

“RULES OF PROFESSIONAL CONDUCT AND PRACTICE – A PERSPECTIVE FROM THE PRIVATE BAR”

(Delivered by Graham Leung, President of the Fiji Law Society
at the Warwick Fiji on Saturday 4 December 2004)

INTRODUCTION

It is not often that I have been invited to speak to an audience who will end up being the subjects of my criticism. At an early age, I was told never to bite the hand that feeds you. So since I have been invited as a guest to this conference and will probably enjoy the organizers' hospitality, I will do my best to be as diplomatic and measured as possible in my observations of lawyers and the legal profession. As a consolation any criticisms are not personal.

Conferences such as the present one are a good time for refreshment and convivial exchanges outside the pressure cooker environment of the courts, law firms, demanding clients and bosses. While this conference affords you the chance to collect mandatory CLE points for the renewal of your Practising Certificates, it is also an opportune moment for us as a group of professionals, to take stock and to do some honest soul searching about where we are heading as a profession.

As President of the Law Society, few topics consume my interest as much as the Rules of Law Professional Conduct and Practice.

My paper this morning will therefore reflect the perspectives of a Bar leader. The kind of profession we bequeath to a future generation of Fiji Islanders will be determined by our commitment to honouring these rules – and whether we have the resolve to change our behaviour as lawyers.

Law as a Profession

There are three common features that can be attributed to law as a profession: (a) special skill and learning; (b) public service as the principal goal (c) self regulation or autonomy

Special skill and learning

Entry to the legal profession is restricted by those have fulfilled certain academic and practical qualifications.

Public service

While it is true that every profession is a job, not every job is a profession. Law and medicine are two of the oldest professions. However, architecture and plumbing are and would not be considered professions. The word "profession" implies a certain stature and prestige (see Kronman in Ethics in Practice by Rhode at p 31). It also suggests that the activity to which it is attached possesses a certain dignity not to be found in “nonprofessional” jobs.

What sets a profession apart from a trade, business, occupation or calling? The answer is to be found in notions of public service. Law is a public calling. It is part of a lawyer's calling to be concerned with the public good. This includes the integrity of the legal system, with the fairness of its rules and their administration, and the well being of the community that the laws aspire to establish.

It is this element of civic or public mindedness from which the notion that "lawyers are officers of the court" has arisen. By virtue of who they are, lawyers are inherently bound to nurse the soundness of the legal system and to take steps to insure its justice; or to refrain from steps that could lead to an injustice.

In saying this of course, I am fully aware that lawyers also have a corresponding duty to act in the interest of their client who will typically have a partisan interest that is sometimes in conflict with the public good. What then is the lawyer's duty in such a case? While he must diligently represent his clients interests his duty is to always keep one eye on the public good and ensure that is protected against the assaults of private interests including that of his own client. He must in short be a "conscious trustee of the public good".

Thus Street CJ stated in **Re Foster**:

"A trade or business is an occupation or calling in which the primary object is the pursuit of pecuniary gain. Honesty and

honourable dealing are, of course, expected from every man, whether he be engaged in professional practice or in any other gainful occupation. But in a profession, pecuniary success is not the only goal. Service is the ideal, and the earning of remuneration must always be subservient to this main purpose.” (1950) 50 SR (NSW) 149 at 151.

Sir Daryl Dawson put it this way:

“It was the subordination of personal aims and ambitions to the services of a particular discipline and the promotion of its function in the community which marked out a profession.” “The Legal Services Market” (1996) 5 JJA 147 at 148.

The profession’s most valuable asset is its collective reputation and the confidence which that inspires. If the legal profession does not inspire great confidence in the community that would be a matter of concern. It would undermine public perceptions that the profession is there to serve the public. In the past, respect from the public came of right to lawyers. Today, increasingly so, that respect must be earned, and rightly so. We as lawyers have to work hard and consistently to ensure that we remain true to our professional ideals in the service of humanity. In this regard the advice of another commentator is worth considering:

“A key benefit the profession offers to the community is its ethical commitment to the legal system and to the community. To build on this advantage requires that the ethical commitment be strengthened and reinforced in the minds of the community. Any step which creates this effect is likely to advantage the profession.” (Martin, “Perspectives on the Future of a Profession Under Reform” (July 1993) Law Society Journal 49 at 52.

