# LAWYERS' DUTIES TO THE COURT

## I. INTRODUCTION

DUTIES of various kinds are imposed on those who practise the legal profession. Lawyers have to comply with ethical duties which are usually laid down and supervised by professional bodies empowered by statute to regulate and monitor the profession. These ethical duties govern the way in which the profession is conducted and range from duties concerning the etiquette of behaviour between lawyers to those requiring honesty and good faith in dealings with clients. Under the general law, contractual, tortious or fiduciary duties, may be imposed on lawyers. Contractual duties ordinarily arise out of relationships between lawyers and their clients, as do tortious and fiduciary duties, which may also stem from lawyers' relationships with reliant third parties. In addition, lawyers owe duties to "the court". This does not mean that duties are owed to a particular judge. On the contrary, duties of this kind are in reality owed to the larger community which has a vital public interest in the proper administration of justice. That public interest is indeed the source of these duties[1], and the court, in enforcing them, is acting as trustee and guardian of the due administration of justice. For that reason, since time immemorial, the courts have assumed the inherent power to impose these duties.[2] The underlying principle is that "the court has a right and duty to supervise the conduct of those appearing before it, and to visit with penalties any conduct of a lawyer which is of such a nature as to defeat justice in the very cause in which he is engaged professionally".[3]

Accordingly, duties owed by lawyers to the court are legal duties imposed by the general law. They are personal in nature and cannot be delegated.[4] They are not duties owed to individuals or parties to litigation, nor are they ethical duties such as those supervised in England by the Inns of Court, the Bar Council, and the Law Society. The ethical rules of these bodies do not determine the nature of duties owed as a matter of law to the court. A breach of a duty owed to the court gives rise to unlawful conduct which may not necessarily be unethical (and, moreover, unethical conduct may not be unlawful).[5]

The role of lawyers has always been essential to the achievement of justice under the adversarial system. The accuracy of Lord Eldon's well-

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[1] *Rondel v. Worsley* [1969] 1 A.C. 191 at p. 227 *per* Lord Morris of Borth-y-Gest.

[2] *Myers v. Elman* [1940] A.C. 282 at p. 302 *per* Lord Atkin.

[3] *Myers v. Elman*, *supra*, at p. 319 *per* Lord Wright.

[4] *Myers v. Elman*, *supra*.

[5] Examples of the distinction can be seen in *Harrison v. Tew* [1989] 1 Q.B. 307 at p. 337, confirmed on appeal [1990] 2 A.C. 523; and *Re A Solicitor* [1975] 1 Q.B. 475 at p. 483.

known statement[6] that "truth is best discovered by powerful statements on both sides of the question" is open to question[7] but it succinctly encapsulates the importance of zeal and efficiency on the part of lawyers. The power of the judge to find the truth is dependent on the ability and desire of the parties' lawyers to lay all the relevant facts before the court. Zeal and efficiency alone, however, do not ensure the doing of justice. The just operation of the legal system depends upon lawyers acting honestly and ethically, and not deliberately delaying or lengthening the proceedings or employing obstructionist tactics. The underlying purpose of lawyers' duties to the court is to protect the administration of justice by empowering the court to enforce appropriate behaviour by lawyers so as to achieve this end. In this sense the jurisdiction is a necessary auxiliary in the search for justice.

The procedures whereby professional bodies monitor and discipline lawyers have been improved and developed; but they remain relatively cumbersome and slow. The bodies concerned, and the ethical rules they administer, serve an important purpose; namely, the maintenance of appropriate ethical standards of behaviour in the legal profession. They are, however, unsuitable for the purpose of ensuring that justice is done in a particular trial where a lawyer fails "to fulfil his duty to the court and to realise his duty to aid in promoting in his own sphere the cause of justice".[8] Such a breach may affect the result of the trial, or at least require the making of special orders as between the litigants. Accordingly, justice requires an alleged breach of duty to be adjudicated upon with relative immediacy, in open court, with all interested parties being able to lead evidence and to make submissions to the judge concerned. For that reason, a summary procedure is applicable. As Lord Wright observed in *Myers v. Elman*:[9]

> "This summary procedure may . . . in proper cases take the place of an action for negligence, or an action for breach of warranty of authority brought by the person named as defendant in the writ."

The circumstances which may give rise to breaches of duties to the court are infinite. As Lord Wright said further,[10] "It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction". It is rare for the breach of a such duty to form the basis of an independent cause of action; proceedings are seldom brought specifically

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6 In *Ex p. Lloyd* (1822) Mont 70 at p. 72n.

7 See Schwarzer, "The Federal Rules, the Adversary Process and Discovery Reform" (1989) 50 U Pitt L. R 703; Ipp, "Reforms to the Adversarial Process in Civil Litigation" (1995) 69 A.L.J. 705 at pp. 713–715.

8 *Per* Lord Wright in *Myers v. Elman* [1940] A.C. 282 at p. 319.

9 *Supra*. at p. 319.

10 *ibid.*

for the purpose of making a claim grounded on the breach of such duties.[11] There is, however, no shortage of judicial pronouncements concerning them. These are usually made in the course of litigation involving other issues, when judges are required to determine whether lawyers have complied with the standards of conduct required by the courts. Questions of this kind may arise in every conceivable kind of legal action and give rise to a myriad of particular duties. In this way, lawyers' duties to the court have developed over time as a network of pragmatic rules laid down by judges in circumstances very much of an ad hoc nature. At least in England and Australia, as far as I have been able to ascertain, they have not been collected and systematised as a principled, structured body of law.

The primary purpose of this article is to attempt to gather and categorise the principal duties so that they form something approaching a coherent whole. In doing so, particular duties have been classified under four broad categories, namely the general duty of disclosure owed to the court, the general duty not to abuse the court process, the general duty not to corrupt the administration of justice, and the general duty to conduct cases efficiently and expeditiously. In the course of classifying the duties, the content of the particular duties is discussed.

The first three mentioned general duties are derived from the public interest in ensuring that the administration of justice is not subverted or distorted by dishonest, obstructive, or inefficient practices. The essence of these duties is the requirement for lawyers (within the context of the adversial system) to act professionally, with scrupulous fairness and integrity[12] and to aid the court in promoting the cause of justice.[13] By their nature, these requirements are immutable, but the content of the particular duties that flow therefrom may change over time as litigation practices and social values change.

On the other hand, the general duty to conduct cases efficiently and expeditiously is itself a reflection of the current changes in community attitudes and standards. These changes have altered the demands made on lawyers by the courts. For example, in 1996, in *Brennan v. Brighton B.C.*[14] Lord Woolf held that lawyers have a duty not to waste time and money and to bring the case to trial as quickly as possible.[15] This was not something expected of lawyers in Lord Eldon's time.[16] The new duties, brought about by changes in the demands made upon lawyers, are commented upon.

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[11] Largely because of the summary procedure available when such duties are breached in the course of the principle litigation: see *Myers v. Elman* [1940] A.C. 282 at p. 319.

[12] *Wallersteiner v. Moir (No 2)* [1975] Q.B. 373 at p. 402 *per* Buckley L.J.

[13] *Per* Lord Wright in *Myers v. Elman, supra*, at p. 319.

[14] *The Times*, July 24, 1996.

[15] See also *Blyth Valley B.C. v. Henderson* (1996) P.I.Q.R. 64.

[16] See *Earl of Radnor v. Shafto* (1805) 11 Ves. 448, where Lord Eldon commenced his judgment by saying: "Having had doubts upon this will for twenty years, there can be no use in taking more time to consider it".

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The lawyer in the adversary system has several duties which are potentially inconsistent with each other. Firstly, to act zealously to advance the interests of the client. Secondly, to keep confidential what the client has imparted. Thirdly, to act with honesty and candour to the court. At times conflicts between these duties may arise, and their resolution is discussed.

Other issues dealt with are the court's jurisdiction to enforce the duties owed to it, the growing need for judges to intervene more actively in the litigation process so as to ensure compliance with those duties, and the availability (in the event of such duties being breached) of the immunity of counsel from claims for negligence.

## II. The Court's Jurisdiction to Enforce Lawyers' Duties Owed to it

In England the generally accepted view is that while solicitors are officers of the court, barristers are not.[17] This is based on the fact that, in England, the function of disciplining barristers is not directly in the hands of the courts, but is left to the Inns of Court (although the judges retain certain powers in this respect, at least as visitors[18]) and the Bar Council. It is to be observed, however, that Lord Reid, in *Rondel v. Worsley*,[19] when dealing with the duties of a barrister to the court, noted that counsel, "*as an officer of the court* concerned in the administration of justice ... has an overriding duty to the court ... ".[20] Whatever the position may be in England as to whether barristers are officers of the court, both barristers and solicitors owe like duties to the court.[21] In other common law countries, no such distinction is made between barristers and solicitors; both are regarded as officers of the court, and both owe like duties.[22]

Until the change to section 51 of the Supreme Court Act 1981, the judiciary in England did not have power to impose compensatory sanctions on barristers for breach of their duties to the court, although solicitors were susceptible to compensatory orders. In England now, however, the court has wide powers under Order 62, Rule 11(1) to make wasted costs orders against both barristers and solicitors. To show a breach of such a duty, it is not necessary to establish dishonesty, criminal conduct, personal obliquity or behaviour such as would warrant striking a solicitor off the roll.[23] When

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[17] *Rondel v. Worsley* [1969] 1 A.C. 191 *per* Lord Upjohn at p. 282.

[18] *In re S (A Barrister)* [1970] 1 Q.B. 160.

[19] [1969] 1 A.C. 191 at p. 227 when dealing with the duties of a barrister.

[20] My emphasis.

[21] *Rondel v. Worsley* [1969] 1 A.C. 191 at pp. 227, 243; *Wallersteiner v. Moir* (No 2) [1975] Q.B. 373 at p. 402 (*per* Buckley L.J); *Ridehalgh v. Horsefield* [1994] Ch 205.

[22] See *e.g. R. v. Lavery (No 2)* (1979) 20 S.A.S.R. 430 (S. Ct. of S.A.); *Kooky Garments Ltd v. Charlton* [1994] 1 N.Z.L.R. 587; *R. v. Hatfield* (1984) 59 N.B.R. (2d) 271.

[23] *Mainwaring v. Goldtech Investments Ltd*, C.A., *The Times*, February 19, 1991; *Gupta v. Comer* [1991] 1 Q.B. 629.

a compensatory order is sought, some causal connection must be shown between the conduct complained of and the costs sought to be recovered.[24]

Generally, in most other common law countries, where duties to the court have been breached, the courts have inherent powers to make similar orders against barristers and solicitors. The courts' jurisdiction in this respect encompasses the statutory and inherent powers exercised by the courts of England and Wales.[25] The jurisdiction is punitive as well as compensatory. It has been noted that:

> "In appropriate cases costs may also be directed against solicitors or counsel for a party where they have acted improperly, have abused the processes of the court, or have otherwise acted contrary to their obligations as officers of the court or inconsistently with their right of audience before the court."[26]

## III. DUTIES OF DISCLOSURE TO THE COURT

### (a) *Duty to disclose the law and not mislead as to the facts*

Irrespective of the nature of the case, counsel is required to make a full disclosure to the court of the relevant law.[27] Further, it is the general duty of lawyers not to mislead the court by stating facts which are untrue, or mislead the judge as to the true facts, or conceal from the court facts which ought to be drawn to the judge's attention, or knowingly permit a client to attempt to deceive the court.[28] Relevant evidence that is before the court should be drawn to the judge's attention notwithstanding that it might be adverse to counsel's case.[29] In a jury trial, if the jury could be misled on some matter of law or fact by what the trial judge is saying, it is the duty of counsel, at the first available and appropriate moment, to mention the cause of his misgivings.[30] These duties of disclosure may conflict with the lawyer's duty of confidentiality to the client. When this occurs, the duty to the court is paramount.[31]

In criminal matters the prosecutor has the duty of ensuring that the Crown case is properly presented and to decide what evidence will be presented. The prosecutor also has the responsibility of ensuring that the

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[24] *Mainwaring v. Goldtech Investments Ltd, supra.*

[25] *Caboolture Park Shopping Centre Pty Ltd v. White Industries (Qld) Pty Ltd* (1993) 45 F.C.R. 224; *Re Bendeich (No 2)* (1994) 53 F.C.R. 422; *Cassidy v. Murray* (1995) F.L.C. 92–633; *Kooky Garments Ltd v. Charlton* [1994] 1 N.Z.L.R. 587.

[26] *Kooky Garments Ltd v. Charlton, supra,* at p. 591 *per* Thomas J.

[27] *Glebe Sugar Refining Co Ltd v. Trustees of the Port & Harbour of Greenock* [1921] W.N. 85 at p. 86, H.L.

[28] *Rondel v. Worsley* [1969] 1 A.C. 191 at p. 227.

[29] *In re G Mayor Cooke* (1889) 5 T.L.R. 407 at p. 408.

[30] *R v. Lavery (No 2)* (1979) 20 S.A.S.R. 430.

[31] *Rondel v. Worsley* [1969] 1 A.C. 191 at p. 227.

