Assessing Lawyers’ Ethics
A Practitioners’ Guide

Many legal practitioners operate in an environment of seemingly endless ethical challenges, and against a backdrop of diminishing public opinion about their morality. Based on extensive research, *Assessing Lawyers’ Ethics* argues that lawyers’ individual ethics can be assessed and measured in realistic frameworks. When this assessment takes place, legal practitioners are more likely to demonstrate better ethical behaviour as a result of their increased awareness of their own choices.

*Assessing Lawyers’ Ethics* advocates a variety of peer-administered testing mechanisms that have the potential to reverse damaging behaviours within the legal profession. It provides prototype techniques, questions and assessments that can be modified to suit different legal cultures. These will help the profession regain the initiative in ethical business practice, halt the decline in firms’ reputations and reduce the risk of state-sponsored regulatory intervention.

**Adrian Evans** is Associate Dean (Staff) in the Faculty of Law at Monash University, and co-Chair of the International Bar Association’s Professional Ethics Committee. He has taught and practised law and consulted in clinical and practical legal education for thirty years. He was Coordinator of Springvale Monash Legal Service Inc., Australia’s largest clinical legal education site, from 1988–2000.
For Maria, Hugh, Dan, James and Angus
Contents

Preface page ix
List of figures xi
Acknowledgements xii

1 An opportunity for law societies 1
  1.1 Professionalism versus commercialism: An opportunity for law societies 1
  1.2 Standing aside from self-interest 6
  1.3 Ethics at the centre of professionalism 10
  1.4 Younger lawyers’ disconnection: Older lawyers’ denial 14
  1.5 Ethics assessments as ‘central value propositions’ 16
  1.6 Preventing public intervention 18

2 Ethical failures, research and core qualities 20
  2.1 Education without assessment is wasted effort 20
  2.2 Representative Australian cases of ethical dysfunction 21
  2.3 North American experience: Over-zealous and over-dependent 29
  2.4 Conflicting loyalties inside large UK and US firms 34
  2.5 Research into lawyers’ ethics 38
  2.6 Core qualities of professional activity 48

3 Understanding ethical methods and types 62
  3.1 Awareness of ethical issues 62
  3.2 Ethical approaches or methods 64
  3.3 Lawyers’ ethical types 72
  3.4 Strengths and weaknesses of the dominant approach to legal ethics 75
  3.5 Ethical complexity 81
  3.6 Ethical complexity and moral courage: The requirement to judge 87
  3.7 From virtue to courage 91

4 Mechanisms to offset business pressure on legal ethics 92
  4.1 Virtuous lawyers as acute businessmen and women 92
  4.2 Information barriers as paradigms of ethics versus business 93
### 4.3 The apparent conflict between law as a profession or as a business 95

