

Accessible Professionalism : A Research Proposal

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Lawyers in private practice are an essential portal between people with legal problems and the just resolutions which law promises. How, and to what extent, do lawyers create access to justice for individuals negotiating with or confronting insurance companies, ex-spouses, landlords, and other non-state parties? What impediments do these private law "personal plight" lawyers encounter in their efforts to provide services to people of modest means? Is there anything that the legal profession and its regulators can do to increase the accessibility of this segment of the legal profession?

To respond to these queries, the applicant proposes a mixed-method empirical research project with Canadian lawyers. The objectives include advancing knowledge of legal professionalism in action, and creating new insights about how private practice lawyers can facilitate access to justice. This document will begin by reviewing the relevant literature about access to justice and legal practice. It will then introduce the research queries and the methodology, and it concludes by explaining the relationship between this project and the applicant's current research agenda.

1. Access to Justice

Access to justice scholarship asks whether individuals are able to assert their legal rights, and considers ways to increase their ability to do so. Meaningful access to justice often requires expert, partisan assistance from a legal professional or firm (Trebilcock et al 2012; Albiston and Sandefur 2013). The inability of people to obtain this assistance has created a wide and growing "justice gap" in North America (Legal Services Corporation 2009; Currie 2007). The mounting wave of self-represented litigants in civil courts is one clear indicator of the justice gap in North America (Buhai 2009; Rigertas 2012).

Why do people go without needed legal services? Service price appears to be the central access to justice problem in many cases (Hadfield 2012). Cost structure factors, such as the hourly billing model and cash retainer requirements, may render legal services less affordable (MacFarlane 2013). However accessibility is also impeded by lack of variety in legal services, and by lack of "legal consciousness" (Susskind 2008; Sandefur 2012). People often do not recognize the legal dimensions of their life experiences and challenges, and do not know how to respond to those legal needs which they do identify (Baxter et al. 2012).

The access to justice problem is not new, and neither are efforts to ameliorate it. Successive and overlapping "waves" of access to justice initiatives have primarily sought solutions in government programs and in reforms to the procedures and institutions of the justice system (Parker 1999; Mossman et al. 2009). The author's current book project is a comparative and normative analysis of legal services regulation, including its ramifications for the accessibility of justice (Semple 2013b). This proposal addresses a niche which has been less comprehensively analyzed: the accessibility ramifications of private sector legal work.

2. A Map of the Bar: Individual-Client and Personal Plight Practices

Lawyers serving individual clients and small businesses occupy one of two "hemispheres" of the Anglo-North American legal profession; the other hemisphere is home to lawyers who serve large corporate and institutional clients (Heinz and Laumann 1982;

Wilkins 2012). The hemispheres are distinct in that lawyers with clients from one hemisphere typically do not have clients from the other (Heinz et al. 2005). In the individual-client hemisphere, lawyers generally practice in small firms or alone, and have less specialized practices (Seron 2007; Mather and McEwen 2012). They also enjoy less income and prestige than those in the corporate/institutional hemisphere (Heinz et al. 2005; Juergens 2012).

The individual-client hemisphere can be subdivided into "personal business" and "personal plight" continents of practice (Heinz and Laumann 1978). Personal business work arises from uncontested transactions, e.g. real estate transfers or will-drafting. In recent years these legal services have become somewhat more affordable and accessible due to technology, commodification, and competition (Sandefur 2012; Morgan 2013 but see Hadfield 2010).

Accessibility gains are less evident in personal plight practice, where legal needs arise from an individuals' disputes with state bodies, with corporations, and with other individuals. Personal plight practice creates distinct dynamics of practice, professionalism and ethicality, which arise from differences in client sophistication and lawyer-client relationships (Levin and Mather 2012). This "continent" of practice is the focus of the proposed research. Further, this research will focus on private law personal plight lawyers, whose clients are not confronting the state, and therefore typically have little access to state-funded legal aid.

