

Legal Ethics in Court Practice—Commentary

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Mr Justice Teague's paper, founded as it is on awesomely extensive research coupled with his Honour's own shrewdness and wide experience, represents a valuable resource which I am sure will be quarried for many years to come.

I mention by way of preface to my commentary (because Teague J's usage is different) that in what follows I use the term "lawyers" or "the legal profession" to embrace all branches of the profession without distinguishing among practising lawyers, those employed by legal firms, judicial officers, lawyers employed by commercial firms and governmental agencies, academic lawyers, and so on.

My theme is that any rule of legal ethics must have as its ultimate justification the public interest. This truism extends I believe to those rules regulating the relationships of lawyers among themselves. Those rules can be justified on the footing that it is in the public interest to have a strong legal profession operating in a collegial spirit. It is necessary to emphasize the paramountcy of the public interest, because the initial reason for the existence of many past and existing rules is far less respectable. Some (like restrictions on advertising and the incorporation of legal firms) have their origin in nineteenth century notions of gentility. Some (like most rules governing courtroom etiquette) are no more than institutionalized inertia. Some are no better than restrictive trade practices.

To prevent our being too high-falutin we should also remind ourselves that the need for ethical rules to protect the public is not peculiar to the legal profession. It is in the public interest that lawyers should be trustworthy. The public also needs to be able to trust plumbers, motor mechanics, public transport operators and food manufacturers.

Although I have suggested it to be axiomatic that public interest should be the guiding requirement of any rule of legal ethics, in fact in practice we lawyers tend as a profession to be excessively precious in relation to legal ethics, using the word precious in the sense of ridiculously over-fastidious. In this commentary I invite you to test that generalization against three recent concrete examples, each of them in an area touched on but not particularly developed by Teague J. One is a judicial decision where I think the Court got it right. The other examples did not arise in the course of any litigation but are *ex cathedra* observations where in my view those making them got things disastrously wrong.

The court case is a decision in October 1992 by Henry J reported under the name of *Equiticorp Holdings v Hawkins* [1993] 2 NZLR 37. It is one of a number of Commonwealth decisions reflecting no doubt a period of flux in the way solicitors group themselves into firms. In the case of a long running litigation where the solicitor to one of the parties wishes to join the firm acting for an opposing party, the migrant must of course abandon his client. But is that client sufficiently protected from disclosure of his

secrets by Chinese walls or the like, or must the migrant's new firm also cease to act for its client?

The judge did not purport to be laying down any sort of general rule, but I do respectfully commend to you as a model his method of approach. First identify the public interest to be protected, in this case the need for the preservation of the confidential information entrusted to the migrant by his former client. Weigh that against two competing factors, first the right of the client of the migrant's new firm to be represented by the solicitors of its choice, and secondly the desirability of preserving reasonable mobility within the legal profession. Do not be seduced by any talk of presumptions from the task of applying general principle to the specific set of facts in order to ensure the public interest objective is fairly met in the particular circumstances.

Unfortunately we cannot be confident that common sense will always prevail over dogma in this level-headed way. My second example relates to the right of former judges to return to practice. In a paper delivered to the Commonwealth Law Conference held in Auckland in 1990 I lamented the fact that there seemed:

... to be no honourable exit for the man who having accepted appointment to the bench finds that the job is just not his cup of tea. If he were to resign convention prohibits his return to the bar, so he continues in office, bored, perfunctory and miserable. Present arrangements smack far too much of a priesthood to be altogether wholesome. Some day we must face up to considering whether it would be a more sensible deployment of the manpower needed for the operation of the justice system if the path from the bar to the bench were not so inexorably a one-way street.

