SUPREME COURT
OF QUEENSLAND

Joint Law Societies Ethics Forum
Law Society House
Monday 7 November 2011
9:00 am

The Hon Paul de Jersey AC
Chief Justice

Observing the conduct of lawyers for litigants, we note varying degrees of zeal. That is consistent with the ordinary human condition which is infinitely various. It may also reflect the degree of pressure exerted by a client, and in these opening remarks this morning I will briefly explore some situations in which a lawyer may be tempted to stray beyond ethical bounds when burdened by such pressures.

The well-known case of *White Industries (Qld) Pty Ltd v Flower & Hart* (1999) 87 FCR 134 involved a solicitors firm faced with client pressure, bringing court proceedings they believed their client could not win, for the collateral purpose of establishing a bargaining position with a view to deferring the client's payment of monies owed to the other party. Goldberg J said this:

> "I do not consider that it is a legitimate purpose for the institution of a proceeding in this court that the purpose of the proceeding is to postpone, delay or put a barrier in front of a claim of another party and the payment of an amount due in respect of that claim. The purpose of the proceedings in a court of law is to vindicate a claimed right. ... It is not part of the legal processes of this Court that its process and procedures be used as an instrument of oppression so as to frustrate the bringing, and expeditious disposition of a legitimate claim."

A related example, though not directed at the legal representatives, is *Williams v Spautz* (1991-2) 174 CLR 509, where the High Court struck down criminal defamation proceedings brought by Dr Spautz for the ulterior purpose of pressuring his former employer, a university, to reinstate him.

Those two cases are interestingly different. *White Industries* was the beneficiary of an order that its debtor company's solicitors pay its costs of the impugned proceeding on an indemnity basis. The Federal Court held that those solicitors had breached their duty in bringing the proceeding on the client's behalf. That was essentially because the solicitors believed that the client could not succeed and instituted the proceeding so that the client could attempt to "secure some bargaining position."

The position in *Williams v Spautz* was different in this way. Although the High Court affirmed the conclusion that his proceeding amounted to an abuse of process, the legal representatives for Dr Spautz were not held to be privy to that abuse. That their client was responsible for an abuse of process was established by a factual finding of the primary judge. That was that "the predominant purpose of Dr Spautz in instituting and maintaining the criminal proceedings ... was to exert pressure upon the University ... to reinstate him and/or to agree to a favourable settlement of his wrongful dismissal case" (page 516). Dr Spautz was entitled to legal representation to propound his case to the contrary. There was thus no impropriety in their acting on his behalf.

The position in *White Industries* was different in the respect previously mentioned, that is, the solicitors' own acknowledgment, communicated to their client, that the client "could not win ... if put to the test", and that the litigation was an "attempt to secure some bargaining position".

Those and other cases are interestingly discussed in an article by Tim Dare, "Mere – zeal, hyper – zeal and the ethical obligations of lawyers" published in 2004 in Volume 7 Part 1 of Legal Ethics at page 24.

Some years ago, the Australian Research Council and the Queensland Law Society sponsored interviews with practitioners with a view to identifying commonly encountered ethical issues. The results are summarised in Parker and Sampford:

Legal Ethics and Legal Practice, Contemporary Issues, published by Clarendon Press in 1995. I believe them as relevant today as when published.

The interviewees reported conflict of interest as spawning the most common ethical dilemmas. But there were also problems associated with maintaining a good relationship with the client. The most usual related to "pressure being applied by clients to do something illegal or unethical" (page 225), such as backdating documents or improperly witnessing documents.

Strong economic conditions can create temptations for practitioners. There are people in the community with an unquenchable thirst for material wealth. Unfortunately they are often the least prepared to seek to understand, and certainly not accept, the ethical standards which constrain legal practitioners. They are also often forceful and persuasive people, inclined to employ their wealth and consequent power as an instrument of pressure. It can therefore be a particular challenge to resist those sorts of temptations, but resisted they must be.

My focus this morning is on the role of solicitors especially in litigation, and my unsurprising thesis is that the astute pursuit of a client's interests must in the end be tempered by a degree of moderation. I offer some illustrations, and it will come as no surprise that I begin with the disclosure of documents.

The direct relevance test for disclosure, applicable for more than a decade in Queensland litigation, obviously dictates a limitation on disclosure. It is a substantial limitation, when one recalls the *Peruvian Guano* test it replaced. One would therefore think this might spawn not infrequent challenges to the sufficiency of disclosure. But my anecdotal assessment based on the Applications jurisdiction in the Supreme Court is that the frequency of such challenges has substantially reduced over recent decades. My consequent concern is that too much disclosure is occurring, without keen regard for the direct relevance limitation. An unscrupulous

lawyer driven by undue zeal may use the disclosure of documents to disadvantage the other party, requiring its lawyers to sift through volumes of only marginally relevant material, wasting resources while at the same time garnering unreasonably large fees and charges for himself or herself.

I have heard other expressions of concern that the selection and collating of disclosable documents, not an especially gripping task in large litigation, is deputed in some cases to inexperienced lawyers, or indeed, carried out offshore, in India and South Africa for example, where the process, while less costly, may lack coordinated control.

