The Ethics of the Advocate

Speech delivered by the Honourable Justice Hugh Fraser at the Bar Practice Course Final Address. Banco Court, Friday 17 February 2012.

---

1. In a well known passage in *Ziems v The Prothonotary of the Supreme Court of New South Wales*, Kitto J said that a barrister "…is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations. If a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of those privileges and in the effective discharge of those responsibilities, he is not a fit and proper person to remain at the Bar".[1]

2. That passage was quoted relatively recently by the Chief Justice in *Barristers' Board v Young*[2] and by McHugh J in *D'Orta-Ekenaike v Victorian Legal Aid*.[3] In this evening's paper, one of the topics I propose to discuss concerns the content of that traditional "relationship of intimate collaboration with the judges…in the high task of endeavouring to make successful the service of the law to the community." In particular, I will refer to the perennial question about the extent to which a barrister is required to subordinate the client's instructions

---

[1] *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 298 (Kitto J).
[2] [2001] QCA 556 at [16].
[3] (2005) 223 CLR 1, at 39-40.

about the pursuit, or defence, of litigation to the barrister's obligation to promote the efficient administration of justice.

3. It is timely to revisit these issues in light of the recent commencement of the 2011 *Barristers Rule* on 23 December 2011, when that statutory instrument was gazetted under the *Legal Profession Act* 2007. I am encouraged to refer in a little detail to these rules because their application is not restricted to this State. In the preface of the 2011 *Barristers Rule*, r 3 provides that "these rules apply throughout Australia to all barristers". Whatever may be the legal effect of that statement, I understand that it is likely to become an accurate statement of fact. I am informed that those bar associations around the country which have not yet adopted the same rules will likely do so in the near future.

4. Whilst the 2011 *Barristers Rule* involves no fundamental departure from the previous ethical rules, there are some interesting changes. Before I discuss those changes, I will briefly sketch the background to the statutory regulation of barristers in Queensland and make some observations about the legal status and effect of the 2011 *Barristers Rule*.

5. When the Bar Association was formed, it adopted the rules of the English Bar. In 1969, the Association circulated to its members a collection of ethical rulings made over the years. Subsequently Williams J (later Williams JA) included a collection of rules prepared with reference to the former English rules and the Bar Association's ethical rulings as an appendix to the second edition of

Harrison's *Law and Conduct of the Legal Profession*.[4] The Association subsequently participated in the development by the Australian Bar Association ("ABA") of model rules and produced its own versions of the rules. Those rules contractually bound members of the Bar Association of Queensland, but they could not bind the relatively few barristers who were not members. The Supreme Court could exercise its inherent jurisdiction to discipline errant barristers, but the Bar Association lacked other practical means of disciplining non-members for less serious transgression which did not justify proceedings in the Supreme Court.

6. Statutory regulation of barristers' ethics in Queensland commenced in 2004, when the *Legal Profession Act* 2004 authorised the making of rules specifying standards of conduct expected of persons who engage, or intend to engage, in legal practice as a barrister in Queensland. Pursuant to that provision, the *Legal Profession (Barristers) Rule* 2004 commenced on 1 July 2004. That Rule was subsequently replaced by the *Legal Profession (Barristers) Rule* 2007 under the *Legal Profession Act* 2007, which commenced on 1 July 2007. There was not much difference between the content of the 2004 and 2007 Rules.

7. In 2009, the Council of Australian Governments commenced a National Legal Profession Reform Project with a view to creating a uniform, nationwide system of regulating the legal profession. The ABA website notes that the ABA had by then already commenced work on a national set of conduct rules for

[4] That short summary of the history is taken from Stephen Corones, Nigel Stobbs and Mark Thomas, *Professional Responsibilities and Legal Ethics in Queensland*, (Law Book Co, 2008) at p 345.

barristers. The proposed national rules were finalised by the ABA in early February 2010, with remaining inter-jurisdictional differences concerning only minor matters. Those rules were duly adopted by the Bar Association of Queensland and are now in force. As I have indicated, it seems only a matter of time before they are in force throughout Australia.

8. The National Legal Profession Reform Project also resulted in a draft of the proposed Legal Profession National Law ("the National Law"), which was intended to create a nationwide framework for regulation of the legal profession, including the introduction of a new National Legal Services Board, Legal Services Commissioner and a publicly available Australian Legal Profession Register. Not all States have decided to adopt it and Queensland has not yet legislated to do so.

9. The introduction of a legislative framework for regulatory barristers' ethics legislation facilitated the enforcement of ethical obligations, if only because the legislation applies to all barristers, not merely members of the Bar Association. But has the regulatory activity affected the content of barristers' ethical obligations? The *2004 Barristers Rule* adopted the rules of the Bar Association of Queensland as in force before the 2004 Act intervened. The 2004 and 2007 Acts and the *2007 Barristers Rule* also did not introduce any major change in barristers' core ethical obligations, although the legislation added to the mechanisms for dealing with ethical transgressions and the 2007 Act made

important changes in the law concerning fees. The *2011 Barristers Rule* also embodies the same core ethical obligations as its predecessors.

10. But there are some differences between the 2007 and 2011 rules. Furthermore, whilst the new statutory regime has not introduced any fundamental change in the nature of the profession or in the content of barristers' ethical obligations, the mere **expression** of barristers' ethical obligations in a set of rules made under legislative authority was a significant, indeed radical, change in direction.

11. To many lawyers, the concept of attempting to reduce the ethics of the advocate to a mere set of rules is problematic. Sir Gerard Brennan's view was that it was not merely difficult but quite inappropriate. In a lecture entitled "Ethics and the Advocate", which is quoted in *Professional Responsibilities and Legal Ethics in Queensland*,[5] Sir Gerard Brennan observed:

> "The first, and perhaps the most important, thing to be said about ethics is that they cannot be reduced to rules. Ethics are not what the barrister knows he or she should do: ethics are what the barrister does. They are not so much learnt as lived. Ethics are the hallmark of a profession, imposing obligations more exacting than any imposed by law and incapable of adequate enforcement by legal process. If ethics were reduced merely to rules, a spiritless compliance would soon be replaced by skilful evasion. There is no really effective forum for their enforcement save individual acceptance and peer expectation.

[5] Stephen Corones, Nigel Stobbs and Mark Thomas, *Professional Responsibilities and Legal Ethics in Queensland*, (Law Book Co, 2008) at p 340.

> However, among those who see themselves as members of a profession, peer expectation is sufficient to maintain the profession's ethical code. Ethics give practice expression to the purpose for which a profession exists, so a member who repudiates the ethical code in effect repudiates members of the profession."

12. At first glance, the introduction of statutory instruments setting out ethical rules was wholly antithetical to those views, but reference to the empowering legislation and to the Rules themselves reveals a more complex picture. In this regard, I will refer to four, interrelated, features of the regulatory scheme.