3. What we Know about Personal Plight Legal Professionalism

Socio-legal scholars have used a variety of qualitative and quantitative empirical techniques to study the practice lives of personal plight and other individual-client lawyers. A common methodological approach is the monograph drawing on long-form, semi-structured interviews with sole-practitioner and small firm lawyers (Carlin 1962; Landon 1990; Seron 1996; Van Hoy 1997). Others have allied quantitative methods with interviews (Heinz et al. 2005; Dinovitzer et al. 2009; Myrick et al. 2012) or observed lawyer-client interactions (Sarat and Felstiner 1997). While much of the work seeks commonalities across the individual-client hemisphere, the personal plight continent has received special attention. Studies have focused on practice areas such as immigration law (Levin 2009); family law (Mather et al. 2001), and personal injury law (Rosenthal 1974; Parikh 2007; Engstrom 2009).

One recurring theme in this literature is the influence of demographic and socioeconomic factors on lawyer careers in a segmented and hierarchical profession (Heinz et al. 2005; Dinovitzer et al. 2009; Levin 2009). The mixed success of women and equity-seeking groups in the profession has been examined (Hagan and Kay 1995; Lempert et al. 2000). Another focus is how the dynamics of personal plight legal practice contribute to ethical or unethical lawyer behaviour (Levin 2004; Fortney 2005; Abel 2008, 2011). In understanding the construction of ethicality, the literature has profited from Mather et al's *communities of practice* concept: "groups of lawyers with whom practitioners interact and to whom they compare themselves and look for common expectations and standards" (2001 at 6).

The access to justice ramifications of lawyer practice models do not appear to have benefitted from the same level of empirical study. Comprehensive data about the prices of legal services for individual clients is not available (Sandefur 2012; Hadfield 2010); nor is the applicant aware of any contemporary North American empirical study of cost structure issues (e.g. firms' choices about whether to use hourly or flat rate billing). Access to justice has not been a prominent issue in the qualitative socio-legal research either, with the important exception of Pilliar's (2012) valuable case study of an innovative but ultimately unsuccessful Vancouver law firm.

This niche in the literature deserves more attention. The private practice lawyer's door is a central gateway between people with personal plight legal needs and the justice to which they are entitled. There is no immediate prospect that the legal system will transform itself into one which people can generally use without expert help. Nor, in this age of austerity, can we expect sufficient expert help to be provided by the state's meagre (and in many cases, shrinking) legal aid programs (Menkel-Meadow 2012). Commodification and technology have some potential to increase accessibility (Katz 2013; Semple 2013), but for personal plight matters this potential is limited by the need for personal advocacy and negotiations, and the common law precedent system's tendency to steadily increase the complexity of law. It is therefore essential to learn more about how and why private-sector personal plight law firms make practice decisions which enhance -- or impede -- their accessibility to individual clients.

4. Research Queries: Accessibility, Professionalism, and Practice Dynamics

Justice would be more accessible if lawyers' services were more affordable. How much do the services of Canadian lawyers in the individual-client actually cost? To what extent do they bill by the hour, on a contingency basis, or using flat rates? Do they typically require cash retainers before beginning work on a file? How many offer unbundled legal services or limited-scope retainers? These basic queries have obvious relevance to the accessibility of justice, but the only two responsive empirical sources have significant limitations (Enviroics Group 2009; Santry 2013). This project proposes to use the quantitative techniques described below to establish reliable data on these points.

Qualitative interviews will be used to learn about the decision-making processes which underlie the practice choices which are relevant to accessibility. What factors influence lawyer decisions about how much to charge? To what extent do lawyers discount their bills due to differential ability to pay among clients, or for other reasons (Mather et al. 2001; Boutcher 2009)? How are business management and profitability imperatives reconciled with professional obligation or personal inclination to help impecunious needy people (Pilliar 2012)? Flat rate and contingency billing arguably have accessibility advantages over hourly billing (Semple 2013); how do lawyers decide between these pricing models? There is a literature on contingency fees (Daniels & Martin 1999; Kritzer 2004) but less is known about hourly billing decisions (but see Woolley 2004, 2005 and Fortney 2005).

