

**ADDING VALUE FOR LAWYERS, CLIENTS,  
AND THE PUBLIC: THE BUSINESS BENEFITS  
OF ETHICALLY-INFORMED PRACTICE**

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*When [managers] claim that competition or capital markets are relentless in their demands, and that individual companies and managers have no scope for choices, it is on the strength of the false premise of determinism that they free themselves from any sense of moral or ethical responsibility for their actions.<sup>1</sup>*

There is a growing sense the public no longer accepts that something can be legal and yet unethical, particularly in relation to the conduct expected of legal professionals.<sup>2</sup> Nationally, law societies appear to be responding and making an effort to ensure that their members attain the goals set for them by the public.<sup>3</sup>

In 2006, the Queensland Law Society (“QLS”) conducted a survey and found that most instances of ethical misconduct by members happen as a consequence of ‘extra and unexpected pressures on the practitioner, lack of preventive or check-up systems in the workplace, or more generally the existence of an unethical culture at the firm’.<sup>4</sup> As a result, the QLS recognised that a rules-only approach does not adequately cover all the issues that lawyers will face.<sup>5</sup> Instead, it recommended

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<sup>1</sup> Sumantra Ghoshal, ‘Bad management theories are destroying good management practices’ (2005) 4 *Academy of Management Learning and Education* 75, 79.

<sup>2</sup> Linnea McCord, ‘The line between unethical and illegal may not exist’, *Los Angeles Business Journal* (23 October 2006). See also Robert A Clifford, ‘The public’s perception of attorneys: a time to be proactive’ (2000) 50 *DePaul Law Review* 1081; Sue Farron, Margaret Llewellyn, and Kath Middleton, ‘Public perception of the legal profession: attitudinal surveys as a basis for change’ (1995) 20 *Journal of the Legal Profession* 79. The authors suggest that the attitudes of the Australian public towards the legal profession are informed by the popular culture portrayals of attorneys in the United States: see, for example, Richard K Sherwin, *When Law Goes Pop: The Vanishing Line between Law and Popular Culture* (2000).

<sup>3</sup> Most of the initiatives promoted by the law societies are not publicly accessible to non-members of the respective associations, but the following examples are demonstrative of these developments. The most prevalent initiative has involved the establishment of ethics committees that guide the initiatives in the respective jurisdictions. The Law Society of New South Wales has established an Ethics Committee and an Ethics Unit, which appears to go beyond the committee function and conducts research and provides legal ethics education: Law Society of New South Wales, *About the Ethics Unit* (2009) available at: <<http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/Ourrole/index.htm>> at 13 September 2009.

<sup>4</sup> Max Del Mar, Ethics Consultant and Policy Advisor to the Queensland Law Society, notes that Queensland is lagging behind other states on ethical issues and exhorts them to rectify this: Max Del Mar, ‘Ethics: Time to take the initiative’ (2006) April *Proctor* 21, 23.

<sup>5</sup> Maksymilian Del Mar, ‘A moral commonwealth of lawyers: the philosophical foundations of the regulation and education of legal professional ethics’ (Paper presented at the Annual Conference of the International Association for Legal

that lawyers, in considering their advice to clients and their personal behaviour, reflect on the values that inform their choices, keeping in mind that lawyers play an important role in society.<sup>6</sup> In other words, to be truly ethical, a lawyer ought to make decisions only after the implications of those decisions are considered.<sup>7</sup> Significantly, the QLS stressed the importance of convincing both professional bodies and individual law firms that the environment they create through the activities of their members shapes the consequences of lawyers' daily decision-making.<sup>8</sup> In effect, the preferred ethical approach should involve professional bodies, law firms, and individual practitioners.<sup>9</sup>

Legal academics also acknowledge that the professional rules alone do not always provide an answer to ethical dilemmas,<sup>10</sup> and some different approaches to lawyering have been proposed. These alternative conceptions of lawyering promulgate the idea that lawyers often refer to other values, like morals, to guide their decisions. This may, and even should, involve lawyers in a more open discussion with their clients about the consequences of lawyers' 'legal', but not necessarily ethical, advice. In reflecting on some recent 'unethical' world events like Enron, Rhode comments that it is 'a good moment for moralists' and 'integrity is in fashion'.<sup>11</sup> Yet will law firms embrace the proposals of both the law society and academics?

There is a growing acknowledgement that firm culture influences the conduct of the individual practitioners within it.<sup>12</sup> For instance, one commentator asserts that 'culture and technique, the etiquette and skill of the profession, appear in the individual as personal traits ... the longer and more rigorous the period of initiation into an occupation, the more culture and technique are associated with it, and the more deeply impressed are its attitudes upon the person'.<sup>13</sup>

It is the writers' thesis that ethical conduct that takes account of one's values and moral considerations could realise the financial demands of practicing law as a commercial enterprise. This approach goes some way to facilitating greater job satisfaction for all lawyers in the hierarchy. Therefore, the writers' contention is that

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Professional Ethics, Auckland, New Zealand, June 2006) 7.

<sup>6</sup> Ibid 3, 4.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid 15. In this regard he refers extensively to the work of John Dewey, *Human Nature and Human conduct: An Introduction to Social Psychology* (1922) and John Dewey, *Democracy and Education* (1944) 12.

<sup>9</sup> Del Mar, above n 2, 21.

<sup>10</sup> O'Dair has made a study of the effects of regulation including ethical codes and concludes that rules or regulatory control have their limits. He maintains that the ethical sensitivity commitment of lawyers determines the outcome achieved: Richard O'Dair, *Legal Ethics: Text and Materials* (2001) 5. Zacharias also notes: 'The codes do not tell lawyers how to reconcile conflicts between their personal sense of ethics and the rules...': Fred C. Zacharias, 'Specificity in professional responsibility codes: theory, practice, and the paradigm of prosecutorial ethics' (1993) 69 *Notre Dame Law Review* 223, 288.

<sup>11</sup> Deborah L Rhode, 'If integrity is the answer, what is the question?' (2003) 72 *Fordham Law Review* 333.

<sup>12</sup> See Christine Parker, 'Law firms incorporated: how incorporation could and should make firms more ethically responsible' (2004) 23 *University of Queensland Law Journal* 347, 365; Christine Parker, Adrian Evans, Linda Haller, Suzanne Le Mire and Reid Mortensen, 'The ethical infrastructure of legal practice in larger law firms: values, policy and behaviour' (2008) 31 *University of New South Wales Law Journal* 158, 168. See also Russell Cocks, 'Ethical ramifications of corporatised legal practice' (2001) 6 *Deakin Law Review* 334.

<sup>13</sup> Everett Cherrington Hughes, *Men and Their Work* (1958) 36.

positive business outcomes will result from adopting and inculcating a more ethically-informed approach to legal practice, but in asserting this it is important to convince the institutions involved, the professional bodies and perhaps more importantly the law firms,<sup>14</sup> that employ the individuals who practice law.<sup>15</sup> Fundamentally, managers of law firms need to lead by example and create a corporate culture that values ethical legal practice.

