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Lawyers, Clients and Friends: A Case Study of the Vexed Nature of Friendship and Lawyering

Kieran Tranter and Lillian Corbin *

Introduction

Lawyers are not monads. Lawyers do form personal relationships with others. Lawyers have families and they have friends, neighbours and acquaintances. Formally, this realm of intimate relationships is meant to be separated from the professional role of the lawyer. Lawyers are meant to owe fidelity and loyalty to clients. However, this proposed neat distinction between the personal and professional facets of lawyers' lives does not always reflect the reality of what happens in practice. It is well known that lawyers routinely act for friends and family. Lawyers often act for clients who originally were known to them as private acquaintances, and clients regularly choose lawyers on the recommendation of a mutual friend of both the client and lawyer. Lawyers also form friendships with their clients.

A strict adherence to the separation of personal and professional relationships might be damaging to lawyers. Taken to its extreme, such a separation does project the image of the lawyer as a monad shunning all social ties. A strong moratorium against mingling personal and professional ties, in conjunction with other negative

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pressures on lawyers, such as working hours and stress, could accelerate social isolation among the profession.¹ Surely it is beneficial that lawyers have friends, and therefore conceivable that some of these friendships will result in lawyer/client relationships.

Legal ethics has not been entirely hostile to conjoining “friendship” and “clients”. Indeed, Charles Fried in his influential 1976 article raised the analogy that lawyers are like friends.² Fried’s use of friendship was limited. He adopted friendship as an analogy to morally justify what we will call in this article the ‘standard conception of lawyering’—the idea that the lawyer zealously pursues a client’s interests within the formal limits of the law.³ Fried postulated the lawyer as a “limited-purpose friend. A lawyer is a friend in regard to the legal system...That means that like a friend he acts in your interests, not his own; or rather he adopts your interests as his own.”⁴ Fried was not suggesting that lawyers be more friend-like, or offering a solution to whether a lawyer should act for a friend. Rather he tapped into the Western thinking on friendship originating from Aristotle’s definition that a friend is one who selflessly acts for another.⁵ Fried does not refer directly to Aristotle. However, the structure of his discussion of friendship mirrors some of Aristotle’s. Like Aristotle, Fried sees the good of friendship as emanating from self-love.⁶ Also Fried can be seen as trying to enlist some of Aristotle’s wholesome endorsement of friendship as a good in the argument for the good of lawyers to act zealously for clients. This assessment marks a fault-line in the Western reflection on friendship. For Aristotle friendship grounds male fraternity and forms *polis*⁷, while for Cicero the personal ties of friendship were considered corrosive to public life.⁸

Fried’s enlisting of friendship to justify the standard conception of lawyering has not gone unchallenged. Dauer and Leff concluded that it is a strange friend that

¹ M. Seligman, P. Verkuil and T. Kang, “Why Lawyers are Unhappy” (2001) 23 *Cardozo Law Review* 33.

² C. Fried, “The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship” (1976) 85 *Yale Law Journal* 1060.

³ This term originated with G. Postema, “Moral Responsibility in Professional Ethics” (1980) 55 *New York University Law Review* 63, 73.

⁴ Fried, *supra* n. 2, 1071.

⁵ Aristotle, *The Ethics of Aristotle: The Nichomachean Ethics* (trans J.A.K. Thomson, revised trans H. Tredennick, Harmondsworth, Penguin, 1976), book 9, 1169a23–b11.

⁶ Fried, *supra* n. 2, 1069–70; Aristotle, *supra* n. 5, book 9, 1166a–b29.

⁷ Aristotle, *supra* n. 5, book 9 1167a18.

⁸ See S. Lynch, *Politics of Friendship* (Edinburgh, Edinburgh University Press, 2005), 25. This tension in the received Western tradition of friendship and public life was recently subjected to a sustained examination by Derrida in J. Derrida, *The Politics of Friendship* (trans G. Collins, London, Verso, 1997).

commits to forwarding or protecting “the interests of a client...so long as he is paid a sufficient amount to do so, and so long as doing so does not inflict any material unforeseen personal costs”.⁹ Irrespective of this, the client-care literature of the past 20 years has urged lawyers to be more “friend-like” in client relationships.¹⁰

The concept of “friendship” has therefore been deployed in contemporary thinking about lawyering. However, legal ethicists have rarely reflected on the basic dilemma of whether lawyers should act for friends, beyond acknowledging that friendship can test the boundaries between professional duties and private obligations.

The focus of this article is on this very boundary of lawyering and friendship and of professional duties and private obligations. Its case study is a situation where the actions of a lawyer and others were subject to an investigation by the Queensland Crime and Misconduct Commission (CMC) surrounding political donations in a local government election. While the parties involved were eventually cleared of breaches under the Local Government Act 1993 (Qld), and therefore of any illegality, the circumstances in which the lawyer was operating raise questions about the nature of contemporary legal practice and the complexities of friendship and lawyering. In recognising the sensitivity of the subject matter and to protect those involved, it is proposed that those involved will simply be referred to as “Lawyer”, “Friend”, “Councillors 1 and 2”, and “Concerned Citizen”.

This article is neither an apologia for Lawyer’s actions, nor is it seeking to condemn Lawyer from our not-quite ivory and not-very-tall tower.¹¹ Instead we approach the CMC inquiry, report and subsequent Magistrate and District Court decisions as a case study of a “real world” dilemma for lawyers. Our intention is to use this case study as a contemporary focus for working through how lawyers *should* respond to situations where they face, on a daily basis, conflicting professional and personal obligations.

What follows is in three parts. The first part outlines the context in which Lawyer was acting. Next, the article asks whether Lawyer’s actions were justifiable in light of three normative accounts of lawyering: the ‘standard conception’¹² that emphasises zealous acting in the client’s interest; David Luban’s ‘common morality’ alternative

⁹ E. Dauer and A. Leff, “Law as Friend: Correspondence” (1976) 86 *Yale Law Journal* 573, 579.

¹⁰ D. Binder, P. Bergman and S. Price, *Lawyers as Counsellors: A Client Centered Approach* (St Paul, MN, West Publishing Co, 1991).

¹¹ A photograph of the new Griffith Law School building at the Gold Coast is available at <http://www.griffith.edu.au/school/law/assets/newsglsvol1summer05.pdf> (viewed 12 March 2007).

¹² Postema, *supra* n. 3, 73.

to this approach;¹³ and the approach of Thomas Shaffer and Robert Cochran¹⁴ advocating personal integrity. While all three accounts of lawyering conclude that most of Lawyer's actions were justifiable, there are significant differences. Lastly, the article acknowledges the lack of unity in the three accounts of lawyering. The accounts differ in their justifications and responses to Lawyer's situation. This diversity attests to the vexed nature of the lawyer-client relationship and, in particular, the dynamism of personal relationships and the dynamite of friendship for professional conduct.

The Council Election

The subject of the CMC inquiry into the council election focused on the existence and management of a fund supporting the campaign of specific candidates. Lawyer set up the fund as a trust account fund ostensibly for Councillor 1 and 2 and then later Concerned Citizen, but really at the request of Friend. The fund was used to support the campaign for election of certain pro-development candidates.

