Ethical settlement negotiation

By David Higgs SC

> A barrister should not deploy or rely upon expert reports at a mediation which are known to contain incorrect assumptions in respect of material facts.
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> A barrister is duty bound to both protect his/her client's secret *but '...not knowingly make a false statement to [an] opponent in relation to [a] case (including its compromise).'* [Barristers' Rule 51]

At the same time, our legal system is adversarial. There is no general common law duty of care owed by counsel to opposing parties.[1] Parties in arms length commercial negotiations are assumed to have conflicting interests. Generally there is no obligation for one party to reveal to the other information of which they are aware, which, if known to the other might cause that party to take a different negotiation stance. Failure to do so would not, without more, ordinarily be regarded as dishonesty or even sharp practice[2]:

> Rule 51 does not mandate full disclosure. Rather, it forbids 'false statements.'
>
> Silence or concealment can be 'a false statement' within the meaning of Rule 51.

Misrepresentation by silence or concealment can be problematic as discussed by Bowen CJ[3] where His Honour said:

> Dealing with the question of misrepresentation constituted by silence, there are cases which show, for example, that an omission to mention a qualification, in the absence of which some absolute statement made is rendered misleading, is conduct which should be regarded as misleading. So too is the omission to mention a *subsequent change* which has occurred after some statement which is correct at the time has been made where the result of the change is to render the statement incorrect so that thereafter it becomes misleading. This also may be regarded as constituting misleading conduct. However, the general position between contracting parties has been expressed in the following way:
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> The general rule, both of law and equity, in respect to concealment is that mere silence with regard to a material fact, which *there is no legal obligation to divulge*, will not avoid a contract, although it operates as an injury to the party from whom it is concealed.
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> ...Under the general law it is important to consider whether there is a legal obligation to divulge. There are particular relationships which have been held to raise an obligation of disclosure...However, the court will not be restricted to cases where such a relationship has already been held to exist at common law or in equity. The court is likely to be faced with situations under s 52 (Trade Practices Act) between particular parties, where it will feel bound to hold that such an *obligation to disclose arises from the circumstances*. (emphasis added)

In *Legal Services Commissioner v Mullins* [2006] LPT 012, Mr Mullins, barrister, acted for a plaintiff who became a quadriplegic as a result of a motor vehicle accident in April 2001. Before the tribunal he was found guilty of professional misconduct described in the judgment as:

> [31] ... [the] fraudulent deception [he practised on the defendant's counsel and insurer which] involved such a substantial departure from the standard of conduct to be expected of legal practitioners of good repute and competency as to amount to professional misconduct.

This 'fraudulent deception' was the barrister's 'silence' leading up to and during mediation on 19 September 2003. In preparation, Mr Mullins conferred with his client on 16 September so as to draft an outline of damages. The plaintiff in conference revealed he was receiving chemotherapy for lung cancer which had only been diagnosed on about 1 September. This cancer was unrelated to the motor vehicle accident. Previously reports had been obtained through Evidex Pty Limited ('Evidex') including an occupational therapist's and accountant's evaluation of the respective care and cost of that care. Those calculations were based on a medical report which assessed a reduction in the plaintiff's life expectancy of 20 per cent.

This 'fraudulent deception' was the barrister's 'silence' leading up to and during the mediation on 19 September 2003...The silence positively misled the defendant and its counsel about life expectancy.

Soon after this conference, Mr Mullins gave the defendant's barrister the outline. At the time he knew the life expectancy assumption in the Evidex reports of 80 per cent normal life expectancy was very probably no longer sound. Nonetheless, he never disclaimed this assumption. Instead, in negotiations he asked the defendant's counsel to have regard to the Evidex reports stating that:

> The claim for future care set out in the [Outline] was very reasonable; and
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> the claim for future economic loss was based on the [Evidex] report'.

As Mr Mullins knew and intended, the defendant's counsel communicated the substance of that telephone representation to his client/insurer.

The problem of disclosure was discussed between Mr Mullins and his client. The client's instructions were that information about his cancer should not be disclosed unless he was 'legally obliged to

do so'.

The silence positively misled the defendant and its counsel about life expectancy.

Context or circumstances influence the extent of legal and equitable obligations of disclosure.

The relevant context here is, firstly the mediation (ancillary to the curial process) and, secondly, the current standards of conduct expected of counsel of good repute and competency.

It did not matter that the uncorrected material advanced by the barrister was a mere assumption rather than evidence of a primary fact. Nor did it matter that the representation when made originally was correct. By the time this material was deployed by the barrister at mediation, it was known to be untrue.

The overarching consideration is probably the proper administration of justice. The current standards expected of counsel are ancillary. Otherwise it may be that clients in these circumstances should be advised to represent themselves at mediation. Such a result is counterintuitive as it would defeat the promotion of the administration of justice by encouraging legal representation.

In any event, the most significant circumstance or context giving rise to the obligation of disclosure is the negotiation involving representations about sworn evidence to be adduced in court. A representation about intended sworn evidence is no trifling matter. It is more than a mere commercial negotiation. To suggest otherwise is contemptuous of the curial process. The natural expectation is for parties to be honest about any representation concerning sworn evidence they intend to adduce. A duty to disclose usually only arises where there exist facts, the non disclosure of which would effectively misrepresent material aspects of the negotiation – such as anything which has taken place that was 'not naturally to be expected in the transaction.' Put another way – '…[t]he necessity for disclosure only goes to the extent of requiring it where there are some unusual features in the particular case relating to the particular…[circumstances].'[4]

The natural expectation is that if a topic is dealt with in a statement intended to be adduced as evidence, all aspects of that topic have been disclosed. Otherwise it is a half-truth and thus misleading. It is the duty of a legal representative to avoid any such half-truths in any proposed statement. In the event of legal representation, such circumstances would not only give rise to a natural expectation but also a duty of full disclosure. For example, in personal injury litigation, one cannot rely on reports of a doctor in situations where the reports are selectively served. Either all reports (both good and bad) are served or none at all.

The barrister, Mr Mullins knew the previously correct assumption of life expectancy no longer applied. He intended for the defendant's counsel and the defendant to be influenced by it – which happened.

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At the heart of the barrister's misconduct was his use of material he knew to be false. The problem for him would have been avoided if he expressly withdrew these reports (containing the incorrect assumption as to life expectancy) or refrained from referring to or relying on them. From a practical point of view it is difficult to imagine how he could have avoided referral or implied reliance on these reports without expressly withdrawing them.

Also, he should have so advised the client. If the client refused to follow this advice, he would have been duty-bound to return the brief.

Endnotes

1. *Orchard v South Eastern Electricity Board* [1987] 1 QB 565.
2. *Lam v Austintel Investments Australia Pty Limited* (1989) 97 FLR 458 at 475.
3. *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Limited* (1986) 12 FCR 477 at 480-490.
4. *Westpac Banking Corporation v Robertson* (1993) 30 NSWLR 668 at 687-8.