulation — Internal to the Profession
4. Regulation — External
5. Concern for Reputation
6. Professional Training and Peer Influence

The three disciplines of literature debate the relative effect of each of these six factors but without the support of empirical evidence, while recognizing the most expensive and difficult to manage is that of personal tort liability. The literature extensively discusses conflict of interest in legal retainers as one of, if not the, most commonly considered professionalism decision and one of signified importance. This thesis is not an examination as to whether lawyers intend to be or are generally professional in their practice of law but rather it is an

examination of what influences assist in making appropriate responses to the professionalism choices of legal practice.

Drawing on these six factors, and identifying conflict of interest as the dependent variable, two models are introduced. The models presented in this chapter form the basis for the investigation of this research study. Chapter 4 details the research strategy, design, data collection and analysis plan for testing these models.

4. Methodology

4.1 Introduction

This chapter outlines the research strategy, design and methodology adopted for this study. It begins with the researcher's philosophical position that is the basis for this study and is followed by a description of this study's research design. The rationale for the selected research method is presented, followed by an explanation of each of the selected instrument, the basis for the sample, and the method used for data collection. A discussion of potential bias issues and how they are addressed is specifically included. The data analysis and approaches employed are also outlined. The chapter concludes with a discussion of the limitations, risks and ethical considerations.

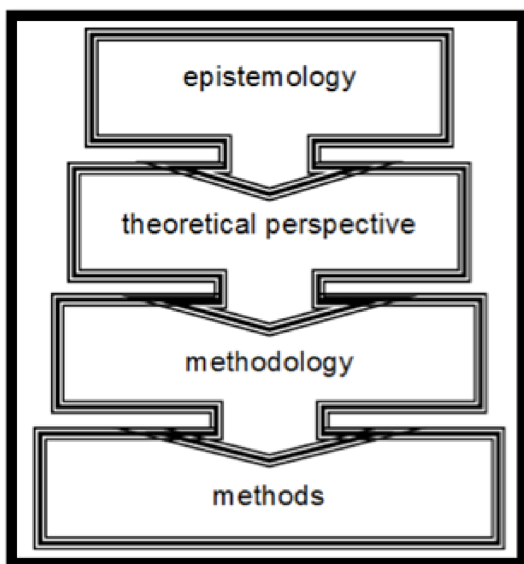
The approach for undertaking a research process suggested by Crotty (1998) was adopted as a starting point and base for this study. His work suggests researchers consider four key questions when beginning the development of the research process:

1. "**What *methods* do we propose to use?** What are the techniques or procedures used to gather and analyse data?"
2. "**What *methodology* governs our choice of methods?** What is the strategy, plan of action, process or design lying behind the choice and use of particular methods?"
3. "**What is our *theoretical perspective*?** The philosophical stance informing the methodology and providing context for the process and grounding its logic and criteria."
4. "**What *epistemology* informs our perspective?** What is the hypothesis of knowledge embedded in the theoretical perspective and thereby in the methodology?"

Consideration was also given to the concepts of Creswell (2007) which adopt a similar perspective. Creswell recommends the use of the identification of the problem to inform a choice of approach. This should encompass the assumptions which will be made in the process, those assumptions including the practical considerations for data collection. Using the concepts of Crotty and Creswell, and the general training I received in my Masters of Business Research program, I recognized my research approach needed to encompass epistemology, theoretical perspective, methodology and methods as elements while recognizing that they are reliant on each other. This provided a basis for a reflective approach grounded in the concept that any decision made for one element affects the decisions made in the others such that they all inform each other and provide a basis for decision making. This is a view that is supported by King and Horrocks (2010) who state that ontology, epistemology, methodology and

methods are all connected and cannot be viewed in isolation. This is described in Figure 4.1 summarizing the work of Crotty. Drawing on these elements, the remainder of Chapter 4 will address the components of the research decisions adopted for this study. The work in the research design process was guided by, and checked on conclusions with, the training received in the Henley Business School program, the insights gained at the EDAMBA Summer Program in Athens (attended twice) and using standard textbooks which were well worn and marked by the conclusions of the process (Cresswell 2007, Cresswell 2018, de Vaus 2014, DeVellis 2017, Fowler 2014, Hair, Celsi, Money & Page 2016, Kothari & Garg 2019).

Figure 4.1: The four elements of research decisions



Source: The four elements of Crotty (1998) as part of research decisions. This image is copyright to Crotty (1998).

4.2 Research strategy

The overall strategy for this research is to undertake an empirical investigation using a survey research design and a quantitative approach. To capture the data required to answer the research questions, it was integral to consider what evidence was required and the appropriate means of analysis of that evidence as directed to address the problem identified. The problem identified for the research is the lack of empirical evidence to support or refute the theories, or a combination of theories, relating to the behaviour influences affecting the professionalism choices of lawyers relating to conflict of interest. The research strategy is intended to address the types of data, the methods of data collection and clearly defined analysis techniques that would address that key research problem. A quantitative approach was selected as most suitable to the problem and the reason for that choice is discussed in subsequent sections.

Using a stepped process for the research design based on these concepts resulted in the following choices being made over a period of over the two years of evolution from research interest to problem identification to research design:

- Epistemology (*Positivism*)
- Theoretical Perspective (*Positivism*)
- Methodology (*Quantitative*)
- Methods (*Survey*)

Crotty (1998) provides a process by which the researcher links their research methods with the research question(s). He suggests that the researcher begin their research design by focusing on a real-life issue, or an important question that needs to be answered. This was therefore my starting point. The issue was the inefficient cost and management techniques arising from the imposed personal liability for lawyers in the conduct of legal practice. Consideration of this issue evolved over this research design process and period as the reasoning and design evolved with a more nuanced understanding of the issue. With a practical management issue clearly in mind, the development of the research objectives occurred through a process of re-examining the issue for implicit assumptions and an evolving understanding of the knowledge gap and therefore the identification of a problem. The first assumption was that there was an identifiable definition of the issue of behaviour interest and then a possible objective ordering of effect and relative quantification of effect from the influences on that behaviour. It is at this point of understanding that the researcher can select the methodology and methods to collect the relevant information. This assumption placed the inquiry in positivism which, as noted elsewhere, reflects well with my view and experience with this management issue, the problem identified and my intention to find a better management approach.

Crotty (1998) also highlights that epistemological perspectives are embedded in the methods and methodological choices that are made to answer the research questions used to focus the view of the issue and problem. In some cases, the goal may be objective, generalizable findings and as a result, data and statistical methods will be utilized. For other types of research question the goal may be qualitative interpretation of a series of events, with the outcome being suggestive, rather than conclusive, which would indicate a different set of methods to be used. Implicit in this process is the fact that the researchers make a series of choices in the creation of their research design. My sequence in this aspect of philosophical contemplation flowed from my belief that I had an issue and a resulting problem capable of objective understanding and assessing if the questions were asked in the right way.

4.3 Philosophical assumptions

The philosophical assumptions underlying the research are articulated from the philosophical assumptions generally made by researchers undertaking a study. The assumptions created the theoretical framework used to collect, analyze and interpret the data collected and resulted in a quantitative approach to the study. These assumptions are the basis for the research methodology.

The ontology firstly considers my view of the nature of reality which, as explained elsewhere, by both the nature of the research interest and my personal view of reality was grounded in a positivist frame. The epistemology, considering my assumptions of what counts as knowledge and how knowledge claims are justified, also sits in a positivist stance, again suitable for the research interest. Axiology, or the role of values in research, I viewed as objective and measurable leading to a realism view of the research question and results. Methodology or the process of research considered that the philosophical assumptions gave a view that the research enquiry could give observable and measurable variables allowing empirical investigation, leading to hypothesis testing.

These philosophical assumptions are the key premises for the interpretive framework and as outlined in the preceding discussion of the research design led to the construction of the design set in a positivist frame and using quantitative methodology with a survey-based method.

4.4 Research design

Research design is used to clarify and organize the research activities to ensure the research questions are addressed and that the overall research objectives are met (Easterby-Smith et al, 2013). This research to address the problem identified had a clear basis in hypothesis which had a gap in the hypothesis basis fully defined by the literature. The problem of conflicting hypothesis on point and a clear gap in foundation tie into a practical law firm management issue which was clearly in my focus during the development of the research objectives. The problem, the issue and questions for the problem and identified gap created for some implicit assumptions leading to design decisions. The research questions were set using these assumptions and the assumptions underpinned the choices made regarding the research strategy and subsequent design. This research study aims to investigate the factors that influence professionalism behaviour in lawyers as reflected in specific decision-making practices of lawyers. There are three competing theories in the disciplines considering this aspect of legal practice and attendant lawyer behaviour and that allowed for consideration of coalescing the debate of the three theories to single primary research question. The central

research question of this study was developed to provide an approach to test the validity of three competing theories and is expressed as:

"What is the relative effect of the six identified influences acting on lawyers' professionalism behaviour and how to manage for best use?"

Expressing the research question in this manner created a measurable basis for assessing the three theories which debate the effect and relative effect of the six behaviour influences which are the factors by which lawyer professionalism conduct is influenced (liability, insurance, internal regulation, external regulation, reputation, professional training). Additional investigation of demographic factors, relative to the professionalism of decisions of conflict of interest, would provide needed insight for management application of techniques to best manage the six behaviour influences. The question is nuanced but does investigate the three and the additional enquiries were used as the basis for a decision to investigate the problem with a positivist (detached) epistemological approach.

Braun & Clarke (2013) discuss the importance of the researcher matching their theoretical framework and methods with the questions that they seek answers for and suggest the researcher needs to both acknowledge these decisions and recognize them *as* decisions. The questions each lead to a consistent philosophy and research design. Table 4.1 identifies the research decisions made for this research study. Each will be explored in detail in subsequent sections. Table 4.1 provides the researcher's ontology, epistemology and methodology aligned with the activities of this quantitative study, including the methodological choices made.

Table 4.1: Outline — ontology, epistemology, methodology and method

Research Question	Ontology	Epistemology	Methodology / Design	Method	Method Analysis
What is the relative effect of each of the six identified factors influencing professionalism decisions? Hypothesis to be supported or refuted: 1) pg. 13 in Chap 2 2) pg. 21 in Chap 2 3) pg. 28 in Chap 2	Positivism	Objectivism / Positivism	Survey Research	Sampling Questionnaire Scaling Statistical Analysis	Develop Models Regression: Logistic and Multiple Correlation Factor Analysis

Research Question	Ontology	Epistemology	Methodology / Design	Method	Method Analysis
Supplemental inquiry: Is there an effect on the professionalism (conflict) decision of lawyers based on demographic characteristics?	Positivism	Objectivism / Positivism	Survey Research	Sampling Questionnaire Scaling Statistical Analysis	Correlation Statistics
Supplemental inquiry: Is there a difference in the relative effect of the six behaviour influence based on demographic characteristics?	Positivism	Objectivism / Positivism	Survey Research	Sampling Questionnaire Scaling Statistical Analysis	Correlation Statistics
Supplemental inquiry: Is there general acceptance for the common management techniques used with the six behaviour influences?	Positivism	Objectivism / Positivism	Survey Research	Sampling Questionnaire Scaling Statistical Analysis	Statistics
Supplemental inquiry: What is the relative effectiveness of the six behaviour influences as a perception by individual lawyer?	Positivism	Objectivism / Positivism	Survey Research	Sampling Questionnaire Scaling Statistical Analysis	Statistics

(Source: Created by Author)

The supplemental inquiries reflected matters of interest to me and of importance to the research problem and contribution to the advancement of management for professionalism. These enquiries do not ground in the literature because the literature does not consider and discuss these supplemental considerations that could affect the primary inquiry in to relative effect of the identified influences. This is entirely consistent with a body of literature that has not to date used empirical study to provide a foundation for the discussion, considered these effects are enquiry of an empirical nature. The lack of empirical study fits in the identification of the gap. That is the reason the primary inquiry as to relative effect, being the one grounded in literature and discussed as being debated by the literature without a suitable empirical support, is the focus of the research. The supplemental enquiries were developed by me from interest and my knowledge of the expressed concern about these aspects of managing

professionalism in the legal profession. The noted matters to consider were taken in part from the focus of long-time professional standards and the legal profession's more recent focus as expressed by recent legal association projects which heavily focus on diversity and inclusion, the formation of diversity and inclusion committees by the American Bar Association is a good example. The choice of the questions and matters for demographic enquiry was taken in part from the studies on demographic trends in the legal profession (CBA 2013, reports of the Law Societies of Saskatchewan 2018, BC 2019 and Ontario 2010, ABA 2020).

4.5 Research methodology

Eriksson and Kovalainen (2015) define methodology as the overall framework of appropriate methods used to capture meaningful data to answer the research questions, while being consistent with the ontological stance and epistemological approach of the research (cited in Collins, 2012). The choice of methodology was derived from the reason why the study was undertaken, the assessment of the theories considering the study issue, how the problem was identified and defined. Consideration of the nature and access to data available to be collected was taken into account and influenced the selection of the techniques for analyzing the data which were used to work with the research problem. The selection of methodology went through a process of iterative consideration evolving with growing understanding of the problem in the context of the philosophy choices. The methods were assessed for selection in a sequence but considering parallel possible approaches each sequence step.

Prior to the grounding of this work in a positivist paradigm, in the early stages of this study, both qualitative and quantitative methodologies were considered for the research as outlined below in Table 4.2. The progressive review and analysis during the literature review and pilot process led to the determination that the research aims best suited a quantitative study and one done by cross-sectional, survey-based research.

Table 4.2: Research methodology and methods considered

Methodology	Method	Consideration Criteria
Qualitative	Case Study	A form of case study, interview-based research was first considered. This was at the start of developing a view from the issue but before the problem was fully formulated and the research questions not properly enunciated. This approach was not proceeded with as a result of a number of developments. The first was a broadening of interest from liability alone to the consideration of the relative effect of the other behaviour influences on lawyer decisions learned from the literature study. This evolved into the recognition of the empirical research gap,

Methodology	Method	Consideration Criteria
		glaring in the literature, that would not be addressed using this case study approach.
Qualitative	Action Research	Action research using the above described case studies was also considered. This approach was also dropped in favour of a quantitative study when the difficulties of properly framing such a study that would gain academic acceptance were recognized, including from the issue of scepticism as to lawyer response rate and willingness to provide an academically refined response.
Qualitative	Content Study	Content study was also explored for the research, using two different concepts for this type of study. This was to be based in court materials in cases that had conflict of interest aspects. The findings from assessment of a preliminary study using this technique and material were that the judges did not enunciate views as to cause and effect of liability and conflict that yielded useful insight on the problem.
Mixed Methods	Survey with Interviews	The methodology overview then involved considering a mixed methods approach using a survey with the results reviewed and supplemented by interviews of the key participants in the case study incidents noted to develop deeper insight into the survey responses. This was not proceeded with as the literature review identified the academic view of the gap that indicated that for further interview research to have use and meaning, an empirical assessment is needed to give a foundation of understanding of relative effect.
Quantitative	Survey / Questionnaire	The growing recognition of the scope of the problem and refining of the research question accordingly, led to the determination that the problem and the related gap best suited a quantitative study. The use of a survey was determined to best deal with the research limitations when researching lawyers that are identified in the literature.

Source: Created by the Author

The decision not to proceed with a qualitative case study design evolved as a better understanding of the problem, the existing literature and most importantly the gap in the research was developed. The problem for inquiry was formulated but in the early state was confined to an interest in the factor “liability” as an effect on conduct of lawyers. At that stage the concept was to use two incidents, litigation based, involving a law firm and liability considered in the context of a professionalism decision. The idea was to conduct interviews involving the professional, emotional and management reactions of the lawyers involved as to the effect of the incidents. The approach being considered was to explore this as a case study and the ability to research this way was advanced and explored with potential interviewees.

The literature review provided a growing knowledge of the debate and theories about the effects of all six factors on behaviour and an interest in their relative importance. Interview-based review, even with the interest of a "live" case examination, would not further the debate or fill the need for numerical empirical research on this issue. The literature noted the use of interview research in many studies with a noted failure to complete analysis without empirical support that is considered to be needed.

In addition to the comments in the Table 4.2 regarding not proceeding with a qualitative action study, the issue of access to lawyers willing to give the time needed (requiring the use of persons well known to the researcher as being the only realistic point of access to subject) would have resulted in a biased selection of respondents. This was coupled with recognition of the same issue that what seemed to be needed to further the academic debate was not a study of this nature.

The underlying research necessary to identify and classify the materials for a qualitative content study was substantially advanced simultaneously with the literature review. The first approach was to take two cases that had a significant consideration of conflict of interest tied to liability and to use the extensive materials available from those incidents, which included court filings and confidential background materials that I have access to and could redact to acceptable form for use. A review was conducted of the more than 10,000 pages of that material using a variety of methods, including advanced artificial intelligence key word search. It was determined that little meaningful insight would be gained specific to the growing interest in assessing the relative effect of the factors from this type of study. A second approach for a content review was considered and developed to use an extensive case law review. This is the review that was ultimately used to define the dependent variable. This court case review used content analysis of court findings to determine what the view of the judiciary was as to suitable conduct and its effectors related to liability and conflict of interest. As noted in the comments of the case law researchers, the case judges do not provide a sufficient indication of their view of the causes of a conflict of interest decision failure that leads to liability. As a result, it was not possible to use these materials to assess the relative effect of influences by deriving conclusions from enunciated failures of decision making.

In considering and then not proceeding with a mixed methods approach, in addition to the comments in Table 4.2 a mixed methods approach was initially considered to possibly provide a valuable next step in the research in the disciplines looking at lawyer professionalism conduct. However, the literature review indicated "next step" of more immediate need would be an empirical study of the relative effect of the behaviour influences discussed. There had

been interview type research done in the area and more did not seem to be of value in furthering a “stalemated debate” when the gap had been clearly identified by the literature to be a lack of empirical support for the discussion and hypothesis.

The development of a research approach using survey and questionnaire is fully explored in this chapter. However, to expand on the comments in Table 4.2 and summarize, the survey method, once access to a sample could be obtained (as it could in this case) allowed for a method of data collection that minimized the problems of response rate, truthfulness of answer (the issue as to truthful response being bias from a desire to demonstrate professionalism), confidentiality and anonymity that has been noted in the literature to date as impeding quantitative research involving lawyers.

4.6 Research method

To address the key research questions of this thesis, a cross-sectional study methodology was chosen, using an online survey. The use of this type of survey research aligned with resolution for the research limitations identified in the literature. This research method also aligns well with the positivist epistemology, allowing for the measurement of multiple factors and the examination of relationships which the problem and questions required (Easterby-Smith et al, 2013).

The survey method was possible because access to a large potential sample could be obtained and the question could be described in a manner that allowed for a method of data collection that minimized the problems of response, truthfulness, confidentiality, anonymity and bias that had been noted in the literature to date. It was also consistent with the suggestions of the literature discussion of the gap identified in the research to date that noted the difficulty of further progress from interview based or action enquiry with lawyers. It also replaced the failed content analysis of secondary sources which did not yield insightful information.

4.6.1 Approach

The research approach for this thesis is a cross-sectional point in time design surveying business law lawyers working at various legal organizations in North America. The lawyers were asked about their perceptions of the influences of the six factors on professionalism conduct at a point in time, aligning with the positivist viewpoint of the researcher. This cross-sectional design allowed for the investigation of how the six factors, as behaviour influences, influence the respondents but also how they may vary by size or location of law firm, demographics and personality attributes, at a point in time, as well as allowing the analysis of relationships between the variables and data segmentation on these enquiries. It also provided a reasonable scope of work for this research, relative to both cost and time, compared to the

multiple periods of data collection and time that would be involved with a longitudinal study. Disadvantages of this approach generally are noted by Easterby-Smith et al (2013) where they note that this approach does not describe processes over time or provide more in-depth explanations of the "why" of the existence of the influences on professional conduct. That shortcoming was not considered to adversely effect the intention of the study in the context of the problem and the gap.

4.6.2 Participant experience

The survey was carefully designed to encourage participation on an unbiased and truthful basis. Lawyers, the literature, are inclined to want to present a positively professional image while preserving confidentiality of client and firm matters. The survey needed to assure the participants that the study assumes they will behave in a positively compliant manner professionally. The enquiry was oriented to relative positive effect of the six behaviour influences assuming an intention to adhere to required professional standards.

4.7 Survey design

Chapter 3 provides a detailed discussion of the dependent and independent variables used to investigate the research questions for this study, drawing on the literature and identifies the related gap in knowledge. The concepts described there formed the basis for the survey design and ultimately the questions used.

4.7.1 Survey — part one (defining the dependent variable)

The first part of the survey was developed for the definition of the dependent variable with the intention of creating a scoring system for a level of professionalism designed to develop the dependent variable. Each of the survey respondents in Part 1 of the survey were asked to answer questions developed from court cases considering conflict of interest where it was necessary to assess if a conflict of interest existed and if so whether it was appropriate to accept or reject the retainer. Five of the questions were developed from case decisions where a conflict was found to exist and the retainer should be rejected, and five from case decisions where no conflict was found to exist or the court found the circumstance did not require a rejection of the retainer even if a conflict of interest existed. The questions and the determination as to whether a conflict existed and should prevent acceptance of the retainer or not were taken from court cases in Canada and the United States (See Appendix G). The survey respondents were then scored as to professional conduct based on the number of times they agreed with the finding of the court. Table 4.3 outlines the questions and the basis for scoring using court decisions used in Part 1 of the survey.

Table 4.3: Concepts of the questions for the dependent variable (correct response)

	Question	Concept for the Dependent Variable	Correct Scoring — the courts determination as to whether there is a conflict or no conflict is as follows:
1	You are asked to act directly against a former client, you may have some confidential information that could be used in this matter because of knowledge of how the client is likely to react, but no directly relevant information, should you accept or reject the retainer?	This involves concerns about whether you have such general knowledge about a former client that you can in no manner undertake a conflict regardless of continuation or termination of that retainer. This is not consistent with the requirements of professional conduct which requires only that the conflict not impact the three general requirements of the need to preserve confidentiality of client information, provide independent advice and be in a position to undertake zealous advocacy.	Conflict (Correct decision is to reject the retainer)
2	You are asked to take a retainer on a matter for an employer of a client, different than your existing client retainer, but you have information about the client that could affect your advice to the employer, should you accept or reject the retainer?	This is a concept as to whether having general knowledge, which is not relevant to or specific to the matter under consideration, should lead to a conflict of interest rejection. The concepts are the same as No. 1.	Conflict (Correct decision is to reject the retainer)
3	You act for a client on a matter which has significant profile and large fees and are approached to also act for a person on that matter who does not currently, but could if certain events happen, have an adverse conflicted position, should you accept or reject the retainer?	There is no current conflict of interest on any standard but the relationships among the parties are such that a conflict of interest could arise in the future.	Conflict (Correct decision is to reject the retainer)
4	You become aware that there are hints of improper conduct by a client which you can not verify with reasonable review but which could harm	The nature of the client and the retainer is such that there could be reputational issues arising, some of which are at least partially based in	No conflict (Correct decision is to accept the retainer)

	Question	Concept for the Dependent Variable	Correct Scoring — the courts determination as to whether there is a conflict or no conflict is as follows:
	investors who are not clients but many rely on your involvement, should you accept or reject the retainer?	a perception, but not the reality, of conflict of interest.	
5	You are approached to take on a retainer for a competitor of a client where work you have done for the existing client could benefit the competitor because of creative solutions you developed for the client but does not involve disclosing direct confidential information about the client, should you accept or reject the retainer.	These are circumstances where there is an apparent conflict of interest but there is no confidential information held by the lawyer with regard to that client. One of the central tenets which drives the need to reject a conflict of interest is the requirement to maintain confidential information, it does not exist in this case.	No conflict (Correct decision is to accept the retainer)
6	You are asked to take on a matter against a client which is not related to the matter you previously represented the client on, which was many years ago so any information you have is dated, should you accept or reject the retainer?	The lawyer has information regarding the client but it is severely out of date and unlikely to be of any use in the context of the matter under consideration.	No conflict (Correct decision is to accept the retainer)
7	You are approached to take on a retainer for a competitor of a client where work you have done for the existing client could benefit the competitor because of creative solutions you developed for the client but does not involve disclosing direct confidential information about the client, should you accept or reject the retainer?	The lawyer is also a lawyer for a competitor but has no specific information with regard to that competitor. The competitor is not in a conflict of interest circumstance in this retainer.	No conflict (Correct decision is to accept the retainer)
8	Your firm is asked to act for a company where one of your partners is a director, should you accept or reject the retainer?	This is a circumstance where there is more than one relationship, in this relationship a lawyer is representing a client where a partner of the firm is a director of that client. While appearing to be a consistent representation for the	No conflict (Correct decision is to accept the retainer)

	Question	Concept for the Dependent Variable	Correct Scoring — the courts determination as to whether there is a conflict or no conflict is as follows:
		client a director's role and a lawyer's professional role could conflict as to information to be given.	
9	You are approached to act for a company that is a competitor of an ongoing client on the basis of your payment including receiving a share interest in the competitor company, should you accept or reject the retainer?	This involves circumstances where the lawyer has a personal interest in the client. While this is not prohibited, if there are circumstances where such personal interest would affect the independent advice then it should be considered a conflict and the retainer rejected.	Conflict (Correct decision is to reject the retainer)
10	You have a personal investment interest in a competitor of a company that seeks to retain you, should you accept or reject the retainer?	This is a circumstance where the lawyer has an interest in a competitor, this would be considered to be likely closer to a conflict requiring rejection but is not an automatic matter of rejection within the professional tenets.	Conflict (Correct decision is to reject the retainer)

Source: Created by the Author

4.7.2 Survey — part two (the relative effect of the six influences)

The six independent factors were constructed using the twenty-four questions of Part Two of the survey, four questions for each of the six factors. The questions on the factors sought to understand each respondent's relative response to the six factors the literature identified as influences intended to prevent inappropriate acceptance or rejection of conflict of interest; the six factors being liability, insurance, internal regulation, external regulation, reputation and professional training. The respondents answered each question about the effect of a factor on the conflict of interest retainer questions using a Likert scale from 1 to 5, with one being no effect, two being some effect, three being minor effect, four being moderate effect and five being major effect. The survey questions and the independent variables were developed from the literature, with the assistance of my experience in law firm management, an extensive pilot process and with considerable assistance from legal professionalism expert inputs. The survey questions developed are shown in Table 4.4.

Table 4.4: Survey questions- part 2

Question	Independent Variable
What effect does your professional code of ethics have on your decision to accept or reject a conflicted client retainer?	Regulation Internal
What effect does your view of yourself as a “professional” have on your decisions to reject a retainer with a potential conflict?	Professional Training
In assessing whether to accept or reject a retainer with a potential conflict of interest, what effect does concern about your personal reputation have on the extent of review you believe you need to do to assess for conflict of interest?	Reputation
What effect does professional (bar, law society) regulation and sanction of conflict of interest have on your review of and acceptance of conflict?	Regulation Internal
How much adverse effect on reputation do you believe a conflict of interest lawsuit against you would have?	Reputation
What effect does the threat of litigation and personal liability have on the extent of review you conduct to identify client conflict?	Liability
What effect does the threat of review of conflict by a court or administrative body and sanction have on your decision to accept a retainer?	Regulation External
What effect does potential regulatory sanction by boards or tribunals have on your conflict of interest review and acceptance?	Regulation External
What effect do you think an adverse conflict of interest liability decision would have on both the availability and cost of professional liability insurance?	Insurance
What effect does the potential of removal for conflict from a matter have on your conflict of interest review and acceptance?	Regulation External
How much of a positive effect do you believe a practice of avoiding conflict of interest has on your professional reputation?	Reputation
What effect does the size of a potential conflict of interest-based liability claim have if the claim is not fully insured but the firm assets are sufficient to cover it?	Liability
What effect would knowing your insurance cost could increase (or availability decrease) if you do not follow your firm conflict of interest policy have on your decision to accept or reject a retainer?	Insurance
What effect should litigation risk have on policy regarding the selection of technology systems to assess conflict of interest?	Liability
What effect do you think increased external regulatory sanction over conflict of interest (courts, tribunals, etc.) would have on decisions to accept or reject conflicted retainers?	Regulation External

Question	Independent Variable
What effect does concern about exposure to litigation based on a conflict of interest have on your decision to take steps to push for tougher firm conflict policies?	Regulation Internal
What effect do you think a lawyer's exposure to liability for conflict of interest has on insurance cost and availability?	Insurance
What effect would an adverse insurance rating arising from conflict have on your decision to reject or accept a client retainer with a potential conflict of interest?	Insurance
What effect does the cost of the hassle and time to manage litigation based in conflict have on your decision to accept or reject a retainer?	Regulation Internal
What effect would increased professional ethics training and firm policy and sanctions regarding conflict have on your conflict of interest assessments?	Professional Training
What effect does a potential but not current conflict have on your decision to accept a retainer if it is technically permitted at the time of retainer?	Professional Training
What effect does the size of a potential conflict of interest-based liability claim have on your decision to reject a conflicted retainer if it is fully insured?	Liability
How much of a positive effect do you believe a reputation for avoiding conflict of interest has to a lawyer's financial success?	Reputation
What effect do you believe your acceptance of conflict of interest has on conflict acceptance by others?	Professional Training

(Source: Created by the Author)

The questions for the survey were developed from the speculation of the literature as to what details of the influence and its application would have on behaviour. For example, the question: How much of a positive effect do you believe a reputation for avoiding conflict of interest has to a lawyer's financial success? is drawn from literature discussing the perception that a good reputation is a direct beneficial driver of business and therefore financial success (Karlan 1998, Schneyer 1998, Stempel 2012). Another question: What effect does professional (bar, law society) regulation and sanction of conflict of interest have on your review of and acceptance of conflict? draws from the concepts of Law and Economics and the assessment of the role of regulation (Hamilton & Monson 2012, Whelan 2009, Schneyer 1997).

The panel of questions developed in this manner was then tested through five very substantial pilot studies. Each pilot study took a somewhat different approach to the interaction with the respondents. The initial pilots were done with in person small group attendance. The participants were asked to complete the survey with only reading the instructions and

responding to the questions. The first four pilot studies had significant in person interaction with the participants. Two had a professionalism lecture that followed survey completion and then open discussion, each with group of about thirty-five asking them to use the lecture and their knowledge gained as to the problem and the purpose of the research to comment on the survey. Another was with a small group of partners at a major law firm who had active involvement with the vetting of conflicts decisions for the firm, those twelve attended in person and completed the survey with open discussion of the survey while completing it and a session reviewing it after. The fourth of this style of review was with a Masters of Law international students class and the completion of the survey was accompanied by questions they could make during the session about the questions and the problem and purpose. The fifth and largest had an invitation for the participants to send comments and enquiries after they completed the survey, the participants were all members of a large law firm well versed in conflict of interest requirements.

The purpose of the pilots and the conduct in this manner was to refine the survey panel using the pilot participants input. The input was as to length of survey, focus and intent of the questions as against the problem, understandability, assessment of sensitivity as to the enquiry and response, ability to assess and respond with understanding and truthfulness and completeness of enquiry as against the problem. The questions were revised, some deleted, new added and clarity enhanced based on these comments and the review of the quality of the responses. There was a significant level of engagement and many useful comments and ideas shared. The expert aspect of this input came from the nature of the survey participants. All were practicing lawyers in four of the pilot studies with the experience of dealing with conflict of interest decisions for themselves, their practice teams and their firms. In the small group study several of the participants have senior management positions that include managing for this aspect of professionalism, and several had direct experience with the large risk and exposure legal cases discussed elsewhere in this thesis.

This method of survey development was possible because of access to willing and knowledgeable participants. It results in a survey questionnaire panel that has the assessment of over 200 participants capable of understanding and assessing the problem and need of the questions to address and define the influences and dependent variable for the research to have a meaningful contribution. The recommendations were all taken, assessed and many were used to improve and complete the questionnaire. Lawyers are popularly notorious for speaking their mind — and in this exercise they did.

4.7.3 Other survey items

One purpose of the study was to use the relative effect of the factors that influence professional behaviour to reach conclusions as to the management techniques that best accentuate those factors that are a positive influence and thereby use less resources by better balancing of techniques and resource inputs. All of the management techniques add expense and cost to the delivery of legal services but with significant difference in cost and perhaps effect and therefore it is a benefit to find the most economically efficient means of delivering the factors that lead to correct professionalism decisions for legal practitioners. The changing influence of law firm management techniques is discussed in the literature but the discussion needs the better understanding of conduct control factors to ground the emerging discussions of the influence of bureaucratic contracts and peer based systems such as peer review, the integration of factor effect and these techniques is not yet done (Fortney 1995, Fortney & Hanna 2002, Fortney 2014, Chambliss & Wilkins 2003, Bruch & Canter 2008). In order to start a review of effective management techniques, eleven techniques were identified and added to the survey questionnaire in a separate section. These were done using techniques identified by literature, management techniques known to me and discussion with experts.

This listing of management techniques was not intended to be a complete compendium of available ways of managing lawyer professionalism but based on literature, experience and discussion (informally) with law firm managers it does represent many of the more common methods of encouraging appropriate professional behaviour. A law firm and a lawyer want to ensure effective ethical compliance but balanced with effective economic decisions in order to reach the appropriate balancing of cost and benefit between professional compliance and practice decisions in the delivery of their legal services. The eleven techniques which were identified and the question used to enquire as to its effect are set out in the following Table 4.5.

Table 4.5: Management techniques and corresponding survey question

Question — If you or your firm was exposed to a significant liability because of a retainer which was found to involve conflict of interest would the significant cost in deductible, insurance rating and management time how much effect would it have in:	
Question	**Management Technique**
Causing you to change your time and effort to assess for client conflict when you accept a client beyond the base firm requirement?	Increased requirement for and means for assessment of conflict of interest
Causing you to change your view as to whether you would accept a current recognized conflict (with a technically sound Chinese wall)?	The creation of an ethical wall in accordance with professional standards

Question — If you or your firm was exposed to a significant liability because of a retainer which was found to involve conflict of interest would the significant cost in deductible, insurance rating and management time how much effect would it have in:	
Question	**Management Technique**
Cause you to change your view as to whether you would accept a perceived potential conflict, with the concept of adding a technically correct wall if needed later?	The creation of an ethical wall before a conflict of interest exists
Cause you to counsel clients more carefully as to the need for independent legal advice and avoidance of conflict?	Reference to independent legal advice as to the retainer
Cause you to be more inclined to whistle blow to management about retainers of concern by other partners?	Increasing whistleblower encouragement
Cause you to accept requiring a second view approval on all retainers by management or a committee?	A secondary view approving the retainer by a conflicts officer
Cause you to accept that increased file supervision and review by an ethics committee is required to effectively protect yourself and the firm?	The use of an ethics committee as a second approval system
Cause you to approve an expensive computer based conflict search system that requires you to identify conflict before file opening?	The expensive acquisition of enhanced computer support for the identification of conflict
Cause you to support a strong policy for rejecting a potentially conflicted retainer even if the client agrees and there is an ethical wall?	A strict rejection policy where any indication of conflict is to be rejected
Cause you to accept rejecting a retainer where there is no current but there is a potential future conflict in a multi-party retainer at intake?	The requirement to reject a potential but not current conflict of interest policy
Cause you to support a conflict policy that requires review at key points in a matter to see if conflict arises?	Periodic review to determine if a conflict of interest has arisen

Source: Created by the Author

4.7.4 Use of the Likert scale

A Likert 5-point interval scale was used to set the requested survey responses on the effect of the variables. It was decided, but considered defensible, that the scale be interval based such that the intervals were adjusted in terms of a rule that was designed to make the units equivalent if not equal. I accepted that the units are equal only in so far as one accepts my assumptions that the responder would understand the relative steps of the scale. An extensive pilot study with specific enquiry on this issue indicated that the respondents did find the selected answers were understandable as being essentially equal increments. This concurs with the work of Fowler (2013) who notes that, “all of the points are more consistently calibrated by the use of words.”

Discussions with the respondents in the pilot study process indicated that a point scale with fewer steps would not give enough variation in the assessed effects and that increasing to a seven-point scale would not add additional information but would have made the response more confusing and difficult. The scale was selected as:

1. No effect
2. Minor effect
3. some effect
4. Moderate effect
5. Major effect

A sample frequency table on the factor "How much of a positive effect do you believe a practice of avoiding conflict of interest has on your professional reputation?" shows a satisfactory extent of variance using the 5-point scale.

Table 4.6: Reputation Effect — Frequency

	How much of a positive effect do you believe a practice of avoiding conflict of interest has on your professional reputation?	Frequency	Percent
1	no effect	8	3.39
2	minor effect	23	9.75
3	some effect	50	21.19
4	moderate effect	81	34.32
5	major effect	74	31.36
	Total		**100%**

Source: Research Data — The percentages do not add exactly to 100 due to rounding.

As can be seen, from this sample question, noting that all of the others had very similar results, the Likert responses are skewed to the right, toward the factors being identified by the question having more of an effect on professional decisions than less. This is consistent with the overall results which indicated that of all of the six factors used to positively influence professionalism behaviour have a tendency to increase the rejection of a perceived conflict of interest, whether it should be rejected or whether it could be accepted. As is described elsewhere, there are more instances of incorrectly rejecting a retainer in circumstances where there is a perceived conflict of interest but such conflict of interest doesn't exist than there is of incorrectly accepting a retainer that should be rejected.

The pilot studies, the post-pilot discussions and the survey results, indicate that the lawyers responding were able to understand the Likert scale, and respond in a manner showing a considered answer and not a simple desire to look more professional. There is sufficient variance in the responses for a meaningful assessment. The curve is a normal curve, based on the concept that correctness as against the finding of the court is indicative of professionalism. More correct answers indicate a more professional response. This response is not simply to reject conflict of interest, the concept is that the courts have stated in some instances it is a conflict of interest and the retainer should be rejected, the correct answer then is to reject. In other instances, the court has said that while there may appear to be a conflict of interest it is acceptable for the retainer to be accepted, the correct answer then is to accept the retainer. This is discussed in detail in Chapter 5.

4.8 Sample

4.8.1 Sample structure

For this cross-sectional study, purposive, non-probability, sampling was employed so that research participants were selected who are best able to provide accurate and meaningful responses to the survey instrument (Andres 2012). To ensure the reliability and transferability of the study, the sampling design is clearly documented, with the following considerations:

i. **The Universe**: The "universe," or population of interest, for this study consisted of business law lawyers practicing in North America. This was selected for the population because it best reflected the initial problem and desired enquiry. The intention to translate the findings into the start of management-based recommendations focused on the literature identified problem pointed to a focus in larger scale, business-oriented law firms.

ii. **Sampling unit:** The sampling unit is the individual. The decisions by lawyers as to professionalism conduct and the variables influencing that conduct are made and managed at the level of the individual, while of importance to the law firm and legal profession the decisions ultimately are personal, albeit guided by firm and profession based standards.

iii. **Sampling frame**: It was necessary to recognize that the sampling frame had to recognize the reality of access and response. The available organizations to approach for sampling of these members consisted of the pre-eminent professional organizations representing lawyers in the chosen population but was oriented to those organizations where I had facilitated access to request sampling access. The

list of those organizations consisted of enough of the leading organizations to provide a reasoned and reasonable basis for sample.

iv. **Size of sample**: The sample size was selected to consider the requirements of efficiency, representativeness, reliability and flexibility. Statistical study guidelines were used to set the number of survey responses considered acceptable, a goal was set based on that and the goal was met and used for the sample. For this study, of the 1150 lawyers requested to respond, there was a full survey completion rate of 235 respondents, or 20.4% of the population invited to participate.

4.8.2 Sample representativeness

This research sample selection process included a wide variety of lawyers as to practice, demographics and law firm size and profile, with lawyers at different levels of seniority, experience, age and practice backgrounds. The questionnaire was delivered by email request with a link to online dissemination using the Qualtrics platform. The email communications to request participation were made through the use of the email communication lists made available by committee chairs of the professional organizations approached and for the law firms by their ethics officers.

4.8.3 Response rates as an issue

The literature and the experience of the legal professional organizations surveyed indicate that, in general, lawyer survey response rates range from 1% to 5% on surveys disseminated by the profession (and lower for outside of the profession enquiries). The completed and useable responses to the survey at 20.4% of the request numbers is a good level of response for lawyer surveys using the experience of these organizations and direct enquiry with the American Bar Association leadership.

4.8.4 Sample size

It was determined that the fully completed surveys at 235 represented an acceptable sample size for the study. Initially, the recommended sample size, while there is considerable variation in the literature, for exploratory factor analysis is, as a general rule, at least five times as many observations as the number of variables (6 factors for a sample of 30 in this case) and is more acceptable at ten times (6 factors for a sample of 60 in this case) with the suggestion that it is preferable to have 100 or more (Hair, Black, Babin & Anderson 2010). Having determined that logistic and multiple regression could not be run, the higher sample numbers required for those techniques were not justified. Even if regression was to be used, a sample with six variables would be acceptable for those regression techniques at the 235 used for this thesis.

To supplement this acceptance of the sample size, consideration was also given to the sample size rules of thumb generally considered for social science research. Fowler (2014) notes that precision increases steadily up to sample sizes of 150 to 200 but after that point there are only modest gains. If partial least squares was to be used, the 10 times rules would have required 60 observations (6 factors and 10 each) (Hair, Sarstedt, Ringle & Gudergan 2018; Hair, Hult, Ringle, Sarstedt 2016). The sample size is well within the range of recommended size in a significant survey of social science studies (Weisberg & Bowen 1977) and in the range noted by Tabachnick & Fidell (1996) of fair to good despite those authors consistently recommending sample sizes larger than other writers. The sample size was determined to be sufficient using these considerations.

The total sample used was 235 fully completed surveys and included respondents that ranged in age from categories 25–40 to 70+, with median age between 41–55. Men represented 69.33% of the sample, while women represented 26.22%, with the rest preferring not to declare their gender. 38.67% of the respondents had between 6–25 years of legal practice experience, 36.89% had over 25 years of legal practice experience, and 24.44% had less than 5 years' legal practice experience. The lawyers responding predominantly worked in Canada (82.22%) and in big law firms of more than 100 employees (76%). In terms of lawyer specialization, 53.98% of respondents were in corporate/commercial/transactional roles, 27.88% were specialized in litigation/advocacy, 11.95% were specialty lawyers, while the rest (6.19%) were legal counsels (lawyers employed by a single employer). There was also a distribution across seniority levels of lawyers within the firm they are associated with, with 32.89% identifying as employees, 19.56% as management partners, 39.11% as non-management partners, and 8.44% identifying themselves as "other."

Table 4.7: Sample profile

Demographic Feature	Percentage of Sample
1. Gender Identification	
a) Male	69.33%
b) Female	26.22%
c) None Selected /Nonbinary	4.44%
2. Years of Legal Practice Experience	
a) < 5 years	24.44%
b) 6 to 25 years	38.67%
c) > 25 years	36.89%
3. Country of Legal Practice	

Demographic Feature	Percentage of Sample
a) Canada	82.22%
b) United States	15.11%
c) Other	2.67%
4. Size of Law Firm	
a) In house	3.11%
b) Solo	2.67%
c) 2 to 5 lawyers	4%
d) 6 to 10 lawyers	13.78%
e) more than 10 lawyers	76.0%
f) Government	.44%
5. Legal Practice Area	
a) Transaction Corporate/Commercial	53.98%
b) Litigation Advocacy	27.88%
c) Speciality Areas	11.95%
d) Legal counsel (in house)	6.19%
6. Firm Seniority	
a) Employee	32.89%
b) Management Partner	19.56%
c) Non-management partner	39.11%
d) Other	8.44%
7. Age of Lawyer	
a) 25 to 40	39.73%
b) 41 to 55	28.57%
c) 56 to 70	25.89%
d) Over 70	5.8%

(Source: Created by Author)

4.9 Addressing potential bias — sample and researcher

The most significant risk of sample bias identified in the literature was the potential for a natural bias of the respondents in the reporting of data because of concerns somewhat unique to lawyers. The literature notes the tendency of lawyers to not be forthcoming or truthful in responding to interview and survey enquiries, Fowler (2013) notes a tendency amongst lawyers as survey respondents to distort responses so that they may project a more positive image, either because of personal risk associated with an honest answer or the accurate answer does not correspond to the respondent's self-image. This couples with the research observation that people tend to give what they think is the 'correct' answer rather than revealing their true feelings, Podsakoff et al (2003) in their discussion of this common rater effect suggest the

assurance of anonymity and confidentiality may address this possible bias. This issue of potential response bias was identified and every effort made to ensure that the instructions and survey questions minimized this issue.

