

## Week 7 Readings – Duty to the Court

LAWS108 – Law, Lawyers, and Society – 26/09

### Candour (from p460)

#### Enforcing the Duty to the Court

- The court has the power to block or remove a lawyer from representing a party in a particular case, using the objective test of whether a fair-minded reasonably informed person would find it subversive to the administration of justice to allow the representation to continue. ***Kallinicos v Hunt (2005) 64 NSWLR***.
- The court can sanction lawyers who breach their duty to the court.
  - o The court can order a lawyer who has committed an abuse of process to pay any associated court fees.
  - o The court may also quash a conviction or set aside a judgement if it is achieved on account of a misleading statement or omission of the lawyer.

#### Independence

- Lawyers have to act in a way which is independent and objective, ***Kooky Garments Ltd v Charlton [1994]***.
- Lawyers must balance courses of litigation, “not only to his client’s success, but also to the speedy and efficient administration of justice.” ***Gianarelli v Wraith (1988)***.
- The solicitor’s rules note that the lawyer must not be “a mere mouthpiece”.
- A lawyer’s independence is undermined where the lawyer is a witness in the matter, and so lawyers should not accept briefs where this is reasonably possible, and should withdraw from cases where this becomes apparent. ***Jeffrey v Associated National Insurance Co Ltd [1984], Solicitor’s Rules***.
- A lawyer must also withdraw where there is a conflict of interest in a matter which undermines “the importance of counsel being personally remote from the subject-matter of the dispute.” ***Barrott v Barrott [1964], Kooky Garments Ltd v Charlton [1994]***.

#### Candour

- Lawyers must not lead the court, nor misrepresent the law to the court, but “must do what they can to ensure that the law is applied correctly to the case”. ***Re Gruzman (1968), Clyne v New South Wales Bar Association (1960)***.
- Lawyers have the obligation to inform the court of any binding authority (or persuasive authority if no binding authority exists), and any applicable legislation, if it is known by the lawyer and is against their client’s case. ***Solicitor’s Rules***.
- A lawyer has a duty to inform the court if their opponent makes an incorrect statement regarding evidence, case law, or legislation by mistake. ***Solicitor’s Rules***.
- Lawyers must take reasonable steps to verify their client’s contentions and may be required to bring caution or mild scepticism to their client’s narrative if they cannot verify these contentions. ***Y v M [1993]***.
- Where a client or someone else has lied, falsified, or suppressed information, (**perjury**) the lawyer must inform the client to disclose this to the court, and if the client refuses, the lawyer must withdraw.

- If a client **intends to disobey a court order** the lawyer must advise against such and not aid the client in doing so; the lawyer cannot disclose this. **ASCR**.
- A lawyer must not be a party to the illegitimate destruction or removal of documents. **ASCR**.

### Dealing with Witnesses

- Lawyers should not confer with more than one witness at a time. **ASCR**.
- Lawyers must not advise a witness to commit perjury, nor coach or encourage a witness to give certain evidence or suggest certain answers or words to be used. **ASCR**.
  - o The lawyer may test and attack the client's account in practice.
- A lawyer must not confer with a witness while that witness is currently being cross-examined.
- Lawyers may communicate with any witness they wish, and need not disclose the existence of a witness to the opposition.

### Relationship with Judges

- Lawyers involved in a case should not give the appearance that he or she carries special favour with the court, and so should avoid direct and exclusive contact with a judge unless previously consented by the opposition.

### Abuse of Process

- Lawyers who are involved in an abuse of process may be subject to disciplinary proceedings and may have costs awarded against them personally.
- Lawyers must not be a party to the making of any **statement or allegation for which** in their opinion, **there is insufficient evidence**.
- Lawyers must not **mislead or confuse the witness**, and must **account for the witness' vulnerability** when asking questions.
- Lawyers, should not make **claims of fraud or criminality** (unless they are able to support such a statement, or are advised to by their clients to do so).
- Lawyers should aim to aid the court in resolving matters promptly and cost-efficiently. **Federal Court Act 1976 (Cth)**
- Lawyers must not pursue civil claims which lack reasonable prospects of success.
- The hopeless case rule does not apply (or at least not in full force) for criminal proceedings.

## Week 8 Readings – Ethics in Criminal Law & Negotiations

### LAWS108 – Law, Lawyers and Society – 4/10

#### Client Perjury

##### **Where perjury has been committed:**

- Where a client (or person procured by the client) informs the lawyer of a material lie before the court, a falsified document tendered, or suppressed material evidence to the court on a topic where there was a positive duty to so (i.e. perjury has been committed).
  - In such a case the rules require the lawyer to advise the client that the court should be informed, and request authority to do so.
  - If no authority is given, the lawyer must withdraw from the case, but otherwise may not inform the court.

