

# LAWYER PROFESSIONALISM IN THE 21ST CENTURY

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It is trite to observe that the environment within which legal services are supplied has witnessed change through the passage of time, but more so, it seems, in recent times. Many have remarked a perceived traversal of legal practice into merely a business,<sup>1</sup> or at least something distinct from its traditional conception, whether due to greater competitive forces, accentuated greed and/or the impact of rapidly developing technology. This has in turn squarely raised the question as to whether a corresponding shift has ensued in what may be described as ‘lawyer professionalism’.<sup>2</sup> If the professional landscape changes, it may be surmised, perhaps the notion of what it means to be a legal professional has likewise changed. The object of this article is to catalogue what has traditionally formed the accepted understanding of (lawyer) professionalism, as a springboard for inquiry into whether the parameters of lawyer professionalism have indeed shifted.

## I TERMINOLOGY

The basal inquiry, to this end, is essentially definitional. When speaking about (lawyer) professionalism, what must first be fleshed out concerns what is meant by professionalism. Like many words in the English language, it cannot be assured of a consistent, uniform meaning. Its derivation invokes the idea of professing *something*. The term ‘profess’ owes its genesis to the Latin *profiteri*, the conjugation of two words *pro* and *fateri*, meaning ‘before’ and ‘confess’. That the term ‘confession’ exhibits a distinctly religious bent makes it unsurprising that one of the main meanings of ‘profess’, including in modern English, is to affirm one’s faith or allegiance, especially to a set of (religious) beliefs. Another meaning in the modern arena refers to a claim to a quality or feeling (often falsely), for instance, to profess undying love.

The term ‘profession’, likewise sourced from Latin (*professio*), means to declare publicly. Again, this public declaration traditionally centred on matters of religious belief (say, a profession of faith). Interestingly, online data from Google books<sup>3</sup> indicates that mentions from the year 1800 onwards of the words ‘profess’ and ‘profession’ have been in decline. But the decline has been more pronounced for ‘profess’ than ‘profession’. This may be because the term ‘profession’ has assumed another meaning through time, namely a paid occupation, especially one that involves prolonged training and a formal qualification. Implicit in the relative mentions of the terms in question, it could well be surmised that any ‘profess’ aspect to being a profession, or a member thereof, has in time declined in significance. This has nonetheless proven no discouragement to a swelling in the classes of endeavour brought under the banner of a ‘profession’.<sup>4</sup>

The term ‘profession’ has spawned the ‘professional’, and attendant thereto the concept of ‘professionalism’. And it almost seems that every further suffix to the term ‘profess’ heralds a further shift away from the very notion (to ‘profess’) that historically underscores it. For instance, the professional is distinguished from an amateur, often in the sporting context. And nowadays it is common to speak of a professional attitude, or acting professionally or with professionalism. From a University of Toledo website<sup>5</sup> (pertaining to a 2005 syllabus for a geophysics unit), the following is described under the heading ‘professional attitude’:

[A] professional is punctual ... because he/she respects the valuable time of others; a professional follows the supervisor’s instructions; a professional in the field respects private and public property; a professional arrives ready to work, appropriately dressed, with his or her tools; a professional is observant and sees what needs to be done; a professional is responsible and does what should be done (carrying the instruments and tools, for example). A professional helps maintain a safe workplace with a civilized atmosphere. A professional is perceived as a representative of his or her organization and always acts in a manner that

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<sup>1</sup> A seminal work is Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press, revised ed, 1993).

<sup>2</sup> See, eg, Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press, revised ed, 2008) 27; Thomas D Morgan, *The Vanishing American Lawyer* (Oxford University Press, 1st ed, 2010) ch 2; Richard Susskind, *Tomorrow’s Lawyers: An Introduction to Your Future* (Oxford University Press, 1st ed, 2013).

<sup>3</sup> ‘Ngram Viewer’, *Google Books* (Web page) <<https://books.google.com/ngrams/>>.

<sup>4</sup> Indeed, as far back as the 1940s it was judicially observed that ‘[t]here are professions to-day which nobody would have considered to be professions in times past’: *Carr v Inland Revenue Commissioners* [1944] 2 All ER 163 [167] (Du Parc LJ).

<sup>5</sup> *Professional Attitude*, University of Toledo (Web page) <<http://www.eescience.utoledo.edu/faculty/stierman/fall2005/4610/pa.htm>>.

reflects favorably on that organization. A professional asks a question rather than risk making a serious mistake with an unfamiliar scientific instrument.

The above conveys notions that *being* a professional, or *acting* professionally, dovetails into character traits, independently of remuneration, competence, education, or the like. It is interesting, moreover, to note that when it comes to mentions according to Google Books, 'professionalism' is a word very much on the rise. From being practically non-existent in pre-1950 literature, its mention has since multiplied many times, unlike its cognate cousins 'profession' and (especially) 'profess'.

## II TRANSLATION TO LAWYERS

How does the above translate to lawyers? It is clear that the professional versus amateur distinction has little relevance to the legal arena. That lawyers are paid for their services hardly makes them professionals. Indeed, the high cost of accessing legal services, which is significantly correlated to what and how lawyers charge, has been earmarked as a factor that actually *misaligns* with some notions of professionalism. At the same time, judges (and commentators) have remarked that pro bono (or reduced fee) legal work reflects high standards of professionalism.<sup>6</sup>

Conversely, from another perspective of professionalism, it is difficult to argue against the proposition that lawyers should ideally exhibit the character traits, and associated behaviours, catalogued in the University of Toledo script extracted above. Yet if these signify what it means to be a legal professional, the description is at best incomplete. After all, they are hardly confined to what lawyers should aspire to, but could read as a creed by employees of an organisation, or otherwise as characteristics one would hope to see in one's students or even one's children.