Professional Rules and Code of Conduct

They are there for good reason. In a sense they are a “public relations document” which are designed to convince the public of the seriousness with which lawyers view their professional responsibilities. In turn the community is invited to place trust and confidence in the profession in the assurance that members of the profession will reflect the standards of conduct espoused in those rules. In this context the reminder of a former President of the New Zealand Law Society bear repeating:

“As they represent the judgment of the profession on how its own members should conduct themselves they, therefore, exceed both in breath and particularity the requirements of the ordinary law of the land and the dictates of moral philosophy or science. Because they

record what should be, they provide a sound and compelling distillation of good judgment to guide, lead and limit the instinctive reactions of the lawyer in the pursuit of his or her profession in those situations where the prospect of personal gain, the opportunity of commercial advantage, whether personal or for the client, might cloud the quality of professional judgment required to be exercised.”

Potter, quoted in Harley, “**Ethics, Professionalism and Success**”, Law Society Bulletin, October 1993, p.14.

Content of Rules

On 6 February 2003, the Council of the Fiji Law Society adopted a Statement ("the Statement") of Ethics, which is binding on lawyers. The Statement reinforces existing values. It also mirrors the Rules of Professional Conduct and Practice contained as a schedule to the Legal Practitioners Act.

It states *inter alia* that the law should protect the rights and freedoms of members of the community. The administration of the law should be just. The lawyer practices law as an officer of the Court. The lawyer’s role is both to uphold the rule of law and serve the community in the administration of justice.

In fulfilling this role, lawyers should:

- Serve their client's interests competently
- Communicate clearly with their clients
- Treat people with respect
- Act fairly, honestly and diligently in all dealings
- Pursue an ideal of service that transcends self-interest
- Work with their colleagues to uphold the integrity of the profession and honourable standards and principles
- Develop and maintain excellent professional skills
- Act frankly and fairly in all dealings with the Courts
- Be trustworthy
- Keep the affairs of clients confidential, unless otherwise required by law
- Maintain and defend the rights and liberty of the individual
- Avoid any conflict of interest

In fulfilling this role, lawyers are not obliged to serve the client's interests alone, if to do so would conflict with the duty which lawyers owe to the Court and to serving the ends of justice.

Failure by a practitioner to comply with any of the provisions of these rules may amount to professional misconduct: see section 101 (3). Importantly, subsection 5 of section 101 states that the rules are not exhaustive as to the matters or circumstances which might amount to professional misconduct or unprofessional conduct.

Purpose Behind Rules

The purpose of rules of professional conduct is to establish standards aimed at facilitating legal practice and procedure. Without rules, the practice of the law would quickly fall into disrepute, with consequential adverse impacts on both the legal profession as well as members of the public whom the practitioner is duty bound by contract and convention to serve. The rules serve to oil the machinery of justice and ensure that disputes and litigation are conducted within a framework that respects the rule of law. They are meant to ensure that legal practitioners behave with appropriate professionalism and objectivity. While clients may be afforded the luxury of differing with rancour and even spite, lawyers should rise above the fray. There is sometimes a temptation for lawyers to embroil themselves in their client's causes rendering it difficult for them to render dispassionate advice. In the process, relations with their adversaries could be affected.

