LAW SOCIETY OF TASMANIA LITIGATION CONFERENCE 2021

ETHICS AND COURT APPEARANCES

In his 2012, article *Between the Devil and the Deep Blue Sea: Conflict between Duty to the Client and Duty to the Court*[1], my colleague and fellow Australian Bar Association advocacy instructor, Justice Kenneth Martin of the Western Australian Supreme Court, discusses the unique responsibility of a legal practitioner. That is, the paramount duty to the Court which prevails even over that of the practitioner's duty to his or her client. The article repays reading.

As Martin J noted, the position of a legal practitioner is unique among professionals. This was recognised by McHugh J in the High Court in *D'Orta-Ekenaike v Victoria Legal Aid*[2] where his Honour said:

> 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 …

This paramount duty to the Court is now enshrined as rule 7 of the *Legal Profession (Solicitor's Conduct) Rules* 2020 ("the Rules"), found in Part 2 under the heading "Division 2 - Fundamental duties of solicitors". The Rules define the term "solicitor" in a singularly unhelpful and circular fashion, as an Australian legal practitioner "who practises as or in the manner of a solicitor". Solicitors in this State regularly act as counsel before the Court.

That rule, which came into effect on 1 October 2020, provides as follows:

> **7 Paramount duty to court and administration of justice (ASCR 3)**
> A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

Rule 7 may be contrasted with rule 8 which enumerates "other fundamental ethical duties", which includes the, clearly subjugated, duty to act in the best interests of a client. That rule provides as follows:

> **8 Other fundamental ethical duties (ASCR 4)**
> A solicitor must also –
> (a) act in the best interests of a client in any matter in which the solicitor represents the client; and
> (b) be honest and courteous in all dealings in the course of legal practice; and
> (c) deliver legal services competently, diligently and as promptly as reasonably possible; and
> (d) avoid any compromise to his or her integrity and professional independence; and
> (e) comply with these rules and the law.

Both rules codify a solicitor's relevant ethical duties, but if you examine them, they are very open textured. What is an offending lack of courtesy? What is an offending lack of competence or diligence? What is an offending compromise of professional independence?

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1 Vol 35, 3 Australian Bar Review, page 252.

2 [2005] HCA 12, 223 CLR 1, [111] - [113].

I suggest that it will still be necessary to understand the common law sources of the relevant obligations, in order to understand the reach of the rules, notwithstanding that the obligations were developed, in the main, with regard to the conduct of barristers.

The best-known exposition of the parent duties is in *Rondel v Worsley*[3]. It was there said that every counsel has a duty to his or her client to fearlessly raise every issue, advance every argument, and ask every question, however distasteful, which he or she thinks will help the client's case. However, importantly, it was also said that, all of that notwithstanding, the overarching principle is that counsel must not mislead the court.

The two duties in *Rondel v Worsley* break down into a subset comprising all of the well-known ethical guidelines relevant to appearing in court, and they underpin the new Rules. You no doubt have now all read the Rules. However I sometimes think that recognizing the duties and observing them in practice when they arise, can prove to be difficult for anyone, as the factual scenarios can be very complex.

As Martin J said in a paper he gave to the Legal Theory and Ethics Course at the University of Western Australia on 17 August 2015, entitled *Legal Ethics: Navigating the daily minefields*[4], any attempt at a comprehensive written codification is likely to fail as real ethical problems are invariably subtle. Few legal practitioners are likely to be troubled by the question of whether or not it is permissible to steal moneys from a client's trust account. Anyone troubled by the negative answer to that question does not have a future anywhere - let alone in the law. His Honour notes that the ethical problems that emerge in legal practice are usually more nuanced.

A very recent example can be found in the very recent High Court decision of *Charisteas v Charisteas.*[5]

In that case, the High Court allowed an appeal from the Full Court of the Family Court of Australia, dismissing an appeal from the Family Court of Western Australia. One of the questions for determination was whether the Family Court's orders should be set aside on the ground of apprehended bias.