The non-financial impediments to access identified above can also be better understood through qualitative research with lawyers. Personal plight legal services might be more accessible if the firms providing them were larger and better-capitalized (OECD 2007; Stephen 2013; Semple 2013). Why have small firms and solo practices remained dominant in this sphere? How do lawyers perceive the benefits and drawbacks of aggregating into larger firms? Would they prefer to serve their clients from within large firms, or from the non-lawyer controlled "alternative business structures" which are now proliferating in the United Kingdom (Stephen 2013)?

Even if they grow no larger, the literature suggests practice innovations which could make personal plight law firms more accessible. Offering unbundled legal services is one (Sossin and Beg 2012; Jennings and Greiner 2012) and creating multi-disciplinary partnerships is another (Knake 2012). Non-lawyer labour, legal process outsourcing, and quantitative legal prediction might allow profitable service at lower prices, as well as innovative new legal products for clients for whom traditional legal representation is unappealing or not cost-justifiable (Hadfield 2008; Campbell 2012; Katz 2013). Business

models leaving more control of legal matters in the hands of clients might respond to the decline of deference to professionals which some observers have noted (Craig 2006; MacFarlane 2013). Have personal plight lawyers considered or experimented with these options? To the extent that they perceive impediments to adopting them, can those impediments be traced to legal services regulation, to professional culture, or to market dynamics?

What are the prospects for personal plight lawyers to increase legal consciousness and thus accessibility? Consumer branding and marketing have the potential to spread knowledge of legal rights and to connect more people with legal assistance (Susskind 2008; Hadfield 2012). How do personal plight lawyers decide whether and how to market their services? Are personal referrals and reputation still the dominant source of new clients (Seron 2007), or are the internet and social media bringing new clients to lawyers?

Isolation and financial insecurity are well-known problems for personal plight lawyers (Arnold and Kay 1995; Sole Practitioner and Small Firm Task Force 2005). They are also access to justice problems, to the extent that they drive lawyers out of these practice areas and make it harder for those who remain to meet demanding client needs without 'burning out.' How do lawyers deal with these problems in their practice lives? To what extent do mentorship, networking, or bar associations create connections and community between individual-client lawyers (Kay and Wallace 2009; Levin 2009)?

5. Methodology: Mixed Method Empirical Research

Qualitative interviews will be used to gain nuanced data responsive to the research queries. The researcher will interview two types of personal plight practitioners: family lawyers and plaintiff-side personal injury lawyers. These are both private law practices in which the clients are predominantly people of modest means confronting serious life challenges. This makes them compelling sites for access to justice research. However the practices also have significant contrasts, including in their payment structures (contingency fees predominate in personal injury; hourly fees predominate in family law) and in adversarial dynamic (individual v. insurance company in personal injury matters; individual v. individual in family law). This study will compare the accessibility of expert legal services in these two personal plight practice areas.

Interviews will be conducted in a representative sample of urban, suburban, and rural communities in the Greater Toronto Area and southern Ontario. The sampling process will begin with queries of the Law Society of Upper Canada's Lawyer and Paralegal Directory, which includes information about office location and number of lawyers practicing together. Family law and personal injury practitioners will be identified either with the Law Society's assistance or through searches of the internet and/or case law databases.

For this project, I plan to conduct face-to-face interviews of 50 lawyers lasting approximately 60 minutes each. Response rates for interview studies with lawyers have varied significantly (e.g. 36% reported in Levin (2009) and 92% in Mather et al (2001)). In order to find 50 respondents with the desired practice characteristics, the researcher will send two or more waves of invitations by mail, followed by phone calls. The researcher will draw on his experience conducting interview-based empirical research with legal professionals (Semple 2012).

