GREEK-AUSTRALIAN INTERNATIONAL LEGAL & MEDICAL CONFERENCE

31 MAY 1999

ARE THE PROFESSIONS WORTH KEEPING?

Murray Gleeson*

Of the influences affecting life at the end of this millenium, one which causes dismay, confusion, and demoralization, is the powerful centripetal force of commercialism. It has affected so many aspects of our lives and our environment, that nothing seems to be immune, least of all professional life.

Professional associations now encourage their members to engage in marketing behaviour which, until a few years ago, they condemned as unethical. It is now taken for granted that being businesslike is a primary objective in the conduct of a professional practice, without much discrimination between those aspects of business conduct which are worth taking up, and those which are not. An American law professor has advocated a "professional

---

* The Hon Murray Gleeson AC, Chief Justice of Australia.

paradigm shift", discarding the "business-profession dichotomy" and accepting as a new paradigm, in the public interest, "law practice as business"[1]. In Australia, the professions are under pressure to conform to national competition policy, and the State and Territory governments have subscribed to a Competition Principles Agreement, which is reinforced by financial sanctions administered by the Commonwealth Government. The agreement involves adherence to a competition code which applies the scheme of the Trade Practices legislation to all anti-competitive business practices. In that context, no business-profession dichotomy is recognized[2].

For many years people within the professions have been asking whether the professions are becoming a business. There is an equally important question: who cares? The public should be encouraged to think about what they expect of the professions. Members of professions need to think about the same thing. Practitioners of medicine and the law, who claim to value their

---

1 Russell G Pearce, New York University Law Review, Vol 70, No 6, Dec 1995, pp 1229-1276.

2 Justice Santow, however, in *Prestia v Aknar*, Supreme Court of New South Wales, Equity Division, unreported, 30 April 1996 saw a difference.

professional status, cannot simply wring their hands and accept devaluation as though it were inevitable.

There could be no better occasion for examining the issue than a gathering of people associated with the medical and legal professions, in this place.

When Hippocrates conceived the idea that medical practitioners should take an oath in common form, it may be assumed that he met some opposition. Local economists would have regarded the proposal as anti-competitive. Other critics would have complained that the idea was elitist. Some practitioners would have gone off to consult lawyers, seeking advice as the precise limits of the restraints imposed on them, and as to how those limits could be circumvented. The organising committee of the Olympic Games would have expressed concern at the prospective loss of sponsorships from manufacturers of pessaries.

The terms of the oath provide a useful summary of the elements of a profession. First, there is a recognition of the importance of formal instruction in an art or science, an acknowledgment of indebtedness to teachers, and an acceptance of an obligation to impart knowledge to others. Next, there is an undertaking to pursue the welfare of patients. There is a promise to

behave in a manner that will not bring the calling into disrepute. There is an undertaking to respect professional confidence. Above all, there is a commitment to the idea of conduct governed by a sense of duty to help others. Hippocrates evidently did not subscribe to the theory that the best way to promote effective health care delivery in Kos was to encourage medical practitioners to pursue their own enlightened self-interest in competition with one another. Perhaps he had less confidence in doctors than Adam Smith had in bakers. Or perhaps he thought it was in the public interest that doctors should be encouraged to think they were in some respects different from bakers.

Lawyers, some people may be surprised to know, originally regarded it as beneath their dignity to charge for their services. Until very recently, in Australia, and in England, barristers, unlike solicitors, could not sue to recover their fees[3]. This did not prevent some of them from arranging to be well paid, and the concept that their fees were technically gratuities was an anachronism that was properly abandoned. But the underlying idea, that they were officers of the court exercising a privilege of audience on behalf of

---

3 For the historical explanation, see *Rondel v Worsley* [1967] 3 WLR 1666.

litigants, is worth keeping, and judges still insist that a lawyer's duty to the court overrides any duty to the client.

In its widest sense, the term "profession" can apply to any organized pursuit or calling. Even in the narrower sense, with which this paper is concerned, it is imprecise. In its modern meaning it undoubtedly extends beyond the four traditional professions: medicine, law, divinity, and the military. Indeed, it is not clear what those four have in common that distinguishes them from others. There is no reason why the traditional professions should resist the extension of the concept, and every reason why they should support it. Professions, in the narrower sense, have the following attributes. First, they involve the exercise of some special skill, not available to the people generally, based upon an organized body of learning, and imparted by systematic instruction[4]. Secondly, the members of the profession usually, although not invariably, enjoy some form of exclusive right to provide their services to the public for reward[5]. Thirdly, the

---

4 Not, however, necessarily involving university education. To this day, admission to practice as a lawyer in New South Wales does not require a university degree.

