

Ethical Conundrums for Criminal Lawyers



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CPD for NT Law Society



Sources of Ethical Duties

- Legal Professional Act and Legal Professional Regulations
- Common law (eg fiduciary duties; duties of confidentiality)
- NT Bar Rules of Conduct (14 March 2002)
- NT Law Society's Policy as to Barrister's Work, 28 August 2014
- NT Law Society's Rules of Professional Conduct and Practice
- DPP Prosecutorial Guidelines
- Cth DPP Prosecution Policy

Duty to the Court

- Note adversarial context in which litigation takes place (cf civil law system)
- “Duty to the court” is really a lawyer’s duty to the law or to justice
- Duty to the court is paramount, prevailing over duties to a client
- Positive duty to assist the court as to the law – eg.
 - Disclosure of authorities and statutory provisions, even those adverse to interests of client
- Frankness, candour and honesty in court (Rules 21-31, Barristers’ Rules):
 - Duty not to mislead the court as to facts (Rule 17.6, *Rules of Professional Conduct and Practice*)
 - Duty to correct a statement previously made which was misleading (Rule 17.7, RPCP)
 - May require investigation as to truth of otherwise of client’s instructions and not blithely accept all client says as accurate
 - Should not witness an affidavit known to the lawyer to be false
 - Where client informs that client has lied in a material particular, lawyer must not inform the court of the lie unless the client consents, or must otherwise refuse to take any further part in the case (Rule 17.8, RPCP)
- *Barristers’ Conduct Rules*
 - Barrister’s duty to accept brief in field within capacity, skill and expertise
 - Cab-rank principle – ensures unpopular cases have equal access to justice

Duty to the Client

- Lawyer has a **fiduciary duty to a client** – the duty has been described as one of “undivided loyalty”: *Maguire v Makaronis* (1997) 188 CLR 449
- **Duty to represent client’s interests fearlessly** – without regard to personal interests of the practitioner
- Abuse by the fiduciary of his or her position may result in civil proceedings leading to orders for compensation and damages
- Breach of a lawyer's fiduciary duty to the client likely be professional misconduct, especially where:
 - lawyer gains at the expense of and without the knowledge of the client
 - lawyer deliberately conceals his or her personal interest
 - where the breach constitutes an abuse of the relationship, it may demonstrate unfitness, requiring removing from the roll

Duty to the Client – Competence and Diligence

- A serious breach of a lawyer's duty of competence or diligence may constitute statutory **professional misconduct** under s 465(1)(a) of the LPA which provides that “professional misconduct” includes:
 - (a) **unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure** to reach or maintain a reasonable standard of competence and diligence ...
- A less serious breach of duty may constitute unsatisfactory professional conduct under s 464 of the LPA which provides that:
 - ... ***unsatisfactory professional conduct*** includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

Examples – duty to client

- **Duty to act with diligence and care**

- Ensuring capacity to take a case including properly taking instructions (prison visits etc)
- Advising client realistically about prospects in a case
- Competence and expertise in area of practice (or access to advice)
- Do not copy and paste prosecutor's submissions if you are defending! (nt case)
- Cost disclosure and Proper trust accounting

- **Duties re client confidentiality**

- Conflict checks – previous representations or acquaintance with witnesses; previous clients
- Chinese walls in a firm working on cases of co-accused

Examples of Conflict - Representing Co-accused

- Rule 7 of RPCP requires the lawyer (before accepting a retainer) to be satisfied that:
 - clients were aware of the possibility of a conflict arising
 - consequences of that conflict; and, specifically,
 - that the lawyer would cease to act for both parties if a real conflict arose.
- Acting where confidential information has been received from one client, which is relevant to another client, should be reserved for rare situations involving sophisticated clients only.
- Lawyers and firms must obtain informed consent in terms of r 7.2 and cease to act for both parties if an actual conflict arises.
- **In practice**
 - Query whether proceedings are contentious or non-contentious
 - Plea in mitigation vs Trial (whether facts agreed or contended; whether evidence to be called)
 - Consider whether instructions are same or conflict
 - Caution re: representing two co-accused at trial
 - Unanticipated but potential conflicts arise with cross-examination questions and answers

