

PART II — ETHICS IN THE ADVERSARY SYSTEM

1 PROBLEMS WITH ADVERSARIAL ADVOCACY

1.1 A Critique of Adversarial Justice

Several criticisms can be made of the normative framework underpinning the adversarial system.

1 Excessive adversarialism leads to disillusioned clients

- The adversarial ideal values client autonomy highly
- The ‘adversarial imperative’ is to leave ‘no stone unturned’: lawyers are obliged to exploit any advantages the system affords the client
- Clients must often pay lawyers a large portion of the damages they are awarded
 - See, eg, Dickens, *Bleak House*
 - ‘The lawyer-client relationship between Richard [client] and Vholes [lawyer] is like that of a drug addict and his supplier’
- Clients can sometimes feel disempowered and unable to obtain justice
- This is sometimes caused by a communication problem between lawyer and client
- However, sometimes it is deliberate: some lawyers actively feed off disputes, selling the illusion that the legal system might result in a good outcome for the client, and profiting from the maintenance of that illusion
- The lawyer benefits by selling the client something that is not necessarily in their financial or emotional best interests

2 The adversarial system raises the cost of justice

- Parties engage in a legal arms race to increase their representation; lawyers are used as symbolic weapons, creating subsidiary technical disputes and raising the costs associated with resolving the real issues
 - Issues are often merely procedural: adversarialism turns conflicts into matters of procedure and not substance, form but not purpose
 - Adversary justice turns disputes into a battle between gladiator lawyers over minor points of procedure, rather than discussion of the substantive merits of each case
 - All too often, the party with the better lawyer/more resources wins
- The system becomes more expensive for everyone
 - An adversary system escalates costs and resources
 - As a function of said costs, it creates unrealistic expectations
 - Each side matches and exceeds the resources of the other in a kind of mutually assured destruction
- Makes the whole system inaccessible to many
- It often has the effect of defeating just causes; ‘Rolls Royce’ justice is offered to the rich/knowledgeable, while the poor/ignorant bear the full burden of the law

- 3 Adversarial advocacy can manipulate truth
 - As where lawyers counsel the destruction of evidence of another liability-minimisation tactic (see, eg, *McCabe*)
- 4 An adversary system increases the power imbalance between the represented/resourced and unrepresented/poor (see, eg, 'McLibel')
- 5 Advocacy slows down dispute resolution, stretching out conflicts into spans of years, wasting court resources and burdening the parties

1.2 **Who Bears Responsibility for Justice?**

An argument in favour of exonerating lawyers might run thus:

Adversarialism is an inherent part of legal conflict. Lawyers' conduct is mandated by the client. Lawyers are just proxies in human battles. Their ethics is a product of their client's needs. Therefore, the client bears responsibility for actions they initiate. The lawyer should not be responsible to mediate or alter the interests of their clients, because the client is entitled to be represented in the manner of their choosing.

However, an argument might also be made that lawyers ought to be responsible for ensuring the truth, fairness and justice of the process – even where that means ignoring their client's interests:

The client is not in a position to know best. As experienced litigator, the lawyer is more than mere legal advisor: they are responsible for counselling their client about the most appropriate and beneficial course of action. As such, they have an obligation – both to the client and to society – to ensure that they deliver a sound and ethical analysis. To fulfil this obligation, their advice must encompass moral appraisal.

Who is responsible for curbing excessive adversarialism?

- If the argument in defence of lawyers is to be accepted, this would suggest that, as mere agent for the client, it is the client's responsibility
- However, most clients would argue that, as their trusted decision-maker, their lawyer is responsible for the ethical content of their conduct – the client does, after all, merely specify desired outcomes (the lawyer decides how to achieve them)

If both of these views are accepted, this creates a situation where apparently no-one is responsible. This is known as the agency paradox. It represents a logical fallacy, implying that one of these positions is invalid.

1.2.1 **Critical Legal Morality**

Legal ethics and practice reflect a particular conception of the role of lawyers in dealing with human conflict in society. This conception is not immune to criticism:

- Adversary ethics penalise and prevent attempts at reconciliation between the parties to a dispute
 - Eg, until recently, fears of liability prevented the giving of apologies

- Statutory intervention made such apologies inadmissible, and reflects a changing conception of lawyers' roles
- In many respects, law has supremacy over morality, and economics over law
 - On one view, law dictates action and curtails moral responses
 - On another, it is greed and economics which curtail such responses, and law which is used to justify inaction
 - Should the lawyer look beyond their immediate financial interests?
 - Arguably, their acts need to have moral authority
 - Is it presumptive to give moral advice to a religious leader?
- Can a lawyer convince a client to abandon a particular ethical position on legal grounds?
 - Eg, the Jesuit priest who wants to apologise to victims of sexual abuse within the Church, despite impending legal action
 - In such a situation, it should rightly be asked 'who is the client?' – the lawyer may be acting for both Church and priest, or only one
 - They have pastoral duties not only to their client but to the court and community
 - At any rate, their reputation stands to be affected by immoral (or even amoral) activity

1.2.2 Ethical Responsibility

Cameron argues that a good legal adviser is one which gives 'independent, legally correct advice to clients.'¹ She argues that this requires the lawyer to maintain both intellectual and emotional distance from the client. To be a 'wise counsellor', the lawyer must exercise judgment independent from the client's immediate economic self-interest.

