Lawyer as Collaborator in Due Process

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Lawyers are increasingly required to assist in the administration of justice

In an era when the "just, quick and cheap resolution of the real issues" in legal proceedings has been given a statutory imprimatur in several Australian jurisdictions, [1] and in which judges are conferred (and expected to exercise) enhanced case management powers to expedite and reduce the cost of litigation, lawyers clearly have a role – an important role – in fostering these aims. If there was any doubt in this regard, the greater willingness nowadays of courts to, inter alia, make personal costs orders against lawyers who engage in abuses of court processes [2] should serve as a reminder.

Of course, it should not be assumed that members of the legal profession have been the culprits in "drawing out" litigation for their own benefit. That many litigation lawyers charge on an hourly basis and so arguably have no vested interest in accelerating the conclusion of proceedings, does not mean that the profession generally has been guilty, for its own benefit, of fostering litigation. The low percentage of litigation that results in court adjudication is testament to this. But in other instances, the lawyer may feel justified, indeed compelled, to pursue litigation to its end because the client, so as to vindicate his or her position, instructs the lawyer to do so. Coupled with the tenets inherent in the adversary process – in which lawyers have the responsibility to protect and further the interests of their own clients, not clients of an opponent – there are clearly structural impediments to the curbing of litigation and its costs.

Lawyers are, to this end, expected to have a moderating influence on their clients. The environment in modern times is less sympathetic to lawyers fostering their clients' interests, or whims, at the expense of due process. What amounts to proper professional conduct may have undergone a shift in this regard. For instance, whereas taking advantage of, and indeed fostering, an opposing lawyer's error may once have been seen as a badge of legal astuteness and one-upmanship, it can now produce professional disciplinary consequences. [3]

But the consequences of failing to cooperate with an opposing lawyer, [4] even if the latter has made a mistake in some circumstances, may generate adverse *legal* consequences. Three examples suffice to illustrate the point.

- Although lawyers are entitled to insist on compliance with the rules of procedure, they should not unreasonably refuse extensions of time that will only cause undue delay and expense. In *St George Bank Ltd v O'Reilly* [5], default judgement was entered against the defendant, although the defendant's solicitor had, in the meantime, sought

particulars, complained that the particulars supplied were inadequate and requested an extension of time. Higgins J set aside the default judgement, reasoning that the plaintiff's solicitors should not have denied an apparently reasonable request for particulars or ignored the defendant's solicitor's request for an extension of time, as this was contrary to the usual expectation that the latter solicitor was entitled to entertain. As the plaintiff's solicitors had occasioned an unnecessary application to set aside the judgement, the plaintiff was ordered to pay the defendant's costs.

- Where an error is obvious on the face of a document and its correction at a later stage in the proceedings would only add to the duration and cost of the proceedings rather than alter their course, the opposing lawyer's failure to correct that error is unprofessional. Again, a breach of this duty can generate adverse costs consequences. In *Green v Schneller* [6], Simpson J, though accepting that it is not the function of a party's lawyers to draw the attention of the opposing lawyers to an obstacle in their path in pursuit of an application, opined that where lawyers "keep to themselves an obvious and deadly point, they run the risk that costs will not be awarded in their favour".

- A lawyer who is sent a privileged document from the opposing lawyers by mistake should not read the document and instead immediately return it to the sender. Not only have attempts to argue that privilege has been waived in such circumstances infrequently succeeded, it is open to the court to disqualify the lawyer from acting for the client on the ground that the lawyer could otherwise use the privileged communications for the client's benefit. [7]

Although the above illustrations focus on lawyers retained to conduct contentious work, the same attitude should surface in non-contentious work. Failing to take advantage of an opponent's mistake in a transaction is, for instance, not necessarily negligent. At least where the likely consequences of fostering the mistake could lead to litigation and to allegations of sharp practice, the lawyer may make a judgement call to decline to exploit the situation. [8]

In conclusion, it is salient to remember that, by becoming increasingly viewed as collaborators in the administration of justice, this cannot but impact on professional standards expected of lawyers.

Notes

1. See *Federal Court of Australia Act 1976* (Cth) s37M; *Civil Procedure Act 2005* (NSW) s56(1); *Family Law Rules 2004* (Cth) r1.07; *Court Procedures Rules 2006* (ACT) r21; *Uniform Civil Procedure Rules 1999* (Qld) r5.
2. See GE Dal Pont, *Law of Costs*, 2nd edn, LexisNexis Butterworths, 2009, Ch 23.
3. See, for example, *Chamberlain v Law Society of the Australian Capital Territory* [1993] 43 FCR 148.
4. More so if the opponent is not legally represented, where the courts have displayed a more yielding approach to the litigant: see Dal Pont GE, *Riley Solicitors Manual*, LexisNexis Butterworths, [27,085] (Riley).
5. *St George Bank Ltd v O'Reilly* [1999] 150 FLR 27.
6. *Green v Schneller* [2003] NSWSC 202 at [32].
7. See Riley, *op cit.*, [10,160].
8. See, for example, *Tamlura NV v CMS Cameron McKenna* [2009] EWHC 538 (Ch) at [168] per Mann J.

Three New Magistrates in May

Attorney-General Christian Porter announced in May the appointments of Michael King, Jennifer Hawkins and Kevin Tavener as magistrates of the Magistrates Court of Western Australia. The appointments come after the recent retirement of magistrate Peter Michelides and to fill two vacancies that will arise when magistrates Jeremy Packington and Robert Black retire in July.

Having served as a magistrate in Western Australia between 2000 and 2007, Dr King has experience in regional courts as well as the Drug Court of WA. In 2007, Dr King moved to Melbourne, where he took an academic post as a lecturer in the Law School at Monash University.

Ms Hawkins was admitted into practice as a barrister and solicitor of the Supreme Court in 1986. Her 23 years of experience has seen her work as a solicitor of the Crown Law Department; a legal registrar of the former Workers' Compensation Board; a partner of various law firms for nearly 10 years and, for the past four years, a full-time member of the State Administrative Tribunal.

With an extensive legal background, Mr Tavener worked as a senior Crown prosecutor with the WA office of the DPP between 1993 and 2005, before commencing practice as a barrister at John Toohey Chambers until 2008. Between 2004 and 2006, he took time out as a senior trial attorney for the United Nations in Sierra Leone, where he was responsible for conducting war crime prosecutions as lead counsel.

Mr Tavener will commence his post on 24 May and Dr King and Ms Hawkins will both commence on 26 July.