Lawyers' Duties to the Court

The Hon Justice James Douglas*
Supreme Court of Queensland

Paper delivered to the Papua New Guinea Law Society
4 September 2013

My object is to say something useful about lawyers' duties to the court. No doubt you will have studied ethics when qualifying. I am not covering anything like the whole field of lawyers' ethics. I also suspect that you will have encountered situations or clients which cause you to reflect seriously on what you have been taught, to consult your partners, colleagues or professional association and to reach a considered decision on how you should behave ethically and responsibly. These are matters that will concern you, particularly because you are members of the legal profession. Some of what I wish to talk to you about is contained in the *Professsional Conduct Rules* 1989 and I will make reference to those rules where it is appropriate.

Professionalism

Lawyers belong to a profession because the law is a special branch of organised knowledge, indispensable to the progress or maintenance of society, which requires its members to place their skill and knowledge at the service of the State or the community.[1]

The persistence of the public service ideal as a necessary incident of the practice of a profession, distinguishing it from a trade or a business, has been questioned in modern times, particularly with the advent of the mega-firm, operating internationally and, these days, sometimes through a corporate structure where lawyers are not the only shareholders. The concern is that where legal firms are structured as businesses and regulated in the same way, then the temptation to act in the interests of the firm or corporation rather than in the interests of justice or even of the lawyers' clients will be heightened.[2] That temptation should be resisted.

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* I wish to acknowledge the assistance of my associate, Mr Hamish Clift, who identified the relevant textbooks and articles for me, made valuable suggestions for the text and produced the select bibliography.

1 See "The Profession of Accountancy" by Sir Owen Dixon, reproduced in *Jesting Pilate*, p.192.

2 See G E Dal Pont, *Lawyers' Professional Responsibility* (Law Book Co 2013, 5th ed) at pp.8-20.

Before I go on to develop what I wish to say about the duties to the court, let me remind you of what two well known judges, one English and one Australian, have said about professionalism.

Lord McMillan said:[3]

> "The difference between a trade and a profession is that the trader frankly carries on his business primarily for the sake of pecuniary profit while the members of a profession profess an art, their skill in which they no doubt place at the public service for remuneration, adequate or inadequate, but which is truly an end in itself. The professional man finds his highest rewards in his sense of his mastery of his subject, in the absorbing interest of the pursuit of knowledge for its own sake, and in the contribution which, by reason of his attainments, he can make to the promotion of the general welfare."

Dealing with the role of a barrister, Kitto J said in the Australian High Court in *Ziems v The Prothonotary of the Supreme Court of NSW*:[4]

> "… the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community."

It is particularly important that lawyers maintain proper ethical standards in all aspects of practice and emphasise the element of public service consistent with the idea of professionalism. It is a good idea in itself but also because "a profession's most valuable asset is its collective reputation and the confidence which that inspires."[5]

What I wish to say will focus on the duty of the lawyer to the court and in court and it is there, particularly, that the public interest in the maintenance of proper ethical standards is obvious. If the community is not convinced of the honesty and transparency of litigation in its courts and in the fairness of the judicial decisions made as a result of that process then its confidence in the rule of law itself is at stake.

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3 See "Law and History" Edinburgh, October 1934, reproduced in *Law & Other Things* (1937) 118 at p.127.
4 (1957) 97 CLR 279, 298.
5 *Bolton v Law Society* [1994] 1 WLR 512, 519.

Acceptance of instructions

The first consideration you will face with any client is whether you will accept the client's instructions. In a profession such as the one I was raised in, the Queensland Bar, there is an obligation to accept instructions from a solicitor offering you a brief to appear before a court at a proper professional fee in a field in which you profess to practise. It is called popularly the "cab-rank rule". The rule, like most legal rules, has exceptions but is one which, in my experience, was regarded as highly important and adhered to strictly by the barristers with whom I was familiar when I was in practice.

