LEGAL ETHICS

Papers presented at a seminar held by the Legal Research Foundation at the Centra Hotel, Auckland on 4 October 1994
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FOREWORD

Too frequently legal ethics is relegated to either the “too hard” basket or it becomes a subject about which strongly held views of principle are applied against others but our own acts or omissions are exempt from scrutiny. Notwithstanding such a dilemma, the Legal Research Foundation resolved that a public consideration of the issues could only be beneficial. A seminar was accordingly held in October 1994 and this volume includes the major contributions presented at it.

It was not thought that it would produce all the answers, and watertight and immutable solutions did not emerge, but the Foundation is confident that this collection of views on a number of the major issues which require constant consideration will prove invaluable.

The reader will find a happy mix of discussion on issues of principle and useful insights into practical responses to individual problems. It is intended to stimulate and continue the debate in this fundamental area.

The Council acknowledges the particular contribution made by Rod Hansen to this project — his enthusiasm and energy ensured an idea became a reality.

J Bruce Robertson
President
Legal Research Foundation

Judges Chambers
High Court
Auckland
Legal Ethics in Court Practice

The Honourable Mr Justice Bernard Teague
Judge of the Supreme Court of Victoria

What is meant by the expression “Legal Ethics”? What is the current public perception of the ethical standards of lawyers? Of judges? Why does the public perception matter? Where does counsel with an ethical problem go for guidance? Where does a judge go? What differences are there in the ethical principles governing the conduct of counsel and judges? What similarities? Should counsel plead/argue a hopeless case? When is a case hopeless? When may a case be an abuse of process? What information against interest should counsel provide to the court? What are the perceived bias conventions observed by judges leading to them disqualifying themselves? When should they not disqualify themselves? What bias is eradicable and what is not? How should counsel go about seeking the judge’s disqualification? What situations create a potential conflict of interest for counsel? What should counsel do when a potential conflict arises? What accountability mechanisms are in place for dealing with the improper conduct of counsel? Of a judge? How effective are those mechanisms? When should a judge censure or otherwise deal with counsel for acting improperly?

I am not suggesting that reading this paper will enable the reader to find the answers to these questions. I do hope that it will assist towards a more focused discussion about the issues they raise.

My brief

I have liberally interpreted my brief as permitting me to focus more particularly on ethical problems arising inside the court-room from the perspective of counsel and of the judge.


Hardie and Kooky are decisions by judges of the High Court, Black by the Court of Appeal and Ridehalgh by the English Court of Appeal.

I have looked at six “practical issues” linked to the four cases: pleading the unwinnable cause; disclosing adverse decisions; judicial bias; conflicts of interest; counsel accountability; judge accountability.

I have prefaced the discussion of the issues with some reflections of a general character.

The four cases

First, a brief reference to the four cases. Hardie was an appeal against a decision of a District Court judge who had occasion to look at a without prejudice document on an interlocutory application. Arguments that the judge was biased and should not have
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presided over the hearing proper, and that the respondent’s counsel should have cited to the court a High Court decision were rejected.

In *Black*, the Court of Appeal dismissed an appeal against the making of a declaration that a practitioner should not act further as counsel because of the perception of a conflict of interest. *Black* is interesting for reasons that include: the Court’s focus on the inherent jurisdiction of the court; its support for taking account of the perception as well as the proved existence of impropriety; its support for the Law Society’s Rules; and its assistance on some other matters.

Matters such as: the levels of questionable conduct of practitioners; differences in the roles of counsel as against solicitors; the approach of a practitioner to self-disqualification; the level of possibility of conflict; the characteristics of the fair-minded observer; the level of knowledge of that observer; the apparent increase in applications for disqualification; the criteria of relationships meriting scrutiny.

*Kooky* is a partial report of an appeal from the District Court on a landlord and tenant dispute. The judge commented adversely on the situation where a practitioner appeared for a client where there was an actual or potential conflict of interest, and made an order for the respondent’s costs to be paid by the appellant’s solicitors. The decision is also of particular interest because it attracted some criticism from Donald Dugdale, and because John Laurenson QC then took Donald Dugdale to task.

*Ridehalgh* is a decision on six appeals from rulings requiring practitioners to personally pay costs. Submissions were put to the English Court of Appeal by the Law Society, the General Council of the Bar and the Attorney-General. *Ridehalgh* contains important messages for counsel and for judges about a number of matters including: the need for achieving balance when reviewing safeguards to the litigation process; what the court termed “satellite litigation”; the hopeless case; and the role of Rules of Professional Conduct.

**My limits**

I suggest below some sources to which judges and counsel may go to look for guidance on how they should behave or conduct themselves ethically or otherwise. The sensitivity of so many areas touched on means that the style of most writers is to mix personal opinions with propositions expressed less rather than more authoritatively. Putting propositions as to what other judges and as to what counsel must or may not do is a highly judgmental exercise. I am far from being in a position to do that.

Although I have a fascination and a little experience in dealing with ethical problems, I did not practise as a barrister sole, I am still a relatively junior judge and I am acutely aware that the subject of legal ethics is highly sensitive, and of judicial ethics even more so. I was asked last year to chair a committee of the Australian Institute of Judicial Administration (AIJA) supervising the preparation of a discussion paper on judicial ethics.

1. LawTalk 405, 12, 22 November 1993.
The more I have come to know, the more I have come to appreciate how much I don’t know or have difficulty articulating adequately. I hope that the limitations of writing from afar do not show too obviously. I have tried to avoid assuming that what applies in Australia ought to, or even might well, apply in New Zealand. I recognize that some things that puzzle me, like one Wellington lawyer’s involvement in more than one capacity in several cases I refer to, will not puzzle locals.

Scope of ethics

I am struggling at the first hurdle of defining “legal ethics”. Does it include conduct which is illegal? Does it include conduct which is merely a breach of etiquette? I obviously concur with Sir Owen Dixon that conduct goes beyond ethics. I sympathize with Dr David Wood, who is drafting the AIJA discussion paper. He has said that he prefers not to try to define “judicial ethics” but to side with Aristotle who said: “It is a mark of the educated man and a proof of his culture that in every subject he looks for only so much precision as its nature permits.”

That approach is echoed in what the Court of Appeal said in Ridehalgh, p 480, to the effect that it is sometimes relatively easy to see whether conduct falls on one side or another of the line marking the bounds of propriety, but hard to define where the line is.

In canvassing issues of conduct and ethics, it is difficult at times to find the right word and easy to use generalizations to excess. I use “judge” instead of “judge or magistrate or master or senior tribunal member” or “judicial officer”, because it is easier to do so. That may mask the very important point that the problems facing such “judges” at their different levels, and the options for addressing those problems can be very different. At times I use the word “greed” where it might have been preferable to use a euphemism.

Comparing lawyers and judges

Writing and talking about ethics would be difficult enough if one was doing so for an audience of only lawyers or only judges. The difficulties are compounded when one does so for an audience of both lawyers and judges. All the polls I have seen as to the public perception of the integrity, etc, of professional groups which have included judges and lawyers have judges at the top and lawyers near the bottom. Why is that so, and what are the implications? One implication is that the pressures on lawyers to change is high, while the pressure on judges is relatively low.

In Australia, in the last two years, lawyers have come under increasing scrutiny, with a series of inquiries by individuals or bodies looking at reforming the profession. As is often the case, although a few recommendations of such inquiries have been implemented, other reforms have occurred ahead of the proposed changes. For example, the Victorian Bar has recently altered its rules, previously considered unalterable, to abolish the two counsel rule, and bans on advertising, direct professional access and co-advocacy. The Victorian Attorney-General has recently stated that she proposes to take the conduct of disciplinary proceedings substantially out of the hands of the legal professional bodies.

3  Jesting Pilate (1967) 129.
4  Dr Wood’s source: Nicomachean Ethics Book 1 Ch 3, 27-28 (Thomson translation, 1953).
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The character of the pressures on judges is quite different. I reflected after reading the report of the interview of Eichelbaum CJ on 2 March last that it did seem that the problems facing the judges in New Zealand were relatively under control. I think that much the same can be said in Australia. That is certainly so by contrast with the 1980s when several trials and inquiries into the conduct of judges and magistrates were held.

One area of pressure relates to the lawmaking role of judges. In Australia, it is being put more often and more forcefully that at least the High Court is going too far. Last year, Justice Beverley McLachlin of the Supreme Court of Canada said:

The judges in modern society are not potentates whose edicts from on high must be uncritically accepted as just and fitting; they are rather servants of the people in the highest and most honourable sense ... their lawmaking role has dramatically expanded ... they are required to decide complex social policy questions ... they must be in touch with the society in which they work ... they must be prepared to work hard ... It is its institutional and individual independence, coupled with integrity, which has made the judiciary the important institution it is.

Her point as to complex social policy questions is graphically illustrated by reference to an address by Lord Justice Balcombe, “Judicial decisions and social attitudes”, published in The Commonwealth Lawyer of May 1994.

He argues that in the field of family law, judges are faced with having to make difficult value judgments on matters where they may have strong personal beliefs different from society at large. The dilemma is accentuated by the concern that the result of recognizing certain changes in social attitudes may accelerate the rate of change, with results which may not be generally welcome. His message is brought home by a cartoon which shows a young girl saying: “As an intransigent heterophobe I demand the right to live with my homosexual dad.”

Judges are coming under increasingly intrusive media scrutiny. The changed media attitude has arisen in part from the increasing activity of members of lobby groups who now see judges as vulnerable targets, and the more so because of the convention that the judges do not retaliate. Attacks on judges as to gender neutrality issues reached a peak in Australia in May 1993. The position of judges who resign or retire is increasingly being commented on critically. Some are seen as double-dipping. Some are seen as using their positions as judges earlier to better position themselves later.

There is increasing encouragement for judges to take a more active role in educating the community. That means moving further away from the traditional position of almost invariably shunning the media, to making themselves regularly accessible. The ethical problems so created are part of the subject of a paper I am to deliver on Friday next to the first Australian Judicial Orientation Programme.

5 [1994] NZLJ 86.
7 For example see editorials in The Melbourne Age on 7 May “Back to school, Judge Bland” and in The Melbourne Sunday Age on 23 May “Time to open up the judiciary”.

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Although I have devoted more space to the pressures on judges than to those on lawyers, it should be apparent that relatively they are minimal compared with the latter.

At this point I would take you to an article written by the editor of the American Bar Association Journal\(^8\) on the results of a 1993 survey of how the public perceives American lawyers. It contained mainly bad news. It noted that between 1973 and 1993, the percentage of Americans surveyed who had “great confidence” in law firms fell from 25% to 8%.

Three other associated and troubling findings were that lawyers were seen as being greedy, as having used the freedom to advertise to generate more litigation in their greed to get more money, and as having poor ethical standards and enforcement.

To the public, acting for a confessed criminal was seen as unethical, while unethical behaviour also covered poor communication skills and fee disputes, whereas to lawyers it covered only non-adherence to the Rules of Professional Conduct and being subject to disciplinary proceedings.