So, what is it that marks lawyers as professionals? There are multiple indicia that have over time been identified to characterise membership of a group of persons who comprise a profession.<sup>7</sup> They do not target the paid versus unpaid distinction, nor do they necessarily or extensively probe character traits, except in the broadest of senses. Common across definitional schemas are the core indicia of special skill and learning, a commitment to public service and self-regulation.<sup>8</sup> Importantly, these should not be treated as unrelated or independent. The second counterbalances the first, before feeding into the third by way of deduction or consequence. Special skill and learning carry with them notions of elitism and selectivity. After all, in this regard, what distinguishes the professional from the non-professional is skill and learning in the former that is lacking in the latter. This in turn places the professional in a stronger position, within the relevant field of endeavour, vis-à-vis the latter, making the non-professional reliant on the professional's skill and learning. Critically, the stronger position is reflected in barriers to admission to the profession, translating to a (statutorily prescribed) monopoly on the provision of the relevant service (whether or not for reward).

This in turn dictates that, at least to an extent, the non-professional (the client) is vulnerable to the professional, not just because the client lacks the skill and learning necessary to address his or her concern or achieve his or her object, but because *only* the professional (and his or her duly qualified ilk) can legitimately provide the service that the client requires. There is accordingly scope for placing the client at a price disadvantage to the (legal) professional. The privilege that comes with an entitlement to charge for legal services, coupled with the position of respective inequality, signal the need for some counterbalance to ensure that the professional's position of power is not abused. Hence the second primary indicium: a commitment to public service. Absent such a commitment, the monopoly position could be 'milked' to the professionals' advantage, at their clients' expense. But a commitment to public service, it is reasoned, means that the profession can be trusted to regulate itself. The commitment to public service thus serves not only as a pivot, but to justify a consequence.

The broad acceptance of the foregoing as three primary profession indicia makes it apt to inquire into whether these remain the domain of the Australian legal profession in the 21st Century. The ensuing discussion reveals that each

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<sup>6</sup> See the discussion at IV A.

<sup>7</sup> See, eg, Ernest Greenwood, 'Attributes of a Profession' (1957) 2(3) *Social Work* 44; Magali S Larson, *The Rise of Professionalism: A Sociological Analysis*, (University of California Press, 1st ed, 1978) 208, 221; C Turner and M N Hodge, 'Occupations and Professions' in J A Jackson (ed), *Professions and Professionalization: Sociological Studies* (Cambridge University Press, 1970) 17, 19–50; Australian Council of Professors 'Competition Policy: The Professions, Public Interest and Competition Policy' (Policy, 2000).

<sup>8</sup> In the legal arena, these do not stray too far from the indicia espoused in American Bar Association, "...In the Spirit of Public Service": A Blueprint for Rekindling of Lawyer Professionalism (1986) 112 *Federal Rules Decisions* 243 10 (referring to: (1) the 'practice requires substantial intellectual training and the use of complex judgments;' (2) 'clients cannot adequately evaluate the quality of the service' and so 'must trust those they consult;' (3) 'the client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving both the client's interest and the public good;' and (4) 'the occupation is self-regulating — that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their client's trust, and transcend their own self-interest').

of these indicia has, particularly in the last 30 years or so, sustained some attack vis-à-vis the legal profession, which, whether singularly or collectively, could conspire to cast a shadow over the concept of lawyer professionalism in the modern era. The question posed by this article, to this end, is whether attacks of this kind have indeed combined to mark a shift in lawyer professionalism.

### III SPECIAL SKILL AND LEARNING?

#### A *Invading the Monopoly*

Some element of ‘skill and learning’ is required of any work or business endeavour, and so, for this element to carry any continuing discrete weight in locating legal practice under the banner of professionalism, something must attach that distinguishes it from the ‘run-of-the-mill’ skill and learning. Appeal could be made here to the qualifying word ‘special’, but of itself it is difficult to distinguish ‘special’ skill and learning from its common or garden variety. Perhaps the key, beyond its concatenation with ostensible commitments to public service elaborated below, is that the special skill and learning endemic to professionalism sets a *barrier to entry* into the ranks of a profession, spawning a *monopoly* wherein only those admitted to its membership (and who meet the requisite practical and other requirements) can legitimately provide the services to which that special skill and learning attaches.

Accordingly, barriers to entry sourced from the accumulation of special skill and learning come at a price. As lawyers are the primary avenue through which ‘access to justice’ may be secured, and the cost of legal services can present significant barriers to this objective, an evident tension ensues. The law has addressed this tension directly by controls, originally at common law and subsequently translated to statute, aimed at reducing the scope for lawyers’ privileged position being abused when it comes to legal costs. These include supervision over costs agreements on the grounds of fairness and reasonableness, the review of bills of costs (via taxation or assessment) and extensive costs disclosure obligations. None of these constitute invasions into the requisite special skill and learning; indeed, they presuppose lawyers being in a power position (capable of being abused) precisely because of that greater knowledge and experience.

The same tension has been confronted, albeit in more recent times, by calls to increase competition in the legal services market. This object is reflected in various ways. Costs disclosure obligations, mentioned above, have some competitive element, to the extent that they position prospective clients to compare the estimated costs of legal services across multiple law practices. Whether or not intentionally targeted at increasing competition, that the rise in practising lawyers in Australia is per capita easily outstripping increases in population<sup>9</sup> may be seen as a mechanism to place downward pressure on the cost of accessing justice. Again, this does not threaten the special skill and learning threshold unless it can be shown that increasing numbers per se function to dilute the level of skill and learning involved.

Where there may, conversely, be some threat to the special skill and learning threshold is pursuant to calls to ‘open up’ the legal services market beyond persons with core legal qualifications and experience. Competition will be increased, and with this downward pressure will be exerted on the cost of accessing (at least some incidents of) justice, it is said, if certain legal services can be legitimately performed by persons other than certificated lawyers, namely persons who do not possess the same (degree of) special skill and learning.

