

## THE DUTY OWED TO THE COURT – SOMETIMES FORGOTTEN

A speech delivered by the Hon. Marilyn Warren AC at the  
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‘[A]s an officer of the court concerned in the administration of justice [a legal practitioner] has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client’s wishes or with what the client thinks are his personal interests.’

*Rondel v Worsley* [1969] 1 AC 191, 227 (Lord Reid).

### INTRODUCTION

Our appreciation for the observations of Lord Reid begins when we are law students; we know that the many years of study and the conferral of a law degree is just the first step to becoming a legal practitioner. To become a legal practitioner, that is to say, a lawyer who may represent the modern client, a graduate must present for admission and take either an oath or make an affirmation. In Victoria, and similarly in other jurisdictions, this oath or affirmation requires the candidate to declare that they will well and honestly conduct themselves in the practice of their profession, as members of the legal profession and officers of the court. It is the taking of the oath or affirmation, and the signing of the roll that marks the transition from simply holding a law degree to being a lawyer. It is on this occasion that a lawyer’s duty to the court is enlivened.

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A candidate presenting for admission today may hope to gain any number of benefits. One might have aspirations to advise publicly listed Blue Chip clients on ASX compliance, while another might wish to defend the criminally accused. Both will go on to perform very different duties as lawyers, however, both candidates will owe the same duty to the court. Being admitted means that a lawyer owes a paramount duty to the court in all of their future dealings.

A lawyer therefore carries both a benefit and a burden. The benefit is obvious; the opportunity to pursue a career in the law as a member of the legal profession. The burden lies in the lawyer's obligation to apply the rule of law and in the duty 'to assist the court in the doing of justice according to law'.<sup>1</sup> It is well-established that, as an officer of the court, a lawyer's paramount duty is to the court as part of the duty to the proper administration of justice.<sup>2</sup> The oath or the affirmation that lawyers take means they have this additional level of responsibility and that they may not be driven by their client's wishes alone.

In an increasingly commercialised and global world, the career path that some lawyers choose does not involve working in a court room. But this in no way reduces the duty those practitioners owe to the court. They are required to discharge their duty as officers of the court even if that duty comes into conflict with their duty to their client. Part of the duty to the court consists of informing the client that such a duty is, in fact, paramount. It is the tension between the practitioner's duty to the court and the duty to the client that I wish to focus on today.

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<sup>1</sup> Sir Gerard Brennan, 'Inaugural Sir Maurice Byers Lecture - Strength and perils: the Bar at the turn of the century' (Speech delivered at the New South Wales Bar Association, Sydney, 30 November 2000).

<sup>2</sup> See for example, *Gianarelli v Wraith* (1988) 165 CLR 543, 555-6, 572 ('*Gianarelli*').

I intend to explore the question of why such conflicts may be increasing. Recent examples of the duties of the prosecution and the defence in criminal matters, advocates' immunity, and of the changing relationship between the commercial lawyer and the commercial client cast some light on this question. Finally, I would like to make some remarks with regard to the potential for reform in this area.

## THE DUTY TO THE COURT

The lawyer's duty to the court is an incident of the lawyer's duty to the proper administration of justice. This duty arises as a result of the position of the legal practitioner as an officer of the court and an integral participant in the administration of justice. The practitioner's role is not merely to push his or her client's interests in the adversarial process, rather the practitioner has a duty to 'assist the court in the doing of justice according to law.'<sup>3</sup>

The duty requires that lawyers act with honesty, candour and competence, exercise independent judgment in the conduct of the case, and not engage in conduct that is an abuse of process. Importantly, lawyers must not mislead the court and must be frank in their responses and disclosures to it. In short, lawyers 'must do what they can to ensure that the law is applied correctly to the case.'<sup>4</sup>

The lawyer's duty to the administration of justice goes to ensuring the integrity of the rule of law. It is incumbent upon lawyers to bear in mind

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<sup>3</sup> *Gianarelli* (1988) 165 CLR 543, 578 (Brennan J).

<sup>4</sup> *Re Gruzman* (1968) 70 SR (NSW) 316, 323.

their role in the legal process and how the role might further the ultimate public interest in that process, that is, the proper administration of justice. As Brennan J states, '[t]he purpose of court proceedings is to do justice according to the law. That is the foundation of a civilized society.'<sup>5</sup>

When lawyers fail to ensure their duty to the court is at the forefront of their minds, they do a disservice to their client, the profession and the public as a whole.

