THE IMPORTANCE OF ETHICS AND THE APPLICATION OF ETHICAL PRINCIPLES TO THE LEGAL PROFESSION

A Working Paper by Peter MacFarlane

The sad truth is becoming more and more apparent; our profession has seen a steady decline by casting aside established traditions and canons of professional ethics that evolved over centuries ...When we speak of the decline in "ethical" standards, we should not use the term 'ethics' to mean only compliance with the Ten Commandments or other standards of common, basic morality.....A lawyer can [adhere to all these requirements] and still fail to meet the standards of a true profession, standards calling for fearless advocacy within established canons of service.

Introduction

Surveys tell us that in terms of ethics and honesty only building contractors, politicians and car sales-people have lower ratings than lawyers. In a study done in the United States funeral directors rated more highly. The fact is that lawyers have been 'on the nose' for a long time now. Part of this can be explained by the fact that the client sees the lawyer as the 'means to justice' and so if they lose a case - be it criminal or civil - the lawyer and 'the system' are easy targets of blame.

It is also the case that the lawyer has divided loyalties - owing a duty to the court while at the same time owing a duty to the client. On occasions, these duties will be in conflict. In these cases, the lawyer is obliged to fulfil his or her obligations to the court. This is not generally understood by clients, or by some lawyers who carry the notion of the duty to the client too far and engage in practices that are unethical and that go to defeat the interests of justice. Making an allegation of fraud in circumstances where there is no evidence to support the claim is an example. Other examples include deliberately delaying proceedings, perhaps in order to force a settlement from the opposing client who is concerned about increasing costs; or issuing writs without their being any proper legal or factual foundation.

This is where legal ethics comes in. A commitment to legal ethics involves a commitment to the introduction of Codes of Ethics or Standards of Professional Practice. An example is the standards reflected in the International Bar Association General Principles of Ethics. However not all jurisdictions have Professional Codes and not all of those that do give sufficient attention to their enforcement. In any case, the lawyer who acts in accordance with a professional code of ethics may still be engaging in unethical practice.

So why is ethics important to the practice of law?

First because lawyers are integral to the working-out of the law and the Rule of Law itself is founded on principles of justice, fairness and equity. If lawyers do not adhere and promote these ethical principles then the law will fall into disrepute and people will resort to alternative means of resolving conflict. The Rule of Law will fail with a rise of public discontent.

Second, lawyers are professionals. This concept conveys the notion that issues of ethical responsibility

and duty are an inherent part of the legal profession. It has been said that a profession's most valuable asset is its collective reputation and the confidence which that inspires. The legal profession especially must have the confidence of the community. Justice Kirby of the Australian High Court once noted:

The challenge before the legal profession....is to resolve the basic paradoxes which it faces....To reorganise itself in such a way as to provide more effective, real and affordable access to legal advice and representation by ordinary citizens. To preserve and where necessary, to defend the best of the old rules requiring honesty, fidelity loyalty, diligence, competence and dispassion in the service of clients, above mere self-interest and specifically above commercial self-advantage.

Third, because lawyers are admitted as officers of the court and therefore have an obligation to serve the court and the administration of justice.

And finally because lawyers are a privileged class for only lawyers can, for reward, take on the causes of others and bring them before the courts.

The application of ethical principles to the legal profession

There are a number of applications of ethical responsibilities so far as the practice of law is concerned. It is common to divide these ethical obligations into duties owed to the client and duties owed to the court. It should be noted that a breach of these ethical obligations may lead to civil proceedings by the client, for example an action for breach of confidence or an action for negligence; while at the same time may be grounds for disciplinary proceedings under the relevant Legal Practitioners legislation.

Conflicts of interest

It is well settled that a solicitor has a fiduciary duty to his or her client. That duty carries with it two presently relevant responsibilities. The first is the obligation to avoid any conflict between his duty to his client and his own interests - he must not make a profit or secure a benefit, at the expense of his client's expense. The second arises when he endeavours to serve two masters and requires....full disclosure to both.

Conflicts of interest have given rise to a number of legal and disciplinary actions. It is an area that is commonly identified by lawyers as a problem in legal practice. Conflicts of interest are not all that easy to resolve because some interests will require that the lawyer not act for the person while other conflicts may still allow fort he lawyer to act for both parties.

