

# DOING WELL BY DOING GOOD

By Kelly Doyle\*

## I. Introduction

There is often a tension between responsibilities related to the profession of law and responsibilities related to the business of law.

Standards of professional responsibility are established by the Law Society of British Columbia pursuant to its statutory obligation to uphold and protect the public interest in the administration of justice. The Canadian Bar Association has its own code of professional conduct to inform lawyers on matters of conduct. These codes define ethical and professional responsibilities. The ethical have been said to represent minimum standards of what is required of every lawyer and the professional to represent higher standards of what is expected of every lawyer.

Most lawyers serve in private practice. The core of a viable practice is a client base comprised of clients who have the ability to pay for legal services or the potential to pay through contingency arrangements. The market for affluent consumers of legal services is highly competitive. Members of the public who require legal services but cannot pay market rates are often at risk of exclusion from the market. This is regrettable. Without oversimplifying the complexity of the issues, the exclusion of members of this group is in some part a foreseeable consequence of the application of good business principles to the practice of law.

Most lawyers in private practice wish to do well by doing good. This may in practice mean different things to different lawyers. In the legal realm, the expression “doing well by doing good” has been applied in a number of contexts including pro bono legal work, public interest advocacy, consumer law and even the delivery of extra value to clients through relationship-driven business development. The expression takes on quite different meanings depending on the context.

This article <sup>1</sup> offers a discussion of some recent observations on the subject of professionalism together with commentary on potential practice management implications. For some lawyers, the structuring of their practices to accommodate the pursuit of the public interest is integral to their professional identities. The object of this article is to continue to encourage and facilitate pro bono work by lawyers. This calls for continued awareness, resolve and vigilance on the part of the profession and its members.

\* Kelly Doyle is chair of the CBA (National) Pro Bono Standing Committee. The views expressed herein are his own. This article was published in a slightly edited form in *The Advocate*, vol. 64 Part 6 November 2006 at pages 769-775.

## **II. Transforming Practice Management: Reconciling Business Interests and Professional Interests**

### **A. A Profession in Transformation and Perceived Crisis**

The practice of law is being transformed in many ways. Most lawyers simply adapt to change in a mass technological consumer society with a view to personal career success. A number of observers have commented on the deeper implications of change for the profession including the implications for the public interest. A recent contributor is The Chief Justice of Ontario, Roy McMurtry, who delivered remarks <sup>2</sup> at the Third Colloquium on the Legal Profession in October 2004 hosted by his Advisory Committee on Professionalism.

Chief Justice McMurtry encouraged the legal profession to remember its role as a helping profession and referred to a book by Anthony Kronman, the former Dean of Yale Law School entitled *The Lost Lawyer: Failing Ideals of the Legal Profession*. <sup>3</sup> Dean Kronman had opined therein that there was a crisis in the American legal profession and that the profession stood in danger of losing its soul. Dean Kronman identified a number of factors. Three are reviewed below.

#### **1. The Principle of Unfettered Economic Self Interest**

Dean Kronman referred to the growing ascendancy of the economic view of the law. This is echoed elsewhere by other writers who discuss the transformation of lawyers' beliefs and the proposition that the law is a business like any other and this business is the unrestrained pursuit of self-interest. <sup>4</sup>

Good business practices make fine servants. However, the single-minded pursuit of profitability for partners at the expense of professionalism might uncharitably be analogized to a virus spreading with the download of good business practices from business sites. <sup>5</sup> Most lawyers and firms are aware of the risk and many take steps to minimize its worst effects.

Roger Cramton, a professor at Cornell Law School, was quoted by the Working Group on the Definition of Professionalism of the Chief Justice of Ontario's Advisory Committee on Professionalism (the "Working Group on Professionalism") in a paper entitled *Elements of Professionalism*. <sup>6</sup> Professor Cramton posed the challenge of competent service for a reasonable price as follows:

Although the sense of lawyers' professionalism is threatened...a more important issue is whether there is a threat to what the public is entitled to expect: competent legal services at a reasonable price from professionals who do not abuse their trust and who act in the public interest. <sup>7</sup>

## **2. The Image of the Law as a Profit Driven Business**

Dean Kronman referred to the decline of the self image of the law as a helping profession and the rise of the self image of the law as a profit driven business. He and Chief Justice McMurtry are not alone in such observations. The possibilities for an ethic of care in its various manifestations have found fertile ground in legal scholarship in the writings of Carol Gilligan and others.

