

Week 5: Duty to the Court

Reading Materials

Lawyers' Professional Responsibility by G E Dal Pont

Chapter 17: Duty to the Court

Context

Lawyer as an officer of the court

- *Giannarelli v Wraith* (1988) 165 CLR 543, 555- 556, Mason CJ: A lawyer's duty to the court is paramount and overriding.
- When the duty to the court conflicts with a duty to the client, the former prevails.
- The lawyer must not act in a matter where his or her personal interests conflict with the duty as an officer of the court and how the matter is conducted.
- For a lawyer to use court processes to achieve an outcome inconsistent with the role of that process amounts to an abuse of process.
- The trust the court places in lawyers also attracts a corresponding duty to diligently observe any undertakings given to the court, to act with due courtesy to the court, and to avoid any unnecessary expense and waste of the court's time.
- The lawyer must bring an independent judgement to the case.
- *Rondel v Worsley* [1969] 1 AC 191, 227: "Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the Court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. And by so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him."

Enforcing the duty to the court

- The Court retains an inherent supervisory jurisdiction over its officer, directed at preserving the proper administration of justice.
- It encompasses both the admission of lawyers to that status and their removal from it.

Court's jurisdiction to restrain a lawyer from acting

- The jurisdiction empowers a court to determine which of its officers may represent parties to litigation.
- For instance, it may restrain a lawyer from appearing where it would breach a confidence owed to a former client.
- The Court may also do so where it doubts the lawyer's capacity to exercise an independent judgement **e.g if he or she has a direct personal interest in the outcome**
- *Davies v Clough* (1837) 8 Sim 262: The relevant inquiry is whether a fair-minded reasonably informed person would find it subversive to the administration of justice to allow the representation to continue.

Court's jurisdiction to sanction a lawyer for breach of duty

- The jurisdiction encompasses a power to sanction a lawyer who has breached the duty owed to the court **e.g** *a lawyer who has committed an abused of process may be ordered to pay the costs of the proceeding or step in that proceeding*
- Breaches of the duty not to mislead the court will be referred by the court to the appropriate disciplinary body.
- *Ex parte Bellanto* [1963] NSW 1556, 1564 – 6 (FC): A lawyer's words or actions that interfere with the administration of justice or otherwise disregard the court's authority can sound in punishment for contempt.
- *Lewis v Odgen* (1984) 153 CLR 682, 693 (FC): The contempt power is exercised to vindicate the integrity of the court and its proceedings **e.g** *where a lawyer has gone out of his or her way to be disrespectful or insulting to the court*
- Misleading the court can generate consequences for the trial process.
- In criminal matters, it can amount to a miscarriage of justice and provide grounds for the conviction to be quashed and a retrial ordered.
- In a civil case, where a misleading statement or omission has caused the judgement to be fraudulently obtained, the court may set aside the judgement.
- *Meek v Fleming* [1961] 2 QB 366, 379: 'Where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so) it would be wrong to allow him to retain the judgement thus unfairly produced.'
- *Rees v Bailey Aluminium Products Pty Ltd* (2008) 21 VR 478: There is also scope for a civil jury to find a miscarriage of justice arising out of some other form of abuse of process perpetrated by a lawyer.

Independence

- The proper administration of justice depends on the faithful exercise by lawyers of an independent judgement in conducting and managing cases.
- *Grimwade v Meagher* [1995] 1 VR 446, 452: The integrity of the judicial process is undermined if lawyers lack the 'objectivity and independence which their professional responsibilities and obligations to the court require of them'.

Independence in presentation of the case

- *Lougheed Enterprises Ltd v Armbruster* (1992) 63 BCLR (2d) 316, 324 – 325: Lawyer's duty is to do right by their clients and right by the court, which requires taking all legal points deserving of consideration.
- *Queensland law Society Inc v Stevens* (1996) 17 Qld Lawyer Reps 27, 30: A lawyer is obliged to put any argument that might reasonably be open to the client.
- Do not have to slavishly follow a client's instructions because part of a lawyer's duty to the court is to avoid a misuse of court time by refraining from advancing arguments that are not reasonably open.
- *Giannarelli v Wraith* (1988), Mason CJ: 'It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the court epitomizes the fact that 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 he has an eye, not only to his 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.'

- ASCR r 17.1 – 17.3; BR rr 16 – 18: 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.

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: confine any hearing to those issues which the solicitor believes to be the real issues; present the client's case as quickly and simply as may be consistent with its robust advancement; or inform the court of any persuasive authority against the client's case.

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. A solicitor must not become the surety for the client's bail.

Independence undermined where lawyer is a witness in the matter

Proscription and its rationale

- *Jeffrey v Associated National Insurance Co Ltd* [1984] 1 Qd R 238, 245; A lawyer must not accept a retainer if there is reason to believe that he or she will be required to give evidence material to the determination of contested issues before the court. If this becomes apparent during proceedings, the lawyer should withdraw and arrange for an independent lawyer to take over the matter.
- May confuse the lawyer's role: The role of the lawyer is to present the case and tests the evidence and arguments, whereas a witness provides sworn testimony of facts within her or his personal knowledge or expertise.
- Prospect of conflict between interest and duty; by appearing as a witness the lawyer may be placed in a position where the duty to the court, or her or his own interests, conflict with the duty to the client.
- *Pittorino v Meynert* [2001] WASC 245, [10]; *Jeffrey v Associated National Insurance Co Ltd* (1984), 245: Could affect a lawyer's objectivity and independence as he or she may be tempted to tailor evidence in support of his or her client.

Court's jurisdiction to disqualify lawyer-witness from acting

- *See, eg, Gugiatti v City of Stirling* (2002) 25 war 349: The court can disqualify a lawyer from representing a party in circumstances where the lawyer is or may be called as a witness.
- The principal inquiry concerns the proper administration of justice, both in appearance and actuality.
- *Mitchell v Burell* [2008] NSWSC 772, [20]: The court is concerned with the likelihood of the lawyer being called as a witness on a material contentious matter, and its impact on the integrity of the trial process.
- *Scallan v Scallan* [2001] NSWSC 1078, [7]: The latter is balanced against the public interest that a party should not be deprived of a lawyer of choice without good cause, and the cost, inconvenience or impracticability of the lawyer being restrained.
- *Executive Homes Pty Ltd v First Haven Pty Ltd* [1999] VSC 261, [10]: The disqualification may be justified where a fair-minded reasonably informed observer would perceive a potential for misuse of confidential information.
- Or where there is a prospect that the lawyer is seen as having a personal interest in the outcome (*See, eg Paino v MDN Mortgages Pty Ltd* [2009]), the lawyer's independence and