The appellant ("the husband") and the first respondent ("the wife") married in 1979 and separated in 2005. In 2006, the husband commenced proceedings under s 79 of the *Family Law Act* 1997 (WA) for orders settling the property of the parties to the marriage. In 2018, Crisford J made orders for the settlement of property.

In May 2018, in response to an enquiry from the husband's solicitor, the wife's barrister disclosed that, between March 2016 and February 2018, she had communicated with the trial judge in person, by telephone and by text, although she said they had not discussed the substance of the case. The communications took place otherwise than in the presence of or with the previous knowledge and consent of the other parties to the litigation.

The husband appealed the 2018 property orders on grounds which included apprehended bias. By majority, the Full Court dismissed the appeal.

The High Court held that the orders should be set aside on the ground of apprehended bias.

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3 [1969] 1 AC 191 at 227.

4 Published in the October 2015 issue of *Brief* magazine, the journal of the Western Australian Bar.

5 [2021] HCA 29.

The apprehension of bias principle is that a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

Once a case is underway or about to get underway, ordinary judicial practice is that, save in the most exceptional of cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party.

The High Court said that there were no exceptional circumstances in the case and that the communications should not have taken place. A fair-minded lay observer would reasonably apprehend that the trial judge might not bring an impartial mind to the resolution of the questions Crisford J was required to decide.

Now, while that appeal succeeded on the ground of apprehended bias, the flip side of the coin is that the barrister should never have made the communications, and to do so was clearly unethical – even if they did not involve the substance of the case.

That scenario is not set out in the Rules but it is one that could easily arise unwittingly when members of a small profession mingle with judges at meetings and dinners or even as innocently as in the course of, the now commonplace, email communications between a solicitor and a judge's associate, if they fail to copy in the opposing party's solicitor.

As Kitto J said in *Ziems v The Prothonotary of the Supreme Court of New South Wales*[6], as to the importance of barristers as functionaries in the legal system:

> A barrister is more than his client's confidante, 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.

Although not related to appearing in court, another, bizarre, example of unthinkingly falling into an, initially at least, less than obvious ethical trap, is instanced by Martin J in his paper[7]. Less than obvious particularly if you are young and in love.

The case concerned the State Administrative Tribunal of Western Australia's determination and orders, made in respect of a Legal Profession Complaints Committee of Western Australia complaint concerning a practitioner, Mr M.

The practitioner accepted he had transgressed by acts of professional misconduct concerning conduct involving his girlfriend/fiancée/wife, Ms T, who had become a legal practitioner at a different firm.

Mr M, in the end, accepted a penalty of a four-month suspension of his annual practising certificate, and he agreed to pay the LPCC's costs of bringing the complaint, fixed in the amount of $12,000. As the matter was effectively "settled", there are no published reasons of the SAT panel.

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6 (1957) 97 CLR 279 286 at 256.

7 Which his Honour has kindly permitted me to reference.

The practitioner was a senior associate employed by his law firm, A. His girlfriend/fiancée/wife was employed at another Perth commercial law firm, D. I will go into the detailed transgressions because some at least on their own could clearly occur somewhat unthinkingly as opposed to deliberately unethically.

Whilst they were engaged at their separate firms, Ms T often sent the practitioner email requests for assistance with her legal tasks at her firm. She would send Mr M copies of correspondence and other documents, thereby disclosing information that was highly confidential within Ms T's firm concerning its clients, or was even the subject of legal professional privilege as advice given in favour of the clients of Ms T's firm.

For the purposes of assisting her with her requests, the practitioner would often send her copies of correspondence and documents that disclosed information confidential within his firm, or to its clients being the subject of legal professional privilege in favour of the clients of law firm A. As part of the private assistance which he rendered Ms T in response to her requests he:

(i) drafted or settled her correspondence;

(ii) drafted, or procured others to draft, research memoranda;

(iii) drafted, or settled, her pleadings, affidavits or other court documents

and he did so in the knowledge that Ms T would represent to her firm that the material which she had received back from Mr M and others at law firm A, was her own work.

