

Ethics in the qualifying degree

The importance of ethics for the profession

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I should start by saying that I am giving a perspective from a large firm rather than from the profession as a whole. Views on this subject may differ widely, depending on the type and size of firm, and the sort of work it does. First of all, I would like to set the scene.

Global market failures over the last decade, from Enron/Andersen to Leman – have led to a re-evaluation of the role of the lawyers. In particular, new expectations have been imposed on lawyers, through new regulation in the form of Sarbanes-Oxley, the Market Abuse Directive, the Third Directive on anti-money laundering and through IRS Section 230 in the US as a result of the KPMG tax shelter issue. Similarly, when giving advice on a discreet legal issue, lawyers must now pay a greater attention to understanding the context in which their advice is sought. Lemans and the true sale opinions is a case in point. Likewise, with work for lawyers increasingly global, it is all the more important for lawyers to appreciate the perspectives, cultures and expectations of other jurisdictions. It is perhaps a sign of the times that at Clifford Chance we are now starting to give training courses to our non-US lawyers around the world on the risks associated with the US.

A couple of weeks ago, there was an article in *The Times*, which reported that the House of Lords Economic Affairs Committee was to investigate whether accountants could have been expected to have raised the alarm in the run up to the financial crisis. One wonders whether a similar question will soon be asked of lawyers.

At the same time, the World Economic Forum has established a working party to look at the role of professional service firms and to consider the extent to which they can use their influence when advising clients to promote 'responsible capitalism', and to reduce the risk of a financial crisis in the future.

All these factors are changing the role of lawyers and intensifying the pressure on law firms.

Meanwhile, regulators are failing to provide a coherent framework. As firms become increasingly international and even global, the failure of regulators to collaborate, to keep up and to set realistic regulatory regimes serves to create new risks. There is, for instance, enormous inconsistency in the way in which bars seek to regulate lawyers when working outside their home jurisdictions; the SRA purports to regulate not only individual lawyers working abroad, but also overseas branch offices of English entities and effectively, therefore, everyone working in them around the world. From the US, it depends entirely on which state a lawyer comes from, with some states leaving the regulation of the lawyer to the country in which he or she is working. The approach of the bars of other countries tends to be pretty incoherent; many purport to regulate lawyers abroad but in practice do nothing to do so.

There is similar inconsistency in regulation, even where this is pursuant to EU directives. Just look at the anti-money laundering provisions in Europe and how, for

instance, in Holland and Italy different steps are required when taking on a new client. One has to assume that law makers have no concept about how hard such unnecessary inconsistencies make it for anyone to run an international business.

Client pressure for greater efficiency in cost reductions has led to increasing outsourcing of support services. In reality, firms have been doing this for years with cleaning, security, software maintenance and email servers etc. Generally, regulators have been a long way behind in addressing this trend, and now firm's are increasingly looking to outsource some word processing and IT support services. Notwithstanding, in just one European country, Germany, any such action by lawyers is arguably a criminal offence; a law which applies to lawyers and doctors but not, bizarrely, to bankers. Such outdated law and inconsistency in legislation makes it very hard for firms to respond to client pressure on fees, and to operate a modern international business.

Meanwhile, back at home in England, what are our regulators up to? Most significantly, we are starting to see the SRA address the concerns set out in the Smedley report of 18 months ago. It must be remembered that the impetus for these changes came from the City firms themselves, so we welcome the SRA's pilot of its new approach which they have called 'relationship management'. We also welcome the appointment of Nick Eastwell who, with David Whitney, will be providing an all important understanding of City type work which the SRA lacked previously.

Some of Nick Smedley's recommendations do not feature in the SRA's new approach. Firstly, the SRA is not establishing a separate 'semi-autonomous division' to focus on the larger corporate firms. Provided there is a distinct and dedicated team dealing with the larger firms and the work they do, then I personally think this will be sufficient. Secondly, the SRA has not agreed that any decision on enforcement against a larger firm should fall to the leader of the City team. In the past, there has been little confidence in the way the SRA has approached enforcement. However, the hope is that the new approach to regulation will make a need for enforcement against a large firm very unlikely and, in any event, I believe there is a good chance that the decision to bring enforcement action against a large firm will not in the future be taken by individuals with no understanding of the City market. Lastly, the SRA is not offering 'safe harbour' to firms which consult on particular issues with the SRA. But, again, provided the SRA respects and takes into account the initiative by a law firm to seek views from the SRA before any enforcement action is considered, then I personally believe this is sufficient. For me, the most important lingering concern is that Nick Eastwell is to be an advisor to the SRA on a very limited number of days per month rather than a hands-on leader of the City focus. There must be some doubt as to whether this level of engagement will be sufficient. Time will tell.

