ETHICAL CONFLICTS: CLASSICAL AND CURRENT

Paper delivered by Justice Emilios Kyrou of the Victorian Court of Appeal at the HAL Rhodes Conference, 12 July 2018

Introduction

The good man acts from honourable motives, and the better he is, the more he acts from honourable motives, and for his friend’s sake; and he passes over his own interest.¹

One of the fundamental ethical principles with which Australian lawyers must comply is to avoid a conflict between the interests of their clients and their personal interests.

In this paper, I will consider the limited role of the personal conflict principle in the early stages of the development of the Greek and English legal professions and then discuss the current manifestations of the principle in Australia.

Development of the Greek legal profession and the early role of the personal conflict principle

My analysis of the development of the Greek legal profession will be confined to the classical Athenian period between the 6th and 4th centuries BCE.

The system of direct democracy that applied in Athens at that time emphasised the sovereignty of the free men of the city. This sovereignty

carried with it an obligation that citizens be responsible for their own affairs and a personal duty to participate in the affairs of the State. As part of that prevailing ideology, parties to civil suits and defendants in criminal actions were expected to argue their own cases.

When the heliastic courts were introduced in the 6th century BCE, with 201 — and often many more — male jurors deciding the case, there was a widespread perception that if a party was not prepared to present his or her own case, then it must not have any merit. Alarmingly, in his speech in 331 BCE in his unsuccessful prosecution of Leocrates for treason, Lycurgus went as far as to contend that the advocates who appeared to defend Leocrates should themselves be charged for sharing his principles and associating themselves with his crimes.

The large juries of classical Athens behaved more like an audience at the theatre than the solemn jury members of today. They expected the parties to entertain them with witty and spirited speeches rather than engage them in a forensic analysis of the issues in the case. They also delivered verdicts immediately, without any deliberation, by placing a disk in an urn. These attributes of the classical jury system made self-representation very hazardous for the average Athenian.

As might be expected, classical Athenians were not lacking in ingenuity. A class of professional ghost writers called logographers emerged who wrote forensic speeches for parties to recite in support of their cases.

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Over time, the *logographers* acquired knowledge of the law and legal procedure and their role expanded to giving advice to parties.\(^3\)

Another class of professionals called *synegoroi*, who presented parties’ cases before the jury, also emerged. These advocates sometimes pretended to be a friend, relative or close associate who was helping the party because the party needed assistance. They resorted to this subterfuge so that the jury would not be prejudiced against the party for hiring a professional advocate rather than presenting his or her case personally.

Furthermore, where an advocate had a personal interest in the outcome of the suit, despite not being a party to it, that *synegoros* was usually permitted to conduct the case on the basis that he was, effectively, a party to it. This reflected the notion that ‘the enemy of my enemy is my friend’, and applied both when the *synegoros* was an enemy of one of the parties, or a party’s advocate.\(^4\)

A well-known instance of an advocate presenting a case in which he had a personal interest occurred in 330 BCE when Demosthenes’ friend, Ctesiphon, was tried for proposing a decree that was said to be false and thus illegal. The decree had stipulated that Demosthenes be crowned with a golden crown in recognition of his political contributions to Athenian affairs. Demosthenes was permitted to defend Ctesiphon on the basis that, as the indictment alleged that Demosthenes was unworthy to receive a golden crown, he was required

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to defend his entire political career. Demosthenes’ speech, which is known as ‘On the Crown’, is regarded as one of the finest pieces of judicial oratory ever delivered. It succeeded in securing a winning majority of jury votes for Ctesiphon. In substance, Demosthenes told the jury that the case was really about him. It is difficult to imagine a modern barrister telling the court that the case was about the barrister rather than the client.

The logographers and synegoroi were the forerunners of the Greek lawyer. However, the fact that they could not openly hold themselves out as professionals who were providing a service for their clients retarded the growth of a legal profession in classical Athens. This may explain why, in contrast to other fields of expertise which recognise a classical Greek as the father of that field, no classical Greek is considered to be the Father of Law.

In approximately 403 BCE, Athens enacted a statute which prohibited payments to advocates in private law suits. This statute was consistent with the Athenian ideology that citizens should assist each other as a matter of civic duty without any expectation of personal reward. This statute was consistent with the personal conflict principle because you are less likely to have a conflict of interest when you cannot benefit financially from acting for a client.

