Ethically Ambiguous Negotiation Tactics (EANTS): What are the Rules Behind the Rules?

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Professor John Wade, Law Foundation Chair, College of Law, University of Saskatchewan. 12 and 14 May 2014 Law Society of Saskatchewan, CPD conferences.

This paper will briefly discuss the following:

- A catalogue of the EANTs in use in negotiation and litigation.
- How common are these behaviours amongst lawyers?
- What are the attempted controls (or not) of these EANTs in different cultures?—market isolation, law, and “ethics”?
- Focussing on attempted ethical controls, what are the five (often overlapping) historic schools of “ethics”?
- Which school of “ethics” do various written codes of law societies predominantly reflect?—answer: pragmatism and self interest.
- If the epidemic of EANTs needs to be reduced, should pragmatism and self interest be taught and modelled more expressly to and by lawyers?

A catalogue of Ethically Ambiguous Negotiation Tactics (EANTs) in negotiation and litigation (sometimes labelled “CABs”—common ambiguous behaviours)

An EANT is a common behaviour used during negotiations in an attempt to gain advantage for the user. However, the widespread use of EANTs raises a debate whether, when and in what cultures it is ethically or legally appropriate to use which of those tactics.

A non-exhaustive catalogue of EANTs is as follows:

1. **False** statements which are (i) intentional, (ii) reckless (iii) negligent or (iv) innocent, relating to:
   - **Facts:** “This business has gross income of at least one million per year.”
   - **Evidence:** “The accounts show clearly income and expenses.”
   - **Intention:** “We intend to live in Australia.
     “I do not intend to set up a competing store.”
   - **Causation:** “It is unlikely that the subsidence of the soil caused the cracks in the building.”
     “The loss of profits was not caused by management decisions.”

2. **Silence** which is intentional, reckless, negligent or innocent about any important or “material” fact, evidence, intention or causation
a. eg Silence about:
   i. The house has termites
   ii. The highway may soon be diverted
   iii. My expert’s report suggests that I am to blame for the accident.

3. “Half-Truths” which are intentional, reckless, negligent or innocent. (A half-truth is a sentence which is literally correct, but a reasonable hearer is likely to reach a false conclusion due to missing facts or context)
   a. eg “This restaurant seats 179 people” (but only has liquor licenses for 102 people)
   b. “There are no formal development applications lodged with the Council” (but there have been ten informal development applications)
   c. “I have advised my client that (s)he is entitled to $1.3 million” (on a good day in court; on a bad day (s)he may receive $120,000)
   d. “Our experts support this conclusion” (almost always false as the experts have been fed garbage in-garbage out)

4. Initial Truth, then silence when facts change:
   a. eg “My business is worth $3 million” (by the time of the signing off, it has dropped to $2.3 million)

5. Puffery and Vague Platitudes
   a. “This is a reasonable offer.”
   b. “This is our ‘bottom line.’”
   c. “This is a good business.”
   d. “Don’t miss this golden opportunity.”

6. Bluffs and Threats which are intentionally or recklessly false, or are “noise”:
   a. “I have an alternative buyer waiting.”
   b. “If we do not get $550,000, we are going to Court.”
   c. “If you don’t leave quietly, you will never work in this industry again.”
   d. “My client is a crusader/martyr/maniac; litigation is no problem for him/her.

7. No Hurry
   a. Convey the false impression that you are in no hurry

8. Extreme Offers (ambit or “insult” claims)
   These are offers which have zero market support either from comparative sales, or from precedents of decision makers

9. Spurious filed claims or cross claims
These are common attempts by a negotiator to intimidate and inconvenience another person by filing claims or cross claims based on dubious facts, evidence and rules.

10. **Add ons**
    “Whenever agreement is in sight, add another demand. (“There is one more thing…”)

11. **Good cop/bad cop routine**
    “Deal with me, otherwise you will have to deal with angry irrational X.”

12. **Flattery and Ingratiation**
    “I’ve always wanted to meet you.”
    “I’ve heard a lot about you.”

13. **Research and “Infiltration”**
    Pay investigators to discover counterpart’s goals, styles, and hidden information

14. **A Lawyer talks directly to the counterpart client**
    “They have an obstructive lawyer; we must communicate directly with them!”

15. **Stonewalling and Silence**
    “We ask for information, and they respond with silence, or vague platitudes”.

16. **Drown in paper, delay and administrative expense.**
    Burden the other negotiators with multiple requests for unnecessary information; and with huge amounts of paper and useless information which are expensive and time consuming for the others to process.

17. **Other?**

How common are EANTs amongst lawyers?

**Exercise.** A. Read through the above list of EANTs and circle the practices which you use or experience most often in your locality or area of work.

    B. In groups of three, interview your neighbours and discover their experiences and answers.

    C. Are there other EANTs which are not listed above which you use or experience regularly?
D. From your experience, do you think that the use of certain EANTs is increasing, or decreasing? Why?

The frequency of use of EANTs predictably varies dramatically across cultures and the cultures of lawyers, as reflected by anecdotes and more systematic research.¹ This raises the important question of whether certain EANTs are so entrenched as part of the “game” of negotiation, that they are substantially immune from regulation?

