

LAW SCHOOL UNE
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Notes for a talk in the Lewis Seminar Room, Thurs 12 August 2010.

1. First I will tell you something about what I've done.

I was born here in Armidale. My father was a solicitor here for 35 years after being a guest of the Japanese army in Singapore and giving them a hand to build the Burma-Thailand railway.

I did Arts here 1956-7 and loved it. The library was on the verandah of Booloominbah and the Union was in a couple of rooms upstairs. I have given my time-line of UNE history to the Vice Chancellor, Prof Jim Barber, as he expressed interest in UNE's history.

I had four years at Sydney University Law School and lived in St Andrew's College. I was in the same year at Law School as Michael Kirby, Murray Gleeson and Marcus Einfield. I did articles of clerkship which was how practical training was acquired in those days, by being apprenticed.

I was in private practice as a Solicitor in Armidale for 40 years. I lectured part time in law to Accounting students at UNE before the Law School started.

Sir Robert Menzies talked of "well furnished lawyers" and I think an Arts degree is a down-payment on a lifelong job of acquiring mental furniture. 1962 at age 24, and was admitted as a solicitor on 8 March. I graduated on 10 April 1963. I returned to Armidale to join my father in practice at A.W. Simpson & Co on 26 September 1963 and married Tricia on 12 Sept 1964. I retired on 31 Jan 2003

I was pleasantly surprised in 1982 when the Law Society took up some notes I had prepared for academic clients, and published multiple copies of the Legal Guide for Home Buyers, which I understand is still being updated 23 years later. My 1987 Legal Guide for the Primary Producer prompted Victoria and Queensland Law Societies to publish their own versions. I enjoyed my two terms as President of the N&NW Law Society, 1986-7, my 34 years, 1967-2001, as its UNE liaison officer for the annual CLE conference, and my involvement in the Northern Medico-Legal Society, which I initiated in 1966, and which died from starvation of effort by Tamworth solicitors about 10 years later.

During my 8 rewarding years on the NSW College of Law Continuing Legal Education Committee, 1977-85, I wrote various papers: -

- 1978 – An Attempt to Classify Laws by Stages of Life, Roles and Activities.
- 1979 – Continuing Legal Education and Continuing Education of Lawyers.
- 1979 – Legal Nicknames.
- 1980 – Honesty and the Law
- 1980 – Lawyers' Tricks and Tactics.
- 1981 – The Lawyer as Problem-Solver.
- 1982 – Trivialities and the Law.

1982 – Some Legislative Devices (published in UK Statute Law Review).
1982 – Legal Drafting.
1983 – Lawyers’ Jargon.
1983 – Lawyers’ Latin.
1983 – Some Lawyers’ Latin Maxims.
1983 – Lawyers’ Languages.
1983 – Ends in Legal Problem-Solving.
1984 – A Dozen Ways of Improving Legal Drafting.
1985 – Abuse of Power, Honesty and the Law.

I gave papers at three Australian Legal Conventions: -

1981 – Hobart “Trends and Prospects in Environmental Law”. 55 ALJ 515
1983 – Brisbane “Legal Drafting”
1987 – Perth “Challenges to the Profession”.

I gave papers at three conferences of the Law and Literature Association of Australia: -

1992 – Sydney “Contrasting Images: Lawyers as seen by writers and by themselves”.
1993 - Wollongong “How to get through to clients more by trying less”.
1994 – Brisbane “Lawyers and Literature: Some questions and suggestions”.

I also gave talks and wrote papers on the Heritage Act 1978, Dividing Fences Law, Crown Lands Conveyancing, Anti-Gazumping Laws, the Coastal Protection Act, Primary Producers and the Law, and Threatened Species and Native Vegetation Conservation Legislation.

I wrote some articles for the Law Society Journal including:–

1989 – The Spirit of Plain Legal English – June LSJ
1990 – Unhealthy Building Land – Feb LSJ
1995 – Life Estates – April LSJ

In 1992 I drafted new Rural Lands Requisitions on Title for the Law Society.

