Civil Procedure Act 2010 (Vic)

28. Court may take contravention of overarching obligations into account

(1) In exercising any power in relation to a civil proceeding, a court may take into account any contravention of the overarching obligations.

(2) Without limiting subsection (1), in exercising its discretion as to costs, a court may take into account any contravention of the overarching obligations.

29. Court may make certain orders

(1) If a court is satisfied that, on the balance of probabilities, a person has contravened any overarching obligation, the court may make any order it considers appropriate in the interests of justice including, but not limited to—

(a) an order that the person pay some or all of the legal costs or other costs or expenses of any person arising from the contravention of the overarching obligation;

...

(f) any other order that the court considers to be in the interests of any person who has been prejudicially affected by the contravention of the overarching obligations.

(2) An order under this section may be made—

(a) on the application of—

(i) any party to the civil proceeding; or

(ii) any other person who, in the opinion of the court, has a sufficient interest in the proceeding; or

(b) on the court's own motion.

(3) This section does not limit any other power of a court to make any order, including any order as to costs.

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Yara Australia Pty Ltd & Ors v Oswal [2013] VSCA 337

'Section 29 in particular is a unique provision, conferring powers broader than those in any other jurisdiction in Australia, to sanction legal practitioners and parties who fail to meet their overarching obligations.' [17]

'The court's powers under s 29 of the Act include the power to sanction legal practitioners and parties for a contravention of their obligations ... In our view, these powers are intended to make all those involved in the conduct of litigation — parties and practitioners — accountable for the just, efficient, timely and cost effective resolution of disputes. Through them, Parliament has given the courts flexible means of distributing the cost burden upon and across those who fail to comply with their overarching obligations ... It may take the form of a costs order against a practitioner' [20]

'The Act does not merely reaffirm the existing inherent powers of the court but provides a powerful indication of the will of the Parliament about the values sought to be achieved by the way in which cases are managed in the courts and the balances that have to be struck.' [22]

'The appearance of seven counsel for the applicants, three of them senior counsel, and two of them appearing for the same party on an application for leave to appeal on a security for costs application, in conjunction with the voluminous content of the application books, compelled the court to inquire as to whether there had been any contravention of the Act.' [35]

'The court was provided with six application folders, comprising submissions, affidavit material, transcript and authorities running to over 2700 pages. Two folders pertained to the Mr Oswal application and four folders related to the application of Mrs Oswal. The affidavit material from the parties' solicitors contained a variety of largely extraneous materials, included old statements of claim, swathes of email correspondence, materials from related proceedings in Western Australia, and transcripts from related hearings in the Supreme Court of Victoria. Much of this material was either peripheral to the application or entirely unnecessary.' [40]

per Redlich and Priest JJA and Macaulay AJA

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Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (Ruling No 8) [2014] VSC 567

'Any contravention of the overarching obligations may be taken into account by a court, first, exercising any power in relation to a civil proceeding and, second, in exercising its discretion as to costs. Third, s 29 … empowers the court with a wide discretion to make any order it considers appropriate in the interests of justice.' [254]

per Dixon J

Other Victorian cases

Setka v Abbott and Anor [2013] VSCA 345

Re Fanning [No 2] [2014] VSC 370

Ilievski v Zhou [2014] VSC 442

Gibb v Gibb [2015] VSC 35

Babcock & Brown DIF III Global v Babcock & Brown International Pty Ltd [2015] VSC 612

Kenny & Anor v Gippsreal Ltd (No 2) [2015] VSC 737

Actrol Parts Pty Ltd v Coppi (No 3) [2015] VSC 758

Further reading

Robert Angyal SC, The ethical limits of advocacy in mediation (2011), *NSW Bar Practice Course*

Campbell Bridge SC, Effective and ethical negotiations (2012), Personal Injury Law Specialist Accreditation Conference (see *campbellbridge.com*)

Guidelines for lawyers in mediations (2011), *Law Council of Australia*

Tanya Sourdin, Good faith, bad faith? Making an effort in dispute resolution (2012), DICTUM: the Victoria Law School journal, vol 2(1)

Steven Standing, Ethical and legal obligations in mediations and other negotiations (2015), *Brief*, August 2015 ed, vol 42(7)

Bobette Wolski, On mediation, legal representatives and advocates (2015), *UNSW Law Journal*, vol 38(1)

LEGAL PRACTITIONERS' LIABILITY COMMITTEE

Professional responsibility in court and settlement negotiations

Matthew Rose, Risk Manager, LPLC

Scenario 1

You act for a plaintiff in a personal injuries claim.