#### I A PROFESSIONAL IDENTITY CRISIS

It is a widely held perception that the role of the professions is changing,<sup>16</sup> and many authors suggest that this is not a positive development.<sup>17</sup> Sir Daryl Dawson, a former High Court judge,<sup>18</sup> was one of the first to call attention to what he believes is the industrialisation of the legal profession.<sup>19</sup> To counter this, he encourages lawyers to uphold the social trust element of their role. In a similar vein, Justice Kirby suggests that Australian lawyers are drifting towards commercialism and asks ‘whether the ascendancy of economics, competition and technology, unrestrained, will snuff out what is left of the nobility of the legal calling and the idealism of those who are

<sup>14</sup> Berenson refers to reviewing the literature and concluding that it ‘reveals a relative paucity of focus on institutions’. Primarily Berenson is calling upon the professional bodies to take professionalism seriously: see Steven K. Berenson, ‘Institutional professionalism for lawyers: realizing the virtues of civic professionalism’ (2006) 109 *West Virginia Law Review* 67, 71. However, in this article the term ‘institution’ can equally be applied to the firms or organisation in which individual lawyers are employed, and therefore need to be convinced of the worth of ethical lawyering.

<sup>15</sup> Christine Parker also makes this point: that is, ‘that law firms need to develop organisation-level ethical infrastructures that encourage and nurture individual ethical responsibility in the face of corporate and competitive pressures’. Christine Parker, ‘An opportunity for the ethical maturation of the law firm: the ethical implications of incorporated and listed law firms’ (Paper presented at the Third International Legal Ethics Conference, Gold Coast, Australia, 13-16 July 2008) 2. This paper will be a chapter in the forthcoming book *Reaffirming Legal Ethics* edited by Kieran Tranter, Francesca Bartlett, Lillian Corbin, Reid Mortensen and Michael Robertson and published by Routledge.

<sup>16</sup> A number of authorities could be referred to here but an often-cited source is Marc Galanter and Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (1991) 2: ‘Today there is a palpable anxiety and dismay within the legal profession concerning the commercialization and the concomitant decline of professionalism in the setting of the big law firm’.

<sup>17</sup> Much has been written on this topic, but see generally: Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993).

<sup>18</sup> Daryl Dawson, ‘The legal services market’ (1996) 5 *Journal of Judicial Administration* 147, 147-148.

<sup>19</sup> The view that law and accounting are industries was reflected in the documents published by the Australian Bureau of Statistics (ABS) in 2000, which categorised the professions of both law and accounting as the ‘Legal and Accounting Services Industry’: see Australian Bureau of Statistics, *Australia Today* (2000) available at: <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/C7FE8671660370A1CA2570B000368E56?opendocument>> at 24 April 2000. Since then the ABS has removed the ‘industry’ characterisation from its category: see Australian Bureau of Statistics, *Legal and Accounting Services* (2004) available at <<http://abs.gov.au/AUSSTATS/abs@.nsf/DOSSbyTopic/86D11D2179F26C70CA256E110082205D?OpenDocument>> at 11 August 2006.

attracted to its service'.<sup>20</sup> In purporting to reclaim the lost nobility of the legal profession, however, it is important to first examine the historical developments that gave rise to the altruistic ethos that is said to underlie the practice of law, but equally important to note those that dispute those historical developments.

Sociologists claim the professions formed at the time of the Industrial Revolution. They suggest that prior to that time, professionals were portrayed as 'subservient to the aristocratic values of their elite patrons' and so 'possessed no ideology of their own, and certainly no sense of self-worth based on the importance of their work'.<sup>21</sup> These researchers suggest that professional bodies were formed as a result of the warnings of writers like Durkheim who argued that the new economic life advanced by industrialisation was a danger to the public.<sup>22</sup> They therefore conclude that the professions were organised to provide a service to the public to counter the destructive effects of industrialisation.<sup>23</sup>

Prest, among others, maintains that a fuller understanding of the beginning of professions would be achieved if the practice of viewing the subject through the lens of Durkheim's sociological theory is abandoned.<sup>24</sup> He particularly draws on anecdotal evidence to establish that lawyers in earlier societies saw themselves as fulfilling a particular function that contributed 'to their prince and commonwealth'.<sup>25</sup> In other words, Prest argues that these early lawyers believed that they were providing a service to the sovereign and the community in general. Many lawyers saw their vocation as a calling and thought they had a duty to serve the public. Some elements of these virtues feature in the historical accounts reported by Roscoe Pound.<sup>26</sup>

Still another view is that the professions, as we know them, only evolved in the 1930s.<sup>27</sup> Hanlon argues that the writings of the early sociologists like Parsons,

<sup>20</sup> Michael Kirby, 'Legal professional ethics in times of change' (Speech presented at the St James Ethics Centre Forum on Ethical Issues, Sydney, Australia, 23 July 1996). See also Kronman, above n 17.

<sup>21</sup> Wilfrid R Prest, 'Why the history of the profession is not written' in GR Rubin and D Sugarman (eds), *Law, Economy and Society, 1750-1914: Essays in the History of English Law* (1984) 312.

<sup>22</sup> Emile Durkheim, *Professional Ethics and Civic Morals* (1957) cited in W Wesley Pue, 'Trajectories of professionalism: legal professionalism after Abel' (1991) 19 *Manitoba Law Journal* 384, 387.

<sup>23</sup> Pue, *ibid* 387.

<sup>24</sup> Prest, above n 21, 306. Other writers also support this view: see also Roscoe Pound, *The Lawyer from Antiquity to Modern Times, with Particular Reference to the Development of Bar Associations in the United States* (1953); W Wesley Pue, 'Rethinking "professionalism": taking the professions in Early Modern England seriously' (1989) 4 *Canadian Journal of Law & Society* 175.

<sup>25</sup> Wilfrid R Prest, *The Rise of the Barristers: A Social History of the English Bar 1590-1640* (1991) 318-319.

<sup>26</sup> Pound, above n 24, 41-55.

<sup>27</sup> Alan A Paterson, 'Professionalism and the legal services market' (1996) 3 *International Journal of the Legal Profession* 137; Gerard Hanlon, 'Professionalism as enterprise: service class politics and the redefinition of professionalism' (1998) 32 *Sociology* 43. Paterson in particular examines two supposed core elements of the sociologists' definition of professionalism of 'public protection' and 'restricted competition' in the United Kingdom. In relation to 'public protection', Paterson traces the history of the introduction of ethical rules, complaints and discipline procedures, a compensation fund and separate accounts for client money and found that they were not implemented until after 1930. In fact, a compensation fund for the City of London Solicitors' Company was not mandated until 1942. He also examines the rules against touting and advertising, scale fees, and the rules on fee-sharing with unqualified persons and professional monopolies under the

Goode, Hughes and Wilensky, were based on the views of Marshall who wrote about a 'new' professionalism that commenced in the United Kingdom in the 1930s: 'social service' professionalism.<sup>28</sup> This approach to professionalism developed as a result of a social consensus called Fordism, which aimed to implement an expansion of the welfare state whereby citizens were guaranteed certain rights.<sup>29</sup> The professionals became a party to this approach as they were able to deliver some of those rights.<sup>30</sup> Hanlon states that the professionals were not being altruistic, but they 'were willing to provide a service to people on the basis of need provided they were adequately reimbursed by the state' in the form of control over certain aspects of the legal service and self-regulation.<sup>31</sup> Hanlon appears to support the view of Prest, however, insofar as he argues that prior to this 'social service professionalism' there was a practice model that he calls 'individualistic professionalism' where professionals were 'servicing those people who could pay and on being a "gentleman"'.<sup>32</sup> This earlier brand of professionalism, it is claimed, 'was characterised by hostility to any state interference and by service to the individual client'.<sup>33</sup>

These accounts suggest that there is some support for the view that lawyers historically played a special role within society. Some argue that this was a quasi-contractual arrangement with the State, and others see it resulting from the altruistic goals of individual practitioners. It remains to be seen, however, whether this describes what is happening in the practice of law today. Do lawyers and their firms act for clients with the public interest in mind?

