

Duties to the Court

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1.1 Introduction. This paper is a slightly revised version of chapter 14 of Alan Paterson and Bruce Ritchie, *Law, Practice and Conduct for Solicitors*,¹ the first full length textbook on legal practice and professional ethics in Scotland for 120 years. In the paper I offer an in-depth, systematic examination of the duties owed to the court by solicitors under Scots law and ethics. It is in this field, perhaps above all others that the special character of the solicitor's agency is most apparent. For here we are reminded that the lawyer is a key player in the justice system with obligations not simply to clients, fellow professionals, witnesses and other third parties, but also to the court.² Despite the description of solicitors as "officers of the court",³ it is not the case, as occasional unguarded commentators suggest, that the lawyer's duty to the court⁴ always trumps the lawyer's other duties.⁵ In fact, where the lawyers' various obligations conflict, a delicate balancing operation is called for, and in the process the key lodestars will be the needs of the adversarial system of truth finding, the interests of justice and the human rights requirement of a fair trial or hearing. Numerous articles and even books have been written in the common law world on the appropriate balance to be struck between these competing duties. There is a rich literature in the field, primarily in the United States but to a lesser extent in Australia, Canada, and England. In these jurisdictions the balance struck will reflect or in some instances, define, the prevailing conception of the role of the advocate in the adversarial system. Indeed, between and within the jurisdictions there are subtle variations which evolve over time. One view that is gaining considerable currency in most of these jurisdictions is that the appropriate balance will vary depending on the type of case, for example, whether the a lawyer is acting for a criminal accused or in a civil case against the state, as opposed to a situation in which the parties are more evenly matched or where the values of a liberal democracy are less clearly at stake.⁶ Again, there is now a widespread view in the common law world that the role of the family lawyer requires a less adversarial balance between the lawyer's duties.⁷

¹ (W Green, Edinburgh,2006). This paper is published in this format with the kind permission of the publishers and my co-author. As indicated in the preface I was responsible for this chapter in the book.

² See the various duties contained in Code of Conduct for Scottish Solicitors 2002 and Article 8 in particular.

³ It is widely accepted that solicitors in the UK, like lawyers in Australia, Canada and New Zealand, are officers of the court, not least since they are admitted and removed from office by the court. Although barristers in England have been less willing to embrace the description, it seems reasonable to treat advocates in Scotland as officers of the court, since they too are admitted to the public office of advocate by the Court.

⁴ The lawyer's duty to the court is in fact a bundle of duties just as the duty to the client is a bundle of separate duties. It follows that when the duties conflict it is a complex balancing of a range of duties which is called for. See e.g. the analysis of conflict of interest as a conflict of duties in A.Paterson & B.Ritchie, *Law, Practice and Conduct for Solicitors* (W.Green, Edinburgh, 2006) para 7.01.

⁵ See e.g. G. E. Dal Pont, *Lawyers' Professional Responsibility*, (2nd edn, LBC,Sydney, 2001) at p.444. Even Lord Reid in his famous description of the duties of the defence lawyer in *Rondel v Worsley* refers to the "overriding" duty to the court. In the UK this is no more true than the reverse, namely that the lawyer's duties to the client e.g. to preserve confidences must always triumph over the lawyer's duty of candour to the court. The latter is a view famously or infamously espoused by Monroe Freedman for US lawyers in *Understanding Lawyers' Ethics* (Matthew Bender, New York, 1990) and *Lawyers' Ethics in an Adversary System* (Bobbs-Merrill,New York, 1975). In truth, in the UK at least, the tension between the lawyer's duties to the client and to the court will be resolved in different ways depending on the type of case in which it occurs and even on the context in which it occurs.

⁶ See e.g David Luban, *Lawyers and Justice* (New Jersey: Princeton University Press, 1988) and C. Menkel-Meadow, "The Limits of Adversarial Ethics" in D. Rhode (ed) *Ethics in Practice* (OUP, New York, 2000) at pp.123ff. These debates have been fought out over many years in the USA but in the last 15 years commentators in most English speaking countries have begun to explore the issues.

1.2 Historical background. The historic association between Scottish law agents and the courts stems back to at least the fifteenth century when a professional caste of pleaders began to emerge, in part because legal representation, which had grown up in the canonical courts, subsequently spread to the secular courts.⁸ While it is undoubtedly the case that court appearance work was more central to the role of the typical solicitor or procurator two centuries ago than it is now,⁹ the association with the courts is not simply a question of rights of audience and Scottish courts having, as courts of justice in many jurisdictions do, an inherent jurisdiction to regulate those who may appear before them. Thus, notaries public, Writers to the Signet (WS) and Solicitors in the Supreme Courts (SSC), none of whom historically actually appeared in the Court of Session, were nonetheless admitted to office by that Court¹⁰ and subject to professional discipline by the same Court.¹¹ (Provincial law agents on the other hand were admitted to office in, and disciplined by, their sheriff courts). Rather the link with the courts reflects the importance to the state of regulating entry to the office of solicitor or law agent. Latterly this had both political and fiscal aspects to it. Thus, in the 18th century, Scottish solicitors or procurators were only permitted to act as such after taking the appropriate oaths in court, in an attempt to ensure the loyalty of these solicitors to the Crown after the 1715 and 1745 Jacobite rebellions.¹² Following the 1785 Stamp Act, both admission and annual certification required payment of the appropriate duty.

Prior to the 19th century the WS and the SSC had exclusive rights to act as law agents in the Supreme Courts while in several of the more important sheriff courts¹³ the local law agents formed societies whose members attained exclusive rights to practise in these courts. However, following the 1870 Royal Commission into the Courts of Law in Scotland¹⁴ the Law Agents (Scotland) Act 1873 was passed, creating a national and uniform mode of entry for solicitors and notaries and enabling any solicitor to practise in any court. Admission¹⁵ and removal for serious professional misconduct¹⁶ of solicitors were now concentrated in the Court of Session. This reform, as Lord Justice-Clerk Cooper noted in *Solicitors' Discipline (Scotland) Committee v. B.*¹⁷ was part of a modernisation process in which Parliament in the latter part of the 19th century transferred the discipline of learned professions from the courts to the professions themselves "subject to the overriding control of the Court on appeal".¹⁸ Unfortunately, the 1873 Act in seeking to strengthen the regulatory regime for solicitors from a practical standpoint, inadvertently introduced a conceptual lacuna which has still not been rectified today. Thus the Act provided for the Court to handle misconduct whilst expressly leaving the powers of the inferior courts¹⁹ intact "so far as these powers may be necessary for supporting the jurisdiction and maintaining the authority" of those courts.²⁰ This formulation appears to derive from Erskine²¹ and, as Lord Cooper

⁷ See e.g. C. Menkel-Meadow, "The Limits of Adversarial Ethics" in D. Rhode (ed) *Ethics in Practice* (OUP, New York, 2000) at pp.123ff and J.Eekelaar, M. Maclean and S. Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000).

⁸ See Legal Profession in *The Laws of Scotland, Stair Memorial Encyclopaedia*, (Butterworths:Edinburgh, 1992), vol.13 , *Solicitors* paras 1126-36; *Advocates* para 1240 ; J. Henderson Begg, *A Treatise on the Law of Scotland relating to Law Agents* (hereafter, Begg on Law Agents) (2nd edn, 1883) Ch 1 Historical Introduction.

⁹ In 2005 the Law Society estimated that about 1,500 of the 9,500 practising solicitors in Scotland (16%) could be classified as court practitioners. (Personal conversation with the author).

¹⁰ See Begg *op. cit.* Ch.2.

¹¹ See Begg *op. cit.* Ch. 25; Greens Encyclopaedia of the Laws of Scotland (W.Green, 1930) Vol.9; *Law Agent* para. 103.

¹² See SME Solicitors, para. 1135.

¹³ Aberdeen, Glasgow, Edinburgh and Paisley.

¹⁴ C175 (1870).

¹⁵ s.7.

¹⁶ s.22.

¹⁷ 1941 S.C. 293 at 296.

¹⁸ at 297.

¹⁹ The Act is silent as to the residual disciplinary powers of the Court of Session, but the position of the latter was drawn into line with that for inferior courts in the Solicitors (Scotland) Act 1933 and again in the Solicitors (Scotland) Act 1980.

²⁰ s.26.

²¹ Institute I, ii, 8.

notes,²² is normally associated with the jurisdiction enjoyed by Scottish Courts to deal with contempt of court. Parliament seems to have assumed that the combination of these contempt powers and the misconduct jurisdiction contained in the statute equated to the pre-existing disciplinary powers of the courts over all solicitors. Unfortunately, since the contempt powers refer only to solicitors undertaking court work or being bound by a court order, the statute appears to have created a regulatory vacuum in relation to (1) the discreditable conduct,²³ (falling short of misconduct) of solicitors who do not appear in court and are not subject to a court order and (2) the discreditable conduct (falling short of misconduct) of solicitors who do appear in court, but which is not covered by the contempt of court jurisdiction of the courts. Previously it could have been argued that the courts' disciplinary jurisdiction in relation to solicitors covered both of these. Indeed, Lord President Normand and two of his First Division colleagues tried to argue that the common law powers of the courts to deal with discreditable conduct, as distinct from professional misconduct, survived the 1873 Act and its successor, the Solicitors' Scotland Act 1933,²⁴ in the seven judge case of *Solicitors' Discipline (Scotland) Committee v. B.*²⁵ However, in a fascinating clash between the First and Second Divisions, Lord Justice-Clerk Cooper with the help of the Second Division and one defector from the First Division, defeated Lord President Normand and the rest of the First Division. Despite Lord Cooper's reputation as a traditionalist, his belief in the modernising intent of Parliament led him²⁶ to observe: "I can see no escape from the conclusion that any common law powers to deal with discreditable conduct, as distinct from professional misconduct, which may have existed in Scotland prior to 1933, cannot survive the [Solicitors' (Scotland) Act 1933]."

Ironically, the actual point of difference between the two camps was ultimately resolved in Lord Normand's favour by the Legal Aid and Solicitors (Scotland) Act 1949 Schedule 7, and the whole of the 1933 Act was subsequently repealed by Schedule 7 of the 1980 Solicitors (Scotland) Act. Unfortunately, it cannot be argued that this allowed the common law powers of the lower courts to discipline for discreditable conduct to revive, since the normal canons of statutory construction indicate that if a statute changing the common law is itself repealed, this does not mean that the common law revives. It follows that the disciplinary powers of the courts over solicitors are now governed by the provisions of the Solicitors (Scotland) Act 1980. Part IV of that Act (as amended)²⁷ contains the modern day complaints procedures for solicitors and the provisions relating to the Discipline Tribunal. The role of the courts is set out in s. 54 (appeals from the Tribunal), s.55 (disposal powers) and s.56 which states: "*Except as otherwise expressly provided, nothing in this Part shall affect the jurisdiction exercisable by the Court, or by any inferior court over solicitors.*" If this reasoning is correct s. 56 cannot revive the common law powers of the courts but must refer to the position as established in *Solicitors' Discipline (Scotland) Committee v. B.*,²⁸ namely, that the courts cannot deal with discreditable behaviour, but only misconduct in accordance with what is now the 1980 Act, but that the courts can still discipline solicitors appearing before them "to the extent necessary for supporting the jurisdiction and maintaining the authority" of the court.²⁹

²² *Op cit.* p.299.

²³ This equates closely to the modern day concept of unsatisfactory conduct. See Ch. 1 Alan Paterson and Bruce Ritchie, *Law, Practice and Conduct for Solicitors*, (W Green, Edinburgh, 2006) and s.53 of The Legal Profession and Legal Aid(Scotland) Act 2007.

²⁴ S.25 of the 1933 Act establishes a Discipline Committee to deal with professional misconduct by solicitors although the Court of Session is left as the body responsible for appeals from the Discipline Committee as well as some first instance work and all proposals to strike solicitors from the Roll. Section 35 repeats the formula of s. 26 of the 1873 Act by stating that the existing disciplinary powers "of the Court or of inferior courts or the judges thereof over solicitors practising before such courts, so far as these powers may be necessary for supporting the jurisdiction and maintaining the authority of [these courts]" are not affected by the Act except in respect to striking solicitors off the roll.

²⁵ 1941 S.C. 293.

²⁶ His three supporting colleagues expressly agreed with his analysis on this point.

²⁷ Primarily by the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990.

²⁸ 1941 S.C. 293.

²⁹ s. 35 1933 Solicitors (Scotland) Act.

