

ETHICS IN THE REAL WORLD ⁱ

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We are here today to talk about your professional obligations as lawyers, the system established under the *Legal Profession Act 2007* for dealing with complaints and discipline and of course ethics more broadly. I want to start with the latter so as to put everything else we have to say today in context.

I won't talk at length but simply make some observations and leave you to think about them. They seem to me to be largely self-evident but to warrant repetition even so. I should mention in passing that I am not a lawyer - in case you think that colours my perspective – but, obviously, my job gives me a close up look at them (at you) and I have to say encourages me to believe that the repetition is warranted.

- the first is simply to remind ourselves what we're talking about. Lawyers typically talk about ethics as if it is the stuff of learned texts or judgements of the courts or disciplinary bodies in relation to ethical matters, and sometimes as if it's just another area of substantive law.

That is a very narrow way of looking at things. Ethics includes all of those things of course but needs to be conceived and talked about much more broadly. Ultimately legal ethics is about how lawyers go about 'lawyer-ing' and 'doing law'. It's about their – your - conduct and customs and cultures as lawyers: it's about how 'you lead your lives as lawyers, make decisions about your clients, your opponents, yourselves and your families, in your search to be 'good' lawyers and 'good' people.'ⁱⁱ

- the second is that there is more to acting ethically than simply not acting unethically. Ethical lawyers aspire to something more and better than simply not being unethical lawyers. There is more to doing well than not doing badly.

I am good as certain that if you ask yourself who you most admire as lawyers you'll have something more positive to say about the people who make your list than that they are competent and diligent and not unethical. They will be people you instinctively know will keep their promises and respect your confidences and not take liberties, by not quoting you out of context, for example, and no doubt they will have a range of other characteristics also – a particular intellect, perhaps, or generosity of spirit or resilience in the face of adversity or a capacity to make you laugh or some such.

The point is worth making because this compulsory professional development workshop goes under the title 'ethics' but inevitably focuses heavily on the system for dealing with complaints and discipline. That's hardly surprising but the fact is that the system for dealing with complaints and discipline is all about minimum standards. My gaze as the person who administers that system focuses inherently on the prospect that conduct subject to complaint might amount to unsatisfactory professional conduct or worse, professional misconduct, yet no one imagines for a moment that ethical lawyers will aspire to conduct themselves in a merely satisfactory manner.

Certainly there's more to acting ethically than not contravening the professional standards and rules you're expected to uphold, much less not getting caught contravening the standards or rules. The rules are about unethical conduct you should avoid, not the positive conduct to which you should aspire. You should know the rules and seek to honor them but not believe for a minute that alone will make you an ethical lawyer.

- the third is that ethics is ultimately not about rules, but values – and equally it's about reflecting on our values and how they might apply to the circumstances in which we find ourselves and the extent to which we live by them.

Clearly it's easy to conceive of someone getting a perfect mark for even the most thorough exam about the rules, but failing to comply in practice – whether through willful disregard or a simple failure to appreciate when and how they might apply.

I'm told, incidentally, that there is a recent and real life example of just such a scenario. It is not just a thought experiment.

The fact is that the rules will only ever be effective if they are supported by internalized ethical values, and by conscience rather than fear of sanction. Sir Gerard Brennan made the point some years ago that 'if ethics were reduced to rules, a spiritless compliance would soon be replaced by skilful evasion.'ⁱⁱⁱ

Sir Gerard was making the point that ethics are not so much learned but lived. It's hard to resist in this context quoting what McPherson JA had to say in his reasons for judgment in a disciplinary matter that came before the Court of Appeal some years ago. He said 'in a matter like this, and perhaps in most others, basic honesty is not a quality that is ordinarily acquired through experience, or by lengthy practice of doing one's best to be honest.'^{iv}

It needs to be said, too, certainly as I read the disciplinary reports, that few of the lawyers who get themselves into trouble with the disciplinary authorities find themselves in that position because they failed to meet any peculiarly high ethical standards that apply uniquely to lawyers. Generally they find themselves there not because they breached any esoteric standard they learned, or should have learned during their undergraduate or subsequent professional legal training in ethics but because they breached a simple and basic ethical standard, typically an ordinary and everyday standard of fairness and decency that applies equally to all of us in a civilized society, or because of a simple failure to communicate.