You will not be surprised to be told then, when some months ago a highly regarded and recently appointed High Court judge having determined to resign decided in the teeth of any inhibiting conventions to resume practice at the bar, I for one entirely approved. I believe this was the general reaction both within and without the profession. In any other walk of life if the holder of a responsible position wished to relinquish it he would be encouraged to do so. Who after all wants to be operated on by a surgeon who would rather be doing something else or fly in an aeroplane whose pilot has lost his nerve or buy shares in a public company whose chief executive officer doubts his fitness for his position? The public interest surely requires that such people be assisted to lay down the burdens they no longer wish to carry. In the case of a judge there should be no restriction placed on his return to legal practice which is in most cases likely to be the one means of earning a living available to him.

But instead we heard from various people who should have known better expressions of disapproval which would have been more appropriately expressed by a mother superior affronted by a naughty nun's having in defiance of her vows leapt over the wall in order to elope to a life of carnal bliss in the arms of an heretic. Various public interest arguments were advanced (principally that clients of an ex-judge might seem to receive favourable treatment) but none of these arguments seemed to have much connection with real life. The public interest surely requires that difficulties should not be put in the way of the return to practice of judges who no longer wish to be judges.

The third example is very recent. A number of practising barristers (of whom I was not one) contributed to a survey of the aptitudes of High Court judges published in a weekly newspaper directed to the commercial community and called *The Independent*. The general view in the profession is I believe that while the published comments were in one or two cases unnecessarily cruel, and in one or two other cases unduly flattering, by and large the quoted observations portrayed their subjects not unfairly.

This was not the view expressed in a joint rebuke by the Chief Justice and the Attorney-General:

It is unprecedented in New Zealand for lawyers to speak out critically in public of the judges in this way.... It has always been accepted that it is the responsibility of the practising profession to support the judiciary, and in particular, to support it in public comments ... [the judges] need support from the practising profession rather than anonymous and unwarranted abuse.

I confess to some sympathy with the criticism of anonymity. I have always thought it preferable that criticisms of those set in authority over us should be expressed openly and roundly rather than by means of behind-the-hand whisperings. But then my father came from Yorkshire, and we Yorkshiremen are well-known for a certain bluntness of utterance.

No doubt the reaction of the Chief Justice and the Attorney-General makes it clear that those barristers who wished to combine the luxury of observations on the faults of the bench with hopes of professional advancement showed a certain worldly wisdom in insisting on anonymity.

But where does the public interest really lie? There are arguments that needed to be but were not addressed. It is at least arguable that the fitness for that office of any holder of any public office is a matter of legitimate public interest. There is the further argument that so far as the judges are concerned the members of the practising profession are those best equipped to comment on their abilities responsibly.

Matters could get worse. There is a tendency for the legislature to pass statutes expressed in bumper sticker generalizations that leave the judges no alternative to applying their own moral assumptions. The New Zealand Bill of Rights Act is the most notorious example. Some judges permit themselves to assert a right to cast aside existing legal rules, advancing a variety of justifications of which the development of an autochthonous New Zealand jurisprudence is one and something styled judicial autonomy is another. There are many reasons for opposing those developments but the one apposite to today's discussion is that if we continue much further along those paths it will become legitimate to examine publicly not just the abilities of the judges but also their personal philosophies, a development with which Judges of the United States Supreme Court and candidates for that office are familiar. It is not a development which one would expect to be welcomed by either the Chief Justice or the Attorney-General. The Attorney-General for his part appoints the judges and in the performance of that duty may only be called to account politically. It seems to me that he comes perilously close to saying that whatever donkey he may appoint to the High Court bench the practising profession must suffer in silence. That may be the tradition but I cannot believe that that is the public interest.

It seems to me that both distinguished commentators came perilously close to saying that the justice system demands sedulous propagation of the myth that all judges are equally fitted for the positions to which they have been appointed. I cannot believe that the legal system I have served throughout my working life is so tender a plant as to require for its survival the suppression of the truth that the Chief Justice and Attorney-General contend for. We are told and I for one believe that justice flourishes most strongly in the light of public scrutiny. There seems no logical reason why that scrutiny should not extend to the abilities of the judges. This may be uncomfortable for the judges but acceptance of a proffered appointment to judicial office has never as I understand it been mandatory.