## THE DUTY TO THE COURT – SOME RECENT EXAMPLES

In examining the consequences of failing to bear in mind the duty to the court, it is helpful to first look to some practical examples of challenges to the practitioner's duty. To this end, let us examine a recent case from Victoria in which counsel failed in his discharge of the duty to the court. The case demonstrates that even senior counsel can fall into difficulty in observing the duty.

*Rees v Bailey Aluminium Products*<sup>6</sup> was an appeal from a civil jury trial grounded in a complaint by the appellant that he did not receive a fair trial as a consequence of the conduct of senior counsel for the respondent. The case at first instance was a claim for damages for personal injuries brought against the respondent as the manufacturer and distributor of an extension ladder. The appellant had fallen from the ladder, which had been set up for him by a third party (also a party to the proceedings), in an over-extended position.

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<sup>5</sup> *Gianarelli* (1988) 165 CLR 543, 578 (Brennan J).

<sup>6</sup> [2008] VSCA 244 ('*Rees*').

It was conceded on appeal that senior counsel for the respondent had, during cross-examination, sought to convey that the appellant and the third party had engaged in a conversation in the court precinct which amounted to them conspiring to pervert the course of justice. The intimation was that they were planning to fraudulently implicate the respondent as being responsible for the applicant's accident thereby exonerating the third party. However, no evidence was adduced to support this allegation and it was not put to the appellant, a clear breach of the rule in *Browne v Dunn*.

In fact, the cross-examination was based upon the personal observation by senior counsel for the respondent of the appellant and the third party in discussion outside the court building. Further criticism was made of the method of cross-examination in relation to counsel repeatedly cutting the witness off, treating his own questions as answers of the witness and disregarding the trial judge's repeated interventions.

The Court of Appeal held that the various aspects of the conduct of senior counsel for the respondent during the trial had breached the duty to the court. The Court noted that an allegation of fraud with no factual basis 'constitutes a serious dereliction of duty and misconduct by counsel' and that the obligation not to mislead the court or cast unjustifiable aspersions on any party or witness arises as part of the duty to the court.<sup>7</sup>

Other examples of senior counsel's dereliction of his duty to the court are also described in the judgment, including a failure to comply with a ruling of the trial judge, failures to meet undertakings provided to the trial

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<sup>7</sup> Ibid [32].

judge and the introduction of extraneous and prejudicial matters in the closing address.

The case makes for instructive reading and is a signal that practitioners must remain ever mindful of their role as officers of the court and the standards of professional conduct that must attend such a position. The desire to win a case has no part to play in the assessment by a practitioner of their responsibility towards the court. The duty to the client is subordinate to the duty to court. There is a line between permissibly robust advocacy and impermissible dereliction of duty. It is incumbent upon practitioners to continue to examine the ethical dimensions of their behaviour and consider their actions in the context of their role as officers of the court.

Another well established aspect of the lawyer's duty to the administration of justice is assisting the court to reach a proper resolution of the dispute in a prompt and efficient manner. This duty has been frequently acknowledged by the courts<sup>8</sup> and was recently revisited by the Victorian Court of Appeal in the *A Team Diamond* case.<sup>9</sup>

As officers of the Court, it is incumbent upon practitioners to bear in mind the obligation to assist the Court in the efficient utilisation of its limited resources. In *A Team Diamond*, the Court of Appeal noted the 'significant public interest in the timely resolution of disputes and the most efficient utilisation of scarce court resources.'<sup>10</sup> As an aspect of the

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<sup>8</sup> See for example, *Giannarelli v Wraith* [1988] 165 CLR 543; *Aon Risk Services Australia Ltd v Australian National University* (2009) 258 ALR 14; *Bomanite Pty Ltd v Slatex Corp Aust Pty Ltd* (1991) 104 ALR 165.

<sup>9</sup> *A Team Diamond Headquarters Pty Ltd v Main Road Property Group Pty Ltd* [2009] VSCA 208 ('*A Team Diamond*').

<sup>10</sup> *Ibid* [15].

duty to the Court, this obligation should be considered by practitioners when preparing for and presenting the case, so much was said by the Court in *A Team Diamond*.

As we judges experience daily, the legitimate interests of the client are usually best served by the concise and efficient presentation of the real issues in the case. Nevertheless, some clients have an interest in protracted legal proceedings. This cannot be given effect by lawyers if they are to act consistently with their duty the court.