13. First, under the 2007 Act the rules are made by the Bar Association, not by the executive or the Parliament. Section 217(a) of the *Legal Profession Act* 2007 provides that the main purposes of the relevant part, Pt 3.2, are "to promote the maintenance of high standards of profession conduct by providing for legal profession rules to regulate persons who may engage in legal practice, or the practice of foreign law, in this jurisdiction." In the same part, s 220 empowers the Bar Association to make rules about legal practice in Queensland engaged in by Australian legal practitioners as barristers. Under s 222, "legal profession rules" (a Solicitors Rule or a Barristers Rule) may make provision about any aspect of legal practice, including standards of conduct which, in the case of the Barristers Rule, are expected of Australian legal practitioners and Government legal officers. The Bar Association makes such rules, but s 225 provides that the rules have no effect unless the Minister notifies the making of them. The

legislation does not include any provision which empowers any entity other than the Bar Association to amend the rules. In short, the executive's role is limited to bringing into force new rules made by the Bar Association. In this way, the bar itself remains responsible for framing ethical rules. In practice it also participates in the formal enforcement of those rules, though its role in investigating complaints is now performed upon referral from the Legal Services Commissioner. The Commission also decides whether to institute disciplinary proceedings.

14. Secondly, the legal effect of the rules, which constitute a statutory instrument, differs from conventional regulations. The rules do not have the status of subordinate legislation.[6] They are also not expressed to have the force of law. Rather, s 227(1) provides that legal profession rules "are binding on Australian legal practitioners, Australian registered foreign lawyers and Government legal officers to whom they apply." The effect of making the rules "binding" upon a confined class of persons in that way is not entirely clear, but the statutory context suggests that a breach of the rules does not itself necessarily attract any disciplinary sanction. Under s 456 of the 2007 Act, the disciplinary tribunal's power to make disciplinary orders arises only if the tribunal is satisfied that the practitioner has engaged in "unsatisfactory professional conduct" or "professional misconduct"; and the effect of ss 227(2), 418, and 419 of the 2007 Act is that a failure to comply with legal profession rules does not itself amount to such conduct. Rather, those sections provide that a breach of a rule is

[6] See *Statutory Instruments Act* 1992 (Qld) s 9 and *Acts Interpretation Act* 1954 (Qld) s 7.

capable of constituting unsatisfactory professional conduct or professional misconduct. In other words, it seems that a contravention of a rule may, but does not necessarily, amount to unsatisfactory professional conduct or professional misconduct, or attract any sanction.

15. An example of this aspect of the regulatory scheme may be seen in the Legal Service Commissioner's decision in the disciplinary proceedings arising out of the proceedings against Dr Haneef. During those much publicised proceedings in 2007, complaints were made to the Legal Service Commissioner alleging that Dr Haneef's barrister breached r 60 of the *2007 Barristers Rule* by releasing a copy of a record of interview to a journalist without having obtained instructions to do so from the client. Dr Haneef subsequently ratified the barrister's conduct. The Legal Services Commissioner considered that there was a breach of r 60 but that it did not warrant a disciplinary response because of the 'exceptional circumstances' of the case - most notably that publishing the interview, without further comment, did not interfere with the administration of justice in the particular circumstances.[7] Accordingly no disciplinary action was taken against the barrister. The effect of the Commissioner's findings was that, despite breaching the rule, the barrister had not behaved unethically.

16. This decision by the Commissioner could not authorise, and has not been regarded as authorising, barristers to disregard the rules according to their own conceptions of the requirements of justice. The decision was accompanied by

[7] Legal Services Commission website at www.lsc.qld.gov.au/__data/assets/pdf_file/0005/106349/lsc-decision-keim.pdf

the following warning in a media statement by the Commissioner on 1 February 2008:

> "… no-one, least of all lawyers, should interpret the Commission's decision in this matter to indicate any willingness on our part to regard failures to comply with the Legal Profession Rules, be they the Barristers Rules or the Solicitors Rules, with anything less than the utmost seriousness, much less as giving a go-ahead to treat them lightly.
>
> …
>
> Notwithstanding exceptional circumstances, such as those demonstrated in this case, solicitors or barristers who breach their professional Rules can expect in the normal course of events to find themselves answering to the disciplinary bodies."

17. The curiosity that a breach of the ethical rules apparently will ordinarily, but not always, constitute unethical conduct, reflects the difficulty of attempting to codify ethics.

18. I note that barristers faced with exceptional cases which are thought to justify breach of a particular rule may now find a remedy in an interesting new rule, r 11 of the *2011 Barristers Rule*, which allows the Bar Council to waive compliance with a particular rule. The legislation does not prescribe the

consequences of such a waiver (or advert to this concept at all), but the apparent intent is that a potential or past breach of the rule which is waived in a particular case is itself incapable of amounting to unsatisfactory professional conduct or professional misconduct by the barrister concerned.

19. The third reason why the *2011 Barristers Rule* does not reduce the advocate's ethics to a mere set of rules is because the Rule itself makes that clear. The *2011 Barristers Rule* does not purport to codify the ethical obligations of barristers. The relevant rules are set out in the attached table. Importantly, r 10 makes it clear that it is not a complete or detailed code of conduct for barristers. That is supplemented by the interpretative provisions in r 6, which require reference to the generally stated purpose, objects and principles in rr 2, 4 and 5. Ultimately, those foundational statements, rather than particular rules, supply the touchstone for barristers' ethics.

20. Finally, s 13 of the 2007 Act preserves the inherent jurisdiction and power of the Supreme Court in relation to the control and discipline of local lawyers and local legal practitioners, and interstate legal practitioners who are engaged in legal practice in this jurisdiction. That provision reflects the status of persons admitted to the legal profession as officers of the Supreme Court, a status which is confirmed in s 38 of the 2007 Act. Ultimately, the Supreme Court may determine whether a barrister should be sanctioned for what the Court regards as unethical conduct. Section 13 expressly provides that the Court's inherent jurisdiction and

power "is not affected by anything in this Act." Thus the Court retains ultimate control over the conduct of its officers, including its barristers.[8]

Efficient Administration of Justice

21. Although the *2011 Barristers Rule* does not comprehensively prescribe the ethical obligations of barristers, there must only be very rare occasions when it is permissible for a barrister to depart from those rules. The differences between the 2011 the 2007 Rule therefore merit detailed examination, as I earlier indicated. However, in a paper of this scope it would be impractical to discuss every such difference. I propose to focus tonight mainly upon the provisions which, I suggest, reflect an increase in the emphasis upon the efficient administration of justice as an aspect of barristers' paramount duty.

22. It has always been the case that barristers exercise independent forensic judgements in the proper administration of justice in a way which is sometimes contrary to their clients' wishes, or, indeed, their clients' express instructions. This is recognised in the 2011 Rule in rr 2, 4(c), 5(a), 5(e), and rr 41 and 42. Although rr 2 and 4 are new, rr 5, 41 and 42 substantially reproduce provisions in the 2007 Rule: see Preamble paragraph 5 and in rr 20 and 21.

[8] The relationship between the Court's role and the statutory scheme, including the legal profession rules, is not elucidated in the *Legal Profession Act* 2007 (Qld). See *Walsh v Law Society of New South Wales* (1999) 198 CLR 73 at [64]-[65] and *Legal Services Commissioner v Madden (No 2*) [2008] QCA 301 at [84]-[88].

