PRACTISING LAW IN A COMMERCIAL ENVIRONMENT: IS THE CUSTOMER ALWAYS RIGHT?

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It is maintained by some that the concept of professionalism is outdated and incompatible with the business entities which law firms have become. In this article the author examines the concept of professionalism and the tensions that exist in modern legal practise. She concludes that, while adjustment is necessary, the two are not incompatible. Indeed continued adherence to the principle of professionalism is necessary to the health of any legal practise.

> I fear that lawyers in New Zealand are in danger of losing their souls, and I fear for our future if we cannot win back our sense of purpose.[1]

It was in these terms that, in May 1996, Austin Forbes QC, then President of the New Zealand Law Society, described the law as a profession in crisis. He cited loss of business in the provinces; loss of market share to other professions; the increasing cost of litigation placing access to the courts beyond the reach of ordinary New Zealanders; the dishonesty of some members and a pressured lifestyle as factors contributing to a "malaise within the profession". He called for "a renewed vision and ideal for our profession"

This article focuses on the concept of 'professionalism' and whether it has relevance for modern legal practice. I believe that the vision of law as a calling and of lawyers as members of a profession has not failed, nor is it necessarily "in severe trouble".[2] In fact, it is precisely because of the increasing pressures of modern legal practice that the concept of professionalism is important. I intend first, to address what is meant by the concept; secondly, to consider the nature of modern legal practice; and thirdly, to reflect on the

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1 Closing address to the New Zealand Law Society Triennial Conference 1996, (1996) LawTalk 454, 12.

2 CEF Rickett, "Legal Ethics in General Practice", *Legal Ethics* (Legal Research Foundation, Auckland, 1994) 40, 43.

modern lawyer as a professional. Because of the limited nature of this article I shall confine myself to addressing only one aspect of legal practice - the relationship between lawyer and corporate client.

I WHAT IS "PROFESSIONALISM"?

> I think the hallmarks of a profession can be summed up in two words - integrity and service.[3]

Traditionally, the notion of the professional has been defined by contrasting it with that of the entrepreneur. The fundamental difference is underlying motivation: the entrepreneur's primary goal is the acquisition of wealth[4] while the professional is primarily motivated by service to society. The theory of professionalism rejects the notion of dependence on the self-regulating market based on individual self-interest and embraces the ideals of identification with, and service to, society as a whole. This is not service of the self-sacrificing kind. Although service is to be the primary focus of the professional, they are not to go unrewarded, however the acquisition of wealth is incidental, and subservient, to the primary focus of service. The professional's reward for service is based not on "market value" but on "reasonable value".[5] This assures the professional of basic financial security so that they are free to concern themselves with perfecting their discipline in the service of their clients and of society as a whole.

Further, professionalism rejects the concept of a universal individual in favour of cluster groups differentiated by role. Within the cluster group members develop a culture reflective of and consistent with the shared goals and values of society, but often more demanding than those goals and values.[6] Members of the group are expected to act with integrity in their dealings with both other members of the group and those outside of it.

Historically, law practitioners possessed all the hallmarks traditionally associated with a profession - law required highly specialised knowledge unlikely to be possessed by those who used lawyers and were therefore vulnerable to exploitation if market forces were to be the sole regulator. The entrepreneur's customer could identify what services or commodities were wanted, and judge whether a particular commodity or service would satisfy those needs. The lawyer's client could not. Precisely because clients lack the skill

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3 Rt Hon Justice I L McKay "Professions at Risk" (1993) NZLJ 104.

4 "Businesses have been set up to create wealth, in the sense of using resources to best effect, and maximising income, and are not set up to undertake charitable functions". Roger Kerr, quoted in A Hubbard, "The Art of Finding Tax Breaks" *Sunday Star-Times*, ,Auckland, New Zealand, 17 August 1997, C3.

5 Above n 2, 43.

6 Above n 2, 42.

and knowledge of lawyers they are unable to diagnose their needs or evaluate the service received. Recognition of this imbalance of power requires lawyers to act with the utmost integrity in regard to their clients.