Notwithstanding the laudable public policy that underpinned the ‘no remuneration’ statute of 403 BCE, it proved ineffective. Parties either overtly flouted the statute by directly remunerating the advocate or found other ways of circumventing it. For example, a party’s family

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might engage the advocate, a party might appoint the advocate as
manager of the party’s affairs, hire him as a servant or treat him as a
close friend and shower him with lavish gifts. Additionally, clubs were
formed in Athens whose main purpose was to render legal aid to their
members.

The position of State prosecutors was very interesting. They had a
personal interest in the outcome of the proceeding because, if they
secured a conviction, they were entitled to retain a large proportion of
the proceeds of sale of the defendant’s assets. For example, the
successful prosecutor of an alien who illegally posed as an Athenian
citizen received a third of the proceeds of both the sale of the alien and
the alien’s property.

The ‘no remuneration’ statute of 403 BCE was not based on any ethical
principle but on the Athenian political ideology of direct citizen
participation in the organs of the State, including the judicial system.
Indeed, Athenian lawyers in the classical period were not bound by any
discrete ethical rules. In his article, ‘Legal Profession in Ancient
Athens’, Chroust cites examples of lawyers betraying their clients by
disclosing the contents of their brief to the opposing party.

Chroust also refers to instances where advocates unscrupulously took
advantage of a law which stipulated that a person charged with a
homicide offence could not appear as an advocate. According to

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Chroust, some advocates falsely charged opposing advocates of such an offence in order to prevent them from continuing to act for the opposing party to a proceeding.\textsuperscript{10} It appears that personal attacks on an opposing advocate and other unfair tactics were an important part of a classical Athenian lawyer’s toolkit.

In summary, except to the extent that the ‘no remuneration’ statute of 403 BCE encouraged lawyers to focus exclusively on their clients’ interests, no personal conflict principle applied in classical Athens.

\textbf{Development of the English legal profession and the early role of the personal conflict principle}

My analysis of the development of the English legal profession will be confined to the 13\textsuperscript{th} century CE.

There are some parallels between the public policies that prevailed in classical Athens and shaped the development of the Greek legal profession, and those that obtained in England in the 13\textsuperscript{th} century.

In early medieval times, litigants in England were expected to appear in court in person and conduct their cases in their own words.\textsuperscript{11} This was a challenging exercise for the average litigant, particularly in the royal courts, whose proceedings were conducted either in Norman French or Latin and required the use of precisely drafted forms. To overcome these difficulties, litigants sought assistance from persons knowledgeable in the law known as narrators. Like the Athenian


\textsuperscript{11} Anton-Hermann Chroust, ‘Legal Profession during the Middle Ages: The Emergence of the English Lawyer Prior to 1400’ (1956) 32 Notre Dame Law Review 85, 101.
logographers, narrators drafted court documents for litigants and like the Athenian synegoroi, they narrated the litigants’ stories to the court.

Litigants were also permitted to be accompanied at court by a friend with whom they could take ‘counsel’ before speaking. Gradually, these friends were permitted to speak on behalf of litigants and plead their cause. Over time, they became skilled professionals known as pleaders who also assumed the functions of the narrators. By the end of the 13th century, the Crown appointed men learned in the law as servientes ad legem to argue cases in court. They became known as serjeants-at-law and they gradually displaced the narrators and pleaders. Serjeants are the predecessors of modern English barristers. Unlike the Athenian synegoroi, serjeants presented their cases with analytical skill and without shallow oratory or flamboyant gesture.12

In the early medieval period, the rule that a litigant had to appear in court in person was applied very strictly. On rare occasions, the King or his justices by writ permitted a litigant to appoint a person as an attorney to appear as a substitute or representative of the litigant in the conduct of the case. Towards the end of the 13th century, the appointment of attorneys started to become commonplace. The attorneys are the forerunners of modern English solicitors.

