OCCASIONAL ESSAY

SOME REFLECTIONS ON LEGAL PROFESSIONAL ETHICS: *PLUS ÇA CHANGE ...*

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The issue for the week 23–29 January 2010 of *The Economist* carries a major article with the heading 'Laid-off Lawyers, Cast-off Consultants'. The general thrust of the article is stated sufficiently for present purposes in the sub-heading: 'The downturn is sorting the best professional-services firms from the rest'. The article concludes with the following admonition:

> As they adapt to survive a tougher climate, lawyers … will need to ensure that any changes do not put their culture of professionalism at risk.[1]

Anyone who has practised for any significant time as a barrister or a solicitor in New South Wales is apt to react to this rather prim and patronizing exhortation by, as it were, battening down the professional hatches in the expectation of yet another bout of what its advocates from time to time are pleased to describe as 'reform'. The legal profession in New South Wales has been 'reformed' without cease during recent decades, and by governments of various political persuasions. There has resulted a gimcrack mess of sorry interferences with legal professional practice such as to vindicate convincingly the observation, rather rueful one is inclined to think, made by Senator Roscoe W Conkling (United States Senator for New York in 1867, 1873 and 1879 and famously corrupt):

> When Dr Johnson defined patriotism as the last refuge of a scoundrel, he ignored the enormous possibilities of the word reform.[2]

As one surveys the current state of play of 'reform' of professional legal practice in New South Wales, and as one reflects upon the

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1 'Laid-off Lawyers, Cast-off Consultants' (2010) 394 (8666) *The Economist* 62.

2 Gore Vidal, *United States: Essays 1955-1992* (1994) 730.

smallness of mind, the meanness of spirit, and the constitutional obtuseness that have marked, and marked overtly, the seemingly insatiable appetite for further such 'reform', it is useful to be reminded that at the heart of authentic professional practice of the law lies a body of ethical principles such that one can say of that body, *Plus ça change plus c'est la même chose*, a well-known French aphorism which translates imprecisely but practically as, 'The more such authentic practice changes, the more it remains the same'.

The purpose of this essay is to say something about that concept.

It is useful to commence by citing some advice that the Chief Justice conventionally gives in his Honour's address of welcome to newly admitted practitioners on the occasion of their formal admission as legal practitioners of the Supreme Court:

> On this occasion I wish to draw your attention to two matters which distinguish the legal profession from other occupations. First, as legal practitioners, you have professional obligations, to your clients and obligations to the Court. These obligations are what distinguish a profession from a business or a job.
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> There is no doubt that many of the aspects of the law constitute a business, but it is not *only* a business or a job.
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> One of the most important aspects of the legal system is that it depends on the performance of professional obligations by professional people.
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> In a period of this nation's history when more and more things are judged merely by economic standards, it is important that some spheres of conduct affirm that there are other values in life. The values of justice, truth and fairness are central to the activities of the legal system. That is why that system cannot be assessed only by economic criteria.

An attempt to flesh out the propositions thus stated by the Chief Justice can be approached by means of an examination of the relevant principles in various reported decisions of the High Court of Australia: for example, *Ziems v Prothonotary of the Supreme Court of NSW*[3] and *Clyne v NSW Bar Association*[4].

The present essay will take a less conventional approach by adopting as its starting point a statement which is found, not in any curial decision, not in any conventional academic legal writing, but in a

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3 (1957) 97 CLR 279.

4 (1960) 104 CLR 186.

celebrated book written by a non-lawyer. The book is *Etiquette* written by Mrs Emily Post and first published in 1922. It contains this statement:

> The code of a thoroughbred is the code of instinctive decency, of ethical integrity, of self-respect and of loyalty.[5]

It is not to the present point to be concerned about what Mrs Post had particularly in mind in connection with the term 'thoroughbred'. What is to the present point is this proposition: that if the words 'person fit to engage in professional legal practice' are inserted in lieu of the word 'thoroughbred', then Mrs Post's proposition, as thus amended, is as good a definition as the present writer can propound of the ethical underpinnings of legal professional practice in the sense that the Chief Justice discusses in the previous quotation.

What is meant, in the stated context, by the expression 'instinctive decency'?

The meaning comes down to this: instinctive decency is the conduct properly to be expected of a lady or a gentleman. A lady or a gentleman, in that context, indeed in any context, can be old or young; rich or poor; powerful or powerless; well educated or hardly educated at all. The ultimate mark of a lady or a gentleman is that he or she never says or does anything without first testing it, however quickly, against that standard of behaviour that we normally call 'the golden rule': Always do to others what you would have them do to you.

A practitioner who at least recognizes that ideal, and who tries to achieve it, not in some flashy or ephemeral way, but in a steady, patient, disciplined and thoughtful way, will come sooner or later to the point where, confronted with a choice between or among possible courses of action, it will hardly be necessary to think before recognizing at once — or instinctively, which is the present point — what is the decent rather than the shabby choice, the honourable rather than the sleazy choice, the professional rather than the unprofessional choice.

What is meant, in the stated context, by the expression 'ethical integrity'?

