

OCCASIONAL ADDRESS

Her Honour Justice Tricia Kavanagh

Delivered at UTS graduation ceremony for graduates from the Faculty of Law

Great Hall, City campus, Wednesday, 5 May 2004, 2.30pm

Chancellor, Vice Chancellor, Fellows of the Council, Lecturers, Ladies and Gentlemen

Graduates

- 1 You and your family must today feel great pride as you graduate in Law or receive a post-graduate Law Degree. There is no more honourable qualification and there is certainly no more responsible a skill than that in which you graduate today. Your aspiration to be a lawyer, now accomplished, must give you great pleasure if not self-satisfaction.
- 2 You have achieved your degree through the high confidence of this Institution, the University of Technology. This University sends you out to protect the citizens of our State and Country and their interests whether it be of their life, person or property.
- 3 There is now a huge personal burden upon you. While your advice must be sound and logical, you must also be personally pleasant and courteous.
- 4 Have no doubt, the bad news is you will all suffer anxiety as you endeavour to both serve the cause of justice as well as give satisfaction to a client.
- 5 Many will have already been before the Chief Justice of New South Wales, the Honourable Justice James Jacob Spigelman AC, for admission to the practice of law as a barrister or solicitor. He will have emphasised you are now, and I quote, a “professional”. He reminds all:

“The true profession of law is based on an ideal of honourable service.”

- 6 Your personal conduct and behaviour must from now on reflect the character of a professional. This means that as individuals engaged in the law and as a professional:

you must primarily serve the interests of justice; you must act competently and diligently in the service of your clients; you must advance your clients’ interests above your own; you must act confidentially and in the protection of all client information; you must act with others for the mutual benefit of the profession; you must avoid any conflict of interest; you must observe strictly your duty to the Court of which you are an officer.

- 7 Sadly, you go out to practice law in a society where the ethical reputation of our profession is under challenge. Do not dismiss lightly recent revelations of bad conduct.
- 8 Let us examine these recent revelations. You must have read of lawyers who describe themselves as "service providers" operating competitive businesses in the marketplace. With such self interest at the heart of their description of themselves they talk proudly only of their "turnover and profits".
- 9 You must have shuddered also as you read of the cute legal title given to a policy decision by a major tobacco company to destroy documents in anticipation of future legal proceedings as, and I quote: a "Document Retention Policy" which meant -- which documents will we keep? It is, in truth, better described as a "Document Destruction Policy".
- 10 I do not need to list the corporate disasters of recent years which have revealed the complete lack of ethical conduct by many businesses - unfortunately, most of which were advised in their actions by in-house or outside corporate lawyers.
- 11 Recently, in the Industrial Jurisdiction, a prosecution under the Occupational Health and Safety Act for an unsafe system of work, which is a criminal charge, was stayed by the court. It did not proceed because the solicitor representing the prosecution refused to disqualify himself. Yet, he had represented the insurance company covering the company and advised the company on its system of work and defended those systems in other litigation. He did not even question or seek advice as to his ethical position – not even when challenged.
- 12 All such manoeuvres and decisions are a challenge to one's ethical standards.
- 13 Criticism of the legal profession is not new. Macauley made a wry observation that a lawyer would:
- With a wig on his head and a band around his neck do for a guinea what, without those appendages, he would think it wicked to do for an empire.
- 14 At the heart of our community's concern is that for a sufficient fee, many legal professionals will 'justify' and facilitate unethical behaviour. The professional is seen to be reduced to the role of a mere cipher, albeit a brilliant creative cipher, who surrenders all claims to exercise professional judgement on matters affecting a client's interest and merely take instructions on a client's "wants".
- 15 In such circumstances, professionals are liable to conflate the client's 'wants' with the client's interests. Such will ultimately fail to serve the clients interests at all.
- 16 The community believes our legal associations protect the lawyer's interest and defends lawyers' bad behaviour rather than protecting the litigant against bad service.

- 17 It is not all negative however. Go into any legal aid office today and you may well receive advice from a Senior Partner of a major law firm doing his voluntary *pro bono* work.
- 18 The NSW Bar Association has a *pro bono* scheme and you can often get representation from an old wise retired judge who will freely represent the litigant.
- 19 Ethics advisors are now on staff in major firms. Such advisers are the first contact for a solicitor who perceives an ethical question or problem. All solicitors are now advised:

If you say that one of your core values is the maintenance of the highest ethical standards, you'd better mean it.

The good news is law firms are now setting the agenda rather than responding to it.

