



Cúirt Uachtarach na hÉireann  
Supreme Court of Ireland

**Keynote Address**

**Delivered by Mr Justice Donal O'Donnell, Chief Justice, at the  
International Bar Association's 2<sup>nd</sup> Global Professional Ethics  
Symposium on 27 June 2024**

I would like to take this opportunity to welcome you to Ireland for this symposium on this interesting, and in my view, very important topic.

When I was a young lawyer listening to speeches, I promised myself that if I was ever in the position of giving a speech, I would not start with some phrase like "*in all my years at the legal profession*", and as you can see, I just about kept to that today. However, one of the supposed benefits of experience is perspective. Normally, we are able to look back and put our present problems in the context of those faced in previous years, and then see our current problems as somehow less threatening.

However, I do not think that you need to have qualified as a lawyer as I did, more than 40 years ago, to recognise the fact that the legal system and the legal profession across the world faces serious challenges today. There are competitive pressures at perhaps a higher level than there ever have been, both from within the profession and from others seeking to perform tasks or provide services previously performed or provided by lawyers; there are technological pressures which apply such as from AI, which you are going to discuss shortly, and which has a particular impact on a knowledge-based profession; and there are external pressures from politics, governments and from society more generally, particularly in an era of social media.

Lawyers pride themselves on being part of a learned profession, with a set of skills which are not easily attained, and to be part of a relatively small expert group used to be seen as a praiseworthy achievement, and for example, elite

sportsperson is still a term of praise. But to be capable of being characterised as a member of an elite in other fields is now a suspect description, and lawyers are high on the list of targets of populist criticism.

Lawyers also pride themselves on careful, thoughtful and balanced judgments but now must exist in a world which demands instantaneous and increasingly radical decision-making, which is definitive, sometimes damning, and with little room for shade or nuance that used to be a measure of quality. In particular, the legal profession has always valued the accumulation of knowledge over years of experience in practice, but that is most vulnerable to technological development.

Faced with all these issues it might be said that ethics, however worthy a topic, should come lower down on the list of lawyers' concerns. I disagree. If anything, the topic of this conference is more urgent today than it has ever been.

It is, I think, the case that there is a mismatch between lawyers' view of their own profession, even among those of us who are inclined to criticise it, and a view which is prevalent among some members of the public, especially those whose views are amplified on social media. Lawyers see themselves as members of a profession not only subject to strict rules, but perhaps more importantly, where they believe in behaviour which is fair, balanced, honest and respectful. It is perhaps an overgeneralisation, but I sometimes think that lawyers are people who will be inclined to join the end of a queue and wait patiently on the basis that it is a fair process, even though a part of our job is to help people get a better place in a line or to defend them when they do and are caught actually jumping the queue. Lawyers left to their own devices tend to believe in good and fair behaviour. They are not unique in this. Most people have an instinct for what is fair, but I was struck recently by a poem by the famous American poet Carl Sandburg entitled, 'The Lawyers Know Too Much'. Law, he suggests, is a profession of:

*"Too many slippery ifs and buts and howevers,*

*Too much hereinbefore provided whereas,*

*Too many doors to go in and out of."*<sup>1</sup>

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<sup>1</sup> Carl Sandburg, *Smoke and Steel* (Harcourt, Brace & Howe 1920).

He concluded by comparing lawyers unfavourably with bricklayers, masons, plasterers, farmers and artists, and asked:

*"Why is there always a secret singing*

*When a lawyer cashes in?*

*Why does a hearse horse snicker*

*Hauling a lawyer away?"<sup>2</sup>*

There is more in the same vein, but it is a very arresting image, given our respect for the rituals of death, and our reluctance to speak ill of the dead. To say that the death of a lawyer is a cause for celebration speaks of a very unfavourable view of the legal profession.

That is not a lawyer's self-image.

The great American lawyer John W. Davis, who was once a candidate for the American presidency, said something a little gentler, but which is sometimes quoted as suggesting that the legal profession is not a particularly valuable component of society:

*"...the lawyer as a lawyer does not build or erect or paint anything. He does not create. All he does is lubricate the wheels of society by implementing the rules of conduct by which the organised life of men must be carried on".<sup>3</sup>*

That sentence depends very much on how you read it, and in particular the phrase "[a]ll he does". It might be a useful exercise in an acting class to see how many different readings there are of the same passage. I do not think that Davis was saying that lawyers do nothing. On the contrary, he was saying, I think, that the job is really important. Implementing the rules of conduct whereby life is carried on in a society is an important role. If so, in many ways ethics are important in distinguishing the Sandburg view, if I can call it that, from that of Davis.