I wrote two articles on Country Solicitors: -

1993 – Country Solicitors and their Country Clients – 67ALJ244.
1994 – The Country Solicitor’s Rules of Thumb for overcoming ignorance 68ALJ600.

In 1997 I contributed the Latin words and phrases for Butterworth’s Australian Legal Dictionary.

In 1999 I presented a paper to the Australian Society of Legal Philosophy annual conference in Canberra “An Australian Restatement?”

I also enjoyed my 6 years on UNE Council as a Convocation Member (1973-9), 8 years on TAS Council as an Old Boy Member (1988-1996), and 5 years as President of the Armidale and District Historical Society (1999-2004).

2. You will soon be part of a fine profession.

Oliver Wendell Holmes Junior, the American Judge wrote in 1885:
“Every calling is great when greatly pursued. But what other gives such scope to realise the spontaneous energy of one’s soul? In what other does one plunge so deep in the stream of life,--so share its passions, its battles, its despair, its triumphs, both of witness and actor?”

The foundation stone of the edifice we call civilization rests on respect for the law, and it is part of the task of every lawyer to help maintain that respect.

A 19th century description of a Solicitor still fits:

“One who knows what is right and wise, and what is wrong and foolish; a man who sustains his client when things have gone rather ill for him, but who holds him back when he might be inclined to be reckless; above all a man of whom the rest of the community say, ‘There is a man I know who can be absolutely trusted’”.

3. I want to talk out the role of the lawyer as a problem solver, which I think is a helpful way of seeing what Solicitors do for clients. Solicitors are not simply legal advisers.
4. There is a lot that a Law School doesn’t teach you about how to use your knowledge of the law to benefit clients and to make you a living. Many things come naturally, or not at all, such as practicality, and ingenuity in using your knowledge. Greed, scheming and cunning come easily to most of us, but there are lots of other practical skills to learn.
5. It is like chess; there is a big difference between knowing the rules and being able to use those rules to play and win. Knowing the law is the essential first step, but knowing how to implement it to the client’s advantage and to your own collateral advantage is another. Some of you may remember Geoffrey Robertson’s ‘hypotheticals’ which showed that ethical and moral issues are inescapable when you are a lawyer. I believe practical skills are just as vital.
6. When a client sits in front of you and asks for help there is a lot going on. It is a dynamic situation. The client has expectations of a reasonably priced, efficient, professional service, mostly without having any real idea about what costs to expect, and you have plans to help the client and make a living from doing so.
7. I found what I learnt about Jurisprudence of significant benefit to me in practice. I started with some basic beliefs in the limitations of the law and saw myself as a problem solver. Laws civilize power. There is a power relationship, when you think about it, in every encounter between individuals and institutions. Superior power comes from many sources including authority, status, age, knowledge and relationship influence. Every form of superior power can be misused. When it is you have oppression which can be trivial of course or very serious as in slavery for example. The lawyer is fired up to every instance of the abuse of a power in case there is a legal remedy. So my radar was set to pick up power differences and instances of oppression

where law had a role. Laws cannot control power any more than it can control people, but it can influence power into acceptable limits by incentives.

Here are some of the Jurisprudential ideas I find useful:

* I content myself to think of law as a social institution to satisfy social wants – the claims and demands and expectations involved in the existence of civilized society – by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society. For present purposes I am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence – in short a continually more efficacious social engineering. Roscoe Pound *An Introduction to the Philosophy of Law* Yale Uni. Press 1922 p47

* Judicial judgments, like other judgments, doubtless, in most cases, are worked out backward from conclusions tentatively formulated. Jerome Frank *Law and the Modern Mind* 1930 p109.
In other words, judges behave just like the rest of us and mostly do what they think is best and then justify it.

* The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men. O.W. Holmes *The Path of the Law* 1896.

* Practical men generally prefer to leave their major premises inarticulate. O.W. Holmes *The Theory of Legal Interpretation* 1899.

* We must think things not words, or at least we must constantly translate our words into facts for which they stand, if we are to keep to the real and the true. O.W. Holmes *Law in Science and Science in Law* 1899.
In legal drafting, Wills, special conditions in contracts, letters and so on, the best advice I can give is to practise meaning what you say and saying what you mean. Concentrate on the content and purpose of the provision and then the words that come naturally will be the right ones.