In 1280, the City of London introduced significant regulation of lawyers by the London Ordinance of that year.13 Two features of this Ordinance are of particular interest for present purposes. First, the Ordinance

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provided for suspension for three years where a lawyer received payment from both parties in any action. Secondly, the Ordinance provided that any lawyer who took money and afterwards abandoned his client, or went over to the opposing side, would be penalised by twofold forfeiture and suspension from the case.\footnote{Anton-Hermann Chroust, ‘Legal Profession during the Middle Ages: The Emergence of the English Lawyer Prior to 1400’ (1956) 32\textit{Notre Dame Law Review} 85, 132.} It appears that the betrayal of clients by lawyers was as much a problem in England in the 13\textsuperscript{th} century as in classical Athens.\footnote{See Jonathan Rose, ‘The Ambidextrous Lawyer: Conflict of Interest and the Medieval and Early Modern Legal Profession’ (2000) 7\textit{University of Chicago Law School Roundtable} 137.}

 Unlike the Athenian ‘no remuneration’ statute of 403 BCE, the London Ordinance of 1280 did not prohibit advocates from being remunerated by their clients. The principle that a barrister could not sue for his fee because it was an honorarium was developed in the 17\textsuperscript{th} century.\footnote{See Anton-Hermann Chroust, ‘Legal Profession during the Middle Ages: The Emergence of the English Lawyer Prior to 1400’ (1956) 32\textit{Notre Dame Law Review} 85, 125 n 45.} However, by prohibiting lawyers from abandoning their clients and receiving payment from both sides, the Ordinance sought to ensure that lawyers acted solely in the interests of their clients and were free of any conflict of interest. In doing so, the Ordinance indirectly supported the personal conflict principle.

 The London Ordinance of 1280 did not deal directly with personal conflicts of interest. This may be because conflicts between a lawyer’s personal interest and that of a client did not pose a significant medieval ethical problem. The few recorded instances of client complaints involved lawyers misusing the client’s confidential information for the lawyer’s personal benefit. However, it appears that these cases were
resolved on the basis of broad agency principles rather than on any distinct principle of professional ethics.\textsuperscript{17}

In summary, as with classical Athenian lawyers, English lawyers in the 13\textsuperscript{th} century were not subject to a direct or explicit personal conflict principle.

**Personal conflict principle in Australia today**

The present day legal profession in Australia is closely regulated. Unsurprisingly, there are general as well as specific rules of professional conduct which reflect the personal conflict principle. A lawyer who fails to avoid a personal conflict of interest may face disciplinary action or may be required to compensate the client for any loss the client has suffered.

An example of a general rule of professional conduct which reflects the personal conflict principle is r 12.1 of the *Australian Solicitors Conduct Rules 2015*.\textsuperscript{18} This rule provides that, subject to the exceptions set out in rule 12, ‘[a] solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor’.\textsuperscript{19}

An example of a specific rule is r 12.4.3 of the *Australian Solicitors Conduct Rules 2015*. Among other things, this rule deals with the


\textsuperscript{18} The *Australian Solicitors Conduct Rules 2015* were prepared by the Law Council of Australia and have been adopted in some Australian jurisdictions.

\textsuperscript{19} Rule 101(b) of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* similarly provides that a barrister must refuse to accept or retain a brief or instructions to appear before a court if the client’s interest in a matter or otherwise is or would be in conflict with the barrister’s own interest or the interest of an associate.
payment of referral fees to a solicitor by another service provider to whom the solicitor has referred the client. The solicitor is permitted to retain such fees so long as:

(a) the solicitor advises the client that the fee is or may be payable to the solicitor;

(b) the solicitor advises the client that he or she may refuse any referral; and

(c) the client provides informed consent to the receipt of the fee.

Another example of a specific rule is r 12.4.1 of the *Australian Solicitors Conduct Rules 2015*. This rule provides that a solicitor may draw a will under which the solicitor or an associate of the solicitor is appointed as executor so long as the client has been advised in writing before signing the will:

(a) of any entitlement of the solicitor or the solicitor’s law practice or associate, to claim executor’s commission;

(b) of the inclusion in the will of any provision entitling the solicitor, or the solicitor’s law practice or associate, to charge legal costs in relation to the administration of the estate; and

(c) if the solicitor or the solicitor’s law practice or associate has an entitlement to claim commission, that the client could appoint as executor a person who might make no claim for executor’s commission.
Generally speaking, Australia’s rules of professional conduct and the common law do not seek to absolutely prohibit a lawyer from advising a client on a matter in which the lawyer has a personal interest. However, they contain safeguards — such as prior full disclosure to the client of the lawyer’s interest — which seek to protect the client. The law reports are also replete with judicial warnings of the dangers of lawyers being personally interested in the commercial affairs of their clients.