In Australia, in a 1994 report by the (then) Trade Practices Commission, it was recommended that some areas of legal practice be opened up to appropriately trained non-lawyers, including conveyancing, taxation, probate, simple incorporations, uncontested divorce, simple civil claims and welfare advocacy.<sup>10</sup> These recommendations saw reiteration in a 2014 Productivity Commission report.<sup>11</sup> Most Australian jurisdictions now empower non-lawyer conveyancers to perform conveyancing services, subject to a licensing regime established by statute.<sup>12</sup> Taxation advice, not limited to compliance, falls heavily within accountants’ domain. Indeed, statute requires a person to be a registered tax agent in order to provide a ‘tax agent service’.<sup>13</sup>

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<sup>9</sup> See *National Profile of Solicitors 2016 Report*, prepared for the Law Society of New South Wales by Urbis, 24 August 2017, 3. It reveals that, in the period 2011–2016, the number of solicitors in Australia increased by 24.2%. Within the same time frame, the total population increased by only 8%.

<sup>10</sup> Trade Practices Commission, *Study of the Professions: Legal*, Final Report (1994) 67–71.

<sup>11</sup> Productivity Commission, *Access to Justice Arrangements*, Inquiry Report Overview No 72 (2014) 21.

<sup>12</sup> *Conveyancers Licensing Act 2003* (NSW); *Agents Licensing Act 1979* (NT) s 5 (applies to, inter alia, conveyancing agents); *Conveyancers Act 1994* (SA); *Conveyancing Act 2004* (Tas); *Conveyancers Act 2006* (Vic); *Settlement Agents Act 1981* (WA) pt III. As to the history of conveyancers in Australia, see *Sande v Registrar, Supreme Court of Queensland* (1996) 64 FCR 123,135–45 (Lockhart J). The same has ensued in New Zealand, pursuant to the *Lawyers and Conveyancers Act 2006* (NZ), which created a new profession of conveyancing practitioners to perform conveyancing work in competition with lawyers, while applying essentially the same regulatory scheme to both.

<sup>13</sup> *Tax Agent Services Act 2009* (Cth), s 50-5 (a ‘tax agent service’ being defined in s 90–5).

There have ensued parallel calls,<sup>14</sup> and a greater yielding to corresponding pressures, elsewhere. For instance, under the *Legal Services Act 1997* (UK), the Institute of Chartered Accountants of England and Wales can now issue licences to enable its members to undertake probate work,<sup>15</sup> thereby becoming the first non-legal body in the United Kingdom to actually regulate legal services. The Canadian province of Ontario, from 2007, licensed paralegals to assist clients with small claims matters, traffic offences, landlord-tenant disputes, administrative matters and minor criminal offences.<sup>16</sup> And five years hence, in an initiative that has attracted interest by other States in the United States, Washington State introduced a regime to qualify and licence non-lawyer ‘Legal Technicians’ to provide limited legal advice on domestic relations.<sup>17</sup>

In one sense, the foregoing could be perceived to reflect some dilution of the special skill and learning element of professionalism vis-à-vis the legal profession. After all, these incursions into the profession’s monopoly are premised on the notion that certain legal tasks are capable of being performed by persons without the requisite skill and learning. From an Australian perspective, though, the incursions in question have been limited at best, chiefly in the field of conveyancing. This in turn sustains the claim to a special skill and learning endemic to the lawyer professional, bolstered by strict proscription on unauthorised legal practice<sup>18</sup> directed primarily at protecting the public from persons lacking that special skill and learning.<sup>19</sup> And areas of legal endeavour that can be described as formulaic, and possibly not underscored by the same level of skill and knowledge required of certificated lawyers, are in any event commonly performed by paralegal staff employed by a law practice, at a lower cost, under the supervision or oversight of a lawyer.<sup>20</sup>

It should also be noted that even where some aspects of the legal services market have been opened up to non-lawyers, there remain parallel regulatory regimes including core qualifications for entry. This in turn bespeaks thresholds for entry punctuated by special skill and learning, bolstered by regimes directed chiefly at protecting the public from the misuse of a privileged position.

Any suggested demise of special skill and learning underscoring legal professionalism is therefore premature at best, and more likely a misrepresentation of the reality in the Australian landscape. As foreshadowed earlier, though, the attendant entry barriers, and monopoly over the legitimate provision of legal services, attract weighty responsibility, namely a commitment to public service, elaborated below.

## IV PUBLIC SERVICE COMMITMENT?

At this juncture, it is apt to return to the notion of ‘professing’, introduced at the outset of the article. In its common usage, the term ‘profess’ translates less to a (special) skill or learning than to a belief system underscoring that skill or learning. The litmus test for the genuineness of a belief system is its conversion into actions consistent with that belief. Applied to the legal profession, what can be argued is that lawyers profess to serve the public through the use and application of their special skill and learning. Yet by itself this does little to differentiate lawyers from others who provide a service to the public requiring some semblance of skill and learning. It is accordingly apt to probe the public service endemic to the legal profession itself.

### A *Pro Bono Services?*

Some see the traditional notion of public service as misaligning with the charging of (full) fees for that service, instead punctuated by voluntariness (or altruism). This translates to the legal arena via those who maintain that professionalism

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<sup>14</sup> See, e.g., Deborah L Rhode and Lucy B Ricca, ‘Protecting the Profession or the Public? Rethinking the Professional Monopoly’ (2014) 82(6) *Fordham Law Review* 2587; Leslie C Levin, ‘The Monopoly Myth and Other Tales About the Superiority of Lawyers’ (2014) 82(6) *Fordham Law Review* 2611; Laurel A Rigertas, ‘The Legal Profession’s Monopoly: Failing to Protect Consumers’ (2014) 82(6) *Fordham Law Review* 2683.

<sup>15</sup> *Legal Services Act 1997* (UK), sch 4, sch 5, cl 2A.

<sup>16</sup> *Law Society Act*, RSO 1990, c L-8, s 1(8).5 (as amended by the *Access to Justice Act*, SO 2006, cl 21).