Anecdotally, from over four decades of practice as a lawyer and mediator in Australia, the writer as “conflict manager” has experienced the above EANTs to be “very common”. At a guess, 80% of cases one or more of the lawyers were using at least one, and usually several of the above EANTs --- namely 2,3,5,6,7,10,11,12, 13 and 14. Number 8, namely insult offers outside any market range, are present in say 90% of such contested, as compared to transaction, situations.

Anecdotally, almost universal in these litigated and mediated cases are the four great oral lies by lawyers-

- “This is our best offer”
- “This is our bottom line” (This phrase has become code for “I am lying and this is not our bottom line”)
- “If you do not take this offer, we are going to court”
- “Our expert opinion supports this conclusion”

Some senior lawyers with whom the writer works say to me “John, these are not really lies as no colleagues believe us when we say these things”!

When such phrases have become ubiquitous lies, they are not verified by adding adverbs such as “this really, really is,--- our bottom line”. The listener still hears the tainted phrase, not the desperate qualifiers. One wonders why lawyers bother with these phrases when the have become cultural code for “I am lying”? It is a fascinating linguistic study to seek out the alternative phrases which are understood as code in different cultures for, “I have been lying for sometime, but now I am telling the truth”. Arguably, such codes as prefixes to truth telling, must be used with scrupulous honesty as otherwise repeat players and club members have no language left with which to do business.

For example, the writer as mediator, has regularly experienced lawyers for insurers lying all morning, and then at a magic moment in the afternoon foreshadowing truth-telling with the code phrase, “I am getting close to my limit (for today)”. They rely on a repeat player listener, or the mediator, to hear and interpret that holy code, which

must never be broken so that the speaker can continue to work efficiently within that particular culture of banking, family, construction etc dispute management.

2013 Study of use of certain EANTs by lawyers.

One recent study in the USA, which accumulated findings from two previous studies of lawyers’ behaviours, found that approximately one third of lawyers surveyed in that study use particular EANTs regularly. The study hypothesised that the accurate number is considerably greater than one third, as respondents tend to be “more ethical” when answering questionnaires, than in the heat and competition of daily legal practice.

This 2013 study hypothesised at least four reasons for the high rate of “unethical” negotiation practices among lawyers, namely:

1. The rules of professional conduct imply or state that deceit is permissible in some circumstances. However, this reason seems to be a questionable cause of EANTs in those places where only a small percentage of lawyers have read or remember the vague local law society rules?
2. Lack of understanding (naivete?) about the importance of a lawyer’s reputation for honesty, if he/she is to have an efficient, and also personally satisfying career.
3. Hypercompetitive environment of law school and legal practice, which leads to justifiable fear of being “exploited” during negotiations. Again, repeating 2 above, an obsession with short term “winning” tends to lead to blindness about long-term life and business “success”.
4. Failure of law schools and some lawyers to understand basic legal rules and consequences of innocent, negligent and fraudulent misrepresentation. That is, there appears to be a surprising disconnect between “knowledge” of basic legal rules and “life”. Why allow a client to enter an unstable settlement which can be set aside forever for misrepresentation? Perhaps the disconnect and risk taking is encouraged by the infrequent direct commercial consequences or punishment upon lawyers for such misrepresentations?

This 2013 study in the USA suggests at least two conclusions based on these statistics. Firstly, every lawyer has a professional duty to his/her own client to start every negotiation with the assumption that the counterpart lawyer is a liar. Of course, this initial duty is modified or confirmed by repeated experience with particular lawyers.

Secondly, every lawyer needs to be expert with a standard repertoire of responses to perceived EANTs.

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3 Ibid at 267.
4 Ibid at 279.
What are the attempted controls (or not) of these EANTs in different cultures?---law, ethics and pragmatism?

The standard use of EANTs by lawyers, evidenced both by anecdote and more systematic research, suggests that control by various forms of “ethics” is very ineffective. Conversely, it could be argued that there would be a greater epidemic of EANTs without various ethical schools in partial and scattered “operation” by publicity, habit and occasional publicised enforcement. 5

It can be hypothesised that where an EANT crosses a line from potential ethical violation to “legal” offence, then more lawyers become vigilant to avoid illegality for both themselves and their clients. That has been the writer’s anecdotal experience. One of the primary reasons for employing a negotiating and drafting lawyer is to increase the chances that an agreement will be durable, and not be set aside at some later date6 Accordingly, where behaviour of client or lawyer is potentially “illegal”, then neon lights usually go on for negotiating lawyers, and careful steps are taken (sometimes to the annoyance of the clients) to avoid that illegality. Thus experienced lawyers are usually vigilant and knowledgeable to avoid or minimise client or own liability for fraudulent, negligent and innocent misrepresentation, promissory estoppel, accidental incorporation of contractual terms, breach of common law or statutory duties to use straight talk and disclose facts, agreements to deceive taxation, customs, and social security departments, and agreements to commit criminal offences. 7

Of course in the majority of cultures in the world, legal systems are both inefficient and corrupt in varying degrees. Accordingly, the modifying force of the “law” on negotiating behaviour of lawyers also fades away in those jurisdictions. 8

Focussing on attempted ethical controls of EANTs, what are the five (often overlapping) schools of ethics which are found hidden in the language and behaviour of lawyers, and further hidden in the “rules” of law societies?

