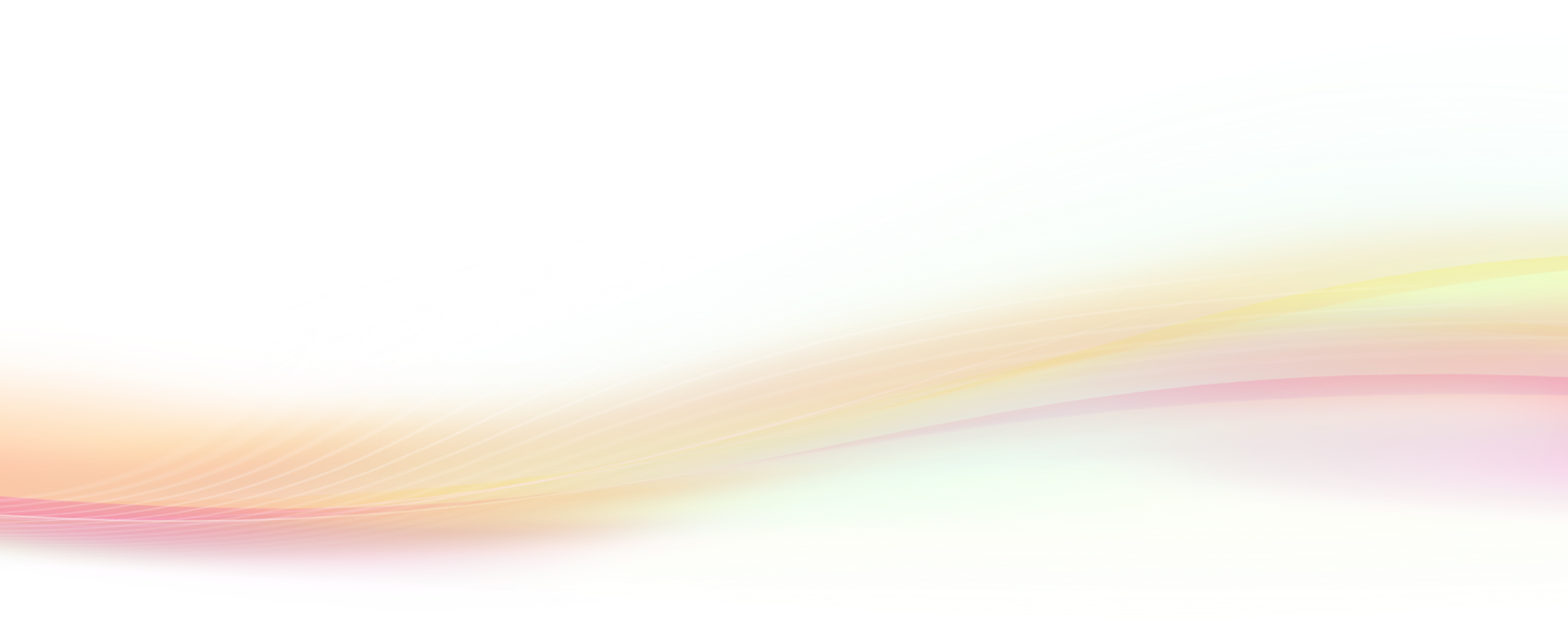
Professional Responsibility

LWB433 Exam Notes

Nick Dowse



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Table of Contents

1.0 Trust Accounting 6

1.1 The Legislative Regime 6

1.2 Definitions and Purpose of Trust Accounts 7

1.3 What is and is not trust money? 8

1.3.1 Trust Money Decision Tree 10

1.4 Practitioners’ Responsibilities 11

1.4.1 Establishing a General Trust Account 11

1.4.2 Notifications About General Trust Accounts 12

1.4.3 Intermixing Money 12

1.4.4 Receiving Funds into Trust 12

1.4.5 Withdrawing Funds from Trust 14

1.4.6 Giving Trust Account Statements to Clients 17

1.4.7 Deficiencies in the Trust Account 18

1.4.8 Reporting of Irregularities 18

1.4.9 False Names 19

1.5 Trust Account Records 19

1.5.1 Flow of Trust Account Information 21

1.5.2 Steps in the Recording Process 21

1.5.3 Transferring Amounts Between Ledgers 22

1.6 Trust Account Receipts 23

1.6.1 Making Corrections and Cancellations 26

1.7 Trust Account Cash Books 26

1.7.1 Trust Account Receipts Cash Book 26

1.7.2 Trust Account Payments Cash Book 27

1.8 Individual Trust Ledgers 28

1.9 Trust Account Reconciliation 31

1.10 External Examination 31

1.11 External Intervention 32

1.12 Case Examples 35

1.12.1 Fraud 35

1.12.2 Unauthorised Transactions 36

2.0 Law as a Profession 44

2.1 What is Ethics? 44

2.1.1 Types of Ethical Approaches 44

2.1.2 Four Approaches to Legal Ethics 45

2.1.3 Lake Pleasant Case Study 46

2.1.4 International Bar Association’s General Principles for Ethics of Lawyers 50

2.2 The Legal Profession 51

2.3 History and Structure of Legal Profession 62

2.3.1 History in England 62

2.3.2 History in Australia and Queensland 63

2.3.3 Structure of Legal Profession in Queensland 63

2.3.4 Monopoly Over Legal Services 66

2.3.5 Incorporated Legal Practices and Multi-Disciplinary Partnerships 68

2.4 Regulation of the Profession in Queensland 74

2.4.1 Advertising 74

2.5 Entry to Valhalla 79

2.6 Defined Terms in LPA 81

3.0 Admission 83

3.1 Who Can Engage in Legal Practice? 83

3.2 Procedure for Admission 84

3.2.1 Role of Legal Practitioners Admission Board 84

3.3 Eligibility for Admission 85

3.4 Suitability for Admission 85

3.4.1 Suitability Matters in Section 9 86

3.5 Specific Problematic Behaviour Affecting Admission 87

3.5.1 Lack of Candour and Frankness 87

3.5.2 Plagiarism 91

3.5.3 Criminal Charges 96

3.5.4 General Unfitness 98

3.6 Other Matters That Need To Be Disclosed 99

3.7 Mitigating Factors 99

3.8 Practising Certificates 101

3.8.1 Principal Level Practising Certificates 103

4.0 Duties Owed to the Client 106

4.1 Contracts for Legal Services and Fees 106

4.1.1 Overcharging 109

4.2 Competence and Diligence 114

4.2.1 Communication with Client 115

4.2.2 Duty and Standard of Care Owed 117

4.2.3 Liability in Negligence 118

4.3 Duty of Confidentiality 120

4.3.1 Legal Professional Privilege Distinguished 123

4.4 Duty to Prevent Conflict of Interest 126

4.4.1 Conflict Between Client and Practitioner 126

4.4.2 Conflict between Current and Former Clients 128

4.4.3 Conflict by Acting for Both Parties 134

4.4.4 Tests For Conflict of Interest 136

4.4.5 Chinese Walls 136

4.5 Termination of Lawyer/Client Relationship 138

4.6 Solicitors’ Fiduciary Duties 138

4.7 Advocates’ Immunity 140

4.7.1 History 140

4.7.2 Modern Doctrine of Immunity 140

4.7.3 Level of Connection to Litigation Required 140

4.7.4 Immunity in Australia 141

4.7.5 Immunity abolished in the UK 145

4.7.6 Arguments For and Against Advocates’ Immunity 148

4.7.7 Other Random Info 153

5.0 Duty to the Administration of Justice 160

5.1 Paramountcy of Duty 160

5.1.1 Lawyers as Officers of the Court 161

5.2 Right to Representation 161

5.3 Refusal to Call a Witness 162

5.4 General Duty 164

5.5 Barristers’ Duties 164

5.5.1 Barristers’ Conduct of Proceedings 166

5.5.2 Guilty or Dishonest Clients 168

5.5.3 Responsible Use of Court Process Privilege 168

5.5.4 Assisting Judge to Identify All Issues in the Case 169

5.5.5 Role of Crown Prosecutors 171

5.6 Solicitors’ Duties 175

5.7 Advertising 180

5.8 Random Cases 182

6.0 Discipline 184

6.1 Role of Legal Services Commissioner 184

6.2 Who Deals With What 186

6.3 Notice to Practitioner 189

6.3.1 Practitioner’s Response to Notice 189

6.4 Standards of Professional Conduct 190

6.4.1 Is this Unsatisfactory Professional Conduct? 190

6.4.2 Is this Professional Misconduct? 191

6.4.3 Case Examples 193

6.4.4 Mitigating Factors 212

6.4.5 Penalties 214

6.4.6 Remedies 216

6.4.7 Tabular Summary of Disciplinary Cases 217

References to Cases 218

Appendix 1: Fitzgerald J’s Article 221

# Trust Accounting

The requirement to deal with trust money and to maintain trust accounting records is an integral part of legal practice.

Trust accounting is a simple form of bookkeeping used exclusively for trust transactions. It is the recording by a law practice of the receipt and payment of other people’s money, with all transactions being recorded in individual accounting records maintained for the person on whose behalf the money was received.

Account = money that is in a bank account, it is not *your* money

Trust = relationship of trust, someone is trusting you with their money

There are generally two types of accounts that lawyers run:

* The firm’s general account, out of which wages and other expenses are paid; and
  + This account can go into debit
* The trust account
  + Although this is one account with the bank, it has many subtrusts in law
  + For example, if you have 50 clients and 83 files, you have 83 subtrusts in the account
  + The trust account must never under any circumstances go into debit
  + Each of the subtrusts must always have a credit (or zero) balance.

## The Legislative Regime

The aim of the legislation is to protect you, protect the client, protect the profession. You are in a higher position of trust as a lawyer than most members of the community.

Up until 1 April 2008, two schemes operated, as the law was in a state of transition. The idea was to allow solicitors to have an orderly transfer into the new method.

The “old method” operated until 1 April 2008 –

* Trust Accounts Act 1973
* Trust Accounts Regulations 1999

A “fresh start” commenced from 1 July 2007 –

* Legal Profession Act 2007 (Qld) Pt 3.3 (“LPA”)
* Legal Profession Regulation (Qld) Pt 3.3 (“LPR”)

The *Legal Profession Act 2007* (Qld) commenced on 1 July 2007. The Legal *Profession Act 2007* introduced a number of important reforms in the handling of trust money entrusted to a law practice. It amended provisions of the *Trust Accounts Act 1973* and will, with effect from 1 April 2008, replace provisions of the *Trust Accounts Act 1973* in so far as they relate to solicitors.

The *Legal Profession Regulation 2007*, which details the recording requirements for law practices that receive trust money, also commenced on 1 July 2007. It amended provisions of the *Trust Accounts Regulation 1999* and will, with effect from 1 April 2008, replace provisions of the *Trust Accounts Regulation 1999* in so far as they relate to solicitors.

Unless otherwise stated, references to the Act are references to the *Legal Profession Act 2007* and references to the Regulation are references to the *Legal Profession Regulation 2007*.

Section 727 of the Act provides for the continued operation of the *Trust Account Act 1973* until 31 March 2008 to give law practices ample opportunity to understand and apply the new legislative provisions. Until that date law practices can comply with either the provisions of the Act or the *Trust Accounts Act 1973* in respect of keeping or dealing with trust money or keeping records of the trust money.

Part 9.11 (Sections 753 – 766, inclusive) of the Act provides for the continued operation of the relevant provisions of the *Trust Accounts Act 1973* for the period from 1 July 2007 to 31 March 2008.

## Definitions and Purpose of Trust Accounts

Purpose

The legislatively-stated purpose of the regulation around trust accounts is to ensure that trust money is held in a way that protects the interests of persons for whom money is held (s 236(a) LPA).

|  |
| --- |
| **236 Main purposes of pt 3.3**  The main purposes of this part are as follows--  (a) to ensure trust money is held by law practices in a way that protects the interests of persons for whom money is held, both inside and outside this jurisdiction;  (b) to minimise compliance requirements for law practices that provide legal services within and outside this jurisdiction;  (c) to ensure the law society can work effectively with corresponding authorities in other jurisdictions in relation to the regulation of trust money and trust accounts. |

Definitions

**Associate** of a law practice is (s 7(1)(?)(?) LPA):

* (a) an Australian legal practitioner who is:
  + (i) a sole practitioner if the law practice is constituted by the practitioner; or
  + (ii) a partner in the law practice if the law practice is a law firm; or
  + (iii) a legal practitioner director in the law practice if the law practice is an incorporated legal practice; or
  + (iv) a legal practitioner partner in the law practice if the law practice is a multi-disciplinary partnership; or
  + (v) an employee of, or consultant to, the law practice; or
* (b) an agent of the law practice who is not an Australian legal practitioner; or
* (c) an employee of the law practice who is not an Australian legal practitioner; or
* (d) an Australian-registered foreign lawyer who is a partner in the law practice; or
* (e) a person who is a partner in the multi-disciplinary partnership but who is not an Australian legal practitioner; or
* (f) an Australian-registered foreign lawyer who has a relationship with the law practice, that is a class of relationship prescribed under a regulation.

**Controlled money** means money received or held by a law practice for which the practice has a written direction to deposit the money in an account, other than a general trust account, over which the practice has or will have exclusive control (s 237(1)).

**Law firm** means a partnership consisting of Australian legal practitioners or Australian-registered foreign lawyers (Sch 2 LPA).

**Law practice** means (Sch 2 LPA):

* an Australian legal practitioner who is a sole practitioner who is a sole practitioner; or
* a law firm; or
* an incorporated legal practice; or
* a multidisciplinary partnership.

**Legal services** is work done or business transacted in the ordinary course of legal practice (Sch 2 LPA).

**Money received** is when a law practice (s 242(1)(?) LPA):

* (a) obtains possession or control of it directly; or
* (b) obtains possession or control of it indirectly as a result of its delivery to an associate of the practice; or
* (c) the practice or an associate of the practice (otherwise than in a private and personal capacity) is given a power to deal with the money for another person.

NOTE: A law practice or associate is taken to have received money if the money is available to the practice or associate by means of an instrument or other way of authorising an ADI to credit or debit an amount to an account with the ADI, including, for example, an electronic funds transfer, credit card transaction or telegraphic transfer (s 242(2) LPA).

**Transit money** is money received by a law practice subject to instructions to pay or deliver it to a third party who is someone other than an associate of the practice (s 237(1) LPA).

**Trust money** is money entrusted to a law practice in the course of or in connection with the provision of legal services by the practice, and includes (s 237(1) LPA):

* money received by the practice on account of legal costs in advance of providing the services; and
* controlled money received by the practice; and
* transit money received by the practice; and
* money received by the practice that is subject of a power exercisable by the practice or an associate of the practice to deal with the money for another person.

## What is and is not trust money?

Trust money is defined in s 237 LPA as money:

* Entrusted to a law practice; and
  + The term “entrusted” is not defined in the Act. However, the use of the word “entrusted” in the definition of trust money reinforces the understanding that trust moneys are not merely given to a law practice but are placed in its “care and protection.”
* In the course of and in connection with the provision of legal services by the practice; and
* Includes but differentiates between:
  + Money received in advance for legal costs; and
  + Controlled money; and
  + Transit money; and
  + Power money.

For example, settlement money received by a law practice on behalf of a client who sold a property and that is invested on the client’s behalf pending the use of the money in the subsequent settlement of the client’s purchase of another property is trust money.

Another example of trust money is where funds are received in payment of a rendered account of costs and disbursements and that account includes incurred but unpaid disbursements, then that portion of those funds received for the incurred and billed, but unpaid, disbursements will be considered as trust moneys that must be banked to the law practice’s general trust account.

Section 238(1) & (2) prescribes that money received in the following circumstances is not trust money:

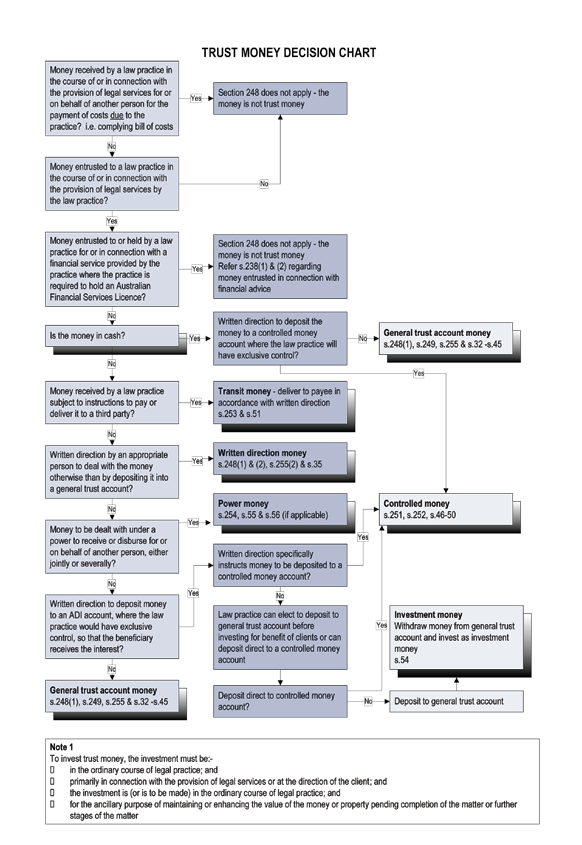
* money entrusted to or held by a law practice in connection with a financial service provided by the practice or associate of the practice in circumstances in which the practice or associate is required to hold an Australian financial services licence covering the provision of the service (whether or not the licence is held at any relevant time) (s 238(1)(a) LPA);
* money entrusted to or held by a law practice in connection with a financial service provided by the practice or associate of the practice in circumstances in which the practice or associate provides the service as a representative of another person who carries on a financial services business (whether or not the practice or associate is an authorised representative at any relevant time) (s 238(1)(b) LPA);
* money that is entrusted to or held by a law practice for a managed investment scheme, or mortgage financing, undertaken by the practice (s 238(2) LPA).

Essentially, if it’s investment money (financial services) it’s not going to be trust money.

In any event, the QLS can decide the status of money if there is doubt or a dispute about the status of money (s 239(1) & (2)). Can be by referral or of the QLS’s own volition.

NOTE: Will also be trust money if it constitutes “investment money” which is money entrusted to a law firm for the ancillary purpose of maintaining or increasing its value pending completion of a matter (s 238(3)(b)(ii).

### Trust Money Decision Tree



## Practitioners’ Responsibilities

### Establishing a General Trust Account

A law practice that receives trust money must keep a general trust account in Queensland (s 247(1) LPA). Penalty: 100 penalty units ($10000). A general trust account is an account kept by a law practice with an approved ADI for the holding of trust money received by the practice, other than controlled money or transit money (s 237(1); s 247(3) LPA).

Requirements under r 33 LPR:

* The general trust account must be established in Queensland and with an approved ADI (authorised deposit-taking institution) (r 33(2)(a)); and
  + See list below in this section if necessary
* Must be kept in Queensland ongoing (r 33(2)(b)); and
* The name of the account includes:
  + The name of the practice or the business name it practices under (r 33(2)(c)(i)); and
    - Does not apply to an account established in QLD before 1 July 2007 (r 33(3)).
  + The expression “law practice trust account” or “law practice trust a/c” (r 33(2)(c)(ii)); and
    - The repetition of the words “law practice” is not required if those words form part of the name or the business name of the law practice (r 33(4)).
    - Does not apply to an account established in QLD before 1 July 2007 (r 33(3)).
* The account is of a kind that is for the time being approved by the QLS (r 33(2)(d)).

Penalty for non-compliance: 100 penalty units ($10000).

For example:

* A law practice that practises under the name “Fred Bones & Associates” that opens a general trust account after 1 July 2007 is required to open the account in the name of “Fred Bones & Associates Law Practice Trust Account”, or “Fred Bones & Associates Law Practice Trust A/c”.
* A law practice that practises under the name “Fred Bones Law Practice” that opens a general trust account after 1 July 2007 is required to open the account in the name of “Fred Bones Law Practice Trust Account”, or “Fred Bones Law Practice Trust A/c”. It is not necessary to repeat the words “law practice”.

List of Approved ADIs

* Australia & New Zealand Banking Group Limited ( ANZ )
* Bank of New Zealand Australia, a division of National Australia Bank Limited ( BNZ )
* Bank of Queensland Limited ( BOQ)
* Bank of Western Australia Limited ( Bank West )
* Bendigo Bank Limited
* Commonwealth Bank of Australia ( CBA)
* Mackay Permanent Building Society Limited
* Macquarie Bank Limited
* National Australia Bank Limited ( NAB)
* Queensland Police Credit Union Limited ( QPCU)
* Suncorp Metway Limited
* St George Bank Limited
* The Rock Building Society Limited
* Westpac Banking Corporation (WBC)

### Notifications About General Trust Accounts

Within 14 days after establishing a new general trust account, the law practice must give the QLS written notice of that fact (r 46(1)). The notification should include the name of the trust account, the name of the approved ADI and branch where the account is held, the account number (including the BSB) and the date the account was established (r 46(4)).

A law practice, either before, or within 14 days after, authorising or terminating the authority of an associate of the practice or an Australian legal practitioner to sign cheques drawn from the general trust account or to otherwise effect, direct or give authority for the withdrawal of money from it, must give the QLS written notice of that fact, including their name, address and whether they are an associate (r 46(2)(a) LPR).

During July of each year the law practice must give the QLS written notice of the associates and Australian legal practitioners, including their names and addresses, who are authorised, as at 1 July of that year (r 46(2)(b))—

(i) to sign cheques drawn on a general trust account of the practice; or

(ii) otherwise to effect, direct or give authority for the withdrawal of money from a general trust account of the practice.

This does not apply to a law practice if the law practice has provided an external examiner’s report pursuant to s 274 LPA (r 46(3)).

### Intermixing Money

Section 257 LPA states that a law practice must not, otherwise than as permitted and to the extent only that is authorised by the QLS, mix trust money with other money. This means that the law practice is not permitted to receive trust money into its office or general account.

Therefore law practices cannot deposit trust money to their office or general account even if they get a written direction to this effect from the person on whose behalf the money is received.

Penalty: 100 penalty units ($10000).

### Receiving Funds into Trust

General Obligation

A law practice must hold trust money deposited in a general trust account of the practice *exclusively* for the person on whose behalf it is received, disburse the trust money only under a direction given by the person and account for the money as required by the regulations (s 249(1) LPA).

* Can be overridden by court order (s 249(2)).

Penalty: 50 penalty units ($5000).

Steps Upon Receiving Trust Money

1. Issue the trust receipt as soon as practicable (r 34(2) LPR, s 18 LPA)
   1. Must give a receipt: see “**1.6** Trust Account Receipts” on page 23 below.
2. Bank the trust money daily, or as soon as practicable (s 248(1)).
3. Post entries within 5 days (incl day of receipt of trust money) to (r 40(4)):
   1. Trust receipts book; and
   2. Client’s individual trust ledger card as a credit.

Cash

Trust money received in the form of cash *must* be deposited into a general trust account (s 255 LPA).

* *Rationale: money does not leave a paper trail so the money must go into the account before anything else happens.*

Trust money, except for controlled money, received in cash must be deposited to the general trust account before it is otherwise dealt with in accordance with the direction (or instructions) relating to the money, regardless of anything contrary in the direction or instructions [s.255]. Hence, transit money, written direction money and general trust money in the form of cash must be first deposited to the general trust account before an appropriate person deals it with in accordance with the written directions.

Controlled money received in the form of cash must be deposited into a controlled money account in accordance with s 251 [s.255(3)].

Money that is received in the form of cash that is subject of a power must also be banked into the general trust account or a controlled money account before it is dealt with in accordance with the power, despite anything contrary in the power or any relevant direction [s.255(5)].

It should be noted that when a law practice receives cash of $10,000 or more, the law practice is required by the *Financial Transactions Act 1988* to report the transaction to Austrac.

If, for some fucked reason, the money cannot be banked immediately or as soon as practicable, the money must be kept in a secure place in the meantime (no authority).

Written Direction Money

Money received subject to a written direction (other than money received in the form of cash) from an appropriate person must be dealt with in accordance with the direction within the period, if any, stated in the direction, or as soon as practicable after it is received (s 248(1)(a), s 248(2)).

Controlled Money

Money received subject to a direction to deposit it into a controlled money account, must be deposited to a controlled money account maintained exclusively for the person on whose behalf it was received, as soon as practicable after it is received (s 248(1)(b), s 251 and s 255(3)).

Transit Money

Money received subject to instructions to pay or deliver it to a third party (other than money received in the form of cash) must be paid or delivered in accordance with the instructions, within the period, if any, stated in the instructions, or as soon as practicable after it is received [s 248(1)(c) & s 253].

Power Money

Money received (other than in the form of cash) on behalf of a client who has given the law practice, or an associate of the law practice, power to operate on an account of the client, may be deposited to the client’s account [s 248(1)(d)].

### Withdrawing Funds from Trust

A law practice may withdraw trust money from the general trust account by way of a cheque or, if the law practice is authorised by the QLS, by way of Electronic Funds Transfer (EFT) [*Legal Profession Act 2007* s.250(1)]. Cash withdrawals, ATM withdrawals or transfers, telephone banking withdrawals or transfers are specifically prohibited [*Legal Profession Act 2007* s.250(2)].

Where possible, have the client sign an authority early in the matter to transfer from the trust account.

When money has been received for a specific purpose (eg stamp duty), it can only be used for that purpose and no other (eg land tax, searches etc). This is why it is important to record in detail the purpose of funds on the receipt.

A special arrangement should be had with the bank to ensure that bank fees and charges are debited against the practice’s general account, not the trust account.

* If however it does happen, you need to inform the auditor the QLS about the technical breach.
* Then ask the bank to reverse the charge and charge it to the general account.

Withdrawing Money from Trust by Cheque

Withdrawal of money by cheque from a general trust account only be effected by:

* An authorised principal of the law practice signing the cheque (r 37(3)(a) LPR); or
* If an authorised principal is not available, by:
  + An authorised legal practitioner associate (r 37(3)(a)(i)); or
  + An authorised legal practitioner who holds an unrestricted practising certificate authorising the receipt of trust money (r 37(3)(a)(ii)); or
  + 2 or more authorised associates jointly (r 37(3)(a)(iii)).

**Authorised** means authorised by the law practice to sign cheques drawn on the general trust account (r 37(10)).

**Associate** of a law practice means (s 7(1)(?)(?) LPA):

* (a) an Australian legal practitioner who is:
  + (i) a sole practitioner if the law practice is constituted by the practitioner; or
  + (ii) a partner in the law practice if the law practice is a law firm; or
  + (iii) a legal practitioner director in the law practice if the law practice is an incorporated legal practice; or
  + (iv) a legal practitioner partner in the law practice if the law practice is a multi-disciplinary partnership; or
  + (v) an employee of, or consultant to, the law practice; or
* (b) an agent of the law practice who is not an Australian legal practitioner; or
* (c) an employee of the law practice who is not an Australian legal practitioner; or
* (d) an Australian-registered foreign lawyer who is a partner in the law practice; or
* (e) a person who is a partner in the multi-disciplinary partnership but who is not an Australian legal practitioner; or
* (f) an Australian-registered foreign lawyer who has a relationship with the law practice, that is a class of relationship prescribed under a regulation.

The cheque drawn must:

* be made payable to a stated person or persons, not “to bearer” or “to cash” (r 37(2)(a)); and
* be crossed “not negotiable” (r 37(2)(b)); and
* include the name of the law practice and the expression “law practice trust account” (r 37(2)(c)).

Each cheque butt must contain (r 37(6)(?) LPR):

* (a) the date and number of the cheque;
* (b) the amount;
* (c) the name of the person to whom the payment is to be made;
* (d) details clearly identifying the name of the person on whose behalf the payment was made and the matter reference;
* (e) details clearly identifying the ledger account to be debited;
* (f) particulars sufficient to identify the purpose for which the payment was made.

Before withdrawing, need to have a **payment authority** or have **issued a bill for services**.

* General position is that trust money cannot be used to pay the debts of the practice (s 256 LPA).
  + However, you can withdraw for legal fees, but must comply with the regulations below (s 258(1)(b)).
* For payment authorities, the practice can withdraw the funds if the money is:
  + Withdrawn under a costs agreement (r 58(3)(a)(i)); or
  + In accordance with client’s instructions (r 58(3)(a)(ii); or
    - Instructions can be written or verbal, but if verbal then must be confirmed in writing within 5 days (r 58(5))
  + Already spent from the general account (r 58(3)(a)(iii)); and
  + The practice has given the client a:
    - Request for payment (r 58(3)(b)(i)); or
    - Written notice of the withdrawal (r 58(3)(b)(ii)).
* After issuing a bill for legal services rendered, the practice can only withdraw the money if it:
  + Gives the bill to the client (r 58(4)(a)); and
  + Client does not object within 7 days (r 58(4)(b)(i)); or
  + Client has objected within 7 days after being given the bill but has not applied for a review of the legal costs under the Act within 60 days after being given the bill (r 58(4)(b)(ii)); or
  + The money becomes otherwise legally payable (r 58(4)(b)(iii))
* NOTE from LSC on fees:
  + Only charge for actual outlays not for undisclosed markups or surcharges such as:
    - Client registration fees
    - File opening, closing, archive or retrieval fees
    - In-house stamping or Citec administration fees
    - Professional indemnity insurance
    - Settlement fees where no agent used
    - Stationery, printing, email charges
  + When charging, the practice must disclose:
    - The amount of the markup in % or $
    - In plain English
    - Not bury the disclosure in “fine print”
  + If there are charges to a service company where the practice or its associate has an interest, need to disclose this to client
    - Eg where company owned by spouse or family member

Before drawing on funds from the general trust account, remember that banks have a standard time of 3 clear business days before funds from *all* cheques can be treated as “cleared.” You cannot withdraw funds from trust until the cheque is cleared. If a practice does so, they will be spending another client’s money and will be in breach of the LPA, and may be subject to disciplinary proceedings for unsatisfactory personal conduct or professional misconduct (s 418 and s 419(1)(a) LPA).

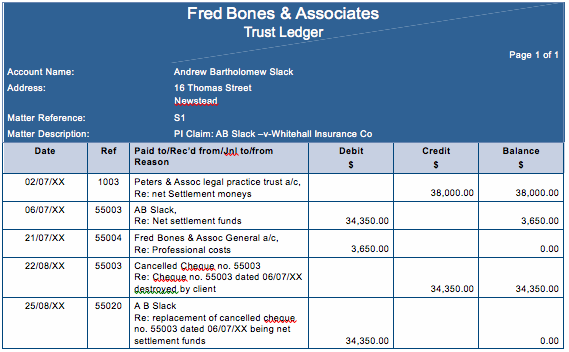
* Bank cheques can be still be dishonoured:
  + Stolen
  + No consideration
  + By operation of law (assets frozen)
  + Fraud

Typical example, a piggy-back conveyance:

* place up for sale, sell house and contract for sale settles on 1 November. Buy new house and get that hopefully settled on 1 November.
* Money used to pay for new house from sale of house
* Lawyer acts for both
* At morning settlement, cheque for $250K to your trust account, can’t hand it over in the afternoon as not payee of ..
* Not going to ask purchaser of house 1 to draw a cheque made payable to whoever is buying a unit off just in case unit sale falls through
* Insist that for house, purchase cheque made payable to your trust account
* Have to deposit to bank, not cleared funds need to wait 3 days – however, need it that afternoon
* Need to get a special clearance which costs $55 courtesy of the bank.

**CHECKLIST:**

* Do I have a signed authority from the client, or, did I receive the funds for this purpose?
* Are the funds cleared?
* Write the cheque (or do the EFT).
* Post entries within 5 days of the payment of the money to:
  + Cash payments book (r 41(4)); and
  + The client’s individual trust ledger as a debt (r 41(4)).



### Giving Trust Account Statements to Clients

A trust account statement is a report designed by the Regulation to inform persons for whom or on whose behalf trust money is held or controlled by the law practice. It provides the person on whose behalf the money is held with a full accounting history and current trust balance relevant to their matter. In terms of general trust money the trust account statement is similar in presentation and detail to that reported in the trust ledger account.

Regulation 53(1) requires a law practice to furnish a trust account statement to each person for whom or on whose behalf trust money (other than transit money) is held or controlled by the law practice.

A trust account statement is to contain particulars of:

* All the information required to be kept under this division in relation to trust money included in the relevant ledger account or record (r 53(5)(a)); and
* The remaining balance, if any, of the money (r 53(5)(b)).

The trust account statement must be given:

* after completion of the matter to which the ledger account or record relates (r 53(6)(a)); or
* after the person for whom or on whose behalf the money is held or controlled makes a reasonable request for the statement during the course of the matter (r 53(6)(b)); or
* after 30 June each year, except if: (r 53(6)(c))
  + ledger is less than 6 months old (r 53(7)(a)); or
  + balance is $0 or no transactions in the last 12 months (r 53(7)(b)); or
  + have given a statement with the last 12 months and there have been no further transactions (r 53(7)(c)).

Do not have to give a trust account statement to a sophisticated client if they have directed the law practice not to give trust account statements (r 54(1)). A sophisticated client is (s 311(1)(c)(?)):

(i) a law practice or an Australian legal practitioner; or

(ii) a public company, a subsidiary of a public company, a large proprietary company, a foreign company, a subsidiary of a foreign company or a registered Australian body, each within the meaning of the Corporations Act; or

(iii) a financial services licensee within the meaning of the Corporations Act; or

(iv) a liquidator, administrator or receiver, as mentioned in the Corporations Act; or

(v) a partnership that carries on the business of providing professional services if the partnership consists of more than 20 members or if the partnership would be a large proprietary company, within the meaning of the Corporations Act, if it were a company; or

(vi) a proprietary company, within the meaning of the Corporations Act, formed for the purpose of carrying out a joint venture, if any shareholder of the company is a person to whom disclosure of costs is not required; or

(vii) an unincorporated group of participants in a joint venture, if--

(A) 1 or more members of the group are persons to whom disclosure of costs is not required; and

(B) 1 or more members of the group (the relevant members) are persons to whom disclosure is required; and

(C) all relevant members have indicated that they waive their right to disclosure; or

(viii) a Minister of the Crown in right of a jurisdiction or the Commonwealth acting in his or her capacity as a Minister, or a government department or public authority of a jurisdiction or the Commonwealth.

The law practice is required to furnish a separate trust account statement in the following circumstances:

(a) *General trust account* - In the case of trust money in respect of which the law practice is required to maintain a trust ledger account, the practice must furnish a separate statement for each trust ledger account (r 53(2)).

(b) *Controlled money account* - In the case of controlled money in respect of which the law practice is required to maintain a record of controlled money movements, the practice must furnish a separate statement for each record (r 53(3)).

(c) *Power money account* - In the case of trust money subject to a power given to the law practice or an associate of the practice in respect of which the practice is required to keep a record of all dealings with the money to which the practice or associate is a party, the practice must furnish a separate statement for each record (r 53(4)).

### Deficiencies in the Trust Account

An Australian legal practitioner must not, without reasonable excuse, cause:

* A deficiency in any trust account or trust ledger account (s 259(1)(a)); or
* A failure to pay or deliver any trust money (s 259(1)(b)).

Cause includes being “responsible for” and deficiency includes the non-inclusion or exclusion of the whole or any part of an amount that should be there (s 259(3)).

Penalty: 200 penalty units ($20000).

### Reporting of Irregularities

Written notice must be provided to the Law Society as soon as practicable after a legal practitioner associate of a law practice becomes aware that there is an irregularity in any of the practice’s trust accounts or trust ledger accounts [*Legal Profession Act 2007* s.260(1)].

* A legal practitioner associate, of a law practice, is an associate of the practice who is an Australian legal practitioner (s 7(2) LPA)
  + An Australian legal practitioner is an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate (s 6(1) LPA)
  + An associate of a law practice is (s 7(1)(?)(?) LPA):

(a) an Australian legal practitioner who is:

(i) a sole practitioner if the law practice is constituted by the practitioner; or

(ii) a partner in the law practice if the law practice is a law firm; or

(iii) a legal practitioner director in the law practice if the law practice is an incorporated legal practice; or

(iv) a legal practitioner partner in the law practice if the law practice is a multi-disciplinary partnership; or

(v) an employee of, or consultant to, the law practice; or

(b) an agent of the law practice who is not an Australian legal practitioner; or

(c) an employee of the law practice who is not an Australian legal practitioner; or

(d) an Australian-registered foreign lawyer who is a partner in the law practice; or

(e) a person who is a partner in the multi-disciplinary partnership but who is not an Australian legal practitioner; or

(f) an Australian-registered foreign lawyer who has a relationship with the law practice, that is a class of relationship prescribed under a regulation.

Written notice must be provided to the Law Society as soon as practicable if a legal practitioner believes on reasonable grounds that there is an irregularity in connection with the receipt, recording or disbursement of any trust money received by a law practice of which the practitioner is not a legal practitioner associate [*Legal Profession Act 2007* s.260(2)].

An Australian legal practitioner is not liable for any loss or damage suffered by another person as a result of the practitioner’s compliance with subsection (1) or (2) [*Legal Profession Act 2007* s.260(3)].

**NOTE:** Because s 260 refers to “practitioners,” other employees like clerks and secretaries are not strictly under a statutory obligation to provide written notice to the QLS under the LPA. However, decency dictates at least informing a practitioner at the firm upon discovery or suspicion of the irregularity.

Penalty: 50 penalty units ($5000).

### False Names

A law practice must not knowingly receive money or record receipt of money in the practice’s trust records under a false name [*Legal Profession Act 2007* s.262(1)].

If a person on whose behalf trust money is received by a law practice is commonly known by more than one name, the practice must ensure that the practice’s trust records record all names by which the person is known [*Legal Profession Act 2007* s.262(2)].

## Trust Account Records

A law practice must keep in permanent form trust records in relation to trust money received by the practice (s 261(1) LPA). Penalty: 100 penalty units ($10000).

* Permanent form = printed or capable of being printed in English on paper or other material (s 237)
  + Cannot be kept in pencil as it allows alteration/obliteration

Accounting records relating to trust money must be kept by the law practice for at least seven (7) years after the last entry in the trust record or after the finalisation of the matter, before they can be destroyed (r 59 LPR).