4.4 Connecting personal values to ethical consciousness 98

4.5 Testing lawyers' competence, and indirectly their ethics 101

4.6 Institutional structures in support of individuals' ethics: Regulation of incorporated legal practices 115

4.7 The credibility of legal risk management 116

4.8 Post-admission training in competence and ethics: Not making enough progress 119

4.9 The need for practitioner opinion 124

### 5 Discovering practitioners' opinions about ethics assessment and psychological testing for integrity 126

5.1 Why consider practitioners' views? 126

5.2 Quantitative ranking of legal professionalism (ethics) issues 128

5.3 Practitioners' concerns for professionalism 131

5.4 Conclusion to concerns for professionalism 135

5.5 The climate for psychological testing for honesty and integrity 136

5.6 Significance of studies of lawyer attributes and personality 138

5.7 Assessing psychological health 142

5.8 Unravelling honesty and dishonesty 147

5.9 Assessing trustworthiness and integrity 150

5.10 Psychological testing for integrity 152

5.11 Recommendations: Assessing psychological preparedness for legal practice 159

5.12 Possible questions for practitioners about trust and integrity issues 160

### 6 Developing character: Disciplinary histories and clients' assessments 163

6.1 The relevance of the past 163

6.2 Disclosable prior offences in Victoria 165

6.3 Can clients fairly assess their lawyers' ethics? 172

6.4 Prior large-scale surveys of clients 173

6.5 Client satisfaction as an indicator of 'quality' 173

6.6 Client rating of interpersonal skills and accountability 176

6.7 Client file audits 180

6.8 Opinions of corporate clients 184

6.9 Usefulness of file audits 185

6.10 Recommendations: Developing character through disciplinary histories and client opinion 185

### 7 Measuring awareness of values and ethics 188

7.1 Towards assessment of lawyers' ethics 188

7.2 Being aware of (personal) values and emotions 191

7.3 Research assessments of ethics and 'complex judgment' 195
CONTENTS

7.4  The Melbourne Study: Lawyers’ awareness of values and ethics  203
7.5  Awareness promotes intentionality  207
7.6  Measuring a lawyer’s preference for an ethical type  209
7.7  Summary methodology for scale development  212
7.8  Implications for a comprehensive scale for assessing lawyers’ ethics  213
7.9  Assessing ethics through peer interview  214
7.10  Template example of a peer interview assessing lawyers’ ethics  218
7.11  Accumulating assessment ratings to produce a composite rating or index  220
7.12  Consequences of an inadequate assessment rating  221
7.13  Recommendations: Achieving and sustaining lawyers’ ethics  223

8  Entrenching ethics assessment  225
  8.1  Improvements, not solutions  225
  8.2  The Melbourne Study and CPD  228
  8.3  Evidence for the effect of CLE  230
  8.4  Continuing opportunities for law societies  231
  8.5  The cost benefits of ethics assessment  234
  8.6  Overall recommendations  236

Appendix A  Research Methods: The Melbourne Study  240
Appendix B  Awareness of ethical type: Detailed methodology for scale development  250
Appendix C  Prototype scale of preference for legal ethical type  254
Index  257
Effective encouragement of lawyers' ethical behaviour is important, not just to the basic functionality of the legal system, but also to public confidence in its operation. The legal profession acknowledges and to some degree compensates the community for lawyers' mistakes – that is, negligence – but our moral failures as lawyers are imperfectly anticipated and far more damaging. In Australia, recent examples of flawed behaviour include notorious cases of excessive adversarialism, particularly in the abuse of legal process, in efforts to evade payment of compensation to injured persons via document destruction and to hide corporate bribes paid to Saddam Hussein's former Iraqi regime.

Internationally, confidence in lawyers' probity is now so eroded that courts are increasingly wary of automatic reliance on their integrity. But this scrutiny cannot and must not lead us to deny our vulnerability or, at the other extreme, lose our self-confidence. More than ever, ethical legal practitioners are essential to public confidence in the complex governance of modern societies. And the prospects for 'inoculating' lawyers to improve behaviour are promising. While external regulators' scrutiny cannot often identify our dishonest colleagues in advance of their misdeeds, the far larger problem of ethics apathy or oversimplification can be tackled before damage becomes irreversible. Our law societies and bar associations can approach colleagues' confusion and even ignorance of ethics by pre-emptively assessing and periodically reassessing their ethical sophistication in the interests of the community, the economy and especially, ourselves.

This book seeks to guide practitioners through the insights of several disciplines in relation to assessment, and explains and reports on new empirical research as to what practising lawyers might be willing to accept by way of preventative ethical initiatives, in the interests of improving collective behaviour. The prize may be a reinvigorated self-confidence in the utility of the legal profession in capitalist societies not just as a service industry sector, but more importantly as a vital control on the exercise of social and economic power and the wealth it controls.

***

I am very grateful to Professors Graeme Hodge (Director of the Centre for Regulatory Studies, Faculty of Law, Monash University) and Stephen Parker (Vice-Chancellor, the University of Canberra) who have carefully read and commented on previous incarnations of various parts of this book. Professor Hodge has in particular expended much time and thought in advising on all stages of this exercise.
and his patience, dedication and energy for that task, especially in commenting on draft chapters, have been invaluable.

I also wish to thank Associate Professor Mary Anne Noone of the Department of Law and Legal Studies of La Trobe University, Judith Dickson, Director, Continuing Professional Development, Leo Cussen Institute, Melbourne and Susan Campbell AM, formerly Professorial Fellow of the Faculty of Law, Monash University, for their readiness to comment promptly on the suitability of a series of propositions about legal professionalism. Mr Michael Brett-Young, Chief Executive of the Law Institute of Victoria, has been very encouraging of the whole enterprise while Dr Barry Rogers and Ray Elliott, both practising psychologists, and Associate Professor Helen Forgasz, Associate Dean of Education (Clayton Campus) at Monash University, have been unstinting in their willingness to advise and comment on technical aspects of psychological testing processes.

