Some ethical questions when opposing parties are unrepresented or upon ceasing to act as a solicitor

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I thought I might talk to you today about some ethical issues that, perhaps, might not frequently be mentioned. In doing so I thought I might draw upon some experiences that have occurred to me as recently as the last few weeks.

The first matter concerns the duty of lawyers when opposed to a self represented litigant. The lawyer acting for a client in a case where the opponent is not represented by a lawyer, and is not legally trained, can be exceptionally difficult. The usual task of a lawyer in an adversarial process is to put before the court the facts and law which support the client's case and position. There is, of course, a duty not to mislead the court but usually each lawyer can rely upon his or her opponent to put forward contrary arguments or matters which might, but do not necessarily, harm the lawyer's own client's case. In other words, the duty upon the lawyer not to mislead the court usually does not require the lawyer to put before the court possible legal arguments for the other side and the arguable facts which an opponent might

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put. Testing or challenging a case is usually the task of the opponent not of the lawyer advancing the case for a client. The duty of the lawyer when there is no lawyer representing the opponent is not so clear.

The adversarial system works best when all litigants are represented by competent counsel and have full access to all of the material that may reliably bear upon the task and issues for the Judge to decide. The parties have a real interest in the outcome which each seeks. They care about the result because it will affect them in a real and meaningful way. It is they, therefore, who have the incentive to put before the decision maker everything which needs to be put for the proper outcome to be reached. The facts are known to the parties and it is only they who have access to those facts which bear, positively or negatively, upon an outcome. It is the parties who will want to test what the opposing party is putting forward as the evidence. It is the parties who will have an interest in thinking about what arguments can responsibly be put to a court. It will be the parties who will have an interest in determining what expert evidence, if relevant, needs to be found. It is they who will have the resources, interest and knowledge necessary to determine who are the appropriate experts in which field for consideration by a decision maker.

An assumption upon which the adversarial system operates is that the Judge can rely upon the parties to put forward everything relevant for the decision. That assumption includes that the parties will have tested before trial, and will test at trial, the evidence and submissions upon which the decision will

depend. The assumption, however, is seriously challenged and potentially compromised when one or more of the parties is not legally represented or not legally qualified.

In such cases the court has a duty to be of some assistance to the unrepresented litigant. The duty may not require, or permit, the court to substitute its own view of what an unrepresented litigant should do for what the litigant may want. In *McWhinney v Melbourne Health*[1] the Court of Appeal said:

> The appellant referred to passages from the decision in *Tomasevic v Travaglini* where Bell J observed:
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> > The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed. The Family Court of Australia has enunciated useful guidelines on the performance of the duty.

[1] [2011] VSCA 22.

> The judge cannot become the advocate of the self-represented litigant, for the role of the judge is fundamentally different to that of an advocate. Further, the judge must maintain the reality and appearance of judicial neutrality at all times and to all parties, represented and self-represented. The assistance must be proportionate in circumstances - it must ensure a fair trial, not afford an advantage to the self-represented litigant.

These propositions are not controversial. It is well understood that a trial judge has certain obligations to assist a self-represented litigant, but those obligations are to be balanced against the requirement that the judge preserve his or her neutrality between the parties. The appellant's view that the judge ought to have adjourned the case on his own motion is inconsistent with that neutrality and the nature of the adversarial system. The appellant's submission that the trial judge in effect step into the shoes of the litigant and do that which the litigant, after receiving the clearest advice, was unwilling to do, would cross the line between the permissible assistance that might be offered and the need to maintain impartiality and respect the position adopted by the litigants. Within our adversarial system of justice it cannot be said that the judge could (and indeed should), on his own motion have

> taken steps, against the wishes of the appellant, to adjourn the proceedings to enable the appellant to obtain medical evidence.[2]

The court, however, may need to assist an unrepresented litigant in different ways depending upon the nature of the proceedings, the state in which the proceeding has reached, the nature of the unrepresented litigant and the particular aspect in which an unrepresented litigant may require assistance. In doing so the court must remain impartial[3] and not confer upon an unrepresented litigant a positive advantage[4] or give the represented party something less than that party is entitled.[5]

The precise obligation of counsel for the represented litigant in such circumstances may be complicated. The duty of the court is and remains that of endeavouring to ascertain the rights of the parties. That obligation does not cease or lessen where a party is self represented. In *Neil v Nott*[6] the High Court observed that a:

> … frequent consequence of self representation is that the Court must assume the burden of *endeavouring to ascertain* the rights of parties which are obfuscated by their own advocacy.[7] (my emphasis)

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2 [2011] VSCA 22, [25] – [26] (footnotes omitted).
3 *Minogue v Human Rights Equal Opportunity Commission* (1999) 84 FCR 438, 446 [29] (Sackville, North and Kenny JJ).
4 *Rajski v Scitec Corporation Pty Ltd* (Unreported, NSW Court of Appeal, Kirby P, Samuels and Mahoney JJA, 16 June 1986) 27 (Samuels JA).
5 Ibid 55 (Mahoney JA).
6 (1994) 121 ALR 148.
7 Ibid 150 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

The duty of the court to ascertain the rights of the parties where a party is unrepresented may require the lawyers representing the other party to assist the court in that burden. The reason for that is that the court does not know all of the facts and inevitably will not be in a position to consider all of the issues and the law which may be relevant to a fair and adequate consideration of the rights from the point of view of the unrepresented litigant. The represented party, through his or her lawyers, is the most likely source of assistance for the court in the burden of ascertaining the rights of the parties. It is the lawyers of the represented party who are likely to have considered the possible relevance of facts which could bear upon a Judge's determination adversely to the interests of the client even if they discounted them. It is the represented litigant's lawyers who are likely to have considered the legal issues, and the law relevant to the legal issues, over time in developing the case even if they decided that they did not defeat their client's case. It is they who will best be able to determine what facts, what legal issues, what authorities, and what law might reasonably bear upon a judicial determination potentially adverse to the client's position even though in their judgement it will not defeat their client's case.

The extent of the obligation upon the lawyers for the represented party may also depend upon the nature of that party. In some cases a litigant may be expected to act as a model litigant especially where, for example, the litigant is the Crown, a government agency or an official exercising public functions or

duties.[8] What the model litigant may be required to do as model litigant is likely to vary from case to case and from situation to situation. In some cases it may require the lawyer for the model litigant to meet the case which an unrepresented litigant ought to have put but did not put because of an inability to do so. A court might not be ascertaining the rights between the parties if the model litigant takes advantage of the obfuscation created by the advocacy of the unrepresented litigant and deals only with the case put and not also with the case that ought to have been met. A court which has assumed the burden of ascertaining the rights between the parties may need to have the model litigant address the critical questions that ought to be addressed even though the unrepresented litigant did not do so. That may be a difficult thing to explain to some clients but it may be no more than the necessary consequence of the lawyer's duty to assist the court in the court's discharge of its own functions in the administration of justice. The outcome, however, will

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[8] Commonwealth Attorney-General, *"Appendix B: The Commonwealth's obligation to act as a model litigant"*, Legal Services Direction 2005; Australian Tax Office, "*Conduct of Tax Office Litigation*" Practice Statement Law Administration 2009/9; Bruce Quigley, "The Role and Implications of Litigation in Tax Administration" (Speech delivered at the Australian Petroleum Production & Exploration Association Annual Conference, Hobart, 22 November 2007); Dale Boucher, *"An Ethical Code ... Not a Code of Conduct"* (1996) 79 Canberra Bulletin of Public Administration 3, 4; GE Dal Pont, *Lawyers' Professional Responsibility in Australia* (2006) 296-7; see also *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342 (Griffith CJ); *SCI Operations Pty Ltd v Commonwealth* (1996) 139 ALR 595, 613-4, 621 (Beaumont and Einfeld JJ); *Yong Jun Qin v Minister for Immigration and Multicultural Affairs* (1997) 144 ALR 695, 704 (Beaumont, Burchett and Goldberg JJ); *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1, 40-1 (Finn J); *Scott v Handley* (1999) 58 ALD 373, 383-4 (Spender, Finn and Weinberg JJ); *White v Minister for Immigration Multicultural Affairs* [1999] FCA 1433, [81] (Ryan, North and Weinberg JJ); *One.Tel Ltd v Deputy Commissioner of Taxation* (2000) 171 ALR 227, 233 (Burchett J); *ACCC v Warner Music Australia Pty Ltd* [2000] FCA 647; *Challoner v Minister for Immigration Multicultural Affairs (No 2)* [2000] FCA 1601; *NAFK of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1374, [9] (Lindgren J); *NAOY v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FMCA 275, [8] (Driver FM); *Wodrow v Commonwealth of Australia* (2003) 129 FCR 182, [38]-[43] (Stone J); *ABB Power Transmission Pty Ltd v ACCC* [2003] FCAFC 261, [35] (Heerey, Stone and Bennett JJ).

be greater confidence in the correctness of the decision and, of course, in the administration of justice as a whole.

