AGS

Legal briefing

Number 107 | 24 July 2015

Duties to the court

The purpose of this briefing is to highlight and explore some of the duties to the court that government lawyers (both in-house and external) most commonly encounter. It discusses the special role of the solicitor on the record, general duties in the conduct of litigation, duties of honesty and candour, duties in the presentation of evidence (particularly in the form of affidavits) and duties attached to the making of serious allegations.

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It is well recognised that a lawyer's duty to the court is their paramount duty.[1]

However, the duties of a lawyer to the court are often poorly understood and can raise complex questions of law and judgment. In the government legal context a strong understanding of these duties is important for a number of reasons:

- The judiciary expects the highest standards of ethics and 'fair play' from government parties (consistent with the model litigant obligation) and from the lawyers representing them.
- There is increasing statutory and judicial recognition of the duty to assist courts and tribunals to adjudicate matters fairly and efficiently.
- Because of the broad and diverse nature of government litigation, duties to the court can be engaged in a wide variety of ways, some of which may be unexpected.
- Parties opposing the Government may wish to suggest in certain cases that there has been some breach of a relevant duty. Therefore, it is important to have conducted litigation in a way that not only avoids such a breach but also does so in ways that are transparent and accountable.
- Any failures to comply with duties to the court in particular matters, or by particular agencies or lawyers, are likely to have broader reputational consequences for the Commonwealth, both with the judiciary and the public.
- Client instructors are themselves often practising lawyers. It is important to recognise certain differences between the duties they owe and the duties owed by external lawyers engaged and acting as solicitors on the record.

In this issue

1 See *Giannarelli v Wraith* (1988) 165 CLR 543 at 555–556, 572; and *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [111].

This briefing is not intended to be either comprehensive or authoritative. No publication of this kind could fully address the myriad professional and ethical issues that can arise in these areas. Therefore, litigation lawyers should ensure they are familiar with relevant practice rules, guidance promulgated by professional bodies and relevant case law.[2] Where issues do arise, lawyers should seek guidance from supervisors, Commonwealth litigation specialists and professional bodies.

Role and significance of the solicitor on the record

> [T]he solicitor on the record is the only person whom the court will recognize as the solicitor acting in the case, and the reason, I think, is that he is the only person who is responsible to the court, responsible to his client and responsible to the other party to the litigation. ... I repeat he is the only person whom the court can possibly recognise as the solicitor acting in the case.[3]

Many of the duties discussed in this briefing are owed by lawyers involved in litigation simply because they are lawyers and regardless of whether they are performing the role of solicitor on the record.[4] For example, it has been said of employed government lawyers:

> They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and etiquette. They are subject to the same duties to their client and to the court.[5]

'...it is important to recognise the distinctive position of the solicitor on the record and, in particular, the non-delegable obligations and expectations that accompany that role.'

However, it is important to recognise the distinctive position of the solicitor on the record and, in particular, the non-delegable obligations and expectations that accompany that role.

The solicitor on the record must be identified and is responsible for the case

Where a party to a court proceeding is represented by lawyers, long practice and court rules require that the lawyers be explicitly identified as solicitors on the record and be identified as being responsible for documents filed and steps taken in the litigation.

In the case of the Federal Court, this does not find expression in a single, neat statement in the rules, but it is clear from their collective effect. This shows that, where a party is represented, the responsibility for the party's case falls upon the lawyer acting; the court, other parties and the public will turn to the lawyer if any issues arise in the conduct of that party's case.

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2 Useful general guidance can be found in the Law Council of Australia's *Australian Solicitors' Conduct Rules 2011 and Commentary*, August 2013 (ASCR), available at http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/SolicitorsConductRulesHandbook_Ver3.pdf. Rules to this effect apply in New South Wales and Victoria from 1 July 2015 as the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015. For convenience this briefing uses examples from the ASCR and does not seek to identify the equivalent rule in each of the professional rules for solicitors and barristers in different jurisdictions in Australia. Likewise, this briefing draws on provisions and rules that are applicable in the Federal Court, where much Commonwealth litigation is conducted, and does not seek to identify the equivalent or related requirements in other jurisdictions.

3 *Ex parte Browne* (1913) 13 SR (NSW) 593 at 597 (Pring J, Gordon and Ferguson JJ agreeing). Although dealing with a context in which employed clerks were denied audience by the Court, the statement has been cited with approval in relation to the requirement for the solicitor on the record to be the principal with whom the client has a relationship: see *Re Bannister; Ex parte Hartstein* (1975) 5 ACTR 100 at 105 (Fox J, with whom Blackburn J agreed).

4 See eg the general application of the ASCR to 'all solicitors': r 1.1.

5 *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102 at 129 (Lord Denning MR), not challenged when on appeal to the House of Lords and approved by the High Court in *The Attorney-General for the Northern Territory of Australia v Kearney* (1985) 158 CLR 500 at 510 (Gibbs CJ); and *Waterford v Commonwealth* (1987) 163 CLR 54 at 60–62 (Mason and Wilson JJ).

The way in which this position arose under the previous rules was explained in *QGC Pty Ltd v Bygrave* (2010) 186 FCR 376 as follows:

> [46] The expression 'solicitor on the record' is not defined in the *Federal Court of Australia Act 1976* or [*Federal Court Rules 1979*]. However, it is implicit from the relevant provisions of the Rules that the expression refers to the solicitor who is nominated to act for an applicant, in the commencing application, or to act for a respondent, in a notice of appearance: see O 4 r 4(1)(c) and O 9 r 4(1)(b) respectively.
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> [47] A party to any proceedings in the Federal Court can only appear in one of two ways: in person, or by a solicitor: see O 4 r 14(1), O 9 r 1(1) and O 45 r 1(1). While this proposition is not expressly stated in the Rules, it is clearly implicit from the fact that the Rules offer no other option, unless leave is obtained. Furthermore, support for it is provided by the limited circumstances in which leave may be obtained to appear by any other person.