23. There is nothing novel in these general rules. In *Giannarelli v Wraith*,[9] Brennan J quoted Lord Eldon's statement in November 1822 in *Ex parte Lloyd*,[10] referring to counsel in the following terms:

> "He is, however he may be represented by those who understand not his true situation, merely an officer assisting in the administration of justice, and acting under the impression, that truth is best discovered by powerful statements on both sides of the question."

24. Again, in *Moscati v Lawson*, Alderson B said that "[t]he institution of barristers is principally to assist the Court in the dispensing of justice…"[11] Similarly, in *Giannarelli*, Mason CJ, referred to the "…peculiar nature of the barrister's responsibility when he appears for his client in litigation."[12] Mason CJ described this as being that counsel owes a duty to the court as well as to his client, the latter being subject to the former. Mason CJ went on to describe some consequences of the paramount duty to the court: it will require counsel to act in a variety of ways to the possible disadvantage of a client: "[c]ounsel must not mislead the court, cast unjustifiable aspersions on any party or witness, or withhold documents and authorities which detract from his client's case. And if he notes any irregularity in the conduct of a criminal trial, he must take the point so that it can be remedied, instead of keeping the point up his sleeve and using it as a ground for appeal."

---

[9] (1988) 165 CLR 543 at 579.
[10] Noted in *Ex parte Elsee* (1830) Mont. 69 at p 70 n, at p 72.
[11] *Moscati v Lawson* (1835) 1 M & R 455 (174 ER 156) (Alderson B), quoted by McHugh J in *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1 at 39 [106].
[12] *Giannarelli v Wraith* (1988) 165 CLR 543 at 555.

25. The Chief Justice pointed out that the duty to the court was paramount and must be performed even if the client gives instructions to the contrary; and that duty "epitomi[s]es 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 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 and 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. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case."[13] Wilson J[14] and Dawson J[15] make similar observations.

26. That barristers' duties include an obligation to contribute to the efficient administration of justice is well established. Nevertheless, I suggest that reference to the comparative table attached to this paper reveals a greater emphasis on this aspect of barristers' obligations in the 2011 Rule.

[13] *Giannarelli v Wraith* (1988) 165 CLR 543 at 556.
[14] Ibid at 572-573.
[15] Ibid at 594.

27. A possible example of this trend concerns provisions of the 2007 rules about "forensic judgments" (Preamble paragraph 5 and rr 20 and 21). Those rules are reflected in the 2011 Rule (rr 5, 41 and 42). However, the definition of "forensic judgments" in the 2007 Rule excluded decisions as to the commencement of proceedings, the joinder of parties, admissions or concessions of fact and other matters, although the term did include advice to make such decisions. Whilst r 116[16] of the *2011 Barristers Rule* includes definitions of most terms which mirror those in the 2007 Rule, the definition of "forensic judgments" has been omitted. If "forensic judgements" referred to in the 2011 Rule, in rr 5(e), 41 and 42, includes decisions about admissions of fact et cetera, then the omission of the definition may have enhanced the barrister's capacity to contribute to the efficiency of litigation despite any contrary wish of the client.

28. More significantly, there are also some entirely new rules in the *2011 Barristers Rule*. The general statements in rr 2 and 4 of the 2011 Rule had no direct counterpart in the 2007 Rule. Rule 12(b) of the 2011 Rule also focuses upon the role of the barrister in the administration of justice. The same theme is again emphasised in the new r 25. Whilst that new rule reflects general statements in the introduction about the underlying objectives of the rules, which did have a counterpart in the 2007 Rule, r 25 is important as an explicit statement of the barrister's overriding duty to act independently in the interests of the administration of justice.

[16] This was r 117 in the *2011 Barristers Rule* published on the Queensland Bar Association website at the time of this speech.

29. Furthermore, whilst most of the rules following r 25 under the heading "Duty to Court" reflect pre-existing rules, there are two noteworthy exceptions. The first is r 28. It had no counterpart in the 2007 Rule. Many barristers might in any event have regarded that rule as a statement of their duty to the Court, but its inclusion is yet another example of the increased emphasis in the 2011 Rule of the barrister's paramount duty to justice.

30. The other noteworthy change in this section of the 2011 Rule is the omission of r 31 of the 2007 Rule. That omission must be understood in the context of r 35 of the 2011 Rule, which reflected r 32 of the 2007 Rule. Rule 35 is premised on the view that defence counsel is not obliged to notify the prosecution of a previous conviction even though defence counsel believes that the prosecution (and thus the Court) is unaware of it. Defence counsel's uncomfortable position in such a case results from his or her duties to the client, including the duty to maintain the confidence of the client's instructions. But the omission in the 2007 Rules of the former r 31 may have made defence counsel's position even more uncomfortable. That rule protected a barrister who, for example, advocated mitigation of a sentence by relying upon evidence of the client's previous good character, whilst at the same time the barrister failed to disclose other unfavourable aspects of the client's character and history. The omission of former r 31 will no doubt focus the attention of barristers in such cases upon the obligation expressed in r 23 not to knowingly make a misleading statement to a Court on any matter.

31. Apparently of broader importance however, are the new provisions in rr 56, 57 and 58 of the 2011 Rule. These provisions replicate rules which the New South Wales Bar Association adopted some years ago, in January 2000, according to Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia*.[17] The author expresses the opinion, at p 526, that these rules were designed to prevent the lawyers' delaying tactics which were criticised by the Full Court of the Federal Court in *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* ("*White Industries*"),[18] upholding Goldberg J's judgment.[19] Goldberg J found that the action brought against White Industries was instituted, not to vindicate a claimed right, but to delay White Industries' own proceedings for the recovery of money under a building contract. There was, Goldberg J found, an illegitimate strategy to continuously attempt to delay the progress of an action and to avoid it being set down for trial. Ross expresses the opinion in footnote 28 on p 526 that it was debatable whether the barrister's behaviour in the *White Industries* case was unethical because the Queensland Bar rules on the use of the court process "are narrow in scope" and there was not any rule that "directly deals with the delay problem."

32. Rules 57(b) and (e) now expressly require the barrister to seek to ensure that the work which the barrister is briefed to do is done so as to have the case ready to

---

[17] Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (Butterworths, 5th ed, 2010) at p 525. There were similar provisions in r 23(A.15 – A.15B) of the *NSW Solicitors' Rule* ("*Revised Professional Conduct and Practices Rules 1995"*).
[18] (1998) 87 FCR 134.
[19] (1998) 156 ALR 169.

be heard as soon as practicable and so as to occupy a short a time in court as is reasonably necessary to advance and protect the client's interests at stake in the case.

33. Those rules go further than rr 41 and 42, which did have counterparts in the 2007 Rule. Rule 41 deals with the independence of the judgments which the barrister must bring to bear. Rule 42 protects the barrister from an allegation of breach of duty to the client in exercising "forensic judgements" aimed at confining the issues and dealing with the case expeditiously. But r 42 is expressed in negative terms, being designed to protect the barrister from challenge by the client or instructing solicitor. Rules 56 to 58 are expressed in imperative terms, positively obliging the barrister to contribute to the efficient administration of justice in the ways described.