Crown case is presented with fairness to the accused[32] and is duty bound to disclose all material information to the defence.[33] Nevertheless, a decision of the prosecutor not to call a particular witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to have given rise to a miscarriage of justice.[34]

(b) *The duty of disclosure within the context of the adversarial system*

The general duty of disclosure is, however, subject to qualifications brought about principally by the essential characteristics of the adversarial system. Thus, while lawyers are obliged to act honestly in all positive statements they make in the court room, they are not ordinarily required to disclose the identity of an adverse witness to the other side.[35] Nor is counsel ordinarily obliged to call every available witness who is able to give relevant testimony.[36]

Ordinarily a distinction is made between fabricating evidence (which is forbidden) and not disclosing evidence (which is allowed). Recently, however, a trend towards a more stringent duty of disclosure has become discernible. In *Vernon v. Bosley (No. 2)*[37] counsel for the plaintiff failed to disclose to the trial judge and the Court of Appeal inconsistent evidence given by the plaintiff in other proceedings to which the defendant was not a party. Stuart-Smith and Thorpe L.JJ. held that the plaintiff's counsel had a duty to disclose that evidence to the court; his failure to do so had led to the court being seriously misled. Stuart-Smith L.J. said that "where the case has been conducted on the basis of certain material facts which are an essential part of the party's case", that party's lawyers have a duty to correct the court's understanding when, before judgment, the facts are discovered by them to be different. Thorpe L.J. pointed out that the balance between counsel's duties to the client and the court "must reflect evolutionary change within the civil justice system". Reforms in civil justice require "strengthening the duty to the court". He stressed the value of an "instinctive and intuitive judgment" in this regard. He said that "the course that feels wrong is unlikely to be the safe course to follow".[38] Stuart-Smith L.J. considered that counsel should advise the client to make disclosure. If the client refused, counsel should withdraw from the case. Thorpe L.J. was of the view that if the client refused to agree to the disclosure, counsel should reveal the new facts to the other side. On this

[32] *Richardson v. The Queen* (1974) 131 C.L.R. 116 at p. 119.
[33] *R. v. Maguire* [1992] 1 Q.B. 936.
[34] *The Queen v. Apostolides* (1984) 154 C.L.R. 563 at p. 575.
[35] *In re G Mayor Cooke* (1889) 5 T.L.R. 407 at p. 408.
[36] *Clayton Robard Management Ltd v. Siu* (1987) 6 A.C.L.C. 57.
[37] [1997] 3 W.L.R. 683.
[38] See pp. 699 (Stuart-Smith L.J.), 723 (Thorpe L.J.)

reasoning, it is arguable by analogy that counsel is not entitled to conceal from the court statements from expert witnesses which are inconsistent with the positive case presented by them.

*Vernon v. Bosley (No. 2)* is an instance of the growing trend of courts to require cases to be determined in accordance with the objective "truth" rather than on evidence adduced solely for reasons of perceived tactical advantage.[39] As was said by the former Chief Justice of Australia, Sir Anthony Mason:

> "I have left to last two developments which have already had or may have an impact on the role of the judge. The first is the rediscovery of the fundamental truth—or truism—that the courts are concerned with the administration of *justice*. There was a time when it was thought that the courts administered the law as distinct from justice. That is not the position today. And judicial concern with the ideal of justice is at bottom one of the reasons why the courts have refined some of the principles of substantive law as well as procedural law."[40]

*Ex parte* applications, by their nature are not adversarial, and the court in those circumstances does not have the benefit of representation of all parties involved in the litigation. Accordingly, it is then the lawyer's unqualified duty to make full disclosure to the court so that the court's decision is made on a fully informed basis.[41] If the applicant relies on a solicitor's affidavit there is a particular duty on the solicitor to ensure that all material allegations are in his affidavit, including any additional facts which he would have known had he made proper inquiries.[42] As long ago as 1850 it was held that it was not sufficient for a party to state all which he *thought* material; he must state all which *proved* to be material.[43]

There are practical difficulties in complying with this rule to the letter. Usually, instructions are received very shortly before the application is made, and often, despite the best efforts of the plaintiff and his lawyers, some relevant facts are not discovered, and therefore not disclosed. In such circumstances, it is doubtful that the lawyers will be regarded as having breached their duty to the court and that the interim injunction will be discharged merely on the ground of non-disclosure.

When application is made for an *Anton Piller* order, counsel is under a duty to ensure that the usual safeguards are contained in the order to protect the position of the absent defendant.[44] A solicitor responsible for preparing

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[39] Ipp, "Reforms to the Adversarial Process in Civil Litigation" (1995) 69 A.L.J. 705 at pp. 712–716.

[40] "The Role of the Courts at the Turn of the Century" (1993) 3 J.J.A. 156 at p. 165.

[41] *Shushma Lal v. Secretary of State for the Home Department* [1992] Imm A.R. 303; *Brink's Mat Ltd v. Elcombe* [1988] 1 W.L.R. 1350.

[42] *Shushma Lal v. Secretary of State for the Home Department, supra.*; *Brink's Mat Ltd v. Elcombe, supra.*

[43] *Dalglish v. Jarvie* (1850) 2 H & Tw 437 at p. 439.

[44] *Chappell v. United Kingdom* [1989] 1 F.S.R. 617.

an application *ex parte* to the court for an *Anton Piller* order is under an extremely high duty to take care to see that his client appreciates the obligation of candour and full disclosure; he must address his mind to the question whenever the facts which he knows put him upon enquiry. In such a case he must pursue the enquiries with his client, and if the client will not co-operate, the duty of the solicitor is to withdraw from the case.[45]

In certain categories of cases, the duty of disclosure overrides the usual consequences of adversarial procedure. Thus, in family law matters the courts have recognised that in certain circumstances the lawyers for the respective parties have a duty to disclose *all* the material evidence no matter the prejudice to their case. In *Jenkins v. Livesey*[46] Lord Brandon of Oakbrook said;

> "Each party concerned in claims for financial provision and property adjustment (or other forms of ancillary relief not material in the present case) owes a duty to the court to make full and frank disclosure of all material facts to the other party and the court. This principle of full and frank disclosure in proceedings of this kind has long been recognised and enforced as a matter of practice."

His Lordship sought to find the legal basis and justification for this principle in section 25(1) of the Matrimonial Causes Act (U.K.), which empowers the court, when exercising discretionary powers largely relating to property adjustments, to have regard to a variety of factors personal to the parties. However, there is no material difference between the issues raised by this legislation and a multitude of other issues that arise under the general law, and public interest considerations are the real justification for the imposition of the duty of disclosure. The approach in *Jenkins v. Livesey*[47] is, indeed, not dissimilar to that adopted in *Woodard v. Woodard and Curd*[48] where Sachs J. when dealing with lawyers' duties in divorce cases involving adultery, held that public interest required a full disclosure of the evidence available. He said:[49]

> "It is clear . . . that [on any charge of adultery] solicitors and counsel appearing for a petitioner have a duty to the court fairly and frankly to present the reasonably available evidence to enable the court to come to a proper decision."[50]

A similar approach applies in regard to children. In *Re K (Infants)*[51] Lord Devlin cited the judgment of the trial judge (Ungoed-Thomas J.) with approval:

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[45] *Chappell v. United Kingdom, supra.*
[46] [1985] 1 A.C. 424 at p. 437.
[47] [1985] 1 A.C. 424 at p. 437.
[48] [1959] 1 W.L.R. 493.
[49] At p. 497.
[50] See also *Holowaty v. Holowaty* [1949] 1 W.W.R. 1064.
[51] [1965] A.C. 201 at p. 240.

> "In the ordinary *lis* between the parties, the paramount purpose is that the parties should have their rights according to law, and in such cases the procedure, including the rules of evidence, is framed to serve that purpose. However, where the paramount purpose is the welfare of the infant, the procedure and rules of evidence should serve and certainly not thwart that purpose."

Relying principally on this authority, Sir Alan Ward has said extra-judicially[52]: "I incline to the view, therefore, that the rule of full and frank disclosure is of universal application in children's cases as well as in claims for ancillary relief".

Accordingly, courts in family disputes and disputes involving children impose a duty of frankness and disclosure, stemming from public interest, that overrides the usual rules relating to the conduct of trials. It remains to be seen whether this principle will be extended, in appropriate cases, to other areas. Efforts to do so in the U.S.A. have met with strenuous resistance, being described as "the attempt to convert the lawyer routinely into an informer against his client".[53] On the other hand, the evolutionary trend exemplified by *Vernon v. Bosley (No. 2)*[54] suggests that tactical concealment of the truth will become more and more difficult to justify.

### (c) *The duty of confidentiality owed to the client (legal professional privilege)*

Ordinarily any duty of confidentiality owed to the client is subject to the duty of disclosure owed to the court.[55] However, the House of Lords held in *R. v. Derby Magistrates' Court*,[56] that the duty of confidentiality to the client is paramount when it arises by reason of legal professional privilege. The basis of the decision was that legal professional privilege is absolute and no circumstances of public interest may detract from it in any way. As Lord Taylor of Gosforth C.J. put it, once the privilege is established, the lawyer's mouth is "shut for ever".[57] This was justified on the public interest ground that communications between clients and lawyers should be uninhibited. "Candour cannot be expected if disclosure of communications between client and lawyer may be compelled, to a client's prejudice and contrary to his wishes."[58]

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[52] "Dealing with Parental Responsibility", in Cranston (ed.), *Legal Ethics and Professional Responsibility* (1995) at p. 138.
[53] Rifkind, "The Lawyer's Role and Responsibility in Modern Society" 30 *The Record* 534 at p. 535.
[54] [1997] 1 W.L.R. 683.
[55] *Rondel v. Worsley* [1969] 1 A.C. 191 at p. 227.
[56] [1996] A.C. 487.
[57] At p. 505.
[58] *Per* Lord Nicholls of Birkenhead at p. 510.

*R. v. Derby Magistrates' Court*[59] was followed by *Re L (A Minor)*[60] where their Lordships held that litigation privilege did not arise in wardship and care proceedings involving children, as such proceedings are non-adversarial in nature. This ruling did not, however, affect legal professional privilege, which remained absolute and could not be overridden. Lord Jauncey of Tullichettle, on behalf of the majority, found it unnecessary to decide whether in *Essex C.C. v. R*[61] Thorpe J. was correct in saying:

> "For my part, I would wish the case law go yet further and to make it plain that the legal representatives in possession of such material relevant to determination but contrary to the interests of their client, not only are unable to resist disclosure by reliance on legal professional privilege, but have a positive duty to disclose to the other parties and to the court."[62]

The approach of the House of Lords was similar to that of Stephen, Mason and Murphy JJ. in *Grant v. Downs*[63] where the following was said:

> "The rationale of this head of privilege, according to traditional doctrine is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision."[64]

This kind of reasoning has been criticised.[65] It is arguable that, as the very basis of the privilege is public interest, a balancing exercise is essential as public interest, by its nature, is not immutable.[66] The

[59] *Supra.*

[60] [1997] A.C. 16.

[61] [1994] Fam. 167 at p. 168; see also *Re DH (A Minor) (Child Abuse)* [1994] 1 F.L.R. 679 and *Oxfordshire C.C. v. P* [1995] Fam. 161.

[62] Lord Nicholls, in a dissenting speech (with which Lord Mustill concurred) expressly disagreed with the observations of Thorpe J.

[63] (1976) 135 C.L.R. 674 at p. 685.

[64] See also *Baker v. Campbell* (1983) 153 C.L.R. 52 at pp. 116–116, where Deane J. said that the principle underlying legal professional privilege was "that a person should be entitled to seek and obtain legal advice without the apprehension of being prejudiced by subsequent disclosure of confidential communications".

[65] See Zuckerman, "Legal Professional Privilege—the Cost of Absolutism" (1991) 112 L.Q.R. 535.

[66] *Grant v. Downs, supra*, n. 63 at p. 685.

contention that, no matter the circumstances, it is in the public interest that communications between lawyer and client remain confidential is not always easy to sustain. Whatever the need to preserve the confidence of the client in the lawyer, and whatever the responsibilities of a barrister or solicitor may be, modern society will not readily accept that, in a serious case, silence may be preserved at the cost of irremediable injustice.

The example of the circumstances in *Re L (A Minor)*,[67] where the disclosure that was prohibited was apparently in the interests of the child, is awkward enough. Then there are the instances[68] where disclosure might assist a person charged with a criminal offence in proving his innocence. An example of the difficult problems that arise in this regard is the strange case of *Dean*, [69] a *cause célèbre* in Sydney towards the end of the last century. Dean was charged with attempting to murder his wife by poison. His defence was that his wife and daughter (the main Crown witnesses) were conspiring against him. Dean was convicted and after the trial confessed to his counsel, Meagher, that he was guilty. Knowing this, Meagher nevertheless agitated for a Royal Commission, and asserted Dean's innocence at a public meeting. A Royal Commission was appointed and by a majority held that the charge against Dean was not proven. Dean was at once granted a Royal Pardon and released from custody. Meagher was regarded as a public hero and became a candidate for the Legislative Assembly. A newspaper opposed to his politics charged him with incompetence for having bungled Dean's initial defence. Meagher consulted professionally Sir Julian Salomons Q.C. a leader of the New South Wales Bar, who had led for the Crown at the Royal Commission. Meagher asked Salomons for an opinion as to whether the article was libellous. He told Salomons that he knew that Dean was guilty as Dean had confessed to him. Salomons was in a painful dilemma. He well knew that he was under a professional confidence, but was now conscious of the fact that Dean's success at the Royal Commission had unjustly led to the destruction of the reputation of Dean's wife and daughter. Salomons told the Attorney-General that he knew beyond all doubt that Dean was guilty but refused to divulge the source of his information. Rumours began to circulate and Dean petitioned Parliament for an inquiry to clear his character. Salomons thereupon addressed the Legislative Assembly and gave a full account of what had occurred. This led to the chemist who had supplied Dean with the poison coming forward. Three days later Meagher confessed. Dean was indicted on a charge of making a false declaration and perjury, found guilty and sentenced to 14 years imprisonment. Meagher was struck off the roll of practitioners.[70]

[67] [1997] A.C. 16.
[68] Postulated by Zuckerman, *op. cit supra*, n. 65 at p. 536.
[69] C.K. Allen, "*R v. Dean*" (1941) 57 L.Q.R. 85.
[70] *Re Meagher* (1896) 17 L.R. (N.S.W.) 157; 12 W.N. 148.