The Court in *A Team* also observed that the obligation is now more important than ever ‘because of the complexity and increased length of litigation in this age’. Without this assistance from practitioners, ‘the courts are unlikely to succeed in their endeavour to administer justice in a timely and efficient manner.’<sup>11</sup>

In a speech to the Victorian Bar,<sup>12</sup> Pagone J described the nature of the obligation as ‘both the Bench and the Bar ... involved together in a problem solving exercise.’ In this way the obligation is beyond the duty to the client, being a duty to the Court which ‘lies in the way in which the client’s case is assembled, explained and argued to the decision-maker’ with the object being to present the case in a manner which ‘helps the decision-maker to achieve the correct outcome.’

## CONFLICT BETWEEN THE DUTY TO THE COURT AND THE DUTY TO THE CLIENT.

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<sup>11</sup> Ibid.

<sup>12</sup> The Hon. Justice Pagone, ‘The Advocate’s Duty to the Court in Adversarial Proceedings’ (speech delivered at the Victorian Bar Ethics Seminar, Melbourne, 23 July 2008).

The conflict between the duty to the court and to the client has been described by Mason CJ as the ‘peculiar feature of counsel’s responsibility’.<sup>13</sup> The Chief Justice also observed that the duties are not merely in competition. They do not call for a balancing act. They actually come into collision and demand that, on occasion, a practitioner ‘act in a variety of ways to the possible disadvantage of his client ... the duty to the court is paramount even if the client gives instructions to the contrary.’<sup>14</sup>

These remarks apply equally to all members of the profession, including solicitors involved in non-contentious work. In fact, legal practice in the modern law firm provides a very good example of the complexity that now surrounds the duty. Finding the right balance between the duty to the court and to the client is complicated by the ever increasing and evolving commercialisation of the profession.

The source of much of the tension between the two duties is the potential for divergent objectives arising from each duty. In particular, a lawyer may be influenced by the financial requirements of the client, which may not correspond with recognised notions of the proper administration of justice.

Since the Hilmer Report<sup>15</sup> and the amendments to the *Trade Practices Act 1974* (Cth), extending competitive conduct rules to non-incorporated businesses, the way law firms conduct their business has been opened up to the scrutiny of the Australian Competition and Consumer Commission. Legislative amendments and a form of self-deregulation resulted in the

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<sup>13</sup> *Giannarelli* [1988] 165 CLR 543, 555.

<sup>14</sup> *Ibid* 556.

<sup>15</sup> Report by the Independent Committee of Inquiry, *National Competition Policy* (1993).



abolition of various practices that were viewed as restrictive. For example, the use of scale fees, the prohibition on advertising. A shift towards a liberal economic model and a focus on free market principles have also resulted in many law firms moving towards operating under modern business models, and away from the traditional partnership paradigm.

The concept of the legal profession as a ‘legal services industry’ and law firms and practitioners operating within a ‘national market for legal services’ has also had an effect. Australian legal services contributed \$11 billion to the Australian economy and generated \$18 billion in income in 2007/08 financial year.<sup>16</sup> With such a large contribution to the economy, it is not surprising that the traditional profession has come to be viewed as a legal services industry.

These factors and the ‘move towards the incorporation of legal practices, the commercial alliance between legal practices and other commercial entities and, more recently, the public listing of law firms on the stock exchange’ have all contributed to the ‘commercialisation’ of the profession.<sup>17</sup> This has raised concern amongst members of the profession, the judiciary and regulators. As Mason CJ expressed extra-curially, ‘[t]he professional ideal is not the pursuit of wealth but public service. That is the vital difference between professionalism and commercialism.’<sup>18</sup>

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<sup>16</sup> Australian Bureau of Statistics, ‘Legal Services Contribute \$11 billion to the Australian Economy’ (Media Release, 24 June 2009).

<sup>17</sup> Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008), 154.

<sup>18</sup> Sir Anthony Mason, ‘The Independence of the Bench’ (1993) 10 *Australian Bar Review* 1, 9.

The shift toward commercialism has, in part, been a response to the needs and demands of clients and the changing business environment in which law firms operate. However, the commercial interests of both the law firm and the client do not necessarily tend towards the efficient use of court time and resources, meaning that this aspect of the practitioner's duty to the court can come into conflict with the duty to the client.

The Law Reform Commission of Western Australia has recognised that this is particularly a problem when lawyers act for well-resourced clients. These clients are able to pursue every avenue for tactical purposes, are able to claim legal fees as tax deductions and need not have regard to the burden of litigation on the taxpayer.<sup>19</sup>

The system of charging by billable hours could also be said to be a disincentive for lawyers to settle matters expeditiously, and has been criticised as inefficient from a market point of view. It is now appropriate to rethink the system of billable hours in certain contexts. For example, certain transactional work that fits into a defined time period may lend itself to a negotiated fee, rather than a billable unit or rate.

