PROFESSIONAL ETHICS – WHY BOTHER ?

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"Liar Liar", the 1997 comedy starring Jim Carrey, was a cinematic smash, taking over US$180,000,000 at the box office. The premise of the movie was that a lawyer, who couldn't lie straight in bed let alone tell the truth to his wife, child or even his mother, was redeemed by the magical intervention of his son's birthday wish which forced him to tell the truth for 24 consecutive, uninterrupted hours.

According to John Grisham's official website, he has over 60 million books in print, and has been translated into 29 languages.. His immensely popular legal thrillers, some of which have been adapted to cinema, are largely formulaic - a young, somewhat naïve, often maverick lawyer battles entrenched corruption of one form or another in the legal system, prevails against the odds, and rides off (if I might mix literary metaphors) into the sunset, sadder and wiser for the experience.

Only recently, one of my colleagues, another silk, in Brisbane took his family on a camping holiday with about 10 other families. He was the only lawyer in the group. On his return, he recounted to me with dismay that this diverse group of doctors, accountants, engineers and other professionals had a common view of lawyers - that we are paid to tell lies for people.

There is nothing new about this perception of lawyers.

The Bard's exhortation in Henry VI, Part 2 that the first thing to do is to kill all the

lawyers is just one of the better known examples of the slings and arrows of outrageous criticism we have had to suffer over the ages. "Lawyers are men who hire out their words and anger" said Martial two thousand years ago. The sainted Thomas More observed that in Utopia "they have no lawyers among them, for they consider them as the sort of people whose profession it is to disguise matters".

To my mind, though, it is difficult to go past Jonathan Swift for a good, old-fashioned, head-butt to the profession. In the course of the final journey in Gulliver's Travels, the author is required to describe lawyers. Gulliver says:

> "I said there was a society of men among us, bred up from their youth in the art of proving by words multiplied for pleasure that white is black, and black is white, according as they are paid. To this society, all the rest of the people are slaves."

He continued that in dealings out of their trade, lawyers were "usually the most ignorant and stupid generation among us, the most despicable in common conversation, avowed enemies to all knowledge and learning; and equally to pervert the general reason of mankind in every other subject of discourse, as in that of their own profession."

But, we protest stoutly, we are professionals! We have ethics! This longstanding popular notion that we are weasel-worded purveyors of the second-oldest profession is all wrong!

Ladies and gentlemen, if that is the popular perception of our calling, we really do

need to ask ourselves: Professional Ethics - Why Bother?

Let us start with definitional issues.

Whilst it is common, and often convenient, to regard ethics as nothing more than a set of rules designed to regulate our conduct, this is a simplistic and undiscriminating approach to the topic. I am not talking of matters of professional etiquette - the various formal and informal rules of conduct which we adopt as matters of courtesy, which may have originally been sourced in matters of professional ethics, but in truth are largely conventions observed by the members of the profession to ease and assist the processes of dealing with one another and the public.

Ethics, in its pure form, actually describes the philosophical study of voluntary human action, with the purpose of determining what types of activity are right and to be done, or wrong and not to be done. Ethics is a philosophical science, which in other contexts may be described as moral philosophy. Indeed, the term *ethics* is etymologically derived from the Greek *ethos*, meaning custom or conduct. It is the science of morals, that term being derived from the Latin *mores,* meaning customs or behaviour.

In general terms, ethics, as a science, studies, and propounds paradigms for, voluntary human conduct - by this I mean actions, reactions and inactions undertaken deliberately by persons who have the capacity to exercise personal control. Similarly in general terms, the object of the science of ethics is to express, in as absolute terms as are reasonably available, conclusions concerning the kinds of voluntary activities

that may be considered good, suitable or appropriate, or otherwise, for a person in society. Once again, the study of ethics in its purest form extends from an individual's personal spirituality through the gamut of relations and relationships in which that individual's actions and choices of action have some degree of influence.

Moreover, ethics is, in essence, a practical science. It does not merely investigate the human or social condition. It is not merely reflective or introspective. Rather it is normative, in that it examines not merely how we operate but how we *ought* to operate.