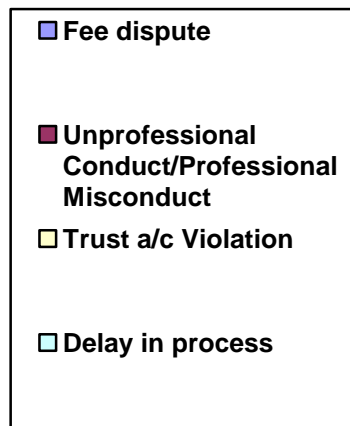
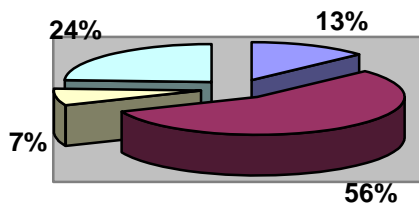
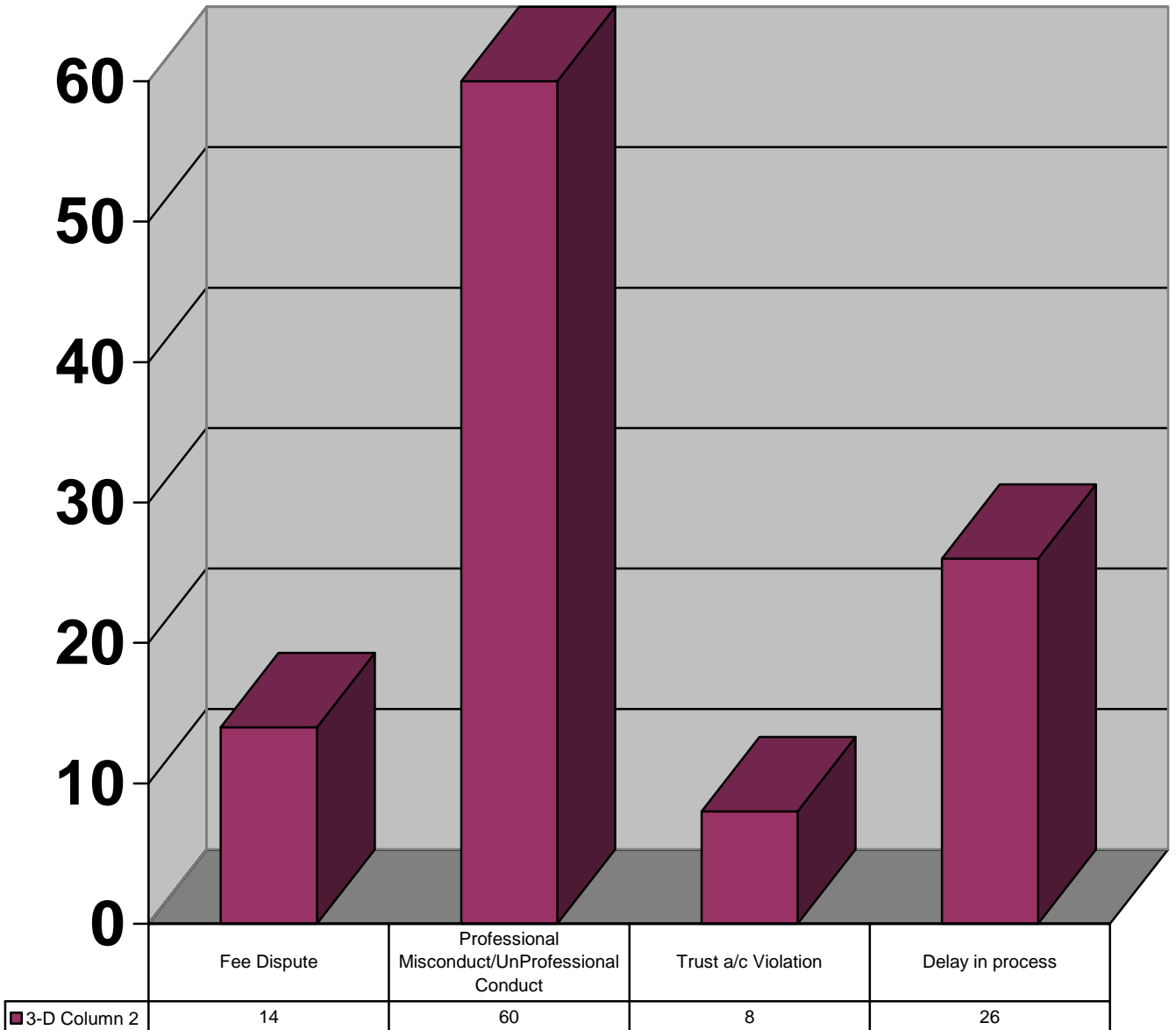
While many of the rules are trite and even self evident, a surprising number of practitioners appear to pay scant regard for them. Practitioners must treat other practitioners with courtesy and fairness. (6.01) A good example of how this rule can be practiced is in court. A junior practitioner should always give way to a senior practitioner if there is no room at the Bar table. Fairness is important. If you know of an authority or a case which goes against you, you have a duty to share that authority with your opponent and the court. A practitioner who deliberately withholds such information would be acting

unfairly. Winning a case by stealth is unethical. It is also cheap and the victory hollow.

