

How far do you need to go in testing your client's instructions?

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Lawyers are not judges of their clients' causes, but great care should be taken to provide proper advice as to risks

The ability to use the coercive powers of court and the right to make allegations about the conduct of opposing parties under the protective umbrella of privilege are significant advantages provided to lawyers. The “price” of these advantages is the obligation to use them responsibly, as set out in Rule 21 of the Australian Solicitors’ Conduct Rules (“ASCR”).

This Rule provides (in part) that a solicitor must take care to ensure that the solicitor’s advice to invoke the coercive powers of a court and that decisions by the solicitor to make allegations or suggestions under privilege against any person are reasonably justified by the material then available to the solicitor.

Further, Rule 21.3 provides that

“A solicitor must not allege any matter of fact in:

- 20.2.1. any court document settled by the solicitor;
- 20.2.2. any submission during any hearing;
- 20.2.3. the course of an opening address; or
- 20.2.4. the course of a closing address or submission on the evidence unless the solicitor believes on reasonable grounds that the factual material already available provides a proper basis to do so.”¹

A recent NSW case - *Mendonca v Dooley & Associates* [2016] NSWCA 144 (27 June 2016) - provides useful guidance as to how far a solicitor need go in order to comply with these obligations. The case arose (as many cases concerning the duties of solicitor do) from a costs dispute. Dooley

& Associates acted for Mr Mendonca (“Mr M”) in proceedings concerning Mr M’s employment. These proceedings were unsuccessful. The Trial Judge found that Mr M was not a reliable witness and declined to accept his evidence. In particular, it was found that Mr M had created a document (called the “*Bonus Policy Document*”) which he said was given to him by his employer and evidenced his claim for the purposes of the proceedings. Additionally, Mr M was ordered to pay his employer’s costs on an indemnity basis because, said the Judge, his case was “*manifestly hopeless*”.

When faced with having to pay these costs Mr M refused and said that Dooley & Associates was in breach of s.345 (1) of the *Legal Profession Act 2004 (NSW)* (which contains obligations broadly equivalent to those contained in Rule 21 of the ASCR) and that they should pay them for him.

In considering Mr M’s arguments, McLoughlin DCJ pointed out that at all times during the initial proceedings Mr M had been adamant that the matters which formed the basis of his instructions and evidence were correct and that the Bonus Policy document was genuine. The Judge acknowledged that Dooley & Associates (and counsel briefed by them) were under a continuing obligation to consider whether there was a reasonable basis for advancing the case, however he found that they had not breached this obligation: “... *at all times [the lawyers] were entitled to accept that which [Mr Mendonca] told them was the truth...*”. The effect of the findings is that Mr M’s instructions, including his insistence that the Bonus Policy Document was genuine provided the “*reasonable basis*” for the allegations made by the lawyers in the course of the initial proceedings.

Mr M sought to leave to appeal to the NSW Court of Appeal. Leave was denied. The two Judges in the NSW Court of Appeal considering the leave application said that, Mr M was, in effect, contending that the lawyers “*should have decided that*

his evidence was unbelievable and advised him accordingly”. It was found that this proposition was untenable.

The Court of Appeal Judges also noted that it was well established that a legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he or she acts for a party who pursues a claim which is bound to fail (citing *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300).

Further, the Court of Appeal Judges said that a legal practitioner is not a de facto judge and his or her role is not to determine the credibility of witnesses, including that of the client, or pre-empt judicial decision-making (citing *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* [2001] HCA 26).

With the benefit of the finding of the initial Court that the Bonus Policy Document was not genuine it could be said that Mr M must have known that fact but his lawyers obviously did not. Had the lawyers been in possession of actual knowledge that the document was not genuine the outcome might well have been different.

R21 obviously places a heavy burden on solicitors, but these findings show that it need not be an overwhelming one.

Even though it might not be improper for a lawyer to act where a claim is bound to fail (something which may well be more obvious only in hind sight) and it is not up to the lawyer to judge their client’s case, it is necessary for lawyers to always give robust advice (in writing) as to the risks of their client’s case. If, for example the client’s case appears weak or contrary to known facts and/or contemporaneous genuine documents, it is important that strong advice as to the risks of proceeding are provided.

(Endnotes)

- 1 The remaining sub-rules of Rule 21 (21.4 – 21.8) are also important and close attention should also be paid to them.