In the course of providing assistance he would also routinely provide Ms T with:

(i) precedents;

(ii) internal legal research memoranda; and

(iii) professional development documents

which were all the property of law firm A and provided without the permission of anyone at law firm A.

Mr M also from time to time provided Ms T with:

(i) copies of journal articles;

(ii) copies of reported and unreported cases; and

(iii) copies of statutes

when he knew this was unauthorised.

One of the more extraordinary acts by the practitioner was his utilisation of the firm's facilities without permission to post out his engagement party invitations utilising the practitioner's firm mail system and facilities, such that the practitioner's firm paid for the postage in respect of the invitations.

Martin J said of this case:

> The underlying facts are unusual, indeed bizarre. This was no 'Adam's Rib' situation - referring to the 1949 Spencer Tracey and Katharine Hepburn classic film.

> The present facts display, very tragically, in my view, a basal violation of numerous professional conduct obligations that ought to have been blindingly obvious to a clear-headed, right-thinking legal practitioner. Vital considerations such as client confidentiality, conflict of interest, basic truthfulness and honest dealing, all seem to have been ignored … Perhaps the excuse was that the practitioner was youngish and was blinded by love.

Another sometimes difficult area of ethics is the independence of counsel. Where independence of counsel may be undermined, then counsel must not act for the client. This clearly occurs where counsel may have previously acted for the opposite party or may be a witness in a case, or where there is a classic conflict such as a personal interest, one way or another, in the outcome of the case.

Less obvious perhaps, as a threat to independence, are personal or professional relationships which are so close as to potentially compromise counsel's duty to the court. In-house counsel, for example might lack true professional detachment from their organization, depending on the nature of the case. Changing sides is also a particularly fraught area.

One of the case studies canvassed by Martin J in his paper contrasts effectively two distinct outcomes in the context of legal conflicts of interest for scenarios of changing sides. The two cases he contrasts are, first, *Fordham v Legal Practitioners' Complaints Committee*[8], and *Ismail-Zai v Western Australia*[9]

The latter decision contains a comprehensive discussion by then Steytler P of the Court of Appeal and Wheeler JA and Heenan AJ, concerning an appeal against conviction.

As Martin J notes, this was a somewhat unusual case where the accused had faced a charge in the District Court of aggravated robbery with violence. He gave evidence at his trial and he was cross-examined.

Essentially, his defence was one of misidentification.

It emerged after all the evidence had been completed and the jury had retired, that the accused had then informed his counsel that he had been nervous whilst giving evidence because he came to realise that the prosecutor at his trial, a Mr H, had previously represented him some 20 months earlier, and "knew all about his background".

The accused said that he had not at first recognised the prosecutor at the District Court trial (as the prosecutor had been robed and was wearing a wig). An application for a discharge of the jury was refused by the trial judge at the time in the District Court.

The prosecutor fully accepted that about two years previously he had appeared for the accused in the Court of Petty Sessions. He had then made submissions on a plea of mitigation following pleas of guilty to 10 charges of fraud, three charges of stealing and three driving offences. That was all over about 20 months before the appellant's trial. However, the accused did not pay his account to Mr H. It went to debt collectors.

Consistently with the purpose of the pleas in mitigation, the accused said that he had at the time earlier disclosed to his lawyer (later his prosecutor) information about his education, work earnings and family circumstances, and how he was "not a thief".

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8 (1997) 18 WAR 467.

9 [2007] WASCA 150, 34 WAR 379.

In the end, the jury convicted. There was an appeal on this conflict ground. It failed.

The Court of Appeal's reasons contain an extensive consideration of the aspects of a legal practitioner's fiduciary duty of loyalty, in a context of assessing whether it can survive the termination of a retainer. As part of that assessment, an evaluation of the use of the information imparted to a legal practitioner in circumstances of confidentiality, arose.