Although professionalism has been described as a modern version of the aristocratic concept of "*noblesse oblige*",[7] Rickett places its origins in the latter part of the 19th century as a reaction to the social order of the day, dependent for its success on acceptance by those opposed to the market model. He argues that the dominance of the market model in New Zealand since the 1980s, the emergence of a plurality of world views in society, and the disappearance of a personal relationship, in any meaningful sense, between client and lawyer have severely undermined the extent to which modern legal practice can be described as a profession.[8] That view is one which is echoed by other commentators.[9] It is, I think, unnecessarily pessimistic. None of these factors in and of itself militates against conceiving of law as a profession.

The lament that lawyers are losing their way in the face of changes in society is not new. In 1895 commentators complained that the American legal profession had lost "... the lofty independence, the genuine learning, the fine sense of professional dignity and honor..." and had "... become increasingly contaminated with the spirit of commerce ..."[10] By 1931 the perjorative term "law factory" had been coined to describe large law firms which resembled " the efficiency and production of a first rate industrial plant".[11] Writing in the Harvard Law Review in 1934, Chief Justice Harlan Fiske Stone deplored this commercialisation:[12]

> [I]t has made the learned profession of an earlier day the obsequious servant of business and tainted it with the morals and manners of the marketplace in its most anti-social manifestations.

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7 N Tollemache, "Legal Ethics in General Practice - Commentary", in *Legal Ethics* above n 2, 70 . The growth of professional societies in the latter part of last century may support Rickett's argument but they also have their origins in older groupings, for example, the Inns of Court.

8 Above n 2, 44 - 46.

9 Most notably see A T Kronman, *The Lost Lawyer - Failing Ideals of the Legal Profession*, (The Belknap Press of Harvard University Press, Massachusetts, 1993).

10 "The Commercialisation of the Profession" (March 1895) *The American Lawyer* 84-85 cited in M S Galanter and T M Palay "Large Law Firms and Professional Responsibility" in R. Cranston (ed) *Legal Ethics and Professional Responsibility* (Oxford University Press, 1995) 189, 190.

11 M S Galanter and T M Palay, above n 10, 191. In New Zealand, the emergence of national law firms, popularly described as "the big six" it is estimated that there are in excess of 200 non-lawyer practice managers or administrators in law firms in New Zealand.

12 H F Stone "The Public Influence of the Bar", (1934) 48 Harv L Rev, 6.

To at least some extent, critics of modern lawyers view the past through rose-tinted spectacles. "The 'earlier day' when virtue prevailed lies just over the receding horizon of personal experience...It is easy to believe that the way it is supposed to be is the way it used to be."[13] That view is echoed by Brent Cotter QC and Christopher Roper in their report to the Council for Legal Education and the New Zealand Law Society who stated: [14]

> It was pointed out to us that 20 years ago it was easier; the status and role of the professional was clearer. Nowadays law firms have to have regard to business efficacy in a climate in which the free market prevails.

II MODERN LEGAL PRACTICE - BUSINESS OR PROFESSION?

It cannot be denied that the firms in which many lawyers now practice are structured in a way which resembles the organisation of their business clients. That is hardly surprising. Law firms are simply another type of organisation. They are bureaucracies and although law firms continue to use the body of partnership, the reality is that many operate as if they were corporations. Within these firms there is intense competition for advancement, success is measured by productivity, and 'team players' are valued. Individual lawyers within the firm may find it difficult, if not impossible, to form a personal relationship with their client.[15] Where the client is a large corporate there is the added complication of determining just who the client really is - the director or executive from whom the instructions come, or the company, including its shareholders? In any event loyalty to the firm may deprive the lawyer of the necessary objectivity in terms of the client - lawyer relationship.

But the fact that a law firm is run efficiently is not incompatible with professionalism.[16] In fact, it may mean that service is provided to clients in a more technically proficient and cost effective manner. In addition, within the firm individual lawyers may be required to conform to the highest professional standards, including ordinary ethical norms while being insulated from the pressures which lead some lawyers to violate those norms. The very structure of large firms may mean that clients are protected from neglect, incompetence and embezzlement.[17] Their sins are rather those arising from over-identification with the client,

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13 Above n 10, 193.

14 W B Cotter QC and C Roper, *Report on Education and Training in Legal Ethics and Professional Responsibility* prepared for the New Zealand Law Society, 1996, 58.