1.3 The jurisdiction exercisable by the court: duties to the court. Even if my analysis is correct with respect to the powers of the courts today in relation to misconduct and discreditable conduct, there remains the issue as to the exact ambit of the courts' residual regulatory and disciplinary powers which are necessary for supporting the jurisdiction and maintaining the authority of the courts. Lord Cooper appears to have thought that the ambit was largely restricted to matters punishable as contempt of court, but with respect, it is clear from the actual practice of the courts, that this is too narrow a reading of the courts' powers, particularly in relation to the award of expenses against solicitors. It is submitted instead that to ask what the residual regulatory powers of the courts are, is simply another way of enquiring as to the scope and enforceability of the duties of solicitors as officers of the courts. These duties to the court are derived from the common law and are owed not to the judges or courts in which a solicitor chooses to practise, as such, but rather to the wider community because of the public interest in the proper administration of justice.³⁰ It is this wider public interest that the courts are safeguarding by enforcing these duties despite that fact that they are universally referred to as "duties to the court" and partly enforced through the use of the contempt of court powers. The exact scope and ambit of these duties in Scots Law is unclear, because of the dearth of Scottish authority. However, Ipp's account of these duties in Commonwealth jurisdictions seems a worthwhile place to start. For Ipp, the duties cover :

- (1) a general duty to conduct cases efficiently and expeditiously,
- (2) a general duty not to abuse the court process,
- (3) a general duty of disclosure owed to the court, and
- (4) a general duty not to interfere with the administration of justice.³¹

1.4.1 The duty to conduct cases efficiently and expeditiously – personal liability. From early times it has been recognised that a solicitor whose wrongful conduct has brought about a delay or dislocation of proceedings could exceptionally be penalised either through an award of expenses against the solicitor in person or through a finding of contempt of court. Thus personal liability in expenses may arise from failing to attend court³² or discharging or adjourning a debate or proof due to the fault of the lawyer. Again it has been held that improperly using the procedure of the court to delay the outcome to which the opponent is entitled can in appropriate circumstances lead to an award of expenses against the lawyer personally. Thus in a case where the sheriff held that it should have been obvious to the solicitor for the defender at a certain stage that there was no defence to the action, the solicitor was found liable in expenses for failing to withdraw the defences at that stage, and instead allowing the defence to stand for another three months until the action reached the head of the queue of cases awaiting disposal and then consenting to decree.³³

1.4.2 Disrupting the business of the court – contempt of court. Equally, there have been a few cases where a solicitor or advocate has failed to appear in court at the due time and thereafter been held to be guilty of contempt of court for egregiously wasting the time of the court. Contempt is a *sui generis* offence³⁴ and has been described as "conduct which challenges or affronts the authority of the court or the supremacy of the law itself".³⁵ In *Muirhead v. Douglas*³⁶ a solicitor was fined for contempt in being 25 minutes late for court. An appeal to the High Court was unavailing, since Lord Cameron took the view that the solicitor deliberately chose to run the risk of being late and causing "an avoidable and quite possibly serious delay in the due dispatch of the court's business". In more recent times, however, the High Court has shown a reluctance to uphold findings of contempt for

³⁰ See Justice D.A. Ipp, "Lawyers' Duties to the Court", 1998 (114) *The Law Quarterly Review* 63 at p.63.

³¹ *ibid.* p.65.

³² See *Stewart v. Stewart* 1984 S.L.T. (Sh Ct) 58 at 59.

³³ *ibid.*

³⁴ See Gerald Gordon, *Criminal Law* (3rd edn.) (W Green, Edinburgh, 2001) Ch. 50.

³⁵ *H.M. Advocate v. Aird* 1975 J.C. 64 at 69.

³⁶ 1979 S.L.T. (Notes) 17.

failure to appear timeously in court. In *Macara v MacFarlane*³⁷ a solicitor who was double booked and unable to attend in court to conduct a trial had arranged cover. Unfortunately the cover arrangements failed and the solicitor was found guilty of contempt for failing to appear on time. His appeal to the High Court was successful. Again, in *McKinnon v. Douglas*³⁸ a solicitor was convicted of contempt of court when he failed to appear in the district court as duty agent. However, it was his partner who was the duty agent and because he was ill, the solicitor having tried and failed to find a substitute, chose first to attend to three custody cases in the sheriff court before going to the district court. He was delayed further in attending the district court due to a misunderstanding, and was accordingly one and a half hours late in arriving at the court. Despite offering his profuse apologies he was held liable for contempt on the following day by the district court. The High Court quashed the conviction noting that in the circumstances there was “no neglect of the obligation to support the dignity of the court” nor any “wilful or reckless interference with the administration of justice”. Similarly, in *Ferguson v. Normand*³⁹ a solicitor who was double booked for the district and sheriff courts, and through an error of judgement concluded that he could fulfil both obligations, was held by the High Court not to have shown the necessary wilful disregard for the authority or dignity of the court to amount to contempt, although he had acted rashly. In like manner, the High Court in *Murdanaigum v. Henderson*⁴⁰ suspended a finding of contempt by a sheriff against a solicitor for turning up over an hour late for the start of a trial. The sheriff had twice previously warned the solicitor as to his conduct and regarded the third failure as contempt. The High Court, however, accepted the solicitor’s assertion that his lateness stemmed from failing to put the correct entry in his diary and concluded that mere inefficiency could not amount to contempt, and that even given the previous warnings the solicitor’s conduct did not amount to a pattern of wilful conduct.

Clearly, the climate has changed significantly since *Muirhead*. Now it is evident that negligent or reckless behaviour even, will not constitute contempt. Thus in *McMillan v Carmichael*⁴¹ the accused was found guilty of contempt of court for yawning noisily and stretching his arms above his head at the back of the court and thus distracting the sheriff, without making any attempt to be discreet or stifle his yawn. The High Court overturned the finding on the ground that contempt required a wilful and intentional challenge to the court’s authority. While this could in appropriate circumstances be inferred e.g. from the deliberate failure to heed a warning from the judge, recklessness or gross negligence on their own could not give rise to a finding of contempt. Again in *Williams v Clark*,⁴² Williams appeared in court late, disrupting another trial, and then his mobile phone started ringing. This was held to be contempt of court, as there were clear signs indicating that phones should be switched off, and the sheriff stated that his behaviour in general amounted to intentional disrespect of the court. However, the conviction was suspended on appeal, as the sheriff was not entitled to take into account other facts, including William’s lateness, and should have considered only the incident regarding the mobile phone. It was however stated that the ringing of a mobile phone may be regarded as contempt as it causes significant disruption to the court. More recently still was the case of *HMA v. Dickie*.⁴³ Here Lord Hardie was confronted with a solicitor who had failed, in his view, to take sufficient steps to find an alternative counsel at relatively short notice to undertake a High Court trial, with the result that the trial had to be postponed. Lord Hardie considered that the solicitor had been cavalier and “grossly reckless resulting in a disregard for the court and the administration of justice”. However, in applying *McMillan v. Carmichael*,⁴⁴ Lord Hardie concluded that gross recklessness could not constitute contempt of court without an intention to challenge or affront the authority of the court or to defy its orders. Lord Hardie considered that the lawyer’s behaviour could be viewed in this

³⁷ 1980 S.L.T. (Notes) 26.

³⁸ 1982 S.L.T. 375.

³⁹ 1994 S.L.T. 1355.

⁴⁰ 1996 S.L.T. 1297.

⁴¹ 1994 S.L.T. 510.

⁴² 2001 S.C.C.R. 505.

⁴³ 2002 S.L.T. 1083.

⁴⁴ 1994 S.L.T. 510.

light, but that equally it was also compatible with sheer incompetence on the part of the solicitor. The solicitor therefore escaped a conviction for contempt of court by the skin of his teeth.

The advocate who failed to turn up for a High Court trial before Lord Hardie a year later⁴⁵ because he was double booked, was not so fortunate. His conduct in failing to appear was held to be reckless, but not thereby contempt, following *McMillan v. Carmichael*.⁴⁶ However his attempt to exculpate himself by the use of statements which the judge considered to be false, was held by Lord Hardie to constitute contempt of court since he deemed them to have been carefully and deliberately (and not recklessly) made and therefore in Lord Hardie's opinion displayed the necessary intention to challenge or affront the authority of the court. Lord Hardie's finding was the subject of a successful appeal to the High Court through the medium of the *Nobile Officium*⁴⁷ but in allowing the petition the High Court did not object to Lord Hardie's statement of the law. In short, therefore, it is clear that nowadays merely disrupting the business of the courtroom by lateness or failing to appear or by one's general behaviour in court, will not of itself constitute contempt "unless there is wilful defiance of or disrespect to the court, or behaviour which challenges or affronts its authority".⁴⁸

1.4.3 Disrupting the business of the court – professional misconduct.⁴⁹ The foregoing cases on contempt and the disruption of the business of the court in no way gainsay the fact that both solicitors and advocates have a duty not to cause delays or dislocations in proceedings before the courts. This duty can in serious cases be enforced through a finding of professional misconduct, not least because, unlike contempt, recklessness or gross neglect can be sufficient to establish professional misconduct. One such case was *Corrigan*.⁵⁰ Here the solicitor was found guilty of professional misconduct in respect of his gross failure in his professional duty to take reasonable steps to ensure his timeous attendance or to make other satisfactory arrangements for the representation of his clients. Between August 1982 and April 1983 the Respondent's conduct in relation to various courts was the subject of adverse comments on five separate occasions. On three of these occasions, the Respondent was found guilty of contempt of court, although he was given an absolute discharge on two of them. The Scottish Solicitors Discipline Tribunal looked at the events surrounding the three contempt findings. In relation to the first, they held that the Respondent had known that he had two simultaneous trials for some time and should have taken action to resolve the conflict in his diary before the night before, when it was too late. This behaviour was held to be sufficient to constitute professional misconduct. On the second occasion the respondent failed to attend a trial diet because he had wrongly noted the date in his diary. The Tribunal held that such carelessness did not contain such an element of recklessness or gross neglect that would justify a finding of professional misconduct. On the final occasion the respondent retained instructions to represent clients in trials in the sheriff court and the district court up to the close of business on the preceding day when it was too late to arrange cover. The respondent was delayed in the sheriff court and was accordingly 35 minutes late for the district court and subsequently held to have been in contempt of court. The circumstances of this case were held by the Tribunal to merit a finding of professional misconduct.

1.4.4 The duty to conduct cases efficiently and expeditiously - the advent of case management. We have seen that solicitors that delay proceedings can be penalised in a variety of ways. It is possible that this may become more of a problem as the culture of judicial case management begins to

⁴⁵ *HM Advocate v. Tarbett* 2003 S.L.T. 1288.

⁴⁶ *ibid.* Lord Hardie added that had the failure to appear been a willful act, that would have been contempt.

⁴⁷ *John Mayer* 2004 S.C.C.R. 734.

⁴⁸ R. McInnes and D. Fairley, *Contempt of Court in Scotland* (CLT Professional Publishing, Hertfordshire, 2000), at p.45. See also R. McInnes, "Conflict between Bench and Bar" 2004 SLT (News) 2.

⁴⁹ J.Ryder, *Professional Conduct for Scottish Solicitors* (Butterworths, Edinburgh, 1995) p.82 argues persuasively that delay to court proceedings by a solicitor can also amount to IPS. It is certainly more than arguable that the Court would constitute "any person with an interest" for the purposes of s.33 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. The Law Society, to date have given the phrase a narrow interpretation.

⁵⁰ See I.Smith and J. Barton *Procedures and Decisions of the Scottish Solicitors' Discipline Tribunal* (T & T Clark, Edinburgh, 1995) at p. 134 and Discipline Tribunal Decision (DTD) 636/84a.

permeate in the future. Traditionally, in Scotland the parties and their legal representatives have effectively been more responsible for the pace of litigation (both civil and criminal), than the judiciary. However in Scotland, as in other parts of the Commonwealth, the increasing cost of litigation has led to a growing recognition that it is inappropriate to leave the progress of proceedings largely to the inclinations of the parties and the work practices of their representatives. In a number of sheriff courts in the last twenty years (principally Dundee and Kilmarnock) the shreival bench has demonstrated that the local legal culture which prevailed amongst the professional participants in courts could be changed. Thus the sheriffs in these courts, by adopting a more restrictive approach to the granting of continuations and adjournments, were able to speed up the pace of litigation in their courts. There have also been a number of procedural reforms, for example the introduction of intermediate diets in summary criminal cases, the Bonomy reforms in solemn cases, and the Coulsfield Rules in personal injury cases in the Court of Session which have encouraged the judiciary to take a more directive/interventionist approach to case management.⁵¹ Further indications of changing times in this area can be found in the dicta of Lord Hardie in the *Dickie*⁵² and *Tarbett*⁵³ cases, which antedated the Bonomy reforms. In the first, Lord Hardie indicated that except in the most unusual of cases adjournments should not be granted simply because the accused wants the services of a particular counsel. He added:⁵⁴

“Adjournment of cases to later sittings causes problems for witnesses, whose memory may be affected by the passage of time. They may also result in an accused person being detained in custody for a longer period than would otherwise be necessary...Moreover adjournments cause disruption to current and future sittings of the High Court, resulting in unnecessary delays to the determination of cases, additional inconvenience to the public, who are involved as jurors or witnesses and a waste of public expenditure and resources.”

In *Tarbett*⁵⁵ Lord Hardie was equally trenchant, observing that the practice of seeking numerous adjournments stems from a minority of solicitors not being willing to prioritise High Court work so that cases can proceed to trial at the first opportunity, and a minority of counsel and solicitor advocates seeking adjournments because of inadequate time for preparation, only for the adjourned hearing to be attended by a new counsel or solicitor seeking yet another adjournment for the same reason. He added: “In my opinion such practices are undesirable and are contrary to the interests of justice. They result in unnecessary delays in the commencement of trials, with adverse consequences for the accused, particularly if he is custody, as well as witnesses and prospective jurors. By their actions the minority of practitioners bring the system of justice in Scotland and the legal profession as a whole into disrepute.”

1.5 The Duty not to Abuse the Court Process.⁵⁶ The second set of duties to the court stems from the need to preserve the integrity of the adversarial system. It follows that a lawyer should not seek unreasonably to raise or defend an action for which there is no legal justification. Where the lawyer *knows* that there is no cause for action but raises or continues with it nonetheless, for example, in pursuit of publicity or some other illegitimate motive, he or she will be potentially liable in contempt of court,⁵⁷ to a conduct complaint and / or an award of expenses against the lawyer personally.⁵⁸ This

⁵¹ The most obvious example in England and Wales is the Woolf reforms.

⁵² 2002 S.L.T. 1083.

⁵³ 2003 S.L.T. 1288.

⁵⁴ 2002 S.L.T. 1083 at p.1086F.

⁵⁵ 2003 S.L.T. 1288 at p.1291E.

⁵⁶ Ipp, *op.cit.* pp.79-83

⁵⁷ See e.g. *R v. Weisz* [1951] 2 K.B. 611 at p.617.

⁵⁸ Abuse of civil process can also be an actionable wrong. See e.g. D.M. Walker, *Civil Remedies* (W. Green & Son, Edinburgh:1974) pp.998 *et seq.*

is true whether the purpose of the lawsuit is to denigrate the other side,⁵⁹ to satisfy the client's malice against the opponent⁶⁰ or simply to buy time.