The use of experts in the design and pilot process supported the view that much of this social desirability bias issue had been addressed. Likewise, the use of an email-delivered, internet-based survey addressed the concerns identified in the literature which indicated a problem with lawyer survey which did not guarantee anonymity, confidentiality, and trust.

Formulating the issue and enquiry as one of relative positive effect and as a management technique enquiry reduced a biased orientation for respondents and researcher. This orientation of the inquiry is a significant advancement for study of the problem, prior research has tended to focus on the professionalism of lawyers rather than why lawyers, mostly, do behave professionally and what influences direct the appropriate professional behaviour, this is extensively discussed in Chapter 2. The lack of bias then drives from the result of the orientation to the inquiry meaning there is no right or wrong answer and nor more or less effective answer from the inquiry. The decision to empirically examine relative effect in a survey format reduced any bias to the questions or analysis of results for the participants and the researcher.

If truthful informed responses are not able to be provided by the sample, then the analysis that was completed, and the models that were developed, could reflect a bias on the part of the researcher influencing the reflection on the questions and the answers provided. It was important for me as the researcher to be aware of the common perception of lawyers of a need to reflect professionalism rather than reflect on and respond as to the influences that affect the choices underlying professionalism decisions. It was important to be aware of this risk of focus and to incorporate reflective thinking into the study using consideration of the possible sources of and means to minimize guided responses toward this perception rather than the questions providing the important needed orientation to assessing influences. The reflective aspect arose from the need to separate personal views of professionalism and conduct from the factors that create the foundation for the decisions that create appropriate professional conduct in the framework of enunciated standards.

The process of creating a survey frame that reduced the concern about influence on the responses and promoted truthful thoughtful answers was supported by the lack of a desired, intended or expected result. Once I recognized that the enquiry was about influences and not about a legal professional wanting to or behaving in a manner that exhibits professionalism, the survey framework could be set in a way the reduced bias issues by removing my framework as

to what is professional behaviour and what influences matter most from the enquiry. Neutral questions looking at the lawyer respondent's considered level of effect for the influences identified from literature could be set into a neutral base.

The research questions did not have an orientation that gave superior or expected results for any influence over another. Any and all insights into the relative effect of the influences give equally valuable knowledge and ability to usefully analyze. There is no better result, and therefore no basis on which my view as the researcher influenced the design, enquiry, questions or presentation to the survey sample. The clear and extensive discussion of the literature on all aspects of the variables and the gap forming the enquiry also ensured a lack of bias in formulating the enquiry.

The survey sample was selected using the broadest reasonably available outreach to legal professional organizations available to the researcher where there was likely to be an acceptable response and response level. There was no personal bias in the selection other than a reasoned ability to access the needed leadership and member lists to disseminate the survey. The choice of the sampled members of the organization approached was done by those leaders following my broad appeal requesting response. The result of the profile of the survey sample is noted elsewhere and reflects access to and interest of the respondents and not a personal bias toward a respondent base likely to provide any particular response orientation.

The pilot process and the assessment of participants, all of whom have some level of expertise as to the topic and many of whom have extensive expertise was designed to confirm this belief about bias. The responses to this enquiry gave a suitable level of assurance. The responses and the pilot purpose are described at 5.2.3.

This research complies with the University of Reading's policies and procedures for research practice and meets its ethical requirements.

4.10 Data collection

Data was collected using an online survey instrument delivered and recorded using the Qualtrics platform. The survey request was delivered using an email link delivered directly to the intended participants. Heen et al (2014) note that online surveys are an invaluable method for academic and management research. The considerations indicating the appropriate use for this mode of data collection included:

1. The population is potentially large and dispersed, the method of using an online response to email request is low cost and can reach the desired number.

2. There is far less risk of bias of the interviewer with a self-administered survey.
3. Respondents have time to consider and provide better response with their answers.
4. It allows reach across a geographic and demographic dispersed sample.
5. Relatively large sample could be obtained making the results more dependable and reliable.
6. It was recognized that there was a risk of low rate of response and bias due to no-response can be indeterminate, but it was believed that leadership requests for participation would reduce this risk.
7. The sample respondents are all educated, and it was believed that profession-based leadership encouragement would result in them being cooperative.
8. The possibility of bias because the respondents are more likely to be concerned about correct professionalism behaviour was recognized and considered in the assessment of generalizability.

The survey was used to obtain self-reported questionnaire data from lawyers working in law practice in the United States and Canada. Research participants were recruited through requests made with the Nova Scotia Barristers Society, Association of Commercial Finance Lawyers, Ontario Bar Association, American Bar Association Business Law Section and an association of the largest law firms in Toronto, Ontario through their jointly owned captive insurance company and its governing body. These are associations where it was possible to access senior leadership who then encouraged participation by member lawyers. Positive responses were received from most requests to these organizations and the sample to distribute to within the organization was chosen by the leadership persons who received the request. The survey was distributed by two of the major law firms, two committees of the ABA Business Law Section, two of the associations and by some direct requests randomly selected, resulting in a distribution to 1,150. At 235 fully completed, useable used surveys this is a 20.4% usable response rate. The surveys were 237 completed but included two deleted as outlier, that would have given a 20.6% response rate.

The number willing to consider doing the survey, as evidenced by opening the online survey, at 455 was 39.6% of those requested. Of those willing to consider by opening the survey the completion rate was 52.1% of the 455. The initial response was 292 as willing to complete part 1, being a 25.1 % of the 1,150-response rate. There was a sample of 29 who started but did only part 1, not continuing to part 2, such that 263 continued to and completed part 2 for a 22.9% response rate of the 1,150. The sample of 237 completing the whole survey is as reported above.

4.11 Data analysis

The analysis of the responses collected from the survey was handled in a traditional approach. The survey had been designed with the data emerging in categories, allowing the raw data to be readily coded against the enquiry questions (the questions had been pre-coded for the intended variable), followed by tabulation and the drawing of statistical inferences.

The analysis commenced with the computation of percentages and coefficients, by applying basic defined statistical formulae. The purpose of analysis was to identify the high level nature of the relationships among the variables, initially as to the dependent variable and then as among the independent variables. The techniques used and the reasons are explained in Chapter 5. The nature of the enquiry allowed a flexible use of analysis techniques and resulted in a sequential assessment leading to support of a suggested model explaining the relationships among the variables and response to the conflicting theories by adding a more nuanced preliminary alternate hypothesis.

4.12 Limitations to research design and method

The design and decisions for this study are grounded in hypothesis and supported by research, however, it is always necessary to acknowledge potential limitations of both the design and method.

Limitations were identified from literature discussion as to why empirical studies had not previously been done on the issue and problem in the lawyer population and those limitations were carefully considered before starting the study design. Responses to the literature identified limitations were developed to try to minimize the adverse effect of those study limitations. The most significant limitation was the literature statement that it is very difficult to obtain an appropriate sample of lawyers. Consequently, it was determined that the sample would need to be obtained from the author’s extensive personal professional networks, fortunately those networks are large and provide a broad representation of lawyer types across all sectors. The ability to access the leadership of the Canadian Bar Association, Nova Scotia Barristers Society, American Bar Association, and a number of the largest law firms in Canada, provided access to a large number of potential respondents across a broad range of the legal profession. While somewhat of a convenience sample, it should not be categorized as such because of the very large number of lawyers that the request for survey was able to be made to and the ability to randomly sample subsets from that number. Also, the very broad range of practice types and demographics of the professionals requested to complete the survey assisted in assuring that it was not, effectively, a convenience sample. The response profile

shown at Table 4.7 shows a broadly representative sample responded although with some distortion towards Canada geographically, larger size law firms and more transaction type practices. The apparent distortion of male and female is not as significant as it may appear when the profession's gender profile is taken into account (CBA 2013; ABA 2020). The American Bar Association, Business Law Section, alone has over 40,000 members, and the ability to choose specific committees for directed request, resulted in a form of random selection on all the key criteria of importance to the survey. This is reflected in the nature of the sample responses.

The literature speculates that a random sample is not possible in the legal profession, because of the difficulty in accessing potential samples which would mean that true samples of convenience would be required. The ability to access a significant number of very large organizations, with the support of senior leadership, to obtain responses from random subsets of those groups minimized the concern about whether the sample could be considered random. By using the several different major organizations that were available and the large and varied population within each of those organizations a random sample could effectively be obtained. This is access only available because of the author's leadership role with the organizations, otherwise these organizations will not respond to a survey request.

My involvement as leadership in these organizations also gave access to extensive informal discussion throughout the study which greatly assisted in sample access and enquiry focus. Attending professional gatherings in Canada and the United States at least seven times a year over the study time with a profile position in each organization gave forums for discussion of the study with lawyers expert in managing the issue under enquiry because they had filled management roles in the firms or organizations for many years and most instances with specific duties relating to professionalism. Lectures on the study topic were given to legal audiences several times over the study period. These gave the opportunity to discuss the topic, research approach and concepts and preliminary findings on many occasions with persons expert, or at least knowledgeable, as to the study focus as a result of professional roles and study in areas of professionalism such as ethics, many were in leadership roles on committees that focused on these issues. This assisted in adjusting and validating many aspects of the study and the results and increased interest in assisting with the study by providing sample access.

Doing an empirical study on this topic with literature statements that a survey-based study of lawyers on the issue of interest, focused on conflict of interest decisions, is likely not possible was daunting. The ability to have continuous open discussion with profession leadership, hold extensive pilot sessions with a population representative of participant types that would be

sampled and gaining the support of thought leaders in the profession was key to proceeding with the study. It was not necessary to accept that the statements made by the literature were accurate because contrary insight was gained from that input and the results of the survey and responsiveness of the sample proved this rejection of the limitations to be correct.

The literature also speculates that lawyers, because of their professional requirement of client confidentiality, are not likely to respond or to respond truthfully to survey inquiries. This was found not to be the case. By ensuring that there was a guarantee of anonymous responses, confidentiality and the use of an appropriate on-line survey provider, the lawyers in the pilot studies said they were confident that they would be protected in this aspect and would respond openly and fully. This was confirmed by exploratory discussions in the pilot process.

Another problem identified by the literature was the concern as to whether lawyers would "tell the truth" in responding to questions about professionalism because of the concern generally held that they appear to be professional. By ensuring that the fundamental underlying assumption to the survey was that the respondents intended to act in a professional manner the difficulties regarding lawyers responding truthfully seem to have been effectively minimized. Discussion with respondents through the pilot development and with the experts advising on survey development assisted in determining that this simple solution of question orientation would substantially resolve this issue. The conclusions that were reached from the way pilot responses were given and the feedback sessions with respondents and experts following the pilot studies, indicated that lawyers are willing to tell the truth as long as the question asked, as it was, was what influences your desire to be professional not whether you intend to be professional. Given that the study question was a relative effect of the factors, asking the question in this manner was believed to be suitable for the study and allowed for truthful responses from the sample.

Response rate to surveys of lawyers is a major challenge noted in the literature. Comments such as that it is notoriously difficult to obtain responses from lawyers caused early concern as to the ability to survey effectively (Samuelson & Jaffe 1990). The primary reason for low response rates was noted in literature on survey methods, including those relating to legal profession survey, as being time commitments, overload and potentially lack of interest in the topic, this has been verified by updated literature review (Saleh & Bistra 2017, Klippenstein 2020). The identified limitation of a low response rate was overcome by careful crafting of the request and the support of leaders in the profession. The specific request made to leaders in the profession that they suggest to their members that consideration be given to responding, noting the importance of the information to the profession, was likely a key to the very acceptable

response rate. Consequently, the response rate did not affect the ability to get a statistically large and broadly-based sample.

The size of the sample is solid and, based on general survey design recommendations, meets, or exceeds, the suggested level of responses for the variables of the inquiry, as determined in the literature. The ability to obtain fully completed survey responses from 235 lawyers provided a suitable size sample. The data profile developed provides for an assessment across the criteria identified for demographics, a suitable sample size being obtained for all key factors such as experience, geographic location, size of firm.

Another limitation to overcome was whether the profile of the sample could be generalized to the population of the legal profession. No claim is being made that the results are capable of generalization to all lawyers or even those who practice in North America because of the predominance of Canadian business lawyers and larger firm members in the survey response. The sample is primarily composed of private practice business lawyers in North America, particularly those who practice in larger law firms. No claim to generalize beyond that is being made for this thesis. However, the profile of the sample is generally reflective of membership in the legal profession and gives a reasonable and reasoned view of the profession in general (CBA 2013, ABA 2020).

Geography did present a challenge, the issue of how to appropriately influence professionalism behaviour is effectively a global one presenting management challenges for practitioners in all modern legal systems but I had sufficient access only to North American lawyers. A survey of both, but only, Canada and the United States, would be done and there is no pretense to generalize beyond Canada and the United States. Feedback from legal professionals in other jurisdictions was obtained informally and from a few survey responses indicated that the need for the inquiry is global, and the further research for responses that could be generalized with more responses outside of Canada and the United States should be done, but this thesis does not pretend to do so.

The most significant survey development challenge was that there is no scale, scoring or construct for the dependent variable, as noted in the literature review for this study. The specific identification of the problem and focused interest in the assessment of the specifically identified factors required that the scale or scoring be developed. Therefore, to develop a basis for analysis, it was necessary to refer to the literature and research responses to specific inquiries by using the pilot process and experts to find a way to define and score. While there is no pretense that the dependent variable scoring created for the study is a refined scale, it does represent a start as evidenced by consistency among the various methods of review and

analysis and the relative success of the analysis between survey response and the enquiry of perceived effect. This is not a scale development thesis but rather a study looking at the relative effects of factors intended to influence professionalism behaviour in a model concept that required a testable concept.

An ability to fully study the moderating effects of the six factors as behaviour influences on each other considered was not possible within the scope of the time commitment for a doctoral thesis and one which is a first empirical study. It was recognized at the model development stage that many of the independent factors have influence on others, it was not reasonable at this stage of research to add a detailed enquiry of inter-factor relationship to the design of the survey and so it was determined to focus on a determination as to whether the inter-factor relationships appear to exist. The length and complexity of a survey which would allow more effective analysis of the extent and nature of those inter-factor effects while defining the scales and models would have been prohibitively long and too complex. Enquiry with this frame for direct questioning will necessarily have to be the subject matter of further study likely broken into separate studies of the effect factor by factor.

4.13 Conclusion

This chapter provided a description of the philosophical underpinnings of this research, and presents the research design, methodology and methods deemed suitable to pursue this investigation of the literature primary influences on lawyer’s professionalism behaviour and to test their resulting theories as to effect. It provides an overview of the theories and resulting model, to be assessed and the survey instrument employed. An explanation and rationale for the data analysis techniques and how this analysis would be conducted is shared. Chapter 5 presents the data collection process, data analysis and the results of this research study.

5. Quantitative results and analysis

5.1 Introduction

The research was primarily designed to determine if any of three theories identified in the literature as to the relative effect of six behaviour influences on lawyer professionalism decisions would be empirically validated or if there was another better supported hypothesis. The three hypothesis that I developed from the summation and analysis of the literature, as outlined in Chapter 2 at 2.2.4, 2.3.6 and 2.4.9 are:

1. Law and Professionalism: The imposition of personal liability and the requirements of insurance are the most effective factors positively influencing lawyer professionalism decisions.
2. Law and Economics: The use of regulation, by the profession and external bodies are the most effective factors positively influencing lawyer professionalism decisions
3. Behavioural Economics and Law: The personal factors of concern for reputation and the effect of training and peer influence are the most effective factors positively influencing lawyer professionalism decisions.

A further hypothesis I developed from observation of the research results and a more nuanced consideration of the debate in the literature and I considered this as a likely hypothesis to explain the relative effect of the six behaviour influences is:

4. Author's hypothesis: The six behaviour influences intended to positively effect lawyer professionalism have such significant effect on each other that a direct assessment of relative effect on the behaviour cannot be assessed.

The six behaviour influences the literature says influences lawyer professionalism are:

1. Imposing personal liability for professional error;
2. The requirement to carry insurance;
3. Regulation internal to the legal profession;
4. Regulation from courts and administrative bodies;
5. Reputation concerns;
6. Professional training and peer influence.

The research became "What is the relative effect of each of the identified behaviour influences intended to positively effect lawyer professionalism (and decisions)." The research explored the research question considering two models, first a single model estimating the linear direct effect of each influence, reflecting the three hypothesis of the literature, and developed from a

set of univariate models examining the effect of each influence respectively on professionalism. Then a second model was developed based on the fact that the factors among the influences are highly correlated, in accordance with the author's hypothesis and concept, and because therefore a single model with all influences will likely lead to higher standard errors in the estimates and potentially yield Type II errors a different model was needed. The survey was developed to identify lawyers' assessment of relative effect among the six influences both as factors and as a direct enquiry. The data analysis showed a very strong correlation among the six factors supporting the fourth author developed hypothesis and failed to support any of the three theories of the literature. Analysis of the data based in demographic factors, self-perception of lawyers and acceptance of behaviour management showed no behaviour factor changed the finding of no dominant influence by any one influence and significant inter-factor relations among all six factors.

The work in the statistical study, in similar manner to the methodology and research design was guided by, and checked on conclusions with, the training received in the Henley Business School program, the insights gained at the EDAMBA Summer Program in Athens (attended twice) and using standard textbooks which were well worn and marked by the conclusions of the process (Fabrigar & Wegner 2012, Field 2013, Gravetter & Wallnau 2013, 2017, Hair, Black, Babin & Anderson 2010, Tabachnick & Fidell 2014). The statements as to accepting statistical levels and results as "rule of thumb" or acceptable practice are taken from these sources.

5.1.1 Scoring the dependent variable

The development of scoring of the dependent variable was a key first step to the analysis. The recognition that the definition process for the dependent variable gave a basis for scoring was a significant early development, explained in Chapter 3. Analyzing data results for this scoring result was an important first step to building an understanding of the factor relations.

The following Table 5.1 shows the respondents scored against the scoring basis of correct or incorrect to the court determination whether the correct accept/reject answer was given. The survey panel of questions on the dependent variable used 10 questions developed from court cases, 5 where the court found the retainer could be correctly accepted and 5 where the court found the retainer needed to be rejected to be correct. An answer was correct (as a score value) if it agreed with the court. Table 5.1 presents the response distributions using the full panel of ten questions. As can be seen from this Table 5.1 the legal profession skews toward being more responsive to professionalism requirements, using court determination as the criteria. More of the lawyers were correct in agreeing with the decision of the court, than those that

weren't. There is a significant clustering around the middle but with the bias skewed to the right meaning an orientation toward more professional conduct. Note should be made that there was one respondent with zero correct, none with only one correct, one with only two correct and none with three correct. The skew of the responses toward a more professional response according to the court, as arbitrator, was taken into account in assessing the results. Simply, there was only one lawyer that scored extremely badly on the professionalism score getting none right and only one other also scored below 4 correct. One lawyer had all ten correct which given the complexity of the decision as to conflict, was also deleted as an outlier. The scoring process showed the dependent variable had the characteristics of a normal curve.

To start the analysis of the dependent variable score, a professionalism score was developed by taking each of the five questions where the court found it would be correct to accept a retainer, give a score of 1 if it was accepted and zero if it was rejected. This is called "Correct to Accept" in the tables. The inverse was done for the questions where it would be correct to reject the retainer. This is called "Correct to Reject" in the tables. The theoretical minimum score is zero and the maximum is ten, the distribution of these scores is given in Table 4, deleting the levels with one lawyer which had all incorrect, the one lawyer which had only two correct and the one lawyer that had all correct all as outliers.

Table 5.1: Dependent variable — distribution — based on 10 questions

Correct Answers	Number of Respondents	Percentage of Respondents	Cumulative Percentage
2	1	0.42	0.42
4	9	3.78	4.20
5	32	13.45	17.65
6	56	23.53	41.18
7	71	29.83	71.01
8	54	22.69	93.70
9	14	5.88	99.58
10	1	0.42	100.00
Total	**238**	**100.00**	

As a result of developing the dependent variable score using half the questions as correct to accept and half as correct to reject it is possible to create two dependent variables. This view looking at the dependent variable as effectively two different variables gives a useful

management insight. One enquiry is to use the correct to reject and look at the effect of the independent variables on the decision as to whether to reject a retainer in circumstances where conflict exists and the courts have stated that the retainer should be rejected. This is a fully ethical decision because complying with the professional requirement to reject the retainer when conflicted is a clear ethical tenet of the legal profession. The second enquiry using the correct to accept 5 question panel is to look at the determination as to whether to accept or reject a retainer in circumstances where the courts have said it is acceptable to take on the retainer, in that set of questions to reject the retainer is not needed for ethics compliance and is overly conservative and economically inefficient. The first of the two variables viewed with this lens is a matter of ethics, the acceptance of a retainer in circumstances where a conflict exists is, by the requirements of the professional codes for lawyers, unprofessional behaviour. The second of the two variables is more of an economic decision because there is no ethical violation to accept the retainer and by being overly conservative in rejecting a conflict when that is not required there is an unnecessary loss of revenue as a result of an overly cautious approach to trying to be professional.

As described earlier in Chapter 3, the determination of the accept or reject decision for conflict on a client retainer is very nuanced, see the discussion and explanation in Chapter 3 — The Dependent Variable and is a key requirement of professionalism. The determination to accept a retainer with facts matching those where the court finds the conflict should have caused rejection is a breach of ethics. On the other hand, where the courts find that it is acceptable to accept a retainer there is no ethics breach and it is an overly cautious decision if made to reject that retainer, that is effectively an economic decision. There is no true ethical issue in the acceptance or rejection of the retainer in circumstances where the courts have identified that a conflict of interest requiring rejection does not ethically exist and the decision can be made to accept. If, in that circumstance, the retainer is rejected, it has an adverse economic impact because of the rejection of revenue without a professional necessity to have done so. It becomes effectively an uneconomic practice decision for the lawyer losing the revenue and the client losing the right to retain the lawyer of their choice.

Once the ability to view the enquiry and data on the dependent variable as two somewhat different variables was recognized the analysis was developed to explore this additional aspect to the research. Separate tables were prepared dividing the correct to reject and correct to accept responses as if they were separate variables, this was done to determine if there was a difference in the distribution for the decision to reject a conflict of interest between the correct to reject and correct to accept a retainer for a lawyer considering conflict of interest. The results of the

responses where it was correct to accept the retainer indicated that there is more of a tendency to reject a retainer in circumstances where there was an indication there might be conflict of interest even if it could be accepted. This supports the view that lawyers will favour exhibiting professionalism in their choices over their economic interests. The distributions for each of correct to accept score and correct to reject as a correct score are shown in Table 5.2 below.

Table 5.2: Dependent variable — distribution — split for correct to reject/correct to accept

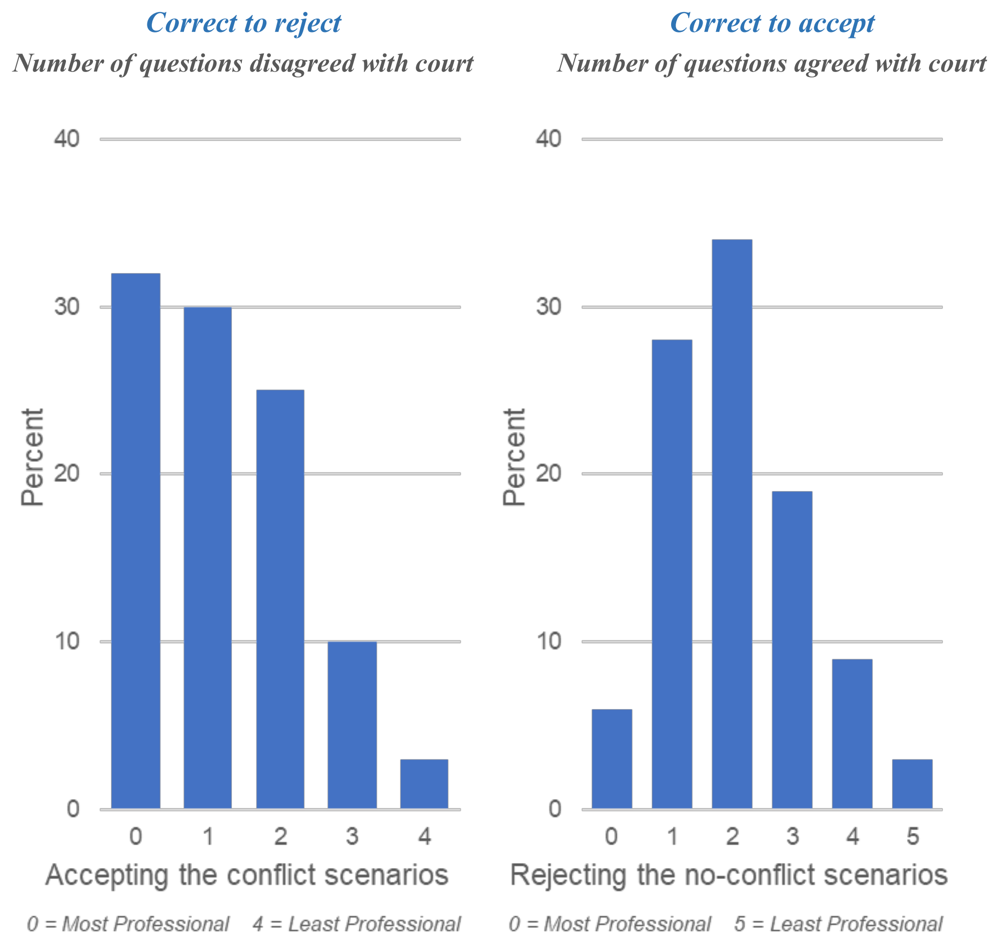
Wrongly Accepting Conflict Scenarios (Correct to Reject) (Ethics)		Wrongly Rejecting No-Conflict Scenarios (Correct to Accept) (Economic)	
Score	**Frequency**	**Score**	**Frequency**
0	75	0	13
1	73	1	67
2	59	2	81
3	23	3	45
4	5	4	22
5	0	5	7

Note: A score of 0 is the best score meaning respondents are not wrongly accepting any conflict scenarios.

Histograms were prepared of the distribution across the full professionalism score of the 10 questions and then separately by the two scores of the 5 questions for each of correct to reject (ethics) and correct to accept (economic). Using these graphs to illustrate scoring were useful to properly visualize the results. The histograms give a visual picture of the relative scores set out in to Tables 5.1 and 5.2 which give the absolute numbers.

Figure 5.1: Distribution of professionalism score — based on 10 questions

Figure 5.2: Distribution of professionalism score: correct to reject (left) and correct to accept scenarios



The Correct to Reject had no lawyer getting all wrong so there is no 5. The score at zero is the most professional and 4 the least because coding was a zero if the retainer was rejected (correctly) and one if the retainer was accepted (incorrectly).

The Correct to Accept is the opposite with the coding as zero rejected (incorrect) and one if accepted (correct). Therefore, taking economics (revenue) into account the lower score (0) is less professional and the higher score at 5 is more so.

On the dependent variable of Correct to Reject the data shows participants being less oriented to wrongly accepting conflict scenarios (correct to reject), with most lawyers not accepting client retainers in those circumstances where they should not and therefore are agreeing with court (getting it right) most of the time. Over 50% of lawyers are either not accepting any clients across all of the 5 Correct to Reject conflict scenarios or they are at most getting one scenario wrong.

On the other hand, the distribution for wrongly rejecting clients when there are no conflicts preventing acceptance (correct to accept) has more incorrect answers. Most lawyers are getting between two to five scenarios wrong (they are rejecting 2 to 5 clients out of 5 clients when they do not need to). This is effectively making an unnecessarily conservative professionalism decision and therefore taking an unnecessary economic loss. This arguably reflects inefficiencies in the current influences and resulting methods used to influence the conflict of interest decision pushing the lawyer toward an unnecessarily conservative professional response at cost to both the lawyer and client.

The reason for scoring the dependent variable was to create a basis for assessing the responses of the participants on the relative effect of the independent variables. Having a score for each lawyer responding against the dependent variable gave a basis for establishing their apparent level of professionalism. Then looking at their responses to the effect of the independent variables it was possible to see if different factors were of more importance as to their effect on professionalism. Using the split dependent variable with the nuanced difference between the ethics and economics aspect it was possible to determine if some factors created economic inefficiency by inducing unnecessary overly conservative decisions (influencing rejection when the retainer could be accepted).

The normal curve (after taking the skew toward more professional response into account) and the variance in the score indicated a successful scoring for both professionalism, and for the aspects of ethics and economic effect. This score could then be used as assigned to the respondents and allow an assessment as to whether the factors acted differently on lawyers with different levels of assessed professionalism.

5.1.2 Scales for the independent factors

The independent factors were constructed using the 24 questions from Part Two of the survey, four questions for each of the six factors. The questions on the factors sought to understand each respondent's response to the relative effect of the six factors the literature identified as the influences intended to positively influence acceptance or rejection of conflict of interest; the six factors being liability, insurance, internal regulation, external regulation, reputation and professional training. The respondents answered each question about the effect of a factor on a Likert scale from 1 to 5, with one being no effect, two being some effect, three being minor effect, four being moderate effect and five being major effect. The survey questions and the independent variables were developed from the literature with the assistance of management

experience and an extensive pilot process including legal professionalism expert input. This is explained in Chapter 3.

The following table states the mean score on the Likert scale, with five being a higher professional response effect, and the rank of the mean set out in descending order for each question with the last column showing the variable being defined and scored. This table is presented to start the analysis to show the effect of each of the aspects examined for each of the independent variables. The responses show the relative effect is somewhat scattered with the reflective enquiries not being clearly clustered. This scattering of effect could be analyzed using factor analysis, as is later described to the result that the factors seem to be correctly defined but with the finding of highly inter-related factor effect. No grouping of responses on a factor are seen in this simple ranking and no clustering emerges to show greater importance. This initial analysis indicated the need to confirm correct definition of factors by the questions, which was done by factor analysis and indicated the possible collinearity issue which was later confirmed.

Table 5.3: Ranking of the mean of effect of each question of the dependent variable

Question	Mean Response	Rank of Mean (1–24)	Independent Variable (initial intended coding to a factor)
What effect does your professional code of ethics have on your decision to accept or reject a conflicted client retainer?	4.52	1	Regulation — Internal
What effect does your view of yourself as a “professional” have on your decisions to reject a retainer with a potential conflict?	4.23	2	Professional Training
In assessing whether to accept or reject a retainer with a potential conflict of interest, what effect does concern about your personal reputation have on the extent of review you believe you need to do to assess for conflict of interest?	4.17	3	Reputation
What effect does professional (bar, law society) regulation and sanction of conflict of interest have on your review of and acceptance of conflict?	4.15	4	Regulation — Internal
How much adverse effect on reputation do you believe a conflict of interest lawsuit against you would have?	4.11	5	Reputation
What effect does the threat of litigation and personal liability have on the extent of review you conduct to identify client conflict?	4.10	6	Liability

Question	Mean Response	Rank of Mean (1–24)	Independent Variable (initial intended coding to a factor)
What effect does the threat of review of conflict by a court or administrative body and sanction have on your decision to accept a retainer?	3.96	7	Regulation — External
What effect does potential regulatory sanction by boards or tribunals have on your conflict of interest review and acceptance?	3.92	8	Regulation — External
What effect do you think an adverse conflict of interest liability decision would have on both the availability and cost of professional liability insurance?	3.88	9	Insurance
What effect does the potential of removal for conflict from a matter have on your conflict of interest review and acceptance?	3.86	10	Regulation — External
How much of a positive effect do you believe a practice of avoiding conflict of interest has on your professional reputation?	3.84	11	Reputation
What effect does the size of a potential conflict of interest based liability claim have if the claim is not fully insured but the firm assets are sufficient to cover it?	3.84	12	Liability
What effect would knowing your insurance cost could increase (or availability decrease) if you do not follow your firm conflict of interest policy have on your decision to accept or reject a retainer?	3.84	13	Insurance
What effect should litigation risk have on policy regarding the selection of technology systems to assess conflict of interest?	3.80	14	Liability
What effect do you think increased external regulatory sanction over conflict of interest (courts, tribunals, etc.) would have on decisions to accept or reject conflicted retainers?	3.78	15	Regulation — External
What effect does concern about exposure to litigation based on a conflict of interest have on your decision to take steps to push for tougher firm conflict policies?	3.78	16	Regulation — Internal
What effect do you think a lawyer's exposure to liability for conflict of interest has on insurance cost and availability?	3.78	17	Insurance
What effect would an adverse insurance rating arising from conflict have on your decision to reject	3.74	18	Insurance

Question	Mean Response	Rank of Mean (1–24)	Independent Variable (initial intended coding to a factor)
or accept a client retainer with a potential conflict of interest?			
What effect does the cost of the hassle and time to manage litigation based in conflict have on your decision to accept or reject a retainer?	3.57	19	Regulation — Internal
What effect would increased professional ethics training and firm policy and sanctions regarding conflict have on your conflict of interest assessments?	3.30	20	Professional Training
What effect does a potential but not current conflict have on your decision to accept a retainer if it is technically permitted at the time of retainer?	3.25	21	Professional Training
What effect does the size of a potential conflict of interest based liability claim have on your decision to reject a conflicted retainer if it is fully insured?	3.22	22	Liability
How much of a positive effect do you believe a reputation for avoiding conflict of interest has to a lawyer's financial success?	3.01	23	Reputation
What effect do you believe your acceptance of conflict of interest has on conflict acceptance by others?	2.98	24	Professional Training

**Higher means more effect as extracted from the responses*

The analysis of this chart indicated that the six influences likely have a nuanced overall effect by influence as factors and the scattering indicated that no factor was emerging as having dominant effect. This was contrary to the three literature theories which had, albeit with each discipline indicating a different dominance by factor, stated support for a factor having dominance on professionalism decisions, as discussed in Chapter 2.

5.1.3 Assessing variance

Resorting of the variables was done to assess the distribution of the six factors to determine if statistical analysis was still possible using the six identified influences despite the apparent scattering of effect. This exercise resulted in satisfactory diagnostic results for continuing statistical analysis. Each influence had sufficient variance for statistical analysis.

Table 5.4: Summary of the distribution on the variables

#	Field	Minimum	Maximum	Mean	Std Deviation
1	Dependent Variable (Professionalism)	2.00	10.00	6.68	1.30
1	Independent Variable — reputation	4.00	20.00	15.13	3.15
1	Independent Variable — Regulation Profession	4.00	20.00	16.25	2.92
1	Independent Variable — Regulation External	4.00	20.00	15.52	3.66
1	Independent Variable — Liability	4.00	20.00	14.74	3.67
1	Independent Variable — Professionalism	4.00	20.00	13.77	2.71
1	Independent Variable — Insurance	4.00	20.00	15.24	3.32

5.2 Factor analysis

Each of the six influences that the literature identified as being the behaviour influences for lawyer professionalism are the independent variables being examined and therefore are intended to be the "factors" affecting the dependent variable of professionalism behaviour for this research. Factors are the variables that are examined in order to determine their effect on the dependent variable. In this research the six influences are the studied phenomena and so the factors. The six influences being examined as the factors were each defined by four questions which could act as a definition and give a scale. The survey was developed as to these factors, as explained in detail in Chapter 4, to create a panel of 4 questions for each factor for a scale as explained in 5.1.3. The questions were developed from the content of the literature discussion for each supplemented by using personal experience, pilot results and expert feedback.

The factors and the number of factors were developed from the literature and gave the panel of phenomena of interest. The selection and therefore the nature and the number of factors was driven by the recognition of the phenomena of interest that the literature identified and suggested needed empirical study as the gap in understanding or the effect and relative effect of each. The conceptualization of each factor, otherwise known as a construct, was extracted from the discussion of the characteristics in the literature and the carefully designed set of questions in the survey. As explained in 5.1, there was no prior conceptualization for the factors in a format testable using statistical methods. The scale was also developed without there being an available precedent using the concepts explained previously.

The decision to determine the factors from the clearly identified phenomena resulted in there being no need to identify and remove any of the six influences as factors, the list of the six

phenomena of interest resulted in the defined set of factors. However, the initial review of the raw data results for the independent variables indicated a more scattered result for the questions on each variable than anticipated. Because this is the first empirical study on the topic, to the author's knowledge, that seeks to measure response to these factors in a quantitative manner scattering or lack of clustering by level of effect as to the questions for the factors indicated the use of factor analysis on the data to assess whether the questions and responses converged on the six identified independent factors was merited. The factor analysis took each of the 24 questions, four questions intended to create the scale for each of the influences, as a factor and each was assessed for its loading on the intended of the six influences. The factor analysis was used to verify the reliability of the questions as a scale by determining of the questions converged on the intended influence. This analysis was not intended as the primary analysis method for the study of factor effect on the dependent variable but rather to verify the scale development for each factor.

The measurement of a factor is usually done using multiple questions that reflect that factor. The questions developed for this research were sets of four with each intended to reflect one of the six influences. The use of factor analysis to assess the validity of the question sets was a first step in analysis of the data results. The basic assumption of factor analysis is that there are a set of underlying variables, in this case the questions were intended to create that set, that can explain interrelationships and reflect that intended factor. The first enquiry therefore to be considered is whether the items actually measure what is intended, in this case the four questions developed as to each of the six influences being studied and used as factors. If items have a relatively high correlation there is a good basis for the use of factor analysis to model the interrelationship. Eigenvalues are the tool to assess for quality and can be used for this because they represent the amount of variance that can be explained by a component. A higher Eigenvalue is likely to represent a real underlying item or factor. Eigenvalues close to zero imply multicollinearity in which case all of the variance in that case could be taken up by the first component.

The results of the factor analysis follow showing the loadings after dropping those four questions that did not meet the determined cut off of Eigenvalues of 0.4, as explained following the table. The table is presented in this manner because the intent is to show the factor analysis results as a determinant of the validity of the questions as scale for the influences as factors. There is no hard rule as to what is a high Eigenvalue but a common rule of thumb is to reject an item that has an Eigenvalue of less than 0.4 and this was selected for this factor analysis (Tabachnik & Fidell 2014, Field 2013). In factor analysis for my purpose

the examination is looking for high Eigenvalues among the four questions interned to reflect the influence they were designed to reflect.

The Table 5.5 following shows the questions sorted for the influence they were designed to reflect and show that adequate Eigenvalues were achieved for each of those as set out. The detailed analysis follows the table but generally the questions did reflect the intended influence used as the factor. The entries in red and noted by * or ** are those deleted from the survey result assessment because of inadequate factor loading.

Table 5.5: Factor analysis on the independent variable (influences)

Factor Analysis	Exploratory Factor Analysis Independent Variable	Factor Loading
1. What effect does the threat of review of conflict by a court or administrative body and sanction have on your decision to accept a retainer?	External regulation	0.764
2. What effect does potential regulatory sanction by boards or tribunals have on your conflict of interest review and acceptance?	External regulation	0.7277
3. What effect do you think increased external regulatory sanction over conflict of interest (courts, tribunals, etc.) would have on decisions to accept or reject conflicted retainers?	External regulation	0.5437
4. What effect does the threat of litigation and personal liability have on the extent of review you conduct to identify client conflict?*	Loads on — External Regulation (this works empirically but there is no logical connection of the question to the factor — this was rejected as not being correct from a concept concern, this was for Liability)	0.767
1. What effect does the size of a potential conflict of interest based liability claim have on your decision to reject a conflicted retainer if it is fully insured?	Liability	0.7397
2. What effect does the size of a potential conflict of interest based liability claim have if the claim is not fully insured but the firm assets are sufficient to cover it?	Liability	0.7204
3. What effect should litigation risk have on policy regarding the selection of technology systems to assess conflict of interest?**	Liability	0.3488
1. What effect do you think an adverse conflict of interest liability decision would have on	Insurance requirements	0.7159

Factor Analysis	Exploratory Factor Analysis Independent Variable	Factor Loading
both the availability and cost of professional liability insurance?		
2. What effect do you think a lawyer's exposure to liability for conflict of interest has on insurance cost and availability?	Insurance requirements	0.7072
3. What effect would an adverse insurance rating arising from conflict have on your decision to reject or accept a client retainer with a potential conflict of interest?	Insurance requirements	0.4851
4. What effect does the cost of the hassle and time to manage litigation based in conflict have on your decision to accept or reject a retainer?*	Insurance requirements (this works empirically but there is no logical connection of the question to the factor — this was rejected as not being correct from a concept concern, this was for Liability))	0.4982
5. What effect would knowing your insurance cost could increase (or availability decrease) if you do not follow your firm conflict of interest policy have on your decision to accept or reject a retainer?**	Insurance requirements (did not meet threshold)	0.3364
1. What effect does your professional code of ethics have on your decision to accept or reject a conflicted client retainer?	Regulation by the profession	0.7133
2. What effect should litigation risk have on policy regarding the selection of technology systems to assess conflict of interest?	Regulation by the profession	0.5666
3. What effect does professional (bar, law society) regulation and sanction of conflict of interest have on your review of and acceptance of conflict?	Regulation by the profession	0.4362
4. What effect does the potential of removal for conflict from a matter have on your conflict of interest review and acceptance?**	Regulation by the profession	0.0221
1. How much of a positive effect do you believe a practice of avoiding conflict of interest has on your Professional reputation?	Reputation	0.758
2. How much of a positive effect do you believe a reputation for avoiding conflict of interest has to a lawyer's financial success?	Reputation	0.7058
3. What effect would increased professional ethics training and firm policy and sanctions	Reputation	0.4833

Factor Analysis	Exploratory Factor Analysis Independent Variable	Factor Loading
regarding conflict have on your conflict of interest assessments?		
4. What effect do you believe your acceptance of conflict of interest has on conflict acceptance by others?	Reputation	0.4513
5. How much adverse effect on reputation do you believe a conflict of interest lawsuit against you would have?**	Reputation (loading does not meet threshold)	0.3324
1. In assessing whether to accept or reject a retainer with a potential conflict of interest, what effect does concern about your personal reputation have on the extent of review you believe you need to do to assess for conflict of interest?	Professional training	0.6648
2. What effect does a potential but not current conflict have on your decision to accept a retainer if it is technically permitted at the time of retainer?	Professional training	0.5968
3. What effect does your view of yourself as a "professional" have on your decisions to reject a retainer with a Potential conflict?	Professional training	0.5308

Table: Author created.

** Dropped for concept error.*

*** Dropped for Eigenvalue below 0.4.*

Table 5.5 displaying the factor analysis showed the six influences as scaled factors were each defined as intended by at least three of the questions for five of the influences and two for the liability influence and that each did positively influence decisions as to accepting a retainer and therefore the professional decision being studied. As a result, the factor analysis indicated no loading or loading on the wrong intended factor, only four questions such that those were dropped as not having a clearly identified relationship to the intended factor or being identified with a different factor than had been intended with experience providing the basis for conclusion that that loading for that question on the factor was incorrect overall rather than incorrectly allocated to the factor.

The selection of the questions to delete from the scale were determined on the following basis. Out of the 24 questions, 20 loaded correctly as intended onto the 6 identified factors, while 4 did not. The reason those 4 questions were determined not to load onto any factor is because their Eigenvalues were lower than 1 and/or factor communalities were lower than 0.2 with

their inclusion and/or their factor loading being lower than 0.4. The criteria to reject questions at these levels are well developed in the literature. The four of the questions that did not meet these acceptance criteria were deleted. This decision to reject questions on this basis is in line with general recommendations (MacCallum, Widaman, Zhang & Hong 1999, Stevens 2009). Two other questions were dropped despite meeting the factor loading criteria because they did not, based on knowledge of the influence meet the criteria of describing the factor they were supposedly loading on. This effect did not demonstrate in pilot studies where the understanding of the participants was consistent with the intended enquiry. However, because of the loading issue these were dropped for conceptual reasons.

The factor analysis did support the literature concepts that the six factors identified by the literature are six separate factors influencing professionalism behaviour as defined by the conflict of interest decision because the responses to the questions did load on the six factors identified consistently with the intended coding. The six factors were verified as being appropriately defined by the questionnaire questions and the majority of the initial questions and their initial allocation to form a definition for an independent variable were sustained by the exploratory factor analysis.