* The life of the law has not been logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories; intentions of public policy avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. O.W. Holmes *The Common Law* 1881.

8. Legal problem solving, like all the other sorts, maths, chess, inter-personal relationships etc., requires ingenuity and lateral imaginative thinking as well as methodical conjecturing and testing of possibilities; thinking of similar

9. I should say here that quite often it is a far more a practical problem of human relations than a legal one of conflicting principles or following laws and regulations to recover damages or compensation-or getting a divorce or a lenient punishment. The steps I am about to list may sound too obvious even to remark on, but your success as a lawyer will depend partly on how well you do them.

10. Here are the rough steps in legal problem solving:

a) Your first task is to warm to the client before retreating in order to be dispassionate. The client is always too close to their problem to see it calmly and coolly and that is your indispensable contribution to helping solve it. Problem solving starts with a close up focus on how your client sees the problem and then moves to a more objective focus on how the opponent and the judge or magistrate will see it. So the Solicitor has to be bifocal as well as bilingual.

b) You must attend and listen with the utmost care and respect the client's way of stating their problem and their conjectures about remedies. Long ago I formed the habit of taking notes as clients spoke. It let them know that nothing they said was lost on me. It helped me get to the nub matters and to restate them succinctly. I had a mantra to condense whatever I heard and then to expand and improve on my condensation. Related to this was my habit of reading the best essayists, Emerson, Thoreau, Chesterton, Hazlitt, Charles Lamb, Edward Thomas, and others, as models of clear articulation.

c) You must ask the best questions. I don't think young people, especially recent male law graduates, ask questions now as much as we used to then. The greatest barrier to learning is thinking you know it already. The second greatest is not caring if you know or not. I have to tell you a story that illustrates both incuriosity and ignorance. Shortly before I retired I told a young Solicitor that if his builder client persisted in his claim, I would subpoena his Fair Trading file bulging with complaints about poor workmanship. "Who was that bloke who pulled the temple roof down killing himself and his girlfriend Delilah?", I asked him, in order to emphasise the point I was making. "Oh Mr Johnstone, I'm only new to town", he replied. So he still hasn't heard about Samson's famous murder/suicide. I knew not to refer to Solomon offering to cut the baby in half, or to Shylock seeking his pound of flesh. Jonathan Swift said lawyers sharpen their minds by narrowing them. Some blunt them with indifference.

d) You mostly have to restate the problem in a legal way, ensuring that it is one which the client understands, but first you have to show, by using the client's language, that you understand it.

e) Dale Carnegie reckoned that the best method of persuading someone to act to help themselves is to lead them up to seeing the answer and letting them say

what the best course is. So the client should, if possible, own the remedy. In other words the solicitor has to restrain the natural tendency grandly to pronounce the remedy and then to justify it. By this time the client can start to resent that they are being told what to do, as an adult telling a child. No one likes being bossed. It is not easy to take advice. The pill has to be sugared in some way. Advice must be accepted to be acted on, so very early you should start thinking how best to plant the idea, whether it is to do nothing, not to sue, or to go for it, but it will be arduous and hazardous. Of course many problems are simple like complete te house purchase by a certain date so they can move in without bivouacking between houses, or get Probate and distribute the estate in a reasonable time.

f) Lawyers have to be at least bilingual, speaking both legal language and the client's idioms. You have to talk at the client's level first and later to another lawyer and possibly to a Magistrate in different tone and language. These are sometimes distinctly different styles. Police witnesses have a distinctive style "I observed a man of Koori appearance in a white and red football jersey, associated I believe with a Sydney Rugby League team, emerge from what appeared to be the toilet facilities and move in an ungainly manner to the bar where he asked the barmaid if he could purchase one cigarette. On being declined he proceeded to the footpath where he fell forwards into the gutter and appeared to empty the contents of his stomach...". It is in a high language register, like that used on formal occasions, but is false and out of place describing a drunk aborigine. It is needlessly tentative, qualified, elaborate, pseudo dispassionate, and striving for an absolute objectivity as if plain language was somehow inadequate. It ends up mock heroic and ludicrous.

