Lecture to USQ Law School

17 March 2017

Reputation, Who Cares?

Themes

I will consider professional reputation as an aspect of ethics and professional responsibility. I will bring a judicial perspective to the topic, rather than address reputation in the community. I will relate reputation to the adversarial system and the impact a poor reputation has on interactions within the courtroom, and on the role the Judge plays.

Introduction

The first thing that comes to mind when addressing the topic of lawyers and reputation is the plethora of acerbic lawyer jokes which paint us as greedy, untrustworthy and self-interested.

Lawyers have been pilloried, ridiculed, loathed and despised throughout history, whether in popular culture or in political discourse. *The first thing we do is kill all the lawyers…* comes to mind. By the way, can anyone tell me where that comes from?... It was Shakespeare in Henry VI. The speaker is a butcher called Dick who said this to the traitor Jack Cade, who was fomenting revolution by the commoners, while planning, all the while, to rule the people as an autocrat. One explanation for the idea of killing the lawyers is the popularity of the move amongst the commoners. Not a very flattering explanation. Another is that the lawyers stood for the maintenance of order and the system under threat. Depending on your perspective, this second explanation might be regarded as a back-handed compliment – a recognition that lawyers stand for the rule of law (whatever that may be at the time).

I note the time honoured demonization of lawyers has not deterred an ever increasing number of students signing up for years of study to gain admission to the profession. This suggests that your impression of lawyers, however gleaned, is more positive than negative. I would like to think that is so for most people who have personal contact with lawyers. When someone tells me how dreadful lawyers are I usually ask them if they have a lawyer. The frequent response is something like "Oh yes but my lawyer is different." It's amazing how many *different* lawyers there are out there. Hopefully you will be able to count yourself amongst the legion of different lawyers who do not conform to the negative stereotype.

But I don't want to dwell any further on community attitudes about lawyers, the legal system or the judiciary. That is far too disheartening a topic. Instead I want to talk from the perspective of a trial Judge about your reputation as a professional. What that means. How it fits within our system of law. Why it matters.

What do I mean by reputation?

I am a lawyer so we must start with a definition. What does reputation mean?

This primary definition from the Miriam Webster dictionary contains two parts, both of which I want to touch on in this lecture:

a **:** overall quality or character as seen or judged by people in general

b **:** recognition by other people of some characteristic or ability <has the *reputation* of being clever>.

It is a nice coincidence that the example given for recognition of a particular characteristic or ability is one which is most likely concerning you now. After all, your degree is intended to impart to you and assess legal knowledge. Can there be a better reputation for a lawyer to have than being *clever?*

Well, we could reflect on whether cleverness is always portrayed positively. Of course it is not. Think of the description of being *too clever by half*. It is not a compliment. This observation accepts the subject is clever, but the derogatory qualification *by half* is a commentary either on the person – usually their arrogant overconfidence in their ability; or on the idea – too tricky, convoluted or overly complicated.

Why have I reminded you of this aphorism? Simply because a reputation for being clever is only one aspect of your professional reputation, and it is almost a given. If you have graduated with a law degree it is assumed you are intelligent. But if in the practice of law your focus is solely, or even primarily, on the intellectual endeavour, you risk developing a professional reputation which will hinder, rather than enhance your success and, therefore, the success of your clients.

In my view, the practice of law is not a vehicle for demonstrating your brilliance, although you may well do that along the way. What a practising lawyer is engaged in is performing a service for others. This grounding in service provides our ethical foundation as a profession – the ethic of service – the qualities and practices that this ethic demands.

How does reputation relate to your role as a lawyer

As a lawyer you are an advocate, a representative, an agent for others. Lawyers are advocates for their clients, whether in Court or with their colleagues or others with whom they are dealing. They are also advocates to their clients; ie they advocate when they advise the better course of action.

