

**Lawyers Duties to the Court: Between the Devil and the Deep Blue Sea:
Part II
Ethics Address to the Australian Lawyers' Alliance
Friday 24 August 2012 at 9.30am
Hyatt Hotel, Perth**

This address is a local corollary to the paper I delivered on 4 March 2012 to the Bar Association of Queensland Annual Conference at the Gold Coast entitled 'Between the Devil and the Deep Blue Sea: Conflict between the duty to the client and duty to the court'. That paper has since been published in the *Australian Bar Review* (2012) 35 Australian Bar Review 252 and you have a copy in your materials.

The March 2012 paper had a Queensland flavour to it, in terms of the cases I collected in the second half, illustrating some failures to measure up to the duty to the court. However, the duty to the court is a national phenomenon. It clearly applies now across the Australian states and territories, having been endorsed by the High Court.

For Western Australia, as an amalgam profession, we operate somewhat differently, to a more strict barrister/solicitor separation as is found in Queensland and New South Wales. Nevertheless there are a good many similarities.

Even if we don't think we need it, there is a need for constant reminding about the public character of the onerous professional obligations of legal practitioners. It is a worthy thing to be reminded constantly about the gravity of these obligations, lest they become submerged in the pressures of a daily grind. Today I want to concentrate on two areas by way of the manifestation of the paramount duty. These are:

- (a) public comment upon present and past proceedings by the participating lawyers; and

- (b) the making of serious allegations by pleadings, cross-examination or by submissions.

There are separate *Western Australian Barristers' Rules* promulgated by the WA Bar Association as of 5 October 2011. They reflect national barristers' conduct rules applicable across the nation as mentioned in my March paper.

Of greater direct relevance to West Australian amalgam practitioners will be the *Legal Profession Conduct Rules 2010* enacted by the Legal Practice Board under rule-making provisions of the *Legal Profession Act 2010*. In those rules I note LPCR 5, found in Part 2, under the heading 'Fundamental duties of practitioners'. LPCR 5 is headed 'Paramount duty to court and administration of justice'. It reads:

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.

LPCR 5 could not be more explicit about where the legal practitioner's paramount duty is owed in terms of obligation as between the duty to the court and the duty to the client.

A lawyer's paramount duty to the court is easy to articulate. But in terms of its daily implementation, flesh needs to be put on the principle by some examples of its operation in practice. I will mention two at the end.

Participating Lawyers' Public Comments on Litigation

A rule considered by the New South Wales Court of Appeal in *R v MG* [2007] NSWCCA 57 or 69 NSWLR 20, was the then New South Wales conduct rule 59. It was promulgated under the heading 'Integrity of hearings'. It commenced:

A barrister must not publish, or take steps towards the publication of any material concerning current proceedings in which the barrister is appearing or has appeared, unless ...

That rule was renumbered under the Uniform National Barristers' Conduct Rules. In New South Wales it is now rule 76. But it is otherwise largely unaltered. It is also found as rule 76 of the West Australian Barristers' Rules. It will not be relevant to solicitors practising in the West Australian amalgam.

LPCR rule 43, by way of contrast to the barristers public comment rule 76, provides:

Public comment

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**.

There are more than a few things to see in LPCR 43:

- (a) LPCR 43(1) starts out being framed in a permissive way (a practitioner **may**)

- (b) There is a particular sensitivity in LPCR 43(2) about **current** proceedings.
- (c) Again as regards LPCR 43(2), capacity to prejudice a fair trial is obviously greater where a trial is being conducted before a jury. That does not just mean criminal trials, there may still be civil jury trials in WA, for instance, in defamation matters.
- (d) For LPCR 43(2), what 'may' subvert or undermine the administration of justice needs to be assessed on the facts of each and every individual case. So, this is an open-ended provision.
- (e) LPCR 43(3) is a cutback to the apparent liberality of LPCR 43(1), as regards public forum media participation.
- (f) LPCR 43(3) engages both present or past professional engagement scenarios for a practitioner.
- (g) The phrase 'contrary to the interests of the client' is open-ended and would probably be assessed objectively (bearing in mind a contrast to LPCR 3(c)).
- (h) The need to give a fair and objective account indicates a need for caution in terms of the tone of a presentation.
- (i) Requirements of rule 43(3)(a), (b) and (c) apply conjointly, not separately. So, where it is radio, television or a 'transmission' 3(b) scenario (say a podcast), there is a need for client informed consent. That is so even if the talk is about a past professional engagement.

With those obligations in mind, I mention *MG v The Queen* (2007) 69 NSWLR 20. Ms Cunneen SC was essentially prohibited from prosecuting a retrial of a convicted rapist, whose conviction had been quashed on appeal. Bar public comment rule 59 (now rule 76) was heavily at issue in that case and found to be infringed.

