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ETHICS AND THE CRIMINAL DEFENCE LAWYER

In our adversarial system the ethical obligations imposed upon prosecuting counsel are often a focus of attention. As a consequence there is much case law and academic discussion on the issue. The ethical obligations imposed upon counsel for the defence¹ in criminal matters are less frequently the subject of judicial and academic attention. In this paper I discuss the ethical obligations governing the conduct of defence counsel in criminal matters. Much of what I have to say will have equal application to prosecuting counsel. I will not deal with the special obligations applicable solely to prosecuting counsel.

Although rules governing ethical conduct have developed over centuries, it is only in relatively recent times that professional bodies have undertaken the task of formulating and reducing to writing rules of conduct designed to provide general guidance to legal practitioners in the discharge of their duties.² In *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 at 199 the High Court observed that rules of professional conduct can be “divided roughly into two classes”. The first class of rules includes those that the court described as conventional in character being rules designed primarily to regulate the conduct of members of the profession in their relations with one another. The remaining class of rules includes those that the court described as fundamental. It was noted that these were (at that time) for the most part not reduced to writing because “they rest essentially on nothing more and nothing less than a generally accepted standard of common decency and common fairness”. An example was provided by the court being that a barrister does not lie to a judge who relies on him or her for information. Another would be the obligation to honour undertakings given to the

court. Many of these fundamental rules have now been incorporated into the written rules provided by professional organisations. Counsel seeking guidance will firstly turn to those rules and then, where necessary, to the body of law that has led to the formulation of the rules. The rules of conduct are, generally speaking, statements of general principles and provide the commencement point for determining ethical behaviour. In order to resolve a particular ethical problem it may be necessary to go beyond those rules and consider rulings of the relevant professional association, the results of disciplinary proceedings and, of course, case law.

The ethical position of counsel for the defence is in some respects markedly different from that of the prosecution. In the well known phrase the role of the prosecutor is in “the character of a Minister for Justice”. Prosecuting counsel “must see to it that every material point is made which supports the prosecution case or destroys the case put forward for the defence. But as prosecuting counsel he should not regard his task as one of winning the case. He is an officer of justice. He must present the case against the prisoner relentlessly but with scrupulous fairness.”³

In the words of Deane J in *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664:

“Prosecuting counsel in a criminal trial represents the state. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused’s trial is a fair one.”

It is not the duty of the prosecuting counsel to obtain a conviction by any means but rather the duty resting upon counsel is to lay before the court the whole of the facts which comprise the case, to make those intelligible and to see that the court is properly instructed with regard to the law and to the facts. The interest of the prosecuting counsel is “that the right person should be convicted, that the truth should be known, and that justice should be done.”⁴

By way of contrast the role of counsel for the defence is to endeavour to protect the accused from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence charged.⁵ It is the duty of defence counsel to do everything he or she honourably can to protect the interests of the accused.⁶ Defence counsel must fearlessly uphold the interests of the accused and must do so without regard to unpleasant consequences either to him or herself or any other person.⁷ Whilst the primary duty of counsel for the defence is to the accused that duty is to be read with, and tempered by, the duty counsel also owes to the court. Where there is a clear duty owed to the court that duty will override any duty owed to the accused. In *Giannarelli v Wraith* (1988) 165 CLR 543 Mason CJ said at 556:

“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 detract 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 for appeal.”

However from time to time there will arise difficult circumstances in which counsel for the defence will have to endeavour to reconcile the duty owed to the court with the duty owed to the accused.

The Duty to Accept the Brief

It is the duty of a barrister to accept a brief in a court in which he or she professes to practice, at a proper professional fee unless there are special circumstances to justify a refusal to accept that brief.⁸

This duty applies notwithstanding that counsel may have formed a view of the guilt or innocence of the accused, that the matters alleged against the accused are abhorrent to counsel, that the accused may be an unpleasant, unreasonable or disreputable person or that he may have an apparently hopeless case. Lord Pearce observed in *Rondel v Worsley* (1969) 1 AC 191 at 275 that it would be “tragic” if our system failed to provide adequate representation in such circumstances and noted that this “would be the inevitable result of allowing barristers to pick and choose their clients.” He explained that “it not infrequently happens that the unpleasant, the unreasonable, the disreputable and those who have apparently hopeless cases turn out after a full and fair hearing to be in the right.” Lord Pearce referred to the words of Thomas Erskine in justifying his unpopular defence of Thomas Paine. Those words were as follows:

“I will forever, at all hazards, assert the dignity independence, and integrity of the English Bar; without which, impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say, that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or of the defence, he assumes the character of the judge; nay, he assumes it before

the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favour the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel.”

The existence of a skilled and professional body of advocates available to ensure that a fair trial is available to all is as much an essential part of our present day democracy as it was in the days of Thomas Erskine. The rule is fundamental to preserving the freedoms that we enjoy as a community.

The obligation to accept a brief imposed upon defence counsel has been substantially modified by the Bar Association Rules. These Rules now provide for mandatory and discretionary exceptions to the requirement. The mandatory exceptions are largely centred upon situations where a conflict of interest may arise. It applies to such circumstances as the barrister having advised on the other side, having a personal interest in the proceedings, where the barrister may be called as a witness or where some aspect of his or her conduct may be called in question. In circumstances such as these it is clear that not only should the barrister not be required to accept the brief but rather he or she should be required not to accept the brief. The duty to refrain from acting where there is a conflict of interest in representing the client is a duty owed to the client and a duty owed to the court.⁹

The discretionary exceptions to the obligation to accept a brief focus upon matters that are often subjective and less clear as to the need for the barrister to decline to act. They include such circumstances as where the length of time in which the barrister will be involved full time in the matter is such as would seriously

prejudice his or her practice, where there may be a clash in point of time with another commitment professional or otherwise, where the barrister has insufficient time to give proper attention to the brief, where acceptance of the brief would possibly involve cross-examination or criticism of a friend or relation of the barrister, where the fee offered is not the barrister's usual fee for a matter of that kind, where the barrister believes on reasonable grounds that it is likely that fees will not be paid, where past experience of the particular accused or an essential witness to the matter gives the barrister good reason to believe that his or her performance in the conduct of the proceedings would be adversely affected, where the barrister has reason to believe that his or her own professional conduct is likely to be impugned in relation to the matters out of which the action arises and other considerations of a similar kind. The written rule ends with a catch all exception which permits the barrister to refuse a brief "in such other circumstances as may be permitted by the Governing Body".

