ETHICS IN THE COURT ROOM

A good understanding of the Ethical duties for effect ones behaviour in Court is essential if one is to practice regularly or even occasionally as an advocate in Court.

Your relationship with the Court depends upon you being an advocate “of good repute”.

How does one acquire such a reputation?

- A reasonable degree of competence
- Absolute honesty in ones dealings with ones opponents and the Court
- Good manners
- Ethical behaviour at all times

While one should not overlook the importance of the first three matters our time today is to be spent on for the fourth consideration because it is in this area that some of the most difficult decisions require to be made by advocates.

The Duty to the Court

An advocate has an obligation to the Court of complete honesty. Advocates must not knowingly make a misleading statement to a Court on any matter. While acting as Counsel one may on occasions mislead a Court unwittingly without committing an ethical offence but it is essential that a person acting as Counsel take all necessary steps to correct any misleading statement made

as soon as possible after he or she becomes aware that the statement was misleading.

In this context misleading has its ordinary meaning and misleading conduct maybe by act or omission and/or express or implied.

Example 1

You are appearing on behalf of a mother in Family Court proceedings. The residential arrangements for the children of the marriage are an issue.

You are instructed for that the mother has commenced a relationship with a female partner.

You know that the children's father is not aware of the new relationship.

The Court asks you whether your Client is in a relationship with a new man.

Do you tell the Court of the lesbian relationship or simply give a negative answer.

Will one answer or the other amount to misleading the Court?

Example 2

You are appearing before the magistrate formally charged with drink driving. Your client pleads guilty. In the course of providing the facts to the magistrate the Police Prosecutor informs the Court that

(a) Your client has no previous convictions

(b) Your client is in regular employment.

You are aware that your client was, shortly prior to the commission of the drink driving offence summarily dismissed by his employer for stealing. You are also aware that your client has two previous convictions for drink driving and, is liable to be imprisoned if that fact is known to the court.

Do you

(a) Adopt what the Police Prosecutor has said as to employment and a lack of previous convictions and urge the magistrate to deal with your client as leniently as possible.

(b) Remain silent on both issues and allow the court to proceed on the basis of what the Prosecutor has said

(c) Disclose the facts as they are known to you

Are there any different considerations that apply to the question of employment then apply to the question of previous convictions?

There is no obligation to assist an opponent but still care must be taken to see that the Court is not misled. An advocate does not mislead a Court simply by failing to correct an error on any matter stated by an opponent or any other person. At times the dividing line between failing to correct an error and contributing to the making of that error can be a fine one.

Example 3

You are briefed to appear for the Defendant on a summons of seeking extension of time pursuant to the Limitation of Actions Act. The proceeding involves a claim for damages for personal injuries. You discuss the matter with your opponent prior to the return date of the

summons and advice your opponent that you intend to argue that the course of action as pleaded is excluded from the operation from the Limitation of Actions Act. Subsequently and during the course of your preparation you discover an authority against the argument. You telephone your opponent and advise that you will not argue that the cause of action is excluded from the operation of the act but that you will argue that the applicants delay has caused prejudice to the Defendant. Your opponent does not enquire and you do not volunteer while you have abandoned the argument but the cause of action was excluded from the operation of the act.

Your opponent considers the matter and comes to the same view that you initially held that is that the cause of action is excluded. Your opponent does not discover the authority that you did which would have supported the application. On the return date your opponent tells the court that an extension of time cannot be granted because the statute does not apply and seeks to withdraw the summons.

You say nothing.

Have you misled the Court?

Would the position be different if your opponent had continued to prosecute the summons?

No matter how thoroughly your preparation it can happen that whilst judgement is pending you become aware of a binding authority, perhaps a new authority or a change in the applicable legislation.

What should you do?

Your obligation is to inform the Court of that matter.

How do you do that?

Either by

(a) A letter to the Court copied to your opponent and limited to the relevant reference information unless the opponent has previously consented to other material being included in the communication; or

(b) A request to the Court to relist the case for further argument after notification is given to the opponent.

Ex parte applications involve particular considerations. The advocate must insure that all material facts are disclosed including facts which maybe contrary to the client's position but which might, if the application were not ex parte be brought to the attention of the Court in defence of the application. Failing to do so co constituted ground to set aside an ex parte order. When seeking such an order the advocate must disclose to the Court all matters

(a) Within the advocates knowledge

(b) Which are not protected by legal professional privilege and

(c) Which the Barrister has reasonable grounds to believe would support an argument against the granting of relief or in favour of limiting the terms of the relief adversely to his Client.

A difficulty can arise where there is a matter which ought to be disclosed but which is the subject of Legal Professional Privilege. The Client maybe unwilling to waive the privilege if the Client refuses to waive the privilege the advocate should;

(a) Tell the Client of the Client's responsibility to authorise the disclosure; and
(b) Seise to act in the application

The Duty to Exercise Independent Judgment

The advocate's duty to the Court recognises that the efficient disposition of litigation will not occur unless advocates exercise an independent discretion and judgement as to the conduct in management of cases which recognises not only the importance of the Clients success in the litigation but also the speedy and efficient administration of Justice.

