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INSIDE LAWYERS' ETHICS

Christine Parker
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Inside Lawyers' Ethics

Legal ethics is often described as an oxymoron – lay people find the concept amusing and lawyers can find ethics impossible. But the best lawyers are those who have come to grips with their own values and actively seek to improve their ethics in practice. *Inside Lawyers' Ethics* is designed to help law students and new lawyers to understand and modify their own ethical priorities, not just because this knowledge makes it easier to practise law and earn an income, but also because self-aware, ethical legal practice is right, feels better and enhances justice. Packed with case studies of ethical scandals and dilemmas from real-life legal practice in Australia, each chapter delves into the most difficult issues lawyers face. From lawyers' part in corporate fraud to the ethics of time-based billing, the authors expose the values that underlie current practice and set out the alternatives ethical lawyers can follow.

This book is a compact, usable resource for all students, teachers and practitioners in the disciplines of law and ethics.

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Inside Lawyers' Ethics

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and
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To
Greg Restall
and
Maria Bohan

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Preface

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Finally, we dedicate this book to our partners, Greg Restall and Maria Bohan, thanking them, and also each other, for helping us to keep on going in the faith that it is worthwhile to spend much of our time in ethics education and discussion with law students and lawyers.

Christine Parker and Adrian Evans
Melbourne, July 2006

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Introduction: Values in Practice

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CASE STUDY 1.1 The Jewish QC and the Alleged Nazi War Criminal

In early 2001, newspapers reported that a leading Melbourne criminal barrister and civil rights advocate had been asked to represent suspected war criminal Konrad Kalejs in a hearing to determine whether Kalejs should be extradited to Latvia to face charges over the deaths of tens of thousands of Jews and others during World War II. The relevant barrister was a Queens Counsel and was also prominent in the Jewish community, a former president of Liberty Victoria (a civil rights organisation) and well known for representing a variety of high-profile criminal accused including Julian Knight (in his trial for the Hoddle Street massacre), John Elliott (who was cleared of corporate fraud), and members of Hells Angels. The barrister was, reportedly, born in 1946 in Russia. His parents fled to Germany when he was six weeks old and later settled in Israel. They migrated from there to Australia in 1959. In 1997 he 'was quoted as telling *The Herald Sun* that elderly Jews living in Melbourne would be having sleepless nights knowing Mr Kalejs was walking free in Melbourne'.[1] Mr Kalejs was 87 at the time of the extradition proceedings. He denied the allegation that he had served as an officer in a death squad within a Latvian war camp where an estimated 20,000 to 30,000 Jews, Gypsies, Red Army soldiers and others were executed, or died of starvation or torture at the camp. However, Kalejs had previously been deported from the US, Canada and Britain because of findings that he had been involved in war crimes. From newspaper reports at the

1 Quotation from D Farrant, 'Leading QC May Defend Kalejs', *The Age* (Melbourne), 23 January 2001, 1. All information in this paragraph from that article and from Richard C Paddock, 'Case Tests Australian Protection of Nazi War Criminal', *The Washington Post* (Washington DC, USA), 21 January 2001, A21; 'Jewish Leaders Warn Govt to Beware Kalejs Health Defence', *AAP News* (Australia), 2 January 2001. See the following newspaper articles for accounts of how the case ended: Nick Lenaghan, 'Vic – Accused Nazi Dies, War Crimes Debate Continues', *AAP News* (Australia), 30 December 2001; '"Witch-hunt" Over Kalejs', *Newcastle Herald* (Newcastle), 10 November 2001, 2; 'Kalejs No-Show Thwarts Watchers', *The Age* (Melbourne), 26 January 2001, 3.

> time, it seemed that Kalejs' defence to the extradition would be that his health was too poor for extradition to Latvia. His health problems included legal blindness, dementia and prostate cancer. Jewish leaders, however, pointed out that it was not uncommon for war crimes suspects in other countries to make claims of unfitness for trial that later proved to be unfounded. The legal process for extradition could easily have dragged on for eighteen months, if Kalejs chose to fight it. Should the barrister have acted for Konrad Kalejs in the extradition proceedings, and if so, how might he proceed?

This situation raises a range of questions about the proper role and conduct of lawyers: To what extent is it our role as lawyers to act as a zealous advocate for any client that comes along? Should we advocate for clients and causes that we personally find morally repugnant? Can we trust the legal system to sort out issues of truth and justice? To what extent should we consider broader duties to society, our relationships with our own families and communities and our religious faith and personal beliefs in deciding what clients to take on, or how to act for them?

Many of the questions raised by this scenario are ethical questions. They raise issues like: Is it possible to be a good person and a good lawyer? What interests should we spend our life serving as a lawyer? How should we relate to clients? To what extent should we consider non-legal, particularly moral, relational and spiritual, factors in attempting to solve clients' problems? What obligations do we, as a lawyer, owe to others beyond our clients, for example, opposing parties, colleagues, the public interest, the courts, our family, the communities (of social interest, faith, geography, sexuality etc) that we are a part of?

We might find answers to these questions in various ways that do not invoke ethics – our own financial interests, what others expect of us, what we find most convenient or fulfilling, and so on. Ethics is concerned with deciding what is the good or right thing to do – right or wrong action, and with the moral evaluation of our own and others' character and actions – what does it mean to be a good person? In deciding what to do and how to be, ethics requires that we look for coherent reasons for our actions and character that show why it is right or wrong to act according to our financial interests, or to do what others expect in certain situations etc. It asks us to examine the competing interests and principles at stake in each situation and have reasons as to why one should triumph over the other, or how they can be reconciled.

In Case Study 1.1, it is not enough to say that the QC should not represent the alleged criminal because he finds it distasteful to do so, or because he might anger his friends or lose business. The anger of friends or personal distaste are not independent ethical reasons for refusing to do something. We need to look more deeply to determine whether they indicate that some ethical principle is at stake; for example, disloyalty to family or community. If so, is this ethical principle more or less important than the values that might be furthered by representing the client, such as protecting civil liberties or lawyers' responsibility for ensuring that criminal accused have fair hearings? Similarly, we cannot simply say that the QC needs to earn a living and therefore should take every paying customer. We need to consider whether there is any justification for a Jewish lawyer, or indeed any lawyer, to earn money to feed himself and his family by arguing

that someone who likely participated in the genocide of Jews and others during World War II should not be held accountable for those crimes. Does the need to earn money override loyalty to religious and racial community? Can a personal commitment to civil liberties be more important than community identity? What about a personal commitment to earning money or arguing challenging cases? Are these good reasons for choosing certain cases over others?

We can also ethically evaluate social rules, practices or attitudes to determine whether they promote right action and good character. Most of us have our own ideas about the right thing to do or what good character is. Our personal ideas about ethics are likely to have come from our family upbringing, our friends and colleagues and any political or faith commitments we might have – our *personal ethics*. But depending on where we work and what we do, there are also likely to be more public or shared expectations that go along with our role. For example, the community has ideas about what it means to be a good friend, a good parent, a good citizen or a good doctor. Sometimes these public ideas about ethics go formally unstated. But some ethical norms are reflected in legal rules and regulation. And sometimes our personal ideas about ethics (for example, on issues like abortion and euthanasia) can come into conflict with community ethical norms and/or legal rules. Good ethical reasoning demands that none of these assumptions about the right thing to do or the right way to be should go unexamined.

For lawyers, apart from our own personal ethics, there are two potential sources of ethical expectations that might affect the way we do, or *should*, behave – professional conduct principles and social ethics.

Professional Conduct

The first is the principles of *professional conduct*. Professional conduct is the law of lawyering, the published rules and regulations that apply to lawyers and the legal profession. In Australia these rules and regulations can be found in the legal practice or legal profession statutes in each state, in the various professional associations' self-regulatory professional conduct and practice rules and in the way the general law (particularly contract, tort and equity) apply to lawyers and their relationships with clients. In this book when it is necessary to refer to the statutory or self-regulatory rules governing Australian lawyers, we will generally refer to the *National Legal Practice Model Bill* (the '*Model Laws*') (2004) and the Law Council of Australia's *Model Practice Rules* (2002) (the '*Model Rules*').[2]

2 The *Model Laws* have been agreed between the Attorneys-General of the Australian Commonwealth and each of the States and Territories with significant input also from the Law Council of Australia (the umbrella organisation for Australian lawyers and legal professional associations). As a result the provisions of the legislation governing the legal professions of the various states and territories are increasingly becoming consistent, although the ordering of provisions and section numbers will vary from jurisdiction to jurisdiction. Similarly, the *Model Rules* have been promulgated by the Law Council of Australia, and as a result the professional conduct rules of the various states and territories now increasingly copy this model. See G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, Pyrmont, NSW, 3rd edn, 2006) 16–18. See Chapter 3 for further discussion of the *Model Laws* and *Model Rules*.

Much teaching and practical discussion of lawyers' 'ethics' in the legal profession is dominated by legalism. Legalism treats legal ethics as a branch of law – 'professional responsibility' or professional conduct. The professional conduct approach may cater to the need for certainty, predictability and enforceability in a context where people often consider ethics to be subjective and relative. However, it is, by definition, not an 'ethical' approach. It explicitly abandons ethics for rules. The law of lawyering is significant as one way in which lawyers' ethics are institutionally enforced or regulated, and can certainly be helpful in guiding behaviour. We refer to the rules of conduct in this book as one of the sources of information that lawyers can and should use to make decisions about what is the right thing to do in different situations. But these rules do not provide a basis for considering what values should motivate lawyer behaviour and choices about what kind of lawyer to be. This is not to say that it is not important for society to have and enforce a law of lawyering. But lawyers must also have an ethical perspective on being a lawyer in order to judge what rules should be made (on a professional level) and also to decide (on a personal level) what the rules mean, how to obey them, what to do when there are gaps or conflicts in the rules and whether, in some circumstances, it may even be necessary to disobey a particular rule for ethical reasons. This book, therefore, will not provide a comprehensive coverage of the law of lawyering,[3] but will provide a basis for ethical critique of professional conduct principles.

Social Ethics

The second source of ethics for lawyers (apart from their own personal ethics) is general philosophical theories of *social ethics*. Social ethics come from general moral theory or ethical theory, philosophical work devoted to understanding what it means for something to be good or right or a duty.[4] Particularly relevant for lawyers are philosophical ideas about justice, social and environmental responsibility, minimising harm and respecting others.

Some commentators on lawyers' ethics go to the opposite extreme from legalism, and propose that general and abstract moral theories or methodologies should be applied, without elaboration, to the practice of law. These fundamental moral theories generally divide into 'deontological' or rule-based theories, on the one hand, and 'teleological' or consequentialist theories, on the other. Kantian ethics and utilitarian ethics are used, respectively, as the main examples of each approach. According to Kantian ethics, 'right' actions or policies are those that primarily respect individual autonomy. Kantian methods refute the notion that 'the end justifies the means'. Kantian theory argues that the means, since they often involve what happens to individuals, are at least as important as outcomes.

3 Other books already provide adequate coverage of the law of lawyering, particularly Dal Pont, *Lawyers' Professional Responsibility*.
4 For a good overview, see Noel Preston, *Understanding Ethics* (Federation Press, Leichhardt, NSW, 2nd edn, 2001).

In a teleological approach, by contrast, right actions or policies are those that bring about desirable consequences. On this approach the ends can justify the means. Utilitarianism, a type of consequentialism, proposes that 'maximising the public good' should be the criterion for ethical action.

Standard deontological and teleological moral theories can be contrasted with a third set of theories, including virtue ethics and the ethics of care, that take a different approach. Virtue ethics shifts the focus of ethical attention from particular conduct and its impact to the quality or character of the actor. Virtue ethics approaches derive from Aristotle's emphasis on right character as a personal virtue and look to how an individual is motivated at a profoundly personal level.[5] The ethics of care focuses attention on people's responsibilities to maintain relationships and communities, and show caring responsiveness to others in specific situations. It is proposed as a correction to the traditional emphasis in ethical theories on individual rights and duties and formal, abstract, universalist reasoning. However, these theories raise the question of how we can know what is a virtuous or caring thing to do without some sort of criteria as provided by deontological or utilitarian theories?[6]

The trouble with the moral theories approach to legal ethics is, as is evident from the summaries above, that moral theories are so abstract that it is difficult to apply them to concrete situations. Furthermore, simply applying general moral theories to legal practice also begs one of the main questions debated in lawyers' ethics, which is: To what extent should lawyers' ethics be determined by the idea that lawyers should play a special and particular social role, or to what extent should lawyers be held to the same general ethical standards as anyone else (be they deontological, teleological or some type of virtue ethics)?

An Applied Ethics Approach

In this book we take a more practical and applied approach to examining lawyers' ethics. Our aim is to enable lawyers and law students to critique and evaluate professional conduct and lawyers' behaviour in practice by combining their own personal ethics with professional conduct rules and social ethical considerations. Our focus will be on using real-life case studies to help practise an ethical evaluation process that involves awareness of the ethical issues likely to arise for lawyers in practice, the standards and values available to resolve those issues, and consideration of how we might implement our ethical decision-making in practice.

In this chapter and the next we introduce four main ethical approaches, derived from the theories mentioned above, which can help lawyers when making ethical decisions:

5 See Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press, Cambridge, 2001). See also Robert Eli Rosen, 'Ethical Soap: LA Law and the Privileging of Character' (1989) 43 *University of Miami Law Review* 1229.

6 Joseph Allegretti, 'Rights, Roles, Relationships: The Wisdom of Solomon and the Ethics of Lawyers' (1992) 25 *Creighton Law Review* 1119.

- Adversarial advocacy;
- Responsible lawyering;
- Moral activism; and
- Ethics of care.

In the following chapters we examine a number of substantial topics in lawyers' ethics through case studies, and analyse the professional conduct principles and ethical approaches that might apply in each area. In each chapter we will introduce some of the major ethical issues facing lawyers in relation to that topic, and set out the conventional ('current') values that are commonly applied to resolving those issues. Then we will compare current approaches with alternatives derived from our four ethical approaches ('alternative values'). Finally we will give readers a chance to work through the current and alternative values that might apply to the area by means of specific case studies (usually based on real cases) and questions designed to clarify and challenge readers' own stance on each area. Our aim is to make explicit the sort of values awareness and decision-making processes we go through (or ought to go through) in order to make decisions about what is the right thing to do or the right sort of person to be in legal practice.

Process of Ethical Reflection and Decision-Making

In order for ethical considerations to make a real difference to lawyers' behaviour, we need to think about what ethical decision-making steps we must go through in applying ethical considerations to real-life situations. It has been suggested that in any practical endeavour ethically responsible decision-making requires at least three different steps. We must:

(1) Be aware of the ethical issues that arise in practice, and of our own values and predispositions;
(2) Take into account a range of standards and values that are available to help resolve those ethical issues and make a choice between them; and
(3) Implement that resolution in practice.[7]

It is very well for philosophical theorists to propose certain theories or principles of ethics that people ought to act on (the second step). But in practice ethical decision-making also requires us to be aware that an ethical dilemma or choice even exists in the first place (the first step), and to have the creativity, skills and will to put our ethical principles into practice (the third step).

The substantive content of this book (as reflected in the chapter template outlined above) critically examines the second step, the standards and values that

7 Based on Kenneth E Goodpaster, 'The Concept of Corporate Responsibility' (1983) 2 *Journal of Business Ethics* 1, 7–9.

should apply to different ethical issues that arise in practice. But learning to reason ethically also involves practising the identification of ethical issues in the first place and creating practical resolutions to ethical dilemmas that respect ethical values. That is one of the reasons that we have included a number of scenarios throughout this book. These case studies are designed to help us learn to become aware of ethical issues, to reflect and decide on what ethical standards and values should apply to those issues, and to consider how we might put those resolutions into practice. We will often learn more about these aspects of ethical reasoning if we can discuss case studies with other people with different knowledge, values and experiences from our own. For that reason the case studies include questions that can be used in a classroom or law firm.

These three steps in ethical reasoning are explained in further detail below, and illustrated with a case study scenario and questions typical of those provided throughout the book, Case Study 1.2: Lawyers, Gunns and Protests. In the remaining chapters the focus will generally be on the second step. But our case studies and questions in each chapter are also designed to improve readers' ethical awareness and their ability to plan and implement practical resolutions to ethical problems.

CASE STUDY 1.2 Lawyers, Gunns and Protest

Gunns Limited, a Tasmanian sawmiller and hardware retailer, is Australia's biggest woodchip exporter and probably Australia's most profitable timber company with profits that grew from $53m to $105m between 2002 and 2004, according to the company's annual reports. At the same time the logging of old growth forests has become a very contentious issue in Tasmania, with regular protest action. Amongst other things, environmentalists claim that many rare species are being destroyed by Gunns and other sawmillers in Tasmania, and they also express concerns about the effects of clearfelling on the ecosystem and issues like local water catchments. During the 2004 federal election campaign, the Liberal–National Party Coalition (which was re-elected to government) promised to act immediately to make another 170,000 hectares of Tasmanian forest protected old-growth forest by 1 December 2004. However the federal Coalition government did not do so until mid-May 2005. In the meantime, environmentalists claimed that the Tasmanian State government was allowing sawmillers like Gunns to log areas that ought to have been protected. In mid-2004 Gunns attracted bad publicity in Tasmania when a helicopter accidentally doused a Tasmanian farm with a potentially carcinogenic herbicide while spraying a Gunns forestry plantation.[8] At the end of 2004 a public consultation phase began for a decision about a new Gunns $1 billion pulp mill in Tasmania.

On 13 December 2004, Gunns lodged a writ in the Supreme Court of Victoria seeking injunctions and damages of $6.36 million against twenty defendants in relation to 'campaign activity' against Gunns. The defendants included Doctors for Native Forests Inc, the Huon Valley Environment Centre Inc, The Wilderness Society Inc, and some of its staff, Green Members of Parliament Bob Brown and Peg Putt, and a number of individuals who had allegedly been involved in protest activities. The damages claimed

8 Adam Morton, 'Logging Giant Sues Activists for $6.3m', *The Age* (Melbourne), 15 December 2004.

included about $1 million for actual losses and more than $5 million in aggravated and exemplary damages.

The writ was unusually long and complex at 216 pages. It was later expanded to 350 pages. It claimed that the 20 defendants engaged in a campaign against Gunns that amounted to, *firstly*, a conspiracy to injure Gunns by unlawful means organised by The Wilderness Society and its staff; and, *secondly*, interference with Gunns' trade and business by unlawful means. The alleged campaign activity included:

(a) logging operations disruption campaigns and actions at Lucaston, Hampshire, Triabunna, and the Styx – including allegations of machinery sabotage, destruction of property, trespassing, blocking bridges, taking keys from cars, damaging property, ramming mud into exhaust pipes, pulling down direction signs, people locking themselves to or inside items and obstructing police officers;
(b) corporate vilification campaigns relating to Gunns' exclusion from the Banksia Foundation's environmental awards shortlist, and allegations that a woodchip pile could harbour harmful bacteria;
(c) campaigns against overseas customers of Gunns including customers in Japan and Belgium – including allegations that conservationists had tried to pressure Japanese woodchip customers to stop buying from Gunns via threats of adverse publicity, consumer boycotts and direct action against the Japanese customers and all their operations;
(d) corporate campaigns targeting shareholders, investors and banks – some of the defendants were accused of 'publicly denigrating, vilifying and criticising' Gunns and encouraging others to boycott or protest against it.

Gunns' executive chairman was reported as saying that the company was taking the action to protect the interests of its employees, contractors and shareholders:

> Gunns Limited and the majority of Tasmanians are sick and tired of the misleading information being peddled about our industry and our state . . . The company's claim includes allegations concerning risks to the health and safety of our employees and contractors, unauthorised entry to private property and damage to equipment owned by Gunns Limited and our contractors. These activities have been going on for years and it is about time they were stopped.[9]

On the other hand, the Gunns action was heavily criticised in the media as a 'SLAPP', a 'strategic lawsuit against public participation'. A SLAPP is when a corporation or government agency makes a civil claim, such as defamation, conspiracy, malicious prosecution or nuisance, against individuals or organisations in order to punish them for voicing their criticisms, or silence them. In some SLAPP situations (but not the Gunns case), the lawyers acting for the plaintiffs have even threatened social commentators and academics with defamation proceedings if they make adverse comments on the ethics of the litigation.[10] In Australia there is no constitutional right to freedom of expression.

A number of US states have passed legislation that seeks to counteract the use of SLAPPs. Critics argue that companies should not interfere with free speech by taking legal action in relation to ordinary political protests, especially where the company can claim its legal expenses as a tax deduction but the people being sued are unlikely to be

9 Ellen Whinnett, 'Gunns Sues', *The Mercury* (Hobart), 15 December 2004, 1.
10 See Sharon Beder, *Global Spin: The Corporate Assault on Environmentalism* (Scribe Publications, Melbourne, 1997) 'Ch 4: Lawsuits Against Public Participation' 63–74; Penelope Canan and George W Pring, 'Strategic Lawsuits Against Public Participation' (1988) 35 *Social Problems* 506.

Source: Kahlil Bendib, www.corpwatch.org

able to afford adequate legal representation or claim tax deductibility, and could even face bankruptcy if the case is upheld against them. In the Gunns case, however, the Hobart *Mercury* reported that 'dozens of lawyers, from top silks to eager law students, are offering to fight the Gunns writ for nothing'.[11] Nevertheless some of the defendants felt threatened by the case:

> There was a general feeling amongst folk [among the defendants] who hadn't been faced with this situation before; they were stunned. One of them wandered around her house thinking that this lounge suite, my TV, the things she'd worked years to get, now inherently are not hers; the cloud of Gunns ownership hangs over them. And people were very frightened because it's not just you that's being effectively, potentially taken to the cleaners by a court case like this – and indeed into potential bankruptcy – but your loved ones, your family, other people.[12]

On 19 July 2005 Justice Bongiorno of the Victorian Supreme Court ordered that Gunns' writ should be struck out because it failed to set out with sufficient clarity the case which the defendants must meet. He suggested 'that the conceptual basis of the plaintiffs' case be subjected to serious reconsideration'.[13] Gunns was given twenty-eight days to file a new writ if the proceeding was to continue.

11 Claire Konkes, 'Free Lawyers Line Up to Battle Gunns', *The Mercury* (Hobart), 6 February 2005.
12 Bob Brown speaking on ABC Radio National, 'The Gunns 20 Litigation', *The Law Report*, 25 January 2005 <http://www.abc.net.au/rn/lawreport/stories/2005/1287516.htm#> at 9 May 2006. See also Ellen Whinnett, 'Road Rage: Gunns Writ Sparks Rally and Direct Action, Suit Sends Gunns Soaring', *The Mercury* (Hobart), 16 December 2004, 2 quoting 'stay at home grandmother' Lou Geraghty: 'I'm just an everyday person trying to protect the area I live in'.
13 *Gunns Ltd v Marr* [2005] VSC 251 (Unreported, Bongiorno J, 18 July 2005) [59].

Step One: Awareness of Ethical Issues

What ethical issues have arisen or might arise in the future in this situation?

- Who are the stakeholders, ie whose interests are affected?
- What interests or values are at stake in this situation from the perspective of the different stakeholders?
- Are there any other principles or values at stake in this scenario?
- Are there any conflicts between those interests or values of different stakeholders?
- What are your own interests and values in this scenario?
- What are the different options as to what you (the lawyer) should do (or should have done) in this scenario?

In this first stage we are simply 'auditing' the ethical issues that have or might have arisen, and what interests and values they raise, not trying to resolve them. The aim is to become aware of what interests and values (including our own personal interests and values) could apply to a scenario. In order to identify what values and interests might apply to a scenario, it is often helpful to start by thinking about all the different people who might have an interest in the outcome of the scenario (the 'stakeholders') and what values and interests they represent. Usually there will be a range of conflicting and complementary values and interests at stake in any situation suggesting a variety of alternative and contradictory courses of action – that is what makes something into an ethical dilemma.

In practice the problem is that often we (and some theorists) forget that there are other genuine ethical perspectives on what to do in certain situations, other than our own, or that of those we spend most time with. Sometimes, there are very major differences between our own values and those of others. In the 1960s Stanley Milgram conducted a series of famous (and highly unethical, but effective) experiments on volunteers who were asked to administer electric shocks to another person. The experiments showed that people are quite willing and able to inflict progressively more pain on another human being, up to very dangerous levels, where the initial level of pain is insignificant, each increase in pain is small, and it is accompanied by reassurance by someone in authority that it should be done.[14] Uncontrolled police and military interrogations are another example of situations in which unethical behaviour such as torture and violence can be seen as normal in the context of police or military sub-cultures. At a more mundane level, lawyers can have their ethical awareness and imagination dulled by working in firms or being with people who see ethically questionable behaviour as 'the way lawyers do things' or 'the way we do things around here'. Ethics education can help improve ethical behaviour by making us more aware of our own value

14 The experiment was actually a hoax – the person receiving the electric shocks was an actor who pretended to suffer the pain of each shock. However the volunteer subjects of the experiment did not know this. For a description of the experiments and their applicability to lawyers' ethics, see David Luban, 'The Ethics of Wrongful Obedience' in D Rhode (ed), *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (Oxford University Press, Oxford, 2000) 94, 96–7.

structures and alternative value structures that we might apply to our everyday lives.

DISCUSSION QUESTIONS

Look at the situation in Case Study 1.2 above. In addition to applying the general questions at the beginning of the description of Step One to your analysis of the ethical issues at stake also consider the following more specific questions:

1. Imagine that you are a senior executive at Gunns. You are due to meet with your lawyers to decide whether to file a new writ and proceed with the litigation: What legitimate interests are you and your company trying to protect? What are the competing interests at stake in deciding whether to continue with the litigation? What other options are available for Gunns to achieve its objectives apart from using this litigation?
2. Now imagine that you are one of the defendants named in the writ: What are your hopes and fears about this litigation? Would you want Gunns to go ahead with a new writ? Would you be keen to defend the case, or to settle it? What would be your main objectives in doing so?
3. Now imagine that you are a barrister new to this case who has been asked to advise Gunns on how to respond to the striking out of the writ. If they decide to go ahead with a new writ, you are likely to have a leading role in arguing the case in court: Would you want to take this case on? Do you have any reservations about the ethical issues raised by the case? What would you advise Gunns to do?

Step Two: Application of Ethical Standards or Principles

What ethical principles should be used to resolve the issues in this scenario?

- What professional conduct principles (the law of lawyering) might apply to this situation, including any relevant professional code of ethics?
- What general ethical principles might apply to this scenario (eg justice and the public interest, conflicts of interest, respect for the spirit of the law, non-harm and respect for others, social and environmental responsibility etc)?
- Are there any particular responsibilities that a lawyer should have in this scenario because of their role as a lawyer?
- If there are conflicts between these various ethical standards and principles that could apply to the situation, how should they be resolved?

Ethical standards and principles provide a basis for deciding what values and interests should prevail in different circumstances. For lawyers, thinking about the ethical standards and principles that should apply to practice generally raises four main questions:

1. *To what extent should lawyers' ethics be determined by a special and particular social role that lawyers should play?*
   Should our conduct be prescribed solely by the role of zealous (and often adversarial) advocate for clients' interests in a complex and adversarial

legal system? Or is there some alternative role that prescribes how we should behave as lawyers – perhaps as an officer of the court or as a trustee of the legal system with a special responsibility for ensuring compliance? Or should we, in our professional lives, be held to the same general ethics as anyone else? For example, should we argue for positions in which we do not believe, for the sake of clients, or should this be considered lying? Further, should we always make sure we are directly advancing justice as much as possible, or do we have enough faith in the justice of the system to simply argue our clients' cases and leave it to the system to determine where justice lies?

2. *How should lawyers and clients relate to one another in relation to ethical issues?*
   Should we consider the justice or morality of our clients' causes in choosing whether and how to represent them? Should ethical considerations – such as our assessment of the public interest, our personal moral, social or religious beliefs (or those of our clients), and the impact of various options on our clients' relationships or psyche or on the opponent – be explicitly discussed in legal advice and counselling? Should either ours or our clients' view of morality prevail over the other in deciding what to do? When there is disagreement over ethical issues, when can or should we act, refuse to act or cease to act?

3. *What are lawyers' obligations towards law and justice?*
   Is it justifiable to help our clients test the limits of the law, provided we can argue that we, and they, are not breaching the letter of the law? Or should we preserve the spirit and integrity of the law against client interests? Should we work to reform the law and legal institutions to improve their substantive social justice; for example, by actively seeking out test cases or lobbying politically for legislative reform? How much should we need to find out about a client's honesty, guilt or innocence, before advocating for them? In what circumstances should we be considered blameworthy for helping a client to break or evade the law, or escape liability? Are there any circumstances in which we could be considered ethically justified in resisting or breaking the law or helping our clients to do so?

4. *To what extent should lawyers in their daily work make sure they care for people and relationships, including themselves?*
   Is not the care of one human for another and for themselves the central ethical imperative? Should we pursue the moral goodness and/or best interests of our clients in the context of their relationships despite what the law says, perhaps despite even the broader dictates of social justice? How should we determine what is in the best interests of clients – is it material and financial, is it power and prestige, or is it psychological, relational, spiritual? What about our own selves? Should we work long

hours in the law even if it means neglecting ourselves, our family and our relationships? Will we wish on our deathbeds that we had spent more time at the office? Or are their alternative ways of practising law and preserving our own psyche?

This chapter and the next chapter provide an overview of four different approaches to legal ethics that answer these questions in different ways, and with quite different priorities. The first and predominant one, the adversarial advocate approach (introduced in this chapter) sees lawyers' ethics as determined solely by lawyers' role as advocates of their clients' interests in a complex and adversarial system constrained only by the letter of law. No ethical considerations other than the letter of the law and the lawyers' duty of advocacy in the client's interest are relevant to ethical decision-making. This makes it very easy to go through the process of ethical decision-making. But as we shall see in the next chapter, there are both a number of criticisms of this approach and some alternatives to it.

DISCUSSION QUESTIONS

Think again about Case Study 1.2: Lawyers, Gunns and Protest. Apply the four questions above – discussing the sort of questions this raises for:

1. a lawyer trying to decide whether to act for Gunns in drafting and filing a new writ, and how to tackle it; or
2. a lawyer considering volunteering their time pro bono (that is, without a fee) to assist those who are being sued.

Try to come to a conclusion on what each lawyer should do.

Step Three: Practical Implementation

How can the ethical thing to do actually be put into action in the current situation? What does it mean in this situation?

- What is feasible in the current situation? What practical alternatives are available to me? What are likely to be the consequences of different alternatives?
- What personal and systemic or organisational resources would I need to access in order to do the right thing (eg legal restraint, clout, independence, collegial support, an ethics policy, character, will)?
- What skills would I need to put it into practice (eg negotiation and communication skills, moral courage)?
- [If appropriate] How can I/we prevent this sort of issue occurring again?

Finally, it is of limited use deciding on principled grounds what is the right thing to do if you lack the courage, will, skills or capacity to put it into practice. In some situations, ethical integrity might even require the sacrifice of giving up your job (because you will be sacked for behaving ethically, or because you should resign).

In others, it requires diplomacy, communication, negotiation and persuasion skills. It is always useful to consider how one might prevent ethical difficulties arising in the future; for example, by making sure your law firm's system for checking for potential conflicts of interest (in the broadest sense) when a client first makes an appointment actually works properly, or refusing to take on a client with an ethically questionable case in the first place.

DISCUSSION QUESTIONS

Consider your conclusion about how a lawyer should approach Case Study 1.2 situation as discussed at Step Two above. Now imagine that you are a solicitor who has already acted for Gunns on a regular basis including in relation to the earlier writ. Gunns' executives want you to act in relation to the new writ. What will you do? How will you put your ethical resolution into action? What will you say to your clients? What will you say to the lawyers on the other side, to the media? How will you react if you are criticised for your decision?

Adversarial Advocacy: The Traditional Conception of Legal Ethics

Adversarial advocacy is the predominant conception of what lawyers' role and ethics ought to be in most common law countries including Australia. It is also the simplest, most absolute and, generally, the most comfortable of the four approaches. It gives a reasonably clear answer of what to do in most situations, that is, a lawyer should advance their client's partisan interests with the maximum zeal permitted by law. This approach to legal ethics is often termed an 'amoral' one because it sees general moral theory as being irrelevant to lawyers' ethics.[15] In fact, adversarial advocacy sees the suppression of one's own individual moral opinions and consideration of general ethical concerns as a moral act in itself. The lawyer must 'turn off' these other ethical considerations in order to fulfil their proper moral role as advocate for their client. The basis for lawyers' ethics within adversarial advocacy is found in the social role that lawyers are supposed to play in the adversarial legal system.

Adversarial advocacy combines the 'principle of partisanship' and the 'principle of non-accountability'.[16] The principle of partisanship means that the lawyer should do all for the client that the client would do for themselves, if the client had the knowledge of the lawyer. This is because the adversarial system is based on party control of the proceedings with each party ensuring that all legitimate arguments in their own favour are put forward. The principle of non-accountability follows on from this and says that the lawyer is not morally responsible for either

15 Gerald Postema, 'Moral Responsibility in Professional Ethics' (1980) 55 *New York University Law Review* 63; Richard Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 *Human Rights* 1.
16 David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, Princeton, 1988) 7.

the means or the ends of representation, provided both are lawful. If the lawyer were morally responsible, it is said, the lawyer may not be willing to act zealously to represent the client's interests.

This approach is most clearly justified in the case of trial lawyers, especially criminal defence advocates who must vigorously assert the rights of the accused against the superior power and resources of the state. By corollary, the adversarial advocate approach is least justifiable if applied to a criminal prosecutor who represents the state against the accused. It is well accepted that prosecutors should act as 'ministers of justice', pay elaborate attention to fairness and candour and only present to the court those facts and arguments that they believe to be well grounded (see Chapter 5). Historically, the adversarial advocate approach was essentially liberal, motivating lawyers to pursue client interests primarily against the power of the state. It was dependent on a conception of the rule of law which puts the courts between citizens and governments, and required lawyers independent of the state and available to help those who want to use the law to challenge or defend themselves against the government. However the adversarial advocate approach has extended beyond representing client interests against state interests to representing client interests against other private interests and in any situation where a lawyer is necessary. Since ours is a complex legal system, lawyers must be readily available to empower those who need to use the law to organise their affairs, settle a dispute, defend themselves against the powers of the state or establish a right against some private interest without pre-judging their clients or being held accountable for what the client chooses to do (provided it is within the bounds of law).

Lord Brougham's 1820 defence of Queen Caroline before the House of Lords is a favourite example of the ideal in action. King George IV was trying to rid himself of Caroline by alleging that she had committed adultery, but it was well known that the King himself had been unfaithful. Lord Brougham implied that although he did not yet need to defend the Queen by attacking her husband, if such a defence did become necessary neither he nor

> even the youngest member in the profession, would hesitate to resort to such a course and fearlessly perform his duty . . . [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.[17]

These words were controversial at the time they were stated, but the same philosophy can still be found today. In the case of *McCabe v British American Tobacco Australia Services Ltd*[18] [BATAS], at first instance the Victorian Supreme

17 Quoted in David Mellinkoff, *The Conscience of a Lawyer* (West Publishing Co, St Paul, Minnesota, 1973) 188–9.
18 [2002] VSC 73 (Unreported, Eames J, 22 March 2002).

Court found that Clayton Utz, the solicitors for the defendant BATAS, had advised the company on a 'document retention policy' that intentionally resulted in the destruction of thousands of documents. These documents would have been relevant and favourable to McCabe's negligence case against the company for her mortal cancer. The court also found that the defendant and their legal advisers had misled the plaintiff and the court about the fact and the extent of their document destruction. The judge struck out the defendant's defence and ordered judgment for the plaintiff, without a trial, on the basis that the destruction of documents had unfairly prejudiced the plaintiff's chances of success.[19] This decision was later overturned on appeal. But in the meantime, the lawyers for BATAS were severely criticised in the media (see Chapter 9). The following comments in defence of their position illustrate the traditional, adversarial conception of the responsibility and role of the lawyer well:

> Moral judgments have no place in the advice a lawyer gives to a client, according to the chief executive partner of Clayton Utz . . . Asked what role a lawyer should play if a client was proposing to do something legal, but immoral, he said: 'I'm struggling to see where there would be a case where that would actually arise'. He said: 'The clients are entitled obviously to avail themselves of the full protection of the law and the lawyers are there to advance their clients' interests subject to the constraints of their professional duties and, in particular, their duties to the court. But if they operate within those constraints then they are acting appropriately'. He said a lawyer might advise on the 'appropriateness' of different strategies, but it was wrong for a lawyer to make moral judgments. 'We don't take a moral stance and it's not up to us, as advocates for a client, to take a moral stance. Ultimately that comes to a decision by the client, not the lawyer.' [The chief executive partner] said: 'We operate for a range of clients and make decisions based on a business assessment. What we aspire to ensures that we act with integrity at all times, but I don't think that involves bringing moral judgment to who we act for and who we don't act for'.[20]

In the case of barristers, the adversarial advocate approach is taken as far as the 'cab rank' rule, which requires that a barrister take on and vigorously defend a brief in any area in which he or she practises, if he or she is available and the client can pay. While solicitors have not had such an onerous duty to take on clients, once they do have a client they, like barristers, owe duties of loyalty to pursue the clients' cases vigorously, to keep them fully informed, and to take instructions from the client. Indeed most of the rules of law and ethics governing lawyers taught in legal ethics and professional responsibility courses relate to the lawyer's duty of advocacy including the duties of confidentiality, diligence and fidelity or loyalty. These duties to clients are limited only by the general requirements of the law: A lawyer must represent his or her client to the full

19 This decision was later overturned on appeal: *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524. For an account of the first instance judgment, including discussion of some of the ethical issue involved, see Camille Cameron, 'Hired Guns and Smoking Guns: *McCabe v British American Tobacco Australia Ltd*' (2002) 25 *University of New South Wales Law Journal* 768.

20 From Margaret Simons, 'Lawyers Not Moral Judges: Clayton Utz Chief', *The Sunday Age* (Melbourne), 4 August 2002, 3.

extent of the law. For some lawyers the adversarial advocate approach can also motivate actively choosing to work for clients who might otherwise miss out on representation because other lawyers find them or their cause distasteful or because they lack resources to pay for a lawyer.

Hence in Case Study 1.1, at the beginning of this chapter, the case of The Jewish QC and the Alleged Nazi War Criminal, the adversarial advocate approach would require the barrister to take on the case and pursue all arguable defences to extradition for his client, if he was available. Indeed his history and reputation as a civil rights advocate suggest that normally he might go out of his way to act according to the adversarial advocate approach in ensuring that even the most morally repugnant accused in criminal cases were adequately and zealously represented. On an adversarial advocate approach, the barrister's Jewish heritage and connections would be seen as a matter of personal loyalties and values that were irrelevant to his role as a lawyer in advocating without discrimination for any client. It would be his ethical duty to his client to not allow those loyalties to affect the quality of his representation.

Limitations of Adversarial Advocacy

Although proponents of the adversarial advocate approach generally state that client advocacy should extend only as far as the law allows, the lawyer's duty to the law is usually left vaguely defined. Indeed, taken to its logical extreme, the adversarial advocate approach requires lawyers to resolve ambiguity in the law and their own ethical duties in favour of the client. One criticism of the adversarial advocate approach is that it prescribes only the barest obligations to the legal framework and is therefore a recipe for sabotage. While the legal system works on the basis that people will generally internalise norms and comply voluntarily, under the adversarial advocate approach

> [lawyers] are expected and even encouraged to exploit every loophole in the rules, take advantage of every one of their opponents' tactical mistakes or oversights, and stretch every legal or factual interpretation to favour their clients. The guiding premise of the entire system is that maintaining the integrity of rights-guarding procedures is more important than obtaining convictions or enforcing the substantive law against its violators.[21]

There is little room within the relationship between an adversarial advocate and his or her client for the idea that the law might make legitimate claims on a client, that people might have responsibilities as well as rights under the law, that a democratic state might 'have a role as guarantor of freedom where liberty is most at peril from the actions of individuals or private institutions'.[22] Individual lawyers and their clients do not have to concern themselves directly with justice

21 Robert Gordon, 'The Independence of Lawyers' (1988) 68 *Boston University Law Review* 1, 10.
22 David Weisbrot, *Australian Lawyers* (Longman Cheshire, Melbourne, 1990) 44–5.

or the public interest. This is ethically justified because as long as all the lawyers for all the parties in any action or deal act adversarially in the narrow interests of their own client, it is said that the legal system will make sure that the right outcome ensues. Indeed, the adversarial advocate believes that it would be a presumptuous denial of justice to anyone who wants to use the legal system for lawyers to act otherwise, that is to judge potential clients before they have had their 'day in court'. However, the fact the advocacy ideal prescribes devoted service to clients' ends, whatever they may be, is problematic where the market functions so that the rich can buy up most legal services. While our criminal defence system is supported by legal aid, many of the best criminal lawyers will not work consistently for the fees offered by legal aid. The advocacy ideal is also problematic when it creates a culture in which good advocacy means a culture of excessive adversarialism that raises the costs and length of litigation, making it more and more unaffordable (see Chapter 4).

There are two main alternative ways of thinking about lawyers' ethics in contrast to the adversarial ideal. The *first* is to accept that lawyers' ethics should be defined by their particular role in the adversarial legal system and in society, but to define that role differently from the traditional adversarial advocate approach, and the *second* is to abandon role morality for lawyers and argue instead that general ethics should apply to lawyers.[23]

Chapter 2 considers, firstly, a different role morality approach for lawyers – *responsible lawyering*. *Responsible lawyering*, like *adversarial advocacy*, is based on the lawyer's role in the adversary system, but sees the lawyer as having more of a mediating role between the law and clients than in adversarial advocacy, which sees the lawyer as acting primarily in the client's interests. We then consider two approaches that apply more general ethics to the legal profession – the *moral activist* and *ethics of care* approaches. *Moral activism* sees social ethics, and particularly social justice, as the final arbiter of what lawyers' ethics should be since the legal system should be concerned with advancing justice, while the *ethics of care* approach sees relational ethics and the minimisation of harm as the most important principles that should govern lawyers' behaviour. *Responsible lawyering* suggests alternatives to and limits on excessive adversarialism within the terms of the adversary system itself, by proposing that lawyers behave as officers of the court as well as client advocates. Existing professional conduct regulation attempts (at least half-heartedly) to put this into practice, as we shall see in the chapters that follow. *Moral activism* and the *ethics of care*, by contrast, provide external critiques to adversarialism. They propose alternatives to the partisanship and non-accountability of adversarial advocacy and even the appropriateness of the adversarial legal system itself as a method of resolving disputes and doing justice.

In Chapter 3 we go on to consider the way that the profession as a whole, and the way it is regulated, sets the ethical climate for individual lawyers' practices.

23 See Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press, New York, 2001) 121–36.

Chapters 4 through 9 look at a number of aspects of legal practice – civil litigation, criminal trial practice, negotiation and alternative dispute resolution, handling conflicting loyalties, lawyers' fees and costs, and acting for corporate clients. Each chapter examines in more detail what the four ethical approaches might mean, and which values would be appropriate to apply, in each of these different contexts.[24] In doing so we will critique the extent to which the rules and regulations as they currently stand do a good job of demonstrating the right values, and how these rules and regulations influence individual lawyers' capacity to put different values into action in practice. We will also critically analyse current standard practices in the profession and the culture of the legal profession in those areas to see what values are reflected, whether they are appropriate and what changes in regulation and ethical practice might be desirable to promote better values in practice. In each chapter we make extensive use of case studies to illustrate our points and also to provide an opportunity for students (and other readers) to develop their own values-based judgments on the topics covered. The concluding chapter, Chapter 10, returns to the connection between personal values and professional practice in the context of admission to the profession and large law firm employment, and finishes with further discussion of how case studies can be used to build lawyers' and law students' values awareness and strengthen their ethical resolve.

The invitation of this tour inside lawyers' ethics is the opportunity to look systematically behind the rules and the case law. Behind both are deeply held personal differences of approach, the knowledge of which will enrich legal practice and help to make it both more satisfying and less vulnerable to public criticism.

Recommended Further Reading

Ross Cranston, 'Legal Ethics and Professional Responsibility' in Ross Cranston (ed), *Legal Ethics and Professional Responsibility* (Clarendon Press, Oxford, 1995) 1.

Adrian Evans and Josephine Palermo, 'Australian Law Students' Perceptions of their Values: Interim Results in the First Year – 2001 – of a Three-Year Empirical Assessment' (2002) 5 *Legal Ethics* 103.

Monroe Freedman, *Lawyers' Ethics in an Adversary System* (Bobbs-Merrill, Indianapolis, 1975).

Charles Freid, 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation' (1976) 85 *Yale Law Journal* 1060.

David Luban, 'The Adversary System Excuse' in David Luban (ed), *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (Rowman & Allenheld, Totowa, New Jersey, 1983) 83; reprinted in Richard Abel (ed), *Lawyers: A Critical Reader* (New Press, New York, 1997).

David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, Princeton, 1988) 'Part I. Problems of Conscience: Trade Idioms and Moral Idioms'.

Daniel Markovits, 'Legal Ethics from the Lawyer's Point of View' (2003) 15 *Yale Journal of Law & the Humanities* 209.

24 Throughout these chapters we italicise the names of each of the four approaches each time we mention them to make it easier for readers to see where we apply and discuss each one.

Donald Nicolson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press, Oxford, 1999) 'Ch 7: Justifying Neutral Partisanship'.
Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press, New York, 2001) 121–36.
Noel Preston, *Understanding Ethics* (The Federation Press, Leichhardt, NSW, 2nd edn, 2001).
William Simon, '"Thinking Like a Lawyer" About Ethical Questions' (1998) 27 *Hofstra Law Review* 1.

2

Alternatives to Adversarial Advocacy

Different Approaches to Lawyers' Ethics

There are four main strands of ethical reasoning or considerations available for lawyers in the context of Australian legal institutions: adversarial advocacy (discussed in the previous chapter); responsible lawyering; moral activism; and ethics of care.[1] (Table 2.1 sets out a summary of the four approaches.) These four approaches are reflected in applied ethics scholarship and in the commonsense 'folk practices' of lawyers. Each emphasises a different value (or bundle of values) that lawyers could or should serve in legal practice. These four approaches are set out in this book as 'ideal types' that emphasise what is distinctive about each approach. However the authors of this book believe that in general the four different approaches tend to complement one another. It would be over-simplistic to seek to brand most individual lawyers or applied legal ethics scholars as following one approach or another. In many situations all four approaches will lead to agreement on the right thing to do. In some situations, the application of the considerations mandated by more than one approach might temper and improve the way in which we might have approached a situation had we applied only one approach. In other situations, careful analysis will show that some ethical considerations should carry more weight than others because of the surrounding circumstances. One objective of this chapter and the previous one is to set out the justifications for the four different types of ethical considerations so that it is

1 For a similar typology of three possible underlying values that legal practice should serve, see Charles Sampford with Christine Parker, 'Legal Regulation, Ethical Standard-Setting, and Institutional Design' in Stephen Parker and Charles Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (Clarendon Press, Oxford, 1995) 11, 21–4.

clear what assumptions each makes about the circumstances in which it should apply.

Ultimately, however, each of us will have to make hard choices about values and ethical considerations in difficult situations (like the case studies in this book). It is these choices that give each of us our distinctive ethical character. For most lawyers, the ethical choices we make (or want to be able to make) in those 'hard' cases will tend to fall into one or other of the four approaches set out here (or perhaps some combination of them). In practice, the first and second, the adversarial advocate and responsible lawyering approaches, are the most dominant ethical approaches cited in public statements about lawyers' ethics. Many lawyers probably unthinkingly follow the dictates of these two approaches to ethical lawyering, without ever clarifying their own ethical beliefs, or the values that lie beneath them. To practise law successfully over the long term, we believe it is necessary to understand our own values and ethical beliefs. Look at Table 2.1: Can you identify an approach (or approaches) that tends to appeal to you most consistently?

The authors of this book find attractions in all four approaches. We see the considerations of adversarial advocacy and responsible lawyering as the starting point for ethical practice in most ordinary situations. But we prefer the moral activist approach as the ultimate criterion for ethical choices in tough cases in the life of lawyering. We believe that ultimately as lawyers we are responsible for improving the way justice is done between individuals and the world at large. Yet both of us are also persuaded by the ethics of care approach that ultimately people, our relationships, our psyches and our spiritual connectedness to each other and the world are more important than the law or any other social institution. Therefore ours is a sense of justice and moral activism tempered very much by the importance of the relational and spiritual dimensions of life in community.

However our aim in this book is not to persuade readers of our personal and particular views of ethics (although we would be delighted if our example and our other writing had that effect). Rather our aim is to help improve the clarity and integrity of ethical reasoning in lawyering more generally. We recognise that each reader will find a different approach (or combination of approaches) attractive and convincing as a way to organise their own career and practices. We suggest, however, that all lawyers can use the four ideal types set out here as a diagnostic aid in clarifying and critically examining their own ethical preferences as a lawyer, and also in making sure they have explored all the facts of any situation they might face as a lawyer, considered all the relevant ethical considerations, and responded appropriately.[2]

The remainder of this chapter describes each of the three alternatives to adversarial advocacy in turn with reference to applied legal ethics literature, the beliefs

2 As per Preston's 'ethics of response' following H Richard Niebuhr: Noel Preston, *Understanding Ethics* (Federation Press, Leichhardt, NSW, 2nd edn, 2001) Ch 4.

Table 2.1. Four Approaches to Legal Ethics

	Social Role of Lawyers	Relationship to Client and Law
Adversarial Advocate (The traditional conception)	Lawyers' ethics governed by role as advocate in adversarial legal process and complex legal system: Partisanship, loyalty and non-accountability.	Lawyers' duty is to advocate client's interests as zealously as possible within the bounds of the law (barest obligation to legality) – let the chips fall where they may. Extends beyond adversary role to ensuring client autonomy in a complex legal system as required by the rule of law.
Responsible Lawyer (Officer of the court and trustee of the legal system)	Lawyers' ethics governed by role of facilitating the public administration of justice according to law in the public interest.	Duties of advocacy are tempered by duty to ensure integrity of and compliance with the spirit of the law; to ensure that issues are not decided on purely procedural or formal grounds but substantive merits. Lawyer is responsible to make law work as fairly and justly as possible. May need to act as gatekeeper of law and advocate of legal system against client.
Moral Activist (Agents for justice through law reform, public interest lawyering and client counselling)	General ethics, particularly social and political conceptions of justice, moral philosophy and promotion of substantive justice define lawyers' responsibilities.	Lawyers should take advantage of their position to improve justice in two ways: (1) Public interest lawyering and law reform activities to improve access to justice and change the law and legal institutions to make the law more substantively just (in the public interest). (2) Client counselling to seek to persuade clients of the moral thing to do or withdraw if client wants something else.
Ethics of Care (Relational lawyering)	Social role of lawyers is irrelevant. Responsibilities to people, communities and relationships should guide lawyers (and clients) as everybody else.	Preserving relationships and avoiding harm are more important than impersonal justice. The value of law, legal institutions and institutional roles of lawyers and others are derivative on relationships. People and relationships more important than institutions such as law. The goal of the lawyer-client relationship (like all relationships) should be the moral worth and goodness of both lawyer and client, or at least the nurturing of relationships and community.

and practices of particular Australian lawyers and possible resolutions to the war crimes extradition case study set out at the beginning of the previous chapter. At the end of this chapter we set out another hypothetical case study with a series of questions that could form the basis for application of the four ethical approaches, and reflection and discussion with others.

Responsible Lawyering: Officer of the Court and Trustee of the Legal System

The adversarial advocate is only one social role that could govern the ethics of lawyers. Another possibility is the 'responsible lawyer' approach. The adversarial advocate approach focuses on the lawyer's role as representative of the client in the legal system. The responsible lawyer approach, by contrast, focuses on the lawyer's role as an officer of the court and guardian of the legal system. The responsible lawyer is still an advocate for the client, but he or she has an overriding duty to maintain the justice and integrity of the legal system, even against client interests, in the public interest. According to this approach to lawyers' ethics:

> . . . the wellspring of a lawyer's duties to clients and to the public flows from the legal profession's unique role in society as the trustee for the forms of social order. The forms of social order include not only legislative, judicial and administrative forums, but also the process of private ordering through contract, and the negotiation and drafting of the constitutions of private organisations. Thus what the lawyer does in the privacy of the office may be seen as part of the *public* administration of justice because law is made and applied through lawyer counselling and planning, and often this 'private' law has public impacts as great as any ruling of a high court in a litigation matter. To keep *all* the forms of social order working fairly and with integrity is the obligation of the profession, and each lawyer must place that obligation above any particular client interest contrary to it. Loyalty to the fair process of law is primary and constrains lawyer behaviour on behalf of clients.[3]

Unlike the adversarial advocate, the responsible lawyer focuses on maintaining the institutions of law and justice in their best possible form. Some would argue that obedience to the rules of the legal system is important in itself. But the underlying justification for responsible lawyering, as with adversarial advocacy, is preserving the social goods that the legal system attempts to serve. Table 2.1 indicates the ways in which each of the four 'applied' ethics of lawyering can relate to more general theories of social ethics. As can be seen, each of these four applied ethics draws on plural strands of the more general philosophy of ethics.

It is generally beyond contention that lawyers should obey the letter of the law and should not assist clients in breaking it. The rules of professional responsibility

3 Alvin Esau, 'What Should We Teach? Three Approaches to Professional Responsibility' in Donald Buckingham et al (eds), *Legal Ethics in Canada: Theory and Practice* (Harcourt Brace, Toronto, 1996) 178, 178–9.

also include rules designed to ensure that lawyers do not abuse the court process on behalf of their clients. But in legal practice there are also many 'grey' areas where lawyers and their clients have choices about how to interpret the law, the rules of professional responsibility, and whether to act in accordance with the purpose of the law or solely in the interests of the client. In choosing how to navigate those grey areas, the responsible lawyer will act in such a way as to contribute to the effectiveness and enforcement of the substantive law. He or she will not unhesitatingly use loopholes, procedural rules or barely arguable points to frustrate the substance and spirit of the law. Responsible lawyers see the practice of law as a 'public profession' in which lawyers have a mediating function, between the client and the law.[4] They certainly advocate for clients' interests, but they also represent the law to their clients, and help clients comply with the law. Responsible lawyering is often to be found among those lawyers who help plan business strategies for clients in such a way that the clients' affairs are in tune with the overall regulatory environment of the business. These lawyers act as 'go-betweens' and help to keep clients and the state in greater harmony than a purely adversarial lawyer might achieve.

Thus, according to the responsible lawyer approach, not only is it desirable for lawyers to be independent of the state, but also to show some autonomy from clients and powerful private interests. Lawyers should not be too dependent on, or too close to, clients. As one legal ethicist has argued:

> . . . as people professionally skilled in casuistry, finding loopholes in rules, exploiting any ambiguity and uncertainty, and playing strategic games, lawyers . . . can completely sabotage the framework. Clients who can afford to pay for such skills can rapidly exhaust adversaries who cannot, and thus turn the legal system into a device for evading the very rules it is designed to enforce, or worse, into a medium for extortion and oppression of the weak by the strong.[5]

As another ethicist argues, 'If lawyers do not moderate their clients' tendency to extract the maximum advantage from the legal system, we can expect legal outcomes to become increasingly skewed in favour of resourceful parties, thus undermining the legitimacy of legal institutions'.[6] Since the market will always be such that some people will be able to buy more than others, there must be some limits to what they can buy. Responsible lawyers will say no to those who are prepared to use their economic power to compromise the integrity of the justice system. Because the legal system depends on shared ideas about justice, lawyers who exercise ethical judgements that go beyond 'pure' legal advice in order to interpret and apply the law might also provide more prescient and strategic advice about how the law is likely to be enforced and interpreted than lawyers who do not consider the ethical perspective.

4 See, eg, Robert Gordon, 'Corporate Law Practice as a Public Calling' (1990) 49 *Maryland Law Review* 255.
5 Ibid 259.
6 Robert Nelson, *Partners with Power: The Social Transformation of the Large Law Firm* (University of California Press, Berkeley, 1988) 234.

For the responsible lawyer, like the adversarial advocate, personal moral beliefs are generally irrelevant. Instead the responsible lawyer will look to the ethics inherent in their role as officer of the court and in the law itself. This approach does not see lawyers as responsible for positively pursuing substantive justice according to some external standard (unlike the moral activist approach, below). The responsible lawyer generally looks for justice within the framework of the existing legal system. It does require that lawyers take those actions that seem likely to promote 'legal justice', that is the basic values of the legal system. It sees the lawyer's role as helping clients to pursue justice according to law, no more and no less.[7]

Thus in Case Study 1.1, the extradition scenario in Chapter 1, the responsible lawyer would have no trouble with representing Kalejs in putting any fair arguments to the court that might militate against extradition. However, given the fact that if extradited, Kalejs would still have faced a legal trial with due safeguards on the allegations themselves and the fact that courts in the US, Britain and Canada had already found at least prima facie evidence that he was involved in war crimes, the responsible lawyer may feel that justice would best have been served if Kalejs had been extradited and tried properly as soon as possible.

Responsible lawyering need not require lawyers to self-righteously force rigid interpretations of the law on unwilling clients. It does mean lawyers who creatively combine technical skill, a sense of social and legal responsibility and the vigorous pursuit of clients' interests; lawyers who do not demand 'dumb, literal obedience to every rule but creative forms of compliance that, although aiming to minimise cost and disruption to the company, effectively still realise the regulation's basic purposes'.[8] Over the last ten to twenty years many corporate lawyers, especially inhouse counsel, in Australia and elsewhere have recognised that this type of stance for advising corporate clients is not only more personally satisfying, but also more helpful to their corporate clients than a purely adversarial approach to lawyering. Lawyers of this type do not confine themselves to being 'the ministry for stopping [suspect] business'.[9] They also engage in the creative task of designing systems for ensuring legal compliance and public legitimacy that add value to corporate products and services, improve business efficiency and enhance corporate image. Consider the way that the inhouse counsel at the Australian headquarters of a multinational waste management firm considered his role. Following some issues concerning price-fixing and market-sharing conduct in the waste management industry in the US, one of his major areas of responsibility became compliance with competition and consumer protection law. This covers issues such as making sure the company's sales people and operatives are not dividing up the market with other firms and not misleading potential

7 See William Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press, Cambridge, Massachusetts, 1998) 9–11, 138–69 for an excellent account of this type of approach.
8 Gordon, 'Corporate Law Practice', 277.
9 This phrase was used by compliance counsel for an insurance company in an interview with one of the authors (Sydney, 7 January 1997). See generally Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, Cambridge, 2002).

customers about their services. He described his role in a way consonant with the responsible lawyer approach:

> You need a fair and just outlook in how a business should be operated . . . There must be an underlying sense of fairness in your character . . . that you shouldn't be overly opportunistic, smart and technical. It needs to be in your character to go looking for fair solutions to problems rather than just technical legal ones. A lot of lawyers love to be wise guys and to hit people over the head with the technical stuff. But in this work it is not a question of whether something is right or wrong in the [technical] legal sense but of whether it could be perceived right or wrong [in the spirit of the law]. In a competitive industry it is to our detriment in the long run if we are seen as a bunch of wise guys.[10]

The responsible lawyering approach clearly addresses the problem of lawyers helping clients to escape, manipulate or abuse the legal system. Yet it also puts lawyers in danger of not adequately serving clients' goals and interests. Probably for this reason there is no strong tradition in Australian or other common law legal systems which emphasises the responsible lawyering ideal of duty to the justice of law without also emphasising the advocacy ideal of duty to client. The responsible lawyer and adversarial advocate approaches are often held in tension with one another in professional conduct rules and widely accepted ideas of legal ethics. This is reflected in the way that debates about ethical issues for lawyers are frequently framed as a question of how to balance the lawyer's duty to the client with the lawyer's duty to the court or, more broadly, to the integrity of the law. Yet they are also recognised as complementing one another. Both approaches derive a role for the lawyer from the system for administration of justice, and in a sense, both roles are required by our system of administration of justice. Radically adversarial, 'loophole' lawyering untempered by the duty to the law and the court cannot ultimately be justified by the legal system because it is destructive of the legal system.

Yet neither the adversarial advocate approach, with its focus on individual client rights, nor the responsible lawyer approach, with its emphasis on preserving the justice of the law as it stands, leaves much scope for critique of the law in accordance with standards of social justice external to the law. The responsible lawyer approach, in particular, allows little possibility for testing the limits of the law, showing up its absurdity or pursuing a corrupt administration on a 'no holds barred' basis. In that sense it is an essentially conservative ethical approach. Moral activism, by contrast, majors on social critique and promoting reform of the law in the public interest.

10 Lawyer quoted in C Parker, *The Open Corporation*, 172. On preventive lawyering by inhouse corporate lawyers see also Robert Gordon and William Simon, 'The Redemption of Professionalism?' in Robert Nelson, David Trubek and Robert Solomon (eds), *Lawyers' Ideals /Lawyers' Practices: Transformations in the American Legal Profession* (Cornell University Press, Ithaca, New York, 1992) 230, 252–3; Keith Mackie, *Lawyers in Business: And the Law Business* (Macmillan, Basingstoke, 1989); Robert Rosen, 'The Inside Counsel Movement, Professional Judgment and Organizational Representation' (1989) 64 *Indiana Law Journal* 479.

Moral Activism: Agents for Justice with Clients and the Law

The second type of alternative to the adversarial advocate approach is to argue that it is not appropriate for lawyers to have a special ethics defined by role at all. Rather they should abide by ordinary ethics, although the application of those ethics to their practice as lawyers may have particular features. Two approaches to lawyers' ethics that propose different ways in which general ethics should apply to legal practice are the 'moral activist' and 'ethics of care' approaches. The ethics of care is discussed in the following section. It finds its inspiration in theories of virtue ethics and a broader literature on the ethics of care. Moral activism, by contrast, requires that mainstream consequentialist and, to a lesser extent, deontological theories of ethics, and of justice in particular, should be applied to legal practice.

Moral activism argues that lawyers should do good according to general theories of ethics, whichever theory the individual lawyer finds attractive. (Of course this 'theory' need not be a formal philosophical theory – it may simply be the lawyer's personal ethics and philosophy of life.) In particular, because the legal system is intended to do justice, lawyers should be particularly concerned with doing justice. Thus moral activism encourages lawyers to have their own convictions about what it means to do justice in different circumstances and to seek out ways to act out those convictions as lawyers. They cannot escape moral accountability for their actions by playing the role of adversarial advocate or even responsible lawyer. American legal ethicist, David Luban, who coined the term 'moral activism' describes what it is likely to mean in practice in the following way:

> Moral activism . . . involves law reform – explicitly putting one's *phronesis*, one's savvy, to work for the common weal – and client counselling . . . And client counselling in turn means discussing with the client the rightness or wrongness of her projects, and the possible impact of those projects on 'the people,' in the same matter-of-fact and (one hopes) un-moralistic manner that one discusses the financial aspects of a representation. It may involve considerable negotiation about what will and won't be done in the course of a representation; it may eventuate in a lawyer's accepting a case only on condition that it takes a certain shape, or threatening to withdraw from a case if a client insists on pursuing a project that the lawyer finds unworthy. Crucially, moral activism envisions the possibility that it is the lawyer rather than the client who will eventually modify her moral stance . . . But, ultimately, the encounter may result in a parting of ways or even a betrayal by the lawyer of a client's projects, if the lawyer persists in the conviction that they are immoral or unjust.[11]

Unlike the responsible lawyer approach, moral activism is not confined by the idea of justice set out in the legal system – instead it contemplates that the legal system may need to be changed to become more just, and that lawyers may

11 David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, Princeton, 1988) 173–4.

have a responsibility to do so. Moral activists argue that lawyers should use legal practice to change people, institutions and the law to make them conform more to general ideals of social and political justice. It is a tradition of active citizenship by lawyers to actively improve justice in ways that simply doing their duty by paying clients and the legal system, as per the adversarial advocate and responsible lawyer approaches, leaves untouched. To the extent that the law and legal processes as they stand coincide with the lawyer's ideals of justice, then the moral activist lawyer will behave similarly to the responsible lawyer. But the moral activist lawyer does not see themself as necessarily confined by a duty to the law where the law is unjust. They see themselves as responsible for doing justice even if that involves changing or challenging the law and, from time to time, its practitioners. Similarly where a moral activist lawyer believes in the justice of a particular client's cause, then they will behave like an adversarial advocate to the extent even of exploiting loopholes and testing the limits of the law to establish their client's cause. But a moral activist will not advocate zealously for clients where they believe their cause is not just.

Many of the obvious examples of moral activist lawyers are often those from the social democratic left (eg those lawyers who worked for little or for free to represent Indigenous clients in ground-breaking native title claims or stolen generation cases). However a lawyer could equally be a moral activist for other causes and political beliefs. For example, in the Kalejs extradition case, a moral activist lawyer might have a strong belief that prosecuting war crimes more than fifty years after the event is unjust and hence wish to represent Kalejs to prevent a war crimes trial taking place. Another moral activist lawyer might take the opposite view and see accountability for the horrendous genocides of the twentieth century as an essential element of global justice. (Chapter 4 on ethics in criminal defence advocacy explores this issue in more detail.) Such a lawyer would probably find it impossible to act for Kalejs.

As is evident in the quotation from David Luban above, a moral activist approach to legal practice can manifest itself in several ways. First, a moral activist lawyer may try to represent only those clients who represent 'worthy causes' or those who are often the subject of injustice. Lawyers who choose to do legal aid work for a reduced fee, to pursue a career in the legal aid or community legal centre sector or to volunteer their time for poor clients are common examples of moral activism.

But moral activism can also lead lawyers to become involved in more politicised law reform activities and representation of people and causes to create legal and social change. In this type of 'public interest' lawyering, the lawyer is as likely to seek out the client to fit the cause, as the client is to seek out the lawyer. In extreme cases, the participation of individual clients is almost subordinated to the bigger cause such as a class action (against a corporation in a product liability case) or constitutional challenges (to government actions). Consider the litigation concerning the Australian government's actions in preventing 433 asylum seekers on board the Norwegian vessel, MV *Tampa*, from disembarking

on Australian soil. The Victorian Public Interest Law Clearing House (PILCH) organised a team of private lawyers (a commercial law firm and senior and junior barristers) to act for free in seeking the release and delivery onto Australian soil of the asylum seekers. Because it was impossible to contact the asylum seekers on board the ship, the Victorian Council for Civil Liberties (Liberty Victoria) (itself acting through public interest lawyers) became the client. In effect the public interest lawyers themselves defined the cause and the shape of the litigation in the absence of instructions from the asylum seeker clients. The Directors of PILCH comment about the case:

> Striking were the roles of the lawyers, and how they were perceived both within the legal profession and more broadly. 'How much money do you make out of defending these worthless scum?' senior counsel was asked by a member of the public. On another occasion it was '[w]hy don't you and all of your tree-hugging, libertarian, do-gooder, wanker buddies go to Afghanistan and practise your law?' In contrast, his Honour Justice French (one of the judges in the majority in the Full Court [who denied the application]) characterised the lawyers as 'acting according to the highest ideals of the law' and of '[serving] the rule of law and so the whole community' . . . The actions of the lawyer were bold. Amongst other things, these were proceedings against the highest echelons of government. They involved a challenge to executive power to ensure the lawful exercise of discretion and concerned conspicuous and controversial government policy. The issues were highly politicised, as the events unfolded in the weeks leading up to a federal election campaign . . . There is a hunger [amongst lawyers] for public interest work that is interesting, challenging, even confronting and political, and involves direct contact with 'real' people. There is also a desire to see an outcome or a challenge to the status quo, not just on a micro level for individual clients, but also on a larger scale.[12]

Not all lawyers all the time have the opportunity to get involved in public interest cases for justice causes that they really believe in. But, secondly, moral activism would also affect the way that lawyers represent and advise all their clients, as argued in the quotation from David Luban above. Moral activist lawyers seek to argue with and persuade clients to do what the lawyer considers the just thing, always bearing in mind the possibility that the client might also persuade the lawyer about what justice involves. Luban illustrates this style of law practice by invoking a famous instance of Abraham Lincoln's advice to one of his law practice clients:

> Yes, we can doubtless gain your case for you; we can set a whole neighbourhood at loggerheads; we can distress a widowed mother and her six fatherless children and thereby get you six hundred dollars to which you seem to have a legal claim, but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember that some things legally right are not morally right. We shall not take your case, but will give you a little advice for which we will charge you nothing. You seem to be a sprightly energetic man; we would advise you to try your hand at making six hundred dollars in some other way.[13]

12 Samantha Burchell and Emma Hunt, 'From Conservatism to Activism: The Evolution of the Public Interest Law Clearing House in Victoria' (2003) 28 *Alternative Law Journal* 8, 11.
13 Luban, *Lawyers and Justice*, 174.

Contrast this quotation with Lord Brougham's defence of Queen Caroline quoted in Chapter 1.

As its label suggests, moral activism gives lawyers a much more proactive role in ensuring justice than either responsible lawyering or adversarial advocacy. Indeed the justice of our current legal system is at least partially dependent on the fact that there are lawyers (motivated by moral activism) who are willing to work for reduced fees or voluntarily for clients and causes who cannot afford any other lawyer, lawyers who seek out and are committed to public interest causes, lawyers who will fight battles no one else will fight and lawyers who seek to reform the law, the legal system and their own profession in the interests of justice. Yet moral activism as a total approach to legal practice can also be criticised for neglecting the wisdom of adversarial advocacy that anyone should be entitled to legal representation and the chance to argue their case in court without first having to persuade a lawyer that their case is worthwhile. Furthermore, moral activism runs the risk of encouraging lawyers to act without regard to law and procedural fairness when they do find a client they believe in. Unlike responsible lawyering, moral activism prescribes no particular duty to the law and the legal system where a lawyer believes their cause is just. Finally, as an ethical approach to lawyering, moral activism has a tendency to place the lawyer's commitment to an ideal of justice above the client. Indeed moral activist lawyering in practice is sometimes criticised as a demonstration of a lawyer's ego that undermines their commitment to justice. The final approach, the ethics of care, puts the focus back on the lawyer's responsibilities to the client and their relationships.

Ethics of Care: Relational Lawyering

The ethics of care, like moral activism, emphasises the integration of personal ethics with legal practice. While moral activism proposes that lawyers should act in a way calculated to best promote social and political justice, the ethics of care, by contrast, is more concerned with personal and relational ethics. The ethics of care focuses on lawyers' responsibilities to people, communities and relationships. Often this approach is linked to the work of Carol Gilligan which proposed that traditional rights-oriented theories of the development of moral reasoning privileged typically male forms of ethical reasoning and ignored the care-based ethics that many females tend to use:[14]

14 Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, Cambridge, Massachusetts, 1982). For influential applications of Gilligan's work to lawyers' ethics, see Rand Jack and Dana Crowley Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* (Cambridge University Press, Cambridge, 1989); Carrie Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Women's Lawyering Process' (1985) *Berkeley Women's Law Journal* 1. For further discussion, see Carrie Menkel-Meadow, 'Portia Redux: Another Look at Gender Feminism and Legal Ethics' in S Parker and C Sampford (eds), *Legal Ethics and Legal Practice*, 25. For evidence that there is a difference between the values orientation of male and female law students in Australia on some issues, see Adrian Evans and Josephine Palermo, 'Australian Law Students' Perceptions of their Values: Interim Results in the First Year – 2001 – of a Three-Year Empirical Assessment' (2002) 5 *Legal Ethics* 103.

> Whereas the ethics of justice is founded on the idea that everyone should be treated equally, the ethic of care requires that no one should be hurt. Whereas men tend to stand on principle and act according to people's rights irrespective of the consequences, women are more pragmatic, being more concerned to uphold relationships and protect their loved ones from harm. Whereas the ethic of justice assumes that one can resolve moral dilemmas by abstract and universalistic moral reasoning, the ethic of care requires due attention to context and the specific circumstances of each moral dilemma. And in resolving such dilemmas, men tend to rank ethical principles, whereas women attempt to address the concrete needs of all and to ensure that if anyone is going to be harmed it should be those who can best bear the harm.[15]

The empirical claim made by Gilligan as to whether an ethics of care is a typically female ethic has been controversial for obvious reasons. But the general contours of an ethic of care have developed a life beyond the gender debate. The ethics of care has been generally accepted as an alternative approach to ethical reasoning in general, and to the application of ethics in legal practice in particular.

Legal ethicist Thomas Shaffer also developed the language of an 'ethics of care' to describe his deeply humanist, relationship and faith-based application of ethics to legal practice.[16] Because it is a contextual style of ethical reasoning, the ethics of care can be difficult to grasp. One teacher of legal ethics has explained Shaffer's rich descriptions of what it involves in the following way:

> The ethics of care is risky. Shaffer attempts to convey its meaning through a series of contrasting terms and through a cast of contrasting characters. The ethics of care is not representation but ministry; it rests not on loyalty but on fidelity, not on contract but on covenant. . . . Ministry focuses on the relationship between lawyer and client; it makes relationships central. Shaffer's view of relationships is teleological; they are goal directed, 'going somewhere'. He argues their proper goal is conversion, conversion to truth and goodness. Achieving a conversion requires movement, change. Inducing change requires an ability to persuade. Those who wish to persuade must be open to persuasion. These ideas diverge radically from traditional ideas of law practice. It is not the standard view that lawyer-client relationships are in their essence commitments by a person toward another's growth toward goodness and toward his own growth. It is not the standard view that one's effectiveness as a lawyer might be measured by the strength of that commitment rather than by the number of cases he wins. If growth through relationships is central, morals and moral growth often will be the subjects of relationships . . .[17]

In both Gilligan's and Shaffer's conceptions, the ethics of care for lawyers focuses on trying to serve the best interests of both clients and others in a holistic way that incorporates moral, emotional and relational dimensions of a problem into the legal solution. It is particularly concerned with preserving or restoring

15 Caroline Maughan and Julian Webb, *Lawyering Skills and the Legal Process* (Butterworths, London, 1995) 36.
16 Thomas L Shaffer, *On Being a Christian and a Lawyer: Law for the Innocent* (Brigham Young University Press, Provo, Utah, 1981); Thomas L Shaffer and Robert F Cochran, *Lawyers, Clients and Moral Responsibility* (West Publishing Co, St Paul, Minnesota, 1994).
17 Mark Weisberg, 'Integrating Personal and Professional Lives: An Essay on Thomas Shaffer's *On Being a Christian and a Lawyer*' (1984) 9 *Queen's Law Journal* 367, 375.

(even reconciling) relationships and avoiding harm. It sees relationships, including both the client's network of relationships and the lawyer's own relationships with colleagues, family and community, as more important than the institutions of the law or systemic and social ideas of justice and ethics. An ethics of care will discard fundamental rules of professional conduct if circumstances seem to demand it. Consider for example the following case study:

> You are acting for a mother of three small children in a divorce and intervention order matter. Your client has previously shown you some old photographs of bruises and marks on the children which she claims were inflicted not by their father, but by her new boyfriend. One of the children now has blurred vision. Your client now instructs you to stop all legal proceedings as she intends to return to the children's father with her children. You believe the children will be at risk if this happens but you know 'mandatory reporting' does not apply to lawyers in your state. Would you break client confidentiality and inform the relevant welfare department of your fears?[18]

In their survey of 700 recent Australian law students in the *Australian Lawyers' Values Study*, Evans and Palermo found that most (59.3%) reported that they would breach client confidentiality in this scenario.[19] (A set of questions and guide for discussing this scenario are provided in Chapter 10.)

While few lawyers might label their approach an 'ethics of care', the concerns that motivate academic discussion of the ethics of care have also been tremendously influential in legal practice in recent times in incremental, if not revolutionary ways. There are at least three practical ways in which 'ethics of care' concerns have influenced legal practice in recent times.[20]

First, the ethics of care encourages lawyers to take a more *holistic* view of clients and their problems. Thus lawyers following the ethics of care are likely to spend more time listening to and discussing the broader concerns of clients and the way that legal issues are likely to impact on other aspects of their lives and relationships. At the very least, the ethics of care encourages lawyers and clients to consider the non-legal and non-financial consequences (eg reputational, relational and psychological) of different legal options. Some lawyers even refer clients for advice or counselling for the non-legal aspects of their legal problems or incorporate relational and psychological wellbeing more explicitly into legal representation (eg through movements such as therapeutic jurisprudence).[21] Holistic lawyering is also a feature of many clinical approaches to legal education. More particularly, the ethics of care encourage lawyers and clients to see ethics and the moral goodness of the client and lawyer as an explicit part of the lawyer-client relationship. It assumes that lawyers and clients will want to discuss the ethical implications of different courses of action, as well as the social, psychological, financial and other consequences. But it does not presume that the lawyer's initial view of the ethics of a client's situation are automatically

18 Evans and Palermo, 'Australian Law Students' Perceptions of their Values', 114.
19 Ibid 115.
20 The three ways are based on Maughan and Webb, *Lawyering Skills*, 118–20.
21 See M King, 'Applying Therapeutic Jurisprudence from the Bench' (2003) 28 *Alternative Law Journal* 172.

correct. Rather it emphasises dialogue about ethics and respect for each other's positions.

Thus, secondly, the ethics of care emphasises dialogue between lawyer and client and *participatory* approaches to lawyering. The lawyer-client relationship is built on mutual trust and shared knowledge. At the most mundane level, this means that lawyers have a responsibility to make sure that clients understand the consequences, costs and uncertainties associated with the various alternative courses of action available to them so that the client can choose which option to pursue in an informed way. More ambitiously, the ethics of care puts a premium on the lawyer spending time listening to the broader concerns of the client so that the legal solution they offer fits in with the other aspects of the client's life. For example, the ethics of care is supported by the legislated costs disclosure process (see Chapter 8). It also requires the lawyer and client to both agree as to any course of action that is taken. Neither can decide for the other – the (fully informed, authentic) consent of both to any course of action is considered necessary as the lawyer-client relationship is seen as a partnership in which both parties are equally responsible. Therefore legal advice is likely to be offered in dialogue with the client, rather than the client told what to do. But at the same time, the lawyer will not take actions in representing a client that the lawyer does not feel ethically (and generally) comfortable with for him or herself.

Thirdly, because the ethics of care asks lawyers (and clients) to see themselves within a network of relationships and to understand the feelings and experiences of others within those relationships, they are likely to look for *non-adversarial ways to resolve disputes* and preserve relationships, if possible. Therefore lawyers will recommend dialogic, non-litigious means to resolve disputes such as negotiation, mediation and other forms of alternative dispute resolution. There will be less emphasis on positional bargaining and more on creative, 'win-win' resolutions. It has been suggested that following an ethics of care, cases that do go to court 'would be conducted on the basis of "good faith" principles. These would suggest a need for: (a) more dialogue and fuller disclosure between parties; (b) respect for the interests of other parties, resulting in avoidance of trial and pre-trial adversarial tactics, and (c) less intimidating advocacy when in court'.[22] Outside of the dispute resolution context, the ethics of care lawyer is also likely to take a collaborative, preventive, problem-solving approach to deals and transactions.

Each of these three aspects of legal practice – holism, lawyer-client participation, and a preventive, problem-solving approach – are now regularly advised in books, seminars and, to an extent, conduct rules on legal interviewing, advising and 'client care'. Many lawyers have chosen to devote themselves to advocating and promoting alternative dispute resolution precisely because they (and their clients) are disenchanted with adversarialism as a way of resolving disputes and prefer to be part of a problem-solving, relationship-preserving way of practising

22 Maughan and Webb, *Lawyering Skills*, 119.

law, whether the concern is with business or family relationships. Similarly, the profession as a whole has also recognised that 'client care' – effective communication with clients and participation by clients in decision-making – is necessary for delivering legal services effectively, and preventing client complaints and public disenchantment with the profession. These are everyday ways in which the ethics of care have influenced legal practice.

Consider also the following description of a lawyer-client relationship as an example of a more unusual way in which an ethics of care might be demonstrated:

> My first legal client in St Kilda, in March 1985, was a sex worker named Julie. She arrived at St Kilda Baptist Church, which surprising as it might sound, houses a legal office, five minutes before her case was due to start at the St Kilda Court . . . I hurriedly threw on my coat and we started walking to the old St Kilda Court . . . I could not help noticing that she was sporting an ugly black eye, with bruising extending down over the cheekbone and towards her chin. I thought she had been callously bashed. I was wrong. I asked her cautiously and sympathetically how she had received the bruising. Julie told me bluntly that her nerves had got to her the previous night when she realised that she might go to prison because of her many prior convictions for theft and prostitution, and so she had attempted to shoot up in her arm. After a number of failed attempts to locate a vein, she had got angry, and in desperation had injected heroin into a vein in her cheek. I inwardly freaked, but tried to look unshocked . . . My plea in mitigation of the offence convinced the magistrate to give her one more chance before prison and he imposed yet another fine. Julie was ecstatic and told me indelicately how many clients it would take to pay out the fine . . . She planted a big kiss on my cheek and graciously invited me out for lunch. I must confess to some deep-seated, middle-class ambivalence, and I hesitated before accepting . . . She replied with delight that she knew a soup kitchen down the road that provided a great free lunch . . . My judgments of Julie dissolved when she told me how she had been raped at fifteen by one of many different men who had passed through her mother's life and home. She felt so 'dirty' that she decided she would never let any man do that to her again. She would at least make them pay! I understand how in a tragically coherent way she was taking back power over her life. Who was I to judge? [We arrived] at the meal program. Unannounced, she commanded silence by telling everyone, including those serving, to shut up because she wanted to introduce her lawyer, who was the best legal eagle in town. I politely waved to the many street people gathering for lunch and lined up and got my dinner.[23]

The narrator is a lawyer, who also happens to be a minister of religion. His care for his client's legal rights, but also the rest of her life is obvious from his description of his encounter with her, and the way in which he is willing to enter into her life. But the care and respect that this lawyer shows his client is met by an equal care and respect shown by the client towards the lawyer in telling him her story and taking him to lunch to meet her community. Consistent with the ethics of care, the human, relational aspects of the lawyer-client interaction are here considered central by both lawyer and client.