Quantitative techniques will be used to gather data about the structure of the personal plight bar, service price, and cost structure factors. The researcher is exploring several

promising data sources. The Law Society of Upper Canada (LSUC) requires all Ontario lawyers to complete an Annual Report, which includes data about practice area and practice context among other things. LSUC staff have indicated willingness in principle to grant the applicant some access to this data. For pricing information, I hope to access the database of assessment files maintained by the Ministry of the Attorney General. These files are created when a client seeks review of the fees charged by his or her lawyer pursuant to the *Solicitors Act* (Gramlow and Linton 2000; Woolley 2004). Other promising data sources are the court orders and party submissions related to Ontario's cost-shifting regime, which include data about the fees being charged to clients.

Analysis will bring the qualitative and quantitative data together inductively to generate propositions about the relationship between accessibility and legal professionalism (Lofland et al 2006). It is anticipated that the lawyers to whom the researcher speaks will serve both as *respondents* with information about their own views and practices, and as *informants* with information about clients, colleagues and other justice system actors (Mather et al 2006, p. 199). All interviews will be audio-recorded and stored in Nvivo 10. Themes will be coded using that software, and key passages will be transcribed.

This mixed methodology will ideally produce a nuanced and robust set of findings about the access to justice ramifications of different approaches to personal plight law practice. The project also entertains professional development and policy goals, which will necessitate utilization of popular and online media. Publicizing innovative and accessible practice models may allow them to spread among lawyers working in this field. Identifying the impediments to more accessible professionalism may set the stage for regulators and professional groups to adopt policies to respond. If so, this research may allow the passage between personal plight and justice to be expanded.

6. Relationship to Applicant's Current Research

Legal services regulation is the topic of the applicant's research in his present postdoctoral position. The relationship between regulation and the accessibility of justice is one of the major themes of the monograph manuscript which is in its final stages. In principle, there are convincing reasons to believe that legal services regulation is impeding access to justice in Canada and the United States. According to the economic critique, regime features such as unification of the legal profession and the prohibition on non-lawyer investment in law firms are making legal services more expensive, less variegated, and less responsive to evolving client needs. However, prior episodes of regulatory liberalization in legal services sectors around the common law world have had only limited success in increasing accessibility. These ambivalent findings have led to the goal of seeking out empirical data on the complex relationship between regulation, professionalism, and accessibility.

Family lawyers are one of the two practice groups with whom the applicant proposes to conduct interviews. In that respect this project builds on the applicant's on-going research interest in family law practice. His doctoral research queried the family justice system's construction of the "best interests of the child" principle. The present application represents another turn to empirical research to study the social impacts of legal professionalism in family law and other personal plight areas.

Timelines

September 2014: Finalize Research Ethics Board approval. (This work will begin before the funding commencement date.)

September 2014: Finalize database of 150 potential interviewees within the target group. (This work will begin before the funding commencement date.)

September 2014: Finalize access to quantitative data sources at court houses and/or Ministry of the Attorney General offices. (This work will begin before the funding commencement date.)

Early September 2014: Send first wave of mail invitations to 70 prospective interviewees.

Early September 2014: Work with research assistant to begin process of gathering quantitative data.

Late September 2014: Follow up phone calls to any first wave invitation recipients who have not responded.

Late October 2014: Send second wave of mail invitations to additional prospective interviewees, as necessary to reach sample quota.

November 2015: Follow up phone calls to second wave recipients who have not responded.

October 2014 to June 2015: Conduct interviews.

October 2014 to April 2015: supervise research assistant in process of gathering quantitative data from bills of costs and/or assessment files.

May 2015 to May 2016: Undertake writing and other knowledge mobilization efforts using research findings.

May / June 2016: Present findings at Law and Society Association Annual Conference

July 2016: Present findings at International Legal Ethics Conference.

August 2016 : Present findings at Canadian Bar Association Canadian Legal Conference.

Summer / fall 2016: Present findings at Canadian Association for Legal Ethics Annual Meeting.

