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Public Defenders' Conference - Common Ethical Problems For The Criminal Advocate

PUBLIC DEFENDERS' CONFERENCE
COMMON ETHICAL PROBLEMS FOR THE CRIMINAL ADVOCATE

Today I propose to discuss two areas which pose ethical problems in the conduct of criminal proceedings. No doubt there are others and, in a constantly changing world, there are sure to be problems not yet encountered. There are well established ethical constraints upon the conduct of a prosecutor, enshrined in rules 62-72 of the NSW Barristers' Rules. However, for the purpose of this conference, I propose to confine myself to difficulties which might be faced by the defence advocate.
I shall refer throughout this paper to the obligations of counsel but, obviously, what I have to say is equally relevant to a solicitor acting as an advocate. In the same way, the principles expressed in the Barristers' Rules to which I shall refer are of general application. Insofar as they bear upon the issues with which we are concerned, the Model Rules of the Australian Bar Association are in identical terms.

Plea

A problem frequently the subject of community debate, although one not often encountered in practice, is that of the client who admits to counsel that he or she is guilty of the offence charged but is determined to plead not guilty. The situation is dealt with in rule 33 of the Barristers' Rules, which provides:
A barrister briefed to appear in criminal proceedings whose client confesses guilt to the barrister but maintains a plea of not guilty:

(a) may return the brief, if there is enough time for another legal practitioner to take over the case properly before the hearing, and the client does not insist on the barrister continuing to appear for the client;
(b) in cases where the barrister keeps the brief for the client:

(i) must not falsely suggest that some other person committed the offence charged,
(ii) must not set up an affirmative case inconsistent with the confession; but
(iii) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;
(iv) may argue that for some reason of law the client is not guilty of the offence charged; or
(v) may argue that for any other reason not prohibited by (i) and (ii) the client should not be convicted of the offence charged.

In previous years, the prevailing view was that it was better to return the brief if there were sufficient time to arrange other competent representation. Under the present rule, however, that can be done only with the client's consent. This is consistent with the adversarial nature of criminal proceedings in the common law system and the right of an accused to put the prosecution to proof.
More contentious is the converse problem posed by the client who maintains his or her innocence of the crime charged but wishes to plead guilty. This is a matter about which opinion in the profession is still sharply divided but, in my view, the answer is clear. In 1991, when I was myself a member of these chambers, I discussed it in an article in *Bar News* entitled "Plead guilty and get it over with?" A copy of that article is attached to this paper. I maintain the views which I then expressed and I believe that they find support in subsequent developments.
Meissner v The Queen (1994-5) 184 CLR 132 was concerned with a charge against the appellant of attempting to pervert the course of justice by improperly endeavouring to influence another person to plead guilty to a charge of making a false statutory declaration. It is unnecessary to recite the facts of the case. It is sufficient to say that some of the judges examined the circumstances in which the entry of a plea of guilty might amount to a miscarriage of justice, although the court was not called upon in that case to consider the ethical duties of counsel. In the joint judgment of Brennan, Toohey and McHugh JJ, their Honours said (at 141):

> A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty. … A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence. (Footnote omitted)

Dawson J said (at 157):

> It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred.

These passages from *Meissner* were referred to by the Court of Appeal of Queensland in a recent decision of *R v Allison* [2003] QCA 125, in which the ethical position of counsel was considered. Of the facts of that case it is sufficient to say that Mr Allison on appeal complained that his counsel at trial had not explained to him the benefit of a plea of guilty to a charge of assault, a course which he claimed he might have taken even though he maintained his innocence. Jerrard JA, with whom McMurdo P and Mackenzie J agreed, had this to say (at pars 23-26):

