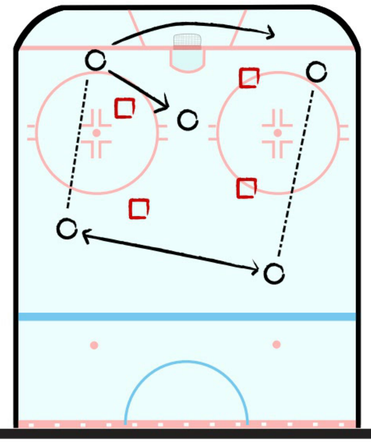

Ethical obligations of model litigants

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I would like to make some respectful observations in relation to the topic addressed in the important article by Jonathan Wells QC in July 2016 (Vol 38 Iss 6) of the Bulletin entitled "Duty to Follow 'Proper' Instructions: What Interests of the Client Do We Represent?". For those who have not read it, I strongly recommend it. The article deals with the fact that a practitioner may only act on "proper" instructions, and what constitutes a category of improper instructions concerning dealing with inadvertent disclosure of privileged material by an opponent.

I would like to posit an additional area where in my view it is improper for a practitioner to accept and act on instructions. That is where the practitioner acts for a model litigant and (as is regrettably sometimes the case) those providing instructions on behalf of the litigant seek to instruct the practitioner to proceed in a manner inconsistent with the obligations of a model litigant.

In my view, accepting and acting upon such instructions could amount to unsatisfactory conduct, or in a more serious case professional misconduct, for the purposes of Division 1 of Part 6 of the *Legal Practitioners' Act 1981* (SA). Much will obviously depend upon the circumstances of the case.

It may be that not every situation where the obligations of a model litigant are breached would constitute conduct worthy of ethical sanction. The boundary between acceptable and unacceptable conduct of a model litigant is sometimes ill-defined. Also, it is clear that many instances where the obligations of a model litigant are breached would constitute a breach of professional ethical standards irrespective of whether the practitioner is acting for a model litigant.

In *Cracknell v Transport Accident Commission* [2007] VCAT 1615, at [49], his Honour Judge Bowman in the context where documents provided to VCAT by the TAC had had material favourable to the applicant "edited out" by a solicitor acting for TAC, stated:

> *"At the outset I wish to record my dissatisfaction with certain aspects of the handling of the presentation of this case by the TAC. The TAC, like the Victorian WorkCover Authority, is a government entity which is meant to be a model litigant. … It is expected to act with complete propriety, fairly and in accordance with the highest professional standards. Indeed, the obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules, and goes beyond the requirements for lawyers to act in accordance with their ethical obligations."*

This statement was in the context of conduct that would clearly be unethical for a practitioner representing an ordinary litigant. Fortunately, in that case the barrister identified the problem and "seems to have done his best to remedy the situation" (at [53]).

The observations by Judge Bowman did not consider the proposition that the fact a practitioner was acting for a model litigant, and hence was required to act in accordance with not just "professional standards" but rather "the highest professional standards" (*ASIC v. Hellicar* (2013) 247 CLR 345 at [140]), would itself affect the boundary of what constituted unethical conduct.

In *Cracknell* there was a second issue which constituted a breach of the obligations of a model litigant. The TAC had engaged an expert, but had withheld from the expert material key to an issue upon which the expert was to opine. His Honour observed (at [61]) that one "might perhaps again query why a model litigant, in obtaining an expert report, would not ensure that all material favourable and unfavourable, was placed before that expert." In fact once the (so called) "unfavourable" material was given to the expert in *Cracknell*, he formed a "firm … belief" on the issue upon which he was proffering an opinion, against the interests of the TAC. While the expert changed his view and the situation was thereby ultimately rescued, one can infer that if the expert had been properly instructed the litigation either would not have gone ahead, or would have been significantly circumscribed in its extent. Thus, the breach of the model litigant obligations caused, it may be inferred, some material and avoidable costs.

At this point, his Honour did not draw a nexus between standards of ethical conduct applicable to the practitioner concerned, and the status of the client as a model litigant. The issue was simply not addressed, and obviously there was no requirement for his Honour to turn his mind to the issue in the context of the case.

I would submit that, if one considers the situation from first principles however, the status of the client as a model litigant is by force of logic relevant to a consideration of what constitutes unsatisfactory conduct or professional misconduct.

First, the "interests" of a model litigant are different from those of other litigants. Subject to an overriding duty to the court and the administration of justice, both solicitors (Conduct Rule, 4.1.1) and counsel (Barristers' Rule, 6.3) must seek to advance and protect the client's "interests". A model litigant has no "interests" of a private nature, but rather its only interest is the public interest, sometimes relevantly to be identified in the context of a body's governing statute (*Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 196; *Morley v. ASIC* (2010) 247 FLR 140 at [716]).

