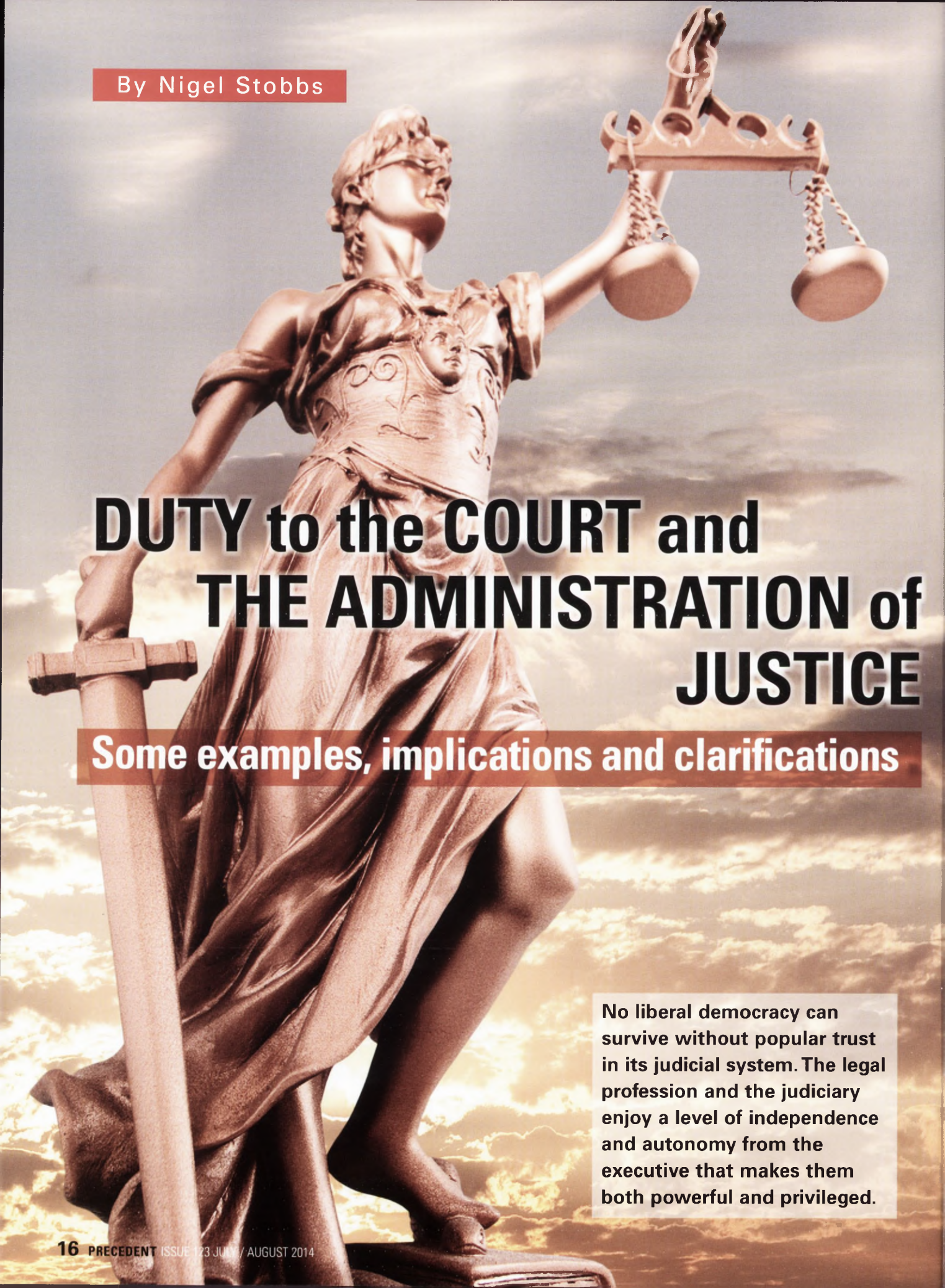
By Nigel Stobbs



DUTY to the COURT and THE ADMINISTRATION of JUSTICE

Some examples, implications and clarifications

No liberal democracy can survive without popular trust in its judicial system. The legal profession and the judiciary enjoy a level of independence and autonomy from the executive that makes them both powerful and privileged.