- the fourth is that ethics is not only fundamentally about values, it's about character – being ethical requires us to have the moral courage and integrity and desire and strength of character it takes to live by our values in the face of myriad temptations to the contrary.

Obviously you need the courage of your convictions if, for example, you stand to lose a client and possibly a large fee by refusing to take instructions which require you to act unethically or even unlawfully, or to jeopardize your career by refusing

to do as you're told by your supervising partner when you believe what you're being asked to do is unethical.

You might not find your self confronted by those or like difficulties everyday but they are real and by no means hypothetical examples of the sorts of circumstances in which you might find yourself, and be sorely tested. You shouldn't think you will be called upon to have the courage of your convictions only occasionally, however. The fact is that the everyday practice of law is permeated with ethical challenges and that they confront you as a matter of course.

It's not the only but perhaps the best way to make the point is to refer not to the practice of law so much as to the business of law. Lawyers often talk out loud about whether the law is a profession or a business (or sometimes 'merely' a business) and that sort of talk, whatever its merits, can serve to disguise the fact that lawyers have always sold their services for profit within business enterprises and in that way to discourage them from paying sufficient attention to how they should go about the business of law and how they can do it well, to their detriment and to the detriment ultimately of their clients. I will come back to this theme again later.

In any event, be that as it may, Chief Justice Murray Gleeson has spoken about 'the pressure of mercantilism in the law' and that pressure manifests itself everyday, not least in what Chief Justice Jim Spigelman describes as 'the tyranny of the billable hour'.

The time-costing method of billing has been widely criticized and those criticisms are well documented and I will not repeat them here. My primary interest is how they might express themselves in conduct. The most obvious way they are likely to do that, of course, is through the inherent temptation for lawyers to exaggerate their hours so as to maximize their profit (and also, it needs to be said, to under-exaggerate their hours so as not to appear to be slow and inefficient).

They might find expression in other ways, too, and there is plenty of anecdotal if not conclusive evidence that they can and they do, and more often than we might like to think. It is easy to find, in fact hard to avoid in the candid things lawyers have to say about the business of law almost every week in lawyers' magazines and the legal affairs pages of the Friday newspapers.

There are any numbers of examples to pick from, but here are just two that I've gleaned more or less at random over the last year or so:

- time-costing creates an environment in which lawyers 'have more concern about achieving a certain billings target than about whether a particular bill for a client is reasonable or not' and in which lawyers who 'don't have expertise in a given field work on matters in that field presumably because they think that by doing so they will realize their budget' - a former managing partner of a large firm, quoted in the Australian Financial Review of 6 May 2005; and
- time-costing makes it 'physically impossible to provide personalized customer service. To the contrary, the temptation, and worse than that, the common practice... is to mask such inhumane pressure by inflating time sheets, undertaking unnecessary work, exaggerating the need to review everything during discovery, undertaking overzealous due diligence processes and other practices readers will be familiar with. In other words, we cheat and lie to make ends meet. We act dishonestly as a matter of course... Everyone does it' - another former partner of a large firm, quoted in the Lawyer's Weekly, Issue 266, 11 November 2005;

The references to 'common practice' and to the fact, apparently, that 'everyone does it' are disturbing. They may well be exaggerated but they find some support in the results of empirical surveys. The Australian Financial Review of 4 August 2006, for example, reported a recent survey of young lawyers in New South Wales as finding that 'billing pressure is pushing many young lawyers to fudge their time sheets. Only 38% of respondents said they always recorded their time accurately, citing billing pressure from senior staff.' It seems, if the results were correctly

reported, that 62% of young lawyers in New South Wales admit to having lied at least once in a way that effectively defrauded a client.

My intention in repeating these bleak observations about contemporary legal practice – all of them describing conduct that is clearly unethical - is not to endorse them. They may well be exaggerated. I simply don't know. There is a nice empirical research project for someone but I think we can assume in the interim that there's at least a measure of truth to them.