In the war crimes extradition scenario, Case Study 1.1 in Chapter 1, an ethics of care approach would require the barrister to consider not only what was in

23 Tim Costello, *Streets of Hope: Finding God in St Kilda* (Allen & Unwin, St Leonards, NSW, 1998) 1–3.

the best interests (including for the moral worthiness) of his potential client, but also the ramifications of taking on this client for his own relationships within his family and community. In relation to the client, a potential lawyer may well be concerned that regardless of what he had done in the past, the client was now an old, sick man and deserving of care and compassion for those reasons, if no other. Hence a lawyer following the ethics of care may be willing to argue that, regardless of any wrong committed in the past, Kalejs should not be extradited and tried at this late stage of his life. Nevertheless, a strong commitment to the ethics of care is likely to require Kalejs' lawyer to also discuss with his client what he (allegedly) did in the past, and, assuming he was involved in war crimes in some way, look for ways in which some reconciliation or resolution could be found. This would undoubtedly be very difficult in this case, given the efflux of time, the horrific nature of the crimes and the fact that the client was in fact suffering from dementia. But the goal would be that, assuming Kalejs was guilty, he would agree to some sort of apology and acknowledgement of wrongdoing, regardless of whether he was extradited and tried, or not.

Granted these possibilities for a 'caring' way of representing an alleged war criminal (if the client could be persuaded), the ethics of care also requires a potential lawyer to ask what impact the representation would have on their own personal relationships and community. In this case, given the controversy over such cases, the barrister's previously stated views on Kalejs, and the barrister's position in the community, taking on this client might easily have been seen as a betrayal of his friends and families and of his own identity. It is possible that a civil rights advocate might choose to represent an alleged Nazi war criminal out of his or her commitment to civil rights, if important civil rights issues were at stake. But in this case, the previous decisions by courts in other countries that Kalejs was in fact a war criminal, the general view amongst those who care that Australia has been particularly negligent in failing to bring war criminals to justice, and the fact that Kalejs had first escaped to and then returned to Australia having been deported from the US, Britain and Canada suggest that it was open to assume that Kalejs had managed to avoid justice more than being the victim of injustice. In real life the barrister decided not to represent Kalejs, perhaps for those very reasons, and Kalejs died before the extradition proceedings were complete.

The ethics of care approach is more focused on the client's best interests than the moral activist or responsible lawyer approaches. However, unlike the adversarial advocate approach, it sees the client's best interests in the context of the client's network of relationships. The moral activist sees the individual client as more dispensable in the cause of justice and social change. The ethics of care approach is more interested in personal change than social change. The caring lawyer wants the client to become the best person they can be. In that sense the ethics of care is as concerned with the ethics of the client as with the ethics of the lawyer, and it sees them as being interdependent. However, the ethics of care approach can have quite a conservative impact. Because the emphasis is on the

goodness and worth of the individual client and preserving relationships, it is not strong on seeing and addressing social and political injustice.

Conclusion

Most lawyers are unlikely to talk in terms of 'adversarial advocacy', 'responsible lawyering', 'moral activism' or the 'ethics of care'. Yet we all implicitly act on intuitions and personal philosophies of life and lawyering that appeal to the logic in one or more of these four approaches. Because they are also based on applied legal ethics theory, these four ethical approaches have some theoretical coherence and are capable of providing us with a principled set of considerations that we ought to respond to in deciding what to do in any particular situation.

These four approaches can be seen as options on an a la carte menu – each of us could choose which approach we prefer for the purpose of guiding our own lives as lawyers and for assessing others. Or they could be seen as the tools and ingredients available for creating our own individual dishes – there are a range of arguments and considerations available which can be combined and used in a variety of ways each unique to each of us in the circumstances of our own lives. But each approach requires a conscious response from us – a decision about whether to use it in each situation and, if not why not; or if so, how? Some of the most thoughtful commentators on legal ethics and the skill of teaching legal ethics argue that the key to understanding and learning legal ethics is a process of judgement: 'moral decision making involves identifying which principle is most important given the particularities of the situation . . . reducing judgment to rules or formulas lands us in an infinite regress of rules'.[24] Moral judgement that goes beyond rules and formulas is likely to be messy. The approaches set out here provide a series of questions and considerations that can help us structure the mess. But it is up to each of us to decide what to 'cook' with them. What combination of ethical approaches resonates most strongly for you in the following case study?

CASE STUDY 2.1 The Nazi Gold

Early in 1997 the large and old Wall Street law firm Cravath Swaine announced that it would be acting for Credit Suisse in its dispute with Jewish organisations and the families of victims of the Holocaust over money deposited in Swiss bank accounts by Jews during World War II, and gold and possessions looted by Nazis from their Jewish victims and also deposited in Swiss bank accounts.

Twelve associates (junior employee lawyers) of Cravath Swaine immediately wrote a memo to the firm's partners protesting this decision:[25]

24 David Luban and Michael Milleman, 'Good Judgment: Ethics Teaching in Dark Times' (1995) 9 *Georgetown Journal of Legal Ethics* 31, 39.

25 Text of the memo and information about the protest from Ronald Goldfarb, 'Guilt by Association' and Alan Dershowitz, 'Defending the Offensive', *The Washington Post* (Washington, USA), 6 April 1997, C3. See also Michael J Bazyler, 'Suing Hitler's Willing Business Partners: American Justice and Holocaust Morality'

> We, the undersigned, protest Cravath Swaine's decision to represent Credit Suisse in its dispute with the families of Holocaust victims.
>
> We are hard-pressed, as Cravath-trained lawyers, to see how it is possible to honour one's ethical and legal obligations to advocate zealously on behalf of one's client and at the same time assert the interests of those asserting claims against that client. It seems implausible that Cravath could both serve Credit Suisse and bring about a fair and honourable resolution for those who suffered at the hands of Nazis and their collaborators.
>
> Representing Credit Suisse would simply add our distinguished firm's imprimatur and legitimacy to a client that profited from laundering Nazi loot under egregious circumstances, and concealed its collaboration. We do not want to see this happen.
>
> We call upon the partners of Cravath Swaine to reconsider our representation of this client and to preserve the good name and reputation of our firm by deciding not to represent Credit Suisse in this matter.

In 1996 and 1997 a number of Swiss banks including Credit Suisse (a private bank) had become the subject of massive media and government attention when their financial implication in Hitler's Holocaust was revealed. Concern centred around two main issues:

> *Looted Gold*: It was discovered that German Nazis had used the Swiss banks to launder loot stolen from the countries they invaded, including gold from state treasuries (about $US4 billion at 1997 prices), and also gold, money, jewellery and personal possessions stolen from Jewish victims of the Holocaust. This latter category included dental gold that was systematically extracted from the victims' teeth after they were killed (and sometimes in the hours immediately preceding their deaths: altogether about $US1.3 billion at 1997 prices). Switzerland's private banks accepted some $US550 million in deposits of gold or bought it outright before sending it on to other neutral countries. In this way the Third Reich was able to gain the foreign currency that they needed to buy vital war materials. The bankers noticed that much of the new gold was coming from Lublin and Auschwitz (sites of concentration camps) and that much of the new gold was of a different quality – dental gold. But they did not do anything about it. Some commentators have noted that without the Swiss bankers' help, the war would probably have ended two years earlier. Credit Suisse was one of Berlin's main economic allies in supplying foreign currency to Nazi economic agents in Lisbon, Madrid and Shanghai.
>
> *Holocaust Victims' Accounts*: Money was deposited by many wealthy Jews in secret Swiss bank accounts (sometimes under assumed names) to keep it safe during the war, and so that their families could inherit it even if they were killed. Since the war, victims' families had found it virtually impossible to access these accounts due to the secrecy laws governing Swiss banks and their bureaucratic approach to claims. There were no death certificates issued at Auschwitz but the banks had demanded written proof of death from the relatives of Holocaust victims, and also details of bank accounts that they did not have because the accounts were opened in haste as their owners were deported and killed.

By 1997, the Swiss government and Swiss banks had done a number of things to return the money in dormant accounts (opened by Jews and others during the war) to its rightful owners. But Jewish groups believed that only a fraction of the money

(2004) 16 *Jewish Political Studies Review* <http://www.jcpa.org/phas/phas-bazyler-f04.htm> at 29 May 2005; Adam LeBor, *Hitler's Secret Bankers: The Myth of Swiss Neutrality During the Holocaust* (Carol Publishing Group, Secaucus, New Jersey, 1997). The website for the class action briefly summarised here is Holocaust Victim Assets Litigation <http://www.swissbankclaims.com/> at 28 April 2006.

and looted gold that rightfully belonged to Jews and others persecuted by the Nazis had been returned, and that processes put in place for identifying and returning the remainder were inadequate. Jewish organisations had threatened to organise a mass withdrawal of pensions and investments from Swiss banks, and filed a class action against the banks to gain access to the dormant accounts, and compensation for Jews and others persecuted by the Nazis (including gays, Roma and the disabled).

DISCUSSION QUESTIONS

1. How would each of the four ethical approaches to lawyering be applied to what the lawyers at the law firm should do in this situation? Should they take on Credit Suisse as their client and if so, how should they represent them?
2. Cravath Swaine is to hold a meeting of all its partners and the concerned associates to discuss whether it should represent Credit Suisse in its dispute with the families of Jewish holocaust victims, as it had planned, or whether it should decide not to represent Credit Suisse after all. The following groups each with strong views on the issue will be in attendance at the meeting:
   - The associates who initially protested the representation of Credit Suisse.
   - Partners in the Litigation Department who will be responsible for defending Credit Suisse in any litigation arising out of the Jewish claims, including the class action that has already been filed.
   - Senior partners in the Corporate Department who will be responsible for advising Credit Suisse on any arrangements to return money and making arrangements for the Holocaust Memorial Fund.
   - Jewish partners.

   What ethical approach might each of these groups take to resolving this issue? If possible, you could role play the meeting (with different groups of people taking on the different roles) and come to a conclusion of what you should do.
3. Some of the plaintiff class action lawyers in the case against the Swiss banks, and in other similar 'Holocaust restitution' cases (such as claims for compensation against German companies that used Jews as slave labour during the war) have been criticised for making millions of dollars in contingency fees from these cases and, in one case, acting more as publicists seeking to bolster their own reputation than as lawyers. It has been suggested that plaintiff lawyers in such cases should take them on a purely pro bono (that is without charging any legal professional fee because the case is in the public interest) basis. Does this change anything about your consideration of whether Cravath Swaine should take on the case? Should lawyers only act for the plaintiffs in such cases on a pro bono basis?

Recommended Further Reading

Joseph Allegretti, 'Rights, Roles, Relationships: The Wisdom of Solomon and the Ethics of Lawyers' (1992) 25 *Creighton Law Review* 1119.

David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, Princeton, 1988).

Stephen Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities' (1986) *American Bar Foundation Research Journal* 613.

Charles Sampford and Sophie Blencowe, 'Educating Lawyers to be Ethical Advisers' in Kim Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Hart Publishing, Oxford, 1998) 315; summarised in Charles Sampford, 'Educating Lawyers to be Ethical Advisers' (1999) 19 *Proctor* 19.

Thomas L Shaffer and Robert F Cochran, *Lawyers, Clients and Moral Responsibility* (West Publishing Co, St Paul, Minnesota, 1994).

William H Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press, Cambridge, Massachusetts, 1998).

W Bradley Wendel, 'Professionalism as Interpretation' (2005) 99 *Northwestern University Law Review* 1167.

3

The Responsibility Climate: Regulation of Lawyers' Ethics

Introduction

This chapter considers how the structure and processes of the regulatory systems that govern the legal profession are relevant to lawyers' ethics and behaviour – that is, the significance of 'institutions' for lawyers' ethics. Traditionally, as we shall see, the legal profession self-regulated on the basis of blind confidence that any misbehaviour by lawyers was an *individual* anomaly, while the culture and practices of the profession as a *whole* were ethical.[1] Most lawyers probably spend more time thinking about their personal ethics than the way the legal profession as a whole is structured and regulated. But the ethical character of lawyers' practices does not depend on personal factors alone. In practice, personal ethical decisions will either be supported or undermined by the surrounding 'institutional' ethical culture and processes in which they are embedded. Personal ethics will be influenced by institutional constraints such as who sets and enforces the rules that govern the legal profession, what ethical and conduct issues the rules address, what values are represented in what the rules say, and whose interests are promoted and whose interests are ignored in those rules – those of lawyers, clients, the community or the profession?

In this chapter we consider two principal ways in which the ethics demonstrated by the legal profession as a whole are likely to impact on lawyers' individual and personal ethics: First, we consider the ethical dimensions of different models of regulation of the legal profession – self-regulation, co-regulation and independent regulation. Secondly, we focus on a particular issue where institutional and

1 Christine Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25 *University of New South Wales Law Journal* 676.

personal ethics interact with one another – the use of interest on clients' trust account balances.

The previous two chapters introduced four different ways of thinking about which values should characterise legal practice – and therefore any regulatory system for lawyers. In the following chapters we will look at a number of specific topics or areas and examine in more detail what these approaches might mean, and which values would be appropriate to apply in these different contexts. In doing so we will critique the extent to which the rules and regulation as they currently stand do a good job of demonstrating the right values, and how these rules and regulation influence individual lawyers' capacity to put different values into action in practice. We shall highlight a number of examples where current regulation fails to give lawyers adequate guidance as to how to put values into action (such as the lack of guidance on the public interest exceptions to confidentiality obligations to facilitate whistle-blowing – Chapter 9), or where lack of enforcement (such as excessive adversarialism – Chapter 4; and prosecutors' duties – Chapter 5) or the wording of the rules themselves (such as allowing clients with potentially conflicting interests to be simultaneously represented – Chapter 7) seem to undermine appropriate values. We will also see a number of examples where 'cultural', taken-for-granted assumptions and practices of the legal profession probably promote unethical conduct by individual lawyers that has not been addressed by rules and regulation (such as widespread lack of effective communication and dialogue with clients about billing – Chapter 8).

Like any other occupation or business, a wide range of laws and regulations apply to legal practice.[2] The most important of these are the duty of care owed by lawyers to clients in negligence and contract at common law, and the fiduciary duties and other obligations, such as confidentiality, owed by lawyers to their clients in equity. All sorts of other areas of law, such as anti-discrimination, corporate, environmental, and trade practices regulation, also apply to legal practice just as they apply to other businesses, and are enforced against lawyers and law firms by regulatory agencies.

In this chapter, however, we focus on the rules and regulatory regimes that have been created to apply specifically to lawyers under the legislation and case law governing the legal professions of each of the states and territories. In particular we focus on the complaints handling and disciplinary systems for lawyers in each of the states and territories, since these are the areas of lawyer regulation most in the public eye, and most criticised. Other rules and regulations specifically set up for lawyers that are not discussed in detail in this chapter include the rules relating to admission to the profession (see Chapter 10), the issue and renewal of practising certificates (a function which is still generally left to the

2 See David Wilkins, 'Who Should Regulate Lawyers?' (1992) 105 *Harvard Law Review* 799; David Wilkins, 'Afterword: How Should We Determine Who Should Regulate Lawyers? Managing Conflict and Context in Professional Regulation' (1996) 65 *Fordham Law Review* 465. See also C Parker, ibid. David Wilkins divides enforcement/regulatory controls for the legal profession into four categories: (1) disciplinary controls (traditional self-regulation); (2) liability controls (negligence etc); (3) institutional controls (enforced by courts and state administrative agencies on lawyers who practise before them); (4) legislative controls (enforced by a special independent regulator or commission or even by the government).

profession[3]), and the prosecution of public complaints about conduct, the inspection and monitoring of trust accounts, compensation systems for breach of trust and the costs disclosure and dispute resolution regimes (see Chapter 8).

The Regulation of Lawyers

Self-Regulation: The Traditional Basis for Regulation of the Legal Profession

The regulatory structures for the legal profession in the various states and territories in Australia are still heavily influenced by the fact that historically the legal profession regulated itself.[4] At the pinnacle of self-regulation, the professional associations promulgated and enforced standards of professional conduct, investigated and prosecuted complaints, and provided the disciplinary tribunals to hear charges. They also decided on qualifications for admission, issued practising certificates, policed compliance with trust account rules and administered fidelity funds and insurance schemes. They also enforced lawyers' monopolies on legal work, set standard fees, and prohibited most forms of competition between lawyers, including any form of advertising or price competition.

There were two main justifications for self-regulation put forward by the legal profession. Both of these justifications appealed to lawyers' role as *adversarial advocates*:[5]

- *First*, it was thought that only lawyers were knowledgeable enough about the law to set standards for their own practice. Clients and the general public lacked the expertise to participate in setting and enforcing the ethics and standards of the legal profession. The whole point of law being a profession was that clients needed to trust lawyers to serve their interests in the legal system (as *adversarial advocates*) because they did not know how to do so themselves. The public likewise needed to trust lawyers to act honourably and 'professionally' by advocating vigorously for clients without breaching their duties to the court and the law, since only lawyers and courts had the experience and expertise to understand how that delicate balance should be maintained.

3 Some law societies – eg Western Australia and Victoria – have lost formal control of the ability to issue practising certificates, but the organised profession is still very much in control of the administrative licensing process in most jurisdictions. Even in Victoria, the new Legal Services Board has delegated the licensing process back to the profession and is likely to leave that delegation intact for the foreseeable future. Linda Haller argues that the power to control practising certificates may be more important for regulatory authority than disciplinary control, because administrative withdrawal of a right of practice may be less expensive for regulators than the commencement of contested disciplinary proceedings: Linda Haller, 'Discipline vs Regulation: Lessons from the Collapse of Tasmania's Legal Profession Reform Bill' (2005) 12(1&2) *E Law – Murdoch University Electronic Journal of Law* [1] <http://www.murdoch.edu.au/elaw/issues/v12n1_2/Haller12_1.html> at 12 July 2006.

4 For accounts of how this model developed historically see Julian Disney et al, *Lawyers* (Lawbook Co, North Ryde, NSW, 2nd edn, 1986) 6; William S Holdsworth, *A History of English Law* (Sweet & Maxwell, London, 1937) vol 6, 443.

5 See Harry Arthurs, 'The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?' (1995) 33 *Alberta Law Review* 800; Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, New York, 1999) 112–14.

- *Second*, the profession argued, the state should not be involved in regulating lawyers. This was because it was necessary that lawyers remain completely independent of government, so that they could defend individuals and society against the state where necessary (as *adversarial advocates*) without bias or fear of reprisal.
- A *third*, subordinate reason for self-regulation was that it was supposed to be in the nature of all the professions to be trusted to self-regulate because the members of professions were motivated by higher goals beyond self-interest in a competitive market-place. If they failed to self-regulate for the benefit of the public, so the argument went, their monopoly on legal practice and/or the right to self-regulate could always be removed by government. This threat of loss of privileges was supposed to be a sufficient incentive to make sure the legal profession (and also other professions) regulated themselves properly.[6]

(We set out the arguments *against* self-regulation in the section headed 'Regulation is Not Enough' below.)

Traditional self-regulation focused on setting strict entry, or 'admission', requirements to the profession in the attempt to ensure that only well qualified people of good character entered the profession – lawyers that clients could trust (see Chapter 10). Lawyers were admitted into practice on the basis of academic legal qualifications, practical training and 'good fame and character'.[7]

Once entry to the profession had been attained, under the traditional model, lawyers were assumed to be competent and capable of serving clients well. The ongoing regulation of lawyers' practice focused on maintaining standards of character, not competence.[8] Thus traditional self-regulation focused on discovering and sanctioning failures of character such as dishonesty (especially knowingly or deliberately misleading a court or tribunal, or falsifying a document), breach of trust account rules (including lawyer misappropriation of client funds) and other fiduciary duties (particularly conflicts of interests; see Chapter 7). Traditional self-regulation did little to make sure that lawyers maintained an appropriate standard of competence or client service. It was assumed that competence would take care of itself through individual lawyers' steadily increasing experience. Only in the case of 'gross negligence' could a lawyer be sanctioned for lack of care and competence.[9] This was despite the fact that the vast majority of complaints clients make about lawyers concern poor service – delay, incompetence, over-charging

6 See Alan Paterson, 'Professionalism and the Legal Services Market' (1996) 3 *International Journal of the Legal Profession* 137.
7 See *Re Davis* (1947) 75 CLR 409; *Ex parte Lenehan* (1948) 77 CLR 403; *Re B* [1981] 2 NSWLR 372. See also G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, Pyrmont, NSW, 3rd ed, 2006) 'Ch 2: Admission to Practice'; Reid Mortensen, 'Lawyers' Character, Moral Insight and Ethical Blindness' (2002) 22 *Queensland Lawyer* 166.
8 See C Parker, *Just Lawyers*, 13–17. See also William Felstiner, 'Professional Inattention: Origins and Consequences' in Keith Hawkins (ed), *The Human Face of Law: Essays in Honour of Donald Harris* (Clarendon, Oxford, 1997) 121; C Parker, 'Regulation of the Ethics of Australian Legal Practice', 689–93.
9 See *Re Moseley* (1925) 25 SR (NSW) 174. Mere incompetence or deficiency in professional service is still not sufficient to amount to professional misconduct: see *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197.

and discourtesy or failure to communicate. These complaints were not even seriously investigated by disciplinary authorities until relatively recently. Overcharging was generally only disciplined where it was blatant and dishonest. Indeed price-fixing (which generally inflates prices) was entrenched by self-regulatory rules (see Chapter 8), and competition of any kind (that might lower fees) was discouraged. Self-regulatory authorities were also unlikely to act against lawyers for conduct that was against the public interest but in the interests of clients, such as abuse of the court process by frivolous or vexatious claims or claims for an ulterior purpose, or for excessive adversarialism that wastes the resources of the court and/or the parties (see Chapter 4).

The main sanctions available as the outcome of disciplinary action were (and still are) expulsion of the lawyer from the profession, or suspension from practice, and monetary fines. A series of lesser sanctions including reprimands, restrictions on practising certificates, and the requirement to attend continuing legal education are also common outcomes. The courts were (and indeed remain) clear that the purpose of these sanctions is to protect the public from professionals that are not worthy of their trust, and to protect the reputation and privileges of the whole profession by ridding the profession of unethical individuals: 'A disbarring order is in no sense punitive in character. When such an order is made, it is made, from the public point of view, for the protection of those who require protection and, from the professional point of view, in order that abuse of privilege may not lead to loss of privilege'[10] (ie, of the profession as a whole).

The assumption in this system is that unethical conduct is the result of dishonest behaviour by individual lawyers of bad character, who must be cast out, or have their character reformed. Sanctions against individual lawyers are seen as sufficient to maintain the standards of the profession, since the only threat to those standards is the individual 'bad egg'. Indeed the courts suggest that the appropriate response to serious misconduct should generally be disbarment or suspension from practice because of the view that it is better to cast someone out of the profession than punish them, even very severely, while allowing them to remain in the profession.

On the other hand, the courts also say that a practitioner who is completely candid with the profession and the court about their past misbehaviour, acknowledges that it was wrong and shows remorse, contrition and a demonstrated change of behaviour can be given a much lesser sanction than might have been expected given their misconduct, as they have shown that they have redeemed their character. Lawyers who have already been disbarred can also be granted readmission to the profession on this basis.[11] The High Court of Australia decided

10 *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 201–2. See also Linda Haller, 'Disciplinary Fines: Deterrence or Retribution?' (2002) 5 *Legal Ethics* 152; and Linda Haller, 'Smoke and Mirrors: Public Health or Hazard?' (2005) 8 *Legal Ethics* 70.
11 Dal Pont, *Lawyers' Professional Responsibility*, [2.130], [2.140], [23.130], [24.20]; Mortensen, 'Lawyers' Character'.

the case of *A Solicitor*[12] on this basis. In that case disciplinary action had been taken against a solicitor who had been convicted of criminal offences relating to the sexual abuse of his step-daughters. The High Court decided that the incidents of sex abuse occurred as an isolated episode when the practitioner was under a lot of pressure, and that in the meantime the practitioner had shown contrition and rehabilitated himself (through seeking psychological counselling). However, the High Court's finding that the practitioner had shown contrition, rehabilitated himself and was free to practise as a lawyer is odd in light of the fact that he had also hidden from the Law Society (that is, the regulator) the fact he had been convicted (but later acquitted on appeal) of further sexual offences against the step-daughters during those five years that it took for his disciplinary case to be investigated, prepared, heard and appealed. The High Court accepted that this amounted to a serious disciplinary offence, but found that the fact that the practitioner had been effectively suspended from practice for five years while the case progressed was sanction enough. The courts in previous cases have generally insisted on complete candour towards regulatory authorities as a condition for admission or re-admission after a history of unacceptable behaviour.[13]

Self-Regulation, Co-Regulation, Independent Regulation: Regulation of the Legal Profession Today

Today, the regulation of the legal profession still reflects its self-regulatory history. The strict requirements of qualifications (law degree and practical training) and suitable character (being a 'fit and proper person') for admission into the profession remain largely the same (*Model Laws* cl 307, 308).[14] Admission is controlled by the Supreme Courts of the various States and Territories. The complaints handling and disciplinary process for lawyers in most Australian jurisdictions have been partially reformed to improve their accountability and transparency to the public, as well as to improve consumer redress. The definitions of what amounts to 'professional misconduct' and 'unsatisfactory conduct' have been expanded to include failures of competence and consumer service in certain situations (*Model Laws* cl 1104, 1105, 1106).

The purposes and powers of the professional regulators' complaints handling functions have also been expanded to include resolving consumer complaints about poor service by lawyers, lawyers' bills and fees, and incompetence. Independent legal services commissioners have also been introduced in New South Wales, Queensland and Victoria to receive and resolve consumer complaints

12 *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253. See also Haller, 'Smoke and Mirrors'; Suzanne Le Mire, 'Striking Off: Criminal Lawyers and Disclosure of their Convictions' (2005) 79 *Australian Law Journal* 641.

13 Compare the decision in the same case in the New South Wales Supreme Court: *Council of the Law Society of New South Wales v A Solicitor* [2002] NSWCA 62 (Unreported, Mason P, Sheller and Giles JJA, 12 March 2002).

14 Dal Pont, *Lawyers' Professional Responsibility*, [2.05]–[2.105]; Adrian Evans, 'Disclosure of an Uncomfortable History' (2003) 77(6) *Law Institute Journal* 77; Sam Garkawe, 'Admission Rules' (1996) 21 *Alternative Law Journal* 109; Mortensen, 'Lawyers' Character'. For further discussion of these requirements, see Chapter 10.

about lawyers, and to investigate conduct complaints about lawyers and prosecute disciplinary action where there is sufficient evidence. But as we shall see in the case studies below, the legal profession in each of these jurisdictions has still managed to maintain involvement, to a greater or lesser extent, in investigating or resolving complaints and prosecuting disciplinary action. Each of these three States has a regulatory structure for the legal profession with elements of both independent regulation and self-regulation known as *co-regulation*. The legal professions in the Australian Capital Territory, Northern Territory and Tasmania still *self-regulate*, with some layperson representation in their processes, while the legal professions in South Australia and Western Australia are *independently regulated*.

Table 3.1 summarises the different approaches taken to complaints handling and the prosecution of disciplinary action in each of the Australian States and Territories according to whether the profession functionally controls its own complaints and prosecutions (*self-regulation*), shares control with some external body (*co-regulation*) or is *independently regulated*.[15] In all cases other than Tasmania and the two Territories – where self-regulation continues – the governance of the external regulator is also described in Table 3.1 in order to indicate the often considerable cultural influence exerted by the profession inside that regulator.

Disciplinary offences are prosecuted in specialist tribunals dominated by practising lawyers in the Australian Capital Territory, Northern Territory, South Australia and Tasmania. In New South Wales, Victoria and Western Australia they are decided in the general administrative tribunals for those States. In Queensland they are prosecuted in a specialist tribunal constituted by a current Supreme Court judge. Courts of superior jurisdiction in Australia also have an inherent jurisdiction to discipline lawyers and to hear appeals on disciplinary decisions from the lower tribunals.

Despite all these reforms, there are still few cases of disciplinary action being taken against lawyers for breach of their duty to the court or the law (as we shall see in Chapters 4 and 9). Nor have there yet been many cases of discipline for failures of customer service and poor billing practices, or in respect of conflicts of interest inside the largest law firms. It is hard to believe that there really are so few cases in each of these categories where disciplinary action might be warranted. The overall focus of the regulatory system is still on the bad character of individual lawyers, rather than systemic change to address public concerns about consumer service quality and the administration of justice, although the New South Wales Legal Services Commissioner in particular has attempted more proactive and educative initiatives to improve the regulatory systems and standards of consumer service in the legal profession.[16]

15 For more detail see Dal Pont, *Lawyers' Professional Responsibility*, 'Ch 24: Disciplinary Procedures' 531–57.
16 See Steve Mark, 'Regulation: Putting the Profession in Good Order' (Paper presented at the Conference of Regulatory Officers, Canberra, 28/29 March 2001) <http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_speeches> at 15 June 2006; Office of the Legal Services Commissioner, *Submission to the NSW Law Reform Commission Issues Paper 18 – 'Lawyers and Complaints: Review of Part 10'* (Office of the Legal Services Commissioner, Sydney, 2000) <http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_submissions> at 15 June 2006.

Table 3.1. Different Regulatory Arrangements for Complaint Handling and Prosecuting Disciplinary Action in Australia – June 2006

Jurisdiction	Regulatory Approach	Regulating Bodies	Composition of External Prosecutor/Regulator and Limits to Independence
New South Wales	Co-Regulation	Law Society of New South Wales/NSW Bar Association/Legal Services Commissioner	A single Legal Services Commissioner (former lawyer), but the LSC often refers investigations to the profession
Queensland	Co-Regulation	Law Society of Queensland/Bar Association of Queensland/Legal Services Commissioner	A single Legal Services Commissioner
Tasmania	Self-Regulation	Law Society of Tasmania	None
Victoria	Co-Regulation	Legal Services Board/ Legal Services Commissioner/Law Institute of Victoria/ Victorian Bar Council	Legal Services Board: 1 Chair (originally a lawyer), 3 elected lawyers, 3 non-lawyers nominated by the Attorney-General. A single Legal Services Commissioner (originally a lawyer), who is also the Chief Executive of and reports to the Legal Services Board, refers most disciplinary matters to the profession for investigation
South Australia	Independent Regulation	Legal Practitioners Conduct Board	Presiding Member and 3 ordinary members (all nominated by SA Law Society, plus 3 other members nominated by the Attorney-General
Western Australia	Independent Regulation	Legal Practice Board, Legal Practitioners' Complaints Committee	Legal Practitioners Complaints Committee (1 chair and 6 members of the Legal Practice Board, plus 2 community representatives appointed by the Attorney-General)
Northern Territory	Self-Regulation	Law Society of the NT	None
ACT	Self-Regulation	Law Society of the ACT, ACT Bar Association, Complaints Investigating Committee	None

Traditionally the regulation of lawyers was controlled by the States and Territories. But a nationally agreed regulatory structure for the legal profession has now evolved. It consists of:

- A set of model provisions for State and Territory legislation governing the legal profession – the *Legal Profession – Model Laws Project Model Provisions* ('*Model Laws*').[17] The *Model Laws* were a co-operative effort of the Standing Committee of Attorneys-General (SCAG) (all the Attorneys-General

17 (2004) Australian Government – Attorney-General's Department <http://www.tisn.gov.au/agd/www/Agdhome.nsf/Page/RWP4B55623E1E4CF96DCA256E85000958E0?OpenDocument> at 12 July 2006. See Daryl Williams, Attorney-General for Australia, on behalf of the Standing Committee of Attorneys-General, 'Communique: Historic Agreement on National Legal Profession' (Press Release, 7 August 2003) announcing agreement to proceed with the SCAG *Legal Profession – Model Laws Project*.

of the States and Territories and the Commonwealth) together with the Law Council of Australia (the national umbrella association for State and Territory legal professional associations); and,

- A national set of ethical rules – the Law Council of Australia's *Model Rules of Professional Conduct and Practice* ('*Model Rules*').[18]

It is up to the governments and professional associations in each State and Territory to decide to what extent they wish to adopt the *Model Laws* and/or the *Model Rules*. There are no regulatory or enforcement bodies for the legal profession at a national level.

The *Model Laws* reflect the fact that the Attorneys and the Law Council were prepared to agree on a uniform national structure for all regulatory arrangements for the legal profession except discipline and complaint investigation (examined in detail below) and rules of conduct, which they agreed were the business of the legal profession associations in each State and Territory. The *Model Laws* contain no prescription about whether elements of self-regulation should be retained or not. It is left completely up to each State and Territory to decide what body/ies in that State or Territory will be responsible for receiving, investigating and prosecuting complaints (*Model Laws* Part 11). It may well be that the Law Council considered that the *Model Laws* were only likely to succeed if local professional associations, in alliance with their Attorneys, were free to retain the control of the structures for complaint handling and discipline – an example of the parochial tail of the federal system wagging the national dog.

Nor do the *Model Laws* make any attempt to set out what substantive values should animate legal practice, or be reflected in the codes of professional conduct promulgated for the profession.[19] It is as if the Attorneys-General and the Law Council of Australia consider that the regulation of the legal profession is a purely technical, neutral matter in which no particular values are significant at all.

The *Model Laws* are, thus, an ethically neutral framework for individual jurisdictions to manage their local profession. Provisions concerning inter-jurisdictional recognition for practitioners' admission, licensing and insurance are uncontroversial, as are many of the general standards to be applied by disciplinary and complaint investigators (for example, requirements for due process in disciplinary investigations and prosecutions in *Model Laws* Division 7). One significant development in disciplinary practice in the *Model Laws* is the agreement that local regulators will publish on an internet site details of disciplinary action taken (*Model Laws* Division 10). There is however no provision for a single national site, and it is not clear how individual jurisdictions will synchronise their sites, if at all, with those of the others.[20]

18 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) <http://www.lawcouncil.asn.au/policy/1957352449.html> at 12 July 2006. The *Model Rules* were first promulgated in February 1997.

19 See *Model Laws* pt 16 on power to make legal profession rules – which says nothing of any substance. The now repealed *Legal Practice Act 1996* (Vic) s 64 set out several guiding principles for legal practice that were to be reflected in any code of practice promulgated by the legal profession associations. But these were omitted from the *Legal Profession Act 2004* (Vic) which replaced it.

20 See Linda Haller, 'Dirty Linen: The Public Shaming of Lawyers' (2003) 10 *International Journal of the Legal Profession* 281.

The *Model Rules* contain only brief statements of principle at the beginning of each section, and no commentary on the principles underlying the rules or guidance as to how to apply them in practice. The *Model Rules* are, however, better drafted, clearer and more comprehensive than the very patchy professional conduct and practice rules that previously existed in the various States and Territories. The law societies and bar associations that make up the institutional membership of the Law Council of Australia have been encouraged to adopt them with or without local modification. They have been substantially adopted in New South Wales, South Australia and Victoria, and other jurisdictions are likely to follow suit.[21]

In later chapters of this book, we refer to the *Model Rules* as the national standard for professional conduct and practice rules rather than any of the local, and sometimes odd, adaptations made by State and Territory professional associations in particular jurisdictions. We will also critique the details of many specific provisions of the *Model Rules* and point out gaps and lack of specification in their coverage.

Regulation Is Not Enough

Ongoing reform to the regulation of lawyers is important because ethical behaviour is a function of individual values, the social and market context of lawyers' practices, and the ethical economy of the whole profession. We need to look at what values are supported by this whole system. Legal regulation and ethical standard setting are a part of the ethical economy of the whole profession that support or detract from the right values being demonstrated in these three areas. But regulation is just one aspect of the whole story.

As mentioned above, one of the profession's arguments for self-regulation was that law is a profession with ethical values beyond those of the market. Some scholars of the legal profession, however, have pointed out that if we examine the nature of the way law is actually practised these days, it is subject to such market pressures that it is hard to see how the case can be made that it is a profession with different values to general business. Richard Abel, who has studied the legal professions in the UK and US for many years, is one who takes this view:

> The lawyer today (and even more tomorrow) is an entrepreneur selling his services to an increasingly competitive market, an employee whose labor is exploited, an employer exploiting subordinates – all increasingly dependent on state or capital for business and therefore increasingly subject to their control. Although the ideal of professionalism undoubtedly will linger on as an ever more anachronistic warrant of legitimacy, as an economic, social, and political institution the profession is moribund.[22]

Even if we are not as cynical as Abel, the profession's arguments in favour of self-regulation are not convincing. Harry Arthurs, another scholar of the legal

21 See Dal Pont, *Lawyers' Professional Responsibility*, [1.105].
22 Richard Abel, 'Toward a Political Economy of Lawyers' (1981) *Wisconsin Law Review* 1117, 1186–7.

profession, has shown convincingly how the three classic arguments for self-regulation (as described above in the subsection headed, 'Self-Regulation: The Traditional basis for Regulation of the Profession') fail:[23]

- *First*, self-regulation is not necessary to defend individuals and society from the power of the state – other countries like Sweden manage well without it. Anyway just because the profession does not self-regulate does not mean it must be controlled by the state, it can be independently regulated.
- *Second*, although lawyers claim to be the only ones who know how to regulate themselves, the legal profession has declined to regulate itself properly. Individual lawyers with appropriate expertise can be used in the regulatory process without having to totally hand over regulation to self-regulatory professional associations.
- *Finally*, the argument that professions have always been self-governing is circular. Just because it has been so in the past does not mean it must be so in the future. Indeed the argument for self-regulation belies the reality that occupational groups for nearly 200 years have been trying to claim 'professional' status for themselves as a means of controlling the market for their services.[24] The self-regulating 'professions' are really just those occupations that have succeeded in establishing a monopoly that they control.

It is also possible that the burden of self-regulation may be more onerous than any of its supposed advantages. The need for the profession to constantly defend professional independence in complaint handling, investigation and prosecution against charges of bias is demoralising and distracting. The reality that any professional association will find it hard to represent the interests of all members politically, while at the same time choosing to prosecute some of those members, must at some level eventually operate to confuse the priorities and concentration of the leadership. Sometimes, the prosecution of peers by peers can be subverted for internal political purposes. At the least, the trust of the membership in the leadership is undermined by the threat of such prosecutions, and personal ethics too are likely to be undermined by institutionally suspect practices.

Harry Arthurs concludes his indictment of self-regulation by invoking Monty Python's infamous dead parrot sketch: '. . . this parrot of self-regulation is definitely deceased; it is pushing up the daisies; it has joined the choir invisible; it is bereft of life; it has met its maker; it is no more; it is bleeding demised'.[25]

Where then might we find a better geography for lawyers' responsibility? Charles Sampford argues that individual development of a 'positive morality' is *the* important part of the answer to the diverse range of values that lawyers encounter

23 Arthurs, 'The Dead Parrot'.
24 Richard Abel, 'Why Does the ABA Promulgate Ethical Rules?' (1981) 59 *Texas Law Review* 639; Magali Larson, *The Rise of Professionalism* (University of California Press, Berkeley, 1977); C Parker, *Just Lawyers*, 109–12, 112–21 (for critique of this approach).
25 Arthurs, 'The Dead Parrot', 809. In the Monty Python sketch the pet shop owner tries to convince a customer that a clearly dead parrot is alive.

in practice.[26] The view that a personal morality is essential to deal with the numerous (morally) significant situations that are encountered in legal practice seems obvious. The conduct rules will not be enough. Below we will examine the way self-regulation has been altered in each of the States and Territories by incorporating co- and independent regulators into the system for governing the legal profession. But the point in critiquing rules and their enforcers in this way is not necessarily to argue about *who* should be regulating the profession, but *what* values should be represented in the regulation of the profession (whoever does it), and how well that regulation connects with everyday practices to help people be ethical. This is not to say, of course, that we do not need anyone watching over us, but rather that watchdogs tend to make us cringe rather than act in a public-spirited manner.

Self-regulation has been ineffective at promoting the right values and critiquing the structure and culture of actual practice. But it is not necessarily the case that just because there is independent regulation or regulation via the market that this will be any better. Consider, for example, the fact that competition policy is probably the external regulatory force that has had most impact on the regulation of the legal profession in Australia.[27] Federal and State governments and an independent regulator, the Australian Competition and Consumer Commission, have all imposed regulation (and deregulation) promoting competition on the profession. But this has not necessarily been helpful in promoting ethical practice. For example, Jim Spigelman, Chief Justice of New South Wales, has argued that essential public protections that are bound up in the current concerns of legal regulation may be abandoned to the market in competition regulation:[28]

> The role of the profession in the administration of justice cannot be characterised simply as the provision of services to consumers. There are structural and institutional issues here of great significance. Competition regulators tend not to understand, or if they understand tend not to value, rival institutional traditions to that of the market. A market does not value history and tradition. As I said at my swearing-in, a market wakes up every morning with a completely blank mind, like Noddy.[29]

If Spigelman is correct, limited rationalist economics provides little help for us in deciding whether or not and how to implement ethical regulatory structures. In the end, the moral stance of those structures is important.

It has been suggested that the profession and the community might be able to renegotiate legal professionalism so that the profession still maintains a role in its own regulation and is also more responsive to other values – that is,

26 Charles Sampford with Christine Parker, 'Legal Regulation, Ethical Standard-Setting, and Institutional Design' in Stephen Parker and Charles Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (Clarendon Press, Oxford, 1995) 11.
27 Christine Parker, 'Converting the Lawyers: The Dynamics of Competition and Accountability Reform' (1997) 33 *The Australian and New Zealand Journal of Sociology* 39; Ed Shinnick, Fred Bruinsma and Christine Parker, 'Aspects of Regulatory Reform in the Legal Profession: Australia, Ireland and the Netherlands' (2003) 10 *International Journal of the Legal Profession* 237, 242–7.
28 Chief Justice J J Spigelman, 'The 2002 Lawyers' Lecture: Are Lawyers Lemons? Competition Principles and Professional Regulation' (Speech delivered at the St James Ethics Centre Lawyers' Lecture Series, Sydney, 29 October 2002). <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_291002> at 12 July 2006.
29 Ibid.

some sort of co-regulation.[30] It may be that a wise government will even encourage some self-regulation, particularly within specialisations, if for no other reason than to harness natural interest in self-improvement as a consolidating force in professional formation.[31] At the most basic level, this is already achieved by regulators' employment of practising lawyers as investigators. But whoever the regulator, the important things are the extent to which any regulatory system seeks to institutionalise the right values (not just that of prohibiting obvious dishonesty), and does so in a way that critiques current practices and cultures, not just individual misconduct.

For the remainder of this chapter we will look first at the ways in which self-regulation has been challenged and changed in New South Wales, Queensland, Tasmania and Victoria; and, second, critically examine the institutional context of the way interest on clients' trust account funds are used.

CASE STUDY 3.1 Reforms to Self-Regulation in Each of the States and Territories

In the following subsections we describe the pressures on self-regulation that have led to reforms to the way the legal profession is regulated in each of the Australian States and Territories. (See Table 3.1 above for a schematic summary of the situation in each of the States and Territories.)

DISCUSSION QUESTIONS

As you read these descriptions, consider the following questions:

1. What are the weaknesses of self-regulation as demonstrated by what has occurred in each of these jurisdictions? What were, or are, its strengths?
2. What do these case studies indicate about which stakeholder interests and ethical values were recognised, and which were ignored in the traditional self-regulatory arrangements for the legal profession? Which stakeholder interests and ethical values are reflected in the various reforms to the regulation of the legal professions in each jurisdiction, as far as you can tell from the facts given here?
3. Do you think that each of the various co-regulatory arrangements introduced in New South Wales, Victoria and, to a lesser extent, Queensland represent an appropriate balance between independence and professional expertise and involvement in lawyer regulation? Which do you prefer and why? Are they likely to be stable? Or will there be discord between the self-regulators and independent regulators, or between the self-regulatory professional associations and their members?
4. What difference do you think it would make to the way you would think about your own behaviour and ethics as a lawyer whether legal profession regulation

30 Parker, *Just Lawyers*, 'Ch 7: Renegotiating the Regulation of the Legal Profession'; Paterson, 'Professionalism and the Legal Services Market'; William Hurlburt, *The Self-Regulation of the Legal Profession in Canada, and in England and Wales* (Law Society of Alberta and Alberta Law Reform Institute, Edmonton, Canada, 2000) 140.

31 C Parker, 'Regulation of the Ethics of Australian Legal Practice', 702: '. . . if we wish to make legal practice more responsive to ethical concerns and community values, then a fruitful strategy might be to bypass the traditional professional associations and look to more specific groups of lawyers to elaborate their own standards of ethical responsiveness'.

is self-regulation, co-regulation or independent regulation? For example, are you likely to pay more attention to rules developed by other lawyers than to those developed by an independent regulator? Are lawyers more likely to feel that if they do anything wrong they will be dealt with kindly if the regulator is their own professional association, rather than an independent commissioner?

New South Wales

In New South Wales, the most populous state, the Legal Services Commissioner (LSC), an independent regulator, receives all complaints made about lawyers. But the system is one of co-regulation, not independent regulation, because although the LSC investigates and concludes all consumer complaints (that is, those that raise consumer disputes about bills, delay and lack of communication), the LSC refers the vast majority of those that involve allegations about professional conduct back to the two professional organisations, the Law Society (solicitors) and the Bar Association (barristers) to investigate and prosecute any disciplinary action. Control by the LSC is emphasised by his capacity, although seldom exercised, to recall a complaint investigation from the profession. The LSC can also review complaints that the professional associations have dismissed without taking any action. He has indicated that he does not refer complaints for investigation to the Law Society if they concern someone who might be connected to the Council of the Society.

The LSC explains his approach as follows:

> In relation to complaints and discipline, the powers to investigate and prosecute conduct complaints is shared equally between my Office and the professional associations. While I have the overall responsibility of overseeing the process, the professional associations play an active and vital role within it . . . [A] strong relationship has developed between my Office and the professional associations for the purpose of improving the profession and ensuring that their high ethical standards are met. This co-regulatory regime is, in my view, the best existing model for regulation of the legal profession as it encourages the profession to continue on its path of self-regulation and improvement, albeit with direction from my Office. It also seems to me that it would be counter-productive if the role of the professional associations were limited to defending its members against charges of misconduct as this would create an adversarial relationship between them and my Office and also be of concern to the ethical members of the profession that their association was acting as an advocate for the worst of its members . . . My thesis is that it is imperative that the legal profession play a much more active and pro-active role in the regulation of the profession both through traditional modes of self-regulation and through creative submissions and suggestions to Government for achieving outcomes to benefit the community directly rather than feasting now with the reality of starvation in the future when Government inevitably intervenes.[32]

32 Steve Mark, 'Is State Regulation of the Legal Profession Inevitable?' (Paper presented at the Pacific Rim Conference, Heron Island, October 2003) <http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_heron> at 12 July 2006.

Opinions differ as to as to whether the balance between independent regulation and self-regulation in this model is appropriate. On the one hand, the LSC appears to be trusted by government and the profession. There have been no specific allegations of any improper decision-making by either the profession or the LSC in the performance of their roles. In fact, when the NSW Bar was perceived to be seriously deficient in its willingness to remove from practice those senior barristers who had failed to pay income tax for many years, and who had then declared themselves bankrupt in order to further escape payment, the LSC was reportedly active in his insistence that the NSW Bar Association proceed in an open disciplinary process against the recalcitrant lawyers.[33] The Bar Association had initially reacted defensively to the scandal, saying that it had not done anything about the barristers' conduct because no complaint had ever been made to it.

But there is also another view that the profession may still be too dominant in the power-sharing arrangements. For example, in relation to the bankrupt barristers, the bar did eventually take disciplinary action against a number of lawyers who had failed to pay their tax and possibly used bankruptcy to avoid their tax debts. But the bar did little to do anything pro-active to try to ensure that such a scandal did not occur again, until they were pushed to do so. Consistent with the traditional approach of self-regulation, their focus was on reactive discipline of the barristers identified as problems. In the meantime the Attorney-General had to act to change the rules to put in place a more sustainable system for identifying potential misconduct in the future and for investigating all misconduct from the past. This occurred only after the Commonwealth requested the States to produce a uniform approach to ensure that barristers who became bankrupt were required to report this to their professional association which would then be required to apply a 'fit and proper' person test to determine if the barrister could continue in practice.[34]

Overall, the New South Wales regulatory system seems to have proved adept at resolving such conflict issues as may have occurred without obvious deficit to the public interest. To that extent, it might be said that co-regulation on the New South Wales model is 'workable'. It might also be that the current Commissioner's personal skills and powers of persuasion are, in practice, sufficient to discretely manage what could be described as a continuing conflict of interest in the involvement of the profession in its own disciplinary processes. Such a system may not be sustainable with different personalities in key positions. In Victoria (see below) the previous co-regulatory system was widely viewed as unworkable because of tensions between the independent and self-regulators. As we see in the discussion of the situation in Queensland below, it can also be argued that any involvement of legal professional associations in the regulation of lawyers is a conflict of interest.

33 Chris Merritt, 'Hearsay', *The Australian Financial Review* (Sydney), 23 March 2001, 35. See, for example, *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279.

34 Richard Ackland, 'Time to Stop Fudging about Bankrupts at the Bar', *The Sydney Morning Herald*, 2 March 2001, 12; Paul Barry, 'Rich Lawyers Dodging Income Tax', *The Sydney Morning Herald*, 26 February 2001, 1; Ruth McColl, 'Disclosure Will Give Barristers' Watchdog a Real Bite', *The Sydney Morning Herald*, 2 March 2001, 12.

Queensland

In Queensland, self-regulation by the two professional associations for solicitors and barristers ended in 2004 as the result of major criticisms of the way the Queensland Law Society (QLS) carried out its regulatory responsibilities by the State Attorney-General, the Legal Ombudsman and the press. The event that sparked the furore was allegations that Brisbane law firm, Baker Johnson had been guilty of a whole range of unprofessional, unethical and fraudulent conduct in relation to its no-win, no-fee clients. Most dramatically, in one instance Baker Johnson had won a case for a client but then effectively diverted to itself the entire compensation payout for the payment of fees, and gone on to sue the client for additional fees, under a 'no-win, no-fee' arrangement.[35] Complaints about Baker Johnson's conduct had been made to the QLS, but the local newspaper and the Attorney-General criticised the QLS for failing to either investigate or prosecute Baker Johnson, and for having inadequate complaints handling procedures in general, leading to numerous unresolved complaints.[36]

The Attorney-General publicly questioned the value of lawyers' self-regulation and asked the then Queensland Legal Ombudsman, Jack Nimmo, to investigate. In his report, Mr Nimmo concluded that the QLS's complaints handling service was '. . . nothing but a post office box'. He found that complainants were unhappy with the fact that QLS's practice was to merely refer a copy of their complaint to the solicitor for response, and then send that back to the complainant. He commented that '. . . for the complainant to be forwarded a copy of the solicitor's response, the contents of which have already been disputed, stating that "on the face of it the response appears to answer your complaint" is inadequate'.[37]

Nimmo set out options for reforming the QLS's self-regulatory complaints handling functions, but made it quite plain that he preferred the option in which complaints handling, investigation and prosecution of disciplinary action were taken away from the QLS and Barristers Board and given to an independent regulator, assisted by lawyers.[38] When the Attorney-General subsequently announced that he was stripping the QLS of its powers and handing them to a new Legal Services Commissioner,[39] no one was surprised, although the QLS has managed to 'claw-back' some investigations, on a similar basis to that existing in NSW (as described above).[40]

The New South Wales Legal Service Commissioner's view on the value of legal professional associations staying involved in professional regulation (set out in

35 *Baker Johnson v Jorgensen* [2002] QDC 205 (Unreported, McGill DCJ, 26 July 2002). This case and the ethical issues raised by no-win, no-fee agreements are discussed further in Chapter 8.
36 Jack Nimmo, *The Queensland Law Society and Baker Johnson Lawyers* (Legal Ombudsman, Brisbane, 2002) 2–3 <http://www.justice.qld.gov.au/dept/pdfs/baker.pdf> at 15 June 2006. See also Haller, 'Discipline vs Regulation'.
37 Nimmo, *The Queensland Law Society and Baker Johnson Lawyers*, 6–7.
38 Ibid 10–12.
39 Sam Strutt, 'Watchdog Set to End Self-Regulation', *The Australian Financial Review* (Sydney), 16 May 2003, 57.
40 Chris Griffith, 'Law Society Hits Reform Process', *The Courier-Mail* (Brisbane), 7 May 2003, 5; the *Legal Profession Act 2004* (Qld) s 182(2) allows the Commissioner to refer investigations back to the QLS or the Bar.

the previous subsection) can be contrasted with that of Jack Nimmo, the former Queensland Legal Ombudsman. Mr Nimmo agreed that lawyers' expertise is needed when a regulator is investigating complaints against lawyers, but disagreed that the profession as an institution should have any role to play in its own regulation:

> From the outset, I emphasise that I fully support the regulation of the profession and investigation of complaints against the legal profession by like professionals. In making this statement, it is also my recommendation that any professionals conducting the regulatory role should be completely independent of the QLS and their associated functions. It is my opinion that QLS has a conflict of interest in maintaining a regulatory role as well as maintaining their role as a society to benefit the profession. This conflict has appeared to have marred its image in their handling of complaints against [Baker Johnson] lawyers. The reported quotes of 'Caesar judging Caesar' and the like appear justified.[41]

This history illustrates clearly the need to align personal and institutional ethics, if lawyers are to be able to practice ethically. The inactivity and delay in QLS investigation and prosecution of Baker Johnson, and other legal practitioners – described by Mr Nimmo as the consequence of an unacceptable conflict of interest between the QLS's role as a union and its complaint handling role – allowed those lawyers to remain in practice, and continue to avoid scrutiny for acts which were subsequently criticised severely in both civil and disciplinary proceedings.[42] The growing publicity about QLS' investigatory inactivity may even have encouraged other recalcitrant lawyers in the belief that self-regulation worked to their advantage.

Reflecting this whole experience, the new Queensland regime is perhaps the most 'independent' of the co-regulation jurisdictions. While investigations can still be delegated to the professional associations, all power to decide on and institute disciplinary action against lawyers is now in the hands of the single Legal Services Commissioner.[43] One of the Commissioner's first successful disciplinary actions was the removal from the roll of practitioners of one of the founders of Baker Johnson.[44]

Tasmania

In a manner similar to the Queensland about-face on self-regulation, the Tasmanian government also became determined to shake up the Tasmanian Law Society (TLS) after the collapse of a number of solicitors' mortgage schemes that ultimately led to criminal proceedings against some lawyers. One firm apparently

41 Nimmo, *The Queensland Law Society and Baker Johnson Lawyers*, 9.
42 Ibid 3.
43 See the *Legal Profession Act 2004* (Qld) s182(2); Linda Haller, 'Imperfect Practice Under the Legal Profession Act 2004 (Qld)' (2004) 23 *University of Queensland Law Journal* 411, 420.
44 *Baker v Legal Services Commissioner* [2006] QCA 145 (Unreported, McPherson, Jerrard JJA and Douglas J, 5 May 2006).

lost up to $20 million of clients' funds.[45] The government was convinced that the TLS had mismanaged the regulatory framework for solicitors' mortgage practices so that the losses went undiscovered until it was too late.[46] The government intended to divest the Tasmanian profession of self-regulatory functions by establishing a new Legal Profession Board – consisting of two non-lawyers and four legal practitioners (to be appointed by the Attorney-General from a list of nominations from the profession). The TLS president was initially reported to be in support of the government's agenda.[47] Later, however, the TLS announced that while it supported the idea that the Board should take over the power to investigate and prosecute complaints against lawyers, it opposed the Board taking over the TLS's other regulatory powers, particularly the power to issue practising certificates, because the new bureaucracy would be too costly compared with the existing system. The government responded that the TLS was prepared to dispense with prosecutions '. . . because that's been trouble for them', but wanted to keep control over the issue of practising certificates because there was money to be made there (lawyers pay a large fee for their practising certificates each year).[48] Regulatory reform is now on hold in Tasmania after the Upper House insisted on an amendment giving control of practising certificates back to the Law Society. This provoked the Attorney-General to adjourn further debate on her legislation indefinitely, despite her initial determination that ethical change was necessary after the behaviour mentioned above became known.

Victoria

After over a hundred years of self-regulation, Victoria's regulatory system began a decade of major change in 1993 when its Solicitors' Guarantee (fidelity) Fund entered a state of technical deficit following major defalcations of clients' funds, contributed to in turn by the economic downturn of 1989–92.[49] The reaction of the then Kennett conservative government was to instigate a major inquiry into the regulatory system, which recommended the introduction of a new co-regulatory system. In 1997 the *Legal Practice Act 1996* came into force. The Act removed control of the fidelity compensation process from the Law Institute of Victoria (LIV) (the solicitors' association) and introduced a tri-level structure that added both complexity and a measure of external accountability to the system. A non-lawyer Legal Ombudsman (LOV) acquired the ability to investigate complaints against lawyers, alongside the LIV and the Victorian Bar, and when necessary to review the exercise by the professional associations of their regulatory functions.

45 'Lawyers Could Lose Power to Investigate Complaints', *The Advocate* (Burnie), 22 June 2000, 4; Anne Barbeliuk, 'Move to Shake Up Law Society', *The Mercury* (Hobart), 21 May 2000, 3; Haller, 'Discipline vs Regulation'.
46 Martine Haley, 'New Watchdog to Regulate Lawyers', *The Mercury* (Hobart), 18 April 2003, 5.
47 Ibid.
48 Ellen Whinnett, 'Legal Battle', *The Mercury* (Hobart), 4 September 2003, 1.
49 Adrian Evans, 'A Concise History of the Solicitors' Guarantee Fund (Vic): A Marriage of Principle and Pragmatism' (2000) 26 *Monash University Law Review* 74, 139.

The two women who filled the Legal Ombudsman position at different times exercised their powers with vigour. Both also attracted sustained criticism from the legal professional associations for securing some successful prosecutions of prominent solicitors, while openly challenging the competency of the LIV and Bar as regulators.[50] In fact, the LOV was a determined if sometimes provocative complaint handler and arguably played a critical role in addressing a number of ethical shortcomings of the professions' approach to complaint investigation and prosecution. It was ironic and unfortunate that, despite the cogency of their criticisms, the style of both Legal Ombudsmen – activist women with little tolerance for what they perceived as sexism within the profession – contributed to the demise of the office. Both incumbents believed they had little option but to challenge the existing system. Both felt it important to put their concerns on the record, in writing, rather than resolve a matter by a telephone call to the CEO of the LIV or Bar. This style could easily be misinterpreted as a lack of respect rather than, as the two women believed, the maintenance of an appropriate arms' length relationship between independent regulator and self-regulators in complaint investigation.

The Victorian Attorney-General was known to be concerned by the complexity of the system and the perceived cost of duplicating regulatory arrangements. But his announcement of a review of those arrangements in June 2000[51] was preceded in February of that year by the fining of a former Victorian Law Institute president for misconduct arising from a conflict of interest. This prosecution had been commenced by the Ombudsman and justified with a determined statement about '. . . investigat[ing] a complaint without fear or favour'.[52]

As a result of the review,[53] the Attorney-General eventually put in place a new system that came into operation at the beginning of 2006.[54] The completely independent Legal Ombudsman and the existing peak regulator, the Legal Practice Board, were replaced by a new seven-member Legal Services Board and Legal Services Commissioner (LSC). The LSC receives all complaints about lawyers (previously complaints could be made to the LOV, the LIV or the Bar) and may handle all investigations itself, but as in New South Wales, the LSC is presently expected to routinely refer investigations and power to make recommendations about prosecutions back to the professional organisations. The Legal Services Board issues practising certificates, administers and manages the trust accounting system and the fidelity fund and can make and approve legal profession rules. The LSC is also CEO of the Legal Services Board. This function will necessarily

50 See, eg, Legal Ombudsman, *Annual Report 2002/03* (Legal Ombudsman, Melbourne, 2003) 'Unlawful Acts by Law Institute and Victorian Bar' 8–9.
51 Office of the Attorney-General, Victoria, 'Another Step in Modernising the Legal Profession' (Press Release, 9 June 2000) <http://www.dpc.vic.gov.au/pressrel> at 12 July 2006.
52 Darrin Farrant, 'Rape Case Conflict Proves Costly for Lawyer', *The Age* (Melbourne), 28 February 2000, 6. See also Darrin Farrant, 'Lawyer Slated on Client Conflict', *The Age* (Melbourne), 10 February 2000, 5.
53 Peter Sallmann and Richard Wright, *Regulation of the Victorian Legal Profession: Report of the Review of the Legal Practice Act 1996* (Victorian Department of Justice, Melbourne, 2001).
54 *Legal Profession Act 2004* (Vic); Fergus Shiel, 'New System for Legal Complaints', *The Age* (Melbourne), 25 July 2003, 5.

involve taking direction from the new Board, the composition of which includes at least three lawyers elected by the profession. However in the LSC's other role as complaints handler, investigator and prosecutor, they are to operate 'independently' of the Legal Services Board.

The Attorney-General was quite annoyed by suggestions that the interrelationship between the new Board and Commissioner would entrench a conflict of interest and later defended the arrangements vigorously:

> This Commissioner will be absolutely independent in terms of his or her complaint-handling function. The Commissioner will not be subject to the Board's direction and will retain ultimate oversight of these matters . . . Significantly, the majority of [the Legal Services Board] will not be elected by the legal profession. The importance of this attribute of the new system should not be understated. It is inaccurate at best, and downright misleading at worst, to suggest that the new commissioner will be at the 'financial and personal mercy of the Board'. This discounts the myriad of checks and balances that have been carefully crafted into the legislation.[55]

The present Victorian version of co-regulation nevertheless raises questions about the capacity of self-regulatory and independent regulatory institutions to co-exist in a way that promotes lawyers' ethics.[56] Figure 3.1 sets out the nature of the relationship between the Legal Services Commissioner, the Legal Services Board and professional associations. There is no question about the integrity of the current LSC, but the major problem with this structure, as a structure, is the lack of arms' length relationships between those responsible for key functions of the Act. A key ethical function of the Act is to ensure that complaints are not, in practice, dealt with by the profession itself. But although it is not possible for the LSC to *delegate* their power to receive and investigate a complaint to a professional organisation, *referral* of the power to investigate a complaint is possible, and occurs in the normal course of events.

South Australia and Western Australia

South Australia and Western Australia, in contrast to all of the other States, have removed the principal regulatory roles from the organised profession.[57] There have been no significant assertions in either State that the structure of regulation interferes with the personal ethics of practitioners or their ability to act independently of government.

Northern Territory and the ACT

Both Territories have always maintained entirely self-regulatory mechanisms for complaint handling and disciplinary procedures.[58] Their practitioners have

55 Rob Hulls, 'Streamlined Path to Legal Complaints Fair and Just', *The Australian Financial Review* (Sydney), 21 January 2005, 62.
56 For stronger statements of the authors' views, see Catherine Bragg et al, 'Hulls' Legal Reforms Will Help Only "Bad" Lawyers', *The Age* (Melbourne), 29 August 2003, 13; Adrian Evans and Christine Parker, 'Too Close for Comfort', *The Australian Financial Review* (Sydney), 10 December 2004, 47.
57 *Legal Practitioners Act 1893* (WA) ss 25(1)(b), 27(1)(c); *Legal Practitioners Act 1981* (SA) ss 74(1)(a), 76.
58 *Legal Practitioners Act 1974* (NT) s 47; *Legal Profession Act 2006* (ACT) ch 4 and s 577.

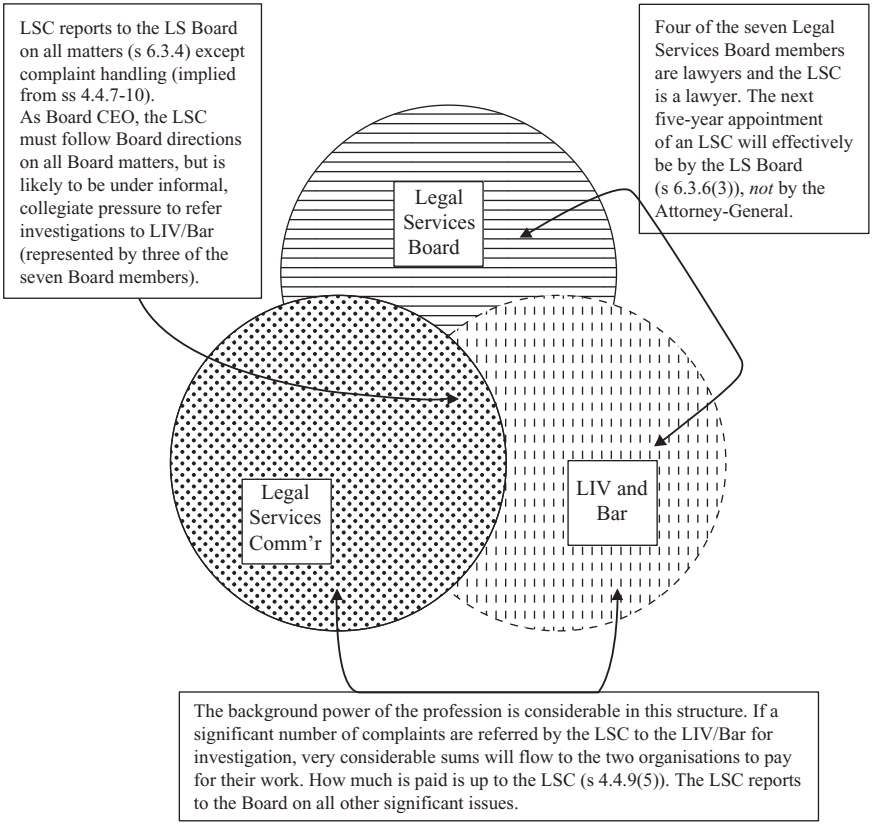


Figure 3.1 Key Relationships of the *Legal Profession Act 2004* (Vic) Affecting Independence in the Relationship between the Legal Services Board and the Legal Services Commissioner in the Investigation of Complaints

maintained that the small size of these jurisdictions compels a cost-sensitive (self-regulatory) approach,[59] and this view has dominated despite the implicit pressure of the national Legal Profession Project Model Laws for nationally consistent complaint handling structures.[60]

The Ethics of Fidelity: Fundamentals in the Appropriation of Clients' Money

A second major area where there is a tension between institutional and personal ethics arises from the phenomenon of practitioners' trust accounts, where clients' funds are held on trust for them until needed. Lawyers typically hold such money

59 Josh Massoud, 'Profession Trades Blows as Regulation Debate Hits ACT', *Lawyers Weekly* (Sydney), 15 August 2003, 4.
60 Williams, 'Communique' (Press release, 7 Aug 2003).

for short periods when their clients are about to purchase real estate, or are winding up a deceased estate. These funds earn interest amounting annually to many millions of dollars, but much of that interest goes to the law societies, legal aid and legal education, rather than to the clients who own the deposits. This strange appropriation, which generally occurs without clients' knowledge or consent, raises an ethical problem.[61]

When lawyers steal trust funds from one of their firm's clients, compensation is ordinarily payable by each one of a number of State-based 'fidelity funds'. These are administered by a mixture of law societies or independent regulators, depending on whether the profession has retained a degree of self-regulation or not in each jurisdiction (see *Model Laws* Part 8). The regulator can try to recover the money from the thieving lawyer and, if they still have any, this recovery will be used to offset what the fund has to repay the former client.

Originally, fidelity funds were financed just by levies on lawyers. Then, in the early 1960s, someone in Victoria worked out that the existing Victorian fund – which was then close to deficit because of a string of thefts – could be topped up by the interest that banks were not paying to anyone, in respect of the trust balances maintained in practitioners' trust accounts.[62] So much money became available from this source[63] that most governments quickly decided to use the excess cash for a variety of other purposes, principally legal aid, but also for the cost of lawyer regulation, practical legal training and other good causes related to the legal profession.

The legally sanctioned diversion of interest from client's accounts began as a means of financing fidelity compensation, an ethical imperative if the profession was to retain the trust of clients. But after the 1960s, fidelity compensation became a secondary purpose. Nowadays the appropriation mainly occurs because clients, as a rule, do not know they can receive this interest if they ask for it, and if it is economical to calculate and pay it. Indeed, the diversion process benefits from the fact that solicitors commonly do *not* advise their clients that they could be receiving at least some of the interest themselves. The situation is so endemic that there is now an implicit institutional ethic of statutory diversion of clients' trust account interest to professional and public purposes, in practical opposition to the personal ethic of the fiduciary, which at common law requires the lawyer to conserve the interest in the hands of the client. When a depositor puts money in the bank, they usually also receive some interest, even if they do not ask for it.[64] Yet practitioners often do not seem to realise that they may be disregarding a fiduciary responsibility by not informing clients of their right to receive the interest. Nor does the profession acknowledge that there is a latent conflict of interest behind the silence of the law societies on the issue – because as mentioned above, the interest is commonly used to finance certain activities of

61 See Adrian Evans, 'A Concise History of the Solicitors' Guarantee Fund (Vic)', above n 49; Reid Mortensen, 'Interest on Lawyers' Trust Accounts' (2005) 27 *Sydney Law Review* 289.
62 Evans, 'A Concise History of the Solicitors' Guarantee Fund (Vic)', 92–5.
63 Estimated at over $100m annually, across Australia: see Mortensen, 'Interest on Lawyers' Trust Accounts', 321.
64 Ibid 312–16.

the law society, especially regulatory activities. This institutional silence extends to the lack of any conduct rule requiring advice to clients about their funds' interest-earning potential. It is a story of inter-dependence rather than independence, of organisations and governments so tied to each other in financial terms that an effective silence prevails as to the morality of the source and means of funding.

Law societies are at least vaguely aware of the fact that the interest on clients' individual trust balances can now be easily and inexpensively calculated and paid to clients.[65] Where manual accounting systems have been the norm, the 'donation' process has been, on the whole, reasonable because the technical task and cost of accurately calculating interest on a sub-account with a tiny balance has, historically at least, often been higher than the interest itself. The Law Society of England and Wales has since the mid-1960s[66] attempted a rough calculation and paid interest to clients in situations where the amount on deposit with the practitioner was sufficiently large, but even that initiative is now effectively redundant. Digital computing has changed everything, and in Scotland it is now recognised that it is possible to economically calculate and pay interest to clients on all trust balances.[67] The question that never really arose in the past – that is, what do the ethics of the situation require? – is now of international concern.

Whenever the profession is asked why there is no move to make a rule requiring practitioners to discuss an interest-earning trust deposit with their clients, it is said sincerely that the expropriation of interest is quite legal, that the expropriation is no different in principle to taxation, and that the funds are used for good purposes. No one argues that the funds are not used for good purposes – legal aid, for example, has received over $100m in Victoria alone from this source. However, the argument that the appropriation is legal misses the point. It is not the transfer *per se* that is questionable, but the decision to permit the transfer in the first place. The legislation is merely permissive. Lawyers can and sometimes do choose to deposit large client balances in separate interest-bearing accounts – known as 'controlled' accounts – usually when the client *knows* to expect the interest. But there is no compulsion to make such deposits, nor even to tell clients that they are possible.

Secondly, taxation is theoretically compulsory. The payment of *clients'* interest to all these purposes, noble as they are, is however, essentially optional: the diversion occurs because, so far, lawyers are not asked to turn their minds to the fiduciary duty to consider whether, given the capacity of modern technology, the capital held for clients could earn interest for them.

Thirdly, there is no contest with the assertion that much of the interest is used for socially important purposes, particularly legal aid, as mentioned above. That may be good if the utilitarian approach – the greatest good for the greatest

65 For example, Westpac has a 'Deskbank' program that can pay interest to client accounts for individual practitioners, allowing them to offer lower net fees to clients by crediting their own interest entitlement against the cost of legal services.
66 Adrian Evans, *The Development and Control of the Solicitors' Guarantee Fund (Victoria) and its Ethical Implications for the Legal Profession* (LLM Thesis, Monash University, 1997) 161, 243–5.
67 Ibid 197.

number – is applied. But if the alternative Kantian approach, that 'means are as important as ends', is regarded as crucial, especially to law and lawyers, then there is another side to it.

The current approach is, however, entrenched at the level of government and law societies. Perhaps it will take a class action by a group of disgruntled clients or an entrepreneurial approach by the banks to reaffirm the central (ethical) proposition that 'interest follows principal'.[68]

Internationally, whether there is too little money to adequately finance fidelity compensation, as in many United States jurisdictions, or an excess of funds, as in Australia and South Africa, the source of funds is a continuing dilemma. In the United States, the levies which local bar associations are prepared to impose on their membership are in general far too low to support more than basic compensation mechanisms, with payment caps that seem meagre by international comparison.[69] In sharp contrast, the use of interest on clients' trust balances is readily applied to pay for fidelity compensation in most Australian states and South Africa.[70] The levels of compensation are generous and there is little or no public pressure to examine these systems because, on the one hand, the compensation schemes have very good reputations for efficiency and fairness, while on the other, the clients who support the mechanism are in the main unaware of their 'donations' to those other clients who lose out to thefts by their practitioners.

DISCUSSION QUESTIONS

1. What are the arguments, if any, *in favour* of using interest on lawyers' trust accounts for public purposes from the perspective of each of the four ethical approaches set out in Chapters 1 and 2 – *adversarial advocacy*, *responsible lawyering*, *moral activism* and the *ethics of care*?
2. What are the arguments *against* using interest on lawyers' trust accounts for public purposes from each of the four approaches?
3. The choice between competing views about interest on lawyers' trust accounts is the choice facing all ethical conundrums: which value is more important? With legal aid crying out for funds and daily injustice occurring to those who are unrepresented, does it really matter if clients do not know what happens to the interest on their money if it can be used for a good purpose? Or is it always wrong to breach the fiduciary duty to the client by appropriating their money without their consent, regardless of the fact that legislation endorses the appropriation?

68 The issue came before the US Supreme Court in *Phillips v Washington Legal Foundation*, 524 US 156 (1998) in the context of a challenge to the use of Interest on Lawyers Trust Accounts (IOLTA) funds. The Court affirmed the (unremarkable) general principle that the owner of a capital sum is also the owner of the interest on that sum. Note also the earlier *Brown v Inland Revenue Commissioners* [1965] AC 244, where the House of Lords established the primacy of clients' ownership of trust account interest under the fiduciary principles of English law. The case led to rules first gazetted in 1965 that provided – pre low-cost computing – for the payment of minimum amounts of interest to clients according to a table specifying a threshold capital amount held by practitioners in trust: see *Solicitors Accounts Rules 1991* (UK) r 21(1).
69 Evans, *The Development and Control of the Solicitors' Guarantee Fund (Victoria)*, 163–8.
70 Ibid 173.

Conclusion

In 1986, the American Bar Association Commission on Professionalism urged lawyers to adopt higher standards than those required by disciplinary rules, and named a devotion to public service as the *dominant* feature of professionalism.[71] The objective of this chapter has been to critique current legal regulatory structures from an ethical perspective – that is, with professionalism in mind. We have provided examples of those structures which affect a lawyer's personal ethics.

It is possible to conclude that the institutional structures of the profession are fair – that significant self-regulation is fundamental to lawyers' self-respect and hence to their *willingness* to 'behave'; and that appropriation of clients' interest for good public service purposes far outweighs any minor losses of interest to some clients. It is also possible to take contrary views. At bottom, attitudes to these contrasting positions ought to be guided by the question: Which viewpoint will best assist me to practise ethically? In answering this question, lawyers will be acting in their local environment but must also consider what is happening internationally. It is now a cliché to describe legal practice as global. Lawyers are entitled to practise in an economically efficient manner in order to compete, yet clients and the consumer movement will also not be denied transparent, international ethical standards in lawyering.

Recommended Further Reading

G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, Pyrmont, NSW, 3rd edn, 2006) 'Ch 1: The Concept of Professional Responsibility' and 'Ch 24: Disciplinary Procedures'.

Reid Mortensen, 'Interest on Lawyers' Trust Accounts' (2005) 27 *Sydney Law Review* 289.

Donald Nicolson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University, Oxford, 1999) 'Ch 4: The Regulatory Context – Ethics and Professional Self-Regulation'.

Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, Oxford, 1999) 'Ch 6: Competing Images of the Legal Profession – Competing Regulatory Strategies' and 'Ch 7: Renegotiating the Regulation of the Legal Profession'.

Deborah Rhode, *In the Interests of Justice: Reforming the Legal Profession* (Oxford University Press, New York, 2000) especially 'Ch 6: Regulation of the Profession'.

Peter A Sallmann and Richard T Wright, *Legal Practice Act Review: Issues Paper* (Victorian Department of Justice, Melbourne, 2000).

Peter A Sallmann and Richard T Wright, *Legal Practice Act Review: Discussion Paper* (Victorian Department of Justice, Melbourne, 2001).

David Wilkins, 'Who Should Regulate Lawyers?' (1992) 105 *Harvard Law Review* 799.

71 American Bar Association Commission on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* (American Bar Association, Chicago, 1986) 10, 50.

4

Civil Litigation and Excessive Adversarialism

Introduction

Lawyers in civil litigation are sometimes criticised for 'excessively' adversarial conduct.[1] On the one hand we might argue that clients are entitled to expect that their lawyer will represent them as zealously as possible within the bounds of the law. Any attempt by lawyers to moderate adversarial advocacy on behalf of clients in civil litigation might be seen as an unjustifiable usurping of the role of the judge in our adversary system. On the other hand, 'excessively' adversarial advocacy by their lawyer might actually be harmful to clients, and we might argue that lawyers have responsibilities to truth and fairness in litigation that override clients' immediate interests.

CASE STUDY 4.1 Excessive Adversarialism

The following short case studies each set out examples of conduct that could be seen as excessively adversarial. For each case consider the following questions:

What consequences might the adversarial behaviour have for other parties? For the legal system as a whole? What about the pursuit of truth and justice? How would you feel about the outcome of each case if you were the client in that case? To what extent do you think lawyers are under any responsibility to curb the adversarialism of the process in each case? To what extent can parties (rather than lawyers) be seen as responsible for the way their case is run?

(a) Lawyers for a large multinational fast food chain routinely issue defamation writs against anyone who criticises the company on issues like its environmental responsibility, its labour standards and attitude towards union representation of its workers, the healthiness of its products, misleading and deceptive advertising, and

1 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (Australian Government Publishing Service, Canberra, 2000) [3.30]–[3.41].

advertising aimed at children. Most protestors faced with a defamation writ from the company agree to apologise and withdraw their protest activities. When two protestors in England choose to defend the writ, the company's lawyers spend four years on interlocutory applications aiming to have the protestors' defence struck out before the case can be heard on its merits. They then spend a further 314 trial days (a record for the longest trial of any kind in English legal history at that time) and £10 million on a trial in which the company is represented by a large team of barristers and solicitors, while the protestors represent themselves. The company is successful in relation to about half of the statements it alleged were defamatory. Later the defendants are successful in the European Court of Human Rights where they argued that they did not have a fair trial because they lacked legal aid, and that the outcome was a disproportionate interference with their right to freedom of expression.[2]

(b) In a nervous shock case, the plaintiff's psychologist and psychiatrist provide evidence that the plaintiff is still suffering from severe depression because of witnessing the aftermath of an accident in which two of his children were killed. This is used to bolster the argument that he should receive a large damages payout. In separate custody proceedings against the plaintiff's former wife, the same psychologist and psychiatrist provide evidence that in the same time period he had experienced a dramatic recovery. This argument is used to support his case that he should be granted custody of his children. Although the plaintiff is represented by different lawyers in each proceeding, the lawyers in the nervous shock proceedings are well aware of the expert witnesses' change of opinion, before judgment in the personal injury action is handed down but advise that the court should not be informed of the change.[3]

(c) A tobacco company settles a suit alleging it is liable for negligence for selling addictive and cancer-causing cigarettes. Soon after the case is settled, lawyers for the tobacco company help draft a 'document retention policy' that leads to the destruction of thousands of documents setting out scientific evidence relevant to understanding the health effects of smoking cigarettes in order to make sure those documents are not used against the company in any subsequent litigation by other plaintiffs. Later on when the tobacco company is sued by another woman dying of cancer, the company's lawyers construe the court's orders for discovery in narrow and pedantic ways so as to avoid not only disclosing existing documents to the plaintiff, but also avoid admitting that thousands of relevant documents had been destroyed after the previous litigation. For example, tobacco company lawyers interpret the order to give discovery of 'documents *of* the defendant' company not to apply to documents held by the defendant company but authored by people who were not its employees or agents. This means that the company did not disclose research papers commissioned by them from external scientists, as well as documents authored by employees and agents of related companies. They do nothing to inform the plaintiff they are interpreting the order in this way.[4]

2 Based on the 'McLibel' Case: at first instance – *McDonald's Corporation v Steel* [1997] EWHC QB 366 (Unreported, Bell J, 19 June 1997); on appeal – *Steel v McDonald's Corporation* [1999] EWCA Civ 1144 (Unreported, Pill and May LJJ, Keene J, 31 March 1999); at the European Court of Human Rights – *Steel and Morris v The United Kingdom*, no 68416/01 [2005] ECHR 103 (15 February 2005). See also <www.mcspotlight.org> and John Vidal, *McLibel: Burger Culture on Trial* (Macmillan, London, 1997). Case Study 1.2, 'Lawyers, Gunns and Protest' in Chapter 1 also raises similar issues.

