



Ethical obligations: doing what is 'right'

By Ros Burke, Director Professional Standards

In this edition of the *Bulletin*, Bill Ericson and Mark Livesey QC provide insight into the obligations of solicitors with respect to costs and engaging counsel. Their articles highlight what solicitors must do to fulfil their legal obligations, but just as importantly, they also raise the issue of what solicitors are required to do to fulfil their ethical obligations.

The work of nearly every solicitor involves travelling into the most private and intimate areas of the lives of persons (including the corporate lives of commercial entities). The journey inevitably results in the solicitor acquiring such a level of access to sensitive information as to make the person vulnerable to attack.

It's all about trust. Solicitors deal in trust. Trust me with your private information. Trust me to negotiate the best deal. Trust me when I tell you that I have the appropriate skills to act for you in this matter. Trust me with your money, your children, your house, your business, your life.

Trusting a solicitor is a risky business for clients. The high standard of conduct expected of solicitors is a justifiable imposition which is designed to increase the level of trust the community has in solicitors.

In South Australia, solicitors often refer to the Australian Solicitors' Conduct Rules (Rules) as being the expression of the standard of conduct expected by the community. However, the Rules are only a part of the story. The Rules deal with only certain aspects of the role of the solicitor in our community. In reality, the solicitor's standard of conduct is measured against what are known as ethical standards.

The concept of ethics is not a fixed one. Some people think of ethics in terms of moral obligations. Others equate ethics with honesty and integrity. In the legal context, I think ethics are about being respectful, honest and doing what is "right" under the circumstances.

The burden that comes with this ethical requirement can be intolerable at times. What is "right" will not involve the same conduct in every situation. Sometimes making a statement that is truthful will not be "honest" or "right"; sometimes it will be downright wrong in fact, if it involves a breach of privilege or confidentiality, or if the truthful statement is being made for dishonest motives.

Legal ethics are all about solicitors making lawful, informed, reasonable and justifiable decisions that take into consideration all of the relevant circumstances. Whether a solicitor has acted ethically can't be judged in a vacuum, it must be assessed with regard to what the solicitor knows, what the solicitor should know, the conduct of the other persons or entities involved and how the solicitor's decision to act in a certain way reflects the level of trust expected of the legal profession.

Sometimes it appears to be relatively easy to identify what is ethically correct. Issues such as maintaining confidentiality and avoiding conflicts look like straightforward requirements that present no particular challenge. The Rules themselves provide some guidance on what is required. But what is ethically correct in specific circumstances may well involve consideration of issues that are not necessarily raised or dealt with by the Rules.

The Rules are not a complete code when it comes to legal conduct. The Rules can't

– and don't profess to – provide ethical solutions to every problem. The Rules should be considered to be a starting point in the search for an ethical solution. When the Rules do not provide a complete solution, or where doubts remain as to whether the solution that presents itself in the Rules is not correct in the subject circumstances, and this will often be the case, solicitors must use their analytical skills to resolve the problem.

It may help to consider the problem as though it was being brought to you by another solicitor. Removing oneself from a situation can assist with diluting a lot of the angst and emotion that may be clouding the judgement that is so important in such cases.

But we can never be completely objective with ourselves and this is why it is so important to seek independent assistance when an ethical solution is elusive. You may talk about the issue with a colleague, or a more senior practitioner, but if you have a personal relationship with that person you may be concerned that you have not obtained a truly independent response.

At the risk of turning this article into an advertisement, I have to say that this is where Professional Standards can be of assistance. In many cases we find that the mere act of setting out the problem to us leads the solicitor to the best conclusion. Trite, but true; a problem shared is indeed a problem halved. **B**

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