Another way of conceiving of lawyers' responsibility is as 'hired gun' (corporate legal adviser) — an employee whose role is not to advise clients, but to achieve the goals of the company by whatever means available. Cameron also notes that lawyers involved with clients on a long-term basis are less likely to be able to exercise independent judgment.

The traditional view of lawyers' moral accountability is that their actions are logically distinct from their clients' past acts. Thus, a lawyer can defend a client against criminal charges, or breach of contract, without being complicit in the crimes or the breach. However, if a lawyer participates in the present commission of breaches or crimes, they become morally accountable. This may include situations where legal advice facilitates client wrongdoing.

1.3 Professional Conduct

Professional conduct rules attempt to curb excessive adversarialism by imposing an objective framework within which advice to the client must be compulsorily evaluated. Arguably, however, this framework is an inadequate protection against the procedural and representational excesses of the adversarial system.

¹ Camille Cameron, 'Case Note: *McCabe v British American Tobacco Australia Ltd* (2002) 25 *University of New South Wales Law Journal* 768, 784.

Professional conduct rules embody a balance between lawyers' duties to their clients and their duty to the Court (and to the administration of justice). They are designed to curb excessive adversarialism.

1.3.1 General Principles

The traditional, common law view of professional ethics in law is broadly resonant with a 'responsible lawyering' approach (see above [2.3.2]). The classic statement is that of Mason CJ in *Giannarelli v Wraith* (1988) 165 CLR 543:

*The advocate is as essential a participant in our system of justice as are the judge, the jury and the witness and his **freedom of judgment** must be protected ... The performance by counsel of his **paramount duty to the Court** will require him to act in a variety of ways to the **possible disadvantage of his client**. Counsel **must not mislead the court**, cast **unjustifiable aspersions** on any party or witness or **withhold documents and authorities** which distract from his client's case. And, if he notes an 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 of appeal.*

*It is not that a barrister's duty to the Court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The **duty to the Court is paramount** and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the Court epitomises the fact that the course of litigation depends on the exercise by counsel of an **independent discretion or judgment in the conduct and management of a case** in which he has an eye, not only to his client's success, but also the **speedy and efficient administration of justice**.*

This statement is today embodied in professional conduct rules 13 and 30.1, which require that lawyers exercise judgement independent from their clients and enforce lawyers' responsibilities to the Court and to the administration of justice.

1.3.2 Lawyers' Duty to the Court

Dal Pont describes a lawyer's primary obligation as consisting of a duty to the administration of justice.² This is a duty owed generally to the community, which has an interest in the proper administration of justice. It comprises several components:

- A duty not to mislead the Court (such would be 'outrageously dishonorable'³);
- A duty of disclosure to the Court;
- A duty not to abuse court processes;
- A duty not to corrupt the administration of justice; and
- A duty to conduct cases efficiently and expeditiously.

In this way, lawyers are, according to Justice Ipp, officers of and assistants to the Court. To mislead, abuse or corrupt court processes by breaching one of the above duties would conflict with this role.

² See Gino Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (2002).

³ *Re Cooke* (1889) 5 TLR 407, 408 (Lord Esher MR); *O'Reilly v Law Society of New South Wales* (19889) 24 NSWLR 204, 230 (Clarke JA).

Some, like Gaetke, criticise this duty as ‘vacuous and unduly self-laudatory’.⁴ Such critics typically contend that lawyers should prioritise their duties to their clients over those owed to the Court. The result, however, is an industry of ‘zealous advocates’ who are morally unaccountable to anyone but their client.

Justifications for an overriding duty to the Court:

- **Without it, the integrity of court processes would be undermined**
Conduct advancing a client’s interests is often in conflict with that advancing the administration of justice; were the former to frequently prevail, the latter would be seriously impeded.
- **It is necessary to maintain public confidence in the legal institution**
‘[A]n unswerving and unwaverable observance of [the administration of justice] by counsel is essential to maintain and justify the confidence which every court rightly and necessarily puts in all counsel who appear before it.’⁵
- **It is intrinsic to the discovery of truth and justice in proceedings**
If what practitioners submit to a court is false or misleading, there is little chance of a judgment proceeding on a correct factual basis.

It is this duty which is embodied in many of the professional conduct principles.⁶

1.3.3 Enforcement

Despite general endorsement of a lawyer’s duty to the Court, professional conduct rules rarely enforce these responsibilities. In general, breaches of duties owed to clients are emphasised and most strictly penalised – not duties to the Court.

The practical implementation of specific professional conduct rules may be contrasted with the general principles stated by Mason CJ. It is difficult to discern the true law. Often public scrutiny (eg, media outrage) will be required to enforce professional conduct provisions.

