Legal Ethics In General Legal Practice

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Introduction

I am honoured to have been asked to deliver this paper today, doubly so since being neither an ethicist nor in general legal practice I have no idea what—apart from the fact that I teach law—could have prompted the invitation. It could have been that since I profess an interest in the jurisdiction of equity, there was some reasonable expectation that I would provide a paper analysing the many recent cases from various Commonwealth countries where the fiduciary principle has been applied in conflict of interest situations. I confess that that was how I had originally anticipated dealing with the assignment. However, the more widely I began to read in the area, the more I came to realize that to focus my paper that narrowly would merely be to help to perpetuate a misleading perspective on the issue of legal ethics in general legal practice. What I have therefore opted to do is to try and lay bare some of the historical, theoretical and practical dimensions of the topic. I attempt first to present a brief description of what I call the vision of the ethical professional. This represented and is still largely regarded as a kind of ideal. I then examine, under the umbrella of the question whether this vision has failed, three matters: the inherent weakness of the vision; the theoretical difficulties in its application to lawyering; and the practical difficulties in its application, particularly to an important structural form of modern lawyering. That examination will make it apparent that I believe we have reached a point where the vision is in its death throes. I do not have any blueprint to offer, but I do believe that debate about ethics in general, and about legal ethics in particular, is the first step to resurrecting this science of morals to its rightful place at the centre of any discussion of what it means to be a good person, and a good lawyer.

The vision of the ethical professional

The elements of the dominant vision of the ethical professional can be sensibly analysed and understood when contrasts are offered with the standard vision of the efficient businessperson or entrepreneur. Both visions in their modern form are rooted in recent history. In the latter part of the 19th century, in Britain and in America, one very powerful conception of the social system in general was that it was comprised of a self-regulating market which was itself underpinned by a theory of liberalism. The latter theory concentrated on presenting an excessive form of individualism, and the former was based on a series of impersonal "rules" under which the market operated efficiently because of the very manner in which individuals were assumed to be motivated. The model of the individual which was used was largely that of a creature with a selfish and quintessentially materialistic orientation. The dominant theory was in fact *egoism*, which the *Concise Oxford Dictionary* defines as "[an] ethical theory that treats self-interest as [the] foundation of morality." That is not to deny amongst those committed to business a sense of and practice of social responsibility, but the point to stress is that this was something of an extra aspect, built in after the event, rather than being seen as a fundamental part of

the social system. It was conceived as a payment owed "the system", which had worked well to benefit the individual philanthropist, rather than as an ethical requirement intrinsic to the system itself.

It was in opposition to this understanding of the social system that the ideal of professionalism emerged in an expressly articulated form. Professionalism was in small part a reaction to the rule by an aristocracy, with the latter's decadence and arrogance, but this was already waning under pressure from the new merchant plutocrats. Professionalism was indeed much more a reaction to the culture of the petite bourgeoisie (the merchants, the traders, and the shopkeepers), whose "members" revelled in and used the twin pillars of the market and liberalism, and whose entire motivation was seen to be the exploitation of customers for a maximum financial return. There was no concern for the interests of the customer, nor any wider concern for the public interest. Indeed, the operation of the system in this way was in the public interest. The business-centred system created wealth, and men—and they were largely men!—were worthy precisely on account of the money they had stored up.

Professionalism was a theory which looked for a new social order, where "power" was to rest with those whose essential calling was one of *service*, rather than in those who ruled either by birthright or by right of having amassed wealth. It was in law and medicine that the concept of professionalism was most quickly and successfully embraced.

What were the central tenets of this professionalism? First, there was a rejection of the idea that the achievement of a stable social order depended upon a blind acceptance of a self-regulating market based on an egoistic notion of the individual. What was missing, it was said, was both a social dimension and an important aspect of individual self-worth. An American scholar, Professor William H Simon, upon whose work I have largely based this section of my paper, calls these missing attributes *socialization* and *honour*. He states:[1]

> Socialization refers to the process by which people internalize as their own goals and values the norms of the general moral order of their society. Honor refers to the process by which people seek to conform to the expectations of others in order to gain their approval or solidarity. Each process makes possible a more spontaneous, flexible, and less alienating mode of social coordination than does a regime of impersonal rule [created by the market]. Such a regime is at best a supplement to the shared goals and expectations that provide the most fundamental social cohesion.

Socialization and honour were best achieved by an ethic of service. Socialization of the type defined provided for identification with the society in general. It oriented the professional to the goals and values of that wider society. Honour came with such socialization, because approval from and solidarity with "people" were the result of identification with and service to them.

The *second* tenet of professionalism was differentiation based on role or function. The

1 Simon, "Babbitt v Brandeis: The Decline of the Professional Ideal" (1985) 37 Stanford L R 565, 566–567.

concept of a universal individual could not stand with the increasing amount of specialization in terms of knowledge and skills. People were not, as Professor Simon describes, "fungible monads".[2] On the contrary, roles played an important part in differentiating people's attitudes and orientations, and the clustering of people in functionally designed groups was as vital as a recognition of socialization and honour. Indeed, not only was there practical sense in such clustering, but socialization was itself advanced because there was the development of a normative culture within the cluster group, which culture was to be reflective of and consistent with, and often more normatively demanding than, the shared goals and values. Further, honour was served because the cluster group promoted a more easily perceived sense of approval from and solidarity with the cluster group members.