It must be acknowledged that the discretionary exceptions constitute substantial erosion of the requirement that the barrister accept a brief. It is very easy for a barrister who does not wish to accept a brief for any reason to bring the matter within one or more of the exceptions. However for the barrister to decline to accept a brief for other than good reason as spelled out in the Rules is for the barrister to contribute to the undermining of the principles that underlay the duty imposed upon counsel to accept the brief. The fact that counsel disapproves of the client or of the alleged activities of the client is not a justification for declining to accept a brief.

There is another side to the presence of the rule and that was expressed by the New South Wales Law Reform Commission as follows:

“In our view the main practical effect of the rule ... is not that it forces reluctant barristers into accepting unpopular cases, but rather that it reduces criticism of barristers who take such cases.”¹⁰

The need for fearless and effective representation for unpopular individuals and unpopular causes is vital to the administration of justice in this country.

Unfortunately the question, “how could you act for such a despicable person?” remains one commonly asked of defence counsel. Further, often there is an assumption made by ill-informed people as to an identity between the advocate and the accused or the accused’s cause.¹¹ The presence of the Rule and adherence to it provides a ready response for those who take on those cases.

The Duty to Continue to Act

Once defence counsel has accepted a brief to represent an accused person he or she has an obligation to continue that representation¹². Of course there are circumstances in which the relationship will be brought to an end before the matter is complete. The most obvious of those is where the accused terminates his instructions. Another may be where the accused is in serious violation of an agreement regarding fees or expenses. The Bar Association Rules permit a barrister to return the brief where the barrister believes on reasonable grounds that it is likely that his or her fees may not be paid¹³. Generally speaking it will not be a reason for ceasing to act that the accused has declined to follow the advice of counsel.

It may not be appropriate to continue to act in a matter where, as a result of developments in the course of the relationship, one of the matters identified in the rules which would have required counsel to decline to accept the brief in the first place arises. The Professional Conduct Rules provide that it is only in exceptional circumstances that a brief for the defence of a person charged with a serious criminal offence may be returned.

Where counsel does return a brief the Professional Conduct Rules provide that this shall occur, wherever possible, at a reasonable time before the hearing so that the solicitor may have the opportunity of properly instructing some other counsel. An example of the late withdrawal of counsel is to be found in the Northern Territory case of *McIntyre v R* (unreported NTG 37 of 1981). In that case the appellant's appeal on the ground that he lacked representation was rejected by a Full Court of the Federal Court. However in doing so Toohey and Fisher JJ referred to the "practical solution" suggested by Murphy J in *McInnis v R* (1979) 143 CLR 575 at 585 where his Honour said:

"A practical solution may have been for the judge to ask Mr Singleton (the counsel who withdrew) to continue to represent Mr McInnis to avoid both the public inconvenience which would arise if the trial were not to proceed and the injustice to Mr McInnis if it were. Any lawyer, conscious of his responsibility as a member of a profession which has exclusive rights to represent others in court and has high ethical standards of public service, would not have refused. If he did refuse, then the judge should have adjourned the case and refused to allow it to continue until Mr McInnis had been provided with adequate representation."

In summary the principles applicable to returning a brief are that this should not occur unless for good cause and with reasonable notice.

When a brief has been accepted it is the responsibility of counsel to be present in court ready to represent the accused on each day upon which the case is called on for hearing. The attendance of counsel at the resumed hearing of a part heard case takes precedence over all other cases in respect of which counsel may hold a brief.¹⁴ Further a barrister should not accept more than one brief in the one court for the one day unless he can do justice to each brief without interfering with the court's disposal of the business before the court.¹⁵

Where counsel is instructed in a civil case that clashes with a case where counsel is also briefed to appear for an accused person in the trial of a serious criminal offence then the civil brief must be returned.¹⁶ A barrister is not justified in returning a brief which has been accepted by the barrister and has received a fixed date for hearing to enable him or her to attend a social or other non-professional engagement.

Once the trial is under way defending counsel should not be absent from the trial unless exceptional circumstances apply where those circumstances could not reasonably have been foreseen. However counsel may be absent with the consent of the instructing solicitor or the accused and where a competent replacement is available to take his or her place.¹⁷

The Duty to the Accused

As has already been observed the duty of counsel for the defence is to protect the accused from being convicted except by a competent tribunal and upon legal evidence sufficient to support such a conviction. That duty prevails irrespective of any opinion which counsel may have formed as to the guilt or innocence of the accused. It is not the function of counsel to assume the role of judge or jury but rather it is to represent the interests of the accused. The function of defence counsel is to “supplement the deficiencies of the client; that he is to bring to the task of persuading the tribunal the faculties or qualities which the client must necessarily lack; knowledge of law, familiarity with the rules of prudence which immemorial experience has shown should be observed before the heavy burden of pronouncing the verdict of guilt can be safely undertaken, and the ability to marshal facts and present them in appropriate language.”¹⁸ As Baron Bramwell observed:

“A client is entitled to say to his counsel, ‘I want your advocacy not your judgment; I prefer that of the court’.”¹⁹