For the person who is fit to practise law, ethical integrity is best defined, to begin with, by excluding some things. For such a person,

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[5] Quoted in J P O'Rourke, *Age and Guile Beat Youth, Innocence and a Bad Haircut* (1995) 213.

ethical integrity does not mean what can be got away with. It does not mean a sullen, unenthusiastic, bare clinging to the words of the rules and the rulings that are brought out from time to time by the Law Society for solicitors and the Bar Council for barristers.

Ethical integrity is the product of the fusion of some simple, critically important and interdependent propositions.

Proposition One: It is morally unwholesome to go through life in what might be called a state of religious or moral mania. It is as unhealthy to approach life as though it were nothing other than a disheartening and unbroken lurch from moral crisis to moral crisis, as it is undoubtedly unhealthy to approach life as though it were nothing more than suspended animation in a moral vacuum.

Proposition Two: Whether or not it is popular or fashionable to say so — and, in this day and age, aggressively secular at the best, aggressively pagan at the worst, it is decidedly unpopular and unfashionable to say so — it is the truth, the eternal truth, that there are certain things that are right and certain things that are wrong, certain things that are good and certain things that are evil, certain things that are proper and will, therefore, always be done, certain things that are improper and that are, therefore, simply not done.

Proposition Three: Every human being — not a select, well-educated professional elite, but every human being — has two defining characteristics: free will is one; understanding is the other.

Understanding gives everybody the power to distinguish between what is right and what is wrong, what is good and what is evil, what is proper and what is not proper.

Free will gives everybody the power to prefer what is good over what is bad, what is right over what is wrong, what is proper over what is not proper.

Those are the propositions the fusion of which produces what is meant in the stated context by the idea of ethical integrity. In that connection, 'fusion' does not mean that molten, white-hot fusion of the moral fanatic, than whom there are few more dangerous people abroad in the world. 'Fusion' means action that integrates, as a matter of individual and personal interior formation and disposition, the three stated disparate propositions, and does so in a way that is thoughtful, sensible, and morally balanced.

What is meant, in the stated context, by the expression 'self-respect'? Once again the definition can take as its starting point the exclusion of certain things. Self-respect does not mean self-regard; it does not mean

self-indulgence; it certainly does not mean self-righteousness, and it emphatically does not mean mere self-will. Self-respect in the stated context entails, once again, a question of balance. This time, the balance has to be struck between a concept of professional privilege and a corresponding concept of professional responsibility.

The concept of privilege that is to be brought into the relevant balance is not related at all to any of the social ephemera that are often put forward in current society as marks of privilege, but are in fact merely marks of snobbery. The relevant concept of privilege can be sketched in this way: every client who comes to a professional legal practitioner for help, comes either in need or in pain, and not infrequently in both need and pain. Every such client comes, also, in faith and in hope. The hope will be that there is in fact a lawful solution for the problem at hand. The faith will be that the chosen practitioner can be trusted, not only to perceive what is the relevant lawful solution, but to pick it up in the correct way, and to apply it in the correct way in the client's proper interest.

Any professional practitioner who accepts instructions in such circumstances adds those instructions to other things that the practitioner carries in any event in his/her own hands: the practitioner's own good name; the good name of the profession of which it is the privilege — not the right, the privilege — of the practitioner to be a member.

A person who, in such a weighty setting, does not have a sound sense of professional privilege cannot be expected, in the nature of things, to have what is the absolutely critical corresponding sense of duty and of responsibility. The practitioner who has self-respect reflecting that interior balance of privilege and responsibility will never be troubled about rejecting, in any situation where proper, ethical, professional choices have to be made, the cheap, corner-cutting, unprofessional choice.

What, finally, is meant in the stated context by the expression 'loyalty'? Essentially, the idea is simple: an ethical professional practitioner keeps his/her word.

That notion has, in its turn, a serious practical aspect, which is usefully recapitulated. Nobody may lawfully practise law without having first been admitted so to practise. That admission is notified by order of the Supreme Court made at a formal and public sitting of the Court and by a bench of at least three judges of that Court, the Chief Justice himself normally presiding. Each applicant for admission to practise is required either to swear or to affirm, in a prescribed form, that if

admitted, he or she will thereafter conduct himself or herself properly as a practitioner, after the laws of the State and otherwise to the best of the particular individual's professional knowledge and skill and ability. To swear or to affirm thus is not to enact a quaint but inconsequential formality. It is to make a public pledge of professional propriety in all respects and at all times, and to seal that pledge in the way chosen by the individual as the most solemn, appropriate form.

That pledge having been given to and accepted by the Court, it will be expected thereafter that the person who has so promised will do, in full measure, and in spirit as well as in bare form, what the pledge undertakes.

The four characteristics which have now been examined, provide in combination a template for the formation of ethical professional practitioners of the law. That template is a fixed and certain point of ethical professional reference. While ever it stands rock-like at the core of legal professional practice, then the self-styled 'reformers' can do their dangerously uncomprehending worst, and yet the mighty shield of the law will remain in place, ensuring as it has done for centuries that the individual citizen is protected against what Brandeis J of the United States Supreme Court famously defined as constituting the 'greatest dangers to liberty': namely, 'insidious encroachment by men of zeal, well-meaning but without understanding'[6].

6 *Olmstead v United States,* 277 US 438, 479 (1928).