Duty to Court over Duty to Client

- Overriding duty to court means that often lawyers are required to act in a manner that appears contrary to interest of their client – eg:
 - Must take a point of irregularity at trial, and not keep it as a ground of appeal, even though it may prejudice client's case: *R v Neal* [1949] 2 All ER 438
 - Must refrain from making allegations of fraud unless there is supporting evidence
 - Must refrain from attacking a person's character without evidential substantiation
 - Must not institute proceedings for improper purposes eg extortion or blackmail
 - Must conduct cases efficiently and expeditiously

Dealing with Client who admits guilt

- See Rule 17.19 RPCP and Rules 32 – 34 of Barristers Conduct Rules
- **What you *can* do when client confesses guilt but maintains not-guilty plea**
 - Object to jurisdiction / competency of the court
 - Object to the form of the Indictment
 - Object to the admissibility of evidence
 - Put prosecution to proof
 - but cannot mislead court
- **What you *cannot* do**
 - Cannot mislead court
 - Cannot suggest that someone else committed the offence charged
 - Cannot call any evidence known to be false (eg evidence supporting an alibi)
 - Cannot set up an affirmative case inconsistent with the confession made
 - Cannot go further, in attacking evidence for the prosecution during cross-examination, than test the evidence given by each witness and argue that the evidence taken as a whole is insufficient to amount to proof of guilt

Other Examples where Duties conflict

- **Disclosing convictions where crown fails to refer**
 - Don't need to disclose, however cannot put a case of client having no convictions
- **Dangerous requests from clients**
 - Eg to assist in their escape; passing suspicious messages to associates
- **Client who doesn't accept advice**
 - If client acts outside own interests, or doesn't accept advice, can seek leave to step off record; but cannot inform court as to why
- **Running trials that are un-meritorious**
 - Client's best interest v lawyer's financial interest ?
 - Duty to properly advise client about consequences of un-meritorious trial (likely sentence on finding of guilt after jury trial) and merits of a plea
- **How fully do you fearlessly convey your client's instructions?**
 - What is the client's best interests? How far do you go?
 - Not a mouthpiece for the client
 - Cannot make allegations of misconduct without availability of supporting evidence
- **Advising client v partaking in a conspiracy**
 - Eg advice on tax evasion; advice re: what to do with (adverse) evidence

Dealing with Witnesses

- **Ok to interview witness before their evidence (“proofing”)**
- **But counsel should avoid becoming a witness in their own case**
 - A problem in direct access cases – use solicitor where necessary (eg taking of evidence)
 - If counsel becomes witness, remedy is to step off the record
- **No property in a witness**
 - Cannot stop the other side from conferring with a witness – Rules 17.33 and 17.34
- **No coaching witnesses**
 - Must not confer with witnesses during cross-examination – Rule 17.32, RPCP
- **Avoid conferring with two or more witnesses at the same time**
 - Avoid suggestion of collaboration between witnesses – see Rules 17.30 and 17.31, RPCP
 - Expert witnesses excepted
- **Cannot improperly persuade a witness not to give evidence**
 - Amounts to improper conduct and/or contempt

Duties to third parties and your opponent

- **Duty pertaining to Practising Certificate**

- Compliance with CPD obligations and maintaining professional qualifications

- **Duty to not mislead**

- Eg don't mislead legal aid commission re client's ability to finance representation

- **Duty to act with courtesy, diligence**

- Duty to deal professionally and respectfully with colleagues
- In all communications – whether across the bar table, oral or written
- Courtesy not to communicate with another lawyer's client except through lawyer

- **Duty to respect the law and administration of justice**

- Do your tax returns
- Be a law-abiding citizen; refrain from conduct amounting to an offence at law