Deliberate and wilful abuse of process⁶¹ through raising or defending a case for which the lawyer is aware that there is no justification is fortunately rare. However, the summary jurisdiction of the court to take action under the common law against wayward officers of the court extends further than this. Although Begg⁶² discusses the summary jurisdiction of the courts, he was writing before *Solicitors' Discipline (Scotland) Committee v. B.*⁶³ and its English equivalent - *Myers v. Ellman*.⁶⁴ *Myers* made it clear that the summary jurisdiction of the English courts was not limited to instances of deliberate wrongdoing or dishonesty. Thus, although a "mere mistake or error of judgement is not generally sufficient.... a gross neglect or inaccuracy in a matter which it is the solicitor's duty to ascertain with accuracy may suffice".⁶⁵ Again in *Edwards v. Edwards*⁶⁶ Sachs J. notes that "anything which can be termed an abuse of the process of the court" is included, adding that "unreasonably to initiate or continue an action when it has no or substantially no chance of success" might be covered. The statutory wasted costs jurisdiction of English courts⁶⁷ has now partially superseded the common law inherent jurisdiction of the court with respect to abuse of process, however, it is clear that the earlier case law established that the abuse of process jurisdiction arose if the lawyer knew *or ought reasonably to have known* that the argument was unsustainable. Recklessness is therefore covered as well as intentional actings.

What about Scotland? The narrower disciplinary role of the courts,⁶⁸ and the dearth of decided cases perhaps requires us to be cautious in reaching a definitive conclusion. In *Manson v. Chief Constable of Strathclyde*⁶⁹ expenses were awarded against a solicitor who raised an action which was "manifestly incompetent and irrelevant." Moreover, the cases of *Stewart v. Stewart*⁷⁰ and *Blyth v Watson*⁷¹ strongly suggest that in Scotland also the court can award expenses where the solicitor was reckless or ought reasonably to have known that the argument was unsustainable. In *Blyth* the solicitors for a personal injury victim reached a full and final settlement of the case in 1984 only for them to re-raise the same claim a year later when it looked as though the victim's condition was going to dramatically worsen. Having obtained legal aid they proceeded to raise the action in order to get within the triennium period of limitation. Thereafter, the solicitors accepted that the earlier settlement excluded the subsequent claim. Lord Morrison in the Outer House held that in raising the action the

⁵⁹ See the New Zealand rule of Professional Conduct r. 7.04 "A practitioner must make all reasonable efforts to ensure that legal processes are used for their proper purposes only and that their use is not likely to cause unnecessary embarrassment, distress or inconvenience to another person's reputation, interests or occupation."

⁶⁰ E.g. *Re Cooke* (1889) 5 TLR 407 at 408. If, however, the action is well founded, the client's motive is usually irrelevant.

⁶¹ "It is an abuse of the process of the Court to bring a claim with no genuine belief in its merits but in bad faith and for an ulterior purpose...A party who makes an exorbitant claim with no genuine belief in its merits, rejecting all reasonable offers of settlement, and exploiting his own inability to satisfy an order for costs in order to bring pressure on the other party to settle for an excessive sum, is abusing the process of the Court." per Millett L.J in *Bowring v. Corsi* [1994] 2 Lloyds Law Rep 567 at p.580.

⁶² Begg on *Law Agents*, *op.cit.* p.280.

⁶³ 1941 S.C. 293.

⁶⁴ [1940] A.C. 282.

⁶⁵ Per Lord Wright in *Myers*, *op.cit.* at p.319.

⁶⁶ per Sachs J. [1958] P 235.

⁶⁷ Presently contained in ss.51(1) and (3) of the Supreme Court Act 1981 (as amended). See e.g. *Count Tolstoy-Miloslavsky v. Lord Aldington* [1996] 2 All E.R. 556.

⁶⁸ A comparison of *Solicitors' Discipline (Scotland) Committee v. B.* and *Myers v. Ellman* appears to show that the English legislation on solicitors' discipline has expressly reserved more of the common law disciplinary powers of the English courts than the Scottish legislation has for Scottish courts. In practice, the difference is not likely to be that great since Lord Cooper in the former case appears to have underestimated the scope of the summary jurisdiction of Scottish courts, by implying that it was largely confined to the contempt of court power.

⁶⁹ *The Scotsman*, Dec 16, 1983 referred to in McPhail, *op. cit.* p.34.

⁷⁰ 1984 S.L.T. 58.

⁷¹ 1987 S.L.T. 616.

solicitors must have been aware that it was insupportable. In the light of the facts of the case it is respectfully submitted that this need not have been the case, however, it is clear that Lord Morrison was taking the view that the solicitors *ought to have known* that the subsequent claim was insupportable. In *Stewart*, Sheriff Ireland QC took the view that even if the solicitor honestly believed that the defence he had put forward for his client was a tenable one, nevertheless he ought to have known or concluded long before the diet of proof that it was in fact unsustainable, and his failure to do so amounted to an abuse of process. Certainly, it seems undeniable that Webster is right to argue⁷² that the lawyer must investigate a case properly before raising an action and should not abuse the process of court by raising an action, out of anger or malice, which is likely to unnecessarily injure the defender.

It should, however, be stressed that in most of the jurisdictions where abuse of process applies, it is clear from the case law that merely because the lawyer chooses to act or to continue to act even when it is obvious that there is little chance of winning, does not necessarily open him or her up to sanction. To hold otherwise would be to severely undermine the effective operation of the adversarial system, for this is an area where the lawyer's duty to pursue the best interests of the client⁷³ comes in direct conflict with the lawyer's duty to the court. Unpopular clients or those with weaker or more problematic cases would find it even harder than they now do to obtain representation if the two duties were not kept in balance. Thus Lord Esher M.R. observed that⁷⁴ where the lawyer knows that the case is "absolutely and certainly hopeless" it is a breach of duty and dishonourable to continue to act. However, he added that it was perfectly acceptable to continue to act if the lawyer is unable to conclude that the case was indeed "absolutely and certainly hopeless". As Sir Thomas Bingham MR noted more recently in an analogous situation:⁷⁵ "A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or defence which is plainly doomed to fail...". As the judge also recognised, it is not always easy to distinguish between a case that is hopeless and one where there is an abuse of process. However, he was surely right to conclude that the benefit of any doubt must be given to the lawyer, i.e. the duty to pursue the best interests of the client.⁷⁶

What more then is required to invoke the jurisdiction? Here it is difficult to be definitive in Scotland, because of the shortage of case law. However one situation where a lawyer who was aware or ought reasonably to have been aware that the case or defence was unsustainable will be found liable in expenses is where the lawyer acted from an ulterior or illegitimate motive, thus causing loss to the other side.⁷⁷

1.5.1 Abuse of the Court Process and defenders – the role of skeletal defences. It is clear that defenders can be guilty of abuse of process just as pursuers can – and the same range of sanctions exists. Thus courts in a range of jurisdictions have rejected as an abuse of process efforts by lawyers defending civil cases to unnecessarily lengthen the duration of proceedings.⁷⁸ Indeed, the case with the lengthiest exposition of the solicitors' liability in expenses in Scotland related to the defence of a

⁷²J. Webster, *Professional Ethics and Practice for Scottish Solicitors* (Avizandum, Edinburgh, 2004) at para. 3.08.

⁷³Sometimes known as the duty of "zealous advocacy".

⁷⁴*In Re Cooke* (1889) 5 TLR 407 at 408.

⁷⁵*Ridehalgh v. Horsefield* [1994] 3 All E.R. 848 at p.863a, although this was a wasted costs order case.

⁷⁶As A. Boon and J. Levin observed in *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing, Oxford, 1999) at 218, it would be unfortunate if lawyers who were *bona fide* running test cases in the hope of changing the law were to be penalised by awards of costs against them.

⁷⁷Again, Goldberg J in *White Industries*, *ibid* is instructive. As he observed (at p. 236): "it involves some deliberate or conscious decision taken by reference to circumstances unrelated to the prospects of success with ... a recognition that there is no chance of success but an intention to use the proceeding for an ulterior purpose or with disregard of any proper consideration of the prospects of success..."

⁷⁸E.g. the USA (see the Model Rules 3.2 "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client"), New Zealand and Australia (see Dal Pont *op.cit.* at p.470).

case for summary ejection from heritable property, namely, *Stewart v Stewart*.⁷⁹ As we saw earlier the defence solicitor had put forward a frivolous defence although he genuinely believed that it was a tenable argument. However, in finding him liable in expenses Sheriff Ireland QC noted that while he could not be criticised for stating the defence of personal bar as he did, his failure thereafter to apply his mind at any stage prior to the proof to the question whether such a defence could be plausibly be argued, constituted an abuse of process. Sheriff Ireland's exposition of the law is worthy of reproduction *in extenso*:

“It has long been recognised that for certain breaches of duty, such as failing to attend court, a solicitor may be found personally liable in expenses. In my opinion it is equally a breach of duty if a solicitor improperly uses the procedure of the court to delay the achievement of a result to which a litigant is entitled. When a pursuer asserts a claim by serving a summons or initial writ, he is entitled to the remedy he seeks unless his opponent can show some ground in fact or law why this should not be granted. If no appearance is entered, the pursuer is entitled to decree in absence. If appearance is entered and defences are lodged, the pleadings have to be adjusted and the law debated and the facts ascertained, and it may be months or years before the remedy is achieved. But this delay is not something to which a defender is entitled in order that he may postpone the discharge of his obligations. It arises solely because the time is required to ascertain the truth if there is a genuine dispute about the facts or the law. It seems to me to follow that if a defender who has no defence either in fact or in law uses the procedures not to establish his right but to delay the enforcement of a right which is undeniable, he is guilty of an abuse of process and, if he is a solicitor, ought to pay what his conduct has cost the other party to the litigation....[It matters not that] he may honestly have believed that there was a defence. A professionally qualified solicitor is in my view required to do more than abstain from dishonesty. It is his positive duty, in the words of Lord Atkin in *Myers v. Elman*, ‘to conduct litigation . . . with due propriety’. I do not intend to suggest that a solicitor acts improperly in all cases by entering appearance and stating a defence which may turn out to be unsubstantial. It may be perfectly proper, if there is initially doubt about the facts or the law, to put in skeleton defences to preserve the position while investigations are made. But as soon as the facts and the law are elucidated, and it appears that there is no defence to the action, the defence should be withdrawn and decree allowed to pass. It is in my opinion improper to allow the defence to stand until the action reaches the head of the queue of cases awaiting disposal, and then to consent to decree. That is to use the intervening time not for the necessary purpose of determining disputed issues of fact or law, but for the improper purpose of delaying the enforcement of a right about which there is no longer any dispute.”⁸⁰

Sheriff Ireland's judgement is instructive on a number of fronts. First he recognises (as Lord Esher and Sir Thomas Bingham M.R. did) that the court's summary jurisdiction does not arise simply because the defender has put forward an argument that the court subsequently finds to be unsound, since to do so would undermine the adversarial system. It is submitted therefore that in Scotland as in England, for so long as we retain the adversarial system substantially in its current guise, then although the lawyer's duty to the client has to be balanced against the duty to the court, the benefit of any doubt should go to the lawyer's duty to safeguard the interests of the client. Secondly, Sheriff Ireland points to the limitations which should attach to the use of skeleton defences. Thus the Law Society indicated in 1986⁸¹ that except in circumstances of extreme urgency, the lodging of skeleton

⁷⁹ 1984 S.L.T. 58.

⁸⁰ For an expression of very similar sentiments in Australia see Goldberg J. in *White Industries Pty Ltd v. Flower & Hart* 213 (1998) 156 ALR 169 at252: “It is perfectly proper for a party and its legal advisers to fight a case and to put an opposing party to proof of its cause, although I question whether it is appropriate to put an opposing party to the proof of an issue, which is not disputed, which will not be a critical issue at trial and which will have the effect of running up costs unnecessarily. Nevertheless, it is not proper, in my view to adopt a positive or assertive obstructionist or delaying strategy which is not in the interests of justice and inhibits the court from achieving an expeditious and timely resolution of a dispute.... If a party instructs its legal advisers to adopt such a strategy the legal adviser should inform the party that it is not proper for it to do so and if the party insists, then the legal adviser should withdraw from acting for that party.”

⁸¹ 1986 J.L.S.S. 248

defences should be avoided, and should not be used simply as a delaying tactic.⁸² The Society also added that while bare denials may be relevant they can saddle the defender with additional and unnecessary expense.⁸³ Here the lawyer's duty to pursue the best interests of the client is very clearly being tempered by the duty to the court not to commit an abuse of process.⁸⁴

1.5.2 Abuse of the Court process and criminal cases. Sheriff Ireland in *Stewart* referred to an English criminal defence case, *Abraham v. Justun*⁸⁵ in a way that suggested that criminal cases are no different than civil cases when it comes to the issue of abuse of process. Halsbury,⁸⁶ however suggests that the abuse of power inherent jurisdiction in civil and criminal proceedings has developed along separate lines in England and Wales and that the test is harder to invoke in criminal cases. In my view this should also be the position in Scotland. As Dal Pont⁸⁷ argues, the balance between the duty to the client and that to the court should be more in favour of the former than the latter in criminal cases for three reasons: first because the criminal proceedings are initiated by the Crown; second because the prosecution has to prove their case beyond reasonable doubt and the accused is entitled to put the Crown to the test and thirdly that the accused has the sole option as between pleading guilty or not guilty.⁸⁸

1.5.3. Basis of abuse of process jurisdiction. Although the commentators are agreed that the abuse of process jurisdiction relates to breach of duty to the court, from time to time the question has arisen as to what the basis of the court's jurisdiction is to find the lawyer personally liable in expenses such cases. Lord Wright in *Myers v. Ellman*⁸⁹ is particularly instructive where he observes that "the underlying principle is that the Court has a right and a duty to supervise the conduct of its solicitors and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally."⁹⁰ For Lord Wright the jurisdiction is compensatory as well as punitive and in this line of thought he is supported by Viscount Maugham.⁹¹ As the cost of litigation rises, the penalty associated with the jurisdiction becomes more severe. Because of this and the court's natural reluctance to undermine the adversarial system, awards of expenses in abuse of process cases are relatively uncommon - in Scotland or elsewhere. However, judges and lawyers alike are aware that the jurisdiction exists and the existence of the power to award

⁸² *Ellon Castle Estates v Macdonald* 1975 S.L.T. (Notes) 66 illustrates the limitations of skeleton defences. Having entered a bare denial the defenders sought to make other averments at a later stage. Since these were held to be incompatible with the bare denial contained in the Process when the case went to the Procedural Roll, the defenders lost the case, thus indicating the dangers of being caught with a straight denial in one's pleadings. (I am indebted to Mike Jones QC for the opportunity to peruse the Process in this case.) Nevertheless, as I. MacPhail, *Sheriff Court Practice* (2nd edn) p.302 indicates, a skeleton defence may be a perfectly fair and relevant defence. See also *Ganley v. Scottish Boatowners Mutual Insurance Association* 1967 S.L.T. (Notes) 45 and *Gray v. Boyd* 1996 S.L.T. 60.

