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In addition to the statement supporting the Truth and Reconciliation Commission of Canada's *Call to Action* 27, the Law Society has been working on a number of Indigenous initiatives. These include:

- Indigenous Land Acknowledgements, which includes basic land acknowledgements, pronunciations and tips for those wishing to make land acknowledgements;
- Indigenous Law Student Summer Employment Program, which facilitates job searches for Indigenous students looking for summer work and employers who wish to develop relationships with Indigenous students;
- Indigenous Advisory Committee, which provides feedback and input on Law Society Indigenous Initiatives;
- Indigenous Initiatives Liaison, who works with the Law Society to develop and implement Indigenous Initiatives and works closely with the Indigenous Advisory Committee;
- Hosting two-day Indigenous conferences in both Calgary and Edmonton;
- Providing education to both Benchers and Law Society staff; and
- Supporting Indigenous programming with various stakeholders, including the University of Edmonton Faculty of Law and the University of Calgary Faculty of Law.

Further to these initiatives, at the February 2020 Bencher Meeting, the Benchers passed the following resolution:

> That the Bencher Lawyer Competence Committee and Indigenous Advisory Committee work with staff to create competence programs for 2020 and 2021 on Indigenous issues to meaningfully address our obligation arising from the Calls to Action in the Truth and Reconciliation Report.

Since that time, the Lawyer Competence Committee and the Indigenous Advisory Committee have identified a program for Indigenous education for lawyers to provide a foundation in the topics listed in *Call to Action* 27. This program is called The Path. The Indigenous Initiatives Liaison along with the Indigenous Advisory Committee have been working with the developers of The Path to create Alberta specific content to include in the program, with the intention of offering an educational tool specifically for Alberta Lawyers.

For information on the importance of Alberta specific content, please see **Appendix A**, Alberta's Indigenous Context.

Federation of Law Societies of Canada Response

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The Federation of Law Societies of Canada (FLSC) established a Truth and Reconciliation Commission Calls to Action Advisory Committee, immediately after the Truth and Reconciliation Commission of Canada released its report. This FLSC Committee released a recommendations document to the FLSC Executive in May 2020. This document makes a number of recommendations for responses to the work of the *Truth and Reconciliation Committee of Canada* and its *Calls to Action*.

The recommendations were adopted in full in mid-August by the FLSC Executive.

These recommendations address both *Call to Action* 27 and 28. As discussed above, 27 addresses the FLSC and Law Societies.

The FLSC Committee notes, at paragraph 5 of the recommendations document, that:

> While the language of Call to Action 27 specifically references the Federation, it is understood that individual law societies are directly responsible for training and education of future legal professionals.

The Federation Committee notes the importance of reconciliation and the role of lawyers in this process. The Committee identifies the following rationale for its work:

> The Advisory Committee recommends a path to reconciliation that emphasizes enhancing knowledge, sharing information, encouraging ongoing dialogue and relationship-building, and promoting reflection on individual and institutional levels. The Advisory Committee recognizes that cultivating an understanding of the fact that Canada is a multi-juridical country in which Indigenous legal orders, the common law and the civil law all have an important place is integral to transforming the relationship between the legal profession and Indigenous peoples in Canada.

The Committee comments on the important role that law societies play in educating lawyers to assist in the reconciliation process. Through its work, the Committee developed recommendations not only for the Federation but also for Law Societies.

The first of these recommendations is:

> That the Federation urge all law societies to make a formal commitment to reconciliation and develop a framework or steps for putting that commitment into action.

Using the Law Society of Alberta's statement as an example of a Law Society that has already done work in this area, the Federation implores "law societies to provide ongoing opportunities for competency and awareness training for law society leadership and staff".

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The Federation Committee goes on to address education and explicitly recommends mandatory Indigenous cultural competency training.

This recommendation is as follows:

> That the Federation urge law societies to
>
> • Consider mandatory Indigenous cultural competency training.
>
> • Ensure that legal professionals in their jurisdictions are provided with access to educational opportunities to enhance their knowledge and understanding of Indigenous peoples, the legacy of colonization and the existence of Indigenous legal orders.
>
> • Ensure the availability of a continuum of educational opportunities and resources to recognize the diversity of legal practices and Indigenous peoples and legal orders within a given jurisdiction.
>
> • Collaborate with Indigenous organizations in the development and delivery of cultural competency training or rely on training already developed by such organizations.

The Federation Committee provides a number of statements in discussion of their recommendation for mandatory training. While noting that recent graduates may have the benefit of increased Indigenous focused learning in law school, in response to *Call to Action* 28, those who graduated before may not have had access to such learning and that law societies should work to address this gap. The Committee states that:

> The Advisory Committee is of the view that, at a minimum, members of the legal profession in every jurisdiction should be encouraged to undertake training that will enhance their knowledge and understanding of Indigenous peoples and legal orders.

The Committee acknowledges that a one-size-fits-all approach may not meet the needs of all lawyers, however “all members of the legal profession need a baseline knowledge of the issues outlined in Call to Action 27, including the existence of Indigenous legal orders”.

This would allow for a primary course for all lawyers, followed by opportunities to expand their knowledge as appropriate for their practice area and location. The Committee states that “Adopting an approach to Indigenous cultural competency that recognizes a continuum of knowledge would be consistent with the ethical obligations of legal professionals.”

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The Committee does note the importance of interpreting *Call to Action* 27 broadly and acknowledging that "it is generally recognized that competence requires more than a single course or workshop. Some observers suggest that approaching reconciliation in this way could undermine its importance and lead to a perception of legal professionals "ticking a checkbox".

As noted above, that checkbox ticking exercise can be avoided with a baseline program for all lawyers, followed by expanded programming opportunities that lawyers can include in their learnings to address their needs.

Perspectives on Mandatory Training

Since the *Calls to Action* were released, a number of debates have occurred in various industries, sectors and spaces, including the legal profession, over whether training called for by the Truth and Reconciliation Commission of Canada should be mandatory.

Voices Within the LSA

The LSA's Indigenous Advisory Committee, Indigenous Initiatives Liaison and Lawyer Competence Advisory Committee have all spoken up in favour of mandatory training.

In a letter to the Lawyer Competence Committee dated July 13, 2020, the Indigenous Advisory Committee clarified its position on mandatory training explaining that:

> While the IAC was concerned about the implications of imposing new obligations on Alberta Lawyers in the midst of a pandemic, they were always of the view that compulsory Indigenous training was preferable. This view was confirmed in April 2020 when the IAC met again and voted unanimously to recommend compulsory Indigenous CPD training for Alberta lawyers.

The question of whether Indigenous Cultural Competence training should be mandatory was also put to the Lawyer Competence Advisory Committee at their May 4th meeting. This group almost unanimously favoured making Indigenous Cultural Competence training mandatory..

Since the spring of 2020, and given the ever-evolving sentiments about systemic racism in North America that have been developing throughout the summer of 2020, providing a greater voice to those impacted by systemic racism, the Indigenous Advisory Committee has reiterated its position and believes Indigenous training should be mandatory/compulsory.

The Indigenous Initiatives Liaison noted that Indigenous cultural competency programs, in these days and times, are essential for a lawyer's practice, stating "I am sure every

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firm deals with an Indigenous client (whether it be a big firm or small)...they just don't know it." She notes specifically the disproportioned numbers of Indigenous individuals with legal issues related to residential schools and the '60s Scoop, as well as interactions with the child welfare and criminal justice systems.

She notes that many of Alberta's lawyers were not taught about the history of residential schools or Indigenous history or perspectives in school and this has led to

> lawyers [who] don't know how to understand their client because Indigenous peoples come from a different culture with different verbal and non-verbal communication cues (and a different language), [and because of this] they miss out on vital arguments that can be made in court. They also miss out on Indigenous legal arguments that can be made.

Indigenous cultural competency training can help improve on this situation and close knowledge gaps.

The Law Society of British Columbia

The debate about whether Indigenous training should be mandatory or optional has already occurred at the Law Society of British Columbia (LSBC). Many items that will likely be of concern in Alberta have already been discussed by the LSBC.

As a result of its discussions, the LSBC is currently developing mandatory training and considers a baseline of knowledge vital for all lawyers. In making this decision, the Law Society of British Columbia (LSBC) notes that *Call to Action* 27 speaks of "all lawyers" in its call for Indigenous training.

Training was recommended to the LSBC Benchers to be mandatory as it was felt that "the objectives of intercultural competence education, including reconciliation, cannot be fully achieved unless all lawyers have a baseline understanding of the skills and topics identified in Call to Action 27."

Many arguments were put forward both for and against mandatory training. In the end, the LSBC determined that anything other than mandatory training would fall short of its obligations to the *Calls to Action* and the public.

Excerpts of these points, from the *Indigenous intercultural competence education for BC Lawyers: Joint Recommendation Report of the Truth and Reconciliation Advisory Committee and the Lawyer Education Advisory Committee*, presented to the Benchers of the LSBC on October 10, 2019, follow.

In the following excerpts, "Option 1" refers to mandatory training, while "Options 2" refers to optional training

- Although many lawyers do not practice in areas of law with high Indigenous usage rates, all lawyers should be aware of the possibility that Indigenous

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issues may affect legal matters in a broad range of areas of law, including but not limited to: human rights, administrative law, Aboriginal and treaty rights, lands and resources, real estate, commercial law, taxation, family (including child welfare) law, wills and estates, intellectual property, civil litigation, immigration law and criminal law. Even in areas of practice where Indigenous issues rarely arise, it is important for all lawyers to be capable of identifying when an Indigenous issue may be relevant to a legal matter and responding appropriately.

- [I]n the first phase of the educational program, the focus would be on establishing baseline knowledge for all lawyers in respect of the topics and skills identified in Call to Action 27… Although many lawyers may already have some exposure to some matters identified in Call to Action 27 (e.g. through their practice areas, or as recent graduates of the Professional Legal Training Course of law school), the Course is intended to ensure that a baseline of information will be conveyed to all lawyers in the province.

- Those in support of Option 1 are strongly of the view that the Law Society's efforts toward reconciliation will be less effective if only those lawyers who "opt in" participate in intercultural competence training, and are concerned that an optional approach may only engage those practitioners who already have an interest in, or awareness of, Indigenous issues.

- The Committee considered whether the educational requirement should only apply to lawyers who practice certain areas of law or in particular geographic areas. The Committee members in support of Option 1 rejected these approaches in favour of a universally applicable mandatory requirement that avoids any real or perceived inequities that may arise from introducing a requirement that only applies to a subset of the membership. There was some concern that an approach in which only some lawyers are required to completed intercultural competence training may disproportionally affect certain groups or create disincentives to work in certain practice areas or locations, with unintended negative outcomes for Indigenous people.

- It may also be met with resistance by some lawyers who are of the view that Call to Action 27, and reconciliation more generally, are not directly, or even indirectly, relevant to their legal practice. Others may suggest that an Indigenous course is too narrow, and that the requirement should be expanded to intercultural competency more broadly, given the diverse and multicultural client base of many lawyers. The Committees have some concern that this opposition may shift the discussion away from reconciliation and toward controversy about what some lawyers may regard as an overly prescriptive educational requirement.

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- To address this concern, a communications campaign would be required to clearly articulate to the membership why Indigenous Cultural competence training, specifically, is relevant to all lawyers. The communications must show the link between lawyers, as key participants in the legal system, competency and the process of reconciliation.

- Option 2 is responsive to the concern that requiring all lawyers in the province to complete Indigenous cultural competency education is overcasting the net because many lawyers have no Indigenous clients, and do not come across Indigenous issues in their practice areas. Mandating a program that has little or no perceived value to them in their practices may cause a reaction that could undermine the Law Society's efforts toward reconciliation. Some concerns have been raised that although some lawyers will greatly benefit from participating in Indigenous intercultural competence training, others will be of the view that the topics and skills addressed in Call to Action 27 have no direct or indirect connection to their delivery of legal services.

- Option 2 may, however, generate criticism on a number of fronts. Adopting an intercultural competence option, rather than a requirement, may be challenged on the basis that it fails to align with the Law Society's TRC Action Plan, which refers to "mandating" Indigenous intercultural competence training for all lawyers, and Call to Action 27, which calls upon law societies to "ensure" lawyers receive intercultural competence training. Both of these provisions are grounded in the moral imperative for lawyers to advance reconciliation, and the need for the Law Society to protect the public interest. Optional training may be perceived as falling short of these responsibilities.

The LSBC is the first Law Society in Canada to mandate training.

Please see **Appendix B** for information regarding training offered by Canada's Law Societies and whether it is optional or not. Please note that not all Law Societies responded prior to publication of this memo and therefore some information may not be accurate.

A Legal Academic Perspective

An excellent piece of academic writing in this area comes from Pooja Parmar, Assistant Professor at the University of Victoria Faculty of Law. She has written an article titled "Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence" published in *La Revue Du Barreau Canadien* Vol.97, 2019, pp.526-557.

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In the article, she notes that this is a complex area and that there is a lot of think about in developing, delivering and assessing the value and effectiveness of educational programs in cultural competence. However, through her discussion, she does not advocate for perfection and waiting until the perfect program exists but to start the learning process and grow from there to build up the complexity and various facets that need to be addressed. Building from common ground and common knowledge will enable work to continue and develop.

The abstract summarizes the article, in part, to state:

> I suggest that an uncritical embrace of cultural competence, as currently understood, is inadequate and might even prove to be counterproductive despite best intentions. While acknowledging that the focus on cultural competence is often driven by genuine commitments to reconciliation within the legal profession in Canada, I outline concerns which show that a limited and deficient conception of cultural competence is unlikely to assist lawyers in representing Indigenous clients better or change Indigenous peoples' experience with the legal system more broadly. I suggest that the TRC Calls to Action demand a response that centres accountability, and that the legal profession must recognize Calls 27 and 28 as a unique opportunity to innovate and lead by rethinking legal education, competence, and ethical lawyering in a multi-juridical space such as Canada.

Professor Parmar describes her intention as not to block the current development of programming but to expand the scope of how and why programming is being developed to include additional aspects of critical thinking that relate to accountability and ethical lawyering:

> The purpose of this critique is not to discourage new or ongoing initiatives that focus on cultural competence training for lawyers or law students, especially where the goal is to initiate broader conversations within the profession about legal representation and access to justice for Indigenous peoples. Instead, my goal is to introduce a note of caution and indicate why an uncritical embrace of cultural competence is not an adequate response to the TRC Calls 27 and 28.

In noting that lawyers frequently have difficulty representing the perspectives of their clients, particularly Indigenous clients, Professor Parmar states that "In a legal system that relies on counsel being able to represent clients fully and competently, a lawyer's inability to hear, comprehend or re-present the client's interests and claims in a meaningful manner is a serious problem."

She continues on to say:

> A commitment to reconciliation places an obligation on the legal profession to acknowledge and address the issue of inadequate or incompetent representation. It is therefore imperative that educators, regulators, and others

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> concerned about this, join the conversation about how lawyers meet their obligations towards those whose encounters with the law and legal processes have been marked by the violence of colonialism.

In looking at cultural competence, Professor Parmar states that:

> calls for cultural competency training for lawyers are broadly based on the idea that a culturally competent professional will have the skills to work more effectively with a diverse range of clients, especially with clients that are perceived to be culturally different than the professional. As a general aspirational goal, provision of appropriate professional legal services oriented to specific needs of differently situated clients is a positive development.

She notes that:

> Treating cultural competence as a critical skill requires lawyers to have a deeper understanding of culture and difference and an ability to recognize the consequences of being seen as culturally different for many.

She cautions that basic courses can only be a starting place and there are many complex arenas that must be explored in ongoing training of lawyers, including ensuring that ethical lawyering and professional responsibility are viewed from an Indigenous perspective. She also encourages education on Indigenous laws and legal orders and "the plurality of legal orders in Canada".

Professor Parmar highlights some of the critiques of cultural competence training and cautions that it cannot be viewed as a substitute for systemic change.

> Along with its emergence as a "professional imperative", cultural competency has also been subjected to numerous critiques. The essence of critiques within social work and health professions is that mandating cultural competence does not help address structural issues. The reasons offered encompass a range of problems: the fact that cultural competence does not increase accountability, focuses on individual action and autonomy (both of professionals and clients), does not enable professionals to pursue a "transformative agenda", can lead to patronizing behaviour, and is often treated as an unproblematic add-on to professional education, or even worse, simply as a "slogan" or "flag of convenience". One of the biggest criticisms of cultural competency is that it reinforces stereotypes.

In response to this, Professor Parmar notes that:

> Scholars point out that treating culture as a separate module, or cultural competence as a technical skill that can be learned in a short time, is an oversight. A commitment to cultural competence requires fundamental changes in ways of thinking and interacting. This relates to my earlier point about the

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> importance of lawyers learning to think critically about culture and difference in ways that enable them to understand and serve Indigenous peoples better.

Professor Parmar's article provides many thoughts on where to go to develop a program past the initial training stage to become a meaningful and impactful program for lawyers: one that can enhance accountability and ethical practice while providing lawyers with a better understanding of and ability to represent clients.

Summary of Positions

The LSBC discussion highlighted positions both for and against mandatory Indigenous competency training. As noted above, similar discussions have been seen in other spheres, as well.

Building on Professor Parmar's approach, one commentator, writing from the perspective of a university student, points out that:

> The Truth and Reconciliation Commission of Canada asks in seven separate calls to action for education to be provided to medical students, nursing students, law students, journalism students, management and staff in Canada's businesses, public servants, teachers, and social workers. It is clear that the next generation of leaders and professionals needs to be competent and aware of the history and culture of Indigenous peoples in our country.
>
> Shape our future doctors, nurses, journalists, social workers, and teachers; but don't stop there. Educate our future engineers, politicians, pilots, accountants, professors, pharmacists, bankers, entrepreneurs - teach all graduates that in order to contribute positively to our country's future, we must first understand its past. Like the commission says: **education must remedy the gaps in historical knowledge that perpetuate ignorance and racism.** (*emphasis in original*)

The student author closes by advocating for mandatory training, noting that through this "We will emerge a more empathetic and understanding generation for your commitment to reconciliation."[4]

While this argument is made in the context of university education, it is important to remember that many Alberta lawyers, who were trained in an earlier time or outside of Canada, may have had little or no exposure to Canadian Indigenous history. It can be argued, therefore, that, in order to ensure that the Law Society meets its obligation to provide Indigenous training to lawyers, the arguments articulated by this student and others writing from a different sphere of reference are still relevant to the Law Society.

[4] https://www.ousa.ca/blog_it_s_time_for_canadian-wide_indigenous_course_requirements

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Supporters of mandatory training reflect on the wording of the *Calls to Action* themselves, as the LSBC has done. The LSBC interpreted the wording to require baseline training for all lawyers. Additionally, comments in the educational sphere, from First Nations leaders, have noted that "Learning about the colonial history of this country should not be optional"[5], which reflects the LSBC perspective. There is a concern, as noted in the LSBC report, that optional training will only attract those who already have an interest in and knowledge of Indigenous issues, leaving those who don't without the key baseline knowledge that the *Calls for Action* demand.

On the other side of the discussion, critiques of mandatory Indigenous training focus on several key points. Many of these are highlighted in the LSBC discussion, set out above, and in Professor Parmar's work but are further summarized as follows:

- providing a basic course is insufficient, amounts to a box-ticking exercise and does not represent the complexity of the issues[6];
- mandatory courses can lead to resistance to what is being taught[7];
- not all lawyers encounter Indigenous clients or legal issues so this training is not relevant to all lawyers[8];
- mandatory Indigenous training is a slippery slope that can lead to other marginalized groups demanding mandatory training for their culture, history or issues[9];
- mandatory training raises the question of why we favour Indigenous cultural competence over cultural competence training for other marginalized groups in our society[10]; and
- this type of "coercion" to learn a particular cultural perspective can cause resentment and backfire[11].

A concern raised by lawyers, in another context, is that of compelled speech and compelled thinking. There is a risk that lawyers will be unreceptive to mandatory training, believing it to force another's views and perspectives on their own. Rather than fostering a broader perspective and critical thinking, some may see it is narrowing the acceptable worldview.

These are the types of arguments that arose in Ontario in the debate over the Statement of Principles. The Statement of Principles was a statement to be produced by every licensee in Ontario, where each licensee was to acknowledge their obligation

[5] https://www.cbc.ca/news/canada/toronto/indigenous-courses-ontario-curriculum-mandatory-1.5145751
[6] https://rabble.ca/blogs/bloggers/campus-notes/2016/03/mandatory-indigenous-studies-courses-arent-reconciliation-theyre
[7] https://www.fastcompany.com/90537483/avoid-these-8-common-mistakes-when-creating-a-di-policy
[8] See LSBC discussion
[9] https://www.macleans.ca/education/uniandcollege/why-indigenous-studies-shouldnt-be-mandatory/
[10] Ibid.
[11] Ibid.

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to promote equality, diversity and inclusion generally, and in their behaviour towards colleagues, employees, clients and the public. This caused tremendous debate and rancour in Ontario and was eventually repealed.[12]

The analogy between the "compelled speech" that was the subject of debate in Ontario and the question here around mandatory Indigenous education is not a strong one. Distinct from requiring an individual commitment to equality, diversity and inclusion, the point of mandatory education is to ensure that Alberta lawyers have training in an area that has been determined by the regulator to be a core competency.

There are many arguments for and against mandatory Indigenous cultural competency training. In the context of the Law Society's response to the Truth and Reconciliation Commission of Canada's *Calls to Action*, it is important to assess these varying perspectives while keeping in mind the catalyst for and the goal of this work.

The Path: Your Journey Through Indigenous Canada

The LSA has undertaken beginning steps to develop an initial starting point for training for Alberta's lawyers. It has reached out to NVision Insight Group Inc., an Indigenous consulting firm that is majority Indigenous-owned with First Nations, Inuit and Métis shareholders and staff, It is the developer of The Path. With NVision, the Law Society is working on creating relevant Alberta content to supplement the existing course.

There are three offerings in The Path program, with the primary offering being considered for adoption by the Law Society of Alberta.

In their own words, NVision describes the first offering as follows:

> ***The Path: Your Journey Through Indigenous Canada***™ is a series of five online modules… Topics include:
>
> - the cultural and historical differences between First Nations, Inuit, and Métis;
> - the evolution of the relationship between Canada and Indigenous people from pre-contact to yesterday's headlines;
> - stories of social and economic success, reconciliation and resilience;
> - understanding intercultural communication in the workplace;
> - and much more.
>
> With videos, quizzes, music and animation, ***The Path*** is lively, entertaining, and engaging.

[12] https://www.thelawyersdaily.ca/articles/15116

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This program was brought to the attention of the Law Society through the Canadian Bar Association. In the spring of 2020, the CBA announced this program as part of its course offerings, providing the first 500 lawyers to register with complimentary admission.

The Law Society has been working with NVision to provide this course to its lawyers through the five online modules version of the program. This provides flexibility to lawyers to proceed through the course at their own pace, fitting this into their busy lives and providing time for reflection on new, upsetting or illuminating information and content. The content can be reviewed over one day or the course of several sittings. There are quizzes at the end of each section, ensuring engagement and learning prior to moving on to subsequent modules.

As noted above, the *Truth and Reconciliation Commission of Canada* requested in *Call to Action* 27 that lawyers learn about "the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples* [(UNDRIP)], Treaties and Aboriginal rights [(Aboriginal Law)], Indigenous law [(Indigenous Legal Principles)], and Aboriginal-Crown relations." These topics are included in The Path.

Members of both the Lawyer Competence Committee and the Indigenous Advisory Committee have taken the course and found it appropriate to recommend as the next step in the development of the Law Society's Indigenous Initiatives programming and response to *Call to Action* 27.

Call to Action 27 also includes a notation that learning will required "skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism". As learning should be a continuous process, these skills are recommended for development in future LSA programming that can build upon the learning provided by The Path.

If mandatory, it is currently proposed that lawyers will have 18 months to complete The Path. commencing in January 2021. The program will take Alberta lawyers about 5 hours to complete and it can be done in chunks, allowing lawyers to set their own pace in working through the material.

COST

The cost of course work, especially that mandated by the regulator, is always a concern for lawyers. Many legal courses and conferences are prohibitively expensive for certain sectors of lawyers, including junior lawyers and some solo and small firm practitioners.

The LSA Executive Leadership Team is proposing that the LSA cover the cost of The Path course for Alberta's lawyers, removing any financial barrier for lawyers and the complexity of administering course fees and collection for the LSA.

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The basic program has already been designed and developed, with the LSA requesting additional Alberta-specific content be developed and incorporated into the existing program.

This pre-existing content reduces the cost of development for the LSA.

Course delivery costs depend on the number of student "seats" purchased.

If the course is mandatory, the LSA will purchase 10,000 seats upfront. If the course is optional, the LSA expects to purchase a minimum of 5,000 seats upfront.

The Chief Financial Officer of the LSA has assessed the cost and believes that the LSA can absorb the costs associated with The Path without charging lawyers directly to complete the course.

The consideration is that the 2020 operating costs are tracking slightly lower than anticipated in the Spring when presented to the Benchers. It is anticipated that the Alberta content costs ($33,000) will be absorbed within the 2020 budget and the costs per seat, (ranging from $36,670 for 2500 seats to $81,670 for 10000 seats) can be included within the 2021 budget while ensuring that the parameters of the contingency reserve and 2021 practice fee are adhered to as previously established by the Benchers.

<u>Considerations for Exemptions</u>

In delivering The Path to lawyers, the LSA may wish to consider exemptions for certain classes of lawyers who request an exemption.

The primary exemption that is recommended is:

1. Lawyers who have already completed The Path or Indigenous Canada *(a 12 week program developed by the University of Alberta's Faculty of Native Studies "that explores Indigenous histories and contemporary issues in Canada.")*

While it may be tempting to consider exemptions for the following categories of lawyers, thought must be put into why a lawyer would be exempt from The Path:

1. Lawyers who have an undergraduate or graduate degree in Indigenous Studies or similar program
2. Lawyers who have a certain number of years at the bar practicing Aboriginal Law (Treaties, Aboriginal Rights, Indian Act, etc) or Indigenous Law (Indigenous Legal Traditions)
3. Lawyers who are First Nations, Inuit or Métis

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The arguments put forward by the LSBC, noted above, would recommend against any exemptions. Specifically, avoiding exemptions would allow the LSA to meet the explicit wording in *Call to Action* 27, that the Law Society "ensure" that all lawyers receive training and that all lawyers have the same baseline knowledge upon completion of the course.

Exemptions would not permit the LSA to ensure that all lawyers have the same baseline training, even where some lawyers would start that process with more knowledge than others.

As noted above, the LSBC Committees recommended that training be mandatory as it was felt that "the objectives of intercultural competence education, including reconciliation, cannot be fully achieved unless all lawyers have a baseline understanding of the skills and topics identified in Call to Action 27." The Benchers of the LSBC adopted the recommendation and mandated training for all lawyers.

Conclusion

The implementation by the LSA of responses to the *Truth and Reconciliation Commission of Canada's Calls to Action* do not require perfection. What they require is a willingness to engage in the process and to start somewhere and build from there.

The LSA has started this process with its Indigenous Initiatives. The implementation of Indigenous cultural competency training through The Path is a great starting point for the development of an educational component for lawyers.

The question remains whether this program will be mandatory/compulsory or optional/voluntary.

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Appendix A – Alberta's Indigenous Context

Alberta has a large indigenous population. As noted by Indigenous and Northern Affairs Canada (soon to become Crown-Indigenous Relations and Northern Affairs, as well as Indigenous Services Canada):

> In Alberta there are:
>
> - 45 First Nations in three treaty areas [Treaties 6, 7 and 8]
> - 140 reserves
> - Approximately 812,771 hectares of reserve land[13]

Alberta contains the largest reservation in Canada:

> The Kainai reserve Blood 148 [the Blood Tribe Reserve] is currently the largest in Canada with 4,570 inhabitants on 1,414.03 km² and is located approximately 200 kilometres south of Calgary.[14]

Additionally, Alberta is the only province to have acknowledged and established Métis Settlements. As noted on the Government of Alberta website:

> In 1985, the Alberta Legislature unanimously endorsed a resolution to transfer lands to the Metis Settlements and establish new legislation which provided Métis Settlements with greater local autonomy.[15]

Edmonton is home to the second largest urban indigenous population in Canada, following Winnipeg.

> Winnipeg has the largest Indigenous population of any major city in Canada, according to the latest census data.
>
> The Statistics Canada numbers, based on the 2016 census, show Winnipeg's census metropolitan area (CMA) with 92,810 people identifying as Indigenous — First Nations, Métis and Inuit.
>
> Edmonton (76,205), Vancouver (61,460) and Toronto (46,315) round out the top four.[16]

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[13] https://www.aadnc-aandc.gc.ca/eng/1100100020670/1100100020675

[14] https://en.wikipedia.org/wiki/Kainai_Nation#:~:text=The%20Kainai%20reserve%20Blood%20148,200%20kilometres%20south%20of%20Calgary.

[15] https://www.alberta.ca/about-metis-settlements.aspx

[16] https://www.cbc.ca/news/canada/manitoba/aboriginal-population-statistics-canada-1.4371222#:~:text=Winnipeg%20has%20the%20largest%20Indigenous,First%20Nations%2C%20M%C3%A9tis%20and%20Inuit.

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While Calgary may not be in the top four cities with an urban indigenous population, it directly abuts the Tsuut'ina Nation, while a short drive to the west finds the Stoney Nakoda Nation and a short drive to the east finds the Siksika Nation. Many of the members of these Nations find themselves in Calgary regularly seeking services for a variety of needs, including legal services.

Other cities and towns in Alberta find themselves equally close to First Nations and Métis Settlements and have First Nations and Métis residents.

More broadly, Canada's indigenous population is the fastest growing segment of the Canadian population, overall:

> A high fertility rate and a growing sense of self are fuelling an explosion in the ranks of Indigenous Peoples, according to fresh census numbers that lay bare the demographic challenges facing one of the most vulnerable and poverty-stricken segments in Canada.
>
> Nearly 1.7 million people identified as Aboriginal in the 2016 census, Statistics Canada says – a 4.9 per cent share of the total population and a breathtaking 42.5 per cent increase since 2006, a growth rate more than four times that of their non-Indigenous counterparts.[17]

Alberta's lawyers have many opportunities for interaction with Alberta's Indigenous population, both at work and in their everyday lives.

[17] https://globalnews.ca/news/3823772/canadas-growing-indigenous-population/#:~:text=Nearly%201.7%20million%20people%20identified,of%20their%20non%2DIndigenous%20counterparts.

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Appendix B – Law Society Comparison

Indigenous Training - Canadian Law Societies

Province	Training Offered	Mandatory or Optional
BC	In December 2019, the LSBC Benchers adopted the following resolution: *The Law Society develop, in consultation with subject-matter experts, an online Course composed of a series of modules that cover the Topics identified in this joint recommendation report. The modules will be provided to lawyers at no cost, and must be completed by all full and part time practising lawyers in BC, within two years of the Course being made available. This new requirement will be established outside of the CPD program, however CPD credit hours will be provided for time spent completing the Course.* Phase I course proposal for Bencher consideration would develop a free six hour, online modularized course relating to TRC#27. The Phase I course would be mandatory for all lawyers beginning in 2021, and lawyers would be required to complete it within two years. Subject to Bencher approval of the Phase I course, the two committees will begin considering a Phase II course(s) requirement. The two committees have not yet focused in any depth on the MMIWG Report, but will presumably do so when considering the Phase II course.	Mandatory We are aiming to introduce the course to the profession in early 2021. Training was recommended to be mandatory for all lawyers regardless of year of call and full- or part-time practice, as it was felt that "the objectives of intercultural competence education, including reconciliation, cannot be fully achieved unless all lawyers have a baseline understanding of the skills and topics identified in Call to Action 27."
SK	We offer stand-alone TRC CPD programs, and we also try to incorporate TRC topics into larger CPD programs.	Optional Our Competency Committee directed that we incentivize all TRC training (discounted price or free) as a first step. Although the Committee's discussion was not intended to be conclusive on the mandatory/optional question, I can advise that one concern they raised was the idea that when you force it on someone it may trigger

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		resentment and/or less engagement related to that particular topic. At the time of the Competency Committee discussion, a TRC Advisory Group was being established so the intention was to get further direction from that group once it was fully functioning. Unfortunately, we have not been able to move work through that group as quickly as we had envisioned, so this matter has not been further considered in any comprehensive manner to date.
MB	We have offered various CPDs in response to the TRC's Calls to Action, including two full day programs on Indigenous law which were held at a traditional teaching lodge on Sagkeeng First Nation and a five part series of programs that covered treaties, urban reserves and other topics. Our CPD department tries to integrate content that helps increase cultural competency in all CPD programs where possible. We are currently working on some additional programming which we hope to have available for the coming year. Our staff and benchers have participated in the CAIROS blanket ceremony.	It isn't mandatory at this time. Our Benchers considered this issue some time ago and decided to make it optional. It's possible that the Benchers may re-consider this issue.
ON	*Based on a Sept 2019 Update:* LSO's CPD continues to offer specific programming on Indigenous Law issues, with 2 half-day programs per calendar year on public and private law topics. Currently, each half day program is offered in a different season – one in Spring, one in Fall. These programs address diverse topics relating to Indigenous Law, including tax, estates, incorporating traditional laws into the Canadian legal system, family law, and consultation issues. Matters relating to the National Inquiry into Murdered and Missing Indigenous Women and Girls has been addressed in previous years' CPD programming, including the Indigenous Law annual programs, and will be featured again in future programs, as appropriate.	*(response not received at time of publication, believed to be optional)*
QU	From our past initiatives, our 3-hour online course on cultural competency is still available.	Optional

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	This online course qualifies for Québec's new Ethics and Professionalism CPD requirement. Since the Fall session of 2018, the same online course on cultural competency is a mandatory component of the bar admission program at the Ecole du Barreau. This mandatory component was adopted as a way to respond to TRC and also various Québec based studies that the Barreau conducted. We are also currently working on the first edition of an annual indigenous law conference that will be held in April 2021.	
NB	We don't normally offer CPD programs. However, following TRC recommendations, the LSNB hosts 2 blanket exercise sessions per year. However, the exercises have been put on hold due to COVID-19	Optional We can't make the exercises mandatory because they are not offered in French – everything we make mandatory has to be offered in the two official languages. Also, we do not have enough resources to hold enough blanket exercise for all our membership.
NS	We have TRC training in PREP and we also do a cultural competence workshop for all new admittees that is mandatory.	Our council is currently looking at making cultural competence training mandatory for all lawyers.
PEI	We have training as part of our Bar Admission Course each year for the articling clerks and we have also had annual cultural competency training for our members, including most recently with Senator Murray Sinclair.	The sessions for the members are not mandatory, although we have strongly encouraged members to attend and have tried to make them very affordable.
NL	Our Indigenous Education and Action Committee has organized several CPD seminars in response to TRC and MMIWG. These seminars have, thus far, been optional. We developed indigenous training content for our Bar Admission Course a few years back. This year we are engaging with the local indigenous groups to elaborate on the existing content and to develop new material. This course is mandatory for all articling students.	Optional

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	We are also exploring the possibility of offering the (relatively) new program developed by the CBA – "The Path" - to our students free of charge.	
NU	*Based on a Sept 2019 Update:* LSN has secured significant funds to deliver a project in partnership with Pauktuutit Inuit Women of Canada on Family Violence Prevention in Nunavut: A Research Project and Awareness Campaign. The Advisory Committee is composed of Inuit organizations, Inuk law student, Government of Nunavut Departments, YWCA AGVVIK Society (which runs the women's shelter in Iqaluit), NU Status of Women and LSN Members. The project will allow the identification of what is and is not working re: legal responses to family violence in the territory and to identify how to respond to unmet legal needs. The fruits of this project may lead into future CPD programmes for members. LSN Members continued to benefit from the Indigenous Cultural Competency (ICC) workshop offered by the Quality of Life Secretariat (GN). This opportunity, at no cost to the LSN and its Members, was made possible by former Quality of Life Secretariat ADM Karen Kabloona. The LSN has taken steps to begin the work of developing its own ICC training with the assistance from Pirurvik Center based in Iqaluit. The training will include an on-line component to make this training accessible to all of its membership. The LSN will now be organizing the speaker series and continue to inform the Members of the Committee to ensure the events are planned and delivered in a manner that is aligned with the Committee's vision. The Committee has provided a list of readings that should be included as part of the mandatory reading list when lawyers apply to be called to the LSN. In addition, the Committee has suggested supplemental readings that would focus on Inuit history and Inuit culture. These suggested readings could be considered as part of the accompanying materials related to the Indigenous Cultural Competency training project (Pirurvik Center). Developing Inuktitut language skills is an important part of recognizing the cultural component when practising in Nunavut. Accordingly, the LSN will evaluate the feasibility	*(response not received at time of publication, some training is mandatory)*

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	and cost recovery scheme to develop an online module with the Pirurvik Center. The current compulsory professional development (PD) policy already recognizes language training as a PD activity. It hopes to be able to offer an online learning opportunity to all of its membership in the future.	
NT	We offer occasional CPD events on indigenous law topics.	Optional Our Executive is meeting in September to discuss whether there should be something more intentional for indigenous training/cultural competency, as opposed to ad hoc CPD sessions. Whether training should be mandatory will come up as part of that conversation.
YK	The Law Society of Yukon provides CPD programming to its members, including a First Nations 101 course which focuses on Yukon First Nations. The program was created by Yukon University and the Law Society of Yukon offers an in-person course to its members each year and will subsidize part of the cost. In addition, the CPD Committee seeks out other opportunities to offer programming on Indigenous Training and recently hosted a CPD on Residential School in Yukon.	The training is strongly encouraged, but at this time it is not mandatory. We have been discussing whether to make Indigenous training mandatory and if so, what it should look like. It is still an ongoing discussion and will likely be getting more attention as the Law Society works to implement the recommendations of the TRC Advisory Committee.

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EDI Advisory Committee ("EDIAC") meeting. The feedback and broad range of perspectives from this group of engaged lawyers will be valuable to the EDI Committee's work.

13 Lawyer Competence Committee ("LCC") Report

Documentation for this item was circulated with the meeting materials. Mr. Warren, Chair, LCC, added background on the LCC's recommendation that the indigenous training should not be mandatory. Subsequently, Mr. Warren met with the Lawyer Competence Advisory Committee ("LCAC") whose members presented a different view. This issue will be discussed further by the LCC; however, in the meantime, the Benchers were asked to approve the revised mandate to remove the mandatory requirement.

Motion: Warren/Petriuk
That the Benchers adopt the amended mandate of the Lawyer Competence Committee, as proposed.
Carried unanimously

Mr. Warren then provided his report on the LCC's activities, noting that the pandemic has provided an opportunity for the LCC to look at articling, lawyer formation, competence, wellness and principal training. Jordan Furlong has been retained to work with the LCC on these issues.

Bencher comments and questions were mainly around the importance of indigenous cultural competency training and when and how this will be addressed. Ms. Ghitter advised that a training course is currently being developed and more information will be available in the fall. The Benchers can also expect a report from the Indigenous Advisory Committee in the fall.

14 Advisory Committees Report

Documentation for this item was circulated with the meeting materials. Ms. Ryan provided highlights from first meetings of the LCAC and EDIAC. For LCAC, the question of indigenous cultural competency training and the concept of subject matter expert advisors are priorities. EDIAC's first meeting focused on the safe reporting process and the Federation of Law Societies of Canada's Model Code of Professional Conduct consultation. The high level of engagement, knowledge and expertise on the advisory committees was noted and Ms. Ryan commended the Law Society for engaging the profession in this way.

15 Consent Agenda

The consent agenda items were circulated with the materials and approved concurrently.

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Bencher Public Minutes

Approved Public Minutes of the Four Hundred and Ninety-Seventh Meeting of the Benchers of the Law Society of Alberta (the "Law Society")

February 20, 2020
Offices of the Law Society, Calgary, Alberta
9:00 am

Benchers present	Rob Armstrong, outgoing President Kent Teskey, President Darlene Scott, President-Elect Arman Chak Elizabeth Hak Bill Hendsbee Cal Johnson Linda Long Jim Lutz Barb McKinley Bud Melnyk Walter Pavlic Lou Pesta, incoming Bencher Corinne Petersen Stacy Petriuk Robert Philp Kathleen Ryan Deanna Steblyk Margaret Unsworth Cora Voyageur Ken Warren Louise Wasylenko Nate Whitling
Regrets	Ryan Anderson Corie Flett
Executive Leadership Team members present	Elizabeth Osler, Executive Director and Chief Executive Officer Cori Ghitter, Deputy Executive Director and Director, Professionalism and Policy Paule Armeneau, Director, Regulation, and General Counsel Nadine Meade, Chief Financial Officer

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	Andrew Norton, Chief Information Officer and Director, Business Operations David Weyant, President and Chief Executive Officer, Alberta Lawyers Indemnity Association
Staff present	Barbra Bailey, Policy Counsel Colleen Brown, Manager, Communications Nancy Carruthers, Manager, Professionalism and Ethics Ruth Corbett, Governance Administrator Shabnam Datta, Policy Counsel Jennifer Freund, Policy Counsel Andrea Menard, Indigenous Initiatives Liaison Stephen Ong, Business Technology Christine Schreuder, Governance Coordinator
Guests and observers present	Glen Buick, former Bencher Loraine Champion, Executive Director, Alberta Lawyers' Assistance Society Kene Ilochonwu, member, Bencher Election Task Force Carsten Jensen, Federation of Law Societies of Canada Bianca Kratt, Treasurer, Canadian Bar Association, Alberta Nonye Opara, Executive Director, Pro Bono Law Alberta Sandra Petersson, Executive Director, Alberta Law Reform Institute Christine Sanderman, Executive Director, Legal Education Society of Alberta

Secretary's Note: The arrival and/or departure of participants during the meeting are recorded in the body of these minutes.

The meeting was called to order at 9:00 a.m.

	Item
1	**Remarks from the Outgoing President** Mr. Armstrong called the meeting to order at 9:00 am, beginning with the Indigenous territorial acknowledgement of the Treaty 7 tribes. Lou Pesta, incoming Bencher to fill the Bencher vacancy left by Mr. Armstrong's resignation, was welcomed to his first Bencher meeting. Other first-time guests welcomed were Carsten Jensen, Bianca Kratt, Kene Ilochonwu, and Andrea Menard. Mr. Armstrong addressed the Benchers with his final remarks as President. He reflected on his years at the Bencher table, particularly over the past year as President, and thanked

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	the Benchers for having confidence in him. Mr. Armstrong talked about the significance of the changes and transitions that have taken place during his Presidency, particularly Ms. Osler's appointment as the new CEO and Executive Director, the new leadership team, and the office move. Mr. Armstrong encouraged the Benchers to continue their commitment to strategic discussions and to strive to make decisions by consensus and speak with one voice, and to lead courageously to move the Law Society forward. Mr. Armstrong received a standing ovation as he left the meeting.
2	**Remarks from the new President** Mr. Teskey provided his opening remarks, expressing his honour to take the Chair as President and acknowledging the work of past presidents. Mr. Teskey highlighted the exciting and important work to be done over the next year, that will impact the public and the profession. Mr. Teskey expressed his hope that the Benchers commit to the pursuit of principled change and progress, to take actions, be accountable, to change course if necessary, and to chart an agenda that is befitting of the organization and the needs of the profession.
3	**Big Issues and Engagements Timelines** The Big Issues and Engagements Timelines were circulated with the meeting materials. Ms. Osler provided background information on the purpose of the timelines and noted that the format has been updated. The timelines will be updated as the year progresses.
4	**Board Relations Guideline (BRG) Annual Review** The BRG was circulated with the meeting materials. Ms. Scott outlined the process that was followed in the development of the BRG's Board Norms. In response to a suggestion that the norm for in-camera sessions is not clear, Ms. Scott directed staff to review the language in the BRG and the In-Camera Guideline to ensure alignment and clarity and, if necessary, bring forward a recommendation for changes.
5	**Videoconferencing Policy** A memo from the President was circulated with the meeting materials. Mr. Teskey invited Bencher feedback on the proposal for a commitment to videoconferencing as the default for remote participation in committee and task force meetings. Mr. Teskey outlined the difficulties that the current model for hybrid in-person/conference call meetings creates. The Benchers supported the suggestion that the default would be participation in-person or by video; however, requested that participation by phone, when appropriate, would not be excluded. The Board requested an amendment to part 1) of the motion to require

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individual Chairs to canvass consensus to adopt video where possible. The amendments to the motion are reflected in italics.

Amended Motion

1) **The Benchers agree to make best efforts to participate in *committee and task force* meetings by video, rather than by teleconference. *Chairs of the committees and task forces will canvass consensus to adopt video where possible.***
2) **Attendees agree to participate in meetings with the camera active.**
3) **The Organization commits to provide the necessary ongoing support to eliminate barriers to video participation through training, support and where necessary, technology upgrades.**
4) **That the Benchers commit to removing the teleconference meeting option except in exceptional circumstances by June 1, 2020.**

Seconded
Carried unanimously

Mr. Pavlic joined the meeting.

6 Continuing Professional Development (CPD) proposal

A memo from the President was circulated with the meeting materials. Mr. Teskey presented the proposal for immediate changes to the Law Society's CPD program. The Benchers' discussion included consideration of suspending the filing requirement, the benefit of keeping the CPD portal 'live' while it is being redeveloped; and discussions on required programs regarding Indigenous issues.

Motion:

1) **That the Benchers immediately suspend the mandatory CPD filing requirement for the profession for the years 2020 and 2021. While the CPD planning tool would remain available for those who want it, it would not be mandatory and no administrative suspensions would take place.**
2) **That the Bencher Lawyer Competence Committee and Indigenous Advisory Committee work with staff to create competence programs for 2020 and 2021 on Indigenous issues to meaningfully address our obligation arising from the Calls to Action in the Truth and Reconciliation Report.**
3) **That the Bencher Lawyer Competence Committee, the Lawyer Competence Advisory Committee and the Benchers consult with the profession, the public and other stakeholders to create a new competence framework for the whole life of a lawyer for the Law Society**

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of Alberta that is proportionate, effective and dynamic and includes wellness as part of that framework.

Seconded
Carried unanimously

7 Access to Justice Staff Initiatives

Documentation for this item was circulated with the meeting materials. Ms. Ghitter provided a brief outline of the initiatives underway or being planned, highlighting the Law Society's decision to bring the Lawyer Referral Service in-house to work on ways to improve the efficiency and effectiveness of the program.

8 Bencher Election Task Force (BETF) Recommendation

Documentation for this item was circulated with the meeting materials. Ms. Petriuk, Chair of the BETF, presented the proposal, highlighting the process that the BETF followed. Following Ms. Petriuk's presentation of the BETF's process, key considerations, and arguments for and against the proposal, Mr. Ilochonwu was invited to the table to share his perspectives. The Benchers then held an extensive discussion of the issues. Benchers' comments and questions revealed further diversity of views. Of those who did not support the recommendation, some preferred that the BETF explore other ways to increase candidate diversity, while others thought the additional category didn't go far enough to address diversity or respond to the TRC Calls to Action. Those in support recognized the recommendation as an initial step in a long and complex process; however, concerns were also expressed that the BETF was not unanimous in its recommendation.

Motion:
That the Benchers approve the creation of a New Lawyer Bencher category, as proposed by the Bencher Election Task Force.

Seconded
Defeated

Mr. Chak, Ms. Datta, Ms. Opara, and Mr. Ilochonwu left the meeting.

9 Contingency Reserves Policy (the "Policy")

Documentation for this item was circulated with the meeting materials. Ms. Ryan, Chair of the Audit and Finance Committee (AFC), presented the draft Policy, highlighting its purpose to safeguard against unexpected costs and promote financial stability. Ms. Meade detailed the process that was followed to formalize practice into the Policy, which included an environmental scan of other law societies and the engagement of external consultants including the actuary, auditor and investment manager. The AFC and the Executive Committee provided comments which were incorporated into the final draft.

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Motion:
That the Benchers approve the Contingency Reserves Policy, as presented.
Seconded
Carried unanimously

10 Pension Committee

Documentation for this item was circulated with the meeting materials. Mr. Teskey explained the rationale for the proposed changes to the oversight of the Law Society's pension plans. Mr. Teskey advised that the Executive Committee has the authority to oversee the pension plans and approved the recommendations on February 12, 2020.

Motion:
That the Benchers approve the following regarding oversight of the Law Society's Pension Plans:

1) **The Group RRSP Plan, which is not subject to regulation and is provided to all employees, excluding ELT, is administered by the Executive Leadership Team.**
2) **The Defined Contribution Plan, which is subject to regulation and provided to ELT members, is administered by the Audit and Finance Committee, with reporting obligations to the Executive Committee**
3) **The Defined Benefit Plan, which is subject to regulation, is administered by the Audit and Finance Committee, with reporting obligations to the Executive Committee**

Seconded
Carried unanimously

11 Law Society Committee Mandates

Documentation for this item was circulated with the meeting materials.

Motion:
That the Benchers approve the Law Society of Alberta Committee Mandates, as circulated.
Seconded
Carried unanimously

12 2020 Committees, Task Forces, and Liaisons

The 2020 Committees, Task Forces, and Liaisons list was circulated with the meeting materials and Mr. Teskey noted that the proposed assignments were circulated to the Benchers on February 6 for advance review and comment before being finalized.

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Motion:

1) **To appoint the 2020 committees, task forces, liaisons and representatives to "other bodies" as set out in the 2020 Committees, Task Forces, Liaisons and Other Bodies list; and**
2) **To continue the term of appointment for any person on a 2019 committee involved in any ongoing adjudicative matter until such time as a report or decision is rendered on the matter in which they are involved.**

Seconded
Carried unanimously

13 Publication and Redaction Guideline for Adjudicators (the "Guideline")

Documentation for this item was circulated with the meeting materials. Ms. Carruthers presented the Guideline, providing background information on the process for amendments intended to align with recent Rule changes governing the publication of disciplinary outcomes. Ms. Carruthers noted that Bencher feedback and direction provided at the December 5, 2019 Bencher meeting for further work to be done on the Guideline was completed, reviewed and recommended by the Policy Committee.

Motion:
That the Benchers approve the amendments to the *Publication and Redaction Guideline for Adjudicators,* as set forth in Appendix "A" of the meeting materials.

Seconded
Carried unanimously

14 Code of Conduct Amendment on Technological Competence

Documentation for this item was circulated with the meeting materials. Ms. Carruthers presented the proposal for a change to the Law Society Code of Conduct to be consistent with recent amendments to the Federation of Law Societies of Canada's Model Code of Professional Responsibility with respect to technological competence.

Motion:
That the Benchers approve the amendment of the Commentary to Rule 3.1-2 of the *Code of Conduct,* as set forth in Appendix "A" of the meeting materials.

Seconded
Carried unanimously

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15 Leadership Report

The Leadership Report was circulated with the meeting materials along with a link to a podcast. Ms. Osler added the following updates:

- Ms. Armeneau will retire from the Law Society at the end of June 2020. Ms. Osler publicly acknowledged the significant contributions of Ms. Armeneau, QC, noting that Ms. Armeneau has been instrumental in positive process changes that have had a significant effect on the organization over the last five years.
- A proposal to transfer management of the process for student appeals from the Benchers to the Canadian Centre for Professional Legal Education will be brought to the Benchers for decision in April. Policy work is underway.
- The theme for the Jasper Retreat is Lawyer Competence. Jordan Furlong, a leading analyst of the global legal market, has been engaged as the keynote speaker. The podcast provides a flavour of what's to come in Jasper this year.

16 CONSENT AGENDA

The consent agenda items were circulated with the materials and approved concurrently. There were no requests to remove any items from the consent agenda.

Motion:

16.1 To schedule the 2020 Annual General Meeting of the Law Society of Alberta at 4:00 pm on April 23, 2020 in Edmonton;

16.2 To re-appoint PricewaterhouseCoopers as auditors for the Law Society of Alberta for the fiscal year ending December 31, 2020; and

16.3 To approve the December 5, 2019 Public Bencher meeting minutes.

Seconded

Carried

17 Reports for Information

17.1 Alberta Law Foundation report (oral report)
17.2 Alberta Law Reform Institute report
17.3 Alberta Lawyers' Assistance Society report
17.4 Audit and Finance Committee report
17.5 Canadian Bar Association report
17.6 Federation of Law Societies of Canada report
17.7 Legal Education Society of Alberta report
17.8 Pro Bono Law Alberta report

18 Other Business

There was no other business. The public meeting was adjourned at 1:45 pm.

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A Path Forward on Competence

February 11, 2020

From:	**Kent Teskey, President**
Re:	**Competence Bencher Motions**

Introduction

During the development of the strategic plan, it became clear that a 21st century modern regulator would create the most impact on the profession and the public interest by prioritizing competence initiatives.

In many ways, the key control that the regulator has over the effectiveness, wellness and ethics of the profession is our power to drive competence. Simply put, a competent lawyer is more likely to be happy, profitable, ethical and effective.

We have been committed to the goal of proactive regulation over the last five years. The Law Society of Alberta believes that the best solution to a regulatory problems is to address it before it becomes a formal conduct matter. My belief is that the next step in the process is to become a competence-centered regulator.

The Challenges

1. The most rigorous competence initiative that the Law Society currently engages is the Articling program which is restricted to one year and relies heavily on informal mentoring. The survey told us that the program creates issues of competence and harassment that we are compelled to act on.

2. Outside of articling, our main competence initiative is our CPD program. While it has been praised for understanding the nature of adult learning, it has some key structural problems. First, it treats all practitioners the same no matter their experience, level of practice or access to firm-based competence programming. Second, while we collect substantial amounts of information, we do not do anything material with it, outside of considering it if a lawyer is in our regulatory stream. The risk is that this could create a substantial credibility gap within the profession.

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3. The shift to a competence-centred model will likely require solutions that look very different from our existing programs.
4. The necessary changes to Articling and CPD will likely require multiple years to transition to and will require substantial consultation.

Call to Action

The Benchers will be asked to pass 3 key disruptive motions to signal our commitment to become competence-centered regulator.

1. The Benchers immediately suspend the mandatory CPD filing requirement for the profession for the years 2020 and 2021. While the CPD planning tool would remain available for those who want it, it would not be mandatory and no administrative suspensions would take place.
2. The Bencher Lawyer Competence Committee and Indigenous Advisory Committee work with staff to create competence programs for 2020 and 2021 on Indigenous issues to meaningfully address our obligation arising from the Calls to Action in the Truth and Reconciliation Report.
3. The Bencher Lawyer Competence Committee, the Lawyer Competence Advisory Committee and the Benchers consult with the profession, the public and other stakeholders to create a new competence framework for the whole life of a lawyer for the Law Society of Alberta that is proportionate, effective and dynamic and includes wellness as part of that framework.

Risks

In taking this bold step, the Benchers would be accepting certain risks. At its basic level, we would be creating a vacuum in our existing competence regime that we would be obliged to fill. While I recognize that concern, I am convinced that the risk of attempting to iterate within our existing regime is greater. The beginning of solutions to this issue require not only time but the blank slate to come up with a regime that support all lawyers through all stages of practice.

Vision

In taking this step, I am hopeful that with our shared vision, good will and hard work that we can look back 3 years from now and say that we have built a system that accomplishes the following:

1. A competence model that supports practitioners at all points of practice proportionately and responsively, and takes into account wellness as part of the competence framework.

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2. That the Law Society of Alberta become a model for protecting the public interest by raising competence across the profession by not only encouraging competence but providing lawyer competence educational programming, where appropriate.
3. That through a young lawyer competence program covering the first five years that our reliance on the current articling model is substantially reduced.

In thinking about plan, I looked back on my election speech for President in 2017,

My vision for the Law Society of Alberta as a proactive regulator is that we not settle for ensuring competence, but rather that we recognize our role in empowering and equipping lawyers to be great.

We have no greater regulatory influence on the ultimate success of practitioner than the articling year. The lessons that a student learns in that formative year will likely shape how the core of that lawyer will practice for the next 30 years.

And yet, articling is one of the most unstructured aspects of our regulatory scheme.

Our theory, largely untested, is that by osmosis an articling student will be able to transition a largely theoretical education into practitioner who can manage a business and serve clients in a practical and ethical manner all in 12 months. With respect we know that isn't true for a great number of students.

A significant number of students receive an article which does not provide the foundations for a successful legal career. It may be lacking in substantive training. It may be lacking in providing a foundation of practice management. And on the other hand, some lawyers receive great articles that do all of those things.

*The outcomes are completely inconsistent and yet our regulatory model assumes that **all** of our students are getting the training they need to compete and to serve the Alberta public.*

There is also a power imbalance in articling. It is market-driven and a student would be hard-pressed to challenge their principal to ensure they are receiving the training they require and that their regulator assumes they are getting.

Beyond that, we have few resources to ensure that articling process is safe and equitable. When was the last time that a hearing committee dealt with an issue of harassment involving an articling student? Is it because it doesn't happen.

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I highly doubt it. Given this backdrop we must assume that a significant number of our colleagues, mostly racialized lawyers and female practitioner are being trained in disrespectful and frankly unsafe environments. There are few options for these members to seek redress with the Law Society.

These are our failures and we must own them.

We must critically look at the articling process. It must start by forging meaningful partnerships with the law schools to create better learning outcomes for our young lawyers. We must talk to young practitioner to understand the strengths and failings of articling regime. We must create a regime that is committed to the broad success of our young practitioner. And lastly, we must create a meaningful ability for young lawyers to seek redress for unsafe or abusive articles in a way that doesn't prejudice to move through the registration process.

And I challenge us to confront the distinct possibility that a modern and dynamic student registration process may look fundamentally different from what articling looks like today. This is an opportunity for the whole Bencher table with obvious potentials that we should embrace

Beyond the articling year, an alarming number of lawyers leave the profession after less than five years in practice. Ambitious, intelligent, and deeply passionate people from all walks of life are unable to find a satisfying and meaningful place in our profession – despite having invested years of their lives and tens of thousands of dollars in a legal education. These are some of the best and the brightest young people in Alberta who we cannot afford to lose to other fields.

I am asking the Benchers to own this issue and lead.

Onward!

Kent.

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Approved Minutes

Policy and Regulatory Reform Committee (Committee) meeting

May 17, 2023

Videoconference

1:00 p.m.

ATTENDANCE	
Committee Members	Stacy Petriuk, Chair Glen Buick, Vice-Chair Sony Ahluwalia Ron Sorokin Moira Váně
Ex-*officio*	Bill Hendsbee, President Deanna Steblyk, President-Elect
Staff	Elizabeth Osler, CEO & Executive Director Elizabeth Aspinall, Practice Advisor Nancy Bains, Tribunal Counsel & Privacy Officer Shabnam Datta, Manager, Policy Tina McKay, Senior Manager, Business Operations Kendall Moholitny, Director, Regulation and Professionalism Noria Neuhart, Policy Counsel Erica Pridham, Membership Counsel Laura Scheuerman, Governance Coordinator
Regrets	Ted Feehan Jim Lutz Mary Ellen Neilson Margaret Unsworth

	Item
1.	**Call to Order and Approval of the Agenda** Ms. Petriuk called the meeting to order at 1:05 p.m. [redacted]

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Policy and Regulatory Reform Committee (Committee) Videoconference meeting

April 13, 2023

Zoom videoconference

10:30 am

ATTENDANCE	
Committee Members	Stacy Petriuk, Chair Glen Buick, Vice-Chair Sony Ahluwalia Jim Lutz Mary Ellen Neilson Ron Sorokin Margaret Unsworth Moira Váně
Ex-*officio*	Bill Hendsbee, President
Staff	Elizabeth Osler, CEO & Executive Director Cori Ghitter, Deputy Executive Director & Director, Policy and Education Elizabeth Aspinall, Practice Advisor Shabnam Datta, Manager, Policy Jennifer Freund, Policy and Governance Counsel Kendall Moholitny, Director, Regulation and Professionalism Noria Neuhart, Policy Counsel Erica Pridham, Membership Counsel Laura Scheuerman, Governance Coordinator
Regrets	Ted Feehan

	Item
1.	**Call to Order and Approval of the Agenda** Ms. Petriuk called the meeting to order at 10:32 am. The agenda was circulated with the materials prior to the meeting and adopted by consensus.

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Tab	Item
[redacted]	[redacted] [redacted]
[redacted]	[redacted] [redacted]
4.	**Continuing Professional Development Review Process Parameters** Documentation for this agenda item was circulated with the meeting materials. Ms. Bailey advised that the purpose of today's discussion was to get feedback and direction from the Committee on the recommendations in the Furlong Report for the new Continuing Professional Development (CPD) program. Specifically, the Committee discussed the following: **What should the minimum requirements be for CPD plans?** Mr. Lutz provided his comments and then left the meeting at 9:35 a.m. Summary of the Committee's discussion and feedback follows: - It was suggested that lawyers could voluntarily self-audit by completing a spreadsheet as they go along. However, if the Law Society's intention for reviews is to dialogue with lawyers about their self-reflection, would a requirement to complete a spreadsheet suggest a more formal assessment process? It was noted that large firms already require this type of professional development review. It was suggested that it might be beneficial to explore ways to coordinate firms' CPD programs with the Law Society's. - The Committee recognized that the CPD tool will provide lawyers with many different options. The importance of the effectiveness of the tool and how it is rolled out was noted.

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Equity, Diversity and Inclusion (EDI) Committee (the "Committee") meeting

March 31, 2022

Law Society of Alberta (the 'Law Society') Zoom videoconference

2:30 pm

ATTENDANCE	
Committee Members:	Corie Flett, Chair Cal Johnson, Vice-Chair Barb McKinley Sanjiv Parmar Moira Váně
Ex-officio:	Ken Warren, President Bill Hendsbee, President-Elect
Bencher Liaison:	Kathleen Ryan
Staff:	Elizabeth Osler, CEO & Executive Director Cori Ghitter, Deputy Executive Director, & Director, Policy and Education Susannah Alleyne, EDI Counsel, and Equity, Diversity & Inclusion Counsel and Equity Ombudsperson Barbra Bailey, Manager, Education Shabnam Datta, Manager, Policy Kate Fiori, Governance Assistant Avery Stodalka, Senior Communications Advisor
Regrets:	Sony Ahluwalia Grant Vogeli Salimah Walji-Shivji

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Lawyer Competence Committee (the "Committee") meeting

March 16, 2022

Law Society of Alberta (the "Law Society")

Videoconference

8:00 a.m.

ATTENDANCE	
Committee Members	Deanna Steblyk, Chair Bud Melnyk, Vice-Chair Ted Feehan Corie Flett Kene Ilochonwu Jim Lutz Sanjiv Parmar Stacy Petriuk Ron Sorokin
Bencher Liaison	Kathleen Ryan
Ex Officio	Ken Warren, President Bill Hendsbee, President-Elect
Guests	Carla Caro, Program Director, ACT Patricia Muenzen, Director, ACT
Staff and Guests	Cori Ghitter, Deputy Executive Director, and Director, Policy and Education Barbra Bailey, Manager, Education Colleen Brown, Manager, Communications and Stakeholder Engagement Ruth Corbett, Governance Administrator Tina McKay, Senior Manager, Business Operations Rebecca Young, Education Counsel, Education

Tab	Item
1.	**Call to Order and Approval of the Agenda** The meeting was called to order at 8:00 am. The agenda was circulated with the materials prior to the meeting and approved by consensus.
[redacted]	[redacted]

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Tab	Item
[redacted]	[redacted]
4.	**Professional Development Profile for Alberta Lawyers Update** ACT's report on the Validation Survey Results was circulated with the meeting materials and the January 5, 2022 version of the Professional Development Profile (the "Profile") was emailed to the Committee during the meeting. Ms. Bailey provided background information on the process for the development of the Profile and Ms. Muenzen presented the Validation Survey Results. The Committee discussed the survey results; specifically, the demographics of respondents, the collection of ratings for each element of the profile, the validation criteria and how to use the results to finalize the Profile. Summary of discussion points: **Domains:** The Committee's discussion of the responses collected on the Domains focused on the data for the lowest-ranking Domains: *Truth and Reconciliation* ("TRC") and *Cultural Competence, Equity, Diversity and Inclusion.* Of the respondents, newer lawyers rated the TRC Domain as important while respondents with more experience rated it less important. However, the more experienced lawyers made up the majority of respondents. The Committee discussed the results from different perspectives: should lower ranked Domains or those not meeting the validation threshold be removed or combined? Or, given the respondent demographics, should the lower ranked Domains stand alone and development in those areas be actively encouraged? It was noted that raising awareness in these areas aligns with other Law Society work in the equity space to address systemic issues, including the mandatory completion of The Path training. The Committee recognized that the Profile is aspirational and voluntary. Overall, there was broad support among the Committee for maintaining the two Domains in question, despite the fact that they were rated lower than the other Domains. **Competencies:** The discussion of Competencies mirrored that of the Domains. The Committee discussed communications and Ms. Ghitter confirmed that reporting back to the profession is a priority but that it would likely be in the form of an Executive Summary of the survey results. Ms. Flett left the meeting at 9:45.

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Tab	Item
	Performance Indicators: The Committee discussed the two Performance Indicators that fell slightly below the validation threshold: *Implement Strategies to Mitigate Trauma* and *Increase Awareness of Qualifications of Internationally Trained Lawyers.* It was recognized that these Performance Indicators are not easy to understand as they are niche areas. Ms. Bailey advised that tools will be made available to assist people who are interested in learning more about certain areas. Mr. Lutz and Mr. Melnyk left the meeting at 10:00 a.m. The Committee also discussed the draft Profile, dated January 5, 2022, particularly the preamble to #2 – *Professional Conduct* – regarding accountability and the specified groups. Following discussion, in which it was recognized that the Profile is aspirational and would not be used for conduct matters, the Committee was satisfied that the wording in #2.2 was sufficient. **Motion: Melnyk/Ilochonwu** **That the Lawyer Competence Committee recommend that the Benchers approve the Professional Development Profile, as circulated.** **Carried unanimously**
[redacted]	[redacted]
[redacted]	[redacted]

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Meeting Minutes

Indigenous Advisory Committee ("IAC") Meeting

March 14, 2022

Law Society of Alberta - ZOOM Meeting

12:30 pm to 2:30 pm

Committee Members in Attendance	Josh Jackson Eugene Creighton, QC Lynda Levesque Harold Robinson Katelyn Lucas Sarah Sinclair Robert Philp, QC
Guests and LSA Staff in Attendance	Cori Ghitter Barbra Bailey Susannah Alleyne Raj Atkar
Regrets	Sandra Christensen-Moore Katelynn Cave Kane Richards

	Discussion Items
	Land Acknowledgment Bob commenced the meeting with a land acknowledgement.
1	**Call to Order and Approval of Agenda** Cori called the meeting to order at 12:34pm. The agenda was circulated with the meeting materials prior to the meeting. **A motion to approve the agenda was made by Bob Philp and seconded by Josh Jackson.** **Carried unanimously**
[redacted]	[redacted]

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Equity, Diversity and Inclusion (EDI) Committee (the "Committee") meeting

January 12, 2022

Law Society of Alberta (the 'Law Society') Zoom videoconference

12:00 pm

ATTENDANCE	
Committee Members:	Louise Wasylenko, Chair Stacy Petriuk, Vice-Chair Sony Ahluwalia Cal Johnson Moira Váně Grant Vogeli Salimah Walji-Shivji
Ex-officio:	Darlene Scott, President Ken Warren, President-Elect
Bencher Liaison:	Kathleen Ryan
Staff:	Elizabeth Osler, CEO & Executive Director Cori Ghitter, Deputy Executive Director, & Director, Policy and Education Susannah Alleyne, EDI Counsel, Education, and Equity Ombudsperson Barbra Bailey, Manager, Education Colleen Brown, Manager, Communications and Stakeholder Engagement Shabnam Datta, Manager, Policy Kate Fiori, Governance Assistant

	Item
1.	**Call to order and approval of the agenda** Ms. Wasylenko called the meeting to order at 12:00 pm. The agenda was circulated with the materials prior to the meeting and approved by consensus.

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Approved Minutes

Policy and Regulatory Reform Committee (the "Committee") Videoconference meeting

September 14, 2021
Zoom videoconference
8:00 am

ATTENDANCE	
Committee Members in Attendance	Deanna Steblyk, Chair Cal Johnson, Vice-Chair Ryan Anderson Lou Cusano Jim Lutz Sandra Petersson Louise Wasylenko
Ex-officio	Ken Warren, President-Elect
Guests and Staff in Attendance	Cori Ghitter, Deputy Executive Director & Director, Policy and Education Elizabeth Aspinall, Practice Advisor Shabnam Datta, Manager, Policy Jennifer Freund, Policy & Governance Counsel Tina McKay, Senior Manager, Business Operations Amanda Miller, Policy Counsel Christine Schreuder, Governance Coordinator
Regrets	Elizabeth Osler, CEO & Executive Director Darlene Scott, President

	Item
1.	**Call to Order and Approval of the Agenda** Ms. Steblyk called the meeting to order at 8:00 am. The agenda was circulated with the materials prior to the meeting and approved by consensus.