And so there developed *the professional*. Law was particularly well suited to capture by the vision of ethical professionalism. Apart from the historical background already placing lawyers in a position somewhat removed from that occupied by the petite bourgeoisie, there were other features. Law was an intellectually complex discipline, of a highly specialized nature, and responsible—or so the theory suggests—for the pursuit and maintenance of the social and moral value of justice. Those who "used" lawyers were likely to be vulnerable (both in terms of lack of skill and knowledge, and perhaps also as the "victims" of injustice), and unlikely to be able to evaluate the quality of the service given. The market was thus an unlikely and potentially inefficient regulator.[3] A self-regulating cluster group was thus the obvious model. Attitudes and beliefs were more fundamental than actions. The professional's behaviour was not to be self-interested behaviour, to be assessed by the standards of the market place. Rather, a professional was to be concerned with the perfection and correct application of his discipline, and in this way he was to serve his clients, and through this he would be serving society at large. The personal goals of the professional were thereby to coincide with those of his cluster group and with those of society at large. The professional was also to look actively for opportunities to serve society directly, to bring about a political and cultural transformation from the base to the good, and from the good to the better. Herein lay the roots of the ideal of the lawyer as statesman.

All this was not, however, to be achieved through the cluster group at the expense of the individual's own interests. Service in the vision of professionalism was not to be thought of as the type of self-sacrificial saintliness associated with a Mother Theresa. Rather, intellectual stimulation and a sense of achievement were guaranteed by the creation in and through the cluster group of a rich occupational culture. Entry to, and certainly advancement within, the group was based on merit. Criteria had to be met, which were often as much of an informal nature as of a formal. Nor were the criteria limited purely to intellectual or skills based achievements; they extended to ascriptive criteria of a person's "suitability", "worth" and "connections". Further, the material interests of the professional were not denied. The professional needed to be assured of basic financial security so as thereby to avoid the lure of commerce (joining the petite bourgeoisie) in order to

2 Simon, p 567.

3 Lee, "From Profession to Business: The Rise and Rise of the City Law Firm" (1992) 31 J of Law and Soc 31.

maintain the purity of the group, and indeed to enable him to operate satisfactorily as a professional. The professional's remuneration was not to be "market value", but "reasonable value". It was not based on ideals of self-interested dealing, controlled only by the vicissitudes of supply and demand. Rather, remuneration was relatively stable, since "reasonable value" was to be assessed by rank within the professional cluster group. The group was designed as a hierarchy, which design had intrinsic worth. Commitment to the cluster group was a commitment to the hierarchy, where "seniority" mattered. "Merit" might have got one into the group, but within the group "seniority" was king. Thus, "reasonableness" within "reasonable value" was measured by the position taken within the hierarchy by the relevant actor.

To the world outside the group, the world which wished to use the services of the group, there was a rapid acceptance of the professional as the model whereby law (and other disciplines) were organized and practised. This all served to reinforce the vision of the ethical professional. Because the professional was cocooned from the effects of the market place—wherein those same people who sought to become clients of the professional were themselves treated, although as monads, as fungible monads—and because the professional was identified with society at large and as promoting a service ethic, the client wanted this professionalism to thrive, and to continue to thrive. Professionalism was the incarnation of a higher state of existence, removed from the excesses and uncertainties of "the world". From the client's point of view, the key dimension was the professional's capacity for responsibility to the client founded on a personal relationship. The client became as personally committed to the professional, as the professional was to the client. Thus, as Professor Simon suggests, "[n]either lawyers nor clients act[ed] as they would in a market because they share[d], to some extent, [in their personal relationship] the values and expectations of the professional ideal."[4] To return for a moment to the issue of remuneration, the professional was thus able to assess "reasonable value" in such a way that he could achieve and secure a comfortable material standard not only because that was the way he wanted it to be, but because that was a fundamental part of the vision of the ethical professional to which *both* he and his clients were committed.

Has the vision failed?

Even if we wish to avoid the conclusion that the vision of the ethical professional has failed, we must, I think, start this part of our discussion with an acknowledgment that the vision is in severe trouble. I do not think it is too difficult to see why. First, the vision contains, in the context of aspects of its own intrinsic requirements, the seeds of its own demise. Secondly, the vision, even in an earlier (and perhaps more opportune) time, needed to be expounded in more considerable detail with respect to the cluster group now generally called the legal profession, and in this exposition there were articulated notions which were themselves self-contradictory and not reflective of the real nature of the activity undertaken by large segments of the group. In other words, there were theoretical problems of application, which largely continue to this day. Thirdly, the vision's practical adaptability has been and is being increasingly found wanting in light of modern developments in legal practice.

4 Simon, p 579.

1 *The inherent weaknesses of the vision*

Here, I simply wish to offer three general observations. They need, in my view, to be taken further, but I have neither the expertise, nor the time available to do so now.

First, as suggested, the vision was in essence a reaction to a different model of social ordering.[5] That latter model was, however, never quite as widespread within society as the proponents of the vision seemed to think it was. Indeed, the vision's initial success was dependent upon the extent to which it could be accommodated by and amongst those in society at large who opposed the market model, and there were many of them. Furthermore, as the vision took hold, the operators of the market model themselves worked with the professionals in an effective symbiosis. But, of course, since the 1970s, and in New Zealand particularly since the 1980s, the market model is no longer a model operated largely only by the captains of industry and commerce. The model has permeated society at all levels. It has become perhaps *the* dominant model. Its power threatens the ability of the vision of the ethical professional to maintain a credible hold. Its impact on the law is beginning to be felt through the law and economics dimension. If law is in large part about the ordering of rights and duties, then decisions on these matters lie open for an evaluation from the economic models available, and most of theses models concern efficiency (the use of scarce resources) and market mechanisms for achieving efficiency. My uninformed guess is that this is a trend which will increase dramatically in the next decade, and that there will be as a result some dramatic alterations to the content of our substantive law. Of course, it is not simply the substance of the law where the market model can be put to use. It is available in the evaluation of the structure and processes of legal practice.[6] Questions which will be asked more and more often might include, from outside the cluster group:

- is this piece of legal work being provided in the most cost-efficient manner?
- would it make more economic (and other) sense to avoid use of lawyers altogether?
- why should the existing cluster group have a monopoly on the offering of legal services?