I have emphasised that the science of ethics is concerned with voluntary human conduct. We shall return to that notion later when considering the particular context of the legal profession. Before moving on, however, it is necessary to stress again that the object of the study of ethics is to propound paradigms of morality. Unfortunately, these days, the words "morals" and "morality" are equated with nothing more than sexual conduct and behaviour. That is only one, often uninteresting, aspect of the notion of morality. Morality is concerned with human customs and behaviour, both personally and in society, and particularly those qualities of human action which conform, or fail to conform, to standards or rules imposed on or accepted by the individual. Those standards or rules are ultimately defined by the end which they serve. At a personal level, morality is concerned with right and wrong, other personal qualities of virtue, and, in a spiritual sense, good and evil. The end which personal morality serves varies from person to person, depending particularly on whether the person subscribes to a particular faith or belief structure, such as Christianity, Islam or Hinduism. At a societal level, the norms are more extrinsic, but

are still determined according to the end sought to be achieved. In a democratic society, the end is the common good, and the moral norms which society imposes determine what is right and wrong for the purpose of achieving that end. In a totalitarian state, the end sought to be achieved is not the common good but subjugation of the masses to an ideology or, more commonly, an individual's ego. Within such a State, actions or inactions are justified or condemned by asking what is good for the State, rather than does this serve the common good.

A debate has been emerging in recent years as to whether there is, or can be, a global morality. Our world, at the risk of stating the obvious, has changed, and continues to change, very quickly. There is global fluidity in politics, in economics, and certainly in business. The declaration of a war on terrorism, even when stripped of its rhetoric, was a response to a global threat. There is, not surprisingly, no agreement in our global village about whose ideas are right or wrong, notwithstanding politicians of all hues exploiting the global media to push messages laden with labels of good and evil. But that's another topic for another day.

Coming back to our own society or community level, the extrinsic norm adopted to achieve the end of the common good is our law. The essence of the law in our community is moral in this sense. In a pluralist society, the law does not directly aim to make us virtuous - virtue, after all, is a very personal matter. It does, however, directly concern and even ordinate our external acts for the purpose of directing society and its members to the common good of peace and communal order.

Lifetimes are, and have been, devoted to the study of these matters, and it's certainly

not possible for me today to do anything more than barely scratch the surface, let alone start discussing such questions as the concept of justice in societal morality. I should also declare that the philosophical framework in which I operate, and which serves to provide this definitional matrix, is that of a middle-class, Anglo-Celtic Australian lawyer, educated in the Catholic school system and at a secular university. Mine is not the only perspective, but it's the one I have chosen to adopt. Some commentators discriminate quite strongly between ethics, morality and the law. For example, one leading American academic has defined ethics as "imperatives regarding the welfare of others that are recognised as binding upon a person's conduct in some more immediate and binding sense than law and in some more general and impersonal sense than *morals"* .[1]

It is, I think, sufficient for our definitional purposes if I recapitulate that when I speak of ethics, I am not merely speaking of rules and regulations, but rather the notions of volition and morality which underlie them.

What happens, then, when we qualify the word "ethics" with the word "professional"? Clearly enough, we are then speaking of the ethics of or pertaining to a profession, but that only begs the further question - What is a profession?

Whilst there is no single definition of a profession, commentators generally ascribe three common attributes: special skill and learning, public service as the principal goal, and self-regulation or autonomy. These were certainly canvassed in relation to the legal profession by Street CJ in *In re Foster* [2] in a passage which usefully draws

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1 Prof Geoffrey Hazard "Ethics in the Practice of Law" (Yale University Press, 1978), p.1

2 (1950) 50 SR(NSW) 149

together some of the threads we have been discussing, and bears recounting:

> It is to be borne in mind that all barristers are members of a profession as distinct from being engaged in trade. A trade or business is an occupation or calling in which the primary object is the pursuit of pecuniary gain. Honesty and honourable dealing are, of course, expected from every man, whether he be engaged in professional practice or in any other gainful occupation. But in a profession, pecuniary success is not the only goal. Service is the ideal, and the earning of remuneration must always be subservient to this main purpose.
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> A barrister who is admitted to practice as such becomes a member of a profession of a very special character. He acquires new and special rights and privileges as an individual and a new standing in society, and with those additional rights and privileges and his newly acquired station in life, he also takes upon himself new duties and increased responsibilities. He is bound to observe proper standards of conduct and behaviour and to comply with all the obligations incumbent upon a good citizen. But he is also a participant in the task of administering justice and enforcing the law, and is bound by those high standards of professional honour and conduct which are so essential to be observed by both barristers and solicitors. He must ever be on his guard and bear in mind at all times his obligation, not merely to comply with the ordinary rules of propriety and decorum, but also to uphold and maintain the dignity of the profession and to see that he does not so conduct himself either by word or deed as to bring discredit upon it.
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> He is under a duty to the public generally, to the Courts, and to his fellow members of the Bar, and one of the essential prerequisites of his admission to professional practice is that he should establish that he is a person of 'good fame and character'. He is not absolved from the further obligation to preserve that fame and character because he has been admitted to practice. He must retain those attributes throughout his professional career, and, if he fails to observe proper standards of conduct and behaves in a scandalous, dissolute or unseemly manner, even falling short of actual criminality, then he may forfeit his right to remain a member of an honourable profession."

We have, therefore, a context in which we can view and rationalize the various rules and regulations which are commonly described as "Professional Ethics". When we become lawyers, we voluntarily assume the responsibility, indeed the obligation, to observe and abide by those rules and regulations. If we exercise the choice not to practice in accordance with those ethics, we render ourselves liable to exclusion from the profession. The object of us practising in accordance with these rules is to participate in the administration of justice and to promote and protect the rule of law, undoubtedly one of the bulwarks of the common good in our society. If that is not our object, then we are just pen-pushers, ciphers, clerks, lobbyists and mouthpieces.

The rules and regulations which are the manifestation of our Professional Ethics may be expressed in various forms. At one end of the scale are general, non-prescriptive, almost motivational statements, such as the exhortation by Street CJ that one must ever be on guard to uphold and maintain the dignity of the profession. At the other end of the scale are black-letter, prescriptive codes of conduct. Each of these forms of rule has its pro's and cons. The principal benefit, in my view, of the general forms of expression is that they are precisely that - general statements of the ideals to which we aspire - and as such are capable of providing a degree of constancy notwithstanding changes in the society in which they are being applied. On the other hand, because they are perforce general in terms they can, and often are, not only difficult to apply to particular situations but open to competing interpretations, even to the extent of leaving matters of the application of professional ethics to the individual judgment alone of the practitioner. Black-letter Codes of Conduct overcome that difficulty, of course, by being quite prescriptive in nature, but that positive aspect can be reversed

by those who choose to live at the very boundaries of the conduct prescribed and who may seek to take advantage of the inevitable loopholes in such Codes.

Thankfully, the profession in Fiji enjoys the best of both worlds. The Schedule to the *Legal Practitioners Act* 1997 contains the Rules of Professional Conduct and Practice made pursuant to section 101 of the Act. It provides regulation for practitioners in the following aspects of their professional lives, namely:

- In their relations with clients
- Advertising
- In their relationship with the Court
- When acting as advocates for the prosecution
- When acting as advocates for the defence
- In relations between practitioners
- In the conduct of their practices
- In client care, and
- For those not in private but in corporate practice

Each section typically commences with an aspirational statement - "A practitioner shall not abuse the relationship of confidence and trust with a client" - and is then followed by more particular rules.