The survey confirms points made by David Pannick QC in *Advocates*\(^9\) that there is a conflict between the professional and the lay approach to the ethics of advocacy, and that the layman’s concern is that the law should achieve morally and socially acceptable results.

To the extent that the result of a court case is seen to be unjust as where a villain gets off, the advocate who has helped to achieve that result is seen as getting his fee by morally dubious practices.

Why are judges held in such high esteem, and lawyers the contrary? Is it just that judges must, and are almost always perceived to, observe not just high but the highest of standards? Sir Winston Churchill said in 1954:\(^10\)

> A form of life and conduct far more severe and restricted than that of ordinary people is required from judges.... The judges have to maintain ... a far more rigorous standard than is required from any other class.

Is the main reason for the difference just that the numbers are so much fewer? The smaller the group, the more likely it is that high standards can be maintained by little more than peer pressure. Is it that judges must largely conduct themselves in open court where their actions are patently open to scrutiny? Is it that the mechanisms which are in place to keep judges accountable for their conduct are much more effective that those there to keep lawyers accountable? Is it that greed is, if not non-existent, much less a factor with judges than with lawyers? If so, is that because of the often-repeated wisdom that judges make huge financial sacrifices on moving to the bench? Is it that judges do not have to bear the burden of the advocate of the perceived amorality of defending the indefensible?

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Does the answer lie in the emphasis placed on the impartiality of the judge as the terms of the judicial oath makes clear: "...I will do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will...."

I digress to note that impartiality has its benefits. As a judge I have a strong sense that I am now acting to promote the common good, as against the good of the client. However, the burdens are heavy. They serve to make the work, as Sir Owen Dixon said on this retirement, “hard and unrewarding”. They include isolation, and a schedule which is rendered unbalanced by excessive reading, researching and writing at least for any individual who prizes contact with people beyond critically assessing witnesses, arguing with counsel, and pontificating to juries.

One must not overlook the similarities. The oath of office of lawyers, like the judicial oath requires them to act according to law. So far as criminal conduct is concerned, what is serious enough to warrant a judge being removed is likely to be serious enough to see a lawyer being struck off, and vice versa. A comprehensive review of conduct warranting striking off is set out in Orkin. As to judges, Shetreet advances a number of propositions. They include that conviction for an offence involving moral turpitude requires immediate resignation, and an unattributed suggestion that a judge committing a heinous crime should resign or commit suicide! Shetreet also provides a number of examples of traffic offences committed by some English judges who chose not to resign.

Noting recently a news item stating that the Lord Chancellor had issued “guidelines on acceptable behaviour” for the judges of England and Wales, I asked for a copy. I was told that the guidelines were not made public. The Lord Chancellor’s Office later sent me a copy of a letter forwarded on 19 July last to the Lord Chief Justice and other judges. It provides a guarded classification of seriousness of behaviour including: conviction for an offence involving violence to persons, dishonesty or moral turpitude; conviction for an offence while driving under the influence of alcohol or drugs; behaviour amounting to sexual harassment; behaviour which could cause offence, particularly on racial or religious grounds; and conduct leading to a charge on a criminal offence other than parking or speeding without aggravating circumstances.

It will suffice at this stage to say that it is in the mutual interest of judges and lawyers that both groups work in unison to maintain high standards. In that light it is understandable why the judge gave the warning that he did in Kooky, and why the Court of Appeal in Black invoked the inherent jurisdiction of the court and stressed as much as it did the importance of perceptions.

Sources
Where does counsel or a judge go to become better informed on what the high standards expected of him or her are, or to obtain more guidance on how to deal with an ethical

11 Op cit n 3, p 256.
12 *Legal Ethics* (1957) 201ff.
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The dilemma? The starting point for any practitioner must be the Law Society's Rules of Professional Conduct. In an age where there are books published on such a wide variety of legal subjects, including some that focus on a very narrow field, it is a little puzzling that there is relatively little available on legal ethics.

For counsel, Australia has little to offer. Sir Gregory Gowan's book on the Victorian Bar published in 1979 offers little help. Lewis & Kyrour provide some assistance, but only incidentally for counsel. In many areas, Advocates by David Pannick QC is invaluable. In others it disappoints but it is always pleasant reading. Legal Ethics by Orkin is valuable as to old authorities, but it is very much out of date. I can go no further, save to say that it is a pity that Rondel v Worsley [1967] 1 QB 443 and [1969] 1 AC 191 does not come with an index.

For judges the position is only marginally better. There is a great deal of writing on the subject from North America. I suggest that much of it is of relatively little value. While international comparisons may be useful, one must be wary. For a start, it is essential to know the criteria for the appointment of judges.

Much information from the United States needs careful scrutiny. A good example of this is to be found in the Mahoney JA and McGarvie J papers on The Accountability of the Australian Judiciary where there is a detailed review of certain Californian practices. I would mention two exceptions. For more than ten years until 1992, newly appointed Federal judges in Canada received from the Canadian Judicial Council a small book titled A Book for Judges written by a retired provincial Chief Justice. Since 1992, new judges have received a book titled Commentaries on Judicial Conduct prepared by a committee chaired by the Chief Justice of Alberta. For me, there is particular value in the Commentaries because the book contains diverse views expressed in response to a questionnaire sent to over 100 Canadian judges.

I would commend three books with a primary focus on the English judiciary: The Judge by Lord Devlin; The Courts on Trial by Shimon Shetreet and Judges by David Pannick. There is much of value in Shetreet. However the book was written nearly 20 years ago specifically as to the English judiciary. At times that shows, as where he sets out the practice of English judges as to disqualification for bias in these terms: "... very rarely have judges disqualified themselves at the instance of parties. Barristers do not raise such objections." That is far from the recent Australian experience.

Of most value to Australian judges is Judicial Ethics in Australia written by Thomas J of the Queensland Supreme Court. I would have preferred that more attention had been

15 Handy Hints on Legal Practice (1993).
16 Op cit n 9.
17 Op cit n 12.
18 (AIJA 1989).
22 (1987).
23 (1988).
given to Australian cases, but that reflects my own disposition to look to the maximum extent possible to the decided cases.

Three other Australian books which may be found to be of some value are *Judges* by Justice Kirby, *The Judges* by Robert Thompson and *Judging the World* edited by Chubb & Sturgess.

Some judges to whom I have spoken relative to the AIJA discussion paper have sought to persuade me that it is not in the interests of the judiciary that a paper be published. They say that any publication would potentially be used by the media to further undermine the independence of the judiciary. They also say that no suitable author could be found to write a paper as no academic could understand the subtleties of the subject matter, no active judge would have the time, and no retired judge would still be in touch with the current climate affecting serving judges. I am confident that a discussion paper will be available by this time next year.

Not without qualification, I accept that the most appropriate sources to consult will be experienced colleagues. The qualification is that even senior colleagues can be wrong. An interesting illustration of that is to be found in *McKaskell v Benseman* [1989] 3 NZLR 75.

**Code or Rules of Conduct**

I turn to the subject of the role and value of a Code or Rules of Conduct for lawyers, and for judges. Lawyers are being increasingly regulated. Extensive Rules or Codes are being established or refined, reducing the capacity to operate otherwise than according to the standards set by the rules. Law Society publications are seen to have an increasingly significant role in setting standards leading to a greater uniformity in practice. The seemingly inevitable consequence is that of increasing negligence claims where there has been a departure from the standards.

As Alastair Campbell has pointed out, while a code is likely to be criticized as being either so general that it has little practical application or so detailed as to be inflexible, it can provide helpful signposts to guide the practitioner in a general way through the moral complexities of everyday practice.

The courts are increasingly referring to such Rules as in *Black, Kooky* and *Ridehalgh*. In *Black*, Richardson J said, p 409, that, while the ethical code did not impose legal obligations or have the force of law it expressed the profession's own collective judgments as to the standards to be expected of practitioners and was some indication of relevant public policy concerns. McKay J referred, p 418, to Rule 1.06 as being relevant as a statement by the responsible body of the profession as to what is an appropriate standard of conduct in a conflict situation.

25 (1986).
28 "Without Fear or Favour: the Challenge of Judicial Ethics" (paper read to the National Conference of District Court Judges, 6 April 1991, Waitangi, New Zealand) 2, 5.
In *Ridehalgh* the Court of Appeal when considering the meaning of “improper”, p 478, said that it included, but was not confined to, any significant breach of a substantial duty imposed by a relevant code of professional conduct.

In Australia, one academic has been pressing for the preparation of a code of judicial conduct.²⁹ The American Bar Association has published a code long ago. An extract is set out as an appendix in Thomas.³⁰ Last year, the Queensland Magistrates prepared their code for insertion in their Bench Book.

There are judges strongly of the opinion that the less that is written about standards of judicial conduct the better, that any text may well be treated as having more authority than it deserves, and that it might well be used to make life more difficult for judges.

Some say that a code of conduct is totally unnecessary as judges are, or at least tend to be, chosen from the ranks of individuals who are naturally disposed to conduct themselves according to high standards. They say that there are just not enough examples of unacceptable conduct. Further, they point to the difficulties of drafting provisions as to the types of conduct which can extend from trifling breaches of etiquette to serious misbehaviour meriting removal.

The arguments are not unpersuasive. The contrary arguments include that having a code will, like other writings on the subject of judicial conduct, in time lead to a better understanding of the principles which govern the conduct of judges, whether those principles are founded on law or convention, and that that will advantage the judiciary, the profession and the community.

In Australia, consideration of the desirability of a code is likely to be deferred until after the preparation of a discussion paper, and then a surveying of judges as done in Canada.

**The hopeless case**

The first ethical issue likely to be encountered in practice which I turn to is that of pleading or arguing the hopeless or unwinnable or unarguable case. I confess that my own experience in this area is somewhat limited. It was mainly in the area of advising people who wished to initiate libel proceedings.

In that role, I was conscious of the need to act as a kind of filter or screen attentive to hidden agendas and other considerations not essentially legal in character. There are plenty of judicial and other comments as to the duty of counsel in this area. I have great difficulty reconciling many of them.

Let me illustrate by paraphrasing instances of a sympathetic attitude taken from Pannick on *Advocates*³¹ (with his page references): the great tradition of advocacy is to make mountains out of molehills, to find a point of law where none had previously been known to exist (5); apparently hopeless cases are occasionally won with skill, judgment,

³⁰ Op cit n 23, p 105.
³¹ Op cit n 9.
inspiration and luck (5); finding a position advanced by counsel to be frivolous must not lead to counsel being disciplined as that might inhibit the bar from vigorous advocacy (94).

Compare those with these, also from Pannick, illustrating an unsympathetic attitude: it is the duty of counsel to say so when a point is unarguable (94); counsel have a responsibility to the court not to use public time in the pursuit of submissions which are really unarguable (94); (Lord Denning) counsel must only advise proceedings if there is a reasonable case to be made (106); counsel should not draft grounds of appeal without being certain that there were arguable grounds (108); counsel has a duty to avoid making a submission which has no foundation in sense, reason or law (216).