3 *Vernon v Bosley* [1997] 1 All ER 614; see also Richard O'Dair, *Legal Ethics: Text and Materials* (Butterworths, London, 2001) 176–86.

4 *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) (overturned *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524). See Camille

(d) A dispute over whether one of Australia's biggest and most profitable financial institutions insufficiently compensated an engineer for designing an online trading and financial advisory system was argued for 222 days in court, costing $80 million before the engineer's claim was thrown out of court because he could not raise $1.9 million security for costs if his case failed. The financial institution had a team of more than thirty lawyers that fought every step of the way. The cross-examination of one witness took ten weeks. The nub of the case was never tested in court.[5] The costs of this one case amounted to more than one quarter of the total amount for legal aid funding for the whole of Australia in the 2003/04 financial year, which is enough to provide legal aid services for three-quarters of a million Australians.[6]

(e) A poorly educated manual worker's back and neck are badly injured in an accident at work. He does not seek legal advice or sue for damages at common law until after the limitation period for such actions has expired. He therefore needs to apply to the court for an extension of the limitation period. During the application for the extension, he endures a hectoring cross-examination designed to show that he has bad motives for bringing suit. The barrister for the other side repeatedly suggests that his injury is not the result of the accident at work, and that he is only suing at common law because he read in union newspapers and other places that high payouts could be achieved. The barrister also repeatedly gives the plaintiff various documents that the barrister refers to and asks questions about. But he never allows the plaintiff to explain that all the questions about what newspapers and magazines he has read are irrelevant because he is functionally illiterate. Although the plaintiff repeatedly tries to say so, he is always cut off. The plaintiff suffers severe stress because of this ordeal, feels 'like an idiot' because he cannot read the things counsel for the defendant shows him, cannot remember all the dates when he received different physiotherapy treatments and becomes very confused. He feels that the whole questioning process is too quick for him. The plaintiff receives permission from the court to go ahead with his action even though the limitation period has expired. But the plaintiff is so worried and depressed about how he will perform in court when the matter comes to trial that he commits suicide eight days after the hearing of the application for the extension. In an action brought by his widow, a court later held that the stress he suffered during the hearing was a cause of the depression that led to his suicide.[7]

In this chapter we first consider how and why problems of excessive adversarialism can occur in civil litigation when neither *adversarial advocate* lawyers nor their clients see themselves as responsible for moral restraint in the conduct of litigation. In the next section we explore the extent to which lawyers should be held morally and legally responsible for the ethics of litigation and use case studies to critically analyse the ways in which the law of lawyering attempts to give lawyers obligations to balance their *adversarial advocacy* with *responsible lawyering*. In

Cameron, 'Hired Guns and Smoking Guns: *McCabe v British American Tobacco Australia Ltd*' (2002) 25 *University of New South Wales Law Journal* 768; cf Martin H Redish, 'The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953–1971' (2001) 51 *DePaul Law Review* 359 (for an *adversarial advocacy* argument in favour of defensive tobacco litigation tactics).

5 A Stevenson, 'He's Mad as Hell, and He Still Wants the Bank's $56 Billion', *The Sydney Morning Herald*, 31 January 2002, 1, 6.

6 National Legal Aid, *About National Legal Aid* <http://www.nla.aust.net.au/> at 15 January 2006.

7 *AMP General Insurance Ltd v Roads & Traffic Authority of New South Wales* (2001) 22 NSWCCR 247.

Chapter 5 we will consider the ethics of advocacy in criminal trials. In Chapter 6, we will go on to consider attempts at alternative and more collaborative (*ethics of care*) forms of dispute resolution and legal practice.

Adversarial Advocacy: The 'Adversarial Imperative' and Excessive Adversarialism

The 'Adversarial Imperative'

According to the *adversarial advocate* approach, a lawyer's role is to advance clients' interests subject only to his or her duty to obey the law, including professional conduct rules and procedural rules that spell out the lawyer's duty to the court and the administration of justice. Although case law and professional conduct rules contain numerous statements that the duties of truth and fairness owed to the court override the duty to the client (see below), in practice, lawyers often feel that the adversarial system makes them subject to an 'adversarial imperative' which requires them to exploit any advantages the legal system allows for their clients:

> The adversarial imperative is the compulsion which litigants and especially their lawyers have to see the other side as the enemy who must be defeated; the 'no stone unturned mentality' is a compulsion to take every step which could conceivably advance the prospects of victory or reduce the risk of defeat. Both, in turn, increase the labour intensiveness and consequently the cost and delay of dispute resolution and, especially as between parties of unequal means, render it unfair.[8]

Although this 'adversarial mindset' has its roots in litigation, it also extends to most areas of practice. Lawyers have a 'pervading consciousness' that litigation is the potential conclusion of any contract, trust or deed of conveyance, or any legal advice tendered. Some lawyers operate on the basis that litigation is the *likely* outcome of each retainer. This leads to an attitude of precaution and anticipation of litigation directed at covering every circumstance and eventuality, which makes legal advice (even outside of litigation) time-consuming, complex and costly.[9]

Problems of 'Excessive' Adversarialism

The level of adversarialism engendered by this imperative can harm the client, the other side, and the legal system as a whole.

First, it *seems* obvious that zealous adversarial advocacy is always in the interests of clients. But this is not necessarily so. The *adversarial advocate* may feel

8 G L Davies, 'Fairness in a Predominantly Adversarial System' in Helen Stacey and Michael Lavarch (eds), *Beyond the Adversarial System* (Federation Press, Sydney, 1999) 102, 111.
9 Australian Law Reform Commission, *Review of the Adversarial System of Civil Litigation – Rethinking the Federal Civil Litigation System*, Issues Paper No 20 (The Commission, Sydney, 1997) [11.10]–[11.11].

that lawyers must do whatever they can to protect, advance and expand clients' legal rights in the short term. Yet *adversarial advocates* might not adequately take into account the costs of these actions to clients.[10] The financial costs of legal advice and action will often be greater, the longer and more adversarial the litigation. There will also be relational, emotional and reputational losses for the client in aggravating or pursuing a dispute, and these too will be greater the longer the dispute continues. Clients are also often disappointed with the outcomes that lawyers, and the legal system, deliver – damages awards are lower than expected, the amount is eroded by costs, and cases are settled without the satisfaction of being morally vindicated in court. Where clients do go through the entire court process, that process is often alienating rather than empowering, and the financial and non-financial costs much greater than expected. Clients can feel cheated by their lawyer as a result (see discussion of fees and costs in Chapter 8). This is partly a matter of clients with unreasonably high expectations not 'hearing' lawyers' words of caution. One writer suggests that we might see the relationship between lawyers and clients as like that between a drug addict and their supplier.[11] The lawyer feeds off the misery of others by selling the promise that law will give clients some substantive good – a promise that many clients are eager to believe.

Second, adversarial behaviour by the lawyer on behalf of the client does not just affect the client and their rights. It also affects the other side, and other parties. As the case studies above illustrate, adversarialism can lead to various misleading and deceptive tactics such as failing to admit facts known to be true (putting the other side to the expense and trouble of proving them), arguing partial truths, choosing expert witnesses such as doctors and engineers on the basis of the evidence they are likely to give (and how favourable it is to the client's case), and 'burying' relevant and damaging documents in an avalanche of documents to be produced on discovery. It can also lead to highly technical and manipulative arguments about the facts or the law that evade the substance, while paying lip service to the letter of the law. There is also just plain aggressive and bullying behaviour that is not only unpleasant, but might be unfair to just claims. Some lawyers argue that each of these tactics is appropriate because each party is represented and can look after themselves. Excessive adversarialism, however, is dangerous where one side cannot afford as much, or as skilful, legal representation as the other side. In a world where large business enterprises dominate many economic and social relationships, the fact that companies' legal expenses are tax deductible and individuals' legal expenses generally are not heightens this type of inequality.[12]

10 David Wilkins, 'Everyday Practice *is* the Troubling Case: Confronting Context in Legal Ethics' in Austin Sarat et al (eds), *Everyday Practices and Trouble Cases* (Northwestern University Press, Evanston, Illinois, 1998) 68.

11 Michael McChrystal, 'At the Foot of the Master: What Charles Dickens Got Right About What Lawyers Do Wrong' (1999) 78 *Oregon Law Review* 393 (describing Dickens' critique of lawyers in *Bleak House*).

12 See Australian Law Reform Commission, *Managing Justice*, [5.34]–[5.50]; Cameron Murphy, 'Tax Deductability [sic] and Litigation: Reducing the Impact of Legal Fees and Improving Access to the System' (2004) 27 *University of New South Wales Law Journal* 240.

This leads to a third concern with the damage that overly zealous advocacy can do to the fabric of the legal system itself. Excessive adversarialism makes the whole system more expensive and unfair for everyone since it constantly increases expectations about the minimal level of representation. It is like the Cold War nuclear arms race – the race by each side to have more weapons than the other so that each side would be deterred from actually using their weapons because the other side would then use theirs – eventually both sides had enough weapons to blow up the entire world several times over. Similarly, with adversarial advocates in an adversary system, each side always needs to do more to protect their own client because of what they believe the other side is going to do, until ultimately the more skilful the advocate, and the more money the parties have, the more the issues seem to revolve around procedure rather than substance, and the form of words rather than their purpose.[13] Excessive adversarialism can make the legal system more and more complex and expensive, yet more and more removed from the substantive justice concerns of ordinary people, and no one person can stop this.[14] We might even argue that in this context overzealous lawyering could eventually lead to social breakdown rather than social justice.

These concerns raise the possibility of at least three different ways in which ethics might restrain the adversarialism of lawyers and their clients. First, lawyers and clients might consider alternative means of dispute resolution other than litigation in court – such as mediation, arbitration or restorative justice processes – that might be less expensive, less time-consuming and/or more likely to resolve the underlying conflict in a way that meets both parties' needs. This might encourage a broadly *ethics of care* approach to lawyering. The ethical issues raised by *alternative dispute resolution* (ADR) for lawyers are considered in Chapter 6. Second, lawyers and their clients might be expected to have certain legal and/or ethical obligations to *truthfulness* in litigation. Third, we might expect that lawyers and their clients should be legally and/or ethically obligated to use the processes of litigation *fairly*, not to invoke court processes unreasonably or for improper purposes, and not to unreasonably waste the court's time and run up costs for the other side. The law of lawyering does indeed give lawyers some (*responsible lawyering*) obligations in relation to truthfulness in, and fair use of, legal processes. We critically examine the ways in which the law attempts to temper *adversarial advocacy* with *responsible lawyering* in the third part of this chapter below.

Mutual Avoidance of Ethical Responsibility for Litigation by Lawyers and their Clients?

The fact that lawyers engage in adversarial behaviour as agents for their clients makes it hard to pinpoint whether it is the lawyer, the client, or the adversarial

13 See William Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press, Cambridge, Massachusetts, 1998) 138–69.
14 See Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, Oxford, 1999).

court system itself that should be held responsible for any unethical conduct. Indeed *adversarial advocacy* can undermine the capacity of both the client and the lawyer to take moral responsibility for the way legal representation is carried out:

> Lawyers often justify their misdeeds as necessary to protect the interests of their client. Whether and when the adversary system or the protection of client rights can justify lawyers in committing lawful acts that would otherwise be unethical is a familiar subject of debate. If the justification holds, it transfers blame from the lawyer to the client. This presupposes the lawyer has actually placed the choice before the client. Too often, lawyers assume that clients would do anything lawful to prevail, while clients rely on their lawyers' judgment on the propriety of their tactics. The attorney-client relationship thus fosters mutual avoidance of responsibility, making it easier for lawyers to use professional rules unethically with a clear conscience.[15]

A purely *adversarial advocacy* approach to the lawyer's role in litigation suggests, first, that lawyers are under no obligation to encourage or equip clients to consider the ethical dimension of any potential courses of action in litigation beyond what the law requires. Second, it suggests that lawyers should not consider ethical matters beyond obedience to the law in considering what they can or cannot do for clients. The argument goes like this: For a lawyer even to advise a client as to the ethical aspects of proposed courses of action might be to discourage clients from fully exercising their rights, because a lawyer's warning about the ethical consequences of a course of action is likely to carry too much weight in the client's mind. It would be even worse, according to *adversarial advocacy*, for a lawyer to unilaterally decide to limit what they are willing to do for a client by reference to ethical considerations or the spirit of the law where the course of action is not clearly prohibited by law. In grey areas, *adversarial advocacy* sees it as up to the other side to complain, and for the courts to order the conduct to stop, if a lawyer is doing something wrong. The client is expected to be able to bring ethical considerations to bear on deciding their own course of legal action without any help or encouragement from the lawyer, and the lawyer is expected to be able to delineate between where advice on the law stops, and ethical considerations begin.

On the other hand, the client feels that they have handed the case over to their lawyer and that the lawyer is the expert who is best placed to choose the tactics and approach to representation (a perception that some lawyers may wish to encourage). The client does not feel morally responsible for the tactics, nor even the whole approach to conflict resolution chosen, because it is the lawyer who has advised those tactics or that approach. Indeed the client may feel they have no expertise or power to make ethical judgments about the appropriateness of the way their case is run. At the same time the lawyer feels it is not their role to do so either. This can lead to a situation in which choices are made that neither

15 John Leubsdorf, 'Using Legal Ethics to Screw Your Enemies and Clients' (1998) 11 *Georgetown Journal of Legal Ethics* 831, 836–7.

lawyer nor client would have chosen by themselves on their own account, or that are in no one's longer term interests.

Consider as an example of how this can happen the reputed role of some lawyers in shaping the response of Anglican and Catholic church leaders to child sexual abuse in Case Study 4.2 below.

CASE STUDY 4.2 Priests and Lawyers[16]

In 2003, the Australian Broadcasting Corporation's current affairs show, *The 7:30 Report*, broadcast the story of Lucien Leech-Larkin. Leech-Larkin had been sexually abused in 1968 by a teacher at the Catholic school run by Jesuits that he attended. Lucien's parents had told the school, but Lucien was not believed. The teacher stayed on at the school and Lucien was asked to leave. Lucien had a breakdown before he turned sixteen and was admitted to hospital twice. Over the next thirty years he had three further breakdowns and attempted to take his own life several times. He now works selling train tickets at a Sydney station. Before the sexual abuse and the school's response to it, he had been a very bright student.

In the late 1990s, the teacher who had abused Lucien was charged with eleven child sex offences in New Zealand. But a magistrate decided he could not be extradited from Australia to New Zealand to face the charges because he was too sick. The New South Wales police then charged the teacher with seventeen child sex offences against three boys in New South Wales. But again the court decided that the teacher was so sick that as a matter of humanity he should not stand trial.

Lucien Leech-Larkin then wrote a series of letters to the headmaster of his old school and to the Jesuits seeking 'reconciliation' with his former schoolmasters (the Jesuits), and asking them to say that they would help him get 'justice' against the teacher. All he received was brief replies from the Jesuits' lawyers. He was also told that the Jesuits had refused to sign up to the Catholic Church's Towards Healing Program which is aimed at reconciliation with victims of abuse and providing assistance in helping them to overcome the abuse.

Leech-Larkin then commenced civil action against the Jesuits. As the head of the Jesuits later explained, their 'clear legal defence' was to 'fight this matter at every point . . . to attempt to block it and until the point either that the complainant gives up from exhaustion or that we win the case or that we lose it'.[17] Reportedly some of the legal tactics that the Jesuits used to fight the case were to argue that because the teacher's 'assaults had not happened on school property and were outside school hours, the trustees of the order were not liable. There was also the proposition that the Jesuit Fathers are an unincorporated association and so it is the individual Jesuits who have to be sued, all of whom have taken a vow of poverty'.[18] It has also been reported that 'In Melbourne, where similar actions are under way against the Catholic Church, one response has been that the diocese is not a legal entity because Henry VIII abolished the Catholic dioceses. You are therefore 500 years too late with your legal action'.[19]

When the Jesuits heard that the ABC *7.30 Report* was going to do a story on the Leech-Larkin case, the relatively new head of the Jesuits, Father Mark Raper SJ promised

16 This case study is based on Richard Ackland, 'At Last, Some Understanding', *The Sydney Morning Herald*, 7 July 2003; and transcripts of two editions of the ABC's *7:30 Report* (23 June 2003 and 1 July 2003) where this story was televised: see <http://www.abc.net.au/7.30/content/2003/s886452.htm> and <http://www.abc.net.au/7.30/content/2003/s892572.htm> (10 October 2006).
17 Transcript of *The 7.30 Report* (1 July 2003).
18 Ackland, 'At Last, Some Understanding'.
19 Ibid.

to visit Leech-Larkin and his mother at their home, and to do an interview with the show. Within forty-eight hours, however, the home visit and interview were cancelled by Raper, after the Jesuits' lawyers advised him not to speak.

The day after the program went to air, Raper decided to ignore the legal advice and wrote Leech-Larkin a letter:

> I'm deeply sorry for the treatment you received while you were a student at St Aloysius in the 1960s. In addition, I offer you a profound apology on behalf of the Australian Jesuits. I'm also deeply sorry that I didn't keep the appointment we had made to meet, and discuss the issues face-to-face last Saturday. It was my decision to accept the advice not to proceed with our planned get-together, and I am sorry for the further hurt this caused you.[20]

Raper also appeared on *The 7.30 Report* a few days later. On the program he explained his change of mind saying:

> I was moved by Lucien Leech-Larkin and also for me it was a moment of liberation, I must say, because I'd been accepting advice against my better judgment . . . Now it seems a sheer folly, but we – supposedly the experts in the pastoral area – allowed the legal area to dominate.[21]

Raper went on to say that he was reviewing the Jesuits' protocol for dealing with these issues and that this would 'certainly mean an end of the way in which the society follows legal advice'.[22] The reporter then asked him 'But what if your approach means the Jesuits might be taken to the cleaners in a financial sense?' Raper replied: 'Um, well, the assets are not as important as the people that we seek to serve'.[23]

DISCUSSION QUESTIONS

The ethical issues in this case are particularly salient because most people still expect religious leaders to be particularly careful to show moral responsibility. Yet this may not have been the only case where 'legal' considerations swamped 'pastoral' concerns in church handling of sexual abuse cases. Former Governor-General Peter Hollingworth was forced to resign his office when he was heavily criticised for the way he had handled sex abuse allegations in relation to an Anglican school when he was Anglican Archbishop in Brisbane. One of the criticisms was that he had inappropriately refused to express compassion or sorrow to victims of sex abuse and their parents, or even to admit what the church knew about what sex abuse had taken place for fear of compromising the church's position under its insurance policy in relation to any litigation.[24]

1. How do you think members of the general community would view lawyers' and insurance companies' advice to church leaders not to apologise for child sexual abuse? Would they see it as unethical? What about the other arguments cited above that were used to defend abuse claims? Do you think the general community would see it as appropriate for a church organisation to make such arguments?
2. Imagine that you have drafted or argued defences like these to a claim against your church client: How will you justify yourself to the parents of an abused child?

20 The exact words of the letter are quoted from Ackland, 'At last, some understanding.'
21 Transcript of *The 7.30 Report* (1 July 2003).
22 Ibid.
23 Ibid.
24 See Garth Blake, 'Child Protection and the Anglican Church of Australia' (2005) 8 *Interface* 112.

Which of the four ethical approaches to lawyering do you think is most justifiable in these circumstances? What would it require you to do if you were lawyer for a church client in a case like this?

3. In what circumstances, if any, do you think lawyers should help clients consider the ethical and relational dimensions of how to respond to legal problems? Does it make a difference what ethical stance the client has? Or should lawyers take some ethical responsibility for the advice they give regardless of the ethical commitments of their clients? Why do you think the lawyers in these cases apparently advised their church clients not to apologise? What other options might they have discussed with their clients?
4. What, if anything, do you think that the clergy representing the defendant church organisations in these cases would have thought about the ethical implications of their lawyers' advice and arguments? What sort of legal advice, if any, do you think the Jesuits would be looking for after the events described above? Could a lawyer help them in any way once the Provincial had apologised to the victim of abuse? In what circumstances do you think clients would value explicitly moral advice from lawyers? Do similar ethical issues arise in more 'mundane' matters of injury compensation and product liability?

If it wasn't for that horrible lawyer the really nice priest would have been a Christian.
Source: Spooner, *Sydney Morning Herald*, 7 July 2003

Alternative Ethical Practices: Fostering Lawyer and Client Responsibility in Litigation

In order to address the potential mutual avoidance of ethical responsibility in litigation by lawyers and clients, lawyers would need to take responsibility, first,

for *advising clients* in a way that helps or encourages them to make decisions about litigation on ethical grounds as well as legal and practical grounds. Second, lawyers would also need to take ethical responsibility for *their own conduct on behalf of clients* in litigation. In the following sections we critically consider whether lawyers *should* take on these *responsible lawyering* type of obligations to the court, and the extent to which current rules on lawyers' obligations in relation to litigation already *do in fact* temper obligations of *adversarial advocacy* with *responsible lawyering*. We argue that as a matter of ethics and good practice, lawyers certainly should advise clients as to the ethical dimension of their decisions about how to pursue litigation. The issue of the extent to which lawyers should take it upon themselves not to act unfairly or untruthfully on behalf of their clients, even where the client is instructing them to do so is, however, more complicated. We suggest that neither *adversarial advocacy* nor *responsible lawyering* is likely to be an infallible guide to how lawyers should behave in these situations. Much depends on context, as we shall see.

Should Lawyers Advise Clients to Consider Ethical Issues in Litigation?

It is generally accepted that good lawyer-client interviewing and advising (or counselling) means that lawyers should work through all the options for responding to legal issues with their clients, and also the potential legal and other consequences of each option – in terms of finances, time, emotions, relationships and so on. Lawyers should put clients in a position where they understand everything they can about the benefits and costs, risks and possibilities of each legal course of action they might take.[25] Although lawyers may not be psychological counsellors, they generally have a greater experience and knowledge of the wide-ranging costs and consequences of different legal strategies than their clients do, and therefore have a responsibility to explain these costs and consequences in a way that clients will listen to and understand. Moreover the lawyer generally gets paid for his or her work, often on a 'time spent' basis, regardless of whether their client is happy with the process or the outcome. Therefore the lawyer is under a special responsibility to make sure that clients understand the costs of litigation, and do not even subconsciously push clients towards litigation for the sake of fees (see Chapter 7 for an analysis of this in terms of conflicts of interest principles).

Lawyers might also encourage their clients to seek other professional advice from counsellors, financiers and accountants, public relations people, family and friends on the likely impact and the wisdom of different courses of action. A good oncologist will advise a patient to think about and discuss with family and counsellor the consequences of chemotherapy or radical surgery in responding

25 See David A Binder, Paul Bergman and Susan Price, *Lawyers as Counselors: A Client-Centered Approach* (West Publishing Co, St Paul, Minnesota, 2nd edn, 2004); Avrom Sherr, *Client Care for Lawyers: An Analysis and Guide* (Sweet & Maxwell, London, 2nd edn, 1999).

to a cancer in relation to their total wellbeing. They do not expect patients to treat this type of decision as a purely medical matter. Good lawyers should be no less holistic in the way they advise their clients. Since legal options are generally about how to resolve disputes with other people, there is likely to be an ethical dimension to a holistic consideration of different options for litigating or resolving a dispute. This is true for all types of clients, individual or business. Business people and companies are, or should be, no less concerned about the cost of different legal options in terms of their own individual ethics and the ethical reputation for corporate social responsibility of their businesses than individuals are. (Indeed in Chapter 9 we argue that lawyers for companies have a particular responsibility to consider the ethical dimension of their advice.)

Both *ethics of care* and *moral activist* approaches to lawyers' ethics suggest, with different emphases, that ethics should explicitly be an important part of the conversation between lawyer and client. *Responsible lawyering*, too, suggests that at least as much as the law seeks to enforce certain obligations of truthfulness and fairness (as set out below), lawyers should, implicitly at least, try to help their clients understand and comply with those ethics. *Adversarial advocacy* includes contradictory views as to the extent to which lawyers should talk ethics with their clients. On the one hand, it might be easier for an *adversarial advocate* to advocate their clients' rights where they limit their knowledge of clients' potentially unethical or illegal behaviour. On the other hand, lawyers are likely to provide a better service and help their clients resolve their problems in a sustainable way the broader the context, including ethical context, that is discussed with each client.

Therefore there seems little justification for lawyers not to discuss with clients at least the ethical obligations of truthfulness and fairness in litigation in relation to different options, and to advise them of likely consequences of courses of action that are likely to be seen as unethical by the courts or other parties. A lawyer should also seek to establish with clients the ethical considerations that the clients themselves would see as important in resolving a dispute, and engage in dialogue with the clients about the lawyer's view of the situation including ethical, legal and practical dimensions.[26]

Are Lawyers Responsible for the Ethics of Actions Taken in Litigation on Behalf of their Clients?

This still leaves open the question as to the extent of the lawyer's responsibility if the client wishes to go ahead with a course of action that is unethical or contrary to professional obligations: Is it enough that the lawyer has clearly advised a client that such conduct would be unethical or perhaps illegal? Must the lawyer withdraw from representation or can they continue to act? Can they, or should they, take it upon themselves to do the right thing regardless of client instructions?

26 For a good case study and ethical analysis of this dynamic see William H Simon, 'Lawyer Advice and Autonomy: Mrs Jones's Case' in Deborah L Rhode (ed), *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (Oxford University Press, New York, 2000) 165.

As we shall show below, current professional conduct rules and court decisions answer these questions in rather fuzzy ways. Some of the law of lawyering suggests that lawyers must make clients aware of situations in which they might be breaching the boundaries of fairness and adversarialism in the adversary system, and simultaneously distance themselves from that behaviour by resigning from representation if the client chooses to go ahead with unethical action. At other times, the rules suggest that as long as excessively adversarial, unethical (or even illegal) behaviour is the client's choice, that the client understands the dangers of so behaving, and that the relevant tactic or behaviour has not been initiated by the lawyer, the lawyer can continue to act without personal responsibility. In still other situations, the law suggests that a lawyer must not take on a case in the first place where the client is proposing to abuse court process or even just run a weak case, even though the client understands the ethical objections to, and is willing to take full responsibility for, their actions.

Moreover, while our focus is on rules of professional conduct, the courts' own rules of procedure also place many more specific obligations on lawyers to do certain things in litigation. Many of these rules go beyond the parameters of the duty to the court in professional conduct rules by explicitly requiring lawyers to disclose certain evidence to the court or to the other side, to conform to certain timetables for the procedural steps of litigation, to use joint, court-appointed expert witnesses and so on.

Why are the rules on the balance between lawyers' obligations to the court and the client so complex and contradictory? A cynic might conclude that the legal profession has deliberately chosen to put in place rules that give lawyers the choice of using those rules to control or disengage from their clients, or continuing to make money from 'unethical' clients. Either way, lawyers are extremely unlikely to ever face disciplinary action for their choices on the basis of such unclear rules. A more sympathetic view is that the complexity of these rules reflects the complexity of lawyers' different, and sometimes contradictory, moral obligations to client and to court in different situations.

As we shall see, it is extremely difficult to lay down 'bright line' rules as to when and how the duty to the court should override the duty to the client without risking clients' access to justice. We can confidently state that the duty to the court is an important guarantor of justice, yet to lay out that duty too strictly in rules seems always to risk the possibility that lawyers will refuse to act for people who should be represented, or that the duty to the court rules will themselves become the subject of adversarial excess. The vagueness of many of these rules requires lawyers to take responsibility themselves for responding to the principles of duty to court and duty to client in the context of the specific facts of each case.

General Principles

The law of lawyering is clear that lawyers in litigation have duties to the court and to the administration of justice that override their duty to their clients.

Adversarial advocacy sees the lawyer as obligated to follow these rules only to the extent that they clearly prohibit certain conduct. Yet the law of lawyering does not frame the lawyers' duty to the court and the administration of justice as a set of clearly defined rules, but rather as a set of broad principles that prescribe a *responsible lawyering* type role as officer of the court, independent from the client. The following statement by former Chief Justice Mason of the High Court of Australia exemplifies the way the law sees lawyers' ethical obligations to the court:

> It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also the speedy and efficient administration of justice.[27]

Similarly, the Law Council of Australia's *Model Rules* state as a matter of general principle that lawyers should not slavishly follow client instructions if this would involve injustice:

> Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.[28]
>
> . . .
>
> A practitioner must not act as the mere mouthpiece of the client or of the instructing practitioner and must exercise the forensic judgments called for during the case independently, after appropriate consideration of the client's and the instructing practitioner's wishes. (*Model Rule* 13.1)

A court can also use its own 'inherent' jurisdiction to control its 'officers' (that is, lawyers admitted to practice in that court) and its own procedure, in the course of each individual case to prohibit lawyers from excessively adversarial conduct, to order them to take certain steps in litigation, to order them to personally pay costs associated with the litigation to the other side if they have behaved inappropriately or to find them guilty of contempt of court where they have breached their duties to the court. The court of its own motion, or by the motion of parties, can comment on the behaviour of lawyers and make procedural and substantive decisions in a case on the basis of what they think the duty to the court involves. It is very rare for disciplinary action to be taken against a lawyer for breach of the duty to the court. But in recent years civil courts have increasingly used their inherent powers to control their own process to limit the level of adversarialism in the way parties and their lawyers run their cases.[29] It seems

27 *Giannarelli v Wraith* (1988) 165 CLR 543, 556 (sexist language in original). But note that *Giannarelli* was a case where the court was using lawyers' supposed duties to the court to defend advocates' immunity from accountability to clients for negligence in court. It was not a case where the duty to the court was enforced.
28 Statement of principle at beginning of section entitled 'Relations with Clients' *Model Rules* 1–11. See also *Model Rule* 30 for a similar statement. See also Australian Law Reform Commission, *Managing Justice*, [3.41] stating that much excessive adversarialism would amount to misconduct.
29 Jill Hunter, Camille Cameron and Terese Henning, *Litigation I: Civil Procedure* (LexisNexis Butterworths, Chatswood, NSW, 7th edn, 2005) 10–18.

that disciplinary authorities and lawyers themselves have left it to the courts to rein in excessive adversarialism on the basis of case management and civil procedure rules. It has not, however, been seen as a matter for disciplinary action or voluntary ethical restraint.

In the following two sections we look at the legal principles governing lawyers' obligations of honesty and fairness as developed in disciplinary cases and the court's exercise of its inherent jurisdiction. We will focus particularly on the extent to which these principles see lawyers as ethically responsible for dishonest or unfair tactics taken on behalf of their clients.

Honesty – Misleading the Court

The clearest curb on lawyers' adversarial behaviour on behalf of their clients is the principle that practitioners must not mislead the court. Many instances of excessive adversarialism amount to misleading (or potentially misleading) the court either directly or indirectly. The Law Council of Australia's *Model Rules* state that:

> Practitioners, in all their dealings with the courts . . . should act with competence, honesty and candour.[30]
>
> . . .
>
> A practitioner must not knowingly make a misleading statement to a court.
>
> A practitioner must take all necessary steps to correct any misleading statement made by the practitioner to a court as soon as possible after the practitioner becomes aware that the statement was misleading. (*Model Rule* 14.1)

Note that these rules define 'court' broadly to include tribunals, investigations or inquiries established or conducted under statute or by a parliament, royal commissions and arbitrations or mediations or any other form of dispute resolution.

The law of lawyering also makes it clear that where a legal practitioner knows that their client, or one of his/her witnesses, has perjured themselves, or has tendered evidence that is false, the lawyer must advise the client that the dishonesty must be corrected or else the lawyer will have to take no further part in the case, and ask the client for authority to inform the court of the correction. If the client refuses to permit the lawyer to make the correction, the lawyer can no longer continue to act, even if this means withdrawing representation in the middle of a trial – something that would generally be anathema to *adversarial advocacy* (see *Model Rule* 15.1). Similarly it is clear that practitioners should 'not advise or suggest to a witness that false evidence should be given', nor 'suggest or condone another person suggesting in any way to any prospective witness (including a party or the client) the content of any particular evidence which the witness should give at any stage in the proceedings' (*Model Rule* 17). As well as being

30 General statement of principle at beginning of section headed 'Advocacy and Litigation Rules' *Model Rules* 12–20.

clearly prohibited in the *Model Rules*, such conduct could amount to a criminal offence and contempt of court.

These appear to be 'bright line' rules setting out precisely how and when the duty of candour to the court (broadly defined) overrides the duty to the client. But what do they mean in practice? In each of the following situations, *would* a lawyer be held legally liable for misleading the court? *Should* they be allowed to behave like this?

- One side makes a genuine mistake about the facts in court. The mistake favours the other side. (For example the lawyer for the plaintiff makes a mistake about the amount owing under a contract.) The lawyer for the other side knows it is incorrect, but does not correct the mistake.
- A lawyer makes a statement that is not incorrect, but leaves out further facts that are unfavourable to their client's case. (For example, a lawyer states that the client had not been drinking alcohol before a car accident, but does not mention that the client had been smoking marijuana.) The other side does not know about these additional facts.
- During lawyer-client interviews, a lawyer always needs to go to the bathroom or get a cup of tea when it looks like his or her client might be going to confess to liability for a crime or civil wrong.
- A lawyer withdraws from representing a client who perjured themselves because of the rule cited above, but does not inform anyone else, including the court, of the perjury because of the need to keep client information confidential. The client is much more convincing at lying to their new lawyer and the case is decided in the client's favour on the basis of their perjured evidence.
- A lawyer informs a proposed expert witness (eg a doctor who is to write a medical report) what type of expert findings would be helpful to their client's case and what would not.[31]
- An inhouse lawyer for a corporation sends an email to an officer of the corporation asking them to come and see the lawyer before the officer gives evidence to a statutory inquiry on possible wrongdoing by the corporation. The email says that the corporation needs to 'make sure that everyone is inside the tent'.
- A lawyer explains to their defendant client what sort of documents the plaintiff on the other side might find helpful to discover. The lawyer explains to the client their obligation under the court rules of discovery to give the plaintiff on the other side access to all these documents if they still exist, but also points out that many of the relevant documents would probably be quite old now so it would be quite understandable if they had been destroyed in order to free up storage space. What if the lawyer waits until after the case has been settled and then suggests to their client that a clean-up of documents might be appropriate before anybody else sues?

31 See Garth Montgomery, 'Clayton Utz Trio Facing Inquiry', *The Australian* (Sydney), 16 September 2005, 25.

The conduct in each of the first four bullet points above is clearly allowed by the law, yet seems contrary to the idea of the lawyer having a broad ethical obligation of honesty to the court. The conduct in each of these cases certainly does not assist the court to decide a matter justly on the facts. In the last three cases the conduct may also be within the letter of the law, depending on the intonation and context of the lawyer's statements, but is even more clearly outside the spirit of the rules prohibiting lawyers from interfering with witnesses' evidence.

The law is clear that for a lawyer to be responsible for misleading the court they must have been actively and knowingly involved in misleading the court. Lawyers can sit back and watch the court being misled (*Model Rule* 14.3). As long as they have not knowingly and actively said anything themselves to mislead the court, their hands are clean, according to the law, at least.[32] Similarly they can fail to disclose the whole truth to the extent that this favours their client, as long as what they do say is correct and not misleading on its own terms (see *Model Rule* 14.10).

Similarly, although the law requires lawyers to withdraw from representation if they know of their client's perjury and their client will not allow them to correct it, the same rule goes on to preserve client confidentiality above the duty of truthfulness to the court by providing 'but [the practitioner] must not otherwise inform the court of the lie or falsification' (*Model Rule* 15.1). These principles do not mandate that a practitioner's duty of candour to the court *overrides* the duty to the client (including the duty of confidentiality). At best the rules cited here *balance* the duty to the court and the duty to the client by requiring the lawyer to withdraw themself from the morally distasteful situation of representing a client who the lawyer knows to be basing their case on perjured evidence. Because the lawyer withdraws without being able to alert the court to the deception, the best that can be said is that the lawyer is no longer directly a part of any deception of the court. Yet the lawyer has still allowed the court to be misled.[33] Many laypeople would view this sort of 'silent withdrawal' as damning for the client and morally weak on the part of the lawyer. The rule gives no definitive moral guidance towards either duty to the client (*adversarial advocacy*) or duty to the court (*responsible lawyering*). Thus although the statements of principles cited earlier suggest that the duty to the court *overrides* the duty to the client, when we look at specific rules, this is not true. Yet simultaneously the rules do not unequivocally support *adversarial advocacy* either.

The same is true where a lawyer does not allow him or herself to find out about a client's perjury or liability. The lawyer's conscience may be clear, but the court has still been misled. Can a lawyer really wash their hands of ethical responsibility for the client's dishonesty to the court so easily? Unless varying ethical approaches are actively compared, the rules can offer great scope for lawyers and their clients to avoid the letter of the law so that the court is misled,

32 See, eg, *Tombling v Universal Bulb Company* [1951] 2 TLR 289; *Englebrecht* (LST (NSW), Disciplinary Reports No 5, 1995, 1); cf *Meek v Fleming* [1961] 2 QB 366; *Vernon v Bosley (No 2)* [1999] QB 18.
33 See the discussion of the 'perjury trilemma' (it is impossible for a lawyer to fulfil all three of their duties to know everything, keep it in confidence and reveal it to the court) in Monroe H Freedman and Abbe Smith, *Understanding Lawyers' Ethics* (LexisNexis, Newark, New Jersey, 3rd edn, 2004) 161.

rather than being an appropriate 'balance' between lawyers' duties to the court and their clients. (See also Chapter 5 on defence ethics in criminal trials for further discussion of these issues.)

The principles and scenarios discussed so far each relate to misleading the court on the *facts*. In relation to making sure the court is fully and honestly appraised as to the *law*, however, lawyers' legal responsibilities are much more onerous. Lawyers are under an obligation to pro-actively inform the court of any binding authority, any authority decided by the Full Court of the Federal Court of Australia, a Court of Appeal of a Supreme Court or a Full Court of Supreme Court (even if it is not binding on the court in question), and any decision (including first instance decisions) on similar legislation to that at issue in a case, as well as any applicable legislation 'which the practitioner has reasonable grounds to believe to be directly in point', against the client's case (*Model Rule* 14.6). This obligation extends to authority that comes to the lawyers' knowledge after argument in a case has concluded and while judgment is pending (*Model Rule* 14.8). In the case of perjury on the facts, lawyers must actually know that their client has perjured him or herself, and must then advise the client to correct the matter and withdraw if they do not. In the case of legal authority against the client's case, however, there need only be 'reasonable grounds' to see the authority as relevant, the client's permission (or even knowledge) is not required, and the lawyer is under a pro-active duty to inform the court of the authority – they cannot wash their hands of the problem by withdrawal or by saying nothing. The principle does not, of course, prevent lawyers from arguing that a contrary authority should not be applied for some reason.

There is only one area where the law provides that lawyers are under a similarly pro-active obligation to disclose *factual* information to the court even though it goes against their client's case. That is where they are making an *ex parte* application for interlocutory relief, where the other side is not present to argue their side of the case in relation to an injunction or other order which might make a big difference to the way their case progresses (*Model Rule* 14.4).[34] The law's allocation of responsibility for dishonesty sees lawyers as wholly responsible for the *legal* argument in a case while clients, not lawyers, are ultimately responsible for the *facts* advanced in a case. Why should the lawyer not be obliged to argue the client's case on the basis of the full *facts*, not hiding facts or misleading the court in their clients' interests, in the same way that they must argue the case on a full view of the relevant *legal authority*?

Fairness – Abuse of Process, Unsupported or Irrelevant Allegations, Unreasonable Delay and Expense, and Hopeless Cases

The principles relating to lawyers' obligations of fair use of court processes are more broadly defined than those relating to honesty to the court. There are four

34 A similar principle might apply where the lawyer is acting against a litigant who is not represented by a lawyer.

broad categories of conduct that can be seen as unfair uses of litigation processes for which a lawyer might be held responsible: (1) using legal processes for improper or ulterior purposes; (2) making unsupported or irrelevant allegations against a person; (3) entering into proceedings without proper consideration for the prospects of success; and (4) running a case in a way that gives rise to unreasonable delay or expense. These principles apply to the *parties* to litigation, not just their lawyers. But the focus here is on the extent to which *lawyers* can be held personally responsible for these types of conduct. Case Study 4.3 below, *White Industries v Flower & Hart*, illustrates lawyers involved in conduct that falls into a number of these categories.

CASE STUDY 4.3 *White Industries v Flower & Hart*[35]

In 1986 'colourful' Queensland property developer George Herscu (through his company Caboolture Park) was building a new shopping centre, and had hired White Industries to build it. After several months, Mr Herscu was running out of money and felt that the cost of the project was blowing out. He did not want to pay any more to White Industries. His solicitors, Flower & Hart, advised him that there were no grounds for refusing to pay any more money under the terms of the contract with White Industries. But they suggested a legal strategy for buying time: They advised that Mr Herscu had an arguable but weak case that the builders had deceived him (as to the costs of the project) and could therefore sue them for fraud. They also briefed Ian Callinan QC (who was later appointed to the High Court of Australia) and other junior barristers for the case. Flower & Hart wrote Mr Herscu a letter advising that:

> The strict legalities are against you and your contractual position is weak . . . Is there anything that can be done to try to give you, at the very least, *a temporary bargaining stance*? (Emphasis in letter as sent) . . . Ian Callinan and I think that you should immediately start Section 52 proceedings (under the Trade Practices Act) in the Federal Court alleging deceptive conduct . . . Fraud on the ground of recklessness may also be available to be pleaded against the builder . . . I do have to make it clear to you however that you could not win any litigation if put to the test . . .[36]

The fraud case went ahead with White Industries cross-claiming for the money due under the contract.

After 150 hearing days (more than a year of trial, and almost three years from when the action was commenced), Caboolture Park had gone into liquidation and Flower & Hart and Mr Callinan had withdrawn from the case. Judgment was entered in favour of White Industries for more than $5 million including costs that were awarded to White as well. But with Caboolture Park in liquidation, White Industries had no prospect of recovering the amount from them, and still had their own very large legal bill to pay. In a separate matter, George Herscu was later convicted and jailed for bribery of a government official.

Because of the liquidation, however, White Industries got access to the written advice and communications Flower & Hart and Mr Callinan had given Mr Herscu. White Industries therefore sued Flower & Hart (not Mr Callinan[37]) for the legal costs in the Federal

35 *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169 (Goldberg J); affirmed *Flower & Hart v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134.
36 *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169, 180–1.
37 This means Callinan was not a party and it was not necessary to make any determination about whether Callinan shared Flower & Hart's improper purpose in commencing the litigation: *Flower & Hart v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134, 148, 149.

Court. In 1998 Goldberg J held that Flower & Hart had alleged fraud without evidence to support it, that their purpose was to delay and frustrate the claims of their client's creditor for payment, and that 'abuse of process was exacerbated by the manner in which Flower & Hart conducted the proceeding and the obstructionist and delaying tactics in which it indulged'.[38] The obstructionist and delaying tactics had included making sure senior counsel was not present when White Industries tried to get a trial date set, so that 'awkward questions' could not be asked, and sending 700 pages of interrogatories to make matters more difficult for the other side.

Justice Goldberg observed that:

> [t]he fact that [Mr Herscu] had a robust approach to litigation, did not believe anything was impossible and was unconcerned about entering into litigation with limited prospects made it all the more important for Flower & Hart to have regard to the manner in which it instituted and conducted proceedings on his behalf and on behalf of his companies and to be conscious of its duty to the Court.[39]

Flower & Hart were ordered to pay White Industries $1.65 million in court costs.[40] The President of the Law Council of Australia asked the Attorney-General for an investigation into Mr Callinan's fitness to remain on the High Court.[41] The Attorney-General refused, saying 'No inquiry into the conduct of the judge is warranted. Any inquiry held inappropriately can endanger the independence of the judiciary, damage the standing of the courts and do harm to an individual judge'. One prominent lawyer, Professor Greg Craven said, 'If this is proved misbehaviour then we've just disqualified 95% of the commercial bar from High Court appointment'. Ian Barker QC (then president of the NSW Bar Association) replied, 'I have perhaps led a sheltered, forensic existence, but everybody does not do it.'[42]

DISCUSSION QUESTIONS

1. If there ever was a client who was clearly capable of abusing the legal system, Mr Herscu was that client. Why do you think the lawyers acted as they did in this case? How would you relate to such a client? What if this client was responsible for 50% of your firm's fees – would you assert a *responsible lawyering* approach? A *moral activist* approach? Can you think of any ways in which you might demonstrate the *ethics of care* with Mr Herscu?
2. Flower & Hart were ordered to pay costs, but the solicitors involved were never disciplined. Justice Callinan was criticised in the media for his involvement, but did not suffer any legal consequences at all, since he was not a party to the costs order action and he had been appointed to the High Court by that time anyway. Do you think this sort of behaviour should be liable for professional discipline, in addition to or instead of wasted costs orders? Does it make any difference if 'everybody did it'? Why do you think the self-regulator in Queensland at the time (the Queensland Law Society) did not take action against the solicitors from Flower & Hart?
3. White Industries is an unusual case because the lawyers' communications with their client about the case became available to the other side for the court to

38 *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169, 251.
39 Ibid 249–50.
40 *White Industries (Qld) Pty Ltd v Flower & Hart (No 2)* (2000) 103 FCR 559, 561.
41 See also *Flower & Hart v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134, 148, 149.
42 Based on Margo Kingston, 'Callinan Casts a Long Shadow', *The Sydney Morning Herald*, 14 August 1998, 19; Margo Kingston, 'Judge Back in Hot Seat', *The Sydney Morning Herald*, 12 June 1999, 1. See also ABC Television, 'His Honour', *Four Corners*, 14 September 1998 <http://www.abc. net.au/4corners/stories/s18184.htm> at 26 July 2006.

consider (because of the liquidation of Mr Herscu's company). Usually such communications are protected by client legal privilege and so only available to the lawyer and their client. Even if the other side suspects a breach of the duty to the court they are unable to access communications between lawyer and client on the other side to prove their case. Most investigations of lawyer conduct arise from complaints by clients, in which case the client has impliedly waived privilege. What problems does this create in uncovering and sanctioning lawyer-client collusion in abuses of court process? How could courts and disciplinary authorities overcome this problem? Is there any other way in which lawyers could be encouraged or forced not to engage in such behaviour?

It is an abuse of process for a party to make allegations, bring proceedings, or argue a particular defence for an *ulterior purpose*; that is, for purposes for which they are not intended, or dishonestly. This is absolutely prohibited.[43] There does not have to be evidence of a malicious intent, as long as the party's purpose for using court proceedings and court processes is unrelated to the objectives the court process is designed to achieve. It is likely to be easier to prove an ulterior purpose where a case is 'arguable although weak',[44] but the prohibition applies also to stronger cases if the only purpose in bringing the case is an ulterior one. Lawyers for a party do not avoid responsibility for running cases for ulterior purposes where they knew that the proceedings were brought for an ulterior purpose, merely because the client also knew of and approved the ulterior purpose.[45] Most of the cases where lawyers have been held liable for ulterior purposes in bringing litigation concern situations where the lawyer knew the cause was hopeless, and the proceedings were clearly designed for some purpose other than to establish the party's legal rights and achieve the remedy available within the proceeding. For example, in *Clyne v New South Wales Bar Association*[46] baseless allegations were made against the solicitor on the other side in order to intimidate him into dropping the case in the hope that the opposing client would then settle on favourable terms. Clyne was struck off for professional misconduct because of this behaviour. In *White Industries* the solicitors, Flower & Hart, were made liable for paying the costs of the other side because they helped Herscu bring the proceedings for the ulterior purpose of gaining a 'temporary bargaining stance'.[47]

The case law and professional conduct rules are also concerned that lawyers not be involved in *using court proceedings to harass or embarrass people* either intentionally (which would amount to an ulterior purpose and therefore an abuse of process as in *Clyne*), recklessly (also grounds for a wasted costs order) or

43 *Williams v Spautz* (1992) 174 CLR 509. For a reworking of the idea of abuse of process and how that might moderate the lawyer's obligation of zealous advocacy, see Tim Dare, 'Mere Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers' (2004) 7 *Legal Ethics* 24.
44 *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169, 251.
45 *R v Weisz* [1951] 2 KB 611; *Ridehalgh v Horsefield* [1994] Ch 205; *Re G Mayor Cooke* (1889) 5 TLR 407; *Levick v Deputy Commissioner of Taxation* (2000) 102 FCR 155.
46 (1960) 104 CLR 186.
47 *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169, 180.

negligently (by making serious allegations against other people without there being an evidential basis for those allegations), or where the allegations are not necessary to the advancement of the case (*Model Rule* 16.1).[48] This is considered especially important since advocates are privileged from liability for defamation for what they say in court. So the courts consider that lawyers need to take responsibility for the 'common decency and common fairness' of what is said.[49]

Ulterior purposes and baseless allegations are two areas where lawyers do have a clear *responsible lawyer* 'gatekeeping' type of obligation to curb their clients' more adversarial tendencies by checking the truthfulness and purpose of client allegations before repeating them before the court. The *Model Rules* provide that:

> A practitioner must, when exercising the forensic judgments called for throughout a case, take care to ensure that decisions by the practitioner or on the practitioner's advice to invoke the coercive powers of a court or to make allegations or suggestions under privilege[50] against any person: are reasonably justified by the material then available to the practitioner; are appropriate for the robust advancement of the client's case on its merits; are not made principally in order to harass or embarrass the person; and are not made principally in order to gain some collateral advantage for the client or the practitioner or the instructing practitioner out of court. (*Model Rules* 16.1)[51]

However the *Model Rules* do give lawyers a number of 'excuses' for avoiding these obligations. They provide that the 'practitioner must make reasonable enquiries to the extent which is practicable' in order to reasonably hold the beliefs required by this principle (*Model Rule* 16.5). In the same breath, the *Model Rules* also state that barristers can rely on the opinion of an instructing practitioner 'except in the case of a closing address or submission on the evidence' (*Model Rule* 16.6). They also provide that practitioners 'must not draw or settle any court document alleging criminality, fraud or other serious misconduct' if there is no factual material available to the practitioner to support it or the evidence would be inadmissible (*Model Rule* 16.2). But this rule goes on to provide an exception where 'the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out' (*Model Rule* 16.2.3) – an exception which seems quite contrary to the spirit of the rest of the rule and the case law on the issue.

The exceptions to the general principle and requirement to only make 'reasonable inquiries to the extent which is practicable' suggest that the rules give lawyers maximum room to move as *adversarial advocates*, rather than wholeheartedly putting the *responsible lawyering* approach into practice. There is considerable

48 See also *Medcalf v Mardell* [2003] 1 AC 120; *Guo v Minister for Immigration & Multicultural Affairs* [2000] FCA 146 (Unreported, O'Loughlin J, 23 February 2000).
49 *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 200.
50 Here 'privilege' refers to the qualified privilege that protects lawyers from being liable to defamation suits for what they say in court.
51 A number of more specific rules apply the same principle to the practitioner opening 'as a fact any allegation which the practitioner does not believe on reasonable grounds will be capable of support by the evidence' (16.3), and cross-examination or an address on the evidence 'so as to suggest criminality, fraud or other serious misconduct on the part of any person' (16.4, 16.7).

room for barristers to say that they relied on the instructing solicitor to check the motivation for, or evidential basis of, a client's claim, while the solicitor can say that they briefed counsel in order to get counsel's expert opinion on that very point. Similarly the rules start off by suggesting that it is ultimately the lawyer's responsibility to act as a gatekeeper on the client's invocation of the court's coercive powers. Yet they also provide that, at least at the beginning of the proceedings when the court documents to start a claim are being drafted, the duty to the client will override any duty to the court so long as the client understands that the claim may not succeed, or even might be struck out as an abuse of process. It is only at the close of the case when the allegations have been made, the defendant or other party forced to defend themselves and whatever evidence there is has been put to the court, that the court advocate has an unequivocal duty to refrain from making unwarranted allegations (see *Model Rule* 16.7).

The rules definitely apply where it is clear that there is absolutely no supporting evidence for a client's case (apart from the client's statement). In any other situation the rules do not give much guidance as to what level of active inquiry lawyers should make about the honesty of what their client tells them, in terms of the evidential basis for the allegations the client wishes to be made. There is even less guidance as to any inquiry that the lawyer should make into the client's motivations for making the allegations, and whether they are for 'some collateral purpose' or 'principally in order to harass or embarrass' someone. Both base fault on what the lawyer knows – but what if the lawyer purposely turns away from finding out? At what point should a lawyer be put on inquiry as to whether what the client is telling them is true?

As we have seen, in order to advise and represent a client well, a good lawyer would usually need to know all about their memory and records of events. A lawyer who wanted to give a client full advice on the strengths and weaknesses of their case (even on an *adversarial advocacy* approach) would need this information, as would any lawyer who wanted to help their client consider and address the ethical and relational aspects of their legal problem (using a *responsible lawyering*, *moral activist* or *ethics of care* approach). Yet the ethics of *adversarial advocacy* might sometimes pull in the other direction – they might motivate lawyers to try to limit their knowledge of any fault on the part of their client so that they are 'free' to advocate zealously for that client.

The obligations on lawyers to avoid making baseless allegations through the court process apply to allegations of fraud, crime and improper conduct. They do not state that the lawyer should be satisfied there is an evidential basis for more run-of-the-mill allegations and claims.[52] Nor do they apply to the situation where lawyers deny (or 'fail to admit') allegations made by the other side that they know are true (ie 'put the other side to the proof'). Although professional conduct rules and disciplinary decisions do not give lawyers active obligations in these areas, the courts are now using practice directions, rules of court and interlocutory

52 Although the overarching rule in *Model Rules* 16.1 suggests caution in making any allegation.

decisions on procedural matters to require 'truth in pleading'.[53] The professional conduct law that we have described may well be lagging behind developments in civil procedure.

What obligations do lawyers have more generally to screen *weak or hopeless cases*, and to ensure that cases are conducted as efficiently and expeditiously as possible in order to avoid *unreasonable delay and expense*?

Model Rule 13.2 supports the independence of *responsible lawyering* in these circumstances by releasing practitioners from an obligation to look after their client when they decide to emphasise the 'real issues' only, or present a case in a concise manner, or actually inform the court of an authority that might persuade the court against their client. These 'freedoms' are important since each of them helps a court to get to a prompt and arguably correct result. But, with the exception of the last circumstance – the existence of the contrary authority or decision, which must be disclosed (see *Model Rule* 14.6) – the rule contains no positive injunction to conduct the case having regard to these factors. It simply *permits* an advocate to take this approach, in the face of client demands to do the opposite. Accordingly, the rule operates in a passive, defensive role (primarily for the benefit of the advocate) rather than in active support of the court's function. As things stand, this rule does not require that an advocate conduct a case expeditiously.

The common law on payment of costs is more rigorous in its requirements. The party (that is, the client) whose case is ultimately unsuccessful must generally pay the legal costs of the other side, and greater costs can be awarded against a party if the court considers that party caused unnecessary delay or expense to the other side because of the way they argued their case. It is generally the party themselves, not their lawyer, who bears these costs. But there are a number of cases where the courts have held that where the 'wastage' of costs through unreasonable behaviour is the lawyer's fault, rather than their client's, that the lawyer (or law firm) personally can be ordered to pay the other side's costs. These costs orders against lawyers personally are clearly available where the lawyer has been party to an abuse of process or something akin to an abuse of process, as in *White Industries*. But the courts have also held that 'wasted costs orders' are available against lawyers where the lawyer has commenced proceedings (or put forward defences) on behalf of a client *'without any, or any proper, consideration of the prospects of success'* (emphasis added),[54] that is the lawyer failed to 'give reasonable or proper attention to the relevant law and facts in circumstances where if such attention had been given it would have been apparent that there were no worthwhile prospects of success'.[55] They are also available where the lawyer has personally caused costs to be 'wasted by a *failure to act with reasonable*

53 Hunter, Cameron and Henning, *Litigation I: Civil Procedure*, 163–5.
54 *Levick v Deputy Commissioner of Taxation* (2000) 102 FCR 155, 166; for an example where a costs order was made on such grounds see *Cook v Pasminco Ltd (No 2)* (2000) 107 FCR 44.
55 *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169, 239. The court is more likely to see the lawyer as unreasonable where there is no case on the law than where there is an unresolved issue of fact: *Levick v Deputy Commissioner of Taxation* (2000) 102 FCR 155, 166.

competence and expedition' (emphasis added).[56] This latter ground would include situations where the lawyer fails to file documents on time, to attend court, or to be properly prepared. Conducting a case with unreasonable delay or other obstructionist tactics (not through negligence or incompetence) on purpose, in order to delay judgment or in the hope of wearing out the other side's resources so that they give up the fight, as in *White Industries*, would also amount to abuse of process. This is because the tactics are being chosen for an ulterior purpose, although it is likely to be difficult to prove this intention.

The availability of the costs orders against lawyers personally for failure of proper consideration of the prospects of success and unreasonable delay and expense is a matter of fairness to the lawyer's own client and the party on the other side. Why should either of the *parties* have to bear costs that were spent because a *lawyer* failed to give proper consideration to the prospects of success and accordingly advise their client, or acted negligently or inappropriately so that the case took longer than was necessary? In such circumstances the lawyer might also be liable for unsatisfactory professional conduct (failing to meet the standard of service of a reasonably competent practitioner), and the client might be able to contest their own legal bill and have it reduced as well. In other words, the problem is that the lawyer has breached his or her duty to the client by acting incompetently during the case,[57] or by taking a weak or hopeless case in the first place. As we have seen, this behaviour potentially reaps costs for the lawyer without giving the client any benefit.

However, the courts traditionally made it clear that even if a case was weak or hopeless, if the lawyer had in fact fully advised the client of the prospects of success, *and* of the likely consequences to the client if the case went ahead (including that costs would likely be awarded against the client), *and* the client instructed the lawyer to proceed, then the lawyer would not breach any duty in proceeding with the case. Indeed, to say that the lawyers should not run cases or argue points merely because they are weak or hopeless would be for lawyers to improperly predetermine the extent of their client's legal rights. Absent an ulterior purpose, clients ought to have a right 'to have a case conducted in the courts irrespective of the view which his or her legal adviser has formed about the case and its prospects of success'.[58] On this view, the lawyer is under an obligation to advise the client of the prospects of success and the fact that it may be considered inappropriate to run it, but not to impose on the client their own view of whether it should be run or not. In other words, the legal duty to give proper consideration to

56 This wording is from the *Supreme Court (General Civil Procedure) Rules* (Vic) r 63.23. Similar provisions exist in other Australian jurisdictions. The rules also refer to 'incurring costs improperly or without reasonable cause' which would reinforce the abuse of process and failure to give proper consideration to prospects of success grounds at common law. See also *Whyte v Brosch* (1998) 45 NSWLR 354; J J Spigelman, 'Supreme Court: Just, Quick and Cheap – A New Standard for Civil Procedure' (2000) 38 *Law Society Journal* 24.

57 For example, for failing to advise the client that their case was hopeless: *Kolavo v Pitsikas* [2003] NSWCA 59 (Unreported, Stein, Santow JJA and Cripps AJA, 1 April 2003).

58 *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169, 231; *Medcalf v Mardell* [2003] 1 AC 120, 143–4; *Orchard v South Eastern Electricity Board* [1987] 1 QB 565, 580–1. See also Bill Pincus and Linda Haller, 'Wasted Costs Orders Against Lawyers' (2005) 79 *Australian Law Journal* 497.

the prospect of success of a case and to avoid unreasonable expense and delay are not generally duties that override the lawyer's duty to follow client instructions. In the law of lawyering, *responsible lawyering* obligations to the court and the speedy and efficient administration of justice are mostly treated as subordinate to the *adversarial advocate* conception of duty to the client (despite the rhetoric that the duty to the court overrides the duty to the client).

In recent years, however, courts and governments have started to give lawyers an obligation to refuse to act in cases even where a client has instructed them to go ahead after being advised of the weakness of their position. The availability of personal costs orders against lawyers in these circumstances is expanding, and some reforms have also explicitly stated that lawyers can be found guilty of professional misconduct or unsatisfactory professional conduct in such circumstances:

- In New South Wales a 2002 law prohibits legal practitioners from providing legal services on a claim 'or defence of a claim for damages unless the solicitor or barrister reasonably believes on the basis of provable facts and a reasonably arguable view of the law' that the claim or defence has 'reasonable prospects of success'.[59] Breach may constitute the disciplinary offences of professional misconduct or unsatisfactory professional conduct and a personal costs order is also available against the lawyer.
- In a series of cases, the Department of Immigration (and also the Australian Taxation Office) have sought personal costs orders against lawyers acting for clients appealing decisions of these government agencies.[60] In most cases they were unsuccessful. In 2005 the federal government inserted into the Commonwealth *Migration Act* provisions stating that a person (including a lawyer) must not encourage another person to commence or continue migration litigation if it has 'no reasonable prospect of success'. A lawyer who acts in contravention of this provision can be ordered to pay the costs of their own client and/or the other side (usually the government), or to pay back costs already received from their own client. Lawyers must not file any documents commencing migration litigation unless they certify in writing that there are reasonable grounds for believing it has reasonable prospects of success.[61] Public interest lawyers argued that these provisions would deter lawyers, especially those working pro bono, from assisting immigration clients to challenge Department of Immigration decisions.

59 *Legal Profession Act 1987* (NSW) ss 198J–198M; *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300.
60 *De Sousa v Minister for Immigration, Local Government & Ethnic Affairs* (1993) 41 FCR 544; *Guo v Minister for Immigration & Multicultural Affairs* [2000] FCA 146 (Unreported, O'Loughlin J, 23 February 2000); *Money Tree Management Services Pty Ltd v Deputy Commissioner of Taxation (No 2)* (2000) 207 LSJS 287; *Gersten v Minister for Immigration & Multicultural Affairs* [2001] FCA 260 (Unreported, Lee, Carr and Sackville JJ, 19 March 2001); *SBAZ v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1280 (Unreported, Mansfield J, 25 October 2002); *Tanddy v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 29 (Unreported, Mansfield J, 30 January 2004); *Buksh v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 32 (Unreported, Mansfield J, 30 January 2004); *Kumar v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* (2004) 133 FCR 582.
61 *Migration Act 1958* (Cth) ss 486E, 486F, 486I; Michael Stanton, 'Removing Voices from the Voiceless: The Migration Litigation Reform Act 2005' (2006) 31 *Alternative Law Journal* 25.

One problem with this *responsible lawyering* approach, as with *responsible lawyering* generally, is that it might tend to reinforce existing law and practices, even where those are unjust. It might discourage lawyers from taking on cases where they would have to argue novel interpretations of the law, challenge existing precedent or common conceptions of how the law should be interpreted, and causes where little evidence is available at the beginning of the case. It is one thing to argue that personal costs orders (and perhaps disciplinary sanctions) should be available against lawyers who are willing to assist a George Herscu to use the legal system as a way to buy time before paying a debt that would inevitably have to be paid. But what if personal costs orders or misconduct charges were pursued against *moral activist* lawyers, like those who sought to argue that the longstanding doctrine of *terra nullius* should be overturned in the *Mabo Case* so that indigenous native title claims could be recognised in Australian law?[62]

Adversarial advocacy emphasises the importance of lawyers being free from the fear of government intervention and control of their activities so that lawyers can challenge government decisions on behalf of their clients. The availability and use of personal costs orders and disciplinary sanctions might discourage lawyers from doing this. The abuse of process rules sanction lawyers for assisting in a misuse of the legal system. But from both an *adversarial advocacy* and *moral activist* perspective, it is quite proper for lawyers to use the legal system to help clients challenge perceived injustices, or to test government decision-making, regardless of the chances of success. On this view, proper but weak or hopeless cases cannot be said to 'waste' the court's and other parties' time and money, as the legal system is available precisely for that purpose. If there is an ulterior purpose to bringing the case, or for using delay and prolixity in the way it is run, then the abuse of process principles would apply anyway. The problem, as we have seen, is that proof of purpose is difficult.

There is a second problem with expanding the availability of personal costs orders and disciplinary charges against lawyer behaviour in civil litigation: Rather than these measures curbing adversarialism, as hoped, paradoxically they often become new tools for excessive adversarialism in satellite litigation.[63] Rather than defending their position in the substantive dispute itself, parties can spend even greater time and money arguing costs order applications or even seeking to have disciplinary sanctions levied against the lawyers on the other side, rather than resolving the substantive dispute between them. Thus the original *White Industries* case took three years from first initiating the action to the trial collapsing, then a further six years in court and appeals on the litigation about the costs order against Flower & Hart. Several months after the introduction of the new law in New South Wales (briefly described above), the Law Society of New South Wales reportedly issued a statement asking lawyers to stop making threats

62 *Mabo v Queensland (No 2)* (1992) 175 CLR 1. See also Peter H Russell, *Recognising Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (University of New South Wales Press, Sydney, 2006).
63 See Stephen Parker, 'Islands of Civic Virtue: Lawyers and Civil Justice Reform' (1997) 6 *Griffith Law Review* 1.

of costs orders against each other and pointing out that it is more appropriate to make an application for dismissal or strike out if one side believes proceedings are so ill-founded as to warrant a personal costs order against the lawyer on the other side.[64] It was also reported that the New South Wales Legal Services Commissioner 'has been forced to reprimand and seek apologies and retractions from solicitors who use the threat of personal costs against other solicitors to put pressure on them to drop a case'.[65]

DISCUSSION QUESTIONS

1. What justifications might there be for taking 'hopeless' public interest cases such as the Stolen Generation case (where indigenous Australians who had been taken from their parents as children and adopted out to white families or put in orphanages as part of government policies of assimilation unsuccessfully sought compensation for their suffering)?[66] Should lawyers in such cases be disciplined or made responsible for costs? If yes, under what conditions? If not, what, if any, is the difference between this and a case like *White Industries*?
2. A commentator on the New South Wales provision mentioned above has said that 'It is not difficult to imagine the Act being used against less empowered litigants, to further discourage them from bringing claims. It might also be a sword in the hands of effective legal representatives of such litigants'.[67] Should lawyers threaten applications for costs orders against each other in this way? (Think about whether such action would be considered justified by each of the four ethical approaches to lawyering – *adversarial advocacy*, *responsible lawyering*, *moral activism*, and *ethics of care*.)
3. What would you do if the lawyer on the other side was seeking such an order against you? Would you drop the client or fight? Should there be disciplinary or costs orders sanctions available against lawyers for inappropriately threatening costs orders against each other?

Conclusion

People need lawyers precisely because of the conflicts we face as we live together in society.[68] Litigation lawyers perform the frequently unattractive and uncomfortable work of representing people as they try to resolve their conflict. When a person needs to use a lawyer, they are often in the midst of conflict and not feeling the most altruistic: the work that they ask their lawyers to do is very

64 'Hearsay', *The Australian Financial Review* (Sydney), 10 September 2004, 52. Also discussed in *Levick v Deputy Commissioner of Taxation* (2000) 102 FCR 155.
65 Marcus Priest, 'Costs Orders Wielded as Threat', *The Australian Financial Review* (Sydney), 10 June 2005, 55. See also *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300.
66 *Cubillo v Commonwealth* (2000) 103 FCR 1; affirmed on appeal in *Cubillo v Commonwealth* (2001) 112 FCR 455. See also Pam O'Connor, 'History on Trial: *Cubillo and Gunner v The Commonwealth of Australia*' (2001) 26 *Alternative Law Journal* 27.
67 Jane Stratton, 'Ethical Threshold for Litigation' (2002) 27 *Alternative Law Journal* 193, 194.
68 Robert Post, 'On the Popular Image of the Lawyer: Reflections in a Dark Glass' (1987) 75 *California Law Review* 379.

likely to be aimed at cutting across the positions that other people have taken in relation to their own interests. Surveys show that people tend to be critical of lawyers in general but very favourable toward their own lawyer: they condemn lawyers for doing for others what they praise them for doing for themselves – being adversarial advocates.[69] We do not like the idea of lawyers being available as hired guns . . . until we need a hired gun ourselves!

Adversarial advocacy argues that it is not for the lawyer to rein in the client's adversarialism – that would be for the lawyer to unjustifiably limit the autonomy and rights of the client. The legal advocate is not responsible for the conflict, nor even for making sure that it stays within ethical bounds. Rather, according to *adversarial advocacy*, it is up to the client to ethically limit their own case, if they wish to. If the other side sees their opponents' tactics as beyond the bounds, then it is up to them to complain about it to the court or the disciplinary authorities. It is for the courts and disciplinary authorities to clearly enforce the boundaries of adversarialism in response. This makes the proper boundary of adversarialism in litigation itself an issue that is often only decided via the adversarial process. Moreover, it gives lawyers little role in encouraging or equipping their clients to limit their own behaviour by reference to any duty to the court or to the legal system.

Justice Ipp has argued that a lawyer is only required to do for a client what the client might 'fairly' do for him or herself, not take every point and make every argument or allegation.[70] This is in tune with the Australian Law Reform Commission's recommendation some years ago that we should move 'away from the idea that litigation is only self-seeking activity in a private sphere with lawyers there merely to oil the wheels . . .' Rather, 'the central role of the court as 'battleground' [should] be downplayed in favour of a notion of the court as a public forum in which, with the assistance of lawyers, rights and obligations of parties to litigation were determined according to law'.[71] This suggests that it should always be part of the lawyer's role, as an officer of the court, to at least *advise* the client as to the limits of appropriate adversarial behaviour in how they approach their case – in terms of both honesty to the court and fair use of process.

To what extent should lawyers go beyond this and screen their clients' cases? To what extent should they take it upon themselves to rein in adversarial behaviour by correcting client dishonesty, or refusing to act at all where a client is instructing them to act in abuse of process or in a truly hopeless case? It is clear as a matter of both legal and ethical responsibility that lawyers must not be actively and knowingly involved in deception of the court, the use of legal processes for ulterior purposes, and making baseless allegations of serious misconduct. But different ethical approaches can give quite different answers as to whether lawyers should

69 C Parker, *Just Lawyers*, 11.
70 D A Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63, 100.
71 Australian Law Reform Commission, *Review of the Adversarial System of Civil Litigation*, [11.17]; partially quoting Stephen Parker, 'Islands of Civic Virtue? Lawyers and Civil Justice Reform' (Speech delivered at the Inaugural Professorial Lecture, Griffith University, Nathan, 1996) 38.

take it upon themselves to correct their client's dishonesty against client instructions, or to screen weak or hopeless cases so as to avoid wastage of court time. Where the law attempts to put more onerous *responsible lawyering* obligations on lawyers, the adversarial system itself seems to encourage lawyers to interpret those obligations narrowly and legalistically as they apply to *themselves*, and simultaneously use them as an extra adversarial weapon *against the other side* in a way that might chill appropriate adversarial representation by other lawyers.[72] This means that taking either a strictly *adversarial advocate* or *responsible lawyering* approach to ethics in litigation is likely to lead to injustice. Lawyers need to make their own ethical decisions in the contexts of specific cases about whether duty to court or to client is more important in particular circumstances.

In the next chapter we consider these issues in a different context – defence and prosecution lawyers in criminal trials. The role of criminal defence lawyers as advocates for the rights of criminal accused against the power of the state is generally seen as the archetypical context in which adversarial advocacy by lawyers is necessary. Are there any limits to adversarial advocacy in that context?

Recommended Further Reading

Camille Cameron, 'Hired Guns and Smoking Guns: *McCabe v British American Tobacco Australia Ltd*' (2002) 25 *University of New South Wales Law Journal* 768.

G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, Pyrmont, NSW, 3rd edn, 2006) 'Ch 17: Duty to the Court' 373–403.

Tim Dare, 'Mere Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers' (2004) 7 *Legal Ethics* 24.

D A Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63.

Carrie Menkel-Meadow, 'The Limits of Adversarial Ethics' in Deborah L Rhode (ed), *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (Oxford University Press, New York, 2000).

Stephen Parker, 'Islands of Civic Virtue: Lawyers and Civil Justice Reform' (1997) 6 *Griffith Law Review* 1.

William H Simon, 'The Ideology of Advocacy: Procedural Justice and Professional Ethics' (1978) *Wisconsin Law Review* 30.

72 See Duncan Webb, 'Civil Advocacy and the Dogma of Adversarialism' (2004) 7 *Legal Ethics* 210.

5

Ethics in Criminal Justice: Proof and Truth

Introduction

Television and movies often portray criminal practice as the most glamorous speciality within the legal profession. In fact it is among the least attractive to most new lawyers – probably because defending accused criminals can be seen as repulsive and unremunerative. Yet it is for these very reasons that the criminal defence advocate is usually taken as the paradigmatic example of the reason why *adversarial advocacy* is necessary and ethically justified. As one senior barrister puts it:

> The quality of the system is tested by how it treats the worst . . . The worst, most revolting criminal or terrorist or whoever it happens to be, if you can get a fair trial for them then everyone else is guaranteed a good run. But if the system starts taking short cuts because somebody is so bad, then it's the system that's coming apart.[1]

Because the potential sanctions for criminal offences, such as deprivation of liberty, are so serious and the resources and capacity of the state to investigate and prosecute crimes so vast, our system assumes that an accused should always have the opportunity to 'put the Crown to proof' of any charges brought against the accused. In other words, the strength of the Crown must be able to be put to the test in the adversary system. This effectively holds the state (including the police and other regulators) accountable by making sure that they have strong enough evidence to justify conviction and imprisonment. It also maintains the

1 Lex Lasry QC in Gary Tippet, 'Counsel for the Condemned', *Insight*, *The Age* (Melbourne), 26 November 2005, 12; cited in Abbe Smith, 'Defending the Unpopular Down Under' (2006) 30 (2) *Melbourne University Law Review*, 495.

integrity of the criminal justice system by making sure that the accused is treated fairly. A similar rationale also applies to advocacy in other areas where the state has the power to deprive people of their liberty:

> I do refugee work because it cries out to be done. I was deeply offended by the way this country was treating refugees. I wanted to make amends for the country and try to make things better for them. It was the simple fact of locking up innocent people indefinitely that hit me like a thunderbolt . . . I saw a Holocaust documentary after taking on the Tampa case. There was a Berlin lawyer talking about Germany in the mid-1930s. He said they passed a law locking up innocent people, and that, in itself, is a terrible crime. I thought it was just plain wrong to hold innocent people on the deck of a ship in the tropics . . . The law was grossly stacked against the people I represented.[2]

To advocate effectively, it is often argued that the defence lawyer must argue passionately, as if they really believe in their client's case.[3] On the other hand, the prosecutor in the criminal trial is probably the clearest example in the law of lawyering, of lawyers being required to act as *responsible lawyers* – as 'ministers of justice' – rather than *adversarial advocates* (at least in theory, if not always in practice):

> The role of defence counsel in defended criminal proceedings is usually to seek an acquittal by any legitimate means; but the role of the prosecution is by evidence to prove all relevant facts to the court and (if appropriate) by moderately presented and reasoned steps to argue that by application of the law to those facts, the rational conclusion beyond reasonable doubt must be that the accused is guilty . . . The prosecution must assist the court to arrive at the truth. It is probably the *only* role that an advocate can perform that is dedicated to the ascertainment of the truth.[4]

Prosecutors have special duties of fairness because the prosecutor is an agent of the state, and it is not 'seemly' for a prosecutor to be adversarial in pressing for conviction in that position. As a state agent, the prosecutor generally has greater capacity and resources for investigating and prosecuting their case than the defence has for their case.

The prosecution often has greater credibility with the jury. As representative of the state, it is the prosecutor's job to present only a fair case for conviction based on good evidence, not to argue for conviction, and for a high sentence, with adversarial zeal (*Model Rule* 20.1–20.4, 20.10–20.12). Indeed the prosecution could be expected to have a role in checking the misconduct of the police or other state agents, by making sure that only fair cases based on lawfully obtained evidence are argued in court (*Model Rule* 20.8). Prosecutors also have various duties to share the evidence collected by the state with the accused in order to assist the accused and their lawyer to prepare a defence to the charges (*Model Rule* 20.5–20.7).

2 Julian Burnside quoted in ibid.
3 Smith, 'Defending the Unpopular'.
4 Nicholas Cowdery (NSW Director of Public Prosecutions), *Ethics and the Role of a Prosecutor* (New South Wales, 1997) 32.

Ethics in Criminal Justice: From Global Justice to the Local Criminal Trial

Global Ethics and Criminal Justice

At the big picture level, the ethics of criminal justice has been challenged by many issues. Both defence and prosecution lawyers and those involved in drafting criminal laws and procedures play an important part in global, as well as national and local, security and justice. Their role is to make sure the law works fairly, legitimately and effectively according to the rule of law, without ignoring fundamental human rights. There are dangers when lawyers face pressures from morally corrupt regimes to be involved in legal systems that take away those rights. Lawyers have been in the past and will again often be required to draft evil laws and as prosecutors, judges and even defence counsel, to implement those laws. This occurred in apartheid South Africa, Stalinist Eastern Europe and Nazi Germany.[5] Even acting as defence lawyers in such a system might be seen as 'legitimating' a system that should only be resisted.

In liberal democracies, the criminal justice system is under pressure as governments try to grapple with the threats of terrorism, trans-national crime, and tax evasion. Ethical challenges for lawyers in these situations are numerous. For example, should criminal defence lawyers comply with government requirements that they get security clearances before *defending* people accused on security-related charges?[6] The 'torture memos' emerging from the United States indicate the pressure government and military lawyers were under to come up with ways to justify practices that would otherwise be seen as human rights abuses: for example, those which occurred at Iraq's Abu Ghraib prison, indefinite detention in Guantanamo Bay, torture, and 'rendition' (moving prisoners to countries where they could be tortured).[7]

The US national psyche was so damaged by the Twin Towers attacks that some process of retribution was politically and perhaps socially inevitable, but the frustration with an apparent inability to successfully fight back meant that many essential elements of fairness in criminal process were deliberately set aside, in Australia as well as the US.[8] The Law Council of Australia was, to its credit,

5 On lawyers' role in apartheid in South Africa see David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing, Oxford, 1998). In the Nazi era trial in Munich of Hans and Sophie Scholl, accused of circulating anti-government leaflets, the government permitted the defendants '. . . to have an "approved" lawyer, but he was much too frightened and intimidated to put up any kind of real defence'. Both were guillotined. See Jacob G Hornberger, *Comparing USA to Nazi Germany*, The Jailhouse Lawyer <http://www.angelfire.com/az/sthurston/comparison.html> at 21 July 2006.

6 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 39.

7 See Jane Mayer, 'Annals of the Pentagon – The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted', *The New Yorker* (New York), 27 February 2006, 32; W Bradley Wendel, 'Legal Ethics and the Separation of Law and Morals' (2005) 91 *Cornell Law Review* 67.

8 *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) s 3, sch 1, amending *Australian Security Intelligence Organisation 1979* (Cth) pt III, div 3 (giving ASIO the power 'to obtain a warrant to detain and question a person who may have information important to the gathering of intelligence in relation to a terrorist activity': Australian Government, *Australian Laws to Combat Terrorism*, Australian National Security <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf> at 26 July 2006. Detention can last up to seven days, and access to lawyers is strictly regulated).

particularly critical of the Australian government's acquiescence in arrangements to establish the now discredited 'military commissions' by the US,[9] in order to deal with those detained. But this criticism had little effect. US government preference for an indefinite and judicially unsanctioned detention, agreed to by the Australian government, showed a seriously flawed approach to criminal justice and to ethical accountability.

The argument rages in the wider community as to whether public security is enhanced or undermined by treating alleged terrorists differently to 'normal' criminal defendants, but in ethical terms, it is a dangerous path to say that one class of defendant is entitled to more rights than another, or that some individuals, though not charged with anything, are nevertheless by mere implication, 'guilty' of something 'bad'.[10] What ethical approach guided the lawyers who helped to establish the Guantanamo incarceration and advised the governments on the repatriation of detainees returned to their communities without charge?

The phenomenon of terrorism raises an essential ethical issue for lawyers and especially, criminal lawyers: If dominant western states, pursuing policing exercises around the planet without a United Nations consensus, do not unconditionally accept the principle of fairness in all adjudication regarding alleged terrorists (entrenching unfairness, in fact), what message is sent to practitioners of the justice systems in those nations? What political guidance is offered to those lawyers in both government and private practice as to the ethical principles that ought to govern them? What is the point, in fact, of demanding due process in a single trial, when tarnished global ethics are setting the pace? What institutional encouragement is there, in reality, for the individual values awareness of either prosecution or defence practitioners?