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3800 Characters for Non-Specialist Scholars

How, and to what extent, do lawyers create access to justice for individuals negotiating with or confronting insurance companies, ex-spouses, and others? What impediments do these "personal plight" lawyers encounter in their efforts to provide services to people of modest means? Is there anything that the legal profession and its regulators can do to increase the accessibility of this segment of the bar? To respond to these queries, the author proposes mixed-method empirical research with Ontario lawyers. The research goals include advancing knowledge of legal professionalism in action and creating new insights about how private practice lawyers can enhance access to justice.

This project lies at the confluence of two fields of research. First is the access to justice scholarship, especially work which scrutinizes financial and non-financial impediments to expert legal service provision. People go without needed legal services because they cannot afford them, but also because they are unaware of the legal dimensions of their life experiences and because they do not see value in the types of legal services currently available to individuals.

The second relevant body of literature is empirical socio-legal study of North American lawyers from the individual client "hemisphere." Socioeconomic career stratification, the business-profession dichotomy, and the ramifications of practice context for legal ethics are all key themes in the existing work. My project aspires to make a distinctive contribution by focusing on the accessibility of justice. Qualitative interviews will be the centrepiece of this project, complemented by the quantitative inquiries described in the Detailed Description document.

The research queries are designed to both analyze accessibility with a goal to expanding it, and expand the existing empirical knowledge base. Justice would be more accessible if lawyers' services were more affordable. What factors influence lawyer decisions about how much to charge? How are business management and profitability imperatives reconciled with the professional and personal inclination to help impecunious needy people? Flat rate billing and contingency billing arguably have accessibility advantages over hourly billing; how do lawyers decide between these pricing models?

Non-financial impediments to access can also be better understood through this empirical research with lawyers. Personal plight legal services might be more accessible if the firms providing them were larger and better-capitalized. Why have small firms and solo practices remained dominant in this sphere? How do lawyers perceive the option of aggregating into larger firms, or the non-lawyer controlled "alternative business structure" firms now proliferating overseas? Have the lawyers experimented with potentially access-enhancing options such as unbundled legal services or quantitative legal prediction? Finally, I hope to ask questions about how lawyers perceive marketing and public legal consciousness, and about their experiences of isolation and financial insecurity.

This mixed methodology will ideally produce a nuanced and robust set of findings about the access to justice ramifications of different approaches to personal plight law practice. The project also entertains professional development and policy goals. Publicizing innovative and accessible practice models may allow them to spread among lawyers working in this field. Identifying impediments to more accessible professionalism may allow regulators and professional groups to mitigate those impediments. If so, this research may

contribute to an expansion and renovation of the congested and arduous passage between personal plight and justice.

2000 Char Summary (not needed for IDG)

Canadians with legal problems who seek access to justice often turn to lawyers for help. I want to explore how lawyers provide access to justice, and I want to ask what's holding them back from offering more accessible legal services. To do so, I plan to interview 50 randomly-selected lawyers providing family law and personal injury services to individual Canadians.

Access to justice is a major problem in Canada. Each year tens of thousands of people confront challenging legal problems without any professional help. Those who go without needed legal help often pay a large price in time and stress, and may end up abandoning important legal rights.

Money is a big part of the access to justice problem. Even middle-income people struggle to pay lawyers' fees, which are over \$300 per hour on average. What's more, lawyers often require a large cash "retainer" payment before they provide any services, and usually can't promise at the outset how much it will cost to resolve the case.

However affordability isn't the only access to justice problem. People experiencing life problems often don't know that legal services might help resolve those problems. Many Canadians also find that there isn't much variety or innovation in the legal services marketplace. Just like 50 years ago, most legal services for individuals are available only in a lawyer's office, and only during business hours. There are things that lawyers can do to make justice more accessible for their clients. They can offer fixed fee (flat rate) services. They can invest in technology to make their services more affordable and easier to use. They can team up with other professionals and businesses to better meet the needs of today's clients.

