



Ego and ethics

By Duncan Graham

Our choice of occupation is held to define our identity to the extent that the most insistent question we ask a new acquaintance is not where they come from or who their parents were but what they *do*, the assumption being that the route to a meaningful existence must invariably pass through the gate of remunerative employment.¹

Work contributes to our sense of identity. The strength of our ego is largely dependent on outcomes at work. Problems can occur when we identify too closely with our work. The waiting rooms of psychiatrists and psychologists are full of people struggling for a meaningful, fulfilling life outside of work. It is unhealthy, and professionally unsafe, to have our feelings of self-worth and, ultimately, our happiness too dependent upon outcomes at work.

None of this is new. My concern is that these problems are much more acute for barristers. The problems are aggravated by the adversarial system in which we operate, and the changes to work as a barrister over the last decade, making it more like a business and less like a profession. The result is a tendency towards self-interest and a slide in ethical behaviour. The adversarial system is unsustainable in such an environment.

Some barristers derive meaning in their lives, not from the role they play in the administration of justice, but from their form and position in an imaginary league table. In the meritocratic, modern world, status is important. It may be determined by one's confidence, imagination and ability to convince others of one's due.² It is therefore hardly surprising that self-worth is proportional to how high you are in the league table within the profession.

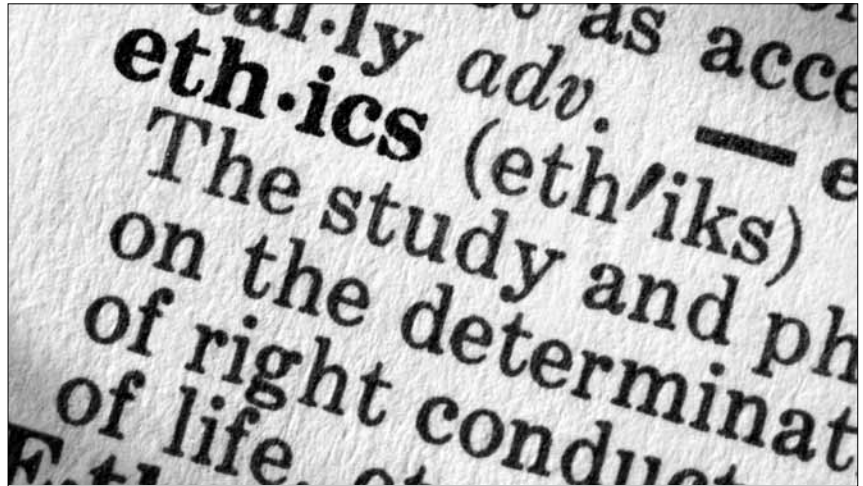


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In a recent seminar to barristers, the legal services commissioner, Steve Mark, observed that legal ethics had a great deal to do with how one regarded oneself and the values and principles the individual held important.³ In a meritocracy, you tend to value yourself if you are at the top of the table rather than languishing winless at the bottom. There must be a risk your ethics will be governed to a degree by what you think you have to do to get to and stay at the top. A conflict may develop between your ethics and your desire to win. Unethical behaviour is the result of a value system dependent on personal success, the opinions of others, and an identity too closely tied to outcomes at work.

We are, however, told we are part of a special profession. Barristers occupy a unique position in society in the proper administration of justice. This role is enshrined in barristers' rules of conduct. Some may regard this view as obsolete. Barristers now operate in a competitive market place. Different principles must dictate practice as a barrister.

In 2007, Michael McHugh AC QC warned of the waning influence of professional ideals:⁴

Outside the Bar, many hold the perception that the Bar is now as much a business as a profession. It should surprise nobody then a large section of the community regard barristers in the same way as they regard business persons. However, I do not think that the perception of the Bar as a profession will ever disappear, fade though it might. At worst, the Bar will continue to promulgate it, thought in practice is may be no more than a nostalgic ideal. It will be used to invoke the notion of barristers as persons dedicated to serving the public, rather than their own, interest.

