

INTEGRITY TESTING FOR LAWYERS: IS IT TIME?

Marvin J. Huberman*
Toronto

"To everything there is a season, and a time to every purpose under the heaven." *Ecclesiastes 3.1*

This paper examines integrity testing for lawyers. It begins by exploring the concept of integrity and the particular need for integrity in the legal profession. It then examines the potential use of testing as a means of ensuring integrity amongst lawyers.

The author explores some of the problems with existing forms of integrity tests as used in other contexts. Finally, some of the potential implications of testing, including the issues of fairness, constitutionality, alternatives, timing and consequences of integrity testing for lawyers are raised and briefly explored. The relevant Canadian and United States legal literature is also reviewed.

Cet article examine la question de la vérification de l'intégrité chez les avocats. D'abord, il explore le concept d'intégrité et le besoin particulier d'intégrité dans la profession juridique. Il examine ensuite l'utilisation éventuelle qui pourrait être faite de la vérification comme moyen d'assurer l'intégrité chez les avocats.

L'auteur se penche sur les problèmes que soulèvent certains types de méthode de vérification de l'intégrité utilisées dans d'autres contextes. Enfin l'article explore brièvement quelques aspects de la vérification, notamment les questions d'équité, de constitutionnalité, de méthodes de rechange, de «timing» et les conséquences de la vérification de l'intégrité sur les avocats. Le lecteur trouvera dans cet article une revue de la littérature canadienne et américaine sur le sujet.

Introduction	48
What is Integrity	48
I. The Concern About Lawyers' Integrity	49
(a) Causes	52
(b) Costs	53
II. Professional Codes and Requirements	54
III. Integrity Testing: A Potential Solution?	55
(a) What Would Testing Do?	56
(b) Does Testing Work?	57
(c) Implications of Testing	57
(i) Fairness	57
(ii) Constitutional Issues	58
(iii) Alternatives	59
(iv) Timing	60
(v) Consequences of Finding a Lack of Integrity	61
Conclusion	64

* Marvin J. Huberman, of Morris/Rose/Ledgett, Toronto, Ontario. The author gratefully acknowledges the helpful comments of Professor Beverley Smith, of the Faculty of Law, University of New Brunswick, and the assistance of Janine Denney-Lightfoot.

Introduction

What is Integrity?

The person who undertakes to become an attorney must approach the law disposed to becoming a good lawyer sensible to the daily process of practical deliberation required to live a life in the law of integrity.¹

Much has been written about legal ethics and professional responsibility, and while integrity is often mentioned as an important characteristic, little has been said about integrity itself. It is often equated with truthfulness or honesty, but while honesty is one element of integrity, it is not the same thing.² Likewise, integrity is something more than good professional ethics, or adhering to professional codes of conduct, although it will influence one's behaviour in both of these regards. Rather it is a basic character trait comprising several elements.³ Character, itself, is recognized as being essential to the ethical practice of law,⁴ and integrity must be seen to be an important element of every lawyer's character. A lawyer's level of integrity will influence how he or she interacts with the legal world.

Several definitions or descriptions of integrity shed some light on its meaning. Rule 7.1 of the Rules made under subs.62(1) of the *Law Society Act*⁵ describes integrity as "a personal trait or attribute describing one's moral character".⁶ Leading dictionaries agree: "Soundness of moral principle; the character of uncorrupted virtue, especially in relation to truth and fair dealing; uprightness, honesty, sincerity",⁷ or "The quality or state of being of sound moral principle; uprightness, honesty, sincerity".⁸

There is some useful writing on this topic. Pamela Ann Rymer describes integrity as honesty to the court, the client and one's own conscience, and sets out a number of characteristics that are required to achieve it:

responsibility...perseverance...commitment...honour and civility...to always be helpful, courteous, polite and professional to the judge and jury, and be considerate of opposing counsel and the other side.⁹

¹ S. Stier, "Legal Ethics: The Integrity Thesis" (1991) 52 Ohio State Law Journal 551 at 591.

² S.L. Carter, *Integrity* (New York: BasicBooks, 1996) at 10, 52.

³ See definitions of integrity, *ibid.* at 2-5.

⁴ Edward J. Eberle, "Three Foundations of Legal Ethics: Autonomy, Community, and Morality" (1993) 7 The Georgetown Journal of Legal Ethics 89 at 110.

⁵ *Law Society Act*, R.S.O. 1990, c.L.8.

⁶ The Law Society of Upper Canada, Rules made under subsection 62(1) of the *Law Society Act*, in force as at March 24, 1995.

⁷ Oxford English Dictionary, 2nd ed.

⁸ Webster's New World Dictionary, 3rd college ed.

⁹ P.A. Rymer, "High Road, Low Road. Legal Profession at the Crossroads" (1989) 25(10) Trial 79 at 81.

Gerald J. Postema includes honesty, uprightness, and soundness of moral principle, and includes "the idea of being whole, complete, and undiminished as a state of character",¹⁰ while Beverley Smith notes that "integrity, competence and a concept called 'quality of service'" are the terms often used in the context of good professional conduct, and defines integrity as honesty and trustworthiness.¹¹ Another writer, F.A.R. Bennion, sets out some of the elements of integrity as "the preservation of confidences, the display of impartiality, the taking of full responsibility...competence."¹² And finally, Stephen L. Carter states that integrity involves three steps:¹³

- (a) discerning what is right and what is wrong;
- (b) acting on what has been discerned, even at personal cost; and
- (c) stating openly that one is acting on his or her understanding of right and wrong.