AT THE CROSSROADS

The legal profession and Fiji as a whole is in an environment of rapid social and political change. In many senses Fiji is at a crossroads. Legal professionalism is under assault. Generally, excellence is lacking and mediocrity the norm. We are seeing a decline in standards in many aspects of national life. It is therefore timely to seek a re-examination of what it means to be a member of the legal profession in today's society.

Regrettably, an unacceptable number of members of the legal profession continue to fall short in their duties to the courts and to the wider community. If the level of complaints against lawyers received by the Law Society is anything to go by, the legal profession although not yet in the intensive care unit, is seriously ill. The following chart shows a breakdown of complaints that remain pending by category from 1998 to date.



While some might criticize my view of the profession as being overly pessimistic and even unfair, the hard facts speak for themselves. Increasingly lawyers have become the butt of rude jokes. Instead of promoting and enforcing the law, some lawyers have crossed the line between the dispensation of objective, dispassionate legal counsel and engaging in criminal activity, under the guise of political advocacy.

Fiji's recent brushes with lawlessness partially explains the tendency of some lawyers to think they are above the law. They have been lulled into a false belief that the law's boundaries either do not exist at all or do not apply to them. Sometimes lawyers may think that there are no constraints to their helping clients to do things that the lawyers imagine are lawful, only to find a court arriving at the conclusion that the client's actions were unlawful; or worse still that the lawyers should have realized this based on existing law. In this context, the observation, of Mark Twain are worth repeating:

"To do right is noble: to advise others to do right is also noble
and much less trouble for yourself."

Good lawyers understand that the ethical practice of law involves lawyers simultaneously shaping legal boundaries and recognizing the real limits to this manipulation. The most significant ethical dilemma for lawyers is therefore not the one traditional posed by legal ethics scholars, in which lawyers use their

knowledge of certain legal boundaries processed in legal, though morally questionable acts. Rather, it is that lawyers sometimes let their awareness of legal uncertainty delude them into thinking that they have more control over constructing legal boundaries than they in fact do. In this sense, the bounds of the law are inextricably intertwined with what lawyers are allowed to do in shaping those bounds. In simple terms, more and more lawyers have great difficulty recognizing what is wrong from what is right. Worse still they do not care so long as they obtain an outcome in their favour.

There are others in the profession that have fallen short of providing the level of service that is expected of lawyers by the community. Non delivery and late delivery are frequent complaints. Others still have no compunction about fiddling with trust moneys belonging to clients. In plain English this is called stealing. No self respecting profession can remain idle while some (albeit a growing minority) of its members engage in these kinds of conduct.

Judgments by the courts at various levels also indicate a growing tendency by some lawyers to be less than candid with the courts. For example, in one case, a High Court Judge made the following observations:

"The defendant annexes a false draft Ground of Appeal to the Fiji Court of Appeal (annexure MD 11) for me to consider in this application. There is a lot I would like to say

on counsel's conduct but for the moment I need only say that he should not be allowed to get away with his way of practicing law particularly with false misleading statements and oblivious of time factor in regard to proceedings in Court be they filing of documents or attending in Court or Chambers before a judge. I have already told him about my disgust at his whole conduct and I will stop at that except to say that this practitioner needs guidance from senior practitioners".

(See Bank of Hawaii v. Maxwell Reynolds 44 FLR, 1988, 138.)

In another more recent case a different High Court Judge had this to say about another practitioner who had apparently willfully misled the Court:

"Indeed in the very case referred to by counsel for the Appellant – *Utesh Raj & ors v. State* Crim. App. No. 018 of 2003, I quashed the trial magistrate's decision to reduce the charge at sentence and restored the original charge, and conviction for indecent assault.

Counsel in that case both at first instance and on appeal, was counsel in this case also. He was well aware of that decision and had a duty to bring to the attention of the trial

Magistrate in this case, the result of the appeal in the High Court. Instead he referred him only to the (reversed) decision of the Magistrate at first instance. Fortunately the Magistrate was not persuaded to reduce the charge".
(Unreported decision Criminal Appeal No. 095/2004)

As I speak there are criminal charges pending against at least two lawyers. A third is a convicted felon, has been recently disbarred and is behind bars. It is not a flattering image of the profession. The facts do not lie and support the view that an increasing number of lawyers continue to push the boundaries in ways that we have never witnessed before. It is a trend that we allow to continue to our collective detriment.

