

## **ETHICS AND THE PROFESSION OF THE LAWYER**

**The Hon Justice Susan Kiefel  
High Court of Australia**

Practising lawyers do not just run a business, selling their skills and services to clients in return for fees. The practice of law is a profession and this sets it apart from other, commercial, enterprises. The word "profession" was first used to signify the taking of vows upon entering a religious order<sup>1</sup>. It took its modern meaning as an "occupation professed" in the mid-16th century.

There are many aspects of the legal profession which distinguish it from a business. It has standing in the community. It forms part of the legal system essential to our society and each lawyer has an integral role in that system. The courts within that system rely upon members of the profession. Lawyers have the trust and the confidence of their clients, that their interests will be properly protected and served.

Admission to the profession requires a person to be of good character. This is the first standard which applies to a lawyer wishing to practise. It encompasses much. Following admission a lawyer is subject to Rules of Professional Conduct and Practice, which serve a number of purposes. The Rules reflect the profession's thinking and identify standards of conduct for disciplinary purposes and serve as guides to practitioners. They cannot provide the answer to every ethical and moral question which a lawyer may face; for that a lawyer needs his or her own moral compass. A lawyer also needs a clear and firm understanding of what it is to be a member of the legal profession. It is in this regard that the profession's Code of Conduct may offer valuable guidance.

The profession of a lawyer demands that persons practising within it conform to the customs and character of the community. To do so is to be acting ethically. The word "ethics" derives from two Greek words – *ethikos*, which means practice and custom and *ethos*, which refers to character<sup>2</sup>. The "community" spoken of is the legal community which serves the wider society. The higher values of that society inform those of the profession.

The 2007 Rules of Professional Conduct and Practice promulgated by the Queensland Law Society are largely based upon the Law Council's Model Rules. The Rules and the *Legal Profession Act* of 2007, which authorises the making of the Rules, resulted from inquiries into the profession and a long period of debate and consultation. Codes of professional rules have, from

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<sup>1</sup> Onions et al (eds), *The Oxford Dictionary of English Etymology*, (1976) at 713.

<sup>2</sup> Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia*, 5th ed (2010) at 9 [1.9].

time to time, been subject to the criticism that they focus upon matters of practice, rather than what might be called "right-thinking" on the part of lawyers<sup>3</sup>.

Right-thinking may encompass the application of both moral and ethical standards. Whether there is a distinction between those standards because, for instance, they derive from different sources of values and rules, may be put to one side. Right-thinking may be more acceptable these days than the words "moral" or "ethical", because they seem rather strong and rather righteous. The description of a right-thinking person implies a person of integrity who is correct. And it is difficult to use "moral" and "ethical" in the abstract. I shall refer to all three since they each encompass aspects of an ethical lawyer.

The criticism that Codes are not more concerned with these matters may be unfair. It is difficult to import statements about general moral standards into a set of Rules which are used for disciplinary purposes. Nevertheless the Rules do show a real concern for the maintenance of moral and ethical standards. They state, as necessary to a practitioner, attributes such as honesty, integrity and loyalty to the client. They speak of duty in the service of the system of justice.

Questions about right conduct will arise for all lawyers and must be answered by them, drawing upon their own standards and guided by their knowledge of what is required as a member of the profession. The Rules serve to identify to the practitioner features of the profession which are essential to their understanding of right behaviour within it: the special relationship of lawyer and client and the high duty owed to them; the higher duty owed to the court and to the system of justice. And the Rules emphasise the need to maintain the standing of the profession in the eyes of the community, if its role in the system of justice is to be maintained.

Codes of professional conduct or ethics are not new. They were first formulated by medical practitioners 2,500 years ago and were later developed by some groups of Roman legal advisers. They were regarded as coming from sacred sources. A professional person's sense of their obligation was strengthened by this knowledge. The Law Council's Model Code of Conduct may not be seen to spring from such a high source. It was more likely the result of many committees. This means that lawyers today must look more to themselves in maintaining the standards set. Pursuant to the Theodosian Code, and later in Anglo-Saxon England, lawyers were required to take an oath that they would fulfil their professional responsibilities in a good and virtuous manner<sup>4</sup>. That remains the case today.