I digress slightly to note a striking Australian case of an apparently unarguable point succeeding. The leading Australian case on a barrister’s immunity for negligence is Gianarelli v Wraith (1988) 165 CLR 543. The defendants included counsel, two senior, who had apparently assessed as unarguable an objection to the admissibility of evidence. The objection was not taken at the committal, trial or appeal to the Victorian Court of Criminal Appeal. The point was taken before the High Court which quashed the conviction.

Ridehalgh is of particular interest because the Court of Appeal was concerned with the provisions of Rules which permitted the awarding of costs against practitioners, which rules were said, p 477, to be clearly aimed at the problem of expense being caused by the unjustifiable conduct of litigation by lawyers. The Court opted for a substantially sympathetic position indicating, p 479, that a lawyer was not acting improperly, unreasonably or negligently simply because he or she acted for a party who was pursuing a claim or a defence which was plainly doomed to fail.

It quoted approvingly what had been said in Orchard v South Eastern Electricity Board [1987] QB 565 to the effect that it was not for solicitors or counsel to impose a pre-trial screen through which a litigant must pass before the litigant can put his complaint or defence before the court, although no solicitor or counsel should assist a case brought in bad faith or for an ulterior purpose or which was otherwise an abuse of process.

Two New Zealand cases merit a mention at this point. In Gazley v Wellington District Law Society [1976] 1 NZLR 452, the Full Court adopted part of a statement of Lord Reid in Rondel v Worsley [1969] 1 AC 191:

Counsel ... has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client’s wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information.... The same public duty applies when drawing pleadings ... as applies to counsel’s conduct during the trial.

In New Zealand Social Credit Political League Inc v O’Brien [1984] 1 NZLR 84, Cooke J said that the position was that counsel had an absolute privilege in drawing pleadings and in presenting a case in court, that counsel had a professional responsibility not to make
allegations without a sufficient basis or without reasonable grounds, and that if counsel
breached that responsibility the proper sanction was to take disciplinary proceedings
before the appropriate professional body.

The important question is not whether a case is hopeless or not, but whether a case is
hopeless or it amounts to an abuse of process.

In *Ridehalgh* the English Court of Appeal, p 479, suggested that it was not entirely easy
to distinguish by definition, but in practice it was not hard to say which is which. The court
emphasized that a lawyer would be acting improperly: in issuing or pursuing proceedings
for reasons unconnected with success in litigation; in pursuing a case known to be
dishonest; in knowingly failing to make full disclosure on an ex parte application; in
knowingly conniving at the incomplete disclosure of documents.

There have been some interesting recent cases as to abuse of process in New Zealand and
Australia,32 but only *New Zealand Social Credit Political League Inc v O’Brien* focused
on the role of the lawyer.

One final note about *Ridehalgh* is that the point was made there, p 479, that a judge should
not assume that a hopeless case was being litigated on the advice of the lawyers involved.
The role of the lawyer was to present the case on instructions. The role of the judge was
to judge it. The court also said, p 483, that judges were not to be encouraged to initiate
their own inquiries.

**Disclosing the law**

I turn next and briefly to the subject of the duty of counsel to draw the attention of the court
to relevant information, even such as will harm counsel’s cause.

In *Hardie*, it was put that counsel below had failed in that duty. Tipping J did not have
need to refer to any authority as to the principle he was called on to apply. He concluded
that the case not drawn to the attention of the judge below had arisen in a wholly different
factual and legal context and that its citation would have made no difference.

The House of Lords said in *Glebe Sugar Refining Co Ltd v Greenock Port & Harbour
Trustees* [1921] AC 66 that it was extremely improper to withhold from the court any
authority or any possibly important relevant statutory provision which cast light upon the
matters under debate, whether or not it assisted the party aware of it. It said that if it were
not so, the court would be just a debating assembly upon legal matters providing a
decision founded upon imperfect knowledge.

In many circumstances, the judge may need little encouragement, following a disclosure
against interest, to show his or her capacity to creatively distinguish authorities or
construe statutory provisions where they are not clearly determinative of the matter.

Bias

I turn next to the subject of judicial bias, an understanding of which is, or ought to be, important to counsel as well as to judges. As I noted above, the words in the judicial oath “Without fear or favour, affection or ill will” focus on the subject of impartiality or bias.

Based on my experience, every judge is likely to have to turn his or her mind often to the possible need for disqualification in any proceeding in which the judge’s impartiality might reasonably be questioned.

That might arise where the judge might have, or reasonably be perceived to have, a personal bias concerning a party or a material issue, or personal knowledge of disputed evidence, or where the judge has served the party as a lawyer, or where the judge has had a family, social, business or professional relationship with a party or a lawyer for a party to the proceeding, or where the judge or a close relative could have a financial interest or any other interest in the case.

I suggest that a close working knowledge of the cases on bias is important for any judge not just because the judge may have to apply the principles when an application is made to do so, but because the cases contain the most reliable source of guidance for judges as to how they should conduct themselves on and off the bench.


A good number of the Australian cases were noted by the High Court in Webb v The Queen (1993–1994) 122 ALR 41.

I am intrigued that, given that there have been so many cases, the subject seems to have received relatively little analysis outside of the cases. An exception is an article by Gerard Kelly, to which I will refer later.33

The Australian case most commonly cited is Livesey v New South Wales Bar Association (1983) 151 CLR 288 where the High Court concluded that there was ostensible bias on the part of members of the New South Wales Court of Appeal in ordering that a barrister be struck off.

In Webb v The Queen, the Court said that the test for juror bias was the same as for judges and for persons who exercise non-judicial functions: “Whether fair-minded people might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case”.

The cases show divergences in the selection of words in the formulation of the test, with comments at times that the differences may not often affect the substantive result.

There are differing views as to matters such as: whether “suspect” is as appropriate as

“apprehend”; why “danger” is inappropriate; and why the hypothetical observers are reasonable not ordinary.

Gerard Kelly,34 in his analysis of cases on bias, notes that many expressions have been used to cover the fair-minded observer. He suggests: that the reasonable man is more analytical and reflective; that the ordinary man is more intuitive and reactive to impressions; and that the latter should be the observer, while the courts have opted for the former.

He also queries why the level of the observer’s knowledge has been seen to vary as between: being totally uninformed; having a sketchy outline; being moderately well informed; being acquainted with most facts; being acquainted with facts in great detail.

Kelly provides a helpful analysis of factors potentially to be considered in determining whether there is a relationship or association which is indicative of bias on the part of a judge: the character of the link; its intensity; the character of information passed on; the duration of the link; the time which has passed since the link was severed; and the relative directness of the link, including whether it comes through a spouse or partner.

A helpful summary of some of the conventions to be born in mind when considering disqualification is provided by Kirby P in *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, 369. Familiarity with those conventions is important to the judge and to counsel. The risk of embarrassment is reduced if the problem is seen and addressed as early as possible. In that same case, Kirby P elaborated, p 373, on aspects of the exceptions of statutory authority, necessity and waiver.

A categorization of the different circumstances in which an apprehension of bias may arise was undertaken by Mahoney JA in *Allen v Corporate Affairs Commission* (1988) 14 ACLR 632, and Mildren J in *Precision Fabrication Pty Ltd v Roadcon Pty Ltd* (1991) 104 FLR 260. It is appropriate to echo the statement in the later case that the categories are not closed.

One case which merits attention because it illustrates well how a judge can bow out more or less gracefully is *Mann v Northern Territory News* (1988) 88 FLR 194. The judge was asked to disqualify himself from hearing a defamation action because he was said to be outspoken and emotively critical of the defendant (and more). The request was handled with an impressively frank level of public soul-searching.

The Australian High Court has made clear its objection to a judge automatically disqualifying himself or herself when requested by one party to do so on the ground of a possible appearance of bias.

To what Mason CJ, Brennan, Gaudron and McHugh JJ said in *Re J R L: Ex parte C J L* (1986) 161 CLR 342, 352 and to what the Court said in *Re Polites: Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78, 87–88, can be added the decisions in *Fitzgerald v Director of Public Prosecutions* (1991) 24 NSWLR 45 and *Metcalf v Vickridge* (Full Court of the Supreme Court of Western Australia, unreported, 20 June 1994).

34 Ibid.
In both of the last two cases, the judge decided to disqualify himself, only to be told that he should not have done so. As to the impact of the bias principles on the conduct of a judge on the bench, there have been plenty of cases which have turned on the judge’s handling of a proceeding at different stages.

Judges will not normally have to disqualify themselves as a result of having ruled on issues earlier in the instant case, or of having decided a case involving parties linked to the same events as in the instant case, or of having presided over an earlier trial of the same party whether or not based on the same events as in the instant case.

Applications for disqualification in those circumstances rarely succeed. An exception was *Police v Pereira* [1977] 1 NZLR 547, where Mahon J allowed the appeal, exercising his customary flair for eschewing the customary constipated legalese, holding that an attentive fair-minded observer might well conclude that the magistrate’s decision to convict was in part founded on the magistrate’s knowing that the allegations matched the defendant’s proclivities.

In *Inform Group Ltd v Fleet Card (NZ) Ltd* [1989] 3 NZLR 293 it was said that a judge may have to consider disqualification if the judge has expressed an opinion in a separate case on a significant fact or the credibility of a witness, but not where he had necessarily to do so at an earlier stage of the same case.

In *Thornton Hall v Shanton Apparel* [1989] 3 NZLR 304 the expression by the judge of a view of an issue to arise at a later stage did not warrant disqualification.

There are a number of Australian cases where the courts have considered claims of bias based on the judge’s past legal links. They include *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, *Pikor v Barrett* (1990) 11 MVR 345, *Precision Fabrication Pty Ltd v Roadcon Pty Ltd* (1991) 104 FLR 260 and *Re Polites: Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78.

It seems from the last of those cases, and from what was said in *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* by Kirby P, that the court looks carefully at a lot of factors affecting the questions of whether a judge can be decontaminated and how long it takes, as where a judge is called on to sit in a jurisdiction where he or she customarily practised before appointment.

Whether a judge should disqualify himself or herself when a friend, former client or the like is a party, or when a friend appears as the lawyer for a party, must depend on how close and how personal the relationship is. The judge must decide whether he or she both feels personally capable of disregarding the relationship and can conclude that others can reasonably be expected to believe that he or she will disregard the relationship. A helpful collection of Canadian cases on disqualification and bias is contained in the *Commentaries*.35

Membership of judges in certain private organizations can present problems. Social clubs or other organizations that exclude people on the basis of their race, religion, sex or

35 Op cit n 19, pp 63ff.
national origin are or may be perceived as prejudiced. Membership by a judge of such a club could create at least the appearance that the judge is biased against the excluded groups. Exceptions may be clubs that do not discriminate invidiously as where the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate concern to its members, or purely informal and private groups like bridge clubs.

**Suppressible preconceived opinions**

I turn to the subject of eradicable bias, which can be described in a number of other euphemistic ways. Under the sub-species “gender bias” it has recently been a source of fascination to numerous Australian journalists and members of lobby groups. The query of Donald Dugdale in his LawTalk comments on *Kooky* about the judge’s views on conflicts prior to appointment adds a different angle.

