Lawyers, Ethics and Justice

TABLE of CONTENTS

Introduction

Issues to consider throughout:

- Legislation
- Common law
- Administrative Decisions
- Self Regulation (practice rules and barrister rules)
- Mediation and Arbitration
- Contracts
- Social Structure
- Social Ethics
- Personal Integrity

Remedies available:

- Monetary damages (punitive and compensatory)
- Restitution
- Adjustment of bills and costs
- Discipline (reprimand, fines, suspension, striking off)
- Apology
- Publicity & shame
- Injunction
- Negotiation as a form of remedy
- Voluntary agreement to reduce the bill, do extra work, keep clients better informed
- Require the practitioner to attend educational courses, to implement a better practice or management system
- Public service (pro-bono work)
- Restricted practicing certificate e.g. can only work under supervision or the practitioner cannot manage trust account funds

ETHICAL IDEALS

1. Advocacy ideal

An ideal of devoted service to clients in an adversarial system where citizens *need* advice and representation in order to enforce the rule of law. Emphasises duty to the client, regardless of what the lawyer personally thinks. The principle is that a lawyer is not morally responsible for the client's cause, but must act aggressively in advancing it. The zealous advocacy ideal is reflected in and justifies the 'cab rank' rule.

Advantages:

- Access to justice to all paying clients.
- Access to justice to all, even repugnant clients - where would they go if this ideal didn't exist?
- Every citizen has a right to put their case just as if they were arguing it themselves
- No room for discrimination etc.

Disadvantages:

- Richer clients will get better lawyers (this undermines the access to justice argument).
- Richer clients also create a culture of excessive adverarialsim, which raises costs of litigation.
- Lawyers are expected and even encouraged to exploit every loophole, take advantage of all mistakes and stretch every legal or factual interpretation in favour of their clients.

2. Social responsibility ideal

Balances and limits the advocacy ideal. It comes from the ethical tradition of duty to the court, the law, and considerations of justice. An ideal of fidelity to law and justice - the rule of law is not to be undermined by clients who will pay a lawyer to do anything. Emphasises the duty to uphold the integrity of the legal system, even if it conflicts with the duty to the client.

Advantages:

- The lawyers skill will not be used as a weapon to do injustice.
- It will help in the efficiency of the legal system (e.g. by lawyers not using delaying tactics etc.)
- It will help spread justice evenly and limit the disadvantages of the advocacy ideal.

Disadvantages:

- It goes beyond saying that lawyers have an overriding duty to the law - it suggests that lawyers have some sort of duty to justice, to the integrity of the law.
- Emphasising the social responsibility ideal puts lawyers in danger of simply becoming governments' "yes" men, and not adequately serving clients' goals and interests.

3. Public interest / Justice ideal

An ideal of willingness to defend people and causes who may need special help to attain justice regardless of self-interest. Issues involved when people and causes cannot afford a lawyer (pro bono work, legal aid, KLC). The justice ideal encourages lawyers to have their own convictions about what would be justice and to seek out ways to act out those convictions as lawyers.

Advantages:

- Promotes access to justice to the disadvantaged, not just to paying clients like the advocacy ideal.
- It goes beyond the social responsibility ideal by proactively finding causes in the public interest in which to act.
- Fills in the gaps left by the market and government profession.
- Encourages lawyers to pursue more political agendas for social interests.

Disadvantages:

- The tradition of justice-oriented public service has some resonance with the idea of ethical discretion in lawyering advocated by Simon (1988), that lawyers should only ever act for those causes they personally believe in. But such an approach neglects the wisdom of the liberal advocacy ideal which ensures anyone who can afford it can get representation rather than first having to persuade a lawyer that their case is worthwhile.
- The ideal of ethical discretion can also run the risk of ignoring the social responsibility ideal by encouraging lawyers to act without any regard to law and justice when they do find a client they believe in.

4. Collegiality value

An ideal of courtesy, collegiality, professionalism and mutual self-regulation amongst members of the profession. About lawyers between themselves. Aims to promote confidence, mutual respect and cooperation within the profession.

Advantages:

- Requires respect and courtesy to other members of the profession
- Requires honesty to bar associations and disciplinary bodies.
- Encourages reporting of misconduct in order to sustain a self-regulating profession

Disadvantages:

- Restrictive trade practices (but no abolished)
- Can be elitist and generally aligned with capital interests, as a study has shown the associations in Canada, UK and USA to be.
- Exploitation of young lawyers who make the partners rich, but have little chance of becoming partners themselves.
- But, it could be rehabilitated to serve a more useful purpose - it could ask lawyers to take some responsibility for remedying problems of discrimination and exploitation. This is what Parker calls "turning the collegiality inside out". She concludes that the ideal of collegiality remains an important ideal for lawyers if they are to nurture the ethics of justice.