The anecdotal evidence some of which I have referred to, suggests that there is a crisis of ethics and of confidence in the legal profession today. It is in danger of losing its soul. There is also growing doubt about the intellectual capacity of some lawyers to practice their profession competently. Short cuts and shoddy work are on the increase.

Also of concern is a trend that sees the legal profession simply as a "business" rather than as a vehicle for addressing the common good in the service of humanity. For many, the law is just a livelihood which has as its main goal, the acquisition of wealth, with little regard for legal ethics and

values. Public service is seen as an unnecessary luxury. A ruthless desire for victory in contested matters coupled with an insatiable desire for larger profits threaten to compromise much of what is noble in the law. The commercialized law firm is here to stay.

Many of the changes in the attitudes of lawyers and how they conceive of their roles are in part explained by larger and more complex changes taking in society and the wider world. They do not however excuse professional misbehaviour. The cult of individualism has encouraged a culture of greed, conspicuous consumption and material success as ends in themselves. Shifting lawyer attitudes to the profession and its ideals have negatively impacted on the key values and ethics which underpin the profession. The result is that seemingly old fashioned virtues like honesty, courtesy and respect have fallen by the wayside. Driven to succeed at all costs a growing number of lawyers think nothing of being rude in the way they speak and write to one another, and in the manner in which they address the courts. Arrogance, sneak and cunning have become the tools of a growing number of lawyers. They see this as an easy substitute for intellectual resourcefulness, hard work and legal acumen. Humility is becoming something of a rarity. Who is to blame for this progressive decline in standards? We must all share some of the responsibility.

Quo Vadis?

So where do we go from here? First of all, I think we must collectively recognize as a profession that there are some fundamental issues that we need to address and to tackle. Our core beliefs and values as a profession must be underlined and reaffirmed. In doing this, we must practice zero tolerance for dishonesty, corruption and cheating. Each of these activities gives the legal profession a bad name. Each of these practices violate the core values and beliefs of the profession. Each of these acts demeans everything that our profession represents. If we turn a blind eye to corruption and deception, we will be sowing the seeds of destruction of the legal profession. It will be a bitter harvest and we will have no one to blame except ourselves.

The legal profession is like a form of life. It has a choice of being strong or weak. It can acquire new vitality or remain smug. In my view, hibernating in the mistaken belief that all is well would be a recipe for disaster. The legal profession today runs the risk of losing potency and the moral authority to act as ministers for justice.

As lawyers we must maintain the highest standards of honesty, faithfulness, diligence and competence. Given the political tides that ebb and flow in Fiji, it is all the more important for lawyers to return to the dispensation of objective and dispassionate legal advice and representation. We politicize the law at our

peril and in doing so disparage it as a science of logic based on centuries of precedent and reasoned intellectual argument.

While the Law Society has had limited success in dealing effectively with complaints against lawyers in the past, in the future, resources permitting, it will be unyielding in the pursuit of practitioners accused of misconduct. We do not have the luxury of doing nothing or not acting in timely fashion. If we allow the legal profession to practice and accept a culture of tolerance towards misconduct and professional incompetence, we run the risk of being discredited to the point where we would be relegated to the status of no more than used car salesmen.

The legal profession has the capacity to be a cohesive force in a world of disintegrating powers. This is one reason why despite the natural suspicion that lawyers frequently arouse in a democratic society, they have been entrusted with such large responsibilities in matters of governance. It is also why everyone – and not just lawyers – should be concerned by threats to the culture of legal professionalism. Lawyers may well serve the private interests of their clients, but they must care also about the integrity and justice of the legal system that defines the public order within which these interests are pursued.

If we fail to meet the challenges of redeeming the legal profession, we will imperil and endanger losing all of the characteristics that make it a profession, as opposed to a job. The collapse of the culture of legal professionalism is something none of us can afford, and the challenge it presents is one that lawyers and non lawyers alike have an interest in meeting.

If you love the legal profession, you will do all within your means to stop others from hijacking it. If you choose to do nothing the profession's detractors will slowly destroy it. The choices are stark. History will judge you on what choices you make.

Graham Leung
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