

INTERNATIONAL LEGAL ETHICS CONFERENCE IV

The Legal Profession in Times of Turbulence*

Vivien Holmes and Kath Hall**

From 15 to 17 July 2010, over 150 lawyers, academics and practitioners gathered at Stanford University for the Fourth International Legal Ethics Conference. The number of participants and the breadth and quality of the presentations at this conference were clear evidence of the continuing energy and enthusiasm amongst scholars and practitioners for the field of legal ethics. While the tranquil and beautiful summertime campus at Stanford and the quiet efficiency of the conference organising staff did not echo the theme of the conference (Times of Turbulence), many sessions during the full conference schedule did. In particular, we were constantly reminded of the rapid and complex changes occurring in legal practice across the globe, and the consequent challenges faced by both the legal profession and academia in understanding, practising and teaching legal ethics.

In an opening plenary session Deborah Rhode outlined the challenge of leadership in turbulent times.¹ She noted the high number of legally trained individuals in leadership positions and suggested that law schools have an obligation to better prepare students for such roles. David Wilkins reflected on the global context within which current and future leaders operate, and on the effect on the legal profession of the forces of globalisation, including disintegration of traditional categories of knowledge and organisation. While noting that lawyers must respond to changes in the global marketplace, Wilkins cautioned that the more the market is seen as driving legal practice and education, the more the

* The conference website is <http://blogs.law.stanford.edu/ilec4> (accessed 26 August 2010). More information on the sessions and some papers can be found there.

** Senior Lecturers, Australian National University College of Law.

¹ Session 1A, 'Lawyers as Leaders': Robert W Gordon, Geoffrey Hazard, Deborah L Rhode and David Wilkins. See Deborah Rhode, 'Legal Ethics on a Global Scale' *National Law Journal*, 20 September 2010.

profession's autonomy and distinctiveness will be questioned. In the same session Robert Gordon gave an interesting historical perspective on leadership by lawyers, noting that in the early twentieth century many corporate lawyers in the United States saw their role as leaders rather than as mere agents for the client. Gordon noted that this perspective has been increasingly sidelined since the rise of managerialism in the 1970s and in light of the ongoing redefinition of lawyers' roles in the context of the drive to maximise profit. Like Wilkins, Rhode, Gordon and Geoffrey Hazard all cautioned against passive acceptance of a market-defined role for the profession, with Rhode emphasising the challenge of institutionalising ethics in the new legal market place. This issue of market pressures, the legal profession and ethics was a theme picked up in several later sessions which discussed reintegrating ethics into economics and law,² and the challenges of sustaining ethical values in times of economic pressure and changing conditions of practice.³

Another recurrent theme throughout the conference was the impact of globalisation on lawyering. One panel reflected on whether the new global market place is diminishing the importance of trust in the lawyer/client relationship, as (many) interactions become less personal, more distant, and more easily replaceable by other service providers.⁴ Another panel discussed a particular form of 'distant relationships'—legal processing outsourcing—with panel members reporting on empirical research into outsourcing from US law firms to India.⁵ The issue of cross-jurisdictional and global legal practice regulation was an issue addressed by several sessions, one of which reflected on the impact of US and UK regulatory systems on the global delivery of legal services,⁶ and another on choice of law problems in attorney conduct cases involving global lawyers.⁷ The conference also included discussion of legal services in China and Japan, with particular focus on the challenges faced by the Chinese legal profession in carving out a new professional identity for itself.⁸

As well as global perspectives on legal practice, there was also a focus on the specifics of local practice, with some particularly moving stories from the coalface. One panel reflected

² Session 4E, 'Legal Practice and Business Imperatives: Reintegrating Ethics into Economics and Law': David Luban, Russell G Pearce, William H Simon and Eli Wald.

³ Session 8D, 'The Case for Ethics in a Context of Change': Linda Baxter, Judith Dickson, Kim Economides and Julian Webb.

⁴ Session 2F, 'Trust and the Global Law Firm: Relationships of Trust and the Regulation of the Legal Profession in the 21st Century': Susan Fortney, Russell G Pearce, Laurel S Terry, Robert Vischer and Brad Wendel.

⁵ Session 5F, 'Technology and Outsourcing': Swetha Ballakrishnen, Vikramaditya S Khanna, Cassandra Burke Roberston, Mark Ross, Carole Silver and David Wilkins. See Carole Silver's report on this panel session: <http://globalprofession.law.indiana.edu/2010/07/legal-processing-outsourcing-in-context-stories-of-globalization> (accessed 2 August 2010).

⁶ Session 4B, 'Ethics Under Pressure: Changing Regulation of Global Law Practice': Andrew Boon, Anthony E Davis, John Flood, Judith L Maute and Daniel Muzio.