The same position applies under the *Federal Court Rules 2011* (FCR 2011). The following rules are of particular relevance:

- A person may be represented by a lawyer or be unrepresented: r 4.01. If a person is represented by a lawyer, a notice of acting must be filed when an unrepresented party comes to be represented by a lawyer (r 4.03) or a represented party changes lawyers: r 4.04. When a lawyer ceases to act for a party, a notice of termination or ceasing to act must be filed: rr 4.04 and 4.05.
- If a lawyer is acting for a party in the proceeding, it is the lawyer, not the party, who must sign all court documents: r 2.15.
- Every document filed in a proceeding must include, at the foot of the document, the phone, fax and email address of the lawyer acting: r 2.16(1)(c). It is only if no lawyer is acting that the party's own details are included: r 2.16(1)(d).
- All documents must be in accordance with court forms (r 2.11). The forms reflect these same footer requirements: see, for example, form 59 – affidavit. The forms also include a requirement to insert the 'Law firm (if applicable)'.
- The footer to each document must also include 'the name of the person or lawyer responsible for the preparation of the document': r 2.16(1)(b) and the specified forms.[6]
- Parties must file a notice of address for service before the first mention in court: rr 5.02, 11.06. If a lawyer is acting, the address for service must be the address of the lawyer (r 11.01(2)) and the party agrees that documents be received by the lawyer's email: r 11.01(4). Again, it is only if no lawyer is acting that the party can receive documents at their own nominated email address: r 11.01(4).

'If a lawyer is acting for a party in the proceeding, it is the lawyer, not the party, who must sign all court documents...'

Solicitor on the record is responsible to the court

In *QGC Pty Ltd v Bygrave* Reeves J explained that the main purpose of the duties owed to the Court by the solicitor on the record was:

> [53] ... to have an officer of the Court who is responsible to the Court for the proper conduct of the litigation before the Court and who is answerable to the Court should anything untoward occur in the litigation. The solicitor on the record therefore represents an essential component of the Court's ability to maintain control over the litigation before it.
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> ...
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> [57] All these observations underscore the fact that the role of the solicitor on the record is critical to the Court's ability to ensure that the cases before it are managed efficiently, promptly and inexpensively. ... These observations also go to demonstrate how important it is that the solicitor on the record is properly identified by name and address and all the required contact information is provided in accordance with the Rules. [citations omitted]

6 When understood in the context of other relevant rules, this rule contemplates that, where a lawyer is on the record, the name of the relevant solicitor/counsel appearing in the case will be included and, where no lawyer is acting, the name of the person who prepared the document will be included.

A number of practical matters flow from the direct accountability of the solicitor on the record to the court.

First, where the Government or its agencies are represented by external lawyers in litigation, the litigation documents and dealings with the court and parties must clearly reflect this in both presentation and fact. (As explained below, this requirement is not satisfied if the solicitors on the record are represented as having performed tasks that they have not, in substance, performed. Also, the requirement cannot be satisfied simply by identifying persons other than the solicitors on the record as being responsible for aspects of the litigation.)

Secondly, where in-house lawyers are entitled to act as solicitor on the record,[7] the particular solicitor responsible should be carefully identified and reflected in litigation documents and dealings with the court and parties; it is 'important that these matters appear unambiguously to the court, and to other solicitors'.[8] The identified solicitor must obviously be a legal person (as opposed to an agency, department, branch or the like) who is entitled to practise in the proceedings as a solicitor. The Federal Court has refused to order costs in favour of a successful Commonwealth applicant because the relevant court documents did not properly identify a solicitor on the record (referring only to the 'Legal Services Branch') and the evidence did not satisfy the Court that the individual nominated as the solicitor on the record had the relevant practising entitlements.[9]

'...practical matters flow from the direct accountability of the solicitor on the record to the court.'

Thirdly, where a client has retained a firm or practitioner, the person identified as the solicitor on the record should be that firm or practitioner, not merely a solicitor employed by that firm or practitioner. This is because the responsibility to the client falls to the principal who has been retained – '[p]ersonal assumption of the role of solicitor on the record and the specific relationship with the court that it entails are part of that responsibility, even though day-to-day work may be delegated to an employee'.[10]

Fourthly, care should be taken to ensure that the name of the lawyer identified as the solicitor on the record remains accurate at all times during the proceedings. In *Blacktown City Council v Wilkie (No 11)* [2011] NSWLEC 216 a personal costs order was considered when a solicitor had 'failed to meet the high standards expected of an officer of the Court and a solicitor on the record'. Although the client had ended the retainer at the relevant time, the solicitor had not been removed from the record. Pepper J stated:

> [55] ... The pleas by [the solicitor] that he was simply 'helping out' [the client] must fall on deaf ears in circumstances where he persisted in remaining his solicitor on the record. From the Court's perspective, a solicitor on the record is just that, irrespective of whatever terms of retainer have been agreed to between the solicitor and his or her client.

Finally, in cases where a Commonwealth officer may appear in court, other than through a solicitor on the record, the different relationship with the court should be recognised. It has been suggested that, despite the fact that a Commonwealth officer has an entitlement to appear without a solicitor on the record, it will not be the case 'that the same degree of trust and confidence will repose as between the court and a litigant

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7 For most Commonwealth agencies, in-house lawyers may only act in court litigation as solicitor on the record or as counsel with the approval of the Attorney-General: see the Legal Services Directions 2005, cl 5.1.

8 *Re Bannister; Ex parte Hartstein* (1975) 5 ACTR 100 at 106 (Fox J, with whom Blackburn J agreed); see also at 112 (Blackburn J).