15 Above n 2, 53.

16 Compare W B Cotter and C Roper, above n 14, 57 "...what we propose is inhibited by the competitive environment in which lawyers must work."

17 Most calls on the NZLS Solicitors' Fidelity Guarantee Fund have been from the clients of small law firms.

in particular, the corporate client where "... subservience to the valued client may... [lead] to a compromise of obligations to other parties and to the larger legal system".[18]

Occasionally, clients will expect their lawyer to assist them in pushing the law to the limits. Particularly where the lawyer becomes closely involved in a client's business decision-making they may be required to tread on wafer thin ice. In the area of potential wrongdoing by the client, the lawyer faces the greatest dilemma in terms of zealousness. "[M]any sophisticated frauds ... cannot be carried out without the active and knowing participation of a solicitor or other advisor."[19]

While the majority of lawyers are unlikely to find themselves in that position, over-identification with the client, even when acting within the law, can lead to unintended consequences: consequences which might well be avoided by recognition that as lawyers something more than technical adherence to prescriptive norms of legal practice is required of them.

The consequences of identifying too closely with a corporate client are well illustrated in a recent article by Cranston.[20] He refers to the part played by a City of London law firm in the acquisition of the House of Fraser by the Fayeds (a prominent Egyptian family based in London). Inspectors appointed to inquire into the circumstances surrounding the take-over concluded that:[21]

> in deciding not to refer the acquisition to the Monopolies and Mergers Commission the government had taken comfort from [various] assurances given ... by the Fayeds and, more importantly, from an impression which had been created that ... the law firm had aligned their reputations with those of the Fayeds.

The law firm responded that solicitors do not generally give an imprimatur of any sort. This contention was rejected by the inspectors who stated:[22]

> We have little difficulty in accepting that these submissions were correct as a matter of theory. ... In their relationships with the [Office of Fair Trading], however, solicitors are not dealing with High Court judges or experienced lawyers. They are dealing with intelligent lay people.

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18 Above n 10, 196.

19 D Kirk, "Blue Arrow: a legacy of suspicion", (1991) 5(43) 5 November *Lawyer* 4 cited in R Cranston, above n 10, 23.

20 R Cranston, "Ethics and Professional Responsibility" in R Cranston (ed), *Legal Ethics and Professional Responsibility*, above n 10.

21 Above n 10, 21.

22 Above n 10, 21.

> ... Anyone reading [the] letter would have obtained the impression that the firm was in a certain sense vouching for the accuracy of what their clients had said.

The inspectors concluded that the problem had arisen from a failure by the solicitors to "appreciate the dangers of identifying with their clients". In that case, over-identification with the client (or at least a perceived over-identification with the client) led to an overestimation by other parties of the strength of the client's case. Wittingly or unwittingly, the solicitors became parties to misleading assurances given by their clients.

Identifying too closely with the client has other pitfalls. Where a firm acts for large corporate clients and a large proportion of the firm's business depends on retention of those clients, there is a risk of "ethical tunnel vision".[23] The desire to keep the clients business can lead to an underestimation by both lawyer and client of the potential risk of conflict where a firm acts for clients with competing interests in the same transaction.

So -called "Chinese walls" and "cones of silence" are devices used by some firms in an attempt to overcome the problem of conflicts of interest between clients for whom the firm acts. As Tony Lusk QC points out "[d]espite very clear indications from the courts that Chinese Walls and similar contrivances do not overcome the problem, the practice goes on of acting for multiple clients with conflicting interests."[24] Firms justify the practice on the basis that each client has been informed of the situation and consents to the firm acting for both (in some cases, all) parties. But rarely are clients referred for independent advice as to potential risks before giving that consent. Lusk identifies this as a "big firm" problem, particularly in the case of major commercial transactions and negotiations and concludes that firms[25]

> are motivated to behave in this way by a combination of greed and arrogance - the arrogance being a belief that they are above the usual rules or that their important commercial clients can only obtain professional services of true excellence, by having their affairs handled by the firm concerned.

Those who ascribe to the view that market forces are now the overriding determinant in legal practice might take a different view. A client (or clients) referred elsewhere because of a conflict may become a client lost to a competitor.

