

7TH COLLOQUIUM ON THE LEGAL PROFESSION: POLEMICS AND PROFESSIONALISM

Background Notes to Professionalism and Commercialism:
The legal profession has sold its soul to *Mammon*

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Ethically and morally, individual lawyers are no better and no worse than any other individuals. It is their peculiar situation that puts them under scrutiny and that so often brings the profession into disrepute. They have been given, and have insisted on discharging, a number of tasks that, if not logically incompatible, are in tension with one another.

A vendor did not only not tell a purchaser who had asked him questions about the slag on the property being sold that it was radioactive, but actually told the purchaser that it was most useful for land-fill purposes. The court had no trouble finding that a fraudulent representation on which reliance had been placed had been made to the purchaser. The damages that flowed from this misplaced reliance were awarded to the purchaser, but he was refused the award of punitive damages he also had sought. Taylor, J., wrote: "It is, I think, clear that the claim for punitive or exemplary damages cannot succeed; this is not a case in which there has been an intentional injury, abuse of authority, or any other factor which would characterize the conduct of the defendants otherwise than as *ordinary commercial dishonesty*." (Emphasis added); C.R.F. Holdings Limited v. Fundy Chemical International Limited (1980), 14 C.C.L.T. 87.

The market dictates a low sense of responsibility to commercial/corporate clients. Lawyers beholden to them and also to the very same market forces and ethics are pushed toward promoting the notion that to serve their clients' interests is to advance ethical practices. But, that notion is in tension with other obligations espoused by the legal professionals.

Lawyers are members of a profession. That is, they belong to a group that has command over a discipline with a theoretical framework that they have been trained to interpret and apply. This knowledge gives them authority over their advisees.

From Hughes, E.C., Men and their Work, Glencoe, Ill.: The Free Press, 1958, 78:" Professions...perhaps more than other kinds of occupations, claim a legal, moral and intellectual mandate. Not merely do the practitioners, by gaining admission to the charmed circle of colleagues, individually exercise the licence to do things others do not do, but collectively they presume to tell society what is good and right for the individual and for society at large in some aspect of life. Indeed, they set the very terms in which people may think about this aspect of life."

The legal profession's obligations in respect of their advice as to what is good and right for the individuals they advise is complicated by the fact that the subject-matter of their professional knowledge is law. Law, in a liberal polity such as Canada, is taken to embody the shared value system that underpins the liberal political scheme. This means that lawyers, as professionals, are expected, and fiercely claim, to uphold the ethical and moral values that are said to be essential to the fabric that holds society together. Their clients, especially the commercial and corporate clients, do not bear, nor feel, any responsibility for the ethical or moral values that create the social consensus the legal system assumes to exist and undertakes to uphold. Their interest is to maximize their material opportunities. Inasmuch as this requires justification, this is furnished by the libertarian economic ideas developed by Adam Smith. The contention is that, if each individual in an unfettered market economy acts in her own interest, the overall result will be the most efficient production of material welfare such an economy can produce. In a paradoxical way, bounty generated by selfish activity will enure to the benefit of all. Self-interest serves the general good. It is sensible, then, for individual market actors to demand that their legal and accounting advisors provide them with the means to pursue their self-serving goals. This is as moral and ethical way to behave as any. Lawyers and accountants keen to serve their clients with zeal, have a tendency to internalize this logic.

Corporate/commercial lawyers (as well as lawyers in different kinds of practices, but less obviously so) seek to advantage their clients by getting rulings that favour their clients and/or by organizing their affairs so as to avert some of the obligations that might arise because of their commercial activities and/or to take advantage of some benefits that, on the face of a legal instrument, was not intended for them. They are asked to use their special skills to interpret and apply the systematic theory they have mastered and which entitles them to be called professionals. They advise their clients as to what is and what may not be efficacious and suggest legitimate ways to them to arrange their affairs and to conduct their dealings. They are expected to be imaginative and often they are. It is natural that, to give themselves as much scope for innovation as possible, they will try to limit the constraints imposed by some vaguely defined ethical fetters. There is a natural and defensible tendency to proclaim that, if conduct is legally permissible, it is ethically appropriate. This will permit the professional to focus on her client's interest without concerns about (possibly) real, but hard-to-discern, legally unarticulated ethical metes and bounds. This robust approach to the enlargement and curtailment of legal rules and doctrines may lead to the devised arrangements and dealings being called into question because they are seen to distort or to undermine legal regulatory regimes as originally envisaged by their creators. Lawyers respond by seeking to have their schemes and schemings endorsed. They make arguments before tribunals and legislative bodies to help their clients' causes. As they do all of this they play a key role in the development of the boundaries of acceptable behaviour.