Global terrorism has made it clearer than ever before that the Rule of Law, under which *everyone* is supposed to be equally protected and accountable, and which underlies every piece of substantive law taught in law school, is only as good as is the will of each government and each lawyer to insist on continuing fairness in all trial processes. Without fairness, the Rule of Law becomes a hollow, even termited, edifice. Thus there may be an ethical duty upon prosecution and defence to protest and withdraw (as *responsible lawyers* and perhaps *moral activists*) when systemic political decisions have been taken to eliminate or limit overall fairness in the drafting of legislation or the management of a trial. Suspect processes emerge by inducing participation from the legal profession. If that participation

9 See Law Council of Australia, 'Government Must Do More Over Mounting Criticism of Military Commissions' (Press Release, 3 August 2005) <http://www.lawcouncil.asn.au/read/2005/2414848000.html> at 26 July 2006. Military Commissions took away many of the rights of defendants in normal criminal trials, eg, the prohibition on hearsay evidence and the right to silence, the denial of jury trial, even the basic requirement for commission members to be legally trained. In June 2006, despite both the Australian and US governments' insistence that these commissions were legitimate, the US Supreme Court finally ruled them illegal: *Hamdan v Rumsfeld*, 548 US_(2006).

10 One of the Australian detainees at Guantanamo Bay, Mamdouh Habib, was returned to Australia after being released from three years detention without charge. The Australian government tried to discourage, under a hastily enacted law, receipt by Habib of any payment for telling his story of incarceration and alleged torture: see Michelle Grattan, 'Canberra Shackled and Shamed by Habib', *The Sunday Age* (Melbourne), 30 January 2005, 17.

is appropriately withdrawn by lawyers, in the name of fairness and compassion, legitimacy withers and that process will lose social and moral credibility as surely as night follows day.

What might happen to criminal justice if things like the 'war on terror' are pushed too far? Consider the issue of genocide. Lawyers' ethics may be implicated in mass killings when lawyers (often employed by government), remain silent about or condone genocides and then participate in compromised prosecutions of the alleged perpetrators. The German state in the 1930s was perhaps the first to systematically involve elements of the legal profession in what we now know as 'ethnic cleansing'. Starting with the drafting of national legislation to progressively de-legalise 'non-Aryans' in the 1930s (as a precursor to the Holocaust), Germans were progressively acclimatised to categorising Poles, Jews, Roma, homosexuals and others as less than human: that is, by degree, as 'cockroaches', 'insects' and finally, 'nothing'.[11] The apparatus of the German criminal law was completely subverted by a relentless legislative (and cultural) program so that, eventually, the Nazi transportation and extermination program became domestic, hygienic and even banal to the populace at large.[12] Lacking any institutional or global ethic of *moral activism* and overwhelmed by the culture of obedience to National Socialist edicts, there were then many lawyers who were simply ethically overwhelmed.

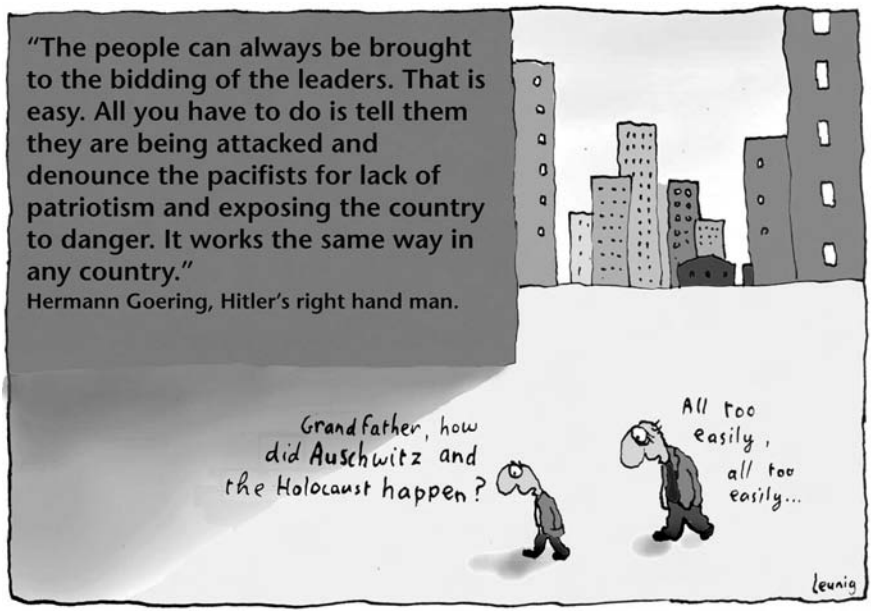
That problem remains today. Consider how easy it is for legislation – drafted with the help of legal professionals – to begin the task of marginalising those who are thought to be different. What ethical approach dominated the lawyers who drafted the recent Australian legislation describing those seeking asylum and entering Australia as refugees, as 'illegal non-citizens'? Or seeking to ensure that asylum seekers from West Papua never make it to Australia for assessment?

Hans Guggenheim, the Holocaust anthropologist, has written:

> We have no right to forgive the suffering inflicted on others, but we can show compassion for the suffering experienced by our enemies and thus lay the foundation for a better future . . . The lesson of Auschwitz is that without compassion our world is doomed . . . that it is the only way we can control our technologies of war, our greed for gold, our lust for power and domination and above all, the only way we can administer our Laws with justice for all.[13]

Guggenheim considers that for justice to be possible it must be inter-generational, inter-personal – that is, as having two sides – and it must be based on *compassion*.[14] There must be a sense of responsibility to and for the past, so that lawyers' ethical

11 See Thérèse O'Donnell, 'Review – "Law After Auschwitz: A Jurisprudence of the Holocaust" by David Fraser' (2005) 15(6) *Law & Politics Book Review* <http://www.bsos.umd.edu/gvpt/lpbr/> at 19 July 2006.
12 See Hans Guggenheim, 'Lecture to GAJE at Auschwitz' (Paper presented at the Worldwide Conference of the Global Alliance for Justice Education, Krakow, Poland, 22 July 2004) (on file with the authors); Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking Press, New York, 1964).
13 Guggenheim, 'Lecture to GAJE at Auschwitz'.
14 Ibid.



Source: Leunig, *The Age*, January 2005

consciousness is never just focused on how they behave here and now, but also on who they *were*. Secondly, lawyers can never forget that those to whom they are opposed have a right to be taken seriously. The key is for law students and then lawyers to see that all *are or may become* defendants themselves and experience the potential degradation of that position. Lawyers must be conscious not to regard themselves as 'good' and defendants as 'bad'. Only in self-identification with fear, with failure and even with their own potential for evil will lawyers realise their existential need (regardless of religious convictions) for a sense of compassion. Indeed, it is the quality of compassion which provides the ethical bridge between a global ethic and the criminal trial.

The Criminal Trial

Defence lawyers see the criminal trial as about putting the Crown to proof, but the general public often think that criminal trials (and lawyers' role in those trials) should be about discovering the truth. Public criticism of criminal trials is often uninformed and unfair. Nevertheless, there is a rarely discussed undercurrent of injustice endemic in criminal practice (assisted by some rules of conduct). This is the procedural trend towards 'managing' criminal justice systems so as to maximise the efficiency of the process and control costs by encouraging accused to plead guilty as early as possible, and make it easier to achieve convictions.

Unfortunately this risks less justice for individual defendants.[15] Cost control is the mantra. But it is also obvious that pressure from politicians and the media to try to achieve security from public execution-style murders of gangland members, large-scale drug distribution and the possibility of terrorist attack are leading to a culture of diminished personal freedoms and fewer rights for defendants generally.

The most established examples of this trend are plea discussions and judicial incentives to change pleas from not guilty to guilty. Plea discussions – under which a prosecutor and defence counsel agree to withdraw some charges in exchange for a guilty plea on others – are of long standing in Australia. Most observers think this process is acceptable, provided it does not degenerate into something like the US system where the court agrees to a definitive sentence without presiding over a proper test of the evidence.[16] Efforts by the court system to formally 'encourage' guilty pleas are far less satisfactory. Magistrates and local courts now commonly schedule so-called 'contest mention' or 'sentence indication' hearings at which the evidence is summarised by the advocates on both sides, and the defendant is then put under some pressure by the court to reflect on the likely outcome and sentence, if the plea is changed to guilty. Governments argue that precious court time is otherwise wasted by the need to schedule a lengthy defended hearing, only to find the magistrate and prosecutor idle when defendants change a plea to guilty at the last minute. There is an attractive offer of relative certainty of outcome, but a defendant must pay for a lawyer for *two* appearances if they insist on a contest (the contest mention and then the actual hearing), effectively compelling many defendants to convert to 'guilty' and avoid the cost of the second appearance. A significant part of the cost of the criminal justice process – which is likely to include some inefficiencies if justice is to be served – is therefore shifted from the state to the defendant.

In his snapshot ethics survey of twenty Australian criminal advocates published in 2003, Ben Clarke observed that there are many other indications of ethical malpractice in criminal justice, but few lawyers prepared to talk extensively about the problems.[17] Clarke's study provides a number of examples of lawyer practices that the public would see as reducing the ability of the courts to find out the truth in criminal cases:

15 Arie Freiberg, 'Managerialism in Australian Criminal Justice: RIP for KPIs?' (2005) 31 *Monash University Law Review* 12; Mike McConville et al, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press, Oxford, 1994); Mike McConville and C Mirsky, 'Guilty Plea Courts: A Social Disciplinary Model of Criminal Justice' (1995) 42 *Social Problems* 216. See also Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, Annandale, NSW, 1998).

16 Kathy Mack, 'Balancing Principle and Pragmatism: Guilty Pleas' (1995) 4 *Journal of Judicial Administration* 232. Plea negotiations should be distinguished from 'plea bargaining'. The latter practice is well-known in the United States as a bargaining process between prosecution and defence under which a defendant agrees to plead guilty to one charge in exchange for the withdrawal of other charges and the certainty of a specific sentence.

17 Ben Clarke, 'An Ethics Survey of Australian Criminal Law Practitioners' (2003) 27 *Criminal Law Journal* 142. Clarke's study received considerable media attention because of its findings: see Kate Marshall, 'Ethical Dilemmas Keep Criminal Lawyers Awake', *The Australian Financial Review* (Sydney), 13 September 2002, 56; ABC Radio National, 'The Ethics of Criminal Lawyers', *The Law Report*, 12 November 2002 <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s724128.htm> at 19 July 2006.

How does a lawyer defend the guilty client? Public incredulity over this issue usually points to a narrower question: Can a lawyer ethically argue a 'not guilty' plea for a 'guilty' client?' The profession says 'yes' on the basis that: First, in very few circumstances will a defence lawyer, faced with their client's denial, be able to be absolutely certain of the client's guilt. Secondly, even if they are so certain, it is still possible to play a limited, legitimate role designed to put the prosecution to their proof beyond reasonable doubt. The question in the mind of the community is nevertheless insistent: why spend time, court resources and/or public money (if the matter is legally aided) on a 'not guilty' plea if the best judgement of defence counsel, (even though this judgment may be slightly short of certainty),[18] is that their client is criminally responsible for the alleged crime? The final response by the profession – that guilt or innocence is for the court to determine – may be reasonable, but critics then ask why advocates are allowed by the rules to make outrageous allegations in court about others in order to defend someone, taking refuge in the principle that they do not *know*, as a fact, whether their allegations are true or false or if their client is criminally responsible? The answer is that the rules on this point are in place to ensure that fairness towards (or compassion for) the defendant, prevails. But the contrary view is that compassion should never mean unbalanced favouritism.

It has been suggested that experienced counsel are in an excellent position to make not just informed, but the *best informed* judgments, as to the truth or otherwise of their client's assertions and therefore should not be ethically permitted to run a 'not guilty' plea when that judgement convinces them that their client is criminally responsible. There may be no really satisfactory answer to this issue except to allow for the possibilities of misunderstanding by advocates as to what is said to them, different cultural and religious understandings of guilt that allow a defendant to say one thing while meaning another, and the fact that what a client thinks of as guilt will occasionally be otherwise, as in the case of someone who commits a criminal act (*actus reus*) but has insufficient *mens rea* (generally because of some form of diminished mental responsibility). While it is therefore almost certainly unwise to alter the Law Council's *Model Rules* (especially *Model Rules* 14–15, discussed below) which seek to balance the

18 The alternative possibility – lying by counsel to ensure that an innocent client is acquitted – is less likely but not altogether unheard of. For example, in the book and film *To Kill a Mockingbird*, defence attorney Atticus Finch's decision to tell a lie to ensure that an innocent man was saved from death exposes the case of justification for lying because knowledge of innocence was *certain*: see Tim Dare, '"The Secret Courts of Men's Hearts", Legal Ethics and Harper Lee's *To Kill a Mockingbird*' in Kim Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Hart Publishing, Oxford, 1998) 39. One view is that there ought to be an ethical rule that says lying by counsel is punishable no matter what, because as soon as any exceptions are allowed, the way is open to all sorts of normative situations that reduce the value of honesty to a functional zero: see T A Zlaket, 'Conference Proceedings on Professionalism' (Paper presented at the Conference on Professionalism, Savannah, Georgia, 20–21 October 2000) 535, 536–8 (arguing that the 'noble lie' example bears little relationship to the day-to-day problems in court: once exceptions are allowed, 'you can kiss the rule goodbye').

ethical obligations of counsel in this area of criminal defence, it is surely appropriate to require a positive educative process in values' awareness among criminal counsel, to improve the chances that they will give serious consideration as to what they actually *know* about their clients' actions and what they should actively enquire about.

- In practice, clients are often deliberately silenced by a lawyer when it is likely that they are about to be 'told something privately' (that is, the client is about to confess) which might set up a conflict between their duties of candour (to the court) and confidentiality (to their client). Despite *Model Rule* 14.1 ('A practitioner must not knowingly make a misleading statement to a court') and 14.2 ('. . . correct any misleading statement . . .'), 70% (fourteen) of Clarke's respondents admitted to this practice and *thought it ethical*. Clarke is possibly over-generous in his comment that the practice is 'complex'.[19] In fact, pretending to ignorance among defence counsel is likely to be a major ethical failing by the profession. Clarke describes lawyers silencing their clients as the avoidance of 'precluding a client from running a successful defence'.[20] However he does acknowledge that this practice might prevent the taking of full instructions. In fact, experienced practitioners, having been caught out early on in their careers and, possibly feeling guilty for past silence, usually do not even allow the situation to arise. They inform a new client in a general introductory statement that the client is not to say anything or volunteer any information, apart from answering the lawyer's questions. If a lawyer learns after an acquittal of murder, of the guilt of a client, most (75%) in Clarke's study would consider they are bound to keep the confidence. In other words, Clarke's survey discloses lawyers' comfort with technical adherence to the rules in the hope that the court will be perceptive enough to recognise any deception by the client. Are lawyers risking subversion of the court with this practice in order to preserve client confidentiality? Is that risk acceptable?
- Another recurring problem is that some advocates lengthen cases to an extraordinary degree, without concern for the process of justice. In *R v Wilson*,[21] for example, the trial and re-trial of two businessmen charged with corporate fraud, the delaying actions of counsel for the defendant Wilson were considered responsible by the court for the bulk of *22 months'* court time, while the prosecution was 'deplored' in the retrial [for *reading* to the jury] '. . . over some ten calendar weeks', the evidence of the defendants at their first trial.[22] This is surely one of the worst cases of *adversarial advocacy* dominating *responsible lawyering*.
- Aggressive tactics are not uncommon – for example, undue pressure is put on witnesses by insulting them (contrary to *Model Rule* 16.1 'making

19 Clarke, 'An Ethics Survey', 148. See also Kenneth Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work* (Yale University Press, New Haven, 1985) 103–18 (evidence of US lawyers in white-collar criminal defence doing the same thing).
20 Clarke, 'An Ethics Survey', 148.
21 [1995] 1 VR 163.
22 David Parsons and Mark Taft, 'Review of Judgments' (1994) 68(9) *Law Institute Journal* 863.

allegations or suggestions under privilege . . . [that are not] reasonably justified or are inappropriate for the robust advancement of the client's case on its merits . . . [or are] made principally in order to harass or embarrass').

- A variation on this problem is that of the incompetent or lazy defence, where advocates, for their own reasons, and despite *Model Rule* 12.1 ('. . . advance and protect the client's interests to the best of the practitioner's skill and diligence . . .'), are clearly unconcerned to attend properly to their client's defence. In *R v Kina*,[23] for example, there was a complete failure of defence counsel to aggressively or competently represent an Aboriginal woman who had killed her de facto husband after shocking and sustained provocation.
- Coaching witnesses is routine despite *Model Rule* 17.3 ('. . . must not coach or encourage the witness to give evidence different from the evidence which the witness believes to be true'): 35% (seven) of Clarke's respondents admitted to this practice.
- Jury nullification is used as a defence tactic, that is, juries are distracted from considering cogent prosecution evidence by focusing them on emotive issues such as personal or racial intolerance of a prosecution witness or remote possibilities of crime scene contaminants. Case Study 5.1 below, *R v Neilan*, illustrates how this problem can occur in practice. 'Demolition' of rape victims occurs in the witness box. The Victorian Law Reform Commission has recommended changes to case procedure such as '. . . judges should have a duty to protect children and people with cognitive impairment from misleading, confusing and intimidating questioning'.[24]
- Some counsel do not welcome the idea of 'cab rank rule' obligations to defend anyone in a paedophile or rape prosecution. The *Model Rules* do not contain an equivalent to the cab rank principle in State-based rules for barristers[25] – that is the rule that barristers cannot refuse a brief if they are competent in the area and available – but the principle that full-time advocates shall accept all comers as clients is so well ingrained that it is regarded as a norm of practice.[26]

The *Model Rules* (insofar as they relate to advocacy) begin with an impeccable general statement which encourages both competence and best ethical practice in all advocates:

> Practitioners, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, should act with *competence, honesty and candour*. Practitioners should be frank in their responses and disclosures to the court, and diligent in their observance of undertakings which they give to the court or their opponents.[27] [our emphasis]

23 [1993] QCA 480 (Unreported, Fitzgerald P, Davies and McPherson JJA, 29 November 1993).
24 Victorian Law Reform Commission, *Sexual Offences Final Report: Summary and Recommendations in Plain English* (Victorian Law Reform Commission, Melbourne, 2004) 8.
25 See, eg, r 87 of the Victorian Bar Council, *Practice Rules* (The Victorian Bar Inc, Melbourne, 2005) 16.
26 See Smith, 'Defending the Unpopular'.
27 From the preamble to 'Advocacy and Litigation Rules', *Model Rules*.

Honesty and candour are the core concepts in this general statement, but many of the Rules and the common law, and the way they are applied in practice, do not obviously or consistently endorse these priorities in criminal advocacy. In the following subsections we consider the rules for defence and prosecution advocates in more detail.

The Defence

Although many of the Law Council's 'Advocacy and Litigation Rules' (*Model Rules* 12–20) do not expressly refer to the prosecution or defence of criminal cases, their context and application make it clear that the obligations of defence counsel in criminal trials are their primary concern.

Model Rule 13.1 refers to the need for candour in its requirement for 'independence':

> A practitioner must not act as the mere mouthpiece of the client or of the instructing practitioner and must exercise the forensic judgments called for during the case independently [of the client] . . .

This means that it is not permissible to simply do as the client wants – for example, lead evidence of an alibi which counsel thinks is very likely to be false – if the effect of that action would be to ignore the requirement for candour with the court. As far as it goes, this rule is credible and reflects the proper priority of *responsible lawyering* over a*dversarial advocacy*.

Similarly, *Model Rule* 13.3 requires a practitioner to avoid making any submissions or expressing any views to a court '. . . on any material evidence or material issue . . .which convey . . . the practitioner's personal opinion on the merits of that evidence or issue'. This rule also supports lawyer independence by prohibiting lawyers from giving personal opinions about cases. It is no surprise that such a rule is needed, since we are all familiar with the stereotypical (and usually foreign) attorney who comments 'zealously' on witnesses and their evidence in closing addresses to a jury. But it is perhaps not so clear that there is a fine line between negative comment on witnesses or evidence, having regard to objective criticisms that can be made of their credibility or recollections, and reflections on witnesses or their evidence that appear to target irrelevant matters or come from the private views of the advocate. The problem arises here not from the rule itself, but from its implementation.

One of the criticisms of this *Model Rule*, and similar local versions in each jurisdiction, is that it is increasingly ignored and rarely enforced. Senior advocates comment that there is a tendency not only to cross the line by implying a negative personal opinion of a witness, but also to undermine an opposing police witness in front of a jury – 'to play the man, not the ball', as the sexist phrase goes – by repeatedly asking them to give opinions on matters of fact and then self-righteously correcting the process by insisting that they did not intend to put

any opinion in front of the jury. Some of the conduct in *R v Neilan*, Case Study 5.1 below, was probably an example of this type of behaviour. On occasion, an appeal court will comment negatively on this tendency, but by then the consequences for the advocate concerned are minimal and only those with an intimate knowledge of the case are aware of the possible transgression. Since the values of the Bar do not yet support whistleblowers, *Model Rule* 13.3 suffers from a lack of comprehensive enforcement.

Advocates are also not supposed to knowingly mislead a court (*Model Rule* 14.1). They may be excused from doing so 'unknowingly' if correction is made 'as soon as possible' (*Model Rule* 14.2). But an advocate '. . . will not have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by the opponent or any other person' (*Model Rule* 14.3). This rule is most often used to advantage by defence counsel when a prosecutor fails, usually because their information is incomplete, to mention relevant prior convictions to a judge and the judge gives a lighter sentence to a defendant as a result. Case Study 5.1 below is an example of this occurring. In fact, there is a specific reference to the prior conviction circumstance in *Model Rule* 14.11, which permits silence by defence counsel, providing they truly remain passive and do not specifically ask a prosecution witness whether there are relevant 'priors', in the expectation of receiving a negative answer. These 'mere silence' rules are so well-established that they are unlikely to be overturned by any court, but there is a real case to review *Model Rule* 14.11. Since the modern trend in legal ethics gives primacy to the duty to the court (the *responsible lawyer*) – with the duty to the client increasingly taking second place – the notion that mere silence is still acceptable, in the face of error by the other side, ought to be re-examined by the regulators.

A good example of a *Model Rule* which allows the increasing distortion of the process of justice in criminal trials is *Model Rule* 14.10:

> A practitioner will not have made a misleading statement to a court simply by failing to disclose facts known to the practitioner concerning the client's character or past, when the practitioner makes other statements concerning those matters to the court, and those statements are not themselves misleading.

The permission granted to defence counsel to keep quiet – even though it is conditional on counsel not affirmatively implying any falsehood *and* also on counsel making other statements which *are* correct – is only of any practical use to a defendant when the hidden facts would give rise to a reasonable implication causing doubt in the mind of the court about a defendant's character. *Model Rule* 14.10 allows the court to remain in the dark, fed an incomplete diet of information simply because one side knows more than the other.

Similarly, on the surface, *Model Rule* 15.1 seems to make a mockery of any sense of truth and justice in criminal trials by providing that counsel should keep a confession by a defendant secret from the court when it is made in the course of a trial, unless the client agrees to its disclosure:

15.1 A practitioner whose client informs the practitioner, before judgment or decision that the client has lied in a material particular to the court or has procured another person to lie to the court or has falsified or procured another person to falsify in any way a document which has been tendered:

15.1.1 must advise the client that the court should be informed of the lie or falsification and request authority so to inform the court;

15.1.2 must refuse to take any further part in the case unless the client authorises the practitioner to inform the court of the lie or falsification:

15.1.3 must promptly inform the court of the lie or falsification upon the client authorising the practitioner to do so; but

15.1.4 must not otherwise inform the court of the lie or falsification.

15.2 A practitioner whose client in criminal proceedings confesses guilt to the practitioner but maintains a plea of not guilty:

15.2.1 may cease to act, if there is enough time for another practitioner to take over the case properly before the hearing, and the client does not insist on the practitioner continuing to appear for the client;

15.2.2 in cases where the practitioner continues to act for the client:

(a) must not falsely suggest that some other person committed the offence charged;
(b) must not set up an affirmative case inconsistent with the confession;
(c) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;
(d) may argue that for some reason of law the client is not guilty of the offence charged;
(e) may argue that for any other reason not prohibited by (a) and (b) the client should not be convicted of the offence charged.

In fact there is a cogent *responsible lawyering* justification for this restriction on the truth, as illustrated by the Northern Territory case of *Tuckiar v The King*[28] decided more than seventy years ago. In that case an Aboriginal elder was charged with the murder of a policeman in Arnhem Land. Tuckiar, or Dhakiyarr as he was and is now known in his community, had come upon the policeman as he (the policeman) was taking Dhakiyarr's wife away in chains, during a search for other Indigenous people who were suspected of killing some Japanese fishermen. According to tribal law, the action of the policeman was probably a 'taking' and therefore Dhakiyarr's intervention was justified.[29] Dhakiyarr speared the victim, narrowly missing his wife and young child in the process.

He was captured and tried in Darwin. However, it was only during his trial that Dhakiyarr communicated to his counsel, through an interpreter, enough of the circumstances of the spearing to produce a hasty and uninformed reaction in the lawyer. The now infamous advocate immediately got to his feet in front of the jury and stated that he was in '. . . the worst predicament he had encountered in all his legal career' (code for 'my client did it') and needed to speak to the judge.[30]

28 (1934) 52 CLR 335.

29 As explored in the documentary *Dhakiyarr vs The King* (Film Australia, 2004). See also Tom Murray, *Dhakiyarr vs The King: Study Guide* (Film Australia, 2004) <http://www.filmaust.com.au/programs/teachers_notes/8660_dhakiyarrnotes.pdf> at 30 June 2006. The documentary makes the point that 'two laws' operated in Arnhem Land at the time and that Dhakiyarr did not realise that his 'law' was no longer dominant.

30 *Tuckiar v The King* (1934) 52 CLR 335, 341.

Counsel did not argue any defence on Dhakiyarr's behalf throughout the case and his client was subsequently convicted.

On appeal to the High Court, there was a unanimous decision that advocates are bound to keep silent in such circumstances and continue with fully testing the prosecution case, although they must avoid putting their clients in the witness box to give affirmative evidence of innocence. Dhakiyarr won his appeal on the basis that his advocate's statement to the court had produced a substantial miscarriage of justice (not that Dhakiyarr's actions were, by the standards of the day, acceptable). He was released, never to be seen again.[31] As a result of the appeal, however, it is clear that the duty of confidentiality binds advocates' actions providing no active misleading of the court occurs. In other words, fairness does dominate. The irony of Dhakiyarr's case, apart from the tragedy of the clash of two uncomprehending cultures, is that his own evidence, had he been allowed to give it, might have caused a modern jury to think he was not guilty, though this result was probably most unlikely before a jury in 1930s Darwin.

As the High Court explained in *Tuckiar's* case, the principles set out in *Model Rule* 15 are designed to retain for even the 'guilty' client some representation before the court, in the interests of ensuring that the continuing prosecution is as fair as possible. This objective is achieved by the practical difficulty in which defendants find themselves if their advocate withdraws because they have lied to the court, a circumstance which is carefully explained to them by the (majority of) advocates who take the rule seriously. Even hesitant clients usually consent to disclosure and rectification of the lie when they realise that the effective penalty for non-co-operation will be the withdrawal of their advocate from the trial (*Model Rule* 15.1.2), a circumstance which most quickly understand will communicate something of their guilt to the jury. The issue which the *Model Rules* do not handle well is the possibility of some deceit upon the court, because the lawyer who withdraws must do so without formally advising the court of the reasons. Some juries may not understand what is happening and some judges, in their anxiety to avoid what they see as a likely guilty defendant escaping judgment, can misdirect juries and leave the verdict subject to appeal on that basis.

If a client calls the bluff of their lawyer and refuses to convert their plea to guilty after confessing to their lawyer that they have lied to the court, do all advocates simply depart from the case and keep silent? The answer is unknown, though Clarke's study suggests that some may stay. However, there may not be too many advocates who, once made aware of apparent lies by their client, are content to let that knowledge simply evaporate. Most experienced advocates realise only too well that criminal defendants have a habit of reappearing before courts from time to time and, facing custodial sentences for other offences, have little to lose and something to gain from reminding that advocate of their prior knowledge. Should an advocate pretend they know nothing after hearing a confession or learning

31 Dhakiyarr's descendants have since claimed, though been unable to prove, that he was killed shortly after his release by those unhappy with the decision of the High Court: *Dhakiyarr vs The King*.

from their client of falsified evidence by others, they would for ever after leave themselves vulnerable to blackmail by that client. In short, the reputation of a criminal advocate within criminal circles is nearly always too important to leave to chance. *Model Rule* 15.1 is generally an effective, but not always complete, antidote to the problem which *Tuckiar* exposed.

Model Rule 15.2 deals with the necessary consequences for the trial when the advocate does not withdraw after hearing a 'confession' from their client. This rule properly allows such an advocate to continue to act providing they confine themselves to testing the prosecution's evidence (*Model Rule* 15.2.2(c–d)) and avoid leading affirmative evidence of innocence (*Model Rule* 15.2.2(a–b)). Evidence (for example, DNA evidence of identity) must still be tested because it might be flawed. If such evidence is flawed, perhaps the alleged 'confession' was also contrived or misunderstood? Advocates are also supposed to avoid putting such clients in the witness box and asking them whether they are innocent or not, knowing their assertion of innocence will be false, because that is equivalent to actively misleading the court. Of course, the fact that the defendant does not give evidence is likely to be seen by most juries as a sign of guilt.

The Prosecution

The focus of criminal justice has for a very long time culturally favoured the nobility of the defence role. Prosecutors, however, have lacked values-based scrutiny of their function. As noted in the Introduction, however, the times are changing.

Recognition of the penetration of organised crime into the Australian community and the politicisation of the so-called 'war on terror' have produced a climate where the role of 'protector of the state' (for want of a better phrase) is now rapidly acquiring a desirable status that has previously been confined to the United States. In Victoria, for instance, where public consciousness of the impact of organised crime has grown rapidly, the general prosecution function is now more powerful than ever with the advent of police powers that permit indefinite detention of witnesses who will not answer questions, a function previously thought safe only in the hands of Crime Commissions.[32] Similarly, the ability of the Australian government to detain anyone incommunicado for up to a week of interrogation when they are suspected of having information regarding terrorist activities[33] may or may not be justified, but such powers indisputably add to the moral authority of the prosecution function. Where once law students would see a decision to become a prosecutor as inexplicable, there are now many who are excited by the prospect. As will be seen in Case Study 5.3, prosecutors do face tactical choices in the exercise of the prosecution function and, as always, those choices are value-driven and ought to reflect the Rule of Law. It is still

32 See, eg, *Major Crime (Investigative Powers) Act 2004* (Vic) (giving the Victorian Chief Commissioner of Police powers previously only possessed by crime commissions in other states).
33 *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) s 3, sch 1, amending *Australian Security Intelligence Organisation 1979* (Cth) pt III, div 3.

essentially the prosecutor's duty to hold the police accountable for the way they use their powers, all the more so now that police and other state instructors operate with ever-widening coercive powers of investigation.[34] In a changing balance of power between prosecution and defence, it is proper to spend a little time understanding prosecutors' current value structures, before moving to the possible alternatives.

Rule 20 deals specifically with prosecutors' duties. *Rules* 20.1–20.4 set out the approach that the prosecutor should take in arguing their case:

> 20.1 A prosecutor must *fairly* assist the court to arrive at the truth, must seek *impartially* to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.
> 20.2 A prosecutor must not press the prosecution's case for a conviction beyond a *full and firm* presentation of that case.
> 20.3 A prosecutor must not, by language or other conduct, seek to *inflame or bias* the court against the accused.
> 20.4 A prosecutor must not argue any proposition of fact or law which the prosecutor does not *believe on reasonable grounds* to be capable of contributing to a finding of guilt and also to carry weight. [our emphasis]

When students first see these rules they are often slightly amused at their quaint expression and more than a little frustrated. If the defence can argue for extreme positions or interpretations of the evidence, why can the prosecution not do so? Certain news and current affairs media appear to reinforce the view that a successful defence of almost any defendant is part of a social disease rather than a check on over-zealous state power. Are these principles of restraint too old-fashioned to worry about? After all, the interests of the state and the safety of its citizens have never been so threatened, or so it is argued.

Whatever the current cultural push to achieve convictions at all costs, whatever the personal attraction of a successful prosecution and regardless of popular pressure to 'safeguard' person and property, there is no alternative in a democratic environment to a balanced prosecution process. If the prosecution function is allowed to become partisan, the burden of proof will subtly shift to the defence and the power of the state will prove inexorably more difficult to check. Prosecutors are supposed to stop at a 'full and firm' presentation of the case; they must not 'inflame or bias the court' (including the jury) against a defendant; and must 'believe on reasonable grounds' in the propriety of their arguments. All of these safeguards have been put in place because earlier generations have seen what can happen to individual autonomy and freedoms once the court system becomes just the instrument of the government of the day.

The stereotypical pressure to get a conviction at all costs is not endorsed by the *Model Rules* and is therefore completely unacceptable in the Australian legal

34 David Brown, 'Breaking the Code of Silence' (1997) 22 *Alternative Law Journal* 220, 222 (asking why prosecutors and lawyers did not speak up about massive police corruption in New South Wales during the 1980s and 1990s).

system. Just how careful a prosecutor must be to remain a prosecutor and – as cultural pressure can increasingly dictate – avoid becoming a persecutor, is made clear by the *Model Rules* in the context of sentencing:

> 20.12 A prosecutor must not seek to persuade the court to impose a *vindictive* sentence or a sentence of a particular magnitude, but:
> 20.12.1 must correct any error made by the opponent in address on sentence;
> 20.12.2 must inform the court of any relevant authority or legislation bearing on the appropriate sentence;
> 20.12.3 must assist the court to avoid appealable error on the issue of sentence;
> 20.12.4 may submit that a custodial or non-custodial sentence is appropriate; and
> 20.12.5 may inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant appellate authority. [our emphasis]

All of these 'informing the court' functions are to be performed by prosecutors without inflaming the situation, that is, without becoming 'vindictive'. Courts are not empowered by the Rule of Law to seek revenge, which is by definition a personal reprisal, but to impose proportionate punishment in a dispassionate atmosphere. There is quite a difference between the two, and prosecutors are expected to model that distinction in their own behaviour, balancing personal detachment with controlled strength rather than snarling or sarcastic commentary on the morality of the defendant. Prosecutors with a clear sense of their role need to be wary of *adversarial advocacy* and pay consistent attention to nurturing alternative ethical values in their advocacy. This is all the more important given that prosecutors are rarely disciplined, let alone subsequently prosecuted themselves, for breaking the rules.

Case Studies

The values of criminal advocates are probably as diverse as those of the rest of the community. There is no empirical evidence to suggest that criminal advocates are all *adversarial* all the time or, on the other hand, all *responsible* all the time, let alone inclined to take a universal *morally activist* approach and decline to act for any clients who refuse to 'do the moral thing'.[35] It is more likely that experienced advocates will tend to take one ethical approach most of the time, varying their behaviour on occasion, when the complexity of the situation demands. It may be appropriate that the *Model Rules* and the common law seek to strike a balance between duties to client and court, but they still give conflicting messages as to the values to apply in criminal advocacy. Rather than simply trying to rely on these, sometimes conflicting, rules it is therefore important to be aware of alternative ethical approaches to criminal trial work. Since the dominant ethic in criminal practice is adversarial, it will often be the case that the alternatives – *responsible*

35 See Smith, 'Defending the Unpopular'.

lawyering and *moral activism* – will be invisible, unless lawyers explicitly bring ethical reflection to the foreground of their minds.

Further, since the enforcement of rules of advocacy in Australia is more or less left by the courts to the legal professional associations and advocates tend not to report one another, it is not unusual for their bad ethical decisions to go unnoticed by the wider community: advocates' ethical decisions are not very accountable. The case studies below each demonstrate the need for criminal advocates to remain alert to the risks of unquestioning *adversarial advocacy*.

CASE STUDY 5.1 The Defence: *R v Neilan*[36]

In the late 1980s, Mark Neilan was a successful veterinary surgeon in the Victorian town of Drouin, where he lived with his wife Kathryn and a young daughter, Sheridan. One night, according to Neilan, intruders broke in, took him outside and, while bundling him into the boot of his car, went to the main bedroom and apparently shot Kathryn, then four months pregnant, in the head. Sheridan was left undisturbed in bed. A neighbour found Neilan locked in the boot of his car the following afternoon. As soon as he was released from the boot, he entered the house and exclaimed, 'Oh Kathy, oh no' when he saw her body. A search for the intruders or any physical evidence of their presence in the house revealed nothing, though a break-in at Neilan's nearby veterinary practice in the town, which apparently occurred on the same night, resulted in some money and a small quantity of Valium disappearing.

Neilan later made various inconsistent statements about when he had first seen the intruders on the night of the murder. The police came to disbelieve his version of events, and charged him with his wife's murder. He was bailed and then two strange things happened. First, some weeks after his release on bail, Neilan claimed to have positively identified one of the intruders at Chadstone shopping centre, prepared a sketch of the sighting at his own expense and advertised for anyone who might know the face. Secondly, about nine days after the advertisement appeared, one of Neilan's dogs, a Border Collie, was shot and killed while he was apparently away from home. The bullets came from a semi-automatic .22 rifle, the same type of gun that had been used to kill Kathryn – a gun that had not then and has never since been found. Neilan asserted that his advertisement had provoked the murderers into killing his dog as a warning to him to leave the murder alone, but the police believed that the incidents were manufactured by Neilan to support his story that the intruders, looking for drugs and money in the area on the night of the offence, were responsible for the killing. The major difficulty for the police, however, was that they could not suggest, let alone prove, any motive at all for Neilan to murder his wife.

When Neilan was eventually brought to trial, he asserted through his counsel that he knew nothing more about the death of his wife than he had already indicated. Significantly, he declined to give personal evidence in his own defence, but did call other evidence. His counsel relied on the lack of motive, witnesses or confession, and concentrated on characterising the prosecution case as entirely circumstantial, even prejudicial and vindictive on the part of the police. Nevertheless, Neilan was convicted.

Of ethical significance in this case is the effort to which defence counsel went to criticise the police witnesses. Neilan was facing the real hurdle of persuading the jury

36 [1992] 1 VR 57.

that he was innocent, while at the same time declining to give evidence about matters that only he could clarify: what happened on the night. A formidable task therefore lay ahead of defence counsel and a device of some sort was needed to capture, or rather divert, their attention. Counsel attempted to persuade the jury that the police, lacking a motive, had been engaged in nothing more than a series of speculations about what really happened, leaving them with the impression that no one could be certain of events on the night of the murder. In the event, however, this strategy failed, probably because the silence of the defendant was just too much for the jury to swallow.

Neilan unsuccessfully appealed his conviction on a number of grounds and in the course of the Court of Criminal Appeal's judgment, their Honours referred to the defence strategy of distraction or nullification:

> A very strong attack was made by the defence on Noonan [a police witness]. It was suggested to him that he had shut his eyes to everything that was in favour of the applicant and assumed his guilt . . . that he had put forward and acted upon theories with regard to the crime which were far-fetched . . . It was not that Noonan sought argumentatively to support the Crown case or attempted to introduce tendentious matter: senior counsel for the applicant forced him to express opinions and in effect to debate with him a number of questions . . . The cross-examination was highly unusual, amounting as it did on occasions to a debate between the police officer and counsel, and moreover a debate which was of counsel's making.[37]

There is a rule of evidence that witnesses, other than experts (and the police witness Noonan did not qualify as an expert in this case), must confine their evidence to factual observations of which they have personal knowledge. Knowing this rule only too well, counsel for Neilan invited the police witness to express an opinion on an issue of fact and, when the witness, after having been exposed to earlier questions of this type, duly provided that opinion, counsel immediately applied for discharge of the jury.[38] Although the request was refused by the trial judge, the seed could have been sown with the jury that, on the basis that opinion evidence had been given, there were other police theories about the crime and any of these theories, in the 'real' minds of the police, were all contenders. In other words, the jury were invited to reflect on the possibility that the police were not certain if the defendant was the murderer.

The Court of Criminal Appeal considered whether the trial judge ought to have reined in defence counsel or done more to counter the effects of the cross-examination, before deciding on balance that the jury had other bases on which to determine that the defendant was guilty. However, the Court was most critical of the strategy of the defence and said so at length, because this strategy of persistent invitation to the police to give opinion evidence, knowing such evidence was arguably inadmissible, was designed only to poison the jury's mind as to the motives of the prosecution.

As with so many other cases where counsel take an ethically suspect stance, however, appeal courts tend to confine themselves to criticism within the case context and rarely refer matters to the regulators – the legal professional associations – for investigation as to whether any misconduct that ought to be disciplined has occurred.

37 In the reported decision of *Neilan* (ibid) the comments of the Court of Criminal Appeal as to the conduct of defence counsel were edited out. However, the unreported decision explains the matter fully: see *R v Neilan* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, Brooking and Marks JJ, 5 April 1991) 67.

38 See *R v Neilan* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, Brooking and Marks JJ, 5 April 1991) 68.

DISCUSSION QUESTIONS

Imagine you were defence counsel for Neilan:

1. Given the facts set out above, what instructions do you think it is likely you would have received from your client?
2. What would have been your advice to the defendant as to the best approach to take to the defence of his case?

Assuming your client was insistent on pleading 'not guilty':

3. Would you decide to criticise the police for their lack of a motive for the killing?
4. Would you think it appropriate to try to persuade the jury that the police were targeting your client unfairly, or casting around for a defendant – any defendant – without any real idea as to who was responsible?

If you thought it appropriate to point out to the jury that the police had nothing absolutely 'concrete' on your client:

5. Would you think it acceptable to point to an ulterior motive by the police and do so by highlighting their opinions, rather than the facts, about the evidence?
6. In representing Neilan, would you see yourself as an *adversarial advocate* (and obliged to make serious allegations about the police in order to throw doubt in the mind of the jury), or someone concerned to ensure that the jury deals only with admissible evidence, in making their decision? Why? What difference would each make to your strategy in the case?

CASE STUDY 5.2 Prior Convictions

If Neilan was probably a case of excessive zeal, there are other examples of experienced criminal advocates who will identify an ethical line which advocates may go up to, but never cross. A former Victorian Supreme Court judge, 'A', cites this case from his own history while at the bar in the 1960s.[39]

Prior to the legislation prohibiting driving with a blood alcohol reading of more than 0.05, A had a client with a number of drink-driving convictions at a time when such a history, if proved, would result in a defendant going to prison for the next offence. However, most of these convictions were interstate, and the prosecution could therefore not then prove those convictions except through a long and complex process. Since defendants are entitled to insist that the prosecution be put to its proof beyond reasonable doubt in all matters, A stated to the Court, when his client was asked by the prosecution about the convictions, that 'on my advice, my client does not admit these convictions'. The prosecution did not wish to go to the expense of the formal proofs. The defendant was accordingly sentenced as if he did not have the drink-driving convictions and therefore, did not go to prison.

The former judge argues that his response was not unethical because of the overarching principle that obligates prosecutors to prove their case and defence counsel to insist on that process. The magistrate at the time was initially angry, but, A believes he subsequently accepted the legitimacy of A's approach. This case study provides a good illustration of the requirement for 'complex judgement' in ethical decision-making. The values agenda embedded in this example is very stark: Is the more important value to support the social principle of the onus of proof upon the prosecution (for powerful

39 Interview with 'A', former Victorian Supreme Court judge (Melbourne, 2004).

systemic reasons represented by the *adversarial advocacy* approach), or is it more important to serve the (utilitarian and *moral activist*) value of ensuring that a multiple drink-driver is removed from society? Regardless of the correct view, the *process of weighing up* these alternative loyalties is to be commended and emulated consciously each time a hard case arises.

DISCUSSION QUESTIONS

1. If your client was facing sentencing for an excessive blood alcohol level and you knew that the prosecution was unaware that your client had some prior convictions for similar offences, would you consider yourself bound to advise the Court of the true position?
2. Would it make any difference to your decision if you had reached the conclusion that your client had little awareness of their behaviour and would offend again, unless they were ordered by the court to undergo a medical assessment, in response to your disclosure of the prior convictions?
3. Suppose you have just 'gone to the bar' and this brief was the only one you had been offered in the last three weeks, would your decision be any different?

CASE STUDY 5.3 Prosecutors' Values

Former judge A also recalls a murder trial that relates to the duty upon prosecutors. In the trial, insanity had been raised as a defence and a then renowned forensic psychiatrist was called to give evidence for the prosecution as to the mental state of the defendant. He said that 'on the balance of probabilities', the defendant was not insane. Counsel for the prosecution (a private barrister, *not* a full-time Crown prosecutor) had in his possession, but did not disclose to the defence, a report from the psychiatrist in which he had said that the defendant was sane on a '51/49%' estimate of the probabilities: in other words, the defendant might just as well have been insane as sane.

The defendant was convicted but committed suicide shortly afterwards. The death exposed the forensic strategy of the prosecution as likely to have been flawed. Desire for conviction for its own sake, rather than for a finding of guilt mitigated by insanity, must have seemed a very hollow victory to the prosecutor, on learning of that death.

In the interests of justice, if not compassion, A considers that the report should have been made available to the defence by the prosecution. Today, prosecution pre-hearing disclosure rules (*Model Rule* 20.5) would require disclosure of such a report. However the thoroughness of prosecutors' compliance with this mandated disclosure is still a matter of concern to defence counsel.

On the other hand, former Liberty Victoria President, Greg Connellan, cites a case he prosecuted of a truck driver accused of raping a hitchhiker. In the defendant's record of interview he had said 'I can't help myself'. Connellan was tempted to use this admission in his summing up to the jury and states that he could have got away with it, but decided against it because, in the context of the whole of the record of interview, the comment related only to the accused's homosexuality, not to the alleged assaults.[40]

40 Interview with Greg Connellan of Counsel, former Liberty Victoria president (Olinda, Victoria, 2004). Connellan cites *R v Rugari* (2001) 122 A Crim R 1 as an example (with some arresting passages from the summing up of the Crown Prosecutor) of a case where an appeal against conviction was allowed because of the failure of the prosecutor to toe the line in his summing up.

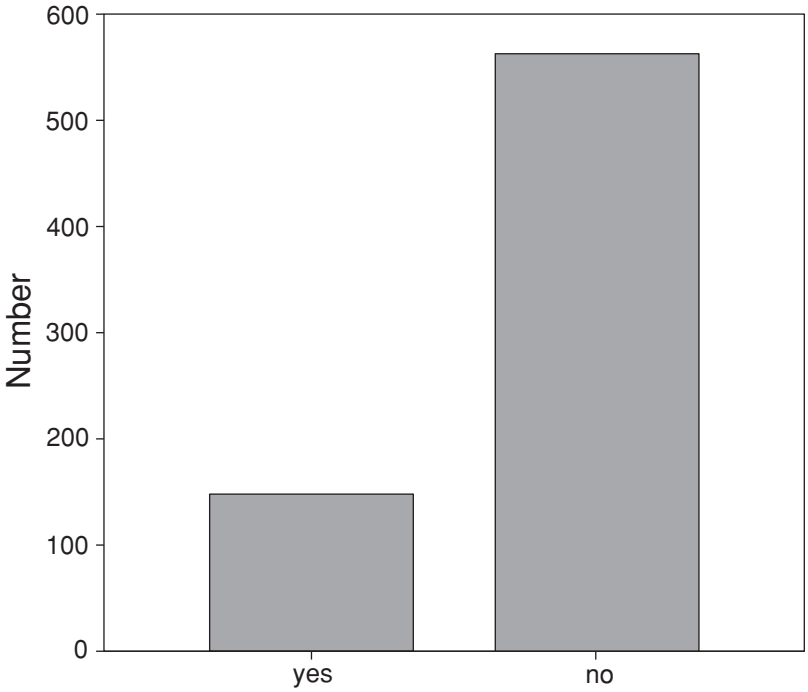


Figure 5.1 Number of Respondents to the Australian Lawyers' Values Study Who Would Report Daughter's Drug Offence[42]

These contrasting examples of prosecutors' values can be seen in the context of recent research into law students' values. Several hundred final-year law students from around the country were asked to imagine what they would do in the following situation:

> You are a DPP [Director of Public Prosecutions] prosecutor who has concentrated on drug trafficking cases. You have argued to many juries that every case of drug dealing harms society and must be reported and dealt with by the Police. You discover that your daughter has been selling cannabis to other students at her school. Your partner implores you not to report the matter and threatens to end your relationship (already strained by overwork) if you do. **Would you report the matter to the Police?**[41]

The results were neither surprising nor encouraging, with a large proportion of law students (78.1%) choosing to remain silent (see Figure 5.1).

DISCUSSION QUESTIONS

1. If you had the choice, would you prefer to be a prosecutor or a defence advocate? If the former, would you see yourself as entitled to prosecute with as much vigour,

41 Adrian Evans and Josephine Palermo, 'Australian Law Students' Perceptions of Their Values: Interim Results in the First Year – 2001 – of a Three-Year Empirical Assessment' (2002) 5 *Legal Ethics* 103, 112.
42 Ibid 113.

energy and willingness to engage in personal criticism, as an advocate for the defence?
2. As a prosecutor, would you see your role as being properly discharged if you simply set out the facts for a jury without emotion, without an attempt to accuse defence witnesses as biased or prejudiced, and without offering any opinion as to what the sentence upon conviction should be?
3. Would you be satisfied that you had done your job as a prosecutor properly if the defence were making all sorts of ridiculous allegations about the police witnesses but you declined to deliver personally damaging (and forensically irrelevant) insults about witnesses for the defence?
4. As a prosecutor with a teenage son or daughter, can you imagine being tempted to keep their transgressions secret? If you agreed to secrecy, would you consider yourself morally vulnerable?
5. Are you by nature more or less inclined to see the outcome of any contest as more important than the means used to get to that outcome? What implications does your answer have for the way in which you will tend to practise law?
6. Are you likely to have one set of values 'at home' and another set for 'the office'? If so, will the differences make it hard to lead an emotionally integrated life?

Conclusion

Criminal justice in Australia is likely to retain its adversarial character, even if governments generally want to shift the goal posts in favour of greater prosecutorial power, heavier penalties and the criminalisation of more and more behaviour. The stakes for all lawyers involved in criminal justice are increasingly ethical stakes: Do they help draft repressive and de-humanising legislation? Do they exploit 'confessions' made by tired and fearful individuals after many hours of interrogation? Do they pressure defendants to simply plead guilty and eliminate the stress of a trial on them and their families? Or, do they risk poisoning the minds of juries by belittling prosecution witnesses when there is no confession and no murder weapon?

In fact, an ethical approach to criminal justice has never been so important for social confidence in our courts. If there is a line somewhere between the approach of the *responsible lawyer* and the *adversarial advocate* inside a criminal trial (with prosecutors struggling to hang on to the former and defence counsel over-zealously defending the latter), both can stray over the boundaries in the quest for adversarial success. Lawyers' personal competitive investment in the trial process is its least attractive feature and is at the heart of public suspicion as to whether the system is really about truth *or* proof, rather than both.

Recommended Further Reading

ABC Radio National, 'The Ethics of Criminal Lawyers', *The Law Report*, 12 November 2002 <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s724128.htm> at 19 July 2006.

Ben Clarke, 'An Ethics Survey of Australian Criminal Law Practitioners' (2003) 27 *Criminal Law Journal* 142.

Ken Crispin, 'Prosecutorial Ethics' in Stephen Parker and Charles Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (Clarendon Press, Oxford, 1995) 171.

G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, Pyrmont, NSW, 3rd edn, 2006) 'Prosecuting Counsel' [18.10]–[18.80] and 'Criminal Defence Lawyers' [18.85]–[18.115].

Peter Hidden, 'Some Ethical Problems for the Criminal Advocate' (2003) 27 *Criminal Law Journal* 191.

David Luban, 'The Fundamental Dilemma of Lawyering: The Ethics of the Hired Gun' in Richard Abel (ed), *Lawyers: A Critical Reader* (The New Press, New York, 1997) 3.

Abbe Smith, 'Defending the Unpopular Down Under' (2006) 30 (2) *Melbourne University Law Review*, 495.

Richard Young and Andrew Sanders, 'The Ethics of Prosecution Lawyers' (2004) 7 *Legal Ethics* 190.

6

Ethics in Negotiation and Alternative Dispute Resolution

Introduction

The standard conception of lawyers' role and ethics revolves around a combination of advocacy on behalf of clients and responsibilities to the court. Yet only a small proportion of lawyers devote a substantial amount of their practice time to litigation. Most disputes do not go all, or even part of the way, to trial. The vast majority of problems that could lead to legal proceedings are handled without recourse to law, lawyers or any other form of organised dispute resolution at all.[1] Even where people do seek legal advice and commence court proceedings, most civil disputes are settled or 'compromised' through negotiation before the dispute goes to trial.[2]

Most lawyers are not involved in litigation on a regular basis, but all lawyers are likely to negotiate on behalf of clients on a daily basis, whether to settle a dispute, or conclude a contract or deal. These negotiations can be a purely private affair between the parties and their lawyers. Or negotiation can occur through a variety of methods of 'alternative' dispute resolution (ADR). We use the term 'ADR' here to include any processes in which neutral third parties (other than courts) intervene to either help parties reach a settlement, or to determine a dispute. ADR can be aimed at avoiding the need to use lawyers or court by helping people to settle their disputes as soon as possible after they arise – for example,

1 See William Felstiner, Richard Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .' (1981) 15 *Law & Society Review* 631; Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (Hart Publishing, Oxford, 1999) 252.
2 Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, Chatswood, NSW, 2nd edn, 2002) 44–6.

customer or workplace complaints schemes within commercial and government organisations, external ombudsman schemes and complaints commissioners, neighbourhood or community justice centres, some commercial mediation and arbitration, and preventive dispute management systems. Or, ADR can be aimed at avoiding trial once lawyers have been hired and court processes invoked – for example, court-annexed or court-ordered mediation, diversionary restorative justice conferencing,[3] industrial conciliation and arbitration, and the mediation offered by government regulators such as Equal Opportunity Commissions and Legal Services Commissioners.[4] In addition to the fact that many lawyers now represent clients during mediation and other ADR processes, increasing numbers of lawyers also practise as ADR facilitators – such as mediators, arbitrators, and in positions such as ombudsman roles.

What ethical standards should apply to lawyers when they are involved in negotiation and ADR, rather than litigating, on behalf of clients? Does the fact that negotiations often occur privately and away from the supervision of the court mean that lawyers should bargain even more aggressively on behalf of their clients as *adversarial advocates* free of the constraints of court? On the other hand, if the purpose of negotiation is for the parties to conclude a deal together, or to come to a consensual agreement about how to resolve a dispute, then perhaps a completely different set of values, more informed by the *ethics of care*, should guide lawyers' role in negotiation?

In this chapter we will explore these questions by reference to lawyers' ethics in the negotiation of settlement of disputes, and in mediation. We focus on mediation, rather than any other ADR processes, since mediation is the ADR process that lawyers are likely to be most commonly involved in as representatives of clients, or as facilitators.[5] This is because as part of the pretrial process of case management, courts now frequently order parties (and their lawyers) to take part in mediation to try to reach a settlement before trial.[6]

First, we consider the ethical issues that are likely to, and commonly do, arise for lawyers in negotiation and mediation, and how current professional ethical standards and the conventional *adversarial advocacy* approach to lawyers' ethics would apply to these concerns. In the second part of this chapter, we

3 '[R]estorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future': John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, Oxford, 2002) 10.

4 For brief descriptions and definitions of ADR and of a range of alternative dispute resolution processes, see Astor and Chinkin, *Dispute Resolution in Australia*, 77–95; National Alternative Dispute Resolution Advisory Council ('NADRAC'), *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (2003) <http://www.ag.gov.au/agd/WWW/disputeresolutionhome.nsf/Page/Definitions2> at 10 March 2006.

5 Other ADR processes in which lawyers are often involved include arbitration (where the impartial third party-arbitrator makes a determination of the issue), conciliation (where the impartial third party-conciliator can take an advisory role on the content of the dispute and outcomes) and combined processes such as 'med-arb' in which the third party uses first mediation then arbitration.

6 Jill Hunter, Camille Cameron and Terese Henning, *Litigation 1: Civil Procedure* (LexisNexis Butterworths, Chatswood, NSW, 7th edn, 2005) 48–56; Kathy Mack, 'Court Referral to ADR: The Legal Framework in Australia' (2004) 22 *Law in Context* 112.

outline an alternative *ethics of care* approach to what lawyers' ethics should be in negotiation and mediation, as reflected in various proposed ADR standards, and consider the difficulties that this is likely to raise.[7] In each section we divide our discussion into a consideration of ethics for lawyers *representing* parties in negotiation or mediation, and those issues facing lawyers acting as *facilitators* of ADR (focusing on mediation), since lawyers' roles are quite different in these two situations.

Current Ethical Practices and Standards for Lawyers in Negotiation and Mediation

Litigotiation? Representing Parties in Negotiation and Mediation

It has often been commented that when lawyers use negotiation to settle disputes, negotiation is not a separate process to litigation. Rather both are part of 'a single process of disputing in the vicinity of official tribunals that we might call *litigotiation*, that is, the strategic pursuit of a settlement through mobilizing the court process . . .'[8]. This means that lawyers are likely to use legal rules and norms to shape the substance of the outcomes they seek to negotiate on behalf of their clients. It also means that they may be likely to conduct negotiations as *adversarial advocates*, consistent with the way they would operate in litigation. Conventional advice on negotiation tactics for lawyers (and often for business people) suggests that they should see their role as to represent their client's position as aggressively as possible, using posturing (emotional displays and manipulation) and other misleading or bullying tactics as required (see the case studies below for examples), and making concessions only to the extent necessary to get greater concessions from the other side.[9] It has also been suggested that negotiation is all about finding out as much as possible about the other side's case and position while hiding the strengths and weaknesses of your own case and preferred outcomes: '. . . the negotiator's role is at least passively to mislead his opponent about his settling point while at the same time appearing to engage in ethical behaviour'.[10]

7 For standards of ethical conduct for lawyers and others in ADR see the Law Council of Australia, *Ethical Standards for Mediators* (2000) <http://www.lawcouncil.asn.au/policy/1957353025.html> at 20 March 2006; Law Society of New South Wales, *The Law Society Guidelines for Those Involved in Mediation* (1993) <http://www.lawsociety.com.au/page.asp?partid=3779> at 20 March 2006; NADRAC, *A Framework for ADR Standards* (NADRAC, Barton, ACT, 2001) 40–7 <http://www.ag.gov.au/agd/WWW/disputeresolutionhome.nsf/Page/Standards> at 20 March 2006. See also Astor and Chinkin, *Dispute Resolution in Australia*, 220–4; Tania Sourdin, *Alternative Dispute Resolution* (Lawbook Co, Pyrmont, NSW, 2nd edn, 2005) 179.

8 Marc Galanter, 'Worlds of Deals: Using Negotiation to Teach about Legal Process' (1984) 34 *Journal of Legal Education* 268, at 268; see also Hazel Genn, *Hard Bargaining* (Oxford University Press, Oxford, 1987) 15.

9 See Albert Z Carr, 'Is Business Bluffing Ethical?' in Carrie Menkel-Meadow and Michael Wheeler (eds), *What's Fair? Ethics for Negotiators* (Jossey Bass, San Francisco, 2004) 246; Jim Parke, 'Lawyers as Negotiators: Time for a Code of Ethics?' (1993) 4 *Australian Dispute Resolution Journal* 216.

10 James White quoted in Richard O'Dair, *Legal Ethics: Text and Materials* (Butterworths, London, 2001) 298 (sexist language in original).

This raises two questions about lawyers' ethics in negotiation. *First*, to what extent *do* current *professional conduct standards* that seek to curb excessive *adversarial advocacy* apply to negotiation and mediation? Or are these private processes outside of the courtroom unregulated? *Second*, to what extent *should adversarial advocacy* and/or *responsible lawyering* values apply to lawyers' behaviour in negotiation, mediation and other ADR processes? Or should different values guide lawyers' behaviour in these processes?

CASE STUDY 6.1 Ethics in Negotiation

Consider the following descriptions of lawyer behaviour and possible tactics that could be used in negotiations. All of the practices recounted here are either based on real cases, or have been recommended as tactics for success in business negotiation.

Thinking about each one, consider the following questions: Which of these behaviours or tactics are in breach of professional conduct standards? Which would you personally use and not use in negotiation? Why or why not? How do you think the other side would view your use of each behaviour or tactic in each situation if and when they found out about it?

1. In negotiations for the sale of a licensed restaurant, the lawyer for the vendor tells the potential purchaser that the restaurant can seat 120 people at thirty-nine tables. In fact, the Liquor Licensing Authority has approved only the seating of eighty-four people at twenty-six tables in the restaurant. The vendor has been illegally seating 120 people at the restaurant for the last two years, and the figures for the restaurant's takings given to the other side are based on this. Both the lawyer and the vendor know all this.[11] As an alternative, what if the vendor simply overstated the average takings of the restaurant and the lawyer, knowing the truth, sat and watched silently?[12]
2. In the course of a mediation, the client instructs the lawyer in a private meeting that the client is willing to pay anything up to $200,000 to the other side to settle the matter. The lawyer then tells the other side 'My client has instructed me that she will not pay a cent more than $150,000. That's our final offer'.
3. It has been suggested that '[t]he art of compromise centres on the willingness to give up something in order to get something else in return. Successful artists get more than they give up. A common ploy is to exaggerate the importance of what one is giving up and to minimise the importance of what one gets in return. Such posturing is part of the game'.[13] Tactics that might be used to achieve this include: Acting as if I am very disappointed with how things are going (even if I am not); Acting as though I am very angry about the situation; Appearing to move in one direction to divert the other party's attention from my real goal; Introducing imaginary issues into the negotiation to disguise my real intentions.[14]

11 Based on *Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd* (1987) 72 ALR 601; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546. See Warren Pengilley, '"But You Can't Do That Anymore!" – The Effect of Section 52 on Common Negotiating Techniques' (1993) 1 *Trade Practices Law Journal* 113, 118–19.

12 See *Sutton v AJ Thompson Pty Ltd (in liq)* (1987) 73 ALR 233. Described in Stephen Corones, 'Solicitors' Liability for Misleading Conduct' (1998) 72 *Australian Law Journal* 775, 784.

13 H Raiffa quoted in Michelle Wills, 'The Use of Deception in Negotiations: Is It "Strategic Misrepresentation" or Is It a Lie?' (2000) 11 *Australian Dispute Resolution Journal* 220, 224.

14 From the survey described in Cheryl Rivers, 'What Are They Thinking? Considerations Underlying Negotiators' Ethical Decisions' (Paper presented at the 2004 Annual Meeting Academy of International Business

4. Consider also the following tactics:[15]
   (a) 'Coercion: Use threats to force the other side to accede to your demands.' For example: Say that I will use negative personal information about the other party to their detriment, although I am just bluffing; Threaten to leave the negotiation permanently unless the other party offers me some concessions now, even though I will stay; Tell the other party that if they do not answer my request by a deadline that I will never do business with them again.[16]
   (b) 'Quick thrust: Try to force a settlement within a short time frame, giving the other side inadequate time to strengthen their case.'
   (c) 'Prolonged pressure: Try to prolong the process over periods of time, using extended time to weaken the other side's case as resolve, memories and witnesses slowly fall away.'
5. The lawyer for Company A negotiates an 'in principle' agreement with Company B in which Company A and Company B will work together on a joint venture and appoint directors to each other's boards. Lawyer A agrees to the terms unconditionally on behalf of Company A. But Company A has not given Lawyer A authority to agree the matter unconditionally. As far as Company A is concerned, the real agreement could only be agreed in detail if they had an adequate cash flow later on, which is unlikely. This has not been revealed to Company B and the in principle agreement means that Company B misses out on the opportunity of negotiating a similar arrangement with a third party because they believe that their arrangement with Company A will work out.[17]
6. Finally, consider the following quotation from a 'chief claims inspector' for a British insurance company. His job is to negotiate and settle personal injury claims (eg motor vehicle accidents and workers' compensation) against the insurance company, and he has the resources and experience to thoroughly investigate each claim and decide what it is worth.[18] This quotation describes his approach to negotiating a settlement in situations where it is obvious to him that the solicitor for the plaintiff does not know as much about the strengths of their own client's case as the chief claims inspector for the defendant does:

> You're going into a discussion to feel your way. After all, if all you're going to do is make an offer, there's no point discussing it anyway. You may as well write him a letter . . . The object of a discussion is to try and find out whether the judgment which you have formed is a sound one . . . and you've got to be prepared to modify your own assessment in the light of what you hear (and that can be up or down). It's not uncommon to think, 'Right if I can get out of this at £5,000 I'll think it's good. I don't want to have to pay more than £6–6,500 . . .' Now, when you get in discussion with a solicitor you find that your case improves – because he hasn't done the depth of work that you've done. He hasn't interviewed the independent witnesses and so doesn't know that the evidence is dead against you. He hasn't been to see

Conference, Stockholm, Sweden, 13 July 2004) <http://eprints.qut.edu.au/archive/00000366/> at 1 May 2006.

15 These strategies for negotiation identified in College of Law Pty Ltd, *Negotiation Strategy: Participants' Manual* (College of Law Pty Ltd, Sydney, 1999).

16 From Rivers, 'What Are They Thinking?'.

17 Based on *Poseidon Ltd v Adelaide Petroleum NL* (1991) 105 ALR 25. See Pengilley, '"But You Can't Do That Anymore!"', 119–20. Consider this issue as an ethical one without regard to whether a court would find that the lawyer had ostensible or actual authority to act in this way.

18 Based on material in Genn, *Hard Bargaining*, 132–3, 163–4. Note that the capacity for individuals to take common law actions for personal injuries is now curtailed in Australia. But this was not true in the UK at the time of this quotation.

> the scene of the accident. And very often you become a bit more optimistic when you get in discussion . . . You realise that the judgment which you were forming had no need to be as pessimistic as it was. I mean, you're not taking advantage of any situation, you are merely altering your own views that you had previously formed.[19]

Do you agree that this is not 'taking advantage' of the situation? Would you do it?

DISCUSSION QUESTIONS

Research has shown that when there is the likelihood of a future long-term relationship with the other party, negotiators are less likely to believe in using marginally ethical tactics such as many of those set out here.[20] Why do you think this is so? How might the use of each tactic affect the way the parties view each other or carry out their agreement later?

Current Professional Conduct Standards for Lawyers in Negotiation and Mediation

Current professional conduct law contains little that *explicitly* sets out specific standards for lawyers' behaviour in negotiation and ADR processes, although a variety of standards for ADR practitioners (of all backgrounds, not just lawyers) have been proposed.[21] We discuss these proposed conduct standards for negotiation and ADR in the second half of this chapter. Here, however, we briefly consider the extent to which current professional conduct rules already regulate lawyers' behaviour in negotiation and mediation, even though those rules were formulated primarily in relation to litigation.

It is sometimes suggested that tactics such as posturing, strategic misrepresentation, taking advantage of the other side's mistakes or ignorance and even bullying and threats are just part of the 'rules of the game' for *negotiation*, as if negotiation has a different set of ethics to everyday life, or even to court. In fact the law of lawyering as it currently stands assumes that lawyers owe similar obligations of truthfulness and fairness in negotiations with other parties as they owe in litigation. Thus 'court' is defined in the definitions section of the Law Council of Australia's *Model Rules* to include 'an arbitration or mediation or any other form of dispute resolution' – a definition that is probably broad enough to include settlement negotiations between the parties. This means that all the rules discussed in Chapter 4 concerning misleading statements to 'the court', client perjury, and the need to have evidence before making serious allegations, apply equally to lawyer behaviour on behalf of clients in all ADR processes and negotiations.

19 Ibid 133.
20 Rivers, 'What Are They Thinking?', 6.
21 See the sources listed above, n 7.

The *Model Rules* also include a rule specifically prohibiting practitioners from 'knowingly' making 'a false statement to the opponent in relation to the case (including its compromise)' and requiring practitioners to correct any false statements made as soon as possible (*Model Rule* 18). Thus the situation in paragraph 2 in the case studies section (where the lawyer lies about client instructions) is certainly a breach of professional conduct standards that could lead to disciplinary action. Many of the tactics described in paragraphs 3 and 4 would also fall foul of the spirit of the *Model Rules*, although one can also imagine most lawyers being capable of legalistic arguments for why they should not be construed as having knowingly made a false statement in such circumstances. As with the rules relating to misleading statements in court, however, *Model Rule* 18 (making a false statement to the opponent) explicitly provides that it is not making a false statement 'simply' to 'fail to correct an error on any matter stated to the practitioner by the opponent'. On this principle, 'taking advantage' of the other side's ignorance of the facts, as in paragraph 6, is not against the rules. (But this does not mean that it is conducive to collaborative problem-solving.)

Furthermore, misleading and deceptive conduct and bullying behaviour in negotiating contracts will generally be contrary to federal and State legislation as well as general principles of contract and tort law. If lawyers knowingly participate in such misbehaviour on the part of their clients, they (as well as their clients) can be liable under general principles of law.[22]

The *Model Rules* also include a catch-all provision that 'A practitioner, in all of the practitioner's dealings with other practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the practitioner's communications are courteous and that the practitioner avoids offensive or provocative language or conduct' (*Model Rule* 21; see also the very general standards in *Model Rule* 30). This would outlaw bullying and aggressive behaviour in negotiation. Thus the type of threats outlined in paragraph 4 are also likely to fall foul of professional conduct standards.

The lawyer in the two versions of the scenario in paragraph 1, and the lawyer in the scenario in paragraph 5 might both argue that they have not made a false statement to the other side. They have simply omitted to mention facts and circumstances that might have been relevant. All three scenarios are, however, based on general law cases in which similar behaviour was held to amount to misleading and deceptive conduct.

Thus many ethically questionable tactics used in negotiation, particularly those that are misleading, are in fact already outlawed under current law and professional conduct standards.

Mediation is essentially a form of assisted negotiation. Therefore the same ethical issues are likely to arise in mediation as in unassisted negotiation, and these same rules will apply to mediation as to negotiation.

22 Pengilley, '"But You Can't Do That Anymore!"'; Corones, 'Solicitors' Liability'.

It has been observed that some lawyers (and clients) use ADR processes, such as court-ordered mediation, as 'just another stop in the "litigotiation" game', another 'opportunity for the manipulation of rules, time, information and ultimately, money'.[23] As one experienced mediation practitioner in Australia has commented:

> Regrettably, many litigators use ADR as an adversarial tool to gain an advantage in the litigation rather than to resolve it. Such parties unashamedly use ADR as a fishing expedition. It can take many forms. Through the careful use of interrogation (in the nature of cross-examination at a case appraisal) or a question and answer session at a mediation, a party can use the process to weed out weaknesses in an opponent's case. It can be used to test the demeanour or frailty of material witnesses or decision-makers. It can be used for fact-finding and accumulating undisclosed information that may not have been available through interlocutory processes such as discovery or interrogatories. It may be used to test an opponent's susceptibility to admissions or to ascertain how vigorously a point of law will be contested or conceded.[24]
>
> There may be several other reasons why a party would use ADR process for an ulterior purpose. If there is a power imbalance, a financially stronger party may use the process and its accompanying expense for the purpose of draining the funds of a poorer litigant. ADR may be used as a delaying tactic.[25]

Where court-ordered ADR is being used for ulterior purposes such as these, then the party, and their lawyer, could be subject to sanctions for abuse of process and contempt of court under the same principles as discussed in Chapter 4.[26] Costs sanctions may also be available and, as we saw in Chapter 4, these may also be available against the lawyer, not just the party, where the conduct is the lawyer's fault, or the lawyer was knowingly involved in improper conduct.[27]

Lawyers as Third Party Mediators and Facilitators of ADR Processes

So far we have considered the ethics and conduct of lawyers as *representatives* of parties in negotiation and mediation. Many lawyers are now also acting as third party *facilitators* of ADR processes, especially as mediators. Mediation can be defined as:

> the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of resolution whereby resolution is

23 Carrie Menkel-Meadow quoted in Sourdin, *Alternative Dispute Resolution*, 235.
24 Grant Dearlove, 'Court-Ordered ADR: Sanctions for the Recalcitrant Lawyer and Party' (2000) 11 *Australian Dispute Resolution Journal* 12, 14.
25 Ibid 16.
26 Ibid.
27 Scott Crabb and Natalie Tatasciore, 'Costs Consequences for Failing to Participate in ADR' (2003) 30 *Brief* 27.

> attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.[28]

Looking at this definition, it is clear that the role of facilitator of ADR differs greatly from the role of lawyer acting as a representative for a party. Current professional conduct rules are only addressed to lawyers in their representative role. Many current conduct rules will be irrelevant or inappropriate for lawyers acting as mediators or other facilitators of ADR, and new and different ethical principles will be necessary to guide their conduct.

It might not even be possible to lay out one set of ethical principles for ADR facilitators since ADR processes range from those that are purely *facilitative* – 'processes in which a dispute resolution practitioner assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues of the whole dispute' – through to those that are *advisory* – where 'a dispute resolution practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law, and, in some cases, possible or desirable outcomes, and how these may be achieved'.[29] There is also the possibility of arbitration where the dispute resolution practitioner makes a determination, and 'conciliation' which can include advisory elements as well as facilitative ones.

In theory, mediation is generally considered to be a purely facilitative process. But in practice, many lawyer-mediators combine advisory elements with their mediation role. This may be formalised in 'hybrid' processes such as 'med-arb' where the ADR facilitator first uses mediation, and then arbitration to resolve the dispute.[30] Any set of ethical standards for ADR facilitators will need to cover all these different roles, and even the use of multiple roles within the one process.

To further complicate matters, many ADR practitioners are not lawyers at all. Should lawyer-facilitators of ADR have additional legal professional obligations that non-lawyer facilitators of ADR do not have? Or, when lawyers act as ADR practitioners, do they cease being lawyers (since they are no longer acting within the adversarial paradigm) and therefore stop being bound by lawyer professional conduct rules?

Finally, having a professional practice as both a lawyer who represents individual clients in some cases, and acts as an ADR facilitator in other cases, can also raise ethical problems with conflicts of interest. Can a lawyer-mediator or their firm *later* represent one of the parties to a mediation that the lawyer-mediator had facilitated? Can they later act against a party to the mediation? What if the lawyer-mediator or their firm has *previously* acted for or against a party to a proposed mediation, can the lawyer-mediator take on the job of facilitating the mediation? The law of lawyering guides lawyers extensively as to what amounts to a conflict of interest in relation to concurrent or successive *representation* of

28 NADRAC, *Dispute Resolution Terms*.
29 Ibid.
30 Ibid.

clients by the same lawyer or the same law firm (see Chapter 7). But it does not address the issue of when facilitating resolution of a dispute might conflict a lawyer from acting for or against a party to the mediation. Nor does the law of lawyering address what personal interests, associations, or previous representation of parties on the part of the proposed mediator might prevent that mediator from facilitating resolution of a dispute. It is conceivable also that a litigation lawyer will be so steeped in an adversarial instinct that the alternative mindset of a lawyer-mediator is beyond their competence, and vice versa.

The case studies below illustrate some of the ethical issues that commonly arise for mediators. In the next section of this chapter, we consider what alternative, or new, ethical principles should be applied to mediators, as well as lawyers representing parties in negotiation or mediation.

CASE STUDY 6.2 Mediators' Ethics

1. Consider again the scenario at paragraph 2 of Case Study 6.1: Ethics in Negotiation, above, where the lawyer lies about their client's instructions. Assume that the mediator is a lawyer and is aware of the truth about the client's instructions because the mediator was present in a private caucus with the lawyer and client immediately beforehand when instructions were discussed. (It is common during mediations for each party and their lawyer to have private meetings with the mediator.) The mediator is also present when the lawyer makes the false statement to the other side. Does the mediator have a duty to do anything about this? (Bear in mind that mediators usually promise confidentiality to both parties in relation to everything said during the mediation in private caucus or in the presence of the other side.[31]) Should the mediator withdraw? The Law Council of Australia's *Model Rule* 31 requires lawyers to report to the relevant regulatory authorities any misconduct by a practitioner: Should the mediator obey this rule and report the lawyer's breach of professional conduct standards to the disciplinary authorities? Or does the need for the mediator to be impartial, and the confidentiality of the mediation process mean that the mediator should not report their own judgments of a lawyer's or party's conduct outside of the process?[32]
2. The facilitator of a mediation is an experienced lawyer in the relevant area of practice. The mediator knows that the deal about to be voluntarily concluded at the mediation is much worse for one party than if they took their case to court. This party is either not represented by a lawyer, or, their lawyer seems to be unaware that their client could do better in court. The mediation has been set up as a purely facilitative process. Can or should the mediator advise the parties that the proposed settlement does not fairly represent the way the dispute would be decided in court? Do you think the parties (especially an unrepresented or poorly represented party) might expect a mediator who they know is a lawyer with expertise in the area to give some advice as to the law relating to their matter? Is there anything else the mediator could or should do in this situation?[33]

31 Astor and Chinkin, *Dispute Resolution in Australia*, 178–86. Indeed confidentiality of what occurs in mediation is often required under statute or court rules for court-annexed schemes as well as the common law privilege for 'without prejudice' communications.
32 Interview with James Leach, Ethics Office, Law Institute of Victoria (Melbourne, 8 March 2006).
33 Scenario from Camille Cameron on the basis of her research into the experience of unrepresented litigants: interview with Camille Cameron (Melbourne, 9 March 2006).

3. A very senior barrister and mediator is facilitating a mediation between two sisters in relation to a dispute over the multi-million dollar estate of their late mother. Each sister is represented by at least one solicitor and one barrister, and the husband of one sister is also present. One sister is participating via phone and fax from Israel, while the other is present at the mediation in Australia. Because of the time difference, the mediation starts in the middle of the day and continues into the evening. At 8pm 'in principle' agreement is reached as to the distribution of the assets under dispute. Some of the lawyers present point out that it is late, and knowing that there are still fine details of finances to work out, they would like to go home and work out the final settlement later. The mediator, however, forcefully insists that no one should leave until the agreement is written down by saying: 'You have got to stay, you have got to do the terms of settlement tonight'; 'No, we are doing it now. We are signing up tonight as that is the way that I do it, that's how I conduct mediations'; 'Given the acrimony between the two sisters we must go away with something that is written. It is in the interests of all parties to sign up tonight'. The lawyers interpret this 'as a direction from the mediator about which, effectively, [we] did not have any choice'.

   The mediator dictates the terms of settlement and one of the people present writes them down. Later it turns out that no clause has been included making the agreement about the transfer of a bundle of shares from one party to the other subject to advice about the impact of tax. Earlier in the day it had been agreed that such a clause should be included, but it was forgotten in the rush to get the settlement agreement written down at the last minute. In fact the transfer attracts capital gains tax and this substantially alters the financial position between the parties as agreed in the settlement.[34]

   Has the mediator done anything wrong? Should the mediator have any ethical responsibility or legal liability to the parties for the missing term in the settlement agreement? Would it make any difference to your answer if one or both of the parties had not been represented by lawyers? Would it make a difference to your answer if the parties had not reached an 'in principle' agreement at 8pm when people wanted to go home and the mediator insisted that they stay until agreement was reached? For mediators the measure of their 'success' and reputation is whether the disputes they mediate end up with final settlement agreement or not. Future mediation work and funding will often depend on success measured in this way. Is this a conflict of interest?

All three of these case studies raise issues about exactly what the role of the mediator is. It is generally accepted that mediators are responsible for the process of dispute resolution, but not for the outcome. They are supposed to facilitate the process, but not advise the parties, nor prejudice their neutrality and impartiality by judging the parties and issues in dispute in any way, or appearing to do so. However, the line between facilitation and advice, between ensuring parties participate in the process in the way they are supposed to, and taking a role in the

34 Based on the allegations in *Tapoohi v Lewenberg* [2003] VSC 410 (Unreported, Habersberger J, 21 October 2003). See John Wade, 'Liability of Mediators for Pressure, Drafting and Advice: *Tapoohi v Lewenberg*' (2004) 16 *Bond Dispute Resolution News* 12 <http://www.bond.edu.au/law/centres/drc/newsletter.htm> at 19 March 2006.

outcome of the process, can be difficult to discern in practice. We shall consider these problems in more detail below as we discuss the alternative values that could guide mediators' ethics.

Alternative Values for Negotiation and ADR

What Ethics 'Fit' ADR?

Current professional conduct rules only minimally limit untruthfulness and unfairness. As we have seen, they provide that a lawyer cannot actively and knowingly make a misleading or deceptive statement to the other side in negotiations, or to a third party ADR facilitator, just as they cannot do so in litigation. The rules assume that apart from these minimal *limits*, lawyers should be free to act as adversary advocates even in negotiation. They do not give lawyers any *pro-active* obligations to act collaboratively in good faith where they are not engaged in adversarial litigation.[35]

On the other hand, many practitioners and theorists argue (and we agree) that the purpose of negotiating a settlement to a dispute is to avoid the adversarialism of a trial in which each side defends a position, and one side's position must win. The advantage of negotiating is that parties can come to a voluntary, mutually agreed resolution in which the interests of both (or multiple) parties in solving the problem efficiently, practically and fairly are recognised and any ongoing relationship (eg business relationships, neighbours, divorced parents) can be maintained, rather than handing their dispute over to a court that will generally make one party the winner in terms of a financial award, while both parties might be losers when it comes to time, cost, and stress.[36]

For example, Roger Fisher and William Ury's leading model of 'principled negotiation' in their book, *Getting to Yes*, proposes that negotiation should not be a matter of hard bargaining over positions, nor should it be soft and gentle offers and concessions with the aim of staying friends. Rather 'principled negotiation' means that parties should separate the people, their egos and emotions from the substantive merits of the problem. They should focus on identifying interests rather than taking positions, consider a variety of possible solutions

35 Note that in some cases the parties (and their lawyers) may have a legal obligation to participate in court-ordered mediation or mediation that is required as a term of a contract in good faith. But it is currently uncertain to what extent the courts are able to enforce this obligation, whether it has any precise legal meaning, and if so if it requires lawyers and parties to take pro-active steps or whether it only provides sanctions for actions that unequivocally demonstrate bad faith. See Sourdin, *Alternative Dispute Resolution*, 22; David Spencer and Tom Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook Co, Pyrmont, NSW, 2005) 489; and the discussion of *Gannon v Turner* (Unreported, District Court of Brisbane, Ford DCJ, 28 February 1997) cited in Dearlove, 'Court-Ordered ADR', 14–15.