In addition, or as an adjunct to these statutory rules, the Fiji Law Society has adopted a Statement of Ethics which is unashamedly aspirational and comprises what would in any secular or business organisation be described as the Mission Statement. It's worth taking a moment to read and reflect on it:

> "The law should protect the rights and freedoms of members of the community. The administration of the law should be just. The lawyer practises law as an officer of the court. The lawyer's role is both to uphold the rule of law and serve the community in the administration of justice. In fulfilling this role, lawyers should
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> - Serve their client's interests competently
> - Communicate clearly with their clients
> - Treat people with respect
> - Act fairly, honestly and diligently in all dealings
> - Pursue an ideal of service that transcends self-interest
> - Work with their colleagues to uphold the integrity of the profession and honourable standards and principles
> - Develop and maintain excellent professional skills
> - Act frankly and fairly in all dealings with the courts
> - Be trustworthy
> - Keep the affairs of clients confidential, unless otherwise required by law
> - Maintain and defend the rights and liberty of the individual
> - Avoid any conflict of interest.
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> In fulfilling this role, lawyers are not obliged to serve the client's interests alone, if to do so would conflict with the duty which lawyers owe to the court and to serving the ends of justice."

There's a week's worth of conference just in that Statement of Ethics!

Before turning to examine just one aspect of that Statement, let me pause for a moment to offer a few editorial comments.

We have already seen that, conceptually, the formulation of professional ethical rules are reflective of notions of right and wrong, proper and improper, in the society in which the profession is practised. And, as I have already noted, one of the benefits of aspirational rules is that, by their nature, they transcend shifts in community attitudes

to right and wrong in particular fact situations - it is difficult for us, for example, to imagine a free and democratic society in which a lawyer should not be exhorted to treat people with respect or be trustworthy. How those aspirational rules are applied, however, is a matter which needs to be kept constantly under review. Whether we like it or not, the way in which we practice, and the milieu in which we practice, have changed, in some respects quite radically, even over the last 10 years. I'm not talking about emails and the internet per se - when all is said and done, they are really just means of disseminating information. The sorts of changes I'm talking about, at a macro level, globalisation of politics, economics and business and, at a local level in many jurisdictions, significant structural changes imposed on the profession by competition authorities or, as has happened in England, by reason of Government sponsored reform. In any event, the point, clearly enough, is that the society in which we practise evolves, and it is incumbent on us to ensure that the particular ethical rules and codes of conduct are properly reflective of, and relevant to, that changing societal context.

On the other side of the coin, it is also necessary, in my view, for practitioners to be regularly engaged in such reviews. For many - dare I say most - lawyers, the first and last occasion on which they undertook any systematic review of professional ethics was when they studied the subject as a prerequisite to admission. Some might encounter an ethical question in the course of practice, either because they have recognised a looming or potential problem, such as a conflict of interest, or because they have been the subject of a complaint to their professional body and need to explain themselves. This just isn't good enough for two reasons:

(a) Practitioners are human. Practitioners are often required to operate in

situations of stress, or find themselves under pressure to achieve a particular outcome. Practitioners, quite innocently, but through years of habit or inertia, may have fallen into a way of doing things which fall outside the bounds of the professional rules. For practitioners regularly to engage in discussion groups or conferences on professional ethics serves a number of useful purposes. Apart from the obvious benefits of re-education, such occasions may serve as the opportunity for the practitioners to engage in what might in another context be described as an examination of conscience. They can actually and actively review the way in which they practice and, even more importantly, the ethical attitude they bring to their practice, with a view to ensuring that the noble and worthy aspirations are in sight. Moreover, such reviews would provide the opportunity for regular, reality-based review of the practical ethical standards. We all know that there's often a world of difference between the theoretical application of rules and regulations and life where we operate at the coalface. The sharing of experience, from the most senior through to the most junior of practitioners, can only be beneficial to them individually and collegially, foster some degree of uniformity of understanding and appreciation in the profession of the application of the rules, and assist those charged with the responsibility of formulating or reformulating the rules themselves.

(b) The second reason why its not good enough for practitioners not to engage in some regular dialogue or review process about ethics is that professional ethics is the responsibility of each and every practitioner. Ethics aren't just something you leave to the Council of the Society to worry about, just as a Practising Certificate isn't just a licence to let you go out and practise law. To paraphrase Street CJ, we must ever be on our guard and bear in mind at all times our obligation, not merely to comply with the ordinary rules of propriety and decorum, but also to uphold and maintain the

dignity of the profession and to see that we do not so conduct ourselves either by word or deed as to bring discredit upon it.