The federal Attorney-General's Access to Justice Taskforce has recommended that the Commonwealth use its buying power in the legal services market to negotiate event based billing arrangements with legal service providers. This is suggested as a means of obtaining information about the costs of different stages of litigation and maintaining greater

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<sup>19</sup> Law Reform Commission of Western Australia, *Review of the criminal and civil justice system in Western Australia*, Final Report, September 1999, 331.

control of government spending, but also as a way of encouraging cultural change in billing practices more broadly.<sup>20</sup>

With economic considerations increasingly gaining ascendance over older notions of professionalism, lawyering now viewed as a commercial activity, and the law as an industry, it is hardly surprising that clients of law firms are increasingly being viewed as consumers. This shift works both ways; users of legal services also view themselves as consumers. Again, such a mindset is not novel to the legal market. It is the result of a change in economic practices and social values generally.

The tendency toward viewing the client as a consumer, stemming from a shift towards a liberal economic paradigm, affects the way the duties to the client and the court interact. Consumers generally are becoming increasingly aware of the market power they wield; the market for legal services is no different.

The evolution of the industry in this regard is not easy to manage, nor is it unmanageable. We cannot ignore the changes that are occurring, or reminisce about days gone by. I continue to believe that, in general, lawyers want to discharge their professional responsibilities competently; and that engendering legal ethics is best begun at the undergraduate level and maintained throughout the career. Lawyers continue to behave ethically, despite the changing legal environment. However, such changes demand that we review and strengthen some of the principles that were developed around concepts of professionalism, including the effective discharge of the practitioners' duty to the court.

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<sup>20</sup> Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Justice System* (2009), 127-128.

## ADVOCATES' IMMUNITY AND THE DUTY TO THE COURT

Turning to the role of advocates, it can be observed that the law in Australia has for some time vested much reliance in practitioners to uphold the rule of law through their duty to the court. This is borne out by the position of the High Court with regard to advocates' immunity.

In *D'Orta-Ekenaike v Victoria Legal Aid*,<sup>21</sup> the High Court re-examined the basis for advocates' immunity, that is the principle that advocates are immune from suit for work they do in court and other work intimately connected with in-court work. Ultimately the Court retained the immunity on the basis of finality, however, the decision contains some interesting points regarding the practitioner's duty to the court.

The High Court's retention of the immunity was surprising to some given the decision of the House of Lords in *Arthur J S Hall & Co v Simons*<sup>22</sup> which ended the immunity in England and Wales. Following the decision in Australia, the Supreme Court of New Zealand declined to follow the High Court, ending the immunity in that country in *Chamberlains v Lai*.<sup>23</sup> A blanket immunity for advocates' court work has never existed in Canada, the United States, or in the European civil law countries.<sup>24</sup>

The Court in *D'Orta* did not restrict the legal scope of the immunity. On one view it actually expanded it, setting in precedent its application

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<sup>21</sup> (2005) 223 CLR 1 ('*D'Orta*').

<sup>22</sup> [2002] 1 AC 615 ('*Hall*').

<sup>23</sup> [2007] 2 NZLR 7 ('*Chamberlains*').

<sup>24</sup> *D'Orta* (2005) 223 CLR 1, 70 (Kirby J, citing *Ferri v Ackerman* (1979) 444 US 193, 205; *Demarco v Ungaro* (1979) 95 DLR (3d) 385; *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, 680-681).

beyond the work of barristers in court<sup>25</sup> which until that time had been observed only in obiter by Mason CJ in *Gianarelli v Wraith*.<sup>26</sup> Despite this, the majority judgment did restrict the scope of the theoretical underpinning of the immunity.

In particular, justifications based on the special nature of an advocate's work were removed. While Callinan J urged consideration for the 'special and unique difficulty' of dealing with matters 'not subject to scientific laws and measurement',<sup>27</sup> the other six judges did not consider the pressures and strains of advocacy to be relevantly different from the pressures and strains of operating on an aorta or flying an aircraft.<sup>28</sup> Also removed were rationales specific to an advocate's role within the court system, such as the potential undermining of the cab rank rule affecting barristers' accessibility and the possibility that an enforceable duty of care to clients would compromise barristers' duties to the court.<sup>29</sup>

Since *D'Orta*, the need to avoid collateral attacks on and ensure the finality of judgments is the single determinative rationale upon which advocates' immunity rests. In light of this, it is worth considering and comparing *Hall* and *Chamberlains*, the cases from England and New Zealand that I mentioned earlier, whilst bearing in mind the effect of finality upon the efficiency of the justice system and the practitioner's obligation in this regard.