He notes that these three elements include the ideas of moral reflectiveness, steadfastness and not being ashamed of doing the right thing.¹⁴

In addition to the lawyerly and academic literature, one member of our Supreme Court has determined that it "is, above all else, honesty to self".¹⁵

It is clear that integrity has a variety of meanings, but in all cases it involves several elements which are each "good" of themselves.

I. *The Concern About Lawyers' Integrity*

The public, and lawyers themselves, are unhappy with the state and perception of the legal profession.¹⁶ We all hear the jokes and the harsh comments about lawyers. A National Law Journal/West Publishing Co. survey in 1993 found disturbing trends in the American public's attitude about lawyers. One important result of the survey was that the number of people who felt that lawyers were

¹⁰ G.J. Postema, "Self-Image, Integrity, and Professional Responsibility" in David Luban, ed., *The Good Lawyer* (New Jersey: Rowman & Allanheld, 1984) 286 at 307.

¹¹ B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths Canada Ltd., 1989) at 3-4.

¹² F.A.R. Bennion, *Professional Ethics* (London: Charles Knight & Co. Ltd., 1969) at 111.

¹³ S.L. Carter, "The Insufficiency of Honesty" (February 1996) *The Atlantic Monthly* 74 and *supra* footnote 2 at 7.

¹⁴ Carter, *supra* footnote 2 at 7.

¹⁵ The Honourable Mr. Justice G.V. La Forest, "Integrity in the Practice of the Law" (1987) 2 *Gazette* 41 at 42.

¹⁶ D. Luban and M. Millemann, "Good Judgment: Ethics Teaching in Dark Times" (1995) 9(1) *Georgetown Journal of Legal Ethics* 31 at 37; and D.S. Kleinberger, "Wanted: An Ethos of Personal Responsibility — Why Codes of Ethics and Schools of Law Don't Make for Ethical Lawyers" (1988/89) 21 *Connecticut Law Review* 365 at 366.

less honest than most people had almost doubled (from 17 to 31 percent of those polled) since a 1986 survey.¹⁷

While lawyers have always been unpopular and subject to derisive remarks,¹⁸ one writer describes the current anti-lawyer sentiment as outright hatred.¹⁹ As Thomas Jefferson said in 1808, "No profession is open to stronger antipathies than that of the law".²⁰ Thus Louis Heller provides a survey of famous moralists, philosophers and others who have "attributed to lawyers every vice from meanness, deviousness, and rapacity to unscrupulousness and fraud".²¹ These include Plato quoting Socrates (lawyers are "unrighteous" and "crooked") through to Oliver Wendell Holmes, Sr.²² American Judge J. W. Donovan in 1915 aptly described the general view of lawyers:

Lawyers, the most trusted and distrusted: the men who make contracts and unmake them; who give advice and sell counsel; who make money out of trouble and make trouble out of money; who create estates and distribute them — legally; who live by loaning money, and often subsist on borrowed capital; who hear and conceal marriage secrets, and drag out faded letters in bitter divorces; who plead and persuade when they are lucky, but often go out of Court branded and dispraised by the side defeated — and with one side always the loser: what wonder that the slurs of character fall to the common lot of the lawyer!²³

At the same time there has been, at some level, an ongoing belief that at one time the profession of law was a noble one dedicated to public service, and held in high esteem.²⁴ Some commentators now note that this ideal may always have been merely a "beautiful" myth.²⁵

David Luban, in *The Ethics of Lawyers*, sets out several popular jokes in his Introduction, none of which are flattering.²⁶ He also sets out some of the common complaints that lawyers are greedy, untruthful and have little respect for law or justice.²⁷ In essence, these concerns about lawyers fall under the

¹⁷ R. Samborn, "Anti-Lawyer Attitude Up" (1993) 15(49) *The Law Journal* 1 at 20.

¹⁸ L.B. Heller, *Do You Solemnly Swear* (New York: Doubleday & Company, Inc. 1968) at 459; and Roger C. Cramton, "The Trouble With Lawyers (and Law Schools)" (1985) 35 *Journal of Legal Education* 359 at 359.

¹⁹ H.I. Saferstein, "These Dead Lawyers Aren't Part of a Joke" (Monday August 2, 1993) *The National Law Journal* 13 at 14.

²⁰ T. Jefferson, Letter to William Wirt, 10 January 1808, in *Writings of Thomas Jefferson* (H. A. Washington ed., 1853) at 5:233.

²¹ Heller, *supra* footnote 18 at 459.

²² *Ibid.*

²³ Judge J. W. Donovan, *Tact in Court*, 6th Edition, (London: Sweet & Maxwell, Ltd., 1915) at 3.

²⁴ N.J. Moore, "Professionalism Reconsidered" (1987) *American Bar Foundation Research Journal* 773 at 782.

²⁵ Moore, *ibid.*; and Michael Distlehorst, "Living in the Faith of Our Special Myths" (1990) 19 *Cap. University Law Review* 1135, 1141.

²⁶ D. Luban, ed., *The Ethics of Lawyers* (New York: New York University Press, 1994) at xi.

²⁷ Luban, *ibid.*

heading of integrity, or lack thereof. In a profession that prides itself on its public service mandate, such concerns are surely cause for alarm.