—and from within the cluster group:

- why should seniority continue to be a dominant internal control mechanism?

5 In his most recent novel, *Pleading Guilty* Scott Turow's central character reflects on one of his partners in a large law firm in a way which reveals this reactive position (pp 185–186):

> Rational self-interest is Carl's creed. He worships at the altar of the free market. The same way Freud thought everything was sex, Pagnucci believes all social interaction, no matter how complex, can be adjusted by finding a way to put a price on it. Urban housing. Education. We need competition and profit motive to make it all work. It is, I know, quite a theory. Let everyone struggle to get their bucket in the stream and then do what they like with the water they fish out. Some will make steam, a few fellows or ladies will decide to take a bath. Entrepreneurship will flourish; people will be happy; we'll get all this nifty indispensable stuff like balsamic vinegar and menthol cigarettes. But what kind of ethical social system takes as its fundamental precepts the words 'I' 'me' and 'mine'? Our two-year olds start like that and we spend the next twenty years trying to teach them there's more than that to life.

6 For a discussion of a recent challenge of this sort in Australia, see Farmer, "The Application of Competition Principles to the Organization of the Legal Profession" (1994) 17 UNSWLJ 285.

• why should the cluster group maintain rules restrictive of commercial activity which could be economically beneficial (in a personal sense) to its members?

It seems then that the standard vision of the efficient businessperson, in opposition to which the vision of the ethical professional developed, may be about to, if it has not already begun, to swallow up the latter.

Secondly, the vision was intended to be reflective of and supported by a conception of a *shared* commitment within a society to a set of goals and values. The concentration on attitudes and beliefs was central in the vision, and the monolithic nature of the underlying shared morality (or "worldview") from which those attitudes and beliefs emanated was largely taken for granted. There was a macroethical shared framework simply because societies were basically monocultural in their structure and outlook. However, especially since the Second World War, and largely as a result of improved travel and communications technology, there has developed something of a confusing tapestry in respect of goals and values. Pluralism and relativism challenge the monolithic worldviews of many societies, including New Zealand. These challenges require of course, and sooner rather than later, the articulation of a new and more relevant worldview, an articulation which should be the responsibility of philosophers, theologians and political scientists, but which task appears largely to have been abandoned to the so-called media "experts", public policy gurus, single interest group spokespersons, and depressingly trite and in many cases destructive television shows. That this widespread confusion should begin to challenge the foundations of the vision of the ethical professional should not be surprising. A Canadian scholar, Professor H Patrick Glenn, has made a particularly telling observation in discussing the American situation, about the consequences of the loss of the macroethical dimension which was so much a part of the vision:[7]

> [T]he individual U.S. lawyer stands before a wider world, free of any generalized limits on behaviour, and largely free of any effective means of control or surveillance. In contemporary language, the shift is from macroethics to microethics, and while theoreticians of applied ethics regard macroethics as providing "a necessary framework of the microethical", it is clear that in the U.S. profession the structure of macroethics is largely, though not entirely, absent. There is of course an older language to describe the phenomenon, since what has been largely removed is the definition of *telos* or role, and the means of education in this telos. It is true that the concept of role continues to play a large part in the contemporary U.S. ethical discussion, but the shift is from a *telos* or role which gives meaning to one's life as an individual, the fulfilment of which is one's purpose in life, to a role in a sociological sense, in which the self is reduced to a set of demarcated societal functions, devoid of ethical content. One's role is simply to deal with the situations as they arise, using the appropriate legal discourse and whatever "role model" appears appropriate in terms of efficiency of execution. The ethic of the professional life is here replaced by the ethics of the situation....

The vision's inherent need, therefore, for a shared worldview appears to have resulted in

7 Glenn, "Professional Structures and Professional Ethics" (1990) 35 McGill L J 424, 432.

an inability to respond in a flexible manner in the context of the present confusion of worldviews.[8]

(Some may accuse me, at this point, of inconsistency. On the one hand, I have suggested a growing uniformity of reference to the market model; on the other, however, I have suggested a growing lack of uniformity of commitment to a shared macroethical viewpoint. I am not clear, however, that the growing dominance of the market model is at present, for most people, anything more than a descriptive phenomenon—something they do, or partake of, rather than something they are committed to. This issue would take us right into one of the most debated issues of moral philosophy—when, if ever, can an "is" become an "ought"?)

A *third* observation has to do with the reliance that the vision of the ethical professional places on the personal relationship between client and professional. There are all types of potential weaknesses in this conception. In the next section, on Theoretical Problems of Application, the manner in which this conception has become dominant in defining the content of the professional ethic, resulting in a skewed notion of that ethic, will be noted. Furthermore, the conception will become increasingly useless in a practical sense as both client and professional become incapable of "personal relationship". More will be said on this matter herein in the discussion on Practical Problems of Application.

2 *The theoretical problems of application*

In the paper by Professor Glenn, quoted from earlier, the author makes some interesting observations about the centrality of structural dimensions in an appreciation of the concept of professional ethics. In particular he identifies two aspects of relevance to the present section of this paper. First, then, even within the practice of law there is, says Glenn, a series of discrete functions, each giving rise to its own more specific ethical implications. In New Zealand legal practice, the most apparent functional distinction is between lawyers acting as solicitors, and lawyers acting as barristers. To some degree, this distinction is recognized in this Seminar, but of course much of the work that barristers undertake is not obviously related to any courtroom function. Thus, the apparent distinction may not be the real distinction. Glenn suggests that the feature of discrete functions is most notable in European legal traditions, where practice is divided amongst separately identifiable cluster groups (my term), whose functions tend to be mutually exclusive, and whose purpose is often seen in the name adopted by the cluster

