

The Callover

Episode | Mistakes and Professional Development

Guest | Dan Rogers

Host | Georgia Athanasellis



Georgia Athanasellis:

Welcome to The Callover, a Queensland Law Society podcast that hopes to inspire a future of connected, capable and healthy lawyers.

Welcome to Country

I'm Georgia Athanasellis, and today I'm speaking with Dan Rogers, Principal and Legal Director of Robertson O'Gorman. Dan is an accredited specialist in criminal law, the President of Caxton Legal Centre, Chair of the QLS Human Rights and Public Law Committee, and a member of both the QLS Ethics Committee and the Queensland Sentencing Advisory Council.

Though Dan has consistently been named on Doyle's Leading Lawyers List for his work in criminal law, his practice extends to professional disciplinary matters, inquiries, coronial inquests, workplace investigations and prosecutions. On this episode, we talk about practical steps to take if you've made a mistake, as well as the importance of ongoing professional development and maintaining ethical standards throughout our careers. Dan, thank you so much for joining me today.

Dan Rogers:

Thanks, Georgia.

Georgia:

Before we get into our main topics, I'd love to hear a little bit about your journey in the law.

As I understand it, you've been with Robertson O'Gorman for 17 years and over that time your practice has been quite varied. Have you always practiced across a lot of areas?

Dan:

Um...yeah, I have. I like many law students, decided to get a job as a law clerk, and so my long journey at Robertson O'Gorman started when I was 19, and I was a law clerk to Terry O'Gorman, who is one of the founding partners of the firm that I now run, and I was really fortunate to have that experience while at university, and really enjoyed the...the practice of criminal defence, but that broader practice that you mentioned, including corporate crime, professional discipline, inquiries and inquests, and I was just absolutely hooked as a law clerk and convinced him to give me a job, and apart from some periods where I've pursued some opportunities working overseas, I've just been at Robertson O'Gorman now for 17 years and I'm really enjoying it.

Georgia:

Well, is there any part of your practice that you particularly like? Do you have a favourite area?

Dan:

Look, I enjoy the absolute majority of the individuals that I act for. I find the personal circumstances of each individual and their life story, and the story of how they came to face an allegation just incredibly interesting, and I really relish that human experience of getting to know people - particularly people in crisis, and so every case is different. Every individual is different, and of course, you know, some are bad, but most are, in my experience, unwell or have made a mistake and are good people that I can be motivated to assist them through what is a really difficult time. And so it's not really any particular type of matter, but just array of difference is what keeps me motivated and interested.

Georgia:

And speaking of the individuals that you work for, is it true that lawyers make the worst clients?

Dan:

I think they do, and it's easy to understand why.

As lawyers, we're so used to giving advice...and being in control, and directing the course of a matter. When a lawyer faces a criminal allegation or a professional disciplinary complaint, and a lot of my clients are solicitors and barristers, it's just a really unnatural fit for them being told what they should do and having to consider that advice and understand, you know, their different options.

And of course, there's so much on the line for a legal practitioner in that situation, not only their reputation but their livelihood, their career. And so they're understandably incredibly anxious, often they develop depression, and so assisting them through that process is a challenge, and of course, lawyers are opinionated and have their own views about how things should be done.

But I find most clients will, over time, you know...display trust and confidence in me to help them navigate a difficult situation.

Georgia:

When they come to you in crisis mode, it's often because either they've done something wrong or they've made a mistake, and that's something I would like to talk a bit more about today. But if we start perhaps with less serious mistakes, everyone makes them at some point.

Dan:

Yeah.

Georgia:

What advice would you give to a young lawyer who's just discovered that they've made their first mistake? What should they do in that moment?

Dan:

My strong advice, based on many years of seeing the consequences of mistakes and how it can play out in a professional disciplined sense, is to just be really upfront when you make a mistake, because the reality is we all make mistakes. Mistakes are okay.