The CMC was of the opinion that the fund had its origins in the confluence of two related anxieties. The first was the perceived difficulty that some councillors experienced in working with, in their terms, three "anti-development" councillors.¹⁵ The second was a concern among property developers that the growing influence of environmental groups might be strengthened by the election of more "wild-card" councillors.¹⁶ The fear was that the election may produce a council that would be unsympathetic to development. The CMC found that the fund was orchestrated by Councillors 1 and 2 (Councillor 2—since deceased) and Friend, who was a local developer (and also since deceased). The aim of the fund was to directly support "sensible",¹⁷ candidates, and specifically to replace three particular councillors.

¹³ D. Luban (ed), *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (Towota, NJ, Rowman & Allanheld, 1983); D. Luban, *Lawyers and Justice: An Ethical Study* (Princeton, NJ, Princeton University Press, 1988), 109; D. Luban, "Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice" (1990) 49 *Maryland Law Review* 424; D. Luban, "Integrity: Its Causes and Cures" (2003) 72 *Fordham Law Review* 279.

¹⁴ T. Shaffer and R. Cochran, *Lawyers, Clients and Moral Responsibility* (St Paul, MN, West Publishing Co, 1994).

¹⁵ R. Needham, *Independence, Influence and Integrity in Local Government: A CMC Inquiry into the 2004 Gold Coast City Council Elections, Crime and Misconduct Commission* (2006), 13.

¹⁶ *Ibid.*, 13, 43.

¹⁷ Crime and Misconduct Commission, *Gold Coast City Council Hearings: Transcript of Proceedings – Day 8 (18.10.05)* State Reporting Bureau (2005), 603, line 24,

The CMC found that while Friend was involved in setting up the fund, and was active in soliciting donations from other developers, it was Councillor 1 who exercised control over the fund.¹⁸ The CMC was of the opinion that the key characteristic of the fund's management was secrecy.¹⁹ This conclusion of the CMC was based on their finding that Councillors 1 and 2 and recipient candidates had repeatedly gone on the public record as denying any knowledge of the existence of the fund, and its goal of supporting a "bloc" of pro-development candidates.²⁰ While at this level the fund and its management tell a story about the problems of "representation" within local government in Australia,²¹ the inquiry and report very clearly present to lawyers and law students alike a very "real world" snapshot of some wider dimensions relevant to the lawyer/client relationship.

The fundamental fact was that Lawyer and Friend had a long and well-known personal relationship.²² Lawyer acknowledged this repeatedly in his evidence before the CMC. He had acted for Friend for 15 years,²³ and he freely admitted to the inquiry that he became involved with the fund at Friend's request.²⁴ Lawyer even explained his actions in friendship terms, that his involvement was a "contribution";²⁵ that he was, at Friend's request, doing Friend "a favour";²⁶ and that he "would never charge a fee" for his involvement with the fund.²⁷

<http://www.cmc.qld.gov.au/data/portal/00000005/content/98562001141625154923.pdf> (viewed 12 March 2007). The attributes of a worthy councillor were later articulated as someone who is sensible and has common sense. See CMC Transcript (Day 8) n. 14, 611, lines 43–44.

¹⁸ Needham, *supra* n. 15, xxi, 16.

¹⁹ Needham, *supra* n. 15, xxiii.

²⁰ Examples of these statements were provided in the report: see Needham, *supra* n. 15, 47–52.

²¹ n. Burdess and K. O'Toole, "Elections and Representation in Local Government: A Victorian Case Study" (2004) 63 *Australian Journal of Public Administration* 66.

²² Media reports confirmed the friendship. After the disappearance of the plane in which Friend was travelling, a number of newspaper articles reported on comments made by Lawyer and referred to him as "a friend of the [Friend] family" and "[Friend's] Lawyer and family friend". See K. MacDermott and J. Clout, "Developer [Friend] and wife still missing", *Australian Financial Review*, 11 July 2005, 3; "Bodies to be recovered from plane wreck", Organisation of Asia-Pacific News Agencies, 12 July 2005; and K. MacDermott and J. Breusch, "Briefs", *Australian Financial Review*, 13 July 2005, 7. This latter article also reports that Lawyer had been appointed to the board of the group that Friend founded. During Lawyer's sentencing, the submission was made by the defence that his friendship with Friend, and, following Friend's death, his actions borne out of friendship, were presented as evidence of Lawyer's generosity of character: Magistrate Nunan, Magistrates Court Brisbane, Transcript of Proceedings MAG-00084515/06(0) *Crime and Misconduct Commission v [Lawyer]* (31 August 2006), 5, lines 33–38.

²³ CMC Transcript (Day 8), *supra* n. 17, 602, line 25.

²⁴ See eg CMC Transcript (Day 8), *supra* n. 17, 602, line 54; 603, line 28; Needham, *supra* n. 15, 15.

²⁵ CMC Transcript (Day 8), *supra* n. 17, 608, line 11.

²⁶ CMC Transcript (Day 8), *supra* n. 17, 637, lines 40–41.

²⁷ CMC Transcript (Day 8), *supra* n. 17, 607, line 55.

According to the report and the inquiry transcript, Friend's association with Lawyer resulted in a significant amount of pro bono activity by Lawyer. Lawyer was in attendance at the meeting with Friend and Councillors 1 and 2 that established the fund.²⁸ The first meeting with the "bloc's" publicity firm took place at Lawyer's office.²⁹ Lawyer actively solicited money from seven of the 13 contributors.³⁰ Most significantly it was through Lawyer's trust account that the fund was managed. It was how Lawyer dealt with the trust account, and specifically the disclosures he made concerning it, that led to criminal charges being brought. The CMC found that a trust account for the Election Campaign Fund was opened in Lawyer's trust account with Councillors 1 and 2 listed as clients.³¹ Lawyer indicated to the CMC that nominating Councillors 1 and 2 was his suggestion.³² However, as media speculation grew about both the existence of the fund and Councillor 1's involvement in organising a "bloc" of pro-development candidates,³³ the CMC found that the decision was made three weeks before the election to "change" the client and name of the fund.³⁴

The new "client" was Concerned Citizen, a local businessman, and the new fund was titled "Common Sense Campaign Fund".³⁵ Commenting on this change the CMC expressed the view that "the appointment of [Concerned Citizen] as the client for [Lawyer's firm]...was a cynical exercise designed to make it appear that he [Concerned Citizen] had control where, in reality, he had not".³⁶

While Lawyer was not party to the decision to change the name and client of the fund, the CMC was of the opinion that he actively suppressed information revealing Councillor 1's true involvement. This occurred in two specific incidents. The first involved the preparation of the required "third-party return" notice under the Local Government Act 1993 (Qld) detailing third-party gifts to candidates in local government elections. Lawyer prepared a statement for Concerned Citizen, which Concerned Citizen later submitted. The CMC interpreted the statement as suggesting that Concerned Citizen was the "client" from the time of the creation of the trust (over

²⁸ Needham, *supra* n. 15, 15; CMC Transcript (Day 8), *supra* n. 17, 603, line 30.

²⁹ Needham, *supra* n. 15, 29.

³⁰ According to the CMC, Lawyer approached a number of organisations indicating that he was acting on behalf of Friend. He followed up on the possibility of donations with other organisations after Councillor 1 had first contacted them about making a contribution: see Needham, *supra* n. 15, 21–35.

³¹ Needham, *supra* n. 15, 109.

³² CMC Transcript (Day 8), *supra* n. 17, 604, lines 27-30; Needham, *supra* n. 15, 30.

³³ Needham, *supra* n. 15, 1.