The requirement for admission as a lawyer under the *Queensland Legal Profession Act* is that a person be fit and proper to practise as a lawyer. In determining whether a person fulfils that description, the Court is required to consider that the person is of "good fame and character"<sup>5</sup>. The requirement of good character thus has an ancient heritage which endures today. It is based upon the premise that, as lawyers have "considerable power and responsibility in society, they must give the public confidence in their capacity to act fairly and to maintain appropriate standards of

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<sup>3</sup> See for example Cranston (ed), *Legal Ethics and Professional Responsibility*, (1995) at 1.

<sup>4</sup> Hutchinson, *Legal Ethics and Professional Responsibility*, 2nd ed (2006) at 62.

<sup>5</sup> *Legal Profession Act 2007* (Qld), ss 9, 31.

conduct."<sup>6</sup> Good character connotes moral or ethical strength, which is an amalgam of virtuous attributes or traits, which include integrity, candour and honesty.

The case of *In Re Davis*<sup>7</sup> concerned a lawyer who could not meet that standard. He was admitted, but subsequently it was discovered that he had been convicted on a charge of breaking and entering. He had failed to disclose the conviction on his application for admission. Justice Dixon recognised the numerous difficulties Davis had had as a young man, when he had committed the crime, but the point was that he had not been frank and honest with the court. He said that<sup>8</sup>:

"The fulfilment of the obligation of candour with its attendant risks proved too painful for the appellant ... In those circumstances the conclusion that he is not a fit and proper person to be made a member of the Bar is confirmed."

He was struck off and not readmitted for another 30 years, after four further applications.

The legal profession stands both apart from, and is a part of, our wider society. The norms of society have always influenced and shaped our laws. It is therefore understandable that they will inform the standards required of lawyers. Justice Cardozo said<sup>9</sup>:

"Law is, indeed, an historical growth, for it is an expression of customary morality which develops silently and unconsciously from one age to another."

We can see the influence of customary morality, in particular, in the development of the law of negligence, in the right-thinking behaviour that it requires. We can see it reflected in the laws of contract and agency and of course in the development of notions of fiduciary responsibility, which is the hallmark of the profession of lawyer. It has been said that to be of moral character requires "those qualities of truth-speaking, of a high sense of honour, of granite discretion, [and] of the strictest observance of fiduciary responsibility"<sup>10</sup>.

The duty of fidelity, or loyalty, to a client, is said to derive principally from the position of lawyers as fiduciaries<sup>11</sup>. The fiduciary relationship also explains the duty of confidentiality owed to clients. The Rules of Professional Conduct require a practising lawyer to be acutely aware of the fiduciary nature of their relationship with a client and to maintain the confidentiality of their affairs.

It is a common misunderstanding, however, that a lawyer is obliged to do the bidding of the client and to act on their every instruction. In this, as in many things, a lawyer's sense of right-thinking must inform decisions as to the proper course of action, when faced with a demand

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<sup>6</sup> Hutchinson, *Legal Ethics and Professional Responsibility*, 2nd ed (2006) at 62.

<sup>7</sup> (1947) 75 CLR 409.

<sup>8</sup> *In Re Davis* (1947) 75 CLR 409 at 426.

<sup>9</sup> Cardozo, *The Nature of Judicial Process*, (1929) at 104-105.

<sup>10</sup> *Schwartz v Board of Bar Examiners of the State of New Mexico* 353 US 232 (1957) at 247 per Frankfurter J.

<sup>11</sup> Cranston, *Legal Ethics and Professional Responsibility*, (1995) at 12.

from a client to pursue the client's interests at all costs. It should not be assumed that the correct course of action is always obvious, as an example given by a professor in legal ethics of the response of students, on the cusp of becoming lawyers, confirms<sup>12</sup>.