<sup>17</sup> See Benjamin P Cooper, ‘Access to Justice Without Lawyers’ (2014) 47 *Akron Law Review* 205.

<sup>18</sup> *Legal Profession Act 2006* (ACT) s 16; *Legal Profession Uniform Law* (NSW) s 10(1) (includes potential for imprisonment) (definition of ‘qualified entity’); *Legal Profession Act 2006* (NT) s 18; *Legal Profession Act 2007* (Qld) s 24 (includes potential for imprisonment); *Legal Practitioners Act 1981* (SA) s 21(1); *Legal Profession Act 2007* (Tas) s 13 (includes potential for imprisonment); *Legal Profession Uniform Law* (Vic) s 10(1) (includes potential for imprisonment) (definition of ‘qualified entity’); *Legal Profession Act 2008* (WA) s 12.

<sup>19</sup> *Legal Practice Board v Mullally* [2003] WASC 225 [3] (Johnson J); *Prothonotary of the Supreme Court of New South Wales v McCaffery* [2004] NSWCA 470 [36]–[38] (McColl JA).

<sup>20</sup> In *Legal Profession Conduct Commissioner v Romano* [2017] SASCFC 167 [80], for instance, the Full Court remarked that ‘[a] solicitor may properly delegate responsibility for preparing simple correspondence on routine administrative matters to an assistant’, and that ‘[s]igning correspondence of that kind after only briefly perusing it is not unsatisfactory conduct’ (although on the facts, the letter in question was not correspondence of that kind).

compels a recognised (and, for some, mandatory) commitment to pro bono legal services.<sup>21</sup> There is little doubt that pro bono work is to be encouraged. Australian judges have, to this end, branded it as ‘a desirable, indeed a necessary part, of every solicitor’s practice’,<sup>22</sup> as acting ‘in the best traditions of the legal profession’,<sup>23</sup> as well as being ‘an important expression of the continuing acceptance of their social responsibilities by members of the legal profession’.<sup>24</sup> Even so, no common law jurisdiction has to date made it mandatory for lawyers to perform pro bono work (though inducements exist,<sup>25</sup> and professional and other bodies have issued aspirational goals).<sup>26</sup> It follows that, while it cannot be denied that a commitment to serving the public can be evidenced by pro bono work, it is debatable whether this should lie at the core of public service in the context of lawyer professionalism.

## B Promoting Access to Justice

At the same time, it is difficult to argue against the proposition that the legal profession has a role to play when it comes to promoting access to justice. Such a role must be divorced, at least partly, from its financial interests in ensuring that as many persons as possible access legal services. Otherwise, it may reflect no more than a mercenary exercise. While a commitment to others need not be mutually exclusive from a drive for concurrent personal benefit, should the two *entirely* equate, it will prove difficult, if not impossible, to isolate the component that substantiates a genuine commitment to public service.

A former Chief Justice of the Supreme Court of the United States has referred to the profession’s ‘special obligations to be energetic and imaginative in producing the best quality justice at the lowest possible costs for those who use it’.<sup>27</sup> And while (increased) competition between legal service providers can drive achievement of such a goal, it is largely an externality to any inherent public service ideal. An illustration of a commitment to public service, driven in part by promoting more cost-effective access to the legal system, is the profession’s willingness to ‘unbundle’ legal services. This means to provide legal services only for a portion of the client’s overall legal needs in the matter in question. While unbundling can surface in a variety of scenarios — say, where a client wishes a second opinion on a specific point, where the lawyer in question is an acknowledged expert in a specific field germane to the broader retainer, or to overcome a lawyer’s conflict of interest in relation to part of the client’s matter<sup>28</sup> — when it comes to promoting access to justice, its primary application targets where the client cannot afford (or is unwilling to pay) the cost of full legal representation.

The commitment to public service in the context of unbundling rests not merely upon providing an avenue to access justice, but doing so in a manner that reflects the client’s best interests, within the financial parameters set by the client’s budget. Not every constraint on the scope of representation will adequately reflect or serve the client’s interests. Approaching an unbundled engagement other than from a client-centred perspective risks locating it as little more than a vehicle to secure *some* rather than no fee, and inter alia thus hardly an exercise genuinely directed at public service.

## C Encouraging the Settlement

Under the umbrella of public service, mention must be made of lawyers’ commitment to settling disputes, in a form sometimes phrased as a duty to promote settlement. In an environment that, at least for most retainers, to pursue litigation

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<sup>21</sup> See, e.g., Richard C Baldwin, ‘Rethinking Professionalism’ — and then Living It!’ (1992) 41 *Emory Law Journal* 433; Jennifer G Brown, ‘Rethinking the “Practice of Law” ’ (1992) 41 *Emory Law* 451; Richard Devlin, ‘Breach of Contract? The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession’ (2002) 25 *Dalhousie Law Journal* 335; Lorne Sossin, ‘The Public Interest, Professionalism, and Pro Bono Publico’ (2008) 46 *Osgoode Hall Law Journal* 131.

<sup>22</sup> *Goldsmith v Villanueva* [2000] NSWSC 1181 [17] (Adams J).

<sup>23</sup> *King v King* [2012] QCA 81 [15] (Chesterman JA).

<sup>24</sup> *WAFI v Minister for Immigration* [2002] FMCA 179 [16] (Raphael FM).

<sup>25</sup> Some large organisations, including governments, select legal service providers by reference to, inter alia, the firms’ pro bono commitment. For example, all law firms seeking to be on one of the Commonwealth Government panels (pre-qualified service providers) must comply with the Legal Services Multi Use List (LSMUL) conditions regardless of whether they are engaged by government to undertake legal work. One condition requires firms to commit to pro bono legal work by either being a signatory to the National Pro Bono Aspirational Target, or to nominate a target value of Pro Bono Legal Services (as defined in the Target) over a financial year.