8 Even the (apparently) most righteous of the partners in Turow's *Pleading Guilty* seems to be a mass of contradictions, wherein the professional ideal has become warped by modern confusions (p 180):

> Martin is your veritable Person of Values, a lawyer who does not see the law as just business or sport. He's on a million do-good committees. He's against the Bomb, the death penalty, and damage to the environment, for abortion, literacy, and better housing for the poor. He's been the chairman for years of the Riverside Commission, which is devoted to making the river clean enough to drink or swim in.... Like any Person of Values who is a lawyer, Martin is not in it for goodness alone. These activities make him prominent, help him attract clients. Most of all, they invest him with the same thing that knowledge of the law imparts to us all: a sense of power. Martin gets off with his hand on the throttle. When he talks about the $400 million public offering we did for TN two years ago, his eyes glow like a cat's in the dark. When he says, 'Public company', he says it in the way the priest passing out the wafers says, 'The body of Christ.' Martin has a grasp of the way business runs America and he wants to help be in charge.

group, for example, jurist, notary, and advocate. Secondly, the mutual exclusivity already referred to is an important enough feature to warrant separate recognition. There exist incompatibilities focussed on functions — the role one has defines both what one must and what one must not do. In New Zealand, there are some role-defined incompatibilities of this type between barristers and solicitors.

Using these insights, it is important to note that in the United States, as Glenn shows, the existence of a "unified profession" from the outset did not provide for role differentiation within the broader function of legal practice; nor did it permit for mutual incompatibilities, since one could take part in all aspects of legal practice. Hence, the role differentiation necessary to reveal ethical implications special to each role had to be performed in too broad a field. The cluster group, unlike in Europe, was simply too large! The prospect was, therefore, that one aspect from the broad range of lawyerly functions would dominate in defining the content of the professional ethic — and this proved to be correct. The advocate role of the lawyer has, in American studies, dominated. This role has spawned the ethical requirement of undivided partisanship towards the client, which worked reasonably well when both clients and lawyers were accepting of an overarching macroethical worldview, but which has started to show its inadequacies as the vision of the ethical professional has come under increasing pressure. In the courtroom the notion is in danger of being abused by its overzealous application. In respect to other non-courtroom contexts, since in its formulation little attention was given to the large variety of non-advocate functions undertaken by lawyers, and to the thought that a different ethical content might need articulation to cope with such a multifaceted dimension, the notion has begun to be ignored to the point where outsiders looking in might think that legal ethics today consists of nothing more than the articulation of a system of substantive legal rules to safeguard potential clients against conflicts of interests.

In New Zealand, of course, the theory is that we do not have a "unified profession". In Professor Glenn's terms, this would place New Zealand closer to Europe than to the United States. This is the position which both the Introduction to the *Rules of Professional Conduct for Barristers and Solicitors*, and its structure and contents, attempt to confirm.[9] And it is likely that increasing specialization and the existence of a growing community of barristers sole probably will be responsible for cementing and developing, as a matter of fact, the notions of different functions and resulting mutual incompatibilities. It seems to me, however, that these developments, along with other features to be noted in the section on Practical Problems of Application, are the result of an increasing sophistication in the structuring of New Zealand legal practice. In terms of Glenn's thesis, then, the features of smaller cluster groups centred on discrete functioning and the mutual incompatibilities which accompany them are relatively recent features in New Zealand legal practice. The content of the ethical obligations of the legal professional was thus established in similar "frontier" conditions as in the United States. Size alone would have prevented early specialization. Thus, in New Zealand, as in the United States, the articulation of the content of the vision of the ethical professional lawyer has been, I suggest, considerably influenced by the model of the lawyer as advocate. Underlying that

9 *Rules of Professional Conduct for Barristers and Solicitors* (2ed, 1993, New Zealand Law Society).

model are certain assumptions which are inadequate and probably misleading when they are examined in the light of the non-advocate functions of lawyers.

To begin with, we should perhaps ask why the advocate model has proved so attractive. There is a sense in which, I think, the tenets of service in professionalism rather unquestioningly found a natural home in the adversarial system, which is itself of course operated by lawyers, and whose climactic event is the trial, where the lawyer as advocate reigns supreme. The adversarial system appears to bring together the two dimensions of service—service to the client and service to the society. "[F]idelity to a particular client and to the legal system as a whole [is thereby maintained] by reference to a combative scheme of social ordering."[10] The advocate's moral obligation is that of undivided partisanship, to act as a champion in the joust, to do all that she can for her client, by presenting her client's case and challenging the case of the opponent, constrained only by formal rules of procedure and the governing substantive law. Beyond that, however, the supposition is that the advocate is under no moral obligation. She is, as Glenn puts it, "a client-controlled judicial Rambo".[11] There is faith that the system will look after matters of "truth" and "right" because at the end of the day a trained impartial umpire adjudicates on a result. There is no need here to rehearse the wider debate about the accuracies of these assumptions as to what the adversarial system can and does achieve. But it is pertinent to suggest that the constricted view of legal processes that the system throws up results in "a correspondingly myopic perception of professional responsibilities."[12] A lawyer "need not contemplate any broader notion of justice than that defined by existing legal norms."[13] Litigation in particular can tend quickly to become divorced from issues of substantive justice. This is true also for other forms of legal activity. As a result lawyering declines in its status to not much more than a game or a sport. That perspective then simply further reinforces the notion that there is no obligation to get a fair or right result. The vicious circle is formed.