Furthermore, records should also be kept:

* In the way prescribed by regulation (s 261(2)(a)); and
* In a way that, at all times, *discloses the true position* in relation to trust money received for any person (s 261(2)(b)); and
* In a way that enables the trust records to be *conveniently and properly investigated* or *externally examined* (s 261(2)(c)); and
* For the period prescribed by regulation (s 261(2)(a)) (7 years (r 59 LPR)).

Regardless of whether a manual or computerised accounting system is used, the various trust account records (s 237(?) – definition of “trust records”) which the law practice must keep are as follows:

1. trust account receipts;
2. cheque butts or cheque requisitions;
3. records of authorities to withdraw by EFT;
4. deposit records;
5. trust account ADI statements;
6. trust account receipts and payments cash books;
7. trust ledger accounts;
8. records of monthly trust trial balances;
9. records of monthly trust account reconciliations;
10. trust transfer journals;
11. statements of account required to be given under a regulation;
12. registers required to be kept under a regulation;
13. monthly statements required to be kept under a regulation;
14. files relating to trust transactions or bills of costs or both;
15. written directions, authorities or other documents required to be kept under the Act or a regulation;
16. supporting information required to be kept under a regulation in relation to powers to deal with trust money.

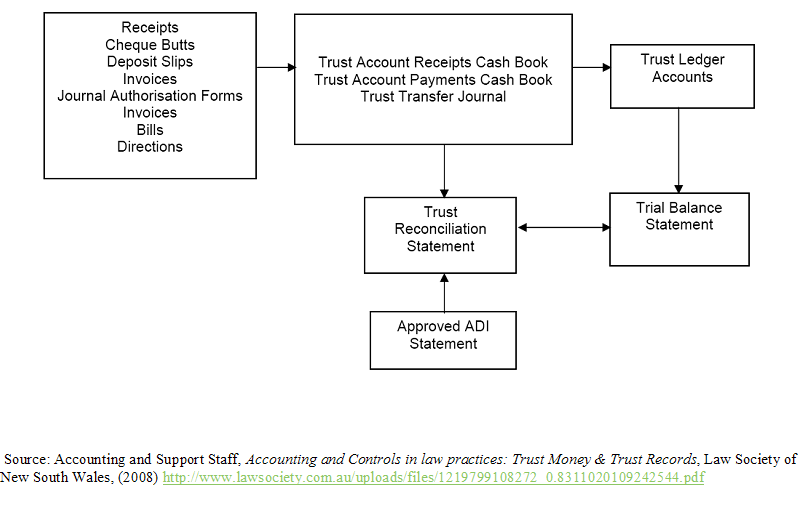
The trust records to be kept by a law practice for the various types of trust money are:

|  |  |  |  |
| --- | --- | --- | --- |
| Type of Money | Source & supporting Records | Secondary Records | Reports |
| General trust money | • Receipts  • Initiating record for withdrawal (cheque butts or cheque requisitions or EFT requisitions)  • Deposit records  • ADI statements  • Trust Transfer Journals  • Trust Account authorisations  • Bills of costs  • Invoices  • Correspondence | • Trust Receipts cashbook  • Trust Payments cashbook  • Trust Ledgers | • Trust trial balance  • Reconciliation statements  (bank & cashbook)  • Trust Account Statement |
| Controlled Money | • Written direction  • Controlled money receipts  • Initiating record for withdrawal  • Deposit records  • ADI statements  • Invoices  • Correspondence  • Bills of costs | • Controlled Money Register made up of Controlled Money Movement records. | • Controlled Money Accounts  Listing  • Trust Account statement |
| Transit Money | • Copies of cheques  • Settlement sheet  • Written direction (if any) | Nil | Nil |
| Written Direction Money | • Written direction  • Copies of cheques | Nil | Nil |
| Power Money | • Power of attorney or other power document  • Bank statements  • Initiating record for withdrawal  • All supporting documents in relation to the dealings | • Power Money Record  • Register of Powers & Estates | • Trust Account Statement |
| Investment of trust money | • Written direction authorising the investment  • Initiating record for withdrawal  • Bank statements  • General trust account payments cashbook  • General trust account receipts cashbook | • Register of Investments | • Trust Account Statement |

Other recommended documents to keep

* Register of Trust Account Receipt Forms – was compulsory, not now.
* Special Clearance Register >> particularly if conveyance involved
* Post-dated Cheque Register
* 30/7 (old/new) Day Fee Register
  + End of matter, $500 left in trust, send statement saying account comes to $420, you keep that = professional fee
  + After 7 days, can go into general account

### Flow of Trust Account Information



The Regulations require that trust money flows in accordance with the above flow chart. Basically, the sorts of documents that practitioners must keep are three fundamental types –

* Source records – These source or evidence the transaction. If a practice receives money, the source document is the receipt. If the practice pays money, the source document might be, for example, the cheque butt.
* Secondary records – Secondary records keep track of all receipts and payments so that the practice can easily keep track of all the money.
  + The trust ledgers keep track of a particular person’s account. Instead of going through the cash book and highlighting the instances in which a relevant person’s name appears, the trust ledger keeps track of individual trust activities.
* Reports – The reports show the balance.

NOTE: Links to above table as well.

### Steps in the Recording Process

* Prepare source documents to record the details of the transaction and verify that the transaction occurred.
* Analyse the transaction to determine whether it is money that should be recorded in the trust account or otherwise accounted for.
* Record the transaction in the cash book:
  + enter opening balance (total as per closing balance of the ledger)
  + enter trust account receipts and payments
  + total cash receipts
  + total cash payments
* Subtract cash payments from cash receipts to determine cash book balance.
* Record any adjustments required in the trust journal.
* Post the debit and credit entries from the cash book or journal to the relevant individual trust ledger account.
* Total each ledger account and prepare a listing of these balances, known as a trial balance. (end of each month)
* Compare the total balance of the trust ledger to the cash book balance and cash payments book
* Perform an approved ADI reconciliation to agree the trust ledger to the balance held in the trust account.

### Transferring Amounts Between Ledgers

This occurs where you have one client but are acting on several different matters, and you have a payment authority to transfer trust money between the subtrusts. Avoids the annoying situation of having to withdraw it, send it back to client and then have client send it back to you.

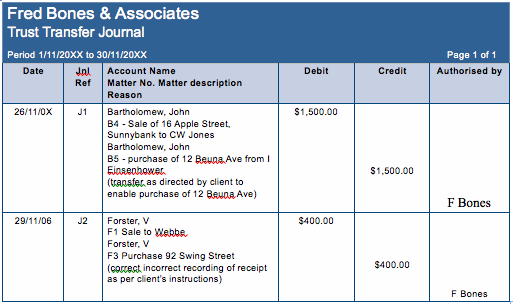
It is called a “journal transfer” and is authorised under r 43 LPR.

Can transfer between journals if:

* The practice is entitled to withdraw the money (see “**1.4.5** Withdrawing Funds from Trust” on page 14 above); and
  + i.e. must have a payment authority or issued a bill
* it is authorised by the principal of the law practice, or, if not available, an authorised legal practitioner associate etc; or
* an external intervener for the practice.

When doing so, must record:

* date of transfer (r 43(4)(a));
* ledger transferring from (r 43(4)(b));
* ledger transferring to (r 43(4)(c));
* amount transferred (r 43(4)(d));
* particulars sufficient to identify the purpose for which the transfer is made, the matter reference and a short description of the matter (r 43(4)(e)).



## Trust Account Receipts

Trust account receipts are a source document specified by the Regulation to record the receipt of money that is required to be banked into a general trust account.

Must give receipt if law practice receives trust money required to be paid into the general trust account (r 34(1)).

The regulations require that trust account receipts be made out as soon as practicable after the trust money is received [*LPR* r.34(2), *LPA* s.18]. However, when received by EFT, advisable to get written confirmation from bank to avoid errors.

Manual trust account receipts must be made out in duplicate (r 34(4)) and trust account receipts, whether as a manual or computer generated receipt, must be consecutively numbered and issued in consecutive sequence (r 34(7)).

The receipt must contain the following particulars (r 34(5)(?)):

1. the date the receipt is issued or made out and, if different, the date of receipt of the money;
2. the amount of money received;
3. the form in which the money was received;
4. the name of the person from whom the money was received;
5. details clearly identifying the name of the client in respect of whom the money was received and the matter description and matter reference;
6. particulars sufficient to identify the purpose for which the money was received (the reason for receipt)
7. the name of the law practice, or the business name under which the law practice engages in legal practice, and the expression “trust account” or “trust a/c”;
8. the name of the person who made out or issued the receipt;
9. the number of the receipt.

The original receipt is to be delivered, upon request, to the person from whom the money was received (r 34(6)).

If a receipt is later cancelled or not delivered, the original must be kept (r 34(8)).

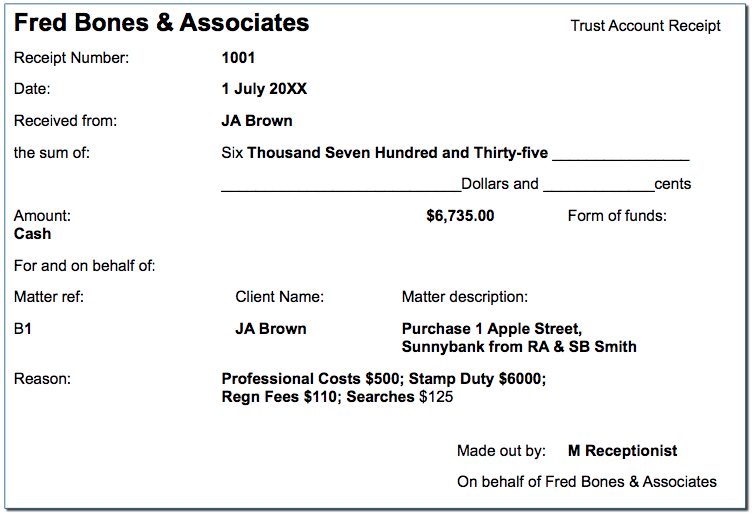
If unsure whether trust money, bank it to the general trust account or discuss with the QLS.

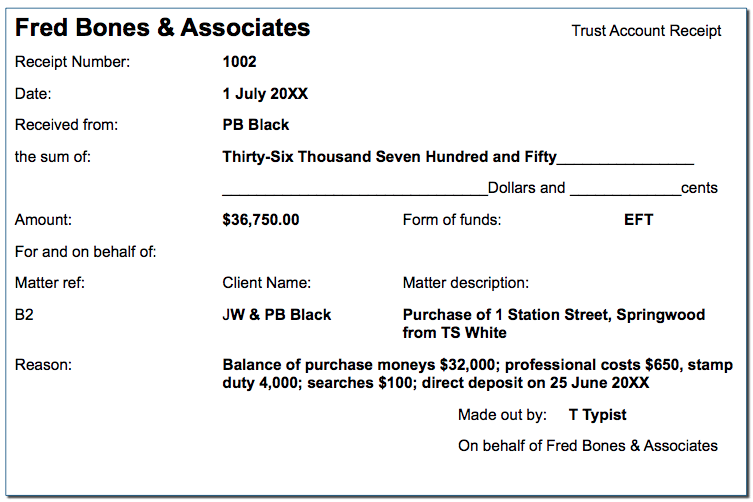
Remember to issue a receipt as soon as practicable (r 34(2)).

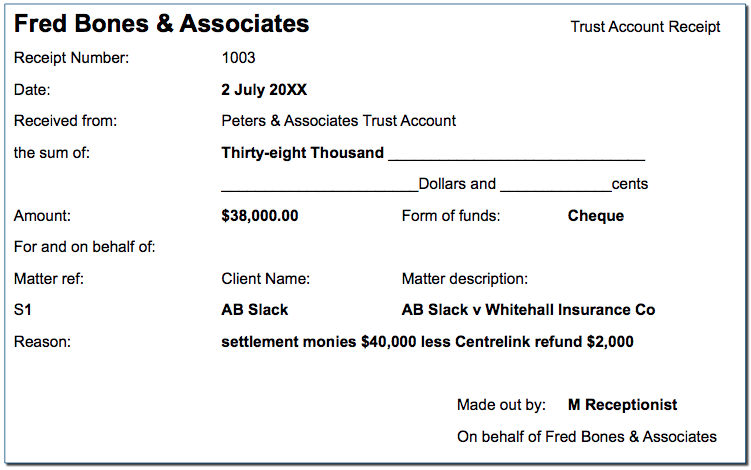
Backdating receipts is prohibited: they must be issued in order (r 34(7)).

Money should be banked daily or as soon as reasonably practicable (s 248(1) LPA). Penalty: 100 penalty units ($10000).

If a cheque is received and made payable to a third party, there is no need to bank it or issue a receipt.







### Making Corrections and Cancellations

For corrections, perform by:

* Ruling through the error;
* Person correcting the mistake must initial the strikethrough; and
* Add correct details to *both* copies.

For cancellations, perform by:

* Record the word “Cancelled” on the original and duplicate, plus the reason for cancellation;
* Staple the original to the duplicate, retaining both (r 34(8));
* Enter the original receipt into the receipts cash book in receipt number sequence with the notation reading “cancelled” and the reason for the cancellation; and
  + In a manual system, an amount will not be recorded in the amount or deposited column of the receipts cash book
* If a manual accounting system is used, details of the receipt are not to be recorded in the relevant ledger account.

## Trust Account Cash Books

A law practice that maintains a general trust account must keep two trust account cash books; a trust account cash receipt book in accordance with r 40 and a trust account cash payment book in accordance with r 41 (r 39 LPR).

The trust account cash books are a secondary record of all transactions through the general trust account. Details of receipts (including cancelled receipts and receipt reversals) and withdrawals (including cheques, cheque reversals and EFT payments from trust) are posted to the trust ledger from the trust account cash books and this is why full particulars of trust moneys received and paid must be recorded in the trust account cash books.

The most suitable type of manual cash book is the treble column cash book with pages numbered consecutively.

### Trust Account Receipts Cash Book

The entries in the trust account receipts cash book are posted from the duplicate trust account receipts. All of the information recorded on the duplicate trust account receipts should be recorded in the trust account receipts cash book.

Regulation 40 requires the following information to be recorded in the trust account receipts cash book:

(a) The date a receipt was made out for the money and, if different, the date of receipt of the money;

(b) The receipt number;

(c) The amount of money received;

(d) The form in which the money was received;

(e) The name of the person from whom the money was received;

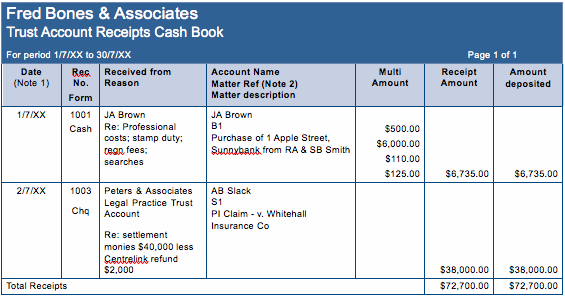
(f) Details clearly identifying the name of the client in respect of whom the money was received and the matter description and matter reference;

(g) Particulars sufficient to identify the purpose for which the money was received;

(h) details clearly identifying the ledger account to be credited.

The date and amount of each deposit in the general trust account must be recorded in the trust account receipts cash book and the particulars must be recorded in the order in which the receipts are made out [LPR r 40(2) & (3)].

Particulars of the receipt must be recorded to the trust account receipts cash book within 5 working days from and including the day the receipt was made out (r 40(4)). However, as a best practice, details of trust account receipts should be posted to the trust account receipts cashbook on a daily basis.



### Trust Account Payments Cash Book

The entries in the trust account payments cash book are posted from the cheque butts (or cheque requisitions). All of the information recorded on the cheque butts or requisitions should be recorded in the trust account payments cash book, as the details recorded in the trust ledger are posted from the trust account payments cash book.

Regulation 41 of the Regulation requires the following information to be recorded to the trust account payments cash book for cheque payments and EFT withdrawals:

(a) The date and number of the cheque or transaction;

(b) The amount ordered to be paid by the cheque or the amount transferred;

(c) The name of the person to whom the payment is to be or was made or, in the case of a cheque made payable to an ADI, the name or BSB number of the ADI and the name of the person receiving the benefit of the payment;

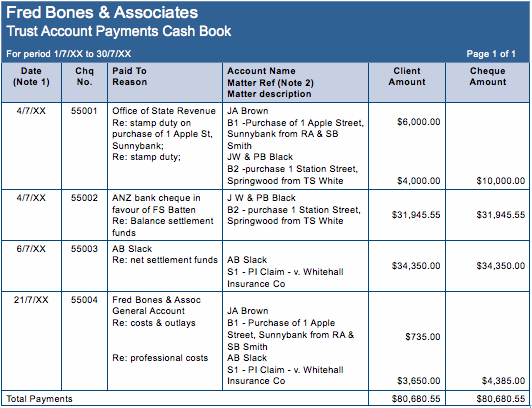
(d) If the withdrawal was via EFT the name and number of the account to which the amount was transferred and the relevant BSB number;

(e) Details clearly identifying the name of the client in respect of whom the payment was made and the matter description and matter reference;

(f) Details clearly identifying the ledger account to be debited;

(g) Particulars sufficient to identify the purpose for which the payment was made.

The particulars in respect of the payments must be recorded in the order in which the payments are made and must be recorded to the trust account payments cash book within 5 working days from and including the day the payment was made [LPR r 41(3) & (4)]. However, as a best practice, details of trust account payments should be posted to the trust account payments cashbook on a daily basis.



## Individual Trust Ledgers

Details of all trust funds held by a law practice on behalf of clients must be correctly recorded in clients’ individual trust ledger accounts so that the actual position, on any given day, can be ascertained.

The trust ledger is comprised of clients’ individual trust ledger accounts with credit balances and a trust ledger account with a debit balance, which records details of deposits of trust funds to a bank account in the name of The Chief Executive, Department of Justice and Attorney General Prescribed Account [Legal Profession Act 2007 s.285 & 286].

If manual trust account records are maintained the most efficient system of filing individual trust ledger accounts is in strict alphabetical order.

Regulation 42 requires the following to be recorded in the trust ledger accounts:

* Title – the full name and address of the client should be recorded in the title of the trust ledger account together with full details of the transaction [Legal Profession Regulation 2007 s.42(2)]. There should be sufficient particulars to identify matter description to which the trust moneys are received. Any changes of the details in the title of the trust ledger account must be recorded [Legal Profession Regulation 2007 s.42(3)]. Each client ledger sheet should be numbered.
* In respect of each Receipt of trust money for the matter [Legal Profession Regulation 2007 s.42(4)]:

a. date of the receipt;

b. date of receipt of money, if different from the date of receipt;

c. the receipt number;

d. The amount of money received;

e. The name of the person from whom the money was received;

f. Particulars sufficient to identify the purpose for which the money was received (reason for receipt).

* In respect to each payment of trust money by Cheque [Legal Profession Regulation 2007 s.42(5)]:

a. the date of the cheque;

b. the cheque number;

c. the amount ordered to be paid by the cheque;

d. the name of the person to whom the payment is made or, in the case of a cheque made payable to an ADI, the name or BSB number of the ADI and the name of the person receiving the benefit of the payment;

e. particulars sufficient to identify the purpose for which the payment was made.

* In respect to each payment of trust money by EFT [Legal Profession Regulation 2007 s.42(6)]:

a. the date of the transaction;

b. the transaction number;

c. the amount transferred;

d. the name and number of the account to which the amount was transferred and the relevant BSB number;

e. the name of the person to whom the payment is made or, in the case of a cheque made payable to an ADI, the name or BSB number of the ADI and the name of the person receiving the benefit of the payment;

f. particulars sufficient to identify the purpose for which the payment was made.

* In respect to each transfer of trust money by journal entry [Legal Profession Regulation 2007 s.42(7)]:

a. the date of the transfer;

b. the amount transferred;

c. the journal reference number;

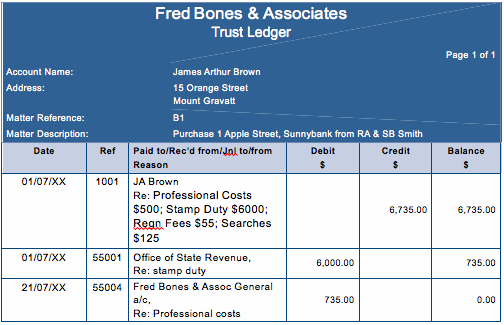
d. the name of the other trust ledger account from which or to which the money was transferred;

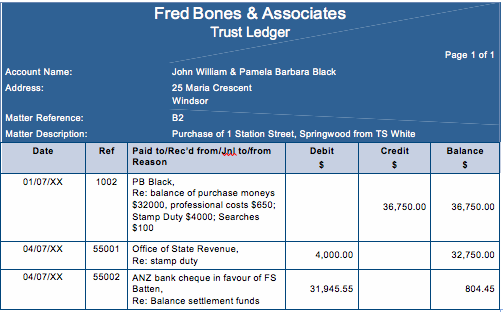
e. particulars sufficient to identify the purpose for which the payment was made.

* Balance – the amount of funds held on behalf of the client is recorded in this column. This must be calculated after each transaction [Legal Profession Regulation 2007 s.42(10)]. Individual client trust ledger accounts must never have a debit balance. However, if this does occur, the letters “DR” should be recorded in the balance column.

Details of trust account receipts, payments and journals should be posted to the trust ledger within 5 working days counting from and including the day the receipt was made out, the payment was made or the transfer was effected [Legal Profession Regulation 2007 s.42(9)].

However, as a best practice, details of trust account receipts, payments and journals should be posted to the cashbooks and ledgers on a daily basis. This should be done immediately after the details of the transactions have been recorded in the trust account receipts cash book and trust account payments cash book and trust journal transfer. The regulations also require that transactions relating to trust money must be recorded in the trust ledger account in the order in which the transactions occur [*Legal Profession Regulation 2007* s.42(8)].





Section 285 LPA Deposits

The account is in the name of the ‘Chief Executive, Dept of Justice & Attorney-General Special Deposit Account’.

Each January, the practitioner must do the calculation and make the appropriate deposit by 21 January:

1. Work out the lowest combined balance (LCB) for the previous year for every day

2. LCB = trust account balance at the bank + amount already held in the account by the Chief Executive

3. Multiply the LCB by 2/3

4. Round down to the nearest $100

5. Make the deposit by January 21

## Trust Account Reconciliation

Within 15 working days of the end of each month, the trust account cash books must be balanced and reconciled with the trust ledger and the ADI balance [*Legal Profession Regulation 2007* s.44(3)]. The regulations also stipulate that the reconciliation statements should be kept and should show the date the reconciliation statements were prepared [*Legal Profession Regulation 2007* s.44(2) & (4)].

It is strongly recommended however that the reconciliation of the trust records be completed as quickly as possible after the end of the month and that consideration be given to reconciling the trust records on a more frequent basis. The reconciliation process is an extremely important internal control and will identify any errors that have occurred during the period since the last reconciliation.

## External Examination

An external examination is an independent examination of the financial information with a view to expressing an opinion.

A law practice must, within 14 days after becoming a law practice, appoint an individual as the external examiner for the practice (s 267(1) LPA). Penalty: 50 penalty units ($5000).

A law practice must, within 30 days after becoming a law practice, give the law society notice in the approved form of the practice's external examiner (s 270(1) LPA). Penalty: 50 penalty units ($5000). A law practice must, immediately after an individual stops being the practice's external examiner, give the law society written notice of the fact (s 270(2) LPA). Penalty: 50 penalty units ($5000).

There are two instances where a law practice is required to have its trust records externally examined and lodge a report with the Society:

1. At the end of each financial period (1 April to 31 March) if the law practice received, held or disbursed trust money during the financial period. The External Examiner’s report is to be lodged by 31 May of each year [Legal Profession Act 2007 s.268(1) & 274(1)].

2. After the law practice ceases to hold trust money. The External Examiner’s report is for the period from the last examination to the date of cessation and is to be lodged within 60 days of the date of ceasing to hold trust money [Legal Profession Regulation 2007 s.276].

When lodging a final external examiner’s report, a law practice is also required to give to the Society a statutory declaration, in the Society approved form, to the effect that the law practice has ceased holding trust money [Legal Profession Act 2007 s.276(3)(b)]. A law practice is not required to lodge an External Examiner’s Report if it only received or held transit money during the period [Legal Profession Regulation 2007 s.62]. The Society can, in these circumstances, require a law practice to give a statement stating whether or not the practice has during a period stated in the notice received or held trust money [Legal Profession Regulation 2007 s.61].

Regulation 65 prescribes that an individual must have at least one of the following qualifications or experience to be appointed as an external examiner:

1. registered as an auditor under the Corporations Act;

2. a member of CPA Australia, who is entitled to use the letters ‘CPA’ or ‘FCPA’ have satisfied the requirements of CPA Australia for practice as a public accountant’;

3. a member of The Institute of Chartered Accountants in Australia (ICAA), who is entitled to use the letters ‘CA’ or ‘FCA and have satisfied the requirements of ICAA for practice as a public accountant’;

4. a member of the National Institute of Accountants (NIA), who:

i) is entitled to use the letters ‘MNIA’, ‘FNIA’, ‘PNA’ or ‘FPNA’;

ii) have satisfied the requirements of NIA for practice as a public accountant; and

iii) has completed a tertiary course of study in accounting with an auditing component from an institute prescribed under the Corporations Act, section 1280(2);

5. a person who the chief executive considers has appropriate qualifications as an auditor under the Corporations Act.

An external examiner appointed to examine a law practice's trust records may, in carrying out an examination of the trust records, examine the affairs of the practice (s 272(1)).

If a law practice has its trust records examined by an external examiner under section 268(1), the practice must, within 60 days after the end of the period to which the examination relates, give to the law society a copy of the external examiner's report on the examination, unless the practice has a reasonable excuse (s 274(1). Penalty: 50 penalty units ($5000).

The external examiner must also provide a written report to the Society if he/she becomes aware of a matter, during the examination of a law practice’s trust records, that is (s 275(1)):

1. reasonably likely to adversely affect the financial position of the law practice to a material extent; or

2. reasonably likely to constitute a breach ; or

3. an irregularity in relation to the trust records or trust accounts of the law practice of which the law society ought reasonably to be made aware.

The written report should be lodged by the external examiner to the Society within 7 days after becoming aware of the matter [Legal Profession Regulation 2007 s.275(2)].

## External Intervention

#### Supervisor

Function is to take over the ***management of the trust accounts*** in the practice: s498(2) + s499

* Appointee must be legal practitioner or accountant (s 499(3) LPA)
* May but need not be employee of QLS (s 499(3) LPA)
* Must give notice to the practice after appointment (s 500(1)(a) LPA)
* Notice is also given to the ADI which holds the practice’s trusts funds (s 500(1)(d) LPA) and the ADI must prevent any withdrawals or transfers without the supervisor signing cheque or with supervisor’s authority (s 501(1) LPA)
* Powers and functions of supervisor are set out in s 502 LPA

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| **Section 502 LPA**   1. The supervisor of trust money of a law practice has the powers and duties of the practice in relation to the trust money of the law practice, including powers—    1. to receive trust money entrusted to the practice; and    2. to open and close trust accounts.       1. For performing the functions of a supervisor of trust money of a law practice, the supervisor may do any or all of the following—          1. enter and remain on premises used by the law practice in connection with its engaging in legal practice;          2. require the law practice or an associate or former associate of the law practice, or another person who has or had control of files or documents relating to trust money received by the practice, to give the supervisor either or both of the following—             1. access to the files or documents that the supervisor reasonably requires;             2. information relating to the trust money that the supervisor reasonably requires;          3. operate equipment or facilities on the premises, or require a person on the premises to operate equipment or facilities on the premises, for a purpose relevant to the supervisor’s appointment;          4. take possession of any relevant material and retain it for as long as may be necessary;          5. secure any relevant material found on the premises against interference, if the material can not be conveniently removed;          6. take possession of any computer equipment or computer program reasonably required for a purpose relevant to the supervisor’s appointment. |

#### Manager

A manager will take over the management of the practice in place of the practitioners who would otherwise be running the practice (s 498(3) and s 505 LPA)

Powers and functions of manager are set out in s 508 LPA

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| **Section 508 LPA**   * + 1. The manager for a law practice may carry on the practice and may do all things that the practice, or a legal practitioner associate of the practice, might lawfully have done, including but not limited to the following—        1. transacting any urgent business of the practice;        2. transacting, with the approval of any or all of the existing clients of the practice, any business on their behalf, including—           1. starting, continuing, defending or settling any proceeding; and           2. receiving, retaining and disposing of property;   accepting instructions from new clients and transacting any business on their behalf, including—   * + - 1. starting, continuing, defending or settling any proceeding; and       2. receiving, retaining and disposing of regulated property of the law practice;   charging and recovering legal costs, including legal costs for work in progress at the time of the appointment of the manager;  entering into, executing or performing any agreement;  dealing with trust money under this Act;  winding up the affairs of the practice.  For performing the functions of the manager for the law practice, the manager may do any or all of the following—  enter and remain on premises used by the law practice in connection with its engaging in legal practice;  require the law practice or an associate or former associate of the law practice, or another person who has or had control of files (including documents relating to trust money received by the practice) to give the supervisor either or both of the following—  access to the files or documents that the supervisor reasonably requires;  information relating to client matters the manager reasonably requires;  operate equipment or facilities on the premises, or require a person on the premises to operate equipment or facilities on the premises, for a purpose relevant to the manager’s appointment;  take possession of any relevant material and retain it for as long as may be necessary;  secure any relevant material found on the premises against interference, if the material can not be conveniently removed;  take possession of any computer equipment or computer program reasonably required for a purpose relevant to the manager’s appointment. |

#### Receiver

Function is to take on the responsibilities of managing the regulated property for the purpose of winding up and terminating the practice (s 498(4) and 512 LPA).

**Other points to note**

* The practice or anyone else adversely affected can appeal against appointment of external intervener (s 531(1) LPA)
* The practice, QLS, external intervener or other interested person can go to QSC for directions as to functions and powers of external intervener (s 532 LPA)
* If a receiver and manager appointed, receiver prevails over manager to the extent of any inconsistency (s 533 LPA)
* External intervener must report to QLS (s 536 LPA)
* It is an offence to obstruct [hinder, delay, resist, attempt to obstruct etc] an external intervener (s 539(1) LPA) – max penalty 100 penalty units

## Case Examples

### Fraud

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| ***Queensland Law Society Inc v Wakeling* [2004] QCA 42**  **Background**  • Wakeling found guilty of professional misconduct and suspended for 2 years by the Solicitors Complaints Tribunal in 2003  • The Council of the Queensland Law Society Inc sought an appeal that the Tribunal erred in failing to find Wakeling guilty of professional misconduct on one count relating to fraudulent misappropriation of trust money  **Facts**  • Wakeling, in acting for a deceased estate had provided the executors with an estimate of fees between $2,700 and $5,700, but drew $14,280 from the estate.  • Wakeling claimed to have provided accounts to the executors on 2 occasions for outlays which had not occurred  • The executors denied receiving the accounts  Other charges Wakeling admitted to at the initial hearing included:  • Dishonestly appropriated $3,030 of clients money  • Two instances of misappropriating deposit monies of which he was a stakeholder ($10,000 and $1,100)  • Two unauthorised withdrawals from his trust account ($41.89 and $1,939)  • Overdrawing his trust account ($1,166)  **Held**  • Guilty of the additional charge, as the tribunal took a narrow view to the charge  • Wakeling removed from the roll of solicitors  **Comments**  In this case, the multiple breaches, occurred over a period of two years, and the instances of established dishonest misappropriation of clients’ funds and the misleading of the court warrant the epithet serious; at [24] per de Jersey CJ.  The court cannot hold out, as fit to practise, a person who has trespassed to this extent beyond the boundary of ethical probity. The respondent’s consciously misleading the court in the probate application of itself probably warranted his being struck off. Adding in the other breaches, encompassing both dishonesty and recklessness, the case for striking off is seen to be compelling; at [27] per de Jersey CJ.  Courts must be able to rely on the honesty of officers of the court in making orders having serious legal consequences. Any solicitor who actively deceives the court into making an order thereby puts at risk the right to practise as such; at [35] per Williams JA. |

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| ***Legal Services Commissioner v Clair* [2008] LPT 8**  **Background**  • Clair a 28 year old solicitor pleaded guilty to 3 counts of fraud through misappropriating clients money in 2007  • Clair placed on a 12 month good behaviour bond   * Clair was admitted at 25 years old.   **Facts**  • Clients had pad Clair money as requested and Clair spent the money for private purposes  • Misappropriated money totalled $4,247.11  **Held**  • While Clair was young and inexperienced, conduct of a criminal character, the only appropriate order is to be stuck off. Clair had cooperated with the investigation.  **Comments**  ..... seriously dishonest conduct of this criminal character committed three times over a three-month period and involving the misappropriation of clients' money bespeaks unfitness for legal practice; per de Jersey CJ |

### Unauthorised Transactions

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| ***Legal Services Commission v Twohill* [2005] LPT 001**  **Facts**  • Family court matter  • Twohill acted for the husband. There was a dispute about how the property was to be split and the money sat in the trust account meantime.  • Twohill received $44,166.87 from clients on the basis that the money would not be dispersed except in accordance with written instructions from the clients  • On 6 occasions over 2.5 years Twohill legitimately transferred $11,586.25 to his general account in discharge of his client’s liability to him  • The deficiency came to light when the Family court ordered the distribution, because the funds were held on trust for both the husband and the wife, not just the client, the husband.  • Twohill alleged that he believed the dispute had been resolved, but restored the deficiency immediately  • The amounts withdrawn would otherwise have been what Twohill was entitled in relation to costs against his client  **Held**  • There should be a finding of professional misconduct as it is difficult not to regard the breaches as involving a substantial departure from what may reasonably be expected of conscientious practitioners  • Twohill pay the Legal Practitioner Interest on Trust Accounts Fund $5,000, undertake and complete the trust accounts module and pay costs of the proceeding  **Comments**  The sacrosanct character of trust account moneys has been emphasised; per de Jersey CJ  It is difficult not to regard these present breaches as involving a substantial departure from what may reasonably be expected of conscientious practitioners. Any dealings in contravention of the Trust Accounts Act 1973 should be viewed seriously; per de Jersey CJ.  A question arises as to the destination of any pecuniary penalty. Desirably it should end up in a situation where it can be utilised for purposes advancing the Courts or the profession; per de Jersey CJ |

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| ***Legal Services Commissioner v Towers* [2006] LPT 003**  **Facts**  Towers charged with 12 charges in varying degrees of severity:   * Grossly excessive charging an incapacitated client by $21,159.27 * 2 & 3. Withdrew $65,000 of clients money and deposited it into his own account, so that it might benefit from higher interest for the client – considered accounting oversight * 4 & 5. Drawing $154,347.32 for his costs without proper authority, and failing to provide the client with an itemised bill justifying the costs * Investment of $405,998.79 of client’s money to gain a higher interest – similar to charge 2 and 3 * Transferring $10,000 to his general account without written authorisation in compliance with act * Transferring $949.20 to his general account without authorisation * Transferring $500 to his general account without authorisation – claim clerical error * Transferring $14,000 and $235.92 to his general account without written authorisation in compliance with the act * 11 & 12. Transferring $950, $6930 and $192.50 to his general account without authorisation   **Held**   * Charges 1 and 4 characterised as Professional Misconduct * All other charges characterised as Unsatisfactory professional conduct because there was no element of dishonesty, rather an inability to comply with technical requirements * Orders were that Towers be removed from the roll of solicitors, pay compensation to incapacitated client and pay applicants costs   Comments  ..... The respondent has shown ***repeated and persistent failure*** to adhere to professional standards; per de Jersey CJ.  ... The exploitation of a client stricken by incapacity in charge 1 adds a reprehensibility which, in my view, taken with the other breaches and, notably, the respondent's cavalier treatment of affairs warrants the conclusion that the Tribunal should not continue to hold out the respondent as fit to practise; per de Jersey CJ. |

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| ***Legal Services Commissioner v Ferguson* [2006] LPT 007**  **Facts**   * Ferguson received $17,000 from a purchaser as trust monies and obliged to retain those monies in his trust account * A month after receiving the money he paid them to his client, without the purchasers authorisation * The sale did not settle   **Held**   * There was no question of dishonesty * The matter had been left to a longstanding, experience law clerk who had made the error * It was a case of misapprehension, rather than dishonesty * Conduct should be characterised as unsatisfactory professional conduct with a pecuniary penalty |

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| ***Williams v Queensland Law Society* [2005] QCA 388**  **Facts**   * Had committed a number of offences, include: * Williams had for the past two years failed to undertake monthly trust account reconciliations as soon as practicable * Received or transferred clients funds directly to this general account * Drew on trust account when the withdrawal was more than the cleared funds available   **Held**   * The difficulties were created by William’s continued and persistent failure to reconcile his trust accounts, issue receipts, a failure to bank, and to post transactions to trust account ledgers * Williams was required to undertake the trust accounting module, pay $10,000 to the fidelity fund, install and operate a computerised trust account system and given a 12 month suspension IF he defaulted on any terms * Williams had difficulty meeting the fine imposed and the suspension was invoked, and upheld on appeal, but reduced to 6 months |

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| ***Queensland Law Society v Priddle* [2002] QCA 297**  **Background**   * Found guilty of 2 charges of unprofessional conduct in October 2001 * Priddle was suspended until June 2002 (approx 9 months) and pay costs of the society   **Facts**   * Priddle was a trustee for a trust which invested trust money from the sale of a rural property * About $85,000 of the trust money and some of Priddle’s was invested in unprofitable companies and ultimately lost * Over the 10 year period very few accounting records were kept tracking the movement, investment and manner the money was dealt   **Held**   * Priddle’s conduct in prevaricating about the trust accounts and other records and in avoiding contact with the beneficiaries was not deceitful or dishonest and the money was not used for his own purpose * The grossly unsatisfactory conduct was to some degree explained by a hostage situation, health, financial and marital difficulties * The initial suspension was sufficient   **Comments**  ***Suspension*** from practice rather than striking from the Roll of Solicitors is an ***appropriate order*** in cases of ***unprofessional conduct*** where a legal practitioner's behaviour has ***fallen below the high standards expected*** of such a practitioner but not in such a way as to indicate that the practitioner is lacking the necessary attributes of someone entrusted with the important responsibilities of a legal practitioner; at [9] per McMurdo P, citing Re a Practitioner  It was open to the Tribunal to be satisfied that at the expiry of the suspension period, having suffered public disgrace and humiliation as well as the economic loss resulting from his inability to practise his profession during this time, the respondent will have learnt his lesson; at [14] per McMurdo P. |