<sup>26</sup> See, eg, New South Wales Law Society, ‘Access to Justice’ (Final Report, December 1998) recommendation 38 (recommending that the Society should consider encouraging members to undertake a minimum of 10 hours per year of pro bono work or give the equivalent level of financial support to centres that provide legal services to those unable to pay for them); Chris Dale, ‘The Blessings of Pro Bono’ (2004) 78 *Law Institute Journal* 4 (referring to the Law Institute of Victoria’s resolution that its members should dedicate a minimum of one hour per week to pro bono); Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report No 89, (2000) [5.12]–[5.20].

<sup>27</sup> Warren E Burger, ‘The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility’ (1980) 29 *Cleveland State Law Review* 377.

<sup>28</sup> As suggested in ‘Law Society’s Unbundling Guidelines’ (2017) 44(10) *Brief* 28.

to its adjudication best aligns with a lawyer's financial interests, the fact that the vast bulk of disputes are resolved without a trial cannot be seen purely as a testament to client rationality. Reflecting what a New South Wales judge has described as lawyers' 'moderating influences' in the interests of bringing clients closer to resolving their disputes,<sup>29</sup> a significant contributor to settlement is the lawyer's commitment to other than his or her own (financial) interests. Of course, there remain lawyers who, for whatever reason, seem unable or reticent to exert those 'moderating influences'. In time, though, with the increasingly pervasive notion of proportionality,<sup>30</sup> coupled with a recognised duty (supported by costs sanctions, amongst others) on lawyers (and others) to promote the just, quick and cheap resolution of issues in dispute (as part of modern civil procedure reforms,<sup>31</sup> but in any event heralded at general law),<sup>32</sup> these will (hopefully) be relegated more and more to the minority.

While imposed by law upon members of the legal profession, their source from precedent serves to differentiate the foregoing from externalities stemming from market competition. They represent the core environment that judges (and now legislators) have decreed that the lawyer–client relationship inhabit, rather than the dictates of the market. This is not to deny that market forces or demands can intersect with lawyer responses capable of serving the relevant public. An illustration, elaborated above,<sup>33</sup> is the 'unbundling' of legal services where, for reasons including promoting cost-effective access to legal services, and despite its risks, the profession has responded by countenancing the compartmentalisation of what would otherwise be entire retainers.

#### D *Fiduciary Constraints*

When speaking of 'public' service (or benefit), an obvious counterpoint is 'private' benefit. It may be difficult to couch an endeavour punctuated *above all* by a focus on private (financial) benefit or gain as propelled by a commitment to serving the public. This has in turn traditionally informed the dichotomy between a business and a profession. An American Supreme Court judge has, to this end, marked 'a distinguishing feature of any profession, unlike other occupations that may be equally respectable' in terms that 'membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market'.<sup>34</sup>

In view of the foregoing, in staking a claim to public service, the application of fiduciary proscriptions to lawyer–client relations cannot be overlooked. Lawyers comprise the only profession clearly acknowledged as subject to the full force of fiduciary responsibility. While there are no doubt other aspects to tempering lawyers' selfish pursuits, fiduciary law stands as the prime doctrine directed at this object. The law proceeds on the assumption that the lawyer is, by virtue of his or her special skill and learning, in the dominant power-position vis-à-vis the client within the parameters of the retainer. That the rise of the multi-national client has evened, or even upset, the scales in this regard has not translated to a real dilution of fiduciary responsibility — which accordingly provides a baseline for conduct irrespective of the form of practice — although it may bolster the prospect of informed client consent to a fiduciary conflict. It is this conflict, after all, to which fiduciary law is directed. The law dictates that a fiduciary (lawyer) must not engage in a dealing, transaction or matter where his or her own interests (may) conflict with those of the (putative) client. Attendant to this

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<sup>29</sup> *Berjaya Group (Aust) Pty Ltd v Ariff* [2007] NSWSC 174 [10] (Barrett J).

<sup>30</sup> Which has received a statutory imprimatur: see, for example, *Federal Court of Australia Act 1976* (Cth) ss 37M(2)(e), (3), 37N(1), (4); *Family Law Rules 2004* (Cth) r 1.07(c); *Court Procedures Act 2004* (ACT) s 5A(2)(e); *Civil Procedure Act 2005* (NSW) s 60; *Civil Procedure Act 2010* (Vic) ss 24, 28(2); *Rules of the Supreme Court 1971* (WA) O 1 r 4B(1)(e). Cf Dana Remus and Frank S Levy, 'Can Robots be Lawyers? Computers, Lawyers, and the Practice of Law' (2017) 30 *Georgetown Journal of Legal Ethics* 555 (who propose that proportionality should be the guiding principle in approaching the question of whether a legal service ought to be automated; the authors reason that while not all existing and emerging software will perform a task as well as — much less better than — a human lawyer, most software is likely to perform tasks more cheaply than a human lawyer, and so phrase the question in terms of whether 'the less-than-human performance [is] adequate for the task at hand, particularly given the lower cost'; as a result, they maintain that 'lowered quality may be an acceptable and desirable tradeoff in service of increased access').

<sup>31</sup> See *Federal Court of Australia Act 1979* (Cth) s 37M(1); *Family Law Rules 2004* (Cth) pt 1.2; *Court Procedures Act 2004* (ACT) s 5A; *Civil Procedure Act 2005* (NSW) s 56(1); *Supreme Court Rules 1987* (NT) r 1.10(1)(a); *Uniform Civil Procedure Rules 1999* (Qld) r 5; *Civil Procedure Act 2010* (Vic) s 7(1); *Rules of the Supreme Court 1971* (WA) O 1 r 4B(1)(a)–(d).

<sup>32</sup> See, e.g., *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169, 252 (Goldberg J) (aff'd *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134 (FC)); *Virgtel Ltd v Zabusky (No 2)* [2009] QCA 349 [30] (McMurdo P); *A Team Diamond Headquarters Pty Ltd v Main Road Property Group Pty Ltd* (2009) 25 VR 189; [2009] VSCA 208 [15] (Redlich JA and Beach AJA).