> **I'm Not Guilty but I'll Plead Guilty**
> Mr Allison's evidence on the appeal made clear that he had at all times maintained to his counsel that he was innocent of the allegation of assault, and he maintained that claim to this court. His complaint, that he was denied the benefit of the opportunity to avoid a trial and to obtain the benefit on being sentenced on a plea of guilty, is valid only to the extent that Mr Allison could both plead guilty and claim innocence at the same time. The judgments in the High Court in *Meissner v R* [(1995) 184 CLR 132 at 141 and 157] require this court to accept that a plea of guilty entered in open court by a person of full age and apparently of sound mind and understanding, and made in the exercise of the free choice in the interest of that person, causes no miscarriage of justice if a court acts on that plea, although the person entering it is not in reality guilty of the offence. A specific example of when that would not cause a miscarriage of justice, given by Dawson J, was when the plea was entered in the hope of obtaining a more lenient sentence than if convicted after a plea of not guilty [(at 157)].
>
> However, an equally important matter, described in the same passage of the judgment by Dawson J, is that an accused person so entering a plea must do so understanding and intending that by that plea, he or she is admitting guilt of the offence charged. This is because, as observed in the judgment of Lawton LJ in *R v Inns* [(1974) 60 Cr App Rep 231 at 233], in a passage cited with approval in the joint judgment in *Meissner* [at 141]:
>
> > "…the law attaches so much importance to a plea of guilty in open court that no further proof is required of the accused's guilt."
>
> Dawson J expressed it (at CLR 157) that the entry of a plea of guilty constitutes an admission of all the elements of the offence.
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> In *R v MacKenzie* [2000] QCA 324 (CA No 353 of 1999, judgment delivered 11 August 2000), the President and Dutney J agreed

> that in Queensland some experienced criminal law practitioners will allow a defendant claiming innocence to enter a plea of guilty, providing that defendant understands that the effect of the plea of guilty is an admission to all the world that he or she committed the offence charged, and otherwise makes a free and informed choice as to that plea. Those remarks were obiter, as were those of McPherson JA in the same case, who cited instead and with approval the remarks in *Turner* (1970) 54 Cr App Rep 352 at 360 that:
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> "… counsel of course will emphasise that the accused must not plead guilty unless he has committed the offence charged".
>
> That last statement has much good sense to commend it, but experience shows that some people charged with serious offences (and particularly offences of incest or indecently dealing with children) wish both to maintain to their lawyers that they are actually innocent, and also to plead guilty. In those circumstances it is imperative that these lawyers ensure that no plea be taken until (written) instructions have been obtained in which the person charged describes a wish or willingness to plead guilty, **and** an understanding that by so doing, he or she will be admitting guilt. If those instructions are obtained and adhered to a lawyer may properly appear on the plea. (Footnotes incorporated.)

His Honour's emphasis upon the importance of obtaining written instructions was echoed by McMurdo P in a short concurring judgment (at par 2). Clearly, this is sound advice for the protection of counsel but I do not understand it to be an ethical prerequisite for representing the client in these circumstances.

In my 1991 article for *Bar News* I referred to what was then a draft rule of the Australian Bar Association. That rule does not appear in the Model Rules published more recently. My inquiries reveal that this was an oversight, rather than the result of a considered decision. It also does not appear in the NSW Barristers' Rules and, as far as I am aware, never was one of the rules of the New South Wales Bar Association. Whether that was because of an oversight, or because views in the profession were divided about the issue, I cannot say.

Disclosure

Given the adversarial nature of criminal proceedings, counsel is under no obligation to disclose to the court material adverse to the client of which the prosecution is unaware, however relevant and significant it might be. Indeed, counsel is bound not to do so unless the client instructs otherwise. (Here, I put to one side the provisions for pre-trial disclosure in certain circumstances now to be found in Div 2A of Pt 3 of the *Criminal Procedure Act*.)

In relation to defended proceedings, these propositions are uncontroversial. It is their application to sentence proceedings that troubles some advocates, because sentence proceedings are usually conducted in a far less adversarial manner. In particular, it sometimes happens that the prosecution does not have the client's complete criminal record and the question arises whether, given its importance, the full record should be disclosed. Once again, we can look to our northern neighbours for guidance.

In *Boyd v Sandercock, ex parte Sandercock* [1990] 2 Qd R 26; 46 A Crim R 206, the appellant had been convicted of a drink driving offence. He had a conviction for a similar offence within the previous five years, a fact which affected the range of penalty available to the magistrate. However, the prosecutor produced no evidence of that conviction because he was unaware of it, and the appellant was dealt with accordingly. Subsequently, the true position came to light and the prosecution applied successfully to the magistrate to re-open the case, relying on a provision of the relevant legislation which enabled that course to be taken in certain circumstances. The question for the Full Court was whether that provision was properly invoked.