It is also an area that requires the balancing of two public interests; namely the interest in clients having full confidence in their lawyers, including the protecting of their confidences, and on the other hand, the interest in the freedom of a lawyer to take instructions and for the client to be represented by the lawyer of his or her choice.

The difficult issue is this: Which conflicts, if not resolved, give rise to a breach of professional ethics and which do not?

There are four broad areas of potential conflict. The first relates to those cases where the lawyer acts for both parties.

Acting for both parties

It may be that a solicitor who tries to act for both parties puts himself in a position that he must be liable to one or the other whatever he does..... [It] would be his fault for mixing himself with the transaction in which he has two entirely inconsistent interests and solicitors who try to act for both vendors and

purchasers must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them.

At the heart of this issue is the fact that the lawyer owes a fiduciary duty to respect the confidences of clients and at the same time to do his or her best for the client. If you have information from one client that is prejudicial to the interests of the other client how can you do your duty to each?

In Commonwealth Bank of Australia v Smith (1991) 42 FCR 390 at 393 Davies, Sheppard and Gummow JJ put the matter bluntly:

We pause to say that various courts in a number of jurisdictions have decried the practice of the one solicitor acting for both vendor and purchaser....It is an undesirable practice and it ought not to be permitted.

And it does not seem to make any difference if one member of a firm deals with one client and another member of the same firm deals with the other client. In 1994 in Blackwell v Barolle Pty Ltd (1994) 51 FCR 347 Davies and Lee JJ concluded:

A firm is in no better position than a sole practitioner if it purports to act for separate clients whose interest are in contention. If it purports to continue to act for both clients by imposing a qualification on the duties of partnership it thereby denies the respective clients the services the clients have sought from the firm, namely the delivery of such professional skill and advice as the partnership is able to provide. In such a circumstance the appearance provided to the public is that the interest of the solicitors as partners are in conflict with, and may be preferred to, the interest of one or both clients.

Australia, as is common in most jurisdictions, has developed Model Rules of Professional Practice which are being implemented across all the Australian jurisdictions.

A practitioner who intends to accept instructions from more than one party to any proceedings or transaction must be satisfied, before accepting a retainer to act, that each of the parties is aware that the practitioner is intending to act for the others and consents to the practitioner so acting in the knowledge that the practitioner:
(a) may be, thereby, prevented from -
(i) disclosing to each party all information relevant to the proceedings or transaction, within the practitioner's knowledge or,
(ii) giving advice to one party which is contrary to the interests of another; and
(b) Will cease to act for all parties if the practitioner would, otherwise, be obliged to act in a manner contrary to the interests of one or more of them.

If a practitioner, who is acting for more than one party to any proceedings or transaction, determines that the practitioner cannot continue to act for all of the parties without acting in a manner contrary to the interests of one or more of them, the practitioner must thereupon cease to act for all parties.

The question arises as to whether professional rules should preclude the lawyer from acting in any case where he or she is instructed by both parties. The problem that arises in small jurisdictions or country towns or villages cannot be ignored, however perhaps the starting position should be that the lawyer is not to act for both parties unless there is no other suitable practitioner available to take the instructions. Another requirement might be that the lawyer cannot negotiate with one party unless the other party is present or otherwise represented. There is a wider public interest here than the mere perception of conflict; there is a real risk in these circumstances that both parties might find themselves without representation and put to additional costs, or that a later dispute between the parties will bring the law into disrepute because of its failure to adequately foresee and protect one or both of the parties.

The lawyer, the client and vested interests

The general principle espoused in Blackwell's case in terms of competing loyalties to different clients is readily transferred to situations where lawyers borrow from a client or have business dealings with a client and fail to make adequate disclosure to the client, or fail to arrange for the client to receive independent advice.

A case example is Law Society of New South Wales v Harvey [1976] 2 NSWLR 15. In that case the defendant was a solicitor who was also a director and shareholder in three companies in the business of property investment. Over a period of years, clients of the defendant lent money to these companies at the suggestion of the defendant. The investments undertaken by the companies were very high risk and the clients stood to lose substantially in the event of failure. In some cases the client was only informed that his or her money had been lent to the companies after this had occurred. The investments turned bad and the clients lost money. This was an appeal on the point of whether the professional misconduct of the defendant was serious enough to warrant him being struck from the roll of solicitors.