So what is advocacy? The definition in the *Macquarie Dictionary* is *"an act of pleading for, supporting, or recommending; active espousal"*. The definition of advocate is *"one who defends, vindicates, or espouses a cause by argument; an upholder; a defender; one who pleads for or on behalf of another."*

The purpose of all this pleading for, supporting, espousing and defending is to influence the outcome by persuading the listener by argument. That's the lawyers' tool – argument.

You may be familiar with Aristotle's *Rhetorical Triangle*; his three pillars of persuasion by rhetoric: logos, ethos and pathos. Logos targets the brain; it is the logical, rational aspect of argument. Pathos is about the heart; moving the listener to *want* to accept your proposition. But for the purpose of this lecture, I want to focus on ethos, the third pillar. Ethos appeals to the gut – the instinctual response to the person – that sense of whether we can trust what we are being told.

An audience will more likely judge the propositions put forward by the credible speaker are true or acceptable. Aristotle said that to appear credible a speaker must display (i) practical intelligence (*phronêsis*), (ii) a virtuous character, and (iii) good will (*Rhet.* II.1, 1378a6ff.).

If the speaker displays none of these qualities, the audience will doubt the speaker is able to give good advice at all. If the speaker displays practical intelligence without either a virtuous character or good will, the audience could doubt whether the aims of the speaker are good. Finally, if the speaker displays practical intelligence and a virtuous character without good will, the audience might think the speaker knows the best suggestion, but doubt that the speaker is revealing it. If the speaker displays all three qualities, Aristotle argues credibility is established.

Aristotle's concern was with the technique of rhetoric. His techniques of persuasion do not assume prior good character – the effects of practical intelligence, virtuous character and good will are to be accomplished by the speaker's content and mode of delivery.

In the real world, however, all three aspects of ethos are affected by the past experience of the audience with the speaker and, in the absence of past experience, it is affected by reputation. Reputation plays an important part in the ethos of your advocacy, whoever your audience. So a good reputation contributes to your advocacy, because it can help persuade.

So why are the qualities of ethos important to Judges?

We operate in an adversarial system. It assumes the Judge will be best placed to make a just decision according to law, if the facts and law are martialled and presented by opponents through the contest of competing positions. Now you may think that is a contestable assumption, but that is a topic for another day. The fact is, we operate in an adversarial system and that is the context in which you must practice your profession.

However, this adversarialism cannot be unbridled. The Court is a forum for fair and neutral resolution of disputes. Fairness dictates restraint in the conduct of adversaries. Parties and their lawyers do not have licence to do anything it takes to win. Judges are expected to stay out of the arena of contest, lest they become or appear to be an adversary themselves. However, that depends on how the contest proceeds. The rules of procedure and the codes of ethics fence the arena within which the contest takes place. If the Judge has confidence the

fence is holding – that the adversaries know, respect and are observing the rules - she will be less likely to enter the arena.

When I speak of the rules, I am not talking about whether an applicant has given their opponent the right number of days' notice of a hearing, although that is part of it. I mean something more fundamental: that the lawyer is true to their duty to the Court.

Some aspects of the duty to the Court are addressed to substantive justice between the parties: Here are a couple of examples of breaches of the duty that you may have already looked at during this course:

Firstly, there is the requirement to make full disclosure of relevant information. In *Guss v Law Institute of Victoria Ltd,*[1] the Victorian Court of Appeal dismissed an appeal by Mr Guss, a solicitor who acted for his spouse in litigation and who the Legal Profession Tribunal found had deliberately failed to disclose a plan of survey which was relevant to an issue in the litigation. On the first day of the hearing, he did not correct an opening submission by counsel for his wife that there was no plan of survey in existence. The Court of Appeal said (at [39]):

"It is difficult to overstate the importance to the administration of justice of the paramount duty of a legal practitioner not to mislead the Court. Where there is any conflict, or risk of conflict, between that duty and what the practitioner perceives to be his/her duty to the client; the duty to the Court must always prevail. Nowhere is the risk of conflict more likely to arise than in the obligation to make discovery. Discovery is, of course, the obligation of the client, but the client inevitably depends upon the advice of the legal practitioner as to what is, and what is not, discoverable…"

Another clear example of a duty to the Court which relates to substantive justice between the parties is the prohibition on misleading the Court – whether active or passive.