Professional conduct rules are enforced in one of three ways:

- 1 Regulation**
Minor infractions may go unnoticed, while repeated violations will usually attract disciplinary measures under the relevant state’s Law Institute guidelines; this typically entails a fine or other penalty;
- 2 Orders**
Where breach is declared by a court, they can make a range of orders to effect compliance; a judge can also require a lawyer to perform community service or even strike them off the practitioners roll; and
- 3 Criminal liability**
Serious breaches of professional conduct rules may also entail breaches of the criminal law (most frequently for fraud, obtaining

⁴ See Eugene Gaetke, ‘Lawyers as Officers of the Court’ (1989) 42 *Vanderbilt Law Review* 39.

⁵ *Kyle v Legal Practitioners Complaints Committee* (1999) 21 WAR 46, 60, 73 (Parker J).

⁶ See below sections 1.4–1.8.

property by deception, contempt of court, perjury, and complicit liability for the aforementioned)

1.4 **Misleading the Court**

A lawyer misleads the Court when he deliberately misrepresents evidence, facts or the law. A practitioner must not knowingly make a misleading statement to a court on any matter.

Examples:

- Selecting only favourable evidence
- Using biased expert testimony
- Perjury of any kind (eg, swearing to false documents)
- Employing misleading cross-examination tactics (eg, making frivolous suggestions about a witness' motivation or criminal activity without evidence, heckling, embarrassing or discrediting a witness, in any way vexatiously reducing the value of their statement)
 - A lawyer can have a significant emotional effect upon witnesses
 - Merciless and misleading cross-examination has been known to cause witnesses to suicide

A duty not to mislead the Court is outlined in the preamble to PCPR 12–20:

Practitioners, in all their dealings with the courts... should act with competence, honesty and candour. Practitioners should be frank in their responses and disclosures to the Court, and diligent in their observance of undertakings...

1.4.1 **Independence**

Clients must be able to receive unbiased legal advice. This can only occur when a lawyer is involved in a personal relationship with the client or opposing counsel, or where they blindly follow a client's directions. The administration of justice depends upon the exercise of independent judgement on the part of practitioners.

PCPR 13 sets out the requirement that a lawyer remain independent from their client:

13 Independence — Avoidance of personal bias

- 13.1 A practitioner must not act as the mere mouthpiece of the client or of the instructing practitioner and must exercise the forensic judgments called for during the case independently, after appropriate consideration of the client's and any instructing practitioner's wishes where practicable
- 13.2 A practitioner will not have breached the practitioner's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing practitioner's wishes, simply by choosing, contrary to those wishes, to exercise the forensic judgments called for during the case so as to:
- 13.2.1 confine any hearing to those issues which the practitioner believes to be the real issues;

- 13.2.2 present the client's case as quickly and simply as may be consistent with its robust advancement; or
- 13.2.3 inform the court of any persuasive authority against the client's case.

Examples of unreasonable partisanship:

- Where a lawyer's relationship with a client makes it impossible to maintain professional independence
 - Alignment with a client's cause (change of misguided choice leading to participation in wrongful conduct)
 - Surety to a client's bail
 - In-house practitioners (unclear whether professional detachment possible in light of 'common economics')
- Where a lawyer's relationship with the opposing counsel may appear to be inappropriate
 - De facto partnerships or shared domestic accommodation
 - Close familial relatives
- Where a lawyer is unduly subject to the client's instructions about how to run the case
 - Counsel must put any argument which might reasonably be open to their client
 - However, a barrister must only take points deserving of legal consideration
 - Making all the arguments pressed by clients without discrimination would be inappropriate – counsel must exercise professional judgment about which submissions are unarguable

1.4.2 Dishonesty

The professional conduct rules prohibit dishonest conduct:

- 30.1 A practitioner must not engage in conduct, whether in the course of practice or otherwise, which is:
- 30.1.1 dishonest;
 - 30.1.2 calculated; or
 - 30.1.3 likely to a material degree, to:
 - (a) be prejudicial to the administration of justice
 - (b) diminish public confidence in the administration of justice;
 - (c) adversely prejudice a practitioner's ability to practice according to these rules.

Enforcement:

- Professional discipline: Professional misconduct or unsatisfactory conduct - Legal Practice Act, PCPR & inherent jurisdiction of court. (Lecture 6)
- Procedural Rules and Wasted Costs Orders: court's inherent jurisdiction to control own procedure and its officers.
- Contempt of court: Criminal offence.

1.4.3 *Misleading Statements*

A lawyer must not actively make false or misleading statements to the Court.