⁸³ See *J. C. Forbes Ltd v Duignan* 1974 S.L.T. (Sh Ct) 74 and *Jarvie v Laird* 1974 S.L.T. (Sh Ct) 75. The Society added that solicitors should not use the practice of delaying the revisal of their pleadings until amendment after their opponent has drawn attention to their deficiencies in debate.

⁸⁴ In 2002 the Professional Practice Committee ruled that a solicitor who had previously acknowledged a debt and part paid the same, had behaved improperly by subsequently seeking to recall the decree in absence by putting forward a defence of "debt denied". The committee agreed with the sheriff that putting forward such a defence in direct contradiction to a prior admission of the debt was inconsistent with the solicitor's duty as an officer of the Court.

⁸⁵ [1963] 1 W.L.R. 658.

⁸⁶ *Laws of England* 4th edn 1995, Vol 44(1), para. 168.

⁸⁷ *op.cit.* at p.475. This accords with the view of David Luban that zealous advocacy is more defensible in criminal defence cases than in most civil cases. See D. Luban, *The Good Lawyer* (Rowman & Allanhead, New Jersey: 1984) at pp.91-93.

⁸⁸ It follows that judges should be slow to seek to emulate Mr Justice Melford Stevenson who sought to dock the legal aid fees of defence counsel in a case (who had attacked the veracity of the police witnesses) on the grounds that defence counsel were not entitled to be mere "loudspeakers for a maladjusted set".

⁸⁹ [1940] A.C. 282 at 319.

⁹⁰ *op.cit* at 319.

⁹¹ *op.cit* at 289.

expenses against lawyers personally influences the behaviour of both the judges and those appearing before them.⁹²

1.5.4. The position of counsel. It is widely believed that whatever may be the position concerning the award of expenses against a solicitor for breach of duty to the court through an abuse of process, there is no power in Scotland to award expenses against counsel in the same situation.⁹³ This is in line with the English position where it was confirmed by the Court of Appeal in *Ridehalgh v. Horsfield*⁹⁴ that there was no common law power to award costs against a barrister. This situation was said to stem from the fact the common law immunity from suit of barristers and the fact that strictly speaking English barristers are not “officers of the court” on historical grounds and not therefore subject to the court’s summary jurisdiction (except with respect to contempt of court). The argument from the barrister’s immunity is misconceived, since the policy objectives for the immunity are not the same as those lying behind attempts to make lawyers open to sanction for breaching their duty to the court not to commit an abuse of process.⁹⁵ In any event, now that the civil immunity from suit of barristers in litigation has been removed in England and Wales,⁹⁶ and arguably also in Scotland,⁹⁷ this argument has lost most of its cogency. As for the argument that advocates owe no duties to the court to avoid an abuse of process because they are not strictly officers of the court, this strikes the modern mind as special pleading of a peculiarly unconvincing nature. If barristers or advocates can be punished for contempt, why not for breach of duty to the interests of justice?⁹⁸

While Scottish authority on this point is hard to come by, one of the Institutional Writers, Bankton,⁹⁹ states that if “during the dependence of a cause, an advocate discovers that it is unjust or calumnious, he ought to desert it, in consequence of his oath at his admission, and in point of conscience and justice to his character” indicating that a failure to so act was misconduct if not a breach of duty. It is unclear whether Advocates are officers of court. In Scots law, however, they are admitted and removed from the public office of advocate by the Court of Session. Moreover there is absolutely no doubt from the case law, the Faculty of Advocates’ *Guide to the Professional Conduct of Advocates*, and from entry on Advocates in the *Stair Memorial Encyclopaedia* that members of the Faculty owe extensive duties to the courts and that they can be punished by the court for contempt of court for their conduct in the performance of their professional duties. Finally, Sheriff Ireland in *Stewart* indicates that in his view there was no difference between the duty owed to the court by counsel and by solicitors. It is respectfully submitted that this is the case and that there is no justification for holding that Scottish advocates are not subject to the summary jurisdiction of the court in relation to duties to the court. Accordingly there would appear to be no reason why a Court could not award expenses against an advocate where an abuse of process can be established, even without a statutory intervention.

1.6 A general duty of candour owed to the court. This duty, which comes into sharpest contrast with the lawyer’s duties to pursue his or her client’s interests to the best of the lawyer’s ability and the duty not to breach the duty of confidentiality to the client, is as longstanding as the duty not to abuse the court process. The strength of the adversarial system in the UK and other common law countries

⁹² The English experience of wasted costs orders suggests that it is weapon in the judicial armoury which should be used very sparingly. Empirical research suggests that it is not a cost-effective procedure, since it brings less back than the cost of invoking it. See H. Evans, *Lawyers’ Liabilities* (Sweet & Maxwell, London, 2002), Ch. 7.

⁹³ See e.g. MacPhail, *op.cit* at p.628 and *Reid v. Edinburgh Acoustics Ltd (No.2)* 1995 S.L.T. (Notes) 87.

⁹⁴ [1994]Ch. 205.

⁹⁵ See the judgement of the New Zealand Court of Appeal in *Harley v. McDonald* [1999] N.Z.L.R. 545 at p.558.

⁹⁶ See *Arthur J S Hall v. Simons* [2002] 1 A.C. 615.

⁹⁷ But see *Wright v. Paton Farrell* 2006 S.L.T. 269 where the First Division, *obiter*, ruled that immunity of suit remains in Scotland for the conduct of legal representatives in criminal trials. However, the justification of the immunity was precisely to enhance the due administration of criminal justice.

⁹⁸ See again the reasoning of the New Zealand Court of Appeal in *Harley v. McDonald* [1999] N.Z.L.R. 545 at p.558.

⁹⁹ (IV iii 13).

has ensured that it is in this area that curbs on the lawyer's ability to zealously advocate his or her client's cause are most keenly contested.

1.6.1 Candour in matters of law. It has long been established in Scotland, as in most English speaking countries, that not only must lawyers not deceive the court on matters of law, but also that they are under a positive duty to make full disclosure as to all the law relevant to the case in hand. This means all authorities, statutory or otherwise which are in point must be brought before the court by each party, *whether they support or undermine the position being argued for by that party*.¹⁰⁰ This requires a lawyer either to keep up to date with changes in the law or to research the field if it is outside the lawyer's normal area of practice. However, the rule does not require the lawyer to present an impartial or disinterested account of the law,¹⁰¹ and the lawyer is entitled and probably obliged to make all reasonable and good faith efforts to distinguish those authorities which do not support the position for which the lawyer is contending. This obligation of candour applies equally in uncontested as well as contested cases. It has been said that a corollary of the rule is that a lawyer may not advance a legal argument which the lawyer knows to be unsound.¹⁰² As against this the malleability of the common law and the fact that ultimately, to paraphrase Dr Johnson, it is the court's job to determine the soundness of legal propositions rather than the lawyer's, probably entails that the constraints imposed by this injunction may be rather limited.¹⁰³ The standard articulation of the principle is to be found by Lord Chancellor Birkenhead in the House of Lords decision in *The Glebe Sugar Refining Company Ltd v The Trustees of the Port and Harbours of Greenock*:¹⁰⁴

"It is not, of course, in cases of complication possible for their Lordships to be aware of all the authorities, statutory or otherwise, which may be relevant to the issues which in the particular case require decision. Their Lordships are therefore very much in the hands of counsel, and those who instruct counsel, in these matters, and this House expects, and indeed insists, that authorities which bear one way or the other upon matters under debate shall be brought to the attention of their Lordships by those who are aware of those authorities. This observation is quite irrespective of whether or not the particular authority assists the party which is so aware of it. It is an obligation of confidence between their Lordships and all those who assist in the debates in this house in the capacity of counsel"¹⁰⁵.

The duty of disclosure is not restricted to advocates. Thus the same obligation applies to solicitor advocates:¹⁰⁶

"(1)... Where a solicitor advocate is aware of a previous decision binding on the court, or of a statutory provision relevant to a point of law in issue, it is his duty to draw that decision or provision to the attention of the court whether or not it supports his argument and whether or not it has been referred to by his opponent."

There is every reason to believe that the rule also applies to solicitors appearing in courts and before tribunals.¹⁰⁷ There have been few reported cases in which the rule has been enforced,¹⁰⁸ but failure to refer to a relevant authority may be reflected in the award of expenses, and could be a conduct offence. The seeming clarity of the rule hides certain areas of debate. First, the ambit of the rule when

¹⁰⁰ See the authorities quoted in M. Blake and A. Ashworth, "Ethics and the Criminal Defence Lawyer" 7 (2004) *Legal Ethics* 167 at p.177.

¹⁰¹ See e.g. the Commentary to Rule 3.3 (a)(1) and (3) of the New Model Rules of Professional Conduct in the USA.

¹⁰² See e.g. Webster, *op. cit.* para 3.06.

¹⁰³ Doubtless American realists or post-modern thinkers would argue that this rule imposes almost no constraints on creative counsel.

¹⁰⁴ 1921 S.C. (H.L.)72.

¹⁰⁵ *Ibid.* pp.73 74.

¹⁰⁶ Solicitors (Scotland) Rules of Conduct for Solicitor Advocates 2002, rule 6(1).

¹⁰⁷ See e.g. Webster (4th edn) *op. cit.* para 3.06.

¹⁰⁸ However, one such case was *Copeland v. Smith* [2000] 1 W.L.R. 1371.

applied to a precedent. Does it only apply to precedents which are binding on the court or tribunal before whom the appearance is being made, or does it extend to authorities which are merely persuasive? This is a point that has attracted some attention in Federal jurisdictions such as Australia and the USA where there are many more persuasive than mandatory decisions. There is no definitive ruling on this matter, but it seems likely that Scotland would adopt the position that only decisions which are binding or in point and highly persuasive, for example, they emanate from an English House of Lords Appeal or Privy Council decision not directly binding on a Scots court, need be cited to the court. Thus, despite globalisation and the greater availability of foreign law reports, it would probably be thought unreasonable to expect the rule to apply to foreign case law unless, perhaps, the case is being argued at the level of the House of Lords or the Privy Council.¹⁰⁹ A second area for debate relates to the rationale for the rule. At first blush it seems somewhat curious that the duty of candour extends further in relation to matters of law than it does in relation to matters of fact – when it might be thought that it was easier for the judge to conduct his or her own researches into the former than the latter.¹¹⁰ Part of the explanation may be that adherence to the rule will usually not involve sacrificing the lawyer’s duty to the client, since following it will rarely violate the client’s confidentiality and with it the client’s trust. The rationale put forward by Lord Birkenhead in *Glebe Sugar Refining*¹¹¹ that not to have such rule would entail obtaining a decision based on imperfect knowledge or involve turning the court into a debating assembly upon legal matters, seems less compelling, since such arguments apply equally to questions of fact.

1.6.2 Candour in matters of fact. The basic proposition here is encapsulated in art.8 of the Code of Conduct for Scottish Solicitors:

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

Superficially this appears not dissimilar to the lawyer’s duty to the court on matters of law. In reality there is a significant difference. While the lawyer must act honestly and non-deceitfully with respect to any evidence which he or she has led in, or information provided to, the court, there is ordinarily no obligation to place all relevant *evidence* before the court. Thus, normally, the lawyer need not disclose the existence and identity of an adverse witness to the other side,¹¹² nor need the lawyer lead every available witness with relevant information.¹¹³ Indeed, if there is evidence that is actively harmful to the client’s case which derives from confidential or privileged discussions with the client, there is a positive ethical obligation not to lay it before the court.

1.6.3 False or fabricated evidence. All but the most ardent supporters of zealous advocacy accept that the adversarial system does not permit lawyers to knowingly put before the court false or fabricated evidence, no matter what the kind of proceeding nor whether the deception causes harm to anyone.¹¹⁴ The *Young* case¹¹⁵ involved a solicitor who misled the court in two separate cases. In the first, the solicitor pretended that his client had died intestate, in order to assist the surviving spouse, even though he was aware that the client had left a holograph will. The solicitor subsequently submitted applications to the court (twice) and to an insurance company (once), indicating that the

¹⁰⁹ Cf. the Australian Bar Association’s 1995 *Code of Conduct*, r.25 which abandoned a requirement in the earlier *Code* which referred to the duty to disclose any “binding or persuasive authority” for a simpler reference to “any binding authority” because of the proliferation of law reports. See Dal Pont *op.cit* p.453.

¹¹⁰ For this and other critiques of the rule see, C. Wolfram, *Modern Legal Ethics*, (West Publishing, St. Paul, 1986) at.p.681.

¹¹¹ *ibid* p.74.

¹¹² Prosecutors are in a special position. The Privy Council ruled in 2005 in *Sinclair v. HMA* Privy Council DRA No. 2 of 2004 (11/05/2005) that the prosecution must disclose all material evidence in its possession for or against the accused (including witness statements) unless there is some strong public interest which would justify non-disclosure.

¹¹³ See Ipp, *op. cit.*p.68.

¹¹⁴ But see, M. Freedman, *Lawyers’ Ethics in an Adversary System* (Bobbs-Merrill, New York, 1975) and *Understanding Lawyers’ Ethics* (Matthew Bender, New York, 1990).