A leading Sydney silk, Tom Hughes, acknowledged in Thomson that he played on judges’ prejudices. A judge quoted without identification in Thomson said: “Different judges have differing likes for the style of argument.... Lines are cast to hook the judge.” Another judge quoted, speaking of counsel, said:

> There are people whose cast of mind is similar to your own, whose capacity you appreciate, and there are those whose capacity is not there.... There is no way of eliminating human attraction and antipathy.

I construe the Hughes reference to prejudices as not just one to style, or to a preference for orderliness, or conciseness or the like.

The received doctrine in Australia as stated shortly by Dawson J, is that privately held views are not seen as an impediment to a judge exercising his function.

In *R v Watson: Ex parte Armstrong* (1976) 136 CLR 248, 264, Barwick CJ, Gibbs, Stephen and Mason JJ said that there were some matters on which a judge might have preconceived opinions and yet be qualified to sit.

Kirby P said in *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, 367 that the case books are replete with statements about the capacity of judges to throw off actual bias upon their appointment.

In *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 116 Dixon CJ, Williams, Webb and Fullagar JJ said:

> Bias must be “real”. The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties.... It has been said that “preconceived opinions—though it is unfortunate that a judge should have any—do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded”...

36 Op cit n 25, p 206.
37 Ibid, p 205.
38 Ibid, p 206.
In Re R and His Honour Judge Leckie: Ex parte Felman (1977) 52 ALJR 155, 160, Jacobs J said:

... a judge is selected for judicial office because of his learning and training in the law, his integrity and capacity for impartiality. The combination of these factors results in a judge being assumed to be able to bring a detached mind to his task of judgment....

In Vakauta v Kelly (1988) 13 NSWLR 502, 527, McHugh JA spoke of the capacity of judges heightened by training, tradition, oath or affirmation, to shed preconceived views.

In R v Cullen [1992] 3 NZLR 577, Eichelbaum CJ said that it was inevitable that defendants will appear more than once before the same judge, and that judges are well able to put out of their minds, at a later appearance, matters that might have arisen on the earlier occasion which were not relevant.

It seems that whether the opinions of a judge might warrant disqualification will depend on such considerations as the character of the issues or other matters which are the subject of the opinions, how strongly the opinions are felt, and whether and to whom the opinions have been voiced.

Where is the line to be drawn on subject matter? Clearly opinions of a general character concerning the protection of the innocent, the punishment of the guilty and the like cannot disqualify a judge from sitting. Presumably the same can be said for all or almost all of a judge’s values, philosophy and beliefs about the law, so long as they can be, and can be seen to be capable of being set aside. Of course juries are customarily being told by judges that they must set aside their prejudices and private opinions.

In J R L; ex parte C J L (1986) 161 CLR 342, 372, Dawson J noted that suspicion of bias through preconceptions existing independently of the case might well be ineradicable in the sense of necessarily incapable of correction as to fairness and as to the appearance as well as the fact of impartiality.

In Vakauta v Kelly (1988) 13 NSWLR 502, 515 Mahoney JA referred to kinds of prejudgment that were ineradicable.

Shetreet argues that a judge who has shown partisanship or is known to have strong convictions on a matter expressed extrajudicially should disqualify himself or herself. He showed how difficult it is to draw the line by going on to say that strong convictions on a matter of public policy, on legal principles, or based on religious beliefs or membership of a racial group do not require disqualification or disclosure.

Where is the line to be drawn on strength of conviction? Frankfurter J of the Supreme Court of the United States of America disqualified himself from sitting on a case as to trams transmitting radio programs saying that he had strong feelings as a victim of the practice, and he was concerned that those feelings might operate on his judgment, or that other people might believe the feelings would so operate.

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40 Op cit n 13, p 309.
41 Quoted in Pannick op cit n 9, p 41.
In a recent article, Lawrence Maher called in aid the writings of Sir Zelman Cowen to support his argument that Sir John Latham's deeply held personal views on communism were such that he ought not to have sat on the Communist Party Dissolution Case.  

It seems that, to warrant disqualification, the bias must be such that there is a real risk that it would result or be seen to result inevitably in a decision on the merits of the case or on an essential element in the case arrived at regardless of the evidence or submissions.

The significance of the circumstance of whether the opinion has been voiced, and to whom, lies in the importance attached to the perception or appearance, as well as the fact, of impartiality.

I give as the last word on bias, McLachlin J\textsuperscript{43}, speaking last year on the demands on judges. She included the demand for new efforts of objectivity, and urged that although a judge may have strong personal views on issues to be decided, which it was impossible to eliminate, the judge must act imaginatively, setting aside preconceptions and prejudices to look at the issue afresh in the light of the evidence and submissions.

**Judge bias from counsel's perspective**

Before making an application to the judge to self-disqualify, counsel ought to allow plenty of time to review the authorities. For reasons to which I have adverted, those which are pertinent may not be readily located. Care must be taken in determining precisely what information is to be placed before the judge, and how the application is taken up with opposing counsel and with the judge.

Special care should be taken in obtaining instructions to check the facts which are to be relied on to substantiate the request for disqualification so as to minimize the prospect that the application could be seen to have been made for a collateral tactical purpose. The application should be made as soon as possible.

In the light of what was said in *Vakauta v Kelly* (1989) 167 CLR 568, the right to object can be waived, although, as Kirby P pointed out in *Goktas v GIONSW* (1993) 31 NSW 684, 687, there is authority in the United States to the contrary.

If opposing counsel does not draw the attention of the court to the recent cases cautioning a judge against too readily agreeing to accede to a request for disqualification, the applicant's counsel's duty might be to do so.

**Conflicts of interest**

I turn to the subject of conflicts of interest noting that I have little of value to offer. More than ten years of assisting in making Ethics Committee rulings on conflict situations left me with a fascination for the subject. More than six years heading a committee supervising the handling of negligence claims against solicitors who had ineptly handled conflicts problems filled me with dismay. Involvement at times in attempts to draft rules to try to reduce the number of such problems left me despairing.

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\textsuperscript{42} "Tales of the Overt and the Covert: Judges and Politics in early Cold War Australia" (1993) 21 Federal Law Review 151, 201.

\textsuperscript{43} Op cit n 6, p 266.
There are so many variables. There are three basic categories, being those addressed by
the New Zealand Rules 1.03, 1.04 and 1.06. But there are many sub-categories, and some
situations that really don’t fit into the basic three. Some variables are common to all
situations, while others only apply in limited circumstances. In this area, I have not
confined myself to counsel conflicts. My justification is that all kinds seem to finish up
in the courtroom.

I may best convey what I mean by variables by posing some questions, the very nature
of which illustrates that they may not apply or will require modification from case to case.
Are “country practitioners” involved? Is greed a factor, patently or inferentially? Is an
alternative practitioner reasonably readily available? Could tactical considerations be
behind an attempt to move a practitioner out? With a past relationship, what was its
character and how long was it in place? Will any future link be for a long or a short period?
If a crisis might occur, what warning time can be expected? Is the obtaining of prior
informed consent an effective option? How effectively can it be shown to be achieved?
Likewise for providing for a limited retainer? As to the communication of confidential
information what can be proved to have occurred? What might be perceived to have occurred?

As in relation to problems of conduct and ethics generally, there are levels of seriousness
to be assessed. At the top of the range of seriousness are the situations where the
practitioner borrows from the client or is in some other way jointly involved in a
transaction with the client. Close to the top are those situations where the practitioner acts
for two clients in a transaction clearly involving a high risk of future problems as with
mortgages and terms contracts of sale.

Section 33 of the Victorian Sale of Land Act contains a proscription of solicitors acting
for both vendor and purchaser under a contract of sale of land on terms. It is qualified in
certain respects, one of which is that it does not apply to solicitors practising more than
50 kilometres from Melbourne!

Also close to the top are the situations like matrimonial disputes where a practitioner’s
attempts to hang in will rarely succeed, perhaps because of the unforgiving attitude of the
disputants.

There is then a vast grey area. I suggest that there are many situations where the risk of
prejudice, if one practitioner (or two practitioners behind Chinese walls) looks after more
than one interest, will be remote or small rather than real or serious, and where that risk
can be suitably provided for.

The mere mention of Chinese walls, as defined and analysed by Tompkins J in
McNaughton v Tauranga County Council (No 2) (1987) 12 NZTPA 429 prompts me to
stress the need to keep in mind the importance of the perception as well as the fact of
prejudice, as was done again and again in Black. I share the suspicion shown by many
judges, and reflected in Rule 1.06, towards Chinese walls.

I referred above to one of the variables being greed. It will ordinarily be impossible to do
more than speculate as to whether greed is a factor. In judgments, it is customary to stress,
at the point that greed might be thought to warrant a mention, the undoubtedly valid consideration that clients ought to have the practitioner of their choice. Not usually referred to, perhaps balanced against greed, may be the consideration of tactical advantage, which is about equally difficult to prove.

There are many reasons why the subject of conflicts of interest merits close scrutiny by legal professional bodies. The decisions of the courts are demanding of high standards, whatever the situation. It is not just as in Black, and as in Barrott v Barrott [1964] NZLR 988 for trying to act against a former client, and as in Kooky for hanging in for a current client, but as in Farrington v Rowe McBride & Partners [1985] 1 NZLR 83 for acting for both parties in a mortgage transaction. I do not see Clarke Boyce v Mouat [1993] 3 NZLR 641 as any form of retreat, but as an example of how attention to detail can save a practitioner who opts to take the risk.

There is a host of recent Australian cases dealing with the situation of the practitioners attempting to act against a former client. Most are summarized in an article by Rosemary Teele.44

In Kooky, reference was made to a 1990 article by Miriam Dean and Christopher Finlayson.45 It is a very comprehensive review of the cases to that time. An article by Paul Finn in 1992 covered much of the same ground.46 Yet the Teele article was able to refer to more than ten cases decided after publication of the Dean/Finlayson piece.

I return to the attitude of the courts, to make the comment that rarely would a court in retrospect assess the risk of prejudice as remote, when the court will have before it the clear evidence that the risk was realized.

The texts on professional negligence like Jackson & Powell47 and Dugdale & Stanton48 understandably stress that the practice of acting for more than one party has been condemned by the courts. However, the former text does note that the 1979 Royal Commission on Legal Services considered that the dangers of acting for both parties in conveyancing transactions were overrated, and that there were usually savings in time and cost when it occurred.49

With an unsympathetic attitude being maintained by the courts, it is inevitable that practitioners who act in conflict situations cause the premiums for lawyers’ professional indemnity insurance cover to rise. In Australia at present the premium level is a source of great dissatisfaction within the profession.

One area on which I would have expected to see more attention focused is that of the level of possibility of prejudice. Often as in Kooky, and as in Rule 1.06, there is reference to a potential for conflict. Rule 1.05 refers to a conflict or likely conflict. In Black, McKay

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45 "Conflicts of interest: When may a lawyer act against a former client?" [1990] NZLJ 43.
47 Op cit n 27.
49 Op cit n 27, p 345.
J referred to Ipp J in *Mallesons Stephen Jaques v KPMG Peat Marwick* [1990] 4 WAR 357 having adopted the test of “a real and sensible possibility that the solicitor’s duty and interest might conflict”.