Street CJ concluded:

Where there is any conflict between the interests of the client and that of the solicitor, the duty of the solicitor is to act in perfect good faith and to make full disclosure of his interest. It must be a conscientious disclosure of all material circumstances, and everything known to him relating to the proposed transaction which might influence the conduct of the client or anybody from whom he might seek advice.....A solicitor who constantly promotes dealings with various clients clearly misuses his position, and puts it beyond his capacity to observe his primary duty to his clients. The price of being a member of an honourable profession, whose duty to his client ought not to be prejudiced in any degree, is that a solicitor is denied the freedom to take the benefit of any opportunity to deal with persons whom he has accepted as clients. Therefore, he ought neither to promote, suggest nor encourage a client to deal with him, but rather should take all reasonable steps positively to avoid dealing directly, or indirectly, with his client.

The defendant's professional misconduct was serious and sustained involving many clients and large amounts of money. His conduct was motivated by greed and self interest in deliberate and flagrant disregard of his duty to his clients, and demonstrates that he is unfitted to be a solicitor, or to be employed in a solicitor's office in any capacity, and that his name should be removed from the roll of solicitors.

By way of example the Model Rules referred to earlier state:

A practitioner must not, in any dealings with a client-
(i) allow the interests of the practitioner or an associate of the practitioner to conflict with those of the client;
(ii) Exercise any undue influence intended to dispose the client to benefit the practitioner in excess of the practitioner's fair remuneration for the legal services provided to the client.

The Rule goes on to note that a practitioner must not accept instructions in relation to any proceedings that would be in conflict with the practitioner's own interest or the interest of an associate. This Rule is harsher than the Rule concerning acting for both parties in the sense that it prohibits any dealings where the lawyer may have a vested interest, rather than allowing for such interests after the client has been properly informed. It is also noted that the words 'the interests of the practitioner' should be given a wide interpretation so as to make it clear that this includes the practitioner's spouse or partner or members of the practitioner's family.

Opposing a former client

To overcome the possibility of compromising the confidences of the former client, firms have used mechanisms such as the quarantining of the former client's information. These mechanisms are sometimes referred to as 'Chinese walls'. The overriding principle is, of course clear; namely that the relationship between lawyer and client continues after the original instructions have been completed. There will be situations where the use of confidential material obtained during the currency of the earlier matter will be detrimental to the client's interests, if used directly or indirectly against the client in later proceedings. However, even if there is no opportunity for abuse of a confidence, there is authority for the view that acting against a former client is a breach of the terms of the retainer with the former client and a breach of professional ethics.

Until recently, the common law position concerning the test for disqualification on the basis of a conflict of interest involving a former client was whether there was a reasonable probability of real mischief. However recently, in the case of Prince Jefri Bolkiah v KPMG (a firm) [1999] 2 AC 222 the House of Lords adopted a stricter test. Lord Millet noted at 237:

I prefer simply to say that the court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial. ....In my view no solicitor should, without the consent of his former client, accept instructions unless, viewed objectively, his doing so will not increase the risk that information which is confidential to the former client may come into the possession of a party with an adverse interest.

The Supreme Court of Victoria in 2000 accepted these principles and suggested that when a court is determining whether a solicitor should be able to act against a former client, the following questions should be asked:

(i) Is the former supplier of services ....in possession of information provided by the former client which is confidential and which the former client has not consented to disclosure?
(ii) Is or may the information be relevant to the new matter in which the interest of the other client is or may be adverse to his own?
(iii) If the answers to the first two issues are yes, then is there a risk which is real and not merely fanciful nor theoretical that there will be disclosure?
(iv) If there is that risk then the evidential burden which is heavy, rests upon the provider of the services to establish that there is no risk of disclosure and this may be established in exceptional cases by the provision of a 'Chinese wall' but this is rarely of sufficient protection.
(v) Should a permanent injunction be granted?

