

Legal Ethics In General Legal Practice—Commentary

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It has been a consciousness raising experience to consider Charles Rickett's paper and the learned and lucid way in which he treats a matter that has worried quite a number of people—legal professional ethics (though the worrying thing of course is their absence in some cases, or the misunderstanding of what ethics is all about). I think Charles is quite right in looking to the history of the legal profession for the roots of the problem, but on some details I part company with his views. There are also some general comments he makes where I don't disagree at all, but where it seems to me useful to add some specific and concrete examples.

Time constraints mean I have had to confine myself to only a few of the many worthwhile points Charles makes, and I will concentrate on just three:

- 1) The emergence of the vocational concept of service.
- 2) The paramountcy of the advocacy role in a unified system.
- 3) The adversary system's effect on the articulation of the advocate's moral obligation.

Perhaps my own training in the adversary system makes me immediately set out to test those points and either attempt to refute them or at least quibble about them.

So, for example, Charles places the origins of the "ethical professional" in the latter part of the 19th century and in a part reaction to the rule by an aristocracy.

I believe that places it too late, and that, rather than being a reaction to the aristocratic model, the public service notion was a new version of "Noblesse oblige". (Not of course Nancy Mitford's version!) The only thing that had to change was that the older concept of service without fee had to adapt to acceptance of fee for service—though the little pocket on the back of a barrister's gown is a salutary reminder of the reason why barristers could not sue for their fees. (Theoretically they did not charge any, and only took what grateful clients slipped into the providentially available pocket!)

The point made about the socialization process of the cluster group must take us back to the Inns of Court and their centuries-long function of not only educating lawyers, but inculcating an esprit de corps; which would be reinforced by the self-selection process by which Benchers and senior barristers emerged—in no other western society did the senior Bar have a monopoly on judicial appointments.

The shared "world view" described (and I don't think it was ever shared throughout a society)—but for lawyers it arose partly from the fact that the law, on the whole, was seen as a "gentleman's" profession and strenuous efforts were made for some time to keep those who practiced at a perceived socially lower level—the solicitors—outside the privileged closed shop. I would suggest, therefore, that barristers did not so much share

a macroethical view, but were segregated into a caste system which gave rise to a well-defined set of obligations that ranged from moral principles to etiquette at the bar.

It is interesting that it was precisely those colonial circumstances which led to the unified profession that also caused what Professor Patrick Glenn described as the “loss of the macro ethical dimension”. I do not believe it was World War II or any other 20th century changes that caused this; rather it was the loss in the American colonies and later in the Commonwealth jurisdictions of the tight control of a professional institution such as the Inns of Court. The later growth of Law Societies and Bar Associations *partially* compensated for this, but the control they exercised was not part of the “socialization of the group” which education at the Inns of Court provided, where senior practitioners had sole charge of the formation of young lawyers. And I don’t think the three to five years at Law School has been able to provide anything like that “socialization”.

The next point made in the paper that I want to pick out concerns the concentration on the advocacy role, with the advocate’s moral obligation of “undivided partisanship”.

I think it needs to be remembered that for a long period of English legal history, felons or traitors had no right to legal representation, so that the advocacy model was worked out in the intricacies of special pleading in largely civil matters. There, indeed, what the pleader was engaged in was a fascinating technical game, and we do well to remember Maitland’s famous aphorism about substantive law being secreted in the interstices of procedure. The proponents of this legal gamesmanship were experts at taking technical points, but somewhat at a loss when arguing the broad principles of justice and fairness, and it is perhaps not surprising that where *justice* or *broad principles* were introduced into English law it was often through canon-law trained Chancellors to whom ethical arguments came naturally, or through Scottish judges who had received a university education with a good dollop of Roman law principle.

And what they found there was a definition of jurisprudence as the knowledge of “*sum quique tribuere*”—“to give everyone his due”— and the fundamental underpinning of *good faith* in all the commercially important contracts. It has taken a long time and the internationalization of legal concepts and consumer-driven legislation to bring that kind of emphasis into our legal system and, just to take one example, it has been interesting to see the strenuous opposition put up by lawyers to being covered by the provisions of the Consumer Guarantees Act!

To go back to unfettered advocacy—what Charles quotes Glenn as calling “a client controlled judicial Rambo”—his use of the feminine pronoun made me think of that most famous example in English literature: Portia’s shafting of Shylock. Audiences over three and a half centuries have loved it without, it seems, taking into account that it was a shameless breach of the good-faith giving rise to implied terms that enabled Portia to insist that if you bargain for a pound of flesh you don’t get with it a single drop of blood! And then, when she had him down, she put the advocate’s boot in to achieve a deal which we would abhor as a breach of fundamental human rights. But even today, audiences lap it up, and perhaps literature shows us more clearly than legal writing what our societal attitudes are to legal aggressiveness.

