

## **PRACTISING PROFESSIONALISM**

A commentary  
By  
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I am going to open this commentary with 2 contemporary quotes:

“Corporations, even tobacco companies, are entitled to the best legal advice they can buy, even where they have broken the law. Lawyers acting for corporations are entitled to play the game as hard as the profession’s ethical rules, the law and the rules of court allow. What makes it harder for lawyers to draw the line today is the win-at-all-costs mentality of modern capitalism and the deployment of lawyers as “strategic partners” in pursuit of this goal.

Yet lawyers retain status and privileges denied other professions. Their first duty is to the court, and the increasing preparedness of judges to punish them and their clients if they forget this fundamental principle is a welcome development.”

Financial Review

“Emboldened by success, amply rewarded and pushed by an ever-demanding client, they theorise, he chose to go with the flow.

There is “no question David Duncan was a client pleaser” “

The Wall Street Journal

These newspaper comments, the first dealing with Australia and the second the USA and accounting serve to illustrate the very real issue raised by the current environment in which our lawyers are practicing. These particular cases and others like them make a reassessment of the situation crucial and make it imperative that there is a recommitment to the rules supporting professional standards.

It is my submission that the justice system is the guardian of societal values. Integral to the operation and functioning of the justice system are the members of the profession.

The rules which govern the members of the profession and the obligations assumed by them are vital to the functioning of the system in a manner which results in a healthy and prosperous society.

It is my contention that the balance between conducting a practice which observes the profession's rules and conducting a practice as a business can and do co-exist reasonably comfortably. The profession is able to manage the considerable conflicting tensions successfully. In so doing the society is well served in a number of ways and the practitioners can enjoy the fruits of their efforts. This is not to imply or suggest the task is easy or cannot be improved.

The life of a practicing professional lawyer is not easy. The actual practice of law is subject to a constant need to be aware of and the need to resolve potentially conflicting tensions. The tensions arise from the rules of professional practice; the desire to achieve particular outcomes for a client and the need to conduct a successful practice/business.

I submit that the rules, duties and obligations imposed on the legal profession are reasonable and appropriate in the main. Further, the majority of professionals practice comfortably within the rules.

To do so they have developed mechanisms and procedures to assist in the resolution of the tensions.

It is not the purpose of this Commentary to explore the nature of the duties and obligations a lawyer must adhere to; they are to be taken on their face. There are many works published on the subject. I intend to look at the issue from the perspective of the lawyer ; the business operator.

I will take a few moments to explain why I consider the rules to be appropriate. I will use the term “rules” throughout to include all duties, rules and obligations that apply to a solicitor no matter what their source. I note in passing the view I express represents a change for me: previously I advocated the removal of rules to enable law firms to compete in the wider market without the restriction imposed by the rules with there necessary cost.

My references to law firms are generally a reference to large firms. This reflects my own experience and it is the large firms which are testing the limits. Further, the profession is concentrated in those firms

2.2% (157) firms have 37.4% of total employment; 49.8% of total income and 52% of profits

the top 4 have 12% of the market

There are many criticisms made of the big firms. His Honour Justice Michael Kirby drew many of the issues in a speech to The St James Ethics Center in

1996. Almost everyone has a view about them. Let us not lose sight of the fact that the large firms we see today are recent arrivals to the profession. I think my experience demonstrates the point: I was made a partner in a well regarded firm which acted for listed clients etc. I was the fourth partner of 4. When I left the firm in 2001 there were 86 partners. My point being that it takes time to develop systems to make such organisations run efficiently to the satisfaction of the majority.

The ability to practice law has always been a position of privilege. This has been the case in many societies over a long period. It is crucial that the government of society and the controls placed on its people be undertaken in a manner that is both responsible and reflects the values of the society. Values do not change quickly and do not necessarily reflect fashionable thinking or current practices. Societies values are constantly challenged and tested, which is healthy, and, not so healthy, threatened and eroded. The influence of some institutions has waned.g. the churches. Recent events have demonstrated the weakness of the business sector to observe an appropriate set of values. in many ways the legal system is the last defender of the values which the society holds. The profession is an integral component in the administration of justice and from society's stand there cannot be an erosion of its obligation and commitment to the values which underpin the rules because they are an integral part of the framework in the justice system which is protecting the standards to which I have referred.

The values reflected in the rules can be classified into 2 broad groups. First is the group designed to ensure the proper functioning of the legal system itself. These

rules deal with obligations to the court, other members of the profession and the profession itself.

The second group addresses the relationship the profession has with the community. The principle and immediate concern is the way the lawyer deals with clients but there are wider obligations such as extending representation to a members of the community and the standing of the profession in the community.

The values have been given renewed emphasis and significance by recent events which cause people to reflect on the deeper issues to do with the way the community functions. Note the public reaction to the sentence imposed on the rapist and the frequent reference to “societies values” in the public debate on the issue.

In return for the professional assuming the important task of taking a role in the administration of justice, with the attendant rules, society has given those in this position certain benefits. Lawyers have enjoyed a monopoly. A person cannot practice law without being admitted to court and signing the roll; obtaining a practicing certificate and paying the prescribed fees. To be admitted a person must have a university degree in law or its equivalent. In strategic/economic terms there are barriers to entry into this business.

The next relevant benefit in the context of this Commentary is to do with fees. The solicitor is able to charge a fixed fee or a series of fees pertaining to the activity performed. The client was protected from over charging by the court having the ability to assess the appropriateness of the fee charged through the taxation process.

It is a well designed scheme: as a professional the lawyer assumed certain rights and obligations and in return was granted a monopoly and a fee arrangement pitched to provide an appropriate level of remuneration for the work done. It was the order of things that the professional would practice alone or in partnership with a limited number of others. The lawyer was expected to stand behind the work done by assuming unlimited personal liability should the work not be correct.