MG's case can be contrasted to the local Western Australian case *Ismail-Zai v WA* (2007) 34 WAR 379; [2007] WASCA 150. Here Steytler P, Wheeler JA and EM Heenan AJA held that the fact that a briefed prosecutor had once acted, having earlier had a very brief professional engagement with an accused (putting in a short plea in mitigation for the accused some years before), was not enough to conclude that there had been a miscarriage of justice. But Wheeler JA pointed out, the closer the relationship, the more the likelihood for a problem.

Serious Allegations

The other issue I wanted to talk about today falls under the heading of 'Serious allegations'. The issue is explicitly dealt with by the Barristers Rules. But in Western Australia there are Legal Profession Conduct Rules governing all legal practitioners.

The bottom line is that 'mud' should not be thrown in pleadings or at a witness in cross-examination or in openings and closings at trial, without some legitimate, factual basis to support a serious allegation. I had occasion very recently to comment about this local rule in a civil trial, see *Austman v Mount Gibson Mining Ltd* [2012] WASC 202 at [441] and [474] - [478], where allegations effectively of a civil conspiracy were made and extensively cross-examined about. See also my decision in *Daraja Ltd v Hogan & Partners Stockbrokers Pty Ltd* [2012] WASC 256 at [35].

In the earlier paper I refer to Uniform Barristers' Rules 60, 63 and 64 in terms of the requirement for reasonable grounds. The WA Legal Profession Rules carry similar requirements.

I will be explicit. In my view, reasonable grounds for a barrister are not, 'My instructing solicitor believes this to be the case'. Reasonable grounds for a solicitor are not, 'My client instructs me that that is the case' or 'those are my instructions'.

There is a basal need for an acceptance of personal responsibility for the advancement of serious allegations by all practitioners concerned in the process. There must be a legal brain turned on in the process somewhere. A logical evaluation must be made about underlying factual support for serious allegations. Any notion, if it ever existed, of the barrister being a mere parrot, or a solicitor being the client's puppet as regards a client's instructions, (no matter how much they strain credulity) is long dead.

From the WA LPCR's, I mention rule 36 under a heading 'Responsible use of court process and privilege'. Note its terminology '**reasonably justified**', seen in rule 36(2)(a), as regards invoking the coercive powers of a court (meaning subpoenas, injunctions, search and seizure orders, freezing orders etc) or making of allegations or suggestions under privilege. The protections enjoyed by legal professionals in their participation in a public process shielded from defamation by the same right of absolute privilege against defamation as proceedings before Parliament, can be forgotten sometimes in the daily grind. It is a privilege always to be used responsibly for the public good.

Likewise, LPCR 36(3) uses a phrase '**believes on reasonable grounds**' in its context of the drawing or settling of a court document that alleges criminality, fraud or other serious misconduct. Note the conjoint character of the three subparagraphs in rule 36(3) as to the factual material available to provide a proper basis for such an allegation, the admissibility of evidence to support an allegation and a need for the client's instructions to advance the allegation (best obtained in writing) following advice about the seriousness of the allegation and consequence(s), if the serious allegation is not made out.

This is a salutary local rule affecting legal practitioners who put their name as counsel to civil pleadings filed daily in our courts. But I would add that in my experience LPCR 36 reflects nothing beyond what the best counsel always demanded in the past, anyway.

The best barristers never threw 'mud' unless they knew there was a respectable basis to back up a serious allegation at the court, from a platform of admissible evidence by a witness or by a document.

The term '**reasonable grounds**' is used in LPCR 36(4) as regards allegations in opening needing to be capable of support by 'available evidence'.

Rule 36(5) referring to criminality, fraud and other serious misconduct applies to cross-examiners. Again, see the conjoint rules 36(5)(a) and (b). Both limbs apply. Again the phrase '**reasonable grounds**' by reference to material '**already available**' and the term '**proper basis**' are used. Moreover, if it is a cross-examination going only to credit, the matter raised really does need to be justified as bearing upon diminishing the witness' credibility. Causing offence, insult or trying to get the witness angry to then look bad (grade 1 cross-examination school) will not be acceptable.

LPCR 36(6) applies to prior subrules (2), (3), (4) and (5). A practitioner must make '**all reasonable practicable enquiries**' before reasonable grounds are held. There is something of a cutback by LPCR 36(7), as regards instructing practitioners' opinions. But this does not apply to closing addresses or to submissions on the evidence.

During the running of a trial, rule 36(8) applies in terms of the practitioner's address on the evidence as regards suggestions of criminality, fraud or other serious misconduct. There must be belief on reasonable grounds tied to evidence 'in the case' providing a proper basis for the suggestion.

See also rule 36(9) as regards submissions in mitigation and allegations of serious misconduct against others.

Sexual assault, indecent assault and indecency cases carry their own special rule. See rule 36(10).

Two Cases

I want to finish in this area with two examples in terms of practical ramifications of the duty to the court. One is a criminal case, the other was civil.