You will probably have gathered by now that I am an advocate for the inclusion of ethics components in mandatory advanced or continuing legal education programmes for all practitioners, regardless of seniority! I shall now descend from my soapbox, and resume where I left off a few minutes ago.

In the time left to us, I would like to look at only one aspect of the Statement of Ethics. Like many things in life, it saves the best till last - "In fulfilling this role, lawyers are not obliged to serve the client's interests alone, if to do so would conflict with the duty which lawyers owe to the court and to serving the ends of justice."

Let's be under no mistake about what this statement means - a lawyer's duty to the court is paramount. When we speak of a duty to the court, we are not speaking merely about duties to the judges, noble, wise, learned and handsome though they might be. The paramountcy of the duty to the courts arises because it is central to our professional mission as lawyers that we aid the administration of justice and promote and protect the rule of law.

The Courts, embodied in our judges, are charged with the function of propounding, applying and maintaining the laws by which our society is regulated and through which peace and order is preserved. We, as lawyers, are not just spectators or mere bit-players. We are part of the process. We are officers of the Court. If you are in any doubt about that, have a look at section 51 of the *Legal Practitioners Act* which says, in terms, that we are officers of the Court.

This isn't to say, of course, that we subordinate the interests of our clients to the interests of the courts or judges. But in performing our duties to the clients and in the client's interests, we are required to observe principal duties of frankness and honesty

to the court. As Lord Reid said in *Rondel v Worsley* [3]:

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But as an officer of the court, concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court.

In the leading case of *Ziems v The Prothonotary of the Supreme Court of New South Wales* [4], Kitto J referred to the fact that a barrister is more than his or her client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. His Honour said that a barrister is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, and fellow members of the Bar, in the high task of endeavouring to make successful the service of law to the community.

More recently, in the English Court of Appeal, Sir John Donaldson MR said in *Abse v Smith* [5]:

> But quite apart from the public interest in ensuring that advocates appearing in the courts have the requisite standard of skill, there is another and even more important requirement. Here there is no difference between what is expected of the members of each branch of the profession. That is the requirement of absolute probity. The public interest requires that the courts shall be able to have absolute trust in the advocates who appear before them. The only interest and duty of the judge is to seek to do justice in accordance with the law. The interest of the parties is to seek a favourable decision and their duty is limited to complying with the rules of court, giving truthful testimony and refraining from taking positive steps to deceive the court. The interest and duty of the advocate is much more complex, because it involves divided loyalties. He wishes to promote his client's interests and it is his duty to do so by all

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3 [1969] 1 AC 191 at 227
4 (1957) 97 CLR 279
5 [1986] 1 QB 545

> legitimate means. But he also has an interest in the proper administration of justice, to which his profession is dedicated, and he owes a duty to the court to assist in ensuring that this duty is achieved. The potential for conflict between these interests and duties is very considerable, yet the public interest in the administration of justice requires that they be resolved in accordance with established conventional rules and conventions and that the judges shall be in a position to assume that they are being so resolved. There is thus an overriding public interest in the maintenance amongst advocates not only of a general standard of probity, but of a high professional standard, involving a skilled appreciation of how conflicts of duty are to be resolved.

That passage was cited by the New Zealand Court of Appeal (not surprisingly, with approval) in *Black v Taylor* [6]. And while we are mentioning cases from the country which hasn't won the Bledisloe Cup (yet!), in case there are any smarties who think that these statements apply to barristers only, I have to tell you that in *Gazley v Wellington District Law Society* [7] and *Y v M* [8], the Courts in New Zealand have held that these principles apply with equal force to members of a fused profession.

And they apply to a person who has been admitted as a barrister, even if that person is appearing in court in some other capacity, such as a police officer giving evidence. As the Hon Justice Kirby said, when President of the New South Wales Court of Appeal, in *New South Wales Bar Association v Thomas [No 2]* [9], with the oath taken or affirmation made before the Court, such a barrister assumed obligations in his relationship with the courts additional to those owed as a citizen and a policeman. His Honour said:

> The rank of barrister is one of status. With it go obligations which cannot be shaken off or forgotten simply because the holder of the office has not been practising in the daily work of a barrister. If a person does not wish to assume the obligations to the courts of a barrister, that person should not seek admission by the Court as such. Once admitted, the additional duties of invariable candour as well as honesty to a court prevail.

