

# Legal Ethics and Etiquette

The Hon. Justice Graham Hiley

# Overview

- Focus: lawyers appearing in court
- Ethical obligations of all counsel to court, client and others.
  - Particular obligations applying to e.g. barristers, prosecutors
- Consequences of breaches of ethical obligations
- Etiquette – courtesies and conventions



# Resolving disputes many years ago...



# Court cases: the modern equivalent of trial by battle?







# Today: a more refined approach?



# The adversarial system today

Court Rules (e.g. NT Supreme Court Rules) aim to 'level the playing field' by ensuring players play by the same **rules**.

Lawyers are bound by strict **ethical duties** – now largely **codified**.

**Conventions of etiquette** have developed.



# Sources of ethical obligations

- Common law obligations
- Now largely written into rules of practice
- e.g. Northern Territory Rules of Professional Conduct and Practice, Barristers' Conduct Rules
- Courts' jurisdiction and inherent powers





# Consequences of breaching ethical obligations

- Contempt of court
- Claims under general law e.g. breach of fiduciary duty; professional negligence
- Disciplinary action e.g. fine, caution, restrictions on practice, struck off roll of practitioners
- Poor outcome for client
- Loss of reputation!



# Hierarchy of Obligations

- - To the court/justice
  - To the client
  - To others

# Duties to the court

- *“Practitioners, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, 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 which they give to the Court or their opponents.”*
- **The functioning of the court system depends on the mutual trust between practitioners and the judiciary**

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# Duties to the client



- *“Practitioners should serve their clients competently and diligently.*
- *They should be acutely aware of the fiduciary nature of their relationship with their clients, and always deal with their clients fairly, free of the influence of any interest which may conflict with a client's best interests.*
- *Practitioners should maintain the confidentiality of their clients' affairs, but give their clients the benefit of all information relevant to their clients' affairs of which they have knowledge.*
- *Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.”*



# Relations with other practitioners

- *“In all of their dealings with other practitioners, practitioners should act with honesty, fairness and courtesy, and adhere faithfully to their undertakings, in order to transact lawfully and competently the business which they undertake for their clients in a manner that is consistent with the public interest.”*



# Relations with third parties

- *“Practitioners should, in the course of their practice, conduct their dealings with other members of the community, and the affairs of their clients which affect the rights of others, according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers and in a manner that is consistent with the public interest.”*



# Dealing with conflicting duties

- Confessions of guilt - NTPCR 14.
- Intent to disobey court order – NTPCR 17.20
- Candour re presentation of facts vs. law?
  - Duty to bring authoritative decisions/legislation to attention of court, regardless of whether supportive vs. duty not to mislead
  - Rule 17.15 allows that 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
  - But be careful: 'half truths' can be misleading.

# Communication with chambers

- Risks:
  - Perceived bias
  - Contempt of court
- Unless it is an ex parte application or a hearing of which the opponent has had proper notice, don't communicate any matter of substance in connection with the current proceedings unless:
  - (a) the court has first communicated with the practitioner in such a way as to require the practitioner to respond; or
  - (b) the opponent has consented beforehand to the practitioner dealing with the court in a specific manner.

(Rule 17.40 NTPCR/56 Barristers' Conduct Rules)

- Unilateral communications about procedural/admin matters not improper *per se* but a sustained sequence could be (*John Holland Rail Pty Ltd v Comcare* 276 ALR 221.)
- Recommended practice: communicate by email, copy in all.

# Special categories

Eg:

- Barristers Rules
- Prosecutors - NTPCR 17.46-17.58
- In house counsel - NTPCR 4 applies the Rules to lawyers who are employed otherwise than by practitioners.
- Counsel assisting inquisitorial bodies have some of the same duties as prosecutors – see 17.58
- Model litigants
- Clients lacking capacity



# Etiquette

- Good behaviour, manners and courtesies extended to other practitioners and to the bench
- Preserves orderly conduct of litigation, marks you as familiar with court room environment, helps you avoid causing offence, overlaps with good advocacy technique
- Consideration and respect can be shown through conduct in court and thoughtful preparation.

*“The lawyer should bring his manners into the court room. If he possesses none, he should borrow a set for court room use.”*

– Dean Frank Irvine, Cornell University, *Ethics of the Trial Court*, 1913.

