CONFLICTING DUTIES
Where does the balance lie?

By Virginia Shirvington

For any legal system to function effectively, the public must have confidence in the court to deliver justice honestly, fairly and efficiently. Legal practitioners, as officers of the court, owe rigorous duties to the court to ensure that its functions and reputation are of the highest standards.

In 1909, in *Incorporated Law Institute of New South Wales v Meagher,* the High Court per Justice Isaacs referred to:

> '[the] serious responsibility on the court — a duty to itself, to the rest of the profession, to its suitors, and to the whole of the community to be careful not to accredit any person as worthy of public confidence who cannot satisfactorily establish his right to that credential.'[1]

This concept is as apposite today as it was then. The comments made in a professional handbook in 1975 equally stand the test of time:

> 'A great deal of rationalisation has been indulged in to endeavour to reconcile the solicitor's duty to do the best he can by his client with the duty to the law and the court; and a great deal of ingenuity has been brought to bear on the fine distinctions which can be drawn between these duties …The fact that it is the duty of the solicitor to *assist* the court must never be lost sight of, as this is the origin of the profession.'[2]

ETHICAL DILEMMAS: HISTORY REPEATED

Years of experience as a legal practitioner, good education in ethical standards, the existence of extensive judicial and academic commentary on appropriate professional behaviour, and the warning bells sounded by publicity about improper behaviour might be expected to provide a buffer against transgressions.

So why are there still breaches of ethical standards? Why are they sometimes committed by experienced and otherwise responsible practitioners? Why do they occur often in relatively uncomplicated matters? Why is it necessary to write about ethics?

Why do practitioners grapple with whether it is proper to threaten criminal proceedings as an alternative to an appropriate form of civil redress; make, or instruct counsel to make, unsupported allegations when cross-examining a witness; commence proceedings that are an abuse of process; arrange for or condone the destruction of documents that may result in perversion of the course of justice; subject a colleague or opposing party to offensive comments; encourage witnesses to give untrue evidence; rely on an opponent's obvious mistake; breach undertakings to the court or to a colleague; make use of privileged information belonging to an opposing party that has inadvertently been disclosed to the practitioner; talk to the media – criticising the court, the opponent, or witnesses; accept instructions that cause a conflict of interest and duty for the opposing party; retain an opposing party's passport without authority; improperly threaten another practitioner with making a formal complaint to regulatory bodies; contact another practitioner's client; give evidence as to material issues in a client's litigation where that leads to a conflict between a practitioner's duty to the court and the duty to the client.

There are many reasons. Unfortunately, these sometimes include practitioners' lack of integrity, their greed or reckless disobedience to the overriding duty to the court that they owe as its officers. Often, however, there are more subtle reasons for ethical breaches – traps for the unwary litter the professional path. The practice of law is replete with ethical dilemmas and complex problems to be solved in limited time that can often lead to the disregard of fundamental duties.

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HIGHEST STANDARDS REQUIRED

In *New South Wales Bar Association v Cummins,*[3] the NSW Bar Association sought declarations that a barrister who for 38 years did not lodge any taxation returns – either personal or for his professional practice – was not a fit and proper person for legal practice, and was guilty of >>

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professional misconduct. The NSW Court of Appeal made the declarations sought, commenting that Mr Cummins's actions were such as to 'bring the entire legal profession into disrepute.'[4] The Court said:

'[19] Honesty and integrity are important in many spheres of conduct. However, in some spheres significant public interests are involved in the conduct of particular persons and the state regulates and restricts those who are entitled to engage in those activities and acquire the privileges associated with a particular status. The legal profession has long required the highest standards of integrity.'

PRACTITIONERS' DUTIES

Very often, the cause of improper professional conduct is an inability to balance the various duties owed by legal practitioners. These duties are described succinctly in *Cummins*:

'[20] There are four interrelated interests involved. Clients must feel secure in confiding their secrets and entrusting their most personal affairs to lawyers. Fellow practitioners must be able to depend implicitly on the word and the behaviour of their colleagues. The judiciary must have confidence in those who appear before the courts. The public must have confidence in the legal profession by reason of the central role the profession plays in the administration of justice. Many aspects of the administration of justice depend on the trust by the judiciary and/or the public in the performance of professional obligations by professional people.'

The duty to the court is often described as 'paramount'. So is the duty to the client. Does a 'paramount duty' exist? If so, which one is it? And when is it permissible to breach one duty to comply with another?