Unfortunately, part of the difficulty may be due to the nature of the profession itself.²⁸ The role of the lawyer is different from that of other professionals.²⁹ That is, lawyers have what is often called a "role-differentiated" function: because they are acting on behalf of a client, they may, and often must, do things and make ethical choices that they, and others, as individuals would not otherwise do.³⁰ Because of this role-differentiated function, the lawyer's integrity is often called into question.³¹ Daniel Kleinberger states that the legal system actually separates lawyers from the results that their work produces, relieving them of the need to think about the effects of their actions and thus desensitizing them to ethical issues.³² Postema has raised the question of whether it is possible for an individual to acquire the necessary professional identity of the lawyer without significantly damaging his or her personal or moral integrity.³³ Charles Fried has asked "Can a good lawyer be a good person?",³⁴ and Serena Stier has stated it even more harshly:

Lawyers thus cannot be persons of integrity because they must choose between either being a good person or a good lawyer.³⁵

If this is true, and if the answer to Postema's question is "no", the legal profession, the justice system and our social order are doomed to failure.

This cannot be true. One observer states that while the role-differentiation theory claims that a person changes to a different person when he or she is functioning in the capacity of lawyer, all that in fact changes are the circumstances involved.³⁶ This creates a different basis for making decisions, and she notes that this alone cannot destroy an individual's basic integrity.³⁷ This is a

²⁸ A. Eschete, "Does a Lawyer's Character Matter?", in D. Luban, ed., *The Good Lawyer*, (New Jersey: Rowman & Allanheld, 1984) 270 at 271.

²⁹ R. Wasserstrom, "Lawyers as Professionals: Some Moral Issues" in D. Luban, ed., *The Ethics of Lawyers* (New York: New York University Press, 1994) at 3.

³⁰ Wasserstrom, *ibid.* at 7; Eschete, *supra* footnote 28 at 271-72; C.P. Curtis, "The Ethics of Advocacy" (1951/52) 4 *Stanford Law Review* 3 at 6; C. Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation" (1975/76) 85 *Yale Law Journal* 1060; Stier, *supra* footnote 1 at 554; and S. Wolf, "Ethics, Legal Ethics, and the Ethics of Law" in D. Luban, ed., *The Good Lawyer* (New Jersey: Rowman & Allanheld, 1984) 38 at 58.

³¹ Wasserstrom, *ibid.* at 16, and G.J. Postema, "Moral Responsibility in Professional Ethics", in D. Luban, ed., *The Ethics of Lawyers* (New York: New York University Press, 1994) 27 at 41, and T.H. Morawetz, "Lawyers and Conscience" (1988/89) 21 *Connecticut Law Review* 383 at 395.

³² Kleinberger, *supra* footnote 16 at 369.

³³ Postema, *supra* footnote 10 at 287.

³⁴ Fried, *supra* footnote 30 at 1060.

³⁵ Stier, *supra* footnote 1 at 555.

³⁶ Stier, *ibid.* at 562-63.

³⁷ Stier, *ibid.*

rational view of the situation and one with which many lawyers would agree.

This is not to say that the problem is one of perception alone. There *is* a problem with professional behaviour amongst lawyers, and this may be linked to a basic integrity problem. A consideration of the Law Society's Discipline Digest shows the existing problems. In each issue there are several lawyers who have been disciplined for a variety of "offenses", ranging from misappropriation of funds and misleading clients, to failing to respond to notices sent by the Law Society and failing to file required forms. Each of these "offenses" may demonstrate a lack of integrity on the part of the lawyer disciplined (although clearly the seriousness and the level of the lack of integrity vary over the range of "offenses"). Whether it be theft, lying or simply failing to do what one is required by one's profession, the lawyer's integrity is called into question.

(a) *Causes*

There are many causes contributing to the negative perceptions of lawyers. Some are related to the structure and functioning of the legal system itself, some to the way law is practised and some related to lawyers' attitudes and behaviour. One cause is dissatisfaction with actual services provided by lawyers, in terms of fees and matters such as failure to communicate.³⁸ But there is deeper resentment due to lawyers' efforts through the legal system to improve the position and rights of those who are less fortunate and less privileged in our society.³⁹

Some see reduced professionalism and breaches of ethical or social norms as important causes.⁴⁰ Others see the emphasis on law as a business based on profit instead of on service and justice as a cause.⁴¹ Still others emphasize the "rights revolution" that took place in the 1960s, the increase in the numbers of lawyers and the fact that bottom-line pressures reduce the ability of lawyers to do anything beyond what is absolutely necessary within their own practices.⁴²

Roger Cramton has discussed the issue of the perception of "declining professionalism" at length. He sees a central cause as being a change in the structure of the legal profession itself: where the profession was once a smaller group with common bonds of language, preparation and training, and group association, this is no longer true.⁴³ The profession was once able to regulate

³⁸ Samborn, *supra* footnote 17 at 22.

³⁹ Samborn, *ibid.*

⁴⁰ Eberle, *supra* footnote 4 at 89.

⁴¹ A.M. Johnson, Jr., "Think Like a Lawyer, Work Like a Machine; The Dissonance Between Law School and Law Practice" (1991) 64 Southern California Law Review 1231 at 1232.

⁴² T.D. Morgan, "The Fall and Rise of Professionalism" (1985) 19 University of Richmond Law Review 451 at 457-58 and 460.

⁴³ R. Cramton, "Delivery of Legal Services to Ordinary Americans" (1993/94) 44 Case Western Law Review 531 at 603.

itself because of this cohesiveness.⁴⁴ The profession is now much larger and is more heterogeneous, by race, culture, gender and specialization so that the earlier cohesiveness and resulting self-regulation no longer exist.⁴⁵

A further basic cause of negative perceptions is that the nature of the adversarial system produces a "loser" in every litigated case so that up to half of those involved with the law will be unhappy with their experience.⁴⁶ If this is the only contact an individual has with the legal system, he or she is not likely to be disposed to view the system or lawyers favourably.