¹¹⁵ DTD 1089/02.

client had died intestate. In the second case, when the client died, his will was sent to a family member and got lost in the post. The solicitor once more submitted an application to the court stating that the client had died intestate, this time to save the family the trouble and expense of seeking to prove the tenor of a lost document. The Solicitors (Scotland) Discipline Tribunal held that the solicitor had submitted these applications to the court in the knowledge that they were untrue and dishonest and found him guilty of professional misconduct in that he had knowingly placed before the court information that was not simply misleading but false.

If the *Young* case was straightforward the *Bridgwood* case¹¹⁶ was rather less so. Mr Bridgwood, a solicitor, found himself in a difficult situation when a longstanding client informed him that she had given the police a false name and address for herself, when arrested. Contrary to his advice, the client refused to disclose her true name to the authorities. Instead, she pled guilty under the false name, thereby avoiding her previous convictions, and Mr Bridgwood spoke in mitigation. He considered it was proper for him to do this, provided that he did not explicitly refer to her using her assumed name, or refer to her character. Unfortunately, the courts did not come to the same conclusion.¹¹⁷ Mr Bridgwood was convicted for acting in a manner tending and intending to pervert the course of public justice, and was fined £2000 by the Solicitors Disciplinary Tribunal. It was not simply the use of the assumed name that mattered. In the UK a person can call themselves anything they like. Had the change of name been done legally, e.g. by deed poll or marriage, it could not have been a false name. It was the adopting of the assumed name in order to deceive the court over the issue of previous convictions that made it a breach of duty to the court. Similarly, an address is not a false one if it is not the client's principal place of residence, provided it is an address where the client can be contacted. As Burleigh observed:

“A solicitor 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 solicitor knows to be false, with the intent of misleading the court. The defence solicitor need not correct information given to the court by the prosecution or any other party which the solicitor knows will have the effect of allowing the court to make incorrect assumptions about the client or his case, provided the solicitor does not indicate in any way his agreement with the information”¹¹⁸

The English Law Society's criminal law committee considered the case and added that in this situation the following should apply:

1. The solicitor should seek to persuade the client to give the court the correct name and address. If the client refuses the solicitor should withdraw from acting.
2. Where the client gives the correct name but a false address or date of birth, the solicitor should also withdraw, since the false information is relevant to previous convictions or to bail.

The committee did not deal with the situation of what the lawyer should do if, having withdrawn from acting the client informs the lawyer that they intend to persist in using the false identity and thus pervert the course of justice. The Canadian solution that this “future harm or crime” permits, but does not require the lawyer to breach confidentiality and disclose the deceit¹¹⁹ may apply in Scotland and England as a public interest exception to the confidence, but would not be effective against an action based on breach of legal professional privilege.

¹¹⁶ See D. Burleigh, *John Francis Bridgwood and the solicitors duty to client and court* 1989 LSG 26, 11.

¹¹⁷ The issue is not a novelty since the Codes of Alberta and British Columbia expressly prohibit misleading the court as to the identity of one's client. See M.Proulx and D. Layton, *Ethics and Canadian Criminal Law*(Toronto, Irwin Law Inc, 2001) at p.267

¹¹⁸ D. Burleigh, “John Francis Bridgwood and Solicitors, Duty to Client and Court” (1989) 26 LSG, 11.

¹¹⁹ See M.Proulx and D. Layton, *Ethics and Canadian Criminal Law*, p. 269.

The Bridgwood case is interesting on a number of fronts, not least because of the guidance it might offer in cases of client perjury. It is, after all, a short step from saying that a lawyer who fails to take remedial action where a known falsehood has been put before the court by his or her client, is guilty of assisting in the positive deception of the court, to holding that the lawyer must also take remedial action when the client has given perjured testimony to that court.¹²⁰ Equally, while Bridgwood dealt with the situation where the client had misled the court *before* the lawyer became involved in the case, what would be the position if the false evidence had been led in court unwittingly by the lawyer, after he had become involved in the case, e.g. he had not known the client beforehand and therefore happily referred to the client using the false name in ignorance that it was not the client's real name. Clearly, such an innocent error cannot give rise to a conduct offence (unless the lawyer's conduct was negligent or reckless), nonetheless, once the lawyer becomes aware of the deception, it appears that the lawyer must take remedial action. It is unclear however, whether it would be enough to simply withdraw¹²¹ – which might send a coded form of disclosure to the judge and prosecutor, though not a jury – or whether as one or two have argued, the lawyer must correct the error.¹²²

1.6.4 The ambit of misleading evidence. Paterson and Ritchie note in *Law, Practice and Conduct for Solicitors*¹²³ that the Scottish Solicitors Discipline Tribunal draws distinctions between (1) intentional and deliberate deceit or lying - which is clearly misconduct, (2) recklessly made statements which are false – which will generally be misconduct and (3) negligent statements which are neither reckless nor intentionally misleading – which will amount to unsatisfactory conduct at most. Similarly the professional rules of the Faculty of Advocates¹²⁴ and the English Bar¹²⁵ refer to the duty not to mislead the court knowingly or recklessly. Commentators on the adversarial system in the anglo-american world have tended, however, to focus on other distinctions when discussing misleading evidence. The first, and basic distinction, is between putting forward misleading evidence (which is banned) and choosing not to disclose relevant evidence (which is generally permitted). This distinction overlaps extensively with that between actively misleading the court and passively standing by and letting the court fall into error by reason of its failure to ascertain facts which are in the lawyer's knowledge.¹²⁶ The latter is acceptable, the former is not. Unfortunately, this is an area of almost infinite shades of grey, as the following excursus on the relevant cases indicates.¹²⁷

Most expositions of the area start with *Tombling v Universal Bulb Co Ltd*¹²⁸, where a witness appeared in court wearing ordinary clothes, to give evidence at a trial. His lawyer in examining the witness on the stand, elicited the latter's home address, the fact that he had previously been a prison governor, and the nature of his subsequent employment without revealing that the witness was currently imprisoned for a motoring offence. The defence's attempt to persuade the Court of Appeal that this behaviour justified a re-trial failed because the majority of the Court took the view (1) that counsel had not set out with the deliberate intention to mislead the court by failing to indicate that witness was currently in prison and (2) because the witness's motoring offence was not relevant to

¹²⁰ On perjury see para. 1.6.5ff below.

¹²¹ This is the most common solution in English speaking ethical codes, see para. 1.6.5.4 below. In practice this is the solution advised by the Professional Practice Department of the Law Society of Scotland.

¹²² See e.g. Stuart-Smith L.J. in *Vernon v. Bosley (No.2)* [1999] Q.B. 18; M.Proulx and D. Layton, *Ethics and Canadian Criminal Law* p.270. Although *Kelly v. Vannet* 1999 J.C. 109 established that the crime/fraud exception to legal professional privilege applied where a Scottish solicitor was unaware that his services were being used to commit a crime, it must be doubtful that a prosecutor could insist that the defence lawyer testify as to his client's confession of perjury, on the grounds that the confession was not privileged because of the crime/fraud exception. In such a case the confession could hardly be described as a communication in furtherance of a criminal purpose since it occurs after the crime has been committed.

¹²³ *Op. cit.* Ch. 1 on Standards.

¹²⁴ Guide to Professional Conduct para 8.1.2

¹²⁵ Code of Conduct para 302.

¹²⁶ See Lord Diplock in *Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198 at . 220.

¹²⁷ There are few Scottish cases in this area. However, it is thought that Scottish courts would be likely to adhere to the general lines laid down in the English cases which follow.

¹²⁸ (1951) 2 TLR 289

his credibility with respect to a completely unrelated matter. In commenting on whether or not the counsel should have informed the court that his client was appearing from prison, Denning L.J. said:

“The duty of counsel to his client ... is to make every honest endeavour to succeed. He must not of course, knowingly mislead the court, either on the facts or on the law, but, short of that he may put such matters in evidence or omit such others as in his discretion he thinks will be most to the advantage of his client...The reason is because he is not the judge of the credibility of the witnesses or of the validity of the arguments. He is only the advocate employed by the client to speak for him and present his case, and he must do it to the best of his ability, without making himself the judge of its correctness, but only of its honesty.”¹²⁹

A similar issue arises where a lawyer is aware that his client has previous convictions but the judge and the prosecutor are not. The lawyer has no obligation to disclose the convictions and indeed owes a duty of confidentiality to the client not to refer to them. He may therefore stand by silent while the court assumes that client is a first offender.¹³⁰ However, the lawyer may not describe the client as a first offender, since that would be to actively mislead the court. What if the court asks the lawyer to confirm the client’s record? This puts the lawyer into a conflict between the duty of candour and the duty of confidentiality to the client. The lawyer may neither confirm the accuracy of the incorrect record nor breach the client’s confidence. An astute lawyer will consult with his or her client as soon as the error is detected and asked for permission to reveal the true position if the lawyer is questioned by the court on the matter, since this is likely to reflect credit on the accused. One Scottish writer has suggested that the lawyer may assert that there are no convictions libelled against the client.¹³¹ It must be doubtful if this would not be seen as actively misleading the court if it was volunteered as an unsolicited submission. But what if it was in response to an enquiry from the court? Given the position of conflict that the judge’s question has put the lawyer in, the response might be construed as passively misleading. However, many sheriffs would probably consider it to be actively misleading. The best course of action is to try to avoid the question if one can.

A similar issue arose in an Australian case of *Rumpf*.¹³² The lawyer had invited the court to make a reparation order to compensate the victim, against his client, in the hope of attracting a lesser sentence. However, he did not mention that his client was bankrupt and that therefore the order would have been without practical effect. The Full Court of Victoria had little difficulty in holding that by volunteering the proposal of a reparation, but not mentioning the bankruptcy, the lawyer had actively misled the court

The case of *Meek v Fleming*,¹³³ is often contrasted with the *Tombling* case. Here an action was brought by a press photographer against a Chief Inspector, claiming damages for alleged assault and wrongful imprisonment by him. By the time of the trial the Chief Inspector had been demoted to the rank of station sergeant for being party to a deception on a court of law. His counsel after long and careful reflection decided that he could ethically suppress the evidence of his client’s demotion and its cause. Accordingly neither fact was put to the court and indeed steps were taken to keep it from the court in that the defendant appeared in court out of uniform and was repeatedly referred to as “Mr” rather than by rank. The judge and the counsel for the other side frequently referred to the defendant

¹²⁹ *ibid* as per Denning L.J. at p297. Singleton L.J. in dissenting, and Thorpe L.J. in the later case of *Vernon v. Bosley (No.2)* [1999] Q.B. 18 at pp.62-63 argued that in leading evidence as to the accused’s home address rather than indicating that he was in prison his counsel crossed the line between active and passive misleading.

¹³⁰ This remains the prevailing view amongst codes and commentators in the common law world, e.g. the *English Guide to the Professional Conduct of Solicitors* Annex 21F at 405-6, Stuart-Smith L.J. in *Vernon v. Bosley (No. 2)* [1999] Q.B. 18 and M.Proulx and D. Layton, *Ethics and Canadian Criminal Law*, p.271. However, there are dissenting voices who argue that the lawyer should correct the court’s error, feeling that greater candour is now required of today’s lawyers. See the discussion of this issue in M. Blake and A. Ashworth, “Ethics and the Criminal Defence Lawyer” 7 (2004) *Legal Ethics* 167 at p.179.

¹³¹ J. Ross Harper, *A Practitioner’s Guide to the Criminal Courts* (Law Society of Scotland, Edinburgh, 1985).

¹³² [1988]VR 466.

¹³³ [1961] 2 Q.B. 366

as “Chief Inspector” - with the latter even at the start of the cross-examination confirming with the defendant that he was a Chief Inspector - without correction by the counsel for the defendant. It was held that a new trial should take place as this matter went directly to the credibility of the witness, whose evidence was in conflict with that of the plaintiff. The court took the view that there had been a deliberate deceit by counsel on a matter material to the case with the intent of giving the impression that the defendant was still a Chief Inspector. In their view counsel had wrongfully subordinated his duty to the court to his duty to his client.

The distinction between the *Meek* and the *Tombling* cases is that in the former, positive action was taken to deliberately deceive the court, in order to enhance the case of the defendant and concerned matters directly relevant to the case. In the latter case, however, the deception was inadvertent and the information was not thought relevant to the case and was therefore simply omitted. Put another way, in *Meek* the lawyer actively sought to deceive the court on a matter that no reasonable lawyer could consider as immaterial to the case, whereas in *Tombling*, counsel merely omitted to lay certain facts before the court which he considered as non material to the case.

The two contrasting cases offer guidance for other situations. Take the case where a witness or a party is attending in court from prison. Does the lawyer have to reveal this? Sometimes it will be obvious (because of the handcuffs and the attendant policemen) that this is the situation, in which case there is no duty to say anything. It may, nonetheless be good tactics to do so e.g. where the client appears in court in relation to another offence from the one for which he was imprisoned. By failing to disclose this fact the lawyer may encourage the judge to feel that he or she is being misled and increase the chances that the client will receive a consecutive sentence. Such a course of action should be cleared with the client because of the duty to safeguard privileged and confidential information.¹³⁴ However, where it is not obvious that the witness or accused appears from prison, then the lawyer should consider whether the nature of the offence to which the sentence relates is pertinent to the case in hand.

A case raising much the same issues involved a client in Scotland who appeared from custody at a bail hearing. His lawyer was aware, although the sheriff was not, that his client was doubly in custody, since he had been unsuccessful the previous week in obtaining bail in connection with an offence charged in another court. The accused gave his address as care of that of the lawyer’s office, when in fact he was in prison. When the sheriff discovered this, he took the view that he had been deliberately deceived. The lawyer’s defence was that he genuinely believed that he would be successful with a bail appeal for the earlier offence and that to disclose the prior offence would be to prejudice his client’s chances of getting bail for the second offence, even although the offences were completely unrelated. The Law Society of Scotland, applying the *Meek* and *Tombling* cases, concluded that the lawyer had only passively misled the court, since the use of his office address had not been deliberately designed to unfairly advantage the client.