The notion of undivided partisanship is also supported by an individualistic rhetoric which figures strongly in the ideology of the adversarial system. Since in the formal features of the system service to a greater good is secured, the care of the individual is in the hands of his lawyer. The lawyer serves by protecting the fundamental interests of the individual in his dignity, privacy and autonomy. She does not judge her client. She must follow various prescriptive norms in the development of her relationship with her client, which norms are designed to foster the security of that relationship. These norms take precedence over other concerns. There are, however, difficulties with all this. While one can appreciate the applicability of this view in the case of a criminal defence, its application in many other areas, for example, most commercial litigation, is far from an accurate reflection of what is involved. Representation of institutional parties presents conceptual problems. Is it true that the ends of human dignity and autonomy are served by the lawyer's unswerving commitment to the company, without reference to other (human) parties who might have legitimate interests at stake (for instance, consumers,

10 Rhode, "Ethical Perspectives on Legal Practice" (1985) 37 Stan L R 589, 595.
11 Glenn, p 434.
12 Rhode, p 603.
13 Rhode, p 603.

employees, investors, etc)? In any event, the rhetoric overlooks structural aspects, particularly financial ones, that often prevent use of lawyers in the first place. Nonetheless, the appeal to the individualistic interests of the client permeates all forms of legal practice, and further isolates lawyers from more extended analysis.

The model of the lawyer as advocate, reflecting the adversarial ethos, retains a strong hold in shaping the ethic of undivided partisanship. However, as Professor Deborah Rhode suggests, this model, "in conflating clients' legal and moral rights, sanctifies a form of private partisanship not readily reconciled with societal concerns or professional aspirations."[14] This theoretical mistake, that lawyering and its professional ethic are to be defined by the functions of the advocate, was hidden away for a very long time, but more recently its inadequacy has raised the issue, particularly in America, whether a redefinition is possible. However, instead of a movement towards rediscovery of a vision of ethical professionalism, much of the new debate on legal ethics is a simplistic retreat into a highly role-differentiated model which is actually more amoral than its predecessor. The underlying "premise is that lawyers neither can nor ought to make factual and normative judgments that more rigorous ethical obligations would entail."[15] Lawyers are just doing a job, for their clients. They are technicians, without moral accountability for their participation in the activities of their clients. Professor Rhode sounds a serious warning about this:[16]

> [T]his refuge in role provides a deceptive haven, and one that extracts a considerable personal price. When professional action becomes detached from ordinary moral experience, lawyers' sensitivity can atrophy or narrow to fit the constricted universe dictated by role. The agnosticism [about the very possibility of making ethical judgments] that [the] advocacy [model] purportedly entails can readily become a defining feature of one's total personality. Such a perspective offers one the illusion of freedom from responsibility, while in fact delimiting individuals' moral autonomy. At best, the result is likely to be a resigned submission. At worst, it can foster an enervating cynicism. Success is gauged by victories, not values, and professional idealism is dismissed as pompous rhetoric.

This echoes, of course, Professor Glenn's view on the effect of the loss of a macroethical worldview.[17] In his own evaluation of the state of the legal ethics debate in the United States, Glenn identifies three features, the first of which it appears is an increasingly obvious feature in the New Zealand context. The third is also present, and there is no reason why the second should not begin to surface relatively soon.

First, Glenn notes, the idea of conflict of interest has become the yardstick for defining appropriate and inappropriate lawyerly conduct.[18] The classic illustration of this point is the 258 page "Note" in the 1981 volume of the Harvard Law Review, where the entire range of what might be regarded as issues of an ethical nature in general and courtroom legal practice is discussed under the heading "Conflicts of Interest in the Legal Profes-

14 Rhode, p 617.
15 Rhode, p 617.
16 Rhode, p 626.
17 Above, n 5.
18 Glenn, p 433.

sion".[19] What stuns me even more about this piece is that no author has expressly claimed it for inclusion in a resume! In New Zealand, as in England and Australia, the area of conflicts of interest, and in particular the role of the fiduciary principle in defining the legal parameters applicable, has become a hot topic in view of a clutch of recent cases, the most notorious of which has been, of course, *Clark Boyce v Mouat*.[20] There has been, accompanying the cases, the usual flood of academic commentaries, most of which seem preoccupied with a fairly standard type of case by case analysis.[21] I do not intend here to follow that path. But I do wish to make an observation of a general nature. I think the manner in which the decisions in *Clark Boyce* were greeted by the New Zealand legal profession (and here I am necessarily guilty of a considerable over-generalization), the almost universal condemnation which was heaped upon the Court of Appeal's decision, followed by high praise for what was regarded as the Privy Council's return to practical sense, indicates a readiness to equate acting ethically in practice to applying the relevant rules of law (a type of ethical reductionism), and a preference for finite rules of law which provide a kind of checklist and require little actual judgment to be exercised. All this is quite consistent with a technician's mentality. But, of course, an ethical professional might be assumed to be more interested in whether there are more demanding ethical requirements than are reflected in the legal rules. Professor Julie Maxton has recently noted, for example, that there is now something of a dissonance between the requirements of the law as stated in *Clark Boyce*, and the requirements of ethical practice as set out in the relevant section of the *Rules of Professional Conduct*.[22] Which "test" will practitioners apply, one wonders? At the end of the day, reliance only on legal rules leads to the measurement of ethical behaviour by the test of whether or not a legal sanction exists. Intense focus on conflicts of interest thus skews the ethical debate. The point is made thus by Professor Glenn:[23]

> A conflict of interest appears initially to be ethically banal. People's interests are seen today as constantly in conflict and what can be said to be wrong with that? Its use in legal ethics therefore implies the superposition of a further ethical criterion, or the conflict of interest will go largely unsanctioned unless actual harm is caused. This is what Francis Bacon contended after accepting gifts from litigants before him, in stating that there was no wrong since he had not been influenced in exercising his judgment.... In the measure that conflicts of interest go unsanctioned absent actual harm, a purported ethical standard is reduced to something very close to the general rules of civil liability.

19 (1981) 94 Harv L R 1244.

