

**Between the Devil and the Deep Blue Sea:
Conflict between the duty to the client
and duty to the court**

By
The Hon Justice Kenneth Martin,
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(A) Introduction

In 1998, Justice David Ipp, then of the Supreme Court of Western Australia, wrote a groundbreaking article, 'Lawyers' Duties to the Court'.¹ Till then, lawyers' duties to the court had 'developed over time as a network of pragmatic rules laid down by judges in circumstances very much of an ad hoc nature'.² The LQR article was one of the first attempts to collect and rationalise lawyers' duties to the court as a 'structured body of law'.

The LQR article assembled many seemingly disparate manifestations of a lawyer's duty to the court, under four broad categories, namely:

- (a) a general duty of disclosure owed to the court;
- (b) a general duty not to abuse the court's process;
- (c) a general duty not to corrupt the administration of justice; and
- (d) a general duty to conduct cases efficiently and expeditiously.

Ipp J observed that general duties (a), (b) and (c) emerged

from the public interest in ensuring that the administration of justice is not subverted or distorted by dishonest, obstructive or inefficient practices. The essence of the duties is a requirement for lawyers (within the context of the adversarial system) to act professionally, with scrupulous fairness and integrity and to aid the court in promoting the cause of justice.³

¹ Ipp J, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63.

² *Ibid* 65.

³ Ipp J (*supra*) 65 (footnotes omitted).

General duty (d) was considered to be a 'reflection of the current changes in community attitudes and standards'.⁴

(B) Some uncontroversial observations about the lawyer's duty to the court

The following aspects of the lawyer's duty to the court were highlighted within Ipp J's article:

1. The lawyer's duty to the court is paramount. It is acknowledged that there may be situations in which this duty is inconsistent with the lawyer's duty to their client. However, as Mason CJ observed in *Giannerelli v Wraith* (1988) 165 CLR 543, 556: 'The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary'.
2. A recognition of the lawyer's duty to the court does not imply that the duty is owed to a particular judge. The duty is actually owed to the community in general as a matter of the public interest in the administration of justice. When it enforces the duty a court will act as a guardian of the due administration of justice.
3. Lawyers' duties to the court are legal duties imposed under the general law. They are personal in nature and non-delegable.
4. A breach of the lawyer's duty to the court constitutes unlawful conduct. Such conduct may not necessarily be unethical. Furthermore, unethical conduct may not necessarily be unlawful.
5. Breach of a lawyer's duty to the court is generally the subject of sanction imposed by summary procedure.
6. A court's jurisdiction to proceed summarily against a lawyer who has breached his or her duty to the court is punitive, as well as compensatory.

⁴ Ipp J (supra) 65 and 105.

7. Where a compensatory order is sought against the lawyer, some degree of causal connection needs to be demonstrated as between the lawyer's conduct complained of and the amount of financial loss sought to be recovered.
8. Usually the breach of the lawyer's duty to the court will not provide a basis for an independent cause of action for a purpose of founding a civil claim (in this context, the nature of the summary procedure referred to at 5, to which the lawyer is exposed, is of significance).

(C) **Entrenchment of the higher duty**

Since 1998 the legal practitioner's paramount duty to the court has become very well recognised.

In 2001, in a disbarment application involving a legal practitioner who had misled a judge on a summary judgment application, by knowingly relying on a false affidavit and then attempting to suborn a witness in disciplinary proceedings, the President of the Queensland Court of Appeal acknowledged the practitioner's duty to the court by reference to *Giannerelli*. In the *Council of the Queensland Law Society Inc v Wright* [2001] QCA 58 McMurdo P (with whom Davies JA and Helman J agreed) said:

A practitioner's duty to the court arises out of the practitioner's special relationship with the court; it overrides the duties owed by a practitioner to clients or others: see *Giannerelli v Wraith*, [577 - 588]. The lawyer's duty of the court includes candour, honesty and fairness. The appellant abused her role as an officer of the court in relying on materials she knew to be false and in deliberately and recklessly misleading the court in an attempt to further the interests of her clients and family. Her conduct was made more serious by its repetition. The effect of administration of the justice system and public confidence in it substantially depends on the honesty and reliability of practitioners' submissions to the court. This duty of candour and fairness is quintessential to the lawyer's role as officer of the court; the court and the public expect and rely upon it, no matter how new or inexperienced the practitioner [67]. (footnotes omitted)

The practitioner was struck off the roll.

For barristers across Australia the duty to the court is clearly spelt out in Professional Conduct Rules which are now largely uniform. The Australian Bar Association Barristers Conduct Rules (Revised 1 February 2010) are replicated by the Barristers Conduct Rules of the Bar Association of Queensland. The Queensland rules commenced on 23 December 2011 and are referred to as 'the 2011 Barristers' Rules'. (See also the Barristers' Rules of the West Australian Bar Association of 5 October 2011.) I refer to these conduct rules for barristers from this point, as the Barristers' National Conduct Rules (the BNCRs).

BNCR 25 now provides:

A barrister has an overriding duty to the Court to act with independence in the interests of the administration of justice.