The majority of mistakes that I see lawyers make are honest mistakes, that we can all make, and if a person accepts that they've made a mistake, shows insight in terms of how the mistake was made, demonstrates that there's processes or learnings or systems in place to avoid that mistake being made again, then they're not going to face a disciplinary proceeding at QCAT, and their reputation will be maintained.

And that's really important because often the mistake is far less serious than how the person actually deals with the mistake, and people can tend to dig themselves a hole, and in order to ensure that you don't fall into that trap, it's really important to get advice when you make a mistake, so that someone objective can say, "look, it's okay. Mistakes happen. Let's just focus on how we can fix this as opposed to trying to hide it", which can just compound what might only be a small problem.

Georgia:

And I...I suppose that goes for both the small mistakes, but then the bigger mistakes where I don't know, you've missed a filing deadline, or you've given some advice that's not right. Who can a young lawyer turn to at that first critical moment to work out what to do next?

Dan:

Obviously, your supervisor within a firm, if you're a young lawyer, is the first person you should go to. But sometimes, for whatever reason, whether its personality or dynamics with that person, a young lawyer might not feel comfortable at such an early stage in going straight to them, they might want advice from someone outside of the firm so that they can then go to their principal with a bit of a plan as to how to fix the problem. And to that end, one of the most under-utilised supports available to young lawyers are QLS Senior Counsellors, and QLS Senior Counsellors are generally those with about 15 or more years of post-admission experience, and they volunteer their time, so they get no remuneration for agreeing to do this, and effectively they're available to take calls from anyone.

There are Senior Counsellors who specialise in different areas of law, so you can find someone who has an understanding about the particular practice area where the mistake might have been made. You can call them and have a confidential chat about what's occurred and how best to deal with it. I think young lawyers should access that support a lot more than they currently do, and I think once they made that initial call, they'll start to develop a relationship with someone that they may feel more comfortable calling again if there's another problem in the future. That's always a good thing.

Obviously, the QLS Ethics Center is there to help us. You know, we all either individually or through our firm, pay for our QLS membership, and that gives us lots of great services. The QLS Ethics Center is an excellent service. The amount of times I've called Stafford Shepherd when I've had an issue, or an ethical decision to make, it's just been so many. He and his team are a great source of support and people can call on them at any time. So...and obviously, other many lawyers will also just have mentors and people that they trust, you know, might be a barrister that they work with it that they can pick up the phone to. The important thing is to talk to someone, and get some guidance and reflect on it before responding to the mistake.

Georgia:

And I think just listening to what you say, it's not something that only young lawyers need. It's of comfort to hear that even someone like yourself could, if they're faced with an ethical dilemma, reach out there so it's not a...a negative thing or a frowned upon thing to go and seek support when you're confronted with an ethical issue.

Dan:

Absolutely. We all make mistakes and...but I find that more senior practitioners are more willing to access their colleagues and talk about a mistake, because they've got that experience and they understand that mistakes happen. Whereas as younger lawyers, in my experience, and this is a bit of a generalisation come out of law school, they're perfectionists, and the thought of making a mistake is

quite horrifying, and they really beat themselves up over it. They just need someone to say, "it's okay, people make mistakes, it's okay. This is not the end of the world. There's a fix to this".

Georgia:

What are some consequences of simply ignoring a mistake - or worse, trying to hide it?

Dan:

Yeah. Look, trying to hide it...is it becomes really problematic, and often it's...it's very rare for a mistake to go unnoticed if it's a significant mistake, and so you should start from the premise that, look, my mistake will be discovered, and the right thing to do is to accept responsibility for the mistake, and as I said, the absolute majority of mistakes that I see are honest mistakes.

As a profession, our integrity and honesty is something that the overwhelming majority pay really close regard to. I don't often see dishonest dealings. It's more honest mistakes, and if an honest mistake is made...and that mistake is not just accepted and fixed, then it can just become really problematic.