5 See the Mullins case set out at the end of this paper. This is a rare example in Australia of a public crucifixion of an eminent lawyer for non-disclosure of a “new fact” which emerged just prior to a personal injury settlement.
8 See Transparency International, Corruptions Perception Index, cpi.transparency.org for ranking of degrees of corruption of many countries of the world.
Some writers such as Lewicki, suggest that there are only four schools of ethics, and that the fifth, namely prudence and practicality (the dominant religion of lawyers), is an imposter as it is so focussed on self interest that it is arguably not about “ethics” at all.⁹

The writer’s experience as a lawyer and mediator is that the dominant behavioural code of lawyers is overwhelmingly “prudence and practicality”. I have never been quoted a section of the written ethical rules of any law society by any lawyer. Is this the experience of other lawyers? I suspect that these written rules are unread and unknown by almost all lawyers. I have never met a lawyer who has admitted to reporting a colleague for breach of such written rules. This appears to be an entrenched situation where behavioural or “normative” codes over-ride written “rule” duties to report. Yet from early years of admission, I was colloquially lectured about (and duly passed on to others) the onerous duties of prudence and practicality (ie self interest), and watched these duties in action from all lawyers whom I respected. Here are extracts from that advice as received, and later given:

- “Never lie, it will come back to bite you”
- “Never make a promise which you cannot fulfil—it is a small community and deviants are remembered.”
- “If you make a mistake, then apologise immediately and fix it, even if you have to pay for the repair from your own pocket.”
- “If a client wants you to lie, then try to talk him out of it, but if he persists, withdraw and refund any fees he has paid you. This is the only safe course of action.”
- “Be known as a straight-shooter, and other lawyers will want to deal with you”
- “We have a list of all the dangerous lawyers in town, and you must never talk to any of them in person or on the phone unless a senior partner is also present.”—(“No, that list is not for public consumption, as defamation claims would soon follow”)
- “If a client complains too often, we politely send them elsewhere---they are too much trouble for too little return.”
- etc.

It is important to repeat that these swift homilies of self interest may have been sometimes supported by personal conscience, common behaviour patterns, legal risk analysis and law society rules. However, they were and are rarely expressed in such cumulative fashion. Perhaps pithy expressions of self interest have more initial educational impact than other perceived as paternalistic speeches?

The daily press, history books, the lives of many pioneers and professional workers including lawyers, are filled with examples of the four plus one schools of ethics set out below in tension or open conflict. The clashes between personal conscience

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combined with the end justifies the means, *versus* rules, organisational norms and practicality, provide the basic script for most books, plays and Hollywood movies.

The writer has been privileged to work with and for a number of lawyers whose personal convictions sometimes led them to break law society rules, *and* standard commercial and legal practices, *and* “imprudently” risk their own incomes, mainstream reputations *and* license to practice as lawyers.
SOME SOURCES OF “ETHICS”

1) Good end justifies means
2) Rules (of “law” and of ethical “codes”)
3) Organisational norms
4) Personal conscience
5) Prudence and practicality ($)
What follows below are helpful charts summarising some of the historical roots of each of the four schools of ethics, and the strengths and weaknesses of each school.\(^{10}\)

<table>
<thead>
<tr>
<th>Ethical System</th>
<th>Definition</th>
<th>Major Proponent</th>
<th>Central Tenets</th>
<th>Major Concerns</th>
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<tbody>
<tr>
<td>End-result ethics.</td>
<td>Rightness of an action is determined by considering consequences</td>
<td>Jeremy Bentham (1748-1832)</td>
<td>* One must consider all likely consequences</td>
<td>* How does one define happiness, pleasure, or utility?</td>
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<tr>
<td>“Robin Hood”:</td>
<td></td>
<td>John Stuart Mill (1806-1873)</td>
<td>* Actions are more right if they promote more happiness, more wrong as they produce</td>
<td>* How does one measure happiness, pleasure, or utility?</td>
</tr>
<tr>
<td>the end justifies</td>
<td></td>
<td></td>
<td>* Happiness is defined as presence of pleasure and absence of pain</td>
<td>* How does one trade off between short-term and long-term happiness?</td>
</tr>
<tr>
<td>the means)</td>
<td></td>
<td></td>
<td>* Promotion of happiness is generally the ultimate aim</td>
<td>* If actions create happiness for 90%, what of the other 10% Is it still ethical?</td>
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<td></td>
<td></td>
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<td>* Collective happiness of all concerned is the goal</td>
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### Four Approaches to Ethical Reasoning