That formulation sounds not unlike that applied in the field of contempt, where the possibility of prejudice must be real or serious rather than remote or small. See *Attorney-General v Times Newspapers Ltd* [1973] 3 All ER 273, 298–299. Likewise the “real likelihood of bias” test reviewed in *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146.

I wish I could do more than say that the problem is a major one and that it is very difficult to address. I confess that during the time that I pressed for tighter restrictions in the major problem conflict areas where I saw that there was a real, rather than a remote, possibility of prejudice, I continued as a litigation solicitor to act for two parties (union and member plaintiff, publisher and journalist defendants, insurer and insured defendant) where I assessed as remote the prospect of a falling out. Assuredly, there were in place the mechanisms to bail out with minimal impact if remote became real.

It does not appear from the report why in *Kooky* the course was followed of investigating the issue of conflict of interest which seems to have been collateral to the issues presented by the parties. I can only assume that the judge was able to draw the inference from what was said before him by the practitioner and by the client that there was nothing in the nature of full disclosure.

**Counsel accountability**

Judges can and do take appropriate disciplinary measures against lawyers who conduct themselves in an improper manner. A review of some of the cases shows that there should be a wariness about doing so. There are at least four options: action for contempt; a wasted costs order; referral for disciplinary action by the relevant professional body; and criticism from the bench.

Am I justified in inferring that the reason for the presence of the endnote to Rule 8 of the New Zealand Rules of Professional Conduct is that New Zealand judges are particularly prone to censure practitioners?

I am not too troubled about censuring carried out by an appellate court, which is likely to have had ample time to weigh the matter. I have a mild reservation that different counsel appearing on an appeal might have good forensic reasons for not putting the position of the original counsel at its highest. I have not looked too hard for reported censures. One was administered in *R v McLoughlin* [1985] 1 NZLR 106 to unnamed counsel for disregarding his instructions. Likewise in *R v Wilson & Grimwade* (Victorian Court of Criminal Appeal, 22 April 1994) to unnamed counsel for wasting time. The trial went for over two years!

Censure by a trial judge, particularly when it is added to by a wasted costs order, as in *Kooky*, can be much more a matter of concern for reasons I will come to shortly. In 1970 I heard a blistering oral censure of counsel, after almost continuous bickering, administered by the judge in the presence of the jury immediately after the verdict was given.
Years later I found it quoted in full in *R v Keech* (Victorian Court of Criminal Appeal, 5 October 1989). The censuring judge relied in part on what was said in *Beevis v Dawson* [1957] 1 QB 195. I am quick to censure, slow to do more. In the long run that may be a vice, not a virtue.

The contempt option is one I would be particularly wary about. I am troubled by the strong action taken in *Jellicoe v Wellington District Law Society* (1900) NZPCC 310 and *Re Wiseman* [1969] NZLR 55. Before going any distance down the track of charging a lawyer with contempt I would read again *Lewis v Judge Ogden* (1984) 153 CLR 682, and particularly the penultimate paragraph where these points are made: the contempt power is exercised to vindicate the integrity of the court and of its proceedings; it is rarely, if ever, exercised to vindicate the personal dignity of a judge; and the summary power of punishing for contempt should be used sparingly and only in serious cases.

Another option is to refer the matter to the appropriate legal professional disciplinary body to investigate and act as it considers fit.

Having been heavily involved in two extensive reforms of the relevant processes in Victoria because of perceived inadequacies, having noted that a further and more extensive reform is now planned, having watched as reforms have been effected in many other jurisdictions, having reflected on what the Hengstler article disclosed,50 I am now ready to accept that may be some point in the Thomson quip: “Unlike the Mafia, the legal profession does not deal quickly and cleanly with those of its own number who have breached the code of ethics.”51

There is the wasted costs order option. *Kooky* troubles me, perhaps because the report does not contain all the information I would like to have in front of me before I could be satisfied that I could have made such an order. In Australia the option of making against an offending lawyer a “wasted costs” order has been the subject of some attention.

In *Jachimowicz v Jachimowicz* (1986) 81 FLR 459 it was said that the degree of blameworthiness of the lawyer’s conduct must be beyond mere negligence and attract the censure of the court in a serious way or amount to a serious dereliction of duty.

In *Da Sousa v Minister* (1993) 114 ALR 708 an order was made by a judge who stressed that the jurisdiction was only to be exercised with care and discretion and only in clear cases.

In *Ridehalgh* six wasted costs orders were the subject of an extensive review. The lawyers came out of that case with a pretty satisfactory result. Judges were told, pp 482–483, that they should be slow to initiate inquiries, and quick to recognize the limitations on the capacity of counsel to tell the full story. Perhaps concern need only be felt by the very small minority of barristers who were the subject of an unsubstantiatable belief that they conducted cases in court in a wholly unacceptable manner. See p 481.

To the extent that one can say so, in quite different contexts, the approach of the Court

50 Op cit n 8.
51 Op cit n 25, p 196.
of Appeal in *Black* (and of Thomas J in *Kooky*) is clearly more intrusive than that of the English Court of Appeal in *Ridehalgh*. In the shorter term, that might be resented. In the longer term, however, the case for resisting the introduction of a bureaucratic agency for complaint investigation may be advanced by the courts retaking some of the ground of supervision they earlier ceded.

**Judge accountability**

As to the accountability of judges, I believe that papers presented in 1987 by Mahoney JA and McGarvie J represent the best source as to the Australian position.\(^{52}\)

McGarvie J examined the formal and customary ways that judges were held accountable. The former include: the statutory mechanisms for removal; that judges are obliged to disqualify themselves if biased; that judges are obliged to give reasons; that judges are subject to appeal; that judges must almost always conduct hearings in open court; that judges bear a personal responsibility for their decisions; and that the decisions are susceptible to criticism by appeal courts, lawyers, academics and journalists. The customary ways include: the strong desire of each judge to retain a good reputation with other judges and with practitioners; the intervention in appropriate cases of the Chief Justice or other senior judicial officer; and the influence of bar associations and law societies.

I touched briefly above on one aspect of the subject of conduct which amounts to misbehaviour meriting removal, namely criminal conduct. At the highest level of being accountable to Parliament, Australia has the reports of the inquiries concerning Justices Murphy and Vasta to provide some light on what is encompassed by “misbehaviour”.

While I accept that the subject merits close scrutiny because of its serious consequences, I justify its scant treatment because of its rarity. Much of what is put by McGarvie J to support his views has been supported or challenged by others, including McLelland J,\(^ {53}\) Kirby J\(^ {54}\) and Vince Morabito.\(^ {55}\)

I infer from the 1983 articles by Ellis and Keith,\(^ {56}\) the presence of the endnote to Rule 8 of the New Zealand Rules of Professional Conduct, and the comments by Eichelbaum CJ about the Judicial Commission issue,\(^ {57}\) that the position in New Zealand is substantially as in Victoria, where there is nothing akin to the Judicial Commission of New South Wales, one of the functions of which is to investigate complaints about judges.

One Victorian academic seems intent on promoting the cause of having in place an effective complaint-investigating Judicial Commission,\(^ {58}\) but in recent years little interest

\(^{52}\) Op cit n 18.


\(^{56}\) [1983] NZLJ 206, 239.

\(^{57}\) Op cit n 5, p 91.

\(^{58}\) Op cit n 55.
has been shown in the subject, save that recently there has been floated the idea that an "Australian Conference of Chief Justices" might receive complaints about the conduct of judges across the country.

I mention only to pass over, conduct which causes merely the raising of an eyebrow, because it is only in breach of etiquette or the traditions or taboos of a particular court. I list by tag line some examples of my court's traditions or taboos that have intrigued me: associate's attendance; council table placings; front stairs; happy hour; J.s; library use; loos; rosette; upstairs/downstairs; welcomes/farewells. I will elucidate upon request.

The source of criticism of judicial conduct which, in my experience, seems to have most impact on trial judges is the appellate court. Shetreet spells out in some detail the reasons why he considers that the English Court of Appeal has played an important role in securing high standards in English courts.59 The reputation of the Court of Appeal appears not to have suffered as greatly in the last few years as that of the Court of Criminal Appeal.60 Sometimes appellate courts pull their punches when dealing with the conduct of a trial by a judge. Sometimes they do not. The difference in approach is strikingly illustrated by the treatment of the trial judge in *Goktas v GIONSW* (1993) 31 NSWLR 684 by Kirby P and Meagher JA. Only the former noted that personal criticism or denunciations were to be avoided.

It goes without saying that a judge may be criticized for conduct over a wide range. A favourite is intervening too much as with excessive questioning as in *Jones v National Coal Board* [1957] 2 QB 55. The judge below was found not to have gone too far down that track in *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146. But the trial judge can also be censured for not intervening enough as in *R v Wilson and Grimwade* (Victorian Court of Criminal Appeal, 22 April 1994), the two year trial.

It is difficult for an outsider to know where to look for such criticism in New Zealand. In *Waymouth v Ministry of Transport* [1982] 1 NZLR 358 the Court of Appeal mildly censured a judge for communicating information about prior convictions to an appellate court.

One example of a stinging rebuke by an appellate court of a named judge is *Re a Barrister* [1993] QB 293. Alastair Campbell makes the point that judges ought to improve mechanisms of informal peer control if they treasure their independence from external control.61 At least in Victoria, those mechanisms have been maintained at a level where there has been no pressure for reform.

Turning to external mechanisms for accountability brings me to criticism of the bench from various quarters. Criticism of judges by academics has not been of great moment in Victoria. That cannot be said in England. See *The Politics of the Judiciary* by Griffiths,62 and the article by Jamieson "Who Judges the Judges?"63

59 Op cit n 13, p 201f.
As I noted above, the media is increasingly prepared to act as a mouthpiece for the criticism by others of judges, and to add criticisms of its own, as to law-making, decisions on sentencing, and comments suggestive of gender bias.

Courts Information Officers have been appointed to assist many courts in Australia work better with the media. I chair a Courts Media Liaison Committee which tries to address some of the actual and perceived deficiencies on both sides.

Finally, may I say that I regard it as healthy that critical comment from a practitioner like that of Donald Dugdale about *Kooky* is published. Perhaps I would not be so enthusiastic if I was the subject of the criticism. On the other hand, I am just as pleased that John Laurenson saw fit to respond to Donald Dugdale.

The ethic or tradition that judges do not respond to criticism is, I think, more to be commended than condemned. But the arrival of a white knight, now a rarer event than in the past, is always a pleasure.
I would like to discuss two of the matters raised by Justice Teague in his illuminating address, namely the public’s perception of judges and lawyers, and the dilemma of the indefensible case.

Judges and lawyers
Justice Teague has commented on the differing public perception of judges and lawyers, the former at the apex of public esteem, the latter near the bottom. I propose to explore this paradox. Speaking first to the judges.

1 Judges
Perhaps one of the most obvious hallmarks of the judiciary is their independence from political interference. Regardless of the government’s role in his or her selection, once appointed, a judge is presumed to be free from political allegiance, influence and persuasion. I would suggest that such independence is an important element in the public’s favourable perception of the bench. The connection is conveniently expressed by de Smith and Brazier: 1

It is clearly of great importance that justice be dispensed even-handedly in the courts and that the general public feel confident in the integrity and the impartiality of the Judiciary. Where the Government of the day has an interest in the outcome of judicial proceedings, the court should not act merely as a mouthpiece of the Executive.