A UNIQUE AND ORGANIC DUTY

So long as the courts are seen to fulfil their duty to guard against encroachments by the executive on the freedoms and rights of individual citizens with integrity and credibility, they maintain enough public support to retain their normative authority. But support for those with power and privilege is easily undermined. It is contingent upon trust. Lawyers who breach that trust in ways that go to the heart of the legal system ought to expect to be made examples of and to suffer severe penalties.

The good news is that the sorts of breach discussed here should be neither difficult to anticipate nor to avoid – in theory. In practice, smart and honest lawyers sometimes fall foul of these duties for all sorts of understandable (if not condonable) reasons. Law does not get practised in a social or cultural vacuum. Lawyers are people, and people have weaknesses, failings and stresses.

What is commonly referred to as the '*duty to the court and to the administration of justice*' is actually a cluster of duties. They are of ancient heritage, but liable to change and expand at any time, by decree of the court. The general duty, long recognised at common law, is now entrenched in the relevant professional rules of the *Australian Solicitors Conduct Rules* (ASCR) and associated instruments.[1] It is relatively rare, however, to see clear or thorough statements of the various duties making up the more general duty or to find full agreement on when they have been breached. Justice David Ipp, writing extra-judicially, has classified the various duties comprising what we refer to as the 'duty to court and to the administration of justice' into four broad, but useful, categories:

(a) a general duty of disclosure owed to the court;
(b) a general duty not to abuse the court's process;
(c) a general duty not to corrupt the administration of justice; and
(d) a general duty to conduct cases efficiently and expeditiously.[2]

What makes this cluster of duties special is that they are not a product of the fiduciary relationship between lawyer and client, not owed to any particular individual, and yet are ultimately for the public benefit. The duty arises out of the compact between the court and citizens, by which citizens surrender their right to personally pursue those who wrong them and the court promises to independently and impartially adjudicate disputes between citizens and between citizens and the state. This compact is at the heart of the rule of law. As agents (or officers) of the court, lawyers are individually and collectively responsible for the integrity of the system in which they work. This is a duty that has no equivalent in other professions.[3] It is individual and cannot be delegated.[4] Neither ignorance of the nature and scope of the duty, nor inexperience as a lawyer will excuse a breach.[5] The duty is, in fact, imposed by law[6] (rather than arising from ethical principles), although breaches may well result in both legal and professional sanctions.[7]

LAWYERS AS 'OFFICERS' OF THE COURT

Lawyers are officers of all those courts that recognise their admission to practise. They only cease to become such officers when they die or when their name is removed from the roll in the court which admitted them.[8] Most lawyers will readily assert and recognise that they owe a paramount duty to the court, and to the administration of justice, but not all have a clear idea of the nature and extent of that duty, or of the ways in which it can arise in practice. They may have learned the mantra about a 'paramount duty' at law school and even be familiar with the legislation and rules that prescribe the duty,[9] but this particular duty really requires lawyers to have a personal commitment to the reputation of the legal system. In short, it requires us to show some moral strength.

Although the key elements of the duty are generally stable over time, the ways in which it can apply are organic and change in response to social and technological changes. For example, the potential to be perceived as engaging in disreputable conduct and bringing the profession into disrepute has become significantly greater with the advent of social media.[10]

Some of the potential ethical issues that can arise are not always obvious. Nevertheless, most disciplinary proceedings for breaches of the duty owed to the court and the administration of justice don't involve any subtle conflict at all. They tend to involve conduct which would probably strike a lay person as clearly dishonest or morally unacceptable. Either this isn't always as obvious to the practitioner, or (more likely) an excess of zeal clouds their mind to the fact that their paramount duty may well require them to act in ways that are clearly to the detriment of their client. Another possibility is that, at a critical moment, they lack the moral strength to subjugate their own self-interest to the interests of the system in which they work. Whatever the explanation (or purported excuse) for such breaches, though, the High Court has reminded us in *Gianarelli*[11] that the proper administration of justice requires the court to have complete faith in lawyers and their commitment to resolve any perceived conflict with other duties in favour of their duty to the court.[12]