(b) Costs

The costs of lack of integrity, and the perception of absent of integrity, are significant. When lawyers act without integrity, people are injured, whether financially or emotionally. The individual lawyer suffers a loss of reputation, the profession's reputation suffers damage, and the justice system is diminished. Mr. Justice La Forest has explicitly stated that lawyers must possess the qualities of honesty and integrity for the justice system to function properly.⁴⁷ Lawyers are individuals' representatives within the legal system. People rely on them to serve their interests, to carry out the tasks required of them, and to do so in a principled fashion. Lawyers "may be entrusted with the liberty, confidences, property, well-being and livelihood of a client".⁴⁸ Likewise, judges rely upon the integrity of the lawyers who appear before them. Judges expect to be able to rely upon lawyers' statements, research and undertakings. If judges cannot assume that on the representations made by lawyers are true and accurate, the system cannot function.

Integrity on the part of lawyers is therefore essential to the effective operation of our legal system. F. A. R. Bennion notes that integrity is the fundamental quality, whose absence vitiates all others.⁴⁹ As stated in Rule 7.3 of the Rules made under subs.62(1) of the *Law Society Act*:

The integrity and honour of the profession as a whole depend on the integrity of its individual members.⁵⁰

And in Rule 7.5:

The integrity of the justice system depends on the integrity of lawyers: without lawyers of integrity there can be no system of justice properly so called.⁵¹

⁴⁴ Cramton, *ibid.*

⁴⁵ Cramton, *ibid.* at 608.

⁴⁶ Heller, *supra* footnote 18 at 460.

⁴⁷ *Supra* footnote 15 at 41.

⁴⁸ *The Law Society of Upper Canada Rules*, Rule 7.4.

⁴⁹ Bennion, *supra* footnote 10 at 112.

⁵⁰ *The Law Society of Upper Canada Rules*, Rule 7.3.

⁵¹ *The Law Society of Upper Canada Rules*, Rule 7.5.

Even further, the integrity of the legal profession is necessary in order to maintain a free and democratic society.⁵² In essence, then, a lawyer's integrity is important for reasons going far beyond the interests of his or her clients; it has implications for our overall legal and social order. Lawyers thus have an obligation to their clients, to the judiciary, to other lawyers and to the public to act, at all times, with integrity.

This is not an easy task. One writer has noted that in order to be able to act with personal integrity within the law, lawyers must reconcile their professional obligations and personal morality, remaining faithful to both and distorting neither.⁵³ Mr. Justice La Forest notes that retaining personal integrity is a duty that lawyers owe to themselves as well as being one of the interests they must reconcile in their work in the law.⁵⁴

II. *Professional Codes and Requirements*

Integrity is also demanded by codes of professional conduct. Rule 1 of the Ontario Rules of Professional Conduct⁵⁵ provides that: "The lawyer must discharge with integrity all duties owed to clients, the court the public and other members of the profession". The Commentary to this Rule is important as it attempts to clarify what is meant by integrity, and why it is necessary in a lawyer:

1. Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If the client is in any doubt as to the lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If personal integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed regardless of how competent the lawyer may be.
2. Dishonourable or questionable conduct on the part of the lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice as a whole. If the conduct, whether within or outside the professional sphere, is such that knowledge of it would be likely to impair the client's trust in the lawyer as a professional consultant, the Society may be justified in taking disciplinary action.
3. Generally speaking, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer

⁵² *The Law Society of Upper Canada Rules*, Rule 7.5.

⁵³ A. Woolley, "Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer" (1996) 9 *Canadian Journal of Law and Jurisprudence* 61 at 92.

⁵⁴ La Forest J., *supra* footnote 15 at 42.

⁵⁵ *The Law Society of Upper Canada, Professional Conduct Handbook*.

which do not bring into question the lawyer's professional integrity or competence.⁵⁶

Section 27(2) of the *Law Society Act*,⁵⁷ provides that: "An applicant for admission to the Society shall be of good character". Although good character is not defined in the Act, it has been defined by Convocation:

Good character connotes moral or ethical strength, distinguishable as an amalgam of virtuous attributes or traits which would include, among others, integrity, candour, empathy and honesty.⁵⁸

This definition of good character, while including integrity as a term, includes elements of the dictionary definition of integrity (candour and honesty) as well. It is reasonable to presume that, in practice, it equates quite closely with the idea of integrity, integrity being (as noted above) a conglomerate of laudable personal character traits.

Gavin MacKenzie, in *Lawyers and Ethics. Professional Responsibility and Discipline*, supports this perspective. He notes that Rule 1 of the Ontario Rules of Professional Conduct, which requires that lawyers act with integrity, as set out above (and the equivalent rule in other jurisdictions), is used to express this requirement of good character.⁵⁹ He states that the purposes of the requirement of good character are to protect the public, to maintain high ethical standards, to maintain public confidence in the legal profession and its ability to regulate itself and to deal fairly with individuals whose livelihood and reputation are affected. These are quite similar to the reasons lawyer integrity is so important to our legal system.

Clearly, it is essential that the profession have, and be seen to have, the necessary level of integrity in order for the legal system to work as it is designed to function, and for the public, lawyers, judges and parties to have confidence in that manner of operation.

III. Integrity Testing: A Potential Solution?

Having determined that integrity is essential within the practice of law, and that there are real concerns about the level of integrity possessed by some or even many lawyers, a potential solution would be to use testing as a screening device

⁵⁶ Chapter 1 of the *Canadian Bar Association Code of Professional Conduct* is entitled "Integrity" and is virtually identical to the Ontario Rule 1, and accompanying Commentary, set out above. The only difference is the addition of a further Commentary which provides that "The principle of integrity is a key element of each rule of the code", emphasizing the importance of this principle in all aspects of lawyers' conduct.