<table>
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| Social contract ethics; “normative” ethics | Rightness of an action is determined by the customs and norms of a community | Jean-Jacques Rousseau (1712-1778) | * People must function in a social, community context to survive  
* Communities become “moral bodies” for determining ground rules  
* Duty and obligation bind the community and the individual to each other  
* What is best for the common good determines the ultimate standard  
* Laws are important, but morality determines the laws and standards for right and wrong | * How do we determine the general will?  
* What is meant by the common good?  
What do we do with independent thinkers who challenge the morality or the existing social order (eg Jefferson, Gandhi, Martin Luther King)?  
* Can a state be corrupt and still moral (eg Nazi Germany)? |
| Personalistic ethics | Rightness of an action is determined by one’s conscience | Martin Buber (1878-1965) | * Locus of truth is found in human existence  
* Conscience within each person calls him or her to fulfil his or her humanness and to decide between right and wrong  
* Personal decision rules are the ultimate standards  
* Pursuing a noble goal by ignoble means leads to an ignoble end  
* There are no absolute formulas for living  
* One should follow one’s group but also stick up for what one individually believes | * How could we justify ethics other than by saying, “it felt like the right thing to do”  
* How could we achieve a collective definition of what is ethical if individuals disagreed?  
* How could we achieve cohesiveness and consensus in a team that only fosters personal perspectives?  
* How could an organization assure some uniformity in ethics? |
ETHICS IN NEGOTIATION EXERCISE

Which of the FIVE schools of ethics do each of these statements predominantly reflect? (Some statements reflect more than one school of ethics.)

5 Schools? – (1) Rule based; (2) End justifies means (Robin Hood); (3) “Normative” (“everyone is doing it”); (4) Personal conscience; (5) Pragmatism, prudence and practicality (protect your perceived self-interests)

(1) “Be realistic, no-one makes full disclosure”

(2) “Never lie, it will come back to bite you”

(3) “The Law Society rules have not been interpreted to prohibit ambit offers”

(4) “I have to be able to sleep at night”

(5) “You have to break a few eggs if you want scrambled eggs”

(6) “Those lying bastards deserve some of their own medicine”

(7) “I don’t care what the rules say, I’m going to protect that forest”

(8) “Only a fool opens negotiations with his/her best offer”

(9) “Be known as a person of integrity; it will serve you well”

(10) “When acting for poor people, it may be necessary to stretch the truth occasionally”

(11) “Don’t act for poor people, it will eventually get you into trouble”

(12) Saying that “‘this is my bottom line’ is not a lie; it is just standard negotiation small-talk”

(13) “No-one has ever been struck-off for using good cop/bad cop routines”

(14) “Get real – all barristers lie about the strength of their cases”

(15) “Well I may lose my job, but I’m not going to attack his/her past behaviour”
The rules behind the written rules. Which school of ethics do various written law society codes of ethics predominantly reflect? Suggested answer: prudence and practicality.

The written rules of ethical codes of Law Societies tend to reflect one of the classic five codes, particularly prudence and practicality (self interest) and sometimes the “normative” school—that is, do what everyone is doing. This may improve the employability of lawyers by certain clients and thus reflect self interest again.

Here are some examples:

1. **From the ABA Code of Professional Responsibility:**
   “A lawyer shall not knowingly make a false statement of material fact or law.” [However] “under generally accepted conventions in negotiation, certain types of statements are not to be taken as statements of a material fact. Estimates of price or value placed on the subject of a transaction and a party’s intention as to acceptable settlement of a claim are in this category”.

   This remarkable and notorious written provision uses “generally accepted conventions in negotiation” to permit a lawyer to do what everyone else does, namely tell familiar lies such as:
   - “We will not settle unless you pay $1 million”
   - “Unless we receive reinstatement and damages of $500,000 we are going to court”.
   - “I have advised my client that she is entitled to a minimum of $700,000

   As previously mentioned, these above lawyer lies are also standard and unpunished outside the USA, but without the express honesty of the ABA Code. Which type of ethical code is preferable—the honest Americans or the devious rest of us?

2. **From the Bar Association of Queensland Code of Conduct:**
   “1.2—General Principles
   A barrister must not engage in conduct which is—
   (a) dishonest or otherwise discreditable to a barrister
   (b) prejudicial to the administration of justice, or
   (c) likely to diminish public confidence in the legal profession or in the administration of justice or otherwise bring the legal profession into disrepute”

   Such common rules as exist in Queensland use “categories of indeterminate reference” or weasel words which cross reference to each other, such as “dishonest”, “prejudicial,” “public confidence”, and “disrepute”. It is unclear if any EANTs are prohibited by these vague words. Rather the vague words appear to reflect predominantly the school of prudence and practicality? Lawyers are permitted to use a certain number of common deceptive negotiation practices in order to enhance our employability.

3. **From the Law Society of Saskatchewan Code of Professional Conduct**
   (effective July 1, 2012)
Like most codes, there is no attempted definition of “ethics” and so the reader must speculate on which historic school of ethics (or wandering combination of schools) is reflected in the code generally, and in specific rule sections. The Saskatchewan code (especially section 1.01) also uses many undefined weasel words such as “integrity”, “trustworthiness”, “respect”, “trust”, “reputation”, “irresponsible conduct”, and “impropriety”. It is again unclear whether any EANTs are caught by such words.

