Third International Legal Ethics Conference
Sheraton Mirage Hotel, Gold Coast
Monday, 14 July 2008, 7 am
Breakfast with the Chief Justice, 'Integrity in Legal Practice'

The Hon P de Jersey AC
Chief Justice

I am very pleased to have the opportunity to speak with you this morning.

This day of the conference is designated 'Practitioners' Day', and its theme is 'Integrity in Legal Practice'. It gives me considerable pleasure to acknowledge, this morning, the excellent efforts of the Law Schools to inculcate proper ethical perceptions in prospective practitioners. The ethical component of practical legal training courses is properly regarded as but the supplementation of ethical training primarily administered by the universities. It is a responsibility the law schools discharge well.

I propose to begin these remarks by going back to the pre-admission period, to refer to a phenomenon which has assumed some prominence over the last decade or so. I refer to disclosure of circumstances bearing on fitness to practise.

It was the highly publicised spate of tax problems burdening some members of the New South Wales Bar which focused our Supreme Court Judges' attention on whether applicants for admission were turning their minds sufficiently to the need for candid disclosure of any matter which may bear on fitness to practise. We amended the form of application for admission to highlight that imperative. Then followed a level of disclosure which frankly surprised me, traffic offences not surprising, but extending to criminal offending, including offences of dishonesty.

I was especially surprised by the extent of 'academic misconduct' which came to light. That generic description embraces a wide range of dereliction, from mere carelessness in the use of apostrophes, to out and out dishonesty in the presentation of another's scholarship as if it is one's own. We took the view, again unsurprisingly, that to cheat, in any substantial way, in acquiring the qualification which bases admission to professional practice, bespeaks unfitness to practise. The public rightly expects utter integrity in its

lawyers. Accordingly that species of dishonesty has led to a denial or at least deferment of admission.

Where the misconduct was old, and could be characterised as what we term a 'one off aberration', with no adverse incident since, we have been inclined to admit the applicant.

I have been informed by our academic colleagues that the Court's approach, which sometimes has necessitated the ventilation of aspects of the breaches before a packed Banco Court, has probably contributed to a reduction in the incidence of plagiarism by law students. That is a good outcome, although the improvement should be motivated by appreciation of the wrongfulness of the conduct, rather than fear of the consequences of detection.

With the capacity of modern computer software to detect such infringements, for a dishonest law student to resort to plagiarism involves taking an audacious risk. The software apparently picks up a lot of minor infringement, such as failure to make sufficiently comprehensive attribution, as well as the graver variety. Fortunately, major plagiarism has apparently become a rarity among those seeking admission. At the admission ceremonies in June, for example, of about 80 applicants, there were I recall only three cases of academic misconduct, and all in the less serious category. There should be none.

I may live to regret saying this, but in my own addresses and papers, I am acutely alert to the danger of even subconscious copying. On the other hand, I was recently driven, in repeating a 'joke' I drew from a London tabloid, to acknowledge even that source.

What was the 'joke'? I was addressing the 60th anniversary dinner of the Queensland University Regiment. I suggested there was nothing wrong with the moderate consumption of alcohol, whether one be army officer or judge, of course out of hours. I

recalled Harold Wilson's foreign secretary, Mr George Brown. Wilson used to say of him: 'He was a brilliant foreign secretary until 4 o'clock in the afternoon.' I then recalled the story about Mr Brown's attendance at an embassy reception in Peru in 1967. He reportedly approached a diverting personage in a flowing crimson gown and asked for a dance. 'You are drunk', was the reply: 'that is not the cha cha cha, it is the Peruvian national anthem, and I am not a delectable young thing in red, I am the Cardinal Archbishop of Lima.' My address to the regiment recorded the source as 'Journalist Alison Little, UK Tabloid Newspaper.'