9 See *Deputy Commissioner of Taxation v Clear Blue Developments Pty Ltd (No 2)* [2010] FCA 1224.

10 See *Kelly v Jowett* (2009) 76 NSWLR 405 at [96] (Barrett J) and at [70] (McColl JA, with whom Beazley JA and Barrett J agreed). To like effect, see *Re Bannister; Ex parte Hartstein* (1975) 5 ACTR 100 at 105 (Fox J, with whom Blackburn J agreed) at 112 (Blackburn J) and 116 (Connor J), followed in *Maguire v Makaronis* (1996) 188 CLR 449 at 495 (Kirby J); and *Knaggs v JA Westaway & Sons Pty Ltd* (1996) 40 NSWLR 476 at 482–4 (Somos A-JA, with whom Giles and Abadee A-JJA agreed).

in person in relation to matters of practice, procedure and ethical conduct, as ordinarily will repose as between the Court and those who are on a roll of practitioners ...'.[11]

Solicitor on the record accountable for conduct of employees and agents

The solicitor on the record cannot avoid or delegate their obligations to the court by having another person perform work for them, regardless of whether that person is an employee, a third party or client or a lawyer or non-lawyer.

The House of Lords considered this point closely in *Myers v Elman* [1940] AC 282 – the leading case on making of personal costs orders against solicitors in the exercise of courts' supervisory jurisdiction over lawyers. In that case a misleading affidavit of discovery had been filed through the actions of a law clerk working for the partner in question. In finding that costs had properly been ordered against the partner, Lord Atkin said (at 302):

> The duty owed to the Court to conduct litigation before it with due propriety is owed by the solicitors for the respective parties whether they be carrying on the profession alone or as a firm. They cannot evade the consequences of breach of duty by showing that the performance of the particular duty of which breach is alleged was delegated by them to a clerk. Such delegation is inevitable ... But as far as the interests of the Court and the other litigants are concerned it is a matter of no moment whether the work is actually done by the solicitor on the record or his servant or agent. If the Court is deceived or the litigant is improperly delayed or put to unnecessary expense, the solicitor on the record will be held responsible and will be admonished or visited with such pecuniary penalty as the Court thinks necessary in the circumstances of the case.[12]

'The solicitor on the record cannot avoid or delegate their obligations to the court by having another person perform work for them...'

The same approach is taken in Australia.[13]

The accountability is not limited to possible exposure to costs; it may also lead to a court taking other action against the solicitor on the record for the failures of their employee or agent.[14] For example, in *CT Sheet Metal Works Pty Ltd v Hutchinson* (2012) 201 FCR 275 the Federal Court considered possible contempt action against the solicitor on the record for a breach of an undertaking to the Court. The breach of the principal's undertaking was committed by an employed solicitor, not the principal. The principal had emphasised to the solicitor the need to comply with the undertaking. On learning of the breach, the principal took prompt steps to notify the other party and the Court.

The Court considered whether action for contempt should be taken against the principal. Although Reeves J recognised that this 'might be thought to be somewhat draconian', his Honour held it to be a necessary adjunct of a solicitor on the record's 'high responsibilities to the Court to ensure that any litigation before the Court is conducted properly and within permissible bounds'. His Honour stated that, without such responsibility, 'the Court's ability to maintain proper control over the litigation before it would be significantly eroded' (at [39]).

The non-delegable nature of the obligations can have an added significance in Commonwealth litigation where client instructing officers are, themselves, commonly

11 See *Pacific Exchange Corporation Pty Ltd v Federal Commissioner of Taxation* (2009) 180 FCR 300 at [57]. In that case Logan J queried whether the late raising of an allegation of sham was related to the earlier removal of solicitors on the record and referred to 'the hazards which are entailed when a person chooses to act for themselves' (at [59]).

12 See further at 303. See also the observations of Viscount Maugham at 291–2, Lord Wright at 320–1 and Lord Porter at 334–5.

13 See eg *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 143 at [48], [58] (Lee, Hill and Sundberg JJ); *CT Sheet Metal Works Pty Ltd v Hutchinson* (2012) 201 FCR 275 (Reeves J); *Kelly v Jowett* (2009) 76 NSWLR 405, particularly at [66]–[67], [72] and [78]–[79] (McColl JA, with whom Beazley JA and Barrett J agreed).

14 Such action could include, for example, a referral to a professional disciplinary body: cf *Day v Perisher Blue Pty Ltd (No 2)* [2005] NSWCA 125.

practising lawyers. The obligations of the solicitor on the record are not avoided or discharged by having clients perform tasks instead of them or perform them in a way that would limit the ability of the solicitor on the record to independently discharge their own duties to the court. If an issue arises during the litigation as a result of some task that a client has undertaken, it is no answer for the solicitor on the record to say they were not involved in that task or that they acted with complete propriety. Rather, it is necessary that they have independently satisfied themselves that the work the client undertook is of a kind, and to a standard, that is appropriate to discharge their own direct obligations to the court.

It is also important to bear in mind that the solicitor on the record cannot avoid their own independent professional responsibilities simply by briefing and relying upon counsel.[15] The solicitor on the record will be accountable for the proper engagement and instruction of counsel, both out of court and in court. They will also be responsible for bringing their own independent judgment to the handling of a case, having regard, of course, to the particular task and the work that counsel has undertaken.

It follows from this that the solicitor on the record must take care to ensure that they do not act as a mere postbox or mouthpiece for the client or particular instructors, witnesses or counsel. In practice, this obligation is particularly important for documents that are filed (as they must be) in the name of the solicitor on the record, whether they be pleadings, interlocutory applications, particulars, interrogatories, notices to produce, affidavits or submissions. In each case the solicitor on the record must bring to bear the independent professional judgment that the court expects of them when they prepare that type of document. This judgment will differ according to the nature of the document (for example, witnesses must have a significant involvement in the preparation of the contents of affidavits and counsel will ordinarily draft submissions) and the nature of the case. Where the document is drafted or prepared by someone other than the solicitor on the record, particular care should be taken to ensure that this process does not undermine duties that the solicitor on the record owes directly to the court.

