

Episode 88: Summary

Episode name: *Vae Victis? Rethinking the Value of Absolute Victory in the Practice of Law*

Guest(s): Steven Mark

What area(s) of law does this episode consider?

The ethics of victory and determining what's in a client's best interest.

Why is this topic relevant?

The traditional theory of the role of lawyers can be encapsulated in the idea of the "adversarial advocate". This adversarial advocate is mollified only by a duty to the court and the law, and is otherwise free - and perhaps obligated - to vigorously pursue the client's legal interests.

One common assumption is that this duty to the client requires the maximisation of all of the client's legal rights - from the perspective of a typical adversarial advocate anything less than this maximisation is a loss or a failure.

But the traditional adversarial theory of the role of a lawyer doesn't account for other interests that the client may have - such as preservation of existing relationships, or the broader impact of the client's actions through their lawyer as agent.

What legislation is considered in this episode?

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW)

Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW)

What cases are considered in this episode?

White Industries (Qld) Pty Ltd v Flower & Hart (A Firm) [1998] FCA 806 ([Jade link](#))

- A developer building a shopping centre was having difficulty paying for construction. The developer sought legal advice seeking to delay payment to White Industries. The advising firm suggested that the developer claim fraud despite no fraud occurring. The Court found that the alleged fraud proceedings had no reasonable likelihood of success and that the firm had abused the court process.

Legal Services Commissioner v Mullins [2006] LPT 012

- A barrister acted on a motor vehicle compensation claim in which he knew of the client's cancer diagnosis but failed to disclose this to the insurer. The claim was settled at mediation with no mention of cancer. The barrister was found guilty of professional misconduct for the failure to disclose.

What are the main points?

- The question of whether law can be a profession when it's focused on the value of the dollar is not either / or - legal practice can be both.
- In Steve's view it's a question of being both a business and profession and doing both well.
- Ethics is based on values, not just rules. The question is; what kind of lawyer do you want to be?

- Lawyers are problem solvers - not gladiators. Law is not just about winning.
- The adversarial approach to legal practice may be necessary - for example in litigation, but lawyers should prioritise the clients' best interests over winning.
- There is sometimes a conflict between following a client's instructions and acting in their best interest.
- Steve gives the hypothetical of a young person wanting to be convicted even though they may not necessarily have committed an offence.
- In negotiation there is often a difference between a position and an interest.
- This is clearly illustrated in the Fisher example of two sides negotiating for the world's last orange. The position is "*I need the orange*" and the interest is that "*I just need a certain part of the orange*".
- Case law is replete with examples where lawyers have crossed ethical lines in pursuit of winning, such as bringing an action with no reasonable likelihood of success or withholding relevant information during negotiation.
- The *Mullins* decision is a good example of this. This was where a barrister failed to disclose his client's cancer diagnosis during mediation, leading to a fine for professional misconduct as the diagnosis impacted the life expectancy calculation.
- The importance of trust in the legal profession is paramount, especially in light of the declining levels of trust in society.
- Steve raised First Nations law and how disputes are resolved through affiliation and relationships rather than adversarial advocacy.
- Indigenous law offers an interesting perspective on negotiation, where greed and narcissism are considered major sins as they lead people to take more than they need or believe they deserve more than others.
- If disputes cannot be resolved, a ceremonial fight may occur where men fight with stone knives, but strict rules apply such as only being allowed to cut on certain body parts
- The winner must also be cut in the same way as the loser to prevent grudges. The concept behind this is that if one person is hurt, it ultimately hurts both parties.
- Building strong client relationships is crucial.
- Building a relationship of trust with clients requires a deep understanding of their objectives and interests, which can be achieved by asking questions and actively listening to their responses.
- Lawyers are problem solvers, not gladiators. Understanding the rules and exploring alternative approaches to litigation, such as negotiation and mediation, is important.

What are the practical takeaways?

- Really knowing your client can assist in negotiating from a position of interest rather than from a position.
- Negotiators must still abide by the rules to avoid consequences such as in the Mullins decision.
- Do not assume authority or status based on information asymmetry with clients.

[Show notes](#)