14 **Frankness in court**

- 14.1 A practitioner must not knowingly make a misleading statement to a court.
- 14.2 A practitioner must take all necessary steps to correct any misleading statement made by the practitioner to a court as soon as possible after the practitioner becomes aware that the statement was misleading.
- 14.3 A practitioner will not have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by the opponent or any other person.
- 14.5 A practitioner who has knowledge of information which is within Rule 14.4.3:
- 14.5.1 must seek instructions for the waiver of legal professional privilege, if the information is protected by that privilege, so as to permit the practitioner to disclose that information under Rule 14.4; and
- 14.5.2 14.5.2 if the client does not waive the privilege as sought by the practitioner,
- (a) must inform the client of the client's responsibility to authorise such disclosure and the possible consequences of not doing so; and
- (b) must inform the court that the practitioner cannot assure the court that all information which should be disclosed has been disclosed to the court.
- 14.12 A practitioner must inform the court in civil proceedings of any misapprehension by the court as to the effect of an order which the court is making, as soon as the practitioner becomes aware of the misapprehension.

Note that misleading the Court includes mediation and settlements (PCPR 18.1):

- 18.1 A practitioner must not knowingly make a false statement to the opponent in relation to the case (including its compromise).
- 18.2 A practitioner must take all necessary steps to correct any false statement unknowingly made by the practitioner to the opponent as soon as possible after the practitioner becomes aware that the statement was false.

18.3 A practitioner does not make a false statement to the opponent simply by failing to correct an error on any matter stated to the practitioner by the opponent.

Rule 17 prohibits the coaching of witnesses:

17.1 A practitioner must not advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so.

17.2 ...must not coach or encourage the witness to give evidence different from the evidence which the witness believes to be true.

Further ethical issues:

- Failing to admit crucial facts or evidence as part of a litigation strategy
- Omitting to disclose relevant authorities against the client's case
- Wilfully turning a blind eye to the wrongfulness of a client's statement or evidence
- Stating half-truths or creating an incorrect impression by omission

In each of these cases, there may be discerned a certain spectrum of acceptability. At one end lie trivial acts or omissions — conduct which may prioritise a client's interests over the proper administration of their case, but which is deemed minor or inconsequential. At the other end lies conduct so nefarious — such 'an intolerable infraction on the principles of justice' — that the lawyer's overriding duty to the Court must be reasserted and the masquerade prevented. An example of this latter kind of case is provided by *Re Thom*.⁷

The precise boundaries of this spectrum are difficult to discern, but it seems clear that, beyond some level of passivity, courts will not tolerate being misled and will, when disabused of their false impression, overturn verdicts to correct its consequences.

1.4.4 **Passive Withholding of Information**

Passive misleading might still be possible because PCPR 14.1, 14.2 and 18.1 only apply where a lawyer knowingly *makes* a deceptive or false statement.

14.3 A practitioner will not have made a misleading statement to the court simply by failing to correct an error in a statement made to the court by the opponent or any other person.

14.10 A practitioner will not have made a misleading statement to a court simply by failing to disclose facts known to the practitioner concerning the client's character or past, when the practitioner makes other statements concerning those matters to the court, and those statements are not themselves misleading.

⁷ (1918) 18 SR (NSW) 70, 74–5.

Passively misleading the Court, whether by abjectly ignorant statements or a form of wilful blindness, might thus be exempt.

PCPR 16.3 probably doesn't include failing to lead evidence, aggressive cross-examination, or failure to admit factual incorrectness:

16.3 A practitioner must not open as a fact any allegation which the practitioner does not then believe will be capable of support by the evidence which will be available to support the client's case.

1.5 Client Perjury

To deal with client perjury requires a careful balancing of duties to the Court and client so as to minimise friction between the two.

Rule 15 prohibits complicity in false statements by a client:

A practitioner whose client informs the practitioner, before judgment or decision, that the client has lied in a material particular to the court:

- 15.1.1A must advise the client that, unless the court is informed of the lie or falsification, the practitioner must not take any further part in the case, and request authority so to inform the court;
- 15.1.1 must refuse to take any further part in the case unless the client authorises the practitioner to inform the court of the lie or falsification;
- 15.1.2 must promptly inform the court of the lie or falsification upon the client authorising the practitioner to do so; but
- 15.1.3 must not otherwise inform the court of the lie or falsification.

Intended client perjury occurs where the client informs the practitioner of their intention to lie, or instructs their counsel to run the case in a manner that will facilitate perjury. Whilst the lawyer may not themselves commit a falsehood, nor may they disregard the client's instructions. When faced with such a situation, counsel should advise the client to change their instructions or seek leave to withdraw (*R v McLoughlin and Isaacs*).

***R v McLoughlin and Issacs* [1985] 1 NZLR 106:**

Facts

- Two persons are accused and subsequently convicted of rape
- They appeal their convictions on the basis that they were denied a full and fair trial
- It emerges that the accused instructed their barrister to pursue an alibi defence
- In fact, the barrister pursued a consent defence (because he thought the alibi evidence was unreliable)

Issue

- Was the applicant deprived of a proper opportunity to put his defence?

Reasoning

- Per Hardie Boys J:
 - It is improper for counsel to act against a client's instructions even where those instructions amount to supporting unreliable or perjured evidence
 - The barrister must either follow instructions or withdraw from the case

Decision

McLoughlin suggests that where practitioner is faced with a circumstance incompatible with his duty to the court or with his professional obligations (or even to his client's best interests), he must inform the client that unless the instructions are changed he will be unable to act further. He may then seek leave to withdraw. However, counsel 'may not take it upon himself to disregard [the client's] instructions and to then conduct the case as he himself thinks best.'