This stricter approach reflects a concern that former clients might otherwise be exposed to potential and avoidable risks to which they had not consented and that former clients could not have sufficient assurance that their confidences would be respected. However there are gradations of conflicts - some being more likely to cause harm or public concern than others, and perhaps this should be reflected in Codes of Practice or Rules of Conduct. In any case, if there is no harm or disadvantage done to the client, should the fact that there has been a breach of the Rules give rise to disciplinary action? If the purpose of discipline is not to punish but to protect the public interest then arguably, disciplinary action arising out of a conflict of interest should be contingent on there being some harm or damage or disapproval by the client, unless it is a case which involves the community generally.

Confidentiality

The duty of confidence which a lawyer owes to a client can be based on various principles of law. It can be regarded as an implied term of the retainer or contract, or it can be based in tort as part of the duty owed by the lawyer to the client, or it may arise in equity.

Apart from these legal principles, the duty of confidence also gives rise to an ethical obligation and thus a breach of client confidentiality would be grounds for disciplinary action. There are exceptions, such as where the client consents, or where the lawyer is compelled by law to disclose, or where the wider public interest requires disclosure. This last exception is still inadequately defined. Furthermore, there remains the issue as to whether the disclosure of a client confidence to the lawyer's spouse or partner should invoke either a common law remedy or the disciplinary machinery for breach of a professional rule. If harm results from the disclosure then the answer is clear; however should Rules of Conduct be treated as absolutes?

The obligation concerning the exercise of competence and care

This obligation of course covers a multitude of circumstances. A failure to exercise competence and care can give rise to an action against the lawyer for damages as well as lead to disciplinary action. Competence and care is all about maintaining professional standards. Practitioners are cautioned to refrain from acting unless they are competent. It is for this reason that various Law Society's around the world have in place continuing legal education programmes - in some jurisdictions these are compulsory. In Law Society v Moulton [1981] 2 NSWLR 736 Hutley JA observed:

The minimum standards include....basic legal knowledge and application to keep abreast of the law in his field of practice....It would seem to follow that a solicitor fit to remain on the roll must make reasonable efforts to keep up with current developments in his field of practice. In a world of rapid change, he must try to keep up to date.

In the United States Model Rule 1.1 states:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The commentary on this Rule is as follows:

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give to the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.....

As an aside to the question of competence and care is the question of counsel immunity; that is, that counsel are not liable in negligence for the conduct of a case in court. There were a number of policy considerations that were said (incorrectly in the authors view) to support the doctrine. In any case, the immunity of counsel for in- court negligence was confirmed in Rondel v Worsley [1969] 1 AC 191 and later in Saif Ali v Sydney Mitchell & Co [1980] AC 198. In Australia the immunity doctrine was confirmed in Giannarelli v Wraith (1988) 165 CLR 543. It is a doctrine that does little to instil public confidence in the law. In Australia, the High Court bench has changed since Giannarelli v Wraith was decided and perhaps, were the matter to be argued again, so would the law.

In England the House of Lords has recently done just that. Lord Hoffman in his judgment said:

Members of other professions and the public in general, are bound to view with some scepticism the claims of lawyers that the public interest requires them to have a special immunity from liability for negligence...

Lord Styne concluded:

My Lords, the cards are now heavily stacked against maintaining the immunity of advocates. I would rule that there is no longer any such immunity in criminal and civil cases. In doing so I am quite confident that the legal profession does not need the immunity...

The duty to assist the court and not to mislead the court

Having considered some of the ethical obligations that give rise to the duty of the lawyer to the client, I turn to some of the ethical obligations that give rise to the duty of the lawyer to the court. As noted earlier in this paper, where there is a conflict between the lawyer's duty to the client and his or her duty to the court, the duty to the court must prevail.

Misleading the court can occur in a number of ways; for example not referring the court's attention to an authority on point - even where that authority is against you, or misleading the court as to the facts of the case. It also means that the lawyer does not merely put to the court what it is that the client wants known. The lawyer is not the mere mouthpiece for the client but has an independent and overriding duty to assist the court. In criminal proceedings this duty would include the duty of the prosecution to bring to court all relevant and reliable witnesses.

