This belated review arises from my interest in the career of the renowned US journalist Janet Malcolm. There can be little value of a review where the interested reader wishes to follow through and finds that the book is no longer stocked or is not readily available. If that be the case then perhaps I can review the book while purporting to discuss the ethical problems facing the solo legal practitioner who sometimes represents a person of dubious character. A not uncommon scenario. The danger facing the solo practitioner is the absence of counsel from and consultation with colleagues and mentors which can lead to compromised ethics without any awareness on the part of the practitioner. The value of such counsel and consultation is the fresh insight provided by another occupying a different viewpoint. Such a discussion is timeless.

My interest in the author’s career arose out of the long-running (two decades!) defamation litigation brought by one-time psycho-analyst Jeffrey Masson against the New Yorker magazine and its star journalist Janet Malcolm. The case petered out in the late 1990s after it had gone all the way to the US Supreme Court and a re-trial after the first trial ended partly in a deadlocked jury. Truly, nobody won in that the plaintiff Masson was held not to have been defamed by the defendants while the defendants were held to have published fabricated quotations attributed to the plaintiff in violation of their own high standards of journalists’ ethics. In fact, it may well be that Masson’s reputation was further damaged by the publicity surrounding the extended litigation. While the defendants could claim a victory in that there was no damages award against them, the injury to their much vaunted reputations and journalists’ ethics in general will take a long time to repair, perhaps never. Thus there was no hesitation when my eye fell upon this book in a Swanston Street second-hand bookshop.

US research in the 1960s and 70s concluded that the paradigm for breaches of lawyers’ ethics was the solo practitioner lacking a colleague or mentor to sound off
on. Unethical lawyers do not engage in solo practice to facilitate their breaches; rather, for the most part they begin as honest lawyers who practice solo by default in that they have failed to engage the interest of the major law firms following graduation where such firms pick off the cream of the graduating class. Thus a less than stellar academic performance leads to solo practice which then facilitates the lone practitioner’s slide into the netherworld of ethical breaches. To this can be added the recent research (Harvard Business Journal, 2007) suggesting independent professionals may be more easily deceived by their dishonest clients out of a desire to please; for example, the outside accountants who signed off on the audits of Enron, Worldcom, Tyco, HIH, and other similar corporate scandals supposedly under the watchful eyes of experienced outside auditors.

Sheila McGough was a lawyer who zealously represented a petty conman and lost with her client sentenced to prison. Then, egged on by the perpetually dissatisfied victim of her client’s fraud, the US attorney charged and prosecuted McGough with participating in her client’s fraud. She lost and was sentenced to three years, serving two and a half years, and was disbarred. [Readers should note that the perpetually dissatisfied victim had been fully compensated by McGough’s professional ‘Errors and Omissions’ insurance policy.]

Should she have been charged and prosecuted? I agree with the author that the criminal proceeding against her was over the top and should never have been undertaken. This is reinforced by the fact that she committed no crime and certainly gained no benefit from her client’s scam. Should she have been convicted? Given that there was no criminal conduct on her part and my conclusion that the criminal proceedings should never have been commenced this would appear to be a no-brainer. Yet, her conviction was inevitable given the conduct of her trial with a defence handicapped by the “ornery-ness” of the defendant client. If ever there was a case exemplifying the notion that a little bit of knowledge is dangerous, this is it. McGough’s defence was hampered by her legal education in a way that a layperson’s defence would not be. Should she have been disbarred? The answer is an emphatic “Yes” because she was (and remains) too naive and gullible to practise law which is a euphemistic way of saying that she’s just too damn stupid to be permitted to practise law. Given that she gained no benefit from her client’s fraud supports the conclusion that her crime was founded on stupidity and not cupidity. It is an old adage that
stupidity is not a crime and should not be prosecuted (otherwise there’d be more people inside prison than outside).

Was Sheila “framed” as claimed by her to the author? Nope. All by herself she successfully snatched defeat from the jaws of victory and secured a conviction for the prosecution where it most likely would have failed. We all acquire a legal education, some of us by attendance at law school, the remainder by attendance and participation in the legal process as a party to a trial. Which is the better legal education? That is not for me to say. Sheila received both and neither was of much value to her and we could conclude that neither is the better legal education and maybe, there is no such thing as a better legal education.

What was her client’s scam that she was convicted of participating in? I have no hesitation here in outlining the scam in the pages of Bar News. I am confident that no reader will be tempted to perpetrate the same fraud given the inevitability of being detected and caught. Persons with the limited intelligence to believe they could get away with this scam are most likely incapable of turning the pages of Bar News. Basically, her client (without her knowledge) represented to the victim that the victim could safely and confidently provide funds by wiring them to Sheila’s bank account where the funds would be held in escrow thus protecting the victim’s interests. Of course, when the victim’s funds arrived in her account the funds were disbursed to the conman client who had failed to advise Sheila that the sender was suffering under the misapprehension that they were to be held in escrow. In fairness to Sheila and my depiction of her as a stupid cow one has to question the prudence of the victim who was depositing money into Sheila’s account on the basis of the representations of her client without first confirming with Sheila that the client’s representations were correct and that the funds would be held in escrow.

Was Sheila as stupid as I have portrayed her? In fairness, I have to relate that her conman client had already tried similar scams with other more experienced attorneys and partially succeeded. Of course, they quickly severed the relationship once the discrepancies and other danger signals appeared. Sheila’s gullibility allowed the attorney-client relation to continue. Why did Sheila not sever the attorney-client relationship after the discrepancies and other danger signals surfaced? Why did Sheila allow her client to move into her law office and conduct his business from her
premises? Perhaps for the same reason an earlier (and more experienced) attorney had
returned from out of town travelling and found the client had moved in during his
absence. [Readers with long memories might recall the junior who moved into his
one-time pupil master’s rooms in Owen Dixon Chambers while the occupant was
interstate on a long trial after having falsely assured the absent counsel’s clerk that the
arrangement was with the full concurrence of the absent member of counsel.]
Malcolm’s narrative includes two more experienced attorneys expressing regret at
their not having warned Sheila of her client’s difficulty in dealing with questions of
honesty. Whether Sheila would have heeded such warnings had they been made is
moot.

