

Professional Conduct For Lawyers And Judges

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This is the third (2007) edition of Professor Smith's book, *Professional Conduct For Lawyers and Judges*, published in all three editions by Maritime Law Book of Fredericton. The first edition in 1998 was an expanded and revised edition of *Professional Conduct for Canadian Lawyers*, published in 1989 by Butterworths. The second edition was a revised and updated version, including expanded chapters on 'The Lawyer As Judge', 'The Lawyer in Civil Pre-Trial' (including alternate dispute resolution) and 'The Lawyer's Other Lives' (including conduct in private life). References were updated to incorporate recent cases and changes to professional conduct codes, including in particular, the Ontario Rules of Professional Conduct (2000) and the Newfoundland Code of Professional Conduct (1999). The third edition continues the process of updating.

Extract from Chapter 1

[11] It is not intended to defend the existence of a profession which has been in some recognizable form since the 13th century in England. However, in pursuing its historicity the question arises: why have a legal profession? Remembering the description of a profession and the hallmarks that go with it¹² a statement made some years ago by F.A.R. Bennion is noted:¹³

'Advisory services (including concomitant executive functions) on matters requiring expert intellectual knowledge and concerning the physical or mental health of an individual, or the protection or advancement of the rights or property of an individual or body corporate, are best provided by a private practitioner whose competence and integrity are vouched for by an independent body representative of such practitioners.'

[12] Amongst other things, Bennion was inveighing against a perceived possibility of a state-administered system of legal services being the only such services made available to individuals and corporations. It is submitted that his proposition is still an apt one if for no other reason than to provide a truly objective third party practitioner who has no hidden agenda in conflict with that of the client. It is here suggested that this includes putting aside any hidden agenda of the practitioner respecting the acquisition of personal wealth or advancement when serving the client.

[13] The link between English concepts of professional legal conduct and those which have evolved in Canada is undoubtedly to be found in the United States of America. Michael Birks records¹⁴ that '[t]he steps taken to regulate the profession in America during the first half of the 18th century followed contemporary trends of thought in regard to such matters in England ...'. He limits this observation by stating that there is no reason to suppose that the colonists were influenced by specific Acts of the English Parliament.¹⁵

However, concerns expressed in the American colonies respecting the conduct of especially attorneys and solicitors arose early in the life of these colonies.¹⁶ As a substantial number of legal persons there came from England it is most reasonable to suppose that their respective standards of what did and did not constitute good professional legal conduct were brought with them. Following the War of American Independence (1775-1783) these standards would

have been carried north into this country. A society of lawyers became established as early as 1797¹⁷ in Upper Canada. With its establishment and the founding of other similar bodies came standards of conduct that were used, inter alia, to both guide and discipline their members.

Integrity, Competence And Quality Of Service

[14] What personal qualities have been viewed by Canadian lawyers as comprising good professional legal conduct? One jurist has indicated that in his view the qualities of honesty, integrity, trustworthiness and respect make up the necessary elements of conduct for a lawyer.¹⁸ In a Convocation address delivered at the University of Toronto in 1986, Chief Justice Dickson of the Supreme Court of Canada used the term 'compassion' as a further desirable element in a lawyer's make-up. His Lordship used the term in the sense of it being 'a feeling of empathy or sympathy for the hardships experienced by others - a feeling, which extends to a sense of responsibility and concern to alleviate hardships at least in some measure.'¹⁹ To these qualities the Canadian Bar Association has added those of loyalty and competence.²⁰

Not to become semantic, it is this set of qualities which may in fact be synthesized into a triplet of terms: integrity, competence and a concept called 'quality of service'. These three terms keep appearing singly or together in relation to the Canadian legal profession in conduct codes, cases and writings. Several Canadian provincial codes deal with them but never under a definition. One is left with the basic meanings of the words themselves, albeit within the perspective and colouring of their application to the legal profession. Thus we find that the term 'integrity' perforce includes honesty and trustworthiness; the term 'competence' includes skill; the term 'quality of service' includes a broader estimate of competence for it goes beyond mere skill and may fairly be said to embody respect for and loyalty to others, whatever other qualities it possesses.

[15] There is historical background in relation to today's requirement of integrity on the part of the Canadian lawyer. Writing of the professionalism of solicitors and attorneys in England in the 1700s Michael Birks relates, somewhat wryly:²¹

'With their fortunes hitched to the wheels of the Industrial Revolution, which produced a new spate of clients, the behaviour of solicitors and attorneys had to match the principles of the rising class of manufacturers and traders. Success ... could not be achieved by the tricks and niceties of special pleading which hitherto had marked the successful lawyer. To be successful he now had to acquire a reputation for integrity and straight dealing.'

[16] F.A.R. Bennion writes:²²

'Integrity, probity or uprightness is a prized quality in almost every sphere of life, and nowhere more so than in the professions ... The professions exact a higher standard of integrity than is found in many other walks of life.'

[17] Bennion goes on to catalogue some items he considers give evidence of a professional's integrity: the preservation of confidentiality, the display of impartiality, the taking of full responsibility, the exhibition of competence, fairness and fearlessness.²³

[18] A decided thrust toward a high degree of integrity being required of lawyers is found in an Act of Parliament passed in England in 1729.²⁴ Entitled "for the better Regulation of Attorneys and Solicitors" it and its two extending Acts, states Birks,²⁵ 'did much towards promoting a higher standard of honesty and integrity among the profession at large ...'.