There is broad acceptance by some authors that increased competition and informed consumers are forcing professionals to offer services that are efficient, commercially aware, and economically profitable to clients.<sup>34</sup> This signifies a shift in the profession's goal from 'performing a task for the "public good" towards the concept of somebody doing their job "well or expertly"',<sup>35</sup> and that these professionals are totally committed to the paying client as opposed to social service.<sup>36</sup>

Hanlon advocates that professionals, particularly corporate law firms,<sup>37</sup> should acknowledge that they now practice within 'commercialised professionalism', as he calls it.<sup>38</sup> He states that the skills for success within this paradigm are (a) technical ability; (b) managerial skill (the ability to balance budgets, manage the firm and satisfy clients);<sup>39</sup> and (c) entrepreneurial skills (the

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banner of 'restricted competition' and reveals that these too were not introduced until after 1930.

<sup>28</sup> TH Marshall, 'The recent history of professionalism' (1939) 5 *Canadian Journal of Economics* 325 cited in Hanlon, above n 27, 49.

<sup>29</sup> Hanlon, above n 27.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Marshall, above n 28.

<sup>33</sup> Hanlon, above n 27, 340.

<sup>34</sup> Ibid 345.

<sup>35</sup> Ibid 346.

<sup>36</sup> Ibid 348.

<sup>37</sup> Although Hanlon argues for a redefinition of professionalism towards a commercial-entrepreneurial approach, he still acknowledges that firms 'serving individual, non-influential clients and markets' are trying to adhere to the traditional understanding of professionalism; that is, one that is more social service minded: at 799.

<sup>38</sup> Ibid 50. Another term that appears to have the same meaning is 'technical professionalism': see William M Sullivan, *Work and Integrity: The Crisis and Promise of Professionalism in America* (2<sup>nd</sup> ed. 2005) 9.

<sup>39</sup> Jim Ife, *Rethinking Social Work: Towards Critical Practice* (1997) 16.

ability to bring in business).<sup>40</sup> He examines these skills to uncover the real aims of professionals. He shows that the ability to bring in new business is more highly regarded than the others since this skill has a direct correlation to the creation of profit. In this regard, Hanlon concludes that ‘personal professional success is related to profitability, not to serving clients in need’.<sup>41</sup> The pursuit of profit gives ‘the client a powerful voice in the creation of the professional service’, and skews the service towards powerful clients ‘rather than the needs of all clients or the profession’.<sup>42</sup> Hanlon continues by suggesting that new entrants to firms, through the socialisation process, are introduced to these attributes of professionalism and are particularly advised that those who are ‘commercially aware’ may one day ‘make it to partner’.<sup>43</sup> Therefore, commercialised professionalism emphasises profit rather than service; it takes direction from clients rather than providing solutions; and even the managerial and entrepreneurial skills take precedence over technical ability.<sup>44</sup>

A recent empirical study conducted by one of the authors reveals that there is support for both the traditional and the commercialised professionalism paradigms, although interestingly, the career level of the participants reflects the distinction.<sup>45</sup> The study found that there is a disparity between the views of those who have only been practising law for two years (the graduates) and those practising for more than 15 years (the experienced legal practitioners). At different career levels, lawyers have quite distinct perspectives on how to practice law. While the former group accept that there are certain professional requirements, such as possessing the requisite knowledge, they maintain that those who practice law ought to aspire to altruistic ideals. They should serve their clients in a way that acknowledges that they personally and their clients live in society. The advice then given to the client should reflect the understanding that others are affected by the actions of the client and ultimately society as a whole. According to the graduates the interest of the public is a consideration. As such this appears to align with the principles attributed to traditional professionalism. Yet the experienced practitioners, many of whom hold the position of partner in their law firms, see their practices as businesses. The experienced practitioners prioritise the interests of their clients as a means of meeting the financial targets of their firms. Therefore the experienced practitioners are predominantly interested in completing the task expertly, according to the law, with little or no regard for the consequential affect of the clients’ wishes on others: commercialised professionalism.

These differing accounts of how a lawyer should practice suggest that there is an identity crisis in the legal profession. It raises questions about how lawyers should go about their lawyering duties when the rules are not clear. While law societies appear to have started this process and recognised that value judgements are made, some academics have proposed some normative theories that in effect

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<sup>40</sup> Hanlon, above n 27.

<sup>41</sup> Ibid 50.

<sup>42</sup> Ibid.

<sup>43</sup> Hanlon, above n 27, 349. It has been suggested that it is now naïve to consider technical skills as the determinant that defines merit for promotional purposes: see Donald C. Langevoort, ‘Overcoming resistance to diversity in the executive suite: grease, grit, and the corporate promotion tournament’ (2004) 61 *Washington & Lee Law Review* 1615, 1625. Langevoort suggests that there are other factors that can be more highly valued, but ultimately the person who is promoted is one who recognises what is valued and accommodates those characteristics into his work practices.

<sup>44</sup> Hanlon, above n 27.

<sup>45</sup> Lillian Corbin, ‘How “firm” are lawyers’ perceptions of professionalism?’ (2005) 8 *Legal Ethics* 265.

take a 'rules plus' approach.<sup>46</sup>

## II THE ETHICAL PRACTITIONER: A VIABLE REALITY?

In recognising that discretionary ethical decision-making operates beyond law society rules, it could be argued that many questions remain unanswered for practitioners. Should a lawyer give prominence to the client or the legal system?<sup>47</sup> Are the means of giving the service to a client more important than the consequences of that service?<sup>48</sup> How should a lawyer behave where he or she sees the client as immoral, or worse, criminal?<sup>49</sup> For instance, it has been stated that 'lawyers routinely do things for clients that harm third parties and would therefore be immoral, even in the lawyers' eyes, if done for themselves or for non-clients'.<sup>50</sup> Interestingly Hazard argues that there are 'relevant others' whose interests need to be considered along with the relevant rules and regulations involved, and one of these is the 'political authority': the person to whom the lawyer is accountable in the organisation; that is, the law firm itself.<sup>51</sup> Hutchinson also makes this point:

A crucial ethical dilemma that is understated by most commentators is the real-world problem of what young lawyers are to do about ethical qualms they have about what they are asked to do by older, supervising lawyers.<sup>52</sup>

These ethical misgivings are not necessarily 'big' problems concerning directions that would require practitioners to forge documents, for example, but often relate to practitioners' beliefs they are expected to inflate bills or misrepresent facts.<sup>53</sup> A growing body of literature suggests that lawyers need to consider both the law and its consequences when making decisions. Rhode asserts that lawyers must accept greater responsibility for the consequences of their professional actions; that

<sup>46</sup> The difficulties surrounding the application of principles stated in codes have been mentioned by Australian text writers such as Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (3<sup>rd</sup> ed, 2001) 198 and Julian Disney, *Lawyers* (2<sup>nd</sup> ed, 1986) 598. These difficulties are elaborated upon by English and American commentators, for example: O'Dair, above n 10, 5; Zacharias, above n 10, 231; Timothy P. Terrell, 'Turmoil at the normative core of lawyering: uncomfortable lessons from the "metaethics" of legal ethics' (2000) 49 *Emory Law Journal* 87; Leslie C. Levin, 'The ethical world of solo and small law firm practitioners' (2004) 41 *Houston Law Review* 309, 318. See also Margaret Ann Wilkinson, Christa Walker and Peter Mercer, 'Do codes of ethics actually shape legal practice?' (2000) 45 *McGill Law Journal* 645, whose study included practitioners from a variety of settings; Lynn Mather, Craig A. McEwen and Richard J Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (2001); Susan Daicoff, '(Oxymoron?) Ethical decision making by attorneys: an empirical study' (1996) 48 *Florida Law Review* 197, 201.