There should be a renewed focus in day to day practice on keeping disclosure within appropriate limits, and that includes presenting documents in a form which will be comprehensible to the other side rather than confuse it.

In the Parker and Sampford study to which I earlier referred, interviewees referred to problems with the disclosure of documents. Their concerns ranged "from knowing how to deal with clients who do not want to disclose discoverable documents, to whether it is unethical to present affidavits which are disorganised or contain hundreds of documents which may be only marginally relevant" (page 230). The research also uncovered concern about "deliberate breaches of time limits and abuses of the litigation process, such as entering hopeless defences or commencing hopeless actions as a delaying tactic" (page 230).

Another illustration of undue zeal in the presentation of a client's case concerns the drafting of affidavits. This has an historical dimension. In the 1980s, with a view to reducing the length of trials, and in commercial litigation especially, courts not infrequently required the presentation of a witness' evidence in chief by way of affidavit, with oral evidence substantially confined to cross-examination. As time went on, the approach faltered. It became clear in many cases that the affidavits

overstated the deponent's recollection. They were drafted by lawyers, in some cases even "settled" by Counsel, with a primary attention to what needed to be sworn to in order to establish the cause of action, rather than what the deponent could swear to. They often swore to the issue, for example as to reliance on representations. In the result, over the last few years, courts have generally come to limit written material to what is non-contentious. I offer this as an example of undue zeal in the prosecution of a client's case.

Sometimes a practitioner may be tempted to seek to advance a client's cause outside the curial proceeding. In this State, while a barrister is ethically bound not to give a media interview on a client's proceeding, a solicitor is not subject to that prohibition. Convictions in late September for drug smuggling in Malaysia and the imposition of the death penalty provoked the Malaysian lawyer for those prisoners to profess to the media that his clients honestly believed that the materials they had consumed, prior to air transportation to Australia, were some form of Chinese herbal medicine. The Malaysian advocate made his statement in the course of announcing there would be appeals. That could not occur here. I have however heard and read of solicitors' statements in this country advancing a client's cause where proceedings are continuing. That should be attended by considerable restraint : while a court would not in fact be influenced by what may be said, the risk is that the public may perceive that a court would be influenced in that way, and that would obviously be inimical to maintenance of confidence in the administration of justice.

Another example of pushing things too far was thrown up in Parker and Sampford's survey. It involved relations with other practitioners, and some subtle dilemmas, such as "whether it was ethical for a lawyer to take advantage of another lawyer's error or ignorance. The error might be an obvious one or a purely technical or mathematical one : in such cases, the lawyers generally agreed that it would be unethical not to disclose it. Where the error was due to the lawyer's inexperience or lack of attention, the lawyers had differing views" (page 231).

A practitioner's duty to the court in the administration of justice must as we know prevail, in situations of conflict, over the duty to the client. The most often quoted example is the obligation to refer a court to an authority which if followed or applied would defeat the client's claim. I mention this duty, in the context of the increasingly prevalent phenomenon of unrepresented litigants, to record this concern. It relates to the suggestion, sometimes advanced in recent times, that a lawyer's duty to assist the court extends to assisting an unrepresented party in the presentation of his or her case.

I can accept that a practitioner must exhibit courtesy to an unrepresented party on the other side of the ledger, and accede to a judge's reasonable request in relation to such things as providing copies of documents, or directing the unrepresented party's attention to a document currently in issue in the proceeding: the practitioner's attitude should be cooperative. But I have great difficulty accepting that a practitioner's duty to the court extends to assisting an unrepresented litigant in any significant way in advancing his or her case. Otherwise the feature of adversarialism would become hopelessly blurred, and the client could rightly assert that his or her lawyer was breaching the retainer.

I spoke at the outset of tempering zeal with moderation. There is prime need for that in charging practices, which came to the fore when the Court of Appeal dealt with gross overcharging in *Council of the Queensland Law Society Inc v Roche* (2004) 2 Qd R 574. I there said, with the concurrence of the other members of the Court (p 585):

> "Major criteria which ultimately inform the professionalism of the law are integrity, and as concomitants, honesty and reasonableness. A degree of recklessness may unfortunately have entered this field in recent times in the case of some practitioners. How, as instances, could it be conceived, as professional, to require recompense form the client, on a timed basis,

> for unsuccessfully seeking to telephone someone, for time spent unsuccessfully searching a file, and as mentioned above for steps taken to express thanks for assistance? The legal profession must realise that to maintain its perceived professionalism, its practices must be seen as those appropriate to a profession, and not those of a run-of-the-mill commercial enterprise. There is, in short, a large role for discretion and conservative moderation, characteristics not evident in this unfortunate case."

Contemporary practice obviously gives rise to new ethical conundrums from time to time. The high stakes which characterise substantial litigation undoubtedly create pressure on practitioners. But the ultimate constraint is to act ethically. Whatever the subtlety of the problem, established principles will provide the answer. The scenarios about to be discussed with the panel will, I trust, illustrate this.