Nothing in *Hall* or *Chamberlains* denies the proposition that advocates' immunity ensures finality of judgments or that finality of judgments is an

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<sup>25</sup> *D'Orta* (2005) 223 CLR 1, 31 (Gleeson CJ, Gummow, Hayne and Heydon JJ); 101 (Kirby J).

<sup>26</sup> (1988) 165 CLR 543.

<sup>27</sup> *D'Orta* (2005) 223 CLR 1, 116.

<sup>28</sup> *Ibid* 15 (Gleeson CJ, Gummow, Hayne and Heydon JJ); 62-3 (McHugh J); 101 (Kirby J).

<sup>29</sup> *Ibid* 15 (Gleeson CJ, Gummow, Hayne and Heydon JJ); 101-2 (Kirby J).

important consideration, although there is some difference of opinion between those cases and *D'Orta* on the effectiveness of alternative procedural safeguards. Likewise, nothing in *D'Orta* denies the importance of the premise, ultimately upheld in *Hall* and *Chamberlains*, that there should be a remedy for a wrong. The majority in *D'Orta* rejected the same traditional bases for the immunity as were rejected in *Hall* and *Chamberlains*, and the judges in those cases decided not that previous cases on the immunity were wrongly decided, but rather that circumstances had changed such that they no longer applied.

The distinction between these three decisions lies not so much in the extent to which different courts were persuaded by the credibility or the impact of each individual rationale for an immunity, but rather in the weighing up of wider concerns about justice and the appraisal of social expectations.

The tension between practitioners' duties to the court and to the client is not itself a justification for retaining advocates' immunity because, as a purely practical matter, an action taken under duty to the court would not be considered negligent.<sup>30</sup> But the tension between these duties is one example of a wider tension between the interests of society in a general sense and the interests of each of the individuals who make up that society, or in this context, between the administration of justice and the justice of the individual case.

Advocates have always stood at the centre of this tension and straddled the line between these two contrasting interests. In deciding, as the Courts in England and New Zealand did, that there should be remedy for

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<sup>30</sup> Ibid.

a wrong despite the risk of a new systemic inconsistency in the administration of justice, or in deciding as the High Court did in this country, that coherency must be maintained at the expense of the individual wronged without remedy, the courts have had to walk that same line.

The House of Lords in *Hall* and the New Zealand Supreme Court in *Chamberlains* considered that public attitudes, expectations and social circumstances had changed such as to tip the balance away from prioritising the overall administration of justice above the individual justice of the case, and the interests of the individual client who has been wronged. In so holding, the Law Lords in *Hall* were echoing a very broad shift in social values.

In this century we have seen an increasing recognition of individual rights, the emergence of new means of asserting individual claims against the state in administrative law and in the framing of these interests within a liberal economic paradigm of consumer interests and consumer rights, notions reflected in the law by the emergence of areas such as trade practices and consumer protection and, more recently, by the concept of the legal client as consumer I noted earlier.

It is of no great surprise then that the commercial aspect of the notion of legal professionalism, that is the provision of a skilled service to paying clients, has become more prominent and begun to resemble the rest of the commercial world. As several former High Court judges have noted in speeches over the years, the advertising of legal services was once

unthinkable. Now it is commonplace.<sup>31</sup> The Law Lords made the same observation in *Hall*.

Reforms recommended by the Access to Justice Taskforce and currently being considered by the federal Attorney-General put the legal practitioner as service provider front and centre. The reforms have been reported as signalling ‘a new era of consumer-driven legal policy’.<sup>32</sup>

The era of the grand social institutions has given way to the era of commerce and the consumer. As Chief Justice Spigelman has observed, the administrative buildings whose stately forms once dominated city skylines are now dwarfed by commercial high-rises.<sup>33</sup> Barristers working in Owen Dixon chambers now look out over and far above the adjacent dome of the Supreme Court of Victoria, once Melbourne’s tallest building.

The dual role of legal practitioners, as officers of the court and, at the same time, as service providers, has evolved and will continue to do so in line with broader changes occurring within and between administrative and commercial institutions, and in line with changing social values.

Thus far, I have focused on civil proceedings and litigation, but, of course, the duty to the court also applies in criminal proceedings. The criminal jurisdiction is subject to similar changing social dynamics and

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<sup>31</sup> See for example, The Hon Murray Gleeson, ‘Are the Professions Worth Keeping?’ (Speech delivered at the Greek-Australian International Legal & Medical Conference, 31 May 1999); Remarks at Opening of the Supreme and Federal Court Judges’ Conference, Auckland, 27 January 2004; The Hon Justice Michael Kirby, ‘Legal Professional Ethics in Times of Change’ (Speech delivered at the St James Ethics Centre Forum on Ethical Issues, Sydney, 23 July 1996).