The professor gave his class a hypothetical. He said to them – your client tells you that he has discovered he is HIV positive from a botched injection by his doctor. Negotiations towards a settlement proceed and the doctor's lawyers appear willing to settle for a sizable amount. Shortly before the settlement, the client informs you that he has had a second medical examination and the good news is that it has revealed conclusively that he is not HIV positive. He insists however that you continue the negotiations on the basis that he is and to take the offer of settlement. He asked the students: what should they do? To his consternation a significant number of them insisted they should follow the client's instructions.

If the students had thought about the role of a professional lawyer, it might have occurred to them that there were other interests at stake, greater than their client's interests – public interests. These interests are recognised in the Rules of Professional Conduct. The Rules require that practising lawyers do not, in the service of their clients, engage in or assist conduct that is calculated to defeat the ends of justice. They are required to conduct their dealings with other members of the community and the affairs of their clients according to the same principles of honesty and fairness that are required in relations with the courts and in a manner consistent with the public interest<sup>13</sup>. A lawyer's duty to the court is, of course, one of the utmost candour and honesty, as the decision *In Re Davis* attests.

The commitment made by a lawyer on admission is not simply to abide by a set of rules. It is a commitment to honesty and integrity in the practice of the profession of law<sup>14</sup>. A degree in philosophy is not necessary to an understanding of honesty. This point was made by Sir Owen Dixon, speaking in *Jesting Pilate and Other Papers and Addresses*<sup>15</sup>. And Justice Rich also pointed out, many years ago, that there does not need to be a legal definition of wrongdoing for a charge of misconduct on the part of a solicitor. His Honour considered that it is enough that the conduct in question is indicative of a failure to understand "the precepts of honesty and fair dealing in relation to the courts, his clients and the public"<sup>16</sup>. To this may be added that honesty in a lawyer must extend to self-analysis.

Another common misconception equates a lawyer with the lawyer's client. One method of dealing with the misconception is to choose one's clients and their cases carefully. Absent a cab-rank rule, most lawyers may consider it their right to decline to act for a person in the exercise of a moral judgment about that person. If lawyers are to be right-thinking, why should they not be

<sup>12</sup> Hutchinson, *Legal Ethics and Professional Responsibility*, 2nd ed (2006) at 1.

<sup>13</sup> Law Council of Australia, *Model Rules of Professional Conduct and Practice*, "Relations with Third Parties", (2002).

<sup>14</sup> As Cranston observes, *Legal Ethics and Professional Responsibility*, (1995) at 1.

<sup>15</sup> Articles collected by Judge Woinarski, 2nd ed (1997) at 129.

<sup>16</sup> *Kennedy v The Council of the Incorporated Law Institute of New South Wales* (1940) 13 ALJR 563 at 563.

permitted moral activism, which permits the course of action which the individual considers to be right? But consideration may also need to be given to the social imperative that all persons should have legal advice and representation.

Two examples illustrate the problem.

Abraham Lincoln, a lawyer as well as a politician, appears to have been a moral activist. He is reported to have said to a person for whom his firm refused to act<sup>17</sup>:

"Yes, we can doubtless gain your case for you; we can set a whole neighbourhood at loggerheads; we can distress a widowed mother and her six fatherless children and thereby get you six hundred dollars to which you seem to have a legal claim, but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember that some things legally right are not morally right. We shall not take your case, but will give you a little advice for which we will charge you nothing. You seem to be a sprightly, energetic man; we would advise you to try your hand at making six hundred dollars in some other way."

The choice made by Lincoln was no doubt personally very satisfying and would have been much approved by the press and members of the public, although perhaps not by those who could not recover money they had loaned.