(my emphasis in bold)

Earlier, the BNCR 5, 'Principles', says:

These Rules are made in the belief that:

- a. **barristers owe their paramount duty to the administration of justice;**
- b. barristers must maintain high standards of professional conduct;
- c. barristers as specialist advocates in the administration of justice, must act honestly, fairly, skilfully and with competence and diligence;
- d. **barristers owe duties to the courts, to their clients and to their barrister and solicitor colleagues;**
- e. barristers should exercise their **forensic judgments and give their advice independently** and for the proper administration of justice, **notwithstanding any contrary desires of their clients;**

(my emphasis in bold)

The BNCRs are to be interpreted on the basis of promoting those principles (see BNCR 6).

For Western Australia, conduct rules 5 and 25 are identical.

Furthermore, in Western Australia, r 5 of the Legal Profession Conduct Rules 2010 enacted pursuant to the *Legal Profession Act 2008* (WA) provides, as regards practitioners:

A practitioner's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty, including but not limited to a duty owed to a client of the practitioner.

(D) **March 2005: The High Court of Australia's decision in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1**

In this 2005 decision (which I will refer to as *D'Orta*), the High Court, by a majority of 6:1, reaffirmed the correctness of its 1988 decision on advocates' immunity, *Giannerelli v Wraith*. The High Court in 2005 declined to follow the no immunity position established for England and Wales by the House of Lords in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615.

In *Giannerelli*, members of the court, notably Mason CJ, had invoked the existence of a lawyer's paramount duty to the court as one of multiple public policy rationales supporting advocates' immunity. In *D'Orta*, seventeen years after *Giannerelli*, the founding policy considerations for advocates' immunity needed to be thoroughly reconsidered by all members of the court.

D'Orta is primarily concerned with the issue of continuance for Australia of advocates' immunity and, in that context, a true rationale underlying the immunity. But *D'Orta* is also a valuable repository of observations concerning the correlative issue of the lawyer's duty to the court, particularly from a policy perspective.

In *D'Orta*, plurality reasons were delivered by Gleeson CJ, Gummow, Hayne and Heydon JJ. Justices McHugh and Callinan wrote separate reasons, as did Kirby J. McHugh and Callinan JJ reached the same conclusion sustaining the immunity as the plurality, albeit for what I assess as somewhat wider underlying policy reasons. Kirby J dissented.

Justice McHugh's reasons in the present context are noteworthy for the emphasis his Honour gave to the pivotal role of the advocate in the administration of justice, in the context of the advocate's duty to the court.

In *D'Orta* the plurality said:

Although reference is made in *Giannerelli* to matters such as: ... (b) the potential competition between the duties which an advocate owes to the court and a duty of care to the client ... each was, and should be, put aside as being, at most, of marginal relevance to whether an immunity should be held to exist.

...

The [above] matter assumes, wrongly, that the duties might conflict. **They do not; the duty to the court is paramount.** But, more than that, the question of conflicting duties assumes that the only kind of case to be considered is one framed as a claim in negligence. That is not so. The question is whether there is an immunity from suit, not whether an advocate owes the client a duty of care [25] - [26].

(my emphasis in bold, citations omitted)

The plurality proceeded to explicitly ground the contemporary policy rationale for the continuance of advocates' immunity upon the nature of the judicial process. The plurality reasons emphasise that, once controversies have been resolved by judicial decision, it is repugnant to the interests of justice to allow 'quelled' controversies to be reopened through proceedings directed against the advocates that participated in the original proceedings. The plurality justices observed:

[T]he central justification for the advocate's immunity is the principle that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances. This is a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society. If an exception to that tenet were to be created by abolishing that immunity, a peculiar type of re-litigation would arise. There would be re-litigation of a controversy (already determined) as a result of what had happened during, or in preparation for, the hearing that had been designed to quell that controversy. Moreover, it would be relitigation of a skewed and limited kind [45].

The plurality reasons manifest something of a retreat from reliance on the aspect of a higher duty policy rationale mentioned in *Giannerelli* to sustain

advocates' immunity. This was assessed in *D'Orta* as being (at most) 'of marginal relevance'.

Kirby J in *D'Orta* was unconvinced by any rationale to sustain advocates' immunity. At [323], touching briefly on the issue of the advocate's duty to the court, he said:

[F]urthermore, the barrister's 'divided loyalty' to client and court does not support the existence of the immunity, as it is difficult to see how negligence could be found where a barrister has simply complied with a duty to the court. (footnotes omitted)

However, McHugh J, in reaching his decision to sustain advocates' immunity in Australia, afforded a powerful recognition to the paramountcy of the advocate's duty to the court, as a contributing policy rationale supporting a continuance of the immunity. Commencing at [105] of his reasons, McHugh J re-examined a body of case authority underlying his premise that the advocate played an indispensable role in the administration of justice. McHugh J observed:

In Australia, the barrister, like the solicitor, is an officer of the court, **as indispensable to the administration of justice as the judge**. (my emphasis in bold, footnotes omitted)

McHugh J referred to Sir Frank Kitto's oft-cited observations in *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279, 286:

It has been said before, and in this case the Chief Justice of the Supreme Court has said again, that the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. **They should be understood as a reminder that a barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability.** [The barrister] is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with ... fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations.