What happened at trial? Out of some misguided belief that to testify on her own
behalf would betray her client and breach the attorney-client relationship, Sheila
refused to take the stand and simply tell the jury exactly what she did and what she
did not do. As I’ve already written, a little legal knowledge is worse than none at all.
According to one of her co-counsel that was the end of the case with the result that the
prosecution scored in an otherwise unwinnable case that should never have been
brought to trial. On the other hand, the other member of her defence believes that she
was right not to testify but for a different reason. His belief is that upon the
prosecutor’s cross-examination, Sheila would have proclaimed her own innocence
and that of her client, proclaimed that there never was a scam, and further proclaimed
that the two prosecutions were based upon a vindictive and vicious government
conspiracy to prosecute and “frame” an innocent man and his honest and zealous legal
representative. His belief was founded upon his inability to persuade Sheila that she
had been duped by her client who was a conman. [Janet Malcolm herself recounts her
depth frustration with her own inability to make Sheila understand that she had been
duped.] Like I’ve said: a little legal knowledge is worse than none at all. Had Sheila
not had the benefit of a legal education it is quite feasible that her defence team could
have “heavied” their client into accepting some reality with the consequence that the
defence could have proceeded without having both hands tied behind its back.

Where did Sheila McGough go wrong? Her second co-counsel defending her
concluded that “the law was probably the wrong line of work for her.” Earlier,
interviewed by Malcolm, he described her background thus:
She simply followed the directions of that idiot [Bailes, her conman client]. She lacked common sense. She was brand-new out of law school, with no supporting network of lawyers to temper her judgment. ... You learn how to deal with the profession. She didn’t have any of that. She’s no criminal, but she could have benefited from some outside judgment. She should have been in the Public Defender’s Office. She would have been a great public defender. ... But at the time she was defending Bailes, there was no Public Defender’s Office in Virginia. She was a solo practitioner taking court-appointed cases. That’s a completely different experience. She was alone, with no one to consult. She lived with her parents, led a sheltered life. Then she was thrown into the maelstrom of criminal defence. It’s a recipe for disaster.

What should Sheila have done? With hindsight we all have 20/20 vision. Well, almost all. Sadly, as reported by Malcolm, Sheila still doesn’t get it — despite the benefit of hindsight she doesn’t have 20/20 vision. A single middle-aged woman fresh out of law school could have left home and moved to an adjoining state that did have a Public Defender’s Office and sought employment in that office. She could have sought employment as a junior employee lawyer in a small criminal law office. She could have sought partnership with an equally inexperienced law school graduate thus enabling the interchange of ideas and insight that may have protected her from her own folly. She could have lowered her ambition and sought employment in a firm not ranked in the stratosphere of the top. She should not have entered into a solo criminal practice by default because she had failed to attract attention from the bigger firms upon graduation. She needed the collegiality of another practitioner to raise a warning flag from a different viewpoint.

This is not to say that collegiality is complete protection. A colleague of mine recently read the Riot Act to a new employee solicitor who had confessed to deliberately leaving off a document from the Affidavit of Discovery prepared by her because she didn’t want the other side to know of its existence. When I did the Readers’ Course, Vincent QC (as he then was) advised us not to slide into doubtful ethical conduct to benefit a client on the basis that our professional career was for three or maybe four plus decades while the longevity of the client’s retainer was of a much shorter and uncertain duration.

At about the same time Vincent QC was addressing the Readers’ Course, Sheila had risen about as far as she could be promoted to in administration at the Carnegie Institute. Her ambition saw her enter George Mason University Law School in Washington, DC. Had she been less ambitious she would probably today be
celebrating her retirement after a long and praiseworthy but otherwise uneventful and nondescript career at Carnegie.

This whole sad story adds a new twist to the old adage that beginner lawyers learn at their client’s expense. In Sheila’s case it was at her own expense and if Malcolm’s report is accurate, she hasn’t even had the benefit of the lesson learnt. Ironically, Sheila’s conman client most likely knew more about the law than she did and most probably sought her out because of her innocence. There is another old adage that fools learn from their own mistakes while wise men learn from the mistakes of others. To this we could add that cretins don’t even learn from their own mistakes.

This book has only added further to my interest in the author’s career – someday there will be a valuable PhD dissertation from some obscure American university on the parallels between the author and her subjects: Janet Malcolm’s criticisms of authors Joe McGinniss (Fatal Vision) and Helen Garner (The First Stone) and her own similar behaviour towards her subject Jeffrey Masson; and Sheila McGough’s inability to accept reality and Janet Malcolm’s own similar inability to accept that she did in fact commit some of the acts complained of by Jeffrey Masson (the fabrication of the quotations attributed to Masson).

[PS — amount of remorse and regret expressed by Sheila’s onetime conman client in the few years between his release from prison and his death in 1995 with regard to her fate and ultimate downfall? Big Fat Zilch! In fact, he offered the view that she had been ensnared by her own greed. What a cad! Maybe Sheila was not the only one in need of a reality transplant. Let that be a salutary lesson to readers seeking and expecting gratitude from their clients.]

Briefless
Cupidity or stupidity: lawyers’ ethics on trial [Review of the book The Crime of Sheila McGough]