The Court of Appeal rejected the contention that there had been a miscarriage of justice. But Wheeler JA[10] said:

> I would unhesitatingly accept that the conduct of a prosecution by counsel who had previously acted for an accused could well give rise to a miscarriage of justice. Even where no specific confidential information is relevant, and even where nothing in the transcript suggests that an accused has not been able to give a good account of himself, in my view, the trial would be unfair if the prosecutor were able to cross examine from a 'position of unfair superiority'.

In the circumstances, however, no member of the court thought that the line had been crossed in that case. The prosecutor had failed to remember the appellant. The inability to recognise the former client emphasised the brevity of their previous connection.

Wheeler JA also said[11]:

> However, whether there is such an unfairness depends upon the nature and degree of previous familiarities. It cannot arise from every former retainer, however brief, remote in time, or unrelated in subject matter.

In *Fordham* in 1997, however, the line was found to be crossed.

The appellant had effectively moved from representing one accused to represent a different accused, within a relatively short period of time concerning the same trial. She then conducted a cross-examination of the first accused about his financial affairs and prior convictions.

It was contended that the cross-examination had not used confidential information obtained from the accused when he was initially her client but, rather, was based on information supplied by a newspaper reporter during the trial and from other sources which were public.

There was a finding of unprofessional conduct by the practitioner continuing to act for the second accused client as she knew or ought to have known that there was a conflict of interest between the two accused, and that a duty to each was likely to conflict.

Martin J reconciles these two cases in his paper, as follows:

> In *Fordham's* case, there emerged issues concerning the use of confidential information given to a practitioner by a former client to advance the interests of a new client, to the detriment of the first.
>
> Again, an appreciation of the stringent fiduciary duty of fidelity and loyalty owed by a fiduciary to the person whose interests they undertake to advance over their own would have resolved this ethical problem. *Fordham's* case was referred to by the Court of Appeal in *lsmail-Zai*, but was distinguished: see par (24] per Steytler P and par [71] per Heenan AJA.

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10 at [53].

11 at [54]

> Sometimes the line is grey. That is particularly so in so-called 'Chinese wall' situations that you will no doubt encounter ...

Next, it must be recognised, I think, that counsel, be he or she solicitor or barrister, is independent in presenting a client's case and must not misuse court time. This means that counsel must refrain from irrelevant cross–examination and from pursuing submissions that are really unarguable, even though *the client may wish to chase every rabbit down its burrow*, as Mason CJ put it in *Giannarelli v Wraith*[12].

That rule, itself stemming from the second limb of *Rondel v Worsley*, forms the basis for a number of the rules appearing in Division 4 of the new Rules, entitled – "Advocacy and litigation".

That Division provides, relevantly for present purposes:

> **22 Independence – avoidance of personal bias (ASCR 17)**
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> (1) A solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client or of the instructing solicitor (if any) and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's instructions where applicable.
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> (2) A solicitor will not have breached the solicitor's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's instructions, simply by choosing, contrary to those instructions, to exercise the forensic judgments called for during the case so as to –
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> (a) confine any hearing to those issues which the solicitor believes to be the real issues; or
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> (b) present the client's case as quickly and simply as may be consistent with its robust advancement; or
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> (c) inform the court of any persuasive authority against the client's case.
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> (3) A solicitor must not make submissions or express views to a court on any material evidence or issue in the case in terms which convey or appear to convey the solicitor's personal opinion on the merits of that evidence or issue.
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> (4) A solicitor must not become the surety for the client's bail.
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> **23 Formality before court (ASCR 18)**
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> A solicitor must not, in the presence of any of the parties or solicitors, deal with a court on terms of informal personal familiarity which may reasonably give the appearance that the solicitor has special favour with the court.
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> **24 Frankness in court (ASCR 19)**
>
> (1) A solicitor must not deceive or knowingly or recklessly mislead the court.
>
> (2) A solicitor must take all necessary steps to correct any misleading statement made by the solicitor to a court as soon as possible after the solicitor becomes aware that the statement was misleading.
>
> (3) A solicitor will not have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by the opponent or any other person.
>
> (4) A solicitor seeking any interlocutory relief in an ex parte application must disclose to the court all factual or legal matters which –
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> (a) are within the solicitor's knowledge; and
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> (b) are not protected by legal professional privilege; and

[12] (1988) 165 CLR 543 at 556.