In *D'Orta-Ekenaike v Victoria Legal Aid*, the High Court in its majority judgment said of the 'potential competition between the duties which an advocate owes to the court and a duty of care to the client':

'[This] assumes, wrongly, that the duties might conflict. They do not; the duty to the court is paramount.'[5]

ASSISTING THE COURT

The significance of the legal profession's role in assisting the court to ensure the effectiveness of the legal system was explained by Isaacs J in *Incorporated Law Institute of New South Wales v Meagher*:

'The errors to which human tribunals are inevitably exposed, even when aided by all the ability, all the candour, and all the loyalty of those who assist them, whether as advocates, solicitors, or witnesses, are proverbially great. But, if added to the imperfections inherent in our nature, there be deliberate misleading, or reckless laxity of attention to necessary principles of honesty on the part of those the courts trust to prepare the essential materials for doing justice, these tribunals are likely to become mere instruments of oppression, and the creator of greater evils than those they are appointed to cure.'[6]

The duty to assist the court will in most cases run in tandem with the duty to the client and not conflict with it.

In *Margiotta v Law Society of New South Wales* (No. 2),[7] the NSW Administrative Services Tribunal (Legal Services Division) was perplexed at the dereliction of duty of a solicitor, with over 30 years' experience, who failed to comply with orders of the District Court in a client's personal injury matter and failed to prepare the matter adequately for hearing:

'[65] The applicant was cross-examined at considerable length and in comprehensive detail by senior counsel for the respondent. That was entirely appropriate and necessary, because, *prima facie*, the Tribunal found it very difficult to comprehend how a solicitor of the applicant's considerable experience in litigation, and his long and successful career as a practitioner, particularly in personal injury matters, could have so manifestly neglected to prepare the case for hearing in a timely fashion. Nor, given the same criteria, how he could have courted the displeasure of the list judge, by failing to comply with directions on numerous occasions...'

The Tribunal found that it was:

'[95] ... satisfied to the standard laid down in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336, that the persistent failure of the applicant to comply with the directions of the court, and to prepare the case for hearing pursuant to those directions, constitutes unsatisfactory professional conduct. The admitted conduct falls short of the standard of competence and diligence that the plaintiff was entitled to expect from the applicant.

[96] The applicant not only failed in his duty to his client, but failed in his duty to the court which, as the court held in *Whyte v Bosch*, is a duty "to ensure that proceedings before the court are conducted efficiently and expeditiously". The applicant's conduct was neither efficient nor expeditious.'

Reflecting the comment made by Kitto J in *Ziems v Prothonotary of the Supreme Court of New South Wales*[8] – that legal practitioners are not required to be 'paragons of virtue' adhering to unrealistic standards but human beings facing daily vicissitudes – the Tribunal accepted that there were extenuating circumstances: work pressure and personal stress. Both of these conditions were caused by the serious

and unexpected illness of the practitioner's uncle, then a partner in the solicitor's law firm; and the consequential expansion of the solicitor's own workload, which was not assisted by employing a solicitor who proved inadequate.

However, the Tribunal could not characterise these factors as 'exceptional circumstances such as would warrant exoneration of the applicant', and took the breach of duty to the court and to the client – particularly the breach of duty to the court – very seriously:

'[45] The applicant does not dispute the facts relied upon by the respondent in coming to the decision under review. He concedes, as is indisputable, that on three occasions in the course of preparing the case for hearing, he failed to comply with the timetable ordered by the court, and, on each occasion, that timetable was one with which he had indicated his capacity to comply, by seeking consent orders.

[46] The applicant concedes that despite realising he was unable to comply with the directions, at no time did he approach the defendant's solicitor to advise of his difficulties and seek agreement to an amended timetable, nor did he approach the court for an amended timetable. His explanation is the pressure of work.

[47] In *Whyte v Brosch & Ors* [1998] 45 NSWLR 354, Spigleman CJ, with whom the other four members of a five judge bench constituted to deal with the matter, agreed, said:

"The matter has been listed before a bench of five in order to emphasise, not only to the members of the profession appearing in this case, but also more widely, that the court regards compliance with these rules to be a matter of considerable significance. Legal practitioners, both solicitors and barristers, owe duties to the court. That is what distinguishes the practice of a profession from a business or a trade or job, in so far as the legal profession is concerned. Those duties include a duty to ensure that proceedings before the court are conducted efficiently and expeditiously. Rules of the Court ... constitute an attempt by the court to ensure that everyone knows requirements that are designed to ensure that proceedings are conducted efficiently and expeditiously and with an appropriate use of judicial resources".