<sup>47</sup> Terrell, above n 46, 89-90.

<sup>48</sup> Ibid.

<sup>49</sup> See, generally, Mary C Daly, 'To betray once: to betray twice: reflections on confidentiality, a guilty client, an innocent condemned man, and an ethics-seeking defense counsel' (1995) 29 *Loyola Los Angeles Law Review* 1611; J M Pool, 'Defending the "guilty" client' (1979) 64 *Massachusetts Law Quarterly* 11.

<sup>50</sup> Ted Schneyer, 'Moral philosophy's standard misconception of legal ethics' (1984) *Wisconsin Law Review* 1529, 1532.

<sup>51</sup> Geoffrey C Hazard Jr, 'Dimensions of ethical responsibility: relevant others' (1993) 54 *University of Pittsburgh Law Review* 965, 970-971.

<sup>52</sup> Allan C Hutchinson, *Legal Ethics and Professional Responsibility* (1999) 55.

<sup>53</sup> Patrick J Schiltz, 'Legal ethics in decline: the elite law firm, the elite law school, and the moral formation of the novice attorney' (1998) 82 *Minnesota Law Review* 714.

is, for the performance of the legal system and its impact on society as a whole.<sup>54</sup> This approach encourages lawyers to primarily do the right thing and do what achieves the greatest amount of good.<sup>55</sup> This includes focussing on public policies that enhance society as a whole,<sup>56</sup> or tangible outcomes, such as ideals of fairness.<sup>57</sup> Proponents of these approaches to lawyering want to produce a 'good' result in a moral product that enforces rights, but not by way of incurring harmful consequences.<sup>58</sup>

One must question whether the modern law firm can accommodate their individual lawyer employees asserting their ethical autonomy. While the authors discussed above advocate individual responsibility, this requires individual lawyers to possess a high level of commitment to the task. It is acknowledged that the standard of integrity demanded may be difficult to achieve given the fact that law firms prioritise the goal of profit maximization,<sup>59</sup> and most lawyers are employees of law firms and those in charge determine its practice culture.

Law societies have encouraged their members to take a more personal approach to practising law, but will the authority figures in the firms be persuaded that these new approaches to lawyering can be used to achieve both altruistic and business goals? Can everything old be made new again?

### III ETHICALLY-INFORMED PRACTICE FOR THE LAW FIRM

Ethics is good for business. The proposition is that simple. It is good for a law firm's employees in a climate where human resources are dissipated through alcoholism, drug addiction, depression, and suicide as incidents of job dissatisfaction.<sup>60</sup> 'Until those persons who are in a position to institute change do so, it does not appear that much can be done to alleviate this situation'.<sup>61</sup> Yet the benefits for the law firm's clients and the public at large, canvassed above, are necessary consequences of the internal business benefits of ethical practice. 'Ethical conduct' cannot merely encompass compliance with rules or a commitment to *pro bono* work. although research indicates that the latter is a necessary ingredient of an ethically-informed approach to legal practice.<sup>62</sup> 'Ethics' as an approach to legal practice has to be about

<sup>54</sup> Deborah L Rhode, 'Law, lawyers, and the pursuit of justice' (2002) 70 *Fordham Law Review* 1543.

<sup>55</sup> Donald Nicolson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (2000) 21.

<sup>56</sup> Terrell, above n 46, 102-103.

<sup>57</sup> Nicolson and Webb, above n 55.

<sup>58</sup> Ibid 13, 20.

<sup>59</sup> Sharon Dolovich, 'Ethical lawyering and the possibility of integrity' (2002) 70 *Fordham Law Review* 1629, 1668.

<sup>60</sup> The Brain and Mind Research Institute, *Courting the Blues: Attitudes towards Depression in Australian Law Students and Legal Practitioners* (2009). See also James J Alfini and Joseph N. van Vooren, 'Is there a solution to the problem of lawyer stress? The law school perspective' (1996) 10 *Journal of Law and Health* 61.

<sup>61</sup> Alfini and van Vooren, above n 60, 64.

<sup>62</sup> Deborah L Rhode, 'Lawyers as citizens' (2009) 50 *William & Mary Law Review* 1323. Boon, Duff, and Shiner suggest that the increased ability of new lawyers to undertake *pro bono* work represents an attempt by commercial firms to reunite the intrinsic and extrinsic rewards of legal practice for new entrants: Andrew Boon, Liz Duff, and Michael Shiner, 'Career paths and choices in a highly differentiated profession: the position of newly qualified solicitors' (2001) 64 *Modern Law Review* 563, 594. In this regard, see Kristin Choo, 'Pay cut for public service: these associates see great gain in the trade-off' (2009) 95(6) *ABA Journal* 27.

doing what is right not just because that is what is required by law, but that taking the preferred course of action is in and of itself the right thing to do. It is not suggested that law firms are unethical *per se*, but rather that practicing law in an ethical way requires something more than pursuing profit. In this context, it requires creating an environment for lawyer-employees that allows legal practitioners to comfortably practice in an ethical way.

Lawyers are represented as the guardians of justice, but this is often not the reality for lawyer employees in the legal profession.<sup>63</sup> As law students, prospective practitioners are indoctrinated with the Atticus Finch motif, and many aspire to this image.<sup>64</sup> It is all too unfortunate that the reality of legal practice in Australia, as elsewhere, lies far from the courtroom scenes of *To Kill a Mockingbird*. Young lawyers find themselves disillusioned upon induction into one of the legal conglomerates that occupy the contemporary employment landscape. They become advocates not of truth and of right, but of the morally ambivalent pursuit of one's client's interests.<sup>65</sup> The law thus becomes not an instrument of justice, but the machinery of public relations as companies seek to avoid 'bad press'.

The reality becomes all the more depressing when one considers that not only are the firm's clients engaged in this kind of conduct, but that the firm itself is avowed to be a commercial player before a justice actor. Therein lays the difficulty, as aptly stated by Milton Friedman: 'a major aim of the liberal is to leave the ethical problem for the individuals to wrestle with'.<sup>66</sup> The individuals within the firm are legal professionals unto themselves and expected to discharge the various obligations required of them as officers of the court. Taken collectively, however, the firm is a commercial entity between 'persons carrying on a business with a view of profit'.<sup>67</sup> The concept is further entrenched in the case of incorporated legal practices, such as Slater & Gordon, where the commercial masters exist beyond the partnership.<sup>68</sup> Lawyers are no longer impassioned advocates, but rather 'legal risk consultants' for big business.<sup>69</sup>

It cannot be disputed that the modern law firm exists as the embodiment of its partnership. It is an environment where rainmakers rule and ethical lawyers must tiptoe between the raindrops. The majority of lawyers in Australia practice in

<sup>63</sup> The Australian Bureau of Statistics reported in its *2001-02 Legal Practices Survey* (2003) that approximately 29,000 individuals were employed in private practice as solicitors of the approximately 36,000 total individuals employed in the legal profession.

<sup>64</sup> See Tim Dare, 'Lawyers, ethics, and *To Kill a Mockingbird*' (2001) 25 *Philosophy & Literature* 127. See also Steven Lubet, 'Reconstructing Atticus Finch' (1999) 97 *Michigan Law Review* 1339; Rob Atkinson, 'Comment on Steven Lubet, *Reconstructing Atticus Finch*' (1999) 97 *Michigan Law Review* 1370.