5. Human rights ideal

an ideal that lawyers should maintain and uphold human rights. (Human Rights and Equal Opportunity Commission; HREOC)

Other values include:

- Stakeholders expectations, needs and desires (i.e. clients, courts, colleagues, the public)
- General social ethics: justice, equality, rule of law, adversarial system, self-regulation and how these specifically apply to lawyers.
- Personal integrity: your personal values and beliefs

Other values: efficiency, profit, personal satisfaction, customer service, equality, access, freedom, self-determination, accountability

Admission and Legal Education

1. Issues in factual scenario that can give rise to legal remedies and disciplinary action

ADMISSION TO THE PROFESSION

In order to gain admission to the legal profession, the applicant must meet the following criteria:

i. **Legal education**
ii. **Sufficient legal training**
iii. **Good fame and character**

[The admission procedure]
The Supreme Court has the power to admit practitioners to the profession on the advise of the Admission board (s4 LPA). In practice, it is the admission board who determines who is admitted, and who is not, because the Supreme Court does not generally act contrary to the advise of the admission board.

The admission board has the power to make rules for admission to the profession. The admission board is free to make rules with respect to the educational requirements for admission (s6 LPA), but must also ensure that the applicant is of good fame and character (s11 LPA).

[What are the legal education requirements?]
An applicant may satisfy the legal education requirement by having either:

i. A law degree
ii. Completed 3 years legal study in a recognised Australian Jurisdiction

As part of the above legal education, the applicant must have competence and knowledge in the *Priestly 11* areas:

- Criminal law and procedure
- Torts
- Property Law (Old System and Torrens)
- Equity (and Trusts)
- Administrative Law
- Federal and State Constitutional Law
- Civil procedure
- Evidence
- Company Law/ Corporations Law
- Professional conduct (and basic trust accounting)
- Business Administration

[What is 'sufficient training']

1. Legal training (1-2 years), or

2. College of Law (Stage one is a full time 15 week training course, and stage two is a 24 week practical experience session)

[What constitutes Good Fame and Character?]
There is a presumption that the applicant is of good fame and character. This presumption can be rebutted through the operation of the rules below…

Dishonesty:
The courts consider the applicant's frankness about any previous convictions, the gravity of the convictions and the time frame between the conviction and now.

- *Re Davis*- Where an applicant fails to reveal past convictions, such dishonesty is so grave as to be incompatible with the continuance of admission into the bar.
- *Ex Parte Lenehan*- Where an applicant discloses earlier offences and has been ever since well behaved, then the applicant may be of good fame and character
- *Wentworth v NSW Bar Association:* Where an applicant has done acts of dishonesty in the past which are fundamentally inconsistent with the professional standards of a barrister, such an applicant is deemed to not be of good fame and character. In this case, the applicant having made baseless and unsupportable allegations of collusion and misconduct during litigation in the past was held to be fundamentally inconsistent with the standards of the barrister

Political Activity:
Generally, mere support of radical political or religious views is not enough for an applicant to be deemed unfit to be admitted to the profession *(Re Julius)*

What is required is the views being so strong that they render the applicant an unfit or improper person because their character, reputation or likely conduct fall short of the expected standards of a practising barrister *(Re B).* For example, in *Re B,* it was held that the applicant breaking the law in zealous pursuit of their political goals made the person not of good fame and character.

READMISSION TO THE LEGAL PROFESSION

In order to be readmitted to the legal profession, the applicant must:

i. Establish that they are of good fame and character
ii. Admit their prior mistakes, and show that they have rehabilitated

[Establishing good fame and character]
In attempting to be readmitted, the applicant must establish that they are of good fame and character, which is a fairly weighty requirement. The following factors will weigh on the courts mind in deciding whether the applicant is of good fame and character:

- **Conduct since removal:** a practitioner demonstrating exemplary conduct (social utility in working in another field and community service), impressive referrals and affidavits can sufficiently prove that an individual can now be regarded as a fit and proper person to be restored to the Rolls; *(Evatt v NSW Bar Association)*
- **Time since removal**: If a practitioner is struck off and re-admitted too soon (i.e. 1-5 years), then it amounts to going behind the decisions of courts (which struck them off). The quantity of time has to be such that "a career of honourable life for so long a time as to convince a court that there has been a complete repentance and a likelihood of perseverance in honourable conduct."; *(Evatt v NSW Bar Association).*
- **Gravity of the offence**: Where the offences leading to the practitioner being struck off were committed over extended period with deliberate intent resulting in severe losses, re-admission is unlikely. However,

where the offences are isolated, and without prolonged deliberate conduct, and where funds of clients has been restored as much as possible it is likely that re-admission is allowed; *(Kotowicz v LAWSOC NSW).*

