



THE OFFICE OF THE LEGAL SERVICES COMMISSIONER

Legal Ethics – What Are They Today?

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**Discussion paper delivered by
John McKenzie
Legal Services Commissioner NSW**

Lawyers belong to a profession and are not just part of a business; though it is a rapidly changing work environment as evidenced by the emergence of digital technology and new models of providing legal services.

The historical role of a lawyer is one of a servant of the public. The public service claim of the profession of law embodied the ideal of the legal profession as one of faithful service. It also embodied ideals of wise and dispassionate advice by a group of learned and privileged representatives who applied their knowledge in the interests of others against the injustices of the State. It is this public service claim that became essential to the purpose of the profession and the real justification for its existence.

Obligations flow from that historical role into the current day duties of practising lawyers. Before turning to an examination of the specific duties and obligations of members of the legal profession, let us consider the overall context of “Legal Ethics”.

One generally accepted definition of the word “ethical” is that it pertains to right and wrong in conduct. Broadly speaking, compliance with relevant rules is necessary to prevent wrongdoing. But the basis of the legal profession’s claim to its special place

as a profession in our society is based on a good deal more than compliance with rules and laws. Integrity is often said to be a cornerstone of legal professional behaviour. A useful definition of “integrity” is the promotion of behaviour that adheres to moral and ethical principles. So compliance is only a pre-condition to achieving the integrity which our profession strives to attain. Something more is required of lawyers, something in the nature of an obligation to abide by moral and ethical principles.

Consider the following characterisation of ethical behaviour borrowed from a discussion concerning the ethical care of the elderly in residential settings:

“The world of ethics is made up of more than just moral rules and compliance. Ethics is a philosophy of living and being, personally and professionally. It’s about relationship; it’s about context and connection; and, it’s as much about emotion and intuition as it is about reason..... The main enemies of ethics are hypocrisy, when we do things that are at odds with personal or professional values; and unreflected practice, when we don’t critique our own work”.

[Quotation from article in SMH 11/2/16 by Elizabeth Shaw (Ethics Centre Vic) and Sandra Hills (CEO of Benetas)]

Whilst I do not contend that the world of ethics pertaining to lawyers is identical to that applicable in the care of the elderly, it is a useful counterpoint on which to launch a discussion of some of the specifics of the obligations of lawyers; especially in its emphasis upon “relationship”, “context” and “connection”. I will leave the observations regarding “emotion and intuition” in comparison to “reason” to a later discussion of my suggestions as to what characteristics should an ethical lawyer aspire.

Lawyers have a paramount duty to the court and the administration of justice. It involves a duty to the community by way of a lawyer’s high ethical standards and duty to uphold the law. It goes further; there is a duty not only to obey the law but to ensure the efficient and proper administration of justice. This duty, and all those that follow, are enshrined in the conduct rules (**LPUL Solicitors’ Conduct Rules 2015**). They are also re-enforced by the courts in the exercise of their inherent jurisdiction to require lawyers never to mislead a court, to act with competence, honesty and courtesy to other lawyers, parties and witnesses. This duty includes an obligation to be independent (free from personal bias), frank in responses and disclosures to the court and diligent in their observance of undertakings given to the court or to opponents. Here we are reminded of the centrality of “context”.

The second in line duty of a lawyer is to their client. It is a fiduciary relationship in which the client places complete confidence and trust in his / her fiduciary, their lawyer. I note here the importance of “relationship” and “connection”. To paraphrase Mason J. (in *Hospital Products Ltd v United States Surgical Corp*, (1984) 156 CLR 4):

“The relationship is such that it gives the fiduciary (the lawyer) a special opportunity to exercise a power or discretion to the detriment

of the client, who is accordingly vulnerable to abuse by the fiduciary and must be protected.”

All lawyers are subject to the range of duties arising out of that fiduciary relationship which can conveniently be summarised as follows:

- (i) Act without conflict of interest
- (ii) Do not profit from the position of trust at the expense of the client
- (iii) Devote undivided loyalty
- (iv) Maintain strict confidentiality

In summary, lawyers have a solemn duty to only ever act for the benefit of their client to the exclusion of all others, within the over-riding duty to the court and the justice system.

There are other duties and obligations by which lawyers must abide, as set out in the conduct rules. A lawyer’s duties to the court and to the client constitute the bedrock of the ethical foundations of our profession. Whilst sourced from the historical origins of the profession, I believe they are capable of continuing to provide sure guidance to lawyers as they navigate the rapidly changing environment in which they practise.

I move now to an overview of some of the more prominent developments in the delivery of services and digital technology as they affect the daily practice of law today.

Our law schools are responsible for providing the requisite skills and knowledge so that their graduates can successfully obtain and maintain a useful position within the practising profession, if that is their ambition. They are already addressing needs for legal technology competence in their curricula. Students learn about data bases, data security, electronic evidence and signatures. Some law schools are already teaching students to build “Law Apps” that might provide fast and inexpensive solutions to standard legal problems. I have read that there is a prevalent view that thinking like a lawyer and thinking like a computer coder are actually quite similar. The emerging vision of the future of the legal profession is one of an increasingly competitive world in which there will be a high importance of technological literacy among lawyers in the digital age that we have begun to enter.

We hear regularly about the so-called “disruptors” already present in the market for legal services. There is an emerging concept of “Uber for Lawyers”, involving the “unbundling” of legal services such that specific components are selected, requested and provided, sometimes by unrelated providers, and usually for an agreed fixed price.

The latest entrant into this ever-evolving landscape is Artificial Intelligence, which usefully can be defined as “technology that can use past data to predict future events”. The need for banks, cheques, receipts, even money may become redundant if the block chain technology of recent emergence becomes widespread in usage.

