Legal Ethics In General Legal Practice—Commentary

A A Lusk QC
Barrister

I would be surprised if many disagreed with Professor Rickett's opinion that society no longer views the lawyer as an ethical professional—at least to anything like the extent it used so to do. Society clearly now rates us as much less trustworthy and ethical than we were (or now should be), and I think our own perception is much the same—it is commonplace to hear members of our profession, particularly the older ones, lamenting the loss of ethical standards of the past.

I suspect the public's perception is mainly a justified reaction to widely publicized acts of theft by a few. Such behaviour would be a breach of any moral code and is not peculiarly a matter of legal ethics. This form of dishonesty is not the same problem worrying many lawyers, which is a lowering of professional standards in an increasingly competitive environment. Such conduct as aggressive and abusive communications; the disparagement to potential clients of another practitioner's abilities; untruthful representation of the practitioner's own experience and expertise; lying as to the state of a transaction, perhaps to explain delay or create it; lying as to the evidence available to a client in a particular case; are but a few examples encountered increasingly frequently, of conduct that will usually go largely unnoticed by the public, but go to the very root of daily practice in the profession.

There are two aspects of Professor Rickett's paper that cause me some concern, and it is to those that my few remarks are directed. In doing so I may seem to lay aside those portions of his paper that discuss in such a thought provoking way the historical origins and theoretical problems inherent in the application of ethics to the legal profession.

Like Professor Rickett, I am not an ethicist. However, my perspective on this issue is that of a practising lawyer of more than 25 years experience, the last half of which has been progressively dominated by cases concerning professional shortcomings of lawyers. Given our different backgrounds it is not surprising we see some causes of the problem and its possible solutions rather differently.

I accept Professor Rickett's starting point that the vision of a lawyer as an ethical professional is now seriously clouded, but I do not think it is in its death throes.

I am not, however, convinced that the first step to solving the problem is to hold a debate about ethics and morality in a general philosophical way—indeed I think we may tend to mislead ourselves if we continue to address the problem under the rubric of "ethics" or even "legal ethics". Many of the rules of conduct prescribed by our professional bodies as minimum standards of behaviour expected of their members, are not matters of ethics or morals at all, but deal with quite mundane aspects of day to day practice or matters relating to relationships between lawyers which have little, if anything, to do with "ethics" in a wider sense. While I will sometimes for convenience use the term "legal ethics" I am

doing so as a reference to observance of professional standards set by the profession itself.

Professor Rickett suggests the purpose of legal ethics is to produce a profession that achieves morally acceptable results and in that way to fulfil a vision society as a whole has of how lawyers should conduct themselves. I do not believe that has been their function in fact for many years—and I now think the vision is unachievable (as I suspect he does). Why I think the debate as to declining legal ethical standards will not be assisted by considerations of historical and theoretical notions of ethics in a wide sense, or social morality, is because often these notions will be in conflict with the interests of both the client and the profession.

When we talk of legal ethics we should recognize that what is being discussed is a set of standards devised and put in place by the profession itself, and at times the perceived needs and interests of the profession may override the interests or objectives of society or individual clients. In his commentary just now Professor Campbell referred to the Law Society Rules of Professional Conduct as an example of "[t]he rhetoric of self advancement". However, in this regard legal governing bodies are in no different position from those of any of the other professions or even trading societies who aspire to become regarded as professions, and who put in place a set of behavioural standards for their members which may well, in some particular respects, be for the benefit of the members rather than for the public or clients.

This point is reflected clearly in some paragraphs of the introduction to earlier versions of the United Kingdom publication "A Guide to the Professional Conduct of Solicitors", issued by the Council of the Law Society.

I refer to paras 1.3. 1.5 and 1.6 of the 1974 version:

> 1.3 The Ormrod Committee in their report on Legal Education, 1971 stated: "a profession involves a particular kind of relationship with clients, or patients, arising from the complexity of the subject matter which deprives the client of the ability to make informed judgments for himself and so renders him to a large extent dependent upon the professional man. A self-imposed code of professional ethics is intended to correct the imbalance in the relationship between the professional man and his client and resolve the inevitable conflicts between the interests of the client and the professional man or of the community at large."
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> 1.5 Mr F A R Bennion in his work on Professional Ethics (1969) Charles Knight & Co London, said that the professional code is in essence "the judgment of the profession on how its members should conduct themselves and this judgment has prevailed over different views from outside".
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> 1.6 The court can, however, overrule a professional body where the court considers that a particular professional rule of ethics is not in the public interest. The rules of conduct, therefore, must always be the light of the public interest on the one hand and of the requirements of the individual profession in its relations with the public on the other.