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Lawyer Competence Committee (the "Committee") meeting

October 30, 2020

Law Society of Alberta Zoom meeting

9:00 am

Committee Members in Attendance	Ken Warren, Chair Stacy Petriuk, Vice-Chair Ryan Anderson Elizabeth Hak Linda Long Bud Melnyk Kathleen Ryan
Ex-officio	Darlene Scott Kent Teskey
Guests and Staff in Attendance	Elizabeth Osler, CEO & Executive Director Cori Ghitter, Deputy Executive Director, and Director, Professionalism and Education Colleen Brown, Manager, Communications Jennifer Freund, Policy Counsel Jordan Furlong, Consultant Tina McKay, Senior Manager, Business Operations Andrea Menard, Indigenous Initiatives Liaison Rachel Piers, Communications Advisor Laura Scheuerman, Governance Assistant
Regrets	Bob Philp

	Item
1.	**Call to order and approval of the agenda** The agenda was circulated with the materials prior to the meeting and approved by consensus. The meeting was called to order at 9:05 a.m.

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Policy and Regulatory Reform Committee (the "Committee") Videoconference meeting

September 17, 2020
Zoom videoconference meeting
8:00 am

Committee Members in Attendance	Bill Hendsbee, Chair Deanna Steblyk, Vice-Chair Elizabeth Hak Jim Lutz Barb McKinley Lou Pesta Margaret Unsworth
Guests and Staff in Attendance	Darlene Scott, *ex-officio* Kent Teskey, *ex-officio* Elizabeth Osler, CEO & Executive Director Cori Ghitter, Deputy Executive Director & Director, Professionalism and Policy Barbra Bailey, Policy Counsel Nancy Bains, Tribunal Counsel Nancy Carruthers, Senior Manager, Policy and Ethics Shabnam Datta, Policy Counsel Jennifer Freund, Policy Counsel Sharon Heine, Senior Manager, Regulation Tina McKay, Senior Manager, Business Operations Christine Schreuder, Governance Coordinator
Regrets	Beth Aspinall, Practice Advisor and Equity Ombudsperson

	Item
1.	**Call to Order and Approval of the Agenda** Mr. Hendsbee called the meeting to order at 8:04 am. The agenda was circulated with the materials prior to the meeting and approved by consensus.

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Approved Minutes

Lawyer Competence Committee (the "Committee") meeting

September 11, 2020

Law Society of Alberta (the "Law Society")

Videoconference

9:00 am

Committee Members in Attendance	Ken Warren, Chair Stacy Petriuk, Vice-Chair Ryan Anderson Elizabeth Hak Linda Long Bob Philp Kathleen Ryan
Ex-officio	Darlene Scott Kent Teskey
Guests and Staff in Attendance	Elizabeth Osler, CEO & Executive Director Cori Ghitter, Deputy Executive Director, and Director, Professionalism and Policy Jennifer Freund, Policy Counsel Jordan Furlong, Consultant Andrea Menard, Indigenous Initiatives Liaison Rachel Piers, Communications Advisor Laura Scheuerman, Governance Assistant
Regrets	Bud Melnyk Colleen Brown, Manager, Communications

	Item
1.	**Call to order and approval of the agenda** The agenda was circulated with the materials prior to the meeting and approved by consensus. The meeting was called to order at 9:05 am.

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Policy and Regulatory Reform Committee (the "Committee") Videoconference meeting

August 13, 2020
Zoom videoconference meeting
8:00 am

Committee Members in Attendance	Bill Hendsbee, Chair Deanna Steblyk, Vice-Chair Elizabeth Hak Jim Lutz Barb McKinley Lou Pesta Margaret Unsworth
Guests and Staff in Attendance	Darlene Scott Cori Ghitter, Deputy Executive Director & Director, Professionalism and Policy Beth Aspinall, Practice Advisor and Equity Ombudsperson Barbra Bailey, Policy Counsel Nancy Carruthers, Senior Manager, Policy and Ethics Shabnam Datta, Policy Counsel Sharon Heine, Senior Manager, Regulation Christine Schreuder, Governance Coordinator
Regrets	Kent Teskey Elizabeth Osler, CEO & Executive Director Jennifer Freund, Policy Counsel Tina McKay, Senior Manager, Business Operations

	Item
1.	**Call to Order and Approval of the Agenda** Mr. Hendsbee called the meeting to order at 8:12 am. The agenda was circulated with the materials prior to the meeting and approved by consensus.

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Approved Minutes

Policy and Regulatory Reform Committee (the "Committee") Videoconference meeting

July 15, 2020
Teams videoconference meeting
8:00 am

Committee Members in Attendance	Bill Hendsbee, Chair Deanna Steblyk, Vice-Chair Elizabeth Hak Jim Lutz Barb McKinley Lou Pesta Margaret Unsworth
Guests and Staff in Attendance	Kent Teskey Darlene Scott Elizabeth Osler, CEO & Executive Director Cori Ghitter, Deputy Executive Director & Director, Professionalism and Policy Beth Aspinall, Practice Advisor and Equity Ombudsperson Barbra Bailey, Policy Counsel Nancy Carruthers, Senior Manager, Policy and Ethics Shabnam Datta, Policy Counsel Jennifer Freund, Policy Counsel Tina McKay, Senior Manager, Business Operations Christine Schreuder, Governance Coordinator

	Item
1.	**Call to Order and Approval of the Agenda** Mr. Hendsbee called the meeting to order at 8:05 am. The agenda was circulated with the materials prior to the meeting. **Motion: Lutz/Scott** **To approve the July 15, 2020 Policy and Regulatory Reform Committee meeting agenda as circulated.** **Carried unanimously**

Form 49

Clerk's Stamp

COURT FILE NUMBER	2301-14224
COURT	Court of King's Bench of Alberta
JUDICIAL CENTRE	Calgary
APPLICANT	Yue Song
RESPONDENT	The Law Society of Alberta
DOCUMENT	**AFFIDAVIT of YUE SONG**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Glenn Blackett Law PO Box 99900 EB 051 272 RPO Thorncliffe Calgary, Alberta, T2K 1P6 Phone: 587-674-3445 Email: glennblackett@outlook.com

Affidavit of Yue (Roger) Song

Sworn on March 11, 2025

I, Yue Song, a.k.a. Roger Song of Calgary, Alberta, SWEAR AND SAY THAT:

1. I have personal knowledge of the facts and matters hereinafter deposed to by me, except where same are stated to be based upon information and belief, and those I do verily believe to be true.

2. Attached hereto and marked as **Exhibit "A"** to this my Affidavit is a true copy of a document by Jordan Furlong entitled "Lawyer Licensing and Competence in Alberta", which is available at the Law Society of Alberta website at https://www.lawsociety.ab.ca/lawyer-licensing-and-competence-report-approved/.

3. Attached hereto and marked as **Exhibit "B"** to this my Affidavit is a true copy of the Articling Program Assessment Research Project dated September 26, 2029, which is available at the Law Society of Alberta website at https://www.lawsociety.ab.ca/lawyers-and-students/become-a-lawyer/resources/articling-placement-program/.

4. Attached hereto and marked as **Exhibit "C"** to this my Affidavit is a transcript I confirmed on March 11, 2025, against excerpts of a video from between [31:27] to [35:39], which video is

available at the LSA's website at https://www.lawsociety.ab.ca/resource-centre/key-resources/truth-and-reconciliation/indigenous-education-series-trc-101/ and which shows, according to the LSA's website, Kathleen Mahoney, KC, who previously served as the lead negotiator for the Assembly of First Nations in designing the TRC.

5. Attached hereto and marked as **Exhibit "D"** to this my Affidavit is a true copy of the Team section of the Nationhood Council House website, which is available at https://nationhoodcouncilhouse.org/team.

6. Attached hereto and marked as **Exhibit "E"** to this my Affidavit is a true copy of the Project Land Use section of the Nationhood Council House website, which is available at https://nationhoodcouncilhouse.org/project-land-use.

7. Attached hereto and marked as **Exhibit "F"** to this my Affidavit is a true copy of the title pages and page 30 of the Summary of the Final Report of the Truth and Reconciliation Commission of Canada at https://nctr.ca/records/reports/.

8. Attached hereto and marked as **Exhibit "G"** to this my Affidavit is a true copy of the Treaty No. 7 document, which I obtained from the Internet Archive website at https://archive.org/details/treatyno700unse/treatyno700unse.pdf .

9. Attached hereto and marked as **Exhibit "H"** to this my Affidavit is a true copy of a letter addressed to The Benchers of the Law Society of Alberta dated February 2, 2023, which my assistant, Brenda Wang, advised me she received on February 2, 2023.

10. Attached hereto and marked as **Exhibit "I"** to this my Affidavit is a true copy of a document entitled "Submission #11", which I received from my counsel, Glenn Blackett. Mr. Blackett advised me that he obtained this document on the Law Society of Alberta website at https://www.lawsocietylistens.ca/my-experience-project/ prior to the submissions page becoming inactive.

11. Attached hereto and marked as **Exhibit "J"** to this my Affidavit is a true copy of a document by Pooja Parmar entitled "Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence," which is available at https://www.canlii.org/en/commentary/doc/2019CanLIIDocs3803#!fragment//BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoByCgSgBpltTCIBFRQ3AT0otokLC4EbDtyp8BQkAGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA.

12. Attached hereto and marked as **Exhibit "K"** to this my Affidavit is a true copy of an article from Probate and Property Magazine by Aastha Madaan entitled "Cultural Competency and the Practice of Law in the 21st Century," which is available at https://www.americanbar.org/content/dam/aba/publications/probate_property_magazine/v30/02/2016_aba_rpte_pp_v30_2_article_madaan_cultural_competency_and_the_practice_of_law_in_the_21st_century.pdf.

13. Attached hereto and marked as **Exhibit "L"** to this my Affidavit is a true copy of a document by L. Danielle Tully entitled "The Cultural (Re)Turn: The Case For Teaching Culturally Responsive Lawyering" which is available at https://law.stanford.edu/publications/the-cultural-return-the-case-for-teaching-culturally-responsible-lawyering/.

14. Attached hereto and marked as **Exhibit "M"** to this my Affidavit is a true copy of a section of the Law Society of Alberta's webpage "Key Resources>Cultural Competence & Equity, Diversity and Inclusion" printed in simplified format available at https://www.lawsociety.ab.ca/resource-centre/key-resources/cultural-competence-equity-diversity-and-inclusion/, which I had attended to attach as Exhibit "KKK" to my original Affidavit. I have confirmed that Exhibit "P" links to the documents listed as Exhibits "LLL" to "SSS" in my original Affidavit.

15. Attached hereto and marked as **Exhibit "N"** to this my Affidavit is a true copy of the Alberta Civil Liberties Research Centre's website containing the "glossary" (referred to in my affidavit sworn December 6, 2023, in this action, at https://www.aclrc.com/issues/anti- racism/cared/glossary/?highlight=glossary.

16. Attached hereto and marked as **Exhibit "O"** to this my Affidavit is a true copy of the North Star section of Act Education Corp.'s website, which is available at https://www.act.org/content/act/en/about-act/north-star.html.

17. Attached hereto and marked as **Exhibit "P"** to this my Affidavit is a true copy of Rule 5.1-1 and 5.1-2 of the Federation of Law Societies of Canada, Model Code of Professional Conduct as amended April 2024, which is available at https://flsc.ca/what-we-do/model-code-of-professional-conduct/.

18. I understand that Canada's first Prime Minister, Sir John A. Macdonald, served as Prime Minister from Confederation on July 1, 1867, until November 5, 1873. He was succeeded by Alexander Mackenzie, whose Liberal Party governed until October of 1878. Macdonald's Conservatives reformed government on October 17, 1878. Attached hereto and marked as

Exhibit "Q" is a true copy of House of Commons Hansard dated March 2, 1876, when the *Indian Act* was introduced available at https://parl.canadiana.ca/view/oop.debates_HOC0303_03/383. It shows that it was introduced by the Honourable Mr. Laird, who was a Liberal member of parliament in Alexander Mackenzie's cabinet.

19. Attached hereto and marked as **Exhibit "R"** to this my Affidavit is a true copy of the *Indian Act*, RSC 1876, c. 18, which is available at the TRC website at https://nctr.ca/.

20. At paragraph 58 of my Affidavit sworn December 6, 2023, I stated that I believe the oath compels lawyers to be neutral towards the Canadian *Constitution* and the laws promulgated thereunder but I think it is more accurate to say that the oath requires that lawyers are loyal to the *Constitution* and, laws thereunder.

21. I make this Affidavit in support of my application for judicial review and for declarations and an injunction and for no improper purpose.

SWORN BEFORE ME AT the City of Calgary, in the Province of Alberta, on this 11 day of March 2025.	)	
Mengya Wang A Commissioner of Oaths in and for the Province of Alberta	)	Yue (Roger) Song

MENGYA WANG
A Commissioner for Oaths
in and for Alberta
My Commission expires September 10, 2025
Appointee No. 0757884

LAW SOCIETY of ALBERTA

Lawyer Licensing and Competence in Alberta

Analysis and Recommendations

Jordan Furlong

1. Introduction

This report was commissioned by the Law Society of Alberta in April 2020. A draft version of the report was prepared and submitted for the review of two law society committees in late July 2020; feedback from these committees and other stakeholders resulted in this final version.

It perhaps goes without saying that these timelines do not permit an extensive investigation of worldwide research regarding lawyer licensing and competence, or the commissioning and collection of detailed survey data about licensing and competence in Alberta. The COVID-19 pandemic, obviously, has also been a factor during the preparation of this report.

Nevertheless, more than two dozen experts and authorities in lawyer development, legal education, and lawyer licensing in Canada, the United States, and Great Britain have been interviewed over the course of these past several months. In addition, numerous staff members and Benchers of the Law Society of Alberta have given freely and significantly of their time and attention in the creation and revision of this report. All these individuals are acknowledged with gratitude at the end of this document.

The purpose of this report is to help the Law Society of Alberta improve the quality and effectiveness of lawyer licensing and competence in this province. It is intended to provide a framework of reference with which the law society can both attend to immediate enhancements to its lawyer licensing and competence systems and lay the groundwork for more significant reforms in the near future.

The triggering event for the commission of this report was the decision of the law society in February 2020 to suspend, for this year and next, the mandatory Continuing Professional Development filing requirement for Alberta lawyers, so that the CPD system could be analyzed and re-evaluated.

In addition, the law society also had the results of two 2019 surveys conducted by the law societies of Alberta, Saskatchewan, and Manitoba that revealed alarming levels of discrimination and harassment in the articling system in these provinces. It made sense to dovetail these two related issues together into one investigation of lawyer licensing and competence in Alberta.

The bulk of this report is divided into three sections. The first deals with lawyer licensing, including a particular focus on the articling system and the supervised practice requirement for bar admission. The second deals with the first three years of a lawyer's career and investigates whether and to what extent the law society should provide compulsory continued learning for lawyers during this time. The third deals with CPD in Alberta, which this report refers to as "continuing lawyer learning," and recommends changes to this system for all Alberta lawyers and for solo and more experienced lawyers in particular.

Prefacing these three sections is a series of observations that explain the premises upon which this report is based and explore key issues related to the lawyer development lifecycle and ecosystem. Included in an appendix is an overview of the current licensing and continuing learning practices of other regulated professions in Alberta.

The author wishes to thank the Law Society of Alberta for the opportunity to prepare and submit this report.

(D) Reconsidering Core Competencies

In September 2012, the FLSC published the "National Entry to Practice Competency Profile for Lawyers and Quebec Notaries."[13] The Law Society of Alberta used this document as a guide when it subsequently established six[14] competencies required not only upon entry to law practice, but throughout the career of a lawyer.[15] They were:

- Ethics and professionalism,
- Substantive legal knowledge,
- Client relationship management,
- Practice management,
- Oral and written communication, analytical and research skills, and
- Wellness.

The commissioning scope of this report did not include a re-evaluation of the law society's six core competencies, and so this report makes no specific recommendations with regard to them. But this report does refer frequently to these competencies — in particular, they are at the heart of Recommendation A3 (the articling experience) and C1 (continuing learning for lawyers). This makes it advisable to re-examine these competencies here in 2020 to ensure they are still accurate and relevant.

Accordingly, offered only for the law society's potential consideration, this report suggests the following revised list of core competencies for the Law Society of Alberta, presented alphabetically.

1. *Client Relationships.* This category changes from "client relationship management," a lawyer-centric term that implies relationships are risky obligations to be "managed," rather than opportunities for healthy and resilient exchanges between clients and lawyers as equal partners in pursuing the client's goals and priorities.
2. *Cultural Competence.* This new category is suggested for reasons set forth in the "Universal Competence Activities" subsection in Section 5 of this report.
3. *Law Business Management.* This category encompasses the previous category of "practice management," but is renamed to reflect the importance to private-practice lawyers of operating an effective and profitable business in which the management of people, projects, procedures, and technology enables effective service delivery, high levels of client satisfaction, and a healthy workplace.
4. *Professional Conduct.* This category encompasses the previous category of "ethics and professionalism," but places the focus squarely on what matters to clients: the lawyer's

[13] https://flsc.ca/wp-content/uploads/2014/10/admission4.pdf

[14] There are actually seven competencies listed on the law society website, but the seventh is "Other," which is not a helpful category for current purposes.

[15] https://www.lawsociety.ab.ca/lawyers-and-students/continuing-professional-development/background/cpd-competencies/

actual behaviour. “Ethics” sometimes leads lawyers to think in narrow terms of obeying rules and avoiding illicit activities, whereas “professional conduct" speaks to the larger issues of a lawyer’s actions and demeanour. (This topic is explored further below.)

5. *Substantive Law.* The slight modification here is to remove the word “knowledge,” which might inadvertently cause lawyers to over-emphasize the textual, black-letter-law elements of substantive law at the expense of the “experiential” aspects of substantive law competence — the skills, systems, and solutions in any given practice area that can help bring the client to their desired goal.
6. *Wellness.* This category is unchanged.

Generally, these suggested revisions are intended to make the law society’s core competencies not just more relevant to the modern legal profession, but also more amenable to achieving learning outcomes, as described in Section 5 of this report.

The law society’s interest in a lawyer’s ethical competence, for example, resides in what the lawyer actually *does*, and what the lawyer actually refrains from doing, to and for their clients. An “ethically competent lawyer,” for example, is defined by their *actions*, which in turn are guided by the habits, systems and processes the lawyer has established to guide those actions. Just as there is no such thing as “fiduciary duty in the air,”[16] there is no such thing as “competence in the air.” Competence is practical, not theoretical.

The same reasoning applies to all six of these competencies. This report therefore suggests that the law society consider at length these questions:

- What does a lawyer proficient in client relationships do, and not do?
- What does a culturally proficient lawyer do, and not do?
- What does a lawyer proficient in law business management do, and not do?
- What does an ethically proficient lawyer do, and not do?
- What does a substantively proficient lawyer do, and not do?
- What does a healthy and well lawyer do, and not do?

[16] *Strother v. 3464920 Canada Inc*., [2007] 2 SCR 177

(E) Equity, Inclusion, and ITLs

One month after this report was commissioned, George Floyd was killed by police in Minneapolis, Minnesota. One month before this report was submitted, Jacob Blake was shot and paralyzed by police in Kenosha, Wisconsin. Before, between, and after these shootings, data has repeatedly shown the disproportionately severe impact of COVID-19 on the lives and health of non-white North Americans and on people in less privileged socio-economic circumstances.[17]

These three developments in particular have galvanized a long-overdue reaction among members of predominantly white populations in the United States and Canada, focusing their attention on issues of racial justice and social equity. It is appropriate that this report take note of these contemporaneous events and make some observations about aspects of racial justice and social equity in legal regulation.

The recommendations in this report are meant to apply broadly in all cases and to have universal impact throughout the legal profession. But it is critical to recognize that while the law society's licensing and competence systems should be improved for all lawyers, Black, Indigenous, and people of colour (BIPOC) lawyers, as well as many internationally trained lawyers (ITLs), have previously faced and continue to experience additional challenges within these systems.

BIPOC Lawyers

BIPOC lawyers routinely encounter numerous obstacles and barriers in their work as a result of systemic racism in Canadian society generally and the legal profession in particular, and they have faced these challenges for generations.[18] A concise snapshot of the problem is expressed by Prof. Joan Brockman in her summary[19] of Prof. Charles C. Smith's watershed article, "Who Is Afraid of the Big Bad Social Constructionists? Or Shedding Light on the Unpardonable Whiteness of the Canadian Legal Profession":[20]

- *The legal profession has failed to recognize racism within itself.*
- *There is a lack of information about the racialized composition of the legal profession and judiciary.*

[17] See generally, "Black Americans dying of COVID-19 at three times the rate of white people," Ed Pilkington, *The Guardian*, May 20, 2020: https://www.theguardian.com/world/2020/may/20/black-americans-death-rate-covid-19-coronavirus

[18] "(Dis)Proving Racism: A Rebuttal to Klippenstein's Critical Review of the Law Society of Ontario's Report on Challenges Facing Racialized Licensees," Joshua Sealy-Harrington, ABlawg.ca, Feb. 20, 2020: https://ablawg.ca/2020/02/20/disproving-racism-a-rebuttal-to-klippensteins-critical-review-of-the-law-society-of-ontarios-report-on-challenges-facing-racialized-licensees/

[19] "Racism and Legal Culture: Is there Room for Diversity in the Legal Profession?" (2008) 45:5 *Alta. L. Rev.: Proceedings of the Law Society of Alberta's 100th Anniversary Conference 75*

[20] (2008) 45:5 *Alta. L. Rev.: Proceedings of the Law Society of Alberta's 100th Anniversary Conference 55*

- *There has been an "undramatic increase [or perhaps decrease] in the numbers of Aboriginal lawyers and lawyers from subordinate racialized groups."*
- *Both law schools and the legal profession are the agents who keep the profession largely white.*
- *There are many examples of what law schools and the legal profession are doing and could be doing to make the legal profession more representative of Canadian society in terms of Aboriginal lawyers and lawyers from racialized groups.*

Internationally Trained Lawyers

For the past several years, the Law Society of Alberta has also been working with ITLs in the licensing process to address their unique circumstances. ITLs include Canadians who obtained their legal education outside of Canada, as well as new Canadians who were qualified and practised law in their home countries before coming to Canada. The number of ITLs choosing to come to Alberta has grown significantly over the last decade, to the point where nearly one-third of articling students in Alberta every year obtained their law degrees outside Canada.

Many ITLs face specific challenges as a result of being trained outside Canada. These include, but are not limited to:

- challenges in obtaining articling positions due to the timing of recruitment cycles,
- lack of access to career services assistance at a Canadian university,
- lack of familiarity with Canadian legal culture,
- absence of an established network of contacts,
- perceived lack of transparency with accreditation and application processes,
- less-than-ideal articling situations, and
- lack of access to quality mentorship after bar admission.[21]

The commissioning scope of this report did not specifically include obstacles and challenges facing BIPOC lawyers and ITLs in Alberta. But it would be wrong to pretend that every lawyer in Alberta walks the same path, is subject to the same challenges, and has access to the same resources and networks as everyone else. The sorry history of racial injustice in this country says otherwise.

The recommendations in this report do not address all the difficulties faced by BIPOC lawyers and ITLs. But in some specific instances, this report recommends the law society take steps to level the playing field and provide better resources and more support for these groups,

[21] See generally: "The Importance of Mentorship in Composite Articles with a Focus on Internationally Trained Lawyers," unpublished, Agnes Bielecki, Internationally Trained Lawyers Research Project, March 2017 (updated January 2019 and April 2020).

particularly for lawyers in sole practice, where a disproportionate number of BIPOC lawyers and ITLs practise law.[22]

More generally, it is hoped that by improving the quality of the articling experience, developing more alternatives to articling, and providing better support for new lawyers, the ITL and BIPOC lawyer experience in Alberta can be significantly improved.

[22] The law society's Strategic Plan also places a great deal of importance on equity, diversity, and inclusion. See: "2020-2024 Strategic Plan and Regulatory Objectives," Law Society of Alberta website: https://www.lawsociety.ab.ca/about-us/strategic-plan/

Universal Competence Activities

In addition to mandating that lawyers self-assess their competence needs, identify related learning outcomes, and design a plan of learning activities to achieve those outcomes, the law society should take one more step towards ensuring the competence of the lawyers it regulates. The law society should oversee the periodic development of certain "universal competence" activities, whose completion within a specified time frame should be mandatory for every Alberta lawyer.

The Alberta legal profession encompasses many different types of careers with myriad specialties and requirements. As noted previously, what keeps a lawyer competent in one type of private practice will be different from what keeps another private-practice lawyer competent, which will differ again for a lawyer in a government law department, a law school faculty, and so on.

But there is a small group of subjects that have relevance to *every* lawyer in 21st-century Alberta, no matter where they work and what they do, and with which every lawyer should possess a minimum level of familiarity and competence. These subjects include, but are not limited to:

- Professional conduct
- Cultural competence
- Access to justice
- Health and wellness

Some of these areas are not necessarily encountered in the everyday experience of many lawyers, or do not always lend themselves easily to inclusion in a "self-assessment and learning outcomes" professional development plan.

It might not, for example, even occur to a lawyer that they should know more about the root causes of justice inaccessibility, or that they are missing business opportunities because they lack familiarity with other cultures and traditions. And even if these occurred to the lawyer as the worthwhile subjects of learning outcomes, where would they go to find activities to help achieve those outcomes?

The law society should therefore supplement lawyers' own continuing learning efforts by way of prescribed programs, courses and other activities, delivered periodically but regularly, in these areas of universal relevance to lawyer competence.

A good example of this sort of activity, — in fact, the model for this recommendation — is the forthcoming online education program "The Path," which will trace the residential school system's history and describe the system's devastating impact on generations of Indigenous Canadians. It is becoming more widely accepted that "cultural competence" is a key attribute for lawyers in the increasingly diverse future of our country and our profession.[94] "The Path"

[94] See: "Cultural Competency and the Practice of Law in the 21st Century," Aastha Madaan, 30 Prob. & Prop. 29 (2016) (https://www.americanbar.org/content/dam/aba/publications/probate_property_magazine/v30/02/2016_aba_rpte_pp_v30_2_article_madaan_cultural_competency_and_the_practice_of_law_in_the_21st_century.pdf); "Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence." Pooja Parmar, 97

responds to that trend, and in particular to the Truth and Reconciliation Commission's Call to Action Recommendation 27, which asks that all lawyers in Alberta receive appropriate cultural competency training.[95]

It is anticipated that this initiative will consist of five to six hours of interactive online programming, with summaries and short quizzes to help ensure the viewer's active engagement with the materials, and that all members of the Law Society of Alberta will be required to complete this program.

This report recommends that the law society draw upon this program as a model for mandated activities and initiatives meant to ensure or enhance competence in areas of universal relevance to Alberta lawyers. In a sense, these could be considered "Competence Special Projects." The law society should continually scan the legal sector, identify critical areas of universal competence that require particular attention, and develop programs or activities to enhance that competence among lawyers. Examples could include:

- *Professional conduct:* Lawyers might be required to complete an interactive online "Ethics Refresher" that updates lawyers on amendments to or critical aspects of the Code of Professional Conduct.
- *Access to justice:*[96] Lawyers might be required to complete 20 hours of pro bono activity over the course of two years specifically targeted to promoting access to legal services for low-income or marginalized communities.
- *Health and wellness:*[97] Lawyers might be required to complete an online program in mental and emotional health, perhaps based on the Ontario Bar Association's Mindful Lawyer series[98] or the Canadian Bar Association's Mental Health and Wellness in the Legal Profession program.[99]

Can. B. Rev. 526 (2019) (https://cbr.cba.org/index.php/cbr/article/view/4558); and "The Cultural (Re)Turn: The Case for Teaching Culturally Responsive Lawyering," L. Danielle Tully, 16 *Stan. J. C.R. & C.L.* 201 (2020) (https://law.stanford.edu/publications/the-cultural-return-the-case-for-teaching-culturally-responsible-lawyering/).

[95] https://www.lawsociety.ab.ca/about-us/key-initiatives/indigenous-initiatives/truth-and-reconciliation-commission-call-to-action-27/

[96] The legal profession needs to acknowledge the metastasizing crisis in access to justice afflicting our country, especially given the economic impact of the global pandemic. See generally, "Access to Justice: Justice in the time of social distancing," The Rt. Hon. Beverley McLachlin, *The Lawyers Daily*, Mar. 31, 2020: https://www.thelawyersdaily.ca/articles/18386/access-to-justice-justice-in-the-time-of-social-distancing-beverley-mclachlin

[97] The legal profession also needs to acknowledge and act to combat rising rates of stress, depression, substance abuse, and suicide among members of the legal profession worldwide. See "Improving Mental Health for the Legal Profession" at the website of the Law Society of British Columbia's Mental Health Task Force: https://www.lawsociety.bc.ca/our-initiatives/improving-mental-health/

[98] https://www.oba.org/openingremarks/MindfulLawyer

[99] https://www.cba.org/Professional-Development/Free-Professional-Development/Wellness

These programs would not replace each individual lawyer's personal self-assessment and learning outcomes plan; they would supplement it.

This does not mean that the law society must devote substantial time and resources to commission a sophisticated interactive online program in a particular area — a mandated activity could be much less cost-intensive. Nor does it mean that the law society must develop such projects frequently — by "periodic," this recommendation intends that such activities might be mandated as infrequently as every two years.

But the law society should recognize both the opportunity and responsibility to "fill in the gaps" that might otherwise develop among Alberta lawyers in these areas that have universal relevance to their competence, but that they might not necessarily be able to easily include in their own learning activities. When it identifies such an area, the law society should consider the best way to ensure that all its members can conveniently access or participate in an activity to promote competence in the area.

There is one other reason why this report recommends the adoption of periodic mandatory programs and activities for all lawyers in certain areas of universal competence.

Law society Benchers and stakeholders interviewed for this report consistently reported one concern: Should this report approve the re-institution (even with improvements) of the self-assessment and learning outcomes CPD system, lawyers might see no significant difference between the program that was suspended in February 2020 and the one that will be re-introduced in January 2022, and they might ask whether anything had meaningfully changed at all.

This report does not favour requiring the addition of a "minimum number of hours" element to Alberta's continuing lawyer learning system, even though the LETR Report allowed for the possibility of prescribing minimum hours. But in that same spirit, this report does suggest that the regulator can prescribe minimum *content*, as a way to strengthen both the real and perceived demands of the CPD system. The recommendation to periodically require learning activities in areas of universal competence is meant to help address that concern.

There are two other demographic segments of the Alberta lawyer population that merit attention and the development of specific types of continuing lawyer learning: lawyers who have been in practice for more than 20 years, and sole practitioners. The next two subsections of this report will examine each of these segments in turn.

CPD Options for More Experienced Lawyers

As noted in Section 4 of this report, statistics from the law society's Early Interventions department indicate that the frequency of problems with and complaints about lawyers that require regulatory intervention decreases noticeably among lawyers with 20 years or more at the bar.

This is not an unexpected finding. It makes sense that most lawyers with more than two decades in practice have developed over that time certain habits, systems, and processes (not to mention confidence and expertise) that enable them to successfully practise law and manage their business. Those lawyers who did not learn these lessons or develop these systems have usually moved on from private practice, voluntarily or otherwise, at this stage of their careers.

Law Society of Alberta

Articling Program Assessment

RESEARCH REPORT

SEPTEMBER 26, 2019

For all inquiries about this report, email feedback@lawsociety.ab.ca.

illumina research partners

LAW SOCIETY of ALBERTA

“

I think students need … to be listened to in terms of needs, a lot of proactive engagement to build confidence, and non-judgmental assistance in all aspects of practice.

- PRINCIPAL

The top three takeaways from the Articling Program Assessment survey.

32% Experience Discrimination and/or Harassment during Recruitment or Articling

Most discrimination and harassment is primarily based on gender or race/ethnicity.

Articling students feel:

1. Resources are not available to address discrimination and harassment concerns.
2. The process to deal with discrimination and harassment will negatively impact them.

Inconsistency in Competencies Learned and Level of Preparedness for Entry Level Practice

- 49% of new lawyers felt prepared for entry level practice.
- 51% lacked confidence and felt only somewhat prepared or unprepared.
- Only one third of students and new lawyers state a learning plan was used.
- Training is weaker in four competency areas:
  - Adjudication/dispute resolution
  - Conducting matters
  - Practice management
  - Client relationship management

Quality of Mentorship and Feedback is a Challenge for Principals/Mentors and Students

- Students feel receiving feedback on work performance, skills and development are areas for improvement.
- Principals and mentors mention lack of time, resources and training as key challenges with mentoring articling students.

Highlights

Methodology Highlights

12-14-MINUTE
online surveys
(May 8 – June 17, 2019)

COMPLETED BY 736
articling students and new lawyers

549
IN ALBERTA
Response rate: 23%

104
IN SASKATCHEWAN

83
IN MANITOBA

COMPLETED BY 407
principals, recruiters and mentors

295
IN ALBERTA
Response rate cannot be determined as the role of mentor is not tracked by the Law Society

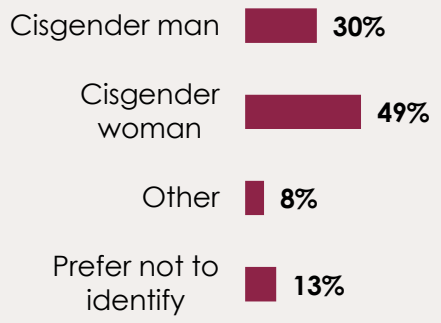
64
IN SASKATCHEWAN

48
IN MANITOBA

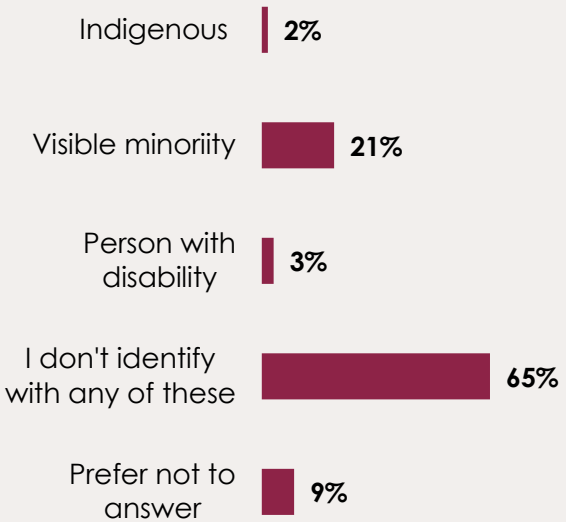
Alberta Demographics Highlights

Articling Students and New Lawyers

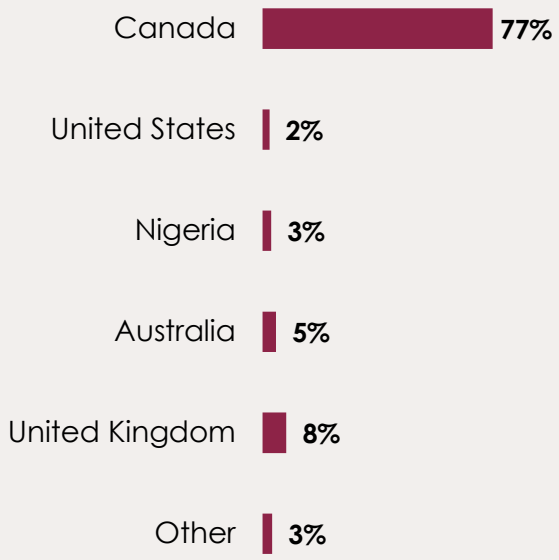
Gender



Minority groups



Education



Practice Setting

	Total AB (n=549)
Sole Practitioner	13%
Government	6%
Corporate	2%
Academic	<1%
Law firm (2-10 lawyers)	33%
Law firm (11-25 lawyers)	9%
Law firm (26-50 lawyers)	7%
Law firm (51+ lawyers)	21%

- *8 in 10 articled in large urban centres*
- *1 in 10 in small urban centres*
- *Almost 1 in 10 articled in rural areas or a combination of locations*

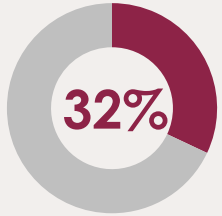
Recruiters, Principals and Mentors

- All primary areas of practice were represented. Across provinces, respondents most commonly work in civil litigation, commercial and corporate law.
- 9 in 10 are located in large urban centres

Practice Setting

	Total AB (n=295)
Sole Practitioner	9%
Government	12%
Corporate	2%
Academic	<1%
Law firm (2-10 lawyers)	29%
Law firm (11-25 lawyers)	8%
Law firm (26-50 lawyers)	9%
Law firm (51+ lawyers)	27%

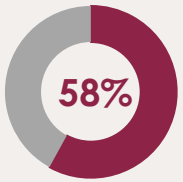
Those experiencing discrimination and/or harassment are more likely to be female.



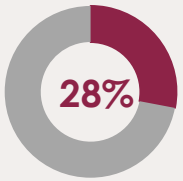
Report experiencing discrimination and/or harassment during recruitment and/or articling.

Profile of Those Who Experienced Discrimination and Harassment

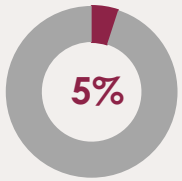
9% Other
15% Prefer not to specify gender



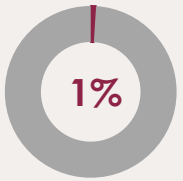
Don't identify as a minority group



Visible minority

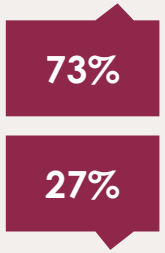


Person with a disability

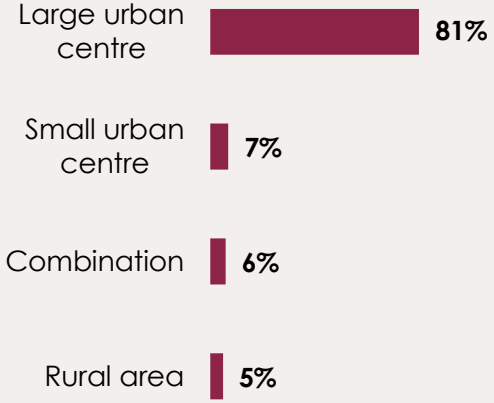


Indigenous

Canadian student
Attended law school in Canada



International Student
Attended law school outside Canada



	Total AB (n=176)
Sole Practitioner	12%
Government	5%
Corporate	2%
Academic	0%
Law firm (2-10 lawyers)	34%
Law firm (11-25 lawyers)	10%
Law firm (26-50 lawyers)	6%
Law firm (51+ lawyers)	21%

Primary types of discrimination and harassment experienced:

- Females getting less challenging work or more administrative and non-billable work
- Being asked about marital status, plans for having children, sexual orientation
- Fewer positions offered to students who are older, educated abroad, with foreign sounding names, or without connections
- Clients expressing preference for male lawyers

Women and minority groups are more likely to have experienced discrimination and/or harassment. Students educated abroad have a lower salary but work fewer hours on average than those educated in Canada.

Articling Students & New Lawyers

	Women (n=269)	Men (n=166)	Minorities (n=143)	Non-Minorities (n=357)	Educated Internationally (n=125)	Educated in Canada (n=424)
Satisfaction with articling experience (Very satisfied + satisfied)	67%	69%	67%	67%	62%	67%
Level of preparedness (Very prepared + prepared)	38%	43%	40%	42%	41%	41%
Experienced discrimination and / or harassment	**36%**	**23%**	**41%**	**28%**	38%	30%
Compensation (Average annual salary)	$50,000	$51,000	$48,000	$51,000	**$46,000**	**$52,000**
Workload (Average hours)	55 hrs / week	53 hrs / week	53 hrs / week	55 hrs / week	51 hrs / week	56 hrs / week

Students feel resources are not available to address discrimination and harassment concerns. There are also concerns that the process to deal with discrimination and harassment will negatively impact them.

***32%** of students and new lawyers experienced discrimination or harassment during recruitment or articling.*

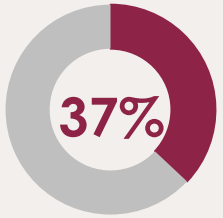
***9%** of principals, mentors and recruiters have had a student express concerns about discrimination or harassment during recruitment or articling.*

74%

Students and new lawyers who experienced discrimination or harassment **felt resources were unavailable** to address issues

82%

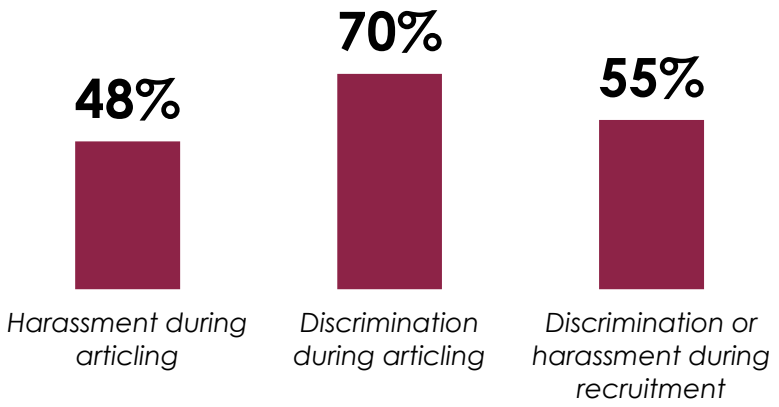
Recruiters, principals and mentors felt resources were available to address issues



Did not take action either due to lack of resources or for fear of reprisal and/or losing their articling position

Discrimination or Harassment Experienced

(Among those who experienced discrimination or harassment, n=176)



Students suggested ways to end discrimination and harassment and to assist those who have this experience during recruitment or articling.

*Respondents' Suggestions**

(based on verbatim analysis)

ENSURE DISCUSSION

of available resources is part of onboarding for articling students

CONSIDER HELPING

students who quit because of discrimination and harassment to find another articling position

HAVE A PROCESS

in place for investigating reports of discrimination and harassment and disciplining the offenders

BLIND REVIEW

of articling position applications (names removed)

MORE STRINGENT

approval or vetting of principals

RANDOMLY CHECK HIRING PRACTICES

to identify the inherently discriminatory ones

**Suggestions are ideas expressed by some respondents. They may not be representative of the whole population of Alberta lawyers and articling students.*

Verbatim Comments About Discrimination and Harassment Experience Highlights

Articling Students & New Lawyers

Is there anything you would like to share about your experience or the resources available to help you address a discrimination or harassment issue?

Among Alberta students who experienced discrimination or harassment during the recruitment process or articling experience, n=175

*"There is **no recourse available** to law students in most firms for sexual harassment by a senior partner. My firm had no dedicated human resources department to effectively and confidentially manage harassment issues."*

*"Students **need to be empowered** to deal with these issues. They cannot feel empowered when they **fear losing their articling position** if they rub their principal the wrong way."*

*"There is **no way to safely report** without fear of reprisal, which is why I didn't report."*

***"Fear of reprisal** is a big issue, especially when your **future position is threatened** if you don't comply with something asked of you by a partner and that something has clear sexual undertones. Widespread **change to attitudes towards women and articling students need to occur** before this sort of thing becomes something of the past. The mentality of boot camp treatment being acceptable for articling students, often on the basis that that is how it was for senior members of the bar, feeds the **notion that harassment is acceptable in certain forms or for certain purposes.** It is not**. It is never acceptable**."*

*"There appeared to be **nothing in terms of resources** available to an articling student to deal with this. **Fear of reprisal and the potential loss of my article** is sufficient for me to stay silent."*

Principals, Recruiters & Mentors

How did you or your firm/organization handle the situation?

Among Alberta principals, recruiters and mentors who had candidates/articling students report being discriminated or harassed during the recruitment process or articling experience, n=40

*"Terribly **- no consequences for harassers/discriminator**, gossiped around the office, **made the student the problem** (this has happened multiple times, same offenders)."*

*"Not great - in a battle between articling student and partner, the **partner always wins**."*

*"Unfortunately, the **partners didn't believe the complaint**, and the student left the firm."*

*"The student was concerned about how she would be impacted by taking any formal steps to report to the partnership (I was a non-partner informal mentor), and asked me not to tell anyone about it. So **nothing was done**, although I personally **kept a closer eye on the conduct of the harasser** around young women in the office after that."*

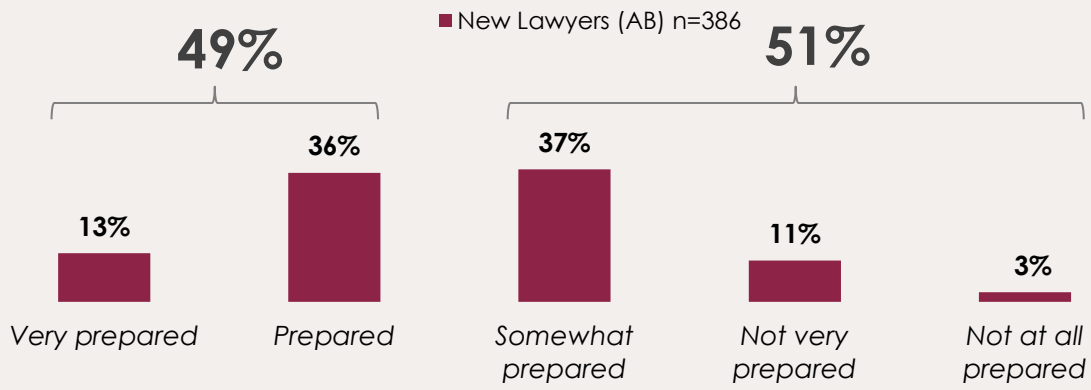
***"Discreet backroom discussions** about how the student should handle it. I wish there was more **discussion with the perpetrator**."*

***"Supported student** and had **serious talk** to individual named."*

***"Provided guidance to the articling student** as to how to deal with the situation, **recommended changes to administration to deal with gender bias** and work everyday to make the firm better for women."*

There is inconsistency in the level of preparedness for entry level practice.

Half of former articling students, now new lawyers, were not confident in their training and felt only somewhat prepared, not very prepared, or not at all prepared for entry level practice.



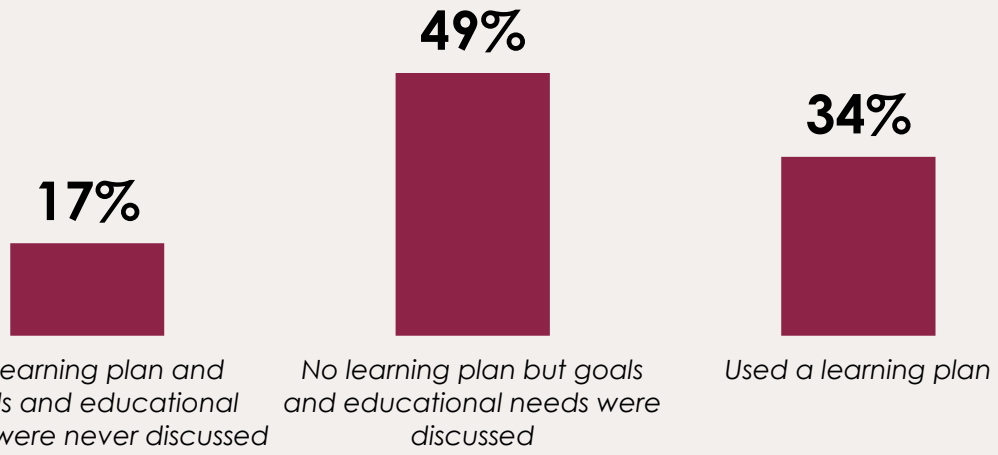
89% of lawyers who felt very prepared or prepared for entry level practice are very satisfied or satisfied with their articling experience.

- The top reasons for both satisfaction and dissatisfaction with the articling experience are:
  - Content of training in terms of exposure to a range of practice areas and variety of skills developed through hands-on experience
  - Quality of training in terms of mentorship and feedback

Level of preparedness for entry level practice is impacted by training received in competency areas and exposure to practice areas.

Training content is mentioned as the top factor for how prepared students feel for entry-level practice.

- Principals, recruiters and mentors feel providing a variety of experiences for training is one of their top challenges.
- One third of articling students and new lawyers indicated a learning plan was used



Just one-third of articling students are exposed to most practice areas

Stronger areas of training

- Analytical skills
- Communication skills
- Ethics & professionalism
- Substantive legal knowledge

Weaker areas of training

- Adjudication / dispute resolution
- Conducting matters
- Practice management
- Client relationship management

**Suggestions are ideas expressed by some respondents. They may not be representative of the whole population of Alberta lawyers and articling students.*

Respondents' suggested ways to improve training in all competency areas.

*Respondents' Suggestions**

(based on verbatim analysis)

MORE FOCUS

on exposing students to training in adjudication/dispute resolution, practice management, conducting matters, and client relationship management

IMPROVE

existing training programs (e.g. the CPLED program)

OFFER MORE EASILY ACCESSIBLE

educational resources (e.g. provide access to LESA's library and courses, offer reduced rates for courses, etc.)

DEVELOP

an education plan that ensures coverage of all competency areas and provides exposure to most practice areas

GIVE

students more articling time

**Suggestions are ideas expressed by some respondents. They may not be representative of the whole population of Alberta lawyers and articling students.*

Verbatim Comments On Preparedness For Entry Level Practice Highlights

Articling Students & New Lawyers

Please explain why you believe you were prepared/unprepared for entry level practice once you completed your articling?
Among total Alberta articling students and new lawyers n=462

Very prepared + prepared (n=226)	Somewhat Prepared (n=179)	Not very prepared + not at all prepared (n=57)
*"I worked in **a number of different practice areas** in the firm and as the year went on I was able to focus more on **practice areas that suited my interest**. The experience I gained **gave me confidence** as I became an associate."*	*"I was **given very little interaction with clients** and managing **matters from start to finish**."*	*"I was effectively **left to fend for myself** for the duration of my articles. Every time I approached my **Principal** with a question, he told me he was **too busy**. It felt like the only purpose I served for the firm was to **do bank and court runs**… I **had no exposure to essential areas,** such as questioning, examination-in-chief, trials, settlement meetings, [etc.]"*
*"The type of tasks I was handling as a student are the same tasks I handled in the early years of practice. By the time I got called to the bar, I was **confident in what I was doing** and **could handle some matters and clients** on my own."*	*"There was **little mentorship** from the senior practitioners at the firm and **little exposure to many areas of litigation or solicitor work**. Much of the work done was **'assistant' type work**."*	*"My **principal was never in the office**. When he was, he was working on his own matters and left me to **work in isolation**."*

Principals, Recruiters & Mentors

Please explain why you believe an articling student is prepared/unprepared for entry level practice once you complete their articling at your firm/organization?
Among total Alberta principals, recruiters and mentors, n=295

Very prepared + prepared (n=233)	Somewhat Prepared (n=49)	Not very prepared + not at all prepared (n=13*)
*"They've had **broad exposure** and **many people to learn from and lean on** for questions and support."*	*"In my opinion, the articling year, at best, provides a **very basic level of understanding** to enable a student to enter practice. I would estimate that **a student would not likely be fully prepared for at least two to three years** of continued mentoring and assistance following completion of articles."*	*"At the courts, students undertake the same type of work for 10 months (legal research) and **do not experience the wide range of tasks necessary for practice**."*
*"They rotate through **various rotations**, and are required to meet **all the competencies in the Education Plan**. Formal **mentorship is excellent**, with a variety of senior lawyers taking this on."*	*"It is a **large leap** to go from articling to carriage of own files."*	*"The organization is **chaotic**, the students have too many matters and are **overwhelmed**. They learn how to hide mistakes, feedback is extremely poor, they feel **uncertain and adrift**."*
*"They are **competent lawyers** with the ability to **open and work on files until they are closed**."*		

Mentorship, guidance and feedback are areas where students, new lawyers, principals, mentors and recruiters all express concerns.

Mentorship and guidance are a top challenge for all involved.

64%
Satisfied with mentorship received

*Despite overall satisfaction, two thirds of students and new lawyers **express some concerns** in their comments **about the quality of the mentorship and guidance provided**.*

34%
Find giving good feedback challenging

*Over half of principals, recruiters and mentors mention in their comments that **they struggle to provide quality mentorship and guidance**.*

Quality of training is the top reason for satisfaction with the articling experience and the second most important factor in preparing students for entry-level practice.

**Suggestions are ideas expressed by some respondents. They may not be representative of the whole population of Alberta lawyers and articling students.*

Respondents' suggested ways to improve mentorship and feedback.

*Respondents' Suggestions**

(based on verbatim analysis)

INTRODUCE

more clarity and structure into the principal – student relationship, more specifically:

- *Clarity on what articling students should expect and what is required*
- *Structured training consistently covering all competency areas*
- *Clear structure to a student's role*
- *Consistency in principal – student interaction (e.g. regular feedback, weekly meetings, etc.)*

ENCOURAGE

other lawyers (beyond the principal) to participate in mentoring and guiding students - team work was mentioned by students as one of the top positive aspects of articling

DEVELOP AND OFFER

LESA training for principals and mentors

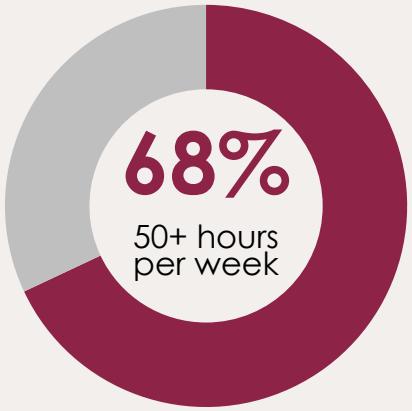
INVOLVE

principals in the recruitment process so that there is a good fit between the student and principal

**Suggestions are ideas expressed by some respondents. They may not be representative of the whole population of Alberta lawyers and articling students.*

Students' top challenge is managing heavy workloads while also completing bar admission course requirements.

Over two-thirds of Alberta students report heavy workloads to be their top challenge.



Combining articling with bar admission course requirements is challenging but the majority of Alberta students are given some time to work on their bar admission course requirements during business hours.

One-fifth of students feel they were given grunt work leading to feelings of burn-out.

*Respondents' Suggestions**

(based on verbatim analysis)

- Allow reasonable time for students to complete their bar examination course requirements during business hours
- If not possible to decrease the workload, ensure that articling student tasks have educational value that prepares them for entry level practice

**Suggestions are ideas expressed by some respondents. They may not be representative of the whole population of Alberta lawyers and articling students.*

Students are most satisfied when they have a balance between compensation and hours of work.

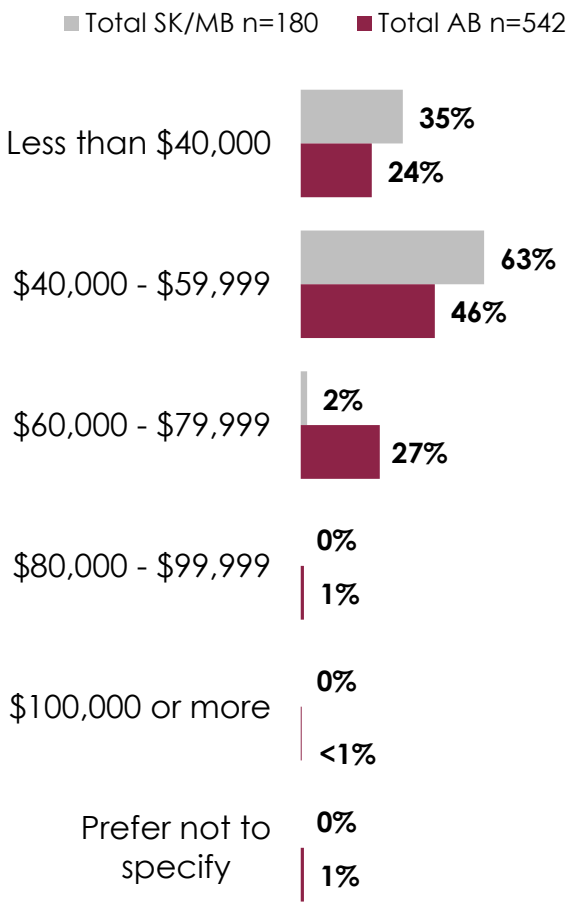
Students in Alberta receive higher compensation and report higher workloads than in the other prairie provinces.

93%
Receive(d) salary while articling

81%
Bar admission course tuition paid by firm

- The highest compensation was given to those working for **big law firms** (approximately **$63,000** on average), but they also report having the highest workload (on average, **63 hours a week**).
- Those working for **medium-sized law firms** appear to have had a better balance between compensation and hours, as they were notably more satisfied with their articling experience (**79% satisfied**). On average, they received approximately **$59,000** and worked **56 hrs a week**.
- **Alberta students** reported **average workload of 55 hrs a week**, while **Saskatchewan and Manitoba students** report an average of **50 hrs a week**

Compensation Received While Articling



Detailed Findings

Research Agency

Illumina Research Partners is a CRIC Accredited Agency. The CRIC Accredited Agency Seal recognizes members who have made the highest commitment to follow best practices and adhere to world-leading standards and ethics in market research, analytics and insights.

For more information: https://www.canadianresearchinsightscouncil.ca/wp-content/uploads/2019/09/CRIC-Public-Opinion-Research-Standards-and-Disclosure-Requirements-1.pdf

For any further inquiries about CRIC and our research practices, please contact Illumina Research Partners at ybrouwers@illuminaresearch.com.

For all inquiries about this report, email feedback@lawsociety.ab.ca.

Research Sponsor

The Law Society of Alberta sponsored and funded two online surveys to assess the current state of the articling program from two perspectives: articling students (current and recent) and those members who supervise or mentor articling students.

Questions Asked

The full questionnaires are in the appendix starting on page 69.

Survey Availability

The Law Society of Alberta managed all aspects of data collection including:

- Communication of the surveys to the membership
- Programming and hosting of the surveys in English
- Sending out of survey invitations to all members of the profession in Alberta via the email registered with the Law Society

Prior to survey launch, the online surveys were thoroughly tested internally by the Law Society of Alberta and Illumina Research Partners.

The Law Society of Alberta posted the 14-minute online survey for students-at-law and new lawyers, as well as the 12-minute online survey for principals, recruiters and mentors, on the website https://www.lawsocietylistens.ca between May 8, 2019 and June 17, 2019.

Availability of the surveys over 5.5 weeks allowed Alberta students and lawyers the time to complete the survey when it was convenient for them.

The Law Society of Saskatchewan and The Law Society of Manitoba also invited their members to complete these surveys during the same timeframe.

METHODOLOGY (in detail cont'd)

Target Audience

Screening questions at the beginning of the surveys were used to find the target audience.

- To qualify to complete the student survey, one needed to be an articling student or a new lawyer who completed their articling in the past five years.
- To qualify to complete the principal survey, a lawyer needed to have been in the role of a recruiter, principal or mentor of an articling student in the past five years.

Process to Maximize Response Rates

To maximize participation, survey completion was incentivized by a draw for a free LESA course as well as promoted using the following channels:

- General eBulletins to entire profession (approx. 12,600) on:
    - May 8
    - May 24
    - May 31
    - June 10
- Targeted emails to students, new lawyers and principals on May 3 (soft launch) and June 12.
- Distribution of 500 postcards at various legal events and presentations
- CBA eNewsletter (week of May 31)

Process to Maximize Response Rates (cont'd)

- Promotion of survey to young lawyers and articling students CBA subsections
- Promotion of survey in April Board Recap video
- Lawyers for Equity, Access, and Diversity (LEAD) Alberta Survey push to subgroups in Alberta legal community including:
    - Promotion at Association of Women Lawyers mystery lunch on May 15
    - Promotion at CBA Battle of the Bands on May 30
    - Federation for Asian Canadian Lawyers targeted outreach
    - Distribution to Alberta Lawyers' Assistance Society email list
    - Targeted promotion to Women's Law Forum and Department of Justice
    - Pushes at big law firms including DLA Piper, Bennett Jones, Caron, Kahane, Blakes, JSS
- Promotion of survey at presentations by:
    - Practice Advisors
    - Equity Ombudsperson
    - Indigenous Initiatives Liaison
    - CPLED CEO
- Social media promotion (Base of Twitter =2,520, LinkedIn = 2,270, with the addition of shares and retweets)

Response Rate Achieved

The surveys were completed by a total of 736 articling students and new lawyers (549 in Alberta, 104 in Saskatchewan and 83 in Manitoba) and 407 principals, recruiters and mentors (295 in Alberta, 64 in Saskatchewan and 48 in Manitoba).

An estimated 23% participation rate of Alberta articling students and new lawyers (n=549 completed surveys in Alberta) was achieved based on a distribution list of approximately 2,347 articling students and new lawyers in Alberta.

An estimated participation rate cannot be determined for principals, recruiters and mentors because the roles of mentor and recruiter are not tracked by the Law Society. There are approximately 484 principals in Alberta.

The data was not weighted.

Survey Limitations

These surveys are a census (non-probability sample) where all Alberta lawyers and students at law were invited to participate using the email address registered with the Law Society of Alberta. Ensuring all eligible lawyers and students at law with an email address receive the survey is intended to eliminate as much "coverage bias" as possible in this survey.

Targeted reminders to complete the surveys were sent to members who met the criteria for participating; however, there are members who met the criteria to participate but because their role is not tracked by the Law Society, they would not have received a reminder.

Survey Limitations (cont'd)

Similar to all online surveys, response bias and non-response bias still exists, which means the results may not be fully and truly representative of the sentiments of the Alberta legal profession.

Margin of error does not apply because this research is a census where all members of the population were invited to participate.

Reporting of Results

The following terms are used throughout graphs and charts in the report.

"Articling students" and those who have "completed articling but have not been called to bar" were combined under "Articling Students" throughout this report.

"New lawyers" refers to practising lawyers who started articling between 2014 and 2018.

"Recruiters" refers to those who have only been in the recruiter role in the past five years.

"Principals" refers to those who have only been in the principal role in the past five years.

"Mentors" refers to those who have only been in the mentor role in the past five years.

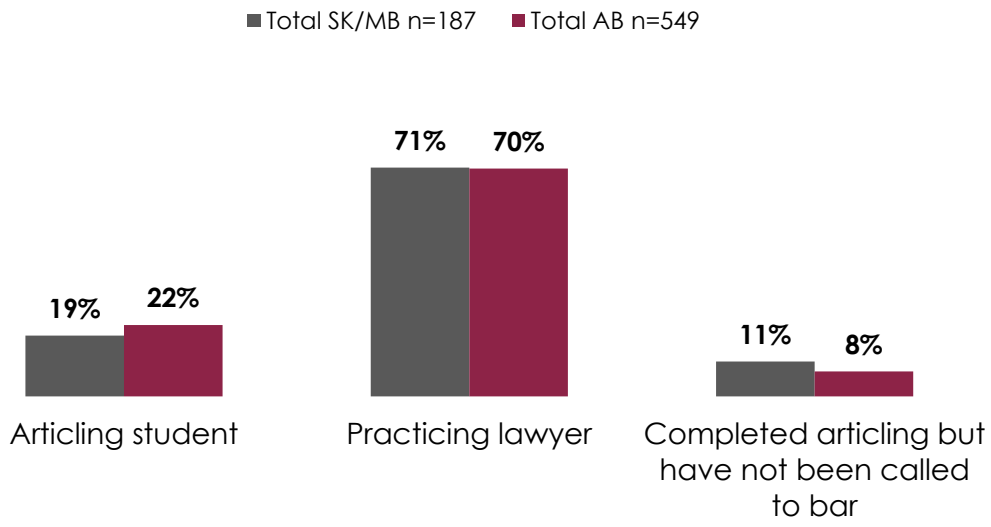
Those who have had more than one role (e.g., recruiter and/or principal and/or mentor) in the past five years are not reported separately because the results are generally similar to Total Alberta.

"Total SK/MB" are the combined results for members from Saskatchewan and Manitoba.

Most of the respondents were practising lawyers, principals, and mentors.

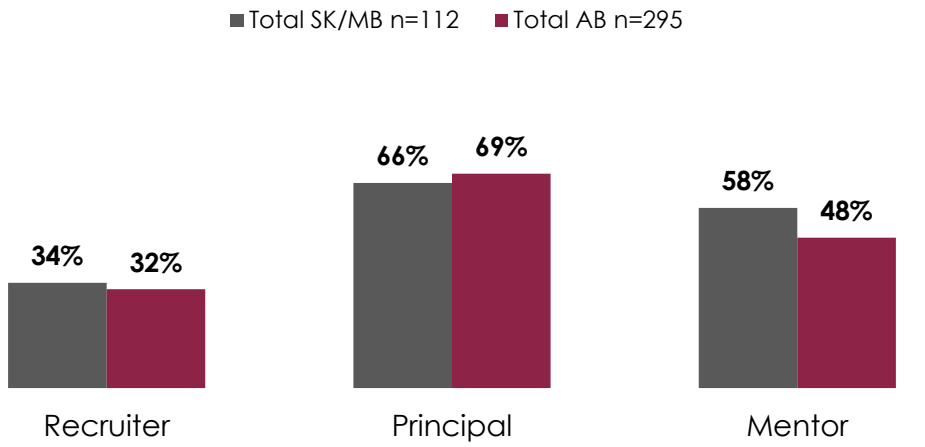
Articling Students & New Lawyers

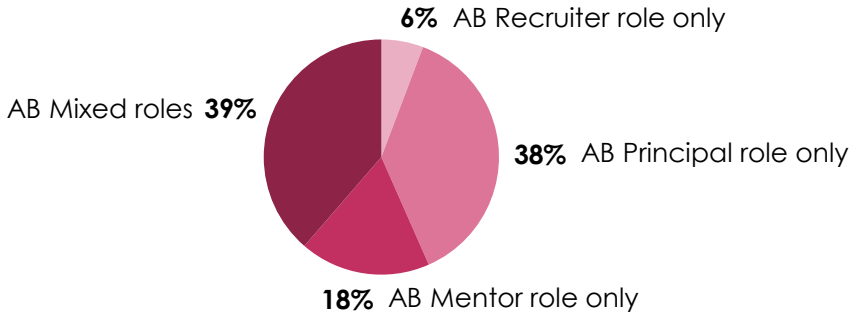
How would you best characterize yourself in the profession?



Principals, Recruiters & Mentors

In the last five years, have you been involved in any of the following roles with articling students?
(Multiple mentions)





Half of principals are working with one student.

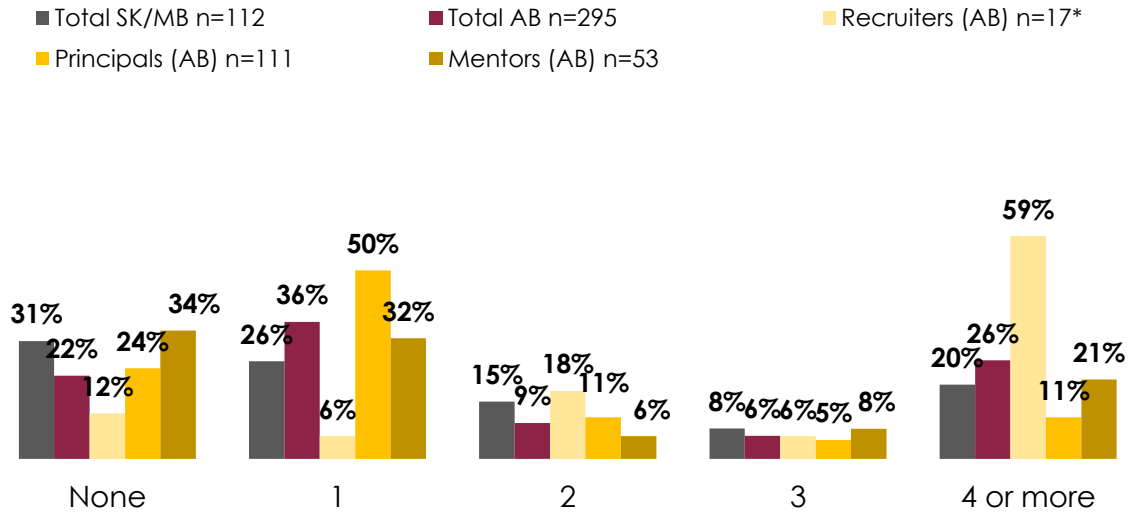
Principals, Recruiters & Mentors

What are your reasons for not being involved in the recruiting, mentoring or supervising of articling students?

Among those not involved in recruiting, mentoring or supervising articling students, n=29

- Cost
- Lack of time
- Too limited scope for students to learn
- Providing mentoring in another way
  - Mentoring summer students
  - Teaching at a law school
  - Giving advice to new lawyers
- No need for additional help

How many articling students have you recruited or are you currently mentoring or supervising at your firm/organization?