I want to talk to lawyers to see whether, and how, they are innovating to provide access to justice to individual Canadians. With the assistance of the Banting Fellowship, this research can both build knowledge and help make justice more accessible in Canada.

3800 Character Statement of Alignment

This project can contribute to the Innovation, Leadership and Prosperity priority area by showing how supply can better meet demand in an important sector of the Canadian economy. Making personal plight legal practice more accessible can lead to new jobs for legal professionals and allied occupations, serving people whose needs are currently going unmet.

According to the Conference Board of Canada, professional services are a significant proportion of the Canadian economy, but also one of its less productive sectors (Hodgson and Shannon 2011). Insofar as the research queries touch on economic issues such as labour utilization, pricing, and investment in technology, they have the potential to shed light on the productivity challenges in the professional services sector generally.

The project can also help determine whether regulation is impeding innovation and efficiency in the legal services sector. The Competition Bureau of Canada (2007) blames over-regulation of professions for productivity problems, and Gillian Hadfield (2008) argues that

regulation deadens innovation in the legal services marketplace. On the other hand, deregulatory reforms in other developed countries have not invariably produced the competitiveness and innovation benefits predicted by some of their proponents (Stephen 2013 at 147; Engstrom 2013). This project is an opportunity to learn about whether lawyers see regulation as impeding their capacity to innovate, or whether it is more accurate to attribute the status quo structure of the bar to non-regulatory factors.

2000 char KM

Knowledge mobilization activities will reflect this project's multiple objectives. To add to the empirical literature about legal practice, I plan to submit of one or more articles to peer-reviewed sociolegal journals. A second goal of the research is to contribute to access to justice research and policy development. I will aim to publish in one of the student-edited law reviews where this material tends to appear. Unless my findings reflect specifically Canadian or regional phenomena, I will aim to publish in the American journals whose pages have contained the most important research to date in this field.

The third audience for this research is practicing lawyers, especially those with personal plight and other individual-clientele practices. My research will hopefully uncover innovations and best practices for making law firms more accessible to the public, and I want to share these with the profession. To this end, I will seek opportunities to publish in trade publications for Canadian lawyers. I will make every effort to ensure that all publications resulting from this research are freely available to the public through the Social Science Research Network.

In addition to these writing projects, I will also pursue knowledge mobilization through professional and research networks. This research could be of significant interest to the Law Society of Upper Canada, the Ontario Bar Association and the Canadian Bar Association, given its relevance with the professionalism and access to justice mandates of those bodies. As indicated in the attached CV, I serve on the advisory board of the National Self-Represented Litigants Project and am currently visiting scholar in residence at the Centre for the Legal Profession. I am also a member of the SSHRC-funded Costs of Justice Community-University Research Alliance. These bodies will all offer opportunities to communicate my research findings to policy-makers and practitioners who will be able to use them.

KM extra

Ideal publication venues include *Law & Social Inquiry*; *Law & Society Review*, *International Journal of the Sociology of Law*, and the *International Journal of the Legal Profession*.

The *Fordham Urban Law Journal* and the *Wisconsin Law Review* have particularly strong reputations in this area. To the extent that my findings seem to be specific to the Canadian

context, I will also consider Canadian journals with a track record of publishing empirical research, such as the *Canadian Bar Review* and the *Osgoode Hall Law Journal*.

Twitter

Suitable venues for the oral presentation of this work include the International Legal Ethics Conference, the University of Toronto Centre for the Legal Profession, and the meetings of the Law and Society Association (LSA). The LSA hosts a Realist and Empirical Legal Methods Collaborative Research Network whose conferences could be particularly appropriate. Other knowledge mobilization possibilities include working with the large network of community organizations involved in the SSHRC-funded Costs of Justice Community-University Research Alliance.

Finally, the author hopes to contribute knowledge to legal education. Ethics and professionalism are increasingly emphasized in Canadian law school curricula. Through course leadership, guest lectures, and curriculum development, consumer welfare insights will be brought to this pedagogical field.