g)The moment you have your client's confidence that you can help them you should discuss costs in a way that enables agreement to be reached about the likely total bill or at least the way they will be calculated, including disbursements like stamp duty and court fees.

h)Often time is almost as important as costs, so that always needs to be discussed.

i) If it is a criminal matter or some other court matter you have to assess how important the outcome is to your client and their level of tolerance for the worries which come with all litigation. Beware of the client who says costs do not matter as it the principle that matters. This sounds appealing to a costs hungry lawyer but it is often a signal that the client is after revenge at any cost, and has lost their sense of proportion, two things which make sound litigating impossible.

j)You should also consider carefully if your client's case has, as lawyers say, merits. By this we mean "can it be stated briefly in a way that would gain the sympathy of most people very readily?". Does the client's case coincide with morality, current notions of a fair go, or at least attract some emotional sympathy? It is one thing to be legally correct and a lot more to be morally right. Realities trump technicalities.

k)Some clients will not be as direct and unashamed as you would like so you have to probe gently to find the real problem. “If a cow has no brand then no one owns it do they?” “ Can I put in my Will that no Menzies will ever own my property?”

l)You must act professionally. Being professional includes knowing the law, being alert for conflicts of interest, being courteous to colleagues and rivals, staying detached, dispassionate and calm, and being totally honest and open with your client. I used to give what I called “whole person advice” which meant including respect for the client’s knowledge, patience and pocket. What would I do in the client’s position without the client’s distortions of perception?

The application of an intellectual technique to the ordinary business of life, acquired as the result of prolonged and specialized training, is the chief distinguishing characteristic of the professions.

The Professions by A M Carr-Saunders and P A Wilson 1964, p28.

Anthony T Kronman, in his *The Lost Lawyer – Failing Ideals of the Legal Profession* Harvard University Press 1993 describes the characteristics of a lawyer-statesman:

Having a prudent sense of where the balance between principle and expediency must be struck. p3.

Possessed of a great practical wisdom and exceptional persuasive powers, devoted to the public good, but keenly aware of the limitations of human beings and their political arrangements. p12

He excels at the art of deliberation as others excel at writing, singing or chess. The lawyer-statesman is a paragon of judgment, and others look to him for leadership on account of his extraordinary deliberative power....In addition to whatever intellectual abilities he might possess the lawyer-statesman is more calm or cautious than most people and better able to sympathise with a wide range of conflicting points of view. p15.

He has broad knowledge and a quick intelligence....(He is known for) his virtue and not just his expertise....One became not just an accomplished technician but a distinctive and estimable type of human being – a person of practical wisdom (p16).

In an earlier article in 1987 Kronman described the mind and character of a good lawyer:

A general lack of surprise at the things people do or fail to do; a calmness in the presence of what may seem to others extraordinary or idiosyncratic, a calmness based upon the fact that one’s confidence in human beings has not been shaken by the disappointment of some expectation as to what they are, or are not, capable of; and, finally, a measure of sympathy or compassion which those who have been disappointed in this way are often unable to feel, seeing no human bond between themselves and those whose conduct they consider beyond the pale.

11. A Problem Solving Example.

You are a law student at UNE and you and your parents ask me about buying a house in Armidale. They are moving here from Sydney to look after you. Your parents suggest putting the house into your three names so that you would own it as joint tenants. On the death of one the surviving two would inherit automatically. They think this will make it easier to transmit the house to you when they both die.

It is my task to advise them. I start by agreeing that their idea does have some minor advantage. Then I point out that there are some disadvantages. If you are part-owner of a house, and marry and want to buy a house, you would not be entitled to the benefits for first-home-buyers such as reduced stamp duty and concession loan interest rate. If you are part owner, that will disentitle your parents to the pensioner discount for local council rates. Your parents have two other children. They want to benefit the three of them equally. Jointly owning the house with you means they would need to remake their wills. That is tricky to get right. One way is to provide that your one-third share in due course is reduced by the value of your share in the house as at the date of death of your surviving parent.