36 See, eg, Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin Books, New York, 2nd edn, 1991); Carrie Menkel-Meadow, 'Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)' (1995) 83 *Georgetown Law Journal* 2663; Jennifer J Llewellyn, 'Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice' (2002) 52 *University of Toronto Law Journal* 253.

to the problem that 'advance shared interests and creatively reconcile differing interests' before deciding what to do, and 'insist that the result be based on some objective standard'.[37] It is assumed that although parties have different positions, they are also likely to share some common interests, and if they explore these they are likely to be able to develop options and solutions that benefit all parties.

Similarly, Carrie Menkel-Meadow, one of the most influential and prolific writers on lawyers' practices and ethics in relation to ADR, argues that negotiation should be a process in which the parties can choose how they want their dispute resolved, with the possibility of a broad range of possible solutions that may be more responsive to their needs and take into account a wide range of principles outside of legal principles. She argues that ideally it 'can be defended as being participatory, democratic, empowering, educative, and transformative for the parties'.[38] There is certainly evidence that going through litigation can have ill effects on people's health and mental state, and that people who resolve their disputes on the basis of a negotiated agreement are more likely to be satisfied with the resolution they have achieved, and to feel that they have achieved their objectives than those who go to court.[39] There is also evidence that truthful, open negotiating behaviour can spur others to act similarly, making collaborative negotiation possible.[40]

Many ADR processes, including mediation, are aimed at facilitating this vision of principled, collaborative or problem-solving negotiation. The mediator or ADR facilitator is supposed to help the parties identify their interests and to see the problem from the other side's point of view and work together to identify options and creative solutions. The policy statements and contracts governing many ADR processes usually explicitly state that it is expected that the parties and their lawyers will enter into the process in a 'good faith' effort to work together to identify interests and options and resolve their dispute.[41] Even court rules and court decisions requiring court mediation as part of the pre-litigation process recognise that the object of mediation is that the parties should 'communicate effectively with each other about the dispute' in an 'endeavour to resolve their differences'.[42] Or in the memorable words of Justice Gray to the litigants in one case, 'you can go and make love before you make war'.[43]

37 Fisher, Ury and Patton, *Getting to Yes*, 10–11.
38 Menkel-Meadow, 'Whose Dispute Is It Anyway?', 2693.
39 On the physical and mental stress effects of litigation, see Brent K Marshall, J Steven Picou and Jan R Schlichtmann, 'Technological Disasters, Litigation Stress, and the Use of Alternative Dispute Resolution Mechanisms' (2004) 26 *Law & Policy* 289; Genn, *Paths to Justice*, 194.
40 See Rivers, 'What Are They Thinking?'; Michelle Wills, 'The Negotiator's Ethical and Economic Dilemma: To Lie, or Not to Lie' 2001 (12) *Australian Dispute Resolution Journal* 48, 54.
41 David Spencer, 'Requiring Good Faith Negotiation' (1998) 1 *ADR Bulletin* 37; Spencer and Altobelli, 'Dispute Resolution in Australia', 485–93.
42 *Australian Competition & Consumer Commission v Lux Pty Ltd* [2001] FCA 600 (Unreported, Nicholson J, 24 May 2001) [26], [28]. See also Hunter, Cameron and Henning, *Litigation I: Civil Procedure*, 48–56.
43 Transcript of Proceedings, *Australian Competition & Consumer Commission v Cadbury Schweppes Pty Ltd* (Federal Court of Australia, Gray J, 22 April 2002). See also Hunter, Cameron and Henning, *Litigation I: Civil Procedure*, 51.

We might therefore expect that where parties are using negotiation or ADR to resolve their dispute, their relationship should be more open and collaborative than in litigation. The ethical standards that apply to their conduct (and that of their lawyer representatives) ought to reflect this. *Ethics of care* type values, such as good faith, fair dealing and open disclosure, are likely to be more appropriate than the conventional combination of *adversarial advocacy* and *responsible lawyering* reflected in the professional conduct standards.[44] In other words problem-solving negotiation and mediation assume certain standards of behaviour to achieve their purposes, and these standards will be different to those that apply in litigation. This will be more important the more explicit the goals of collaborative problem-solving are in the negotiation or the ADR process. It is also more important for lawyers acting as third-party facilitators of the negotiation or mediation to promote these values than it is for lawyers who are acting as representatives for the parties.

Carrie Menkel-Meadow has suggested that any ethical rules applying to lawyers' conduct in ADR (as representatives or facilitators) should reflect five generally accepted underlying goals of ADR.[45] These goals are different to and complementary to adversarial litigation:

1. 'Party consent' – 'outcomes should not be coerced' and 'parties should be given a fair chance to make their own choices';
2. 'Democratic participation (of clients vis-à-vis lawyers and multiple parties when disputes involve more than two dyadic players)' – parties should be given a fair opportunity to participate in their own dispute resolution, and third parties should be neutral and show no partisanship;
3. 'Responsive and particularized solutions to legal disputes and transactions, which do no worse harm to the parties (or other parties) than non-resolution of the dispute';
4. 'An orientation to joint, not individualized, problem-solving'; and
5. '"Problem-solving," rather than "adversarial" orientation to legal disputes and transactions.'

These principles reflect the ideal of ADR as an equitable process where people communicate freely, understand each other, settle differences and perhaps even change their behaviour rather than have a judgment (usually financial damages) imposed on them in the alien, adversarial setting of the court.[46]

In the following two subsections we consider what this might mean for lawyers acting as representatives of parties in mediation or in negotiation, and lawyers acting as mediators. As we shall see there have been some ethical standards

44 Carrie Menkel-Meadow, 'The Limits of Adversarial Ethics' in Deborah L Rhode (ed), *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (Oxford University Press, New York, 2002) 123; Wills, 'The Use of Deception in Negotiations'.

45 Carrie Menkel-Meadow, 'Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities' (2004) 38 *South Texas Law Review* 407, 453.

46 Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, Oxford, 1999) 36–8, 60–1; Genn, *Paths to Justice*, 225 (on the anxiety and stress people feel on 'entering the alien world of the court').

proposed for lawyers and other ADR practitioners in these roles – most significantly the National Alternative Dispute Resolution Advisory Council's proposed 'framework' for ethics standards for ADR practitioners[47] and the Law Council of Australia's Standards for Mediators.[48] We shall use these as our starting point. In the final subsection we consider what role if any (*moral activist*) concerns about harm to third parties and public interests ought to have in ethics standards for ADR and private negotiations.

What Ethics Are Appropriate for Lawyers as Representatives of Parties in Negotiation and ADR?

One outcome of the Australian Law Reform Commission's inquiry into adversarialism, ADR and the federal civil justice system was that lawyers' professional conduct rules were changed to make it clear that lawyers have a duty to 'inform the client about the reasonably available alternatives to fully contested adjudication of the case' (*Model Rules* 12.3). The existing principles of lawyers' duties to act in the interests of their clients mean that this obligation should go further than this anyway. Lawyers should thoroughly assess with their clients what dispute resolution option is likely to best suit the client's needs and circumstances. However, the adversarial mindset (discussed in Chapter 4) means that lawyers do not always naturally think about the possibility that non-adversarial dispute resolution might suit their clients better than litigation.

Lawyers should also help clients to prevent disputes arising in the first place. As the Law Council of Australia has suggested in its *Policy on ADR*, '. . . they should assist their clients who are about to enter upon commercial or other relationships to put in place, whenever appropriate, machinery which is aimed at preventing disputes from arising and, where disputes nevertheless do arise, to procure resolution of them as soon as possible otherwise than by litigation'.[49] Such 'machinery' could include setting up ADR processes at the beginning of major projects even before any disputes have arisen (eg 'project alliancing'[50]), including mediation or arbitration clauses in contracts and, for organisational clients, setting up internal dispute resolution schemes and joining up to external complaints resolution and ombudsman schemes.

Each of these obligations is broadly consistent with the *adversarial advocacy* emphasis on the paramount duty to the client. But instead of assuming that the client's interests are always likely to be furthered by advocacy in the adversarial

47 NADRAC, *A Framework for ADR Standards*, 110–14. The ethical issues covered by the framework are: promoting services accurately; ensuring effective participation by parties; eliciting information; managing continuation or termination of the process; exhibiting lack of bias; maintaining impartiality; maintaining confidentiality; and ensuring appropriate outcomes (with particular reference to statutory and other frameworks).

48 Law Council of Australia, *Ethical Standards for Mediators*.

49 Law Council of Australia, *Law Council Policy on Alternative Dispute Resolution* (1989) <http://www.lawcouncil.asn.au/policy/1957353089.html> at 24 May 2006.

50 Greg Rooney, 'Mediation and the Rise of Relationship Contracting – A Decade of Change for Lawyers' (2002) 22(6) *Proctor* 18.

system, these obligations require lawyers to help clients consider their broader *ethics of care* concerns to prevent disputes arising in the first place, and to resolve them in a way that does less damage to themselves and to their relationship with the other party.

Once a client's matter does actually proceed to negotiation or ADR, the appropriate ethics for the process should relate to the purpose of the process. A lawyer's role in ADR is not to aggressively represent client's positions. It is to assist the client in working with the other side to attempt to solve their problem through open (fair and honest), interest-based (based on interests and principle, not on adversarial positions) negotiation. Our concern in this book is with the ethics of lawyers – but when it comes to collaborative negotiation and, especially, ADR processes, one of the main purposes of these processes is to allow the parties (clients) to participate directly in resolving their own disputes. This means that it is the ethics and conduct of the parties that is more important in many ways than the ethics and conduct of their lawyers. Indeed many ADR processes stipulate that parties may not be represented by lawyers at all. Where parties are represented, it is a very important part of a lawyer's role to explain to their clients how the ADR process will work, what their obligations are in that process and to prime them to participate effectively.[51]

During mediation and other collaborative negotiation or ADR processes, it is the duty of the lawyer, as the Law Society of New South Wales suggests, 'To participate in a non-adversarial manner . . . A legal adviser who does not understand and observe this is a direct impediment to the mediation process'.[52] Indeed in order to make the mediation and collaborative negotiation processes work as intended, lawyers (and parties) would need to have pro-active obligations to co-operate with one another. Thus leading US legal ethicist Robert Gordon has suggested the following standard for lawyers' ethics in conducting settlement negotiations:[53]

(A) A lawyer shall at all times act in good faith and with the primary objective of resolving the dispute without court proceedings;

(B) A lawyer shall not
   a. Knowingly make any statement that contains a misrepresentation of material fact or law or that omits a fact necessary to make the statement considered as a whole not materially misleading;
   b. Knowingly fail to
      i. Disclose to opposing counsel such material facts or law as may be necessary to correct manifest misapprehensions thereof; or, alternatively,

51 See the Law Society of New South Wales, *Law Society Guidelines*, '2. Professional Standards for Legal Representatives in Mediation' for a helpful guide as to what the lawyer's role in preparing a client for mediation involves.
52 Ibid.
53 Robert Gordon, 'Private Settlement as Alternative Adjudication: A Rationale for Negotiation Ethics' (1985) 18 *University of Michigan Journal of Law Reform* 503, 530.

ii. Give reasonable indication to opposing counsel of the possible inaccuracy of a given material fact or law upon which opposing counsel appears to rely. Such indication may take the form of statements of unwillingness to discuss a particular matter raised by opposing counsel.

The first part gives a different role to the lawyer than the conventional one of zealous *adversarial advocacy*. The second part gives lawyers more pro-active obligations to avoid misleading and deceptive conduct than the rules that apply in litigation (discussed above). They give lawyers an obligation to actually disclose facts to correct mistakes or ignorance on the other side, or at least refuse to take advantage of mistakes or ignorance of the other side. It certainly makes sense for the parties, and their lawyers, to take a fair and truthful approach to negotiation so that the parties can trust each other and cooperate to strike a bargain. As Wills puts it, 'If a negotiator's opening gambit to a fellow negotiator was, "I wish to make it clear that it is accepted that we will both lie to each other in the course of these negotiations", how many people would continue to do business on this footing?'[54] It is also likely to be good for the long-term reputation of both the lawyer and their client, and the maintenance of a good relationship with the other side, if parties and their lawyers engage honestly and fairly in negotiation.

If we expect lawyers (and parties) to co-operate with one another, this will also have implications for other aspects of lawyers' professional conduct obligations. Firstly, conventional lawyer-client confidentiality and privilege rules assume that every client has an interest in keeping many aspects of their case confidential. In mediation, however, the parties are encouraged and expected to 'lay bare their souls' and their cases to the other side. Disclosing documents and facts to the other side, and making admissions, could mean that confidentiality in any such admissions, statements and documents would be lost, and that the other side could use them in any subsequent litigation. This creates a problem for lawyers deciding how to advise their clients to behave in mediation or negotiation. On the one hand, they might feel that they should advise clients to keep as much confidential as possible to preserve their rights in any later litigation. On the other hand, lawyers might realise it is more conducive to a negotiated resolution to disclose certain confidential information, and advise their clients accordingly. In order to encourage parties to feel free to be open and honest in mediation, everything said and revealed in mediations (and many other ADR processes) is usually subject to confidentiality under the terms of the contract setting up the mediation and, for court-annexed schemes, the legislation or court rules under which the mediation takes place. Similarly there is a common law privilege for 'without prejudice' communications made in the course of genuine settlement

54 Wills, 'The Negotiator's Ethical and Economic Dilemma', 48–9.

negotiations that prevents them from later being disclosed. But the exact limits of these protections of confidentiality are not clear.[55]

Moreover, there are further problems if parties attempt to settle a matter at negotiation or mediation, fail to reach a resolution and then proceed to litigation. How can a lawyer who has tried to genuinely work together with the other side on behalf of their client and heard and seen much confidential information subsequently act for their client against the other side?[56] Similarly, how can a lawyer be required to help a client come to a resolution with the other side with one of the principles of the negotiation being that they will work towards their joint interests and 'do no worse harm to the parties (or other parties) than non-resolution of the dispute' (as suggested by Menkel-Meadow in the quotation above), but also keep an eye on the possibility that there might be litigation in the future where that lawyer will need to act as an *adversarial advocate* for their client against the other side? Some of these conflicts may be so intractable that, in tune with the *ethics of care*, the only ethical practice is for the lawyer who unsuccessfully represents a client in an ADR to withdraw from subsequent litigation.

The candour and co-operation required in collaborative negotiation do not fit well with traditional adversarial roles and ethical expectations governing lawyers. Therefore groups of lawyers who are interested in taking a more collaborative, problem-solving approach to practice have developed various alternative methods and ethical expectations for lawyering. One of these alternatives is 'collaborative law'. It was started in the United States, but has now spread to Australia, where it is becoming popular with family law specialists.[57] Collaborative law is one way in which practitioners who want to act according to *ethics of care* values have tried to specify what this might mean in practice by setting out a precise protocol for how they should behave. In the case study below we evaluate these alternative ethics.

CASE STUDY 6.3 Collaborative Law

Consider the following description of 'collaborative law' from a leader of the collaborative law movement in the US:

> Collaborative law consists of two clients and two attorneys, working together toward the sole goals of reaching an efficient, fair, comprehensive settlement of all issues. Each party selects independent collaborative counsel. Each lawyer's retainer agreement specifies that the lawyer is retained solely to assist the client in reaching a fair agreement and that under no circumstances will the lawyer represent the client if the matter goes to court. If the process fails to reach agreement and either party

55 See discussion accompanying n 31 above and also n 93 below.

56 It may even be possible for a party to mediation to prevent lawyers who had acted for the other side in that mediation from acting against them in a future case on the basis that the lawyers had been privy to confidential information from the other side: *Williamson v Schmidt* [1998] 2 Qd R 317; *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* [2001] 3 NZLR 343.

57 Mary Rose Liverani, 'Collaborative Law Practice Shaping Up as the Primary Dispute Resolution Mode' (2004) 42 *Law Society Journal* 24; Marilyn Scott, 'Collaborative Law: A New Role for Lawyers' (2004) 15 *Australian Dispute Resolution Journal* 207; Pauline Tesler, 'Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It' (1999) 13 *American Journal of Family Law* 215.

> then wishes to have matters resolved in court, both collaborative attorneys are disqualified from further representation. They assist in the orderly transfer of the case to adversarial counsel. Experts are brought into the collaborative process as needed, but only as neutrals, jointly retained by both parties. They, too, are disqualified from continuing work and cannot assist either party if the matter goes to court. The process involves binding commitments to disclose voluntarily all relevant information, to proceed respectfully and in good faith, and to refrain from any threat of litigation during the collaborative process . . . The process moves forward via carefully managed four-way [ie two lawyers and two clients] settlement meetings . . .[58]

One key feature of collaborative law is the agreement that the lawyers will withdraw from the case if the process breaks down and does not achieve resolution. This gives lawyers a powerful incentive to 'find a good solution for the other party's legitimate needs that is also acceptable to my client'.[59] In traditional practice, if lawyers fail to help their clients negotiate a settlement, they just go on to represent their client in court – charging the appropriate fees.

The second important feature of collaborative law is the promise to negotiate in good faith and voluntarily share information. In some protocols for collaborative law in Australia this has been spelt out to mean that lawyers are required to point out to the other side any mistakes they have made, or matters they have overlooked, rather than taking advantage of mistakes or ignorance.

DISCUSSION QUESTIONS

1. How do the two key features of collaborative law described above fit with traditional conceptions of the lawyer as *adversarial advocate* and traditional professional conduct rules? How does it change the conventional expectations of whose interests lawyers should be considering? How does it change the relationship between the lawyer and their own client?
2. The disqualification requirement in collaborative law is not only useful as an incentive to lawyers to come up with creative solutions to settle the parties' dispute. It also avoids some ethical problems of protection of confidential information and, possibly, conflicts of interest, where lawyers act co-operatively to try to resolve a problem but know that adversarial litigation is still a possibility. How does it do that?
3. What are the disadvantages of the collaborative law protocols? What complaints might a client have if their lawyer is acting as a collaborative lawyer?[60] How would each of the four different ethical approaches – *adversarial advocacy*, *responsible lawyering*, *moral activism* and *ethics of care* – evaluate the practice of collaborative law? Would each see it as ethically justified? Why?

58 Tesler, 'Collaborative Law: What It Is', 219.
59 Ibid 221.
60 See John Lande, 'Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering' (2003) 64 *Ohio State Law Journal* 1315; John Lande, 'The Promise and Perils of Collaborative Law' (2005) 12 *Dispute Resolution Magazine* 29; Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* (Department of Justice, Canada, 2005) <http://www.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/index.html> at 26 July 2006.

What Ethics Are Appropriate for Lawyers Acting as Mediators (ADR Facilitators)?[61]

A mediator's role is to be a neutral facilitator of collaborative, interest-based negotiation between the parties to resolve their dispute. Neutrality and impartiality of the mediator towards the parties is crucial. It is usually suggested that mediators who cannot be impartial should withdraw from the mediation process.[62] Some might suggest that a lawyer whose main work is in litigation should not also attempt the very different role of mediation. At the very least, lawyers ought to be aware of the different mindsets appropriate to the two different settings and identify their own dominant value approach before choosing to act in either litigation or ADR.

At the minimum, mediators should be free of any association with either party, or their case, that could mean they have an interest in the way the dispute is resolved. The relevant principles should be similar to those concerning how an *adversarial advocate* lawyer should handle any conflict of interest that might interfere with them zealously advocating on behalf of a client. But the objective is different – the purpose is to ensure that the mediator is free of any interest that could impact on being completely neutral towards *either* party's case (like a judge), whereas for conventional lawyering the objective is that they should be free of any interests except the need to zealously represent their *own client*. Thus NADRAC suggests in its framework standards for ADR practitioners:

> ADR practitioners need to demonstrate independence and lack of personal interest in the outcome, so that they approach the subject matter of the dispute with an open mind, free of preconceptions or predisposition towards either of the parties. The importance of exhibiting lack of bias is that the parties can be satisfied that they can trust the ADR practitioner to conduct the process fairly. This has usually been referred to as a requirement of neutrality. In NADRAC's view neutrality requires that the ADR practitioner disclose to all parties: any existing or prior relationship or contact between the ADR practitioner and any party; any interest in the outcome of the particular dispute; the basis for the calculation of all fees and benefits accruable to the practitioner; any likelihood of present or future conflicts of interest; personal values, experience or knowledge of the ADR practitioner which might substantially affect their capacity to act impartially, given the nature of the subject matter and the characteristics of the parties.[63]

As with the general law on conflicts of interest, these principles recognise that full disclosure to the parties and their consent can 'cure' conflicts of interest so that the mediator is free to continue to act. It also recognises the possibility of future conflicts – if the mediator, or their firm, might act for one of the parties in the future, this is a potential conflict of interest that would detract from the mediator's neutrality. For that reason, some commentators have suggested that

61 For an excellent account of ethical issues in mediation practice see Astor and Chinkin, *Dispute Resolution in Australia*, 224–31.
62 See for example Principle 2 ('Impartiality') of the Law Council of Australia, *Ethical Standards for Mediators*.
63 NADRAC, *A Framework for ADR Standards*, 112. See also Law Council of Australia, *Ethical Standards for Mediators*, Principle 3 ('Conflicts of Interest').

mediators, and their firms, should not act for parties to any mediation in the future in relation to similar issues, or there should at least be a certain period of time (eg five years) before the mediator or their firm can do so.[64] Note also that the 'basis for calculation of fees and benefits' for the mediator is a matter that should be disclosed because it could lead to conflicts of interest. If, for example, the mediator's fee depends on the success of the mediation, this ought to be disclosed because this makes it more likely the mediator might pressure parties into a false harmony.[65]

There will almost certainly be a range of minor, and perhaps not so minor, factors that arise as the mediation progresses that potentially make a mediator less than completely neutral in their attitude to the parties, whether it is personal dislike of the way a party presents themselves, or deep-rooted values and assumptions that affect their opinion about the rights and wrongs of the parties' cases.[66] The mediation process, however, requires that the mediator conduct the whole process 'in a fair and even-handed way'. They should 'generally treat the parties equally', for example by 'spending approximately the same time hearing each party's statement or approximately the same time in separate sessions' and 'ensure that they do not communicate noticeably different degrees of warmth, friendliness or acceptance when dealing with individual parties'.[67] This is likely to require considerable self-awareness, as well as training and practice. Indeed discussion of the appropriate *ethics* of mediators often shades into discussion as to the character, skills and techniques that mediators should have.

It is part of the purely facilitative, impartial role of the mediator as a neutral third party that they are not to advise the parties on the content of the dispute. Thus the Law Council of Australia's *Ethical Standards for Mediators* states that:

> Even if all the disputants agree that they would like the mediator to express an opinion on the merits, there is a substantial risk in giving such an opinion that the mediator may no longer appear to be impartial. As a result the mediator may be obliged to withdraw.[68]

The reason for this is that mediation is intended to be a process in which the parties come up with their own solution to their own problem. ADR facilitators are supposed to facilitate parties reaching a voluntary agreement. They are not to advise or guide the parties towards any outcome.

But what capacity or obligation does this imperative impose on mediators to correct any unfairness they observe in the way the parties negotiate with one

64 See Menkel-Meadow, 'Ethics in Alternative Dispute Resolution', 432–41. Note that the commentary to Principle 3 of the LCA's *Ethical Standards for Mediators* says that 'The mediator should not establish a professional relationship with one of the parties in relation to the same dispute': Law Council of Australia, *Ethical Standards for Mediators*.

65 Also the commentary to Principle 6 ('Quality of the Process') of the LCA's *Ethical Standards for Mediators* says that 'A mediator's conduct should not be influenced by a desire to achieve a high settlement rate': Law Council of Australia, *Ethical Standards for Mediators*.

66 See Astor and Chinkin, *Dispute Resolution in Australia*, 228. Note that the NADRAC principle quoted in the text above suggests that the ADR practitioner should disclose any 'personal values, knowledge or experience' that might affect their capacity to act impartially.

67 NADRAC, *A Framework for ADR Standards*, 113.

68 Law Council of Australia, *Ethical Standards for Mediators*, commentary on Principle 2 ('Impartiality').

another, and the outcome by which they resolve their dispute?[69] The case studies on mediators' ethics above included situations where one party was not represented, or was poorly represented, and therefore did not understand their own legal rights sufficiently, and also where the mediator was aware that one side's lawyer was lying in the mediation. Negotiations in a mediation process might also be unfair where there is a power imbalance between the parties, for example, husband and wife where there has been domestic violence; or business and individual consumer where the allegations concern the business taking advantage of a disability on the part of the consumer; or where one side is seeking to abuse the mediation process to cause the other side additional expense or get a foretaste of the other side's evidence and has no intention to resolve the dispute. Even where there is no specific unfairness or power imbalance, there is also always the constant danger that one or both of the parties will simply feel pressured into coming to a 'voluntary' resolution of their dispute, despite misgivings, in order to avoid trial and further conflict.

The mediator may also become aware of unfairness to third parties or the public interest. For example, two parents might agree to shared parenting arrangements in circumstances where one has admitted during mediation to physical or sexual abuse of the children in the past. Or an aspect of the arrangements agreed in a commercial dispute might amount to illegal conduct: for example, backdating a document to avoid stamp duty, or making part of the settlement payment in cash to avoid income tax. Someone who has been injured by a faulty product might agree not to warn anyone else of the danger in return for a larger settlement amount (see also Case Study 6.4 on the Cape asbestos settlement below).

Consistent with the mediator's role in facilitating party participation, ADR practitioners and commentators generally suggest that it is the mediator's role to do what they can to ensure the integrity of the process, but not to interfere in the outcome. It is clear that a large part of the mediator's role will often be educating the parties as to what the process requires of them and guiding them through the steps of a collaborative interest-based negotiation. Thus:

- It is the mediator's responsibility to ensure as much as possible that the parties are entering into a voluntary agreement, for example by giving parties the opportunity and recommendation to seek independent advice before signing any agreement.
- Mediators should also have a responsibility to notice whether parties are participating freely, equally and in good faith in the negotiation process.
- They should make suggestions as to how the mediation *process* should unfold in order to address any inequality or unfairness they have noticed, and prevent it tinging the outcome.
- The mediator's ordinary role of suggesting and facilitating processes such as private caucuses, reality testing, identifying interests, and generating options should also help to even out less substantial power imbalances and engage reluctant parties in good faith negotiation.[70]

69 See Astor and Chinkin, *Dispute Resolution in Australia*, 229–31.
70 Dearlove, 'Court-Ordered ADR', 17.

Where power imbalances and inequalities are more entrenched, the mediator should have the responsibility to make more substantial suggestions about changes to the process. The NADRAC *Framework for ADR Standards* suggests that where issues arise:

- The mediator 'may then consider' including an interpreter, support person, adviser, or representative in the process to even up any power imbalance; or
- Enabling the provision of technical assistance, information or expert advice to even up any knowledge and expertise imbalance.[71]

Thus the mediator would have the responsibility to recommend that the parties expand the number and range of people participating in the process in order to make sure that the parties have adequate support to participate effectively.

Other ethicists and commentators have gone even further and suggested that mediators (and facilitators of other ADR processes) have a responsibility to make sure that all the parties who have an interest in a particular dispute should be present (or represented) in any ADR process, so that the issues can be comprehensively settled.[72] For example, consider the situation where one victim of child sexual abuse by a teacher in a church school sues the church, and it is known that many other children were abused as well. If the school wants to resolve the matter without litigation, then the ADR process should include any other victims that could be identified, rather than leaving each one to negotiate or sue individually without knowing what has happened in the other cases.[73] This partially addresses the possibility of negotiated resolutions creating unfairness or harm to third parties by making sure that third parties who have an interest in the way the dispute is resolved participate in its resolution. There are also more practical reasons for including third parties who have an interest in the dispute resolution process since it means that any solution agreed to is likely to be more sustainable in the long term, because people who participated in negotiating the solution are less likely to challenge it.

In cases where it is impossible to address problems of power imbalance, lack of good faith by the parties, or structural inequality within the mediation process, where the parties refuse to follow the mediator's lead on process issues, or where the parties simply cannot communicate effectively (perhaps because one party is not physically present), it is generally accepted that the mediator's ethical responsibility is to terminate the process and withdraw.[74] If the problem, and the fact that it cannot be remedied, is evident beforehand, the mediator could and should refuse to take on the mediation in the first place. The mediator's duty is to

71 NADRAC, *A Framework for ADR Standards*, 110–11.
72 Making sure that all those affected by a dispute or crime are present when the matter is discussed in 'conferences' is a hallmark of the 'restorative justice' approach to diversionary conferencing in the criminal justice system and other disputes. See Braithwaite, *Restorative Justice*.
73 Example based on Llewellyn, 'Dealing with the Legacy'.
74 Dearlove, 'Court-Ordered ADR', 18; Law Council of Australia, *Ethical Standards for Mediators*, Principle 7: 'A mediator may terminate the mediation if the mediator considers that: (i) any party is abusing the process; or (ii) there is no reasonable prospect of settlement'.

ensure integrity of the mediation *process*, so where integrity cannot be ensured, termination of that process seems an appropriate response.

The standard view of ADR practitioners and commentators is that the mediator cannot, however, suggest a different *resolution* to that which the parties come up with.[75] Nor can the mediator *breach confidentiality* by reporting party or lawyer misconduct to regulatory authorities, or by blowing the whistle on any illegal or unethical aspects of agreements reached in mediation, unless there is a law specifically authorising such disclosure.[76] The rationale is that if parties and their lawyers believe that mediators are judging their conduct with a view to reporting any ethical misconduct or illegality afterwards, this would destroy their trust in the impartiality of the process.[77] Thus the mediator's role is to protect the ADR *process* and its integrity, but not to worry about any *substantive* illegality or injustice as seen by criteria external to that process, unless a law clearly requires them to do so. This raises the issue of the role, if any, of considerations of public interest, potential harm to third parties, and legality in negotiated resolutions to disputes that could otherwise have been litigated. These issues can be equally significant for lawyers representing parties in ADR and indeed in negotiations not assisted by a third-party neutral. We consider these issues in the next, and final, subsection of this chapter.

Protecting Third Parties and the Public Interest in Negotiated Settlements and ADR?

While collaborative negotiation and ADR are put forward as means for people to resolve their disputes to meet their own needs in their own way, critics argue that they are just as likely to perpetuate the domination and oppression of everyday life as they are to empower disputants to participate in resolving their own problems. Inappropriate mediation in family law and domestic violence can return disputes to families already imbued with imbalances of power between men and women, give unaccountable power to mediation professionals, and detour women away from enforceable decisions of courts. Consumer complaint schemes in a bank or phone company can send pacified customers away unaware that their problem confronts thousands of others who may or may not complain, and leave exploitative company policies untouched. Internal dispute resolution in a workplace can change issues of institutional bias and discrimination into individual management problems for particular work areas to deal with.[78]

75 The Law Council of Australia's *Ethical Standards for Mediators* also recommends that 'The mediator ought to be cautious about direct involvement in drafting the terms of agreement, as their involvement in drafting may be construed as providing legal advice': Law Council of Australia, *Ethical Standards for Mediators* commentary to Principle 8 'Recording Settlement'.

76 Dearlove, 'Court-Ordered ADR', 18–19. Note that mediators employed by the Family Court of Australia have a legislative obligation to report suspected child abuse: see Astor and Chinkin, *Dispute Resolution in Australia*, 182–3.

77 See Law Council of Australia, *Ethical Standards for Mediators*, commentary to Principle 5.

78 C Parker, *Just Lawyers*, 61–3; Genn, *Paths to Justice*.

We have seen above that collaborative negotiation and mediation require lawyers representing parties, and especially those acting as mediators, to be centrally concerned with doing what they can to ensure that *processes* of negotiation are open, honest, fair and cooperative.[79] Should lawyers and ADR facilitators also be concerned about whether the *outcomes* decided in ADR processes are fair as between the parties, and whether the interests of third parties and the public interest are appropriately protected?

Where settlements are negotiated between the parties and their lawyers without third-party assistance, the lawyers will often be 'god' in deciding what an appropriate settlement is. As one of the specialist plaintiff's solicitors in Hazel Genn's research said:

> The fact is, when you settle a case, who can argue? The client's happy. I mean, most clients will settle for tuppence. You know, you tell them that that's all they're going to get – they'll settle . . . So all you've got is you and your conscience to actually play with and it depends where your conscience leads you.[80]

The standard *adversarial advocacy* conception of lawyers' ethics and professional conduct obligations says that lawyers have a responsibility to make sure their own clients get the best deal they can in negotiations. But how do they balance the desire to get justice for their client against the need to compromise in order to get anything at all? The client will generally rely on the lawyer to advise them as to whether to accept a deal that gives them less money than they think they deserve (that is, less than justice), or whether to risk getting nothing at all, except a huge bill for legal costs, if they go to court. A lawyer might also have considerable discretion as to how hard to press the other side in negotiations for a public apology or admission of liability, as opposed to a confidential settlement. A good lawyer should not simply advise their client to agree to anything that gets the matter resolved co-operatively. But nor should they refuse any deal that does not conform exactly with what they believe the courts would, or should, give their client. Lawyers will often need to take responsibility for developing their own ethical opinion about what is a 'good' deal for their clients – taking into account their duty to represent their client's needs and desires, the other side's interests, and legal principle. Case Study 6.4 on the Cape asbestos settlement illustrates some of the issues that might be relevant in such a decision.

The issue of whether lawyers ought to take ethical responsibility for the justice of the outcome of negotiation becomes even more pressing when we consider their role as mediators.[81] The Law Society of New South Wales has argued that lawyers (and others) acting as facilitators of ADR should have no role at all in evaluating, or trying to influence, the fairness of an outcome agreed in ADR:

79 Note however that this does not necessarily require that they follow legal standards or procedural fairness.
80 Genn, *Hard Bargaining*, 129.
81 Note that for ADR practitioners who have a role in evaluating and determining the dispute, such as arbitration, this is less of a problem, as they clearly have a role in advising the parties as to what an appropriate outcome would be.

> To promote fairness and justice for the parties, we prefer the test of the 'satisfaction of the parties' . . . We would not like to see dispute resolvers intervene on the basis of 'We have to protect you from your own values' or 'We know what's best for you' . . . [P]arties have a right to enter into agreements that may be perceived as 'unfair' by an uninvolved person's yardstick.[82]

By contrast, Astor and Chinkin take the *moral activist* view that:

> There are clearly some situations where the agreement that the parties propose is repugnant and the mediator can, and should, withdraw . . . because, although they recognise that the parties are free to make an agreement, the mediator finds it ethically unacceptable that she or he has anything to do with arriving at that agreement.[83]

Mediators cannot hide behind their role where they can see that social structural inequalities make mediation unfair. They should withdraw if the solution proposed by the parties to a mediation is morally repugnant or creates some injustice such as prejudicing the safety or welfare of a party, a third party or the public. A *moral activist* approach would argue that the same should be true for lawyers representing parties. The NADRAC *Framework for ADR Standards* is consistent with this view stating that, in cases of grave injustice, mediators and other ADR practitioners retain a discretion to refuse to take part in that injustice and to do what they can to remedy it. The *Framework for ADR Standards* states that even in non-determinative cases ADR facilitators

> may need to consider and get advice on whether: the interests of third parties are appropriately protected, or at least not unnecessarily or unjustifiably threatened; . . . an agreement condones an illegal activity; an agreement is legally void or voidable; . . . any advice, agreement or decision does not involve unlawful or unjustifiable discrimination.[84]

A *responsible lawyering* perspective might argue that this means that lawyers, as officers of the court, have a fundamental duty to law that means that whether they are acting as representatives of parties in negotiation and ADR, or as ADR facilitators, then they ought to have regard to whether the deals agreed to in negotiation and ADR meet the requirements of legal fairness both in terms of process and substance.[85] Moreover they might have a duty to make sure that disputes are resolved publicly, and in a way that sets precedent, and is subject to precedent.[86]

But to take this approach would be to give up the idea of the distinctiveness of ADR and negotiation – that they provide an opportunity for doing justice

82 Law Society of New South Wales, *Submission on NADRAC Paper: Issues of Fairness and Justice in Alternative Dispute Resolution* (1997) National Alternative Dispute Resolution Advisory Council <http://www.ag.gov.au/adr/Lawsocnsw.htm> at 5 March 2006.
83 Astor and Chinkin, *Dispute Resolution in Australia*, 230–1.
84 NADRAC, *A Framework for ADR Standards*, 113–14.
85 It has been argued that the empirical research on party satisfaction with ADR shows that the most important thing is people's sense of procedural fairness in the process, whether litigation or ADR: Just Balstad, 'What Do Litigants Really Want? Comparing and Evaluating Adversarial Negotiation and ADR' (2005) 16 *Alternative Dispute Resolution Journal* 244.
86 For discussion of arguments for and against this approach see David Luban, 'Settlements and the Erosion of the Public Realm' (1995) 83 *Georgetown Law Journal* 2619.

and resolving disputes in ways other than those traditionally envisioned by law. Proponents of ADR argue that parties should be free to choose to settle matters in ways that they are happy with even if this means agreeing to something less than, or different to, what the law might strictly require, as long as they are not actually agreeing to break the law, and provided they have fully and freely participated in the process and consented to the outcome.[87] Yet, how are we to know what full and free participation and consent mean, without recourse to legal principle? There are no easy answers in exploring lawyer and ADR practitioners' ethical responsibilities for the justice of negotiated settlements. There is likely to always be a space in which lawyers and others will need to choose for themselves how to balance legal principle, client interest and justice for third parties or the public in a particular set of circumstances. The following case study is designed to help identify how these issues might arise and what considerations might be relevant.

CASE STUDY 6.4 The Cape Asbestos Settlement[88]

A South African company, Cape Plc, had mined and crushed asbestos in South Africa for decades. In March 2003 Cape (and an associated company, Gencor, another asbestos mining company) finally settled a long-running compensation claim in the UK courts made by 7500 largely poor, black and illiterate South Africans who had worked for the company or been affected by its operations because they lived nearby and now suffered from various diseases caused by exposure to asbestos. Over the seven years of litigation and settlement negotiations in relation to the group action by 7500 claimants, about 1000 of them died. An earlier settlement in 2001 in which Cape agreed to pay a total of £21 million to the claimants collapsed in late 2002 when Cape's financial difficulties meant that their bankers would not release the money needed to pay the agreed amount. Gencor was joined to the action and the matter was eventually settled for £7.5 million to be paid by Cape for the claimants, and about another £40 million to be paid by Gencor in relation to the claims against Cape as well as claims against Gencor in its own right, including £3 million for environmental rehabilitation.

The law firm that represented the plaintiffs in the group action was Leigh Day, a well-known law firm with a history of taking on public interest cases on behalf of disadvantaged people. Richard Meeran, the partner who ran the case, has commented that:

> The settlement terms represented a pragmatic solution to the financial reality of Cape's position rather than reflecting any relation to the true value of the case . . . Although the evidence justified the claimants' confidence of winning the trial . . . Cape's financial position was such that it would probably have gone into liquidation if it lost . . . the only achievement of a court victory might have been to set a precedent for claims against multinationals. Victims would receive only what was available on the break-up of the company. The claimants could also have lost what was, after all, a cutting-edge case. Furthermore, judgment was at least seven months away and

87 See Menkel-Meadow, 'Whose Dispute Is It Anyway?'.
88 See Richard Meeran, 'Cape Plc: South African Mineworkers' Quest for Justice' (2003) 9 *International Journal of Occupational & Environmental Health* 218. Some of this material is based on an interview with Richard Meeran, former Leigh Day partner (Melbourne, 7 March 2006).

> the process could be drawn out by appeals . . . So there was a serious risk that an award would not have translated into real money.[89]

The Leigh Day team of lawyers (up to forty-two at one stage) developed a database and formula to determine what amount of compensation each individual claimant would get, depending on their exposure, development of the disease and so on. Many of the claimants did not even have up to date medical records. The lawyers knew that not only was the settlement amount less than a court might have judged to be appropriate, but also there were likely to be many individual cases where claimants actually had a more or less deserving case than the scant evidence available suggested. But it would have cost much more money to make the necessary assessments to make a fairer distribution and this would have just eaten into the settlement amount (which was already lower than the claimants legally deserved). Just as importantly, undertaking more evidence-gathering and analysis would have taken time, which was most undesirable given the claimants' financial predicament, and the rate at which the victims were dying uncompensated.

The law firm Leigh Day agreed to destroy all the documents they had received from Cape in discovery relating to Cape's liability in relation to the matter (but Cape agreed to keep their copies of the same documents until 2011) and also agreed not to act for any future claimants against Cape. Cape insisted that this was a precondition for any settlement, what lawyers call a 'deal-breaker'. An additional condition of the first (failed) settlement, but not the second (successful) settlement was that the South African government agreed not to fund any future claims against Cape, and that it would not pursue Cape in relation to its environmental law obligations for any of the cost of rehabilitating its former asbestos mines.

DISCUSSION QUESTIONS

1. In group actions such as this the lawyers for the plaintiffs negotiate the terms of any settlement and also the arrangements for sharing out the settlement amount, and then advise the claimants on whether or not to accept the settlement package. (In group or class actions the court will also need to approve the settlement, but the court will not generally suggest changes to particular terms.) What factors do you think the lawyers took into account in recommending this settlement to their clients? Was a settlement on these terms the only way to meet their clients' needs? What would have been the arguments, if any, in favour of going to court even if Cape was bankrupted? Do you think lawyers for the parties have too much discretion in deciding these matters? Is there any alternative?
2. It is not uncommon for a plaintiff's lawyers (and their firm) to be asked to agree not to represent any future plaintiffs against the defendant in relation to the same issue where there are likely to be multiple people with the same complaint against the defendant. In this case there were another couple of thousand potential claimants who had not signed onto the action.[90] Why would the defendant want such a clause? Is it in the plaintiff's lawyers' interests to sign up to such a clause? Is it in their client/s' interests? It might be argued that such clauses prevent lawyers acting according to the fundamental rules of the adversary system of being

89 Meeran, 'Cape Plc', 225.
90 The earlier settlement agreement (that collapsed) had actually included provision for these potential future claimants, but the second one did not.

available to any client who comes along. Is it ethical for the defendants' lawyer to ask for such a clause in a settlement agreement? Should the courts approve agreements that include such agreements?[91] Do the plaintiffs' lawyers and their clients have any duty to consider and protect other potential plaintiffs' interests?

3. Leigh Day were criticised by one group of asbestos activists for agreeing to destroy the documents received from Cape on discovery, although two other prominent asbestos support groups, and also the Premier of the Northern Cape province supported Leigh Day.[92] But there is a rule of law ('the rule in Harman') that means that those discovered documents would be subject to an implied undertaking not to disclose them, or use them for any other purpose, without the leave of the court (which will only be given in special circumstances) anyway.[93] Why do you think this principle exists? Why do you think asbestos activists might have been angry about this aspect of the agreement?
4. Firms like Leigh Day would generally be seen as *moral activist* in their ethical orientation. To what extent do their actions described above fit with *moral activist* values in lawyering? To what extent do they not? Are their actions ethically justified on other bases?

Conclusion

When lawyers *represent* clients in negotiation, mediation or other ADR processes, they are usually not acting primarily as *adversarial advocates*. Nor is it in their clients' interests that they act as *adversarial advocates*. Rather they act in collaborative, problem-solving mode to help their clients prevent or resolve disputes. When lawyers act as ADR *facilitators*, their role is even further from traditional *adversarial advocacy*. They are third-party neutrals with an obligation to impartially help both parties co-operate to resolve their problems. The processes of negotiation and ADR themselves assume that practitioners' ethics and practices should be informed by *ethics of care* values, rather than *adversarial advocacy*. This assumption does not apply only to lawyers. The parties themselves and non-lawyer ADR practitioners should demonstrate similar ethics.

If the role and ethics of lawyers in ADR and interest-based negotiation are so different from the traditional role and ethics of adversarial lawyering, we might question whether lawyers should be encouraged or allowed to be involved

91 See David A Dana and Susan P Koniak, 'Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms' (2003) *University of Illinois Law Review* 1217; Luban, 'Settlements and the Erosion of the Public Realm', 2624–5; cf Stephen Gillers and Richard W Painter, 'Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements' (2005) 18 *Georgetown Journal of Legal Ethics* 291; Yvette Golan, 'Restrictive Settlement Agreements: A Critique of Model Rule 5.6(b)' (2003) 33 *Southwestern University Law Review* 1.

92 Kevin Maguire, 'Law Firm Was Ready to Shred Data on Asbestos Claims', *The Guardian Weekly* (London, UK), 1–7 October 2004, 12; unpublished letters to *The Guardian* from these parties on file with the authors.

93 Matthew Groves, 'The Implied Undertaking Restricting the Use of Material Obtained During Legal Proceedings' (2003) 23 *Australian Bar Review* 1.

in collaborative negotiation and ADR at all.[94] Indeed some ADR processes have rules that state that parties are not allowed to bring lawyers into the process, or that lawyers may be present but cannot speak. The reason is the danger that where lawyers are allowed to participate freely, they will tend to dominate the process so that parties do not feel empowered to take responsibility for their own dispute. Lawyers' interventions can also mean that the process becomes excessively concerned with legal and procedural rights. Some commentators have also argued that when lawyers act as mediators, their training makes them inclined to be too opinionated and directive of the parties, rather than facilitate the parties' own development of solutions to their problems.

At the same time many lawyers have themselves become disillusioned with traditional legal practice based on *adversarial advocacy*, and the way it requires them to behave as aggressive warriors rather than problem-solvers for their clients. Many lawyers see the possibility of being involved in collaborative negotiation and ADR as a welcome broadening of conventional practice. But lawyers who are used to conventional adversarial practice will need to be aware of the change they need to make to their own adversarial instincts, values and practices in order to practise appropriately in ADR and negotiation processes. Rules alone are unlikely to be able to enforce such a change in culture and mindset.

Finally, it is important to note again the fact that legal professional practice inspired by the *ethics of care* can be criticised because it is not primarily aimed at protecting people's rights (unlike *adversarial advocacy*) or advancing legal or social justice (unlike *responsible lawyering* and *moral activism*, respectively). It will not be desirable to encourage *all* lawyers to act according to *ethics of care* values *all* the time, if this means abandoning these other roles. Even the strongest advocates of the use of *ethics of care* values and ADR by legal practitioners emphasise that ADR and co-operative negotiation can only work fairly where people still have realistic access to courts and lawyers to vindicate their rights if necessary, and law and lawyers are vigilant in promoting justice more broadly.[95]

Recommended Further Reading

Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, Sydney, 2nd edn, 2002).

Law Council of Australia, *Ethical Standards for Mediators* (2000) <http://www.lawcouncil.asn.au/policy/1957353025.html> at 20 March 2006.

Carrie Menkel-Meadow, 'Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)' (1995) 83 *Georgetown Law Journal* 2663.

Carrie Menkel-Meadow, 'Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities' (1997) 38 *South Texas Law Review* 407.

94 See Sourdin, *Alternative Dispute Resolution*, 235–83.
95 Menkel-Meadow, 'Whose Dispute Is It Anyway?'; Parker, *Just Lawyers*.

Carrie Menkel-Meadow, 'The Limits of Adversarial Ethics' in Deborah L Rhode (ed), *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (Oxford University Press, New York, 2002) 123.

Carrie Menkel-Meadow and Michael Wheeler, *What's Fair? Ethics for Negotiators* (Jossey Bass, San Francisco, 2004).

National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (NADRAC, Barton, ACT, 2001) <http://www.ag.gov.au/agd/WWW/disputeresolutionhome.nsf/Page/Standards> at 20 March 2006.

Jim Parke, 'Lawyers as Negotiators: Time for a Code of Ethics?' (1993) 4 *Australian Dispute Resolution Journal* 216.

Michelle Wills, 'The Negotiator's Ethical and Economic Dilemma: To Lie, or Not to Lie' 2001 (12) *Australian Dispute Resolution Journal* 48.

7

Conflicting Loyalties

Introduction

The touchstone of lawyers' professional obligations of devoted client service to their clients is the trilogy of duties: loyalty, confidentiality and care. The most strict and onerous rules in the law of lawyering relate to these duties, and although there is much case law and commentary on the detail of each obligation, their main contours are quite clear.[1]

First, lawyers are supposed to avoid situations involving a *conflict of interest* between a lawyer's personal interest and their duty to a client; or, a *conflict of duties* owed to two or more clients. Lawyers are also supposed to refrain from using their relationship with the client as a means of making any personal gain, and they must fully disclose to their client any conflicts of interest or personal gains that do arise. These obligations apply not just to the individual lawyer but to the whole firm: if one lawyer cannot act for a potential client because of a conflict of interest, then usually the whole firm cannot act. These are 'fiduciary' obligations set out and enforceable in the law of equity and also reinforced in professional conduct rules and disciplinary decisions. In addition to being sued by their clients for breach of these obligations at general law, lawyers can also be disciplined.

Lawyers also have strict obligations to maintain the *confidentiality* of information relating to the representation of each client, and generally must not disclose or otherwise use that information for other purposes. This duty of confidentiality continues forever – after the client's matter has been finalised, and even after the

1 For a thorough account see G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, Pyrmont, NSW, 3rd edn, 2006) 'Part II: Lawyers' Duty to the Client'.

client is dead. This means that lawyers (and their law firms) cannot act against a former client in relation to any matter in which they had received relevant confidential information from that client. As with lawyers' fiduciary obligations, lawyers who breach their confidentiality obligations to clients can be sued by those clients in general law, and also disciplined for misconduct. In fact the law considers lawyers' obligations of confidentiality so important that much that is communicated between lawyer and client is also protected from disclosure to courts, police and regulatory authorities (all of whom can normally compel disclosure of information) by client legal privilege.

Finally, lawyers owe a general duty of *care* to their clients which means they can be sued for negligence or breach of contract if they do not take reasonable care to protect and advance their clients' interests, and perform their legal work competently. Gross breaches of care can also be subject to disciplinary action.

The profession has traditionally seen it as a cornerstone of *adversarial advocacy* that lawyers serve each client's interest loyally, confidentially and carefully. Indeed *adversarial advocacy* assumes that clients need to be able to trust their lawyers to provide advice and represent them in the legal system completely uninfluenced by any concern other than the client's interests. In doing so clients must also be able to fully inform their lawyer of all relevant facts, 'confident' that the information will not be passed on to anyone else for any other purpose.

In practice, however, these obligations are not as simple and straightforward as they might appear. It is part of the nature of legal practice that lawyers will inevitably face conflicting pressures and loyalties that might *interfere with* the performance of their duties of loyalty, confidentiality and care. The ethically significant thing is how each lawyer responds to these conflicting pressures and loyalties when they occur, or whether they even notice them. (Case Studies 7.1 and 7.2 give examples of law firms that, arguably, did not adequately respond to conflicts of duties to different clients.) There are also (or should be) ethical *constraints* on the extent of lawyers' duties of loyalty, confidentiality and care to clients. These constraints on the duty to the client will come from the lawyer's duty to the court and the law, to the public interest and perhaps, in some circumstances, even to the lawyer's own family and self.[2] Lawyers also need to be sensitive to the fact that zeal on behalf of clients is not always the highest ethical goal, a delusion that is especially likely to occur where the client's interests (in unethical or illegal behaviour) coincide with the lawyer's own interests (in making money and keeping a client that produces steady and interesting work).

In the first part of this chapter, we critically analyse the principles of professional conduct set out in the *Model Rules* that relate to conflicts between lawyers' own interests and their duty to their clients, conflicts between the duties owed

2 As we shall see below, the *ethics of care* would certainly say that it is a lawyer's obligation to themselves not to ethically debase themselves in the interests of a client. An *ethics of care* might also argue that in some circumstances the obligation to spend time with one's family should trump the obligation to serve a client zealously.

to two or more current clients, and the situation where a lawyer proposes to act against a former client for a new client. As we shall see, some of these obligations are not set out as clearly, nor enforced by professional regulators as strictly, as we might expect, given the emphasis which the dominant *adversarial advocacy* ideal gives to devoted client service. In the second part of this chapter we consider how using the three alternative ethical approaches introduced in Chapter 2 – *responsible lawyering*, *moral activism* and *ethics of care* – would change our view of the extent and limits of a lawyer's duty to their client in the face of various conflicting pressures and loyalties.

How Far Does Loyalty to Client Extend? The Values in the *Model Rules*

The *Model Rules* reflect the major value of loyalty to the client, but they also temper and sometimes undermine that loyalty with internally conflicting rules which can provide opportunities for lawyer self-interest to hold sway. In this section we look firstly at the rules concerning lawyer-client conflicts of interest, and ask how broadly defined are the conflicting 'interests' that lawyers must avoid. Does and should the prohibition only extend to lawyers' financial interests that conflict with their client's interests, or does it also extend to 'fuzzier' conflicts of interest such as conflicting social or political ties that might temper a lawyer's zeal on behalf of their client?

Next, we consider the situation where lawyers owe duties of loyalty, confidentiality and care simultaneously to two or more clients who might have conflicting interests in a matter. We ask whether the *Model Rules'* position that lawyers must absolutely avoid acting simultaneously for two or more clients with conflicting interests, but can act for clients with *potentially* conflicting interests makes any ethical sense.

Finally, we critically consider the situation where a lawyer or law firm proposes to act for one client against a former client. The dominant view is that the lawyer's obligation of loyalty and care to the former client stops when the retainer stops, but the ongoing duty of confidentiality often might prevent the law firm from acting for the new client. We ask whether this confidentiality-based approach to deciding when lawyers and law firms can act against former clients is ethically adequate. This question is especially pertinent in the context of the widespread use of information barriers (often known as 'Chinese walls') within law firms in an effort to continue acting against former (or even current) clients, even where the law firm does hold relevant confidential information.

Lawyer-Client Conflict

Model Rule 9 is straightforward in its blunt requirement that lawyers 'must not, in any dealings with a client':

> allow an interest of the practitioner or an associate of the practitioner to conflict with the client's interest (*Model Rule* 9.1.1)
>
> exercise any undue influence intended to dispose the client to benefit the practitioner in excess of the practitioner's fair remuneration for the legal services provided to the client. (*Model Rule* 9.1.2)

The Rule goes on to categorically state that lawyers must completely avoid entering, or continuing, the lawyer-client relationship if there will be any conflict between the client's interests and the lawyer's interests, or even the interests of 'an associate' of the lawyer:

> A practitioner must not accept instructions to act or continue to act for a person in any matter when the practitioner is, or becomes, aware that the person's interest in the matter is, or would be, in conflict with the practitioner's own interest or the interest of an associate. (*Model Rule* 9.2)

An 'associate' of a practitioner is defined very broadly (in the definitions section of the *Model Rules*) to include 'a partner, employee, or agent of the practitioner or of the practitioner's firm', 'any corporation or partnership in which the practitioner has a material beneficial interest', 'a member of the practitioner's immediate family' or 'a member of the immediate family of a partner of the practitioner's firm'.[3]

Despite the fact that these rules seem to suggest that lawyer-client conflicts of interest should be completely avoided, in practice lawyer-client conflicts are likely to be unavoidable. How should they be handled and which ones can, and should, be completely avoided?

Most obviously, as *Model Rule* 9.1.2 (quoted above) implicitly recognises, a lawyer's interests are in conflict with their client's interests 'the minute they begin work for a client, since their interest in making a larger income conflicts with the client's interest in paying as little as possible for solving his or her legal [problems]'.[4] Moreover the fact many lawyers are employed by law firms means that their interest in serving their employer law firm (by clocking up billable hours) may well conflict with their fiduciary duty to their client.

The *Model Rules* and the courts have recognised that a lawyer's interest in receiving a higher fee from the client is a conflict of interest that should be handled carefully. In *Council of the Queensland Law Society Inc v Roche*,[5] for example, a practitioner negotiated a substantial increase in fees with an existing 'no win, no fee' client in a personal injuries matter. The client was in financial difficulties, did not fully understand how charges were being incurred under the original fee agreement, and was anxious for the legal practitioner to take on a second case on his behalf. The court found the practitioner guilty of professional misconduct for

3 'Immediate family' is defined in turn to mean 'the spouse (which expression may include a de facto spouse or partner of the same sex), or a child, grandchild, sibling, parent or grandparent of a practitioner'.
4 Larry May, *The Socially Responsive Self: Social Theory and Professional Ethics* (University of Chicago Press, Chicago, 1996) 126.
5 [2004] 2 Qd R 574.

'preferring his own interest to that of his client'. He had breached his fiduciary obligations to the client by failing to fully inform the client of the way the client's rights under the fee agreement and the fees payable would change. He should also have advised the client to obtain independent legal advice before signing the new agreement, even though the client gave evidence that he would not have sought out that independent advice.[6] (See Chapter 8 for further ethical analysis of lawyers' fees and billing arrangements.)

On the other hand, there are many lawyer-client conflicts where an uncompromising stand is resolutely (and properly) applied. The courts and legal profession regulators consistently denounce and sanction obvious, direct conflicts of interest such as financial or property dealings between lawyers and clients, including borrowing or lending money to one another, as well as situations where the client invests in a scheme or business run by the lawyer.[7] Lawyers have also been disciplined for receiving a profit or commission for referring clients to other service providers (eg to a financial adviser or real estate agent) where that has not been fully disclosed to the client. Indeed receiving a secret profit in this way can even amount to a crime by the lawyer (see *Model Rules* 32 and 33).[8]

Similarly, *Model Rule* 10 addresses the conflicts of interest inherent in lawyers earning fees from their clients in the specific environment of will-making, an area where there is a timeless concern about temptation overtaking lawyers acting for elderly, well-resourced and unsupported clients. *Model Rule* 10.2 prevents a lawyer from drafting a will 'under which the practitioner or the practitioner's firm or associate will, or may, receive a substantial benefit in addition to reasonable remuneration'. *Model Rule* 10.1 also requires lawyers to disclose to the client in writing any commission or fee they will be entitled to claim under the will, for example for being appointed executor and administering the estate, and to inform the client that they could appoint as executor someone else who would charge no fee. But this rule does not prohibit these additional benefits accruing to the lawyer, since there is a long tradition of lawyers acting both as executors (when no suitable family members exist) and solicitors for deceased estates. The remuneration for these roles is set by verifiable scales of costs and commissions.

Most cases of enforcement in this area have been concerned only with *direct* conflicts of *financial* interests. What about more *indirect* conflicts of interests? The rules quoted above define it as a conflict of interest where the lawyer, or any immediate family member of the lawyer, or a partner in the lawyer's law firm, or any immediate family of the partner, have any interest that conflicts with that of the client. This could include any of these people holding shares in a company that is in dispute with, or possibly even on the other side of a proposed transaction with, the client. Most lawyers would probably consider it ethical practice to disclose to a client any interests of their own of this nature, and

6 Ibid 576 (de Jersey CJ).
7 See, eg, *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154; *Maguire v Makaronis* (1997) 188 CLR 449; Dal Pont, *Lawyers' Professional Responsibility*, 144–52.
8 Dal Pont, *Lawyers' Professional Responsibility*, [6.35]–[6.85].

perhaps any immediate family member's interests that they are aware of, and allow the client to decide whether the lawyer can continue to act. But the *Model Rules* seem to demand that the lawyer should not act at all if any of those people have any interest at all (including holding shares in a company on the other side) that conflicts with the client's interests. Certainly the *Rules* seem to expect lawyers to have a high level of awareness of potentially conflicting interests among a wide range of associates where those conflicting interests could interfere in any way with the lawyer's loyalty to their client.

Moreover, *financial* conflicts of interest between lawyer and client are only the most obvious of the many ways in which a lawyer's personal interests are likely to diverge from pure client loyalty. There is also the question of whether lawyers must avoid or discontinue acting where there are conflicting interests that are not financial, but more personal, social or political. For example, what about the situation where the lawyer on the other side is a close friend or family member, or where the client asks the lawyer to do work for them to advance a social or political cause to which the lawyer is opposed? It is only recently that there has been some suggestion in the disciplinary cases, and in commentary on the rules of professional conduct, that even something as obviously fraught with the potential for conflict of interest as a sexual relationship between a lawyer and client is, or should be, prohibited.[9] There is no *Model Rule* explicitly prohibiting it, and professional associations have been very slow to take any action in this area.[10] Similarly, there are no rules addressing situations where the lawyer's own client, or one of the other parties to a matter (either a client or lawyer on the other side) is a social associate of some kind (whether spouse, friend or indeed enemy), although lawyers are generally advised to avoid these situations as a matter of commonsense.

Ethicist Larry May has commented on a number of other types of conflict between a lawyer's personal interests and their client's interests:

> [T]he lawyers I have known are often highly ambitious individuals who see the pursuit of a particular client's case as a means of furthering their own careers. Furthermore, lawyers also have political agendas. As Wolfram and others have pointed out, 'Even in pro bono representations, the ideological or altruistic motives that induce a lawyer to offer legal services' can often obscure the pursuit of the client's interests.[11]

The lawyer's personal interest in receiving a higher fee, pursuing satisfying and career-enhancing cases, or advocating certain political, ethical or ideological interests might have a tendency to influence the way the lawyer performs their duty to the client. Yet the potential for these conflicts is unavoidable. Lawyers naturally have their own concerns and interests that they bring to the lawyer-client relationship. It would be naive to assume, as the literal wording of *Model*

9 *Legal Practitioners Conduct Board v Morel* (2004) 88 SASR 401; Dal Pont, *Lawyers' Professional Responsibility*, [6.105].
10 Dal Pont, *Lawyers' Professional Responsibility*, [6.105]; John Ellard, 'Sex and the Professions' (2001) 75 *Australian Law Journal* 248.
11 May, *The Socially Responsive Self*, 132 (footnote reference omitted).

Rule 9 does appear to assume, that complete client loyalty in all one's thinking and acting as a lawyer can be guaranteed, and that all conflicts can be completely avoided. Indeed the more broadly we define the lawyer's 'interests', beyond the direct financial interests of the lawyer personally, the more likely we are to discover other conflicts between the lawyer's interests (and their associates' interests) and their duty to the client. Lawyers cannot be expected to be completely immune to these other interests or pressures. The real ethical issue is whether a lawyer is able to:

- *identify* the interests of themselves and their 'associates' (including colleagues and their immediate families) and the way those interests might affect their judgement and actions on behalf of clients;
- *avoid* or rid themselves of those conflicts that can be avoided; and
- *fully and clearly explain* any remaining conflicts, and their possible effects, to the client in a way that ensures the client properly understands what the limits of their lawyer's loyalty will be, and can make up their own mind about whether to continue with that lawyer or not – which may involve strongly suggesting that the client seek independent legal advice on the issue.

The existing rules give lawyers little indication of the degree of openness and honesty about their own interests that might be required to fully apprise the client of the extent of lawyer-client conflicts of interest. Consider for example the situation where a lawyer has a personal or political commitment that goes against a position they are asked to argue: perhaps a committed animal-lover and vegetarian is asked to defend a fast food company that claims it has been defamed by suggestions that the chickens it cooks have been treated inhumanely. The law of lawyering generally seems to assume the *adversarial advocacy* view that a lawyer will automatically be able to do his or her best for the client regardless of their personal opinion of them and their case. But a broad view of the principle of avoiding lawyer-client conflict suggests that at the least the lawyer ought to disclose to their client their personal opinion and the way it might affect the representation of the client's case.

This requires lawyers to recognise the need to be brutally honest with themselves (before they can be honest with their clients) about what interests they might have that will interfere with their duty to each client, and the impossibility of being absolutely and completely loyal to clients. In the second half of this chapter, we will return to this issue as we consider the different ethical approaches that lawyers might take to obligations, interests and loyalties beyond pure zealous advocacy of clients' interests.

In the following two subsections we consider conflicts between the duties owed to two clients. As we shall see, lawyer-client conflicts can magnify client-client conflicts, since it will often be in the interests of a lawyer or law firm to keep acting for two clients with conflicting interests – so as to earn more fees or maintain a relationship with a client who provides steady and interesting

work – and this may influence lawyers' ethical judgment about how to handle client-client conflicts.

Current Clients

The *Model Rules* provisions as to whether lawyers can act where there is a conflict between two clients are confused. *Model Rule* 8.2 requires a practitioner to '*avoid* a conflict of interest between two or more clients of the practitioner or of the practitioner's firm' (our emphasis). But it is immediately followed by *Model Rule* 8.3, which *allows* legal practitioners to act for more than one party in a matter, even though this might give rise to conflicts of interest:

> 8.3 A practitioner who or whose firm intends to act for a party to any matter where the practitioner or the practitioner's firm is also intending to accept instructions to act for another party to the matter must be satisfied, before accepting an engagement to act, that each party is aware that the practitioner is intending to act for the others and consents to the practitioner so acting in the knowledge that the practitioner:
>
> 8.3.1 may be, thereby, prevented from –
>
> (a) disclosing to each party all information relevant to the matter within the practitioner's knowledge; or
>
> (b) giving advice to one party which is contrary to the interests of another; and
>
> 8.3.2 will cease to act for all parties if the practitioner would, otherwise, be obliged to act in a manner contrary to the interests of one or more of them.[12]

The values expressed in *Model Rules* 8.2 and 8.3 are contradictory. On the one hand, *Model Rule* 8.2 requires lawyers to avoid *any* conflict of interest, however insignificant the practitioner, or even the client, thinks it is. One might expect that if it is the lawyer's purpose to *avoid* conflicts of interest between clients, they should also avoid situations, such as joint representation, that are likely to give rise to a conflict of interest. The joint representation of criminal accused is a case in point. It may be convenient for the one lawyer to represent both accused, but the danger is that facts and arguments that emerge during preparation and trial mean that the two clients may benefit from having inconsistent defences argued on their behalf, or even blaming each other for the crime. Yet *Model Rule* 8.3 implicitly allows a firm to act for two clients to a matter, even though this joint representation could involve a conflict of interest. Indeed, *Model Rule* 8.3.1 contemplates that the lawyer, or law firm, may well already be in possession of information which will benefit one client and hurt the other, but they are still allowed to represent both.

Model Rule 8.3 attempts to reconcile the inconsistency by allowing joint representation only where the lawyer has disclosed the (potential) conflict to both clients, and both clients consent. In effect, the Law Council has 'avoided' the

12 See also *Model Rule* 8.5 that prohibits practitioners, and their firms, from acting for both clients in a number of situations, unless the lawyer first provides a written explanation of, and obtains a written consent to, the risks.

inconsistency between *Model Rules* 8.2 and 8.3, by decreeing as a matter of expediency that a conflict of interest will be disregarded, providing the clients agree. Some clients do want the same lawyer to represent them both in relatively simple transactions, because they see it as more convenient and less expensive. Even in more complicated, commercial transactions two clients may well be happy for different partners (in different offices) of the same large law firm to represent them both – perhaps a lawyer who is familiar with their business, or a lawyer who specialises in a particular area.[13]

Model Rules 8.2 and 8.3 see client consent as the 'cure-all' for a potential conflict in joint representation. The consent process appears to be tight and protective: it insists on a high level of disclosure of the (potential) conflict, and its likely impact, to both clients, and requires that joint representation must cease in any event once an *action* is required that would be contrary to the interests of one or more of them. However, a client's understanding of the potential conflict, its likely impact on them, and whether they should consent to it will depend very much on what their lawyer tells them. The whole point of prohibiting conflicts of interest is that the lawyer's own judgement, and ability to fully inform and advise the client about the conflict, might be clouded by the conflict. The case law on breach of fiduciary obligations generally requires that independent advice be obtained before someone can consent to a conflict of interest. For lawyers and clients, this means that the client should be advised to go to a second, independent lawyer in order to receive reliable advice as to whether to consent to the first lawyer acting in a potential conflict situation.[14] Yet the professional obligations of the *Model Rules* do not appear to reflect this requirement of the general law. Instead, they seem to suggest that it can be left completely up to the lawyer's judgement when and how to inform clients of potential conflicts and obtain consent, and when to withdraw.

The last part of *Model Rule* 8.3, subsection 8.3.2, only makes sense in an extremely rarefied atmosphere. Assume that a practitioner has information (as contemplated under 8.3.1(a)), which would be inimical to the interests of one client to disclose, and beneficial to the other. So long as there is no 'act' which the practitioner must take that would be contrary to the interests of one client (under 8.3.2), the knowledge itself can float around in the practitioner's brain indefinitely, according to the rule. Once the lawyer, or their firm, is required to act in a way that is contrary to the interests of one of the clients, they must 'thereupon cease to act for all parties' (*Model Rule* 8.4). Lawyers might have a better ability than most to compartmentalise information in such a way that it does not *unconsciously* corrupt their thinking or prejudice their advice, but that ability is not infallible. Indeed, in cases where a previous client asks the court to prevent their former lawyer from acting against them for a new client, the courts have granted the injunction even to protect against unconscious use of

13 See Elizabeth Nosworthy, 'Ethics and Large Law Firms' in Stephen Parker and Charles Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (Clarendon Press, Oxford, 1995) 57.
14 See *Clark Boyce v Mouat* [1993] 3 NZLR 641; Dal Pont, *Lawyers' Professional Responsibility*, [7.55]–[7.70].

confidential information previously passed between the lawyer and their former client.[15] Inadvertent influences on our consciousness abound. Just as psychologists do not seem to be any freer of mental delusion than the rest of us, so lawyers are not noticeably more honest than the rest of the population.[16] It seems foolish to assume that the mental and emotional gymnastics required by *Model Rule* 8.3.2 can be routine for lawyers.

These provisions of the *Model Rules* seem to suggest that there is a difference between an 'actual' conflict, which must be avoided, and a 'potential' conflict, that may be tolerated so long as it does not crystallise into an actual conflict. But the purpose of rules requiring lawyers to avoid conflicts of interest is to avoid the need to make such mental contortions in the first place. Consider the following comments by Justice Cummins of the Victorian Supreme Court at an ethics seminar:

> What bedevils the prohibition of a conflict of interest is a confusion of purposes. The purpose of prohibition of conflict of interest is not to remedy an offence or a failure. The purpose of prohibition of conflict of interest is to prevent an offence or a failure. Prohibition of conflict operates upstream of offence or failure. It is preventative. It is prophylactic. Thus it is no answer to breach of conflict to say that in fact no harm occurred, that the client was not harmed. If harm, a loss, a failure, an offence occurred, you would be dealt with for a consequential matter. Prohibition of conflict is an antecedent matter. That also is why the phrase 'potential conflict of interest' is tautologous.[17]

Model Rule 8.3 seems to assume that both clients will be willing to agree to just so much loyalty – or agree to tolerate as much infidelity – as may be necessary for them to enjoy access to the same lawyer. But why is it felt necessary at all to endorse joint representation of two clients involved in the same matter? It is often suggested that clients should be able to have their 'lawyer of choice', or might even need access to a particular lawyer in order to obtain adequate representation at all, especially where there might be a shortage of lawyers with relevant specialist expertise. Chief Justice Young of the New South Wales Supreme Court, however, has recently commented that 'lawyers generally are a pretty able lot and it usually does not take long for someone to develop the skills and experience which places him or her among the major league in particular fields of little competition'.[18] To the public it might look more like the rules have been crafted expediently to make sure that lawyers and law firms can preserve their ability to earn fees from multiple clients, rather than being intended to assist access to rare expertise. To the extent that *Model Rules* 8.2 and 8.3 enshrine a mechanism for tolerating conflict without first ensuring that the mechanism (consent) operates independently of the practitioner, the prevailing values might relate more

15 See *Australian Commercial Research and Development Ltd v Hampson* [1991] 1 Qd R 508.
16 Adrian Evans and Josephine Palermo, 'Australian Law Students' Perceptions of their Values: Interim Results in the First Year – 2001 – of a Three-Year Empirical Assessment' (2004) 5 *Legal Ethics* 103, 110–11.
17 Justice P D Cummins, 'An Ethical Profession: Dealing with Ethical Dilemmas' (Speech delivered at a Law Institute of Victoria Continuing Legal Education seminar, Melbourne, 28 February 2002).
18 *British American Tobacco Australia Services Ltd v Blanch* [2004] NSWSC 70 (Unreported, Young CJ in Eq, 20 February 2004) [142].

to business efficacy, than the untrammelled loyalty to one client required by the *adversarial advocacy* ideal. This does not imply that all lawyers behave badly in this environment, but rules are there to deal with those practitioners who have no other conscious values base from which to operate, and no great inclination to examine the case law.

Competing loyalties between clients can occur in respected and respectable law firms. The very *size* of large law firms – each with hundreds of partners and employee practitioners – requires that they be constantly on guard in case one of those partners takes on a client who is involved in a dispute or transaction with a client already represented by another partner. Often, there is no intention for such 'joint representation' to occur, it is simply a case of one partner not being careful enough to check out the proposed retainer with the partner (often described as the 'conflicts partner') designated to keep a list of all current clients and, especially, their opposing parties. This situation is not so much an occasion of conflicting loyalties as inattention. More problematic is the situation where the partners concerned realise that they each have a client opposed to the other (or in negotiation with the other) and decide to try and 'finesse' or 'manage' the situation so that no 'material' conflict of interest emerges. This approach can be a slippery slope to either breach of obligations, or a situation where the law firm has to cease acting for both clients. In Case Study 7.1 (Allens Arthur Robinson and the Drug Companies) at the end of this chapter, we see how easily conflicts of interest can arise in the large law firm context.

In the next subsection we consider how the *Model Rules* apply to situations where the conflict is between a former client and a current client, an even more common scenario in the context of large commercial law firms.

Former Clients and Information Barriers

Where a lawyer or law firm is considering representing one client in a matter where they would be acting against a former client, *Model Rule* 4.1 provides that:

> A practitioner must not accept an engagement to act for another person in any matter against, or in opposition to, the interest of a person ('the former client'):
>
> for whom the practitioner or the practitioner's current or former firm or the former firm of a partner, director or employee of the practitioner or of the practitioner's firm has acted previously and has thereby acquired information confidential to the former client and material to the matter; and
>
> if the former client might reasonably conclude that there is a real possibility the information will be used to the former client's detriment.

In this rule, which closely reflects the position at common law,[19] loyalty to a former client is only required where there is confidential information that is both

19 *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222; Dal Pont, *Lawyers' Professional Responsibility*, [8.05]–[8.50]. This means that in addition to a lawyer being liable to disciplinary action for breach of this rule, the former client can seek an injunction to prevent their former lawyer acting against them on this basis.

'material' to the matter, and that could be used to the detriment of the former client. If so, then in the leading House of Lords decision in *Bolkiah's* case, and also in a series of Australian cases, the courts have held that the former client can get an injunction to prevent their former lawyer, or their former lawyer's law firm,[20] acting against them unless there is *no* risk, or no 'real' risk, of disclosure.[21] *Model Rule* 4.1 reflects this by suggesting that the lawyer cannot act if 'the former client might reasonably conclude that there is a real possibility the [material, confidential] information will be used to the former client's detriment'.

Here the *Model Rules* convey a certainty or simplicity that is not present in the common law. Again, the *Model Rules* take the issue only so far. There is no indication in the rule at all that the practitioner should actually consult the former client for their opinion or permission. Nor is the lawyer, or law firm, required to refer the matter to any other authority for decision. The *Model Rules* appear to contemplate that the lawyer may in fact come to their own decision about whether they hold 'material' confidential information, the likelihood that it will be prejudicial to the former client's interests, and whether there is a risk of disclosure, without reference to anyone else. Yet the lawyer themself will generally have a material interest in the outcome – to decide that they can take on the new case and earn fees – that might influence their thinking on these issues.

Model Rule 4.1 attempts to brush over a subjective conflict for the lawyer in such a way that their loyalty to the former client is permissively disregardable in all but the most obvious cases. The value expressed by this and most of the other relevant conduct rules (which generally reflect the common law) is a conditional loyalty only. Many former clients might feel that *any* confidential information their lawyers acquired from them could be material, and it will not matter much to them if their lawyer thinks otherwise. They might expect that the value of loyalty inherently requires that if a lawyer or law firm holds confidential information from a former client, they should not act against them. This would seem to be consistent with the very strict, almost sacrosanct, protections for lawyer-client confidentiality that lawyers argue for in all other circumstances, especially when any court or other external authority seeks access to any information that might prejudice the confidentiality of communications between lawyer and client.[22]

Indeed we might question whether lawyers only have a duty of loyalty to a former client to the extent that this is necessary to protect confidential information received from the former client, suggested by *Model Rule* 4.1. Should lawyers have more wide-ranging duties to remain loyal to their former clients? In the

20 This can even include their former lawyer's new law firm, where the lawyer has switched firms in the meantime: see Dal Pont, *Lawyers' Professional Responsibility*, [8.170].

21 *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222. For a good summary of the law, see *World Medical Manufacturing Corp v Phillips Ormonde & Fitzpatrick Lawyers* [2000] VSC 196 (Unreported, Gillard J, 18 May 2000).

22 See William Simon, 'The Confidentiality Fetish' (2004) 294(5) *The Atlantic Monthly* 113; Richard Tur, 'Confidentiality and Accountability' (1992) 1 *Griffith Law Review* 73.

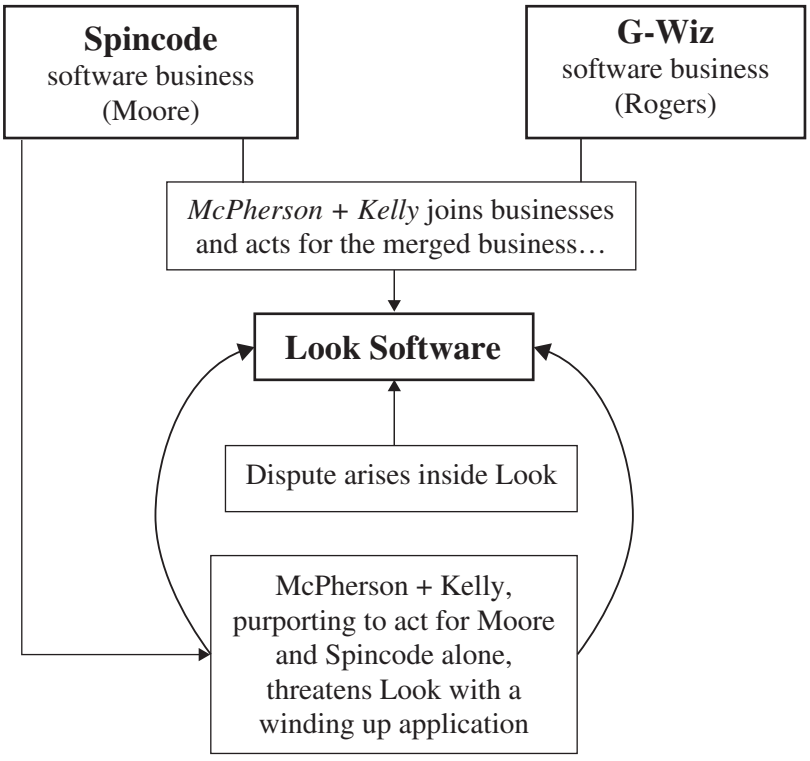


Figure 7.1 Relationship between Law Firm and Clients in *Spincode* Case

Full Court of the Victorian Supreme Court's decision in *Spincode Pty Ltd v Look Software Pty Ltd ('Spincode')*,[23] Brooking JA somewhat controversially stated that case law and legal principle suggest they do. The facts of that case concerned the not uncommon problem of a lawyer who was supposed to be acting for a company, but in fact preferred the interests of one individual officer of the company with whom he presumably had a good working relationship.

Figure 7.1 sets out the relationships between the law firm and its clients. The law firm McPherson + Kelly (sic) acted for Look Software. The McPherson + Kelly lawyer helped set up Look as a joint venture when businessmen Robert Moore and Gavin Rogers decided to join their existing businesses, Spincode and G-Wiz, together into one business. McPherson + Kelly continued to act for Look in relation to all its ongoing legal matters. A little while after setting up the business, Moore and Rogers invited three more men to join the venture, and work for Look, promising that each of them would get shares in Look in addition to the shares already held by Spincode and G-Wiz. But these shares were never issued. Later they began to disagree as to what each was entitled to in terms of remuneration and shares.

23 (2001) 4 VR 501.

All the participants in Look went to their (that is, Look's) lawyer for advice as to how to resolve their disagreements. Their McPherson + Kelly lawyer set up a mediation to try to resolve the issues, but this collapsed. A few days later the managing director of Look was surprised to find Look's own law firm McPherson + Kelly sending a fax purporting to act on behalf of Moore (and Spincode), which made a series of allegations and complaints, and raised the possibility that Moore would sue to have Look wound up. McPherson + Kelly later denied that they had been acting for Look at all throughout the dispute, despite the fact that Look was paying their bills. Instead McPherson + Kelly claimed they had been acting for Moore only all along.