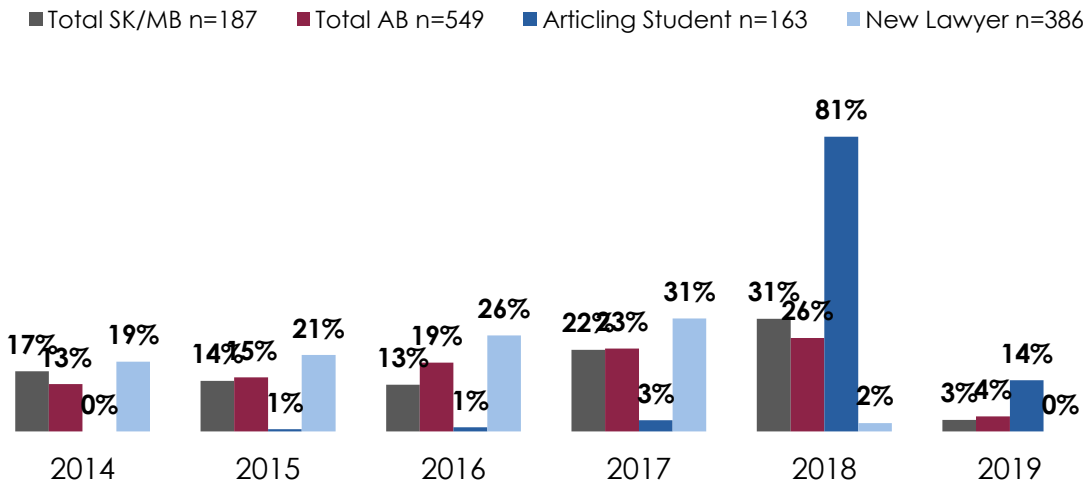


* Caution small base size for recruiters n=17

Over one-third have been working with articling students for five years or less.

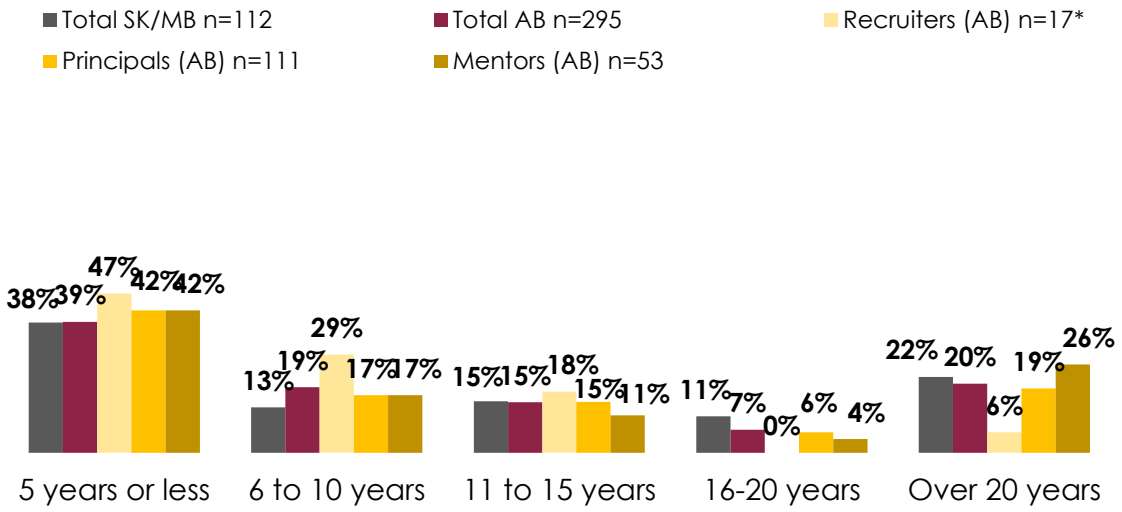
Articling Students & New Lawyers

In which year did you start articling?



Principals, Recruiters & Mentors

How many years have you been recruiting, mentoring, and/or supervising articling students?

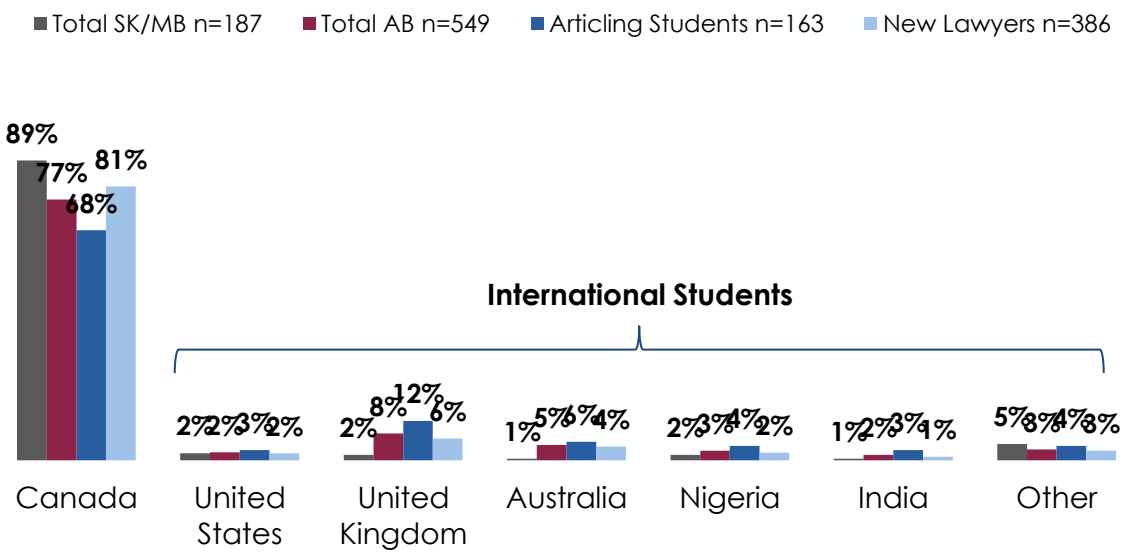


* Caution small base size for recruiters n=17

One-third of current articling students were educated abroad.

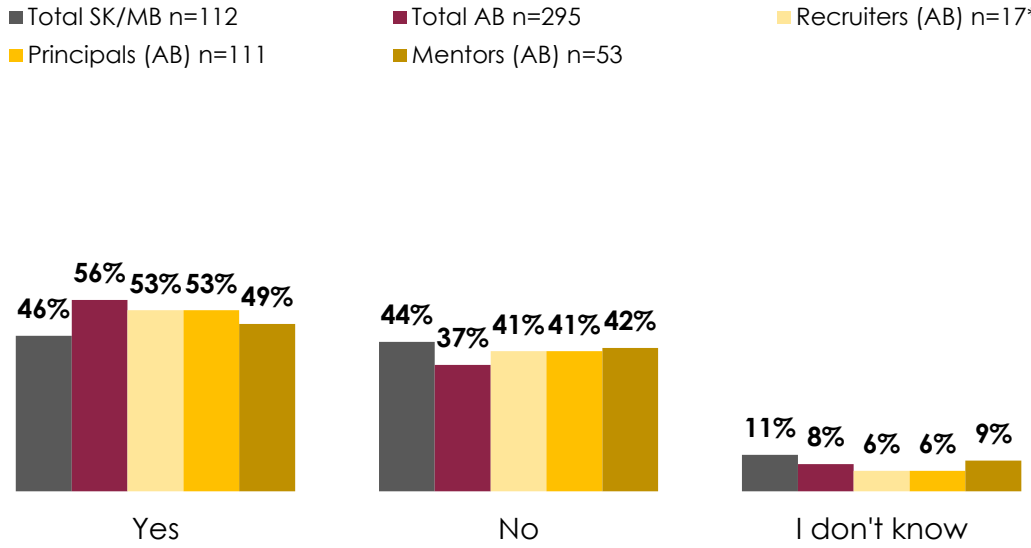
Articling Students & New Lawyers

Where did you attend law school?



Principals, Recruiters & Mentors

Has your firm/organization hired internationally trained students for articling positions?



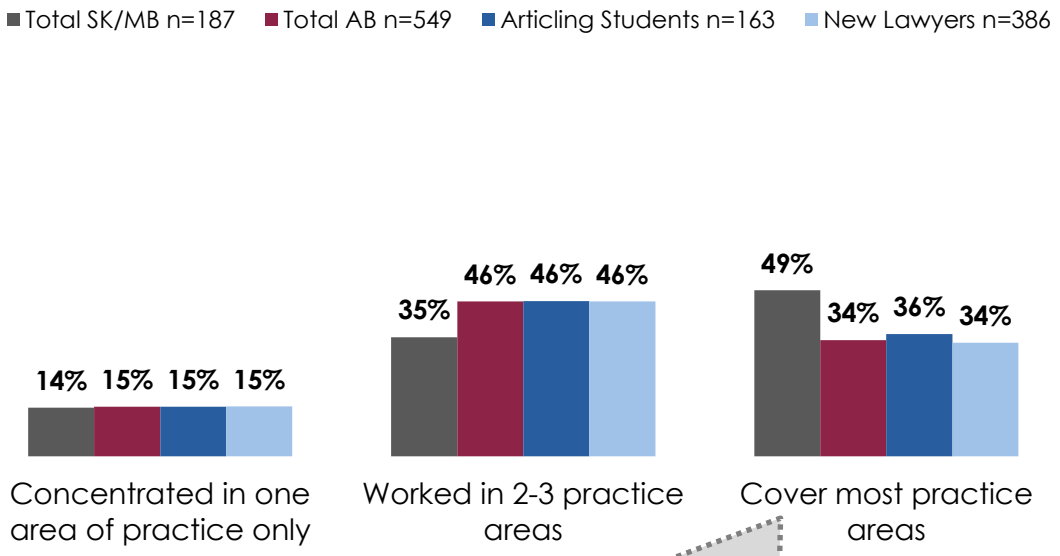
3 principals and 1 recruiter claimed that internationally trained students struggle and need more than 1 year of articling to be prepared for entry-level practice.

* Caution small base size for recruiters n=17

Only one-third of Alberta students claim they have been exposed to most practice areas while articling.

Articling Students & New Lawyers

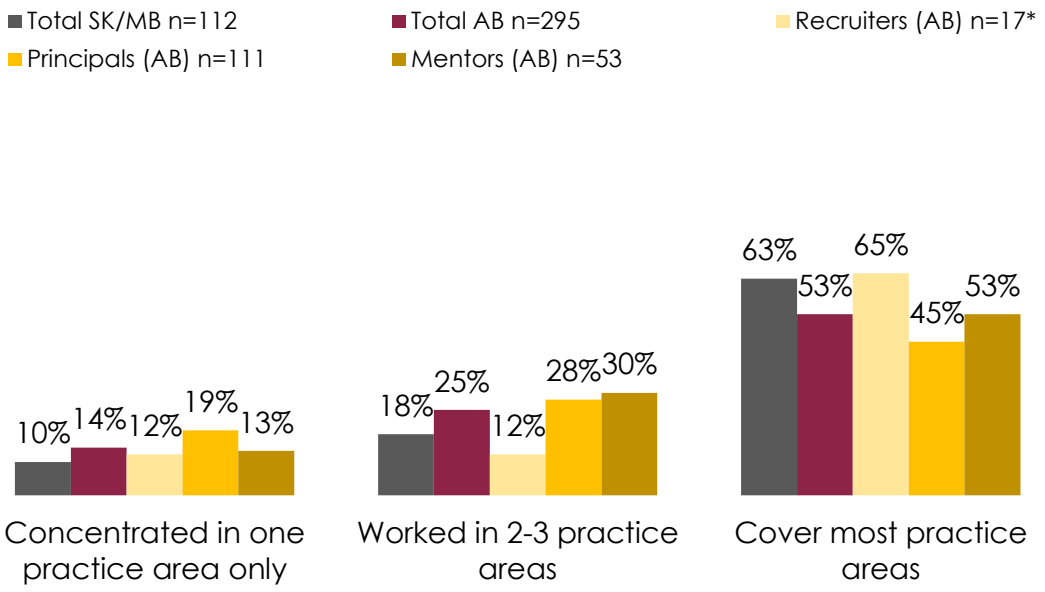
Type of Exposure to Different Practice Areas



A few students mentioned that rotations with other firms and articling in more than one setting were good ways to get exposure to new areas of practice.

Principals, Recruiters & Mentors

Type of Exposure to Different Practice Areas

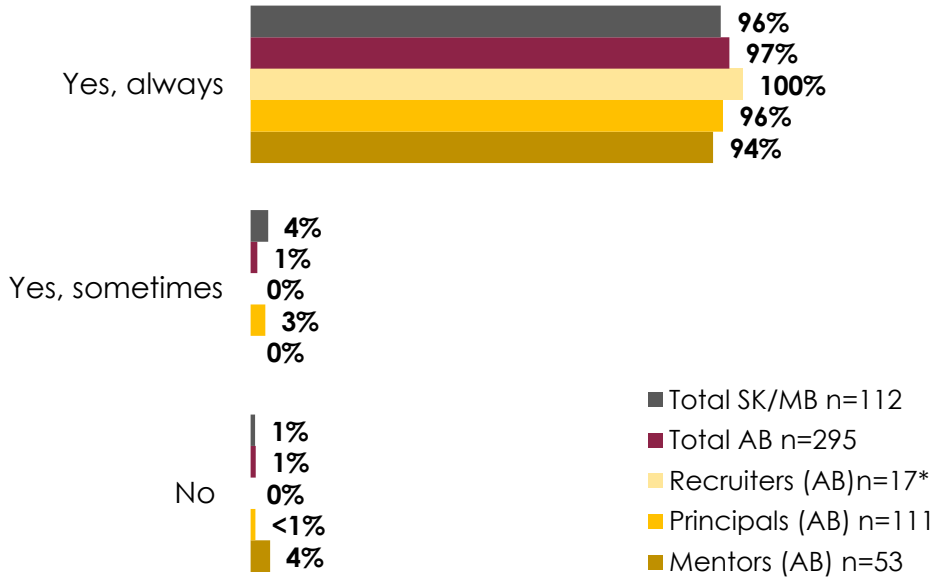


* Caution small base size for recruiters n=17

Nearly all firms offer articling students compensation.

Principals, Recruiters & Mentors

Does you firm/organization offer compensation to articling students?



Top Reasons for Not Offering Compensation to Articling Students

Among those that do not offer compensation to articling students in AB, n=3

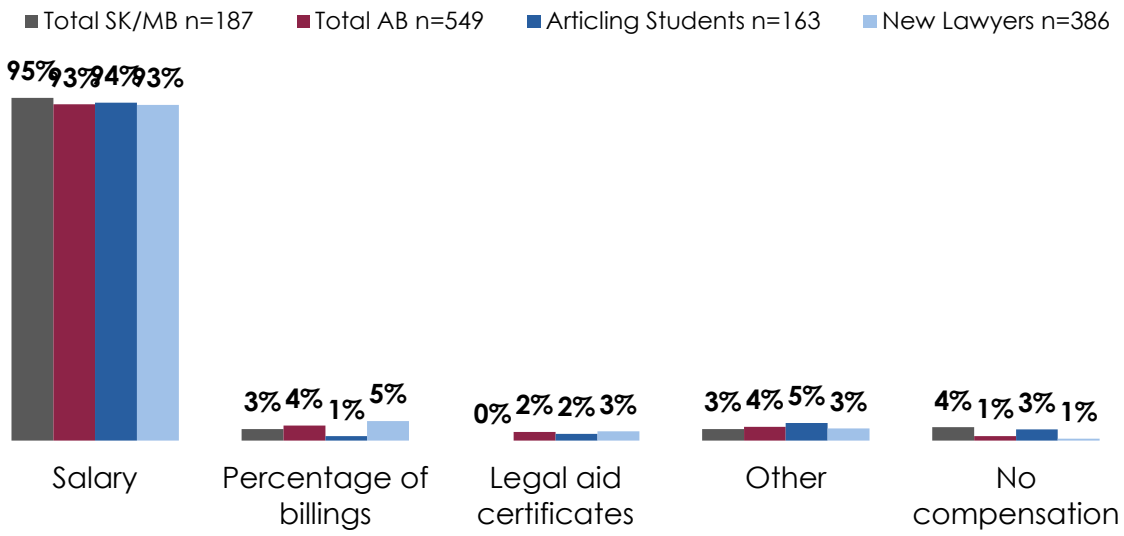
- Insufficient funds to cover costs
- Students volunteer
- Hours are required as component of educational program
- Offer mentoring only in one area of practice

* Caution small base size for recruiters n=17

The vast majority of students were paid a salary while articling.

Articling Students & New Lawyers

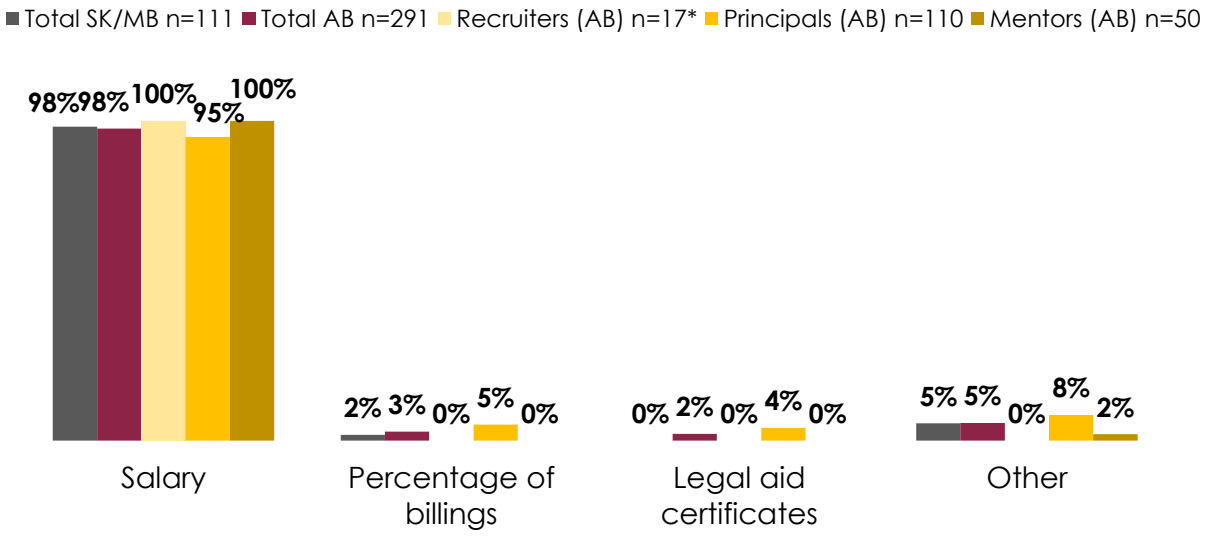
What type of compensation are you receiving/did you receive during your articling experience?



Principals, Recruiters & Mentors

What type of compensation does your firm/organization typically provide to articling students?

Among those who offer compensation



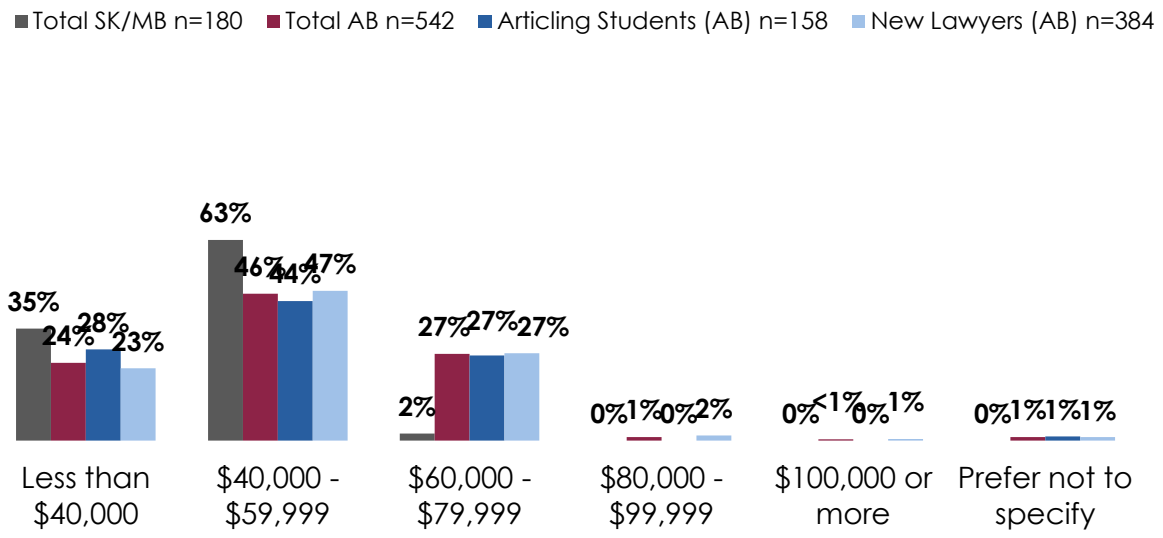
* Caution small base size for recruiters n=17

Students tend to be paid between $40,000 and $59,000, with those articling in Alberta being paid more on average than in other prairie provinces.

Articling Students & New Lawyers

What is/was your annual compensation during your articling?

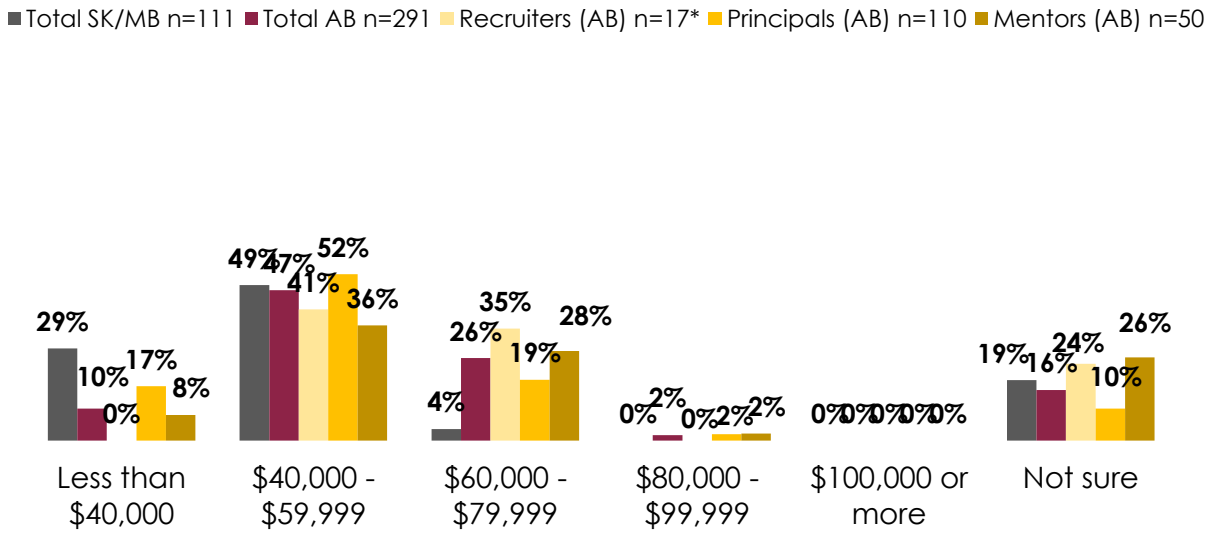
Among those who have received compensation



Principals, Recruiters & Mentors

In general, what is the compensation range offered to articling students at your firm/organization?

Among those who offer compensation

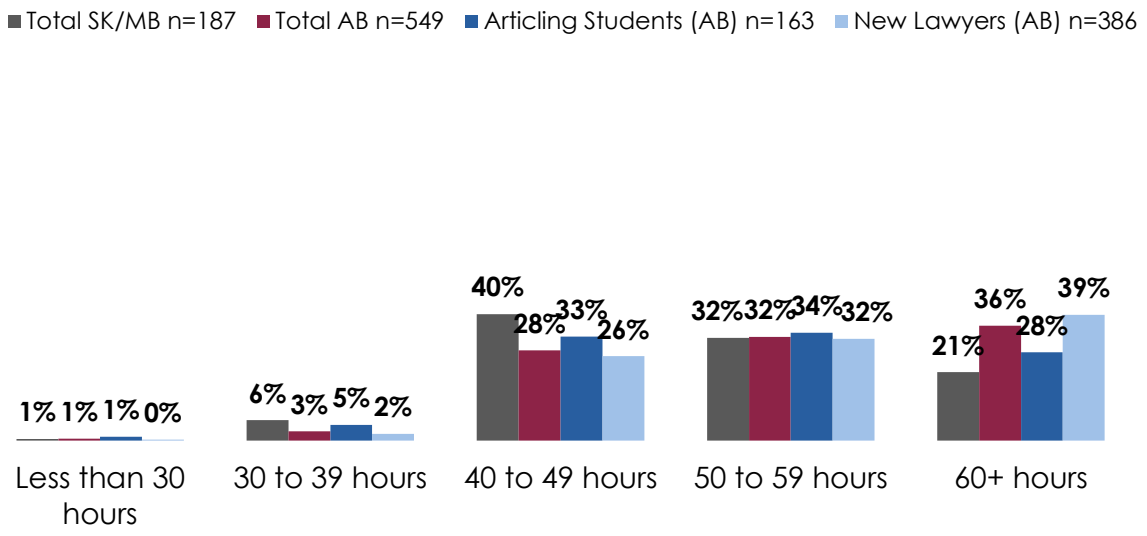


* Caution small base size for recruiters n=17

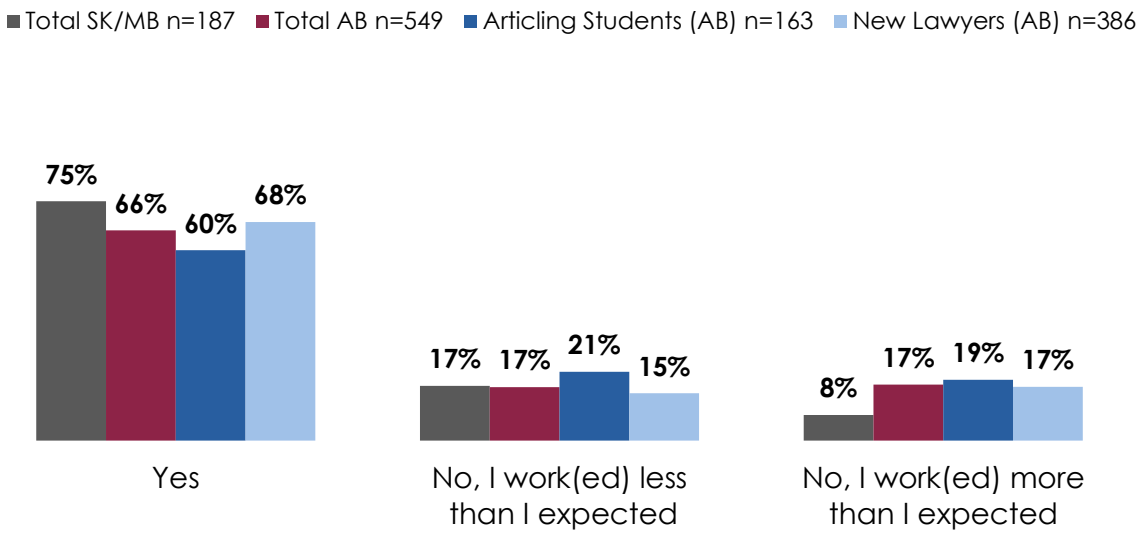
One-third of the students work 50-59 hours per week. Compared to other prairie provinces, more students in Alberta work over 60 hours per week.

Articling Students & New Lawyers

On average, approximately how many hours per week do/did you work during your articling?



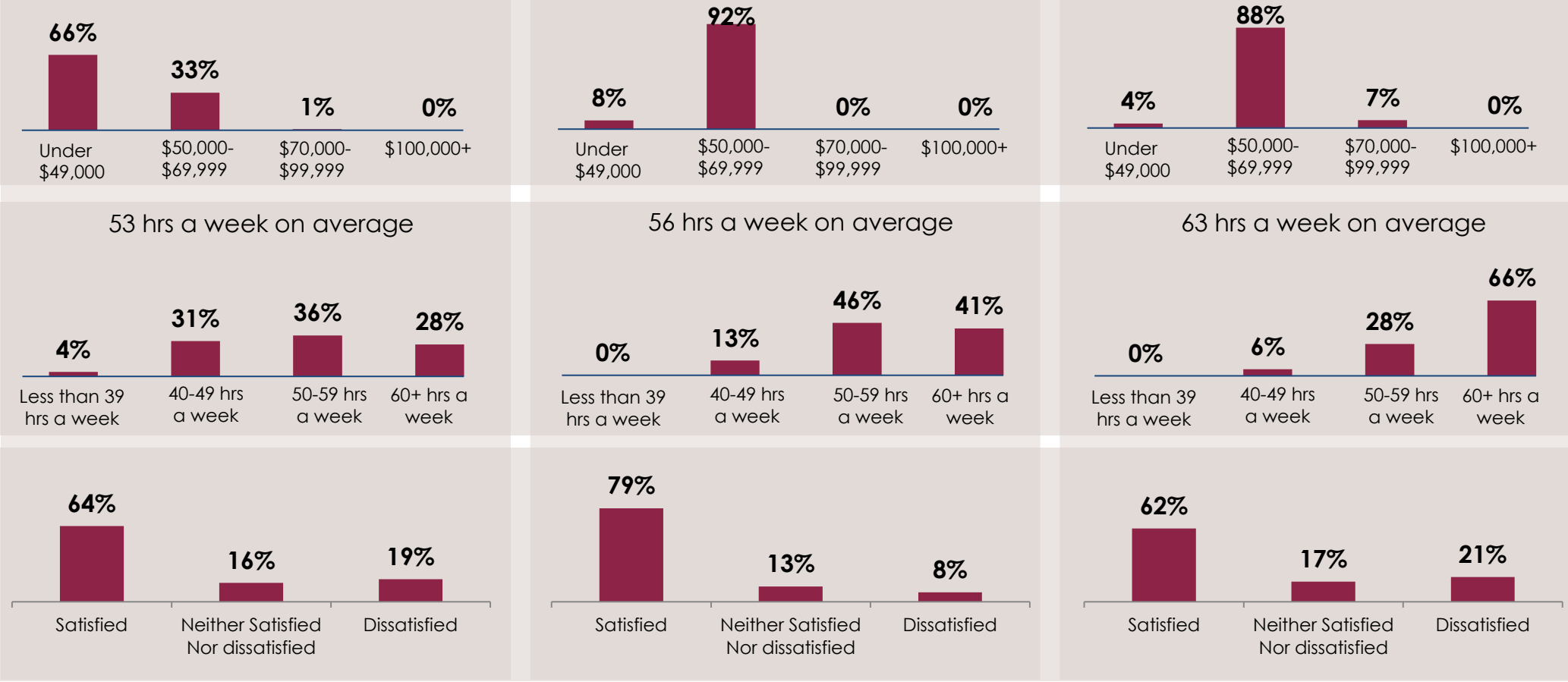
Do/did the number of hours you work(ed) during articling fit with your expectations?



IMPACT OF COMPENSATION AND WORKLOAD ON SATISFACTION

Satisfaction with articling experience is the highest in medium-sized law firms, where workload, although heavy, is lighter than in big firms, but pay is slightly lower.

	Small Law Firm (2-25 Lawyers)	Medium-Sized Law Firm (26-50 Lawyers)	Big Law Firms (51+ Lawyers)
Compensation (Among Total AB)	Approx. $47,000 on average	Approx. $59,000 on average	Approx. $63,000 on average
Workload (Among Total AB)	53 hrs a week on average	56 hrs a week on average	63 hrs a week on average
Satisfaction (Among Total AB)			

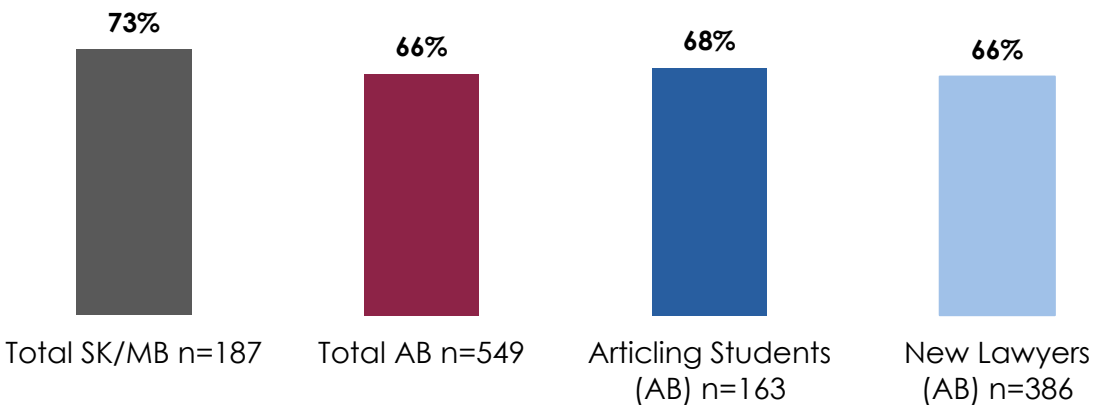


Two-thirds of students and new lawyers state they are/were given time to complete their bar admission course requirements during business hours.

Articling Students & New Lawyers

In general, are you/were you given time to complete your bar admission course requirements during business hours at the firm/organization where you are/were articling?

% Yes

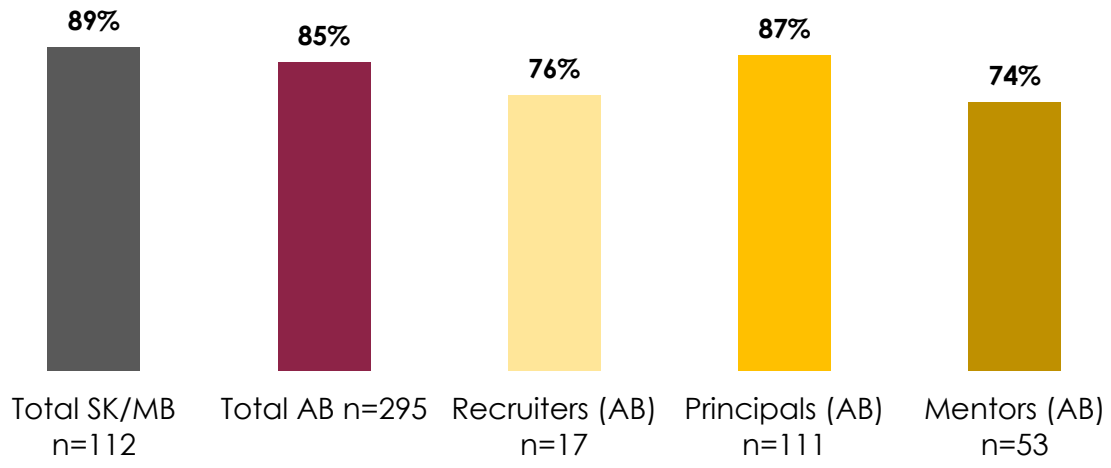


Students articling in large firms (51+ lawyers), especially those working in corporate settings, were less likely to be given time to complete the bar admission course requirements during business hours. In general, those who were given the time during business hours were more satisfied with their articling experience.

Principals, Recruiters & Mentors

In general, do articling students at your firm/organization typically get time during business hours to complete their bar admission course requirements?

% Yes



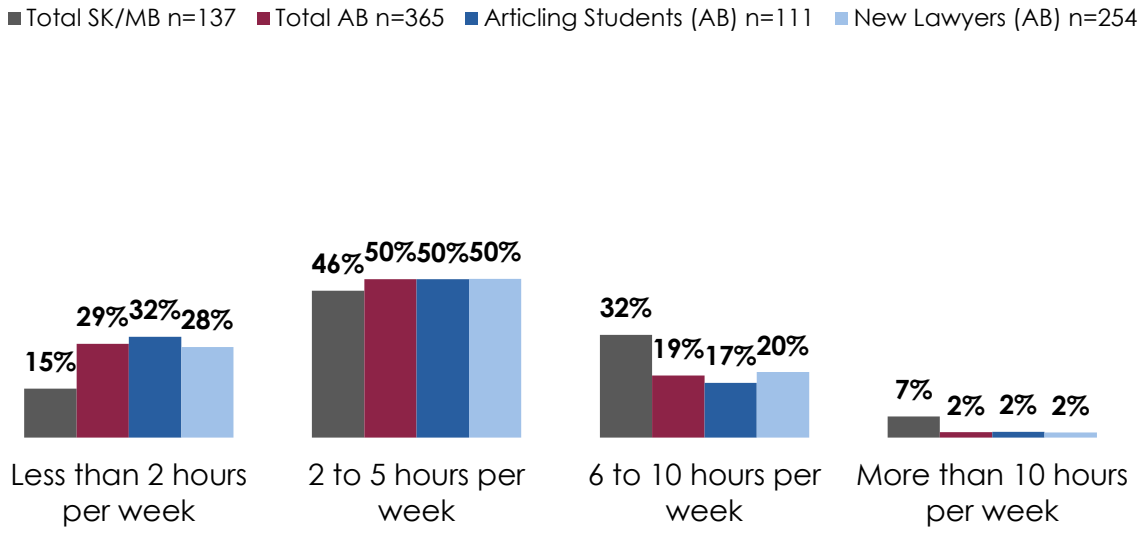
* Caution small base size for recruiters n=17

Half of students and new lawyers say they are, or were, given two to five hours per week to complete the bar admission course requirement.

Articling Students & New Lawyers

On average, how many hours per week are you/were you given to complete your bar admission course requirements?

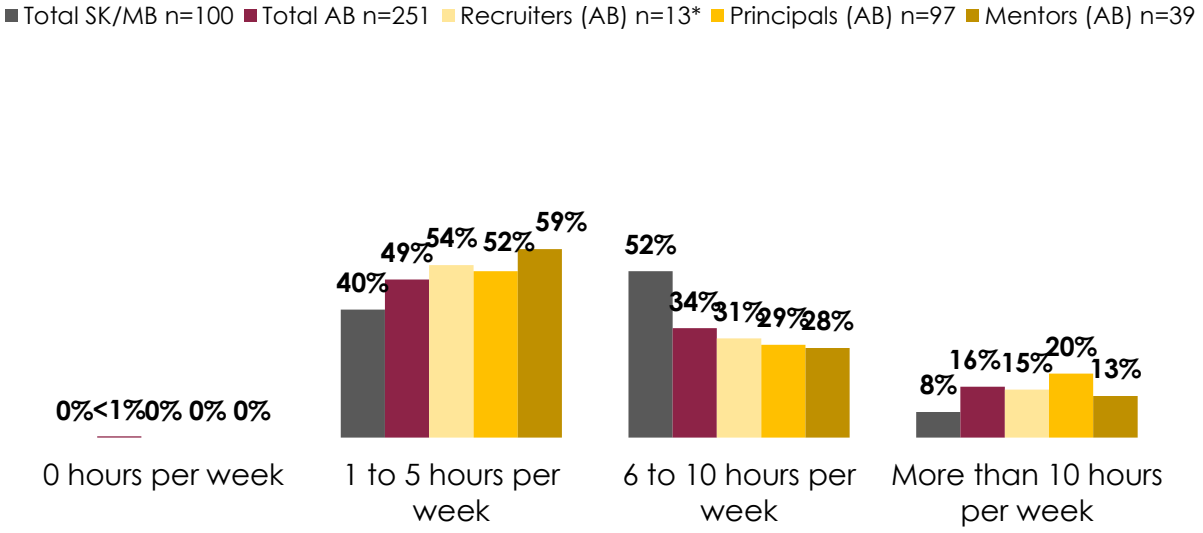
Among those who were given time during business hours to complete their bar admission course requirements



Principals, Recruiters & Mentors

To the best of your knowledge, on average how many hours per week are articling students given to complete their bar admission course requirements?

Among those who give time for articling students to complete bar admission course requirements during business hours

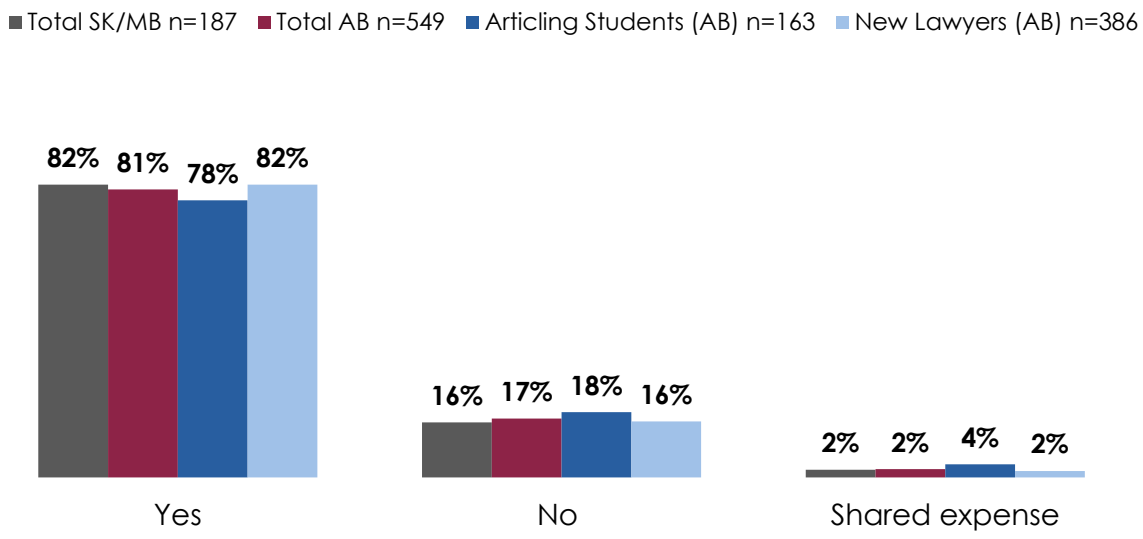


* Caution small base size for recruiters n=13

The majority of firms pay their students' bar admission course tuition.

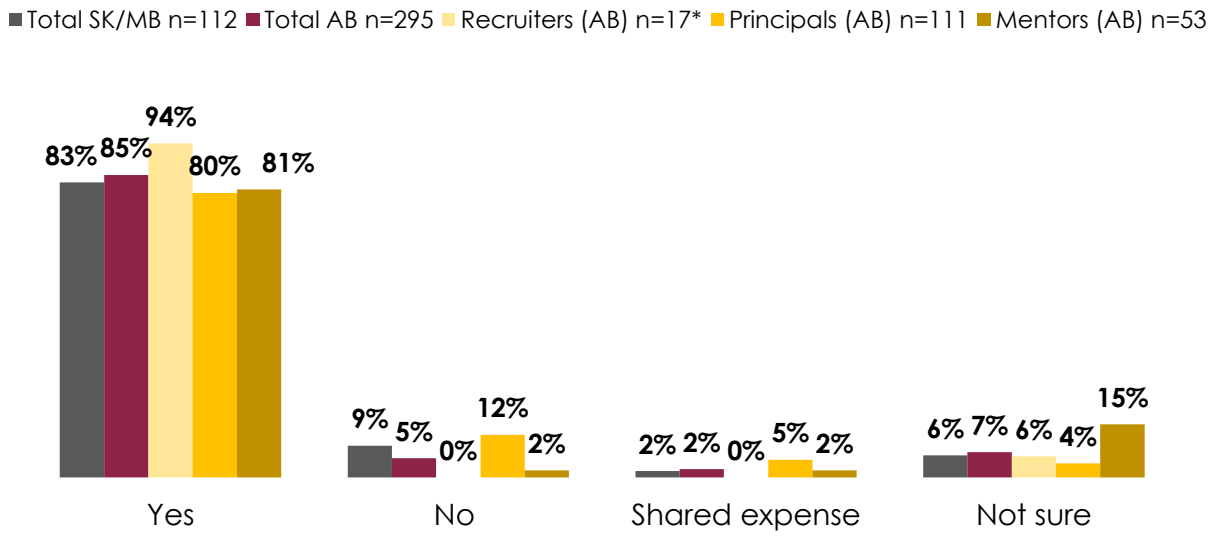
Articling Students & New Lawyers

Did/is your firm/organization pay(ing) your bar admission course tuition?



Principals, Recruiters & Mentors

To the best of your knowledge, does your firm/organization pay for articling students' bar admission course tuition?

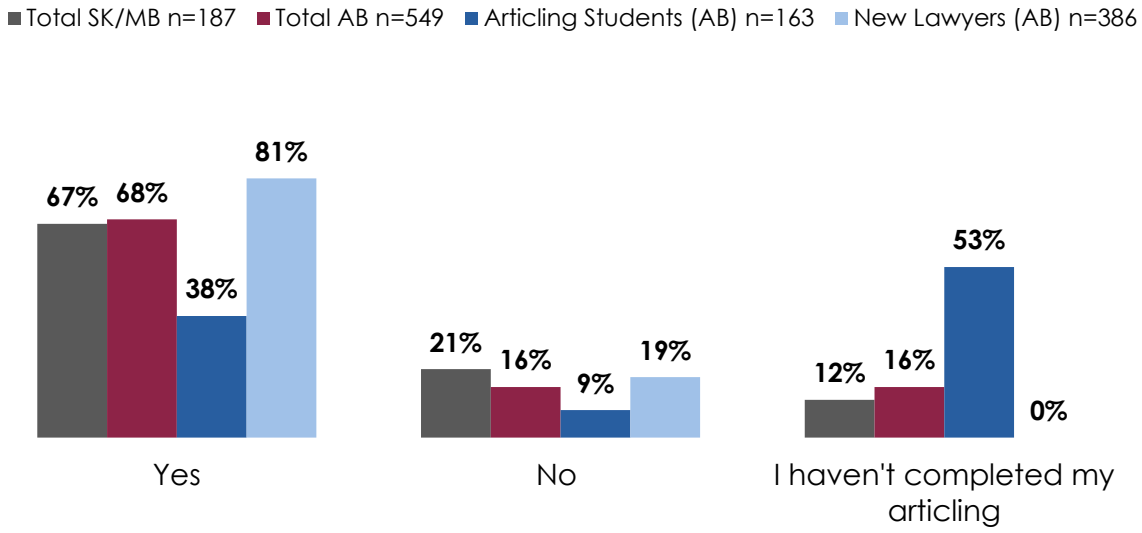


* Caution small base size for recruiters n=17

Eight in ten new lawyers were offered a position where they completed articling.

Articling Students & New Lawyers

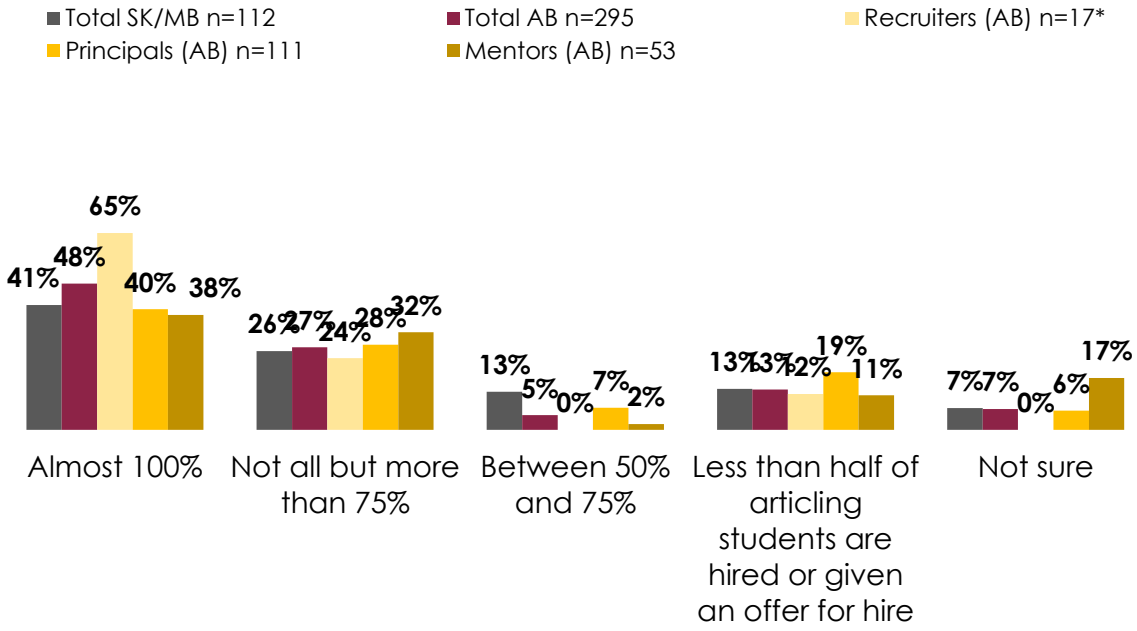
Were you offered a position at the firm/organization where you completed your articling?



Larger firms (25+ lawyers) are more likely to offer their articling student a position.

Principals, Recruiters & Mentors

What proportion of articling students does your firm/organization hire, or give an offer for hire, after they complete their articling position?

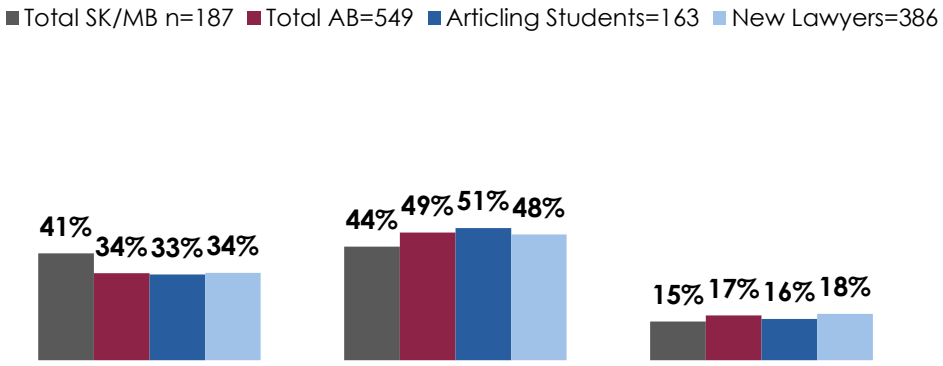


* Caution small base size for recruiters n=17

Even though the majority of recruiters, principals and mentors state they use a learning plan, only one-third of articling students say they were exposed to one.

Articling Students & New Lawyers

For your articling position, do/did you have a learning plan that guided your learning?

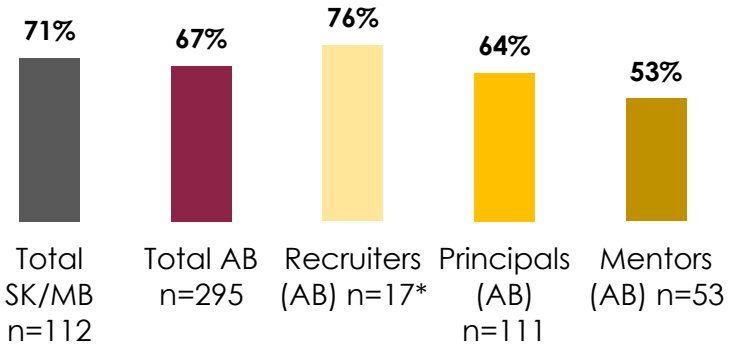


Students who had a learning plan feel considerably more prepared for entry level practice.

Principals, Recruiters & Mentors

In general, do you use a learning plan to guide the articling experience?

% Yes



Why don't you use a learning plan?

Among total Alberta recruiters, principals and mentors who do not use a learning plan, n=97

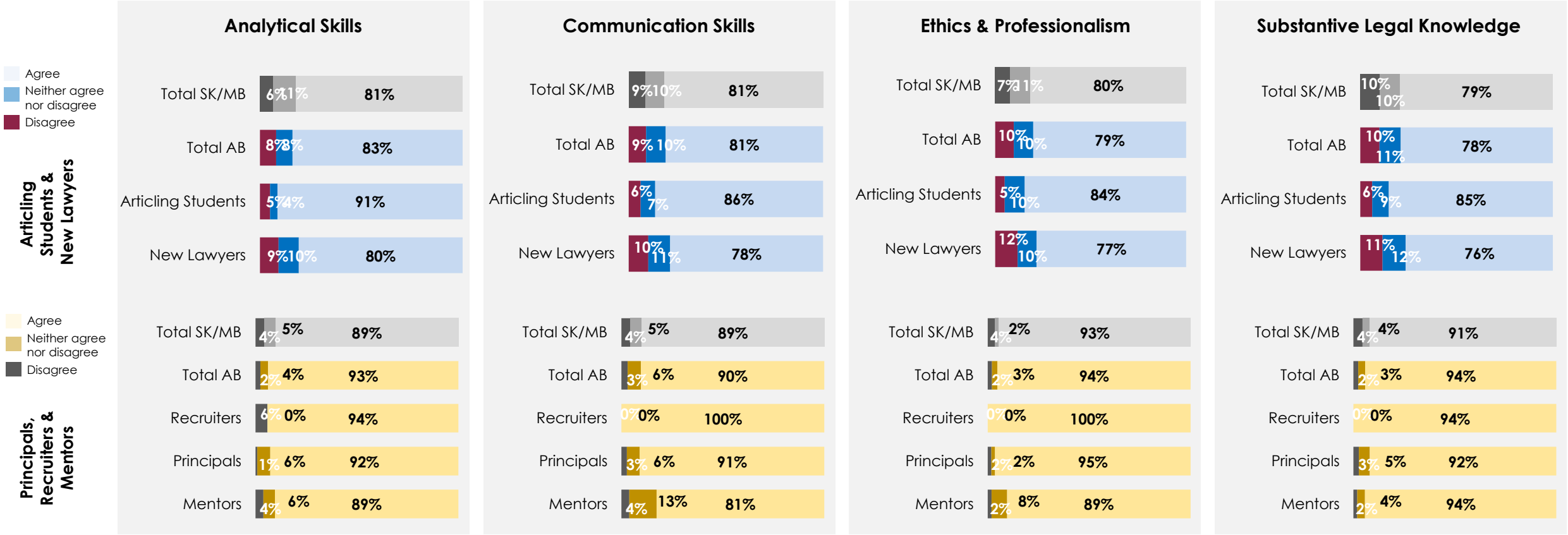
60%	Find it unnecessary
31%	Use a different resource (checklist, internal course, lecture series, etc.)
25%	Never thought of it
14%	Too limiting/individual approach is better
9%	Too much work
2%	Not a good fit for the firm

* Caution small base size for recruiters n=17

Students feel they get somewhat stronger training in analytical skills, communication skills, ethics & professionalism, and substantive legal knowledge during articling.

What extent do you agree or disagree that you are receiving/received adequate training to prepare you for entry level practice in each of the following areas?

What extent do you agree or disagree that articling students receive adequate training during their articling at your firm /organization in each of the following areas?

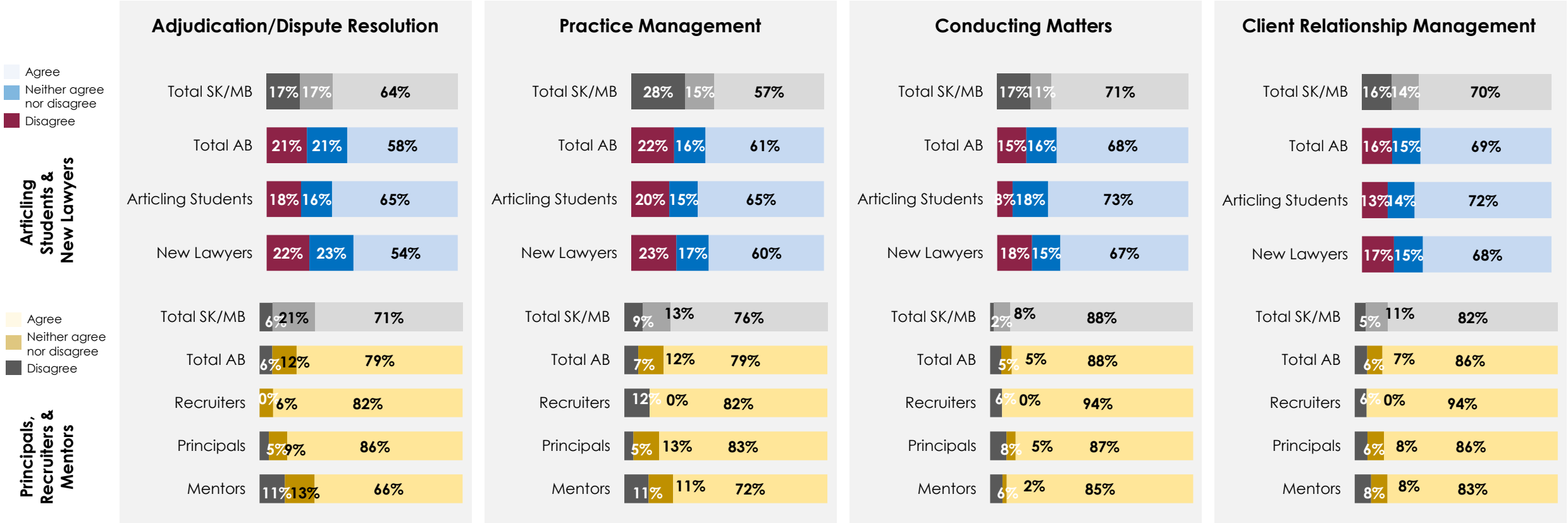


* Caution small base size for recruiters n=17

Adjudication/dispute resolution, practice mgmt., conducting matters, and client relationship mgmt. are perceived by students to have somewhat weaker training during articling.

What extent do you agree or disagree that you are receiving/received adequate training to prepare you for entry level practice in each of the following areas?

What extent do you agree or disagree that articling students receive adequate training during their articling at your firm /organization in each of the following areas?



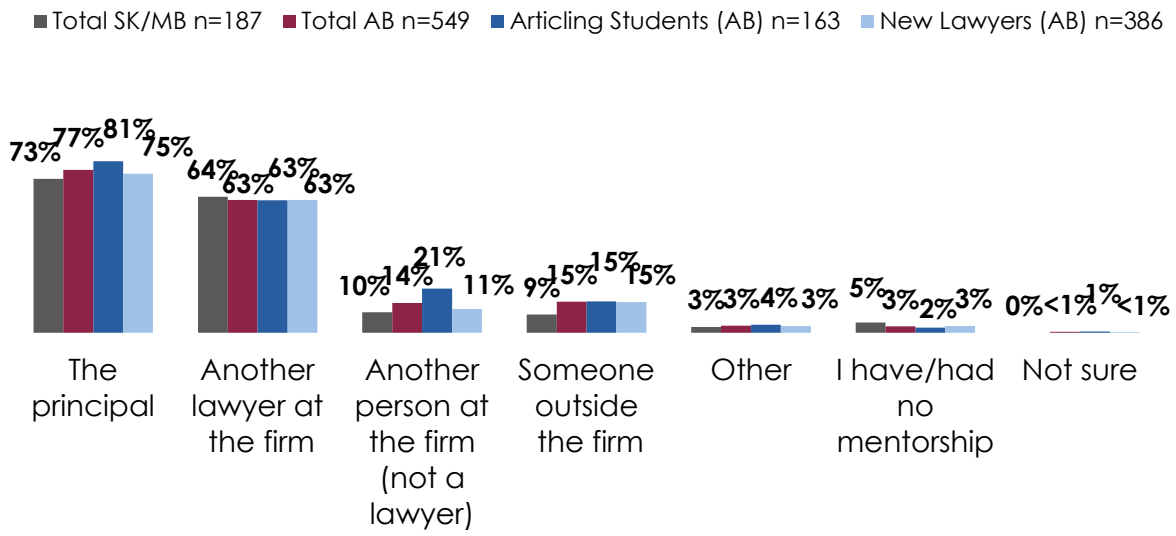
Practice management, conducting matters and client relationship management are mentioned on an unaided basis as top three areas in which students had experiences in the first few years of practice that they could have been better prepared for during articling.

* Caution small base size for recruiters n=17

While the principal is often the primary mentor, another lawyer at the firm is also commonly a primary mentor.

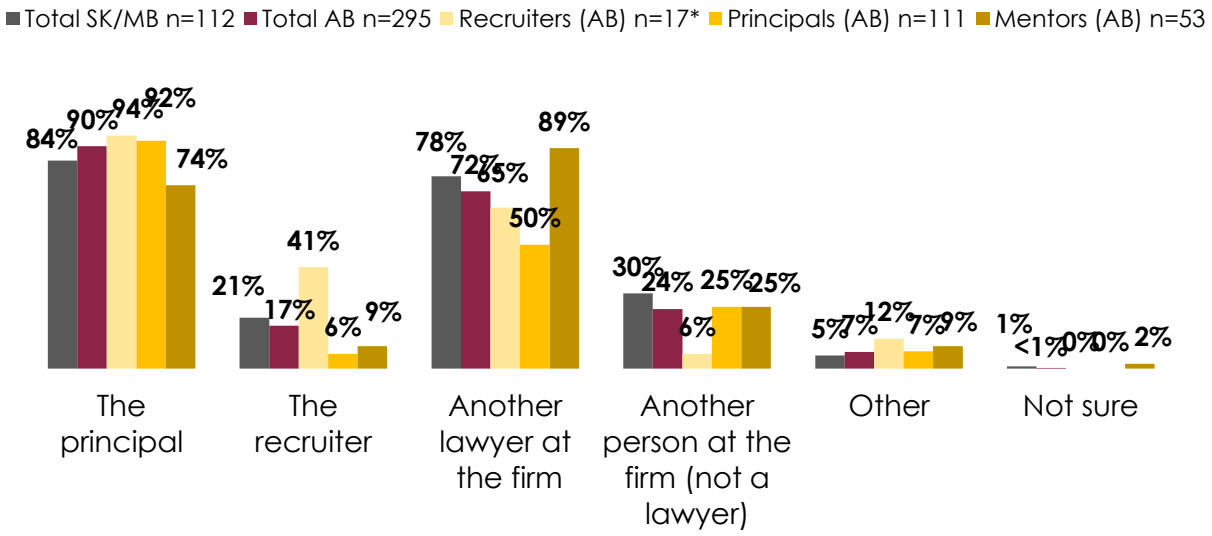
Articling Students & New Lawyers

Who are/were your primary mentor(s) during your article(s)?



Principals, Recruiters & Mentors

Who is/are typically mentor(s)?



* Caution small base size for recruiters n=17

Students perceive quality of mentorship as an area for improvement, especially in terms of receiving feedback on work performance, skills and development.

To what extent do you agree or disagree with the following statements about the mentorship you are receiving/received during your articling?

To what extent do you agree or disagree with the following statements about the mentorship articling students receive at your firm/organization?

Agree
Neither agree nor disagree
Disagree

Articling Students & New Lawyers

I receive/received regular feedback on my work performance

	Disagree	Neither agree nor disagree	Agree
Total SK/MB	25%	16%	59%
Total AB	26%	14%	60%
Articling Students	22%	20%	58%
New Lawyers	28%	11%	61%

I receive/received regular feedback on my skills and development

	Disagree	Neither agree nor disagree	Agree
Total SK/MB	34%	19%	47%
Total AB	36%	18%	46%
Articling Students	29%	24%	47%
New Lawyers	39%	15%	46%

Someone is/was available to answer my questions or clarify things when I needed help

	Disagree	Neither agree nor disagree	Agree
Total SK/MB	11%	7%	82%
Total AB	13%	9%	78%
Articling Students	10%	7%	82%
New Lawyers	14%	10%	76%

Overall, I am satisfied with the mentoring that I receive/ received during my articling

	Disagree	Neither agree nor disagree	Agree
Total SK/MB	20%	11%	68%
Total AB	25%	12%	64%
Articling Students	20%	16%	64%
New Lawyers	26%	10%	64%

Agree
Neither agree nor disagree
Disagree

Principals, Recruiters & Mentors

Students are provided with regular feedback on their work performance

	Disagree	Neither agree nor disagree	Agree
Total SK/MB	4%	7%	88%
Total AB	4%	4%	91%
Recruiters	6%	6%	88%
Principals	5%	3%	93%
Mentors	4%	11%	85%

Students are provided with regular feedback on their skills development

	Disagree	Neither agree nor disagree	Agree
Total SK/MB	4%	22%	73%
Total AB	5%	13%	82%
Recruiters	6%	6%	88%
Principals	3%	13%	85%
Mentors	9%	25%	66%

There is someone available to answer students' questions or clarify things when they need help

	Disagree	Neither agree nor disagree	Agree
Total SK/MB	3%	1%	96%
Total AB	1%	1%	99%
Recruiters	0%	6%	94%
Principals	<1%	<1%	98%
Mentors	0%	0%	100%

Overall, I am satisfied with the mentoring students receive during articling at our firm

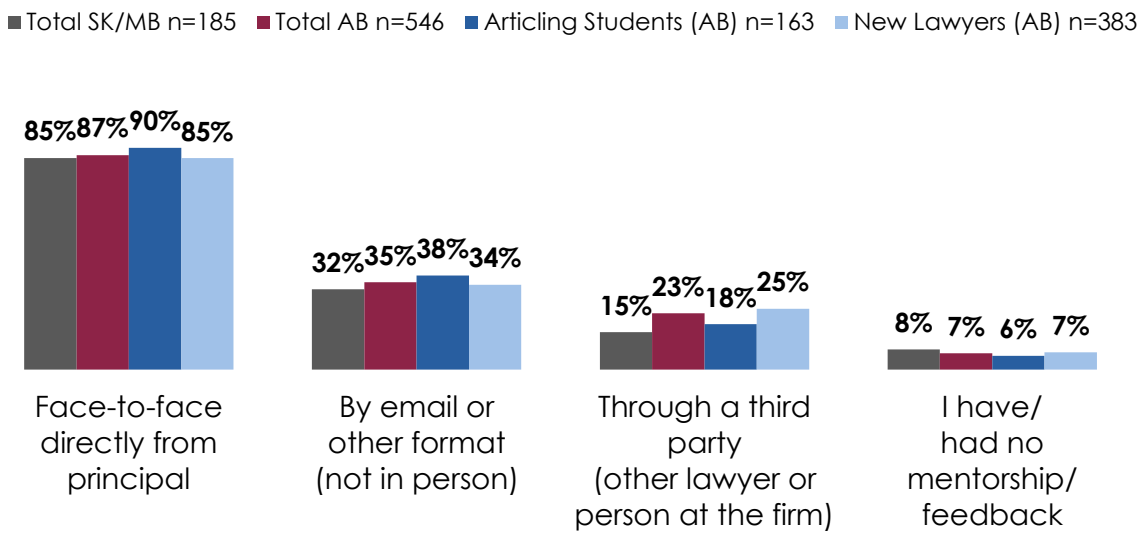
	Disagree	Neither agree nor disagree	Agree
Total SK/MB	5%	7%	88%
Total AB	4%	5%	91%
Recruiters	0%	6%	94%
Principals	3%	5%	93%
Mentors	9%	9%	81%

* Caution small base size for recruiters n=17

Most students receive face-to-face feedback directly from the principal.

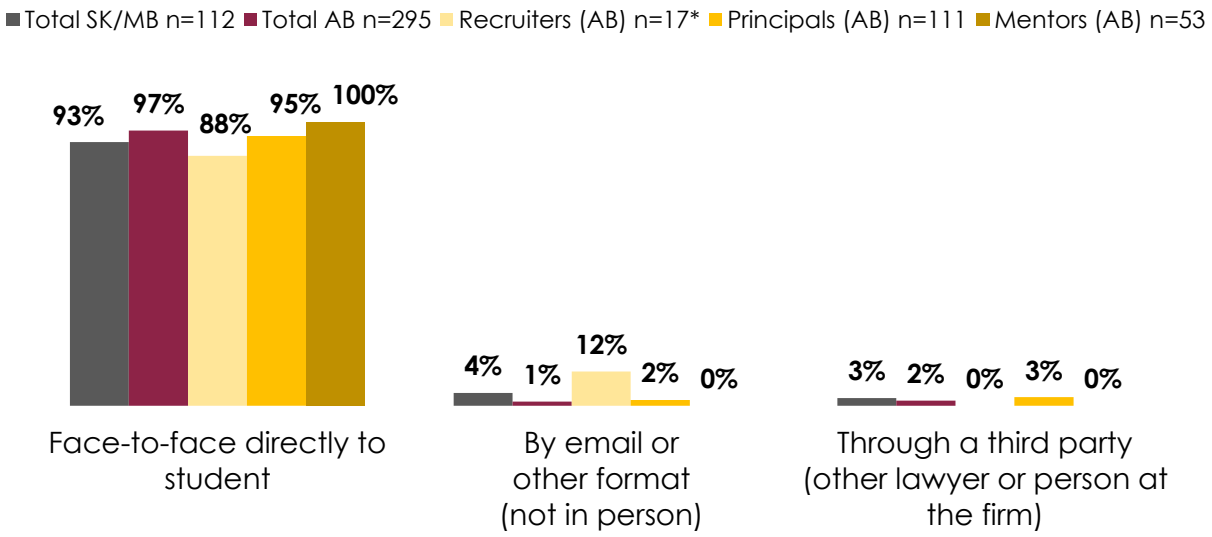
Articling Students & New Lawyers

How do/did you receive mentorship/feedback during your articling?