One matter of particular concern in this area is the making of allegations without their being a proper factual or legal basis upon which they can be supported. In White Industries v Flower and Hart [1998] 806 FCA the defendant firm was given advice from a Queen's Counsel confirming that the defendants legal position was weak but that there was one possibility of temporarily improving the defendant's bargaining stance, namely to start proceedings under the Trade Practices Act alleging deceptive conduct and fraud. In a strong criticism of the legal firm (Flower and Hart) the Full Federal Court held that they had breached their duty to the court by instituting proceedings without proper foundation and for making an allegation of fraud that was without foundation. The Court also criticised the manner in which the firm had conducted the proceedings and the obstructionist and delaying conduct that exacerbated the abuse of process. Little comment was made of the advice given by the Queen's Counsel, however the Court indicated that a solicitor was obliged to make an independent assessment of whether proceedings should be instituted and not just follow the advice of counsel in the matter.

The Giving of Undertakings

Undertakings given by practitioners are taken seriously and a practitioner will generally be held personally liable for any undertaking given on behalf of a client if the client subsequently breaches that undertaking.

Personal liability will only be avoided if such avoidance is expressly disclaimed in the undertaking itself. This is because the undertaking is construed as a binding promise a breach of which can sound in costs or in discipline. An undertaking against a client is only enforceable if it is given with the client's express authority. The consequences for a client breaching an undertaking are not as severe as for a solicitor, due to the duty to the court owed by the lawyer.

Conclusion

Law is a profession and lawyers have certain obligations to their clients and to the court. These obligations are generally articulated in a Code of Ethics or Rules of Practice.

In Vanuatu the Legal Practitioners Act (Cap119) makes provision for the discipline of lawyers on the grounds of misconduct (s.9 (2)). The Rules made under the Act make provision for an allegation or complaint of professional misconduct or unprofessional conduct. These words are not sufficiently defined in the Act, although they have been given particular meaning over a series of cases. Neither the Act nor the Rules prescribe in any way the ethical obligations of lawyers. It would therefore be left to the Court,

based on the case law, to determine whether a lawyer was in breach of professional ethics.

This is unsatisfactory. The public must be able to have confidence in the legal profession and the administration of justice. To this end it is desirable that clearly articulated rules of conduct are introduced - not only so that the profession is aware of their ethical obligations but also because this is in the public interest. In the present framework it would be exceedingly difficult and most unlikely for a lawyer who is abusing their position of trust or who is in breach of their ethical obligations to their client to be disciplined. In most cases the client will be unaware that what has happened is a breach of professional ethics. In other cases, without clear Rules or guidelines, misconduct, unless gross and obvious, will go unnoticed and unpunished.
Professional Codes of Ethics are one of the most important characteristics of a profession.

Professional ethics are frequently formulated in Codes of Conduct or Rules of Professional Practice, which illustrate the high standards on which reputations for professionalism rest. .... [P]rofessional Codes or Rules are designed in part to help reassure the public of two conditions. These conditions are that any particular set of professional services is being given not only by (i) properly qualified or technically expert persons but also (ii) by persons whose professional standards merit the high degrees of public trustworthiness which are typically required of professionals.

In those jurisdictions where comprehensive Rules have been developed, the focus should be on the nature and rationale for their enforcement. If 'public interest' then the question 'what are you protecting the public from?' becomes relevant.

Secondly, if lawyers are not open to accepting the importance of regulation in the public interest then the experience of other places is that it will be imposed - either by the courts or by government. The experience in Fiji and the difficulties that have been faced by various Australian Law Society's is evidence of this.

Finally, there is a growing concern over the subordination of service and professionalism to profit, personal aims and ambitions. We need to remind ourselves of the honourable nature of the profession otherwise there is little point talking about ethics. It is the substance and not the form that matters here. Comprehensive Codes of Ethics do not guarantee ethical practice; rather, this lies in the fundamental nature of being 'called to the Bar'. Fifty years ago, in the case of In re John Cameron Foster (1950) 50 SR NSW 149 Street CJ observed:

It is to be borne in mind that all barristers are members of a profession as distinct from being engaged in a trade. A trade or business is an occupation or calling in which the primary object is the pursuit of pecuniary gain. Honesty and honourable dealing are, of course, expected from every man, whether he be engaged in professional practice or in any other gainful occupation. But in a profession, pecuniary success is not the only goal. Service is the ideal, and the earning of remuneration must always be subservient to this main purpose"