Doreen McBarnett has noted that "lawyers are not simply means to the implementation of statutory or other ready-made rights, but creators of legal techniques, definitions and devices...[they are] legal entrepreneurs, routinely making law by establishing legal practice" (1988), 15 *Jo. Law & Soc.* 113, 118).

Often, the results disgust a healthy mind unburdened by the lore of the law and the robust indifference to others that is the mainstay of a market capitalist economy.

From McLean, b., & Elkind, P., The Smartest Guy in the Room: The Amazing Rise and Scandalous Fall of Enron, 2003, at 142: “ Say you have a dog, but you need to create a duck on the financial statements. Fortunately, there are specific accounting rules for what constitutes a duck: yellow feet, white covering, orange beak. So you take the dog and paint its feet yellow and its fur white and you paste an orange plastic beak on its nose, and you say to your accountants, “This is a duck! Don’t you agree that it’s a duck?” And the accountants say, “Yes, according to the rules, this is a duck.” Everybody knows that it’s a dog, not a duck, but that doesn’t matter, but that doesn’t matter, because you’ve met the rules for calling it a duck.” See also, Fundamental Causes of the Accounting Debacle At Enron: Show Where It Says I Can’t: Summary Of Testimony Before The House Committee On Energy And Commerce, 6 Feb., 2002, statement by Roman L. Weil.

In Salomon v. Salomon & Co., [1897] A.C. 22, the doctrine of separate personality was exploited to have it apply to small firms that incorporated, even though the history of corporate legislation was crystal clear: it had not been intended to apply it in this setting. It was a manipulation that, at that time, struck large numbers of people as shocking and offensive because it enabled individuals to avoid personal responsibility for conduct clearly engaged-in by them or on their behalf. This was anathema to a free will/free market society. Indeed, not only was there popular opinion to the effect that Salomon (and his lawyers) had used the law inappropriately, unethically, perhaps fraudulently (see Aaron, in John Adams, ed., Essays for Clive Schmithoff, Professional Books Limited, 1983), but this argument was made before the court by Salomon’s creditors and appeared to resonate with members of a very strong Court of Appeal. Nevertheless, the House of Lords gave its imprimatur to Salomon’s lawyers’ manipulation of the law, something that has had a tremendous impact on contemporary corporate law and ethics. Lord Macnaughton, at p.52, quoted with approval a statement from In re Baglan Hall Colliery Co., L.R. 5 Ch. 346 to the effect that to form a company to avoid personal liability was acceptable as the law did not expressly forbid it, even though it was manifest that the law was used contra its drafters’ intention and that the manipulative technique was anathema to large sections of the public.

In this context, how is a lawyer supposed to act?

From Willis, J., “What I like and don’t like about lawyers” (1969), Queen’s Quarterly, 76 (Spring), 1—9: “ Except in routine transactions such as buying a house or settling an uncontested estate, the usual reason for a lawyer coming at all is to get something to which he is not really entitled: ”get me off this drunk driving charge”, “show me how to get around this tax”, “win this negligence case for me”. So that the lawyer spends his life in a moral smog—or if that is putting things too high, in an area where the air is less than pure.”

The line that separates imaginative and lauded lawyering from anti-social, unethical manipulation, often is a blurry one. This has been a core problem for eons. Underpinning the difficulties are aspects of the overarching political economic logic of market capitalism.

Manifestly both the integrity of the liberal legal/political system and the extent of the lawyers' authority and knowledge are elastic notions and spheres. Lawyers, therefore, have wiggle room when asked to serve the potentially divergent interests of their clients' and the legal system. In our legal regime, lawyers faced with resolving troublesome tensions between serving their clients and the underlying (as well as the explicit) tenets of the administration of justice are lawyers in **private** practice, that is, they are professionals who, like their clientele, are bent on maximizing their personal economic opportunities.

Lawyers want to make a good living. Private, for-profit, entrepreneurs are to serve competing masters at the same time. While looking after their own welfare, they also are expected to guard the letter and spirit of the law. As they make choices and these turn out to offend and inflict harms on their clients or on the political and moral policies promoted by law, while they continue to make a very good living, lawyer-joke writers have a field day and conferences are set-up to determine whether lawyers have (once again) sold their soul to mammon. It becomes apparent that a **public** purpose—the maintenance and furtherance of supposedly shared values and norms—has been left to private actors who were trusted because their professional obligations were expected to outweigh their personal and their clients' concerns. All too often this has proved a vain expectation. The recent stock market scandals fuelled the most recent outbreak of lawyer breast-beating. The basic elements of this latest ethical/moral crisis were the same as the ones that characterized the long history of similar crises.