³⁴ Needham, *supra* n. 15, 37-39.

³⁵ Needham, *supra* n. 15, 109.

³⁶ Needham, *supra* n. 15, 40.

two years earlier), and that the statement misrepresented the existence of the earlier trust account in the names of Councillors 1 and 2.³⁷ The second incident involved Lawyer initially submitted a similar document in response to requests from the CMC for documents relating to his firm's trust account. Again the CMC was of the opinion that in that document Lawyer presented all the transactions involving the fund as occurring under the auspices of Concerned Citizen.³⁸

Lawyer was originally found guilty of misleading the Commission under the Crime and Misconduct Act 2001 (Qld); however, the conviction has since been set aside on appeal.³⁹ On appeal Shanahan DCJ did not accept the CMC's version of the facts. He found that Lawyer responded properly to the exact wording of the CMC's initial request, which was for him to provide them with the trust account in Concerned Citizen's name; and subsequently he responded to the CMC's further request to provide the initial trust account.⁴⁰ Shanahan DCJ found that:

“No suggestion has been made that there was any attempt to destroy or hide documents showing [Councillor 1's and Councillor 2's] involvement. No suggestion has been made that the appellant attempted to influence others to hide [Councillor 1's and Councillor 2's] involvement.”⁴¹

This article does not examine Lawyer's actions in light of the Legal Profession Act 2004 (Qld) whose key standards are “unsatisfactory professional conduct”⁴² and the more serious standard of “professional misconduct”.⁴³ Instead, in the next section it engages in an in-depth examination of whether Lawyer's actions were justifiable according to three normative theoretical accounts of lawyering.

³⁷ Needham, *supra* n. 15, 58.

³⁸ Needham, *supra* n. 15, 109. The CMC was not misled for long. During sentencing the defence emphasised that within four days after the submission of the “composite” document enough primary documents were with the CMC for it to be aware of the involvement of Councillors 1 and 2: Magistrate Nunan, Magistrates Court Brisbane, Transcript of Proceedings MAG-00084515/06(0) *Crime and Misconduct Commission v [Lawyer]*, 31 August 2006, 11, lines 46–51.

³⁹ *[Lawyer] v Crime and Misconduct Commission* [2007] QDC 210.

⁴⁰ *Ibid*, per Shanahan DCJ at [67], [69].

⁴¹ *Ibid*, per Shanahan DCJ at [69].

⁴² Defined by the “standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner”, Legal Profession Act 2004 (Qld), ss. 244, 245(1)(a).

⁴³ Defined as including conduct that amounts to “a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence”. Legal Profession Act 2004 (Qld), ss. 244, 245(1)(a). See L. Haller, “Imperfect Practice under the Legal Profession Act 2004 (Qld)” (2004) 23 *University of Queensland Law Journal* 411, 418.

Were Lawyer's Actions Justifiable?

Generally speaking there is a widely held view, whether real or imagined, that the standard of lawyer conduct generally is declining, which in turn has brought about the perceived decline in the status of lawyers in the wider community.⁴⁴ In response to this there is a marked increase in thinking about the ethical dimension of lawyer conduct, later referred to as the legal ethics project, particularly in relation to formulating a theory that explains how lawyers should behave. In fact, there are a number of diverse normative theories competing for authority.⁴⁵ This section looks at three "theories" or normative accounts of lawyer conduct. It begins by looking at what the North Americans have termed the "standard conception of lawyering"⁴⁶ that emphasises zealous acting in the client's interest. It is argued that its application to Lawyer's actions in this situation results in ambiguous justifications. There were multiple clients and clearly Lawyer did not, as found in the CMC inquiry, act in Concerned Citizen's interest; however, his actions could be argued to be justifiable as a "hyper-zealous" pursuit of his "true" client's interests, ie Friend. After referring to some of the criticisms of the standard conception, this article will then consider Lawyer's actions through the lens of two alternative normative accounts of lawyering: Luban's common morality model and Shaffer and Cochran's account of personal integrity.

The Standard Conception of Lawyering

The central tenet of the standard conception of lawyering has been summarised by Stephen Pepper as lawyers assisting their clients, bound only by the limits of the law.⁴⁷ Fried analogises the lawyer/client relationship to that of friendship, in that like a friend the lawyer puts his client's lawful interests first. Pepper and Fried exemplify what is often identified as one of the lead characteristics of the standard conception or

⁴⁴ M. Robertson, "Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective" (2005) 8 *Legal Ethics* 222; K. Tranter, "'Ethical, ooh, Yeah Ethical is Yeah, What's Right Yeah': A Snapshot of First Year Law Students' Conception of Ethics" (2004) 7 *Legal Ethics* 85; and L. Corbin, "How 'Firm' are Lawyers' Perceptions of Professionalism?" (2005) 8 *Legal Ethics* 239.

⁴⁵ C. Parker, "A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics" (2004) 30 *Monash University Law Review* 49.

⁴⁶ Postema, *supra* n. 3, 73.

⁴⁷ S. Pepper, "Counselling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering" (1995) 104 *Yale Law Journal* 1545, 1599.

“amoral lawyering”,⁴⁸ that of partisanship. In essence the standard conception encourages lawyers to act zealously for their clients.⁴⁹ It requires them to do what their “duty” demands regardless of the outcome,⁵⁰ and this duty is then interpreted to mean that which the client instructs.⁵¹ It establishes that lawyers are simply playing a role that effectively separates them from the consequences of a client’s actions.⁵² The term “standard conception” has two associations within the legal ethics project. The first is that it summarises what historically the American Bar Association rules and other regulatory schemes established as the legitimate boundaries of professional practice. The second is that it represents normative attempts, like Fried’s, to defend a conception of lawyering that prioritises partisanship, role morality, and the zealous following of a client’s (lawful) instructions.

In his legal ethics text Ross describes an Australian version of the standard conception as “fearless advocacy”.⁵³ In so doing he appears to suggest that there is a more balanced approach between the duty to the client and the duty to the court, than evident in the North American standard conception literature. However, irrespective of whether Ross’s fearless advocacy is an Antipodean manifestation of the standard conception, there seems to be significant evidence that concepts such as partisanship, role morality and zealous following of clients’ (lawful) instructions are significant themes within the Australian thinking of professional conduct. The Australian Law Reform Commission Issues Paper 20 critically reported that the “system is about

⁴⁸ R. Vischer, “Legal Advice as Moral Perspective” (2006) 19 *Georgetown Journal of Legal Ethics* 225, 257.

⁴⁹ T. Dare, “Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers” (2004) 7 *Legal Ethics* 24; and T. Dare, “Virtue Ethics and Legal Ethics” (1998) 28 *Victoria University of Wellington Law Review* 141; A. Perlman, “A Career Choice Critique of Legal Ethics Theory” (2001) 31 *Seton Hall Law Review* 829; 851.

⁵⁰ T. Terrell, “Turmoil at the Normative Core of Lawyering: Uncomfortable Lessons from the ‘Metaethics’ of Legal Ethics” (2000) 49 *Emory Law Journal* 87, 133. Yet the distinction is not as clear as this, since there are some deontologists who believe that consequences can be considered in defining rights: see D. Rhode and D. Luban, *Legal Ethics* (New York, Foundation Press, 2004), 10.