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| ***Queensland Law Society v Cummings* [2004] QCA 138**  **Background**   * Cummings admitted guilt on 8 charges before the tribunal in 2003 * Cummings agreed to restore deficiencies, suspended for 12 months and pay costs of the QLS * Attorney-General and Minister for Justice appealed the suspension * Cummings was 63 years old and has held a practising certificate for 33 years, generally self-employed in South-East Queensland * From original tribunal hearing ‘On the orders that this Tribunal makes, the Tribunal is reasonably satisfied that the practitioner will be a fit and proper person to practise after the period of suspension."   **Facts**  Eight counts Cummings guilty under:  1. Failure to ensure trust accounts were audited and the report submitted to QLS within 2 months of 31 March 2001  2. Instances (10) of failing to undertake monthly trust reconciliation as soon as practicable at the end of the month  3. Paying 9 clients receipted money directly to the general account or transferring money to the general account without authorisation ($2,720)  4. Wrongfully drawing against or causing payments (85 offences, relating to 75 clients) to be made totalling $19,575.80 from the trust account and transferring the money to the general account or dispersing to 3rd parties without authorisation – maximum penalty was $7,500 per offence ($637,500) or 1 year imprisonment  5. Causing payments to be made ($4,421.92) from the trust account to the general account where payments not posted to the trust ledger  6. Paying $2,780.51 directly to his general account (3 offences)  7. Paying $2,011.96 to the credit of his general account without authority (3 offences)  8. Failure to keep, operate and conduct trust accounts in a proper professional manner with more than 150 particulars disclosing numerous offences  **Held**   * The failure to properly supervise staff and meet obligations was a serious breach of professional standards constituting professional misconduct * Cummings undertaking to repay the deficiency suggested good character and some sense of honour, responsibility and commitment to his profession * There was no suggestion of dishonesty or personal gain in the offences or that the offences affected his professional duties and obligations * Cummings has never committed any other types of professional breaches * Cummings acceptance not to take a principle level practising certificate, an otherwise good character, and undertaking to repay deficiency were critical * The suspension was a sufficient penalty imposed   Comments  Not all such breaches amounting to ***professional misconduct*** will justify a finding of unfitness to practice requiring striking off and the ***question of fitness to practice*** is to be decided at the time of the hearing; at [22] per McMurdo P.  The ***primary role of disciplinary proceedings*** under the Queensland Law Society Act 1952 (Qld) is to ***protect the public*** from those unfit to be held out as officers of the court, ***not to punish the solicitor*** whose conduct the court finds to be in breach of those professional standards, although an order of the Tribunal should also provide an ***appropriate general and specific deterrent***; at [23] per McMurdo P.  A suspension rather than a striking off is an appropriate order for offending practitioners whose ***conduct has fallen below the high standards*** expected of a practitioner but not so far below those standards as to indicate that the practitioner lacks the ***qualities of character*** and which are the necessary attributes of a person entrusted with the ***responsibilities of a legal practitioner***; at [23] per McMurdo P citing Re A Practitioner. |

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| ***Queensland Law Society v Roche* [2004] Qd R 574**   * QLS brought two charges against Roche * Tribunal found Roche guilty of professional misconduct and suspended for 12 months   **Facts**   * Roche’s firm agreed to act for the client on a ‘no win, now fee’ basis in pursuing a claim for damages for injuries by his daughter * A retainer was signed (1996) providing payment of fees on graduated hourly rate of $250/hr for partners and personal injury specialists to $100 for paralegals * The firm could also charge for care and consideration, a supplement not to exceed 30% and it could increase its hourly rate once per year by no more than 10%, however 30 days notice needed to be given * A second retainer was executed (2000) which provided fees of $300 per hour for all employees of the firm, and a premium of 30% * The firm agreed to take on the client’s second claim at $300 per hour, but only if the client agreed to pay $300 per hour with respect to the first claim (majority of the work of the first claim had been done by paralegals at only $100 per hour)   **First Charge – Failed to discharge his fiduciary obligation to his client**   * The tribunal found that Roche had not advised the client to seek independent legal advice on the matter * The conduct of Roche did not come close to an acceptable standard for the carrying out of their fiduciary duty   **Second Charge – Gross overcharging**   * The gross overcharging was in particular relating to charging $300 per hour for paralegals, described as being ‘unusually high’ * Majority of the work was ‘fairly mundane nature’ including wrapping a box of chocolates and discussions about the nature of the chocolates’ which were both charged * Levying grossly excessive charges amounts to professional misconduct whether or not other charges for the work have been forgone   **Held**   * Finding of professional misconduct on both charges * Court was concerned that Roche showed a lack of contrition   **Comments**  ... a concerning feature of this respondent, distinguishing his position from that of those other solicitors, is his ***apparent lack of contrition, and the absence of an acknowledgement of his wrongdoing***. But then one must give due weight to the view of the Tribunal that the ***respondent was basically honest*** and that with the salutary lesson of this suspension behind him, he could confidently be expected to conduct himself appropriately; at [42] per de Jersey CJ  It should however be unequivocally affirmed that the respondent’s conduct ***exhibited an intolerable rapacity, and a blinkered, self-serving approach to the discharge of his fiduciary duty***. That he has avoided being struck off in no degree diminishes proper recognition of the reprehensible character of his professional misconduct; at [43] per de Jersey CJ  In light of the clear statements made by the Court in this case, practitioners who continue to breach their fiduciary duty by placing their own and their firm’s interests before those of clients, importuning them to enter into costs agreements charging exorbitant fees, whether or not in speculative cases, can expect heavier deterrent penalties for their professional misconduct; at [57] per McMurdo P |

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| ***Baker v Legal Services Commissioner* [2006] QCA 145**   * Offensive and insulting language held to amount to unprofessional conduct * Court preserved findings of legal practice tribunal that conduct in respect of the first three clients held to constitute professional misconduct. Each of the client retainers were made expressly on the footing of “no win no fee”.   **First Client - Mr Nutley**   * The first charge against the practitioner concerned a retainer received from Mr Keith Nutley. * He had previously consulted a firm of solicitors, about a claim against his former medical practitioner Dr Sykes. On the strength of medical advice, those solicitors recommended that he abandon the claim on the terms of settlement offered by Dr Sykes. Mr Nutley consulted the practitioner for a second opinion. * The practitioner was provided with a copy of the medical advice, but was nevertheless optimistic about Mr Nutley’s prospects of success in the action * Further medical advice sought essentially confirmed the prior advice. On the strength of this opinion, counsel advised that the prospects of success in the action were “virtually nil”. The action eventually settled on the same basis as previously offered. Practitioner claimed he had incurred a substantial amount in the way of professional costs which it was then asserted Mr Nutley was liable to pay. * On construction of the retainer the fees claimed were not owing. The practitioner denied authorising the account being sent to the client. However, it was established in cross-examination that in fact the practitioner had written on a draft copy in identical terms “this is fine”.   **Second Client – Mrs Jorgensen**   * Mrs Jorgensen was prevailed on by an employed solicitor of the firm to retain the firm in an action against her employer arising out of a workplace injury sustained in 1995. * A week before trial the claim was settled on 6 March 2000 on terms that the insurer reimbursed $9,324.23 to WorkCover and paid a further $10,000 to or on account of Mrs Jorgensen. * When, in reliance on the “no win no fee” agreement, Mrs Jorgensen refused to pay, a bill of costs for $19,699.65 was rendered by the firm. * The fees claimed were not properly chargeable. An outcome could not properly be characterised within the meaning of the retainer “as a ‘win’ from the point of view of the client unless the client actually recovers something herself – i.e that the client will not have to pay the solicitor other than from the proceeds of the claim. * The firm’s advice to settle was “bad” advice, and that, in recommending to the client a settlement that was financially disadvantageous to the client, the firm was “plainly in breach of its fiduciary duty to the client”. * Partner claimed he was not involved in this file. He was, however, the partner of Baker Johnson who was designated in respect of the file and who dealt with it as shown by the bring-up notations on the file. It was “highly probable” that the decision to sue for the fees in the magistrates court and the consequent appeal to the District Court was taken with his knowledge or endorsement.   **Third Client – Ms Robertson**   * Involved as a pedestrian in a motor accident in which she sustained personal injury and property damage about which she consulted the firm, whom she retained. * She filled in a questionnaire and signed a client agreement concerning the payment of fees. Essentially that was the only occasion on which she consulted the firm. * She next heard from them when she received a latter advising her that they had unwittingly commenced to act for the other party & that it was not now possible for the firm to act for either party in connection with this matter. * The firm issued a plaint in the magistrates court claiming $1,829.20, representing a total of $1,312.57 for work and outlays on the personal injury claim, and $516.63 for the property damage claim * The fees here were not due and payable when the firm discovered the conflict of interest - the retainer was frustrated when the conflict of interest arose * For the few items of work for which charges might have been legitimately been made, an amount of $1300 for taking instructions on initial consultation, carrying out computerised CITEC search was grossly overstated. There was no evidence at all of any work conducted on the property claim for which $500 was charged.   **Fourth Client – Mrs Hajistamoulis**   * Issue was whether practitioner failed to adequately supervise a solicitor who had written a letter responding to the law society in which it was falsely claimed that the client retainer was not on a “no win no fee” basis. * On any view of it, the conduct of the firm in the matter was misleading and deceptive. * If either of the partners of the firm was guilty of a failure to adequately supervise it was, on the evidence not the practitioner but Mr Johnson * In the case at least of a firm with only two or a few partners like Baker Johnson, the excuse that it was the other partner who dealt with a complaint from the Law Society will not be so readily accepted hereafter. * A system will have to be instituted in such firms to ensure that something as serious as a complaint having the potential to produce a charge against a member of the firm is considered by all partners of the firm before a response to it is sent.   **Conclusion**   * It is accepted that the criterion by which professional misconduct falls to be judged is whether the conduct violates or falls short of the standard of professional conduct observed or approved by members of the profession of good repute and competency: Adamson – Now not applicable * It is also accepted that the sanction for violation is not intended to punish but is designed for the protection of the public and to maintain confidence in the profession in the estimation of the public and of the profession as a whole. * In determining the sanction to be applied the Tribunal or Court is entitled to take account of the persistence with which the conduct has been pursued and the degree of candour displayed by the practitioner in the course of the disciplinary hearing. * He has an unduly aggressive response to clients who fail to pay what he conceives is due to the firm irrespective of the reservations of other practitioners around him. * The culture that emerges is that a claim for fees is made, and, if not immediately paid and irrespective of the reason why it is not, it is then remorselessly pursued and the amount is escalated on each occasion when a further account or bill for the same matter is sent to the client. * The clients were all in poor financial circumstances and were unsophisticated persons inexperienced in legal matters. He used his authority, position and facilities as a solicitor and partner in the firm in order to overwhelm them * The practitioner showed a notable want of that form candour expected of a solicitor confronting such serious charges. He persisted before the Tribunal in assertions that were shown to be false * Order that the practitioner’s name be removed from the local roll. |

# Law as a Profession

## What is Ethics?

There is not one single mode of thinking about legal ethics. While we may have been exposed primarily to the ethics associated with the adversarial system (so-called *adversarial ethics*), we will also look at alternative philosophical and practical approaches to legal ethics which also may be appropriate and provide additional ways of thinking about how we might practice as lawyers.

Generally ethics are a set of moral principles which guide the behaviour of individuals. Professional ethics or professional rules of conduct were essentially rules based on moral principles. Ethical rules were seen as being synonymous with moral principles; however, moral principles alone are no longer the sole basis for regulating contemporary legal practice in Queensland.

### Types of Ethical Approaches

**Moral Approach**

People feel obliged to act ethically out of a sense of moral conviction. While religion and spirituality are a source for moral conviction, there are people who accept that being ethical is an end in itself, requiring no further justification or incentive. However, cannot simply rely on a personal moral orientation as a rationale for choosing to act ethically also places a person in a difficult position if that person’s personal morality conflicts with professional conduct rules.

**Economic Approach**

Focuses not on conduct as being intrinsically neither good nor bad, but rather as giving rise to costs and benefits. Ethics reflect the method used to calculate and act on those costs and benefits and if this happens to coincide with enforcement policies of the regulator then it maybe concluded that the person is behaving ethically.

**Deontology**

A focus on the intrinsic moral nature of the action and comes from morality and ethical principles. Individuals can determine right or wrong independent of consequences. The principle of Deontology draws an analogy with natural law principles, particularly Kant, who believed in universal reciprocity, that is, individuals only do things that they would be happy with, and that totally rational humans could live morally.

**Consequentialism/Teleology**

The focus is on the consequences of an act, and that the value of an action is derived entirely from its effect. This is derived from the consequences of the act. Under this argument, nothing is intrinsically right or wrong, rather ethics are determined by the consequences of the actions. This raises the distinction between Rule Utilitatianism and Decision Utiliatianism. In the case of Rule Utilitatianism, the question is what rule can be applied generally to produce the best scenario in most cases – this is the basis of most legal systems. Conversely, Decision Utilitarianism focus on the specific consequences of a particular act, and what decision achieves the best outcome. The two main types of consequentialism are:

* Jeremy Bentham:
  + Primarily concerned with utilitarianism, that is, the greatest good for the greatest number should determine decision making
* Ethical Egoism:
  + Individual ethical egoism is the notion that everyone should act in their own interests, and universal ethical egoism is the notion that everyone should act in their own interest except to the extent that other interests align with their own
  + Objections:
    - It can be difficult to determine all consequences of an action
    - It can lead to humans being thought of in terms of maximising the economy, which can lead to human rights abuse

**Contractarianism**

Relies on reason or rational thought and social justice comes through determining the conflict between competing interests. Examples include:

* Locke:
  + Rights are inherent in natural order and government should protect and nurture human rights
* Hobbes:
  + Mutual advantage of citizens to trade off some freedoms for social benefits
* Rawls:
  + Freedom principle where everyone has equal liberties
  + Equality and social difference principle where inequalities of wealth, power, status and income can be justified only if they are of the greatest benefit to the most disadvantaged

**Virtue Ethics**

Focuses on the character of the person, with the ethical nature dependent on the person, not on the act. Main focus on working as a community towards being a virtuous person, and Aristotle believed that the way to happiness was to lead a virtuous life.

**Ethics of Care**

Focuses on relationships

### Four Approaches to Legal Ethics

According to Parker & Evans there are four main strands of ethical reasoning or considerations available for lawyers in the context of Australian legal institutions. All of these approaches should complement each other and lead to agreement on the ‘right’ thing to do.

**Adversarial Advocate**

These lawyers are bound by the ethical principles enshrined in the law. They are partisan, loyal and zealous in pursuit of their client’s interests and have little concern for the that effect their actions within the legal system will have on society.

**Responsible lawyer**

These lawyers consider themselves an officer of the court and a trustee of the legal system. Their ethics are governed by their role as a facilitator of the administration of justice, and they take note of the public interest in just law. Their duties of advocacy are tempered by their duty to ensure the integrity of the law and the legal system, and they suggest alternative options to their client to ensure that the client’s actions are consistent with lawyers’ ethics.

**Moral activist**

These lawyers are part of the legal system to ensure reform and movement towards a more just law and legal system. They attempt to improve justice by performing public interest legal duties such as pro bono services, law reform activities and counselling their clients to be moral. They do not consider themselves bound by a law which is unjust, and can be zealous and behave like an adversarial advocate where they believe it is in the morality or justice of their client’s case (which can be dangerous for the legal system).

**Ethics of care/relational lawyering**

These lawyers feel that the responsibilities of a lawyer are to the relationships he or she has with a client, people and communities. The aim of the lawyer/client relationship is the moral worth and goodness of both the lawyer and the client. They have a holistic view of their client, that is, they are concerned with emotional and financial wellbeing and consider non-legal and non-financial consequences (e.g. reputation, relational, psychological).

### Lake Pleasant Case Study

Facts:

* Occurred in 1973 in New York
* Garrow was the accused, Armani was his attorney.
* Garrow had a previous criminal history including rape and murder in the 1960s, for which he served 8 years in prison.
* Garrow was charged with the murder of Philip Dombelowski and was suspected in other murders.
* Garrow insisted that Armani defend him in the criminal case
* Under hypnosis, Garrow admitted to murdering him and revealed the whereabouts of the bodies.
* Armani verified that the bodies were there personally (creepy)
* Armani never told the victims’ families or the police about their discovery.
* Considerable time and money spent on locating the dead people. Duty of confidentiality to the client.

Should Armani reveal the information?

*Yes argument:*

The ethical decision making theory that this analysis uses is Utilitarianism. This ethical model is a subset of consequentialism, which maintains that an action is morally right if the consequences of that action are more favourable than unfavourable. Utilitarian advocates believe that an action is morally right if the consequences of that action provide the greatest good to the greatest number of people.

Armani should anonymously tell the authorities and Mr. Petz. Telling anonymously will give the greatest benefit to the largest number of people. It will give the parents peace, provide evidence to help ensure a guilty man is locked up, stop the waste of police time and resources, and allow Armani to clear his conscience.

*No argument*:

Armani is bound by legal and moral restrictions to keep confidential any and all information from Garrow. While he cannot tell Daniel Petz what has happened to his daughter, Armani should defend Garrow to the best of his professional ability. If Armani can legitimately base the defence on an insanity plea, then Armani has a duty to support that plea. The evidence suggests that he was aware of the consequences of his actions. Therefore it is probable that he is fit to stand trial. Armani should take all actions that are within the letter and the spirit of the law. This course of action is legal.

However, is it moral? By simply ignoring the information about the victims, Armani does not act morally. To fulfil his duty to fundamental categorical imperatives, such as respect for others, Armani must work relentlessly to persuade Garrow to confess. Is this realistic? Since the authorities already have strong evidence against Garrow’s murder of Philip Domblewski, it is certainly possible that Garrow would be willing to confess in exchange for leniency. Armani must defend Garrow faithfully, but must also work to convince Garrow to confess. This course of action is both legal and moral.

***Analysis from Blackboard***

American mores stem from many sources and reflect diverse interests and peoples. These moral foundations are best outlined in the U.S. Constitution. The framers of the Constitution had numerous goals, but in many instances they sought to prevent the systematic abuses of power inherent in governments throughout the ages. While grounded in practicality, the U.S. Constitution, in a broader sense, incorporates a combination of teleological (consequence-based) and deontological (duty-based), and religious theories. In addition to the U.S. Constitution, these theories play a significant role in all levels of the rules governing society.

Immanuel Kant, a deontological philosopher, developed theories about respect and duty, two concepts firmly rooted in the U.S. Constitution and the U.S. legal system. “Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only,” (Kant, p.47). In contrast, when you treat people as a means to an end, you treat them with disrespect. And indeed, respect has become a fundamental component of society in the United States. On the teleological side, philosophers like Jeremy Bentham developed utilitarianism theories which heavily influence American’s attitudes toward societal order and the consequences of disrupting that order. Punishing a criminal, thereby denying a criminal’s happiness, is viewed as acceptable by society because it promotes the greater happiness of more individuals. Our morality also draws heavily upon religious doctrine as well, most notably the Ten Commandments.

The Lake Pleasant case illustrates the ethical dilemmas resulting from a collision of individual rights and values and societal rules, such as the U.S. Constitution and state law, enacted to protect citizens from abuses of power. An analysis of the individual, social, and institutional ethical issues is required to effectively recommend a course of action in the Lake Pleasant case.

*Individual Values / Ethical Dilemmas*

As noted above, Armani was faced with the decision of whether to share privileged information or uphold his responsibility to his client to keep that information confidential. As Armani attempted to resolve this conflict, he invariably used several aspects of the Blanchard and Peale and Wall Street Journal methods to address the ethical dilemmas. These two methods encourage viewing the issue from the vantage point of all parties. Armani empathized with the victim’s families, which brought to mind his parent’s crisis when his brother was missing in action.

Armani’s dilemma appeared to rest solely with his sympathy to the victim’s families. Armani was less concerned about other stakeholders, such as the police and judge. Armani could probably better justify not divulging the information due to the questionable tactics of the authorities, such as physically abusing Garrow on the way to the hospital.

In addition, Armani was concerned with the possibility of defending Garrow too well, thereby, allowing a dangerous man to potentially go free one day. Should Armani defend Garrow to the best of his abilities, or go through the motions to ensure a dangerous criminal does not go free?

Underlying value systems, corresponding with teleological and deontological theories, play a crucial role in Armani’s decision making process. The fact that the decision was even a dilemma for Armani shows his desire to adhere to certain fundamental rules of morality. According to Kant, “Everything in nature works according to laws. Only a rational being has the capacity of acting according to the conception of laws, i.e. according to principles,” (Kant, p. 29). As a rational being, Armani felt an obligation to act in a manner consistent with “doing the right thing” because of the simple fact that he is a rational being.

Armani also felt a sense of professional duty to his client. In the U.S. judicial system, the role of the defending attorney is to make sure the system operates fairly with guilty and innocent people alike (Jennings, p. 78). The facts of the case suggest the small New York town was unlikely to give Garrow a fair trial. This is essentially a utilitarian argument. Ensuring a fair trial for each member of society yields the greatest good for the greatest number. While certainly not the most efficient method or in some cases the fairest method, it does provide the greatest good as members of society have assurances that they will not arbitrarily be judged guilty. This intangible peace of mind is an important component of the greatest good. On the downside, individuals suffer in promoting the greater good, for example, crime victim’s families.

*Institutional / Societal Values*

As a practising attorney, Armani was expected to act according to a prescribed code of professional responsibility. The New York State Bar Association defines 9 Canons which state attorneys must abide by. Canon 7 states “A lawyer should represent a client zealously within the bounds of the law,” (New York State Bar Association Code of Professional Responsibility). By disclosing privileged information about his client, Armani would violate Canon 7. In addition to the ethical dilemma arising from the state code of professional responsibility, Armani had to contend with the dilemmas involved in possibly violating portions of the U.S. Constitution and U.S. law, such as the presumption of innocence and the right to have the assistance of counsel during a trial.

The second phase of the Blanchard and Peale method is to assess whether or not the course of action in question is legal. Could Armani legally disclose the whereabouts of the bodies? Similar to the individual values Armani had to face, institutional values meld several philosophical approaches. Amendments V, VI, IX, and XIV of the U.S. Constitution protect citizens from abuses of power. Alternatively, these amendments codify respect for individuals, a categorical imperative according to Kant. However, the rights granted in the Constitution to each citizen provide the greatest good for society, which follows utilitarianism thinking. The concern with this line of thinking is that utilitarianism can be too permissive, justifying any action and even making it morally obligatory and can also negatively impact a minority of individuals in the name of the greater good.

*Recommendation*

Kant considers it a categorical imperative that man act according to duty, “Act only according to the maxim by which you can at the same time will that it should become a universal law,” (Kant, p.39). In addition, he says, “Duty is the necessity of an action executed from respect for law,” (Kant, p. 16). To act according to the law is to do your duty and reason demands duty. Since duty will always be in conflict with inclinations, reason lays down laws and is universal. This means freely imposing obligation on one’s own self to act dutifully. Many of society’s rules are self-imposed duties that limit some freedom and/or happiness, but in the aggregate promote the greater good. For example, as a society we follow self-imposed rules, such as Constitutional and state rules that promote fair trials, that may harm some individuals in the name of fairness to all.

Kant’s theories differ with those of Utilitarian philosophers like Bentham in that Kant believes the motivation of an action stems from the action itself, where Bentham felt it was the consequence of the action that was the motivating factor. However, both schools of thought do advocate the rule of law. Therefore, the underlying ethical theories most applicable to this case combine aspects of utilitarianism and Kant’s theories on universal maxims, such as respect for others, and the importance of duty.

The Wall Street Journal model of ethical dilemma resolution requires the evaluation of a decision’s contribution to the stakeholders, (Jennings, p. 78). The concept of respect for others dictates that Armani disclose the information for the benefit of the certain stakeholders, most notably the victim’s families. Following this logic, the application of deontological theory supports disclosing the information about Garrow’s victims. However, it is Armani’s duty to act according to the law, since he is a rational man. From a utilitarian perspective the argument could be made that disclosing information related to Garrow’s case serves the greatest good among local stakeholders (Armani, Belge, Garrow, the local community, the victim’s families, and the local judge). Does this course of action serve the greatest good to society? Unfortunately, the answer is no.

By serving his client, a course of action that requires not divulging the information, Armani abides by the law, thereby fulfilling the criterion of the Blanchard and Peale and the Wall Street Journal methods. In accordance with Kantian philosophy, it is important that Armani act legally by not divulging confidential information, and in doing so, is benefiting the greatest number of people. Essentially, we hold that his duty to uphold Constitutional and state law supersedes his duty to respect the individual (i.e. the victim’s families).

**Possible Decisions**

The options that Armani is faced with are:

1) Say nothing to Daniel Petz about his daughter’s murder

2) Disclose to Daniel Petz the fact that his daughter Susan was murdered

The pros and cons of each decision are:

*Pros of saying nothing:*

* Maintaining attorney/client privilege
* Armani follows the law, thus benefiting society from honoring those laws
* Ensuring the fair operation of the judicial system

*Pros of disclosing:*

* Mental purge of feelings of guilt
* Giving peace of mind to Susan Petz’ parents

*Cons of saying nothing:*

* Family continues feelings of anguish over ignorance of Susan’s whereabouts
* Armani’s feelings of guilt over not telling family

*Cons of disclosing:*

* Armani breaks legal code of ethics concerning client confidentiality
* Breakdown in society’s system of proper adjudication

**Stakeholders Options & Analysis**

Regarding the decisions, and the effects of those decisions:

Decision: Armani says nothing

#1) Society: benefits because it is in society’s best interest that Armani does not disclose to the Petz family any information regarding Susan’s death.

#2) Armani: he benefits legally by not disclosing, but does not benefit ethically

#3) Garrow: he benefits from Armani not disclosing his confidences, thus ensuring the fairness of his trial

#4) Susan Petz’ family: they do not benefit from Armani’s confidentiality because their daughter’s whereabouts are still unknown

#5) Lake Pleasant community: they benefit from disclosure because they obtain peace of mind regarding the whereabouts of the campers’ fate.

#6) Armani’s other clients: this group suffers as a result of Armani spending precious time on Garrow’s case but they benefit from Armani’s professional integrity. His quality as a lawyer is at stake here should he reveal confidential information about his client.

Decision: Armani discloses information

#1) Society: does not benefit because Armani would not be upholding the attorney/client privilege.

#2) Armani: he would not benefit legally, by violating a professional ethic, but would benefit by having peace of mind by telling the family about their daughter’s whereabouts.

#3) Garrow: does not benefit, as it would jeapordize the fairness of his trial

#4) Susan Petz’ family: they benefit from Armani’s disclosure because it would give them knowledge as to their daughter’s fate

#5) Lake Pleasant community: they benefit from disclosure, thus gaining peace of mind regarding their young members’ fates

#6) Armani’s other clients: this group suffers as a result of Armani spending precious time on Garrow’s case but they benefit from Armani’s professional integrity. His quality as a lawyer is at stake here should he reveal confidential information about his client.

**Recommended Course of Action**

Armani is bound by legal and moral restrictions to keep confidential any and all information from Garrow. While he cannot tell Daniel Petz what has happened to his daughter, Armani should defend Garrow to the best of his professional ability. If Armani can legitimately base the defense on an insanity plea, then Armani has a duty to support that plea. The evidence suggests that he was aware of the consequences of his actions. Therefore it is probable that he his fit to stand trial. Armani should take all actions that are within the letter and the spirit of the law. This course of action is legal.

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### International Bar Association’s General Principles for Ethics of Lawyers

These principles aim at establishing a generally accepted framework against which to measure the professional approach which may reasonably be expected of a lawyer in any part of the world.

1. Lawyers shall at all times maintain the highest standards of honesty and integrity towards all those with whom they come into contact.
2. Lawyers shall treat the interests of their clients as paramount, subject always to their duties to the Court and the interests of justice, to observe the law and to maintain ethical standards.
3. Lawyers shall honour any undertaking given in the course of their practice, until the undertaking is performed, released or excused.
4. Lawyers shall not place themselves in a position in which their clients’ interests conflict with those of themselves, their partners or another client.
5. Lawyers shall at all times maintain confidentiality regarding the affairs of their present or former clients, unless otherwise required by law.
6. Lawyers shall respect the freedom of clients to be represented by the lawyer of their choice.
7. Lawyers shall account faithfully for any of their clients’ money which come into their possession, and shall keep it separate from their own money.
8. Lawyers shall maintain sufficient independence to allow them to give their clients unbiased advice.
9. Lawyers shall give their clients unbiased opinion as to the likelihood of success of their case and shall not generate unnecessary work.
10. Lawyers shall use their best efforts to carry out work in a competent and timely manner, and shall not take on work which they do not reasonably believe they will be able to carry out in that manner.
11. Lawyers are entitled to a reasonable fee for their work. A demand for fees should not be a condition of the lawyer carrying out the necessary work if made at an unreasonable time or in an unreasonable manner.
12. Lawyers shall always behave towards their colleagues with integrity, fairness and respect.

## The Legal Profession

According to the Oxford Dictionary, “profession” comes from the Latin “*professionem*” - making a public declaration, which came to mean taking a public vow on entering a learned occupation.

*A profession is a vocation or a call that involves some advanced learning, knowledge or understanding*

* Concept of a vocation of particular importance
* ‘The oldest profession’
* 3 learned professions – divinity, medicine, law
* Divinity – a vow is taken upon entering a religious order. A vow is also taken by those upon entry to the medical and legal profession

It is **distinguished from an occupation** which is based on knowledge – an understanding and set of skills of a different level. A profession is recognised either by a range of attributes (see ‘characteristics of a profession’) or by an analysis of the functions that the profession performs (see ‘sociological approach’).

The literature on this topic suggests 2 ways to answer this question, one is a descriptive answer, and the other is described as analytical.

1. By description we mean recognising and stating the features of a person who is regarded as society as a professional person.
2. By analysis, we question the relationship between a professional and society and examine the internal or intrinsic nature of a professional.

Descriptive approach to the question: What is a profession?

The “characteristics approach” attempts to list the characteristics of a profession by looking at the traditional professions of medicine and law and listing their perceived characteristics (an intrinsic approach).

1. ***Specialised skill and knowledge***

* Professionals have extensive theoretical knowledge based upon specific training and education and possess skills based on that knowledge that they can apply in practice.
* They also have accredited competence, whereby formal organisations give accreditation and organisation to a profession (e.g. Australian Medical Association, the Bar Association and the Queensland Law Society).
* Dal Pont notes that the fact that entry into the legal profession has been restricted to those who have fulfilled certain academic requirements means that lawyers have a virtual monopoly on legal work because persons who do not fulfil these requirements are prohibited from carrying out legal work for reward.

1. ***Public service***

* Professionals serve the public and work in the public interest (e.g. a lawyer protects the administration of justice and a doctor protects his patients).
* In 1996, Sir Daryl Dawson, former High Court judge, noted in his article “*The Legal Services Market*” that public service was the subordination of personal aims and ambitions to the service of a particular discipline, and the promotion of its function in the community.
* Roscoe Pound said that the pursuit of the learned art in the spirit of a public service is the primary purpose.
* Below and the whole Caesar judging Caesar thing fits in
* A trade or business is an occupation or calling in which the primary object is the pursuit of pecuniary gain. Honesty and honourable dealing are, of course, expected from every man, whether he be engaged in professional practice or in any other gainful occupation. But in a profession, pecuniary success is not the only goal: service is the ideal and the earning of remuneration must always be subservient to this main purpose (*Re Foster* per Street CJ).

1. ***Organisational structure and self-regulation***

* Professional bodies tend to insist that they should be self-regulating and independent from the government because they have expert skill and knowledge, so it is best that they determine the acceptable standards of conduct and competence.
* There is reluctance on the party of those structures responsible for regulating the conduct of the legal profession to be amenable to outside interference.
* Professions tend to be policed and regulated by senior, respected practitioners and the most highly qualified members of the particular profession.
* However, we now have the Legal Services Commission who replaced the Queensland Law Society as the body responsible for disciplining lawyers, as this was viewed as “Caesar judging Caesar”.
* In the *Legal Profession Act 2007* (Qld) s 218 defines *barristers rules* as rules made by the Bar Association, and defines *solicitors rules* as rules made by the law society.

1. ***Ethical Code of Conduct***

* Codes of Conduct are one of the most important characteristics of a profession.
* They raise the public and community expectations as to quality, competence and confidence in the profession, which promotes faith in the legal system.
* Codes also provide a basis for disciplining members of the profession who, although not necessarily acting contrary to the law, act in a way which is detrimental to the notions of justice, fairness and equality.
* Ross notes that Codes will not stop thieves stealing trust account moneys or overcharging or improper conduct. However, it does have the benefit of ensuring that where such conduct exists, it will be actioned by the profession as opposed to other occupational groups where there are no such standards.

1. ***Status given by the community***
2. ***Nature of services given and expected***

Analytical approach to the question: What is a profession?

Focus on the internal / intrinsic relationship between a member of a profession and society

**Knowledge – Power Relationship**

* What does society perceive the functions of a particular profession - consequences of these perceptions?
* Eg. When visiting a doctor, what do we perceive or expect in patient – doctor relationship
* This knowledge imbalance leads to a power imbalance and the professional has taken power/control over the individual seeking assistance

A person visits their legal practitioner or medical practitioner in the absence of knowledge; cf when buying a pair of shoes or a book, we generally know what we want to purchase whereas when visiting a lawyer or doctor we don’t always know what we want or need.

*Is This Knowledge – Power Relationship Changing?*

The community is better educated of their rights than 10 or 20 years ago, however does this change the relationship from power and subservience to equality?

* Not necessarily as the professional still has that degree of skill / knowledge that the consumer needs, provided the service is worth buying. Consumers are more aware of quality and cost of services although there remains a power relationship between the parties.

*Shortcomings of above analysis*

The analytical approach is the extrinsic perception of society about the power or control the professional has that is the foundation of this acknowledgement of the profession. Perceptions of what is a profession will vary depending on the stage of evolution of society, the values of society, and the economic standing of society.

There are three traditional ‘learned professions’ – divine (priests and clergy), medicine and law.

The legal profession distinguished from other professions

The profession of law is distinguished from other professions because it is the law itself that is one of the mechanisms by which the standards of professional conduct are recognised and imposed.

Law vs Medicine

Where the medical profession provides a public service, the beneficiary is the patient. On the other hand, the beneficiary of the legal profession is not only the client but the legal system, the judicial system, the justice system and ultimately the rule of law itself. This is evidenced with a comparison of the Hippocratic Oath undertaken by medical practitioners and the oath undertaken by those admitted to the legal profession –

*Hippocratic Oath*

“… I will prescribe regimens for the good of my patients according to my ability and my judgment and never to harm to anyone…”

* + This outlines the focus of the medical practitioners’ service to the good of the patient.

*Obligation of a Qld Lawyer*

“*I will truly and honestly conduct myself in the practice of a legal practitioner and I shall faithfully serve as such in the administration of the laws and usages in Qld, according to the best of my knowledge skill and ability*”

* serve clients
* protect and serve the laws and usages of the laws in Qld
* the oath reflects qualifications as well as continuing/future legal education and training
* obligation to be knowledgeable, skilful, keep up to date with changes in the law, to observe ethical standards and faithfully serve the legal system

Types of Professionalism

The legal profession has changed over the last 20 or 30 years from a system described as based upon *social trustee professionalism* to one based upon *expert professionalism*.

*Social trustee professionalism*

* emphasises lawyers’ duty to the court, the duty to the administration of justice and the duty to the community.
* While the client is relevant, the client is no the focus.
* Lawyers are bound by the high standards of professional form of conduct – they must comply with ordinary rules of propriety and decorum and not bring the profession into discredit.

*Expert professionalism*

* places as much focus upon the provision of legal services to the client on a commercial basis which is effective and efficient – as well as the duties owed to the court and the wider community. In addition to the duty to the client, to the court, to the administration of justice, to the rule of law and those associated with it, the profession now have a duty to deliver services efficiently and effectively to clients in a competitive context.

The question arises as to whether these two approaches can be balanced in today’s environment. The answer lies in the way in which a member of the legal profession discharges the relevant responsibilities imposed by the law, the ethical standards of the profession and the practitioner as an individual.

Distinctive features of law profession

Distinguished from other professions because it is the law itself that is one of the mechanisms by which the standards of professional conduct are recognised and imposed.

The distinguishing features of the legal profession include the –

1. duty to the court ie. to protect the rule of law & ensure the integrity of the legal system
2. duty to the judicial system ie. promote justice w/n the administration of the legal system.
3. duty to the public/client
   * The profession of law is distinguished from other professions because it is the law itself that is one of the mechanisms by which the standards of professional conduct are recognised and imposed.

While the medical profession provides a public service, the beneficiary is the patient. On the other hand the beneficiary of the legal profession is not only the client but also the legal system, the judicial system, the justice system and ultimately the rule of law itself. This is evidenced by the Hippocratic Oath undertaken by medical practitioners compared with the oath undertaken by those admitted to the legal profession.

Law as a Business Enterprise

*What does it mean to practice law?*

There is no definition of legal practice in the Act. To engage in legal practice (either as a barrister or a solicitor) you must have:

* Been admitted (over 18, approved academic qualifications, approved practical legal training – s30(1) LPA2007)
* Hold a practising certificate
* Have taken out indemnity insurance
* Make a contribution to the fidelity fund

You have to meet the requirements for admission in being a fit and proper person, suitability matters s31(2)(a) and (b) LPA2007

To practice law means to uphold the values of the law and to give legal advice in solving your clients problems. To practice the law is conclusive of practising legal strategies and solutions which will give your client the best advice in relation to their legal position.

*What does it mean to practice law distinct from practising other professional activities?*

It can be hard to distinguish between these activities as they tend to blur into one another. For example – where does the practising of law stop and the advice on business structure start? Perhaps the distinction lies in the knowledge of the expert. If they are taken outside of there area of expertise they should say so as they are genuinely not qualified to give advice that is not of a legal nature. There does however seem to be movement towards legal firms providing comprehensive solutions to businesses that tend to overstep the boundaries of legal advice and become more strategic business advice.