5 eg *Legal Profession Act* 1987 (NSW) s 48B, *Medical Practice Act* 1992 (NSW) s 104, 105.

profession publicly avows, or professes, obligations of service to the community and its members accept that such obligations constrain their pursuit of individual self-interest. Fourthly, professions are permitted, and actively pursue, a substantial degree of self-regulation.

The third of those elements has been regarded as vital to the difference between professions and other businesses. Justice Sandra Day O'Connor of the United States Supreme Court said[6]:

> "One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market".

The distinction has never been clear-cut, but that does not mean it is unimportant.

Many businesses, and vocational groups who do not regard themselves as professions, subscribe to codes of conduct, or, in more modern times, service charters and mission statements, which correspond to codes of professional ethics. Furthermore,

---

6 *Shapero v Kentucky Bar Association* (1988) 486 US 466 at 488.

professional codes themselves are often an amalgam of precepts of ethics, and etiquette, and considerations of enlightened self-interest. Typical codes of behaviour for lawyers, at least until recently, devoted as much attention to prohibitions against advertising and price cutting as they did to requirements of duty to clients and to courts. Much of what used to be called professional ethics was an elaboration of traditional forms of courtesy which, although not unimportant, reflected manners which could change with time, and was not based upon considerations of public interest. Some of the content of professional "ethics" was also frankly anti-competitive, and was bound to attract critical attention in an age which, rightly, values competition as a means of promoting both the public interest and equity with organised groups.

The distinction drawn by Justice O'Connor was also blurred by the notorious failures of the professions to live up to the standards they set for themselves. The shortcomings of lawyers, in that respect, are widely known. Through the ages, they have been celebrated in prose, verse, and popular humour[7]. An American

---

7 Scriptural castigation of "lawyers", however, should be understood in the light of the fact that the lawyers there referred to were the counterparts of the modern clergy, not of barristers and solicitors.

scholar, Professor Rhode[8], observed that, throughout history, the legal profession seems to have been permanently in decline. Noting that for more than two thousand years commentators had been remarking on the lowering of standards of behaviour amongst lawyers, she concluded that, if there had been a fall from a state of grace by the profession, it must have occurred at a very early stage in its history.

Consider the following passage from a work describing the decline in the standards of lawyers:

> "Some of them procured admittance into families for the purpose of fomenting differences, of encouraging suits, and of preparing a harvest of gain for themselves or their brethren. Others, recluse in their chambers, maintained the gravity of legal professors, by furnishing a rich client with subtleties to confound the plainest truth, and with arguments to colour the most unjustifiable pretensions ... Careless of fame and justice, they are described for the most part as ignorant and rapacious guides, who conducted their clients through a maze of expense, of delay, and of disappointment; from whence, after a tedious series of years, they were at length dismissed, when their patience and fortune were almost exhausted."

---

8 Deborah L Rhode, The Professionalism Problem, William and Maris Law Review Vol 39 No 2 Jan 1998 p 283.

That was written by Edward Gibbon in "The Decline and Fall of the Roman Empire"[9]. It was written about lawyers in Byzantium in the Third Century.

Even this history of lamentation, however, has an encouraging side to it. Implicit in some of the criticism of professional people, for behaviour of a kind that would not be regarded as extraordinary, or even reprehensible, if engaged in by people in trade or commerce generally, is an acceptance of the idea that the public are entitled to expect more of them.

The idea of a professional calling has been said to involve a "cluster of belief and attitudes: a belief that the field of work has special importance to the public welfare; a belief that those engaged in this work can, for better or worse, affect the public good, and that therefore it is important that they consider themselves to be engaged in a form of public service; a belief that the work is complex and performing it well is not easy, and that it is important that those performing it be competent and dedicated to performing it at a high level; and a belief that through continuous

---

[9] Edward Gibbon, The Decline and Fall of the Roman Empire, Vol 1, Ch 17, p 245.

and collective improvement the profession can make increasingly valuable contributions to the public good" [10].