Salomons was criticised by some because he had disclosed a professional confidence, but justified what he had done on the ground that Dean's wife was under a "gross imputation". He said:

> "I gave a great deal of time to the consideration of the authorities on the relation existing between counsel and a confessor to him of a crime, and I came to the conclusion that no person—be he client or solicitor—can make any man by an unsought confidence a co-conspirator with him in a felonious silence and make him the depository of other men's infamies."

The issue, of course, is: was there a "felonious silence"?

*R. v. Derby Magistrates' Court*[71] accepted that the principle expressed in *R. v. Cox and Railton*[72] remained a well-recognised exception to the existence of legal professional privilege. In the latter case Stephen J. said[73]:

> "The reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice. Nor do such communications fall within the terms of the rule. A communication in furtherance of a criminal purpose does not come into the ordinary scope of professional employment."

Recently Schiemann L.J. in *Barclays Bank Plc v. Eustice*[74] reiterated that advice sought or given for the purpose of effecting iniquity is not privileged. Iniquity means fraud in a wide sense, or misconduct of such a nature that it ought in the public interest be disclosed to someone having a proper interest to receive it.[75] Thus, advice given for the purpose of effecting undervalued transactions so as to prejudice the interests of a creditor was regarded as "iniquitous" and therefore not privileged.[76]

(d) *The distinction between past and future conduct*

While the absolute privilege laid down in *R. v. Derby Magistrates' Court*[77] applies to all communications of past conduct, even if that conduct was criminal, the *R. v. Cox and Railton*[78] exception relates to future or ongoing conduct. Moreover, the privilege does not apply if the lawyer is consulted

[71] [1996] A.C. 487.
[72] (1884) 14 Q.B.D. 143.
[73] At p. 1667.
[74] [1995] 1 W.L.R. 1238 at p. 1249.
[75] *Initial Services Ltd v. Putterill* [1968] 1 Q.B. 396; *Barclays Bank Plc v. Eustice* [1995] 1 W.L.R. 1328.
[76] *Barclays Bank Plc v. Eustice, supra, per* Schiemann L.J.
[77] [1996] 1 A.C. 487.
[78] (1884) 14 Q.B.D. 153.

in order to learn how to cover up or stifle a fraud.[79] As it was put in the American case of *United States v. Hodge and Zweig*[80]:

> "Because the attorney-client privilege is not to be used as a cloak for illegal or fraudulent behaviour, it is well-established that the privilege does not apply where legal representation was secured in furtherance of intended, or present continuing illegality."

There are several examples of lawyers being required to make disclosure where silence on their part would result in the furtherance of criminal or dishonest or anti-social conduct. Particularly noteworthy (as it concerned conduct which while not criminal was regarded as "iniquitous", and resulted in an ongoing order of disclosure) is *Re B (Abduction: Disclosure)*.[81] In this case a father abducted his children aged two and four years respectively from Germany and disappeared with them. His solicitor held documents from the father, including a letter asking him not to reveal the father's whereabouts. The trial judge ordered that the solicitor disclose to the mother's solicitor the whereabouts of the father and all documents in the solicitor's possession relating to the father's whereabouts, including the letter from the father. The judge also ordered that the solicitor should keep the mother's solicitors informed of any change of address of the father in future if such address came into his possession.

*Finers (a Firm) v. Miro*[82] is also instructive. The plaintiffs, a firm of solicitors, while acting for the defendant, carried out work in setting up chains of overseas companies and trusts to hold assets and moneys provided by the defendant. All assets were held at the plaintiffs' order. The object of the exercise was unquestionably secrecy. The defendant did not want anyone to know who owned these assets and moneys. When the solicitor dealing with the matter on the plaintiffs' behalf set up the trusts and companies he honestly believed that all the moneys and assets belonged to the defendant. Later he discovered facts which led him to conclude that the moneys and assets had been acquired by a fraud on insurers. The solicitor appreciated that it was arguable that his firm had constructive notice of the fraud and if the plaintiffs transferred the moneys and assets to the defendant in the U.S.A. they might be regarded as having acted dishonestly so as to render themselves liable to the liquidator of the insurers for the moneys and assets transferred. The plaintiff froze the moneys in the bank accounts in which they were held and applied for directions. The court held that the moneys should remain frozen and the

[79] *O'Rourke v. Darbishire* [1920] A.C. 581 at 613; *Finers (a Firm) v. Miro* [1991] 1 W.L.R. 35 at pp. 40–41.
[80] 548 F.2d 1347 (9th Cir., 1977) *per* Kennedy J.
[81] [1995] 1 F.L.R. 774; [1995] Fam. Law 398.
[82] [1991] 1 W.L.R. 35.

plaintiff should disclose sufficient information to the liquidator to enable him to make a claim against the defendant. Dillon L.J. observed:[83]

> "The difficulty ... is ... that ... any communication ... to the liquidator ... which gives enough information to be of practical use must breach the secrecy which was the whole object of the defendant's instructions to (the solicitor) and must breach the legal professional privilege to which the defendant is consequently entitled as against the plaintiffs.
>
> It is well established that that privilege is lost by the criminal or fraudulent intent of the client, whether or not the solicitor was aware of that intent ... The privilege cannot apply if the solicitor is consulted (concerning a fraud), even though he does not realise this and is himself acting innocently to cover up or stifle a fraud.
>
> In my judgment ... the privilege does not require the court to compel the solicitor to continue, at his own personal risk, to aid and abet the apparently fraudulent ends of the defendant in covering up the original fraud of which there is such a prima facie case."

Some of the reasoning of the Court of Appeal was based on the fact that the plaintiff was a trustee. Nevertheless, the defendants had disclosed information to the solicitors to the effect that not only had they committed a crime, but intended in the future to commit criminal acts (i.e. the further "laundering" and appropriation of the moneys and assets obtained by fraud). On that basis, irrespective of their rights and duties as trustees, the solicitors were free to disclose the information given to them as their knowledge of the future iniquity was not privileged and no confidentiality could attach thereto.

(e) *A positive obligation to disclose?*

While in some circumstances the duty of confidentiality may be nullified, it is another thing to hold that the duty to the court *requires* a lawyer to make disclosure of information received from the client.

Chief Justice Burger of the United States Supreme Court observed in *Nix v. Whiteside*[84]:

> "Indeed, both the Model Code and the Model Rules do not merely *authorize* disclosure by counsel of client perjury; they *require* such disclosure ...
>
> These standards confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence. This special duty of an attorney to prevent

[83] At p. 40.
[84] 475 U.S. 175 (1986).

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> and disclose frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice."

The learned Chief Justice went on to say that any "system of justice worthy of the name" would require disclosure.

These remarks have been criticised in the United States.[85] It is now generally accepted in that country, however, that at some point a lawyer has a duty to disclose client perjury so as to avoid assisting fraud on the tribunal.[86] Although Sir Thomas Lund stated[87] that in the case of an intended serious crime a lawyer has a duty to disclose the relevant information to the authorities, this approach is hardly universal.[88] In the United Kingdom it has been thought necessary to implement money laundering legislation[89] involving legislative limitations on the lawyer's duty of confidence. This is tacit acceptance that, without such legislation, no duty of disclosure would be owed by lawyers. The need for a recognition of a duty of this kind to protect the community against commercial frauds is underlined by the growing incidence of lawyers' participation in money laundering. It has been said that "there is clear evidence from other jurisdictions that legal professional privilege and the duty of confidence have been used to cloak the identities of the real beneficial owners of laundered bank accounts".[90]

Apart from in the USA, the courts have yet to resolve the question whether, and in what circumstances, there is a positive duty on a lawyer to disclose information, imparted pursuant to a professional confidence, that the client intends to commit a crime. In that country it has been held that as a matter of policy, at least where the intended crime is serious and violent, the lawyer has a duty as an officer of the court to make disclosure to the relevant authorities.[91] It is difficult to fault this reasoning.

(f) *Limits of legal professional privilege*

The appreciation that the extended application of legal professional privilege might conflict with the public interest in candid disclosure has led the courts to emphasise that the privilege should be confined within strict limits.[92] Accordingly, the privilege is enjoyed only where documents are

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[85] Hazard, Koniak and Cramton, *The Law and Ethics of Lawyering* (2nd ed., 1994), p. 372.
[86] *ibid.* at p. 373.
[87] *Guide to the Professional Conduct and Etiquette of Solicitors* (1960), p. 103.
[88] See however *Guide to the Professional Conduct of Solicitors* (7th ed, 1996), 616.02.
[89] Criminal Justice Act 1993 (U.K.), ss.16, 18.
[90] Cranston, "Legal Ethics and Professional Responsibility" in *Legal Ethics and Professional Responsibility* (ed. Cranston, 1995), p. 2.
[91] See *Hawkins v. King County* 24 Wn.App. 388, 602 P. 2d 361 (Wash. App., 1979).
[92] See *Grant v. Downs* (1976) 135 C.L.R. 674 at p. 685.

produced or brought into existence for the purpose of obtaining legal advice or to conduct or aid litigation.[93] When the privilege does not apply, the duty of confidence to the client will, in appropriate circumstances, readily be overridden by the duty of disclosure to the court. For example, legal professional privilege does not alone protect a solicitor from disclosing the name of his client, and the court will order the solicitor to make such disclosure when that is required by the demands of justice.[94]

In the USA it has been held that the privilege does not apply to physical evidence (other than evidence created as part of the defence, such as a witness statement). So where lawyers for an accused secretly retained in their possession a rifle stock that was attached to a rifle their client had allegedly used in a murder, they were held to have committed crimes of hindering the prosecution and tampering with evidence.[95] The court in so holding, pointed out that "decisions in other jurisdictions appear to be virtually unanimous in requiring a criminal defence attorney to deliver physical evidence in his possession to the prosecution without court order".

It would ordinarily be difficult to argue that the delivery of incriminating evidence to a lawyer would have as its purpose the obtaining of legal advice. If the lawyer retained the evidence it would be even more difficult to argue that such retention should attract the privilege on the ground that it was for legitimate purposes, and not for the purposes of unlawfully hindering the police investigation.

Where the privilege does properly exist, the courts will be astute to protect the client's right of confidence to the extent that, where information is privileged, and solicitors deliberately obtain that information (thereby infringing the privilege), they will be enjoined from continuing to act as solicitors of record; this being necessary to protect the party whose rights are infringed.[96]

(g) *Duty to know the law, prepare the case and advise the judge*

Both solicitors and counsel have a duty to the court to prepare the case properly and to know the relevant law.[97] The duty to prepare properly may be breached if a solicitor briefs counsel excessively late, or inadequately, or if one counsel drops out at the last moment with the consequence that new counsel is required to appear without appropriate preparation. In such circumstances it is the duty of the counsel who does appear to do the best that he can in the circumstances.

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[93] *Grant v. Downs*; *Att.-Gen. (N.T.) v. Maurice* (1986) 161 C.L.R. 475.

[94] *Bursill v. Tanner* (1885) 16 Q.B.D. 1; *Pascall v. Galinsky* [1970] 1 Q.B. 39.

[95] *Commonwealth v. Stenhach* 356 Pa.Super. 5, 514 A 2d 114, (1986); app. denied, 517 Pa. 589, 534 A 2d 769 (1987).

[96] *Re Markovina* [1991] 6 W.W.R. 47.

[97] *Ivan Fergus* (1994) 98 Cr. App. R. 313.