Your client has been rendered paraplegic by the accident and is unable to work. In anticipation of a scheduled mediation you prepare a schedule of damages and calculate future economic loss on the basis that your client has a life expectancy of 25 years, which is what your medical evidence says. You serve this schedule on the other side.

On the day of the mediation your client tells you he has been diagnosed with an unrelated terminal illness and has been told he has only months to live. He says he doesn't want anyone to know this.

You decide it's ok to keep this information to yourself, as long as you don't say anything during the mediation about your client's life expectancy.

Are you right?

Scenario 2

You attend a mediation for a defendant. Negotiations have continued for some time through the mediator. Your last offer of $400,000 has produced a counter offer from the plaintiff of $750,000.

You tell your client you think the plaintiff will almost certainly take $500,000 if she is convinced that is your client's final offer. Your client says, "*we would really like to get out of it for $500,000 and I hope I don't have to pay any more*".

(a) Is there any problem with you now saying to the mediator, "*$500,000 and that's our final offer*"?

(b) What if your client says, "*okay, tell them $500,000 is our final offer, although I'd pay a bit more if I had to*"?

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Scenario 3

You act for the plaintiff in a personal injury claim and brief counsel to appear at the trial. Your client's injuries occurred when he suffered an electrical shock and one of his claims is that this has had a very adverse effect on his libido, a matter about which both he and his wife will give evidence.

Shortly before the trial starts, your barrister tells you she has received an offer from counsel on the other side. She says that while the amount might at first seem insufficient, she believes it will have to be recommended to the plaintiff. She has been told by the defendant's barrister that he will be calling evidence from a private investigator who has taken video of the plaintiff on a number of occasions. The video makes it clear he is having an affair with a neighbour.

Your barrister was shown the evidence. She believes it will establish that the allegations of loss of libido are untrue and also turn the jury against your client (not to mention the effect it will have on his marriage).

You say that you will make these revelations known to your client and talk to him about settlement. Your barrister says you cannot do that because she has been given the information by the other barrister strictly on the basis that it will not be revealed to the plaintiff and can only be used by you and counsel to determine whether or not to recommend the settlement. Your barrister says she was given the information "between counsel" and that there is a well-recognised rule at the Bar that if information is conveyed in such circumstances it can only be passed on to a third party with the authority of the barrister providing the information.

In this case, your counsel says, her only authority is to give the information to you and neither she nor you can convey it to anyone else.

Scenario 4

You act for two sisters in their capacity as executors of the estate of their late mother.

Apart from a small amount being the balance of a bank account, the sisters are the only beneficiaries with their brother essentially left out of the will.

Probate of the will was granted four months ago.

Two months ago and against your express advice, the sisters instructed you to distribute the majority of the estate. You subsequently made a distribution of around $450,000 net value divided equally between the two sisters.

One week ago, you received a letter from a lawyer acting for the brother, giving notice that the brother intended to make a claim against the estate. In the letter, the lawyer requested that *'as you are now aware of a potential claim against the estate, you confirm that the estate will not be distributed until six months has expired from the date that probate has been granted on the will'*. The letter did not ask whether any distribution had been made at that point.

The sisters tell you that their brother was estranged from them and their late mother for several years and they 'want nothing to do with him'. They intend to vigorously defend any claim against the estate.

How do you respond to the letter from the brother's lawyer, specifically to the request for confirmation that the estate will not be distributed?

Some of the above was adapted from scenarios written by the late Harry Curtis with thanks to Lander & Rogers.