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<sup>2</sup> *ibid.*

<sup>3</sup> William H. Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis* (Oxford University Press, 1973) 23.

Recently, the Post Office scandal in our neighbouring jurisdiction of the United Kingdom has given rise to a public inquiry in which a number of lawyers have had to give evidence about decisions which would normally be made in private, not subject to public scrutiny, and often protected by legal professional privilege. In the words of Professor Richard Moorhead of Exeter University, a professor of law and expert in ethics, the scandal:

*"...may be symptomatic of a broader issue within the legal profession where adversarial partisanship often trumps justice.*

*The legal profession's obligations to uphold honesty, independence, and integrity appear too routinely overcome; client interests overshadow ethical considerations. This is so whether or not one sees some of the problems as giving rise to criminal behaviour or more serious professional misconduct, as Inquiry, regulators, and prosecutors might".<sup>4</sup>*

Professor Moorhead reflects on a culture which he describes as "*drawing on the marketing of legal services, where aggressive, tactical lawyers may be prized, further entrenching the problematic culture*".<sup>5</sup> In other words, the competitive market in which lawyers now work, which in itself is a good thing for the interests of consumers in creating competition on price and improving quality, may nevertheless contribute to a culture where, as he puts it, partisanship trumps justice.

These are issues that deserve the most serious consideration. Commerciality is a prized value among lawyers today; the understanding of their own clients' commercial interests, and the obligation to work in a business-like fashion ourselves are critical to success but can, if unrestrained or unconstrained, lead to a situation where clients' interests and lawyers' profit motive are advanced at all costs, to the detriment of the interests of broader society, which the legal profession, at its best, is meant to serve.

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<sup>4</sup> Richard Moorhead, 'The Post Office Scandal & Lawyers: An Extraordinary Orthodoxy' (*Richard Moorhead Thoughts on the Post Office Scandal*, 01 June 2024) <<https://richardmoorhead.substack.com/p/the-post-office-scandal-and-lawyers>> accessed 01 July 2024.

<sup>5</sup> *ibid.*

It is essential that we recognise the gravitational forces that are at work and pull in this direction, and very important that we provide a strong counterbalance to the economic imperative to seek to maximise profit and short term gain by seeking in turn the best outcome for the client at all, or any cost. And that has to be general rather than individual. Furthermore, in a highly competitive market it is necessary that lawyers who wish to perform ethically understand that if they do so, and appropriately, that they will not be at a competitive disadvantage with others.

Litigation, which is where I have spent most of my life, is the field in which the Post Office scandal in the UK arose, but it is, or at least ought to be, one of the easier areas of legal practice in which to promote and ensure ethical behaviour. All litigation occurs, if not in court, then in the shadow of it, with at least the prospect that the behaviour of lawyers will be subject to scrutiny by an independent judge. All lawyers owe a duty to the Court, which in the words of the Legal Services Regulatory Authority's Draft Code of Practice for Practising Barristers in Ireland for example means that an advocate "*is obliged to uphold the rule of law and to facilitate the administration of justice. Where he or she appears before a Court or tribunal established by the State, a Practising Barrister owes a duty of candour to the Court or tribunal, which duty prevails over any conflicting duty owed to his or her client, any other legal practitioner associated with the proceedings or any other party to the proceedings.*"<sup>6</sup> This is a very important statement of principle, which emphasises that the advocate's duty cannot be reduced to the fearless pursuit of a client's case. There are other considerations and constraints.

This conference takes place in a common law country where there is a split profession. That is, has always been, and will always be, the subject of debate and there are undoubtedly pros and cons, but in this field, there are I think certain benefits in the division of the legal profession. The fact that an advocate is independent and separate from the solicitor acting for a client means that decisions must pass through at least two ethical filters. It is perhaps easier for an advocate to give advice which may be unwelcome to the client and easier for a

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<sup>6</sup> Legal Services Regulatory Authority, *Draft/ Code of Practice for Practicing Barristers* (2019) 9.

solicitor to have the support that the advocate has taken this position. A barrister has moreover a heightened incentive for ethical behaviour in a small jurisdiction, because it is to be expected that he or she will have further cases before the self-same judge, there will in any event be only a relatively small group of judges, and a barrister will be dealing with other advocates on a continual basis. The long term commercial desirability of maintaining a reputation provides a useful counterbalance to the temptations of seeking short term gain through unethical behaviour.