Principals, Recruiters & Mentors

How do/did you provide mentorship/feedback?

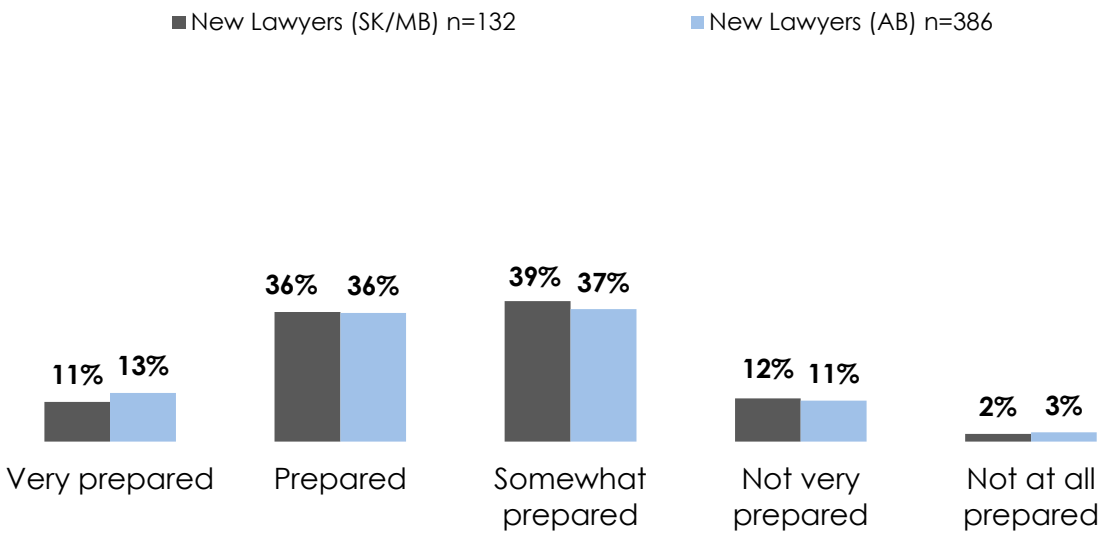


* Caution small base size for recruiters n=17

Nearly half of former articling students were not confident in their training and felt only somewhat prepared or not very prepared.

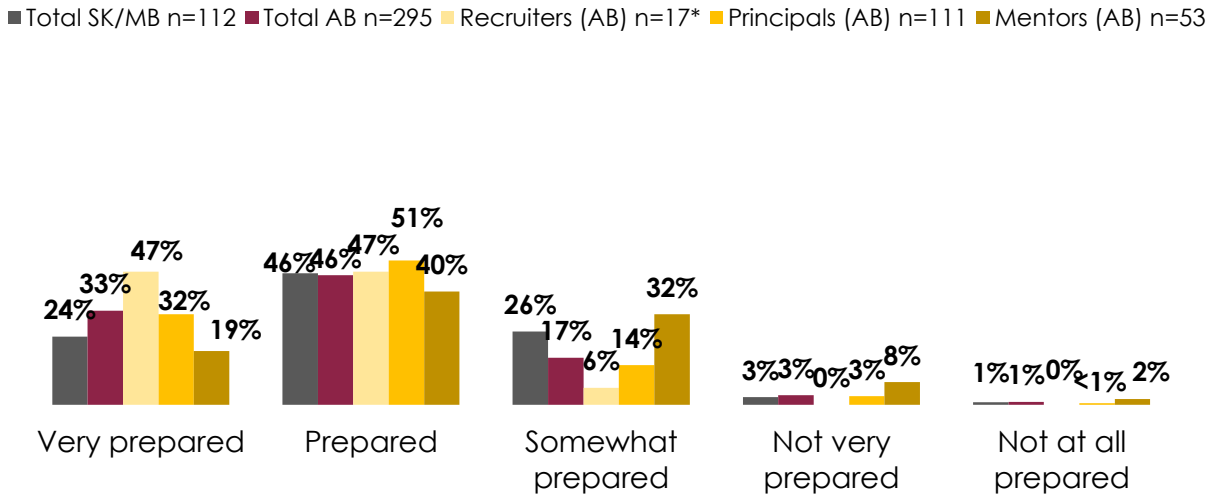
Articling Students & New Lawyers

How prepared were you to enter the practice of law once you completed your articling?



Principals, Recruiters & Mentors

In your experience, how prepared is an articling student for entry level practice once they compete their articling at your firm/organization?



* Caution small base size for recruiters n=17

Training content and quality of training are the top factors determining how prepared students are for entry-level practice.

Articling Students & New Lawyers

Please explain why you believe you were prepared/unprepared for entry level practice once you completed your articling?
Among total Alberta articling students and new lawyers n=462

Very prepared + prepared (n=226)	Somewhat Prepared (n=179)	Not very prepared + not at all prepared (n=57)
75% Good training content **50%** Got training in practice mgmt. **20%** Gained substantive knowledge **16%** Knowledge of conducting matters	**58% Poor training content** **33%** No training in practice mgmt. **21%** Mostly grunt work **9%** No training in conducting matters	**77% Poor training content** **42%** Mostly grunt work **39%** No training in practice mgmt. **33%** No training in conducting matters **19%** Too narrow scope
73% High quality of training **48%** Good guidance available **24%** Empowering experience	**30% There's always room for improvement**	**54% Poor quality of training** **53%** Guidance unavailable **23%** Ineffective principal

Principals, Recruiters & Mentors

Please explain why you believe an articling student is prepared/unprepared for entry level practice once you complete their articling at your firm/organization?
Among total Alberta principals, recruiters and mentors, n=295

Very prepared + prepared (n=233)	Somewhat Prepared (n=49)	Not very prepared + not at all prepared (n=13*)
74% Good training content **49%** Got training in practice management (e.g. how to run files) **49%** Wide range of experiences **14%** Knowledge of conducting matters	**51% There's always room for improvement** **43%** Year is not long enough/there are always more things to learn **16%** Learnt some skills, but not all	**77% Poor training content** **38%** No training in practice management **31%** Mostly grunt work **8%** Too narrow scope **8%** No training on interaction with clients
74% High quality of training **52%** Good guidance available **17%** Empowering experience	**45% Poor training content** **24%** No training in practice management **16%** Mostly grunt work	**8% Negative firm environment**

* Caution small base size for not very prepared + not at all prepared n=13

Students could benefit from better training resources and more relevant training content.

Articling Students & New Lawyers

Are there additional tools and resources that you believe are needed to help you be better prepared for entry level practice?

Among total Alberta articling students and new lawyers, n=458

- **49% Better training resources**
  - 12% Better mentorship
  - 10% Better CPLED program
  - 8% Interaction with and learning from other lawyers and students/SoloNet
  - 8% Access to LESA library/reduced rates for courses
  - 6% Education plan for articling students
- **33% More relevant training content**
  - 10% More practice management training
  - 8% File management training
  - 7% Improving basic business management skills
- **28% Providing opportunity to get rich experience**
  - 9% More hands-on experience (in general)
  - 9% More court experience
- **12% Nothing**
- **10% Good working conditions**

Principals, Recruiters & Mentors

What additional tools and resources would help you better mentor/train/prepare articling students for entry level practice?

Among total Alberta principals, recruiters and mentors, n=292

- **39% Better training resources**
  - 12% Education plan for articling students
  - 6% Better CPLED program
  - 6% Better mentorship
  - 5% Access to LESA library/reduced rates for courses
  - 3% LESA training for principals and mentors
- **22% Nothing**
- **18% More relevant training content**
  - 7% More practice management training
  - 4% Improving basic business management skills
- **9% Providing opportunity to get rich experience**
  - 5% More hands-on experience (in general)
- **9% More time articling**
- **3% Good working conditions**

Practice mgmt., conducting matters and client relationship mgmt. are the three top areas in which new lawyers say they could have been better prepared in the first years of practice.

Articling Students & New Lawyers

What experiences have you had in the first few years of practice that your could have been better prepared for during articling?

Among total Alberta articling students and new lawyers, n=455

34% Practice management
- 12% File management from start to end
- 8% Billing / payment acquisition
- 6% Practice management (in general)
- 6% Time / workload management

26% Conducting matters
- 10% Court knowledge/procedures
- 5% Dealing with opposing counsel / other lawyers

26% Nothing

20% Client relationship management
- 15% Client communication
- 5% How to deal with a difficult client

10% Substantive legal knowledge
- 4% Broader experience, exposure to different areas of law

4% Adjudication, Dispute Resolution
- 3% Dealing with conflicts / dispute resolution

Principals, Recruiters & Mentors

What gaps in knowledge or skills, if any, do new lawyers have that could be better addressed in articling or during the first few years of practice?

Among total Alberta principals, recruiters and mentors, n=291

44% Practice management
- 17% Business side of practice
- 15% Practice management (in general)
- 8% Billing / payment acquisition
- 7% Time / workload management

22% Conducting matters
- 9% Court knowledge/procedures
- 7% Drafting legal documents / writing
- 5% Dealing with opposing counsel / other lawyers

19% Client relationship management
- 16% Client communication
- 4% How to build a client base

12% Substantive legal knowledge
- 6% Law training /more actual legal work / legal knowledge

10% Ethics and professionalism
- 6% Ethical issues/ethics

Articling Students & New Lawyers

Are there additional tools and resources that you believe are needed to help you be better prepared for entry level practice?

Among total Alberta articling students and new lawyers, n=458

*"**CPLED** should play a larger generalist role in **ensuring that students are prepared for all forms of practice**. This is to compensate for the different types of articles students may obtain."*

*"Exposure to **more elements of a case file**. Seeing a file from inception onward rather than just one component."*

***"More relevant CPLED courses**."*

*"More **connection to other mentors** in the community."*

*"**More true mentorship** from my principal. A **course or guidance on the more "advanced" legal skills** such as how to create a good file strategy, looking at variety of legal avenues before determining best course of action…"*

*"…Exposure to multiple practice areas and **mentorship from other lawyers than principal**. **Face-to-face work with clients** (I had this but friends did not). **Regular feedback** - increased supervision in the first few months of articling."*

*"**CPLED** covering all the activities that a well rounded 1st year lawyer should know. A **Portal for new lawyers** that explains **how to do basic tasks** that you need to know but that may not be done at your firm."*

*"Would have liked to see **better feedback from CPLED**. When a student passes a module, you have no idea if you did really well or if you just barely passed."*

Principals, Recruiters & Mentors

What additional tools and resources would help you better mentor/train/prepare articling students for entry level practice?

Among total Alberta principals, recruiters and mentors, n=292

***"Free sessions for the student from LESA or the LSA**. Our budget for the students was limited and taken up entirely by their CPLED tuition and modest compensation."*

*"**More time** to sit down face-to-face to **discuss issues and questions** they are facing."*

***"CPLED should ensure substantive knowledge; not just skills**. It is a false assumption that every student has the same substantive knowledge, especially when the degree was just obtained."*

*"If there were **optional modules as part of CPLED** where students could **practice skills** they wouldn't be able to practice during their article (in our case, time tracking and billing)."*

*"Better **integration with the CBA**, more **LESA seminars** that target those lawyers with less than 5 years at the bar, and a **focus on new technologies** that will affect the practice of law in the coming years."*

*"The answer is always: **more time**. But time costs a lot of money and it is hard to justify the investment of it to the level that would make the articling students' experience an excellent one."*

*"Perhaps a **basic format of articling plan**, which would include aspects of ethics and professionalism and which would also engage the student to consider the financial aspects of the practice of law (marketing, billing, collection, overhead review, etc.)"*

EXECUTIVE SUMMARY: VERBATIM COMMENTS ON WHAT COULD HAVE BEEN ADDRESSED DURING ARTICLING TO BETTER PREPARE STUDENTS FOR THEIR FIRST FEW YEARS OF PRACTICE

Articling Students & New Lawyers

What experiences have you had in the first few years of practice that your could have been better prepared for during articling?

Among total Alberta articling students and new lawyers, n=455

*"Taking a **file from start to finish**, including running conflicts, billing and reporting."*

*"Dealing with **billing**, **client communications about billing**, and communication with **opposing counsel**, some of whom are difficult towards junior lawyers."*

***"Practice management**. In particular, the **use of management software**, e.g. PC Law or Clio."*

*"Certain **applications or files that were way over my head**. I should not have been given those files at my firm. I should be shadowing senior counsel A LOT more so that I can learn more. If a junior is handling a difficult trial, senior counsel should attend with them. There **should be a lot more guidance from senior counsel**, or there should be a **help-line available to students and junior counsel** so that they do not feel like they are failing or don't know what to do next. There should be more support."*

*"My most serious issues were related to **practice management**. How much work to take on? What type of work? When to refuse work? The other issues are related to **very little trial experience**."*

*"I wish I was better prepared **for time and file management**, **managing client expectations, dealing with personal stress** levels…"*

Principals, Recruiters & Mentors

What gaps in knowledge or skills, if any, do new lawyers have that could be better addressed in articling or during the first few years of practice?

Among total Alberta principals, recruiters and mentors, n=291

*"Conducting **client intakes**, preparing **retainer letters**, reviewing and **understanding billing processes**."*

***"Practice management** tips: entering time, managing files, communicating clearly."*

***"Practice management**. Learning **what a file can and can't support** (a $10k file can't support a $10k research memo)."*

*"We find that new lawyers tend to have strong legal-analytical skills, but very few skills with respect to **personal organization, time management, resource management, project management, customer service and client communication**. We believe that we have a good process at our firm for exposing students to these important aspects of practice."*

***"Client management**. Not all client complaints are legal issues or translate to a valid, defensible cause of action."*

***"How to handle clients** and **deal with other lawyers**. Making sure that they understand both sides of the case and have considered as many contingencies as possible. Good, **practical "hands on" experience** in applying their knowledge of the law to an actual case."*

Wide hands-on experience and exposure to tasks and practice areas of interest are top positive aspects of the articling experience for students, new lawyers, principals, recruiters and mentors.

Summary of Most Positive Aspects of Articling Experience

Articling Students & New Lawyers
Among total Alberta articling students and new lawyers, n=549

- **81%** Wide hands-on experience
- **77%** Tasks and practice areas of interest
- **73%** Team work
- **56%** Mentorship and guidance
- **50%** Working with clients
- **21%** Compensation
- **11%** Emotional support
- **5%** No positive aspects

Principals, Recruiters and Mentors
Among total Alberta principals, recruiters and mentors, n=295

- **92%** Providing mentorship and guidance
- **88%** Providing wide hands-on experience
- **76%** Providing tasks and practice areas of interest
- **59%** Working with clients
- **53%** Team work
- **33%** Emotional support to articling students
- **2%** No positive aspects

Team work through working closely with lawyers and contributing to a group/team is one of the top positive aspects of the articling experience for students and new lawyers.

Wide hands-on experience 81%	Tasks and practice areas of interest 77%	Team Work 73%	Mentorship & Guidance 56%	Working with clients 50%
76% Getting hands-on experience	**63%** Working on interesting files	**56%** Working closely with supportive and helpful lawyers	**46%** The mentorship I received from my principal	**50%** Working with clients
48% Getting experience with doing a wide range of tasks that are relevant to practising law	**62%** Being exposed to specific areas of practice that are interesting to me	**36%** Being a contributing part of a group/team and making a difference	**30%** The feedback I received to help me improve	**Compensation 21%**
		32% Working with other articling students	**15%** The on-going learning sessions to help ensure my learning goals were met	**Emotional Support 11%**
			9% The onboarding training that helped me prepare for my articling experience	**No positive aspects 5%**

Those who received wide hands-on experience are more satisfied with their articling experience and feel more prepared for entry-level practice.

Providing mentorship and guidance is the most positive aspect of the articling experience for principals, recruiters and mentors.

Providing mentorship and guidance 92%	Providing wide hands-on experience 88%	Providing tasks and practice areas of interest 76%	Working with clients 59%	Team work 53%
78% The opportunity to provide mentorship to articling students	**82%** Providing hands-on experience to articling students	**60%** Providing the opportunity for articling students to work on interesting files	**59%** Providing the opportunity for articling students to work with clients	**53%** Allowing articling students to contribute to a practice group/team
72% Providing feedback to help ensure articling students improve	**61%** Providing a wide range of tasks that are relevant to the practice of law	**56%** Exposing articling students to specific areas of practice that interest them		**Emotional Support 33%** Providing wellness supports to articling students
40% Onboarding articling students to the law firm experience				**No positive aspects 2%**
31% Participating in learning sessions to ensure articling students' goals are met				

Mentorship and guidance is a top challenge for all those involved. Students also struggle with heavy workload, while principals, recruiters and mentors struggle with lack of training and resources.

Summary of Key Challenges of Articling Experience

Articling Students & New Lawyers

Among total Alberta articling students and new lawyers, n=549

- **69%** Heavy workload
- **67%** Poor mentorship and guidance
- **60%** Lack of clarity and structure
- **49%** Financial challenges
- **44%** Limited availability of articling positions
- **34%** Getting a variety of experiences
- **32%** Navigating personality differences
- **18%** Mental health support
- **5%** No challenges

Principals, Recruiters and Mentors

Among total Alberta principals, recruiters and mentors, n=295

- **63%** Lack of training and resources
- **53%** Mentorship and guidance are challenging
- **51%** Providing a variety of experiences
- **36%** Lack of clarity and structure
- **34%** Managing personality differences
- **32%** High costs
- **9%** Mental health support
- **3%** No challenges

Heavy workloads, poor mentorship and guidance, and a lack of clarity and structure are the top challenges of the articling experience for students and new lawyers.

Heavy workload 69%	Poor mentorship and guidance 67%	Lack of clarity and structure 60%	Financial challenges 49%	Limited availability of articling positions 44%
58% Managing workload	**47%** Lack of support with the steep learning curve	**33%** Lack of clarity of what is required of an articling student	**44%** Not being paid or being paid minimally	**44%** Limited availability of articling positions
48% Long working hours	**43%** Lack of mentorship	**32%** Receiving training in all competency areas	**26%** Additional costs	**Getting a variety of experiences 34%**
Heavy workload is especially an issue for those articling at big firms (50+ lawyers) in large urban areas.	**40%** Lack of feedback	**28%** Lack of structure to my role	Students articling in smaller firms (2-25 lawyers) have more financial difficulties.	**Navigating personality differences 32%**
	17% Lack of tools and resources available to help my principal support me	**20%** Unrealistic expectations going into the position	Most students in smaller firms (2-25 lawyers) in rural areas mention limited articling positions as a big challenge.	**No challenges 5%**

Lack of time and providing quality mentorship and a variety of experiences in competency and practice areas are the top challenges for principals, recruiters and mentors.

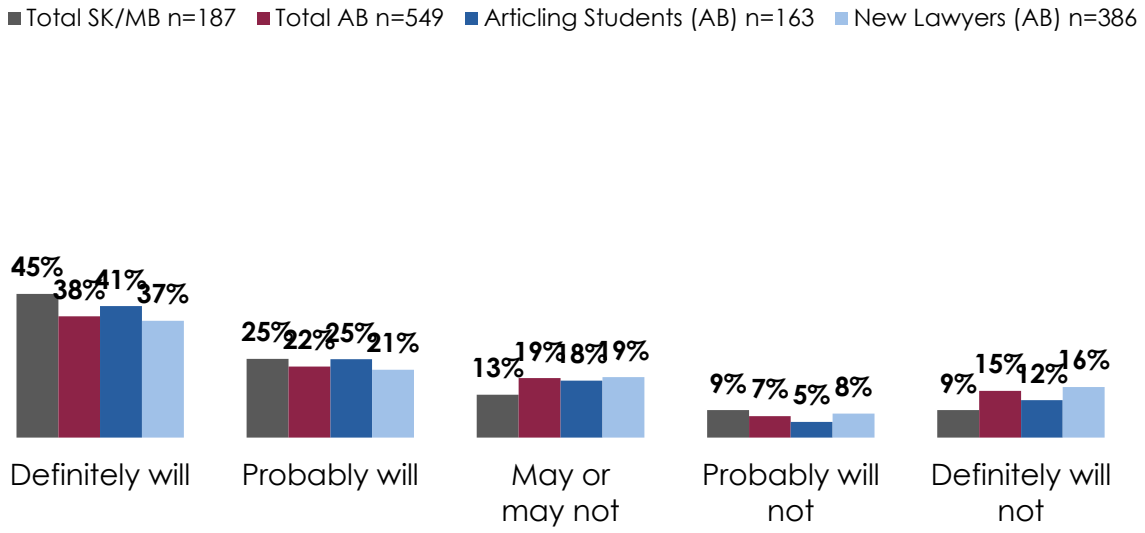
Lack of training and resources 63%	Mentorship and guidance are challenging 53%	Providing a variety of experiences 51%	Lack of clarity and structure 36%	Managing personality differences 34%
59% Lack of time to mentor articling students	**37%** Supporting articling students through their steep learning curve	**34%** Training articling students in all competency areas	**28%** Unrealistic expectations of articling students	**26%** Managing personality differences
21% Lack of training on being a principal / recruiter / mentor	**34%** Giving articling students feedback they can learn from	**33%** Exposing articling students to different areas of practice	**14%** Lack of clarity on what is required of me as a principal / recruiter / mentor	**22%** Understanding the unique learning styles of articling students
15% Lack of tools and resources available to help me better support articling students				**High costs 32%**
				No challenges 3%

LIKELIHOOD OF TAKING ON ARTICLING STUDENTS/ RECOMMENDING ARTICLE TO ARTICLING STUDENTS IN THE FUTURE

One in five students will not recommend articling at the firm they articled.
Most principals, recruiters and mentors will likely take on a student in the future.

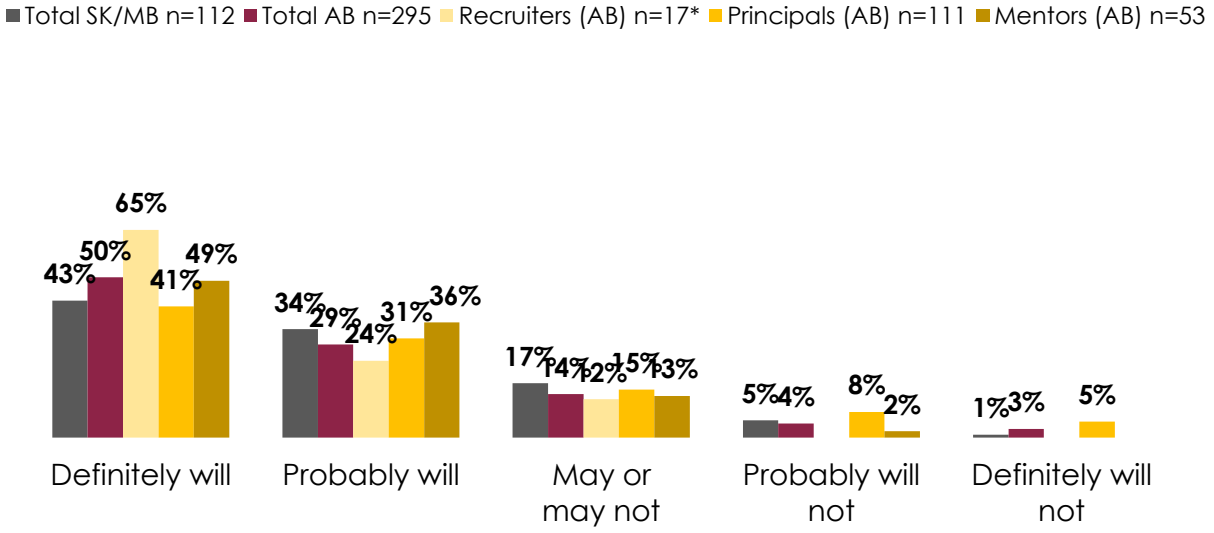
Articling Students & New Lawyers

Now thinking more generally about where you article/articled, would you recommend it to articling students in the future?



Principals, Recruiters & Mentors

Based on your experiences as a principal/recruiter/mentor, how likely are you to take on an articling student again in the future?

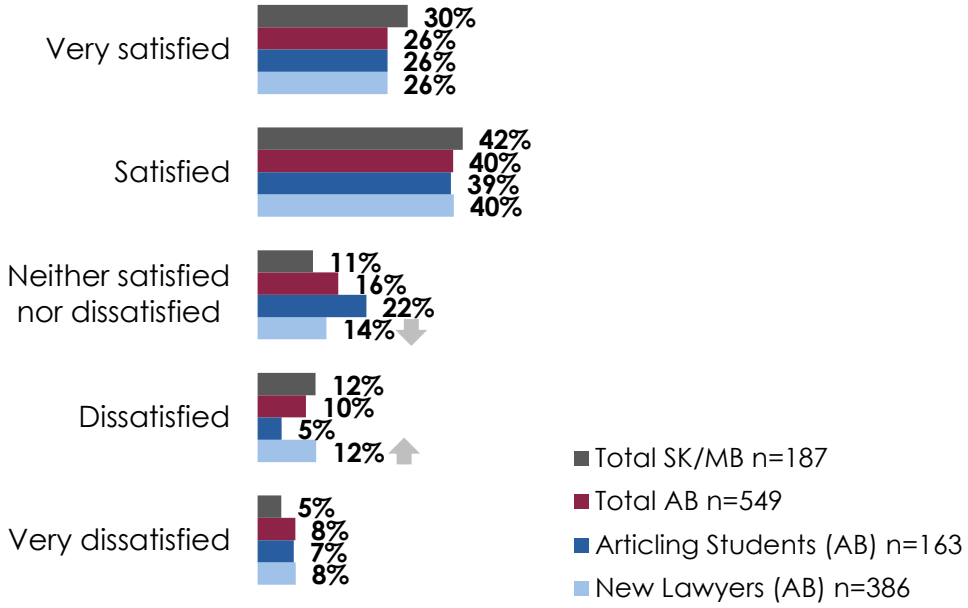


* Caution small base size for recruiters n=17

Quality of training and a positive work environment are the top two reasons for satisfaction with the articling experience.

Articling Students & New Lawyers

Overall, how satisfied were/are you with your articling experience?

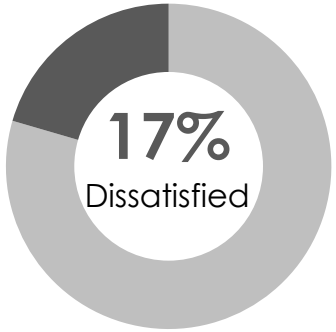


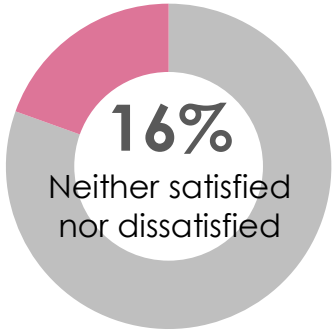
Top Reasons for Satisfaction with Articling Experience

Among total Alberta articling students and new lawyers, n=549
Mentions under 8% not reported

Satisfied (n=363)	Neither satisfied nor dissatisfied (n=90)	Dissatisfied (n=96)
79% Good training	43% Poor training	69% Poor training
35% Positive work environment	38% Negative work environment	66% Negative work environment
10% Good firm	32% Good training	27% Ineffective Principal
8% Enabled me to practice law	23% It was okay/could be improved, but could have been worse	18% Lack of clarity
	14% Inadequate compensation	
	13% Lack of clarity	

Overall, two thirds of articling students are satisfied with their articling experience.





Wide experience and team work are key benefits of the articling experience.

- ✓ Good training through **wide hands-on experience**, **exposure to relevant tasks and practice areas**, and **working with clients**
- ✓ Positive work environment through **teamwork** with supportive, helpful lawyers and other articling students
- ✓ **Positive mentorship and guidance** through onboarding, feedback and support

There is a strong link between student dissatisfaction and not recommending the firm where they articled.

- **1-in-5** articling students **would not recommend** the law firm in which they articled to other students

Articling Students & New Lawyers

Please explain why you are [satisfied/neither satisfied not dissatisfied/dissatisfied] with your articling experience?

Among total Alberta articling students and new lawyers, n=549

*"I worked in a **supportive environment**, **with a strong team**. There was no feeling of competition between articling students for a position at the end of articling, as our firm generally hires everyone back unless something has gone terribly wrong along the way. This meant that **as students, we helped each other out** and didn't signal busyness just to impress partners or make our colleagues look bad in the hopes of better positioning ourselves for a job. I had **good training on interesting files**. I was allowed to make mistakes and to learn from them. It was challenging and I was able to meet that challenge."*

*"I enjoyed working at a large firm with **many resources** helpful to me. I also enjoyed being **exposed to many different lawyers' practice styles**. The **training** at the beginning of articling was **thorough**, and I was happy to receive **formal reviews** throughout the year."*

*"I really **liked the type of law** I was doing, and the kinds of **files** I was working on, but it was an extremely **stressful environment** with **little mentorship**. It also always felt like I and other women were doing a lot of work, but never getting any recognition while the men at the practice seemed to constantly be going for golf or drinking together."*

*"I feel I received the **basic training needed to be a lawyer**, and I got a lot out of the CPLED course. But I feel my experience **could have been vastly improved** with a better mentor to guide me, or at least other junior lawyers to commensurate with (I articled with a sole practitioner). I found the experience to be valuable but very isolating and lonely."*

***"Overworked**, severely **underpaid**, **lack of proper mentorship** (within the firm), little or **no work available in the fields I'm interested in**, competitive market with **few positions** leading to a less desirable position/firm, little to **no feedback**, **lack of direction and clarity** with respect to my role (i.e. lack of a specific learning plan complete with goals, timelines, tangible performance metrics and evaluations)."*

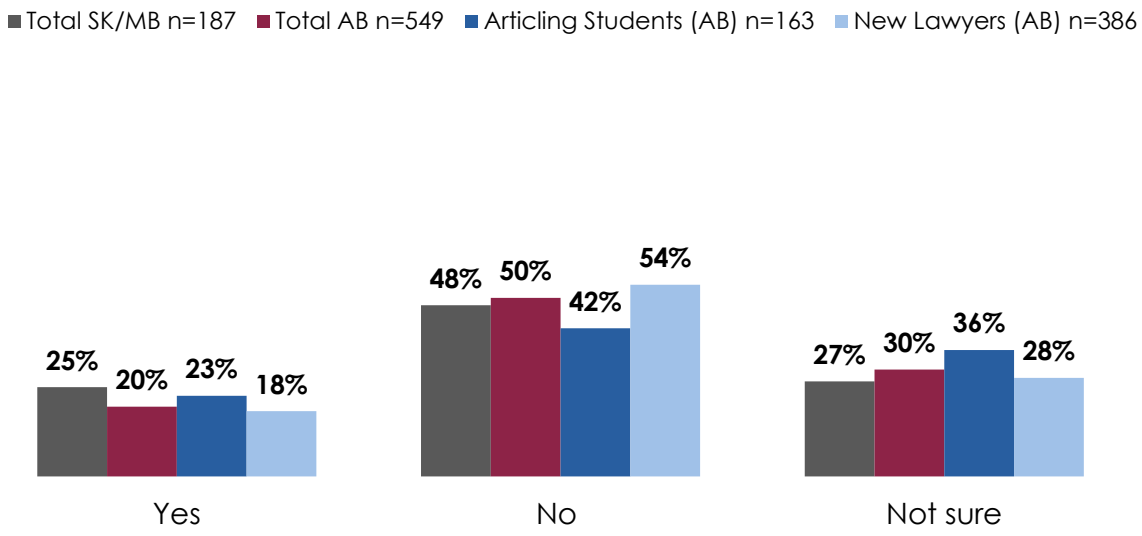
*"The law firm **didn't provide me with the training and support** that they told me they were going to provide me with. I was **harassed** and **sexually abused**."*

*"It was an incredibly **toxic work environment**."*

While most recruiters, principals and mentors feel supports are available to help students with managing stress, anxiety, etc., less than a quarter of articling students and new lawyers felt they had access to appropriate mental health supports.

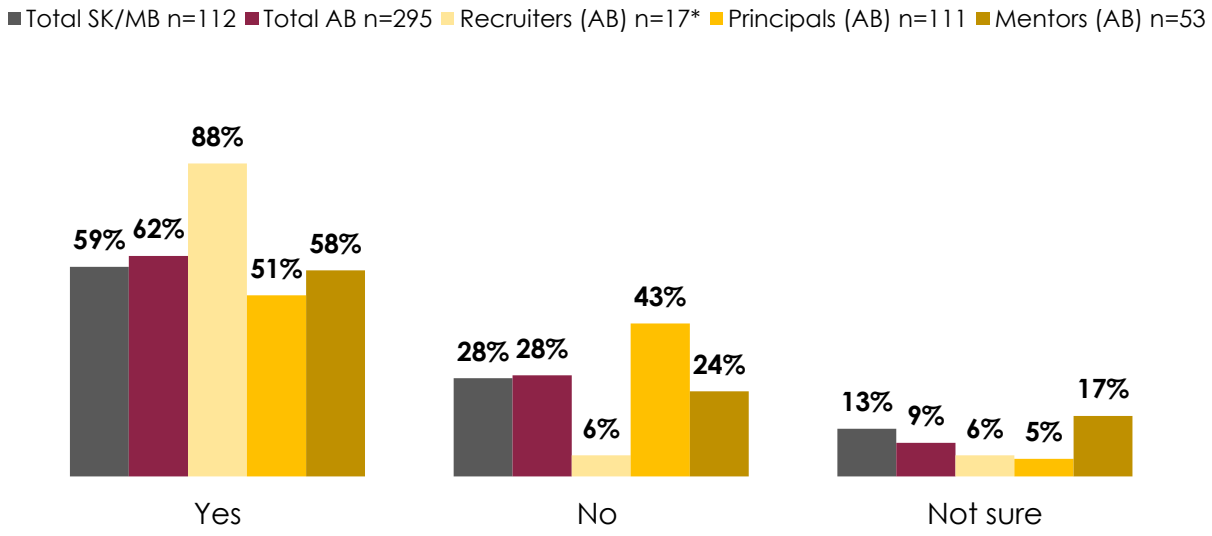
Articling Students & New Lawyers

Are/were there appropriate mental health supports available at the firm/organization where you are/were articling to help you with managing stress, anxiety, etc.?



Principals, Recruiters & Mentors

Are mental health resources available at your firm/organization for articling students who may need support with things like stress management, anxiety, etc.?

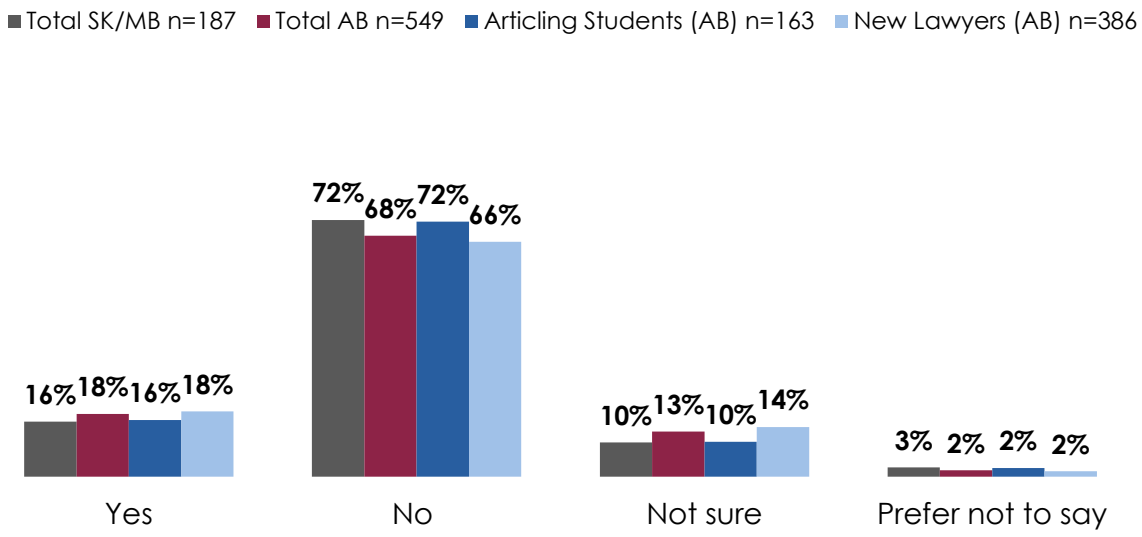


* Caution small base size for recruiters n=17

During the recruitment process, close to one-fifth of students and new lawyers experienced discrimination and harassment.

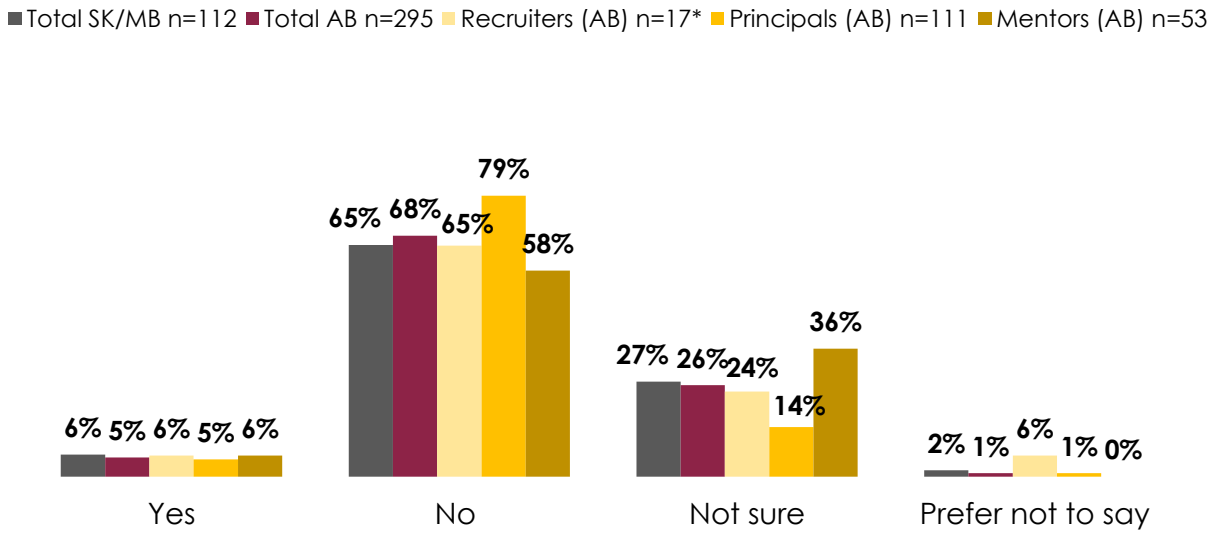
Articling Students & New Lawyers

During the recruitment process for your articling position did you experience discrimination or harassment related to your age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status, gender identity, gender expression, sex and/or sexual orientation, or other factors?



Principals, Recruiters & Mentors

Has your firm/organization every had a candidate indicate that they have been discriminated against or harassed related to age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status, gender identity, gender expression, sex and/or sexual orientation, or other factors during the recruitment process?

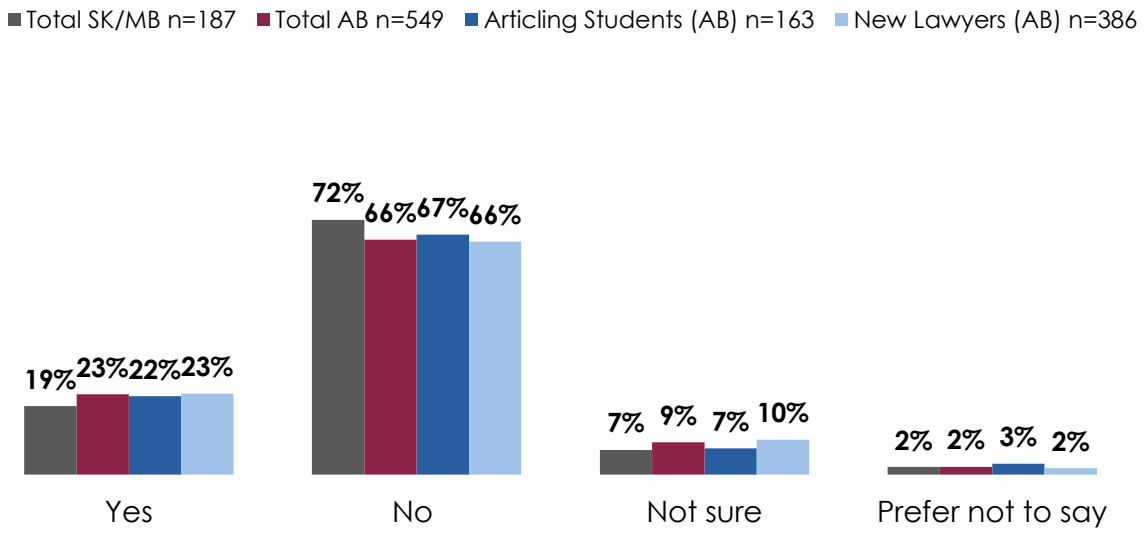


* Caution small base size for recruiters n=17

During articling, almost one-quarter of Alberta students and new lawyers stated they experienced discrimination.

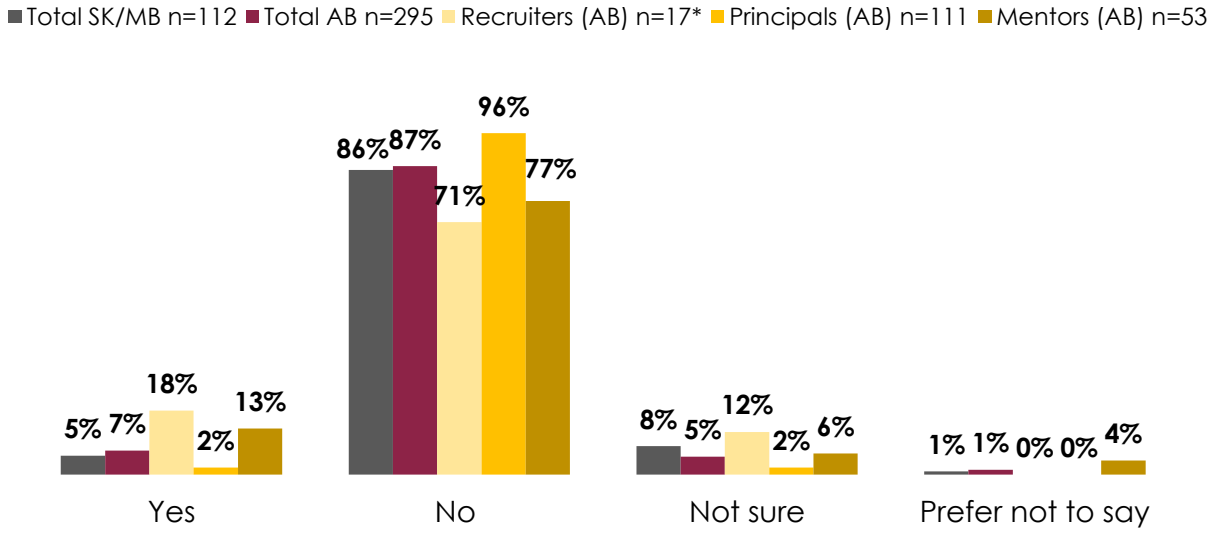
Articling Students & New Lawyers

During your articling, did you experience discrimination related to your age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status, gender identity, gender expression, sex and/or sexual orientation, or other factors?



Principals, Recruiters & Mentors

Has an articling student come to you with concerns about being discriminated against by someone at the firm/organization related to age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status, gender identity, gender expression, sex and/or sexual orientation, or other factors during their articling experience?

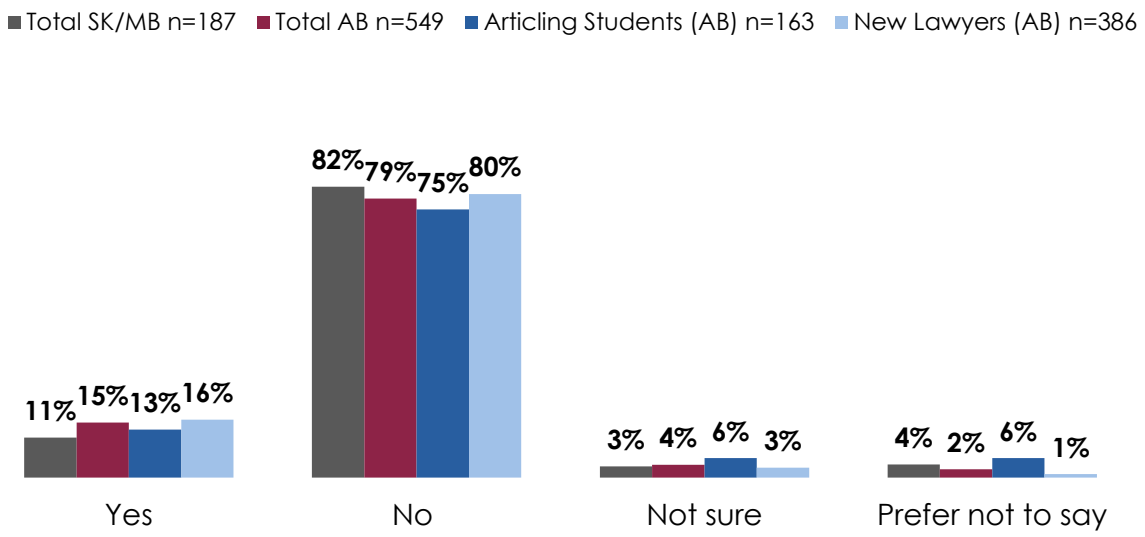


* Caution small base size for recruiters n=17

Some students experienced harassment during their articling.

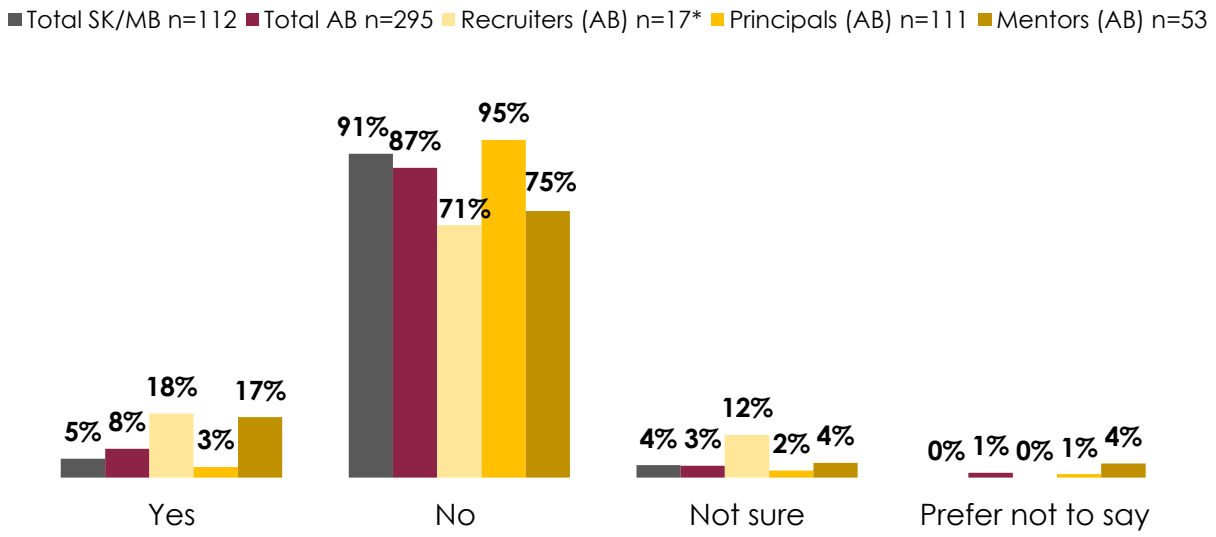
Articling Students & New Lawyers

During your articling, did you experience harassment related to your age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status, gender identity, gender expression, sex and/or sexual orientation, or other factors?



Principals, Recruiters & Mentors

Has an articling student come to you with concerns about being harassed by someone at the firm/organization related to age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status, gender identity, gender expression, sex and/or sexual orientation, or other factors during their articling experience?



* Caution small base size for recruiters n=17

Primary types of discrimination and harassment described by students and new lawyers.

Discrimination and Harassment based on Gender

During recruitment:

- Being asked about marital status, plans for having children, or sexual orientation

During articling:

- Females getting less challenging work or more administrative and non-billable work
- Clients expressing preference for male lawyers
- Female lawyers being mistaken for assistants or receptionists
- Sexual innuendos and jokes

Discrimination and Harassment based on Race and Ethnicity

During recruitment:

- Fewer interviews compared to peers with non-foreign sounding names
- Racist comments and jokes

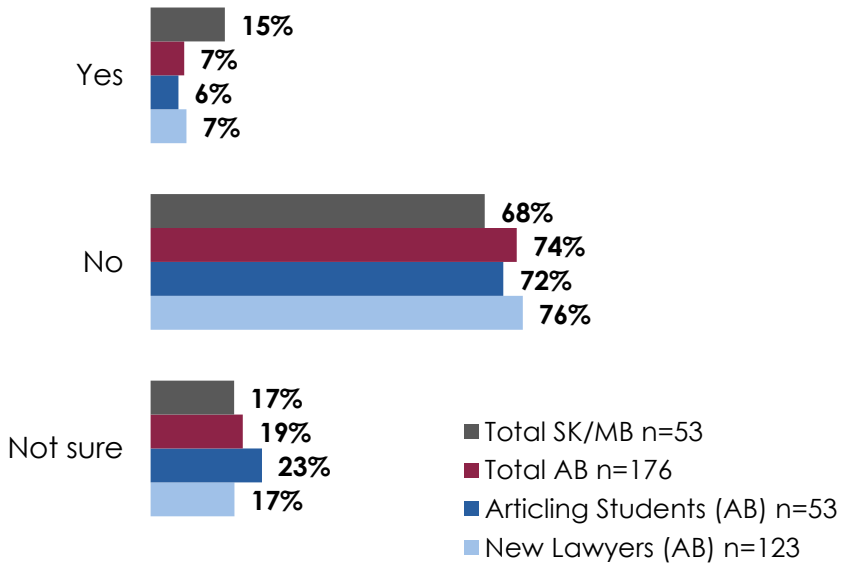
During articling:

- Racist jokes
- Non-Canadians described as passive, too accommodating, not assertive enough, etc.
- Lack of trust for foreign degrees (in general and among visible minorities)
- Comments to use student's skin colour to bring in clients of their race/ethnicity
- Sent to work mostly with minority clients (e.g. First Nations tribe)

Most students do not have or do not know about the resources available to help deal with discrimination and harassment. In addition, many perceive that no action is taken when it does occur.

Articling Students & New Lawyers

Were resources available to address the discrimination or harassment you experienced?



Is there anything you would like to share about your experience or the resources available to help you address a discrimination or harassment issue?

Among Alberta students who experienced discrimination or harassment during the recruitment process or articling experience, n=175

37% No action taken
- 21% Resources were lacking
- 10% Fear of reprisal
- 9% Just put up with it
- 8% Fear of losing the articling position

20% Discrimination/harassment was based on gender

10% Discrimination/harassment was based on age

10% Discrimination/harassment was based on race

9% Had to deal with power imbalances

While some principals, recruiters and mentors state that no action was taken in situations where articling students reported situations of harassment or discrimination, others provided support for the articling student.

Principals, Recruiters & Mentors

How did you or your firm/organization handle the situation?

Among Alberta principals, recruiters and mentors who had candidates/articling students report being discriminated or harassed during the recruitment process or articling experience, n=40

30% Provided support for the articling student

30% Reported to appropriate department or person

30% No action / No help

- 5% No consequences for the offender
- 5% Partners failed to believe the complaint
- 5% Articling student was yelled at for reporting

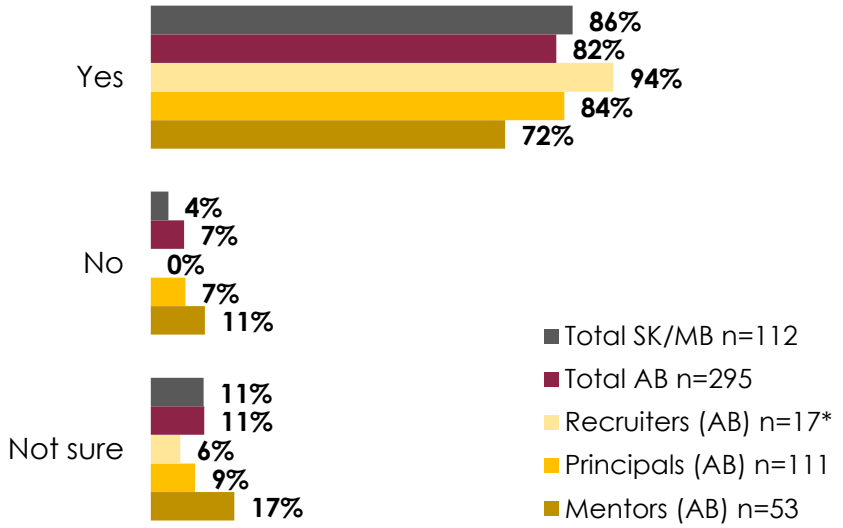
28% Took action against the offender

- 15% Held a discussion with affected individuals
- 8% Serious talk with offender / offender was disciplined
- 3% Termination of the offending party after investigation

8% Investigation

8% **Educating about and reviewing relevant policies**

If an articling student believes they have been discriminated against or harassed by someone in your firm/organization, is there a place they can confidentially address their concerns?

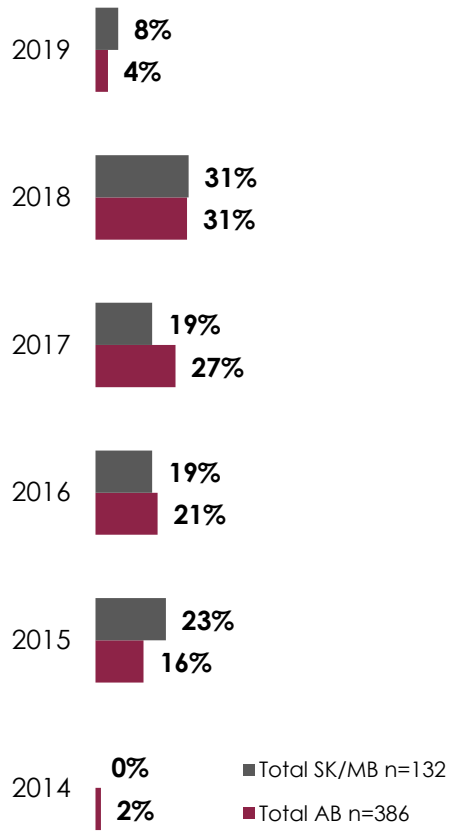


* Caution small base size for recruiters n=17

Profile of Articling Students or New Lawyers.

Year called to the Bar

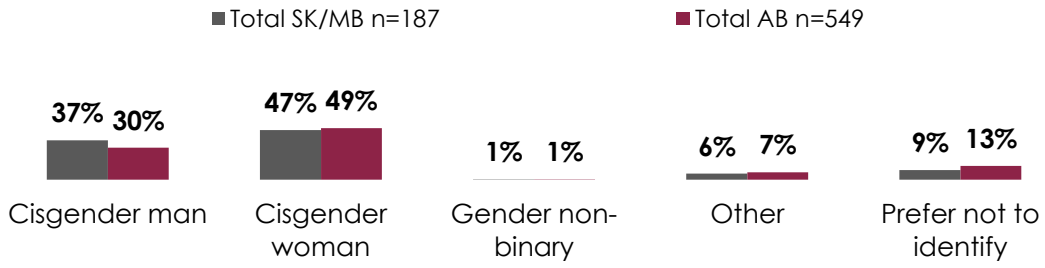
(Among those who are practising lawyers)



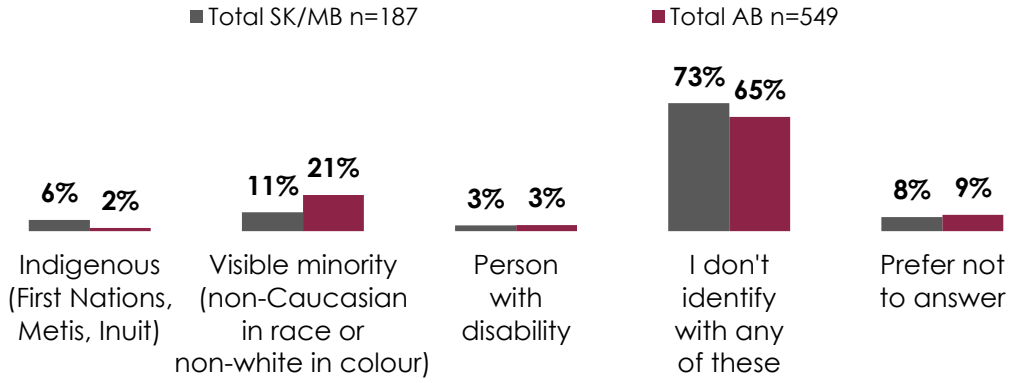
Practice Setting

	Total SK/MB (n=187)	Total AB (n=549)	Articling Students (n=163)	New Lawyers (n=386)
Sole Practitioner	7%	13%	13%	12%
Government	11%	6%	8%	6%
Corporate	2%	2%	4%	2%
Academic	-	<1%	1%	0%
Law firm (2-10 lawyers)	34%	33%	34%	32%
Law firm (11-25 lawyers)	19%	9%	9%	10%
Law firm (26-50 lawyers)	9%	7%	6%	8%
Law firm (51+ lawyers)	13%	21%	18%	22%

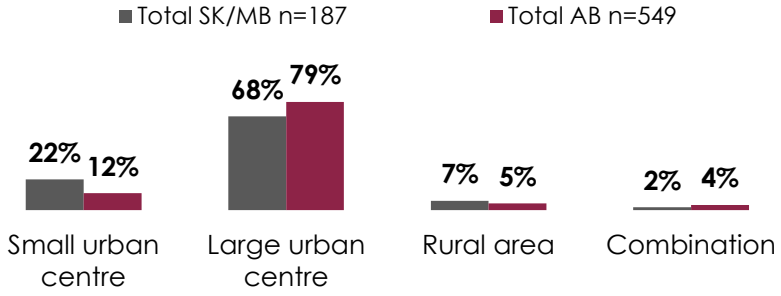
Gender



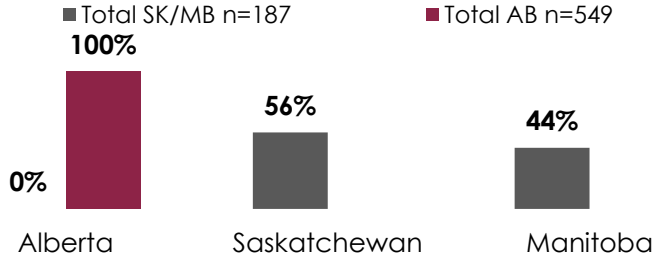
Do you self-identify with the following groups…



Articling Location

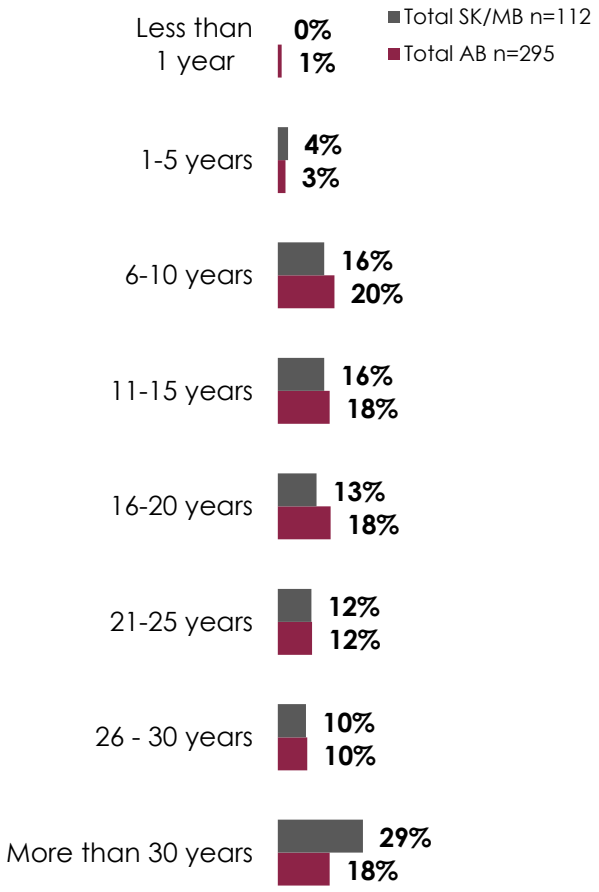


Province of Articling



Profile of Principals, Recruiters & Mentors.

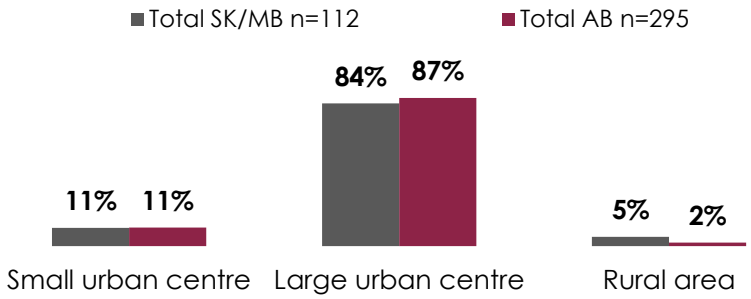
Length of Time as a Bar Member



Practice Setting

	Total SK/MB (n=112)	Total AB (n=295)
Sole Practitioner	5%	9%
Government	21%	12%
Corporate	5%	2%
Academic	-	<1%
Law firm (2-10 lawyers)	23%	29%
Law firm (11-25 lawyers)	17%	8%
Law firm (26-50 lawyers)	4%	9%
Law firm (51+ lawyers)	21%	27%

Practice Location



Primary Area(s) of Practice*

	Total SK/MB (n=112)	Total AB (n=294)
Civil Litigation	30%	41%
Commercial	32%	24%
Corporate	29%	24%
Real Estate Conveyancing	29%	20%
Matrimonial/Family	26%	21%
Wills and Estates	26%	16%
Criminal	24%	12%
Administrative/Boards/Tribunals	21%	11%
Employment/Labour	19%	13%
Estate Planning and Administration	19%	11%
Mediation	7%	4%
Entrepreneurial/Business	6%	5%
Indigenous	5%	5%
Arbitration	5%	5%
Bankruptcy/Insolvency/Receivership	4%	4%
Municipal Government	4%	2%
Environmental	3%	2%
Intellectual Property	2%	2%
Other	16%	12%

Appendix

Articling Students and New Lawyers

[INTRO SCREEN]

Thank you for participating in this 14-minute survey.

This survey is designed to help the law societies of Alberta, Saskatchewan and Manitoba better understand the experiences and supports that articling students are getting during their articling experiences and how they are preparing lawyers for the future.

The results of this online engagement will help the law societies determine if the current articling systems are providing the appropriate training and support for articling students and new lawyers.

Your experiences and feedback as a new lawyer or articling student are extremely important to help us further our understanding. If you are a practising lawyer, we ask that you answer these questions to the best of your recollection.

If you are currently completing your articling, please answer the survey questions based on your experiences so far.

If you articled at more than one firm/organization, please answer based on the articling experience *that most stands out in your mind*.

Just a reminder that the responses you provide will be analyzed in aggregate form only. Nothing you share will be linked to you in any way.

[NEW PAGE]
[SINGLE CHOICE]
1. In which year did you start articling?

[DROP DOWN MENU]
2019
2018
2017
2016
2015
2014
Prior to 2014 **[TERMINATE]**

[TERMINATE TEXT: Thank you for your interest in this survey. This survey is for articling students and lawyers who completed their articling in the past five years.**]**

[NEW PAGE]
[SINGLE CHOICE]
2. What is/was your articling location?

Small urban centre
Large urban centre
Rural area
Combination

Articling Students and New Lawyers

[NEW PAGE]
[SINGLE CHOICE]
3. Which of the following best describes the practice setting during your articling?

Sole Practitioner
Government
Corporate
Academic
Law firm (2-10 lawyers)
Law firm (11-25 lawyers)
Law firm (26-50 lawyers)
Law firm (51+ lawyers)
Other (please specify)_____

[NEW PAGE]
[SINGLE CHOICE]
4. What type of exposure did you have to different practice areas during your articling?

I concentrated in one area of practice only
I was able to work in 2-3 practice areas
I was a generalist (covered most practice areas)
Other (please specify)_____

[NEW PAGE]
[MULTIPLE CHOICE]
5. What type of compensation are you receiving/did you receive during your articling experience? Select all that apply.

Salary
Percentage of billings
Legal aid certificates
Other (please specify)_____
I did not receive any compensation

[NEW PAGE]
[SINGLE CHOICE. DO NOT ASK IF ~~Q4~~ Q5=5]
6. What is/was your annual compensation during your articling?

Less than $40,000
$40,000 to $49,999
$50,000 to $59,999
$60,000 to $69,999
$70,000 to $79,999
$80,000 to $89,999
$90,000 to $99,999
$100,000 or more
Prefer not to specify

[NEW PAGE]
[NUMERIC OPEN END. MIN 1 MAX 120]
7. On average, approximately how many hours per week do/did you work during your articling?

Articling Students and New Lawyers

[NEW PAGE]
[SINGLE CHOICE]
8. Do/did the number of hours you work(ed) during articling fit with your expectations?

Yes, I expected to work the number of hours I do/did
No, I work(ed) less than I expected
No, I work(ed) more than I expected

[NEW PAGE]
[SINGLE CHOICE]
9. In general, are you/were you given time to complete your bar admission course requirements during business hours at the firm/organization where you are/were articling?

Yes
No

[NEW PAGE]
[SINGLE CHOICE] [IF Q9=1]
10. On average, how many hours per week are you/were you given to complete your bar admission course requirements?

Less than 2 hours a week
Between 2-5 hours a week
Between 6-10 hours a week
More than 10 hours a week

[NEW PAGE]
[SINGLE CHOICE]
11. Did/is your firm/organization pay(ing) your bar admission course tuition?

Yes
No
Shared expense

[NEW PAGE]
[SINGLE CHOICE]
12. Were you offered a position at the firm/organization where you completed your articling?

Yes
No
I haven't completed my articling

[NEW PAGE]
[SINGLE CHOICE]
13. We would like to ask about your training during articling. Canadian law societies have a national standard for admission to the legal profession which requires applicants to demonstrate skills and understanding of core legal concepts based on a national competency profile. These competencies can often form the basis for a learning plan.

Articling Students and New Lawyers

For your articling position, do/did you have a learning plan that guided your learning?

Yes, there is/was a learning plan
No, there is/was no learning plan but my goals and educational needs were discussed
No, there is/was no learning plan and my goals and educational needs were never discussed

[NEW PAGE]
[SINGLE CHOICE GRID]
14. Please consider the following definitions as your answer the questions below.

Ethics and professionalism is about acting ethically and professionally in accordance with the standard set by each Law Society's Code of Conduct.

Practice management is about effectively managing time, files, finances, and professional responsibilities, as well as being able to delegate tasks and provide appropriate supervision.

Client relationship management is about dealing with clients in a professional, ethical and timely manner to meet their needs and expectations in relation to their legal matter.

Conducting matters is about lawyers handling a range of items on a regular basis such as gathering facts through interviews, searches and other methods, and developing case strategy.

Adjudication/ dispute resolution is about identifying core elements of a dispute and resolving disputes through use of alternative dispute resolution or adjudication.

Substantive legal knowledge is about understanding the substantive aspect of the law like the laws of contracts, torts, wills and real property.

Communication skills is about lawyers possessing strong oral and written communications skills to effectively represent clients and communicate professionally and effectively, as necessary for the practice of law.

Analytical skills is about lawyers having the skills to effectively identify issues and analyze problems on behalf of clients, as well as properly research those issues and problems to advise clients.

Thinking about your general articling experience, to what extent do you agree or disagree that you are receiving/received adequate training to prepare you for entry level practice in each of the following areas?

[RANDOMIZE ROWS]

	Strongly Disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree	Don't Know
Ethics and professionalism	○	○	○	○	○	○
Practice management	○	○	○	○	○	○
Client relationship management	○	○	○	○	○	○
Conducting matters	○	○	○	○	○	○
Adjudication / dispute resolution	○	○	○	○	○	○
Substantive legal knowledge	○	○	○	○	○	○
Communication skills	○	○	○	○	○	○
Analytical skills	○	○	○	○	○	○

Articling Students and New Lawyers

[NEW PAGE]
[MULTIPLE CHOICE]
15. Now, think about your experience with your principal and other lawyers in the firm/organization. Who are/were your primary mentor(s) during your article(s)? Select all that apply.

The principal
Another lawyer at the firm/organization
Another person at the firm/organization who was not a lawyer
Someone outside of the firm/organization
I have/had no mentorship during my articling
Other (please specify) _____
Not sure

[NEW PAGE]
[SINGLE CHOICE GRID]
16. To what extent do you agree or disagree with the following statements about the mentorship you are receiving/received during your articling?