The Supreme Court of Victoria made it very clear that the relevant McPherson + Kelly solicitor was Look's lawyer and should have behaved that way. His conduct was heavily criticised: 'One would have expected a solicitor acting for the company in an attempt to sort out disagreements among those who were or intended to become shareholders in it to act as an "honest broker" and not to seek to advance covertly the interests of one person at the expense of another'.[24] The court gave an injunction to prevent McPherson + Kelly acting for Moore against Look.

The court granted the injunction on the basis that the law firm did have confidential information from Spincode that was at risk of being disclosed to their detriment. But Brooking JA also stated that case law suggested that lawyers have an ongoing obligation of loyalty not to act against a former client and in the interests of a preferred client in relation to the same matter in which the solicitor had acted for both, regardless of whether there is any issue about confidential information. Brooking JA argued that this was because, first, a solicitor's obligation of loyalty cannot be 'extinguished by the mere termination of the period of [the lawyer's] retainer' and, second, because public policy 'gives a special relationship to the relationship of solicitor and client that the law will not generally permit to be stained by the appearance of disloyalty'. He went on to say there was a 'public interest in reassuring the community . . . that even the appearance of improper behaviour will not be tolerated', and that the lawyer's conduct in this case was 'offensive to common notions of fairness and justice'.[25]

Courts in other jurisdictions outside of Victoria have so far not accepted Brooking JA's suggestion that a solicitor can be restrained from acting against a former client on the basis of the obligation of loyalty, or the courts' inherent jurisdiction over solicitors as officers of the court to prevent the appearance of impropriety.[26] They have seen the existence of confidential information, its

24 Ibid 507.

25 All quotes in above paragraph from ibid 517 (Brooking JA). Note that Brooking JA is not the only judge to have emphasised the importance of the impropriety of a lawyer being seen to 'change sides' as important in this context. See, eg, *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307, 311–12 (Drummond J) and the other judicial statements cited in Dal Pont, *Lawyers' Professional Responsibility*, [8.35].

26 See the NSW Supreme Court decisions in *Belan v Casey* [2002] NSWSC 58 (Unreported, Young CJ, 4 February 2002); *British American Tobacco Australia Services Ltd v Blanch* [2004] NSWSC 70 (Unreported, Young CJ in Eq, 20 February 2004).

relevance to the new matter, and its risk of disclosure as the only basis for restraining a lawyer from acting against a former client. This tends to focus attention on technical legal arguments between the former client and their lawyers as to the existence and nature of the confidential information, and of the arrangements within the firm that might lead to its disclosure. It might be more in keeping with the expansive way in which the profession usually expresses its value of loyalty to clients, to see lawyers' obligations more broadly as refraining from acting at all against former clients at least in relation to the same or similar matters.

This is, broadly, the approach that the American Bar Association's *Model Rules of Professional Conduct* take regarding when a lawyer can act against a former client. The American *Rules* do not limit themselves to where confidential information exists, but instead provide that lawyers cannot represent 'another person in the same or a substantially related matter' as a former client, if the former client's interests will go against the new client's interests, unless the former client consents.[27] This would see the lawyers' obligation of loyalty to the client as coming out of the lawyer's role in the justice system (as advocate for the client), rather than being purely a matter between the lawyer and client relating to the confidential information that has passed between them. It also sees the privilege of being an advocate for a client as carrying with it responsibilities to preserve that loyalty, and the appearance of loyalty, rather than being able to take any client at any time. While the profession might consider this approach to be commercially naive, loyalty to clients is a basic value which the courts lean towards, leaving behind the evasiveness of the *Model Rules*.

A final problem with the approach of the existing law and *Model Rules* concerning when lawyers can act against former clients is the problem of *information barriers* (sometimes called 'Chinese walls'; and also, disparagingly, known as 'dingo fences' or 'Dutch dykes'). It will usually be impossible for the same lawyer to act against a former client, since they personally will know any confidential information from the former client, or even if they believe they have forgotten it, might subconsciously use that information. But law firms sometimes argue that other individuals within the law firm, who had nothing to do with the representation of the earlier client, should be able to act for the new client, as long as adequate safeguards are in place to make sure they cannot access any confidential information from those who did act for the former client. On the other hand, the law and the *Model Rules* provide that generally if one lawyer is disqualified from acting, the whole firm is disqualified. Nevertheless the courts have held that, in exceptional cases, a law firm may be able to show that there is no risk of detrimental disclosure to the lawyers acting for the new client against the old client by showing that it has in place an effective information barrier between

27 American Bar Association, *Model Rules of Professional Conduct* (2004) Rule 1.9 <http://www.abanet.org/cpr/mrpc/mrpc_home.html> at 13 June 2006. See Richard O'Dair, *Legal Ethics: Text and Materials* (Butterworths, London, 2001) 466.

those lawyers (and other staff) who worked on a case for the former client, and know or have access to the former client's relevant confidential information, and those working for the new client.[28]

According to the courts an effective information barrier should include established, documented protocols for setting up and maintaining barriers or screens between those with relevant confidential information from former clients and those working on new matters. These would include undertakings and procedures to make sure that people on either side of the information barrier have no, or limited, contact with one another, physical separation of people and files on each side of the information barrier from one another, restricted access to electronic files, programs to educate all staff on their responsibility in relation to confidentiality and the firm's protocols for information barriers, monitoring of effectiveness of the protocols by a compliance officer, and disciplinary sanctions on any staff who breach the protocols.[29] Yet all these precautions may not be enough to prevent inadvertent slips in discussion, especially in those firms that cultivate a 'work and play together' attitude among their staff.

As with the decision about whether the lawyer holds material, confidential information, one of the potential problems with the use of information barriers is that lawyers and law firms are likely to have an interest in believing that there will be an effective way of 'managing' potential conflicts in a much wider range of circumstances than is appropriate. For example, in the case law the courts have generally said that information barriers are only relevant for protecting the confidential information of *former* clients who are no longer clients of the firm.[30] They are not appropriate where there is an active duty to promote the interests of two current clients. But many law firms also extensively use information barrier arrangements to allow them to represent clients with potentially conflicting interests at the *same time* in transactional work, as is illustrated in Case Study 7.1 (Allens Arthur Robinson and the Drug Companies) at the end of this chapter.[31] Although this was not the case with Allens, it is particularly dangerous where law firms simply assume that these arrangements will be acceptable without even consulting affected clients or former clients. Case Study 7.2 (Blake Dawson Waldron and the Share Buy-Back) gives another scenario in which a law firm, belatedly, found out that it had a conflict problem between a current client and a former client. It informed its current client about the problem and how it could deal with it, but did not inform the former client.

28 See Lee Aitken, '"Chinese Walls", Fiduciary Duties and Intra-Firm Conflicts – a Pan-Australian Conspectus' (2000) 19 *Australian Bar Review* 116; Law Society of New South Wales in consultation with the Law Institute of Victoria, *Information Barrier Guidelines* (2006) Law Society of New South Wales <http://www.lawsociety.com.au/page.asp?partID=15645> at 2 June 2006.

29 See *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222; Law Society of New South Wales, *Information Barrier Guidelines*.

30 But see *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd* [2002] VSC 324 (Unreported, Habersberger J, 14 August 2002).

31 See Janine Griffiths-Baker, *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* (Hart Publishing, Oxford, 2002) 148–57.

Conclusion: Client Loyalty and the Ideal of Adversarial Advocacy

The *Model Rules*' approach to client loyalty is based on the ideal of *adversarial advocacy*. In relation to *lawyer-client conflicts*, *adversarial advocacy* assumes that in their role as professional advocates, lawyers can and should divest themselves of human temptations and all other concerns apart from their obligation to further their client's interests. But this is more difficult than the *Model Rules* assume. Some conflicts – such as lawyers writing wills for clients which include bequests to the lawyers themselves – can be easily avoided. But some conflicts are not addressed in the *Model Rules* at all, such as avoiding sexual relationships with clients. Other conflicts cannot be so easily prohibited and avoided: for example, the inevitable conflict of interest between lawyer and client in negotiating the lawyer's fee, and the time and priority devoted by the lawyer to clients' work as against personal and family commitments. Handling these sort of conflicts well is likely to be more a matter of lawyers being aware of the influences on their own thinking and action, rather than merely following rules.

In relation to *client-client conflicts*, the *Model Rules* themselves undermine their own apparently absolute commitment to client loyalty. The duty to avoid conflicts between current clients or former and current clients are expressed subject to conditions and qualifications that may well be based on commercial expediency, rather than principle. Lawyers and law firms often seem to be able to decide for themselves which clients will receive their loyalty. As we have seen previously, the ideal of *adversarial advocacy* developed particularly as a rationale for the role of lawyers representing individual (not corporate) clients in criminal proceedings. The *Model Rules* have not adequately dealt with the current context of large commercial, growth-oriented law firms with many large clients, often including many in the same industry, some of whom are likely to come into conflict with one another at some point in time. It is hard to see how allowing law firms to act in these situations really demonstrates the ideal of zealous advocates' devotion to the client's best interests. But the pressure to allow this to occur seems to have affected the content of the *Model Rules*.

Alternative Ethical Approaches to Client Loyalty

In the next three sections we consider how the *adversarial advocacy* picture of unadulterated loyalty to client is made richer, and more complex, by considering the insights of the other three ethical approaches introduced in Chapter 2 – *responsible lawyering*, *moral activism* and *ethics of care*, respectively. We have argued above that the *Model Rules*, or at least the way they have been applied, seem to allow exceptions to the *adversarial advocacy* duty of pure loyalty to clients for *practical and commercial* reasons. The other three approaches give *principled and ethical* justifications as to the extent and limits of lawyers' loyalty to clients

that challenge the current rules and the way they are applied to legal practice. Following this, we set out three case studies that can be used to explore in more depth the application and implications of the dominant *adversarial advocacy* approach, and three alternative ethical approaches to the problems of lawyers and law firms facing conflicting loyalties.

The Responsible Lawyer

The *responsible lawyering* approach takes the lawyer's obligation of loyalty to the client very seriously because it is derived from the lawyer's role as an officer of the court who must be available to represent and advocate for clients. Client representation and advocacy is seen as a public obligation, not just a private matter between lawyer and client. A *responsible lawyering* approach to conflicts between clients would therefore likely be consistent with Brooking JA's view in *Spincode* that a lawyer should not act in a situation where there would be an appearance of impropriety in the administration of justice, regardless of whether there was a risk of the detrimental disclosure of confidential information from one client to another.[32] Similarly, *responsible lawyering* would see the lawyer's obligation to avoid personal conflicts as absolute and going well beyond the current concern only with avoiding direct, financial conflicts.

Responsible lawyering would also suggest that, since loyalty to the client is part of the public role of the lawyer and must be strictly protected for that reason, lawyers and clients should not be allowed to make private arrangements in which clients consent to waive their rights to full loyalty. Arguably, it is not up to clients to decide how much loyalty they are willing to accept from their lawyer. There is also a public interest in requiring lawyers to show full loyalty to the first client every time, so as not to damage the appearance of justice being done by lawyers performing their role properly in the legal system.[33] *Responsible lawyering* is therefore highly suspicious of information barriers and other arrangements by which law firms try to garner client consent for continuing to act in conflict situations.

However, for the *responsible lawyer*, alongside the duty of loyalty to the client there will also always be an equal ethical concern that lawyers not show 'too much' loyalty to clients. According to the *responsible lawyer*, because the duty of loyalty to clients is derived from the lawyer's role as officer of the court, the lawyer's loyalty to the client must be confined and constrained by the lawyer's loyalty to the court and the legal system. Loyalty to the client cannot be carried out in a way that is inconsistent with the lawyer's duty to the court or the law. We have already considered what this might mean in the litigation context (in Chapter 4) in terms

32 It is also important to remember that one reason the law so strongly protects the confidentiality of information communicated between lawyers and clients is also because of the lawyer's role as officer of the court: see, eg, *A-G (NT) v Maurice* (1986) 161 CLR 475, 490 (Deane J); *Baker v Campbell* (1983) 153 CLR 52, 120 (Deane J).

33 See Duncan Webb, 'Autonomy, Paternalism, and Institutional Interest: Why Some Conflicts Can't be Waived' (2005) 12 *International Journal of the Legal Profession* 261.

of the lawyer seeking to dissuade a client from any action that goes against the lawyer's duty to the court, withdrawing from acting from the client if they refuse, and perhaps informing an appropriate authority of the issue. In Chapter 9 we will also consider lawyers' responsibilities in relation to legal or ethical misconduct by corporate clients, including lawyers' whistleblowing capacities and obligations. Discerning at what point the duty to the court overrides the duty to the client is not always easy. This discernment is even more difficult where lawyers have become so used to seeing things from their client's point of view – and profiting from the fees obtained – that they have lost touch with ordinary ideas of fairness. Even more difficult issues are raised if we consider that lawyers, in at least some circumstances, might also owe an obligation of loyalty to the public interest that overrides their duty to their client, and perhaps even to the court. This is the concern of the *moral activist*.

Moral Activism

Moral activism encourages lawyers to have other ethical loyalties beyond their loyalty to the client which may impinge on what those lawyers will and will not do for their clients. This does not mean that *moral activism* gives lawyers an excuse for allowing self-interest or personal taste to limit their loyalty to client interests. Rather *moral activism* says that lawyers must critically examine their own inclinations and commitments in each situation in terms of what justice requires. *Adversarial advocacy* and *responsible lawyering* will encourage lawyers to put their own ethical commitments out of their mind when acting for clients. *Moral activism* on the other hand encourages lawyers to identify what justice requires, on the basis of principle (not personal opinion), and then to explicitly put justice into action in every part of their lives, including their work for their clients.

The *moral activist* celebrates the lawyer who integrates their other ethical loyalties into their professional role. For example, the *moral activist* might say that instead of lawyers being required to show loyalty to whichever client comes along first, regardless of that client's cause, lawyers should be encouraged to actively seek out and choose clients and causes to whom they can ethically devote their services loyally. A *moral activist* approach would also urge lawyers to explicitly discuss their own ethical commitments with their clients, to inform the client as to the likely limits of their loyalty, but also more importantly to try to persuade the client to share their ethical commitment. This general compassion for the wider community and humanistic responsibility for the body politic would also allow *morally activist* lawyers to support causes and individuals who are either ahead of or well outside mainstream sympathies, policies and even fair procedures. *Moral activist* lawyers will support the law if, in their opinion, it is just, but will dispense with it also when justice demands. Thus, for example, environmentalist lawyers and those with a Gaia-like sense of 'deep ecology' for the exploited and degraded environment might in extreme circumstances determine

to act outside the law and disable timber-cutting equipment adjacent to national parks, if they considered that long-term environmental concerns justified their stance.[34]

In serious circumstances, where a client cannot be persuaded to do what the lawyer believes (on principled grounds) to be the right thing, the *moral activist* would consider breaching client loyalty and confidentiality to prevent harm.[35] For the *moral activist* this in itself would be a difficult decision that must be taken after due ethical examination. The *moral activist* does not discount the importance of loyalty and confidentiality to clients as an important part of the way justice is usually achieved in our legal system. But where a client's actions are likely to physically or financially harm third parties, or put some other public interest at serious risk, then a *moral activist* could decide that ethical regard for client loyalty and confidentiality is outweighed by the need to do what is necessary to stop the client harming others or the public interest. Normally this would mean informing an appropriate authority (the police or a regulator) of the client's intended actions. There may even be situations in which informing the media at large, or some other drastic measure might be justified.

In Chapter 9, in our discussion of lawyers' responsibilities in relation to corporate misconduct, we will examine again in more detail the circumstances in which whistleblowing might be appropriate. As we will see in Chapter 9, the *Model Rules* and the law itself do recognise that there are exceptions to lawyers' obligations of confidentiality where clients are acting illegally or unethically. These exceptions give lawyers some discretion to behave in a *moral activist* way to breach confidentiality and loyalty where a greater public interest demands it.[36]

The Ethics of Care

The *ethics of care*, like *moral activism*, encourages lawyers to be aware of, critically examine and act on their own ethical commitments in the practice of law. But the *ethics of care* will embrace more personal and relational ethical commitments than *moral activism's* focus on what justice requires. For example, the other three ethical approaches might each see a lawyer's commitment to maintain a healthy family life by getting home every day in time to eat dinner with the children and put them to bed as a personal concern that might interfere with doing one's best for one's clients in some situations. Indeed, a plain reading of *Model Rule* 9 seems to require a lawyer to completely avoid such influences on their work for

34 See Bradley Wendel, 'Civil Obedience' (2004) 103 *Columbia Law Review* 363, 418.
35 Sissela Bok, *Secrets: The Ethics of Concealment and Revelation* (Pantheon Books, New York, 1983) 129–30; David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, Princeton, 1988) 177–205; Donald Nicolson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press, Oxford, 1999) 'Ch 9: Confidentiality' 253–76; Tur, 'Confidentiality and Accountability', 83–4.
36 Dal Pont, *Lawyers' Professional Responsibility*, [10.100]–[10.115]. See also Paul Finn, 'Professionals and Confidentiality' (1992) 14 *Sydney Law Review* 317, 323; Karen Koomen, 'Breach of Confidence and the Public Interest Defence: Is it in the Public Interest?' (1994) 10 *Queensland University of Technology Law Journal* 56, 86–8.

their clients: it explicitly says that 'A practitioner must not, in any dealings with a client . . . allow an interest of the practitioner or an associate of the practitioner [associate is defined to include immediate family members] to conflict with the client's interest'. The *ethics of care* sees any rules or practices, like this, that try to divorce lawyers in their professional capacity from their personal relationships and commitments, as dehumanising and unethical. Rather the *ethics of care* see such personal ethical commitments as a desirable and legitimate part of the way the lawyer cares for themself and their client in the practice of law. Similarly a lawyer's personal commitment to a 'healing' practice, that as much as possible helps clients to resolve disputes amicably rather than adversarially, would be an appropriate influence on the way a lawyer interprets and represents their clients' interests, according to the *ethics of care*.[37] But it may well be seen by the other three approaches as an illegitimate conflicting interest that might distract the lawyer from properly considering what the client's interests justly require (as we have seen in Chapter 6).

The *ethics of care* approach also recognises lawyers' humanity, fallibility and susceptibility to pressure and temptation, even when trying to act ethically. Conflicting interests and obligations will inevitably be a part of the lawyer-client relationship, for good and for ill. According to the *ethics of care* therefore, lawyers need to be completely open and honest with their clients about the factors that might influence their judgement, so that clients can judge their lawyer's advice for themselves, and even persuade their own lawyer to a different point of view on ethical issues.[38]

An *ethics of care* approach would see a client as able to consent to their lawyer continuing to act in a situation of conflict of interests, or potential conflict, as long as the lawyer has put the client in a position to fully understand the conflict and its possible implications for them. Indeed the *ethics of care* approach sees it as possible and desirable that two or more clients will want the same lawyer or law firm to act for them both on the same matter. The *ethics of care* will focus on the clients' potential to harmonise their interests and work together to a 'common goal' – for example, in putting together a deal, arranging matters amicably after a separation or divorce or mediating a dispute between business partners.[39] Here the *ethics of care* suggests that it might be quite appropriate for a lawyer to act as 'lawyer for the situation' and disregard the traditional adversarial advocate ideal of pure loyalty to just one client's interests.[40]

However joint representation can only be justified by an *ethics of care* approach where the clients genuinely want to work together, can be equal partners, and

37 See Steven Keeva, *The Healing Practice* (Contemporary Books, Chicago, 1999).
38 See, eg, Nicolson and Webb, *Professional Legal Ethics*, 146–56 on the concept of 'autonomy-in-relation'.
39 Griffiths-Baker, *Serving Two Masters*, 115 cites solicitors' firms as differentiating 'common goal' conflicts as one type of conflict.
40 See Richard Tur, 'Family Lawyering and Legal Ethics' in Stephen Parker and Charles Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (Clarendon Press, Oxford, 1995) 145; Richard Tur, 'Legal Ethics, Overview' in Ruth Chadwick (ed), *Encyclopedia of Applied Ethics* (Academic Press, San Diego, 1998) vol 3, 59, 67–9; Milner S Ball, *Called By Stories: Biblical Sagas and Their Challenge for Law* (Duke University Press, Durham, 2000) 'Ch 3: Counsel for the Situation' 22.

are in a position to understand what that involves. If that is so, then it seems unlikely that the lawyer or law firm would be using information barriers and other arrangements to maintain confidentiality and the appearance of separation. For if clients truly want to work together, then they will need to do so on the basis that they are going to be completely open and honest with each other, and go to completely new, separate lawyers if they fail to work together effectively (as in the discussion of collaborative lawyering in Case Study 6.3 in Chapter 6). The *ethics of care* cannot be used merely as a justification for arrangements that seem to promise clients complete loyalty, while risking breach of confidential information and disloyalty. If the clients are not willing to agree to the proposal that the lawyer help them work together completely openly and honestly, then under an *ethics of care* approach it is questionable whether they have really given their true consent to the arrangement at all.

CASE STUDY 7.1 Allens Arthur Robinson and the Drug Companies

Large national law firms with many partners in different offices, and many clients, frequently find themselves in situations where different partners are acting, or proposing to act, for clients with conflicting interests. Often conflicts between existing clients only emerge slowly and incrementally. It is tempting to assume that these conflicts can be 'managed', rather than avoided, so that the firm can continue to earn fees from two clients. This is a case study of a potential conflict that a large firm tried to manage, but eventually a decision to drop at least one of the clients became inevitable.

The Melbourne branch of major national law firm, Allens Arthur Robinson, found itself acting for three drug companies with potentially conflicting interests. Two, Pfizer and GlaxoSmithKline, were 'originators', major multinational pharmaceutical companies that invent, develop and manufacture new drugs. They had been Allens' clients for many years, and Allens acted for them on many issues.

The third was a 'generic' manufacturer, Mayne. Generic drug companies do not develop their own drugs, but manufacture drugs developed by other companies by waiting until originator companies' patents expire, or by successfully challenging originators' patents. Generic and originator drug manufacturers are strong commercial competitors, and also routinely engage in disputes and litigation over intellectual property rights. The Allens partner who acted for Mayne had previously acted for them from time to time when he had had his own small firm. That firm, and its practice, was then acquired by Allens.

For several years Allens maintained both Mayne and its originator clients on its books. Allens judged that this was appropriate, as there was no actual conflict of interest between the clients – the firm held no specific confidential information on the operations of each client that was of specific relevance to the matters they handled for other clients. Allens also put in place internal procedures (information barriers) to make sure that any confidential information that did exist would not pass between the lawyers acting for the different clients.

However, five years after the partner representing Mayne had joined Allens, 'it became increasingly clear there was a real potential for conflict'.[41] By this stage, Allens had already been acting for both GlaxoSmithKline and Mayne in relation to the same

41 Quotation from an Allens spokesperson reported in 'Mallesons Prospers from Allens IP Conflict', *Lawyers Weekly* (Sydney), 11 September 2003.

transaction (with the consent of both). Now, after five years, another client, Pfizer, was likely to sue Mayne in relation to a patent dispute, and was not happy that Allens also acted for Mayne.

It was considered necessary to cease acting for both Pfizer and Mayne, and Allens decided to 'let go' one client – Mayne. Mayne took action against Allens for breach of retainer, alleging, among other things, a conflict in Allens' continued representation of Pfizer, an action which was settled on undisclosed terms with Pfizer remaining an Allens client.[42] The partner and his team who had represented Mayne, however, also left Allens and joined another firm where, presumably, they could continue to act for Mayne.

Allens believed that the context and history of their relationship with both sets of clients made their decision to dispense just with Mayne appropriate. Mayne were recent clients, brought in to the Allens fold only as a result of a firm merger. Further, Allens' representation of Mayne was sufficiently limited so that a degree of consensual separation akin to an information barrier had been constructed for the specific purpose of enabling that representation to occur. The originators, GlaxoSmithKline and Pfizer, were clients of much longer standing and had been represented by Allens in litigation as well as in a wide range of transactional matters. Allens believed that their loyalty to Mayne was in these circumstances limited.

DISCUSSION QUESTIONS

1. Suppose you were making the decision as to which client was owed the most *loyalty* and you were 'interviewing' both clients to determine their likely reactions to your withdrawal from acting for one of them before making a decision: Which issues do you think that GlaxoSmithKline and Pfizer would raise with you? What matters would be stressed by Mayne?
2. Imagine you are the Allens partner who does work for Pfizer. In what way would you respond to a request from Pfizer that you go to your fellow partner (working for Mayne) and ask them to stop acting for Mayne? What would the four different ethical approaches – *adversarial advocacy*, *responsible lawyering*, *moral activism* and the *ethics of care* – suggest about how you should handle this situation?
3. Allens decided to withdraw from representing its more recent, smaller client[43] in preference to its larger, longer-standing clients, when faced with a looming concurrent conflict involving litigation. A spokesperson from Allens was reported as saying, 'Decisions such as these are never easy, but we had longer standing relationships with those originator companies, those were better established'.[44] Is this an ethically justified reason to decide which client to continue representing? Which values, among those espoused by the four ethical approaches as discussed above, would most appeal to you in making your decision about who to 'let go' as a client? What would be the consequences of applying your chosen values? What would be the consequences of applying the alternative values? What would you do?
4. In hindsight, was Allens' initial reaction of setting up a device like an information barrier a good one? What other options were available to the firm and to the

42 Christopher Webb, 'Dramatic Exile on Mayne Street', *Strictly Private*, *The Age* (Melbourne), 18 June 2003, 4.

43 Mayne is a large company by Australian standards, but not as large as the multinational drug companies Allens was representing. And it appears Mayne was not giving Allens as much work as these other clients.

44 'Mallesons Prospers from Allens IP Conflict'.

partner who represented Mayne when Allens first hired Mayne's lawyer? Would there still have been a conflict problem if the partner from the acquired law firm had ceased all representation of Mayne after joining Allens and then later Allens had planned to act against Mayne?

5. Do the conflicts of interest rules unjustifiably restrict the opportunity for individuals and smaller businesses or new entrants to a market to obtain access to lawyers with experience and expertise in a particular area of law (because they are all likely to already be acting for larger incumbents in the market)? Do the conflicts of interest rules unjustifiably restrict lawyers' capacity to move between firms (because they might create conflict of interests for the new firm)?
6. Should law firms have an obligation not to act for two clients where the clients have conflicting *commercial* interests ('commercial conflict of interest'), but there are no legal issues between them? For example, a law firm acts for two drug companies in relation to completely separate matters, but the two companies compete with each other for market share? What about where the two clients have conflicting interests in how a legal *issue* should be resolved ('issue conflict of interest') – that is, how a legal doctrine should be interpreted or applied in certain situations – but are not litigating or arguing between themselves in any matter relating to that issue? For example, the one law firm acts for originator drug companies arguing for interpretations of the law that lead to stronger and longer protections for patents in some cases, but acts for generic manufacturers arguing the opposite interpretation in other cases. What do you think would be the consequence on the availability of lawyers as *adversarial advocates* and *moral activists* if lawyers and law firms felt they could not act where there were commercial conflicts of interest and issues conflicts of interest? Are there some clients (or potential clients) in some situations who would be more affected by this than others?[45]

CASE STUDY 7.2 Blake Dawson Waldron and the Share Buy-Back[46]

In this case study another major law firm, Blake Dawson Waldron, found itself in a conflict of interest when one partner was retained by one client to attack an arrangement that another partner had been retained to help pull together for another client. Blakes was not even aware of the conflict, until the client on the other side pointed it out.

One Blakes partner was paid by major film distributor Village Roadshow to review a draft trust deed and other documents relating to a proposed share buy-back,[47] and to advise the proposed trustee for the arrangement, Permanent Trustee, about the documents and their obligations under the trust deed. A court later accepted that, although technically Permanent Trustee was Blakes' client, Village Roadshow and Permanent

45 On the impact of commercial and issues conflicts on the availability of pro bono legal work, see Elisabeth Wentworth, 'Barriers to Pro Bono: Commercial Conflicts of Interest Reconsidered' in Christopher Arup and Kathy Laster (eds), *For the Public Good: Pro Bono and the Legal Profession in Australia* (The Federation Press, Sydney, 2001) 166. On the impact of commercial conflicts on the availability of lawyers generally see also Griffiths-Baker, *Serving Two Masters*, 102–3, 113–14.

46 *Village Roadshow Ltd v Blake Dawson Waldron* (2004) Aust Torts Reports ¶81–726.

47 This is where a company buys back some of its own shares from its shareholders. Because this reduces the total capital available to the company and may reduce the value of other shareholders' shares, company law puts strict conditions on the process by which this can take place, including various requirements for shareholder consultation and votes as well as opportunities for shareholders to object to the proposed buy-back. Share buy-backs can be quite contentious within a company.

Trustee were working together as a team. The documents had been prepared by Village's main law firm, Minters, and Minters continued to act for Village. Indeed it was Minters, as Village's law firm, that organised Blakes' involvement in the case.

The Blakes partner spent about 30 hours over two weeks in September on this task, and then advised Village on Permanent Trustee's behalf that Permanent Trustee was happy for the deal to go ahead with the documentation. The buy-back process then began. No further work was performed for Permanent Trustee (or Village) by Blakes.

At the end of October of the same year, a different Blakes partner was approached by Boswell, one of Village's shareholders, to help Boswell contest the share buy-back. The second Blakes partner was in the same work team as the first partner, a group of about 20 partners and 50–60 employees all working from the same floor of Blakes' offices. One of Boswell's early objections to the share buy-back, as laid out in a letter on its behalf from Blakes to Minters, was that some aspects of the scheme documentation were misleading and deceptive. Blakes went on to act for Boswell in various court applications seeking to stop the buy-back going ahead.

On 22 November, three weeks after Blakes' first letter to Minters on behalf of Boswell, someone from Minters' client, Village, pointed out to Minters that Blakes had acted for Permanent Trustee and was now acting for Boswell. The Minters partner handling the matter said he had not noticed before 'due to inadvertence'.[48] In mid-December Minters eventually objected to Blakes acting for Boswell, saying that the work Blakes had previously done for Permanent Trustee and Village represented a conflict.

When Blakes found out that Village was objecting to its representation of Boswell, it contacted Boswell and asked what it wanted them to do. Boswell was happy for Blakes to continue acting, and agreed that it would not expect Blakes to disclose any confidential information that had been obtained from Permanent Trustee. Blakes did not, however, contact their former client, Permanent Trustee. Instead Permanent Trustee contacted Blakes and suggested Blakes might cease acting for Boswell. Blakes' response was 'non-committal if not evasive' according to the judge who eventually decided the matter.[49] The decision was made to continue acting for Boswell, but this was not communicated to Permanent Trustee.

In Village's application for an injunction to restrain Blakes from acting for Boswell against it, the court found that Blakes in fact had no confidential information from Permanent Trustee. But Byrne J applied Brooking JA's approach in *Spincode* and granted the injunction according to the test of 'what a fair minded reasonably informed member of the public might think of the administration of justice which permitted this to occur'.[50]

DISCUSSION QUESTIONS

1. The judge in this case simply accepted that Village Roadshow and Permanent Trustee were part of a team with a common goal, in contrast to Boswell (so that Blakes' work for Permanent Trustee meant Blakes would not be allowed to act against Village either on the same matter). But do you see any potential conflicts in relation to Blakes accepting Village's money to advise Permanent Trustee about the scheme?

48 *Village Roadshow Ltd v Blake Dawson Waldron* (2004) Aust Torts Reports ¶81–726, 65 337.
49 Ibid.
50 Ibid 65 339, quoting *Sent v John Fairfax Publications Pty Ltd* [2002] VSC 429 (Unreported, Nettle J, 7 October 2002), another decision that followed Justice Brooking's decision in *Spincode*.

2. Most law firms have systems for checking for conflicts of interest before taking on a new matter, such as database searches for names related to the new matter to see if the same names are on any files relating to existing matters. What do you think went wrong here? Why do you think neither Blakes nor Minters (who as part of their representation of Village had hired Blakes to act for Permanent Trustee) knew about Blakes' conflict until an officer from Village pointed it out? What would they have had to check to know?
3. Village argued that 'for a firm of solicitors to take money from a client for erecting a legal edifice, it should not then take a fee from some other to dismantle it'.[51] This could be interpreted as a particularly *responsible lawyering* concern that a lawyer should not argue that something is legally valid and appropriate one day for one client, and then attack the same thing for another client the next day. Rather they should have a consistent and sincere opinion about what the law requires that is the same every day.[52] It could also be seen as a matter of loyalty to a previous client not to attack a document or arrangement that the lawyer took money to set up for that client. What do you think? Are there reasons why a lawyer or law firm should not ethically argue on behalf of one client that a document it drafted or arrangement it set up for another client is flawed? What are they? (Consider what each of the four ethical approaches would say about this situation.)
4. Would there be a lawyer-client conflict, not just a client-client conflict in such a situation? What if the lawyer or law firm had in fact done a bad job in drafting the documents or setting up the arrangement for the first client? What should their duty to each of the first and second client entail in that situation? (You might find it helpful to think about what each of the four ethical approaches would say in this situation.)
5. Byrne J was not very sympathetic about the difficulties of clients trying to obtain un-conflicted representation from amongst a very small pool of very large firms:

> To my mind, this is the price which the clients of such firms and the firms themselves must pay. The firms have found it commercially convenient to become large. This is but one disadvantage of this trend. It is certainly no reason for the courts to weaken the traditionally high standard of a practitioner's loyalty to the client which have characterised the practice of law in this State.[53]

Thinking about the facts of both this case and Case Study 7.1, do you think that the concentration of large commercial law firms and their approach to managing conflicts of interest might threaten their ability to live up to the ideal of *adversarial advocacy*, and indeed the other ethical approaches, in relation to handling conflicts? If so, is this a problem? Should the courts' relatively strict approach to conflicts of interest, especially in cases like *Spincode* and *Village Roadshow*, change or should law firm practices change?

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51 *Village Roadshow Ltd v Blake Dawson Waldron* (2004) Aust Torts Reports ¶81–726, 65 339.
52 See Robert Eli Rosen, 'Devils, Lawyers and Salvation Lie in the Details: Deontological Legal Ethics, Issue Conflicts of Interest and Civic Education in Law Schools' in Kim Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Hart Publishing, Oxford, 1998) 61, 73–81.
53 *Village Roadshow Ltd v Blake Dawson Waldron* (2004) Aust Torts Reports ¶81–726, 65 339.

CASE STUDY 7.3 Enron's Lawyers' Conflicted Loyalties

The two case studies above concerned situations where law firms had separate clients with conflicting interests. This final case study is a situation where the law firm, Vinson and Elkins, clearly owed its obligation of loyalty to one corporate client, Enron, but apparently performed that duty in terms of unconditional loyalty to management no matter how dramatically management's instructions conflicted with legitimate shareholder, employee and public interests, and even when the law firm itself had become so entangled in management's financially corrupt schemes that it could no longer offer the firm independent advice (even if anyone had wanted to hear that).

Enron was a United States energy company that over the course of the 1990s shifted the main focus of its business from buying, transporting and selling oil, gas and electricity to creating and trading in innovative financial products based on rights to buy and sell energy: 'The guiding principle seems to have been that there was more money to be made in buying and selling financial contracts linked to the values of energy assets . . . than in the actual ownership of physical assets'.[54] It quickly became the major energy trader in the US market. Indeed, with its phenomenal profits and culture of innovation, Enron was a darling of the stockmarket, and one of the highest profile and most successful companies in America. Its apparent success was based on internal systems that aggressively rewarded innovation that would lead to Enron being able to show more profits on its balance sheet. Many of those who did not were sacked, under employment contracts that required everyone to re-apply for their jobs periodically, and regularly sacked the worst performing employees (known as the 'Rank and Yank' process). Financial innovation that led to profits on the books was the only criterion for success in the organisation. Those that succeeded at this were seen as correct in everything, and left in charge of their own domains.[55]

Enron's financial success was, however, a mirage. The company had huge debts, but was able to show a profit to the stockmarket and the public by taking advantage of accounting rules that allowed it to record future profits from its innovative financial products in its balance sheets. In reality, the debt levels of the company were growing and growing, forcing management to create more and more risky financial products and deals to make it look as if the profits were continuing to grow.

Enron's auditors, Arthur Andersen, collapsed soon after Enron's true situation became public knowledge, because of its part in allowing Enron to mislead investors and the public. The evidence suggests that Vinson and Elkins too played a role in assisting Enron to technically comply with accounting standards, while actually deceiving the market about its true position.[56] In particular, Vinson and Elkins assisted Enron to create 'Special Purpose Vehicles' (SPVs) to which Enron was able to transfer its debt so that it did not have to report the debts on its balance sheets. This way Enron's huge debts could be listed as only a footnote to the accounts, rather than appear as a main balance sheet liability. It has also been reported that Vinson and Elkins wrote 'true sale opinion letters' that supported the genuineness of Enron's transactions

54 Deborah Rhode and Paul Paton, 'Lawyers, Ethics and Enron' (2002) 8 *Stanford Journal of Law, Business & Finance* 9, 13; citing Mark Jickling, *The Enron Collapse: An Overview of Financial Issues* (Congressional Research Service, Washington, DC, 2002) 1 <http://fpc.state.gov/documents/organization/9267.pdf> at 13 June 2006.

55 Milton C Regan, 'Teaching Enron' (2005) 74 *Fordham Law Review* 1139, 1146–7; Rhode and Paton, 'Lawyers, Ethics and Enron', 18.

56 See generally Rhode and Paton, 'Lawyers, Ethics and Enron', 15, 17–24; Regan, 'Teaching Enron'; Mike France with Wendy Zellner and Christopher Palmeri, 'One Big Client, One Big Hassle', *BusinessWeek Online*, 28 January 2002 <http://www.businessweek.com/magazine/content/02_04/b3767706.htm> at 13 June 2006.

with the SPVs, for the purposes of getting audit approval, and therefore allowed the SPVs to be used in Enron's public financial reporting to hide their debts. Vinson and Elkins also allegedly provided advice on the legality of many of these transactions, and assisted Enron with preparation of its required public disclosures in relation to these transactions.

In 2001, corporate whistleblower Sherron Watkins wrote an anonymous memo to Kenneth Lay, Enron's Chairman, setting out concerns about the propriety of Enron's disclosures, and its accounting treatment of these transactions, including naturally the fact that they had been approved by Arthur Andersen's audits. She recommended that Lay hire an independent law firm to investigate her concerns. She explicitly stated that Vinson and Elkins should not be hired to do the job, as they faced a conflict of interest from having provided opinion letters supporting the legal propriety of some of the deals that the auditors would have relied on. Nevertheless Lay did ask Vinson and Elkins to conduct the review, which they did. But he specifically asked them not to delve into the accounting treatment of the transactions, and Vinson and Elkins apparently saw no reason to go outside those instructions. Vinson and Elkins concluded that the facts did not 'warrant a further widespread investigation by independent counsel and auditors', but did comment that the 'bad cosmetics' of the deals might lead to 'adverse publicity and litigation'.[57]

A few months later, Enron's true financial position and the nature of the deals became public knowledge, Enron collapsed and thousands of investors lost their money. Enron is now a byword for corporate corruption:

> By October 2002 . . . investigations of Enron-related criminal conduct have resulted in three criminal indictments. In June 2002, A Texas jury convicted Andersen of federal charges of obstruction of justice. In August 2002, Michael Kopper, an Enron employee working for the company's Chief Financial Officer between 1994 and July 2001, pled guilty to conspiracy to commit wire fraud and money laundering. Under the terms of a Cooperation Agreement, Kopper admitted participating in a scheme to secretly use the [SPVs] to defraud Enron for his own financial benefit. On October 1 2002, the Justice Department charged Enron's former Chief Financial Officer, Andrew Fastow, with securities fraud, money laundering, mail fraud, wire fraud, bank fraud and conspiracy related secret deals he allegedly made with the company for his own financial benefit.[58]

In May 2006 Lay and the Chief Executive Officer Jeffrey Skilling were convicted by a Texas jury of fraud and conspiracy arising from the collapse. Lay is now dead but at the time of writing, Skilling is likely to appeal.[59]

What might have led Vinson and Elkins to see it as unnecessary to review dubious transactions in which they themselves had been involved, nor to strongly advise Enron senior management and the board about the problems with these transactions, nor to warn anyone else, including the investors who lost their money, the corporate regulator, or stock exchange? It seems that Vinson and Elkins did not even recognise that its overriding obligation of loyalty to the Enron company as a whole might mean that it had to think about the conflicting interests of Enron management (to hide Enron's true financial position) and Enron's shareholders, creditors and employees (to know the true situation and avoid financial loss). Nor did they apparently consider any other obligation to the market or the community. Remember Enron was the United States' largest energy trader and its activities could potentially cut off supply of electricity and

57 Rhode and Paton, 'Lawyers, Ethics and Enron', 19–21.
58 Ibid 16.
59 Laurel Brubaker Calkins, 'Skilling Seeks a New Trial', *Business*, *The Age* (Melbourne), 22 June 2006, 2.

gas to millions of people.[60] Enron's 'situational culture' – involving the exercise of a type of moral power over these 'professionals' – appeared to be irresistible. As Ian Ramsay has observed:

> . . . [A]s a lawyer's status and income become increasingly dependent on a single client or on success in a particular proceeding, the pressure to avoid ethical judgments intensifies.[61]

DISCUSSION QUESTIONS

The role of Vinson and Elkins as law firm to Enron illustrates well the way in which lawyers' own ethical values and awareness are likely to be very important in helping them to identify conflicting loyalties and constraints on the duty to clients, and decide how to respond to them. Merely trying to apply the *Model Rules* to this situation might not have helped very much. The questions below are designed to help you consider the different ethical approaches and values that you might apply to difficult situations of conflicting loyalties.

1. If you had been a lawyer in Vinson and Elkins, the law firm which advised Enron on almost everything, would you see yourself as:
   (a) a *zealous advocate*, concerned to get the best deal for management,
   (b) a *responsible lawyer* – working to get the company's debt within the accounting rules and worried about how the disclosure requirements could be met,
   (c) a *moral activist* about to blow the whistle on the deception, or
   (d) an *ethicist of care*, weighing up the best way to look after both the shareholders who are about to lose their savings and the Enron employees who were 'just following orders', and other stakeholders?
2. If you see yourself as a *zealous advocate*, where would you be now? If you see yourself as a *responsible lawyer*, who would you be working for now? If you are a *moral activist*, would you be employable now and, if so, in what sort of workplace environment? If you were an *ethicist of care*, what would be the consequences for you if you had succeeded in caring for both shareholders and low-power employees?
3. Finally, which of the above ethical approaches, or which combination of them, would most influence you if and when you find yourself in a similar position to a Vinson and Elkins partner working some time in the future for a similar, powerful and valuable client?

Conclusion

Understanding and anticipating the ethical challenges raised by conflicting loyalties is arguably one of the most difficult processes for lawyers because 'the facts' do not always present neatly, or may be at first hidden from view. But there usually comes a point at which the competing loyalties do become evident. We

60 In fact there is evidence that Enron energy traders would manipulate the availability of electricity to certain areas if the electricity provider in that area would not agree to pay the right price, in order to force them to come to Enron's price.
61 Ian Ramsay, 'Ethical Perspectives on the Practice of Business Law' (1992) 30(5) *Law Society Journal* 60, 63.

cannot say when Enron's lawyers first crossed the ethical line, but the more experience a lawyer acquires, the earlier they should reach that point of recognition in each case. The earlier it is understood that loyalty is being compromised, the more capacity lawyers have to do something about it.

Lawyers can easily become occupationally desensitised to the implications of conflict – the need sometimes to choose between opposed positions. They can come to see the process of living with different competing interests – that is, owing different loyalties to different people and different institutions – as merely one of 'operational management' or 'tweaking'. Surmising only from the reports that we have and without knowing for sure what was going on ethically inside the law firm, it is possible that Enron's outside law firm, Vinson and Elkins, rationalised a one-eyed loyalty to directors and managers of Enron (which had a phenomenally innovative and attractive leadership role within the US economy) over their duty to shareholders as reasonable and manageable. Uncomfortable but diffuse notions of the big picture, the 'spirit' of the law and ethics were not in the race. More precision in ethical consciousness – such as the four approaches set out in Chapters 1 and 2 – might have made it easier for Vinson and Elkins to identify (or less easy to ignore) their overarching obligations.

Many successful lawyers might also cultivate the sense among clients with potentially opposed interests that they can in fact juggle their competing loyalties or positions indefinitely, without sacrificing either client: so much so that the art of wearing more than one hat can become, for some of them, a comfortable position, a position from which loyalty is perceived as highly situational. All this continues until one of the parties perceives that there is just too much at stake to allow such an ambivalent loyalty to continue, or the firm concerned realises that perception is imminent and does something about it.

A choice of values occurs in all cases of conflicting loyalty, whether we make that choice consciously or not. Sometimes without even realising that we are making a decision, we in fact decide that a problem is 'all just too hard' and give up on coming to a principled, ethical resolution to the conflict. Instead we 'go with the gut feeling', without trying to know what is the value behind that feeling. It is often in these situations, where we do not feel we have made an ethical choice at all – we have simply allowed a situation to carry us along – that our actions end up having consequences that we did not expect. We might end up in losing valued clients, having our reputation questioned by colleagues, even facing disciplinary action or ridicule in the media. A conscious choice to act on a known values base will produce consequences that are, at least, anticipated and, it is to be hoped, defendable and desirable within an ethical and satisfying legal practice.

Recommended Further Reading

G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, Pyrmont, NSW, 3rd edn, 2006) 'Part II: Lawyers' Duty to the Client' especially Chapters 6, 7, 8, 9 and 10.
Adrian Evans, 'A Mutuality of Interest' (2003) 77(7) *Law Institute Journal* 86.

Adrian Evans, 'Concurrent Loyalties' (2004) 78(6) *Law Institute Journal* 82.
Janine Griffiths-Baker, *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* (Hart Publishing, Oxford, 2002).
Law Society of New South Wales in consultation with the Law Institute of Victoria, *Information Barrier Guidelines* (2006) Law Society of New South Wales <http://www.lawsociety.com.au/page.asp?partID=15645> at 2 June 2006.
Donald Nicolson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press, Oxford, 1999) 'Ch 9: Confidentiality' 253–76.
Richard Tur, 'Confidentiality and Accountability' (1992) 1 *Griffith Law Review* 73.
Duncan Webb, 'Autonomy, Paternalism, and Institutional Interest: Why Some Conflicts Can't be Waived' (2005) 12 *International Journal of the Legal Profession* 261.

8

Lawyers' Fees and Costs: Billing and Over-Charging

Introduction: Legal Fees and Access to Justice

Clients are more likely to complain about their lawyers' fees and costs than any other issue,[1] and even the most conscientious lawyers have trouble controlling costs and explaining them to clients. Typical complaints include that the lawyer has failed to make proper disclosure of likely costs at the commencement of the matter, failed to even provide a written bill, failed to provide an itemised bill once requested, or charged for the preparation of an itemised bill.[2] Deliberate gross over-charging also features prominently among client complaints, as does the withdrawal of costs from a client's trust account without their permission, or in the absence of a proper bill. Clients complain about lawyers who charge costs in relation to litigation matters that amount to more than the amount actually recovered in litigation.[3] Also featuring prominently among client complaints about lawyers are complaints about excessive hourly billing rates and exploitation of 'no-win, no fee' agreements.[4] Clients routinely complain that they have been promised that they will incur no fees unless they win, but find themselves losing

1 Adrian Evans, 'Acceptable, But Not Entirely Satisfied: Client Perceptions of Victorian Solicitors' (1995) 20 *Alternative Law Journal* 57; Legal Fees Review Panel, *Report: Legal Costs in New South Wales* (2005) Lawlink New South Wales 7 <http://www.lawlink.nsw.gov.au/lawlink/legislation_policy/ll_lpd.nsf/pages/lp_publications> at 29 May 2006.

2 These matters would amount to breaches of the *Model Laws* pt 10 ('Costs Disclosure and Review'), specifically cl 1009(1)(c), cl 1029(1), cl 1032(1) and cl 1032(3) respectively. The list of complaints is from Legal Fees Review Panel, *Discussion Paper*: *Lawyer's Costs and the Time Billing* [sic] (2004) Lawlink New South Wales 7–8 <http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwPreviewActivePages/OLSC_lfrp> at 29 May 2006.

3 Whether or not a lawyer intends to treat a client in this way, the fact that they would not think that their client might complain about such a bill is, in itself, remarkable.

4 For a good example of a lawyer treating unsophisticated clients 'shamefully' in relation to no-win, no-fee agreements see *Baker v Legal Services Commissioner* [2006] QCA 145 (Unreported, McPherson, Jerrod JJA and Douglas J, 5 May 2006).

and having to pay the costs of the other side, or disagreeing with their lawyer about whether there has been a 'win'. One Queensland lawyer was suspended for twelve months for gross over-charging for billing a 'no-win, no fee' client $300 per hour plus a premium of 25% for all work done by any employee of the firm, from partner to paralegal to secretary. The charges included twelve minutes (at $300 an hour) for a secretary wrapping a box of chocolates to be given to a reporting doctor's secretary as thanks for correcting a report, and another twelve minutes discussing the purchase of the chocolates.[5]

Clients often seem to consider lawyers to be unscrupulous when it comes to fees, and there is some evidence that they are right. In a survey, recent Australian law graduates were asked if they would be prepared to co-operate in overcharging a client, if 'requested' to do so by their firm – 40% said 'yes'.[6]

It is not just because of unethical practices by *individual* lawyers that clients complain about their legal bills. Cultural and structural factors in the organisation of litigation and legal practice also often lead to client misunderstanding of, and disillusion about, how they are billed. But it is not a case of 'either-or'. Most rip-offs, when they occur, are the product of both an inadequate system and a practitioner ready to exploit the deficiency. Systemic problems of excessive adversarialism, individual problems of over-charging, and lack of effective lawyer communication about costs interact to make access to justice problems worse.

As we shall see below, there is uncertainty about what is reasonable for lawyers to charge, and what methods can fairly be used to calculate legal fees. Client uncertainty about billing methods and how high their bill should be creates opportunities for over-charging. But it is not just the level of fees a lawyer charges their *own* client that increases the costs of justice. Many judges and law reform commissions believe that legal fees and costs, however they are calculated, have now risen to unacceptable levels for systemic reasons.[7] As we have seen in Chapter 4, the adversarial litigation *system* also creates high, and unpredictable, costs, putting at risk the fundamental values of fair and equal access to justice for all. Large 'defendant firms' (firms that typically act for corporate defendants and insurance companies in personal injury and workers compensation matters) can delay or even completely frustrate the conclusion of litigation by devices such as overburdening plaintiffs with documents in discovery, contesting every step of the pretrial process, and then arguing every point during trial. If the other

5 *Council of the Queensland Law Society Inc v Roche* [2004] 2 Qd R 574. See the comment by de Jersey CJ at 584 that he 'hoped' it would be very unusual for a law firm to charge for the time of secretarial staff at the same rate as partners.

6 See Josephine Palermo and Adrian Evans, 'Preparing Future Australian Lawyers: An Exposition of Changing Values Over Time in the Context of Teaching About Ethical Dilemmas' (2006) (1) 11 *Deakin Law Review*, 104–30. See also Adrian Evans and Josephine Palermo, 'Zero Impact: Are Lawyers' Values Affected by Law School?' 8 (2005) *Legal Ethics* 240, 245–8.

7 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (Australian Government Publishing Service, Canberra, 2000) 'Ch 4: Legal Costs'; Access to Justice Advisory Committee, *Access to Justice – An Action Plan* (Australian Government Publishing Service, Canberra, 1994); Legal Fees Review Panel, *Report: Legal Costs in NSW*; Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice: Foundations for Reform* (Australian Government Publishing Service, Canberra, 1993); Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice: Checks and Imbalances* (Australian Government Publishing Service, Canberra, 1993).

side decides to be nasty and, for example, deliver 700 pages of interrogatories in order to push their opponent to the brink financially (as occurred in the *White Industries Case*, Case Study 4.3 in Chapter 4), costs can blow out quickly. Excessive adversarialism cripples possibilities for access to justice, especially for individual plaintiffs, precisely *because* it increases costs in unpredictable ways.

Consider the following two short examples of lawyer misconduct in relation to charging clients. Why do you think so many clients in each of these two cases were willing to do what these lawyers asked? Is there something special about the relationship between lawyer and client that might prevent some clients from complaining about their lawyer or challenging their billing practices earlier on?

- In the late 1980s one suburban Melbourne practitioner devised a scheme to overcharge hundreds of vulnerable clients by first telephoning them and asking to be paid in cash – usually relatively small amounts of several hundred dollars for wills and conveyances – and then, some twelve to eighteen months later, sending them a bill for the same amount. Numerous clients could not recall for certain whether they had previously paid or not, since no receipts were ever issued on the first occasion. Many paid a second time before the scam was uncovered and terminated. The practitioner was belatedly investigated by the Law Institute of Victoria and eventually agreed to close his practice.[8]
- In *Re Veron: Ex parte Law Society of New South Wales*,[9] a New South Wales court found a practitioner guilty of professional misconduct for charging plaintiffs in simple, uncomplicated personal injuries matters up to $1500 more than the average fee. Prior to settlement, the practitioner would extract from his clients an authority to settle their claims for a set sum, with an added clause that permitted him to also deduct costs of $1000 or more without further reference to his client. The practitioner argued that his clients had consented to the deduction and, by implication, it was no one else's business what those fees were if the client had consented. While it *is* acceptable to withdraw fees from a trust account by prior written arrangement with the client, the combination of the authority and the over-charging here seemed to be designed to prevent client scrutiny until the deduction was a *fait accompli*. Perhaps the practitioner hoped that the difficulty of complaining would discourage his clients, none of whom he expected to represent again. The court showed it was ready to set aside any client consent process where the effect was in fact to deceive the client, and described the arrangements as extortionate and dishonourable in dealing with the client's trust funds.

In the following section we analyse where and how ethical issues arise in lawyers' fees and billing practices in more detail. We conclude the first half of the chapter with an extended examination of the ethics of time-based billing, and the

8 From the files of the Springvale Monash Legal Service Inc.
9 [1966] 1 NSWR 511. See also Legal Fees Review Panel, *Discussion Paper*, [3.18].

pressures it puts on individual lawyers to behave unethically. In the second half of this chapter, we consider alternative values for lawyers' fees and costs relating first to the way in which lawyers should communicate about costs with their clients and second, the methods used to calculate legal fees.

Ethical Problems with Lawyers' Fees and Billing Practices

Two Methods of Calculating Legal Bills

One reason that clients complain so often about their legal bills is that legal costs are often unpredictable and no one method of calculating legal fees seems to be perfect. Therefore we begin by introducing the two main ways in which lawyers calculate their fees, and the different ethical issues that these two methods of billing raise. As we shall see, both contain significant potential for client disillusion.

First, lawyers can charge on an *item remuneration* or *task-completed* basis, which means they apply a predetermined 'scale' or schedule, which specifies the amount of money that may be claimed for each sub-category of legal work, or task, in a larger case or transaction. Thus, drafting a letter may be charged to the client at, say, $30 per 'folio' (a folio = 100 words). It makes no difference *how long* the lawyer takes to draft the letter of 100 words – the lawyer will still be paid the same amount.

The actual amount charged per item usually varies upwards according to how much money is being claimed (or defended), to recognise the extra 'skill and responsibility' associated with a larger claim. A typical scale will allow $30 for a letter where the total claim is for say, $1500, but permit a charge of say, $45 for exactly the same letter, where the amount claimed is $2500. Historically, there were minimum fee scales for all legal work set out under legislation. However these were abolished in the 1990s because they were considered anti-competitive – they effectively allowed the profession to set a minimum floor for their own prices. The courts, however, have continued to publish fee scales for the purposes of assessing disputes about costs in litigation, and many lawyers use these 'court scales' as a basis for their own charging.[10]

Item remuneration allows lawyers to be specific about what they have done for their client and to produce a bill itemising the amount charged for each task in the case. Item remuneration is probably less dangerous than time-based billing for the unsophisticated client. Clients have the comfort of knowing that, even if the lawyer is a bit slow in completing the task, it is the lawyer not the client who carries the cost of the extra time spent. But clients do not, as a rule, understand why they should pay $45 for the same letter that would only cost them $30 if the

10 There are also special scales and rules about fees and disputing fees in the family and criminal law jurisdictions.

amount in dispute were smaller. For most clients, the fact that there is more risk for the lawyer in the larger claim and therefore it is reasonable (or fair) for him or her to charge more, is beside the point. Clients believe that they are entitled to the same proficiency no matter how large the claim, and tend to view fee differences of this nature as simple exploitation.

Moreover the profession itself has a major influence on how much lawyers can charge for each item in the court scale. The scale amounts are set by committees and, although those committees may be diligent and conscious of their wider responsibilities, they are dominated by lawyers rather than being comprised of a mix of lawyers and consumers. Finally, court scales of costs generally only specify a *minimum* fee, because the cost committees that set the court scales have always leaned towards lawyers' arguments that fees for individual items under the scales may be increased where the circumstances are peculiar.

Second, in *time-based billing*, a client signs a cost agreement with the lawyer under which fees are charged according to how many hours the lawyer spends on the matter. The lawyer specifies an hourly rate – say $350 – and the client agrees to pay $350 multiplied by however many hours the task takes. Time-based billing is attractive to the profession because it normally results in a higher level of fees than item remuneration. It might also reflect lawyers' sense that they are being paid for their professional advice, rather than for a product. But it is not as transparent as the traditional system, because individual bits of legal work need not be as precisely specified in any bill. As we shall see below, this opaque billing alternative is increasingly regarded by clients as both inefficient and unfair, since there is no automatic upper limit to the total hours appearing on the time sheet.

The fact that both these costing methods are ethically flawed does not mean that all lawyers abuse them. It does mean that, as with most aspects of the lawyer-client retainer, the vast majority of clients are dependent on their lawyer's sense of integrity. Some large clients (or those seeking conveyancing services) have enough purchasing power to avoid both these methods of billing and require law firms to tender for a package of services, ensuring that the successful tenderer agrees to a lump sum for all work, regardless of the problems that might later occur in providing the contracted services. However, most clients have no alternative but to accept the billing method proposed by their lawyer. Moreover, where the matter involves litigation, both lawyer and client are at the mercy of the tactics chosen by the other side, and the inherent unpredictability of the system, in working out how much a matter is likely to cost. As former President of the Law Council of Australia, Bret Walker SC has pointed out, 'the poorer litigant has a much greater threat from the unpredictability of litigation than the richer litigant does'. This is not only because the richer litigant has 'relatively deep pockets', but also because the richer litigant has the capacity 'to increase the threat of litigation costs being paid by the other party as a result of complications and elaborations of the dispute and the procedure for deciding it'.[11] This is even more evident when

11 Bret Walker, 'Proportionality and Cost-Shifting' (2004) 27 *University of New South Wales Law Journal* 214, 216–7.

we consider the complicated question of deciding who pays what costs after a litigated matter is concluded.

Legal Costs Awards after Litigation

As part of the final court orders in litigation, the court will usually decide who should pay what legal costs, on the basis of what is fair and equitable between the parties. The cost indemnity rule says that a client who wins a legal action is normally entitled to have their *reasonable and necessary*[12] costs paid by the losing party. These costs are known as *party-party costs*, and they are calculated on an item remuneration basis under the relevant court scale. *Reasonable* costs are all those costs which the lawyer was justified in incurring in running the case and attending to their client's needs for information. *Necessary* costs are more restricted. They cover only those expenses which directly relate to getting the case ready for trial. It may be necessary, for example, to speak to a client in business hours about the evidence they will give the following day, but it is not usually necessary that that conversation occur again at midnight. So while the client might be very anxious and phone their lawyer at midnight to go over their evidence again, charging the client for the second phone call would be reasonable, but not necessary according to the law of costs. A successful party can also recover from the losing party all their reasonable and necessary expenses ('disbursements'), such as court filing fees, medical report fees and barristers' fees.

Party-party costs generally cover only 70–75% of the total costs that the winning party actually owes their lawyer, whether the total costs are calculated on an item or time-based process. These actual costs are called *solicitor-client costs*. The extra 25–30% of solicitor-client costs cannot be recovered from the losing party. In the example above, this would include the midnight phone calls; that is, the actions by their lawyer that the winner did not strictly have to perform in order to run their case but would, nevertheless, be considered reasonable for the party's own lawyer to charge for. These extra costs would have to be paid by the winning party to their own lawyer out of their 'winnings'. In order to understand what legal fees and costs they might have to pay in relation to litigation, a client therefore needs to understand that even if they win the case, they will also need to personally pay, say, 30% of the costs charged by their lawyer. In order to go ahead with litigation, they would need to be confident that they will win and that paying that 30% of their own costs will not unacceptably reduce their net receipts from the case.

If this is confusing for law students and lawyers, consider how clients feel when they first hear about the types of legal costs and the effect of the system on what they think is their just entitlement? Figure 8.1 below describes the relationship between these concepts.

12 Some court rules refer to such costs being 'necessary or proper': see, eg, *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 63.29.

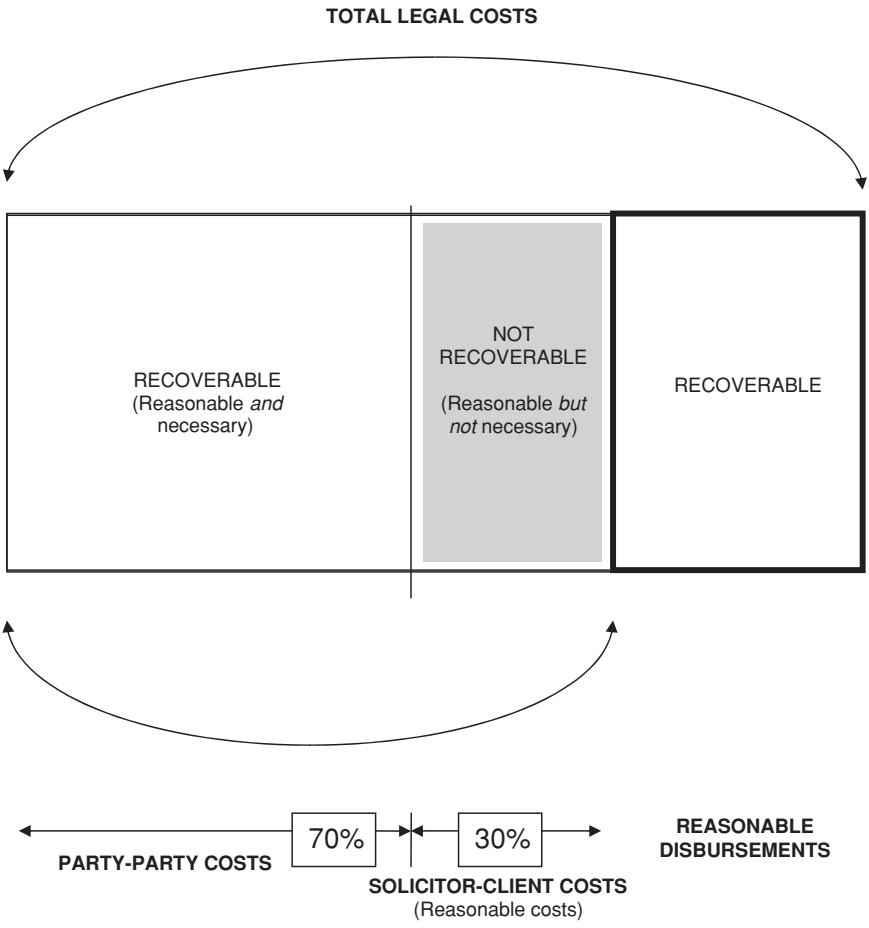


Figure 8.1 Relationship between Solicitor–Client Costs, Party–Party Costs and Total Legal Costs

Consider a client who has sued for $10,000 for damage to their boat after it is holed by a jet-ski. Their solicitor-client costs (that is, their actual costs) amount to $3500 and the party-party proportion of those costs totals $2500. They win the case and are entitled to:

Judgment for:	$10,000
Plus party-party costs:	$2500
Sub-total:	$12,500
Less solicitor-client costs:	$3500
Net receipts from action:	$9000

Some clients will be annoyed that they have to pay in effect for $1000 of the damage to the boat themselves, particularly if their lawyer has not taken time to explain how costs work in advance.

But it gets worse for the client. Consider a common variation to this calculation. The court finds that the plaintiff has contributed to their own loss through contributory negligence. For example, the plaintiff partially caused the collision by manoeuvring their boat into the path of the jet-ski. A magistrate might decide that the case should be decided 60% in favour of the plaintiff and 40% in favour of the defendant. Costs normally 'follow the event', so the plaintiff would be entitled to only 60% of their party-party costs (60% of $2500 = $1500) and the defendant to 40% of their party-party costs (say, $800). Since the jet-ski was itself severely damaged in the collision and will cost $6000 to repair, the costs calculation for the plaintiff will look like this:

Plaintiff's successful claim:	$6000 (60%)
Plus party-party costs:	$1500 (60%)
Sub-total:	$7500
Less 40% of Defendant's claim:	$2400
Less 40% of Defendant's party-party costs:	$800
Sub-total:	$4300
Less Plaintiff's solicitor-client costs (payable to their own lawyer):	$3500
Net receipts from action:	$800

Extreme results like these are not uncommon in lower court litigation. It is not surprising that clients complain that the case they thought was worth $10 000 produces a meagre result. Unless the amount in dispute is substantial, court-based dispute resolution will often be uneconomic for the client and benefit only the lawyers. It is for this reason that lawyers face a considerable obligation to be candid in fully apprising potential clients of the financial risks of their proposed court action. As we have seen in Chapter 4, lawyers who do not communicate effectively on this issue may be criticised for putting their own interests in reaping fees from litigation ahead of their clients' interests.

Diminishing Access to Justice

So long as the proportion of *unrecoverable* costs is not too high, parties to litigation can afford to start a case with some expectation that the extra costs – the 30% mentioned above – can be paid from the judgment amount awarded to them. Recently however, the proportion of successful parties' costs that is not recoverable from the other side has been approaching 50%, rather than 30%. This is because of relentless annual increases in the amount that the profession can charge for each item of work, and the widening gap between what practitioners are charging under time-based billing, and what costs assessors will approve for recovery from the losing party by way of party-party costs.[13]

This means that parties to litigation must increasingly ask themselves whether the amount of costs they will have to bear themselves, whether they win or lose,

13 Tori Strong, 'At What Cost?' (2005) 79(4) *Law Institute Journal* 4.

is justified by the amount at stake in the dispute. As a result, even clients who are very likely to succeed in court may feel forced to agree to negotiation or mediation to resolve their disputes, regardless of how suitable their case is for mediation (see Chapter 6). This makes the prospect of equal access to justice in the court system recede further and further, and makes it more likely that matters will be settled unjustly. It is no wonder that some clients fume in frustration because they cannot afford to litigate, and still have to pay their lawyer to be advised of this reality. As mentioned in Chapter 4, successful corporations are not constrained by these concerns because their legal fees are generally tax deductible. But individuals and undercapitalised small businesses often see legal costs and inaccessible justice as interchangeable terms, and this is regardless of whether they might have to deal with any member of the profession who behaves unethically by over-charging.

Over-charging

The public view that lawyers routinely over-charge stems partly from the fact that lay clients do not understand the worth of their lawyers' work in the way that their lawyers do. Much legal work is invisible to clients because it consists of applying abstract knowledge and conceptual judgement to fact situations that often differ only subtly from prior cases. Precedents from earlier decisions are rarely complete templates for later disputes, but the significance of the minute differences does not stand out to clients, especially when their own research provides them with what they think is a clear answer to their problem. By contrast, householders can see what their plumber does and can therefore partially relate the (expensive) repairs to their roof to the size of the bill – and their roof no longer leaks. Legal clients see very little happening in their case, and often experience continuing stress in their lawyer-client interactions, yet feel they have achieved only compromised outcomes.

Contact with the legal system is always likely to involve conflict, dispute and difficult choices, but lawyers can positively influence clients' understanding of costs. The way clients perceive the worth of their lawyers' work often depends a lot on the quality and amount of information and communication they receive from their lawyer. As we shall see below, this means that good lawyering requires lengthy explanation and disclosure to clients about likely fees. The written costs disclosures required by legislation (see below) are not enough when clients' literacy or concentration span is limited. Lawyers should sit down with their prospective clients and 'walk them through' the way they will be charged, checking as they go to see that they have been properly understood. This is also a way of building trust between client and lawyer. Clients need to know they can trust their lawyer to handle their case competently and efficiently because the legal services market is imperfect: the buyers of legal services do not always know where to get quality work done at a fair price and the sellers (lawyers) are commonly unable to predict accurately what their fee will be. An important aspect of client trust in their lawyer is knowing: 'Can I trust my lawyer to tell me the

truth in their assessment of the merit of my case and how much it will cost me?' The legal costing system, as it stands, and frequent lack of adequate communication about costs, however, may entrench dissatisfaction for both lawyer and client.

Conditional and Uplift Fees

One way in which some lawyers attempt to make justice more affordable and accessible for clients who cannot afford litigation is by charging *conditional* and/or *uplift* fees (see descriptions below) that apply only where the client is successful in litigation. Under these arrangements the lawyer will charge no fee, or a reduced fee, if the client is not successful. The ethical implications of conditional and uplift fees are, however, considered controversial. These types of fees can be justified by reference to *adversarial advocate*, *moral activist* and *ethics of care* concerns with helping clients access legal and substantive justice. But from a *responsible lawyering* perspective, conditional and uplift fees are seen as dangerous mechanisms that can damage the purity, probity and integrity of the lawyer-client relationship. This is because they have the potential to distort the litigation process by giving lawyers a personal stake or interest in the litigation, which may conflict with their ability to advise clients as to their best interests, or even to obey their duty to the court.

Conditional costs agreements are those in which the lawyer and client agree that the lawyer will only be paid if the client is 'successful'. Conditional agreements can include those that merely provide that the lawyer will charge their ordinary base fee if the client succeeds. Most conditional cost agreements, however, allow the lawyer to charge an 'uplift' of their fee (see below) if the litigation succeeds.

Conditional costs agreements have been accepted by the Australian courts as a way of assisting litigants who cannot afford to pay lawyer's fees in advance.[14] Professional conduct rules tolerate the conflict of interest of the lawyer effectively having a stake in the client's case because it is thought to be outweighed by the public interest in access to justice.[15] Most disputes about conditional costs agreements arise because lawyers and clients have different understandings of what constitutes a successful outcome, or because some lawyers have taken too much or *all* of their client's 'winnings' – and then some. In one infamous case, after settlement at about $10,000, Queensland law firm Baker Johnson sent a bill for $18,000 and sued the client for the balance of $8000 that the firm could not recover from the settlement amount![16]

Contingent fee arrangements, in contrast to conditional fees, allow a lawyer to take a *percentage* of the actual judgment or settlement sum, if the client is

14 *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 203.
15 See, eg, *Legal Profession (Barristers) Rule 2004* (Qld) r 91(d) which states that a barrister must decline a brief if the barrister has a material financial or property interest in the outcome of the case – '*apart* from the prospect of a fee in the case of a brief under a speculative fee agreement' [emphasis added].
16 *Baker Johnson v Jorgensen* [2002] QDC 205 (Unreported, McGill DCJ, 26 July 2002). See also *Legal Services Commissioner v Baker* [2006] QCA 45 (5 May 2006).

successful. The more a client recovers in a judgment, the more their lawyer is paid. The terminology is confusing, as 'conditional' and 'contingent' are synonyms in normal language. The term 'proportional' fee agreements might better describe contingent arrangements. Contingent or proportional fees do have the advantage of certainty, as the client knows that their lawyer will never take more than a certain percentage of their 'winnings'. But they are *prohibited* in Australia on the basis that they create a more serious conflict of interest than conditional costs agreements (*Model Laws* cl 1025), although they are common in the United States. The rationale for banning contingent fees is that they create an incentive for the lawyer to seek to maximise the settlement sum while minimising the amount of work he or she does. Accordingly, the lawyer might not advise settlement early on, even though this might be better for the client, in the hope of holding out for a higher fee. Equally the lawyer will not want to go ahead with the actual trial, even though this might give the client a better chance at a higher amount, because the trial creates more work for the lawyer. So contingent fees might create a structure in which lawyers are more likely to pressure their client into a settlement on the steps of the court just before trial. This might also go against a public interest in the prompt settlement of disputes (with reasonable financial recovery), which the community sees as more important than the individual's interest in attempting to maximise a final settlement just before trial, but after lengthy delay.

Instead, the Australian *Model Laws* allow for a modified contingency fee in the form of an *uplift fee*. An uplift fee means that the practitioner charges up to 25% of their normal fee as an addition, or uplift, to their normal fee, if they are successful. This would usually occur where they have a 'no-win, no-fee' costs agreement with their client (*Model Laws* cl 1024). An uplift fee is not based on the settlement sum, as with the contingency fee, but on the lawyer's ordinary fee for the same work. The argument is that the lawyer should be compensated for the risk of financing a speculative no-win, no-fee case (that is, not charging any professional fees if they lose) by a bonus if they win. This creates an incentive to take on the matter in the first place.

Uplift fees do, however, suffer from an internal ethical contradiction. Lawyers are not permitted to enter into an agreement for an uplift fee under the *Model Laws* unless they have certified that the case has reasonable prospects of success.[17] Is it consistent to allow an uplift permitting up to an additional 25% of fees as an incentive for taking on a *speculative* case, when the same lawyer must certify to the effect that the case has reasonable prospects of success to start with anyway?[18] Although no litigation is risk free, the 25% uplift may often be used simply as a means of charging higher fees where there is no great risk of an action failing. The NSW Legal Services Commissioner has commented that:

17 Cl 1024(4).
18 Chris Merritt, 'Lawyers Protest at Ban on Uplift Factor', *The Australian Financial Review* (Sydney), 28 January 2005, 46.

> . . . concerns arise when practitioners accept matters on a contingency basis [meaning, no-win, no-fee] where the outcome of the matter is virtually guaranteed. It is the experience of the OLSC that the 25% uplift is applied in these situations, regardless of the lack of risk and without financing of ongoing disbursements by the practitioner.[19]

Additional problems may arise with any form of 'no-win, no-fee' agreement because, apart from the risk of paying the winning defendant's costs in the event of failure, a plaintiff who does not have to put up any money at all at the start of a case might be encouraged to make an unmeritorious ambit claim, notwithstanding the obligation on practitioners to proceed with such cases only if they have merit. When such cases are lost, the defendant faces a plaintiff with no assets and the defendant cannot recover their costs.[20] Plaintiffs who do have assets also often complain that they did not understand (despite the agreement they have signed) that they would have to pay the defendant's costs if they lost, arguing that 'no-win, no-fee' means exactly that.

Ultimately, the effect of both the 'true' contingency fee (that is, the fee which varies directly with the size of the ultimate settlement or judgment) and, to a lesser extent, the uplift fee is to give the plaintiff's lawyer a financial interest in the *result* of the litigation. Fee uplifts will be greater if cases proceed closer to trial without settlement, because more work will be done in preparing for trial. Since that lawyer has a fiduciary obligation to dispassionately advise their client as to what to do at each stage of the litigation (that is, to compromise or not), if the size of their fee is a factor in the equation, it becomes more likely that such advice will be unconsciously coloured by their own interest in that result.

How 'Fair and Reasonable' Are Lawyers' Bills?

So what is the good lawyer to do in relation to billing clients if they want to respect their client and yet not sell themselves short? The best that courts and parliaments have come up with is the notion of 'fair and reasonable' charging: that is, lawyers may (and should) charge what is fair (having regard to disclosure and consent) and reasonable (having regard to an objective assessment) in the circumstances. This will depend on 'the size of the solicitor's firm, the resources employed or available to be employed by it, the value which the lawyers place upon their skill and expertise and the urgency of the client's requirements' and 'must be determined following an appropriate analysis of the practice of the particular solicitor'.[21] This is obviously not a recipe for comfort, but it does signify a value of respect for both the client's right to *fairness* in the *process* of the agreement, and the lawyer's right to be paid what is objectively *reasonable*, having regard to what the case is about.

19 Legal Fees Review Panel, *Discussion Paper*, 16.
20 Ibid 15–16.
21 *Veghelyi v The Law Society of New South Wales* (Unreported, Supreme Court of New South Wales, Court of Appeal, Kirby P, Mahoney and Priestley JJA, 6 October 1995) 6–7, cited in Legal Fees Review Panel, *Discussion Paper*, [3,17]; *Model Laws* cl 1041(2).

The fairness of the bill begins with the clarity of its language:

> For the client, a bill provides an itemised summary – or not, as the case may be – of what it has paid for. On reflection, individual items may appear over priced or of exceptionally good value, essential or largely unnecessary, and clear in description or too vague to be useful. All of these factors are likely to influence the client's assessment of the services provided by the firm.[22]

But the issue of clarity is critical long before a bill is delivered. Confusion often reigns for consumers trying to work out how much they will have to pay their lawyer and the position is not much better for lawyers themselves.

The *Model Laws* (cl 1009) address this by requiring lawyers to communicate in writing with their prospective clients about how they will calculate their fees, what rights the client has in relation to negotiating and contesting the costs agreement, and an estimate of the total cost if the fees are expected to exceed $750:

(1) A law practice must disclose to a client in accordance with this Division:
  (a) the basis on which legal costs will be calculated, including whether a costs determination or scale of costs applies to any of the legal costs; and
  (b) the client's right to:
    (i) negotiate a costs agreement with the law practice; and
    (ii) receive a bill from the law practice; and
    (iii) request an itemised bill within 30 days after receipt of a lump sum bill; and
    (iv) be notified under section 1016 of any substantial change to the matters disclosed under this section; and
  (c) an estimate of the total legal costs, if reasonably practicable; and
  (d) if it is not reasonably practicable to estimate the total legal costs, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs; and
  (e) details of the intervals (if any) at which the client will be billed; and
  (f) the rate of interest (if any) that the law practice charges on overdue legal costs; and
  (g) if the matter is a litigious matter, an estimate of:
    (i) the range of costs that may be recovered if the client is successful in the litigation; and
    (ii) the range of costs the client may be ordered to pay if the client is unsuccessful; and
  (h) the client's right to progress reports in accordance with section 1018; and
  (i) details of the person whom the client may contact to discuss the legal costs; and

22 Francis Wilkins, 'Footing the Bill', *Lawyers Weekly* (Sydney), 30 July 2004, 16.

(j) the following avenues that are open to the client in the event of a dispute in relation to legal costs:
  (i) costs review under Division 7;
  (ii) the setting aside of a costs agreement under section 1028 . . .;

These standards reflect the values of respect for clients as clients, rather than fee units, and the desire to serve society with reasonable access to legal dispute resolution. The majority of practitioners act upon these principles, placing their clients' interests first, and usually reap the benefit of repeat clientele. Nevertheless, the nature of the legal system is that legal costs are often unpredictable. The *Model Laws* only require lawyers to specify estimates or, even just a range of estimates to suit different scenario outcomes. Although many clients do not realise this, estimates are not quotes, and the estimates given are frequently exceeded when the actual bill arrives.

Some regulatory controls exist on over-charging, but they are primarily reactive. Costs assessment (or 'review', as it is described in the *Model Laws*) is a process whereby an independent costs assessor (usually a court official) assesses the bill for its fairness and reasonableness when a client or losing party complains. Even with time-based bills, the fees that would be payable under item remuneration for a similar matter usually become the unofficial reference point for this assessment: although a client signs an agreement to pay whatever the time adds up to, a decision by both law firms and assessors about the size of a time-based bill needs to be referrable back to some sort of independent baseline in order for the assessment to mean anything. Whether item remuneration or time-based billing is used, therefore, a law firm that is interested in pro-actively avoiding client complaints about its fees should, and often will, check a client's bill to ensure it is no higher than would probably be allowed by an independent assessor.

The costs assessment process corrects over-charging when complaints are made, but complaints usually come only after the client relationship has already been badly damaged. Moreover the assessment process is itself expensive and must be paid for.[23] Therefore assessment is often at the cost of reducing the total net revenue available to the client from the matter, further souring the whole experience for lawyer and client.

The Ethics of Time-Based Billing

One of the major reasons for the unpredictability of legal fees is time-based billing. Time-based billing, which is permitted in most standard-form costs agreements,[24] allows lawyers to charge by the hour. The ethics of time-based billing are, however,

23 *Model Laws* cl 1043. Clause 1043(2)(a)(i) provides that the bill complained of must be reduced by at least 15% in a costs review, or the client will have to pay the costs of the review process themselves.
24 Cost agreements have become so important to the financial success of legal practice that they are usually lengthy and cover numerous rights and obligations of both lawyers and clients. Firms typically present their preferred form of cost agreement in a standardised format to clients and are prepared to negotiate on only a few key clauses connected with hourly charging rates.

highly contested. Jim Spigelman, Chief Justice of New South Wales, has gone so far as to say that much of the problem with lawyers' fees centres on time-based billing. He describes it as not just ethically indefensible (because a mediocre lawyer can charge more time than the efficient lawyer who does the same job in less time), but also unsustainable if access to justice is to be restored and 'external regulation' is to be avoided:

> . . . [I]t is difficult to justify a system in which inefficiency is rewarded with higher remuneration . . . [because] the legal practitioner does not have a financial incentive to do the service as quickly as possible. The control is of course, the practitioner's sense of professional responsibility. For most members of the profession, this restraint is a real one. Only a handful of members of the profession exploit their position by providing services that either do not need to be provided at all, or provide them in a more luxurious manner than is appropriate. The enlightened self-interest of the majority requires some form of professional control of the handful who may abuse the system. Such conduct, even by a minority, affects the reputation of the profession and may determine the nature of external regulation.[25]

Time-based billing will be in a client's interest if the lawyer completes the task quickly, and so charges less than if fees were calculated on an item remuneration basis. But it is usually not in a client's best interests, because the final fee is rarely known at the time the client signs the agreement, and the lawyer has no contractual incentive to limit the bill.