Professor Stephen Barkoczy, of the Faculty of Law at Monash University, Jenny Cerins, a friend and former colleague at Springvale Legal Service and my partner, Maria Bohan, have also provided much valued commentary on the text as a whole and for that I am most grateful. Finally, it goes without saying that Maria is the person to whom I dedicate this work. Many years of nights and weekends have not been spent together, as we both would have wished, because of the need to attend to this research and bring it to fruition. None of this would have been possible without Maria’s active support, love and forbearance.

Adrian Evans
Melbourne, May 2010.
List of figures

1.1 Willingness to overcharge  page 14
2.1 Proportion of 'yes' responses in five chosen scenarios  39
2.2 Percentage of male and female responses to scenarios in years 1–3  42
2.3 Percentage responses by ethics/non-ethics groups to scenarios in years 1–3  44
3.1 The virtue arc  71
3.2 Interrelating legal ethical types  74
3.3 Example of competing ethical priorities  86
5.1 Respondents' views as to the relative importance of elements of professionalism  129
5.2 Tree display of concerns for professionalism  132
5.3 Tree display of psychological testing for honesty and integrity  155
6.1 Tree display of relevance of disciplinary history  168
6.2 Tree display of client rating of interpersonal skills and accountability  178
6.3 Tree display of client file audits  181
7.1 Tree display of awareness of values and ethics  205
Acknowledgements

An opportunity for law societies

1.1 Professionalism versus commercialism: An opportunity for law societies

‘Professionalism versus commercialism’ (as famously identified by the International Bar Association) \(^1\) sums up a central struggle within legal practice. If lawyers are to serve justice consistently and with open eyes, it can be hard to say ‘no’ to some commercial opportunities and some clients. It is not a new struggle. Individual lawyers have always had to identify on a daily basis what is ethical and decline to meet some clients’ demands. Many, probably most, succeed in this role, but in recent years major cases involving everything from document destruction to money laundering and deceit of the United Nations have occurred against a background of demanding corporate interests. In the process, negative public and especially judicial opinion about lawyers’ ethics has been galvanised.

Response to the perceived decline in professional standards has been strongest in the United States, followed closely by the United Kingdom. Rhode for example, suggests US Bar leaders should just use the disciplinary process routinely, without bothering too much about constant ‘professionalism initiatives’. \(^2\) Reflecting frustration with unethical behaviour, Rhode has sounded almost at the point of discarding ethics as a bar association goal, for what she sees as the major public concern: access to justice. \(^3\)

---


\(^3\) Ibid.
Despite apparent good intentions and successive well-regarded reports over the last 20 years, there have been no really effective campaigns by the profession to pre-emptively develop and sustain members’ ethics. Such a need is now urgent and cannot be left entirely to the traditional fixers: law schools. Ethics assessment is the missing ingredient in such efforts because it involves accountability for ethical consciousness, something that has always been missing in the professionalism versus commercialism debate. Lawyers’ competence has been extensively examined because it is a baseline element of professionalism and is relatively easy to address, but ethics is not easy to define let alone assess, despite the terrible consequences of bad behaviour for both lawyers and clients. Ethics assessment has been ignored or left in the ‘too hard’ basket for too long and is now overdue for major attention. Careful and conservative assessment of ethics also offers an opportunity to law societies and bar associations to improve their members’ attitudes in a manner that will pre-empt regulators’ less empathetic scrutiny.

There is much at stake here. Community confidence in the legal system is at least partly influenced by their lawyers’ behaviour, which can powerfully facilitate or retard global commerce. Lawyers’ collective contribution to economic activity is enormous and so, therefore, is their influence. Value-added contributions to the relatively small Australian economy by legal practices and other organisations in 2007–08 was AUS$11 billion, as compared to UK legal services for 2004 of £Stg14.028 billion and US legal services which are estimated to generate US$180 billion annually in revenue.