Section 1.01(1) Commentary.---
“If integrity is lacking, the lawyer’s usefulness to the client and reputation within the profession will be destroyed ---. [a] lawyer’s conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community---“
It can be argued again that the predominant code (not the only code) behind these Saskatchewan words is that of self interest, prudence and practicality---behave to certain standards so that we as lawyers are more likely to be employed?

Section 6.01(3) of the Saskatchewan Code provides:
“Unless to do so would be unlawful or would involve breach of solicitor-client privilege, a lawyer must report to the Society: (e) conduct which raises a substantial question as to another lawyer’s honesty, trustworthiness, or competency as a lawyer.”

Do EANTs come within this mandatory duty to report? If so, in practice the section is ignored as EANTs are epidemic. Or are EANTs outside this section of the Code because they are not “substantial”? Or does the word “competency” qualify “honesty” and “trustworthiness” when discussing “common” EANT behaviours? Or do the schools of normative ethics and self interest qualify the meaning of “honesty” and “trustworthiness” (as the audacious ABA Code expressly concedes)? It would seem so.

If the epidemic of EANTs “needs” to be reduced, should prudence, practicality and self interest be taught more expressly to lawyers and law students?
Arguably, some version of self interest is the dominant belief system, backed by language, codes and behaviour, amongst lawyers who are engaged in negotiation. And in reductionist fashion, litigation is primarily a form of negotiation.11
Of course, self interest often overlaps with, and sometimes competes with, the ethical schools of personal conscience, common practice, Law Society rules and rulings, and sometimes the end justifying the means.
Almost all EANTs can be currently justified or rationalised as OK under all four schools of ethics, and also under a narrow interpretation of self interest of lawyers.

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So if “someone” disapproves of the widespread use of EANTs by the majority of lawyers in certain areas of legal practice, then the four schools of ethics appear to be ineffective as sticks or carrots to effect change. All four have been easily manipulated into silence or vague approval of the common use of EANTs.

If this is correct, then at least three conclusions follow: **first**, more repeated emphasis could be placed on enlightened self interest, by studying the behaviour, beliefs and emotions of “successful” lawyers ---both anecdotally and systematically. My predictable hypothesis is that the majority of the EANTs (not all!!) are counter productive to **long term** marketability of respected and employed individuals or firms of lawyers both nationally, and internationally.

**Secondly**, all lawyers should be trained to expect the “standard” presence of EANTs in all negotiations; and to be competent in the routine responses to the likely presence of EANTs.

**Thirdly**, those legislators and judges who consider that some EANTs by lawyers are exploitative practices and expensive games, can be expected to experiment with attempted regulation by old or new **laws** directed both at lawyers and their clients.

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12 In USA, there appears to be renewed interest in studying “lawyering”, as well as the traditional focus on studying various aspects of “law”. Eg see Harvard Law School, Program on the Legal Profession [www.law.harvard.edu/programs](http://www.law.harvard.edu/programs); ssrn Law and Society; The Legal Profession eJournal

13 These first two conclusions echo Hinshaw, Reilly and Schneider at note 2.

14 In Australia, there have been repeated legislative and judicial attempts to control EANTs: eg by expanding the meaning of “good faith” in certain “types” of disputes, Western Australia v Taylor (1996) 134 FLR 211; by heavy fines on commercial lawyers and clients, Australia Consumer Law Act 2010 (Cth), s18 (formerly s52 of the Trade Practices Act 1974); see helpful W. Pengilley, “But You Can’t Do that Anymore!---the Effect of Section 52 on Common Negotiation Techniques” (1993) 1 Trade Practices Law J 113; by requiring all lawyers to certify that any claim has “reasonable prospects of success,” with personal penalties on lawyers for negligent certification, Civil Liability Act 2002 (NSW) s.198J (subsequently sterilised by judicial interpretation); by federal requirements that all lawyers certify “genuine steps to resolve” have been taken before filing in court, Civil Dispute Resolution Act 2011 (Cth); by multiple familiar rules of civil procedure aimed at modifying EANTs.
LEGAL PRACTICE TRIBUNAL  Queensland, Australia

CITATION: Legal Services Commissioner v Mullins [2006] LPT 012

PARTIES: LEGAL SERVICES COMMISSIONER
(applicant)
v
GERARD RAYMOND MULLINS
/respondent)

FILE NO/S: BS1876 of 2006

DIVISION: Legal Practice Tribunal

PROCEEDING: Application

ORIGINATING COURT: Legal Practice Tribunal at Brisbane

DELIVERED ON: 23 November 2006

DELIVERED AT: Brisbane

HEARING DATE: 6 November 2006

JUDGE: Byrne J

Mr K Dorney QC and Dr J Lamont assisting

ORDER: The Tribunal orders that the respondent:

(1) is publicly reprimanded;

(2) pay a penalty of $20,000;

(3) pay the applicant’s costs of the application to be assessed.