[Admission of guilt and rehabilitation]

- Generally, an applicant must admit past guilt, and must demonstrate that he has rehabilitated
- **Lack of contrition**: An applicant who is unwilling to accept the reasons for having been struck off the rolls will not be readmitted *(Kotowicz v LAWSOC NSW).*

[Re-admission procedures]

Courts can impose conditions and limitations on licences when readmitting; *(Kotowicz v LAWSOC NSW)*

2. Values of legal profession under threat

- Advocacy ideal under threat if the practitioners or barristers if admission criterion aren't properly adhered too. This problem is worse if there is a wrongful readmission of an unfit practitioner.
- Social ethics that although over half the law school candidature are women, but women entering private practice are finding it difficult to obtain same status or same pay as men

3. How the problems have developed in light of patterns in the lawyer client relationship

- Public interest how the lack of LLS teaching is a factor
- Law schools traditionally failed to incorporate legal culture and the role lawyers play in society into their courses
- Further funding has become a problem since the law school by nature has more staff per student ratios than other faculties, and small group teaching
- Movement to limited full fee paying positions
- Increased women in law schools (over 50%)
- In a student driven market the course structure has changed significantly; i.e. with the advent of Business Administration as a core subject

4. Broader reform policies to the profession, legal system or firm (medium – long term)

- Practical legal training
- Stronger application of equal employment opportunity and anti sex discrimination in the private arena
- Law schools must acknowledge their importance to the community at large and not only their largely skewed members. These values should be reflected in their admission policies and courses offered

Cost Issues

1. The law and possible sanctions for breach?

Costs are defined as:

1. fees (professional time, hourly charge),
2. charges (same as disbursements, doctors fees, anything not involving lawyers time),
3. disbursements,
4. expenses (same as disbursements) and
5. remuneration (money flowing in)

A practitioner must enter into a cost agreement

A practitioner must in writing (ss179 LPA) disclose to a client the amount of costs (s175) or the basis for calculating costs plus an estimate of the costs of the work (ss175, 177). Such disclosure must be made before the solicitor is retained, or if not reasonably practicable, as soon as practicable after being retained (s178).

Subject to certain exceptions

- When the total costs (excluding disbursements) to be charged are reasonably estimated to be under $750 for an individual or a private company, or under $1500 for a public company, disclosure is <u>not</u> required (Solicitor's Rule 1.2)
- Where there is already a cost agreement in place that is still in force (perhaps as a result of an earlier legal issue), disclosure is not required. (Solicitor's Rule 1.3.1)

Conditional Cost Agreements are valid…

- A practitioner may enter into a conditional cost agreement, where the amount of costs that are required to be paid depends on the outcome of the case. Where the client is not successful, a conditional cost agreement may require the client to pay no or less costs. However, where a client is successful, a cost agreement may provide that a practitioner can receive up to 25% more than the costs as set out in the bill. (ss186, 187 LPA)
- A conditional cost agreement may exclude disbursement costs (s186 LPA)
- Costs are not to be calculated based on the amount recovered in proceedings (s188 LPA- compare to position in USA)

Consequences of failing to enter into a cost agreement…

- A solicitor who does not enter into a cost agreement cannot recover costs unless the bill has been assessed by a cost assessor. (s182(1)(2) LPA)
- Failure to enter into a cost agreement may constitute professional misconduct or unsatisfactory professional conduct. (s182(4) LPA)
- If the bill is below $2500, the client may seek mediation through the OLSC or the relevant council (s198B LPA)
- Even where costs on a bill have been wholly or partially paid, the client can still take the matter to the cost assessor (s199 LPA)

The process of cost assessment…

When considering a bill, a cost assessor considers: (s208A LPA)

i. Whether or not it was reasonable to carry out the work performed
ii. Whether or not the work was carried out in a reasonable manner
iii. Fairness and reasonableness of the amount of costs to the work done

In assessing the fairness and reasonableness of the amount of costs, it is necessary to consider factors such as: (s208B)

- whether practitioners disclosed the basis of the actual or estimated costs
- relevant advertisements made by practitioner
- skill, labour and responsibility displayed on the part of the barrister or solicitor responsible for the matters
- instructions given and how they were adhered to
- nature of the matter
- quality of the work done
- place where and circumstances in which the legal services were provided
- time within which the work was required to be done

Where the cost assessor deems the bill of costs unfair or unreasonable, he is required to substitute an amount that he deems to be fair and reasonable (s208(2) LPA). Where the assessor concludes that costs have been incurred improperly or without cause, or have been waste by undue delay, the cost assessor may disallow costs between the practitioner and the client (s208P)

How can an assessor help a client who has entered into an agreement?