The principles in place to deal with client perjury require a practitioner to do everything in their power to convince the client to authorise him to inform the Court; however, the practitioner must not do so without such authorisation (and must instead withdraw):

- The practitioner must advise their client that, if they do not refrain from perjury, they will not be able to continue acting for them;
- If client refuses to correct their perjury (or refrain from perjuring themselves), the practitioner must withdraw from case (with the Court's leave if a trial is in progress);
- In general, the practitioner's obligation of confidentiality prevents them informing the Court of the perjury, even after they cease acting for the client;
- However, if an exception to confidentiality and professional privilege applies, the Court can be informed (subject to the lawyer's discretionary ethical judgment);

These principles require fidelity to the Court (by preventing complicity in client perjury) but respect duties of confidentiality to the client (by not mandating disclosure by the lawyer). In this way, they can be said to *balance* (rather than override) a lawyer's duties to their client with their duties to the Court.

1.6 **The Guilty Client**

1.6.1 **Criminal Cases**

PCPR 15 sets out rules dealing with clients who admit guilt in a criminal trial:

15.2 A practitioner whose client in criminal proceedings confesses acts alleged by the prosecution to the practitioner but maintains a plea of not guilty

15.2.1 may cease to act, if there is enough time for another practitioner to take over the case properly before the hearing, and the client does not insist on the practitioner continuing to appear for the client;

15.2.2 where the practitioner continues to act for the client:

- (a) must not falsely suggest that some other person committed the acts;
- (b) must not set up an affirmative case inconsistent with the confession;
- (c) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;
- (d) may argue that for some reason of law the client is not guilty of the offence charged; or
- (e) may argue that for any other reason not prohibited by (a) and (b) the client should not be convicted of the offence charged.

However, lawyers may only terminate their representation of the client with 'just cause' and 'reasonable notice'.

The criminal defence lawyer is the paradigmatic example of an adversarial advocate. It is the legal context which best suits the rationale behind adversarial advocacy. As such, rules regulating the representation of guilty clients are strongly in favour of a lawyer's duty to their client.

Tuckiar (Dhakiyarr) v The King (1934) 52 CLR 335:

Facts

- An aboriginal accused confesses to his lawyer
- However, instead of running a frozen defence, the lawyer confides in the judge
- Tuckiar is subsequently (and unsurprisingly) convicted

Issue

- Should the conviction be overturned?

Reasoning

- Adversarial advocacy (or something like it) is essential in criminal trials – particularly for those deemed unfit by society to receive legal protection
 - The consequences of losing are greater than in a civil context
 - The client is being defended against the control of the state's mechanisms
 - However, such justifications in support of adversarial advocacy are much weaker in a civil context
- In a criminal context, a lawyer's duty to his client should be correspondingly greater
 - Here, however, the defence lawyer 'transferred his embarrassment to the judge'
- Per Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ at 346–7:
 - 'The subsequent action of the prisoner's counsel in openly disclosing the privileged communication of his client and acknowledging the correctness of

the more serious testimony against him is wholly indefensible. It was his paramount duty to respect the privilege attaching to the communication made to him as counsel, a duty the obligation of which was by no means weakened by the character of his client, or the moment at which he chose to make the disclosure. ... But he was not entitled to divulge what he had learnt from the prisoner as his counsel. Our system of administering justice necessarily imposes upon those who practice advocacy duties which have no analogies, and the system cannot dispense with their strict observance.'

- Per Starke J at 354:
 - 'It was a grave mistake to announce, in open Court, after he had consulted with the prisoner at the suggestion of the Judge, that "he was in a predicament, the worst predicament that he had encountered in all his legal career." And it was a grave breach of the confidence reposed in him by the prisoner to make the following public announcement after the prisoner had been convicted and before he was sentenced: 'I have a matter which I desire to mention before the Court rises...'

Conclusion

- The lawyer acted in manifest dereliction of his duty to his client
- As a result, there was a miscarriage of justice and the conviction should be quashed

Application of 'guilty client' principles: if a client 'confesses' to their lawyer —

- Be sure that they have confessed: Do the facts admitted amount to liability? Is the confession trustworthy?
- Advise the client to change their plea to guilty
- If the client insists on retaining a plea of not guilty:
 - Return the brief, if there is time and the client does not object; or
 - Conduct a frozen defence (PCPR 15.2)
 - A frozen defence means that the lawyer may only argue defences consistent with the client's confession to the lawyer (*Tuckiar*)
 - If client has already given perjured evidence, correct with their consent
- If they refuse to give consent, withdraw (PCPR 15.1)
 - If they insist on an affirmative defence which requires leading false evidence, the lawyer can probably withdraw (*McLoughlin*)

Managing Guilty Knowledge

- If a lawyer merely thinks their client is guilty, there is certainly no duty to actively probe the client for every piece of information
- Because anything the client says may potentially negatively affect the client's defence (by partially freezing it), enquiries should be minimised
- Strategies to minimise guilty knowledge:
 - Don't enquire about the client's memory or motivations
 - Explain what is relevant *before* hearing the client's evidence
 - Actively shape what the client should remember or forget or what evidence/documents should disappear
- Is this ethical? Even if it results in a guilty accused being acquitted?