The issue in the appeal and the outcome need not concern us. What is relevant for present purposes is a passage from the judgment of Thomas J, with whom Connolly and Ambrose JJ agreed (at 28; 208):

A court is bound to decide a case on the evidence, and only on the evidence before it. The penalty that was imposed was entirely in conformity with both the facts and the law. All that happened was that the prosecutor failed to provide evidence to the court of a relevant fact. The consequence of this should be no different from that in any other case where a party fails to call relevant evidence. It makes no difference whether the proceedings follow a plea of guilty or not guilty. The court is to decide the case on the evidence before it. Of course where a party deliberately misleads the court, other remedies may exist. For example if fraud is practised upon the court a remedy is available either by order to review or by certiorari (*Hallahan v Campbell; ex parte Campbell* (No. 2) [1964] Qd R 337, 348). Nothing like that happened in the present case in which the prosecutor was simply not aware of the previous conviction and elected to proceed on the assumption that there was none, and to say expressly to the court that there were no previous convictions. *The solicitor for the appellant was in the circumstances under no positive duty to bring it to the attention of the court.* (My emphasis.)

The Queensland decision was cited with approval in a recent decision of our own Court of Criminal Appeal: *R v Bourchas* [2002] NSWCCA 373. Yet again, it is unnecessary to recite the issues decided in that important case. It is an observation of Giles JA, with whom Levine and Sperling JJ agreed, which is germane (at par 92):

> Even at sentencing the offender and the Crown act within the adversary system, and it is not consistent with that system that the offender is under a duty to bring forward everything adverse to the offender's interests on sentencing. (See for example *Boyd v Sandercock, ex parte Sandercock* (1990) 2 Qd R 26, where it was held that the solicitor for the offender was "under no positive duty" to bring to the court's attention a previous conviction. Deliberately misleading the court would have been a different matter.)

Of course, in cases such as this the duty not to mislead the court means that counsel must be very careful in framing submissions about the client's background. Nothing must be said to suggest that the client has not previously offended in the manner disclosed by the convictions of which the court is unaware. In most cases it would be prudent to avoid any reference to the subject of the client's criminal antecedents.

The general duty of counsel not to knowingly mislead a court is spelled out in Rule 21 of the Barristers' Rules. However, the right of counsel to withhold information about the client's record, without misleading the court, is recognised in Rule 30, which provides:-

A barrister who knows or suspects that the prosecution is unaware of the client's previous convictions must not ask a prosecution witness whether there are previous convictions, in the hope of a negative answer.

It must be emphasised that I am speaking only of the ethical duty of counsel. There may be cases in which there is nothing to be lost, and perhaps something to be gained, by a frank disclosure of previous convictions unknown to the prosecutor. Whether that is done, however, is not a matter for counsel. It is a matter for the client to decide, after appropriate advice.

A related problem, more commonly encountered, is where an expert report obtained by the accused's solicitor discloses adverse material unknown to the prosecution. This is most likely to occur in psychiatric reports which, in the course of recounting the client's background, may record admissions of criminal conduct for which he or she has never been prosecuted. The problem may arise in reports prepared for use at trial as well as for sentence proceedings.

Can counsel ethically request the psychiatrist to redraw the report without the offending material? I believe that counsel can, provided the material is not of significance to the psychiatrist's opinion about relevant matters and its omission would not mislead the court about his or her conclusions. Sometimes psychiatric reports are prepared in some haste by busy practitioners, who include in their reports everything the client has told them without careful thought about how much of it is germane to the opinions sought from them.

With some experts, the problem is solved by a detailed letter of instructions setting out the whole of the factual material about which he or she is asked to express an opinion. However, this is not usually a practicable option for a psychiatric report in a criminal case. Often the psychiatrist is asked, at an early stage of the proceedings, to explore any psychiatric issue which might arise, whether at trial or for the purpose of sentence. A psychiatrist must be free to obtain a comprehensive history from the client because it may elicit relevant material which the client has not disclosed to the solicitor. In addition, legal practitioners may not always appreciate the psychiatric significance of what has been disclosed.

If the expert is not prepared to excise the adverse material because it is relevant to his or her opinion, it must then be determined whether the report will be used in the proceedings. That is a tactical decision for counsel but it is for the client to decide, again after appropriate advice, whether he or she is prepared to allow that material to be disclosed to the court.