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6 [1993] 3 NZLR 403
7 [1976] 1 NZLR 452
8 [1994] 3 NZLR 587

Let's look at some examples of how this duty applies in practice.

It is our duty to be frank, honest and not to mislead the court. This means that we cannot be parties to half-truths, or conduct ourselves in such a way as leave the court with a false impression. In *Re Thom* [10], the Chief Justice, speaking for the New South Wales Full Court, said that it is of greatest importance that any mere casuistry in the presentation of evidence should be strictly avoided by those entrusted with the responsible duties of a legal practitioner. He said:

> It is perhaps easy by casuistical reasoning to reconcile one's mind to a statement that is in fact misleading by considering that the deponent is not under any obligation to make complete disclosure. By this means a practitioner may be led into presenting a statement of fact which, although it may not be capable of being pronounced directly untrue in one particular or another, still presents a body of information that is misleading, and conceals from the mind of the tribunal the true state of facts which the deponent is professing to place before it.

I'll give you an example. Some years ago, I was appearing for the applicant in a contested injunction application. The solicitor for the respondent had sworn an affidavit in which he deposed to having written a particular letter to my instructing solicitors. My solicitors told me they had never received this letter. It was a small, two-partner firm, and the partners met every morning to open the mail together over a cup of tea. When we went back to Court, I was armed with affidavits from each of them, deposing to the fact that this letter had not been received by them in the mail. I had an affidavit from their receptionist saying the letter had not been delivered. And I had an affidavit from the office junior, saying the letter had not been received on the fax. When the judge read these affidavits, he wondered aloud to my opponent what had happened to the letter his solicitor had written. My opponent stood up, looked the judge in the eye, and said "Your Honour, the solicitor only swears that he wrote the letter. He does not say that he sent it." To describe the scene that followed as Vesuvian, if not Krakatoan, is still somewhat of an understatement. You may not be

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9 (1989) 18 NSWLR 193
10 (1918) 18 SR(NSW) 70

surprised to hear that that particular solicitor was struck off soon thereafter for trust account irregularities.

The duty of candour is particularly important in ex parte applications. It has long been stated that in such cases, counsel are under a duty to show the utmost fairness and good faith, and see that all relevant matters, whether for or against the application are brought to the attention of the court - *Re Cooke* [11]. If the practitioner cannot assure the Court that all matters which should have been disclosed have been disclosed, then it is unlikely that the court will accede to the application, especially where the potential consequences for the respondent are severe. In any event, if an order is obtained ex parte without full and proper disclosure, it is susceptible to being dissolved on an application by the respondent, and the fact that there was material non-disclosure will at least be a relevant factor in the court deciding whether to continue or dissolve the injunction - *Re South Down Packers Pty Ltd* [12]. See also *Garrard v Email Furniture Pty Ltd*[13]

In ensuring that we present cases with truth and candour, it is appropriate, and even necessary, that we take reasonable steps to verify our clients' contentions, particularly where serious allegations are made against another party. In *Y v M* [14], it was found that an affidavit containing allegations of child sexual abuse was misleading, and had been filed because of the "unquestioning acceptance by the partner in the firm as to what the mother had to say". Similarly, a practitioner cannot be a party to the presentation to the court of any evidence, or the making of any statements or allegations, for which, in the practitioner's opinion, there is insufficient evidentiary foundation. In *Re Gruzman; Ex parte the Prothonotary* [15], the Court of Appeal in New South Wales said:

> Frankness should be one of the main attributes of a barrister. It is his duty not to keep back from the court any information which ought to be before it, and he must in no way mislead the court by stating facts which are untrue, or mislead the judge as to the true facts, or knowingly permit a client to attempt

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11 (1889) 5 TLR 407
12 [1984] 2 QdR 559
13 (1993) 32 NSWLR 662
14 [1994] 3 NZLR 581
15 (1968) 70 SR (NSW) 316

to deceive the Court.