1.6.2 Civil Cases

Excessive adversarialism can arguably be more dangerous in civil cases, particularly since the client is often (financially) in control of their lawyer. This results in lawyers not being independent enough from their clients; it is more conducive to a binding duty to the client.

The 'guilty' client in civil cases:

- Because the rationale for adversarial advocacy is weaker in civil trials, a lawyer representing a defendant in a civil case has a greater duty to the Court than in a criminal trial
- Accordingly, where the lawyer believes the client is 'guilty' of illegal or unethical behaviour, they may have more extensive legal and ethical responsibilities

This is especially so for in-house counsel or firms maintaining a long relationship with a client. These lawyers may be more complicit in their clients' wrongdoings than others: see, eg *McCabe v British American Tobacco*; see further Cameron

1.7 Abuse of Process

To ensure the due administration of justice, it is necessary that the Courts' procedures are not abused inequitably. Where such processes are misused unfairly or to bring the legal institution into disrepute, an abuse of process is said to occur

Abuse of process arises primarily in civil cases. It can arise in many circumstances, of which the following comprise several.

1.7.1 Ulterior Purpose

If a case is brought for an ulterior motive, such as publicity, malicious (and legally unsupported) prosecution, ..., the instituting practitioner may be liable in contempt of court. Litigation of this kind includes defences brought for an ulterior purpose.

- Note that this abuse concerns *purpose* and not *motivation*
- Thus, it is acceptable to bring an action in support of a legal right, even if the motivation is malicious
 - But note the tort of malicious prosecution
 - A lawyer may be jointly liable in some circumstances
- However, to achieve a purpose outside of the law is not acceptable

Using litigation dishonestly, or for purposes for which it was not intended, is considered an abuse of process and is absolutely prohibited, even if the case is not hopeless.

White Industries v Flower & Hart (1998) 156 ALR 169:

Facts

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Issue

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Reasoning

- At 249–50:
 - '[t]he fact that [Herscu] had a robust approach to litigation, did not believe anything was impossible and was unconcerned about entering into litigation with limited prospects made it all the more important for Flower and Hart to have regard to the manner in which it instituted and conducted proceedings on his behalf and on behalf of his companies and to be conscious of its duty to the Court.'

Decision

Upheld by the Full Court of the Federal Court of Australia: see *Flower & Hart v White Industries* (1999) 163 ALR 744.

The reaction of the legal community to *White Industries* warrants mentioning:

- Attorney General: 'No inquiry into the conduct of the judge is warranted. Any inquiry held inappropriately can endanger the independence of the judiciary, damage the standing of the courts and do harm to an individual judge'
- Professor Greg Craven: 'If this is proved misbehaviour then we've just disqualified 95% of the commercial bar from High Court appointment.'
- Ian Barker QC (then president of the NSW Bar Association): 'I have perhaps led a sheltered, forensic existence, but everybody does not do it.'

1.7.2 **Unsupported or Irrelevant Allegations**

A lawyer must not cast aspersions upon the other party, witnesses, or third parties where there is no reasonable basis for making them. This obligation is derived from a practitioner's professional responsibility to the Court not to make unreasonable allegations.

Unsupportable claims are prohibited by PCPR 16:

- 16.1 A practitioner must not seek to invoke the coercive powers of a court or to make allegations or suggestions in court against any person:
- not reasonably justified by the material then available to the practitioner;
 - not appropriate for the robust advancement of the client's case on its merits;
 - or made principally in order to harass or embarrass the person.
- 16.2 A practitioner must not draw or settle any court document alleging criminality, fraud or other serious misconduct:
- 16.1.1 if the factual material available to the practitioner does not provide a proper basis for the allegation;

16.1.2 if the evidence by which the allegation is to be made, will be inadmissible;

unless 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.

16.3 A practitioner must not open as a fact any allegation which the practitioner does not then believe will be capable of support by the evidence which will be available to support the client's case.

Clyne claims to be the only lawyer ever struck off for advocating zealously for his client.

Clyne v New South Wales Bar Association (1960) 104 CLR 186:

Facts

- When opening civil proceedings, Clyne made 'a savage public attack' on the professional character of another solicitor
- He alleged fraud, perjury and blackmail 'in extravagant terms' without evidence to support them
- The impugned solicitor advises the NSW Bar Association to bring proceedings striking off Clyne from the roll of barristers

Issue

- Is Clyne guilty of such grave professional misconduct as shows him not to be a fit and proper person to practise as a barrister?