This is a matter to be approached with the utmost care, given that an expert witness is not an advocate for the client and owes an overriding duty to the court. It would not be proper for the expert to excise any material, however tangential, which might be capable qualifying his or her opinion. The long recognised responsibilities of an expert witness are now set out in a code of conduct, which is to be found in schedules to the rules of both the Supreme Court and the District Court. A copy of that code (Schedule K to the Supreme Court Rules) is attached.

That said, the course which I believe is permissible is a far cry from what occurred in relation to the report of Dr Malcolm Dent, psychiatrist, in the notorious defamation trial before Levine J of *Marsden v Amalgamated Television Services Pty Ltd* [2001] NSWSC 510. Time does not permit an

explanation of that aspect of the case which would do it justice. Put very briefly, Dr Dent had been retained by the plaintiff's solicitor to provide a report on the question of damages, and an issue before Levine J was the extent to which the plaintiff's depressive illness was the result of the defamatory publications complained of, rather than other events. Dr Dent had been supplied with a volume of material from which it appeared that there were other relevant stressors in the plaintiff's life, and initially his report was prepared on that basis.

The plaintiff's solicitor, after consultation with the plaintiff, returned the report to Dr Dent with suggested amendments. The effect of those amendments was to remove any reference to the material about other stressors, so as to relate the plaintiff's depression exclusively to the defamatory publications. Dr Dent furnished a revised report in that form. That this had occurred emerged in the course of the evidence, with the result that Levine J found Dr Dent's evidence to be devoid of probative value: see the judgment at par 5016ff.

In all the circumstances, his Honour did not conclude that there was a deliberate attempt to mislead the Court on the part of Dr Dent, the plaintiff's solicitor or the plaintiff himself. As to the plaintiff and the solicitor, his Honour found that they were motivated by a desire not to disclose to the defendant material which would otherwise have been privileged (par 5070), and he was content to characterise the solicitor's conduct as "silly and wanting in good sense and judgement" (par 5073). Nevertheless, what the solicitor did was clearly impermissible, and his Honour observed that "this calamitous course of events" was the very type of conduct which was sought to eliminated by the amendments to the Supreme Court Rules introducing the expert witness code of conduct (par 5072).

Plead Guilty and Get it Over With?

What to do when your client assures you s/he is innocent, but nevertheless wants to plead guilty. Peter Hidden QC, Senior Public Defender explains.

It is not uncommon for a client in a criminal case to tell counsel that he or she is innocent of the crime charged but, nevertheless, wishes to plead guilty. Some clients who are, in fact, guilty cannot bring themselves to confess to their legal representatives (particularly if the decision to plead guilty follows earlier protestations of innocence). Other clients, who may well be innocent, elect to plead guilty because their defence to the charge necessarily involves revealing other criminal conduct more serious than that charged or other behaviour, not itself criminal, of which they are deeply ashamed.

Barristers who have been instructed by the Aboriginal Legal Service will be particularly familiar with the situation. Many older Aborigines, especially from rural areas, have a long history of appearing without representation in magistrates' courts, and their experience of the criminal justice system taught them that conviction follows arrest as the night follows the day. Even with legal representation, they cannot break the pattern of pleading guilty "and getting it over with", regardless of the merits of their case; and it is understandable that they have no stomach for a fight which they are convinced they cannot win.

"... conviction follows arrest as night follows day ..."

In view of the familiarity of the problem, it is surprising that there is such a divergence of opinion among members of the Bar as to how it should be resolved. While the situation may present real difficulties in individual cases and must always be handled sensitively, the ethical position of counsel is not in doubt. It is succinctly expressed in one of the draft rules of the Australian Bar Association:

"8.5 PLEAS

(a) It is the duty of the barrister representing a person charged with a criminal offence to advise that person generally about any plea to the charge. It should be made clear that whether the client pleads "not guilty" or "guilty", the client has the responsibility for and complete freedom of choice in any plea entered. For the purposes of giving proper advice, a barrister is entitled to refer to all aspects of the case and where appropriate may advise a client in strong terms that the client is unlikely to escape conviction, and that a plea of guilty is generally regarded by the court as a mitigating factor, at least to the extent that the client is thereby viewed by the court as co-operating in the criminal justice process.