The Exercise of Independent Judgement includes making an assessment of

(a) What witnesses will be called.
(b) What questions will be asked in cross-examination.
(c) What matters will be raised in address.
(d) What points of law will be raised.

A passage from the Judgement of the High Court (Wilson J.) in Giannarelli v Wraith[1] is worth repeating in this context. It will be remembered if the High Court was there upholding the immunity of barristers in respect of work done in Court. His Honour said;

> "Never the less Counsel's duty to the Court is often easier to state than to apply in specific situations. For example, in a particular case, what will constitute sufficient evidence so as to justify Counsel attacking the character of an opposing witness? There will be cases where it will not be easy to determine when the interests and instructions of the Client collide with Counsel's duty to the Court. It is in those cases that Counsel's judgement maybe consciously or unconsciously impaired, leading him to favour his Client's interest over his paramount duty. Yet the Court "has and must continue to have implicit trust in Counsel", Rondel, at 272). True it is that Counsel who errs on the side of his duty to the Court is unlikely to be found liable negligence even if he has misinterpreted the position and the reality is that there was no relevant duty to the Court operating to prevent him doing something which would be in his Clients best interests. Counsel is not negligent nearly because of a mere error of judgement. But it is the threat of litigation, not the likelihood of defeating such litigation, which is material. The expectation that an action in negligence brought against him would fail does not counter the instinctive motivation of Counsel to air on the sight of caution by bending to the Clients interests and avoiding the possibility of troublesome medication. For the same reason Counsel may be led, contrary to his view of what the justice of the case requires, to extend his examination of witnesses and submissions on

[1] 1988 81ALR417 @ 434

the law, thereby unnecessarily prolonging the proceedings. The administration of justice would be at risk".

Example 4

You are briefed to defend a dangerous driver charged before the magistrate. A critical witness in your case is a mechanic who can give evidence that would support a defence revolving around a sudden and unexpected mechanical failure which explains the accident which is the subject of charge.

You propose to call the witness on Tuesday morning after one or two other short witnesses.

On Tuesday morning you are informed that your instructing Solicitor has not subpoenaed the witness and that the witness has indicated that he will not come to Court until 12 midday. Do you

(a) *Advise the Court of your instructing Solicitors error and seek a necessary adjournment after calling the formal witnesses.*

(b) *Conduct a tedious and time consuming examination of the formal witnesses designed to fill in the time until the witness arrives*

Is the position any different in relation to the second option if you have flagged the need for an adjournment and receive a string indication from the Court that no application for adjournment will be granted?

The duty to provide assistance to the Court

This obligation requires the advocate to provide whatever assistance he or she can provide to the tribunal to avoid thunder mentally errors occurring in the course of a trial this duty is particularly in criminal trials where the advocate is obliged to take objections during the course of the trial as well as drawing the Courts attention to the need to exercise particular care in considering evidence.

Where the advocate is a prosecutor there are particular duties to ensure that evidence is presented properly and with fairness to the accused.

Example 5

You are seated in Court awaiting a decision to be given during the course of the afternoon. When the Court resumes a Police Prosecutor arrives with a number of persons charged with street offences. The Prosecutor informs the magistrate that all of them are charged with being drunk in a public place and the magistrate seeks to be informed as to their criminal history without calling on them to enter a plea.

Do you intervene and point out the error to the magistrate?
Why not?

Example 6

You appear in the magistrates Court on an application for some prejudgement. As a result of submissions you make the magistrate

becomes aware of an earlier proceeding between the same parties in which a hearing has been conducted and judgement delivered. The magistrate decides that he will set aside the judgement in the earlier proceeding despite the fact that that proceeding is not before him and he has no power to overturn it. It is in your client's interest to have the order made but you know the magistrate ruling has no power.

What will you do?

How will you explain that to you Client?

The duty not to engage in illegal or improper conduct

An advocate must not assist in any illegal or improper behaviour. This includes an obligation not to engage in any deception of another party by ones Client.

In Flower and Hart v White Industries (Qld) Pty Ltd[2] the full Court of the Federal Court held that an abuse of process occurs when proceedings are brought not to vindicate a legal right but for some other purpose. In that case proceedings had been issued and maintained with a view to securing a stronger commercial bargaining position advocates ought not to advance cases not supported by evidence.

[2] (1999) 87FCR134, 150

In the Deputy Commission of Taxation v Levick[3] a Solicitor who caused the defence to be raised where none was available, not to contest the claim of the Plaintiff but to delay its enforcement was ordered to pay the Plaintiff's costs on the indemnity basis. Advocates should be alive to the possibility of costs orders being made being made against them where the costs are incurred improperly or by reason of the advocate's incompetents.