20 See (1991) 1 NZ ConvC 190,794 (Holland J); (1991) NZ ConvC 190,917 (CA); [1994] 1 AC 428 (PC).

21 See, for example, Finn, "Conflicts of Interest and Professionals" in *Professional Responsibility* (Legal Research Foundation Seminar, 1987), 7–48; Tomasic, "Chinese Walls, Legal Principle and Commercial Reality in Multi-Service Professional Firms" (1991) 14 UNSWLJ 46; Finn, "Professionals and Confidentiality" (1992) 14 Syd L R 317; Midgley, "Confidentiality, Conflicts of Interest and Chinese Walls" (1992) 55 MLR 822; Aitken, " 'Chinese Walls' and Conflicts of Interest" (1992) 18 Mon L R 91; Finn, "Fiduciary Law and the Modern Commercial World" in *Commercial Aspects of Trusts and Fiduciary Obligations* (McKendrick (ed) 1992) Ch 1; Teele, "The Necessary Reformulation of the Classic Fiduciary Duty to Avoid a Conflict of Interest or Duties" (1994) 22 ABLR99.

22 Maxton, "Equity" [1994] NZ Recent Law Review 247–251.

23 Glenn, p 433.

The second feature which Glenn notes about the American debate is the extent to which there are calls for the development of a new ethical framework, which takes legal ethics beyond the constrictions imposed thereon by the traditional advocacy based model.[24] That latter model is regarded as providing a minimalist ethical standard, out of step with, and indeed far reduced from, what is expected of the non-professional ordinary citizen. In particular, the notion of undivided partisanship to the client is seen as permitting abusive and vicious behaviour which is fundamentally and ethically not acceptable for all civilized people, and cannot thus be justified by assertions of role requirement. Role can be used to raise the standard expected, but not to reduce it. Perhaps this is the beginning of the attempt to apply modern macroethical theory in its virtue ethics model to legal practice. At the very least it reveals that something is seriously wrong.

Professor Glenn's third feature is the apparent movement away in America from "the idea of broad standards of conduct to precise rules of professional conduct."[25] He states, somewhat tellingly:[26]

> Standards address the question of how one acts and assume the existence of an articulated role the standard is meant to implement. In contrast, rules tell one what to *do*, in a particular case, and their implementation appears to require no concept of professional role or professional standards. To the extent that a profession seeks rules in order to know what to do, it is clear that it lacks a clear sense of role informing it as to how it should act.

The contents of the *Rules of Professional Conduct* here in New Zealand seem, it must be said, to fit admirably with their title. Do they convey a message, as Professor Glenn suggests?

The model of the lawyer as advocate does not simply introduce the assumptions underlying the adversarial system, and all that they entail. It does not make adequate allowance for the wide range of functions which lawyers in general legal practice perform. Professor Murray Schwartz has usefully categorized these functions in a scale moving from those which have closest connection with the central function pursued by the advocate to those where the advocate model is simply irrelevant.[27] First, he identifies "compelled negotiations". These are circumstances where a controversy is litigable if no prior agreement is reached. Here the lawyer is concerned to pursue her client's interests, as an advocate would, until agreement is reached, when she then becomes concerned to promote the agreement between her client and the other party. She moves from a zealous advocate for her client, but without the constraints of procedural rules and yet perhaps with the constraint of her client's wish to avoid litigation if possible, to the role of advocate for a consensus position. An ethic of undivided partisanship sits uneasily in this context. Secondly, Professor Schwartz recognizes "voluntary negotiation", where the matter between the parties is not litigable if no agreement is reached (for example, contractual negotiations). Here the lawyer acts to some degree as an advocate, but she must restrain

24 Glenn, pp 433–434. For a recent contribution in New Zealand along this line, see Enright, "Legal Ethics and the Family Lawyer" (1994) 7 AULR 821.

25 Glenn, p 434.

26 Glenn, p 434.

27 Schwartz, "The Professionalism and Accountability of Lawyers" (1978) 66 Calif L R 669, 675–677.

her zeal since she is not involved as a defender of a client's rights. She is there to aid her client in reaching a satisfactory agreement, but this "satisfactoriness" is not obviously divorced from wider ethical considerations. Thirdly, in many cases a lawyer is merely exercising a "counselling" function, whether it be drafting a will or trust, advising on the tax consequences of particular activities, establishing a company constitution, or a host of other like activities. In these cases there is no adversary. There are only lawyer and client. A concept of undivided partisanship can reduce severely the range of matters that ought to be discussed. In all three types of non-advocate functions, it might, consistent with the vision of the ethical professional, be pertinent to ask a question which the prevailing adversarial ethos would regard as excluded ab initio in respect of the advocate function. That question is (to paraphrase Professor Schwartz[28]): if in trying to achieve her client's objective the lawyer would be achieving an unfair, unconscionable, or unjust, though not unlawful, end, or the lawyer would have to use unfair, unconscionable, or unjust, though not unlawful, means, should the lawyer decline to act? As Schwartz indicates, the requirement not to act would be an ethical one, not a legal one. If the lawyer chooses to act, she must bear the moral responsibility. She cannot find refuge in her role. Of course, the infatuation with the adversarial ethos in the working out of the vision of the ethical professional prevented such a question from being put.

3 *The practical problems of application*

Not only has the vision of the ethical professional run into difficulty at a theoretical level, but it is now under increasing pressure from changes in the structural dimensions of much legal practice. The first point to note is that lawyers in general practice may regard themselves as professionals, but in reality their status is essentially derivative. Their incomes and reputations depend, in large measure, on satisfactory service to their clients. Put crudely, lawyers are patronized.