(my emphasis in bold)

McHugh J addressed squarely the significance of the advocate's primary duty. He did this in illustrative terms, helpful to the present discourse. His Honour said:

Despite being in a relationship of confidence with a lay client, the first duty of the barrister is not to the client but to the court in which the barrister appears. The duty to the instructing solicitor or the lay client is secondary. Where the respective duties conflict, the duty to the court is paramount. That duty to the court imposes obligations on the barrister with which the barrister must comply even though to do so is contrary to the interests or wishes of the client. Thus, the barrister can do nothing that would obstruct the administration of justice by: **deceiving the court; withholding information or documents that are required to be disclosed or produced under the rules concerned with discovery, interrogatories and subpoenas; abusing the process of the court by preparing or arguing unmeritorious applications; wasting the court's time by prolix or irrelevant arguments; coaching clients or their witnesses as to the evidence they should give; using dishonest or unfair means or tactics to hinder an opponent in the conduct of his or her case.**

Moreover, the advocate owes a duty to the court to inform it of legal authorities that 'bear one way or the other upon matters under debate' [see *Glebe Sugar Refining Co Ltd v Greenock Harbour Trustees* [1921] SC (HL) 72 at 74]. The duty applies 'quite irrespective of whether or not the particular authority assists the party which is so aware of it' [see *Glebe* (supra) at 74].

Thus, in many situations arising in the conduct of litigation, the common law requires an advocate to act contrary to the interests of his or her client. I doubt if there is any other profession where *the common law* requires a member of another profession to act contrary to the interests of that person's client. In some professions and callings, statutes now impose specific obligations on members to disclose information against the interests of the client. **But advocacy is probably unique in imposing common law obligations on a professional person to act contrary to the interests of a lay client. This factor alone is probably sufficient to preclude reasoning by analogy from the liability of other professions and occupations for negligent conduct [111] - [113].**

(my emphasis in bold)

McHugh J went further than the plurality judges in *D'Orta* in continuing to recognise as a contributing policy rationale for the continuance of advocates' immunity, the wholly unique task of the advocate. McHugh J's examples of the paramount duty owed by the advocate to the court - in contrast to obligations

imposed in other professional callings - display an overlap in content to the examples of the lawyer's duty to the court mentioned by Ipp J in his 1998 LQR article.

Justice Ian Callinan in *D'Orta* reached the same result as the plurality and McHugh J. But he, on my reading of his reasons, also took a wider view of the policy rationale and the contribution arising out of the advocate's paramount duty to the court, in terms of a continuation of the advocates' immunity for Australia.

At [370], Callinan J endorsed the three rationales mentioned by Mason CJ in *Giannerelli* as providing, 'even more compelling reasons for the existence and the continuation of the immunity'. Callinan J continued:

There are other matters which require separate discussion. One is the duty that advocates owe to the court. It is a primary duty and transcends the duty owed to the client. **That it transcends the latter does not mean that it is always easy for the advocate to distinguish between, and give preference to the primary duty in cases of doubt.** The need for observance of the duty to the court as a primary duty requires that there be no ambiguity about what may flow from it, in particular, a claim, however misconceived, by the client against the advocate [379].

(my emphasis in bold)

Callinan J's reference to the difficulty in first, distinguishing, then second, giving preference to the advocate's primary duty, sets the scene for a pragmatic discussion as to tensions that can arise in day to day practice.

(E) **Devil and the Deep Blue Sea: Some practical observations concerning the advocate's duty to the court post *D'Orta***

I will now mention some manifestations of the lawyer's duty to the court, in the context of the present discussion, which is directed to circumstances where the paramount duty may fall into conflict with the duty to the client.

I do so commencing from a foundational premise that barristers are not 'mere mouthpieces' (BNCR 41) of a client or an instructing solicitor.

Could I mention, at this point, a significant article relevant to this general topic, from Justice Dyson Heydon: 'Reciprocal Duties of Bench and Bar' (2007) 81(1) *Australian Law Journal* 23. At page 24, his Honour refers to various duties which he describes as mundane and sometimes less well remembered. That modest introduction should not dissuade a reader from an intimate familiarity with his Honour's discourse, which is invaluable, especially for young members of the Bar.

In terms of day to day manifestations of the present duty, I largely work from the fourfold taxonomy of Ipp J in what follows.

(i) *The duty of candid disclosure to the court*

Manifestations of the duty include:

- (a) A cardinal responsibility not to intentionally mislead a court about facts or the law or, in the event that an inadvertent error is realised, to immediately and frankly correct the position with the court, at the earliest opportunity (BNCR 26 and 27).