These clients may well be receiving highly competent advice in the technical sense. Nonetheless, regardless of the underlying rationale, the practice of acting for more than one party in a transaction compromises the service which a firm is able to offer those clients even where the clients are advised by different persons within that firm. The allegiance

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23 D L Rhode "Ethical Perspectives on Legal Practice" (1985) 37 Stan L Rev 589, 627.

24 A A Lusk QC "Legal Ethics in General Practice - Commentary", *Legal Ethics* , above n 2, 66.

25 Above n 24, 66.

owed by the individual lawyer to the firm (whether a partner or not) coupled with the firm's desire to retain the client makes the provision of truly objective advice an impossible challenge.

My view is that the problems illustrated in these examples have their solution, at least in part, in an understanding and acceptance by lawyers that as members of a profession there are limitations upon the manner in which they may act for clients.

III THE MODERN LAWYER AS A PROFESSIONAL

Much of the criticism of the concept of professionalism applied to the law has focused on its origins in the advocacy role of the lawyer. Today, many aspects of a lawyer's work do not involve advocacy in the sense of supporting the client in the face of an adversary. There may simply be no third party involved in any direct sense. For lawyers acting for large corporate clients most of the advice they are asked to provide may be of this nature, for example, in the minimisation of tax liabilities or obtaining finance for their enterprise. However, while there may well be no 'other party' in the adversarial sense the actions taken by the client will impact on other people. The result of tax minimisation for one client, corporate or otherwise, indirectly affects every other taxpayer by reducing funds available to the public purse. This is not to suggest that the lawyer cannot act for a client who wishes to achieve ends which may have adverse consequences for others, rather that, in acting for the client, the lawyer must have a conscious awareness of the responsibility she owes to society and the law.

Lawyers do not act in a moral vacuum. They are not "simply technicians".[26] They are required to exercise skill and judgment in the interest of their clients, not merely to carry out the clients instructions uncritically, whether acting as advocate or adviser. Lord Denning's admonition to advocates[27] that they owe their first allegiance to truth and justice, applies equally to lawyers in non-advocacy roles. While the client is entitled to set out what it is he wishes to achieve, how and whether it can be achieved are matters which are solely within the realm of the lawyer, as a professional. The client who does not accept that must "take their problem elsewhere"[28] (always supposing that there is somewhere else to take it). This is a necessary corollary of preserving the autonomy of the lawyer but in a competitive

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[26] R Cranston, above n 10, 5.

[27] "It is a mistake to suppose that [the advocate] is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice." *Rondel* v *Worsley* [1966] 3 WLR 950, 962 per Lord Denning MR.

[28] Above n 3, 104. See also Forbes above n 1, 13 "The client shopping around for a legal opinion to support a dubious transaction must find that they will be disappointed."

environment where client loyalty is no longer assured the lawyer is most at risk of seeing things the way the client wishes her to. Giving the client prudent, principled advice runs the risk of severance of the lawyer-client relationship, if that advice is not what the client wants to hear. Failure to do so, however, may also have that effect.

When lawyers act without reference to the wider public good it is not only society which suffers. The client itself may suffer because the advice given is so focused on what the lawyer believes the client wants to hear that the client is provided with inadequate or incomplete advice to the client's subsequent disadvantage. In a very real sense it is in the interests of the client to receive dispassionate advice. I would suggest that this is particularly so where the lawyer (or her firm) acts across the full spectrum of legal services for the client. A lawyer may find that having provided advice to a corporate client in a non-adversarial role she is then required, in essence, to justify that advice in subsequent litigation or investigation. If the initial advice has been inadequate, the problem may be compounded to the client's and the firm's disadvantage.

In the context of non-advocate functions Rickett suggests that it is pertinent to ask:[29]

> if in trying to achieve her client's objective the lawyer would be achieving an unfair, unconscionable, or unjust, though not unlawful, end, or the lawyer would have to use unfair, unconscionable, or unjust, though not unlawful, means, should the lawyer decline to act?

There is no easy answer to that question but it is one which all lawyers must consider in the course of practice.