⁵⁷ R.S.O. 1990, c.L.8.

⁵⁸ G. MacKenzie *Lawyers and Ethics. Professional Responsibility and Discipline*, (Scarborough: Thomson Canada Limited, 1993) at 23-26, citing the reasons of Convocation in the decision of *Re Rizzotto*, September 14, 1992.

⁵⁹ MacKenzie, *ibid.* at 22-23.

for lawyers. Such tests are quite common and have traditionally involved written tests designed for pre-employment screening to determine which individuals are dishonest or counterproductive workers.⁶⁰ While they have mainly been designed and used specifically to reduce the risk of employee theft, the range of behaviours being targeted through such tests is now growing.⁶¹

Integrity tests, as they have been used to test for propensity for theft, can be divided into three main groups:⁶²

- (a) “overt” tests in which questions, usually with regard to attitudes towards theft, dishonesty and past behaviour, are asked;
- (b) “personality-oriented” tests which predict a variety of counterproductive work behaviour; and
- (c) “multidimensional assessment batteries” which have several scales, including integrity.

(a) *What Would Testing Do?*

In theory, testing could be used to determine which individuals have the requisite level of personal integrity to make “good” lawyers. Individuals would complete a pre-set test and would be evaluated on their performance. There would have to be a pre-set level, or more appropriately, an overlapping range of levels which would be interpreted with other variables,⁶³ that would be acceptable. Those who have the required level would be admitted to the bar, or allowed to continue to practise law if already admitted. For those who do not meet the required level, “something else” would have to be done, as discussed below.

In order for this type of system to work it must be possible to measure the characteristic of integrity. As has been pointed out in the integrity or honesty-testing literature, honesty tests can only be used if honesty is a measurable trait that is stable over time, and if it translates into and is predictive of actual behaviour.⁶⁴ This must similarly hold true of integrity for the tests to work. It is not clear that the concept is a fixed characteristic that will thus be stable over time. Given the level of expertise in the fields of psychiatry, psychology and sociology today, however, if integrity truly is a measurable characteristic, it is likely that a test could be designed to determine an individual’s integrity level.

⁶⁰ K.U. Byford, “The Quest for the Honest Worker: A Proposal for Regulation of Integrity Testing” (1996) 49(2) SMU Law Review 329 at 331.

⁶¹ Byford, *ibid.* at 333.

⁶² C. Wiley and D.L. Rudley, “Managerial Issues and Responsibilities in the Use of Integrity Tests” (1991) 42 Labor Law Journal 152 at 152-153.

⁶³ Byford, *supra* footnote 60 at 371.

⁶⁴ Byford, *ibid.* at 342.

(b) *Does Testing Work?*

A 1991 American review of honesty tests raised two significant problems with the use of such tests: individuals are able to “fake” the desired level, and there is a significant false result rate.⁶⁵ While a recent article states that there is a general consensus with regard to both the validity and utility of integrity tests,⁶⁶ another has argued that there is no agreement as to the reliability of integrity testing, that even the tests that have been shown to have a high level of validity have unacceptably high false result rates.⁶⁷

Should a test for measuring integrity be developed and used as a basis for refusing entry to practice or for disbarment, false results would be disastrous.

Additionally, concerns have been raised about what currently existing integrity tests actually measure, stating that it may really be conformity and conventionality rather than honesty or morality.⁶⁸ This type of result must be scrupulously avoided if such tests are developed for lawyers as they will simply leave the problem unresolved.

(c) *Implications of Testing*

(i) *Fairness*

One of the important elements of testing would be to ensure that the tests are fair and are administered fairly, and are seen to be so. A 1920s project conducted in Pennsylvania appears to have failed in these respects. In 1928 Pennsylvania introduced a requirement that all prospective lawyers undergo a character investigation at the beginning of law school and again when applying for admission to the state bar.⁶⁹ One of the results of this form of character testing was that there was a drop of 16% in the number of Jewish lawyers

⁶⁵ S.J. Guastello and M.L. Rieke, “A Review and Critique of Honesty Test Research” (1991) 9 Behavioral Sciences and the Law 501 at 513 and 515.

⁶⁶ W.J. Camara and D.L. Schneider, “Integrity Tests. Facts and Unresolved Issues” (1994) 49(2) American Psychologist 112 at 117.

⁶⁷ Byford, *supra* footnote 60 at 342 and 350. For further discussion of integrity tests, see D.S. Ones, C. Viswesvaran and F.L. Schmidt, “Comprehensive Meta-Analysis of Integrity Test Validities: Findings and Implications for Personnel Selection and Theories of Job Performance” (1993) 78 Journal of Applied Psychology 679; D.S. Ones, C. Viswesvaran and F.L. Schmidt, “Integrity Tests: Overlooked Facts, Resolved Issues, and Remaining Questions” (1995) 50(6) American Psychologist 456; and M.L. Rieke and S.J. Guastello, “Unresolved Issues in Honesty and Integrity Testing” (1995) 50(6) American Psychologist 458.

⁶⁸ W.J. Camara and D.L. Schneider, “Questions of Construct Breadth and Openness of Research in Integrity Testing” (1995) 50(6) American Psychologist 459 and S.O. Liliennfeld, G. Alliger and K. Mitchell, (1995) 50(6) American Psychologist 457.

