Ethics in negotiations and ADR

Legal Services Commissioner v Mullins

A barrister who failed to reveal his client's newly diagnosed cancer during alternative dispute resolution (ADR) for a personal injuries claim has learnt the hard way that lawyers must be consistently truthful in not only litigation but also mediation and other forms of ADR. Dr Reid Mortensen explains.

The veritable ethical minefield during the negotiation and mediation of a dispute can often leave practitioners confused as to where they can or cannot step. Whilst, in many instances, creating the balance between acting in the best interests of clients and still maintaining professional and ethical duties to the court may be clear, in other cases the professional ethical standards required of lawyers who are engaged in negotiations and ADR may not be.

The list of precedents that help as ethical guides for practitioners involved in negotiations and ADR is short.

That is why the recent decision of Byrne J in the Queensland Legal Practice Tribunal case of *Legal Services Commissioner v Mullins* [2006] LPT 012 is not only important for lawyers in this state, but for lawyers elsewhere in Australia and the Commonwealth. *Mullins* reinforces that lawyers should be consistently truthful, not only in litigation, but also in mediation and other forms of ADR.

The negotiation and mediation

The case involved a barrister who was acting in a mediation in a personal injuries action that followed after the plaintiff had been made a paraplegic in a motor vehicle accident. Several days before the mediation and settlement, the barrister was informed that the plaintiff was suffering from cancer.

After consulting senior counsel about the ethical obligations of a barrister disclosing contingencies adverse to his client's claim, he (with his client) decided not to disclose this diagnosis in the mediation that was looming for September 19, 2003. Several points should be noted about this:

- The client learned of his cancer, at the earliest, on September 1, 2003. Statute required disclosure of this 'change' in his medical condition within a month of that date.[1] The client (and presumably the barrister) therefore believed it was important to settle the claim in the mediation before – as the statute required – the cancer had to be disclosed to the insurer.[2]
- The barrister advised his client that the failure to disclose the diagnosis of cancer in the mediation might, if the insurer were later to discover it, lead to a successful challenge of any compromise that emerged from the mediation. The client still insisted on withholding information about the cancer until the time of disclosure required by statute.[3]
- The mediation was not one that was required by statute, or the Uniform Civil Procedure Rules.[4] Apparently, it was a completely voluntary negotiation.

The claim settled in the mediation of September 19. The documents (prepared before the diagnosis of cancer) provided by the plaintiff's lawyers assumed that he had a life expectancy of somewhere between 24 and 28 years. They also assumed that, but for the injuries suffered in the motor accident, the client would have been working for just over another 16 years.

These documents were given to the insurer and its lawyers before the mediation, and the settlement was concluded on the basis of the assumptions made in them. Byrne J was satisfied that, given his knowledge of the cancer, at the time of the mediation the barrister knew that those important assumptions of life expectancy and working life were "very probably, no longer sound".[5]

Subsequently, the insurer learned of the undisclosed cancer. It moved to recover the settlement proceeds (and these efforts at recovery were themselves settled on confidential terms).[6]

Honesty in representations

The Legal Services Commissioner's case was that the barrister's conduct amounted to common law deceit or, at least, to a breach of another professional ethical standard for lawyers. Interestingly, in the course of the hearing Mr Sofronoff QC (for the LSC) argued that this was "unprofessional conduct".[7]

However, Byrne J found that the barrister's reliance on the documents (with their assumption about life expectancy) showed an "intentional deception" of both the opposing barrister and the insurer,[8] and a "fraudulent deception" of both of them.[9] According to Byrne J, this amounted to more than "unprofessional conduct". It was the more serious "professional misconduct".[10] Byrne J also pointed out that, at the time, a member of the Bar Association could not have approached a voluntary mediation as "an honesty-free zone".[11]

The Queensland Barristers Rules[12] prohibited members of the Bar Association from "knowingly making a false statement to an opponent in relation to the case (or its compromise)", and required accidental misstatements to be corrected.[13] These rules now have the status of subordinate legislation that binds all barristers, by their own force and effect, and as conditions of their practising certificates.[14]

And solicitors should take note that the same rules are found in the Model Rules of Professional Conduct and Practice,[15] which are the basis of rules that the QLS is considering for all solicitors in Queensland.