'...the solicitor on the record must take care to ensure that they do not act as a mere postbox or mouthpiece.'

The solicitor on the record will be accountable to the court even when they are not actually aware or put on notice of potential issues.[16] In cases where a solicitor on the record does become aware of any conduct of their employed solicitors or agents that may give rise to a potential breach of a duty to the court, they must directly 'take control of the situation'. This means they should properly investigate the issue, rectify or address any problems and ensure that they are not put in a position where their own interests conflict with those of the client. It is unlikely to be adequate for the solicitor on the record to merely direct the employed solicitor or agent to do this.[17]

15 See *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 143 at [48], [58] (Lee, Hill and Sundberg JJ); *Modra v State of Victoria* [2012] FCA 240 at [37] (Gray J).

16 See *Kelly v Jowett* (2009) 76 NSWLR 405, particularly at [66]–[67], [72] and [78]–[79] (McColl JA, with whom Beazley JA and Barrett J agreed).

17 See *Keppie v Law Society of the Australian Capital Territory* (1983) 62 ACTR 9 at 19 (Blackburn CJ, Kelly and Gallop JJ), followed in *Kelly v Jowett* (2009) 76 NSWLR 405 at [98]–[100] (Barrett J).

Duties to conduct litigation efficiently and effectively

Lawyers have well-recognised duties to assist the court to achieve resolution of cases in ways that are both just and efficient. These duties stem from a recognition of the broader interests in ensuring effective and efficient use of the public resources in the court system.[18]

The nature and extent of these duties have been the subject of substantial judicial consideration.[19] Increasingly they have also found expression in professional conduct rules[20] and rules of court.

In the Federal Court the duties have been developed, detailed and made readily enforceable, including through costs orders against solicitors, through ss 37M, 37N and 37P of the *Federal Court of Australia Act 1976*. These provisions impose duties on both the parties themselves (to conduct proceedings in a way that is according to law and as quick, inexpensive and efficient as possible) and upon their lawyers (to assist the parties to comply with that duty). Additionally, comparable obligations fall upon the Commonwealth and its agencies as part of the model litigant obligation.[21]

The ways in which these duties may arise (and be breached) are too many and varied to seek to list exhaustively. However, by way of example, they may be breached by:

- failing to comply with court deadlines, thereby creating delays, costs and other prejudice in the proceedings[22]
- bringing proceedings and appeals for the purposes of creating a delay rather than the proper adjudication of legal rights[23]
- filing clearly deficient pleadings[24]
- creating false issues through tactical denials and refusals to admit matters known to be true[25]
- running arguments that are disproportionately lengthy, complicated and tendentious[26]
- conversely, failing to present arguments that are adequate to enable the court to determine significant legal issues[27]
- bringing proceedings on the basis of voluminous and poorly defined evidence rather than proper pleadings[28]
- filing affidavits that ignore the rules of evidence or are unnecessarily complicated and prolix.[29]

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18 See generally *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [25] and [113].

19 See eg *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd* [2008] NSWCA 243 at [160]–[163] (Allsop P, with whom Beazley and Campbell JJA agreed); *Edwards & Nosworthy v R* (1997) 90 A Crim R 571 at 573 (Heenan J); *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 143 (Lee, Hill and Sundberg JJ); *Franco v Frattelli's Fresh Pasta Pty Ltd* [2011] NSWSC 576 (White J); *Unioil International Pty Ltd v Deloitte Touche Tohmatsu (No 2)* (1997) 18 WAR 190 (Ipp J); *White v Overland* [2001] FCA 1333 at [4] (Allsop J); *Director of Consumer Affairs Victoria v Scully (No 2)* [2011] VSC 239 (Hargrave J).

20 See eg *Barristers Conduct Rules*, Australian Bar Association, 1 February 2010, rr 57–58.

21 See Legal Services Directions 2005, Appendix B at paras 2(a), (aa), (b), (d), (e), 5.1 and 5.2.

22 See eg *Kelly v Jowett* (2009) 76 NSWLR 405 on both the conduct of the proceedings originally and in the conduct of the appeal, at [30]–[31] and [86]–[88].

23 See eg *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 143 (Lee, Hill and Sundberg JJ); *Saragas v Martinis* [1976] 1 NSWLR 172 (Moffit P, with whom Hutley and Glass JJA agreed).

24 See eg *Modra v State of Victoria* [2012] FCA 240 (Gray J).

25 See eg *Unioil International Pty Ltd v Deloitte Touche Tohmatsu (No 2)* (1997) 18 WAR 190 (Ipp J).

26 See eg *McLaughlin v Dungowan Manly Pty Ltd (No 3)* [2011] NSWSC 717 at [30]–[34] (Pembroke J); *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys* [2012] FCA 282 (Reeves J).

27 See eg *Saragas v Martinis* [1976] 1 NSWLR 172 (Moffit P, with whom Hutley and Glass JJA agreed).

28 See eg *Director of Consumer Affairs Victoria v Scully (No 2)* [2011] VSC 239 (Hargrave J).

29 See eg *Kinda Kapers Charlestown v Newcastle Neptunes Underwater Club* [2007] NSWSC 329; *Karwala v Skrzypczak Re Estate of Ratajczak* [2007] NSWSC 931; and *Thomas & Ors v SMP (International) Pty Ltd & Ors* [2010] NSWSC 822.