In *Council of the Law Society v Wright*[2] a solicitor intentionally misled a Court about a relevant fact, relied on an affidavit she knew was no longer accurate, made false oral submissions about a witness and about the financial status of her client, and attempted to suborn a witness to swear a false affidavit in order to deceive the Law Society in its investigations of her conduct.

The Court of Appeal (at [67]) dismissed her appeal and said:

"A practitioner's duty to the Court arises out of the practitioner's special relationship with the Court; it overrides the duties owed by a practitioner to clients or others…The lawyer's duty to the Court includes candour, honesty and fairness. The appellant abused her role as an officer of the Court in relying on material she knew to be false and in deliberately and

[1] [2006] VSCA 88.
[2] [2001] QCA 58.

recklessly misleading the Court in an attempt to further the interests of her clients and family. Her conduct was made more serious by its repetition. The effective administration of the justice system and public confidence in it substantially depends on the honesty and reliability of practitioner's submissions to the Court. This duty of candour and fairness is quintessential to the lawyer's role as officer of the Court; the Court and the public expect to rely upon it, no matter how new or inexperienced the practitioner. Breaches such as this are hard to detect and once established to the requisite standard are deserving of condign punishment, not only as a deterrent but also to reassure the public that such conduct on the part of lawyers will not be tolerated."

In Wright's case, her offending occurred when she sought to further her client's interests. A different and equally disturbing example of misleading the Court is provided by the case of the *Barristers' Board v Darveniza*[3] where the would-be lawyer's motivation was self-interest.

Darveniza had minor drug convictions. When applying for admission, the Bench requested an affidavit about his current lifestyle, presumably to be satisfied that he was no longer at risk of illicit drug use. He deposed to having eschewed his former life. He failed to disclose that since the minor convictions he had sold 300 tablets of amphetamine to an undercover police officer and, thinking he was a drug dealer, he offered to launder money for the officer. It was his willingness to mislead the Court about his recent involvement in drug trade (rather than the offending itself) which the Court noted. It showed his contempt for the administration of justice and, therefore, his unsuitability to be an officer of the Court. As Justice of Appeal Thomas said (at [45]) "a barrister does not lie to a Judge who relies on him for information."

Other aspects of the duty to the Court might appear to be directed to respect for the forum – the way in which lawyers behave towards each other and how Judges and lawyers behave towards each other. This is not mere politeness or good manners. These rules and conventions involve respect for the forum itself and for the roles that the different agents play within it. They allow all involved to do their job appropriately and professionally, and with their reputation intact. Let me use a few examples to illustrate the point.

Firstly, let's look at the conduct of practitioners towards each other:

In *Legal Services v Janes*[4] a solicitor who had to explain her client's non-compliance with a Court order to file material by a certain date swore an affidavit and made oral submissions in which she wrongly blamed counsel previously instructed in the matter. She told the Judge that counsel had told her not to worry about the dates. The Judge was understandably concerned by this allegation and provided material to the President of the Bar Association so that the Bar Committee could seek an explanation from the barrister, a very serious thing for the young barrister. In fact, counsel had urged Janes to seek an extension of time more than once and Jane's accusations were without merit. There is no suggestion that this incident had any impact on the outcome of the litigation between the parties themselves. However, the

[3] [2000] QCA 253.
[4] [2013] QCA 551.

Tribunal found this to be professional misconduct because of the critical nature of the trust and confidence that Courts must be able to repose in legal practitioners. This solicitor's conduct towards another practitioner, as well as being dishonourable, demonstrated she was willing to mislead the Court.