This aspect of the duty falls into particularly sharp focus in the context of *ex parte* applications, particularly for urgent injunctions (BNCR 29). As Ipp J pointed out at page 69 of the LQR article, such applications are not adversarial, so it is 'the lawyer's unqualified duty to make full disclosure to the court so that the court's decision is made on a fully informed basis'.⁵

- (b) In criminal cases, a prosecutor's duty to act fairly with regard to the accused. In consequence the prosecutor must disclose all material information to the defence (BNCR 86). This aspect of the duty has recently been the subject of close attention in my home state of Western Australia.⁶ It is obviously important the duty be scrupulously observed,

⁵ Ipp J (supra) 69, referring to footnote 41 and authority there cited.

⁶ See *Mallard v The Queen* (2005) 224 CLR 125. See also *Cannon v Tahche* (2002) 5 VR 317 [57] - [59] (Winneke P, Charles and Chernov JJA).

given the serious potential against personal liberty if it is not. In *Libke v The Queen* (2007) 230 CLR 559 a Queensland prosecutor's 'wild, uncontrolled and offensive' cross-examination (Heydon J at [121]) was the subject of an appeal to the High Court, and made the object of strong disapproval. See also BNCRs 82 - 94.

- (c) The obligation to refer the court to all relevant case law, irrespective of whether the authority advances or detracts from the advocate's position. (BNCRs 28, 31(a) and 33).

(ii) *The duty not to abuse the court process*

Day to day practical implications for a barrister arising under this aspect of the duty are many. But to mention a few examples, I will note:

- (a) Allegations of serious misconduct:

The obligation to exercise great care before making allegations of serious misconduct against others. At page 85, Ipp J observed of this aspect of the duty if the client insists that such unsubstantiated allegations be made, it is counsel's duty to decline to carry out those instructions or to withdraw from the case.⁷

For barristers these obligations are firmly embodied in the BNCRs.

Sitting as a member of the Full Court of the Western Australian Supreme Court in *Oldfield Nott Architects Pty Ltd v Ortiz Investments Pty Ltd* [2000] WASCA 255, Ipp J addressed this subject in the context of an arbitration, where serious allegations, including allegations of fraud, had been made without being properly identified by a pleading or by particulars. Referring to a well established line of authority concerning the requirement for fraud to be distinctly alleged and particularised (see *Davey v Garrett* (1877) 7 Ch D 373, 489 (Thesiger LJ), *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250, 268

⁷ See Ipp J (supra) 85, in particular the authorities cited at footnotes 140 and 141.

(Buckley LJ) and *Armitage v Nurse* (1998) Ch 248, 256 - 257 (Millett LJ) (as he then was) and *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563, 573) Ipp J then observed:

In my opinion, the foregoing principles apply equally to allegations of professional impropriety or misconduct, whether they arise in the context of an action brought in a court or in arbitration proceedings. **Allegations of this kind are so serious and potentially so damaging that a defendant is entitled to have them specified in appropriate detail in order to know precisely the case which it has to meet.** It is no answer then to say that the Arbitrator did not have to order pleadings or that the Arbitrator was not bound by the rules of evidence but might inform himself as he thinks fit... Unpleaded allegations of professional impropriety or misconduct are so serious that it would be highly prejudicial and unfair to require the party to proceed with an arbitration subject to pleadings where these allegations are not pleaded [38].

(my emphasis in bold)

See also Murphy JA in *Streeter v Western Areas Exploration Pty Ltd (No 2)* [2011] WASC 17; (2011) 278 ALR 291 [605], [606] referring to the *Australian Metropolitan Life Assurance Co Ltd v Ure* (1923) 33 CLR 199, 219 - 220.

Notwithstanding the clarity of these principles, day to day tensions obviously can arise as regards a client's firm belief or suspicions, especially when they perceive that they have been subjected to a cruel injustice. Dare I suggest that it is on these occasions when detached and dispassionate thinking by an experienced barrister is invaluable.

It is not surprising in this area that the BNCRs, under their heading 'Responsible use of court process and privilege' (BNCRs 59 - 67), erect a regime of balance between adviser independence, fearless pursuit of the client's interests when necessary and overall fair play. BNCR 60 provides:

A barrister must take care to ensure that decisions by the barrister to make allegations or suggestions under privilege against any person:

- (a) are **reasonably justified** by the material then available to the barrister;

- (b) are **appropriate** for the robust advancement of the client's case on its merits; and
- (c) are not made principally in order to **harass or embarrass** a person.

(my emphasis in bold)

As to allegations of fact see BNCR 63.

As regards submissions and opening and closing addresses, there is a requirement for a barrister's belief on **reasonable grounds** that 'the factual material already available provides a proper basis'.

For allegations of fact amounting to criminality, fraud or other serious misconduct BNCR 64 requires a barrister's belief 'on **reasonable grounds**' that:

- (a) available material by which the allegation could be supported provides a proper basis for it; and
- (b) the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.

The rule requirement for 'reasonable grounds' to be held by the barrister under BNCRs 63 and 64 are then seen to be balanced by BNCR 65 which provides:

A barrister may regard the opinion of the instructing solicitor that material which is available to the solicitor is credible, being material which appears to the barrister from its nature to support an allegation to which Rules 63 and 64 apply, as a reasonable ground for holding the belief required by those rules (except in the case of a closing address or submission on the evidence).