Given that all of the evidence has not been presented or tested any opinion formed by counsel as to the guilt of the client must, of necessity, be a preliminary opinion. When the case is complete counsel may form a different view or a jury may take a quite different view from that formed by counsel. In any event judgment of the client’s case is not a matter for counsel. The role of counsel is to urge all matters relevant to the cause of the client “so that those whose business it is to judge should not pronounce judgment without having the advantage of hearing all that can be said from the client’s point of view.”²⁰

A difficulty may arise when a clear confession of guilt is made to either the instructing solicitor or to defence counsel. In such circumstances there will

always be a preliminary issue whether the confession is truly one of guilt. Often there will be no doubt. In many cases the complexity or subtlety of the law will make it difficult for the lay client to determine whether conduct is criminal or whether it is authorised, justified or excused. In other cases there may be false self-accusation on the part of the accused in order to protect another or to assume the burden of guilt for some reason.

Some legal practitioners may seek to avoid being confronted by a clear confession of guilt by delivering to the accused what W.A.N. Wells²¹ termed “the lecture” prior to obtaining any instructions from the accused as to the circumstances leading to the charges. The lecture will vary from case to case and will depend upon the circumstances of the particular matter and the defences that may be available. Part of the lecture will include advice to the effect that admissions made to counsel or solicitor may inhibit the manner in which the defence of the accused may be presented. Once the lecture has been delivered the practitioner will then seek instructions as to the matter at hand.

The difficulty with such an approach is that it is likely to lead to the accused providing a sanitised version of events on the basis of the preliminary advice received. This may mean that important information leading to the identification of possible defences may not be exposed. It may be better to adopt a gradual and incremental approach to obtaining instructions using the experience and instincts of the practitioner to avoid embarrassment.

Where there is a clear confession of guilt or there exists the disclosure of facts that lead to what counsel sees as an irresistible inference of guilt, counsel is not required to withdraw. Counsel is duty bound to advise the accused of the benefits of entering a plea including the fact that such a plea is regarded as a mitigating factor by the courts in the sentencing process. Where necessary the advocate is entitled to address all aspects of the case and provide advice in strong terms that

the accused is unlikely to escape conviction and of the benefits of a plea in the particular case. However in the end the accused must be allowed complete freedom of choice as to the plea he wishes to make.²² The decision whether or not to plead guilty is one for the accused alone.

In the event that there is a plea of not guilty in circumstances where counsel has a clear confession of guilt the situation is governed by the Professional Conduct Rules.²³ If the confession is made before the proceedings have commenced counsel *may* continue to act. If it comes during the proceedings he or she *shall* continue to act but “shall not set up an affirmative case inconsistent with the confession by, for example, asserting or suggesting that some other person committed the offence charged or calling evidence in support of an alibi.”²⁴

As Sir David Napley reminds us²⁵ a plea of not guilty is not synonymous with a declaration of innocence. The onus rests upon the Crown to prove the necessary elements of its case beyond reasonable doubt. The plea of not guilty simply puts the prosecution to proof. In continuing to act for the accused counsel does no more than put the Crown to proof. That may involve challenging the reliability of the prosecution evidence, objecting to inadmissible evidence, making submissions as to the sufficiency of evidence and the advancement of any defence that may be available upon the evidence adduced. The constraint imposed upon counsel is to refrain from presenting a positive case inconsistent with the confession of guilt made to him or her.²⁶

A problem will arise if the accused insists upon presenting a positive case, for example by himself giving false testimony or calling others to do so on his behalf. In those circumstances the advocate must withdraw for to do otherwise would be to participate in an attempt to deceive the court. Counsel must not disregard the instructions of the client and conduct the defence as counsel thinks best.²⁷

Counsel should withdraw without alerting the court to the problem arising from the proposed course of conduct to be adopted by the accused because to raise that matter with the court would be to act in breach of the obligation to maintain confidentiality.²⁸

Where counsel is in a position to withdraw consistent with his or her obligations under the relevant rules, it would be wrong to do so by advising the accused that it would be better for him to obtain other representation because his new advocate would not be embarrassed by the admission of guilt which has been conveyed to counsel. Sir David Napley suggests that the propriety of such conduct is questionable given that it may amount to encouragement to the accused to deceive the court by giving evidence as to his innocence with the aid of his new advocate who, because he is not fully informed, will not commit any breach of a professional duty. It is suggested that the proper approach is to inform the accused of the limitations imposed upon counsel by virtue of the knowledge gained including the inability to present arguments suggesting that some other person has committed the offence or otherwise protesting the innocence of the accused. It then becomes a matter for the accused as to how he proceeds and if he should seek to obtain the services of another advocate then that is his affair.²⁹

A similar response would apply to circumstances in which the confession of guilt is made to the instructing solicitor rather than to the counsel engaged to appear at the hearing. In those circumstances the solicitor should inform counsel of the information he or she has obtained. To do otherwise would be to become involved in assisting the accused to deceive the court through the innocent involvement of counsel. In my opinion the solicitor should inform counsel of all of the circumstances and then one or other or both of counsel and the solicitor should provide to the accused the advice I have referred to above and abide the decision of the accused as to the continued conduct of the matter.³⁰

In circumstances where an accused person denies having committed the offence charged but nonetheless insists upon pleading guilty to it counsel may continue to represent the accused person but only after advising the accused of the consequences of such a course of action. In particular the accused should be informed that submissions in mitigation would have to be on the basis that the accused is guilty of the offence charged. In such circumstances, as a matter of prudence and also as a matter of obligation under the Bar Association Rules, counsel should, wherever possible, receive written instructions from the client.³¹