*Is the practice of law a business enterprise?* – The shift from Social Trustee Professionalism to Expert Professionalism:

There is suggestion of the movement from Social Trustee Professionalism to Expert Professionalism.

* STP emphasises the duty to the court, the duty to the administration of justice and the duty to the community – while the client is relevant they are not the focus
* EP places as much focus upon the provision of legal services to the client on a commercial basis which is effective and efficient – as well as duties owed to the court and the wider community
* There is criticism of this more strategic advice that encompasses not only legal but strategic business practices on the basis that the benefit is to the lawyers and not to the client
* This may be challenged however as the client may achieve more well-rounded advice (but be aware of quality of advice given)

Justice Kirby’s Article

**Objectives – The basic questions posed by the Article are**

1. Is expressed anxiety nothing more than a nostalgic hankering for a return to the good old days of legal practice which were not so good for the consumer after all?

*For the large part, I would agree. While there has been a well documented shift from trustee professionalism to expert professionalism, I think that the articles cast a glimmering veil over the many inequalities of the past that the legal profession has served to overcome – for example, it has one of the highest female graduate rates (I made that up but it’s probably true).*

*The shift toward a ‘user-pays’ profession is probably for the best as more transparency is required. As once stated, the duty to the client is the same as the duty to the court – by advocating a client’s issues, a legal professional is upholding the adversarial system and the administration of justice (given they stay within the rules, both common law and statutory)*

1. Was the professionalism of the past merely a self-deceiving disguise to preserve a large hold on the power of society?
2. Or is our anxiety a last desperate effort to keep alive the flame of professionalism in the face of so much evidence that law is moving in the direction of a business and that the idealism and selflessness of professionalism is finally dying out?

**Problems identified by Kirby’s Article**

**(1) *The Lost Lawyer; Failing Ideals of the Legal Profession* by Kronman**

* The author considers that, in the hands of today's lawyers, the stewardship of the institutions of law in the USA has been extremely poor.
  + Contrasts the suggested idealism, self-discipline, public spirit, economy and wisdom of the lawyers of early years with those of today
  + Kronman writes of the crisis in the American legal profession – that the profession is in danger of losing its soul –crisis of morale
* Attorneys practice law in a different way than did their forebears. The best graduates gravitate to huge and impersonal law firms where they are put in a corner and time charging is the rule. Original ideals of wise and dispassionate advice to clients are increasingly enfeebled by a mercantile attitude – lets the client dictate the course of the dispute without the cautionary words that lawyers have previously given
* Role of the lawyer in the good old days involved compassion for the client’s entire predicament tempered by detachment and also a measure of concern for the public good
* Advocates too are changing their ways. The old days of complete honesty with the courts and candour and honour in dealing with each other has given way to a more ruthless effort to win cases because large profits hang upon them, essential to the lawyers “business”. The client becomes a mere “punter”. In the past, the advocate was more like the judge with maintenance of detachment.
* Criticises law schools for fostering the teaching of law in ways that pander to the market view of legal practice places upon the law schools, and for negating the teaching of legal ethics.
* Appellate judges under the pressure of their case loads have become mere editors of opinion drafts presented to them by their clerks. The consequence is discursive opinion writing, needless dissents and footnote battles as the clerks struggle for their place in the law books.

**(2) Sir Daryl Dawson essay “The Legal Services Market”**

* Acknowledges that the very changes which give rise to many of Kronman’s concerns can already be detected in the Australian legal sense
* Law is now increasingly conceived of as a “commercial activity”, although one of a very special kind
* Such changes of approach will doubtless improve the accessibility, efficiency and cost of some legal services and even the rewards to some legal practitioners
* Yet surveys of the members of the Australian legal profession show very high levels of dissatisfaction with professional life
* Sir Dawson lists these as among the reasons:
* Many of the problems are connected with the growing concentration of legal practice in large firms
* There is a loss of objectivity exacerbated by the employment of marketing managers to attract profitable clientele
* The priority has changed to the making of money rather than the provision of disinterested, yet sympathetic legal advice
* The work satisfaction which attended much legal practice in the past has been replaced by a strictly commercial and entrepreneurial approach to the practice of the law

**(3) Address by William Renquist, Chief Justice of the USA**

* Acknowledged that lawyering today was probably of a higher quality that in those days and that law firms were certainly more efficient today.
* The practice of law is today a business, where once it was a profession
* Market capitalism has come to dominate the legal profession in a way that it did not a generation ago
* Today the profit motive seems to be writ large in a way that it was not in the past
* Large firms simply cannot economically justify taking on small matters and so they end up with only large clients and large case and very few actually go to completed trial
* Law firms run the risk through billable hours as just being regard by their clients as another service provider
* Reaffirmed the comments Justice Gleeson has often made in Australia – the system of billable hours can reward a slow-witted lawyer but penalize those who are experienced, wise and efficient

**Lessons from Kirby’s Article**

**(1) Avoid nostalgia**

* We should avoid tiresome nostalgia for the past
* Lawyers and their institutions must move with fast changing times
* Technology stimulates rapid change
* Other factors include:
* A better educated community
* A much expanded legal profession; and
* A less monochrome society with changing values and an era in which every
* institution, from the Crown down, is under the microscope of critical social scrutiny
* It also includes fresh perceptions of the imperfections of the system presently organized to deliver justice to the ordinary citizen and new insights into the unsatisfactory features of the ethnic and class make up of the profession itself

**(2) Avoid exaggeration**

* We should avoid exaggeration of the extent of change in the ideals of the legal profession
* Big firms have always existed
* If the practice of law was cocooned in small old time personalised firms, lawyers would be criticised for failing to respond to national needs and international opportunities

**(3) Change is inevitable**

* No institution is impervious to change
* This is least of all so in a profession which repeatedly boasts of its adaptability and which rests upon the foundation of the common law
* To the extent that we are advancing in the same general direction, the forces of economics, technology and consumer awareness probably stimulate the changes and make many of them inevitable

**(4) Change for the better**

* Lawyers should not be adverse to acknowledging that many changes which alter somewhat the character and activities of the legal profession, often forced upon it reluctantly, have been for the better
* Clinging to old ways just because they are old is not very rational
* If changes resisted at the time are now seen to have been “beneficial reforms”, members of the legal profession must keep their minds open to the possibility that other changes, urged today, will in due course become seen as beneficial to the ultimate objective of practising lawyers, which is to ensure that as many people as possible secure accurate advice and competent representation

**(5) Legal Idealism endures**

* It should be acknowledged, both within the legal profession and by its critics, that there may remain possibly a majority who are as committed to the ideals of service and dispassionate advice as existed in times gone by
* Fine leaders of the bar daily accept the call to pro bono work
* Women and Aboriginal and Gay lawyers blaze a trial for equal opportunity
* Councils for Civil Liberties and endless professional associations connected with the law and law reforms such as the International Commission of Jurists, the International Bar Association, Amnesty International etc

**(6) Issues ripe for attention**

* Some of the issues of professionalism derive from the growth of very large firms with their assignment of unrewarding work for the best and brightest graduates
* Such firms themselves must address the growing evidence of lawyer dissatisfaction with their life and work
* Unless a culture of loyalty and self respect can be restored, the mercantile values of ruthless self interest will permeate legal practice in Australia just as they have come to do in the USA
* This will be to the destruction of the ethos of the firm loyalty and client loyalty that has existed until now

**(7) Teaching legal ethics**

* The revival of public debate about what professional ethics should be should make it timely to urge an intensified interest in law schools the teaching of legal professional ethics
* This is not just a rudimentary training in the provisions of the local professional statue, rules of etiquette and where applicable, book keeping and trust account requirements; it is a matter of infusing all law teaching with a consideration of ethical dilemmas that can be presented to lawyers in the course of their professional lives
* Only in this way will law schools provide students with guidance on the professional responsibility and on the ethical issues that they will face as they enter the profession

**(8) Need for curial vigilance**

* The courts and bodies supervising professional conduct also have a duty to uphold high standards of honest, faithful, diligent, competent and dispassionate legal advice and representation
* In Australia, the courts rarely become involved in professional discipline except in the most serious cases
* Many clients and citizens feel more comfortable with the notion of complaining to a body unencumbered by representational and lobbying functions for the legal profession
* Such professional bodies should look on external guidance not as enemies to be traduced but as supporters of the high standards which are vital if they are to earn the privileged position which the legal profession still enjoys in a society such as ours

**(9) Gather data**

* We should be encouraging the gathering and analysis of data on ethical defaults so that we can derive lessons from the teaching of the law and ethics
* This is one positive result flowing from the establishment of the office of the Legal Services Commissioner in NSW
* The first step in law reform is to establish all the facts
* As the law profession is larger and more diverse and less homogenous, new institutions, more rules and better teaching of legal ethics are essential

**(10) Spiritual values**

* In a time when so many fundamentals are questioned, doubted and even rejected, it is hardly surprising that the ethics of the legal profession should also be doubted by some of its members and attacked by its critics
* It is easier to adopt a purely economic or mercantile view of the law if you have no concept of the nobility of the search for individual justice, of the essential dignity of each human being and the vital necessity of providing the law’s protection, particularly to minorities, those who are hated, even demonised and reviled

**Conclusions**

* The challenge before the legal profession in Australia today is to resolve the basic paradoxes which it faces
* To adapt to changing social values and revolutionary technology
* To reorganise itself in such a way as to provide more effective, real and affordable access to legal advice and representation by ordinary citizens
* To preserve, and when necessary to defend the rest of the old rules requiring honesty, fidelity, loyalty, diligence, competence and dispassion in the service of clients, above mere self interest and specifically above commercial advantage
* We have yet to move with the changing direction of legal services in a global and national market
* To adapt to the growth and changing composition of our society and of its legal profession beyond the monochrome club of Anglo-Celtic mates and to mould itself to the fast changing content and complexity of substantive and procedural law
* The great debate for lawyers the ascendancy of economics, competition and technology unrestrained will snuff out what is left of the nobility of the legal calling and the idealism of those who are attracted to its service

Dee’s notes dump

**Do you think ethics should play a part in the practice of law or should the lawyer do whatever is necessary (provided it is lawful) to protect the interests of the client?**

I think ethics should definitely play a part in the practice of law. Law is a profession which requires utmost integrity and honesty in order to maintain the underlying principles of what the law stands for and for the this reason ethical considerations are important rather than a ‘win at all costs’ approach.

It is also not only important to protect one’s interests of the client but to maintain one’s duty to the court at the same time. This is another reason that the role of ethics is important in order to maintain this balance and to maintain ones obligations to another.

For example, is it ethical to use delaying tactics to expose a weaker opponent to the fear of extra costs or to use particularly aggressive behaviour?

There is again the conflict now between being a ‘good lawyer’ and being an ethical person. Again there remains the conflict between client and court once again. The duty to the court would prevent you from doing things in this regard as you would not be doing the best thing in the course of justice (refer back to the IBA Rules), however perhaps in seeing the best outcome for your client you may find some benefit in a delaying tactic. However, the problem then arises that you are taking one risk at the expense of another, here for example the possibility of increased costs at trial.

It would be difficult to maintain your integrity and not use particular tactics in certain circumstances, particularly where they are generally ‘harmless’ to your client, however I believe that these practices are not truly ethical.

**Is it ethical for a lawyer to lead a defence which he or she believes is spurious?**

I couldn’t personally do it. Again it comes down to duty to client vs duty to court. If you don’t believe something is genuine then as a person I have grown up believing that you don’t say it and you don’t back it. However, if you are trying to do all that is best for your client and give them all opportunities then really you should give them every possible opportunity to defend their case.

**Do the different approaches to legal ethics outlined in *Inside Lawyers’ Ethics* necessarily lead to different outcomes?**

No. There are many situations where all 4 approaches will lead to agreement on the right thing to do.

All lawyers can use the four types as a diagnostic aid for clarifying and critically examining their own ethical preferences as a lawyer and also in making sure they have explored all the facts of any situation they might face as a lawyer, considered all the relevant ethical considerations and responded appropriately. Having considered that it is possible that someone may use all 4 approaches as someone else but reach different outcomes due to their own ethical preferences and circumstances.

**What would happen if you were to adopt one of the alternative approaches to adversarial ethics, and it suggested a different course of action from “conventional” analysis?**

The idea of the different approaches is to identify which principle is most important given the particularities of the situation.

There is no right and wrong approach and each situation is likely to be more appropriate in certain situations that in others. If you suggested one of the alternative approaches then you would be likely to adopt that different course of action.

**Is it likely that a conflict could arise between what you are required to do as a lawyer (subject to the rules of conduct applying to lawyers) and what you believe you should do (as a morally autonomous human being)? How might you resolve that conflict?**

Yes absolutely. As with the questions above your own personal beliefs about right/wrong and what I or is not moral may conflict with the requests of your client in particular situations.

In resolution of this conflict you are really bound by your client’s instructions, so short of removing yourself from being their advocate there are only going to be compromises. Perhaps alternative points of view that meet middle grounds?

## History and Structure of Legal Profession

### History in England

* 11th Century England: monarchical system in which all authority was vested in the sovereign (no courts, no executive and no parliament)
* Function of sovereign was to ensure peace and order – achieved partly by enforcing what we now describe as criminal law and partly by dispensing justice to those who felt the need to find a redress in some way or other. The sovereign might do this personally or delegate the function to another.
* Court of Kings Bench – dealt with criminal matters
* Court of Common Pleas – dealt with disputes between members of the community.
* Court of Executer – ensure that members of society were paying their debts to the King (ie Taxes).
* Courts of Equity and Courts of Chancellery – 16th Century

Those to whom the function of dispensing justice was delegated became what we would describe today as judges. These decision makers were not in the first instance lawyers. First distinctive function recognised was adjudication (settling disputes). Persons seeking assistance from the courts began to require help and advice themselves (rights and procedures). These advisors operated as agents eventually known as “attorneys at law” (emerged in the Middle Ages). They engaged in a variety of function, such as acting as agent for the client, by way of provision of advice in general terms, but could also appear in the courts of Common Law. The courts of Common Law preceded the Courts of Equity and Chancellery, but the Courts of Chancellery were served by those called “solicitors”.

Attorneys were answerable to solicitors in the Courts of Chancellery. In the Ecclesiastical Courts (wills, succession etc.), those appearing were described as Proctors, in the sense of agents providing general advice and service. Accordingly, Attorneys were also answerable to Proctors in the Ecclesiastical Courts. Solicitors and Proctors provided the more specialised advice.

Specialisation emerged in the thirteenth and fourteenth centuries with a group of agents known as pleaders becoming involved in advocacy in the courts. Their specialty was drawing up pleadings for the courts. Their additional function was to act as advocates in the courts of Common Law, bearing in mind that they would have drawn up the pleadings for the litigation. These specialists became the group from which were appointed judges. These specialists organised themselves institutionally through the creation of facilities which became known as the Inns of Court. Today, pleaders would be described as akin to Barristers.

Pleaders, Apprentice Pleaders and Sergeants (senior members of the pleaders – generally became judges)

In 1574 attorneys and solicitors were expelled from the Inns of Court. In practice, the effect was that no lawyer could plead at a court in Westminster unless they were a “bencher” of the Inns of Court (today = barrister). Consequently, this created a divided profession in England, between those who were entitled to appear in the Common Law Courts (Barristers) and those members who were not entitled to appear (Solicitors).

The next step in organizational restructuring came around in 1739, when the society of Gentlemen Practicer’s in Courts of Law and Equity was established. This was the first step when those others than Barristers became formally recognised as such.

In 1843, the Society of Solicitors was established (which included Attorneys). The term solicitors, which had different connotations prior to this date, became the term to describe the legal profession in England other than a Barrister. The legal profession was therefore split into two branches, Barristers and Solicitors (“The Formally Divided Legal System”). Both had different functions, different skills different backgrounds and different professional organisations.

### History in Australia and Queensland

No Courts in the colony of NSW until 1814 (when the Supreme Court of NSW was first established). The provision of legal advice and assistance from then on was provided by “Convict Attorney’s”. At this stage, there was no formal organisation in England until 1843 whereby lawyers described themselves as solicitors. It is therefore not surprising that the term “Attorney” was used in the colony of NSW at that time.

Once a person had completed an Articles of Clerkship in the colony, they were able to practice. The Supreme Court of NSW was re-established in 1824. By that time, there were a few English Barristers that practiced before the court and the Supreme Court took on the functions of the Supreme Court in England and that included the function of admitting to the court those wishing to practice as Barristers and Solicitors. At that time, Barristers and Solicitors had equal rights of audience before the court, so it was NOT a divided profession at that time in NSW. But this was simply a quirk of the circumstances as they arose when the Supreme Court was established.

In the 19th Century, the profession was formally divided along the same lines as England.

In 1850, one Supreme Court judge from the Supreme Court of NSW was appointed to hold judicial proceedings in Brisbane by way of delegation from Sydney. In 1859 there was effectively 1 judge on the Supreme Court, 2 barristers and 6 solicitors. The structure of the profession at that time was a separate board of admission for Barristers and a separate board for solicitors (“The Barristers Board” and “The Solicitors Board”). The functions of the law society and the Bar association came much later. There was nothing more than two boards for admission at that time.

From 1859 onwards, there was in fact a separate profession of barristers and a separate profession of solicitors. It was not until 1973 that Solicitors had rights of audience in Courts in Queensland. Although in practice there is still largely a divided profession, in strict theoretical terms, it is not.

The first attempt by a woman to seek admission into the legal profession occurred in 1896 in Western Australia. The legislation in WA at the time permitted “any person to apply for admission” provided they had the right eligibility and qualifications. But the courts interpreted the term “any person” to mean only men, and not women. In 1905, the State of Queensland enacted legislation specifically allowing women to apply for admission. The first female solicitor was admitted in 1915 and the first female barrister was admitted in 1926.

### Structure of Legal Profession in Queensland

Historically, barristers and solicitors were admitted by the courts, but then disciplinary actions or matters were dealt with by the Bar Association or the Queensland Law Society. Where non-lawyers were involved (such as the legal ombudsman under the Queensland Law Society Act 1952 (Qld)), there was still an appeal to the Queensland Law Society. This led to the poor perception of the legal profession, as the QLS was headed by senior lawyers, and it was seen as “Caesar judging Caesar”.

Now, the Legal Services Commission deals with disciplinary actions or matters (Legal Profession Act 2007 (Qld) ss 583 and 591). It is governed primarily by the Legal Profession Act 2007 (Qld), the Barristers Rule and Solicitors Rule.

While the foundations of the common law processes remain adversarial, the functions performed by lawyers have changed. The focus is now as much on strategic skills in proactively managing a client’s legal affairs as it is on transactional skills in managing the consequences of what has happened in the past and is happening on a day to day basis. The nature of the services provided by the legal profession is changing in the sense that the legal profession is concerned as much with the commercial and corporate interests of institutions and governments as much as the personal interests of individuals. Hence, the movement from a profession based upon social trustee professionalism to one of expert professionalism.

NOTE: A solicitor has rights of appearance in the Queensland Supreme Court (s 14(4) LPA).

Divided or Unified Profession?

The arguments for a divided profession depend on the nature of the adversarial system. There is a suggestion that there is a distinctive set of skills on the one hand required on the part of a barrister and on the other required for a solicitor. There have been several arguments both for and against the divided system. They include:

**Advantages of the Divided System**

* The existence of the Bar nurtures to some extent the development of specialisation within the profession.
* this can enable a practitioner to substantially improve the quality, speed and efficiency of his or her service.
* Barristers may be less prone than many solicitors to certain conflicts of interest.
* The division of labour means that barristers have limited contact with clients, thus may be able to give more objective advice etc.
* The fact that barristers practice as sole practitioners rather than as partners or employees of other practitioners leaves them free of possible conflicts between, on the one hand, their clients interests, and on the other hand, interests of their partners or employers, or of clients of their partners or employers. Solicitors, on the other hand, may have ties with partners or … employers, and with a wider range of business interests than most barristers.
* “Client-poaching”: Because a barrister may not deal with clients except through solicitors, any solicitor may obtain the assistance of a barrister without running the risk of losing that client to the barrister.
* This is said to improve the client’s access to lawyers of appropriate skills
* Due to the “corporate life” of the Bar, many barristers have ready access to the advice and assistance of other barristers.
* The current division confines advocacy in the higher courts to the Bar – it thereby prevents the courts from being flooded with inexperienced or incompetent advocates who are unfamiliar to judges and other advocates.
* The Bar provides a specialist pool of advocates from which judges can be chosen.

**Disadvantages of the Divided System**

* In many cases, 2 lawyers (a barrister and a solicitor) are used where one lawyer would be sufficient and more economical – ie additional costs
* Where 2 lawyers are used, the division of labour between them is often determined by rules or practices which are not appropriate to the particular circumstances, with the result that duplication, omission or confusion may occur.
* Many solicitors are unduly deterred from handling matters on their own, without reference to a barrister, meaning they do not develop their ability to undertake advocacy and advise on difficult questions of law.
* The number and calibre of specialist solicitors tends to be underestimated, especially by members of the public, thus inhibiting their supply and accessibility.
* In practice, the ranks of leading advocates and advisers (including QC’s) and the judiciary are deprived of much valued talent to be found amongst solicitors.
* Specialist advocates and advisers are less readily accessible to clients in country and rural areas.
* There are undue restrictions on the freedom and incentive for lawyers to introduce new methods of providing legal services, or to extend existing methods into new areas.

Appointment of judges from solicitors?

Judges are only appointed from barristers on the bar. This does not recognise the skills of solicitors, and that they may be appropriate for judicial appointment –

* The work of solicitors has become less transactional and more litigious
* There is a large amount of knowledge vested in solicitors that useful for judges
* Solicitors now provide proactive legal advice to ensure that their client is compliant with the legal system instead of waiting for things to go wrong

Anti-competitive nature of current structure

Certain features of our current structure of a divided profession may have anti-competitive elements, for example–

* There is a strict admission process, which is justified by the important role of lawyers in the democracy and separation of powers
* The use of scale fees as a way of charging for legal services
* The requirement of a barrister to be briefed by a solicitor in the first instance, and the practice of a barrister requiring a junior to be briefed as well in the case

Good vs Outstanding Lawyers

* Competence
* Service to the community
* Commitment beyond the strict call of duty
* Personal integrity
* A Solicitor is primarily involved in the transactional nature of the client’s issues
* A Barrister is primarily involved in the advocating the client’s problems in court
* A Judge is primarily responsible for overseeing the matter to be heard and making a determination
* As such each will have particular qualities necessary in order to be good or outstanding in their job.

Solicitor:

* exceptional listening skills
* problem solving skills
* practical knowledge
* organisation
* time management
* good contact with clients
* good skills in summarising information
* good research skills
* ability to brief a barrister well
* honesty and fairness
* dignity and respect
* moral values

Barrister:

* public speaking skills
* being concise
* thinking on their feet
* preparing at short notice
* dealing with pressure
* being able to speak to and question a variety of persons
* exceptional general understanding of all areas of the law
* specialised knowledge of a particular area of the law

Judge:

* impartiality
* composure
* exceptional knowledge of all areas of the law
* excellent listening skills
* good processing skills
* exceptional knowledge of court procedures

### Monopoly Over Legal Services

A person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner: **s 24(1) LPA**.

The efficiency of this structure has been questioned over recent years, leading to a move towards incorporated legal practices and multi-disciplinary partnerships including lawyers as well as non-lawyers. Allowed in ***s 144 LPA.***See “2.3.5 Incorporated Legal Practices and Multi-Disciplinary Partnerships” on page 68.

Practising Certificate: method adopted by the profession in maintaining its monopoly and control over lawyers already admitted

**Conveyancing**

In Queensland property conveyancing is done by lawyers. Further, unlike other Australian jurisdictions there is no occupation of ‘conveyancer’ in Queensland: ***Re Sande.***

Thus conveyancers in other jurisdictions cannot be admitted under mutual recognition legislation.

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| --- |
| ***Re Sande* [1996] 1 Qd R 671**   * Sande came from South Australia and was a ‘Licensed Landbroker’ in South Australia * Sande applied under the *Mutual Recognition Act* to the Acting Registrar * Upon being denied approval, Sande applied to the Supreme Court * The *Supreme Court Act 1867*, which later became the *Legal Practitioners Act 1954*, created or recognised the existence of the occupation of ‘conveyancer’ * Sande argued that pursuant to the *Mutual Recognition Act* and the fact that Queensland recognised the existence of such a profession, he should be entitled to an admission in Queensland * **Held:** Fryberg J – Conveyancers cannot practice in Queensland * The existence of the provisions in the *Legal Practitioners Act 1954* does not create an ‘occupation, trade, profession or calling’ as conveyancers * The *Supreme Court Act 1867* deems the performance of a number of occupations an offence unless they are performed by a person in numerated classes * Sande argued on ss 38 and 39 *QLS Act* that such an amendment implies continuing legislative recognition of conveyancers * There is no ‘occupation, trade, profession or calling’ in Queensland, despite the recognition in Queensland legislation * Sande chose not to call any evidence that there were conveyancers in Queensland (whether admitted or not), which could support or go against his position * The court held that there can only be mutual recognition where the profession is recognised in the State, despite recognition in other States * There is an occupation of ‘conveyancer’, but there was no evidence put forward by the parties that it existed today |

**EXCLUSIVITY & THE CONVEYANCING PROFESSION**

|  |  |
| --- | --- |
| **Arguments for** | **Arguments against** |
| They’ll fuck it   * Original 1938 rationale that there will be problems with things done incorrectly * Conveyancers only have a limited understanding of a discrete area of the law * Unlike the UK, Queensland has a Torrens system and indefeasibility of title, thus a conveyance gone wrong can have serious ramifications as the register may not be corrected, thus having a legal professional with specialist legal knowledge is advantageous to prevent this * Regulation of solicitors is extensive and onerous * As the single greatest investment most people make in their lives, greater protection is needed   Other Reasons   * For smaller practices, it is a steady stream of income to subsidize legal practice * It was taken away for a reason – too many conveyancers were abusing the system | It’s easy   * Repetitive and mechanical task does not necessarily require a lawyers * Can get specialised training and don’t need the full scope of legal knowledge in other jurisdictions can obtain a conveyancing certificate from TAFE   + Indefeasibility of title and the consequences of a faulty conveyance is taught in 1 subject in a law degree; it is not necessarily an all permeating area of law that requires legal specialist knowledge * Conveyancers can always go and obtain legal advice if needed * Increased competition will lead to lower costs for all consumers – from a utilitarian perspective, better * Analogy with r/estate agents * no particular issues in other states with conveyancing professions * in small towns where there is no lawyer, conveyancing service can be provided * A cynic would point to the fact Fryberg J (***Sande***) was a lawyer, so may not be entirely objective |

### Incorporated Legal Practices and Multi-Disciplinary Partnerships

For the purposes of the LPA, a “law practice” may be a sole practitioner, an Incorporated Legal Practice (ILP) or a Multi-disciplinary Partnership (MDP) (Sch 2 definitions).

This paradigmatic shift in law and policy allows lawyers a much greater flexibility in choosing and developing a management and business structure, and some quite significant benefits in terms of taxation, the ability to raise capital and to avoid personal/vicarious liability for some breaches made by their partners. Flip side is that there is new ethical and professional duties and responsibilities under the new structures.

**Incorporated Legal Practices (ILPs)**

Contained in chapter 2, part 2.7, divisions 1-7 and 9 of the *Legal Profession Act 2007* (Qld) (the ‘LPA’), which commenced on 1 July 2007. As a result, corporations may now engage in legal practice in Queensland. This is one part of the process of creating a national legal market in Australia.

Certain terms are defined for the purposes of part 2.7 of the LPA (s110). Of particular note is the term ‘legal practitioner director’ (‘LPD’), which is defined as a director of an incorporated legal practice (‘ILP’) who is an Australian legal practitioner (‘ALP’) holding a principal practising certificate.

A corporation is an ILP if it engages in legal practice in Queensland (regardless of whether it also provides non-legal services) (s111(1)). However, a corporation is not an ILP if the only legal services it provides are:

* in-house; and/or
* services that are not legally required to be provided by an ALP, and are provided by an officer/employee who is not an ALP (s111(2)).

A regulation may also prescribe corporations that are not ILPs (s111(3)). The LPR provides that community legal services and certain non-profit legal services are not ILPs (r 10).

Further, a corporation that the Court disqualifies from providing legal services in Queensland ceases to be an ILP (s132(7)).

The LPA does not authorise a corporation to provide legal services, if the corporation is prohibited from doing so under an Act or law of the jurisdiction in which it is incorporated or in which its affairs are regulated (s113(2)).

An ILP is not required to hold a practising certificate (s113(3)).

An ILP may provide any lawful service or conduct any lawful business (s112(1)), except that it (and any related bodies corporate) must not conduct a managed investment scheme (s112(2)).

Before a corporation starts engaging in legal practice in Queensland, it must give notice to the Society of its intention to do so (in QLS Form 23 (LPA)) (s114(1)). There is no prescribed time frame for giving the notice (except that it must be given before engaging in legal practice in Queensland). It is an offence to engage in legal practice without giving this notice (s114(2)). A corporation is not entitled to any payment for legal services provided before the notice was given (s114(5)). It is also an offence for a corporation (s115(1)), or a director, officer, employee or agent of a corporation (s115(2)), to represent or advertise that the corporation is an ILP, unless this notice has been given (except if it has a reasonable excuse). If a corporation engages in legal practice in Queensland without giving notice, it remains in default until it gives notice to the Society (in QLS Form 24 (LPA)) of its failure to comply with s114(1) and the fact that it has started engaging in legal practice (s114(3)).

The *Legal Profession (Solicitors) Rule 2007* (Qld) (the ‘Conduct Rule’) applies to an ALP who is an officer/employee of an ILP in the same way it applies to any other ALP (unless the rule provides otherwise).

Nothing in the LPA prevents an ALP from sharing with an ILP receipts, revenue or other income arising from the provision of legal services (s128(1)) (except that they must not be shared with a disqualified person (s128(2))). ‘Disqualified person’ is defined in schedule 2 to the LPA as, inter alia, a person:

* whose name has been removed from and not restored to an Australian roll;
* whose practising certificate is cancelled/suspended;
* who has been refused a renewal of a practising certificate and has not since been granted one;
* who is the subject of an order prohibiting a law practice from employing him/her; and/or
* who has been disqualified from managing a legal practice under s133.

*Legal Practitioner Directors (LDPs)*

An LPD is defined as a director of an ILP who is an ALP and holds a principal practising certificate (s110). An ILP must have at least one LPD (s117(1)). If an ILP does not have an LPD for more than seven days, it will be in default from the end of that period. An ILP must not provide legal services in Queensland during this period of default (s119(3)). The Society may appoint a person under s119(5) if it considers it appropriate.

Each LPD is, for the purposes of the LPA, responsible for the management of the legal services provided by the ILP in Queensland (s117(2)). Each LPD must ensure that appropriate management systems are implemented and kept to enable the ILP to provide legal services:

* under the professional obligations of ALPs and other obligations under the LPA; and
* so that the obligations of the officers/employees who are ALPs are not affected by those who are not ALPs (s117(3)).

The term ‘appropriate management systems’ is not defined in the LPA. However, the view of the Society and the Legal Services Commission (‘LSC’) is that the following ten areas of sound legal practice (known as the ‘ten commandments’) need to be addressed to ensure that an ILP has appropriate management systems in place:

* **negligence** (providing for competent work practices);
* **communication** (providing for effective, timely and courteous communication);
* **delay** (providing for timely review, delivery and follow up of legal services);
* **liens/file transfers** (providing for timely resolution of document/file transfers);
* **cost disclosure/billing practices/termination of retainer** (providing for shared understanding and appropriate documentation on commencement and termination of retainer, along with appropriate billing practices during the retainer);
* **conflict of interests** (providing for timely identification and resolution of conflicts of interests, including when acting for both parties or acting against previous clients, as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies, or conducting another business, referral fees and commissions etc);
* **records management** (minimising the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving etc and providing for compliance with requirements regarding registers of files, safe custody, financial interests);
* **undertakings/orders etc** (providing for undertakings to be given, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the LSC and courts);
* **supervision of practice and staff** (providing for compliance with statutory obligations covering licence and practising certificate conditions, employment of persons and providing for proper quality assurance of work outputs and performance of legal, paralegal and non-legal staff involved in the delivery of legal services); and
* **trust account regulations** (providing for compliance with the *Trust Accounts Act* 1973 (Qld); chapter 3, part 3.3, division 2 of the LPA; and proper accounting procedures).

If it ought reasonably to be apparent to an LPD that the ILP’s provision of legal services will result in breaches of the professional obligations of an ALP or other obligations under the LPA, then he/she must take all reasonable action available to ensure that the breaches do not happen (s117(4)(a)). If a breach has occurred, then the LPD must ensure appropriate remedial action is taken (s117(4)(b)). Similarly, an LPD must also ensure that all reasonable action available to him/her is taken to deal with any unsatisfactory professional conduct or professional misconduct of an ALP employed by the ILP (s118(3)).

Each of the following is capable of constituting unsatisfactory professional conduct or professional misconduct by an LPD:

* unsatisfactory professional conduct or professional misconduct of an employee who is an ALP (s118(1)(a)), unless the LPD establishes that he/she took all reasonable steps to ensure ALP employees did not engage in the conduct (s118(2)(a));
* conduct of a non-ALP director that adversely affects the provision of legal services by the ILP (s118(1)(b)), unless the LPD establishes that he/she took all reasonable steps to ensure non-ALP directors did not engage in the conduct (s118(2)(b));
* the unsuitability of a non-LPD director to be a director of a corporation that provides legal services (s118(1)(c)), unless the LPD establishes that he/she took all reasonable steps to ensure unsuitable non-ALP directors were not appointed or holding office (s118(2)(c));
* failure to ensure the ILP complies with s129(1) regarding disqualified persons (s129(2));
* failure to ensure the ILP or any officer/employee complies with any requirement made by an ILP investigator (or someone authorised by an ILP investigator) in the exercise of his/her powers under chapter 6, part 6.7 (Provisions about investigations relating to ILPs) (s574(c)(i)); and
* failure to ensure the ILP or any officer/employee complies with any condition imposed by an ILP investigator in the exercise of his/her powers under chapter 6, part 6.7 (s574(c)(ii)).

*Advantages of engaging in legal practice as an ILP*

The advantages include:

* directors are not liable for the actions of other officers/employees, unless a personal guarantee has been given or the veil of incorporation is lifted (although LPDs have responsibilities relating to the suitability of other directors and the conduct of ALP employees);
* shareholders’ liability is limited to the value of their shareholding (unless an indemnity has been given to directors);
* creditors can only access the ILP’s assets, not the directors’ personal assets (unless a personal guarantee has been given or the veil of incorporation is lifted);
* although there is nothing to prevent principals in a traditional law firm structure from sharing receipts (subject to the provisions of s33 of the Legal Profession (Solicitors) Rule 2007), an incorporated structure allows for more capital-raising opportunities and allows non-ALP staff, family members, clients and other investors to own a share of the practice; allows more flexibility in motivating and retaining staff; allows for easier funding of lawyer retirements; and alleviates the problem of older practitioners managing the business with short-term financial objectives;
* equity holders can contribute capital at different times;
* different classes of shares can be issued, as well as share options;
* shares are easily bought/sold/transferred;
* an ILP can reduce share capital by way of a share buy back;
* shareholders need not hold shares personally, allowing for income and asset protection, as well as potential tax savings;
* company tax rate (30 per cent instead of personal tax rates of up to 46.5 per cent);
* employees benefit from favourable tax, superannuation and redundancy pay arrangements;
* ability to retain rather than distribute profits (which will be taxed at the company rate while retained);
* broader knowledge/skill base from non-lawyers with complementary skills;
* improved management practices, as management can be left to those with management skills (whether directors, shareholders or employees), while lawyers focus on providing legal services;
* those contributing to the success of the business (both ALPs and non-ALPs) may be more appropriately remunerated according to their performance and may be rewarded by being offered a directorship;
* superior management options where the CEO is answerable to the board of directors, and is not impeded by individual partners;
* a company continues in existence regardless of the personal circumstances of its members or directors (whereas upon the death/retirement/withdrawal/bankruptcy of a partner, the partnership must be reconstituted, details of the ownership of the partnership’s assets must be changed etc);
* non-performing LPDs may simply be voted off the board (whereas litigation may be required to remove a non-performing partner);
* opportunity to change the culture of the law practice;
* incorporation can be used as a tool to facilitates merger with another law practice (or demerger)
* debt financing is easier, as the financier is dealing with only one entity rather than all partners.

*Disadvantages of engaging in legal practice as an ILP*

The disadvantages include:

* transfer duty payable on the transfer of the business to the company (NB according to the government, this tax will be halved in 2010 and abolished in 2011);
* additional duties for LPDs and other company officers under the Corporations Act (see ss179-197 and 588G), and the burden on LPDs under the LPA (including responsibility for the conduct of ALP employees and the suitability of other directors);
* potential conflict between the duties owed to the court, client and profession on one hand and to the company and its shareholders on the other hand, which may lead to extra pressure on LPDs (particularly in publicly listed ILPs);
* non-ALP directors, and ALP directors who were previously salaried partners, will have access to the practice’s financial records;
* possible obligation to comply (some small proprietary corporations are exempt) with the requirements of chapter 2M of the Corporations Act (Financial reports and audit) – this may involve regularly submitting to ASIC information regarding the ILP’s financial position and the remuneration of LPDs, resulting in clients and competitors having access to this information when the audited financial statements become public records;
* obligation to comply with other provisions of the Corporations Act (eg chapter 2G Meetings);
* if the ILP is floated on an Australian stock exchange, then it must also comply with the stock exchange financial reporting rules;
* costs of incorporation;
* capital gains tax issues;
* payroll tax, PAYG tax, fringe benefits tax, workers’ compensation and superannuation guarantee and employment law issues for former partners who become salaried employees of the company;
* small business concessions may not apply;
* admission and exit of equity holders, and variations in equity interests may be less flexible in a company structure than in a partnership, due to tax implications;
* necessity to comply with and manage company franking rules;
* requirement to perform self-assessment, and possible audit by the Commissioner;
* loss of status and autonomy for former partners who do not become directors; loss of collegiality; exposure to the possibility of a takeover;
* ILPs as corporate entities are not protected by the Queensland Law Society Limitation and Liability Capping Scheme, however, individual solicitors within ILPs are;
* obligation to comply with the Trade Practices Act 1974 (Cth) (which is less applicable to a partnership);
* incorporation may change the culture of the law practice;
* shareholders cannot make use of the ILP’s tax and capital losses; and
* necessity to renegotiate the practice’s banking facilities.