(c) the solicitor has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.

(5) A solicitor who has knowledge of matters which are within subrule (4) –

(a) must seek instructions for the waiver of legal professional privilege, if the matters are protected by that privilege, so as to permit the solicitor to disclose those matters under subrule (4); and

(b) if the client does not waive the privilege as sought by the solicitor –

(i) must inform the client of the client's responsibility to authorise such disclosure and the possible consequences of not doing so; and

(ii) must inform the court that the solicitor cannot assure the court that all matters which should be disclosed have been disclosed to the court.

(6) A solicitor must, at the appropriate time in the hearing of the case if the court has not yet been informed of that matter, inform the court of –

(a) any binding authority; and

(b) where there is no binding authority, any authority decided by an Australian appellate court; and

(c) any applicable legislation –

known to the solicitor and which the solicitor has reasonable grounds to believe to be directly in point, against the client's case.

(7) A solicitor need not inform the court of matters within subrule (6) at a time when the opponent tells the court that the opponent's whole case will be withdrawn or the opponent will consent to final judgment in favour of the client, unless the appropriate time for the solicitor to have informed the court of such matters in the ordinary course has already arrived or passed.

(8) A solicitor who becomes aware of matters within subrule (6) after judgment or decision has been reserved and while it remains pending, whether the authority or legislation came into existence before or after argument, must inform the court of that matter by –

(a) a letter to the court, copied to the opponent, and limited to the relevant reference unless the opponent has consented beforehand to further material in the letter; or

(b) requesting the court to relist the case for further argument on a convenient date, after first notifying the opponent of the intended request and consulting the opponent as to the convenient date for further argument.

(9) A solicitor need not inform the court of any matter otherwise within subrule (8) which would have rendered admissible any evidence tendered by the prosecution which the court has ruled inadmissible without calling on the defence.

(10) A solicitor who knows or suspects that the prosecution is unaware of the client's previous conviction must not ask a prosecution witness whether there are previous convictions, in the hope of a negative answer.

(11) A solicitor must inform the court of any misapprehension by the court as to the effect of an order which the court is making, as soon as the solicitor becomes aware of the misapprehension.

(12) A solicitor must alert the opponent and if necessary inform the court if any express concession made in the course of a trial in civil proceedings by the opponent about evidence, case-law or legislation is to the knowledge of the solicitor contrary to the true position and is believed by the solicitor to have been made by mistake.

Rule 22 is the first, and obviously one of the most important of these rules in Division 4. It stems of course from cases like *Rondel v Worsley* (above) and *Giannarelli v Wraith* (above). However to stipulate, as the rule does, that a "solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client or of the instructing solicitor (if any) and must exercise the

forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's instructions where applicable" is a very large statement.

Even with the inclusion in r 22(2) of express permission to choose, contrary to instructions, to exercise the forensic judgments called for during a case, the rule covers a large area of legal territory, and once again really cannot be easily recognised and implemented in practice without reference to the legal principles that preceded the rule.

In his article entitled *The Ethics of Independence: Running your own case* [13] Craig Colvin SC, a former President of the Western Australian Bar, notes that sometimes your clients want to take a highly active role as to how their case is to be conducted, but he warns, the overriding legal principle is that:

> All clients are entitled to express their wishes about the conduct of a case and have them considered by their lawyers. They are also entitled to an explanation as to what is being done and why. However, it is improper for a lawyer to act as the mere mouthpiece of a particular client in court. It is up to the lawyer to decide what is to be said and done in court. The same goes for all written submissions and other documents filed in court.
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> All decisions about how to run a court case must be made by the lawyer and not by the client … All these forensic decisions are matters for the lawyers responsible for the conduct of the case in court. It is an important responsibility of lawyers to make their own independent decisions about how to run the case. Those decisions must be guided by the duties of lawyers as officers of the court, not by instructions from the client.
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> Sometimes this obligation may be difficult to communicate to a client. However, it is of fundamental importance. The court process is part of the government of a civil society. Judges depend upon lawyers fulfilling their duties as court officers to be able to conduct court proceedings that are fair and efficient. The duty of lawyers to the court is paramount and must be performed even if the client gives instructions to the contrary.