The duty to the accused of course does not involve assisting him or her to concoct his or her version of relevant events. In the usual situation there will not be a clear request from the accused for assistance of this kind. However where defence counsel provides either “the lecture” or general advice which may lead the accused to include false information or exclude otherwise relevant material from his or her instructions then one comes close to participating in improper conduct. Counsel must not invent a defence for the accused. That is not to say that technical defences should not be relied upon. Such defences are available notwithstanding that they are technical. They remain so even if the case for the accused appears to be otherwise devoid of merit. Napley observed that an advocate “must state every fact freely and use every argument, whether technical or otherwise, which can, in accordance with the law and within the rules of professional conduct properly be made. Far from failing in his duty to the public, he is fulfilling a duty towards it, when he raises a technical defence on the wording of a statute, even though had the statute been worded differently the clear absence of merits in the case would have justified a conviction.”³²

The Presentation of the Case

The presentation of the case must be in accordance with the instructions of the accused. Insofar as is possible counsel should ensure that the instructions provided by the accused are based upon adequate information. The accused should be placed in a position to make informed decisions as to how the case is to proceed.

There is an obligation imposed upon counsel appearing for an accused to advise that person of his or her rights including the right to challenge jurors, the right to give evidence and the right to call evidence. The decision whether to challenge a juror or for the accused to give evidence or for the accused to call evidence is a decision for the accused alone. It is not a decision for counsel for the defence. Of course counsel will provide to the accused all of the information necessary to enable the accused to make an informed decision but the sole right to make these decisions rests with the accused. In the event that the accused elects not to give evidence it is the duty of counsel to put the accused's defence before the court and, if necessary and appropriate, to make positive suggestions to witnesses called on behalf of the Crown.³³

The Duty of Confidentiality

There is ongoing debate as to the extent, appropriateness, effectiveness and justification for the legal professional privilege that attaches to information provided to lawyers by their clients and the consequent advice provided by those lawyers to the client³⁴. Napley³⁵ expressed the following justification:

“The efficient administration of justice requires that clients be free to reveal, however incriminating these may be, all material facts and information to their lawyers, whether solicitors or barristers, without fear that they may subsequently be disclosed to others. For this reason the law provides that any communication (except one aimed at constituting the lawyer the conscious or unconscious instrument in the furtherance of a

fraud or crime) which is made by a person to a lawyer in his capacity as such is a privileged communication which the lawyer is under an obligation not to disclose.”

The issue has been the subject of High Court consideration in recent years.³⁶ The Court has held that legal professional privilege is the product of a balancing exercise between competing public interests. Subject to the well recognised exceptions of crime or fraud the public interest in “the perfect administration of justice” is accorded paramouncy over the public interest that requires, in the interests of a fair trial, the admission in evidence of all relevant documentary evidence. Once legal professional privilege applies no further balancing exercise is required.³⁷

It must be remembered that the privilege rests with the accused and save for exceptional circumstances it is the accused and the accused alone that may waive privilege from disclosure.

There are exceptions to the rule. One exception is that communications by a client for the purpose of being guided or helped in the commission of a crime or fraud are not privileged from discovery.³⁸ Further, legal professional privilege will be denied to a communication which is made for the purpose of frustrating the processes of the law itself even though no crime or fraud is contemplated.³⁹ There would seem to be a distinction between past and future acts.⁴⁰ The conclusion reached by Disney et al is that lawyers may be required, or at least permitted, to disclose information if it is necessary to do so in order to prevent death or serious injury or if the information was communicated to the lawyer in furtherance of a proposed crime or fraud.⁴¹

The duty of confidentiality can give rise to situations of extraordinary difficulty for the individual lawyer. Some extreme examples of the difficulties that may arise are discussed in Disney et al and include a situation where, in Scotland, a solicitor kept confidential for a period of seven years the fact that his client had confessed to having committed a murder in relation to which another person had been convicted and was serving life imprisonment. Another was where an accused person confessed to New York attorneys that he had murdered three people and provided the attorneys with details of the location of the bodies⁴².

There are many circumstances in which the obligation to provide confidentiality will impact upon the course adopted by counsel appearing for the defence. I have already discussed the situation of counsel who receives a clear admission of guilt from an accused person. Another area is where the accused makes inconsistent statements to counsel during the process of obtaining instructions or during the course of the proceedings. In those circumstances counsel is likely to point out the differences to the client and obtain instructions as to what the accused says is the true position. If counsel is left in the position where it is clear that the accused intends to mislead the court then counsel can take no part in the presentation of that evidence and should decline to act further. However if the situation is not then clear counsel is under a duty to continue to act. It is not for him or her to judge the bona fides of the accused. In the event that the accused subsequently admits to counsel that he has deliberately misled the court then counsel must decline to act further in the matter unless the accused agrees to reveal his misleading conduct to the court.

A further example of the duty to maintain confidentiality arises in circumstances where the court has been led by the prosecution to believe that an accused person has no previous convictions and counsel is aware that this is not so. The Professional Conduct Rules provide that counsel in those circumstances is under no duty to disclose to the court facts to the contrary nor to correct any information

given by the prosecution if such disclosure would be to the detriment of the accused. The Rule goes on to provide that counsel shall not lend himself or herself to any assertion that the accused has no convictions and shall not ask a prosecution witness whether there are previous convictions against the accused in the hope that he will receive a negative answer.⁴³ It follows that in such circumstances counsel cannot put forward a positive case that the client is without convictions. This rule may have significant consequences in many cases eg in circumstances where mandatory sentencing provisions apply. The difference between a person who has no prior convictions and a person who has one prior conviction, or more than one prior conviction, for a particular offence can be crucial to the disposition of the matter⁴⁴. Although counsel cannot knowingly mislead the court he or she is under no obligation to correct the misapprehension as to factual matters under which the court may operate based upon information provided by the prosecution.⁴⁵

A practitioner who is informed that his or her client intends to disobey a court order is obliged to advise the client in the strongest terms against such action and to warn of the dangers of so doing. However counsel is under no duty to inform the court or the legal representatives of his opponent of the intention of the client.⁴⁶ An exception to this rule is said to be where the intended conduct of the client constitutes a threat to the safety of any person.⁴⁷ In those circumstances it is said that the public interest in confidentiality of lawyer/client communications is outweighed by the public interest in securing the safety of an individual, a group or the community in general. The exception would appear to fall within the class of exceptions which deal with future unlawful conduct where death or serious injury may arise as earlier discussed.