It was never, however, an obligation which bound solicitors' firms. In a jurisdiction such as yours where there is no independent Bar, I imagine that it is not incumbent on solicitors' firms to accept instructions from any client even if the client is willing to pay the firm's fee. The public interest, however, requires lawyers to be prepared to represent unpopular or disagreeable clients, at a proper fee, to ensure that they are able to receive justice within the legal system. Lawyers who are also willing to perform pro bono legal work for the deserving poor and disadvantaged justifiably deserve the praise of the system for upholding the public interest as true professionals.

Ideally the system should also provide appropriately funded legal aid to those who would otherwise not be able to defend themselves or vindicate their legal rights. In a developing society legal aid may, understandably, not be so readily available. Its absence in developed societies can lead to dissatisfaction with the acceptance of the rule of law. As the famous French author, Anatole France, said sarcastically:[6]

> "The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread."

In other words, if the system is or becomes one which, like the Ritz Hotel in London, is "open to all", but in reality only available to the wealthy, then the poor and those with average incomes will remain sceptical about access to justice.

Here, the *Constitution* creates the office of Public Solicitor, who is responsible for providing legal aid, advice and assistance for those who are in need of it. This system, which is vital to the rule of law, is only able to function well if it has the support of the profession, so I urge you to support the provision of legal aid and the office of the Public Solicitor.

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6 Anatole France, *Le Lys Rouge*, (Paris) (1894) p 117.

Let me then go on to the duties that a lawyer owes in preparing and presenting litigation. The first duty of the lawyer engaged in litigation is to the Court. He or she is an officer of the Court. The next obligation in order of importance is to the client.

Much of what I say is informed by my own experience as an Australian lawyer and judge but I expect that the principles will apply here to a large extent. I will be interested to learn of any differences that have developed in legal practice here.

One of the most useful expositions of the relevant rules from the Australian point of view can be found in Professor Dal Pont's work *Lawyers' Professional Responsibility*.[7] What I propose to say is, in many respects, an abbreviated version of the lengthier discussion in that work.

Independence in presentation of the case

It is highly important that the lawyer retains independent control over the conduct of the case. You are not to follow your client's instructions slavishly as you have an obligation to avoid the misuse of court time and to refrain from advancing arguments that are not reasonably open. You are not your client's mouthpiece.

This obligation to retain your independence may require you to withdraw or refuse to accept a retainer if it is apparent that you will need to give evidence material to the determination of the contested issues before the court. This will avoid the potential for conflict between your interest and your duty as, otherwise, you may be placed in a position where your duty to the court or your own interests conflicts with your duty to your client. In an appropriate case, a court may enjoin a lawyer from continuing to act for a particular client.

Too close a relationship with a client may also threaten the lawyer's independence and objectivity as may a family or other personal association with a lawyer for an opponent.

Candour in the presentation of the law

Candour is one of the most attractive features of any good advocate. From the point of view of the judge, the lawyer's reputation for honesty is a powerful weapon in his or her favour. The duty of candour is reflected in a number of obligations. You should be aware of the relevant legal principles and the requirements of applicable rules of court and properly

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7 Dal Pont, fn 2 at Chapters 17 and 18.

prepare your submissions by researching the relevant law thoroughly, including extracting the relevant decisions and statutes for the assistance of the court. You have an important role to assist the judge to reach decisions as quickly as possible. You should strive to minimise the judges' need to do their own research so that they can determine straightforward cases as soon as possible, ideally at the end of the hearing.

You are obliged not to withhold relevant decisions or statutes from the court. Therefore you must inform the court of any binding authority and any applicable legislation that you know of and that your researches have revealed. This obligation includes, of course, authorities and statutes contrary to your client's position. This is demanded by r. 15(5) of the *Professional Conduct Rules.* The obligation persists until final judgment is given.

It is desirable, in this context, to be discriminating in your reference to decisions to ensure that they are ones of binding authority. You should not swamp the judge with large numbers of decisions that are merely individual applications of a general principle. The authority that establishes the principle or one that restates it authoritatively is the most important one to bring to the attention of the court.

Candour in the presentation of the facts

The duty of candour or honesty in presenting the facts reflects the overall commitment not to knowingly deceive or mislead the court on any matter, as r. 15(2) says. If you do mislead the court you will immediately lose your reputation both with the court and your fellow practitioners. In a profession where reputation is paramount, it is in your own self-interest as much as the public interest that you preserve intact your reputation for honesty.