HONEST AND CANDID ADVERSARIES

The commercial reality is that lawyers who achieve good outcomes for their clients get repeat business. Lawyers are (arguably at least) ethically required to be tenacious in defending and promoting their clients' interests[13] and sometimes to go to, what the lay person might think are extraordinary lengths to protect their clients' confidentiality. One expectation of officers of the court is that they act with frankness, candour and honesty in their dealings with the judiciary and other members of the profession. The temptation to 'push the envelope' in pursuing the best outcome for the client, demonstrating what judges like to refer to as 'excessive zeal' can, however, derail this duty.

In *Mullins*,[14] the Queensland Legal Practice Tribunal considered the conduct of counsel acting for a client who sustained personal injuries (resulting in quadriplegia) as a result of a motor vehicle accident. Counsel provided the respondent insurer with a forensic accountant's report >>

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prepared by Evidex, which assessed the client's future earning capacity to age 65 years, but for the injury, at $934,178. He provided other Evidex reports that the client's life expectancy was reduced by 20 per cent and that he would have continued to work in his trade as a builder until retirement. A mediation was arranged with counsel acting for the insurer. At this stage no court proceeding had been commenced, as the claim was progressing under the *Motor Accident Insurance Act* 1994 (*MAIA*). At a meeting of the plaintiff and his legal team held to settle a schedule of damages, a few days before the mediation, the client revealed to the lawyers that he had been diagnosed with cancer, including secondary cancers at various places in his body. Counsel's preliminary view was that this diagnosis must be disclosed to the other side before the mediation, but the client was adamant that he did not want to disclose this information unless he was legally required to do.

Counsel then prepared a written advice that the client wasn't obliged at law to disclose the diagnosis within one month, and that he could still represent the client at the mediation provided they did not 'positively mislead' the insurer. The advice did not advise on how this reconciled with the fact that the other side had already been given a report stating that there was no impediment (unrelated to the accident) to the client's life expectancy.

The Tribunal found that this conduct constituted professional misconduct, and ordered that the barrister be publicly reprimanded, pay a penalty of $20,000 and pay costs. The instructing solicitor was bound to act in accordance with paragraph 4.08 of the *Solicitors Handbook*[15] which prescribed that 'a practitioner shall not attempt to further the client's case by unfair or dishonest means'. In disciplinary proceedings against the solicitor, he sought to mitigate his complicity in the impugned conduct by claiming that he was simply relying on the barrister's view.[16]

The Tribunal acknowledged that an instructing solicitor could reasonably rely on counsel's advice in some contexts, but the circumstances of this mediation clearly showed that the solicitor had not been merely a passive recipient of advice, but had brought his own legal knowledge, skill and experience to his consideration of it.[17] The tone of the judgment indicated that the Tribunal found it somewhat mystifying that the lawyers could have believed their conduct, in knowingly allowing their colleagues to be misled, to be ethical.

THE DUTY EXTENDS TO WORK BEYOND LITIGATION

The *Mullins* matter also reminds us that the duty to the court and honesty extends to professional work outside of litigation.[18] Indeed, in our capacity as officers of the court it even extends to our conduct outside our professional lives.[19] Legal practice is becoming increasingly diverse and the skills required of a lawyer are evolving and changing. What constitutes 'legal work' is sometimes a matter of opinion, and the question inevitably arises as to which of the many professional and commercial activities in which lawyers are involved are caught by the duty to the court.[20] Justice Byrne in *Mullins* was concerned to emphasise the public perception and confidence dimension of the duty; that if a member of the public would think that the conduct was improper, whatever the nature of the work involved, then that needs to give pause to practitioners. In the case of mediations, one thorough analysis of the *Mullins* matter concludes that 'currently in Australia, legal representatives owe exactly the same duties of honesty and candour in mediation as they owe in litigation before a court of law'.[21]