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – STATUTORY PROCEEDINGS – QUEENSLAND – where assumption forming the basis of experts’ reports had become false to barrister’s knowledge – where barrister deliberately relied on reports at mediation despite falsity of assumption – where other party settled case in the belief that the reports’ assumptions were valid – whether barrister’s actions in relying on reports constituted professional misconduct

COUNSEL: W Sofronoff QC (with him S McLean) for the applicant R Douglas SC (with him D de Jersey) for the respondent

SOLICITORS: Legal Services Commission for the applicant Gilshenan & Luton for the respondent

15 See note 5. This is an Australian example of an occasional crucifixion of an eminent lawyer for committing an EANT, namely silence about a last minute pre-settlement change of a material fact.
Discipline application

The Legal Services Commissioner contends that the respondent, a barrister, is guilty of professional misconduct in connection with negotiations for the compromise of a claim for compensation for personal injuries. Essentially, the complaint is that the respondent knowingly misled an insurer and its lawyers about his client’s life expectancy.

Client’s claim

In April 2001, Mr White was rendered quadriplegic in a motor vehicle accident. He retained solicitors to pursue a claim for damages. The insurer was Suncorp-Metway Insurance Limited (“Suncorp”).

Mr White’s solicitors supplied Suncorp with a report prepared by Evidex Pty Ltd (“Evidex”). The report included a comprehensive assessment by an occupational therapist, Ms Welshe, of the then 48 year old claimant’s future care needs, and an accountant’s evaluation of the cost of that care. Expressly, the report was based on an assumption that information in certain medical reports was correct.

In one such medical report, it was, it seems, Dr Davie who wrote that the injuries sustained in the accident had reduced Mr White’s life expectancy by 20% of that of a normal male of his age. The assessment stated that Mr White would continue to require care, equipment and home modifications for the rest of his life. Calculations of future care costs were prefaced by a statement that the assessment reflected 80% of the life expectancy of a 48 year old male: 27 years 11 months.

Later, the claimant’s solicitors provided Suncorp with a “Worklife Assessment” by Ms Welshe. This report recorded that Mr White had said that “[b]ut for his injury he had intended to continue working in his pre-injury occupation until retirement”. It also restated the author’s assumption that Mr White’s otherwise normal life expectancy had been reduced by 20% through the injuries sustained in the accident.

Eventually, the claimant’s solicitors provided Suncorp with an Evidex forensic accountant’s report. This revealed that the assessment of the value of the claimant’s future earning capacity – $934,178 – was based on projected earnings to “normal retirement age of 65”: 16 years, four months.

Cancer

By mid-September 2003, a mediation had been arranged in an attempt to negotiate a compromise of Mr White’s claim. The claimant’s solicitors had already retained the respondent to represent him at the mediation; and Suncorp’s solicitors had engaged Mr Kent, also a barrister, to protect Suncorp’s interests.
The mediation was set for 19 September 2003. In preparation for the event, on 16 September, the respondent conferred with the claimant and his solicitor, Mr Garrett. One topic of discussion was a draft schedule of damages prepared by the respondent which was to be settled and presented to Suncorp.

At the conference, the claimant said that: he was to receive chemotherapy treatment for cancer; he had been advised by his doctor that he had cancer spots on his lungs and in other places throughout his body; the cancer was described as secondary cancer and the doctor had been unable to find the primary cancer; he had been treated by a general practitioner and subsequently by a specialist; these matters had been discovered, at the earliest, on or about 1 September 2003; and there were no medical reports dealing with the cancer or treatment (“the cancer facts”).

On hearing this, the respondent told his client that it was his preliminary view that the cancer facts had to be disclosed to Suncorp before the mediation, and that the mediation was likely to be adjourned so that the insurer could investigate the issues. Afterwards, Mr White instructed Mr Garrett and the respondent that he did not wish to reveal the cancer facts unless he was legally obliged to do so, and that he wished the mediation to proceed because he wanted his claim resolved.

Propounding the client’s case

On or about 16 September, the respondent gave Mr Kent a two page document headed “Plaintiff’s Outline of Argument at Mediation”. This was a version of the schedule of damages settled at the conference with the claimant. There is no consensus about whether the Outline was delivered before or after the conference. But it is not expressed to be a draft, and nothing about it indicates that it is. So the probabilities are that it was delivered after the conference. As it happens, however, nothing turns on that.

The Outline proposed $854,787.20 for future economic loss. A footnote records that the sum has been arrived at “as per the Evidex report, but reduced for contingencies by 20%, including the prospect that the plaintiff may not have worked to age 65”. Future out-of-pocket expenses of $137,964 were said to have been calculated in accordance with the Evidex “report”. The costs of future care ($595,211.76), medical attendances and pharmaceuticals were expressed to have been based on needs “for 24 years”.

The respondent knew about the life expectancy assumption stated in the Evidex reports. No doubt he realized that it was founded on a medical report.

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16 An opinion written by the respondent on 19 September 2003 mentions different dates for this conference: 16 (p 1) and 15 September (p 6, twice). His fee note has 16 September as the date.
17 See Agreed Fact 16.
18 There is no explanation for the 24 years. It is not, however, suggested that it allowed for the cancer facts.
As the respondent hoped, Mr Kent and representatives of Suncorp considered the Outline. The two barristers discussed it. Their conversation took place after Mr White had disclosed the cancer facts to the respondent. According to the Statement of Agreed Facts:

“Between 16 September 2003 and 18 September 2003, in a telephone conversation, the respondent stated to Mr Kent that:

The claim for future care set out in the [Outline] was very reasonable; and

The claim for future economic loss was based upon the [Evidex] reports.