A client can seek relief from an assessor when:

i. The complaint does not relate to the rate charged or the amount charged (where it was specified in the cost agreement)- s208C(1)
ii. A particular term in the cost agreement is 'unjust' - s208C(3).

In determining whether a particular term is 'unjust', section 208D prescribes that an assessor is to consider the public interest and the circumstances of the case, as well as factors such as:

- The relative bargaining power between the parties
- Whether the provisions in the agreement were subject to negotiation
- Personal attributes of the client (such as age, economic circumstances, educational requirements
- Whether there is any unfair conduct alleged

What if the assessor finds that there is gross overcharging?

Where there is gross overcharging, the cost assessor may refer the matter to the Commissioner, who may take up disciplinary action for professional misconduct or unsatisfactory professional conduct (s208Q(1) LPA)

2. Values under threat

- Social responsibility values are undermined when a lawyer overcharges, there is a responsibility to clients to charge fairly. The needs of the client and the work actually done are ethical considerations, which need to be addressed.
- Ethical dilemmas include charging the lawyers fees when the clerk did the work, charging disproportionate amounts relative to work actually conduct.
- Collegiality values undermined because the profession comes under scrutiny if lawyers over-charge giving the profession a bad name.
- Why should the lawyers be restricted from a huge mark-up when other professions are allowed. The counter-argument links to the adversarial system.
- Failure to enter into cost agreements can undermine values relating to client's expectations. If the client is uninformed, their expectations may significantly differ from the lawyer.

3. How has the problem developed?

Cost Agreements…

- *Consumer awareness*: Lack of consumer awareness as to law in relation to cost disclosure requirements
- *No absolute rule as to cost agreements*- if no cost agreement, the law still allows practitioners to recover as long as cost is assessed

Overcharging…

- *Disciplinary model of self-regulation*: Professional self-regulators failed to take action when consumer complaints dealt with issues such as overcharging. The disciplinary model used was geared only towards complaints dealing with fraud and dishonesty. See v2 p27
- *Educational restrictions*: Educational restrictions to gain admission to the profession meant that supply of legal services is fairly restricted, and so price can be kept relatively high.
- *Anti-competitive practices*: Competition was hindered through professional practices in the legal services market such as restrictions on advertising (lifted only in 1991) and monopoly on provision of certain services (eg. Conveyancing monopoly lifted in 1992). Other rules such as two-thirds rule and scale fees (both now abolished) also promoted anti-competitive behaviour.
- *Relationship issues*: clients often develop a working relationship with a particular lawyer, and such relationships mean that they are reluctant to switch
- *Commercial factors*: Most large law firms have substantial corporate clientele base, who can afford high costs and so firms can get away with such prices. Furthermore, practitioners in large law firms may have pressure placed on them by management of those firms to generate income for the firm (see dicta in Foreman case)
- *Adversarial system*: The adversarial system promotes excessive work and charges Lawyers during the discovery phase are required to leave no stone unturned, because if they miss vital evidence, they could be found to be negligent. (v2, 235)

4. Possible reforms to remedy the situation

Cost agreement problem…

- Make cost agreements compulsory, i.e. effectuate the already existing rules
- Increase consumer awareness of cost agreements, further education
- Development of model cost agreements by OLSC to provide guidelines for practitioners

Overcharging…

The legal profession have taken steps to remedy the overcharging problem:

- Findings of professional misconduct in certain cases eg. Carol Foreman Case
- Removal of many barriers to competition in the industry (see v2 p30)
- Establishment of OLSC to deal with consumer complaints into overcharging
- Disclosure requirements (eg cost agreements)

BUT more can be done to remedy the problem:

- Increase consumer awareness of laws in relation to cost agreements (v2 p33)
- Introduction of model cost agreements to help practitioners comply with the Act
- Disbursements could be incorporated into the hourly charged or at more reasonable rates
- Clear plain language in cost agreements
- Itemization of the bill in terms of work done by clerks
- Billing base level charges when work done was minimal. We recommend that small work done could be added up rather than charging base levels each time.
- Councils should pursue claims of overcharging more rigorously
- Statutory capping of negligence actions against clients seeking to sue lawyers for failing to pursue certain areas of their case.