5.2.1 Factor analysis

The results of the factor analysis were such that each of the independent variables, other than liability, have three or more questions which converge to that factor. Liability only has two remaining questions, despite all four questions testing well in the pilot studies and expert consultation discussion two of the questions intended for liability did not converge on liability. The two questions for liability which each have Eigenvalues over 0.4 (0.7397 and 0.7204, with 0.7 being considered a high Eigenvalue on a rule of thumb basis) are also strong direct questions as to the influence of liability on professional behaviour based on the pilot input and therefore it was determined that the concept of liability as an independent factor could be retained for the purpose of this study despite only using two questions to reflect the factor. Further refining of a fulsome set of questions to test liability as a professionalism behaviour influence should be considered for subsequent study given the significant interest of the profession in this aspect of behaviour influence.

The confirmation by factor analysis of the convergence of most questions on the factor which was intended and seemingly consistent with the responses addressing the factors as intended indicated the factors had been correctly defined. The six independent factors were supported as each being able to be defined and assessed as separate from each other. The questions

developed to define each factor converged on the factors each was to define indicating appropriate definition to create the scale for the factor.

5.2.2 Reliability and validity factor analysis

The next assessment for the validity of the factors as reflected and tested was to assess for reliability using Cronbach's Alpha. Cronbach's Alpha is a measure of internal consistency, that is, how closely related a set of items are as a group. It is considered to be a measure of scale reliability or consistency. A generally accepted rule of thumb is that an alpha of 0.6-0.7 indicates an acceptable level of reliability and 0.8 or greater a very good level. Values higher than 0.95 might be an indication of redundancy and would need careful assessment.

Reliability of the six independent factors was assessed using Cronbach's Alpha, as the most commonly suggested method for this verification. The Cronbach's Alpha for each of the six factors ranges from .53 to .67. At approximately .6 this is not as high as would be desirable, with .7 or greater being an indication of greater factor reliability but is sufficient for the assessment for this thesis.

Table 5.6: Scale reliability of the independent variables

Factors	Cronbach Alpha (Scale Reliability)
Regulation — External	0.671
Liability	0.619
Insurance	0.563
Regulation — Internal	0.53
Reputation	0.529
Professional Ethics	0.605

Although the validity as tested is not as high as it should be, it is greater than 0.4 which is the cut off point for acceptance or non-acceptance (Tharenou, Donohue & Cooper 2007, Hair, Block, Babin & Anderson 2010, Hair, Hult, Ringle & Sarstedt 2016). The validity in this instance ranging from 0.5 to 0.6 did result in sufficient factor loading, the levels are shown in Table 5.6. and generally would be accepted even though at the lower end of the range. Cronbach's alpha is a statistic that measures the internal consistency among a set of survey items that (a) a researcher believes all measure the same construct, (b) are therefore correlated with each other, and (c) thus could be formed into some type of scale. These results validated the scale developed for the factors using the questions as intended.

5.2.3 Construct development

The identification of, and the outline of, the concept of the dependent variable and the six independent variables was taken from the literature and is described and validated as a literature concept in Chapter 3. These concepts are abstract and difficult to visualize and so have been treated as constructs, being the abstract concept chosen to explain the phenomena, in this case the phenomena are the influences on behaviour and the affected behaviour. Recognizing the complexity and the abstract nature of the constructs, care was taken to validate the concepts as correctly identifying the phenomena of interest. The use of a very significant pilot process testing exactly that, the clarity and applicability of the constructs was considered key to validating the constructs as such. This is extensively discussed in in 4.7.2, the input from a large participation group (over 200) validated that the participants believed the constructs correctly reflect the concepts and were clearly understood by the practicing lawyer participants as was evidenced by the input from the pilot studies as described in 4.7.2. The development of constructs using the literature to identify the concepts and the questions for enquiry that would develop the construct proved to gain acceptance of the constructs based on the response of well-informed participants for the pilot input. This was further validated by the factor analysis and correct loading of the questions on most of the constructs and the confirmation using the Cronbach's alpha, both as intended and as discussed in this 5.2.

5.2.4 Standard deviation

Analyzing the results of the factor analysis, variation was the first attribute considered. Standard deviation is a measure of the average distance between the values of the data in the data set and the mean of that set. A low standard deviation indicates that the data points tend to be very close to the mean; a high standard deviation indicates that the data points are spread out over a large range of values. As a rule of thumb, a standard deviation greater than or equal to 1 indicates a relatively high variation, while a standard deviation less than 1 can be considered low. In this case looking for consistency with sufficient variation to measure differences is desirable. A standard deviation below 1 and with the standard deviation differing for the factors is a good result.

In this analysis there is a difference in the results by factor; as an example there is more spread, higher deviation, between external regulation and liability than there is, for example, for reputation. Professional training and internal regulation are not as spread and insurance not as consistent but with enough difference to indicate a factor had been defined by the intended questions. The conclusions supported the factors having been acceptably defined by the reflective questions.

Table 5.7 the distribution of the factors after exploratory analysis allowing a more focused view of the standard deviations and the ranges for the factors. There is a considerable difference in the range for some of the factors, such as concern for liability and to a lesser extent reputation, indicating a wide set of responses to these factors but with acceptable rule of thumb ranges of below 1.

To best read the results in Table 5.7, note should be made that adjusting using the exploratory analysis gives all of the independent variables means of zero because of the software features for the program used for the analysis. This gives a mean-centered variable, this effect needs to be considered if the results are used for future analysis and interpretation. The professionalism score, which is the dependent variable, has a mean of 6.725 indicating that about two thirds of lawyers are getting this decision correct based on the court case result basis for scoring developed. The standard deviation indicates significant variance but with about 95% ranging from 4.3 to 9.1 which is consistent with the review discussed elsewhere once note is made as to the few outliers.

Table 5.7: Summary of the distribution on the variables using the factor analysis program

Variable	Mean	Standard Deviation	Minimum	Maximum
Dependent Variable				
Professionalism Score	6.725	1.233	4	9
Wrongly Accepting the conflict scenarios / Correct to Reject	1.199	1.063	0	4
Wrongly Rejecting the no-conflict scenarios / Correct to Accept	2.076	1.157	0	5
Independent Variables				
Regulation — External	0	0.811	-2.487	1.176
Liability Claim	0	0.867	-2.077	1.249
Insurance	0	0.498	-1.269	0.915
Regulation — Internal	0	0.416	-1.162	0.594
Reputation	0	0.638	-1.691	1.324
Professionalism	0	0.338	-1.070	0.524

5.3 Descriptive statistics and correlation

The analysis using exploratory factor analysis resulted in no re-sorting of the selected identifying questions used to define the six independent factors from that intended by the

initial conceptualization. The decision was made to focus analysis on correlation and descriptive statistics once it was determined that attempts at regression based analysis would not provide an effective basis for testing the theories and resulting models (see later discussion at 5.4 of regression issues) because the independent variables had been verified to have been correctly identified but the factor analysis showing strong inter-relationships indicated strong multicollinearity which would result in an inability to identify the independent effect of each factor on the dependent variable. As a result of this recognition, it was determined to use correlation analysis to assess the three theories of relative influence effect on lawyer professionalism and assess if any were supported or to determine whether this alternate model of significant inter-factor relations was at play. The potential for, and effect of, factor collinearity is reflected in the modified model described in Chapter 3. The correlation Table 5.8 below does indicate significant multicollinearity such that none of the independent variables has a statistically significant independent effect, other than a statistically significant, although weak, positive effect for reputation. Reputation, based on correlation analysis, does provide for a statistically significant independent positive relationship with the conflict decision. This is consistent with the initial results of the regression analysis discussed later which indicated that only reputation had a significant independent effect on the professional determination of accepting or rejecting a retainer considering a conflict of interest. This is a significant finding resulting in none of the three theories of literature being supported, each of which theorized a more significant effect for a factor which did not emerge. Rather the hypothesis of factor inter-relationship and the modified model I developed showing significant influence among the factors is better supported by these findings.

The table 5.8 following below presents the means and standard deviations for the entire sample. It also includes pairwise correlations between the constructs and variables of interest. The pairwise correlations clearly show the collinearity problem. Correlation is the strength of a linear relationship between two variables. A high correlation means that two or more variables have a strong relationship with each other while a low correlation means that the variables are hardly related. Correlation analysis is the process of studying the strength of that relationship with available statistical data. A correlation greater than 0.8 is generally described as strong, whereas a correlation less than 0.5 is generally described as moderate or weak (Hinkle, Wiersma & Jurs 2003). The type of data can affect the determination that a correlation is high but the nature of the data in this study does not justify varying from this suggested assessment.

Table 5.8: Descriptive: mean and standard deviation for sample: pairwise correlation

	Mean	Std Dev.	Prof. Score	Accepting the conflict scenarios	Rejecting the no-conflict scenarios	Reg. — External	Liability Claim	Insurance	Reg. — Internal	Rep.	Prof.
Professionalism Score	6.725	1.233	1								
Accepting the conflict scenarios	1.199	1.063	-0.500***	1							
Rejecting the no-conflict scenarios	2.076	1.157	-0.606***	-0.386***	1						
Regulation — External	0	0.811	0.0245	-0.144*	0.106	1					
Liability Claim	0	0.867	-0.0586	-0.0127	0.0741	0.578***	1				
Insurance	0	0.498	0.00964	-0.153*	0.130*	0.773***	0.572***	1			
Regulation — Internal	0	0.416	0.0452	-0.172**	0.110	0.933***	0.472***	0.767***	1		
Reputation	0	0.638	0.00591	-0.241***	0.215***	0.492***	0.250***	0.626***	0.573***	1	
Professionalism	0	0.338	0.0633	-0.248***	0.161*	0.579***	0.330***	0.643***	0.741***	0.775***	1

** p<0.05 ** p<0.01 *** p<0.001*

** Note should be made that the means of the factor variables are zero because they are standardized factors. These factors have been created using exploratory factor analysis, as a result of which they are mean centered to zero.*

This pair-wise correlation table gives standardized correlations (i.e., between 0 and 1 (positive and negative)) while a regression in this case would give a different interpretative number, however, the interpretation of result is the same. For example, using the values from the pair-wise table, reputation has a negative correlation with the accepting conflict, this means the higher the concern for reputation the lower the odds of accepting a conflict retainer when it should not be. However, higher concern for reputation also increases the likelihood of rejecting

a retainer that could be accepted. The finding is consistent with the hypothesis of behavioural economics that reputation is a significant positive influence on professionalism but consistent with the view could be at the cost of economic efficiency.

Another useful observation is that for each of the six factors a higher respect for the effect of the factor creates less incorrect responses of a correct to reject decision. Each of the factors positively and correctly influences the decision to reject where it is correct to do so. However, for the six factors when using the correct to accept score as the dependent variable this is not the case. As an example, for these where there is a higher concern for the effect of insurance, reputation and professional ethics that effect is positively related to rejection of a client where there is no conflict and it could be accepted. This is an economically inefficient result of the factor effect on the decision. Lawyers concerned with the factors of reputation and being professional are more likely to incorrectly reject clients, causing unnecessary adverse economic cost to them and the client.

Many of the correlations are well above 0.5 indicating collinearity and several close to or exceeding 0.8 which is the usual cut off for identifying the existence of significant multicollinearity. Multicollinearity arises when at least two highly correlated predictors are assessed simultaneously in a regression model. The purpose of the regression model in this study would be to investigate associations between the independent factors independently on the dependent factor, multicollinearity among the predictor variables can obscure the computation and identification of key independent effects of collinear predictor variables on the outcome variable because of the overlapping information they share. The existence of the collinearity in this case would render the use of regression of little use because the standard errors of each of the factors would be overestimated, implying significant results would be rendered insignificant.

The identification of the collinearity was a significant and useful finding for this research. This identified inter-factor effect suggests a stronger modifier effect than is discussed in the literature and supported the identification of the second modified model which is supported by the correlation findings. The next step for research should be to assess the extent and nature of the inter-factor relationships. This should be done as a multi-step process effectively testing pairs of factors as theorized in the model as this would be needed to keep survey enquiry understandable and of a reasonable length for respondents. It is not realistic to test all of the suspected relations in a single survey because of length and complexity.

Another observation from the correlation analysis arises from looking at the correlation of the professionalism score separated into the Correct to Reject and Correct to Accept score.

Quantitative results and analysis

Discoveries from this view are interesting. One observation supports that Professionalism (training) as a factor on of the Correct to Reject scores is a strong positive professionalism influence but not an efficient economic decision factor. Looking at Column 4 of Table 5.8 (Professionalism score) it is the most negatively correlated with the incorrect acceptance of conflict (error in the Correct to Reject) but is positively correlated with the incorrect rejection of no-conflict scenarios (error in the Correct to Accept). This is to be expected, the higher professionalism score means lower incorrect acceptance of conflict scenarios but higher incorrect rejection of no-conflict scenarios skewing the decision making toward the perception of more professional behaviour.

This type of result is consistent for all factors. There is a generally negative correlation for each factor with incorrectly accepting a conflict retainer meaning all have some positive effect on making the right decision for the more ethically oriented decision. But all also have a positive effect on incorrectly rejecting a retainer which could be accepted meaning all of the factors have some adverse effect resulting in the making of an incorrect economic decision by rejecting revenue that can be accepted.

Correlation shows the six factors are all significantly and positively related to one another. In other words, a respondent who has high concern for external regulation also has high concern for liability claims, internal regulation, insurance, reputation and professional values. While the six factors are distinct from one another theoretically, they are not unrelated empirically.

A univariate analysis is included as the following Tables 5.9, 5.10 and 5.11, for completeness of data presentation but it should be noted that the pair-wise correlations are a sufficient equivalent and were chosen to be used on this presentation. Pair-wise (one variable's relation to another) is conceptually similar to univariate regression (one independent variable's relation to a dependent variable). The difference is in the number and basis for interpretation.

As such, Table 5.9 shows all statistically insignificant relationships, as posited in column 4 of Table 5.8. Statistically significant results are shown in Tables 5.10 and 5.11, mimicking the observations from columns 5 and 6 from Table 5.8 respectively. For example, in Table 5.10, a one-unit increase in concern for reputation reduces the acceptance of conflict scenarios from 0.345 to 0.359. This 0.345 represents approximately one-third of a standard deviation (see Table 5.8). Therefore, comparing two lawyers, separated by 3 points on a Likert scale, the findings show that the lawyer with the higher concern for reputation will perform one full standard deviation better on the ethical element of not accepting conflict scenarios compared to the lawyer with the lower concern for reputation. Similar interpretation can be made for insurance, internal regulation, and for professional training (the impact of this one being the highest).

From Table 5.11, it can be seen that higher concern for reputation and professional training increases economic costs because it increases the rejection of retainers when it is not necessarily required to comply with the conflict of interest professionalism standards. Just like the conclusion drawn from Table 5.8, higher concern for reputation and higher professional training increase costs to the lawyer and client because these factors make it more likely that the lawyer will incorrectly reject retainers where there is no conflict without a justification for that loss of income.

Table 5.9: Univariate analysis — independent variables on the dependent variable as a score

Professionalism Score:	(1)	(2)	(3)	(4)	(5)	(6)
Regulation — External	0.00561 (0.121)					
Liability Claim		-0.106 (0.117)				
Insurance			0.0216 (0.168)			
Regulation — Internal				0.0972 (0.227)		
Reputation					-0.0485 (0.120)	
Professionalism						0.0777 (0.222)
Constant	6.697*** (0.0991)	6.696*** (0.0995)	6.696*** (0.0990)	6.697*** (0.0996)	6.697*** (0.0979)	6.697*** (0.0992)
Observations	236	236	236	236	236	236
Adjusted R-squared	-0.005	0.001	-0.005	-0.004	-0.004	-0.005

Standard errors in parentheses
** p<0.05 ** p<0.01 *** p<0.001*

Table 5.10: Univariate analysis — independent variables on the dependent variable correct to accept only

Accepting the Conflict Scenarios:	(1)	(2)	(3)	(4)	(5)	(6)
Regulation — External	-0.151 (0.0912)					
Liability Claim		0.0367 (0.0958)				

Accepting the Conflict Scenarios:	(1)	(2)	(3)	(4)	(5)	(6)
Insurance			-0.281* (0.133)			
Regulation — Internal				-0.400* (0.172)		
Reputation					-0.359*** (0.109)	
Professionalism						-0.692*** (0.197)
Constant	1.227*** (0.0857)	1.229*** (0.0848)	1.230*** (0.0844)	1.227*** (0.0854)	1.229*** (0.0792)	1.226*** (0.0811)
Observations	236	236	236	236	236	236
Adjusted R-squared	0.009	-0.004	0.012	0.021	0.042	0.046

Standard errors in parentheses
** $p<0.05$ ** $p<0.01$ *** $p<0.001$*

Table 5.11: Univariate analysis — independent variables on the dependent variable correct to reject only

Rejecting the no-conflict scenarios	(1)	(2)	(3)	(4)	(5)	(6)
Regulation — External	0.146 (0.101)					
Liability Claim		0.0692 (0.1000)				
Insurance			0.260 (0.162)			
Regulation — Internal				0.303 (0.190)		
Reputation					0.408** (0.127)	
Professionalism						0.615** (0.199)
Constant	2.076*** (0.0743)	2.075*** (0.0749)	2.074*** (0.0728)	2.076*** (0.0745)	2.074*** (0.0699)	2.078*** (0.0735)
Observations	236	236	236	236	236	236
Adjusted R-squared	0.005	-0.002	0.007	0.007	0.044	0.028

Standard errors in parentheses
** $p<0.05$ ** $p<0.01$ *** $p<0.001$*

5.4 Regression analysis (multicollinearity)

The original intention for the analysis of the data from this study was to use multiple regression analysis to identify the linear relative effect of each of the six independent factors on the dependent variable. This was contemplated initially to be a study analyzed using a multiple linear regression model seemingly identified from the three hypothesis which consider the relative direct effect of the independent variables separately on the dependent variable. One concept was that ordinary least squares would be an effective way to achieve this review, this was attractive because giving a partial regression co-efficient for each of the identified independent variables while keeping all other independent variables at their average could require a lower sample number. The dependent variable, acceptance or rejection of a retainer, is a dichotomous decision and therefore one thought for a regression based analysis was to use a logistic regression approach when the ability to create a score for the dependent multiple regression was also considered as a suitable analytic technique. However, despite the literature and hypothesis indicating a view of direct significant independent effect of each factor on the professionalism decision of interest, multi-collinearity found in the correlation survey data analysis would not allow proper multiple regression of either multi or linear format or an OLS analysis. As noted previously, this finding of multi-collinearity is academically significant because it highlights that the inter-factor relationships hinted at in the literature, but not explored, are actually the more accurate description of the relationships.

The consideration originally given to using regression analysis arose because it was recognized that a question by question analysis could be explored by coding the dependent variable as incorrect (0) vs. correct (1), this is done by setting the coding as each respondent gets 0 if they incorrectly rejected a retainer in a no-conflict scenario and gets 0 if they incorrectly accepted a retainer in a conflict scenario. This coding should allow a logistic regression which would inform as to the factors that lead to correct responses if it could successfully run. Unfortunately, the multi-collinearity did not allow the regression to successfully run and despite running test regressions none of the results provided a statistically significant result.

Table 5.12 presents the results of the logistic regressions for each of the questions used to define the dependent variable. The coefficients presented are log odds ratios, where a number above one denotes a positive relation and a number below 1 denotes a negative relation. Taking the first question (would you accept a retainer acting against a former client) it is noted that none of the independent variables are significant as a positive influence, except for reputation. The reputation having a significant result means that a one-unit increase in concern for reputation and reduces the likelihood of accepting a retainer when the other party is a former client, a retainer that should be rejected, by 15.5% (calculated as: e^0.425 -1).

Quantitative results and analysis

As another example, the last question of would you accept a retainer when the retainer is by a competitor of another client, which is a retainer that can be accepted, shows a one unit increase in external regulation that increases the likelihood of answering correctly, whereas the concern for a liability claim or internal regulation reduces the likelihood of answering correctly. Professionalism, on the other hand, increases the likelihood of answering this enquiry correctly. None of these results is significant statistically however.

Table 5.12: Logistic regression — 10 dependent variable enquiries

	Former Client	General Knowledge Only	No Current Conflict	Personal Investment	Competitor Interest	Client Reputation Issue	No Confidential Information	Out of Date Information	Competitor No Information	Partner Director
Regulation — External	1.221 (0.822)	3.036 (3.373)	0.495 (0.335)	0.691 (0.434)	0.161* (0.130)	0.901 (0.563)	0.588 (0.382)	1.879 (1.221)	0.904 (0.547)	0.461 (0.331)
Liability Claim	1.053 (0.252)	0.870 (0.320)	1.061 (0.250)	1.223 (0.265)	2.145* (0.687)	1.019 (0.220)	0.880 (0.192)	0.916 (0.202)	1.042 (0.215)	1.046 (0.247)
Insurance	1.516 (0.833)	1.660 (1.434)	1.245 (0.700)	0.932 (0.472)	0.323 (0.214)	0.724 (0.367)	2.031 (1.059)	0.568 (0.304)	0.843 (0.414)	2.009 (1.118)
Regulation — Internal	0.231 (0.329)	0.0638 (0.143)	5.470 (8.086)	2.927 (3.964)	71.26* (126.6)	1.294 (1.739)	2.080 (2.940)	0.563 (0.802)	1.447 (1.887)	3.618 (5.496)
Reputation	0.425* (0.169)	0.554 (0.333)	1.257 (0.512)	0.883 (0.322)	1.380 (0.677)	1.010 (0.373)	0.322** (0.127)	1.268 (0.481)	0.613 (0.220)	0.651 (0.271)
Professionalism	1.408 (1.348)	3.351 (5.117)	0.187 (0.187)	0.466 (0.427)	0.0429** (0.0508)	0.617 (0.562)	1.072 (1.040)	0.272 (0.273)	2.430 (2.165)	0.965 (0.987)
Observations	236	236	236	236	236	236	236	236	236	236
Pseudo R-squared	0.067	0.018	0.012	0.009	0.098	0.012	0.057	0.033	0.010	0.013

Exponentiated coefficients; Standard errors in parentheses
** $p<0.05$ ** $p<0.01$ *** $p<0.001$*

Analysis as to whether the independent variables affect the decisions in each of the correct to reject and correct to accept differently was of interest and able to be done with the scoring developed. The enquiry of whether the professionalism decision arising from the requirement to reject a conflict of interest retainer is affected differently than the more economic decision to accept or reject a retainer where it could be accepted was able to be done by separating the ten questions defining the dependent variable into the five questions for each as described previously. Creating the questions so it was possible to look at these as two separate dependent

variables allowed the analysis of difference. The effect of the independent variables on the determination whether to reject a retainer when a conflict exists and it should be rejected is that all of the independent variables have positive sign but all were non-significant. This is consistent with the concepts in the modified model reflecting extensive inter-relationship interfering with the direct effect. Wrongfully accepting a retainer when you should not is a serious ethical professional issue and has both greater sanction and more significant loss of reputation than wrongfully rejecting a retainer which you could otherwise accept. It is an ethics issue and therefore the legal profession leans toward rejection of the retainer in those circumstances without a significant difference in the reason why, effectively all of the influences have a similar positive effect when a direct linear assessment of the effect on the dependent variable is attempted. This is shown by the results in Table 5.13. The willingness of legal professionals to reject a retainer when they should reject it is strong enough that none of the variables independently influences that decision, all of them have a positive sign.

Table 5.13: Logistic regression — coded to professionalism correct answers

	Former Client	General Knowledge Only	No Current Conflict	Client Reputation Issue	No Confidential Information	Out of Date Information	Competitor No Information	Partner Director	Personal Investment	Competitor Interest
Regulation — External	0.819 (0.551)	0.329 (0.366)	2.019 (1.367)	0.901 (0.563)	0.588 (0.382)	1.879 (1.221)	0.904 (0.547)	0.461 (0.331)	1.448 (0.909)	6.194* (5.005)
Liability Claim	0.950 (0.227)	1.149 (0.422)	0.942 (0.222)	1.019 (0.220)	0.880 (0.192)	0.916 (0.202)	1.042 (0.215)	1.046 (0.247)	0.818 (0.177)	0.466* (0.149)
Insurance	0.660 (0.362)	0.602 (0.520)	0.803 (0.452)	0.724 (0.367)	2.031 (1.059)	0.568 (0.304)	0.843 (0.414)	2.009 (1.118)	1.073 (0.544)	3.098 (2.052)
Regulation — Internal	4.333 (6.179)	15.69 (35.13)	0.183 (0.270)	1.294 (1.739)	2.080 (2.940)	0.563 0.802)	1.447 (1.887)	3.618 (5.496)	0.342 (0.463)	0.0140* (0.0249)
Reputation	2.354* (0.934)	1.804 (1.084)	0.795 (0.324)	1.010 (0.373)	0.322** (0.127)	1.268 (0.481)	0.613 (0.220)	0.651 (0.271)	1.133 (0.413)	0.724 (0.355)
Professionalism	0.710 (0.680)	0.298 (0.456)	5.346 (5.346)	0.617 (0.562)	1.072 (1.040)	0.272 (0.273)	2.430 (2.165)	0.965 (0.987)	2.145 (1.963)	23.30** (27.58)
Observations	236	236	236	236	236	236	236	236	236	236
Pseudo R-squared	0.067	0.018	0.012	0.012	0.057	0.033	0.010	0.013	0.009	0.098

Exponentiated coefficients; Standard errors in parentheses
** p<0.05 ** p<0.01 *** p<0.001*

Quantitative results and analysis

The following Table 5.14 shows OLS regressions where the dependent variables are first shown on the total score (out of 10 enquiries), then the results are shown in a format split for wrongly accepting conflict scenarios (out of 5 conflict enquiries, correct answer was to reject), and wrongly rejecting no-conflict scenarios (out of the remaining 5 enquiries, correct answer was to accept).

Table 5.14: OLS regression — dependent variable

	(1) Professionalism Score (10)	(2) Wrongly Accepting the conflict scenarios	(3) Wrongly Rejecting the no-conflict scenarios
Regulation — External	0.161 (0.325)	-0.332 (0.310)	0.170 (0.285)
Liability Claim	-0.175 (0.130)	0.147 (0.103)	0.0275 (0.110)
Insurance	0.0245 (0.308)	0.0296 (0.227)	-0.0541 (0.291)
Regulation — Internal	-0.199 (0.747)	0.612 (0.604)	-0.413 (0.642)
Reputation	-0.240 (0.197)	-0.161 (0.200)	0.401** (0.139)
Professionalism	0.663 (0.561)	-0.794 (0.546)	0.131 (0.485)
Constant	6.725*** (0.0861)	1.199*** (0.0739)	2.076*** (0.0757)
Observations	236	236	236
Adjusted R-squared	-0.008	0.053	0.024

Standard errors in parentheses
** $p<0.05$ ** $p<0.01$ *** $p<0.001$*

Table 5.14 in presenting the results of the OLS regressions reports unstandardized coefficients, where below 0 denotes a negative relationship and above 0 denotes a positive relationship. None of the independent variables have a statistically significant relationship with the dependent variables, except for reputation which has a significant but not substantial relationship. A higher concern for reputation increases a respondent's rejection of a no-conflict scenario by 0.401. A higher concern for reputation causes a more conservative approach resulting in more incorrect rejection of retainers.

The responses on the acceptance when the retainer should be accepted (correct to accept) and the rejection when the retained shouldn't accept (correct to reject) could be a cause of regression failure as factors cancel each other out when a compiled score on the answer is sought. This could be one reason for the resulting inability to appropriately analyze when using all ten

questions as a single variable. Separating between the two different focuses of accepting when you should and rejecting when you should, was used to provide better results and an easier ability to identify the effect of the independent variables when assessed on a linear regression basis. In this analysis, reputation remains the only statistically significant factor when assessed as an independent direct effect. The results despite the regression failing to identify the difference in effect, if there is one, of the influences each as a direct independent behaviour influence still showed the legal professional is frequently willing to sacrifice revenue for professional compliance as is shown by the tendency to reject retainers when they could be accepted, effectively lawyers are taking a conservative approach to compliance with professionalism. This is not the optimum economic effect for the profession, and arguably clients and society as costs are passed on, because there is a loss of revenue without the commensurate benefit of correctly identifying the existence and extent of conflict. The finding of this effect is a useful result for the research as it is applied to management for professionalism.

Rejecting a retainer when it could be accepted has a less serious overall effect and is not a professionalism effect. It is an economic issue; it means that the lawyer in rejecting a retainer is behaving in an overly conservative manner and incurring a revenue cost to do so. In this case the reputation influence shows as being the only significant factor that will independently affect this decision, causing a more conservative choice. The concern about reputation is sufficient to push lawyers to reject some percentage of retainers they could otherwise accept, with the adverse economic effect that that entails. This also causes access to justice and client choice of legal counsel cost.

As a result of the multi-collinearity, further regression analysis was not explored. The reason for the regression failing being grounded in multi-collinearity provided a very useful research conclusion. The factors each have a strong positive effect on each other which modifies the direct effect on the dependent variable. This provides valuable insight to the theories and their validation as a starting point to better understanding.

Each of the three theories of the literature states that there is a direct and dominant positive influence on professional behaviour by one of the factors, together with a second linked factor. This was not supported by the findings. The extensive influence of the factors on each other supported the author's hypothesis that there is very extensive interaction among the factors which means there is neither significant direct effect or dominance of a factor. Rather, the six factors act on each other in some complex manner and simultaneously but not individually or consistently on the dependent variable. Because no factor is dominant and all act positively on the professionalism behaviour logically management can select the influences to emphasis in

their management techniques in a manner the can lead to a more cost effective approach. Intuitively the results indicate that there is no need to retain and use all of the influences because they have somewhat equal and clearly overlapping effects allowing selection away from the more expensive or less efficient.

5.5 Analysis of hypothesis validation

5.5.1 Development of hypothesis

The hypothesis to be validated were developed from summation and analysis of the literature debate on the topic of professionalism and behaviour influences used to positively direct lawyer behaviour toward appropriate conduct as established by the legal profession and its regulators. The theories and their development are explained in Chapter 2.

5.5.2 General analysis of hypothesis

The thesis aim was the validation or rejection of the predominant theories of behaviour influences on lawyer professionalism as discussed to this point. The result that both correlation analysis and the extensive multi-collinearity emerging in regression analysis show that the independent factors are so intertwined in concept and effect that they cannot be reliably assessed independently using a linear model and regression started a basis for support of the more nuanced hypothesis and model. The correlation results (pair-wise) supported the highly modified model showing inter-factor effects as better reflecting the overall effect of the factors. This is a valuable finding for the profession and law firm management and one not previously recognized in the literature, at least as to the extent of the interrelationships determined. Based on experience managing for these effects, individually supervising lawyers and knowing the needed result of managing for professionalism, these results make sense and the extent of the relationships among the variables are reasonable and responsive to actual management circumstances.

A review of the thesis by the general counsel, ethics officer, for a large Toronto law firm gave rise to comments such as “This is very strong and representative set of conflict scenarios that you have chosen,” “I completely agree with your point that lawyers who are conservative and reject mandates they could have accepted are concerned about reputations,” “The results are exactly what I would have expected in terms of what factors are important. The comments support the view that there are, in practical application, relationships among all of the independent variables, the analyzed correlations clearly indicate the complexities which are added by this multi-collinearity effect. Effectively, the independent variables have a strong effect on each other, potentially cancelling out effects on the dependent variable, such as insurance cancelling, or at least largely reducing, the effect of liability, as is speculated by the

literature. The factors do not affect the dependent variable independently but rather after some complex modifier effects.

Looking at the dependent variable separately for the two aspects of an ethics decision and a more economics orientation in the profession provided an interesting analysis. In the legal profession, based on these survey results, the correct ethical decision is more important to lawyers than the correct economic decision. Ethics driven decisions for retainers are those of correctly rejecting the conflicted retainer when it should be rejected and economic driven decisions are those of correctly accepting the retainer which it can be accepted. Correctly rejecting the retainer was more often the case with few not getting that right. Correctly accepting the retainer was less often that case meaning lawyers are being overly conservative in being willing to reject retainers even if they could be accepted. The correlation of acceptance and rejection is in the pair-wise correlation matrix/table, Table 5.8.

After reviewing the difference between the Correct to Reject (Ethical) and Correct to Accept (Economic) the result of the statistical analysis is that the ethical determination, rejecting a conflict when it should be rejected, is more positively but efficiently associated with the six behaviour factors than the economic, which is to accept a retainer when it should be accepted. The decision to reject a retainer when it can be accepted indicates that ethical concerns may override economic requirements to the point of inefficiency. Fully balanced behaviour effects would result in a more consistent accepting of retainers when it is possible to accept than was indicated by the survey results. The six independent variables, particularly reputation, suppress the acceptance of a retainer where there is no disqualifying conflict and the retainer can be accepted. The effect of the factors is that economic consequences of this decision are considered less important than the potential for breach of an ethical concern.

An illustration of this effect can be seen by looking at inter-factor relationships using the correlation results between liability and concern about reputation because it is those lawyers that are more concerned about liability that tend to be less concerned about reputation. It shows a different mindset and would likely result in a need to consider a different management approach to most effectively use the different factors with differently oriented lawyers. Liability sanction seems to be less of an overall effective factor because it is a stronger effect on the more economic decisions and that economic decision is a lesser concern for professionalism.

There are differences in factor effect that can be seen in this analysis between the Correct to Reject and the Correct to Accept, the Correct to Reject decision is more positively associated with the concern about reputation and professional training. Reputation is negatively correlated to incorrectly accepting a conflicted retainer at -0.241 and professionalism at -0.248, while

liability is negatively correlated at only -0.0127 and insurance at -0.153. Regulation internal is correlated at -0.172 and external at -0.144. The results are the basis for determining the ethics decisions are more positively associated with reputation and professionalism.

Looking at the economic decision of correctly accepting a retainer where permitted the higher positive correlation is a more ineffective result. In this view liability at 0.0741, insurance at 0.130, internal regulation at 0.110 and external regulation at 0.106 are all considerably lower, so less inefficient effect, than reputation at 0.215 and professionalism at 0.161. The Correct to Accept decision is more positively associated with the threat of liability and insurance cost and loss. This results in an overall less economically effect result from the use of the liability and insurance factors. These conclusions from the correlation results are consistent with prospect hypothesis, prospect hypothesis being the base hypothesis of behavioural economics.

The results were received in an attempt to validate the three theories of the literature, effectively that liability or regulation or reputation depending on the discipline had the dominant effect on professionalism behaviour. The results did not validate any of the three theories. Rather the more subtle assessment that there are very complex factor relationship is the better supported by these results.

5.6 Additional enquiries and analysis

5.6.1 Introduction

The primary aim of the thesis and research was to validate or disprove the three theories of literature as to which is the most significant effect among the six behavioural influences on lawyer professionalism. It was, however, recognized that additional enquiries could be made to add valuable information without adversely effecting the length and complexity of the survey for the participants. These additional investigations are now described:

5.6.2 Perception — self-assessment of the factors

It was of interest to look at the self-assessment of the lawyer respondents obtained by specifically asking them “what is the relative influence, on a percentage of influence basis, of each of the independent factors on the conflict retainer decision.” Each of the respondents was asked to score the six independent factors by asking what percentage of 100% would each of the factors have in influencing their professional behaviour. They were not permitted to click back in the survey and therefore did not know that the six independent factors in this question were what underpinned the enquiries of the first two sections of the survey. The responses were consistent with the assessment from the survey analysis. Four of the factors were not

significantly different from each other, each having a relatively consistent and equal effect, with reputation and the desire for professional conduct being more important as influences in the self-assessed view of what is of most effect. Reputation was viewed as most important in the self-assessment by the respondents as to what influenced their professional behaviour. Interestingly, the desire to behave professionally was considered very important, which is a result that differs somewhat from the statistical analysis.

The distribution of response to the self-assessment is described in the following Table 5.15. The question was: Using a total of 100 points, indicate the extent to which each of the following factors contribute to your decision to accept or reject a retainer with a potential conflict of interest? (The sum of the factors' impacts must equal 100.)

Table 5.15: Self-assessment — distribution

#	Factor	Mean %	Std Deviation	Variance	Count
1	Desire to Comply with Professional Ethics	29.30%	23.82	567.59	257
2	Effect on Reputation	24.49%	16.16	261.08	257
3	Risk of Litigation	17.34%	13.92	193.71	258
4	Regulation by the Profession	13.60%	11.69	136.77	257
5	Regulation by External Parties	7.89%	7.77	60.32	257
6	Cost of Insurance	7.71%	7.64	58.42	257

The mean of the percentage has been ordered from the highest to lowest. Each respondent was giving their personal view of the percentage by which each factor would relatively influence their conflict and retainer decision. The desire to be professional is highest followed by reputation, both being ethics-based influences and consistently high for all respondents. The other factors had considerably less perceived influence overall on the professional decision.

The following Table 5.16 looks at whether a person's view of the importance of the factors varied by how they scored on the professionalism score of the dependent variable.

The results for the self-assessment response on the Dependent Variable across the total score (number right on all questions against the court decision) are reflected in this Table 5.16.

Table 5.16: Self-assessment against the score on the dependent variable (over all 10 questions)

Independent Factor — % of Effect	4 Correct	5 Correct	6 Correct	7 Correct	8 Correct	9 Correct	Total
Risk of litigation	17.22%	19.69%	18.34%	17.01%	17.35%	9.357%	17.32%
Effect of reputation	18.33%	20.78%	25.05%	28.31%	25.02%	15%	24.59%
Cost of insurance	11.67%	6.250%	9.696%	6.218%	8.944%	5.643%	7.845%
Desire to comply with Prof. Ethics	25%	32.34%	26.96%	29.46%	26.43%	50%	29.61%
Regulation by External Parties	10%	71.09%	8.018%	7.007%	8.296%	6.786%	7.657%
Regulation by Profession	17.78%	13.83%	11.93%	11.99%	13.96%	13.21%	12.97%
Observations	236						

An important observation from this enquiry is that for lawyers who are scored as more professional over all 10 questions, litigation and insurance drop as perceived factors influencing the decision, reputation and professionalism become more of an effect, with regulation remaining relatively the same across the professionalism score. The more professional a lawyer is scored the more effect is taken from reputation and professionalism. This provides valuable insight and could be key to finding ways of improving professionalism while reducing the management cost of doing so.

This following Table 5.17 looks at the self-assessment enquiry against the scoring on the five questions where the respondent should reject the retainer (a higher score — 4 — meaning the lawyer is less professional, note there were none with all incorrect so there is no 5). These results clearly show the primary factors influencing the more ethics-based decision are reputation and professionalism and not sanction (liability and insurance) or regulation.

Table 5.17: Self-assessment of the effect on the independent variables on correct to reject (ethics)

	Number Correct by Court					
	More Professional				Less Professional	
Independent Variable	**0**	**1**	**2**	**3**	**4**	**Total**
Risk of litigation	16.52%	15.95%	18.63%	20.42%	19%	17.32%
Effect of reputation	22.88%	28.56%	24.88%	20.42%	9%	24.59%
Cost of insurance	8.213%	7.226%	8.271%	8.958%	1%	7.845%

	Number Correct by Court					
Independent Variable	**0**	**1**	**2**	**3**	**4**	**Total**
Desire to comply with Prof. Ethics	30.99%	28.36%	28.22%	31.04%	37%	29.61%
Regulation by External Parties	8.480%	7.582%	6.949%	7.188%	7%	7.657%
Regulation by Profession	12.92%	12.32%	13.05%	11.98%	27%	12.97%
Observations	236					100%

Risk of litigation (liability sanction) had a fairly consistent perceived effect but was lower for those with higher professionalism scores. Interestingly reputation also dropped with a higher professional score with desire to comply with ethics becoming more of an influence for the more professional. This view shows the self-assessment of relative importance and favours reputation and professionalism for factor effect on the ethics-based decision. In this assessment all of the factors remained fairly consistent across the professionalism score as was expected from the survey results that had most lawyers getting the ethics five questions right.

The following Table 5.18 looks at the self-assessment on the five questions where the retainer could be accepted (correct to accept), this being effectively an economic decision. Again, the factors self-assessed as having the most effect are reputation and professionalism but with a very strong influence being shown from the professionalism factor.

Table 5.18: Self-assessment of the effect of the independent variables on correct to accept

	Number Correct by Court Decision (Conservative Ethic)						
	Less Economic					More Economic	
Independent Variable	**0**	**1**	**2**	**3**	**4**	**5**	**Total**
Risk of litigation	11.62%	17.37%	17.91%	19.02%	14.64%	17.86%	17.32%
Effect of reputation	14.23%	25.37%	25.67%	25.33%	24.09%	20.71	24.59%
Cost of insurance	3%	7.358%	8.784%	8.804%	6.500%	8.571	7.845%
Desire to comply with Prof. Ethics	51.92%	29.40%	26.41%	27.89%	31.23%	33.57%	29.61%
Regulation by External Parties	5%	7.463%	7.642%	7.913%	9.045%	8.571%	7.657%
Regulation by Profession	14.23%	13.03%	13.59%	11.04%	14.50%	10.71%	12.97%
Observations	236						

This table shows that the desire to comply with professionalism training and maintain reputation remain important as factors in the more economic based decision but with the effect

of litigation and insurance increasing over the scale. Effectively reputation and professionalism were causing more incorrect responses and resulting in more decisions to reject when the retainer could be accepted creating an unfavourable economic response.

This table indicates that lawyers' perception of ethical considerations (reputation and professionalism) may have more significant effect than economic considerations in making the determination as to appropriate professional conduct. It supports the view that concerns about good professional conduct are the more effective methods that influence behaviour rather than sanction or regulatory rules. This is significant for selecting the methods which should be emphasized in managing for professional behaviour, the selection of techniques should take account of the perception of effect and importance by lawyers in presenting management methods.

5.6.3 Personality — testing for effect

It was possible to add enquiry seeking to determine whether personality could have an effect on the manner in which lawyer professional choices are made. The question what effect each of the different lawyer predominant business personality types would have on professional decision-making could be important for hiring and management decisions. Understanding this could have an effect on how to direct management tools or possibly have an effect on hiring decisions based on the desire of a firm to have professionals that behave in a professionally appropriate manner but with balanced concern for economics. Professional conduct is important for many aspects of firm management, including reducing exposure to liability and increasing preservation of reputation. As is explained in the development of the survey at Chapter 4 Research Method, Pilot Result and Survey Development, five business personality types were identified and described. While the personality types described were initially based upon the extrapolation in literature of the Myers Briggs assessment of the personality types most common in lawyers, the Myers Briggs test and the manner of assessment used for it were not used, being considered somewhat discredited as a tool in more recent years (Barbuto 1997). Rather, the description of personality as a "lawyer style type," without the attributed Myers Briggs personality name or score, were used to identify five personality types from the few informed articles in this topic. Based on experience, these business personality types adequately reflect the basic range of the personality types in the legal profession for the limited purpose intended for this study but the types are not put forward as a definitive set of personalities prevalent in the legal profession. Developing a table of personality type and prevalence would require extensive research on the point and should be considered for future investigation.

Table 5.19 shows the business personality types selected and the distribution of the responses that lawyers selected as the business personality type that best described them.

Table 5.19: Business personality distribution

Business Personality Type	% Selected	Count
Extrovert, interested in marketing and sales	12.45	32
Interested in social justice and significance in work	6.61	17
Corporate type team player	23.35	60
Hard working and technically competent	40.47	104
Competitive and results oriented	17.12	44
Total	**100%**	**257**

A significant majority of lawyers view themselves a more conforming and conservative business personality type. This is consistent with the finding that lawyers tend to favour a more conservative approach to professional decisions.

The effect of personality was looked at using multivariate regression. See also an assessment as univariate regression using the equivalent data analyzed with pair-wise correlations in Table 5.8. The professionalism score in the first column of results is the number of times the person agreed with the court in total and then in the second results column sorted for the ethics decision of Correct to Reject and in the third results column sorted for the economic decision of Correct to Accept.