⁶⁹ MacKenzie, *supra* footnote 58 at 23-25; and W.C. Douglas Jr., “The Pennsylvania System Governing Admission to the Bar” (1929) 54 Reports of American Bar Association 701.

admitted, and “virtually no blacks gained entry”.⁷⁰ While this experiment and its results must be viewed in light of the context in which it was conducted, it does demonstrate the dangers inherent in using any form of test to evaluate character. This theme was discussed by the United States Supreme Court when Justice Black noted that “good moral character” is vague and ambiguous and “can be a dangerous instrument for arbitrary and discriminatory denial of the right to practise law”.⁷¹ MacKenzie notes that in addition to the potential problems of arbitrary and discriminatory denial of the ability to practise law, problems of unpredictability, inconsistency and vagueness also exist.⁷² The problems this causes are not limited to those whose character is actually challenged. There may be many individuals who do not apply to law school or for admission to the bar out of fear that they will not meet the good character requirement.⁷³ These same difficulties would exist with the equally vague and ambiguous integrity requirement if integrity testing is introduced.

(ii) *Constitutional Issues*

Questions have been raised in Ontario as to whether the requirement that applicants for membership to the bar, and existing lawyers, have “good character” may be unconstitutionally vague.⁷⁴ These same questions will apply to any form of integrity testing for lawyers where a lawyer must meet some (arbitrarily) determined level of integrity.

The important question is whether an integrity test for lawyers, if found to breach a *Canadian Charter of Rights and Freedoms*⁷⁵ right would be “saved” by s. 1 of the *Charter*. Section 1 provides that:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The s.1 test has several elements, all of which must be satisfied:⁷⁶

⁷⁰ Mackenzie, *ibid.*

⁷¹ *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957), as discussed in MacKenzie, *ibid.*

⁷² MacKenzie, *ibid.* at 23-26.

⁷³ MacKenzie, *ibid.* at 23-13.

⁷⁴ MacKenzie, *ibid.*

⁷⁵ *Constitution Act*, 1982 R.S.C. 1985, s.7. It is unlikely that a claim of a breach of s.15 of the *Charter* could succeed, given the words of McIntyre J. in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174-75:

Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.

⁷⁶ Ontario Law Reform Commission, *Report on Drug and Alcohol Testing in the Workplace* (Ontario: Ontario Law Reform Commission, 1992) at 92-100, discussing the s.1 test as set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 and *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

- (a) the objective (for the test) must bear on a pressing and substantial concern; and
- (b) the means must be proportional to the ends:
 - (1) the measures must be rationally connected to the objective;
 - (2) they must impair the right as little as possible; and
 - (3) their effects must not be so severe that the breach of the right(s) outweighs the objective.

It may be possible to argue that ensuring that lawyers have the necessary integrity for the practice of law is a pressing and substantial concern given the implications of lack of integrity and resulting lack of confidence in our legal system. Showing that an integrity test is rationally connected to this goal may be more difficult, however, given the ongoing debate about what integrity or honesty tests are actually measuring and the capacity for false result rates. The test design and administration would be important, together with a comparison to the existing alternatives, to determine whether individuals' rights are interfered with as little as possible by integrity testing. It may also be difficult to argue that the objective is not outweighed by the effect of the breach in lawyers' rights, particularly if an individual is denied admission to the bar or a lawyer is disbarred because of his or her "score" on the test.

(iii) *Alternatives*

Every applicant for admission to the Law Society of Upper Canada and to other Canadian Law Societies must be of "good character". This requirement appears to be quite similar to that of having integrity and is one way of approximating a search for integrity. At the stage of admission then, assuming that the test for determining whether or not an applicant is of good character is reliable, there appears to be no need for an independent test for integrity. However, there is no real test administered at the entrance stage, unless an applicant is refused entry for lack of good character in which case he or she is entitled to reasons for the refusal and may dispute the finding. The majority of applicants do not undergo any form of testing, investigation or challenge. Additionally, the "good character" requirement applies only at the time of admission. It is not in any formal way an ongoing requirement that could be tested for. Instead, it is Rule 1 of the Rules of Professional Conduct, requiring that lawyers act with integrity, and the legislative provisions providing for disbarment, reprimand or some other disposition for professional misconduct or conduct unbecoming a barrister and solicitor, that become the operative standards after admission. These processes can be and are used to monitor and deal with problems that can be related to lack of integrity, as shown through discipline proceedings. While these processes do work, they are completely reactive and depend upon reporting or some other method of discovery,

responding to a problem that has already arisen. At this stage, the damage to clients and the legal system is already done. On the other hand, a proactive mechanism, like integrity testing at the time of application for entrance to the bar, and perhaps at different times throughout a lawyer's career, could be used to *prevent* the problems.

The "good character" requirement and post-call mechanisms represent a beginning in dealing with problems of lawyer integrity, but alone they are likely not enough. Thomas Morawetz notes that, at least for some, having professional codes will affect their attitudes and behaviour,⁷⁷ while others see professional codes as mere rules of conduct which do not improve the moral sensitivity of lawyers.⁷⁸ Steps could be taken to improve this system, by providing for ongoing peer supervision or mentoring of new lawyers and those who have had "problems" in the past. One writer emphasizes the central role of senior practitioners in teaching, by example, acceptable attitudes and behaviour to new lawyers.⁷⁹ Viable alternatives would have to include those that work aggressively, to ensure that lawyers have the required integrity before commencing, or continuing, legal practice, to avoid problems. There are many advocates of teaching ethics and professional responsibility to students while in law school and in bar admission courses, with different approaches being put forth by differing advocates. Many law schools in Canada and most provincial bar admission courses require students to complete coursework in professional ethics or responsibility.⁸⁰ However, teaching ethics and professional responsibility, while related, are not the same thing as teaching integrity. Teaching ethics and professional responsibility will help students prepare for some of the ethical and practice problems that they may face in legal practice. Integrity, on the other hand, is a character trait that plays a vital role in a lawyer's approach to ethical and practice problems. It is a character trait which will affect one's approach to a specific problem, rather than being an approach in itself.