<sup>33</sup> See the discussion at IV.B.

<sup>34</sup> *Shapiro v Kentucky Bar Association* (1988) 486 US 466, 488–9 (O'Connor J). Similar remarks have surfaced in Australian courts: see, for example, *Re Foster* (1950) 50 SR (NSW) 149, 151 (Street CJ) ('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'; these remarks were endorsed by Daubney J in *Legal Services Commissioner v Walter* [2011] QSC 132 [19]).

‘no-conflict’ duty is what is known as the ‘no-profit’ duty, wherein a lawyer must not make an unauthorised profit from his or her engagement.

The core object served by the fiduciary proscriptions is loyalty, here by the lawyer to the client, in what a commentator has described in terms of ‘disinterested altruism’.<sup>35</sup> The conflict proscription dictates that the financial interests of a lawyer cannot prevail over a duty owed to the client, and this includes the lawyer’s financial interests not only in dealing with the client, but in representing another client. Fiduciary law, to this end, functions to proscribe (at the pain of civil and profession sanction) the prevailing of private lawyer interest over a conflicting client interest. To the extent that the object of lawyers is to serve clients’ interests, this evidently dovetails into the relevant public whom, as professionals, lawyers are called to serve. Fiduciary law, functioning as a bulwark against illegitimate conflict when it comes to client interests, thus stands as an immobile reminder of the profession’s commitment to benefit other than itself. There is, as a result, not a little confluence between the object(s) of fiduciary law and the unselfishness or altruism that many perceive to lie at the core of public service. That the fiduciary proscriptions are triggered not merely by actual conflict, but by *perceived* conflict, bolsters the commitment to public service by being concerned with appearance, not just to the individual client, but *to the public*.

Bringing it back to the notion that being a professional means, at least partly, to *profess* a belief, fiduciary law moreover gives colour to this profession. Lawyers can, unlike non-fiduciaries, legitimately market themselves — in counterbalancing the inequality between lawyer and client in skill and learning — as professing a belief, translating to practice subject to strict enforcement, in loyalty and unselfishness. To the extent that these can be seen as core ‘ethical’ values, they concurrently substantiate a commitment to ethical behaviour.<sup>36</sup>

## V SELF-REGULATION?

### A *Trajectory from Self-regulation*

Earlier was explained the interrelationship between the three primary ‘profession’ indicia: if the power position deriving from special skill and learning (and its monopoly protection) can be legitimately counterbalanced by a commitment to (or profession of) public service, there exists a justification to allow the profession to largely regulate itself. In the 1950s, a noted American academic opined that ‘[i]t cannot be insisted too strongly that the idea of a profession is inconsistent with performance of its functions, exercise of its art, by or under the supervision of a government bureau’.<sup>37</sup> More recently, another North American commentator spoke of ‘professionalisation’ in terms of ‘the belief that people who have the expertise to provide services ought to be entrusted with a substantial measure of control over these services and the working conditions in which they are provided’.<sup>38</sup>

It is important to appreciate what is meant here by ‘self-regulation’. The traditional notion of a profession, and indeed the legal profession, was essentially as a ‘club’, which determined matters going its own membership (including admission, removal and discipline) and rules, without the input or oversight of others (especially of government). This stemmed, as Sir Daryl Dawson has explained, not only from the members of a profession alone possessing the knowledge necessary to ensure the maintenance of proper standards but ‘because it was they who, above all others, could be trusted to apply the appropriate discipline for the purpose’.<sup>39</sup> For lawyers, this remained subject to the court, of which they are officers.

Yet whether by reason of some incursion into the special skill and learning necessary to perform legal work, or question marks over the profession’s commitment to public service (or, perhaps more tellingly, a societal challenge to the value of expertise,<sup>40</sup> coupled with governmental responses thereto, including those informed by competition policy),<sup>41</sup> the above notion of self-regulation has passed very much by the wayside. Of course, legal profession statutes have long put pay to complete self-regulation. But these were a mere shadow of the modern regulatory environment. Not only is today’s

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<sup>35</sup> Peter Birks, ‘The Content of Fiduciary Obligation’ (2000) 34 *Israel Law Review* 3, 12–22.

<sup>36</sup> See Gino E Dal Pont, ‘Seminary Students, Ethics, and Lawyers’ Claims to Ethical Status’ (Paper presented at Continuing Legal Education Association of Australasia Annual Conference, 10 September 2004).

<sup>37</sup> Roscoe Pound, *The Lawyer from Antiquity to Modern Times*, (West Publishing, 1st ed, 1953) 361.

<sup>38</sup> Jerome E Bickenbach, ‘The Redemption of the Moral Mandate of the Profession of Law’ (1996) 9(1) *Canadian Journal of Law & Jurisprudence* 52.

<sup>39</sup> Daryl Dawson, ‘The Legal Services Market’ (1996) 5 *Journal of Judicial Administration* 147, 148–9.

<sup>40</sup> See Tom Nichols, *The Death of Expertise*, (Oxford University Press, 2017) ch 1.

<sup>41</sup> Dawson, above n 39, 149 (‘because governments understand competition and the mechanisms necessary to ensure its existence, self-regulation is no longer seen as adequate and, indeed, is seen as inconsistent with a competitive environment’).

regulatory schema more comprehensive and detailed — witness the exponential growth in the size of legal profession legislation — it has supplanted the regulatory function of the profession’s ‘clubs’ (law societies and bar associations) by bodies established by statute and comprised (partly) of lay membership. The ‘clubs’ no longer determine their own membership, excepting chiefly to the extent that they are charged by statute to issue practising certificates, and place conditions thereon. This is not a phenomenon confined to Australia.<sup>42</sup>

Complaints about members of the legal profession are now almost uniformly directed to independent statutory offices or bodies. Likewise, the investigation and determination of complaints, whether or not as a prelude to hearings before administrative (not professional) tribunals or courts. Moreover, it cannot be assumed that the rules governing legal practice, including professional conduct rules, remain wholly the profession’s domain. Nor are investigations into suitability for admission to practice nowadays confined to professional bodies.