It has been said that it is counsel's duty to present argument based on full research and not to rely on practice books.[98] Counsel is expected to be experienced in his particular legal fields[99] and to be aware of the requirements of the relevant rules of court.[100] Where it is known that a judge is unfamiliar with the procedure involved in a particular case there is a duty on counsel to draw his attention to all relevant matters.[101] Counsel has a duty to bring all relevant authorities to the attention of the court, whether or not they assist the party represented by him.[102] It would be a serious breach of this obligation if counsel based a submission on a particular case which was varied on appeal, and did not disclose the appeal decision.[103] A failure to comply with this duty may result in an order for wasted costs or for solicitor client costs.[104]

It has frequently been observed in sentencing cases that it is the responsibility of counsel on both sides to make themselves aware of the relevant law, however difficult that may be, and to ensure that the judge is passing a sentence which is one within his jurisdiction to pass.[105] It is the duty of both counsel to inform themselves of the extent of the court's powers in any case in which they are instructed, to know what options are available to the trial judge and to correct him if he should make a mistake.[106]

No lawyer should advise that an appeal be instituted from a judgment until he has read it, understood it, and arrived at a bona fide conclusion that there are proper grounds for appealing from it. Anything less amounts to an abandonment of his duty as an officer of the court.[107] Counsel advising on an appeal (whether criminal or civil) will abdicate his duty to the court (and to his client) if he simply scatters throughout the notice of appeal grounds for which no proper basis exists.[108]

## IV. DUTY NOT TO ABUSE THE COURT PROCESS

### (a) *Ulterior purpose*

The integrity of the adversarial process requires lawyers (whether instructed or not) to desist from making allegations or bringing proceedings for ulterior purposes. Take the case of a solicitor who is instructed by his

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[98] *R. v. Dick* (1982) Tas. R. 252.
[99] *Davy-Chiesman v. Davy-Chiesman* [1984] Fam. 48.
[100] *Kennedy v. McGeechan* [1978] 1 N.S.W.L.R. 314.
[101] *Abdu Apac Rowena Ltd v. Norpol Packaging Ltd* [1991] F.S.R. 273.
[102] *Glebe Sugar Refining Co v. Greenock Port & Harbours Trustees* [1921] W.N. 85 at p. 86, H.L.
[103] *Re Comeau* (1986) 77 N.S.R. (2d) 57.
[104] *General Motors Acceptance Corporation of Canada v. Isaac* [1993] 1 A.R. 294.
[105] *E.g. Walker* [1996] 1 Cr. App. R. 447 *per* Wright J. at p. 448.
[106] *Granvias Oceanicas Armadora SA v. Jibsen Trading Co (The Hartrey)* (1993) 14 Cr. App. R. (S) 507.
[107] *Farquhar v. Laffin* (1975) 12 S.A.S.R. 363; see on appeal (1975) 12 S.A.S.R. 363.
[108] *R. v. Bicanin* (1976) 15 S.A.S.R. 20: see also *R. v. Lavery* (No 2) (1979) 20 S.A.S.R. 430

client to take proceedings which legally could be taken, and which would—to the knowledge of the solicitor—injure his antagonist unnecessarily. What if the client nevertheless instructs him to go on in order to gratify the client's own anger or malice? In such circumstances, the solicitor would be acting improperly if he carried out those instructions.[109]

An example of this principle is *R. v. Weisz*[110] where a solicitor was instructed by a client to bring an action against bookmakers for money alleged to be owing by them to the client on bets. The client insisted on the action being brought (although he knew that it was not maintainable in law) in the hope that the threat of publicity would induce the bookmakers to pay, or, if they did not, for the purpose of showing them up. Accordingly a specially indorsed writ was issued against the bookmakers by which the money was claimed to be due on an account stated. No account had been stated as the solicitor knew. Lord Goddard C.J. held that putting forward a feigned issue, not the true but a fictitious cause of action, was a contempt. If a writ is endorsed for a fictitious but apparently legal cause of action a default judgment could be signed as of course, and accordingly this would lead to an interference with or a distortion of the course of justice.[111]

As part of the rule against ulterior purposes, a legal representative—whether instructed or not—is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing proceedings for reasons unconnected with success in the litigation, or pursuing a case known to be dishonest.[112] Thus it would be a breach of the duty to the court for lawyers to put their names to notices of appeal which are manifestly hopeless, or which they know or ought to know, are being advanced merely to take advantage of the considerable time lag between the lodging of the notice of appeal, and the listing of the case for a full hearing. The intention of this delaying tactic would be to postpone payment or to force the respondent to accept a lower sum in settlement in order to dispose of the matter.[113] A breach of duty would also result if a solicitor swore an affidavit in support of a winding up petition, not for the purpose of obtaining a winding up order, but for the purpose of bringing pressure to bear on the company so that it would pay what was claimed rather than suffer the consequence of the advertisement of the petition.[114]

Manipulating the court's process to subvert the known intention of the court would constitute a breach of duty. An example of such an instance

[109] *In re G Mayor Cooke* (1889) 5 T.L.R. 407 at p. 408.
[110] [1951] 2 K.B. 611.
[111] See also *Ridehalgh v. Horsefield* [1994] Ch 205 *per* Sir Thomas Bingham M.R. at p. 225.
[112] *Ridehalgh v. Horsefield, supra.*
[113] *Saragas v. Martinis* [1976] 1 N.S.W.L.R. 172.
[114] *Re a Company (No 006798 of 1995)* [1996] 2 B.C.L.C. 49.

was *Ragany v. Pusztai*[115] where a lawyer filed a caveat without any purpose other than to circumvent a prior indication from the court.

Related to these principles is the rule that an implied undertaking is deemed to be given by the solicitor personally to the court that he will not use or allow discovered documents or copies of them to be used for any collateral or ulterior purpose of his own, his client or anyone else; and any breach of that implied undertaking is a contempt of court by the solicitor himself.[116]

(b) *Truth in pleading*

The traditional requirement of candour and honesty, the rule against ulterior purposes, and the modern duty to reduce unnecessary issues and costs, cast grave doubt on certain tactics used in pleading practice. Take the following examples. First, where a critical fact, essential to the plaintiff's case of action, is known by the defendant to be true, but has to be proved by a witness who can only be found and brought to testify after considerable delay and expense. The delay and expense involved may cause the plaintiff to accept a substantially reduced sum in settlement of the claim. Is the defendant's counsel justified in putting the plaintiff to the proof of that fact? Secondly, assume that the plaintiff will only be able to prove a fact (which the defendant knows is true) by calling a witness, who the defendant very much wants to cross-examine. If the defendant does not put the plaintiff to the proof of that fact, the witness will not be called. Is the barrister justified in putting the plaintiff to the proof of the fact known to be true? Thirdly, take the case where the plaintiff's counsel knows that a particular cause of action is doomed to fail, but by pleading that cause of action the plaintiff will gain some tactical advantage, usually by being able to place some facts before the court that will excite the sympathy of the judge, thereby—he hopes—inducing the judge to look with greater favour upon some other pleaded cause of action. Tactics of this kind are not consonant with the rule against ulterior purposes, and the rule that counsel is obliged to act reasonably and to raise only genuine issues which have some prospect of success.

It is of interest to note that more than 100 years ago it was said that counsel's signature on a pleading is a "voucher that the case is not a mere fiction".[117] More recently, Stephenson L.J. said: "The experienced counsel who had signed the defence to the claim (on behalf of insurers repudiating liability) would doubtless not have done so without believing the allegations to be true".[118] Tactical allegations or denials or failures to admit of

[115] Unrep., S.Ct. N.S.W., case no 104605 of 1992, delivered June 19, 1992.

[116] *Harman v. Secretary of State for the Home Department* [1983] 1 A.C. 280 at p. 304.

[117] *Great Australian Gold Mining Co v. Martin* (1877) 5 Ch. D. 1 at p. 10.

[118] *Butcher v. Dowlen, The Times*, October 17, 1980.

the kind I have mentioned are not based on any belief that they are warranted by the factual instructions given to the pleader. It follows, at least in such instances, that courts are not justified in regarding counsel's signature as a voucher of his belief in the veracity of what is stated in the pleading.

It is difficult to appreciate how the ordinarily high standards of the profession can be subordinated to tactical gain of the kind described. Surely the time has come for lawyers to be duty bound to ensure that reasonable grounds exist for all statements made in pleadings? This would not mean that counsel would have to warrant the truth of the pleaded allegations, or even that counsel would have to believe that the pleaded allegations are true, but it would mean that counsel could make no allegations or denials or put any allegations to the proof, where a pleading of that kind would be contrary to the factual instructions received. And whenever a barrister is instructed that a fact is true, it would have to be admitted.

There is a "growing distaste for the resolution of substantive disputes otherwise than on the substantive merits".[119] This is reflected by the recurring calls for pleadings to be verified in some way, whether by the oath of the parties or by some kind of certificate from the lawyers responsible for them. In the U.S.A., for example, Federal Rule 11, which applies to all Federal courts and has been adopted by many State courts, provides in effect that when filing any document in court, or making any application, a lawyer is deemed to certify that reasonable grounds exist for making any statement in the document, including a denial, and for bringing the application. The purpose of this rule is to ensure truth in pleading, to make lawyers "stop and think", and to discourage frivolous or vexatious applications.

The *Access to Justice* Final Report proposes radical reforms in this area. Lord Woolf makes three principal recommendations in this regard. Firstly, a defence should state the parts of the claim admitted and not admitted, and the defendant's version of the facts so far as they differ from those stated in the claim.[120] Secondly, where the defendant has grounds for putting the plaintiff to proof, he should be required to state them.[121] Thirdly, all pleadings would have to conclude with a declaration, by or on behalf of the litigant, of belief in the accuracy and truth of the matters put forward.[122] The latter requirement is controversial as it might be said that the need for the lawyer to believe in his client's case is foreign to the adversarial system. A rule based rather on the American Federal Court Rule 11 might be more acceptable.

[119] *Per* Kirby P in *Clayton Robard Management Ltd v. Siu* (1987) 6 A.C.L.C. 57.
[120] S.20, para 23
[121] S.20, para 25
[122] S.20, para 30

Failure by the legal profession to recognise the need for truth in pleading will result in judges being required to intervene more readily in the trial process. I have previously referred to the growing trend that judges have a responsibility to find the objective "truth".[123] Suffice it to say that in modern times it is difficult to justify a legal system which countenances conscious and deliberate departures from the truth in pleading.

(c) *Excessive zeal*

Excessive zeal may cause lawyers to conduct cases otherwise than in accordance with the highest dictates of justice. Breaches of this kind may take many forms, including misleading the court, rampant obstructionism, and raising arguments and issues that are bound to fail.

Lord Brougham, counsel for Queen Caroline in the great litigation of the early nineteenth century, offered this justification for unrestrained zeal on the part of lawyers:

> "An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion."[124]

This approach is unacceptable nowadays. The lawyer's duty to the client is usually neither his only duty nor his first duty. The modern system whereby justice is administered will not tolerate the lack of restraint advocated by Lord Brougham. As Mason C.J. said in *Giannerelli v. Wraith*[125]:

> "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 ... "[126]

A striking example of what in modern times is regarded as over-zealous representation leading to a breach of duty is *Meek v. Fleming*.[127] A press photographer claimed damages for assault and wrongful prosecution against a police officer. There was direct conflict between the plaintiff on

[123] See *supra*, nn. 39. 40.

[124] *Proceedings in the House of Lords, Trial of Queen Caroline* (Duncan Stevenson & Co., 1820 ed.), Vol 2, p 7 (J Nightingale. 1821 ed).

[125] (1988) 165 C.L.R. 543 at p. 556.

[126] See also *Ashmore v. Corporation of Lloyds* [1992] 1 W.L.R. 446 at p. 453: *R. v. Wilson and Grimwade* [1995] V.R. 163.

[127] [1961] 2 Q.B. 366.

the one hand and the defendant and other police officers on the other. Between the time when the plaintiff issued the writ and when the trial took place the defendant had been reduced in rank from chief inspector to station sergeant on the ground that he had been party to a deception on a court in the course of his duty as a police officer. That was known to the defendant's legal advisers, but a decision, for which leading counsel for the defence assumed full responsibility, was taken not to make it known to the court, and deliberate steps to that end were taken in the conduct of the defence. The defendant testified as to his career up to the time he was chief inspector, but said nothing about what had subsequently happened to him. In cross-examination it was put to him that he was a chief inspector and he had been in the force since a certain time. He replied in the affirmative. That was untrue. Similar replies were given to other questions. The plaintiff's counsel and the judge referred to the defendant many times as Chief Inspector Fleming and nothing was done to disabuse them.

It was held that the court had been misled in a material matter that probably tipped the scale in favour of the defendant. The duty to the court had unwarrantably been subordinated to the client. The defendant appeared to the judge and the jury as a person still holding the rank of chief inspector, whereas he had been demoted for an offence involving deception of the court. Counsel had knowingly misled the court. The judgment was set aside.[128]

In the past the force of ethical conventions was a strong factor in controlling the conduct of lawyers. The modern phenomena of massive increases in litigation[129] and the number of lawyers, the wide geographic dispersal of lawyers and their consequential relative anonymity have resulted in the effectiveness of these conventions diminishing.[130] Competition amongst lawyers (often deliberately encouraged by government intervention) has increased. A leading American commentator has observed that self-interest is readily evident in the legal profession.[131] These factors increase the susceptibility of lawyers to over-zealous conduct and the incurring of unnecessary costs, obstructionism, and other abuses.[132] There is accordingly a growing need for judges to exercise their powers robustly so as to control counsel who do not observe their duties to the court. As long ago as 1975, Sir Richard Eggleston said:

> "I do not say that most lawyers are inefficient or dishonest, but there are enough who are inefficient, or more rarely, dishonest, to ensure

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[128] See also *Vernon v. Bosley (No. 2)* [1997] 1 W.L.R. 683.

[129] Alschuler, "A Two-Tier Trial System" (1986) 99 Harv L R. 1808; Miller, "The Adversary System: Dinosaur or Phoenix" (1984) 69 Minn L Rev 1 at p. 5; Beaumont, "Legal Change and the Courts" (1994) 12 Aust Bar Rev. 29; Marks, "The Interventionist Court and Procedure" (1992) 18 Monash U.L.R. 1

[130] Ipp, "Reforms to the Adversarial Process in Civil Litigation" (1995) 69 A.L.J. 705.

[131] Resnik, "Failing Faith, Adjudicatory Procedure in Decline" (1986) 53 U. Chi. L. Rev. 94.