**Multi-Disciplinary Partnerships (MDPs)**

Contained in chapter 2, part 2.7, divisions 1, 8 and 9 of *the Legal Profession Act 2007* (Qld) (the “LPA”), which commenced on 1 July 2007. As a result, partnerships may now provide legal services in conjunction with non- legal services in Queensland (by way of a multi-disciplinary partnership (“MDP”)). This is one part of the process of creating a national legal market in Australia.

An MDP is a partnership between one or more Australian legal practitioners (“ALPs”) and one or more persons who are not ALPs, if the partnership business includes the provision of legal services in Queensland as well as other services (s.144(1)).

However, a partnership of only one or more ALPs and one or more Australian- registered foreign lawyers is not an MDP (s.144(2)).

There is nothing in the legislation to prevent an ALP from forming an MDP with a corporation. However, given that a partnership is “the relation which subsists between persons carrying on a business in common with a view of profit” (s.5(1) of the Partnership Act 1891 (Qld)), it would be prudent to consider whether the corporation would therefore be engaging in legal practice and accordingly be an incorporated legal practice (and therefore also have to comply with divisions 2-7 of part 2.7).

Certain terms are defined for the purposes of part 2.7 of the LPA (s.110). Of particular note is the term “legal practitioner partner” (“LPP”), which is defined as a partner of an MDP who is an ALP holding a principal practising certificate.

An ALP may be in partnership with a person who is not an ALP, regardless of whether the partnership business includes the provision of legal services (s.145(1),(2)).

Before an ALP starts providing legal services in Queensland as a partner in an MDP, the practitioner must give notice to the Society of his/her intention to do so.

Each LPP is, for the purposes of the LPA, responsible for the management of the legal services provided by the MDP in Queensland (s.147(1)).

Each LPP must ensure that appropriate management systems are implemented and kept to enable the provision of legal services by the MDP:

* under the professional obligations of ALPs and other obligations under the LPA; and
* so that the obligations of LPPs, and ALPs employed by the MDP, are not affected by other partners and employees (s.147(2)).

The term ‘appropriate management systems’ is not defined in the LPA. However, the view of the Society and the Legal Services Commission (‘LSC’) is that the following ten areas of sound legal practice (known as the ‘ten commandments’) need to be addressed to ensure that an ILP has appropriate management systems in place:

* **negligence** (providing for competent work practices);
* **communication** (providing for effective, timely and courteous communication);
* **delay** (providing for timely review, delivery and follow up of legal services);
* **liens/file transfers** (providing for timely resolution of document/file transfers);
* **cost disclosure/billing practices/termination of retainer** (providing for shared understanding and appropriate documentation on commencement and termination of retainer, along with appropriate billing practices during the retainer);
* **conflict of interests** (providing for timely identification and resolution of conflicts of interests, including when acting for both parties or acting against previous clients, as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies, or conducting another business, referral fees and commissions etc);
* **records management** (minimising the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving etc and providing for compliance with requirements regarding registers of files, safe custody, financial interests);
* **undertakings/orders etc** (providing for undertakings to be given, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the LSC and courts);
* **supervision of practice and staff** (providing for compliance with statutory obligations covering licence and practising certificate conditions, employment of persons and providing for proper quality assurance of work outputs and performance of legal, paralegal and non-legal staff involved in the delivery of legal services); and
* **trust account regulations** (providing for compliance with the *Trust Accounts Act* 1973 (Qld); chapter 3, part 3.3, division 2 of the LPA; and proper accounting procedures).

Each of the following is capable of constituting unsatisfactory professional conduct or professional misconduct by an LPP:

* unsatisfactory professional conduct or professional misconduct of an ALP employed by the MDP (s.148(1)(a));
* conduct of a non-ALP partner that adversely affects the provision of legal services by the MDP (s.148(1)(b)); and
* the unsuitability of a non-ALP partner to be a member of a partnership that provides legal services (s.148(1)(c)).

An LPP must ensure that all reasonable action available to him/her is taken to deal with any unsatisfactory professional conduct or professional misconduct of an ALP employed by the MDP (s.148(2)).

The *Legal Profession (Solicitors) Rule 2007* (Qld) (the “Conduct Rule”) applies to an LPP, or an ALP employed by an MDP, in the same way it applies to any other ALP (unless the rule provides otherwise).

Nothing in the LPA prevents an LPP, or an ALP employee, from sharing with a non- ALP partner receipts, revenue or other income arising from the provision of legal services (except that they must not be shared with a disqualified person).

*Advantages of engaging in legal practice as an MDP*

The advantages include:

* broader knowledge/skill base from non-lawyers with complementary skills, resulting in less risk and better quality service;
* the convenience for clients of a “one stop shop”;
* the ability of lawyers to form partnerships with corporations;
* cost savings as economies of scale reduce staff, rent and other overheads;
* a ready source of work from complementary business(es);
* ability to reward non-ALP staff (eg. accountants) by offering them partnership;
* ability to attract staff with complementary skills (eg. “rain-makers” and relationship builders) by offering them partnership; and
* less scope for communication error than where different entities are involved in a project.

*Disadvantages of engaging in legal practice as an MDP*

The disadvantages include:

* possible difficulty for non-ALP partners and employees in understanding the professional and ethical obligations of ALPs; and
* pressure from non-ALP partners to run the MDP on a more commercial basis, which could possibly conflict with the professional and ethical obligations of the LPPs and employees who are ALPs; and
* possible confusion about whether legal professional privilege applies when legal services are mixed with non-legal services.

## Regulation of the Profession in Queensland

Regulation of the legal profession in Queensland is thought to be required to inspire confidence in the profession and the administration of justice.

More information on admission is at “3.0 Admission” on page 83.

Professional negligence at common law – solicitors owe a duty of care to their clients (*Hedley Byrne v Heller*). This does not apply to barristers.

Statutory standards apply to legal practitioners – namely sections 418 and 419 of the LPA and personal misconduct.

The objects of the *Solicitors Rule 2007* are to ensure that each solicitor:

* Acts in accordance with general principles of professional conduct
* Discharges the solicitor’s obligations in relation to the administration of justice
* Supplies clients with legal services of the highest standard, unaffected by self-interest.

Certain personal misconduct will lead to disciplinary action. For example, in *Re Margolis* (1921) 112 A 478 a lawyer was struck off for promoting anarchy. In *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279, a solicitor was imprisoned for involuntary manslaughter after he ran over a motorcyclist when he was trying to rescue a woman from an assault by an intoxicated man (not the motorcyclist); the court held that this represented an act of disapproval, but that it was not incompatible with practising the law, however the court suspended his practising certificate for the period he was in jail. As such, there is no easy line which can be drawn (*Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279).

### Advertising

A person must not represent or advertise that the person is entitled to engage in legal practice unless the person is an Australian legal practitioner (*Legal Profession Act 2007* (Qld) s 25(1)).

Any such advertising has to comply with the guidelines laid down in the TPA and FTA:

* + - It can not be misleading or deceptive, etc.
    - The advertisements should not be vulgar or defamatory.

Bar Association Code of Conduct also states that the advertisements should not bring the profession or the courts into disrepute.

* Note that advertising contingency fees (no win, no fee) is outlawed, as a losing client may still have to pay administration costs, court fees and the other party’s costs. This could lead to a problem with the TPA or FTA for being misleading or deceptive or being likely to misled or deceive.

SEE ALSO: “5.7 Advertising” on page 180.

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| **Solicitors Rule – Advertising**  **36.** A solicitor must not advertise the solicitor’s expertise or practice if that advertising:  36.1 is false;  36.2 is misleading or deceptive, or likely to mislead or deceive;  Note particularly s 52 TPA and s 38 FTA!  36.3 is vulgar, sensational, or otherwise as would bring or be likely to bring a court, the solicitor, another solicitor or the legal profession into disrepute;  36.4 uses the words ‘accredited specialist’ or a derivative of those words, including the associated post-nominals (LLB, eg), unless the solicitor is an accredited specialist, in which case the accredited specialist must use those words, or a derivative of those words, in compliance with the agreement entered into by the accredited specialist with the Queensland Law Society concerning the use of those words, or derivates of those words, and the associated post-nominals;  36.5 uses the accredited specialist logo (reproduced below) except as permitted by the agreement entered into with the Queensland Law Society concerning use of the logo. |

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| **Barristers Rule – Advertising**  **124.** A barrister may advertise.  **125.** An advertisement must be factually true and verifiable and must not be of a kind that is  or might reasonably be regarded as:   1. false, misleading, or deceptive; 2. in contravention of any legislation; 3. vulgar, sensational, or otherwise such as would bring or be likely to bring a court, the barrister, another barrister or the legal profession into disrepute. |

**Current guidelines – *Personal Injuries Proceedings Act 2002* (Qld)**

**66 Restriction on advertising personal injury service**

A practitioner/other person cannot advertise personal injury services except for a publication that states the name and contact details of the practitioner or law practice, & information about the area of practice: (1)(a)

*Example of advertising that contravenes subsection (1)--*

*advertising personal injury services on a 'no win, no fee' or other speculative basis*

Maximum penalty--300 penalty units. ($3K),

and possible misconduct charge: s 66(3)

A practitioner/anyone can advertise to

* + existing clients: s 66(2)(a)(i)
  + anyone at their practice: s 66(2)(a)(ii)
  + under a court order: s 66(2)(a)(iii)

A firm can advertise on their website if the ad is limited to

* the operation of negligence and a person’s legal rights under that law: : s 66(2)(b)(i)
* the conditions under which they are prepared to provide personal injury services: s 66(2)(b)(ii)

Okay if before 18 June 2002: s 66(4) PIPA

BANNED:

* + ‘the No Win No Fee Lawyers’;
  + ‘the Sue Now Pay Later Lawyers’;
  + ‘the Home Visit Lawyers’; or
  + ‘the We Come to You Lawyers
  + ‘competitive rates’;
  + ‘free initial consultation’;
  + ‘home consultations by arrangement’;
  + ‘we can come to you’; and
  + ‘personal and thorough service’.
  + ‘serving all Queensland’;
  + ‘industry leaders’;
  + ‘over 20 years experience’;
  + ‘call our legal help line’; and
  + ‘relax - we have you covered’.

**Justice Ipp – ‘Reforms to the Adversarial Process in Civil Litigation’**

**Tute Q: *Does the legal profession need to be regulated along the lines discussed by Ipp J re Rule 11 of the US Federal Rules of Civil Procedure?***

There is a general perception that the administration of justice is unable to cope with the vast increase in litigation and injustices through unnecessary delays, excessive costs and other causes. The question arises as to whether there has been a ‘loss of faith’ in the adversarial system.

* The adversarial process = a highly complex set of interconnecting rules, developed on an ad hoc basis, each influencing the other and each of importance to the whole.

Rising

* vast, continuing increase in litigation throughout the common law world,
* increased no. of statutes, bringing more statutory actions
* increase no. of lawyers

The search for truth is largely dependent on the energy and efficiency of the lawyer in presenting the testimony on behalf of the client, as well as on lawyers acting honestly and ethically.

Mason CJ in ***Giannarelli v Wraith***:

*The duty to the court is paramount and must be performed even if the client gives instructions to the contrary… The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case;* cf ‘first and only duty to the client’ expounded by Lord Brougham

**Weakening of ethical conventions?**

* Professional rules require lawyers to act fearlessly in upholding he interests of their clients
* There is a distinction between fabricating evidence and not disclosing evidence

Changing Values

* The very strong competition between lawyers brought about by the increase in numbers, recession and the application of the free market economic theory to the profession, and this has meant a significant alteration in values
* The profession has become more and more of a business – the desire for profit dominates
* *adversarial excesses*, such as dubious delaying tactics, claims brought for tactical reasons rather than their true merit, sham defences, and unnecessary motions are frequently to be observed
* system of civil litigation creates *perverse incentives for lawyers* and then relies on judges to police litigant and lawyer behaviour through techniques like managerial judging

Neither lawyers nor clients are under an obligation to act candidly

* Practitioners must not act dishonestly regarding misleading the court, they must not assist clients in breaking the law, but parties are not ordinarily obliged to disclose material evidence and a lawyer should not advise the opposing party of the names of witnesses who might help their case.

**Legislative changes to lawyers’ duties – an American example (ties into Ipp J article)**

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| The gospel of many American lawyers is the paean of Lord Brougham – who, in the course of acting as counsel for Queen Caroline in the great litigation of the early 19th century, said:  *“An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is**his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may**bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.”* |

* In America excessive zeal on the part of lawyers has become a serious concern
* The concerns about the lowering of ethical standards have resulted in several courts altering their rules so that, by legislative force, lawyers owe expressly defined duties to the courts prevailing over their client obligations

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| --- |
| Rule 11(b) Federal Rules of Civil Procedure – Representations to Court  By presenting to the court a pleading or other paper, an attorney is certifying that to the best of that person’s knowledge, formed after an inquiry reasonable under the circumstances:  (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;  (2)the claims, defense [sic], and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension/ modification, of existing law  (3)factual contentions have evidentiary support or, likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and  (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.’ |

* A lawyer is not obligated to make the opponent’s case, to disclose client confidences, or to substitute for a judge in assessing the client’s claims
* The reasonableness of the lawyer’s conduct is measured by an objective standard

Purpose

The purpose of Rule 11 is twofold - to discourage dilatory or abusive tactics and to streamline the litigation process by lessening frivolous claims or defenses: Notes of the Advisory Committee on Civil Rules146 FRD 588.

Sanctions for Breach (Ipp, (1995) 69 ALJR 705, 730)

* prohibit reimbursement from any source
* strike out offending material
* issue an admonition, reprimand or censure.
* require participation in seminars or other educational programs.
* the payment of a fine or may refer the matter to disciplinary authorities.

**The future in Australia**

* It is arguable that lawyers’ obligations to the court and the system should be defined in specific terms so as to ensure the speedy and efficient administration of justice
* Rule 11 could be a model in Australia for legislative regulation of the conduct of lawyers
* An appropriate ethical foundation is critical to the future generation of lawyers

*Safeguards in Australia*

However, unlike Lord Brougham’s zealous approach to advocacy is not one that culturally is imbedded in the Australian legal profession. Additionally, the following legislation may already be sufficient:

* + UCCPR
  + Solicitors and Barristers Rules

***(1) UCCPR***

***JUST AND EXPEDITIOUS***

* rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules: s 5(2) UCCPR
* In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way: s 5(3) UCCPR
* The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court: s 5(4) UCCPR

**DENIALS OF FACTUAL CONTENTIONS**

**166 Denials and nonadmissions**

(3) A party may plead a nonadmission only if—

1. the party has made inquiries to find out whether the allegation is true or untrue; and
2. the inquiries for an allegation are reasonable having regard to the time limited for filing and serving the defence or other pleading in which the denial or nonadmission of the allegation is contained; and
3. the party remains uncertain as to the truth or falsity of the allegation.

(4) A party’s denial or nonadmission of an allegation of fact must be accompanied by a direct explanation

(5) If a party’s denial or nonadmission of an allegation does not comply with subrule (4), the party is taken to have admitted the allegation.

(6) A party making a nonadmission remains obliged to make any further inquiries that may become reasonable and, if the results of the inquiries make possible the admission or denial of an allegation, to amend the pleading appropriately.

(7) A denial contained in the same paragraph as other denials is sufficient if it is a specific denial of the allegation in response to which it is pleaded.

***(2) Solicitors Rules***

* Must not knowingly mislead the Ct: r 14
* Must use privilege responsibly: r 16
* Must not engaged in conduct which is misleading/dishonest/prejudicial to the administration of justice: r 30

***(3) Barristers Rules***

* + Responsible use of court process privilege: r 37
  + Not make any allegation which does not believe on reasonable grounds capable of support by evidence: r 39
  + Only cross-examine to suggest serious misconduct if they believe there to be reasonable grounds to make the suggestion: r 40(a)
  + Must make reasonable enquiries if want to suggest under r 40(a): r 42

**What is the public image of lawyers today? Is it justified?**

* ***Trustworthiness?***
* ***Money-focused?***
* ***Generally negative perceptions conveyed through media outlets***
* ***‘Rough Justice’ ‘you get what you pay for’***
* ***Lawyers cop the blame where the law needs changing (Legislature’s responsibility?)***
* ***Lack of understanding***

Initial impressions are of wealth and of status. General perception of private law firms and court rooms with little consideration of non-private roles and community legal services.

Public image of lawyers today in similar discussion to that of Kirby’s article from last week in that the nature of law has become greatly commercialised and is more about big business than it is about customer service and client contact.

Again, there are areas of the law and practice that have not been affected by this shift (for example community legal services, government departments, in-house counsel etc) but as a generalisation this move towards commercialisation is fairly justified.

Examples include:

* nature of larger firms getting larger
* global expansion of firms
* jobs of junior grads in those large firms
* time cost billing
* mixed nature of client advice
* Slater and Gordon being listed on the stock exchange

## Entry to Valhalla

The traditional concept of professionalism embraces three main attributes: special skill and learning, a principal goal of public service, and self regulation. While legal practice continues to be regarded as a profession, recent times have seen these three attributes eroded in the context of legal practice.

Competition has been seen as the means of addressing concerns over the high cost of legal services resulting from lawyers’ monopoly over legal work. Activities previously regarded as unprofessional such as advertising, contingency fees and opening up certain areas of legal work to non-lawyers are now seen as important in not only fostering competition between lawyers but also improving efficiency and accessibility to the law.

Legal practices operating in the marketplace may also now be more inclined to a commercial entrepreneurial approach than one based on providing a service to the community. There has also been public and government concern regarding the profession's inclination or ability to properly address complaints through self regulation in this competitive environment.

D Dawson, “The Legal Services Market” (1996) 5 JJA 147. (CANNOT FIND THIS FUCKING ARTICLE)

*Hanlon, “A Profession in Transition? Lawyers, the Market and Significant Others” (1997) 60 Modern LR 798.*

This paper set out to examine the issue of transformation within the UK solicitors profession. It appears to be the case, that the UK is following the route of the United States where the demarcation of two separate hemispheres is quite pronounced. The new organisational structures of many large law firms, the increasingly entrepreneurial and managerial skills required of partners and staff, the demanding nature of the corporate client, and, indeed, inter-professional links, all reflect the fact that at the large firm end of the profession the nature of professionalism has altered. These professionals no longer have control of the professional-client relationship, they are no longer evaluated on purely technical criteria and they no longer view themselves as having a social service role. Rather, to be professional in these organisations means to successfully engage the market, to identify solely with the client who is accepted on ability to pay rather than need, to manage budgets and staff, etc. These are the values of business rather than the professions, at least in traditional terms.

All of this is a long way from the supposedly antagonistic relationship which existed between the business and the professional worlds. It has been argued that the relationship between these two worlds shaped much of the twentieth century. However, in the 1990s these business values are in many respects the values of those professions which have been commercialised. This is a radically new departure in the sense that those professions, or elements of those professions, that still espouse the professional ethic of much of the post war era are under increasing pressure to change, as they are numerically replaced by the rapidly growing ‘commercialised’ professionals — such a transition is a key element in a wider social restructuring.

In contrast to the large firms, small firm lawyers experience different pressures. These, however, do not appear to be driven by client demands in the same sense as their large firm counterparts (although market collapse is obviously client driven). These professionals appear to want to retain at least elements of the older form of professionalism. For example, many wish to retain a well funded legal aid system that serves clients according to their need as much as their ability to pay and does not create a two tiered hierarchy of work within the solicitors profession. Hence they fear some of the current changes concerning legal aid reform. Likewise, these solicitors regret the loss of their sole right to practise conveyancing in the 1980s. They constantly make references to the need to protect the public and the importance of their public service ethic. These lawyers espouse a social service ethos and rhetoric and are most hostile to the managerialist values of the commercialised professional which exists in the large firm.

Professions in areas like law, accountancy and surveying, especially the largest firms, appear to be increasingly working together. They refer work to one another, they invade one anothers’ jurisdictions, they jointly tender for projects, etc. Many professionals feel that the multi-disciplinary partnership is inevitable and that it will come sooner rather than later. It has progressed so far that some firms are currently evading the spirit of the Law Society’s rules and regulations by expanding into new areas with new personnel. This is similar to how the larger firms avoided the Law Society’s restrictions on partnership size in the 1960s. It is the largest firms that are engaged in these processes as they have the resources to invest and the markets to exploit. Increasingly, the future of these practices is bound up with being able to offer as wide a range of services as possible, by having a reservoir of experience in-house, by being able to link up with other professionals for particular jobs and offer joint services, or by purchasing talent from other professions. Whichever option is used, it seems inevitable that large law firms will establish new ways of working which will involve lawyers working closely with other professionals either in the one firm or in the one network. In short, these professionals are heading towards mutual dependence. Such a transition will affect their allegiance to their professions and their professional ideology. For example, one of the main groups these lawyers work with are Big Six accountants. These accountancy firms have taken the commercialised professional ethos to a very advanced stage and it seems likely that lawyers will be increasingly influenced by this as they work in ever closer proximity to Big Six accountants. Examples of this are already emerging in the way both groups sell their services and the ‘skills’ they market.

In the light of these changes, it seems reasonable to state that the idea of a unified and homogenous solicitors profession is past its sell by date. Such a statement is given more force when one also examines the divisions which now fracture non-commercial law. Given this, it seems pertinent to ask what the role of the Law Society should be and is it possible for the one professional body to control the disparate groups within the profession? And also, if this inter- dependence does grow and develop, who is to control this new, corporate, professional service elite and how?

## Defined Terms in LPA

**Associate** of a law practice is (s 7(1)(?)(?) LPA):

* (a) an Australian legal practitioner who is:
  + (i) a sole practitioner if the law practice is constituted by the practitioner; or
  + (ii) a partner in the law practice if the law practice is a law firm; or
  + (iii) a legal practitioner director in the law practice if the law practice is an incorporated legal practice; or
  + (iv) a legal practitioner partner in the law practice if the law practice is a multi-disciplinary partnership; or
  + (v) an employee of, or consultant to, the law practice; or
* (b) an agent of the law practice who is not an Australian legal practitioner; or
* (c) an employee of the law practice who is not an Australian legal practitioner; or
* (d) an Australian-registered foreign lawyer who is a partner in the law practice; or
* (e) a person who is a partner in the multi-disciplinary partnership but who is not an Australian legal practitioner; or
* (f) an Australian-registered foreign lawyer who has a relationship with the law practice, that is a class of relationship prescribed under a regulation.

**Australian lawyer** is a person who is admitted to the legal profession under LPA (s 5(1)).

**Australian legal practitioner** is an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate (s 6(1)).

**Legal practitioner associate**, of a law practice, is an associate of the practice who is an Australian legal practitioner (s 7(2)).

**Law practice employee** means an employee of a law practice engaged in the activities associated with the practice, other than an Australian legal practitioner who is an employee of the practice.

**Lay associate**, of a law practice, is an associate of the practice who is not an Australian legal practitioner (s 7(3)).

**Law firm** means a partnership consisting of Australian legal practitioners or Australian-registered foreign lawyers (Sch 2 LPA).

**Law practice** means (Sch 2 LPA):

* an Australian legal practitioner who is a sole practitioner who is a sole practitioner; or
* a law firm; or
* an incorporated legal practice; or
* a multidisciplinary partnership.

**Legal services** is work done or business transacted in the ordinary course of legal practice (Sch 2 LPA).

**Principal**, of a law practice, is an Australian legal practitioner who is (s 7(4)(?)):

1. a sole practitioner;
2. a partner in a law firm;
3. legal practitioner director (LDP) in an ILP; or
4. legal practitioner partner (LPP) in an MDP.

# Admission

The rationale for regulation of the legal profession in Queensland is that it protects:

* clients;
* the profession; and
* the public at large.

If these objectives are to be achieved, members of the legal profession must be appropriately educated, trained and increasingly supervised.

The problem with the legal profession is that it is part of the machinery of the administration of justice, and yet the law has a part to play in supervising the activities of members of the legal profession.

As legal services become less transactional and more strategic, the structure and regulation of the legal profession has moved to some extent away from a social trustee professionalism toward an expert professionalism focusing upon the efficient delivery of services to clients.

A person who is admitted to the membership of the legal profession is held out as someone in whose competence and integrity the public can be confident. For this reason in addition to meeting academic and professional training requirements, any applicant must meet certain character-based requirements.

Generally this will mean that the person must be a “fit and proper” person to be admitted. This is something determined by the Supreme Court, taking into account various so-called “suitability matters” and any other relevant circumstance.

The chief suitability matter is that the person is of “good fame and character”. While “good fame” focuses on the person’s reputation, “good character” concerns the quality of the person, judged mainly by reference to former acts and motives. Evidence concerning honesty is particularly important.

## Who Can Engage in Legal Practice?

A person cannot engage in ‘legal practice’ unless they are an ‘Australian legal practitioner’ (s 24(1) LPA).

* An ‘Australian legal practitioner’ is an ‘Australian lawyer’ who holds a current local practising certificate, or a current interstate practising certificate (s 6(1) LPA).
  + An Australian lawyer is a person who is admitted to the legal profession by the LPA or a corresponding law (s 5(1) LPA).
* The term ‘legal practice’ is not defined in the LPA. It is left to the court’s discretion. Some examples of legal practice include:
  + Conduct of litigation in a court
  + Preparation of pleadings and other papers in relation to litigation
  + Ensuring that the appropriate procedural steps are taken in relation to litigation
  + Drawing up contracts
  + Drawing up transfers of interests in land and other property
  + Advising on legal rights and legal obligations either before or after the event
  + Some grey areas include:
    - Giving advice regarding tax liability (is it legal or purely financial advice?)
    - Use and development of resources, including land (is it advising on legal rights and duties or just planning?)
    - Family law issues, specifically rights and obligations of parents in relation to children such as custody and welfare of the child (is it legal advice or just sociological/psychological issues?)
* Penalty: 300 penalty units ($30000) or 2 years’ imprisonment (s 24(1) LPA).

Therefore, to engage in ‘legal practice’ one must:

* Be admitted to the legal profession (s 5(1)); and
* Hold a current practising certificate (s 6(1)); and
* Hold professional indemnity insurance (s 353(1) & (2)); and
* Be a contributory to the fidelity fund (s 368(1)).

## Procedure for Admission

First step is to apply to the QSC to be admitted (s 34(1) LPA). The application must be in the approved form and in compliance with the rules (s 34(2)). The QSC can consider the application however it sees fit (s 35(1)).

QSC may admit the applicant if it is satisfied that they are:

* Eligible (s 35(2)(a)(i)); and
* A fit and proper person to be admitted (s 35(2)(a)(ii).

QSC may refuse the application if not satisfied (s 35(2)(b)).

QSC can admit a person unconditionally, or on conditions the court considers appropriate (s 35(3)).

* The court has power to vary the conditions (s 36(2)(a));
* The court has power to remove a person’s name from the roll for a breach of condition (s 36(2)(b)).
  + Also, a breach of a condition can constitute unsatisfactory professional conduct or professional misconduct (s 36(3)).
* For example, if there were alcohol-induced indiscretions, admission could be granted conditional on attending AA meetings: *XY v Board of Examiners* [2005] VSC 250.

In deciding the application, the QSC may rely on a recommendation of the board under s 39 (s 35(4)). The QSC can hear and decide an application for a direction under s 32(3)(b) and give a direction to the board as the court considers appropriate (s 35(5)).

### Role of Legal Practitioners Admission Board

The board's role is to help the Supreme Court by making a recommendation about each application for admission, which can be relied on by the court (ss 35(4) & 39 LPA).

* The Board may require the applicant to give the board information or to cooperate with inquiries: s 40(1)
  + Further obligations in box below.
* The Board is entitled to appear before the Supreme Court on an application for admission (s 41 LPA)
* Legal Practitioners Admission Board is under the auspices of the QLS.

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| **S 39 LPA**  (2) The board must consider each application and, in particular, whether or not--  (a) the application is made under the admission rules; and  (b) the applicant is eligible for admission to the legal profession under this Act; and  (c) the applicant is a fit and proper person for admission to the legal profession under this Act, including having regard to all suitability matters in relation to the applicant to the extent appropriate; and  (d) there are other matters the Supreme Court may consider relevant.  (3) The board makes a recommendation to the Supreme Court about the application by giving the recommendation to the Brisbane registrar and a copy of it to the applicant. |

## Eligibility for Admission

A person is eligible for admission only if the person:

* Is a natural person aged 18 years old or more (s 30(1)(a)); and
* Has attained approved academic qualifications (or corresponding) (s 30(1)(b)); and
  + Qualifications that are approved under the admission rules for admission (s 30(2))
* Has satisfactorily completed approved PLT requirements (or corresponding) (s 30(1)(c)).
  + Legal training requirements that are approved under the admission rules (s 30(2))

Corresponding academic qualifications means academic qualifications that would qualify the person for admission to the legal profession in another jurisdiction if the board is satisfied that substantially the same minimum criteria apply for the approval of academic qualifications for admission in the other jurisdiction as apply in this jurisdiction (s 30(2)).

Corresponding practical legal training requirements means legal training requirements that would qualify the person for admission to the legal profession in another jurisdiction if the board is satisfied that substantially the same minimum criteria apply for the approval of legal training requirements for admission in the other jurisdiction as apply in this jurisdiction (s 30(2)).

If person is prima facie eligible, still need to check suitability requirements (below).

## Suitability for Admission

A person is suitable for admission if they are a fit and proper person (s 31(1)). The suitability matters in s 9 LPA must be taken into account (s 31(2)(a)), in addition to other matters the court wants to take into account (s 31(2)(b)).

Notwithstanding any suitability matter, the QSC may consider a person to be fit and proper in the circumstances (s 31(3)). If a person is a fit and proper person, there is no additional, discretionary ground to deny admission (such as political outlook, race, colour, religion, etc) (*Re B* [1981] 2 NSWLR 372).

The chief suitability matter is that the person is of “good fame and character”. While “good fame” focuses on the person’s reputation, “good character” concerns the quality of the person, judged mainly by reference to former acts and motives. Evidence concerning honesty is particularly important.

Early Consideration of Suitability

If a person thinks that they may not be fit and proper and suitable for admission, they may apply to the board for a declaration that a matter stated in the application will not, without more, adversely affect the board’s assessment of their character under the LPA: s 32(2).

(3) The board must consider the application and do 1 of the following--

(a) make the declaration;

(b) refer the application to the Supreme Court for a direction if the board considers a direction would be appropriate, and the Court may give a direction to the board: s 33(1)

(c) refuse to make the declaration.

(5) If the board decides to *refuse to make the declaration* sought--

(a) the board must give the applicant an information notice about the refusal; and

(b) the applicant may appeal to the Supreme Court against the refusal within 28 days after the day the information notice is given to the applicant.

A declaration or direction to the QSC is *binding on the board* unless the applicant failed to make a full and fair disclosure of all matters relevant to the declaration sought: s 32(4)

### Suitability Matters in Section 9

Each of the following is a suitability matter (s 9(1)(?)(?) LPA):

1. whether the person is currently of good fame and character;
2. whether the person is or has been an insolvent under administration
3. whether the person has been convicted of an offence (in Australia or a foreign country), and, if so:
   1. the nature of the offence; and
   2. how long ago the offence was committed; and
   3. the person’s age when the offence was committed.
4. Whether the person engaged in legal practice in Australia:
   1. When not admitted to the legal profession, or not holding a practising certificate, as required; or
   2. Contravening a condition on which admission was granted; or
   3. When a practising certificate was suspended
5. Whether the person has practised law in a foreign country:
   1. When not permitted to do so; or
   2. In contravention of a condition of permission
6. Whether the person is currently subject to an unresolved complaint, investigation, charge or order under a:
   1. Relevant law; or
   2. Corresponding law; or
   3. Corresponding foreign law
7. Whether the person:
   1. Is subject of current disciplinary action in another profession or occupation (in Australia or O/S); or
   2. Has, in the past, been the subject of disciplinary action that involved a finding of guilt
8. Whether the person’s name has been removed from:
   1. A local roll and has not since been restored; or
   2. An interstate roll and has not since been restored; or
   3. A foreign roll
9. Whether the person’s right to engage in legal practice has been suspended or cancelled (in Australia or O/S)
10. Whether the person has contravened a law about trust money or accounts;
11. Whether a supervisor, manager or receiver is or has been appointed in relation to any legal practice engaged in by the person
12. Whether the person is or has been subject to an under disqualifying the person from being employed by or partner of an Australian legal practice or from managing an incorporated legal practice
13. Whether the person is currently unable to satisfactorily carry out the inherent requirements of practice as an Australian legal practitioner;
14. A matter declared under an Act to be a suitability matter
    1. For example, s 133(3) of the *Criminal Organisation Act 2009* (Qld).

## Specific Problematic Behaviour Affecting Admission

### Lack of Candour and Frankness

An applicant must be candid and act with the utmost good faith in disclosing issues which are reasonably regarded as touching on whether they are a fit and proper person under s 31 LPA (*Re Bell*). The applicant’s candour (openness and honesty) in disclosing past conduct or lack thereof will affect the outcome of the admission application (*Re Davis*).

Full and frank disclosure of past behaviour shows the applicant recognises the prior conduct as dishonest and has since rectified their behaviour, which is relevant to whether they are currently fit and proper. The court expects that even ancient peccadilloes are disclosed (*Re OG* @ [123]).

The Board regards lack of candour very seriously and it seems that if the applicants disclose any prior conduct at admission, they are more likely to have their application approved than if they do not disclose it (*Re Bell; Re Liveri, Re Davis; Re H*).

The court may use the applicant’s lack of candour as a guide to the applicant’s present character. Disclosing past conduct gives the applicant the best chance of having their application approved. The lack of candour reveals certain things about an applicant’s character, that is, that they are dishonest, and allows the board to reject the application without having to consider the past conduct itself, unless such consideration is required for the assessment of the applicant’s character.