A further exception to the duty to maintain confidentiality arises where a complaint has been made against counsel. In those circumstances counsel is

permitted to disclose to a relevant disciplinary tribunal information which would otherwise be confidential provided disclosure is necessary for the proper examination of the complaint.⁴⁸

Of course an exception will arise where the accused provides a full and informed consent having received a full disclosure concerning counsel's knowledge of the confidential information. In addition the Rules provide that information ceases to be confidential if it becomes public knowledge or if counsel subsequently obtains the same information independently of the original confidential circumstances.⁴⁹

Otherwise where a barrister obtains confidential information he or she cannot use that information against the former client and shall not commence or continue to act against that person. Confidential information shall not be used to the detriment of the former client whether the former client is involved in the relevant proceedings or not. Information remains confidential notwithstanding the cessation of the relationship between counsel and the client.

Duty to Assist the Court

As has been observed above tension may arise between the duties owed by defence counsel to the accused and those owed to the court. Whilst there is a duty of confidentiality owed to the accused there is also a duty not to mislead the court. This is sometimes described as a duty of candour in the presentation of the law and the facts. In the discussion above examples of the potential for conflict have been addressed indicating how some difficulties have been resolved. I now consider some instances where the duty to the court overrides any duty owed to the client.

Counsel for the defence has a duty to draw to the attention of the court a procedural irregularity that comes to his or her attention before verdict. Counsel is

specifically required to inform the court of such an irregularity as soon as practicable. Counsel is precluded from withholding the information with a view to raising the matter later on appeal.⁵⁰

Similarly counsel for the defence has a duty to disclose all relevant authorities that come to his or her attention, including those that may be adverse to the case being presented on behalf of the accused.⁵¹ The duty of the advocate is to “do what they can to ensure that the law is applied correctly to the case”.⁵² Counsel owes a duty to the court to research the law and to avoid judicial error that may flow from a failure to inform the court correctly as to the law. In *R v Dick* Cosgrove J deplored the tendency of counsel to “rely on general statements in text books without extracting the authorities from which those statements come”.⁵³

In the Bar Association Rules the obligation is expressed in terms of imposing an obligation upon counsel to inform the court of cases that are “of a binding or persuasive authority or a provision of a statute or regulation and which appears to be directly in point”.⁵⁴ The obligation does not apply where an opponent tells the court that the opponent’s client wishes to discontinue or withdraw proceedings because the opponent considers that such proceedings could not possibly result in the client’s success.

Whilst the obligation rests upon counsel to draw to the attention of the court an authority which is adverse to the case of the accused and counsel must not “conveniently forget its existence for fear of damaging his client’s case”, he or she may of course seek to distinguish the facts or endeavour to show that the authority was wrongly decided. Counsel must not knowingly make a bad point and thereby deceive the court. It is not misconduct to make a point that the tribunal holds to be bad, it is only misconduct if counsel is dishonest.⁵⁵

In sentencing cases a responsibility rests upon counsel for both sides to inform themselves of the extent of the court's powers in any case in which they are instructed and to know what options are available to the sentencing judge and to correct him or her if a mistake should be made.⁵⁶

The obligation of candour in relation to the presentation of facts is different from that which applies in relation to the law. On matters of fact the duty imposed upon defence counsel is to refrain from making any statement to the court or presenting evidence to the court which is to counsel's knowledge false or misleading.⁵⁷ If a misleading statement has been made by counsel to the court then he or she has an obligation to correct that statement.

The duty imposed upon counsel to not knowingly mislead the court includes misleading the court by way of statements or conduct that may be regarded as "half truths" which leave the court with an incorrect impression.⁵⁸ This will occur where a practitioner "may be led into presenting a statement of fact which, although it may not be capable of being pronounced directly untrue in one particular or another, still presents a body of information that is misleading, and conceals from the mind of the tribunal the true state of facts which the deponent is professing to place before it."⁵⁹ A case of half truths is to be found in *Meek v Fleming* (1961) 2 QB 366 where, in a civil case, the defendant, a chief inspector of police, had been reduced in rank to station sergeant for disciplinary reasons relating to the deception of a court in another matter. In the case before the court counsel for the defence disguised the reduction in rank by presenting the defendant in plain clothes and referring to him as "Mr". Both the plaintiff's counsel and the judge referred to him as "Inspector" and nothing was done by counsel for the defence to correct them. On appeal the court held that the conduct amounted to concealment as it enabled the defendant to "masquerade as a chief inspector of unblemished reputation enjoying such advantages as that status and character

would give him at the trial” and that “the duty to the court here was unwarrantably subordinated to the duty to the client”.

The Bar Association Rules include the direction that a barrister is under no duty to correct any error of fact or law put to the court by an opponent⁶⁰. Although that rule would seem to be widely expressed if taken alone the rule is expressed to be subject to the other rules imposed by the Bar Association and will in practice be of narrow application.

Although counsel for the defence has a duty to assist the court and also has a duty to the court to conduct proceedings as expeditiously as the interests of justice require⁶¹ there is no obligation imposed upon counsel, other than by compulsion of statute (eg raising an alibi defence), to disclose to the court or to the prosecution the nature of the defence case. As a matter of tactics the nature of the case may be disclosed but that would only be upon clear instructions and for the benefit of the accused.