	Strongly Disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree
I receive/received regular feedback on my work performance	○	○	○	○	○
I receive/received regular feedback on my skills development	○	○	○	○	○
Someone is/was available to answer my questions or clarify things when I needed help	○	○	○	○	○
Overall, I am satisfied with the mentoring that I receive/received during my articling	○	○	○	○	○

[NEW PAGE]
[SINGLE CHOICE]
17. How do/did you receive mentorship/feedback during your articling?

Face-to-face directly from principal (or primary mentor)
By email or other format not in person
Through a third party (other lawyer or person at the firm / organization)
I have/had no mentorship/feedback during my articling

[NEW PAGE]
[SINGLE CHOICE]
18. How prepared were you to enter the practice of law once you completed your articling?

Very prepared
Prepared
Somewhat prepared
Not very prepared
Not at all prepared
I have not completed my articling

Articling Students and New Lawyers

[NEW PAGE]
[OPEN END. DO NOT ASK IF Q18=6]
19. Please explain why you believe you were **[INSERT Q18]** for entry level practice once you completed your articling?

[NEW PAGE]
[OPEN END. DO NOT ASK IF Q18=6]
20. What additional tools and resources do you believe are needed to help you be better prepared for entry level practice?

NEW PAGE]
[OPEN END. DO NOT ASK IF Q18=6]
21. What experiences have you had in the first few years of practice that you could have been better prepared for during articling?

[NEW PAGE]
[MULTIPLE CHOICE]
22. Overall, what would you say are/were the most positive aspects of your articling experience? Please select all that apply.

[RANDOMIZE]
- Getting hands-on experience
- Being exposed to specific areas of practice that are interesting to me
- Working closely with supportive and helpful lawyers
- The mentorship I received from my principal
- Working with other articling students
- Being a contributing part of a practice group/ team and making a difference
- Working with clients
- Working on interesting files

[RANDOMIZE]
- The onboarding training that helped me prepare for my articling experience
- The emotional support that was available to me
- Getting experience doing a wide range of tasks that are relevant to practising law
- The on-going learning sessions to help ensure my learning goals were met
- The feedback I received to help me improve
- The compensation I received
- There are/were no positive aspects of my articling experience [anchor position]
- Other (please specify) _____[anchor position]

[NEW PAGE]
[MULTIPLE CHOICE]
23. Overall, what do you think are the key challenges to being an articling student?
Select all that apply.

[RANDOMIZE]
- Lack of mentorship
- Lack of support with the steep learning curve
- Lack of feedback
- Getting proper exposure to different areas of practice
- Long working hours
- Not being paid or being paid minimally
- Additional costs e.g. CPLED tuition bar admission course tuition, moving expenses, etc.
- Managing workload, i.e. firm/organization work, bar admission course assignments, etc.

Articling Students and New Lawyers

[RANDOMIZE]

Receiving training in all competency areas (ethics and professionalism, practice management, client relationship management, conducting matters, adjudication/dispute resolution, substantive legal knowledge, analytical skills and communication skills)
Unrealistic expectations going into the position
Navigating through personality differences
Lack of clarity on what is required of an articling student
Lack of tools and resources available to help my principal support me
Getting access to appropriate mental health supports
Lack of structure to my role
Having a place to safely address concerns without fear of reprisal
Limited availability of articling positions
I didn't find my experience(s) to be challenging [anchor position, exclusive]
Other (please specify)_____ [anchor position]

[NEW PAGE]
[SINGLE CHOICE]
24. Now thinking more generally about where you article/articled, would you recommend it to articling students in the future?

Definitely will
Probably will
May or may not
Probably will not
Definitely will not

[NEW PAGE]
[SINGLE CHOICE]
25. Overall, how satisfied were/are you with your articling experience?

Very satisfied
Satisfied
Neither satisfied nor dissatisfied
Dissatisfied
Very dissatisfied

[NEW PAGE]
[OPEN END]
26. Please explain why you are **[INSERT Q25]** with your articling experience?

[NEW PAGE]
[SINGLE CHOICE]
27. We would like to ask you some questions on equity, diversity and supports that were/are available to you. We would like to remind you that responses are being aggregated and reported in summary form only.

Are/were there appropriate mental health supports available at the firm/organization where you are/were articling to help you with managing stress, anxiety, etc.?

Yes
No
Not sure

Articling Students and New Lawyers

[NEW PAGE]
[SINGLE CHOICE]
28. During the **recruitment process** for your articling position did you experience discrimination or harassment related to your age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status, gender identity, gender expression, sex and/or sexual orientation, or other factors?

Yes
No
Not sure
Prefer not to say

[NEW PAGE]
[SINGLE CHOICE]
29. During your **articling**, did you experience **discrimination** related to your age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status, gender identity, gender expression, sex and/or sexual orientation, or other factors?

Yes
No
Not sure
Prefer not to say

[NEW PAGE]
[SINGLE CHOICE]
30. During your **articling**, did you experience **harassment** related to your age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status, gender identity, gender expression, sex and/or sexual orientation, or other factors?

Yes
No
Not sure
Prefer not to say

[NEW PAGE]
[SINGLE CHOICE]
[ASK IF YES TO Q28 OR Q29 OR Q30]
31. Were resources available to address the discrimination or harassment you experienced?

Yes
No
Not sure

[NEW PAGE]
[OPEN END. IF YES TO Q28 OR Q29 OR Q30]~~YES TO Q26, 27 OR 28]~~
32. Is there anything you would like to share about your experience or the resources available to help you address a discrimination or harassment issue?

[NEW PAGE]
The last set of questions is for demographic purposes only.

Articling Students and New Lawyers

[NEW PAGE]
[SINGLE CHOICE]
33. How would you best characterize yourself in the profession?

I am a current articling student
I am a practising lawyer
I have completed my articling program, but I have not been called to the Bar

[IF Q33=2]
[SINGLE CHOICE]
34. What year were you called to the Bar?
[DROP DOWN MENU]

2019
2018
2017
2016
2015
2014
Prior to 2014

[NEW PAGE]
[SINGLE CHOICE]
35. Where did you attend law school?

Canada
United States
United Kingdom
Australia
Nigeria
India
Other

[NEW PAGE]
[SINGLE CHOICE]
36. Do you self-identify with any of the following groups? Select all that apply.

Indigenous (First Nations, Metis, Inuit)
Visible minority (non-Caucasian in race or non-white in color)
Person with a disability
I don't identify with any of these
I prefer not to answer this question

Articling Students and New Lawyers

[NEW PAGE]
[SINGLE CHOICE]
37. Do you identify as….?

Cisgender man (assigned male at birth and identifies as a male)
Cisgender woman (assigned female at birth and identifies as a female)
Transgender man (assigned female at birth and identifies as a male)
Transgender woman (assigned male at birth and identifies as a woman)
Gender non-binary (gender expression does not fully conform to sex-linked social norms)
I prefer not to specify
Other (please specify) _____

[NEW PAGE]
[SINGLE CHOICE]
38. Which of the following provinces do you primarily article/work in?

Alberta
Saskatchewan
Manitoba

[Closing]

[IF Q38=1, DISPLAY THE FOLLOWING MESSAGE WITH THE OPTION TO SKIP]
We appreciate you taking the time to respond. Please submit your name and email address for a chance to win a free LESA course of your choice (excludes multi-day programs). Please note that this information will not be linked to your survey responses.

Name
Email Address

[IF Q38=2, DISPLAY THE FOLLOWING MESSAGE WITH THE OPTION TO SKIP]
We appreciate you taking the time to respond. Please submit your name and email address for a chance to win a free LSS CPD program of your choice (excludes multi-day programs). Please note that this information will not be linked to your survey responses.

Name
Email Address

[IF Q38=3, DISPLAY THE FOLLOWING MESSAGE WITH THE OPTION TO SKIP]
We appreciate you taking the time to respond. Please submit your name and email address for a chance to win a free (Manitoba) course of your choice (excludes multi-day programs). Please note that this information will not be linked to your survey responses.

Name
Email Address

[IF Q38=1, 2, or 3 DISPLAY THE FOLLOWING MESSAGE]
Thank you for completing this survey.

Principals, Recruiters & Mentors

[INTRO SCREEN]

Thank you for participating in this 14-minute survey.

This survey is designed to help the law societies of Alberta, Saskatchewan and Manitoba better understand the experiences and supports that articling students are receiving during their articling experience and how they are preparing lawyers for the future.

Your experiences and feedback as a principal, recruiter or mentor are extremely important to helping us further our understanding.

Just a reminder that the responses you provide will be analyzed in aggregate form only. Nothing you say will be linked to you in any way.

[NEW PAGE]
[MULTIPLE CHOICE]

1. To begin, we would like to ask you a few questions about your experience in recruiting, supervising and/or mentoring articling students.

In the last five years, have you been involved in any of the following roles with articling students?

A principal
A recruiter
A non-principal mentor
None of the above

[NEW PAGE]
[OPEN END. ASK IF Q1=4]

2. What are your reasons for not being involved in the recruiting, mentoring or supervising of articling students?

[TERMINATE IF Q1=4]
[TERMINATE TEXT: Thank you for your interest in this survey. This survey is for those who recruit, supervise or mentor articling students.**]**

[NEW PAGE]
[For all of the following questions ASK IF Q1 = 1,2,3}
[SINGLE CHOICE]
3. How many years have you been recruiting, mentoring, and/or supervising articling students?

Less than 2 years
2 to 5 years
6 to 10 years
11 to 15 years
16 to 20 years
Over 20 years

Principals, Recruiters & Mentors

[NEW PAGE]
[SINGLE CHOICE]
4. How many articling students have you recruited or are you currently mentoring or supervising at your firm/organization?

None right now
1
2
3
4 or more

[NEW PAGE]
[SINGLE CHOICE]
5. Has your firm/organization hired internationally trained students for articling positions?

Yes
No
I don't know

[NEW PAGE]
[SINGLE CHOICE]
6. What type of exposure does/did your firm/organization provide to articling student(s) in different practice areas?

We concentrate in one area of practice only
We get them to work in 2-3 practice areas
We cover most practice areas
Other (please specify)_____

[NEW PAGE]
[SINGLE CHOICE]
7. Does your firm/organization offer compensation to articling students?

Yes, always
Yes, sometimes
No
I don't know

[ASK IF Q7=3]
[NEW PAGE]
[OPEN END]
8. Why doesn't your firm/organization offer compensation to articling students?

[NEW PAGE] [ASK IF Q7=1 OR 2]
[MULTIPLE CHOICE]
9. What type of compensation does your firm/organization typically provide to articling students? Select all that apply.

Salary
Percentage of billings
Legal aid certificates
Other (please specify)_____
I don't know

Principals, Recruiters & Mentors

[NEW PAGE] [ASK IF Q7=1 OR 2]
[SINGLE CHOICE]
10. In general, what is the compensation range offered to articling students at your firm/organization?

Less than $40,000
$40,000 to $49,999
$50,000 to $59,999
$60,000 to $69,999
$70,000 to $79,999
$80,000 to $89,999
$90,000 to $99,999
$100,000 or more
Not sure

[NEW PAGE]
[SINGLE CHOICE]
11. In general, do articling students at your firm/organization typically get time during business hours to complete their bar admission course requirements?

Yes
No
Not sure

[NEW PAGE] [IF Q11=1]
[SINGLE CHOICE]
12. To the best of your knowledge, on average how many hours per week are articling students given to complete their bar admission course requirements?

0 hours per week
1 to 5 hours per week
6 to 10 hours per week
More than 10 hours per week

[NEW PAGE]
[SINGLE CHOICE]
13. To the best of your knowledge, does your firm/organization pay for articling students' bar admission course tuition?

Yes
No
Shared expense
Not sure

[NEW PAGE]
[SINGLE CHOICE]
14. What proportion of articling students does your firm/organization hire, or give an offer for hire, after they complete their articling position?

Almost 100%
Not all but more than 75%
Between 50% and 75%
Less than half of articling students are hired or given an offer for hire
Not sure

Principals, Recruiters & Mentors

[NEW PAGE]
[SINGLE CHOICE]
15. Next, we would like to ask you about the training articling students receive.
Canadian law societies have a national standard for admission to the legal profession which requires applicants to demonstrate skill and understanding of core legal concepts based on a national competency profile. These competencies can often form the basis for a learning plan.
In general, do you use a learning plan to guide the articling experience?

Yes
No

ASK IF Q15=2
[NEW PAGE]
[OPEN ENDED]
16. Why don't you use a learning plan? Please explain why.

[NEW PAGE]
[SINGLE CHOICE GRID]
17. Please consider the following definitions as you answer the questions below.

Ethics and professionalism is about acting ethically and professionally in accordance with the standard set by each Law Society's Code of Conduct.

Practice management is about effectively managing time, files, finances, and professional responsibilities, as well as being able to delegate tasks and provide appropriate supervision.

Client relationship management is about dealing with clients in a professional, ethical and timely manner to meet their needs and expectations in relation to their legal matter.

Conducting matters is about lawyers handling a range of items on a regular basis such as gathering facts through interviews, searches and other methods, and developing case strategy.

Adjudication/ dispute resolution is about identifying core elements of a dispute and resolving disputes through use of alternative dispute resolution or adjudication.

Substantive legal knowledge is about understanding the substantive aspect of the law like the laws of contracts, torts, wills and real property.

Communication skills is about lawyers possessing strong oral, written and communications skills to effectively represent clients and communicate professionally and effectively, as necessary for the practice of law.

Analytical skills is about lawyers having the skills to effectively identify issues and analyze problems on behalf of clients, as well as properly research those issues and problems to advise clients.

To what extent do you agree or disagree that articling students receive adequate training during their articling at your firm/organization in each of the following areas?

[RANDOMIZE ROWS]

	Strongly Disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree	Don't Know
Ethics and professionalism	○	○	○	○	○	○

Principals, Recruiters & Mentors

	Strongly Disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree	Don't Know
Practice management	○	○	○	○	○	○
Client relationship management	○	○	○	○	○	○
Conducting matters	○	○	○	○	○	○
Adjudication / dispute resolution	○	○	○	○	○	○
Substantive legal knowledge	○	○	○	○	○	○
Communication skills	○	○	○	○	○	○
Analytical skills	○	○	○	○	○	○

[NEW PAGE]
[MULTIPLE CHOICE]
18. Now, think about the mentorship that articling students receive at your firm/organization. Who is/are typically mentor(s)? Please select all that apply.

The principal
The recruiter
Another lawyer at the firm/organization
Another person at the firm/organization (not a lawyer)
Not sure
Other (please specify) _____

[NEW PAGE]
[SINGLE CHOICE GRID]
19. To what extent do you agree or disagree with the following statements about the mentorship articling students receive at your firm/organization?

	Strongly Disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree
Students are provided with regular feedback on their work performance	○	○	○	○	○
Students are provided with regular feedback on their skills development	○	○	○	○	○
There is someone available to answer students' questions or clarify things when they need help	○	○	○	○	○
Overall, I am satisfied with the mentoring students receive during articling at our firm/organization	○	○	○	○	○

Principals, Recruiters & Mentors

[NEW PAGE]
[SINGLE CHOICE]
20. How do/did you provide mentorship/feedback?

Face-to-face directly to the articling student
By email or other format (not in person)
Through a third party (other lawyer or person at the firm / organization)
I provide no mentorship/feedback to articling students

[NEW PAGE]
[SINGLE CHOICE]
21. In your experience, how prepared is an articling student for entry level practice once they complete their articling at your firm/organization?

Very prepared
Prepared
Somewhat prepared
Not very prepared
Not at all prepared

[NEW PAGE]
[OPEN END]
22. Please explain why you believe an articling student is **[INSERT Q21]** for entry level practice once they complete their articling at your firm/organization?

[NEW PAGE]
[OPEN END]
23. What additional tools and resources would help you better mentor/train/prepare articling students for entry level practice?

[NEW PAGE]
[OPEN END]
24. What gaps in knowledge or skills, if any, do new lawyers have that could be better addressed in articling or during the first few years of practice?

[NEW PAGE]
[MULTIPLE CHOICE]
25. Overall, what would you say are the most positive aspects of the articling experience for a recruiter, principal or mentor? Select all that apply.

Providing hands-on experience to articling students
Exposing articling students to specific areas of practice that interest them
The opportunity to provide mentorship to articling students
Allowing articling students to contribute to a practice group/team
Providing the opportunity for articling students to work with clients
Providing the opportunity for articling students to work on interesting files
Providing a wide range of tasks that are relevant to the practice of law
Onboarding articling students to the law firm experience
Providing wellness supports to articling students
Participating in learning sessions to ensure articling students' goals are met
Providing feedback to help ensure articling students improve
There are no positive aspects of the articling experience **[anchor position, exclusive]**
Other please specify _____ **[anchor position]**

Principals, Recruiters & Mentors

[NEW PAGE]
[MULTIPLE CHOICE]
26. What key challenges are faced by a recruiter, principal or mentor of an articling student in an articling placement? Select all that apply.

[RANDOMIZE]

- Lack of time to mentor articling students
- Supporting articling students through their steep learning curve
- Giving articling students feedback they can learn from
- Exposing articling students to different areas of practice
- Training articling students in all competency areas (ethics and professionalism, practice management, client relationship management, conducting matters, adjudication/dispute resolution, substantive law, analytical skills and communication skills)
- Unrealistic expectations of articling students
- High costs associated with hiring articling students (compensation, CPLED, etc.)
- Understanding the unique learning styles of articling students
- Managing personality differences
- Lack of clarity on what is required of me as a principal/recruiter/mentor
- Lack of tools and resources available to help me better support articling students
- Lack of training on being a principal/recruiter/mentor
- Providing articling students access to the appropriate mental health supports as needed
- There are no challenges to being a principal/recruiter/mentor **[anchor position]**
- Other (please specify) _____ **[anchor position]**

[NEW PAGE]
[SINGLE CHOICE]
27. Based on your experiences as a principal/recruiter/mentor, how likely are you to take on an articling student again in the future?

- Definitely will
- Probably will
- May or may not
- Probably will not
- Definitely will not

[NEW PAGE]
[SINGLE OPTION]
28. Now we would like to ask you some questions on equity, diversity and supports that are available to articling students at your firm/organization. We would like to remind you that responses are being aggregated and reported in summary form only.

Are mental health resources available at your firm/organization for articling students who may need support with things like stress management, anxiety, etc.?

- Yes
- No
- Not sure

Principals, Recruiters & Mentors

[NEW PAGE]
[SINGLE OPTION]
29. Has your firm/organization ever had a candidate indicate that they have been discriminated against or harassed related to age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status, gender identity, gender expression, sex and/or sexual orientation, or other factors **during the recruitment process**?

Yes
No
Not sure
Prefer not to say

[NEW PAGE]
[SINGLE OPTION]
30. Has an articling student come to you with concerns about being **discriminated against** by someone at the firm/organization related to age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status, gender identity, gender expression, sex and/or sexual orientation, or other factors **during their articling experience**?

Yes
No
Not sure
Prefer not to say

[NEW PAGE]
[SINGLE OPTION]
31. Has an articling student come to you with concerns about being **harassed** by someone at the firm/organization related to age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status, gender identity, gender expression, sex and/or sexual orientation, or other factors **during their articling experience**?

Yes
No
Not sure
Prefer not to say

[OPEN END]
[ASK IF Q29=1 OR Q30 =1 OR Q31=1]
32. How did you or your firm/organization handle the situation?

[NEW PAGE]
[SINGLE OPTION]
33. If an articling student believes they have been discriminated against or harassed by someone in your firm/organization, is there a place they can confidentially address their concerns?

Yes
No
Not sure

[NEW PAGE]

The last few questions are for demographic purposes.

Principals, Recruiters & Mentors

[NEW PAGE]
[SINGLE CHOICE]
34. How many years have you been a member of the Bar?

Less than one year
1 - 5 years
6 -10 years
11 -15 years
16 - 20 years
21 - 25 years
26 - 30 years
More than 30 years

[NEW PAGE]
[SINGLE CHOICE]
35. Which of the following best describes your practice setting?

Sole Practitioner
Government
Corporate
Academic
Law firm (2-10 lawyers)
Law firm (11-25 lawyers)
Law firm (26-50 lawyers)
Law firm (51+ lawyers)
Other (please specify)_____

[NEW PAGE]
[MULTIPLE CHOICE]
36. What is your primary area(s) of practice?

Indigenous
Administrative / Boards / Tribunals
Arbitration
Bankruptcy / Insolvency / Receivership
Civil Litigation
Commercial
Corporate
Criminal
Employment / Labour
Entrepreneurial / Business
Environmental
Estate Planning and Administration
Intellectual Property
Matrimonial / Family
Mediation
Municipal Government
Real Estate Conveyancing
Wills and Estates
Other (please specify)_____

[NEW PAGE]
[SINGLE CHOICE]
37. Where is your practice located?

Small urban centre
Large urban centre
Rural area

Principals, Recruiters & Mentors

[NEW PAGE]
[SINGLE CHOICE]
38. In which of the following provinces do you primarily practise?

Alberta
Saskatchewan
Manitoba

[IF Q38=1, DISPLAY THE FOLLOWING MESSAGE WITH THE OPTION TO SKIP]
We appreciate you taking the time to respond. Please submit your name and email address for a chance to win a free LESA course of your choice (excludes multi-day programs). Please note that this information will not be linked to your survey responses.

Name
Email Address

[IF Q38=2, DISPLAY THE FOLLOWING MESSAGE WITH THE OPTION TO SKIP]
We appreciate you taking the time to respond. Please submit your name and email address for a chance to win a free LSS CPD program of your choice (excludes multi-day programs). Please note that this information will not be linked to your survey responses.

Name
Email Address

[IF Q38=3, DISPLAY THE FOLLOWING MESSAGE WITH THE OPTION TO SKIP]
We appreciate you taking the time to respond. Please submit your name and email address for a chance to win a free (Manitoba) course of your choice (excludes multi-day programs). Please note that this information will not be linked to your survey responses.

Name
Email Address

[IF Q38=1, 2, or 3 DISPLAY THE FOLLOWING MESSAGE]
Thank you for completing this survey.

illumina
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NATIONHOOD COUNCIL HOUSE

HELPING FIRST PEOPLES ASSERT THEIR INHERENT AND TREATY-BASED LAND RIGHTS

LAND USE & NATIONHOOD

LAND BACK - NCH INSIGHT

WHAT IS THE LAND BACK MOVEMENT ABOUT ?

Canadians are hesitant to discuss the concepts of Land Back, Indigenous Sovereignty and Inherent Jurisdiction. Such conversations are difficult to have with settlers as they often get defensive about how they came to be on this land that we now call Canada. 'Land Back' is a relatively new phrase that is emerging out of the Canada-First Nations situation. At the first

sound of it, it can be mistaken to be a "everyone, except for the Indigenous peoples, go back to where you came from" narrative, but it is not that. The situation is more complex than that and it should not be simplified for a shutdown of discussion. To us at NCH, in an easy-to-understand language for a lay-Canadian, it means to understand the history of where you live and also, how you get your livelihood. It means to understand, for enabling your gain, what was stolen and what continues to be stolen. And then understand what has to happen to stop this ongoing theft. Canadians need to connect these dots and then work on the relational accountability that they owe to the Indigenous Peoples. In a nutshell, it is about taking outcome-based corrective action on - what happened, where we are stuck now and where we should be.

What happened

The five structures that define and sustain Canada and its continued land theft are — Doctrine of Discovery, Doctrine of Reception, British North America Act, the Confederation and the Indian Act. The basic premise of the new arrivants in 17-18th century was to settle on lands previously occupied, with their respective monarchs and church leaders enabling this activity by creating any law possible - whether it was the "Doctrine of Discovery" - a lie that no one occupied the Americas - or, the "Doctrine of Reception" – that only English or French laws will be imported and imposed on the original occupants of this land. With that in place, illegal laws kept getting created. Whether through the Canadian Confederation, Indian Act, Residential Schools or more. There was ban on voting, ban on hiring lawyers, ban on how we used our lands. Sweeping and extensive tracts of land across Turtle Island were just for taking by the settlers. The quick enshrining of these early colossal illegal laws and constitution has led to two centuries of a complex web of case laws that continue to sustain land grab. Organization like ours have a list of such case laws. None of this ever had First Nations on the decision making tables. Why would it? Which First Nation would have said "Yes - take my land, and then my children, my language, my very way of being"?

Also, we all need to question exactly what is "crown" land — a term pulled out from thin air in time of occupation and now a highly entrenched term in Canadian courts — or, who decides how this so-called "crown" land (or, public land) is handed out or managed (our organization is studying the rapid spread of suburbs, mining and other extractive corporate agencies in last few years in previously "crown" lands), all these are nothing but the continuing by-products of the foundational piece we mentioned above — the five illegal constitutive structures that define and sustain Canada and its continued land stealing.

Where we are stuck now

So, once the basic foundation of current relationship rests on unlawful premises, something that mainstream Canada is still not talking about — it is not in school curriculum, it is not in Canadian citizenry tests for the tens of millions of people who have recently become "Canadians" — we are all going about current land stewardship like the parable of the blind men and an elephant. This ancient story is from the Indian subcontinent and describes how a group of blind men who have

never come across an elephant before and who learn and conceptualize what the elephant is like by touching it. Each blind man feels a different part of the elephant's body, and then describes the elephant based on their limited experience. Each description is different, and they even come to blows for disagreeing. The moral of the parable is that humans tend to claim a truth based on their limited, subjective experience. And settlers in Canada ignore the basic premise – that this land has lived experience of thousands of years by the Indigenous people. And that it was stolen. I do not have to detail here the devastation— the land encroachment, the environment devastation, the Indigenous society devastation that has taken place in last two centuries. Especially in the last 50 years. Pick any report up on Indigenous peoples to know that. It is time for Canadians to connect the dots…if you take an Indigenous child away to state care, you get easier access to land. If you allow MMIW to happen, it gives you easier access to land.

Where we should be

There is so much that can be done much of which has already been researched and reported on, beginning with the Royal Commission on Aboriginal Peoples (RCAP) in 1996. It details solutions to the challenges affecting the relationship between the Indigenous Peoples, the Canadian government and Canadian society as a whole. A reset/reconstitution is the desired outcome for a more just system of land governance. These are difficult and unfathomable words, I know, but this has to be done for just systems. Our communities must be treated as nations with our own laws. Currently, we do not even have the veto power on extractive projects. If we do not repair and reset the very foundation, the house will continue to stand on a weak base. There are thousands of non-Indigenous lawyers in this country – as they go about their livelihood, my first call to action would be to them – do some self-reflection and ask where their law/the Canadian law, is originally stemming from. And then knowing that, why are they continuing to go about business-as-usual? If the Canadian Constitution was imported in a matter of days, surely, corrections can be made in similar time frame. Each passing day of status quo is a day of unlawfulness that they help retain.

Lastly, if there is one simple thing that I could request of the allies – is to focus and prioritize. There are myriad of issues and problems in our current world. And it is easy in this age of connectivity to be constantly distracted. But if you understand that the problems in Canada today stem from the foundation of illegal occupation – whether it is environment degradation, racism, infrastructure inequity, youth incarceration or suicide, third-world like poverty – then prioritize that foundational issue first. Ask for a reset of Canadian laws and Constitutive structures. Let us work on foundational pieces. Indigenous organizations like ours have many ideas.

Articles of a Treaty

made and concluded this twenty-second day of September, in the year of our Lord one thousand eight hundred and seventy-seven, between HER MOST GRACIOUS MAJESTY THE QUEEN *of Great Britain and Ireland, by Her Commissioners, the Honorable* DAVID LAIRD, *Lieutenant-Governor and Indian Superintendent of the North-West Territories, and* JAMES FARQUHARSON MACLEOD, *C.M.G., Commissioner of the North-West Mounted Police, of the one part, and the Blackfeet, Blood, Piegan, Sarcee, Stony and other Indians, inhabitants of the Territory north of the United States Boundary Line, east of the central range of the Rocky Mountains, and south and west of Treaties numbers six and four, by their Head Chiefs and Minor Chiefs or Councillors, chosen as hereinafter mentioned, of the other part.*

Whereas the Indians inhabiting the said Territory have, pursuant to an appointment made by the said Commissioners, been convened at a meeting at the "Blackfoot Crossing" of the Bow River, to deliberate upon certain matters of interest to Her Most Gracious Majesty of the one part, and the said Indians of the other;

And whereas the said Indians have been informed by Her Majesty's Commissioners that it is the desire of Her Majesty to open up for settlement, and such other purposes as to Her Majesty may seem meet, a tract of country, bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a Treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty and between them and Her Majesty's other subjects; and that Her Indian people may know and feel assured of what allowance they are to count upon and receive from Her Majesty bounty and benevolence;

And whereas the Indians of the said tract, duly convened in Council, and being requested by Her Majesty to present their Head Chiefs and Minor Chiefs or Councillors, who shall be authorized, on their behalf, to conduct such negotiations and sign any Treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance, by their respective Bands of such obligations as should be assumed by them, the Blackfeet, Blood, Piegan and Sarcee Indians have therefore acknowledged for that purpose, the several Head and Minor Chiefs, and the said Stony Indians, the Chiefs and Councillors who have subscribed hereto; that thereupon, in open Council, the said Commissioners received and acknowledged the Head and Minor Chiefs and the Chiefs and Councillors presented for the purpose aforesaid;

And whereas the said Commissioners have proceeded to negotiate a Treaty with the said Indians; and the same has been finally agreed upon and concluded as follows, that is to say: the Blackfeet, Blood, Piegan, Sarcee, Stony and other Indians inhabiting the District hereinafter more fully described and defined, do hereby cede, release, surrender and yield up to the Government of Canada for Her Majesty the Queen and Her Successors for ever, all their rights, titles and privileges whatsoever to the lands included within the following limits, that is to say:

Commencing at a point on the International Boundary due south of the western extremity of the Cypress Hills, thence west along the said boundary to the central range of the Rocky Mountains or to the boundary of the Province of British Columbia, thence north-westerly along the said boundary to a point due west of the source of the main branch of the Red Deer River, thence south-westerly and southerly following on the boundaries of the Tracts ceded by the Treaties numbered six and four to the place of commencement;

And also all their rights, titles and privileges whatsoever, to all other lands wherever situated in the North-West Territories, or in any other portion of the Dominion of Canada;

To have and to hold the same to Her Majesty the Queen and Her Successors forever;

And Her Majesty the Queen hereby agrees with Her said Indians, that they shall have right to pursue their vocations of hunting throughout the Tract surrendered as heretofore described, subject to such regulations as may, from time to time, be made by the Government of the country, acting under the authority of Her Majesty and saving and excepting such Tracts as may be required or taken up from time to time for settlement, mining, trading or other purposes by Her Government of Canada or by any of Her Majesty's subjects duly authorized therefor by the said Government.

It is also agreed between Her Majesty and Her said Indians that Reserves shall be assigned them of sufficient area to allow one square mile for each family of five persons, or in that proportion for larger and smaller families, and that said Reserves shall be located as follows, that is to say:

First—The Reserves of the Blackfeet, Blood and Sarcee Bands of Indians shall consist of a belt of land on the north side of the Bow and South Saskatchewan Rivers, of an average width of four miles along said rivers, down stream, commencing at a point on the Bow River twenty miles north-westerly of the Blackfoot crossing thereof, and extending to the Red Deer River at its junction with the South Saskatchewan; also for the term of ten years, and no longer, from the date of the concluding of this Treaty, when it shall cease to be a portion of said Indian Reserves, as fully to all intents and purposes as if it had not at any time been included therein, and without any compensation to individual Indians for improvements, of a similar belt of land on the south side of the Bow and Saskatchewan Rivers of an average width of one mile along said rivers, down stream; commencing at the aforesaid point on the Bow River, and extending to a point one mile west of the coal seam on said river, about five miles below the said Blackfoot Crossing; beginning again one mile east of the said coal seam, and extending to the mouth of Maple Creek at its junction with the South Saskatchewan, and beginning again at the junction of the Bow River with the latter river, and extending on both sides of the South Saskatchewan in an average width on each side thereof of one mile, along said river against the stream, to the junction of the Little Bow River with the latter River, reserving to Her Majesty as may now or hereafter be required by Her for the use of Her Indian and other subjects, from all the Reserves hereinbefore described, the right to navigate the above mentioned rivers, to land and receive fuel and cargoes on the shores and banks thereof, to build bridges and establish ferries thereon, to use the fords thereof and all the trails leading thereto, and to open such other roads through the said Reserves as may appear to Her Majesty's Government of Canada necessary for the ordinary travel of Her Indian and other subjects, due compensation being paid to individual Indians for improvements, when the same may be in any manner encroached upon by such roads.

Secondly—That the Reserve of the Piegan Band of Indians shall be on the Old Man's River, near the foot of the Porcupine Hills, at a place called "Crow's Creek."

And, Thirdly—The Reserve of the Stony Band of Indians shall be in the vicinity of Morleyville.

In view of the satisfaction of Her Majesty with the recent general good conduct of her said Indians, and in extinguishment of all their past claims, she hereby, through her Commissioners, agrees to make them a present payment of twelve dollars each in cash to each man, woman and child of the families here represented.

Her Majesty also agrees that next year, and annually afterwards forever, she will cause to be paid to the said Indians, in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief, twenty-five dollars, each minor Chief or Councillors (not exceeding fifteen minor Chiefs to the Blackfeet and Blood Indians, and four to the Piegan and Sarcee Bands, and five Councillors to the Stony Indian Bands), fifteen dollars, and to every other Indian of whatever age, five dollars; the same, unless there be some exceptional reason, to be paid to the heads of families for those belonging thereto.

Further, Her Majesty agrees that the sum of two thousand dollars shall hereafter every year be expended in the purchase of ammunition for distribution among the said Indians; Provided that if at any future time ammunition become comparatively unnecessary for said Indians, Her Government, with the consent of said Indians, or any of the Bands thereof, may expend the proportion due to such Band otherwise for their benefit.

Further, Her Majesty agrees that each Head Chief and Minor Chief, and each Chief and Councillor duly recognized as such, shall, once in every three years, during the term of their office, receive a suitable suit of clothing, and each Head Chief and Stony Chief, in recognition of the closing of the Treaty, a suitable medal and flag, and next year, or as soon as convenient, each Head Chief, and Minor Chief, and Stony Chief, shall receive a Winchester rifle.

Further, Her Majesty agrees to pay the salary of such teachers to instruct the children of said Indians as to Her Government of Canada may seem advisable, when said Indians are settled on their Reserves and shall desire teachers.

Further, Her Majesty agrees to supply each Head and Minor Chief, and each Stony Chief, for the use of their Bands, ten axes, five handsaws, five augers, one grindstone, and the necessary files and whetstones.

And further, Her Majesty agrees that the said Indians shall be supplied as soon as convenient, after any Band shall make due application therefor, with the following cattle for raising stock, that is to say: for every family of five persons, and under, two cows; for every family of more than five persons, and less than ten persons, three cows; for every family of over ten persons, four cows; and every Head and Minor Chief, and every Stony Chief, for the use of their Bands, one bull; but if any Band desire to cultivate the soil as well as raise stock, each family of such Band shall receive one cow less than the above-mentioned number, and in lieu thereof, when settled on their Reserves and prepared to break up the soil, two hoes, one spade, one scythe and two hay forks; and for every three families, one plough and one harrow; and for each Band, enough potatoes, barley, oats and wheat (if such seeds be suited for the locality of their Reserves) to plant the land actually broken up. All the aforesaid articles to be given, once for all, for the encouragement of the practice of agriculture among the Indians.

And the undersigned Blackfeet, Blood, Piegan, and Sarcee Head Chiefs and Minor Chiefs, and Stony Chiefs and Councillors, on their own behalf, and on behalf of all other Indians inhabiting the Tract within ceded, do hereby solemnly promise and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will, in all respects, obey and abide by the Law; that they will maintain peace and good order between each other and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, Half-Breeds or Whites, now inhabiting, or hereafter to inhabit any part of the said ceded tract; and that they will not molest the person or property of any inhabitant of such ceded tract or the property of Her Majesty the Queen, or interfere with or trouble any person, passing or travelling through the said tract or any part thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty, or infringing the laws in force in the country so ceded.

In Witness Whereof, Her Majesty's said Commissioners, and the said Indian Head and Minor Chiefs and Stony Chiefs and Councillors, have hereunto subscribed and set their hands, at the "Blackfoot Crossing" of the Bow River, the day and year herein first above written.

Signed by the Chiefs and Councillors within named in presence of the following witnesses, the same having been first explained by JAMES BIRD, Interpreter:—

A. G. IRVINE, Assistant Com., N. W. M. P.
J. McDOUGALL, Missionary.
JEAN L'HEUREUX.
W. WINDER, Inspector.
L. N. F. CROZIER, Inspector.
E. DALRYMPLE CLARK, Lieut. and Adjutant, N. W. M. P.
A. SHURTLIFF, Sub-Inspector.
C. E. DENING, Sub-Inspector
W. D. ANYROBUS, Sub-Inspector.
FRANK NORMAN, Staff Constable.
MARY J. MacLEOD.
JULIA WINDER.
JULIA SHURTLIFF.
E. HARDISTY.
A. McDOUGALL.
E. A. BARRETT.
CONSTANTINE SCOLLEN, Priest, witness to signatures of Stonixosak and those following.
CHARLES E. CONRAD.
THOMAS J. BOGG.

DAVID LAIRD, Lieutenant-Governor of North-West Territories, and Special Indian Commissioner.

JAMES F. MacLEOD, Lieut.-Colonel, Com. N. W. M. P., and Special Indian Commissioner.

CHAPO-MEXICO, or Crowfoot, Head Chief of the South Blackfeet. his x mark.

MATOSE-APIW, or Old Sun, Head Chief of the North Blackfeet. his x mark.

STAMISCOTOCAR, or Bull Head, Head Chief of the Sarcees. his x mark

MEKASTO, or Red Crow, Head Chief of the South Bloods. his x mark.

NATOSE-ONISTORS, or Medicine Calf. his x mark.

POKAPIW-OTOIAN, or Bad Head. his x mark.

SOTENAH, or Rainy Chief, Head Chief of the North Bloods. his x mark.

TAKOYE-STAMIX, or Fiend Bull. his x mark.

AKKA-KITCIPIMIW-OTAS, or Many Spotted Horses. his x mark.

ATTISTAH-MACAN, or Running Rabit. his x mark.

PITAH-PEKIS, or Eagle Rib. his x mark.

SAKOYE-AOTAN, or Heavy Shield, Head Chief of the Middle Blackfeet. his x mark.

ZOATZE-TAPITAPIW, or Setting on an Eagle Tail, Head Chief of the North Piegans. his x mark.

AKKA-MAKKOYE, or Many Swans. his x mark

APENAKO-SAPOP, or Morning Plume. his x mark.

MAS-GWA-AH-SID, or Bear's Paw. his x mark.

CHE-NE-KA, or John. his x mark.

KI-CHI-PWOT, or Jacob. his x mark.

(Stony Chiefs.)

STAMIX-OSOK, or Bull Bacfat. his x mark.

EMITAH-APISKINNE, or White Striped Dog. his x mark.

MATAPI-KOMOTZIW, or the Captive or Stolen Person. his x mark.

APAWAWAKOSOW, or White Antelope. his x mark.

MAKOYE-KIN, or Wolf Collar. his x mark.

AYE-STIPIS-SIMAT, or Heavily Whipped. his x mark.

KISSOUM, or Day Light. his x mark.

PITAH-OTOCAN, or Eagle Head. his x mark.

APAW-STAMIX, or Weasel Bull. his x mark.

ONISTAH-POKAH, or White Calf. his x mark.

NETAH-KITEI-PI-MEW, or Only Spot. his x mark.

AKAK-OTOS, or Many Horses. his x mark.

STOKIMATIS, or The Drum. his x mark.

PITAH-ANNES, or Eagle Robe. his x mark.

PITAH-OTSIKIN, or Eagle Shoe his x mark.

STAMIXO-TA-KA-PIW, or Bull Turn Round, his x mark.

MASTE-PITAH, or Crow Eagle. his x mark.

JAMES DIXON. his x mark.

ABRAHAM KECHEPWOT. his x mark.

PATRICK KECHEPWOT. his x mark.

GEORGE MOY-ANY-MEN. his x mark.

GEORGE CRAWLOR. his x mark.

(Stony Councillors.)

EKAS-KINE, or Low Horn. his x mark.

KAYO-OKOSIS, or Bear Shield. his x mark.

PONOKAH-STAMIX, or Bull Elk. his x mark.

OMAKSI SAPOP, or Big Plume. his x mark.

ONISTAH, or Calf Robe. his x mark.

PITAH-SIKSINUM, or White Eagle. his x mark.

APAW-ONISTAW, or Weasel Calf. his x mark.

ATTISTA-HAES, or Rabit Carrier. his x mark.

PITAH, or Eagle. his x mark.

PITAH-ONISTAH, or Eagle White Calf. his x mark.

KAYE-TAPO, or Going to Bear his x mark.

We, the members of the Blackfoot tribe of Indians having had explained to us the terms of the Treaty made and concluded at the Blackfoot crossing of the Bow River, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and seventy-seven;

Between Her Majesty the Queen by Her Commissioners duly appointed to negotiate the said Treaty and the Blackfeet, Blood, Piegan, Sarcee, Stony and other Indian inhabitants of the country within the limits defined in the said Treaty, but not having been present at the Councils at which the articles of the said Treaty were agreed upon, do now hereby, for ourselves and the Bands which we represent, in consideration of the provisions of the said Treaty being extended to us and the Bands which we represent, transfer, surrender and relinquish to Her Majesty the Queen Her heirs and successors, to and for the use of Her Government of the Dominion of Canada, all our right, title and interest whatsoever which we and the said Bands which we represent have held or enjoyed of in and to the territory described and fully set out in the said Treaty; also all our right, title and interest whatsoever to all other lands wherever situated, whether within the limits of any other Treaty heretofore made or hereafter to be made with Indians, or elsewhere in Her Majesty's Territories, to have and to hold the same unto and for the use of Her Majesty the Queen Her heirs and successors forever;

And we hereby agree to accept the several benefits, payments and Reserves promised to the Indians under the Chiefs adhering to the said Treaty at the Blackfoot Crossing of the Bow River, and we solemnly engage to abide by, carry out and fulfil all the stipulations, obligations and conditions therein contained on the part of the Chiefs and Indians therein named, to be observed and performed and in all things to conform to the articles of the said Treaty, as if we ourselves and the Bands which we represent had been originally contracting parties thereto, and had been present at the Councils held at the Blackfoot Crossing of the Bow River, and had there attached our signatures to the said Treaty.

In Witness Whereof, JAMES FARQUHARSON MacLEOD, C.M.G., one of Her Majesty's Commissioners appointed to negotiate the said Treaty and the Chief of the Band, hereby giving their adhesion to the said Treaty, have hereunto subscribed and set their hands at FORT MacLEOD, this FOURTH DAY of DECEMBER, in the year of our Lord one thousand eight hundred and seventy-seven.

Signed by the parties hereto in the presence of the undersigned witnesses, the same having been explained to the Indians by the said JAMES FARQUHARSON MacLEOD, one of the Commissioners appointed to negotiate the said Treaty, through the Interpreter, JERRY POTTS, in the presence of

A. G. IRVINE, *Assistant Commissioner.*
E. DALRYMPLE CLARK, *Lieutenant and Adjutant, N.W.M.P.*
CHARLES E. CONRAD.
W. WINDER, *Inspector.*

JAMES F. MacLEOD, Lieut.-Col., *Special Indian Commissioner.*

MEANXKISTOMACH, OR THREE BULLS. his x mark.

RECONCILIATION AND ETHICAL LAWYERING: SOME THOUGHTS ON CULTURAL COMPETENCE

Pooja Parmar*

This paper critically examines the turn to cultural competence as a response to the Truth and Reconciliation Commission ("TRC") Calls to Action 27 and 28. I suggest that an uncritical embrace of cultural competence, as currently understood, is inadequate and might even prove to be counterproductive despite best intentions. While acknowledging that the focus on cultural competence is often driven by genuine commitments to reconciliation within the legal profession in Canada, I outline concerns which show that a limited and deficient conception of cultural competence is unlikely to assist lawyers in representing Indigenous clients better or change Indigenous peoples' experience with the legal system more broadly. I suggest that the TRC Calls to Action demand a response that centres accountability, and that the legal profession must recognize Calls 27 and 28 as a unique opportunity to innovate and lead by rethinking legal education, competence, and ethical lawyering in a multi-juridical space such as Canada. I conclude with two suggestions for taking this conversation forward.

Le présent article examine, sous un angle critique, le recours aux compétences culturelles pour répondre aux appels à l'action no 27 et no 28 lancés par la Commission de vérité et réconciliation (« CVR »). L'auteure avance que, malgré les meilleures intentions, le fait d'embrasser aveuglément les compétences culturelles, telles qu'on les conçoit actuellement, constitue une solution insuffisante qui pourrait même aller à l'encontre du but recherché malgré les meilleures intentions. Tout en reconnaissant qu'un engagement sincère envers la réconciliation au sein de la profession juridique au Canada sous-tend bien souvent cette mise en valeur des compétences culturelles, l'auteure fait état de préoccupations voulant qu'une conception limitée et défaillante des compétences culturelles soit peu susceptible d'aider les avocats à mieux représenter leurs clients autochtones ou de modifier l'expérience de ces derniers au sein de l'appareil judiciaire en général. Selon l'auteure, les appels à l'action de la CVR requièrent la prise de mesures axées sur la responsabilisation, et la profession juridique doit reconnaître que les appels à l'action no 27 et no 28 représentent une occasion unique d'innover et d'avancer en reconsidérant la formation juridique, les compétences et la

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déontologie dans l'exercice du droit au Canada, pays aux facettes juridiques multiples. Pour conclure, l'auteure présente deux propositions afin de faire avancer ce discours.

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Introduction

What does ethical lawyering look like when we take reconciliation seriously? This was one of the questions on my mind as I prepared to teach a course on ethics and professional responsibility soon after the Truth and Reconciliation Commission of Canada ("TRC") published its final report in 2015.[1] This question eventually developed into an empirical research project in which I examine the relationship between processes of legal representation and access to justice for Indigenous peoples. In this paper, I draw on the conceptual framework for that ongoing project to share my concerns about the recent turn to cultural competence as a response to the TRC Calls to Action 27 and 28.[2] I suggest that a narrow focus on

[1] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Ottawa: Truth and Reconciliation Committee, 2015), online (pdf) <www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf>. [TRC, *Summary Report*].

[2] Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission

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cultural competence as currently understood in the context of lawyers is, on its own, inadequate, and might prove to be counterproductive despite best intentions. Despite being a worthy aspiration and often driven by genuine commitments to reconciliation within the legal profession in Canada, the current limited conception of cultural competence is unlikely to assist lawyers in better representing Indigenous clients. More broadly, it is also unlikely to change Indigenous people's encounters with the legal profession in meaningful ways. A more useful approach might be to recognize the TRC Calls to Action as a unique opportunity for rethinking lawyer competence, ethical lawyering, and legal education in a multi-juridical space such as Canada.

I share the concerns with an uncritical embrace of cultural competence in the first part of this paper in order to highlight the need for broader and more robust conversations about the role of legal education in enhancing access to justice for Indigenous peoples. I suggest that developing a normative conception of cultural competence must necessarily involve a critical examination of the culture of the Canadian legal profession and include inquiries directed at systemic issues and the knowledge base of the profession. Asking lawyers to be culturally competent without attention to the training required for a professional to understand both 'culture' and 'difference'—what these are and how each operates in Canadian society—is unlikely to meaningfully change Indigenous peoples' experience with the legal profession. The purpose of this critique is not to discourage new or ongoing initiatives that focus on cultural competence training for lawyers or law students, especially where the goal is to initiate broader conversations within the profession about legal representation and access to justice for Indigenous peoples. Instead, my goal is to introduce a note of caution and indicate why an uncritical embrace of cultural competence is not an adequate response to the TRC Calls 27 and 28.

In the second part of this paper, I develop the suggestion that the TRC recommendations be interpreted most fundamentally as a call to rethink legal education and ongoing lawyer training. This calls for a broader conversation about accountability. With that in mind, I explore two ideas in the context of competence and ethical practice of law in Canada: first, that all lawyers be trained to understand the relevance of Indigenous laws and epistemology not only to the substantive legal claims Indigenous peoples pursue, but also to the professional relationships between legal professionals and Indigenous peoples and to ethical practice of law more broadly; and second, that all legal professionals learn to recognize that

of Canada, 2015), online (pdf): *Truth and Reconciliation Commission of Canada* <trc.ca/assets/pdf/Calls_to_Action_English2.pdf> [*Calls to Action*]. See note 4 and accompanying text.

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ethical lawyering requires them to take seriously their role as translators across legal worlds and train to be ethical translators.

1. Reconciliation and the Legal Profession

The Truth and Reconciliation Commission was constituted pursuant to the Indian Residential Schools Settlement Agreement, which settled a class action lawsuit initiated by survivors of the residential school system for Indigenous peoples in Canada.[3] The Commission published its report in 2015. The Report includes 94 Calls to Action that set out several specific things that need to be done in order to further the process of reconciliation in the country and calls upon various relevant government and other bodies to take up these tasks. The TRC Calls 27 and 28 ask the Federation of Law Societies of Canada ("FLSC"), as well as law schools in Canada, to ensure that all lawyers and law students acquire certain knowledges that are typically not included in law school curriculums, or at least not included as *mandatory* components of the curriculum. These include knowledge of the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, and Indigenous law.[4] The TRC Call number 27 asks that these topics be included in cultural competency training that all lawyers

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[3] TRC, *Summary Report, supra* note 1 at 3. The last of these federally supported schools were in operation until the 1990s, although most had closed by the 1980s. While the TRC refers to "Aboriginal people" in Canada, in this paper—except when the word Aboriginal is used in the material I refer to—I use the contemporary term 'Indigenous', which is preferred by many Indigenous peoples and scholars in Canada as well as globally.

[4] See "A Denial of Justice" in *Final Report of the Truth and Reconciliation Commission of Canada: The Legacy*, vol 5 (Montreal & Kingston: McGill-Queen's University Press, 2015) [TRC, *Legacy*]; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008) [*UNDRIP*]; *Calls to Action*, *supra* note 2. In Call No 27, the TRC states:

> We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal—Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

In Call No 28, the TRC calls on law schools to implement intercultural competency training for law students:

> We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

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must receive. The two TRC Calls also note that this education requires that lawyers and law students acquire specific "skills-based training" that is otherwise not currently considered essential by all.[5] The list includes intercultural competency, conflict resolution, human rights, and anti-racism.[6] These Calls unmistakably convey the need to rethink the essential knowledge base and skillsets for all legal professionals in Canada.

The TRC Report provides extensive context for these Calls to Action by documenting the various ways in which the Canadian legal system—its substantive law, its legal and court processes, its criminal justice system and civil litigation processes, the adversarial nature of litigation, and the prejudices and biases of legal professionals—have failed Indigenous peoples.[7] The Report notes that Canadian law and the legal system have in fact hindered, not enabled or facilitated, access to justice for Indigenous peoples.[8]

Access to justice involves more than access to legal representation. But adequate, competent, and effective legal representation plays a significant part in enabling access to justice for members of the public.[9] In her paper on the Caring Society litigation, Cindy Blackstock writes about the challenges of working with counsel on that case.[10] Even as she acknowledges certain rewarding aspects of the experience, Blackstock points to gaps in the knowledge and skills of the lawyers working with Indigenous peoples. The TRC Report also refers to issues related to inadequate legal representation in cases where individual Survivors were "not well *understood* or *served* by their own lawyers."[11] These issues have a long history in Canada.

In her historical work on trials of Aboriginal men accused of murder in the late 19th and early 20th Century in Canada, Constance Backhouse notes that even when marginalized communities are able to "retain legal services, the lawyers are often *unable to represent* them properly," and that

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5 *Calls to Action, supra* note 2 at No 27–28.

6 *Ibid*.

7 See TRC, *Legacy*, *supra* note 4.

8 See Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada*, vol 6, *Canada's Residential Schools: Reconciliation* (Montreal & Kingston: McGill-Queen's University Press, 2015) at 48 [TRC, *Reconciliation*].

9 See Jamie Baxter, "Access to Justice" in Alice Woolley et al, eds, *Lawyers' Ethics and Professional Regulation*, 3d ed (Markham: LexisNexis, 2017) 691.

10 Cindy Blackstock, "The Complainant: The Canadian Human Rights Case on First Nations Child Welfare" (2016) 62:2 McGill LJ 285 at 303–08.

11 TRC, *Legacy, supra* note 4 at 208 [emphasis added].

this is most evident in the case of Aboriginal communities.[12] Backhouse shows how attempts by the accused to challenge the jurisdiction of the Euro-Canadian system at the time were "misconstrued", "unheard", or "mangled" by their counsel who were "incapable of comprehending the complex Aboriginal political and justice systems that had been operating for centuries before contact."[13] More than one hundred years later, the situation is not very different. In a legal system that relies on counsel being able to represent clients fully and competently, a lawyer's inability to hear, comprehend or re-present the client's interests and claims in a meaningful manner is a serious problem.

A commitment to reconciliation places an obligation on the legal profession to acknowledge and address the issue of inadequate or incompetent representation. It is therefore imperative that educators, regulators, and others concerned about this, join the conversation about how lawyers meet their obligations towards those whose encounters with the law and legal processes have been marked by the violence of colonialism. This requires something more than focusing on cases of professional misconduct or disciplining lawyers engaged in unethical practices while representing Indigenous clients. The TRC Report itself points to cases of unethical conduct by some lawyers who represented survivors of the residential school system in Canada in the Residential school litigation, and Law Societies in Canada have received complaints related to legal fees and to unethical behaviour in the representation of large numbers of Survivors.[14] The questions raised about lawyers' conduct in these cases certainly require attention and an appropriate response from the regulators in accordance with existing or modified rules of conduct. However, the problem is not necessarily or always unscrupulous lawyers.

Reconciliation demands that the profession also turn its mind to training competent lawyers who are committed to ensuring that the legal

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12 Constance Backhouse, "Gender and Race in the Construction of "Legal Professionalism": Historical Perspectives" in Adam Dodek and Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) 126 at 138 [Backhouse, "Legal Professionalism"][emphasis added]; See also Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: The Osgoode Society for Canadian Legal History by University of Toronto Press, 1999) at 115–17.

13 Backhouse, "Legal Professionalism", *supra* note 12 at 138 [citations omitted].

14 TRC, *Legacy, supra* note 4 at 208. The TRC also recognized the hard work of many lawyers who "tried to be sensitive" and did not take "advantage of their clients" at 209. See also *Law Society of Saskatchewan v Merchant* [2000] LSDD No 24, 2000WL35801832 (WL Can); Trevor CW Farrow, "Residential Schools Litigation and the Legal Profession" (2014) 64:4 UTLJ 596 for a critical assessment of the problematic litigation strategies and practices of lawyers in the residential schools litigation.

system no longer replicates colonial violence. In order to make skilled and effective legal representation a reality for Indigenous peoples, those tasked with ensuring professional competence must think of better ways to train all legal professionals. In this context, it becomes important to ask whether lawyers who take their responsibilities seriously and are committed to representing Indigenous clients competently and with integrity, have the necessary knowledge, training, and skills to do so. It is further imperative to determine what training is necessary for lawyers representing other parties in legal disputes involving Indigenous peoples and for judges who decide such disputes.

Early responses to the TRC Calls within the legal profession—in the form of public acknowledgments and my own conversations with members of the profession—indicate that regulators and educators are, in fact, concerned about this, and are turning their minds to reconciliation and what it means for the legal profession. The FLSC, as well as a number of Law Societies, have officially acknowledged the TRC Report, as well as struck committees to develop strategies and resources.[15] Specific guidelines for lawyers working with Indigenous clients are also beginning to appear.[16] An attention to cultural competence or skills generally associated with the idea are particularly noticeable in these responses.

These are all welcome interventions. I say this because my argument here is not that the desire for culturally competent lawyers (or judges) is misplaced, but rather that it is inadequate. Therefore, before I share my concerns about cultural competence, I want to emphasize that recent attention to cultural competence is a positive development *if* it serves to initiate conversations about the meaning of reconciliation for all legal professionals—the lawyers who represent Indigenous clients, the lawyers who appear for other parties in a dispute, and the judges called upon to decide on such claims. An uncritical embrace of a limited conception of cultural competence, on the other hand, is likely to do more harm than good. It is therefore imperative that we take a closer look at what cultural competence means in the here and now given our particular histories.

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15 See e.g. Law Society of British Columbia, "Why Reconciliation Matters" (2019) online: *Law Society of British Columbia* <www.lawsociety.bc.ca/our-initiatives/truth-and-reconciliation/>.

16 See The Indigenous Bar Association & The Law Society Ontario, "Guide for Lawyers Working with Indigenous Peoples" (8 May 2018), online (pdf): *The Advocates' Society* <www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/Guide_for_Lawyers_Working_with_Indigenous_Peoples_may16.pdf> [*Advocates' Society Guide*]; Law Society of British Columbia, "Truth and Reconciliation Action Plan" (8 May 2018), online (pdf): *Law Society of British Columbia* <www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/TruthandReconciationActionPlan2018.pdf>.

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2. Cultural Competence for Lawyers

Lawyers in Canada are required to provide competent legal services to clients.[17] The existing codes of professional conduct define a 'competent lawyer' as one who has the relevant knowledge as well as the ability to apply that knowledge to the task undertaken. The knowledge of relevant legal principles and procedures is regarded as fundamental to competence, while the list of skills considered necessary include legal research, ability to identify issues, ascertaining client objectives, advocacy and problem solving, effective communication, and an ability to adapt to changes in professional requirements, standards and practices.[18] The FLSC Model Code of Professional Conduct notes that an incompetent lawyer not only does a disservice to their client, they also bring discredit to the profession and to the justice system.[19]

While the specific meaning of competence can only be determined within each particular context, some scholars suggest that an obligation to be competent requires lawyers to also be culturally competent.[20] As in other professions that consider it crucial, calls for cultural competency training for lawyers are broadly based on the idea that a culturally competent professional will have the skills to work more effectively with a diverse range of clients, especially with clients that are perceived to be culturally different than the professional. As a general aspirational goal, provision of appropriate professional legal services oriented to specific needs of differently situated clients is a positive development.

The TRC Calls to the law schools and regulators of the legal profession, however, present a very specific context to consider both the generally progressive intent that underlies the turn to cultural competence, as well as the mechanics of such training for lawyers in Canada. Given that cultural and intercultural competency are specifically mentioned in the TRC Calls 27 and 28 as being necessary skills for lawyers, it is heartening to see energies being directed towards this. However, I want to introduce a note of caution and suggest that we think more carefully about cultural competence as a response to the TRC Calls. We must be careful and concerned not because cultural competency training for lawyers or law students is a bad idea. It is not. However, a narrow and singular focus on cultural competency without careful attention to the histories and the

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17 See Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2017, r 3.1-2 [*Model Code*].

18 *Ibid*, r 3.1-1.

19 *Ibid*, r 3.1-1, commentary 14.

20 See Richard Devlin, "The Lawyer-Client Relationship" in Alice Woolley et al, eds, *Lawyers' Ethics and Professional Regulation*, 3d ed (Markham: LexisNexis, 2017) at 188–91.

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social, political, and economic context for these particular calls might prove to be counterproductive in that it prevents thinking about the ethical practice of law in more meaningful ways.

The TRC Calls offer an opportunity to reimagine lawyering in ways that might further access to justice for Indigenous peoples. Before I explore how we might begin to do this reimagining, I share five broad concerns about the limited conception of cultural competence as a response to the TRC calls.

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A) What does Cultural Competence Mean?

Cultural competency is regarded as essential to the effective delivery of services by professionals in a growing number of fields. It is often a reference to a set of skills, behaviours, attitudes, and knowledge that enable a professional to provide services that are appropriate to a diverse range of clients.[21] Each profession appears to have adapted this basic understanding to the issues it seeks to address, however there is some consensus on its core components. For example, an ability to communicate effectively across cultural difference is a key focus across the board. Scholarship on the topic in fields such as social work and health services also indicates that self-awareness is increasingly seen as an essential component of cultural competence training.[22] Within the legal profession, cultural competence is interpreted to also include work that is mindful of issues of justice and equality.[23]

These are all useful ways of thinking about cultural competence broadly. However, even as the legal profession in Canada begins to take cultural competency seriously, we do not know what it means in the

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21 See Izumi Sakamoto, "An Anti-Oppressive Approach to Cultural Competence" (2007) 24:1 Can Soc Work Rev 105 at 107; Marcie Fisher-Borne, Jessie Montana Cain & Suzanne L Martin, "From Mastery to Accountability: Cultural Humility as an Alternative to Cultural Competence" (2015) 34:2 Soc Work Education 165 at 168; Cynthia Pay, "Teaching Cultural Competency in Legal Clinics" (2014) 23 JL & Soc Pol'y 188 at 190; Laura S Abrams & Jené A Moio, "Critical Race Theory and the Cultural Competence Dilemma in Social Work Education" (2009) 45:2 J Social Work Education 245 who describe cultural competence as a "fundamental tenet of professional social work practice" at 245; Michelle LeBaron, "Learning New Dances: Finding Effective Ways to Address Intercultural Dispute" in Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 11; Richard Devlin & David Layton, "Culturally Incompetent Counsel and the Trial Level Judge: A Legal & Ethical Analysis" (2013–14) 60:4 Crim LQ 360; *Advocates' Society Guide*, *supra* note 16.

22 Sakamoto, *supra* note 21 at 107.

23 Pay, *supra* note 21; Devlin & Layton, *supra* note 21. See also Travis Adams, "Cultural Competency: A Necessary Skill for the 21st Century Attorney" (2012) 4:1(2) William Mitchell L Raza J 1.

particular context of reconciliation. This is a problem because the task here is more than an acknowledgement of the multicultural nature of Canadian society, which is the idea that underlies much of the existing literature on cultural competence broadly, as well as in the specific context of lawyers.[24] As legal professionals continue to think about ways of providing effective and competent services to the diverse range of people and communities in Canada, they must also learn to recognize that reconciliation is not a diversity initiative. The questions reconciliation poses are not only about fair allocation of resources in Canadian society, although distributive justice is often the only way in which claims of Indigeneity can be understood within liberal democracies.[25] It is certainly important to be able to work more effectively with clients perceived as culturally different, or those seen as different based on gender, sexuality, religion, ability, or language.[26] But reconciliation requires more than an attention to the specific needs of a marginalized minority group, however defined. Any commitment to reconciliation demands acknowledgement of the foundational violence of colonialism that has shaped Canada, Canadian laws, and Canadians.[27] It also requires explicit acknowledgement of Indigenous peoples as the first peoples of Canada, whose rights are specifically recognized in the Canadian Constitution.[28] In fact, the longstanding and continued assertion of sovereignty sets Indigenous peoples apart from other

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[24] For ways in which discourse of multiculturalism shaped early understanding of cultural competency, see Leyla Feize & John Gonzalez, "A Model of Cultural Competency in Social Work as seen through the Lens of Self-awareness" (2018) 37:4 Soc Work Education 472 at 473. See also Abrams & Moio, *supra* note 21 at 245; Rose Voyvodic, "'Change is Pain': Ethical Legal Discourse and Cultural Competence" (2005) 8:1 Leg Ethics 55; Ruaim A Muaygil, "From Paternalistic to Patronizing: How Cultural Competence Can Be Ethically Problematic" (2018) 30:1 HEC Forum 13 at 15.

[25] See Pooja Parmar, "Undoing Historical Wrongs: Law and Indigeneity in India" (2012) 49:3 Osgoode Hall LJ 491 at 524. See also Aaron Mills, "Rooted Constitutionalism: Growing Political Community" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous Settler relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 133 [Mills, "Rooted Constitutionalism"] for limits of the liberal constitutional and individual rights discourse to respond to colonial violence.

[26] See Abrams & Moio, *supra* note 21 at 245 for a summary of the evolution of cultural competency in the United States from an initial focus on racial and ethnic difference to encompass a broader range of differences such as gender and religion. See also Voyvodic, *supra* note 24 at 569 for an expanded conception of culture.

[27] For role of foundational violence (including destruction of pre-existing polities, economies, cultures, meanings and modes of life) in the creation of settler states see Joan Cocks, "Foundational Violence and the Politics of Erasure" (2012) 15:1 Radical Philosophy Rev 103. For the injustices associated with colonialism, including epistemic injustices, see Margaret Moore, "Justice and Colonialism" (2016) 11:8 Philosophy Compass 447; Mills, "Rooted Constitutionalism", *supra* note 25.

[28] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35.

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minorities in Canada today. Recognition of this difference and knowledge of the legacies of Canada's colonial history has to be part of appropriate training required for lawyers in the context of reconciliation.

Another reason I suggest that we do not know what cultural competency means in this specific context is that there is currently a lack of conceptual clarity that will have implications for the design of programs and skills. For example, the TRC Calls mention both *cultural* competency and *intercultural* competency. While it is not clear from the Calls themselves what the TRC specifically had in mind while including both terms, the two signal very different approaches. While the former is based on the idea of understanding a different culture and adapting to it, the latter requires a distinctive approach to understanding cultural difference itself, promotes a mutual exchange of ideas based on respect for existing differences, and, in the view of some, involves using difference as a 'resource' for learning and responding in new ways.[29] Adding cultural competency skills to lawyer training, unaccompanied by critical reflection on the different ways in which this particular competence itself can be conceptualized for the legal professional is unlikely to lead to meaningful changes to Indigenous peoples' experiences. Thus, before adopting cultural competence as a requirement for lawyers, we need a broader dialogue on what we mean by it, and what the implications of adopting any particular term are.

This critique is not limited to the conceptual terrain. As signaled above, it is necessary to unpack the terminology as the profession moves from broad commitments to the more challenging task of translating the commitment into specific skills required to become culturally competent. Of the number of important skills recognized as essential for a culturally competent lawyer in existing literature in Canada, the US, and Australia, an ability to communicate effectively with a diverse range of clients is considered essential to cultural competence. Sensitivity to diversity and plurality, cross-cultural learning, listening carefully, humility, recognition of unconscious biases, are also highlighted in the context of lawyering.[30] But the work necessary to learn what it means to have these skills in our particular context given our particular history of dispossession, colonialism and racism, and how these skills can be acquired and practiced for reconciliation has only just begun.

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29 See Voyvodic, *supra* note 24; Victor J Friedman & Ariane Berthoin Antal, "Negotiating Reality: A Theory of Action Approach to Intercultural Competence" (2005) 36:1 Management Learning 69.

30 See Farrow, *supra* note 14; Voyvodic, *supra* note 24; Susan Bryant, "The Five Habits: Building Cross-Cultural Competence in Lawyers" (2001) 8:1 Clinical L Rev 33; *Advocates' Society Guide*, *supra* note 16.

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The empirical research I am conducting on lawyering and access to justice for Indigenous peoples in British Columbia is based on the idea that we need to better understand how lawyers who actually do the work of representing Indigenous peoples approach their work, the challenges they might face in fulfilling their obligations due to gaps in their own training or those of other legal professionals, and the strategies they develop to deal with any challenges. The resources these lawyers draw upon when they encounter legal claims or concepts unfamiliar to them, and what they learn from their everyday successes and failures can all help identify knowledge and skillset necessary for a competent lawyer. The reason careful further research is necessary is that we need to have more meaningful conversations about ethical lawyering in this specific context of reconciliation.

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B) What are we Talking about When we Talk about 'Culture'?

We live in a culturally diverse world, one in which people and ideas have been traveling for centuries. And even though it is not always easy to define 'culture', we have come to understand it generally as a set of beliefs, practices, and histories that inform our assumptions about and shape our reactions to the world around us. Culture is also understood as a source of individual and group identity.[31] Cultural identity, as any other identity, does not however represent or shape the entirety of human experience. Identities are also always contestable, even though we cannot disregard them.[32] That is because regardless of whether or not we can find any essence that lies at the core of an identity, being associated with a particular cultural identity has meaning for those who bear it, and even more significantly, these associations have consequences in terms of how others treat the bearer of a cultural identity.[33] It is therefore important to acknowledge difference. It is, however, equally important to recognize that every invocation of real or perceived difference is not in pursuit of justice. Some invocations of identity and difference are shaped by a desire

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[31] See Kwame Anthony Appiah, *Lies That Bind: Rethinking Identity, Creed, Country, Color, Class, Culture* (New York: Liveright Publishing, 2018) at 205. Appiah also presents a fascinating account of how we have come to understand culture in ways we do at 187–211.

[32] *Ibid.* For an assessment of the difference between First Nations and 'dominant' Canadian cultures, see generally LeBaron, *supra* note 21. See also Catherine Bell, "Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks: Intercultural Dispute Resolution Initiatives in Canada" in Catherine Bell and David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) at 241 for an argument for the "need to risk" generalizations of cultures and complex cultural identities.

