

Professional Legal Education in the Multi-Disciplinary Corporate Environment

Australasian Professional Legal Education Council Annual Conference

Welcome Address by Justice P.A. Bergin Nov 12 1999. University of Wollongong. Faculty of Law

Of lawyers of another era it has been said that they were for the "most part 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". [Edward Gibbon The decline and fall of the Roman Empire Vol. 1 Chapter 17 p 245.](#)

Although this was said to be a description of lawyers in the Byzantine State in the 3rd Century [Chief Justice M Gleeson "An Honourable Profession?" The Inaugural Lawyers Lecture. Introduction St James Ethics Centre. 23 July 1996.](#) similar sentiments have been expressed in relative terms in our popular press in the late 20th Century.

I understand that the theme of your conference is "Achieving Peak Practice in Professional Legal Education". I also understand that you are involved in the pre-admission training of future legal practitioners in Accredited Practical Legal Training courses.

So many authors, professors, practitioners and commentators have written and spoken about the responsibility of law teachers to give attention to the ethical underpinnings of legal practice. You will no doubt be provided with more wisdom on this topic in the next two days.

I am reminded of the Honourable TEF Hughes QC's analysis of the role of barristers and the need for diligence in maintaining standards within the profession. Hughes QC said:

"The public is entitled to scrutinise our behaviour because ours is no private calling. Moreover, our decisions, even our instinctive mental reflexes translated into action on the floor of a courtroom may have far reaching effects on the lives and fortunes of other people. Our mistakes, when we make them, are not entitled to soft judgment. If we are harsh in our evaluation of our own performance there is less chance that others will be, because frank self-evaluation is a great spur to improvement". [The Honourable TEF Hughes QC, "Art of Advocacy", Proceedings and Papers of the 7th Commonwealth Law Conference, Hong Kong. 1983.](#)

Your role is pivotal to the development and maintenance of proper standards of professional conduct within the legal profession. Your role is also pivotal to the development of a culture within the legal profession which will embrace the "frank self-evaluation", which Hughes QC advocated, as an essential feature of the legal profession.

Hughes QC's statement that the mistakes of barristers are not entitled to "soft judgment" was of course a statement made in 1983 prior to the recent developments that we have seen in both the Federal Court and the Supreme Court where barristers and solicitors have been held liable to clients in respect of out of court work. [Yates Property Corporation \(In Liq\) v Boland \(1998\) 157 ALR 30; \(1997\) 145 ALR 169; NRMA Ltd v Morgan \(1999\) 31 ACSR 435.](#) In particular in one of those cases [NRMA Ltd v Morgan \(1999\) 31 ACSR 435 at 738 pars 1210 and 1211.](#) the Court found that it was the duty of counsel to not only read the transcript of an application for leave to appeal but also if the grant of special leave signalled the need, to peruse the transcript of argument on appeal. This was for the purpose of analysing the exchanges between Bench and Bar for the purpose of assessing the likelihood of the outcome of such an appeal.

If one takes the law as it presently stands [Noting that both of these cases are subject to further appeal.](#) you may think that the obligations and duties of legal practitioners are not only expanding but will obviously be the subject of very close scrutiny not only by the Courts but by disappointed clients. It seems there is a view amongst the legal profession that legal practitioners should assume that the prospect of facing a suit from a disappointed client will increasingly become a fact of life ["Two recent decisions against Counsel". Justin Gleeson and Geoffrey Kennett.](#) This is an environment in which you must prepare legal practitioners for practice.

However there is more. Two recent and significant events that will impact even further upon your lives are firstly the New South Wales Law Society Council's approval of the multi-disciplinary partnership manner of practice for solicitors as contemplated by s 48G of the Legal Profession Act 1987, as amended; and secondly, the Council's recent resolution that in principle:

"there should be no restrictions on the holding of shares in an incorporated legal practice subject to legislation providing adequate safeguards for the integrity of the conduct of legal practice and the appropriate amendment of the professional conduct

and practice rules. [Settled: no restrictions on shareholding and legal corporations Law Society Journal July 1999 p 71.](#)

The Law Society's Professional Regulation Task Force May 1997 recommendations which led to this resolution were that solicitors should be free to incorporate under the Corporations Law and:

- (1) be able to raise capital from the market generally; and
- (2) there should be no restrictions on shareholding.