Let us consider another unattractive client, the American Nazi Party which, in more recent times, faced the same difficulty in obtaining representation as Lincoln's client. No private lawyers in Chicago were prepared to represent the Nazis at the hearing of an injunction, brought by others against them, to prevent the public meetings which the Nazis were attempting to organise. But on this occasion the American Civil Liberties Union felt honour-bound to take on the case, although they were heavily criticised for doing so. The Civil Liberties Union's attempts to explain that their actions did not mean that they supported the party or approved of its views were to no avail<sup>18</sup>.

The Civil Liberties Union had a moral standpoint, as did Lincoln. But, as the Union clearly understood, in their case the public interest in the representation and defence of every person was at stake. Although the actions of lawyers in taking on unpopular causes are more evident in the criminal sphere, lawyers in other areas cannot consider themselves immune from such decisions. In any such case the question which must be addressed is: what is required of a member of the legal profession?

Another obligation dealt with by the Society's Rules of Conduct is the avoidance of conflicts of interest. Conflicts of interest are ever present. Conflicts between the interests of two clients of the same lawyer should be evident. Nevertheless, some lawyers appear to struggle against the loss of one or both of them. Self-interest is powerful. Self-interest may be present at many levels, including in the way lawyers undertake their role, provide their services and charge their clients.

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<sup>17</sup> Luban, *Lawyers and Justice: An Ethical Study*, (1988) at 174.

<sup>18</sup> Dare, *The Counsel of Rogues?*, (2009) at 11, referring to Basten, "Control and the Lawyer-Client Relationship", (1981) 6 *Journal of the Legal Profession* at 7-38, 35.

The weekly Legal Affairs newspaper columns, on occasions, appear indistinguishable from the business pages. They speak at length about the size of the earnings of law firms, where they see their business coming from, which firms have succeeded in tenders for government contracts and their strategies for further growth.

Of course no-one can question the need for law firms to make a profit or that lawyers who work hard should not earn a good living, even a very good living. But it cannot be denied that the profession has been subject to increasing commercialisation in the way practices are conducted. Firms take on the character of businesses; in the case of some, rather big businesses. Concerns about the adoption of business models for legal practice and the elevation of the profit motive have been expressed for many years by judges here and abroad.

Legal firms have always had to act in a business-like manner in order to survive. The market for legal services is highly competitive. Competition may be a good thing in some respects, particularly if it promotes best practices and provides value to clients for services. Even so, Richard Posner suggests that, whilst competition may not erode ethical obligations owed to a client, it may do so with respect to a lawyer's obligation to the court for the reason that competition implies the subordination of these interests to the consumer<sup>19</sup>.

A lawyer's duty to the court is paramount. Lawyers who practise regularly in the courts or have dealings with the courts are, unconsciously, reminded of this and of their role in the legal system. Lawyers who do not have that connection in their day-to-day practice may not have the benefit of this perspective. A sense of remoteness from the operation of the profession in its traditional role is not helpful to a lawyer. The sense of what it is to be part of the profession should not be lost.

It should not be suggested that lawyers operating in areas remote from the courts cannot and do not maintain professional standards. But the world of commerce has different imperatives. It would not serve lawyers well to equate themselves with their clients, nor should they conduct all aspects of their practice as their clients might run a corporation. Commerce does not have the standing of a profession such as law. It does not have the confidence and trust of the public, which the legal profession seeks to maintain by its standards. The standards of conduct required of a lawyer are *professional* standards. This should not be lost sight of.

All lawyers must have a strong moral and ethical sense to be right-thinking. An ethical lawyer is not just one who has an awareness of a Code of Conduct and what may constitute a breach of that Code. A guide to right conduct is provided by an understanding of the place of the profession in the legal system and therefore in society; an understanding not only of the duty to a client but to the court and to the public interest in the maintenance of a working legal system. Lawyers may generally be said to be necessary to the working of the law in all its respects. But it is only the ethical lawyer who is essential to a system of justice.

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<sup>19</sup> Posner, "Overcoming Law", in Rhode and Luban, *Legal Ethics*, 5th ed (2009) at 43, 45.