##### **Where perjury is proposed:**

- Where the client informs their lawyer that they intent to commit perjury,
  - The lawyer's first duty is to attempt to dissuade the client from this unlawful course of conduct.
  - A lawyer who knows of such an intent cannot be a party to it and so must withdraw where appropriate.
  - If perjury is considered a “serious criminal offence” in the context of the rules, the lawyer may have grounds to justify the timely disclosure of an intention to commit perjury to the court.

#### Client's Intention to Disobey a Court Order

- Lawyers must not advise, encourage or aid in such a venture
- Must advise against this and warn of the dangers
- Cannot inform the court unless there is a threat to any person's safety.

#### Duty Not to Illegitimately Destroy or Remove Documents

- Lawyers must not be a party to the illegitimate destruction or removal of documents.
  - If the document may be relevant to current or future litigation.
- This is considered professional misconduct.

#### Prosecuting Counsel (p502).

##### **Basic Duty of Fairness and Impartiality:**

- Rules require prosecutors to “fairly assist the court to arrive at the truth” and “seek impartially to have the whole of the relevant evidence placed intelligibly before the court”.
- Rules also preclude prosecutors from arguing any proscription of fact or law that they do not believe on reasonable grounds is capable of contributing to a finding of guilt and of carrying weight.
- Prosecutors have higher standards of fairness and impartiality regarding disclosure, the calling of witnesses, and submissions on sentence.

- Prosecutors should not press a case for conviction beyond the fair and full presentation of the case, **Rules**, and that prosecutors should refrain from using tactical manoeuvres, or taking advantage of mistakes, in order to gain a conviction.
- Prosecutors, by the rules, must be personally detached from the subject matter, and should not give expression of their opinion regarding any material evidence or issues.
- The prosecutor must not enflame any possible or existing prejudices that the court/jury may have against the accused. **Rules**, and **R v Thomas (unreported, CANZ, Henry, Tipping, and Salmon JJ 15 December 1998)**.
  - This applies similarly to excessively emotive language, i.e. “language that is calculated not to enlighten but to ignite” **R v Munroe (1995) 96 CCC (3d) 431, 447**, see also **McCullough v R [1982] Tas R 43**.

#### Consequences of failure to observe standards of fairness:

- An appeal may occur if it can be clearly demonstrated that unfairness has been occasioned to the accused as a result of the prosecutor’s intemperance. **Whitehorn v R (1983) 152 CLR 657, 664** and also **R v Russo [2004] VSCA 206, [10]**.
- If a prosecutor departs significantly from standards of fairness, and the court is unable to safely correct this before the jury, the conviction may be quashed. E.g. **R v Russo**.

#### Prosecutor’s Duty of Disclosure:

- In order to provide a fair trial, the prosecution and defence must be on an equal playing field, which is usually not the case.
- This is an issue which is “overcome or lessened by the obligation of the prosecution to make all relevant material available, including that which may be helpful to the defence.”
- The rules require that the prosecutors disclose to their opponent as soon as practicable all material which could constitute evidence relevant to the guilt or innocence of the accused.

#### Calling of Witnesses by the Prosecution:

- When calling witnesses, the prosecution should present impartially the available, relevant credible evidence, whether it tends for or against conviction, and should recognise and not seek to hide any weaknesses of the prosecution’s case. **R v Deriz (1999) 109 A Crim R 329, 338**.
- “A refusal to call the witness will be justified only by reference to the overriding interests of justice.” **R v Apostilides (1984) 154 CLR 563, 576**.
  - Therefore, a witness need not be called if:
    - The opponent consents to such,
    - Their entire evidence has been dealt with by an admission of the accused, or by the accounts already established by other witnesses **Whitehorn v R (1983) 152 CLR 657, 674-675**.
    - If the prosecutor believes on reasonable grounds that their testimony is unreliable or plainly untruthful **Rules** and example **Walsh v State of Western Australia [2011] WASCA 119, [75]**.
- A failure of the prosecutor to call a necessary witness can result in a miscarriage of justice, e.g. **R v Kneebone (1999) 47 NSWLR 450**.
- The prosecution must inform the opponent as soon as practicable of the identity of any witness to be called and the reason for this. **Rules**.