<sup>32</sup> Michael Pelly, ‘A-G’s reforms put consumer first’, *Australian – Legal Affairs*, 18 September 2009, 29.

<sup>33</sup> The Hon Chief Justice Spigelman, Address to the Medico-Legal Society of New South Wales Annual General Meeting, 6 August 1999.



reforms as the civil jurisdiction. It is therefore necessary to consider the position of the prosecutor and defence counsel.

## PROSECUTOR'S SPECIAL DUTY TO THE COURT

Modern social values not only affect the practitioner representing the private individual. The well-established prosecutor's general duty to conduct a case fairly, impartially and with a view to establishing the truth<sup>34</sup> is an important aspect of the prosecutor's role.

The duty of a prosecutor is a duty owed to the court and not the public at large or the accused.<sup>35</sup> On one view, the prosecutor may be seen as a lawyer with no client, but rather with sectional interests or constituencies.<sup>36</sup> Alternatively, the prosecutor may be viewed as having a single client, the state. However, even on this view there is, in theory, an absence of conflict between the prosecutor's duty to the court and the duty to the client because the proper administration of justice serves the interests of both.<sup>37</sup> Nevertheless, the function of the prosecution is not free from its own difficulties and pitfalls, and this has come under scrutiny.

The High Court's decision in *Mallard v The Queen*<sup>38</sup> illustrates this in relation to the duty to disclose unused evidence. There the Court ordered the retrial of Andrew Mallard who was convicted for the murder of a

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<sup>34</sup> *Whitehorn v R* (1983) 152 CLR 657; *Canon v Tahche* (2002) 5 VR 317.

<sup>35</sup> *Canon v Tahche* (2002) 5 VR 317, [58]; see also the discussion on the role and responsibility of a prosecutor in *Richardson v The Queen* (1974) 131 CLR 116 and *The Queen v Apostilides* (1984) 154 CLR 563.

<sup>36</sup> Wolfram, *Modern Legal Ethics* (1986), 759-60 in G E Dal Pont, *Lawyers' Professional Responsibility*, (3<sup>rd</sup> ed, 2006), 405.

<sup>37</sup> G E Dal Pont, *Lawyers' Professional Responsibility*, (3<sup>rd</sup> ed, 2006), 406.

<sup>38</sup> [2005] 224 CLR 125 ('*Mallard*'); cf *R v Lawless* (179) 142 CLR 659.

Perth jeweller and imprisoned for ten years. Mr Mallard petitioned for clemency after the discovery of material in the possession of police that was not disclosed to the defence.

Previously held confidence in the relatively informal practices surrounding prosecutorial disclosure has been reduced following *Mallard* and a series of miscarriage of justice cases in the United Kingdom.<sup>39</sup> However, in *Mallard* the High Court noted that there is authority ‘for the proposition that the prosecution must at common law also disclose all relevant evidence to an accused person, and that failure to do so may, in some circumstances, require the quashing of a guilty verdict.’<sup>40</sup> The Court held that the prosecution in that instance had failed in its duty to reveal probative evidence to the defence.

The decision in *Mallard* goes some way to strengthening the focus on the prosecution’s duty to disclose exculpatory material to the defence and reinforces the duty at common law. As a result, previous practices in relation to the duty to disclose that were reliant upon the discretion of the prosecution as minister of justice in deciding what evidence to disclose have become more formalised.

## THE DUTY OF DEFENCE COUNSEL

Although the duty of defence counsel to the court is the same at a conceptual level as that of other practitioners, it does raise some peculiar issues in practice. Mason CJ recognised that the duty not to mislead the

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<sup>39</sup> For example, *R v Maguire* (1992) 94 Cr App R 133; *R v Ward* [1993] 1 WLR 619. For discussion see, David Plater ‘The Development of the Prosecutor’s Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?’ (2006) *University of Tasmania Law Review* 25(2), 111.

<sup>40</sup> *Mallard* [2005] 224 CLR 125, 133.

court requires that if counsel ‘notes an irregularity in the conduct of a criminal trial, he must take the point so that it can be remedied, instead of keeping the point up his sleeve and using it as a ground for appeal.’<sup>41</sup>

This issue was considered by the Victorian Law Reform Commission in its final report on Jury Directions.<sup>42</sup> The Report examined obligations of defence counsel to the court and to their client in the context of the judge’s charge to the jury.<sup>43</sup> It was noted that while the duty of counsel to raise exceptions to the charge was well established, errors that could have been dealt with by the trial judge were not being raised at trial. In fact, in more than fifty per cent of successful applications for leave to appeal against conviction in Victoria between 2004 and 2006, the grounds of appeal included issues that had not been raised at trial by defence counsel.