[33] See Appiah, *supra* note 31 at 141.

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to be heard and seen. Others are driven by desires to maintain existing relations of power and systems of oppression.

In the context of cultural difference, it becomes necessary to ask what understanding of culture, and what approach to difference, informs attempts to be culturally competent professionals. We must ask whether in invoking cultural difference we are relying on, or worse, reinforcing stereotypes deployed to understand the 'other' in ways that are problematic, or whether our approach to difference acknowledges that human beings are culturally complex, and that individual and group identities are shaped by multiple social, economic, professional, and other cultures both clients and lawyers inhabit simultaneously and at different times in their lives. We cannot expect professionals to be able to work effectively with and across difference in the absence of real opportunities to engage with culture and difference in meaningful ways.

Treating cultural competence as a critical skill requires lawyers to have a deeper understanding of culture and difference and an ability to recognize the consequences of being seen as culturally different for many. It is necessary, for example, to understand how difference is deployed to justify violence.[34] It is important to be able to recognize when and how attacks on a culture are also attacks on a peoples' self-determination.[35] Taking cultural competence seriously also requires critical thinking on how knowledge, including knowledge about cultures, is produced and by whom.[36] It is therefore not simply a matter of 'cultural literacy' or learning about the others' culture as part of cultural competence training.[37] It is not enough, for example, to point out to lawyers that there is no single Indigenous culture, or that Indigenous cultures like any other culture are not static. A lawyer must also understand why any particular articulation

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34 Oppressive colonial policies were often based on articulations of difference between the civilized colonizers and savage 'natives'. The literature on difference and colonial violence is too voluminous to cite here. See e.g. Frantz Fanon, *The Wretched of the Earth,* translated by Constance Farrington (New York: Grove Press, 1963); Albert Memmi, *The Colonizer and the Colonized*, Revised ed, (New York: Routledge, 2013). For the kinds of violence visited upon Indigenous peoples in Canada, see Mills, "Rooted Constitutionalism", *supra* note 25.

35 Kirsten Anker, "Reconciliation in Translation: Indigenous Legal Traditions and Canada's Truth and Reconciliation Commission" (2016) 33:2 Windsor YB Access Just 15.

36 See Sakamoto, *supra* note 21 at 106 for her insights into ways in which members of marginalized communities who otherwise feel silenced might self-essentialize in order to be able to speak. See Gayatri C Spivak, "Can the Subaltern Speak?", revised ed, in Rosalind C Morris, ed, *Can the Subaltern Speak?: Reflections on the History of an Idea* (New York: Columbia University Press, 2010) 21; Edward Said, *Orientalism* (New York: Vintage Books, 1979).

37 Sakamoto, *supra* note 21 at 107.

of something dynamic and ever-changing by an Indigenous person matters to them in the context of the issue at hand. What is the client really saying when they invoke 'their' culture or define it in a certain way? In what ways can any narrative of culture be re-presented in a language that may not have the necessary vocabulary? I return to this point below in my discussion on the need for lawyers to be better translators but I mention it here to emphasize that any attempts at taking cultural competence training for lawyers seriously must begin with some basic inquiries as to what knowledge of 'culture' and of 'difference' legal education provides to law students, and what skills lawyers possess that allow them to recognize how societies create and deploy difference.

Taking cultural competence seriously also requires turning the gaze to the culture of the legal profession. Cross cultural competence necessitates learning that enables professionals to understand how legal culture is constituted and to what ends. It requires a professional to learn to recognize that no culture, including one they might regard as their own, is neutral or passive, and that each culture needs to be interrogated for the relationships of power it produces and maintains.[38]

It is only professionals who have the necessary knowledge, skills, and confidence to question accounts of their own culture—as well as that of the clients—that can effectively navigate the multiple normative worlds they are called upon to work with and across. For example, a lawyer who has the training to engage with the broader questions of culture and difference highlighted above will be better placed to ask what in their professional culture might prevent them from taking seriously a client's reference to a cultural practice's relevance to the legal issue at hand. Such a lawyer is also less likely to simply accept a client's account of culture out of fear of offending the client and more likely to ask meaningful follow-up questions to better understand the information provided by the client. Similarly, a judge with appropriate training and skills to navigate conversations about culture and difference will be better placed to adjudicate and respond to claims in more meaningful ways.

Having highlighted the need for a more robust understanding of culture and difference above, I now suggest that our inquiry into what we are talking about when we talk about culture be extended to include another question: what are we *not* talking about when we talk about culture? It is critical to ask whether *cultural* competency is in fact the most appropriate concept in this context of ethical lawyering or whether these words are preferred because other words such as colonialism and racism, which seem more appropriate in certain contexts, make many lawyers

38 I draw on Sakamoto (*Ibid* at 108) for this argument.

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uncomfortable. It is important to recall here that these other words, as well as specific references to human rights and the *United Nations Declaration on Rights of Indigenous Peoples*, are all mentioned in the same Calls to Action 27 and 28.

As Joyce Green notes in her paper on the Stonechild Inquiry in Saskatchewan, it is important to ask if 'cultural difference' is invoked only to avoid naming or addressing systemic racism.[39] Noting the relationship between colonialism and racism in Canada, as well as the ways in which institutional racism permeates professional cultures, Green argues that decolonization is more useful than 'cultural understanding' when the goal is systemic change.[40] Similarly, in the context of legal education, Jeffrey Hewitt has argued that Call to Action 28 requires that law schools engage in decolonization.[41] Attention to cultural competence training for legal professionals is similarly a missed opportunity if it does not include training in anti-racism and colonialism. It is for this reason that it is important to ask every time what work the words 'culture' and 'difference' are doing in each invocation within each response to the TRC.

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The call for training culturally competent lawyers must be interpreted in the context in which it is made. The TRC Report documents how ideas of racial difference influenced policies of assimilation and cultural genocide in Canada. The basis of such policies was not simply a recognition of the diversity of human experience, knowledge, and ways of being. Instead, the difference was seen as a marker of all that Indigenous peoples were seen to lack, and deployed to create hierarchies of practices, knowledges, and political and legal systems in ways that continue to shape Indigenous and non-Indigenous encounters in Canada. Thus, a lawyer who is alert to the significance of listening carefully across cultural difference may be committed to listening, without being able to really hear their client, unless they understand how racial difference works, how such ideas frame law and policy, and how colonial legacies such as the pressure to conform or assimilate permeate the present.[42]

An aspiration to be competent in this context requires attention to the ways in which law and legal processes are implicated in the past and ongoing colonial practices. Cultural competence would therefore require an ability to navigate difficult conversations about racism and colonialism.

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39 Joyce Green, "From Stonechild to Social Cohesion: Anti-Racist Challenges for Saskatchewan" (2006) 39:3 Can J Political Science 507 at 520.

40 *Ibid* at 510.

41 Jeffery G Hewitt, "Decolonizing and Indigenizing: Some Considerations for Law Schools" (2016) 33:1 Windsor YB Access Just 65.

42 For the relevance of this to the work of social workers see Abrams & Moio, *supra* note 21.

These conversations are never easy.[43] Many law students, for example, arrive in the classroom without the knowledge base and skills necessary to engage in meaningful conversations about race. Depending on course selections they make while in law school, many lawyers join the profession without having developed any skills for navigating conversations about race and racism.[44] The resultant lack of a critical skill shows in the manner in which race is eclipsed in legal narratives in Canada.[45] Therefore, before professionals are expected to engage with ideas that many of them have never had to encounter before, care and attention must go into appropriate training. Thinking about racism in the context of cultural competency will inevitably also require attention to structural racism.[46] A profession that is genuinely committed to the radical transformation necessary for bringing about real change in lawyering cannot continue to ignore this issue and the ways in which racism contributes to the processes of othering. Unless the adoption of cultural competency creates space for such critical inquiries, it will not help the profession serve Indigenous peoples any better.

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C) Individual Obligations to be Culturally Competent

Early thinking on cultural competence has emphasized individual interpersonal skill development.[47] This approach tends to focus on individuals, their ability or inability to communicate across cultural difference, and the need for training individuals, while disregarding the more difficult questions of wider systemic changes often necessary to address the complex issue of inequality at play. The rational independent self-reliant individual lies at the heart of this narrow approach to cultural competence.[48] In the individual-centric model of cultural competence, it becomes an autonomous individual's responsibility to find time and

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43 See *Ibid* at 248 suggesting that even educators might not be ready to "deal with the intense personal and interpersonal reactions that can arise" in discussions about racism or other kinds of oppression.

44 See e.g. Natasha Bakht et al, "Counting Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education" (2007) 45:4 Osgoode Hall LJ 667 for choices students make regarding 'outsider' courses like those on race.

45 See David M Tanovich, "Constitutional Cases 2007: Ignoring the Golden Principle of Charter Interpretation?" (2008) 42 SCLR (2d) 441 for eclipsing of race and see David M Tanovich, "The Further Erasure of Race in Charter Cases" (2006) 38 CR (6th) 84.

46 See Abrams & Moio, *supra* note 21 at 253 arguing that, without a critical race analysis, cultural competency is inadequate.

47 See Muaygil, *supra* note 24 at 16; Fisher-Borne et al, *supra* note 21 at 165.

48 See Mark Furlong & James Wight, "Promoting 'Critical Awareness' and Critiquing 'Cultural Competence': Towards Disrupting Received Professional Knowledges" (2011) 64:1 Australian Social Work 38. See also Amélie Blanchet Garneau, Annette J Browne & Colleen Varcoe, "Drawing on Antiracist Approaches Toward a Critical Antidiscriminatory Pedagogy for Nursing" (2018) 25:1 Nursing Inquiry e12211 at 2 for critique of longstanding dominance of liberal individualism in cultural competency.

resources to acquire cultural competency. A requirement to be culturally competent without thinking about the human and financial costs involved also makes it possible to eventually treat as incompetent those individuals who do not have the means (for financial or other reasons) to acquire these skills.

The abilities of differently situated lawyers to avail themselves of opportunities to 'become' culturally competent vary depending on what area of law they practice in, where they practice, who they practice with, and the time and resources at their disposal. Cultural competency would typically require lawyers to be more understanding and aware of any cultural differences that might hinder communication with a client. The literature speaks to the significance of professionals building meaningful relationships with clients. This inevitably requires being able to spend time with a client. What does that mean for criminal defence lawyers with the ongoing crisis in legal aid funding? What does it mean for a lawyer based in a city who has to travel for hours to meet with members of small communities she is representing? What does it mean for a lawyer representing a diverse range of Indigenous communities? What does it mean for a lawyer at a firm where partners do not think spending time with clients in order to strengthen professional relationships is a sensible use of firm resources? How might distinctions be made between billable and non-billable hours in this context? These are all questions the profession needs to consider even as members are encouraged to acquire cultural competence.

A limited focus on individuals tends to eclipse necessary broader conversations about systemic inequalities in place, as well as about professional cultures themselves. Therefore, meaningful conversations about cultural competency as an essential skill must take into account the reality of legal practice represented in the questions above and the professional culture within which individuals operate. Sole focus on individual attitudes and skill development cannot prepare a professional to recognize or challenge systemic issues in Canadian legal culture that might limit their ability and impact the lawyer-client relationship.

Simply emphasizing cultural competency without working to bring about broader changes necessary within the legal system creates conditions for a superficial check-box approach to cultural competence. There is also a risk here of losing capable and, more importantly, committed practitioners—those who may walk away from representing Indigenous clients because they consider themselves incompetent without first obtaining a certificate in cultural competence. Others might feel personally discouraged because their personal or professional environments do not

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afford them the opportunity to develop necessary skills. Such an outcome cannot be in the interest of the profession, the public, or Indigenous peoples.

D) A Turn to Cultural Competence does not Always Achieve the Stated Goals

The idea of cultural competence is relatively new within the legal profession but the concept itself is not a new one. Its roots are traced back to the American Civil Rights movement in the 1960s, even though the term itself was used for the first time in 1982 by an anthropologist in the context of child protection services.[49] Law enforcement agencies, healthcare professionals, and social workers began paying attention to cultural competency training early, while business and management professionals have turned to it more recently.[50] Each of these fields has its own reasons for adopting cultural competency and, over time, the concept itself has been defined in different ways, with each profession focusing on what they saw as the problem and the best approach to addressing it.

Despite concerns over a lack of "conceptual coherence", the concept remains popular in large part due to the fact that it is difficult to find fault with its "progressive intent".[51] Some consensus has emerged around core principles and skills across the range of disciplines that have adopted cultural competence. The same core principles, desirable skills, and intent, are reflected in the literature on cultural competence for lawyers. Thus, even though the Canadian legal profession's turn to cultural competence is a welcome development, as other professionals have discovered, intentions alone are inadequate. It is therefore important that the legal profession pay attention to critical insights from other professions.

Along with its emergence as a "professional imperative", cultural competency has also been subjected to numerous critiques.[52] The essence of critiques within social work and health professions is that mandating cultural competence does not help address structural issues. The reasons offered encompass a range of problems: the fact that cultural competence does not increase accountability, focuses on individual action and autonomy (both of professionals and clients), does not enable professionals to pursue a "transformative agenda", can lead to patronizing behaviour, and is often treated as an unproblematic add-on to professional education,

[49] See Feize & Gonzalez, *supra* note 24 at 472. Abrams & Moio, *supra* note 21 at 246.

[50] See Fisher-Borne, Cain & Martin, *supra* note 21 for mandates in fields of medicine, social work, psychology, and nursing.

[51] Furlong & Wight, *supra* note 48 at 39.

[52] See e.g. Sakamoto, *supra* note 21 at 107.

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or even worse, simply as a "slogan" or "flag of convenience".[53] One of the biggest criticisms of cultural competency is that it reinforces stereotypes. In an attempt to shed some of its early baggage, some disciplines have even sought alternative terminology like 'cultural safety', 'cultural humility', 'cultural sensitivity', 'cultural understanding', 'cultural awareness', and even 'diversity management'.[54] Each of these terms represent certain assumptions that operate within the different fields of practice. There appears to be no agreement on which term is better or what the set of otherwise desirable skills should be called.

It is not my goal to settle the debate over terminology, but rather to suggest that the debate matters and that the legal profession must take seriously the critiques that inform the various positions. Engaging with relevant critiques from other disciplines can offer insight into why cultural competency fails to bring about meaningful change even when there are genuine commitments to serve clients better. For example, critics have noted that particular models of cultural competency in social work might unintentionally eclipse the ways in which racism influences professional relationships.[55] A study on health professionals' perceptions about the medical autonomy of Saudi Arabian women in the United States illustrates the dangers of a hurried acceptance of a particular cultural narrative as a "cultural good".[56] Regardless of intentions, uncritical acceptance of accounts of any culture, and an unreflective imposition of 'presuppositions of difference' on clients, can be patronizing and could also cause harm to those who are meant to benefit from contact with a culturally competent professional, rendering the attempt to be ethical as in fact "ethically problematic".[57]

Another reason the legal profession might benefit from taking research in other fields seriously as it considers responses to the TRC Calls, is that the literature on cultural competence for lawyers has so far only focused on the need for serving a diverse range of clients generally without specific attention to Indigenous peoples. Insights from studies that have considered competence in the context of Indigenous peoples could therefore prove to be a useful resource. For example, a study on provision of healthcare services (where cultural competency is a standard requirement and expectation) shows that well-intentioned, culturally

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53 Furlong & Wight, *supra* note 48 at 39, 41. See also Sakamoto, *supra* note 21; Fisher-Borne, Cain & Martin, *supra* note 21 at 171.

54 See e.g. Fisher-Borne, Cain & Martin, *supra* note 21.

55 See Abrams & Moio, *supra* note 21.

56 Muaygil, *supra* note 24 at 25.

57 *Ibid.*

competent professionals are not able to serve the specific needs of Indigenous communities.[58]

A significant reason for the failure identified in the literature is a common misplaced belief that cultural competence can be acquired through add-on courses or skill-development workshops in the absence of broader curriculum-wide changes. Scholars point out that treating culture as a separate module, or cultural competence as a technical skill that can be learned in a short time, is an oversight.[59] A commitment to cultural competence requires fundamental changes in ways of thinking and interacting.[60] This relates to my earlier point about the importance of lawyers learning to think critically about culture and difference in ways that enable them to understand and serve Indigenous peoples better.

In view of the critique that cultural competence does not prepare professionals to recognize and challenge systemic problems that limit their ability to serve clients better, it is important to ask what, if anything, can be achieved through piecemeal attempts (such as an optional workshop or a set of guidelines for individual practitioners) in the absence of broader ongoing conversations in the profession and law schools about existing social, political, and economic inequities and ways in which law and legal processes continue to reflect or replicate colonial violence. I suggest therefore that the current initiatives, whether in the form of a workshop, course, or a published guide for lawyers, be treated primarily as opportunities for beginning critical conversations within the profession. In order to move the conversation forward, the legal profession's responses to the TRC Calls must be attentive to lessons from other disciplines that embraced cultural competency training early on, as well as to critical research that points to the need for more careful thinking about competence—especially when the goal is to make the legal system and legal services more accessible and responsive to Indigenous peoples.

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58 Patricia Johnston, *When Cultural Competence is Inadequate: An Opportunity for a New Approach to Child Welfare in Nunavut* (MSW Thesis, University of British Columbia, 2009) [unpublished] at 118: The researcher argues for a different approach, informed by the specific Indigenous community's values and beliefs, and against cultural competence as a piecemeal attempt to fix a system otherwise unsuitable to the community served.

59 Fisher-Borne, Cain & Martin, *supra* note 21. For a critique of incorporation of culture as a distinct topic in conflict resolution training, without attempts to integrate it into all aspects of skill acquisition and process design, see LeBaron, *supra* note 21.

60 Fisher-Borne, Cain & Martin, *supra* note 21 at 171.

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E) Continuing Disregard of Indigenous Laws

Conversations about cultural competence for lawyers are attentive to cultural differences between lawyers and clients but imagine a single legal world. Existing literature draws attention to cultural differences between lawyers and clients.[61] Those who call for a 'client-centred approach' to lawyering see differences between lawyer and client as those arising from class, race, gender, and cultural practices.[62] Communications between lawyers and clients are seen mainly as communications between a legal expert and a non-expert client who has a story that needs to be translated into the language of the law.[63] A culturally competent lawyer in this context would be expected to better translate the set of facts presented by clients into a legal story while paying attention to the clients' cultural or linguistic differences. This would not be an incorrect understanding of a lawyers' role generally, but it is an incomplete one in multi-juridical spaces like Canada.

What is not acknowledged in conversations on cultural competence is that an Indigenous client may be speaking a different legal language, invoking a different law, and deploying different legal categories and claims that have been rendered untranslatable through colonial violence.[64] This is the violence that is often enabled by the very law the lawyer is expected to translate an Indigenous client's claim into. A lawyer who recognizes this violence and takes reconciliation seriously will also see the encounters between lawyers and clients as encounters between different legal worlds.[65] More specifically, such a lawyer will see them as encounters between the existing legal systems in Canada: the Common law, Civil law, and Indigenous laws.

Understanding a lawyer-client encounter only as one between 'law' and 'culture' replicates colonial violence. As generations of Indigenous peoples and scholars who study Indigenous laws have repeatedly pointed

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61 See e.g. Voyvodic, *supra* note 24 at 66.

62 *Ibid*. See also Bryant, *supra* note 30; Julie Macfarlane, *The New Lawyer: How Clients are Transforming the Practice of Law,* 2d ed, (Vancouver: UBC Press, 2017).

63 See Elizabeth Mertz, *The Language of Law School: Learning to "Think Like a Lawyer"* (New York: Oxford University Press, 2007) at 112.

64 See Pooja Parmar, *Indigeneity and Legal Pluralism in India: Claims, Histories, Meanings* (Cambridge: Cambridge University Press, 2015) at 15–20 [Parmar, *Indigeneity and Legal Pluralism*].

65 *Ibid.* See The Honourable Chief Justice Lance SG Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper 2.1 prepared for the Continuing Legal Education Society of British Columbia, Vancouver, November 2012), online: *CLEBC* <www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-253.pdf> at 2.1.1 [Finch, "Duty to Learn"].

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out, Indigenous laws are alive in Canada.[66] These laws live in resilient legal traditions that have survived repeated attempts by the colonial state to erase Indigenous laws along with Indigenous cultures and languages. The continued existence of these plural legal orders makes Canada a "multi-jural nation".[67] In fact, the TRC Report urges us to recognize 'Indigenous law' as a source for reconciliation and the Calls specifically point to the importance of learning Indigenous law. Article 40 of UNDRIP also acknowledges the relationship between ensuring access to justice for Indigenous peoples and formal recognition of Indigenous law and legal systems.[68] A study by the UN Expert Mechanism on Rights of Indigenous Peoples further points to the relationship between access to justice and Indigenous law, as well as to the strengthening of Indigenous legal institutions.[69] Despite these various and longstanding national and international calls to acknowledge the existence of Indigenous laws, and despite the role Indigenous laws have played in shaping Canadian law,[70] the legal profession does not take them seriously. This disregard is reflected in the narrow understanding of cultural competence that is inattentive to the critical importance of knowledge of Indigenous laws and institutions for practitioners.

A more meaningful response to the TRC Calls 27 and 28 therefore, would be for the legal profession to turn a critical eye towards its own culture and how it treats Indigenous laws. Reconciliation in this context demands a radical rethinking of not only the dominant understanding of

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66 See e.g. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 244 [Borrows, *Canada's Indigenous Constitution*]; James (Sákéj) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 Indigenous LJ 1; Val Napoleon, "Tsilhqot'in Law of Consent" (2015) 48:3 UBC L Rev 873 [Napoleon, "Tsilhqot'in Law of Consent"]; Hadley Friedland & Val Napoleon, "Gathering The Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015–16) 1:1 Lakehead LJ 16 [Friedland & Napoleon, "Methodology"]; Sarah Morales, "'*a'lha'tham*: The Re-Transformation of s. 35 through a Coast Salish Legal Methodology" (2017) 37:2 NJCL 145 [Morales, "*a'lha'tham*"]; Anker, *supra* note 35; Darlene Johnston, "Aboriginal Traditions of Tolerance and Reparation: Introducing Canadian Colonialism" in Micheline Labelle, Rachad Antonius & Georges Leroux, eds, *Le devoir de mémoire et les politiques du pardon* (Sainte-Foy: Presses de l'Université du Québec, 2005) 141; Finch, "Duty to Learn", *supra* note 65.

67 Finch, "Duty to Learn", *supra* note 65.

68 *UNDRIP*, *supra* note 4.

69 *Access to justice in the promotion and protection of the rights of indigenous peoples,* EMRIP UNHRC, 24th Sess, Annex, Advice No 5, UN Doc A/HRC/24/50 (2013) at 23. It urges States to "consult with indigenous peoples on the best means for dialogue and cooperation between indigenous and State [justice] systems."

70 Canadian jurisprudence on Aboriginal Title as well as on treaty rights is an example of this. For a recent example of a Canadian court drawing on Indigenous laws, see *Restoule v Canada (Attorney General),* 2018 ONSC 7701, 431 DLR (4th) 32.

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the lawyer-client relationship but also that of the legal landscape. Legal professionals need to ask why *their* culture disregards Indigenous laws. Further, they need to become familiar with histories that document how colonial logics shaped the idea that some people have 'culture' while others have 'law' and created hierarchies—placing Indigenous peoples' knowledges, governance systems, economies, laws and epistemologies at the bottom of those hierarchies everywhere.

A critical examination of the legal culture would allow professionals and educators to question received knowledge about the profession and professionalism. It would, for example, enable a lawyer to ask why the appearance of the lawyer "as an authoritative knower" is often the measure of success[71] and to examine how this measure of success might specifically interfere with competent representation of Indigenous clients. It is worth considering as we think more carefully about competence how the expert/non-expert model of the lawyer/client relationship specifically defines Indigenous peoples' experience of the legal system by reinforcing colonial relations of oppression. Once again, the task is more than what an add-on, optional cultural competency component to legal training can achieve. Critically reflecting on the knowledge base of a profession opens up space for questioning assumptions about peoples, places, and things that underlie the knowledge.[72] The more important question then becomes: what do lawyers learn about Indigenous legal systems, and of the profession's obligations towards reconciliation, when they learn about law?

A competent lawyer must learn common law and/or civil law well, but a competent lawyer in the context of reconciliation in Canada would have to be reimagined as one who, while learning these legal traditions, does not inherit the unquestioned belief that these legal systems are capable of responding to all the wrongs experienced by Indigenous peoples in Canada. It is only when legal professionals begin to recognize the limits of common/civil law that they will begin to see that competence in a multi-juridical space requires that all lawyers and judges have skills that also allow them to draw on Indigenous legal traditions to address legal problems.[73] Competence requires that all legal professionals have the knowledge and

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71 Voyvodic, *supra* note 24 at 59. For an argument against this view of the lawyer, see Macfarlane, *supra* note 62.

72 Here I draw on Sakamoto, *supra* note 21 at 109–12 arguing what a cultural competency model grounded in 'anti-oppressive practice' requires. See also Furlong & Wight, *supra* note 48.

73 The joint degree JD-JID program launched at the University of Victoria Faculty of Law in Fall 2018 is designed with this in mind. See: "Joint Degree Program in Canadian Common Law and Indigenous Legal Orders JD/JID", online: *University of Victoria Law* <www.uvic.ca/law/about/indigenous/jid/index.php>. See also Karen Drake, "Finding a

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skills which allow them to understand when it is necessary to draw on Indigenous laws in order to represent or respond to an Indigenous claim.

3. Ethical Lawyering for Reconciliation

I have suggested that the TRC Calls 27 and 28 offer a unique opportunity to rethink lawyers' ethics in a multi-juridical space. I set out two ideas here that are worth considering as we think about possibilities of ethical legal practice in the context of reconciliation. These proposals are based on the premise that a meaningful response to the two TRC Calls would be to interpret them most centrally as a call to the legal profession to be more accountable to those it has not served well. The critical issue then is that of conceiving of competence in ways that centre the idea of accountability.[74] A focus on accountability leads away from models of competence that emphasize learning about others and towards one in which knowledge of, and engagement with, difference enables legal professionals to also learn about themselves individually and collectively. It also allows legal professionals to rethink competence and ethics in ways that takes the plurality of legal orders in Canada seriously.

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A) Indigenous Laws, Epistemologies and Practitioners as a Source of Ethical Practice

The continuing disregard of Indigenous laws is a missed opportunity for reconsidering ethical lawyering and professional responsibility in the context of Canada's commitment to reconciliation. As I have set out in the preceding section, a limited understanding of cultural competence makes it impossible to conceive of critical questions that need to be asked. One of those questions must be about what we can learn about lawyering from Indigenous laws and those who practice it. In his paper on legal education and Indigenous laws, John Borrows calls for attention to Indigenous epistemology in order to better teach future Indigenous legal practitioners.[75] He also explores the relevance of Anishinaabe legal principles and teachings to contemporary legal issues and to legal

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Path to Reconciliation: Mandatory Indigenous Law, Anishinaabe Pedagogy, and Academic Freedom" (2017) 95:1 Can Bar Rev 9; John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019) [Borrows, *Law's Indigenous Ethics*].

[74] See Fisher-Borne, Cain & Martin, *supra* note 21 for cultural competence for social workers centred on accountability.

[75] John Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill LJ 795 at 807. The paper is about challenges as well as opportunities offered by the possibility of teaching Indigenous laws, and while it does not speak specifically to teaching of ethics and professional responsibility, I have drawn on this work in thinking about the significance of Indigenous epistemology for ethical lawyering for all professionals in plural legal spaces.

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education broadly in Canada.[76] Val Napoleon, in her work on Indigenous laws and legal processes, has also created invaluable resources for legal practitioners.[77] Several other scholars have contributed to the creation of literature on ways to work meaningfully with different Indigenous legal systems in Canada by drawing on Indigenous epistemologies, ontologies, and legal principles, on the need for robust and ethical engagement with Indigenous legal orders, and the possibilities for respectful relations between the multiple legal traditions in Canada.[78] The Indigenous Law Research Unit at University of Victoria continues to direct energies and resources towards revival of Indigenous laws in ways that can make a real difference for communities.[79] This work of documenting and making visible laws that generations of Indigenous peoples have kept alive in their everyday practice is critical to undoing some of the colonial violence.

Building on this rich and growing body of work on Indigenous laws, I suggest that the continuing disregard of Indigenous laws impoverishes not only the development of substantive law and legal principles in Canada, but also impoverishes the practice of law. The legal profession can only be enriched by seeking out ways in which Indigenous epistemologies might inform the ethical practice of law and ideas of professionalism. Existing codes or principles of ethics are shaped by old and new stories about practices of lawyering and judging in the common and civil law traditions. Absent from these are the stories of ethics that exist within Indigenous legal traditions. More research in this area is likely to reveal stories of representation, practices of advocacy, and ethical practices of responding to claims that can help us build upon, or even rethink, obligations of lawyers and judges as recognized in existing codes of professional responsibility or principles of ethics. For example, by drawing on multiple legal traditions,

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76 Borrows, *Law's Indigenous Ethics*, *supra* note 73 offers valuable insights into what can be learnt about regulation, dispute resolution, holistic learning and so on if we take seriously the Anishinaabe understandings of concepts like 'love', 'humility', 'truth' and 'wisdom'.

77 See e.g. Val Napoleon et al, *Mikomosis and the Wetiko*: *A Teaching Guide for Youth, Community, and Post-Secondary Educators* (Victoria: Indigenous Law Research Unit at the University of Victoria, 2013); Napoleon, "Tsilhqot'in Law of Consent", *supra* note 66; Friedland & Napoleon "Methodology", *supra* note 66 at 20; Val Napoleon, "Thinking about Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism* (Dordrecht: Springer, 2013) 229.

78 See e.g. Morales, "*a'lha'tham*", *supra* note 66; Anker, *supra* note 35; Drake, *supra* note 73 at 20–21; Hadley Friedland, "Waniskā: Reimagining the Future with Indigenous Legal Traditions" (2016) 33:1 Windsor YB Access Just 85–101; Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 [Mills, "Lifeworlds"].

79 Indigenous Law Research Unit (ILRU), "Our Vision", online: *University of Victoria Law* <www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/index.php> [ILRU].

we may reconceptualise effective, competent representation, the lawyer-client relationship, conceptions of confidentiality, and even ideas of who one's client is (an issue that comes up for lawyers working with communities) in ways that enable, rather than hinder, access to justice.

In arguing that we treat Indigenous laws and epistemologies as sources for ethical lawyering, I am neither suggesting a rejection or replacement of existing common or civil law principles or the codes of conduct, nor proposing a one-sided appropriation of Indigenous principles. I am also not proposing an unquestioned uncritical acceptance of Indigenous legal principles.[80] The task, instead, is that of treating Indigenous legal principles seriously and rethinking ethical practice and professionalism by drawing on more than one legal system. This work begins with humility.[81] It must begin with recognizing the limits of traditions one is most familiar and comfortable with. Genuine commitments to reconciliation demand that legal professionals commit to unlearning colonial logics, hierarchies of legal cultures, and the disregard of particular knowledges, and approach differences with humility and respect. Instead of a cultural competence model that focuses solely on learning about the culture of particular Indigenous peoples, this alternative model would require legal professionals to consider what legal representation means within the particular Indigenous culture. It enables the professional to ask about obligations placed within that culture on a person who represents another, upon one who speaks for the other, upon one who tells the stories of another.

The kind of necessary work I am suggesting requires us to direct our energies and resources to the development of rigorous research methods, protocols, and careful thought as we seek to draw principles of ethical lawyering from multiple legal traditions. This is necessary to ensure that attempts to learn do not end up replicating colonial practices

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[80] I especially acknowledge my many conversations with Val Napoleon on this issue. Napoleon and other scholars have argued that taking Indigenous laws seriously requires development of robust methodologies and meaningful engagement with them and that includes, for example, questioning multiple interpretations of Indigenous laws, as one is expected to do while engaging with any legal tradition. See e.g. Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:4 McGill LJ 725. See also Morales, "*a'lha'tham*", *supra* note 66; Anker, *supra* note 35.

[81] For humility as an important legal principle, see Lindsay Borrows, "*Dabaadendiziwin*: Practices of Humility in a Multi-Juridical Legal Landscape" (2016) 33:1 Windsor YB Access Just 149. For need for humility, respect and receptivity in legal practitioners' individual and collective approaches to Indigenous legal systems, see Finch, "Duty to Learn", *supra* note 65 at 2.2.2.

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of appropriation.[82] Navigating multiple legal worlds is hard work, and not just in the sense of trying to figure out the rules of an unfamiliar legal system. Ideas about ethics, ethical practice, as well as professional aspirations, are grounded in cultures.[83] Figuring out ways to work with rules and aspirations that might, at times, be irreconcilable with ones we are familiar with cannot be easy. For example, ideas of zealous advocacy, civility, effective representation, and competence might differ not just between common law, civil law, and Indigenous laws, but even across different Indigenous laws. What the common law expects from a legal practitioner may not be what a particular Indigenous legal tradition might ask of her, or vice versa.

The difficulty of the task ahead, or even the potential of failure, are not however good reasons not to try if accountability lies at the heart of the profession's response to the TRC Calls. The need to take this seriously is also obvious if we recognize the reality of legal practice in Canada. The fact is, legal professionals in Canada are already being called upon to navigate multiple legal terrains. The evolution of the Canadian jurisprudence on Aboriginal title is one example of this. Lawyers working on different sides of disputes over resource development are other examples. Judges are regularly called upon to decide on claims shaped by Indigenous legal conceptions of right and wrong. Recognizing the reality of Canada as a plural legal space, and training legal professionals who can work across and with the multiple systems of law, will better prepare them and make them more competent. This is why training in Indigenous laws is necessary for all lawyers and judges, and not just for those that represent Indigenous clients.[84] I argue that this knowledge must not be confined to substantive legal principles but must also inform every legal professional's understanding of ethical practice. Considering this an issue for the profession collectively, rather than relying on individual attempts at cultural competence, will also enable the profession to develop resources and tools that help identify and respond to conflicts that are bound to arise as professionals attempt to draw on multiple legal traditions to develop ideas of professionalism and ethical lawyering.

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82 See ILRU, *supra* note 79. See also Mills, "Lifeworlds", *supra* note 78.

83 For a cautionary exploration of transnational professional ethics drawing on multiple legal systems see Andrew Boon & John Flood, "Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct" (1999) 2:1 Leg Ethics 29 at 50–56.

84 For clear and compelling arguments on the need for mandatory training in Indigenous laws for all legal actors see Drake, *supra* note 73. See also Borrows, *Canada's Indigenous Constitution, supra* note 66 at 129ff; James (Sákéj) Youngblood Henderson, "Constitutional Vision and Judicial Commitment: Aboriginal and Treaty Rights in Canada" (2010) 14:2 Australian Indigenous L Rev 24; Finch, *supra* note 65.

B) Ethical Translations

A commitment to ethical lawyering in multi-juridical spaces requires attention to the critical work lawyers do as translators and to questions of ethical translation. All lawyering involves translation (of complex, messy realities into focused narratives required by law) and all translations are necessarily incomplete and imperfect.[85] But for lawyers in plural legal societies, the task is even more challenging, as they are called upon not only to translate social realities into legal facts, but are often also required to translate claims that arise from, and are shaped by, one legal system (e.g. an Indigenous legal system) into claims that will make sense within another legal system (e.g. the common law).[86] However, legal concepts and processes are not always perfectly translatable across different legal cultures. An expert who testified at trial in the *Delgamuukw* case has noted the challenges of "translating Gitxan and Witsuwit'en concepts into a form that the court would comprehend and respect."[87] Other reflections on the trial and appeal process in this case further point to the struggle faced by the Indigenous claimants, their lawyers, and expert witnesses in presenting the claim or evidence in a manner that would make sense within the common law.[88] Kirsten Anker makes a similar argument about the "problem of translation" in the *Marshall/Bernard* decision.[89]

Cases like *Delgamuukw* and *Marshall/Bernard* offer opportunities to recognize the limits of the Canadian legal system, which demands a translation in order to address a claim. However, when lawyers and judges are not trained to recognize these limits for what they are, or look critically at their own roles as translators, they are incapable of comprehending the

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85 See, on lawyers and translation, Mertz, *supra* note 63. On justice and translation, see James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990) at 255–56, 257–58. On impossibility of translation, see Gayatri C Spivak, *Outside in the Teaching Machine* (New York: Routledge, 1993) at 196 and see generally, Jacques Derrida, *Monolingualism of the Other, or, The Prosthesis of Origin*, translated by Patrick Mensah (Stanford: Stanford University Press, 1998) at 56–57.

86 See Parmar, *Indigeneity and Legal Pluralism*, *supra* note 64.

87 Antonia Mills, "Problems of Establishing Authority in Testifying on Behalf of the Witsuwit'en" (1996) 19:2 Political & Leg Anthropology Rev 39 at 40. *Delgamuukw* v *British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193.

88 See Michael Jackson, "Forward" in Richard Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005); Michael Asch & Catherine Bell, "Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*" (1993) 19:2 Queen's LJ 503; Leslie Hall Pinder, "The Carriers of No: After the Land Claims Trial" (Speech to the BC Library Association in Vancouver, British Columbia, April 1991), (Vancouver: Lazara Press, 1991).

89 See Anker, *supra* note 35 at 27. *R v Marshall*, 2005 SCC 43, [2005] 2 SCR 220; *R v Bernard*, [2005] 2 SCR 220, 255 DLR (4th) 1.

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consequences of the untranslatability of claims. This is especially true in the context of Indigenous peoples as meanings change in the process of translation, sometimes changing the nature of the claim to such an extent that it ceases to represent the original grievance, often making any response from a court meaningless.[90] The violence of this process is evident in Canadian jurisprudence both in cases where the Indigenous claimants are successful in litigation (*Tsilhqot'in Nation*) and in those where the claimants are unsuccessful (*Ktunaxa Nation*).[91]

Lawyers and judges often push against the perceived limits of state law in pursuit of justice. In fact, a practitioner's ability to disrupt what law is comfortable with in order to further a client's interest, is often seen as a sign of successful lawyering. And yet Indigenous peoples in Canada continue to struggle with the state law's inability to offer them a just response. The inadequacy or lack of response is because the Canadian legal system and its representatives and adherents are often unable to 'hear' what the Indigenous claimant is saying. This is not because they are not making an effort to listen (although this happens too), nor because what is being said makes them uncomfortable (which too is not uncommon),[92] but primarily because the claim brought forward is unrecognizable within the common or civil legal system that lawyers and judges are familiar with. Sometimes the issue is mistranslation due to incompetence of the translator. Sometimes the state law does not have an equivalent category into which it can successfully translate the original claim.[93]

Attention to the nature of work involved when working across different legal traditions therefore reveals that access to justice for

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90 See Parmar, *Indigeneity and Legal Pluralism*, *supra* note 64 at 135, 200–07, 215.

91 See *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in Nation*], and *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations),* 2017 SCC 54, [2017] 2 SCR 386. For an assessment of *Tsilhqot'in Nation* that makes this violence visible, see Bradford W Morse, "*Tsilhqot'in Nation v. British Columbia*: Is It a Game Changer in Canadian Aboriginal Title Law and Crown-Indigenous Relations?" (2017) 2:2 Lakehead LJ 64; John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v. British Columbia*" (2015) 48:3 UBC L Rev 701 at 727ff. For the Ktunaxa Nations' unsuccessful attempts to frame their claim as a *Charter* right and the ways in which Canadian laws privilege settler religions, see Howard Kislowicz & Senwung Luk, "Recontextualizing *Ktunaxa Nation v. British Columbia*: Crown Land, History and Indigenous Religious Freedom" (2019) 88 SCLR (2d) 205.

92 See e.g. Pinder, *supra* note 88.

93 See generally Parmar, *Indigeneity and Legal Pluralism*, *supra* note 64. For incommensurability of common law with some Indigenous laws see also Aaron Mills, "What is a Treaty? On Contract and Mutual Aid" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) at 209ff.

Indigenous peoples is also an issue of translation.[94] More specifically, it is about the mistranslation of their claims, sometimes by well-intentioned lawyers and judges who may otherwise be committed to ensuring justice. It is important to understand however, that the issue of mistranslation is not only one of linguistics and cross-cultural communications as emphasized in the cultural competence approach,[95] but also of failures in conceptual translation across legal systems. The fact that a person's right to legal representation can be lost in the very process of being represented should concern those who care about access to justice for Indigenous peoples.[96]

The practice of law that is not attentive to this translational aspect of representation in multi-juridical spaces cannot be considered ethical or competent if we are committed to undoing historical wrongs and meaningful reconciliation. A commitment to enabling access to justice for Indigenous peoples requires an acknowledgement of an obligation to engage in ethical translations. When the legal system requires claims to be rendered legible in the language of the common or civil law, a meaningful response to the TRC Calls would be training lawyers to have the skills to navigate multiple legal orders and for them to strive to be better translators for Indigenous peoples. I use the word 'strive' here because I am not suggesting that awareness of their roles will allow legal professionals to translate successfully and completely across legal worlds. My intention is to suggest that a better understanding of their roles will allow lawyers to develop practices of ethical translation that can lead to more effective representation and response.

Let us, for example, consider the skill of listening carefully to a client. This is considered a critical skill in the context of all lawyering but it is particularly emphasized in cultural competence literature aimed at helping professionals overcome cultural differences between them and the client. How might we conceive of ethical practices of listening in the context of reconciliation? It is worth considering here what it might mean for a legal professional to interpret the essential skill of listening carefully as an "act of hearing-to-respond," a necessary component of ethical translation.[97] The phrase hearing-to-respond centers accountability. It is

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94 See Parmar, *Indigeneity and Legal Pluralism*, *supra* note 64 at 125–26.

95 See e.g. Diana Eades, "Legal Recognition of Cultural Differences in Communication: The Case of Robyn Kina" (1996) 16:3 Language & Communication 215 for argument that access to justice for Indigenous peoples is partly a linguistic issue.

96 See Homi Bhabha, "The Voice of the Dom: Retrieving the Experience of the Once-Colonized", *Times Literary Supplement* (8 August 1997) 14 for an account of the "once-colonized" whose very "right to representation is […] lost in the process of translation".

97 Gayatri C Spivak, "Translation as Culture" (2000) 6:1 Parallax 13 at 22 for suggestion that an ethical translation involves an "act of hearing-to-respond".

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an act of hearing grounded in a responsibility to respond to what is said. It necessarily involves an obligation to respond to what an Indigenous client is actually seeking a response to.

I suggest that listening as act of 'hearing-to-respond' calls upon lawyers and judges within the common law system to not only take note of an Indigenous claimant's inability to meet the requirement of the common law, for instance, but also to recognize when the inability is attributable to the impossibility of translation owing to the limits of the language of the common law itself. This is not a scenario where an Indigenous claim is unable to meet a neutral test set out by the common law, but rather an unequal encounter between two legal systems where the outcome is predetermined by one legal system's power to determine a test that is incapable of responding to the Indigenous person's actual claim. An ethical professional who understands this process will not simply be satisfied with translating a claim for the common law, but will also be able to see and reveal for others the violence of untranslatability. Such a professional will demand a response that takes the untranslatability into account. It is worth considering whether such legal representation is closer to the ideal of access to justice in a process centered on a claimant 'being heard' by the decision-maker.

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Conclusion

The TRC Calls to Action directed towards regulators and educators deserve serious attention and an urgent response. Even as I recognize the commitments to do things differently in the turn to cultural competence as a response to TRC Calls 27 and 28, I have argued in this paper that we have yet to understand what cultural competence means in the specific context of reconciliation in Canada. I have set out concerns about a narrow and limited conception of cultural competency and suggested that careful thought and research must precede any response. Any normative conception of cultural competence must necessarily involve a wider critical examination of the culture of the legal profession itself.

I have suggested that asking legal professionals to be culturally competent without attention to how Indigenous peoples' encounters with the legal system and its various actors are affected by systemic racism, colonial legacies, and ideas of professionalism that privilege only the practitioner's knowledge (as well as the limited knowledge base of the legal profession and the legal professionals' inability to engage meaningfully with culture and difference) are unlikely to lead to any meaningful change. I have suggested that unless the adoption of cultural competency opens up the space for critical inquiries into these larger issues, it will not have

the desired impact on Indigenous peoples' experience with the legal profession.

In order to be more accountable to Indigenous peoples, and to train professionals that can better understand, represent, and respond to Indigenous peoples, we must interpret the TRC recommendations primarily as a call to rethink legal education both in and outside of law schools. One way to begin this work is by recognizing that any training in ethics and professional responsibility is incomplete unless it includes Indigenous perspectives on competence and ethical legal practice. Piecemeal attempts where cultural competency is treated as an optional skill that can be uncritically added to the existing training programs are unlikely to serve the goal of reconciliation. I have suggested that rethinking ethical lawyering requires attention to Indigenous laws, legal practices, and epistemologies as sources of ethics and professionalism. It also requires legal representatives to recognize their role as translators across legal worlds and learn to be more effective, competent, and ethical translators.

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Cultural Competency and the Practice of Law in the 21st Century

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In an increasingly diverse society, it is quickly becoming imperative for estate planning attorneys to be culturally competent to effectively serve their evolving and diverse clients.

> "Culture is like the air we breathe— it is largely invisible and yet we are dependent on it for our very being. Culture is the logic by which we give order to the world."
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> —Raymond Carroll, *Cultural Misunderstandings: The French-American Experience* 2 (1988)

Traditionally, an estate planning attorney would help clients—usually an All-American family of a husband, a wife, and a few kids—create a plan for the future, which could include trust agreements, wills, and powers of attorney for finances and health care. As long as the attorney was fulfilling his duties, such as the duties to be competent, prompt, and diligent, he was considered to be effective counsel to his clients. In the past, attorneys could simply attend continuing legal education courses to fulfill these duties. Now, the United States is home to over 350 languages, U.S. Census Bureau, *Census Bureau Rel. No. CB 15-185*, Nov. 3, 2015, with over 13.3% of the population born outside of the United States. Sandra Colby & Jennifer Ortman, *Projections of the Size and Composition of the U.S. Population: 2014 to 2016* (Mar. 2015). The client demographic that requires estate planning services is changing quickly. In today's society, estate planning attorneys can serve same-gender couples with adopted children, couples without children, immigrant families, and other nontraditional clients. In an increasingly diverse society, it quickly is becoming imperative for estate planning attorneys to be culturally competent to effectively serve their evolving and diverse clients. This article attempts to demystify the meaning and purpose behind the concept of cultural competency and explore some ways in which attorneys can achieve it.

The Importance of Cultural Competency

Becoming culturally competent is important, not only because it is the right thing to do, but also because inevitably it will affect the attorney's business and is the mandate of the American Bar Association. ABA Center for Professional Responsibility, Model Rule of Professional Conduct (Model Rule) 1.1: Competence.

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As mentioned above, the potential client base for estate planning attorneys is becoming increasingly diverse because of new laws and Supreme Court decisions, an increase in immigration and international investments, and an evolving society, among other factors. This means that for estate planning attorneys to stay relevant and continue serving new clients effectively, cultural competency will be key.

Cultural competency also plays an important role in civility and professionalism in the legal community. As the demographic of the legal profession catches up with society, the number of attorneys of color, attorneys with disabilities, LGBT attorneys, and women attorneys will continue to increase. In 2000, only 28% of lawyers were women, and in 15 years, that percentage has increased only to a mere 35%, but it does continue to increase. In 2000, 89% of all attorneys self-identified as "White, Not Hispanic," and less than 11% of attorneys self-identified as minorities. This percentage has not increased by much, and in 2014, 12% of attorneys self-identified as minorities. American Bar Association, *Lawyer Demographics*, www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf. Although the increase in diversity within the profession is slow, it is steady. In interacting with colleagues in the profession, all attorneys will need to learn how to interact with cross-cultural colleagues to build a reputation as a respectful and culturally aware professional.

The ABA's Model Rule 1.1 addresses competence and mandates that "a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rule 1.1: Competence. Model Rule 1.3 states that "a lawyer shall act with reasonable diligence and promptness in representing a client." Model Rule 1.3: Diligence. This Model Rule is further explained in comments, which state that "a lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Id. Keeping the interests and wishes of the client in mind is especially important in estate planning, where often the true application and effect of the attorney's work becomes known after the client is deceased.

In 2008, the ABA also adopted Goal III, which aims to eliminate bias and enhance diversity. Goal III aims to "promote full and equal participation in the association, our legal profession, and the justice system by all persons and to eliminate bias in the legal profession and justice system." American Bar Association, ABA Mission and Goals, www.americanbar.org/about_the_aba/aba-mission-goals.html.

The ABA has made it clear through the Model Rules, adoption of Goal III, and other initiatives that cultural competency, by any name, is its mandate within the profession and outside of it. In addition, one of the most important reasons for attorneys to become culturally competent is because cultural competency will play an important role in the future of the profession and society.

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What Cultural Competency Means

According to the National Center for Cultural Competence (NCCC), cultural competence "embraces the principles of equal access and non-discriminatory practices in service delivery." National Centre of Cultural Competence, *Conceptual Frameworks/Models, Guiding Values and Principles*, http://nccc.georgetown.edu/foundations/frameworks.html. For legal professionals, cultural competency has been defined more specifically as "the ability to adapt, work and manage successfully in new and unfamiliar cultural settings." Sylvia Sevens, *Cultural Competency: Is There an Ethical Duty*, Oregon State Bar Bull. (Jan. 2009). Cultural competency can be

achieved by the counselor's acquisition of awareness, knowledge, and skills needed to function effectively in a pluralistic society (ability to communicate, interact, negotiate, and intervene on behalf of clients from diverse backgrounds) and on an organizational/societal level, advocating effectively to develop new theories, practices, policies, and organizational structures that are more responsive to all groups.

Annette Demers, *Cultural Competence and the Legal Profession: An Annotated Bibliography of Materials Published Between 2000 and 2011*, 39 Int'l J. Legal Info. 22, 24 (citing D.W. Sue & G.C. Torino, *Racial-Cultural Competence: Awareness, Knowledge, and Skills*, in 2 Handbook of Racial-Cultural Psychology and Counseling: Training and Practice 3, 8 (R.T. Carter ed., Wiley 2005)).

The concept of cultural competency is a broad one in its scope. The best way to understand and apply it practically is to understand the legal needs of each client as an individual. The practice of cultural competency is driven in service delivery systems by *client preferred choices*, not by culturally blind or culturally free interventions. Id. Estate planning attorneys often develop relationships with clients, and these relationships are most efficient when they recognize that estate planning is primarily service-based. This means that understanding the needs and wishes of each client, and understanding how those needs and wishes are informed by the client's culture, can help the attorney be effective.

To be mindful of a client's cultural background, it is important to be mindful of the characteristics that can define different cultures. Culture is often described as the combination of a body of knowledge, a body of belief, and a body of behavior. National Institutes of Health, *Cultural Respect*, www.nih.gov/clearcommunication/culturalcompetency.htm. Culture refers not only to the superficial features of a person, such as his appearance, but also refers to a person's personal identity, language, thoughts, communications, actions, customs, beliefs, values, and institutions, which often are specific to ethnic, racial, religious, geographic, or social groups. Id.

Although appearances and linguistic differences are clear indicators that there may be a need for heightened cultural awareness, other characteristics, such as personal identity,

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can be difficult to ascertain. One example of this is simply the way that we refer to people. If a client introduces herself using a certain name or in another specific way, keep that in mind. Be mindful of the way a client refers to herself, and if you are unsure of how to refer to her, ask instead of assuming.

In defining cultural competency and the broad scope that it covers, the foremost thing to keep in mind is to treat each client as an individual without applying cultural stereotypes.

Implicit Bias in the Profession and Practice

Any discussion of cultural competency calls for a mention of implicit bias. Implicit bias is the unintentional or unaware act of grouping persons or things into categories that can lead to discriminatory behaviors.

We naturally assign people to various social categories based on salient and chronically accessible traits, such as age, gender, race, and role. Just as we might have implicit cognitions that help us walk and drive, we have implicit social cognitions that guide our thinking about social categories. Where do these schemas come from? They come from experience with other people, some of them direct (that is, real-world encounters), but most of them vicarious (that is, relayed to us through stories, books, movies, media, and culture).

Although shorthand schemas of people can be helpful in some situations, such schemas also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities. ABA Section of Litigation Implicit Bias Initiative, *What Is Implicit or Unconscious Bias*, www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/what-is-implicit-bias.html, quoting Jerry Kang, *Implicit Bias: A Primer for Courts*, prepared for the National Campaign to Ensure Racial and Ethnic Fairness of America's State Courts (Aug. 2009), www.americanbar.org/content/dam/aba/migrated/sections/criminal justice/PublicDocuments/unit_3_kang.authcheckdam.pdf.

The danger of implicit bias lies in the lack of self-awareness because it can present itself and allow discrimination not only in situations of conflict, such as in litigation, but also in situations without conflict, such as in interactions with clients from certain backgrounds. Implicit bias can lead to a lack of effort and, sometimes, a violation of an estate planning attorney's duties of diligence and competence because she used past experience, rather than the client's individual wishes and desires, in representing the client. For an estate planning attorney, taking the test for implicit bias, called "Implicit Association Test," which is available on-line, can be a vital first step toward becoming self-aware and culturally competent.

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Practice Tips

In addition to taking the Implicit Association Test, some easy practice tips can help estate planning attorneys conduct their daily interactions with colleagues and clients in a more culturally competent way.

Appreciate Individuality and Focus on Needs

When a potential client walks in for her first meeting and the attorney begins to learn about the client, it can be tempting to find similarities with that potential client's culture or background. Sharing the one or two greetings the attorney may know in the potential client's native language, or saying that the attorney likes the food from the client's country of origin can seem like a fun and harmless way to connect, especially because, at first blush, both interactions seem like compliments. Remember, however, that each client is an individual and is more than the language they speak or the food from their country. These interactions may be appropriate once the attorney has started building a relationship, but try to connect on the basis of the client's individual needs and the reason for which she sought your counsel, rather than stereotyping her, whether positively or negatively.

One of the many reasons it is important to focus on needs, rather than background, is because certain behaviors and decisions that are taken for granted in the attorney's culture may be unacceptable in the client's culture. If a client thinks the attorney is aware of the client's culture and may judge or negatively stereotype her for straying from her culture, then the client may not feel as comfortable sharing her true needs and wishes with the attorney. Gauge the client's comfort level, and build a relationship before bringing any stereotypes into the relationship.

Value Diversity

Diversity is a catchall word for the notable characteristics in a person. Diversity has many avatars, and learning how to convey information to diverse clients can be a career-defining action. A little bit of research and understanding can go a long way. Conveying information to a client so that it is easily understood is an invaluable skill, whether conveying to someone with limited English proficiency or literacy skills, an individual with disabilities, or someone who has never before dealt with an attorney.

Similarly, valuing diversity within the legal profession is just as important. Attending diverse bar association events can be the first step in learning cultural competency in the legal profession. LGBT bar associations, ethnic bar associations, and religious bar associations are generally safe places to ask questions about diverse groups to increase cultural competency.

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Communicate

Communication is key for all attorneys, but for estate planning attorneys, it is especially important because usually clients are preparing for their death or disability, and the interactions with the practitioner can be life-altering for the clients and their families. Communication includes listening actively, assessing the client's body language, and asking questions to understand the clients' needs better. Begin by asking about the client's legal needs first, and set boundaries in conversation, along with a personable tone. Then assess each client's reaction and comfort level before asking questions that could be perceived as personal, such as country of origin, family background, education, and so on. In certain situations, such as discovery during litigation, questions about background may be inevitable. In transactional work, such as business law or estate planning, the same questions can seem irrelevant and intrusive. This can lead to distrust, especially in clients who come from backgrounds in which law enforcement and legal counsel are perceived as more intimidating than helpful, whether in another country or in a disadvantaged neighborhood.

Engaging and staying attuned to each client's boundaries and comfort level can provide a solid foundation on which to build and nurture relationships based on trust and mutual respect.

Conclusion

In an increasingly diverse society, attorneys no longer will be able to maintain competence simply by attending CLE courses. Understanding diversity and learning about cultural competency is becoming more and more important. Cultural competence is a developmental process that evolves over an extended period, which means that estate planning attorneys have the opportunity to learn and improve the way in which they interact with clients. The foundation of cultural competency is not conforming to an arbitrary standard; rather, it is recognizing the needs and individuality of each client and recognizing that each client brings a unique set of values and beliefs. It is the attorney's duty, as the client's legal counsel, to respect and act according to each client's values and beliefs.

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THE CULTURAL (RE)TURN: THE CASE FOR TEACHING CULTURALLY RESPONSIVE LAWYERING

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Recent changes to the American Bar Association's (ABA) accreditation standards require law schools to adopt learning outcomes that demonstrate competencies for legal practice and to measure progress toward this goal. Absent from the new requirements, however, is any mention of "culture." Instead, "cultural competence" is included as an optional skill, which law schools may choose to identify and measure (or not). But culture is anything but optional. In light of contributions from psychology and cognitive science, and calls from the bench and bar, law schools can no longer avoid including culture in meaningful, sustained, and integrated instruction throughout the curriculum. Building on critical legal scholarship and the movement to foster cross-cultural lawyering competencies in clinical education, this article proposes culturally responsive lawyering as a new orienting framework for legal education and for law practice. Culturally responsive lawyering specifically rejects the notion that cultural competence is an optional skill, divorced from other core competencies. Rather, culturally responsive lawyering is grounded in a deliberative process, which extends deeper than outward-facing performative skills. Culturally responsive lawyering acknowledges that culture and law exist in a mutually constitutive relationship and employs both transformative legal analysis and intercultural sensibility to meet the ethical requirements of competent lawyering. In addition to sketching a theoretical framework, this article proposes learning outcomes and curricular strategies for culturally responsive lawyering that can be interwoven into any law school course.

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INTRODUCTION

> *"[I]f y'all, this is how I feel, if y'all think I did it, I know that I didn't do it so why don't you just give me a lawyer dog cause this is not what's up."*[1]

In law school, professors train their students to analyze the law, evaluate facts, and render decisions. They teach law students that reasonable minds can differ. But, when reasonable minds differ, what should law students (or, for that matter, attorneys) do? What training and experience can they rely on to determine how the law applies to a specific set of facts, in a particular context, during a moment in time? What obligation do they have to their clients and, more broadly, to the justice system to consider not only the legal landscape—the "context"—but also the larger human contexts in which decisions are made? And what obligation, if any, do law schools have to provide every law school graduate with direct instruction and experiential learning opportunities to foster the critical mindset and skills needed to address this complex interplay?

These questions are not new. In fact, they have been thoroughly debated for decades.[2] Scholars and practitioners alike have conducted studies, drafted

1. State v. Demesme, 228 So. 3d 1206, 1206 (La. 2017).

2. *See, e.g.*, Carrie Menkel-Meadow, *Taking Law and ___ Really Seriously: Before, During and After 'The Law'*, 60 VAND. L. REV. 555, 560-80 (2007) (chronicling the history of legal education reform). For examples of scholarly critiques and reform proposals, see

reports, and made recommendations.[3] At the heart of the debate for legal education is whether law schools should teach students to "think like" lawyers or to "be" lawyers.[4] "Thinking like" lawyers has long been associated with critical thinking and abstract reasoning.[5] But legal thinking need not and should

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Sharon L. Beckman & Paul R. Tremblay, *Foreword: The Way to Carnegie*, 32 B.C. J.L. & SOC. JUST. 215, 216 (2012) (arguing that the Langdellian case method "erases the context of practice and, in doing so, fails to teach students to recognize and take account of the social, economic, and political forces constraining the choices of others"); Kimberlé W. Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1988) (calling for a critical collective pedagogy that centers minority student perspective and experiences in law school classrooms); Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 212-15 (1948) (describing the prevailing "case teaching" method and critiquing its "concentrat[ion] upon subject matter at the expense of training in craft-skills"); Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597 (2007) (arguing for the inclusion of problem-solving materials requiring students to generate alternative solutions that include legal, normative, and practical considerations).

3. *See, e.g.*, ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS (1979); ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 138-207 (1992) [hereinafter MACCRATE REPORT], https://perma.cc/R86E-KULB; ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP (2007), https://perma.cc/K59F-ZJMF; WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, TASK FORCE ON THE FUTURE OF LEGAL EDUCATION (2014), https://perma.cc/4S9N-TX3R; *see also* Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 64-71 (2009); Anthony Niedwiecki, *Law Schools and Learning Outcomes: Developing a Coherent, Cohesive, and Comprehensive Law School Curriculum*, 64 CLEV. ST. L. REV. 661, 668–71 (2016).

4. *See, e.g.*, Stephen Wizner, *What Is a Law School?*, 38 EMORY L.J. 701, 713 (1989) (arguing the goal of legal education should be "to teach students to *be* lawyers, not just to 'think like lawyers' or 'act' like lawyers"); Menkel-Meadow, *supra* note 2, at 559 (arguing there is also ambiguity in the term "a" lawyer and stating there are "too many different forms of legal practice to construct a generalizable or uniform idea of 'a' lawyer for educational purposes").

5. *See* Angela P. Harris & Marjorie M. Shultz, *"A(nother) Critique of Pure Reason": Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1777 (1992) ("The prevailing image of the law is of blindfolded Justice balancing the scales of decision. Because lack of bias or prejudice is essential to adjudication, Justice wears a blindfold to shut out persons and passions that might inappropriately influence her inward deliberation. Even where lawyers are advocates or advisors rather than adjudicators, the profession emphasizes 'thinking like a lawyer.'"); *see also* Beverly I. Moran, *Disappearing Act: The Lack of Values Training in Legal Education*: *A Case for Cultural Competency*, 38 S.U. L. REV. 1, 16-17 (2011) (discussing EDUCATING LAWYERS and stating "[s]tudents discover that thinking like a lawyer means redefining messy situations of actual or potential conflict as opportunities for advancing a client's cause through legal argument before a judge or through negotiation"); Crenshaw, *supra* note 2, at 2 (defining the dominant mode of legal academe as "perspectivelessness").

not be so limited.[6]

Warren Demesme's case makes this point loud and clear. In October 2017, grammarians, bloggers, and lawyers alike took to the internet to hash out the meaning of these words: "[i]f y'all, this is how I feel, if y'all think I did it, I know that I didn't do it so why don't you just give me a lawyer dog cause this is not what's up."[7] Mr. Demesme, a criminal defendant charged with first-degree rape and indecent behavior with a juvenile, claimed this statement was his request for an attorney.[8] The Criminal District Court for the Parish of Orleans disagreed and denied his motion to suppress.[9] Subsequently, the Supreme Court of Louisiana denied his application for a writ of certiorari review in a 6-1 decision without written opinion.[10] Likely, this decision would have faded into the archives were it not for a concurring opinion penned by Justice Crichton.[11] There, Justice Crichton concluded, "the defendant's ambiguous and equivocal reference to a 'lawyer dog' does not constitute an invocation of counsel that warrants termination of the interview . . . ."[12]

The decision and the debates that ensued illustrate the interplay between cognition, context, culture, and the law. Memes of dogs in suits flooded Twitter feeds. Angela Helm, writing for *The Root*, asserted that this decision demonstrated how "the court system does not work for black people—especially those who lack resources."[13] Jordana Rosenfeld, writing in *The*

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6. *See* Deborah N. Archer, *There Is No Santa Claus: The Challenge of Teaching the Next Generation of Civil Rights Lawyers in a "Post-Racial" Society*, 4 COLUM. J. RACE & L. 55, 56-61 (2013) (critiquing the post-racial narrative present in the typical law school curriculum and identifying it as part of dominant social and legal culture); Andrea A. Curcio et al., *A Survey Instrument to Develop, Tailor, and Help Measure Law Student Cultural Diversity Education Learning Outcomes*, 38 NOVA L. REV. 177, 180 (2014) (arguing that thinking like a lawyer requires cultural sensibility); Kathryn M. Stanchi, *Step Away from the Case Book: A Call for Balance and Integration in Law School Pedagogy*, 43 HARV. C.R.-C.L. L. REV. 611, 612-13 (2008) (explaining that "thinking like a lawyer" includes mastering doctrine, including theories related to doctrine and criticisms, and being skilled with how to use this knowledge in context); Stephen Wizner, *Is Learning to 'Think Like a Lawyer' Enough?*, 17 YALE L. & POL'Y REV. 583, 589 (1998) (suggesting that it is "possible to discourage fuzzy thinking and sentimentalism, and to teach 'abstract hypothetical-deductive critical thinking skills,' while at the same time raising and addressing moral issues and encouraging humane responses to human experience").

7. State v. Demesme, 228 So. 3d 1206, 1206 (La. 2017).

8. Petition for Supervisory Writs to Review the Trial and Appellate Courts' Denial of Mr. Demesme's Motion to Suppress Statements at 6-9, *Demesme*, 2017-0954 (La. Oct. 27, 2017) [hereinafter Petition].

9. *Id.* at 7-8.

10. *Demesme*, 228 So. 3d 1206.

11. *Id.* at 1206 (Crichton, J., concurring) (agreeing Mr. Demesme's request for an attorney was ambiguous).

12. *Id.* at 1207.

13. Angela Helm, *La. Court Rules That Man Who Said 'Give Me a Lawyer, Dog' Wasn't Asking for Counsel*, ROOT (Nov. 5, 2017), https://perma.cc/W96J-5LLK.

Nation, argued that the decision reflected the continued refusal of the U.S. legal system to acknowledge language outside of Standard American English, which results in "the unfair treatment of an individual based solely on the characteristics of their speech."[14]

The decision made its way through legal circles as well.[15] Scholars questioned whether the transcription of Mr. Demesme's quote fairly captured his intent or whether "the transcript didn't do the request justice."[16] If Mr. Demesme paused and said "dawg," then perhaps his request was clear: "why don't you just give me a lawyer, dawg."[17] Or perhaps the ambiguity wasn't in the word "dog" but in the "conditional" statement that proceeded it: "if y'all think I did it."[18] According to the State of Louisiana, Mr. Demesme never unambiguously invoked his right to counsel because his statement suggested he only wanted an attorney if the interrogating officers thought he was guilty.[19] Under this analysis, "[a] reasonable officer under the circumstances would have understood, as [the] Detective . . . did, that the defendant only *might* be invoking his right to counsel."[20] Therefore, denying his motion to suppress wasn't "obviously wrong."[21]

But does that somehow make it right? The result in Mr. Demesme's case was severe: If he invoked an attorney with those words, nothing he said after would be admissible in court. On the other hand, if those words weren't a

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14. Jordana Rosenfeld, *In the Legal System, Talking White Is a Precursor to Justice—and That's Wrong*, NATION (Jan. 29, 2018), https://perma.cc/5HNN-WHAM.

15. *See, e.g.*, Holly Howell, *Improper Grammar and Our Modern Day Vernacular Collide Raising Questions About Whether One Louisiana Man's Fifth Amendment Rights Were Violated*, AM. J. TRIAL ADVOC. (2019), https://perma.cc/ZZF6-D7TP; Norman Tabler, *The Unspeakable Comma*, 65 FED. LAW. 18, 18 (2018); Elie Mystal, *Suspect Asks for a 'Lawyer, Dog,' Willfully Ignorant Court Denies Comma, Counsel*, ABOVE THE LAW, (Oct. 30, 2017), https://perma.cc/NF6G-52GH; *see also* Orin Kerr, *The Lawyer Dog' Decision Isn't Obviously Wrong*, WASH. POST (Nov. 3, 2017), https://perma.cc/6G38-UTSH; Eugene Volokh, Opinion, *You Have the Right to Ask for a Lawyer Dog — But It Won't Do You Any Good*, WASH. POST (Oct. 31, 2017), https://perma.cc/G4JS-8Q3T. *See generally* Christopher A. Hebert, Note, *Context is King: Lawyer Dogs, Pure Applesauce, and Your* Miranda *Right to Counsel*, 92 TUL. L. REV. ONLINE 1 (2018).

16. Volokh, *supra* note 15.

17. Kerr, *supra* note 15. Hyperlinking to the definition of "dawg" on urbandictionary.com, Kerr writes, "[t]he funny part of *Demesme*, of course, is that there's a sentence in the opinion suggesting that Crichton may have misunderstood the vernacular 'dawg,' roughly meaning 'friend,' as if it meant 'dog' as in the animal." *Id.*

18. *Id.* Kerr noted that the ambiguity wasn't in the word "dog," but in the "conditional" statement that proceeded it. According to Kerr, Mr. Demesme's use of conditional phrasing ("if y'all think I did it") and his subsequent question ("so why don't you get me a lawyer") make the *Davis* test determination a close call.

19. Opposition to Defendant's Original Writ Application at 7-8, State v. Demesme, 228 So. 3d 1206 (2017) (No. 2017-0954).

20. *Id.* at 8.

21. Kerr, *supra* note 15.

request for counsel, then anything he said after could be introduced at trial and used against him. For Mr. Demesme, the exercise wasn't academic—and it certainly wasn't funny. Law, for most who experience it, is seldom either.