[132] Schwarzer, "The Federal Rules, The Adversary Process and Discovery Reform" (1989) 50 U. Pitt. L. Rev. 703.

that a substantial benefit would flow from a more active concern by the court with the performance of the representatives of the parties."[133]

(d) *Duty to conduct case fairly, reasonably and with due regard to the client*

The responsibility of counsel to the client requires the case to be presented fearlessly and with vigour and determination. But the overriding duty (owed to the court) remains to "contribute to the orderly, proper and expeditious trial of causes in our courts".[134] As Lord Denning observed[135] "courage and courtesy should go hand in hand". Nevertheless, mere discourtesy (as opposed to a wilful insult) would not ordinarily be regarded as a breach of duty to the court. The freedom and responsibility which counsel has to present the case are so important to the administration of justice that a court will be slow to hold that remarks made by counsel, that are relevant to the issues in the case, amount to a wilful insult to the judge.[136]

Lawyers should not "degrade" themselves in any way for the purposes of winning their client's case.[137] Whilst lawyers, in fulfilling their duties to their clients, are allowed, even expected, to be committed to their cause and to act zealously; nevertheless as officers of the court they must be rigorously dispassionate.[138] Even in the most hostile litigation, lawyers must be scrupulously fair and not take unfair advantage of obvious mistakes by the other side.[139]

As part of the duty to act with the utmost honour and fairness, lawyers owe a duty to the court to exercise care when making allegations of misconduct about others. Otherwise the process of the court is susceptible to abuse. In particular, before allegations are made inferring unjust conduct on the part of the court, or unprofessional conduct on the part of other lawyers, counsel must first satisfy himself by personal investigations or inquiries that a foundation exists, apart from his client's instructions, for making such allegations.[140] If the client insists that such unsubstantiated allegations be made, it is counsel's duty to decline to carry out those instruction or to withdraw from the case.[141]

A lawyer is often in a difficult position when a client wishes to pursue what he may regard as a hopeless case. If the lawyer is of the view that the

[133] "What is Wrong with the Adversary System?" (1975) 49 A.L.J. 428 at p. 431.
[134] *Saif Ali v. Sydney Mitchell & Co. Ltd* [1980] A.C. 198 at p. 233 *per* Lord Reid.
[135] *The Road to Justice* (1954) at pp. 55–56.
[136] *Lewis v. Judge Ogden* (1984) 153 C.L.R. 682 at p. 689.
[137] *In re G Mayor Cooke* (1889) 5 T.L.R. 407 at p. 408.
[138] *Re B and H (Minors)* [1995] 2 F.C.R. 416.
[139] *Ernst & Young v. Butte Mining Plc.* [1996] 1 W.L.R. 1605.
[140] See for example *R. v. Elliott* (1975) 28 C.C.C. (2d) 546; *Myers v. Elman* [1940] A.C. 282.
[141] *Thatcher v. Douglas* [1996] *Times Law Reports* 6.

client's case is certainly hopeless, he would be obliged to advise the client of that conclusion and urge that the case not be brought. A lawyer who proceeds with a case in such circumstances in order to make costs for himself would be guilty of a breach of his duty.[142] The breach of duty to the court would be exacerbated if the lawyer brings a case which is utterly hopeless and it is known that the client will not be in a position to pay any costs that may be ordered against him, and where the case will harass the other party.[143]

But if the lawyer could not come to the certain opinion that the case is hopeless, and informs the client of the risk involved, and advises the client most strongly not to proceed, and the client still insists on going on (without having any ulterior motive), the lawyer would commit no breach in taking those instructions.[144] As Sir Thomas Bingham M.R. said in *Ridehalgh v. Horsefield*[145]:

> "A legal representative is not to be held to have acted improperly, unreasonably or negligently, simply because he acts for a party who pursues a claim or defence which is plainly doomed to fail ... Legal representatives will, of course, whether barristers or solicitors, advise the clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated."

As part of the duty to the court to act reasonably, lawyers should ordinarily advise the acceptance of reasonable payments made into court or reasonable offers of settlement. They must not proceed with the case on the chance of getting more.[146] They must put out of their minds altogether the fact that by going on with the case, they will get more costs for themselves. They must not run up costs by instructing endless medical experts for endless reports or by any unnecessary expenditure.[147] As part of the duty not to increase costs unnecessarily, there is a duty on a firm of solicitors to advise the client, where another firm of solicitors is already employed for a party with a common interest, that it is unnecessary to employ them as well. There should be no unnecessary duplication of work.[148]

(e) *Undertakings to the court*

As officers of the court lawyers are expected to abide by undertakings given by them professionally and if they do not do so they may be called

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[142] *In re G Mayor Cooke*, (1889) 5 T.L.R. 407 at 408.
[143] *Tolstoy-Miloslavsky v. Aldington* [1996] 1 W.L.R. 736.
[144] *In re G Mayor Cooke, supra*, at p. 408.
[145] [1994] Ch 205 at pp. 233–234
[146] *Kelly v. London Transport Executive* [1982] 1 W.L.R. 1055 at pp. 1064–1065.
[147] *ibid.*; see also *Re B and H (Minors)* [1995] 2 F.C.R. 416.
[148] *Re B and H (Minors)* [1995] 2 F.C.R. 416 *per* Ward J at pp. 416–417.

upon summarily to make good their defaults.[149] Failure to implement their undertakings will prima facie be regarded as misconduct on their part.[150] The court must be able to have confidence that solicitors as officers of the court will not give undertakings which they cannot honour.[151] An undertaking given to the court which is not honoured may result in the process of the court being abused.

Exceptionally, a lawyer may be able to give an explanation for the failure to honour an undertaking given by him. Such an explanation may be regarded as being adequate to demonstrate that there has been no misconduct on his part in the particular case.[152]

An application for the implementation of an undertaking may be made by a person who is not the client of the lawyer in circumstances where there is no suggestion of dishonourable or discreditable conduct on the lawyer's part.[153] Neither the fact that the undertaking was that a third party should do an act, nor the fact that the lawyer may have a defence to the action at law, precludes the court from exercising its jurisdiction.

The jurisdiction, like that to make compensatory orders, is a summary one and is normally by originating summons, although it can be by simple application in an action where the conduct complained of occurred in the course of that action. Pleadings will not automatically or usually be involved and nor will discovery or oral evidence automatically be required. The court may, however, in appropriate circumstances, require a definition of the issues (by pleadings or otherwise), discovery and oral evidence.[154] Where it is inappropriate for the court to order the lawyer to perform the undertaking, the court may order the lawyer to pay appropriate compensation.[155]

## V. Duty Not to Corrupt the Administration of Justice

### (a) *The problem of client wrongdoing*

If a client makes a confession to a lawyer before the trial, the lawyer should withdraw. If, during the trial, counsel learns that the client intends to commit perjury, or that there is a possibility of this occurring, different considerations apply. If counsel is able to continue without advancing a case that to his knowledge is dishonest, it is his duty to do so. But counsel must never assert as true that which he knows to be false; nor connive at

[149] *John Fox v. Bannister, King & Rigbeys* [1988] Q.B. 925;
[150] *Udall v. Capri Lighting Ltd (in Liq)* [1988] 1 Q.B. 907.
[151] *A Ltd v. B Ltd* [1996] 1 W.L.R. 665.
[152] *Udall v. Capri Lighting Ltd (in Liq), supra.*
[153] *United Mining & Finance Corp v. Becker* [1910] 2 KB 296; *John Fox v. Bannister, King & Rigbeys* [1988] Q.B. 925.
[154] *John Fox v. Bannister, King & Rigbeys, supra.*
[155] *Udall v. Capri Lighting Ltd (in Liq)* [1988] 1 Q.B. 907; *John Fox v. Bannister, King & Rigbeys, supra.*

or attempt to substantiate a fraud. If the case cannot be otherwise conducted, counsel must withdraw, no matter the stage of the proceedings. In criminal cases leave of the court is required before counsel can withdraw.[156] Leave will normally be given if counsel informs the court that he would be "forensically embarrassed" by continuing.[157]

These principles are often difficult to apply in practice.[158] Take a case where the client has confessed to his counsel that he has committed the offence, and the Crown calls a witness to testify that he saw the accused assaulting the victim. It would be open to counsel to suggest to the witness that he *might* be mistaken, but he could not put to the witness that he *was* mistaken.

It does happen from time to time that counsel will find himself unable or unwilling to act in accordance with his client's wishes. Those wishes may be incompatible with counsel's duty to the court or with his professional obligations; or he may consider that compliance would be prejudicial to his client's best interests. Should such a circumstance arise, then he must inform the client that unless the instructions are changed he will be unable to act further. But counsel certainly may not take it upon himself to disregard his instructions and then to conduct the case as he himself thinks best.[159]

Great care must be taken before withdrawing. In *Tuckiar v. The King*[160] an uneducated person was charged with murder. During the trial counsel interviewed his client to ascertain whether the accused agreed with evidence given by a Crown witness of a confession alleged to have been made by the accused to a witness. After interviewing the accused, his counsel in open court said that he was in the worst predicament that he had encountered in all his legal career. During his summing up to the jury the judge commented on the failure of the accused to give evidence. The High Court of Australia pointed out that counsel seemed to have taken a course calculated to transfer to the judge the embarrassment which he appeared so much to have felt. In setting aside the conviction, they said:

> "Why he should have conceived himself to have been in so great a predicament, it is not easy for those experienced in advocacy to understand. He had a plain duty, both to his client and the court, to press such rational considerations as the evidence fairly gave rise to in favour of complete acquittal or conviction of manslaughter only ... The subsequent action of the prisoner's counsel in openly disclosing the privileged communication of his client and acknowledging the

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[156] *R. v. Lyons* (1978) 68 Cr. App. R. 104.
[157] *R. v. Lyons, supra.*
[158] See for example Mellinkoff, *The Conscience of a Lawyer* (1973).
[159] *R. v. McLoughlin* [1985] N.Z.L.R. 106 (approved in *Sankar v. State of Trinidad and Tobago* [1995] 1 W.L.R. 194).
[160] (1934) 52 C.L.R. 335.

correctness of the more serious testimony against him is wholly indefensible."

In *Sankar v. State of Trinidad and Tobago*[161] counsel was representing the accused in a murder trial. On the Friday, counsel explained to the accused the pros and cons of giving evidence from the witness stand or making an unsworn statement from the dock. On the Monday, the day on which the accused was due to testify, he told counsel "something". Counsel pondered over this something and when the trial judge came into court, he told the accused that he was duty bound to advise him to remain silent and this occurred. During closing argument counsel made it clear that he was merely putting the prosecution to proof. The Privy Council pointed out that the accused had remained silent without his being given any explanation as to the alternative courses which were open to him. This should have been done by counsel who could have sought an adjournment for this purpose. It would have been open to counsel to withdraw from the trial if the course that the defendant selected was inconsistent with counsel's duty to the court. Because counsel had not fulfilled his duty to the court by carefully explaining to his client what options were open to him there had been a miscarriage of justice and the conviction was set aside.

(b) *Conniving at dishonourable or improper conduct*

Allied to counsel's duty not to assert or connive at perjury or a fraud (whether in criminal or civil proceedings) is the duty not to assist in any way in dishonourable or improper conduct. This applies to conduct both in and out of court. A striking example of the latter is a Canadian case where a lawyer was representing a client who was attempting to obtain a firearms acquisition certificate. The client was connected in some way to a disreputable gang. The client was asked questions by the police about a murder to which the client was a witness. Fearing that police knowledge about the connection to the gang would jeopardise the firearms application, the lawyer advised the client "to be forgetful and evasive" in answering the police. The lawyer was convicted of attempting to obstruct the course of justice and the breach of his duty as an officer of the court was a material factor in the sentence imposed on him.[162]

Difficult problems may arise when lawyers advise in regard to commercial transactions which have the potential to be unlawful. This is particularly so in regard to tax avoidance. In *Leary v. Commissioner of Taxation (Cth.)*[163] Brennan J. observed:

[161] [1995] 1 W.L.R. 194.
[162] *R. v. Sweezy* (1988) 39 C.C.C. 182; see also *R. v. Delaval* (1763) 2 Burr. 1434; 97 E.R. 913.
[163] (1980) 47 F.L.R. 414 at p. 435.

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> "But activities of an entrepreneur in the promotion of a scheme in which taxpayers will be encouraged to participate falls outside the field of professional activity; those activities are not pursued in discharge of some antecedent professional duty. Entrepreneurial activity does not attract the same privilege nor the same protection as professional activity; and the promotion of a scheme in which particular clients may be advised to participate is pregnant with the possibility of conflict of entrepreneurial interest with professional duty."

An example of senior counsel experiencing difficulties of this kind is *Forsythe v. Rodda*[164] which concerned an application for the review of a magistrate's decision committing the barrister concerned for trial on charges of conspiracy and incitement regarding his advising clients on a tax avoidance scheme. It was submitted on the barrister's behalf that his advice concerned only the lawfulness of the scheme and with nothing else. Counsel for the respondent argued, on the other hand, that the scheme "was on its face preposterous" and plainly artificial. The stripping of assets was a necessary incident of the scheme. The Full Court of the Federal Court of Australia held that a case had been established which the barrister was required to answer.

In the light of the modern developments concerning proprietary claims where parties have assisted in fraud, there are now powerful incentives for solicitors to ensure that they do not do anything to further conduct involving financial impropriety.[165] Lawyers are at risk particularly in regard to "accessory liability".[166] Notwithstanding the growing number of instances where breaches of the duty not to connive at dishonourable or improper conduct are unconnected with court proceedings, the usual way in which breaches of this duty come to the attention of the courts is when, in the course of litigation, lawyers assist in dishonourable conduct on the part of the client.

