

Doing the right thing in strange times

As we begin to adapt to the new normal, **John Gould** asks whether it's time to adopt a new approach to ethics

It's easy in prosperous times to do the right thing, but it's a lot harder when the financial pressure is on. Character is barely tested when behaving properly is easy, but most people have a moral breaking point if the circumstances are extreme. No two people are likely to feel pressure in exactly the same way and intolerable pressure for one may be an exciting challenge for another.

The epidemic is changing the rules of behaviour in ways which are as yet uncertain. For law firms, the larger the economic threat, the more their values and beliefs will be tested. The foundations of well-worn expressions of people priorities may begin to crumble. For some who have enjoyed a benign prosperity, a new and unfamiliar balance may have to be struck between their money and their values. It may be that there is a gap between the lowest acceptable standards of business ethics and the integrity expected of lawyers. Is it possible to be both a ruthless businessman fighting for survival and an honourable professional?

For individuals there will also be the additional pressures that come from employment insecurity. This may make some vulnerable to additional performance pressure. If some firms cross the line, should they share the responsibility for any professional misconduct which results?

Two recent stories, unconnected with the virus but tangentially linked to each other, illustrate the conflict between pressure and values and the division of culpability between individuals and firms.

The first concerns a solicitor by the name of Claire Matthews who, at the relevant time, had been qualified for a month. Claire Matthews worked in Birmingham for a well-known firm of solicitors called Capsticks. Travelling home with a locked briefcase, she had fallen asleep and lost it. Unfortunately the case contained papers relating to proceedings brought by a Mr X, ironically based on an alleged data breach by the SRA itself for whom Capsticks were acting.

Claire Matthews, who had a history of anxiety and depression, says she was overcome with panic. Presumably in the hope of recovering the case, she claimed for several days that it was at home and then revealed its

loss to her employer but falsely claimed that the loss had happened several days later than was actually the case, presumably to cover the late reporting. She was rapidly dismissed.

At some point later, Mr X discovered what had happened and complained to the SRA. The SRA prosecuted Claire Matthews before the SDT and she was struck off for dishonesty.

The Tribunal commented that no notification of her alleged dishonesty had been made by Capsticks to the SRA, which would not, therefore, have been investigated but for Mr X's complaint. No indication was given as to why the report of dishonesty required of Capsticks as a matter of professional conduct was not made. The SRA wrote to Capsticks reminding them of their obligations. No disciplinary action was taken against the firm.

An appeal and controversy has followed Claire Matthews's striking off. Responding to the chair of the Junior Lawyers division of the Law Society, the SRA identified the nub of its approach: '...neither a person's junior position, nor health, will be an answer where the person has been found guilty of culpable dishonesty.'

A major limitation of the concept of dishonesty in the regulatory context is that it does not admit degrees of culpability. It is a binary question—honest or dishonest. There are no multiple shades of grey and all dishonesty is culpable. This goes to the heart of the problem because, in terms of a person's fitness to practise, actions in particular circumstances may or may not show that they lack the integrity to be a solicitor. The public would not regard all dishonesty as equally culpable and may struggle even to agree where the line between honesty and dishonesty actually lies other than on specific facts.

There are very good reasons why a lack of integrity, particularly if it involves the aggravating feature of dishonesty, generally requires severe sanctions to protect public confidence and provide deterrence. It doesn't follow, however, that striking off must pretty well always be the sanction for stepping marginally over a line of integrity which is neither bright nor distinct. At the margin, the degree of culpability does matter.

There is no suggestion that the office environment at Capsticks was toxic or uncaring (quite the opposite) but that was the position found by Lord Justice Flaux in relation to another young solicitor who told untruths. The striking off of Sivona James was upheld on appeal and represents the law. The 'toxic and uncaring' environment in which she worked was created by McMillan Williams. They have been in the news recently for being insolvent and re-emerging from a 'pre-pack' sale out of administration.

The last filed accounts show a serially loss-making firm with 26 offices and over 400 staff. In its last two accounts it stated losses totalling close to £4m and debts of more than £20m. The loss to creditors and the implications for employees and clients are as yet unclear. A dash for scale, accumulating losses and substantial borrowings, is a very risky business. It may involve tough decisions and high performance pressure along the way. It is, however, a risk which is consciously taken, even if it is not clear until the end whose risk it actually turns out to have been. It may be months before it is clear who has lost most among losers likely to include: owners; lenders; creditors; clients; or employees.

Comment

So how would the public, whose trust must be maintained, see issues such as these? Would they worry more about their solicitor going bust or a mentally ill employee under pressure lying to their employer? Would they consider that a departure from telling the truth in any situation meant that a person was never to be trusted again as a solicitor? Would they judge the failings of a large firm more harshly than those of an individual?

Sometimes individual justice must give way to the public interest in deterrence. Deterrence is, however, better served by the probability of detection than exemplary punishment for a very few. Would a solicitor be significantly less likely to risk an untruth to a colleague if the risk was, say, only suspension or some other published and painful sanction rather than the end of a career? Is the certainty of a report to the SRA upon discovery by a firm the best deterrence? I'll leave it to you to decide.

If all else fails perhaps a modern Portia will appear pro bono on Claire Matthews's appeal:

'The quality of mercy is not strained.
It droppeth as the gentle rain from heaven
Upon the place beneath. It is twice blest:
It blesseth him that gives and him that takes.'

NLJ

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