⁵¹ Nicholson and Webb refer to the retainer as the foundation of the lawyer/client relationship and therefore conclude that the contractual relationship (which in reality connotes an agency arrangement) requires them to follow the client’s instructions “by all proper means” (*Groom v Crocker* [1939] 1 KB 194 at 222). See D. Nicolson and J. Webb, *Professional Legal Ethics: Critical Interrogations* (New York, Oxford University Press, 1999), 130.

⁵² For instance Postema categorised the standard conception of Lawyering as a detachment strategy, which, he argues, causes Lawyers to deceive themselves into believing that they are not responsible for the consequences of their professional activities. See G. Postema, “Self-Image, Integrity, and Professional Responsibility” in Luban (ed), *The Good Lawyer: Lawyers’ Roles and Lawyers’ Ethics* *supra* n. 13, 289.

⁵³ Y. Ross, *Ethics in Law: Lawyers’ Responsibility and Accountability in Australia* (Sydney, LexisNexis Butterworths, 2001), 432.

winning which places emphasis on confrontation; the lawyers' role is strictly partisan which is not tempered enough by their duties to the court".⁵⁴

In effect, being partisan means that lawyers are "permitted and required to do everything to further the client's interests provided only that it is neither technically illegal nor a clear breach of a rule of conduct".⁵⁵ This statement aligns very closely to the Local Government Association of Queensland's submission, which urged the CMC to "take a 'real world' view and accept that political candidates are entitled to anything that does not contravene the law to advance the political causes they support".⁵⁶ What this alignment emphasises is the narrow range of considerations that are legitimate under the standard conception. Wolgast bluntly summarised the standard conception as providing "a framework...where moral considerations are blocked from view, where people allow themselves to do what they might otherwise shrink from".⁵⁷

It might seem that the standard conception with its emphasis on excluding moral factors and deference to client wishes might provide clear-cut justifications for Lawyer's actions. This is not the case; the existence of multiple "clients" means that the standard conception presents ambiguous justifications. Formally, Lawyer had two "clients", ie Councillors 1 and 2 and Concerned Citizen. These were the people whose names appeared on the trust fund, and in evidence at the inquiry Lawyer emphasised that he insisted that the trust account have a nominated client who would make decisions about distributing the funds.⁵⁸ Under the standard conception the question is whether Lawyer acted in the interests of these clients.

According to the CMC's understanding of the circumstances for Councillors 1 and 2 it can be suggested that Lawyer acted in their interests. The CMC was of the opinion that Councillors 1 and 2 wanted their involvement with the fund to remain

⁵⁴ Ross, *supra* n. 53, 433–4; Australian Law Reform Commission, *Issues Paper 20: Review of the Adversarial System of Litigation – Rethinking the Federal Civil Litigation System*, Australian Government Publishing Service (1997) at [1.7]. It is notable that efforts have been made to address these concerns; in particular note the statement of general principle under the heading "Relations with clients" in the Legal Profession (Solicitors) Rules 2007 in Queensland and para 12.1 under the heading "Advocacy and litigation rules".

⁵⁵ R. O'Dair, *Legal Ethics: Text and Materials* (Sydney, LexisNexis Butterworths, 2001), 134. Perlman suggests that lawyers simply "follow their clients' wishes": A. Perlman, "A Career Choice Critique of Legal Ethics Theory" (2001) 31 *Seton Hall Law Review* 829, 845.

⁵⁶ Needham, *supra* n. 15, v.

⁵⁷ E. Wolgast, *Ethics of an Artificial Person: Lost Responsibility in Professions and Organisations* (Stanford, CA, Stanford University Press, 1992), 89.

⁵⁸ CMC Transcript (Day 8), *supra* n. 17, 604, lines 27–30.

secret.⁵⁹ In the CMC's reading of the facts Lawyer undertook four tasks that facilitated this desire. The first was changing the client on the trust account to Concerned Citizen, when requested by Councillor 1 to do so.⁶⁰ The second was not informing Councillors 1 and 2 of their potential obligations when Lawyer was reminded by the Solicitor for the Council of the duty to lodge a third-party return under s 430 of the Local Government Act 1993 (Qld).⁶¹ The third was the preparation of Concerned Citizen's return that did not include the names of Councillors 1 and 2. The fourth was the submission of the trust account to the CMC.

It must be kept in mind that the District Court did not share the CMC's interpretation of these facts, and found, as has been noted, that Lawyer did not actively attempt to suppress the involvement of Councillors 1 and 2. What is significant for our purposes is that the Lawyer at the inquiry justified his actions in standard conception terms. He explained his failure to inform Councillors 1 and 2 of their potential obligations by saying, "I wasn't asked to advise them and I didn't want to have to give them any advice on those matters at all".⁶² Similarly, Lawyer adopted standard conception rhetoric in defence of his actions surrounding the changing of the account. He told the CMC that he was disinterested in the change and did not ask for an explanation; that all he was doing was ensuring that "there's a trust account being managed in a proper legal way in accordance with their directions and that was it",⁶³ and "[a]lways a solicitor acting for a client acts in accordance with directions and that's what I did".⁶⁴ Under the standard conception a lawyer's actions are justifiable if they accord with the client's interests, regardless of how "immoral" those interests might appear to bodies like the CMC. Indeed, the CMC found that the actions of those involved with the fund were contrary to its understanding of the legislation's desired goals of transparency and accountability in local government elections; however, it was of the opinion that no laws were broken. Instead, the CMC recommended a process of cultural change: "elected officials and public officers [need] to be willing

⁵⁹ Needham, *supra* n. 15, xxiii.

⁶⁰ CMC Transcript (Day 8), *supra* n. 17, 645, lines 45–50.

⁶¹ Needham, *supra* n. 15, 56.

⁶² Crime and Misconduct Commission, *Gold Coast City Council Hearings: Transcript of Proceedings – Day 23 (24.11.05)* State Reporting Bureau (2005) CMC Transcript (Day 23), 2142, lines 12–15, www.cmc.qld.gov.au/data/portal/00000005/content/67767001141625611033.pdf (viewed 12 March 2007). This point was **again reiterated** by Lawyer's legal representative, Mr Martin, in CMC Transcript (Day 23), 2148, lines 15–20; Needham, *supra* n. 15, 57.

⁶³ CMC Transcript (Day 8), *supra* n. 17, 647, lines 46–49.

⁶⁴ CMC Transcript (Day 8), *supra* n. 17, 647, line 31.

to take a healthy attitude towards compliance obligations, rather than looking for loopholes to avoid them”.⁶⁵ But the role of the lawyer in the standard conception is, after-all, to exploit “loopholes”, and in this light Lawyer’s actions would be justifiable.

