Report
from Ethics Forum

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On 13 and 14 August 2012 I had the benefit of attending an Ethics Forum hosted by the Law Society of New South Wales. The Forum was a gathering of ethics solicitors from Law Societies around Australia, representatives of the Office of the Legal Services Commissioner in NSW, educators in ethics from universities, together with solicitors from large firms who are designated within their firm to provide ethical advice and guidance.

Observations from the Bench

A number of members of the judiciary addressed the Forum on a variety of topics. One clear message was the importance to the proper functioning of the Courts, and the administration of justice, of an ethical legal profession. Justice Bergin, Chief Justice in Equity of the Supreme Court of New South Wales, observed that a client is often motivated by a number of factors, such as money and obtaining a competitive edge, but generally not by the need to behave ethically.

Justice Griffiths of the Federal Court pointed out that a shift away from professional courtesies is also having an impact on the Courts; correspondence that is written in a provocative or vitriolic style ultimately wastes the Court's time. It does nothing to advance the relevant issues and can often distract a practitioner and a client from the real focus of the matter. His Honour was not the only one to make an observation on this style of letter writing over the course of the forum.

Federal Magistrate Altobelli reflected that good ethical behaviour from legal practitioners contributed to confidence by the broader community in the profession but bad ethical behaviour reduces that confidence.

The duty that a practitioner owes to the Court requires more than mere lip service. It requires thoughtfulness and attention from members of the profession. Federal Magistrate Altobelli, who was a solicitor in private practice for 25 years before his appointment to the bench, postulated an interesting approach by encouraging practitioners to think about saying "no" more often to clients. He believed that practitioners are fearful that adopting a "lawyer" controlled approach will cause the client to terminate the retainer. He observed that if this were to occur it may not be such a bad thing; often this client is perhaps one that in the long run is not such a loss. It was his experience, however, that clients will often continue the retainer and an important boundary has been established with the client; they may come to understand that their lawyer has ethical obligations and is more than just a mere mouthpiece.

Interestingly, Federal Magistrate Altobelli also noted that studies had shown a link between mental health, particularly depression, and ethical behaviour

Government Lawyers

The different pressures that may be experienced by practitioners employed in-house by government departments or as in-house Counsel for corporate clients also came in for discussion during the Forum.

In these circumstances the practitioner has only one client, who also happens to be their employer. Practitioners in such a role need to pay particular attention to ensure that they maintain their ethical responsibilities, particularly in providing independent advice or opinions and not to be swayed into providing an advice that meets a preferred outcome.

Ethics in other professions

The Forum was also addressed about comparative ethics by speakers from backgrounds in medicine and accounting.

Associate Professor Tobin from the Plunkett Centre for Ethics presented an interesting concept of ethics from an Aristotelian perspective. Tobin used the analogy of playing a game of football. There are rules and boundaries to the game. On Aristotle's view, unethical behaviour is not playing the game badly; it is simply not playing the game at all.

Tobin also spoke about the concepts such as truthfulness, humility and compassion that feature strongly in the key qualities associated with ethical behaviour within medicine. Clear parallels can be drawn with these qualities to ethical behaviour within the legal profession.

Joanne Gorton from Price Waterhouse Coopers aptly observed that being a member of a profession creates an obligation to act in the best interests of the community, and not just in the interests of a client or an employer. She advised that the Australian accounting standards had recently been changed in relation to remuneration and assessed KPI targets for accountants responsible for undertaking external audits. As a result of the change, an accountant can no longer be remunerated or assessed on the basis of other services they sell to a client when they have been engaged to undertake an external audit for that client. The aim of the changes is to modify behaviour. This is as a result of lessons learnt about the extent to which the manner of remuneration and assessment of a person drives their behaviour.

Interestingly, not all jurisdictions outside Australia have an ethical obligation to the Court that overrides their duty to their client. Notably, in one foreign jurisdiction, the duty to the client surpasses everything, and the speaker suggested that this even made lying by the practitioner permissible. Perhaps it is for this reason that local practitioners find clients sitting across from their desk expecting their solicitor or barrister to do the same, and feeling that maybe they just haven't got the right lawyer who is prepared to fight for them when their lawyer politely tells them they are not prepared to act unethically in the manner that the client seeks.

Teaching Ethics

The information gleaned from attending this forum about the teaching of ethics was valuable and will contribute to the development of the Society's CPD programme into the future. However, there are important lessons for principals and practitioners, in terms of how they supervise their employed professional staff and reflecting upon the ethical culture of their firm, that can come from an understanding of how we learn our ethics, and how ethics may best be taught to the next generation of lawyers coming through. Ethics are more than just rules. Ethics are very much about values.

There are two facets to educating practitioners about ethics. One is to teach the "boundaries" – in other words the rules of conduct. This is somewhat easier to do. The other facet is to embed ethical behaviour into the culture within a practice or work environment, and into the day-to-day practice of the law. Significantly, the most critical ethical training comes from the environment within which a young practitioner commences their legal career.