If one of your parents dies and the other descends into dementia without a Continuing Power of Attorney, you will have trouble selling the house without an order from the Guardianship Tribunal, which means added cost and delay. Sometimes in trying to gain the advantage of one law, you run the risk of forfeiting benefits from other laws. As I used to say, you may miss the dog and hit the parked car.

14. Problem solvers know a lot including:

*What you cannot do directly, you can often achieve indirectly. There are many ways of skinning a cat.

Before 1975 I was called to the police station to see a client in the lock-up as a maintenance confinee, gaol'd at the instigation of his wife for failing to keep up his payments to her. He had tried to suicide by slashing his wrists with staples taken from a comic, and swallowing some staples. I quickly formed the opinion he was in a bad way and should at the very least be in hospital with his bandaged wrists. In those days there were only male police, and the one on the desk just laughed and said my client was on a staple diet. I thought carefully, and had a doctor visit him in the cell. That didn't persuade the officer. He remained intransigent until I quietly pointed out that if my client committed suicide in the lock-up there would be an awful lot of paperwork to be done... My client was released to the hospital that day. The day that the Family Law Act 1975 came into force, all maintenance confinees walked out of gaol.

*Clients often have good ideas about possible solutions. They mostly know the other people involved, which can be highly helpful.

*The world is deeply reciprocal, so you mostly get back what you give. So if you are rude and abrasive to your fellow Solicitors they will play hard ball with you, to the disadvantage of you and your client. Manner and tone of voice matter a lot. "An iron fist in a velvet glove" is best.

*Practical considerations provide solutions more often than theoretical factors. I used to wait until after morning tea to enter a guilty plea, especially if the Magistrate smoked. I remember filibustering to success by extending my examination of my client so the opposing Barrister had little time to cross-examine as I knew he was booked on the 5 o'clock plane and had to leave.

*Lawyers, like doctors, nurses, vets and so on, are one of the helping professions. I eventually realized that this brought a high degree of responsibility as well as rewards. I discovered that if I wasn't helping, I was hindering; there was no neutral position. If I didn't make really sure I was being positively useful in achieving what the client wanted, I was getting in the way of someone else who could be doing that.

15. Here is my suggested Modern Lawyers' Credo, as qualified by reality and the bottom line: -

- i) I will accept instructions from anyone,
provided they can pay.
- ii) I take on any task, small or large,
but not of course if it is uneconomical or if it is going to mean I have to work on it over the weekend.
- iii) I am the spokesperson of righteous causes,
when I believe in them and have a paying client.
- iv) I plead for the poor, the persecuted, the widow and the orphan,
but only, of course, if they are entitled to legal aid.
- v) I teach mankind to respect the rights of others to their property, to their personal liberty, to freedom of conscience, to free speech and free assembly,
if I have time, and if I am up-to-date with my better paying work.
- vi) I am the champion of unpopular causes,
and my costs are proportionate to the unpopularity.
- vii) I am the foe of tyranny, oppression and bureaucracy,
at least while I find saying that I am gets me good publicity.
- viii) I plead for the rich man lest prejudice prevent him from getting justice, and I insist that the poor man be accorded all his rights and privileges,
provided there is a dollar in it for me.
- ix) I seek the equality of mankind, regardless of race, colour, sex or religion,
but inequalities of financial means to pay must be respected.
- x) I am honest, upright and professional,
while ever this suits my purpose and my pocket.
- xi) I respect everyone,
except my rival lawyers, and clients who desert me in the middle of a case and ask me to transfer their file without offering to pay my costs.
- xii) I hate fraud, deceit and trickery,
except when the defendant has been guilty of them in which case they are trump cards to play in bargaining and in cross-examination.

16. Lord Denning said "I like to work with nice people. I like to dine with nice people. I like to sleep with a contented mind". I wonder how many of us can do that?

