

# Doing the wrong thing for the right reason

A wholesome motive hardly shields lawyers  
from breaches of duty



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At the core of perhaps the most challenging ethical dilemmas is the existence of conflicting duties or conflicting loyalties. The very fact that duties or loyalties conflict dictates that fulfilling one duty, or being loyal, will necessarily dictate a failure, in some way, to fulfil another duty or exhibit loyalty. Indeed, it reflects the age-old Biblical notion that a person cannot serve two (or more) masters.<sup>1</sup> This, when translated to the lawyer and client relationship (and indeed various others), underscores the application of the core ‘no conflict’ fiduciary proscription. This applies to proscribe not just conflicts between two masters (in this context, clients), but equally to proscribe conflicts between the interests of the servant (here the lawyer) and those of the master (here the client).

The civil and disciplinary case law is littered with instances of lawyers who placed themselves in an impossible position by representing two clients with conflicting interests in the matter of the subject of the retainer; pursuing the interests of one client necessarily prejudiced the interests of the other. (Far) more often than not, the lawyers fell into this trap with what appears the best of intentions. Take, for example, the solicitor in *Stewart v Layton*,<sup>2</sup> who continued to represent each party to a conveyancing (and financing) transaction, whilst withholding from the vendor information as to the paucity of the purchaser’s financial position, in an ultimately unsuccessful effort to assist each client. Or the solicitor in *Taylor v Schofield Peterson*,<sup>3</sup> who in seeking to assist partners in a partnership, who were longstanding clients, to resolve their differences, failed to protect the financial interests of one partner. In neither case was there any suggestion of dishonesty or bad faith on the solicitor’s part; to the contrary, the respective solicitors acted with the best of intentions to assist their clients in a difficult position. Both nonetheless committed fiduciary breaches, and were

liable to compensate the client-victim of those breaches.

The cases reflect the broader notion that, merely because a lawyer acts with a wholesome motive, this does not shield him or her from civil liability to a client whose interests have been prejudiced by those acts. Outside of the fiduciary arena, a lawyer could otherwise make an unauthorised disclosure of confidential client information by pleading a broader public interest,<sup>4</sup> or breach an undertaking to the court in the face of an allegedly more compelling public interest.<sup>5</sup> The law is clear, to this end: lawyers cannot pursue a utilitarian agenda that drives breaches of duty by a wholesome motive under the guise of the greater good (or something equally ostensibly more beneficial).

In each instance it is therefore critical for the lawyer to be clear as to whom the relevant duty is owed, and the attendant priority to be accorded to that duty. As foreshadowed above, in the fiduciary and confidentiality context, that duty is directed to the client. But in other instances client interests, and attached loyalty, cannot stand in the way of a more compelling interest, namely the broader administration of justice. It is trite to note that, where these conflict, it is the latter that must prevail, at least within its parameters as recognised by the law. Consistent with the foregoing, it stands to reason that a lawyer’s wholesome motive in seeking to benefit the client (or a third party) cannot justify a breach of the paramount duty to the administration of justice.

Lawyers who have sought to justify, or at least ameliorate, acts or omissions inconsistent with the duty to the administration of justice, by resorting to a wholesome motive, have proven misguided. The disciplinary case law, in particular, takes a dim view here of doing the wrong thing for the allegedly right reason. For instance, in *Attorney-General v Bax*<sup>6</sup> the respondent lawyer falsified documents and transactions, antedated

a deed of loan and deceived a creditors’ meeting. That the respondent did so in order to assist a client facing bankruptcy in no way mollified the seriousness of this misconduct. More recently, in *Legal Practitioners Conduct Board v Warburton*<sup>7</sup> the respondent failed to comply with court orders requiring him to pay a sum, held on trust, to an unrepresented opponent, as a result, it appeared, of sympathies for his client. In both cases the respective lawyers were struck off.

In a broader ethical sense, it may be said that lesser fault, or even absolution, should attend a person who does the wrong thing but for the right reason, in particular, to benefit another person, or even the greater good. Indeed, in a disciplinary case Heydon JA once remarked that the culpability of a person who lied, apparently to protect his wife, “must be judged in the light of the fact that many people think that lying to protect one’s family is in many circumstances not blameworthy”.<sup>8</sup> Yet legal ethics in the main bucks this belief. Certainly in the face of clearly prescribed duties and priorities, there is no role for some utilitarian ‘balancing’ of the consequences of right and wrong. It therefore behoves lawyers to attune their ethical radar in each instance as to whom the relevant duty is owed.

## NOTES

1. Matthew 6:24.
2. (1992) 111 ALR 687.
3. [1999] 3 NZLR 434.
4. See, for example, *Stewart v Canadian Broadcasting Association* (1997) 150 DLR (4th) 24.
5. See, for example, *Solicitor-General v Miss Alice* [2007] 2 NZLR 783.
6. [1999] 2 Qd R 9.
7. [2014] SASFC 65.
8. *Prothonotary of the Supreme Court of New South Wales v Del Castillo* [2001] NSWCA 75 at [81].