Whilst it is not suggested that all of these errors should have been identified by counsel, many of them should properly have been raised at the trial stage. The failure to do so has implications for the efficacy of the trial process in terms of financial inefficiencies and the emotional burden on victims and their families, witnesses and accused persons.

With the introduction in Victoria next year of the *Criminal Procedure Act 2009* and *Evidence Act 2008*, more will be asked of both prosecution and defence in assisting the Victorian courts. Consideration of the Commission’s recommendations in relation to jury directions may see yet further requirements.

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<sup>41</sup> *Gianarelli* (1988) 165 CLR 543, 556 (Mason CJ).

<sup>42</sup> Victorian Law Reform Commission, *Jury Directions*, Report No 17 (2009).

<sup>43</sup> Victorian Law Reform Commission, *Jury Directions*, Report No 17 (2009), 87-8.

## REFORM PROPOSALS

Increasing tension and complexity surrounding the legal practitioner's duties to the court and the client have resulted from a variety of factors including changing markets, economic theories, technologies and social attitudes. However, these changes have begun to transform into proposals for reform, some of which may result in simplification and an easing of the tension between conflicting duties. Reform has the potential to strengthen the lawyer's duty to the court.

In Victoria, reforms of the civil justice system have been proposed by the government in response to recommendations arising from the Victorian Law Reform Commission's review.<sup>44</sup> In its report, the Commission recommended that the legal practitioner's duty to the court be expanded and given greater definition in the context of civil proceedings. Some of the duties proposed would be imposed not only on practitioners but on parties and other participants. This would have the effect of diminishing, to some extent, the conflict between the duties to the court and the client by placing obligations on the client of a similar nature to some of those placed on the practitioner and arising from the duty to the court.

These recommendations are under consideration and the Victorian government has already signalled its intention to introduce obligations and duties in legislation. This will result in some aspects of the lawyer's duty to the administration of justice being put into legislative form.

The Victorian Law Reform Commission's recommendations include the introduction of 'overriding purpose' and 'overriding obligations'

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<sup>44</sup> Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008).

requirements. These would relate to the practitioner's duty to conduct litigation in a prompt and efficient manner, although they would also apply directly to the parties themselves.

The Commission has recommended that there be a uniform statement of 'overriding purpose and duties' applicable to Victorian civil courts to facilitate the 'just, efficient, timely and cost effective resolution of the real issues in dispute.'<sup>45</sup> Judges would seek to give effect to the overriding purpose when interpreting or exercising powers in relation to civil disputes, and practitioners and parties would be obliged to assist the court to further the overriding purpose.

'Overriding obligations' are proposed as a set of positive obligations and duties, including ten specific standards of conduct. These include the duty to act honestly and not engage in misleading or deceptive conduct; the obligation to refrain from making or responding to claims that are frivolous, vexatious, for a collateral purpose or without merit; act promptly and minimise delay; narrow the issues remaining in dispute if the dispute is unable to be resolved by agreement.<sup>46</sup>

## NATIONAL UNIFORMITY IN THE REGULATION OF THE PROFESSION

Reform of the legal profession is also proposed at the national level. In recent years there has been a push towards national uniformity in legal profession legislation and this has brought about a greater uniformity in

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<sup>45</sup> Ibid 152.

<sup>46</sup> Ibid 150.

the rules of professional conduct between jurisdictions.<sup>47</sup> For example, many jurisdictions have now enacted rules that parallel the Law Council of Australia's *Model Rules of Professional Conduct and Practice*.

More recently, the Prime Minister and federal Attorney-General have announced the formation of a National Legal Profession Taskforce, arising as a result of the issue being placed on the Council of Australian Governments (COAG) microeconomic reform agenda.<sup>48</sup> The Taskforce is to prepare draft legislation by April 2010 to regulate the profession across Australia. The aim of the process is to deliver:

- '(a) a national legal profession and a national legal services market through simplified uniform legislation and regulatory standards;
- (b) clear and accessible consumer protection, so that consumers have the same rights and remedies available to them regardless of where they live; and
- (c) a system of regulation that is efficient and effective.'<sup>49</sup>

It is thought that greater uniformity will reduce the compliance burden for lawyers practicing across jurisdictions, promote Australia's participation in the international legal services market, and increase the level of consumer protection for users of legal services.<sup>50</sup> Jurisdictional

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<sup>47</sup> G E Dal Pont, *Lawyers' Professional Responsibility*, (3<sup>rd</sup> ed, 2006), v.