This duty will require you to correct any misleading statement you may have unknowingly made to the court once you become aware of it. You do not make a misleading statement by not correcting an error in something said by your opponent but you may need to inform your opponent and, if necessary, the court, if your opponent has made a concession about evidence, case law or legislation that you know not to be true and which you believe has been made by mistake.

You must not knowingly submit a false document to the court, which includes the making of false allegations of fact in pleadings. Nor should you indulge in half truths or otherwise leave the court with an incorrect impression about the true factual position in the case.

When you make an ex parte application you must supply "the place of the absent party to the extent of bringing forward all material facts which that party would presumably have brought forward in his defence to that application".[8] This obligation may extend to you seeking instructions for the waiver of legal professional privilege so that you can permit disclosure of relevant matters to the court.

You should also be cautious or even mildly sceptical about your client's instructions, especially in respect of serious allegations against an opponent. If you do have misgivings regarding your client's version of events, you may be required to withdraw from the litigation.

Where it becomes apparent to you that your client has committed perjury, you should request authority to inform the court of that fact. If the client refuses that request you must withdraw from the case, but your duty of confidentiality may prevent you from informing the court of the fact. Some maintain, however, that disclosure to the court by you in any event is the appropriate course.[9]

If your client informs you that he or she proposes to give perjured evidence, you should attempt to dissuade the client and, if unsuccessful, withdraw from the case. If the case is at a stage where you cannot properly withdraw, you may not lend your aid to the perjury and there is a good argument, at least in Australia, that the status of perjury as a serious criminal offence would release you from an obligation to maintain your client's confidence and justify your disclosure to the court of the intended perjury.[10]

You must advise a client against disobeying a court order or some means of circumventing it.

You must also avoid illegitimately destroying or removing documents relevant to the litigation.

Dealing with witnesses

Your role is to assist the witness to present his or her evidence, not to suggest to the witness what the story should be.

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8 *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679, 682.
9 See Dal Pont fn 2 at p.559.
10 See Dal Pont fn 2 at pp.560-561 and r. 15(3) of the *Professional Conduct Rules.*

To that end you should not, as a general rule, confer with more than one lay witness at the one time about contentious issues in the hearing. This is to avoid collusion between witnesses.

The same rule does not, generally speaking, apply to expert witnesses, but there can still be legitimate criticism of experts conferring as it may compromise their independence.

You must not coach witnesses, advising or suggesting to the witness that false evidence should be given or that particular answers should be given to individual questions. The witness should not be encouraged to give evidence different from what the witness believes to be true. Nor can you counsel a witness to be forgetful or evasive.

You are perfectly entitled, of course, to advise a witness to tell the truth and to test his or her evidence which may include drawing the witness's attention to inconsistencies or other difficulties with it. You may prepare witnesses for the type and manner of questioning and inform yourself how he or she will respond to vital questions.

When a witness is under cross-examination, r. 15(11) provides that you are not entitled to speak to him or her about the case without the court's leave. You may need, for example, to confer with the witness if he or she is your client and a settlement has been proposed of the action during the course of cross-examination. Inform your opponent if such a situation occurs and then ask the judge's leave.

When you cross-examine an opposing witness remember that it is necessary that the witness be put on notice of the nature of your client's case in contradiction of the witness's evidence, particularly where your client's case relies on inferences to be drawn from the other evidence in the proceedings.[11]

In the well-known phrase, there is no property in a witness and no lawyer has the sole right to call or discuss the case with a witness. Therefore you may confer with any witness who is willing to speak to you, including expert witnesses.

You are not, however, obliged to disclose to your opponent the existence of a witness whose evidence is likely to assist your opponent and injure your own client. You must not, however, prevent or discourage prospective witnesses from conferring with an opponent or

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[11] *Cross on Evidence*, (Australian ed.) at [17435].

being interviewed by someone else involved in the proceedings. This does not prevent you from simply telling a prospective witness that he or she need not agree to confer with or be interviewed by other lawyers.