In cases of sexual assault, indecent assault or indecency there is a balancing effected as between BNCRs 61 and 62 for cross-examination as to credit (see BNCR 66) and as regards pleas in mitigation involving allegations of serious misconduct against others and the obligation to avoid disclosing the other person's identity directly or indirectly (unless there are reasonable grounds to believe that that disclosure is necessary for the proper conduct of the client's case) (BNCR 67).

(b) Cases that are bound to fail:

The legal practitioner who advances litigation merely in order to generate costs or fees would be acting in breach of his or her primary duty to the court.⁸

In the area of hopeless cases, Queensland Justice of Appeal Davies' reasons in *Steindl Nominees Pty Ltd v Laghaifar* [2003] QCA 157; (2003) 2 Qd R 683 deliver a very significant contribution. Davies JA rejected the statement of principle in *Ridehalgh v Horsfield* [1994] Ch 205. There, the Court of Appeal of England and Wales had adopted a cautious approach to characterising any case as hopeless, observing (234):

It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it.

The UK Court of Appeal drew a distinction between a case that was bound to fail, in contrast to the scenario of lending assistance to proceedings which are an abuse of the court's process. However, in *Steindl Nominees Pty Ltd v Laghaifar* in observations agreed in by Williams JA and Philippides J, Davies JA said:

To the extent that those statements state or imply that it is not improper for a legal representative to present a case which he or she knows to be bound to fail, I would reject them. **I would prefer to say that it is one thing to present a case which is barely arguable (but arguable nevertheless) but most likely to fail; it is quite another to present a case which is plainly unarguable and ought to be so to the lawyer who presents it.** In my opinion, with respect, it is improper for counsel to present, even on instructions, a case which he or she regards as bound to fail because, if he or she so regards it, he or she must also regard it as unarguable [24].

Davies JA proceeded to mention the bar conduct rule of the day entrenching the role of counsel's forensic judgment, to be exercised

⁸ See Ipp J (supra) 85 - 86, in particular footnote 142.

independently, notwithstanding a client's desires. See now BNCR 42, which provides:

A barrister will not have breached the barrister's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's wishes, simply by choosing, contrary to those desires, to exercise the forensic judgments called for during the case so as to:

- (a) confine any hearing to those issues which the barrister believes to be the real issues;
- (b) present the client's case as quickly and simply as may be consistent with its robust advancement; or
- (c) inform the court of any persuasive authority against the client's case.

Running a hopeless case may generate an exposure to adverse cost consequences for the legal representatives involved, if a court is satisfied there has been a serious dereliction in performance of the practitioner's duty to the court: see *McClelland v Perpetual Trustee Co Ltd* [2010] QCA 281 [23] (Holmes JA, with whom White JA and Mullins J agreed). I also mention the observations by Mansfield J in the Federal Court in *Kumar v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCA 18; (2004) 133 FCR 582 [14]. In that case Mansfield J thought it was not enough that an advocate had been arguing a hopeless case. More was required. Even so, advocates are not excused from their duty of independence and frankness to the court: *Kumar* [15]. The subsequent reasons of French J (as he then was) in the Federal Court in *Ex Christmas Islanders Association Inc v Attorney General Commonwealth (No 2)* [2006] FCA 671; (2006) 233 ALR 97, in the context of costs orders made against a solicitor advocate, collect and review what presents now as a somewhat divergent body of authority across the country, in the context of personal costs orders against legal representatives. There appears to be something of an unresolved question whether Justice Davies' observations in *Steindl* at [27] were too

robust: see French J's reasons at [13] - [20]. French J did award costs against the solicitor advocate. But he concluded:

In the present case the way in which the application was formulated and the argument presented indicated **not merely** the presentation of an **unarguable case**. It indicated a failure to discharge the practitioner's basic duty to **consider the legal issues** which should have been considered before the application was prepared and filed and before argument on it was presented to the Court [21].

(my emphasis in bold)

(c) Where a legal practitioner is or becomes aware that the client's proceedings are instituted or continued merely for the purpose of applying pressure upon a defendant, then the practitioner cannot facilitate or participate in that tactic. Specifically, the tactic of pursuing proceedings with the primary objective of exhausting the financial resources of a defendant in order to force a settlement would transgress this aspect of the duty.⁹

(iii) *The duty not to corrupt the administration of justice*

Day to day manifestations of this aspect of the duty include:

(a) In the criminal law context, that a practitioner is heavily constrained in representing a client who insists on pleading 'not guilty', if the client has made a frank admission of guilt to the practitioner prior to the trial.¹⁰ (See also BNCRs 78 and 79.)

(b) Not to participate in any dishonourable or improper conduct of the client, either in or out of court. As to when the line is approached, but not crossed, in advising bikie clients of the looming execution of a search warrant against their premises by the police, see *Legal Services Commission v Winning* [2008] QLPT 13 [25] - [26], a decision of the (former) Legal Practice Tribunal of Queensland. White J was the

⁹ See generally *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509.