All professionals associated with making and increasing wealth are under scrutiny, not just lawyers, but lawyers’ influence may put them in a special category. The rolling 2008–09 global financial crises have encouraged suspicion of economists, financial planners, accountants, actuaries and the like, even though many if not most of these practitioners were powerless to prevent the losses. Yet lawyers were and are in a special position because of their broad ‘deal-making’ role. They sign off on everything. Their professionalism and sense of separation remains a critical issue in modern economies because at key points in facilitating wealth creation, and also later when that wealth is lost, their behaviour is pivotal to outcomes. If some lawyers choose commercial priorities and behave poorly in these hard cases, all lawyers’ self-esteem can suffer with them.

Lawyers’ independence then is vital, but their own corporate behaviours now also respond strongly to these economic cycles, so much so that commercially
prominent lawyers can often be identified far more readily from their business priorities than for their ethical credentials. Websites of the most influential law firms in all jurisdictions display concern for every commercial and client priority possible, but not for ethics. And attempts to identify any firm on the basis of a cyber-ethical profile are unsuccessful. If these lawyers’ own drivers are mainly commercial, the question is naturally asked: can they (psychologically) encourage at the critical time any other priority in those who pay them and upon whom they are dependent?

Fortunately, there are many lawyers in many firms who are interested in ethical accountability. Many heads of legal practices are privately understanding and supportive of an independence of spirit and purpose, although their roles hamstring them. Their admirable personal priorities and reputations positively influence a few around them or inside a partners’ meeting or a client’s boardroom, but client confidentiality means that they can offer little case-specific encouragement to law students or provide much in the way of convincing public examples so that many lawyers constantly struggle for their ethical identity. Confidentiality is a key ethical priority, but it keeps secret good deals and bad alike, unless a client consents to disclosure. Since ‘deal making’ is advertised widely, but not of course ‘deal breaking’, the public does not know the cost to lawyers who insist on an ethical position that might ruin a deal. Crucially then, many other lawyers do not hear of their ethical models.

If individual lawyers are constrained about their public positions on specific ethics issues and their law firms even more so, the same need not be true of their professional representatives who could act decisively if the case is well enough made. This book is addressed to law societies and bar associations as lawyers’ representatives; but not so much to the representative professional organisation as to the representative role of that organisation. Representative and regulatory roles are distinguished in this book because in an increasing number of jurisdictions those roles are separated. Representative associations – which for convenience are termed ‘law societies’ or ‘bar associations’ – generally have the respect of their members voluntarily offered rather than compulsorily required. However, the many associations which still retain both representative and regulatory roles, and even a co-regulatory function with an independent body, will also find the discussion relevant to their efforts to balance both functions.

The strategies advocated here are addressed to the representative role rather than the organisation per se, because that representative function is just as important to lawyers’ ethics as is that of regulation. Representatives, or those wearing a representative hat, have the positive interests of their members in necessary focus at all times and can take assessment initiatives which a pure regulator may either not have power to commence or will consider itself unable to initiate because of perceived conflicts of interest. Associations of lawyers are able to take a public lead on a professional issue if they want to, without an individual client complaining. They can be more responsive to overarching social and professional
needs than regulators because, once freed of regulatory obligation, they do not need to be constrained by the possibility of conflict in prosecuting a particular member. In fact, many members both expect and need their associations to take public-interest initiatives on many issues, without regard to the politics of regulation. A rare individual regulator may have the charisma and professional respect of lawyers, but they cannot easily expand programs to develop and improve ethics without at least some suspicion that there might be a regulatory consequence for non-cooperation. Representative societies and associations have the potential to take forward the professionalism agenda with members' cooperation, based on a sense of mutual interest, whereas regulators can only require a minimal compliance, rarely with a concern for lawyers' autonomy and never with a sense of their allegiance.