The distinction between actively and passively misleading the court also prompts us to consider what the position would be if the evidence as originally tendered to support the lawyer’s case is truthful, but subsequently, because of a change in circumstances, it ceases to be an accurate statement of the position. Is the lawyer guilty of misleading the court if he or she fails to inform the court of the changed circumstances? This issue arose in *Vernon v. Bosley (No.2)*.¹³⁵ In a somewhat unsatisfactory case, the three judges in the Court of Appeal upheld *Meek* and *Tombling* but disagreed amongst themselves on the fundamentals. The facts concerned a plaintiff who had suffered from nervous shock following the death of two of his children, before his eyes, and succeeded in his claim for damages both in the lower court and the Court of Appeal, having relied heavily on the testimony of his medical experts to demonstrate the extent of his trauma and his poor prospects of a full recovery. After seventy days of evidence the proceedings in the personal injury case had been adjourned. Prior

¹³⁴ See e.g. J. Ross Harper, *A Practitioner’s Guide to the Criminal Courts* (Law Society of Scotland, Edinburgh, 1985) at pp.143-144.

¹³⁵ [1999] Q.B. 18.

to final submissions being made to the court in the personal injury case an action was heard in the Family Division of the High Court, in which the same medical experts reached a more positive conclusion as to his prognosis than they had in the personal injuries case, thus enabling the plaintiff to argue that he was well enough to have a residence order in relation to his remaining children. Counsel for the plaintiff became aware of the new medical opinion after final submissions had been made in the tort action, but before the judgement was handed down. He concluded that he had no ethical obligation to reveal to the personal injury judge that his client's medical experts had now formed a different conclusion as to his prognosis, than they had when giving evidence before the judge. Counsel considered that he was not actively misleading the Court, since the evidence when originally tendered had been truthful, it was just that circumstances had changed. Lord Justice Evans agreed with him but was in the minority. Stuart-Smith L.J., however, said that counsel had actively misled the court in a manner akin to what had occurred in *Meek* since in his view counsel's silence on the changed condition of the plaintiff misled the court as to a material fact in the case. Curiously, he was prepared to accept that the plaintiff's counsel did not deliberately intend to deceive the court. Stuart-Smith L.J. considered that the counsel should therefore have withdrawn¹³⁶ from acting unless his client was willing to reveal the new evidence to the court, although there was no need for counsel to correct the "error". Thorpe L.J. agreed that the case was like *Meek* but considered that counsel should have informed the other side or the court if the client refused to agree to the evidence of his changed condition being revealed.

The guidance to be derived from this case in Scotland is unclear. A close reading of the judgements in the Court of Appeal suggests that the outcome was partially influenced by the English law on discovery and by English decision of *Re L*¹³⁷ on litigation privilege in Family actions. Secondly, Evans L.J. in dissent was at pains to argue that this was not a case of evidence being fabricated, or false evidence having been given originally and not corrected, or of a witness changing his or her story. Here circumstances had changed. In the eyes of the plaintiff's counsel he was not actively misleading or deceiving the court – he was simply not disclosing evidence that he was not required to proffer to the court. It is difficult not to conclude that, absent a requirement under the Scottish law of procedure to update the court on any change in the pursuer's condition after the leading of the evidence and before final arguments, to follow this case in Scotland would mark a change in the balance of duties which comprise the adversarial system. Indeed Thorpe L.J. indicated as much when he rejected the dispassionate role "morality argument" of counsel for the plaintiff, advising him to pay more attention to his ordinary moral feelings, and added:

"In general terms the balance between the advocate's duty to the client and the advocate's duty to the court must reflect evolutionary change within the civil justice system. If evolutionary shifts are necessary to match civil justice reforms they should in my judgement be towards strengthening the duty to the court. Differing practices and procedures in the family justice system, the criminal justice system, and the civil justice system must be reflected in different requirements in, for instance, a criminal trial and a Children Act hearing."

Ipp argues that *Vernon* is an instance of a "growing trend of courts to require cases to be determined in accordance with the objective 'truth' rather than on evidence adduced solely for reasons of perceived tactical advantage."¹³⁸ While this may indeed be the case, it is also arguable that what we are witnessing is a recognition that "zealous advocacy in the adversarial system" is more justifiable in

¹³⁶ In one of the few jurisdictions to have explicitly addressed the point raised in *Vernon*, the Code of Professional Conduct of the Law Society of Alberta Commentary 15.2 also requires the counsel to withdraw if the client will not voluntarily disclose the change in circumstances – even if the change takes place after the case has been judicially determined.

¹³⁷ [1997] A.C. 16.

¹³⁸ See Ipp, "Lawyers Duties to the Court" 114 (1998) *Law Quarterly Review* 63 at p.69 and Ipp, "Reforms to the Adversarial Process in Civil Litigation" (1995) 69 A.L.J. 705 at pp.712 - 716

criminal law cases or civil cases against the State than in family law or even other civil cases.¹³⁹ Thus in *ex parte* applications, which by definition are not adversarial, the lawyer's duty is to make full disclosure of all material facts known to him or her. This might also suggest that it is relevant that *Vernon* was not a criminal case and had Family elements. Certainly, Ipp argues that courts in family disputes and disputes involving children impose a duty of frankness and disclosure, stemming from the public interest that overrides the usual rules of the adversarial system.

The acid test for this contextual ethics line of argument would be if there was to be a repetition of the facts of the *Spaulding v. Zimmerman*,¹⁴⁰ but this time in Scotland. Here, a minor in the 1950s in Minnesota was injured in a road accident. None of the three doctors to examine the teenager for the purposes of supporting his action detected that the accident had begun to produce a life threatening aneurysm in his chest. The neurologist for the defendants, however, noticed it and brought it to attention of the defence lawyer. The plaintiff's lawyer failed to seek discovery of the defendant's medical report as he could have done and the defendant's lawyer settled the case for considerably less than if the aneurysm had been detected. The parties then jointly sought the court's approval of the settlement, since the plaintiff was a minor, which was duly granted. Two years later, the minor had a medical check up for other reasons and the aneurysm was detected. A successful operation then followed. Unsurprisingly, the plaintiff sought to reduce the court's agreement to the settlement. The Supreme Court upheld this application on the basis of the plaintiff's minority and the emergence of "new" evidence, whilst affirming that there was no ethical or legal obligation on the defendant's lawyer to reveal their medical evidence, in the absence of a request for discovery from the plaintiff. In Scotland discovery would not be open to the pursuer, and had the injury occurred to an adult, no challenge could have been taken to the settlement or the conduct of the defending lawyer. Moreover, under our adversarial system there would be no obligation in terms of professional ethics on the defendants to disclose their medical evidence to the court or the other side. Nonetheless, if Ipp is correct our courts might equally be tempted to reduce the settlement, on the grounds of his argument that courts in family disputes and disputes involving children impose a duty of frankness and disclosure, stemming from the public interest, that overrides the usual rules of the adversarial system. Even if they did not, the case raises sharply the question of whether the lawyer for the defence should not have allowed his or her conscience as a moral person to override the duty of client confidentiality and disclosed the existence of the aneurysm at the very latest after the settlement had gone through.

1.6.5 Misleading evidence as perjury. A particular variant on the misleading evidence question which has attracted widespread, and hotly contested, comment in English speaking countries outside the UK, is the issue of client perjury. As Monroe Friedman observed in 1975¹⁴¹ the problem when perjury arises is that the "lawyer is required to know everything, to keep it in confidence, and to reveal it to the court." This stems from the triple duty of the litigator to diligently elucidate all the relevant facts, to keep such facts confidential and thirdly not to mislead the court. These conflicting duties are exacerbated in the area of criminal defence by the onus on the Crown to prove its case beyond reasonable doubt, the right to a minimally adequate defence,¹⁴² the right to a fair trial,¹⁴³ and the right against self-incrimination. As M. Proulx and D. Layton, have observed¹⁴⁴:

"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?"

¹³⁹ See footnotes 6 and 7 above.

¹⁴⁰ 263 Minn.346, 116 N.W. 2d 704.

¹⁴¹ "Perjury: The Lawyer's Trilemma" 1 (1975) *Litigation* 26.

¹⁴² Ineffective assistance of counsel (*Strickland v. Washington* (1984) 466 US 668) and *Anderson v. HMA* 1996 S.L.T. 155.

¹⁴³ See Article 6.1 of the European Convention on Human Rights and *Anderson* at p.158.

¹⁴⁴ *Ethics and Canadian Criminal Law, op.cit.* at p.360.

Since, as we have seen, even the post-modern critics accept the case for neutral partisanship in relation to criminal defence work, it is not difficult to see that when the duty to the client is at its strongest it will sit uneasily with the litigator's duties to the court. It is perhaps for this reason, that the ethical guidance in this area in English speaking jurisdictions is so often unclear or unsatisfactory.¹⁴⁵ Such is the complexity of the field that the lawyer's best course of action can be affected by whether the case is civil or criminal, whether the perjury or proposed perjury arises before, during or after the trial, and whether it involves a client or another witness.

In a difficult area, where there is almost no authority in Scotland and little more in the rest of the UK, there are only a few islands of safety where almost all English language commentators are agreed as to the best options, e.g. the importance of knowledge, the need to seek to dissuade the witness, and the need to take remedial action if persuasion fails.

1.6.5.1 Perjury: the importance of knowledge. As in other areas where the duties to the client and to the court collide to form the parameters of the adversarial system of truth finding, much depends on the state of knowledge of the lawyer. Mere suspicion, or even a reasonable belief is not enough. The lawyer must have actual *knowledge*¹⁴⁶ that the version of events that the client proposes to testify to is false or sufficient evidence from the circumstances to reach "an irresistible conclusion of falsity from available information".¹⁴⁷ This may come from a confession from the client or from the latter changing his or her story. However, neither of these in themselves is sufficient to establish knowledge without further probing of the client's story to try to establish its truth or otherwise. The consensus of the commentators extends further. Although it is sometimes suggested the defence lawyers occasionally avoid eliciting from their clients what happened in the case, commentators generally agree that lawyers are not permitted to avoid acquiring knowledge of the client's proposed perjury by wilful blindness or failing to investigate the facts of the case properly. To do so would be to sacrifice the duties of competence and diligence to the client.¹⁴⁸ Equally, it is considered improper to interview an accused client in such a way as to assist the client to construct a version on events that will actually be perjured testimony.¹⁴⁹

1.6.5.2 Perjury: Persuading the witness to tell the truth. If the lawyer has reached the conclusion that the client has decided to commit perjury or has already committed perjury, almost all of the authorities and commentators suggest that the lawyer must seek to persuade the client or witness not to commit perjury or to correct any perjured testimony that has been offered. Typically, the client/witness should be told that perjury is a crime, that if discovered by the trier of fact it will probably assist in the accused's conviction and if so, to a higher sentence. Next, the lawyer must explain to the client what the options facing him/her are.¹⁵⁰ Most commentators also agree that finally the client should be told that the lawyer may be required to take remedial action. However, there the consensus ends, for although it is probably improper for the lawyer to coerce the accused by threatening a remedial action that he/she has no intention of carrying out; there is little agreement as to what that remedial action might be. Many authorities permit or require withdrawal, but this can be problematic if the trial is part heard.¹⁵¹ Further the authorities and commentators are sharply divided as to whether disclosure of the perjury to the court is ever permissible.¹⁵²

¹⁴⁵ See M.Proulx and D. Layton *op. cit.* at pp. 357-411, Ch 7

¹⁴⁶ See e.g. The Faculty of Advocates' Guide – "An advocate may not be party to the giving of evidence which he knows to be perjured." Para 9.2.2.3 and ABA Model Rules (2002) 3.3(a)3 and Commentary [8].

¹⁴⁷ M.Proulx and D. Layton, *op. cit.* at p.370.

¹⁴⁸ See *Sankar v. State of Trinidad and Tobago* [1995] 1 W.L.R. 194 where the Privy Council required counsel to "investigate the matter fully".

¹⁴⁹ See M. Blake and A. Ashworth, "Ethics and the Criminal Defence Lawyer" 7 (2004) *Legal Ethics* 167 at p.176.

¹⁵⁰ See *Sankar v. State of Trinidad and Tobago*.

¹⁵¹ see para 1.6.5.4 below.

¹⁵² see para 1.6.5.5 below. *Nix v. Whiteside* 475 US 157 (1986) is particularly apposite here. There, Chief Justice Burger asserted that counsel's threat to withdraw and disclose the client's perjury to the court if he gave perjured testimony was not a breach of the client's constitutional right to testify on his own behalf. This obiter

1.6.5.3 Perjury: Opting to continue acting. If the client agrees not to commit perjury then the lawyer should continue to act. However, what if the client gives no such undertaking or refuses to correct the perjured testimony? Some authorities consider that the lawyer can continue to act if :

(a) the lawyer does not *know* but only has a reasonable belief that the client will commit or has committed perjury;¹⁵³ or

(b) if the lawyer insists that the client does not take the witness stand¹⁵⁴; or

(c) the client's testimony is restricted to the truthful elements¹⁵⁵; or

(d) 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 trial¹⁵⁶; or

(e) the perjury is already complete, the lawyer makes no subsequent reference to the false testimony.¹⁵⁷

There is one other school of thought of which Monroe Freedman is the most celebrated adherent,¹⁵⁸ namely, that the lawyer having tried and failed to persuade the client to tell the truth, should continue to act as normal and use any testimony, perjured or otherwise in the case. This resolves the conflicts between the duties to the client and to the court, decisively in the former's favour. It perhaps because it condones active misleading of the court and thus fundamentally tips the balance in the adversarial system away from "truth", that this viewpoint has little support in ethical codes or amongst commentators,¹⁵⁹ and we would not support it.