Defence Counsel and the Witness

It is improper for counsel to communicate directly with the client of another lawyer save where that lawyer has provided consent or in circumstances of necessity.⁶² Putting to one side the position of a party represented by a lawyer there is no property in witnesses. There is a specific rule of conduct that provides that a practitioner shall not seek to discourage or prevent a witness from being interviewed by opposing practitioners.⁶³ It is possible for counsel in that position, with care, to inform the witness that he or she is not required to discuss matters with the other party but that should not occur in a way that may suggest that there is an attempt to prevent or discourage the witness from being interviewed. It would be quite wrong for a defence lawyer, whether solicitor or barrister, to directly or indirectly place pressure upon a witness to not co-operate with the

prosecution. The temptation to do so, including where the accused indicates that he or she “could have a word to the witness”, is to be resisted. In the event that the issue of discouraging a witness from talking to the prosecution is raised by the accused there should be firm advice that proceeding in that way would be quite improper.

It would also be quite improper for the legal representatives of the defence in a criminal matter to seek to influence any witness to tell a false story or, by harassment or intimidation, to have the witness give evidence contrary to that which he or she proposed to give.⁶⁴ In *Kennedy v The Council of the Incorporated Law Institute of New South Wales* (1939) 13 ALJR 563 Mr Kennedy had his name removed from the Roll of Solicitors for approaching a witness in a civil matter and attempting to influence her to change her testimony.

Obviously it would be improper for counsel to advise or suggest to a witness that false evidence should be given.⁶⁵ It is also improper for counsel to coach a witness by advising what answers the witness should give to questions which might be asked.

What amounts to “coaching” means different things in different jurisdictions.⁶⁶ It has been said that English practitioners are bound by “the unrealistic prohibition against coaching in its most elementary sense of assisting witnesses to ‘rehearse or practice’ their evidence ‘or the way in which they should give it’.” In the United States a lawyer is able to coach a witness provided that the testimony given at the trial is the testimony of “the witness” and not that which the Attorney “has placed in the witness’ mouth and not false or perjured testimony”. Professor Mahoney says that in Australia and New Zealand there is adopted “some midway point”. A substantial degree of witness preparation is accepted as part of litigation practice.⁶⁷ The issue of “coaching” a witness is one which is often a cause for concern. It is acceptable for defence counsel to confer with witnesses and to help them prepare

for trial. It is appropriate in such cases for the witnesses to be provided with information regarding the issues in the case so that they may provide relevant information⁶⁸. Regrettably it is not possible to advise with any certainty what falls within or without the prohibition.

As a general rule, counsel should not confer with or condone another lawyer conferring at the same time with more than one lay witness regarding any issue that may be contentious at the hearing. The purpose of this rule is to reduce the risk of contamination of evidence and is one which would apply as part of prudent preparation practice in any event. Such a practice serves to counter the prospect of any suggestion that the witnesses have concocted the story or that the account of one witness has been an influence upon that of another.

Once the witness has been called to give evidence and has entered cross-examination then there should be no communication with that witness until cross-examination is concluded. If, for some special reason, it is necessary to confer with a witness during the course of cross-examination then that information should be provided to the opponent before the conclusion of the cross-examination.⁶⁹

Conduct in Court

In opening the case for the accused counsel for the defence should not open any alleged fact as a fact where counsel does not believe the alleged fact will be supported by the evidence to be presented.⁷⁰

A similar provision applies in relation to cross-examination on matters that go to credit. Counsel should not ask questions in cross-examination which go only to credit and which attack the character of the witness unless there are reasonable grounds for believing that the imputation conveyed by the question is well founded or true and where the answers to such questions might materially affect the credibility of the witness. A barrister is entitled to rely upon a solicitor's instructions to the effect that in the solicitor's opinion the imputation is well founded and true. If there is no such instruction then an obligation falls upon the barrister to enquire of the solicitor whether there are grounds for believing that the imputation is well founded or true.⁷¹ Where cross-examination goes to a fact in issue (irrespective of whether it goes to credit) counsel shall not put questions suggesting fraud, misconduct or criminality where there is no ability, or no intention to call affirmative evidence to support or justify the imputation, unless counsel is satisfied that the matters are put as part of the accused's case and there is no reason to believe that they are only put forward for the purpose of impugning the witness' character.⁷²

To similar effect, counsel shall not in an address in any proceedings make serious imputations against the character of a person not a party to the proceedings unless there are reasonable grounds for believing that such matters are both well founded and relevant and also the imputations are put in language which is no stronger than the needs of the case require.⁷³ Before allegations inferring unjust conduct on the part of the court or unprofessional conduct on the part of other lawyers is made counsel must satisfy himself or herself by appropriate enquiries that a foundation

for so doing exists apart from the instructions of the client. Where the client insists upon making unsubstantiated allegations then counsel must decline to carry out those instructions or withdraw from the case.⁷⁴

It is improper to suggest to a witness during the course of evidence that he has deposed to something that he has not in fact deposed to. Further, cross-examination is not a time for comment. As the learned author of Archbold put it⁷⁵:

“Cross-examination must be confined to putting questions of fact. An advocate must not in the course of cross-examination state matters of fact or opinion, or say what someone else has said or is expected to say ... cross-examination must not be used for making comments, which must be confined to speeches.”