Table 5.20: Effect of personality on the dependent variable

	Professionalism Score (10 questions)	Correct to Reject the conflict scenarios	Correct to Accept the no-conflict scenarios
Corporate type team player	-0.0383 (0.275)	0.0608 (0.236)	-0.0225 (0.269)
Extrovert, interested in marketing	0.240 (0.323)	0.0514 (0.276)	-0.291 (0.316)
Hard working and technically competent	0.576* (0.249)	-0.429* (0.213)	-0.147 (0.244)
Interested in social justice and sig	0.691 (0.426)	-0.792* (0.365)	0.101 (0.417)
Competitive and results oriented	6.400*** (0.208)	1.429*** (0.178)	2.171*** (0.204)

Quantitative results and analysis

	Professionalism Score (10 questions)	Correct to Reject the conflict scenarios	Correct to Accept the no-conflict scenarios
Observations	200	200	200
Adjusted R-squared	0.033	0.043	-0.013

As can be seen from assessing Table 5.20, there were no clear differences by personality type as to the professionalism score. The personality type had no significant effect on the dependent variable. The only exception to this was that personalities more interested in sales and marketing (effectively more economically-driven types) were more likely to accept a retainer when the retainer could be accepted but this was not a statistically significant result. Recognizing the general lack of effect of personality for professionalism means there should be no effect on hiring decisions but there could be some considerations for the slight difference in personality effect that might lead to different management decisions around how to manage sales-oriented personality types and potentially to encourage other personality types to more effectively determine whether to accept a retainer. Personality should not affect hiring decisions because there is no personality type that significantly underlies inappropriate responses to professionalism or reactions inappropriate to the factors designed to encourage more professional conduct.

It is, however, worth observing that there are some differences among personality types on the retainer acceptance decisions that might influence training and management. The persons who identified themselves as hardworking and technically competent score higher on the professionalism scale; that is they made more correct decisions on rejecting conflict of interest when they should than other personality types. There was a slight difference between the hardworking and technically competent, who are less likely to accept a retainer overall, than the persons who self-identified as competitive who are more likely to accept retainers, rightly or wrongly. The persons who identified themselves as social justice oriented are also less likely to accept a retainer overall. Nothing else significantly showed as a difference among the personality types. There is no effect among any of the personality types as to rejecting a retainer when they should accept it because conflict of interest would not prevent it, meaning the personality differences, which are mainly as to how conservative a lawyer tends to be, do not have much differing influence on ethics-based professionalism decisions.

5.6.4 Demographics — no identified effect

Demographic effects were also considered. A variety of demographic enquiries were made and an assessment as to the effect of the selected demographic states on the conflict acceptance or rejection decision considered. The academic discipline of Behavioural Economics and Law, as reviewed in Chapter 2, has only discussed experience as a socio-demographic influence on professionalism decisions, the discussion in that literature being that greater experience tends to lead to a more professional response (Rajeev 2012). This was not found to be the case in the responses in this survey enquiry where no demographic condition, including experience, had a material effect on the professionalism decision.

The demographic distribution of the sample is shown in the following tables of enquiry and distribution:

Table 5.21: Demographic distributions

1. What is your gender identity?

Minimum	Maximum	Mean	Std Deviation	Variance	Count
1.00	5.00	1.39	0.70	0.49	243

	Answer	%	Count
1	Man	69.55	169
2	Woman	26.34	64
3	Non-binary	0.41	1
4	Prefer not to say	3.29	8
5	Prefer to self-describe	0.41	1
	Total	**100%**	**243**

2. How many years of experience do you have?

Minimum	Maximum	Mean	Std Deviation	Variance	Count
1.00	5.00	3.57	1.60	2.55	243

	Answer	%	Count
1	New to 5 years	26.34	64
4	6 to 25 years	37.45	91
5	More than 25 years	36.21	88
	Total	**100%**	**243**

3. What is your firm size?

Minimum	Maximum	Mean	Std Deviation	Variance	Count
1.00	7.00	5.51	1.14	1.30	243

	Answer	%	Count
1	In house	3.29	8
2	Solo	2.47	6
4	2 to 5	4.12	10
5	6 to 100	15.23	37
6	More than 100	74.49	181
7	Government	0.41	1
	Total	**100%**	**243**

4. What is the nature of your practice?

Minimum	Maximum	Mean	Std Deviation	Variance	Count
1.00	4.00	2.02	0.92	0.84	243

	Answer	%	Count
1	Litigation/Advocacy	28.69	70
2	Corporate/Commercial Transactional	52.87	129
3	Counsel Role	6.15	15
4	Specialty	12.30	30
	Total	**100%**	**244**

5. What is your role?

Minimum	Maximum	Mean	Std Deviation	Variance	Count
1.00	4.00	2.34	0.89	0.78	243

	Answer	%	Count
1	Partner — Management	18.93	46
2	Partner — Non-Management	37.04	90
3	Employed	34.98	85
4	Other	9.05	22
	Total	**100%**	**243**

6. What is your age?

Minimum	Maximum	Mean	Std Deviation	Variance	Count
1.00	4.00	1.95	0.95	0.91	242

	Answer	%	Count
1	25 to 40	41.74	101
2	41 to 55	27.27	66
3	56 to 70	24.79	60
4	Over 70	6.20	15
	Total	**100%**	**242**

7. What is your country of law practice experience?

Minimum	Maximum	Mean	Std Deviation	Variance	Count
1.00	3.00	1.21	0.47	0.22	243

	Answer	%	Count
1	Canada	81.89	199
2	United States	15.23	37
3	Other	2.88	7
	Total	**100%**	**243**

Table 5.22 looks at the regression of some demographic effects initially chosen for assessment, this type of analysis was not continued when the regression process was determined not to able to be used overall as described earlier. This table of information is to demonstrate the general lack of effect of demographics without claiming there is fulsome support that regressed results would have given:

Table 5.22: Demographics and dependent variable (some selected factors)

Demographic	(1) Professionalism Score (Overall)	(2) Accepting the conflict scenarios (When should reject)	(3) Rejecting the no-conflict scenarios (When can accept)
Experience Level			
More than 25 years	-0.0189 (0.239)	-0.0712 (0.208)	0.0900 (0.227)
New to 5 years	-0.435 (0.320)	0.0829 (0.279)	0.352 (0.305)

Demographic	(1) Professionalism Score (Overall)	(2) Accepting the conflict scenarios (When should reject)	(3) Rejecting the no-conflict scenarios (When can accept)
Gender			
Woman (compared to man)	0.0490 (0.216)	-0.156 (0.189)	0.107 (0.206)
Geography			
United States (as opposed to Canada)	0.677* (0.314)	-0.0755 (0.274)	-0.602* (0.299)
Type of Legal Practice			
Counsel Role	0.780 (0.519)	-0.864 (0.453)	0.0839 (0.495)
Litigation/Advocacy Role	0.183 (0.203)	-0.232 (0.177)	0.0495 (0.193)
Specialty Role	-0.0808 (0.291)	-0.103 (0.253)	0.184 (0.277)
Government	-0.932 (1.370)	0.604 (1.194)	0.328 (1.305)
In-House	-1.100 (0.750)	0.813 (0.653)	0.287 (0.714)
Size of Firm			
6 to 100	-0.301 (0.505)	0.287 (0.440)	0.0136 (0.481)
More than 100	0.123 (0.489)	0.748 (0.426)	-0.871 (0.466)
Solo	-0.795 (0.891)	1.025 (0.777)	-0.230 (0.849)
Constant	6.768*** (0.566)	0.700 (0.493)	2.533*** (0.539)
Observations	199	199	199
Adjusted R-squared	0.018	0.014	0.036

Standard errors in parentheses
** $p<0.05$ ** $p<0.01$ *** $p<0.001$*

None of the demographic features had an effect on the level of scored professionalism based on the decisions made on the dependent variable. While it might theoretically make sense that more experience will lead to better professional decisions, experience seems to simply lead to a more informed decision making, that process being one which would usually affect decisions based on economics more than ethics driven decisions. The more experienced lawyer may be in a position to better determine that a conflict either doesn't exist or can be appropriately and professionally

handled, allowing acceptance of a retainer when it is correct to do so, which is an economic decision. More experience logically would not change the requirement for rejection of a retainer where it should be rejected as the appropriate professional decision. Because the study results have indicated that the ethics determinations are more strongly associated with the economic determinations by all of the factors, there was not any result that identified demographic differences being associated with the professional decision in the demographic enquiries.

The lack of gender effect is interesting and consistent with the findings in research looking at cognitive moral development which is associated with age and education but not with gender. (Trevino, Weaver & Reynolds 2006). It is, however, inconsistent with literature looking at moral behaviour, perhaps because the conflict and retainer decision is considered more economic than moral (Rajeev 2012).

Another assessment conducted was to look at the effect of demographics on the independent factors. The independent variables of Liability and Reputation were selected for this review. There were no statistically significant demographic factors acting on those independent factors. As a result of the overall result of finding no demographic effect on the factors, a more detailed review of each factor and demographics was not considered useful.

It was expected that the size of a law firm could potentially affect decision making and professionalism because larger firms traditionally provide more form-based rules and better training for compliance (Schneyer 2013–2014). This effect was not identified in this study but it needs to be noted that the small firm portion of the sample was relatively small (Hazard, Schneyer 2002, Chambliss 2005, Schneyer 1998).

Table 5.23 includes examples randomly selected to support the foregoing general identification of a lack of effect from the selected demographics.

Table 5.23: Sample of demographics and effect on independent variables

Demographic	(1) Liability Claim	(2) Reputation
Experience Level		
More than 25 years	0.0714 (0.171)	0.117 (0.125)
New to 5 years	-0.190 (0.229)	0.0121 (0.167)
Gender		
Woman	-0.201 (0.155)	-0.0308 (0.113)
Geography		

Demographic	(1) Liability Claim	(2) Reputation
United States	-0.000152 (0.225)	0.0274 (0.164)
Nature of Practice		
Counsel Role	-0.238 (0.371)	-0.128 (0.271)
Litigation/ Advocacy Role	-0.165 (0.145)	-0.0415 (0.106)
Specialty Role	-0.165 (0.208)	0.122 (0.152)
Government	-0.678 (0.979)	0.835 (0.714)
In- House	0.00674 (0.536)	-0.00451 (0.391)
Role in Firm		
Partner management	-0.0902 (0.245)	-0.0491 (0.179)
Partner Non-Management	-0.364 (0.219)	-0.231 (0.160)
Size of Firm		
6 to 100	0.410 (0.361)	0.183 (0.264)
More than 100	0.227 (0.349)	0.120 (0.255)
Solo	0.127 (0.637)	-0.509 (0.465)
Constant	0.0812 (0.404)	-0.0451 (0.295)
Observations	199	199
Adjusted R-squared	-0.021	-0.010

Standard errors in parentheses
** $p<0.05$ ** $p<0.01$ *** $p<0.001$*

5.7 Management techniques and effect

One purpose of this thesis and study is to use the relative effect of the factors that influence professional behaviour to reach conclusions as to the management techniques that could best accentuate those factors that are a more positive influence and thereby use less resources by better balancing of techniques and resource inputs. All of the management techniques used to manage for the behaviour influences required by the legal profession add expense and cost to

the delivery of legal services and therefore it is a benefit to find the most economically efficient means of delivering the factors that lead to correct professionalism decisions for legal practitioners. The growing influence of law firm management techniques on lawyer practice decisions is discussed in the literature but the discussion needs better understanding of conduct control factors to ground the emerging discussions of the use of bureaucratic contracts and peer based systems such as peer review for professionalism management. The integration of factor effect and management techniques is not yet done (Fortney 1995, Fortney & Hanna 2002, Fortney 2014, Chambliss & Wilkins 2003, Bruck & Canter 2008). In order to start a review of effective management techniques, eleven techniques were identified and questions about respondent responses to those techniques were added to the survey questionnaire in a separate section. The identification was done by selecting techniques identified by literature, management in my firm and discussion with experts.

This listing of management techniques was not intended to be a complete compendium of available ways of managing lawyer professionalism, but rather were based on a review of the literature, experience and discussion (informally) with law firm managers. I believe it does represent many of the more common methods of encouraging appropriate professional behaviour. A law firm and a lawyer want to ensure effective ethical compliance but balanced with effective economic decisions in order to reach the appropriate balancing of cost and benefit between professional compliance and business decisions in the delivery of their legal services. The eleven techniques which were identified and the question used to enquire as to its effect are set out in the following Table 5.24.

Table 5.24: Management techniques and corresponding survey question

Question — If you or your firm was exposed to a significant liability because of a retainer which was found to involve conflict of interest would the significant cost in deductible, insurance rating and management time how much effect would it have in:	
Question	**Management Technique**
Causing you to change your time and effort to assess for client conflict when you accept a client beyond the base firm requirement?	Increased requirement for and means for assessment of conflict of interest
Causing you to change your view as to whether you would accept a current recognized conflict (with a technically sound Chinese wall)?	The creation of an ethical wall in accordance with professional standards
Question	**Management Technique**

Question — If you or your firm was exposed to a significant liability because of a retainer which was found to involve conflict of interest would the significant cost in deductible, insurance rating and management time how much effect would it have in:	
Cause you to change your view as to whether you would accept a perceived potential conflict, with the concept of adding a technically correct wall if needed later?	The creation of an ethical wall before a conflict of interest exists
Cause you to counsel clients more carefully as to the need for independent legal advice and avoidance of conflict?	Reference to independent legal advice as to the retainer
Cause you to be more inclined to whistle blow to management about retainers of concern by other partners?	Increasing whistleblower encouragement
Cause you to accept requiring a second view approval on all retainers by management or a committee?	A secondary view approving the retainer by a conflicts officer
Cause you to accept that increased file supervision and review by an ethics committee is required to effectively protect yourself and the firm?	The use of an ethics committee as a second approval system
Cause you to approve an expensive computer based conflict search system that requires you to identify conflict before file opening?	The expensive acquisition of enhanced computer support for the identification of conflict
Cause you to support a strong policy for rejecting a potentially conflicted retainer even if the client agrees and there is an ethical wall?	A strict rejection policy where any indication of conflict is to be rejected
Cause you to accept rejecting a retainer where there is no current but there is a potential future conflict in a multi-party retainer at intake?	The requirement to reject a potential but not current conflict of interest policy
Cause you to support a conflict policy that requires review at key points in a matter to see if conflict arises?	Periodic review to determine if a conflict of interest has arisen

The responses were requested on a Likert 5 scale as to how much effect each technique would have and the distribution of those responses at to the Management Techniques are reported in Table 5.25. The enquiry was how much would knowing there was a potential conflict have on accepting the cost and inconvenience of the management technique described.

The respondents were asked to identify how effective they thought each of these techniques would be in appropriately influencing their professional decision on the acceptance or rejection of a retainer using a 5 point Likert scale for response. The nature of the question allowed the participants to consider the extent and basis acceptance of each technique. Most of the responses showed the techniques did all indicate a positive relationship, that is that the techniques were all identified as having some positive effect on the professional decision. The levels of acceptance varied but with general overall acceptance. Table 5.25 sets out each

technique and the response as to acceptance of the technique as a positive influence on the professional decision.

Table 5.25: Management techniques — distribution

(Question: How much effect would each of the following have on your professional decision to accept or reject a retainer when considering conflict of interest.)

Field	Minimum	Maximum	Mean	Std Deviation	Variance	Count
The care with which you counsel clients regarding the need for independent legal advice and avoidance of conflict? (Advise to get Independent Legal advice)	1.00	5.00	3.57	1.11	1.23	242
Your view regarding whether or not to accept a current recognized conflict (with a technically sound Chinese wall)? (Accept retainer with Chinese wall)	1.00	5.00	3.45	1.18	1.40	242
Your acceptance of increased file supervision and mandatory review by an ethics committee to effectively protect yourself and the firm? (File supervision by Ethics Committee)	1.00	5.00	3.44	1.16	1.35	242
Your support for a conflict policy that requires review at key points in a matter to see if conflict has arisen? (Periodic review for conflict)	1.00	5.00	3.44	1.15	1.34	241
Your acceptance of a second view approval requirement on all retainers by management or a committee? (Committee based retainer approval)	1.00	5.00	3.40	1.16	1.34	242
Your approval of an expensive computer based conflict search system that requires you to identify conflict before file opening? (Expensive Computer Support System)	1.00	5.00	3.40	1.13	1.28	242
Your view regarding whether or not to accept a perceived potential conflict, with the possibility of adding a technically correct wall if needed later? (Adding Chinese wall later)	1.00	5.00	3.36	1.11	1.23	242
The amount of time and effort you spend (beyond base firm requirement) on assessing for client conflict when you accept a retainer? (Amount of time assessment)	1.00	5.00	3.29	1.12	1.25	242
Your support for a strong policy regarding the rejecting of a potentially conflicted retainer even if	1.00	5.00	3.26	1.15	1.31	241

Field	Minimum	Maximum	Mean	Std Deviation	Variance	Count
the client agrees and there is an ethical wall? (Strong requirement to reject)						
Your willingness to reject a retainer where there is no current, but a potential future, conflict in a multi-party retainer at intake? (Accept where there is Potential)	1.00	5.00	3.25	1.11	1.23	242
Your inclination to whistle blow about retainers of concern by others? (Whistle blower policy)	1.00	5.00	3.03	1.19	1.41	241

5.7.1 Management techniques and personality

A review of management techniques was also done considering whether there is an effect from personality type and that demonstrated that the effectiveness of management techniques is not personality dependent. In Table 5.26 the personality type is 1= Corporate Type; 2=Extrovert, Marketing; 3=Hard Working, Competent; 4= Social Justice; 5= Competitive (See Table 19). Using the 5 point Likert scale of how likely was the technique to positively affect the professional decision and sorting by personality type gave the insight that acceptance of management technique is not aligned with personality type. This is set out in the following Table 5.26.

Table 5.26: Management techniques and effect of personality

	Corporate Type	Extrovert	Hard Working	Social Justice	Competitive
Amount of Time on Assessment	3.175	3.222	3	3.206	2.400
Accept Retainer with Chinese Wall	3.325	3.352	2.929	3.237	3.667
Adding to Chinese Wall Later	3.250	3.148	2.964	3.062	3.067
Advise to get Independent Legal Advice	3.425	3.500	3.286	3.423	2.800
Whistleblower Policy	2.900	2.925	2.643	2.825	2.867
Committee Based Retainer Approval	3.525	3.148	3	3.165	3.200

	Corporate Type	Extrovert	Hard Working	Social Justice	Competitive
File Supervision by Ethics Committee	3.500	3.500	2.929	3.216	2.733
Expensive Computer Support System	3.100	3.167	3.107	3.402	2.800
Strong Requirement to Reject	3.100	3.352	2.964	3.124	3.200
Accept Where there is Potential	3.225	3.259	2.464	3.010	3
Periodic Review for Conflict	3.125	3.481	2.893	3.320	3.643
Observations	234				

The conclusion from the data sort is that the responses to management techniques are essentially consistent across personality type. The majority of lawyers indicate they will appropriately respond to management techniques designed to positively influence professionalism decisions as long as they are approachable, practical, perceived to be efficient, and will, in most instances, accept a second view and requirement to report. This is contrary to the views of many of the authors in the area regarding acceptance of supervision (Davis 2008, for this contrary view). This is consistent with the writers looking at collegial impacts and cultural influences in the law firm (Chambliss 2005). The literature considers the key to effective management to be leadership and a perception of an orientation to values and ethics. This was found to be more important than the characteristics of the program, and is consistent with these results when sorted for personality (Trevino, Weaver, Gibson & Toffler 1999).

The literature discussion of management challenges and the need for change to recognize changed, and still changing, demands on the business of the legal profession and its professionalism requirements suggests there is value to expanding an assessment of management issues and practices. Using the understanding developed of the complex relationships of the six conduct regulation factors could assist in this further study (Samuelson & Fahey 1990, Alfieri 2005, Chambliss & Wilkins 2002, Carr & Mathewson 1990).

The following are charts reporting the mean responses showing the effect of the management techniques on the dependent variable as a score, firstly in Table 5.27 as to all ten of the dependent variable enquiries and then separately in Table 5.28 on the five enquiries where Correct to Accept is the correct answer (the 5 questions where the answer scoring to the court is the ability to accept the retainer) and finally Table 5.29 on the five enquiries where Correct

to Reject is an appropriate response. The management technique questions for each are set out in the earlier Table 5.25 Management Techniques — Distribution. The purpose of these charts is to assess whether different management techniques have a different effect on the level of professionalism of a lawyer. A more effective technique would have more effect on the higher scoring lawyer on the professionalism scale. A higher mean shows a more significant effect. The results were sorted across the professionalism scale and then to see if there si a difference between the correct to reject and correct to accept.

Table 5.27: The mean of the management techniques on the dependent variable

*Number of Correct Answers in Professionalism Score 4 = Less Professional; 9 = More Professional						
Technique	*** 4 Mean**	*** 5 Mean**	*** 6 Mean**	*** 7 Mean**	*** 8 Mean**	*** 9 Mean**
Amount of Time on Assessment	3.333	2.969	2.911	3.159	3.315	3.357
Accept Retainer with Chinese Wall	3.556	2.813	3.268	3.362	3.407	3.143
Adding to Chinese Wall Later	3.556	2.750	2.893	3.275	3.315	2.786
Advise to get Independent Legal Advice	3.444	3.219	3.232	3.420	3.556	3.500
Whistleblower Policy	2.889	2.438	2.768	2.824	3.185	2.786
Committee Based Retainer Approval	3.444	3.063	3.036	3.116	3.519	3.286
File Supervision by Ethics Committee	3.778	3.281	3.357	3.072	3.444	2.786
Expensive Computer Support System	3.222	2.969	3.304	3.304	3.148	3.357
Strong Requirement to Reject	3.667	3	3.232	3.043	3.278	3
Accept Where there is Potential	2.889	2.813	2.875	3.174	3.204	3
Periodic Review for Conflict	3.333	2.906	3.214	3.324	3.537	3.357
Observations	234					

These results indicate that the management technique used does not have a different effect on lawyer having a higher professionalism score than those with a lower score. The relative consistency of each of the techniques across the professionalism scores indicates no relative difference. A law firm manager using this information would not be induced to select a techniques because there is a perception of a better result in professionalism scoring therefore allowing them choices based on cost and efficiency.

Table 5.28: The mean of the management techniques on the dependent variable as correct to accept

* Number of correct answers in the Right Score (Ethics) 0 = Less Professional; 5 = More Professional						
Technique	* 0 Mean	* 1 Mean	* 2 Mean	* 3 Mean	* 4 Mean	* 5 Mean
Amount of Time on Assessment	2.846	3.258	3.063	3.130	3.182	3
Accept Retainer with Chinese Wall	3.308	3.182	3.163	3.413	3.682	3
Adding to Chinese Wall Later	2.769	3.045	3.050	3.283	3.318	3
Advise to get Independent Legal Advice	2.923	3.470	3.263	3.457	3.591	3.714
Whistleblower Policy	2.308	2.939	2.650	3.067	3	3.143
Committee Based Retainer Approval	3	3.182	3.263	3.065	3.318	3.714
File Supervision by Ethics Committee	2.692	3.212	3.212	3.457	3.364	3.857
Expensive Computer Support System	2.769	3.273	3.175	3.217	3.500	3.286
Strong Requirement to Reject	2.538	3.076	3.025	3.457	3.545	3.429
Accept Where there is Potential	2.769	3.015	2.962	3.087	3.364	3.286
Periodic Review for Conflict	2.846	3.197	3.266	3.565	3.318	3.429
Observations	234					

Table 5.29: The mean of management techniques on the dependent variable as management of the correct to reject

* Number of correct answers in the Accept Score 0 = Less Professional; 4 = More Professional					
Technique	* 0 mean	* 1 Mean	* 2 Mean	* 3 Mean	* 4 Mean
Amount of Time on Assessment	3.227	3.319	2.828	2.958	3.200
Accept Retainer with Chinese Wall	3.427	3.403	3.155	2.708	3
Adding to Chinese Wall Later	3.307	3.153	3.069	2.458	2.800
Advise to get Independent Legal Advice	3.533	3.569	3.241	2.875	2.600
Whistleblower Policy	3.203	2.833	2.707	2.292	1.800
Committee Based Retainer Approval	3.400	3.194	3.259	2.583	2.800
File Supervision by Ethics Committee	3.333	3.167	3.534	2.833	2.600
Expensive Computer Support System	3.373	3.236	3.155	2.917	3
Strong Requirement to Reject	3.373	3.208	3.017	2.875	2.200

* Number of correct answers in the Accept Score 0 = Less Professional; 4 = More Professional					
Technique	*** 0 mean**	*** 1 Mean**	*** 2 Mean**	*** 3 Mean**	*** 4 Mean**
Accept Where there is Potential	3.267	3.139	2.948	2.458	2
Periodic Review for Conflict	3.667	3.338	2.948	3.083	2
Observations	234				

These results show consistent and relatively invariable acceptance of and therefore effect from most management techniques across all professionalism score levels with no real difference between the Correct to Reject (ethics) and Correct to Accept (economics) results. These results differ from the concept suggested by Davis where he says: *Almost by definition, lawyers are generally hostile both to being managed and to accepting management responsibility* (Davis 2008), but reflect the suggestions of Davis that effective risk management systems are both required and will be accepted: *"Equally important is that the firm has in place a culture that promotes both awareness of the kinds of risks that the firm's practice necessarily entails and actively supports compliance with the policies and procedures that the firm has adopted. Of course, it is impossible to eliminate or avoid all risk."* (Davis 2008).

5.7.2 Acceptance of management

The literature recognizes the need for effective management by law firms and the profession for professionalism and recognize that the study of such has not had the support of an empirical study of effect and acceptance. This thesis is a start, demonstrating that lawyers do view management techniques as effecting conduct and accepting the requirement for imposing and accepting management for that influence is useful. The importance of finding the most effective management techniques is recognized by the literature:

> "…is client intake management. When lawyers accept engagements from clients who subsequently sue their firms, leave their firms with substantial unpaid receivables, or cause their firms to be sued by disgruntled third parties, it is all too easy to blame the individual lawyers for poor client selection and lack of adequate due diligence. In reality, however, when these situations arise it is usually the absence of effective and appropriately supported risk management systems within the firm at large that is the real culprit. Furthermore, firms that fail to consider either the adequacy of their client intake management infrastructure or the adequacy of the firm's culture in supporting and encouraging compliance by its lawyers with its chosen systems unquestionably increase the likelihood that such painful episodes will endlessly recur."
>
> *(Davis 2008)*

5.8 Likert scale and use

Based upon the results of discussions with the participants, experts and survey respondents during the pilot process, a five-point Likert scale was selected for survey response on all questions. The extensive discussions indicated that a lesser point scale would not give enough variation in the assessed effects and a seven-point scale would not add additional information and made response more confusing and difficult. The scale was selected as:

1. No effect
2. Minor effect
3. some effect
4. Moderate effect
5. Major effect

A sample frequency table on the factor "How much of a positive effect do you believe a practice of avoiding conflict of interest has on your professional reputation?" shows a satisfactory extent of variance using the 5-point scale.

Table 5.30: Reputation effect — frequency

	How much of a positive effect do you believe a practice of avoiding conflict of interest has on your professional reputation?	Frequency	Percent
1	No effect	8	3.39
2	Minor effect	23	9.75
3	Some effect	50	21.19
4	Moderate effect	81	34.32
5	Major effect	74	31.36
	Total		**100% (actually 100.01)**

As can be seen, from using this sample question as an example used to assess the choice of a 5-point Likert scale, noting that all others had very similar results, the Likert responses are skewed to the right, toward the factors being identified by the question having more of an effect on professional decisions than less. This is consistent across all of the results which indicated that of all of the six factors used to influence professionalism behaviour have a tendency to increase the rejection of a perceived conflict of interest, whether it should be rejected or whether it should be accepted. As is described elsewhere, there are more instances of incorrectly rejecting a retainer in circumstances where there is a perceived conflict of

interest but such conflict of interest doesn't exist than there is of incorrectly accepting a retainer that should be rejected.

The pilot studies, the post-pilot discussions with both participants and experts and the survey resulted, indicate that the lawyers responding were able to understand the Likert scale and respond in a manner showing a considered answer and not a simple desire to look more professional. There is sufficient variance in the responses for a meaningful assessment. The curve is a normal curve, based on the concept that correctness as against the finding of the court is indicative of professionalism. More correct answers indicate a more professional response. This response is not simply to reject conflict of interest, but rather the concept is that the courts have stated in some instances there is a conflict of interest and the retainer should be rejected. The correct answer then is to reject to meet the court stated correct practice. Where the court has said that while there may appear to be a conflict of interest it is acceptable for the retainer to be accepted, the correct answer then is to accept the retainer.

5.9 Conclusions from the analysis

A list of the conclusions from the foregoing discussion appear below. These are explored in more detail in Chapter 6: Conclusions, Limitations and Future Research but are set out here to provide a base for the Chapter 6 discussion.

1. Each of the six independent factors identified by the literature do positively influence appropriate professional behaviour. However, the relative direct effect of each factor cannot be assessed until the extent of the inter-factor relationships among the independent factors is understood.
2. There is significant multicollinearity identified among the six independent variables, leading to the conclusion that hypothesis and a model showing significant influence among the factors is closer to the explanation as to how each of these factors affect each other and then act on professional behaviour decisions.
3. A concern about the preservation of a good reputation emerges as the most important factor affecting professionalism decisions for lawyers both statistically and in self-perception of importance. Reputation concern, consistent with the theories of behavioural economics, emerges as the only statistically significant factor. This is not to say that reputation has a much stronger effect than a combination of others of the factors but that it independently and individually is the only one which is statistically significant.
4. The three existing theories as to the relative effect of the six behaviour influences were not validated. A more complex hypothesis involving inter-factor effects appears to

better reflect the effect of the behaviour influences. In this context the author developed hypothesis includes recognition of extensive inter-factor influence.

5. The results of the foregoing conclusions are consistent across demographics, personality and the self-assessed view of importance by the lawyer respondents. There were no specifics of demographics or personality that indicated a different set of variables or influences or a different relative effect of the influences. There was no inconsistency between the view of the respondents that reputation is the most important factor driving a professional decision from that which was identified by the other portions of the study.
6. The identification of the response that the consistent professional decision is to err on the side of a more conservative ethical response over the better economic result is also consistent across all respondents. Within reason, a conforming ethical decision will prevail over an economic decision for lawyers, such that lawyers will cost themselves (and effectively their clients) to be more ethically conservative.
7. As a consequence of the determination that reputation and the associated factors is the most significant independent factor indicate that training, peer influence, and management systems based on a top-down demonstration of the ethical responses should be the most effective techniques to manage professional behaviour. These are also the most economically efficient techniques using the resources of firm culture, mentoring and example.
8. The management techniques used by law firms to manage for professionalism are generally accepted by lawyers and provide a positive effect on professionalism decisions.
9. The positive effect of all six factors, the apparent inter-factor effects and simultaneous effects on professionalism without a dominant effect leads to the view that a more cost and benefit assessment of management and factors would be merited.

6. Conclusions, limitations and future research

6.1 Chapter overview

The chapter presents a summary of the research results and discusses the theoretical contributions and managerial implications of this study. The chapter also discusses the limitations of the research design and suggests opportunities for future research. The chapter begins with an overview of the rationale for undertaking this research highlighting the problem and the issue for the research question. It is followed by a discussion of the key findings in relation to the central research question and how the empirical assessment fits with the theoretical base and applies to managerial implications. The theoretical, methodological and empirical contributions are reviewed and assessed as a step to understanding and form a base the managerial research application. The limitations of the research are identified in a manner designed to create discussion of concepts for future research.

6.2 Review of the research purpose

The legal profession is societally considered as one of the "learned professions." It is a service business that can be carried on only by persons who meet statutory requirements as to education, competence and professional business standards expressed as professionalism requirements. This effectively creates a monopoly for persons meeting those requirements and thereby being eligible for licencing to practice law. Access to the profession has been guarded by the requirement for a licence, whether as a practicing lawyer or more recently as a trained paralegal or an equivalent to that capacity (where paralegal is a category of licensed legal practitioners, it is now permitted in many jurisdictions but with constrained licence terms) (Stemple 2012). Certain aspects of legal professional services are required to be delivered in the manner established by professional standards, mainly set out in codes of practice by the professions governing body which sets practice standards, including ethical considerations. Compliance is enforced through supporting statute and regulatory requirements (law) monitored and sanctioned for compliance by the applicable governing bodies. Many of the professional requirements for lawyers are directed to minimizing the information friction which is believed to exist for clients, potential clients and society. This information friction arises from the specialized knowledge the lawyer acquires and uses in practice; the need for measures to reduce the adverse effect of this knowledge imbalance are considered necessary because the information friction does not allow market driven acceptance or rejection of legal services to act as an effective regulator. The public policy underpinning the profession's standards and requirements are designed so legal services must be

delivered by a lawyer in a position to provide independent advice (independent from conflicts or influences of self-interest or the interests of other clients), and who is capable of undertaking zealous advocacy on the part of the client (free from the influence of self-interest or the interests of other clients) while being capable of maintaining the standards of quality advice and confidentiality of client information.

In order to ensure adherence to those professional standards, including those of maintaining competence, several methods of directing or influencing lawyers' behaviour as to these aspects of practice been developed over, literally, centuries. These are the six primary influences for lawyers' professionalism behaviour which are studied as the factors in this thesis, namely:

1. The imposition of tort liability (exposure to personal liability);
2. The influence of the requirement to maintain insurance (cost and availability of insurance coverage);
3. Internal regulation by the statutorily appointed regulatory bodies;
4. External regulation by the bodies where lawyers must appear such as courts and administrative bodies;
5. The desire to preserve professional reputation for firms and individuals, which is key to business success; and
6. Professional training which is geared to increasing adherence to professionalism standards.

The need for the legal profession and the law firms and lawyers in practice to develop management techniques that address the need to support and direct the professional compliance requirements for lawyers, in an effective and efficient manner, while rationalizing and reducing the cost of compliance has been identified in public policy writing as an issue becoming more pressing in recent years. Changes to the business environment for the legal profession is resulting in increasing challenges when managing law practice, as a business, and are placing pressure on law firms and their managers to maintain cost effective delivery of legal services. These changes include the recent increase in competition from other service providers (such as the accounting profession, paralegals and technology based providers who are increasing taking on "near-legal" aspects of legal advice) is missing empirical support for consideration in theoretical debate. These new competitors create an environment where the law firm must manage the imposed ethical and practice standards that their competitors do not have to meet as the same costly professional requirements are not extended to those service providers (Samuelson & Jaffe 1991, Samuelson & Fahey 1990, Garcia 2011, Dzienkowski & Peroni 2000).

The objective of the thesis research was to empirically investigate the six factors the literature discusses to determine their influence on the professional behaviour of lawyers because they

increase the cost of and reduce the access to legal services. A critical review of the literature established the frame of the current thinking into three theories of relative effect of behaviour influences and found a clearly discussed knowledge gap. Supporting the need for management oriented research, a perception was recognized in the literature that the overlapping and uncoordinated use of the six noted factors is inefficient and adds unnecessarily to cost as all of direct monetary, recognition of cost, reduced access to legal services and the encouragement of overly conservative advice all add cost to the delivery of legal services. The literature examining lawyer behaviour in providing legal services is particularly focused in the disciplines of "law and professionalism," "law and economics" and "behavioural economics and law." This literature identified the six noted behaviour influences and their concurrent use to influence and control lawyer's professionalism behaviour and speculate on the relative effect or value of each. These six influences where created as they study factors (variables) and examined factors along with demographic variables to inform the development of two new conceptual models and associated research questions explaining the relative effect of the factors on lawyer professionalism behaviour. A survey was developed, using these variables, to test the prevalent theories using the visualization of the models.

The concepts and questions for the survey were extensively pilot tested and reviewed by an expert panel prior to deployment. Data was collected using a remote delivery on line survey and the models were thereby empirically tested using exploratory factor correlation and regression analysis of the survey data. The results of the study have been presented and interpreted in Chapter 5. This chapter highlights the conclusions of this study and the analysis. Primarily, this thesis sought to fill the literature identified gap of a lack of empirical research as to the relative effect of factors intended to influence to allow the development of properly supported advanced hypothesis to underpin both public policy development of professional lawyer professionalism requirements and to improve law firm management by identifying the best use of the predominant techniques to manage lawyer behaviour to a cost-effective result.

6.3 Discussion of research findings and implications

This thesis investigates the factors influencing lawyer professionalism behaviour through examining a key related decision-making requirement and the practices of lawyers. To explore the relative effect of the influences and thereby their relationships, two conceptual models were created considering the six influences as relative to that factors to influence lawyer behaviour identified in the literature as professionalism. The factors were examined using data in a form to allow exploratory factor analysis, correlation analysis and regression analysis to determine the strength of the relationship of the factors on the selected professionalism

decision of conflict of interest and client retainer and among the six factors as influences on that behaviour.

The results presented in Chapter 5 show that the data and related findings support a model with complex inter-factor relationships among the factors while all still having positive influence. The six factors used to influence behaviour work together, with each having effect on the others, and then in a coordinated (but not yet quantified) manner positively effecting the conflict of interest lawyer professionalism decision behaviour. The results found a statistically significant preference of the two influences of reputation and training as having more positive influence on appropriate lawyer behaviour than the other influences of the sanction and regulatory methods. Reputation was the single one of the six factors found to have a statistically significant independent positive effect (or association) on the legal professionalism decision of accepting client retainers when considering conflict of interest issues. While not sufficient for a conclusion to support the hypothesis that reputation and training influences have the most effect this finding is of sufficient strength to give immediate management use suggesting emphasis on these influences. However, the finding is that the interaction among all six factors is much more significant than the literature had recognized and that finding is important to the development of a hierarchy of influence importance that could focus management techniques for the six ways lawyer behaviour is influenced. Creating such a hierarchy is key to developing an effect panel of management techniques for lawyers' professionalism decisions that are positive influences but more efficient and effective in overall cost.

6.3.1 Development of the factors — understanding the behaviour influences

Exploratory factor analysis was used to assess the definition by survey question of each of the six factors and this analysis technique resulted in confirmation that the survey questions appeared to effectively define the six factors that influence professional behaviour as they were identified by the literature to allow empirical research. The use of correlation analysis thereafter developed a better understanding of how those factors, as influences on professional behaviour, worked together and then affected the decision making of lawyers. The use of hypothesis from the literature identified in the form of three contrasting and competing theories and then model conceptualization designed to test those theories allowed a research design for an assessment of the relationships among the influences as factors. The non-linear model which was developed, showing extensive inter-factor relationships, a model that modified the linear factor effect assessments of the existing hypothesis, was supported by the study results

and is, at a high level, the most consistent with my experience and other work done by me in legal professional policy reviews.

While only lightly recognized in the literature, the model developed showing extensive, complicated, factor relationships do reflect more recent speculation by some academic authors that indicate inter-factor effects do exist despite their earlier support of linear relative effect theories. The way in which, and the extent to which, each of the independent variables operates on each other could not be fully examined in the context of a thesis study designed as a first empirical study on the factors and effect on lawyer behaviour because the nature and extent of the needed enquiry would have added impossible challenges to the length and complexity of the survey. The needed further study of inter-relationship among the factors will need a series of specific studies devoted to each relationship if the enquiry is to be expected to have reasonable responses from the notoriously difficult to survey legal profession. It will be of use and interest to the profession and managers of law firms to further study the complexities of those inter-factor relationships but that will take a series of studies focused on specific first level relationships and then on modified and modifier effect.

Improving the understanding of the basic factors effecting lawyer professional behaviour empirically, the substantially supported result that there is a positive involvement on an interrelated basis of all six behavioural influences on a legal professional's response is also of immediate interest. This conceptual understanding adds the new perspective that each of the three areas of academic discipline examining legal professionalism and that actively debate the validity of their view of the relative effect of influences on professional behaviour are each, at least in part, correct but they each fail to recognize the assertion of relative effect is flawed by the extent of the very significant influences of each of the factors on the other factors. This adds new context to the debate of the academic literature to date but is generally consistent with the recent writing which is beginning to recognize and support a move from favouring the sanction based discipline and regulation controls for the profession to ones more grounded in learning and prospective management techniques, such as is reflected in recent articles being published by Fortney (2018, 2019).

The concept identified in this research of the significant relationship of the behaviour influences for lawyers is of importance. It can and should affect the manner in which societal requirements for lawyer professional behaviour could be set, when considering the use of regulation and statutory requirements means to control professional behaviour the overall cost and benefit from effect can be assessed and taken into account. The empirical assessment of the relative effect on professionalism among the influences leads to a recognition that the more

costly of the methods of behaviour influence, particularly that of imposing liability, may not be required as a primary behaviour influence. While liability may modify, enhance or effect the other, more efficient and readily enforced, methods liability does not have a significant independent effect that would justify continuing its extensive use as a lawyer behaviour influence. This can result in recognizing that equally effective results can be achieved using a focus on the less costly methods of behaviour influence. The finding that concern for reputation was the only statistically significant method of influencing professional behaviour is important in this line of thinking. It changes the focus of behaviour influence from a sanction based method of regulation, which is inherent in liability and insurance and to a lesser but still significant in regulation, to using more influence from training, peer-based influence, and top down management techniques. This moves resources and management time, effort and money spent from sanction into training. It encourages the promotion of persons and behaviour exhibiting positive professionalism decisions within the firm, even if that at some economic cost of behaviour because not promoting more questionable but successful business generation success could be the result. However a firm culture of consistent support to appropriate professional conduct may provide more effective overall results because the cost of sanction and the imposition of liability and insurance “punishment” can be very high. Using positive support for “good” professional behaviour is a very different means of managing professionals than would be chosen if sanction-based behaviour modifiers were more effective, in that case management efforts would need to be turned to creating sanction-based punishments earlier in the system. These methods include imposing requirements that make it more difficult to open files or provide for more extensive oversight of the manner in which professional services are delivered by committees, among others. Sanction based governance is more expensive, it leads to more cost from the manner in which it is delivered, included for clients because it can lead to more conservative legal advice on the part of lawyers to self-protect, which is not necessarily to the advantage of clients or society.

The insight that the personal behaviour influences of training and support for appropriate professional behaviour by positive peer and society support for reputation are the more effective overall leads to a different approach to management. Recognizing the more effective methods of behaviour influence are really based in culture and teaching, which are more cost effective than sanction methods, may allow for more effective delivery of and access to legal services. This has been recognized in recent academic articles which examine the recent move to using prospective management and learning models to influence professional behaviour (Fortney 2018, 2019).

6.3.2 Additional survey insights

In addition to the primary research enquiry, the survey also gathered data to examine the direct perception of lawyers as to the relative effectiveness of the six influences on the behaviour of lawyers. This enquiry was made by direct questioning in survey format as to the respondent's belief of that relative effect of each of the named factors. This respondent self-assessment was intended to be compared with the results of the analysis of the answers to the questions designed to measure the relative effect. This aspect of the study was intended to identify if a gap between perception and survey response existed and if so the extent of the gap between the self-perception of lawyers as to what influences them and the reality of the manner in which they appear to be reacting to behaviour influences. There was no such gap, the perceptions of lawyers when directly questioned was consistent with the data and analysis of the main enquiry. The results are helpful in the application of the findings to management techniques used to promote professionalism and to underpin effective legal practice because managing needs to take account of both the lawyers' perception and the measured effect from the factor assessment.

6.3.3 Academic debate refocused to a hypothesis of relationships

Each of the six factors used to influence lawyers' professional behaviour, as discussed in the relevant literature, was found to, at least to some extent, positively influence professional decisions but it was shown that the focus of the academic discussion on advocating one method of influence over the others does not adequately capture the full picture of the complicated relationships among those influences. Further, the debate was based, by admission of several authors, on inadequately supported assumptions because of a lack of empirical study. Authors who advocate hypothesis which supports the use of liability as the primary behaviour influence over the use of professional regulation for such purpose, as an example, may not fully recognize the very extensive influence of each factor on the others reducing the importance of liability alone as an influence. The academic literature advocating liability as the primary influence only peripherally recognizes the influence of reputation concern and training and so does not consider the most effective independent method by which lawyers' professional behaviour apparently is influenced. The discussion of that same literature advocating liability as the influence of choice discussing the effect of insurance as a modifier on the effect of liability may not sufficiently recognize that insurance itself is a behaviour modifier as a consequence of the requirements to maintain cost-effective access to insurance. The three theories of the literature in the relevant disciplines was not equipped to capture the extensive inter-relationships the research identified without the empirical study. The empirical results pull the three theories together to a more revelatory model of extensive inter-factor effect

among the influences and a relatively similar effect of each when assessed as a positive influence on lawyer professionalism behaviour.

