Trusting in the (lawyer's) word

The need for lawyer honesty cannot be compartmentalised

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My two most recent columns have targeted the issue of dishonesty by lawyers, or by future lawyers. The cases catalogued in these columns highlighted that illegitimate claims to social security[1] or to other benefits,[2] and false statements on résumés,[3] by putative or existing lawyers is susceptible to a protective order. In none of these occasions did the dishonesty surface in the actual course of legal practice. Accordingly, it could not be said that any member of the public necessarily suffered as a result. To the extent that professional discipline (and refusal of admission to practise) is driven primarily by a protective aim, it must be premised in these contexts upon the assumption that dishonesty outside of legal practice reveals some tendency to engage in dishonesty in the course of legal practice, or at least some greater likelihood of continuing dishonest conduct. Once a person's character is smeared with dishonesty, it is a difficult smear to remove, it seems.

Of course, professional disciplinary proceedings (and refusals to admit) foster aims not confined to the protective.[4] The profession's (and court's) responses to dishonesty outside the course of practice arguably represent an attempt to protect the reputation of the profession. To tolerate dishonest behaviour amongst its (future) members, it is reasoned, would suggest to the public that the profession (and the courts) does not view matters of honesty as crucial to persons who, as members of the legal profession, are privileged to hold the keys to accessing justice. Lack of trust in members of the legal profession therefore brings a lack of trust in the broader administration of justice. And a system of administering justice grounded in anything other than honest conduct would not, it is reasonably assumed, reflect justice in any form.

So far as professional discipline is concerned, the language adopted nowadays, by Victorian courts in particular, is that of deterrence, both specific and general. The latter dovetails into the reputational objective of the disciplinary process. In the Victorian case of a lawyer who forged a false academic transcript, and secured employment more than once on the basis of that transcript, it was noted, under the heading of 'general deterrence', that the fact that the lawyer's reliance on the transcript continued for some years without detection "demonstrates the extent to which practitioners must be able to be trusted to be honest and candid".[5] The point has broader significance in highlighting a core reason why (future) lawyers' word must be trustworthy. Whether the courts, clients, other lawyers or third parties generally, each usually proceeds on the assumption that what a lawyer says can be trusted. Upon this assumption, the lawyer's statements are often accepted without being questioned or subjected to immediate checking or verification.

Accordingly, without a robust disciplinary response to dishonesty in this regard, the assumption as to a lawyer's trustworthiness may in some instances prove misplaced. A scenario different from those mentioned above, but which similarly raises the spectre of dishonesty, is where a lawyer falsely certifies the proper execution or witnessing of a document. Lawyers are frequently called on to certify execution or witnessing, and others often rely on this certification vis-à-vis the integrity of the dealing evidenced by the relevant document(s). But the case law, in the main spawning from the New South Wales Court of Appeal's decision in *Fraser v Council of the Law Society of New South Wales*,[6] suggests that false certification here will ordinarily trigger no more than a reprimand (albeit also with a fine), at least if the (mis)conduct is isolated more so than ongoing.

It is difficult to characterise acts of this kind as other than dishonest; they, after all, involve a known material misrepresentation upon which others are intended to rely. They, moreover, occur in the course of legal practice, rather than anterior to admission or in the lawyer's private capacity. A lawyer who is struck from the roll for a single false representation, outside the course of practice, to secure a financial concession (say, the first home owner's grant) may well ponder why he or she has burdened with the ultimate 'penalty' whereas others, such as the appellant in *Fraser*, receive what many may perceive as no more than a 'slap on the wrist'. That the dishonesty in the former scenario is driven by lawyer self-interest (and greed), whereas in the latter it need not be, is arguably not a compelling distinction, from a culpability perspective; this is not just because *Fraser*–like scenarios can also be driven by lawyer self-interest (and convenience), but because whether or not conduct is dishonest should arguably be independent of motive. Otherwise a lawyer could routinely 'justify' dishonesty by appealing to some allegedly higher ideal.

Ultimately, as 'the public as a whole suffers when a practitioner engaged in dishonest conduct',[7] the prudent lawyer should indeed pay heed to the Biblical observation that '[w]hoever can be trusted with very little can also be trusted with much, and whoever is dishonest with very little will also be dishonest with much'.[8]

NOTES

1. *Re Application by Saunders* [2011] NTSC 63; *Jarvis v Legal Practice Board* [2012] WASAT 28.
2. *Law Society of Tasmania v Matthews* [2010] TASSC 60.
3. *Legal Services Commissioner v PFM* [2013] VCAT 827.
4. See G E Dal Pont, "For the Protection of the Public" (September 2004) 78 *LIJ* 81.
5. *Legal Services Commissioner v PFM* [2013] VCAT 827 at [144].
6. CA(NSW), Kirby P, Handley and Cripps JJA, 7 August 1992, unreported. The manifold subsequent cases that have held likewise are catalogued in G E Dal Pont, *Riley: Solicitors Manual*, LexisNexis Butterworths, looseleaf, para [35,040].
7. *Legal Services Commissioner v PFM* [2013] VCAT 827 at [135].
8. Luke 16:10 (New International Version).