It's best illustrated by a quick example. Court dates are critical and firms obviously should have systems in place to ensure that a court date is not missed. Whether it's a family law proceeding or a criminal law proceeding, the consequences of not showing up or your client not showing up can be severe. In criminal law, it can result in a warrant being issued, in domestic violence court, it could result in an order being made, or an application being dismissed.

And they're quite serious consequences, and I've seen numerous instances where practitioners have, for whatever reason, missed a court date, and something has occurred in their absence. I've seen occasions where that solicitor has dealt with it by going to the client telling them that the mistake was made, telling them how it will be fixed at their cost, including bringing the matter back on or appealing the order, and just fixing it at their own cost. In that situation, it's rare for a client to then make a complaint to the Legal Services Commission, but if they do, that person would be confident that no disciplinary proceedings would be brought, because the LSC would say that the person has insight, that the person's fixed it, and it's unlikely to occur again.

On the contrary, if someone ignores that and tells a lie to the client...perhaps blames them, or just tries to absolve themselves of the responsibility of the mistake, that's when things can get really ugly. And if it's discovered by the LSC that a person has acted dishonestly in covering up that mistake, that's when someone is at risk of a finding of professional misconduct.

And it's not the mistake itself. It's the way in which it's being dealt with, yeah.

Georgia:

Now might be a good time to look at the LSC. I think most lawyers would hope that they go their entire career without ever having to come into contact with the LSC, but obviously sometimes some lawyers do.

Could you, for those listeners who haven't come across the LSC before, can you explain what they do, what powers they have, and why a solicitor might come into contact with them?

Dan:

Yeah. It's important to understand that although the LSC is an independent statutory body, and they have the job of regulating the legal profession, so that means that they receive complaints, sometimes the complaints are from other practitioners against another practitioner, or more often it's from a client. And their job is to investigate that complaint, which will generally mean sending correspondence to solicitor and asking for a response, and they'll then determine whether or not the matter can be dealt with informally, such as, you know, a caution or an undertaking, or some other resolution that doesn't involve actual proceedings. But in serious cases, they have the responsibility to file an application for disciplinary proceedings, and that's done in QCAT.

And so that that's what the LSC does. But they also produce a lot of really good resources on their website and it's worth looking at those. It's great to learn from the mistakes of others, and you can see some of those resources deal with how best to communicate costs, how to respond to a client complaint if it's made within the firm, and those things are really good to look at in order to, I guess, mitigate the risk that will end up as an actual disciplinary proceeding.

Georgia:

And you would see a lot of these things as part of your work, but what are the most common reasons that lawyers at the moment are getting hauled into the LSC?

Dan:

Costs (laughs)

Georgia:

(Laughs) Right.

Dan:

Yeah costs is the big one. A failure to give clear and early estimates of costs is probably the biggest one that I see, so clients who are taken by surprise, there's suddenly this big bill that they that wasn't what they were expecting. That's probably the main one.

But in addition to costs, there's...there's lots of other, I guess, areas that you could group in terms of solicitors receiving complaints. Improper communications is one that I've seen quite a lot of in the last five years. And that can come down to just really discourteous and unprofessional communications between solicitors. I see it particularly in family law and commercial law, and that can often see a practitioner receiving a complaint.

Georgia:

If a lawyer does get that dreaded complaint, what is the first thing they should do when they receive it?

Dan:

Seek advice. The most frustrating thing for me is when I act for a new, say, solicitor client, and they brief me with the complaint and their response, which they've already made, and you just sort of shake your head at the emotional reaction that they've displayed to the complaint that they've received.

The worst thing you can do is respond to an LSC complaint on your behalf, because you're understandably emotional and...and often the LSC complaints that might be made against you a complete rubbish.

If you respond emotionally within a short period of time while those emotions are still running high, that's when you're at risk of making the situation worse or failing to accept responsibility if there has been a mistake.