¹⁰ See Ipp J's LQR observations (supra) at 87 and 99 referring in particular to the forensic embarrassment of counsel and how far the Crown's witnesses can be challenged. The leading High Court case *Tuckiar v The King* (1934) 52 CLR 335 remains the salutary example of the existence of counsel's duty both to the client and to the court. The significance of *Tuckiar* was reiterated by McHugh J in *D'Orta* [110] particularly at footnote 166.

presiding tribunal member. (I observe that Rockhampton would appear to be no place for the fainthearted practitioner.) Particular care needs to be taken in the area of tax advice.¹¹

- (c) The obligation not to participate in, introduce into evidence or rely upon an untrue affidavit sworn by a client. That is an obligation particularly applicable in relation to an affidavit of discovery in civil litigation. Whilst this is an obligation of perhaps more practical application to solicitors than barristers, it is not uncommon for advice to be sought from the Bar in respect of the ambit of discovery and privileged communications. In the LQR article Ipp J observed:

The solicitor must assist and advise his client as to the latter's bounden duty in that matter, and if the client should persist in omitting relevant documents from his affidavit, the solicitor should decline to act for him any further ... [A] solicitor owes a duty to the court to go through the documents disclosed by his client carefully, to make sure, as far as possible, that no relevant documents have been omitted from the client affidavit.¹²

- (d) Dealings with witnesses. Care obviously needs to be taken to avoid coaching or at any improper attempt to deter a witness from giving truthful evidence in a case: BNCR 68. It is permissible to prepare a witness to give coherent evidence, particularly in a commercial case involving many documents. It is proper for a trial witness to peruse and refresh from the documents, so as to be adequately prepared, both for providing a witness statement and then for giving evidence. Legitimate document familiarisation is in stark contradistinction to attempts to school witnesses by equipping them with clever responses for questions that are likely to be asked during cross-examination. Instructions about a lack of memory or the problematic consequences arising from the word 'would', are, however, legitimate.

¹¹ See generally *Forsythe v Rodda* (1989) 42 A Crim R 197, referred to by Ipp J (supra) 90.

¹² See Ipp J (supra) 90 - 91 and footnote 169 referring to *Woods v Martins Bank Ltd* [1959] 1 QB 55, 60 (Salmon J).

- (e) Barristers and solicitors must advise scrupulously as regards an assertion of a claim to legal professional (client legal) privilege. They must not connive in a 'hiding' of relevant documents under abuses of this privilege. In 2008 the Australian Law Reform Commission made ethical conduct recommendations concerning invocations of legal professional privilege, in the wake of recent notorious abuses.¹³
- (f) Actively encouraging a potential witness, defendant or accused to depart from a truthful account of events which is perceived to be 'unhelpful' or, worse still, to not give evidence at all. *Legal Practitioners Complaints Committee v Pepe* [2009] WASC 39, is an egregious West Australian example of such a transgression captured by the recording of the solicitor's phone call to a prisoner, advising, pleading and cajoling the witness not to give evidence against her client (who was also the solicitor's abusive lover). That misconduct strikes at the heart of the administration of justice. It is likely to result in the practitioner being struck from the roll, as occurred in Pepe's case.¹⁴
- (g) Speaking to the media. There are now uniform media comment rules for barristers, nationally. BNCRs 75 and 76 relevantly provide:
75. A barrister must not publish or take any step towards the publication of any material concerning any proceeding which -
- (a) is known to the barrister to be inaccurate;
 - (b) discloses any confidential information; or
 - (c) appears to or does express the opinion of the barrister on the merits of a current or potential proceeding or on any issue arising in such a proceeding, other than in the course of genuine educational or academic discussion on matters of law.
76. A barrister must not publish or take any step towards the publication of any material concerning any current proceeding in

¹³ See ALRC Report 107 (February 2008) including recommendations 9-1 to 9-6 inclusive.

¹⁴ See *Legal Practitioners Complaints Committee v Pepe* [2009] WASC 39 [36], [37] and [39] (Murray and Beech JJ).

which the barrister is appearing or any potential proceeding in which a barrister is likely to appear, save that:

- (a) a barrister may supply answers to unsolicited questions concerning a current proceeding provided that the answers are limited to information as to the identity of the parties or of any witness already called, the nature of the issues in the case, the nature of the orders made or judgment given including any reasons given by the court and the client's intentions as to any further steps in the case;
- (b) a barrister may, where it is not contrary to legislation or court practice and at the request of the client or instructing solicitor or in response to unsolicited questions supply for publication -
 - (i) copies of pleadings in their current form which have been filed and served in accordance with the court's requirements;
 - (ii) copies of affidavits or witness statements, which have been read, tendered or verified in open court, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection;
 - (iii) copies of transcript of evidence given in open court, if permitted by copyright and clearly marked so as to show any corrections agreed by the other parties or directed by the court; or
 - (iv) copies of exhibits admitted in open court and without restriction on access.

(BNCR 77 concerns advice to a client about media comment.)

In Western Australia, the Legal Profession Conduct Rules 2010, made by the WA Legal Practice Board under ss 577, 578 and 579 of the *Legal Profession Act 2008*, contain r 43 which deals with public comment. It provides for WA legal practitioners:

- (1) Except as otherwise provided in this rule, a practitioner may -
 - (a) participate in any lecture, talk or public appearance; or
 - (b) participate in any radio, television or other transmission; or
 - (c) contribute to any written or printed publication.