In *Legal Services Commissioner v Winning*,[5] a lawyer used grossly offensive and obscene language in Court, and in conversations with other legal practitioners and officials, when referring to fellow practitioners and high public officials. There was no question of his honesty and it was accepted he made a valuable contribution to the community through his practice. It was also accepted that he had some cause for suspicion and anger about his dealings with some of the agencies. However, he did not deal appropriately with any complaints that might have been justified. The Tribunal found it was unsatisfactory professional conduct to express himself in the crude, vulgar, and undisciplined way that he did. I'm not going to repeat the language he used – it is on the public record – not because of any delicacy on my part, but because I was offended just reading it. Suffice it to say that it would not be out of place in an Elmore Leonard novel.
Conduct short of misleading the Court can also lead to censure because of the imposition then placed on the Court by the practitioners' conduct.

In *Legal Services Commissioner v Puryer*[6] a solicitor's conduct in personal litigation against a co-tenant under a lease led to disciplinary proceedings. He obtained an order against the co-tenant in her absence. The co-tenant successfully appealed to the Court of Appeal, which concluded there was evidence that the solicitor had misled a Supreme Court Judge about the extent to which his co-tenant had met her obligations under the lease and how much notice he had given her of the particular application. One argument raised by Mr Puryer was that the correct information was contained in documents placed before the Judge. The Court of Appeal said,[7] *"to say the least, Mr Puryer did not seem to understand that a lawyer's obligations of candour to the Court, whose officer he is, are not discharged by leaving it to the Court to plough through a bundle of papers in order to discover relevant material adverse to this case."* It referred his conduct to the Legal Services Commission. The Queensland Civil and Administrative Tribunal found he deliberately mislead the Court. But the case also illustrates that the duty to the Court requires a lawyer to provide active assistance to the Court. The fact that the litigation was personal did not affect his responsibilities as an officer of the Court.

A view from the bench

Before I sat on any Court or Tribunal I would have said that I understood the importance of reputation. After more than 14 years as a judicial officer I now know I did not truly appreciate the tremendous value of a good reputation; nor did I really understand how a poor

[5] [2008] LPT 13.
[6] [2012] QCAT 48.
[7] *Puryer v Webb & Ors* [2008] QCA 246 at [31].

reputation might have hampered my client's prospects of success or my own career prospects. Most important, however, I don't believe I ever explored what a good reputation meant.

I want to return to Aristotle's ethos and provide a view from the bench about why this matters. A lawyer's reputation can be adversely affected by a failure to demonstrate any of the three aspects of ethos. From the Judge's perspective all three: practical intelligence, virtuous character and good will relate to the lawyer's duty to the Court.

Practical intelligence is displayed when a lawyer chooses only credible arguments to run, makes sensible and reasonable concessions and identifies pragmatic solutions that will progress resolution.

Virtuous character relates to honesty and integrity and observance of those codes of conduct intended to ensure confidence between the profession and the judiciary.

The final quality of good will speaks to motivations. Is the lawyer advocating in the client's best interests? Is the lawyer unnecessarily extending proceedings with unmeritorious applications and if so, why? Is this lawyer abusing the Court process?

The examples I have given you all involve one or all of those aspects of ethos. But while those examples involve professional misconduct or unsatisfactory professional conduct, I don't want to leave you with the impression that it is only these extreme examples that affect your professional reputation.

For example, the President of the NSW Court of Appeal, Justice Margaret Beazley recently told Lawyers Weekly she was in the process of preparing a judgment that condemns lawyers for wasting court time with arguments that are not well grounded. *"Lawyers are running points and grounds of appeal regardless of whether, on a critical assessment, it has good grounds or not…and presumably they charge for them".*[8] Be in no doubt that this will affect the reputation of the lawyers to whom she directs her comments in that case.

Your reputation rests on your everyday practice. How you behave in Court reveals your respect for the forum, your opponent, your client and the Judge or jury you are trying to persuade.