34. It would seem incongruous in the present era if barristers' ethical obligations did not comprehend obligations to seek to expedite litigation. The incongruity would be most pronounced in the civil jurisdiction, having regard to the implied undertaking which each litigant is taken to give by UCPR r 5(3) to proceed in an expeditious way. Procedural rules of that kind do not exist for the discipline of practitioners, as Thomas JA observed in *Quinlan v Rothwell*.[20] But it is unsurprising that the inroads upon the adversarial system involved in the significant increase in judicial involvement in case management are now reflected in express ethical rules.

[20] [2002] 1 Qd R 647 at [29].

35. In a paper entitled "A changing judiciary" given at the Judicial Conference of Australia on 7 April 2001, which was quoted by Thomas JA in *Quinlan v Rothwell* at [28], former Chief Justice Gleeson noted that "trial judges are expected to adopt a role most of their predecessors would have regarded as inappropriately interventionist". Because the paramount duty of a barrister is to the court - the barrister being, as Kitto J observed, "in a relationship of intimate collaboration with the judges…in the high task of endeavouring to make successful the service of the law to the community" - we should not be surprised to see the changing role of the judge reflected in the development of ethical rules which bind barristers. If, as Wilson J observed in *Westsand Pty Ltd v Johnson*, "it is the duty of the court to avoid undue delay, expense and technicality"[21] (reflecting UCPR r 5(2)), then barristers must surely have a significant role to play in assisting the fulfilment of that duty.

36. I do not suggest that these new rules displace the fundamental tenets of the adversarial system. Rather, the rules reflect the now established retreat from some of the more extreme features of the system. That retreat has been most pronounced in the civil jurisdiction. Correspondingly, the newly expressed rules appear to have much less impact in the criminal jurisdiction, where we still find the equivalent of the late, unlamented plea in civil cases of "not indebted as alleged or at all". In the criminal jurisdiction, under the general plea of "not guilty" defence counsel ordinarily may rest upon the obligation of the

[21] *Westsand Pty Ltd v Johnson* (Unreported, Supreme Court of Queensland, Wilson J, 15 November 1999) at [11].

prosecution to prove guilt beyond reasonable doubt. The courts regularly see competent defence counsel narrowing the issues for sound forensic reasons, but rules such as r 57(a) appear to have limited scope for application where an accused person exercises his or her right to put the prosecution to proof beyond reasonable doubt of all issues and insists that defence counsel maintains legal confidence in instructions, including any admission of guilt. So much is reflected in r 79.

37. It remains the case, however, that the ethical obligations of expedition, economy, and efficiency now reflected in rr 56 to 58 are expressed to apply in all cases, including criminal cases. It is to be hoped that the expression of these rules will have an effect in promoting the efficient administration of justice.

Advocating an unarguable case

38. It is useful, I think, to consider the potential significance of this emphasis in barristers' ethical rules upon the efficient administration of justice in the context of the ethical obligations of a barrister who is instructed to pursue a hopeless case.

39. In New South Wales and the Australian Capital Territory there is legislation which precludes lawyers from pursuing hopeless damages claims. The relevant statutes provide that legal services on a claim, or in the defence of a claim, for

damages must not be provided unless the legal practitioner associate responsible "reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success".[22] "Provable" is defined as meaning that the legal practitioner associate "reasonably believes that the material then available to him or her provides a proper basis for alleging that fact".[23] "Reasonable prospects of success" is not defined. In *Degiorgio v Dunn (No 2)* Barrett J construed that term, with reference to the Premier's second reading speech and the apparent legislative purpose, as being equivalent to "so lacking in merit or substance as to be not fairly arguable", and falling short of "likely to succeed".[24] Failure to comply with this provision is capable of amounting to unsatisfactory professional conduct or professional misconduct.[25]

40. I have not found any similar Queensland legislation. I will therefore discuss only the common law position.

41. In *Steindl Nominees Pty Ltd v Laghaifar*, Davies JA observed, after referring to the former ethical rules and to case law, that "[i]f it is counsel's duty to exercise his or her own independent judgment upon which points will be argued it must also be his or her duty, in the exercise of that judgment, to decide whether there

[22] *Legal Profession Act 2004* (NSW) s 345(1); and similar provisions in *Civil Law (Wrongs) Act 2002* (ACT) ss 188(1) and 188(2).
[23] *Legal Profession Act 2004* (NSW) s 345(2); and similar provisions in *Civil Law (Wrongs) Act 2002* (ACT) s 186.
[24] *Degiorgio v Dunn (No 2)* (2005) 62 NSWLR 284, 293 at [28].
[25] *Legal Profession Act 2004* (NSW) s 347(1); *Civil Law (Wrongs) Act 2002* (ACT) s 188(3).

is any point which can be argued."[26] After referring to the greater care which must be taken in judging the arguability of questions of fact than of legal questions, Davies JA concluded that ultimately the question is the same whether it depends on fact or law: "if the case is plainly unarguable it is improper to argue it."

42. Authorities in other jurisdictions, suggest a different view. In *Ridehalgh v Horsefield*, the Court of Appeal held that "…clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved", and that it is "one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court."[27]

43. Davies JA referred to *Ridehalgh* and to similar statements by Goldberg J in *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)*[28] and by the Full Court of the Federal Court in *Levick v Deputy Commissioner of Taxation*,[29] but rejected the view that a barrister may advocate what the barrister thinks is an unarguable case provided that the barrister does not believe the case to amount to an abuse of process. At [24], Davies JA accepted that it was appropriate to present a case which was "barely arguable (but arguable nevertheless) but most likely to fail…", but that "…it is improper for counsel to present, even on

[26] *Steindl Nominees Pty Ltd v Laghaifar* [2003] 2 Qd R 683 at [27].
[27] *Ridehalgh v Horsefield* [1994] Ch 205 at 234.
[28] (1998) 156 ALR 169 at 239.
[29] (2000) 102 FCR 155.

instructions, a case which he or she regards as bound to fail because, if he or she so regards it, he or she must also regard it as unarguable." Williams JA, at [40], expressed agreement with the reasons of Davies JA, and Philippides J agreed with both Davies and Williams JJA.

44. The complicating feature of the decision is that Williams JA, at [41], referred with apparent approval to the following obiter dicta by Lord Hobhouse in *Medcalf v Mardell*:[30]

> "So it is not enough that the court considers that the advocate has been arguing a hopeless case. The litigant is entitled to be heard; to penalise the advocate for presenting his client's case to the court would be contrary to the constitutional principles to which I have referred. The position is different if the court concludes that there has been improper time-wasting by the advocate or the advocate has knowingly lent himself to an abuse of process."

45. Lord Hobhouse also concluded at 143, (although Williams JA did not expressly refer to this conclusion) that "it is the duty of the advocate to present his client's case even though he may think that it is hopeless and even though he may have advised his client that it is". For that proposition, his Lordship cited *Ridehalgh*.[31] Further support for that, or a similar, view may be found in various Australian decisions, including *Levick v Deputy Commissioner of*

[30] [2003] 1 AC 120 at 143-144.
[31] *Ridehalgh v Horsefield* [1994] Ch 205, 233-234.

