Ethics and Professional Conduct:
Current issues and challenges, duty to the Court, duty to the Client

17 March 2015

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Ethics is an essential part of any profession. Rather than attempt a definition of ethics:
What is a profession?

Professions Australia AGM 1997

'A profession is a disciplined group of individuals who adhere to ethical standards and hold themselves out as and are accepted by the public as possessing special knowledge and skills in a widely recognised body of learning derived from research, education and training at a high level and who are prepared to apply this knowledge and exercise these skills in the interest of others.'

For lawyers then, broadly there are 3 core ethical duties:

Duty to the court
Duty to obey the law
Duty to the client

There are other obligations around a lawyer's dealings with 3rd parties, but here we focus on the core ethical duties and in particular the duty to the court and the duty to the client.

An important source of a lawyer's duties (not the only source) are the professional conduct rules of the relevant practice jurisdiction. Here in WA, the Legal Profession Conduct Rules 2010 ("Conduct Rules"). They can and of course do differ slightly between State jurisdictions and indeed other common law jurisdictions such as the UK. In Australia there is some impetus towards harmonisation, though that's outside the remit of this discussion.

In passing, the Rules v Guidelines distinction, to highlight a quote from Sir Gerard Brennan AC: 'ethics is more than mere rules, ethics cannot be reduced to merely rules and if they were, a spiritless compliance would soon be replaced by skilful evasion.'

Duty to the Court

From the Conduct Rules:

Rule 5  A practitioner's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty, including but not limited to a duty owed to a client of the practitioner.

This at least, requires a lawyer to act honestly and respect the process.

Unsurprisingly perhaps, courts have described 'respect for the court' and 'respect for the process' as critically important qualities for a lawyer, along with honesty and objectivity.

2014 produced a significant case in this area:

Solicitors Regulation Authority v Alastair Brett (Case No. 11157-2103) and subsequently appealed,

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It is a useful case in considering this duty and repays reading in full, but in particular the helpful comments made on appeal, where Justice Wilkie said (at paragraph 85 and then at 86):

'In my judgement that duty, not knowingly to mislead the court or not to take the risk that the court might be misled, is not incompatible with the duty of confidentiality owed to a person who has disclosed material on an occasion of legal professional privilege.'

'There were a number of options available to him. One was to obtain the agreement of PF to waive privilege so that the true factual position could be presented to the court. A second was to correct the misleading impression given by the witness statement by making it clear that the witness statement only intended to convey that the identity of Nightjack as RH could have been revealed through publicly available sources…. A third was for Mr Brett to disclose to his instructed counsel.....the true position and to invite them to correct paragraphs 7 and 8 of the skeleton and in open court to make a statement, different from the one which Mr White QC made, which would similarly avoid giving a misleading impression to the court. A fourth was for Mr Brett, on behalf of his client TNL, to abandon defending the claim without revealing the information given to him by PF on an occasion of legal professional privilege.'

Duty to obey the law

Rule 6 (1) A practitioner must…..
(e) comply with these Rules and the law.

Lawyers are held to a higher standard, especially when it comes to compliance with court orders and the preservation of due administration of justice, than ordinary members of the public.

'The community must be able to look to legal practitioners to shoulder responsibility for the maintenance of the rule of law to a greater extent than persons who do not make their livelihood from the law'
Emerton J, Legal Services Board v Forster (No. 3)[2012] VSC 640

A case in point from 2014:
Solicitors Regulation Authority v Anna Louise Butcher (Case No.11227-2014)

Although the theft was very serious and she admitted failing to behave with integrity, the real issue was the damage to the reputation of the profession and the dishonesty shown in the failure to disclose it to the Solicitors Regulation Authority (on renewal of her practising certificate). Dealings with the Regulator had to be made in an open and timely manner.

The Tribunal there cited Bolton v The Law Society [1994] 1 WLR 512:

'The most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth…'

Duty to the client

The duties here:
Duty of confidentiality
Duty to act in the client's best interests
Duty of competence and diligence
Duty to avoid conflicts

They are - set out in the Rules;
- reinforced by a lawyer's fiduciary duties;
- the common law obligation to exercise reasonable care; and
Most ethical dilemmas involve conflict between the various duties solicitors owe. A good rule of thumb is that if you can't carry out one duty without breaching another then your course of action can't properly be taken. The focus of your concern primarily though is going to be acting in your client's best interests (but not serving those interests at all costs, see Rule 5 and the Alastair Brett case).