⁷ Session 7A, 'A Model for International Choice of Law and Coordination of Attorney Regulation': Stephen Denyer, Catherine A Rogers and Laurel S Terry.

⁸ Session 6D, 'Legal Ethics in China and Japan': Kay-Wah Chan, Lawrence K Hellman, Judith A McMorro, Michael Santoro and Richard Wu. A revised version of Kay-Wah Chan's paper is published in this issue of *Legal Ethics*.

on the ethical dilemmas that arise when working with clients with diminished capacity,⁹ and another presenter spoke on the stratification of the Louisiana legal profession and the impact this had on African American lawyers.¹⁰ Cause lawyering and rural lawyering were discussed,¹¹ as were the impacts of organisational dynamics on lawyers' ethical conduct.¹² Another session explored how specific practice contexts influence lawyers' behaviour, with panellists commenting on large law firms, criminal prosecution work, corporate litigation practice, tax law and immigration practices.¹³ Two sessions, organised by Richard Devlin, considered contemporary issues in the duty of loyalty and conflicts of interests.¹⁴

The conference program provided a rich opportunity for comparative perspectives on legal practice and education. One panel considered lessons from, and current issues in, the differing regulatory approaches in Australia, the UK and the US,¹⁵ while another offered cross-cultural perspectives on pro bono services.¹⁶ Further panels explored judicial ethics in different jurisdictions.¹⁷ The teaching of legal ethics was (appropriately) another theme at the conference, with a plenary session on the first day including a debate on whether legal ethics should be a required course in legal education.¹⁸ Not surprisingly, all the panellists agreed that legal ethics should be a required course. Kim Economides, however, acted as 'devil's advocate', forcing each of the panellists to argue against a number of objections to including legal ethics as a required course in the curriculum and to articulate the benefits experienced by those jurisdictions where it is a required course. A further session explored the challenges of teaching legal ethics in different cultural settings,¹⁹ while another discussed research into the ethical formation of law students and new practitioners, with one presenter

⁹ Session 8A, 'Challenges in Representing Clients with Diminished Capacity': David Boulding, Susan Brookes and Jonathon Wells.

¹⁰ Session 7C, 'Lawyers and Clients: Case Histories': Matthias Kilian and Okechukwu Oko.

¹¹ Session 4A, 'Cause Lawyering': Susan Carle, Mae C Quinn, Rebecca Sandefur, Hilary Sommerlad and Limor Zergutman. Session 6C, 'Rural Lawyering': Caroline Hart, Reid Mortensen and Lisa R Pruitt.

¹² Session 5E, 'Social and Organisational Psychology': John Briton, Elizabeth Chambliss, Christine Parker and Milton C Regan.

¹³ Session 7D, 'Lawyers in Practice: Ethical Decision Making in Context': Elizabeth Chambliss, Bruce Green, Kimberly Kirkland, Leslie Levin, Tanina Rostain and Ellen Yaroshefsky.

¹⁴ Sessions 7F and 8G, 'The Duty of Loyalty and Competing Interests Part I': Adam Dodek, John Dzienkowski, Kath Hall and Kay Lauchland; 'The Duty of Loyalty and Competing Interests Part II': Joan Loughrey, Freddy Mnyongani and Joanne Stagg-Taylor.

¹⁵ Session 5B, 'Regulating Legal Practice: Global Perspectives': Lawton P Cummings, Stephen Gillers and Ted Schneyer.

¹⁶ Session 7E, 'Pro Bono Services: Confronting the Challenges': Stephen Daniels, Robert Granfield, Joanne Martin and Deborah L Rhode.

¹⁷ Session 7B, 'Judicial Ethics: Contemporary Challenges': David Applebaum, Dmitry Bam, Sarah Cravens and Keith Swisher. Session 8B, 'Comparative Judicial Ethics': Michele Benedetto Neitz, Yasutomo Morigwa and Brad Wendel.

¹⁸ Session 1A, 'Roundtable on Legal Ethics in Legal Education: Should it be a Required Course?': Andrew Boon, Brent Cotter, Kim Economides, Christine Parker, Stephen L Pepper and Richard Wu.

¹⁹ Session 5C, 'Legal Ethics Education in Cultural Context': Sampson Erugo, Ernest Ojukwu, Kevwe Omoragbon and Leah Wortham.

reflecting on what law teachers might learn from the medical profession in teaching clinical judgment.²⁰ In another session participants work-shopped the practicalities of sharing ideas and resources for teaching and researching legal ethics via an interactive website being developed by the UK Centre for Legal Education and the National Institute for Teaching Ethics and Professionalism (USA).²¹