While Lawyer seemed to accept Councillors 1 and 2 as his clients whose interests he was prepared to further, Concerned Citizen, as the events are recorded in the CMC transcripts of evidence and report, did not appear to attract this status. It seemed that Lawyer never actually spoke with him,⁶⁶ but instead still regarded Councillors 1 and 2 as the people responsible for the trust fund. There was evidence at the inquiry which suggested that even when Concerned Citizen was the “client”, Lawyer continued to act on Councillor 1’s instructions concerning payments.⁶⁷ A specific example was when Lawyer accepted a donation from a company that was conditional on the money not being used against one of the “errant” councillors; he made a point of advising Councillor 1, not Concerned Citizen.⁶⁸ Indeed, Lawyer told the CMC:

“[Councillor 1] **still—still** had an involvement in the process because of [Councillor 1’s] involvement from day one but overall [Councillor 1] was obviously interested in knowing...what funds were available.”⁶⁹

In his evidence to the CMC, Lawyer suggested that there was no lawyer-client relationship between himself and Concerned Citizen; that he was not providing legal advice.⁷⁰ Concerning the third-party return, Lawyer stated that he provided the document to Concerned Citizen, but did not advise Concerned Citizen about it. Indeed, he implied that he did not know whether the submitted return was exactly the same as the one he provided, not having seen the submitted return.⁷¹

Yet, in our opinion, the listing of Concerned Citizen’s name on the trust account meant that he was Lawyer’s client. Therefore, in not advising Concerned Citizen and in preparing a document that could be argued to be misleading,

⁶⁵ Needham, *supra* n. 15, vii.

⁶⁶ CMC Transcript (Day 8), *supra* n. 17, 649, lines 45–46.

⁶⁷ CMC Transcript (Day 8), *supra* n. 17, 650, line 34.

⁶⁸ CMC Transcript (Day 8), *supra* n. 17, 655, lines 25–38.

⁶⁹ CMC Transcript (Day 8), *supra* n. 17, 652, lines 36–41.

⁷⁰ CMC Transcript (Day 8), *supra* n. 17, 647, lines 39–42.

⁷¹ CMC Transcript (Day 8), *supra* n. 17, 670, lines 45–48.

Concerned Citizen was exposed to the possibility of prosecution.⁷² Indeed, the CMC did recommend Concerned Citizen to the relevant state government department to be considered for prosecution.⁷³ It is difficult in these circumstances to see Lawyer as furthering Concerned Citizen's interests. According to the standard conception, such action by a lawyer is not justifiable. Lawyer can be seen as prioritising the interests of some clients (Councillors 1 and 2) over those of another client (Concerned Citizen).

The reason why Lawyer did not see Concerned Citizen as a "true client" was that Lawyer seemed to be prioritising the interests of Friend.⁷⁴ Indeed, Lawyer was only involved in the fund at Friend's request.⁷⁵ The initial appointment of Councillors 1 and 2 as clients was made with Friend's approval,⁷⁶ and therefore facilitated his desire not to be "formally" identified with the fund.⁷⁷ Lawyer was able to approach other developers for contributions because he was regarded within the developer community as Friend's lawyer.⁷⁸ Indeed, in this light even Councillors 1 and 2 can be seen as only "quasi-clients", with Friend residing in the background as the actual client. Lawyer seems to admit this when he responded affirmatively to Counsel Assisting the Commission's question—"[a]nd so far as being clients of yours...that was really for convenience sake only?"⁷⁹ When asked why he had not suggested Friend as the client to be nominated on the trust account, Lawyer said that he did not think that was appropriate.⁸⁰ The whole thrust of Lawyer's evidence was that he was involved in the fund because of his association with Friend. Lawyer, when he was recalled to give evidence, steadfastly asserted that he had not provided legal advice to

⁷² Local Government Act 1993 (Qld), s 436(2).

⁷³ See also Needham, *supra* n. 15, 105. It was decided not to prosecute Concerned Citizen.

⁷⁴ CMC Transcript (Day 23), *supra* n. 62, 2149, lines 12–15.

⁷⁵ See eg CMC Transcript (Day 8), *supra* n. 17, 602, line 54, 603 line 28, 646, lines 37–42.

⁷⁶ CMC Transcript (Day 8), *supra* n. 17, 606, lines 7–8.

⁷⁷ CMC Transcript (Day 8), *supra* n. 17, 626, lines 32–55. This conclusion seems evident in a letter to Quadrant: see CMC Transcript (Day 8), *supra* n. 17, 636, lines 40–46.

⁷⁸ For instance a CEO of one of the organisations testified that he donated at the request of Friend and was happy to do so because Friend was a trusted friend. Crime and Misconduct Commission, *Gold Coast City Council Hearings: Transcript of Proceedings – Day 13 (08.11.05)* State Reporting Bureau (2005), 1200, lines 24–34, www.cmc.qld.gov.au/data/portal/00000005/content/58779001141625314751.pdf (viewed 12 March 2007). Another CEO said that he agreed to the donation because Friend was an extremely important client: Crime and Misconduct Commission, *Gold Coast City Council Hearings: Transcript of Proceedings – Day 14 (09.11.05)* State Reporting Bureau (2005), 1266, lines 26–30, www.cmc.qld.gov.au/data/portal/00000005/content/17715001141625314751.pdf (viewed 12 March 2007).

⁷⁹ CMC Transcript (Day 8), *supra* n. 17, 646, lines 27–30.

⁸⁰ CMC Transcript (Day 8), *supra* n. 17, 614, line 27.

Councillors 1 and 2, or to Concerned Citizen.⁸¹ The reality seems to be that Friend was the “true client” and the level of service Lawyer provided to the others was conditional on whether or not their interests were aligned with those of Friend—the election of a development friendly council.⁸² This seemed to have resulted in Lawyer working for Councillors 1 and 2 and explains his failure to assist Concerned Citizen with the third-party return. Tim Dare has recently coined the phrase “hyper-zealous” to cover lawyer behaviour like Lawyer’s.⁸³ Lawyer appears, with regard to his actions for his “true client”, to be the epitome of the standard conception lawyer throughout: “The Lawyers’ role in this system is that of the agent of the client and therefore their behaviour in handling the matter is of small importance.”⁸⁴

However, the standard conception in its picture of the lawyer as zealously pursuing a client’s interests within the formal limits of the law, unperturbed by notions of personal morality, has been highly criticised within the legal ethics project. It has been criticised as engaging in a fundamental Cartesian error of separating outer and inner life and opening lawyers up to personal malaise.⁸⁵ It has been identified as the reason for a perceived decline in the social status of lawyering,⁸⁶ and in key public controversies, lawyers acting according to the standard conception have been heavily criticised as allowing, and even facilitating, fundamental attacks on the public good.⁸⁷

Indeed, the CMC seems to have placed the Council Election within this last category when it referred to the participants involved with the fund, including Lawyer, as possessing no conception of the public good; as operating in a “Wonderland”.⁸⁸ Notwithstanding the Commissioner’s criticism, the question whether Lawyer’s actions are justifiable according to some of the alternative accounts of Lawyering remains unanswered. Common to these alternatives is the fundamental realisation that lawyering takes place within all the eventualities of life and therefore

⁸¹ CMC Transcript (Day 23), *supra* n. 62, 2142, lines 11–15.

⁸² Friend’s involvement with the fund was described by the CMC as his “own decision to become more involved with the plan, about which he was enthusiastic”: see Needham, *supra* n. 15, 15.

⁸³ Dare (2004), *supra* n. 49.

⁸⁴ Ross, *supra* n. 53, 4.

⁸⁵ J. Webb, “Being a Lawyer/Being a Human Being” (2002) 5 *Legal Ethics* 130, 132.

⁸⁶ In Australia, the Law Council too reports that “A number of recent studies portray today’s legal workplace as characterised by long hours and dissatisfied workers. Many practitioners express regret in their career choice. A significant percentage, it is reported, are intending to leave their current position”: Law Council of Australia, 2010: *A Discussion Paper: Challenges for the Legal Profession* (Law Council of Australia, 2001), 129.