Australian jurisdictions now allow for the incorporation of law firms and for multi-disciplinary partnerships, making the legal services market more complex and diverse. Yet when it comes to the tension between business and ethics, most of the ethical problems that come to the attention of the courts and disciplinary bodies still seem to involve fairly obvious breaches, related to obvious conflicts. Dishonest or improper conduct in the way in which practitioners do business with third parties can clearly be construed as breaches of duty to the administration of justice. If not dealt with in decisive and timely ways, the potential for the erosion of confidence in the profession and the legal system is significant.[22] Practitioners are not expected to meet the same sort of fiduciary standard in business dealings with third parties as they do with their clients.[23] However, dishonest or suspect business practices that fall short of actual fraud or misrepresentation can be just as damaging to the way in which the community views the legal system, and so the standards expected in those relationships is still high.[24]

In *Narayanasamy*,[25] a solicitor was found guilty of professional misconduct in that he failed to pay a third party debt in relation to payments for services (and a judgment debt) for property searches and inspections. In responding to the allegations, the solicitor drafted written pleadings and made oral submissions to the effect that he held the honest but mistaken belief that his clients were to pay the service provider directly. He also claimed that a disgruntled employee deliberately induced this mistaken belief by failing to include the third party's invoice as a disbursement when issuing the firm's tax invoices. Another self-serving assertion was that cheques which had been dishonoured when presented by the third party had been issued by an employee of the firm who had authority to operate the relevant account without reference to available funds. The Law Society had said that this suite of assertions 'defies logic' and the Tribunal's view was that 'the bona fides of that defence is

questionable'. The Tribunal, in classifying this breach as professional misconduct, held that this level of misconduct fell squarely within the parameters of *Allinson's* case;[26] namely, conduct which 'would be reasonably regarded as disgraceful and dishonourable' by 'professional brethren of good repute and competency' in that the solicitor 'has without reason or excuse failed or neglected to satisfy the debt'. He was publicly reprimanded and subject to a costs order.

THE OBLIGATION TO ENSURE COSTS ARE REASONABLE AND PROPORTIONATE

In 1994, a Victorian trial judge lamented that there had developed 'an alarming culture at the Victorian Bar, which dictates to those afflicted with it, that there is no such thing as a case which is too long or too costly... no issue too small to be explored at excruciating length... and that concessions or admissions must never be made...' His Honour predicted that 'this culture will destroy our trial system sooner than later unless steps are taken to stop it'.[27] Referring to this and similar matters, the Victorian Court of Criminal Appeal declared: 'Let it be understood henceforth, without qualification, that it is the responsibility of counsel to cooperate with the court and with each other...[to not overly prolong litigation].'[28] The court added that the survival of the court itself was under threat and that although counsel was possessed of duty and privilege, neither of these would survive the death of the trial system.

The Victorian Parliament enacted the *Civil Procedure Act* 2010 (Vic) to (in part) 'cure unnecessary expenditure on litigation and the inappropriate use of the courts' which the Attorney-General noted as 'a matter that has been highlighted in several recent decisions'.[29] Ought we to be surprised that 16 years after those dire predictions of the Court of Criminal Appeal, that this abuse of court processes was still a major concern? If the 'alarming culture' of over-servicing had not been remedied after all those years, perhaps this was because the sort of personal commitment to the reputation of the legal system, described above as being required of officers of the court, was not common enough. That is at least arguable in my view.

This rather cynical view might explain why we are not particularly surprised to encounter continuing consternation expressed by the court, such as that in the recent matter of *Yara Australia Pty Ltd v Oswal.*[30]

In *Yara*, the Victorian Court of Appeal refused an application for leave to appeal a decision in which a single judge had set aside the order of an Associate Justice for security for costs. The Court took the unusual step of 'requesting' the parties to address the question of whether in the conduct of the leave application there had been a breach by any party of its overarching obligation pursuant to s24(a) and (b) of the *Civil Procedure Act* 2010 to use reasonable endeavours to ensure that the costs incurred in the proceeding were reasonable and proportionate to the complexity and importance of the issues and the sums in dispute.