It's not just honesty when you're on your feet in court. The duty is of probity applies to all aspects of the court process. So, it has been held that lawyers who file pleadings containing allegations which, to their knowledge, are false will breach their ethical duties to the court, and will ordinarily be considered guilty of unprofessional conduct - *Kyle v Legal Practitioners Complaints Committee* [16].

Practitioners have a duty to ensure that the court's process is not abused and used for improper or ulterior purposes. A solicitor is obliged to make an independent assessment of whether proceedings should be instituted, particularly where proceedings are instituted without either investigation of the circumstances or the delivery of a full brief to counsel containing adequate information and material. The solicitor is duty bound to turn his or her own mind to the prospects of success and to the purpose of the proceedings, and to the nature of the causes of action proposed to be pleaded. For a solicitor to cause proceedings to be instituted for the purpose, distinct from any purpose the client may have, of obtaining for the client the possibility of a temporary bargaining stance is beyond the bounds of the duty See *White Industries v Flower & Hart* [17].

Similarly, the duty means that practitioners cannot, or rather ought not, raise and argue manifestly hopeless points on appeal - *R v Bicanin* [18], *Venezia v Marshall* [19].

As I said, these are just some examples, hopefully instructive, of the manifestation and practical application of the practitioner's duty to the Court.

There is a range of potential consequences of a breach of the duty to the court:

(a) obviously, a practitioners who breach the duty render themselves liable to disciplinary proceedings for professional misconduct. In an egregious case, the practitioner may well be struck off.

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16 (1999) 21 WAR 56
17 (1998) 156 ALR 169; affirmed on appeal (1999) 163 ALR 744
18 (1976) 15 SASR 20

(b) if a judgment is obtained as a consequence of a breach of the duty, such as by reason of misleading statements, then the court has an inherent jurisdiction to set aside such a judgment as having been fraudulently obtained - *Meek v Fleming* [20].

(c) the court also has an inherent jurisdiction to make costs orders, even on an indemnity basis, against the practitioner concerned - *White Industries v Flower & Hart* [21].

There can be other less formal, but equally potent, consequences. A loss of reputation amongst the judges and one's peers cannot be underestimated. The cases in which you are involved become ever more onerous and tiresome, simply because nobody trusts you.

Finally, there is what I would describe as the judicial admonition. That can range from the white-heat rage directed against the solicitor I mentioned earlier to the judge causing formal complaint to be referred to the proper authorities.

However, to find a true master of judicial admonition, I must tell you, one must venture far from these fair islands. Permit me to direct you, ever so briefly, to the Fifth Federal Circuit, the United States District Court for the Southern District of Texas, Galveston Division, where you will find the judicial seat of Judge Samuel B. Kent. His Honour is a bit of celebrity amongst those who research more interesting aspects of judicial conduct. Let two examples explain why.

In *Bradshaw v Unity Marine Corporation* [22], His Honour had before him an application by the defendant for summary judgment on the plaintiff's claim for personal injuries suffered while working on a tugboat. After stating the facts, His Honour said:

> Before proceeding further, the Court notes that this case involves two extremely likeable lawyers, who have together delivered some of the most

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19 (2001) A Crim R 596
20 [1961] 2 QB 366
21 (1998) 156 ALR 169; affirmed on appeal (1999) 163 ALR 744

> amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact - complete with hats, handshakes and cryptic words - to draft their pleadings entirely in crayon on the backsides of gravy stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins.

The judgment then descended into an analysis of the obviously paltry submissions made for each side. In relation to an authority cited on behalf of the Plaintiff, His Honour observed that "The Court cannot even begin to comprehend why this case was selected for reference. It is almost as if the Plaintiff's counsel chose the opinion by throwing long range darts at the Federal Reporter, remarkably enough hitting a nonexistent volume".