1.6.5.4 Perjury: Opting to withdraw but not disclosing the perjury. This approach is perhaps the most widely supported option where the client refuses to agree not to testify falsely or to reveal the completed falsehood to the court. It is supported in England,¹⁶⁰ Canada,¹⁶¹ Australia¹⁶² and New Zealand¹⁶³ and is likely to be followed in Scotland given the persuasive decision of the Privy Council in *Sankar v. State of Trinidad and Tobago*. Unfortunately, if the withdrawal requires the permission of the court because the trial is ongoing it may be difficult to get that permission without in effect revealing that perjury has been or is likely to be committed, and thus breaching the duty of confidentiality and loyalty to the client. The use of the formula that the lawyer would be "forensically embarrassed" by continuing certainly reveals the score to the judge and the prosecution, though not necessarily to the jury (if there is one). It is much better for the lawyer to indicate that the relationship with the client has broken

dictum although supported by a majority of the Supreme Court has attracted much critical comment in the USA and elsewhere. Ironically, the 2002 ABA Model Rules of Professional Conduct 3.3(a)(3) have moved much closer to Burger's position.

¹⁵³ See Faculty of Advocates Guide 9.2.2.3 and the ABA Model rules *op.cit.* 3.3(a)(3). Indeed Commentary [9] of the Model Rules makes it clear that "because of the special protection historically provided criminal defendants" the lawyer cannot refuse to allow such a client to testify if he/she only reasonably believes the testimony to be false as opposed to knowing that it is false. This is the only instance in Model Rule 3.3 where the Rules distinguish between civil and criminal cases.

¹⁵⁴ In some jurisdictions e.g. Canada (see M. Proulx and D. Layton, *op.cit.* p.383) this is probably contrary to the client's constitutional rights to testify on his/her own behalf, although *Nix v. Whiteside* did not settle the matter in the USA. It is not clear that Article 6.1 of the European Convention enshrines such a right, however, the Privy Council in *Sankar v. State of Trinidad and Tobago*, (which was subsequently endorsed on the point in *Anderson v. HMA* 1996 SLT 155 at p.163) appeared to accept that the accused's lawyer may not exclude the accused from testifying altogether.

¹⁵⁵ Model Rules 3.3(a)(3) *op.cit.* Commentary [6] and the *Third Restatement, op.cit.* para. 120(i).

¹⁵⁶ *Sankar* permits the former approach, the Model Rules *op.cit.* 3.3(a)(3) commentary [7] the latter (if the local state's courts permit this). See also M.Proulx and D. Layton, *op.cit.* p.385.

¹⁵⁷ This approach has few supporters where the lawyers *knows* that perjury has been committed, although Ipp, *op.cit.* appears to indicate that it can be acceptable, at p.87.

¹⁵⁸ See e.g. Freedman, *Lawyers' Ethics in an Adversary System* (Bobbs-Merrill, New York, 1975) and *Understanding Lawyers' Ethics* (Matthew Bender, New York, 1990).

¹⁵⁹ See M.Proulx and D. Layton, *op.cit.* p.388.

¹⁶⁰ See e.g. *Sankar*, English Law Society Guide 1999 ; Written Standards of the Bar para. 12.

¹⁶¹ See M.Proulx and D. Layton, *op.cit.* pp.362-363.

¹⁶² See Dal Pont, *op.cit.* p.459 and Y. Ross, *Ethics in Law* (3rd edn ,Butterworths, Sydney, 1998) pp. 431-2.

¹⁶³ See Dal Pont, *op.cit.* p.460.

down irreparably.¹⁶⁴ Certainly, great care must be taken before withdrawing. Thus in *Tuckiar v. The King*¹⁶⁵ counsel was faced with a client in mid trial who confessed to the crime. Counsel announced in open court that he was in the worst predicament of his life and prevented his client from taking the stand. The judge, perhaps irritated by counsel's breach of client privilege and lack of zealousness, commented on the accused's failure to give evidence. The High Court of Australia was not impressed by counsel's way of handling the dilemma he faced, however, they set aside the conviction nonetheless. In another murder trial, *Sankar v. State of Trinidad and Tobago*¹⁶⁶ the accused once again informed his counsel in mid-trial of his guilt. Once again counsel told the client to remain silent and thereafter in closing argument made it clear that he was simply putting the prosecution to the test. The Privy Council indicated that in such a situation it was the duty of defence counsel to investigate the matter fully and advise the accused as to his options, if necessary seeking an adjournment for the purpose. It was not appropriate for counsel forthwith to abandon the positive defence originally proposed (e.g. self-defence, provocation or accident) and to refuse to put the accused in the witness box or to allow him to make an unsworn statement from the dock. Instead counsel should have explained the importance of the accused's evidence for the positive defence, and that without it there was in practice no defence. If the accused had persisted in his desire to behave in a manner which was inconsistent with counsel's duty to the court, then counsel could have withdrawn after explaining the options available to the accused.

In Scotland the course of action proposed in *Sankar* poses particular difficulty where the client waits until they are in the witness box before launching into an account of events that is completely inconsistent with the story that he/she has consistently told their lawyer in earlier stages. In the case of solicitor-advocates, under the Solicitors (Scotland) Rules of Conduct for Solicitor Advocates 2002, r.7(4) a solicitor advocate may not be a party to the giving of evidence which he knows to be perjured evidence, or to any other course that would enable a case to be put forward on behalf of a client which the client has informed him is unfounded in fact. Does standing by while your client appears to be perjuring himself/ herself, breach r.7(4)? It is tempting to follow the suggestion in *Sankar* and seek an adjournment in which to have a free and frank discussion with your client. However, under r.7(10) of the Code of Conduct a solicitor-advocate may not, except with consent of his opponent and of the court, communicate with any witness, including his client, once that witness has begun to give evidence until that evidence is concluded. Reconciling this with r.7(4) is not easy. Assuming that you find your client's change of heart unpersuasive and that your client does not wish to change his plea, you can either advise your client that you intend to withdraw, or advise your client that your representation will be limited to questioning whether the prosecution has proved their case. Finally, to complicate matters the Law Society considers that Rule 7(10) does not apply to ordinary solicitors. Unfortunately, not all the judiciary agrees with them on this point.

1.6.5.5 Perjury: Opting to withdraw but also disclosing the perjury. Although withdrawal without disclosure of the perjury to the court has a wide measure of support, some critics are unconvinced since it merely warns the accused to be less honest with his or her next lawyer. Perhaps for this reason, there has also been a school of thought which favours the opposite of the Freedman argument by ultimately placing the duty of candour before the duty of loyalty and confidentiality. Few commentators have endorsed the lawyer withdrawing and disclosing the proposed perjury *before* it has been committed.¹⁶⁷ However, the threat to do so if the accused persisted with his intention to commit perjury was upheld by the majority of the Supreme Court in the controversial decision in *Nix v Whiteside*.¹⁶⁸ Certainly, the writers have been more willing to advocate the disclosure of a completed client perjury,¹⁶⁹ although relatively few Codes of Conduct clearly support this. One that does, in a

¹⁶⁴ As argued by M.Proulx and D. Layton, *op.cit.* p.379.

¹⁶⁵ (1934) 52 C.L.R. 335.

¹⁶⁶ [1995] 1 W.L.R. 194.

¹⁶⁷ See, however, M.Proulx and D. Layton, *op.cit.* pp. 390ff who consider that the "future-harm" exception to the privilege in Canada would permit, though not require, lawyers in that jurisdiction to disclose future crimes such as the proposed perjury of their clients.

¹⁶⁸ 475 US 175 (1986)

¹⁶⁹ See M.Proulx and D. Layton, *op.cit.* p.401 and the *Third Restatement, op.cit.* para 120 (h) which argues strongly for disclosure in such circumstances. Although *Kelly v. Vannet* 1999 JC 109 established that the

considerably stronger form than its earlier version, is the 2002 ABA Model Rules 3.3(a)(3). After more than forty years of debate amongst American jurists the new Model Rules have come down decisively in favour of disclosure if a perjury has been committed, the client will not correct it and other measures e.g. withdrawal will not cure the perjury.¹⁷⁰ This is a significant shift towards concluding that in the area of perjury, even in criminal cases, ultimately the ABA favoured the duty not to deceive the court or to subvert the truth-finding process¹⁷¹ over the duties of loyalty and confidentiality to the client.

1.7 A general duty not to interfere with the administration of justice. Ipp's final set of duties to the court relate to the dangers of excessive zeal by a lawyer for his or her client and the need not to overstep the mark.¹⁷² The spectrum of temptation for lawyers ranges from clear cut, criminal interferences with the course of justice such as perjury, tampering with witnesses and forgery to situations where an excess of zeal will constitute a conduct offence at worst such as the permitted limits to defending the guilty, discrediting truthful witnesses, demeaning or denigrating witnesses, taking advantage of obvious mistakes, the lawyer taking the witness stand and finally, acting in a conflict of interest.

1.7.1 Perjury. Perjury is a criminal offence and for a lawyer to encourage a client or witness to commit perjury would not only be criminal act in itself¹⁷³ but also a breach of the lawyer's duty to the court, which would not be covered by legal professional privilege. However, there can sometimes be a fine line between refreshing a witness's memory and assisting with perjury.¹⁷⁴

1.7.2 Tampering with witnesses. It is a breach of the lawyer's duty to the court to put witnesses under pressure to adjust their evidence in particular directions, just as it is impermissible to encourage them to give evidence which the witness does not believe to be true,¹⁷⁵ or to suggest to them that they be forgetful or evasive.¹⁷⁶ While, at least in the USA and England it is permissible to take witnesses through their evidence to refresh their memory the lawyer has to take care that this does not become a process in which witnesses are coached as to the answers to give to possible questions. Equally, while it is acceptable to tell a witness that that you do not propose to call on them to testify, to encourage them to go on a long holiday or in other ways to make it difficult for the opposing side to trace them is to interfere with the course of justice as well as a breach of duty to the court.¹⁷⁷

1.7.3 Forgery or falsified documentation.¹⁷⁸ It goes without saying that lawyers who present false or altered documentation to the court are at risk of criminal conviction or a finding of misconduct. Thus a solicitor who repeatedly signed executions of service on summonses although he knew or should have known that he had not signed the citations on the relevant service copy summonses was found guilty of misconduct.¹⁷⁹ Again an English solicitor who deliberately forged his colleague's signature

crime/fraud exception to legal professional privilege applied where a Scottish solicitor was unaware that his services were being used to commit a crime, it must be doubtful that a prosecutor could insist that the defence lawyer testify as to his client's confession of perjury, on the grounds that the confession was not privileged because of the crime/ fraud exception. In such a case the confession could hardly be described as a communication in furtherance of a criminal purpose since it occurs after the crime has been committed. See para 6.23 above .

¹⁷⁰ Model Rules, *op.cit.* 3.3(a)(3) Commentaries [10] and [11].

¹⁷¹ This argument is ultimately circular since it is the balance between the duties to the court and the duties to the client which delineates the ambit of the truth-finding process in the adversarial system. In other words truth in adversarial system is the product of playing the litigation game according to certain rules – rules which reflect the balance between the lawyer's duties to the client and the court.

¹⁷² *ibid* pp.87ff.

¹⁷³ Namely, Subornation of perjury. See para 47.20 Gordon, *Criminal Law* (3rd edn) W.Green vol II.

¹⁷⁴ Ipp, *op.cit.* p.91.

¹⁷⁵ See e.g. Faculty of Advocates Guide, *op.cit.* 9.2.4.4. and Rules of Conduct for Solicitor Advocates, *op.cit.* 7(9).

¹⁷⁶ See generally Dal Pont, *op.cit.* p.462.

¹⁷⁷ See generally, Wolfram, *op. cit.* p.646 and also art. 8 of the Code of Conduct for Scottish Solicitors 2002.

¹⁷⁸ See also para 14.06.03 *supra*.

¹⁷⁹ DTD 203/61.

on a witness statement for her own Industrial Tribunal case received a six month jail sentence for forgery.¹⁸⁰ Even if no one is harmed by the process it may be misconduct. Thus a Scottish solicitor who altered and lodged in court a Joint Minute without the knowledge or consent of the party on whose behalf the Joint Minute had already been signed, was found guilty of misconduct by the Tribunal. Although the alteration had not affected the other party's interest, the Tribunal held that the unauthorised alteration was in breach of the implied understanding from the other party that the document would not be altered and thus constituted a breach of trust.¹⁸¹ Similarly, in a case in 2003¹⁸² the solicitor in question was found guilty of professional misconduct for notarising documents outwith the presence of the deponing witness, signing dockets which he which he knew to be false in respect of the date and whether the witness was present or not and his tendering of these documents as evidence in the sheriff court.

1.7.4 The limits to Defending the Guilty. Occasionally, through an accused's confession or otherwise the lawyer for the accused comes to appreciate that the client is guilty of the offence with which he or she has been charged. This does not require the lawyer to withdraw from acting or to insist that the client enters or changes his/ her plea to guilty. However, the lawyer's knowledge coupled with the duty not to mislead the court restricts the scope of the defence that he or she may run since in the new situation the balance to be drawn between the lawyer's duties to his or her client¹⁸³ and the duties to the court and the justice system on the other, is subtly altered. (As such, as was noted in para 1.1, it reflects that in this situation a slightly different conception of the role of the advocate in the adversarial system and the scope for manoeuvre by the lawyer prevails.)

