Ethics and Law and Legal Ethics

As a child in a lower middle-class family in Cardiff, South-Wales, I knew of just one lawyer, the family solicitor, Liz Nam. I recall only ever meeting her once, but I do remember a series of events in which my parents sought her advice and representation. As a child, I could tell that Nam was a little more sophisticated than most of the adults I knew, but she seemed to fit in seamlessly with small business people, parents and the Catholic community in and around Cardiff. Looking back, I didn't appreciate it, but Nam was in fact a small business person, like most high street practising lawyers.

This is a short note about legal ethics that focuses on the lawyer's role in society and how that role and the underlying ethical base of the profession have changed. It used to be said that a lawyer's role was to "fight their client's corner". As an articled clerk, often under the leadership of the managing clerk, trainee solicitor's used to have a similar training as pupil barristers. They were not permitted to deal with clients or have conduct of cases, but rather were required to shadow the principle, watch, observe, research, learn what it meant to "fight" a client's corner.

Wrapped around this was an inherent ethical grounding, a subtle understanding of the complex nuances of society from the law to the social relationships between individuals, groups and corporations.

However, as society became more complex and the law became more complex with it, as a commercial business the "old profession" had to adapt to a changing economy and the challenges and opportunities that came with it. The emergence of Legal Executive Lawyers, Licensed Conveyancers and the shift in economic thinking to monetarism created a landscape full of challenges and opportunities.

In the 70's a lawyer acting on a residential property transaction, the professional educated qualified lawyer, would command fees as a % of the value of the transaction, much as Estate Agents still do. Over time, through a combination of rising house prices and competition, these fees shifted to negotiated amounts, and then as competition and the volume of transactions increased, to fixed fees. As this transition took place, the person doing the actual work also changed. More and more often, trainees, unqualified paralegals and in some cases "supervised" estate agents, began to conduct matters themselves. A trainee doctor or surgeon would not perform the operation after all, and so it was with the legal profession of old. Yet, that profession was elitist, not diverse and had a much smaller market to operate in.

Thus began the break from the "old school" traditions, and it appears one consequence of this break was the loss of the ethical grounding that the old school instilled into its professionals, so much so that all these decades later, there is a movement to incorporate legal ethics as a core requirement in LL.B degrees and the GDL as well as the LPC (the modern post-graduate solicitor's qualification).

Over the past 20 years, we have seen a commercial focus overshadow all other imperatives, despite the first rule of the rules of professional conduct still being to act "in the best interests of the client" or in other words "fight the client's corner".

Modern lawyers, it seems, simply do not generally have the balls to do this the way the old school would have, and this is perhaps a result of the loss of the deep ethical understanding of what the role of a lawyer ought to be. Today, the focus is on access to justice, being an officer of the court, a commissioner for oaths and upholding the law. Whilst this concepts are genuinely noble and desired, the context in which they exist is so fundamentally different from that of the old school, that the combination of the loss of a solid ethical understanding and the strong focus on commercial profitability has resulted in a profession where, both in terms of practice and the judiciary, it is harder to determine what is ethically sound or not.

For example, many observers have commented on the so-called “Black Hole” problem. (Such as Michael L. Waldman, “Beyond Upjohn: The Attorney–Client Privilege in the Corporate Context. Let’s suppose that a CEO wants to do an internal investigation without the risk of being compelled to reveal what is found. The CEO puts a lawyer in charge. Every conversation between the lawyer and employees is privileged, and the lawyer’s report to the CEO is likewise privileged. The lawyer becomes a black hole of information: information goes in but it does not come out. Now, on the one hand, the lawyer's role is to act in the best interests of the client, which he does diligently. On the other hand, the old school ethics would have compelled the lawyer, as an upstanding citizen and defender of justice, to have declined the work unless the investigation resulted in findings and action. In essence, the lawyer in this scenario has become a tool, rather than a professional with a sound ethical base.

There are many other examples of this trend over the years. Referral fees, commercial arrangements, adapting technology to do less physical work but charge the same billable time.

Of course, it is important to distinguish ethics from morality. They are two entirely different concepts. A lawyer need not concern himself with the morality of a particular case (criminal lawyers defending accused murderers or

paedophiles spring to mind - in fact, one could conclude that it is ethically imperative for a lawyer to represent such individuals in a legal system where they are innocent until proven guilty). Yet, outside of criminal practice, the black and white boundaries of ethics have become so gray that it is often difficult to ascertain whether there are any boundaries at all.

Take the recent surge in property transactions through the so called "transaction schemes" which seek to avoid stamp duty by employing vehicles and solutions that the Finance Acts and regulations created. These are legitimate statute-based methods for avoiding tax. The Treasury is desperately trying to stop people using these schemes and even the Law Society has been putting out messages to the profession aimed at dissuading lawyers from getting involved. Yet, it is in the best interests of the client to pay no stamp duty if the law so provides. So on the one hand, a lawyer who does get involved with these schemes will be subjected to additional scrutiny by both the Treasury and the regulators who have an adverse mind-set to the schemes. The Treasury has also (so far unsuccessfully) brought legal action against the individuals and the scheme providers, only to fail in Court because the schemes are within the scope of the statutory provision. On the other hand, a lawyer who turns away such work will be financially penalised by having less work coming in, and it is not inconceivable that a lawyer acting for a client who suggested a scheme but was advised against it could face negligence proceedings for failing to act in the best interests of the client who has lost out financially by paying the stamp duty.

Such a quagmire of conflicting reasoning, legal ambiguity and ethical divergence would never have arisen under the old school, but it has become an endemic part of contemporary legal practice across so many areas that the arguments for formalising legal ethics in the education and training appear to be sound. The only question is what those ethics will actually be and how they would work in the real world with its increasingly commercial focus. Personally, although I have never myself been involved with such a scheme, I do think those lawyers are fighting their client's corner and have shown they have the balls to do that in a way which would make the old school proud, but it seems the reasoning behind their boldness is not a sense of ethical duty to the client, but rather the commercial opportunity of referral fees and having an edge in the marketplace.

It therefore seems that the last vestige of any sense of old school ethics lies in realms of pro bono, where the lawyer has no financial or commercial interest and is acting entirely to fight the client's corner. However, even here, this is eroding. For example, a pro bono client outlines the nature of a case. The lawyer acting sees that the case is strong, the evidence supports the case and that a sufficiently compelling argument can be constructed to give the case a high probability of success. The lawyer thinks to himself "I could do this on a CFA and get costs". Then the pro bono client becomes a "no win no fee" client on a conditional fee agreement and the lawyer can start charging fees. A commercially sound thing to do by all rights. The client after all, pays nothing, so remains in the same position they would have been if the work had been done pro bono. The lawyer benefits financially, however. Again, the old school would have done the work pro bono in any event because their word was their bond and the client was a pro bono client, but today, there is nothing wrong with the lawyer starting out on a pro bono matter and converting it to a "no win no fee" so they can recover costs. They need to eat after all!

Yet, in all of this, it seems to me that legal ethics (at least the ones the old school built up to be so indomitable) have been forever lost and any future attempts to correct this by formalising the requirement for ethics as part of the education and training would amount to nothing more than an exercise in self absolution by those wondering how to feel more professionally sound than they do.

"A 34% cut in our corporate ethics should return us to profitability."