Taxation,[32] *Kumar v Minister for Immigration and Multicultural and Indigenous Affairs*,[33] and *Bagshaw v Scott*.[34]

46. This approach, under which a barrister may advocate, and may be obliged to advocate, a case which he or she considers is unarguable may be found in *Harley v McDonald*,[35] a decision of the Privy Council in which *Ridehalgh* was cited with approval. Lord Hope of Craighead concluded that it was in the public interest that litigants who insisted on bringing their cases to court should be represented by legal practitioners "…however hopeless their cases may appear." In "Civil Advocacy and the Dogma of Adversarialism", Webb expressed the view that the Privy Council's approach perhaps indicates that the advocate's duty to assist in the efficient administration of justice "is rhetorical only",[36] the sole task of the advocate, in real terms, being to present the client's case in the best light possible. He concluded, at p 229, that the result is a "bleak assessment of the capacity of the reformed civil procedure framework to dilute the adversarial approach to litigation and thereby lead to outcomes which are more just and more efficiently reached."

47. Support for a more optimistic assessment about the contribution barristers may make to the efficient administration of justice is to be found in the provisions of the *2011 Barristers Rule* which I have discussed.

---

[32] (2000) 102 FCR 155 at 166 [44] (the Full Court of the Federal Court).
[33] (2004) 133 FCR 582 (Mansfield J).
[34] [2005] FCA 104 (Bennett J).
[35] [2002] 1 NZLR 1.
[36] Duncan Webb, 'Civil Advocacy and the Dogma of Adversarialism' (2004) 7(2) *Legal Ethics* 210, 227

48. Judicial support for the view expressed by Davies JA may also be found in *Carson v Legal Services Commission*,[37] *Tran v Minister for Immigration & Multicultural & Indigenous Affairs (No. 2)*[38] and *Lemoto v Able Technical Pty Ltd*.[39] In *Lemoto* at [92], McColl JA, with whose reasons Hodgson and Ipp JJA agreed, first summarised some principles gleaned from the English and Australian authorities which considered the power to order legal practitioners to pay the costs of proceedings in which they have represented parties. At [92] (b) McColl JA proposed the following principle:

> "A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he or she acts for a party who pursues a claim or a defence which is plainly doomed to fail: *Ridehalgh* (at 233); *Medcalf v Mardell* [2003] 1 AC 120 at 143 [56], per Lord Hobhouse of Woodborough; *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169; 29 ACSR 21 (affirmed on appeal; *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134); *Levick v Commissioner of Taxation*; cf *Steindl Nominees Pty Ltd v Laghaifar* [2003] 2 Qd R 683;"

[37] [2000] NSWCA 308 at [113] (Hodgson CJ in Eq., Sheller JA and Giles JA agreeing).
[38] [2006] FCA 199 at [15] (Weinberg J).
[39] [2005] NSWCA 153 at [92(b)], as qualified at [94] – [114].

49. At [99], under the heading "The expeditious administration of justice", her Honour concluded that this principle "requires some elaboration." Her Honour said:

> "The proposition that a legal practitioner would not be subjected to a personal costs order simply because he or she acted for a party who pursued a claim or a defence which was doomed to fail reflected the first of the tensions referred to in *Ridehalgh* [(at 226)], 'that lawyers should not be deterred from pursuing their client's interests by fear of incurring a personal liability to their client's opponents'. In *Ridehalgh* (at 234), the Court said:
>
> > "Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it."

50. McColl JA then pointed out, at [101], that:

> "The proposition that a lawyer who acted for a party who pursued a claim or a defence 'plainly doomed to fail' had not acted improperly (*Ridehalgh* at 233) has been expressed in more qualified terms. In *Re Cooke* (1889) 5 TLR 407 at 408, Lord Esher MR said:

> "[I]f the solicitor could not come to *the certain and absolute opinion that the case was hopeless*, it was his duty to inform his client of the risk he was running, and, having told him that and having advised him most strongly not to go on, if the client still insisted in going on the solicitor would be doing nothing dishonourable in taking his instructions." (Emphasis added.)

51. After referring to authorities, at [110] – [113], McColl JA said in relation to *Steindl*:

> "Although Williams JA agreed with Davies JA, he also expressed his agreement with Lord Hobhouse of Woodbrough's statement in *Medcalf* (at [56]) concerning the entitlement of litigants to be heard notwithstanding the fact the court considered the advocate had been arguing a hopeless case. Philippides J agreed with Davies JA's reasons and also with Williams JA's further reasons.
>
> It is plain, as Goldberg J accepted in *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (at 231), that the proposition that 'commencing or maintaining proceedings with no or no substantial prospects of success enlivens the jurisdiction to order a solicitor to pay the costs of a party" is expressed at a dangerous level of generality. Something more is required as both Goldberg J and Davies JA accepted. Sheller JA in *Carson* characterised it as improper for a solicitor to

> commence proceedings which were "futile or foredoomed to fail'. This accords with Davies JA's proposition.
>
> It is not necessary for the purpose of this judgment to resolve the tension between these decisions. Suffice it to say that Sheller JA's observation in *Carson* and Davies JA's qualification in *Steindl* appear to presage the philosophy underpinning Div 5C.
>
> The cases in which legal practitioners have been ordered to pay the other party's costs of the proceedings costs bear out the 'plainly unarguable' and 'futility' test."

52. Of course what is a hopeless case is a matter for judgment. As Lord Steyn observed in *Medcalf v Mardell*:[40]

> "The law reports are replete with cases which were thought to be hopeless before investigation but were decided the other way after the court allowed the matter to be tried."

53. No doubt, there is nothing to stop a barrister from mounting a genuine challenge to orthodox principles: experience shows that what is orthodox in one era may be bad law in another. Furthermore, in many cases there may be scope for a broad range of opinions amongst barristers about the merit, or lack of merit, in the case. And no doubt, barristers would not contemplate refusing to

[40] [2003] 1 AC 120 at 139.

argue a case without being wholly convinced, after careful study, that the case is unarguable. But there are some litigants who seek to pursue manifestly unarguable claims. Some do so, not for any improper or ulterior purpose, but simply because, despite obtaining advice, they are unable to accept accurate advice that their claims are illegitimate. Others may refuse to act upon accurate advice that the claim is unarguable for some ulterior purpose, but the material in the brief might not justify the barrister in concluding that the proceeding is an abuse of process. In such cases, barristers may now find support in the emphasis upon the efficient administration of justice in the *2011 Barristers Rule* for the view that the barrister should decline to advocate the unarguable claim, regardless whether it is otherwise an abuse of process.

54. I will conclude with a question. Rule 37 qualifies the barrister's duty to the client by reference to which is "proper", and other rules, including r 57, presumably inform what is "proper". If so, in terms of r 57(a), could there be any issue of fact or law "genuinely" in dispute in a claim which the barrister correctly believes, and has advised the client, is hopeless, either as a matter of fact or of law?