As found in this research, the inter-relationships among the factors which govern lawyer professionalism behaviour are of more significance than the linear effect of those each on the dependent variable. This changes the way in which the legal profession needs to be viewed both as to the basis for positively exercising professional decisions by lawyers and the manner in which to best manage for behaviour. This recognition of factor relationships and the importance of the more personal of the factors on lawyer decisions should be taken into account in considering how society imposes regulation, how the profession guides, governs and regulates behaviour and how lawyers and law firms train and manage for professional conduct.

6.4 Contributions to knowledge

This research aims to contribute to scholarly research by its conceptual, methodological and empirical findings which bring new insight to an aggressive existing debate among theories in three disciplines. The contributions to the academic literature, its hypothesis, debates and knowledge developed from the research of this thesis are presented below. This is a Doctorate of Business Administration and, accordingly, the focus on management issues and techniques is considered throughout and is important to the intended contribution to both theoretical and managerial knowledge.

The literature in three academic disciplines directly examining lawyer professional behaviour and the influences on the related professionalism decisions resulted in consistent recognition of the behaviour influences having positive effect on professional decisions by three conflicting theories as to the relative importance of those influences. The only lightly recognized and discussed inter-factor relationships did not reach the point of a hypothesis as to the effect of those relationships among factors and then on the decision process. The lack of empirical study in the body of knowledge resulted in there being no means to properly assess relative effect which is needed to lead to identification of a more effective and supported hypothesis. The assessment of the literature, identification of hypothesis, development of a combined hypothesis and illustrative model which was supported by empirical result is an important contribution to knowledge in the area of lawyer professionalism. The quantitatively supported hypothesis that the six factors heavily influence each other which the factors of concern for reputation and being professional from training are of greater influence than sanction methods leads to an important advancement directly applicable to management approaches.

6.4.1 Conceptual contributions

This study has made conceptual contribution by integrating the three strands of literature examining influences on professionalism in the legal profession into a new conceptual framework. The literature review and the main body of writing in "law and professionalism," "law and economics" and "behavioural economics and law" identified that there are 6 ways concurrently used to influence and control lawyer's professionalism behaviour — liability, insurance, profession regulation, court and administrative body regulation, reputation effect and training. This coalesced into three theories each allocated to a discipline which can be explained by two potential models, a linear and a highly integrated one. The three theories each indicated a linear influence relationship of the six influences on the professionalism decision with each advocating a different one as the primary positive influence. Each indicated there is likely some influence by others and on each other but without conclusion and recognition of a lack of proper empirical support to the hypothesis. Organization of the extensive writing to reflect this pattern of debate has not previously been done.

6.4.2 Methodological contributions

The academic literature on the topic of positively influencing of lawyer professional behaviour and the means by which appropriate professional behaviour is achieved clearly sets out the view of most author's as to the lack of and the challenges and difficulties of undertaking an empirical study on this topic. The challenges were expressly noted and once identified could be anticipated and solutions to each resolved early in the process. Methods such as ensuring appropriate instructions were given to respondents as to the study intent, specifically stating that it was about what effected professionalism and not the intention to be professional, ensuring a sufficiently large and varied sample and finding a means to appropriately identify the factors into a non-confrontational concept were ways found for the challenges to be overcome. The survey was developed for the participant to understand they were assumed to be competent and act professionally and that the enquiry was about the relative effect of the ways that behaviour was positively influenced, as discussed in previous chapters. The success in achieving the respond able survey was verified by discussion with participants in pilot and expert review as well as achieving sound levels of response rate.

There have been no empirical studies on the topic of this thesis and only limited empirical studies on any enquiry of the behaviour aspects of legal practice, meaning that the academic literature in legal professionalism discipline was discussing concepts without definitions or scale, using assumptions unproven by direct study, as is frequently admitted by the literature. Therefore, it was necessary to build the definitions of the variables and the means of measuring

them in an empirical concept. This was done using highly defined concepts of the influences in the literature, pilot study with expert input and extensive personal experience. This was greatly assisted by the ability to do a very extensive pilot process coupled with extensive discussion with experts readily available to assist in exploring whether the questions were capable of identifying concepts that would be understood by lawyers and that appeared to relate to the behaviour aspects of practice that mattered to lawyers. The survey was determined by the pilot and expert discussions to elicit effective response comments were received in the pilot process from survey respondents that the survey made them think and, while readily understandable, caused them to carefully consider their behaviour and their reaction to the methods by which that behaviour is governed. The comments demonstrated that respondents could and did respond to the concepts of questions as they defined the factors. These highly educated and trained legal professionals were able to and did respond effectively to the questions used to define the factors.

The primary challenges to a survey-based empirical study examining lawyers and their behaviour identified by the literature included accessing a sample, getting a suitable response rate from the sample, getting apparently truthful answers and getting sufficient variance in those answers. All of those challenges were substantially resolved as is demonstrated by the study data results. The discussion of the academic literature as to the existence of those challenges aided in the initial development of the methods, approaches and survey and allowed a focus on finding working solutions to identified issues.

The ability to obtain sufficient quantitative data that gave normal curves across a suitable response base, for the dependent variable and the independent variables, indicated that empirical, quantitative, methods can be used to study lawyers' professional behaviour. There was no clustering around a single view of any of the variables and all the variables had sufficient variability to indicate a thinking and personal response by each of the respondents. This, while an early development of scales and scores, indicated that usable scales and scores were developed and that with further refinement they can become more validated. The ability to develop a definition for each of variables that can be studied and analyzed, indicating the ability to create scales and scores on lawyer professional factors was an important breakthrough.

The literature self-identifies that the discussion of the effect, and relative effect, of the influences on lawyers' professionalism behaviour is based upon assumptions which have not been empirically tested. Accordingly, it is reasonably believed that this thesis represents an original attempt to define a dependent variable to act as a proxy for professionalism, or at the very least to clearly define and identify the concept conflict of interest as an acceptance or

rejection decision, a concept discussed in the literature but not defined. It is further an original attempt to define and create a method of measuring the six behaviour influences identified by the literature as the methods to influence that behaviour. As a first attempt to study the issue empirically, definitions needed to be developed to create scales and this was done using the literature, expert review, pilot response and personal experience. It was necessary to identify a series of questions that would allow analysis to place responses on a scale, or at least develop a score, which would allow quantitative assessment of the views and approaches of lawyers to the independent variables and their effect on the dependent variable.

A method was identified to define the dependent variable. This has not been done in previous studies. The method was to do an extensive review of court cases looking at conflict of interest and using those to create a panel of enquiries to divide cases into those where the court stated that the conflict should have resulted in the retainer being rejected and a panel of those where the retainer could be accepted. The facts for each could then be used to frame a question of accept or reject the retainer for each enquiry. This created a panel of ten questions, five more oriented to ethics-based decisions and five more oriented to the retainer business decision. The panel approach to defining the dependent variable resulted in the ability to define a variable based upon the independent arbiter of court decisions and a score based upon agreement or disagreement with the court decisions.

The independent variables were defined using the concepts heavily discussed in the literature. Then combining the discussion in the literature as to the effect of those methods of influencing lawyer behaviour with personal experience and extensive expert and pilot discussion a set of questions was developed for each influence. Questions to reflect the six influences to scale then as a factor were developed. Effectively, the way in which the challenge of a lack of defined variables was addressed was to find a unique way to categorize the influences as the factors and using a combination of literature review, personal experience, access to leading experts and pilot for responsiveness and understanding build a scalable concept. Exploratory factor analysis on the independent factors satisfactorily loaded the questions on the six factors identified by the literature supporting effective definition of the factors.

The research is a start to the development of scales (or at least scoring) for the dependent variable of the conflict of interest decision making with the ability to assess it also as if it is two variables, one with ethical and one economic orientation and for the six independent variables which reflect the lawyer behaviour influences. This should significantly assist future research on the topic of managing lawyer professional behaviour. It also allows assessment of the theories on the problem from three disciplines and identifies models to explain them. It is recognized that the

newly identified existence of significant factor correlation on the factors as defined while informative will need a great deal more exploration but it provides a valuable start.

6.4.3 Empirical contributions

An empirical study of factors influencing lawyers' professionalism decisions has not previously been done and the successful obtaining and analysis of survey-based data on the topic is a first, based on the discussion on point of an extensive literature review which states there is a lack of such theoretical support. The findings supporting the highly factor integrated model, with reputation as the single one of the six ways used to influence lawyer behaviour with a statistically significant independent effect on the professionalism decision of client retainers acceptance considering conflict of interest is of immediate management use. The data shows that the six factors used to influence lawyer professionalism behaviour work together with each having effect on the others and then effecting the conflict retainer decision professionalism behaviour. This finding that the interaction of the factors is much more significant than the literature had recognized is important to development of a hierarchy of influence importance for the six behaviour influences. Creating such a hierarchy is key to making management for professionalism decisions more efficient and effective. The results rank reputation and training as having more influence than the sanction and regulatory methods providing support for the more recent literature advocating the use of influence and training based management.

There is a solid body of academic literature in three disciplines looking specifically at professionalism in the legal profession, including work looking specifically at acceptance or rejection of conflict of interest retainers as a professionalism decision, with discussion of the means by which the legal profession is, and should be, regulated for this conduct. As discussed in the literature review, there is an extensive and active debate between three disciplines in academia that examine professionalism in lawyers, with views expressed by academics who support the concept that sanction based regulation (the use of personal liability and insurance) as the better influence for regulating behaviour differing from those that believe that it is economically inefficient to use those sanction methods and that licencing based regulation both by the profession and by external bodies is more economically efficient and accomplishes similar ends. This debate is added to by the discussion of those academics who use behavioural economics concepts to add in the view that there is a very significant influence from personal behaviour modifiers, including concern about reputation and acceptance of professional training. The three-way debate is relatively vigorous and has been actively engaged in over a period of approximately thirty years. While there has been concern about lawyer

professionalism and its regulation throughout much of human history (the legal profession is an old one), the active debate among these three schools of thought is more recent, particularly the addition of the concepts of law and economics and behavioural economics questioning cost and benefit and the effectiveness of the influences considering personal reactions as effectors of lawyer professional behaviour.

This academic debate provides an extensive examination of the difficulties of ensuring that professional behaviour is positively guided in the manner desired by society as to the professionalism aspects of practice by lawyers, as discussed previously in this thesis, but the discussion to date is without the empirical analysis of relative effect necessary for balancing use for economic efficiency. The debate is robust and does support that there are six factors by which lawyers' professionalism decisions are guided but with the clear concern that the relative effectiveness of those factors has not been the subject of empirical study. The academic debate advocates for the importance, continued imposition and relative effect of each of the six factors of influencing behaviour to different conclusions and without empirical support. The trend on academic writing to recognize the importance of training and peer influence as a key to more effective management called for this gap of empirical study to be filled.

This thesis provides a first iteration of that missing empirical study. The academic literature in identifying the empirical study gap put forth a view that it may not be possible to bridge the gap of lack of empirical study as a consequence of inherent difficulties in survey and other methods of empirical study of lawyers. One of the biggest challenges, after finding the gap, was to find the means to bridge each of the literature identified difficulties in undertaking an empirical study. This was accomplished. A successful survey of lawyers was done with, what the literature on survey-based statistics stated was, a sufficiently large sample to avoid the pitfalls identified by the literature and to start filling that very large gap by providing an initial empirical study.

The research is a start to the development of scales (or at least scoring) for the dependent variable of the conflict of interest decision making and for independent variables which reflect behaviour influences which should significantly assist future research on the topic of managing lawyer professional behaviour. It also assesses the theories on the topic from the three disciplines and identified models but with the result that the newly identified significant factor correlation develops a fourth hypothesis of inter-related effect that will need a great deal more exploration.

6.5 Managerial implications

6.5.1 Management and regulation — new orientation

The results of the research identify and support the recent trend in the literature toward advocating training and feedback-based regulation and education for management of professional behaviour. The identification of the trend in the literature toward recognizing training-based management as a more effective management approach was supported by the research data showing a skew toward reputation as the most influential factor of the six behaviour influences, reputation being a factor that uses the key management techniques of training and top down influence-based management. The support for training and the desire to be professional was identified as a very significant influence, particularly for more professional lawyers, both in survey response to fact-based questions and in self assessment. This leads to management being encouraged to recognize that training and peer influence need emphasis when selecting management techniques.

6.5.2 Support for the change from punishment based regulation to proactive education and management basis

The findings of the extensive inter-relation of the six factors and the importance of reputation and professionalism compliance supports the more recent writing advocating the effectiveness of behaviour influence of lawyer professionals focused on education, training and feedback based management systems. These findings should assist in finding a better balanced approach to positively influencing lawyer professional behaviour.

6.5.3 Management hiring and training

The study results showed that there is not a demographic or personality aspect to professionalism. This finding is important knowledge for hiring protocols and training development because differentiation for these factors seems to not be required to build legal teams who tend to make the desired professionalism decisions.

6.6 Further areas for research

6.6.1 Inter-factor study

The two models developed to illustrate the academic hypothesis were developed recognizing that each of the factors influence or affect each other to some extent based on the “speculation” of the literature, but also because the inter-factor influence was only lightly recognized and not directly studied or extensively discussed. The initial model was the linear one more dominantly suggested as to the effects on the professionalism decision. Based on the literature it was

believed that the independent effect of each of the factors would be sufficient to be able to regress and analyze each of those variables while noting the possible need for further study of the modifying inter factor relationships. The acceptance of a linear relationship did not prove to be correct based on the data. The inability to run regressions on the survey results because of multicollinearity indicated that the relationships among the independent factors is so significant that those relationships must be understood prior to looking at the ability to do regression-based analysis of the relative effect on the dependent variable. This will be an exercise which will take several studies; the modified inter-related factor model developed to supplement the linear model more clearly indicated by the literature prior to the survey does appear to have more appropriately identified the relationships among the variables. In order to be able to understand the relative modifying effects a very complex study of the modifier effects will need to be first undertaken.

This study developed an understanding of the complexity of the factor relationships and supported the concepts of behavioural economics and the more recent writing that recognizes the importance of personal reactions and concerns such as reputation and training giving support to the more recent support of prospective management concepts that should lead to better professionalism results.

6.6.2 Additional demographic analysis

The findings suggest that demographics and personality do not seem to have a significant effect on professionalism. This is indirectly recognized in the academic literature, which does not extensively study demographic effects and has commented only that there was a belief that experience may have an influence on professional behaviour in professionalism increasing with experience but has not otherwise considered these as factors having an effect. The data based finding that demographic attributes for lawyers do not significantly affect professionalism decision making is important and another contribution of this thesis. The recommendation that further study to verify the demographic findings has been made previously in this thesis. This stood out as an area for further research, likely best conducted by a combination of directed survey and some interview-based research. The demographic nuances of the effects may be so subtle that it would require a more personal, interactive basis to identify these differences but the consequences for management could be significant.

A more fulsome study of the effect of personality on professionalism would be of interest, if there are personality differences to a professionalism response that could change hiring, training and management processes. In this study, there was not a significant enough difference

among the personality types to reach any conclusion, with the exception of some slight difference between sales oriented and technically oriented lawyers. The difference is subtle enough that it should not affect hiring decisions but may be significant enough that it could affect the individual delivery of management methods used for overseeing behaviour.

6.6.3 Management techniques

The management techniques which were identified for questions were drawn from a relatively limited base and recognizing the need to avoid increasing survey length and complexity. A survey to identify the management techniques most commonly used should be done as a first step to study of the effect of management techniques. As a consequence of the limited ability, within the context of the survey length and its intended focus, to ask extensive questions about how the delivery of management techniques effected their view or perception of the methods used, there was insufficient ability to fully differentiate the effect of the techniques. The enquiry was still of interest and one response that was clearly identified was that overly conservative, excessively punishment-oriented techniques do not receive as much acceptance as the more reward for good behaviour-based techniques or those that appeal to the personal intent of being professional. The sanction-based techniques were the only techniques in the survey that were less accepted and therefore of less effect on behaviour.

6.6.4 Geographical and practice area study

While a statistically acceptable sample was accessed for this study, this is not a broad examination across the legal profession. Geographic based research is merited and consideration of different areas of law practice should be done. The practical aspects of legal practice particularly as to conflict decisions are different in different types of legal practice. Also, it is expected there will be differences between transactional, counsel and litigation lawyers and their professionalism view. Further, while the professionalism requirements are generally consistent on a global basis, the legal systems which deliver the six factors vary between the common law system and civil law system and there are some jurisdictional differences. This study was largely confined to lawyers who practice transactional or counsel based business law in the common law system in North America. It would be an interesting further study to determine whether there are differences between the two primary types of legal system and the approaches of each to legal practice and professionalism, different locations and different practice areas.

6.6.5 Broader survey sample

As a consequence of the unique position the author has with the legal profession, including as a leader in many professional organizations I had access to a broad number and range of types of legal practitioners. The sample was potentially very large but the practical decision, as a result of resources was made to focus the request to a manageable but statistically sound number. The result was that the number and variety of the respondents was acceptable but not a large and diverse sample. Following advice in the literature on acceptable sample sizes and the recommendations of experts consulted during the survey process, the sample size of 235 completed surveys was considered acceptable. This was verified by temporal review of the responses that showed there was no significant variation in the later responses from the earlier responses showing further responses were not adding to the strength of the data.

However, one thing that has been supported by the response to the pilot and survey is that lawyers will participate, will answer truthfully and will answer with a suitable base of understanding and willingness to answer. The attempt to do a very broadly-based study, to start the foundation for empirical research in this area, required access across a large number of professional associations and a variety of membership involvement. The results should therefore assist future researchers to have easier access as a result of developing survey techniques lawyers were willing to respond to.

It was expected that there would be a significant limitation in the undertaking of the study as a consequence of the literature comments about the inability to do an empirical study among lawyers. In fact, this was not the case. All of the persons who took an active involvement in the pilot study, the experts and those who took the survey, were willing to fully and actively participate in looking at the problem. The enquiry elicited interest among most of those who took the survey and those who participated as experts. Further, I discussed the undertaking of this research with many audiences, not just academic colloquiums but also before audiences in a continuing legal education environment and the consistent responses expressed interest in the study and agreement with the approach. The study created a great deal of interest and a willingness to be involved to provide comments and suggestions and to participate in the survey. The limitations of lawyer participation identified in the literature were not found and this finding should generate an interest in more empirical research regarding lawyers and law practice. A broad large scale enquiry seems to be possible and should be considered.

6.7 Recommendations for analytical expansion

6.7.1 Increase factor understanding

The most significant shortcoming of the research has been discussed extensively throughout this thesis, which is the inability in the context of research without precedent, with the time and resource restrictions of a doctoral thesis study, to be able to acquire the further data needed to identify and quantify the relationships among the independent factors. This is a shortcoming which can only be overcome by extensive further research, best done both on a survey and an interview basis, designed for better identification of the relative effects of the independent factors on each other.

An expanded study to support analytical techniques that deal with the extensive multi-collinearity, modifier effect, among the variables should be considered for further research. Such a study would need to use sophisticated statistical research and would require several different surveys focused on each of the inter-factor relationships to better deal with the recognition of the relationships among the factors and then the effect of the modified independent factors on the dependent variable. This would require sequencing a review of the factors on a paired basis and then the use of sophisticated statistical methods for analysing modifier effects.

Using the thesis study and survey as a basis, it should be possible to undertake further research to better define all of the variables. Developing a better understanding of what makes up each of the factors would be valuable and assist in translation into a better understanding for management use. It is suggested that future research could include more expert input and interview-based discussions with those experts to further develop the scales and create a more nuanced definition of each of these variable factors.

6.7.2 Solidify scales and scoring

The scales and scoring developed for this research worked well despite this being a study using empirical analysis without precedent scales. The scales and scoring created provided a base assessment that there is an important effect of reputation on lawyer professionalism but the very inter-related effect of the other factors had not been properly recognized in the literature. Further study should be done by postulating and testing different scales and scoring methods. The solidification of definitions, scales and scoring would be invaluable to underpinning future research.

6.7.3 Consideration of other aspects of professionalism

While the client retainer decision considering conflict of interest was identified to use for a definition of professionalism as the dependent variable for this study because it provides a measurable aspect of, and is a key tenet of, professionalism, there are other aspects of professionalism that could be studied. All aspects of professionalism are governed by the same six behaviour modifying influences, conflict of interest is merely a predominate professionalism requirement. It would therefore be of interest to determine whether other aspects of professionalism for lawyers can be defined and if they are influenced in the same manner as client retainer and conflict of interest choices. This could be a difficult study in that the development of the dependent variable could be very difficult and potentially impossible to define. A means of measuring professionalism as a general concept might not be possible but there are other aspects of professionalism which are capable of decision-making processes that can be measured against court determinations of right and wrong (such as reporting or furthering criminal activity which has been looked at in some literature although not looking at the influences on that behaviour). This would be an interesting further study, perhaps adding nuance by using some qualitative study methods which could also add value.

The dependent variable is potentially complex and it needed to be simplified to permit an empirical study to be undertaken. While conflict of interest decisions is of itself of interest and is a suitable and measurable proxy for professionalism, a better understanding of what constitutes professionalism and how to define it in a manner that can lead to an empirical study, whether quantitative or qualitative, is merited. Further nuanced examination of the dependent variable, using experts in the field, including general counsel and ethics counsel who deal with professionalism, could be an insightful further study.

6.7.4 Geographic studies

The study had limited geographic variety (Canada and the United States), therefore a study looking at both geography and the two different primary legal systems of common law and civil code would be of analytic interest. There were some hints in literature that there may be a difference in the view and attitudes of professionals, and the profession, between Canada and the United States (and other jurisdictions) around the acceptance of conflict of interest as it effects client retainer decisions. This may not arise because of legal differences or professional code differences but could more likely result from differences in the view of exposure to liability in the different jurisdictions. A geographic study, once a solid base for this inquiry is established, could be of interest. Also interest could be a study of the difference between

common law and civil code systems which use some differences in legal concepts that could affect professionalism responses in each system.

6.7.5 Additional techniques of analysis

Clearly, a study without precedents will not have gotten it all right, future studies to improve the factor study with additional techniques for survey and analysis are merited. This is, based on literature comment, apparently a first empirical study looking directly at influences on lawyer professionalism. The initial concept behind this thesis research was to do mixed methods, that is to combine interview and personal experience studies with a survey-based review. It was naive to think that this could be done in the time and resource constraints of a doctoral thesis. The requirements for the development of the quantitative study alone absorbed the reasonable capabilities of time for a doctoral thesis. However, the idea of adding interview-based qualitative research remains of merit. Consideration has been given undertaking further academic study using this study as the base and collaborators have been found to undertake such further research. The intention would be to obtain a richer, more nuanced, view of the law firm management decision makers as to the research problem and results of the study. It could also expand the results of this research to consideration of the ability to use the results of this research to effective management improvement.

6.7.6 Further related questions

Other questions which the studies done to date, including this research do not address and which might be of interest include:

1. Do the individual practitioners react differently than law firm management to liability from professionalism decisions?
2. Is there a material reaction if there is consequence heightened awareness of the possibility and liability imposed?
3. Is the reaction to professionalism liability consistent or does it vary with the nature of the causative stress or the length of time after the stress?
4. Does lawyer reaction to sanctions add liability cost to the process of the delivery of professional services?
5. Does lawyer reaction to liability for professionalism change the composition of deal teams generally decreasing the use of and therefore the access to development of associates eventually adversely affecting quality of the profession?
6. Is lawyer reaction to liability for professionalism decisions an isolated effect, such that it fades with time, is limited to the persons directly involved or are these broader effects?

6.8 Conclusion

This thesis has adopted a novel approach to investigating the factors that influence and control the professionalism behaviour of lawyers. This study offers an integrated view of the key factors that influence professional decisions, drawing on key literature to identify the factors influencing professionalism decisions. The study both complements and integrates existing literature in three disciplines namely, “law and professionalism,” “law and economics” and “behavioural economics and law” that identified the six noted factors concurrently used to influence and control lawyer’s professionalism behaviour. These six factors are foundational to the development of an integrated conceptual model, that was tested using a survey-based research design. This model provided valuable insight as to the relative effect of the behaviour influences on lawyer professionalism and further provides a base for future research in the field, by addressing the empirical gap noted in the literature. The findings from this research provide unique insights and implications for both academia and management. Multiple opportunities exist for future research using the conceptual model and findings to add to the base empirical findings to value for law firm management. Qualitative and quantitative methodologies could be used to look at a larger sample, across multiple jurisdictions and areas of practice to further insight. The determination of the importance of the personally based influences of reputation and desire to be professional is a strong support for the most recent direction of the literature to advocate for more training, top down and peer influenced, management techniques for lawyer professionalism. Management of law firms have a base from this study to adjust techniques to a most effective and cost-effective approach to managing the client retainer professionalism decisions of their lawyers.

The final chapter, Chapter 7, offers a reflection on both the research and the doctoral journey.

7. Personal reflections

7.1 Reflecting on the research study

I have been practicing law and managing a large practice team for over 40 years. I have also been heavily involved in bar association leadership in both Canada and the United States and with political processes in Canada involving regulation of the legal profession for many of those years. An understanding I reached from those involvements is that cost effective and broadly available delivery of legal services is essential to the future of the legal profession as societal requirements for legal assistance have been increasing over the last many years. Creating management efficiency and improved access to chosen legal assistance is key to both safeguarding access to justice for society and will affect success for practitioners in the profession.

Regulation using liability risk for lawyers in relation to their professional decisions imposes a cost on delivery of legal services. The need to monitor and control for liability risk imposes cost on lawyers which are likely to be reflected in increased costs in the legal services they deliver. It also causes a defensive reaction of taking a more conservative approach to the legal advice given, whether or not best for the client. The increase in cost is either passed on to persons seeking access to justice and is therefore a cost on society or absorbed by the law firm and lawyers and is a cost to the business of the practice. It is important to know if this cost is merited for either, which would only be the case if the practice requirements imposed to meet a perceived need for regulation properly influence lawyers to the desired behaviour established for legal professionals on a reasoned cost-benefit basis. Also, understanding if and how the practice requirements do influence lawyer behaviour can give the key to better management for professionalism both of the profession and by the profession. This understanding from my legal practice and profession leadership set the framework for my interest and the research study.

The study and its results were and are important to me as a leader in the profession and as a manager in a law firm. I deal with the issues and effects every day of my practice life and I needed information on regulation and compliance to better do my job and to better represent the legal profession in its aim to do a better job on promoting positive professionalism. That information does not exist. Fortunately, this meant the research, and its analysis, could be done without the concern of preconceived concepts of result or a desired for better result, simply having the knowledge of how lawyers respond to influences and the resulting methods and compliance needs would give a better framework for managing the application of required compliance-based influences on lawyer behaviour.

Personal reflections

The literature search discovered a rich body of literature directly looking at lawyer professionalism that informed me and focused my thinking to the recognition that six factors have an influence on lawyer professionalism behaviour. I had not previously ordered my thinking in that way, previously focusing on the cost and effect of only one regulatory tool, imposition of liability. Having recognized the strengths of the other influences I realized that the gap noted by the literature was indeed the very gap of knowledge that I needed filled for better management of professionalism, a daily law firm management challenge. I believed that if I needed for it filled my law practice management activity then there was an excellent possibility that others in similar position would also find this knowledge helpful. That view proved true as I explored the research with colleagues and law practice experts. What was missing was the gap of empirical understanding of the effect and relative effect of the way that we, as lawyers, were being influenced in the making of our professionalism decisions. We know we must manage for these professional requirements but a view of the effect of how and what we manage for in professionalism was missing. While there is considerable academic interest in this area, this is research and a thesis with very real and immediate management use in the legal profession and for managers of law firms. That statement has been repeatedly verified by the collegial discussions I have had through this process and forms an important backdrop to the research.

There were significant hurdles to overcome in designing, placing and focusing the research. Fortunately, many were well understood and fully discussed by the literature allowing me to plan for those challenges and design a research study addressing the challenges directly. The challenges included:

1. No quantifiable definitions and no scales existed for any variable;
2. Empirical study had not previously been done creating scope challenges;
3. Literature expressed the view that lawyers were not “survey able”;
4. Literature expressed the view that access to a suitable sample was not possible;
5. Literature expressed the view that response rate to a survey of lawyers would not be adequate; and
6. Literature was very inconsistent in assessing the relative effects of the behaviour influences identified to be studied, conflicting theories and statements were not resolved in the literature although there was some recent coalescence around the growing view that more personal influences such as reputation and training, with a strong element of peer guidance, were important and should be managed for.

My overview using the identification of the gap and consideration of research philosophy approaches narrowed the study methodology to quantitative. The concept that quantitative assessment best fills the gap in the literature, which recognized a lack of empirical study, emerged during the literature review and research planning. Extracting what could be developed as hypothesis despite extensive debate, was challenging because of inconsistency and lack of verification. However, hypothesis was identified from three disciplines of academic literature to provide a base for study and identified an empirical gap leading to a positivist ontology. This focus for this study fit with both my management problem and interest and my general research and philosophy orientation, making research the easier for suiting my world view and experience, thus avoiding the potential strain of a framework that I intellectually am not comfortable with.

Intellectual insights and excitement emerged at many points in my research journey. One was the assessment that the professionalism, conflict of interest, decision actually had two manifestations that could be separated and revealed to reflect different aspects of the conflict of interest professionalism decision. The first aspect of the definition being developed for professionalism is where it is “correct to reject” is a matter of ethics, the acceptance of a retainer in circumstances where a conflict exists is, by the requirements of the professional codes for lawyers, unprofessional behaviour. Then considering the second aspect “correct to accept” is an economic decision, if the decision is to reject when a retainer could be accepted is overly conservative and in rejecting a conflict when that is not required there is an unnecessary loss of revenue as a result of trying to be professional. Recognizing this nuance to the enquiry was enlightening. Interestingly the results of the responses where it was correct to accept the retainer indicated that there is more of a tendency by lawyers to reject a retainer even if it could be accepted, indicating an overriding of concern for ethics over economic interests when a choice is to be made.

Another enlightening insight was the confirmation that the six factors designed to influence behaviour are all significantly and positively related to one another. This was not entirely unexpected, the development of a model indicating just that effect had been done from literature speculation and experience, but it was a useful and solid result indicating a significant evolution to hypothesis. The emergence of concepts such as a respondent who has high concern for external regulation also having high concern for liability claims and those having concern about reputation having a correspondingly high concern for professional values while also not entirely unexpected was a further emerging insight. The emergence of only one statistically independent influence, concern about reputation, was a satisfying result especially

when combined with the ethics over economics result and one I valued as a lawyer. It reflected a profession not always well profiled in political and public views but matched the view of the lawyers I spoke with as to how they saw as their motivation and what they valued.

That the survey data showed that the majority of lawyers will appropriately respond to management techniques designed to positively influence professionalism decisions as long as they are approachable, practical and perceived to be efficient, and will, in most instances, accept a second view and requirement to report was also of interest in development of the research. This was contrary to unsupported and negative reflections on the legal profession and lawyer professionalism in some of the literature. It also supported the view that management based resolution could be developed to the issues facing the profession and the practicing lawyers dealing with the cost and risks of the behaviour influences. The data shows each of the six independent factors identified in the literature do positively influence appropriate professional behaviour. A concern about the preservation of a good reputation emerging as the most important factor affecting professionalism decisions for lawyers both statistically and in self-perception of importance is consistent with the theories of behavioural economics and allows the development of management based on peer influence and education over the stressing of sanction and punishment. These results are of value to those of us actively managing for professional conduct in an increasingly difficult environment for legal practice and is consistent with my view of the effect of the changing nature, diversity and generational make up of lawyers in active practice.

This research started out to be of very real interest and potential value to me as researcher, educator and manager and delivered on that throughout. And, best of all, the research has proven to be of interest to others, including the respondents to the pilot studies. I received consistent comments such as:

"Yes, it was clear. What I meant is that it forced me to think about motivations and decision-making processes internal to me that I hadn't really clearly considered before. I do innately but never had the chance to think about it like that."

"I enjoyed completing it — interesting questions!"

"I have now had the chance to do the survey. It was interesting to think about all of the questions and challenge myself about what truly motivates my approach to conflicts."

7.2 Reflecting on the DBA journey

I entered the DBA program as a much older experienced student and researcher bringing over 60 years of life experience and 40 years of business experience to the undertaking of the study. This necessarily affected my advancement of skills and my approach to learning and research development. This background brought to the DBA an unusually broad professional practice, which has included management roles in a large law firm and academic contribution to legal writing throughout my career with over 15 books written and several hundred articles (professionally based rather than academic) and teaching as an adjunct professor at the Masters of Law level. This experience was supplemented with extensive involvement in professional service, mainly in leadership roles. This background allowed me to develop a mature set of skills and knowledge touching on many core competencies needed for doctoral level study and research. The purpose of pursuing my doctorate was therefore not to develop nascent competencies, but rather to expand, enrich and deepen mature competencies with a view to enhancing not only skills in academia, but in developing an entirely new and expanded base for my participation in my professional activities. I believed that enhancing and developing the competencies entailed in this advanced level of academic endeavor would allow me to continue to participate in my professional career, including the academic aspects of that career, with new but also refreshed skills and understanding for many years to come. The exciting development in my DBA journey emerged early in the process when I realized how different and stimulating the concepts and thought process of doctoral study would be from my professional practice and related study. I expect over the remainder of my career to take full advantage of the development of the competencies I worked on during the DBA program.

Accordingly, my approach to building competency through the doctoral study process was focused on an expansion, using the strengths and identifying and working on the weaknesses that have developed over my 4 decades in professional practice. I focused on development in several areas that I identified for personal development early in the DBA program with a significant amount of my time spent developing the much needed academic research skills needed to undertake the research process including the identification of a need to understand research philosophy and its component parts. I realized and worked on understanding methodology and method, survey approach and content, used analytic methods and hypothesis development. In both the overall design process and in creating the detailed approach to the research project I was learning new ways to approach a research problem and the design of acceptable methodology and method. Accordingly, during the DBA phase of this education the

majority of my time and attention was spent on the third of the three core competencies I identified early in the program as those I wanted to develop, being research methodology.

7.3 Development during the DBA phase

My focus for development during the DBA phase of the program was on quantitative research and analysis skills, skills new to me. The need for a focus on the development of the research competency was made apparent when I encountered a significant issue in the initial planned basis for research analysis. I used this experience and how the apparent failure was used for enhanced personal development within the program as an example of many journey inflection points. This occurred in the fall of 2018, when I, not quite seriously but with a distressed truth, said to a Colloquium at Rotman "What the heck is my dependent variable?." The enquiry was serious, having spent a considerable amount of time learning skills around a planned approach to quantitative research based on survey, with multiple questions and partial least squares as the analytic tool, I realized that the work done to date had failed to properly identify the dependent variable. Notwithstanding five substantial pilots, which were intended to fine tune the survey process but not to complete an initial data diagnosis and test regression, I had not identified this fundamental failure in my reasoning of variable definition. In the sixth pilot, when a sufficient survey response was obtained, with the intention of completing diagnosis and running initial test regression, I realized that I had failed to properly identify a dependent variable that could be regressed.

This realization took a considerable amount of time to work through using, assistance from fellow Colloquium attendees and the reading of a rather ridiculously large number of text books on regression methods. A recommendation was made during the Rotman Colloquium, that at first seemed of little assistance, the suggestion being that perhaps my dependent variable was binomial and therefore it was not multiple regression but logistic regression that should be considered, when I had been focused on multiple regression and because of inexperience did not easily see the similarities and differences or what they meant. The suggestion wasn't expressed in quite that way but the underlying concept was sufficiently clear indicating that perhaps I needed to reconsider that the dependent variable was in fact binomial and not a scaled factor. Taking advantage of the Colloquium atmosphere, I continued questioning with the person, a recent DBA, who had made the suggestion and from there was able to work through to the resolution of my dilemma. My dependent variable in fact was a binomial factor, it is a simple accept or reject a retainer in circumstances where there is a potential of conflict of interest, and this breakthrough was crucial to progressing the research.

Having reached that realization and the collateral realization that I needed to bring a more comprehensive and philosophy based approach to the structure of the research plan, and before revising my survey approach, expanding it in this case, I spent the next several months ensuring that my technical skills in quantitative research, survey techniques, and the use of logistic regression were sufficiently advanced to permit me to better understand and complete the survey process and to thereafter undertake informed diagnosis and better apply statistical tools. After the considerable period of time spent building those skills, I returned to the survey, and re-assessed it using expert input, a further pilot and self-review. The survey, as to the identification and assessment of the independent factors had stood up well, little was needed other than to add clarity to the questions using commentary from the pilots. The dependent variable was solidly identified in its questions, what I had been missed was a more flexible lens for viewing the measurement. By simplifying and adjusting the questions intended to define the dependent variable, this specific problem was solved. This is offered as an example of the value of personal and skill development in the DBA journey.

The questions for the dependent variable were adjusted in wording (but not concept) to ask would you accept or would you reject the retainer in these circumstances. The ability to recognize this simple solution could be effective was a development made during the DBA program. The concept of using 10 questions to define the dependent variable that were pulled from court decided cases considering conflict of interest and liability, the topic of the research was a novel approach I would not have developed absent doctoral level training.

Then realizing that using the novel basis developed for defining the dependent variable also allows scoring of the respondents based upon correct or incorrect responses to the question, if the respondent accepted a retainer in circumstances where the court found there was a conflict that was scored as an error, zero coded, and the reverse in the other cases was a significant expansion of my research reasoning and ability. Learning about scales and scores allowed a design placing respondents in categories from 1 to 10 of their realization and manifestation of professionalism, the start of a useful scale knowing how to find those ideas and translating them into part of the research "thinking" was an important development for me, satisfying a need for a deep understanding of a problem that had been in my sightlines for decades.

The survey was also expanded by adding to the identification of the dependent variable and the quantification of the independent variables, with further concepts included to add interest to the research. I had at first not seen a real need for demographic examination. But training assisted reflection on the reason for demographic assessment in social science made me realize the potential value of this aspect of the research. The selected demographics were assessed as

suitable by literature and pilot commentary but in considering my thinking what aspects of demographics would be of real value, I expanded my understanding of demographics as important to social science research. One idea was to ask questions intended for simple statistical analysis, being a self-assessment of professionalism and a self-assessment of personality. These were analyzed against the scores on the dependent variable to see if self-view and personality have an effect on apparent professionalism in private choices (they do not). The second addition was a series of questions enquiring about perceived effectiveness of management techniques for managing conflict and retainer acceptance. This was analyzed both simply by statistics as to what lawyers view as effective management but also assessed against the professionalism scores. These are ideas that gave useful insight but ones I would not have considered prior to the DBA program.

The development of competency during the early years of the program involved learning and absorbing a new way of viewing the world and how I gathered, organized, classified and processed information. The latter part of the program was focused on the development of the needed research skills, which were vital to the appropriate undertaking of the research, its analysis and its ultimate conclusions. Without this period of development, the research would have failed, as an example it would not have been possible to deal with the recommendations and suggestions that arose when I asked the simple question, "what is my dependent variable?"

I continued with literature research throughout the entirety of the program, again a part of research competency, enhancing my search skills and expanding the areas of research from the previously completed law and professionalism and law and economics to include behavioural economics and other social science fields. I continuously read to expand my technical competency, actually developing a real interest in the needed research method and analysis competency.

My basic approach for competency development was to find a starting point of identification and understanding of my then current level of information and to identify a path for appropriate information gathering. Development was also focused on competencies intended to improve skills particularly the development of research competency and work on that competency was extensive. It was necessarily heavily oriented to text book materials because text book level understanding of research methods, including specifically regression techniques using logistic enquiry and survey technique, are most commonly provided in text and research competency development in major papers. My reading therefore was heavily oriented to written materials but with full advantage taken of collegial opportunities. I attended three or more colloquiums each year, attended and fully took advantage of the M.Sc. phase classes of the DBA program and attended the EDAMBA summer school twice to learn as much as I

could. The DBA journey was an exciting adventure of new learning, new insights and new skills, a whole new way of thinking, researching and analyzing.

I believed that a clear orientation towards developing competencies intended to ensure effective research, reporting and thesis preparation was the appropriate orientation to the work I was undertaking. A significant amount of time was spent understanding, translating and revising the research findings using recommendations of the text materials and the basics of research competency, into a direct application to the undertaking of a quantitative research project identified for the thesis. The decision to undertake quantitative research was regularly questioned and consideration of comparatives to other research techniques, rather than the intended survey technique, was added to the review, regularly during competency building. The decision was made to continue with the quantitative assessment that had been identified when the gap was identified for reasons explored elsewhere and significantly because it best dealt with that identified gap in the literature, of a lack of empirical survey-based assessment and best fit my philosophical orientation.

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Appendices

Appendix A — Glossary of terms

This is a non-academic set of definitions for terms that might not be familiar to the reader and is provided for assistance in understanding only and convenience by providing a handy non-academic source for terms used. They are drawn from popular on-line sources and are intended for general information only. They have been checked for general accuracy and confirmed to convey the needed information for the reader. There is no claim that any of these form part of the research, thesis or having been independently created. This appendix is included because it is anticipated the readers will include legally trained readers who do not have a familiarity with the academic terms from quantitative research and academics in behavioural sciences who do not have familiarity with legal terms. This proved to be the case during the development of the research, the many presentations made and the review of the thesis. The terms to provide this aid for reading were selected based on review by both legally trained and academics readers.

Administrative Body: means any domestic or foreign, national, federal, provincial, state, municipal or other local government or regulatory body and any division, agency, ministry, commission, board or authority or any quasi-governmental or private body exercising any statutory, regulatory, expropriation or taxing authority under the authority of any of the foregoing, and any domestic, foreign or international judicial, quasi-judicial, arbitration or administrative court, tribunal, commission, board or panel acting under the authority of any of the foregoing. (lawinsider.com/dictionary)

Architectural Compliance System: The core of all professions is the claim to collective disinterest (Durkheim 1933, 1957). The information asymmetry engendering professionals make them uniquely capable of protecting consumers. As lawyers multiplied and diversified, informal social control lost efficacy, but professional associations were slow in promulgating and lax in enforcing ethical rules. Lawyers are perpetually torn between client loyalty, personal morality, and obligations to the legal system (Luban 1988, Simon 1997). The dissatisfaction of increasingly assertive and organized consumers is forcing lawyers to improve their complaint mechanisms and exhibit independence from professional associations (perhaps adding lay members) under threat of losing self-regulation altogether. At the same time, external regulation proliferates: malpractice claims (and insurers), courts (supervising litigation), ombudsmen, competition authorities, supranational bodies (EU, NAFTA), and administrative agencies with jurisdiction over the host of ancillary services lawyers are beginning to offer

(such as investment, mortgages, estate agency, and insurance). Within the profession, factions struggle over substantive rules (advertising, confidentiality) and the cost of regulation and mutual insurance funds.

Behavioural Economics: is the study of psychology as it relates to the economic decision-making process of individuals and institutions.

Binomial: The **binomial** is a type of distribution that has two possible outcomes (the prefix "bi" means two, or twice). For example, a coin toss has only two possible outcomes: heads or tails and taking a test could have two possible outcomes: pass or fail. (www.statisticsshowto.datasciencecentral.com/probability-and-statistics)

Civil law: a body of laws and legal concepts which are code based and which come down from old Roman laws established by Emperor Justinian used in many European and Latin American countries, and which differ from English common law, which is the framework of legal systems in all countries which formed part of the British Empire. (In the United States only Louisiana (relying on the French Napoleonic Code) has a legal structure based on civil law.)

Collinearity: is a condition in which some of the independent variables are highly correlated. Why is this a problem? **Collinearity** tends to inflate the variance of at least one estimated regression coefficient, $\hat{\beta}_j$. This can cause at least some regression co-efficients to have the wrong sign. (www.stat.tamu.edu/hart/collinearity)

Common law: the traditional unwritten law of the British Empire, based on custom and usage which began to develop over a thousand years ago. The best of the pre-Saxon compendiums of the common law was reportedly written by a woman, Queen Martia, wife of a king of a small English kingdom. Together with a book on the "law of the monarchy" by a Duke of Cornwall, Queen Martia's work was translated into the emerging English language by King Alfred (849–899 A.D.). When William the Conqueror invaded England in 1066, he combined the best of this Anglo-Saxon law with Norman law, which resulted in the English common law, much of which was by custom and precedent rather than by written code. By the 14th century legal decisions and commentaries on the common law began providing precedents for the courts and lawyers to follow. It did not include the so-called law of equity (chancery), which came from the royal power to order or prohibit specific acts. The common law became the basic law of most states due to the Commentaries on the Laws of England, completed by Sir William Blackstone in 1769. Today almost all common law has been enacted into statutes with modern variations some principles of Common Law are so basic they are applied without reference to statute. (www.law.com)

Conflict of Interest: In the practice of law, a conflict of interest is when a lawyer has been put in a situation where their ability to serve the interests of their client with full loyalty is potentially jeopardized. The Law Society of Upper Canada's Rules of Professional Conduct, Section 3.4 defines conflict of interest as "a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person."