⁸⁷ Watergate, Enron, and the collapse of HIH have called the role of the lawyer into question. See for example E. Wald, “Lawyers and Corporate Scandals” (2004) 7(1) *Legal Ethics* 54.

⁸⁸ Needham, *supra* n. 15, v.

calls for a certain amount of accountability from lawyers with regard to their decisions about their own conduct and the advice they give to clients.

Common Morality

Luban criticises the role morality of the standard conception as amounting to “an institutional excuse from the requirements of common morality”.⁸⁹ He refuses to believe that people are just the “sum” of their roles,⁹⁰ and maintains that there is a moral self “behind the social mask”.⁹¹ Acknowledging that there will be times when an individual’s common morality will conflict with role morality, he asserts that common morality should prevail.⁹² He defines common morality as “morality concerned with how persons behave”.⁹³ In his definition Luban is careful not to subjectify morality as whatever set of values a person chooses to live by: Luban identifies a common set of values that are at the core of any person who lives in a community.⁹⁴ He describes the tension between common morality and role morality dramatically “as a clash between consequences and duty”.⁹⁵ Having established common morality as a competitor to the standard conception’s role morality, Luban goes on to prioritise common morality in all except criminal defence matters.⁹⁶ He advocates that lawyers ought to be moral activists,⁹⁷ who should operate in a way that accepts that role morality is a presumption that can be rebutted.⁹⁸

Like the standard conception analysis, the application of Luban’s account of common morality does not lead to clear-cut justifications concerning Lawyer’s actions. First and foremost it could be argued that Lawyer should have abandoned his

⁸⁹ Luban (1990), *supra* n. 13, 426. Originally argued in Luban (1988), *supra* n. 13, 105.

⁹⁰ Luban (1988), *supra* n. 13, 111.

⁹¹ Luban (1988), *supra* n. 13, 112.

⁹² Luban (1988), *supra* n. 13, 112.

⁹³ Luban (1988), *supra* n. 13, 110.

⁹⁴ Luban (1988), *supra* n. 13, 110.

⁹⁵ Luban (1990), *supra* n. 13, 426. He elaborates on this by saying that there is often a tension between consequentialist moral theories, like utilitarianism, and deontological moral theories that emphasise a person’s obligations or duties: Luban (1990), *supra* n. 13, 428–9.

⁹⁶ While Luban particularly advocates for moral activism in civil matters, he takes a more traditional view of how lawyers should act for their clients in criminal proceedings: Luban (1988), *supra* n. 13, 157.

⁹⁷ Luban (1988), *supra* n. 13, 160–1.

⁹⁸ Esau continues his analysis of Luban’s approach by classifying it as “restricted differentiation” in that partisanship on behalf of clients is limited by common moral obligations and instead of pure non-accountability, moral activism is encouraged. This requires lawyers to employ moral counselling in dealing with their clients: A. Esau, “Professional Ethics and Personal Ethics”, www.umanitoba.ca/Law/Courses/esau/lppr/ethics.htm (viewed 9 October 2006).

role morality approach the moment he realised the likely consequences of the fund for the common good, namely the integrity of the election. However, this assumes that the fund was in fact likely to be corrosive to the election. Yet the actual result of the election does not seem to support this. While only some of the bloc candidates were elected, the three “obstructionist” councillors were re-elected. This also assumes that the fund was the only corrosion on the electoral process; at the time of the formation of the fund the Chamber of Commerce, Friend and other developers, and Councillors 1 and 2 were of the opinion that the election was going to be undermined by environmental organisations. Lawyer’s actions in supporting the fund could be justified as providing a ‘balance’, and ensuring the common good of the election process.

Common morality could dictate that agents, in the circumstance of Lawyer, should make it clear to all that Friend was his true principal. In the alternative, common morality could be conceived in Aristotelean terms with friendship as the cornerstone of the fraternal good life, in which case Lawyer’s acts for Friend seem justifiable.⁹⁹ However, this absolute valuing of friendship with the good is criticised by Cicero. For Cicero the dissolution of republican Roman into dictatorship was facilitated because civil virtue had been undermined by private accords between powerful “friends”.¹⁰⁰ In the realm of common morality, even the issue surrounding the provision of documents to the CMC could become morally justifiable. At the inquiry Lawyer explained the return as an effort on his part to assist the common good of a public inquiry by giving the CMC exactly what they had asked for.¹⁰¹ While the CMC maintained, in the report, and in the hearings in the Magistrates’ and District Courts that this was a narrow interpretation of their request, Lawyer’s understanding of the request was accepted by the District Court. In light of this, it is tempting to suggest that calls for common morality to displace role morality leads to a form of sophism with every argument for, balanced by an equally convincing counter argument.

Lawyer’s dealings with Concerned Citizen, however, appear not to be justifiable at all according to common morality. The harm to Concerned Citizen in

⁹⁹ Aristotle, *supra* n. 5, book 9, 1167a18.

¹⁰⁰ Lynch, *supra* n. 8.

¹⁰¹ CMC Transcript (Day 23), *supra* n. 62, 2144, lines 42–48. In his answers Lawyer said that he interpreted the Commission’s request to be one that required him to advise on who received the monies and he believed that he gave a very full disclosure of this information. He did not understand the Commission to be asking about who operated or who authorised the accounts.

exposing him to potential prosecution cannot be said to be outweighed by the political harm to Councillors 1 and 2 and Friend if it was publicly disclosed that Councillors 1 and 2 were in charge of the fund. This is especially so as it appeared that Councillor 1's relationship to the fund was common knowledge within elements of the community,¹⁰² and was the subject of almost daily allegations and speculations within the media.¹⁰³ This action by Lawyer seems to be a clear situation where his role morality should have been suspended by common morality, and he should have ensured that Concerned Citizen be given greater advice concerning the return, and Councillors 1 and 2 should have been advised of their obligation to lodge a third-party return.

This conclusion, via a very different route, ends with the same conclusion that the standard conception analysis yielded: that most of Lawyer's actions appear justifiable with the exception of his dealings with Concerned Citizen. This outcome, from an application of Luban's account of lawyering, has been anticipated by Luban's critics who identified the difficulty with open, and seemingly unbounded, concepts such as common morality.¹⁰⁴ Although, in his more recent work, Luban seems to be refining his notion of common morality through an emphasis on personal integrity and the necessity of lawyers justifying their actions morally.¹⁰⁵ In this, Luban appears to be moving towards the normative account of lawyering offered by Shaffer and Cochran.

Personal Integrity

The notion of personal integrity has become a common rallying point for much recent theorising within the legal ethics project.¹⁰⁶ These approaches have a radically different orientation to the role of lawyering. Where the standard conception

¹⁰² Indeed, it was common knowledge to the developers and the bloc of pro-development candidates. It was also common knowledge to the three obstructionist councillors and, as evidenced by the actions of the Solicitor for the Council, common knowledge within the senior management of the Council GCCC.

¹⁰³ For example, J. Sexton, "Rift runs through coastal developers", *The Australian*, 19 February 2005, 1.

¹⁰⁴ Atkinson criticised Luban's model for lawyering because it relies on universally binding objective norms. He questions whether there is an "inclusive set of moral norms under which citizens are morally bound to obey laws with which they disagree". R. Atkinson, "Beyond the New Role Morality for Lawyers" (1992) 51 *Maryland Law Review* 853, 949.

¹⁰⁵ Luban (2003), *supra* n. 13.