Great care must be taken by an advocate in making any allegation a fraud[4].

The advocate must not make such allegations unless there is material available that provides a proper basis for them. If the allegation is to be made during an address on the evidence the advocate must be sure that the suggestion is relevant and that the suggestions are made in language which is no stronger than is necessary.

The advocate must not abuse his position by making allegations the sole purpose of which is to harass, embarrass or intimidate a witness. The advocate must not become the instrument by which publicity is obtained for allegations which are scandalise or calculated to vilify, insult or injure the commercial or personal reputation of any person.

The High Court pointed out in Clyne v the NSW Bar Association that the privilege enjoyed by Counsel in respective statements made in Court is abused where statements are made

> "…which may have ruinous consequences to the person attacked, and which he cannot substantiate or justify by evidence. It is obviously

[3] (1999) 168ALR383 @ 390
[4] See Flower and Hart v Whites Industries above

unfair and improper in the highest degree for Counsel, hoping that, where proof is impossible, prejudice may suffice, to make such statements unless he definitely knows that he has and definitely intends to adduce, evidence to support them".[5]

The advocate's duty not to mislead the Court includes not only his or her own conduct but extends to that of Clients and witnesses.

Particular difficulties arise where the advocate learns during a hearing or while a decision is reserved and remains pending that a Client or witness called by the advocate has

(a) Lied in a material particular or procured another person to lie
(b) Falsified or procured another defalsified document which is being pended or
(c) Suppressed or procured another to suppress material evidence on a topic where there is a positive duty to make a disclosure to the Court.

What is the advocate to do?

Should you

(a) Refuse to take any further part in the case unless the Client authorises you to inform the Court of the material facts
(b) Promptly inform the Court of the relevant conduct upon being authorised by the Client to do so

[5] 1960 104CLR 186 @ 201

(c) Inform the Court of the conduct whether or not the Client authorises him to do so[6].

What happens when the Client tells you as an advocate that the Client intends to disobey the Courts order made while you were acting as advocate?

(a) Do you advice the Client against the course and warn of its dangers
(b) Can you advice the Client how disobey the order with the minimum of exposure to penalty and/or imprisonment
(c) Should you inform the Court and/or your opponent of the Clients intention to breach the order
(d) Does it make a difference to the answer to (c) above if the Client authorises the advocate to inform the Court and/or the opponent
(e) Does is make a difference in respect to para (c) above if the advocate has reasonable grounds to believe that the Clients conduct constitutes a treat to the safety of any other person

Advocates should be aware that is no property in witnesses and it is improper to take any steps to prevent or discourage witnesses from conferring with the opponent or being interviewed by any other person involved in the proceeding it is permissible to advice a witness that there is not obligation to confer with or be interviewed by the opposing party or their representatives but should not go further.

[6] See Vernon v Bosley (number 2) (1999) 1QB18

The Duty of Competence

Every person who acts as an advocate undertakes to ring to that acting the exercise of a reasonable degree of care and skill.

Advocates are expected to know the law, to know the rules of procedure and the rules of conduct of the profession.

It is important that the advocate recognise an invitation to perform in an area in which he does not have the requisite degree of care and skill so that he can decline the invitation.

Acts and admissions which constitute negligence and fall short of standards of competency in preparation expected of an advocate may constitute unsatisfactory conduct or even professional misconduct.

In Copeland and Smith[7] the English Court of Appeal said it was Counsel's duty not only to bring and keep themselves up-to-date with recent authority in the field of practice but also to have a necessary system in place to enable and keep up-to-date with reported cases across the principal law reports.

The Duty of Diligence

The advocate is under a duty to conduct a case efficiently and expeditiously.

Courts recognised and protect the need for advocates to engage in fearless and robust advocacy on behalf of the Client.

[7] (200) 1 All E R 457

That advocacy should not result in the advocate departing from the requirement of the case be presented as quickly and simply as is consistent with its robust advancement.

Obfuscation as a technique or as an end in itself is not tolerated.

Example 7

You are briefed to appear for a Plaintiff concerning termination of his employment. You are told that if the mediation is unsuccessful you will be retained for the trial. On examining the materials you

(a) Realise that the credit of your client will be relevant to outcome of the trial and might be raised at mediation; and

(b) You realise that there is a connection between your Client and a former Client of yours where the present Client had been called and cross-examined by you. The cross-examination had been lengthy and directed to credit. The previous proceeding had been resolved with no adverse finding made against the witness.

The case is likely to be a "good earner" and you are reluctant to abandon it. Should you do so?

Would the position be any different if an adverse finding had been made against the Client in the present proceeding following your cross-examination?

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I have drawn much assistance an a number of examples from the “Good Conduct Guide” a publication of the Victorian Bar