<sup>65</sup> See generally, Christine Parker, Adrian Evans, Linda Haller, Suzanne Le Mire and Reid Mortensen, 'The ethical infrastructure of legal practice in larger law firms: values, policy and behaviour' (2008) 31 *University of New South Wales Law Journal* 158; Robert Granfield and Thomas Koenig, 'It's hard to be a human being and a lawyer: young attorneys and the confrontation with ethical ambiguity in legal practice' (2003) 105 *West Virginia Law Review* 495; Schiltz, above n 53, 705; Corbin, above n 45.

<sup>66</sup> Milton Friedman, *Capitalism and Freedom* (1962) 34.

<sup>67</sup> See, for example, *Partnership Act 1891* (Qld), s 5(1).

<sup>68</sup> See, for example, Parker, above n 12. See also James R. DeBuse, 'Opening at \$25 ½ is Big Firm USA: why America may eventually have a publicly traded law firm, and why law firms can succeed without going public' (2008) 34 *Journal of Corporation Law* 317; Arthur T Farrell, 'Public interest meets public ownership: pro bono and the publicly traded law firm' (2008) 21 *Georgetown Journal of Legal Ethics* 729.

<sup>69</sup> Anthony V Alfieri, 'The fall of legal ethics and the rise of risk management' (2006) 94 *Georgetown Law Journal* 1909.

medium to large law firms that for the most part adopt this mindset.<sup>70</sup> To change the way these law firms practice is, in effect, to realign the core of the legal profession itself. This requires the partnership to alter the way in which the law firm is managed with a view to ethically-informed practice. First and foremost, this means doing right by one's employees.

#### IV FROM HUMAN RESOURCES TO HUMAN BEINGS: FREEING LAWYERS FROM THE CORPORATE MACHINE

The commercial world was shaken by the Enron scandal in the United States.<sup>71</sup> Similar misgivings were raised in respect of the conduct of managers at AWB,<sup>72</sup> and James Hardie,<sup>73</sup> in Australia. Contemplating the root of this evil, esteemed management academic Sumantra Ghoshal remarked that 'by propagating ideologically inspired amoral theories, business schools have actively freed their students from any sense of moral responsibility'.<sup>74</sup> Putting aside the extent to which these corporate scandals were enabled by handmaiden legal practitioners, these comments are equally applicable to lawyers-as-managers (that is, the partnership). In this regard, Ghoshal further states, 'Even those who never attended a business school have learned to think in these ways because these theories have been in the air, legitimizing some actions and behaviours of managers, and generally shaping the intellectual and normative order within which all day-to-day decisions were made'.<sup>75</sup>

Therefore, despite the fact that the vast majority of practice managers are lawyers first and foremost without any significant business training, the way in which they manage their respective law firms is necessarily informed by these same rebuked theories. Having established the applicability of Ghoshal's comments to the

<sup>70</sup> See Koops on the growth of the major law firms in Australia: Harland Koops, 'Should major law firms have a social conscience?' [2001] *University of Western Sydney Law Review* 10.

<sup>71</sup> See, generally, William H Simon, 'The post-Enron identity crisis of the business lawyer' (2006) 74 *Fordham Law Review* 947; Thomas G Bost, 'The lawyer as truth-teller: lessons from Enron' (2005) 32 *Pepperdine Law Review* 505; Keith R. Fisher, 'The higher calling: regulation of lawyers post-Enron' (2004) 37 *University of Michigan Journal of Law Reform* 1017; Bernard S Carrey, 'Enron: where were the lawyers' (2003) 27 *Vermont Law Review* 871; Roger Crampton, 'Enron and the corporate lawyer: a primer on legal and ethical issues' (2003) 58 *Business Lawyer* 143; Deborah Rhode and Paul D Paton, 'Lawyers, ethics, and Enron' (2003) 8 *Stanford Journal of Law, Business and Finance* 9.

<sup>72</sup> See generally, Linda Botterill, 'Doing it for the growers in Iraq? The AWB, oil-for-food and the Cole Inquiry' (2007) 66 *Australian Journal of Public Administration* 4. The concern with respect to the conduct of legal practitioners emerged in relation to the defensive use of the client legal privilege doctrine: see *AWB Ltd v Cole* (2006) 152 FCR 382 and, generally, Christos Mantziaris, 'Client legal privilege in administrative "proceedings": killing off the adversarial/inquisitorial distinction' (2008) 82 *Australian Law Journal* 397; Robert McDougall, 'The evolving principles governing client legal privilege' (2007) 21 *Commercial Law Quarterly* 3.

<sup>73</sup> With respect to the James Hardie litigation, there was evidence that the legal representatives of that corporation had abused the discovery processes of the Court and destroyed inculpatory documents: see John T Rush, 'Documents, defendants, destruction: lawyers' ethics and corporate clients' (2006) 136 *Victorian Bar News* 28. See also *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199.

<sup>74</sup> Ghoshal, above n 1, 75.

<sup>75</sup> *Ibid* 76.

management of law firms,<sup>76</sup> it becomes resoundingly clear that the practice of law in the modern commercial firm is of itself unethical. The thrust of Ghoshal's thesis is stated thus: 'Employees, including managers, contribute their human capital, for example, while shareholders [or, in this case, equity partners] contribute financial capital. If the value creation is achieved by combining the resources of both employees and [equity partners], why should the value distribution favor only the latter?'<sup>77</sup> Yet law firm management committees fail to acknowledge the significance of empowering their lawyer-employees in order to promote the profitability of the firm. As Neff notes, 'satisfied employees improve the bottom line. They work harder, longer, and more efficiently because they know they are critical to the success of the organization. ... Employees of law firms who are content and motivated are not only more productive, but also improve client perceptions of and strengthen clients' relationships with the firm'.<sup>78</sup>

To that end, what follows functions as a demonstration to law firm management of developments in the human resources field that go some way of redistributing value to lawyer-employees as well as the partners. These developments are framed within the notion of stewardship theory, which is counterintuitive to the agency theory practices adopted in the majority of the law firms under discussion.<sup>79</sup>

#### V STEWARDSHIP IN THE AUSTRALIAN LAW FIRM: FROM THEORY TO PRACTICE

Davis, Schoorman, and Donaldson articulate the definition of a 'steward' for the purposes of stewardship theory in the following terms:<sup>80</sup>

In stewardship theory, the model of man is based on a steward whose behaviour is ordered such that pro-organizational, collectivistic behaviors have higher utility than individualistic, self-serving behaviours. Given a choice between self-serving behaviour and pro-organizational behaviour, a steward's behaviour will not depart from the interests of his or her organization.

The shift in first principles that Davis, Schoorman, and Donaldson emphasise in stewardship theory are manifest in the modern behavioural management approach to human resource management,<sup>81</sup> which promotes the implementation of managerial initiatives that seek to address five key workplace issues: job satisfaction, flexible work arrangements, work-related stress, management involvement and career progression, and corporate culture. The following discussion highlights these issues as they have emerged in the legal professional context and, further, emphasises the desirability of their adoption for law firm management. In this regard, it will be apparent that the themes discussed emerge from a review of law society journals;

<sup>76</sup> See also Ashly Pinnington and Timothy Morris, 'Archetype change in professional organizations: survey evidence from large law firms' (2003) 14 *British Journal of Management* 85.

<sup>77</sup> Ghoshal, above n 1, 80.