The fiduciary duty has four elements (which of course overlap):

Duty of loyalty to the client
Duty of confidentiality
Duty to disclose to the client all information within your knowledge that is relevant in order to act in the client's best interests
Duty not to put your own or anyone else's interest before those of the client

From the Conduct Rules:

Rule 9 defines client information and at Rule 9(2):

A practitioner must not disclose client information to a person other than a client unless the person is:
(a) an associate of the practitioner's law practice; or
(b) a person engaged by the practitioner's law practice for the purposes of providing legal services to the client
And (c) deals with an associated entity providing administrative services in similar terms

then Rule 9(3) states that, despite sub rule (2), a practitioner may disclose client information to a person if:

- expressly or impliedly authorised by the client (consent, informed consent and exactly what constitutes informed consent)
- compelled by law
- disclosure in a confidential setting to get advice on legal or ethical obligations (of the practitioner)
- avoiding probable commission of a serious offence
- preventing imminent serious physical harm to the client or to another person
- to your insurer, to obtain, claim or notify
- to respond to complaint brought against the practitioner, the law practice, associated entity, person employed by one of the aforementioned

The duty of confidentiality is an essential facet of the fiduciary duty and it survives the termination of the retainer. It is also integral to legal professional privilege.

Some recent general examples (not lawyer specific but in the 'those who should know better' category):

General David Petraeus, an American hero of the troop surge in Afghanistan, pleads guilty to a very obvious and clear breach of confidentiality in the unauthorised removal and retention of classified material, in this case his diaries and their rather precise contents. He lent them to his biographer, who was also his mistress.

The Royal Commission into institutional responses to child sexual abuse, concerning Knox Grammar School, Sydney, from the Guardian online website, 'Former judge tells inquiry he told Knox Grammar headmaster to go to police' 5 March 2015:
'This article was amended on 5 March to remove the name of the teacher now known as ARZ. The Commission made an error in naming the teacher during questioning of witnesses and has since apologised.'
The following case though is highly topical and raises some interesting ethical issues, not least around the way in which the law firm concerned responds.

It starts with a tweet.

India Knight is a columnist with the Daily Telegraph in London and she has 95,000 followers. 11.34pm. Wed (10/7). 'The book I’m reading (detective nov called the Cuckoo’s Call Robert Galbraith, so good, feat/ghastly cokey v think Mayfair women) has ++'. Harriet Green, family editor for the Guardian, tweets, 'is it a good choice for holiday reading?’ ‘Yes’ says Knight. Then at 12.07am @JudeCallegari says ‘written by JK Rowling’. Knight's response ‘eh?’ JC ‘its her pseudonym - promise its true’. IK ‘seriously? how do you know?’ JC ‘seriously. Friend works for publisher’.

The book went from 4,709th on Amazon's sales chart to No. 1. The search for the leak began4. The link, unknown even to JK Rowling, between Callegari and the information, was revealed when Russells solicitors released the following statement:

"We, Russells solicitors, apologise unreservedly for the disclosure caused by one of our partners, Chris Gossage, in revealing to his wife’s best friend Judith Callegari, during a private conversation, that the true identity of Robert Galbraith was in fact JK Rowling.

Whilst accepting his own culpability, the disclosure was made in confidence to someone he trusted implicitly. On becoming aware of the circumstances, we immediately notified JK Rowling’s agent. We can confirm that this leak was not part of any marketing plan and that neither JK Rowling, her agent nor publishers were in any way involved."5

Before we look closer at that statement, let’s look at JK Rowling’s reaction:

“To say that I am disappointed is an understatement. I had assumed that I could expect total confidentiality from Russells, a reputable professional firm, and I feel very angry that my trust turned out to be misplaced”. 6

Two interesting ethical questions:

1. What does the regulator do?

2. What, in the circumstances, should Russells do?

Taking No. 2 first. I submit that saying sorry and blaming the partner’s wife’s best friend is probably not enough. No issue they have to report it (see Anna-Louise Butcher earlier). But they also have to manage their reputation and they have to show their staff and the regulator and I add, the profession at large, that they take their ethical obligations seriously.