This request arose in the context of hearing of the application for leave to appeal being dealt with in a single day, with appearances by five senior counsel, six junior counsel and five firms of instructing solicitors representing the parties[31] (the Court noting that at the security for costs hearings there had been a very similar level of representation). The Court also noted the fact that in addition to the notices of appeal and the parties' written submissions, they had between them filed as their application books six lever arch folders of material.

At [52] the Court noted that it was 'burdened with excessive material' and that the applicants and the respondents were burdened with the costs of that material. The Court found that there had been a 'breach of the overarching obligation to ensure the costs are reasonable and proportionate by including in the application books voluminous material that was extraneous or repetitious and excessive.' The court proclaimed its strong intention to 'hold parties to account for undesirable civil litigation practices that are unfortunately too common.'[32]

CONCLUSION: *LEX VITAE LEX* AND 'STUPID MOMENTS OF MADNESS'

Lex vitae lex refers to those laws that apply to people who choose a life in the law. Given the overarching public interest element that informs the duty to the court, lawyers are always going to be under greater public scrutiny than other professions. We have seen how factors such as ignorance, inexperience, excessive zeal and perhaps excessive >>

self-interest can blind us to the paramountcy of our duty to the court. But those who depend on the law for a living need to be constantly aware that even a momentary lapse in judgement can have far-reaching professional consequences. In *Singh*,[33] a 56-year-old solicitor had practised as a lawyer in New Zealand, Fiji and Australia. The Queensland Law Society refused to renew his practising certificate in 2008 after discovering that he had been convicted in Fiji, in 2006, of attempting to pervert the course of justice, by attempting (on behalf of a client) to bribe a witness to change his evidence. He had initially resisted the criminal charge,[34] but eventually changed his plea to guilty, asserting that he had acted in a 'stupid moment of madness'. He served a six-month sentence extramurally upon conviction. The Legal Services Commissioner took the view that he was therefore not a fit and proper person to practice, and succeeded in having him struck off.[35] Singh variously argued that given his right to practice in Fiji had been renewed, that he had not reoffended or been subject to any other disciplinary proceedings, that a long period had elapsed since the original offence, and that he was continuing his legal studies, that striking off was an overly punitive response. If, indeed, he viewed his original transgression as a 'stupid moment of madness', then that moment had cost him dearly. But the potential erosion in public confidence in the profession, had he been allowed to continue in practice after such a 'moment', demonstrates the risk we take if we pursue a life in the law without making a requisite commitment to preserve the reputation of the court and of the profession. ■

This article has been peer-reviewed in line with standard academic practice.