Put another way: lawyers are praised for their skill at manipulations that bemuse and often disgust citizens, especially when they learn about the adverse impacts of the manipulations. Lawyers are in a bind. Their fellow professionals and many of their clients want them to bend and twist the law and their duty to serve their clients pushes them to do so. This gets them accolades and riches but this professional narrowness may put them and their clients on a collision course with our shared value system that undergirds our justice system and which the legal profession promises to protect.

The line that separates imaginative and lauded lawyering from anti-social, unethical manipulation, often is a blurry one. This has been a core problem for eons. Underpinning the difficulties are aspects of the nature of this unique profession and, even more importantly, the overarching political economic logic of market capitalism.

As to the first of these difficulties, while lawyers, because of their professional standing and culture, perceive that there are some restraints on how far they should go in manipulating the law, there are no such professional cum cultural constraints on their clientele. For lawyers this balancing is made more difficult because their professional restraints are not defined by some precise goal. Medical practitioners set out to fight impersonal forces of nature; lawyers act on behalf of clients who are trying to outwit

other individuals and/or the government. Here it is important to observe that one of the landmarks of a profession is to stress its independence. Leaving aside the basic argument that this independence *depends* on the government's willingness to grant certain people a monopoly over services, there is a serious question as to the degree of independence of a law firm that lives off the fees of large commercial/corporate activities.

From Willis, J., op.cit.:" Most of the well-known firms in Toronto now do mainly what is called 'commercial work' which means, in plain English, that they spend their lives pushing the interests of large corporations, or, using still plainer English, finding legally respectable ways of doing what their clients want done; one of my non-legal, jumping at conclusions, calls them 'lackeys of business'. There is, in other words, now a real danger that the 'successful lawyer in private practice will become what he has always sneered the government lawyer or the man in a legal department of a business corporation for being—a 'kept man'."

This was written in 1969. This tendency has increased markedly. In the current economic climate this tendency is leading to renewed anxiety about the extent to which lawyers have sold out their professional souls. This brings us to the second of the underlying difficulties.

We inhabit a world that has accepted what is often termed to be a neo-liberalist agenda. Central to this commentary, the main features of this agenda include the collapse between industrial and financial capital and the institutional logic that comes with this re-arrangement. As well, technologies and the break-down of nation state barriers have moved production and competition onto a global plane, increasing pressures to have governments get out of the way of commercial/corporate activities. (Susan George, David Harvey, R. Brenner, P.Treanor, D. Henwood, J. B. Foster,...).

Lawyers are in the forefront of deregulation, the advocacy of voluntary compliance and privatization, helping their clients to gain more room for profit-chasing, less fettered by pesky government regulation. In and of itself, this does not create ethical dilemmas, but it heightens the perception that the leaders of the legal profession are handmaidens of the well-resourced and not too fussed about the needs of the vulnerable, a perception that does not help when things go sour.

More directly relevant, these macro-economic developments signify that much of the private accumulation of wealth is attainable by the generation of profits by means of financial dealings that use the productive activities of firms and corporations as a substratum for their machinations, rather than as their end-all, be-all. It is increasingly possible to make money without having too much regard for the state of a particular form. To serve these new captains of the economy, accountants have used their manipulative skills in pyrotechnical ways.

Lawyers are needed to give effect to their machinations. And their techniques of manipulation, perfected over the ages and as noted by McBarnett, op.cit., are similar to those of the much-maligned accountants. Just as high end lawyers were willing to

destroy documents / doctor scientific reports (see tobacco and asbestos illustrations below)/ intimidate witnesses (see Dalkin Shield)/ help to hide truth (asbestos, Visy, discussed below), so-called top tiers law firms assisted in the preparation of option plans, in the lending agreements that were portrayed as sales and purchases, in the creation of Special Purpose Entities that hid losses, in the creation of off-shore entities that shifted the incidence of responsibilities, etc., in the recent Enron scandals. Coffee, Sarbanes-Oxley, Glasbeek). Much of this activity was within the bounds of black letter law; some was not. But, was any of this acceptable to our shared value system, to the culture of an ethical milieu to which the profession claims to adhere?