(iv) *Timing*

There are several potential stages for integrity testing: on application to law school, during the bar admission programme or on application to be called to the bar, or post-call.

A test on application to law school has the benefit for applicants of avoiding the time, effort and cost of law school if they will not be able to practise law due to a poor score or failure of an integrity test. It has the further benefit to the public

⁷⁷ Morawetz, *supra* footnote 31 at 387.

⁷⁸ G.C. Hazard, Jr., "Personal Values and Professional Ethics" (1992) 40 *Cleveland State Law Review* 133 at 139; D.S. Kleinberger, "Ethos and Conscience — A Rejoinder" (1988/89) 21 *Connecticut Law Review* 397 at 400; and W.H. Simon, "The Trouble With Legal Ethics" (1991) 41 *Journal of Legal Education* 65 at 66.

⁷⁹ R.L. Curry, "Lawyers of Conscience" (1987) 23(4) *Trial* 62 at 64.

⁸⁰ W.W. Pue, "Becoming 'Ethical': Lawyers' Professional Ethics in Early Twentieth Century Canada" (1991) 20 *Manitoba Law Journal* 227 at 229.

of preventing the individual who lacks integrity from practising at all, thereby avoiding the difficulties likely to be caused by a lawyer who is deficient.

Testing on application to the bar has the same benefit of preventing a lawyer who lacks integrity from practising. For those who are found to be lacking and are refused admission, however, great amounts of time, effort and resources will have been wasted.⁸¹

If one adheres to the developmental approach of character determination, testing at either of these stages has the drawback that it may be too early as the individuals being tested have not yet been in practice and have not been in situations that may affect their behaviour.⁸²

One author, writing in the context of character screening for the good character requirement, favours testing before call to the bar as she feels that once an individual is admitted to practice, it is harder to identify the problem and to deal with it.⁸³

Testing post-call has the benefit of ensuring that individuals who initially possess the necessary qualities continue to do so throughout their legal career. Testing at regular intervals after call to the bar therefore would be appropriate.

(v) *Consequences of Finding a Lack of Integrity*

The discussion here is based on the assumption that an integrity test for lawyers could be designed to accurately measure that characteristic. If a lawyer "fails" such a test, meaning that he or she does not meet the level set as necessary to be a lawyer of integrity, what would be the options? Would there be a low-end standard such that anyone performing below this level on the integrity test would be absolutely refused admission to the bar, or be disbarred if already in practice, while others scoring above this low-end but below what is acceptable would have the opportunity to improve their level of integrity and be re-tested? Refusal of admission or disbarment seems like a harsh result, but as noted earlier, integrity is not merely a desirable trait in lawyers — it is an essential one. It is not unreasonable to suggest that those who do not meet the required level not be allowed to practise law.

An important question that follows is whether one can enhance or improve one's level of integrity. In other words, can it be taught? Unfortunately there is no empirical data on the effects of teaching legal ethics to law students in Canada.⁸⁴ Studies completed in other professions have, however, shown that

⁸¹ D.L. Rhode, "Moral Character as a Professional Credential" (1984/85) 94(3) *The Yale Law Journal* 491 at 515-16.

⁸² Rhode, *ibid.*

⁸³ Rhode, *ibid.* at 509.

⁸⁴ D.E. Buckingham, "Rules and Roles: Casting Off Legal Education's Moral Blinders for an Approach that Encourages Moral Development" (1996) 9 *Canadian Journal of Law and Jurisprudence* 111 at 113.

there is "much promise" for teaching moral development to students as part of a professional programme.⁸⁵

Some believe that a person's character and disposition is already determined before he or she goes to law school, such that the teaching of ethics at that stage is a waste of time.⁸⁶ If this position is accurate, then attempting to "teach" integrity at the law school stage or afterwards would similarly be a waste of time. Others hold that a lawyer's professional behaviour is determined more by situational factors than by his or her moral character and disposition.⁸⁷ A prevalent opinion is that while a person's character, attitudes, thinking and behaviour have largely been already formed through upbringing, and that situational factors will have an impact on behaviour in practice, education at the law school or post-law school stage *can* play a role.⁸⁸ Elliott Abramson, writing on the work of psychologist Lawrence Kohlberg, notes that Kohlberg's research indicates that individuals maintain the capacity for moral development and growth into their thirties.⁸⁹ He notes that it is possible to improve the moral consciousness of law students, although he does go on to warn that this does not guarantee that such students will then act in accordance with that elevated level.⁹⁰

Alvin Esau notes in his discussion of teaching professional responsibility that it is simply not clear whether law school, or any other type of school, can change a lawyer who lacks basic moral integrity into one who possesses it,⁹¹ while Deborah Rhode believes that an individual's personal integrity is gained through early socialization: "Students either 'have it or they don't', and postgraduate training offers too little, too late".⁹² On the other hand she also believes that courses at law school can help instill professional norms and attitudes in students.⁹³ Roger Cramton has written that "whether we like it or

⁸⁵ Buckingham, *ibid.* at 114.