Clients consult lawyers not only because they have a technical knowledge of the law - the ways and means of achieving legal objectives - but also, more importantly, because lawyers have experience in, and of, the law which their clients do not. A competent lawyer demonstrates not only technical capacity but also practical wisdom and judgment in her dealings with clients. In the words of Kronman "[a] lawyer whose only responsibility is to prepare the way for ends that others have already set can never be anything but a deferential servant."[30]

Increasingly lawyers who work closely with corporate clients are involved in their client's (and in the case of in-house counsel, their employer's) business decision-making. While this has benefits for both lawyer and client,[31] there is a danger that the autonomy of the lawyer will be compromised. In that event the result is loss for both client and lawyer. If

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29 Above n 2, 52.

30 Above n 9, 15.

31 For example, the lawyer gains intimate knowledge of the client's affairs and is able to provide advice grounded in that knowledge in a way an outsider cannot.

the lawyer focuses solely on the client's objectives to the exclusion of wider issues of justice, she deprives her client of a valuable service. According to Rhode, lawyers who fail to consider "the moral consequences" of a client's actions may:[32]

> compound the deflection of responsibility that too often characterises organisational behaviour. Clients can justify asocial action on the ground that counsel have pronounced it not unlawful, while counsel can rationalise their participation by deferring to client autonomy.

since judgment is not exercised in a vacuum the result of "[c]onceiving of legal practice in terms of *judgment* as well as skill, competence and habit" is to enable practitioners to focus more clearly on "the relationship between theoretical knowledge and ethically guided action".[33] In exercising judgment, the lawyer must balance "different, sometimes contradictory, considerations as part of the decision-making process".[34] Technical arguments about whether particular transactions fall just within or outside of the law should alert lawyers to the wider issues at stake.[35]

The law continually shapes social and political relations.[36] The lawyer must be aware, and have an understanding of social relationships in order to assess the effect of various courses of action. Increasingly, politicians and the public look to law as a means of addressing social concerns. For that reason, the lawyer has an obligation to look beyond the client's immediate goals in order to provide the client with adequate advice.

IV MORALITY AND THE PRACTICE OF LAW

In his commentary on Rickett's paper Campbell asks whether there is "such a thing as betrayal of the ethical foundations of law, even when, in a technical sense, the lawyer is acting within the confines of legally permitted practice?"[37]

The question must be answered affirmatively. Law is not separate from morality. "[T]o do what is legally required is not always to be morally in the clear..."[38] The nature of the

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32 Above n 23, 625.

33 A Goldsmith, "Heroes or Technicians? The Moral Capacities of Tomorrow's Lawyers", (1996) 14 Journal of Professional Legal Education 1, 4.

34 Above n 33, 4.

35 Above n 1.

36 An example is the perceived "judicial activism" of the Court of Appeal during the presidency of Lord Cooke of Thorndon. Likewise the current concern of business interests with the decisions of the Employment Court.

37 A V Campbell "Legal Ethics in General Practice - Commentary" Legal *Ethics* above n 10, 57.

38 T Honoré "The Dependence of Morality on Law" (1993) 13 Oxford Journal of Legal Studies 1, 17.

relationship between law and morality is complex, particularly in a pluralistic society. As Honorè states:[39]

> ..laws do not usually rule on moral conflicts directly. ... What they are ruling on is the question whether to permit certain behaviour or a certain institution creates serious injustice between those who make use of the permission and others. ... Not everything that is permitted is approved.

Are lawyers, then, required to judge the morality of their clients ends?

Many practitioners are uncomfortable with the idea that they should look beyond the narrow parameters of the law, in the legalistic sense, to issues of substantive justice when advising clients. They argue that in a democratic society the law is defined by the majority to best meet the needs of the majority. Arguments about substantive justice are to be left to society's elected representatives.

The theory of role-differentiation suggests that lawyers may escape moral accountability for their participation in their clients' activities. Thus the lawyer may act with "unswerving commitment to the [client] company, without reference to other (human) parties who might have legitimate interests at stake (for instance, consumers, employees, investors, etc)".[40] As long as the lawyer is acting within her role she may be allowed to act in ways which, outside of that role, would be immoral.