As the respondent knew and intended, Mr Kent communicated the substance of the telephone representations to Suncorp”.

There is no suggestion that Suncorp or its lawyers had pertinent information on Mr White’s life expectancy other than the Evidex reports. So it is not surprising that it is agreed that:

“As a consequence of the statements and representations referred to above, Mr Kent and the representatives of Suncorp responsible for the claim each believed that, by reason of the injuries, the claimant had a life expectancy of 80% of that of a normal man of his age.”

The Outline identified the various components of the claim. Life expectancy was highly significant to many of them. On its face, the Outline sought to support some by invoking the Evidex reports. These references invited Mr Kent and Suncorp to rely on those reports. That is also true of the respondent’s assertion to Mr Kent that the future economic loss component was “based upon” the reports.

**Respondent’s knowledge of changed circumstances**

When that conversation occurred, the respondent had already inferred that Mr White’s longevity was at least “likely to be further reduced … by the cancer facts”. In other words, he then believed, on substantial grounds, that the stated life expectancy that was critical to important parts of the claim was, very probably, no longer sound. But he did not disclaim the assumption. Instead, in effect, he asked Mr Kent to have regard to the Evidex reports on which the future economic loss claim was “based”.

From Mr White’s perspective, achieving a resolution at the mediation was desirable: a fortnight’s delay and Suncorp would have to be told of the cancer facts. Section 45(3) of the Motor Accident Insurance Act 1994 mandated disclosure to the insurer of any “significant change in … medical condition” since the Notice of Claim had been given within a month after the claimant had become aware of the change.

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19 Transcript: p 18.
The respondent conducted some research and spoke to senior counsel about his situation. By 18 September, he had resiled from his initial impression that the cancer facts should be disclosed. Instead, he came to the view that for as long as the claimant’s lawyers did not positively mislead Suncorp and its lawyers about the claimant’s life expectancy, they would not be violating any professional ethical rules. He then sought his client’s instructions.

He adverted to a risk that non-disclosure of the cancer facts might provoke a challenge to any compromise were Suncorp subsequently to discover the truth. Mr White did not wish to disclose the information unless legally obliged to do so. He wished to proceed with the mediation, and to finalise his claim as soon as possible. The respondent advised that the law did not oblige Mr White to disclose the diagnosis. He also told him and Mr Garrett that it was not appropriate to make positive assertions during the mediation that the facts were different from those they knew to be true, and that positive assertions could not be made that there were no impediments to the claimant’s life expectancy.

Mediation

The mediation did proceed, attended, it seems, by Mr White, Mr Garrett, the respondent, Mr Kent and Suncorp representatives.

During the mediation, the respondent “[r]eferred to and relied upon aspects of” his Outline to support Mr White’s compensation claim and “[r]epresented that, immediately prior to the injury, the claimant intended to continue working to normal retirement age”. It is not said whether any of those “aspects” concerned an Evidex report. But those present will have recognized that life expectancy was critical to the worth of major components of the claim. In any event, the respondent realized the impact of the Evidex reports: in particular, that the information in them about the assumption had led Mr Kent and Suncorp to suppose that an otherwise normal life expectancy had been reduced by about 20% by the accident.

At the mediation, the claim was settled. However, had Suncorp been informed of the cancer facts, it would not have agreed to the compromise.

The mediation was conducted, and the compromise concluded, in circumstances where the respondent appreciated that:

- the Evidex reports his solicitors had supplied to Suncorp assumed a particular life expectancy in apparent reliance on expert medical opinion;
- the reports had been furnished in the hope and expectation that they would influence a decision by Suncorp about compromising Mr White’s claim;

The pre-litigation mediation was not conducted under any statutory or other regulatory regime, such as the Uniform Civil Procedure Rules (with their requirement that the “parties must act reasonably and genuinely in the mediation”: Rule 325). And it is not suggested that terms, express or implied, of the consensus to participate in the mediation have significance for this application.

Para 27 of the Statement of Agreed Facts.
Mr Kent and Suncorp were persuaded by the reports of the accuracy of the life expectancy assumption and throughout the negotiations supposed that Mr White’s life expectancy accorded with it; 

that assumption, so fundamental to the value of the claim, was unsafe.

The respondent argues that his conduct in continuing to rely on the Evidex reports without disclosing the cancer facts was not tantamount to some representation that he was not aware of facts that could deleteriously impact on longevity. His case characterizes the compromise negotiations as “commercial”, conducted on a tacit, common assumption that, in deciding whether to settle, the parties would rely exclusively on their own resources and information. There would not, it is said, have been a reasonable expectation that influential information communicated during the negotiations would not knowingly be false.

These, at first blush startling, contentions presuppose that neither the general law nor any more demanding ethical duty required disclosure of the cancer facts or else disavowal of the life expectancy assumption.