But their statement just really misses the point - confidentiality is breached at the point that a member

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4 JK Rowling unmasked: the lawyer, the wife, her tweet - and a furious author, The Telegraph, 21 July 2013 (although in fact it was the wife’s friend that posted the tweet)
5 Lawyer who uncovered JK Rowling's Robert Galbraith alter ego fined £1,000 the Guardian online 31 December 2013
6 Guardian, ibid
of the firm tells someone else, no matter how much you implicitly trust them, not when or if that
person then disseminates that information, late night tweet after a few wines or not.

So what should the SRA do in the circumstances?

This one is interesting because the client has suffered no economic loss which one can, perhaps, say
reduces the seriousness. In fact in purely monetary terms JK Rowling probably made more than she
otherwise would have had her anonymity remained intact. But one can also say that the value of her
anonymity is incalculable, based on her statement she certainly regarded it as important.

So there are some real issues here for the SRA:

- is it trivial? Is it a one off, with no continuing or serious risk of repetition?
- perhaps the initial response of Russells suggests blame shifting and accordingly, the SRA
ought to endeavour to put a stop to that.
- pretty clearly JK Rowling had no intention of reporting it to them. In fact she sued Russells
and donated the 'substantial' damages obtained thereby to a soldier's charity that had helped
her with the research for the main character in the book.
- there is a human tendency to gossip and show off. Ought the SRA to try and address this,
perhaps with one eye on the casual treatment of confidential information generally (working
on public transport for instance, or loud conversations on mobile phones, or in lifts or other
public places)?

The SRA fined the partner, Chris Gossage, £1,000 and issued him with a written rebuke. The SRA
said that by disclosing confidential information about a client to a third party, Gossage had breached
several principles of the rules and Code of Conduct. The breaches included failing to act in the best
interests of the client, the rule that solicitors should behave in a way that maintains the trust the public
places in you and the provision of legal services.

One aspect of the duty of confidentiality is legal professional privilege.

Grant v Downs (1976) 51 ALJR 198

'[Legal professional privilege] promotes the public interest because it assists and enhances the
administration of justice by facilitating the representation of clients by legal advisers. This it does by
keeping secret their communications, thereby inducing the client to retain the solicitor and seek
his/her advice, in encouraging the client to make a full and frank disclosure of the relevant
circumstances to the solicitor.'

Personal information is valuable. In 2010 it was famously said, that if you’re not paying for it, you’re
not the customer, you’re the product.

Personal information is collected, whether it is ‘volunteered’ or harvested, by your actions, with or
without your consent, in many places and through many practices.

Recent examples include an AAMI statement that the insurer was considering allowing police access
to the data collected by its ‘safe driver’ app. The intention of the app is to ‘record and reward’,
presumably through a lower premium, ‘safe driving’. It logs speeding, accelerating, hard braking and
phone usage and it also creates a map of each journey and identifies each of the points…where an
incident occurred.

Others include
- Facebook's 'Like' button.
- Smartphone location services.
- Uber. A practise it called 'rides of glory', where Uber, using its data, tracked anyone
  who took on Uber between 10pm and 4am on a Friday or Saturday night. They then
  searched that data for how many of the same people took another ride about four to
  six hours later, from, at or near the previous night's drop off point. They then posted a

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SRA Sanction - 26 November 2013, Gossage, Christopher Alan 274860
blog article on its users one night stands. The blog actually said ‘one of the neat things we can do with our data is to discover rider patterns’.

- Mobile phone networks, triangulation and movement records.
- Exif data in pictures.
- Facial recognition.
- Samsung TV voice recognition.

Free business models on the internet are based on the sharing of private information. The Tiny Flashlight and LED app for iPhone - transmits private information such as location, details of the phone's owner, even in some cases the content of the text messages. The authority to do so is in the small print.

There is a public - private surveillance partnership, data the government collects, corporations use and data corporations collect, governments use. These practices have important implications for privacy. In the face of widespread collection and the use of big data, it will affect how you go about observing the duty of confidentiality.