The judiciary must therefore be secure from undue influence and autonomous within its own field.

The need for independence from government and the various arms of the executive is further magnified in jurisdictions where courts are empowered to strike down legislation. The United States of America comes immediately to mind, and within the Commonwealth, Canada is an example. This role has assumed significance in Canada since the enactment of the Charter of Rights and Freedoms, 1982. 2 Justice McLachlin of the Supreme Court of Canada describes independence as a necessary requirement for a judiciary that must be ready to review a wide range of government action. 3 Although courts in New Zealand may not have such sweeping powers in pronouncing upon the validity of legislation, 4 they are nevertheless seen as a check against the excesses of

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2 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982 (being Schedule B of the Canada Act 1982 (UK)).
3 "The Role of Judges in Modern Commonwealth Society" (1994) LQR 260, 264.
executive action. I would suggest that while the public’s confidence in the legislative and executive functions may be changeable, the judiciary is regarded as a stable and constant force in our lives.

Judicial immunity from government interference is also reinforced by judicial-political protocol. For example, Standing Orders\(^5\) of the House of Representatives prohibit members from passing unbecoming comments in respect of individual judges. Again, appointment to judicial office is for life\(^6\) and incumbents can only be dismissed in very limited circumstances.\(^7\) These elements combine to establish an essential requirement for credibility, impartiality and freedom from influence.

At this point, I would like to mention two related matters: the profile of judges in the community and the resumption of Bar practice by former judges.

Turning to the first. Upon appointment to the bench it has long been considered appropriate for a judge to assume a degree of social isolation. Whether this should be viewed as a mandate of the position is, however, questionable. While this may be seen as a concomitant of impartiality and independence, it is perhaps something of a two-edged sword. There is the corresponding thought that judges, as enforcers of our social values, should be more visible in the community. Traditionally there is little direct involvement between judges and the media and consequently the human face of the judiciary is often unknown to the average person. In the United Kingdom, two relatively recent high level judicial appointees, Sir Thomas Bingham MR and the Lord Chief Justice, Lord Taylor, have moved to establish a new openness in this regard, to the extent of participating in a televised public discussion.

With regard to the second matter, there is a school of thought that as a reflection of its collective commitment, members of the judiciary should remain in office until retirement. As Chief Justice Eichelbaum commented recently:

> We cannot have future candidates regarding the judiciary as a bus on which lawyers may take a short trip in the course of the journey through professional life.\(^8\)

Yet I would suggest that this has to be balanced against other factors. The role of a judge is a singular one for which there can be little adequate preparation. With the best will in the world, a judge may tire of the routine, its demands, pressures and privations. It is unrealistic to impose the expectation that incumbents will remain in office until retirement, regardless of their personal wishes. Such a commitment is unrealistic and there is little profit in tethering individuals to a job that requires a high degree of motivation. In jurisdictions where the judiciary are more numerous, such as the United States, it is accepted that in the normal course of events, there will be attrition from the bench. In Canada some provinces regard this as a perfectly acceptable phenomenon, imposing modest restrictions upon a former judge’s right of audience.

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5  Clause 179.
6  Subject of course to stipulated retirement.
7  New Zealand Constitution Act 1856, s 65.
I believe that judges should have an unqualified right to resume practice at the Bar. I also believe that any concerns are, upon closer examination, illusory. The Bar accepts that collegiality and impartiality can function side by side. For centuries members of the same chambers have regularly acted for opposing parties in litigation. Again, some senior counsel may enjoy close social contact with members of the judiciary. There is no suggestion that this should disentitle them from appearing before those judges. By the same token, the same may be said where a judge changes status, to practise as counsel.

Furthermore, the very credibility of the bench is founded upon its impartiality. Judges are heirs to a long tradition in which personal feelings are set aside in fulfilment of the administration of justice. It takes little imagination to assume that judges may be confronted with civil litigants and criminal defendants whom they might regard as unprepossessing. Indeed, they may have little sympathy for some of the causes that are urged before them. Yet whatever the case, there is a clear expectation that the issues will be heard in a fair and balanced manner. It is perhaps a testimony of this, that despite a variety of controversial issues heard before our courts, there is rarely any suggestion of personal bias.

2 Lawyers

Much has been said about the public perception of lawyers and I would like to make a few brief remarks on some of the recent factors contributing to loss of confidence in the profession. The following words of Justice Temm are most apposite:

Recently the profession has been badly served by some of its members. They have acted dishonestly and they have been expelled from its ranks. The profession guards its reputation jealously because it knows that it can only be harmed from within and never from without.9

If I may venture to identify two internal elements that lead to that harm. One, I would suggest, is the pressing factor of economics. Whilst law is of course a means to a livelihood, the concept of practising a profession in its older and more venerable sense, is often overtaken by the fact that it is also a business undertaking. In this connection, the impact of advertising on the legal profession has no doubt affected public perceptions. Overt marketing invites the public to compare services, and to view itself as a “consumer” of those services. With this, a more discriminating attitude prevails.10 I do not believe that this is a bad thing, but the profession must be prepared to be judged by that standard.

A second, and obvious point, is that the well documented trust account frauds by certain solicitors have severely undermined public confidence. The failure of the fidelity fund to provide a complete safety net has also made people more guarded in their attitude towards the legal profession. At the same time, it must be remembered that the profession has absorbed substantial additional levies to meet these claims, and it is hoped that this will also be given due weight in the overall equation.

I will now turn to the second issue: the indefensible case.

10 In the same spirit, it is now not uncommon for government and industry to require law firms to competitively tender for their legal services.
The indefensible case

This is an extension of the previous discussion on the status of judges and lawyers. Justice Teague posed the question: "Is it that judges do not have to bear the burden of the advocate of the perceived amorality of defending the indefensible?" 11 As a practising criminal lawyer, I would like to consider the idea of the indefensible case and to ask whether such a principle is compatible with criminal jurisprudence. The question meshes with what I believe is a popular misconception that gives rise to an unwarranted criticism of the Bar. Again, I can do no better than to quote Justice Teague: "To the public, acting for a confessed criminal was seen as unethical..." 12

For the lawyer, I believe, the issue is understood quite differently and is presented in an entirely different context. It arises in relation to the class of civil proceedings which are categorized as frivolous, vexatious or an abuse of process. Yet from a lay perspective, the distinct features of the civil and criminal process are not always distinguished, resulting in a misapprehension of the role of the Criminal Bar. In principle and in purpose, the contexts are fundamentally different and I would like to take the opportunity of laying this misapprehension to rest.

If I may start at basics, in civil litigation, a party commencing an action may be accused—with complete justification—of engaging the court and the defendant in a frivolous exercise which the plaintiff cannot realistically hope to win. 13 In contrast, in criminal proceedings, such views are applied not to the party initiating the action, but to the accused, for "defending the indefensible". Not only are the parties different as between civil and criminal proceedings, but so too are the essential dynamics. It is indisputable that a person accused of an offence is entitled to two things: a defence under the law and the right to put the Crown to the proof. As the burden of proof lies on the Crown, a plea of not guilty in its most limited sense invites the prosecution to prove its case. The initial premise on which our system of justice rests is that the accused is innocent until proven guilty. And if I may dwell on fundamental principles, guilt must of course be established beyond a reasonable doubt. The accused is entitled to do nothing and see if the Crown can satisfy the court as to his or her guilt. In this setting, the notion of an unwinnable case (or more accurately, "a defence") is not readily transposed into the criminal sphere.

I should mention another consideration with respect to public perceptions of criminal proceedings. Where the facts clearly indicate guilt, public outrage towards the perpetrators of serious crimes is understandable. Yet there is common confusion as to guilt as an inference from known facts, and guilt as a judicial pronouncement. The latter is arrived at through a process governed by strict rules of evidence and procedure. Guilt in the first sense is distinct from guilt in the second. A related thought is that no matter how objectionable the offence, it is equally objectionable to deny the right to representation. In this sense, there are no indefensible cases.

11 Page 5.
12 Ibid.
13 Teague J cites his own experience advising clients in regard commencing libel proceedings, where the intended plaintiff may be motivated by a hidden agenda or other non-legal motives.
The boundary in civil proceedings, between legitimate assertion of rights and an abuse of process, cannot therefore be related to criminal proceedings.

My previous comments suggest some of the bases upon which the accused's interests may be defended. It should also be remembered that defence counsel are officers of the court. If they become aware that their client proposes to mislead the court, counsel understand their duty not to call the accused as a witness, to thwart any possible perjury.

If I may end as I began, I would like to express my thanks to Justice Teague for his thought-provoking address, which has encouraged me to respond to a few of the ethical issues he has raised.
Mr Justice Teague's paper, founded as it is on awesomely extensive research coupled with his Honour's own shrewdness and wide experience, represents a valuable resource which I am sure will be quarried for many years to come.

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

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

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

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

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

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

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

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

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

But instead we heard from various people who should have known better expressions of disapproval which would have been more appropriately expressed by a mother superior affronted by a naughty nun's having in defiance of her vows leapt over the wall in order to elope to a life of carnal bliss in the arms of an heretic. Various public interest arguments were advanced (principally that clients of an ex-judge might seem to receive favourable treatment) but none of these arguments seemed to have much connection with real life. The public interest surely requires that difficulties should not be put in the way of the return to practice of judges who no longer wish to be judges.
The third example is very recent. A number of practising barristers (of whom I was not one) contributed to a survey of the aptitudes of High Court judges published in a weekly newspaper directed to the commercial community and called *The Independent*. The general view in the profession is I believe that while the published comments were in one or two cases unnecessarily cruel, and in one or two other cases unduly flattering, by and large the quoted observations portrayed their subjects not unfairly.

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

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

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

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

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

Matters could get worse. There is a tendency for the legislature to pass statutes expressed in bumper sticker generalizations that leave the judges no alternative to applying their own moral assumptions. The New Zealand Bill of Rights Act is the most notorious example. Some judges permit themselves to assert a right to cast aside existing legal rules, advancing a variety of justifications of which the development of an autochthonous New Zealand jurisprudence is one and something styled judicial autonomy is another. There are many reasons for opposing those developments but the one opposite to today's discussion is that if we continue much further along those paths it will become legitimate to examine publicly not just the abilities of the judges but also their personal philosophies, a development with which Judges of the United States Supreme Court and candidates for that office are familiar. It is not a development which one would expect to be welcomed by either the Chief Justice or the Attorney-General. The Attorney-General for his part appoints the judges and in the performance of that duty may only be called to account politically. It seems to me that he comes perilously close to saying that whatever donkey he may appoint to the High Court bench the practising profession must suffer in silence. That may be the tradition but I cannot believe that that is the public interest.
It seems to me that both distinguished commentators came perilously close to saying that the justice system demands sedulous propagation of the myth that all judges are equally fitted for the positions to which they have been appointed. I cannot believe that the legal system I have served throughout my working life is so tender a plant as to require for its survival the suppression of the truth that the Chief Justice and Attorney-General contend for. We are told and I for one believe that justice flourishes most strongly in the light of public scrutiny. There seems no logical reason why that scrutiny should not extend to the abilities of the judges. This may be uncomfortable for the judges but acceptance of a proffered appointment to judicial office has never as I understand it been mandatory.
Legal Ethics in Court Practice—Commentary

J Laurenson QC
Barrister

Introduction

My first comment is that my presence here today should be taken as a lesson to you all that next time you are minded to take up your pen and “write to the paper” you are better advised not to do so.