Another characteristic of a profession used to be the idea of reputation, and eminence, within the profession, rather than public esteem, or financial success, as the mark of professional achievement. What doctors and lawyers valued most was the good opinion of their peers. This, again, was not without some negative aspects, and it was never absolute. Some of the justifiable criticisms of the professions are based on their tendency to be inward-looking and exclusive, and insufficiently responsive to community values and opinion. Further, there have always been successful professional people who pursued public acclaim and financial success as vigorously as any entrepreneur. Even so, a concern for the good opinion of other members of the profession is a salutary thing, and usually tends to promote standards of behaviour which serve the public interest. The legal test of serious professional misconduct is conduct which would be regarded as disgraceful or dishonourable by right-thinking members of the profession.

---

10 Carl T Bogus, "The Death of an Honorable Profession", (1996) Indiana Law Journal, Vol 71, p 911 at 937-938.

Professional eminence, of course, can be closely related to a capacity to command high fees. This has implications both for the public interest and for equity within the profession. The long-standing practice of formally recognizing eminent barristers as Senior Counsel is a subject which is at the interface between professional self-regulation and competition policy.

In the United States, one of the major challenges to the idea of professionalism came from the exposure of the legal profession, and other professions, to scrutiny under the antitrust laws[11]. Professional rules against price competition and advertising were held to be subject to the *Sherman Act*, and many such rules were struck down. In *Goldfarb v Virginia State Bar*[12], the Supreme Court held that a bar association's rule prescribing minimum fees for legal services was unlawful. However, it was not the lawyers who bore the brunt of this decision. To a considerable extent the legal profession gained shelter from Federal regulation because it was largely organized on a State basis, and its rules were sanctioned and controlled by the State Supreme Courts, lawyers being officers

---

11 For a detailed examination of this subject, see Thomas D Morgan, The Impact of Antitrust Law on the Legal Profession, 1998, 67 Fordham Law Review, 415.

12 421 US 773.

of those courts. The engineers were not so well protected. Although acknowledging that "engineering is an important and learned profession", the Supreme Court, in *National Society of Professional Engineers v United States*[13] in 1978, struck down consulting engineers' rules against competitive bidding, saying[14]:

> "The *Sherman Act* reflects a legislative judgment that ultimately competition will produce not only lower prices, but better goods and services."[15]

In Australia, numerous professions, or sections of professions, are being challenged to measure up to competition policy. In the medical profession, for example, the issue of accreditation by colleges, including accreditation of people with overseas qualifications, is sensitive. The State of New South Wales has agreed to review the *Legal Profession Act* 1987 (NSW) for conformity with national competition policy. The procedures for the appointment of Senior Counsel are being examined. Many other examples could be given.

---

13 435 US 679.

14 435 US 679 at 695.

15 See also *Federal Trade Commission v Superior Court Trial Lawyers Association* 493 US 411, 1989.

One of the circumstances attracting this kind of attention is the extent to which medical and legal practitioners are now paid for their services from public funds. The amount of public money devoted to legal aid is modest compared to the amount spent on health care, but in both areas it is inevitable that legitimate demands for accountability will involve an attempt by governments to be assured that they are getting value for money and that charges for professional services are not excessive. The Government would not be doing its job if it did not concern itself with this matter.

Governments, and regulators, and the professions themselves, are working out the extent to which professions must conform to a competition policy which was primarily designed for business, and which is based upon assumptions about the behaviour of suppliers and consumers of goods and services that are commercial, and founded on self-interest. They will have to address some fundamental questions. What should now be expected of professions? Are they no more than businesses? Are they worth keeping? If so, at what price? In answering those questions the guiding principle must be the public interest.

Although there are areas of disagreement about the structure of the various professions, and the way in which they should be

regulated and controlled, and there are criticisms of what are said to be unnecessarily and inappropriately anti-competitive aspects of their rules and practices, there seems to be no serious challenge to the basic restriction on competition which sustains the medical and legal professions. Few would suggest that anybody in the community who wishes to do so should be entitled to provide medical or legal services to others for reward, regardless of lack of training, experience, qualification or accreditation. In that respect, therefore, the market for the supply of medical and legal services is not, and no government suggests it should be, freely competitive. In Australia, the membership of both professions is large, and they are accessible on merit. Membership is not restricted to people from privileged or affluent backgrounds. Both professions have supported a substantial growth in centres of professional training, mainly at universities. Reasonable accessibility to the professions is an implied condition of the continued acceptance, by the community and governments, of the monopolies upon which the professions are based.