Costs and Overcharging

Justice Haylen QC, who currently presides in the Legal Services Division of the New South Wales Administrative Decisions Tribunal, spoke to the Forum about the issue of costs and had a number of interesting observations. The key to costs as an ethical issue centres on the concept that as a profession we are entitled to "*fair and reasonable*" remuneration. Often this concept can come under pressure as the day-to-day burden of running a business imposes. It is important however, to reflect on this ethical obligation which is balanced with a practitioner's entitlement to return an income from their performance of their professional duties. Steven Mark, the Legal Services Commissioner of New South Wales, eloquently described it as there being no conflict at all in profits versus ethics but that greed versus ethics does result in a conflict.

Justice Haylen also made reference to a NSW Court of Appeal decision[1] in which a firm was acting for three clients who were members of the same family, and suffered injuries on three different days but within the same premises. As the accidents occurred in similar circumstances and were against the same defendant, it was agreed that all three proceedings would be heard together. At the conclusion of a six day trial, the barrister and the solicitor billed each client for the full six days. The Court held that this constituted overcharging and that there is a need to apportion time spent on a matter where there are multiple clients.

It was observed by Justice Haylen, however, that often in overcharging cases, the practitioner did not have a deliberate intention to overcharge the client, but rather was reckless about the bill sent to the client or lacked proper procedures to ensure that the bill sent to the client was fair and sustainable. Justice Haylen referred to the decision in Law Society of New South Wales v Foreman[2] and the observation of Kirby P in that case that the use of time costing carries with it a risk that it will lead to overcharging[3].

It is worth mentioning that a lack of supervision or even a culture within the firm can result in the principal or principals failing to ensure that the costs passed on to clients were justifiable, and result in a potential conduct finding for overcharging. Principals should ensure that there are proper office systems in place to examine bills before they go out; that the work of the secretary who prepared the bill is checked and for the principal to also check down the line to ensure the work being billed was actually done.

Some numbers about complaints in New South Wales

In New South Wales the response to complaints against members of the profession is shared between the Professional Standards Committee of the Law Society,(the equivalent to the Law Society

Northern Territory Council's Ethics Committee), and the Legal Services Commission. Michael Brogan, who lectures in Ethics at University of Western Sydney and has been a member of the NSW Professional Standards Committee for a number of years, informed the Forum that over the last few years the NSW Professional Standards Committee has dealt with an average of 600 to 700 complaints per annum. By comparison the Law Society Northern Territory dealt with 44 complaints during the 2011/2012 year[4]. For that same year there were 568 legal practitioners in the Northern Territory (not including those practising on an interstate practising certificate)[5]. By contrast there were 24,543 practitioners in New South Wales as at 5 October 2011[6].

A number of interesting statistics about the complaints dealt with by the NSW Professional Standards Committee were presented by Michael Brogan. The Professional Standards Committee dismissed approximately 70% of the complaints received, and the remaining 30% were referred to the Administrative Decisions Tribunal. Ultimately around 20% of the complaints received in NSW resulted in a finding of either unsatisfactory professional conduct or professional misconduct against the legal practitioner. In New South Wales sole practitioners represent the largest group of practitioners the subject of complaints. The four most common grounds of complaints were negligence or incompetence, costs, communication and non-compliance with trust account requirements.

Michael Brogan had analysed the outcome of the substantiated complaints about practitioners in NSW, and distilled the behaviours that seem to lead practitioners into unethical behaviour into three groups. At one end of the scale are the practitioners who have a lack of understanding of their ethical obligations; their response to a complaint falls into the category of "I just didn't know". At the other end of the scale are the practitioners who deliberately do the wrong thing. Fortunately for the profession, these practitioners are in the minority. The largest group however, falls in the middle. These are practitioners who rationalise their behaviour; they try to find a way to justify why they did what they did. Their rationalisations include being time poor, being under financial pressure or just being under pressure either from their practice or their personal life.

Food for thought

One theme emerged over the two days of the forum. This centred on the importance of understanding that ethical behaviour is more than just careful observation of the Rules of Professional Conduct and Practice (although this is important), but also about developing character and values within a practitioner's own practice, particularly for the benefit of junior practitioners looking to the senior practitioners around them for leadership and guidance on ethical behaviour. A secondary topic that also developed was the rising concern on the bench and amongst the various regulators (the Law Societies, Professional Conduct Committees and Boards and the Legal Services Commission) about the lack of civility and professional courtesy creeping into some practitioners' behaviour and lexicon.

Without ethics the practice of the law would merely be reduced to a trade or a service industry. Ethics are what set us apart as a profession. If we wish to maintain that lofty mantle, we need to appreciate and value the importance of ethical behaviour. ●

Endnotes

1. Bechara v Legal Services Commissioner [2010] NSWCA 369
2. (1994) 34 NSWLR 408
3. At page 422
4. Law Society Northern Territory Annual Report 2011 - 2012
5. Law Society Northern Territory Annual Report 2011 - 2012
6. Report "2011 Profile of the Solicitors of NSW" sourced from Law Society of New South Wales website (www.lawsociety.com.au)