As in the case of perjury, mere reasonable suspicion or belief that the client is actually guilty will not suffice to restrict the lawyer's scope for action. Nor is the fact of a confession from the accused sufficient since he or she may be confused, deluded, exhausted or even trying to shield another person. Where, however, the lawyer reasonably comes to an "irresistible knowledge"¹⁸⁴ of a client's guilt based on a thorough investigation of the case then the restriction on the scope of the defence will apply. Again, as with perjury, commentators are largely agreed that for lawyers to avoid acquiring knowledge of the client's guilt by wilful blindness or failing to investigate the facts of the case properly, is to sacrifice the duties of competence and diligence to the client.¹⁸⁵ This is not, however, to suggest that it is part of the lawyer's role set out to form an opinion as to whether his or her client is actually guilty – that would be to usurp the role of the judge and jury. Thus the celebrated Scots defence lawyer, Joseph Beltrami, observed on the matter:¹⁸⁶

"When solicitors see a client for the first time they do not — at least, I do not — ask him whether or not he is guilty of the charge. The matter is put this way: How will you be pleading to the charge - Guilty or Not Guilty? If a client says 'Guilty', then steps are taken to act on this instruction. If he replies 'Not Guilty', then the preparation for the defence begins. If, in the course of further dealings with the client, he advises me that he *is* guilty of the charge, then I can take one of two courses. I can send him to a solicitor outside my firm. Or I can continue to defend him — on the clear understanding that, whereas I can put the Crown to the test with regard to proof beyond reasonable doubt, I cannot lead a substantive defence on his part."

Nonetheless, there will be occasions where the client's admission or diligent investigation of the case leaves the lawyer with "irresistible knowledge" of the client's guilt. In these situations the lawyer may not conduct the defence on a basis that is inconsistent with the knowledge, for example, by

¹⁸⁰ The Times, July 17, 1998

¹⁸¹ Discipline Tribunal Annual report 2000/2001.

¹⁸² DTD 3/12/2003 (McAnulty).

¹⁸³ i.e. to pursue his or her client's interests to the best of the lawyer's ability and not to breach the duty of confidentiality to the client.

¹⁸⁴ See M.Proulx and D. Layton, *op.cit.*

¹⁸⁵ See M.Proulx and D. Layton, *op.cit.*

¹⁸⁶ J. Beltrami, *The Defender* (Chambers, Edinburgh, 1980) at p16.

suggesting to a witness that his or her client is innocent or was elsewhere or that another person committed the crime.¹⁸⁷ Although the lawyer is prevented from running an affirmative defence he or she can and indeed must put the strength of the prosecution's case to the test. This might include:¹⁸⁸

- 1) challenging the jurisdiction of the court;
- 2) challenging the competency or relevancy of the indictment or complaint;
- 3) challenging the admissibility of evidence;
- 4) testing the prosecution's evidence in cross-examination – thus even a “truthful” witness can be questioned as to their eyesight or the lighting conditions at the time;
- 5) leading evidence to support a defence of insanity or self-defence;
- 6) leading evidence required for a successful plea in mitigation;
- 7) making submissions as to the sufficiency in law of the evidence to support a verdict of guilty.

1.7.5 The limits to discrediting truthful witnesses. From time to time, particularly where the client has confessed his or her guilt to the lawyer, the latter will be faced with a witness whose testimony the client affirms to be truthful or the lawyer's investigations suggest is truthful, e.g. correctly testifying that the accused was near the scene of the crime at the relevant time and date. Notwithstanding this, the lawyer may cross-examine the witness to test the witnesses' eyesight, accuracy in estimating distances or height, ability to recall details or to ascertain the lighting conditions. This may not be done in such a way as to suggest an affirmative defence or that the accused was elsewhere or innocent. Indeed, the more vigorous and intensive the cross-examination the more it will appear like an affirmative defence. There are also other difficult areas. Is it legitimate to try to establish in cross-examination that the truthful witness has an animus against the accused, when to do so is not to test the accuracy of the witness's recall or eyesight but rather to suggest that the witness is lying and that the accused is innocent? Similarly, is it permissible to attack the character of the truthful witness? The better answer seems to be in the negative, particularly if it arises in a civil case,¹⁸⁹ but also in criminal defence cases, since both lines of attack are designed to suggest that the witness is lying rather than simply mistaken. It seems then, that when dealing with a truthful witness, it is permissible to seek to establish whether the truthful testimony is more than mere happenstance, but not to go further and to suggest that the witness is lying.¹⁹⁰

1.7.6 The limits to demeaning or denigrating witnesses and others in court. Neither an advocate nor a solicitor advocate may suggest to a witness who is testifying that they have been guilty of a crime, fraud or other illegal or improper conduct unless the lawyer has reasonably concluded that there is evidence which could, if necessary, be led in support of the suggestion.¹⁹¹ It is assumed that this holds true for solicitors also. Harassment of witnesses can distort the truth-finding process as well as amounting to abuse of power. Lawyers who take advantage of their position in examining or cross-examining witnesses to demean, bully, or insult them, risk bringing our system of justice into disrepute as well as undermining its long term efficacy.¹⁹² In the USA the federal judiciary has a positive obligation to protect witnesses against harassment. The same obligation should exist in Scotland. This is particularly true in the case of vulnerable witnesses and both in Scotland¹⁹³ and England¹⁹⁴ there have been efforts to afford greater protection to such witnesses in recent years. There is little public understanding for the perceived vilification which some victims of rape have been subjected to in the courts in the last twenty years. Apologists for zealous advocacy rightly point to the need for unpopular

¹⁸⁷ See e.g. Faculty Guide, *op.cit.*, 9.2.2.6; Rules for Solicitor Advocates, *op.cit.*, 7(12).

¹⁸⁸ See e.g. Faculty Guide, *op.cit.*, 9.2.2.7; Rules for Solicitor Advocates, *op.cit.*, 7(13). See also Blake and Ashworth, “Ethics and the Criminal Defence Lawyer” 7 (2004) *Legal Ethics* 167 at pp. 172-174.

¹⁸⁹ See e.g. Wolfram, *op.cit.* p.651.

¹⁹⁰ For a contrary view see M.Proulx and D. Layton, *op.cit.* at pp.66ff.

¹⁹¹ Faculty Guide, *op.cit.*, 9.2.2.4; Rules for Solicitor Advocates, *op.cit.*, 7(5). See also the English Bar's Code of Conduct para. 708(j).

¹⁹² Quite apart from anything else it difficult to see why honest witnesses who are doing their public duty should volunteer to be abused in this way. Advocates and solicitor advocates who make bullying or offensive remarks to witnesses risk sanction. See Faculty Guide, *op.cit.*, 9.3.2; Rules for Solicitor Advocates, *op.cit.*, 8(2).

¹⁹³ Vulnerable Witnesses (Scotland) Act 2004.

¹⁹⁴ See e.g. Blake and Ashworth, *op.cit.* p.185 and Boon and Levin, *op.cit.* p.364.

clients to be provided with effective defence advocacy if the ideals of the adversarial system and the right to a fair trial are to be upheld. However, victim support groups are also correct to claim that vulnerable victims and witnesses also have human rights. It may take a ruling from the European Court of Human Rights to determine how the conflict between these mutually inconsistent human rights should be resolved.¹⁹⁵ Quite apart from the law and professional ethics it is perhaps also worth bearing in mind that it is usually unwise tactics to browbeat or demean an elderly, truthful witness or an vulnerable victim since the sympathy of the jury is likely to be with them.

1.7.7 Respecting the court. The duty to avoid excessive zeal for a client and the need not to overstep the mark, requires lawyers as officers of the court to honour any undertakings which they have given to the court.¹⁹⁶ Failure to do so is likely to be a conduct offence. Similarly, a lawyer who defies a clear ruling of the court may either be guilty of contempt of court or of a conduct offence. In *Blair-Wilson, Petnr*¹⁹⁷ a solicitor sought to play a tape-recording to a witness as part of his cross-examination. The sheriff, for reasons which remain unclear, refused to allow this – or at least at that stage of the proceedings. The solicitor’s efforts to seek clarification of the sheriff’s position lead the latter to regard the solicitor as being in defiance of a court order and therefore guilty of contempt of court. The High Court held that it was established law that if a judge makes a ruling in clear terms which the lawyer then refuses to comply with or obey, this can amount to contempt provided “an intention to challenge or affront the of the court or to defy its order” can be proved.¹⁹⁸ In this case the High Court concluded that the sheriff had not made a clear ruling and that the solicitor had not defied such a ruling and was therefore not guilty of contempt.

1.7.8 The limits to taking advantage of obvious mistakes. Ipp¹⁹⁹ is of the opinion that even in the adversarial system, lawyers, as officers of the court should not take unfair advantage of obvious mistakes by the other side.²⁰⁰ As far as mistakes in law are concerned, many English speaking jurisdictions take the view that the lawyer should not take advantage of errors of law (including those by the judge) any more than misleading the court on a point of law.²⁰¹ It would seem reasonable to conclude that since acting in this way breaches no duty to the client and conforms with the lawyer’s duties to the court to assist with the proper administration of justice, that this should be followed in Scotland also.²⁰²

However, what about errors of fact? As we saw in relation to misleading the court on matters of fact, a distinction is normally drawn between commission – actively misleading and omission – passively misleading the court. Some have criticised this distinction, arguing that to win by failing to correct a judicial error or an obvious procedural error by the other side, even in a criminal case, is to jeopardise the duty of the lawyer to assist in the proper administration of justice.²⁰³ However, there is good reason to believe that in Scotland this position does not prevail. When in the past the Crown miscalculated the days before initiating the trial due it being a leap year, and thus miscalculated when the 110th day had arrived, there was no suggestion from any in the profession that the lawyers for the accused had behaved in anything other than impeccable propriety in not revealing this error until after the 111th day was well under way. Joseph Beltrami describes one such case in which he was involved in *The Defender*²⁰⁴ :

¹⁹⁵ *Ibid.*

¹⁹⁶ See Ipp, *op.cit.* pp.86-87.

¹⁹⁷ 1997 S.L.T. 621.

¹⁹⁸ See *McMillan v. Carmichael* 1993 SCCR p.945E and *Ferguson v. Normand* 1994 S.C.C.R at p.814

¹⁹⁹ *op.cit.* p.85.

²⁰⁰ See *Ernst & Young v. Butte Mining Plc*[1966] 1 W.L.R. 1605.

²⁰¹ See e.g *Blake and Ashworth, op.cit.* pp.176-177.

²⁰² On the other hand the Guide to the Professional Conduct of Advocates, *op.cit.* 9.2.2.5

implies that counsel only has a duty to draw a judge’s attention to any errors of law that he has inadvertently made where the judge has asked for assistance from counsel on legal matters (in the absence of the jury).

²⁰³ E.g. *Blake and Ashworth, op.cit.* p.188-9 citing David Pannick, *Advocates* (OUP, Oxford, 1992).

²⁰⁴ J. Beltrami, *The Defender* (Chambers, Edinburgh, 1980) at p.219.

“There were various editorials in the national Press about this dramatic turn of events, and some writers stated that it was the duty of the defence to advise the prosecution of such a matter, since it was merely a technicality. They went on to argue that the defence should not take advantage of such a situation. My answer to this proposition is that the two accused were acquitted because of the law prevailing in our country at the time. To have advised the prosecution on the Tuesday and so caused them to make application to the Court for an extension would have been betraying the interests of both clients.”

1.7.9 The perils of the lawyer taking the witness stand. It is widely accepted that it is, undesirable for a solicitor or an advocate to appear as a witness in a case in which he or she is acting. Thus Webster²⁰⁵ opines that a lawyer should not act in any proceedings in which he or she is likely to be called as a witness, except to give formal evidence, for example, as to the execution of a deed. Thornton,²⁰⁶ likewise, indicates that counsel should reject a brief where it can be anticipated that he or she is likely to become a witness. Where a barrister cannot avoid giving evidence, then, he suggests, they are required to withdraw from acting. As so often, this is an area which has attracted considerable commentary in the USA²⁰⁷ culminating in r.3.7 of the Model Rules 2002. The latter provides that:

“A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- 1) the testimony relates to an uncontested issue;
- 2) the testimony relates to the nature and value of legal services rendered in the case; or
- 3) disqualification of the lawyer would work substantial hardship on the client.”

The rationale for the limits imposed on lawyers acting as witnesses is twofold. First, because there is a potential for misleading the court and secondly because there is a potential for conflict between the lawyer and the client – especially if there is likely to be a conflict between the testimony of the lawyer and that of the client, remembering that the lawyer may be called to testify either by the client or by the other side. The first argument is that the fact-finder, particularly if it is a jury, may be confused as to which capacity the lawyer is appearing in, when speaking from the witness box. This is a systemic protection which can be achieved either by the lawyer not testifying or by ceasing to act as advocate.²⁰⁸

1.7.10 Avoiding Conflicts of Interest. As the last paragraph indicated the duty to avoid acting in a conflict of interest is another aspect of the lawyer’s duty to the court to safeguard the administration of justice. As Ipp argues, the duty to the court “arises from the court’s concern that it should have the assistance of independent legal representation for the litigants”.²⁰⁹ While the court will disqualify lawyers where there is a threatened breach of fiduciary duty, it can also do so where continued representation would lead to a breach of duty to the court because the lawyer was no longer able to act with the objectivity and independence required by the court.²¹⁰ The Guide to the Professional Conduct of Advocates and the dictum of Lord President Inglis in *Batchelor v. Pattison and Mackersy*²¹¹ place a similar emphasis on the importance of the advocate being “entirely independent” in representing a client. Inglis, however, was less clear that a solicitor had the same degree of independence from the client given the contract of employment that exists between the solicitor and the client. It should be said, however, that judges will be understandably reluctant to disqualify a lawyer on this ground if it

²⁰⁵ *Op. cit.* para. 3.07.

²⁰⁶ A. Thornton, “Responsibility and Ethics of the English Bar” in R. Cranston (ed.) *Legal Ethics and Professional Responsibility* (Oxford, The Clarendon Press: 1995), p.82.

²⁰⁷ See e.g. Wolfram, *op.cit.* pp.375-390 and the references contained therein.

²⁰⁸ Another way out of the difficulty is for the lawyer to take another person with him/her to meetings which the lawyer believes might be the subject of litigation, to avoid the lawyer having to be called as a witness.

²⁰⁹ *Op.cit.* p.93.

²¹⁰ Ipp cites case law from New Zealand and Canada to support this proposition, *op.cit.* pp.94-95. See also Dal Pont, *op.cit.* p.446.

²¹¹ (1876) 3 R. 914 at 918.

comes late in the day or it appears like a device for tactical advantage, and when disqualification will be likely to result in undue costs to an innocent party.