However, that element of beneficial behaviour reinforcement is of limited application, and the bigger the jurisdiction, the greater the number of lawyers involved, and the greater the competitive pressures, the less effective this type of traditional peer pressure is. It is generally only capable of arising in just this way in the context of litigation, and therefore, does not address the vast amount of legal work that is done outside the courtroom. Nevertheless, it does point, in my view, in the correct direction; most lawyers have an inbuilt desire to behave ethically and properly, but even if that is true, what is necessary is to have an incentive to reinforce and promote good behaviour and a system that identifies and penalises bad behaviour. If you take a more cynical view like Carl Sandburg, then this type of positive reinforcement and negative deterrence is even more important.

Paul Gallagher SC, a two time Attorney General in Ireland, wrote in 2005 an important article in the Bar Review in relation to the interaction of legal ethics and competition law. He pointed to the importance of ethics as an intrinsic part of the service which lawyers provide. Ethics is properly understood as a part of what makes the service valuable, but he also pointed out that breaches of ethical principles are sometimes difficult to detect and hard to police. That means that there must be a system of rigorous oversight.<sup>7</sup>

This, to my mind, emphasises the importance of a conference such as this. If there is to be an effective counterbalance against the commercial forces that properly operate within the legal profession, then it must come through a process of both education on the one hand and rigorous enforcement of disciplinary codes on the

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<sup>7</sup> Paul Gallagher, 'Can Ethics be Competitive?' (2005) 10(5) Bar Review 144.

other. At one level, the steady stream of cases of professional misconduct by doctors that we might read in newspapers can seem depressing, but it operates to sustain public confidence in the system, because it shows that it is capable of identifying error and, where necessary, imposing sanctions. A process of education is also vital. Nobody should think that it is easy to do what we ask of modern-day lawyers; that is to pursue their own professional development and earn a living in a sometimes shrinking and always highly competitive market, to be fearless in pursuit of the defence of their clients, no matter what that client may have done or how difficult that client may be, and yet to maintain ethical behaviour. Difficult problems of ethics do not land on a lawyer's desk labelled as such. It is not always easy to identify the precise line between advice that should properly be given as to the limits of what is lawful or permissible, and helping someone to cross those limits.

Unethical behaviour, particularly in the midst of dramatic and sometimes pressurised circumstances, can be easy to miss. I sometimes say to young lawyers that preparation is the really essential quality for a lawyer – you need to ask yourself all the questions and more than you think you might be asked in court. The last place you want to start to think about a difficult issue is in the glare of the spotlight immediately after a judge has asked you a question. Something similar can be said about ethics. It is much easier to have thought about these issues in advance, to have identified the types of areas in which they arise, and the correct way to address them. It is certainly a lot easier in the relatively pleasant surroundings of Dublin in the summertime than in the unforgiving glare of the spotlight in the course of a trial or tribunal of inquiry, or a professional or regulatory inquiry thereafter.

Ultimately, this is worth addressing, not just for self-interest or self-preservation, but because of the importance of the role which lawyers perform, and will continue to perform. It is only fair to balance Carl Sandburg's view with that of another poet, in this case also a distinguished lawyer. Archibald MacLeish said that:

*"The business of the law is to make sense of the confusion of what we call human life — to reduce it to order but at the same time to give it possibility, scope, even dignity".<sup>8</sup>*

That remains an important task and it is something which can provide an absorbing and rewarding career. It is as important today as it ever was, not just to perform that task, but to do it as well as possible, as conscientiously as possible and ethically. That is not an optional extra, it is intrinsic to the job we all do.

I wish you well in your work.

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<sup>8</sup> Archibald MacLeish, 'Apologia' (1972) 85(8) Harvard Law Review 1558, remarks originally delivered at the 85<sup>th</sup> Anniversary Banquet of the Harvard Law Review, March 25, 1972.