Judge Kent's conclusion in the case was as follows:

> After this remarkably long walk on a short legal pier, having received no useful guidance whatever from either party, the Court has endeavoured, primarily based on its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue

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[22] (2001) 147 F.Supp.2d 668

> presented. Despite the waste of perfectly good crayon seen in both parties" briefing (and the inexplicable odour of wet dog emanating from such) the Court believes it has satisfactorily resolved this matter. Defendant's motion for summary judgment is granted.

According to the indices, if you go to 144 Fed Supp (2d) at 740, you should find the report of *Labor Force Inc v Jacintoport Corp*. You should, but you won't. What you will find is a page which is completely blank, save for an editorial note that the report of that case was "withdrawn from the bound volume at the request of the court". What had Judge Sam said? Thanks to the wonders of modern technology, I can tell you. After noting that it was a defendant's application to dismiss or transfer proceedings commenced in an improper venue, he said:

> Manifestly, any person with even a correspondence course level understanding of federal practice and procedure would recognise that Defendant's motion is patently insipid, ludicrous and utterly and equivocally without any merit whatsoever. Worse, it is just plain blatantly wrong in light of the unambiguous language of a decades old statute and veritable mountains of case law.

He then quoted the statute, adding emphasis because "it is apparently needed by blithering counsel". Five short lines later he dismissed what he described as "Defendant's obnoxiously ancient, boilerplate, inane Motion", and concluded:

> "Moreover, Defendant's present counsel of record, Mr Eric G Carter, is

> determined to be disqualified for cause from this action for submitting this asinine tripe."

That's one way of getting the message across!

Informed choice is one of the touchstones of a free democratic society. If you choose to drive a car, you do so knowing that the manner in which you drive that car will be licensed and regulated because it is in the best interests of the community as a whole that traffic be safe and that citizens commute in an orderly and efficient fashion (although you wouldn't always recognize that at the Walu Bay roundabout!). If you are not prepared to abide by the regulations then your options are either not to drive or drive and render yourself liable to penalty. If you choose to enter into contractual relations with another party, you do so knowing that you are assuming the benefit and burden of the rights and obligations under the contract, and that your failure to perform in accordance with the terms of the contract will have adverse consequences for you. That's why we have a whole body of law dedicated to protecting those whose choice to enter into contractual or other legally binding relations was not properly informed, because they were misled, unconscionably compelled or induced to bind themselves, or were in a position of being unable to make an informed choice. But once the informed choice is made, it is in the best interests of the community for persons to be compelled to be held to their legally binding promises, or suffer the consequences. Otherwise, there could simply be no commerce (in its broadest sense) for the benefit of both individuals and the community as a whole.

For my part, I made an informed decision not to comment in this paper on particular issues that may or may not have local relevance, such as ethics in judicial administration, the ethics of the relationship between judges and practitioners, and the nature and extent of practitioners' ethical obligations to defend and promote the proper application of a Constitution which, by its terms, expressly reaffirms this country's recognition of the human rights and fundamental freedoms of all individuals and groups, safeguarded by adherence to the rule of law, respect for human dignity, and the importance of the family. I made that choice not because these, and other

such topics, ought not be discussed. Quite the contrary – each of those raises issues of great significance for the profession as a whole and the administration of justice in this community. But those topics are beyond the purview of this particular paper. For me to encroach on them would quite possibly, if not quite likely, be perceived by some as willfully provocative, potentially divisive, and not serve the ends of this Conference, which is to ensure that an harmonious and happy time is enjoyed by all. Those are topics which I will leave, and would exhort you to take up in a proper forum, on another day.

So we come back to the point at which we started : Professional Ethics – Why Bother? We bother because we can. We bother because we have the luxury of living and working in a society which permits us to make choices as to how we conduct ourselves. We bother because the system of justice in which we have chosen to serve depends on us acting rightly to achieve the right end, namely peace and order in the community. To return to the popular images with which we were concerned at the outset, let me conclude by asking: How would you like to be remembered? As the greed-is-good shyster, who would sell his soul to turn a dollar? Or as a person with a fundamental appreciation of justice, whose practice of the law actually does make a contribution to the benefit of the community.

The choice is yours.