In litigation where a practitioner represents an ordinary litigant, that client may generally pursue their rights in a self-interested manner, in disregard of the public interest, and the retained practitioner must accept and act upon

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those instructions accordingly. It is only in a minority of more extreme situations where the overriding obligations to the courts and the administration of justice are engaged, such that as the client's self-interest is pitted against the higher interests of a duty to the court and administration of justice. Where this occurs it is trite that the latter interests override the private interests of the client. In most situations (i.e. outside the extreme situations referred to), the adversarial nature of litigation will allow the competing private interests of the one party to be counterbalanced by the advocacy of the other party in relation to their private interests, giving rise to a just result. Model litigants stand in a different position, because of their size, resources and litigation experience (Appleby, G, *Government as Model Litigant*, (2014) 37(1) UNSWLJ 94 at 98). Self-evidently in the adversarial situation, this factor can conduce to unfair outcomes, if not mitigated by model litigant obligations.

While there may be scope to argue in particular situations that the public interest to be pursued by a particular model litigant, differs in scope from the type of public interest involved in duties to the court and the administration of justice, in the round these interests ought at least roughly to coincide. It may be that they always are co-extensive. Where the truth lies in this respect is beyond the scope of this short note.

Given the co-incidence of the public interest or interests, however, a practitioner who accepts and acts upon improper instructions from a model litigant is not actually advancing the "interests" of the client in the legally relevant sense, and is therefore in breach of the rules of conduct. The acceptance of the improper instructions is therefore potentially unsatisfactory conduct, or professional misconduct, depending upon the degree of impropriety.

A second and related point attaches to a purposive rationale for model litigant obligations. As Finn J observed in *Hughes Aircraft Systems* (supra) model litigants ought to be held to higher standards in litigation because they are "moral exemplars". Holding a model litigant to these standards, may be seen as part of the higher duty of the practitioner to the administration of justice – which duty one assumes a moral exemplar should axiomatically also seek to discharge. In these circumstances where improper instructions are proffered there is a conflict with "what the client thinks are" its interests (to use the terminology in *Roundel v. Worsley* [1969] 1 AC 191 at 227) and the higher obligations of the practitioner to the courts and the administration of justice; for the administration of justice requires the model litigant to be a moral exemplar.

While I do not believe that the divided duty of a practitioner (as between client and court) completely disappears when acting for a model litigant, taking the two points referred to above together, much of the potential conflict is resolved. Thus, both the practitioner's duty to advance and protect the client's proper interests (i.e. for the model litigant the public interest), and the higher duty to the courts and the administration of justice, both require that a practitioner refuse to act on most instructions reasonably perceived to be inconsistent with the duties of a model litigant.

Obviously, the above abbreviated discussion cannot do justice to the full merits of the issues addressed, and I have rather skated over many of the complexities.

Importantly, however, this discussion is not merely academic. Model litigant obligations, when breached, rarely lead to real sanctions against the model litigant or those representing them. There are occasions when Courts take into account model litigant obligations when exercising a costs discretion adverse to a model litigant (*Site Plus Pty Ltd v. Wollongong City Council* [2014] NSWLEC 125 at [101]; *Nelipa v. Robertson & Anor* [2008] ACTSC 16 at [100]). However, there is no mechanism, such as a cause of action for damages, to enforce directly a model litigant obligation. Accordingly, the High Court has referred to a model litigant as being subject to "a duty of imperfect obligation" in relation to model litigant obligations (*ASIC v. Hellicar* (2013) 247 CLR 345 at [152]).

A consideration that an acceptance of instructions to pursue a matter contrary to the obligations of a model litigant may have ethical consequences, would greatly assist in ensuring that the obligations are met. Without it, their efficacy would be most tenuous. Given the importance of model litigant obligations to the proper functioning of the legal system, they ought not to have a tenuous position.

While raising an ethical dimension in circumstances where model litigant obligations are not well defined may cause concern for practitioners representing model litigants, in situations of doubt, practitioners may seek ethical guidance from the Law Society of South Australia or the South Australian Bar Association. A lack of clarity about the extent of model litigant obligations would tend against the finding of ethical transgression, and such an argument (i.e. based upon lack of clarity) cannot gainsay the logic of the arguments advanced above in my view.

One final observation is in order. It is sometimes asserted that section 55ZG(3) of the *Judiciary Act 1903* (Cth) prevents a party raising a breach of model litigant obligations against a Commonwealth body in judicial or other proceedings (for example in relation to a costs discretion). It might be said that this prevents a model litigant obligation being deployed in an argument about the scope of professional ethical obligations.

However, for the reasons identified by Robertson J in *Caporale v. DCT* (2013) 212 FCR 220 at [51] the guidelines propounded pursuant to the *Judiciary Act 1903* (Cth) do not affect the common law obligations, and thus section 55ZG(3) of that Act does not intrude to negate the force the argument advanced above. B