Why then would a client sign up to time-based billing? Some lawyers will restrain the number of hours they charge the client if they hope to receive more work from the client. But generally only clients with 'buying power', usually companies and government departments that repeatedly use legal services, can negotiate an upper limit on the amount that can be billed. Other clients will have less negotiating power. Perhaps there are too few lawyers who will agree to act on any other basis. Apart from conveyances and probate matters, the set or lump sum fee for service is rarely available to 'consumer' plaintiffs, though this group is most in need of precise and predictable legal fees.

The good lawyer should set their hourly rate having regard to all the issues regarded as fair and reasonable in legal costs (as discussed above), but the irresponsible lawyer may insert an excessively high hourly rate in the cost agreement if they think the client will not notice, understand, or perhaps even care. A high hourly rate in the cost agreement unfortunately strikes the client's eye as just a few hundred dollars and nothing more.[26] Many potential plaintiffs, perhaps one-off litigants anxious to prove a point or recover what they think will be many thousands of dollars in a judgment, do not do the mental arithmetic on the spot and multiply those few hundred dollars by the real killer – total hours anticipated. Too frequently, clients do not think even to ask questions about the number of

25 J Spigelman, 'Address' (Speech delivered at the Opening of the NSW Law Term Dinner, Sydney, 2 February 2004) <http://www.cso.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_020204> at 31 May 2006. See also the extensive critique of time-based billing in Legal Fees Review Panel, *Discussion Paper*.

26 See Legal Fees Review Panel, *Discussion Paper*, 29–30.

hours which might be necessary to get to judgment or an offer of compromise, and the likely true cost goes undiscussed.

Unremarkably, all clients care (and many later complain) when they later think about what they have agreed to. This is particularly likely if they begin to get concerned about losing a case which, they believe, their lawyer assured them had 'more than a reasonable prospect of success'. Clients who believe passionately in the correctness of their claim, or are just dazzled by the potential dollars, can find it hard to notice their lawyer's reservations about the strength of the case. But potential over-charging is only one problem with time-based billing.

The lawyer-client relationship is also badly affected. According to the New South Wales Office of the Legal Services Commissioner, the pressure to bill as many hours as physically possible means that '. . . lawyers no longer take the time to sit down and communicate with their client about the fees involved or discuss the progress of the matter. The factory environment of the law firm reinforces the ethos that time is money and one cannot waste time on tasks that cannot be billed'.[27] Since there is no 'return' for a lawyer whose own performance is measured by the hour on spending time carefully explaining to a client what likely cost blowouts will occur, it is little wonder that the New South Wales Legal Services Commissioner's office estimates that up to 80% of all complaints received by his office have an element of dissatisfaction about costs.[28] The New South Wales Legal Fees Review Panel's discussion paper on time-based billing goes further:

> It is important to consider whether the entrenching of time billing in the legal profession is leading to *systemic breakdown* in the solicitor-client relationship by virtue of the fact that the structural assumptions on which time billing is based puts it in opposition to principles of good communication.[29]

Time-based billing is not always accurate either because, human beings being fallible, all time is not accurately recorded to a file. Time is usually recorded in six minute units or intervals, 'or part thereof', so a six-second phone call can be billed as a full six minutes. Technology does not necessarily help. There is an almost universal move to some method of automated (computerised) billing in order to achieve accuracy and efficiency in time-based billing, but the benefits of the automation process are overstated. The software companies routinely claim that their products will eliminate under-billing entirely, and reduce over-billing considerably. While under-billing does tend to disappear because, for example, these systems capture the length and purpose of phone

27 Ibid [3.20]. See also Susan Saab Fortney, 'The Billable Hours Derby: Empirical Data on the Problems and Pressure Points' (2005) 33 *Fordham Urban Law Journal* 171. Popular culture has not been slow to portray over-charging as closely related to time billing. The 2005 Australian Broadcasting Corporation telemovie *Hell Has Harbour Views* (based on Richard Beasley's novel *Hell Has Harbour Views* (Macmillan, Sydney, 2001)) includes much dark comedy on the effects of some law firm approaches to fee generation, referring in one segment to a grasping associate whose progress was assured because he had billed twenty-five hours in one (twenty-four hour) day.

28 Legal Fees Review Panel, *Discussion Paper*, [2.54].

29 Ibid [2.57]. Emphasis in the original.

calls,[30] permit easily generated interim bills, and allow wireless-linked personal digital assistants to add to billing data while practitioners are on the move, they contain no automatic safeguard against over-charging. In fact, some billing technology appears specifically designed to sell itself by making deliberate over-charging an efficient process. For example, one commercially available time billing software system enables multiple time clocks for multiple matters to run *simultaneously* in open windows, together on the screen, facilitating the charging of multiple clients for the same time.

In summary, time-based billing too often expresses a dominant value in lawyers' fees of disrespect for fairness to clients. Time-based billing also encourages its own destructive psychology inside larger firms. Most law firms set targets of numbers of hours to be billed by each lawyer each year. About 6.5 hours per day is standard practice in Australia. But eight to 8.5 hours is sometimes required. In 2003 the *Australian Financial Review* reported that Workcover (the occupational health and safety regulator) in New South Wales was inquiring into the working hours of young lawyers, and reported that a Victorian young lawyers' survey in 2000 had found that 65% of those surveyed worked longer than ten hours every day in order to achieve their targeted billable hours.[31] Billable hours are those that clients can be billed for. Non-billable hours include coffee and meal breaks, toilet breaks, smoking breaks, general training sessions, administration meetings and associated paperwork. Lawyers generally need to work about ten hours to generate six to eight billable hours.

In this environment, billing can seem all important, particularly in the many firms where a practitioner's budget, that is, the number of chargeable (billable) hours per month which they must achieve if they are to retain their job (let alone be promoted), is the ever-present personal watchdog. Some United States estimates of associates' (the most junior employee lawyers in a firm) time billing expectations put the number of expected annual billable hours at 2500. This expectation requires 3300 hours in the office, or nine billable hours a day, *every* day of the year.[32] Such commitment demands one of two things: a lawyer prepared to forego work-life balance, or consistent over-charging.[33] This expectation is not yet the reality in Australia, but a survey of more than 2000 solicitors in New South Wales and Victoria focusing on job satisfaction and best practices in law firm management found that, according to solicitors, law firms:

> . . . have a preoccupation with billable hours, budgetary targets and fees billed . . . there is a fixation with quantitative measurement along a single financial dimension of a business – revenue. These findings suggest that in many instances the profitability

30 Wilkins, 'Footing the Bill', 17. These systems are particularly useful when there are phone calls that unexpectedly continue for a long time.
31 Marcus Priest, 'Lawyers Caught in Painful Tort', the *Australian Financial Review* (Sydney), 10 January 2003, 10.
32 Legal Fees Review Panel, *Discussion Paper*, [3.7].
33 See Chris Merritt, 'No Case for Padding in Australian Billing Targets', the *Australian Financial Review* (Sydney), 1 November 2002, 55; Marcus Priest, 'Survey Exposes Bill Extortion by Lawyers', the *Australian Financial Review* (Sydney), 31 January 2003, 25; Priest, 'Lawyers Caught in Painful Tort', 10.

> of a legal services business is understood and pursued primarily in terms of getting more money in by sending out bigger and bigger bills . . . The prevailing business model of law firms, as constructed from these findings, incorporates its human resources as more or less expendable components of a revenue production machine. Workers are assumed to have uni-dimensional lives, putting job and career first, last and everywhere in between . . . The character of the process is 'recruit, exploit, and discard'.[34]

It is not difficult to see how these managerial pressures can eat away at possibilities for trust and collegiality between lawyers. It can also make it extremely difficult for lawyers to spend time away from the office fostering their own relationships, interests and community involvements.

Rigid requirements about work outputs can also lead to deception of clients about billing. In other words the imposition of targets for number of hours billed on individual lawyers and work groups can provide incentives for lawyers and their staff to 'pad' their timesheets, and ultimately the bills sent to clients. One legal management consultant has been quoted as saying that billing targets of between six and eight hours a day 'may be fine during a period of high workload but over the long term it is unsustainable. It translates to either huge working hours or fraudulent timesheets'.[35] Individual lawyers might increase the number of billable hours recorded on their timesheets by doing things like waiting until a time when people are unlikely to be in their office (such as lunchtime) and then making thirty (unanswered) phone calls, recording each one as a separate six-minute task, or by doing tiny tasks on a number of files in one six-minute timeslot so that work done on each file can be recorded as a separate time unit.[36] Other notorious practices for increasing billings include recording time spent thinking about a client matter in the shower or on the bus as billable time, charging one client for time spent doing research on a previous relevant client matter as if it had been done for the first time for the later client, using more senior lawyers (who charge out at a higher rate) than necessary, or charging the client for a whole team of junior lawyers to support a senior lawyer doing work that may not be strictly necessary and which has to be checked by the senior lawyer anyway. Case Study 8.3 (The Foreman Case) at the end of this chapter illustrates in more detail the budgetary pressures that lawyers can feel, and the impact it can have on ethics.

Negotiating Fair and Realistic Cost Agreements

Perhaps lawyers should pressure their professional leaders to change a billing system that is dragging down their collective reputation, and the quality of their own work lives. Any reform to the legal fee system that seeks to be just and

34 Mark Herron, *Facing the Future: Gender, Employment and Best Practice Issues for Law Firms – Volume 1: The Job Satisfaction Study* (Victoria Law Foundation, Melbourne, 1996) 60.
35 Merritt, 'No Case for Padding'.
36 See also Lisa Lerman, 'Gross Profits? Questions About Lawyer Billing Practices' (1994) 22 *Hofstra Law Review* 645 for reports of similar practices in the United States.

equitable to all concerned should involve some mechanism that ensures similar legal work will attract a broadly similar fee as a case progresses, not just when a complaint is made after everything is finalised. We have also seen that many of the problems with legal fees and costs stem from lack of early, verbal and comprehensive communication between lawyers and clients about costs, even if such discussions are not easily or fully recoverable in the client's bill. Therefore any reforms should also entrench better communication into the fee structure. We discuss these two aspects of possible reforms to lawyers' billing practices below – communication and alternative bases for charging a reasonable fee.

Communication About Fees and Costs

Wise lawyers go to great lengths to explain as much as possible to each and every client about what must be done, the risks of different litigation strategies and why some aspects of the case, including the final fee, are necessarily unpredictable. A good lawyer will use language and diagrams that make sense to clients to explain this. For a multicultural clientele, this does mean communicating face-to-face through a trusted interpreter, and not just relying on an unknown telephone interpreter for the all-important initial interview. Unwise lawyers, or those in too much of a hurry, cut corners and suffer later. They do not receive thanks and prompt payment of their fees, but rather complaints, slackening demand for their services (because clients' word-of-mouth among their acquaintances can be bad, as well as good) and disciplinary investigations.

Time-based billing cannot operate at all without an agreement between lawyer and client, since billing other than billing on the basis of scales of costs for litigation cannot occur without a costs agreement.[37] Fair costs agreements terms – and how they are negotiated with clients – are the linchpin of many successful legal practices, and can be a powerful expression of the *ethics of care*, because they depend on lawyers giving clients information and communicating effectively with them.

The *Model Laws* provide a good (but not yet ideal) model of how disclosure to clients should work. They specify that a cost agreement must be at least evidenced in writing.[38] This means that the client has to be given written disclosure, but the agreement itself does not have to be signed and concluded in writing.

The *Model Laws* specifically allow a client to apply to set aside a cost agreement that is not 'fair, just and reasonable'. Matters that are relevant in deciding whether a cost agreement is fair, just and reasonable include whether the client was induced to enter into the agreement by the fraud or misrepresentation of the lawyer, whether there was any professional misconduct involved, whether the lawyer failed to make the required disclosures relating to fees, and the time at

37 *Model Laws* cl 1019.
38 Cl 1022(2).

which the agreement was made.[39] This means that currently acceptable practice must be considered by the lawyer when drafting the agreement. Additionally, no fees may be recovered at all if the agreement attempts to recover a contingency (proportional) fee.[40] Note that the common law suggests that the onus will be upon the lawyer to rebut a presumption of undue influence in executing the agreement.[41] Thus an agreement may be just and reasonable, but not necessarily fair if, for some peculiar reason, the client did not really comprehend what they were doing. Too often, regulators hear allegations (whether justified or not) that clients have been verbally induced to enter cost agreements by unrealistic or merely vague promises as to the likely outcome of litigation – promises which the agreements do not, of course, record. Less satisfactorily, because the *Model Laws* permit a basic (no conditional or uplift fee) agreement to be accepted by conduct and do not necessarily require a client's signature, clients under stress can legally bind themselves without realising that they have done so (cl 1022(3), (4)).

The *Model Laws* include special protections for clients who enter into conditional costs agreements or costs agreements which contain provision for uplift fees. These must be signed by the client and define the circumstances which constitute a 'success' sufficient to entitle the uplift (cl 1023(3)). This is intended to address the problem that some practitioners previously left the term 'success' undefined or vague in the agreement, but claimed the uplift fee when any settlement, often much less than the client would have considered 'successful', was achieved. To protect both lawyer and client, lawyers must be quite sure that there is both a reasonable chance that the action will succeed, and be able to specify in the agreement what level of success will be acceptable to their client, in order for the fee to be payable. An action may be commenced claiming say, $100,000 but settled reluctantly by the client for just $45,000. Lawyers will need to find out before the cost agreement is finalised whether the client really understands that they will be paying an uplift fee as well as the normal fees, if they receive just $45,000. Lawyers who are not sure about whether a client understands the implications of the level at which success will be defined or (even worse) that they will be obliged to pay the other side's party-party costs if they lose the action,[42] should re-check with their client, since this might amount to sufficient circumstances to have the costs agreement set aside for being not 'fair, just and reasonable'.

Clients have a specific right to apply to set aside a costs agreement entered into via fraud or misrepresentation (*Model Laws* cl 1028(2)(a)), providing they complain and apply for a costs review (that is, an assessment) within sixty days of

39 Cl 1028.
40 Cl 1027(5). See *Equuscorp Pty Ltd v Wilmoth Field Warne (No 4)* [2006] VSC 28 (Unreported, Byrne J, 10 February 2006) for an ingenious but unsuccessful attempt to get around the prohibition on contingency fees.
41 At least in a family law matter: see *Schiliro v Gadens Ridgeway* (1995) 121 FLR 322, 324.
42 The so-called 'cost indemnity rule'.

the delivery of the bill *or* payment of the costs (cl 1034(4)). While the application fee for a costs review can be waived on a hardship basis (cl 1037(4)), clients in calamitous circumstances (eg as a result of the financial loss or injury that led to the original proceedings) are often too preoccupied with more fundamental issues of survival. These clients frequently present at community legal centres and government legal aid offices many months after bills have been delivered and are incredulous that they have no automatic right to challenge a bill which is older than two months. The *Model Laws* do provide that the cost reviewer must accept a late application for review '. . . unless . . . to do so would, in all the circumstances, cause unfair prejudice to the law practice' (cl 1034(5)). But in cases where the law firm thinks that the client is unhappy with the bill and will be unwilling to pay it, the law firm may well have already issued proceedings to recover their costs.[43] However, once an application for a costs review is made, the law practice must not commence any proceedings to recover the legal costs (*Model Laws* cl 1038(b)).

Although it is inconvenient to practitioners to dispute an old bill, it is not impossible if the file is complete. The client file is the key evidence in any cost review, and the place where all material action on the case should be recorded. The *Model Laws* sixty-day limitation period for complaints about bills is completely out of step with the requirement that client files must be kept for at least six years after the matter is concluded (*Model Rules* 7.2). It seems unlikely, therefore, that there will be unfair prejudice to any legal practice in consenting to a late costs review, if that firm has not seen fit to commence proceedings to recover the fee before the client's application is eventually made.

On the other side of the coin, some complaints about costs are generated by clients who seize upon a minor issue because they do not wish to pay for civil litigation services fairly provided, regardless of the merits. It is very hard to predict which clients will fall into this category, so the best protection for both clients and lawyers is either to avoid time-based billing entirely or strike a fair costs agreement and, while respecting the client at all times, behave cautiously and act preventively in all client interactions. Complaint prevention is best practice, and the best expression of an *ethics of care* for clients. Few problems will surface at the end of a case if the lawyer engages in the following complaint prevention practices:

- Avoid time-based billing, instead estimating fees according to one of the alternative approaches mentioned below;
- Fully comply with the spirit as well as the letter of the costs disclosure rules (see above) when the retainer begins – that is make sure clients actually understand the basis for the lawyers' charges through whatever means

43 In practice, even when proceedings are commenced, the defending client will succeed in an interlocutory application to have the bill assessed by an independent cost assessor and the case is adjourned until that assessment is available and both parties can then decide to continue or settle. Most settle, so that the effect of issuing is very similar to the review process. Note that *Model Laws* cl 1046 also provides that if the client has made a complaint to the legal profession regulator about the bill under Part 11, there cannot be a costs review as well.

is necessary, rather than just minimal compliance with legal disclosure requirements;
- Provide regular written progress reports to the client;[44]
- Deliver interim bills, at pre-agreed intervals throughout the life of a file (*Model Laws* cl 1033);
- Actively encourage clients to discuss any concerns about their bill with them, especially if the lawyer notices it is taking a while for payment to be received.

If these alternative approaches are followed, an unhappy client will come to notice quite quickly, allowing a check that their understanding of what is happening is realistic, mediation of any disagreement, and probable improvement in communication about the progress of the matter, before they become what is often unfairly categorised as a 'difficult client'. Many lawyers take these 'best practice' precautions already, but there are still too many examples of lawyers failing to follow these precepts for their usage to be described as standard practice.

DISCUSSION QUESTIONS

1. Do you think that a standard-form cost agreement should be capable of legally binding a client on the basis of their conduct alone? Would it make a difference to your answer if the agreement was a 'basic' conditional costs agreement or included an uplift clause? What if the client had had an opportunity to discuss the contents of the proposed agreement with an independent adviser?
2. If you were a client who had suffered an injury that left you disoriented and or disabled, would you consider sixty days long enough in which to raise your dissatisfaction with your lawyer's bill? As a lawyer, would you allow a client who wants a costs review to go ahead with the review up until a certain (longer) period is reached, or at any stage, after the bill is received?

Possible Alternatives to Time-Based Billing

Consider the following three possible alternatives to time-based billing, as methods of getting away from the tyranny – for client *and* lawyer – of the 'six minute interval': To what extent are each of the ethical approaches to lawyering implicit in each of these alternative approaches to billing? Which do you think is best? To what extent do different billing methods suit different contexts: for example, different practice contexts (solo practitioner, large firm, lawyers employed

44 *Model Laws* cl 1018 provides that lawyers must respond to reasonable requests for progress reports, but does not prescribe their provision as a normal part of ongoing representation.

inhouse in a corporation or government department), or different types of cases (litigation, preparing and advising on a contract, writing a will)?

Event-Based Fees for Litigation

There is no event-based fee system in operation yet, but there may be soon. The idea is not to reduce fees directly, but to set *fixed fees* for different types of cases and to change the time period in which those fees become payable so that they are less burdensome for the client and present less of a conflict of interest for the lawyer. One of the advantages of this system is that it attempts to transfer the impact of high charging levels from close to the trial (near the end of a case) to the start of proceedings so that practitioners have a financial incentive to conclude cases early rather than stringing them out.[45]

Civil cases are the arena where most disputes about fees occur. Under standard time-based billing, civil cases involve moderate fees being incurred at the beginning with slowly increasing costs as witnesses are interviewed, affidavits prepared and discovery of documents undertaken, rising to very high levels of cost as practitioners prepare briefs for trial, conduct intensive conferences with clients and witnesses, and then spend days in court. The process produces higher fees (on an item remuneration basis) for lawyers only if a case goes to trial, simply because they are paid most for the extensive work done close to the trial date. Figure 8.2 shows how fees increase over time in civil litigation under traditional item-based remuneration billing.

The alternative event-based fee structure (an example is shown in Figure 8.3) recognises that more work is done at the end than at the beginning of a case, but allows for more of the value in that work to be charged at the beginning of the matter, compared to the end stages. (Table 8.1 shows the difference in fees charged under the two methods, as represented in Figures 8.2 and 8.3.) An experienced costs committee would set the fee for each 'event' or stage in the proceedings according to their belief as to a reasonable lump-sum return for that event, and revise that fee at regular intervals. Since time-based billing would be excluded from the process, not only would the overall costs of litigation be limited, but lawyers would be paid earlier for the same work, eliminating any tendency to prolong proceedings. Although there are many clients who begin litigation determined to 'have their day in court', this sentiment changes as the length and stress of the process sinks in. The lawyer therefore has an incentive to use alternative dispute resolution to maximise the chances of early resolution, when a relatively high proportion of fees has been earned, leading to fewer trials, faster resolution of disputes and greater community satisfaction with the justice system.

45 Philip Williams et al, *Report of the Review of Scales of Legal Professional Fees in Federal Jurisdictions* (Attorney-General's Department, Canberra, 1998); extracted in Australian Law Reform Commission, *Managing Justice*, 285–91.

Table 8.1. Amount of Legal Fees Charged at Different Stages of Litigation Under Traditional Item Remuneration Charging Structure and Event-Based Fee Structure

Amount of Legal Fees ($): Traditional Item Remuneration Charging Structure	Progress of Litigation	Amount of Legal Fees ($): Event-Based Fee Structure
500	Letter of demand	500
1000		1000
1500	Issue proceedings	2500
2000	File defence	3500
2500	Discovery	4000
3000	Pretrial direction hearing	4250
3500	Mediation	4500
4000		4750
6000	Brief counsel	4850
7000	Start of trial	5000

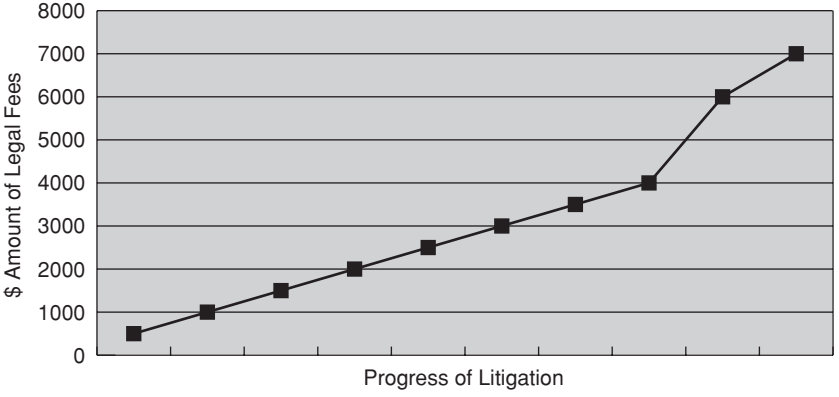


Figure 8.2 Example of Rate of Increase of Fees in Litigation under Traditional Item Remuneration Basis

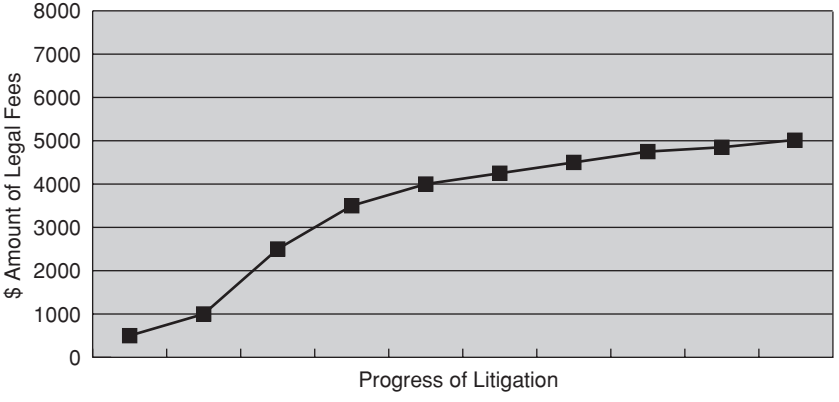


Figure 8.3 Example of Rate of Increase of Fees in Litigation under Event-Based Fee System

Court Control of the Costs Process

Although there is some recent evidence that costs disputes are reducing,[46] there is still a view that the cost assessment system applicable to litigation is too cumbersome and unpredictable in outcome because the training and background of assessors is variable. The courts might accordingly control the cost process, as in New Zealand, by requiring the successful party to make an application to the trial judge for a fixed, lump-sum costs order as a part of the substantive judgment, after receiving evidence from the parties as to their costs.[47] Since the trial judge would understand the issues in the trial better than anyone, there is some prospect that judge-ordered costs would match the fair cost of proceedings more precisely. When married with the now common principles of 'active case management', under which the trial judge decides many procedural issues under strict timelines set by the court rules, judge-ordered costs may also be far more predictable to the parties' lawyers in advance. They might also aid earlier identification of the point in the proceedings at which costs are at a minimum in relation to the likely financial return to the client.

'Value' Billing

The New South Wales Legal Services Commissioner suggests 'flexible, fixed-fee or value billing' as the ideal approach to fair fees and minimal complaints about costs in both court and transaction work. This approach aims to develop a trust relationship between practitioner and client under which they meet early and negotiate as to the value of the 'project' to the client. This might be expressed in the lawyer's initial question 'what do you hope to achieve by this process/transaction?' The lawyer would provide a fixed fee (probably based on the relevant court or item remuneration scales) and some estimates of add-ons for extra services that might become necessary if the case goes in a number of alternative directions.[48]

Value billing as an alternative approach to billing has now been formally recommended in the report of the New South Wales Legal Fees Review Panel which

46 The Law Society of New South Wales Professional Standards Department's *Annual Report* for 2003–04 shows a fall in cost complaints from 109 to 90: Professional Standards Department of the Law Society of New South Wales, *Professional Standards Annual Report 2003–2004: Complaints and Discipline in the Legal Profession – Developments, Trends and Statistics* (The Law Society of New South Wales, Sydney, 2004) <http://www.lawsociety.com.au/uploads/filelibrary/1101250075484_0.5302461048020102.pdf> at 28 July 2006. Additionally, cost complaints handled by the Office of the Legal Services Commissioner (which has been referring fewer complaints to the Law Society and handling more itself) declined to 2390, including 490 in writing, a reduction of 560 from 2003: see generally Tracy Lee, 'Cost Complaints Drop as Interest in Ethics Rises', the *Australian Financial Review* (Sydney), 26 November 2004, 58. This reduction in cost complaint numbers is supported by the large costs consultants DG Thompson Driscoll + Matters, who think that solicitor-client cost assessments are reducing because of legislative change, which has shifted costing assessment from variable to lump sum fees in a number of jurisdictions including workers compensation, transport accident and some general civil liability: Strong, 'At What Cost?'.

47 See Deborah Vine Hall, 'Present Difficulties with the Assessment System' (2004) 27 *University of New South Wales Law Journal* 206.

48 Steve Mark, 'The Cost of Justice or Justice in Costs: The Experience of the OLSC in Handling Costs Complaints' (2004) 27 *University of New South Wales Law Journal* 225. See also Wilkins, 'Footing the Bill', 16 who comments 'Task or project-based billing systems are now increasingly finding a place within the profession. And some practitioners expect firms' choice of billing system in the future to be increasingly task-based rather than time-based'.

recommends optional substitution of the cost disclosure rules with a 'budget' plan. Under this proposal, lawyers and clients would agree to draft an initial fees budget for a proposed matter or case, to identify stages at which bills would be issued, and to issue bills only in accordance with the budget. Lawyers would report on and review compliance with the budget at regular intervals, and modify it only on a strict schedule. If lawyers fail to review and request an update to a budget, any work done after the expiry of the prior stage would be chargeable only at fair and reasonable value, less 20%.[49] The proposal appears soundly based on the desirability for straightforward, early communication with clients, and there are many clients who can deal with this sort of negotiation productively. Yet there also are many vulnerable clients for whom the success of this approach depends greatly not only on the integrity and respect of the lawyer but also on their skill in personal communication.

CASE STUDY 8.1 The Basis for Determining Fees[50]

A first client, Argus, asks you to prepare a contract. The fee, calculated on a time basis, is $15,000. Later, a second client, Bogus, wants a contract for a similar transaction. As a result of your work for Argus, you now have a precedent which covers most of Bogus' requirements. Only a small percentage of the document needs to be altered. Argus and Bogus do not know each other and are unlikely to have anything to do with each other in future. Would you charge Bogus less than Argus, say just $5000, or the same $15,000? What are the arguments in favour of charging the same or different amounts?

DISCUSSION QUESTIONS

1. What if Argus and Bogus were, by pure chance, to meet and to compare notes? What would they think about your charging strategy if you had charged Bogus less than Argus? What if you had charged each the same?
2. Would Bogus feel she had been deceived if she was charged $15,000?
3. How would Argus feel if Bogus had been charged less than him?
4. How would you explain your fee structure to your two clients? For example, if you decided to charge $15,000 for the second contract, would you attempt to discuss the value of your work to the client's project as a basis for justification of the higher fee? Or would you simply say that you have done the work in the past and that this intellectual property is now reflected in the fee for all subsequent work drawing on your expertise?
5. Which fee best represents the true *value* of the work to your clients? To you?

CASE STUDY 8.2 The Collapse of HIH and the Rise in Legal Fees

In March 2003, HIH Insurance Limited collapsed with $5.3 billion in debt, caused by premiums that were too low, massive under-provision for claims and losses associated with US and UK businesses. Although the CEO and several other directors were found

49 See Recommendation 27 in Legal Fees Review Panel, *Report*, 66.
50 This scenario is from Legal Fees Review Panel, *Discussion Paper*, [2.59], which in turn drew on Stuart Kay, *Cost, Value and ROI for Knowledge Management in Law Firms* (2003) LLRX.com <http://www.llrx.com/features/kmcost.htm> at 31 May 2006.

to have committed criminal offences that added to the consequences of commercial misjudgements,[51] the central losses were of such a magnitude that they caused a ripple effect throughout the entire insurance industry, provoking a period of price-cutting among many insurers that carried on over time into the fee structure of the legal profession. As insurers paid out less on claims, plaintiffs' lawyers' incomes reduced because much of their work was only worthwhile if an insurer stood behind a defendant. These firms were in turn forced to reduce their fees in order to attract a smaller pool of clients whose cases were viable.

Lower legal fees were welcome, but that effect was short term and not as important as the other consequence – reduced public access to compensation for civil loss. The fallout from the HIH collapse led to insurers withdrawing from some sectors of the market entirely – especially indemnity insurance for the professions, including lawyers – and raising premiums in public liability cover (for 'accidental' injuries) to enormous levels. At one stage, even local scouting organisations, town markets and athletics clubs were reportedly unable to obtain public liability insurance at a reasonable price, and were clamouring for something to be done about the high cost of insurance. The politicians stepped in and, despite the objections of organisations such as the Australian Lawyers' Alliance (an association of predominantly plaintiff lawyers), introduced new rules designed to make insurance more affordable by radically restricting the circumstances in which claims for personal injury could be litigated.[52] The insurers persuaded the public and the various parliaments that insurance would cost less if there were fewer claims being litigated and fewer lawyers involved in the claims process. Insurers' spokesmen were frequently in the media, with the support of some politicians, asserting that lawyers' fees were excessive and that the costs of lawyers' involvement in compensation processes made insurance too expensive.

The Australian community seemed willing to agree that lawyers simply cost too much. Few members of the public felt that their own lawyers' fees were reasonable and MPs were prepared to believe that lawyers' collective reputation for over-charging might be one of the causes of the insurance 'crisis'.

At this distance, it is now obvious that insurance affordability is cyclical. The economic cycle is a far more powerful influence on insurance premiums than lawyers, because reduced economic activity usually leads to more corporate collapses, higher insurance claims, bigger payouts, reduced insurer profits and, consequently, higher premiums. Insurance cover, although now readily obtainable, is no cheaper than before the rights of small claimants were removed, despite the fact that insurance companies have regained their profitability.[53]

DISCUSSION QUESTIONS

1. One of the main outcomes of the collapse of HIH and associated insurance 'crisis' was the loss of people's right to sue for compensation in the courts, and lawyers' loss of a source of income, despite the later recovery in insurer profitability. In the context of the material presented in this chapter, why do you think it was so easy for the insurance companies to convince the public and government that lawyers'

51 David Elias, 'Rocket Rod Crashes To Earth', *The Age* (Melbourne), 17 February 2005, 13.
52 See J J Spigelman, 'Tort Law Reform: An Overview' (2006) 14 *Tort Law Review* 5; Des Butler, 'A Comparison of the Adoption of the Ipp Report Recommendations and Other Personal Injuries Liability Reforms' (2005) 13 *Torts Law Journal* 201; Stella Tarakson, 'Personal Liability' (2005) 51 *Hot Topics: Legal Issues in Plain Language* 1.
53 Marcus Priest, 'Lawyers Slam Insurers Profits', the *Australian Financial Review* (Sydney), 3 June 2005, 7.

greed was to blame for high insurance premiums? Do you think this justified the radical restriction of people's access to the courts to sue for compensation in tort matters that followed?

2. All lawyers are required to have professional indemnity insurance as a condition of holding a practising certificate. Imagine you are in legal practice with many files to handle and the possibility of making mistakes a constant issue. Compulsory insurance against being sued for negligence is very expensive for you and, inevitably, must be paid for by your clients through your fees. Would you think it worthwhile to specify, for the information of each client, the proportion of your fee that is allocated to such insurance? Would it make a difference to your decision if all lawyers had to give this information to clients?

CASE STUDY 8.3 The Foreman Case: Over-Charging and Falsifying Evidence Under Pressure of Law Firm Billing Practices[54]

In 1994 Carol Foreman, former family law partner at national mega-firm Clayton Utz, was struck off the roll of practising solicitors by the New South Wales Court of Appeal for deception of other practitioners and the court. Her deception occurred in the course of a dispute with a former divorce client, Mrs Avidan, about the firm's bill (based on time-billing) of more than $500,000 for Mrs Avidan's divorce arrangements. Ms Foreman swore that she had given Mrs Avidan a standard costs agreement at their first interview and then again a few months later. However, the costs agreement could not be found and nor was there any record in Ms Foreman's file memos or timesheets relating to the case that the costs agreement had ever been given to the client. The costs dispute was going to a hearing in the Family Court, and without evidence that they had entered into a costs agreement with the client, the firm would not be able to prove any basis for demanding such high fees from the client.

Ms Foreman rewrote her timesheet in her own client file to make it appear that she had recorded the handing over of the costs agreement at the beginning of the relationship with the client. Later, when the matter was about to go to the Family Court, she discovered that another copy of the original (unaltered) time sheet was about to be submitted to the court by her firm. (This copy of the timesheet had been filed in the accounts department as was the normal practice.) Ms Foreman destroyed this copy of the original timesheet and forged a new version to be submitted to the court.

Ultimately the Family Court (hearing the costs dispute) accepted that the costs agreement had been given to the client and signed despite the fact the costs agreement could not be found. The costs dispute between the firm and the client was consequently settled. Nevertheless, Ms Foreman faced disciplinary action in the Legal Profession Disciplinary Tribunal, because she had knowingly misled the court, her colleagues at Clayton Utz and their lawyers in the costs dispute, as well as the lawyers and client on the other side. She was struck off by the New South Wales Court of Appeal.

In her disciplinary hearing Ms Foreman accepted that she had acted inappropriately, but argued that she had done so because she was working under great pressure to meet the billing targets for her section of Clayton Utz. Ms Foreman was a very successful family lawyer who had been a partner at another law firm before being headhunted to head up the family law division at Clayton Utz. However, by the time of the Avidan dispute,

54 Based on *Council of Law Society of New South Wales v Foreman (No 2)* (1994) 34 NSWLR 408. Other material for this case study from Ann Daniel, *Scapegoats for a Profession: Uncovering Procedural Injustice* (Chapter 4, 'The Cost of Justice', Gordon and Breach, New York, 1998) 71.

she had been told that Clayton Utz was going to close down its family law practice because it was not making enough money, and that she and another specialist family law partner would have to work for a more junior partner in another area. She was allowed to run the family law division on a trial basis for six months, at which point its financial performance would be assessed. Her evidence to the court indicated that during that time she was totally cost-driven, working 12.5 hour days in the office and close to breakdown. One of the judges, Kirby P, commented that:

> Astonishingly, the evidence revealed that she and some staff members even slept at the office on occasion after working very late. Many, like [Ms Foreman], were highly stressed by the pressure under which they worked. Part of the stress would appear to have arisen from the obligation to meet budgeted requirements of fee production established by the firm. This was allegedly done by reference to the standards set by the Tobacco Institute, an amply funded client well able to pay its monthly accounts upon presentation.[55]

Originally Ms Foreman had been charged with 'gross over-charging'. However this aspect of the case was dropped, because the Family Court had held that there was in fact a costs agreement. The Disciplinary Tribunal accepted that this meant there could be no basis for a finding of over-charging, and this was not re-opened in the Court of Appeal.

DISCUSSION QUESTIONS

1. Kirby P commented, 'it seems virtually impossible to credit that legal costs in a dispute between a married couple for the most part over their matrimonial property could properly run up legal costs in the figures that are mentioned here [ie half a million dollars]'. Generally the 'deliberate charging of grossly excessive' legal costs or 'deliberate misrepresentations as to costs' can amount to professional misconduct. The test is generally 'whether the lawyer has charged fees grossly in excess of those which would be charged by lawyers of good repute and competency'.[56] Do you think Ms Foreman should have been subject to disciplinary action for over-charging? Do you think disciplinary action for over-charging would have been successful if it had been continued?
2. Kirby P went on to point out that 'those charges were rendered not by Ms Foreman alone but by her firm' and that Ms Foreman's own 'charging strategy was, to say the least, influenced by a system of time charging and by budget requirements within the firm which were not of her individual making' and that he was 'not satisfied that this matter has been as fully and properly investigated as it should have been'. He suggested that perhaps the law firm itself should have been held responsible for over-charging.[57] To what extent was Clayton Utz as a firm responsible for the fees charged in this case? To what extent was it responsible for Foreman's dishonest conduct? Do you think that Clayton Utz should have been disciplined for over-charging in this case? Why do you think Clayton Utz's charging practices were not more thoroughly investigated and subjected to disciplinary action?

55 *Council of Law Society of New South Wales v Foreman (No 2)* (1994) 34 NSWLR 408, 414. See the judgments of Mahoney JA at 433–8 and Giles AJA at 462–3 for descriptions of the firm (the threat to close down the family law section because of its lack of profitability) and budget (the requirement to enter into written costs agreements and to meet monthly preset budgets for billing) pressures that Foreman was under.
56 G E Dal Pont, *Lawyers' Professional Responsibility* (Law Book Co, Pyrmont, NSW, 3rd edn, 2006) 565–6.
57 *Council of Law Society of New South Wales* v *Foreman (No 2)* (1994) 34 NSWLR 408, 422–3.

Recommended Further Reading

G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, Pyrmont, NSW, 3rd edn, 2006) 'Part III: Costs'.

Legal Fees Review Panel, *Discussion Paper: Lawyer's Costs and the Time Billing* [sic] (2004) Lawlink New South Wales <http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwPreviewActivePages/OLSC_lfrp> at 29 May 2006.

Legal Fees Review Panel, *Report: Legal Costs in New South Wales* (2005) Lawlink New South Wales <http://www.lawlink.nsw.gov.au/lawlink/legislation_policy/ll_lpd.nsf/pages/lp_publications> at 29 May 2006.

Lisa Lerman, 'Gross Profits? Questions About Lawyer Billing Practices' (1994) 22 *Hofstra Law Review* 645.

Various Authors, 'Forum: Stopping the Clock? The Future of the Billable Hour' (2004) 27 *University of New South Wales Law Journal* 198, 198–249.

9

Corporate Lawyers and Corporate Misconduct

Introduction

In 2005, the large national Australian law firm, Allens Arthur Robinson ('Allens') won the *Business Review Weekly* – St George 'Client Choice' awards for being best large law firm, and also best large professional services firm of the year. The managing partner was quoted explaining how the firm had won these accolades:

> We don't run this place as a holiday camp . . . We expect our people to treat the client as if they were God and to put themselves out for clients. You don't say 'Sorry I can't do it, I'm playing cricket on the weekend' . . . You don't have a right to any free time.[1]

Lawyers employed in commercial law firms and those employed 'inhouse' in a company's legal department often also seem to talk and behave as if they have no right to a free conscience or independent moral judgement either. If you are a corporate lawyer, it is not seen as your job to have a moral opinion about your clients' (or employer's) activities. To express one may jeopardise your career.

Traditionally it was thought that the *external* lawyers for a company were automatically more independent and more capable of giving fearless, ethical advice to corporate clients if they thought their client was behaving wrongfully than were *internal or inhouse* lawyers employed inside the company whose whole job depended on the company. But, as we shall see, nowadays external law firm lawyers can often be almost as financially dependent on, and closely involved in, their corporate clients' businesses as inhouse lawyers. And, like inhouse legal staff, most external corporate lawyers are themselves also employed in

1 Lucinda Schmidt, 'Best Large Law Firm', *Business Review Weekly* (Melbourne), 3 March 2005, 48.

large profit-oriented organisations, whether it is a law firm, or a consultancy or accounting firm.[2] We therefore use the term 'corporate lawyer' throughout this chapter to refer both to lawyers employed inhouse in business corporations, as well as those in law firm practice who are retained as external lawyers to advise or represent corporate clients, since both face many similar ethical pressures and opportunities.

In public opinion, corporate lawyers are morally tainted by their complicity in corporate scandals.[3] In both Chapter 1 and the introduction to Chapter 4 we briefly described *McCabe v British American Tobacco Australia Services Ltd* (BATAS) as a possible example of excessive adversarialism in litigation.[4] At first instance the Victorian Supreme Court found that Clayton Utz, the solicitors for the defendant BATAS, had advised the company on a 'document retention policy' that intentionally resulted in the destruction of thousands of documents, as part of the preparation for an anticipated wave of litigation against the tobacco industry. The Court also found that the defendant and their legal advisers had misled the plaintiff and the Court about the fact and the extent of their document destruction. The trial judge struck out the defendant's defence and ordered judgment for the plaintiff, without a trial, on the basis that the destruction of documents had unfairly prejudiced the plaintiff's chances of success. This sanction was later overturned on appeal,[5] but the precise legal obligations that applied to this situation remain a topic of debate.[6] The public and media reaction to the case indicated that ordinary members of the public considered Clayton Utz's advice to be at least unethical, if not illegal. Headlines included: 'Lawyers choking in their own smoke' and 'Call for ethics debate after BAT case',[7] as well as the caustic cartoon reproduced on the next page. A government report recommended that the law in Victoria, where the case occurred, should make it unambiguously clear that such actions are unlawful.[8] There is now a maximum five-year jail term for wilful document destruction.[9]

2 At the same time, it is now recognised by many inhouse lawyers themselves that they should try to preserve their ethical independence from their clients. See Robert Eli Rosen, 'The Inside Counsel Movement, Professional Judgment and Organizational Representation' (1989) 64 *Indiana Law Journal* 479.

3 Susan Koniak, 'Corporate Fraud: See, Lawyers' (2003) 26 *Harvard Journal of Law & Public Policy* 195; Eli Wald, 'Lawyers and Corporate Scandals' (2004) 7 *Legal Ethics* 54.

4 *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73 (Unreported, Eames J, 22 March 2002).

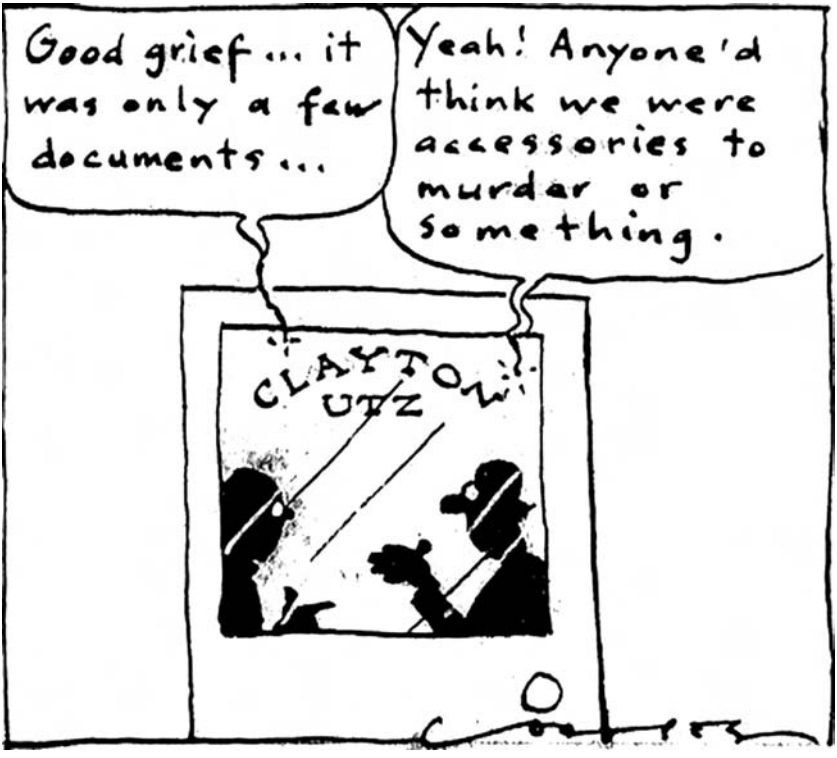
5 *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524.

6 Camille Cameron and Jonathon Liberman, 'Destruction of Documents Before Proceedings Commence: What is a Court to Do?' (2003) 3 *Melbourne University Law Review* 273. The controversy arises only where there is a likelihood of future litigation from any one of a number of potential plaintiffs, but there is no one particular plaintiff or defined cause of action that is in contemplation. If there were a particular plaintiff or cause of action clearly in view, the destruction of relevant documents would clearly be unlawful.

7 Amanda Keenan and Janet Fife-Yeomans, 'Lawyers Choking in Their Own Smoke', *The Weekend Australian* (Sydney), 13–14 April 2002, 1, 4; Chris Merritt, 'Call for Ethics Debate After BAT Case', the *Australian Financial Review* (Sydney), 2 August 2002, 55; Sarah Crichton and Cynthia Banham, 'Tobacco Lawyers Face Two Inquiries', *The Sydney Morning Herald*, 13 April 2002, 4.

8 Peter Sallman, *Report on Document Destruction and Civil Litigation in Victoria* (Crown Counsel Victoria, Melbourne, 2004).

9 *Crimes (Document Destruction) Act 2006* (Vic) s 3, amending *Crimes Act 1958* (Vic) ss 253–255. See also *Evidence (Document Unavailability) Act 2006* (Vic), amending *Evidence Act 1958* (Vic) and the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). A professional conduct rule to similar effect was also introduced in New South Wales: *Legal Profession Regulation 2005* (NSW) reg 177.



Source: Jenny Coopes, *Australian Financial Review*, 21 June 2002

Corporate lawyers' ethics may be more important than those of any other sector of the profession. Corporate lawyers play an important part in facilitating almost every economic activity in our society. They negotiate and draft business deals. They often advise what representations can or should be made in advertising campaigns, financial statements and disclosure documents for investors. They advise as to how to comply with the host of regulatory laws that apply to business, including environmental, health and safety, competition and fair trading regulation. And, of course, corporate lawyers also advise businesses on a day-to-day basis as to when to litigate and when to settle disputes.

Business corporations are amongst the most powerful actors in our society because of the far-reaching impact that their actions and activities can have on many people and on the natural environment.[10] For example, when Enron Corporation collapsed after the major part of its overwhelming debts were found to have been hidden from shareholders (see Case Study 7.3 in Chapter 7), more

10 See David Korten, *When Corporations Rule the World* (Kumarian Press, West Hartford, Connecticut, 1995).

than 4000 employees lost their jobs and thousands of investors lost their life savings as Enron's US$70 billion in market capitalisation vanished.[11] Lawyers might generally be facilitators, more than initiators, of corporate action, but their entwinement in corporate decision-making and activity makes them powerful too.[12] They can facilitate corporate misconduct by explicitly or implicitly giving approval to corporate projects, by not dissuading clients from immoral or illegal courses of action, and by failing to disclose breaches of the law by their clients to the appropriate authorities once they become aware of them. In some cases, the lawyer can even be the designer of the client's misconduct (for example by designing and selling illegal tax shelters).[13]

In the next part of this chapter we set out the major ways in which corporate lawyers have been criticised for facilitating and covering up corporate misconduct while acting as *adversarial advocates* for corporate clients. The corollary of the fact that lawyers can enable much economic (and other) activity, including misconduct, is that they can also act as 'gatekeepers' – who can 'disrupt misconduct by withholding their cooperation from a wrongdoer'.[14] Because of their duty to the law and position as officers of the court, regulators and critics of corporate lawyers' ethics now argue that corporate lawyers should undertake these gatekeeper responsibilities more actively. Thus the response to lawyer complicity in corporate scandals has generally been to underscore, reinforce or mandate *responsible lawyering* type obligations on corporate lawyers to remain independent of clients, to help corporate clients comply with the law, not assist in any fraud or other wrongdoing, and even to blow the whistle on individual managers or clients who do engage in wrongdoing.

In the third part of this chapter, we suggest that ethics in corporate law practice might require going beyond *responsible lawyering* values of compliance with the law to include consideration of substantive issues of business ethics. We briefly outline how the law of lawyering already places some *responsible lawyering* obligations on lawyers in relation to the misconduct of corporate (and other) clients. We suggest that corporate lawyers may need to take moral responsibility for their own actions and advice as members of the corporation, a *moral activist* approach, rather than maintain the fiction of independence from it. As in the previous chapters of this book, we use case studies and questions to examine what the key ethical considerations might be in corporate legal practice.

11 Deborah Rhode and Paul Paton, 'Lawyers, Ethics, and Enron' (2002) 8 *Stanford Journal of Law, Business & Finance* 9, 9–10, citing Greenwood's statement in the hearing on the destruction of Enron-related documents by Andersen personnel before the House of Representatives Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, United States Congress, Washington DC, 24 January 2002, 1 (James C Greenwood, Chairman of the Subcommittee).

12 Robert A Kagan and Robert Eli Rosen, 'On the Social Significance of Large Law Firm Practice' (1985) 37 *Stanford Law Review* 399.

13 Peter Grabosky, 'Professional Advisers and White Collar Illegality: Towards Explaining and Excusing Professional Failure' (1990) 13 *University of New South Wales Law Journal* 73.

14 Ibid 74; John C Coffee, *Professional Gatekeepers: The Professions and Corporate Governance* (Oxford University Press, Oxford, 2006).

A Line between Corporate Law and Ethics?

Corporate lawyers have been criticised for simply acting as *adversarial advocates* who allow the way their business clients set their own business goals to drive the legal advice and other work they do for their clients in one of three main ways.

(a) Reactive Corporate Lawyering: Narrow Legalism That Ignores Ethical Issues

Corporate lawyers have been criticised for using their legal skills uncritically to enable misleading, illegal or unethical corporate conduct. Lawyers in these situations often claim that they did not know about the problematic nature of the conduct they assisted with. Often they do not 'know' because they have not asked, and they have not asked because they have – intentionally, negligently or subconsciously – closed their eyes, ears and mouths to the discussion of 'non-legal' factors that might raise questions.[15]

- For example, in Case Study 7.3 in Chapter 7 we considered the role of Enron's external law firm, Vinson and Elkins, in allowing misleading and corrupt financial practices at Enron to continue unabated until Enron's collapse. Enron's lawyers have been criticised for their propensity 'to try to preserve plausible deniability, by refraining from asking hard questions that might yield awkwardly unwelcome revelations that might have to be reported to the directors, shareholders, or regulators'.[16]
- In Case Study 9.1 at the end of this chapter, the lawyers for James Hardie gave detailed technical legal advice (over a number of years) about how James Hardie could 'separate itself' from its liabilities to compensate those who had suffered disease or died as a result of exposure to the asbestos that the company had manufactured into various products. At one point during the government-commissioned inquiry into James Hardie's actions, Commissioner David Jackson QC commented in relation to the lawyers' advice, 'Why didn't someone stand back and say "This is just too hot"?'[17]

It can be in the interests of both lawyers and their corporate clients to keep the scope of the work given to the lawyer very narrow, so as to exclude the possibility that the lawyer might find out about, or need to address their mind to,

15 See Robert Eli Rosen, 'Problem-Setting and Serving the Organizational Client: Legal Diagnosis and Professional Independence' (2001) 56 *University of Miami Law Review* 179; William H Simon, 'Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct' (2005) 22 *Yale Journal on Regulation* 1.
16 Robert Gordon, 'Portrait of a Profession in Paralysis' (2002) 54 *Stanford Law Review* 1427, 1436.
17 Statement in the hearing before the Special Commission of Inquiry into the Medical Research and Compensation Fund Established by the James Hardie Group, Sydney, 7 July 2004, 2 (David F Jackson QC, Commissioner) <http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/MRCF_transcripts> at 2 June 2006. In his report Jackson eventually concluded that he found it 'disturbing' that none of Hardie's professional advisers and officers, especially its solicitors, 'expressed any view of the merits [or rightness] of the underlying transaction'. But he did not find that Hardie's law firm breached any legal or professional conduct obligation on this issue: D F Jackson, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Fund* (New South Wales, 2004) [29.16] <http://www.cabinet.nsw.gov.au/publications.html> at 22 May 2006.

any unethical or illegal aspects of corporate plans. For example, journalist and observer of the Australian legal profession, Richard Ackland, analysed the James Hardie situation in terms of 'plausible deniability' for both the lawyers and the corporate client:

> Boards of directors and senior directors have schemes that need implementation. Lawyers are hired to get the client over the line. When things go wrong, as they often do, the directors and executives invariably say, 'We acted on advice'. The standard retort of the advisers is; 'We were not given all the information, so the advice was necessarily limited'. This reliable formulation usually saves a lot of bacon.[18]

This type of plausible deniability can be seen as an example of a narrow, reactive approach in which the corporate lawyer avoids consideration of issues that might give rise to ethical obligations:

> Legal departments adopting the narrow view sharply distinguish legal from business advice and confine the lawyer's role to the strictly legal; their advice is reactive, neutral risk analysis, given only when sought, accepting as the 'client' whatever manager at whatever level consults it, and accepting the 'problem' and the corporation's 'interest' as defined by the manager. They don't ask what happens when the 'client' leaves their office – unless required to perform monitoring or auditing functions, in which case they will confine themselves to formal questions and formal responses. Under attack by regulators or civil adversaries, they will see their function as simply minimizing liability in every case . . .[19]

Ethically unreflective corporate lawyering can sometimes occur not so much because of failures of personal ideals as because of narrow legalistic training and culture that do not equip corporate lawyers to know how to put ethics into action in real-life corporate contexts, or even to recognise ethical issues when they arise. This type of practice will often not be in the interests of the company as a whole.

For example, some years ago a major Australian company was subject to a serious complaint of sexual harassment by one of its female employees. They asked their external lawyers (one of the large national law firms) for advice. The lawyers, applying all the technical skills they had learnt in law school, advised fighting the case. There was no possibility of an argument that the harassment had not occurred on the facts. But the lawyers advised that the company may be able to escape liability to compensate the woman because she had let the harassment go on for several years before complaining. In effect, the lawyers advised the company to admit that the harassment had occurred and to argue in defence that the situation within the company had been so bad that the woman should have complained earlier. The case took five years to settle and cost the company much financially (some estimates are half a million dollars), in 'public humiliation' and loss of staff morale. Lawyers who were presumably trying to please a corporate

18 Richard Ackland, 'Irresistible Charms', *Business Review Weekly* (Sydney), 29 September 2004, 50.
19 Robert Gordon and William Simon, 'The Redemption of Professionalism' in Robert Nelson, David Trubek and Robert Solomon (eds), *Lawyers' Ideals / Lawyers' Practices: Transformations in the American Legal Profession* (Cornell University Press, Ithaca, New York, 1992) 230, 252; summarising Rosen, 'The Inside Counsel Movement'.

client by telling them how they could escape legal liability on technical legal grounds apparently failed to consider, or to emphasise, how this might affect the company's reputation, let alone the company's ethical obligation to compensate the woman and address its culture of harassment and discrimination.[20]

Perhaps the lawyers in the example above thought that matters of corporate culture, ethics and reputation would be considered by others better equipped to do so in the corporate hierarchy. As we shall see, the nature of organisations is such that this is not necessarily so.

(b) Pro-active Corporate Lawyering: Commercial Savvy that Consciously Uses Law to Achieve Unethical Goals

In recent times, business clients increasingly expect their lawyers to take a more pro-active, 'commercial' approach. They are expected to bring to bear commercial, social and political contexts on the advice they offer and work they do. Lawyers are expected to understand their client's business goals, and advise on how to use law to achieve them. Indeed, in some businesses it is now expected that, rather than being a mere 'cost centre', an inhouse legal department should generate profits or 'value-add' through strategies such as aggressive tax planning, intellectual property protections and takeover litigation.[21] More constructively, lawyers might be expected to implement corporate governance systems to improve corporate decision-making processes and corporate social responsibility systems and the businesses' credibility with the public and therefore its brand value.

Corporate lawyers have been criticised for legal manipulation and innovation that produces legal devices and techniques that achieve client goals, but without regard to the spirit and ethical substance of the law or the community's ethical expectations. Unlike the first category of critique of corporate lawyers above, here the lawyers are expected to understand and address the company's broader commercial, political and ethical context, not just their technical legal needs. But they may be expected to come up with strategies for the client to achieve its goals by 'managing' this context. As the following examples illustrate, corporate lawyers can help companies engage in 'creative compliance' by avoiding and evading the imposition of law before it becomes a problem, or by creating legal techniques that make it look like companies are complying with the law and addressing social and governmental expectations of ethical behaviour, while making as little real change as possible. They may also devise legal techniques that abuse the law by achieving corporate goals regardless of the real purpose of the law involved:[22]

20 Example from Christine Parker, 'How to Win Hearts and Minds: Corporate Compliance Policies for Sexual Harassment' (1999) 21 *Law & Policy* 21, 32–3.

21 Robert Eli Rosen, '"We're All Consultants Now": How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services' (2002) 44 *Arizona Law Review* 637, 650–60, 675–9; G Richard Shell, *Make the Rules or Your Rivals Will* (Crown Business, New York, 2004).

22 Doreen McBarnet, 'Legal Creativity: Law, Capital and Legal Avoidance' in Maureen Cain and Christine Harrington (eds), *Lawyers in a Postmodern World: Translation and Transgression* (New York University Press,

- During the 1980s 'decade of greed', corporate lawyers in the United States and also in Australia would aid corporate clients in using the 'litigation option' as a tactic to put commercial pressure on their opponents in takeover battles and other corporate disputes.[23] One of Australia's 1980s 'corporate cowboys' used litigation in this way in the *White Industries* case (see Case Study 4.3 in Chapter 4).
- During the 1990s (and continuing today) tax scheme promoters began creating tax shelter products on a massive scale to help wealthy individuals evade tax. These products are commonly backed up with opinion letters from certain barristers stating that the schemes are legal. The promoters then market the schemes by paying commissions to law firms to refer clients to them to participate in the schemes.[24] It is also standard practice for corporate clients to expect advice from their lawyers as to the best way to structure transactions and operations to minimise, or completely avoid, tax. Lawyers sometimes distinguish between tax 'minimisation' or 'planning' (which is legal), as opposed to tax 'avoidance' (which is not), but rarely do lawyers and legal professional regulators comment on the ethics, as opposed to the legality, of these schemes. It is generally left up to the Australian Tax Office to regulate.[25]

(c) Abusing Lawyer–Client Confidentiality Protections to Cover up Misconduct and Obstruct Justice

The final and most serious criticism of the ethics of corporate lawyers is that they sometimes aid their clients by helping them obstruct justice where civil litigation or regulatory investigation and prosecution is occurring or likely:

- In the last weeks before Enron's collapse, and when it was already obvious that the regulator would be investigating Enron and multinational accounting firm Arthur Andersen's audits of Enron, an in-house Arthur Andersen lawyer wrote a memo reminding colleagues who had worked on Enron audits of Arthur Andersen's 'document retention policy'. This policy required the destruction of notes and working papers used to prepare audits. Arthur Andersen's lead partner responsible for Enron then organised the urgent disposal of tons of Enron-related documents.[26] The same lawyer also wrote another email suggesting changes to a draft file record on an Enron matter, to delete any reference to the fact that Arthur Andersen

New York, 1994) 73; Michael Powell, 'Professional Innovation: Corporate Lawyers and Private Lawmaking' (1993) 18 *Law & Social Inquiry* 423.

23 Roman Tomasic and Stephen Bottomley, *Directing the Top 500* (Allen & Unwin, St Leonards, NSW, 1993) 3.

24 John Braithwaite, *Markets in Vice: Markets in Virtue* (Federation Press, Leichhardt, NSW, 2005) 6, 37, 43, 48, 110–11.

25 See G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, Pyrmont, NSW, 3rd edn, 2006) 428–33 for a discussion of the professional conduct rules that do apply specifically to the ethics of tax advice.

26 *Arthur Andersen LLP v United States* 544 U.S. 696 (2005); Gordon, 'Portrait of a Profession', 1436. Loren Schechter, William O Purcell and Cecilia W Kaiser, 'The Effect of the Arthur Andersen Verdict on Inside Counsel' (2002) 3(1) *Journal of Investment Compliance* 27, 27–8.

had legal advice that Enron's disclosures in that matter might be misleading. Arthur Andersen was later convicted of the crime of obstruction of justice and then acquitted on appeal.[27] Arthur Andersen, previously one of the 'big five' multinational accounting firms, collapsed as a result of its involvement with the Enron scandal.

One very important way in which business corporations can use lawyers to obstruct justice is where corporate lawyers are able to use their professional responsibilities in relation to confidentiality and client legal privilege to protect corporate activities from scrutiny, and cover up evidence of any wrongdoing.[28]

- Tobacco industry lawyers in the United States devised schemes to ensure that it was lawyers who commissioned and controlled scientific evidence about the health effects of smoking. They then claimed client legal privilege over reports that showed smoking was dangerous, when litigants sought discovery in suits against tobacco companies. However, they made sure that reports prepared by 'sympathetic' scientists that were positive for the tobacco industry were well publicised. Eventually, the claim of privilege over these reports was struck down as an abuse of privilege. But in the meantime lawyers had kept hidden for years scientific reports showing the dangers and addictiveness of smoking, and showing that the tobacco companies knew this. It was not until whistleblowers alerted plaintiff lawyers to the existence of these reports and devices that these claims of privilege could be attacked.[29]
- In Australia, a court has heard the evidence of former British American Tobacco Australian Services (BATAS) inhouse legal counsel, Fred Gulson, that BATAS and law firm Clayton Utz participated in a 'contrivance' to hide evidence behind client legal privilege. BATAS would give Clayton Utz copies of its documents (including those that might harm it if discovered in litigation) ostensibly for legal advice. The originals would be destroyed under the document retention policy while Clayton Utz kept the copies, but claimed that they were protected by privilege.[30] The court found that there was evidence that BATAS had dishonestly concealed the true nature

27 Schechter, Purcell and Kaiser, 'The Effect of the Arthur Andersen Verdict'. The Enron 'engagement partner' pleaded guilty to charges involving the destruction of documents, and stated that he believed he was following the lawyer's memo in doing so: Simon, 'Wrongs of Ignorance', 9.

28 William Simon, 'The Confidentiality Fetish' (2004) 294(5) *The Atlantic Monthly* 113.

29 Ralph Nader and Wesley J Smith, *No Contest: Corporate Lawyers and the Perversion of Justice in America* (Random House, New York, 1996) 18–31; Martha Derthick, 'The Lawyers Did It: The Cigarette Manufacturers' Policy Towards Smoking and Health' in Robert Kagan, Martin Krygier and Keith Winston (eds), *Legality and Community: On the Intellectual Legacy of Philip Selznick* (Rowman & Littlefield, New York, 2002) 281; Bruce A Green, 'Thoughts About Corporate Lawyers Reading the Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun"?' (2001) 51 *DePaul Law Review* 407; Richard Kluger, *Ashes to Ashes: America's Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip Morris* (Alfred A Knopf, New York, 1996).

30 Susannah Moran, 'Cloaks of Privilege and Smoking Guns', the *Australian Financial Review* (Sydney), 19 May 2006, 57; Vanda Carson, 'Smoke Clearing on Big Tobacco as Insurers Fight' and 'Policy Failed the Smell Test: Whistleblower', *The Australian* (Sydney), 19 May 2006, 24.

of its document policy from the other side and ordered disclosure of the documents.[31]

- Another example of client legal privilege being invoked to prevent public scrutiny of alleged organisational wrongdoing is in the response by the Australian Wheat Board (AWB), which controls the export sale of all Australian wheat, to an Australian government commission of inquiry into whether it paid 'kickbacks' (a form of bribe) to former Iraqi dictator Saddam Hussein in order to make sure the Iraqi government bought wheat from Australia under the United Nation's Oil-for-Food program (that operated while trade sanctions were in place against Iraq). According to newspaper reports of evidence given at the Commission of Inquiry, as soon as AWB became aware of allegations of corruption and bribery in June 2003, two months after the fall of Saddam Hussein, they set up an internal investigation of the allegations, code named 'Project Rose', under the control of their inhouse lawyer. He in turn called in three external law firms and two barristers to review emails and documents and to advise on whether AWB had paid illegal bribes. At the Australian government's commission of inquiry in 2006, the AWB Board then claimed privilege over all the legal advice they had received, and also all internal minutes and records that related in any way to the advice received from external lawyers. AWB's inhouse lawyer also claimed privilege to prevent him from answering any questions about his own opinion about any of the documents the external lawyers had been asked to advise on since, he said, even his own opinion would be based in part on the outside advice, which was privileged. Since hundreds of emails and other documents had been handed over to the external lawyers, this left very little that the inhouse lawyer could be questioned about. Other AWB Board members and staff also refused to answer questions on the basis of similar claims of privilege.[32] AWB also tried (unsuccessfully) to claim privilege over a document accidentally given to the commission which recorded a draft 'statement of contrition' prepared in a teleconference with external lawyers, and a corporate image and crisis management consultant.[33] This consultant had advised that AWB should apologise 'sooner rather than later', and an apology had been drafted. But AWB decided it did not want to admit that level of responsibility. Some of the statements made by the AWB chief executive in the draft apology were inconsistent with what he later told the commission about AWB senior management's awareness of, and responsibility for, bribery.[34]

31 Elisabeth Sexton, 'Ifs, Butts and Big Bucks', *Insight*, *The Age* (Melbourne), 3 June 2006, 4. The case, however, then settled and the documents therefore did not have to be disclosed: Vanda Carson, 'Tobacco Company Sidesteps Ruling', *The Australian* (Sydney), 6 July 2006, 8.
32 Richard Ackland, 'That's Privileged, Sir, and Go Scratch', *The Sydney Morning Herald*, 3 March 2006, 13; Marian Wilkinson, 'Lawyers Swept Up Files, Inquiry Told', *The Sydney Morning Herald*, 24 February 2006, 1.
33 *AWB Ltd v Cole* [2006] FCA 571 (Unreported, Young J, 17 May 2006)
34 Caroline Overington, 'I'm Deeply Sorry: AWB Chief's Apology', the *Australian*, 19 May 2006, 1, 8.

During the AWB inquiry, Commissioner Terence Cole commented that, although it might have been *legal* to claim privilege in some of the circumstances in which AWB claimed privilege, the AWB Board should be careful to consider the 'wisdom' of making the claim, from a 'corporate governance' point of view.[35] In other words, clients always have a choice about whether to claim privilege or enforce confidentiality, or not. There may be a number of considerations in deciding whether to do so, other than the mere fact that it is legally possible. For example, it might be desirable to not claim privilege so as to fully co-operate with a Commission or regulator in order to indicate an attitude of taking ethical responsibility for past wrongdoing. In each of the examples above, the lawyers involved do not appear to have seen it as their role to give this type of advice to their clients, nor, perhaps, did the clients want or expect to hear that advice.

Commercial Immersion of Corporate Lawyering

Critics argue that the types of uncritical corporate lawyering described above have become more ethically problematic, more widespread, and more deeply entrenched as the market for legal services has become more competitive and fragmented. Big companies (and also government departments) now shop around more for the right legal advice at the right price. They have unbundled their legal services so that no one firm, not even their own inhouse legal department, is necessarily guaranteed a steady flow of legal work, or is aware of all legal matters in which the company is involved. Yet, at the same time, there is also more demand for corporate lawyers to be embedded in (employed by, or seconded to) business sub-units within corporate clients so that they can provide commercially realistic advice and anticipate, avoid or resolve legal problems for that unit. Yet at the same time that there is demand for a closer relationship between lawyers and business, that relationship is also less secure for the lawyer – lawyers can easily be sacked if their advice does not suit. This is one reason that lawyers will come under pressure to please individual managers, executives or work teams (who control the purse strings) rather than consider their obligation to the corporation as a whole, let alone any duty to the law or the public interest.[36]

The ethical dangers posed by businesses' increasingly commercial approach to legal advice are compounded by the fact that law firms themselves are also being managed more and more like large business corporations. Corporate lawyers rarely operate as independent solo practitioners, or work together in equal partnerships. Rather, an increasing number of lawyers today work as employees subject to detailed direction and supervision, especially in large national and

35 Statement in a hearing for the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Program, Sydney, 6 March 2006, 4042 (TRH Cole, Commissioner) <http://www.ag.gov.au/agd/WWW/UNOilForFoodInquiry.nsf/Page/Transcripts> at 2 June 2006. Subsequently the Federal Court decided that a number of the documents over which AWB claimed privilege were not privileged: *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No. 5)* [2006] FCA 1234 (Unreported, Young J, 18 September 2006).

36 Rosen, "'We're All Consultants Now"', 672–3.

international law firms. These firms are vastly more profitable, and more profits-driven, than smaller firms (see for example Case Study 8.3, The Foreman Case, in Chapter 8).[37]

The *McCabe v BATAS* case provides a good example of the extent of this commercial immersion of corporate lawyers. As the judge described the facts:

> The relationship between the defendant [BATAS] and its retained solicitors was so close that solicitors employed by private [law] firms sometimes became employees of Wills [a company in the BAT corporate group] and then continued to work alongside members of their former firm, and employees of one of the legal firms sometimes spent months working on the premises of Wills. Private practitioners and in-house lawyers travelled together to conferences of litigation lawyers, organised by companies in the BAT Group, to discuss litigation tactics . . . The long standing and very close association between in-house lawyers and private practitioners had the potential for blurring the roles and responsibilities of the lawyers.[38]

Similarly, it seems likely that Vinson and Elkins' lawyers felt that they needed to do everything possible for Enron for fear of losing a major source of firm income. According to newspaper reports, Enron and Vinson and Elkins had 'one of the closest lawyer-client relationships in corporate America' with both Enron's general counsel (head inhouse lawyer) and deputy general counsel being former partners at the law firm. Another twenty or so Vinson and Elkins lawyers had also taken jobs in Enron's legal department in the previous decade, and Enron was the firm's single largest customer, accounting for more than 7% ($31.5 million) of Vinson and Elkins' revenue in 2001. Vinson and Elkins also had several lawyers working virtually full-time on Enron business, with some permanently stationed in the company's offices.[39]

It would be easy to criticise the role of lawyers in these various cases of corporate misconduct as simply due to unrestrained greed, and individual moral failing. But the loss of ethical discernment is often a subtle and gradual progression, especially in the context of complex corporate decision-making.[40] It is easy to ignore the interests of investors, the public, the courts and the law, without even noticing that is what we are doing, where it is psychologically more comfortable to do so, or the issues have become so complex that we subconsciously screen out uncomfortable facts. In particular, when lawyers become financially dependent on their clients, spend a lot of their time with clients, and

37 John M Conley and Scott Baker, 'Fall from Grace or Business as Usual? A Retrospective Look at Lawyers on Wall Street and Main Street' (2005) 30 *Law & Social Inquiry* 783, 817. See also Marc Galanter and Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (University of Chicago Press, Chicago and London, 1991); Michael Kirby, 'Billable Hours in a Noble Calling?' (1997) 21 *Alternative Law Journal* 257; Bret Walker, 'Lawyers and Money' (2005) 62 *Living Ethics* 6 – also available via <http://www.ethics.org.au/things_to_read/articles_to_read/law_and_justice/article_0465.shtm> (at 28 July 2006).

38 *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [284]–[286].

39 Mike France with Wendy Zellner and Christopher Palmeri, 'One Big Client, One Big Hassle', *BusinessWeek Online*, 28 January 2002 <http://www.businessweek.com/magazine/content/02_04/b3767706.htm> at 2 June 2006.

40 See Rosen, 'Problem-Setting', 182.

try to see things from their client's point of view in order to provide a good service, they will naturally, and often subconsciously, tend to identify with those clients and their purposes. We all want to believe the best of those we identify with, including clients that we serve. If we were to notice any sign of dishonesty or other conduct that goes against our own personal ethical standards and social values amongst our friends and colleagues, this would cause what psychologists call 'cognitive dissonance' – that is, the uncomfortable feeling of lack of fit between our belief in ourself as an ethical person on the one hand, and our involvement or identification with unethical activity on the other. Psychologists have shown that people often use subconscious strategies to avoid this sort of cognitive dissonance: They either subconsciously strive to 'not notice' unethical activity, or rationalise it as soon as they do notice it. Thus corporate lawyers

> will often unconsciously dismiss or discount evidence of misconduct and its impact on third parties. The risks of such dissonance are exacerbated when lawyers bond socially and professionally with the client's management team. The more that [the lawyer] blends with the culture of corporate insiders, the greater the pressures of cohesiveness. That, in turn, encourages lawyers to underestimate risk and to suppress compromising information in order to preserve internal solidarity.[41]

Where it is in the client's interest to keep information about unethical conduct from the lawyer, it is even easier for lawyers to choose to remain ignorant of their clients' misconduct.

A persuasive literature in business ethics suggests that corporate decisions can become immoral, illegal or just bad because, although many individuals are involved in making them, none feels personal responsibility for the ultimate outcome – it's a 'corporate' decision, not a personal one.[42] Everybody has their own role within the corporation – whether it is as lawyer, marketer, sales agent or financial controller – but often no one feels that it is their job to understand the whole context, including the ethical context, for decision-making, nor to access all the relevant information for understanding that context. Lawyers, and other corporate advisers and employees, allow their sense of personal responsibility to be subsumed by their role in an organisational bureaucracy. They see themselves as disposable actors hired to play bit parts in bureaucratic games. So they take their instructions as they find them, rather than actively taking responsibility for working out whether they have been given all the relevant information to understand a problem or decision in its full context.[43] This is compounded if legal services are 'unbundled' and given to a number of lawyers.

41 Rhode and Paton, 'Lawyers, Ethics and Enron', 32. See also Kenneth Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work* (Yale University Press, New Haven, 1985) for evidence of lawyers purposely remaining ignorant of their clients' guilt so that they can zealously defend them.
42 Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, Cambridge, 2002) 31–7.
43 Rosen, 'Problem-Setting'.

Adversarial Advocacy and Responsible Lawyering: Hired Gun or Independent Counsellor?

Many of the issues of mutual ethical responsibility between lawyer and corporate client raised by corporate wrongdoing are similar to those raised in Chapter 4, where we discussed the way that the lawyer-client relationship might foster mutual avoidance of responsibility for the ethical dimension of litigation. We showed there that the justification for an *adversarial advocacy* approach in which the lawyer single-mindedly and aggressively pursues client rights may not be justified in the civil litigation context because of the harm it can do to the client, the other side and the legal process. On the other hand, in the civil litigation context there is, at least, always the possibility that the court can choose to rein in excessive adversarialism by lawyers. *Adversarial advocacy* is even less suited to the corporate counselling context. Most of the matters on which a corporate lawyer advises will never be aired in a court, or any other public forum.

Moreover, the power imbalance between the individual criminal defendant and the state means that criminal defence lawyers might be justified in zealous advocacy that protects their clients' autonomy to the limits of the law against the state. But large corporate clients are not necessarily (or generally) the victims of any power imbalance. Indeed, many corporate clients can afford hordes of lawyers to work out ways to interpret the law and to present the company to others (regulators, investors, customers) as legally compliant. Therefore the justification for legal advocacy that goes to the limits of the law and ethics on behalf of corporate clients is correspondingly reduced.

In this type of context, it does not seem justified for lawyers to primarily take the *adversarial advocacy* approach.[44] In most situations where lawyers advise business, they are not just advocating afterwards as to how something the client has done should be interpreted. They are actually helping the client decide whether to comply with the law and if so how. The ideal of *responsible lawyer* as trusted, independent counsellor seems to express this role better than adversarial advocacy:

> In giving advice, [the *responsible lawyer*] refers not only to specific rules of black-letter law, but also to general principles of equity, fair dealing, and public policy in dealing with inchoate or potential legal problems. By advising businesses about the legal risks, constraints and requirements associated with proposed actions, the corporate lawyer plays a crucial role in pushing business toward socially responsible behavior . . . By telling business executives how to avoid antitrust suits, civil rights suits, and regulatory prosecutions, and by insisting on knowing the truth about financial weaknesses that might affect the accuracy of representations in disclosure statements, license applications, or opinion letters signed by the law firm, the lawyer necessarily forces corporations to be more honest and to establish internal systems for ensuring compliance with the law.

44 Robert Gordon, 'A New Role for Lawyers? The Corporate Counselor After Enron' (2003) 35 *Connecticut Law Review* 1185, 1204–7.

> The corporate lawyer, from this perspective, is an autonomous agent of social control and enforcement.[45]

In the following section, we explore this alternative ethical approach for corporate lawyering in more detail, and suggest ways in which corporate lawyers will need to go beyond *responsible lawyering* to elements of *moral activism* in order to avoid unethical conduct.

Corporate Lawyers as Corporate Citizens

The Corporate Lawyer as Responsible Lawyer in the Current Law of Lawyering

Much that is written or proposed about making corporate lawyers more ethical suggests that corporate lawyers should be required to be more separate and independent from corporate managers and their interests in order to discharge their duties to the law and the corporate entity more reliably, in line with a *responsible lawyering* approach. In particular, much discussion of corporate lawyers' ethics emphasises the need to strengthen their gatekeeping responsibilities by expecting lawyers to act in the interests of the corporation as a whole, including its investors and other stakeholders, to clearly counsel clients against illegal behaviour and behaviour at the margins of legality, and requiring them to report corporate misconduct to appropriate authorities within the organisation or outside it, if they cannot otherwise prevent it occurring.[46]

In fact, in Australia at least, the general principles set out in current professional conduct rules, the law of lawyering, and criminal and regulatory law *already* give corporate lawyers many obligations to act as 'independent counsellors' (*responsible lawyers*). Legal profession regulators in Australia have so far not done much to enforce these obligations in the corporate lawyering context. Nor are these obligations set out very specifically and clearly in the *Model Rules*.[47] Nevertheless, corporate lawyers do have legal and professional conduct obligations (a) to the law, and (b) to the corporate entity as a whole, as well as (c) capacities and obligations in relation to whistleblowing (as shown in the three subsections below). However, as we shall see, something more than merely restating and reinforcing current obligations in the law of lawyering is likely to be necessary to promote ethical conduct by corporate lawyers.

45 Kagan and Rosen, 'On the Social Significance', 409–10. See also Robert Gordon, 'Corporate Law Practice as a Public Calling' (1990) 49 *Maryland Law Review* 255; Gordon, 'A New Role for Lawyers?'; David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, Princeton, New Jersey, 1988) 206–34.
46 See, eg, Coffee, *Professional Gatekeepers*; Gordon, 'A New Role for Lawyers?'.
47 But see the Australian Corporate Lawyers Association's (ACLA) and Corporate Lawyers Association of New Zealand's booklet, *Ethics for In-House Counsel* (Australian Corporate Lawyers Association, 2nd edn, 2004). In the US the American Bar Association convened a taskforce to look at corporate responsibility issues in relation to lawyers in response to Enron and other scandals, and eventually made some changes to their professional conduct rules as a result: American Bar Association, *Report of the American Bar Association Task Force on Corporate Responsibility* (2003) <http://www.abanet.org/buslaw/corporateresponsibility/home.html> at 22 May 2006.

(a) Duty to the law

We have seen in Chapter 4 that lawyers owe general obligations to the law and justice, including obligations not to assist in any abuse of process or misleading of the court. Disciplinary action and other sanctions are available if these obligations are breached. These obligations apply equally in lawyers' work for corporate clients as other clients, and mean that lawyers should try to dissuade their clients from illegal or improper courses of action and withdraw from representing them if the client insists on that course of action.[48] For an inhouse lawyer, withdrawal from representation may, unfortunately, mean resigning their job.