The *Evidence Act* (NT) permits the court to disallow any question put in cross-examination which appears to it to be vexatious and not relevant to any matter proper to be enquired into in the proceeding.⁷⁶

Further the court may disallow a question put to a witness in cross-examination that relates to a matter not relevant to the proceeding except insofar as it affects the credit of the witness by injuring his character.⁷⁷ The Act includes guidance as to whether a question affecting the credibility of a witness is relevant and that guidance includes reference to matters such as the remoteness in time, the character of the imputation and the proportion of the imputation in the context of the proceedings. The court may disallow questions that are indecent or scandalous or that are intended to insult or annoy the witness.⁷⁸

Similarly defending counsel shall not in a plea in mitigation make any allegation that is merely scandalous or calculated to vilify or insult any person.⁷⁹

When cross-examining a witness counsel should not use any document or thing so as to induce a belief in the mind of the witness, the jury or the court that there is documentary information to support the substance of the suggestion conveyed by a question when the document or thing does not support such suggestion.⁸⁰ To proceed in that way is to mislead the witness and may be to obtain unfairly admissions that would not otherwise have been made. It is effectively to seek to trick the witness.

In presenting the case for the defence, counsel should not use expressions that suggest a personal view regarding the particular case before the court. Counsel should not be identified personally with his or her submissions. There is a duty imposed upon counsel “not to make submissions in terms suggesting that the submission represents his or her own personal views”.⁸¹

A further duty imposed upon counsel for the defence is not to prolong cases unnecessarily. This duty has been the subject of recent comment in Victoria where the Court of Criminal Appeal said:

“While fully discharging the duty owed to the client, counsel for an accused person must exercise, in the interests of justice as a whole, a proper discretion so as not to prolong cases unnecessarily, whether by the taking of manifestly untenable points, by unnecessarily lengthy cross-examination or submissions, or in any other way.”⁸²

This duty to the court was recognised in *Giannarelli v Wraith* (supra) and was described as “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 to the speedy and efficient administration of justice.”⁸³

In that case Mason CJ went on to say:

“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. In such an adversarial system the mode of presentation of each party’s case rests with counsel ... who, not being a mere agent for the litigant exercises an independent judgment in the interests of the court.”

Conclusions

I have addressed the principal ethical obligations imposed upon counsel for the defence. Obviously there are many more such obligations. If further guidance is required reference should be made to the Rules of Conduct of the relevant professional body, the rulings of that body and the case law. Guidance is also to be obtained in the various texts that address the topic.

As one would expect the obligations accord with common sense and reflect the onerous and yet privileged position that counsel for the defence holds in our society.

¹ Although I refer to counsel for the defence, and I have directed my attention to the position of a barrister at the independent bar, in most instances the observations have application to all persons who appear to defend in the criminal courts.

² In the Northern Territory the applicable rules are the Professional Conduct Rules of the Law Society of the Northern Territory and the Bar Association Rules adopted by the Northern Territory Bar Association. The Professional Conduct Rules are of general application. The Bar Association Rules apply only to barristers (as defined) and are expressed to be subject to the Professional Conduct Rules. The Bar Association Rules reflect in large measure the Australian Bar Association Code of Conduct of 1993. That Code of Conduct has yet to be adopted in all jurisdictions in Australia but similar provisions apply to barristers practising in other jurisdictions.

³ Napley, *The Technique of Persuasion* (4th edition) (Sweet & Maxwell) at 70.

⁴ *R v Sugarman* (1935) 25 Cr App R 109 at 115.

⁵ The Professional Conduct Rules 16.15; Singleton KC, *Conduct at the Bar* (Sweet & Maxwell).

⁶ Kenny's *Outlines of Criminal Law* (19th Ed) 1966 at 611.

⁷ Gowans, *The Victorian Bar: Professional Conduct, Practice and Etiquette* (Law Book Company) at Ch11.

⁸ Gowans, p66; Bar Association Rules 4.2-4.5. Professional Conduct Rules 15.2(a)

⁹ D.A. Ipp, *Lawyers Duties to the Court* (1998) 114 LQR 63 at 93.

¹⁰ First Report on the Legal Profession (1982) New South Wales Law Reform Commission (par 6.78).

¹¹ Members of the profession will be aware of examples from their own experience. A famous instance arose out of the decision by Dr H. V. Evatt KC to accept a brief on behalf of a group of industrial unions to dispute the validity of the *Communist Party Dissolution Act* of 1950. The controversy was sufficiently real for a Committee of the New South Wales Bar Association to issue a statement to the press supporting Dr Evatt's right to accept the brief and explaining the duty imposed upon him by his calling as a barrister. Disney, Redmond, Basten & Ross, *Lawyers* (2nd Edition) (LBC) at 605.

¹² Bar Association Rules 4.6.

¹³ Bar Association Rules 4.5(h).

¹⁴ Professional Conduct Rules 15.2(c).