This aspect of legal practice is exacerbated in those firms which represent corporate clients. The volume of business that these clients generate introduces the prospect of venal considerations, and where competition exists to "keep the company's business" therein "the likelihood of ethical tunnel vision increases."[29] Lawyers start to see things the way their clients would wish them to, and this can extend not only to ethical considerations but even to straight legal matters. This must not of course be overstated. A reputation for integrity still matters, but the readiness of lawyers to turn a blind eye to many of the ethical wrongs committed by entrepreneurs and corporate high fliers during the 1980s bears recent testimony to the "moral smog"[30] that can be conveniently conjured up. Lawyers' stature in society is based on dependency. This dependency, the patronage structure of legal practice, "reinforces partisan norms while compromising normative [or ethical] premises."[31] Another problem generated, as identified by Professor Glenn, is "that client control of professional organization will result in the profession lacking 'the power to

28 Schwartz, pp 678–681.

29 Rhode, p 627. The entire plot of Turow's *Pleading Guilty* centres on the law firm's desperate need to retain its major corporate client.

30 Rhode, p 628.

31 Rhode, p 631. This feature, sometimes euphemistically called "client care", also raises the question whether vigorous promotion of a client's interests really amounts to "care" in a more general context. It is easy to get clients into trouble: see *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587.

draw the boundaries that separate lawyers' work from that of other occupations ... to set standards of professional conduct, and thus to control the course of the profession'".[32]

What is at issue here, therefore, is the extent to which practical realities permit us to continue to view the ethical professional lawyer in terms which present her as having a degree of autonomy which she may not in fact have. For example, the structures within which increasing numbers of practitioners now find themselves located resemble the structures of their corporate clients. Various factors have conspired together to create an opportune climate for the growth of large firms: the commercialization of professional services in general, the advent of the information age, general deregulation, and internationalization. These firms are simply yet another type of organization. Most organizations are bureaucracies, where rules of functioning define various jurisdictions within the organization, duties are allocated to those with the specialization required in the matter at issue, importance and authority depend upon position within the organization, and there exists an ethos which requires institutional loyalty.[33] These observations are true for law firms, and are exacerbated as the firm gets larger and larger. Although the larger law firms might have continued to use the body of a partnership, their mind tends to be that of a corporation. There are, of course, benefits which flow from this development, even in respect of ethical issues. Larger firms may in fact prove to be more efficient at monitoring the ethical requirements set down in the *Rules of Professional Conduct*. Larger firms are able to establish more sophisticated measures to guard against potential conflicts of interest, and their ability to purchase high quality information technology gives them a considerable advantage. In addition, there is the general fillip of "good and efficient management". Nonetheless, there are obvious downsides. Organizations compete with each other, not only for clients, but for staff; and within the organization there is intense competition for advancement. Success within the organization is measured by productivity, which is linked to the measure of "billable hours". The organization itself imposes heavy burdens of internal and inflexible costs, which themselves create further pressures to maintain productivity.

The organizational dimension often flies in the face of the notion of a personal relationship between lawyer and client. Not only is it difficult to see, where the client is a corporation, in just what sense there can be a personal relationship. It is increasingly difficult from the lawyer's point of view, where she is one of a team within a large organization, to accept that she is in a relationship of personal responsibility with a client with whom she may have little or no direct contact. Furthermore, since she is an institutional employee, and in this context I do not think it matters that she might in strict terms be a partner, her loyalty to her organization must mean that she does not come to the relationship with the client with an entirely client-oriented focus. In respect of these organizational dimensions of practice, there is indeed need for radical redefinition of the ethic of the professional lawyer.

32 Glenn, pp 430–431.

33 Turow's *Pleading Guilty*, apart from being a good yarn, is a study in the dynamics of the large firm. The organizational culture, with its expectations and social (almost normative) rules, permeates the story in a devastatingly effective way. In particular, the annual Groundhog Day, where the partners' worth is revealed in the points sharing, whereby the "profits" are distributed, looms throughout the story as a kind of cultic celebration, the pilgrimage to the Temple.

Productivity orientations also threaten relationships with clients. Billable hours are important, and work can easily expand unnecessarily to fill time sheets. There is always a temptation to find more to deal with than is really there. The more distant any relationship is, the less rigorous tend to be the checks and balances in place.

Productivity orientations, especially in but not limited to the medium-sized to large firms, may threaten the personal ethical integrity of individual lawyers. When coupled with the push to early specialization, the dangers are enhanced. Not only are family and other interests curtailed as a work ethic dominates, but total immersion in the detail of a few areas of law cuts the lawyer off from the law as a whole, and prevents the appreciation of any broader ethical constraints in the practice of law as a professional. Professor Rhode observes the result of this high pressure environment:[34]

> By choice or necessity, many lawyers with non-competitive orientations or strong commitments to family or nonprofit pursuits drift out of firm hierarchies, leaving management composed largely of those who accept revenue-maximizing priorities. That selection process perpetuates a culture well insulated from alternative values.

The further dimension of collegiality encouraged in firms also tends to the perpetuation of a culture that can easily stifle the originality, energy, and—dare it be said—ethical awareness of individuals. Team players are valued. "Getting on" with others can become a very important criterion. It is difficult to set one's own agenda, even when one moves towards the top of the ladder. Jobs are given out rather than accepted, and thus the likelihood of being able to exercise an independent ethical judgment is further minimized.

On the other hand, this collegiality is often fairly transitory. The organizational structure of many firms means that personal identification with that firm, in the sense of a measure of psychological "ownership", is often lacking. People feel free to move from firm to firm. Caps on promotion and partnership possibilities will further encourage movement. The result is a further erosion of the personal relationship basis of the client-lawyer interface. Clients belong to the firm, not the individual lawyer. One matter of concern which has been generating much interest, arising from the freer movement of lawyers from firm to firm, is that the scope for conflicts of interest to arise is enlarged, and so the devices of "Chinese walls" and "cones of silence", devices developed primarily in the worlds of finance and accountancy, are applied to try and deal with the resulting difficulties. In a small jurisdiction like New Zealand these problems can loom particularly large. The effectiveness and propriety of various techniques are increasingly matters on which courts are expected to adjudicate.[35] The temptation to view matters of ethics in legal practice as matters suited to and determined by the substantive law, a temptation already recognized earlier in this paper, is thus further exacerbated.