Duties of honesty and candour

The overriding duty of a lawyer to the court requires them to be frank and honest with the court about both facts and law.[30] This applies to all dealings with the court, whether through pleadings, evidence or argument.[31]

Duty not to mislead

Lawyers must not mislead a court or knowingly be party to a court being misled. Most obviously this precludes lawyers from actively making false statements to a court or putting before a court pleadings or evidence that they know to be untrue.[32] This conduct cannot be justified by reference to the interests of the lawyer's client. For example, the Western Australian Court of Appeal has stated:

> The duty of counsel not to mislead the court in any respect must be observed without regard to the interests of the counsel or of those whom the counsel represents. No instructions of a client, no degree of concern for the client's interests, can override the duty which counsel owes to the court in this respect. At heart, the justification for this duty, and the reason for its fundamental importance in the due administration of justice, is that an unswerving and unwavering observance of it by counsel is essential to maintain and justify the confidence which every court rightly and necessarily puts in all counsel who appear before it.[33]

The prohibition on misleading applies to any misleading in the course of proceedings, even if it is not critical to the case and the lawyer intends to correct it before the court makes any decision.[34]

'Lawyers must not mislead a court or knowingly be party to a court being misled.'

Of course, it will be rare for a lawyer to mislead a court directly and actively. However, it is important to recognise that this duty also squarely precludes a party from misleading through half-truths, strategic omissions or careful phrasing. The courts' approach to such cases is set out in detail below in the consideration of duties concerning evidence and affidavits.

In general terms a solicitor will not have misled the court merely by failing to correct an error in a statement that an opponent has made to the court.[35] However, real care needs to be taken with this exception, as there may well be cases in which the model litigant obligation requires a different course. For example, an aspect of the obligation is that the Commonwealth ought not require another party to prove a matter that the Commonwealth knows to be true.[36] Were it to 'stand by' while an opponent put wrong information before the court in an unsuccessful attempt to prove a matter that the Commonwealth knows to be true, it would not be to the point to argue that the Commonwealth was not breaching the duty not to mislead the court.

Duty of candour on ex parte applications

The duty of candour takes a distinctive, positive form in the context of an application for an ex parte injunction. Such an applicant is bound not only to avoid misleading the court but also to discharge a duty of utmost disclosure to the court. This duty is imposed

30 ASCR, r 19. See *Tombling v Universal Bulb Co Ltd* [1951] 2 TLR 289 at 297.

31 See eg *Kyle v Legal Practitioners' Complaints Committee* (1999) 21 WAR 56 at [12]–[14] (Ipp J, with whom Steyler J agreed).

32 An example of such a case is *Linwood v Andrews* (1888) 58 LT 612, where the barrister was imprisoned for contempt, having actively conspired in the creation of false affidavits.

33 See *Kyle v Legal Practitioners' Complaints Committee* (1999) 21 WAR 56 at [66] (Parker J, with whom Ipp and Steytler JJ agreed).

34 Ibid.

35 See ASCR, r 19.3, and, in the context of criminal defence counsel, *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 220.

36 See Legal Services Directions 2005, Appendix B at para 2(e)(i).

because the court is being asked to grant the interim injunction without having heard any submission from the respondent. The duty requires complete disclosure by the applicant for the injunction of all relevant factors, especially factors that might not favour granting the injunction. This involves a 'high standard of candour' and imposes a 'heavy responsibility' on those who seek these orders:

> In an ex parte hearing, it is the obligation of the party seeking orders, through its representatives, to take the place of the absent party to the extent of bringing forward all the material facts which that party would have brought forward in defence of the application. That does not mean stating matters obliquely, including documents in voluminous exhibits, and merely not mis-stating the position. It means squarely putting the other side's case, if there is one, by coherently expressing the known facts in a way such that the Court can understand, in the urgent context in which the application is brought forward, what might be said against the making of the orders. It is not for the Court to search out, organise and bring together what can be said on the respondents' behalf. That is the responsibility of the applicant, through its representatives.[37]

The court treats this duty most seriously. A failure to comply with it would normally result in discharge of the injunction, with costs orders against the applicant.[38] Also, such a failure by the Commonwealth (or a Commonwealth minister or officer) would be likely to be a breach of the Commonwealth's obligation to act as a model litigant, with the resulting potential for criticism by the court and action by the Attorney-General under the Legal Services Directions. It is possible that a deliberate failure to provide utmost disclosure could also be a contempt of court, punishable by a fine and/or imprisonment.

Duties to represent the law accurately

'Lawyers must not misrepresent the law to courts and tribunals.'

Lawyers must not misrepresent the law to courts and tribunals.[39] Rather, they have a positive duty to bring to the court's attention applicable legislation and any authorities that are binding or that have been decided by an appellate court.[40]

This obligation requires lawyers to make the court aware of binding or appellate authority that may be unhelpful to their client's case. It is an obligation with added significance for the Commonwealth, because one component of the model litigant obligation is to act consistently in litigation.[41] Leaving a court to act unaware of significant contrary authority may therefore breach not only the duty that lawyers owe to the court but also in some cases the model litigant obligation.

Duties in preparing and presenting evidence/affidavits

The preparation and presentation of evidence and affidavits give rise to a suite of more specific aspects of the overriding duty to the court. How these apply in each case will vary according to the rules, requirements and directions for preparing evidence, whether it involves the exchange of witness statements, proofs or affidavits, and the extent to which evidence may be given orally.

The following discussion focuses on the preparation of affidavits, given their extensive use in the Federal Court and Commonwealth litigation more generally. With some

37 *Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd* [2007] FCA 955 at [38], citations omitted. See also [47].

38 Examples of cases where the duty has been breached include *Town and Country Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* (1998) 97 ALR 315; and *Print Management Australia Pty Ltd v Pasupati* [2008] NSWSC 342.

39 *Clyne v The NSW Bar Association* (1960) 104 CLR 186 at 200, citing *Carr v Wodonga Shire* (1924) 34 CLR 234 at 239–40.

40 See ASCR, rr 19.6–19.8.

41 See the Legal Services Directions 2005, Appendix B at para 2(c).

necessary modification, equivalent principles generally apply to the preparation and presentation of other forms of evidence.