Be mindful, however, not to open yourself to allegations of tampering with the evidence of an opposing witness. In criminal cases be particularly careful to ensure that nothing is done or said to intimidate a prosecution witness. In circumstances such as those, you may wish to interview the witness in the presence of the opposing lawyer.

If necessary, you may need to warn a person you are interviewing if it appears that there is a risk that he or she will be revealing confidential information.

Communications and relationship with the judge

You must not deal with the court on terms of familiarity that suggest that you have some position of special favour with the court. You should try to avoid being alone with the judge from the commencement of the hearing until the conclusion of addresses except with your opponent's prior consent.

This covers communications outside court as well including, for example, communication by email. If it is necessary for you to communicate with the court, you should inform your opponent and ask for his or her consent and copy the opponent into any email that you do send to the court.

You should not appear before a judge who is a close relation such as a parent or spouse or sibling.

Public disclosures and media communications

I am not familiar with the local practice about public disclosure of evidence relevant to a case or media communications but, in my experience, it is unwise for lawyers to try to use the media as a vehicle to sway public opinion. It can interfere with the integrity of the trial process.

Abuses of process

You must not lend yourself to the abuse of litigation for ulterior motives. As I said earlier, you are not a mouthpiece for your client. As Professor Dal Pont says, the circumstances in

which an abuse of process can arise are many and varied. He goes on to say about baseless aspersions or allegations:[12]

> "As an officer of the court concerned in the administration of justice, a lawyer must not be a party to the presentation to a court of any evidence, or the making of any statement or allegation, for which there is, in her or his opinion, insufficient evidentiary foundation. Nor should a lawyer lend herself or himself to casting aspersions on the other party, witnesses or third parties for which there is no sufficient basis in the information in her or his possession. This may require a lawyer to decline instructions to institute proceedings ostensibly designed to antagonise an opponent unnecessarily or to gratify the client's own anger or malice, although a lawyer may ethically represent a client with a good cause of action or defence notwithstanding the client is inspired by ill-will towards the opponent."

That duty applies particularly to serious allegations of fraud or criminal behaviour and, in some jurisdictions, requires a lawyer who has instructions involving serious allegations of misconduct against another person who is unable to answer them in the case to avoid disclosing that person's identity unless it is necessary for the proper conduct of the client's case.

Another example of abuse of process is the wasting of time and money in court proceedings. You should endeavour to resolve disputes as quickly and cheaply as possible, but always be mindful of where you place the comma in pursuing the goal that the results of legal proceedings should be "just, quick and cheap". Good lawyers have always tried very hard to keep their clients out of court and you will be well advised to attempt seriously to settle legal proceedings if that can be done consistently with your client's interests.

Another example of potential abuse of process is when you are asked to institute proceedings which lack any legal foundation. They cause unnecessary discomfort, cost and inconvenience to the opposing party and waste the court's time. Simply acting on a client's instructions in such a case is inappropriate, but you must be careful to distinguish the case where there is no good cause of action from one where there is a weak but arguable case. In the latter event, you are entitled to represent your client, having informed him about the weakness of the case.

This approach is not as applicable in the defence of criminal cases because it is always incumbent on the prosecution to institute proceedings and to prove the guilt of the defendant

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[12] Dal Pont, fn 2, p. 574.

beyond a reasonable doubt. In such a case, the defendant is entitled to put the prosecution to proof. Also the client has the sole right to make the decision whether to plead guilty or not guilty.

Let me now say something about particular representative roles where there are other duties affecting lawyers, namely: prosecutors, criminal defence lawyers and lawyers in family law cases involving children.

Prosecuting counsel

While the general rules affecting lawyers' duties to the court apply to prosecutors, they also have some overriding considerations to bear in mind, including the duty to be fair and impartial. That duty shows itself in an obligation to make disclosure as well as to call relevant witnesses. The prosecutor should not pick and choose the witnesses or evidence to be presented so as only to favour a conviction, but should present impartially the available, relevant, credible evidence whether it tends for or against conviction and should recognise and not seek to hide any weaknesses of the prosecution case. That still leaves a discretion to decide what witnesses need to be called and whether to call witnesses whose evidence the prosecutor believes reasonably is plainly unreliable or plainly untruthful.