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| ***Re Bell* [2005] QCA 151**   * Bell made an application for admission as a legal practitioner * The suggestion was that the applicant had failed to disclose information which should have been disclosed and had in addition made statements and conducted himself in such a way that made him inappropriate to be admitted as a legal practitioner. * Bell had a number of circumstances in his past –   + Bankruptcy (discharged in 1995)   + 12 breaches of domestic violence orders   + Made threats to officers of the Family Court and the Federal Magistrates Court in affidavits e.g. “If this court countenances any continuation of such a travesty, there will be the most severe consequences for the officers concerned”   + Unresolved allegation of contempt of court for breaching Family Court orders   + Made scandalous public claims about the court system, saying the opposition to his admission could be traced to pro-paedophilia stance of govt   + Failed to comply with a Supreme Court order that he re-advertise his intention to be admitted   **Held**: Bell’s application for admission was refused   * Applicant must be candid and act with the utmost good faith in disclosing issues which are reasonably regarded as touching on whether the applicant is a fit and proper person under s 31 LPA * The court held that his conduct was inconsistent with being an officer of the court – to be admitted, the person must –   + Be able to distinguish between vigorous but legitimate advocacy and inappropriate behaviour (thinking any court adverse to him was persecuting him)   + Not be prone to using any means to achieve an objective, instead must show an intention to act according to the law   + Not act in contempt of court, and must follow orders of a court etc   + Not act in such a way as to undermine the court system   + Have regard for justice system * Having regard to the above, it was held that Bell was not a fit and proper person   **Comments:**  This Court has consistently affirmed the important principle that an applicant for admission as a legal practitioner must be candid and act with the utmost good faith in making comprehensive disclosure of issues relevant to any matter which might reasonably be regarded as touching on the applicant's fitness to become a legal practitioner. The obligation is closely related to the ethical duty of a legal practitioner as an officer of the Court not to mislead the Court at [5] per McMurdo P, Keane JA and Wilson J.  Mr Bell's conduct is inconsistent with the unique and indispensable functions of a legal practitioner in the administration of justice at [14] per McMurdo P, Keane JA and Wilson J.  He presently lacks proper regard for the authority of the judicial system and that he is prepared to act improperly to achieve an end which he believes is desirable at [18] per McMurdo P, Keane JA and Wilson J. |

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| ***Re OG* [2007] VSC 520**   * OG studied at Victoria University for a Bachelor of Business and a Bachelor of Laws * He submitted an assignment as part of his unit, Strategic Marketing and Planning * OG was accused by his unit co-ordinators of preparing the assignment in collusion with his friend, GL * As a result, OG and GL were awarded a mark of zero for their assignment * GL had failed the subject and had to repeat it, whereas OG passed with a grade of 51 * Following the completion of their degrees, OG and GL both undertook their Practical Legal Training course * One of the lecturers discussed the obligation of each student to disclose to the Board of Examiners any matter relevant to the question of whether the student was a fit and proper person to be admitted to practise as an Australian lawyer * GL recalls that the lecturer specifically referred to allegations of plagiarism and other incidents resulting in disciplinary action at university as examples of the sorts of matters needed to be disclosed. * GL wanted to disclose the matter, but OG said that there was no need as the incident was never referred to the University Board as a formal incident of collusion * GL disclosed the matter at admission and OG did not, OG was admitted and GL wasn’t * OG accused GL of plagiarising off him, Judges asked 3 times why he didn’t tell GL that he thought GL had copied * As part of OG’s admission, he misrepresented the circumstances that led to him receiving the zero mark. He said that he had “incorrectly approached the paper” because he “did not attend the tutorial at which the examination was discussed and therefore misunderstood the assessment requirements.” This was a misrepresentation of the facts.   HELD:   * Took into account OG’s obvious education in finding that he was lying * “All things considered, we have concluded that we should revoke the order admitting OG to practise. As we have found, he deliberately or recklessly misrepresented to the Board of Examiners the circumstances in which he came to be awarded a zero grade or mark for his second assignment. His actions, therefore, were the antithesis of a ‘realisation… of his obligation of candour to the court in which he desire[s] to serve as an agent of justice’. We say nothing of what has happened since, including his evidence in this court and his attempt to shift the entire blame onto GL by alleging that GL had copied by utilising his access to OG’s computer and also changed OG’s own assignment on that computer. It cannot be doubted that the Board of Examiners would not have granted OG a certificate if it had been aware of the misrepresentation. He should not be permitted to benefit from the fact that he managed to mislead them.”: at [125].   **Held:** Orders admitting OG to practise be revoked and that he be struck off the roll.   * OG not prepared to swear that fellow student had copied and likely that OG copied from fellow student or both colluded because assignment similarities striking. * OG’s failure to disclose for admission was seen to be dishonest * Not possible on evidence to say that either of two possibilities more probable that other however court inclined to find collusion rather than copying. * OG knew collusion suspected and mark reduced to zero for that reason and by representing mark reduction for other reasons respondent guilty of deliberate or reckless misrepresentation. * OG required to make full disclosure regarding anything which might reflect adversely on fitness and propriety to practise and candour did not include deliberate and reckless misrepresentation pretending to be disclosure therefore respondent appropriately struck off.   **Comments:**  Increasingly, there is an expectation that even ancient peccadilloes should not be left out. In the past, perhaps, the obligation was not always seen as going quite so far. But the need for honesty has never been in doubt. Admission to practise is conditioned upon an applicant having a “complete realization … of his obligation of candour to the court in which he desire[s] to serve as an agent of justice”. An applicant must at least disclose anything which he or she honestly believes should not be left out. Plainly, candour does not permit of deliberate or reckless misrepresentation pretending to be disclosure at [123] per Warren CJ, Nettle JA and Mandie J. |

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| ***Bacon***   * Denied admission on the ground that her lack of honesty concerning her role in standing bail for a prison. * The court found that the funds had been obtained from the prisoner. Bacon denied knowledge of the prisoner’s interest and alleged the moneys had been obtained as a loan from a close mutual friend.   **HELD:**   * Prepared to be untruthful and to mislead the court in pursuit of the desired end of being a barrister. * Not a fit and proper person – application for admission denied. |

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| ***Re Davis***   * Convicted of breaking, entering and then stealing. * Failed to disclose this on his application for admission.   **HELD:**   * Conviction of a crime of dishonesty of so grave a kind as breaking and entering/stealing is incompatible with the reputation and the more enduring moral quality of “good fame and character.” * To overcome the crime as a barrier to admission would be difficult in any event. But a prerequisite would be to realise the need for complete candour. * Admission refused. |

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| ***Re Lenehan***   * Committed a number of dishonest acts relating to misappropriation of money 20 years before admission whilst working as an articled clerk. * Did not disclose at admission. * Employment record for last 20 years has been respectable. * Admission had been denied in two previous attempts.   **HELD:**   * Admitted. * Present case discloses early manhood under bad influences without proper guidance and a fully adult life of seemingly correct and exemplary conduct. |

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| ***Victorian Lawyers RPA Ltd v X***   * Applicant had made false accusations of sexual assault. * Did not appear to have any appreciation of the impact of those accusations. * Did not inform the admissions authority and had misled them.   **HELD:**   * Court found her to be otherwise of good fame and character, but not a fit and proper person. |

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| ***Re Hampton* [2002] QCA 129**   * Former registered nurse applied for admission as a solicitor. * The Board received a letter in response to his compulsory advertising stating that he was unprofessional as a nurse, including massaging women’s breasts, necks, undoing their dresses etc, for which he was disbarred. * He was later charged under the *Nursing Act* and pleaded guilty in the Magistrates’ Court. He was convicted and fined, but no conviction was recorded. * On the form, "questions to be answered by applicant for admission under rule 17(1)(c)", submitted to the Solicitors' Board, the applicant accordingly answered "no" to the question: "Prior to the date of this statement have you been convicted of any criminal offence whether in Queensland or elsewhere?" * He did not disclose the unprofessional behaviour nor the conviction to the Board.   **HELD:**   * If it emerges an applicant has not, in some significant respect, been frank with the court, then the application should ordinarily be rendered doubtful at least (@ [27]). * Previous professional disbarment and of the circumstance of the applicant's concededly having acted as a professional contrary to a statutory prohibition - even though no conviction was recorded. All of those matters are potentially highly significant to the assessment of fitness to practise as a solicitor. The applicant's either having failed to appreciate that, or having determined not voluntarily to place those matters before the Board, provides further confirmation that he is not a person who should at this stage be held out by the court as fit to practise as a solicitor (@ [28]). * The applicant's reliance on the form of the question as excusing his not disclosing his acknowledged contravention of the legislation, provides yet further evidence of his lack of appropriate ethical awareness and judgment (@ [29]). * His failure to disclose his past demonstrates want of understanding of the high degree of trust which the court, of necessity, must repose in a person whom it endorses as a fit and proper person to practise the profession of solicitor. It is his want of understanding of this against the background of his past that raises present doubts about his fitness for practice (@ [37]). |

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| ***Thomas v Legal Practitioners Admission Board***   * Applicant committed 9 offences over a 3 month period involving the misappropriation of a total of $8640 of his employer’s money. * Did not disclose this fully when applying for admission.   **HELD:**   * Unfit for practise. * Fraudulent misappropriation on that scale, albeit committed six to seven years ago, suggests present unsuitability to practise in a profession in which absolute trust must be of the essence. * Counsel for the appellant pointed to a number of other relevant considerations:   + that the appellant was just 20 years of age at the time of the offences;   + that he was then subject to financial pressure;   + that the offences occurred seven years ago;   + that they constituted "the only stain on an otherwise unblemished character";   + that the appellant cooperated with the police, repaid the monies and pleaded guilty;   + that the appellant has been employed and has conducted businesses involving the handling of money subsequently, and has not succumbed to any temptation to re-offend; and   + that he has had the benefit of testimonials from others as to his good character. * It was also emphasised that, as an Articled Clerk, the appellant would be under his master's control and supervision with minimal opportunity to deal in financial matters. * However, aggregation of those plainly relevant considerations was nevertheless insufficient to outweigh the significance of the criminal activity. * Although the criminal offences were committed some years ago, the manner of the applicant's disclosure of them constitutes very recent evidence of his unsuitability to practise, for want of appreciation of the need to arm the Board with all the information relevant to the performance of its publicly important role. |

### Plagiarism

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| ***Re Liveri*** **[2006] QCA 152**   * Liveri applied for admission as a legal practitioner. * The Legal Practitioners Admissions Board opposed the application, on the basis that Liveri has not demonstrated she is fit for admission * Liveri was a student at JCU * She submitted an optional assignment in relation to the subject the Law of Trusts. There were findings against her that involved serious plagiarism, committed more than once, namely –  1. L submitted, as her own work, with only minor adjustment (omitted a few paragraphs), an article published online by an Adjunct Professor of Law at Bond University. When it was brought before the uni board she swore that she accidentally submitted the article instead of her own assignment.    1. She then asked to submit her “real” assignment, which was of very poor quality and hastily written (obviously after she got found out). 2. Administrative law assignment 3. Law of the sea assignment  * Due to her academic dishonesty and the fact that she misled them about them, she was suspended from the law firm she worked at. * Initially denied having plagiarised, on second application admitted it * The NSW Legal Practitioners Board also denied her admission as a legal practitioner. * Despite the findings of academic misconduct against them and the strong foundation for them, she maintained that she didn’t do it and refused to acknowledge its significance.   **Held:**   * The QCA said – “Her unwillingness, subsequently, to acknowledge that misconduct, establishes a lack of *genuine insight into its gravity and significance: for present purposes, where the Court is concerned with fitness to practise, that aspect is at least as significant as the academic dishonesty itself*. It could not presently be concluded the applicant is fit for admission as a legal practitioner… If and when the application does again come before the Court, the Court will need to be persuaded on appropriately cogent material that a finding of fitness is warranted. The mere lapse of time would not, without more, in a case of this overall concern, warrant the Court's concluding that fitness has been demonstrated. It is especially the applicant's subsequent attitude to the established misconduct which warrants a circumspect approach.” @ [21]. * it is inappropriate to accept to practice a person who reacts to stress by acting dishonestly to ensure his personal advancement * to be admitted must exhibit a degree of integrity which engenders in Court and in clients unquestioning confidence in the completely honest discharge of their professional commitments * Cheating so close to the time of admission in the course which qualifies you for practice is unacceptable and makes you unfit for admission.   **Comments:**  The findings against the respondent involve serious plagiarism, committed more than once. At relevant times, she was a person of mature years — 25 and 27 years old. Her unwillingness, subsequently, to acknowledge that misconduct, establishes a lack of genuine insight into its gravity and significance: for present purposes, where the Court is concerned with fitness to practise, that aspect is at least as significant as the academic dishonesty itself. It could not presently be concluded the applicant is fit for admission as a legal practitioner at [21] per de Jersey CJ, McMurdo P and Williams JA.  The mere lapse of time would not, without more, in a case of this overall concern, warrant the Court’s concluding that fitness has been demonstrated. It is especially the applicant’s subsequent attitude to the established misconduct which warrants a circumspect approach at [24] per de Jersey CJ, McMurdo P and Williams JA. |

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| ***Re AJG***   * Applicant copied the work of another student while completing the Practical Legal Training Course at Griffith * The copying was substantial copying, and the applicant failed, and passed the unit on the reattempt * While AJG admitted the academic dishonesty, he had committed it at a time when he concededly appreciated its possible effects for admission   **Held:**   * Not a fit and proper person   **Comments:**  Over the last couple of years, the court has, in strong terms, emphasised the unacceptability of this conduct on the part of an applicant for admission to the legal profession. At the last Admissions Sitting, the court indicated a strengthening of its response to situations like this on the basis adequate warning had been given per de Jersey.  Legal practitioners must exhibit a degree of integrity which engenders in the court and in clients unquestioning confidence in the completely honest discharge of their professional commitments. Cheating in the academic course which leads to the qualification central to practice and at a time so close to the application for admission must preclude our presently being satisfied of this applicant's fitness per de Jersey |

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| ***Re OG* [2007] VSC 520**   * OG studied at Victoria University for a Bachelor of Business and a Bachelor of Laws * He submitted an assignment as part of his unit, Strategic Marketing and Planning * OG was accused by his unit co-ordinators of preparing the assignment in collusion with his friend, GL * As a result, OG and GL were awarded a mark of zero for their assignment * GL had failed the subject and had to repeat it, whereas OG passed with a grade of 51 * Following the completion of their degrees, OG and GL both undertook their Practical Legal Training course * One of the lecturers discussed the obligation of each student to disclose to the Board of Examiners any matter relevant to the question of whether the student was a fit and proper person to be admitted to practise as an Australian lawyer * GL recalls that the lecturer specifically referred to allegations of plagiarism and other incidents resulting in disciplinary action at university as examples of the sorts of matters needed to be disclosed. * GL wanted to disclose the matter, but OG said that there was no need as the incident was never referred to the University Board as a formal incident of collusion * GL disclosed the matter at admission and OG did not, OG was admitted and GL wasn’t * OG accused GL of plagiarising off him, Judges asked 3 times why he didn’t tell GL that he thought GL had copied * As part of OG’s admission, he misrepresented the circumstances that led to him receiving the zero mark. He said that he had “incorrectly approached the paper” because he “did not attend the tutorial at which the examination was discussed and therefore misunderstood the assessment requirements.” This was a misrepresentation of the facts.   HELD:   * Took into account OG’s obvious education in finding that he was lying * “All things considered, we have concluded that we should revoke the order admitting OG to practise. As we have found, he deliberately or recklessly misrepresented to the Board of Examiners the circumstances in which he came to be awarded a zero grade or mark for his second assignment. His actions, therefore, were the antithesis of a ‘realisation… of his obligation of candour to the court in which he desire[s] to serve as an agent of justice’. We say nothing of what has happened since, including his evidence in this court and his attempt to shift the entire blame onto GL by alleging that GL had copied by utilising his access to OG’s computer and also changed OG’s own assignment on that computer. It cannot be doubted that the Board of Examiners would not have granted OG a certificate if it had been aware of the misrepresentation. He should not be permitted to benefit from the fact that he managed to mislead them.”: at [125].   **Held:** Orders admitting OG to practise be revoked and that he be struck off the roll.   * OG not prepared to swear that fellow student had copied and likely that OG copied from fellow student or both colluded because assignment similarities striking. * OG’s failure to disclose for admission was seen to be dishonest * Not possible on evidence to say that either of two possibilities more probable that other however court inclined to find collusion rather than copying. * OG knew collusion suspected and mark reduced to zero for that reason and by representing mark reduction for other reasons respondent guilty of deliberate or reckless misrepresentation. * OG required to make full disclosure regarding anything which might reflect adversely on fitness and propriety to practise and candour did not include deliberate and reckless misrepresentation pretending to be disclosure therefore respondent appropriately struck off.   **Comments:**  Increasingly, there is an expectation that even ancient peccadilloes should not be left out. In the past, perhaps, the obligation was not always seen as going quite so far. But the need for honesty has never been in doubt. Admission to practise is conditioned upon an applicant having a “complete realization … of his obligation of candour to the court in which he desire[s] to serve as an agent of justice”. An applicant must at least disclose anything which he or she honestly believes should not be left out. Plainly, candour does not permit of deliberate or reckless misrepresentation pretending to be disclosure at [123] per Warren CJ, Nettle JA and Mandie J. |

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| ***Richardson* [2003] TASSC 9**   * Application by Law Society of Tasmania to remove a mother, father and son from the roll of legal practitioners. * The son had applied to be admitted but did not disclose a finding of misconduct during his time at university. * University gave him written advice expressing 'its expectation that he would disclose the determination to the Court when he applied for admission'. * His mother and father moved his admission and did not disclose the matter. * Before his admission, he asked his parents what he should disclose. They told him not to disclose the academic misconduct because it was not relevant. * LST’s assertion was that all 3 of them were not fit and proper persons because of this.   **HELD**   * Application for removal from roll dismissed against all 3 of them. * Dismissed against parents because it is the applicant’s responsibility to disclose matters, not the mover of the admission. * Dismissed against son because “he was a 22 year old student and not a legal practitioner. He owed none of the duties of a practitioner and he had no experience as a practitioner. His knowledge of the law was limited. His appropriate response to the determination was to seek advice from those he thought would know and whose advice would readily be forthcoming [his parents].” (@ [85]). * Crawford J emphasised that 'all aspects of his or her past life that might be open to criticism or arguably amount to examples of imperfections of character or performance' do not need to be disclosed. (@ [80]).   **COMMENT**  Student misconduct appears, at least where the student does not believe the conduct is relevant to his character, to be characterised as simply an 'imperfections of character or performance'. This case implies that the notion of 'honesty' required by the fitness criterion may be discharged by technical compliance to the words of the statute (there was no reference to misconduct in the Act) and complete reliance on advice. It imposes no burden on the applicant to demonstrate his awareness of and commitment to the protective principle. |

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| ***Re Humzy-Hancock* [2007] QSC 34**  Re Humzy-Hancock is the most recent [sic] case in Queensland concerning an application for admission which was opposed by the Board on the basis of alleged student misconduct. The Board objected to the application on the basis of three occasions of alleged misconduct during the course of Humzy-Hancock's legal studies at Griffith University. In relation to the first incident, which involved collaboration in breach of university rules for the subject, the Law School Assessment Board imposed a penalty of failing him in the subject. In relation to the two later incidents (occurring in the same subject), the Law School Assessment Board found that allegations of plagiarism had been made out but, due to his candid disclosure, treated this as 'one charge of academic misconduct' resulting in a lesser penalty of failure in the subject and suspension from enrolment in the law program for a period of six months. On his application for admission, Humzy-Hancock revealed the incidents and action taken by the university. However, he denied that he was guilty of any misconduct; specifically, that he was not guilty of plagiarism or any dishonesty during his studies. He therefore disputed allegations that he was unfit on the basis of the dishonest character of past conduct. The question for the Court of Appeal was whether such conduct rendered the applicant unfit to practice.  McMurdo J looked at all the evidence surrounding the allegations of plagiarism and determined that:   * It was insignificant, and in any case could be reasonably explained by the other student copying his work; and * The work was of a poor quality as distinct from having an intention to pass off the work of another as one’s own; and therefore * None of the allegations of plagiarism were proved (@ [42]).   Humzy-Hancock was therefore free to be admitted as there was no misconduct to disclose. |

When taken together, *Re OG* and Re *Humzy-Hancock* demonstrate that there are two steps in the court's evaluation of honest character in application processes the applicant's honesty in revealing all prior incidents that may be taken against his or her character and the nature of any prior event in the applicant's life. This is nothing new in jurisprudence on admission to legal practice. However, these cases provide further weight to earlier jurisprudence that dishonesty is a key indicator of 'unfitness' and provide new insights into the judicial reasoning in determining honesty. In particular, the two cases confirm that any student misconduct will be a relevant matter for disclosure when applying for admission, and that the disclosure required must be honest and fulsome. This approach is based on a well-articulated concern to protect the public and a clearly defined understanding of how this is best achieved. While Richardson represents an alternative line of reasoning which adopts a softer approach, this authority appears to have little weight in the light of more recent decisions. Recent decisions demonstrate that courts in admission proceedings 'go behind' university determinations of misconduct in order to divine the true character of the applicant. This inquiry into 'intrinsic character' is based on a fulsome approach to the ethical underpinnings of professional regulation.

### Criminal Charges

Items 21, 23 and 24 of s 9A of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) obliges applicants to disclose any “contraventions” (not necessarily convictions!) of any law whether committed in Queensland or elsewhere, including convictions that have been recorded.

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| ***Thomas v Legal Practitioners Admission Board***   * Applicant committed 9 offences over a 3 month period involving the misappropriation of a total of $8640 of his employer’s money. * Did not disclose this fully when applying for admission.   **HELD:**   * Unfit for practise. * Fraudulent misappropriation on that scale, albeit committed six to seven years ago, suggests present unsuitability to practise in a profession in which absolute trust must be of the essence. * Counsel for the appellant pointed to a number of other relevant considerations:   + that the appellant was just 20 years of age at the time of the offences;   + that he was then subject to financial pressure;   + that the offences occurred seven years ago;   + that they constituted "the only stain on an otherwise unblemished character";   + that the appellant cooperated with the police, repaid the monies and pleaded guilty;   + that the appellant has been employed and has conducted businesses involving the handling of money subsequently, and has not succumbed to any temptation to re-offend; and   + that he has had the benefit of testimonials from others as to his good character. * It was also emphasised that, as an Articled Clerk, the appellant would be under his master's control and supervision with minimal opportunity to deal in financial matters. * However, aggregation of those plainly relevant considerations was nevertheless insufficient to outweigh the significance of the criminal activity. * Although the criminal offences were committed some years ago, the manner of the applicant's disclosure of them constitutes very recent evidence of his unsuitability to practise, for want of appreciation of the need to arm the Board with all the information relevant to the performance of its publicly important role. |

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| ***Re Hampton* [2002] QCA 129**   * Former registered nurse applied for admission as a solicitor. * The Board received a letter in response to his compulsory advertising stating that he was unprofessional as a nurse, including massaging women’s breasts, necks, undoing their dresses etc, for which he was disbarred. * He was later charged under the *Nursing Act* and pleaded guilty in the Magistrates’ Court. He was convicted and fined, but no conviction was recorded. * On the form, "questions to be answered by applicant for admission under rule 17(1)(c)", submitted to the Solicitors' Board, the applicant accordingly answered "no" to the question: "Prior to the date of this statement have you been convicted of any criminal offence whether in Queensland or elsewhere?" * He did not disclose the unprofessional behaviour nor the conviction to the Board.   **HELD:**   * If it emerges an applicant has not, in some significant respect, been frank with the court, then the application should ordinarily be rendered doubtful at least (@ [27]). * Previous professional disbarment and of the circumstance of the applicant's concededly having acted as a professional contrary to a statutory prohibition - even though no conviction was recorded. All of those matters are potentially highly significant to the assessment of fitness to practise as a solicitor. The applicant's either having failed to appreciate that, or having determined not voluntarily to place those matters before the Board, provides further confirmation that he is not a person who should at this stage be held out by the court as fit to practise as a solicitor (@ [28]). * The applicant's reliance on the form of the question as excusing his not disclosing his acknowledged contravention of the legislation, provides yet further evidence of his lack of appropriate ethical awareness and judgment (@ [29]). * His failure to disclose his past demonstrates want of understanding of the high degree of trust which the court, of necessity, must repose in a person whom it endorses as a fit and proper person to practise the profession of solicitor. It is his want of understanding of this against the background of his past that raises present doubts about his fitness for practice (@ [37]). * NOTE: Required to be disclosed as a suitability matter under s 9(1)(g)! |

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| ***Re Davis***   * Convicted of breaking, entering and then stealing. * Failed to disclose this on his application for admission.   **HELD:**   * Conviction of a crime of dishonesty of so grave a kind as breaking and entering/stealing is incompatible with the reputation and the more enduring moral quality of “good fame and character.” * To overcome the crime as a barrier to admission would be difficult in any event. But a prerequisite would be to realise the need for complete candour. * Admission refused. |

### General Unfitness

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| ***Cohen***   * Application to be admitted as legal practitioner * Cohen had a range of previous indiscretions including:   + Criminal history   + Bankruptcy   + Driving offences   + Company’s failure to lodge BAS statements   + Evasive and equivocal when questioned by ASIC board over his company’s actions   **Held:**   * Denied his company had been engaged in misleading conduct * Cohen not fit for practice   **Comments:**  At his mature age especially, his attitudes to these matters are a matter for considerable concern, when this court comes to assess his suitability for admission as a legal practitioner. Consistently with those attitudes, his disclosure was not initially comprehensive, leading to the Board’s not being satisfied as recently as 22 January 2008 that he had made full and frank disclosures of all suitability matters at [9] per de Jersey CJ, MacKenzie AJA and Chesterman J.  We appreciate the gravity of refusing an application for admission, but the court’s obligation to protect consumers of legal services transcends the personal interest of an applicant in cases like these at [11] per de Jersey CJ, MacKenzie AJA and Chesterman J. |

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| ***Wentworth***   * W was notorious for brining numerous legal actions. * She stated in an interview that opposition to her admission was because she had sued a number of judges, barristers and solicitors and ‘partly because I am a woman and the very male dominated legal profession doesn’t like a woman…questioning their superiority.”   **Held:**   * Court found her unsuitable for admission as a barrister. Court said that she habitually made grave allegations against people without proper foundation which was not consistent with good character. * He found that she lied & was unable to accept responsibility for any decisions that went against her and instead blamed the wrongful conduct on the part of others. |

Where a suitability matter arose when the person was young, and arose out of immaturity, the court may allow admission. However, full disclosure and evidence of restoration are important factors. In *Re Owen*, the NZ High Court admitted a man who had burglary charges at ages 25 and 27, but who turned over a new leaf at age 30, seeking admission at 38 – the court was satisfied that his character had been reformed. However, in *Frugtniet v Board of Examiners*, a person who had a raft of convictions for theft, burglary and fraud over the past 25 years (including recently) was not admitted.

Previous improprieties, even in another profession, trade or occupation, are relevant if they reflect aspects of the applicant’s character which may be pertinent to the practice of law: *Re Hampton* [2002] QCA 129. In this case misbehaviour concerning the handling of clients’ accounts is of direct relevance to the integrity expected of legal practitioners, who have a duty to account in relation to money held or handled on behalf of their clients.

## Other Matters That Need To Be Disclosed

* Alleged plagiarism/academic dishonesty at university cases – ***Re Liveri***
* Instances that exhibit dishonesty
* Whether the person is (or has been) the subject of current disciplinary action, however expressed, in another profession or occupation in Australia or a foreign country
* Whether the person’s name has been removed from a foreign roll
* Bankruptcy or other insolvency;
* Investigations by ASIC of companies associated with applicant;
* Any restrictions on applicant’s right to engage in legal practice in another jurisdiction;
* Whether an applicant is subject to a restraining order for domestic violence;
* Persistent traffic breaches
* Any other conduct that has the potential to be relevant to the admitting body’s consideration of the application, such as
  + Prior history of depression,
    - Medical history is important because there is a need to protect members of the public from that the damage that could be caused by an unsuitable person handling their affairs
    - Prolonged depression, for example, could lead to a neglect of the client which is an aspect of suitability
    - *XY v Board of Examiners* 
      * Applicant had been sexually abused and had since been subject to alcohol abuse and had attempted to self harm
      * Held that she should be admitted because her mental instability did not evidence dishonesty but could be explained by her poor mental state – she had not been charged with any criminal offences and the medical opinion surrounding her case was unanimous that she was fit to do the job.
    - Depression, whether in the past or even the present, will not of itself be a ground to refuse admission: *S v Legal Practice Board of WA* (2004) 29 WAR 173.
    - Alcoholism, which might be accepted as an ongoing problem, as to unfitness for legal practice, admission may be allowed on condition that the practitioner does not drink any alcohol and continues to attend Alcoholics Anonymous: see *XY v Board of Examiners* [2005] VSC 250.
  + Suicide attempts;
  + Unresolved contempt allegation arising out of litigation conducted by the applicant.

## Mitigating Factors

The court may consider the following mitigating factors:

* **Age at which the misconduct occurred and any subsequent redemption**
  + If the improper act was committed at a young age, and since that time the applicant’s behaviour has been redeeming, then this is likely to be a good thing.
  + *Lenehan*
    - Committed a number of dishonest acts relating to misappropriation of money 20 years before admission whilst working as an articled clerk.
    - Did not disclose at admission.
    - Employment record for last 20 years has been respectable.
    - Admission had been denied in two previous attempts.
    - **HELD:**
      * Admitted.
      * Present case discloses early manhood under bad influences without proper guidance and a fully adult life of seemingly correct and exemplary conduct.
  + *Re B*
    - Applicant had during her university days been convicted for various offense including obscene publication, trespass, damage to property and using obscene words
    - She had also published material that evidenced her defiance of the law
    - This alone would not have been enough to prevent her admission however right before admission she was a party to a dummy bail agreement where she pledged money of a prisoner pretending that it was her own
    - HELD
      * She was not admitted – Held that the question was whether a person who aspires to serve the law can be said to be fit to do so when it is demonstrated that in the zealous pursuit of political goals she will break the law
* **External stressors at time of impropriety**
  + That the applicant was subject to external stressors that are not likely to appear in the legal environment may allow for admission despite otherwise unfavourable acts.
  + *Prothonontary v Del Castillo*
    - Applicant had been tried for murder but found not guilty
    - Had lied to his solicitor and given a series of bad instructions
    - He had also lied to police
    - Rejected by ACT admission board but allowed in NSW
    - HELD
      * Conduct stemmed from an unforeseeable set of circumstances which placed extraordinary pressures on him nearly ten years ago.
  + *Re Bell*
    - Although there were external pressures, the same types of pressures would occur in legal practice, so rather than mitigating, it actually shows an unfitness to practice.
* **Lapse of time between impropriety and admission**
  + Mere passage of time would not ordinarily, without more, show a fitness to practice (*Re Liveri*).
  + Not necessarily a mitigating factor.
* **Otherwise of good fame and character**
  + The cases clearly demonstrate that even a single course of conduct, limited to a certain period and never again repeated can still impede admission (*Thomas v Legal Practitioners Admission Board*)
* **Contrition**
  + Being remorseful can only go some way to repairing prior impropriety (*Re Liveri*)
  + That the applicant cooperated with police, repaid the money and pleaded guilty is not enough to outweigh the initial impropriety (*Thomas v Legal Practitioners Admission Board*).
* **No temptation to reoffend**
  + Will be difficult to overcome the initial impropriety (*Thomas v Legal Practitioners Admission Board*).
* **Character references from others**
  + Helpful but not enough to outweigh (*Thomas*).
* **Mental illness**
  + Must be used carefully to mitigate
* **Poor health at time of impropriety (*Hope*)**
* **Deteriorating financial position due to bad health (*Hope*)**
* **Conduct occurred in isolation, uncharacteristic (*Hope*)**
* **Full cooperation with investigative/prosecuting authorities (*Hope*)**
* **Repayment of lost money (*Hope*)**

## Practising Certificates

It is an offence for a person to hold themselves out as being a legal practitioner if they do not meet the requirements of the LPA (s 24(1)/25).

Can occur where a practitioner is stuck off but continues to do legal work, or where someone who has never been admitted holds themselves out as being able to perform legal work.

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| ***Dean Phillip Bax***   * Resp. had never been admitted in QLD and had no qualifications that would otherwise entitle him to practise * Had introduced himself to a client as a solicitor from a certain firm and said that he was the 3rd ranking person in the firm, that he would make partner but that the only thing holding him back was that he had not completed the practice management course * Tribunal didn’t have enough to charge on the above allegation but found various other oral instances where such representations were made and agreed that the abovementioned impression was intended * The tribunal cautioned firms to be vigilant in relation to stationery and other documents which could imply that clerical and paralegal staff were lawyers. |

In order to practice as a solicitor <insert name of party> must have the following:

1. A practising certificate
   1. Issued from the Law Society (if a solicitor); OR
   2. Issued from the Bar Association (if a barrister)
      1. If the solicitor has been **admitted to practise in another jurisdiction** but not QLD they may:
         1. Practise in QLD anyway without the need to acquire a local practising certificate – **S74 LPA**
         2. Apply for a local practising certificate
            1. Means they do not have to go through the formal process of a QLD admission

At the discretion of those issuing the certificates

NB that under s46(3) that the holder must not hold another practising certificate, or an interstate practising certificate that is in force during the currency of the local practising certificate

* + 1. **If the solicitor has been admitted to practise in a foreign jurisdiction** then **part 2.8 of the LPA** outlines what is required for that practitioner to be allowed to practice in Australia essentially
       1. The lawyer, if considered to be an Australian registered foreign lawyer, can only provide a limited number of services such as:
          1. Doing work in relation to the law of the foreign country
          2. Appearances for arbitration purposes
          3. Appearances for mediation/conciliation purposes
          4. A proceeding before a body, other than a court , being a proceeding where the body concerned is not required to apply the rules of evidence
       2. **S167(2)** states that nothing in part 2.8 of the LPA authorises an Australia-registered foreign lawyer to appear in any court, except on the lawyers on behalf, or to practise Australian law in this jurisdiction.
          1. May advise on foreign law if it’s incidental to the practice of their foreign law **(167 (3)(a))**
          2. The advice in relation to Australian law is coming from an Australian lawyer who is not an employee of the foreign lawyer **(s167(3)(b))**
       3. **s177** allows for foreign registered lawyers to be registered as such in Australia
          1. Their practising certificates also last for a period of one year but the lawyer is not considered to be an officer of the Supreme Court
          2. A foreign registered lawyers is till required to have professional indemnity insurance **(s175)** and to pay fidelity cover **(s176).**

Must hold professional indemnity insurance (s 353 LPA).

Must contribute to the fidelity fund at the end of each financial year (s 368(1) LPA).

Suitability matters for continued holding of a practising certificate include those listed above, and in addition:

* Whether the person obtained an Australian practising certificate because of incorrect or misleading information (s 46(2)(a));
* Whether the person has contravened a condition of an Australian practising certificate held by the person (s 46(2)(b));
* Whether the person has contravened a relevant law or a corresponding law (s 46(2)(c));
* Whether the person has contravened
  + An order of a disciplinary body or the Supreme Court (s 46(2)(d)(i));
  + An order of any other disciplinary body (s 46(2)(d)(ii));
* Whether failed to pay an amount liable to pay (s 46(2)(e));
* Whether the person contravened a provision about professional indemnity insurance (s 46(2)(f)).

Even though a practitioner has these suitability matters, they may still have their practising certificate renewed (s s 46(3)).

If a matter was disclosed in the person’s application for admission and decided not to be sufficient for refusing admission, the matter cannot be taken into account for refusing to grant or renew or for suspending or cancelling a practising certificate (s 46(4)).

Practising certificates must be renewed annually at the end of each financial year (s 47(1)). If for some reason the renewal doesn’t come through by 1 July, then it remains in force until:

* The authority renews or refuses to renew the certificate (s 47(3)(a)(i)); or
* The application is withdrawn (s 47(3)(a)(ii)); or
* The certificate is suspended or cancelled (s 47(3)(a)(iii)).

Once renewed, it is backdated to 1 July.

Annual renewal of practising certificates carries with it an ongoing obligation to disclose any matters which might bear on the application!

1. To be renewed the following conditions must be met **(s49(2))** 
   1. a) in the case of a **lawyer who is not an Australian legal practitioner** at the time of making the application—
      1. (i) the lawyer reasonably expects to be engaged in legal practice solely or principally in this jurisdiction during the currency of the certificate or renewal applied for; or
      2. (ii) if subparagraph (i) does not apply to the lawyer or it is not reasonably practical to decide whether it applies to the lawyer—the lawyer’s place of residence in Australia is this jurisdiction or the lawyer does not have a place of residence in Australia; or
   2. (b) in the case of a **lawyer who is an Australian legal practitioner** at the time of making the application—
      1. (i) the jurisdiction in which the lawyer engages in legal practice solely or principally is this jurisdiction; or
      2. (ii) the lawyer holds a current local practising certificate and engages in legal practice in another jurisdiction under an arrangement of a temporary nature; or
      3. (iii) the lawyer reasonably expects to be engaged in legal practice solely or principally in this jurisdiction during the currency of the certificate or renewal applied for; or
      4. (iv) if subparagraphs (i), (ii) and (iii) do not apply to the lawyer or it is not reasonably practical to decide whether subparagraph (i), (ii) or (iii) applies to the lawyer—the lawyer’s place of residence in Australia is this jurisdiction or the lawyer does not have a place of residence in Australia.

It is possible to get admitted without making full disclose of certain facts and for those facts, upon their being discovered at a later date, leading to the practitioner’s removal from the roll.

**EXAMPLES**

**Re Davis**

* Appellant failed to disclose his conviction for breaking, entering and stealing 12 years earlier
* The HC unanimously ruled that the appellant should be stuck off
* He had sourced certificates of character from two solicitors and had not made that disclosure and had then gone on to use those certificates to the board
* The court stated it is not necessary to disclose everything you have ever done in your entire life but that matters such as this were so crucial that a failure to disclose them reflected poorly on the person’s character

**Prothonotary of the Supreme Court of New South Wales v Tatar**

* Supreme court of New South Wales removed from the roll a lawyer who had not disclosed , upon his admission, two recent convictions for fraudulent application for credit cards, one of which had been quashed
* He also failed to disclose that subsequent to admission he was convicted of multiple charges relating t forgery of documents ad the opening of fictitious bank accounts
* HELD that such actions demonstrated a basic failure to appreciate the standards of behaviour required of a legal practitioner

### Principal Level Practising Certificates

Unrestricted principal practising certificates are issued to all principals in law practices. Principals must satisfy the Practice Management Course requirements and must be covered by professional indemnity insurance in accordance with the Indemnity Rule.

Restricted principal practising certificates are issued to those principals who have not completed the required period of supervised legal practice. A restricted principal practising certificate cannot be issued to a sole practitioner.

Limited principal practising certificates are issued to some classes of principals with certain conditions attached (for example, the principal solicitor in a community legal service).

**Principal**, of a law practice, is an Australian legal practitioner who is (s 7(4)(?) LPA):

1. a sole practitioner;
2. a partner in a law firm;
3. legal practitioner director (LDP) in an ILP; or
4. legal practitioner partner (LPP) in an MDP.

*Practice Management Course*

Practitioners (admitted in Queensland after 17 December 1988) who intend to practise as principals are required to successfully complete the QLS Practice Management Course prior to being issued with a principal practising certificate. This course offers practitioners the opportunity to expand their managerial skills and assist them to move more easily through legal practice to the role of principal.

The aim of the Practice Management Course is not to exclude practitioners from the right to practise but to ensure that solicitors who become principals are better prepared to run their practice efficiently and effectively. With four units covering Trust Accounting, Professional Standards, Management and Risk Management the Practice Management Course is also a great professional development tool for practitioners who are just wishing to explore their future options - and it also attracts 10 CPD points (including all of the compulsory core units).

Practitioners can enrol for the Practice Management Course at any time throughout the year. Upon enrolment they are then issued with their course login details and can start work on the modules at any time as this is a self-paced course.

Candidates are urged to allow for approximately 80 hours of online coursework before they attend at their nominated tutorial date. The tutorial date in effect becomes the last day of your course and it is a requirement that you will have completed all materials before your tutorial.

*Professional Indemnity Insurance*

Every Law Practice in Queensland must hold professional indemnity insurance.

QLS established Lexon Insurance Pte Ltd (Lexon) (formerly QLS Insurance) in 2001, which has helped protect solicitors from rises in PII premiums of up to 1,000% as seen in other professions.

QLS is exempt from the requirement to hold an Australian Financial Services Licence under the *Corporations Act 2001* (Cth) in relation to the operation of the Professional Indemnity Insurance Scheme and this Scheme is not regulated under the *Insurance Act 1973* (Cth).

Lexon is exempt from the requirement to hold an Australian financial services licence under the *Corporations Act 2001* (Cth) in respect of the financial services provided in this jurisdiction and is regulated by the Monetary Authority of Singapore under Singaporean law, which differ from Australian laws.

# Duties Owed to the Client

The duties owed to the client are either contractual, tortious, fiduciary, statutory or flow from the ongoing loyalty owed by a practitioner to a client. Traditionally, solicitors (but not barristers) have had a contractual relationship with their client and traditionally barristers have been immune from liability for negligence for the way in which they have conducted litigation.

## Contracts for Legal Services and Fees

Traditionally, the arrangements between a client and a solicitor have taken the form of a contract and it has been for the parties to determine what its terms should be. This led to a widespread community perception that lawyers charge too much and this makes access to the legal system too costly. A contract for legal services is a contract for the whole amount. Once an agreement on the provision of services has been agreed upon between solicitor and client, the relationship is contractual (*Underwood, Son and Piper v Lewis*[1894] 2 QB 306). The contract is entire, and is supposed to run from the beginning of the action to the practitioner bringing the action to a close. The contract does not have to be performed where there is action on the part of the client to absolve the solicitor from further performing the contract (*Underwood*).

However, under Part 3.4 of the LPA, there is a new costs disclosure, billing and assessment regime.