Affidavits and the solicitor on the record

Consistent with the requirements discussed above, the affidavits to be filed in a matter will be filed by the solicitors on the record. Accordingly, it is those solicitors, and the witnesses themselves, to whom the court will look to investigate and address any irregularities or deficiencies that are seen to arise in relation to the affidavit evidence. As explained above, solicitors cannot delegate this accountability to agents, be they employees, clients, lawyers or non-lawyers.

A distinctive feature of an affidavit is that it is not simply a proof of evidence or a statement of the evidence that a person would be prepared to give in oral testimony in due course if required; it is itself the evidence in chief that is to be led, albeit in written rather than oral form. This means that all of the matters that the court directly supervises and opposing parties scrutinise when a witness gives oral evidence are instead done in private under the control of the persons who prepare the affidavit. This necessarily places significant responsibility upon that deponent and the lawyers responsible for the affidavit to ensure it is prepared, scrutinised and sworn with the same rigour that would be applied to the giving of oral evidence in chief.[42]

Therefore, in practice, the fundamental duties and practices that apply to oral evidence in court must also be discharged when taking affidavits. This has been emphasised in various ways. In *ERS Engines Pty Ltd v Wilson* (1994) 35 NSWLR 193 (*ERS Engines*), Young J stated (at 197):

> It cannot be emphasised too greatly that one's obligation in making an affidavit is the same as when one is giving evidence in the witness box. One is to tell the truth and the whole truth.

'...the fundamental duties and practices that apply to oral evidence in court must also be discharged when taking affidavits.'

His Honour elsewhere stated:

> Judges have been saying over and over again that practitioners must be careful in preparing affidavits as they usually serve as the evidence-in-chief of the deponent. They must therefore present the evidence in the same admissible form as if the witness was giving evidence from the witness box.[43]

This gives rise to a suite of obligations for which the solicitor on the record is ultimately answerable to the court. These obligations include taking proper steps to:

- ensure that the witness understands the nature and purpose of the affidavit, how it is used in court, the scope for cross-examination and so on
- treat the oath/affirmation with solemnity; ensure that it is properly administered; and ensure that the witness understands what they are doing and whether the oath/affirmation is to be used
- avoid leading the witness or suggesting to them what their evidence should be or whether/how it is significant to the case
- avoid putting other witnesses' testimony to them or jointly 'conferencing' witnesses
- ensure that answers are wholly truthful, not misleading by omission or careful phraseology and not the subject of a drafting 'gloss'

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42 This is not to say that witness proofs and witness statements can be prepared without regard to any of the following duties. Depending upon practice rules and court directions, witness statements may be intended to serve a function that is so close to that of an affidavit that many of the same duties arise (although not, obviously enough, those specific to swearing and administering oaths).

43 Young J, writing extracurially as the editor of the *Australian Law Journal*: (2007) 81 ALJ 308 at 309.

- ensure that the witness properly understands the evidence, especially when the witness has any limitations in literacy, education, eyesight or the like
- ensure that the rules of evidence are complied with
- ensure that the evidence satisfies other professional obligations such as the duty to the court and parties to not waste time or resources in proceedings.

This suite of obligations finds voice in a variety of cases, rules and professional duties. A number of these are set out below.

Not surprisingly, there is no single formula for how a solicitor on the record must discharge the duties in any given case. What is important for present purposes is that the court will expect the solicitor on the record to take proper steps to ensure that the obligations set out above are fulfilled and will hold that solicitor responsible for failures to do so.

Witnessing affidavits

It is important that, when lawyers administer oaths and affirmations, they do not take it lightly or as being more a matter of form than substance. The lawyer stands, in effect, in the shoes of the court in the solemn administration of a witness's oath or affirmation. The following judicial statements are illustrative.

'The lawyer stands, in effect, in the shoes of the court in the solemn administration of a witness's oath or affirmation.'

In *R v Gary Shane Austen (No 2)* (2010) 246 FLR 362, Refshauge J explained serious deficiencies in the witnessing of various 'affidavits' that a party sought to rely upon and how a failure to take these duties very seriously may undermine the integrity of the system. His Honour stated (at [23]) that a lawyer 'owes a duty to the court to ensure that the documents, especially affidavits, tendered to the court, are in a proper form to be so tendered and have been properly prepared and in the case of witnesses, made and witnessed as required'.

In *Zorbas v Sidiropoulos (No 2)* [2009] NSWCA 197 at [97]–[98], Young J emphasised the need for the deponent to 'appreciate the solemnity of what he or she was doing' and cautioned against an 'over-casual approach' to oaths.

In *Re a Barrister and Solicitor* (1984) 73 FLR 79 at 86, the Full Federal Court found that disciplinary action against a solicitor was warranted because of 'his misconception of the solemnity associated with the swearing of affidavits and a general lack of understanding of the duties of a Solicitor and a justice of the peace in this respect'.

Ensuring witness understands the evidence

The attesting witness should take proper steps to ensure that the deponent understands what is in an affidavit and their duty to be frank and truthful in the evidence it contains. In *Bourke v Davis* (1889) 44 Ch D 110 witnesses gave evidence in the witness box that differed substantially from evidence in their affidavits. The oaths had been administered by commissioners independent of the solicitors in the cause (consistent with the practice at that time). Kay J specifically enquired into how the oaths had been administered. Kay J deprecated the commissioner's failure to take any steps to 'ascertain whether the witnesses knew to what they were swearing'. His Honour went on to state (at 126):

> The commissioner's duty before he administers the oath is to satisfy himself that the witness does thoroughly understand what he is going to swear to; and he should not be satisfied on this point by anyone but the witness himself. ...
>
> Where, as in this case, many of the witnesses are in a humble position of life, I do not see how the commissioner can be satisfied without having the affidavits read over in his presence.