The ethical underpinnings of legal practice have now become even more significant in the environment of the multi-disciplinary partnership and with the prospect of incorporation.

The role of legal practitioners in the administration of justice requires them to act honestly, fairly, skilfully, diligently and bravely. The intermingling of business interests in the multi-disciplinary partnership and corporate setting will no doubt test the limits of the ethical underpinnings of the legal profession.

It has been said that a "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". [Shapero v Kentucky Bar Association \(1988\) 486 US 466 at 488.](#)

Consistently with present principles it will be your task to identify the arrangements in this modern practice of the law which may present temptations to the practitioner to prefer the economic pursuit of success to the adherence to ethical standards of conduct.

Having identified such arrangements it will be necessary for you to analyse the predicaments in which the modern practitioners will find themselves dealing with very different dilemmas from those of the past when these concepts of the multi-disciplinary partnership and incorporation would only have been viewed as a creation of fiction. But they are now the reality and are features of the legal profession with which you must grapple not the least because it will be in the community's interest to protect the profession against any diminution in its status as a profession by reason of these changes.

The fact that these arrangements in modern times will be more complex means also that your task will be more complex.

A sign of things to come was referred to in the Australian Financial Review last Friday [Hearsay Andrew Burrell; Australian Financial Review November 5 1999 p 30.](#) The reader was informed that an "intriguing development" had occurred in South Africa which could not now be ignored in Australia. The development is that one of South Africa's biggest law firms, Edward Nathan, has sold a "large chunk of itself" to the investment bank Nedcor in what is being "hailed as the first deal of its kind in the world". The investment bank is to pay about \$100 million for Edward Nathan's corporate and commercial law business which will be merged with the bank's corporate advisory services.

The senior partner of the law firm is reported to have said that he would be "amazed if this were not the model everyone follows in two or three years time".

Chief Justice Gleeson has recently commented upon these changes that have been adopted by the Law Society. His Honour had this to say:

'One possible outcome is that the essential legal profession will contract in size. Perhaps there will develop a gap between those lawyers, barristers or solicitors, whose work is principally concerned with the administration of justice, and other legally skilled persons whose principal expertise is in areas more readily compatible with the services of accountants or merchant bankers, or the business practices of entrepreneurs. Perhaps the new multi-disciplinary partnership and corporations will find that their structures are difficult to adapt to the provision of some aspects of legal services; especially those concerned with the conduct of litigation. Perhaps courts will find that they need to assert their control over lawyers in ways that may come as a surprise to some of their more entrepreneurial associates. The competitive forces to which the profession is responding may ultimately force a reconsideration of the nature of the profession.' ["The Changing Paradigm". Chief Justice M Gleeson. Women Lawyers' Association of NSW 26 October 1999.](#)

These last two predictions of the Chief Justice that the courts will assert control over lawyers and that there will be pressure to reconsider the nature of the profession will in my view come to fruition in the not too distant future. If that be correct then your involvement in both of the processes referred to by the Chief Justice will be central.

It seems to me that the reality of control to which His Honour referred will not occur properly without the support and

commitment of the Associations governing the professional conduct of legal practitioners. It is also my view that the healthy reconsideration of the nature of the profession will depend upon the commitment of people such as yourselves and the Associations' willingness to expand their thinking in the flexible environment of competition.

Although the Chief Justice was of the view that another option in the light of the changes may be that lawyers will simply "have an opportunity to adopt more flexible, advantageous, operating structures" I am of the view that even if that is right the assertion of control and the reconsideration of the nature of the profession will be two features of the professional life of the legal practitioners of the future.

In all of this one of your essential tasks will be to develop and/or nurture an approach that firstly makes it easier for the practitioner to recognise the situations in which a conflict or ethical dilemma will arise in this new environment and that secondly facilitates a second nature in the practitioner to choose the ethical course as opposed to any other.

Your task in such a new environment is indeed a complex and challenging one. I wish you every success for the future and more particularly for what seems to me to be a very thought provoking and interesting Conference.

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