Having, on this occasion, ignored that advice and having, as a result, found myself here as a commentator, I must say that I have found his Honour’s paper very helpful for the way it gathers together a wide variety of ethical considerations and presents so many references in relation to them.

It is, of course, quite impossible to comment on all aspects and, in any event, I suspect I am really here to revisit Kooky Garments Ltd.

When considering my position in that light, I found myself wanting to clarify for my own benefit what were the ethical issues relevant to that case. This in turn led me to try and define for myself the same question posed by his Honour, namely, what are legal ethics?

The more I tried to think this through, the more did I become intrigued with his Honour’s question—do legal ethics include conduct which is merely a breach of etiquette?

The question, as posed, seemed to indicate that if legal ethics did include merely a breach of etiquette then there was no justification for the ethic beyond a wish, probably outdated, to preserve an element of civilized behaviour. Put another way, is there a distinction to be drawn between ethics on the one hand and mere etiquette on the other?

What follows is a brief attempt to pursue this question a little further and my suggestion that legal etiquette is an integral part of legal ethics.

Legal ethics

1 What are legal ethics?

I suggest that, very simply stated, they can be defined as rules of behaviour regulating the conduct of lawyers when providing legal services.

2 Why is there a need to regulate this behaviour?

The answer, I suggest, is because the nature of the task requires something more than just the provision of legal services.

In 1933 the Council of Legal Education in England invited Mr J E Singleton KC to deliver a series of lectures under the title of “Conduct at the Bar”. They were delivered in the Niblett Hall of the Inner Temple under the Chairmanship of Lord Atkin. The Masters of the Bench of the Inner Temple later resolved that the lectures should be published.
As part of his opening preamble Mr Singleton stated that his object was to show (inter alia):

How much good you can do whether you become great advocates or not, reminding you that a man who regards the Bar merely as a trade or business and does not understand that it is also a professional community with public ideals misses the heart of the thing.

3 What is this element of "public ideals"?
I suggest that this element can be deduced from:

a) The nature of the services provided.

b) The nature of those receiving the services; and

c) The circumstances in which they are provided.

(a) The nature of the services
In a democracy the law is propounded by the community for its proper regulation and for the common good of the community.

In using the term "regulation" I mean this in the wider sense, ie, to include not only regulations inhibiting or prescribing behaviour, but also legal concepts such as the presumption of innocence.

Regulation in this sense involves the inter-action of: a) citizen–citizen; b) citizen–state; c) state–state.

Singleton suggests that the lawyer when involved in any of these disputes also has a wider responsibility, ie, to ensure that the law should be administered with an eye to ensuring that the wider community interest is recognized. This, I submit, is met by recognizing and giving effect to the purpose underlying the particular law.

(b) The nature of the recipients of the services
The law has become more complex. The lawyer exists to assist citizens to deal with the law.

By reason of his/her training (provided by the community) the lawyer is, because of his/her greater familiarity and facility with the law, a privileged person. That privilege can also be interpreted as power.

On the other hand, the recipient of legal services is in the main dependent and vulnerable. Therefore, there is implicit in the relationship between lawyer and client a fundamental requirement that the lawyer must accept without reservation the responsibility arising from the trust which has to be reposed in him/her.

(c) The circumstances in which the services are provided
A lawyer is involved because clients cannot cope without assistance. At stake are variously the client's freedom, economic interest or emotional interest.
In my view, the common factor to all these is almost invariably stress. This stress applies not only to the client but also to the lawyer and to the judge hearing the case because of the responsibility which devolves on them in their different roles.

From the point of view of the lawyer the provision of legal services therefore involves: a) a responsibility to ensure not only the protection of the client, but also to ensure that the law works, i.e., the community interest; b) a position of privilege and power and hence trust so far as the client is concerned; c) a stressful background.

It is these factors which require that the conduct of lawyers be regulated by ethical rules.

These rules fall into two broad categories: a) rules determining the relationship with clients; b) rules determining how the lawyer carries out his/her functions.

4  **Rules relating to clients**

The overriding requirement here is, I suggest, to ensure that the client is assured of independent advice unequivocally free from any conflicting interest. That is to say, either the interest of the lawyer or the interest of any other person. If this element is not observed then the responsibility arising from the trust factor cannot be met or cannot be seen to be met.

5  **Rules relating to the manner in which duties are carried out**

These reflect the need to observe the public interest and also reflect the stressful nature of the circumstances in which the services are provided.

To my mind, the regulation under this head includes what, at first sight, might be seen only as the courtesies or etiquette within the profession, i.e., to fellow practitioners and the courts. They include a demonstrated respect for the courts and a dispassionate dealing with other lawyers.

I therefore suggest that an observance of these two matters goes far beyond merely being courteous. Their observance is essential to ensure: a) the effective operation of the law in the wider sense; and b) allied to that, the lessening of stress by the imposition/acceptance of civilized debate and behaviour.

I suspect that today the maintaining of courtesies, particularly to the court, may be perceived as an attempt to place the courts upon a pedestal where they are seen to be free of criticism.

If I am right, then my answer is, that an acceptance of this view indicates a failure to understand that the outward forms of respect are much more than traditional courtesies. They are rather, outward forms of behaviour having the clear purpose of ensuring that justice is dispensed calmly, dispassionately and in a manner which ensures that all participants in the court process are free from any intimidation.

So far as the judiciary is concerned, the courtesies are appropriate to reflect its rightful position within the doctrine of the separation of powers.
Observance of courtesies to court does not in any way detract from the independence of counsel in relation to courts.

Currently the judiciary is being subjected to closer public examination and criticism. This applies to the manner in which judges are treated and their accountability.

One cannot argue that judges should not be accountable.

I argue that they have always been accountable in that: a) in the main, their decisions are public documents; b) there are appeal procedures; and c) I have no doubt that there is an element of peer pressure.

I argue further that these accountability mechanisms have in fact proved to be effective. The question which we are now faced with is whether there should be a greater or different form of accountability.

It is probably going beyond the bounds of this seminar to debate this question too far, but I do offer the following comments.

a) If changes are to be made, they must be thought through very carefully. They should not be driven merely by an ill-defined and abstract concept of accountability.

b) Any changes made must not carry with them the chance of imposing any pressure on judges which may inhibit their ability to dispense justice between litigants freely and in accordance with their oath.

c) A clear distinction must be made between the judicial functions of judges as opposed to the administration systems under which they operate.

d) Any change must be viewed against one standard, namely—will the change improve the standard of justice which we have received from the courts up to this time?

It is my view that the relative lack of criticism of the courts in this country to this date is an indication that the existing accountability mechanisms have worked and if there is to be, for example, any loosening of the conventional limits of criticism of the courts then this must be done very carefully indeed.

**Kooky Garments**

As I see it, this case has raised three ethical considerations:

a) The issue of unequivocal independence of counsel in relation to clients.

b) The judicial response to the judge's perception that there had been a breach in this case.

c) The commentaries on the appeal decision.

I have to say at the outset that it was the third issue which prompted me to rise from my slumbers out there in the provinces.

The tenor of the article did not accord with my view of how a judge's decision should be criticized. I felt that the overall tenor was necessarily to diminish the judge concerned. As
such, my reaction was, that even though there may have been a contrary view to those expressed by him, the manner in which it was done did not assist the process.

Whether my reaction was right or wrong is for you to decide.

The first issue is that which relates to the question of conflict of interest.

Mr Justice Teague has made the point that it is often easy enough to determine whether conduct falls on one side or other of a particular line, but it is difficult to determine where the line should be drawn.

As I see it, in the *Kooky Garments Ltd* decision, the following points were relevant.

The central issue in the case was the interpretation of documents.

A critical document had been prepared by counsel’s partner.

The client alleged that the solicitor partner had been at fault in the preparation of that letter.

There was, accordingly, conflict between the firm to which both the counsel and solicitor belonged and the client.

In effect, two issues arose:

a) If an independent lawyer had been consulted, it is possible that the issue could have been identified and then resolved in the same proceeding.

b) Because the conflict involved counsel personally (through his firm) there was the possibility/perception that he was not acting entirely free from self interest.

To this point I do not see that the judge’s conclusion can be argued.

What may be arguable is whether the judge’s enunciation of a wider principle was correct.

As I read the decision, his enunciation went no further than saying that if there was an actual or potential conflict of interest, then a judgement was required before counsel decided to remain with the case.

It does not mean that counsel from the same firm can never act when his/her firm has been involved in the matter leading up to litigation. If the firm has been involved in this way, then a judgment is required. If that consideration produces a doubt, then get out.

In my view, this is a reasonable and correct statement of the ethical conduct involved. Informed consent is an answer, particularly in cases where conflict is with third parties. However there are practical difficulties in establishing proof.

The second issue is the question of the judicial response in such instances.

Looking at the position generally it seems to me that if a judge sees a situation where counsel has erred, then given the client’s vulnerability and dependence, it is not just appropriate but behoven on the judge to react. How else, in many cases, would the client
ever know of the correct position? I suggest that judicial intervention as part of its inherent jurisdiction is an essential part of the regulatory process.

This will, of course, be determined in the particular case by the nature of the conduct which comes under examination.

The real question is the manner and extent of the judicial reaction.

Mr Dugdale in his commentary very fairly makes the point that before anything is done by way of reaction by the judge, the person who may be criticized must be given a proper opportunity to be heard. There cannot be any argument over this.

So far as Kooky Garments Ltd is concerned, we do not know to what extent counsel was given this opportunity. My impression is that there is enough in the judgment to indicate that the issue was discussed and that the judge’s reaction followed that discussion.
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

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”. 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. 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.
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. 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 these 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. 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:


The vision's inherent need, therefore, for a shared worldview appears to have resulted in
an inability to respond in a flexible manner in the context of the present confusion of worldviews.  

(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. 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
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.”\textsuperscript{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”.\textsuperscript{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.”\textsuperscript{12} A lawyer “need not contemplate any broader notion of justice than that defined by existing legal norms.”\textsuperscript{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,

\textsuperscript{10} Rhode, “Ethical Perspectives on Legal Practice” (1985) 37 Stan L R 589, 595.

\textsuperscript{11} Glenn, p 434.

\textsuperscript{12} Rhode, p 603.

\textsuperscript{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." 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. 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:

This 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. 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. 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-
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. 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. 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. 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:

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.

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

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 Schwartz28): 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”.

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. 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:  

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. 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!).

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 un instructed 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.