Examples of cases where a lawyer has been found to have not complied with the personal conflict principle include the following:

(a) *Law Society of New South Wales v Harvey*,22 where a solicitor arranged loans from clients to associated entities of the solicitor on terms that were favourable to those entities.

(b) *Wright v Carter*,23 where a solicitor accepted a substantial gift from a client.

(c) *Szmulewicz v Recht*,24 where a solicitor prepared a will under which he and his co-executor could charge lucrative executor’s commission without advising the testator that he could appoint as executor a person who might make no claim for executor’s commission.

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(d) *Keppie v Law Society of the Australian Capital Territory*,\(^{25}\) where a solicitor who had a personal interest in a proceeding acted for the client in that proceeding and conducted it in a manner which resulted in the interests of the client being partly sacrificed to those of the solicitor.

In the time remaining, I would like to focus on a particular instance of a conflict between a lawyer’s personal interest and his or her duty to the client, namely, where the lawyer is accused by the opposing lawyer of behaving unethically in the course of acting for the client. If the accusation is true then a conflict could arise in at least two ways. First, the lawyer may have a personal interest in taking steps to minimise any liability to the client which may not be compatible with fully advancing the client’s legal rights. Secondly, the lawyer may become distracted by his or her own predicament and not be able to devote all the energy required to protect the client’s interests.

Although modern lawyers do not take the extreme step of the classical Athenian advocates of charging their opponents with a homicide offence in order to preclude them from acting in a case, accusations of unethical conduct against an opposing lawyer are not unusual. While most such accusations are made in the genuine belief that an ethical principle has been infringed, it would be naïve not to acknowledge that some of them are motivated by a desire to unsettle the opposing lawyer and sew dissension between that lawyer and his or her client.

A case in which it was found that a solicitor for the defendants had made unfounded allegations against the solicitors for the plaintiffs, with

\(^{25}\) (1983) 65 FLR 147, 161.
the aim of inducing the plaintiffs to distrust their solicitors and persuade them to terminate their solicitors’ retainer, is *Nauru Phosphate Royalties Trust ( Receivers and Managers Appointed) v Business Australia Capital Mortgage (In Liquidation).*

In Victoria, the *Civil Procedure Act 2010* imposes overarching obligations on parties and their lawyers regarding the conduct of civil proceedings. Those overarching obligations include an obligation to have a proper basis for a claim, an obligation to minimise delay and an obligation to ensure that costs are reasonable and proportionate. Under s 29 of the *Civil Procedure Act 2010*, the court can impose sanctions on parties and lawyers who are found to have contravened an overarching obligation, including ordering a lawyer personally to pay another party’s costs.

There have been examples of lawyers prematurely accusing opposing lawyers of breaching an overarching obligation when there was no proper basis to do so. In *Melbourne Linh Son Buddhist Society Inc v Gippsreal Ltd*, the Victorian Court of Appeal stated that issuing a summons seeking relief under s 29 of the *Civil Procedure Act 2010* for alleged breaches of overarching obligations is a serious matter and should not be undertaken lightly. It should also be noted that r 32.1 of the *Australian Solicitors Conduct Rules 2015* provides that an allegation of unsatisfactory professional conduct or professional misconduct should not be made unless it is made bona fide and the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it.

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26  [2008] NSWSC 833.
27  [2017] VSCA 198 [39].
A lawyer who is accused of breaching an overarching obligation or of acting unethically should not panic or act hastily. It would be wrong to cease to act for a client immediately upon such an accusation being made. If the accusation lacks substance, such a course may play right into the opponent’s hands and severally prejudice the client. The best course is to inform the client of the accusation and seek independent advice from an experienced colleague.

If the advice is that the accusation is misconceived, the lawyer should, with the client’s concurrence, write to the opponent to explain why this is so and state that the lawyer will continue to act in the best interests of the client undistracted by the accusation. To do otherwise would allow the personal conflict principle, which exists to protect the client’s interests, to undermine those interests.

**Conclusion**

The personal conflict principle was not conspicuous in the formative years of the Greek and English legal professions. Now, however, it is considered one of the fundamental ethical principles which underpin legal practice in Australia.

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28 Such a course is consistent with r 102 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015.*