Commercialization and internationalization, with the considerable business opportunities they bring, and the increasing complexities that follow, mean that further developments in the organization and operation of legal practice are likely. We are already in the age not only of the large firm, but of the large national firm. We are also beginning to

34 Rhode, p 634.
35 See above, n 18.

experience the advent of multinational firms and, dare it be suggested, the next stage may be the development of multidisciplinary firms. It needs no special talent to see that these "creatures" will put further strain on the traditional concept of legal ethics. Lest it be thought that smaller firms are immune, the growth of what are in truth one stop legal shopping centres is likely to force the smaller providers to become niche market providers. That development will introduce in a stark way some of the challenges identified in respect of larger firms. These are the dimensions in which the meaning of the ethical legal professional of the future is likely to be articulated.

Conclusion

How shall we deal with the challenge? First, it seems to me to be essential to understand and to be able to offer informed critiques of the various dimensions of general legal practice. My paper has had no substantial underpinning of empirical research about the structures and modes of operation of legal practice in New Zealand. Such research would be of considerable value. For example, we could then be more confident in some of our predictions. We could evaluate more successfully some of the alternative models. Should we in fact give over legal practice entirely to an unregulated free market, or if regulation is needed, how much, and from whom? Should there be even stronger, perhaps even outright governmental, regulation? To what extent is the present model of self-regulation of any relevance to much of what actually goes on? Who runs the present system, how, and why?

Secondly, there is an ideological crisis which needs to be exposed. Perhaps we have put too much "faith in the ability of [an] insular occupational [community] to generate adequate normative visions"?[36] Professor Rhode, for example, believes that lawyers must assume personal moral accountability for the consequences of their professional actions. She continues:[37]

> Given the tendency of parochial interests to skew ethical judgment, the justification for conduct must be tested by conventional techniques of moral reasoning. The rationale for professional action cannot depend on a reflexive retreat to role, which denies the need for reflection at the very point when reflection becomes most essential. To be convincing, professional judgments must withstand scrutiny by individuals seeking consistent, disinterested, and generalizable foundations for conduct.

In essence, the legal profession needs to commit itself to becoming a profession where ethical issues and legal issues are regarded as equally fundamental.[38] This needs to be reflected in structures as much as in words.

36 Rhode, p 643.

37 Rhode, p 643.

38 The loss of normative vision is doubly tragic if one bears in mind one of the central tenets of Blackstone's view of the law and its study, which, as Professor Birks has recently reminded us (in "Adjudication and Interpretation in the Common Law: a Century of Change" [1994] LS 156, 178) was that "the study of the law [is] a high and complex form of the study of ethics." Birks quotes Blackstone on this point (from Blackstone, "On the Study of Law" 1 *Commentaries on the Laws of England* 27): But that a science, which distinguishes the criterions of right and wrong; which teaches to establish the one, and prevent, punish or redress the other; which employs in its theory the noblest faculties of the

Thirdly, one of the structural dimensions most in need of reform in this context is, in my view, law school education. Since, I believe, we now live in a world where on the whole the students we enrol come in without an ability to recognize, let alone reason through ethical issues, I think we have to accept that professional responsibility education is an urgent need. I do not mean a compulsory Jurisprudence course! I think what is needed first is systematic exposure to the forms of moral reasoning, and thereby the teaching of ethical decision-making. This can then more centrally be placed within the framework of ethical issues in law practice. The lack of such education at present sends out a powerful message that ethics are not an important part of being a lawyer. Furthermore, lawyers are then often left to "pick up" ethics as they go along, as if what was involved was the equivalent of picking up the steps required to see through a successful house conveyance. Ethics, the science of morals, needs reflection. Ethics cannot be left to be acquired by habit of practice. Especially is this so when many of the practices are themselves in need of critical assessment. Professor Rhode reminds us:[39]

> G K Chesterton once suggested that abuses in the legal system arose not because individuals were "wicked" or "stupid" but simply because they had "gotten used to it".

Addendum

Shortly after I completed this paper I managed to get hold of a new book which I had been unable to consult whilst writing it. The book is *The Lost Lawyer—Failing Ideals of the Legal Profession*, by Anthony T Kronman.[40] Kronman's thesis and my own are similar in a number of ways, and many of the points introduced in my paper are developed in detail in his fascinating and very readable work. For those interested in pursuing the issues raised in my paper in more depth, I strongly recommend Kronman's book to you. There are insightful chapters in the book for each branch of the legal fraternity—judges, practitioners, and academics (who perhaps come off worst of all!).

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soul, and exerts in its practice the cardinal virtues of the heart; a science which is universal in its use and extent, accommodated to each individual, yet comprehending the whole community; that a science like this should ever have been deemed unnecessary to be studied in an university, is a matter of astonishment and concern. Surely, if it were not before an object of academical knowledge, it was high time to make it one: and to those who can doubt the propriety of its reception among us, (if any such there be) we may return an answer in their own way, that ethics are confessedly a branch of academical learning; and Aristotle himself has said, speaking of the laws of his own country, that jurisprudence, or the knowledge of those laws, is the principal and most perfect branch of ethics."

39 Rhode, pp 651–652. Blackstone likewise had something to say about reliance on practice alone (as quoted by Birks, p 177, from 1 *Commentaries on the Laws of England* 32):
If practice be the whole that he is taught, practice must also be the whole that he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est* is the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any argument drawn *a priori*, from the spirit of the laws and the natural foundations of justice.

40 The Belknap Press of Harvard University Press, Massachusetts (1993).