A client can pursue a malpractice lawsuit in one of three ways: negligence (e.g., proving the lawyer did not act competently according to the professional standard), breach of contract (e.g., the lawyer did not uphold the terms of the contract or retainer), and breach of fiduciary duty (e.g., the lawyer betrayed the trust of the client or failed to act in the best interest of the client). The respective law societies or regulatory bodies can impose sanctions on a lawyer regardless of whether their actions resulted in harm to their client, e.g., for the LSO, conflict of interest cases are not meant to remedy a violation of lawyer's duties, rather, they are meant to evaluate whether a lawyer has inappropriately placed themselves in a situation where they may violate their fiduciary duty (Sukonick and DeMerchant, George Hunter Douglas). Thus, a lawyer can simultaneously face disciplinary sanctions (such as fines or suspension of their license) through their respective regulatory body, as well as a malpractice lawsuit through the courts.

While each respective regulatory body will differ slightly in their rules and regulations, there are guiding principles common across all and tribunal hearings will reference other law society's decisions. We primarily focus on Law Society of Ontario's (LSO) Rules of Professional Conduct (the "Rules").

Correlation is a statistical technique that can show whether and how strongly pairs of variables are related. (www.surveysystems.com)

Dependent Variable: Dependent and independent variables are variables in mathematical modeling, statistical modeling and experimental sciences. Independent variables are controlled inputs. Dependent variables represent the output or outcome resulting from altering these inputs.

Of the two, it is always the dependent variable whose variation is being studied, by altering inputs, also known as **regressors** in a statistical context. In an experiment, any variable that the experimenter manipulates can be called an independent variable. Models and experiments test the effects that the independent variables have on the dependent variables. Sometimes, even if their influence is not of direct interest, independent variables may be included for other reasons, such as to account for their potential confounding effect.
(www.wikipedia.org/wiki/Dependent_and_independent_variables)

Disqualification: Disqualification cases commonly involve instances where a lawyer wishes to represent two clients that may have adverse interests and where a lawyer is unable to protect a client's (former or current) confidential information if they take on the new client (more on handling confidentiality in Section 5). A conflict checking system that is able to detect potential conflicts from client intake can save a law firm substantial, unnecessary legal costs from going to trial for disqualification.

Within a search done for this research, disqualification cases make up approximately 11% of the judgments involving conflict of interest (1,152 cases out of 10,000 results on Westlawnext).

Empirical Study: is the collection and analysis of primary data based on direct observation or experiences in the "field." (betterthesis.dk>research-methods>empirical studies; researchgate.net/post/what_is_empirical_study)

Epistemology: Epistemology is the study of the nature of knowledge, justification, and the rationality of belief. Much debate in epistemology centers on four areas: (1) the philosophical analysis of the nature of knowledge and how it relates to such concepts as truth, belief, and justification,[1][2] (2) various problems of skepticism, (3) the sources and scope of knowledge and justified belief, and (4) the criteria for knowledge and justification. Epistemology addresses such questions as: "What makes justified beliefs justified?,"[3] "What does it mean to say that we know something?,"[4] and fundamentally "How do we know that we know?" (www.wikipedia.org/wiki/Epistemology)

Exploratory Factor Analysis (EFA) is a statistical approach for determining the correlation among the variables in a dataset. This type of analysis provides a factor structure (a grouping of variables based on strong correlations). An EFA should always be conducted for new datasets. The beauty of an EFA over a CFA (confirmatory) is that no *a priori* theory about which items belong to which constructs is applied. This means the EFA will be able to spot problematic variables much more easily than the CFA. A critical assumption of the EFA is that it is only appropriate for sets of non-nominal items which theoretically belong to *reflective latent* factors. Categorical/nominal variables (e.g., marital status, gender) should not be included. Formative measures should not be included. Very rarely should objective (rather than perceptual) variables be included, as objective variables rarely belong to reflective latent factors. (statwiki.kolobkreations/index.php?title=Exploratory_Factor_Analysis)

Factor: Regression analysis is a way of mathematically sorting out which of those variables does indeed have an impact. It answers the questions: Which factors matter most? Which can

we ignore? How do those factors interact with each other? And, perhaps most importantly, how certain are we about all of these factors? In regression analysis, those factors are called variables. You have your dependent variable — the main factor that you're trying to understand or predict. In Redman's example above, the dependent variable is monthly sales. And then you have your independent variables are the factors you suspect have an impact on your dependent variable.

Fiduciary duty: A legal obligation of one party to act in the best interest of another. The obligated party is typically a fiduciary, that is, someone entrusted with the care of money or property. (www.businessdictionary.com)

Independent Variable: Dependent and independent variables are variables in mathematical modeling, statistical modeling and experimental sciences. Independent variables are controlled inputs. Dependent variables represent the output or outcome resulting from altering these inputs.

Of the two, it is always the dependent variable whose variation is being studied, by altering inputs, also known as **regressors** in a statistical context. In an experiment, any variable that the experimenter manipulates can be called an independent variable. Models and experiments test the effects that the independent variables have on the dependent variables. Sometimes, even if their influence is not of direct interest, independent variables may be included for other reasons, such as to account for their potential confounding effect. (www.wikipedia.org/wiki/Dependent_and_independent_variables)

Influencer: use the same powerful principles-principles that are honest, non-manipulative and effective. These are tools that can be used to solve problems that involve changing behaviour-whether it's your own behaviour or that of others.

Law and economics: is the application of economic theory (specifically microeconomic theory) to the analysis of law that began mostly with scholars from the Chicago school of economics. Economic concepts are used to explain the effects of laws, to assess which legal rules are economically efficient, and to predict which legal rules will be promulgated. (Wikipedia). The **law and economics** movement applies **economic** theory and method to the practice of **law**. It asserts that the tools of **economic** reasoning offer the best possibility for justified and consistent **legal** practice. It is arguably one of the dominant theories of jurisprudence.

Law and professionalism: studies the requirements for legal professional conduct using a law and regulation view.

Law Firm: A law firm is a business entity formed by one or more lawyers to engage in the practice of law. The primary service rendered by a law firm is to advise clients (individuals or

corporations) about their legal rights and responsibilities, and to represent clients in civil or criminal cases, business transactions, and other matters in which legal advice and other assistance are sought. (Wikipedia)

Legal ethics: is a term used to describe a code of conduct governing proper professional behaviour, which establishes the nature of obligations owed to individuals and to society.

Legal ethics, principles of conduct that members of the legal profession are expected to observe in their practice. They are an outgrowth of the development of the legal profession itself. (Wikipedia and Encyclopedia Britannica). Legal ethics are principles and values which, along with conduct rules and common law, regulate a lawyer's behaviour. (Law Society of Alberta)

Liability: Professional liability are legal proceedings which are brought by clients who have suffered as a result of the negligent actions of the professional. The duty that underpins professional liability is the duty to exercise reasonable care. If an avoidable mistake is made the professional will be required to pay for the resulting damages. The test is whether the conduct falls below the reasonable standard of care for the service provider in the field, reasonable care has a flexible standard and takes context into account. The concepts behind imposing liability by the requirement to practice law as a sole practitioner or in partnership, retaining liability for that person's provisions of services, is to ensure that the duty of reasonable care has a consequence, the consequence being the ability to make claim and to recover damages personally, rather than the professional being able to hide behind a limited liability shield.

The concept for the requirement is that the market cannot weed out bad actors because the market does not have the necessary information to be able to assess the standards to be met, or the exercise of reasonable care.

Limited Liability Partnership: A limited liability partnership (LLP) is a business structure entity popular with professions such as lawyers and accountants. The primary function of a LLP ensures that partners are limited to legal liability of their own actions, and avoids exposure to other partner's liabilities from negligence, wrongful acts and omissions, and malpractice or misconduct. However, there are two critical aspects to the limited liability:

1. The protection against liability does not apply for employees under direct supervision of the partner, or if the partner was aware of the wrongful act/omission and failed to act adequately, and
2. The law firm is still vicariously liable for actions of all partners.

Logistic regression is a statistical **model** that in its basic form uses a **logistic** function to **model** a binary dependent variable, although many more complex extensions exist. In **regression** analysis, **logistic regression** (or **logit regression**) is estimating the parameters of a **logistic model** (a form of binary **regression**). (en.wikipedia.org) It is the appropriate regression analysis to conduct when the dependent variable is dichotomous (binary). Like all regression analyses, the logistic regression is a predictive analysis. Logistic regression is used to describe data and to explain the relationship between one dependent binary variable and one or more nominal, ordinal, interval or ratio-level independent variables. (statisticssolutions.com/what-is-logistic-regression)

Moderated Model: In statistics, **moderation** and mediation can occur together in the same **model**. **Moderated** mediation, also known as conditional indirect effects, occurs when the treatment effect of an independent variable A on an outcome variable C via a mediator variable B differs depending on levels of a **moderator** variable D. (en.wikipedia.org>Moderated_mediation)

Multicollinearity is a state of very high intercorrelations or inter-associations among the independent variables. It is therefore a type of disturbance in the data, and if present in the data the statistical inferences made about the data may not be reliable. (statisticssolutions.com/multicollinearity)

Multivariate Regression is a method used to measure the degree at which more than one independent variable (predictors) and more than one dependent variable (responses), are linearly related. (en.wikipedia.org>multivariate-regression). As the name implies, multivariate regression is a technique that estimates a single regression model with more than one outcome variable. When there is more than one predictor variable in a multivariate regression model, the model is a multivariate multiple regression. (stats.idre.ucla.edu/stata/dae/multivariate-regression-analysis)

Policing: the enforcement of regulations or an agreement. (Oxford Dictionary)

Profession: a calling requiring specialized knowledge and often long and intensive academic preparation. (Merriam-Webster Dictionary)

Professional tenet: doctrine, principle or position held as part of a philosophy, religion, or field of endeavour (www.thefreedictionary.com/tenet)

Professional Training: igi-global.com/dictionary: Building knowledge, skills and competence in individuals, a group or team, and development of universal, professional competencies.

Professionalism: professionalism was being used purely as a means of separating a training and behaviour-based combination of factors, from regulatory and sanction based. Professionalism in general in this review is the broader concept of how a professional is required to behave as they conduct their business of the practice of law.

Regulation: n. rules and administrative codes issued by governmental agencies at all levels, municipal, county, state and federal. Although they are not laws, regulations have the force of law, since they are adopted under authority granted by statutes, and often include penalties for violations. One problem is that regulations are not generally included in volumes containing state statutes or federal laws but often must be obtained from the agency or located in volumes in law libraries and not widely distributed. The regulation-making process involves hearings, publication in governmental journals which supposedly give public notice, and adoption by the agency. The process is best known to industries and special interests concerned with the subject matter, but only occasionally to the general public. (www.law.com)

Regulatory body: A regulatory body is a public organization or government agency that is set up to exercise a regulatory function. This involves imposing requirements, conditions or restrictions, setting the standard for activities, and enforcing in these areas or obtaining compliance. (www.safeopedia.com/definition/regulatory-body)

Sanction: a financial penalty imposed by a judge on a party or attorney for violation of a court rule, for receiving a special waiver of a rule, or as a fine for contempt of court. If a fine, the sanction may be paid to the court or to the opposing party to compensate the other side for inconvenience or added legal work due to the rule violation. (www.law.com)

Tort liability: is a legal duty to compensate someone for damages caused. It is the result of a court's sentence where the wrongdoer has to pay for the injury committed against the victim. (myaccountingcourse.com/accounting-dictionary/tort-liability)

Tortious conduct: A tort is an act that brings harm to someone — one that infringes on the rights of others. The adjective tortious therefore describes something related to a tort. (www.vocabulary.com>dictionary>tortious)

Tribunal: Tribunal hearings are conducted by the regulatory body of each Province's Law society, with their structure and rules outlined within their respective *Law Society Act*. While Law Society decisions are not binding on courts, and vice versa, each serve as guiding principles for the other (Cite Macdonald Estate please, p. 1246). Typically, penalties imposed by the Law Society include fines or license suspensions. As a service-based profession, a

lawyer's penalty of a disciplinary hearing lies in the loss of potential for new business more so than the fines themselves.

Vicarious Liability: n. sometimes called "imputed liability," attachment of responsibility to a person for harm or damages caused by another person in either a negligence lawsuit or criminal prosecution. Thus, an employer of an employee who injures someone through negligence while in the scope of employment (doing work for the employer) is vicariously liable for damages to the injured person. (www.law.com)

Variable: are those simplified portions of the complex phenomena that you intend to study. The word variable is derived from the root word "vary," meaning, changing in amount, volume, number, form, nature or type. These variables should be measurable, i.e., they can be counted or subjected to a scale.

Appendix B — Codes of conduct and regulatory explanations

This Appendix is included to allow a non-legally trained reader to have a ready source for a high level view of the Codes and Standards imposed on lawyers by their professional requirements. The Codes and Standards as quite similar in all North American jurisdictions. Two were selected (Ontario and the American Bar Association) to allow a reader to see that consistency (in a non-rigorous way) and have a handy reference to the base required levels of professional conduct. Only the portions relating to conflict of interest were included as being relevant and ensuring the length of the material is not overwhelming (the Codes are very lengthy and detailed and cover many aspects of legal practice).

Codes of conduct and regulatory explanations

Law Society of Ontario: Rules of professional conduct: Chapter 3: 3.4 Conflicts

Duty to avoid conflicts of interest

3.4-1 A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.

Commentary

[1] As defined in rule 1.1-1, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. Rule 3.4-1 protects the duties owed by lawyers to their clients and the lawyer-client relationship from impairment as a result of a conflicting duty or interest. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.

[2] In addition to the duty of representation arising from a retainer, the law imposes other duties on the lawyer, particularly the duty of loyalty. The duty of confidentiality, the duty of candour and the duty of commitment to the client's cause are aspects of the duty of loyalty. This rule protects all of these duties from impairment by a conflicting duty or interest.

[3] A client may be unable to judge whether the lawyer's duties have actually been compromised. Even a well-intentioned lawyer may not realize that performance of his or her duties has been compromised. Accordingly, the rule addresses the risk of impairment rather

than actual impairment. The expression "substantial risk" in the definition of "conflict of interest" describes the likelihood of the impairment, as opposed to its nature or severity. A "substantial risk" is one that is significant and plausible, even if it is not certain or even probable that it will occur. There must be more there a mere possibility that the impairment will occur. Except as otherwise provided in Rule 3.4-2, it is for the client and not the lawyer to decide whether to accept this risk.

Personal interest conflicts

[4] A lawyer's own interests can impair client representation and loyalty. This can be reasonably obvious, for example, where a lawyer is asked to advise the client in respect of a matter in which the lawyer, the lawyer's partner or associate or a family member has a material direct or indirect financial interest. But other situations may not be so obvious. For example, the judgment of a lawyer who has a close personal relationship, sexual or otherwise, with a client who is in a family law dispute is likely to be compromised. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer.

[5] Lawyers should carefully consider their relationships with their clients and the subject matter of the retainer in order to determine whether a conflicting personal interest exists. If the lawyer is a member of a firm and concludes that a conflicting personal interest exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work without the involvement of the conflicted lawyer.

Current client conflicts

[6] Duties owed to another current client can also impair client representation and loyalty. Representing opposing parties in a dispute provides a particularly stark example of a current client conflict. Conflicts may also arise in a joint retainer where the jointly represented clients' interests diverge. Acting for more than one client in separate but related matters may risk impairment because of the nature of the retainers. The duty of confidentiality owed to one client may be inconsistent with the duty of candour owed to another client depending on whether information obtained by the lawyer during either retainer would be relevant to both retainers. These are examples of situations where conflicts of interest involving other current clients may arise.

[7] A bright line rule has been developed by the courts to protect the representation of and loyalty to current clients. c.f. *Canadian National Railway Co*. v. *McKercher* LLP, [2013] 2 S.C.R. 649. The bright line rule holds that a lawyer cannot act directly adverse to the immediate legal interests of a current client, without the clients' consent. The bright line rule applies even if the work done for the two clients is completely unrelated. The scope of the bright line rule is limited. It provides that a lawyer cannot act directly adverse to the immediate legal interests of a current client. Accordingly, the main area of application of the bright line rule is in civil and criminal proceedings. Exceptionally, the bright line rule does not apply in circumstances where it is unreasonable for a client to expect that the client's law firm will not act against the client in unrelated matters.

[8] The bright line recognizes that the lawyer-client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate legal interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests. This type of conflict may also arise outside a law partnership, in situations where sole practitioners, who are in space-sharing associations and who otherwise have separate practices, hold themselves out as a law firm and lawyers in the association represent opposite parties to a dispute.

[9] A lawyer should understand that there may be a conflict of interest arising from the duties owed to another current client even if the bright line rule does not apply. In matters involving another current client, lawyers should take care to consider not only whether the bright line rule applies but whether there is a substantial risk of impairment. In either case, there is a conflict of interest.

Former client conflicts

[10] Duties owed to a former client, as reflected in Rule 3.4-10, can impair client representation and loyalty. As the duty of confidentiality continues after the retainer is completed, the duty of confidentiality owed to a former client may conflict with the duty of candour owed to a current client if information from the former matter would be relevant to the current matter. Lawyers also have a duty not to act against a former client in the same or a related matter even where the former client's confidential information is not at risk. In order to determine the existence of a conflict of interest, a lawyer should consider whether the representation of the current client in a matter includes acting against a former client.

Conflicts arising from duties to other persons

[11] Duties owed to other persons can impair client representation and loyalty. For example, a lawyer may act as a director of a corporation as well as a trustee. If the lawyer acts against such a corporation or trust, there may be a conflict of interest. But even acting for such a corporation or trust may affect the lawyer's independent judgment and fiduciary obligations in either or both roles, make it difficult if not impossible to distinguish between legal advice from business and practical advice, or jeopardize the protection of lawyer and client privilege. Lawyers should carefully consider the propriety, and the wisdom of wearing "more than one hat" at the same time.

Other issues to consider

[12] A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest. For example, the addition of new parties in litigation or in a transaction can give rise to new conflicts of interest that must be addressed.

[13] Addressing conflicts may require that other rules be considered, for example

(a) the lawyer's duty of commitment to the client's cause, reflected in Rule 3.7-1, prevents the lawyer from withdrawing from representation of a current client, especially summarily and unexpectedly, in order to circumvent the conflict of interest rules;

(b) the lawyer's duty of candour, reflected in Rule 3.2-2, requires a lawyer or law firm to advise an existing client of all matters relevant to the retainer. Even where a lawyer concludes that there is no conflict of interest in acting against a current client, the duty of candour may require that the client be advised of the adverse retainer in order to determine whether to continue the retainer;

(c) the lawyer's duty of confidentiality, reflected in Rule 3.3-1 and owed to current and former clients, may limit the lawyer's ability to obtain client consent as permitted by Rule 3.4-2 because the lawyer may not be able to disclose the information required for proper consent. Where there is a conflict of interest and consent cannot be obtained for this reason, the lawyer must not act; and

(d) Rule 3.4-2 permits a lawyer to act in a conflict in certain circumstances with consent. It is the client, not the lawyer, who is entitled to decide whether to accept risk of impairment of client representation and loyalty. However, Rule 3.4-2 provides that client consent does not permit a lawyer to act where there would be impairment rather than merely the risk of impairment.

[14] These rules set out ethical standards to which all members of the profession must adhere. The courts have a separate supervisory role over court proceedings. In that role, the courts apply fiduciary and other principles developed by the courts to govern lawyers' relationships with their clients, to ensure the proper administration of justice. A breach of the rules on conflicts of interest may lead to sanction by the Law Society even where a court dealing with the case may decline to order disqualification as a remedy.

Consent

3.4-2 A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is consent, which must be fully informed and voluntary after disclosure, from all affected clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

Commentary

Disclosure and consent

[1] Disclosure is an essential requirement to obtaining a client's consent and arises from the duty of candour owed to the client. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

[2] Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. The lawyer therefore should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.

[2A] While this rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest, in some cases the lawyer should recommend such advice. This is to ensure that the client's consent is informed, genuine and uncoerced, especially if the client is vulnerable and not sophisticated.

[3] Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might

include, for example, the availability of another lawyer of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

Consent in advance

[4] A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

[5] While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter.

Consent and the bright line rule

[6] The bright line rule, referred to in the Commentary to Rule 3.4-1, does not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters. No issue of consent arises in such circumstances absent a substantial risk of material and adverse effect on the lawyer's loyalty to or representation of a client. Where such a risk exists, consent is required even though the bright line rule does not apply.

[*Amended — February 2016]*

Dispute

3.4-3 Despite rule 3.4-2, a lawyer shall not represent opposing parties in a dispute.

Commentary

[1] A lawyer representing a client who is a party in a dispute with another party or parties must competently and diligently develop and argue the position of the client. In a dispute, the

parties' immediate legal interests are clearly adverse. If the lawyer were permitted to act for opposing parties in such circumstances even with consent, the lawyer's advice, judgment and loyalty to one client would be materially and adversely affected by the same duties to the other client or clients. In short, the lawyer would find it impossible to act without offending the rules in Section 3.4.

[*Amended — October 2014*]

3.4-4 [FLSC — not in use]

Joint retainers

3.4-5 Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

[1] Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other.

[2] A lawyer who receives instructions from spouses or partners as defined in the Substitute Decisions Act, 1992, S.O. 1992, c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with this rule. Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will

(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;

(b) in accordance with rules 3.3-1 to 3.3-6 (Confidentiality), the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and

(c) the lawyer would have a duty to decline the new retainer, unless:

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

[3] After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with rule 3.4-7.

[3.1] Joint retainers should be distinguished from separate retainers in which a law firm is retained to assist two or more clients competing at the same time for the same opportunity such as, for example, by competing bids in a corporate acquisition or competing applications for a single licence. Each client would be represented by different lawyers in the firm. Since competing retainers of this kind are not joint retainers, information received can be treated as confidential and not disclosed to the client in the competing retainer. However, competing retainers to pursue the same opportunity require express consent pursuant to rule 3.4-2 because a conflict of interest will exist and the retainers will be related. With consent, confidentiality screens as described in rules 3.4-17 to 3.4-26 would be permitted between competing retainers to pursue the same opportunity. But confidentiality screens are not permitted in a joint retainer because rule 3.4-5(b) does not permit treating information received in connection with the joint retainer as confidential so far as any of the joint clients are concerned.

[*Amended — October 2014*]

3.4-6 If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

3.4-7 When a lawyer has advised the clients as provided under rules 3.4-5 and 3.4-6 and the parties are content that the lawyer act, the lawyer shall obtain their consent.

Commentary

[1] Consent in writing, or a record of the consent in a separate written communication to each client is required. Even if all the parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that a contentious issue will arise between them or their interests, rights or obligations will diverge as the matter progresses.

3.4-8 Except as provided by rule 3.4-9, if a contentious issue arises between clients who have consented to a joint retainer, the lawyer shall not advise either of them on the contentious issue and the following rules apply:

(a) The lawyer shall

(i) refer the clients to other lawyers for that purpose; or

(ii) if no legal advice is required and the clients are sophisticated, advise them that they have the option to settle the contentious issue by direct negotiation in which the lawyer does not participate.

(b) If the contentious issue is not resolved, the lawyer shall withdraw from the joint representation.

[*Amended — October 2014*]

Commentary

[1] This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

[2] If, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

3.4-9 Despite rule 3.4-8, if clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and shall refer the other or others to another lawyer for that purpose.

Acting against former clients

3.4-10 Unless the former client consents, a lawyer shall not act against a former client in

(a) the same matter,

(b) any related matter, or

(c) save as provided by rule 3.4-11, any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

Commentary

[1] Unlike rules 3.4-1 through 3.4-9, which deal with current client conflicts, rules 3.4.10 and 3.4-11 address conflicts where the lawyer acts against a former client. Rule 3.4-10 guards against the misuse of confidential information from a previous retainer and ensures that a lawyer does not attack the legal work done during a previous retainer, or undermine the client's position on a matter that was central to a previous retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client if previously obtained confidential information is irrelevant to that matter.

[*Amended — October 2014*]

3.4-11 When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer ("the other lawyer") in the lawyer's firm may act in the new matter against the former client provided that:

(a) the former client consents to the other lawyer acting; or

(b) the law firm establishes that it has taken adequate measures on a timely basis to ensure that there will be no risk of disclosure of the former client's confidential information to the other lawyer having carriage of the new matter.

[*Amended — October 2014*]

Commentary

[1] The guidelines at the end of the Commentary to rule 3.4-20 regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the rare cases in which, having regard to all of the relevant circumstances, it is appropriate for another lawyer in the lawyer's firm to act against the former client.

Affiliations between lawyers and affiliated entities

3.4-11.1 Where there is an affiliation, before accepting a retainer to provide legal services to a client jointly with non-legal services of an affiliated entity, a lawyer shall disclose to the client

(a) any possible loss of solicitor and client privilege because of the involvement of the affiliated entity, including circumstances where a non-lawyer or non-lawyer staff of the affiliated entity provide services, including support services, in the lawyer's office;

(b) the lawyer's role in providing legal services and in providing non-legal services or in providing both legal and non-legal services, as the case may be;

(c) any financial, economic or other arrangements between the lawyer and the affiliated entity that may affect the independence of the lawyer's representation of the client, including whether the lawyer shares in the revenues, profits or cash flows of the affiliated entity; and

(d) agreements between the lawyer and the affiliated entity, such as agreements with respect to referral of clients between the lawyer and the affiliated entity, that may affect the independence of the lawyer's representation of the client.

3.4-11.2 Where there is an affiliation, after making the disclosure as required by rule 3.4-11.1, the lawyer shall obtain the client's consent before accepting a retainer under rule 3.4-11.1.

3.4-11.3 Where there is an affiliation, a lawyer shall establish a system to search for conflicts of interest of the affiliation.

Commentary

[1] Lawyers practising in an affiliation are required to control the practice through which they deliver legal services to the public. They are also required to address conflicts of interest in respect of a proposed retainer by a client as if the lawyer's practice and the practice of the affiliated entity were one where the lawyers accept a retainer to provide legal services to that client jointly with non-legal services of the affiliated entity. The affiliation is subject to the same conflict of interest rules as apply to lawyers and law firms. This obligation may extend to inquiries of offices of affiliated entities outside of Ontario where those offices are treated economically as part of a single affiliated entity.

[2] In reference to paragraph (a) of rule 3.4-11.1, see also subsection 3(2) of By-Law 7.1 (Operational Obligations and Responsibilities).

[*Amended* — *January 2008*]

Acting for borrower and lender

3.4-12 Subject to rule 3.4-14, a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

3.4-13 In rules 3.4-14 to 3.4-16 "lending client" means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

3.4-14 Provided there is compliance with this rule and rules 3.4-15 to 3.4-19, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction in any of the following situations:

(a) the lender is a lending client;

(b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;

(c) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction;

(c.1) the consideration for the mortgage or loan does not exceed $50,000; or

(d) the lender and borrower are not at "arm's length" as defined in section 251 of the *Income Tax Act* (Canada).

3.4-15 When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary

[1] What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip," where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

3.4-16 If a lawyer is jointly retained by a client and a lending client in respect of a mortgage or loan from the lending client to the other client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to

(a) provide the advice described in rule 3.4-5 to the lending client before accepting the retainer;

(b) provide the advice described in rule 3.4-6; or

(c) obtain the consent of the lending client as required by rule 3.4-7, including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary

[1] Rules 3.4-13 and 3.4-16 are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g., mortgage loan instructions) and the consent is generally acknowledged by such clients when the lawyer is requested to act.

[2] Rule 3.4-16 applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

Civil society organizations

3.4-16.1.1 When practising through a civil society organization, a lawyer shall establish a system to search for conflicts of interest of the civil society organization.

[*New — February 2019*]

Multi-discipline practice

3.4-16.1 A lawyer in a multi-discipline practice shall ensure that non-licensee partners and associates observe the rules in Section 3.4 for the legal practice and for any other business or professional undertaking carried on by them outside the legal practice.

[*Amended — June 2009*]

Pro bono and other short-term legal services

3.4-16.2 In this rule and rules 3.4-16.3 to 3.4-16.6,

“short-term client” means a client to whom a lawyer provides short-term legal services;

“lawyer’s firm” means the law firm at which the lawyer practices law as a partner, associate, employee or otherwise.

“short-term provider” means a *pro bono* or not-for-profit legal services provider that makes lawyers available to provide advice or representation to clients.

“lawyer” means (i) a volunteer lawyer who provides short-term legal services to clients under the auspices of short-term provider or (ii) a lawyer providing services under the auspices of a Pro Bono Ontario program; iii) a lawyer providing short-term legal services under the auspices of a Legal Aid Ontario program or clinic; or iv) a lawyer providing short-term legal services under the auspices of a clinical education course or program.

“clinical education course or program” means a course, program, placement or partnership that is organized or accepted by an Ontario law school and that provides Ontario law students with an opportunity to gain practical and applied legal experience.

“short-term legal services” means legal advice or representation to a short-term client under the auspices of a short-term provider with the expectation by the lawyer and the client that the lawyer will not provide continuing legal advice or representation in the matter.

3.4-16.3 A lawyer may provide short-term legal services without taking steps to determine whether there is a conflict of interest arising from duties owed to current or former clients of the lawyer’s firm or of the short-term provider.

3.4-16.4 A lawyer shall take reasonable measures to ensure that no disclosure of the short-term client’s confidential information is made to another lawyer in the lawyer’s firm.

3.4-16.5 A lawyer shall not provide or shall cease providing short-term legal services to a short-term client where the lawyer knows or becomes aware of a conflict of interest.

3.4-16.6 A lawyer who is unable to provide short-term legal services to a client because there is a conflict of interest shall cease to provide such services as soon as the lawyer actually becomes aware of the conflict of interest and the lawyer shall not seek the short-term client’s waiver of the conflict.

Commentary

[1] Short-term legal services, such as duty counsel programs, are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best efforts and existing practices and procedures of the short-term provider, the lawyer and the lawyer’s firm. Performing a full conflicts screening in circumstances in which short-term *legal* services are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided. The time required to screen for conflicts may mean that qualifying individuals for whom these brief legal services are available are denied access to legal assistance.

[2] The limited nature of short-term *legal* services significantly reduces the risk of conflicts of interest. Accordingly, the lawyer is disqualified from acting for a client receiving short-term legal services only if the lawyer has actual knowledge of a conflict of interest in the same or a related matter. For example, a conflict of interest of which the lawyer has no actual knowledge but which is imputed to the lawyer because of the lawyer’s membership in or association or

employment with a firm would not preclude the lawyer from representing the client seeking short-term *legal* services.

[3] In the provision of short-term legal services, the lawyer's knowledge about conflicts is based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of the consulting with the *short-term* provider regarding the short-term *legal* services.

[4] The disqualification of a lawyer participating in a short-term *legal* services program does not create a conflict for the other lawyers participating in the program, as the conflict is not imputed to them.

[5] Confidential information obtained by a lawyer representing a short-term client, will not be imputed to the lawyers, paralegals and others at the lawyer's firm. As such, these people may continue to act for another client adverse in interest to the short-term client and may act in future for another client adverse in interest to the short-term client.

[6] Information obtained by a lawyer representing short-term clients may result in a conflict for the lawyer with an existing client that could require the lawyer to cease representation of that existing client. This risk can be minimized by the establishment of a system to search for conflicts of interest of the lawyer's law firm prior to representing short-term clients,

[7] Appropriate screening measures must be in place to prevent disclosure of confidential information relating to the short-term client to other persons at the lawyer's firm. Rule 3.4-16.4 extends, with necessary modifications, the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rules 3.4-17 to 3.4-23) to the situation of a law firm acting against a current client of the firm in providing short-term legal services. Measures that the lawyer providing the short-term *legal* services should take to ensure the confidentiality the client's information include

(a) having no involvement in the representation of or any discussions with others in the firm about another client whose interests conflict with those of the short-term client;

(b) identifying relevant files, if any, of the short-term client and physically segregating access to them to those working on the file or who require access for specifically identified or approved reasons; and

(c) ensuring that the firm has distributed a written policy to all licensees, non-licensee partners and associates and support staff, explaining the screening measures that are in place.

[8] Rule 3.4-16.5 precludes a lawyer from obtaining a waiver in respect of conflicts of interest that arise in providing short-term legal services.

[9] The provisions of Rules 16.3 and 16.4 are intended to permit the provision of short-term *legal* services by a lawyer without the client being considered to be a client of the lawyer's firm for conflicts and other purposes. However, it is open to the lawyer and the short-term client to agree that the resources of the lawyer's firm, including other lawyers, may be accessed for the benefit of the client, in which case the provisions of Rule 16.3 and 16.4 do not apply, the lawyer would be required to clear conflicts and the short-term client would be considered a client of the lawyer's firm.

[*Amended — October 2019*]

Lawyers acting for transferor and transferee in transfers of title

3.4-16.7 Subject to rule 3.4-16.8, an individual lawyer shall not act for or otherwise represent both the transferor and the transferee in a transfer of title to real property.

3.4-16.8 Rule 3.4-16.7 does not prevent a law firm of two or more lawyers from acting for or otherwise representing a transferor and a transferee in a transfer of title to real property so long as the transferor and transferee are represented by different lawyers in the firm and there is no violation of rule 3.4.

3.4-16.9 So long as there is no violation of the rules in Section 3.4, an individual lawyer may act for or otherwise represent both the transferor and the transferee in a transfer of title to real property if

(a) the *Land Registration Reform Act* permits the lawyer to sign the transfer on behalf of the transferor and the transferee;

(b) the transferor and transferee are "related persons" as defined in section 251 of the *Income Tax Act* (Canada); or

(c) the lawyer practises law in a remote location where there are no other lawyers that either the transferor or the transferee could without undue inconvenience retain for the transfer.

[*Effective March 31, 2008*]

Conflicts from transfer between law firms

Interpretation and application of rule

3.4-17 In rules 3.4-17 to 3.4-23

"matter" means a case, a transaction, or other client representation, but within such representation does not include offering general "know-how" and, in the case of a government lawyer, providing policy advice unless the advice relates to a particular client representation.

[*Amended — June 2015*]

3.4-18 Rules 3.4-17 to 3.4-23 apply when a lawyer transfers from one law firm (“former law firm”) to another (“new law firm”), and

(a) the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers it is reasonable to believe the transferring lawyer has confidential information relevant to the new law firm’s matter for its client; or

(b) the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that

(i) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents or represented its client (“former client”);

(ii) the interests of those clients in that matter conflict; and

(iii) the transferring lawyer actually possesses relevant information respecting that matter.

Commentary

[1] the purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification. As stated by the Supreme Court of Canada in *Macdonald Estate v. Martin* , [1990] 3 SCR 1235, with respect to the partners or associates of a lawyer who has relevant confidential information, the concept of imputed knowledge is unrealistic in the area of the mega-firm. Notwithstanding the foregoing, the inference to be drawn is that lawyers working together in the same firm will share confidences on the matters on which they are working, such that actual knowledge may be presumed. That presumption can be rebutted by clear and convincing evidence that shows that all reasonable measures, as discussed in rule 3.4-20, have been taken to ensure that no disclosure will occur by the transferring lawyer to the member or members of the firm who are engaged against a former client.

[2] The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

[3] Law firms with multiple offices — This rule treats as one “law firm” such entities as the various legal services units of a government, a corporation with separate regional legal departments and an interjurisdictional law firm.

[*Amended — June 2015*]

3.4-19 Rules 3.4-20 to 3.4-22 do not apply to a lawyer employed by the federal, a provincial or a territorial government who, after transferring from one department, ministry or agency to another, continues to be employed by that government.

Commentary

[1] Government employees and in-house counsel — The definition of "law firm" includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.

[*Amended — June 2015*]

Law firm disqualification

3.4-20 If the transferring lawyer actually possesses confidential information relevant to a matter respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless

(a) the former client consents to the new law firm's continued representation of its client; or

(b) the new law firm has

(i) taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm; and

(ii) advised the lawyer's former client, if requested by the client, of the measures taken.

Commentary

[1] It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information." Such measures may include timely and properly constructed confidentiality screens.

[2] For example, the various legal services units of a government, a corporation with separate regional legal departments, an interjurisdictional law firm, or a legal aid program may be able to demonstrate that, because of its institutional structure, reporting relationships, function, nature of work, and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences. If it can be shown that, because of factors such as the above,

lawyers in separate units, offices or department do not "work together" with other lawyer in other units, offices or departments, this will be taken into account in the determination of what screening measures are "reasonable."

[3] The guidelines that follow are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

Guidelines: how to screen/measures to be taken

1. The screened lawyer should have no involvement in the new law firm's representation of its client in the matter.
2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.
4. The firm should take steps to preclude the screened lawyer from having access to any part of the file.
5. The new law firm should document the measures taken to screen the transferring lawyer, the time when these measures were put in place (the sooner the better), and should advise all affected lawyers and support staff of the measures taken.
6. These Guidelines apply with necessary modifications to situations in which non-lawyer staff employees leave one law firm to work for another and a determination is made, before hiring the individual, on whether any conflicts of interest will be created and whether the potential new hire actually possesses relevant confidential information.

How to determine if a conflict exists before hiring a potential transferee

[4] When a law firm considers hiring a lawyer from another law firm, the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time.

[5] After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether any conflicts exist. In determining whether the transferring lawyer actually possesses relevant confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer,

or other recruitment process, to ensure that they do not disclose client confidences. See Rule 3.3-7 which provides that a lawyer may disclose confidential information to the extent the lawyer reasonably believes necessary to detect and resolve conflicts of interest where lawyers transfer between firms.

[6] A lawyer's duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

Transferring lawyer disqualification

3.4-21 Unless the former client consents, a transferring lawyer referred to in rule 3.4-20 or 3.4-22 must not

(a) participate in any manner in the new law firm's representation of its client in the matter; or

(b) disclose any confidential information respecting the former client except as permitted by rule 3.3-7.

[*Amended — June 2015*]

3.4-22 Unless the former client consents, members of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer referred to in rule 3.4-20 except as permitted by rule 3.3-7.

[*Amended — June 2015*]

Lawyer due diligence for non-lawyer staff

3.4-23 A transferring lawyer and the members of the new law firm shall exercise due diligence in ensuring that each member and employee of the lawyer's law firm, and all other persons whose services the lawyer or the law firm has retained

(a) complies with rules 3.4-17 to 3.4-23, and

(b) does not disclose confidential information of

(i) clients of the firm, or

(ii) any other law firm in which the person has worked.

Commentary

[1] This rule is intended to regulate lawyers who transfer between law firms. It also imposes a general duty on lawyers and law firms to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose

confidences of clients of the lawyer's firm and confidences of clients of other law firms in which the person has worked.

[2] Certain non-lawyer staff in a law firm routinely have full access to and work extensively on client files. As such, they may possess confidential information about the client. If these staff move from one law firm to another and the new firm acts for a client opposed in interest to the client on whose files the staff worked, unless measures are taken to screen the staff, it is reasonable to conclude that confidential information may be shared. It is the responsibility of the transferring lawyer and the members of the new law firm to ensure that staff who may have confidential information that if disclosed, may prejudice the interest of a client of the former firm, have no involvement with and no access to information relating to the relevant client of the new firm.

[*Amended — June 2015*]

3.4-24 [deleted]

3.4-25 [deleted]

3.4-26 [deleted]

Transactions with clients

3.4-27 — For the purposes of rules 3.4-27 to 3.4-36,

"regulated lender" means a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business;

"related person" in relation to a lawyer means

(a) a spouse, child, grandparent, parent, or sibling of the lawyer,

(b) a corporation that is owned or controlled directly or indirectly by the lawyer or that is owned or controlled directly or indirectly by the lawyer's spouse, child, grandparent, parent, or sibling, or

(c) an associate or partner of the lawyer;

"syndicated mortgage" means a mortgage having more than one investor;

"transaction with a client" means a transaction to which a lawyer and a client of the lawyer are parties, whether or not other persons are also parties, including lending or borrowing money, buying or selling property or services having other than nominal value, giving or

acquiring ownership, security or other pecuniary interest in a company or other entity, recommending an investment, or entering into a common business venture.

3.4-28 A lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client.

3.4-28.1 Except for borrowing from a regulated lender or from a related person, a lawyer shall not borrow from a client.

3.4-28.2 A lawyer shall not do indirectly what the lawyer is prohibited from doing directly under Rules 3.4-28 to 3.4-36.

Commentary

[1] Transactions between a client and

(a) a related person to the lawyer;

(b) a trust or estate for which a lawyer is a beneficiary, or

(c) a trust or estate for which the lawyer acts as both trustee and lawyer

will ordinarily be treated as if the lawyer is a party to the transaction. However, if such a transaction is genuinely independent of the lawyer and does not involve the lawyer, the transaction would be outside the scope of this rule. Factors such as the proportion of the lawyer's interest in the trust and the relationship between the lawyer and the trustee may be considered.

[2] A lawyer who acts as a trustee for a trust or estate should take care to comply with the strict trust obligations that apply in respect of any dealings with the trust or estate. These trust obligations are in addition to the obligations imposed by these rules.

[*New — May 2016*]

3.4-29 In any transaction with a client that is permitted under Rules 3.4-28 to 3.4-36, the lawyer shall in sequence

(a) disclose the nature of any conflicting interest or how and why it might develop later;

(b) with respect to independent legal advice and independent legal representation;

(i) in the case of a loan to a client who is not a related person, the lawyer shall require that the client receive independent legal representation;

(ii) in the case of a loan to a client who is a related person, the lawyer shall require that the client receive independent legal advice;

(iii) in the case of borrowing money from a client who is a regulated lender, the lawyer need not recommend independent legal advice or independent legal representation;

(iv) in the case of a corporation, syndicate, or partnership borrowing money from a client of the lawyer where either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest in the corporation, syndicate or partnership, the lawyer shall require that the client receive independent legal representation;

(v) in all other cases, the lawyer shall recommend that the client receive independent legal advice and, where the circumstances reasonably require, recommend or require that the client receive legal representation; and

(c) obtain the client's consent to the transaction

(i) after the client receives the disclosure, legal advice or representation required under paragraph (b) and before proceeding with the transaction, or

(ii) where a recommendation required under paragraph (b) is made and not accepted, before proceeding with the transaction.

Commentary

[1] The relationship between lawyer and client is a fiduciary one. The lawyer has a duty to act in good faith. A lawyer should be able to demonstrate that the transaction with the client is fair and reasonable to the client.

[2] In some circumstances, a lawyer may be retained to provide legal services for a transaction in which the lawyer and a client participate. The lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined. This is because the lawyer cannot act in a transaction with a client where there is a substantial risk that the lawyer's loyalty to or representation of the client would be materially and adversely affected by the lawyer's own interest, unless the client consents and the lawyer reasonably believes that he or she is able to act for the client without having a material adverse effect on loyalty or on the representation.

[3] If the lawyer does not choose to disclose the conflicting interest or cannot do so without breaching confidence, the lawyer must decline the retainer.

[4] Generally, in disciplinary proceedings under Rules 3.4-29 to 3.4-36, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, that

independent legal advice was received by the client, where required, and that the client's consent was obtained.

[5] Whether a person is considered a client within this rule when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

Documenting independent legal advice

[6] A lawyer retained to give independent legal advice relating to a transaction should document the independent legal advice by:

(a) providing the client with a written certificate that the client has received independent legal advice;

(b) obtaining the client's signature on a copy of the certificate of independent legal advice; and

(c) sending the signed copy of the lawyer with whom the client proposes to transact business.

Documenting a client's decision to decline independent legal advice or independent legal representation

[7] If the client declines the recommendation to obtain independent legal advice or independent legal representation, the lawyer should obtain the client's signature on a document indicating that the client has declined the advice or representation.