Once the newly admitted practitioner enters into practice, he or she may confront a lot of pressures these days: to satisfy the client; especially for the ambitious, to impress the partner – and maybe the judge or magistrate; to be regarded as a 'gun' lawyer; to satisfy and improve upon the firm's financial 'bottom line'. Any one of those goals may in itself be quite legitimate, provided there is recognition of the supervening ethical stipulation, which is the honest and competent service of the client, subject to the overriding commitment to the administration of the law and the Court. The practical reality is, however, that those pressures can and do lead into temptation.

For example, I have no doubt that the 'billable hours' regime has led to some overstatement and dishonest claiming: that may be explained, though plainly not excused, by the sorts of pressures to which I have referred. I understand, by the way, why solicitors firms have adopted that approach. It does, however, 'reward inefficiency' as others have observed, and for the latently deceitful, it invites dishonesty.

The last published report of the Legal Services Commission, for the year to 30 June 2007, records that as at that date, the Commission had 34 current 'prosecution files'. Those files alleged these species of misconduct: undue delay; failing to communicate; unauthorised dealings with trust money; overcharging, and charging on a time cost basis where there was no client agreement; obtaining a personal benefit while acting for a client in a conveyance; failure to disclose taxable income; sending a threatening letter to a

complainant demanding the withdrawal of the complaint; failure to honour an undertaking; failure to comply with an investigating body's directions; practising contrary to conditions imposed on a practising certificate by the Law Society; misrepresentations by one practitioner to another; and two-tier marketing – failure to disclose information to the detriment of clients.

A variety of cases come before the Legal Practice Tribunal. It must now sit for about eight weeks a year, spread out over the year. While I sought to steer that Tribunal through its 'bedding down' phase into this year, the judges broadly will hereafter sit in the Tribunal.

My impression is that the most frequent derelictions – delay and failure to communicate, dishonesty, overcharging, and unauthorised dealings with trust monies – often have spring from the sorts of pressures I earlier mentioned. There is also pressure to comprehend and take into account a myriad of legislative requirements, requirements which not infrequently change. The client pressures embrace, obviously, the desire to win, but also the pressure to gain the client's work in the first place. Modern practices have to tender for some work, and their approach must remain competitive if they are to retain the client. In this landscape, the pressure to gain the client and then 'win' for the client, can be immense. The consequent temptation for an expedient or even dishonest practitioner may be correspondingly large.

In the Legal Practice Tribunal, we have been alert to the prospect of moulding the Tribunal's responses in order to rehabilitate the errant practitioner, where that can be achieved consistently with the Tribunal's primary responsibility of community protection. For example, the Tribunal has from time to time conditioned its orders upon the practitioner's undertaking appropriate psychological treatment, or practice management courses run by the Law Society. In doing that, it proceeds as did the Solicitors' Complaints Tribunal.

One very important imperative for the Legal Practice Tribunal, and indeed for all work accomplished by the Legal Services Commission, is expedition. Any question mark hanging over a practitioner's conduct must in the public interest be resolved as soon as possible.

We may accept that people do not enter the legal profession for the purpose of amassing money by whatever means. Why then do practitioners lapse? A senior practitioner, Dr John de Groot, recently suggested three root causes: the pressure of time and circumstance; what he termed the "trying to be helpful" trap; and simple expediency. He gave me some practical illustrations.

As to the pressure of time and circumstance, he instanced the forging of a client's signature on a security, where the client was unavailable and a deadline imminent. Plagiarism falls into that category as well, where there is sometimes not only the pressure of time, but also pressure to compete.

As to the "trying to be helpful" trap, he instanced "witnessing" a signature which has been applied on another earlier occasion. What may at the time seem a safe expedient may have unforeseen serious consequences.

As to expedience, there is again the witnessing of a signature where the signatory is not present. Doing it properly may be criticized by a client as pedantic. The client may find it difficult to understand why something apparently merely formal in nature can matter a great deal.

While those instances are fairly black and white in character, the complexion of many ethical questions is grey. Discussion with one's peers may aid their solution.