Similarly, the prosecutor's submissions on sentence should not seek to persuade the court to impose a vindictive sentence. It is appropriate to assist the court by indicating an appropriate range of penalties by reference to comparable sentencing decisions.

Rule 17 of the *Professional Conduct Rules* outline these and other duties of lawyers prosecuting a person accused of crime.

Criminal defence lawyers

It is a very common experience to be asked by a lay person what you do when your client confesses guilt of a criminal offence to you. If that occurs during the proceedings, you will be obliged to continue to act; see r. 16(4)(b). If the confession is made shortly before the commencement of proceedings and there is no time for another lawyer to take over the case properly and the client insists on the lawyer continuing to act you may continue; see r. 16(4)(a).

You are, as always in a criminal case, entitled to put the prosecution to proof. Where the client has confessed, however, you are severely curtailed as to how to conduct the accused's defence in line with the duty not to mislead the court. You cannot set up an affirmative case inconsistent with the confession.

The converse situation is perhaps less frequent, where the client denies guilt but wishes to plead guilty for a variety of possible reasons. You are not ethically prohibited from representing such a client but should seek to ascertain the reason for the client's decision to ensure that it is not irrational or misconceived. The client should be fully informed of the consequences of a guilty plea and advised on the strength of the prosecution case and that submissions in mitigation can be advanced only on the basis that the client is guilty. The client should also be informed of the likely penalty, any criminal compensation orders that may follow and of any possibility that the plea could affect civil liability. As always, this advice should be supplied in writing and any instructions provided in writing.

Sometimes it becomes an issue whether you should disclose prior convictions of your client unknown to the prosecution. As a general principle, defence counsel owes no duty to disclose that information and should not do so unless instructed by a client who fully understands the consequences of the proposed disclosure. You are not entitled, however, to mislead the court by, for example, informing it that your client has no convictions when, on your instructions if not the prosecution's, the client has been convicted previously.

Your client has the sole right to decide whether to plead guilty or not guilty and whether or not to give evidence. You may advise the client of course, but he or she should be allowed complete freedom of choice in respect of these decisions.

These duties and others are set out in r. 16.

Duty of family lawyers in cases involving children

In Australia statute requires the court to have regard to the welfare or interests of the child as the paramount consideration. This obligation comes from art 3.1 of the *United Nations Convention on the Rights of the Child*. All the UN countries except Somalia, South Sudan and the United States of America have ratified or otherwise accepted the convention. Papua New Guinea did so in 1993 and therefore has an international obligation to have regard to the best interests of the child, as well. It affects the lawyer's approach to representing a party to

the marriage. There is authority in Australia to say that the lawyer must always remain aware that the child's interests come before those of his client. It has been held that it is necessary therefore to adduce all available evidence which might have a bearing on the matter.

A typically difficult issue may be where your client who seeks custody has admitted to you that he or she has abused the child in the past. In those circumstances, the Australian practice dictates that you cannot make submissions or lead evidence inconsistent with that admission and circumstances may arise where the rules may allow you to disclose such confidential information for the sole purpose of avoiding the probable commission of a serious criminal offence.[13]

Conclusion

Sir Gerard Brennan, the former Australian Chief Justice who appeared in a number of Papua New Guinea cases, gave an outstanding address to the Bar Association of Queensland in 1992 dealing with ethics and the advocate. Let me conclude by quoting an observation of his that I expect will be relevant here in encouraging you to maintain high ethical standards:

> "… perhaps the most immediate advantage which those standards confer is the sense of collegiality in the day to day work of the Bar. A barrister in good standing, without consciously adverting to rules, lives his or her professional life in the camaraderie of a group devoted to justice and to law, jealous of its standards and of the great privileges which it exercises in service of the public. It is not surprising that those of us who have left active practice at the Bar have a nostalgia for the years in which that camaraderie was enjoyed and a certain pride in our continued relationship with an institution held in both affection and respect."

I hope and expect that in your profession too you are jealous of your professional standards and deservedly trust your colleagues to exercise the privileges of their profession honestly and fairly in the interests of your Courts and your clients.

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[13] Dal Pont, fn 2, at p.610.

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