

Protection of the rule of law through a duty to the court?

Jenny Gracie

As financial pressure can lead to morality being thrown out of the window, 'honour' can, sadly, no longer be taken for granted. One solution is to make it more financially painful to be dishonest than honest. That is where express duties to the court can be useful – with cost sanctions to enforce them.

Both sides of the channel, lawyers can be disciplined for breach of professional rules outside the courts, in addition to civil liability (e.g. negligence) and criminal liability (e.g. being a client's accomplice).

In the UK, solicitors can be disciplined by the Solicitors' Regulation Authority (SRA) and the Solicitors Disciplinary Tribunal (SDT) and barristers, by the Bar Standards Board (BSB) and the Disciplinary Tribunal of the Council of the Inns of Court.

The SRA has the power to impose fines of up to £2,000 on solicitors. It refers more serious cases to the SDT, that can make any costs orders that it 'shall think fit'(1).

Solicitors and barristers owe a duty to their client to act in their best interests and to the court, not to 'mislead' it(2). These rules are supplemented by laws on Contempt of Court and Perjury.

Breach of this duty to the court can be punished by judges, including through costs orders and 'naming and shaming' (making the judgment public).

In a family law case, in which I was solicitor for the wife [W v W [2004] 1 FLR 494], Mr Justice Mostyn (then Mr. Mostyn QC) had to decide whether lawyers are simply post boxes, or should verify what their clients declare. The husband claimed that it was the fault of his original (disinstructed) solicitor, not him, that his financial declaration had been incorrectly completed – by omitting several million pounds.

Mostyn J. ordered a separate hearing on this issue alone, to give the former solicitors a chance to defend themselves. He concluded: "solicitors, as officers of the court, have an important responsibility to ensure that true and realistic figures [are presented]".

This defence of the husband's did not work. Mostyn J found that he had lied and called a separate hearing and asked him to justify why the case citation should remain anonymous. He also ordered that the husband pay the wife the difference between her 'natural' costs [had the husband not lied] and her actual costs (lying generated more paperwork and more hearings, to reveal the hidden truth).

In another of my cases, the husband's property law solicitor denied having files that my client was aware of. This was after the solicitor had spent weeks handing over files in a piecemeal fashion. Extra costs were incurred to obtain an emergency production order, to stop the solicitor from destroying

these hidden files. On appeal, the judge found that the solicitor had misled the court, so decided to make an 'open' (public) judgment and an order for costs against the solicitor.

I am not claiming that this system is ideal! Not all judges would have used their power in this way. Maybe this is the problem – both sides of the Channel.

Although there is no express duty to the court, French judges can punish avocats them for being misleading about the law and otherwise(3). But do they?

Perhaps, there is another problem. Disciplinary proceedings that take place in the local French Barreaux do not result in orders for costs(4). And little is made of the power to publicise the decision, most Barreaux preferring an 'in-house' solution. Appeals to the regional Court of Appeal are rare.

No one likes being policed. However, competition from unregulated lawyers is on the increase. Also, globalisation has led to forum shopping – clients now scrutinise the legal advice and representation on offer when choosing the best jurisdiction. Therefore, lawyers who mislead the court, risk bringing their profession and legal system into disrepute, not only nationally but internationally.

With reputation becoming increasingly important, regulation with 'teeth' is necessary to maintain it. But are existing professional rules enough? Should Barreaux have the additional power to impose costs orders? Are existing laws being enforced by judges enough? I suggest that time has come for a review.

Publicity is powerful.

And money talks.

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(1) Solicitors (Disciplinary Proceedings) Rules 2007, paragraph 18.

(2) Solicitors Rules of Conduct, Chapter 5 and the Bar Standards Board Handbook, Part 2.

(3) For example, 'Code de procédure civile, article 697'.

(4) Article 184 of 'décret' No. 91-1197 of 27 November 1991.