- (2) A practitioner must not publish or take steps towards the publication of any material concerning current proceedings that may prejudice a fair trial or otherwise subvert or undermine the administration of justice.
- (3) A practitioner must not participate in or contribute to a forum of a type referred to in subrule (1) if the forum is, in whole or in part, about a matter in which the practitioner is or has been professionally engaged unless -
 - (a) participation is not contrary to the interests of the client; and
 - (b) the practitioner gives a fair and objective account of the matter in a manner consistent with the maintenance of the good reputation and standing of the legal profession; and
 - (c) if the forum is of a type referred to in subrule (1)(b), the client has given informed consent.

Discussion about these rules could occupy an entire weekend. By highlighting them, can I simply observe:

- (i) the balance the rules seek to strike between freedom of speech and the integrity of the curial process;
- (ii) the embodied recognition in the rules that, in the main, justice should be administered transparently;
- (iii) the objective that the wider public be accurately informed as to what takes place in litigious proceedings and that the media be assisted, to the extent feasible, towards achieving accuracy in their reports of curial proceedings;
- (iv) recognition of a tension as between a client's aspiration that an eloquent senior and respected barrister can provide a public vindication for their position, which is balanced against the independence and paramount duty the barrister owes to the court in the administration of justice.

In this area I mention two cases, one from Western Australia and one from Queensland. Both arise out of the arrest and conviction in Bali of Schappelle Corby. The Western Australian case concerned senior counsel who had been engaged for Corby pro bono under a direct brief. *Legal Practitioners*

Complaints Committee and Trowell [2009] WASAT 42 is a decision of the Western Australian State Administrative Tribunal (SAT) comprising Judge Eckert, Mr Edmonds SC and Ms Holland, delivered 13 March 2009.

The second decision is by the Queensland Legal Practice Tribunal in *Legal Services Commissioner v Tampoe* [2009] QLPT 14, in a Tribunal presided over by Atkinson J.

In both cases the essence of the transgression (for senior counsel and the practitioner respectively) appears not so much to have been the making of a media statement per se. Rather the emerging problem was the disclosure of the client's confidential information in doing that: see BNCR 75(b).

The decisions highlight obvious risks associated with speaking outside of court (defamation liability and contempt of court being other risks).

In *LPCC and Trowell* there is a fascinating discussion concerning whether there is an obligation to speak out in circumstances of perceived illegal activity. That case saw an assertion that some persons, within Corby's Indonesian team of advisers, had made a proposal that they should bribe Indonesian appeal court judges and that funds were being solicited on Corby's behalf in Australia to further that unlawful end. The Tribunal said:

However ... disclosure by a lawyer of such confidential information could only be **justified if made to the appropriate authority** or otherwise in accordance with the exceptions to [the applicable rule]. It is **difficult to see how it could justify publication to the press** [384].

(my emphasis in bold)

In *LPT v Tampoe* the solicitor concerned became the subject of the Tribunal's recommendation that his name be struck from the roll of legal practitioners. His participation in a television interview on the Channel 9 programme 'Sunday' and subsequent participation in a documentary about the Corby case, had both been problematic. In the first interview he had disclosed confidential material. The Tribunal observed (5):

It is fundamental to the relationship between solicitor and client that the legal practitioner will not reveal confidential information. It is hard to think of a more egregious breach than to do so on a national television programme.

In a second interview, the practitioner was found to have made scandalous and offensive remarks, likely to bring the profession into disrepute. Their 'X' rated content inhibits me from traversing them: see pages 1 - 6 of the reasons.

Potential to be wedged between the Devil and the Deep Blue Sea by media comments must be recognised. In *MG v The Queen* [2007] NSWCCA 57; (2007) 69 NSWLR 20, a New South Wales Appeal Court comprising McClellan CJ at CL, Bell and Hoeben JJ, considered the then New South Wales barristers' conduct rule as to media statements (r 59) [36], which in terms is on all fours with BNCR 76. Remarks by a prosecutor at a public lecture demonstrated a bias, sufficient to sustain a stay of a retrial of a serious sexual assault case, until the prosecutor was replaced: see [85] - [89].

Having said that, there may be occasions in which a proper informative public comment can be appropriate, as the work of Queensland solicitor, Peter Russo, and local silk, Stephen Keim SC, demonstrated by their representation of Dr Mohamed Hanif in proceedings well known in Queensland: see Media Statement of the Queensland Legal Services Commission of 1 February 2008 at www.lsc.qld.gov.au. In that case, conduct complaints were dismissed against senior counsel although an infringement of the equivalent of BNCR 76(b) was acknowledged.