I have already referred to part of what Mason CJ said in *Giannarelli v Wraith*. However the full text of the relevant passage is as follows[14]:

> The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary ... the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which there is an eye, not only to the client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow ... in general, the litigant will be represented by a lawyer who, not being a mere agent for the litigant, exercises an independent judgment in the interests of the court.

So what is involved in putting this principle into practice?

In *Steindl Nominees Pty Ltd v Laghaifar*[15], the Queensland Court of Appeal put it this way:

> 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.

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13 Published in the October 2015 issue *Brief* magazine.

14 At 556-7, quotation also edited for gender inclusiveness.

15 [2003] 2 Qd R 683 at [24], Davies JA with whom Williams JA and Philippides J agreed.

As Colvin points out in his article, examination of the nature of the independent obligation on a solicitor not to bring a hopeless case most often arises where special costs orders are sought.

In *re The Black Stump Enterprises Pty Ltd and Associated Companies (No 212)*[16], the Court of Appeal in New South Wales referred to *Steindl* with apparent approval in deciding whether to order the lawyers to pay the costs of an appeal. The view was then expressed that one of the difficulties for a court when applying those authorities was in making an assessment whether it was the solicitor or the client who was the real cause of the problem.

Colvin notes that it is difficult to see in the light of new conduct rules and case management practices, how a practitioner could blame the client for insisting upon bringing a hopeless case or appeal where there is an obligation upon the practitioner to exercise an independent judgment as to whether there is a real issue to advance.

However, the authorities concerning indemnity costs orders against parties to litigation were summarised by the Court of Appeal in Western Australia in *Swansdale Pty Ltd v Whitcrest Pty Ltd*[17]. There the Court observed:

> To obtain an indemnity costs order, it is not the case that the successful party needs to show a collateral purpose, or establish some species of fraud against the unsuccessful party. In *J-Corp* … French J by reference to the observations of Woodward J in *Fountain Selected Meats* said:
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> It is sufficient, in my opinion, to enliven the discretion towards such costs that, for whatever reason, a party persists in what should on proper consideration be seen to be a hopeless, case.
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> …
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> Competing principles need to be balanced in assessing the making of a potential award of indemnity costs. In *Quancorp* … Wheeler J observed:
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> On the one hand, a party should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain....
>
> It is inappropriate that a case be too readily characterised as 'hopeless' so as to justify an award of indemnity costs to the successful party. However, where a party has by its conduct unnecessarily increased the cost of litigation, it is appropriate that the party so acting should bear that increased cost. Persisting in a case which can only be characterised as 'hopeless' is an example of the type of conduct which may lead the court to a view that the party whose conduct gave rise to the costs should bear them in full.[18]

The remaining rules set out in Division 4 of the Rules are quite explicit and require little explanation, even if time permitted.

I will mention only a few issues that lie at the fringes of the relevant rules and may be helpful, and also touch briefly on the issue of mediations.

It is now well understood that counsel's duty to the court prevents him or her withholding authorities that are contrary to his or her client's case. But less well recognized is the obligation to be adequately prepared as counsel and armed with reasoned argument and with relevant authorities – not just textbooks, I might add.

You must not simply assert propositions or make submissions without having conducted a considered review of the law and an analysis of the cases. To leave the judge to do all the work and then to be

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16 [2006] NSWCA 60.

17 [2010] WASCA 129.

18 *Swansdale* at [10] (footnotes omitted).

caught out overlooking elementary legal principles will result in you being labelled by the Court as untrustworthy and unethical.