As seen, the operation and structure of commercial/corporate practice makes this last question difficult to confront. It is easily avoided by hanging on to the premisses that in serving the client within the rules, all that needs to be done has been done. In the new economic climate, in which market ethics have no serious rivals, this is an easier argument to make. Lawyers are rewarded for assisting accountants develop new means of speculating in the markets—often called new products, an ironical use of the word in a world where production is subordinate to non-productive activities--, for assisting merger and take-over tactical stances-again pushing new products such as poison pills; see Michael Powell—and so forth. Financial profiteering focuses on short-term planning, rather than on producing welfare over the long haul by winning market share as a result of quality production. This short term approach is reflected in neo-liberal policies and productive relations. One obvious instance is the demise of the indefinite contract of employment, being replaced by short term, one-off contracts and a geometric increase in the incidence of casual employment relations. In this kind of world, it becomes normal for lawyers to believe that they are doing the right thing as they devise instruments for, and advise their, clients on how to maximize profits by legal manipulations that have little regard for the spirit of the laws and concepts that underlie the rules they are pushing and twisting. A libertarian ideology is triumphing and makes it easier to serve th clients' unadulterated needs while believing that the facilitating lawyers are serving the common weal.

The legal profession, always in a bind by its acknowledged loyalty to a greater good, to its cienteles' needs and its members' personal material goals, is peculiarly vulnerable to the pressures that stem from the dominance of a market ethic that increasingly dominates our social relationships.

J.-F. Lyotard, The Postmodern Condition, 1984, 66:” The temporary contract supplants permanent institutions in the professional, emotional, sexual, cultural, family and international domains, as well as in political affairs.”

In short, there is little new about lawyers being seen as leaning toward privileging money-making (for themselves and their commercial clients) over their professional responsibilities toward other values. What is new is the changing ethos about how to draw the line in a world where market forces are more directly relied on as a wealth producing mechanism and they have become less and less fettered. In that setting the age-

old lawyers' balancing trick tilts their conduct ever further in the direction of mammon as mammon becomes ever more representative of what is perceived to be the general good.

In an action brought by the regulator overseeing competition policy in Australia, the evidence relied on by the regulator came from one of the parties that believed that it had been participating in a conspiracy. It offered proof of meetings between its officers and those of the defendant to rig prices in the industry which they dominated. The defendant acknowledged that there had been such meetings, but that, after legal advice, it had never intended to conspire to fix prices, but had merely pretended to do so in order to get useful information about its competitor/supposed conspiracy partner's business. That a defence of legally counselled advice could be used (presumably by lawyers) to fend off other problems may say something about the parlous state of ethical sensibilities. Amcor v. Visy

In recent times, there has been much litigation about the shredding of records by tobacco companies, after receiving legal advice. Lawyers endorsed such destruction of potential evidence by telling their clients that efficiency arguments supported it, provided it was not intended to deprive litigants of vital information. The line being walked between the need to be seen to be ethical and the need to serve the client was tightrope like. In at least one case, a judge was offended deeply enough to find for the plaintiff (an alleged second-hand smoke victim) by imposing the burden of proof on a tobacco company which had got rid of documents on lawyers' advice; see McCabe v. British American Tobacco.

In the asbestos litigation, there are many recorded instances of document doctoring and destruction. As well, there is evidence of lawyers advising scientists how to put the 'best' interpretation on their findings which, if they had been put out as originally drafted by the scientists, might have allowed workers to bring successful actions much earlier than they were able to do. In a parallel way, workers in one part of the country did bring a successful action based on evidence and admissions of culpability which the same defendants were able to hide from workers elsewhere because their lawyers had obtained agreements that this damnifying evidence would not be revealed. Lawyers participated in hiding evidence; Brodeur, Outrage Is Not Enough, 1985.

In the infamous Dalkon Shield affair, A.H. Robins' lawyer sought to blame injured women's sexual activities for their injuries. To this end, during discovery, they put questions to them about their sex lives and personal habits, about their hygienic habits both before and after sexual intercourse, about their habits during menstruation. They insisted that these women's partners be present when these questions were being posed as well as questions about extra-marital sex by each of the partners. There was clear evidence that the intra-uterine device in question always was intended to be sold to sexually active women, regardless of their habits. Manifestly, these lawyers' questions were intended to intimidate and harass plaintiffs, not attempts to get at the truth; Morton Mintz, At Any Cost, 1985.