The second example comes from a situation that arose on Monday of this week. It too concerns the duty of lawyers to the court but arises in a different context and applies particularly to solicitors.

On Monday I began to hear a case by a bank against a guarantor. The guarantor had been legally represented by a firm of solicitors, but by the time the case began the instructions to the solicitors had been withdrawn. On Monday morning the proceeding was called in the usual way and there was no appearance for the defendant: neither litigant nor legal representative appeared.

Order 20.03 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) deals with when a solicitor may cease to act for a party in a proceeding. Rule 20.03(1) provides that a solicitor who ceases to act for a party in a proceeding is required to serve a notice that the solicitor has ceased to act for the party. That rule is largely administrative and does not require that the solicitor obtain the court's permission for the notice to be filed and served.

A solicitor may not file a notice under that rule, however, in a number of circumstances. One of those circumstances is "after a proceeding has been set down for trial".[9] In that case, and the other circumstances governed by

[9] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 20.03(3)(b).

the exception, the solicitor must obtain the court's leave to file a notice that the solicitor has ceased to act for a party. It is not difficult to obtain the court's leave under the rule,[10] but leave does need to be obtained. The court has a discretion about whether to grant leave but "unless there are special circumstances which render it expedient to retain the solicitor on the record the order will generally be made as a matter of course upon proof that the solicitor has in fact ceased to act for the party and that no steps have been taken to take the solicitor's name off the record".[11]

Obtaining leave is not a mere formality and it may be quite important for leave not to be granted. In the case before me the former solicitors for the defendant had written to the solicitors for the plaintiff the week before the date set for the hearing indicating that their client was seeking instructions about filing an application for voluntary bankruptcy. The letter from the defendant's solicitors to the plaintiff's solicitors expressed the view that the filing of an application for voluntary bankruptcy would have the effect of staying the proceeding that was due to start before me on Monday.

The solicitors did not appear at the start of the proceeding and had made no application for leave to file a notice ceasing to act as solicitors for the former client. Amongst the reasons why it may have been important to have done so before, or at, the commencement of the trial was that it was the former solicitors for the defendant who were best placed to know whether the

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10 *Re Creehouse Ltd* [1982] 3 All ER 659, 663-4 (Lawton LJ); *Conrae Nominees Pty Ltd v Doherty* (Unreported, Supreme Court of Victoria, Southwell J, 22 July 1992); *Plenty v Gladwin* (1986) 67 ALR 26, 27 [40] (Wilson, Brennan, Deane and Dawson JJ).

11 *Plenty v Gladwin* (1986) 67 ALR 26, 27 [40] (Wilson, Brennan, Deane and Dawson JJ).

application for voluntary bankruptcy had been filed by the former client. Whether or not an application for voluntary bankruptcy had been filed was relevant to the court's jurisdiction and to the plaintiff incurring additional costs in a trial which might have been both futile and potentially improper. The rule about needing to obtain leave in that context provides an illustration of a lawyer's duty to the court in ensuring that it performs its work properly.

The need to obtain leave is important for other reasons connected with the proper administration of justice. The reason for the termination of the solicitors' retainer in the case before me appears to be that the client could not afford the solicitors' professional fees. Generally speaking it is appropriate in such circumstances for the court to grant leave and not to require a legal practitioner to perform professional services without proper payment. However, that may not always be the case. There may be some circumstances when some forensic advantage is sought by a party from the termination of a solicitors' retainer. Occasionally a party to a proceeding seeks to vacate an imminent hearing date of a trial on the basis of having terminated the retainer of their lawyer and either being unrepresented on the day of the hearing or being represented by newly appointed lawyers who are not ready to conduct the trial. It would, I think, be quite wrong for a legal practitioner to advise a client to terminate a retainer to obtain a forensic advantage in this way by seeking an adjournment of a proceeding. The requirement in rule 20.03(3) of seeking the court's leave before filing a notice of having ceased to act as a solicitor provides some safeguard against abuse because the solicitor may be required to provide a sufficient explanation for

seeking the leave. The practitioner's duty of honesty to the court should ensure that such forensic advantages are not obtained inappropriately. In some cases the application may need to contain information that will not be disclosed to opposing parties.[12]

[12] *Re Creehouse Ltd* [1982] 3 All ER 659, 663-4 (Lawton LJ).