The same goes as to the facts of the case. Counsel must not be a party to the presentation of evidence that is false or misleading. And of course a failure to disclose can result in presenting a half-truth.

Although it arose in the context of mediation, in *Legal Services Commissioner v Mullins*[19], Byrne J found a barrister guilty of intentional and fraudulent deception by remaining silent during negotiations about his client's reduced life expectancy brought about by the recent onset of very significant secondary cancers and the commencement of chemotherapy.

Incidentally, I think that the topic of ethical limits in negotiations and in mediation is much neglected. If you are interested, there are two very good papers available on the internet - *Effective and Ethical Negotiations* by Campbell Bridge SC, published in February 2011; and *The Ethical Limits of Advocacy in Mediation* by Robert Angyal SC, published in May 2011.

Care must also be taken to decide whether evidence with which you are presented as counsel has been illegally obtained, for example by covert recordings of telephone conversations, or improperly obtained emails or documents, and if so, what to do about it.

Obviously counsel must never advise that evidence be illegally obtained, but if presented with such evidence it must be borne in mind that legal professional privilege does not apply, and the required disclosure of the material to the other side may prejudice or harm your client by revealing unlawful activity, see *Dubai Aluminum v Al Alawi*[20].

As to witnesses, I expect that everyone appreciates that there is no property in a witness, including an expert witness; that you should not confer with witnesses together, other than perhaps some interdependent expert witnesses, and that no witness may be coached, including an expert witness.

Understand also though that precisely the same rationale that produces those rules, namely the protection of the integrity of evidence, underpins the rule that prohibits counsel from conferring with a witness, including an expert witness, under cross-examination. The relevant rule does not extend to re-examination but care should be taken there also.

There are now specific rules about the integrity of evidence, but if you would like to read more in the area of dealing ethically with expert witnesses, there is a very useful paper by Declan Kelly SC and Dan Butler presented to a Bar Association of Queensland seminar on ethics on 1 December 2010, entitled, unsurprisingly, *Ethical Considerations in Dealing with Experts*. It is published online in *Hearsay*, the journal of the Bar Association of Queensland. There is also an article in the Autumn 2013 edition of our own Law Society's *Law Letter* by G Blake SC and P Doyle-Gray entitled *Can Counsel Settle Expert Reports?*

Now, again I think that it is universally understood that a lawyer to whom a client has made a confession of guilt may nonetheless continue to represent the client if he or she wishes to plead "not guilty", and indeed, subject to the new Rules, must continue if the confession is made during the course of the trial. However, the obverse seems less well appreciated, that is, the situation that arises where the client denies guilt, but wishes to plead "guilty".

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19 [2006] LPT 012.
20 [1999] 1 WLR 1964.

In that situation, counsel is not ethically prevented from representing the client on the plea in mitigation, notwithstanding that it would, at first blush, appear to amount to misleading the court. In *Meissner v The Queen*[21] Brennan J (as he then was), Toohey and McHugh JJ explained that a person charged with an offence is at liberty to plead guilty or not guilty to the charge whether or not that person is in truth guilty or not guilty.

The plurality in *Meissner* went on to explain that there is no miscarriage of justice in a court acting on such a plea of guilty entered in open court by a person who is of full age and sound mind, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea.

People have all sorts of good reasons for wishing to plead guilty and get a matter over and done with, but in order for it to be a free choice it must be an informed choice and it must be in their best interests. Counsel should seek to ascertain the reasons for the client wishing to enter such a plea, and should also advise the client of the prospects of an acquittal on a plea of not guilty, and of the consequences of a guilty plea, including the fact that the plea of guilty is an admission of all of the elements of the offence, and that any plea in mitigation must accept those elements as proved and cannot be quibbled with.

It is also well established that counsel must not, without his or her client's instructions, disclose to the court the client's prior convictions of which the prosecution, and thus the court, is unaware. However, it must be remembered also that counsel must not in any way imply to the court that there are in fact no prior convictions.

Observing this ethical rule however, may sometimes have concealed ramifications for the client.