- 20 The ancient Greek philosopher, Socrates of Athens, asked the fundamental question that gives rise to the distinctive pursuit of an ethical reflection. I ask such a reflection from you today. His question was based not on asking "What is good? What is evil? What is right? What is wrong? Rather, he defined the ethical test more simply with the straight forward question:

What ought one to do?

- 21 For those who wish to live a worthwhile life, personally and professionally, the ethical question is inescapable. Ethics is not the same as morality. Ethics is a matter of public as well as private concern.
- 22 Ethics touches on the decisions faced by a lawyer when you are performing your everyday role. Ethical dilemmas abound. There are many occasions when it is impossible to discern the right course of action. Yet you must make the choice.
- 23 You may dismiss any statement of principles as merely – I think the modern term is “a mission statement”. But I challenge you all to think and regularly test yourselves against an ethical reflection in the practice of your profession, namely:

what ought one do?

- 24 You make a commitment to practice ethically when you are sworn in as a member of the legal profession.
- 25 As a lawyer, you may have joined a solicitor's firm or been called to the Bar or you may be working within a government department, a statutory authority or a corporation. In each capacity, you must ensure the integrity of the profession and the ethical administration of justice for the common good.
- 26 This Law School at UTS is rightly admired for graduating many part-time and mature aged students (like me!) whose work is reflected in wide ranging fields. Legal skills are added to

previous qualifications. The wide experience held by UTS graduates makes this institution's reach into our community particularly effective.

27 It must also be remembered that the rule of law is one of the most important foundations of a civilized and humane society. Be careful. Sadly, today it often seems the rule of law stands in the way of manipulating politicians and against the mindset of the radio talk-back -- be it the shock jocks or their listeners.

28 The principle was put succinctly and persuasively by Robert Bolt in his play about Sir Thomas More, "A Man for all Seasons". More had employed a law clerk called Rich who, when he was denied promotion by More, left his service and went across to Thomas Cromwell, More's enemy. More's son-in-law urged More, still the Lord Chancellor, with immense powers, to arrest Rich. More asked his son-in-law, Roper, whether Rich had broken any laws and Roper replied that he had broken God's laws. More suggested that God should therefore arrest him. Roper in disgust protested that More would give the benefit of law to the devil himself. More's reply was this -

"Yes, I would, for my own sake. This country England is planted thick with laws from coast to coast. If you, when chasing the devil, were to cut them down, what would you do when you got to the end and he turned on you, the laws all being down; and do you really think that you could stand in the winds that would blow then?"

29 The maintenance of the rule of law depends on lawyers who respect the truth and whose integrity is not for sale. Such qualities must be rooted in the very way in which you as lawyers do your business.

30 In this respect, there is no difference between the exchange in a court room and in a conference room, between a lie told to a judge or jury and a lie told to the other side in a commercial or common law, or industrial or land and environment negotiation.

31 Ethical behaviour provides the most fundamental distinction between the law as a profession and law as a business enterprise and it draws a distinct line between the legal practitioner and the mouthpiece.

32 You must do more than talk about your ability to give primary importance to the provision of public service. You must take the initiative and put the principles into practice. Be warned, the community will not continue to tolerate mere displays of window dressing. The practice of law based on the manipulation of images is the ultimate act of folly.

33 You must lead with wise counsel. Your ethical behaviour will permeate and influence the future standing of our profession as well as that matter of paramount importance, that is, the protection of the rule of law through the administration of justice. Within our community we are entrusting our profession's integrity and reputation to you.

- 34 I once had the opportunity to address your law lecturers on Ethics and I reminded them they were, quote "the guardians at the gate". Although I have said ethics is not the same as a morality I use rather a biblical phrase to say to you who are new to our profession - "in you we trust".
- 35 I congratulate you on your degrees, degrees for which you have worked long and hard. You and your families have had not only to earn the degree but pay for it too through HECS. I feel humbled that I received three free educations. Those days are sadly gone. My congratulations on your graduation.
- 36 It is really a great profession, fun and intellectually invigorating. In you we place our trust.

References: With thanks:

St James Ethics Centre Statements, Article "Professions in Society", Dr Simon Longstaff, St James Ethics Centre, Australian Financial Review (Dec 1995). Occasional Address – "Some Reflections on Advocacy on Ethics" (2003). the Hon Justice Adams, Supreme Court of NSW. Occasional Address, the Hon Justice Mary Gaudron, University of Sydney, Conferral of Degrees (29.10.1999). Article: "Law as a Means to an End – Thomas Aquinas" Thomas E. Davitt SJ, Natural Law, Vol 1, edited by John Finns, University of Oxford, Dartmouth Press, 1991. Law Society of NSW, Statement of Ethics (Dec 2003)