Prosecutorial Ethics

- NT DPP Prosecutorial Guidelines: *currently not available as under review*
- Cth DPP Prosecution Policy: https://www.cdpp.gov.au/sites/g/files/net2061/f/Prosecution-Policy-of-the-Commonwealth_0.pdf
- *Prosecution Policy* has a two-stage test to commence prosecution:
 - 1. there must be **sufficient evidence** to prosecute the case; and
 - 2. it must be evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the **public interest**.
- Public Interest Factors
 - whether the offence is serious or trivial
 - any mitigating or aggravating circumstances
 - youth, age, intelligence, physical health, mental health or special vulnerability of alleged offender, witness or victim
 - alleged offender's antecedents and background
 - passage of time since the alleged offence
 - availability and efficacy of any alternatives to prosecution
 - prevalence of the alleged offence and the need for general and personal deterrence
 - attitude of the victim
 - need to give effect to regulatory or punitive imperatives, and
 - likely outcome in the event of a finding of guilt.
- Prosecutorial decisions to be made in accordance with prosecution policy
- Cannot have regard to politics, religion, cannot discriminate; or commence charges for ulterior purposes

Prosecutorial Duties – Act Fairly

- **See Rule 17.46 RPCP and Rule 62 Barristers Conduct Rules**
- **Prosecutors have a special position re: administration of justice**
- **Duty to act fairly, reasonably and in a balanced manner**
 - Duty Not to act over-zealously
 - Duty to refrain from seeking to inflame or bias a court against an accused
 - Cannot bring trumped up charges to form basis of plea negotiation
 - Cannot threaten to use (Supreme Court) jurisdiction in order to force a plea of guilty
- Newton J and Norris AJ in *R v Lucas* [1973] VR 693, 705:
- It is very well established that prosecuting counsel are ministers of justice, who ought not to struggle for a conviction nor be betrayed by feelings of professional rivalry, and that it is their duty to assist the court in the attainment of the purpose of criminal prosecutions, namely, to make certain that justice is done as between the subject and the State.

Prosecutorial Duties – Disclosure and Witnesses

- **Duty to disclose matters both inculpatory and exculpatory**
- **Duty to call witnesses as part of prosecution case all witnesses whose testimony is admissible and necessary to give a whole picture**
 - Failure of prosecutor to call a witness may place Defence at a forensic disadvantage, in needing to call that witness in its own case, whereby leave must be sought to cross-examine if evidence not favourable
 - Obligation not enlivened if prosecution deems witness is “plainly untruthful or unreliable”
 - That determination must be made after conferral with the witness

Prosecutorial Duties for Barristers

- **Rules 62 to 72 of Barristers' Rules** set out specific prosecutorial duties for barristers:
 - must not, by language or conduct, seek to inflame or bias the court against the accused: r 64;
 - must not argue any proposition of fact or law which the prosecutor does not believe on
 - reasonable grounds to carry weight: r 65;
 - must disclose all material available to the prosecutor or whose existence prosecutor is aware of, that could be relevant to the guilt or innocence of the accused: r 66; and
 - must call as part of the prosecution's case, all witnesses whose testimony is admissible and necessary for the presentation of the whole picture: r 66B.

What to do if you have an ethical conundrum

- Great care is required to resolve conflicts between duty to court and duty to client
- In times of uncertainty, seek assistance from colleagues, the Law Society, or the Bar Association
- Advise your Professional Indemnity Insurer ahead of a potential claim
- Try to deal with the problem before it becomes bigger

What to do if you become a Defendant in a Law Society Complaint

- Speak to a trusted colleague for a second or third opinion
- Obtain legal representation re: whether your conduct constitutes:
 - unsatisfactory professional conduct under s 464 of the *Legal Professional Act*
 - professional misconduct under s 465 of the *Legal Professional Act*
 - professional misconduct at common law
 - whether the complaint should be dealt with summarily under s499
 - whether there are any special circumstances which apply under s 499(2)(a)
 - what penalties might apply under section 499(2)(b) of the Act
- Respond timely to Law Society's requests or seek extension of time
- Provide substantiation for your responses where possible

College of Law Practice Papers

reviewed and edited by Lyma Nguyen July 2016

- Professional Conduct and Discipline – Practice Paper PR801
- The Lawyer and Client Relationship – Practice Paper PR802
- A Lawyer’s Relationship with the Court - Practice Paper PR803
- A Lawyer’s Relationship with the Public – Practice Paper PR804

Ethics ... Justify It



“And now round two of ‘Justify It’.
We’ll start with you.”