Having someone independent look at it and say, look, it's obvious he did make a mistake, but if you don't just accept that, there's a risk that a proceeding could be brought. And the LSC aren't out to get us. They're not seeking to bring disciplinary proceedings just for the fun of it. They reserve actual proceedings for cases which are the most serious, or where a practitioner is just not willing to accept any responsibility for a mistake that might have been made.

Sometimes no mistake has been made, and just a proper response setting all that out is what's needed. So the biggest thing is don't respond when you get an LSC complaint until you get advice.

Georgia:

Yes, all of that sounds a little scary, I must say. But what practices can young lawyers implement in their sort of daily lives at an early stage to ensure they're aware of their obligations, and sort of constantly monitoring themselves, I guess, so that they can try and avoid ever coming into contact with an LSC complaint?

Dan:

Our...professional development very much includes constant learning when it comes to ethical decision making. Of course, we have, I think, one CPD requirement concerning ethics, and that's a good thing, but in my view, that's not enough, I think it's important to be mindful of the areas of interests of the LSC, or be mindful of the recent disciplinary cases that have looked at particular solicitor conduct rules. And so as a...as a starting point, if someone has not...if a practitioner has not recently in the last, you know, couple of years, read the Solicitor's Conduct Rules that seem to pick that up and have a flick through it. I know that sounds incredibly boring, and maybe throw it in your bag and read it while you're waiting at court, you know, where you just killing some dead time. But the solicitor conduct rules and the commentary to those rules, are really useful just to remind ourselves of some of those things.

And then the second resource which the QLS started to develop about...four, about four years ago, are the QLS Guidance Statements, and they're produced by the members of the Ethics Committee who practice across all different areas of law, and a lot of work goes into those guidance statements. They...they...most of them are only about five or six pages, and they cover all range of topics from termination of retainer, to costs, to judicial bullying, to sexual harassment. Just so many different things. And they're designed to be a quick guide that identifies the Solicitor Conduct Rules that are engaged on a particular issue, identifies the cases that have considered it, and provides some practical steps to avoid a breach of those rules, or to safeguard the lawyer.

And so if you haven't looked at those guidance statements, again, that's something to just keep an eye on and when QLS updates come out, if there's a new guidance statement, it's normally there. There's often consultation with, you know, lots of senior lawyers outside the Ethics Committee. The Legal Services Commission sometimes provides feedback, and so they're quite authoritative in terms of a resource that you can go to if you've got a difficult ethical issue and you want to just have a read of something to give you some guidance and practical steps.

Georgia:

I know another topic that you feel quite passionately about is judicial bullying, which unfortunately seems to affect younger lawyers more than seasoned advocates. It can be difficult to navigate your obligations to the court, your client and your professional ethics in the face of sometimes extreme behaviour from the bench.

What advice do you have for young lawyers on how to manage those situations?

Dan:

This is a really tricky topic and one that I think it's great to talk about. For me, the starting point is that solicitor advocacy is on the rise, and I think that's a great thing. More and more solicitors are advocating their own cases. Of course, there's a really important place for an independent bar and barristers do amazing work but solicitors are advocating every day. It might be in their written communications, phone calls, but it's not every day that they translate those advocacy skills into the courtroom. And of course when they do they...they need to realise that they're performing a specialist function within the solicitors branch and it's called a solicitor advocate. And as I said, the number of solicitor advocates at all court levels is rapidly increasing. It's what I enjoy most about criminal law is arguing my own cases at all court levels, not always, but the majority of the time.

And I think it's really important that the society support the rise in solicitor advocacy. In the United Kingdom, for example, solicitors are arguing almost half of jury trials now and there's that push and there's many reasons for it. And so it's important that we embrace it as an idea. But we also need to understand that it comes with a lot of responsibilities. And there's a saying that advocates aren't born, they're trained. There's this perception that certain barristers or certain solicitors just have these god-given gifts that they can speak to judges and persuade them to a particular outcome. The reality is that advocates are trained, and there's lots of great courses to improve your advocacy and QLS runs, a really good one with the Australian Institute of Advocacy.