There is, however, argument about the range of services to which the exclusive rights given to members of the legal and medical professions should continue to apply. Proposals that people other than qualified doctors and lawyers should be able to provide certain medical and legal services will continue to generate

debate, but they are not central to the theme of this paper. So long as it is accepted that doctors and lawyers will continue to have the exclusive right to provide some services, then that condition of the continuation of the professions will continue to exist.

Granted their existence, however, there remain issues as to role and purpose of the professions, their structure and governance, accreditation, and regulation. Accepting that doctors and lawyers are worth having, that some of their skills are indispensable, and that it is in the public interest that they should retain the exclusive right to supply some services, it does not necessarily follow that they should continue to function, organize and regulate themselves, and be treated as professions, rather than guilds, unions, or trade associations. There is a question whether they should be permitted to associate at all; or at least to associate along the traditional lines of a profession.

If, to the proposition that the professions are now businesses, and ought to behave and be treated accordingly, there is added nothing more than a grudging acceptance of the minimal necessity to prohibit people other than qualified and accredited doctors and lawyers from providing certain kinds of health care or legal services, then what purpose is served by having a medical profession or a legal profession? Why should the government not

simply license doctors and lawyers, giving them the minimum monopoly rights consistent with the safety and interest of the public, and otherwise forbid any form of association and self-regulation going beyond that lawfully available to any other trade association?

It appears that most members of the community do not believe that professions are merely businesses. At all events, very few people seem willing to follow such a proposition through to its logical conclusion. Governments and regulators continue to act as though they accept that the professions are worth keeping. Unless they hold that view, in challenging particular aspects of professional organisation, but otherwise permitting the professions to continue to function as self-regulating entities, they are straining at gnats and swallowing a camel.

Insofar as the argument relates to the structure, governance and regulation of the professions, rather than their very existence, another question demands consideration. What level or degree of governmental or other outside participation in the affairs of an organization is consistent with its continued existence as a profession?

In practice, political decision-making does not usually operate at this level of principle. Questions of expediency and, above all,

cost, play a role in determining how far any push against self-regulation by the professions is likely to be taken. What government would seriously want to take over the responsibility of regulating the medical profession? Self-regulation involves a large amount of unpaid work by people whose time is valuable. An attempt to bureaucratise the process would involve substantial cost to government, for little evident benefit. The same economic rationalism which provokes demands for more accountability by the professions also tempers any enthusiasm for taking over the responsibility of running them.

Where does the public interest lie? Can it be that the best argument in favour of keeping the professions is that it would be costly to replicate by governmental action much of the work they do? I would answer that question in the negative. However, I would be willing to make a substantial concession, which is demanded by considerations of reason and practicality.

Because of the exclusive right to provide some services which the law confers upon doctors and lawyers, the public rightly expect that they will accept collective responsibility to do what, within their powers, they are able to do, to ensure reasonable public access to those services. No factor more directly affects public access to services of any kind than the cost of those services.

It is here that competition policy is intended to have its main impact. (It is also aimed at assisting to achieve greater equity within the professions, but that is a separate issue). Whatever may have been the case in past times, it is now clear that the public can no longer rely solely on collective or individual restraint on the part of professional people to keep fees at levels which mean that their services are generally available.

Some points need to be made in order to put the matter of fees into perspective. First, nobody is entitled to expect that the services of a leading Queen's Counsel will be available, at an affordable price, to any person who wants to litigate in any case, large or small. Secondly, the fees charged by even the most successful lawyers are often considerably lower than the fees charged by some providers of financial advice and services. Thirdly, self-employed people who charge on the basis of their time are limited in what they can earn by the availability of time. Fourthly, it is misleading to use the fees charged by the most senior and successful members of the profession as an indication of the fee levels that apply generally throughout the profession. Fifthly, the individuals and corporations who engage the services of the leaders of the legal profession are usually, (although not always), able to look after their own interests.

That having been said, professional fees have such an important bearing on access to justice, or to health care, that the public, and governments, have a legitimate concern about mechanisms to ensure their reasonableness.

Price control is no longer accepted as a practical method of dealing with the problem. There was a time, not long ago, when courts fixed scales of fees charged in litigation. Similar scales applied to other legal services, such as conveyancing and probate. Ultimately, however, this came to be seen to be a clumsy and ineffectual process, as price control usually is. There may be still be limited instances in which scales can perform useful functions, but bureaucratic regulation of fees for services is not a solution likely to appeal in the twenty-first century. This leads to the concession which has to be made.