[19] As to competence, Bennion refers to it as ‘the giving of the hallmark’ by the professional association to which a professional person belongs.²⁶ He intimates that the public looks for such a hallmark when engaging the services of a professional person. More will be said on the matter of competence of the lawyer in succeeding chapters.²⁷

[20] ‘Quality of service’ is in a sense both an older and a newly minted term. It of course springs from the tradition of service that has been at the base of other professions as well as that of the legal profession. The word ‘quality’ becomes allied with the criteria now set out in the codes of professional legal conduct as to what does - or does not - comprise competence amongst lawyers. Speaking on the word ‘service’ a presidential address given to chartered land surveyors some years ago²⁸ has a clear message for our profession as well:

‘The finest tradition of any calling is a readiness to serve. The spirit of a great profession is the spirit of service ... It is a spirit which derives, I suggest, from an interest not in things but in people - which alone begets understanding’.

[21] Bennion puts the matter in language which is more prosaic but just as direct when he states:²⁹

‘The tradition of service which leads the true professional consultant to place the interests of his client before his own, and to give of his utmost without regard to material reward, is a most precious concept.’

[22] Should one question the historical roots of the legal profession’s dedication to this primary ideal of service to one’s clients, some findings of modern legal historians are instructive. Daniel Duman writes:³⁰

‘... [B]y the middle of the 19th century, if not earlier, the members of the professions had begun to distinguish themselves from both the business and the landed classes. They had established the ideal of service as a central part of their occupational creed.’

[23] Professor J.H. Baker, arguably England’s leading present day legal historian, goes back much further - to at least the 15th century - on this ideal of service. Writing in *The Order of Serjeants At Law*³¹ he recounts the taking of an oath by members of this branch of the legal profession. The form of the oath was settled by the late 1400s but was likely of origin in the century before:

‘Ye shall swear that well and truly ye shall serve the king’s people as one of the serjeants at the law. And ye shall truly counsel them that ye shall be retained with, after your cunning. And ye shall not defer, tract or delay their causes willingly for covetise of money or other thing that may turn you to profit. And ye shall give attendance accordingly. As God your help, and his saints.’

¹² See this chapter, fns. 1 and 2, supra.

¹³ In *Professional Ethics* (London: Charles Knight & Co. Ltd., 1969), pp. 15, 16.

¹⁴ In *Gentlemen of the Law* (London: Stevens and Sons Limited, 1960), p. 258.

¹⁵ *Ibid.*

¹⁶ *Op. cit.* and especially Chapter 12 thereof.

¹⁷ See W. Wesley Pue, *Becoming ‘Ethical’; Lawyers’ Professional Ethics in Early Twentieth Century Canada* (1991), 20 *Manitoba Law Journal* 227, at p. 236.

¹⁸ Justice E.N. Hughes of the Saskatchewan Court of Queen’s Bench, *Seminar on Legal Ethics* (Saskatchewan: Second Annual Practitioners Seminar on Criminal Law, 1976).

¹⁹ In his work, *Professional Ethics* (London: Charles Knight & Co. Ltd., 1969), at p. 58, F.A.R. Bennion states: ‘The ideal consultant is a man or woman with a liking for people and a desire to understand them. Imagination, tact and sympathy are important characteristics ... All the efficiency and

competence in the world will not suffice to meet human distress if humanity and sympathy are lacking ...

²⁰ The Canadian Bar Association, Code of Professional Conduct, August, 1987, Preface, p. vii, hereinafter referred to as the C.B.A. Code.

²¹ Michael Birks, *Gentlemen of the Law* (London: Stevens & Sons Limited, 1960), p. 145.

²² F.A.R. Bennion, *Professional Ethics* (London: Charles Knight & Co. Ltd., 1969), p. 108.

²³ *Op. cit.*, p. 111 et seq.

²⁴ 2 Geo. 2, c. 23.

²⁵ Birks, *op. cit.*, p. 140.

²⁶ Bennion, *op. cit.*, p. 36 et seq.

²⁷ See especially Chapter 2, para. [15] et seq., *infra*.

²⁸ Reported by F.A.R. Bennion, *op. cit.*, at p. 61.

²⁹ *Op. cit.*, p. 63.

³⁰ Daniel Duman, *The Judicial Bench In England 1727-1875* (London: Royal Historical Society, 1982), p. 5.

³¹ (London: Seldon Society Supplementary Series, 1984), especially at p. 25 et seq., 88.

[24] Why this ancient and continuing emphasis on service by lawyers? Beyond the beliefs of a still predominantly Christian country, is there any reason for lawyers in Canada to serve other persons to the degree suggested by both historians and law societies? One such reason has been advanced which has the ring of pragmatism. It is that because the legal profession was and is a form of monopoly, the societal scheme dictates that those within its privileged borders do their utmost for those who come to them for assistance. There are no others available - i.e., permitted - to do the same things.³¹ It seems fair to assume that the failure to so serve one's clients could result in the loss of the monopoly, perhaps giving rise to the state-oriented delivery of legal services envisaged by F.A.R. Bennion.³¹