**Prior to Acting**

Under s 308 of the *Legal Profession Act* 2007 (Qld), a law practice ***must disclose to the client*** the following matters:

* The basis on which legal costs are ***calculated*** (s 308(1)(a));
* The ***client’s right*** to (s 308(1)(b));
  + Negotiated the costs agreement;
  + Receive a bill;
  + Request an itemised bill after a lump-sum bill;
  + Be notified under s 315 of any substantial change.
* An ***estimate*** of legal costs if practical or a range of estimates with an explanation of variables effecting the cost (s 308 (1)(c));
* Details of the ***intervals of billing*** (s 308(1)(d));
* Rate of ***interest*** on overdue bills (s 308(1)(e));
* If ***litigious***, the ***range of costs*** that may be recovered if successful and the range of costs that they may be liable for if unsuccessful (s308(1)(f));
* Right to ***progress reports*** under s 317 (s 308 (1)(g));
* Who to contact to ***discuss legal costs*** (s 308(1)(h));
* Avenues to ***dispute costs***, including time limits (s308(1)(i));
* The ***relevant law*** as to costs (s308(1)(l)).

Some of these (1 (b)(i)-(iii), (g), (i), (j) & (l)) may be discharged by using Form 1 of the *Legal Profession Act* 2007 (*Legal Profession Act* 2007 (Qld) s 308 (5)).

All disclosure under s 308 must be made in writing as soon as practicable after the practice is retained (LPA s 310 (1)).

NOTE: Barristers’ fees must be reasonable (r 118 – 123 BR).

Disclosure is not required if:

* Total legal costs are less than $1500 (s 311 (1)(a));
* The client has received a disclosure from the practice in the last 12 months (s 311 (1)(b)(i));
* The client has agreed in writing to waive the disclosure (s 311 (1)(b)(ii));
* The law practice decides on reasonable grounds that having regard to previous disclosures, further disclosures are not warranted (s 311 (1)(b)(iii));
* The client is (s 311 (1)(c)):
  + A law practice or Australian legal practitioner;
  + Public company or large proprietary company within the meaning of the corporations act;
  + A financial services licensee within the meaning in the corporations Act
  + A liquidator, administrator or receiver;
  + A partnership carrying on professional services with more than 20 partners;
  + A proprietary company for the purpose of a joint venture, where any of the shareholders is a person who disclosure is not required;
  + An unincorporated association where one or more members are of a type that do not require disclosure and one or more members are of a type that requires disclosure, and all members have indicated that they waive their right to disclosure;
  + A minister of the Crown;
* The legal costs have been agreed through a tender process (s 311 (1)(d));
* The client will not be required to pay costs (s 311 (1)(e));

**Settlement**

Before a law practice executes a settlement, it must inform the client of:

* A reasonable estimate of the legal costs that the party will be required to pay, including the costs of the other party (s 312 (1)(a)):
* A reasonable estimate of the costs likely to be recovered from another party (s 312 (1)(b));

**Contingency Fees prohibited**

A law practice cannot enter into a costs agreement where the costs payable is calculated in accordance with the value of any settlement, or take any interest in the settlement (LPA s 325).

**Void cost agreements**

A cost agreement that contravenes division 5 of part 3.4 of the Legal Profession Act is void (LPA s 327).

**Disbursements and Miscellaneous Expenses**

* NOTE from LSC on fees:
  + Only charge for actual outlays not for undisclosed markups or surcharges such as:
    - Client registration fees
    - File opening, closing, archive or retrieval fees
    - In-house stamping or Citec administration fees
    - Professional indemnity insurance
    - Settlement fees where no agent used
    - Stationery, printing, email charges
  + When charging, the practice must disclose:
    - The amount of the markup in % or $
    - In plain English
    - Not bury the disclosure in “fine print”
  + If there are charges to a service company where the practice or its associate has an interest, need to disclose this to client
    - Eg where company owned by spouse or family member

**Setting Aside Costs Agreements that are not Fair and Reasonable**

1. The Supreme Court can set aside costs agreements which are not fair and reasonably under **s328 LPA** (This section gives a list of things that the court must consider when setting an agreement aside).
   1. **Fair and reasonable** is defined in *Brown v Talbot and Oliver* to mean fair and reasonable of a costs agreement having had regard to 
      1. The circumstances of its creation
      2. If the terms themselves are unreasonable
      3. If it agreement in its effect upon the client is unreasonable
2. **Time costing**
   1. Where practice just charges a flat hourly fee and does not discriminate between the kind of work being done.
   2. This kind of charging does leave the practice open to a finding that their agreements are unreasonable
   3. It is seen as being inefficient as it rewards those who are slow and unfair in that it provides an incentive for lawyers to undertake unnecessary work
3. **Conditional Agreements (no win no pay agreements)**
   1. These are ok so long as they meet certain requirements
      1. **Clyne v New South Wales Bar Association**
         1. So long as there is no bargain with the client to take a share of the proceeds, he does not commit a wrong of champerty or maintenance
         2. Where a solicitor agrees only to be paid for disbursements or out of the amount awarded or where there is nothing awarded, to bear the loss on himself, and that is made clear, then again it is not a wrong
         3. To hold otherwise, in either of these cases, would be against the public interest
      2. Also so **Baker v Johnson** which dealt with a no win no fee system
         1. In this case DCJ McGill held that in for something to be considered a “win” for the client, the client must actually be able to take away something
         2. So in circumstances where the costs outweigh the award then its difficult to categorise it as a win for the client
   2. **S323(3)** outlines the requirements for a valid conditional costs agreement
      1. There are some exceptions for sophisticated clients which are set out in **s323(4)**
4. **Up lift fees are allowed** 
   1. Uplift fees are defined in section 300 of the LPA
      1. Additional legal costs, excluding disbursements, payable under a costs agreement on the successful outcome of the matter to which the agreement relates
      2. Almost like getting a cash bonus if the outcome is good
      3. There are obviously some get factors which govern disclosure of these costs to the client which are outlined in section 300
         1. **Council of the Qld Law Society Inc v Roche** 
            1. McMurdo warned that these fees must not go beyond hat is reasonable or a solicitor to charge in these circumstances
5. **Contingency fees are not allowed**
   1. Calculating fees on the basis that the amount payable to the law firm or any part of that amount is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.
   2. **S325(1)**
6. **Undisclosed outlays and disbursements are not allowed**
   1. Outlays and disbursements are the amounts that have actually been paid out on the clients behalf by some other person or entity
   2. A law practice cannot charge a client for its overheads
   3. Examples of things you cannot charge for include **(Council of the Queensland Law Society Inc v Roche)** 
      1. Making phone calls that are unanswered
      2. Putting an appointment in a diary
      3. Making phone calls and leaving a message
      4. Searching for documents and files in the firms possession that were unable to be located readily
      5. Arranging accommodation for counsel

**Recovering costs once an agreement is set aside**

See s328(4)

* If a costs agreement is set aside for lack of fairness or reasonableness this does not prevent the lawyer from recovering any costs
* If a costs order is set aside the Supreme Court can make an order that details what needs to be paid for the services the subject of the agreement which has been set aside
* In determining the amount to be paid the Court is entitled to consider the following (which is not exhaustive):
  + The advertised prices of the practice’s costs
  + Any skill, labour and responsibility displayed on the part of the legal practitioner responsible
  + The complexity of the matter
  + Circumstances in which the work was done
  + Time within which the work was done

### Overcharging

The charging of excessive legal costs is capable of constituting unsatisfactory professional conduct or professional misconduct. A solicitor has been struck off the roll for overcharging (*Baker*).

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| ***Baker v Legal Services Commissioner* [2006] QCA 145**   * Offensive and insulting language held to amount to unprofessional conduct * Court preserved findings of legal practice tribunal that conduct in respect of the first three clients held to constitute professional misconduct. Each of the client retainers were made expressly on the footing of “no win no fee”.   **First Client - Mr Nutley**   * The first charge against the practitioner concerned a retainer received from Mr Keith Nutley. * He had previously consulted a firm of solicitors, about a claim against his former medical practitioner Dr Sykes. On the strength of medical advice, those solicitors recommended that he abandon the claim on the terms of settlement offered by Dr Sykes. Mr Nutley consulted the practitioner for a second opinion. * The practitioner was provided with a copy of the medical advice, but was nevertheless optimistic about Mr Nutley’s prospects of success in the action * Further medical advice sought essentially confirmed the prior advice. On the strength of this opinion, counsel advised that the prospects of success in the action were “virtually nil”. The action eventually settled on the same basis as previously offered. Practitioner claimed he had incurred a substantial amount in the way of professional costs which it was then asserted Mr Nutley was liable to pay. * On construction of the retainer the fees claimed were not owing. The practitioner denied authorising the account being sent to the client. However, it was established in cross-examination that in fact the practitioner had written on a draft copy in identical terms “this is fine”.   **Second Client – Mrs Jorgensen**   * Mrs Jorgensen was prevailed on by an employed solicitor of the firm to retain the firm in an action against her employer arising out of a workplace injury sustained in 1995. * A week before trial the claim was settled on 6 March 2000 on terms that the insurer reimbursed $9,324.23 to WorkCover and paid a further $10,000 to or on account of Mrs Jorgensen. * When, in reliance on the “no win no fee” agreement, Mrs Jorgensen refused to pay, a bill of costs for $19,699.65 was rendered by the firm. * The fees claimed were not properly chargeable. An outcome could not properly be characterised within the meaning of the retainer “as a ‘win’ from the point of view of the client unless the client actually recovers something herself – i.e that the client will not have to pay the solicitor other than from the proceeds of the claim. * The firm’s advice to settle was “bad” advice, and that, in recommending to the client a settlement that was financially disadvantageous to the client, the firm was “plainly in breach of its fiduciary duty to the client”. * Partner claimed he was not involved in this file. He was, however, the partner of Baker Johnson who was designated in respect of the file and who dealt with it as shown by the bring-up notations on the file. It was “highly probable” that the decision to sue for the fees in the magistrates court and the consequent appeal to the District Court was taken with his knowledge or endorsement.   **Third Client – Ms Robertson**   * Involved as a pedestrian in a motor accident in which she sustained personal injury and property damage about which she consulted the firm, whom she retained. * She filled in a questionnaire and signed a client agreement concerning the payment of fees. Essentially that was the only occasion on which she consulted the firm. * She next heard from them when she received a latter advising her that they had unwittingly commenced to act for the other party & that it was not now possible for the firm to act for either party in connection with this matter. * The firm issued a plaint in the magistrates court claiming $1,829.20, representing a total of $1,312.57 for work and outlays on the personal injury claim, and $516.63 for the property damage claim * The fees here were not due and payable when the firm discovered the conflict of interest - the retainer was frustrated when the conflict of interest arose * For the few items of work for which charges might have been legitimately been made, an amount of $1300 for taking instructions on initial consultation, carrying out computerised CITEC search was grossly overstated. There was no evidence at all of any work conducted on the property claim for which $500 was charged.   **Fourth Client – Mrs Hajistamoulis**   * Issue was whether practitioner failed to adequately supervise a solicitor who had written a letter responding to the law society in which it was falsely claimed that the client retainer was not on a “no win no fee” basis. * On any view of it, the conduct of the firm in the matter was misleading and deceptive. * If either of the partners of the firm was guilty of a failure to adequately supervise it was, on the evidence not the practitioner but Mr Johnson * In the case at least of a firm with only two or a few partners like Baker Johnson, the excuse that it was the other partner who dealt with a complaint from the Law Society will not be so readily accepted hereafter. * A system will have to be instituted in such firms to ensure that something as serious as a complaint having the potential to produce a charge against a member of the firm is considered by all partners of the firm before a response to it is sent.   **Conclusion**   * It is accepted that the criterion by which professional misconduct falls to be judged is whether the conduct violates or falls short of the standard of professional conduct observed or approved by members of the profession of good repute and competency: Adamson – Now not applicable * It is also accepted that the sanction for violation is not intended to punish but is designed for the protection of the public and to maintain confidence in the profession in the estimation of the public and of the profession as a whole. * In determining the sanction to be applied the Tribunal or Court is entitled to take account of the persistence with which the conduct has been pursued and the degree of candour displayed by the practitioner in the course of the disciplinary hearing. * He has an unduly aggressive response to clients who fail to pay what he conceives is due to the firm irrespective of the reservations of other practitioners around him. * The culture that emerges is that a claim for fees is made, and, if not immediately paid and irrespective of the reason why it is not, it is then remorselessly pursued and the amount is escalated on each occasion when a further account or bill for the same matter is sent to the client. * The clients were all in poor financial circumstances and were unsophisticated persons inexperienced in legal matters. He used his authority, position and facilities as a solicitor and partner in the firm in order to overwhelm them * The practitioner showed a notable want of that form candour expected of a solicitor confronting such serious charges. He persisted before the Tribunal in assertions that were shown to be false * Order that the practitioner’s name be removed from the local roll. |

Should Baker be allowed to practise?

The fundamental principles of professional conduct for solicitors include serving the interests of justice and complying with the law. Solicitors should not engage in conduct which is dishonest or otherwise discreditable to a solicitor, prejudicial to the administration of justice or likely to diminish public confidence in the legal profession or bring it into disrepute: *Object of Solicitors Rules*. They have a fiduciary duty to always put the interests of their clients and the courts’ before their own interests.

Michael Baker clearly did not uphold these fundamental principles. He was dishonest to his clients and put his interests ahead of theirs. He attempted to use his authority and position as a solicitor and partner in a firm to overwhelm his clients into paying, all of whom were in poor financial circumstances and inexperienced in legal matters. At times he engaged in unfair conduct such as lying to an ex-client’s employer in order to obtain her personal information. Even after he was charged, “he still had a lack of appreciation of the impropriety of his conduct and its consequences for the clients, the legal profession and the public interest at large…”

Unfortunately “his behaviour was not an isolated occurrence of overcharging, but was behaviour that was systematic down to and including the hearing, which involved findings of dishonesty…”

Michael Baker, through his actions, brought the legal industry into disrepute and has undermined public faith in solicitors. He continually showed little regard for the fundamental principles of professional conduct, and the extent of his misconduct warrants his practising certificate being withdrawn.

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| ***Legal Services Commissioner v Towers* LPT 2005**   * The respondent was the attorney of White * White could not look after his own affairs, so the respondent was given power of attorney * The solicitor was charging $300 per hour for non-professional services, such as shopping and talking to White   **Held:**   * Overcharging White was professional misconduct – the solicitor was taking advantage of White’s condition for his own benefit * The court ordered that instead of the solicitor being struck off, he should be removed and it should be annotated that he ask to be removed himself   + The solicitor had a medical condition and other personal issues   + Asking to be removed showed a degree of insight into his behaviour and the fact that it was unacceptable   + It would look favourable to him if he were to seek re-admission |

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| ***Queensland Law Society v Roche* [2004] Qd R 574**   * QLS brought two charges against Roche * Tribunal found Roche guilty of professional misconduct and suspended for 12 months   **Facts**   * Roche’s firm agreed to act for the client on a ‘no win, now fee’ basis in pursuing a claim for damages for injuries by his daughter * A retainer was signed (1996) providing payment of fees on graduated hourly rate of $250/hr for partners and personal injury specialists to $100 for paralegals * The firm could also charge for care and consideration, a supplement not to exceed 30% and it could increase its hourly rate once per year by no more than 10%, however 30 days notice needed to be given * A second retainer was executed (2000) which provided fees of $300 per hour for all employees of the firm, and a premium of 30% * The firm agreed to take on the client’s second claim at $300 per hour, but only if the client agreed to pay $300 per hour with respect to the first claim (majority of the work of the first claim had been done by paralegals at only $100 per hour)   **First Charge – Failed to discharge his fiduciary obligation to his client**   * The tribunal found that Roche had not advised the client to seek independent legal advice on the matter * The conduct of Roche did not come close to an acceptable standard for the carrying out of their fiduciary duty   **Second Charge – Gross overcharging**   * The gross overcharging was in particular relating to charging $300 per hour for paralegals, described as being ‘unusually high’ * Majority of the work was ‘fairly mundane nature’ including wrapping a box of chocolates and discussions about the nature of the chocolates’ which were both charged * Levying grossly excessive charges amounts to professional misconduct whether or not other charges for the work have been forgone   **Held**   * Finding of professional misconduct on both charges * Court was concerned that Roche showed a lack of contrition   **Comments**  ... a concerning feature of this respondent, distinguishing his position from that of those other solicitors, is his ***apparent lack of contrition, and the absence of an acknowledgement of his wrongdoing***. But then one must give due weight to the view of the Tribunal that the ***respondent was basically honest*** and that with the salutary lesson of this suspension behind him, he could confidently be expected to conduct himself appropriately; at [42] per de Jersey CJ  It should however be unequivocally affirmed that the respondent’s conduct ***exhibited an intolerable rapacity, and a blinkered, self-serving approach to the discharge of his fiduciary duty***. That he has avoided being struck off in no degree diminishes proper recognition of the reprehensible character of his professional misconduct; at [43] per de Jersey CJ  In light of the clear statements made by the Court in this case, practitioners who continue to breach their fiduciary duty by placing their own and their firm’s interests before those of clients, importuning them to enter into costs agreements charging exorbitant fees, whether or not in speculative cases, can expect heavier deterrent penalties for their professional misconduct; at [57] per McMurdo P |

## Competence and Diligence

Solicitors should serve their clients competently and diligently. They should be acutely aware of the fiduciary nature of their relationship with their clients, and always deal with their clients fairly, free of the influence of any interest which may conflict with a client’s best interests. Solicitors should maintain the confidentiality of their clients’ affairs, and give their clients the benefit of all information relevant to their clients’ affairs of which they have knowledge. Solicitors should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.

Solicitors

A solicitor must act honestly and fairly, and with competence and diligence, in the service of a client (r 1).

* Competence = the ability to do something successfully or efficiently; scope of person’s knowledge or ability;
* Diligence = careful and persistent work or effort

A solicitor should agree to act for a client only when they can serve the client honestly and fairly with competence and diligence and can attend to the work with reasonable promptness (r 2.1).

A solicitor must not engage in conduct, whether in course of practice or otherwise, which is (r 30):

* Dishonest
* Calculated or likely to a material degree to
  + Br prejudicial to the administration of justice
  + Diminish public confidence in the administration of justice
  + Adversely prejudice a solicitor’s ability to practice according to the rules.

A solicitor must seek to advance and protect the client’s interests to the best of the solicitor’s skill and diligence, uninfluenced by the solicitor’s personal view of the client or the client’s activities, and notwithstanding any threatened unpopularity or criticism of the solicitor or any other person, and always in accordance with the law including these Rules (r 12.1)

* Must assist the client to understand the issues in the case and the client’s rights and obligations (r 12.2)
* Inform the client about any reasonably available alternatives (r 12.3)
* Advise a client in a criminal matter of any law that holds the prospect of some advantage if the client pleads guilty (r 12.4)

A solicitor must not act as the mere mouthpiece of the client or of the instructing legal practitioner and must exercise the forensic judgments called for during the case independently, after appropriate consideration of the client’s and the instructing solicitor’s wishes, where practicable (r 13.1)

* Must not act/appear for a client when it is known or becomes apparent that the solicitor will be required to give evidence material to the determination of contested issues before the court (r 13.3).

Barristers

A barrister must seek to advance and protect the client’s interests to the best of the barrister’s skill and diligence, uninfluenced by the barrister’s personal view of the client or the client’s activities, and notwithstanding any threatened unpopularity or criticism of the barrister or any other person, and always in accordance with the law including these Rules (r 16).

According to the Cab-rank principle a Barrister must a brief from a solicitor in a field in which the barrister practises or professes to practise if: *r 89*.

1. the brief is within the barrister’s capacity, skill and experience;
2. the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may, as a real possibility, prevent the barrister from being able to advance a client’s interests to the best of the barrister’s skill and diligence;
3. the fee offered on the brief is acceptable to the barrister

A Barrister must refuse to accept or retain a brief to appear if:*r 91 BR*

1. the barrister has information which is confidential to any other person in the case other than the prospective client, and –
   1. the information may, as a real possibility, be helpful to the prospective client’s case; and
   2. the person entitled to the confidentiality has not consented to the barrister using the information as the barrister thinks fit in the case;
2. the barrister has a general or special retainer which gives, and gives only, a right of first refusal of the barrister’s services to another party in the case and the barrister is offered a brief to appear in the case for the other party within the terms of the retainer;
3. the barrister has reasonable grounds to believe that the barrister may, as a real possibility, be a witness in the case;
4. the brief is to appear on an appeal and the barrister was a witness in the case at first instance;
5. the barrister has reasonable grounds to believe that the barrister’s own personal or professional conduct may be attacked in the case;
6. the barrister has a material financial or property interest in the outcome of the case, apart from the prospect of a fee;
7. the brief is on the assessment of costs which include a dispute as to the propriety of the fee paid or payable to the barrister, or is for the recovery from a former client of costs in relation to a case in which the barrister appeared for the client;
8. the brief is for a party to an arbitration in connexion with the arbitration and the barrister has previously advised or appeared for the arbitrator in connexion with the arbitration;
9. the brief is to appear in a contested hearing before the barrister’s parent, sibling, spouse or child or a member of the barrister’s household, or before a bench of which such a person is a member (unless the hearing is before the High Court of Australia sitting all available judges);

### Communication with Client

The failure to communicate effectively with clients is a major source of complaints against practitioners. The practitioner’s duty to communicate is an aspect of the overriding fiduciary duty owed by the practitioner to the client.

Practitioners should assist in their clients’ understanding of the issues involved in the matter, by explaining their rights and obligations. The level of communication required should be consistent with the client’s knowledge and sophistication (*Baker* at [32]-[34] per Moynihan J), the nature of the matter, and the level of importance the client attaches to the matter.

Solicitors

A client’s instruction should be confirmed in writing to the client unless valid reasons exist for this not to occur (r 2.2).

Who is the client?

* Whether or not a client-solicitor relationship exists falls to be determined according to the ordinary principles of contract law: *Maxwell v Chittick & Ors* and *Apple v Wily*.
* Thus, a signed costs agreement between a solicitor and a person for the provision of legal services by the solicitor or firm to or for the benefit of that individual is evidence that the individual would be a client. In the absence of a written client agreement, one needs to examine the conduct of the parties as a retainer may be implied by conduct if all essential elements of a binding contract are satisfied.
* Where the client is a corporate entity, it is possible for a solicitor to be retained by a holding company to advise about its corporate structure and the inter-relationship with its subsidiaries, but the solicitor is not necessarily in a solicitor-client relationship with any of the subsidiaries, even though the advice might affect them. The question of the existence of a retainer is to be determined by reference to the objective facts, not by the belief of the solicitor as to the companies for whom s/he is acting: *Beach Petroleum NL v Kennedy & Ors*.
* Merely providing instructions on behalf of the company is not sufficient to establish a confidential relationship towards the provider-employee: *Gainers Inc v Pocklington* (1995) 125 DLR (4th) 50). The right of a client to have the services of a lawyer of its choice should not be unnecessarily restricted: *Rakusen v Ellis, Munday & Clarke* [1912] 1 Ch 831.

Every discussion with a client, whether by telephone or in conference, should be recorded in a contemporaneous file note summarising the principal matters discussed and what action was agreed to be taken.

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| ***Legal Services Commissioner v Voll* [2008] LPT 001**   * A dispute arose as to whether a solicitor had, in fact, sent an important letter advising the clients that they needed to be at court. * The clients denied receiving the letter. * The clients sent a fax to the solicitor on 10/09 advising they would be in Sydney from 12 Sept until 02 Oct. * Solicitor said he rung the clients after receiving the fax, but there was no diary note or any other record of that phone call. The clients denied this.   **HELD:**   * The bald assertion of fact with no supporting evidence put the telephone call into a unique position in the case. * The clients were keen to progress the case so it would be highly unlikely that they’d go to Sydney if they knew they had to be in court. * Solicitor only mentioned phone call for the first time in his second affidavit. * The finding that that conversation did not occur reflects seriously on the solicitor’s credibility. * Conduct involved a substantial and consistent failure to reach or keep a reasonable standard of competence and diligence, and trust. * Amounted to professional misconduct |

### Duty and Standard of Care Owed

Where the practitioner fails to carry out the retainer, the practitioner will be liable to the client in tort for negligence, or in contract for breach of an implied term that they would perform their services with reasonable care and skill. This is analogous to the tortious duty of care (*Astley v Austrust*).

The standard of care expected is of a reasonably competent and diligent practitioner in the circumstances of the case. There may be a higher standard of care if the solicitor is specialising in a particular branch of the law, even if it does not say so in the contract/retainer (*Yates v Boland*). Failure to adhere to a published standard is evidence, though not conclusive, of a breach of the requisite standard of care.

The scope of the duty would not ordinarily extend beyond the terms of the retainer and the provision of legal advice, but not other forms of advice such as financial or investment; *Citicorp v O’Brien*.

A solicitor exercising reasonable care and skill in the context of the retainer would:

* Advise clients on all matters relevant to the retainer, so far as may be reasonably necessary;
* Carry out instructions by all proper means;
* Consult with clients on all questions which do not fall within the express or implied discretion left to the solicitor;
* Keep clients informed to such an extent that may be reasonably necessary; and
* Carry out defendants’ instructions by all proper means within a reasonable time.

*Olympic Holdings v Lochel* [2004] WASC 61 @ [167].

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| ***Citicorp Australia Ltd v O’Brien* (1996) 40 NSWLR 398**   * + - The O’Briens brought a property, and got a mortgage from Citicorp for a loan of $60,000     - The O’Briens were unable to keep up the payments and had to sell the property     - O’Briens sued Citicorp and the solicitor Eliades, for relief against each defendant     - Eliades was retained without any specific contractual stipulations in the retainer     - Mr Eliades acted as solicitor for Hooker Homes and the O'Briens on the purchase and for Citicorp and the O'Briens on the mortgage.     - They lacked economic sophistication and, in his Honour's opinion, were very strongly in need of guidance from a professional person with some insight into the nature of their business when they entered into their transaction with Citicorp.     - no evidence that the O'Briens looked to Mr Eliades to advise them about the financial wisdom of buying the house or of the finance agreement or mortgage   **HELD:**   * There was no obligation on the solicitor to provide advice outside the retainer   + - No evidence that the plaintiff looked to Eliades for financial advice in any event.     - There were no special terms in the retainer which required Eliades to provide the O’Brien with financial advice     - To require a duty would require solicitor’s to give their opinion on financial matters, which they would not be qualified to give     - solicitors, when retained to act on a purchase or mortgage for their skill in the law, have no duty to inform clients for whom they so act of their views about the financial prospects of the purchase or mortgage where they feel, or ought reasonably to feel, that there is a risk of cost to the clients, nor can the fact that a contract for sale contains special conditions making it subject to the client obtaining evidence, impose such a duty |

Duty to Third Parties

Liability to a third party might accrue where advice was given negligently and it is reasonably foreseeable that a third party might suffer loss or damage if the advice was not correct (*Hill v Van Erp*).

For example, a solicitor might be liable to a third party, the beneficiary of the deceased client’s estate (*Hill v Van Erp*). If the solicitor’s carelessness results in the loss of a testamentary gift intended to be given to a beneficiary, it is eminently fair, just and reasonable that the solicitor should be liable in damages to the intended beneficiary (*Hill v Van Erp; White v Jones*).

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| ***Hill v Van Erp* (1997) 188 CLR 159**   * Solicitor Hill, had the deceased’s husband, Van Erp, witness the will * This made the gift invalid under s 15(1) of the *Succession Act 1981* (Qld)   HELD:   * Per Brennan CJ – The duty of a solicitor is to their client, and where there was a third party interest that was consistent with those of the client, duty could be owed to third party person. * Per Dawson and Toohey JJ –applied the proximity test and said that a solicitor took on the responsibility, when drafting a will, of carrying out the client’s testamentary intentions. The duty therefore existed to the intended beneficiary, if in fact and not law only. * Per Gaudron J – The relationship of proximity existed between the intended beneficiary and solicitor, as the solicitor controlled whether or not the beneficiary would get their gift. * Per Gummow J – The relationship exists because the retainer was designed to give a financial boost to the beneficiary and the solicitor controlled the beneficiary’s ability to claim the benefit |

### Liability in Negligence

Liability in negligence arises only in relation to activities associated with the provision of legal services. Again this is subject to any particular arrangement between the parties.

Delay

The application of diligence implies that a client’s matter will be attended to promptly. Accepting, however, that no client commands the complete attention of their practitioner, failure to attend to a client’s matter in a timely fashion is framed in terms of *undue or unreasonable delay* (*Little v Ryland*). Therefore, in most cases, mere delay (other than delay leading to loss of rights or opportunity for the client) are unlikely to be negligent because the essential element of damage will be lacking. Nevertheless, delay itself may result in a complaint to the LSC and discipline.

Accepting Work Outside the Practitioner’s Field of Competence

Barristers must accept briefs within their capacity, skill and experience unless there is a valid reason not to (r 89(a)).

Solicitors should only agreed to act for a client where they can serve the client with competence and diligence (r 2.1.1).

Similar requirements in negligence (*Vulic v Bilinsky*). Damage confined to financial losses.

Loss of Opportunity

In some instances, a client’s losses are easily quantifiable. However, in situations where a practitioner’s inattention to a client’s matter results in a limitation period expiring or a claim being struck out for want of prosecution such that the client loses the opportunity of prosecuting their claim, the losses are not easily quantifiable.

In such situations that the appropriate course of action is for the client to pursue their loss through an action against the practitioner rather than by relaxation of the limitations provisions.

A lost chance to succeed in a negligence action is compensable: *Sweeney v Attwood*. A court will take into account the reasonable prospects of success, and the likely quantum awarded by a hypothetical judge.

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| ***Sweeney v Attwood* [2003] QCA 348**   * appellant was injured by a truck owned by incorporated association appellant a member of * Although it commenced proceedings on the appellant's behalf within time, it failed to give notice under s 37 of the *Motor Accident Insurance Act 1994* until a month after the expiry of the limitation period * common ground between the parties that thereby it breached the duty of care   **HELD**   * His Honour found that in respect of each of the particulars of negligence the plaintiff's prospects were poor - assessed the value of the plaintiff's lost chance at "about one third” * Damages = prospects of success, deduction for contributory negligence |

Examples of Conduct

Some examples of allegations of professional negligence against Solicitors in Queensland include:

* Failure to advise of the need to commence action within a limitation period under the Warsaw Convention 1929; ***Gaffney v Cranston McEachern & Co***
* Failure to give notice under the Motor Accident Insurance Act 1994; ***Perham v Connolly***
* Failure to make adequate enquiries as to factors relevant to quantum of damages; ***Valencia v Wlodarcyzk & Co***
* Settling a distribution of assets under the Family Law Act 1975 (Cth) for an inadequate sum; ***Luadaka v Dooley & Anor***
* Failing to advise on the availability of possible remedies under judicial review; ***Island Link Pty Ltd v Thynee & Macartney***
* Failure to advise as to the absence of guarantees with respect to the purchase of an investment unit; ***Walker v Richards & Ors***
* Failure to serve or give notice of an application for family maintenance provision in relation to the administration of an estate; ***Holdway v Acuri***

## Duty of Confidentiality

The efficient administration of justice requires that clients can fully disclose information without the fear that their lawyers will disclose information (*Esso Australia Resources Ltd v Commissioner of Taxation*), or have conflicts of interest.

The common law implies a term of confidentiality (that communication between the client and the lawyer will be kept secret and not disclosed without just cause) into the retainer (*Crowley v Murphy* (1981) 52 FLR 123).

Lawyers are fiduciaries, so a duty of confidentiality arises at common law and in equity (*Clark Boyce v Mouat*). Whilst the end of the retainer marks the end of the duty at common law, the duty in equity survives:

* This is what prevents a solicitor from acting against a former client
* In equity, there is a relationship of trust and confidence that survives the end of the retainer (*Hospital Products* per Mason J).

A practitioner owes his/her client a duty of confidence in relation to all communications between them: *Grant v Downs* (1976) 135 CLR 674. While a breach of confidence may be justified where there is a threat to life (Solicitors Rules R3), the context of such a threat must be taken into account.

Solicitors Rule 3is relevant to the duty of disclosure for solicitors.

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| **Solicitors Rule 3 - Confidentiality**  A solicitor must never disclose to any person, who is not a partner or employee of the solicitor’s law practice, any information which is confidential to a client and acquired by the solicitor or by the solicitor’s law practice during the client’s retainer, unless:   1. the client authorises disclosure; 2. the solicitor is permitted or compelled by law to disclose; 3. the solicitor discloses the information to a particular person in circumstances in which the solicitor believes on reasonable grounds that the law would compel its disclosure to that person, whether or not a client makes a claim of legal professional privilege or confidentiality; 4. the solicitor discloses the information to a particular person in circumstances in which the solicitor believes on reasonable grounds that it is necessary to disclose that information to that person for the sole purpose of avoiding the probable commission of a serious offence; 5. the information has lost its confidentiality; 6. the solicitor obtains the information from another person who is not bound by the confidentiality owed by the solicitor to the client and who does not give the information confidentially to the solicitor; or 7. in the solicitor’s opinion the disclosure of the information is required to prevent imminent serious physical harm to the client or to another person. |

**Guilty or delinquent clients**

Lies/Falsified Document

Where the client has lied or got someone else to lie/falsify documents, the solicitor must:

* + Advise client that court should be informed of lie (rule 15.1.1);
  + Refuse to take part further unless client authorises the solicitor to inform the court of lie or falsification (rule 15.1.2);
  + Must promptly inform court after authorisation given (rule 15.1.3);
  + Must not disclose to court unless given authorisation (rule 15.1.4).

Confession but maintains plea of not guilty

Where the client confesses, but maintains plea of not guilty, the solicitor can:

* + Cease to act where there is enough time for a new solicitor to be appointed, unless client insists solicitor continues (rule 15.2.1);
  + Where solicitor continues to act, the solicitor:
    - Must not falsely suggest some other person did it (rule 15.2.2(a));
    - Must not falsely suggest other person committed offence charged (rule 15.2.2(b));
    - May argue that not enough evidence to convict (rule 15.2.2(c));
    - May argue that by reason of law, client is not guilty (rule 15.2.2(d));
    - May argue that for any reason not excluded by (a) or (b), client is not guilty (rule 15.2.2(e)).

Client intends to disobey court order

Where the client intends to disobey court order, a solicitor must –

* + Advise client against it and warn of the consequences (rule 15.3.1);
  + Not advice client how to carry out course (rule 15.3.2);
  + Not inform court or opponent unless:
    - Client has consented (rule 15.3.3(a)); or
    - Solicitor believes on reasonable grounds that client’s conduct constitutes a threat to their safety (rule 15.3.3(b)).

If a client tells you a story during interviews and changes this immensely when they take the stand, practically the best way to handle this is to ask for a short adjournment immediately to try to sort out the problem.

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| ***Solicitors Rule 15 – Guilty or Delinquent Clients***  A solicitor whose client informs the solicitor, before judgment or decision that the client has lied in a material particular to the court or has procured another person to lie to the court or has falsified or procured another person to falsify in any way a document which has been tendered; ***r 15.1 SR***.   1. Must advise the client that the court should be informed of the lie or falsification and request authority so to inform the court; ***r 15.1.1 SR***. 2. Must refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie or falsification: ***r 15.1.2 SR***. 3. Must promptly inform the court of the lie or falsification upon the client authorising the solicitor to do so; ***r 15.1.3 SR*** but 4. Must not otherwise inform the court of the lie or falsification; ***r 15.1.4 SR***.   A solicitor whose client in criminal proceedings confesses guilt to the solicitor but maintains a plea of not guilty: ***r 15.2 SR***.   1. may cease to act, if there is enough time for another solicitor to take over the case properly before the hearing, and the client does not insist on the solicitor continuing to appear for the client; ***r 15.2.1 SR***. 2. In cases where the solicitor continues to act for the client: ***r 15.2.2 SR***.    1. Must not falsely suggest that some other person committed the offence charged; ***r 15.2.2(a) SR***.    2. Must not set up an affirmative case inconsistent with the confession; ***r 15.2.2(b) SR***.    3. May argue that the evidence as a whole does not prove that the client is guilty of the offence charged; ***r 15.2.2(c) SR***.    4. May argue that for some reason of law the client is not guilty of the offence charged; or ***r 15.2.2(d) SR***.    5. May argue that for any other reason not prohibited by (a) and (b) the client should not be convicted of the offence charged. ***r 15.2.2(e) SR***.   A solicitor whose client informs the solicitor that the client intends to disobey a court’s order must: ***r 15.3 SR***.   1. Advise the client against that course and warn the client of its dangers; ***r 15.3.1 SR***. 2. Not advise the client how to carry out or conceal that course; ***r 15.3.2 SR***. 3. Not inform the court or the opponent of the client’s intention unless: ***r 15.3.3 SR***.    1. The client has authorised the solicitor to do so beforehand; ***r 15.3.3(a) SR*** or    2. The solicitor believes on reasonable grounds that the client’s conduct constitutes a threat to any person’s safety; ***r 15.3.3(b) SR***. |

Barristers Rule 109 and 110 are relevant to the duty of disclosure for barristers.

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| **Barristers Rules 109,110**   1. A barrister must not disclose (except as compelled by law) or use in any way in the course of practice confidential information obtained by the barrister concerning any person to whom the barrister owes some duty or obligation to keep such information confidential unless or until: 2. the information has been published; 3. the information is later obtained by the barrister from another person who is not bound by the confidentiality owed by the barrister to the first person and who does not give the information confidentially to the barrister; or 4. the person has consented to the barrister disclosing or using the information generally or on specific terms. 5. A barrister must not disclose (except as compelled by law) or use confidential information under Rule 109(c) in any way other than as permitted by the specific terms of the person’s consent. |

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| **Rule 34 & 36 – Guilty and Delinquent Clients**  A barrister whose client informs the barrister, during a hearing or after judgment or decision is reserved and while it remains pending, that, upon an issue which may be material the client has lied to the court or has procured another person to lie to the Court or has falsified or procured another person to falsify in any way a document which has been tendered; ***r 34 BR***.   1. Must refuse to take any further part in the case unless the client authorises the barrister to inform the court of the lie or falsification; ***r 34(a) BR***. 2. Must promptly inform the court of the lie of falsification upon the client authorising the barrister to do so; ***r 34(b) BR*** but 3. Must not otherwise inform the court of the lie or falsification; ***r 34(c) BR***.   A barrister whose client informs the barrister that the client intends to disobey a court’s order must: ***r 36 BR***.   1. Advise the client against that course and warn the client of its dangers; ***r 36(a) BR***. 2. Not advise the client how to carry out or conceal that course; ***r 36(b) BR*** but 3. Not inform the court or the opponent of the client’s intention unless ***r 36(c) BR*** -    1. The client has authorised the barrister to do so beforehand; ***r 36(c)(i) BR*** or    2. The barrister believes on reasonable grounds that the client’s conduct constitutes a threat to any person’s safety; ***r 36(c)(ii) BR***. |

However, a barrister is able to show briefs to the instructing solicitor, clerical staff or pupil or to another barrister doing work as long as the barrister has reminded them of the duties of confidentiality: r 109 and 110 (Barristers Rule 111). A barrister who is shown a brief as a pupil is subject to the same duties under Rule 109 and 110 (Barristers Rule 112). See also rules 36, 109-114.