It is impossible to resist the argument that the community must look to the process of competition for systematic and long-term constraint in the pricing of professional services. In the market for professional services, providers, naturally, will want to maximise, or at least, optimise, their incomes. If permitted to fix their prices by agreement between themselves, and confront

consumers with charges struck accordingly, they, or many of them, will seek to do so.

To acknowledge this, however, is not to accept that competition alone is sufficient to safeguard the interests of the public.

The effectiveness of competition as a mechanism for limiting professional fees, at least in the legal profession, varies. In the case of relatively standardised services, such as conveyancing and probate, or routine litigation, where there are a large number of potential service providers, and a reasonably level playing field, competition has had a substantial effect on fee levels. At the other extreme, there are some areas of legal practice, including major litigation, and some corporate and financial advising, where the cost of legal services is , by any reckoning, high.

There is one important respect in which competition theory, in its application to some professional services, does not correspond with reality. Consumers of professional services are often not well placed to decide for themselves the extent of their need for services. Consider, for example, in the area of medical practice, the matter of diagnostic services. How is competition likely to prevent over-servicing? How can patients, as consumers, make a

judgment as to their need for diagnostic services? In the area of legal practice, major litigation provides a good example of a similar problem. Most solicitors now charge at hourly rates. The rates charged by competing solicitors are readily compared, but what is equally important is the number of billable hours to which those rates are applied. Even the most sophisticated client is likely to be at a disadvantage in making a judgment about the reasonableness of the time spent by the solicitor on various aspects of the case.

Apart form over-servicing, there are other aspects of professional behaviour to which competition can provide only a limited and unsatisfactory solution. Frequently, the playing field is not level. Some providers of services, because of their personal skill or reputation, are in a position to act almost without competitive constraint. Furthermore, some practices concerning the method by which fees are set, known in other countries, but still regarded as impermissible in Australia, could readily be undertaken by some professionals here if they were at liberty to do so.

There may be many grounds for complaining about lawyers' or doctors' fees, but it is worthwhile considering what some of them might do if they were not constrained by standards of professional behaviour.

Reliance on competition alone is insufficient. The constraint upon the pursuit of self-interest which is an essential aspect of professionalism also provides a necessary form of protection for consumers of services. Let me give a practical example, concerning the issue of contingency fees in litigation. Many lawyers in New South Wales have, for a long time, in one particular area of practice, operated on the basis of contingency fees. They are lawyers who act for plaintiffs in claims for damages for personal injury. This has had a significant and generally beneficial effect on access to justice. However, the practices adopted by some United States lawyers in relation to the method of charging contingency fees have never been regarded as professionally acceptable in Australia. As the charging of contingency fees becomes more widespread, then the controls imposed by standards of professional behaviour, including the need to avoid conflicts of interest, have become more, not less, important.

The setting and enforcement of standards of professional behaviour in relation to matters other than fees will also continue to be at least as important in the future as in the past. In particular, the development and policing of ethical standards, and standards of competence, will remain a vital role of the professions. Consider, for instance, the ethical challenges which the medical profession will face in the next ten or twenty years. Some of these will, no

doubt, be examined in other papers to be given at the Conference. Can it seriously be denied that a strong, effective and independent profession, with an historic sense of duty, is essential to a resolution of those issues in the public interest?

Both the medical and the legal professions need, at the present time, to give more, not less, attention to the formulation and refinement of their ethical standards, and to the promotion of those standards amongst their members. The leaders of the professions, and those responsible for professional education, may need to engage in some self-examination about this matter. How clear are the ethical standards of the professions at the moment? What systematic instruction in those standards is given to members of the professions? At least in relation to the medical profession, others are better informed about the answers to those questions. It is to be hoped, however, that someone is asking them.

The idea of professionalism is as important now as it ever was. It should be reinforced, not devalued. Members of the traditional professions should not see themselves as jealously preserving ancient privileges. They should support other vocations wishing to take up the idea. The status of a profession should not be a badge of exclusivity. Rather, it should be seen as an acceptance of responsibility, and encouraged. Provided they

understand the reason for their existence, and accept that the public interest is the ultimate test of the legitimacy of their practices, the professions are more necessary than ever, and well worth keeping.