Similarly, general principles of liability in criminal law and most areas of business regulation prohibit lawyers from helping their clients if this would amount to aiding and abetting illegality, or conspiring to break the law.[49] The Australian Competition and Consumer Commission and Australian Taxation Office have both taken action against lawyers on these grounds.[50]

However, consistent with the *adversarial advocacy* approach, lawyers (both corporate lawyers and those who act for individual clients) have argued that they are not morally responsible or legally accountable for their clients' misconduct unless they are knowingly and intentionally involved in initiating or assisting the misconduct.[51] But it is often hard to prove that the lawyer had the requisite knowledge and intention to establish this type of liability.[52] As we have seen, lawyers and executives are expert at plausible deniability in many corporate ethical scandals, and the language of the relevant rules themselves often gives them numerous excuses to avoid liability.[53]

Moreover this type of liability will of course only apply to client conduct that is itself illegal. Much of the 'genius' of corporate lawyering is to contrive ways in which unethical conduct can be performed 'legally'. Indeed the law itself is not necessarily tough enough on corporations precisely because lawyers have helped break down the application of law to corporate wrongdoing, and have helped keep corporate misconduct secret through confidentiality and privilege. Lawyers have helped create enough 'wobble' room to make much of the application of law to corporate activities uncertain.[54] Things that would be crimes if individuals did them are only regulatory offences or civil wrongs if corporations do them. For example, why is it that corporate deceit and intentional behaviour in marketing addictive and potentially deadly cigarettes to young people is not legally defined as a crime (see the cartoon referred to earlier)?[55] Or why is it only recently that it

48 See Dal Pont, *Lawyers' Professional Responsibility*, 423, 427.
49 Russell Lyons and David Handelsmann, 'Corporate Misconduct and Legal Professional Responsibility' (2003) 41(4) *Law Society Journal* 60; see Dal Pont, *Lawyers' Professional Responsibility*, 425–6.
50 Eg *Australian Competition & Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79. See also Dal Pont, *Lawyers' Professional Responsibility*, 428–33.
51 Lyons and Handelsmann, 'Corporate Misconduct'.
52 Simon, 'Wrongs of Ignorance'.
53 William H Simon analyses this in terms of lawyers (wrongfully) being able to avoid liability for corporate misconduct on the grounds of 'ignorance' and 'ambiguity': ibid.
54 Ibid 207.
55 Jonathan Liberman and Jonathan Clough, 'Corporations That Kill: The Criminal Liability of Tobacco Manufacturers' (2002) 26 *Criminal Law Journal* 1.

has even been contemplated that illegal conspiracies to price-fix by corporations should be a criminal offence (rather than merely a civil offence), while ordinary theft and conspiracy by individuals have always been considered crimes?

Emphasising corporate lawyers' duty to the law is not enough where the law itself has proven to be so easily manipulated, unless the duty to the law encompasses an obligation to consider what ethical and justice concerns the law applying to corporations *should* embrace, and to act accordingly – a more *moral activist* conception of lawyers' ethics.

(b) Duty to the corporation as a whole

It is quite clear that lawyers acting for a corporation owe their obligations of care and loyalty to the corporation as a whole, not to individual managers, executives or work teams, since it is the corporation that is the client, not individual officers (see Chapter 7).[56] Much of lawyers' complicity in corporate wrongdoing amounts to conflicts of interest, where lawyers defy their duty to the corporation as a whole to follow the instructions and wishes of individual managers, executives or work teams, at the expense of shareholders and other stakeholders (whether the lawyers are confused about their real clients or not). Moreover it will usually be in the interests of the corporation as a whole to comply with the law (and therefore avoid the legal sanctions and reputational losses that come with breach of the law). Breaches of the obligation to the corporation as a whole could amount to a basis for disciplinary action or actions for breach of duty by the corporation (in negligence or contract). Often where management or the board has breached its duties and a company has collapsed or suffered severe losses as a result, the new management, the shareholders, or the liquidator will sue the previous management and/or board to recover the losses. Lawyers who have contributed to the previous management's wrongful conduct can also be sued, as may occur with Vinson and Elkins in relation to Enron.[57]

Corporate lawyers usually deal with individual corporate officers who define the scope of their work, and whose concerns and goals colonise corporate lawyers' consciences. Comprehending and acting on the duty to the corporation as a whole requires lawyers to actively look beyond the instructions they receive from the individuals they are dealing with in order to consider whether the interests of the corporation as a whole are being followed properly. This requires a degree of ethical discernment beyond the law – an element of *moral activism*.

As we argue below, this duty to the corporation as a whole does not mean that corporate lawyers need to substitute their own moral judgement for that of the corporation. What it does mean is that they need to take their share of responsibility for making sure that the broad interests of the company as a whole are pursued (including the corporation's interest in behaving legally and ethically) by clearly

56 William H Simon, 'Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict' (2003) 91 *California Law Review* 57.
57 See Milton C Regan, 'Teaching Enron' (2005) 74 *Fordham Law Review* 1139. This is an article based on the Enron liquidator's assessment of what causes of action might be available against Enron's various lawyers.

flagging potential ethical and legal problems that might otherwise be ignored or overridden, even if they are not directly within the scope of the particular jobs they have been assigned by individual officers. Having flagged these legal and ethical issues, corporate lawyers should then go on to make sure that the corporation as a whole uses proper decision-making processes, and proper substantive principles, to decide what to do about them. This may entail the lawyer disclosing potential misconduct up the corporate hierarchy or even outside the company, as we see in the next section.

(c) Whistleblowing capability and obligations

Corporate lawyers also have considerable capacity, and indeed obligation, to blow the whistle on corporate wrongdoing under current rules and law. The obligation of confidentiality is not owed to individual managers, but only to the corporation as a whole. Logically, if individual managers are breaching the law, or even acting unethically, then a lawyer's obligation to the corporation as a whole means that they should first try to dissuade the manager they are dealing with from engaging in the misconduct, and then disclose the problem up the decision-making hierarchy within the organisation to someone who can authoritatively decide the matter – all the way to the board if necessary. Where shareholders' interests in a large public company are at stake, and the board itself is corrupt or ineffectual in resolving the issue, the lawyer might even have a duty to report to a regulator or to the public what the problem is – in the interests of the corporation as a whole. This would be because this was the only effective way to serve the interests of the whole corporation – when the board is corrupt or ineffectual, the corporation as a whole must rely on the relevant regulator, or some other public authority, to protect it from illegal and damaging behaviour.[58]

The principle is that the lawyer should start by raising issues of ethics and misconduct with the person concerned in a private and confidential way, and move on to more public and coercive ways of resolving the issues only gradually as each previous option fails. This process respects the confidentiality and sensitivity of the information – by only revealing the information to the extent absolutely necessary to prevent unethical conduct. Nevertheless, the process is likely to be emotionally and professionally draining for the lawyer, since it will involve sensitive, often tense, communications and negotiations, and the constant possibility of open conflict. It is easy to understand why lawyers might often prefer not to notice, or to rationalise, unethical corporate conduct instead of following this pathway.

The Australian Corporate Lawyers' Association (ACLA) 'best practice guidelines' on ethics for inhouse lawyers reflect this understanding that the law and professional conduct rules require lawyers to report unethical conduct up the corporate hierarchy. They state that where an inhouse lawyer needs to be a whistleblower, 'they should make the appropriate disclosures first to the company's

58 Simon, 'Wrongs of Ignorance', 18–19; see also Simon, 'Whom (or What) Does the Organization's Lawyer Represent?'.

Senior Legal Officer and then, if still necessary, to the company's Chief Executive Officer. If required, the disclosures should then be made to the company's Chairman [of the Board]'.[59] This whistleblowing pathway is equally valid for external lawyers advising the company. It is also consistent with the 2004 amendments to the *Australian Corporations Act* which protect corporate employees and service-providers from civil or criminal liability, or victimisation, where they disclose in good faith information relating to a possible breach of the corporations legislation within the company to the board or to the corporate regulator.[60]

Moreover, there are also exceptions to confidentiality and lawyer-client privilege in unusual situations where the public interest is at stake, or the client is abusing the lawyers' services for illegal purposes. The *Model Rules* (3.1.3) provide for an exception to lawyer-client confidentiality that allows a lawyer to disclose information 'in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege [client legal privilege], and for the sole purpose of avoiding the probable commission or concealment of a serious criminal offence'. The wording of this rule is rather confusing, but it appears to incorporate into the *Model Rules* the 'illegality' exception to client legal privilege, and possibly also the public interest defence to breach of confidence.

The *illegality exception* to client legal privilege says that a client cannot claim that lawyer-client privilege protects them from disclosure of communications with their lawyer where the client was seeking to use the lawyer to help further a criminal, fraudulent or other illegal purpose.[61] It does not matter whether the lawyer knew at the time what the client's purpose was, nor whether the lawyer joined in that purpose. The High Court of Australia has defined the scope of this exception broadly. It is not 'confined to cases of crime and fraud . . . unless the meaning is extended to anything that might be a fraud on justice'.[62]

The general law on confidentiality also recognises that disclosure of confidential information to an appropriate authority that can do something about it might be necessary in the public interest. A person who discloses someone else's confidences will therefore be protected from liability by the *public interest defence* if a court decides that the interest in maintaining the confidence is outweighed by a higher public interest, such as the prevention of wrongdoing or harm to others or to national security.[63] In addition to *Rule* 3.1.3, the *Model Rules* (3.1.2) also make an exception to the professional duty of confidentiality where the lawyer 'is permitted or compelled by law to disclose'. This would import the

59 ACLA, *Ethics for In-House Counsel*, 6. They go on to say 'Subject to any overriding legislation, disclosure beyond that level is not required'. We do not agree with this rider, as the text above makes clear.
60 *Corporations Act 2001* (Cth) pt 9.4AAA (commenced 1 July 2004). There is no reason why these provisions should not apply to both internal and external lawyers. They do not, however, explicitly abrogate lawyer-client privilege.
61 See Dal Pont, *Lawyers' Professional Responsibility*, 247–50.
62 *A-G (NT) v Kearney* (1985) 158 CLR 500, 514.
63 See Paul Finn, 'Professionals and Confidentiality' (1992) 14 *Sydney Law Review* 317, 323; Karen Koomen, 'Breach of Confidence and the Public Interest Defence: Is it in the Public Interest?' (1994) 10 *Queensland University of Technology Law Journal* 56. For cases that may be examples of the public interest defence (or very similar principles) being applied to lawyers, see *Finers v Miro* [1991] 1 All ER 182; *R v Bell; Ex parte Lees* (1980) 146 CLR 141.

public interest defence into professional conduct obligations and allow a lawyer to disclose confidential information, if a court would find it was in the public interest to do so.

Corporate lawyers often act as if confidentiality is an absolute value that must be protected at all costs (William Simon talks about the legal profession's 'confidentiality fetish'[64]). But in fact the illegality exception to client legal privilege and the public interest defence to breach of confidence mean that lawyers' ordinary legal obligations of confidentiality do not apply, and client legal privilege does not apply, where a corporation is acting illegally, or perhaps unethically, and the conduct is likely to physically or economically harm people, or the public interest otherwise demands it.

The content of the current law on confidentiality gives ample room to corporate lawyers to fulfil their ethical duties. But knowing when to breach confidence requires ethical judgement (again an element of *moral activism*), not just legal knowledge, as the circumstances in which the public interest or a client's 'fraud on justice' might justify and, indeed, demand whistleblowing can never be fully specified in the law. The way the legal profession tends to treat confidentiality as an absolute value (see above) probably discourages lawyers from this type of ethical judgment.

Conclusion: Legal Ethics and Business Ethics

It would certainly be helpful if the *Model Rules* and professional regulators spelled out more clearly the ethical obligations of corporate lawyers, and actually enforced them. But when ethical failures in corporate lawyering occur, the problem might be more in the attitude and style of corporate lawyering than in the content of the current rules. As we have seen, the ethical problems for lawyers in many situations of corporate misconduct arise because either: (1) they have taken too narrowly legalistic an approach to the situation, and screened out non-legal factors that would raise ethical alarm bells, or the corporate structure and people instructing them have screened out those non-legal factors; or, (2) they have come up with clever ways to avoid or break the law, without appearing to do so.

These are failures of corporate lawyers first to adequately engage in *business* ethics before they are failures of *legal* ethics. Looking to the law alone will never adequately guide lawyers as to how to behave ethically in these types of corporate scandals. For example, as is evident from Case Study 9.1: James Hardie, below, to give legal advice is not enough where a course of action is probably legal, but legal advice is being used by a company's management to urge the Board into action that fails to deal with the real ethical issue – in the James Hardie case, the tragic crisis of thousands and thousands of asbestos related deaths.

64 Simon, 'The Confidentiality Fetish'.

Consider this description by Gideon Haigh of the role of the lawyers from James Hardie's external law firm, Allens, during the crucial February 2001 Board meeting at which it was decided to hive off James Hardie's asbestos liabilities into a separate entity, the Medical Research and Compensation Fund (MRCF) (which was later cut adrift from the Hardie group without adequate funding to compensate all those who would be legally entitled to compensation). Hardie's Chief Executive Officer and chief inhouse lawyer urged the Board to make the decision to separate the MRCF, but they also withheld vital claims data from the Board that would have given the Board a more realistic idea of the funding the MRCF was likely to need:

> Through this, too, sat the advisers . . . the lawyers staved off concern about the data whose absence had made them so anxious that morning. [One of the Allens solicitors present] contemplated raising the subject, but chose not after asking his superior: 'We were available for questions to be asked of us. No questions were asked of us and so we did not say – we did not raise it.' . . . Yet it may not only be in what they did or did not do that the advisers in this transaction were influential. The impression of having the best advice at one's beck is a reassuring one. The advisers here were by now familiar faces at Hardie, and this was a board culture that placed heavy reliance on them. Recall [the chief inhouse counsel's] acid comment on directors in July 2000: 'I don't think we should underestimate the value the Board will place on *outside* third party advisers (as insulting as that is to the company's internal advisers – myself included)'. Yet these same advisers were by now so close to the company as to be almost indistinguishable from corporate officers.[65]

Haigh points out that even in saying nothing at all, the external lawyers participated in the management (the CEO and inhouse lawyer's) plan to separate off the MRCF, and the Board's acquiescence in that plan. By saying nothing about the missing data, which they were aware of, the external lawyers also played their part in the deception of the Board.

Corporate lawyers cannot 'kiss off' their moral responsibility by saying 'it's not my job'.[66] It is part of their job whether they like it or not, and whether they actively do anything or not. An *adversarial advocate* might plausibly argue that an individual client always retains some independent capability to make their own decisions regardless of legal advice. But corporate decisions are always made by individuals standing in for the entity as a whole. Business decisions, particularly in corporate contexts, are frequently made collectively and lawyers, and their advice, or lack of it, are an important part of those decisions.[67]

Lawyers advising business need to demonstrate responsibility for the ethics and legality of what they advise business to do and be held accountable for it (as other business people should be too for the part they each play). Corporate

65 Gideon Haigh, *Asbestos House: The Secret History of James Hardie Industries* (Scribe, Melbourne, 2006) 269–70.
66 Rosen, 'Problem-Setting', 181. For this point, Rosen cites William H Simon, 'The Ideology of Advocacy: Procedural Justice and Professional Ethics' (1978) 1978 *Wisconsin Law Review* 29, 74.
67 Richard Painter, 'The Moral Interdependence of Corporate Lawyers and Their Clients' (1994) 67 *Southern California Law Review* 507, 520; see also Rosen, 'The Inside Counsel Movement', 542–5.

lawyers' particular ethical responsibility will relate mainly to their legal expertise and role, but they cannot avoid responsibility for having a substantive ethical view about the situations they are called to advise on and participate in merely because they are lawyers and supposedly independent of the corporate client. This means that corporate lawyers should be business ethicists and this is likely to require them to use the following three strategies.

Strategy 1: Identifying the Client Correctly

Corporate lawyers regularly participate in, or at least aid, business decisions that affect the wealth and wellbeing of hundreds and thousands of people who hold a 'stake' in that business. Most of the key ethical issues for businesses concern potential conflict between their different stakeholders. Indeed, corporations are basically entities made up of, and exercising power over, different stakeholders.[68] These stakeholders include people who have invested their wealth in the organisation – shareholders, banks, superannuation funds etc; and those who have invested their time, skill and labour in the business – employees and managers.

When a lawyer acts for a corporation, they are supposed to act for the entity as a whole, not individual managers or work teams. This means that ethical issues are likely to be unavoidable for corporate lawyers. They must constantly keep one eye on whether the managers they take instructions from are adequately taking into account the interests of all the corporation's stakeholders, or whether they are asking their lawyers to help them prefer their own interests over those of, say, the shareholders, or even employees.

Where the lawyer thinks management may not be appropriately pursuing the interests of the entity as a whole, the lawyer, as a participant in corporate decision-making, should be able to initiate discussion and resolution of the issue within the company.[69] This is not the lawyer deciding what is the appropriate thing to do *for* the corporate client; but the lawyer should be in a position to activate a decision-making process within the corporation that will decide properly. As we have seen, debate and controversy over the role of lawyers in corporate misconduct has focused on whether corporate lawyers should (or already do) have a 'whistleblowing' obligation to raise such matters within the organisation and outside it. But, ideally, this role of raising ethical issues should not be seen as extraordinary whistleblowing, but rather it should be seen as a natural part of their role. This means that inhouse lawyers, particularly the chief inhouse lawyer in each organisation, need to have a certain degree of power and respect so that, if necessary, they can question corporate activities, goals and commitments, and can ensure that ethical issues are resolved properly at an appropriate place in the corporate decision-making process.

68 C Parker, *The Open Corporation*, 3–7; James E Post, Lee E Preston and Sybille Sachs, *Redefining the Corporation: Stakeholder Management and Organizational Wealth* (Stanford University Press, San Francisco, 2002).
69 See Simon, 'Wrongs of Ignorance'; Rosen, 'The Inside Counsel Movement', 542–5.

This is why most commentators on ethics for inhouse lawyers say that inhouse lawyers should have a degree of influence and power within the organisation by having the possibility of dotted line reporting[70] direct to the Chief Executive Officer and to the Board of Directors itself, and of having the authority to investigate and intervene at any level of a company.[71] The ACLA guidelines on ethics suggest that inhouse lawyers 'should preferably report to a senior executive such as the chairman or CEO' and should 'ensure that his/her employment contract specifically recognises that the employee, as counsel, may be obliged to act as a whistle-blower and requires that there will not be recriminations in that event'.[72]

Strategy 2: Framing the Problem to Include Ethical Issues

Lawyers advising business need to be aware of the ways in which the business context is likely to shape their own view of the ethics of each situation on which they are asked to advise. Their own judgement is likely to be affected by their relationship to the organisation – what information comes to them, how it comes to them, how the politics of the organisation work, and what influence they themselves have within that organisation. Lawyers ought to take special care and responsibility to make sure that they see the questions and problems brought to them by business in a holistic context that means they can take ethical and legal responsibility for those problems, rather than simply allowing the organisation (with its politics and bureaucratic pathologies) to present problems to them as isolated events or concepts.[73] This requires substantive ethical analysis.

One way of trying to make sure that corporate decisions are always made in an ethical way is for the company (client) to put in place internal controls or management programs that seek to make sure that the whole organisation meets its legal and ethical responsibilities, and guard against those responsibilities being forgotten or trampled on. These internal controls and management programs are a way of trying to create a conscience within business organisations.[74] Lawyers might be particularly suited to helping businesses with this.

Consider again the sexual harassment case mentioned above that the company foolishly fought on legalistic grounds in line with legal advice.[75] That company learnt that a broad corporate commitment to preventing sexual harassment and dealing with it fairly within the organisation was much more important than a legalistic focus on how to avoid liability. They then hired both business ethics

70 'Dotted line' reporting means that in addition to your everyday obligation to report up the line to your direct superior, you also have the capacity to bypass that superior to a higher level. It is a safeguard for where your direct superior may be acting unethically, obstructively or incompetently.
71 Gordon and Simon, 'The Redemption of Professionalism', 253.
72 ACLA, *Ethics for In-House Counsel*, 9 and 6 respectively. For suggestions as to how inhouse lawyers should 'interview' their prospective employers in relation to ethical issues and the safeguards available to ensure the lawyer will be able to act ethically, see Adrian Evans, 'Safe Employment for Corporate Counsel' (2003) 77(4) *Law Institute Journal* 84.
73 Rosen, 'Problem-Setting'.
74 See C Parker, *The Open Corporation*.
75 See above C Parker, 'How to Win Hearts and Minds', n 20, and accompanying text.

and equal employment opportunity consultants to start a process of organisational cultural change that culminated in the implementation of a state of the art workplace ethics policy, including a sexual harassment grievance handling process.

Many legal ethicists have suggested that corporate lawyers should take a more pro-active or positive role in making sure adequate internal controls and whistleblowing protections are in place, so that companies can police themselves to make sure they comply with the law and with ethical obligations. Thus the ACLA guidelines suggest under the heading of corporate lawyers' relationship with 'stakeholders generally' that they 'should promote the adoption of compliance and other procedures and policies within their organisations that take account of the legitimate interests of all the organisation's stakeholders and community expectations of proper behaviour'.[76] They also 'should encourage an environment which permits internal whistleblowers to come forward without fear of retribution' and 'should work to help protect the anonymity of whistle-blowers and the integrity of their communications'.[77] The *Sarbanes-Oxley Act* requirements in the United States and the Australian Stock Exchange's *Best Practice Principles for Corporate Governance* (also introduced in response to corporate collapses and scandals) also both seek to encourage companies to make sure they have adequate internal controls, codes of conduct, and whistleblowing protections in place to make sure that obligations to the corporation as a whole, including its shareholders and stakeholders, are protected. These institutional safeguards complement rather than replace 'bottom up' cultural change that originates when employees lower down the corporate ladder also push for ethical development.

Strategy 3: Law Firm Ethics

It is even more important that business lawyers engage substantively with business ethics when we consider lawyers' own practice structures. The disciplinary provisions and ethical conduct rules in most jurisdictions are generally directed only at individual practitioners, not at law firms.[78] This reflects the traditional assumption that once a person qualifies as a lawyer they will become an independent practitioner who is able and competent to take responsibility for the quality and ethics of their own work. But the majority of lawyers no longer operate as independent professionals. They are employed by law firms, as well as accounting firms and inhouse corporate legal departments.

One of the biggest challenges for the ethical regulation of lawyering is to see law firms (and other organisational practice contexts) as having their own

76 ACLA, *Ethics for In-House Counsel*, 9.
77 Ibid 6.
78 See Ted Schneyer, 'Professional Discipline for Law Firms?' (1991) 77 *Cornell Law Review* 1; Elizabeth Chambliss and David B Wilkins, 'Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting' (2002) 30 *Hofstra Law Review* 691.

ethical character for good or for ill.[79] This should mean that in addition to individual lawyers being held accountable for ethical failures, their law firms should also be held responsible as entities for ethical misconduct where firms' culture or management policies have contributed to that misconduct. We have already seen the importance of internal responsibility and management/ethics systems within law firms for explaining fees and communicating about problems with bills and costs (Chapter 8), and avoiding and managing conflicts of interest (Chapter 7). Internal ethical structures for law firms could also include values awareness training, ethics hypotheticals, conflicts avoidance systems, procedures for internal reporting and resolution of ethical problems, billing guidelines and client complaints handling procedures.

In Australia, legal professional associations have been encouraging law firms to voluntarily institute ethics programs and other internal controls. In the immediate aftermath of the original *McCabe* decision, for example, the President of the Law Institute of Victoria announced an initiative encouraging all law firms to introduce ethics partners to be 'the first contact when someone in the firm has an ethical question or problem'.[80] They might also review internal ethical decisions and rule on internal differences of opinion on ethical matters.

DISCUSSION QUESTIONS

1. Think back to the situations described in the introductions to this chapter and Chapter 4 in relation to Clayton Utz's work for British American Tobacco, and also the Foreman case (discussed in Chapter 7): How could Clayton Utz have organised its work differently to avoid the problematic conduct in each of these cases occurring? Are there any policies or structures that might have been put in place that would have prevented these events?
2. Would an ethics partner be an effective tool for improving ethics generally in large law firm practice? Consider again the four ethical approaches introduced in Chapters 1 and 2: What would a whole law firm need to do in order to ensure that its legal practice meets the values of its chosen approach, or combination of approaches?

We conclude this chapter with an extended case study examining in detail James Hardie's attempts to 'separate itself' from its asbestos liabilities, and the role its lawyers played in that series of events. This case study provides a vivid example of the ways in which lawyers can become an important part of corporate decision-making, and the way the law can be used to 'manage' rather than resolve a company's ethical problems. It illustrates well the opportunities that corporate lawyers have to contribute, for good or for ill, to the ethical climate within corporate decision-making and ultimately to the impact of corporate activities on thousands of individuals.

79 See Lillian Corbin, 'How "Firm" are Lawyers' Perceptions of Professionalism?' (2005) 8 *Legal Ethics* 265.
80 See, eg, Kim Cull, 'Ethics and Law as an Influence on Business' (2002) 40(9) *Law Society Journal* 50, 50–1; John Cain, 'Good Ethics Requires Constant Vigilance' (2002) 76(8) *Law Institute Journal* 4, 4.

CASE STUDY 9.1 James Hardie's Attempts to Separate Itself from Its Asbestos Liabilities[81]

James Hardie opened its first Australian asbestos factory in 1916. The first known death of a Hardie employee due to asbestos occurred about 1960, and the first asbestos compensation claims were filed against James Hardie and other Australian companies in 1977. Hardie stopped manufacturing asbestos in 1987 and focused on other businesses, including expansion into the US and Europe. However, James Hardie management realised that it would be facing significant asbestos liabilities for years to come. Hardie's asbestos manufacturing business had been enormously successful and Australians were the highest per capita users of asbestos in the world. By 2001 approximately 2000 asbestos compensation claims had been made against James Hardie, but asbestos diseases can have a latency period of up to 40 years before they develop. There are estimates that asbestos-related disease in Australia will not peak until 2020 with about 13,000 cases of mesothelioma (a deadly cancer of the pleural lining of the lungs caused only by asbestos) and 40,000 cases of other asbestos-related lung cancer.[82]

By 2001, James Hardie management were keen to 'resolve' the ongoing liability to compensate asbestos victims, so that management could focus entirely on growing the company for the benefit of all shareholders'.[83] Over the period from February 2001 to March 2003 management restructured the James Hardie group of companies with the ultimate result that all the group's asbestos liabilities were vested in the Medical Research and Compensation Foundation (MRCF) together with a set amount of funding for compensation. However, it soon became evident that the money would run out after three years, with a shortfall of between $800 million and $1.5 billion for future liabilities after that time. The MRCF had no legal recourse against the rest of the group for further funds to pay compensation, the parent company moved from Australia to the Netherlands, and there was a public outcry. The New South Wales government set up a Special Commission of Inquiry, under David Jackson QC, into these events.

The facts set out below explain, in summary, the legal manoeuvres through which the James Hardie group tried to separate itself from its asbestos liabilities, and the role played in this process by James Hardie's external law firm, Allens Arthur Robinson. James Hardie and Allens had a relationship going back 100 years, and one of the principal Hardie executives who orchestrated the events (the chief inhouse counsel and later Company Financial Officer at James Hardie) was a former Allens partner.[84]

February 2001

Before February 2001, the James Hardie group's main legal responsibilities for asbestos compensation related to claims against two subsidiary companies owned by the parent

81 Case study material based on Jackson, *Special Commission of Inquiry into the MRCF Established by the James Hardie Group*; Haigh, *Asbestos House*; Ackland, 'Irresistible Charms'; Elizabeth Sexton, 'Hardie Writhes in Self-Made Circles of Hell', *Insight*, *The Age* (Melbourne), 21 August 2004, 8. See also Suzanne Le Mire, 'The Corporation, the Lawyers, its Schemes and their Ethics' *Alternative Law Journal* (forthcoming).

82 Peta Spender, 'Blue Asbestos & Golden Eggs: Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability' (2003) 25 *Sydney Law Review* 223, 235–6.

83 Quoted words are from James Hardie's 16 February 2001 media release upon the establishment of the Medical Research and Compensation Fund (see explanation below): James Hardie, 'James Hardie Resolves Its Asbestos Liability Favourably for Claimants and Shareholders' (Press Release, 16 February 2001) available in Annexure R to Jackson, *Special Commission of Inquiry into the MRCF*, 333–4.

84 He later lost his job at James Hardie, as did Chief Executive Officer Peter Macdonald: Ean Higgins, 'Hardie Dumps Asbestos Chiefs', *The Australian*, 16 May 2006, 2.

company, James Hardie Industries Ltd (JHIL). These two companies, Amaba Pty Ltd and Amaca Pty Ltd, had made asbestos products from 1937 until 1987. In February 2001 James Hardie Industries Ltd (JHIL) transferred ownership of Amaba and Amaca to a new trust, the MRCF. They also gave the MRCF $293 million to meet future compensation claims. At the same time Amaba and Amaca indemnified JHIL for any further asbestos liabilities.[85] This meant that JHIL would not be liable in the future in relation to asbestos.[86]

The JHIL's Board's decision to create the MCRF with $293 million was based on an actuarial report on the likely amount of claims that would need to be paid out in relation to asbestos liability (the Trowbridge Report). However this report was based on out-of-date data and other inaccurate methodologies. In fact, $293 million would be nowhere near enough money to pay out all of Amaba and Amaca's asbestos liabilities. JHIL's chief inhouse counsel had a more up-to-date 'draft' report and was aware of other problems in the Trowbridge Report, but chose not to make this information available to the Board of JHIL. Allens lawyers were involved in advising on the preparations for the creation of the MRCF, and the Allens lawyers raised concerns about the fact that the report to be given to the Board did not include more up-to-date data, but were assured by Hardie's chief inhouse counsel and the CEO that the report was adequate and that the MRCF would be sufficiently funded.[87] The role of the Allens lawyers in relation to this Board meeting was described above.[88]

James Hardie put out a media release and report to the Australian Stock Exchange on 16 February 2001 announcing the creation of the MRCF, and stating that 'The Foundation [MRCF] has sufficient funds to meet all legitimate compensation claims anticipated from people injured by asbestos products that were manufactured in the past by two former subsidiaries of JHIL'. The announcement also stated that all asbestos related costs would be removed from JHIL's future balance sheets and that 'No future provisions are expected to be required'.[89]

Commissioner Jackson later described this announcement as 'seriously misleading'[90] on the provision of funds for asbestos victims, and also stated that, in his view, the CEO and chief inhouse counsel had breached their duties as JHIL officers 'by encouraging the Board to act on the Trowbridge Report in forming the view that the Foundation would be fully funded'.[91]

Between February and October 2001

The directors of the MRCF realised that they were facing a shortfall in funds to meet the asbestos liabilities of Amaba and Amaca, and began to insist that JHIL needed to do something about this. It was conceivable that the MRCF might sue JHIL. However JHIL 'was adamant that no further substantial funds would be made available

85 The net assets of Amaca and Amaba were $214 million with JHIL adding the rest: Jackson, *Special Commission of Inquiry into MRCF* [1.6].
86 There is controversy about the exact extent to which JHIL, as the holding company (that is the company that owned Amaca and Amaba at the time asbestos liabilities arose, but was legally a separate entity to them) might be liable in relation to asbestos claims where the asbestos was produced and sold by its subsidiaries (Amaca and Amaba), but JHIL had accepted that it had some responsibility to provide for asbestos compensation claims at least as long as it still owned Amaba and Amaca.
87 Haigh, *Asbestos House*, 262–3, 269–71, 281–2; Jackson, *Special Commission of Inquiry into MRCF* [29.14], [24.25]–[24.28].
88 See Haigh, *Asbestos House*, above, n 65 and accompanying text.
89 James Hardie, media release (16 February 2001).
90 Jackson, *Special Commission of Inquiry into MRCF*, [1.15]. See also [1.26].
91 Ibid [24.82].

to the Foundation, and that it had taken all proper steps at the establishment of the Foundation'.[92]

Allens advised Hardie that the Foundation would have no compensable legal claim against Hardie. Commissioner Jackson later commented, 'There was no legal obligation for JHIL to provide greater funding to the Foundation, but it was aware – indeed, very aware because it had made extensive efforts to identify and target those who might be "stakeholders", or were regarded as having influence with "stakeholders" – that if it were perceived as not having made adequate provision for the future asbestos liabilities of its former subsidiaries there would be a wave of adverse public opinion which might well result in action being taken by the Commonwealth or State governments (on whom much of the cost of such asbestos victims would be thrown) to legislate to make other companies in the Group liable in addition to Amaca or Amaba'.[93]

October 2001

The Hardie group restructured. The assets of the Australian parent, JHIL, were transferred to a new parent company based in Amsterdam, James Hardie Industries NV (JHINV). JHIL was left as a non-operating 'shell' company with net assets of $20 million. As part of the restructure, JHIL issued partly paid shares to JHINV. The partly paid shares gave JHIL the ability to call on funds up to the value of $1.85 billion from JHINV (the new Dutch parent). Allens continued to act for JHIL. In the lead-up to the restructure Allens and JHIL discussed the possibility that the partly paid shares would be cancelled at some time in the future. Jackson found that while there was no 'fixed intention' to cancel the partly paid shares at this stage, 'it was, in effect, the "operating assumption" on which both management and the Board were proceeding' that it would occur within a year or so of the restructure.

The 2001 restructure had to be approved by the NSW Supreme Court (Justice Kim Santow) in order to ensure that the interests of shareholders and creditors in the company were adequately looked after (as a 'scheme of arrangement'). As part of this process JHIL stated that the $20 million and the funds available from the partly paid shares would be available to the MRCF to meet the asbestos liabilities of JHIL's former subsidiaries, Amaba and Amaca, if necessary.[94] Allens and JHIL did not tell Justice Santow about the concerns about the MRCF's solvency, or the possibility that the partly paid shares would be cancelled. Permission for the restructure was granted.

Jackson later found Allens and JHIL were in breach of their duty of disclosure to the court by not telling the court that cancellation of the partly paid shares was 'almost inevitable', a view that should have been held by 'anyone familiar with JHIL's internal strategic planning' including the JHIL Board, senior management and Allens lawyers.[95] However he found that this failure was not deliberate. He also thought Allens might have breached its duty of care to JHIL in failing to make sure disclosure occurred.[96]

92 Ibid [1.22].
93 Ibid [1.8].
94 Haigh, *Asbestos House*, 286; Jackson, *Special Commission of Inquiry into MRCF* [25.21], [25.22].
95 Jackson, *Special Commission of Inquiry into MRCF* [25.87]. One of the options that James Hardie had considered before entering into the October 2001 scheme of arrangement was an option in which no partly paid shares would be issued to link JHINV and JHIL. Rather JHIL would be completely separated from the group, possibly even liquidated. That option was explicitly rejected by the JHIL Board in favour of the 'more flexible' option of issuing the partly paid shares that could later be cancelled or called in to bring further funds into JHIL.
96 Ibid [25.91]. They also unintentionally failed to disclose the existence of a put option which would in effect require MRCF to buy all the shares in JHIL, having the same effect as cancelling the partly paid shares.

March–July 2002

After October 2001 the MRCF directors became increasingly worried about their lack of funds. MRCF's relationship with JHINV (now standing in the place of JHIL) deteriorated further as MRCF asked for extra funding and JHINV refused. In March 2002 JHINV sought advice from Allens about the possibility of cancelling the partly paid shares. At the meeting where this was discussed, Allens lawyers discussed the possibility that it was 'too soon' to cancel the partly paid shares, because it might look like the company had had the intention to cancel the partly paid shares at the time of having the restructure arrangement approved by the court, and therefore misled the court by not disclosing that intention in the scheme documents at the time.[97] Notes from the meetings also indicated that the lawyers considered that if this were true, there would be nothing that the court could do about it, as the failure to disclose had already occurred. However the Australian Securities and Investment Commission might be able to prosecute for failure to disclose, and there would also be a 'commercial and political risk' in James Hardie being seen to have misled the court.[98]

15 March 2003

JHIL (now known as ABN 60 and wholly owned and controlled by JHINV) cancelled the partly paid shares, which were all held by JHINV, for no consideration. The cancellation of these shares meant JHINV no longer had any legal liability to give any funds to JHIL (ABN 60), and therefore JHIL had no capacity to fund MRCF, beyond JHIL's own $20 million in assets. The James Hardie group's asbestos liabilities were effectively 'owned' by MRCF, while the group's main assets were owned by JHINV, separate legal entities from one another with no clear legal responsibilities between them. The JHINV Chief Financial Officer, who was also a director of JHIL, was responsible for executing this plan. At the Commission of Inquiry he claimed to rely on advice from Allens that JHIL was not liable to the MRCF for anything.[99]

DISCUSSION QUESTIONS

1. In his findings Commissioner Jackson commented that he was surprised that the lawyers from Allens did not raise the question of the adequacy of the funding for MRCF earlier than just before the fateful Board meeting of February 2001. He also thought that it was 'disturbing' that JHIL's advisers had failed to say that 'separation was unlikely to be successful unless the Foundation was *fully* funded, and that this was required to be rigorously checked'.[100] Why do you think Hardie's lawyers did not provide this advice more forcefully and earlier? Why did they not speak up about this issue and the adequacy of the Trowbridge Report at the Board meeting?
2. Commissioner Jackson described JHIL's chief inhouse lawyer as 'a man who seemed determined to control the course of events, and the activities of the participants'.[101] He also commented that 'It may well be, however, that this was a

97 Ibid [26.60]–[26.71], [26.82–26.87]; Haigh, *Asbestos House*, 303–6.
98 One Allens lawyer did attempt to communicate these concerns to JHINV in a letter of advice, but the letter was substantially edited while he was on holidays, and there is no evidence that it received any attention at JHINV anyway: Haigh, *Asbestos House*, 310–12.
99 Jackson, *Special Commission of Inquiry into MRCF* [27.67].
100 Ibid [29.14], [29.15].
101 Ibid [29.9].

case where the JHIL management were determined so far as possible, to deal with the matter in-house as far as possible [sic] and that outside advice touching the merits of the proposal was unwelcome'.[102] Jackson seems to be suggesting that JHIL management (particularly the CEO and chief inhouse lawyer) may have intentionally discouraged the Allens lawyers from looking more broadly at the arrangements for setting up the MRCF in their advice. If you were the external lawyer, how would you feel about this? Should you accept these types of limitations on the way your work is framed? What other options do you have? What would happen if you attempted to bypass the chief inhouse lawyer and CEO and go straight to the Board with any concerns? (In answering these questions, think about what the four different ethical approaches would say about how you should respond to this sort of situation.)

3. Jackson found that JHIL and Allens misled the court about JHIL's plans in relation to the cancellation of the partly paid shares (although not intentionally). At the Commission of Inquiry, Allens and JHIL attempted to make a distinction between what was the 'intention' of JHIL at the time and what was in 'contemplation'. (Cancellation was in contemplation but there was no fixed intention to cancel.)[103] Is this type of distinction justified? Could the lawyers have done anything differently to make sure that the court was fully informed of the likely cancellation in the future? (Again, think about how the four different ethical approaches would help you answer these questions.)
4. After the MRCF became aware of its lack of funds and began to demand that JHIL do something about it, Allens provided advice on several occasions that there was little likelihood of JHIL (the parent company) being held legally responsible for the asbestos liabilities of its former subsidiaries, Amaca and Amaba. Yet JHIL, as parent of the group, had previously acted as if it had moral responsibility at least to compensate asbestos sufferers on behalf of the whole group. Moreover, as Jackson commented, regardless of the precise legal situation in relation to JHIL's liability, there was a real possibility that if JHIL failed to adequately provide for the group's asbestos victims, the government would step in and legislate to make them responsible. This is in fact what happened. As a result of the Commission of Inquiry, the New South Wales government threatened to legislate to make the James Hardie group liable unless they were able to negotiate a satisfactory arrangement for compensation of everyone. They suffered much bad publicity before an arrangement was finally negotiated.[104] In hindsight, should the external lawyers have more strongly advised JHIL about ethical and political considerations? What do you think the duty to the corporation as a whole required? Would you have felt capable of giving this sort of 'hard' advice to JHIL in all the circumstances?

102 Yet later the CEO used Allens' name when journalist Ben Hills raised concerns that the fund may not be adequate – the CEO pointed out that they had received 'in-depth advice from a large number of specialist firms with noted, long-standing experience in relevant areas': Haigh, *Asbestos House*, 276–7 and see also 282–3 (Allens were concerned about their name being used in this way).
103 Ibid 303.
104 On 1 December 2005, the company effectively agreed to undo its 2001–02 restructuring and re-establish its liability to compensate victims of asbestos: Marcus Priest, 'Buck Stops with New Local Unit', the *Australian Financial Review* (Sydney), 2 December 2005, 5.

Recommended Further Reading

Richard Beasley, *Hell Has Harbour Views* (Macmillan, Sydney, 2001); and the Australian Broadcasting Corporation telemovie based on the novel (written and directed by Peter Duncan), *Hell Has Harbour Views* (2005).

Kenneth E Goodpaster, 'The Concept of Corporate Responsibility' (1983) 2 *Journal of Business Ethics* 1.

Robert Gordon, 'A New Role for Lawyers? The Corporate Counselor After Enron' (2003) 35 *Connecticut Law Review* 1185; also extracted in Milton C Regan and Jeffrey D Bauman (eds), *Legal Ethics and Corporate Practice* (see full reference below) 64.

Robert A Kagan and Robert Eli Rosen, 'On the Social Significance of Large Law Firm Practice' (1985) 37 *Stanford Law Review* 399.

Donald C Langevoort, 'The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behaviour' (1997) 63 *Brooklyn Law Review* 629.

David Luban, 'Integrity: Its Causes and Cures' (2003) 72 *Fordham Law Review* 279.

Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, Cambridge, 2002).

Christine Parker, 'Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible' (2004) 23 *University of Queensland Law Journal* 347.

Milton C Regan and Jeffrey D Bauman, *Legal Ethics and Corporate Practice* (Thomson/West, St Paul, Minnesota, 2005).

Robert Eli Rosen, 'Problem-Setting and Serving the Organizational Client: Legal Diagnosis and Professional Independence' (2001) 56 *University of Miami Law Review* 179.

William H Simon, 'Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct' (2005) 22 *Yale Journal on Regulation* 1.

10

Conclusion – Personal Professionalism: Personal Values and Legal Professionalism

Introduction

At the start of this book, four models for how we might decide what is ethical behaviour for lawyers were introduced. Zealous, client-focused lawyering, *adversarial advocacy*, was contrasted with lawyering that counterbalances client advocacy with upholding the responsibilities and duties of citizens to society, *responsible lawyering*. A third approach, *moral activism*, sees the ethical duties of lawyering not so much in vigorously asserting clients' rights, or the rule of law, as in actively doing one's best in the interests of justice. Finally, the *ethics of care* sees the ethical virtues of all three of the preceding approaches as overrated in comparison with the importance of caring for and respecting the needs and moral aspirations of each client, each witness, even each opponent with whom the lawyer may come in contact, as well as cultivating their own virtue as a person and a lawyer.

In practice, of course, lawyers can and do move around between these ideal types. The zealous *adversarial advocate* might still be dominant, but even the determined and fearless criminal barrister can and does change into the quiet and grieving *carer*, standing, if they are so permitted, near their condemned client when the trapdoor drops. Consider for example the case of Nguyen Tuong Van, aged 25, of Melbourne, who was hanged in Singapore on 2 December 2005 for smuggling 496 grams of heroin through Changi airport in 2002. His Australian lawyers, Lex Lasry QC and Julian McMahon, represented him fearlessly and expertly throughout his trial and subsequent international pleas for mercy. When those pleas were rejected by Singapore, the two lawyers, who had always acted *pro bono*, applied without success simply to be present at the hanging, for no other purpose but to stand alongside their client.

There is probably no virtue in any lawyer rigidly following just one of these four ideals of ethical lawyering all the time. But it seems likely that just as individuals have preferred or comfortable psychological types,[1] so also ethically aware lawyers will tend to identify more often than not with one ethical type that expresses their values for lawyering and shapes their practice. All lawyers and law students are likely to benefit from identifying their own values, and reflecting about the ethical behaviour that they might derive from those values. In each of the previous chapters we have examined how the values represented by the different approaches would apply to certain specific situations and contexts that commonly arise in legal practice. In this chapter we examine more closely the significance of personal values-awareness for lawyers' ethics. In the third section, underlying values are explored in two concrete situations that commonly provoke very personal challenges to lawyers' values: the good character requirement for admission to practice, and the working atmosphere of medium and large law firm employment and the balance between work and the rest of life. Finally, the chapter and the book then concludes with a suggested method for using case studies to help law students (and lawyers) identify their personal values for legal practice in class (or law firm) discussions, and a worked-through example of the questions a discussion leader might ask about a case study scenario.

The Significance of Personal Values in Legal Professionalism

Underlying all our analysis of the four ethical approaches to lawyering and ethics in legal practice throughout this book are personal value commitments by scholars, as well as by practising lawyers. Consider for example the continuing debate among lawyers and ethicists about lawyers' proper role, if any, in securing justice where law does not do so. The issues of contention between the *responsible lawyer* and the *moral activist* are not merely academic. Rather each participant in this (scholarly and practical) debate conscientiously asserts the moral superiority of their own viewpoint because they believe that it matters enormously to the continued legitimacy of law and legal practice.

On the one hand, for example, ethicists like Stephen Pepper and Bradley Wendel argue that the 'liberal,' or neutral model of legal partisanship, which favours the primacy of legal rules as the major reference point in resolving ethical quandaries, is the proper framework for determining lawyers' ethics.[2] Broadly

1 See, eg, the *Myers-Briggs Type Indicator* (MBTI), a psychological categorisation instrument developed from the work of the Swiss psychologist and psychiatrist Carl Jung (1875–1961): see Isabel Briggs Myers with Peter B Myers, *Gifts Differing: Understanding Personality Type* (Davies-Black Publishing, Palo Alto, California, 2nd edn, 1995).

2 See, eg, Stephen Pepper, 'Lawyers' Ethics in the Gap Between Law and Justice' (1999) 40 *South Texas Law Review* 181; Stephen Pepper, 'Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering' (1995) 104 *Yale Law Journal* 1545; Stephen Pepper, 'The Lawyer's Amoral Ethical Role:

speaking, they ground their powerful advocacy of this position on the personal conviction that there is no greater guarantee of individual fairness or justice than that provided by the rules, in effect, by the rule of law. Their argument is not new, although it is developed by both writers with great care and sophistication. The essence of the argument is that true security comes from definable rules or, at least, from rules that are capable of flexible interpretation, as circumstances and developing moral dialogues require.[3]

In contrast, ethicists like Donald Nicolson and Julian Webb's equally impassioned injunction is first to look at the justice and fairness of the context facing the lawyer's choice about how to act, regardless of any apparently applicable rules.[4] They suggest that deep-seated social inequality governs the major western economies and that to rely on the rule of law (that is, to have blind confidence that the rules are fair and are administered fairly) as an ethical guideline is naive, or worse, complicit in the perpetuation of that inequality. Nicolson and Webb ask about the moral context: Whether the client is, directly or indirectly, behaving oppressively to those more vulnerable than themselves, or being unfairly oppressed?

The important point is not that Pepper and Wendel (who might be said to defend *responsible lawyering*) and Nicolson and Webb (who are probably *moral activists*) do not agree – but that they disagree with their personal values on display. These ethicists' write with energy and conviction because they believe it matters, and think that others need to believe and act as if it matters too. Their actual ethical judgments are almost secondary. Their commitment to open discussion of passionate positions is the essential quality that all lawyers, indeed all law students, can seek to identify with and talk passionately about, as one way to assist in working out their own ethical choices.

Inside lawyers' ethics in practice there are many very personal dilemmas. Feelings about what is right and wrong can lurk beneath the surface without being expressed. Many people may find it difficult to recognise the importance of their often confused feelings for ethical decision-making, and lawyers can be particularly poor at this skill. We often gloss over the personal dimensions of ethical conflicts by using only rules as our guide, ignoring the fact that rules are often like cryptic crosswords full of overriding principles, qualifications and provisos, and discounting our 'gut feelings' about what is right.

As we have seen in the previous chapters of this book, all sorts of (possibly unethical) things are possible if bare rules are the start and finish of decision-making about ethical conduct: Whether acting for the tobacco company that is intent on selling its product according to law (but manoeuvring to avoid liability

A Defense, A Problem, and Some Possibilities' (1986) 1986 *American Bar Foundation Research Journal* 613; Bradley Wendel, 'Civil Obedience' (2004) 104 *Columbia Law Review* 363. See also Daniel Markovits, 'Legal Ethics from the Lawyer's Point of View' (2003) 15 *Yale Journal of Law & the Humanities* 209.

3 Pepper, 'Lawyers' Ethics in the Gap Between Law and Justice'.

4 Donald Nicolson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press, Oxford, 1999).

for its past deceit about the fatal effects of tobacco smoke), or over-charging a client because the system of costing makes it easy to do so without being prosecuted for misconduct, or even acting for a new client who has interests that are different to another, long-standing and loyal client.

Rules should be only one part of the complex jigsaw of factors that lawyers consider in taking any ethical decision. The other legitimate jigsaw pieces are far more numerous than just the practice rules, and even the common law and legislation. An ethical decision must include the political and economic environment of the case:

If the lawyer helps a client do one thing or another, who benefits and who suffers? For example, will the community's needs for environmental stability be protected in a new mining complex or shopping mall? Will workers' rights to fair employment conditions be respected in the defence of applications alleging unjust dismissal? Will freedom of speech and freedom from arbitrary imprisonment be sufficiently valued in a decision to prosecute a Muslim who is perhaps a little too critical of government policy and calling for the rejection of its policies on the international Arab TV network, Al Jazeera?

- Will the lawyer, whether consciously or unconsciously, choose to benefit themselves in the way they advise the client to handle the matter? For example, will a mediated settlement be encouraged, knowing that fees will be reduced if the mediation is successful?
- Will the way the client is proposing to use the legal system fit with the purpose and policy of the particular law, or general legal standards of accountability, good faith, procedural fairness and human rights?
- Will the process and/or substance of the law be able to deal with these issues in an ethically appropriate and democratically legitimate way, or is there just too much room for powerful players to be able to manipulate the law to their will, too many gaps in the law or even corruption and political expediency that make the law untrustworthy in this situation?
- Even if reflection on these complexities is useful, ultimately are there too many variables to do anything more than leave it to the (imperfect) law to decide what to do in the circumstances?

More than anything, the jigsaw piece which must be explicitly identified and taken into account in each of these dilemmas is the individual lawyer's values – the personal, and often quite private, set of priorities that are the bedrock for each person's beliefs, attitudes and behaviours. Values do not necessarily determine our behaviour. But they are the starting point in understanding that lawyers are as human as the rest of the species, and can and should make choices about what they actually do.[5]

5 Hugh Brayne, 'Learning to Think Like a Lawyer: One Law Teacher's Exploration of the Relevance of Evolutionary Psychology' (2002) 9 *International Journal of the Legal Profession* 283, 301. In contrast to our hopeful view of lawyers' autonomy, consider Markovits' argument that there is a sense in which lawyers can't make those choices – they are forced by their role in helping apply the law to be 'unethical . . . due to historical forces beyond their control': see Markovits, 'Legal Ethics from the Lawyer's Point of View', 293.

It is not just awareness of values that is important, but also emotions: Hugh Brayne emphasises the importance of feelings in understanding values for everyone, including law students, by citing Daniel Goleman, the author of *Emotional Intelligence*:

> While strong feelings can create havoc in reasoning, the lack of awareness of feeling can also be ruinous, especially in weighing the decisions on which our destiny largely depends: what career to pursue, whether to stay in a secure job or switch to one that is riskier but more interesting, whom to date or marry, where to live, which apartment to rent or house to buy – and on and on through life. Such decisions cannot be made through sheer rationality; they require gut feeling . . .[6]

An individual lawyer may or may not be fully aware of their values or, more precisely, of the interplay between their ethical reasoning, emotional (feeling) processes and professional practice, but personal values awareness is an important aid to ethical practice.[7] The lawyer who is unaware of their own values preferences cannot so easily decide, if they can, for example, live with keeping a possible killer from 'telling what happened', from evading tax by laying a false and confusing trail of bank accounts, which utilise 'commissions' to a succession of foreign merchant banks in exchange for millisecond use of those accounts, from polluting a waterway as a consequence of expanding a client's pine plantation, or from selling shares with their client's inside knowledge, knowing that other smaller shareholders will be trailing along in the ruins of a company that is rapidly going under.

Lawyers may have some inkling of the right thing to do, but if they have not delved into their values very much, if all this ethics and 'psychology' seems a bit too hazy or suspect, and they can find a rule – whether of substantive law or procedure – which just might allow them to not think about it too much, that rule will, all too often, be located and relied upon. For this reason, the emphasis of this book has not been so much on rules of conduct[8] as on exploring the values which underlie the traditional approach to many ethical dilemmas, and then suggesting possible alternatives.

For many new lawyers, knowing what they truly *value* inside these dramas will be the starting point not just for workplace survival, but for longer-term satisfaction in the legal world. In the following section we consider two 'pressure points' in legal professional practice where the connection, or clash, between personal values and professional practice is likely to be particularly acute – proving 'good fame and character' upon admission to practice, and work-life balance in large law firm employment.

6 Brayne, 'Learning to Think Like a Lawyer', 298; citing Daniel Goleman, *Emotional Intelligence: Why It Can Matter More Than IQ* (Bloomsbury Publishing, London, 1996) 6–13.
7 Brayne, 'Learning to Think Like a Lawyer', 298. See also Donald Schön, *The Reflective Practitioner: How Professionals Think in Action* (Basic Books, New York, 1983).
8 Although, of course, conduct rules and the law of lawyering form part of the context and values structure for personal decision-making.

Two Personal Pressure Points in Legal Practice

Character Requirements for Admission to the Profession

Only those who have the required knowledge (the law degree[9]), have completed a practical legal training requirement, have proficiency in English, and are 'fit and proper' to be admitted can be admitted to the legal profession. Usually, it is only the last of these requirements that ever causes any difficulty or contention. To be 'fit and proper' a candidate for admission must show they are of 'good fame and character'. Being 'fit and proper' and of 'good fame and character' could mean almost anything: For potential lawyers, it is generally demonstrated by the absence of anything that would cast doubt on the suitability of the person for admission to the profession, such as a prior criminal history or any other indication of dishonesty, continuing mental illness that makes the candidate unfit to practise law and, on rare occasions, continued disregard for the political and social norms of the era (including perhaps the membership of suspect political organisations).[10]

This suggests that one of the implicit intentions of the admission requirements is to ensure that only those who are not only trustworthy but also conventional in their political allegiance, and unlikely to ridicule or cause embarrassment to the rest of the legal profession, are able to enter the profession. It is easy to agree that a history of criminal deceit should raise questions about whether someone should be excluded from practice, especially if they conceal that history from the admission authorities.[11] But occasionally there has been a case where someone has been refused admission to the profession because of the way they have expressed their more personal moral opinions and political convictions by ridiculing the establishment, especially the judicial establishment. Case Study 10.1 below, the *Wendy Bacon* case, is such a case. It raises questions about the extent to which dissent from dominant political and personal values will be tolerated within the legal profession.

Although the *Bacon* case was decided twenty-five years ago, in contemporary times there continue to be pressures on the free expression by citizens, and even by lawyers, of political and moral dissent which is arguably one of the hallmarks of democracy. In particular, anti-terrorism legislation in Australia now allows government to insist that only certain 'extra-reliable' lawyers, cleared for security, be allowed to represent those charged with terrorist offences.[12] Sedition legislation

9 Strictly the requirement is to complete the required 11 subjects: Sam Garkawe, 'Admission Rules' (1996) 21 *Alternative Law Journal* 109.

10 See G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, Pyrmont, NSW, 3rd edn, 2006) [2.42]–[2.105] for a general summary of the requirements. See also *Re Davis* (1947) 75 CLR 409; *Ex parte Lenehan* (1948) 77 CLR 403; *Re B* [1981] 2 NSWLR 372; *Victorian Lawyers RPA Ltd v X* (2001) 3 VR 601; *Re Legal Practitioners Act 1970* [2003] ACTSC 11 (Unreported, Higgins CJ, Crispin and Connolly JJ, 13 March 2003); *XY v Board of Examiners* [2005] VSC 250 (Unreported, Habersberger J, 15 July 2005).

11 See Reid Mortensen, 'Lawyers' Character, Moral Insight and Ethical Blindness' (2002) 22 *Queensland Lawyer* 166.

12 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 39.

introduced into Australia could, over time, swing the balance against the admission of lawyers who, for example, call for the downfall of the government. The Public Interest Advocacy Centre (PIAC) observed to a Senate Committee hearing inquiring into new anti-terrorism legislation in 2005 that a 'Bring Johnny Down' poster[13] or public rallying call could be interpreted as an incitement to violence and therefore grounds for a prosecution for sedition under the proposed legislation. Other developments such as employee psychological testing, media concentration in the hands of large businesses, increasing international wealth imbalance, even the possibility of genetically engineered 'designer babies', may also promote a climate of conformity in which all kinds of people are afraid to express dissenting opinions.

It is easy to assume that free speech is reasonably safe, particularly for lawyers, but *Wendy Bacon* shows that complacency about lawyers' rights to dissent is unwise. Potential new lawyers who are politically critical of established priorities may find it hard to get through the admission gate in the future.

CASE STUDY 10.1 The Wendy Bacon Case[14]

Wendy Bacon, a journalist and political activist sought, but was denied, admission to legal practice in the early 1980s. Her case is probably the best-known Australian example of a refusal to admit someone to practice because of conflict between a practitioners' own personal morality and the political and cultural mores of a generation.

Between 1970, when she was 24, and 1981, when she was aged 35, Wendy Bacon participated in a string of activist causes on issues including calling for the repeal of existing pornography laws, maintenance of the residential amenity in the Rocks area of Sydney Harbour, the dismissal of the Whitlam Labor government by the Governor-General in 1975, the export of uranium, the treatment of prisoners, especially female prisoners, New South Wales police corruption and the then fairly restrictive censorship laws. Over this period, Ms Bacon was arrested numerous times and received ten convictions for offences associated with her protest activities such as daubing political slogans on buildings (including the slogan 'justice is just arse'), impersonating a nun and displaying an obscene publication outside a court (as part of a protest on obscenity laws), indecent language, failure to leave premises when required to leave, and disobeying the police.

When she later applied for admission to practice, Ms Bacon was very candid about all this activity, and much else that did not result in any prosecution. But she was still denied admission, even though there were no convictions against her for dishonesty or violence, and despite her candour with the admitting authorities and the court. But the members of the NSW Court of Appeal relied, they said, upon a separate allegation that she had been dishonest.

The Court said that crucial to the question of Wendy Bacon's fitness for practice was an incident in 1979 (only a couple of years before her application for admission) when she provided bail for a criminal defendant on charges that she was helping him defend. Ms Bacon told the Court that she had borrowed the money for the bail from a mutual

13 Referring to Prime Minister John Howard.
14 *Re B* [1981] 2 NSWLR 372. See also Wendy Bacon, 'I Fought the Law . . .', *The Sydney Morning Herald*, 22 November 2003, 6.

friend and had not provided the money herself.[15] But the New South Wales Court of Appeal in deciding her admission application did not believe her and found her deceit fatal to her admission application:

> That a person can be trusted to tell the truth and, regardless of the ends, not participate in a breach of the law is fundamental to being a barrister . . . The bail matter and her evidence in respect of it establish she is not fit to be a barrister.[16]

The Court went to some pains to assert that, of itself, being a political radical, or holding extremist views on sex, religion or philosophy was no bar to admission.[17] The judges also agreed that matters from the past that could be characterised as 'youthful indiscretions' might be set to one side.[18] But, having concluded that she had lied about the bail matter, they were scathing of her claim that her previous attitudes had changed. The Court considered that Ms Bacon was unfit to practise because her claim that her previous attitudes had changed was in essence only partly true, and she remained prepared to break the law, if she thought the cause was worthy enough. According to the Court, It was a question of 'whether a person who aspires to serve the law can be said to be fit to do so when it is demonstrated that in the zealous pursuit of political goals she will break the law if she regards it as impeding the success of her cause'. The court pointed out that she had done so in the past and her dishonesty about the bail matter meant she remained prepared to do so again.[19]

DISCUSSION QUESTIONS

1. Bacon appears to have been undone by what the court determined to be a lie[20] over something that she no doubt considered important at the time – the release from custody of a friend in need – yet that lie apparently cost her, her application for admission: Should the attitude of preparedness to break the law in the cause of caring for a friend, if bona fide, be a barrier to practice?
2. Over 400 years ago, the English Lord Chancellor, Sir Thomas More, determined that a law of Henry VIII, which he considered unjust, had to be opposed and lost his life for his opposition.[21] No one expects a death sentence for disregarding any law in Australia today, but does the Wendy Bacon case suggest that we can only have lawyers who will obey the law regardless of all other considerations? Is a person who asks whether a law is just or not in the circumstances, before deciding whether to obey it, the sort of person who should, or should not, be admitted into the legal profession?
3. When you face a conflict between your values and 'the law', which will be your priority?

15 This is generally considered unethical: see, eg, Victorian Bar Council, *Practice Rules* (The Victorian Bar Inc, Melbourne, 2005) Rule 160, which says a barrister must not promote or be a party to any arrangement whereby the bail provided by a surety is obtained by using the accused's money, or by which the surety is given an indemnity by the accused, or a third party acting on behalf of the accused. Nor should a practitioner become surety for their own client's bail.
16 *Re B* [1981] 2 NSWLR 372, 395 (Moffitt P).
17 Ibid 380 (Moffitt P).
18 Ibid 381 (Moffitt P).
19 Ibid 402 (Reynolds JA); see also 395 (Moffitt P).
20 Note that Ms Bacon herself continued to maintain at her admission that she did not lie and she did not know about the circumstances that indicated that the bail money had probably come from the accused himself.
21 Peter Ackroyd, *The Life of Thomas More* (Chatto & Windus, London, 1998); Randy Lee, 'Robert Bolt's *A Man For All Seasons* and the Art of Discerning Integrity' (2000) 9 *Widener Journal of Public Law* 305.

In 2003 Wendy Bacon wrote an article for the *Sydney Morning Herald* reflecting on her experience twenty-two years earlier. After she had been refused admission to the profession by the Admissions Board, her only option for 'appeal' was to apply to the Supreme Court for a declaration that she was of good fame and character. She comments that:

> In practice this meant placing my extremely unconventional life before a group of male, middle-aged and mostly conservative judges . . . In hindsight, I can say that I regret asking the Supreme Court to pass judgment on my character. It was a demeaning process. Cross-examination, as Porter [counsel on the other side in her case] admits, is not always an effective way to reach the truth. In his book, he observes that while I did not weaken under cross-examination, I did myself a disservice by playing more to the public gallery than the judges. While I do not agree, I experienced a tension between being true to my beliefs and giving brief opinions that would not damage me too much with the judges. In fact, I would have done a greater service to both myself and the law if I had expressed more fully my continuing view that most of the freedoms we have today would not exist if people, often supported by progressive lawyers, had not confronted authority and broken unjust laws.[22]

4. What do you think? In hindsight, was it better that Wendy Bacon was not admitted to the profession, or should she have been admitted? Given her current views expressed above, should she be admitted now, if she sought admission?

Large Law Firm Employment and Work–Life Balance

The second area of concern for values arises in larger law firms. In some sections of some of these firms, the climate can be almost family-like, with supportive partners, an atmosphere of collegiality, and a shared excitement in pursuing intellectually challenging cases and transactions. But there is also evidence that new lawyers are likely to be under pressure inside larger practices, in particular, to prioritise business values and to discount or ignore entirely traditional professional values.[23]

For many new lawyers, knowing what they truly *value* inside the large law firm would seem to be important not just for day-to-day survival, but for the decision about whether or not to remain as practising lawyers. In Chapter 8, we briefly referred to findings in the *Australian Lawyers' Values Study* relating to lawyers' attitudes towards overcharging their clients. In that study, the following scenario was put to law students and lawyers in each of the three years from 2001–03:

> In your first year of work in a law firm, the partner supervising you gives you some files to get ready for 'costing'. She asks you to total the number of hours which you have spent on each file and, from her harried expression, it is pretty clear that she is concerned to charge out a significant amount on each matter. She asks you to 'round up' your hours

22 Bacon, 'I Fought the Law . . .'.
23 See Lillian Corbin, 'How "Firm" are Lawyers' Perceptions of Professionalism?' (2005) 8 *Legal Ethics* 265; Bruce A Green, 'Professional Challenges in Large Firm Practices' (2005) 33 *Fordham Urban Law Journal* 7.

> to the next hundred in each file, saying that, on average, clients are happy because the main thing they demand is quality work. You know that these clients are more or less satisfied with the firm and that your supervisor is not about to debate the issue with you. **Would you round up the hours as requested?**[24]

This scenario specified rounding up *hours* to the next 100, not just *dollars*. Rounding up hours could add many thousands of dollars to a typical bill. Only 40% of respondents in their final year of law school reported that they would *not* round up the hours to the nearest 100 hours. However, this proportion increased to 50% of respondents in year 2, and 60% of respondents in year 3.[25] In other words, exposure to practice resulted in more lawyers resisting pressure to over-charge their clients, but in the third year of that study, 40% of those surveyed were still ready to over-charge if circumstances required it.

Imagine the type of pressure on a new lawyer that can generate an intention to, in effect, steal from a client. The survey responses indicate that some new lawyers (the majority of respondents in the later years) manage to find the means to identify their values early on and resist over-charging pressure, while others do not. Many identify themselves as 'unhappy' with their working life and may cope with this type of pressure by choosing to leave this type of practice – there is an average 20–40% annual 'churn' rate of personnel across all law firms in Victoria.[26]

Circumstantial, but still anecdotal, evidence exists that such pressure on values is greatest inside the larger legal practices. Consider this reflection by a large law firm partner, who wrote anonymously to a lawyers' trade magazine in 2005:

> The large firms have very little to do with the practice of law as it was normally understood. These workplaces are combinations of several profit centres in one building(s) under centralised management. Partners hardly know each other, or at all. Profit is not a consideration; it is the sole driving force, the only criteria [*sic*] to measure success. Partners are as 'good' as their last quarter. Sometimes, they are no longer partners after one of those quarters . . . [T]he temptation, or worse than that, the common practice in the large and medium firms is to mask such inhumane pressure by inflating time sheets, undertaking such unnecessary research, exaggerating the need to review everything during discovery, undertaking overzealous due diligence processes, and other practices readers will be familiar with. In other words, we cheat and lie to make ends meet. We act dishonestly as a matter of course. We do it because we have no choice. Everyone else does it to fit within the system. There is no way out . . . Partners are aware of

24 Adrian Evans and Josephine Palermo, 'Zero Impact: Are Law Students' Values Affected by Law School?' (2005) 8 *Legal Ethics* 240, 245–6. Note that this study surveyed lawyers in all sorts of practices, not just large law firm practices.

25 Ibid; Josephine Palermo and Adrian Evans, 'Preparing Future Australian Lawyers: An Exposition of Changing Values Over Time in the Context of Teaching About Ethical Dilemmas' (2006) 11 (1) *Deakin Law Review*, 104–30.

26 Law Institute of Victoria, 'Generation Future: Working Towards a More Flexible Workplace' (2006) 80(7) *Law Institute Journal* 18, citing Alicia Patterson, Law Institute of Victoria Marketing Manager. See also Mark Herron, Annie Woodger and George Beaton, *Facing the Future: Gender, Employment and Best Practice Issues for Law Firms* (Victoria Law Foundation, Melbourne, 1996) 22–8 [evidence about the correlation between job satisfaction and intentions to leave the profession]; Andrew Boon, 'From Public Service to Service Industry: The Impact of Socialisation and Work on the Motivation and Values of Lawyers' (2005) 12 *International Journal of the Legal Profession* 229.

> their colleagues' unhappiness, because they know about their own. However, as long as budgets are met, nobody bothers to inquire (let alone propose an alternative) when a particular partner – as I have recently witnessed – had to replace her rather large entire team twice in a single year. People simply voted with their feet and left quietly en masse.[27]

This anonymous partner was undoubtedly upset. He or she went on to describe life in the large firm as all-encompassing in a way that throws the rest of lawyers' lives out of balance:

> . . . as a result of this, it can hardly be surprising if we feel irascible, abusive, unfit, and stressed. A weak month, or three in a row makes us anxious and insecure. Many tend to fight such feelings by working even harder: arriving at the office before 7 am, never leaving before 9 pm every day. I see them abusing staff, making unreasonable requests, refusing delegation, abdicating responsibility, throwing files, taking many calls at once, getting drunk at office parties, keeping their offices in appalling conditions, all while chained to their routines to preserve a lifestyle they may deplore but feel they must sustain.[28]

This 'slavery' to work appears to be more than just one experience, as was evident in the *Australian Lawyers' Values Study*. In that survey, respondents were also asked to respond to the following scenario:

> You are a junior solicitor working for a large city firm. The long working hours are causing a lot of pressure at home with your partner and your young children. This issue has been the topic of many recent conversations at home. The firm's managing practitioner asks you to show commitment on a file. This would involve even longer hours than usual with many late nights for at least the next month. The managing practitioner has intimated that if you perform well in this task it could lead to a promotion. Working longer hours would cause a serious argument at home and be highly detrimental to your relationship with your family. **Would you take on the extra hours?**

Among the minority (26–28% over the three years of the survey) who would take on the extra hours, knowing that their family life would be adversely affected, 'professional ambition' was overwhelmingly the most important value in relation to this decision.[29] The majority, who preferred not to sacrifice their family life for their ambitions, mentioned (perhaps obviously) loyalty to their children and their spouse as their motivating values. Nevertheless, in real life, lawyers might often feel that they have no real choice – their *values* might be loyalty to their family, but their *actions* are likely to reflect professional ambition because they are afraid they will lose their job and therefore the wherewithal to provide for their family if they do not.

Combining the earlier finding about the pressure on lawyers to over-charge together with their preference *not* to work the sort of hours that appear to be

27 Anonymous, 'Big Firm Partner Breaks Ranks', *Lawyers Weekly* (Sydney), 11 November 2005, 3.
28 Ibid. See also Patrick J Schiltz, 'On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession' (1999) 52 *Vanderbilt Law Review* 871.
29 Josephine Palermo and Adrian Evans, 'Relationships Between Personal Values and Reported Behaviour on Ethical Scenarios for Law Students' (2006) 24 *Behavioural Sciences & the Law* (forthcoming).

associated with over-charging, it may be that only those for whom ambition is more important than their family life will continue to work in large law firms in the future. It is also probable that those who are choosing to leave legal practice are doing so because they see a work–life balance as too difficult to achieve in the prevailing values systems of law firms. If the anonymous partner quoted above is to be believed, those remaining in practice in the larger Australian law firms may also be those for whom over-charging is tacitly acceptable.

Early awareness of these possibilities and especially of the effect that the climate of legal practice can have on lawyers personally may be important for new lawyers' decisions about the type and structure of legal practice they intend to pursue. Such awareness should also lead law students and young lawyers to ask questions (of the firm, and also of colleagues and contacts in the profession more widely) about the values and ethical climate of practice in any law firm they are thinking of joining, *before* they decide whether to take a job there.[30]

Values Awareness[31]

The values which can be said to underlie ethical choice may appear well-developed by the time a student is in law school, but the assumption of this book is that an individual law student's ethical preference is still in formation and may be open to some change when presented with possible alternatives.[32] If this is correct, then law students' early knowledge of their basic values' orientation and of the possibilities and challenges of change, may promote earlier ethical development and more satisfactory working lives. Some might realise sooner that they are not suitable as lawyers. Some will understand that they have a legal vocation, and not just an occupation. Values awareness earlier on might also help law students and lawyers make better choices at the beginning of their careers about what area of practice to pursue.[33] Greater clarity about ethical choice could also lead to a better sense of professionalism and contribute to better public regard for those professionals.

Values education can 'transform' legal ethics education to make it more effective. Complete transformation is most unlikely, but using a values awareness process with students (and lawyers) could assist in values identification and in strengthening any resolve to behave ethically. In this process, the teacher (discussion leader) should express their own views as well, in the context of respect for divergent views. If this happens, the chances are improved of law students *and* lawyers understanding their own values base and their potential choices,

30 Andrew M Perlman, 'A Career Choice Critique of Legal Ethics Theory' (2001) 31 *Seton Hall Law Review* 829.
31 This section draws on and modifies material originally published in Palermo and Evans, 'Preparing Future Australian Lawyers'.
32 See generally Evans and Palermo, 'Zero Impact'; J D Droddy and C S Peters, 'The Effect of Law School on Political Attitudes: Some Evidence from the Class of 2000' (2003) 53 *Journal of Legal Education* 33.
33 Perlman, 'A Career Choice Critique'.

before they are under too much pressure to make quick decisions that might not be ethically justified.[34]

One way of uncovering students' and lawyers' values and challenging them with new perspectives might be the following staged approach to discussing a practical ethics scenario:

1. Bring a group of law students or lawyers together and introduce them to the main ethical *methods* available as decision-making frameworks for lawyers, such as those set out in Chapters 1 and 2 – *adversarial advocacy*, *responsible lawyering*, *moral activism* and the *ethics of care*. Ask each student/lawyer to consider and express which approach to ethical decision-making (or mixture thereof) intuitively seems most appropriate for them to apply in their own legal practice (if and when they enter practice).
2. Give students a hypothetical, but realistic, practice scenario to consider, such as the case studies in this book and elsewhere.[35] Begin by asking, 'Has anyone seen anything or heard of anything similar in their work experience or practice environments?' then go on to ask a series of more specific questions designed to uncover the values each student/lawyer would apply to resolving the scenario. For illustration, we set out below as Case Study 10.2 one of the scenarios from the *Australian Lawyers' Values Study* (discussed briefly in Chapter 2 under the ethics of care heading).

   This approach can be compelling for participants because of its potential to extend their ethical 'horizon', allowing them to observe and reflect upon what they would each do in a similar situation. In many cases, people discuss what they have already done and the discussion builds from there, leading to a further discussion of their preferred (and sometimes newly re-formed) ethical method. It is not necessary to define a 'correct' answer. Often, there is none. The discussion itself tends to raise the various competing moral issues.
3. Utilise results of actual values preferences and intentional choices, such as those in the *Australian Lawyers' Values Study*,[36] displayed graphically. Invite individual participants to discuss how these results differ from their own answers. This is often a moment of great surprise because differences between the two can be significant.
4. 'De-brief' participants by informing them about any rules of conduct, legislation and case law that apply to the scenario, and revisit the choice of ethical method with which they, as individual students/lawyers, feel most

34 Adrian Evans, 'Just Following Orders' (2004) 78(5) *Law Institute Journal* 95.

35 Other resources include the scenarios in the *Australian Lawyers' Values Study* in, eg, Evans and Palermo, 'Zero Impact'; Debra Lamb, 'Appendix: Case Studies' in Stephen Parker and Charles Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (Clarendon Press, Oxford, 1995) 237 (case studies collected from interviews with Australian lawyers about their real experiences); Philip B Heymann and Lance Liebman, *The Social Responsibilities of Lawyers: Case Studies* (Foundation Press, Westbury, New York, 1988). See also Robert Eli Rosen, 'Ethical Soap: LA Law and the Privileging of Character' (1989) 43 *University of Miami Law Review* 1229 (for an excellent discussion of the use of TV shows and popular culture for ethics teaching and the limitations of using only short hypothetical scenarios to explore issues of ethical character).

36 See Adrian Evans and Josephine Palermo, 'Australian Law Students' Perceptions of their Values: Interim Results in the First Year – 2001 – of a Three-Year Empirical Assessment' (2002) 5 *Legal Ethics* 103.

comfortable. Take care to highlight any differences between what the ethical rules and law say should be done in the scenario and what the different ethical approaches say should be done, in order to encourage critique of the rules and law.

5. Finally, extend an invitation to participants to consider where they might stand, in the light of these preferences, when the issues in the scenarios come before them in real life.

CASE STUDY 10.2 Confidentiality in the Face of Likely Child Abuse

The issue of child abuse has a very high profile in Australia. The deaths of young children at the hands of family members comprise regular features of metropolitan newspapers. Nevertheless, confidentiality could be described as one of the 'core' values of the Australian legal profession and, despite some policy concerns that now question the utility of confidentiality in achieving just results in the trial process, it remains undeniably crucial as a linchpin of common law systems of representation. Consider the following case study:

> You are acting for a mother of three small children in a divorce and intervention order matter. Your client has previously shown you some old photographs of bruises and marks on the children which she, unconvincingly, claims were inflicted not by their father, but by her new boyfriend.
>
> One of the children now has blurred vision. Your client now instructs you to stop all legal proceedings as she intends to return to the children's father with her children. You believe the children will be at risk if this happens but your client tells you, as she leaves, to do nothing. **Would you break client confidentiality and inform the relevant welfare department of your fears?**[37]

DISCUSSION QUESTIONS

1. Consider your reactions to the scenario. Have you seen anything or heard of anything similar in your work experience environments, or those of your friends?
2. A similar choice may confront you at some point in your career. In reflecting on your decision about what to do here, which of the preferred ethical approaches (as described above) is most attractive to you? How would you answer the question posed in this scenario?
3. If you thought that a report to the welfare authorities would result in the Legal Services Commissioner investigating you, would you still proceed and make the report?
4. Would your answers be different if, upon later, more thorough questioning of your client, you discovered that your client has an old history of drug abuse and was not, in the past, always reliable in what she said?
5. What arguments would you raise if you had reported the matter to the welfare authorities, later discovered your client's history, and your client then complained to the Legal Services Commissioner about your breach of her confidentiality?
6. If you were the Commissioner, what attitude would you have to the complaint if the client complained about a breach of confidentiality?

37 Ibid 114.

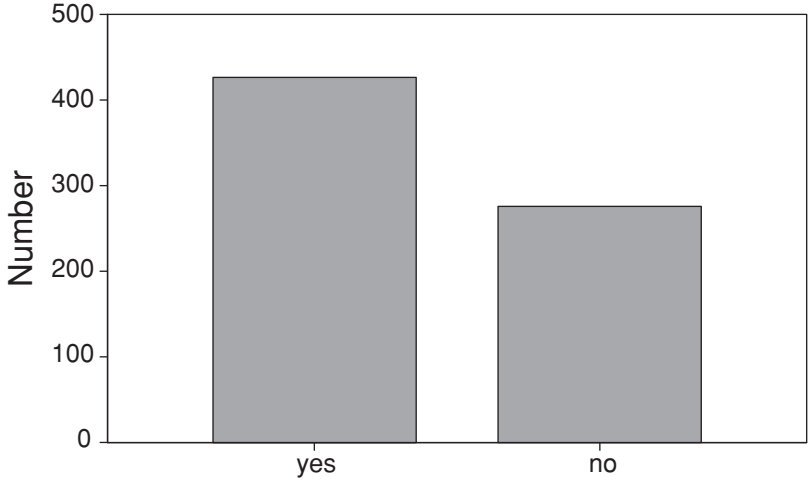


Figure 10.1 Respondents Who Would Break Confidentiality and Inform Welfare Authorities of Suspected Child Abuse – Results from 2001 Survey

Consider the following result from a survey of final year Australian law students who reflected on this scenario:

> In the first year of the survey (2001) most final year law students indicated they would breach client confidentiality (60.6%), with females more likely than males to do so (65.3%). The value that influenced the decision of participants in this instance was equality. In contrast, participants who reported they would not break confidentiality appeared to be motivated by more instrumental values such as ambition, a sense of accomplishment, and obedience.[38] In the following two years the students, now in the first and second years of their working lives, were surveyed again. Now that they were lawyers they were increasingly prepared to break confidentiality in this case. The proportion of respondents who would inform the welfare authorities rose to 67% in year 2 and 72% in year 3 (see Figure 10.1).[39]

7. How different is this result from your own choice and what does that say to you?
8. *Model Rule* 3.1 provides that:

> A practitioner must never disclose to any person, who is not a partner, director or employee of the practitioner's firm any information, which is confidential to a client and acquired by the practitioner or by the practitioner's firm during the client's engagement . . .

Model Rule 3.1.3 provides that lawyers do not have to maintain confidentiality where

> the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a serious criminal offence.

38 Palermo and Evans, 'Relationships Between Personal Values and Reported Behaviour'.
39 Palermo and Evans, 'Preparing Future Australian Lawyers'.

Does the *Model Rule* affect your choice as to what to do in this scenario? Does it change your preferred ethical method? Do you think the rule together with its exception, reflects an appropriate ethical approach to this issue?

Conclusion

The UK legal ethicist Kim Economides has made the point that lawyers need to discover what really motivates them.[40] As we have seen in Chapters 1, 2, 3, 5 and particularly 9, legal practice serves up a proportion of clients whose objectives, strategies and tactics are morally questionable, even repugnant. New lawyers face pressure to act quickly and with a clear idea as to their values and motivation in dealing with these environments. Only with this knowledge is it possible to approach ethical dilemmas with some idea of the way through. The question for the reader here is therefore: Have you, in reading this book, developed any better ideas as to what motivates you to be a lawyer?

40 Kim Economides, 'Learning the Law of Lawyering' (1999) 52 *Current Legal Problems* 392, 393.

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