If I was writing a reference for a lawyer with a good professional reputation, I would say this about them. They:

- Arrived at Court well prepared.
- Focussed on the essentials of the argument, not on extraneous issues.
- Did not mislead the Court.
- Were courteous to the Court and their opponent.
- Did not ambush their opponent.
- Did not waste the Court's time.

[8] Leanne Mezrani, 'Judge warns lawyers not to waste court time and client money' *Lawyers Weekly* (5 May 2015).

Clients talk, lawyers talk and, I can assure you, so do Judges talk about their experience of you as a lawyer.

Happily I can say that often Judges share good impressions. Frequently, the first time I hear the name of a young lawyer is when a colleague mentions in passing that they were impressed by the way the lawyer in question has conducted themselves in Court that day. When that lawyer rises to their feet before me for the first time, I am likely to recall my colleague's good report.

Sadly, though, not all impressions are good ones. I wonder whether poor impressions are more likely to be shared. An exasperated Judge may check out their experience with a colleague. I am regularly asked whether a particular lawyer has appeared before me and, if so, my view of them.

When that question is asked, Judges know the question is not directed to the lawyer's intellect. This is a quick referee check that the lawyer will never know has taken place. Without articulating it in these terms, Judges are sounding out each other about the lawyer's ethos.

Let me illustrate my point by returning to that reference for the lawyer with a good professional reputation and run it past an ethos check:

- Arrived at Court well prepared on both the facts and the law. (practical intelligence)
- Focussed on the essentials of the argument, not on extraneous issues. (practical intelligence)
- Did not mislead the Court. (virtuous character)
- Were courteous to the Court and their opponent. (virtuous character)
- Did not ambush their opponent. (good will)
- Did not waste the Court's time. (good will)

So you see, I hope, what a useful concept ethos is when undertaking the practice of law.

I sometimes seek out another Judge's opinion of a lawyer if I have had a bad experience with a practitioner; or if think I may be reacting unfairly to them or might have misread their motivations. The view of a respected colleague will be a powerful influence. If my colleague reports a favourable impression I will examine my own response more closely. Why was it I formed a bad impression of the lawyer? Do I have a firm foundation for that? Perhaps I was confused, distracted, fatigued? Did I misconstrue the situation? A good report from another Judge can save me from forming a negative view too hastily.

But if my colleague reports their own negative experience with the practitioner, this will strike a significant blow to the lawyer's reputation. Now, not one, but two Judges will have had and shared a bad experience and had their negative perception reinforced…and so it goes on when the next Judge makes the enquiry of one of the first two Judges.

Conclusion

Reputation is nebulous and intangible and can be a precious asset or a weight on your shoulders. It is exponentially affected by others sharing their experiences of you as a lawyer. The more negative experiences that are shared, the more devastating it is to your reputation. The more shared positive experiences, the more snugly your good reputation will sit around your shoulders. Your reputation may be made or broken without you being aware of how or when that has taken place. However, your reputation is, ultimately, in your hands.

In this course you are examining ethics and professional responsibilities. You will learn the rules that are the expression of the ethic of service that I have talked about. But you should not see professional codes of conduct as a manual. There will be many situations that you will encounter where the answer is not obvious; where conformity to one rule may seem to put you in conflict with another. The resolution of conflict involves ethos perhaps more than anything else, because those three aspects of practical intelligence, virtuous character and good will lie at the heart of professionalism.

This is not a code of chivalry for an exclusive elite. But it is apt to think of it as a knightly code in its most principled sense – a set of expectations about our conduct that allows us as practitioners to accept assertions and undertakings from our colleagues without proof; to be able to rely on what our fellow practitioners tell us; a code that depends on our members not taking advantage of the privilege and confidence reposed in them.

So that concept of ethos, our reputation as a professional lawyer, provides a platform for our confidence in each other and, hopefully, for public confidence in the justice system.

When you commence practice you will start to form your reputation immediately. I hope I have given you some ideas about how to develop a sparkling reputation that shines through your career as well as guides you in fulfilling the ethic of service you are about to adopt.