> If an educated man says to him, 'I have read over this affidavit, to the truth of which I am going to swear, and all the statements in it are accurate,' that may in some cases be sufficient. But I confess I wish that it was made incumbent upon the commissioner in every case to go through the affidavit with the witness, and to refuse to take his oath until he was satisfied that the witness understood and intended every statement in it. A great deal of false swearing would be prevented if this were done.

The solicitor should also assist the deponent to ensure that they fully understand and agree with the language and meaning of the affidavit. In this regard, an attempt to 'polish up' a deponent's testimony may have adverse consequences for a party's case. For example, in *Byrnes v Jokona Pty Ltd* [2002] FCA 41 at [14], repetitively similar language used in various affidavits led Allsop J (as his Honour then was) to consider that 'some lack of attention' had been paid 'to the seriousness of the task of giving evidence by affidavit'. His Honour observed:

> The preparation of written evidence that reflects the honestly held recollection of individuals, assisted by sensibly ordered and presented documentary and other background material, is a difficult task and one requiring experience and skill. However, I approach the majority of the affidavit material prepared on behalf of the applicants in this case with great caution.

More formal requirements apply in the case of a blind or illiterate witness. Under rule 29.04 of the FCR 2011, the witness must certify that the affidavit was read to the deponent in the presence of the witness.

Taking appropriate steps to ensure affidavit is accurate and complete

This may be the most complex of the duties that a solicitor must discharge. There are more aspects to this duty than can be simply captured in summary form, but they include the duties set out below.

Taking proper steps to ensure complete truths: The evidence given in an affidavit should be frank and complete. In *In re Thom* (1918) 18 SR (NSW) 70 the court described as 'reprehensible' a solicitor's involvement in preparing an affidavit that, though not literally false, created a misleading impression. The Chief Justice (with whom Gordon and Ferguson JJ agreed) stated (at 74–5):

> It is of the greatest importance that any mere casuistry in the presentation of evidence should be strictly avoided by those entrusted with the responsible duties of a legal practitioner. It is perhaps easy to reconcile one's mind to a statement that is in fact misleading by considering that the deponent is not under any obligation to make a complete disclosure. By this means a practitioner may be led into presenting a statement of fact which, although it may not be capable of being pronounced directly untrue in one particular or another, still presents a body of evidence that is misleading, and conceals from the mind of the tribunal the true state of facts which the deponent is professing to place before it. For that reason it is proper on such an occasion as this to express condemnation of any such casuistical paltering with the exact truth of the case.

Likewise, in *ERS Engines* a liquidator's assistant had omitted significant relevant information from an affidavit. Young J stated:

> It is completely unacceptable for a solicitor to prepare an affidavit in which a witness gives a half truth and it is completely unacceptable for a witness, especially an employee of an officer of the court, to only give the court a half truth. In the instant case the position was that the liquidator's officers were suspicious that the steam cleaner might belong to the company. There was no evidence in the company's records one way or the other to prove or disprove this. There was no reason why the liquidator's assistant could not have told me this.[44]

Except perhaps where an experienced witness is dealing with a simple topic, telling a witness of their duty to be completely accurate is likely to be only a beginning, not

44 *ERS Engines Pty Ltd v Wilson* (1994) 35 NSWLR 193 at 197.

an end. It may well be necessary to probe, clarify, test, contextualise and develop in conference with the witness precisely what they are, and are not, saying.

The way in which this duty is to be discharged in an affidavit of discovery was described by Lord Wright in *Myers v Elman* in this way (at 321–2):

> The order of discovery requires the client to give information in writing and on oath of all documents which are or have been in his corporeal possession or power, whether he is bound to produce them or not. A client cannot be expected to realize the whole scope of that obligation without the aid and advice of his solicitor, who therefore has a peculiar duty in these matters as an officer of the Court carefully to investigate the position and as far as possible see that the order is complied with. A client left to himself could not know what is relevant, nor is he likely to realize that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case. The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to.

Correcting errors or untruths: A closely related duty is the duty to correct any erroneous statement in an affidavit or otherwise withdraw from acting. This obligation is expressed in most professional conduct rules[45] and was clearly stated in *Myers v Elman* in the passage quoted above. It was also set out in the following terms by Viscount Maugham in *Myers v Elman* (at 293–4):

> [S]uppose that the solicitor has previously given his client full and proper advice in the matter but has no good reason to suppose that the affidavit is untrue, it may be asked what else ought the most punctilious solicitor to do? My answer is nothing at that time. But suppose that, before the action comes on for trial, facts come to the knowledge of the solicitor which show clearly that the original affidavit by his client as defendant was untrue and that important documents were omitted from it, what then is the duty of the solicitor? I cannot doubt that his duty to the plaintiff, and to the Court, is to inform his client that he, the solicitor, must inform the plaintiff's solicitor of the omitted documents, and if this course is not assented to he must cease to act for the client. He cannot honestly contemplate the plaintiff failing in the action owing to his client's false affidavit. That would, in effect, be to connive in a fraud and to defeat the ends of justice. A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false owes it to the Court to put the matter right at the earliest date if he continues to act as solicitor upon the record.

As *Myers v Elman* indicates, a solicitor will be responsible for any action of an 'agent' that leads to an affidavit containing significant errors, untruths or half-truths, even if the solicitor on the record was personally 'innocent'. Accordingly, from the professional duty perspective, a failure by the agent to have done the necessary probing, testing, checking and clarifying will be the failure of the solicitor on the record.

Avoiding the colouring of the affidavit through leading: This duty includes preparing the affidavits in a way that does not involve leading the witness or suggesting to them what their evidence should be or what evidence would best assist the case. The risks to the accuracy of evidence from leading are notorious and find expression in professional conduct rules,[46] the rules of evidence[47] and case law about 'coaching'.[48]

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45 See eg ASCR, r 20.1.