That may be an extreme example, but the “my client right or wrong” attitude is common and in my practical experience the lawyer often takes a much harder legalistic stance than the corporate client. It is one reason why in a number of Western countries the large financial services industries have set up their own dispute resolution systems which emphasize “fairness in the circumstances of the case” as overriding strict legal rights. And even in the context of such schemes, the lawyers of banks, insurance companies and building societies try to argue strict law and procedure on behalf of their principals and sometimes risk endangering the alternative dispute resolution mechanism that has been set up, at some cost, by the industry.

The third point I picked out—the adversary system’s effect on the advocate’s moral obligation—is closely related to the second point. Where the ideal of reaching a fair and just result is *not* ingrained in the advocate’s mindset, it is easy to succumb to temptation to take short cuts or even dishonest means to further the client’s cause, and these can range from failure to disclose relevant information to the opposing party to deliberate non-production of documents.

Even the use of threats of destructive litigation to “soften up” a debtor, or encouraging one’s principal to litigation which cannot benefit either party but may be a purely fee-enhancing move, comes within this adversarial attitude. I note that the fee-maximizing behaviour is particularly likely where the costs can be on-charged to a third party via the client.¹ I am pleased to see the courts are taking a dim view of some of these unethical moves and using the most effective sanction: refusing to order costs. They are also taking a tough line on non-disclosure, taking advantage of unsophisticated clients and breach of fiduciary responsibility which, while it may in the first instance impact on the principal, will have a rapid flow-on effect on the legal advisers of these principals. Perhaps Charles Rickett’s statement “[t]hey are technicians without moral accountability for their participation in the activities of their clients” may be the low point from which a combination of judicial intervention, statutory regulation and the activities of alternative dispute resolution mechanisms such as ombudsman offices may yet rescue the “partisan lawyers”. Even the long-standing debate about the Wine Box may have a salutary indirect effect by squarely raising the question Charles poses: “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?”

The conflict of interest problem may be more difficult to solve. At the New Zealand Law Society Conference 1993 Mr Blennerhassett wrote a learned paper discussing the repercussions of the *Mouat* case which deserves to be better known,² though it has of course been overtaken by later events. The HL decision in *Barclays Bank plc v O’Brien*

1 At least we are spared the unifying consequences of an American-type contingency fee system, which produces not only ambulance chasers and medical and pharmaceutical malpractice artists but now the securities investigators seeking the “dumb client” who did not understand the disclosures made and can then launch a class action on behalf of a list of investors dredged up from the corporation’s shareholder register.

2 Tim Blennerhassett, “Either a borrower or a lender be” Conflicts of Interest, Solicitors Certification for Bankers’ Advance and Other Hidden Traps, Conference Papers Vol I, p 380.

[1993] 4 All ER 417 has already been cited in several New Zealand judgments.³ However the biblical injunction “No man can serve two masters” becomes extremely difficult to apply when on the one hand the cost of legal services makes it more and more common for, say, mortgagor and mortgagee, guarantor and creditor to use the same lawyer,⁴ and on the other hand large firms with constantly metamorphosing corporate clients with multiple subsidiaries are hard pressed to shift about sight-and-sound-proof Chinese Walls between the offices of the various partners involved and their support staff. As for the difficulties of clearing the computer systems—that I won’t begin to talk about—but we had a salutary reminder with the Securities Commission garage sale!

To conclude—my suggestion is that we need to look very carefully at whether the historical baggage that colours present day views of how lawyers should act is an unrecognized stumbling block to a clear formulation of appropriate professional ethics for today’s practitioners.

To apply that to the three points I chose for comment:

While the adversary system may still be important in the context of the trial, I believe lawyers do their clients a great deal of harm if the adversary stance is used in other contexts, whether in commercial, family or administrative law situations.

I believe that the advocacy model which underpins the way law is taught at law schools must be balanced with a model of the independent impartial adviser role and that students must be taught to take much wider consideration of fairness, equity and ethics into account.

And, lastly, I think the vocational concept of service will probably have to be reconciled with the economic concept of added value so that we get back to something almost like the medieval concept of the reasonable price.

My thanks to Professor Rickett for raising so many difficult issues and making us think.

3 For example, by Blanchard J in his judgment granting an interlocutory injunction in *Harlick v ASB Bank* (Auckland M 541/94).

4 For example, see the judgment of Fisher J in *Harrison v Westpac Banking Corporation* (Auckland CP 92/93):

It seems to me that the result was that on the occasion upon which the plaintiffs executed the mortgage there were effectively two solicitors sitting in the room. One was Mr Midlane wearing his hat as the Bank’s solicitor. The other was Mr Midlane wearing his hat as the solicitor to the plaintiffs. That, I think, is an inevitable consequence of a situation in which a solicitor accepts instructions to act simultaneously for two different clients. In the majority of these standard conveyancing transactions it is no doubt a very convenient arrangement but analytically it does mean that the Bank’s solicitor is placed in a position of observation which at least arguably fixes the Bank with certain knowledge.