## **3. The Ideal of the Accomplished Technician**

Dean Kronman referred to the loss of a common definition of the ideal of the good or outstanding lawyer, the lawyer who serves as a model for the rest. The aspirations of lawyers do not today centre on the belief that the outstanding lawyer must be more than simply an accomplished technician, but also a person of prudence or practical wisdom. Dean Kronman opined that earlier generations of lawyers saw their highest goal to be the attainment of a wisdom that lay beyond technique – a wisdom about human beings and their tangled affairs that anyone who wished to provide real deliberative counsel must possess.<sup>8</sup> Technique has supplanted wisdom as the measure of the good or accomplished lawyer in the eyes of some.

### **B. Pillars of Professional Practice Management**

The transformation of the practice of law can be an opportunity for positive contributions to the market for legal services and the public interest generally. The practice of law is well able to resist and engage the forces arising from economic pressures. Certain pillars make the practice of law distinctive from business models which might otherwise be uncritically imported but for the encumbrance of professional responsibilities.

#### **1. The Standard of Professionalism**

The starting point is a definition of professionalism. If ethics are a minimum standard that is required of all lawyers, then professionalism is a higher standard expected of all lawyers. In a 1996 report of the Professionalism Committee of the Section of Legal Education of the American Bar Association, the term was defined as follows: “[a] professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good.”<sup>9</sup> The elements of learned art, service to clients and public service are central.

At the heart of professionalism is the long term reward that comes from the pursuit of character and civic mindedness. It sees the practice of law as an opportunity for more than a series of short term gratifications of reputation and self interest. For example, contributions to the timely and affordable resolution of disputes can promote both justice and public good. Similarly, pro bono advocacy and service for the disadvantaged in our communities and those non profits and others who serve them would be integral to such civic mindedness. From time to time, tensions may arise between the zealous advocacy of the rights and self interest of the client and the spirit of public service. There is generally room between ethical minimums and professional aspirations for practitioners to make decisions in the best interests of themselves and their clients.

## 2. The Image of the Law as a Helping Profession

The Working Group on Professionalism identified service to the public good through client relationships and responsibilities to the administration of justice as another building block of professionalism. For the law to be seen as a helping profession serving clients, lawyers must find ways to deliver their services effectively at a reasonable cost so as to be helpful and affordable to the market at large. This is central to addressing the challenge posed by Roger Cramton concerning the confidence of the public that competent legal services are being provided at a reasonable price.

There are public interest concerns over the decline in the image of the law as a helping profession including the justification for self governing status of a guild of gifted technicians. The keys to profitability are often affluent clients or clients with significant monetary claims against affluent defendants. Many members of the public who require legal services fall outside the target groups. What about them? Are they to be ignored?

It has been observed that to run a law firm like a business is not to say that a law firm is simply a business. This was well put by Earl Cherniak who suggested a simple proposition to inform our future. In an address to The Advocates' Society (Ontario) in November 2003 called *Professionalism at the Crossroads*, he stated:

We have to recognize in our firms, large and small, and whether solicitor or barrister based, that when we say law is a business, what we mean is that a law firm must be run like a business, but the practice of law is a profession, because if it is only a business, there is no justification for the monopoly that we that we have in the practice of law, and no reason to continue to call ourselves professionals.<sup>10</sup>

If the adversarial system is not working in a meaningful way and the accommodation of self represented litigants becomes increasingly necessary, there is the prospect of the profession losing self governing status. There is in civil cases the potential for adoption of an inquisitorial model in place of the traditional adversarial model.

If the practice of law is reduced to competence and ethical minimums, it ceases to be a profession in the traditional sense of the term. If its practitioners define themselves in terms of competence and ethical minimums, they risk losing an integral and essential part of their identity as professionals. They may well be very competent technicians and decent people but they have lost something of who they were meant to be through their failure, refusal or neglect to promote the public good in meaningful ways. Lawyers can make a commitment to serve the public good in the face of the forces that conspire against it and spend time on many worthy initiatives including law reform and pro bono representation of clients and causes. This commitment in the face of the ethos of commercialism is a matter of courage and resolve.<sup>11</sup>

## 3. The Principle of Balanced Commercialism

There is an increasing acceptance of commercialism. "Balanced commercialism" was an element of professionalism recognized by the Working Group on Professionalism in *Elements of Professionalism*. The paper also made reference to the Creed of Professionalism of the North

Carolina Wake County/Tenth Judicial District Bar (February, 1997) which states: “[a] lawyer need not sacrifice the opportunity to prosper, but the practice of law must be motivated by service rather than inspired by profit.”<sup>12</sup> Public service and service to clients are ends in themselves rather than simply means to personal and firm profit.

How do lawyers pursue the opportunity to prosper? Law firms often adopt one of three basic business models. Many firms have models with hybrid features. It is not the name of the model that is definitive but its substantive application.