In an orderly slow moving socio-economic environment the scheme worked well and was in balance. It operated as it was designed to operate.

The profession was a “gentlemanly” environment. Few women practiced law. Firms engaged one another in friendly spirited sports competitions. The rules prohibited marketing, touting and even the overt representation of the firm was frowned on to extent the size of the lettering which could be used was regulated. It was not permitted to have large partnerships; it was only in the 1980s that the restriction of a maximum of 20 people in a partnership was lifted.

The economy changed. The style of doing business changed. The speed at which business was done changed. The scale on which business was transacted blew out. Many of the changes were facilitated by major structural changes to the economy such as floating the currency; removing currency controls; globalisation; increasing wealth of the community in toto; the growth of large corporate entities and the massive changes in technology.

As the business environment changed law firms responded. Large partnerships were created; national firms emerged and foreign law firms entered the

Australian market. In a relatively short time the practicing landscape changed dramatically.

Competition between firms for clients and talented lawyers became fierce. The firms moved away from the old scale charges to time based charging. Clients asked firms to tender for work in order, among other factors, to help contain costs marking the end of a concept referred to as client loyalty to their service provider. To cope with the volume of work and the scope of the transactions the firms grew larger. To manage them developed practices involving leverage and utilisation rates as components in the generation of profits. This increased the demand for talent. Intense competition for the top graduates marks the present day recruitment from universities. Firms eagerly compete for experienced senior practitioners who are thought to be capable of making a valuable contribution to the practice. There is a bevy of placement professionals to assist the process. The number of graduates in law increase dramatically.

Naturally, there developed intense competition for clients.

The firms and the solicitors are rated by industry commentators according to a variety of criteria. For example, in the finance sector firms are rated according to number of deals they have acted on, the value of those deals and whether or not those deals were finalised. Awards are given to firms or departments judged to be the “best” in nominated areas.

The influence which technology has had on the manner and style of practice has been immense. It has, perhaps most significantly, increased the speed for the

delivery of the legal service. Geography no longer has the relevance it once did.

Documents can be moved to any part of the globe instantly.

The capacity of the professional to comprehend the “law” is tested to the point where it cannot be achieved. Hence, specialisation developed .

The size of the firms meant they had to be managed by appropriately trained managers. Billings in the tens of millions of dollars and with overheads almost matching it is to be noted that the firms are big businesses on any analysis. The list of the largest private firms in the country include the 9 largest law firms. Many firms have offices in multiple Australian locations and off shore.

The capability and capacity of a country’s legal profession is vital to the economy. The stature of New York and London as financial and business centres is underpinned in part by the strength of their respective legal professions. The government of Singapore acknowledged this issue and modified its restrictions on foreign firms operating in the country in an effort to increase its legal professions capability. Our own government looks to legal services as a source of export income.

With competition between firms extending to the international arena further pressures are placed on the firms. It may be they are practicing in environments where the professional rules of conduct are different or non-existent

The combination of these changes has forced a re-examination of the concept of personal liability to the point where legislation in some parts now permits liability to be limited.

I have shown how and why the firms have grown. How they have moved from a protected professional environment to being large businesses often run and controlled by trained managers who are not lawyers. The partners want and have become accustomed to significant incomes. To function the firms need a strong reliable flow of fees. This requirement creates the driving force for the firms. It also creates the economic pressure to get and retain clients; render fees and find ways to add value to a client's business or particular transaction. This is the environment which creates tension with the rules.

Let us examine a number of areas to determine how the firms deal with the problem.

#### Conflicts of Interest

##### Client v Client

This is a very difficult area and which occupies huge amounts of time for the firm management, usually at managing partner level. In some firms a committee is formed to deal with the issues as they arise. This is a subject of which the firms are acutely aware and go to extensive lengths to avoid falling foul of this rule.

##### Firm v Client

Generally, there are prohibitions against members of the firm having commercial dealings with a client. This extends to the holding of shares in publicly listed companies where strict guidelines are generally developed to

regulate sales and purchases. The firms are keenly aware of the need to maintain objectivity in their lawyers and avoid issues to do with insider trading.

“..act with all due skill and diligence...”

In the desire to take on more work and to do work at profitable levels matters are often “pushed” to junior people. A point often made the commentator, David Maister, is true professionals should turn work away if they cannot give it their best. He comments that he rarely sees that happen. I would agree that it would be rare that a matter was declined was affirm was too busy and pressure of work could mean a lowering of standards. My comment is that it does not appear t be a problem in practice and the standard of practice in Australian firms must be rated world class.

“defeat justice on behalf of a client”

The desire to please a client, more specifically, an executive of a client, can cause the solicitor to cross the line. Refer to my opening quotations. The executives are an ongoing source of work either with the client corporation or from a new corporation should they move. Obviously a problem area and one which is in need of greater attention. It is highly probable that this maybe the subject of further judicial pronouncements.

Pro bono

The profession makes a huge commitment to pro bono work for the benefit of the community. This is done at significant cost to the firms but is done

willingly. However it cannot be totally discounted for it is a contributor to the overheads which has to be made up from paying clients.

#### To the Profession

The profession has had and increasingly, has taken the responsibility to train and develop its people very seriously. This maintains standards and teaches the younger members of the profession the finer points of practicing. It has taken the obligation of self regulation seriously and shown willingness of enforce the rules against those who transgress.

#### Duties to Partners

The obligations arising on entering a partnership are many and are the source of many of the pressures which partners feel individually. In the tough world of the large firms there are often departures of those who cannot maintain the duties demanded of a partner.

I close my remarks at this point noting that the future will be as it has always been; very interesting and exciting. On developments to arise from recent events we are part heard.