[8] If the client is vulnerable and declines independent legal advice or independent legal representation, the lawyer should not enter into the transaction. Some signs that the client may be vulnerable include cognitive decline, disabilities such as impaired vision and hearing, financial insecurity, and major changes in life circumstances that may make the client more susceptible to being unduly influenced.

Borrowing by related entities

[9] Rule 3.4-29(b)(iv) addresses situations where a conflicting interest may not be immediately apparent to a potential lender. As such, the lawyer is required to make disclosure and require that the client from whom the entity in which the lawyer or the lawyer's spouse has a direct or indirect substantial interest in borrowing has independent legal representation.

3.4-33.1 A lawyer engaged in the private practice of law in Ontario shall not directly, or indirectly through a corporation, syndicate, partnership, trust, or other entity in which the

lawyer or a related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities

(a) hold a syndicated mortgage or loan in trust for investor clients unless each investor client receives

(i) a complete reporting letter on the transaction,

(ii) a trust declaration signed by the person in whose name the mortgage or any security instrument is registered, and

(iii) a copy of the duplicate registered mortgage or security instrument,

(b) arrange or recommend the participation of a client or other person as an investor in a syndicated mortgage or loan where the lawyer is an investor unless the lawyer can demonstrate that the client or other person had independent legal advice in making the investment, or

(c) sell mortgages or loans to, or arrange mortgages or loans for, clients or other persons except in accordance with the skill, competence, and integrity usually expected of a lawyer in dealing with clients.

Commentary
Acceptable mortgage or loan transactions

[1] A lawyer may engage in the following mortgage or loan transactions in connection with the practice of law

(a) a lawyer may invest in mortgages or loans personally or on behalf of a related person or a combination thereof;

(b) a lawyer may deal in mortgages or loans as an executor, administrator, committee, trustee of a testamentary or inter vivos trust established for purposes other than mortgage or loan investment or under a power of attorney given for purposes other than exclusively for mortgage or loan investment; and

(c) a lawyer may collect, on behalf of clients, mortgage or loan payments that are made payable in the name of the lawyer under a written direction to that effect given by the client to the mortgagor or borrower provided that such payments are deposited into the lawyer’s trust account.

[2] A lawyer may introduce a borrower (whether or not a client) to a lender (whether or not a client) and the lawyer may then act for either, and when rule 3.4-14 applies, the lawyer may act for both.

Disclosure

3.4-33.2 Where a lawyer sells or arranges mortgages for clients or other persons, the lawyer shall disclose in writing to each client or other person the priority of the mortgage and all other information relevant to the transaction that is known to the lawyer that would be of concern to a proposed investor.

No advertising

3.4-33.3 A lawyer shall not promote, by advertising or otherwise, individual or joint investment by clients or other persons who have money to lend, in any mortgage in which a financial interest is held by the lawyer, a related person, or a corporation, syndicate, partnership, trust or other entity in which the lawyer or related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities.

Guarantees by a lawyer

3.4-34 Except as provided by rule 3.4-35, a lawyer must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

3.4-35 A lawyer may give a personal guarantee in the following circumstances

(a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;

(b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or

(c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and

(i) the lawyer has complied with the rules in Section 3.4 (Conflicts), in particular, rules 3.4-27 to 3.4-36 (Doing Business with a Client), and

(ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

Payment for legal services

3.4-36 When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer shall recommend but need not require that the client receive independent legal advice before accepting a retainer.

Commentary

[1] The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

Gifts and testamentary instruments

3.4-37 — [FLSC — not in use]

3.4-38 If a will contains a clause directing that the lawyer who drafted the will be retained to provide services in the administration of the client's estate, the lawyer should, before accepting that retainer, provide the trustees with advice, in writing, that the clause is a non-binding direction and the trustees can decide to retain other counsel.

3.4-39 Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

[*New — October 2014*]

Judicial interim release

3.4-40 Subject to Rule 3.4-41, a lawyer shall not in respect of any accused person for whom the lawyer acts

(a) act as a surety for the accused;

(b) deposit with a court the lawyer's own money or that of any firm in which the lawyer is a partner to secure the accused's release;

(c) deposit with any court other valuable security to secure the accused's release; or

(d) act in a supervisory capacity to the accused.

3.4-41 A lawyer may do any of the things referred to in rule 3.4-40 if the accused is in a family relationship with the lawyer and the accused is represented by the lawyer's partner or associate.

[*New — October 2014*]

American Bar Association: Rules of professional conduct: conflict

Rule 1.7: Conflict of interest: current clients

Client-lawyer relationship

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8: Current clients: specific rules

Client-lawyer relationship

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

"Disciplinary authorities, too, ought to consider education about the psychology of ethics as a component of discipline or as part of a set of measures aimed at prevention. Common approaches to ethical violations include disbarment, suspension, reprimand, and ethics education. See generally A.B.A. STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS (1979); Leslie C. Levin, The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions, 48 AM. U. L. REV. 1 (1998).

Appendix C — Explanatory notes prepared for supervisor review

These notes were prepared at times during the research process and included in reports to supervisors to assist in explanation and development. While not needed for the thesis it was thought that they provide additional explanation and "colour" that might be useful for a reader. The thesis topic spanning and being of interest in two very different disciplines meant that additional cross discipline materials and explanation might be useful for readers. This material is not intended to form part of the thesis but to aid in its reading.

These first notes are a simple outline to explain the development of the variables and the research approach in a more approachable manner for the non-academic reader:

Defining the variables

Dependent — The intention is to first establish a basis for the dependent variable. Ten questions have been developed which are based on brief scenarios derived from review of an extensive panel of legal cases involving conflict of interest and lawyer liability. The cases selected for the questions were selected to include 5 where there was found to be conflict and 5 where there was found not to be a conflict. Each question asks whether the respondent would accept or reject the retainer in the briefly outline circumstance. The question is whether this approach is suitable to define a baseline tolerance for accepting conflict and thereby frame the dependent variable.

Independent — Then the six independent variables are each defined by four questions specific to the effect of that independent variable on the decision, each is intended to create an assessment of the extent of effect of that factor on the surveyed lawyers as to their conflict decisions. These questions have been developed from the literature and experience, there is no existing scale and so are each newly created to define a view of the effect of the variable on the decision to accept or reject the retainer. The questions have been piloted 5 times in substantial pilot runs. The last pilot was assessed for diagnostics. The results are clear that the questions are understandable and will be answered; the results respond well to diagnostics. The pilots also gave support to the view that the questions did result in responses as to the variables that seemed suitable for the enquiry.

Analysis

The result will be a data table with each respondent providing:

1. **Dependent** — The responses to the 10 scenario based questions giving an accept / reject; these will be aggregated to define the dependent variable — the binomial accept/ reject; this will be a table of 10 lines of data for each respondent giving a dichotomous accept/ reject conclusion over the variety of possible assessments.

   The intention is to also assess the differences between the conflict questions and the no conflict questions on a simple statistical basis to determine if it seems that the professional decision does differentiate conflict stations.

2. **Independent and regression** — Responses will be sought to 24 questions (6 independent variable times 4 questions each) for each respondent; these questions will be answered on a Likert 5 point scale (verified in pilot as suitably giving variability); this will result in each of the 6 variables having 4 questions to define that variable.

   There will be assessment for demographics, these questions will be asked of each respondent:

   1. Experience (years in practice)
   2. Gender
   3. Country
   4. Nature of Practice
   5. Management Role
   6. Size of Firm
   7. Age
   8. Marital Status

3. **Independent — factor analysis** — an analysis using statistical methods (factor analysis) will be used to check that the questions define the intended variable and will supplement and likely precede the regression to determine if model change from the originally identifed linear model is merited.
4. **Direct respondent assessment** — A further question will be included enquiring as to the direct view of the survey takers regarding the importance of each of the factors (they will not have been able to see this enquiry when taking the survey). This is to simply assess the validity of the assessment using the factor and regression analysis viewed against the professionals' views of themselves and the decision.

5. **Management responses assessment** — A final set of questions will enquire about liability as a stand-alone factor affecting management decisions around conflict management, looking only at the effect of liability. It will also be on a Likert 5 point scale looking at the view of the survey takers as to actions that might be affected by liability. The intent is to assess the responses by looking at the strength of effect and variability for each with a view to outlining potential management responses to the professional concern regarding liability consequences of conflict decisions. The idea is to have a more robust contribution to management concepts from the results of the quantitative study by suggesting responses that could best influence desired behaviour.

The following is an explanation of the survey process in a simplified manner to assist the reader who has not engaged in social science survey based research to understand the process and purpose.

Survey process

The survey will be sent to a large potential group, it is hoped there will be a 10% response rate. If there is not more can be sent to reach the minimum desired 200. The survey will be disbursed by the chairs of legal professional organizations or committees of such organizations. Assistance from those professional organizations encouraging response should result in a suitable level of response. Pilot results gave satisfactory response levels and completion rates.

Discussion of basis for survey questions

Some percentage of what leads to a lawyer to accept or reject business (and therefore revenue) where a retainer might be conflicted for professionalism reasons comes from each of the six named factors. Liability has long been thought to be the primary motivator of professional behaviour but without any identified empirical study of its effectiveness, essentially the dialogue about the need for and effect of liability is speculative. Liability is an expensive and inefficient method of regulation of behaviour leading to a management need to assess the relative effect of more efficient and potentially effective methods of guiding professional behaviour for lawyers.

This answer to the questions assessing the theory of the value of liability, and then the relative effects of the several methods of regulation, as regulators of professional conduct, should assist managers of professional firms in understanding their organizational dynamics, as they arise from the liability structure, providing better methods of internal management to address the perceived risks and benefits. This should improve efficiency and effectiveness of liability as a

tool for regulating conduct. The thesis will draw the conclusions necessary to allow firms to tailor their management of professional conduct to the methods and concerns most effective as to result.

The survey — explanatory notes to assist in understanding the basis for the questions

Part 1 — Defining the dependent variable

The following ten questions will each ask if the respondent would accept or reject the retainer in the specified situation. The survey did not show the coded court determination of conflict or no conflict, that is shown here for reader information only.

Also, for reader understanding assistance, the historic reason for not allowing lawyers to accept a retainers where they are conflicted is the need to (1) preserve client confidentiality, (2) preserve independence of view as to the advice being given and (3) ensure the maintenance of the incentive to give vigorous advocacy. Those concepts underpin the selected questions from cases reviewed. C = conflict, NC = no conflict

1. NC — Your firm is approached to represent creditors making claims against a former client, should the retainer be accepted or rejected if you do not believe there is confidential information known about the former client which could be used against their interest in this matter?
2. C — You are asked to act directly against a former client, you may have some confidential information that could be used in this matter because of knowledge of how the client is likely to react, but no directly relevant information, should you accept or reject the retainer?
3. NC — You are asked to take on a matter against a client which is not related to the matter you previously represented the client on, which was many years ago so any information you have is dated, should you accept or reject the retainer?
4. C — You are asked to take a retainer on a matter for an employer of a client, different than your existing client retainer, but you have information about the client that could affect your advice to the employer, should you accept or reject the retainer?
5. NC — You are approached to take on a retainer for a competitor of a client where work you have done for the existing client could benefit the competitor because of creative solutions you developed for the client but does not involve disclosing direct confidential information about the client, should you accept or reject the retainer?

6. C — You act for a client on a matter which has significant profile and large fees and are approached to also act for a person on that matter who does not currently, but could if certain events happen, have an adverse conflicted position, should you accept or reject the retainer?
7. NC — You become aware that there are hints of improper conduct by a client which you can not verify with reasonable review but which could harm investors who are not clients but many rely on your involvement, should you accept or reject the retainer?
8. NC — Your firm is asked to act for a company where one of your partners is a director, should you accept or reject the retainer?
9. C — You have a personal investment interest in a competitor of a company that seeks to retain you, should you accept or reject the retainer?
10. C — You are approached to act for a company that is a competitor of an ongoing client on the basis of your payment including receiving a share interest in the competitor company, should you accept or reject the retainer?

Part 2 — Defining the independent variables:

A 5 point Likert scale was piloted and independently assed for variability; the 5 point scale was determined to best suit the sample.

- Some Effect 1
- Moderate Effect 2
- Quite a Lot of Effect 3
- Significant Effect 4
- Strong Effect 5

All questions have the same 5 response Likert scale options.

Basic instruction given:

You are being asked to consider the relative influence of a number of factors that might influence a decision to accept or reject a retainer where there could be a conflict of interest. It is assumed you are intending to act in a professional manner and make a responsible decision about the potential conflict. The decision will have a financial effect if you reject the retainer and its associated fee revenue.

The following questions are designed to assess the importance of a number of factors that might affect decisions as to the extent of assessment for, and acceptance or rejection of, a retainer with the potential for conflict of interest. You may assume the conflict is more subtle

and does not involve direct, head on, conflict that would affect advocacy or allow use of confidential information to disadvantage. It is assumed that you are trying to reach the suitable professional decision and do not intend to behave unethically.

Coding was not visible to respondents. Questions were random sorted.

Coded: R = Reputation; I = Insurance; RP = Regulation Profession; RE = Regulation External; L = Liability; P = Professionalism

1 R In assessing whether to accept or reject a retainer with the potential with a conflict of interest, how much effect does concern about your personal reputation have on how much review you believe you need to do to assess for conflict of interest?

2 R How much positive effect do you believe a practice of avoiding conflict of interest brings to your professional reputation?

3 R How much positive effect do you believe a reputation for avoiding conflict of interest contributes to practice financial success?

1 L How much effect does the threat of litigation and personal liability have on the extent of review you do to identify client conflict?

4 R How much adverse effect on reputation do you believe a law suit against you based in conflict of interest would have?

1 I How much effect do you think an adverse conflict of interest liability decision would have on the availability and cost of professional liability insurance?

1 P How much effect would increased professional ethics training in firm policy and sanctions regarding conflict have on your conflict of interest assessments?

1 RP What effect does the professional code of ethics have on acceptance or rejection of a conflicted client retainer?

2 P What effect does a potential but not current conflict have on your decision to accept a retainer if it is technically permitted at the time of retainer?

2 L What effect does the size of a potential conflict of interest based liability claim have on your decision to reject a conflicted retainer if it is fully insured?

3. L What effect does the size of a potential conflict of interest based liability claim have if it is not fully insured but the firm assets are sufficient to cover so you would not pay personally?

2 I What effect would knowing your insurance cost could increase or availability decrease if your firm conflict of interest policy is not followed have on your decision to accept or reject a retainer?

3 I What effect do you think a lawyer's exposure to liability for conflict of interest has on insurance cost and availability?

2RP How much effect does concern about exposure to litigation based on a conflict of interest have on your decision to take steps to push for tougher firm conflict policies?

4L How much effect does the cost of the hassle and time to manage litigation against you affect your consideration of conflict of interest acceptance?

3 P What effect do you believe your view on acceptance of conflict of interest has on conflict acceptance by others in the firm?

3 RP How much effect should litigation risk have on firm policy as to selecting technology systems to assess conflict of interest?

1 RE What effect does the threat of administrative review and sanction by fine have on the decision to accept a retainer?

2RE What effect does potential regulatory sanction by boards or tribunals have on your conflict of interest review and acceptance?

3RE What effect does the potential of the court sanction of removal from a matter have on your conflict of interest review and acceptance?

4 RP What effect does professional (bar, law society) regulation and sanction of conflict of interest have on your review of and acceptance of conflict?

4RE What effect do you think external (courts, tribunals, etc.) having increased regulatory sanction over conflict of interest would have on decisions to accept or reject conflicted retainers?

4P What effect does your view of yourself as a "professional" have on your decisions to reject a retainer with a potential conflict?

4I How much would adverse insurance rating have in your decision to reject or accept a client retainer with a possible conflict of interest?

4P How much effect would exposure to a litigation based on a potential conflict have on your decision to take steps to push for increased conflict policies, education and review for the firm?

Demographics

The demographics enquiry is intended to identify key characteristics in the population which may affect the view of tolerance (acceptance) of conflicts of interest.

1. Gender (as you identify)
   - Male
   - Female
   - Other
2. Years of Practice Experience
   - new to 5 years
   - 6 to 10 years
   - 11 to 15 years
   - 16 to 25 years
   - more than 25 years
3. Country of Law Practice Experience
   - Canada
   - United States
   - Other
4. Size/ Nature of Firm
   - In house
   - Solo
   - 2 to 5
   - 6 to 50
   - 51 to 100
   - More than 100
5. Nature of Practice
   - Litigation/ Advocacy
   - Corporate/Commercial Transactional
   - Counsel Role
   - Specialty
6. Position
   - Partner — management
   - Partner — non-management
   - Employed
   - Other

7. Age
   - 25 to 40
   - 41 to 55
   - 56 to 70
   - over 70
8. Marital Status
   - Married no children
   - Married children
   - Not married or separated

Part 3 — General self-assessment

Then there were two general questions to try to get a view of each respondents view of the factors and themselves as professionals. The first will ask for the percentage they believe each of the six factors affects their conflict of interest professional decisions. The second asked them to assess their view of themselves as a professional considering risk appetite.

Part 4 — Management response enquiries

To add more depth to understanding the effect on general professional behaviour the following questions were be asked to start a data base suggest management responses that could maximize the effect of the factors on desired behaviour.

The same 5 point Likert scale will be used, it was piloted and independently assed for variability; the 5 point scale was determined to best suit the sample.

- Some Effect 1
- Moderate Effect 2
- Quite a Lot of Effect 3
- Significant Effect 4
- Strong Effect 5

All questions have the same 5 response Likert scale options.

Question — If you or your firm was exposed to a significant liability because of a retainer which was found to involve conflict of interest would the significant cost in deductible, insurance rating and management time how much effect would it have in:

1. Causing you to change your time and effort to assess for client conflict when you accept a client beyond the base firm requirement?

2. Causing you to change your view as to whether you would accept a current recognized conflict (with a technically sound Chinese wall)?
3. Cause you to change your view as to whether you would accept a perceived potential conflict, with the concept of adding a technically correct wall if needed later?
4. Cause you to counsel clients more carefully as to the need for independent legal advice and avoidance of conflict?
5. Cause you to be more inclined to whistle blow to management about retainers of concern by other partners?
6. Cause you to accept requiring a second view approval on all retainers by management or a committee?
7. Cause you to accept that increased file supervision and review by an ethics committee is required to effectively protect yourself and the firm?
8. Cause you to approve an expensive computer based conflict search system that requires you to identify conflict before file opening?
9. Cause you to support a strong policy for rejecting a potentially conflicted retainer even if the client agrees and there is an ethical wall?
10. Cause you to accept rejecting a retainer where there is no current but there is a potential future conflict in a multi-party retainer at intake?
11. Cause you to support a conflict policy that requires review at key points in a matter to see if conflict arises?

Survey ethics and explanation

The survey had the following explanation and set up for ethics.

Study for doctorate business administration

Professionalism and liability

Explanation for respondents

You are being invited to participate in a research study titled ***"How Effective is Personal Liability as a Regulator of Professional Conduct for Lawyers."*** This study is being done by Alison Manzer from the University of Reading, Henley Business School, also a practicing lawyer in Toronto, Ontario, called to the bar of the Province of Ontario and active with related committees with the American Bar Association.

The purpose of this research study is to assess the relative effect of the matters that regulate the choice to accept or reject a retainer in conflict of interest retainer decisions and will take you

approximately 15 minutes to complete. Your participation in this study is entirely voluntary and you can withdraw at any time.

The survey is based on the assumption that the lawyers responding intend to and will make a proper professional choice. The enquiry is what of 6 identified factors most influence that choice, it is not enquiring whether the respondents would act professionally, that is assumed.

There is extensive literature stating that liability is an effective regulator of behaviour influencing professional conduct, supplementing or replacing regulation and providing additional market support by source of recovery to deal with the perceived issue of market inefficiency from information friction. Liability in this case means the personal, including where applicable vicarious, liability imposed by the requirement that professionals be exposed to personal liability for the results of their performance (in North America because of the required partnership structure) not the exposure of firm assets.

However, it has been stated by some writers that the cost and benefit of this method of regulation of behaviour is grossly under tested as to the assumption that the threat of common law tort liability in fact deters tortious conduct. It is hoped that this research will assist lawmakers, the profession and law firms to better regulate and manage conflict of interest and client intake resulting in lower cost and risk for lawyers without loss of professionalism.

Professionalism for this research has been defined as conflict of interest, assessment and acceptance; conflict of interest is considered to be a suitable proxy for professionalism as a whole. Conflict of interest is the leading cause of liability claims against lawyers, on all basis, including specifically in professionalism-based claims. Conflict of interest is one of the primary professionalism requirements of legal practice in all common law (and civil law) organized legal jurisdictions and the most commonly assessed (at each client intake).

Therefore, I am seeking to answer the Research Question:

"How much does the imposition of personal, including vicarious, liability for lawyers affect conflict of interest professionalism decisions at client intake compared to other methods of regulation?"

By completing this survey, you are consenting to the use of the responses for the purpose of anonymous aggregation and statistical analysis of the factors affecting professional decisions and the best management practices for conflict of interest control practices that arise as a result. The responses will not be disclosed, identified, analyzed or used on an individual basis or for any other purpose. Individual survey responses will be destroyed on completion of the

review and assessment, only aggregated results will be maintained. No one will have any visibility to the identity of any person responding.

I believe there are no known risks associated with this research study; however, as with any online related activity the risk of a breach is always possible. To the best of our ability your answers in this study will remain confidential. **I will minimize any risks by using the anonymous survey tool, Qualitrics, which uses highly secure encoded systems and provides only fully anonymous responses to the researcher. I will have no access to the names of responders, their location, or otherwise and this information will not be recorded or retained.**

Appendix D — Legal concepts used in the thesis — literature

The following is an informal outline of legal matters relevant to the thesis content that may be of interest and useful for a non-lawyer reader. This is informal information not presented in an academic style or with formal citation. Much is based on 42 years of experience practicing law. The concepts properly reflect legal concepts and were developed for this project using literature but are not intended to form part of the research or thesis, they are provided for reader assistance only.

Legal practice — context for the study

In order to properly understand the enquiries, theory development and the hypotheses which are being used to examine and test the theories, it is necessary to understand the context of the issue, which is examined and debated in law and professionalism and law and economics. Using the Fortney literature extensively cited in the thesis, and selected aspects of practice management which are used for the assessment of this thesis, the concept of the research started with the intention to understand whether a law firm partnership will enhance its review procedures, and its criteria for the rejection of a client retainer, in circumstances of client conflict of interest, because there is individual and vicarious liability imposed on the partners. The corollary of this result would be that greater attention to the adverse effect and the greater amount of potential liability should increase both the review and the likelihood of the rejection of a client retainer as a consequence of client conflict of interest. Both of those reactions have significant costs to the law firm, its partners individually and the client, particularly for the larger law firm where this occurs frequently. Understanding the law firm reaction to the imposition of liability, and the effectiveness of the imposition of liability as compared to the other identified behaviour influences on both the review and acceptance of client conflict of interest, is of importance to law firm management and the cost of, and access to, the provision of legal services.

Liability — a concept of the literature that needs to be understood

Three of the concepts that underlie the context of this enquiry require understanding are:
(i) What is the personal liability and vicarious liability of legal practitioners for malpractice,
(ii) what is a conflict of a client interest and (iii) What is the resulting purpose of an assessment of the existence of conflict of interest. The review of literature, and the development of the model and concepts of the study, started with an examination of the requirement that legal professionals retain personal liability for the consequences of their delivery of legal services and the desire to

understand the necessity and effectiveness of this method of behaviour control. As a result, to place the literature in context, some discussion of these concepts is useful.

Liability for malpractice refers to the ability of a client, and potentially third parties, to take legal action and recover damages against a legal practitioner as a consequence of negligence or misconduct. This would arise in circumstances where there has been a failure by the lawyer to meet a standard of care, or standard of conduct, that is recognized by the profession to be in keeping with reasonable, profession based, standards of conduct. Malpractice arises when there is a failure to reach that standard of care or standard of conduct. A malpractice lawsuit is a tort lawsuit alleging negligence by the professional or in some circumstances can be a lawsuit based in breach of contract or fiduciary duty. Lawyers face allegations of malpractice in four general areas: (i) Negligence as a consequence of legal advice error, (ii) Negligence by mistake such as missing a deadline, (iii) An error in representation in the professional relationship, and (iv) Fee disputes and claims which may be filed by the opposite party or a non-client against the lawyer on the same basis. Lawyers are required in all dealings and relations with the client to act with honesty, good faith, fairness, integrity and fidelity, these are the central concepts of all legal profession codes of conduct. The lawyer must deliver the legal skill and knowledge that is ordinarily possessed by members of the possession. A lawyer must abide by the professional requirement of loyalty, confidentiality and advocacy (the basic reasons for conflict restrictions). All of these are requirements for being permitted to engage in legal practice and are imposed by professional standards of licensing.

A number of other professional requirements are involved in the legal relationship between lawyer and client including those of the necessity of avoiding conflict of interest and insuring there is no breach of attorney client confidentiality and privilege. These are to support the fundamental legal professional requirements of confidentiality of client information and the ability to provide independent advocate-based advice and service. Where the lawyer fails to meet the required standards then, in addition to professional discipline, the client, or in some instances an adversary or third party, may take legal action against that lawyer claiming damages and a requirement for payment of a monetary amount to rectify the damage. This liability, in tort or contract, is not significantly different from that of other professionals, but in the context of the legal practitioner is underpinned by a very significant code of professional conduct bringing in requirements to meet professionalism and ethics standards in addition to the quality of the delivery of legal services.

As a result of being required to carry on business either individually or as a partner of a general partnership (there is some limited ability to use a corporation for business and tax reasons but

not to shield liability) a lawyer is responsible for their own malpractice and, when in a legal partnership, for the malpractice of any of the members of the partnership and its employees. This adds a very considerable cost to the delivery of legal services because of the risk and the need to manage for that risk.

Claims which are made against lawyers now also include claims by government arising from regulatory matters. There has been a dramatic increase in recent years in allegations of conflicts of interest, claims arising from the issuance of opinion letters, claims following incidents of insider trading, malpractice claims and claims based on breach of fiduciary duty. (Davis 1994) Recent years have seen lawyers being more commonly sued for legal malpractice, and a growing number of theories of liability are being made available to assist clients and third parties in undertaking these suits. Client rights are generally expanded by invoking the detailed lawyer professional codes, which are admissible as evidence, and indicate the standards to which lawyers are held. These lawsuits are increasingly forming a ground for discipline using the very extensive lawyer professional codes, that frequently include conflicts of interest requirements and principles. (Wolfram 2001) Looking to sue their lawyers as a consequence of the view that the loss will be covered by insurance and cause the defendant lawyer no actual financial loss is frequently present. Clients and others often believe the large insurance policies held by lawyers are a “cookie jar” to reach into without concern for the personal issues for the lawyer. This is far from the truth, and while courts now seem to accept legal malpractice recoveries as a cost of conducting business, and being appropriately covered by malpractice insurance, this fails to recognize the overall professional cost. There is a need to rebalance views and this could be done by understanding the effectiveness of liability as a regulator of conduct and the generally imposed costs on both the providers of legal services and their clients as costs are passed on.

Conflict and the issues for lawyers

Recent studies in Canada, in the Province of Ontario, have found that approximately 8% of the regulatory matters coming before the Law Society of Upper Canada through the period ending in 2016 were concerning conflicts of interest, and 5% of malpractice insurance claims were due to conflicts of interest (The Law Society of Upper Canada 2016). The Canadian Bar Association has enunciated ethical practices in a self-evaluation tool that includes conflict of interest as a client management issue and suggests that policies and procedures must be in place to check for and evaluate conflicts of interest. It has been noted by leading academic writers in the area of legal regulation that lawyers are regulated generally using four different systems, professional discipline; direct judicial regulation of trial and appellate lawyers

through court proceedings; direct regulation by some administrative agencies and civil liability, mostly for malpractice. These methods have been developed for the purpose of deterring professional misconduct but there is considerable debate as to their effect because of the lack of coordination, the difference in the nature of the proceedings and results, the standards they define and impose, the sanctions they impose and the effectiveness of those sanctions. (Schneyer 1997–1998)

As noted, the finding of malpractice liability frequently is grounded in issues arising from a conflict of interest. It is accordingly necessary to understand what constitutes a conflict of interest for the purposes of the imposition of malpractice liability on lawyers. Lawyers are required to avoid conflict of interest which could affect their independent, objective presentation of legal advice to their clients. As an example of the very specific requirements, the Ontario Rules of Professional Conduct of The Law Society of Ontario define conflict of interest, or conflicting interest, as an interest (anything of importance or consequence) that would likely have an adverse effect on the lawyer's judgement on behalf of, or loyalty to, a client or prospective client, or that a lawyer might be prompted to prefer self or the interest of others to the interests of a client. Conflicts of interest include not only current conflicts of interest but potential conflicts of interest, interests that would likely have adverse effects or that a lawyer might be prompted to prefer. The Canadian Bar Association's Code of Professional Conduct requires that a lawyer must not advise or represent both sides of a dispute except in some few instances after adequate disclosure to and with the consent of the client or prospective client concerned. A lawyer should not act, or continue to act, in a matter where there is or there is likely to be a conflicting interest.

The classification and identification of conflict is not a "bright line test," it is subtle, nuanced and complicated in many instances, as is reviewed in Chapter 3 "Defining the Variables." A conflicting interest is one which would be likely to affect adversely the judgment of the lawyer on behalf of, or their loyalty to, a client or prospective client or because of which a lawyer might be prompted to prefer another's interest to the interests of a client or a prospective client. A lawyer who has acted for a client in a matter should not thereafter act against them (or against persons who are involved in or associated with them in that manner) in the same or any related matter, or place themselves in a position where they might be tempted or appear to be tempted to breach the rule relating to confidential information. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work they have previously done for that person. The American Bar Association provides for a substantially similar test requiring that a lawyer recognize that conflict of interest arises

where the representation of that client may be materially limited by the lawyer's responsibility to another client or by the lawyer's own interests.

Conflict of interest as a client and client conflict generally ranges from (i) Acting for both sides in a legal transaction, (ii) Acting for multiple interested parties in an overlapping legal matter, (iii) Representing a corporate client where there may be separate interests for its directors and officers, (iv) Representing a party adverse in interest to a former client where information relating to that former client may impact the matter undertaken by the use of confidential information, and (v) Circumstances where a lawyer has developed a personal conflict of interest such as personal investments with the client. The possible intersections of interests and knowledge which can give rise to conflict of interest are extensive.

As stated by the Law Society of British Columbia in its professional conduct handbook, conflict of interest relating to client interests arises from the general principles that a lawyer has a duty to give undivided loyalty to every client, and a lawyer has a duty and responsibility to maintain the information relating to a client confidential. Limited exceptions are granted in most professional conduct handbooks and guides allowing a limited ability to act for clients adverse in interest where those circumstances are specifically permitted and where there is informed consent. Another issue of concern as to conflict of interest is the establishment of a separate business relationship by a lawyer with a client, such as holding equity in the client. This is permitted by requires care in ensuring advice independent from the interest of the lawyer as to matters affecting dealing with the equity interest, requiring independent advice from another lawyer on those matters.

As a result of the professional prohibitions against acting in circumstances where clients are in conflict of interest, clients have access to professional malpractice liability for the purpose of seeking redress for damages whether directly arising from that conflict of interest or not. A lawyer must be able to gain sufficient information about the client, issue and conflict before commencing a retainer to determine when a conflict of interest exists, and then make a determination as to whether the extent and nature of the conflict of interest will allow the retainer to proceed despite the conflict of interest either because of an exception to the restriction or as a consequence of the limited nature of the conflict. (Fortney & Hanna 2001)

The review by the lawyer in assessing client conflict of interest must initially start with the attempt to eliminate liability and vicarious liability, but also needs to take into account the malpractice insurance experience ratings and cost, reputation adverse effect, and potential impact of a claim against partnership assets. The interests of the client also must be considered, legal advice and relationships are not fungible. Lawyers must assess the potential for a conflict

of interest at the initiation of the client intake and frequently will also need to reassess conflict of interest as the matter proceeds. The lawyer must assess the potential conflict of interest at first contact in order to ensure that they have identified conflicts of interest and reject a retainer prior to receiving confidential information from the new client, if there is conflict. Once confidential information is obtained from a prospective client it will be necessary to continually evaluate for conflict of interest that might arise during the course of representation. Lawyers in a firm will generally be required to obtain and review memos outlining potential representations, to ensure that there is no potential problem with the representation based upon conflict, this will generally be accompanied by some form of manual check or computer system that will check against firm retained data. (Fortney & Hanna 2001)

As a consequence of the growing size of law firms, the professional regulation relating to conflict of interest increasingly requires structural controls within firms, as opposed to the individual practice records, and conflict avoidance systems with internal reporting procedures which generally require firm wide review. Comments have been made, however, that research indicates that most law firms have inadequate structural controls and even firms with well-developed conflict procedures at intake tend to lack the systematic procedures that might be required for detecting conflicts arising during the course of representation (Chambliss & Wilkins 2003) Consistent with the Fortney theory indicated above, the literature has noted that effective policies and procedures, particularly within a larger firm, that are designed to promote compliance with ethical standards, particularly around conflict of interest, may assist lawyers resisting informal pressure to lower practice standards (Chambliss & Wilkins 2003)

There has been some concern expressed in the literature that notwithstanding the starting point dictating rejection of any conflict of client interest, the professional standards and the legitimate requirements of clients may indicate that rejection of a conflict of interest is not always in the best interest of the client or the most effective delivery of legal services. Where clients have specific reasons for their choice of legal counsel, frequently as a consequence of knowledge of the client and its affairs through prior engagements or a long-standing trusted relationship, and the client is capable of assessing the consequence of conflict of interest, deference should be given to the views of the client, and their ability to consent and waive conflicts of interest. In those circumstances, provided the waiver is informed and complete, liability should be eliminated as to the conflict of interest aspect of the arrangement. (Ewing 1983)

The cost of regulation for conflict

The consequences of professional regulation relating to conflict of interest have been the development of extensive, and potentially very expensive, firm infrastructure blending

policies, the use of technology and cultural requirements to identify and control retainers. Lawyers within the firm are required to strictly comply with the procedures for the identification of conflict of interest, and the determination of independent third parties who are often committees or appointed ethics or general counsel partners, as to whether the client retainer can be accepted in the face of an identified conflict of interest. These requirements are frequently accompanied by mandatory conflicts checks, mandatory compliance with conflicts standards and rejection of conflict of client interest in a wide range of mandated circumstances. Frequently best practice will place responsibility for this compliance with a committee, such as a firmwide ethics committee or practitioner specialist. These increase cost to the firm, increase the likelihood of rejection of a client retainer and its accompanying revenue, and add the cost of the compliance measures which increases with the formality and requirement for independent review. (Alfieri 2005)

The cost to the larger law firm is significant, as both the likelihood of conflicts and the difficulty of identifying them increases with the size of the firm despite the reason for the rules having less actual presence. Further, these costs are not effectively dispersed across the partnership or the clientele, they tend to be clustered around particular clients and particular partners. This gives rise to significant management issues as a consequence of the concerns that an individual's partner reputation, advancement in the firm, and compensation may be tied to the acceptance of clients, where the overall health of the firm would dictate rejection as a consequence of the conflict of interest. (Schneyer 1998)

As a consequence of increasing exposure to liability arising from conflicts of interest, there is increasing cost to the delivery of legal services which tie into both the increased need to investigate potential conflicts of interest and to deal with the consequences of conflicts of interest when they arise. An insured lawyer, even where insurance covers the full amount of the damages, will be responsible for the deductible under the insurance policy, future insurance premium surcharges, the cost of time and resources devoted to defending the conflicts claim, dealing with potential disqualification motions, and the cost of harm to the reputation and standing of the lawyers. (Fortney & Hanna 2001). Firms therefore are increasingly bringing into play expensive and complicated conflict avoidance procedures. The firms will set up requirements, prior to the acceptance of a retainer, to compare the parties adverse to the proposed client through a database of all past and present firm clients, and lawyers will be prohibited from commencing the work and billing hours until the database comparison is complete. This database comparison will often include potential conflict with the lawyer's interests which could be in conflict, including those of the law firm, their family, their business

and other interests. Effectively the review must ensure that there is no acceptance of a client retainer where confidential information could be shared or where the objectives of one client's representation conflicts with the objectives of another or the interest of the lawyer. In the current environment of increasing litigation, law firms are now forced to expand client research from a database name check to include background and credit checks and monitoring of external databases for evidence of potential conflict. All lawyers in the firm must review the memos prepared, and provide their personal, file based, information as to the potential of conflict. (Fortney & Hanna 2001)

The difficulty of the assessment of a conflict of interest involves the two aspects of identifying the conflict or potential conflict and then determining whether the client retainer can be accepted in the face of the conflict of client interest. This is a fundamental management issue for the law firm because a reaction to potential conflicts which results in a failure to accept a retainer will result in loss of revenue for the law firm. Client costs can be increased as a result, either as a consequence of the additional costs which are passed on by the law firm through their increased malpractice insurance and conflict of interest processes and protocols or as a consequence of the inability to retain the lawyer of their choice. It may be more cost effective for a client to retain a single lawyer or law firm together with others having similar but not identical interests notwithstanding the potential conflict of interest. It can be more cost effective for clients to continue to use lawyers that they have long relationships with and therefore have a strong knowledge of the client's needs and requirements.

Clients incur additional expenses in retaining and educating new lawyers. The process of developing and implementing the policies and procedures utilizes resources that could more effectively be used in the provision of legal services. The need to check conflicts of interest can inhibit a law firm's ability to react on a timely basis where matters are time sensitive, which is a frequent occurrence. (Fortney & Hanna 2001)

The legal services market is becoming highly competitive and as a consequence lawyers struggle to attract and retain clients. This can result in an erosion of professionalism and appropriate ethical responses including those relating to conflict of interest. (Alfieri 2005) The increasing competitiveness of legal practice and law firm incentive systems makes it hard for lawyers to turn away clients, notwithstanding the identification of conflict of interest. This increases the business management concerns arising from the identification and assessment of conflict of interest. (Ribstein 1998 noting Carl S. Okamoto FN 144) The increasing access to the use of malpractice liability by clients and third parties suing lawyers with claims based in conflict of interest is increasing the cost of delivery of legal services. The costs are substantial,

in the cost to law firms of identifying, assessing and rejecting client revenue as a consequence of conflict of interest, access to counsel of choice by clients, the increasing cost of malpractice insurance and passing on of those costs to law firms and in many circumstances to their clients. The result is a very expensive system of behaviour regulation, and one which has been the subject of significantly different views as to its efficacy, but without a quantitative, empirical study as to whether the imposition of liability does affect, in an economically rational fashion the practices, procedures and steps for the identification of conflict of interests and potential conflict of interest. It is trite to note that "the appropriate selection of new clients is also crucial to a firm's success. Clients will be neither content nor profitable to the firm if they value a different kind of service than the firm has decided to offer." (Samuelson & Fahey 1990–1991)

The reason for the research question

The debate as to the relative effect of a number of professional behaviour modifiers, and the consistent recognition of the issue and recognized shortcomings of the literature to date creates a solid platform for the research. The research question explores: "What is the relative effect of the six primary methods of behaviour control for lawyers with regards to the professional decision to accept or reject a client retainer considering conflict of interest."

The literature review findings in the three primary disciplines will be explored in more detail subsequently, but the review findings effectively result in recognition of the following points:

- **(a)** There is an oft stated (and debated) view that imposing personal liability for professionals is a good (and may be the best) method of regulating professional behaviour, but it is not empirically researched, only compared and with no consistent conclusion.
- **(b)** The speculation is that liability is necessary to regulate the profession because of market inefficiency from information friction, which leads to a comparison of the regulation methods (primarily liability and formal regulation) but not an assessment of the existence or extent of an effect or statement of theory as to this effect.
- **(c)** Literature postulates that liability for lawyers is required to manage for the economic theory that there are incentives to "cheat" on time, quality and control without research as to the existence or extent of the effectiveness of the liability effect. It has not been empirically tested.
- **(d)** As a result, there is almost no assessment as to whether any of the foregoing are correct, meaning the underpinning of the concepts put forward is not on a solid empirical foundation.

(e) Until the more recent discussions of behavioural economics, there was a failure to appropriately recognize that lawyers are people delivering a complex service which requires education, training and adherence to professional standards which are dictated by the profession and society. As people in that role, they are significantly guided, directed and influenced by influences arising from their interactions with the profession, society, clients and peers.

(f) A first step to solidify the foundation for assessing the use of liability as a conduct regulatory approach is to determine if liability creates a positive (client protective) reaction; using the empirical studies done on the effect of tort liability can present a starting point but does not present solid conclusions specific to lawyer professional behaviour.

(g) If there is a significant effect from the liability risk, then the next step is to understand the nature and scope of the reaction and compare it to other methods of achieving the same result.

(h) If the theory of liability effect tests positively and the reaction to liability is effective and comparable to or exceeds other methods then further research can then assess the cost/benefit analysis of each.

(i) There is no research that gives a method for research that deals with the need to recognize that liability is the practice norm for lawyers. There is a need to find a way for the research subjects to be able to analyze and respond as to their reactions, and compare that to other methods used to encourage and even enforce appropriate professional decisions.

(j) Using conflict of interest as a proxy for professionalism, the rationale and acceptability of that choice provides a means for defining professionalism in a way which could be quantified and tested.

The point at (e) is the heart of the thinking in behavioural economics. This is that the human element of the interactions of lawyers with others, on an individual basis and a societal basis, will have a significant influence on how lawyers react to the requirements of professional standards, and how best to manage the reaction to most effectively influence behaviour toward maximizing the efficiency and effectiveness, while delivering services to the enunciated professional standards. Assessing and being able to quantify these reactions will provide an important tool for management, effectively recognizing that leadership, culture and reward systems are delivery systems which will necessarily influence promotion of professional behaviour.

The literature to date has not taken the step of quantitatively identifying the relative effect of the imposition of liability on the process of assessing conflict of interest, either as to whether the imposition of such liability changes the approach to the identification of conflict of interest or changes the assessment of the acceptability of conflict of interest. While not quantitatively assessed, the literature recognizes that the costs to the legal profession, both in actual financial costs as a consequence of increased administrative, insurance and damages and lost revenue and the cost of reputation damage, are significant, but without any effective study to determine the most efficient way to manage for that cost. Further there has not been an assessment of either the extent and nature of those costs or of the effect of those costs on the professional conduct of lawyers, individually or as a firm. This leads to the research question looking at the professional issue of conflict of client interest, the requirement for behaviour regulation and the cost to the legal profession, and its clients as a consequence of the passing on of such costs, as well as the cost to society in increasing the cost of, and difficulty in accessing, legal services.

The grounding point for the literature review

"The unlimited liability shared by partners encourages the partners to participate actively in firm affairs in an effort to control their own personal liability exposure. Vicarious liability provides a powerful incentive for principles to engage in a careful selection, instruction and supervision of personnel, and to take "every precaution" to see that they conduct the enterprise safely." (Fortney 1997)

Fortney goes on to note that the vicarious liability which is imposed on legal professionals undertaking business in a partnership structure gives an incentive for the principals of the law firm to engage in activities which will lead to conducting the enterprise safely, the traditional justification for vicarious liability embodies the principles of risk allocation and harm avoidance through deterrence. This builds on the general deterrence approach which imposes liability in a manner that encourages people to act efficiently and avoid injury to others. (Fortney 1997) The theoretical base has been expanded by noting the Harris study which suggests that empirical data has supported the concept that the threat of tort liability discourages professionals from engaging in tortious conduct. This concept, arising from the theory that vicarious, firm wide, liability for harm caused by the negligence of law firm personnel gives incentive to adopt controls, is generally considered in the context of law firm regulation and discussion as to the effectiveness of such regulation.