As Viscount Maugham pointed out in *Myers v. Elman*,[167] the swearing of an untrue affidavit of documents is perhaps the most obvious example of conduct which a solicitor cannot knowingly permit.[168] The solicitor must assist and advise his client as to the latter's bounden duty in that matter, and if the client should persist in omitting relevant documents from his affidavit, the solicitor should decline to act for him any further. He could not, consistently with his duty to the court, prepare and place upon the file a perjured affidavit. Indeed, a solicitor owes a duty to the court to go through the documents disclosed by his client carefully, to make sure, as far

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[164] (1989) 42 A. Crim. R. 197.

[165] *Lipkin Gorman v. Karpnale Ltd* [1991] 2 A.C. 548.

[166] See Birks, "Misdirected Funds: Restitution from the Recipient" [1989] L.M.C.L.Q. 296; Podzebenko, "Redefining Accessory Liability" [1996] Syd. L. Rev. 234.

[167] [1940] A.C. 282 at p. 293.

[168] See also *Re Thom* (1918) 18 S.R. (N.S.W.) 70; 35 W.N. 9.

as possible, that no relevant documents have been omitted from the client's affidavit.[169]

What if the solicitor believes initially that the original affidavit is true, but before the trial discovers that it was untrue and important documents have been omitted? The duty of the solicitor is to advise the client that the opponent's solicitor must be informed of the omitted documents and if this course is not assented to he must cease to act for the client. Otherwise the solicitor would be conniving at a fraud.[170]

Of course, everything that has been said about affidavits of discovery applies to affidavits, generally of whatever kind. Thus, for example, a solicitor who swears an affidavit in which he verifies that a debt is owing, or that a company is insolvent, when he does not have any belief that those facts are true, will breach his duty to the court.[171]

There are several other examples of lawyers being required either to dissuade the client from intended dishonest conduct in the proceedings, or to withdraw. For instance, a solicitor should withdraw if he knows that the client is using false name in proceedings,[172] particularly if it is for fraudulent purposes.[173] Knowledge of any kind of other dishonest conduct in the proceedings should lead to the same result.

(c) *Dealing with witnesses*

A barrister, in England, in a civil case, after he has been supplied with a proper proof of evidence, may discuss the case with a potential witness in the presence of a solicitor. In other common law countries counsel may discuss the case with a witness at any time, save when the witness is under cross-examination by the other side.

It is not improper to refer witnesses to the pleadings, affidavits, and other sources, including, during the conduct of the hearing, the oral evidence of other witnesses, in order to ascertain what they will say about that material. Counsel with experience will not put a witness on the stand without knowing in advance what that witness will say in answer to vital questions.[174] Such preparation is regarded as the mark of a good trial lawyer, and is to be commended because it promotes a more efficient administration of justice and saves time.[175] However, there can be a fine line between refreshing memory or explaining what is relevant on the one hand and assisting perjury on the other.[176] Witnesses may not be placed

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[169] *Woods v. Martins Bank Ltd* [1959] 1 Q.B. 55 *per* Salmon J. at p. 60.
[170] *Myers v. Elman*, *supra*, n. 167.
[171] *Re a Company (No 006798 of 1995)* [1996] 2 B.C.L.C. 49.
[172] *Cahill v. Law Society of N.S.W.* (1988) 13 N.S.W.L.R. 1.
[173] *R. v. Gruzman; ex p. The Prothonotary* (1968) 70 S.R. (N.S.W.) 316.
[174] *R. v. Chapman (1958)* 26 WWR 385 (B.C. C.A.).
[175] Applegate, "Witness Preparation" (1989) 68 Tex L. Rev. 277.
[176] *Re Spedley Securities Ltd (In Liq), Reed v. Harkness* (1990) 2 ACSR 117.

under pressure to provide other than a truthful account of their evidence nor may witnesses be rehearsed, practised or coached in relation to their evidence or in the way in which it should be given.

It is particularly important that an expert's report is in its content the product of the expert. An expert witness should not be asked to change a report so as to favour the client or conceal prejudicial material. Lawyers must not "settle" the evidence of medical experts.[177] Expert evidence should be seen to be the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation.[178]

If counsel discovers that a witness intends or is likely to give false testimony, he is duty bound not to produce that individual as a credible witness.[179] He is also required not to produce a witness statement that he knows to be false or where he knows that the witness does not believe the statement to be true in all respects.[180] If the lawyer is put on inquiry as to the truth of the facts stated in the statement, he should, where practicable, check whether those facts are true. If a lawyer discovers that a witness statement which he has served is incorrect, he must inform the other parties immediately.[181]

(d) *The lawyer as a witness*

It is undesirable for a lawyer to appear as a witness in the same case as he is instructing solicitor (and, *a fortiori*, counsel).[182] Similarly, it is undesirable that, where an affidavit has been filed by a lawyer in support of an application by a client, the lawyer appear as solicitor or counsel.[183] The reason for this is that the lawyer would be in a position of apparent conflict between the duty to advance the interests of the client and the duty to the court to give impartial evidence.

In Australia it has been held that such a conflict would not be sufficient to justify an injunction restraining the lawyer from continuing to act for the client.[184] This is to be contrasted with Canada, where the courts have restrained lawyers from acting in cases where they, or members of their firm, are to testify as witnesses.[185] The test laid down is that the court must be satisfied that mischief would probably result if the lawyer who appears

[177] *Whitehouse v. Jordan* [1981] 1 W.L.R. 246 at p. 256.

[178] *Kelly v. London Transport Executive* [1982] 1 W.L.R. 1055 at pp. 1064–1065 *per* Lord Denning M.R.

[179] *Brand v. College of Surgeons* (1990) 83 Sask R. 218; revsd. on other grounds (1990) 80 Sask. R. 18.

[180] *Chancery Guide*, February 28, 1995, para 3.7(7).

[181] *ibid.*

[182] *Chapman v. Rogers; ex p. Chapman* [1984] 1 Qd R. 542 at p. 545.

[183] *R. v. B* (SH) (1993) 89 Man R (2d) 267; *R. v. Deslaurier* [1993] 2 W.W.R. 401 (Man. C.A.).

[184] *Yamaji v. Westpac (No 1)* (1993) 42 F.C.R. 431.

[185] *Northway Chevrolet Oldsmobile Ltd v. EAM Management Ltd* (1993) 110 DLR (4th) 440; *Dana-West Hotels Ltd v. Royal Bank of Canada* (1984) 37 Sask. R. 81.

as the advocate will or will likely testify at the trial.[186] It is submitted that the Canadian approach is to be preferred. After all, the improper exercise of legal rights is a foundation for the modern jurisdiction of injunction.[187] Where the circumstances establish a material degree of impropriety, the court should be entitled to protect its integrity by granting an injunction.

(e) *Conflict of interest*

Where a lawyer is guilty of a conflict of interest in representing a client he will have committed a breach of duty. That duty is usually expressed as a fiduciary obligation arising out of the relationship between solicitor and client.[188] But there is a similar duty owed by the lawyer to the court[189] (as well as an ethical duty[190]). The duty to the court arises from the court's concern that it should have the assistance of independent legal representation for the litigating parties.[191] The integrity of the adversarial system is dependent on lawyers acting with perfect good faith, untainted by divided loyalties of any kind. This is central to the preservation of public confidence in the administration of justice.[192]

The usual basis for restraining a lawyer from acting for a client on the ground of conflict of interest is that a conflict is perceived between the continuing duty of the lawyer (owed to his former client) not to disclose or use to the latter's prejudice that which he learned confidentially, and the interest he has in advancing the case of his new client.[193] In recent times relatively stringent tests have been laid down in regard to whether an injunction should be granted on this basis. These involve, for example, whether a reasonable man informed of the facts might reasonably anticipate a danger of the confidential information being misused[194]; or whether there is a real and sensible possibility of a conflict arising between the opposing interests.[195] Conflicts can, however, arise, on other grounds, such

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[186] *Northway Chevrolet Oldsmobile ltd v. EAM Management Ltd, supra; Dana-West Hotels Ltd v. Royal Bank of Canada, supra.*

[187] *National Mutual Holdings Pty Ltd v. Sentry Corporation* (1989) 22 F.C.R. 209 at p. 232 *per* Gummow J.; see also *Davies v. Clough* (1837) 8 Sim 262, (1836) 42 R.R. 171 at p. 174.

[188] See for example *Mallesons Stephen Jaques v. KPMG* (1991) W.A.R. 357; *Carindale Country Club Estate Pty Ltd v. Astill* (1993) 42 F.C.R. 307.

[189] *Kooky Garments Ltd v. Charlton* [1994] 1 N.Z.L.R. 587; *Black v. Taylor* [1993] 3 N.Z.L.R. 403; *Murray v. Macquarie Bank Ltd* (1991) 33 F.C.R. 46; *Keys v. Boulter* [1971] 1 Q.B. 300 at pp. 306, 309; *Everingham v. Ontario* (1992) 88 D.L.R. (4th) 755; see also *In re A Firm of Solicitors* [1992] 1 Q.B. 959, where the firm was restrained from acting because of a risk that confidential information was obtained from a company which, strictly speaking, had never been its client.

[190] *O'Reilly v. Law Society (NSW)* (1988) 24 N.S.W.L.R. 204.

[191] See, *e.g. Nangus Pty Ltd v. Charles Donovan Pty Ltd* (in Liq) [1989] V.R. 2184.

[192] *Blackwell v. Barroile Pty Ltd* (1994) 51 F.C.R. 347 at p. 360.

[193] *Mallesons Stephen Jaques v. K.P.M.G.* (1991) W.A.R. 357; *Martin v. Gray, McDonald Estate v. Martin* [1990] 3 S.C.R. 1235, (1991) 77 DLR (4th) 249; L. Aitken, "Chinese Walls and Conflicts of Interest" (1992) 18 Monash U. L. R. 91; F.M.B. Reynolds, "Solicitors and Conflict of Duties" (1991) 107 L.Q.R. 536.

[194] *In re A Firm of Solicitors* [1992] Q.B. 959.

[195] *Mallesons Stephen Jaques v. K.P.M.G., supra; Carindale Country Club Estate Pty Ltd v. Astill* (1993) 42 F.C.R. 307.

as where a lawyer attempts to act for clients whose financial or personal interests are in opposition to his.

In determining whether injunctive relief should be granted in regard to these other conflicts, it is likely that tests similar to those applicable in regard to the alleged misuse of confidential information will be applied. Whatever the nature of the conflict, the courts will rigorously enforce the adherence by lawyers of their duty to provide their clients with professional advice and skill uncompromised by any conflicting duty owed to others.[196]

Generally, injunctions have been granted on the basis that the lawyer, by acting in circumstances where his interests conflict, is likely to commit a breach of fiduciary duty. In an appropriate case, however, the court may grant an injunction merely on the basis that the conflict is of such a nature that continued representation by the lawyer concerned would result in a breach of his duty to the court,[197] or as it was expressed by the Full Court of the Ontario Divisional Court in *Everingham v. Ontario*[198]:

> "It is within the inherent jurisdiction of a superior court to deny the right of audience to counsel when the interests of justice so require by reason of conflict or otherwise."[199]

This is consistent with what was said in *Davies v. Clough*[200] by Shadwell V.-C.:

> " . . . all courts may exercise an authority over their own officers as to the propriety of their behaviour: for applications have been repeatedly made to restrain solicitors who had acted on one side from acting on the other, and those applications have failed or succeeded upon their own particular grounds, but never because the court had no jurisdiction."

The inquiry in such event might involve broader considerations[201] and would be focused principally on whether the lawyer was able (or would be perceived to be able[202]) to act with the objectivity and independence the courts require from lawyers representing clients in litigation.[203] As was said by Thomas J. in *Kooky Garments Ltd v. Charlton*[204]:

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[196] *Blackwell v. Barroile Pty Ltd* (1994) 51 F.C.R. 347 at p. 360.

[197] *Black v. Taylor* [1993] 3 N.Z.L.R. 403; *Murray v. Macquarie Bank Ltd* (1991) 33 F.C.R. 46 (but see the doubts expressed in *Yamaji v. Westpac (No 1)* (1993) 42 F.C.R. 431).

[198] (1992) 88 D.L.R. (4th) 755 at pp. 761–762, followed in *Black v. Taylor* [1993] 3 N.Z.L.R. 403 and *Grimwade v. Meagher* [1995] 1 V.R. 446.

[199] In essence, this ground is no different to a breach of the lawyer's duty to the court.

[200] (1837) 8 Sim 262 at p. 267; (1836) 42 RR 171 at p. 174.

[201] *cf Re A Solicitor* [1975] 1 Q.B. 475 at p. 483.

[202] *Black v. Taylor* [1993] 3 N.Z.L.R. 403 at pp. 496 and 408–409, but see *In re A Solicitor* [1997] 1 Q.B. 1, where it was held that the mere possible perception of impropriety would not justify an injunction.

[203] *cf Grimwade v. Meagher* [1995] 1 V.R. 446.

[204] [1994] 1 N.Z.L.R. 587 at p. 589 *per* Thomas J.

"As part of their professional responsibility ... solicitors and counsel must ensure that they do not appear in a matter in which they have an actual or potential conflict of interest or where, by reason of their relationship with their client, their professional independence can be called into question."