<sup>78</sup> Theresa M Neff, 'What successful companies know that law firms need to know: the importance of employee motivation and job satisfaction to increased productivity and client relationships' (2003) 17 *Journal of Law and Health* 385, 386.

<sup>79</sup> James H. Davis, F. David Schoorman, and Lex Donaldson, "Toward a stewardship theory of management" (1997) 22 *Academy of Management Review* 20.

<sup>80</sup> *Ibid* 24.

<sup>81</sup> See, generally, Stephen P. Robbins, *Organizational Behaviour: Concepts, Controversies, Applications* (4<sup>th</sup> ed, 2004).

that is, the practices described are not unknown, but ignored. The authors do not purport to dictate how law firms should be managed or what initiatives should be implemented, but rather attempt to bridge the perceived divide between a strictly profit-focused approach to legal practice and the maintenance of legal ethics.

There is some indication that individuals with particular personality types are attracted to legal practice, which may typify a preference for certain motivating influences over others,<sup>82</sup> yet as Boon, Duff, and Shiner speculate promoting either extrinsic or intrinsic rewards in the absence of the other will necessarily reduce overall job satisfaction, and the absence of either will likely prompt lawyer-employees to seek a new career, whether within the legal field or elsewhere.<sup>83</sup> Thus, to the extent that law firms promote extrinsic rewards to their lawyer-employees they necessarily eclipse the intrinsic rewards of being a lawyer. By imposing a hierarchical structure on the law firm with strict reporting obligations and time monitoring regimes,<sup>84</sup> the contemporary law firm replicates the worst excesses of the tired and long-abandoned scientific approach to management espoused by Frederick Taylor.<sup>85</sup> To the contrary, it is argued, law firms need to inculcate a workplace environment that facilitates and encourages ethical practice by its lawyers.

It is the authors' central argument that the development of such an environment requires that practice managers lead by example and treat their lawyer-employees ethically, which in turn demands that lawyers operate in a workplace that encourages the exercise of their ethical discretion and professional judgment. Yet there are two fundamental barriers to such flexibility in legal practice: the adherence to billable hours, and the reluctance of senior management to adopt family-friendly arrangements. Much of that reluctance, however, stems from the use of hourly billing, insofar as the practice requires lawyer-employees to present at the office for 'face time'.<sup>86</sup> The law society journals are replete with criticisms of 'billable hours'.<sup>87</sup> Richmond locates the evils of billable hours in its abuse by deceptive lawyer-employees who fraudulently bill clients through self-interest.<sup>88</sup> The other

<sup>82</sup> Lawrence R. Richard, 'Psychological type and job satisfaction among practicing lawyers in the United States' (2002) 29 *Capital University Law Review* 979.

<sup>83</sup> Boon, Duff, and Shiner, above n 62, 594. See also Lawrence S. Krieger, 'The inseparability of professionalism and personal satisfaction: perspectives on values, integrity and happiness' (2005) 11 *Clinical Law Review* 425; Deborah L. Rhode, 'Foreword: Personal satisfaction in professional practice' (2008) 58 *Syracuse Law Review* 217.

<sup>84</sup> See, generally, Luis Garicano and Thomas N. Hubbard, 'Managerial leverage is limited by the extent of the market: hierarchies, specialization, and the utilization of lawyers' human capital' (2007) 50 *Journal of Law and Economics* 1; Luis Garicano and Thomas N. Hubbard, 'Hierarchical sorting and learning costs: theory and evidence from the law' (2005) 58 *Journal of Economic Behavior & Organization* 349; Susan Saab Fortney, 'Are law firm partners islands unto themselves: an empirical study of law firm peer review and culture' (1997) 10 *Georgetown Journal of Legal Ethics* 271;

<sup>85</sup> See, generally, Frederick Taylor, *The Principles of Scientific Management* (1911).

<sup>86</sup> Timothy Kuhn, 'A "demented work ethic" and a "lifestyle firm": discourse, identity, and workplace time commitments' (2006) 27 *Organization Studies* 1339.

<sup>87</sup> Simone Jacobson, 'Time to say goodbye to billable units?' (2008) 82(7) *Law Institute Journal* 89; Giles Watson, 'Time to re-think the hourly fee?' (2007) 27(4) *Proctor* 23; Elizabeth Broderick, 'Clock watching: the impact of billing for time' (2006) 88 *Reform* 32. Compare Graeme McFadyen, 'What's it worth? \$????? per hour' (2008) 28(4) *Proctor* 57; Graeme McFadyen and Mark Vincent, 'Profitability: every minute counts: the imperative of time recording' (2004) 24(2) *Proctor* 33.

<sup>88</sup> See Douglas R. Richmond, 'The new law firm economy, billable hours, and professional responsibility' (2001) 29 *Hofstra Law Review* 207. Consider, for example, the argument by Rotunda that the individual ethical concerns that Richmond highlights relate to any

explanation is that 'greedy partners' seek to preserve or increase their revenue by exploiting the time and labour of lawyer-employees.<sup>89</sup> The inevitable response to complaints of the excesses of billable hours, however, is that the ultimate power to change rests squarely with law firm management.

The imperative that lawyers account for their time for the purpose of billing clients underscores the view of clients endorsed by the partnership, which also explains the reluctance of law firm management to afford flexible workplace practices to its employees. A former managing partner of Allens Arthur Robinson was quoted by the *Business Review Weekly* as stating: 'we expect our people to treat the client as if they were God and put themselves out for clients'.<sup>90</sup> Yet the balance of commentary in the Australian law society publications maintains a preference for a family-friendly approach to legal work.<sup>91</sup> Cunningham studied the use of family-friendly work arrangements for fathers in the United States, which he observed were plagued by structural and cultural barriers for their effective use.<sup>92</sup> Cunningham reasserts the role of senior management, describing them as 'predominantly older men who have not faced the same work-family challenges of this generation's associates',<sup>93</sup> but also noted that the legitimacy of family-friendly work practices is contingent upon their use by male lawyers. As Dau-Schmidt and Mukhopadhaya confirm,<sup>94</sup> the adoption of such practices by female lawyers is typically deleterious to their career progression and their relative income and, as such, their job satisfaction.<sup>95</sup>

In the United States context, Alfini and van Vooren remark that 'an ever-increasing number of attorneys are experiencing symptoms of lawyer burnout due to too much stress'.<sup>96</sup> They relate this stress to the billable hours issues addressed immediately above, insofar as 'law firms are encouraging lawyers to sacrifice, rather

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form of billing structure, such that individual conduct must ultimately determine the ethical merits of any system: Ronald D Rotunda, 'Moving from billable hours to fixed fees: task-based fees and legal ethics' (1999) 47 *University of Kansas Law Review* 819.

<sup>89</sup> Susan Saab Fortney, 'The billable hours derby: empirical data on the problems and pressure points' (2006) 33 *Fordham Urban Law Journal* 171, 172.

<sup>90</sup> Lucinda Schmidt, 'Best large law firm', *Business Review Weekly* (Australia), 3 March 2005, 48.

<sup>91</sup> 'Generation future: working towards a more flexible workplace' (2006) 80(7) *Law Institute Journal* 18; Kristen Le Mesurier, 'Life balance buys loyalty', *BRW: Business Review Weekly* (Australia), 30 November 2006, 68; Simone Jacobson, 'Taking the long-term view of "part-time"' (2005) 79(10) *Law Institute Journal* 82; Juliet Bourke, 'Engaging leaders on work/life issues' (2003) 25(3) *Bulletin of the Law Society of South Australia* 15; Heather Jacobs, 'Balancing the work-life conundrum' (2003) Spring *Australasian Law Management Journal* 10; Kris Will, 'Flexible work schedules' (2003) Summer *Australasian Law Management Journal* 31.