Context influences the extent of legal and equitable obligations of disclosure. The disclosure duties of a fiduciary, for example, ordinarily extend beyond those of parties dealing at arm’s length in the pursuit of economic self-interest. But that negotiations between a potential litigant and a tortfeasor’s insurer for the compromise of a damages claim may be tinged with a commercial aspect serves rather to support the idea that the negotiants anticipate a measure of honesty from each other. After all, honesty promotes confidence in the process. As Lord Bingham of Cornhill puts it: “Parties entering into a commercial contract … will assume the honesty … of the other[s]; absent such an assumption they would not deal”. And the common law enforces such an expectation through the tort of deceit, which “provides a legal remedy for harm suffered in consequence of dishonesty” in business contexts.

Nor does the involvement of lawyers suggest that negotiations about settling a personal injuries claim are conducted in a shared expectation that legal consequences will not attach to intentional deception about material facts.

The respondent’s submissions accept that he was “impressed with knowledge that Suncorp would probably have been proceeding on the factual foundation that there was no other specific health vicissitude or contingency which impacted on Mr White’s damages assessment”: para 37 (original emphasis).


Donne Place Pty Ltd v Conran Pty Ltd [2005] QCA 481, [42]-[44]; Magill v Magill [2006] HCA 51, [48], [58], [156].


Magill v Magill at [17].

Magill v Magill at [140].
When this mediation was held, Queensland barristers could not have approached the exercise on the basis that they were entering an honesty-free zone. For one thing, Rules adopted by the Bar Association of Queensland then included:

“51. A barrister must not knowingly make a false statement to the opponent in relation to the case (including its compromise).
52. A barrister must take all necessary steps to correct any false statement unknowingly made by the barrister to the opponent as soon as possible after the barrister becomes aware that the statement was false.”

Professional misconduct

By continuing to call the Evidex reports in aid as information supporting Mr White’s claim after learning the cancer facts and recognizing their significance for the validity of the life-expectancy assumption, the respondent intentionally deceived Mr Kent and Suncorp representatives about the accuracy of the assumption. He did so intending that Mr Kent and Suncorp would be influenced by the discredited assumption to compromise the claim: which happened.


See also Rule 21, which provides that a barrister must not knowingly make a misleading statement to a court on any matter. “Court” is defined to include a “mediation”: Rule 15.

The express adoption at the mediation of the Evidex reports makes it unnecessary to consider the “principle that the maker of a representation believed to be, or actually true when made, but which the maker later discovers to be false, but refrains from correcting, well knowing that the representee is acting upon the representation, and intends the representee to do so, will be guilty of fraud”: Permanent Trustee Australia Limited v FAI General Insurance Company Limited (in Liquidation) (2003) 214 CLR 514, 534; cf Macquarie Generation v Peabody Resources Ltd [2000] NSWCA 361.
expected of legal practitioners of good repute and competency as to constitute professional misconduct.\textsuperscript{35}

**Penalty**

[32] The financial consequences for Suncorp were serious, potentially at any rate. After the deception was discovered, Suncorp commenced proceedings to recover the settlement sum. The case settled on confidential terms. So the extent of Suncorp’s loss is unknown.

[33] In mitigation, there are many references from senior practitioners attesting to the respondent’s competence and good character. Despite the stance adopted in resisting this application, the references indicate that there is good reason for optimism that the respondent will not set about deceiving a colleague again. And his misconduct was not designed to derive a personal advantage: an anxiety to advance his client’s interests accounts for his grave misjudgement.

[34] The respondent also points to investigations he made before advising Mr White that there was no obligation to disclose the cancer facts. He conducted research. He asked senior counsel about his predicament, which was prudent. These efforts are to his credit even though, unfortunately, in both pursuits, he posed the wrong questions. Supposing that no more candour was to be expected of him at this mediation than of an advocate in court, the respondent inquired of a senior colleague whether, at a trial, a plaintiff’s barrister had to lead evidence of contingencies that adversely affect the client’s claim – missing the significance of his continuing reliance on the life expectancy assumption. His research was similarly misdirected: legal difficulties involved in what he had in mind were overlooked.

[35] The misconduct warrants a public reprimand and a substantial\textsuperscript{36} fine. The reprimand publicly signifies disapproval of his misconduct. It and the fine should also deter similar misbehaviour, by the respondent and others. The protection of the public does not require more severe sanctions.

**Disposition**

[36] The Tribunal orders that the respondent:

1. is publicly reprimanded;\textsuperscript{37}
2. pay a penalty of $20,000;\textsuperscript{38}
3. pay the applicant’s costs of the application to be assessed.\textsuperscript{39}

\textsuperscript{35} cf. Adamson v Queensland Law Society Incorporated [1990] 1 Qd R 498, 507, 508; Baker v Legal Services Commissioner [2006] QCA 145, at [46]. The conduct having occurred before the Legal Profession Act 2004 (“LPA”) came into force on 1 July 2004, whether it amounts to professional misconduct is to be assessed by the standards at the time: s. 614(4) LPA.

\textsuperscript{36} This fine exceeds the fees derived in connection with the mediation, which amounted to $9,100 (excluding GST).

\textsuperscript{37} Section 280(2)(e) LPA.

\textsuperscript{38} Section 280(4)(a) LPA.

\textsuperscript{39} Section 286(1) LPA.