## VI. Duty to Conduct Cases Efficiently and Expeditiously

### (a) *Duty to take due care and skill*

Mere mistake or error of judgment is not a breach of duty to the court. But misconduct, default or negligence, any of which are found by a court to be of a serious nature, may be sufficient to justify an appropriate order.[205] Similarly a breach of duty may arise where costs have been incurred unreasonably or improperly, or have been wasted by failure to conduct proceedings with reasonable expedition.[206]

The power to award costs against a practitioner, personally, involves special considerations and must be exercised with caution. Too ready an exposure of the lawyer to personal liability for the costs of the client or of the other party is likely overly to inhibit the way the lawyer acts in conducting the litigation. Moreover, practitioners should not be encouraged to threaten costs order applications as a tactic to put pressure on their opponents.[207]

A solicitor cannot escape liability for lack of diligence on the ground that counsel has been briefed.[208] Although, in general, a solicitor is entitled to rely on the advice of counsel properly instructed, he is not entitled to follow such advice blindly and must apply his own professional mind to the issue. The solicitor is expected to be experienced in his particular legal fields and the briefing of counsel does not operate so as to give automatic immunity.

### (b) *Duty to conduct cases expeditiously*

The public interest in the prompt and economical disposal of litigation has frequently been acknowledged[209] and these duties are becoming more

[205] *Ridehalgh v. Horsefield* [1994] Ch. 205; *Myers v. Elman* [1940] A.C. 282; *Cassidy v. Murray* (1995) F.L.C. 92–633.

[206] *Ridehalgh v. Horsefield, supra.*; *Myers v. Elman, supra.*; *Cassidy v. Murray, supra.*

[207] *Bendeich (No 2)* (1994) 53 F.C.R. 422; *Orchard v. South Eastern Electricity Board* [1987] 1 Q.B. 565 at pp. 577 and 580.

[208] *Davy-Chiesman v. Davy-Chiesman* [1984] Fam. 48.

[209] See, *e.g. Sali v. SPC Ltd* (1993) 67 A.L.J.R. 841; *GSA Industries Pty Ltd v. NT Gas Limited* (1990) 24 N.S.W.L.R. 710; *Galea v. Galea* (1990) 19 N.S.W.L.R. 263; *El Dupont de Nemours & Co. v. Commissioner of Patents* (1988) 83 A.L.R. 499; *Bomanita Pty Ltd v. Slalex Corp Aust Pty Ltd* (1991) 104 A.L.R. 165; *English Maitland Hospital v. Fisher* (No 2) (1992) 27 N.S.W.L.R. 721; *Boyle v. Ford Motor Co. Ltd.* [1992] 1 W.L.R. 476.

and more important.[210] Throughout the common law world courts are making rules for the swifter determination of litigation and recognise that cases must be conducted as expeditiously as possible within the constraints of the requirements of justice.

> "If unwarrantable tactics are taken to an extreme lawyers will 'tend to place more pressure on the system than it can reasonably bear, [and] it will be put in danger of collapse'."[211]

Counsel have a duty to present the issues as clearly and economically as possible, and to avoid waste of time, prolixity and repetition.[212] That duty will be breached when lawyers fail to observe the usual courtesies, and where the use of aggressive and discourteous tactics lead to the incurring of delay, inconvenience and needless costs.[213] Lawyers should not use rules as a weapon to punish other lawyers with whom they are on bad terms.[214]

There is a growing perception that lawyers should be required to co-operate for the purposes of reducing unnecessary disputes. Accordingly, it is a theme of the *Access to Justice* Final Report[215] that:

> "An adversarial system should not be unduly combative ... Where the parties do not co-operate, not only are they likely to incur costs which are unnecessary but the litigation process is likely to be drawn out and the court's task more difficult."

For that reason, the report advocates a new ethos of co-operation on the part of litigants and their legal advisers.[216] Duties which reinforce the need to co-operate and avoid adversarial excesses will have to be the cornerstone of any new ethos. Indeed, in the USA it has been suggested that there should be means to "punish parties who frustrate the process by failing to act co-operatively".[217]

In criminal cases lawyers have a similar duty to act diligently and expeditiously so as to bring the trial to a conclusion. Lawyers acting for an accused in criminal appeals have a particular obligation to proceed expeditiously where the client has been allowed bail.[218]

There is a trend, particularly in cases of serious commercial fraud, for some defence lawyers to employ the "filbuster defence". This involves

[210] See draft rules 1.1 and 1.2, forming part of the *Access to Justice* Final Report.
[211] *R. v. Sorby* [1986] V.R. 756 at 786; see also *R. v. Wilson and Grimwade* [1995] V.R. 163.
[212] *McFadden* (1975) 62 Cr. App. R. 187.
[213] *Garrard v. Email Furniture Pty Ltd* (1993) 32 N.S.W.L.R. 314; *R. v. Davis* (1989) 39 O.R. (2d) 604.
[214] *Khunou v. M. Fihrer & Sons Pty Ltd* 1982 (3) S.A. 353; *Brenner's Service Station & Garage Pty Ltd v. Milne* 1983 (4) SA 233.
[215] S.19, para 7.
[216] S.19, Recommendation 1.
[217] "Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes" (1990) 103 Harv L. R. 1086 at p. 1097.
[218] *R. v. Le* (1994) 162 A.R. 4.

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attempting to produce a finding of not guilty through exhausting and confusing witnesses and the jury by causing as much delay and obfuscation as possible. This perversion of the system of justice is difficult to prevent as the sanctions available to the court in criminal cases are inadequate. A judge in the state of Victoria has expressed the following warning about this kind of conduct:

> "This culture will destroy our trial system sooner rather than later, unless steps are taken to stop it. I do not shrink from the responsibility I must bear for failing to intervene to a greater extent, but my powers of intervention are limited as I was often reminded by counsel. Radical reform is needed, legislative, I fear."[219]

Should the trend persist, remedial legislation will be inevitable.

(c) *Specific case management duties*

The overall purpose of case management, where a trial is unavoidable, is to ensure that cases proceed as quickly as possible to a final hearing which is itself of limited duration.[220] For that reason, as Lord Donaldson of Lymington M.R. said in *Langley v. North West Water Authority*:

> "Solicitors who fail to adhere to rules and practices laid down to speed up litigation may thereby breach their duty to the court. The courts will not allow anyone to frustrate their efforts to provide better and quicker methods of determining disputes, if they have jurisdiction to devise and implement them."

The "new ethos" that underlies Lord Woolf's *Access to Justice* Final Report emphasises that the requirements of case management do not tolerate tardy and inefficient conduct tending to delay the bringing of cases to trial. There are several illustrations of this new ethos being transformed into specific duties owed by lawyers to the court. Many concern the observance of listing procedures and the need to avoid unnecessary adjournments.

Thus, solicitors are obliged to ensure that listing procedures are complied with and that as far as possible the action is ready to proceed on the day on which it has been set down for trial.[221] Solicitors on the record have a duty constantly to search the court lists to ascertain for themselves whether or not applications (and other matters) are likely to be listed; courts will not generally accept the excuse that ignorance of the date on which the application is listed for hearing has resulted in the lawyer not being able to argue the matter.[222] A failure on the part of solicitors to

[219] Phillips, "The Duty of Counsel" (1994) 68 A.L.J.834.
[220] *Access to Justice*, Final Report, s.11 para 16.
[221] *Copini & Sons v. Skopalj* (1985) 42 S.A.S.R. 100.
[222] *Parkins v. McDonald* (1989) 43 A.L.J.R. 363.

remove themselves promptly as solicitors of record, resulting in listing procedures not being complied with, has been regarded as a breach of duty to the court.[223]

Solicitors have a duty to give reasonable estimates of the length of hearings and may be held responsible for costs where adjournments are caused by non-compliance with that duty.[224] Solicitors should take reasonable and timeous steps to ensure that adjournments are not unnecessarily brought about. They should give due notice of circumstances that are likely to cause an adjournment or delay.

Generally speaking, breaches of rules of court which are for the benefit of the court (particularly rules designed to facilitate case management)—as well as the parties—will constitute breaches of the lawyer's duty to the court.[225]

(d) *Duty to take all points and the duty to exercise an independent judgment*

In *Johnson v. Emerson*[226] Bramwell B. expressed the traditional view:

> "A man's rights are to be determined by the court, not by his attorney or counsel. It is for the want of remembering this that foolish people object to lawyers that they will advocate a case against their own opinions. A client is entitled to say to his counsel, 'I want your advocacy, not your judgment, I prefer that of the court'."

In *Abraham v. Jutsun*[227] Harman L.J. remarked that it would only be misconduct on the part of counsel in taking a bad point if counsel knew that it was a bad point and concealed from the court, for instance, an authority which showed it clearly to be a bad point.[228] Lord Denning frequently asserted the view that counsel's duty is to take any point which he believes to be fairly arguable on behalf of his client, reiterating that an "[advocate] is not to usurp the province of the judge".[229] These views were perhaps most clearly expressed in *Tombling v. Universal Bulb Co. Ltd*[230]:

> "The duty of counsel to his client ... is to make every honest endeavour to succeed. He must not of course knowingly mislead the court either on the facts or on the law, but short of that, he may put such matters in evidence or omit such others as in his discretion he thinks will be most to the advantage of his client. So also, when it

[223] *Copini & Sons v. Skopalj* (1985) 42 S.A.S.R. 100.
[224] *Ibbs v. Holloway Bros Pty Ltd* [1952] 1 All E.R. 220.
[225] *Lall v. 53–55 Hall Street Pty Ltd* (1978) 1 N.S.W.L.R. 310
[226] (1871) L.R. 6 Ex 329 at p. 467.
[227] [1963] 1 W.L.R. 658.
[228] Although Pearson L.J. thought that in an extreme case it might be misconduct to take a bad point.
[229] *Abraham v. Jutsun* [1963] 1 W.L.R. 658 at p. 663; see also *In re G Mayor Cooke* (1889) 5 T.L.R. 407 at p. 408
[230] [1951] 2 T.L.R. 289 at p. 297.

comes to his speech, he must put every fair argument which appears to him to help his client towards winning his case. The reason is because he is not the judge of the credibility of the witnesses or of the validity of the arguments. He is only the advocate employed by the client to speak for him and present his case, and he must do it to the best of his ability, without making himself the judge of its correctness but only of its honesty. Cicero makes the distinction that it is the duty of the judge to pursue the truth, but it is permitted to an advocate to argue what has only the semblance of it."

Closely related to this approach is the proposition, often quoted in the past, that: "It must never be forgotten that it is not for solicitors or counsel to impose a pre-trial screen through which a litigant must pass before he can put his complaint or defence before the court".[231]

This must be contrasted with the requirements of the modern systems of case management, which depend for their proper function not only on judicial intervention, but on lawyers taking a sensibly realistic and critical view of the strength of their case. In the light of modern conditions it has been recognised that the over-burdened legal system must also take into account the need to do justice to those many persons waiting for their cases to be heard.[232] I suggest it is no longer open to counsel to argue every point indiscriminately. While the duty to take every possible point might be a duty owed by lawyers to the client, the paramount duty to the court is to advance only points that are reasonably arguable. Lawyers should indeed act as a screen so as to exclude unreasonable or hopeless arguments. That is the very least that is nowadays required for a proper functioning of the administration of justice. Thus in *Giannerelli v. Wraith*[233] Mason C.J. said that

> "A barrister's duty to the court epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down every burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of [an] independent judgment in the conduct and management of the case. In such an adversarial system the mode of

[231] *Orchard v. South Eastern Electricity Board* [1987] Q.B. 565 *per* Sir John Donaldson M.R. at p. 572; *Mainwaring v. Goldtech Investments Ltd*, C.A., *The Times*, February 19, 1991.

[232] See cases referred to *supra.*, n. 185.

[233] (1988) 165 C.L.R. 543.

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."[234]

Similar sentiments have been expressed in England. The pursuit of hopeless applications has long been of vital concern to judges, and judicial warnings have been given of the appropriateness of wasted costs orders in the face of unmeritorious claims having the consequence of delaying the meritorious claims of others.[235] Lord Templeman, in *Ashmore v. Corporation of Lloyd's* said[236]:

> "It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination."[237]

The apparent conflict between these two approaches is capable of ready resolution. The overriding principle is as Dr Johnson said[238]: "A lawyer is to do for his client all that his client might fairly do for himself, if he could". The issue is what is meant by the term "fairly". What might fairly be done by a lawyer to advance the client's case encompasses the exercise of a professional discretion[239] and judgment involving the selection of appropriate evidence to be led and points to be argued. As was said by the Court of Appeal of the Supreme Court of British Columbia[240]:

> "[Counsel's duty] is to do right by their clients and right by the court ... In this context, 'right' includes taking all legal points deserving of consideration and not taking points not so deserving. The reason is simple. Counsel must assist the court in doing justice according to law."

This does not mean that counsel must determine which points are likely to succeed and refrain from presenting or arguing any others (although that might be excellent advocacy); on the other hand, it does mean that counsel must determine which points are reasonably arguable, and must jettison the rest. This approach is not radically different to what has been said in past

[234] These remarks echo what was said by the High Court of Australia some 15 years earlier in *Richardson v. The Queen* (1974) 131 C.L.R. 116 at n. 123, namely "Counsel have a responsibility to the court not to use public time in the pursuit of submissions which are really unarguable".

[235] Fordham, "Practitioner Standards" [1996] J.R. 1.

[236] [1992] 1 W.L.R. 446 at p. 453.