<sup>92</sup> Keith Cunningham, 'Father time: flexible work arrangements and the law firm's failure of the family' (2001) 53 *Stanford Law Review* 967.

<sup>93</sup> *Ibid* 1008.

<sup>94</sup> Kenneth G. Dau-Schmidt and Kaushik Mukhopadhaya, 'The fruits of our labours: an empirical study of the distribution of income and job satisfaction across the legal profession' (1999) 49 *Journal of Legal Education* 342.

<sup>95</sup> Ronit Dinovitzer and Bryant G. Garth, 'Lawyer satisfaction in the process of structuring legal careers' (2007) 41 *Law & Society Review* 1.

<sup>96</sup> Alfini and van Vooren, above n 60, 61. For a discussion of the clinical concerns resulting from lawyer work-related stress, see Silver, Portnoy, and Peters, who observe that beyond the institutional stressors in the lawyers' work life are those that arise from high client-contact specialisations such as family law: see Marjorie A. Silver, Sanford Portnoy, and Jean Koh Peters, 'Stress, burnout, vicarious trauma, and other emotional realities in the lawyer/client relationship' (2004) 19 *Touro Law Review* 847.

than dedicate, themselves to their firm by working ever-increasing billable hours'.<sup>97</sup> The problem is not limited to the United States, however, as English firms also demand high levels of lawyer-employee sacrifice: 'The provision of sleeping cubicles and medical and dental facilities on site reflect expectations of higher levels of commitment from staff'.<sup>98</sup> In light of the comment made by the former Allens Arthur Robinson managing partner above, the situation is no less dire in Australia.<sup>99</sup>

There are undeniable connections between the foregoing issues and stress management. A Canadian empirical study of women lawyers found that those surveyed 'felt stress and frustration' because of an inability to accomplish daily duties, which was exacerbated in cases where caring for children was involved.<sup>100</sup> The causative chain that results is that stress increases due to a lack of job flexibility, which necessarily results in job dissatisfaction. Such job dissatisfaction emanates from the reality that, owing to the work practices and management structure of the contemporary law firm, even those afforded the opportunity to utilise flexible work arrangements to alleviate the pressures of legal practice cannot readily progress to partnership.<sup>101</sup> Although new lawyers are increasingly less inclined to pursue a rapid ascent to partner level,<sup>102</sup> the fundamental precepts of law firm management instil in lawyers an employee identity that reflects its goals and motivations. As Silverbrand observed:<sup>103</sup>

Judge Schiltz has noted that associates strive to become partners because they are sucked into a money-obsessed 'game' where associates measure their worth as attorneys or even as human beings by how much money they make. Similarly, Professors Zaring and Henderson find that students from top law schools choose to work at firms with longer hours and a less family-friendly work environment because of the potential for significant earnings, substantial outplacement options, and vanity.

Thus, law firms deprive their lawyer-employees of the capacity for independent judgment, which is imperative to the exercise of ethical discretion, by enforcing the dominant financially-focused culture upon its employees. That culture is perpetuated by the partners and associates upon new entrants as their aspirations of public service and pursuing justice are overborne by the prevailing corporate culture. As Ghoshal notes:<sup>104</sup>

For the employees, the use of hierarchical controls signals that they are neither trusted nor trustworthy to behave appropriately without such controls. Surveillance that is perceived as controlling threatens peoples' personal sense of autonomy and decreases their intrinsic motivation. It damages their self-perception. One of the

<sup>97</sup> Ibid 62.

<sup>98</sup> Boon, Duff, and Shiner, above n 62, 593.

<sup>99</sup> See also Bruce MacDermott, 'Overcoming workload problems in your office' (2006) 44(10) *Law Society Journal* 44.

<sup>100</sup> See Jean McKenzie Leiper, 'Women lawyers and their arrangements: time crunch, stress and career paths' (1998) 13 *Canadian Journal of Law and Society* 117.

<sup>101</sup> Mary C Noonan and Mary E Corcoran, 'The mommy track and partnership: temporary delay or dead end?' (2004) 596 *Annals of the American Academy of Political & Social Science* 130.

<sup>102</sup> Walter L Metcalfe, Jr., 'Partnership: an old ideal under siege' (2003) 69 *Vital Speeches of the Day* 495.

<sup>103</sup> Ian J Silverbrand, 'Modified partnership structures and their effects on associate satisfaction' (2008) 21 *Georgetown Journal of Legal Ethics* 165, 169-170.

<sup>104</sup> Ghoshal, above n 1, 85.

likely consequences of eroding attitudes is a shift from consummate and voluntary cooperation to perfunctory compliance.

The unrelenting reporting requirements relating to billable hours and the management-reinforced perception that career progression is purely a product of one's economic productivity have the consequence that lawyer-employees must comply with the prevailing corporate culture that promotes and values profitability over professionalism. Lawyers lose the capacity to think for themselves and are enmeshed in the corporate machine of the firm, which perpetuates the soul-crushing workplace trauma that results in depression, addiction, and suicide. It is immediately apparent that a firm culture that fails to encourage ethical legal practice has a deleterious effect on its employees in terms of both their professional and personal identity, and that sustainable profitability requires that lawyer-employees be permitted to practice in a manner that is empowering and, in itself, sustainable.

Even if a law firm were to escape all of the dilemmas canvassed above, however, one thing remains clear: those intermediate lawyers who have been trained in the 'old ways' will eventually enter the senior management of the firm risk perpetuating the old system 'as they inflict [their culture] on yet another generation of new lawyers'.<sup>105</sup> One must therefore question the extent to which any change might create a new norm instead of temporarily disrupting the status quo.

#### VI QUESTIONING THE PERMANENCY OF SELF-INTERESTED CHANGE

The global financial crisis that emerged in the last quarter of 2008 has prompted certain changes to the Australian legal profession. In some firms, the more expensive senior ranks have been culled.<sup>106</sup> In others, recruitment of junior lawyers has quietened.<sup>107</sup> Another approach has involved providing lawyers with flexible working conditions and promoting study opportunities.<sup>108</sup> Of course, these developments have only manifested in those practice groups that have reduced productivity during the economic downturn. Practitioners in those areas that have inevitably exploded, such as insolvency and bankruptcy, have not been afforded the same encouragement from management.<sup>109</sup> The self-interest in these flexible work practices is readily apparent, and one questions the permanency of those changes upon the resuscitation of the economy in the coming years.

Despite the trenchant opposition of private practitioners to the introduction of employee-focused work practices,<sup>110</sup> these recent moves suggest that such practices are not intrinsically incompatible with the nature of legal services work. The notion is further degraded by the availability of flexible practices to in-house counsel in

<sup>105</sup> James E. Brill, 'The secret of success: need balanced lives not necessarily more billable hours' (1992) 78 *American Bar Association Journal* 100, 100.

<sup>106</sup> Chris Merritt, 'Allens Arthur Robinson offers redundancies', *The Australian* (Australia), 17 April 2009, 27; Chris Merritt, 'Firms saw slump coming: job cuts started six months ago', *The Australian* (Australia), 12 December 2008, 29.

<sup>107</sup> Chris Merritt and Nicola Berkovic, 'Financial crisis hits Victoria's summer clerks', *The Australian* (Australia), 24 October 2008, 31.