Legal education is partly to blame for the deft combination of willful blindness and technical parsing used to deny Mr. Demesme's writ. For too long, law schools have perpetuated the notion that lawyers and judges merely call "balls and strikes," immune from bias and subjectivity.[22] Further, first year courses—taught almost exclusively from edited appellate decisions—gloss over human context, both flattening and distorting the law's development and its interpretation by focusing on black letter law to the exclusion of most everything else.[23]

There is hope. Recent changes made to the Standards and Rules governing law school accreditation (the ABA Revised Standards)[24] finally reflect an understanding that preparing students to participate in the legal profession as effective, ethical, and responsible lawyers requires competencies that go far beyond legal knowledge. At their most basic, the ABA Revised Standards require law schools to evaluate their curricula and instructional methods and to ensure that students meet minimum knowledge, skills, and values competencies. But as Mr. Demesme's case makes clear, law schools should do more than this: They should reimagine their curricula to make certain their students are prepared to fulfill their ethical duty to "seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession."[25] Clinical and critical legal theory scholars have been making this plea for decades, yet first-year required courses have remained largely unchanged.

Building on the movement to foster cross-cultural lawyering competencies

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22. *Roberts: 'My Job Is to Call Balls and Strikes and Not to Pitch or Bat,'* CNN (Sept. 12, 2005), https://perma.cc/FAE5-PMHG; *see also* Kevin Bennardo, *Abandoning Predictions*, 16 LEGAL COMM. & RHETORIC 39, 43 (2019) (noting that judges are "all-too-human workers," who "cannot be counted on to apply legal rules to the facts in a purely mechanical manner").

23. *See* Eduardo R.C. Capulong, *Client as Subject: Humanizing the Legal Curriculum*, 23 CLIN. L. REV. 37, 39-42 (noting that students encounter "prospective clients from the perspective of institutions far removed from ordinary human existence—appellate courts"); Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1196 n.226 (2008) (stating legal reasoning "privileges technical form and levels of legal authority over social contexts and moral issues"); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1735-36 (1993) ("The arguments the students make, arrived at entirely without reference to the clients, are determined by and confined within structures of argumentation that reflect the available and acceptable categories of legal analysis.").

24. ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2017-2018, https://perma.cc/9KRG-9QNJ [hereinafter ABA STANDARDS].

25. MODEL CODE OF PROF'L RESPONSIBILITY pmbl. 6 (2015).

in clinical and experiential teaching, and harnessing reform momentum spurred by the learning outcome requirements, this Article proposes that law schools adopt a new conceptual framework—culturally responsive lawyering—to ground curricular reforms. The term "culturally responsive lawyering" is inspired by the work of education scholars who have been developing pedagogy and curricula aimed at transforming the educational experiences of students of color in the U.S.[26] Culturally responsive lawyering is not cultural competence repackaged. It is much more. Like the critical pedagogy that inspired its connection to law, culturally responsive lawyering is not a prescriptive program but a way of thinking about, interacting with, and practicing law that supports dignity, equity, and systemic transformation. To this end, the culturally responsive lawyering framework includes three tenets. Culturally responsive lawyering: (1) accepts that culture and law exist in a mutually constitutive relationship; (2) utilizes transformative legal analysis[27]—a reconceptualized approach to traditional legal analysis that specifically evaluates how culture, context, and cognition affect what the law is and encourages law students and practitioners to make normative assertions about what the law should be; and (3) employs this transformative legal analysis along with inter-cultural sensibility in the provision of legal services or when otherwise operating within the legal profession.

This Article proceeds in four parts. Prior to sketching the three tenets of culturally responsive lawyering, Part I defines "culture" and summarizes how culture and social cognition interact. It then briefly describes the inclusion of "culture work" in legal scholarship and pedagogy. Here, "culture work" refers to the various ways that culture is explored and taught in law schools. Culture work encapsulates the inclusion of culture in theoretical legal studies

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26. *See generally* GENEVA GAY, CULTURALLY RESPONSIVE TEACHING: THEORY, RESEARCH, AND PRACTICE (3d ed. 2018) (collecting works that explore the development of culturally responsive pedagogy through theory, research, scholarship, and practice); ZARETTA L. HAMMOND, CULTURALLY RESPONSIVE TEACHING AND THE BRAIN: PROMOTING AUTHENTIC ENGAGEMENT AND RIGOR AMONG CULTURALLY AND LINGUISTICALLY DIVERSE STUDENTS (2015). According to Hammond, culturally responsive teaching (CRT) "[e]mphasizes communal orientation focused on relationships, cognitive scaffolding, and critical social awareness." *Id.* at 156. Hammond approaches CRT not as a prescriptive program, but as a "way of thinking about and organizing instruction to allow for great flexibility in teaching." *Id.* at 5. To date, the term culturally responsive lawyering has not been adopted by the legal profession. *But see* Debra Chopp et al., *Arguing on the Side of Culture*, LITIG. J. (MICH.), Fall 2014, at 10-13 (describing culturally responsive professional practice as including four components: knowledge, awareness, affective or cultural sensitivity, and the integration of "professional and cultural knowledge and skills").

27. The term "transformative legal analysis" is inspired by the work of legal writing and rhetoric scholar Professor Lucy Jewel, who wrote: "The law is not just a static system of rules to be studied; rather, students and practitioners engage in a dynamic intellectual enterprise of remixing and reconstituting precedential legal texts, with the goal of forging new and transformative legal meanings." Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV. 663, 680 (2017).

scholarship and in competence, sensibility and awareness frameworks taught primarily through clinical education. Part II critiques the requirements imposed on law schools by revised ABA Standard 301, which lays out *the Program of Legal Education's Objectives*, and Standard 302, which establishes *Learning Outcomes and Minimum Competencies.*[28] It argues that although the ABA Guidance for Standard 302 includes "cultural competence" as an optional "other professional skill[]," the inclusion of "culture" here belies the powerful influence that culture has on law, law practice and legal systems, and undermines adopting culture work throughout the legal curriculum. Part III sketches out the three tenets of culturally responsive lawyering in addition to proposing learning outcomes aligned with these tenets. Part IV returns to the article's opening scene and considers how a law student or lawyer might begin to think through Mr. Demesme's case using the tenets of culturally responsive lawyering. The Article concludes by calling on law schools and their faculty to situate culture at the heart of legal education and law practice by adopting culturally responsive lawyering as a guiding framework. In addition to supporting students' ability to demonstrate the minimum competencies outlined in ABA Standard 302, the tenets of culturally responsive lawyering foster ethical practice, enhance the legal profession, and advance equity and justice.

I. WHAT'S CULTURE GOT TO DO WITH IT?

"[C]ulture is everywhere invoked and virtually nowhere explained."[29]

A. Culture Defined

Despite (or perhaps because of) the term's adoption across disciplines, a concrete definition of culture is both contested and elusive.[30] For the purposes of describing culturally responsive lawyering, this article adopts the definition proposed by Professor Naomi Mezey in "Law as Culture."[31] Culture, then, is

28. ABA STANDARDS, *supra* note 24.

29. Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 35 (2001).

30. *See* Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3, 15-16 (2001) (noting "culture" has ascended in legal scholarship while at the same time "[t]alking about culture at the start of the twenty-first century means venturing into a field where there are almost as many definitions of the term as there are discussions of it, and where arguments rage inside as well as outside the academy"); *see also* Verlyn F. Francis, *Infusing Dispute Resolution Teaching and Training with Culture & Diversity*, 33 OHIO ST. J. DISP. RESOL. 171, 180-96 (2018) (outlining what culture is not); Ascanio Piomelli, *Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L.J. 131, 134-35 (2006) (noting "[s]everal disciplines, such as cultural anthropology and sociology, are devoted in part to the task [of defining culture] and [are] deeply divided in the effort").

31. Mezey, *supra* note 29, at 42. For this definition, Professor Mezey drew from the

"any set of shared, signifying practices—practices by which meaning is produced, performed, contested or transformed."[32] While demographic markers are routinely used to define the variables that constitute culture,[33] no single characteristic or membership determines a person's culture. Each person embodies and reflects multiple cultures and each culture generates its own values, customs, and traditions.[34] Additionally, the very act of naming and categorizing constituent parts of "culture" belies its dynamism. By naming its parts, we lose sight of the role people play in defining and shaping culture.[35]

Legal culture is one such culture.[36] As with any macro-cultural

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work of Raymond Williams and William Sewell. *See id.* at 38-45 (discussing "culture").

32. *Id.* at 42-43 (proposing this definition for the term "culture" and expressly describing culture as both a semiotic system and as the practices that make, reproduce, and contest this system, and arguing that rather than a "self-contained whole made up of coherent patterns," culture is "porous" and fluid).

33. For example, narrow definitions of culture may include only ethnicity or nationality, whereas broader definitions include additional demographic variables. *See* Neil Hamilton & Jeff Maleska, *Helping Students Develop Affirmative Evidence of Cross-Cultural Competency*, 19 SCHOLAR 187, 188-89 (2017) (listing age, gender, race, ethnicity, sexual orientation, physical ability, nationality, religion, and socio-economic group, and acknowledging that sharing a category does not equate with sharing a culture or experience). *See generally* Christina A. Zawisza, *Teaching Cross-Cultural Competence to Law Students: Understanding the 'Self' as 'Other'*, 17 FLA. COASTAL L. REV. 185 (2016) (discussing results from exercises conducted with legal academics and law clinic students and adding categories such as politics, profession, geography, and generation).

34. *See* Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 41 N.Y.U. REV. L. & SOC. CHANGE 367, 368 (2017) (noting "we are each a part of several cultures, and each culture generates its own norms"); Leslie G. Espinoza, *Solidarity, Inclusion, and Representation: Tensions and Possibilities Within Contemporary Feminism*, 2 VA. J. SOC. POL'Y & L. 23, 24-27 (1994) (discussing how language reflects culture and how an individual can belong to multiple overlapping subcultures); Piomelli, *supra* note 30, at 135 (noting we each belong "to multiple cultures–some of which we choose, some to which others assign us"); Zawisza, *supra* note 33, at 194 ("Every person assumes hundreds, perhaps thousands, of culturally learned identities and affiliations at one time or another."). *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244-45 (1991) (explaining intersectional identity theory and "highlight[ing] the need to account for multiple grounds of identity when considering how the social world is constructed").

35. *See* Milton J. Bennett, The Ravages of Reification: Considering the Iceberg and Cultural Intelligence, Towards De-reifying Intercultural Competence, Keynote Presentation for the Forum for Intercultural Learning and Exchange (Sept. 28, 2013), https://perma.cc/D7YW-K779 (noting that "[w]henever we talk about culture as if it is a thing, we are neglecting our authorship of the construct").

36. *See* Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, *in* RACE, CULTURE, PSYCHOLOGY & LAW 47, 48 (Kimberly Holt Barrett & William H. George eds., 2005); *see also* James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985) (describing a lawyer's rhetorical life as always culturally situated). Legal institutions and other entities (inside and outside of law) can also have "culture." Additionally, as Naomi Mezey notes, "[l]aw can be seen as one (albeit very powerful) institutional cultural actor whose diverse agents (legislators, judges, civil servants, citizens) order and reorder meanings." Mezey, *supra* note 29, at 45.

identification, legal culture contains myriad micro-cultures. These micro-cultures can be affected by geography and practice area.[37] Law school and legal curricula also produce and affect culture because, as Professor Leslie Espinoza recognized over twenty-five years ago, "[l]aw school is where the power and possibilities of law are learned."[38]

Although an imperfect metaphor, culture is like a river.[39] Made up of water molecules, a river is "constrained by its banks but at the same time slowly carving those banks in different ways."[40] Tearing away rock and soil, a river changes slowly over time. At any given moment, whether viewed from 30,000 feet or from a perch along its bank, a river appears fairly stable.[41] So too with culture. People perceive and internalize culture through a process of assimilation to their human and natural environments.[42] Like a river, people also affect their culture(s)—altering its shape, density, and course over time.[43]

Culture, described this way, is influenced by and influences social cognition, the embedded knowledge structures in the human brain.[44] Working in the background at the subconscious level, these structures and the processes

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37. *See generally* Mary Helen McNeal, *Slow Down, People Breathing: Lawyering, Culture and Place*, 18 CLIN. L. REV. 183 (2011) (discussing how culture influences lawyering within communities of practice).

38. Leslie G. Espinoza, *Multi-Identity: Community and Culture*, 2 VA. J. SOC. POL'Y & L. 23, 28 (1994). Professor Espinoza explains that traditional law teaching exposes students to "a whole new way of thinking, of categorizing and conceptualizing information. They learn: to think of problems as issues, divorced from emotion; to think of justice in terms of economic cost-benefit analysis; to think of judging as the application of preset rules; to evaluate power; and to speak in the language that will be heard by the law." *Id.* at 30.

39. *See* Bennett, *supra* note 35 (proposing and explaining this metaphor). Various other metaphors have been employed to capture culture's essence. Susan Bryant and Jean Koh Peters, in their ground-breaking article on the Five Habits, wrote "culture is like the air we breathe—it is largely invisible and yet we are dependent on it for our very being." Susan Bryant & Jean Koh Peters, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33, 40 (2001). Prominent socialist Edward T. Hall analogized culture to an iceberg, where readily perceived physical characteristics like skin color and gender exist above the waterline and represent only a small portion of factors that comprise a society's (or a person's) culture. This metaphor has been widely adopted and critiqued. *See, e.g.*, Jayne Seminare Docherty, *Culture and Negotiation: Symmetrical Anthropology for Negotiators*, 87 MARQ. L. REV. 711, 712 (2003) (noting widespread adoption and suggesting that the model can be misleading).

40. Bennett, *supra* note 35.

41. *Id.*

42. *See* Bryant & Peters, *supra* note 36, at 48 (noting "[c]ulture is the logic through which we give meaning to the world"); Chopp, *supra* note 34, at 372 ("People learn their culture through a process of assimilation, which entails learning and internalizing group preferences, evaluations, and values.").

43. *See* Piomelli, *supra* note 30, at 135 ("One might thus analogize culture to a current that we and other members of our social group[s] move with, or against, and occasionally even redirect, as we strive to make sense of and act in the world.").

44. *See* Bennett, *supra* note 35 ("[S]eeing cultural difference is a function of employing observational categories that have been constructed by us human beings.").

through which they filter, store, and use information have a profound effect on the study and practice of law. The categories and schemas we rely on to create our realities are the same schema that influence law making and interpretation. As a result, social cognition affects how law students, lawyers, and judges understand client issues, interpret legal standards, and imagine solutions. For example, as Professor Chen and Hansen explain, legal disputes routinely come down to a question of categorization. "Is a business a partnership? Is a person a public figure? Is an employee a servant? Is a work environment hostile? Is a corporation a person? Is a fetus a human being? Is separate equal?"[45] Answering these questions competently requires that law students and legal professionals consider culture, context, and cognition. The Subpart below briefly describes social cognition and then discusses how legal scholarship and pedagogy have incorporated (or failed to incorporate) both culture and social cognition theory into legal education.

B. Social Cognition, Culture Work, and Law

During the past two decades, numerous studies in the fields of cognitive science, social psychology, and neuroscience have demonstrated that the organizing structure of the human brain sorts, interprets, and categorizes information.[46] Unbeknownst to the thinker, the brain uses schema and mapping rules to make sense of incoming information.[47] Schema work like a mental blueprint. As Professor Linda Berger explains, they "sort and organize our experiences and acquired knowledge of the world, plugging them into slots in an existing framework and allowing us to assess new situations and ideas without having to interpret and construct a diagram of inferences and relationships for the first time."[48] In short, these embedded knowledge

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45. Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1239 (2004).

46. For a review of the scientific research on social cognition, see MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE 78-87 (2013). *See also* Chen & Hanson, *supra* note 45, at 1103 (describing schemas, categories, and human cognition and exploring their role in legal scholarship and theory); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1499-1504 (2005) (describing how racial meanings, racial categories, and mapping rules create racial schemas).

47. Chen & Hanson, *supra* note 45, at 1133-35; *see also* Linda H. Edwards, *Telling Stories in the Supreme Court: Voices Briefs and the Role of Democracy in Constitutional Deliberation*, 29 YALE J.L. & FEMINISM 29, 60 (2017) ("[A] schema does its world-creating work before we become aware of the information it organizes."); Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305, 317–18 (2012) (explaining schemas and schematic thinking).

48. Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 265 (2009); *see also* Andrea A. Curcio, *Addressing*

structures influence perception, interpretation, and behavior. As a result, they impact and are impacted by culture.[49]

Although slow to apply these findings to law, legal scholars have produced a recent surge of scholarship on implicit social cognition.[50] For example, legal scholars have explored the role of implicit bias in jury selection and sentencing,[51] jury and judicial decision-making,[52] immigration proceedings,[53]

Barriers to Cultural Sensibility Learning: Lessons from Social Cognition Theory, 15 NEV. L.J. 537, 545-47 (2015).

49. *See* Lisa W. Rozas & Joshua Miller, *Discourses for Social Justice Education: The Web of Racism and the Web of Resistance*, 18 J. ETHNIC & CULTURAL DIVERSITY IN SOC. WORK 24, 28-29 (2009) ("people enter a world in which their social identity [race, ethnicity, religion, gender, sexual orientation, etc.] influences what they are taught, how they are treated, and to what information and opportunities they are exposed."); *see also* Jewel, *supra* note 23, at 663 ("Culture can produce unified categories that function as metaphorical 'code' for more implicit concepts. For example, when we use the category 'unwed mother' or 'working mother,' our mind quickly latches onto the majoritarian cultural values associated with these categories."); Wilkins, *supra* note 47, at 330 (noting that schemas change over time with cultural shifts).

50. *See, e.g.*, Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563 (2013) (discussing the potential effect of implicit bias in legal proceedings); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 799-80 (2000) (arguing that "the mental image of a prototypical case can alter legal categories); Curcio, *supra* note 48, at 552-53 (explaining confirmation bias and bias blind spot bias); Lorie M. Graham & Stephen M. McJohn, *Cognition, Law, Stories*, 10 MINN. J.L. SCI. & TECH. 255, 255-57, nn.1-16 (2008) (citing scholarship that applies cognitive science to diverse areas of law); Kang, *supra* note 46, at 1536-37 (discussing explicit bias and setting out a research agenda for exploring the nexus between law and racial mechanics); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267 (2012) (discussing fundamental attribution error); Lawrence Solan et al., *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268 (2008) (discussing impact of "false consensus bias" on contract formation and interpretation); Christine M. Venter, *The Case Against Oral Argument: The Effects of Confirmation Bias on the Outcome of Selected Cases in the Seventh Circuit Court of Appeals*, 14 LEGAL COMM. & RHETORIC: JALWD 45 (2017) (describing empirical study exploring impact of confirmation bias on oral argument).

51. *See, e.g.*, Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (discussing possible interventions to counter judge and jury bias); Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 830 (2012) (critiquing proposals to use the IAT to screen and educate jurors); Wilkins, *supra* note 47, at 311-12 (discussing effect and mitigation of implicit bias in capital sentencing); M. Eve Hanan, *Remorse Bias*, MO. L. REV. 301, 306 (2018) (explaining how cognitive biases may affect judges when deciding whether to credit remorse in sentencing decisions).

52. *See. e.g.*, Kenneth D. Chestek, *Fear and Loathing in Persuasive Writing: An Empirical Study of the Effects of the Negativity Bias*, 14 LEGAL COMM. & RHETORIC: JALWD 1, 2-3 (2017) (reporting study of negativity bias and judicial decision making); Sara Gordon, *Through the Eyes of Jurors: The Use of Schemas in the Application of Plain-Language Jury Instructions*, 64 HASTINGS L.J. 643, 646 (2013); Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 63 (2017) (discussing study of 239 judges that found greater implicit and explicit bias against Asians and Jews than Whites and Christians); Justin D.

and employment discrimination[54]—just to name a few. In response to this scholarship, numerous local bar journals have published articles calling for implicit bias and cultural competence training.[55] Additionally, law firms, The National State Judges Association, the American Bar Association, and law schools have provided trainings to familiarize law students, lawyers, and judges with implicit association.[56] Recently, courts have also begun to consider implicit bias in judicial decisions[57] and some judges now include information about implicit bias in their jury instructions.[58] Finally, lawyers seem to be acknowledging what social psychologists have long argued: "even the most

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Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 347 (2007) ("Judges and jurors may unintentionally and automatically 'misremember' facts in racially biased ways during all facets of the legal decision-making process.").

53. *See, e.g.*, Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 419 (2011) (arguing that the current structure for adjudicating immigration matters exacerbates biased decisions).

54. *See, e.g.*, Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010) (exploring bias in the workplace through raced and gendered grooming regulations); Kang et al., *supra* note 51, at 1152-69 (discussing how implicit bias might affect a federal employment discrimination lawsuit).

55. *See, e.g.*, Yasir Billoo, *Implicit Bias and Its Application in the Life of a Lawyer*, FLA. B. J., https://perma.cc/K638-6NUZ; Kenneth v. Desmond, Jr., *The Road to Race and Implicit Bias Eradication*, BOS. B.J. (2016), https://perma.cc/UD78-LCWH; Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. B.J. 40, 40 (2014); Nelson P. Miller, *Beyond Bias—Cultural Competence as a Lawyer Skill*, 87 MICH. B.J. 38, 38 (2008); Ortega et al., *supra* note 26, at 10-13.

56. Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235, 2238 (2017) (listing entities that have sponsored or offered implicit bias trainings).

57. *See id.* (discussing *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2512 (2015), and the inclusion of "unconscious prejudices and disguised animus" as a reason for holding that disparate impact claims are legally cognizable under the Fair Housing Act); *see also* United States v. Mateo-Medina, 845 F.3d 546, 553 (3d Cir. 2017) (relying on a 2013 report by the Sentencing Project that "remarked on research indicating that police are more likely to stop, and arrest, people of color due to implicit bias" and holding that the lower court's consideration of the defendant's bare arrest record when imposing his sentence was plain error). *But see* Sherri Lee Keene, *Stories that Swim Upstream: Uncovering the Influence of Stereotypes and Stock Stories in Fourth Amendment Reasonable Suspicion Analysis*, 76 MD. L. REV. 747, 752 (2017) (noting that there has been less focus on "how courts might address implicit biases that are more firmly rooted in laws and procedures").

58. *See, e,g.*, ADMIN. OFF. ILL. CTS., CIVIL JURY INSTRUCTION 1.08, https://perma.cc/7C5F-FJF2; *see also* Jennifer K. Elek & Paula Hannaford-Agor, *Can Explicit Instructions Reduce Expressions of Implicit Bias?: New Questions Following a Test of Specialized Jury Instruction*, NAT'L CTR. FOR ST. CTS. (Apr. 2014), http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/What%20We%20Do/Can%20Explicit%20Instructions%20Reduce%20Expressions%20of%20Implicit%20Bias.ashx; Marella Gayla, *A Federal Court Asks Jurors to Confront Their Hidden Biases*, MARSHALL PROJ. (Jun. 6, 2017), https://perma.cc/RJ4U-HKR5 (describing efforts by judges in the U.S. District Court of the Western District of Washington to address juror bias by showing prospective jurors a video about unconscious bias).

well-meaning person unwittingly allows unconscious thoughts and feelings to influence seemingly objective decisions."[59]

Like the scholarship on social cognition, the concept of "culture" has also become embedded in many aspects of legal scholarship in the last two decades.[60] Writing in 2011, Menachem Mautner identified no fewer than twelve approaches in legal scholarship that connect law and culture.[61] At its core, each approach struggles with identifying and explaining the relationship between law and people. Critical Race, Feminist, LatCrit, and Queer legal theory scholars have also explored this relationship and added a critique of "legal culture" as well as a call to amplify outsider voices.[62] The import of this inquiry—for legal scholarship and law practice—cannot be overstated.

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59. Mahzarin R. Banaji et al., *How (Un)ethical Are You?*, HARV. BUS. REV., Dec. 2003, at 56.

60. *See generally* Symposium, *Approaches to the Cultural Study of Law*, 13 YALE J.L. & HUMAN. 3 (2001); *see also* Annette Demers, *Cultural Competence and the Legal Profession: An Annotated Bibliography of Materials Published Between 2000 and 2011*, 39 INT'L J. LEGAL INFO. 22 (2011); Imani Perry, *Cultural Studies, Critical Race Theory and Some Reflections on Methods*, 50 VILL. L. REV. 915, 915-23 (2005) (encouraging the use of cultural studies methods to examine race, law, and power). Predating this recent scholarship, in the late 1960s, the Law and Society (or socio-legal studies) movement emerged as a multidisciplinary group of scholars who studied law and legal institutions in context. *See* Menkel-Meadow, *supra* note 2, at 569-70.

61. Menachem Mautner, *The Future of Legal Theory: Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 841 (2011). Of those twelve, Mautner described three "major" approaches in detail. The first category theorizes that law is a product of a nation's culture. *Id*. Mautner traces this approach to the codification movement and specifically to the German jurist Friedrich Carl von Savigny, who proffered that law is made from culture embedded in daily practices. *Id*. at 844-48. As a result, statutes do not create new law, but they reflect existing social practices. *Id*. at 845. Influenced by the cultural studies movement, the second category, the constitutive approach, posits that law participates in the constitution of culture. *Id*. at 841. Mautner locates the third approach in twentieth century Anglo-American jurisprudence. *Id*. Discussing Karl Llewellyn, Stanley Fish, James Boyd White, and Pierre Bourdieu, Mautner describes the third approach as one in which the law of the courts forms and operates as a distinct cultural system. *Id*. at 856-67. Under this approach, a legal culture exists, and it both structures and constrains law and the practice of law.

62. *See, e.g.*, Frank Rudy Cooper, *Understanding Depolicing: Symbiosis Theory and Critical Cultural Theory*, 71 UMKC L. REV. 355, 355-57 (2002) (merging doctrinal analysis, cultural studies, and identity theory to analyze how discourse around policing practices results in depolicing); Bridget J. Crawford et al., *Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment*, 47 U. BALT. L. REV. 167, 181-82 (2018) (explaining how the feminist judgments project bridges the gap between legal theory and practice and shows how "careful attention to issues of gender, race, sexuality, and other aspects of individual identity can be incorporated into judicial decisions while still following precedent"); Sarudzayi M. Matambanadzo et al., *Afterword: Kindling the Programmatic Production of Critical and Outsider Legal Scholarship*, 37 WHITTIER L. REV. 439 (2016) (reflecting on the evolution and development of LatCrit theory); Menkel-Meadow, *supra* note 2, at 575-76 (discussing the influence of 'outsider jurisprudence' on legal scholarship and pedagogy); Francisco Valdes, *Afterword & Prologue: Queer Legal Theory*, 83 CAL. L. REV. 344 (1995).

Whether law reflects a nation's culture or law and culture exist in a dialectic, law is not a value-free or value-neutral mechanism. Nor is law static.[63] Rather, law and culture are mutually constitutive. Together they are engaged in a symbiotic meaning-making process: law shapes social practices and social practices give rise to law.[64]

Complementing the law and cultural studies movement, rhetoric and narrative theory scholars, particularly in the Legal Writing discipline, have relied on discourse analysis to unearth law's dynamism and to critique pedagogy. For example, a rich body of scholarship investigates the interplay between culture, metaphor, narrative, and persuasion.[65] Employing communication and linguistic theory, others have investigated how legal writing pedagogy contributes to muting outsider voices.[66] Legal Writing

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63. *See* Jewel, *supra* note 27, at 679-81 (discussing how the common law is both dynamic and recursive); White, *supra* note 36, at 691 ("[T]he process of law is at once creative and educative. Those who use this language are perpetually learning what can and cannot be done with it as they try—and fail or succeed—to reach new formulations of their positions.").

64. *See* Mezey, *supra* note 29, at 46 (describing the relationship between culture and law as "dynamic, interactive, and dialectical" and asserting that "law is both a producer of culture and an object of culture"); *see also* Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and* Arvizu, 47 VILL. L. REV. 851, 861-69 (2002) (applying cultural studies and discourse analysis to explore how the drug war encodes and decodes and investigating this meaning-making relationship).

65. *See, e.g.*, Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 275 (2011) (exploring culture, metaphor, and persuasion); Bruce Ching, *Argument, Analogy, and Audience: Using Persuasive Comparisons While Avoiding Unintended Effects*, 7 J. ASS'N LEGAL WRITING DIRECTORS 311, 311-16 (2010) (discussing the connection between audience familiarity and effective analogy); Lindsay Head, *Standing (Near)by Things Decided: The Rhetorical and Cultural Identifications of Law*, 15 LEGAL COMM. & RHETORIC 189, 191 (2018) (discussing the import of rhetorical culture to law and law practice); Katie Rose Guest Pryal, *The Rhetoric of Sissy-Slogans: How Denigrating the Feminine Perpetuates the Terror Wars*, 15 J. GENDER RACE & JUST. 503, 504-08 (2012); Anne E. Ralph, *Narrative-Erasing Procedure*, 18 NEV. L.J. 573, 586 (2018) (using narrative theory to discuss master narratives as legal principles); J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, LEGAL WRITING 53, 55-56 (2008); *see also* Graham and McJohn, *supra* note 50, at 281 (suggesting that including the cognitive role of stories would broaden legal reasoning).

66. *See, e.g.*, Anthony v. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law Essay*, 121 HARV. L. REV. 805, 810-12 (2008) (discussing cultural and social difference in classrooms and client representation); Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. 577, 579 (2018) (discussing how "nondominant cultures communicate and negotiate their identity within dominant structures"); Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEGAL COMM. & RHETORIC 39, 50 (2016) (arguing that "discriminatory legal categories" can work "in favor of the dominant group but not at all for those left outside at the margins"); Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1156-59 (2008); Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 9-10

scholars have also written about the need to examine and confront bias in language and legal analysis.[67]

While critical legal scholars proposed theoretical methods of cultural inquiry and rhetoric scholars employed discourse analysis to engage law as text, across campus another movement gained traction. Spurred by funding from the Council on Legal Education for Professional Responsibility, in the 1960s, a handful of law schools created legal clinics to serve low-income clients.[68] Clinics were not quickly or universally embraced,[69] but the clinical movement steadily carved out a place in the legal academy.[70] Now, clinics can be found in nearly every ABA-accredited law school,[71] and under the Revised ABA Standards students must complete at least six credit hours of experiential learning to graduate with a law degree.[72]

Along with creating clinics, professors developed robust scholarship to

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(1998).

67. *See, e.g.*, Lorraine Bannai & Anne Enquist, *(Un)Examined Assumptions and (Un)Intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1 (2003); *see also* Elizabeth E. Berenguer, *The Color of Fear: A Cognitive-Rhetorical Analysis of How Florida's Subjective Fear Standard in Stand Your Ground Cases Ratifies Racism*, 76 MD. L. REV. 726, 727 (2017); Charles R. Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 LA RAZA L.J. 140, 160 (1995) (observing that "professors should be aware of the biases and limitations of their cultural perspectives and should carefully consider the potential merits of a fresh perspective before rejecting an invitation to explore it further"); Keene, *supra* note 57, at 751-52 (discussing role of implicit bias in judicial review of police officer decision-making); Teri A. McMurtry-Chubb, *The Practical Implications of Unexamined Assumptions: Disrupting Flawed Legal Arguments to Advance the Cause of Justice*, 58 WASHBURN L.J. 531, 560-65 (2019) (discussing findings from six-year empirical study of first-year legal writing students).

68. Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1934 (2002) (explaining that the initial goal of these newly-created legal clinics was "to get students out of the classroom into the real world of law, from which they would return to the classroom with a deeper understanding of how legal doctrine and legal theory actually work—or don't work").

69. Jane Aiken & Stephen Wizner, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 999 (2004) ("Clinicians were a different breed from their law professor counterparts. They were often housed in different spaces, not allowed to participate in faculty governance, and offered no job security. Indeed, many, if not most, clinicians had to raise funds to ensure their own job continuation.").

70. *See* Margaret Martin Berry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 16 (2000) ("While student demands for relevance in the law school curriculum and the social ferment of the 1960's played an important role in spurring the growth of clinical programs, it was the development of a clinical teaching methodology that was critical in solidifying the place of clinical legal education in the law school curriculum during the period running from the 1970's through the present.").

71. *See id.* at 30; Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 58, 77-78 (2009) (describing the substantial expansion of law school clinics).

72. ABA STANDARDS, *supra* note 24; *see also* Chopp, *supra* note 34, at 380 (noting that this requirement substantially increases the previous single credit requirement).

support clinical teaching including initial frameworks for teaching cultural competence in experiential courses. In fact, clinical professors have been arguing for decades that cultural competence is a fundamental lawyering skill.[73] This deeply influential culture work has transformed clinical education over the past two decades.[74] From Professor Michelle S. Jacobs' 1997 article critiquing clinical education's failure to address (or even mention) the challenges of providing legal assistance in cross-cultural interactions, and Professor Sue Bryant's seminal piece on *The Five Habits*, to Professor Carwina Weng's early call to teach social psychology and cognition to clinic students, clinical pedagogy has widely embraced cross-cultural lawyering as a cornerstone of clinical instruction.[75]

Although this development has not been uniform, certain concepts and pedagogical practices have become widely adopted.[76] Early scholarship, for example, focused on preparing law students to work with clinic clients whose life experiences and backgrounds were different from their own.[77] These early

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73. *See, e.g.*, Alexis Anderson et al., *Challenges of "Sameness": Pitfalls and Benefits to Assumed Connections in Lawyering*, 18 CLINICAL L. REV. 339, 343 (2012) (discussing "multicultural competence"); Susan Bryant, *The Five Habits: Building Cross-Culture Competence in Lawyers*, 8 CLINICAL L. REV. 33, 35-36 (2001); Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL'Y 133, 136 (2004); Antoinette Sedillo López, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self-Awareness, and Intercultural Communication Through Case Supervision in a Client-Service Legal Clinic*, 28 WASH. U. J.L. & POL'Y 37, 38-39 (2008); Mary A. Lynch, *An Evaluation of Ten Concerns About Using Outcomes in Legal Education*, 38 WM. MITCHELL L. REV. 976, 1004-05 (2012); Piomelli, *supra* note 30, at 133 (analyzing how clinical textbooks prepare students for cross-cultural work); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 377-78 (2002); Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 372-73 (2005).

74. Although described as two separate scholarship streams, work emanating from the critical legal studies and clinical movements share synergies. Writing in the early 1990s, Phyllis Goldfarb identified the overlap between CLS's desire to "reveal the inherent indeterminacy of the categories and values underlying legal thought" and the clinical movement's concern with "illuminat[ing] the assumptions, biases, values, and norms embedded in law's workings in order to heighten awareness of the political and moral choices made by lawyers and the legal system." Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717, 722 (1992).

75. Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U.L. REV. 345 (1997); Bryant, *supra* note 73; Weng, *supra* note 73.

76. *See generally* Piomelli, *supra* note 30 (assessing how five clinical legal textbooks published between 1997 and 2006 address cross-cultural work and highlighting the differences in content).

77. *See* Anderson et al., *supra* note 73, at 343 (noting issues of "sameness" and "the influence of interpersonal dynamics when sameness, actual or perceived, exists between lawyer and client[]" have received less attention in clinical scholarship and pedagogy).

attempts at addressing "culture" in clinical education focused largely on the client's culture and encouraged law students to "generalize and stereotype without ever questioning their own internally-held beliefs."[78] Such an approach perpetuated narratives that stigmatize individual clients and flatten their multidimensional experiences.[79] Significantly, as has happened in the medical profession, law clinic scholarship and pedagogy have moved away from this early reliance on tip sheets and pocket guides and now advocate for honing a set of tools based in self-awareness and reflective practice.[80]

Both social cognition and culture work have permeated legal scholarship, particularly over the last few decades. But in law schools, this scholarship only has a foothold in Law + courses and experiential learning.[81] Neither podium[82] nor Legal Writing courses have widely included an exploration of culture, context, or cognition in their first-year classrooms.[83] And while legal clinics

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78. Anastasia M. Boles, *Seeking Inclusion from the Inside Out: Towards a Paradigm of Culturally Proficient Legal Education*, 11 CHARLESTON L. REV. 209, 244 (2017); *see also* Curcio et al., *supra* note 6, at 184-89 (chronicling the evolution from cultural competence to cultural sensibility).

79. *See* Alfieri, *supra* note 66, at 837 (arguing that cross-cultural training focused on acquiring "certain habits of thinking, speaking, and doing understates the deep-seated dimensions of difference-based identity"); *see also* Archer, *supra* note 6 (noting students who fail to interrogate the post-racial cultural norm that law and culture operate in will fail to understand how this norm affects lawyering).

80. *See generally* Chopp, *supra* note 34, at 371-72 (discussing evolution of cultural competence training in medical schools); Angela C. Jenks, *From 'Lists of Traits' to 'Open-Mindedness': Emerging Issues in Cultural Competence Education*, 35 CULTURE, MED., PSYCHIATRY 209 (2011) (discussing the development of cultural competence training in the medical profession from an early focus on a categorial approach involving "lists of traits" and "pocket guides" to a cross-cultural approach that focused on communication and care across difference).

81. Here, "Law +" denotes courses such as "Feminism and the Law," "Race and the Law," and "Literature and the Law." *See* Bannai & Enquist, *supra* note 67, at 6; Moran, *supra* note 5, at 25 (noting "many law schools offer seminars on aspects of gender and race for interested second and third year law students"); Stanchi, *supra* note 7, at 611; *see also* Mary Lynch, *Importance of Experiential Learning for Development of Essential Skills in Cross-Cultural and Intercultural Effectiveness*, 1 J. EXPERIENTIAL LEARNING 129, 132-34 (2014).

82. I use "podium" courses to denote traditionally large, lecture-based or Socratic-method courses that focus on discrete legal topics such as Torts, Property, and Contracts. I use this term rather than "doctrinal" because both the clinical and legal writing disciplines have doctrines. Although initially scarce, there are now numerous textbooks for core first-year courses that present various theoretical critiques and invite students to apply these approaches to legal issues. *See* Moran, *supra* note 5, at 35, 35-36 n.86 (collecting sources).

83. There have been recent efforts by legal writing professors to discuss whether and how to incorporate concepts like social cognition and bias into the first year legal writing curriculum. For example, in 2017, the Association of Legal Writing Directors dedicated its biennial conference to diversity and inclusion, with the theme *Acknowledging Lines: Talking About What Unites Us and Divides Us*. *See* ASSOC. OF LEGAL WRITING DIRECTORS, *Welcome to ALWD Conference 2017!*, https://perma.cc/U8HL-2RHC. Few legal writing textbooks, however, explicitly incorporate these topics. In February 2020, Boston University School of

provide students with invaluable first-hand experiential learning opportunities through which they can navigate the interplay between law, culture, and the clients they seek to represent, clinics should not be expected to shoulder this essential work alone.[84] In part, the very focus of clinical pedagogy on client-centered lawyering may not provide sufficient exposure to the constitutive relationship between law and culture. Additionally, exploring culture merely through a theoretical lens in practical skills electives may not sufficiently connect these concepts to actual lawyering practice. Instead of the current piecemeal, often elective approach, law students should be exposed to meaningful, sustained, and integrated instruction throughout the law school curriculum. From influencing how lawyers read, interpret and apply legal rules to communicating this information to clients, community members, public representatives, and the legal community, law students should understand that culture impacts how law is made and how the profession is practiced.[85]

Part II will summarize and critique the ABA's newest accreditation changes before I move on to outline the tenets of culturally responsive lawyering.

Law convened a two-day symposium, which acknowledged that "first-year casebooks in legal education are written from a neutral perspective." *Racial Bias, Disparities and Oppression in the 1L Curriculum*, B.U. SCHOOL L., https://perma.cc/SE6Z-DNM4. This symposium brought together faculty and students to explore how to build "an inclusive, rigorous, and critical first-year legal education that empowers students to be effective legal professionals." *Id.*

84. *See* Phyllis Goldfarb, *Back to the Future of Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 279, 293 (2012) (noting that "law school clinics have been shouldering the lion's share of the pedagogical burden for developing in law students the sorely needed apprenticeships of skills and professional identity."); *see also* Menkel-Meadow, *supra* note 2, at 577-78 (acknowledging that status and legitimacy issues continue to linger in the law school faculty hierarchy); Moran, *supra* note 5, at 19 (noting "one reason why clinical courses cannot completely bridge the gap between practical and cognitive training is their placement outside the first-year curriculum"). Although outside the scope of this article, the new six-credit experiential learning requirement combined with the high cost of providing in-house clinical courses might lead law schools to expand externship opportunities rather than their clinical programs. Such a change may jeopardize the inter-cultural sensibility training that students currently receive in clinical courses.

85. *See* Bannai & Enquist, *supra* note 67, at 6 ("As professionals in a multicultural society, then, today's students are required to become 'culturally competent' . . . ."); Curcio, *supra* note 49, at 538 ("'[T]hinking like lawyers' requires that they become culturally sensible lawyers—lawyers who understand that we all have multifaceted cultural backgrounds, experiences, and biases that affect how we perceive and analyze legal problems and how we interact with clients and colleagues."); Shiv Narayan Persaud, *Is Color Blind Justice also Culturally Blind: The Cultural Blindness in Justice*, 14 BERKELEY J. AFR. AM. L. & POL'Y 23, 23-24 (2012) ("[C]ompetent representation" and "the fair dispensation of justice" requires broad-based "cultural competency training among legal service providers and practitioners."); Bonny L. Tavares, *Changing the Construct: Promoting Cross-Cultural Conversations in the Law School Classroom*, 67 J. LEGAL EDUC. 211, 227 (2018) (arguing for "includ[ing] cross-cultural awareness among the many tools they should use for effective legal analysis.").

II. FAILING CULTURE IN THE NEW REFORM AGENDA

"[A]ll lawyering is cross-cultural, yet few lawyers perceive it as such."[86]
"[W]hat we fail to instill in our law students we find lacking in our lawyers."[87]

Legal education has been in a perennial state of critique and reform for over a century, yet legal education has remained largely unchanged.[88] Straddling a "dual identity" of professional school and academic institution, law schools have attempted to strike the appropriate balance between teaching what the law is and teaching what to do with the law.[89] In addition to longstanding critiques about the gap between what law schools teach and what lawyers need to know, law schools face pressure to adapt to rapidly changing social, economic, and cultural forces.[90] In the midst of these tensions, after years of study, review, and discussion, in 2014 the ABA Council on Legal

86. Marjorie A Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219, 230 (2002).

87. Wizner, *supra* note 4, at 708.

88. *See* Goldfarb, *supra* note 84, at 290-91. This isn't to say there haven't been any changes in legal education, or that specific law schools haven't made substantive curricular change. *See* Margaret Martin Barry, *Practice Ready: Are We There Yet*, 32 B.C. J.L. & SOC. JUST. 247, 263 (2012); Menkel-Meadow, *supra* note 2 (summarizing major changes to legal education generally and discussing three specific programs). But, as Professor Menkel-Meadow notes, "[t]he only really big bang has been Langdell's. If one looked at the schoolroom, the hospital, the police station, the prison, or the business office of the nineteenth century, and then compared it to today's institutions, one would see more change in each of these than in the law school classroom." *Id.* at 579. *See also* Rakoff & Minow, *supra* note 3 (noting the formative first year of law school "remains remarkably similar to the curriculum invented at the Harvard Law School by Christopher Columbus Langdell over a century and a quarter ago. Invented, that is, not just before the Internet, but before the telephone . . . ; not just before *Brown v. Board of Education*, but before *Plessy v. Ferguson*").

89. *See* Goldfarb, *supra* note 84, at 283-84.

90. *See id.* at 279-80 (noting "changes in social, economic, and cultural forces such as the internationalization of markets, the incursion of technology, and a series of economic and global cataclysms occurring since the turn of the millennium" are causing a "seismic shift" in the legal profession); *see also* Am. Bar Ass'n, *Working Notes: Deliberations of the Committee on Research About the Future of the Legal Profession, On the Current Status of the Legal Profession Working Notes*, 13 ME. B.J. 236, 236 (2001) (noting that the legal profession is "undergoing unprecedented change"); Chopp, *supra* note 34, at 365-66, 366 n.7 (stating cultural misunderstandings are more likely to occur as the United States becomes increasingly more diverse); William D. Henderson, *A Blueprint for Change Symposium: The Lawyer of the Future*, 40 PEPP. L. REV. 461, 470-90 (2013) (discussing changing factors such as the decline in traditional legal service jobs, the proliferation of legal technology, and the globalization of legal services); Rosa Kim, *Globalizing the Law Curriculum for Twenty-First-Century Lawyering*, 67 J. LEGAL EDUC. 905, 908 (2018) (arguing that the increase in cross-border and transnational legal activity requires competencies in navigating multiple legal systems with diverse stakeholders).

Education and Admission to the Bar adopted the ABA Revised Standards.[91]

Now law schools must design their curricula to ensure that graduates "have (a) some competencies in delivering (b) some legal services" and not "just some body of knowledge."[92] In addition to requiring two writing experiences and minimum credit hours for both professionalism and experiential coursework, law schools must now adopt specific learning outcomes and assess demonstrated student competencies.[93] Although these newly expanded requirements seem fairly tame, especially for the institutions tasked with educating people who will owe ethical and fiduciary duties to others, these additions actually signal a fundamental change. Previous standards focused largely on discrete factors unrelated to whether law students could demonstrate mastery of legal knowledge or skills.[94] For example, prior to the adoption of the revised ABA Standards, the only ABA accreditation requirement arguably related to student learning was bar passage rates for law school graduates.[95] In contrast, the new standards are meant to close the yawning gap between the current educational experience provided by law schools and what students actually need to begin ethical law practice as newly minted lawyers.

Despite these seemingly sweeping changes, it remains unclear what substantive impact they will have on student learning, especially where social cognition and culture work are concerned.[96] Although there is growing

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91. The ABA Council on Legal Education and Admission to the Bar began a comprehensive review in 2008 and approved revisions in June 2014. The House of Delegates concurred in August 2014. *See generally* Am. Bar Ass'n, *Task Force on the Future of Legal Education, Report and Recommendations* (Jan. 2014).

92. *Id.* at 26.

93. ABA STANDARDS, *supra* note 24, at 16. Standard 303(a) states: "A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following: (1) one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members; (2) one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised; and (3) one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement." *Id.*

94. *See* Niedwiecki, *supra* note 3, at 671-72, 671-72 nn.65-67 (noting that previously law schools were evaluated on library size, faculty-student ratio, and the duration of a student's course of study).

95. *Id.* at 672-73. As early as 2007, two contemporaneous legal reports specifically recommended that law schools adopt outcome-based measures that would focus legal education on the proficiencies that law students would be expected to demonstrate after completing their legal studies. *See generally* STUCKEY ET AL., *supra* note 3; SULLIVAN ET AL., *supra* note 3.

96. See Boles, *supra* note 78, at 215-16 (noting that "[u]nlike other professions, the legal profession has underemphasized the dismantling of social hierarchies through cultural proficiency efforts."); Lynch, *supra* note 81, at 132-35 (critiquing the failure of legal education to incorporate cross-cultural and intercultural learning in the law school curriculum); Moran, *supra* note 5, at 33 (acknowledging that "although the legal profession contributes to developing and maintaining social structures, legal education does not

acceptance by lawyers and legal scholars of culture's impact on the law, legal systems, and legal representation, the term "culture" is conspicuously absent from the Revised Standards' text. Instead, the Managing Director's Guidance Memo on Standard 302 (Guidance Memo) includes "cultural competence" as an optional "other professional skill."[97] If the goal of legal education is to ensure law students are prepared to practice law ethically and to advance justice and equity, then including "cultural competence" as an optional "other skill" fails to be meaningful reform.

A. ABA Standards 301 and 302

Standards 301 and 302 finally embrace the "knowledge, skills, and values" paradigm articulated over twenty-five years ago in the ABA Task Force's 1992 *MacCrate Report* and then echoed fifteen years later by the Clinical Legal Education Association's report, *Best Practices for Legal Education*.[98] To this end, Standard 301, "Objectives of Program of Legal Education," reiterates that the traditional goal of a legal education is to prepare graduates for the legal profession. It states:

> (a) A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.
> (b) A law school shall establish and publish learning outcomes designed to achieve these objectives.

Standard 302, "Learning Outcomes," sets out minimum competencies for law school graduates:

> A law school shall establish learning outcomes that shall, at a minimum, include competency in the following:
> (a) Knowledge and understanding of substantive and procedural law;
> (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
> (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and
> (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.

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recognize cultural competency as a core skill").

97. *See* A.B.A. Managing Director's Guidance Memo 2 (June 2015) ("A law school may also identify any additional learning outcomes pertinent to its program of legal education.") [hereinafter ABA Guidance Memo].

98. *See* MACCRATE REPORT, *supra* note 3, at 138-41 (identifying ten "Fundamental Lawyering Skills" and four "Fundamental Values of the Profession"); *see also* STUCKEY ET AL., *supra* note 3, at 48-67 (identifying core attributes that all law school graduates should be able to demonstrate prior to admission to the profession include: self-reflection and lifelong learning skills, intellectual and analytical skills, core knowledge of the law, core understanding of the law, professional skills, and professionalism).

According to the ABA Managing Director's Guidance Memo, "[f]ocusing on outcomes should serve as a catalyst for law schools to be intentional in curriculum development."[99] To be sure, the Revised Standards do not jettison the focus of traditional legal education. As confirmed by the Guidance Memo, "the traditional legal curriculum, which purports to teach students to 'think like a lawyer,' will remain at the center of law schools' J.D. programs."[100] The Guidance Memo also makes clear that Standard 302 is not meant to create uniform legal education across the U.S.[101] While Standard 302 does require students to develop knowledge, professional skills, and values through a structured, coordinated curriculum, it largely leaves the details to each law school.[102]

Although embedding flexibility into the Revised Standards allows law schools to respond to the needs and interests of their students and to adapt as the legal landscape shifts, it also neglects some of the direct and consistent critiques of legal education. The *MacCrate Report*, followed by *Best Practices*, called for more than merely refocusing legal education to incorporate lawyering skills and values. Together, these reports argued that law schools have an obligation to instill in their students a duty to provide access to justice.[103] The

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99. ABA Guidance Memo, *supra* note 97, at 3; *see also* Niedwiecki, *supra* note 3, at 675 (distinguishing course objectives, where the focus is on what the professor intends to teach, from learning outcomes, which focus on what a student is able to do upon completion of the course).

100. ABA Guidance Memo, *supra* note 97, at 3.

101. *See id.* at 4 ("Standard 302 outlines the minimum outcomes that a law school must identify for its program of legal education. Other outcomes will vary depending upon the stated mission of a law school.").

102. *See* Andrea A. Curcio, *A Simple Low-Cost Institutional Learning-Outcomes Assessment Process*, 67 J. LEGAL EDUC. 489, 492 (2018); Niedwiecki, *supra* note 3, at 664. *But see* Roy Stuckey, *The American Bar Association's New Mandates for Teaching Professional Skills and Values: Impact, Human Resources, New Roles for Clinical Teachers, and Virtual Worlds*, 51 WAKE FOREST L. REV. 259, 261 (2016) (noting that "[t]he potential impact of the ABA mandates is also weakened by the absence of a requirement for law schools to organize their programs of instruction to help students develop their professional skills and values in a structured, coordinated curriculum"). On per-school flexibility, see ABA Guidance Memo, *supra* note 98, at 6 ("There is no one-size-fits-all set of outcomes or assessment program."). Standard 314 similarly provides law schools with wide discretion to establish formative and summative assessment methods to evaluate whether students are attaining the competency levels set forth by each law school. ABA STANDARDS, *supra* note 24, at 23 (Standard 314). ABA Standard 315, Interpretation 315-1 states "The methods used to measure the degree of student achievement of learning outcomes are likely to differ from school to school and law schools are not required by this standard to use any particular methods." *Id.* at 24.

103. *See* STUCKEY ET AL., *supra* note 3, at 19 (calling on law schools to "give more attention to educating students about the importance of providing access to justice and to instilling a commitment to provide access to justice in their students"); MACCRATE REPORT, *supra* note 3, at 140-41 (describing four "fundamental values of the profession:" as 1) provision of competent representation; 2) striving to promote justice, fairness, and morality; 3) striving to improve the profession; and 4) professional self-development); *see also* Moran,

MacCrate Report emphasized that "competent, ethical practice" requires that students possess "more than just knowledge of the applicable rules and principles of professional responsibility."[104] It specifically called on law schools to teach students about their duty to "promote justice, fairness, and morality" in their daily practice, to refrain from any type of discrimination, and to improve both the legal system and the profession.[105] Such improvement included "rationalizing the law and legal institutions" and taking corrective measures to address the legal system's deficiencies.[106] Teaching justice, promoting equity, and improving the legal profession and the judicial system require a deep and nuanced understanding of the relationship between law and culture. The Revised Standards, however, do not fully incorporate this charge and actually suggest in their framing that law students may be able to graduate without ever exploring how culture impacts the law or their role as lawyers.[107]

As a result, these current reforms also fail to keep pace with the accrediting standards of other client-facing professional schools. A quick survey of accrediting requirements for medical,[108] nursing,[109] social work,[110] and dental schools[111] reveals that each of their accrediting bodies has some formal educational requirement tied to cultural competency. For example, since 2000, the Liaison Committee on Medical Education (LCME), the accrediting body for medical education in the U.S. and Canada, has included specific standards

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supra note 5, at 23 (noting the reports are "clear on the lawyer's obligation to promote, and the law school's obligation to teach, justice").

104. MACCRATE REPORT, *supra* note 3, at 207.

105. *Id.* at 207-21 (describing four fundamental values of the profession).

106. *Id.* at 215. Quoting from the ABA's Model Rules of Professional Conduct, the MacCrate Report states that "corrective measures" include "endeavoring to change '[r]ules of law . . . [that] are not just, understandable, and responsive to the needs of society." *Id.*

107. Moran, *supra* note 5, at 23. ("[I]n the twenty-first century law school, students can (and often do) graduate without any exposure to questions of gender, race, ethnicity, or class.").

108. *See* Chopp, *supra* note 34, at 384-86 (discussing cultural competence standards and training in medical schools); *Functions and Structure of a Medical School: Standards for Accreditation of Medical Education Programs Leading to the MD Degree*, LIAISON COMMITTEE ON MEDICAL EDUCATION 11, 22 (2016), https://perma.cc/U34B-R5VS; *ACGME Common Program Requirements (Residency)*, ACCREDITATION COUNCIL FOR GRADUATE MEDICAL EDUCATION 19, 21 (2018), https://perma.cc/YYR4-N2VT.

109. *See generally* Suzan Kardong-Edgren & Josepha Campinha-Bacote, *Cultural Competency of Graduating US Bachelor of Science Nursing Students*, 28 NAT'L CTR. FOR BIOTECHNOLOGY INFO. 37 (2008).

110. *See* Chopp, *supra* note 34, at 390 (summarizing social work accreditation standards and competencies related to cultural competence); *Educational Policy and Accreditation Standards for Baccalaureate and Master's Social Work Programs*, COUNCIL ON SOCIAL WORK EDUCATION 1, 7, 14 (2015), https://perma.cc/9A8R-QB9U.

111. *See Accreditation Standards for Dental Education Programs*, COMMISSION ON DENTAL ACCREDITATION, ACCREDITATION STANDARDS FOR DENTAL EDUCATION PROGRAMS 1, 16-17, 27, 31 (2016), https://perma.cc/XL9U-PWGH.

for cultural competence.[112] LCME Standard 7.6 requires that "faculty and students must demonstrate an understanding of the manner in which people of diverse cultures and belief systems perceive health and illness and respond to various symptoms, diseases, and treatments."[113] It also calls for "medical students to learn to recognize and appropriately address gender and cultural biases in themselves, in others, and in the health care delivery process."[114]

Similarly, the Council on Social Work Education (CSWE) has established nine competencies that a social work student should be able to demonstrate upon graduation.[115] These competencies describe "the knowledge, values, skills, cognitive and affective processes, and behaviors associated with competence at the generalist level of practice."[116] Competency 2, "Engage Diversity and Difference in Practice," states:

> Social workers understand how diversity and difference characterize and shape the human experience and are critical to the formation of identity . . . . Social workers understand that, as a consequence of difference, a person's life experiences may include oppression, poverty, marginalization, and alienation as well as privilege, power, and acclaim. Social workers also understand the forms and mechanisms of oppression and discrimination and recognize the extent to which a culture's structures and values, including social, economic, political, and cultural exclusions, may oppress, marginalize, alienate, or create privilege and power.[117]

According to the CSWE, to demonstrate this competency social workers should be able to:

> apply and communicate understanding of the importance of diversity and difference in shaping life experiences in practice at the micro, mezzo, and

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112. *See Cultural Competence Education for Medical Students*, AMERICAN ASSOCIATION OF MEDICAL COLLEGES (2005), https://perma.cc/T93N-CYRB; *see generally Functions and Structure of a Medical School: Standards for Accreditation of Medical Education Programs Leading to the MD Degree*, LIAISON COMMITTEE ON MEDICAL EDUCATION (Mar. 2016).

113. *See Functions and Structure of a Medical School*, *supra* note 112, at 11. Additionally, Standard 7.6 requires that the medical curriculum include instruction in "[t]he basic principles of culturally competent health care. The recognition and development of solutions for health care disparities. The importance of meeting the health care needs of medically underserved populations. The development of core professional attributes (e.g., altruism, accountability) needed to provide effective care in a multidimensional and diverse society." *Id.*

114. *Id.* at 11. Supporting these curriculum requirements, The American Association of Medical Colleges also developed the Tool for Assessing Cultural Competence Training (TACCT), which medical schools can use to assess whether students are developing cross-cultural sensibilities. *See* Chopp, *supra* note 34, at 385; *see also* AMERICAN ASSOCIATION OF MEDICAL COLLEGES, *supra* note 114, at 4-6. The Code of Medical Ethics further reinforces the import of culture and working to counteract both explicit and implicit bias. *See* Chopp, *supra* note 34, at 393-94.

115. *See Educational Policy and Accreditation Standards*, *supra* note 110, at 1, 7-9.

116. *Id.* at 11 (Educational Policy 2.0—Generalist Practice).

117. *Id.* at 7 (Competency 2: Engage Diversity and Difference in Practice).

> macro levels; present themselves as learners and engage clients and constituencies as experts of their own experiences; and apply self-awareness and self-regulation to manage the influence of personal biases and values in working with diverse clients and constituencies.[118]

Even the National Architecture Accreditation Board requires accredited degree programs to demonstrate that graduates possess knowledge and skills relating to how culture impacts their profession.[119] Under competencies for "critical thinking and representation," graduates of accredited architecture programs should be able to demonstrate the following understanding:

> A.7 History and Global Culture: *Understanding* of the parallel and divergent histories of architecture and the cultural norms of a variety of indigenous, vernacular, local, and regional settings in terms of their political, economic, social, ecological, and technological factors.
>
> A.8 Cultural Diversity and Social Equity: *Understanding* of the diverse needs, values, behavioral norms, physical abilities, and social and spatial patterns that characterize different cultures and individuals and the responsibility of the architect to ensure equity of access to sites, buildings, and structures.[120]

Each of those professional standards and competencies require schools to demonstrate that graduates understand how culture and context affect clients and the professional/client relationship. They even go further to require that students recognize and address systemic and structural inequity.

In contrast, the ABA Revised Standards do not explicitly require that law students be able to demonstrate how culture and context impact clients and the professional/client relationship. Nor do they require law students to question, challenge, or remedy the American legal system's biased foundations.[121] Such competencies, however, are essential to legal education and to ethical law practice.[122] Neglecting to require them is particularly problematic because law, like medicine and social work, is historically and culturally situated.

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118. *Id.* In addition to these accreditation competencies, the National Association of Social Workers (NASW) adopted Standards for Cultural Competence in Social Work Practice and Indicators for the Achievement of the NASW Standards for Cultural Competence in Social Work Practice. The social work code of ethics also charges social workers with the ethical responsibility to be culturally competent. *See* *CODE OF ETHICS*, NATIONAL ASSOCIATION OF SOCIAL WORK, Standard 1.05, at 4 (Cultural Awareness and Social Diversity) https://perma.cc/CMR9-FHGB.

119. NAT'L ARCHITECTURAL ACCREDITING BD., INC., *2014 Conditions for Accreditation* 15-16 (2015), https://perma.cc/24DZ-YJT8.

120. *Id.*

121. Boles, *supra* note 78, at 221-22.

122. *See* Nora Freeman Engstrom et al., *Dear SLS Students, We Can Do Better*, STAN. DAILY (Feb. 25, 2018), https://perma.cc/4ASA-F6MY; *see also supra* note 74 (listing a number of clinical professors who argue that cultural competency is a fundamental skill).

B. The Problem with 302(d): Cultural Competence as an "Other" Professional Skill

Unlike the changes made by accrediting bodies for other professions, the ABA has neglected to account for the way that culture and social cognition impact the study and practice of law. Excluding "culture" from the Revised Standards and then including "cultural competence" as an *optional* "other skill" in the Interpretation to Standard 302 poses numerous problems. Interpretation 302-1 states:

> For the purposes of Standard 302(d), other professional skills are determined by the law school and *may include skills* such as, interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, *cultural competency*, and self-evaluation.[123]

First, by being optional, the Guidance Memo suggests that "cultural competence" is not required for competent lawyering. Even though the ABA Model Rules of Professional Responsibility do not specifically address an attorney's duty to consider social cognition or to engage in culturally competent practice,[124] lawyers, scholars, and even ABA Section groups have been calling for such an interpretation for at least a decade.[125] The preamble to the Model Rules of Professional Responsibility specifically calls on lawyers to "seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession."[126] Paragraph 6 goes on to say:

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123. ABA STANDARDS, *supra* note 24, at 16 (emphasis added).

124. *See* Chopp, *supra* note 34, at 395-96 (noting that MRPR 2.1 "is th[e] rule that comes closest to acknowledging a client's embeddedness in his/her own culture, but does not explicitly acknowledge it"). In August 2016 the ABA House of Delegates adopted changes proposed by the ABA Standing Committee on Ethics and Professional Responsibility. *Id.* at 398. The Model Rules now include a prohibition on knowingly or negligently engaging in conduct that "is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." *Id.*; MODEL RULES OF PROF. CONDUCT r. 8.4 (AM. BAR ASS'N 2016). As Chopp notes, revised Rule 8.4 represents an improvement, but it fails to acknowledge in the text or the Comments that unconscious bias plays a significant role in everyday professional interactions. Chopp, *supra* note 34, at 398.

125. *See, e.g.*, Sylvia E. Stevens, *Is There an Ethical Duty?: Cultural Competency*, 69 OR. ST. B. BULL. 9, 9-10 (2009) (arguing that Oregon RPC 1.1 should be read to include cultural competence); Chopp, *supra* note 34, at 390, 396 (stating "[i]t is clear from the rule and from the cases that have interpreted the rule that 'competence' does not include cultural or linguistic competence, nor does it include competence to recognize and address biases" and arguing for the inclusion of additional guidance in the Comment to MRPR 1.1); Aastha Madaan, *Cultural Competency and the Practice of Law in the 21st Century*, PROB. & PROP. MAG. (2018) 1-3, https://perma.cc/H54Z-E26J; BLANCA BANUELOS ET AL., EMBRACING DIVERSITY AND BEING CULTURALLY COMPETENT IS NO LONGER OPTIONAL 5-6 (2012), https://perma.cc/MM5D-Y5SQ.

126. MODEL RULES OF PROF. RESP. Preamble (AM. BAR ASS'N 2016) section 6.

> As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."[127]

In addition to the Preamble, MRPR 1.1 (Competence),[128] MRPR 1.3 (Diligence),[129] and MRPR 1.4 (Communication)[130] require attorneys to consider cultural context and social cognition in the provision of legal services.[131] Such a reading of the Model Rules of Professional Responsibility

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127. *Id.*

128. MODEL RULES OF PROF. RESP. r. 1.1 (AM. BAR ASS'N 2016). The language in MRPR 1.1 specifically acknowledges that a lawyer owes a duty of competent representation to her client, and that this requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Neither the rule nor the commentary includes any reference to culture. The most recent addition to the Commentary added a requirement that lawyers keep abreast of relevant technology, but it fails to require that lawyers consider developments in other fields, like cognitive and medical sciences, which may impact an attorney's ability to provide counsel. *Id.* But, as Andrea Curcio notes, "[i]n today's multi-cultural world, regardless of practice area, lawyers cannot accurately analyse a case without understanding the context, and they cannot understand the context if they are unaware of the cultural forces that may be in play." Andrea Curcio et al., *Educating Culturally Sensible Lawyers: A Study of Student Attitudes About the Role Culture Plays in the Lawyering Process*, 16 U. W. SYDNEY L. REV. 98, 103 (2012).

129. MODEL RULES OF PROF. RESP. r. 1.3 (AM. BAR ASS'N 2016). MRPR 1.3 states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." *Id.* Comment 1 to MRPR 1.3 explains in part that "[a] lawyer must [] act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MODEL RULES OF PROF. RESP. r. 1.3 cmt. 1 (AM. BAR ASS'N 2015).

130. MODEL RULES OF PROF. RESP. r. 1.4 (AM. BAR ASS'N 2016). MRPR 1.4 regulates when a lawyer must communicate with a client. As Professor Debra Chopp notes, the rule and the comments to it "are centered on the lawyer's perspective—they dictate when a lawyer must provide details about trial strategy or proposals made during negotiation. They address client comprehension only in the situation of a client who is a minor or has a disability." Chopp, *supra* note 34, at 393. She argues that failing to account for the client perspective and how culture impacts trust building and communication is a "significant defect." *Id.* at 394. *See also* Curcio et al., *supra* note 128, at 102 ("Because culture affects verbal and non-verbal communication . . . lack of cultural sensibility skills make it more difficult for lawyers to effectively interview, counsel, negotiate, strategise, or resolve conflicts."); Nelson P. Miller et al., *Equality as Talisman: Getting Beyond Bias to Cultural Competence as a Professional Skill*, 25 T. M. COOLEY L. REV. 99, 115 (2008) (discussing "communication" as one of five main categories for cultural competency).

131. *See* BANUELOS ET AL., *supra* note 125, at 5-6; Hamilton & Maleska, *supra* note 33, at 189 ("For a lawyer to truly provide competent representation to his or her clients, the lawyer must not only understand the law, but also understand the culture of: (1) the client; (2) the groups with whom the lawyer works to advance the client's interests; and (3) the adversaries and decision-makers whom the lawyer seeks to influence."); *see also* Moran, *supra* note 6, at 26-31 (describing the *MacCrate Report* and *Educating Lawyers* and their call for law schools to include values education and the eradication of bias as part of ethical training).

makes culture's absence from the ABA's Revised Standards (and many law school classrooms) that much more stark.

And, if legal education's past reform pace is prologue, law schools will make the fewest changes possible to comply with the new accreditation standards. This trend is already apparent. While some law schools have adopted cultural competence as a learning outcome, many have adopted learning outcomes that do not explicitly require consideration of culture or any facility with intercultural law practice. The Holloran Center for Ethical Leadership in the Professions has compiled a database of learning outcomes published by law schools.[132] As of its last update in June 2019, the Holloran Center had analyzed the learning outcomes from 177 law schools. Of these, it identified only 46 law schools that had included some form of cultural competency as a learning outcome.[133] Even within those listed under "Cultural Competence," the learning outcomes vary wildly. For example, Penn State Dickinson requires under "Professional Values" that each graduating student will understand "the important role that cultural competency serves in a lawyer's ability to deliver competent legal services to clients."[134] The University of Washington School of Law expects law graduates to work collaboratively with others, which includes "[u]nderstand[ing] and appreciat[ing] the diverse backgrounds and perspectives of clients, colleagues, adversaries, and others."[135] University of Minnesota

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132. *See, e.g.*, *Holloran Center Learning Outcomes Database*, U. ST. THOMAS, https://perma.cc/P6LY-RUSN (cataloging law schools' published learning outcomes and identifying those that have identified cultural competence).

133. While useful for thinking about how law schools are fulfilling the ABA requirement to adopt and publish learning outcomes, the Holloran Center website does not contain clear guidance on the criteria used for the identifying whether a learning outcome should be placed in the sub-category for "Cultural Competence." *See id.* For example, both Northeastern University School Law (NUSL) and Stanford Law School are not included in the "Cultural Competence" database, but both schools specifically include "culture" in their learning outcomes. For example NUSL's commitment to the ideals of culturally responsive lawyering is evident from both its published core values, which acknowledge that "social and cultural awareness [] are essential to serving clients and pursuing social justice" and from its learning outcomes that require students to "understand law in its social context." *History and Mission*, NORTHEASTERN UNIV. SCHOOL OF LAW, https://perma.cc/EKT8-EBT9. Stanford Law School includes "cultural competency" in its Learning Outcome 7 as "other professional skills." In addition, while not specifically mentioning "culture," Learning Outcome 2 requires that students "Demonstrate facility with legal analysis and reasoning. This may include, but will not necessarily include, a combination of skills such as synthesizing cases, identifying and applying relevant principles, and mastering modes of inquiry (whether scientific, social scientific, or humanistic) that inform and contextualize legal analysis and reasoning." *Student Handbook 2018-2019*, STANFORD LAW SCHOOL, https://perma.cc/HP2P-7J7E.