Legal Ethics In General Legal Practice—Commentary

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Let me begin this commentary with a disclaimer similar to that of Professor Rickett at the start of his paper. I cannot claim any knowledge of, or experience in, the law (unless being married to a recently qualified lawyer counts!). I am trained in ethics, but I have applied this training to the dilemmas provoked in medical practice and in health care delivery generally. Thus what I have to offer must be seen as providing a perspective from outside the legal profession on some of the puzzles and problems of legal ethics, so comprehensively and persuasively delineated in Professor Rickett’s paper. I find myself amplifying some of his comments about the “death throes” of the vision of the ethical professional; and then taking up the argument where he leaves it in his concluding section, by exploring more fully the idea of ethics as a critical discipline, one which leads practitioners to reflect on the adequacy of their practice from a moral point of view and which calls for justifications which are wider than mere professional consensus.

My commentary falls into four parts: first, I consider why the “vision” of the ethical professional is appropriately subject to moral criticism; next I reflect on the lessons which might be learned from the revolution in the medical profession’s understanding of “medical ethics” over the past three decades; this leads me to explore the meaning of the term “ethics” itself; and finally, I make some tentative suggestions about what such a redefinition might mean for legal ethics not only within the profession but more widely in society as a whole.

The professional ideal: rhetoric and reality

Professor Rickett has documented the rapid erosion of the vision of the “ethical professional” through the emergence in our age of a powerful monetarism which elevates business efficiency to a predominant position in the scale of social values. I agree with this observation, but to it we must add the rapid disenchantment with the professional ideal provoked by recent sociological and political analyses of professional power. I have in mind the writings of Eliot Freidson (Profession of Medicine (1975)), Paul Wilding (Professional Power and Social Welfare (1982)) and Ivan Illich (Disabling Professions (1977)). For these social theorists professionalism is to be seen largely as a way of gaining social power and so maintaining competitive advantage. Their conclusions are well summed up by Wilding in his description of professional codes of ethics as “campaign documents in a search for privilege and power.” Thus, if these analyses are accurate, it is not just that monetarism is submerging a hitherto disinterested ideal of service, but rather that the claim to such a high moral ground was always of dubious worth. How much of the vision of the ethical professional was the rhetoric of self-advancement and how much a genuine commitment to ethical values?
From medical ethics to bioethics

In this regard much can be learned from the history of medical ethics over the past three decades. This area of professional ethics has seen a whole series of radical transformations which have been well documented by Edmund Pellegrino in a recent essay.\(^2\) Pellegrino starts his account as follows:

> When I entered medical school 50 years ago, medical ethics was, as it had been for centuries, solely the domain of the profession, protected from the mainstream of cultural change and framed in seemingly immutable moral precepts.

Pellegrino describes how, since 1960, this profession-dominated subject area has gone through a succession of radical changes. The rapid changes in medical practice, the emergence of health bureaucracies and the ever changing dilemmas of medical treatment have forced the profession to look outside its own ranks for guidance. The old ideas of a code of conduct agreed to by professional colleagues alone and of rules of behaviour as much concerned with etiquette as with morality could no longer meet the demands put upon the profession. Thus there came the philosophical critique of traditional ethics and the search for a new set of principles more suited to modern practice. This Pellegrino calls the “period of principlism”, since at this stage doctors looked to moral philosophers for the needed general ethical principles. Medical ethics thus became an interdisciplinary subject, and the transition towards “bioethics” began (that is, a more general account of ethics in the context of the life sciences as a whole, rather than an exclusive focus on medicine). But this change introduced into medical ethics all the debate about the nature and grounding of ethics itself, which has always characterized the history of philosophy. Thus there followed a period of “antiprinciplism” when new voices were heard (many of them coming from the rapidly expanding area of feminist ethics). In this period (still upon us at the present time) different voices vie for a hearing—narrative ethics, virtue ethics, the ethics of care, casuistry, to name the most prominent ones. Pellegrino foresees a new period ahead, a period of crisis, when medical ethics or bioethics may lose its bearings entirely in a sea of relativism.

What bearing might this recent transformation of medical ethics have for legal ethics? It would appear that legal ethics is still in the equivalent of what Pellegrino calls the “quiescent period” of medical ethics when a code based morality derived from intraprofessional sources prevailed. For the medical profession in New Zealand the Cartwright enquiry was a watershed. Since 1988 it has been impossible to suppose that doctors alone know what is ethical or unethical in their practice. Perhaps it is quite ironical that a judicial enquiry should have this effect on the medical profession, while the legal profession continues to see ethics as a matter of internal regulation! I suspect that, in truth, the era of quiescence is all but past. Professor Rickett has pointed to numerous practical pressures which will shift the loyalty of the lawyer towards corporate and monetary goals and which will take to an absurd extreme the notion of advocacy for the client above all other considerations of ethical value. It can only be a matter of time before the self-regulation of the legal profession comes under similar scrutiny to that now commonplace.

for the medical profession. Where then will the profession turn to put its ethical house in better order?

“Ethics”—a word for all seasons

Perhaps, like the doctors, the lawyers will look first to moral philosophy for the kind of fresh analysis needed. Professor Rickett seems to favour this approach when he writes of law school education requiring “systematic exposure to the forms of moral reasoning, and thereby the teaching of ethical decision-making” (p 56). There is merit in this reaching out to such a new perspective on the dilemmas of legal practice, but (as the history of medical ethics/bioethics suggests) a move in this direction may bring confusion as well as clarity, and it will certainly not provide final answers to the questions of the definition of ethical and unethical practice. The problem lies in the ambiguity of the word “ethics” itself. Professor Rickett drops in, as a passing phrase, reference to “the science of morals”. That is useful so far as it goes, but what is the significance of the term “science” in such a description? Here the controversy begins. Most theorists of ethics would accept that we have to make some kind of distinction between the moral beliefs and practices of a particular culture or subgroup within a culture and the critical evaluation of these culturally determined beliefs and practices. We can reserve the term “ethics” for such a critical exercise, leaving “morals” to describe that which ethics studies. (This is deliberately to ignore their root similarity in ethos (Greek for “custom”) and mores (the Latin equivalent).) But what kind of critical study is to be classed as the “science” of morals? An appeal might be made to the rules of logic. Moral beliefs could be scrutinized for their internal coherence and for their consistency of application to practical situations. But this leaves the normative questions unanswered: the values enshrined in Nazism or apartheid were quite internally coherent and were consistently applied, yet we would surely wish to question their acceptability as moral values. Ethics has always sought a normative base from which rival claims of moral value can be evaluated. Just what that normative base is remains fraught with ambiguity, with numerous rival theories of ethics competing for first place. A natural reaction to this inconclusiveness is to abandon the quest for an authoritative “ought” and resort to some form of positivism. But then why should the profession bother looking outside its ranks at all, if there is nothing to be gained? Legal ethics may just as well remain as the shared ethos of one’s legal colleagues. If one is to have unfounded moral beliefs they may as well be those that promote collegial loyalty and the strength of a unified profession.

An alternative, however, is to accept the inconclusiveness of the quest for ethical foundations, yet still see it as a quest worth undertaking. Here “ethics” is seen as a process rather than a solution, a commitment to open enquiry and to radical self-criticism, which requires a plurality of points of view in order to be properly pursued. On this account of ethics a profession which keeps discussion of ethical practice within its own enclave can never be seen as an ethical profession, since it must inevitably be prone to partiality of opinion and narrowness of vision. Equally there can be no academic imperialism about the method of ethical enquiry, whether this be philosophical imperialism, or any other. Rather a diversity of methods will be encouraged, as it now is in the teaching of bioethics. For example, a multi-disciplinary or multi-professional approach to difficult case examples might be encouraged. (The doctors have long since abandoned the excuse that
their subject is too technical for outsiders to understand the nature of their dilemmas.) There could be a search for general ethical principles which apply to legal practice, with particular attention to those situations where two or more general principles are in conflict. There could be a "narrative" approach, looking to the lawyer in literature, or to the diverse approaches of experienced practitioners, or (better still) to the stories of clients in their encounters with the profession. All these are possible avenues into a supra-professional legal ethics and, more importantly, represent the willingness of the professional group to be morally accountable to the society within which it earns its livelihood. With this approach, "professional ethics", in the old sense, is in its death throes, but no one need mourn its passing!

**Law, ethics and morality**

I come finally to the most tentative part of my commentary. In the previous section I was looking at what might be summed up as the dependence of legal ethics on a wider and more inclusive approach to ethics than the profession can itself achieve. But this is to ignore certain distinctive features of the academic disciplines of law itself, and thus to fail to do justice to what is uniquely available from internal resources and not to be found outside. Another way of putting this point is to say that the increasing commercialization of the legal relationship detracts not only from the profession but from the intrinsic value of the law itself. This is suggested in several places in Professor Rickett's paper, particularly when he writes of the danger of lawyers becoming "technicians, without moral accountability" (p 13). Can we argue that there is such a thing as betrayal of the ethical foundations of law, even when, in a technical sense, the lawyer is acting within the confines of legally permitted practice? To answer this question fully would require a detailed discussion of the relationship between law and morality, and would inter alia take us down some of the more interesting byways of jurisprudence. I have neither the time nor the competence to make such a journey, but I would like to focus for a moment on one issue: what happens to our social morality when a radical disjunction is drawn between law and morality?

In this regard I have been greatly impressed by a paper by Tony Honoré entitled "The Dependence of Morality on Law".3 Honoré accepts the fundamental point that morality is distinct from law and that all laws are subject to moral criticism. But he also argues for the dependence of morality on the exercise of law, in two senses. Firstly, law can give a specific determination to the more general and abstract requirements of morality. For example, the moral requirement to protect the vulnerable can be given some precision in trust law, or in child protection determinations. Secondly, in areas of moral conflict or uncertainty the law specifies the limits of toleration of conflicting views. Examples would be laws relating to abortion or to the use and sale of drugs. In these instances law functions as an indispensable part of social morality. It provides the specifications which morality alone cannot give: it represents a social consensus on what our shared morality requires us to permit, to enforce or to prohibit. Honoré concludes:"...morality is not separate in the sense of being self-sufficient. On the contrary, morality and law intermesh in complex ways...."

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This observation seems to me to be crucial for any consideration of legal ethics, whether in general practice or in the practice of the courts. When the profession of law is reduced merely to business efficiency or to clever manipulations on one's client's behalf, then something is lost, not only to the practitioner thus patronized by her client, but to the society in which such lawyers practice. The law can help us reflect more deeply and concretely on our obligations to one another or it can help to strengthen the Hobbesian perception of society as a state of constant and barely restrained enmity. For this reason, if for none other, it matters to more than the legal profession what the future of legal ethics will be. Despite the plurality of moral beliefs in our age, we can still look for a law which implements our shared moral vision and hope for lawyers who (in Kant's phrase) act not merely in conformity with the law, but out of respect for it.
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 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.”

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”.

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 jurisdi-
tion 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 profession-
als. 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 preventa-
tive 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 profes-
sional 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.
Legal Ethics In General Legal Practice—Commentary

Nadja Tollemache
Banking Ombudsman

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 “suum 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. 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, 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 unedifying 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. 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, 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.

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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.