So as a starting point, solicitors need to understand their responsibilities as an advocate. They can't just rock up to court and do a matter that is too complicated for them, or their years of experience. But when they are confident and prepared, then absolutely they should embrace it, and to me it's disheartening that some solicitors may not do that because they're fearful about judicial bullying from certain judicial officers.

In my experience, it's a small group that misbehave. Judicial officers are by and large incredibly professional, hardworking and patient, and that temperament is what makes the best judges. But of course we need to recognise that judges have a tough role and that doesn't excuse certain judicial bullying, but understanding they've got a busy list and that they need assistance from solicitors, and the best way to avoid judicial bullying is to be in the best position to assist judges to do their job.

It's also important to distinguish what is not judicial bullying and what is judicial bullying. So judicial bullying is not direct questioning or challenging of arguments or perhaps robust debate. That's a part of advocacy. Effective advocacy is the foundation upon which our whole system is built, you know, the capacity to challenge competing views to arrive at an outcome is what makes up our adversarial environment. And it can be confronting sometimes. But that's okay. That's not judicial bullying. Judicial bullying is when it becomes abusive. When a judge screams or attacks personally, or comments on physical appearance or attire or sexual harassment or something like that, that is clearly judicial bullying and it's a...it's a hard thing for any practitioner to deal with, particularly younger ones. There's a QLS guidance statement on this, and there are lots of supports in the form of senior counsellors.

Georgia:

You've...you've sort of touched on it, but what is the profession can we do collectively to address the issue? I suppose looking after each other and being there for each other is one, but is there anything else?

Dan:

There is a...push at the moment among some advocacy groups for the creation of a Judicial Commission like in New South Wales, and I think there's a benefit to that. There is an argument that it might undermine the independence of the judiciary, but I think a properly constructed Judicial Commission has benefits to deter misbehaviour. But it's really important to keep remembering that the focus shouldn't just be on the judge, it should be about professionalism in the courtroom, which includes us. And so what we should do is make sure that we're doing our part, in order to ensure our own professionalism in terms of being prepared, and speaking in a courteous way to judicial officers and opponents in order to foster an environment where people treat each other with more respect.

Of course, ensuring that their support to younger practitioners is really important. I know that there've been occasions when I've felt a need to go with a young lawyer appearing in front of a particular judicial officer to be there to support him or her and/or to intervene if things don't go well and so sometimes that level of support is necessary because it is a workplace health and safety issue for law firms.

But I think that the Society's doing a lot at the moment to try and advocate, you know, protocols for professionalism in the courtroom and also to support practitioners.

Georgia:

The idea that you need to go to court to support a person in that situation is a little confronting. But...but it sounds like it's a rarefied occasion that that's necessary.

Dan:

It is. The impact on the wellbeing of practitioners who experience that rogue judicial officer who treats them horribly, can be really catastrophic without wanting to sound too dramatic, there have been suicides in certain jurisdictions in the immediate aftermath of a judicial bullying experience. And of course, sadly, there have been occasions where judicial officers have taken their lives because of the stress that they feel, and so...realising the impact that the adversarial environment can have on us all is really important, and should be a motivation for us to try and deal with this together.

Georgia:

Yes, we all have to...to look after each other, which...which sort of leads me into the final thing I'd like to discuss, which is your time as the President at Caxton Legal Centre.

I think a lot of our listeners would know the great work that Caxton does but...often community legal centres can be a place where lawyers of all different...experiences and seniorities sort of gather to help the community. So could you explain what opportunities are at Caxton and other CLCs generally for young lawyers?

Dan:

Yeah sure. So for those that don't know, Caxton Legal Centre is the largest community legal centre in Queensland. It's almost 50 years old and now is quite a large organisation, that provides free legal and social work support services to those who are unable to afford those privately.

So the client groups are the most vulnerable in the community, and the practice areas include human rights, civil law, we've run a...a bail program for men on remand, we provide a duty lawyer service to the coroners court, we assist a lot of people with domestic and family violence and family law and those suffering elder abuse, those subject to consumer law issues, the...the list just goes on and on.