The proponents of role-differentiation justify the theory on the ground that in a pluralistic society the function of law is to "secure stable and just political community between the advocates of diverse views of the good".[41] The role of the lawyer is fundamental to this function and the obligations arising from the role are fundamental to it. Those obligations require that lawyers act in certain prescribed ways and that "... lawyers neither can nor ought to make [the] factual and normative judgments that more rigorous ethical obligations would entail".[42] To do so is to substitute their own morality for that of "the ideal of neutrality between the reasonable views represented in the communities in which they apply".[43]

For the lawyer busy with day-to-day practice the theory is seductively pragmatic. Faced with the client who wishes to achieve an end by morally, though not legally, dubious means,

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39 Above n 38, 16.

40 Above n 2, 48.

41 T Dare "Legal Ethics and Legal Education" (1997) NZLJ 311.

42 Above n 23, 595.

43 Above n 41, 313.

or to achieve a morally dubious, but not illegal, end, the lawyer simply acts as the client's agent in assisting with or carrying out the legal transaction. The question of morality is irrelevant. But as Rhode pointed:[44]

> this refuge in role provides a deceptive haven, one that extracts a considerable personal price. ... Such a perspective offers one the illusion of freedom from responsibility, while in fact delimiting individuals' moral autonomy. At best, the result is likely to be a resigned submission. At worst, it can foster an enervating cynicism.

The need to schismatize professional and personal moralities which the theory of role-differentiation requires is neither healthy nor desirable. Lawyers should not be required "to do for a guinea" what, outside of the role of lawyer, they would consider it "wicked and infamous to do for an empire". That is not to say that lawyers should substitute their personal morality for professional morality. Rather they should remain alive to the tension which exists between the two. "[T]he real challenge" according to Kronman "is not to overcome the dilemma (for that cannot be done), but to resist the temptation to resolve it by always putting the client's well-being before the law's".[45] At the heart of the lawyer's role is achieving justice and giving effect to the law. Routinely putting the interests of a paying client before these fundamental principles will inevitably compromise that role.

Professionalism does not require that lawyers should be "moral saints"[46] or behave as "hopelessly high-minded prig[s]" dispensing "Polonian advice"[47] from on high. What is required is a recognition by lawyers that professional responsibility necessitates "a sense of when to conform with current conventional professional opinion and practice, and when to exhibit professional courage to act across the grain".[48] In order to act professionally the lawyer must be prepared to live by honest answers to fundamental questions about the nature of her conduct since the decision to act for a client always represents a moral choice whether the lawyer is conscious of that or not.

V CONCLUSION

Even though the social conditions which gave rise to the concept of professionalism have changed I believe that the fundamental underlying notions of honesty, integrity and service

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44 Above n 23, 626.

45 Above n 9, 145.

46 "I don't know whether there are any moral saints - if there are, I am glad that neither I nor those about whom I care most are among them": S Wolf "Moral Saints" (1982) 79 Journal of Philosophy 419.

47 Above n 9, 145.

48 Above n 33, 2.

to society have continued relevance to practice into the 21st century and beyond. Because of their unique position in relation to the law lawyers must act "not merely *in conformity* with the law, but *out of respect* for it".[49] In doing so they deserve the support of their colleagues. In a competitive, market-driven economy, that is not often easy but I would suggest that it is vital:[50]

> When the profession of the law is reduced merely to business efficiency or to clever manipulations on one's client's behalf, then something is lost, not only to the practitioner thus patronised by her client, but to the society in which such lawyers practice. The law can help us reflect more deeply and concretely on our obligations to one another or it can help strengthen the Hobbesian perception of society as a state of constant and barely restrained enmity.

In the environment in which lawyers practice today, it is more important than ever that they retain a sense of belonging to a profession. Unless they do so there is a danger that they will come to regard themselves, as will others, simply as technicians. The very nature of a lawyer's work requires more. Because they have skill and knowledge not readily available to their clients or to the general public, and because of the impact of the subject matter of their skill upon society, they must exercise that skill with honesty and trustworthiness. It is not enough for lawyers to suspend moral judgment when they start their working day. It is only by acting with integrity that the lawyer is able to reconcile the tension that exists between service to the client and service to society as a whole.

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[49] Above n 37, 61.

[50] Above n 37, 61.