The English Bar Standards Board takes the view that where counsel is aware of previous convictions, he or she should give clear advice as to the options.

Counsel should, firstly, inform the defendant that information as to the previous conviction will remain confidential unless the client waives privilege.

Second, counsel should inform the defendant that nothing can be said as to the defendant's record which expressly or even impliedly adopts the position outlined by the prosecution, as to the absence of convictions; or as to the absence of convictions of a particular type or gravity; or as to a period of time free from conviction; or as to the absence of a particular type of sentencing disposition; or of apparent good character.

Third, counsel should advise the defendant as to the possibility that the failure by counsel to refer to the defendant's antecedents may not go unnoticed by experienced prosecution counsel who might apply for an adjournment to investigate. Later discovery could, of course, also ground an appeal against sentence, see *Plumstead v The Queen* [22] and *Criminal Cod*e, s 402(4).

I would like to finish with a word or two about unethical cross-examination. While there are some differences between the disallowable and improper questions provisions in the Uniform Evidence Law in force in most Australian States and Territories, they all render disallowable, and therefore, in my view, unethical, questions that are misleading or confusing, or unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or oppressive: *Evidence Act* 2001, s 41.

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[21] (1995) 184 CLR 132 at 141.

[22] (1997) 7 Tas R 206.

The provision also renders disallowable otherwise unobjectionable questions that are put to a witness in a manner or tone, I repeat, *in a manner or in a tone* that is belittling, insulting or otherwise inappropriate.

But wait, there is more; neither, in Tasmania nor in Victoria may you ask a question that has no basis other than a stereotype. For example, "You are an accountant Mr Smith – accountants are very careful people now aren't they?" Section 41 prohibits specifically, but not exclusively, stereotypes based on a witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability.

There are, however, other questions that are impermissible and thus unethical. You must not put to one witness that his or her evidence is contrary to that of other witnesses, and expressly or by implication invite an opinion as to the reason. The best known example, of course, being, "She is a police officer Mr X, what reason would she have to lie?"

You must not ask a witness to speculate about the reasons someone else did or said something. You must not put a hypothetical question to a witness other than an expert. And you must not put a question that invites the drawing of an adverse inference from the exercise of the common law right to silence.

Again, while legislation in some States is changing as to this, a well-known example of a question impinging upon the right to silence is, "Mr X why did you not tell that to the police officer when she arrested you?" (For a coverage of the additional constraints on a prosecutor conducting cross-examination in criminal proceedings, see *Whitehorn v The Queen*[23].)

There is also a very valuable discussion of the common law limits to ethical cross-examination by Heydon J in *Libke v The Queen*[24], where his Honour deals with unethical advocacy involving compound questions, questions assuming the existence of a fact in controversy, argumentative questions, questions that are only comments, and the cutting off of answers before they are complete. As Heydon J points out, all these rules rest on the need for fairness and on the need not to mislead or confuse a witness. Deliberate breaches of them are unethical.

While on the subject of Heydon J's writings and the ethics and courtesy of advocacy, there is a must-read article by his (former) Honour in the Australian Law Journal (2007) Vol 81 at 23, entitled *Reciprocal Duties of Bench and Bar.*

Finally, remember also that s 37 of the *Evidence Act* which deals with leading questions in examination-in-chief and re-examination, actually entirely prohibits their asking, stipulating that, except in the situations allowed by the section, "a leading question *must not be put*". So it is not just poor advocacy to ask leading questions, it is, strictly speaking, unethical advocacy.

I have merely scratched the surface in the time available today, but I can say that all of these issues, and many more, are covered in meticulous detail by Gino Dal Pont in his book, *Lawyers' Professional Responsibility.* I recommend that everyone read chapters 17 and 18 every year or so to remind yourselves of the very important obligations you carry into your work every day.

Justice Stephen Estcourt AM

12 November 2021

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[23] (1983) 152 CLR 657 at 663 – 664.

[24] [2007] HCA 30, 230 CLR 559 from [127].