Society's view of what constitutes moral behaviour should not be ignored, of course, by those responsible for prescribing and reviewing rules of professional conduct of any

body, but those notions should not drive the formulations of those rules and as those citations suggest may be in conflict with them.

There are many obvious examples—in litigation, society's wish to see the criminal convicted whereas the client's objective is to attain an acquittal (the successful lawyer often attracting society's condemnation for using his or her professional skills to achieve the client's objective). I am sure society's views on the subject of what are ethical levels of legal costs will often conflict with the profession's recognition that the maintenance of sound levels of income is in the best interest of the profession itself, and ultimately in a general sense benefits the client.

The second aspect of the paper on which my views diverge rather from those of its learned author is in the section dealing with the practical problems of application of the vision of the ethical professional.

Of course there have been changes in the structural dimensions of much of legal practice in New Zealand, and probably more so in the last decade than ever before.

The profession has to be vigilant to ensure that its rules of professional conduct are suitable for the changed environment, and if they are not, then to adapt them or if the changed circumstances warrant it, adopt new rules to prescribe the standards of conduct expected of those members affected by the change.

Having been a partner for some years in a large national law firm, and subsequently having been closely involved through my practice with other large firms grappling with ethical and professional standards matters, I feel able to say that I do not agree with Professor Rickett that the growth of large firms has made the practical application of ethical standards more difficult. On the contrary, as I will mention, I think the approach the large firms generally adopt to these matters, and their method of practice generally provide some safeguards against the insidious erosion of proper behaviour in the profession.

I am not saying unethical behaviour does not occur in large firms, or that their partners or staff are entirely sheltered from those pressures of modern practice that are the breeding ground of unethical conduct. We know, unfortunately, of some instances in the late 1980s where the contrary was alleged to have been the case. The amount of money involved attracted greater publicity and resultant opprobrium for the profession than perhaps the small number of such cases justified.

In my experience the big firms have very active programmes within their training structures to educate their staff and maintain the awareness of their partners and staff, as to what are the profession's rules of conduct, how to behave in a proper professional way and how to combat the pressures that can arise that might lead the unwary into unprofessional behaviour. Most of the large firms also have an ethics committee comprised of some of their most senior and respected partners who deal immediately and usually effectively with any ethical matter arising in the conduct of the firm's business.

The team approach that is the manner in which the large firms conduct most of their clients' business has inherent in it important safeguards against unethical conduct—the

opportunity for juniors to learn in a practical context at the knee of experienced practitioners, and the constraint against an individual responding to pressure to behave in an unethical manner, that comes from the fact that he is not a free agent, but part of a team.

I agree with Professor Rickett that productivity orientations are a problem, and pressure to fulfil these expectations can be considerable, and this is a feature of practice in large firms. It is a management problem to ensure these pressures are not unreasonable, and provided the other beneficial features of large firm practice I have mentioned are adequate, the fee and time performance pressure should not lead to a lessening of professional standards.

Another area of concern rightly identified by Professor Rickett is the conflict of interest area, and the devices employed in some firms to attempt to overcome it, such as Chinese Walls and Cones of Silence.

It is really only since the mid 1980s that New Zealand courts have stamped their disapproval in an unmistakable way on lawyers acting in circumstances where the interests of two or more clients conflict, or there is a conflict between the interests of a client and the practitioner's own interests.

Professor Rickett refers to the profession's horrified reaction to the appeal court's majority decision in *Clark Boyce v Mouat* (1991) 1 NZ ConvC 190,917 (a horrified reaction with which I am happy to claim an association) as reflecting the profession's readiness to equate acting ethically in practice to applying the relevant rules of law. The case is an extreme example, and may cloud discussion of the real issues. The profession's reaction reflected its belief that the practitioner concerned acted entirely ethically, and the obviously incorrect application of rules of the substantive law by the majority judges, if not put right on further appeal, would have required an unreasonable standard of conduct if substantive law remedies were to be avoided.