17. I have lived through the major decline in our profession. Standards of diligence, professional selflessness, decency and ethics have fallen, and so has our standing in the community and our morale. It happened as unobtrusively as ageing, and each time there has been a formal change which seemed on its own to have worthwhile advantages, we have disregarded the undesirable side-effects. Lawyering used to be both socially useful, and personally fulfilling. It has gradually become instead a way of making money by being useful to, and using, clients, finding relief in leisure and retirement, and the reward of a substantial income. Most lawyers now ignore, and even scorn, the common good, and have given up on achieving any personal fulfillment. When I retired I wrote these verses.

LAWYERING.....I'VE DONE IT ALL

The endless striving to be thorough, not to overlook a thing,
Delivering ultimatums, without unnecessary sting,
The relentless care for detail, so each document's exact,
And at the end of every day, still more business to transact.
I've done it all.

Uninformative answers, to antiquated requisitions on title,
Making mostly wasteful inquiries, on the off-chance one is vital,
Suggesting mutual bequests to ageing fathers and to mothers,
Discouraging unwise life estates, for second time marrieds and others.
I've done it all.

You see a novel cunning condition, so you save it,
You slip a telling inadmissible fact into an affidavit,
You make threats and menaces you'll never implement,
You hate to see laws broken, but you love to see them bent.
I've seen it all.

The straight-jacket forms, into which reality won't fit,
No Denning style telling, as the rules prohibit it;
Suddenly there's a new form, without any notice or reason,
And your thoughts about governments border on treason.
I've endured it all.

Those long neglected files, on the do-them-later shelf,
A burden to your conscience, and a disappointment to yourself,
Sitting on the stove's rear, with their bottoms black and burned,
And they multiply mysteriously, while your back is turned.
I've had all these.

So many hours wasted, in waiting around at Court,
Such predictable pedestrian pleas, and all so cheaply bought!
Such inattentive visiting Magistrates, always so impatient to leave,
They only ever half listen, and then only half believe.
I've seen them all.

You treat your “learned friends” with the traditional flatteries,
And accept that courts grind slowly, like monsters with flat batteries,
You never criticize the system, though it’s so arcane and slow,
You rebel at radical change, and never say “I do not know”.
I’m like this too.

You get the vital facts out, with scalpel-like questions;
You pack hurts and insults, into the smallest of suggestions;
You use your words as weapons, and you relish verbal fights;
And protest that all you’re doing, is protecting clients’ rights.
I’ve seen it all.

Vastly more new Acts and cases, than you can ever read,
Far more limits and controls, than we really need,
You’re supposed to know it all, with compulsory CLE,
But you learn it only as you pray, from dire necessity.
I’ve done just that.

It’s a bit like learning Latin, or a bit like learning French,
Reading some ponderous pronouncement, from some remote Bench,
Same old Contracts, same old Wills,
Same anxious joking about your bills.
I’ve had them all.

Self-righteous clients for whom debts are seldom properly due,
Always find some principled excuse, for not paying you,
The meanest motives bring some to you – revenge, spite and greed,
And injured pride is all dressed up, to look like real need.
I’ve seen through it all.

Some fine fellow lawyers are practical, professional, helpful and wise,
Some petty and pretentious, are, you might say, otherwise,
Fomenting latent litigation, “We’ll meet you under the clock”,
Scarcely caring that he’s a human being, that poor chap in the dock..
I’ve seen all sorts.

“If you live by the sword, you will die by the sword”;
But how often do you really see just punishment or reward?
Or anyone, against their interest, ever repay a good turn?
Those who sneak advantages, seldom honest habits learn.
I know it’s so.

“Law sharpens the mind by narrowing it”,
So you admire art, music and literature through your lawyer’s slit;
The bird becomes oblivious of the cage in which it’s caught;
So you pick, pick, away, with your verbal-analytical habits of thought.
I do just this.

Winnable worthy causes, and wise judges to hear them,

No snide secret motives, and no reasons to fear them,
Clear instructions from rich, unfussy, trusting clients;
The chance to practise law, as an art, and as a science.
That's all I want.

Every honest, earnest effort is its own reward,
And being so damn busy, means there's no time to be bored;
Genuinely helping clients, in a socially responsible way;
These are real satisfactions, that nothing can take away.
I have known them all.