[237] See also *The Kavo Peiratis* [1977] 2 Lloyd's Rep 344.

[238] Quoted in a letter of February 17, 1870 written by Charles Dickens to his son Sir Henry Dickens after the latter's first speech at the Union, referred to in Singleton, *Conduct at the Bar.* (1933).

[239] As recognised even by Lord Denning (in *Tombling v. Universal Bulb Co Ltd* (1951) 2 T.L.R. 289 at p. 297).

[240] *Lougheed Enterprises Ltd v. Armbruster* (1992) 63 B.C.L.R. (2d) 317 (C.A.) at pp. 324–325.

times, it merely requires counsel not to waste public resources on points that are in his judgment bound to fail. In *Rondel v. Worsley*[241] Lord Pearce justified counsel's immunity against claims for negligence on the basis that at times, counsel is required "to prune his case of irrelevancies against his client's wishes" and that this would be difficult if counsel, in so doing, was likely to face a claim for negligence. His Lordship pointed out that it was counsel's duty to go so far as to reject a legal or factual point taken in his favour by the judge, or to remove a misunderstanding which is favourable to his own case. That being the law, it is difficult to argue that it would be wrong to require counsel to exercise a careful discretion in raising legal and factual issues which would simply waste the time of the court and the other parties.

If no fetters are placed on counsel, the system may, in extreme cases, be so abused that its very survival would be in jeopardy. An illustration of what may occur in the modern climate is the *cri de coeur* of the trial judge in Victoria (to whom reference has previously been made) who has referred to

> "an alarming culture at the Victorian Bar, which dictates to those afflicted by it that there is no such thing as a case which is too long or too costly, that no issue is too small to be explored at excruciating length, that no number of questions is too many, that no speech is too long and that concessions or admissions must practically never be made for fear of their unknown consequences."[242]

Conduct of this kind led to this strong warning in *R. v. Wilson and Grimwade*[243]:[244]

> "Let it be understood, henceforth, without qualification, that part of the responsibility of all counsel in any trial, criminal or civil, is to co-operate with the court and each other so far as is necessary to ensure that the system of justice is not betrayed: if the present system of litigation is to survive, it demands no less. The system, and the community it is designed to serve, cannot easily support the prodigal conduct which was responsible for exacting 22 months' devotion to this re-trial, a disproportionate part of which was due to the conduct of counsel for Wilson. This is not to deny that counsel are entitled and obliged to deploy such skill and discretion as the proper protection of their clients' interests' demands. Whether the cost of legal representation be privately or publicly borne, counsel are to understand that they are exercising a privilege as well as fulfilling a duty in appearing in a court of law; and neither privilege nor duty will survive the system of justice of which the court is part. We derive no satisfaction from

[241] [1969] 1 A.C. 191 at pp. 272–373.
[242] Reported in Phillips, "The Duty of Counsel" (1994) 68 A.L.J. 834.
[243] [1995] 1 V.R. 163.
[244] At p. 180.

making these observations save, by doing so, to give public notice of the peril to which, by this re-trial, the system of justice was put."[245]

### VII. Counsel's Immunity and Breach of Duties to the Court

In *Kelly v. London Transport Executive*[246] Lord Denning M.R. said in regard to counsel who give opinions to the relevant area committees (in connection with applications for legal aid) that:

> "Counsel have a special responsibility in these cases. They owe their duty to the area committee who rely on their opinions. They owe a duty to the court which has to try the case. They owe a duty to the other side who have to fight it and pay all the costs of doing so. If they fail in their duty, I have no doubt that the court can call them to account and make them pay the costs of the other side. They will not be able to escape on the ground that it was work done by them in the course of litigation. They cannot claim the immunity given to them by *Rondel v. Worsley.* That only avails them in regard to their own client. They have no immunity if they fail to have regard to their duty to the court and to the other side."

In *Orchard v. South Eastern Electricity Board*[247] it was pointed out that these remarks of Lord Denning were *obiter*, but at least, in regard to the absence of immunity where the duties to the court are breached, they find an echo in the following observations of Lord Diplock in *Saif Ali v. Sydney Mitchell & Co Ltd*[248]:

> "A barrister must not wilfully mislead the court as to the law nor may he actively mislead the court as to the facts; although, consistently with the rule that the prosecution must prove its case, he may passively stand by and watch the court being misled by reason of its failure to ascertain facts which are within the barrister's knowledge ... He must not abuse the immunity which the law accords to him as counsel in rendering him immune from liability."

On this basis, the immunity provided by *Rondel v. Worsley*[249] and *Saif Ali v. Sydney Mitchell & Co. Ltd*[250] is not available in respect of conduct which involves a breach of counsel's duty to the court. As a matter of principle, counsel's immunity is founded significantly on the duties owed by counsel to the court. It is difficult to see how that immunity can be retained if the counsel acts in breach of the duties.

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[245] See also *R. v. Sorby* [1986] V.R. 753 at p. 756.
[246] [1982] 1 W.L.R. 1055 at pp. 1064–1065
[247] [1987] Q.B. 565.
[248] [1980] A.C. 198 at p. 220.
[249] [1969] 1 A.C. 191.
[250] *Supra.*

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## VIII. SUMMARY AND CONCLUSIONS

### (a) *Conflicting duties*

Lawyers' duties to the court may conflict with duties owed by lawyers to their clients. Generally, when this occurs, the duties to the court are paramount. As was said by Mason C.J. in *Giannerelli v. Wraith*[251]:

> "It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line is unclear. The duty to the court is paramount even if the client gives instructions to the contrary."

This paramountcy is justified by reason of "the court" being the representative of the public interest in the administration of justice. Lawyers have a reciprocal responsibility:

> "The lawyer's highest loyalty is at the same time the most intangible. It is a loyalty that runs, not to persons, but to procedures and institutions. The lawyer's role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends."[252]

There are exceptions to the paramountcy. The duty of disclosure is limited by the requirements of the adversarial system. Generally, lawyers are not required to disclose evidence. Nevertheless, in family matters, and those involving children, public interest factors may require the disclosure of adverse testimony. Moreover, evolutionary change has led to the courts requiring counsel to disclose evidence given in earlier proceedings when that evidence is significantly different to the material facts on which the case has been conducted. If the client refuses to agree to such disclosure, counsel should withdraw, or at least inform the other side of the inconsistent evidence.

*Ex parte* applications are not adversarial, and in these applications the lawyer's duty is to make full disclosure of all relevant material to the court so that its decision is made on a fully informed basis.

The duty of disclosure to the court is further subject to the duty of confidentiality to the client when the latter duty arises through legal professional privilege. Advice sought or given for the purpose of effecting iniquity is not privileged. Moreover, the privilege does not apply where

[251] (1988) 165 C.L.R. 543 at p. 556.

[252] Fuller and Randall, *Professional Responsibility: Report of the Joint Conference* (1958) 44 A.B.A.J. 1159 at p. 1162.

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legal representation is secured in furtherance of intended or present continuing illegality.

Related to issues of disclosure is the question whether, and to what extent, lawyers should be truthful in pleading. Pressures are building on lawyers to ensure that reasonable grounds exist for all statements made in pleadings and to avoid tactical denials and allegations where there is no factual basis for them.

It is open to argument whether circumstances may arise whereby a positive duty is imposed on a lawyer to disclose incriminating evidence concerning his client. It may well be that, where the intended crime is serious and violent, the lawyer has a duty to make disclosure to the relevant authorities.

Difficult practical questions may arise if counsel learns during a trial that the client intends to give deliberately false evidence. There is then a conflict between counsel's duty to the court not to corrupt the administration of justice and the duty to the client. Again the duty to the court is paramount. If counsel is able to continue without advancing a case that to his knowledge is dishonest, it is his duty to do so. But counsel must not assert a case he knows is false, nor connive at or attempt to substantiate a fraud. Similar considerations apply when, in other circumstances, the client is involved in dishonest conduct.

Conflicts of duty may arise when lawyers are required to testify (whether in writing or orally) in the trial. If mischief would probably result if the lawyer who appears as the advocate will or will likely testify at the trial, the lawyer should withdraw. In appropriate circumstances the court should be able to protect the integrity of its processes by enjoining the lawyer from continuing to act.

Conflicts of duty to the court may also arise where there is a conflict between the lawyer's duty in representing his client and his duty to some other person or interest. If the lawyer is not able to act with perfect good faith (so that the court does have the assistance of independent representation for the litigating parties, untainted by divided loyalties) he should withdraw.

There is a strong case to be made that while the duty to take every possible point might be a duty owed by lawyers to the client, the paramount duty to the court is to advance only points that are reasonably arguable.

(b) *General duties relating to disclosure, the avoidance of abuse of court processes and the corruption of justice*

The general duty of disclosure requires lawyers to be candid with the court and not mislead it in any way. This duty is qualified by the constraints of the adversarial system, although, as has been noted, evolutionary change is tending to lessen those constraints.

As part of the general duty of disclosure, lawyers must prepare cases properly and be familiar with the relevant law so that they may provide appropriate assistance to the court.

The administration of justice requires the processes of the court to be protected from abuse and particular duties enable courts to police their own procedures. Generally, most instances of abuse stem from the use of litigious procedures for purposes for which they were not intended, and from excessive zeal.

Increasing instances of overly zealous behaviour, and the demands of case management, will require judges to become more robust in enforcing lawyers' duties to the court. As was observed, in 1985, in the *General Issues* paper published by the Civil Justice Review Committee:

> "... however clear and apt the rules may be, some litigants and lawyers will not abide them unless the rules are policed and not just refereed."

The general duty not to corrupt the administration of justice requires lawyers to conduct cases with due propriety and not to further dishonest conduct on the part of the client. If the client insists on the lawyer conducting the case improperly, the lawyer must withdraw.

The general duties of disclosure, not to abuse the process of the court and not to corrupt the administration of justice, have not changed over the years. Modern circumstances, however, have resulted in these general duties giving rise to particular duties of some novelty. Examples of the latter are those designed to restrain adversarial excesses, and to ensure that lawyers do not connive at modern forms of dishonest or unlawful conduct on the part of their clients (such as tax evasion or concealment through shell companies of moneys obtained by fraud).

(c) *The general duty to conduct cases efficiently and expeditiously*

Negligence of a serious nature will be a breach of the general duty to conduct cases efficiently.

The general duty to conduct cases expeditiously has relatively recently been recognised and is derived from the attempts of the administration of justice to keep pace with the altering demands of society, brought about largely by the vast increase in litigation.[253] This increase has not been accompanied by a proportionate increase in the number of judges and courts, and governments are seldom prepared to allocate the requisite resources to restore the balance. In consequence courts have responded by introducing case management procedures which impose new duties on

[253] Ipp, "Reforms to the Adversarial Process in Civil Litigation" (1995) 69 A.L.J. 705.

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lawyers having as their object the achievement of fairer, cheaper, and quicker justice.

This general duty requires counsel to present the issues as clearly and economically as possible and, in appropriate circumstances, to co-operate so as to avoid needless disputes. Breaches will result when lawyers waste time, and are guilty of prolixity and repetition, and when the use of aggressive and discourteous tactics lead to the incurring of delay, inconvenience and needless costs. Lawyers who fail to adhere to rules and practices laid down to speed up litigation may thereby breach their duty to the court.

As calls for reform of the justice system increase, duties which stress the lawyer's responsibility to assist the judge by exercising an independent judgment as to the evidence to be led and the points to be argued will assume greater importance.

(d) *A coherent and significant body of law*

The pragmatic case by case reaction of courts to inappropriate conduct by lawyers has led to judges fashioning particular lawyers' duties to the court of an infinite variety. The multitude of these particular duties do, however, generally speaking, fall into categories capable of classification. These categories have as their source the need to serve and protect the justice system. Underlying the particular duties is the need and expectation that, within the context of the adversarial system, lawyers will act with honesty, fairness, expedition, efficiency and restraint. These elements form a thread which unifies the various categories so that, when collected, the duties form a coherent, principled body of law.

This body of law is significant to both the court and the legal profession. Within it are contained the legal principles and rules by which judges protect the administration of justice from improper conduct on the part of lawyers. These principles and rules regulate lawyers' conduct in representing parties in the course of litigation before the court. They constitute a code of conduct, policed by the court (usually by way of summary procedures) that is independent and separate from the ethical codes administered by the governing institutions of the profession (such as Bar Councils, Law Societies).

It is of fundamental importance that, in enforcing lawyers' duties owed to the court, judges should be governed by firm principles and rules and not define justice for themselves. Judicial decisions must be made by rule of law and that rule is abrogated when judges determine issues by reference to personalised or idiosyncratic visions of justice unbounded by procedural and substantive safeguards.

Counsel's immunity for claims for negligence is founded significantly on the duties owed by counsel to the court. Accordingly, if counsel fails to

comply with any of those duties, it is likely that immunity would not be granted.

Generally, it may be said that whatever the nature and category of the particular duty, it is critical to the welfare of the administration of justice that lawyers' duties to the court be rigorously observed. This is the continuing, essential task of both judges and members of the legal profession.

D. A. IPP.*

* A Justice of the Supreme Court of Western Australia. This article was written during a period of sabbatical leave at the Institute of Advanced Legal Studies, London, and the Inns of Court and I express my appreciation to these institutions for the assistance and facilities provided to me. I also wish to express my appreciation to Professor Avrom Sherr of the Institute of Advanced Legal Studies who read this article in draft form and who proffered many helpful suggestions.