Law societies and bar associations have in these proposals a chance to strengthen public confidence in the profession and minimise the risk of government intervention when that confidence is shaken. And shaken it is, with more noticeable effect after each deplorable event. Consumer and government pressure on ethical agendas is now relentless. In common law legal systems there is an identifiable trend towards, for example, independent complaint handling. Where the dysfunction is bad enough, government intervention can extend to eliminating professional control of much more: admission controls, trust account regulation, client compensation funds and even malpractice insurance.7

Law societies have the opportunity through the measures proposed here to provide additional practical encouragement of lawyers' ethical behaviour, not just to support the legal system and resist government intervention in the profession, but to continue to build community confidence in the fairness of society. When lawyers' ethics are seen to be inferior, the ability of the justice system to function (and the social confidence which is nourished by our courts' ability to deliver justice), is undermined. Although community dissatisfaction with many aspects of lawyers' performance is not always reasonable or justified, questions about the integrity of the court process go to the heart of citizens' willingness to obey the law and must be answered, either by the profession or if not, by governments.

This book identifies various assessment strategies that law societies could use to improve lawyers' professional behaviour. Chapters 1 to 4 explore the cases and empirical research which establish the need for improved behaviours. They then describe legal ethical methods and types which are significant for assessment (that is, the ethical decision-making processes which all lawyers use, consciously or otherwise, to make decisions), and set out various approaches to counteract the commercial pressures of legal practice – notably 'quality' and competence testing in the United Kingdom, the insights from US efforts to assess medical

---

AN OPPORTUNITY FOR LAW SOCIETIES

professionalism and the emerging ‘ethical infrastructures’ of incorporation and malpractice risk management that will increasingly influence practitioners’ behaviours. Chapters 5 to 8 then discuss the opinions of a group of 30 specialist lawyers as to the usefulness of a number of compliance-like assessment mechanisms designed to encourage an individual lawyer, in their working life, to behave professionally. These chapters review what interviewees in this Melbourne-based study thought about, specifically:

- the possibilities for psychological testing of honesty and integrity,
- the relevance of disciplinary histories and clients’ assessments to ongoing licensure,
- lawyers’ awareness of values and ethical method and type, as periodically assessed by the combination of a numerical measure of awareness of ethical type and law society-controlled interview, and
- the potential of current continuing professional development schemes as mechanisms through which ethics assessment could be implemented.

It is important at this point to specify what is actually meant by ‘ethical behaviour’ when that term is used in this book. Potential understandings are numerous, but this is the definition used in following chapters: ethical behaviour is considered, decisive and proper in the circumstances. A lawyer behaving ethically will intentionally choose between the major competing legal ethical principles and rules and adopt a bona fide position and course of action, rather than responding to laziness, to intuition or to self-preservation. Such behaviour does not automatically fall on one side of a line rather than the other; for example compliance with professional conduct rules, because such rules are often inconsistent and do not always concur with underlying ethical principles. Conduct rules also vary widely across jurisdictions, making them relatively unsuitable for assessing ethical consciousness among practitioners with transnational practices. Rules are important, but if law societies limit themselves to promoting mere compliance with rules, devoid of context or situation, a continuously tightening spiral of decision making is necessary in order to try to reach ever narrowing but never certain guidance: a barren enterprise.

Similar reasons apply for the emphasis here on ethical methods and types for assessment purposes, rather than on assessing a lawyer’s knowledge of inevitably local ethical doctrines and common or civil law principles such as confidentiality, client privilege or the limits of defence advocacy in any one jurisdiction. While knowledge of ethical doctrines can be tested as readily as any piece of substantive information, such knowledge does not indicate whether a lawyer, particularly a new lawyer, is more or less likely to decide to behave ethically, when they are struggling under the considerable pressure of the practice environment.

In proposing innovation of this nature, the ethics of assessment is itself an issue. As lawyers must collectively remain a central, if not the central mediator of individual rights and freedoms in tension with increasingly centralised and information-powerful governments, the possibility for ethics assessment to be utilised against the legal profession for ignoble purposes will seem too much for
some critics. They will claim, reasonably enough, that even the conservative proposals of this book will provide a thin end of the wedge for oppressive regulation, making it progressively easier to proscribe certain assessed attitudes as 'contrary to the public interest'. Orwellian thought control might be around an even closer corner as a result. But the proposals here are very cautious for precisely this reason; they do not advocate assessment of attitudes, that is, of a person's ethics per se, but rather of their awareness of the varying options that present themselves as a basis for decision making. It might even be said that they are too conservative and that mere awareness of options will say almost nothing about how a person might choose to behave. Yet the experience of educators and researchers is highly suggestive that it is the quality of awareness,8 gained through discussion, learning about concepts and especially personal reflection on choices and on what is 'right' or 'wrong', that is more likely than anything else to give pause for consideration in ethically demanding situations and lead to better ethical behaviours in the vast majority of good lawyers who do seek to practice law with integrity. If there is any greater risk to lawyers' independence as a result of assessment of their awareness of ethical choices, it is hard to see how these proposals will produce that threat.