The final plenary sessions of the conference required participants to make a difficult choice between two fascinating topics. One panel, organised by Mitt Regan, explored recent research on neuroscience and moral cognition.²² Daniel Bartels, a cognitive psychologist, demonstrated that, while moral rules play an important part in decision making, their role is context sensitive. He suggested that moral choice is often a function of where a person directs their attention, and in particular whether it is towards the nature, or the costs/benefits, of an action. John Mikhail then discussed the well-known 'trolley dilemma' and research that demonstrates consistent responses to such moral dilemmas across culture, religion, ethnicity, gender, education level and age. Mikhail also explored the idea that we are born with a universal moral grammar that causes us to unconsciously analyse human action in terms of its basic moral structure.²³ Jana Schaich Borg, a neuroscientist, then addressed the question of whether neuroscientists have found the 'morality centre of the brain' in the ventro-medial pre-frontal cortex. Her conclusion was that, despite recent claims in courts to the contrary, neuroscience does not yet have sufficient evidence about the workings of the brain to support such a claim. Overall, this was a highly informative and thought-provoking session that left many in the audience keen to learn more about the contribution neuroscientific and cognitive psychology can make to our understanding of ethical decision making.

The other highly successful and stimulating final plenary was moderated by David Luban and included a discussion by Tim Dare, Daniel Markovits, Katherine Kruse, Stephen Pepper, Bill Simon, Brad Wendel and Alice Woolley.²⁴ Each panelist had prepared a short paper on whether the principal concern of legal ethics was the morality of lawyers, the morality of clients, or the morality of law.²⁵ Against this theoretical background, they were then asked to respond (as a lawyer) to a client who advised, under privilege, that he intended to commit suicide. The participants were told to assume the existence of a conduct rule expressly

²⁰ Session 8F, 'Teaching Judgment, Moral Engagement and Habits of Ethical Practice': Vivien Holmes, Emily Hughes and Seow Hon Tan. Emily Hughes' paper explored how the medical profession addresses the teaching of professional judgment.

²¹ Session 4D, 'Legal Ethics and Professionalism in Legal Education: Global Collaboration': Clarke K Cunningham and Nigel Duncan. The website can be accessed at www.teachinglegalethics.org (accessed 3 August 2010).

²² Session 9A, 'Neuroscience and Moral Cognition': Daniel Bartels, Jana Schaich Borg and John Mikhail.

²³ Mikhail referred in his talk to an article which explains some of this research: Steven Pinker, 'The Moral Instinct' *New York Times* (online), 13 January 2008.

²⁴ Session 9B, 'Jurisprudence and Legal Ethics': Tim Dare, Katherine Kruse, David Luban, Stephen L Pepper, William H Simon, Brad Wendel and Alice Woolley. Thanks to Reid Mortensen for his report to us on this plenary, which we have adapted for this article.

²⁵ The papers are published in this issue of *Legal Ethics*. See the *Forum* section beginning on p 165.

prohibiting disclosure of the client's intention.²⁶ Most, if not all, of the panelists indicated that they would break the conduct rule and each was questioned on the consistency of their responses with their own (theoretical) writings. Wendel and Dare spoke of 'moral remainders': the need to recognise the moral wrongdoing of breaking the rule, but choosing to do so and live with the consequences (including disciplinary consequences). Simon queried whether the rule—or 'law'—deserved any respect, which led to a discussion on whether the procedure for making the rule was appropriate. Kruse rounded off the debate by pointing out that, while the rule regulated the lawyer, it also had consequences for the client. The practical resolution agreed to by all panelists was to talk, and keep talking, to the client in an attempt to dissuade him from his plans.

Overall, this was a wonderful conference that left many participants keenly looking forward to ILEC V. Of course, the energy, collegiality and enthusiasm that characterised the conference was able to flow unimpeded thanks to the great work done by the Conference Steering Committee and Stanford Law School administrative staff. We express our thanks to those people, particularly Deborah Rhode and the Stanford Centre on the Legal Profession who hosted the conference, and also to the co-sponsor (the American Bar Association Center for Professional Responsibility) for its interest in and support of this event.²⁷

As to the future, this conference demonstrated that the field of legal ethics has a dynamism fed by the many ongoing and new challenges that arise in legal practice, and that it can continue to make a significant contribution to legal theory, to practice and, more broadly, to the rule of law. To better facilitate such engagement, there are plans for an International Legal Ethics Association²⁸ to promote research, teaching, conferences, programs, and policy initiatives in this area. We hope that such an Association will help foster links with legal academics and practitioners from countries not represented at ILEC IV, and encourage some new faces to attend the next conference (ILEC V), in Banff, Alberta, Canada from 12–14 July 2012. Mark it in your diary now!

²⁶ The rule is a conduct rule in Alberta, Canada.

²⁷ It should be noted that Carolyn Lamb, President of the American Bar Association, generously gave a keynote address at lunchtime on the first day.

²⁸ See <http://iaole.org>, and the notice announcing the formation of the International Association of Legal Ethics from Deborah L Rhode, Stanford University, in this issue of *Legal Ethics*.