Telecommunications (Interception and Access) Amendment (Data Protection) Bill 2014 (Cth) is currently before the Federal Parliament, has received extensive comment and has been polarising in terms of its community reception. It deals, amongst other matters, with the mandatory retention of metadata for 2 years and access thereto.

There were some 200 submissions to the Parliamentary Joint Committee on Intelligence & Security, many suggest the Bill as drafted imposes an unacceptably high level of interference with privacy that is neither necessary nor proportionate to the objectives of law enforcement and national security.

The Parliamentary Joint Committee on Human Rights (PJCHR) quoted European Court of Justice in Digital Rights Ireland Ltd and Kartner Landesregierung ors v Minister for Communications, Marine and Natural Resources and ors (8 April 2014) (C-293/12)

‘Such data taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained such as the habits of everyday life, permanent or temporary placed of residence, daily or other movements, the activities carried out, the social relationships of these personals and the social environments frequented by them.’

The PJCHR recommended the period of retention be cut, perhaps to 6 months and that access be granted only on the basis of a warrant approved by a court or independent administrative tribunal.

The Law Institute of Victoria has expressed strong concerns about the government’s data retention proposals and in particular their impact upon legally privileged relationships.

Law Council of Australia has voiced similar concerns - it is not reasonable, necessary or proportionate

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10 We are all suspects now thanks to Australia’s data retention plans, Bruce Baer Arnold, The Conversation website 2 March 2015 and Report of the Inquiry into Potential Reforms of Australia’s National Security Legislation (2013) PJCIS

11 Reproduced in The Metadata Retention Debate rages on, Peter Leonard, Gilbert & Tobin, November 2014

to a legitimate purpose\textsuperscript{13}.

A recent example from the UK illustrates some of the dangers: \emph{Liberty and others v Security Service, SIS, GCHQ} \cite{2015} UKIPTrib 13/77/H 6/2/2015 is a decision of the Investigatory Powers Tribunal. Justice Burton gave the approved judgment of the 5 justices:

The Tribunal declared that 'the regime governing the soliciting, receiving, storing and transmitting by UK authorities of private communications of individuals in the UK, which have been obtained by US authorities pursuant to Prism and/or (on the Claimant's case) Upstream contravened Articles 8 or 10 of the European Convention on Human Rights'.

Article 8 deals with privacy and Article 10 with freedom of expression.

The essence of this is that UK intelligence agencies have been monitoring conversations between lawyers and their clients for the past 5 years and the British government has now admitted that the monitoring is unlawful\textsuperscript{14}.

The existence of Prism and Upstream (big data surveillance programs undertaken by the US government) was revealed in documents provided by Edward Snowden.

The government/commercial link is best understood in considering what advantages there are for the security agencies when they share data profiles with commercial usage. They do so for two reasons, because it allows the security agencies to circumvent accountability and transparency mechanisms and commercial usage is unhindered by jurisdictional boundaries.

What big data offers both of these groups though is prediction and that is why it will continue.

It's not within the scope of this ethics talk to examine the Federal Government’s proposed legislation, or to compare the approach of the EU, which is human rights based, or the US which is constitutionally based and therefore doesn't afford protection to non US citizens, whether inside or outside the US.

In this context though I mention the recently published DLA Piper Legal Professional Privilege Global Guide, \textit{3\textsuperscript{rd} Edition}, 2015. 161 pages covering 51 countries, which in the introduction describes legal professional privilege (or as there termed, legal advice privilege) as a fundamental human right, not just a rule of evidence.

There are some fundamental questions that need answers, such as how does one protect confidential information from a commercial entity in league with a national government, in say a takeover situation? What about hacking and other illegal and unauthorised access, an issue at the heart of the Alastair Brett case referred to in connection with the duty to the court?

There is a curiously naïve attitude: nothing to hide, nothing to fear. This is an untenable position, I submit, for a solicitor to adopt in the face of this proposed legislation. We seem to me to be at that pivotal point where what happens next has enormous implications in our ability to fulfil our obligations as lawyers to our clients.

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\textsuperscript{13} Peter Leonard, op cit
\textsuperscript{14} \textit{UK admits unlawfully monitoring legally privileged communications}, the Guardian online, 19 February 2015