¹⁰⁶ For example M. Strassberg, "Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics" (1995) 80 *Iowa Law Review* 901; Postema, *supra* n. 52, 290; S. Levine, "Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation" (2003) 37 *Indiana Law Review* 21.

prioritises role morality to the exclusion of the personal, personal integrity emphasises the limits of role morality and the necessity that lawyers unify personal and professional morality.¹⁰⁷ Allan Hutchinson summarised it as the realisation that:

“...acting ethically is not about adherence to a code that is resorted to in occasional moments of indecision. Rather, it is about the development of a moral way of living and lawyering that encompasses an organic set of attitudes, dispositions, and values, and that can be incorporated into each lawyer’s daily routines and regimen.”¹⁰⁸

However, there is a danger that certainty and authority vanish once talk turns to personal values. Calls to personal values can all too easily slip into valuelessness, giving the impression that a lawyer can choose any values from a pool of commensurable values. If this was so, recourse to personal integrity as a solution to the more sophist elements in calls for common morality would be self-defeating. Personal integrity theorists seek to navigate these concerns by providing a prescriptive set of values that are required for a life to be lived with integrity.¹⁰⁹

One of the foundational accounts of lawyering as personal integrity is Shaffer and Cochran’s “collaborative” theory of lawyering.¹¹⁰ They conceive the lawyer-client relationship as a moral one where lawyers should regard clients as collaborators in the good,¹¹¹ each helping the other to become better people.¹¹² Drawing upon the revitalisation of Aristotelian and Thomism traditions of “virtue ethics”,¹¹³ Shaffer and Cochran argue that lawyers should care about which clients they represent and “the type of person the client is becoming”.¹¹⁴ These calls are not mere platitudes; Shaffer and Cochran provide the values of a virtuous life. The “good” that lawyers and clients

¹⁰⁷ L. Gantt, “Integration as Integrity: Postmodernism, Psychology, and Religion on the Role of Moral Counselling in the Attorney-Client Relationship” (2004) 16 *Regent University Law Review* 233, 249.

¹⁰⁸ A. Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto, Irwin Law, 1999), 48.

¹⁰⁹ Strassberg, *supra* n. 106; D. Rhode, “If Integrity is the Answer, What is the Question?” (2003) 72 *Fordham Law Review* 333.

¹¹⁰ Condlin describes the argument made by Shaffer and Cochran as a rejuvenated Fried argument. See R. Condlin, “‘What’s Love Got to Do With It?’ – ‘It’s Not Like They’re Your Friend for Christ’s Sake’: The Complicated Relationship Between Lawyer and Client” (2003) 82 *Nebraska Law Review* 211, 230.

¹¹¹ Shaffer *et al*, *supra* n. 14, 47.

¹¹² R. Cochran, D. Rhode, P. Tremblay and T. Shaffer, “Symposium: Client Counselling and Moral Responsibility” (2003) 30 *Pepperdine Law Review* 591, 599.

¹¹³ A project beginning with A. MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame, IN, University of Notre Dame Press, 1984).

¹¹⁴ Shaffer *et al*, *supra* n. 14, 44.

should collaborate towards is for both of them to live a life that manifests virtues like “compassion, tolerance, humility, courage, honesty, care, and persistence”.¹¹⁵

If these values are perceived as foundational to the lawyer’s role, Lawyer’s actions seem unjustifiable, as reflected in the CMC’s moral condemnation of the participants in the fund.¹¹⁶ Accepting the CMC’s perspective that Lawyer engaged in conduct to hide Councillor 1’s involvement, Lawyer did not act honestly. In his dealing with Concerned Citizen, Lawyer appeared to show little compassion and care for Concerned Citizen. Furthermore, in facilitating the interests of Councillors 1 and 2 and Friend through a course of action that was considered deceptive by the CMC, Lawyer was not being courageous and persistent in helping them to live a more virtuous life. In his continual assertions that he was just assisting a friend with what he regarded as a non-legal scheme, Lawyer can be criticised as **failing to courageously take responsibility** for his actions. In this reading, Shaffer and Cochran’s account of personal integrity, with its strong prescription of what amounts to a life lived with personal integrity, presents Lawyer’s actions as unjustifiable.

However, this reading shows the weakness of calls to personal integrity. Shaffer and Cochran’s account of lawyering renders Lawyer’s actions unjustifiable because they establish a set of quite specific values as universally leading to the good life. If an alternative set of values is adopted, Lawyer’s actions may not seem so morally reprehensible. For instance, if Aristotle’s strong valuing of friendship¹¹⁷ is substituted, Lawyer’s actions consistently for the benefit and in the interests of Friend appear justifiable. Friendship becomes deeply problematic for virtue-based calls of integrity; after all friendship is a critical component of Aristotle’s account of the good: the virtuous become virtuous through friendship.¹¹⁸ More materialistically, if the substituted value was getting on with business and doing what was necessary to secure Friend’s financial wellbeing through ensuring a pro-development Council, then this may render Lawyer’s actions justifiable.

The adoption of a strongly prescriptive moralistic account of the good or virtuous life, like Shaffer and Cochran’s, can lead to regarding Lawyer’s actions as unjustifiable. However, if different foundational values are adopted, Lawyer’s actions become more justifiable. Most calls to personal integrity within legal ethics tend to

¹¹⁵ Shaffer *et al*, *supra* n. 14, 54.

¹¹⁶ Needham, *supra* n. 15, Ch 10.

¹¹⁷ Cochran *et al*, *supra* n. 112, 599.

¹¹⁸ Aristotle, *supra* n. 5, book 9, 1172a6–a15.

prescribe a theory of personal integrity from within the tradition of virtue ethics which Shaffer and Cochran advocate.¹¹⁹ This commonality allows us to generalise that with the particular understanding of personal integrity generally advocated within legal ethics, Lawyer's actions appear unjustifiable.

The Vexed Nature of the Lawyer-Client Relationship

In summary, many of Lawyer's actions seem justifiable from the perspective of the standard conception of lawyering, with the exception of his less-than-zealous representation of Concerned Citizen. This is particularly so if Friend is considered Lawyer's true client throughout the period. With the exception of the relationship with Concerned Citizen, common morality appears ambiguous, with insufficient justification present for it to trump the default role morality. With the personal integrity approach it depends on the values determined as manifesting a virtuous life. If strongly moralistic values of compassion, tolerance, humility, courage, honesty, care and persistence are identified, like in the work of Shaffer and Cochran and other contemporary personal integrity theorists, then little of what Lawyer did appears justifiable, but this assessment can change depending on the values emphasised.

This lack of unity between competing accounts of what lawyers should do points to the vexed nature of the lawyer-client relationship. It reminds us that representing a client involves complex assemblages of relationships, values, responsibilities and expectations that individual lawyers negotiate every day.¹²⁰ Notwithstanding the standard conception's attempt to simplify and standardise the relationship through prescriptions of partisanship, role morality, and the zealous following of a client's (lawful) instructions, the CMC inquiry and report reveals the complexities for that approach in a real world situation of friendships and competing loyalties. As has been argued, conduct that is justifiable according to the standard conception can often be equally justifiable under a common morality model. Luban's schema only displaces an action justified by role morality when that action is not justified by common morality. Again Lawyer's circumstances showed that even

¹¹⁹ Cochran encourages clients to draw on their own moral resources: see R. Cochran, "Legal Ethics, Client Counseling and Moral Responsibility" (2002) *Association of American Law Schools Newsletter* 1, 2 in Cochran *et al.*, *supra* n. 112, 602.