In the civil case, the solicitors and counsel all ended up being ordered by the judge to pay indemnity costs associated with a pursuit of an unsustainable allegation made against a party, who had been unduly kept in the proceedings. The decision was by Emerton J in *Apollo 169 Management Pty Ltd v Pinefield Nominees Pty Ltd* [2010] VSC 475 delivered 22 October 2010. This was a unique case. The plaintiff had managed to defeat a defendant's summary judgment application by the third defendant, who was saying that the critical conversations relied upon by the plaintiff could not have happened. The plaintiff's client swore an affidavit saying the conversations had happened.

The matter proceeded to an expedited trial. There was then a late change of counsel.

It wasn't until day 7 that the new counsel, although he knew this (so did his instructing solicitor), told the court frankly that the key disputed conversations had not happened at the time it was said they had. On day 7 it was finally acknowledged to the court that the case against the defendant was unsupportable. The case was immediately dismissed by the trial judge at that time and costs reserved.

It would be a mistake to think that this decision by Emerton J turned upon particular terms of the local rule of the Victorian Supreme Court General Civil Procedure Rules 63.23(1) and (7). Courts have inherent jurisdiction to make costs orders of this kind against solicitors and counsel when that is warranted.

Apollo 169 was an appalling case on its facts. But by the time I got to the end of it I could not help having a feeling of some sympathy for a very junior counsel who agreed late to come into a red hot case, but was basically

always on the back foot and out of his depth. What counsel should have done immediately was make it plain to the court that the case against the third defendant was hopeless and should be dismissed. Instead, maybe with his head in the sand, possibly because of panic or in denial, he said nothing until day 7.

The end consequence was that counsel ended up, along with his instructing solicitor and the client, wearing an order for indemnity costs of the trial up to day 7. The decision as to costs was made in circumstances where the client would not waive privilege. The client even later appealed against the judgment, although did not proceed with the appeal in the end. The difficulty was that essentially the plaintiff had taken a position in order to improve itself tactically, but go into liquidation to avoid unacceptable costs orders if it lost - as it did in the end.

There is a clear pecuniary lesson in this case for young and old practitioners in terms of where their primary duty lies. It is always to the court.

The second case I mention is a Queensland criminal case in the Court of Criminal Appeal: *R v Nerbas* [2011] QCA 199. This is a decision by Philip McMurdo J with whom de Jersey CJ and Dalton J agreed. Essentially it was a case about an appeal over a refusal by the primary judge to allow the appellant to withdraw a plea of guilty made during the course of the running of a trial. The guilty plea had been entered after evidence at trial emerged which basically showed that an account of events which Mr Nerbas had given in terms of why it was not he who had made some incriminating searches on his computer in relation to customs (in the context of a drug prosecution for the importation of prohibited substances), emerged.

There ensued a conference between senior counsel, junior counsel and the client. The plea of guilty was then entered. But later there was an attempt to withdraw the guilty plea on the basis Mr Nerbas was denied the opportunity to

defend on a premise that he **did** undertake the incriminating internet searches, but for an innocent purpose: see [46] in which Mr Nerbas said:

... just prior to the trial 'I meditated my mind back to see if I could be absolutely sure it was or wasn't me who conducted those searches, and I recalled something. Eventually the memory came back where it was me who did those searches'.

Mr Nerbas' senior and junior counsel, had basically told him at their conference during trial, that if he wanted to change his evidence (they had already cross-examined Crown's witnesses on the basis of Nerbas' instructions that it was someone else who had undertaken the potentially incriminatory computer searches), they could no longer act for him. The advice was totally wrong. McMurdo JA in the Queensland Court of Appeal observed at [50]:

However in my view, this change in his instructions would not have required or permitted his counsel and solicitor to withdraw from the case. They were precluded from conducting his case upon any factual basis which they knew to be false. But they would not have been placed in that position by this change of instructions. They would have been understandably sceptical about the applicant's new instructions. But it was not for them to adjudicate upon their truth.

At [53] McMurdo JA said:

In my respectful view, the lawyers' problem with the change of instructions would not have been an ethical one; rather it would have been the practical difficulty for an advocate in explaining to a jury how his client might now be truthfully recalling an event after having been mistaken for much of the trial.

What was critical was not the strong advice of Mr Nerbas' lawyers as to his poor prospects (see [54]) which did not of itself make his pleas of guilty involuntary. But there was an unjustified threat by the lawyers to withdraw, if Mr Nerbas changed instructions. As to this McMurdo JA said:

That had the consequence of depriving the applicant of the option of defending the charges, with the benefit of legal representation, upon the factual position which he claimed to be true. It is inherently likely that this threat, at least in part, induced him to plead guilty.

He concluded at [55]:

However, the apparent strength of the prosecution case should not result in the applicant being deprived of a trial, once he has demonstrated that he was relevantly induced to plead guilty by his lawyers' unjustified threat to withdraw.

Leave was given to allow Mr Nerbas to withdraw his plea of guilty. It is not clear if a retrial proceeded.

Conclusion

The body of Australian case law and local conduct rules enshrining and building upon the lawyer's paramount duty to the court is now part of the mainstream fabric of daily practice in the law. It is an important principle that embraces and distinguishes Australian legal practice from practice in other jurisdictions.