<sup>108</sup> Chris Merritt, 'Freehills freezes pay to stay trim', *The Australian* (Australia), 27 March 2009, 27.

<sup>109</sup> On the variations in workflow between practice groups, see Chris Merritt, 'Jobs go but it's not all gloom', *The Australian* (Australia), 5 December 2008 27; Chris Merritt, 'The last lifeboat: resource work', *The Australian* (Australia), 24 October 2008, 29.

<sup>110</sup> Exemplified by the views expressed at n 90, insofar as private firms are client-focused to the detriment of their lawyer employees.

large corporations,<sup>111</sup> as well as the Australian Government Solicitor, which operates as a competitive law firm for the provision of government legal services.<sup>112</sup> The single counterweight to the continued availability of flexible work practices is the profit motive of the partnership, and therein lays the problem.

Yet there is hope that the changes canvassed herein will emerge as the new norm in Australian legal practice, although such hopes are founded upon self-interest. First, the emerging jurisprudence of legal practice tribunals is to the effect that senior lawyers can be held liable for unethical conduct by their juniors.<sup>113</sup> Second, the inertia of the present responsive reforms to the law firm workplace might propel continued change, particularly considering the shift to smaller boutique firms.<sup>114</sup> Third, the cyclic shakedown of the profession has resulted in some of the 'old guard' leaving the field,<sup>115</sup> which contemplates the eventual rise of juniors with a different ethical mindset.

Finally, the profession, the clients, and the public demand it. The continued supply of new law graduates requires an accommodating workplace. The continued patronage of customers requires competent and capable lawyers. The continued support of the public requires that the profession reclaim its ethical foundation. The partnership must lead by example and manage its practice in a manner consistent with its expectations of how its lawyers practice law. It should be flexible and accommodating. It should encourage and inspire. It should be ethically discerning. It should advance justice. These goals should imbue the corporate culture that shapes the professional identity of the lawyers that work within it. None of these criteria are necessarily prohibitive of a generous profit, but rather are central to sustaining it.

## VII CONCLUSION

Traditionally, the lawyer has been an individual guardian of justice. That image has changed dramatically with the amalgamation of lawyers into bodies corporate, whether *de facto* or *de jure*. Empirical research demonstrates that lawyer-employees in these firms, particularly recent entrants into the profession, are largely disenchanted with the work they do and the way that they do it. This disenchantment has resulted in an exodus from the profession for those that leave, and extremely high rates of personal dilemmas for those that stay. The historical reticence of law firm managers to shift their firms' business models in light of the broader developments canvassed above appears to emanate from an untested assumption that

<sup>111</sup> See, for example, Jason Silverii, 'Firms to fight for talent' (2004) 78(7) *Law Institute Journal* 26.

<sup>112</sup> See Daryl Williams, 'Competition increases for Commonwealth legal work' (1999) 21(8) *Bulletin of Law Society of South Australia* 29.

<sup>113</sup> See, for example, *Legal Services Commissioner v Duffield*, Legal Practice Committee of Queensland, 26 May 2008. See also Neil Watt, 'The boss ... and why there's a reason to worry!' (2008) 28(9) *Proctor* 45. Compare Tanina Rostain, 'Partners and power: the role of law firm organizational factors in attorney misconduct' (2006) 19 *Georgetown Journal of Legal Ethics* 281.

<sup>114</sup> See Chris Merritt, 'Revolt against billable hours heralds a new era', *The Australian* (Australia), 3 April 2009, 25; Chris Merritt, 'Ebsworth continues to recruit', *The Australian* (Australia), 6 March 2009, 27; Chris Merritt, 'Corporates turn to boutiques', *The Australian* (Australia), 20 February 2009, 27; Chris Merritt, 'Low overheads help minors to thrive', *The Australian* (Australia), 20 February 2009, 27; Chris Merritt, 'Partners decide boutique is better', *The Australian* (Australia), 23 January 2009, 27. See also Andrew Bruck and Andrew Canter, 'Supply, demand, and the changing economics of large law firms' (2008) 60 *Stanford Law Review* 2087.

<sup>115</sup> See above n 106.

the practice of law is somehow unique or different from corporations more generally. That view sits uncomfortably, however, with the prevailing view in the profession that legal practice is first and foremost a commercial undertaking. In any event, the authors contend that law is in fact unique and different, but that it is that difference that makes the management alternatives all the more compelling.

To that end, stewardship theory promotes the empowerment of lawyer-employees with a view to returning lawyer-employees to the 'guardian of justice' image by conferring ethical autonomy on those lawyer-employees in an environment conducive to such an approach to practice. Fundamental to the inculcation of such a corporate culture is both enabling and empowering lawyer-employees to discharge their commercial duties in an ethically-informed manner. Research has demonstrated that the creation of a corporate culture starts with a company's board of directors or, in the case of a law firm, its management committee.<sup>116</sup> As an initial step, therefore, law firm management must do right by its lawyer-employees such that its lawyer-employees can do right by the firm's clients. That is, management committees, by whatever means appropriate, should encourage a culture of an ethically-informed approach to legal practice. Those practice managers who maintain the inapplicability of the proposed alternatives to legal practice need only consider the operation of such measures in the in-house counsel context. In-house practitioners are considered employees of the corporation more broadly, but are legally mandated to maintain legal and ethical autonomy from management proper.<sup>117</sup>

Many lawyers remain passionate about the practice of law and the values inherent in that practice, which are instilled throughout law school. That passion, it seems, dwindles upon entry into commercialised legal practice as the profit imperative overrides the justice obligation. The foregoing clearly demonstrates that it is incumbent upon law firm management committees to invest in the professional well-being of their lawyer-employees for increased ultimate returns.<sup>118</sup> Doing so has the additional benefit of being the right thing to do. There is hope yet that the profession may be saved from such rampant commercialism, however, as Justice Mark Weinberg of the Victorian Court of Appeal recently observed:<sup>119</sup>

I think things are on the improve. I am discerning among young lawyers a real turnaround and move away from the obsessions with billable hours and rising to partner in large firms. ... I think that the era of lawyers seeing themselves predominantly as part of big business is coming to an end. ... In that regard, the next generation will be better than my own.

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<sup>116</sup> See, for example, Terence Lee, 'How great firms create high performance cultures' [2001] Spring *Australian Legal Practice Management Journal* 11. See also Matthew Harvey and Suzanne Lemire, 'Playing for keeps? Tobacco litigation, document retention, corporate culture and legal ethics' (2008) 34 *Monash University Law Review* 163.

<sup>117</sup> See, generally, Suzanne Le Mire and Christine Parker, 'Keeping it in-house: ethics in the relationship between large law firm lawyers and their corporate clients through the eyes of in-house counsel' (2008) 11 *Legal Ethics* 201. See also Hugh P. Gunz and Sally P. Gunz, 'The lawyer's response to organizational professional conflict: an empirical study of the ethical decision making of in-house counsel' (2002) 39 *American Business Law Journal* 241; Mary C. Daly, 'The cultural, ethical, and legal challenges in lawyering for a global corporation: the role of the general counsel' (1997) 46 *Emory Law Journal* 1057.

<sup>118</sup> See Neff, above n 78.

<sup>119</sup> See Michael Pelly, 'Erudite luddite mourns court's loss of focus', *The Australian* (Australia), 31 October 2008, 31.

While the authors are less convinced than his Honour as to the present state of play, it is hoped that the foregoing discussion will urge law firm management to assist in changing the profession, for the better, for the next generation of lawyers, and the public generally.