Reasoning

- Because law gives counsel immunity from actions in negligence and defamation, abuses of this privilege must be dealt with in professional misconduct proceedings
 - 'The privilege may be abused if damaging irrelevant matter is introduced into a proceeding. It is grossly abused if counsel, in opening a case, makes statements which have ruinous consequences to the person attacked, and which he cannot substantiate or justify by evidence. It is obviously unfair and improper in the highest degree for counsel, hoping that, where proof is impossible, prejudice may suffice, to make such statements unless he definitely knows that he has, and definitely intends to adduce, evidence to support them. It cannot, of course, be enough that he thinks that he may be able to establish his statements out of the mouth of witness for the other side.'
- Referring to Manning J in an earlier case:
 - 'You are never entitled to open ... this highly prejudicial matter merely because you think, if and when the other side goes into the witness box, you will be able to get some admission to show it. I think it is quite improper.'

Decision

Because Clyne had already received a direct and severe judicial warning (in the earlier case) against making baseless allegations, and because the allegations here made were in such violation of 'elementary ethical standards', disbarment is the appropriate penalty in order to

protect the public and maintain confidence in the need for professional privilege in Court.

See further:

- Allegations of fraud or criminal activity: see Dal Pont at 468 (PM 143);
- Family law proceedings: see Dal Pont at 469 (PM 143);

1.7.3 **Unreasonable Delay and Expense**

Practitioners must bring a case to trial with reasonable expediency.

Rule 13.2 permits practitioners to exercise some discretion when running a client's case. It represents a prioritisation of procedural efficiency over ideals of fidelity to the client's wishes:

- 13.2 A practitioner will not have breached the practitioner's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing practitioner's wishes, simply by choosing, contrary to those wishes, to exercise the forensic judgments called for during the case so as to:
- Confine any hearing to those issues which the practitioner believes to be the real issues;
 - Present the client's case as quickly and simply as may be consistent with its robust advancement;

Inform the court of any persuasive authority against the client's case.

In *White Industries*, the following warning was given:

The time has passed when obstructionist and delaying tactics on the part of parties to proceedings in the Court can be countenanced by the Court. It is perfectly proper for a party and its legal advisers to fight a case and to put an opposing party to the proof of its cause, ... Nevertheless, it is not proper ... to adopt a positive or assertive obstructionist or delaying strategy which is not in the interests of justice and inhibits the Court from achieving an expeditious and timely resolution of a dispute.

Court resources are finite and so are the resources of most litigants and the Court should not countenance a deliberate strategy of obstruction and delay. If a party instructs its legal advisers to adopt such a strategy the legal adviser should inform the party that it is not proper for it to do so and if the party insists, then the legal adviser should withdraw from acting for that party.⁸

1.7.4 **Harassment or Embarrassment**

⁸ *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169, 252 (Goldberg J).

Legal proceedings primarily designed to maliciously and without reasonable cause pursue another with the intention to cause damage to their person, property or reputation, may be liable for the tort of malicious prosecution (*Johnson v Emerson* (1871) LR 6 Ex 329). It is also prohibited by the *Barristers' Practice Rules* r 31(c) in Victoria.

Litigation for the sole purpose of harassment or embarrassment could also be an example of type litigation for an ulterior purpose (1.7.1).

Cross examination must not be intended solely to insult or annoy the witness. Counsel may not antagonise the opponent or gratify a client's anger or malice.

However, practitioners may represent a client with a valid legal standing regardless of the client's malicious motivations for proceeding with an action.

1.7.5 Hopeless Cases

Instituting proceedings without any legal merit is an abuse of process because it wastes the Court's time and resources. It is therefore in contravention of the lawyer's duty to the Court. It may also be in contravention of lawyers' duty to act in the best interests of their clients, in that unnecessary costs will be accrued.

It is insufficient for a lawyer to follow a client's instructions to bring an action; a practitioner must ascertain the relevant facts and law to determine whether a cause of action exists and stands a chance of succeeding. If no cause exists that is likely to be successful, the lawyer must inform their client and advise not to proceed. If the client insists on proceeding notwithstanding that advice, the lawyer is not liable in negligence⁹ or under professional conduct rules.¹⁰

Lord Esher MR outlines three requirements in *Re Cooke*:

- That the case is 'absolutely and certainly hopeless';
- That there could be 'absolutely no doubt as to the result';
- But that the lawyer nevertheless carry's out the client's 'mad instructions in order to make costs for himself'.

Such conduct is said to comprise 'a dishonourable act'.¹¹ However, if the lawyer informs the client of the low prospect of success and advises them not to proceed, no such act will have occurred.

Levick suggests that there must be 'something akin to abuse of process'.

Levick:

Facts

- The Deputy Commissioner of Taxation seeks to enforce bankruptcy against a client for tax debts
- The solicitor, Quinn Levick, files a notice of opposition, arguing that the taxation office's

⁹ *Ashby v Russell* [1997] ANZ Conv R 321, 323 (Debelle J).

