

***Legal Truth – where the
duties to the Court and the
Client Collide***

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Outline of Presentation

1. Introduction

2. A general duty to be honest,

3. A general duty not to mislead,

4. A general duty of disclosure owed to the court,

5. A general duty not to interfere with the proper Administration of Justice

6. Other Jurisdictions

7. Conclusions

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Royal Brunei Airlines v Tan [1995]

JCPC 4

Honesty is subjective to the extent that the courts look at what the individual actually knew at the time (as opposed to “ought to have known”). Dishonest behaviour is almost always advertent or intentional conduct. Carelessness is not dishonesty. Nevertheless the standard of what constitutes honest conduct is generally seen as objective. Thus if a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he saw nothing wrong in such behaviour.

The Duty of Honesty

Rule B1 1.2 2011 Practice Rules Law Society

“A solicitor must act honestly and in such a way to put their personal integrity beyond question”

The case of the separation agreement and the matrimonial debt

Not knowingly deceiving clients, the Law Society, colleagues or the public e.g by claiming to have lost one's records or that one has raised an action (and won it) when no action has been raised

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The Duty not to Mislead

- 1) The Out and out lie – made knowing its falsity;
- 2) Untrue statements which the solicitor has recklessly made without checking their veracity;
- 3) Untrue statements made carelessly or negligently

Case 1 “The payment is coming via a third party”.
Subsequent tax demand. Cheque intercepted.
Intention changed. Law Society’s ruling.

Case 2 The nominee purchaser – Discipline Tribunal ruling.

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Adversarial v Inquisitorial modes of trial

Adversarial approach to trial:

- i) Opposing parties responsible for gathering, selecting and presenting evidence. Accused may plead “guilty”, need not give evidence and often does not, but if chooses to do so must do so on oath.***
- ii) Court’s role is to adjudicate not investigate or go beyond evidence led by the parties.***
- iii) Court will expect the parties’ lawyers to address them on the law but can do own research on the law provided puts to the parties.***

Adversarial v Inquisitorial modes of trial II

Inquisitorial approach to trial:

- i) Investigation and trial of criminal offences not up to opposing parties, but to a central judicial authority whose role it is to act in the wider public interest.***
- ii) Judicial investigator is charged with investigating evidence which exculpates, as well as incriminates the suspect.***
- iii) Judicial investigator will often put informal questions to the accused who is not on oath and is not required to tell the truth.***
- iv) Guilty plea still requires case to be investigated by the judge.***
- v) The judge is responsible for finding the law.***

Legal Truth – where the duties to the Court and the Client Collide

4.A general duty of disclosure owed to the court

- a)*** Candour in matters of Law
- b)*** Candour in matters of Fact



Legal Truth – where the duties to the Court and the Client Collide

4.A general duty of disclosure owed to the court

a) Candour in matters of Law

- i) To produce all relevant *and* binding legal authorities (cases or statutes)
- ii) What if highly relevant but non-binding?
- iii) Does it matter which side you are on?

Legal Truth – where the duties to the Court and the Client Collide

4.A general duty of disclosure owed to the court

b) Candour in matters of Fact

“You must never knowingly give false or misleading information to the court.”

“You must never **knowingly** give **false** or **misleading** information to the **court**.”

Legal Truth – where the duties to the Court and the Client Collide

4.A general duty of disclosure owed to the court

b) Candour in matters of Fact

“You must never knowingly give false or misleading information to the court.”

However, unlike matters of Law there is NO duty to:

- i) Bring all relevant matters of fact which you know about to the attention of the Court***
- ii) as a defence lawyer to bring all material witnesses to the notice of the other side or the Court***
- iii) to lead all material witnesses in Court***

Legal Truth – where the duties to the Court and the Client Collide

4.A general duty of disclosure owed to the court

b) Candour in matters of Fact

“You must never knowingly give false or misleading information to the court.”

The clash with legal professional privilege

See ***Hilton v Barker Booth and Eastwood*** [2005] UKHL 8
Lord Walker of Gestingthorpe at para.34 *“It is a [lawyer’s] duty to act in his client’s best interests . . . To disclose discreditable facts about a client, and to do so without the client’s informed consent is likely to be a breach of duty, even if the facts are in the public domain.”*

The case of the chest aneurysm teenager

4.A general duty of disclosure owed to the court

b) Candour in matters of Fact

“You must never knowingly give false or misleading information to the court.”

The client who gave a false name and address to the police to avoid previous convictions becoming known:

Does the lawyer have to correct the falsehood?

What if the name or address are correct but not the normal ones?

So what should the lawyer have done?