<sup>48</sup> Australian Government, Attorney-General's Department, 'Council of Australian Governments (COAG) National Legal Profession Reform' (2009) [http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews\\_CouncilofAustralianGovernments\(COAG\)NationalLegalProfessionReform#taskforce](http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_CouncilofAustralianGovernments(COAG)NationalLegalProfessionReform#taskforce) at 8 October 2009.

<sup>49</sup> National Legal Profession Reform Consultative Group, 'Background Paper' (4 August 2009), 9.

<sup>50</sup> Australian Government, Attorney-General's Department, 'Council of Australian Governments (COAG) National Legal Profession Reform' (2009) [http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews\\_CouncilofAustralianGovernments\(COAG\)NationalLegalProfessionReform#taskforce](http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_CouncilofAustralianGovernments(COAG)NationalLegalProfessionReform#taskforce) at 8 October 2009.; National Legal Profession Reform Consultative Group, 'Background Paper' (4 August 2009), 16.

differences have also been cited as causing an increase in the cost of legal services to client consumers.<sup>51</sup>

If reform is undertaken in this area, I envisage that the lawyer's duty to the administration of justice will remain as the lynchpin of regulation of the profession. It is this duty which will continue to provide the theoretical basis for a lawyer's obligations to the court and the public at large. The obligation to engender an understanding of the lawyer's role as an officer of the court in law students, and to ensure a continued understanding of that role in admitted practitioners, remains crucial to the ethical behaviour of members of the profession.

Also significant, and at times neglected, is the obligation to ensure the client and the public at large understand the lawyer's duty to the court and the proper administration of justice. In the absence of an adequate level of appreciation of this duty on the part of consumers, the conflict between the duty to the client and the duty to the court is likely to continue to be problematic, and increasingly so.

## FURTHER POTENTIAL CONFLICT

One further consequence of the changing legal landscape and increasing commercialisation of the legal profession is the potential for an even more complex scenario to arise where litigation is conducted by a litigation funder.<sup>52</sup> In such a situation multiple duties would need to be deciphered and weighed against each other.

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<sup>51</sup> Mr John Corcoran, President, Law Council of Australia 'The State of the Profession', (Speech delivered at the 36th Australian Legal Convention, Perth, 19 September 2009).

<sup>52</sup> A helpful overview of the position and role of litigation funders is found in a paper by the Hon. P Keane, *Access to Justice and other Shibboleths*, presented at the JCA Colloquium, Melbourne 2009.

The litigation funder would effectively be the real client giving instructions to the lawyer who could potentially be a company floated on the ASX. The litigation funder has duties to its shareholders and could see itself as owing no duty to the court. The lawyer has a duty to the court, a duty to the client and also a duty to its shareholders. Counsel instructed by those parties would be in the situation of facing a complex situation of conflicting interests and duties.

Notwithstanding these various duties, the paramount duty would remain the duty to the court, yet with the tension of so many other factors at play, I would not envy the practitioner in such a situation; and it is a situation that is likely to arise in the future.

## CONCLUSION

In the market driven climate of the modern global economy, it is hardly surprising that the law is now viewed in terms of a market for legal services. To ignore this fact and to yearn for days gone by where the situation was different (if this was ever really the case) would be futile. It is imperative in these changing times that lawyers remain mindful of the paramountcy of their duty to the administration of justice, and consequently to the court. This begins with the teaching of legal professional ethics in law schools, but must be maintained throughout the legal career.

The need to comprehend the legal practitioner's duty to the court also extends to legal clients and the public.



As Brennan J observed: ‘A client – and perhaps the public – may sometimes think that the primary duty of [a lawyer] in adversary proceedings is to secure a judgment in favour of the client. Not so.’<sup>53</sup> The lawyer is, ‘however he may be represented by those who understand not his true situation, merely an officer assisting in the administration of justice, and acting under the impression that truth is best discovered by powerful statements on both sides of the question.’<sup>54</sup>

The paramountcy of the duty to the court is of the utmost importance to the effective functioning of the legal system. It is imperative that lawyers, clients and the public understand this. The integrity of the rule of law, and the public interest in the proper administration of justice, depend upon it.

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<sup>53</sup> *Gianarelli* (1988) 165 CLR 543, 578 (Brennan J).

<sup>54</sup> *Ex parte Lloyd* (Lord Eldon, 5 November 1822) in *Giannarelli* (Brennan J), 579.