Still, in *Mullins* Byrne J treated the ethical duty not to mislead another lawyer as independent of the Barristers' Rules – and it should

Notes

1 *Motor Accident Insurance Act* 1994 (Qld), s45(3).
2 [2006] LPT 012, [18].
3 Ibid, at [20].
4 Ibid, at [21].
5 Ibid, at [17].
6 Ibid, at [32].
7 For example, *Legal Services Commissioner v Mullins*, transcript of proceedings, Legal Practice Tribunal, November 6, 2006, p9. The common law standard, and description, of "unprofessional conduct" would apply as the events took place before the *Legal Profession Act* 2004 (Qld) commenced, from when the Act's own standard of "unsatisfactory professional conduct" (s244) effectively replaced the common law standard.
8 [2006] LPT 012, [30].
9 Ibid, at [31]
10 Ibid.
11 Ibid, at [29].
12 See Queensland Barristers Rules, rr 51-52.
13 [2006] LPT 012, [29].
14 *Legal Profession Act* 2004 (Qld) ss57(e), 223.
15 Model Rules of Professional Conduct and Practice, r18.1.
16 [2006] LPT 012, [17], [24].
17 Ibid, at [33].
18 Transcript of proceedings, p63.
19 [2006] LPT 012, [35].
20 Ibid, at [33].

be treated as independent of the Model Rules. It amounts to an intentional and fraudulent deception, and an extremely serious breach of ethical duties, to rely on material assumptions about a client's medical condition that the lawyer knows to be 'unsound' or 'unsafe'.[16] And it is irrelevant that:

- The client wishes that the false representation be maintained; or
- The time in which statute requires any change in the client's condition to be disclosed has still not expired.

The barrister in *Mullins* received a public reprimand, a fine of $20,000 (well above the Queensland average) and an order to pay the LSC's costs. Despite the finding of professional misconduct, the barrister's good character was proved, and Byrne J believed there was every reason to think he would not set out to deceive another lawyer again.[17]

The principle for disciplinary fines

The higher than average fine, though, is worth comment. There has been no evident principle behind the amounts imposed as fines in discipline applications. In *Mullins*, Mr Sofronoff (for the LSC) submitted that any fine imposed should exceed the amount that the barrister charged to do the work. "A person who does this ought not profit from it and indeed ought to lose by it, and the profession ought to know that".[18]

Byrne J seems to have accepted that principle.[19] If other judges who sit as the Legal Practice Tribunal also accept it, we should see some coherence developing in the fining practices of the tribunal – and we should also see larger fines being imposed more often.

Where to get help with ethics?

It is important to note, and this was taken into account by the tribunal, that the barrister in *Mullins* saw the ethical quandary he was facing, and sought ethical advice from senior counsel. Unfortunately, the barrister asked the wrong question – limiting his inquiry to the leading of evidence about contingencies that, in court, would be adverse to his client's interests, but overlooking the fact that he would be continuing to rely on a false assumption about life expectancy. He therefore received unhelpful advice, and misled himself – a "grave misjudgement".[20]

Mullins thus highlights the necessity of directing questions concerning ethical problems to an appropriate body, and of discussing all of the relevant circumstances. That can help just to allow the right questions to be asked, and to get a relevant and informed answer.

So what should solicitors do if faced with ethical quandaries, in negotiations, in mediations, in court, or in any other aspect of practice?

The Client Relations Department of the Queensland Law Society provides confidential advice to members on such issues, and should be your first point of call. The QLS also has a list of Senior Counsellors who can give confidential advice on ethical issues.

In addition, the QLS has recently formed the Ethics Committee, which will be addressing wider ethical issues facing practitioners.

With the imminent employment of an ethics officer, members will also be able to access a database of precedent on ethical issues, and will be informed regularly on ethical practice directions in later issues of Proctor and QLS Update. However, the ethics committee does not give specific advice or rulings on ethical issues.

The QLS places great importance in the continuing education of its members on ethical practices, and welcomes any queries or suggestions members may have in this regard.■

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