## B *Self-policing*

This invasion into the profession’s self-regulation does not mean that its members have no ongoing interest in professional regulation. Those who are admitted to the profession, the standards expected of its membership, and the consequences of falling short thereof, remain of interest to professional bodies. Indeed, these should presumably remain of interest to each member because, irrespective of any regulatory takeover, the conduct of individual lawyers has the capacity to tarnish or, in the alternative, enhance the reputation of the profession as a whole, and thus public confidence therein.<sup>43</sup> Stated another way, there should ideally prevail a justifiable jealousy to preserve that reputation and confidence. Few would, to this end, query the observation of an English judge that ‘a profession’s most valuable asset is its collective reputation and the confidence which that inspires’.<sup>44</sup>

Beyond their own professional conduct, one way whereby individual members of the profession can foster this reputation and confidence is to be alert to, and if necessary, report misconduct by other members. Reporting of lawyer misconduct forms the duty of judges who become aware of it<sup>45</sup> and, pursuant to legal profession legislation, may also come within costs assessors’ domain when surfacing in the course of costs assessment.<sup>46</sup> While judges and costs assessors may become privy to apparent lawyer misconduct as part of their roles, as only few matters actually arrive at the door of the court or are the subject of costs review, the preponderance of misconduct is shielded from these forums. Complaints against lawyers instead primarily derive from disgruntled clients. Statistics nonetheless repeatedly reveal that a substantial proportion of client complaints prove, if not entirely unrealistic or baseless, to lack a sufficient foundation for further disciplinary investigation, let alone ultimately disciplinary sanction. This is not to be unduly critical of clients, and no doubt there are instances where better client communication or interaction would have obviated the complaint, but it does reflect the reality that clients are often not well positioned to understand and make informed assessments of lawyer (mis)behaviour.

Other lawyers do not suffer this disadvantage, at least not to the same extent. And most lawyers, whether in non-contentious or contentious matters, regularly deal with other lawyers, including with lawyers within their own practice. Of anyone, they are thus best placed to both witness and assess instances of ostensible misconduct by their peers. Presumably informed by this, legal profession legislation obliges lawyers to report other lawyers’ dishonesty or irregularity in accounting for trust money.<sup>47</sup> (There is also a statutorily-sourced duty to *self-report* convictions for serious offences or tax offences and insolvency.<sup>48</sup>) Whereas a need for vigilance and monitoring when it comes to proper trust

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<sup>42</sup> In the United Kingdom, for instance, the *Legal Services Act 2007* (UK) abolished the Law Society’s regulatory function, instead delegating it to a separate and independent Solicitors Regulation Authority.

<sup>43</sup> This in turn explains why reference is not infrequently made to ‘general deterrence’ as part of disciplinary determinations.

<sup>44</sup> *Bolton v Law Society* [1994] 1 WLR 512, 519 (Sir Thomas Bingham MR).

<sup>45</sup> See, e.g., *Spector v Ageda* [1973] ch 30, 50 (Megarry J); *Zelino v Budai* (2001) 47 ATR 488 [238] (Palmer J); *Re Read* (2006) 243 LSJS 368 [20] (Besanko J); *Perpetual Trustee Co Ltd v Cowley* [2010] QSC 65 [134] (Atkinson J); *Re Manlio (No 2)* [2016] VSC 130 [78]–[85] (McDonald J); *Simic v Norton* [2017] FamCA 1007 [36]–[38] (Benjamin J).

<sup>46</sup> *Legal Profession Act 2006* (ACT) s 303; *Legal Profession Uniform Law* (NSW) s 202; *Legal Profession Act 2006* (NT) s 370; *Legal Profession Act 2007* (Qld) s 343; *Legal Practitioners Act 1981* (SA) sch 3 cl 50; *Legal Profession Act 2007* (Tas) s 332; *Legal Profession Uniform Law* (Vic) s 202; *Legal Profession Act 2008* (WA) s 307.

<sup>47</sup> *Legal Profession Act 2006* (ACT) s 231(2); *Legal Profession Uniform Law* (NSW) s 154(2); *Legal Profession Act 2006* (NT) s 256(2); *Legal Profession Act 2007* (Qld) s 260(2); *Legal Practitioners Act 1981* (SA) Sch 2 cl 24(2); *Legal Profession Act 2007* (Tas) s 254(2); *Legal Profession Uniform Law* (Vic) s 154(2); *Legal Profession Act 2008* (WA) s 227(2).

<sup>48</sup> Termed ‘show cause events’ or, in New South Wales and Victoria, ‘automatic show cause events’: *Legal Profession Act 2006* (ACT) s 61; *Legal Profession Uniform Law* (NSW) s 88; *Legal Profession Act 2006* (NT) s 62; *Legal Profession Act 2007* (Qld) s 68; *Legal Practitioners Act 1981* (SA) s 20AH; *Legal Profession Act 2007* (Tas) s 73; *Legal Profession Uniform Law* (Vic) s 88; *Legal Profession Act 2008* (WA) s 62. In New South Wales and Victoria, the legislation now also makes provision for ‘designated show cause events’, directed to Australian legal practitioners who have engaged

accounting cannot be gainsaid, neither statute nor professional rules cast any further obligation on lawyers to report their peers' misconduct. There is not even acknowledgement of discretionary reporting in this regard, although in no jurisdiction is reporting proscribed (unless, say, it involves the making of allegations without a factual foundation).