[48] The applicant's failure to comply with directions, on numerous occasions, is clearly conduct of the nature contemplated by the court in *Whyte v Brosch & Ors.*'

The Tribunal therefore confirmed a finding of unsatisfactory professional conduct, which had been made by the Law Society of NSW, and administered a caution to the practitioner.

MISLEADING THE COURT

Misleading the court is clearly regarded as one of the most serious errors that a legal practitioner can commit. This is >>

sometimes done for the benefit of the client or, as in the four cases referred to below, to achieve a personal advantage for the practitioner.

In *In re Thom; Ex parte the Prothonotary,*[9] the NSW Supreme Court found that a solicitor's wilful failure to admit adultery in his own divorce proceedings, despite his obligation as a litigant to do so, constituted professional misconduct. He was found to have deceived the court in the exercise of its matrimonial causes jurisdiction.

In *Legal Practitioners Complaints Committee v Dixon,*[10] the Supreme Court of Western Australia found a solicitor guilty of professional misconduct and ordered that he be struck off the roll of practitioners:

'[10] This was therefore a case of a practitioner who must have known that he had a duty to disclose his ownership of funds which would have a material impact upon the orders to be made by the Family Court in respect of the property settlement and maintenance. The evidence amply supported the conclusion of very serious unprofessional conduct in failing to make the necessary disclosure by deliberately concealing the true position from his wife, who was the applicant before the Family Court, and, more importantly, from the court itself. Further, the practitioner was guilty of illegal conduct in the form of perjury committed by the deliberately false statements made in his affidavits. That was a form of perjury which related directly to the practitioner's duty as an officer of the court and to the integrity of the proceedings before the court.'

In *Legal Services Commission v Walters,*[11] the Queensland Legal Practice Tribunal ordered that the practitioner's name be removed from the local roll for professional misconduct in forging a client's signature on an application to the Family Court, falsely attesting it and filing it in the Court to 'escape the embarrassment of dilatoriness in pursuing his client's affairs'.

The Tribunal noted also that the solicitor's conduct 'impugned the legitimacy of the court process' and emphasised the seriousness of the breach's effect on the court:

'Public confidence in the courts and the legal profession depends on having practitioners who are competent, aware of their obligations to courts and clients and who act in accordance with those obligations.'

In a similar matter, *Legal Services Commission v Mackereth,*[12] the Queensland Legal Practice Tribunal ordered that the practitioner's name be removed from the roll for professional misconduct for forging a client's signature, falsely witnessing the signature and swearing a false affidavit and, in doing so, 'wilfully misled his clients and the Court and the other parties to the litigation'.

> Very often, the cause of improper professional conduct is an inability to balance the various duties owed by legal practitioners.

COURT VERSUS CLIENT?

In 1889, Lord Esher in *Re Cooke*[13] said, 'How far a solicitor may go on behalf of his client is a question far too difficult to be capable of abstract definition.'

New South Wales Bar Association v Punch[14] is a clear case of 'too far' (See the Case Note in this issue of *Precedent*, p50.) The NSW Administrative Decisions Tribunal (Legal Services Division) found a barrister guilty of professional misconduct for misleading the District Court in leading alibi evidence in the trial of his client on a charge of armed robbery, knowing that evidence to be untrue, and ordered[15] that his name be removed from the roll of legal practitioners. The Tribunal noted:

'[12] By leading the alibi evidence the respondent misled the District Court. That evidence resulted in the acquittal of the respondent's client on very serious charges of assault and armed robbery. Thus it can fairly be said that the respondent's misconduct facilitated a grave miscarriage of justice.'

The decision in *Punch* recognises the difficulty faced by a practitioner whose client gives inconsistent instructions, but emphasises that it is not appropriate for a practitioner simply to accept the instructions that will produce the most expedient outcome – 'a barrister of far less experience than the respondent would have been alerted to the fact that this was a statement that required investigation'.[16]

BREACHING DUTY TO OTHERS CAN BREACH DUTY TO THE COURT

The Queensland disciplinary matter of *Legal Services Commissioner v Mullins*[17] recalls Lord Esher's conundrum – the practitioner's sometimes difficult work of reconciling duties to the court and client. This decision involved a barrister briefed for the plaintiff in a personal injury matter, who allowed the opposing party to make a false assumption at a mediation about the plaintiff's life expectancy on the basis of certain reports. The Queensland Legal Practice Tribunal noted that this led to potentially serious consequences for the opposing party's insurer, and referred to the need for honesty in negotiations:

'[27] Context influences the extent of legal and equitable obligations of disclosure .... that negotiations between a potential litigant and a tortfeasor's insurer for the compromise of a damages claim may be tinged with a commercial aspect serves rather to support the idea that negotiants anticipate a measure of honesty from each other.'