Leaving that case aside, the profession's recent anger and concern that in the breach of fiduciary duty field the courts have found a new and unreasonable substantive law remedy, interfering with legal practice, is itself misinformed and wrong.

There have been ethical rules or rules of professional conduct proscribing such practices for years. The judges in the Court of Appeal in 1985 in *Farrington v Rowe McBride* [1985] 1 NZLR 83, 91, 97 drew comfort for their decision that the solicitor in that case was in breach of his fiduciary duty, from the feature that his conduct also fell short of the standard of fidelity and loyalty to the client reflected in the then Code of Ethics of the New Zealand Law Society. Nor in 1985 was the substantive law remedy for breach of fiduciary duty for acting with a conflict of interest, a new development in the law. Had the practitioners in that case, and some of the others that have followed, observed the conflict rules of the Code of Ethics, they are unlikely to have found themselves in the position of being liable for breach of fiduciary duty.

Professor Rickett clearly did not want this session to be dominated by a concentration of attention on the subject of conflict of interest cases—and rightly so, because they

represent only one of the areas of concern in the field of legal ethics in general practice.

However, unrepentantly, before leaving conflicts, I want to mention two further aspects.

Despite very clear indications from the courts that Chinese Walls and similar contrivances do not overcome the problem, the practice goes on of acting for multiple clients with conflicting interests. This practice not only exposes the practitioner to liability to pay compensation for breach of fiduciary duty, but is a breach of Section 1.05 of the Rules of Conduct of the New Zealand Law Society.

I, and other barristers handling Professional Indemnity claims are incredulous that the most blatant breaches of the Rule continue. I am not concerned here with vendor/purchaser, lessor/lessee, mortgagor/mortgagee conveyancing transactions (although there is no doubt the Rule applies and should be observed there also in cases where the two clients' interests truly conflict). My concern is more with conflicts in major commercial transactions and negotiations.

This I do think is largely a big firm problem. It is always difficult to obtain a convincing explanation. The existence of a conflict of interest is usually readily acknowledged, the immediate answer being that the client knew the situation and consented to the firm acting for both parties. Any remaining problem is said to have been taken care of by a Chinese Wall or Cone of Silence.

My conclusion in these cases is that those firms are motivated to behave in this way by a combination of greed and arrogance—the arrogance being a belief that they are above the usual rules or that their important commercial clients can only obtain professional services of true excellence, by having their affairs handled by the firm concerned.

It is possible that some help to reduce or eliminate this unprofessional conduct may come from an unexpected quarter. Professional indemnity underwriters are the ones who have had to pay most of the compensation that has resulted from these transgressions. There has been serious consideration given already to introducing policy exclusions for claims arising from circumstances that breach Rules 1.03-1.06. Some underwriters have already acted against perceived persistent offenders by requiring payment of multiple excesses where the firm has acted for more than one party to a transaction from which a claim arises.

But what the courts are doing to mulct offenders in damages, and what desperate underwriters might introduce in their policies, beg the question this seminar is addressing. There have been ethical rules proscribing this type of conduct for years and these are persistently ignored, even by those sections of the profession best able to stand the loss of one client's fee on a transaction, and which I have suggested are most educated and vigilant in matters of ethical concerns.

There have been relevant structural changes in the profession recently other than the emergence of the large firms. I suggest Professor Rickett may have honed in on the wrong risk area when identifying large firms. We should be more concerned in this respect with the emergence of large numbers of sole practitioners, many of whom are young and experienced.

From whom and when do these people learn legal ethics and what are proper standards of professional practice? They did not learn it at law school, and they have in many instances had insufficient, if any, opportunity to practise alongside an experienced practitioner and see how important observance of those principles is in practice, and the situations in which they can or may arise.

Those of us who qualified in the days of part-time university study had the great advantage of four or five years working in law offices, and being exposed to professional standards and how experienced practitioners observed them, long before the three rather desultory lectures that were in those days the law school's only introduction to the subject.

Many of today's young practitioners graduate from law school, work for a period of only three years in a firm (perhaps specializing in one aspect of legal work only), and then are able to set up in sole practice, and in some instances have virtually no alternative if they are to remain in practice.