⁸⁶ A.A. J. Esau, "Teaching Professional Ethics and Responsibility at law School: What, How, and Why?", in Mr. Justice Roy J. Matas and Deborah J. McCawley, eds., *Legal Education in Canada* (Montréal: Federation of Law Societies of Canada, 1987) at 308 at 352; and E.M. Abramson, "Puncturing the Myth of the Moral Intractability of Law Students: The Suggestiveness of the Work of Psychologist Lawrence Kohlberg for Ethical Training in Legal Education" (1993) 7 *Notre Dame Journal of Law, Ethics & Public Policy* 223.

⁸⁷ Esau, *ibid.*

⁸⁸ Esau, *ibid.* at 353.

⁸⁹ Abramson, *supra* footnote 85 at 224.

⁹⁰ Abramson, *ibid.* at 235 and 240-41.

⁹¹ Esau, *supra* footnote 86 at 356.

⁹² D.L. Rhode, "Ethics by the Pervasive Method" (1992) 42 *Journal of Legal Education* 31 at 44.

⁹³ D.L. Rhode, "Ethical Perspectives on Legal Practice" (1984/85) 37 *Stanford Law Review* 589 at 650. Stier, *supra* footnote 1 at 591 and 600 notes that professional training cannot create good character. She does believe, however, that standards which link honesty and good practice can strengthen an individual's professional integrity.

not", law teachers do teach values to students.⁹⁴ And Thomas Eisele states that virtue, a skill that he feels is acquired, can and must be taught to students.⁹⁵ In sum then, even amongst those who believe that character and integrity are already developed before law-school, there are commentators who believe that teaching legal ethics and professional standards may be useful in enhancing an individual's existing level of integrity. Ian Johnstone and Mary Patricia Treuthart have set out four approaches to use in teaching professional responsibility to law students:⁹⁶

- (a) the pervasive approach where professional responsibility is included in other substantive courses;
- (b) a separate, concentrated course in legal ethics and the legal profession;
- (c) clinical training; and
- (d) perspective courses and cocurricular activities.

Donald Buckingham points out five methods for teaching legal ethics where the goal is to enhance the moral development of students:⁹⁷

- (a) formal, compulsory instruction in moral philosophy and legal ethics theory;
- (b) simulation exercises, role-playing, and problem-solving as part of formal courses in legal ethics and in substantive courses and clinical programmes;
- (c) role-modelling from faculty and administration such that students see that their instructors and their institution value and embrace the goal of facilitating the moral development of students;
- (d) seizing direct opportunities with students to encourage moral reflection and to encourage and reward integrity and virtue in the classroom; and
- (e) designing and implementing integrated legal ethics programs that specifically target each component of moral development.

As another has posited: "The development of moral dispositions and character involves experiential learning, not just abstract reasoning with hypothetical cases".⁹⁸ Others share this view, advocating theoretical classroom instruction and reflection and clinical casework to teach legal ethics with an

⁹⁴ R.C. Cramton, "Beyond the Ordinary Religion" (1987) 37 Journal of Legal Education 509 at 513.

⁹⁵ T.D. Eisele, "Must Virtue be Taught?" (1987) 37 Journal of Legal Education 495 at 501-502.

⁹⁶ I. Johnstone and M.P. Treuthart, "Doing the Right Thing: An Overview of Teaching Professional Responsibility" (1991) 41 Journal of Legal Education 75 at 86.

⁹⁷ Buckingham, *supra* footnote 84 at 126.

⁹⁸ Esau, *supra* footnote 86 at 348.

element of moral judgment.⁹⁹ A programme based on experiential learning, including elements of hands-on or clinical work, role-playing and practical workshops may be able to improve upon an individual's development. If teaching integrity or teaching professional standards in order to strengthen or improve integrity, may improve integrity, some or all of these methods could prove useful. Individuals who "failed" an integrity test could then improve their level of integrity, and hope to approach the standard.

Conclusion

It is clear that something has to be done to improve the image of lawyers. Integrity testing might help. It could be used to identify which lawyers are deficient in that regard. But there are many questions surrounding the testing of lawyers. Can integrity actually be measured? How could one determine what standard would be used to determine those who have enough as opposed to those who do not? And could a test be designed that could do so accurately? Could such a test overcome the difficulties of "fake" tests and false results as seen in current integrity or honesty tests? Would such a test withstand a *Charter* challenge? Indeed one can ask whether integrity testing is needed? There are presently mechanisms in place designed to ensure that lawyers are of good character, adhere to professional standards, and avoid "conduct unbecoming" a lawyer. Although these mechanisms are largely re-active, and clearly are imperfect, they do form a foundation on which to build. And while it is not clear that integrity itself can be taught to adults — at law school, during the bar admission programme or through continuing legal education programmes — some believe that teaching legal ethics and professional standards may be useful in improving or enhancing an individual's existing level of integrity, or in helping instill professional norms and attitudes. Buckingham has written that while teaching legal ethics only in the form of a set of rules is inadequate, where an individual lacks moral values, such teaching may at least be a "positive step".¹⁰⁰ Improving the teaching of professional ethics and standards, combined with the improved mechanisms designed to monitor lawyer conduct may be sufficient. Such devices may also be acceptable. This is particularly so given the potential difficulties with integrity testing, the implications for those who are assessed incorrectly, and the large costs of implementing such a system.

In the end, however, it may not matter whether or not an individual's level of integrity can be changed, if he or she can accept and learn the attitudes and behaviour consistent with high integrity. Does it really matter whether or not an individual actually has that high level of integrity, or has merely learned to behave *as if* he or she does? Behaving in such a way would appear to satisfy all the needs that integrity fulfils in our legal system, and may therefore be satisfactory, although not ideal.

⁹⁹ Luban and Millemann, *supra* footnote 16 at 40-41.

¹⁰⁰ Buckingham, *supra* footnote 84 at 122.