In *Legal Practitioners Complaints Committee v Dixon,*[18] referred to above, the court suggested that misleading the court is more serious than misleading another party or person:

'The evidence amply supported the conclusion of very serious unprofessional conduct in failing to make the necessary disclosure by deliberately concealing the true position from his wife, who was the applicant before the Family Court, and, more importantly, from the Court itself.'

How a breach of duty to the court might result from a breach of duty to another party is explained in the following extract from the *Cummins* judgment:

'[61] In *Chamberlain v The Law Society of the Australian Capital Territory* (1992) 43 FCR 148, the Deputy Commissioner of Taxation had issued a writ claiming the amount of $25,557.92 from a legal practitioner. There was an error in the decimal point as the amount owing was $255,579.20. The practitioner drew terms of settlement and agreed to judgment in the amount claimed in the summons. The Deputy Commissioner was unsuccessful in his attempt to recover the balance (*Chamberlain v Deputy Commissioner of Taxation* [1988] HCA 21; (1988) 164 CLR 502) or to have the judgment set aside (*Chamberlain v Commissioner of Taxation* (1981) 28 FCR 21).

[62] The Law Society instituted proceedings against Mr Chamberlain asserting professional misconduct. The Supreme Court of the Australian Capital Territory in *Re Law Society of the Australian Capital Territory and Chamberlain* (1993) 116 ACTR 1 per Miles CJ and Gallop J, Higgins J dissenting, found that the conduct was professional misconduct. An appeal to the Federal Court was dismissed on this point (*Chamberlain v Law Society of the Australian Capital Territory* (1992) 43 FCR 148 per Black CJ, Lockhart, Whitlam and Beazley JJ, Jenkinson J dissenting.

[63] The case involved a solicitor engaged in litigation in a personal capacity. The misconduct alleged was the act of procuring the Deputy Commissioner's execution of terms of settlement, which led to judgment in the mistaken amount. This was held to be "professional misconduct". The reasons were variously expressed.

- "amounted to grave impropriety affecting his professional character ... indicative of a failure on his part to understand or practise the precepts of fair dealing in relation to his opponent and to the court" (116 ACTR at 17 per Miles CJ).
- "using his knowledge and skills as a legal practitioner" (43 FCR at 156 per Black CJ).

[66] The appellant chose deliberately to take advantage of the error ... for his own personal tactical advantage ..." and "further", "[t]he use ... of the processes of the Supreme Court for the entry of judgments in all the circumstances ... was improper" (43 FCR at 166 per Lockhart J).'

MAINTAINING THE BALANCE

Practising law ethically is not easy given the fine line that practitioners need to navigate to ensure that they balance their duties to the law, the court, clients, colleagues, the public and the due and efficient administration of justice.

The practitioner's primary duty is undeniably to the court. This duty arises not only when a practitioner is appearing before, or engaged in proceedings in, a court but from every facet of a practitioner's activities. Discharging the duty to the court requires careful balancing of all duties owed by a practitioner. It might be said that a great deal of justice is handed out in practitioner's offices. ■

Notes: **1** (1909) 9 CLR 655 at 681. **2** Roger J Atkins, *The New South Wales Solicitor's Manual: A Collation of the Law and Practice Relating to the Profession of the Solicitor in New South Wales*, Law Society of NSW, 1975. **3** (2001) 52 NSWLR 279. **4** At [30] per Spigelman CJ. **5** [2005] HCA 12 at [26]. **6** (1909) 9 CLR 655. **7** [2007] NSWADT 65. **8** (1957) 97 CLR 279. **9** (1964) 80 WN (NSW) 968. **10** [2006] WASCA 27. **11** [2007] LPT 006. **12** [2008] LPT 6. **13** (1889) 5 TLR 407. **14** [2008] NSWADT 78, see case note in this edition, p50. **15** In [2008] NSWADT 146. **16** [2008] NSWADT 78,at [30] **17** [2006] LPT 012. **18** [2006] WASCA 27.

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