Time-costing is said to be at the root of other problems, too, all of them with an ethical dimension. It is said to:

- lead to an 'extremely competitive culture' in which it is 'very difficult to build any kind of team spirit... because of the extreme competition between members of the firm' - another former partner of a large firm, quoted in an article in the Australian Financial Review of 6 May 2005;
- cause legal firms 'to fail to live up to their promises of 'work-life' balance' - a young lawyer quoted in the Australian Financial Review of 4 August 2006 - with 'significant consequences in terms of life-style and retention rates in the profession';
- nurture workplace cultures in which 'bullying and harassment are common' - an anonymous former partner of a large firm who was quoted in the Lawyer's Weekly, Issue 265, 4 November 2005 and an anonymous correspondent in the subsequent issue, Issue 266, of 11 November 2005. This claim might be exaggerated, too, but once again finds some empirical support in survey results. The Australian Financial Review of 15 July 2005 reported that a survey of lawyers in Victoria showed among other things that just short of 70% of them described having been humiliated during the previous year by sarcasm, criticism or insults from colleagues; and

- measure the worth and standing of individual lawyers in direct proportion to their generation of revenue - Brett Walker SC, in his St James Ethics Centre 2005 Lawyer's Lecture, *Lawyers and Money*, first published on the Centre's website - www.ethics.org.au - on 24 October 2005. 'Imagine', he says, 'if medical practitioners took the approach that professional kudos should go to the doctor who performs the most procedures for the largest fees... Why should the mercantile aim of much contemporary practice of law not be just as shocking as these imaginary false doctors?'

My point is this: ethical challenges abound. You will be tested - to tell a little lie here; to gloss over or stretch the truth there; to do work in an area of law where you can't properly claim the requisite expertise; to give in to client pressure not to disclose documents or information that ought be disclosed; to turn a blind eye to a fellow practitioner's or a colleague's, perhaps a supervising partner's misconduct; to take advantage of an opponent's inexperience or mistake; perhaps even to tell a big lie - all achieve your billable hours target, to please your boss, to keep a client happy, to secure some repeat business, to make a quick buck.

- the fifth, if we're genuinely interested in improving the standards of ethical conduct within the profession, is that we'll pay attention not only to individual practitioners and their consciences and knowledge and skills but also to their workplace cultures - to the values, attitudes, customs, systems, structures and business management and supervision practices that nurture and sustain ethical conduct within law firms or alternatively leave it to chance or even undermine it.

It's striking given what we know about the impact workplace cultures have on behavior that the disciplinary framework in relation to lawyers leaves misconduct an almost exclusively personal responsibility of individual lawyers, irrespective of their workplace culture. This is in stark contrast to the laws that regulate other aspects of our conduct in a civilized society and that are intended to raise the bar. The law in this and every other state and federally in relation to sexual harassment, for example, makes employers vicariously liable for the proven misconduct of their employees and agents and even imposes a reverse onus of

proof – they will be held jointly liable unless they can prove they took all reasonable steps to prevent their employees and agents from conducting themselves in that way.

Why shouldn't law firms be similarly accountable for the greedy or otherwise unacceptable conduct of their employees, especially if there's reason to believe that the firm condoned or tolerated such conduct, much less encouraged or expected it?

It's not an entirely eccentric idea or one that's limited to human rights law. I note for example the comments of Kirby J in the *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408. Ms Foreman had been head hunted to run the family law practice of a large national firm and was under pressure to perform. She was told some time later that the firm was contemplating closing the practice down - this harks back to remarks I quoted earlier about 'the tyranny of the billable hour' - because it wasn't achieving its billings targets. She subsequently forged a time sheet for submission in evidence to the Family Court in support of her claim in a costs recovery action against a client that she had given her client a written costs agreement – she was seeking to recover more than \$500,000 in fees and was not entitled to fees in that amount in the absence of a costs agreement.

Kirby J commented that it was 'virtually impossible to credit' that she could have run up costs of that order in a dispute between a married couple for the most part over their matrimonial property. He added that the charges 'were rendered not by Ms Foreman but by her firm' and that her conduct was 'influenced by a system of time-charging and budget requirements within the firm that were not of her individual making.' He suggested that perhaps the law firm should have been held responsible for the over-charging.