This group (and from the phone list it looks to be quite large) may be the real risk area, and one which so far as I am aware the system at present fails to assist by providing an opportunity for instruction and continuing education or effective supervision in matters of professional standards. Even in the two and three partner firms the tendency in most cases is for each partner to have his own practice and there is little opportunity or time taken for the kind of ongoing training and mutual awareness exercises the big firms are able to put in place. Almost invariably when claims arise, and no doubt if disciplinary action is taken, the other partners are found to have had no idea of what went on in the other office or how their partner conducted his practice.

If, as Professor Rickett suggests, pressure to produce fees encourages a disregard of ethical standards, then I would suspect the pressure is at least as great among this group as it is in a larger firm, and without any of the constraints that may exist there. Changes in recent years such as abolition of scale charges for conveyancing and some commercial work, tendering and quoting for jobs, the introduction of law shops and the like, have all combined with greater competition for the conveyancing dollar to produce a fertile breeding ground for unethical practices in that section of the profession most dependent on it.

I doubt that the decline in the public perception of our ethical standards owes much to some of the other structural changes that have occurred in the profession such as the emergence of a much stronger (numerically at least) independent bar, or the emergence of larger groups of lawyers practising in commercial environments. The professional bodies applicable to these groups have and can continue to address the question of ethical rules appropriate to their fields of practice.

Conclusion

Professor Rickett is correct in my view to emphasize the importance of empirical research into the structures and modes of operation of legal practice in New Zealand.

There must be in place an authoritative body established by the governing professional bodies to see that this work is undertaken, and to ensure the rules of professional conduct

are responsive to changes and are observed. The New Zealand Law Society has an ethics committee which regularly reviews and recommends to the Society revisions of the Rules. There are also bodies established under the Law Practitioners Act given jurisdiction to hear complaints for alleged non-observance of the Rules and impose sanctions for their breach. I am one who has misgivings as to the effectiveness of these disciplinary procedures. It can be said with certainty that they have not prevented a steady decline in standards of professional conduct, and despite the existence of these bodies there has been a marked reduction in society's regard for lawyers as trustworthy and ethical professionals. Only quite serious breaches seem to get any action, and these are in a disciplinary context with the resultant delays and cumbersome procedures that modern administrative law notions entail.

Some disciplinary procedures are of course essential. I question strongly whether in relying on these bodies to enforce professional standards we have put the emphasis in the wrong place. These bodies necessarily act after ethical breaches have occurred and damage has already been suffered, either in the form of loss to clients, rifts in professional relationships, or jeopardy of the right to practise. I wonder whether there should be local tribunals as arbiters at least for lesser transgressions, operating less formally and with more flexibility in their procedures, and available quickly to rule between solicitors and clients as to the rights and wrongs of ethical incidents, and before transactions or relationships have gone irretrievably sour. Perhaps something to function in a preventative and advisory mode, with a couple of members drawn from a panel of experienced practitioners such as the Uncle panel operated now on a voluntary basis in the Auckland district.

Apart from concern at the lack of any structure to operate in an advisory and preventative mode, the most important element that I think is presently missing is in the instruction area, except in those firms large enough to provide it for themselves, or in others lucky enough to include partners of experience who take the time and trouble to ensure awareness and observance of professional standards in the firm's practice. The professional bodies actively encourage continuing legal education into issues affecting the substantive law, but there is not much emphasis, if any, given to continuing instruction on ethical issues.

Professor Rickett concludes by identifying law school education as one dimension most in need of reform. The law student during full-time study has no conception of how ethical problems arise in practice, and I doubt that instruction at that stage has any real benefit other than perhaps as an introduction to some of the general concepts. That is not to say I disagree with Professor Rickett that such reform is desirable—I entertain doubts that it will help to deal with the problem at the right level.

The general problem is posited by Professor Rickett:

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

I agree with his general sentiment, although doubt that the profession ever would treat

ethical and legal issues as of equal importance, but there is a real need to re-orientate the profession's view of the importance of professional standards, and put in place structures that ensure as far as possible that practitioners are familiar with them and are assisted to observe them.

I congratulate Professor Rickett on an excellent paper.