(iv) *The duty to conduct cases efficiently and expeditiously*

This aspect of the lawyer's obligation to the court was described by Ipp J as 'a reflection of the current changes in community attitudes and standards'.¹⁵ It is a responsibility which nowadays is of greater importance than ever. The day

¹⁵ See Ipp J (supra) 65 and footnote 15.

to day implications of the duty are numerous, but as to practicalities, could I mention:

- (a) The obligation not to take on a case as an advocate in circumstances where the barrister is plainly unqualified for the complexity of the task or has an inadequate knowledge of the area of law concerned. In a Queensland Legal Practice Tribunal decision, *Legal Services Commission v Scott* [2009] LPT 7, a practitioner commenced a class action arising out of the Patrick Stevedores waterfront dispute of the late 1990s. Fryberg J observed that the practitioner was 'out of his depth': see [22]. That comment was as to the magnitude of the litigation and the nature of the clients (described as 'difficult'). There, the clients' instructions to the practitioner were particularly robust, see [22]. The adverse consequences for clients and the court of a legal practitioner, barrister or solicitor, 'biting off more than they can chew', are self-evident.
- (b) As a corollary, legal practitioners - and, I think, barristers in particular - have a responsibility not to accept an engagement under brief, in circumstances where they are simply too busy or overcommitted to enable them to perform their task to an acceptable standard. A solicitor or client confronted with a handover scenario caused by the barrister's own difficulties should not be asked to bear the cost of the barrister's over-commitment.
- (c) The obligation to facilitate the timeous meeting of case management directions rather than treat court directions as little more than aspirational objectives, to be ignored with impunity. Orders and directions of a court must be respected in the interests of justice. Otherwise the system grinds to a halt.
Commercial courts are very well acquainted with the pressures of modern practice. In my experience, we will readily accommodate a

properly grounded request/application for a timing variation in orders or directions if made.

So, where a direction or order cannot be met for a reason of good moment, the court should usually be approached with an explanation, provided under affidavit (if possible), which explains the default (or the looming default) and seeks the court's indulgence by a variation of the order.

- (d) Self-evidently, but (regrettably) still needing to be articulated, is the situation where a barrister gives a personal undertaking to the court. That is an occasion of the utmost seriousness. The undertaking should never be lightly made or, if given, ought be scrupulously honoured in its performance. The cavalier attitude sometimes seen that attaches little importance to honouring such undertakings is never to be countenanced.
- (e) Since 1998, when Justice Ipp made the LQR observations concerning this duty to conduct cases efficiently and expeditiously, the electronic communication revolution has intensified. But rather than leading to a reduction of the amount of documentary material placed before courts, the modern ease of marshalling information stored electronically has just meant that more documents than ever are being trawled over and then dumped on courts.

The BNCRs reflect a modern and critical need for the independent role of the barrister to assist by curtailing what is now 'out of hand' by reason of sheer information overload on everyone. Sadly, oppressive volumes of documents are routinely assembled without a discriminating mind being applied to their relevance or utility in the litigation.

Given an overload problem everyone acknowledges, I note those BNCRs which emphasise the independence and forensic judgment of the barrister, above the wishes of the client.

First, see BNCR 5(e):

These rules are made in the belief that barristers should exercise their forensic judgments and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients;

Next, see BNCR 42:

A barrister will not have breached the barrister's duty to the client, and will not have failed to give appropriate consideration to the clients or the instructing solicitor's wishes, simply by choosing, contrary to those desires, to exercise the forensic judgments called for during the case so as to:

- (a) confine any hearing to those issues which the barrister believes to be the real issues;
- (b) present the client's case as quickly and simply as may be consistent with its robust advancement.

Then see BNCR 57, which is in affirmative terms for barristers:

A barrister must seek to ensure that work which the barrister is briefed to do in relation to a case is done so as to:

- (a) confine the case to identify issues which are genuinely in dispute;
- ...
- (c) present the identified issues in dispute clearly and succinctly;
- (d) limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case; and
- (e) occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case.

Recent observations by Pembroke J in *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822 [19] - [22] under the heading 'Duty to Court' are pertinent. His Honour referred to counsel's duty to inhibit litigants from using their evidence as an opportunity to 'unburden themselves in unmanageable detail of the many facts which have preoccupied them in the years preceding the hearing of their case'. Justice Heydon's article ('Reciprocal Duties of Bench and

Bar') was mentioned in this respect towards his Honour's cry for a curtailment of the 'strictly adversarial approach': see [22].

There is now ample power, incentive and, I would suggest, protection for barristers, whilst remaining appropriately cognizant of a litigant's interests, to 'flex their muscles' as true quality controllers in relation to the issues, documents and evidence brought before the court.

(F) Conclusion

One of my colleagues recently observed that, from a practical perspective, once the true character of a lawyer's duty to the court is appreciated, its implementation in terms of advancing the interests of a client should rarely be a problem. This was because, in the end, he believed that the duty of loyalty owed to a client (or instructing solicitor) and the duty of loyalty owed to the court both advance the same object, namely the interests of justice.

No doubt 'on the ground' day to day tensions will arise. A fearlessly independent Bar plays an indispensable role recognising and then delivering a proper prioritisation of objectives in situations where these obligations are perceived to clash, or jar.

The indispensable role of an independent Bar, as an unshackled 'quality controller' in a pursuit of honourable standards of professional conduct, in an honourable legal profession is, today, more important than ever.

The Hon Justice Kenneth Martin