Overall, all these developments point to the reality that the legal clients of today are more empowered and have higher expectations of what services they will receive from their professional service providers. This trend appears to be constantly increasing as time passes.

It has also been opined that tomorrow's lawyers must be prepared to deliver legal services from behind the scenes; specifically, from behind digital platforms. But does that mean they will be faceless and unaccountable? What of the indispensable aspects of the human touch, the deliverables that are innately sourced from expert individuals?

In order to explore this issue we need to have regard to the meaning of "legal services". In the context of the all-important duties to the court and to the client discussed above, the Legal Profession Uniform Law (LPUL) defines legal services as, "work done, or business transacted, in the ordinary course of legal practice". There is no definition provided in LPUL of "legal practice". As such, it will most likely be a concept that, whilst rooted in its historical origins as already discussed, will change and adapt over time. Indeed, it may now be an appropriate time for the profession to undertake a review of what the term encapsulates today. But the case law and the LPUL is unambiguous: legal services may only be provided by registered practising lawyers. It is unlawful for anyone else to attempt to do so.

In the end, if legal services are provided, there must be a lawyer who takes responsibility for those services, whether it is advice, a document tailored to the specific instructions of the client or representation in negotiations and litigation. If there is no registered practising lawyer evident on the face or behind the scenes of whatever platform, digital or otherwise, then it is likely that the legal profession regulators will take steps to remove access to the platform by the public and prosecute those responsible for the unregistered provision of legal services.

In what components of legal practice will it be difficult for technology to replace the human lawyer?

Whilst there are likely to be a number of such components upon which I am not presently focussed, two strike me as relevant to this inquiry.

Firstly, there is the exercise of a lawyer's judgement, especially in the more complex and multifaceted legal matters. A lawyer needs to interpret and apply whatever underlying analysis is undertaken by technology onto a particular case and scenario and give considered advice on the best, or preferable course of action.

Secondly, there is the value and importance of trust in the client / lawyer relationship. It is clear that many, if not most clients value the deep relationships that develop, the knowledge and understanding of the client's challenges and needs that a devoted lawyer brings to the case at hand for that particular client. There is often a significant reliance on the lawyer and the expertise they provide in what can be a very high stakes situation for the client.

The successful lawyers of tomorrow will understand how they can use technology to assist their clients whilst remaining true to the professional values and duties, now long-established. It will require a clear sighted familiarity with those traditional values and duties, coupled with an up to date awareness of the latest relevant technologies.

Next, I wish to turn to the assistance that I believe the Legal Profession Uniform Law (LPUL) offers to the profession in adjusting to the challenges that lie ahead, as raised by modern work practices and technology. A great deal of the commentary around the development of technology in the practice of law revolves around the issue of legal costs and better value for the client's money. One of the major perceived benefits of the new technology is the reduction in the cost of retaining lawyers. The LPUL addresses this topic in Part 4.3, "Legal Costs". The first stated objective of Part 4.3 is "to ensure that clients of law practices are able to make informed choices about their legal options and the costs associated with pursuing those options;" (**Section 169 (a)**). Requirements are set out as to the nature of the disclosure of legal costs according to the estimated total legal costs of a matter. If disclosure of costs is required because of the likely total cost of the matter, then the "law practice must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs" (**Section 174 (3)**). And if events occur or issues arise during the conduct of the matter, such that the earlier estimate of costs is no longer accurate, the lawyer must update the client as to the revised costs estimate and the reasons for it (**Section 174 (1)(b)**).

This requirement for a lawyer to take all reasonable steps to obtain what might fairly be characterised as "informed consent" from their client is one of the most significant changes to the regulation of lawyers introduced by the LPUL. It moves away from the approach taken in the former Legal Profession Act that set out detailed items that must be included in any costs disclosure. The LPUL moves to an approach based on the principle of doing what is reasonably possible to place each client, according to their own sophistication or lack of it, in the position of understanding both the proposed outline of the future conduct of their matter and the estimate of the total legal costs that conduct will generate. Then if the client agrees to proceed, they are accurately described as having given informed consent.

This new approach could be said to be an attempt to move lawyers to re-conceptualise their relationship with their clients. Long gone are the days when it was sufficient for a lawyer to accept initial instructions in a matter, solemnly advise their client that they will look after it, run the matter to conclusion and then tender a final costs invoice. Lawyers, in order to comply with LPUL, must now effectively communicate with their clients at the beginning of each matter and during the course of its conduct as to both the direction and the estimated cost involved. With regard to the new technologies, there will be various ways that such communication may take place including text messages, emails, chat lines, telephone and old-fashioned conversations in person. Clients are increasingly empowered to demand such communication in most aspects of their lives, especially any in which they will pay for service. In a way, the emerging technologies are answering this demand for greater autonomy in what is agreed to be paid for and delivered, and at what price.

Whatever form the new technologies take, lawyers are well advised to adopt the approach of doing all they can to take their clients with them on the journey.

Effective and ongoing communication with clients will position lawyers to adapt to this emerging reality, whilst ensuring they comply with the obligations of the regulation of their profession. It will allow lawyers to accentuate the very aspects of legal services that technology will not be able to replace, that are their judgement and the trust they engender in their clients. It will also require an appreciation of the historical role and duties of the legal profession, as expressed in the relevant conduct rules of today.

Checklist of practical suggestions for an ethical lawyer:

- Pause and reflect
- Study the facts and relevant rules
- Identify alternatives and their consequences
- Seek advice
- Identify the relevant values – professional and personal
- Ask yourself, “does this fit with the kind of lawyer I want to be?”
- Can the decision be explained in plain language?
- Is the proposed choice practical as well as desirable?

Suggestions for Resilience and Wellbeing:

- Debrief with colleagues
- Have outside interests and at least some non-lawyer friends!