The body of literature in law and professionalism notes that the first category of negligence, mistakes of law, rarely leads to the imposition of vicarious firm liability as a consequence of

small size, the large costs of pursuing such claims and the advent of extensive malpractice insurance which would frequently pay on these complaints. These articles observe that complaints which are made to regulatory bodies will generally not result in discipline arising from the agency concepts of vicarious liability. (Schneyer 2013) The academic discussion, while looking at the tension between commercialism and professionalism in the legal profession, gives rise to the question of who should regulate and how should they regulate the legal profession. The determination in essentially all North American jurisdictions is to use self-regulation by a professional body, which gives rise to the concern that regulation may not effectively deal with issues of professionalism where they are contrary to the commercial and business development of the profession. (Whelan 2009)

One of the professional requirements which has been extensively considered, looking at ethical problems and the imposition of liability, are conflict of interest issues. Conflict of interest issues are considered an effective illustration of the sources of ethical problems for large law firms, being both increasingly difficult to manage and monitor and an increasing source of liability challenges by clients and "near clients," with increasing instances of the court finding liability based in conflict claims. The cost of a conflict of interest liability claim is both a financial cost and damage to a firm's reputation. There are often discrepancies between risk and reward balances for a lawyer, a team, a department or for the firm which creates increasing difficulties in managing and administering conflict of interest decisions. (Hazard & Schneyer 2002) Hazard and Schneyer note that where a lawyer will benefit disproportionately if things go well, and the legal and reputation costs only arise if the risk actually materializes and will be spread throughout the firm, lawyers may be encouraged to engage in wrongdoing that results in liability as to a third party claim without effective discipline as a consequence of the coverage by insurance or the spreading of the consequences and result of the claim.

Reviewing the literature in this area, it is necessary to be cognizant of the discussion as to the intersection between the use of liability and that of direct regulation within the self-regulatory mechanisms of the legal profession. The research question looks at law firms, as well as sole practitioners, which brings into the discussion consideration of the structure of the law firms and their relationship with the individual lawyers that carry out the conflict of interest reviews as well as the recognition of value and credit for the work which arises from the acceptance of client retainers. The bureaucratization of law firms, and the imposition of procedures, systems, committees, reporting lines, technology capabilities, compensation and promotion among others can affect behaviour as much as individual skills and values. (Schneyer 2005) The conclusions reached by authors such as Schneyer are that vicarious liability does give an

incentive to an organization to do what can effectively be done to prevent or mitigate misconduct in a way that may be more ethical than direct judicial sanctions for ethics violations. Those authors state such direct judicial sanctions are more likely to influence internal law firm controls in the circumstances of conflict of interest, particularly where the judicial sanction is disqualification by a law firm from acting because of such conflict of interest. The adequacy of the firm's internal controls will both affect the likelihood of judicial sanctions and the likelihood of both a liability attack and success in that attack.

The economist's view of the discussion in law and professionalism is that economic theory can support the imposition of liability for professional conduct, including conflict of interest assessment, because the clients want to insure that the lawyers personally have incentives such that that the advice they give is not arrived at negligently, or without adequate consideration of the specific requirements of the client. (Iacobucci & Trebilcock 2013) This has been supported by discussions making the argument that unlimited liability can be a solution to the moral hazard problem posed by an asymmetry between the client and the professional, primarily an information friction asymmetry. It also serves to provide a market indication that there is a trustworthiness, both as to competence and professionalism, of the members of the firm because each of the partners is willing to place their personal assets at risk for their conduct and skill as well as for the conduct and performance by the remaining partners and employees. (Stephen & Love 2000)

Research in the accounting profession of interest

The related professional field accounting particularly as to auditors and audit risk management provide some empirical studies of use to assessing a potential research philosophy. Research in accounting risk management has done testing studies to look at the effect of changes in litigation risk levels of client portfolios following audit failures. The tests did not indicate significant changes in overall management practices but concerns were noted that the scores used were comprised of factors that fluctuate, perhaps widely, from year to year and that therefore studies may need to be a redone to analyze changes in client portfolio decisions over time and stressed liability failures. The conclusion of these studies was that following audit failures auditors do not make long term adjustments to their risk-management strategies as they relate to client acceptance and retention decisions. These studies also noted that the need to establish and preserve reputations for providing high quality audits seemed to be of more importance. The review, and thesis format, of these studies did not provide an outline of the basis for the research philosophy or methodology underlying these audit studies. (Fafatas 2006) The Fafatas study looked at the effect on the fees charged in addition to client intake

practices and noted that there was no detectable increase in fees charged to high risk clients compared to those of lower risk clients. The study is useful in indicating a potential thread for research but does not provide sufficient support as to the selected research philosophy or methodology. The Fafatas thesis study found that the client's overall financial condition is the primary litigation risk factor that auditors consider in planning and pricing decisions, effectively the primary assessment at client intake. Clients with greater financial risk were generally the subject matter of more audit evidence, more effort and accordingly higher fees.

Nicholas Dopuch and Ronald R. King, The Accounting Review, Volume 67 No. 1 January 1992 page 97–120. *Negligence vs. Strict Liability Regimes and Auditing: An Experimental Investigation.* Dopuch and King (1992) undertook an experimental study looking at the question of whether there are systematic benefits for imposing a strict liability rule on verification services in accounting. The purpose of the review was to look at differences between negligence liability, which allows for a standard of care defence and strict liability which is imposed as liability as a consequence of the results as opposed to the handling of the matter leading to the results. The experimental study they undertook indicated that negligence liability operates at a level of economic efficiency higher than in the strict liability regime, meaning that strict liability did not improve audit conduct. Discussion of the paper was that the results of the experiment suggest that tendencies of courts, and the auditing profession itself, to expand the scope of auditors' liability may not achieve the net benefits of improved audit performance expected from such expansion toward strict liability.

The experimental study compared a no liability regime, that is one in which the accountant is not liable regardless of the level of services provided against both a liability regime and a strict liability regime. In a negligence liability regime the professional is not liable if they provide the due care in the level of service, in a strict liability regime they are liable for the consequence regardless of the service level. The concern which underlay the desire to do the experimental study was that although auditors, as a profession, do not operate under a strict liability regime expansion in the imposition of liability in the profession is resulting in a scope creep moving towards strict liability. The experiment was done using 120 subjects, consisting of undergraduate business students, and using a market participation experimental study. This study represented an empirical study, focused on the accounting profession, with results indicating that the efficiency levels are significantly higher in the negligence and strict liability markets than in a no liability market. It also indicated that the results were significantly higher in the negligence market than in the strict liability market. However, the authors concluded that after subtracting the cost of audit testing, the efficiency levels do not differ among the three

regimes, providing mixed support for any of the hypothesis of liability and performance benefit. The conclusion relevant to the thesis study is that this was an empirical study, albeit of an experimental investigation format, which indicated that when the additional costs required for the performance of services, in a strict liability, negligence liability system are compared to no liability, there is no benefit or advantage to imposing either of the liability systems. This is consistent with the conclusions of law and economics, that liability regimes may not represent an economically efficient method of control of professional behaviour.

Ronald R. King and Rachel Schwartz, Contemporary Accounting Research, Winter 1999, 16, 4 *Legal Penalties and Audit Quality: An Experimental Investigation*. King and Schwartz (1998) reviewed the impact of legal penalties on audit quality under different legal regimes. The premise behind the investigation was that economic theory predicts that players adopt equilibrium strategies that reflect the expectation that a penalty will be incurred, but the actual occurrence of penalties, if consistent with the expectation, does not prompt an individual to modify his or her strategy. This contradicts learning theory which suggests that player's choices will be repeated in the future based on outcomes. The experimental study found that penalties trigger both increases and decreases in effort and seemed to introduce a shock that increased the variability of effort, with greater changes in effort closer to the imposition of penalties and smaller changes as more periods go by without a penalty.

The imposition of legal penalties is effectively the liability factor that is being discussed and reviewed in this thesis. The study, while looking specifically at auditors and audit practices, looked at how subjects react to the actual imposition of financial penalties under the various regimes. This study, similar to the Dopuch study (Dopuch and King 1992), looked at two damage measures, out-of-pocket damages and independent of investment damages and two liability rules negligence liability and strict liability. Using experimental economic concepts the study looked at the tie between financial payments and choices made by the subjects, looking at a controlled assessment of how legal regimes and financial penalties influence choice patterns. This study found that there were not significant differences across the four legal regimes, and that the actual imposition of penalties had a significant effect on subject choices of effort, with the effort increasing in the period immediately following the penalty, however falling away to a level at or below the pre-penalty level over time. These findings looking at audit effort, is similar to the study review of professionalism decisions and conflict of interest. The determination as to how much effort to place in an audit process is a similar professionalism choice to that of the conflict of interest choice of lawyers. This article does cite, with favour, the Dopuch and King (1992) review.

The method used a subject pool of 60 business school students. The object was that they, as if an auditor, should select an effort level which will minimize total costs, looking at the direct costs of the effort and the expected cost of liability. This is not precisely *ad idem* with a review of professionalism choices which are more complex and have more implications outside of the strict economic effect. It does, however, support much of the law and economics concepts where the study finds that the actual occurrence of the penalty does not particularly influence the players equilibrium effort choice if it is consistent with expectation, and any effect of an actual imposition of liability penalty is temporal, falling away in a relatively short period of time following after the penalty. The statement is specifically made that the model accounts only for some and short term response and liability is not a consistent and strong factor affecting professionalism behaviour, consistent with the literature in the areas of law and economics.

Fafatas noted that Johnson and Bedard (2004) reviewed audit liability by looking at risk characteristics of departing and new clients. Their study used logistic regressions, comparing discontinued clients to continuing clients and new clients to continuing clients evaluating client risk in terms of both financial and audit risk. Johnson and Bedard have also used data gathered from engagement partner's assessments of their existing clients to look at earnings manipulation risk and poor corporate governance, indicating that this has led to both planned audit hours and billing rate increases. Much of the legal literature looks at liability and management issues for law firms using economic principles to underpin their thesis and arguments.

Claire Kamm Latham and Mark Linville, Journal of Accounting Literature, Volume 17 1998, pages 175–213, "A Review of the Literature in Audit Litigation." Latham and Linville (1998) note in their article that the important role of the auditor in the release of financial information means that the public needs assurance that the auditor is performing appropriately. Standards have been created to ensure appropriate performance and the legal system can be invoked to impose civil liability on an auditor who causes harm through a failure to perform their duty. This is similar to the liability which is imposed on lawyers, in fact it is a directly parallel liability system. The article discusses the fact that there has been considerable debate in the United States about the role of civil liability to be used for settling economic disputes and concern has been raised that law suits have been increasingly abusive, lacking merit in the plaintiff's claims, and imposes a significant cost on the profession.

The article, citing Simpson (1988) identifies the five functions of a legal system that are aspects of the civil liability system for audit litigation, these are resolution of the conflict, communication of expectations, damage recovery, deterrence or regulation of behaviour and restraint, distribution of power. These concepts are very useful for understanding the expected

impact of liability on professional behaviour and the following figure has been taken from the Latham and Linville article. The article, again citing Simpson (1988) indicates the belief that the legal system should serve as an agent of stability establishing expectations about roles and responsibilities, using the statutory law to codify legislative intent, and common law using the legal concepts of precedent. An interesting complexity to the use of liability to influence professional behaviour is identified in the article where it notes the five functions, and comments that damage recovering behaviour restraint is reactive, the damage having occurred, with the deterrence objective being proactive, seeking to prevent injury. Deterrence is only achieved as the threat of damage payments or other negative consequences are sufficient to prevent the breach of the duty, it would be necessary to make the inappropriate actions sufficiently costly to provide an inducement to better professional behaviour. Law suits must therefore be associated with improper action by the, in this case, auditors.

The discussion of the article is that in many instances litigation is not of this nature but rather arise from other motives or actions on the part of the parties taking the litigation steps. Therefore, it may be that deterrence causes more restrictive rather than client screening better professional performance, which in the case of legal professionals is contrary to the requirement of societal access to the professional services. This is also the case in auditing where it is becoming increasingly difficult to retain auditors of choice. Deterrence effect would have any concern about litigation at least partially resolved by avoiding clients who may have tendencies which could lead to the inability to appropriately perform the audit functions. Another aspect of deterrence is correctly pricing the services, client characteristics that are associated with increased litigation risk, would normally result in an increase in fees to maintain normal profit. This increases the cost of access to the professional services on a speculative basis and perhaps without commensurate benefit.

Appendix E — Explanatory notes

In the thesis a few notes were made for further explanation. These are not necessary to the thesis text but were noted as areas where one readership or the other (legal and academic) might benefit from some explanation of the concept being presented. These are informal explanatory notes for that purpose.

EN1 Professionalism in general is a code of conduct developed to guide the proper societally desired quality of delivery of professional services. The code of conduct is intended to ensure lawyers interface with clients, other lawyers, courts and administrative bodies and society in an acceptable manner.

The following of a profession for gain or livelihood. The International Bar Association, Charles E. McCallum in April 2009 discuss the aspects of the practice of law that makes it a profession, this helps to give some guidance as to what this meant by professionalism. The discussion starts with the recognition of the classic definition of a profession is that it is an occupation which is so based on specialized body of knowledge and skills that entry into that practice is restricted to those which prove their confidence. Of more interest to the topic being researched as second a key attribute which is that it is conducted in the interest of those that serves in the public generally and the subject to self-imposed rules of ethical conduct. McCallum suggests the seven key attributes of the legal profession are:

i. Dedication to serving clients before self, dedication to serving the public interest, improving the law and to proving the profession.
ii. Devotion to honesty, integrity and good character.
iii. Passion for excellence, practice in context.
iv. Maintenance of competence in a specialized body of knowledge and skills, independence and self-regulation.

He notes that helping others being at the core, lawyers must daily subordinate their personal lives and needs of the client with service to the public interest also being an essential part of the profession. Legal professionals are, and all of the areas of this study being the legal jurisdictions in North America, although effectively throughout the world, subject to *Rules of Professional Conduct*, which make a set of requirements that lawyers as public citizens must have a duty to improve the law, improve the profession and to improve access to the administration of justice. The words used in the assessment are good character, excellence, context for the area of work, specialized knowledge and skills, independence and self regulation.

EN 2 While it may appear, on superficial review, that professionals are permitted to practice in a corporate structure, this is not legally correct in any of the primary jurisdictions where larger law firms practice, including essentially all of the North American, Europe, South American, Asian and African law firms. The ability to use a professional corporation is limited protection from business claims, a means for non-lawyer ownership or a tax related device, many jurisdictions permit the practice to be undertaken pursuant to a corporate form but the corporate form relates only to the business of the practice. The professional remains exposed to the liability which would otherwise attend the provision of professional services in a sole proprietorship or general partnership practice. The professional remains liable for the results of their professional practice, and decisions, including the professionalism decisions examined in this thesis.

Limited liability partnerships have been relatively recently developed, see the discussions later in this introduction and are intended to provide a partial shield to liability only. No jurisdiction permitting the use of a limited liability partnership allows that to extend to the professional providing the services, they remain fully responsible and liable for the results of those services and decisions, and generally for those of the persons that they supervise, the protection of liability is only as to the actions, errors and omissions of others. Even in those circumstances partners in supervisory roles will often have liability for the actions of partners that they are deemed to be supervising, creating a very partial shield from liability only. A detailed discussion of the liability, and the advent of limited liability partnerships and their effect, is included in the text *A Practical Guide to Canadian Partnership Law,* Canada Law Book, written by myself, commencing in 1996 and updated annually subsequently. That text is Canada's leading text on the topic of partnership law, including liability and the limitations of limited liability partnerships, and is recognized globally as being an expert text on the topic.

There has been public policy pressure placed on legislation and regulation of liability issues for professionals over the past two decades, commencing heavily after the failure of Arthur Andersen (accounting firm) as a consequence of the liability recoveries in the Enron matter. This history and the resulting introduction of a partial liability shield are discussed in some detail in the chapter on limited liability partnerships in *A Practical Guide to Canadian Partnership Law*, (Manzer). Much of the ability to move into this, at least partial, shield from liability arose as a consequence of the activities of chartered accountants and lawyers, including, in Canada, the Canadian Bar Association in conjunction with the Canadian Institute of Chartered Accountants. I was the lead negotiator with the Senate of Canada and represented the Canadian Bar Association in its discussions with that body. As has been noted elsewhere, the result was the encouragement of the provinces to provide a partial shield from liability for

professionals, which has been done on an across Canada basis. Other jurisdictions, following the initial U.S. model, have provided for similar protection, the limited liability of partnership protections in countries such as the United Kingdom, Australia and New Zealand being essentially identical. There however, has been continued concern that the provision of the partial shield is insufficient to deal with the issues presented by a liability based regime in the context of the continued expansion of the size and nature of law firms, the commencement of multi-discipline practices, the permission in many jurisdictions for non-licensed persons to provide legal equivalent services, among other market changes. This indicates a need for further review and consideration of expanding protection from liability into that similar to other service businesses. I testified before the Senate of Canada, Committee on Banking, Trade and Commerce, in October 1996 and November 1997 representing the Canadian Bar Association, suggesting a regime of modified proportionate liability could be a first step in balancing plaintiff and defendant rights in legislation governing financial and commercial institutions and professionals. Refer to Senate of Canada Proceedings, available online particularly that of November 1997.

While the requirement in most jurisdictions, and all legal jurisdictions in North America remains requirement to practice in a partnership a new form of partnership known as a liability partnership has been developed in the United States and is now expanded in use throughout North America and is accepted and essentially all jurisdictions. A Limited Liability Partnership reduces liability for other partners professional services, creating a partnership in which partners remain liable for their own practice and the practice of those under their supervision, but not the practice of other partners or the matters under their supervision.

Limited Liability Partnerships retain liability for the partner practicing for their own matters. In many instances it also retains liability for supervisory activities, to an extent not currently understood as a consequence of a lack of legal challenge for matters that may extend to those under management by members of executive or committee members.

There is a perception that the wording of the Limited Liability Aspects of the Partnership Acts is such that persons that participated in executive, management and committee roles may has a consequence of taking on a supervisory of responsibility or liability that exposes them to the continued for a whole members of the firm. This was not the original intention of Liability Limited Liability Partnerships which was to make liability more directed to the activities of the professional, but appears to be the result and is being used by courts and some jurisdictions to again expand liability for lawyers.

EN 3 The reference to management effects in this case are to the defensive postures and steps taken by the management of law firms, particularly larger law firms, to reduce and protect themselves from the potential effect of liability and other behaviour sanctions. These management reactions include refusing to accept retainers by potential clients (both as a consequence of conflict or concern about the nature of the retainer or client), the undertaking of expensive systems for the identification of exposure to claims, including most specifically those of conflict. Management reaction to liability is to focus both on the steps that can be taken as a defensive posture by the firm and also on the sanctioning and refusal to advance professionals that create a perception of increased risk, although law firms generally advance lawyers based upon economic performance, as much as it does on professional excellence. The firm must generate revenue, and accordingly the ability to generate revenue is a key criteria for the advancement of lawyers into and within the partnership. If retainers are rejected as a consequence of overly conservative assessment of the potential risk to liability, this reduces income for the firm but more drastically reduces the income identified for the partner who has sourced the potential retainer, resulting in more restricted advancement within the firm creating a counter to excessive rejection of retainers.

EN 4 Every business day, and often weekends and holidays, I arrive to the office with my first task being to check the client intake list and to identify potential conflicts of interests. The statement that checking essentially daily is a reality, particularly larger firms. Every client intake requires an assessment of conflict of interest, the number of times in which it was assessed, conflict of interest is depended upon the number of files. A larger firm, such as mine, will open as many of 40 or 50 a day, and the larger global firms in the hundreds.

There are a number of practice assists made available to assist in this check, including the capability of cross checks, centralized records, checks that are required before file opening, file opening clerks who have specific knowledge as to conflict of interest. Lawyers have the conflict of interest before them everyday. Lawyers must assess potential conflicts of interest everyday. Lawyers are well educated and attuned to what constitutes a conflict of interest, in general. That said the complexities of factual situations, demonstrated in the earlier explanatory note providing the examples, means the assessment is individual, and often difficult, where any implication of a client on client, lawyer on client, or business-based conflict might exist.

The American Bar Association at s. 1.7 Conflict of Interest: Current-Clients comment notes that the primary duties being considered of the lawyers' duties of loyalty and independence.

Part 14 of the Rule recognizes the clients ordinarily can consent representation notwithstanding a conflict, but some conflicts are non-consentable. A test for consent-ability is whether the

interest of the client will be adequately protected as the clients are permitted to give informed consent despite the conflict of interest, the basis being whether it reasonable to conclude the lawyer will be able to provide competent and diligent representation, this is the advocacy part of the test. This is confirmed in part 17 of the Rule which looks at vigorous development of each client's position.

The ultimate result of the conflict of interest determination is acceptance or rejection, this does not take away from the complexity of the decisions or the ability to at times accept a retainer where there is a conflict of interest using consent, independent legal advice, and protections for confidentiality.

EN 5 While the comment is taken from the cited literature in law and economics, it is useful to observe that this is the observation of the legal profession. My membership and senior leadership at the American Bar Association, and previously with the Canadian Bar Association, meant that I was personally involved in the discussions of the profession as how to deal with this trend and the cost that it added to both the profession and to access to justice issues of society. Access to justice is an issue of concern to the legal profession, based upon the many hundreds of volunteer hours spent by legal professionals attempting to find a solution to the problems of the increasing cost and issues presented by litigation against the legal profession as matter of reduction of access to cost effective legal services. I personally participated in many of those hundreds of hours, sitting on committees looking at a number of regulatory issues including the chairmanship of several committees with the Canadian Bar Association looking at requirements to reduce costs, through several means, to improve access to justice.

EN 6 incites.swim.ed/incites.can/behaviour/economics/law in 2009 wrote that behavioural law and economics seem to modify traditional law and economics by incorporating the growing body of empirical evidence on the biases and confusions that often affect human behaviour. Harvard, at www.law.harvard.edu/programs/olin/papers/pdf wrote that empirical evidence gives reasons to doubt the assumptions of the economic analysis of law.

Steven M. Sheffrin in behavioural and law economics is not just a refinement of law and economics. In Oeconomia, 7/3 2017 (https://journals.edition//economia//2640) looks at the contrast between traditional law and economics and more recent scholarship and behavioural law and economics. This article notes that the key difference between behavioural law and economics is that behavioural economics uses more realistic descriptions of human behaviour as its base, providing more accurate useful understanding of the relationships between economics and the law. The paper goes on to say that behavioural economics is not simply a refinement of traditional law and economics but changes the core of rationality principles

underlying traditional law and economics and include assessments of welfare and now present in law and economics.

Avishalom tour, in the methodology of the behavioural analysis of law, law-haifa.ac.il/images/documents/The methodology looks at behavioural analysis of law which is the application of empirical behaviour evidence to legal analysis, noting it is becoming increasingly used in looking at behavioural economics and law.

EN7 This is a simple logical thought that it is not possible to comply with or recognize, the effect of a factor if you are not aware of the factor and its intended effect. It is quite simple if a professional is not aware that liability can be imposed as a consequence of the breach of conflict interest rules in addition to liability for the making of a legal determination mistake, then the lawyer will not perceive liability as being an effect on their conflict of interest decisions. It requires professional training advising the lawyer of factors, and effects. This must supplement professionalism training which provides a clear outline of professional requirements, including those relating to conflict of interest.

This training is given to all lawyers as part of the required confidence and professional training both in the law school environments, the articling and Bar Admission programs and Continuing Legal Education required of lawyers. The conferences of chief justices is the conference of the American Bar Association, and publishes its materials at www.AmericanBar.org/groups/resources/report_archive/ccj

EN8 A fundamental problem with the identification and assessment of conflicts is that conflicts are difficult to identify as to whether they exist, or could potentially exist, the extent and nature of the conflict and whether it does or could affect the professional and ethical requirements of the lawyer. It has been noted that the standards for determining whether a matter is conflicted, and whether that requires a substantial relation or an interest being adverse, is ambiguous at best. (Painter 2001) This ambiguity extends to the difficulty of clearly providing the necessary advice to allow a client to assess conflicts, and to then waive the conflict, in a manner that will successfully shield the lawyer from the liability issues which might arise from conflict of interest. The difficulty is particularly acute where at the time of the client intake a conflict was not expected but subsequently the conflict arose as the representation continued. The concerns about ambiguity are exacerbated by the policy considerations which at times indicate that although clients need to be protected from the dangers of multiple representation, certain client objectives are better achieved through multiple representation which unfortunately then must be balanced against the need to preserve

a lawyer's reputation which is often best achieved through avoidance of any apparent impropriety. (Moore 1982–1983)

EN 9 Lawyers react to the potential for personal liability in a number of ways, this following list is based upon personal experience, management at an executive level of a large law firm, extensive involvement in Bar associations, writing on partnership law and lecturing on liability issues, among other personal experience. The lawyers reactions are well-recognized to include:

i. Greater reluctance to accept retainers in circumstances where there is a more significant potential for liability, this can be on a case by case basis, client basis, or exposure to practice area with areas of potentially more liability or litigation and claims being less attractive to the more competent practitioners;
ii. Increased insurance coverage to ensure that there is coverage for the potential liability, increasing the cost of delivery of service for the costs of insurance;
iii. Adding lawyers to a team to ensure that there is a spreading reliability risk, this includes the bringing in of specialists but also the obtaining of second opinions;
iv. The use of committees to oversee the provision of opinions and the completion of file matters adding cost to the delivery of legal services;
v. Refusal to provide definitive answers to clearly asked legal questions, fudging the answer in ways that reduces the exposure to liability based upon a more definitive answer;
vi. Provision of confusing or duplicated answers to enquiries in order to reduce the possibility of liability based upon specific answer.

All of these add to cost, both the actual cost of legal service, and the cost of the client obtaining clear easily understandable and actionable legal response.

This issue relates to the consequences of the management of the contingent risk of liability, particularly relating to conflict. Lawyers tend to take conservative approaches to protection from liability, both as to the firm and as to the individuals within the firm. This conservative reaction will potentially increase costs of management, and increases the diligence, and reviews, which would be undertaken when a partner desires to move firms, this additional due diligence includes an extensive review of client sources and current matters, to ensure there is no conflict of interest and potential liability issues which the firm would inherit. A similar problem, with a larger ramification, is a merger between two firms, where every individual lawyer must be reviewed for the possibility of inheriting conflicts, or potential liability from professional performance. This significantly adds to the cost of a merger process, and reduces the ability of firms to merge, to reach optimum size.

EN 10 These consequences are not just self-protective for the profession but have a societal impact on access to justice and the cost of legal services. An overly conservative approach to the possibility of liability exposure, particularly as a consequence of conflict of interest, will result in professionals taking more time, and accordingly expense, in examining an issue and a more conservative approach in providing recommendation. It will result in a more aggressive turn down of retainers resulting in more difficulty in clients accessing suitable legal representation. It results in lawyers being unwilling to provide commercially aggressive recommendations, even when they are the most suitable response for the client. All of this reduces the effectiveness of the professional services provided, increases the cost, and reduces the ability of more marginal clients, or clients with larger market presence and accordingly higher likelihood of conflict, having a significant difficulty in retaining legal services at all, and certainly in retaining the legal services of their choice.

EN 11 Access to and the cost of insurance is dependent on the perception of the insurer as to the likelihood and successful claim against the insured. This is a fundamental concept of insurance, insurers assess risks, and allow access to their product and price their product based upon their assessment of the likelihood of a successful claim, and the magnitude and cost of that claim. Insurers therefore audit for the factors that they believe will affect the ability of a client, third party or tribunal to make a successful insured claim against the lawyer. The International Bar Association in its booklet on Legal Expenses Insurance and Access to Justice, Hannah McNee, Legal Policy and Research Unit International Bar Association in 2019 undertook a detailed study on the issue of insurance for lawyers. The premise of the article is the access to justices of relevant temporary legal issue that the international committee recognizes affecting all jurisdictions around the world regardless of legal system, social economic development or mode of government. The article specifically states the justice is not accessible without robust and timely legal advice and representation.

Reference is made to the world justice projects rule of law index 2019. The article looks specifically at legal expense insurance in looking at how to improve access to justice.

Lawyers Mutual, one of the most significant insurers of lawyers in the United States, in an article by Dan Zureich in 2015 examined why professional liability insurance premiums change. The article is based upon the concept that insurance for lawyers, and its access in pricing, is based on a claims made basis. Professional liability insurance is noted is done at the lawyer as a unit basis, with premiums being a multiple of the number of lawyers, and assessment of the lawyers as well as the firm.

Acadia, another insurer of professionals, in 2017 https://acadiapero.com/top-10-factors-affecting-cost-of-professional-liability-insurance identified ten factors affecting the cost of liability insurance for professionals, the ten factors were:

- The location of practice
- The field especially
- History with claims and losses
- Who the insurance provider is
- Hours worked, longer hours mean higher risks
- Competition among insurance
- Types of practice
- Special policy limits
- Types of insurance providers
- Type of coverage

Useful concepts are also discussed in the book produced by United States Congress Senate, Committee on Science and Transportation, looking availability and cost of liability insurance. The hearing materials before the committee noted factors contributing to the problems of liability and insurance as including the mind set of society, noting that society has become a "litigious society." These hearings noted by one of the testimonies that society in general now thinks: well, I will get mine, they can afford it, they translating into the insurance companies. Notice made the size of the woods, the contingency fear arrangements, the ability of class action suits, and the causes of action expanding, add to the problem of affordable practice insurance.

EN 12 Access to insurance and the pricing of that insurance is depended upon the claims history of the professional. If a professional experiences claims as a consequence of professional behaviour, including conflict of interest, determinations, that professional would be sanctioned by the inability to obtain, at all potentially and cost effectively almost certainly, insurance to carry on practice. There may be the compulsory regulatory required insurance available, but excess coverage which is generally needed for most practices will often become prohibitively priced, or totally unavailable. This is central concept of insurance, in general, which uses claims history for purposes of acceptance and pricing of that insurance. As a consequence, lawyers must undertake the practice in a way that reduces claims and satisfies the audit requirements as to the insurers as to the practices, processes and procedures in place to ensure continued reduction of the possibility of claims.

Insurance as to access and price is based upon claims, the insurer assesses the likelihood of claims, and the extent and nature of the claims, in providing the access and pricing of the product. Because professional liability can be grounded in a failure to meet enunciated professional standards, and regulation will set out these professional standards, it is necessary that the insurers understand and look to the professional standards, and the basis upon which it expects its potential insured to comply, to set insurance requirements. Accordingly, the existence of regulation, and its requirements setting the standards of professional conduct, will influence determinations as to insurance availability and cost, but the sanctions of regulation remains a separate branch of behaviour control.

EN 13 Administrative bodies and tribunals will not have the same capability of setting rules and sanctions as courts, and courts at various levels will have different capabilities. Lawyers who practice before the courts, administrative bodies or tribunals will necessarily be aware of these rules, and of the sanctions for breach of the rules, and will take them into account. The courts, administrative bodies and tribunals do not hesitate to enforce these rules, the rules extend across a large range of conduct before the body, and will essentially always include conflict of interest requirements. These rules are supplemented by the general concepts and requirements governing the professional in general, but will be enhanced by these additional rules of the body.

EN 14 Throughout the course of completing this research and thesis I remain very active in leadership positions at my firm, and with several professional associations including the American Bar Association Business Law Section, Association of Commercial Finance Attorneys and American College of Commercial Finance Lawyers. This allowed me a forum on several occasions a year, professional gatherings, to discuss the research I was undertaking, and solicit informal responses to some of the specific enquiries. One of the most common questions I asked was what did the lawyers I was speaking with think was the most common response to the most important effect of the six factors, the almost universal reply was reputation. When there was a discussion about regulatory sanction and punishment, it was indicated that that was of course a concern, but less so because they did not view themselves as being in a position where they would ever complete such breach. The mere existence of the requirements and their knowledge of those requirements was sufficient to control conduct, sanction was not considered an effect. Regulation was effective for these professionals because of its existence, not because of an expectation that it would be imposed by sanction. These discussions were conducted on at least a monthly basis over the last four years, resulting in literally hundreds of lawyers responding to the discussion enquiry.

Appendix F — Pilot process

The materials in this appendix explain some of the results from the pilot process. It is intended to indicate the background to the development of the question and scales which were based in extensive pilot process with lawyers and law students because of the lack of definitions and scales. The pilot process was an important aspect to the research process allowing the development of the survey in a manner that avoided many of the potential challenges to a lawyer survey process identified by the literature.

Purpose of the pilot studies

The pilot studies were developed to:

i. Determine an effective basis for empirical study, whether secondary source, interview, survey with or without scenario study could be effective.
ii. Test the effectiveness of proposed scenarios in providing context for associating liability with professionalism and behaviour, a scenario testing of liability effect being an initial concept.
iii. Test the survey questions for understanding and ability to respond, are they considered to be clear, consistent as to positive or negative, not ambiguous or biased.
iv. Assess the likelihood of full and honest response; the literature speculates that lawyers can be difficult to survey as a consequence of the issue of expected replies and concern for confidentiality.
v. Assess whether the questions will result in meaningful responses, with sufficient variation, and ensure that the questions lead to an understanding of the research enquiry.
vi. Ensure that the questionnaire is not so long as to prejudice response rate (aim for 15 minutes).

Pilot results

The first pilot was used to assess whether secondary source qualitative based, or mixed method, research methodology would be suitable to respond to the research question (Pilot #1). This initial pilot consisted of doing two independent secondary source studies, one using the available reports of case law in Canada and the United States referencing conflict of interest and lawyer liability and the second a detailed assessment of two significant legal actions based on liability claims grounded in conflict of interest. The first, an extensive review of case law, was used to assess whether content analysis of judgments arising in cases where the basis of the claim was liability through aspects of conflict of interest issues could be used to assess the use of liability as a regulator. The review showed that content analysis would not provide

consistent, or even recognizable, results. The second study examined the 10,000 (and more) pages of pleadings, press materials, court determinations, and internal materials relating to two significant liability claims against a major law firm where conflict of interest was a central issue. Again, looking at these two litigation challenges, both of over 5 years in duration and thousands of pages of material, it was clear that no consistent understanding could be reached as to the view of the effect of liability on the conduct of lawyers using those materials. The review of the materials provided an inconsistent assessment of the enquiry. This led to the determination to consider a survey based quantitative approach to the research question. The possible use of primary source qualitative research was kept in mind in assessing the pilot results but determined not to be required to answer the selected research question.

The first formal pilot study using the survey method (Pilot #2) consisted of an in-workshop delivery to 23 lawyers with an introductory explanation of the basis and purpose of the research. They were asked in a general discussion format to discuss the research of a survey, and their belief as to response rate and the likely quality of their responses, based on their understanding of the profession. They were asked to respond as to a series of questions looking at effectiveness.

This pilot was intended to examine the clarity and value of the use of scenarios to explain the basic enquiry and to obtain a general assessment of the length and complexity of the intended survey questions. The group attending was very interested in focusing on the scenarios and provided valuable discussions which resulted in a change to the scenario process. This group indicated that the length of the questionnaire, the nature and type of the questions, and the basis for the asking of the questions was such that it was understandable, of a reasonable length to properly complete, and that the questions would be answered honestly and with some range of variation. The results of this pilot test were a significant revision to the scenario but with the questions following the same basic format.

The third pilot (Pilot #3) consisted of deployment of the survey for completion to twenty-five MBA/JD and JD students of University of Toronto. The attendees completed the survey to allow assessment of variation in response and ability and willingness to respond and provided comments as to various aspects. This resulted in meaningful changes questions to shorten and simplify the questions.

The fourth pilot consisted of deployment of the survey to twelve practicing lawyers at a large Bay Street, Toronto, Ontario business law firm in two sessions (for time availability). The survey used was revised for the Pilot #3 results. This fourth pilot was used to confirm that the revised survey questions improved clarity and were likely to provide valid, useable answers. The most important contribution was clarification of the need that the questions focus on the

importance of factors, not on whether the "right" choice will be made. The results supported the effectiveness of the survey for the purpose of enquiry. General discussion was held with the respondents after the survey was finished and the discussion provided valuable input as to both the survey and the importance and validity of the research questions, this resulted in further minor revisions.

A specific enquiry was made in this Pilot as to the use of a 5 response Likert scale or the more academically accepted 7 response scale. The respondents, as to 10 of the 11, responded that the 5 response scale was adequate for variety and easier to understand. A specific question to verify responses against clear identification of the importance of the factors showed support for response validity. The basis of the discussion is outlined in Appendix C which provides insight to the pilot process.

The fifth pilot was a distribution of the survey in its expected to be final form. This survey was dispatched to over 200 lawyers available in my law firm. The purpose of this pilot was to look at response rate, completion rate and apparent ability to understand and respond to the questions, and to start initial diagnostic and quantitative analysis to ensure that the survey was sufficiently robust for the thesis study. In addition, specific enquiry was made of the respondents, and discussions were had with experts within the firm as to the acceptability of the survey. Positive results were received on all areas of enquiry. The response rate was good, although I do recognize that this is somewhat tainted with being within my own firm, the completion rate was high, and the initial diagnostics of the responses were good. Sufficient variation was identified, and the initial analysis indicated a solid understanding of the questions and responses which defined the constructs being investigated. In the end, the pilot study results and the ultimate survey results were remarkably similar, a result to be expected.

Subsequent discussion with respondents, particularly those with expertise in the area, provided validation of the use of a 5 point Likert scale and confirmed that the questions incented both thought and suitable response. As a consequence of the completion of the fifth pilot it was determined that the survey was a mature form and could be utilized as prepared.

Appendix G — Court case development chart

This chart outlines the dependent variable questions and the case used to create the question and determination of the correct answer as to correct to reject or correct to accept.

Dependent variable — scale creation

The following question preceded the actual questions: Introduction: The following section will provide brief descriptions of scenarios which may or may not result in a conflict of interest. Please read each scenario carefully and answer whether you would accept or reject the retainer on the basis of this information alone.

Question	Case Cite	Brief Case Summary	Brief Decision Summary	Accept / Reject
You are asked to act directly against a former client. You may have some confidential information because you have knowledge of how the client is likely to react, but you have neither directly relevant information. Should you accept or reject the retainer?	Canadian National Railway Co. v McKercher LLP, 2013 SCC 39	CNR retained McKercher to act for it on a variety of matters. At the same time, McKercher accepted a retainer from Wallace to act against CNR in a $1.75 billion class action. The Wallace action was not related to ongoing CNR retainers. McKercher did not advise CNR that it intended to accept the Wallace retainer — CNR only found out when it was served the statement of claim. Prior to that, various McKercher partners hastily terminated their retainers with CNR.	Appeal allowed with costs. Remitted to trial court for redetermination of remedy. The Bright Line Rule is usually remedied by disqualification.	It was reasonable for CNR to expect that their counsel would not be suing them for 1.75 billion dollars (duty of loyalty) Reject
You are asked to take a retainer for an employer of a client which does not affect your existing client retainer. However, you have information about the client that could affect your	Dobbin v. AcroHelipro NLCA 2005	Appellants are suing their company for wrongful dismissal and retained a lawyer who worked on a credit agreement transaction for the company, the respondent company seeks to disqualify the lawyer from representing	Lawyer is disqualified from representing the appellants because the lawyer had access to confidential information about the wrongful dismissal strategy	Appellants retained a lawyer for a wrongful dismissal lawsuit against AcroHelipro Inc. However, lawyer worked on a negotiation for credit agreement, during which, the bank specifically

Question	Case Cite	Brief Case Summary	Brief Decision Summary	Accept / Reject
advice to the employer. Should you accept or reject the retainer?			during his work with the company	inquired about strategies for handling wrongful dismissal Reject
You act for a client on a matter which has significant profile and would result in large fees. You are also approached to act for a person on the same matter who does not currently have an adverse conflicted position, but could if certain events happen. Should you accept or reject the retainer?	Trillium Motor World Ltd. v. General Motors of Canada Limited, 2015 ONSC 3824	The allegation stemmed from a decision to not disclose the potential conflict of interest to their clients (the affected dealers) until the conflict actually developed. The allegations were that to the firm not properly ascertaining whether or not a conflict existed	On July 8, 2015, Judge McEwen of the Ontario Superior Court issued his decision in the *GM* case. The Court ruled against the law firm for breach of their duties, largely because of failure to disclose the potential for conflict arising. It should be noted there were complications as to a disclosure and consent which was made to the client but not communicated to third parties.	Reject If there is potential for a conflict then disclosure should be considered. If disclosure cannot be properly done then the retainer should be rejected.
You become aware that there are hints of improper conduct by a client which you cannot verify with reasonable review, but which could harm investors who are not clients but may rely on your involvement for assurance as to the client's legitimacy. Should you accept or reject the retainer?	In the matter of YBM Magnex International, et al, Ontario Securities Commission	Counsel to the Special Committee and YBM. Rossman advised the Board that the Special Committee should retain its own independent counsel. The Board declined this advice based upon a lawyer's but the OSC position was cognizant of conflicted positions.	The case against the lawyer director was dismissed because the lawyer had undertaken suitable diligence in review the case against the partner who made unsupported statements was settled without admission of liability	Accept

Question	Case Cite	Brief Case Summary	Brief Decision Summary	Accept / Reject
Your firm is approached to represent creditors making claims against a former client. If you do not believe there is confidential information which you know about the former client that could be used against their interest in this matter, should the retainer be accepted or rejected?	MacDonald Estate v. Martin 1990	Lawyer previously counselled plaintiff, and now works for defendant law firm, who represents creditors against plaintiff's estate	Defendant law firm disqualified to represent	Accept Does a conflict prohibit lawyer to continue counselling plaintiff? Can a lawyer be removed by a judge because of conflict? Professional standards determines what constitutes a disqualifying conflict of interest. Martin establishes a role of the courts in regulating lawyers' ethical choices
You are asked to take on a matter against a client unrelated to the matter in which you previously represented the client. The past matter took place many years ago so any information you have is dated. Should you accept or reject the retainer?	Law Society of Upper Canada v. DeMerchant, Sukonick 2014	Claim the firm was acting in conflict, violation of Law Society's Rules of Professional Conduct, failure to	Dismissed	Accept Defendant lawyers advised a corporation whose majority voting shares held by Executives that were former clients Lawyers should be clear about to whom, and for whom, they are giving legal counsel, if they simultaneously represent a corporation as well as its individuals but this is not a conflict preventing the later unrelated retainer
You are approached to take on a retainer for a	3464920 Canada Inc. (Monarch			Accept

Question	Case Cite	Brief Case Summary	Brief Decision Summary	Accept / Reject
competitor of an existing client where work you have done for the client could benefit the competitor because of creative solutions you developed for the client. However, the retainer does not involve disclosing direct confidential Information about the client. Should you accept or reject the retainer?	Entertainment) v. Strother			
Your firm is asked to act for a company where one of your partners is a director. Should you accept or reject the retainer?	In the Matter of YBM Magnex International et al; Ontario Securities Commission 27 June 2003 (upheld at the Ontario Court of Appeal)	Although could have done more to get to the bottom of suspicions surrounding the company and should have offered more leadership and insight to the board. Most sources also report that, nevertheless, met his obligations as a director and acted reasonably based on his involvement in the matter, and the skills and access to information in the circumstances, and was cleared by the OSC.	When asked about whether the Special Committee should retain its own independent counsel or use services. This indirectly addresses the conflict of interest issue that faced as both a senior partner at the law firm and a YBM Board Member. The OSC noted that "'s legal background and his professional board experience suggests that he should have been attuned to the potential conflicts of interest in this case," and stated that he should not	Accept Provided the director responsibility is properly exercised and reasonable

Question	Case Cite	Brief Case Summary	Brief Decision Summary	Accept / Reject
			have "accepted the facts at face value because they required more scrutiny and analysis." The OSC concluded that he "acted reasonably based on his involvement in the matter, his skill and his access to information in the circumstances."	
You have a personal investment interest in a competitor of a company that seeks to retain you. Should you accept or reject the retainer?	Monarch Entertainment v. Strother [SCC 2007]	Breach of Fiduciary Duty due to holding financial interest in a competitor, and withholding material legal counsel	Disgorgement of Profits Defendant lawyer, plaintiff business, and defendant lawyers' law firm Defendant lawyer had financial interest in competing business	Financial interest in a competitor creates a serious risk of affecting lawyer's judgement and loyalty to client
You are approached to act for a company that is a competitor of an ongoing client on the basis of payment which includes receiving a share interest in the competitor company. Should you accept or reject the retainer?	Monarch Entertainment v. Strother [SCC 2007]	Breach of Fiduciary Duty due to holding financial interest in a competitor, and withholding material legal counsel	Disgorgement of Profits Defendant lawyer, plaintiff business, and defendant lawyers' law firm Defendant lawyer had financial interest in competing business	Reject The receipt of the share interest is the factor disqualifying