We will be hearing more of notions of this kind in future. Notably for example the regulatory framework that applies to incorporated legal practices under the *Legal Profession Act 2007* goes a long way in this direction.^v It requires incorporated legal practices to have at least one legal practitioner director and it makes legal

practitioner directors personally responsible for the management of the legal services provided by the practice and the conduct of their lawyer employees. It will require them in particular to:

- ensure that the practice implements and maintains appropriate management systems which enable the practice to provide legal services consistent with the standards expected of lawyers generally; and
- if it ought be reasonably apparent that those standards will be breached, to take ‘all reasonable action... to ensure that the breaches do not happen and, if a breach has happened, appropriate remedial action.’

Their failure to meet their obligations in this regard can amount to unsatisfactory professional conduct or professional misconduct, and so, too, can:

- unsatisfactory professional conduct or professional misconduct on the part of lawyers employed by the practice; and
- the conduct of directors other than legal practitioner directors ‘that adversely affects the provision of legal services by the practice.’

I have to say that I can see no ‘in principle’ reason why traditionally structured law practices should be subject to less rigorous regulatory supervision than incorporated legal practices. Lawyers have always sold legal services for profit within a business enterprise, whatever its structure, and have always had to balance their commercial obligations to their business enterprise with their professional obligations to their clients and to the courts. There is no particular reason to think that lawyers who practice in incorporated legal practices will find it harder to balance their responsibilities than lawyers who practice within a traditional partnership arrangement.

On the other hand and more to the point I can see good practical reasons why traditionally structured practices should be subject to the more proactive

regulatory framework that applies to incorporated legal practices. We often find ourselves dealing with complaints and ‘own motion’ investigations which see consumers get less than a good or a fair deal not because the respondent lawyers are less than competent or diligent in their practice of law as such but because their law practice doesn’t keep and implement appropriate management systems which support and assist them to deliver legal services to expectation.

The current disciplinary framework makes it difficult to give consumers redress in these circumstances or to promote and enforce better standards of service delivery. We have no capacity to deal with law practices as such, only individual lawyers, and our only avenue is to explore whether the managing or supervising partner can be held to account for a ‘failure to supervise’. That is a notoriously hard charge to make stick and in any event discipline is a blunt instrument not well suited to securing improvements to a practice’s management arrangements.

Be that as it may, returning to my main theme, it seems to me that if we’re serious about nurturing and sustaining high standards of conduct in the profession we will ask ourselves questions like the following – and as I understand the social science, ‘yes’ answers will correlate with good ethical performance and ‘no’ answers will correlate with poor ethical performance:

- is ethical discussion part of the norm within my workplace?
- is my workplace ‘values (as opposed to rules) driven’?
- am I and my colleagues within my workplace willing to seek ethical advice from our peers and supervisors, or to query whether what I and others are doing or have been asked to do by a client or a supervisor is ethical?
- am I and my colleagues within my workplace willing to report ‘bad news’ to our supervisors, including suspicions that a colleague’s or a supervisor’s conduct might be unethical?

- am I confident that reporting bad news within my workplace will be rewarded and not punished?
- do my supervisors act consistently with their expectations of me and others they supervise?
- am I and my colleagues treated fairly at work and with dignity and respect?

We should ask ourselves a range of other questions, too. One of the most striking facts about the complaints we receive at the Commission is that women solicitors are more than three times less likely to be subject to complaint than men solicitors relative to their numbers in the profession overall and, putting gender aside, that solicitors become increasingly likely to be subject to complaint as they get older. Solicitors aged in their 30s are only a little more than half as likely as lawyers in their 40s to be subject to complaint relative to their overall number in the profession and three times less likely than solicitors in their 50s.^{vi} Why is that, and what does it tell us?

Another striking fact that is beginning to get the attention it deserves is that more lawyers than any other professionals - about 15% or 1 in 7 of all lawyers – experience moderate to severe symptoms of depression and that a significant proportion of them ‘self-medicate’ using non-prescription drugs and alcohol.^{vii} The Australian research to this effect mirrors similar research elsewhere. Their lethargy and impaired judgment puts these lawyers at ethical risk and comes at a high cost to them and their families if their symptoms are left untreated, and so too of course the costs to their law firms and their clients.