Hugh Fraser JA

17 February 2012

2011 Rules	2007 Rules
2. The general purpose of these Rules is to provide the requirements for practice as a barrister and the rules and standards of conduct applicable to barristers which are appropriate in the interests of the administration of justice and in particular to provide common and enforceable rules and standards which require barristers: (a) to be completely independent in conduct and in professional standing as sole practitioners; and (b) to acknowledge a public obligation based on the paramount need for access to justice to act for any client in cases within their field of practice. … 4. The object of these Rules is to ensure that all barristers: (a) act in accordance with the general principles of professional conduct; (b) act independently; (c) recognise and discharge their obligations in relation to the administration of justice; and (d) provide services of the highest standard unaffected by personal interest.	
5. These Rules are made in the belief that: (a) barristers owe their paramount duty to the administration of justice; (b) barristers must maintain high standards of professional conduct; (c) barristers as specialist advocates in the administration of justice, must act honestly, fairly, skilfully and with competence	These Rules are made in the belief that: 1. The administration of justice is best served by reserving the practice of law to those who owe their paramount duty to the administration of justice. 2. As legal practitioners, barristers must maintain high standards of professional conduct. 3. The role of barristers as specialist advocates in the administration

and diligence; (d) barristers owe duties to the courts, to their clients and to their barrister and solicitor colleagues; (e) barristers should exercise their forensic judgments and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients; and (f) the provision of advocates for those who need legal representation is better secured if there is a Bar whose members: (i) must accept briefs to appear regardless of their personal beliefs; (ii) must not refuse briefs to appear except on proper professional grounds; and (iii) compete as specialist advocates with each other and with other legal practitioners as widely and as often as practicable.	of justice requires them to act honestly, fairly, skilfully, diligently and fearlessly. 4. Barristers owe duties to the courts, to other bodies and persons before whom they appear, to their clients, and to their barrister and solicitor colleagues. 5. Barristers should exercise their forensic judgments and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients. 6. The provision of advocates for those who need legal representation is better secured if there is a Bar whose members: (a) must accept briefs to appear regardless of their personal prejudices; (b) must not refuse briefs to appear except on proper professional grounds; and (c) compete as specialist advocates with each other and with other legal practitioners as widely and as often as practicable.
6. These Rules should be construed to promote the objects and principles expressed in this Introduction. 10. These Rules are not intended to be a complete or detailed code of conduct for barristers. Other standards for, requirements of and sanctions on the conduct of barristers are found in the inherent disciplinary jurisdiction of the Supreme Court, the *Legal Profession Act* 2007 and in the general law (including the law relating to contempt of court).	10. These Rules are not, and should not be read as if they were, a complete or detailed code of conduct for barristers. Other standards for, requirements of and sanctions on the conduct of barristers are found in the inherent disciplinary jurisdiction of the Supreme Court, in the Legal Profession Act 2007 and in the general law (including the law relating to contempt of court). 11. These Rules should be read and applied so as most effectively to attain the objects and uphold the values expressed in their Preamble.

Waiver of Rules 11. The Bar Council shall either before or after the event have the power to waive the duty imposed on a barrister to comply with the provisions of these Rules in such circumstances and to such extent as the Bar Council may think fit and either conditionally or unconditionally.	
12. A barrister must not engage in conduct which is: (a) dishonest or otherwise discreditable to a barrister; (b) prejudicial to the administration of justice; or (c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute. 13. A barrister must not engage in another vocation which: (a) is liable to adversely affect the reputation of the legal profession or the barrister's own reputation; (b) is likely to impair or conflict with the barrister's duties to clients; or (c) prejudices a barrister's ability to attend properly to the interests of the barrister's clients. 14. A barrister may not use or permit the use of the professional qualification as a barrister for the advancement of any other occupation or activity in which he or she is directly or indirectly engaged, or for private advantage, save where that use is usual or reasonable in the circumstances.	

Cab-rank principle 21. A barrister must accept a brief from a solicitor <u>to appear before a court</u> in a field in which the barrister practises or professes to practise if: a. the brief is within the barrister's capacity, skill and experience; b. the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may, as a real possibility, prevent the barrister from being able to advance a client's interests to the best of the barrister's skill and diligence; c. the fee offered on the brief is acceptable to the barrister; and d. the barrister is not obliged or permitted to refuse the brief under Rules 95, 97 , 98 or 99. 22. A barrister must not set the level of an acceptable fee, for the purposes of Rule 21(c), higher than the barrister would otherwise set if the barrister were willing to accept the brief, with the intent that the solicitor may be deterred from continuing to offer the brief to the barrister. **Briefs which may be refused or returned** 99. A barrister may refuse or return a brief to appear before a court: … (n) <u>in such other circumstances as may be permitted by the President or a delegate of the President who is a Senior Counsel.</u>	89. A barrister must accept a brief from a solicitor in a field in which the barrister practises or professes to practise if: (a) the brief is within the barrister's capacity, skill and experience; (b) the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may, as a real possibility, prevent the barrister from being able to advance a client's interests to the best of the barrister's skill and diligence; (c) the fee offered on the brief is acceptable to the barrister; (d) the barrister is not obliged or permitted to refuse the brief under Rules 91, 92, 93, 95. 96 and 97. 90. A barrister must not set the level of an acceptable fee, for the purposes of Rule 89(c), higher than the barrister would otherwise set if the barrister were willing to accept the brief, with the intent that the solicitor may be deterred from continuing to offer the brief to the barrister.

Duty to the Court	
25. A barrister has an overriding duty to the Court to act with independence in the interests of the administration of justice.	
26. A barrister must not deceive or knowingly or recklessly mislead the Court.	23. A barrister must not knowingly make a misleading statement to a court on any matter.
27. A barrister must take all necessary steps to correct any misleading statement made by the barrister to a court as soon as possible after the barrister becomes aware that the statement was misleading.	24. A barrister must take all necessary steps to correct any misleading statement made by the barrister to a court as soon as possible after the barrister becomes aware that the statement was misleading.
28. A barrister must alert the opponent and if necessary inform the court if any express concession made in the course of a trial in civil proceedings by the opponent about evidence, case-law or legislation is to the knowledge of the barrister contrary to the true position and is believed by the barrister to have been made by mistake.	
29. A barrister seeking any interlocutory relief in an ex parte application must disclose to the court all factual or legal matters which: a. are within the barrister's knowledge; b. are not protected by legal professional privilege; and c. the barrister has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.	25. A barrister seeking any interlocutory relief in an ex parte application must disclose to the court all matters which: (a) are within the barrister's knowledge (b) are not protected by legal professional privilege; and (c) the barrister has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.
30. A barrister who has knowledge of matters which are within Rule 29(c): a. must seek instructions for the waiver of legal professional privilege if the matters are protected by that privilege so as to permit the barrister to disclose those matters under Rule 29; and b. if the client does not waive the privilege as sought by the	26. A barrister who has knowledge of matters which are within Rule 25(c)- (a) must seek instructions for the waiver of legal professional privilege if the matters are protected by that privilege so as to permit the barrister to disclose those matters under Rule 25; and (b) if the client does not waive the privilege as sought by the barrister -