It is perfectly understandable for barristers to consider their own interests. Many have very powerful incentives to do so, such as mortgage repayments, family responsibilities, school fees, etc. But this is not the sort of self-interest with which I am concerned. I am referring to the definition of self through work, where identity and work are indivisible. Problems occur when ego is everything. Barristers not only become concerned with winning and the relentless quest for money, but will search for ways to become the centre of public attention, like film, singing and sporting stars.⁵

What types of problems eventuate when professional thought is dominated by

interest in self or by the idea that work is the only means of identifying self?

First, there is a risk of losing independence. One of the most important aspects of practice is a barrister's independence. Some find this difficult to maintain. The temptation to give clients and solicitors opinions that they want to hear in the hope of return work or a lengthy hearing (with associated fees) may be hard to ignore. When the whole of your identity is dependent on outcomes at work, it becomes almost impossible to ignore.

Second, objectivity may be lost. If you identify too closely with your work, then you lose insight into the consequences of your conduct. You

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may lose judgement. For example, a barrister may take on a brief in an area of the law with which he or she has no experience or expertise. A barrister would be appalled if a brain tumour was removed by a colorectal surgeon who wanted a bit of a change in the surgery he performed. Why is it reasonable for a personal injury lawyer to accept a brief in a building contract dispute and charge his or her standard rates for the experience? They may get by with bravado and the equivalent of a good bedside manner. Meretricious conduct is surprisingly difficult for clients and the public to detect.

Third, barristers who see work as being all about them, rather than as something with obligations to courts and clients, tend to run cases that could be settled. They tend to develop entrenched positions and lose the ability to analyse a case from the other side's perspective.

Fourth, there is a risk of self-aggrandisement. Running cases may give the barrister greater exposure to the judiciary or to the media. A barrister may enjoy seeing himself or herself striding in slow motion along the tarmac, or see excerpts of his or her (undoubtedly) withering cross-examination on the nightly news. But a client, cowering behind a scrum of television cameras and microphones, may not find the experience as enjoyable. There is no place for the shameless self-promotion that comes with courting the media. Public interest in court cases is nothing new. It will continue. Court cases are not, however, opportunities to grandstand and to self-promote.

Fifth, in a competitive, commercial market place and an adversarial system, the health problems of identifying too closely with one's work or having one's ego dependent upon success at work, are made much more acute. It leads to a generally unhappy work environment and significant mental health issues. Rudeness, aggression and abuse to colleagues may occur if winning and self is everything. Depression is common among barristers. We all know it can be a stressful, lonely and demanding job. If your sense of happiness is overly dependent upon success in this job, or your belief as to how the public perceives you is your overwhelming concern, then events may conspire to cause your self-esteem to crumble and for depression to set in.

Having identified these problems, it is not easy to suggest solutions.

One could argue for a return to the anti-competitive practices of prior centuries, but that is unlikely to occur. Barristers' rules only go so far. The teaching of ethics could be given greater attention. An avenue of reporting concerns about colleagues would be helpful. This is not a matter of "dobbing in" a colleague for poor conduct. Rather, there is a need for a process of educating barristers when they lose perspective or their colleagues become concerned about their welfare. There should be a blanket prohibition on contact with the media. This will rein in the self-promoters.

Ultimately, I do not think these problems will disappear unless the adversarial system is abandoned. In contemporary meritocratic society, it is inevitable that barristers will value themselves entirely upon success in court, the number of briefs occupying their chambers, the size of their negotiated settlements, etc. Some barristers, when informed of an upcoming opponent, may remark, 'He won't cause much of a problem. I thrashed him in a case last year.' As if a trial is a football match and success is wholly determined by the brilliance of the barrister. Litigation should not be approached as a game.⁶ And yet, the adversarial system encourages us to do just that. Especially when so much of what we see of ourselves rides on the outcome.

Endnotes

1. Alain de Botton *The Pleasures and Sorrows of Work* (2009) Hamish Hamilton, p106.
2. *Ibid.*, p121.
3. Ethics Hypothetical, 24 March 2010.
4. Michael McHugh AC QC, 'The Rise (and Fall?) of the Barrister Class', 20 August 2007.
5. *Ibid.*
6. *Sydney South West Area Health Service v MD* [2009] NSWCA 343 at [55] per Allsop P.