

# 'Play On!' If and when changing instructions requires you to withdraw

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Powerpoint prepared by S Crane



# Introduction



No bright line demarcating between proper and improper

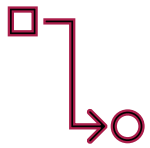


Not heavily litigated nor many examples of the court interrogating a decision to withdraw or not



The issue of what constitutes a 'misleading statement' is important in determining compliance with the rules.

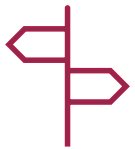
# This paper will discuss three cases



New South Wales Bar Association v Punch [2008] NSWADT 78 (**Punch**) – an obvious breach.



Moustafa v R [2019] NSWCCA 89 (**Moustafa**) – an example of a proper way to deal with conflicting instructions



Director of Public Prosecutions v Ahmu [2014] NSWCCA 312 (**Ahmu**) – example of a very difficult case

# Relevant Rules

Act with independence in the interests in the administration of justice: Rule 23

Must not mislead the court: Rule 24

Correct any misleading statement after becoming aware it was misleading: Rule 25

Fearlessly protect their client's best interests: 35

Must not act as a mouthpiece and exercise your own forensic judgment: Rule 42

Must refuse to take further part if informed client or witness had lied: Rule 79

Circumstances you may continue to act for a client who admits guilt: Rule 80

*Starting point is to ask: "does my continued representation of the client and my duties to the client lead me into conflict with my duties to the court?"*

# NEW SOUTH WALES BAR ASSOCIATION v PUNCH [2008] NSWADT 78

## Key takeaway:

Willfully misleading the court by adducing evidence in direct conflict with clear instructions from the client which the barrister knew to be true.

## Facts:



Lawfully recorded conversation in the Bankstown cells



Client provided instructions that acknowledged that he had been present during the course of the armed robbery



Proceeded to call evidence from his client to the effect that he was at home in bed

# NEW SOUTH WALES BAR ASSOCIATION v PUNCH [2008] NSWADT 78

Breach!



Rule 24 and 25

Because at the time of the conduct the barrister knew it to be false.

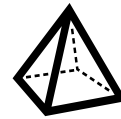
More than a bare belief in the truth of the instructions is required.

# MOUSTAFA v R [2019] NSWCCA 89

Key takeaway:

The appeal is instructive in how one might approach the issue of changing instructions

Facts:



The appellant was convicted of armed robbery. He gave three different versions of instructions to his legal reps.



Despite being advised not to, appellant chose to give evidence. The Crown cross examined him on fabrication/recent invention.



Appeal asserted incompetence of counsel for not recalling complainant after receiving 3<sup>rd</sup> version of inx, or not seeking a discharge of the jury.

# MOUSTAFA v R [2019] NSWCCA 89

Okay



- No criticism for continuing to act when instructions continued to change in a way beneficial to the appellant.
- In the absence of something confirmatory not likely in danger of breaching duties to the Court.
- An example of counsel adhering to Bar Rule 42: not acting as a mere mouthpiece and making own forensic decisions.

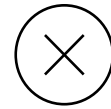


## AHMU v R; DIRECTOR OF PUBLIC PROSECUTIONS v AHMU [2014] NSWCCA 312

Key takeaway:

Not necessarily required to correct the record where you've cross-examined on the basis of instructions that change during the cross examination. A question is not a 'statement to the court'

Facts:



Instructed to put to complainant that aspects if her evidence were false.



After Crown sought short service subpoena for corroborative material client admitted to counsel that compl evidence was true.



Inx'd to cross on same issues on a different basis

# AHMU v R; DIRECTOR OF PUBLIC PROSECUTIONS v AHMU [2014] NSWCCA 312

## Navigate Carefully



- Putting questions, based on instructions asserting a particular fact is not a 'statement' for the purpose of Bar Rule 25, and therefore does not require correcting.
- If after the fact you become aware that the premise of those questions was false you have not deceived, or misled the court for the purpose of Bar Rule 24 because you did not know at the time that the instructions you were acting upon were false.

# Some takeaways from the cases

Rules 24 and 25 will be breached where one makes a misleading statement (as distinct, for eg, from asking a question with a presumed factual premise). You must know the statement is misleading at the time it's made.

A question to a witness, even if it implies a fact which subsequently the barrister discovers to be untrue, is not a statement that requires correction.

The Court affords practitioners a robust ability to take forensic approaches even where the client does not agree to such an approach.

None of the cases cited in this paper express a *ratio decidendi* on the question of what constitutes compliance with the bar rules and would be at most, instructive or persuasive.