barrister: i. must inform the client of the client's responsibility to authorise such disclosure and the possible consequence of not doing so; and ii. must refuse to appear on the application.	(i) must inform the client of the client's responsibility to authorise such disclosure and the possible consequence of not doing so; and (ii) must inform the Court that the barrister cannot assure the Court that all matters which should be disclosed have been disclosed to the Court.
31. A barrister must, at the appropriate time in the hearing of the case if the court has not yet been informed of that matter, inform the court of: (a) any binding authority; (b) where there is no binding authority any authority decided by an Australian appellate court; and (c) any applicable legislation; known to the barrister and which the barrister has reasonable grounds to believe to be directly in point, against the client's case.	27. A barrister must, at the appropriate time in the hearing of the case and if the court has not yet been informed of that matter, inform the court of: (a) any binding authority; (b) any authority decided by an intermediate court of appeal in Australia; (c) any authority, including any authority on the same or materially similar legislation as that in question in the case, decided at first instance in the Federal Court or a Supreme Court, or by superior appellate courts, which has not been disapproved; or (d) any applicable legislation of which the barrister is aware, and which the barrister has reasonable grounds to believe to be directly in point, against the client's case.
32. A barrister need not inform the court of matters within Rule 31 at a time when the opponent tells the court that the opponent's whole case will be withdrawn or the opponent will consent to final judgment in favour of the client, unless the appropriate time for the barrister to have informed the court of such matters in the ordinary course has already arrived or passed.	28. A barrister need not inform the court of matters within Rule 27 at a time when the opponent tells the court that the opponent's whole case will be withdrawn or the opponent will consent to final judgment in favour of the client, unless the appropriate time for the barrister to have informed the court of such matters in the ordinary course has already arrived or passed.
33. A barrister who becomes aware of a matter within Rule 31 after judgment or decision has been reserved and while it remains pending, whether the authority or legislation came into existence before or after argument, must inform the court of that matter by:	29. A barrister who becomes aware of a matter within Rule 27 after judgment or decision has been reserved and while it remains pending, whether the authority or legislation came into existence before or after argument, must inform the court of that matter by:

(d) a letter to the court, copied to the opponent, and limited to the relevant reference unless the opponent has consented beforehand to further material in the letter; or (e) requesting the court to relist the case for further argument on a convenient date, after first notifying the opponent of the intended request and consulting the opponent as to the convenient date for further argument.	(a) a letter to the court, copied to the opponent, and limited to the relevant reference unless the opponent has consented beforehand to further material in the letter; or (b) requesting the court to re-list the case for further argument on a convenient date, after first notifying the opponent of the intended request and consulting the opponent as to the convenient date for further argument.
34. A barrister need not inform the court of any matter otherwise within Rule 31 which would have rendered admissible any evidence tendered by the prosecution which the court has ruled inadmissible without calling on the defence.	30. A barrister need not inform the court of any matter otherwise within Rule 27 which would have rendered admissible any evidence tendered by the prosecution which the court has ruled inadmissible without calling on the defence.
	31. A barrister will not have made a misleading statement to a court simply by failing to disclose facts known to the barrister concerning the client's character or past, when the barrister makes other statements concerning those matters to the court, and those statements are not themselves misleading.
35. A barrister who knows or suspects that the prosecution is unaware of the client's previous conviction must not ask a prosecution witness whether there are previous convictions, in the hope of a negative answer.	32. A barrister who knows or suspects that the prosecution is unaware of the client's previous conviction must not ask a prosecution witness whether there are previous convictions, in the hope of a negative answer.
36. A barrister must inform the court of a misapprehension by the court as to the effect of an order which the court is making, as soon as the barrister becomes aware of the misapprehension.	33. A barrister must inform the court in civil proceedings of a misapprehension by the court as to the effect of an order which the court is making, as soon as the barrister becomes aware of the misapprehension.

Duty to client 37. A barrister must promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person.	**Duty to client** 16. A barrister must seek to advance and protect the client's interests to the best of the barrister's skill and diligence, uninfluenced by the barrister's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the barrister or any other person, and always in accordance with the law including these Rules.
Independence 41. A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor 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 wishes where practicable. 42. A barrister will not have breached the barrister's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's wishes, simply by choosing, contrary to those wishes, to exercise the forensic judgments called for during the case so as to: (f) confine any hearing to those issues which the barrister believes to be the real issues; (g) present the client's case as quickly and simply as may be consistent with its robust advancement; or (h) inform the court of any persuasive authority against the client's case.	**Disinterestedness** 20. A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor 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 desires where practicable. 21. A barrister will not have breached the barrister's duty to the client, and will not have failed to give reasonable consideration to the client's or the instructing solicitor's desires, simply by choosing, contrary to those desires, to exercise the forensic judgments called for during the case so as to: (a) confine any hearing to those issues which the barrister believes to be the real issues; (b) present the client's case as quickly and simply as may be consistent with its robust advancement; or (c) inform the court of any persuasive authority against the client's case. 14. Unless the context requires otherwise, the following expressions are defined as follows when used in these Rules: … "forensic judgments" do not include decisions as to the commencement of proceedings, the joinder of parties, admissions or

	concessions of fact, amendments of pleadings or undertakings to a court, a plea in criminal proceedings, but do include advice given to assist the client or the instructing solicitor to make such decisions
Efficient administration of justice 56. A barrister: (a) must seek to ensure that the barrister does work which the barrister is briefed to do in sufficient time to enable compliance with orders, directions, Rules or practice notes of the court; and (b) if the barrister has reasonable grounds to believe that the barrister may not complete any such work on time must promptly inform the instructing solicitor or the client. 57. A barrister must seek to ensure that work which the barrister is briefed to do in relation to a case is done so as to: (a) confine the case to identified issues which are genuinely in dispute; (b) have the case ready to be heard as soon as practicable; (c) present the identified issues in dispute clearly and succinctly; (d) limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case; and (e) occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case.	

58. A barrister must take steps to inform the opponent as soon as possible after the barrister has reasonable grounds to believe that there will be an application on behalf of the client to adjourn any hearing, of that fact and the grounds of the application, and must try, with the opponent's consent, to inform the court of that application promptly.	
Responsible use of court process and privilege 59. A barrister must take care to ensure that the barrister's advice to invoke the coercive powers of a court: (a) is reasonably justified by the material then available to the barrister; (b) is appropriate for the robust advancement of the client's case on its merits; (c) is not made principally in order to harass or embarrass a person; and (d) is not made principally in order to gain some collateral advantage for the client or the barrister or the instructing solicitor out of court. 60. A barrister must take care to ensure that decisions by the barrister to make allegations or suggestions under privilege against any person: (a) are reasonably justified by the material then available to the barrister; (b) are appropriate for the robust advancement of the client's case on its merits; and (c) are not made principally in order to harass or embarrass a person.	37. A barrister must, when exercising the forensic judgments called for throughout a case, take care to ensure that decisions by the barrister or on the barrister's advice to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person: (a) are reasonably justified by the material then available to the barrister; (b) are appropriate for the robust advancement of the client's case on its merits; (c) are not made principally in order to harass or embarrass the person; and (d) are not made principally in order to gain some collateral advantage for the client or the barrister or the instructing solicitor out of court.