Some firms may effectively have a presumption against the performance of pro bono work whether on a reduced fee or no fee basis. A pure **profitability model** of firm management might focus on total revenues as the essential measure of success and apply a **revenue maximization test**. Doing well by doing good may mean doing well financially by doing good work for high quality clients. Making money is the measure of success in law as it is in business. Individual and per partner average remuneration also represent the scorecards and measures of comparative personal and firm success. Ethical minimums inform and constrain conduct. Pro bono and other nonbillable work lower the effective billing rates of lawyers involved. Billable work, if not otherwise absorbed within the firm, may not be performed at all thereby lowering potential firm revenue. The pursuit of professional obligations as distinct from ethical obligations are tolerated and acknowledged as a matter of firm culture, often in the absence of pro bono firm policies. Even in such a practice structure, there are ad hoc opportunities to pursue activities related to pro bono and professionalism. At a minimum, dead time arising from the settlement of cases, collapse of deals or a temporary practice malaise can be dedicated to professional obligations after the priorities of billable work, marketing, business development and other revenue related pursuits are exhausted.

Most national and regional firms are open to doing pro bono work but place limitations on its integration and performance. A **productivity model** of firm management might focus on billable hours and the work ethic it fosters as the foundation for firm success. Such a model might accept a **business purpose test** requiring a business justification of some value in effectively deeming nonbillable or unremunerative work “productive” for firm purposes. There may also be pro bono firm policies requiring approvals for the performance of such work. There is often a caveat that individual lawyer billing targets are otherwise met although approved pro bono work may in some firm policies be given some limited equivalency to billable work for target billing purposes. Acceptable business purposes may take the form of positive firm image and public relations, positive client relations, work attraction and retention, improved morale and productivity among partners and associates, opportunities for experience and training of associates and students, and advantages in the recruitment of students and lateral transfers. Doing well by doing good may mean doing well financially and doing good work which is intellectually challenging and reflects well on the firm. There is an acceptance that professional responsibility may have some role in shaping the character or image of the firm. There are tensions where hard profitability factors are given inflated weight in decision making at the expense of soft professional responsibility factors.

Some firms may effectively have a presumption in favour of pro bono work if it can be accommodated. A **service model** of firm management might apply a **sustainable revenue test**. Lawyers practice law for its own sake rather than as a means to an end. The willing acceptance of reduced fee or no fee pro bono work would necessarily be assessed against fiscal responsibilities. Its performance cannot compromise the sourcing of revenues sufficient to maintain the funding floor required to meet the overhead, expense and reasonable income requirements of the firm in

the pursuit of its objectives. Such objectives might be public service of different descriptions. Doing well by doing good may mean doing well enough financially but wellness is also the reward of doing good work which helps people and is interesting and often of social value. Store front and community law offices may champion disadvantaged people and compassionate and social justice causes. Small general practice law offices may generously serve people in their communities including some who cannot pay market rates for legal services.

For a firm to be commercially viable in the long-term, there ought as a matter of firm governance be a clear consensus on the adoption and application of a particular business model. Partners and associates ought to share common values. A pure profitability model may attract and produce very capable and talented practitioners but may be limited in its accommodation and nurture of pro bono and professionalism. A productivity model intentionally and meaningfully integrating such work or a service model presuming the performance of such work seemingly hold more promise in balancing the self interested objectives of the business of law with the public interest objectives of the profession of law.

#### **4. The Ideal of the Good Lawyer**

The ideal to be embraced is that of the good lawyer practicing a learned art rather than the accomplished technician. Rosalie Abella, now a Justice of the Supreme Court of Canada, provided the opening address entitled *Professionalism Revisited* at a planning session of the benchers of the Law Society of Upper Canada. She opined on the ideal of the good lawyer and the quality of wisdom and wrote:

My thesis is that there are three basic values which merge in a good lawyer; a commitment to competence, which is about skills; a commitment to ethics, which is about decency; and a commitment to professionalism, which transfuses the public interest into the two other values. My sense is that while there is a crisis in neither of competence nor of ethics, most lawyers having both in laudable abundance, the same cannot be said of the spirit of professionalism.

...how will we define success in this profession? By money? By partnership? By hard work? Of course. But also by integrity, by decency, by compassion, by wisdom, by courage, by vision, by innovation and by idealism.

If we venerate these qualities and reward those who have them with our respect, we send signals to the profession that our shared values and expectations exceed the tangible economic consequences of the expertise we enjoy.<sup>15</sup>

The quality of wisdom in a good lawyer was also discussed by Dean Kronman. The good lawyer displayed what Dean Kronman calls practical wisdom which is conceived of as a trait of character as much as an operational skill. It was an excellence in deliberating about ends. It included calmness, caution and an ability to sympathize with a wide range of conflicting points of view. It also included a familiarity with human nature through a broad acquaintance with suffering and ambition on which sound judgment generally depends.