¹⁰

¹¹ *Re Cooke* (1889) 5 TLR 407, 408 (Lord Esher MR).

structure is constitutionally invalid

- However, they can produce little evidence — legal or factual — that this is the case
- Levick also argued that the client was physically incapable (again, no evidence)
- The original litigation occupied three days
- Levick withdrew when a costs order was made against him
- This case concerns the costs order

Issue

- Can the personal costs order be granted, on the basis of an abuse of process?

Reasoning

- Policy issues:
 - Personal costs orders should be available so as to make the *lawyer*, rather than the client, responsible for wasting the Court's resources
 - However, courts must be cautious in applying these principles – it can't let the orders become a tactic to prevent zealous advocacy
 - See Lord Esher's requirement that the case be 'absolutely and certainly hopeless'
 - If the standard was set lower, a wronged person may be unable to assert their rights where they face practical or other challenges
 -
 - Confidentiality makes it difficult to assess what was known – there is often a lack of evidence about the lawyer's state of mind
- 'What constitutes unreasonable conduct must depend upon the circumstances of the case; no comprehensive definition is possible. In the context of instituting or maintaining a proceeding or defence, we agree with Goldberg J that unreasonable conduct **must be more than acting on behalf of a client who has little or no prospect of success. There must be something akin to abuse of process; that is, using the proceeding for an ulterior purpose or without any, or any proper, consideration of the prospects of success.**'

Decision

It is clear from the arguments Quinn made that they originated with the lawyer. The lawyer was thus the one who devised the legal strategy. It was unreasonable to go ahead without considering the likelihood of success. This makes Quinn in breach of his duty to the client (by running up costs needlessly) *and* his duty to the Court (by wasting its time).

It is also possible that the action was brought for an ulterior purpose (delaying bankruptcy).

As a result, the personal costs order is valid and should be made against Quinn.

Levick suggests that, although it might be unreasonable to put hopeless arguments, there needs to be something more than hopelessness. According to *Levick*, if a client presents a hopeless case, it should still be run – everyone has a right to run their case. However, the chances of success should be considered.

This may be compared with the approach taken in *Steindl*, which held that if a case is bound to fail then it is improper to bring it, because the lawyer must regard it as unarguable (*Steindl*).

Steindl Nominees Pty Ltd v Laghaifer [2003] QCA 157 (17 April 2003):Reasoning

Davies JA (with whom Philippedes and Williams JJA agreed)

To the extent that those statements state or imply that it is not improper for counsel to present, even on instructions, a case which he or she regards as bound to fail, I would reject them. I would prefer to say that it is one thing to present a case which is barely arguable (but arguable nevertheless) but most likely to fail; it is quite another to present a case which is plainly unarguable and ought to be so to the lawyer who presents it. In my opinion, with respect, it is improper for counsel to present, even on 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.

If a lawyer does not give proper consideration to their prospects of success, bringing proceedings with constitute a dereliction of duty. A lawyer must turn their mind to the prospects of success and advise their client accordingly:

- PCPR 12.2A:
 - Duty to advise about ADR
 - Advise to accept reasonable offers of settlement and not proceed on the 'chance' of getting more
- Case management duties and other procedural reforms emphasise this obligation
- These duties are owed not only to the client, but also — to the extent that they prevent frivolous litigation — to the Court as gatekeepers of the system
- In a criminal context, it seems unlikely that raising a hopeless defence will ever be an abuse of process:
 - Criminal proceedings are instituted by the Crown, not the accused
 - The prosecution must establish the guilty of the accused beyond a reasonable doubt, so the accused is entitled to raise doubts, however, slight
 - The accused is entitled to plead guilty *or* not guilty, and can make a case either way

But note the observations of Sir Thomas Bingham MR:

*A legal representative is not to be held to have acted improperly ... simply because he acts for a party who pursues a claim or defence which is plainly doomed to fail ... Legal representatives will, of course ... advise clients 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.*¹²

This suggests that bringing a hopeless claim will rarely be an abuse of process. However, *Steindl Nominees* leaves the correctness of this statement uncertain.

1.7.6 Consequences and Rationale

¹² *Ridehalgh v Horsefield* [1994] 3 WLR 462, 479.

Whether proceedings constitute an abuse of process is a matter to be decided on facts of each case.

Consequences:

- The instituting practitioner may be struck off
- They may be ordered to pay the costs of the other side (because the lawyer breached their duty to the Court)

Justifications:

- It is not fair to force a client to pay costs where it is there lawyer who is responsible for the wastage of resources
- The threat of a personal costs order may deter practitioners from taking cases and advocating too zealously (in a civil context)
- It is often difficult to judge what a practitioner did or did not know about the facts and what advice was given

1.8 *Complicity in Illegal Conduct of the Client*

Several legal obligations bind practitioners in relation to client illegality (see Lyons and Handelsmann).

In particular, the following acts are prohibited, and may attract criminal penalties:

- Conspiracy with a client to breach the law
- Aiding, abetting or counselling a client to breach the law
 - See, eg, *ACCC v REIWA* (1999) ATPR ¶¶41–673
- Acting as an entrepreneur in a tax avoidance scheme

There is also the possibility of disciplinary action, especially if the conduct is dishonest (PCPR 30).