Australia, in this regard, is out of step with various other comparable jurisdictions. The English rules mandate reporting where a lawyer becomes aware of serious misconduct by another lawyer, albeit taking into account, where necessary, the duty of confidentiality to a client.<sup>49</sup> The New Zealand rules prescribe likewise in the event of reasonable grounds to suspect that another lawyer has been guilty of misconduct, subject to any legal professional privilege.<sup>50</sup> Hong Kong solicitors must report 'any professional misconduct or dishonesty on the part of another solicitor or a member of his staff, or of any other person purporting to represent or to be in the employment of another solicitor or firm', after having obtained client consent if necessary.<sup>51</sup> In the United States, a lawyer who knows of another's violation of the professional rules that 'raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects' must report this to the appropriate professional authority.<sup>52</sup>

The Canadian rules address the issue more comprehensively by imposing a reporting obligation, unless it would be unlawful or breach lawyer-client privilege, as regards:<sup>53</sup>

- the misappropriation or misapplication of trust monies;
- the abandonment of a law practice;
- participation in criminal activity related to a lawyer's practice;
- the mental instability of a lawyer of such a nature that the lawyer's clients are likely to be materially prejudiced;
- conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer; and
- any other situation in which a lawyer's clients are likely to be materially prejudiced.

The above rules aim not only to protect the public but to preserve the reputation of the profession. 'Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue', it is said, as '[e]vidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future'.<sup>54</sup> Moreover, making reporting mandatory 'reduce(s) the internal debate between one's desire to weed out the corrupt element from the bar and the concern that one must not snitch, squeal, or tattle on a colleague'.<sup>55</sup>

Issues surrounding a mandatory rule nonetheless remain difficult, chiefly because obliging a report may locate a failure to report as itself amounting to misconduct. In the United States, where the rule has antecedents harking back to 1908,<sup>56</sup> the first instance of lawyer discipline for failure to report awaited 1988.<sup>57</sup> If there is to be an enforceable duty of this kind, the following, at least, must be clear:<sup>58</sup> the level of proof that attracts the obligation; what comes within and falls outside the duty; and the moment when the duty is triggered. Then there is the issue of protecting a reporting (whistleblowing) lawyer, who may fear reprisal. This concern is heightened in the intra-firm scenario, where a lawyer (particularly a junior lawyer) is likely to be reticent to report misconduct for fear of sacrificing his or her employment, or even career. Yet it is here that a reporting duty arguably has the greatest value. It stands to reason that unless a duty to report, beyond being phrased in precise terms, is adequately supported by a process that protects the lawyer fulfilling the duty, it is unlikely to be exercised.

That these are vexed issues does not mean that they should be ignored. At present, there is no indication in Australian professional rules as to the appropriateness or otherwise of reporting other lawyers' misconduct. If the

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in legal practice outside the conditions imposed by their practising certificates or otherwise practised without holding the requisite professional indemnity insurance: *Legal Profession Uniform Law* (NSW) s 91; *Legal Profession Uniform Law* (Vic) s 91.

<sup>49</sup> Solicitors Regulation Authority, *SRA Code of Conduct 2011* (2011) O (10.4).

<sup>50</sup> *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008* (NZ) SR 2008/214, r 2.8. A discretion to report applies where there are reasonable grounds to suspect that another lawyer has been guilty of (the lesser) unsatisfactory conduct at r 2.9.

<sup>51</sup> Law Society of Hong Kong, *Hong Kong Solicitors' Guide to Professional Conduct* (2013) vol 1, 2013.

<sup>52</sup> American Bar Association, *Model Rules of Professional Conduct* (2018) r 8.3(a). See also Restatement §5(3).

<sup>53</sup> Federation of Law Societies of Canada, *Model Code of Professional Conduct* (2017) r 7.1–3.

<sup>54</sup> *Ibid* comment [1].

<sup>55</sup> Ronald D Rotunda, 'The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel' (1988) *University of Illinois Law Review* 992.

<sup>56</sup> In its first code (American Bar Association *Canons of Professional Ethics*, (1908)), the American Bar Association obliged lawyers to 'expose without fear or favour before the proper tribunals corrupt or dishonest conduct in the profession': canon 29.

<sup>57</sup> *Re Himmel* 533 NE 2d 790 (Ill, 1988) (involving a lawyer's failure to report another lawyer who had converted a former client's funds, in an attempt not to disincite the errant lawyer from fulfilling his promises to reimburse the client).

<sup>58</sup> See Gino E Dal Pont, 'Mandatory Lawyer Reporting of their Peers' Misconduct: Should Australia Follow Suit?' (2014) 17 *Legal Ethics* 23.

profession is keen on sustaining public confidence, involvement in its regulation via some expectation of misconduct reporting, *whether or not enforced by potential disciplinary sanction*, may prove one of the few avenues at its disposal.

## VI CONCLUSION

In an ever-changing society, it is unsurprising that the landscape in which legal services are supplied should not remain static. But this does not mean that the core of lawyer ‘professionalism’ should also be blown by the prevailing winds. While the three core indicia of professionalism probed in this article have not been entirely unshaken in this regard — there have been calls for incursions into special skill and learning that underscores entry to the profession, question marks have been raised over the profession’s commitment to public service, and notions of self-regulation have been diluted — their resonance within the profession remains. Special skill and learning continue to underscore and inform entry barriers, and associated privileges of entry. In speaking of a commitment to public service, various facets intrinsic to the lawyer–client relation place client (and thus ultimately broader public) service ahead of lawyer interest. And while the profession has been (at least partly) deprived of various regulatory functions, evidence of a subsisting jealousy in preserving its reputation may itself bespeak some commitment to professionalism.

The take-home message thus remains as valid in the 21st Century as in earlier times. Professionalism involves something ‘cerebral’, emanating from the exercise of judgment under a mantle of special skill and learning. It also involves something ‘ethical’, under the banner of public service, punctuated by the core notion of unselfishness when it comes to client matters. And, notwithstanding the demise of much self-regulation, it arguably involves a self-policing dimension informed by ‘jealousy’ over the reputation of the profession. These in turn give colour to what lawyers may legitimately ‘profess’.