(b) Where a client denies committing the offence charged, but nonetheless insists on pleading guilty to it for other reasons, the barrister may continue to represent that client, but only after advising what the consequences will be, and that what can be submitted in mitigation will have to be on the basis that the client is guilty. Wherever possible, in such a case, a barrister should receive written instructions.

Provided that, a barrister acting as a Duty Lawyer in a Magistrate's Court shall not under any circumstances represent a client on a plea of guilty if the client insists on pleading guilty, but denies having committed the offence charged."

One can see the sense of the proviso but, as barristers in this state do not act as duty lawyers in magistrates' courts, it need not concern us.

It is not necessary that a client should confess to the crime charged to his or her legal representatives before counsel can appear on a plea of guilty. All that is necessary is that it be explained to the client that by a plea of guilty he or she necessarily admits the elements of the offence, and those elements should be related to the facts of the case at hand. It should also be explained that no evidence can be tendered and no submissions can be made inconsistent with an admission of those elements. If the client accepts that course, written instructions to that effect should be obtained and counsel is then free to appear on that basis.

Of course, counsel should try to ascertain in conference why the client is adopting that stance, to ensure that it is not based upon some wholly irrational reason or some misconception as to the possible outcome of the proceedings. In particular, counsel should advise the client as to the strength of the prosecution case and the prospects of acquittal. That said, however, it is the client's right, and his or hers alone, to determine how to plead.

If the client persists with the plea of guilty but insists that evidence be called or submissions made which call into question the elements of the offence, counsel should withdraw. If, however, counsel is able to appear on the basis suggested above, he or she is free to make submissions to the court not only as to the background, antecedents and rehabilitative prospects of the client, but also on any matter in mitigation of the seriousness of the offence which appears from the evidence in the prosecution case.

The situation also arises where a client claims to have no memory of the offence as a result of a prodigious ingestion of alcohol or drugs but, in the light of the evidence in the prosecution case, accepts that he or she must have committed the offence. That client can be represented on a plea of guilty on the same basis and, indeed, the intoxication may be relied upon (for what it is worth) in mitigation.

These have long been my own views on the matter and, at a recent meeting where this issue was discussed, they were affirmed by the Bar Council. ❑

[Sch K] SCHEDULE K — EXPERT WITNESS CODE OF CONDUCT

P 36 r 13C(1)
P 39 r 2(1)

[Sch K inst Amendment 337 Gaz 9 of 28 January 2000 p 452]

Application of code

1. This code of conduct applies to any expert engaged to:
   (a) provide a report as to his or her opinion for use as evidence in proceedings or proposed proceedings; or
   (b) give opinion evidence in proceedings or proposed proceedings.

General Duty to the Court

2. An expert witness has an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise.

3. An expert witness's paramount duty is to the Court and not to the person retaining the expert.

4. An expert witness is not an advocate for a party.

The Form of Expert Reports

5. A report by an expert witness must (in the body of the report or in an annexure) specify:
   (a) the person's qualifications as an expert;
   (b) the facts, matters and assumptions on which the opinions in the report are based (a letter of instructions may be annexed);
   (c) reasons for each opinion expressed;
   (d) if applicable — that a particular question or issue falls outside his or her field of expertise;
   (e) any literature or other materials utilised in support of the opinions; and
   (f) any examinations, tests or other investigations on which he or she has relied and identify, and give details of the qualifications of, the person who carried them out.

6. If an expert witness who prepares a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.

7. If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.

8. An expert witness who, after communicating an opinion to the party engaging him or her (or that party's legal representative), changes his or her opinion on a material matter shall forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect which shall contain such of the information referred to in 5(b), (c), (d), (e) and (f) as is appropriate.

9. Where an expert witness is appointed by the Court, the preceding paragraph applies as if the Court were the engaging party.

Experts' Conference

10. An expert witness must abide by any direction of the Court to:

(a) confer with any other expert witness;
(b) endeavour to reach agreement on material matters for expert opinion; and
(c) provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for any non agreement.

11. An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.

[The next page is 4501]

NOTE: This paper was prepared for a conference in Sydney for New South Wales criminal defence advocates. Although the views I have expressed are likely to be pertinent throughout Australia, the only regulatory provisions to which I have referred are the New South Wales Barristers' Rules and the Rules of the Supreme Court and District Court in this State. There may be different provisions in the Territories and the other States.