134. *Learning Outcomes*, PENN STATE DICKINSON LAW, https://perma.cc/8ZGE-AVB3.

135. *Student Learning Outcomes*, UNIV. OF WASHINGTON SCHOOL OF LAW, https://perma.cc/Z337-GGC7. Although not identified by the Holloran Center as a "Cultural Competence" learning outcome, arguably all of Learning Outcome 6 could fit under this umbrella. That learning outcome states that law graduates of the University of Washington

School of Law expects their graduates to be able to "(4) collaborate, including the ability to . . . (ii) Respect diverse views and perspectives and work effectively across difference."[136]

In part, this variety may be a result of the Revised Standards' requirement that law schools not only identify learning outcomes, but that they also assess whether their students are meeting the standards. Faculties and Learning Outcomes Committee members struggle to find consensus on competencies like "legal analysis" that have been core to legal education for over a hundred years. "Cultural competence" is perhaps even more difficult.[137] As a concept, "cultural competence" has been described as "amorphous," "nebulous," and even "tautolog[ical]."[138] The term "competence" as it relates to "culture" has additional issues. In learning theory, "competence" illustrates a process of mastery.[139] And while some scholars have mapped the development of self-reflection and cross-cultural intrapersonal skills onto the stages of competence,[140] "culture" cannot be mastered. Where culture is concerned, seeking mastery is particularly dangerous because such an approach has often led to acquiring knowledge of the "other" and prioritizing specific performative dos and don'ts.

Second, in a framework setting out three competence spheres (knowledge, skills, and values), identifying "cultural competence" as an "*other* professional skill" ignores the complex relationship between culture, law, and competent lawyering. It suggests, among other things, that law and its participants operate outside of "culture."[141] For example, law schools could identify "cultural

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School of law should be able to: "Situate issues in their extra-legal context. This includes the ability to: 1) Understand the law from diverse and global perspectives; 2) Recognize the political, social, and economic forces that shape various areas of the law; and 3) Consider not only the likelihood of an argument or strategy's legal success, but also the moral, economic, social, political, and other factors implicated by the argument or strategy."

136. *Learning Outcomes for the JD Program*, UNIV. OF MINNESOTA LAW SCHOOL, https://perma.cc/P3HM-XMV2.

137. *See* Lynch, *supra* note 81, at 134 (noting that "law schools have not yet addressed intercultural learning in *systematic* ways nor *prioritized* its importance in pre-professional legal education").

138. Casey Schutte, *Mandating Cultural Competence Training for Dependency Attorneys*, 52 FAM. CT. REV. 564, 567 (2014).

139. Curcio et al., *supra* note 128, at 100.

140. *See* Boles, *supra* note 78, at 248-57 (discussing the cultural continuum utilized by Dr. Kikanza Nuri-Robins). Additionally, a number of assessments have been developed for industry and educational use. For example, the Intercultural Development Inventory (IDI) is a 50-item questionnaire that "assesses intercultural competence—the capability to shift cultural perspective and appropriately adapt behavior to cultural differences and commonalities." *See* IDI, *The Roadmap to Intercultural Competence Using the IDI*, https://perma.cc/SUU9-UPJF.

141. *See* Jane H. Aiken, *Provocateurs for Justice Papers Presented at the Rutgers-Newark Law School Conference on the Social Justice Mission of Clinical Education*, 7 CLIN. L. REV. 287, 290 (2001) ("The law does not exist 'out there' to be found; rather it is a

competence" but treat it as a performative skill, confining it to courses specifically designated as "skills" or "experiential."[142] Even if exposed to "cultural competence" in a law school clinic or other "skills" course, law students may only see "culture" as related to individualized client representation. Such a perspective risks limiting law students' understanding of the ways that culture infiltrates and creates human interaction and understanding and the impact it has on law, legal decision makers, and legal institutions. It also reifies a false theory/practice divide.[143] This divide belies what any practicing attorney knows: competent lawyering requires a holistic approach in which these spheres intermingle and reinforce one another. Additionally, many law school courses that focus on the "skills" and "values" spheres—like Legal Writing and in-house legal clinics—are taught by faculty with less status, rights, and remuneration than those who teach courses focused primarily on the "knowledge" sphere.[144] Such hierarchies impede the type of imagination and collaboration necessary for durable, institution-wide reform.

Finally, to thrive in practice, law students' socialization to the legal profession should enhance, not undermine, their ability to understand how culture impacts the law and the lawyering process.[145] But current legal training, particularly in the critical first-year curriculum, does not prepare future lawyers to understand or mitigate the effects of implicit social cognition and other cognitive processes on legal analysis, decision-making, and client representation.[146] Nor does it prepare law students to navigate the myriad ways that culture affects lawyering. If it did, then law schools could continue to

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reflection of a complex interplay of information, experience, and value choice.").

142. Moran, *supra* note 5, at 19-20.

143. *See generally* Harold Anthony Lloyd, *Exercising Common Sense, Exorcising Langdell: The Inseparability of Legal Theory, Practice, and the Humanities*, 49 WAKE FOREST L. REV. 1213 (2014) (criticizing the existence of a theory/practice divide in legal education as impossible factually and semantically); Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education Symposium: Clinical Education*, 34 UCLA L. REV. 577, 577 (1986) (critiquing the division of traditional legal education "into the theoretical and the practical: the main tent and the sideshow"); Goldfarb, *supra* note 85, at 285-86 (explaining "[a]nalysis, synthesis, reasoning, and application to new situations of the legal doctrine that emerges from judicial opinions are fundamental lawyering skills, which are at once both intellectual and practical endeavors."); Lynch, *supra* note 81, at 988 (arguing "[t]he claim of a dichotomy, that 'theory' is somehow in opposition to, or unrelated to, 'practice,' should no longer have a place in serious discussion of legal education."); *see also* Curcio et al., *supra* note 6, at 193-94 (noting that the knowledge-attitudes-skills framework is used by many disciplines to develop student learning outcomes but there is invariably overlap in these spheres).

144. *See* Lynch, *supra* note 81, at 988.

145. Miller et al., *supra* note 130, at 112-13 (arguing cultural competencies can, and should be, taught by integrating "cultural-competency work" into the law school curriculum).

146. Curcio, *supra* note 48, at 552 (noting that "[l]egal training in rational and analytical thinking does not immunize one from having and acting upon biases").

replicate their current curricula with the confidence that newly-minted lawyers could operate bias-free, or minimally bias-aware, and culturally proficient.

A recent survey of law students by Andrea A. Curcio, Teresa E. Ward & Nisha Dogra, however, demonstrates the opposite.[147] In general, the law students surveyed minimized the impact of culturally biased assumptions on their decision-making and believed they possessed a strong ability to identify when bias affected their behavior or judgment.[148] For example, students thought a client would be more influenced by cultural background than a lawyer would.[149] According to their analysis, "Students felt fairly confident that they could identify when they were acting based upon stereotypes or culturally biased assumptions."[150] The results suggested that law students may actually think that "legal training somehow immunizes lawyers from viewing legal problems and clients through their own cultural lenses, and from having cultural biases that affect their analyses and interactions."[151]

This mismatch between what students believe and what scholars (and many practitioners) know has been exacerbated by the failure of law schools to adopt curriculum-wide reforms. Even though law schools remain responsible for training future lawyers, they have consistently failed to provide students with sufficient direct instruction and experiential learning opportunities that might address such concerns. As explained above, modern scholarship in legal theory and social cognition suggests that law students will be hard-pressed to demonstrate the competencies required by Standard 302 without sustained instruction and opportunities to explore and reflect on how culture influences law and its practice.[152] Without this foundation, practicing lawyers may fall short of their ethical duties to their clients and to the profession.[153]

As a result, even when law schools do not specifically identify cultural competence as an "other professional skill" under Standard 302(d), they should nonetheless view culturally responsive lawyering as essential to fulfilling the requirements of Standards 301 and 302. That is because law schools provide a powerful unifying experience for future lawyers as they become acculturated to the profession.[154] Law schools teach the "craft of law" and "inculcate[]

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147. *See id.* at 541-43; *see also* Curcio et al., *supra* note 7.

148. Curcio, *supra* note 48, at 543-44.

149. *Id.* at 542-43 ("589 law student respondents thought lawyers are less likely than clients, and somewhat less likely than judges, to look at legal problems through their own cultural lens. Students were even less likely to think that they, personally, viewed the legal system through a culturally biased lens").

150. *Id.* at 544.

151. *Id.* at 540.

152. *See* Bryant, *supra* note 73, at 53-54; Piomelli, *supra* note 30, at 162 (arguing that we must "direct[] attention to what we know about others [and ourselves], how we feel about them [and ourselves], and how we act on our knowledge and feelings").

153. Persaud, *supra* note 85, at 24.

154. *See* SULLIVAN ET AL., *supra* note 3, at 5-6. The Educating Lawyers report

professional values, explicitly or implicitly."[155] Although inserting the term "ethical" into Standard 301(a) is a small addition compared to the new learning outcomes requirements announced in 301(b) and further outlined in Standard 302, this addition provides support for adopting culturally responsive lawyering as an orienting framework for curricular reform. In combination with the language in Standards 301(b) and 302(c), the new objectives signal that all law schools should teach and provide opportunities for students to demonstrate ethical lawyering[156] Explicitly interweaving culture work throughout the curriculum and specifically embedding learning outcomes within each sphere—knowledge, skills, and values—will help to ensure that all graduates can demonstrate how social cognition, culture, and context impact law and can provide culturally sensible legal services once in practice.

III. TEACHING CULTURALLY RESPONSIVE LAWYERING

"[L]aw is the quintessential form of 'active' discourse, able by its own operation to produce effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates law."[157]

Culturally responsive lawyering rejects the notion that "cultural competence" is an *optional* skill, divorced from other core competencies. Rather, culturally responsive lawyering is grounded in a deliberative process that extends deeper than outward-facing performative skills and embraces what scholars and lawyers already know: culture matters. There are three core tenets of culturally responsive lawyering. These tenets specifically build on two pillars: scholarship that grapples with the relationship between law and culture, and clinical pedagogy that seeks to build inclusive lawyering models and teach

observed that the first months of law school provide "rapid socialization into the standards of legal thinking" (Observation 1), that this socialization occurs mostly through the case method, which provides students with a "deep, largely uncritical level" of understanding (Observation 2); and "the task of connecting [abstracted legal] conclusions with the rich complexity of actual situations that involve full-dimensional people, let along the job of thinking through social consequences or ethical aspects of the conclusions, remains outside the case-dialogue methods." *See also* Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 61 (1995) (arguing that "casebooks have the power to influence students' and readers' views beyond the closed confines of classroom black-letter law").

155. Wizner, *supra* note 4, at 591; *see also* Moran, *supra* note 5, at 29 ("Legal education's null curriculum works against producing well trained lawyers by letting students believe that gender, race, ethnicity, and class are not important to their future practice."); *see also* Lynch, *supra* note 81 (discussing the 2007 *Educating Lawyers* report, which described legal education as an acculturation process).

156. *See* ABA Guidance Memo, *supra* note 97, at 1-4.

157. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 839 (1987).

those models to students as they learn to be lawyers.

Culturally responsive lawyering:

(1) Accepts that culture and law exist in a mutually constitutive relationship;
(2) Uses transformative legal analysis, a transparent and integrated approach to legal problem-solving that evaluates the impact of culture, context, and cognition on what the law is and makes normative assertions about what the law should be; and
(3) Employs transformative legal analysis along with inter-cultural sensibility in the provision of legal services or when otherwise operating within the legal profession.

Embedding the tenets of culturally responsive lawyering from the very first day of law school will demonstrate to students that understanding culture is essential in the legal profession.[158] While these tenets should be adopted institution-wide and appear in every law school course regardless of size or content area, minimally they should be incorporated throughout the first-year curriculum and in the courses that meet the ABA-required Legal Writing, professional responsibility, and experiential learning credits.[159]

In the first year, other than the ABA's requirement that law schools provide their students with "a rigorous writing experience,"[160] law schools have autonomy to design their course curricula. In addition to Legal Research and Writing, which introduces students to legal discourse and the structure and function of the legal system, and requires them to apply substantive and procedural law through a series of written and oral assignments,[161] most law schools require first-year students to take Torts, Civil Procedure, Property, Contracts, Criminal Law, and Constitutional Law. While critiques of this formula abound,[162] the proposal here does not ask law schools or law professors to abandon this framework. Rather, it asks them to adopt an approach to teaching these courses that develops competencies in culturally

158. *See* Moran, *supra* note 5, at 19 ("[T]he first year of law school is the time when students learn what 'really counts' in their profession.").

159. ABA STANDARDS, *supra* note 24, at 16.

160. Kenneth D. Chestek, *MacCrate (in)Action: The Case for Enhancing the Upper-Level Writing Requirement in Law Schools*, 78 U. COLO. L. REV. 115, 122 (2007).

161. *See* Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909, 913 (2011) (noting legal research and writing instruction in the first year focuses on "traditional legal authority—statues, cases, regulations, treatises, law review articles, and legislative history").

162. *See, e.g.*, Rakoff & Minow, *supra* note 2 (arguing for problem-solving, fact-forward curriculum from the first year of law school); Menkel-Meadow, *supra* note 2, at 580-86.

responsive lawyering.

Blending the three tenets of culturally responsive lawyering, learning outcomes that could be adopted in any law course might include the following:

(1) Students will be able to identify the mutually constitutive relationship among law, legal actors, and the people and relationships law regulates;
(2) Students will be able to identify, analyze, and work within the cultural contexts in which legal problems emerge;
(3) Students will be able to identify how social cognition impacts law, legal systems, and the provision of legal services;
(4) Students will be able to understand how their own identities and cultures interact and interface with legal analysis, decision-making, and communication;
(5) Students will be able to identify and use narrative structures in various forms of legal communication with their clients and other members of the legal profession;
(6) Students will be able to identify, understand, evaluate, and employ various types of authority in context;
(7) Students will be able to identify structural barriers to the equitable provision of legal services.

When students can demonstrate competence in the learning outcomes above, they will be able to integrate transformative legal analysis into the provision of culturally sensible legal services—both in their experiential courses and later in practice. These learning outcomes satisfy the minimum competencies set out in Standard 302. Specifically, the components of transformative legal analysis, discussed in Subpart B below, meet Standards 302(a) and 302(b) by requiring students to demonstrate an understanding of and facility with law as process and product, historically grounded and culturally informed. Additionally, the components of intercultural sensibility, discussed in Subpart C below, satisfy Standard 302(c) and (d), which require students to demonstrate the skills and values required to exercise their ethical responsibilities to clients and the legal profession.

Interweaving the tenets of culturally responsive lawyering throughout the law school curriculum will help students become ethical, effective lawyers. The Subparts below provide a conceptual sketch of culturally responsive lawyering's three tenets and some suggestions for how to include them in any law school course.

A. Acknowledging That Culture and Law Exist in a Mutually Constitutive Relationship

Although few mandatory law school courses explicitly teach about the relationship between law and culture, the concept is not novel. As discussed in Part I.B, which summarized scholarship from the fields of critical theory, rhetoric, and clinical pedagogy, law is created and implemented in culturally specific contexts.[163] Similar to the function of language as a symbolic system, law's "intended and unintended meanings circulate and are transformed. Those whom the law seeks to govern may redefine the law, the law may redefine them, or both."[164] This is to say: culture impacts law and legal structures as well as the relationships that law often regulates, informs, and defines. For example, as Eduardo Capulong notes, in the pages of legal decisions humans are legal categories: "human identity and circumstances are defined by legal doctrine and formal legal institutions."[165] Culture impacts these categories by affecting social and political norms.[166] At the same time, law feeds back into this loop by "shap[ing] individual and group identity, social practices as well as the meaning of cultural symbols."[167] When viewed within a constitutive framework, legal terms and concepts—whether "marriage," "reasonable person," or "dwelling house"—are historically and culturally grounded and have both descriptive and generative functions.

What does this mean for legal education? Inquiry into law and culture should not remain neatly bound in scholarly journals or cabined to discussions at academic conferences.[168] From the first day of their first class, law students should be taught to engage in critical thinking about the law. As they pore over casebooks and pick apart statutes, they should be taught to deconstruct and reconstruct meaning from various perspectives, situating culture and context at

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163. *See* Mezey, *supra* note 29, at 60 (noting that implementing law "always takes place in culturally specific contexts"); *see also* Frank Rudy Cooper, *The "Seesaw Effect" from Racial Profiling to Depolicing: Toward a Critical Cultural Theory*, *in* THE NEW CIVIL RIGHTS RESEARCH: A CONSTITUTIVE APPROACH 23 (Benjamin Fleury-Steiner & Laura Beth Nielsen eds., 2006), https://perma.cc/L3K4-KMSK ("Law is a set of discourses that hold sway over our very ways of seeing the world"); *see also* Carolyn Grose, *A Persistent Critique: Constructing Clients' Stories*, 12 CLINICAL L. REV. 329, 329 (2006) (suggesting the dominant discourse around gender impacts which stories law understands); Aiken, *supra* note 141, at 290 ("The law does not exist 'out there' to be found; rather it is a reflection of the complex interplay of information, experience, and value choice.").

164. Mezey, *supra* note 29, at 60.

165. Capulong, *supra* note 23, at 39; *see also* Chase, *supra* note 154.

166. Mezey, *supra* note 29, at 46 (noting that culture impacts "what is socially desirable, politically feasible, [and] legally legitimate").

167. *Id.*

168. *See* Menkel-Meadow, *supra* note 2, at 573 (noting, for example, the law and literature movement has produced substantial scholarship but that "the core of legal education has hardly been touched by these developments, except for a more informed set of interpretive moves and principles in the legal interpretation").

the heart of this inquiry. Although particular professors may expose their law students to the widely accepted theory that "all interpretations of law are cultural interpretations,"[169] too often the way in which law and legal analysis are taught (and even practiced)—as objective and neutral—masks this reality.[170]

Returning to this article's opening scene, the concurring decision denying Mr. Demesme's writ confirms that cultural ignorance has the potential to harm individuals, create bad law, and undermine the legal system.[171] If we accept that law and culture constitute one another, then understanding the constitutive relationship is essential to competent lawyering. Adopting transformative legal analysis, a more transparent and integrated approach that illuminates the complex relationship between law and culture, will ground student learning and help them to develop critical cognitive architecture for interpreting and practicing law.

B. Using Transformative Legal Analysis

Transformative legal analysis incorporates concepts from discourse analysis, cultural studies, and critical legal theory to evaluate the impact of culture, context, and cognition on what the law is and to make normative assertions about what the law should be.[172] These theoretical underpinnings provide rich dimensionality and perspective to the study and practice of law. In particular, transformative legal analysis borrows and expands upon Professor Naomi Mezey's cultural interpretation of law framework, which sets out three spheres of inquiry: (1) the site of production; (2) the cultural practices that "inspire the law and those that the law confronts when applied"; and (3) the "encounter between law and culture."[173] While course content will certainly vary, before graduation students should become comfortable identifying and interrogating two spheres: law's sources and the socio-cultural contexts in

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169. Mezey, *supra* note 29, at 58.

170. *See* Moran, *supra* note 5, at 15 ("[T]he case method, which is generally accepted as the central defining feature of the last one hundred years of legal education, tends to maintain, and even reinforce, class gender, and race hierarchies."); Jeffrey M. Lipshaw, *Metaphors, Models, and Meaning in Contract Law*, 116 PENN ST. L. REV. 987, 1033 (2012) (noting "rules derive meaning only in use. To talk of the meaning of rules, however, is senseless without focusing on whose *meaning* and in what *use*").

171. *See generally* Hebert, *supra* note 15.

172. The argument for teaching legal theory—particularly critical legal theory—is not new. In fact, in a 1998 article Professor Kathryn Stanchi advocated for incorporating critical theory and methodology in first year courses. *See generally* Stanchi, *supra* note 66. But, as she noted a decade later, podium courses largely taught using the case method remain paramount, while both skills and theory are marginalized. *See* Stanchi, *supra* note 6, at 611.

173. Mezey, *supra* note 29, at 63.

which law operates.[174]

The Subparts below include suggestions for teaching transformative legal analysis through exploring these two spheres.

1. Investigating law's sources

Exploring law and its sources is the bread and butter of law school curricula. This sphere of inquiry includes traditional sites of legal meaning such as the text of federal and state constitutions, judicial opinions interpreting statutory or common law rules, legislative history, and scholarly commentary. Like Professor Mezey's framework, transformative legal analysis also incorporates learning about these sources of authority and the relationship they have to one another.[175] It asks students to complexify their understanding of the law and legal system by understanding these sources as part of a larger cultural project in which they operate.[176] To do this, in each first-year course, students should be instructed how to situate legal sources in context. As Professor Amy Griffin explains, "[t]he landscape of legal authority is not fixed and flat."[177] Recognizing such dynamic terrain, transformative legal analysis requires the broad exploration of the following contexts:

(1) The source of law (or institutional author);
(2) The source's human author(s);
(3) The source's underlying and missing narrative(s); and
(4) The source's purpose.

Even when exploring these traditional sites of legal meaning, whether in Legal Writing or in Property, slight shifts in discourse can open students' perspectives. For example, transformative legal analysis requires that students go beyond traditional notions of legal hierarchy and enacted law versus common law. As Professor Griffin suggests, while "[t]he very purpose of the hierarchy of authority is to rank authorities so that some outweigh others," the hierarchy metaphor is inapt at best and, at worst, is actively detrimental to deep

174. *Id.* at 62.

175. *See id.*

176. *See id.* at 63. Describing a cultural interpretation of law approach to understanding the Columbine shootings, Mezey suggests inquiring into the laws around school funding, zoning, mental health care, and law enforcement "and attempt[ing] to make sense of them as law, and also as metaphor and symbol, understanding them as part of a larger set of social discourses of which they are an inextricable part." *Id.*

177. Amy J. Griffin, *Dethroning the Hierarchy of Authority*, 97 OR. L. REV. 51, 93-94 (2018) ("The landscape of authority is not fixed and flat; authority is used differently depending on factors such as the field of law, the identity of the decisionmaker, the reason why the legal question is a difficult one, and the amount or quality of mandatory authority on the issue.").

legal inquiry and understanding.[178] Rejecting or at least qualifying the hierarchy metaphor is particularly important in the first year of law school when students are striving to learn a new language and its many norms and rules.[179]

Rather than perpetuate a dangerous myth that law is neutral and that lawyers merely need to find the right law and apply it as it has always been applied, law students should be taught to consider the relative "weight" of authority along a continuum, and understand that the relative weight of any given authority can and does change over time.[180] Sometimes weight shifts because of new rules. For example, before the adoption of Federal Rule of Appellate Procedure 32.1, courts could restrict or prohibit citation to unpublished authority.[181] Such a limitation severely affected the type of persuasive authority that a lawyer could present to a court. Sometimes weight shifts because a source gains or loses force. Recent lawsuits evaluating the import of presidential tweets reflect how changes in human communication and technology have led to using new sources in legal analysis.[182] Exploring these weight shifts helps to situate legal analysis in historical and cultural context. Here, Legal Writing professors can take the lead as they introduce foundational concepts and help students acclimate to law's discursive structure.

In particular, whether discussing enacted law, executive order, or judicial decision, students should understand that a "finite group of authors"—both

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178. *Id.* at 60. Professor Griffin notes "[t]he fixed boundaries of mandatory authority are a bit like political boundaries of a state. On a map, the line between two states appears perfectly clear—conceptually the boundary is distinct. But on the ground, that line is often invisible. Every lawyer and law student understands the difference between binding and nonbinding authority. But on the ground—in the work of building legal arguments—the distinction is much less clear." *Id.* at 66-67.

179. Professor Jeff Lipshaw characterizes the mismatch between a law student's desire for coherent rules and the reality of American law by recalling the classic first-year law student frustration: "can you just tell me what the rules are?" Lipshaw, *supra* note 170, at 1032. Lawyers and law professors "know that the question is meaningless: the rules arise in a clash of instrumental interests in which competing parties assert competing rules that would dictate competing outcomes, and judges attempt to resolve disputes in a way that keeps all of those rules coherent and consistent." *Id.*

180. Griffin, *supra* note 177, at 63. Griffin explains that "[w]eight, as applied to legal sources, is not specific; typically, the most that can be said is that one source weighs more or less than another. Greater and lesser weights make more sense given a continuum of weight, where the value and persuasiveness of sources are relative. Sources are balanced against one another, the weight of a source might fall anywhere along the spectrum, and that weight can change over time." *Id.* at 92.

181. *See id.* at 78; FED. R. APP. P. 32.1.

182. *See, e.g.*, *Knight First Amend. Inst. v. Trump*, 302 F. Supp. 3d 541, 567 (2018) (noting the parties' joint stipulation states that tweets from the @realDonaldTrump Twitter account are public records and must be preserved and that the "account has been used in the course of the appointment of officers (including cabinet secretaries), the removal of officers, and the conduct of foreign policy"); *see also* Margolis, *supra* note 161, at 911 (arguing that online research is blurring the lines between traditional and non-traditional legal sources).

institutional and human—have produced the law.[183] Even though there have been efforts to diversify voices at the student, lawyer, law professor, and judge level, the demographics of the legal profession have never reflected the U.S. polity.[184] Further, most first-year law professors continue to teach law from a white, largely male, normative perspective—what Professor Kimberlé Crenshaw has described as "perspectiveless."[185] Students are rewarded for parroting this contrived objectivity.[186] However, when law professors in a first-year course acknowledge law's historic and enduring exclusivity, and explore the four context spheres above, they invite students to question and wrestle with the law. They also create space for and center students' diverse identities and experiences.

Similarly, introducing law students to the subjectivity of the law and the U.S. legal system counters the notion that a neutral body of law exists. Part of this inquiry includes considering the identity of a particular decision-maker and how that identity may affect their choice of authority. While the institutional identity of the decision-maker—for example, Supreme Court versus arbitration panel—is important, the inquiry should go further. Judges are not just influenced by sources cited in the briefs before them.[187] They are also

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183. Margolis, *supra* note 161, at 914 ("Traditional legal authority is produced by lawyers, primarily judges and legal academics, for use by other lawyers, judges, and legal academics").

184. *See ABA Profile of the Legal Profession*, American Bar Association (2019) https://perma.cc/WP4K-FTC8; *see generally* MEERA E. DEO, UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA (2019).

185. *See* Crenshaw, *supra* note 3, at 2; *see also* Boles, *supra* note 78, at 221 ("Most law students are taught from an invisible and assumed perspective that is largely white, male, heterosexual, economically advantaged, and able-bodied. This assumed perspective forms an invisible pedagogical norm."); Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 U. MICH. J.L. REFORM 263, 314 (2000) ("Not only is legal doctrine developed to obfuscate the importance of the racial context to entire areas of law, but silence is maintained in particular disputes. Legal actors—judges, lawyers, scholars, deans, and professors—are socialized to maintain a decorum that protects this silencing.").

186. *See* Chase, *supra* note 154, at 58 (arguing that "contrived stance of objectivity" validates the cultural perspective of most white students "while the perspectives of rights, fairness, justice, and equality of many African-American students and professors are seen as less worthy of serious consideration."); *see also* Archer, *supra* note 7 (arguing many law students view the world through a post-racial lens and this lens dominates social and legal culture); Angela Onwauchi-Willig, Dean, Boston University School of Law, Welcome Remarks at the Boston University School of Law Symposium: Racial Bias, Disparities and Oppression in the 1L Curriculum: A Critical Approach to the Canonical First Year Law School Subject Democracy (Feb. 28, 2020) (on file with author) ("For far too long, what it has meant to teach students to think like a lawyer has meant that we expect some students to ignore the realities of their lives, their families' lives, and the lives of those in their communities—to ignore what is readily visible to them—while reinforcing the privilege that other students have in keeping those realities invisible.").

187. Bennardo, *supra* note 22, at 47 (noting that these extralegal issues influencing decision-making include, but are not limited to, "prejudice based on certain characteristics of

influenced by culture and their own experiences.[188] As Professor Linda Edwards notes, "there exists no neutral moment—no moment when a judge's perception is unaffected by one cultural frame or another . . . ."[189] Instead, judges rely on a near "limitless batch" of information to inform their decisions.[190]

This "batch" of information encompasses binding authorities as well as a host of other legal sources.[191] Optional legal authorities that law professors could introduce in their first year courses include legislative history, agency interpretations, treatises, dictionaries, empirical studies, and "voices briefs."[192] Such sources help deepen a future lawyer's understanding of the mutually constitutive relationship between law and culture. Non-legal sources also play an increasingly important role in both enacted law and judicial decisions.[193] As Professor Ellie Margolis explains, a non-legal source is "not explicitly 'about the law' and not directed at a legal audience but . . . is nonetheless used as authority in support of legal analysis."[194] Students should be aware that lawyers and judges do not adhere to specific rules regarding non-legal sources, and they should be taught to vet those sources with a critical eye.[195]

Finally, students should also understand canons of interpretation and explore their import beyond a brief introduction in Legal Writing and

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the parties or the parties' attorneys, the financial resources of the parties, the publicity surrounding a case, public opinion, social trends, and on and on").

188. *See* Edwards, *supra* note 47, at 58-59 ("There is no such thing as a hermetically sealed judicial environment.").

189. *Id*. at 61.

190. *See id*. at 53.

191. Griffin, *supra* note 177, at 54; Margolis, *supra* note 161, at 913-19 (describing traditional legal authority, which is generally broken into binding (mandatory) authority and persuasive authority).

192. Edwards, *supra* note 47, at 34. Edwards defines the term "voices briefs" as "stories drawn from the lives of individuals who are strangers to the case." This subset of amicus briefs is a relatively new. Edwards explains, "[t]o date, voices briefs have been used almost entirely in abortion rights and marriage equality cases. These cases share two important, overlapping characteristics: (1) the outcome will have a direct personal impact on the intimate lives of those affected; and (2) the storytellers' experience is likely outside of the Justices' experience." *Id*. at 39.

193. Margolis, *supra* note 161, at 920 (noting the quantity and variety of non-legal sources cited in legal decisions has increased dramatically).

194. *Id*. at 919 (arguing as use of non-legal sources becomes more accepted, these sources "increasingly take on the mantle of authority"). For example, Justice Sotomayor relied on law review articles, scholarly books, and writing by authors such as W.E.B. Du Bois, James Baldwin, and Ta-Nehisi Coates to support her dissent in *Utah v. Strieff*, 136 S. Ct. 2056, 2064-72 (2016). *See also* Crawford et al., *supra* note 62, at 186-89 (discussing Justice Sotomayor's dissent as an example of a legal opinion reflecting feminist theory and methods).

195. *See* Griffin, *supra* note 177, at 85 (noting when it comes to non-legal sources "the only guard against bias seems to be the adversarial design of the judicial system").

Constitutional Law courses.[196] These "never-binding" sources inform judicial decision-making, which in turn alters the legal landscape in which people and entities operate.[197] For example, law professors would do well to include empirical data to show how courts use canons in various ways, and engage students in thinking about how canons impact specific cases and also affect the development of the law more generally.[198]

In order to evaluate the weight of authority in context, students also need to go beyond the edited appellate decisions that make up the bulk of first-year casebooks. While many casebooks include selected materials that help students contextualize the legal concepts they are learning, these heavily curated and neatly packaged sources do not replicate or prepare students to solve problems or create value in complex human environments.[199] Indeed, "[a]ppellate opinions hide, rather than display, how 'facts' are constructed and how more than one narrative can be consistent with "raw data."[200] The transformative legal analysis framework requires adding depth by uncovering narrative and including backstories. Adding to law's narrative helps students to contextualize the law.[201] As lawyers, today's law students will confront messy stories, not pristine legal doctrine. Their law school courses should prepare them for this

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196. *Id*. at 73 ("[C]anons of interpretation, a long-accepted part of statutory interpretation, have no particular place on the hierarchy of authority but are used for their status."); *see also* Charlie D. Stewart, *The Rhetorical Canons of Construction: New Textualism's Rhetoric Problem*, 116 MICH. L. REV. 1485, 1510-11 (2017) (discussing *State v. Demesme* as an example of the "cocktail party" canon of construction, where "plain meaning" is derived from personal experience).

197. Griffin, *supra* note 177, at 73-77 (discussing various types of optional authority and concluding these texts are routinely relied on for their authoritative weight and cited in judicial decisions).

198. *See, e.g.*, James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005) (evaluating 632 cases 1969-2003 to see how the Supreme Court uses canons in workplace jurisprudence).

199. *See* Rakoff & Minow, *supra* note 2, at 604 (suggesting an alternative); Capulong, *supra* note 23, at 39-40 (noting that the client encounters in appellate decisions function as legal categories).

200. Rakoff & Minow, *supra* note 2; *see also* SULLIVAN ET AL., *supra* note 3, at 187 (observing that the case dialogue method deliberately ignores the "rich complexity of actual situations that involve full dimensional people"). In the area of contract law, Professor Deborah Zalesne has argued that judges often omit identifying characteristics of the parties. She notes that "[d]etails sure to have influenced the judge's legal reasoning and analysis—such as the relationship between the parties, or the age, race, gender, or class of one or both of the parties—are conspicuously missing, leaving readers to hypothesize or fill in the gaps." Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value*, 3 COLUMBIA J. RACE & L. 25, 29 (2013).

201. *See* Graham & McJohn, *supra* note 50, at 258 (noting "narrative plays a fundamental role in legal reasoning, in such areas as memory, moral decision-making, reasoning by analogy, explanation, and even the organization of the vast amounts of information that lawyers contend with."); *see also* Peter Brooks, *Narrative Transactions - Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1 (2006).

work.

One way to add backstories and thereby fill in the law's narrative is to introduce students to documents underlying trial court and appellate decisions.[202] Docket entries, such as exhibits and transcripts, reveal competing stories and illuminate how law is shaped by non-legal sources. For example, students can compare facts from competing briefs and other supplemental material to identify which facts were included in an opinion. Where a case results in judges or justices issuing concurring or dissenting opinions, students can parse and wrestle with the implications of those drafting decisions.[203]

Professors teaching required first-year courses can also supplement their traditional casebooks with selections from the Feminist Judgments series.[204] These "shadow decisions" rely on precedents in effect at the time of the original opinion and use only established facts from the case record, yet reach a different conclusion from the original decision.[205] Using "shadow judgments" in combination with Supreme Court decisions "concretely demonstrate[s] that

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202. *See* Rakoff & Minow, *supra* note 2 (noting appellate "opinions state 'the facts.' Even when encountered with contrasting statements by a dissent, these factual statements do little to equip students to navigate overlapping and diverging witness accounts, gaps in forensic material, disputes over significance levels in statistical studies, or the influence of a narrative frame").

203. For example, the case history from *Bell v. Itawamba County School Board* demonstrates how complex narratives, legal frameworks, and cognitive biases affect legal decisions. In that case, 17-year old Taylor Bell sued his school, the principal, and others in the Northern District of Mississippi for suspending him and placing him in an alternative educational facility for writing and publishing on Facebook and YouTube a rap that alleged sexual misconduct by faculty at his public school and used explicit and violent imagery. *Bell v. Itawamba County Sch. Bd.*, 859 F. Supp. 2d 834, 836-37 (N.D. Miss. 2012). Documents filed by Bell in support of summary judgment reveal that after an initial disciplinary hearing the school board's Disciplinary Committee found there wasn't conclusive evidence that Taylor's rap could be construed as a threat. *See* Plaintiff's Motion for Summary Judgment, *Bell*, 1:11-cv-00056, Ex. 8. After the district court granted summary judgment in favor of the defendants, holding that Bell's off-campus speech was not protected by the First Amendment because it caused a material school disruption that was reasonably foreseeable, the Fifth Circuit reversed. *Bell v. Itawamba County Sch. Bd.*, 774 F.3d 280, 304 (5th Cir. 2014). The majority concluded that "the summary-judgment evidence and materials establish that Bell composed and recorded his rap song completely off campus; that he used his home computer to post it on the Internet during non-school hours; and that the School Board did not demonstrate that Bell's song caused a substantial disruption of school work or discipline, or that school officials reasonably could have forecasted such a disruption." *Id.* at 282. Compelled by the then-recent school shooting at Sandy Hook and the near-universal use of social media, the dissenting opinion concluded that the First Amendment did not protect Bell's off-campus speech because "an objectively reasonable person would interpret the rap recording as a true threat" and because Bell's speech could be regulated under the *Tinker* substantial disruption test. *Id.* at 315, 322-24 (Barksdale, J., dissenting). After rehearing en banc, the Fifth Circuit affirmed the district court's decision in an opinion written by Judge Barksdale. *Bell v. Itawamba County Sch. Bd.*, 799 F.3d 379, 380 (5th Cir. 2015) (en banc).

204. Crawford et al., *supra* note 62, at 180.

205. *Id*. at 181.

the development of the law or the outcome of a lawsuit is not inevitable or predetermined, whether one is talking about constitutional interpretation or statutory analysis."[206]

Finally, students should become attuned to missing facts, voices, and stories and understand the impact that procedural rules have on them. For example, while first-year students generally take Civil Procedure, they may memorize the operative rules without understanding why they exist or how they order the chapters in a litigation story.[207] Yet these rules, like those in Evidence and Criminal Procedure, govern which facts are deemed important and which are suppressed. They not only impact the development of the law, but they also determine how and whether certain stories are told.[208] As a result, these rules affect the "legal imagination."[209] Professors Todd Rakoff and Martha Minow describe the legal imagination as "the ability to generate the multiple characterizations, multiple versions, multiple pathways and multiple solutions, to which [law students] could apply their well-honed analytic skills."[210]

Rather than focusing solely on procedural rules or appellate decisions, students should also be taught how to select, evaluate, and explore law's sources and the narratives that impact them. Students can engage more fully with transformational legal analysis by going beyond law's immediate sources to consider its social and cultural contexts. This will help students become archaeologists of the lawyering process, more adept at determining what the law is, and at articulating visions of what the law could and even should be.[211] The Subpart below suggests how to approach this work.

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206. *Id*. at 180.

207. *See* RUTHANNE ROBBINS ET AL., YOUR CLIENT'S STORY: PERSUASIVE LEGAL WRITING 39 (2019) (using the phrase "chapters in a litigation story" to explain the lifecycle of a case).

208. *See* Ralph, *supra* note 65, at 584-85 (describing the process by which law determines which stories are told); *see also* Bennett Capers, *Evidence without Rules*, 94 NOTRE DAME L. REV. 867, 867 (2018) (discussing the effect of un-governed "other evidence"—like race, attire, and presence of family members in attendance at trial—on case outcomes); Barbara A. Babcock, Toni M. Massaro & Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, *in* Coleman, Malveaux, Porter & Pedro, A CRITICAL GUIDE TO CIVIL PROCEDURE (forthcoming 2021) (on file with author) (calling on scholars to reconceptualize how procedure is taught and practiced by focusing on how procedure both works for and fails ordinary people).

209. Rakoff & Minow, *supra* note 2, at 602.

210. *Id*.

211. *Id.* at 607. Rakoff and Minow caution that without introducing students to the messy, open-ended problems people face beginning in the first year–to challenge them in this way–"students will learn to think of the legal system as only so many rooms, so many pieces of furniture, that they can never reorder." *Id.*

2. Excavating law's socio-cultural context

Transformative legal analysis situates law's socio-cultural contexts in the center of legal pedagogy. It asks law students to analyze the law and the legal system from a variety of perspectives and to consider what these perspectives add to their analysis. Doing so prepares law students to engage in self-reflective law practice and conscious professional identity development. Currently, the type of legal analysis that is taught in most first-year law courses stops at legal text. As the previous Subpart notes, first-year students are taught to decipher what the law says—to find a legal rule—often by extracting legal principles from a handful of sources.[212] But competent lawyering requires more. As a result, transformative legal analysis asks the law student and future lawyer to look into the human environment in which law operates and to evaluate law and its effects from the perspective of the people who it regulates, defines, and impacts.

Like the work involved with investigating law's sources, excavating law's social and cultural contexts requires a primary understanding of the core concepts from social and cognitive science that impact how people come to understand and make sense of information. Class discussions of how humans make subconscious and conscious assumptions will help to destigmatize critical conversations about law, legal reasoning, and legal systems.[213] When law students and lawyers are able to identify and unpack assumptions, they deepen their critical thinking and analysis. The list of potential differences (and similarities) that can complicate and impair lawyering is infinite.[214] Because people experience information differently, two individuals can look at the same information and apply different metaphors.

In addition to assigned readings and class discussions, professors can introduce simple exercises throughout the first year to help students understand that their brains use schemas and mapping rules for everything. For example, asking students to define terms like home, mammal, and garbage will trigger different images and associations.[215] Inviting students to experience the

212. Margolis, *supra* note 161, at 913 ("In their legal research and writing classes, law students are taught how to find and use authority to analyze issues and form legal arguments."). For sample texts explaining how to find a legal rule see David Romantz & Kathleen Elliot Vinson, LEGAL ANALYSIS: THE FUNDAMENTAL SKILL (2009); Christine Coughlin et al., A LAWYER WRITES (2018).

213. *See e.g.*, Anderson et al., *supra* note 73, at 391-96 (providing clinic seminar exercises to explore how sameness and difference affect individual relationships and the legal system).

214. Casey Schutte, *Mandating Cultural Competence Training for Dependency Attorneys*, 52 FAM. CT. REV. 564, 566 (2014) (noting, at a minimum, there are differences in age, development, educational level, gender, language, national origin, religion, sexual orientation, disability, neighborhood and family structure).

215. HSBC's "Local Knowledge" marketing campaign provides numerous visuals professors can use to jumpstart the conversation. A simple Google image search results in

diversity of associations within a classroom and then think about how such results might impact the lawyer/client and even lawyer/supervisor relationship will enable them to understand that culture and cognition shape how people encounter and understand information. This reality is as true for the law student as it is for the judge or the client, or the juror, or the witness, or the parties to a contract. Associational exercises can quickly expose this mental process and lay the foundation for more careful, nuanced, and creative legal analysis.

While cognitive and narrative theory are often included in Legal Writing courses when discussing persuasive advocacy, their role in making and interpreting law is equally important. As a result, concepts from these disciplines such as schema, master narrative, and ethos/pathos/logos should be included in Legal Writing courses at every stage of legal problem solving, which includes critical reading, rule synthesis, legal analysis, and overall prediction. Additionally, other first-year professors can build and strengthen the foundation laid by Legal Writing professors by pulling these concepts into their courses, which helps students to scaffold and deploy the knowledge they are acquiring. For example, Contracts professors can help students understand that a contract represents an artifact of a transactional lifecycle.[216] The contract came from somewhere. Its lifecycle began as the subjective desires of each party and those desires at some point became an agreement—there was a meeting of the minds. These subjective desires, the contract itself, and the law that will determine the result of any later dispute all rely on communicating with language across various cultures and contexts.[217] Understanding the master narratives and schemas in a contract's transactional lifecycle helps to reveal the subjective nature of legal analysis and unpack power dynamics, both among contracting parties and in relation to the development of contract law more generally.

Next, courses should include the human environment. While some traditional first-year podium courses may incorporate how cultural context and individual cognition impact the stories that get told and the legal decisions that result, often the people, entities, and institutions that law affects—the sphere of

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images ranging from three different "footballs" (football/USA; soccer/UEA; rugby/Australia) to the same small rug with the terms: "décor," "souvenir," and "place of prayer." *See also* Jeffry Pilcher, *HSBC 'Different Points of Value,'* FIN. BRAND (July 6, 2009), https://perma.cc/5DDU-ZZYN (describing campaign and including image samples).

216. *See* Lipshaw, *supra* note 170 (arguing for teaching students contract law by exploring metaphor, prototypical frames, and the lifecycle journey of a contract).

217. *See* Zalesne, *supra* note 200, at 35 (noting that "[f]actors such as ethnicity and national origin can play a major role in contract formation and interpretation. The unique experiences and vocabularies of different communities can affect individual business practices and therefore can affect the subjective intent of parties entering into a contract"); *see also* Chase, *supra* note 154, at 39-40 (arguing that "[t]he effect of the historical treatment of African-Americans as property and as the subject of contracts undoubtedly has affected the white perception and attitudes towards African-Americans and contracts").

reception—remain curiously absent.[218] Casebooks filled with summaries and excerpted decisions can gloss over the main characters and disguise the life of the law. Even in first-year "lawyering" or "skills" courses, the fact patterns are often carefully curated, stripped of the discursive interplay between law and the people and spaces it regulates.[219] When considering context—and especially when finding, evaluating, and using facts—students should understand that they already have categories or schema for the material they are encountering and have also likely developed a perspective. This is not good or bad, it simply is. As Professor Linda Edwards notes, "[t]he question is not *whether* we see the situation through a lens, but *which* lens focuses our view. The danger is, of course, that we are often oblivious to our own unconscious frames."[220]

Interweaving discourse and critical legal theory into teaching legal analysis in the first-year curriculum is one way to encourage law students to *read* both the law and the facts in context.[221] This skill is particularly important because creating, interpreting, and applying the law occurs in a space of translation between author and audience. When students understand law as discourse—as a way of explaining, regulating, and understanding social events and ideas—they can evaluate how courts and legislatures construct an argument, or "encode," as they interact with law and culture.[222] At the same time, they can consider how people and institutions perceive the law, or "decode."[223]

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218. *See* Rakoff & Minow, *supra* note 2, at 602 (noting that students "most crucially lack . . . the ability to generate the multiple characterizations, multiple versions, multiple pathways, and multiple solutions, to which they could apply their very well honed analytic skills"). For a discussion of how to place legal doctrine in context in a first-year Contracts class see Lipshaw, *supra* note 170.

219. *See* Michael A. Millemann & Steven D. Schwinn, *Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education into the First Year*, 12 CLINICAL L. REV. 441, 454-58 (2006) (describing the "canned" legal hypothetical as "a highly simplified environment, free of many of the complications of practice" where the "'question' for the students is defined by the pre-determined 'answer'" and there are a "limited number of pathways for the students to follow"); Ann Shalleck, *Constructions of the Client within Legal Education*, 45 STAN. L. REV. 1731, 1733-39 (1993) (discussing how various law school classes rely on a one-dimensional, constructed client to avoid the ambiguities and complexities of "real" clients); *see also* L. Danielle Tully, *Collaborative Case Development for the First-Year Legal Writing Problem*, 31 THE SECOND DRAFT 3, 3 (2018) (explaining a method for engaging first-year students in developing their simulated case file).

220. Edwards, *supra* note 47, at 61.

221. For an example of applying critical cultural theory to policing and depolicing see Cooper, *supra* note 63.

222. Cooper, *supra* note 64, at 858-61 (describing encoding of discourse as the "construction of an argument" and suggesting when we analyze encoding we "break[] apart the structure of the discourse to see why its building blocks were combined in a certain way").

223. *See id.* at 861-64 (describing decoding a discourse and explaining that an audience can read discourse consistent with the dominant position (in the way its author intended) or in an oppositional position (in a way its author never intended)).

Understanding how socio-cultural context impacts encoding and decoding provides students with critical perspective on how their clients interpret, use, and exist within legal frameworks. Sometimes law has a profound regulating effect on behavior. Other times, like with the laws that regulate speed limit on roadways, culture has more influence than the formal rule.[224]

Including backstories and counter-narratives, like those mentioned in the previous Subpart, also injects a dose of context into the first-year curriculum. It helps students understand that facts in a decision do not necessarily tell the entire story. At the same time, these facts are essential to the case's narrative, and that narrative is situational.[225] For example, in her article *Law as Culture*, Professor Mezey recounts an example first proposed by philosopher Gilbert Ryle and then employed by Clifford Geertz to explain the import of culture to interpretation. She asks: What is the difference between an unintended twitch of the eye and a wink?[226] In order to understand whether an eye movement is voluntary or involuntary, an observer must do more than read the mere physiological description of the movement itself. Rather, to make sense of the movement the observer must also understand "the social codes that give it meaning as a twitch, a wink, a fake-wink, a parody of a wink, a rehearsal of a wink, etc."[227] As Professor Robert Cover argued: "[j]ust as the meaning of law is determined by our interpretive commitments, so also can many of our actions be understood only in relation to a norm."[228] He explained, "[t]here is a difference between sleeping late on Sunday and refusing the sacraments, between having a snack and desecrating the fast of Yom Kippur, between banking a check and refusing to pay your income tax. In each case, an act signifies something new and powerful when we understand the act is in reference to a norm."[229] Moving beyond description to interpretation, the observer must understand, or read, the social and cultural contexts.[230] This "reading" is core to transformative legal analysis.

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224. *See* Mezey, *supra* note 29, at 52-53. Describing analysis conducted by legal scholars on speed limits, Mezey argues "the de facto 'legal' speed limit[] is the limit set by the conventions of drivers–conventions which vary depending on the stretch of road, the time of day, the prevailing conditions, or the habits of a particular city or geographic region." *Id.* at 52. Additionally, she states, "[t]he color of one's car, or more important still, the color of one's skin, will change the legally enforced speed limit and traffic laws generally." *Id.* at 53.

225. *See* Ralph, *supra* note 65, at 577 (discussing events recounted in *Walker v. City of Birmingham* and *Shuttlesworth v. City of Birmingham* and noting the Supreme Court created two distinct narratives of the same event for different purposes).

226. Mezey, *supra* note 29, at 60.

227. *Id.*

228. ROBERT COVER, *Nomos and Narrative*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 95, 99 (1995).

229. *Id.* at 99-100.

230. *See* Montoya, *supra* note 185, at 274-77 (exploring silence as a communicative device and situating its meaning within culture).

Exploring backstories and counter-narratives also situates law within history and supports culturally responsive lawyering because it demonstrates the dynamic nature of legal norms. Some examples illustrate this point. When studying the law of discrimination, students should understand that it developed in tandem with the scientific theory that "individuals were aware of their biases and prejudices, and accordingly that discrimination was manifested in overt, express ways."[231] Subsequent developments in the fields of psychology and cognitive science complicate the law's landscape and provide new avenues for both understanding and critiquing legislation, case law, and regulations governing discrimination. When learning about restrictive covenants in Property, students should understand the socio-historic context that supported their widespread use and its lasting consequences on housing and education. Students could be introduced to recent work by Professor Richard Rothstein, which deftly demonstrates how the enduring legacy of racial segregation is intentionally created, supported, and sustained by local, state, and national law.[232] Similarly, in Constitutional Law, students should understand that the recognition of marriage equality and an individual right to bear arms under the Second Amendment reflect not only legal changes, but also profound social transformations that resulted from the complex mutually constitutive relationship between law and culture.[233] The law's history is ripe with stories to demonstrate this critical point: socio-cultural context matters.

Including both theory and the socio-cultural context does not water down or detract from teaching core legal concepts. Rather, including them throughout the curriculum—not simply in specialized elective courses—helps students to develop nimble problem-solving skills and prepares them to meet the multidimensional demands of competent law practice.[234] This foundation supports the third tenet of culturally responsive lawyering.

C. Employing Inter-Cultural Sensibility

When legal education and law practice situate culture at the heart of legal inquiry, employing transformative legal analysis in the provision of culturally sensible legal services embodies culturally responsive lawyering.

The cultural sensibility framework proposed by Professors Curcio, Ward, and Dogra focuses on students' understanding that "culture is a complex

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231. Bassett, *supra* note 50, at 1574.

232. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

233. DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW (2016) (discussing marriage equality and right to bear arms).

234. *See* Jeffrey M. Lipshaw, *What's Going On: The Psychoanalysis Metaphor for Educating Lawyer-Counselors Essay*, 45 CONN. L. REV. 1355, 1355 (2013) (arguing lawyers need to be interdisciplinary theorists to understand "what's going on").

compilation of numerous influences and emphasizes developing students' understanding of how culture, in turn, influences interactions or knowledge."[235] Importantly, the cultural sensibility framework acknowledges that cultural experiences impact the interpretation, application, and communication of facts and law.[236] At its core, cultural sensibility promotes curiosity, humility, and open-mindedness.[237] It "emphasizes self-reflection and treats each person as an expert on his or her own cultural experience(s)."[238] Additionally, cultural sensibility acknowledges that cultural experiences and understanding vary over a person's lifetime.[239] As a result, culturally responsive lawyering, much like a lawyer's duty of competence, requires an ongoing commitment to self-reflection, inquiry, and growth.

Currently, most law students who encounter curriculum on cultural sensibility do so in the second or third year of law school when they participate in a legal clinic. While a well-designed and supervised clinic experience is invaluable for developing competent lawyering skills, imagine the potential for student growth if the entire legal education supported a student's first client representation. In such a scenario, the student would be applying concepts and skills honed over two years of large lecture, small seminar, and simulation-based courses. Alongside the core concepts and skills associated with transformative legal analysis, students should be exposed to and begin to cultivate the professional values, attitudes, and skills undergirding inter-cultural sensibility from the first day of law school.

As discussed previously, clinical scholars have developed both theoretical and practical models for teaching cultural sensibility in their clinics and a full summary is beyond the scope of this article.[240] Some of the models and exercises for teaching cultural sensibility are easily adapted to other courses outside the clinical experience. For example, consistent with the proposed learning outcomes above, Legal Writing, first-year podium, Professional Responsibility, and other non-clinical experiential courses should include professional identity development as a core learning outcome. In courses outside of the clinical setting, professional identity development should include engaging students in developing self-awareness through frequent self-assessment and reflections. This could include asking students to think about

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235. Curcio et al., *supra* note 128, at 189.

236. *Id.* at 191-92; *see also* Chopp, *supra* note 34, at 370.

237. Curcio et al., *supra* note 128, at 189.

238. Chopp, *supra* note 34, at 367.

239. *See* Curcio et al., *supra* note 128, at 188 (noting that cultural sensibility "account[s] for the fact that cultural experiences vary over our lifetimes and . . . encourage[s] students to continuously [] examine whether their own worldviews or beliefs might need to shift").

240. For an extensive list of learning outcomes supporting the cultural sensibility framework, see *id.*

how their own identity and experiences impact their reaction to and understanding of the material they are encountering.[241] In a Legal Writing course, this may include asking students to read *The Five Habits* and walk through some of the exercises.[242] While addressed to clinical professors looking to support students in building cross-cultural competence, the exercises in this seminal text could be adapted to any law school classroom. For example, students in first-year Legal Writing courses often represent a fictional client and engage in a client interviewing simulation.[243] In preparation for the simulation, students can be asked to complete an exercise based on "Habit 1: Degree of Separation and Connection."[244] Here, students can identify the similarities and differences between themselves and their clients. They can then brainstorm how these similarities and differences might impact the lawyer/client relationship—from issue-spotting and fact gathering to client communication and legal drafting.

Certainly, there are limits to such an exercise in simulated "client" settings. As Professors Capulong and Shallek have each noted, simulated clients can never adequately capture human complexity.[245] Acknowledging these limitations, law professors should be transparent with students about what they can and should learn from casebooks, simulated exercises, and actual-client representation. For example, unpacking assumptions around sameness is particularly important for first-year law students who are developing their issue-spotting and problem-solving skills in both podium and Legal Writing courses.[246] As Professor Alexis Anderson notes, "assumptions attributed to sameness can complicate lawyering . . . . [U]ntested assumptions, whatever their source, can impair lawyering judgments."[247] One strategy that professors can employ in any type of course is to challenge students to make the familiar strange. Using this sociological concept, students should move beyond

241. Weng, *supra* note 73, at 386; Zawisza, *supra* note 33, at 232 (asking students to reflect on an assumption of theirs that "proved to be untrue"); Anderson et al., *supra* note 73, at 386.

242. *See* Bryant, *supra* note 73; *see also* Bryant & Koh Peters, *supra* note 36.

243. *See e.g.*, Peggy Cooper Davis & James Webb, *Learning from Dramatized Outcomes*, 38 WM. MITCHELL L. REV. 1146, 1151-52 (2019).

244. Bryant & Koh Peters, *supra* note 36, at 51. For suggestions on applying *The Five Habits* in large first-year required courses, see Mikah K. Thompson, *Toward a Pedagogy of Self-Awareness in the First-Year Law School Classroom*, CULTURAL COMPETENCE IN HIGHER EDUCATION (forthcoming), https://perma.cc/QTR2-PQ92.

245. *See* Capulong, *supra* note 23, at 41-42 (noting that "because it is impossible to simulate social circumstances fully and dynamically, simulated clients are bounded and are replete with individual, not social, detail"); Shalleck, *supra* note 23, at 1733 (noting that simulated clients are stripped of extraneous features because they are created to serve pre-existing legal frameworks).

246. Anderson et al., *supra* note 73 (noting challenge of addressing sameness for clinical students).

247. *Id.* at 341.

"common-sense" conclusions that are grounded in their own social reality and attempt to describe, interpret, and evaluate events and people from different perspectives. When discussing a case—such as one relying on concepts like the "reasonable person" or "apparent authority"—students can be asked to consider whether identity, cultural background, or other considerations impact such determinations.[248] As part of this inquiry, taking a transformative legal analysis approach, students can investigate sources that explore the socio-cultural contexts in which these legal rules were developed.[249] This type of perspective-taking can be used when reading appellate decisions or when representing a fictional client. Exercises like this help students to experience law's subjectivity. And practicing this skill throughout law school will help students to prepare to competently represent clients.[250]

When integrated throughout the law school curriculum, students will begin to understand that professional identity development is critical for both learning and practicing the law. They will come to understand that "a lawyer's multicultural knowledge, intercultural communication skills, and cultural sensitivity are often the keys to avoiding misunderstanding and promoting effective problem solving."[251] Finally, teaching students to consciously reflect on how perceptions of difference and sameness affect their lawyering practices will result in attorneys who are more agile and ethical in a pluralistic society and will inspire them to build a judicial system that is more just and equitable.

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248. For a simple, engaging addition to a discussion on "reasonable person," include the podcast: "Mr. Graham and the Reasonable Man." *Mr. Graham and the Reasonable Man*, MORE PERFECT (2017), https://perma.cc/V3L3-R393. For suggestions on discussing "implied consent" in Torts, see Thompson, *supra* note 244. Professor Osamudia James uses a brief classroom exercise in her Torts course to help her students understand how race shapes the construction of the reasonable person standard and to understand that engagement with core legal concepts is not neutral. She asks her students to close their eyes and picture the reasonable person. She asks: who is this person? What do they look like? Where do they live? How do they move around the world? Students then open their eyes and she asks a series of questions about who or what they conjured. Osamudia James, Professor, University of Miami Law School, Presentation at the Boston University School of Law Symposium: Racial Bias, Disparities and Oppression in the 1L Curriculum: A Critical Approach to the Canonical First Year Law School Subjects (Feb. 28, 2020) (remarks on file with author).

249. For example, professors could assign law review articles or book chapters to contextualize and ground the cases they read. *See, e.g.*, Ann McGinley, *Reasonable Men?*, 45 CONN. L. REV. 1 (2012) (discussing the reasonable person standard in negligence law and Title VII); Lucy Jewel, *Does the Reasonable Man Have an Obsessive Compulsive Disorder?* 54 WAKE FOREST L. REV. 1049 (2019) (exploring the cultural and legal attributes of the reasonable man); Martha Chamallas, MEASURE OF INJURY, 119-53 (exploring how omission bias, normality bias, and fundamental attribution error negatively affects marginalized tort plaintiffs).

250. *See* Susan A. Bandes, *Moral Imagination in Judging*, 51 WASHBURN L. J. 1, 24 (2011) (noting that moral imagination arises through "the effort to understand the perspectives of others").

251. *See* Lynch, *supra* note 81, at 136.

IV. CULTURALLY RESPONSIVE LAWYERING APPLIED

While a full exploration of Mr. Demesme's story is beyond the scope of this article, returning to the opening scene and sketching a possible pathway forward will help to ground the preceding pages. Did he ask for an attorney? Should anything he said after he made the statement be suppressed in his criminal trial? What do the answers to these questions say about what the law is? What, if anything, do they say about what the law should be? This Part illustrates how using the culturally responsive lawyering framework might impact Mr. Demesme's case and provides suggestions for its use in a law school course.

The court reporter transcribed Mr. Demesme's statement as follows:

> *"If y'all, this is how I feel, if y'all think I did it, I know that I didn't do it so why don't you just give me a lawyer dog cause this is not what's up."*[252]

Like the eye movement—a twitch or wink—Mr. Demesme's statement to two police officers during a custodial interrogation might be understood in numerous ways. But where would you start? First, acknowledge that law and culture exist in a mutually constitutive relationship. For Mr. Demesme's story, this means that before he spoke those words, he existed in the world, his life and how he understood the world were influenced by his experiences, which is to say: he existed in culture(s). The rules being applied to Mr. Demesme, those that he allegedly broke and those governing his interactions with law enforcement, also existed within and were informed by culture. Finally, you the law student or lawyer, imbued with multiple identities and shaped by experience, will process all of the materials in this case through the cognitive architecture that has been building itself in your brain since you were born. Some of that architecture will process information consciously and you will be aware of its working. Much of that architecture will process information subconsciously. That's the starting point: law and stories come from somewhere and your perception of both is subjective.

Then what? Before situating the legal sources that might govern this case, heighten your self-awareness. Consider how your identity and experiences influence the choices you make in legal research, issue spotting, case analysis and client communication. What are your initial thoughts on the case? For some, you may think that Mr. Demesme asked for a lawyer, and that his request was clear. If you think this, why? What supports your conclusion? For others, you may think that Mr. Demesme didn't ask for a lawyer, or that he asked but then kept answering questions so he must not have really wanted one. If you think this, why? What supports your conclusion?

Next, as you investigate legal sources, consider the role that state and

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252. State v. Demesme, 228 So. 3d. 1206, 1206 (La. 2017).

federal law play in this scenario. The Supreme Court of Louisiana will apply its own substantive and procedural precedents along with the Supreme Court's Fifth Amendment protections. Here, Mr. Demesme petitioned the Louisiana Supreme Court for a supervisory writ to review the trial court's denial of his motion to suppress and the intermediate appellate court's subsequent writ denial. Can the Louisiana Supreme Court take the case? Should it? What rules will the court apply? What level of error must Mr. Demesme demonstrate? Which way do these scales tip? Which way should they?

When considering Mr. Demesme's Fifth Amendment argument, start with the text of the Fifth Amendment, and consider the Supreme Court decisions in *Miranda v. Arizona*, *Edwards v. Arizona*, and *Davis v. United States*. For context, understand the dilemma the Supreme Court faced in this series of cases. On the one hand, prior to *Miranda*, coercive custodial interrogation practices routinely resulted in questionable confessions.[253] Some of those custodial practices were so brutal and intimidating that they "effectively infringed on the Fifth Amendment's privilege against self-incrimination."[254] On the other hand, the government has an interest in interrogating criminal suspects. This history, steeped in both racism and subjugation, helps to ground the law's various purposes.

Think about how Supreme Court in *Davis* added to the Fifth Amendment story. There, it said that in order for an investigation to cease, the suspect must "at a minimum, [make] some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney."[255] Statements that reference an attorney, but are "ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that they suspect *might* be invoking an attorney," do not require ceasing the interrogation.[256] The Supreme Court of Louisiana has interpreted *Davis* to mean that Louisiana courts should evaluate facts on a case-by-case basis to determine whether a suspect made the request with "sufficient clarity."[257] What "facts" matter in this case? How do you know they matter? Are there facts that might not matter but should? What does "sufficient clarity" sound like? What does it look like? When you read the Louisiana cases, question your hunches and the way that you justify the similarity or differences between their facts and those in Mr. Demesme's case.

While investigating the sources of authority that impact the outcome in Mr. Demesme's case, consider the justices and judges who wrote key opinions. Consider the sources they cite and the types of arguments that might have

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253. Mezey, *supra* note 29, at 55.

254. *Id.*

255. Davis v. United States, 512 U.S. 452, 459 (1994) (quoting McNeil v. Wisconsin, 501 U.S. 171, 178 (1991)).

256. *Id.*

257. State v. Payne, 833 So. 2d 927, 938 (La. 2002).

influenced them at the time. Pay attention to whether they rely on a canon of construction to support their decisions. Do they rely on the same canon in similar cases? Would using a different canon render a different result? Consider also the facts in each case, consider what is present and what might be missing. Ask yourself whether those facts change your analysis. Also consider whether the cases you are relying on could have come out differently using the same facts and precedent and think about how this answer might influence your analysis.

Next, look beyond the law's source and consider the socio-cultural context—for the law and for Mr. Demesme. The stories you surface will reveal that law and culture had been busy creating meaning and constructing one another long before Mr. Demesme said: so why don't you get me a lawyer. The *Miranda* warning and the attendant rule from *Edwards* requiring that interrogations cease once a custodial suspect invokes the right to an attorney by requesting one, also became part of popular culture.[258] They "found [their] way not only into police stations, but into television stations, movies, children's games, as well as the popular imagination of Americans and foreigners alike.[259] Consider how the rules' operation in the popular imagination, and perhaps even in Mr. Demesme's own experiences, might have influenced how he expressed himself in that interrogation room. Would Mr. Demesme's literacy level, education, mental health or other factors affect your thinking?

Then, consider what happens to your analysis if you change up the syntax, or even word choice?

What if Mr. Demesme said this:

> *"If y'all (pause). This is how I feel. If y'all think I did it, I know that I didn't do it. So why don't you just give me a lawyer, dawg, cause this is not what's up."*[260]

Or this?

> *"If you? This is how I feel. If you think I did it, I know that I didn't do it. So why don't you give me a lawyer because you are wrong."*

Or this?

> *"Just give me a lawyer."*[261]

Take a step back and consider how your initial hunch has changed. Are you more or less certain? Why? And, how do you feel about this certainty? How

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258. Mezey, *supra* note 29, at 55; *see also* Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM J. L. & ARTS 91, 95 (2005) (noting that many Americans' dominant perspective of the law and legal institutions comes from their representation in popular culture and this influences "collective expectations, societal myths and the national psyche").

259. Mezey, *supra* note 29, at 55.

260. *Cf. Demesme*, 228 So. 3d. at 1206.

261. Petition at 9, *Demesme*. Mr. Demesme's attorney argued in his motion and in subsequent petitions that these were the operative words.

might this feeling affect your case planning, decision-making, and client representation? How might it change what you think the law should be?

The avenues to consider in Mr. Demesme's case are nearly limitless, and the paragraphs above only scratch the surface. But they also represent something powerful—something captured by the media storm Justice Crichton's concurrence sparked after he decided "[i]n [his] view, the defendant's ambiguous reference to a 'lawyer dog' does not constitute an invocation of counsel,"[262] a view which has no support in Louisiana or Supreme Court precedent.[263] Teaching future lawyers and judges about culture, cognition, and context matters.

CONCLUSION

"For it is important that awake people be awake, or a breaking line may discourage them back to sleep; the signals we give—yes or no, or maybe—should be clear: the darkness around us is deep."[264]

Although social cognition and culture work have emerged in some legal corners, these concepts can no longer be buried in scholarship or largely siloed in "Law +" or in experiential courses. If law schools continue with this approach, they will send the message that these concepts and skills are peripheral to legal education and practice.

Certainly, the changes proposed here may seem daunting. Faculty members might feel that this framework is inconsistent with their teaching or course plan. As Part IV illustrates, the culturally responsive lawyering framework requires professors to dedicate syllabus space and class time to dynamic spheres of inquiry. There will be no simple answers. Law professors may feel ill-equipped to teach and assess students on cultural responsiveness, especially since few law professors were trained to be culturally sensible lawyers.[265] The danger is the perpetuation of "empty, abstract, and ill-educated efforts to meet a rather lofty and elusive goal."[266] Law faculty are right to be cautious when adopting new trainings and curricula, especially in these critical areas where a decontextualized approach to teaching about culture risks reification.

But cognition and culture influence every aspect of human interaction. They inform how people perceive, evaluate, and communicate information. It is time for legal institutions and law professors to embrace their import for legal education. Even though the newest changes to the ABA Standards do not

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262. *Demesme*, 228 So. 3d. at 1207.

263. *See* Hebert, *supra* note 15, at 7-8.

264. WILLIAM STAFFORD, A Ritual to Read to Each Other, *in* THE WAY IT IS: NEW AND SELECTED POEMS 42 (1998).

265. *See* Boles, *supra* note 78, at 224.

266. *Id.*

explicitly require law schools to ensure their graduates demonstrate any competency with these concepts, law faculty should take this opportunity to rethink legal curricula—and to adopt new approaches that prepare law students to practice law ethically, promote justice, and improve the legal profession. Adopting the tenets of culturally responsive lawyering will help them do just that.

Our Glossary

The CARED Collective maintains a glossary with definitions of key terms related to your work in anti-racism. These terms are crucial to the system of thought that works to combat individual, institutional and systemic racism. This list is by no means exhaustive. Moreover, history has shown us that terminology tends to shift over time, particularly as marginalized groups and individuals are increasingly heard.

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