How should this new approach to regulation of the larger firm's work? In my view, it should be a relationship marked by collaboration. The SRA corporate team should be discussing with each firm it is regulating what the risks are that the firm is facing and what approaches the firm can or should take to mitigate those risks. Through those discussions, the SRA should be developing a good idea about alternative approaches and gaining a good understanding of what might be considered best practice. Armed with that information, it should be able to assist pro-actively each firm in developing and putting in place suitable processes and safeguards. The

major firms do not see risk management as a competitive issue and I believe they all take the view that it is in the interests of their industry generally, and of the success of the City as a financial centre, that none of them brings about a serious regulatory problem which can only serve to damage the reputation of the City as a whole.

Meanwhile, what about the Legal Services Board? For them, it is still relatively early days. So far, it has been kept busy by its domestic consumer focus and the introduction of Alternative Business Structures. However, it is important that everyone remembers that three of the eight regulatory principles of the Legal Services Act were to:

- Protect the public interest – the public from my perspective being stakeholders in companies and financial institutions and those, generally, reliant on the reputation of London as a financial centre.
- Promote professional principles of independence and integrity, proper standards of work, observing the best interests of the client and the duty to the court.
- Encourage an independent, strong and effective legal profession.

In satisfying these principles, I believe the LSB just as much as the SRA needs to start prompting thinking on a wider level. They should be looking at the role of lawyers in the success of London as a financial centre; they should be questioning what lawyers can do to enhance that success and, equally, what any lawyer or law firm might do to damage London's reputation. For the larger city firms, this is the level at which our regulators need to be engaging.

There is one particular consequence of the implementation of the Smedley recommendations which I should mention. I believe that the development of 'relationship management' encourages the larger firms to build their compliance around a General Counsel role. To my mind, having such a role has many advantages, which are not relevant for now. However, it also has a disadvantage. This is simply that centralisation of responsibility can lead lawyers to expect others to think about critical issues. Some examples might be conflicts, privilege, information barriers and confidentiality. Where lawyers sense that someone else is thinking about these things for them, this can lead them to think that they do not need to focus on them themselves. It can be alarming how little a good lawyer can understand about conflict, privilege etc and this can lead to its own risks.

Against this general scene-setting, let me come back to the main issue – legal ethics. I would like to outline eight features of legal practice today which makes me think that a thorough understanding of legal ethics is more important now than ever before:

1. There is increasing commercialism in the practice of law. Clients expect their lawyers to understand their business and their commercial objectives. They expect a lawyer's advice to reflect and be tailored to their business needs. This is fine, but only so long as the lawyer is mindful of the ethical restraints in the advice that he or she can give, and understands the boundaries.
2. There is greater competition than ever before between law firms. There is constant pressure on profitability. This can lead to lawyers who feel under pressure to take on work that they are not properly qualified to do, or even to do things they should not do.
3. Business clients are increasingly powerful, and some of them have extraordinary buying power. This can result in excessive influence over their advisors. Enron/Andersen is a case in point.
4. There is an increasing tendency to 'dumb down' the solicitors' role. The Legal Services Act and the LSB both focus insistently on 'consumers' rather than 'clients', and this is exacerbated by common references to Tesco law. Treating the purchase of legal services as no different to buying washing powder overlooks the fiduciary relationship which a lawyer has with their client and ultimately undermines the professionalism of solicitors.
5. There is increasing fluidity in the legal workforce, and lateral hires are more and more common. As a result, it is far more difficult for firms to establish common standards and, equally, it is less likely that a firm will see its own culture of ethical professionalism as a core value.
6. The value of time has increased and, as a result, senior lawyers feel less able to commit significant amounts of time to teaching more junior lawyers. In-house training has become less paternalistic.
7. We are being moved to 'outcome-focused regulation', where we have a limited number of principles and our compliance is to be judged, without the benefit of detailed rules or guidance, on how we end up with the right result through the application of those principles. For this to work, solicitors need an ethical compass to help them apply the principles in an appropriate way.
8. There is increased centralisation in law firms and, as I have already said, one consequence of this is that individual lawyers can avoid having to focus on ethical issues on a regular basis, resulting in a diminished awareness.

The result of these eight features is, I believe, that we need a far greater focus on the teaching of legal ethics. Compared with a number of other countries, such as the US and Australia, this subject attracts a worrying lack of attention. Moreover, as transactions become increasingly global, there is a corresponding need for awareness by lawyers of different expectations and standards in other countries.

So, in conclusion, I believe we are all engaged in an increasingly complex business. Our regulators don't provide all the answers; nor can they. Globalisation and the fact that standards and expectations vary from country to country makes it that much harder. To address these issues, lawyers increasingly need a good understanding of legal ethics to meet these challenges. We should not be apologetic or defensive about this; legal ethics as a subject could and should be fascinating. And lastly, I would urge that courses should not simply be focused on England and Wales; there also needs to be a significant comparative element with other jurisdictions.

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