Some aspects of 21st century practice throw up particular ethical conundrums and challenges. Incorporated legal practice is a good example, and the public floating of practices is, for a traditional lawyer, a most challenging development.

Some years ago, The Australian Research Council and the Queensland Law Society sponsored interviews with practitioners with a view to identifying commonly encountered ethical issues. The results are summarized in Parker and Sampford: Legal Ethics and Legal Practice, Contemporary Issues, published by Clarendon Press in 1995. I believe them as relevant today as when published.

The interviewees reported conflict of interest as spawning the most common ethical dilemmas. Then there were problems associated with maintaining a good relationship with the client. The most usual related to "pressure being applied by clients to do something illegal or unethical" (p 225), such as backdating documents or improperly witnessing documents.

A different situation concerned client dishonesty. "Many of the lawyers reported situations where they believed or suspected that their clients were not being truthful. In such a case, the lawyers were concerned about whether they had a duty to investigate what they were being told. Failure to do so, where investigations would otherwise appear to be reasonable, might in some way implicate the lawyer in the client's fraudulent or misleading behaviour" (p 227).

Litigation threw up problems with the disclosure of documents, concerns ranging "from knowing how to deal with clients who do not want to disclose discoverable documents, to whether it is unethical to present affidavits which are disorganized or contain hundreds of documents which may be only marginally relevant" (p 230). The research uncovered concern about "deliberate breaches of time limits and abuses of the litigation process, such as entering hopeless defences or commencing hopeless actions as a delaying tactic" (p 230).

Relations with other practitioners pointed to some subtle dilemmas, such as "whether it was ethical for a lawyer to take advantage of another lawyer's error or ignorance. The error might be an obvious one or a purely technical or mathematical one: in such cases, the lawyers generally agreed that it would be unethical not to disclose it. Where the error was due to the lawyer's inexperience or lack of attention, the lawyers had differing views" (p 231).

And in the firms, issues arose as to charging practices, and in relation to the conduct of others within the office. The text refers to a lawyer who "discovered that a partner in his firm had given incorrect advice to a client. He advised the partner of the error, but the partner refused to alter his advice to the client 'as he wanted to save face and did not want to appear as if he did not know the law'. The lawyer was unsure whether he should have approached the staff partner or even the client to advise them of the error, however ultimately he did nothing. That decision was partly due to a concern for his own career" (p 222-3).

This conference is being held in a part of Queensland where bustling economic prosperity means some of the temptations to which I have referred may more frequently arise. In addressing the Gold Coast District Law Association on 2 June two years ago, I said this:

> 'Ebullient economic conditions can create temptations for practitioners. There are people in the community with an unquenchable thirst for material wealth. Unfortunately they are often the least prepared to seek to understand, and certainly not accept, the ethical standards which constrain legal practitioners. They are also often forceful and persuasive people, inclined to employ their wealth and consequent power as an instrument of pressure. It can therefore be a particular challenge, in a region like this, to resist those sorts of temptations, but resisted they must be.'

While salutary here, those sentiments are pertinent to the profession State-wide. Bearing in mind that the membership of our profession in Queensland falls only a little short of

10,000, the comparatively small extent of ethical departure is reassuring. Unfortunately, any major breach will, with some citizens, stigmatize the profession as a whole. That will be manifestly unfair. But it is a reaction which cannot be excluded, at least in the short term. In the long term, the profession exhibits resilience not unlike that of the courts.

Over recent years, the courts in this State have endured a number of major challenges. While they may have led to some temporary doubting of the effectiveness of our process, that has fortunately been only temporary. The peoples' confidence in the courts' adherence to the rule of law, and their delivery of justice according to law, has prevailed.

Travelling around the State, I have not in recent years discerned any pervasive cynicism about the profession. The reason, one infers, is that those who engage legal services are by and large satisfied with what they receive. The profession is seen to be fulfilling the charter laid out at admission – essentially, to serve the public with honesty and expertise.