And there are lots of opportunities for practitioners in private practice to volunteer at Community Legal Centres, whether it's Caxton or somewhere else, and I think it's a great opportunity to do that for a range of reasons, firstly Community Legal Centres need that support, because although they're government funded, whether it's state or commonwealth, the...the reliance on volunteers is high in order to meet the enormous demand for those services.

But from a professional development perspective I found it really great, both as a law student and a young lawyer doing that, because I got to meet lots of practitioners from all levels of seniority all different practice areas, and learn by sitting in on client conferences or just interacting with them while at the Community Legal Centre about, you know, different communication styles, different areas of law and just different ways to problem solve.

So I think there's a great opportunity to develop your professional network, do some good work and take home some good karma, and...be a part of that, I guess broader involvement in the legal profession where a lot of really great work is being done. So yeah, I absolutely encourage people to contact their local Community Legal Centre, wherever that might be and volunteer, and it might only be a couple of hours a month. It's not necessarily a massive commitment, but it's a good thing to be a part of.

Georgia:

I think that's a positive note on which we can end this discussion. We've dealt with some...some more serious topics today, but I would like to ask one more piece of advice from you. If you could give your younger self one piece of advice, what would it be?

Dan:

You gave me a heads up about this question (laughs), I have thought about it a bit. I was tempted to say practice medicine not law, but...

Georgia:

...Probably not what we're aiming for (laughs)...

Dan:

...No no, but the truth is I have no regrets in deciding to study law.

I think compassion is a really important thing, in two senses. The first is self-compassion, as I said, our jobs are really tough, and I have learned in the last few years through, I think, greater, just awareness, about mental health and vicarious trauma training and things like that, that firms are now better engaged with the importance of self-compassion in terms of taking care of ourselves, and treating ourselves as we would treat our friend or our family member, being sympathetic when we make mistakes, and just trying to sort of have that self-compassion, but also compassion in the sense of compassion versus empathy.

I'd encourage your listeners to go...to Google David Heilpern. He's a retired magistrate and he talks a lot about compassion and empathy, and he's very open about his own vicarious trauma experience as a magistrate, and he's presented at QLS, and he's come to our firm, spoken to us before. He talks about how compassion is a good thing when we're dealing with our clients. Empathy is dangerous. We often wear empathy like a badge of honour. You know, we're empathetic to our clients. We'll put ourselves in your shoes.

But if you're practicing family law or criminal law and you're putting ourselves in the shoes of a defendant, you know, multiple times a day on a daily basis, that is going to very quickly wear you down, and understanding that compassion as a concept is a better thing when dealing with clients is a good thing, because if you're compassionate towards a client you can understand why they're feeling a particular way and of course, your sympathetic. But then you focus on what you can do to assist their suffering. It's no good if you just put yourself in their shoes and suffer with them. If you're compassionate you're more likely to make that adjustment to focusing on what's within your control and not where the emotional burden that they are experiencing, which actually disables your ability to help them.

So compassion for yourself and compassion towards a client as opposed to empathy, I think is a good thing for us all to think about, and it requires sort of constant reminders.

Georgia:

That's a great piece of advice, and I think it ties to what you said at the very beginning, which was that when people come to you...you then become their crisis manager, and to be able to distinguish between compassion and empathy assist you to do that in a more effective way.

Thank you so much for joining us on the podcast today. You've mentioned a lot of resources that I think would be great for the young lawyers to refer to, and we'll certainly make them available sort of in the show notes or on The Hub.

But thank you for sharing your...your time and your insight today, on The Callover.

Dan:

Thanks, Georgia. It's my pleasure.

Georgia:

If you enjoyed listening to this episode of The Callover, hit subscribe and please share the link with your friends and if there's any topics you'd like to hear us discuss or person you think should have been next on The Callover, please get in touch using the contact details in the show notes.