Overall, the argument is that better governance of lawyers by lawyers may be addressed at a practical level, not only in the general population of legal practitioners, but also among elite lawyers, by promoting and reinforcing – as positives – not just their competence but particularly their key ethical sensitivities. If adopted by law societies, this promotion and reinforcement might help to initiate a stronger culture of ethical accountability as a visible norm of all legal practice, in much the same way, for example, as 'accredited' or certified specialisation has become a visible norm of competent legal practice in a number of jurisdictions.

1.2 Standing aside from self-interest

It is certainly not suggested that lawyers as a class are no longer trustworthy. That proposition is ridiculous and extreme, but the indications of a profession under behavioural stress justifies a focus on greater ethical consciousness and accountability, just as the profession has thus far promoted lawyers' technical skills. Stephen Parker has commented:

If, for example, it is accepted that work of a particular kind is specialist work and that lawyers who meet certain standards can hold themselves out as especially competent to practise it, why can it not also be accepted that the work brings with it particular

---

responsibilities which depart from the traditional idea of what a lawyer does? In other words, if boundary-drawing is possible for competence, is it not also possible for conscience?9

How therefore might law societies manage to prioritise ethical accountability, including responsibilities to the courts and the community? At least part of the answer must lie in the constructive study of bad cases and reflection on their impact. Such scrutiny is not easy for the profession and particularly difficult for law societies and bar associations because the cases themselves often involve well-known people who remain connected to the professional organisations in various formal and informal ways. To delve into such matters without good purpose can seem offensive, gratuitous or just embarrassing. But if the purpose is reflective; if the study of such matters is designed to alert and forewarn, even to inoculate, then it must be in the interests of those societies and bar associations to make use of the history in order not to repeat it, or at least not to be defensive when the exercise is part and parcel of a wider process of enhancing ethical maturity.

One such case – and perhaps the best known recent Australian example – involved a large national law firm, Clayton Utz, which was initially criticised by the Victorian Supreme Court in an important case involving the tobacco industry. Rolah McCabe, a terminally ill victim of lung cancer, had sued British American Tobacco Australia Services (BATAS) alleging that her cancer was a result of her childhood addiction to nicotine acquired from smoking and that BATAS was responsible because it had known of the toxic and addictive qualities of tobacco at the time they were marketing their cigarettes to her as a child. Mrs McCabe succeeded in persuading Justice Geoffrey Eames at first instance that the defendant, knowing that litigation was imminent by someone addicted to nicotine and suffering from lung cancer, had destroyed its own historical documents; documents which presumably showed that it knew of the toxicity of nicotine at the time of its cigarette marketing.10 BATAS defence was struck out by Justice Eames on the basis that a fair trial had been denied to the plaintiff when the defendant (having destroyed its records) failed to provide sufficient discovery.

More particularly for the present purpose, His Honour found that BATAS was assisted by Clayton Utz in developing a ‘document retention policy’, which was in fact designed to systematically destroy incriminating documents, noting that they had ‘. . . advised Wills [BATAS] on the wording of the policy, [ensuring] that words were inserted into the written policy document to which reference could

9 Stephen Parker, Cost of Legal Services and Litigation: Discussion Paper No 5 – Legal Ethics, Parliament of Australia, Senate Standing Committee of Legal and Constitutional Affairs, 1992, p 94 [6.14]. Parker’s comments were delivered in the context of a discussion about different rules of ethics for different sectors of practice, so that, for example, criminal lawyers might adhere to strict rules of zealous advocacy while corporate lawyers might be bound to consider the public interest at least as much as their own clients’ interests.

10 McCabe v British American Tobacco [2002] VSC 73.