### III. Conclusion

Dean Kronman observed that an ideal must be nourished and kept alive for, in the end, nothing survives in this world which is not cared for by human beings.<sup>14</sup> Madame Justice Cronk of the Ontario Court of Appeal has recently opined that it is the obligation of every lawyer to foster the ideals of professionalism in the lawyers that follow. She referred to a speech by James E. Coleman Jr. of the American College of Trial Lawyers on professionalism which expressed the proposition well. He said:

The serpent in our paradise is our indolence in perpetuating and passing from one generation of lawyers to the next the idealism of the profession. We can change this! ...if not us, who?...[Remember], as you help young lawyers grow, as you work for ethics, civility, and honour, your influence will merge with the good influences of lawyers of past generations, into the eternal stream of a true profession – ripe with idealism. **What sculpture is to marble, idealism is to the legal profession** [emphasis added].<sup>15</sup>

Ideals such a pro bono, professionalism and the good lawyer must continue to be nourished in order to survive. The ongoing contributions of individual lawyers, firms and organizations to such worthy ends are to be commended as is the institutional support offered by the courts, the provincial law societies and provincial law foundations. The good work of the late Dugald Christie in British Columbia is a source of inspiration for many as are the efforts of Access Justice, the Salvation Army and other provincial pro bono service providers. Pro Bono Law Ontario, Pro Bono Law of B.C. and other provincial pro bono non profit societies serve a valuable coordinating and resource role in the continuing engagement of the profession and the promotion of access to justice. And lest we forget: the Canadian Bar Association has a unique national role to play in providing institutional support in our provinces and territories and ensuring that the public image of the profession captures the reality of the altruistic and good works of members of our independent bar.

#### ENDNOTES

<sup>1</sup> This article arises out of the author's participation in the *Dispute Resolution Conference*, May 2006 (Continuing Legal Education Society of British Columbia) and is adapted from extracts of his conference paper entitled "*The Joy of Problem Solving: Risk Management, Conflict Management and Conflict Resolution*".

<sup>2</sup> "*The Legal Profession and Public Service*"

[http://www.lsuc.on.ca/media/third\\_colloquium\\_mcmurtry.pdf](http://www.lsuc.on.ca/media/third_colloquium_mcmurtry.pdf) (date accessed: 24 July 2006)

<sup>3</sup> (Belknap Press of Harvard University Press: 1993)

<sup>4</sup> Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (Farrar Straus & Giroux: 1994) at p. 6.

<sup>5</sup> This is not to say that there is not considerable literature promoting corporate social responsibility as a business strategy. The potential limitations of such approaches are discussed by Joel Bakan in *The Corporation: the Pathological Pursuit of Profit and Power* (Penguin Canada: 2004)

<sup>6</sup> (October 2001 as revised December 2001 and June 2002)

[http://www.lsuc.on.ca/media/third\\_colloquium\\_jim\\_varro.pdf](http://www.lsuc.on.ca/media/third_colloquium_jim_varro.pdf) (date accessed: 24 July 2006)

<sup>7</sup> "*Elements of Professionalism*", *ibid* at p. 10.

- <sup>8</sup> *The Lost Lawyer*, supra note 3 at p. 2.
- <sup>9</sup> Cited in the State Bar of Georgia, *Professionalism CLE Guidelines*  
[http://www.gabar.org/programs/continuing\\_legal\\_education/professionalism\\_cle\\_guidelines/](http://www.gabar.org/programs/continuing_legal_education/professionalism_cle_guidelines/)  
(date accessed: 31 January 2006)
- <sup>10</sup> Referred to by Madame Justice Cronk of the Ontario Court of Appeal in her keynote address  
entitled “*Professionalism & Barriers to Justice*” at p. 25  
<http://www.lsuc.on.ca/media/fourthcolloquiumkeynoteaddress.pdf> (date accessed: 24 July  
2006)
- <sup>11</sup> *The Lost Lawyer*, supra note 3 at p. 365.
- <sup>12</sup> “Elements of Professionalism”, supra note 6 at pp. 9-10.
- <sup>13</sup> Ontario *Lawyers Gazette*, November/December 1999 at pp. 20 and 25.
- <sup>14</sup> *The Lost Lawyer*, supra note 3 at p. 7.
- <sup>15</sup> “*Professionalism & Barriers to Justice*”, supra note 2 at pp. 26-27.