61. Without limiting the generality of Rule 60, in proceedings in which an allegation of sexual assault, indecent assault or the commission of an act of indecency is made and in which the alleged victim gives evidence: (a) a barrister must not ask that witness a question or pursue a line of questioning of that witness which is intended: (i) to mislead or confuse the witness; or (ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; and (b) a barrister must take into account any particular vulnerability of the witness in the manner and tone of the questions that the barrister asks.	
62. A barrister will not infringe Rule 61 merely because: (a) the question or questioning challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or (b) the question or questioning requires the witness to give evidence that the witness could consider to be offensive, distasteful or private.	
63. A barrister must not allege any matter of fact in: (a) any court document settled by the barrister; (b) any submission during any hearing; (c) the course of an opening address; or (d) the course of a closing address or submission on the evidence; unless the barrister believes on reasonable grounds that the factual material already available provides a proper basis to do so.	39. A barrister must not open as a fact any allegation which the barrister does not then believe on reasonable grounds will be capable of support by the evidence which will be available to support the client's case.
64. A barrister must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the barrister believes on reasonable grounds that: (a) available material by which the allegation could be supported provides a proper basis for it; and	38. A barrister must not draw or settle any court document alleging criminality, fraud or other serious misconduct unless the barrister believes on reasonable grounds that: (a) factual material already available to the barrister provides a proper basis for the allegation if it is made in a pleading;

(b) the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.	(b) the evidence in which the allegation is made, if it is made in evidence, will be admissible in the case, when it is led; and; (c) the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client if it is not made out. 40. A barrister must not cross-examine so as to suggest criminality, fraud or other serious misconduct on the part of any person unless: (a) the barrister believes on reasonable grounds that the material already available to the barrister provides a proper basis for the suggestion; (b) in cross-examination going to credit alone, the barrister believes on reasonable grounds that affirmative answers to the suggestion would diminish the witness's credibility. 42. A barrister must make reasonable enquiries to the extent which is practicable before the barrister can have reasonable grounds for holding the belief by Rule 40(a), unless the barrister has received and accepted an opinion from the instructing solicitor within Rule 41. 43. A barrister must not suggest criminality, fraud or other serious misconduct against any person in the course of the barrister's address on the evidence unless the barrister believes on reasonable grounds that the evidence in the case provides a proper basis for the allegation.
65. A barrister may regard the opinion of the instructing solicitor that material which is available to the solicitor is credible, being material which appears to the barrister from its nature to support an allegation to which Rules 63 and 64 apply, as a reasonable ground for holding the belief required by those Rules (except in the case of a closing address or submission on the evidence).	41. A barrister may regard the opinion of the instructing solicitor that material which appears to support a suggestion within Rule 40 is itself credible as a reasonable ground for holding the belief required by Rule 40(a).

66. A barrister must not make a suggestion in cross-examination on credit unless the barrister believes on reasonable grounds that acceptance of the suggestion would diminish the credibility of the evidence of the witness.	See r 40(b)
67. A barrister who has instructions which justify submissions for the client in mitigation of the client's criminality which involve allegations of serious misconduct against any other person not able to answer the allegations in the case must seek to avoid disclosing the other person's identity directly or indirectly unless the barrister believes on reasonable grounds that such disclosure is necessary for the proper conduct of the client's case.	44. A barrister who has instructions which justify submissions for the client in mitigation of the client's criminality and which involve allegations of serious misconduct against any other person not able to answer the allegations in the case must seek to avoid disclosing the other person's identity directly or indirectly unless the barrister believes on reasonable grounds that such disclosure is necessary for the robust defence of the client.
Delinquent or guilty clients	
78. A barrister who, as a result of information provided by the client or a witness called on behalf of the client, learns during a hearing or after judgment or decision is reserved and while it remains pending, that the client or a witness called on behalf of the client: (a) has lied in a material particular to the court or has procured another person to lie to the court; or (b) has falsified or procured another person to falsify in any way a document which has been tendered; or (c) <u>has suppressed or procured another person to suppress material evidence upon a topic where there was a positive duty to make disclosure to the court;</u> must refuse to take any further part in the case unless the client authorises the barrister to inform the court of the lie, falsification or suppression and must promptly inform the court of the lie, falsification or suppression upon the client authorising the barrister to do so but otherwise may not inform the court of the lie, falsification or	34. A barrister whose client informs the barrister, during a hearing or after judgment or decision is reserved and while it remains pending, that, upon an issue which may be material the client has lied to the court or has procured another person to lie to the Court or has falsified or procured another person to falsify in any way a document which has been tendered: (a) must refuse to take any further part in the case unless the client authorises the barrister to inform the court of the lie or falsification; (b) must promptly inform the court of the lie of falsification upon the client authorising the barrister to do so; but (c) must not otherwise inform the court of the lie or falsification.

suppression.	
79. A barrister briefed to appear in criminal proceedings whose client confesses guilt to the barrister but maintains a plea of not guilty: (a) should, subject to the client accepting the constraints set out in sub-rules (b) to (h) but not otherwise, continue to act in the client's defence; (b) must not falsely suggest that some other person committed the offence charged; (c) must not set up an affirmative case inconsistent with the confession; (d) must ensure that the prosecution is put to proof of its case; (e) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged; (f) may argue that for some reason of law the client is not guilty of the offence charged; (g) may argue that for any other reason not prohibited by (b) or (c) the client should not be convicted of the offence charged; and (h) must not continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence.	35. A barrister briefed to appear in criminal proceedings whose client confesses guilt to the barrister but maintains a plea of not guilty: (a) may return the brief, if there is enough time for another legal practitioner to take over the case properly before the hearing, and the client does not insist on the barrister continuing to appear for the client; (b) in cases where the barrister keeps the brief for the client: (i) must not falsely suggest that some other person committed the offence charged; (ii) must not set up an affirmative case inconsistent with the confession; but (iii) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged; and (iv) may argue that for some reason of law the client is not guilty of the offence charged; or (v) may argue that for any other reason not prohibited by (i) or (ii) the client should not be convicted of the offence charged.
80. A barrister whose client informs the barrister that the client intends to disobey a court's order must: (a) advise the client against that course and warn the client of its dangers; (b) not advise the client how to carry out or conceal that course; but (c) not inform the court or the opponent of the client's intention unless – (i) the client has authorised the barrister to do so	36. A barrister whose client informs the barrister that the client intends to disobey a court's order must: (a) advise the client against that course and warn the client of its dangers; (b) not advise the client how to carry out or conceal that course; but (c) not inform the court or the opponent of the client's intention unless - (i) the client has authorised the barrister to do so beforehand; or

beforehand; or (ii) the barrister believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety. 81. A barrister whose client threatens the safety of any person may, notwithstanding Rule 109, if the barrister believes on reasonable grounds that there is a risk to any person's safety, advise the police or other appropriate authorities. Rule 109 concerns non-disclosure of confidential information except with the client's consent.	(ii) the barrister believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.