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- ¹⁵ Professional Conduct Rules 15.2(b).
- ¹⁶ Professional Conduct Rules 15.2(f).
- ¹⁷ Professional Conduct Rules 16.19.
- ¹⁸ The Ethics of Advocacy: J.V. Barry (1941) 15 ALJ 166 at 168. See also: Legal Ethics: Anita Del Medico (1993) (unpublished paper for the Office of Director of Public Prosecutions).
- ¹⁹ *Johnson v Emerson* (1871) LR 6 Ex 329 at 467.
- ²⁰ *Ibid* at 169.
- ²¹ W.A.N. Wells, Evidence and Advocacy, Butterworths, 43-44.
- ²² Professional Conduct Rules 16.18, Bar Association Rules 7.2(c). The Rules of the New South Wales Bar Association (Rule 17B) require a barrister to advise a client charged with a criminal offence about any matter of law practice or procedure that “holds out the prospect of some advantage” for the client.
- ²³ Professional Conduct Rules 16.17.
- ²⁴ Professional Conduct Rules 16.17(b).
- ²⁵ Napley, 57.
- ²⁶ See generally *Tuckiar v The King* (1934) 52 CLR 335 at 346.
- ²⁷ *R v McLoughlin* (1985) NZLR 106, *Sankar v State of Trinidad and Tobago* (1995) 1 WR 194.
- ²⁸ See discussion in Napley, 57 et seq.
- ²⁹ Napley at 59.
- ³⁰ Legal Ethics: E.A. Douglas (1939) 13 Law Institute Journal (Victoria) 34 referred to in Disney et al at 904.
- ³¹ Bar Association Rules 7.2(g).
- ³² Napley, 65.
- ³³ Bar Association Rules 7.2(f) and Professional Conduct Rules 16.23.
- ³⁴ eg Ross: Ethics in Law (2nd Edition) Butterworths Chapter 11.
- ³⁵ Napley, 54.
- ³⁶ *Grant v Downs* (1997) 51 ALJR 198; *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121; *Re Bell; Ex parte Lees* (1980) 146 CLR 141; *Baker v Campbell* (1983) 153 CLR 52; *Waterford v Commonwealth* (1987) 163 CLR 54; *Attorney-General (Northern Territory) v Kearney* (1985) 158 CLR 500.
- ³⁷ *Waterford v Commonwealth* (1987) 163 CLR 54 at 64.
- ³⁸ *Re Kearney; Ex parte Attorney-General for the Northern Territory* (1985) 59 ALJR 749 at 752 per Gibbs CJ.
- ³⁹ *R v Bell; Ex Parte Lees* (1980) 146 CLR 141.
- ⁴⁰ See discussion in Disney et al at 676 et seq.
- ⁴¹ Disney et al at 904.
- ⁴² Disney et al at 676 et seq; see also “*R v Dean*” (1941) 57 LQR 85. A case in which the duty to respect privilege was clear was *Tuckiar v The King* (1934) 52 CLR 335.
- ⁴³ Professional Conduct Rules 16.22.
- ⁴⁴ In sentencing terms, in the Northern Territory, the difference for property offences can be between minimum terms of 14 days, 90 days or 12 months imprisonment. *Sentencing Act* s 78A.
- ⁴⁵ *Saif Ali v Sydney Mitchell Co Ltd* (1980) AC 198 at 220.
- ⁴⁶ Professional Conduct Rules 16.12; Bar Association Rules 5.7.
- ⁴⁷ Dal Pont, Lawyers Professional Responsibility, LBC at 356.
- ⁴⁸ Bar Association Rules 3.6.
- ⁴⁹ Bar Association Rules 3.3(d).
- ⁵⁰ Professional Conduct Rules 16.21.
- ⁵¹ Napley, 66; *Rondel v Worsley* (1969) 1 AC 191 at 227-228.
- ⁵² *Re Gruzman* (1968) 70 SR(NSW) 316 at 323.
- ⁵³ *R v Dick* (1982) Tas R 252 at 255.
- ⁵⁴ Bar Association Rules, 5.3.
- ⁵⁵ *Abraham v Jutsun* (1963) 2 All ER 402 at 404.
- ⁵⁶ D.A. Ipp, (supra) at 79.
- ⁵⁷ *Re Gruzman* (supra at 323).
- ⁵⁸ Dal Pont at 353.
- ⁵⁹ *Re Thom* (1918) 18 SR(NSW) 70 at 74-75.

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- ⁶⁰ Bar Association Rules 5.5.
- ⁶¹ Bar Association Rules 7.2(e).
- ⁶² Bar Association Rules 8.5. Professional Conduct Rules 11.1(a).
- ⁶³ Professional Conduct Rules 11.2; Bar Association Rules 8.4.
- ⁶⁴ Gowans, 73.
- ⁶⁵ Bar Association Rules 8.1.
- ⁶⁶ Richard Mahoney, *Witness Conferences* (2000) 24 CLJ 297.
- ⁶⁷ *Ibid* at 299.
- ⁶⁸ D. Ipp: *Reforms to the Adversarial Process in Civil Litigation – Part II* (1995) 69 ALJ 790 observed that it was not improper and was indeed desirable for lawyers to prepare witnesses for trial assuring they do not unknowingly contradict themselves or, by mistake, contradict others and by refreshing the memory of the witness and advising “how best to present the evidence”. Witness preparation may, as Justice Ipp has observed, involve suggestions for improving demeanour to avoid the appearance of untruthfulness and suggestions relating to “dress, the general appearance of the witness, and even the approach to nervousness”. There is a very fine line between preparing a witness and coaching a witness in contravention of the Rules of Conduct.
- ⁶⁹ Professional Conduct Rules 16.10; Bar Association Rules 8.2.
- ⁷⁰ Bar Association Rules 5.8.
- ⁷¹ Bar Association Rules 6.2.
- ⁷² Bar Association Rules 6.3.
- ⁷³ Bar Association Rules 6.5; Professional Conduct Rules 16.7.
- ⁷⁴ D.A.Ipp, (*supra* at 85).
- ⁷⁵ Archbold: *Pleading, Evidence and Practice in Criminal Cases* (41st edition) (Sweet & Maxwell) at 365.
- ⁷⁶ *Evidence Act* (NT) s13.
- ⁷⁷ *Evidence Act* (NT) s14.
- ⁷⁸ *Evidence Act* (NT) s16.
- ⁷⁹ Professional Conduct Rules 16.24.
- ⁸⁰ Bar Association Rules 5.9.
- ⁸¹ *Roberts v R* (1994) 178 LSJS 131 at 151.
- ⁸² Quoted in *Practical Advocacy* (1994) 68 ALJ 834.
- ⁸³ *Giannarelli v Wraith* (1988) 165 CLR 543 at 556; see also *R v Wilson & Grimwade* (1995) 1 VR 163 at 180.