Notes: **1** www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AustralianSolicitorsConductRules.pdf **2** David Ipp, 'Lawyers' Duties to the Court', (1998) 114 *Law Quarterly Review,* 64. **3** 'Our system of administering justice necessarily imposes upon those who practise advocacy, duties which have no analogies, and the system cannot dispense with their strict observance.' *Tuckiar* (1934) 52 CLR 335 per Gavan-Duffy CJ, Dixon, Evatt and McTiernan JJ at 346-7. **4** *Myers v Elman* [1940] AC 282, 302 per Lord Atkin. **5** *Milu v Smith* [2004] QSC 27. **6** Although the *Australian Solicitors Conduct Rules* has no legal status until adopted and enacted within a jurisdiction, it will carry both normative and statutory force when so adopted. This has been the case in Queensland, for example, where it is a statutory instrument pursuant to the *Legal Profession (Australian Solicitors Conduct Rules) Notice* 2012 (Qld). The duty is also relevant, of course, to members of the Bar. For example, pursuant to the *Legal Profession Act* 2007 (Qld) they are bound in that jurisdiction by their Duty to the Court (rr25-36) within the *2011 Barristers' Rule*. **7** Ipp asserts that courts have an inherent power and duty to supervise the conduct of those appearing before them and, as such, the courts themselves determine the nature of the duty, the occurrence of breach and the adequacy of sanctions. Above n2, 65. **8** See, for example, s38(1)-(30) of the *Legal Profession Act* 2007 (Qld). Similar statutory provisions apply in all other Australian jurisdictions. Given that admission to practise in a state or territory is required for practice in any court exercising federal jurisdiction, this status applies regardless of the court in which the lawyer appears – s55B *Judiciary Act* 1903 (Cth). **9** Rule 3.1 of the *Australian Solicitors' Conduct Rules* provides, for example: 'A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.' **10** A fairly recent consideration of the potential for social media to impact on legal professional ethics can be found in Sarah Vallance, 'Legal Dangers of Social Media' (2013) 117 *Precedent* 31. **11** *Gianarelli v Wraith* (1988) 165 CLR 543, per Wilson J at 572. **12** The High Court notes in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 at [26] that, as the duty to the court is paramount, there can be no actual conflict of duties. If the paramount duty is observed, it would be an error to conceive of any other duty as suggesting a different course. **13** See, generally, r4 of the *Australian Solicitors' Conduct Rules* with reference to the duty to act in the 'best interests' of a client. **14** *Legal Services Commissioner v Mullins* [2006] LPT 012 (23 November 2006). **15** *Solicitors Handbook* (1996 Edition – Update 3, August 2000) *Queensland Law Society* r4.08. *The Solicitors Handbook* was the relevant source of the ethical rules at that time. **16** *Legal Services Commissioner v Garrett* [2009] LPT 12. **17** Citing the reasoning of Kirby J in the context of an allegation of professional negligence in *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209, 240 [142]. **18** Discussed in more depth in: Gino Dal Pont, 'To Disclose or Not to Disclose: Do the Same Ethical Standards Apply to Lawyers as Negotiators as to Lawyers in Court?' (2007) 45(3) *Law Society Journal* 28. **19** Rule 5 of the *ASCR* relates to 'dishonest and disreputable conduct'. Such conduct ('in the course of practice or otherwise'), when of a serious enough nature, may be prejudicial to, or diminish the public confidence in, the administration of justice; or bring the profession into disrepute. **20** The Glossary to the *ASCR* provides a broad definition of 'court' which includes various forms of tribunal, Royal Commissions, statutory investigations and inquiries and 'an arbitration or mediation or any other form of dispute resolution.' **21** Bobette Wolski, 'Truth about Honesty and Candour in Mediation: What the Tribunal Left Unsaid in Mullins' Case' (2012) 36 *Melbourne University Law Review* 706, 739. See, also, reference *Legal Services Commissioner v Sampson* [2013] VCAT 1177. **22** Rule 5.1 of the *ASCR* provides that: 'A solicitor must not engage in conduct, in the course of practice... which is likely to a material degree to... be prejudicial to, or diminish the public confidence in, the administration of justice bring the profession into disrepute.' **23** See Stephen Corones, Nigel Stobbs, and Mark Thomas, *Professional Responsibility and Legal Ethics in Queensland* (Thomson Reuters 2014) 150-5. **24** The Tribunal in Narayanasamy (see n24 below) was of the view, in relation to dealings with third parties, that 'lawyers must adhere to the highest business standards of the community, which are often higher than those imposed by law'. **25** *Council of the Law Society of NSW v Narayanasamy* [2014] NSWCATOD 18. < http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=170500>. **26** *Allinson v General Council for Medical Education and Registration* (1894) 1 QB 750, 751. **27** As reported in John Phillips, 'The Duty of Counsel', (1994) 68, *Australian Law Journal* 834, 834. **28** *Ibid*, 835. **29** Parliament of Victoria, *Parliamentary Debates,* Legislative Assembly, 24 June 2010, 2607 (Attorney-General Rob Hulls). **30** [2013] VSCA 337. **31** The applicants, ANZ and the receivers, were represented by two senior counsel and one junior, Yara by two junior counsel, Apache by senior and junior counsel, Mr Oswal by senior and junior counsel and Mrs Oswal by senior counsel. Different firms of solicitors represented each party. **32** *Yara* at [52]. **33** *Singh v Legal Services Commissioner* [2013] QCA 384. **34** He initially alleged that he was entrapped by the Fijian DPP, which was jealous of his forensic success. He had originally denied that a recording of his confessions contained his voice, but eventually entered a plea of guilty: *Singh v Legal Services Commissioner* [2013] QCA 384 at [5]. **35** *Legal Services Commissioner v Singh* [2013] QCAT 154.

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