“A lawyer takes part in a positive deception of the court when he puts forward to the court himself, or lets his client put forward, information which the lawyer knows to be false, with the intent of misleading the court. The defence lawyer need not correct information given to the court by the prosecution or any other party which the lawyer knows will have the effect of allowing the court to make incorrect assumptions about the client or his case, provided the lawyer does not indicate in any way his agreement with the information”

4.A general duty of disclosure owed to the court

b) Candour in matters of Fact

“You must never knowingly give false or misleading information to the court.”

What does “misleading” mean?

“Active” as opposed to ***“Passive”*** misleading

Not disclosing that the witness is currently in prison *Tombling case*

Not disclosing the client’s previous convictions

Not correcting the Court’s mistake about your client's convictions

Not disclosing that the witness has been demoted as a police officer for misleading the Court in another case. *Meek case*

Not disclosing that information which was true when first given to the Court is now no longer true. *Vernon case*

What if lawyer learns that information believed to be true when given to the Court turns out to have been false all along – what should the lawyer do?

4.A general duty of disclosure owed to the court

b) Candour in matters of Fact

“You must never knowingly give false or misleading information to the court.”

The Doctrine of Perjury

i) Civilian countries

Does not exist – although witnesses who lie to the court can be guilty of a crime.

ii) Common law countries

*“The question becomes, how can the profession’s ethical standards best accommodate the competing principles of loyalty to the client and solicitude towards the truth-finding function of the criminal justice system?” Proulx and D. Layton, *Ethics and Canadian Criminal Law**

“The lawyer is required to know everything, to keep it in confidence, and to reveal it to the court”. Friedman’s Trilemma

The Doctrine of Perjury

1. Lawyer can continue to act if:

i) Client agrees not to lie

But what if client does not agree not to lie OR refuses to retract lie already made to the Court?

ii) The lawyer does not know, but only has a reasonable belief that the client will commit or has committed perjury (what if lawyer declines to elicit the truth from the client?) ; or

iii) The lawyer insists that the client does not take the witness stand; or

iv) The client's testimony is restricted to the truthful elements; or

v) The client either makes an unsworn statement or provides the untruthful parts of the testimony in a narrative format to which the lawyer makes no subsequent reference in the trial; or

vi) The perjury is already complete, the lawyer makes no subsequent reference to the false testimony.

The Doctrine of Perjury

2. Lawyer can withdraw but decide not to say anything about the perjury

Most widely supported approach in England, Canada, Australia, New Zealand and Scotland.

Problem – what to say to the Court?

The Doctrine of Perjury

3. Lawyer can withdraw but also tell the Court why he or she is doing so.

Few supporters for this if the client has not yet lied to the Court.

If perjury has been committed, the client declines to admit to it and other options e.g. withdrawal will not solve the problem then 2.3.3(a)(3) of the American Bar Association Model Rules of Professional Conduct permit disclosure of the perjury. Recent Scots case law along these lines.

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5. A general duty not to interfere with the Administration of Justice

- a) Perjury***
- b) Tampering with witnesses***
- c) Forged documentation***
- d) Defending the “Guilty”***
- e) Discrediting “truthful” witnesses***
- f) Demeaning vulnerable witnesses***
- g) Obeying the orders of the Court***
- h) Taking advantage of “obvious” errors***
- i) Not being a witness and a representative***
- j) Not acting in a conflict of interest***

5. A general duty not to interfere with the Administration of Justice

a) Perjury

- i. Crime and Misconduct***
- ii. Refreshing the witness's memory***

b) Tampering with witnesses

- i. Coaching the witness***
- ii. "Hiding the witness"***

c) Forged documentation

- i. Falsifying document for use in court***
- ii. What to do if unaware of forgery until later***

d) Defending the "Guilty"

d) Defending the “Guilty”

- i. Cannot mislead the court***
- ii. Knowledge must be “irresistible”***
 - 1) Cannot use affirmative defence - alibi or incrimination***
 - 2) Can challenge Court’s jurisdiction, admissibility of evidence, relevance of the criminal case, the reliability of the prosecution witnesses, and the sufficiency of the evidence***

5. A general duty not to interfere with the Administration of Justice (continued)

e) Discrediting “truthful” witnesses

Can test accuracy and recall – cannot suggest is lying or attack the character of the witness

f) Demeaning vulnerable witnesses

May not harass or bully - the human rights of vulnerable witnesses

5. A general duty not to interfere with the administration of justice (continued)

- g) Obeying the orders of the Court***
- h) Taking advantage of “obvious” errors***
- i) Not being a witness and a representative***

***5. A general duty not to interfere with the
Administration of Justice (continued)***

j) Not acting in a conflict of interest -

***For example – acting for more than two accused
persons***

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