These facts have obvious ethical dimensions and if we are interested in nurturing and sustaining high standards of conduct in the profession we should be taking them seriously: what can we do about it? How should we respond? Should lawyers be under an ethical duty to report their impaired colleagues to their professional body? Are there any underlying structural causes – the ‘inhumane pressure’ to achieve unrealistic billings targets, for example, that one of the

practitioners I quoted earlier in the paper described and that many other commentators have similarly described – and, if so, what are we going to do about them? We need to talk about these issues and find solutions.

So those are my preliminary observations. I don't think we can talk seriously about ethics unless we contextualize the discussion in those and like ways.

That said, you will of course all find your own ways to heaven or hell but let me by way of conclusion and at the risk of some hypocrisy give you my advice:

- know the ethical rules. Know the codes of conduct, the regulatory frameworks and the like that apply to your line of work and honor them. Don't believe for a minute, however, that mere compliance with the rules will make you an ethical person. Set your sights higher than that.
- reflect on what's happening around you at work, and to you. Acknowledge how powerful workplace culture can be and how you are being influenced by the 'system' and the people about you. Recognize when you find yourself admiring things you didn't admire before, or not being troubled by things that might have troubled you before, and ask yourself why. Make conscious choices. Identify who and what you admire in life, and try to be like that.
- finally, if you want to be an ethical lawyer, be an ethical person - as a husband or wife, son or daughter, friend and colleague and citizen - and take those same values with you when you go to work. Keep it simple: 'treat others as you want them to treat you. Be honest and fair. Show respect and compassion. Keep your promises. Here is a good rule of thumb: if you would be ashamed if your parents or spouse or children knew what you were doing, then you should not do it.' ^{viii}

There are ample materials on the Commission's website including our annual reports that describe the system for dealing with complaints and discipline and how we approach our work and I commend that information to you, including as I've

mentioned the discipline register but especially the judgement or reasons for decision in those matters.

Thank you for listening.

ENDNOTES:

ⁱ This is an abbreviated version of a talk I have given at various locations across Queensland during 2006 as part of the Queensland Law Society's continuing professional development workshops on ethics. I have deleted the material about the system for dealing with complaints from this version because those issues are more than amply addressed in other materials in the Commission's website.

ⁱⁱ I've lifted this quote from Stephen Parker's introduction to the collection of essays he co-edited with Charles Sampford under the title *Legal Ethics and Legal Practice*, Oxford, 1995. That is a useful and interesting collection based as he says on empirical research into the ethical problems that modern practitioners say most trouble them in contemporary practice; focus group discussion on the case studies extracted from that research; and scholarly writing and reflection. One of the contributors to the collection describes the research - undertaken by Griffith Law School and funded in part by the Queensland Law Society - and describes also the ethical problems that most trouble practitioners who participated in the research and illustrates them with 48 case studies. They make interesting reading.

ⁱⁱⁱ Sir Gerard is quoted by Ken Crispin QC in his contribution to Parker and Sampford, at p.176.

^{iv} Appeal No. 7088 of 1997, *QLS v Bax* [1998] QCA 089, at p.4

^v I note as an aside that the Lawyer's Weekly ran an article in Issue 285 on 14 April 2006 by way of reporting the Cole Inquiry's investigation into the Australian Wheat Board and the UN Oil-for Food Program about a previously unused section of the Commonwealth *Criminal Code Act 2005*. The section enables corporations to be found to have formed an intention to commit a crime if their corporate culture directed, encouraged, tolerated or led to non-compliance with the Code. The Code defines corporate culture as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate or in the part of the body corporate in which the relevant activities take place.' The article continues: 'the development has potential ramifications for senior managers of corporations because they can be held accountable for the criminal activity of their staff.'

^{vi} The Commission's annual reports include full statistical details about the complaints we receive, including breakdowns by age and gender. The reports are available on the Commission's website (www.lsc.qld.gov.au) and in hard copy on request.

^{vii} The issue has been aired recently by the Hon Justice Margaret McMurdo, President of the Court of Appeal, in the course of her opening address to the Conference of Regulatory Officers in Brisbane on 1 November 2007. Her speech is available on the Court's website and includes references to various publications where others have canvassed the topic also. I would mention in this context the article by Patrick J Schiltz, below.

^{viii} Patrick J Schiltz, *On being a happy, healthy and ethical member of an unhappy, unhealthy and unethical profession*, *Vanderbilt Law Review*, (52) 1999 at p.910.