¹²⁰ A point emphasised by Sarat and Felstiner in their seminal empirical study of lawyers and clients: see A. Sarat and W. Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (New York, Oxford University Press, 1995).

actions by a lawyer which entities like the CMC found to be misleading, are not necessarily in clear breach of common morality. Examining consequences can often lead to a balanced board; and in such a circumstance common morality sides with role morality.

It is only when “virtue” values, such as honesty, care, courage and persistence—values legal ethicists tend to promote under the banner of personal integrity—are taken into account that Lawyer’s actions, as a whole, are arguably unjustifiable. Indeed, when such values are prescribed, it can be argued that Lawyer, in allowing Councillors 1 and 2 and Friend to continue to participate in the scheme, did not act like a friend. However, if the value of unquestioned fidelity to a friend is substituted, a different assessment of Lawyer’s actions may follow.

Most critics of the standard conception advocate for a “contextual” account of lawyer ethical conduct.¹²¹ Kronman emphasises practical reason,¹²² while Luban and Rhode in their textbook talk of “judgment”.¹²³ While the specifics of these different accounts of ethical decision-making diverge, what is common is the recognition that rule-based codes do not relieve lawyers from making routine and quite complicated ethical determinations on a regular basis.¹²⁴ Lawyer’s circumstances, as documented in the CMC’s transcript and report, reveal the latitude that lawyers have in making decisions concerning clients and friends, and also the various ways in which such decisions can be justified. It might have been trust in a friend, political naivety or a belief in the aims of the fund (or a combination of all) that motivated Lawyer’s continual involvement. However, short of prescribing some substantive values of personal integrity, that lawyers must be scrupulously honest in all dealings, much of what Lawyer did seems justifiable.

This diversity is reflected in the sociological studies of lawyers which emphasise what might seem an obvious point—that different lawyers are immersed in different personal and professional contexts and so belong to different “communities

¹²¹ This summary as “contextual” is from W. Simon, *The Practice of Justice: A Theory of Legal Ethics* (Cambridge, MA, Harvard University Press, 1998), 10–11, but particularly Ch 6, 138 ff.

¹²² A. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, MA, Belknap Press of Harvard University Press, 1995).

¹²³ L. Rhode and D. Luban, *Legal Ethics* (New York, University Casebook Series, Federation Press, 2001), xvii–xviii.

¹²⁴ The difficulties surrounding the application of principles stated in codes have been mentioned by Australian text writers such as Ross, *supra* n. 53, 198 and J. Disney, *Lawyers* (North Ride, NSW, Law Book Company, 1986), 598.

of practice”, and therefore make different choices.¹²⁵ Another lawyer might have refused an invitation from a developer friend to become involved in a scheme of soliciting political donations. A third, possibly with more knowledge of electoral law,¹²⁶ might have advised Councillors 1 and 2 and Friend at the early planning meetings of the requirement of third-party returns, causing the participants to reconsider their strategies.

This case study reveals that the exercise of mixing friendships with professional responsibilities is a vexed one for lawyers. It shows how the claims of friendship can draw a lawyer into difficult circumstances. Although cleared of illegal activity, in becoming involved with the campaign fund at Friend’s request, Lawyer’s actions became the subject of an inquiry, criminal prosecution and some would say negative public notoriety as a result of the reporting of these events in the Australian media. Yet regardless of these eventualities Aristotle’s basic point that having friends is good for the self is important. Lawyers should not distance themselves from others. Having friends can counter what has been described in the literature as a direct correlation between social isolation and mental health in the legal profession.

However, as the case study shows, caution must be exercised when personal relationships develop into professional relationships. A negative impact on clients, non-clients and the public good can result. The case study is a fascinating example because it is not the expected situation of a lawyer acting for a friend as a formal client. Lawyer’s commitment to Friend meant that he lost sight of who his clients were and what duties were owed, and this is the common conclusion from the three normative accounts of lawyering discussed. As a contextual approach it shows that lawyers need to exercise extreme care when asked to undertake professional activity at the behest of friends. A lawyer must retain a sense of distance, a space for reflection and assessment, concerning what is being asked and how that will impact on formal obligations.

This case study is a timely reminder for those involved in legal education and those currently practising. “Contextual” accounts of lawyering quite graphically show that future and current lawyers will need to develop the art or skill of using “practical reason” or “judgment” or, put another way, recognise that, for some decisions, a

¹²⁵ L. Mather, C. McEwen and R. Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (New York, Oxford University Press, 2001), 3–11.

¹²⁶ See Needham, *supra* n. 15, 56.

course of action that requires them to resort to an “integration of personal and professional morality”¹²⁷ is required. Law students and lawyers need to learn and practise reflecting.¹²⁸ They need to take seriously the task of nurturing the skills that will enable them to make justifiable decisions, and much of this will come from hearing and deliberating on examples of how other lawyers have negotiated specific and complex situations. What we hope is that Lawyer’s actions as documented in the transcript of the CMC inquiry and the report provide a case study through which lawyers (and law students) can reflect on how they would respond to the demands of friendship in legal practice and the complexities of the lawyer-client relationship. It also shows how the daily decisions made by lawyers reveal scope for ethical reflection, and how choices made within that scope can be justified.

Conclusion

This article examines the actions of a lawyer, as documented in the CMC inquiry, as a case study for thinking about lawyer conduct. While Lawyer’s actions were held to be legal, wider implications of his conduct are explored through a discussion of three accounts of lawyering: the standard conception, common morality and personal integrity. It seems that most of Lawyer’s involvement in the scheme could be justified according to the standard conception, and even common morality. Both, however, also suggest that Lawyer’s action, in exposing Concerned Citizen to possible criminal prosecution, was unjustifiable; although different explanations are offered.

When examining Lawyer’s actions through the lens of recent scholarship on personal integrity, it is suggested that the **proscription** of specific virtue values by personal integrity scholarship led to an assessment of Lawyer’s actions as unjustifiable. However, it is also suggested that inserting alternative values leads to more positive assessments.

In conclusion, it is suggested that Lawyer’s actions show the complexities that flow from the lawyer-client relationship and particularly how obligations of friendship can interfere with seemingly clear duties and responsibilities. This contextual examination of lawyer conduct illustrates three points. First, lawyers have significant autonomy in terms of how they resolve ethical issues in their daily practices. While

¹²⁷ Postema, *supra* n. 52, 290.

¹²⁸ M. Robertson and K. Tranter, ‘Grounding Legal Ethics Learning in Social Scientific Studies of Lawyers at Work’ (2006) 9(2) *Legal Ethics* 211.

much of what Lawyer did was justifiable according to established normative accounts of lawyering, when strong values of personal integrity—values that it must be remembered are not yet part of the formal law of lawyering—were applied to measure Lawyer's conduct his actions became unjustifiable. Second, undertaking legal work borne out of friendship is a situation that must give lawyers cause to pause and reflect on how this activity will impact on clients and non-clients. Third, in setting out this case study, we hope to have provided a salutary example for lawyers and law students alike of a complex situation involving the conflict of personal ties and professional obligation, and presented an opportunity to recognise the need for vigilance and the development of skills for making sound and justifiable choices in their professional lives.