46 See eg ASCR, r 24.

47 See eg *Evidence Act 1995*, s 37.

48 See eg *Majinski v Western Australia* (2013) 226 A Crim R 552 and the cases there referred to.

Avoiding the colouring of the affidavit through 'conferencing': Under this duty a solicitor must avoid putting to the deponent the evidence to be given by other witnesses or jointly 'conferencing' witnesses in a way that could be later said to have coloured the deponent's recollection or account. Again, this requirement is addressed in conduct rules (for example, the Australian Solicitors Conduct Rules (ASCR), r 25). 'Conferencing' has led to strong criticism and a referral to a professional body for consideration of possible disciplinary complaints.[49]

Taking reasonable steps to ensure that affidavits do not cause waste of cost and resources: In preparing affidavits, solicitors have a duty to ensure that they do not lead to a waste of time and resources. That duty arises under court rules, professional rules, model litigant obligations and the like (as described earlier in this briefing).

Very obvious ways in which these duties can be breached include:

- failure to ensure compliance with the rules of evidence[50]
- failure to avoid unnecessary argumentativeness, prolixity and so on.[51]

'In preparing affidavits, solicitors have a duty to ensure that they do not lead to a waste of time and resources.'

An obvious risk is where an affidavit needs to be withdrawn or significantly corrected late in the piece. This may lead to the need for the other side to put on further evidence, the need for further discovery and subpoenas and the vacation of hearing dates. If the correction concerns a matter that would have been readily identified and addressed if the solicitor on the record had properly engaged with the witness in the first place, it may be difficult for that solicitor to explain a failure to have done this.

An obligation to speak directly to a witness: There does not appear to be a simple statement or rule as to whether or when it may be possible for a solicitor on the record to have fully discharged all their duties concerning an affidavit without ever having spoken directly to the deponent.

There is no unqualified affirmative rule to the effect that the solicitor on the record must, in every case, deal directly with each witness who files an affidavit. It is doubtful that such a rule would accommodate the huge variety of situations thrown up by the nature of the case at hand, the nature of the particular evidence, the personal and professional attributes/circumstances of particular deponents, the significance of the evidence, the processes in place for drafting the affidavit, the process for swearing the affidavit, logistical and geographical issues, time constraints and so on.

For instance, it may be possible in a given case to discharge the obligations without having directly communicated with the witness if that witness is a highly experienced expert witness giving a simple affidavit on an uncontroversial matter. Similarly, process servers regularly produce affidavits of service without personal dealings between them and the solicitor on the record.

However, it can readily be seen from the matters described above that there may be significant difficulties in practice in trying to discharge the various duties without directly engaging with the witness (consider, for example, the need to avoid leading and conferencing, the need to avoid half-truths and the need to ensure a proper appreciation of the oath). Therefore, in the great majority of cases it will simplest and safest for solicitors to perform their role through direct dealings with the deponent.

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49 See for example *Day v Perisher Blue Pty Ltd (No 2)* [2005] NSWCA 125.

50 See *Kinda Kapers Charlestown v Newcastle Neptunes Underwater Club* [2007] NSWSC 329 and *Karwala v Skrzypczak Re Estate of Ratajczak* [2007] NSWSC 931).

51 See *Thomas & Ors v SMP (International) Pty Ltd & Ors* [2010] NSWSC 822.

Duties when making serious allegations

Serious allegations of impropriety, fraud, criminality and the like must be 'clearly alleged and proved' and the circumstances in which they will be found are 'rare and extreme.[52] The burdens on lawyers who advance these sorts of allegations are well known. Solicitors and counsel must exercise 'the most scrupulous care' when making these allegations. In particular, there has been longstanding approval for the following statements of Lord Macmillan:

> For an advocate to allow such charges to be launched with this name attached to them without the fullest investigation would be to abuse the absolute protection against actions for slander which the law affords to counsel. Counsel is not worthy of that protection unless he justifies it by the most scrupulous care in his written or oral attacks on character. He must insist upon being supplied with all the information which is thought by his client to justify the attack, and then he must decide for himself whether the charges made are such as can justifiably be made.[53]

'It is not uncommon for government agencies to need to make allegations of a serious kind.'

A particularly serious example of a breach of this duty was that considered by the High Court in *Clyne v The NSW Bar Association* (1960) 104 CLR 186. There the appellant barrister was found to have been properly struck off the roll for deliberately making the most serious allegations against an opposing solicitor without any basis for doing so.

These obligations are reinforced by relevant professional rules (for example, ASCR, r 21). They are also reinforced by the requirement in r 16.01 of the FCR 2011 that pleadings prepared by a lawyer certify that the factual and legal material available to the lawyer provides a 'proper basis' for each allegation in the pleading.

It is not uncommon for government agencies to need to make allegations of a serious kind. For example, in a civil penalty case these sorts of allegations are not only common but also positively necessary to prove a case. Very often the making of a civil penalty allegation will equate also to a suggestion that a parallel criminal offence provision has been breached.

Again, while any solicitor involved in making serious allegations must ensure that there is a proper basis to do so, the court will look to the solicitor on the record if issues of these kinds arise. The 'scrupulous care' required is likely to involve more in a particular case than merely accepting instructions as to proposed evidence or affidavits.

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52 See *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749 at [43]–[44].

53 See *Oldfield v Keogh* (1941) 41 SR (NSW) 206 at 210–11 per Jordan CJ (with whom Halse, Rogers and Street JJ agreed); *Perkins Maritime International Pty Ltd v Commonwealth Bank* (1991) 105 FLR 216 at 220; and *Rajski v Bainton* (1990) 22 NSWLR 125 at 135–7 per Mahoney JA (with the agreement of Samuels and Handley JJA at 127), which reasoning was followed in *Pharm-a-Care Laboratories Pty Ltd v Commonwealth (No 3)* (2010) 267 ALR 494 at [68].

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ISSN 1448-4803 (Print)

ISSN 2204-6283 (Online)

Approved Postage PP 233744/00042

Client Services 166–2015 07/15