### Legal Professional Privilege Distinguished

The duty of confidentiality to the client is different from the privilege attaching to information disclosed.

The professional responsibilities of a solicitor do not cease completely when the contract ends or when the service provided to the client is complete. A solicitor owes an ongoing duty of loyalty to the client. This fundamental principle has a number of ramifications. One is the duty of the practitioner not to have a conflict of interest and the other is not to disclose confidential information. This is supported by the common law of professional legal privilege. These obligations are closely linked with the acquisition of information and its use for the purposes of providing legal advice.

Legal professional privilege attaches to:

* Confidential communications between client and legal practitioner for the purpose of obtaining or giving legal advice; and
* Confidential communications between client and legal practitioner for the dominant purpose of use in litigation

(*Commissioner of Taxation v Pratt Holdings Pty Ltd*); *r 3 Solicitors Rules*

Legal professional privilege encourages full and frank disclosure between the client and legal practitioner, supporting the public interest in the administration of justice (*Esso Australia Resources Ltd v Commissioner of Taxation*).

Reasons for Existence

The quality of legal advice and of justice administered through the judicial system largely depends on the quality of the available information. Thus there is a need for full and frank disclosure of information by the client to the legal adviser to ensure good legal advice. The client is less likely to give full and frank disclosure unless the client can be assured that his information will not be disclosed to anyone or used to benefit anyone not entitled to receive it.

Privilege assists in the administration of justice. Two general principles relating to privilege are that:

1. privilege adheres to the client and not the lawyer,
2. privilege is restricted to lawyer-client relationship

At Common Law, there are two kinds of legal professional privilege recognised: *Commissioner of Taxation v Pratt Holdings Pty Ltd and Another*

1. Legal Advice privilege
   * Attaches to confidential communications between the client and the client’s legal advisors for the purpose of giving legal advice.
   * Does not include communications with 3rd parties, only between client and legal advisor(s).
2. Litigation privilege
   * Is slightly wider – does cover third parties such as accountants and experts
   * Relates to litigation which is under way or in contemplation.

The privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers.’

Clearly, the scope of what is covered by ‘legal advice privilege’ and ‘litigation privilege’ differ. One such difference, from Kenny J in *Commissioner of Taxation v Pratt Holdings Pty Ltd and Another*:

‘... is that, unlike litigation privilege, advice privilege is not available “where one of the parties to the communication is a third party who is not the agent of the client for the purpose of the communication”: see *Mitsubishi* at 336 [9] per Batt J A. Where, as in this case, litigation is neither pending nor contemplated, communications between a person or his legal advisor and a third party (who is not the agent of either of them) are not privileged, even though the communications were made for the purpose of giving or obtaining legal advice. The law in England and New Zealand would appear to the same as that in Australia in this regard: ...’

Exceptions to Privilege

The privilege does not extend to advice sought or given in the furtherance of, or to facilitate, criminal, fraudulent or other unlawful purposes. Whether or not the lawyer was a party to, or ignorant of, those purposes is immaterial; the client’s purpose is the relevant inquiry.

Communications falling outside the privilege are not limited to those in pursuit of a crime or fraud, but extend to communications in pursuit of an illegal or improper object. In *Southern Equities Corporation Ltd (in Liq) v Arthur Andersen and Co,* Doyle C J stated (at 174) that the exception covers ‘... a range of legal wrongs that have deception, deliberate abuse of or misuse of legal powers or deliberate breach of a legal duty at their heart.’

Where the privilege is being used to help a client engage in an ‘illegal purpose’, it no longer applies (***Kearney v Attorney-General (NT)***).

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| ***Kearney v Attorney-General (NT)* (1985) 158 CLR 500**   * The administrator of Northern Territory was attempting to extend regulations over a large area, in order to prevent an Aboriginal native title claim being made over the area * In discovery, the administrator claimed that legal documents that pertained to the matter were privileged * **Held:** The documents were not protected by legal professional privilege * Legal documents that are concerned with perpetrating a deliberate use of a statutory power would be against the public interest * You must have a reason for suggesting that they relate to an illegal purpose |

Also see rules 3.4SR and 34BR. If you do not refuse to act, you could potentially become an accessory to the crime.

One of the exceptions to the general rule of client confidentiality/privilege in lawyer-client relationship (see eg *Legal Profession (Solicitors) Rule 2007,* rules 3.1-3.7, but particularly 3.2 and 3.3) involves situations where the law “permits or compels” disclosure of material which would otherwise be the subject of confidentiality or [privilege].

One example of such a situation arises by virtue of the requirement in s 67ZA(2) that reasonably based suspicions of child abuse held by persons prescribed in sub(1) be reported to a prescribed child welfare authority.

Most of the persons to whom the section applies are (or may be) lawyers. However, the majority are holders of statutory office, and, even though they may be lawyers, they are not actually in a lawyer-client relationship (eg a Registrar of the Family Court).

Section 67ZA of the *Family Law Act 1975* provides:

Where member of the Court personnel, family counsellor, family dispute resolution practitioner or arbitrator suspects child abuse etc.

(1) This section applies to a person in the course of performing duties or functions, or exercising powers, as:

(a) the Registrar or a Deputy Registrar of a Registry of the Family Court of Australia; or

(b) the Registrar or a Deputy Registrar of the Family Court of Western Australia; or

(c) a Registrar of the Federal Magistrates Court; or

(d) a family consultant; or

(e) a family counsellor; or

(f) a family dispute resolution practitioner; or

(g) an arbitrator; or

**(h) a lawyer independently representing a child's interests.**

(2) If the person has reasonable grounds for suspecting that a child has been abused, or is at risk of being abused, the person must, as soon as practicable, notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.

Subsection (h), however, includes a “lawyer independently representing a child’s interests”. Clearly, this does constitute a lawyer-client relationship of some form, even though it is a relationship created under a statute.

Consequences

Disciplinary proceedings under LPA. Liability in tort (negligence). Breach of contract.

## Duty to Prevent Conflict of Interest

The fiduciary nature of the position and status of legal practitioners with respect to their clients is the fundamental source of the obligations which rest on practitioners to:

* Maintain confidential information which they receive from clients
* Avoid conflicts

The primary sources of conflict are:

* Conflict between former and current clients
* Conflict between current clients and the practitioner
* Conflict by the practitioner acting for both parties

### Conflict Between Client and Practitioner

See page 273 of textbook for common situations of conflict (loans, sale of property between practitioner/client, gifts, other bequests).

Lawyers must not compromise their integrity by creating a personal interest that may conflict with the duty to the client: *Bonds & Securities v Glomex Mines* [1971] 1 NSWLR 879. A lawyer must not borrow any money from a client (Solicitors Rules, Rule 11.1) since generally speaking this creates a conflict between the interests of the client and the lawyer's own personal interest. A lender naturally wishes to maximise the return on the loan while a borrower wishes to minimise the amount he/she has to repay. Even where commercial interest rates are charged the borrower may feel beholden to the lender, and/or the lender may expect some special flavour in return. The appearance of conflict should be avoided: *Spector v Ageda* [1973] Ch 30.

Solicitor

A solicitor must not, in any dealings with a client:

* Allow an interest of the solicitor (or an associate of the solicitor) to conflict with the client’s interests (r 9.1.1); and
* Exercise any undue influence intended to dispose the client to benefit the solicitor (or an associate of the solicitor) in excess of the solicitor’s fair remuneration for legal services rendered (r 9.1.2); and
* Refuse to accept instructions to act or continue to act for a person in any matter when the solicitor is, or becomes, aware that the person’s interest in the matter is, or would be, in conflict with the solicitor’s own interest or the interest of an associate (r 9.2).

Barrister

A barrister must refuse to accept or retain a brief or instructions to appear before a court if the barrister has a material financial or property interest in the outcome of the case, apart from the prospect of a fee in the case of a brief under a speculative fee agreement (r 91(f)).

Cases

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| ***The Law Society of New South Wales v Harvey***   * The practitioner was a director and shareholder of a number of companies which borrowed money from the practitioner’s clients – lots of money involved and speculation in real estate * Harvey suggested his clients invest money into these companies which subsequently failed. * In some cases he made partial disclosure of his interests however, in many the clients had no idea of his interests. * Harvey failed to explain to many clients how their moneys were invested and many of his clients were inexperienced and relied heavily upon him. * Harvey failed to advice his clients to seek independent advice as to the wisdom of such investments.   **HELD: Court of Appeal**   * Found him guilty of serious professional misconduct involving many clients and large sums of money and struck him off the role of solicitors * Deliberately caused the clients affairs to be intermingled with his affairs and that, while acting for the client, he grossly preferred his own interest to those of his client * Used his position of solicitor to channel the money of his clients as the risk money in his own ventures in which he could lay little and involved substantial speculations in land. Recklessly disregarded clients interests – invested in speculative land and on terms that no reputable solicitor acting independently could have contemplated.   Chief Justice Street:  Where there is any conflict between the interests of the client and the interests of the practitioner, the duty of the solicitor is to act in perfect good faith and to make full disclosure of his interest. There must be a conscientious disclosure of all material circumstances and all material known to him relating to the proposed transaction which might influence the conduct of the client or anybody from whom they might seek advice. To disclose all that is less than material may positively mislead, for a solicitor to merely disclose that he has an interest without identifying the interests may serve only to mislead the client and to enhance confidence that the solicitor will be in a position better to protect the clients interests. The conflicts of interest may and usually will be such that it is not proper or impossible for the solicitor to continue to act and advise his client. If conflict, should take independent advice. |

***Maher v Millennium Markets***

* Solicitor retained to aid in paying back a debt of 6.5mil
* Bank had agreed to accept 5.8mil as full payment
* The purchasers of the property agreed to pay the solicitor $150,000 in commission for introducing them to the vendors – he obtained the consent of his clients to receive the fee in a Deed of Agreement dated 1 March 1999

**ISSUE**

* That’s a position of conflict – he was a making a profit from his client’s case
* For this to be ok the vendors would have had to get independent legal advice in relation to the commission giving/allowing – he they are signing it because the solicitor said so then that could cause problems even if they really were ok with it
* Then onus was on the solicitor to show that the consent was fully informed

***Maguire v Makaronis* (1997) 188 CLR 449**

* Husband and wife were clients of a solicitor
* Solicitor did not mention that he was also acting for the mortgagee
* They defaulted on the loan and the solicitors took possession of the premises

**CLAIM**

* That the mortgage was void

**HELD**

* That the mortgage should be set aside
* Solicitor had breached fiduciary duty by entering into a mortgage with the clients in the absence of informed consent (even if they would have entered into the mortgage if they had have known otherwise re the solicitors acting for the bank)
* It is not enough for a client to consent to a transaction
* The client must be fully informed.

Receiving a Benefit Under a Will or Other Instrument

There is a risk for conflict when a solicitor who draws a will for a client is a beneficiary under that will.

Rule 10 SR provides that a practitioner must decline to act on those instructions and offer to refer the person to another practitioner who is not an associate of the practitioner.

### Conflict between Current and Former Clients

Solicitor

A solicitor must not accept a retainer to act for another person in any matter against, or in opposition to, a former client: (r 4)

* for whom the solicitor or the solicitor’s current or former law practice (or the former law practice of a partner or employee of the solicitor or of the solicitor’s law practice) has acted previously and has thereby acquired information confidential to the former client and material to the matter; and
* if the former client might reasonably conclude that there is a real possibility the information will be used to the former client’s detriment.

Normally a lawyer who is possessed of confidential information will be disqualified from acting against a former client: *In re a firm of Solicitors* [1995] 1 All ER 482. However, the substance of the matter must be examined to see if there is a real risk of misuse of information: *Rakusen v Ellis, Munday & Clarke* [1912] 1 Ch 831. In the case of a “migratory lawyer” it may be possible to establish a “Chinese Wall” information barrier whereby he has no involvement in the case and gives an undertaking not to share any confidential information: *Wagdy Hanna v National Library of Aust* (2004) 185 FLR 367; Information Barrier Guidelines.

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| ***Prince Jefri Bolkiah v KPMG***   * The Ds were auditors for an investment agency managing the external assets of the govt of Brunei * P in this case was chairman of investment agency & happened to be the younger brother of the sultan of Brunei. The accountants had acted for the P in relation to litigation about his financial affairs by providing what was called forensic accounting services involving highly confidential information about him * litigation was settled & no further work done by accountants for P. * Soon after that the P was removed from position as chair of the agency & the govt of Brunei set up task force to investigate activities of the agency while he was the chair, the same firm of accountants was retained by the govt of Brunei * The firm of accountants accepted this task & set up Chinese walls w/in the organisation * The persons involved with the P’s litigation earlier on were not on the team of auditors & accountants looking at the later investigation & information barriers were created w/in the forensic accounting department itself * P brought action in England for breach of confidence & for injunction to prevent firm working for the govt of Brunei * TJ granted the injunction, discharged by ct of appeal but granted again by the House of Lords.   HELD   * One practitioner or one firm cannot act for one client & for another client at the same time where these clients have opposing interests w/out the consent of the client – inescapable conflict of interest. * Duty of confidentiality is continuing one & not dependent on contractual rel’ship – hence its relevance in this situation where dealing with former clients with a possible conflict of interest vis a vis existing or current clients. * “The court should intervene unless satisfied there is no risk of disclosure – and, for this purpose, a risk of disclosure amounted to a real risk not a mere fanciful risk” – * The Chinese Walls would not satisfy the test – still risk of disclosure. * Court looked at 5 factors  1. whether the institutional arrangements were designed to prevent flow of information between separate factors, 2. ad hoc responses to individual circumstances 3. large no of individual personnel and have to take into account their mobility and inter-accessibility within the one department of the info 4. physical separation – one development operated in different building – separation still not enough   ***Comments:***  A solicitor is under a duty not to communicate to others any information in his possession which is confidential to the former client. The duty extends well beyond from refraining from deliberate disclosure. It is the solicitors’ duty to ensure that the former client is not put at risk that confidential information may be used against him in any action at 519 per Lord Hope.  Particularity is needed if the solicitor agrees to act for a new client who has or may have an interest which may be in conflict with the former client. The former client is entitled to the protection of the court if he can show that his solicitor was in receipt of confidential information which is relevant in a matter in which the solicitor is acting against the former client’s interest for a new client. He is entitled to insist that measures be taken by the solicitor which will ensure that the client is not exposed to risk of careless, inadvertent or negligent disclosure of the information to the new client by the solicitor, his partners, employees or anyone else for whom the solicitor is responsible at 519 per Lord Hope  Whether founded on contract or equity the duty to preserve confidentiality is unqualified. It is a duty to not merely to take all reasonable steps to do so. Moreover it not merely a duty not to communicate the information to a third party, it is a duty not to misuse it, that is to say without the consent of the former client to make any use of it, or to cause any use of it to be made by others otherwise than for his benefit per Lord Millett. |

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| ***Fruehauf Finance Corporation Limited v Feez Ruthning***   * Plaintiff made application to restrain Feez Ruthning from further acting on behalf of Westpac in its action against the Plaintiff. * It asserted that because FR had previously acted for it in an earlier and entirely unrelated action, FR had confidential information relating to the operations of the Plaintiff and its manner of conduct its business which may in some way bear upon allegations in the present action. * The FR personnel who had been involved in the earlier action had no knowledge of the present action and vice versa. Westpac agreed to vary its retainer:   + to relieve FR of its ordinary duty to make full disclosure of all matters within its professional knowledge to the extent that this duty involve a disclosure of information obtained by FR in the earlier action   + Undertook not to contract any partner or person employed or formerly employed by FR who were in any way involved with the earlier action. * FR undertook:   + By the partner and solicitors who had knowledge of the earlier action, not to disclose directly or indirectly to any person without the prior consent of Fruehauf, any information acquired as a result of the earlier action   + By the partner in charge of the current action and any person in or employed by FR acting on behalf of Westpac in that action, an undertaking that they would not seek to obtain any information whatsoever from the persons involved in the earlier action   HELD: Lee J   * dismissed F’s application and held   + That there had been no communication of confidential information with FR so as to give rise to a real risk of prejudice or mischief;   + That there was no sufficient prospect of communication of any confidential information in the future so as to give rise to a real risk;   + That there was no prospect of detriment to F. * To overcome a potential prohibition (on FR acting) Westpac varied its retainer (to relieve FR of its ordinary duty to make full disclosure) and FR gave various undertakings to prevent disclosure of confidential information. * F argued that although FR legal staff were of the highest professional integrity and competence, there was a real risk that due to some chance encounter, remark, reaction etc FR employees may unconsciously use information obtained from the earlier action, to the detriment of F in the current action. * Lee J identified some competing matters of public interest:   + The right of client to obtain legal advice without apprehension that confidential information will later be disclosed and encouragement of full and frank disclosure between solicitor and client.   + The necessity that justice appear to be done and should not be subverted by a solicitor in possession of confidential information, changing sides.   + The right of a client not to have the services of a solicitor of his/her choice restricted. * Lee J acknowledged that the Court should apply a strict approach to an individual solicitor. * Lee J confirmed there is no general rule that a solicitor cannot subsequently act against a former client. * Lee J confirmed that the circumstances of each case should be considered. * Lee J confirmed that a Court should not interfere unless there be a case where mischief is rightly anticipated- ie there is a probability of mischief. * Lee J confirmed that a client may modify a solicitors client- here Westpac was prepared to do this * Lee J considered “Chinese walls” and stated Chinese walls were not necessary in the present case as there were already such walls in existence at FR. |

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| ***Mallesons Stephen Jacques v KPMG and Louis James Carter***   * Mr Carter, had been charged with serious offences arising out of his role as auditor of Rothwells. Mallesons were retained by the Commissioner for Corporate Affairs to assist in the prosecution of Carter. Prior to that, partners of Mallesons had advised Carter and another partner of KPMG in relation to aspects of certain audits which they carried out for Rothwells. * The evidence established that one of the matters discussed with Mallesons was KPMG’s apprehension that they might face criminal charges as a consequence of investigations into the 1987 and 1988 accounts of Rothwells. * The charges subsequently laid against Carter concerned the accounts for those two years. Carter & KPMG terminated Mallesons’ retainer 11 months before Mallesons were retained by the Commissioner. * Carter and KPMG sought an injunction to restrain Mallesons from further representing the Commissioner on two grounds   Held   * The applicants were successful in obtaining an injunction to prevent MSJ from acting against them. * Ipp J adopted the test from Bestobell Industries:   + *if, by a solicitor acting for a new client there is a real and sensible possibility that advancing the case of the new client might conflict, with his duty to keep information given to him by the former client confidential, or to refrain from using that information to the detriment of the former client, then an injunction will lie to restrain the solicitor from acting further.* * MSJ’s current client who was acting against KPMG agreed to vary MSJ’s retainer. * MSJ had put up Chinese walls and all partners and employees had provided undertakings to the Court not to disclose any confidential information acquired in the course of previously acting for the applicant. * Ipp J concluded despite MSJ’s best will as evidenced by the varied retainer and Chinese walls, the subject information would subconsciously colour the approach of MSJ in the present proceedings. * Ipp J considered the concept of “Chinese walls” to be “novel and potentially porous”. * Ipp J considered the law’s treatment of fiduciaries and concluded that undertakings of the kind offered by MSJ as fiduciaries do not avoid the consequences that ordinarily flow from such a conflict. * Ipp J reaffirmed the principle of partnership law that the knowledge of one partner is imputed to be the knowledge of all other partners. |

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| ***Spincode Pty Ltd v Look Software Pty Ltd***   * A firm of solicitors had acted for Look Software since its incorporation * The firm continued to act for Look Software when disputes arose among the shareholders and also covertly gave advice to two of the shareholders in relation to those disputes * One of those shareholders, Spincode Pty Ltd, brought proceedings to wind up the company and the solicitors acted for it in those proceedings * The trial judge, Warren J, granted the defendants an injunction restraining the solicitors from acting or continuing to act in the proceedings for Spincode * Spincode appealed against the injunction   **HELD:**  The appeal was dismissed and the injunction was upheld   * Brooking JA recognised further grounds on which the court had a jurisdiction to prevent a solicitor from acting against a former client   + Confidential information was not the only ground on which a court’s jurisdiction to issue an injunction against a solicitor acting against a former client could be invoked.   + There was an equitable obligation of “loyalty”, which forbids a solicitor from acting against a former client, and this obligation of loyalty is separate from the duty not to misuse confidential information. Although this view acknowledges that solicitors have a continuing duty not to disclose confidential information, it widens the scope of that duty and imposes a negative equitable obligation which reaches far beyond a duty not to disclose confidential information.   + Solicitors should be restrained from acting against former clients to ensure the due administration of justice and to protect the integrity of the judicial process. They should, as officers of the court, be restrained even if they have not infringed any legal or equitable right. |

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| ***Legal Practitioners Complaints Committee v Clark* [2006] WASAT 119**   * The Legal Practitioners Complaints Committee asserted that the practitioner was guilty of unsatisfactory conduct in February 2004 when he acted for an elderly and vulnerable client in a position of conflict of interest by preparing and arranging for the execution of a codicil to her will. Under the codicil, the practitioner and his wife were to receive a gift of $50 000, with priority of payment ahead of other gifts.   **HELD**   * It was incumbent on the practitioner not only to ensure that independent legal advice was given to the client, but also to ensure that the independent legal advisor was fully apprised of all relevant facts including relevant allegations against the practitioner himself. The practitioner did recognise this duty. Indeed it was not possible for the practitioner to be satisfied that there had been the opportunity for any independent advice to have been given at all at the time of arranging the execution of the codicil. * Guilty of unsatisfactory conduct by acting for an elderly client in conflict of interest, in preparing and arranging for the execution of a codicil to the client's will under which the practitioner and his wife would receive a gift of $50 000 with certain priorities of payment. |

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| ***Legal Services Commissioner v Madden (No 2)* [2008] QCA 52**   * Accepted following facts (kind of 3 & 4):   1. guilty of neglect and delay, as the settlement conference took place more than six years after Mr Kampf had retained the applicant, largely due to long periods in which the applicant did nothing to progress the claim   2. compromised the defendant's application for an order for delivery of a statement of loss of damage without his client's authority or knowledge, part of the compromise requiring the client to pay the defendant applicant's costs which were later agreed to be fixed at $1,125.70   3. Withdrew the necessary money from his Trust Account without the authority or knowledge of his client, and paid it to the defendant's solicitors in breach of the Trust Accounts Act 1973.   4. Rendered an invoice for his professional fees including charges for 2 applications where he had not obtained instructions to provide those services.   5. failed to maintain a reasonable standard of competence in the preparation of a financial agreement between Mr Portch and his future wife, for both of whom the applicant acted.   6. Despite the conflict and notwithstanding objection, he acted in an application before the Family Court for financial orders against Mrs Portch where he had previously acted for both Mr and Mrs Portch in preparing the financial agreement and for Mrs Portch in taking instructions for the revision of her will following their separation; during which he had obtained a detailed account from her of the separation * notice of appeal contended that the order that the name of the applicant be removed from the local roll, was manifestly excessive * just because the LSC didn’t argue re public interest ≠ not enlivened   Surrounding Circumstances   * Office 50km south of Toowoomba - elderly clients will be inconvenienced if a stay is not ordered because of the absence of a close legal practice other than the applicant's. * 53 years, and in his financial position in that event, he would never be in a position to recover from the loss of his clients * The significance of these matters is diminished by the serious findings against him in the Tribunal * Mr Davies (trusted solicitor) deposes to having personally reviewed each of the applicant's files, and found that each of them is up to date and in order. * other factors to be taken into account include those listed in by Chesterman J in *Legal Services Commissioner v Baker*, at para 31.They include:   I.  The seriousness of the misconduct found.  II. The likely prejudice to public confidence both in the integrity of the discipline processes themselves and the reputation of the profession if the practitioner is granted a stay.   * The importance of the protection of the public interest and the reputation of the legal profession is a factor of particular significance in a case such as this   III.  The means available to mitigate the prejudice alleged.  IV.  The expedition with which the appeal can be heard.  Granted an order to stay proceedings because:   * Queensland Law Society has appointed a supervisor to the applicant's Trust Accounts * a reputable independent solicitor, Mr Davies, is willing to attend the applicant's office to supervise his staff and to monitor each file * These conditions are, in my opinion, more effective to mitigate damage to the integrity of the disciplinary processes than were the conditions criticised by Justice Chesterman in *Baker's* case at para 31 |

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| ***Village Roadshow v Blake Dawson Waldron***   * Village Roadshow wanted to buy back preference shares under the Corporations Act * Permanent Trustee Co Ltd agreed to act as trustee, and then engaged BDW for the purposes of preparing a trust deed * Later, Boswell Filmgescellschaft MBH (Boswell) sought to oppose the preference share buy back – it also engaged BDW * BDW continued to act for both parties, until December, when Village Roadshow applied to stop BDW acting for both   **Held**: Argument based upon actual confidential information failed   * However, legal duty of solicitor to client was of loyalty (i.e. not to act in the same matter or a matter that is closely related to it) * Clearly, this was breached |

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| ***Flanagan v Pioneer Permanent Building Society Ltd & Anor***   * Involved Flanagan’s solicitors acting against them in a subsequent action and whether they were entitled to use information gained in the first dealing   Held   * Position in Queensland is that it is sufficient if the plaintiff demonstrates that there is a real and not a fanciful risk of disclosure of confidential information thought it is not necessary to show that the risk is substantial – more in line with ***Prince Jefri***, than ***Spincode***. |

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| ***Pott v James Mitchell & Anor***   * A solicitor who had never acted for Pott, and nor had they been a partner or employee of the firm previously retained by Pott, however, the solicitor had had an association with the firm in a ‘consultancy’ relationship   Held   * Decide whether there is a real possibility that confidential information will come into the possession of the solicitor   There is no possibility that the proceedings can be affected by the previous relationship |

Barrister

Barristers Rule 114 & 117 are relevant to barristers’ conflicts of interest between former and current clients.

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| **Barristers Rule 114**   1. A barrister who is briefed to appear for two or more parties must determine as soon as possible whether the interests of the clients may, as a real possibility, conflict and, if so, the barrister must then return the brief for:    1. all the clients in the case of confidentiality to which Rule 109 would apply; or    2. one or more of the clients –       1. giving preferences to the earliest brief if the barrister; and       2. so as to remove that possibility of conflict. |

*Instructing Solicitor’s interests vs Client’s Interests*

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| **Barristers Rule 117**   1. A barrister who believes on reasonable grounds that the interests of the client may conflict with the instructing solicitor’s interests, or that the client may have a claim against the instructing solicitor, must:    1. advise the instructing solicitor of the barrister’s belief; and    2. if the instructing solicitor does not agree, advise the client of the barrister’s belief, seek to advise the client in the presence of the instructing solicitor of the barrister’s belief. |

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| ***Flanagan v Pioneer Permanent Building Society Ltd*** [2002] QSC 346   * since about 1969 Macrossan & Amiet have acted for F and her family in about 15 matters * 1999 Mr Ghusn of M & A acted for the Flanagans in the sale of the business of JF Garments Pty Ltd to the Flanagan's son and his girlfriend – involved financing through PP and Fs giving guarantees * Pioneer Permanent through Mr Ghusn served a demand for the sum of $261,967.60 on the Flanagan's pursuant to the guarantees in relation to which he had earlier acted for the Flanagans * Basis of claim - Mr Ghusn failed to comply with his instructions in relation to the guarantee to the advantage of Pioneer Permanent and disadvantage of the Flanagans   HELD   * Application dismissed * there is some connection between the subject matter of the magistrates court proceedings and the sale and subsequent recovery of the business of JF Garments by the Flanagans in which Macrossan & Amiet either acted or, at least gave advice. * Confidential information can include information personal to the client obtained by virtue of the solicitor/client relationship which may be used for the advantage of the subsequent client. |

### Conflict by Acting for Both Parties

Solicitor

A solicitor must avoid any conflict of interest between two or more clients of the solicitor or of the solicitor’s law practice (r 8.2).

A solicitor who (or whose law practice) intends to act for a party to any matter where the solicitor (or the solicitor’s law practice) is also intending to accept instructions to act for another party to the matter must be satisfied, before accepting a retainer to act, that each party is aware that the solicitor is intending to act for the others and consents to the solicitor so acting in the knowledge that the solicitor:

* May be, thereby, prevented from:
  + Disclosing to each party all information relevant to the matter within the solicitor’s knowledge (r 8.3.1(a)); or
  + Giving advice to one part which is contrary to the interests of another (r 8.3.1(b));
* Will cease to act for all parties if the solicitor would otherwise be obliged to act in a manner contrary to the interests of one or more of them (r 8.3.2).

If a solicitor who is acting or whose law practice is acting for more than one party to any matter determines that the solicitor or the solicitor’s law practice cannot continue to act for all of the parties without acting in a manner contrary to the interests of one or more of them, the solicitor or the law practice must thereupon cease to act for all parties (r 8.4).

A solicitor must not act where the solicitor or the solicitor’s law practice is acting or intending to act; ***r 8.5 SR***.

1. For both vendor and purchaser in connection with the contract for the sale of land or a transfer of land for value at arm’s length; ***r 8.5.1 SR***.
2. For both vendor and purchaser in connection with the contract for the sale of a business at arm’s length; ***r 8.5.2 SR***.
3. For both lessor and lessee in connection with the lease of land or an agreement for the lease of land for value at arm’s length; ***r 8.5.3 SR***.
4. For both financier and borrower in connection with the loan of money or provision of finance or an agreement to lend money or provide finance; ***r 8.5.4 SR*** or
5. For both the purchaser of land and the lender of money or provider of finance intended to be secured by a mortgage of that land; ***r 8.5.5 SR***.

unless and until the solicitor or the solicitor’s law practice obtains a satisfactory written acknowledgment from each party of the receipt of information as to the basis on which the solicitor acts, and after first fully informing that party in writing concerning the potential disadvantages to that party of the solicitor so acting.

Barrister

Rule 95 – Briefs which must be refused

A barrister must refuse a brief if the barrister has information which is confidential to any person with different interests from those of the prospective client if: ***r 95 BR***.

1. the information may, as a real possibility, be helpful to the advancement of the prospective client’s interests in the matter on which advice is sought; ***r 95(a) BR*** and
2. the person entitled to the confidentiality has not consented beforehand to the barrister using the information as the barrister thinks fit in giving advice; ***r 95(b) BR***.

Rule 114-117 – Confidentiality

A barrister who is briefed to appear for two or more parties in any case must determine as soon as possible whether the interests of the clients may, as a real possibility, conflict and, if so, the barrister must then return the brief for; ***r 114 BR***.

1. all the clients in the case of confidentiality to which Rule 109 would apply; ***r 114(a) BR*** or
2. in other cases, one or more of the clients ***r 114(b) BR*** -
   1. giving preferences to the earliest brief if the barrister was briefed at different times; ***r 114(b)(i) BR*** and
   2. so as to remove that possibility of conflict; ***r 114(b)(ii) BR***

A barrister who, during the hearing of the case, becomes aware that the interests of the clients or some of them do or may, as a real possibility, conflict, must return the brief for; ***r 115 BR***.

1. all the clients in the case of confidentiality to which Rule 109 would apply; ***r 115(a) BR*** or
2. in other cases, one or more of the clients ***r 115(b) BR*** -
   1. Giving preference to the earliest brief if the barrister was briefed at different times; ***r 115(b)(i) BR*** and
   2. So as to remove that possibility of conflict; ***r 115(b)(ii) BR***.

A barrister need not return any briefs to appear under Rules 114 or 115, if the barrister has informed the instructing solicitor or the clients, as the case may be, of the barrister’s view as to the clients’ conflicting interests, and the instructing solicitor or the clients, as the case may be, inform the barrister that all the clients nonetheless wish the barrister to continue to appear for them; ***r 116 BR***.

A barrister who believes on reasonable grounds that the interests of the client may conflict with the interests of the instructing solicitor, or that the client may have a claim against the instructing solicitor, must: ***r 117 BR***.

1. advise the instructing solicitor of the barrister’s belief; ***r 117(a) BR***. and
2. if the instructing solicitor does not agree to advise the client of the barrister’s belief, seek to advise the client in the presence of the instructing solicitor of the barrister’s belief; ***r 117(b) BR***.

### Tests For Conflict of Interest

*Rakusen v Ellis, Munday & Clarke [1912] (House of Lords)*

Solicitor should be restrained from acting for the new client only if the former client could demonstrate ‘that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act’

*Prince Jefri Bolkiah v KPMG (1999) (House of Lords)*

The court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful or theoretical at 528 per Lord Millett.

### Chinese Walls

There is no rule of law that Chinese walls or other arrangements of a similar kind are insufficient to eliminate the risk. The courts should restrain a firm from acting unless satisfied on the basis of clear and convincing evidence that effective measures have been taken to ensure that no disclosure will occur per Lord Millett. Chinese walls generally involve some combination of the following organisational arrangements:

* The physical separation of the various departments in order to insulate them from each other
* An educational programme to emphasise the importance of not improperly or inadvertently divulging confidential information
* Strict and carefully defined procedures for dealing with a situation where it is felt that the wall should be crossed and maintaining of proper records where this occurs
* Monitoring by compliance officers of the effectiveness of the wall
* Disciplinary sanctions where there has been a breach of the wall

Other factors in determining the effectiveness of Chinese walls include:

* Sustainability of clients
* Number of lawyers in the company
* Size of the firm
* Length of time between taking instructions from former client and current client
* How long walls were in place
* Procedures for when the wall should be crossed and maintenance of proper records when this occurs
* Disciplinary sanctions for breach of the wall
* Provide physical separation (include dining arrangements)
* Education

*Mallesons Stephen Jaques v KPMG and Louis James Carter (1990) (WASC)*

If, by a solicitor acting for a new client there is a real and sensible possibility that advancing the case of the new client might conflict with his duty to keep information given to him by the former client confidential, or to refrain from using that information to the detriment of the former client, then an injunction will lie to restrain the solicitor from acting further

*Fruehauf Finance Corporation Pty Ltd v Feez Ruthning (1991) (QSC)*

Adopted Rakusen:

As a general rule, the court will not interfere unless there is a case where there is such a probability of mischief that the court feels it ought to interfere and say that a solicitor shall not act.

*Spincode Pty Ltd v Look Software Pty Ltd (2001) (VSCA)*

Three possible sources of a relevant duty suggest themselves:

* Confidential information was not the only ground on which a court’s jurisdiction to issue an injunction against a solicitor acting against a former client could be invoked.
* There was an equitable obligation of “loyalty”, which forbids a solicitor from acting against a former client, and this obligation of loyalty is separate from the duty not to misuse confidential information. Although this view acknowledges that solicitors have a continuing duty not to disclose confidential information, it widens the scope of that duty and imposes a negative equitable obligation which reaches far beyond a duty not to disclose confidential information.
* Solicitors should be restrained from acting against former clients to ensure the due administration of justice and to protect the integrity of the judicial process. They should, as officers of the court, be restrained even if they have not infringed any legal or equitable right.

*Pott v James Mitchell & Anor (2004) (QSC)*

Decide on the basis of whether there is a ‘real possibility that confidential information possessed by a solicitor has or will pass to a future client’.

**POSITION IN AUSTRALIA:**

Notwithstanding differences as to the potential nature of the jurisdiction which might be invoked to restrain a practitioner from acting in a situation of successive client conflict, the test enunciated by Lord Millett in ***Prince Jefri*** has been generally accepted as a more appropriate benchmark than the more lenient test which had emerged in ***Rakusen***.

The High Court has not had the opportunity to consider the precise terminology which will define the threshold to be reached before an injunction will be granted to restrain solicitors from acting in circumstances of successive client conflict.

Neither has the court decided whether, or in what circumstances, Chinese Walls might offer an acceptable mechanism for allowing firms to act for successive clients where there is a potential for the disclosure of information confidential to the former client.

In Queensland it seems likely that ***Prince Jefri*** will prove the dominant view as to the appropriate test where the jurisdiction invoked is that of protecting the confidences of a former client.

## Termination of Lawyer/Client Relationship

A lawyer is under a contractual obligation to complete the work which they have undertaken to perform. Termination prior to completion would result in a breach of contract. The Solicitors rule outline circumstances where the lawyer-client relationship can be terminated. Generally the work must be completed unless: ***r 6.1 SR***.

1. the solicitor and client agree to terminate; ***r 6.1.1 SR***.
2. the solicitor is discharged from the retainer by the client; ***r 6.1.2 SR***.
3. the solicitor terminates the retainer for just cause and on reasonable notice to the client; ***r 6.1.3 SR***.

**IF Early termination by the lawyer**

Just cause and on upon reasonable notice depends on the circumstances of each case. Some circumstances which constitute just cause include:

1. Client commits significant violation of a written agreement regarding fees or expenses
2. Client has made material misrepresentations about the facts of the matter to the solicitor
3. Client insists the lawyer commit a breach of the law or professional rules
4. Client has legal aid and legal aid is withdrawn and the client is unable to make other arrangements to pay fees which would not be incurred if the retainer continued
5. Continued representation would require the lawyer to commit a breach of the professional rules
6. Continuing engagement in the matter is likely to have a seriously adverse effect upon the lawyers health
7. Client or the lawyer has died or become insane

**IF solicitor is required to give evidence in client’s matter**

If a solicitor is required to give evidence in a client’s matter they must not continue to act for the client; ***r 13.4 SR***. However it is not necessary for the solicitor to actually give evidence; ***Woolworths Ltd v Shine Lawyers*** at [8] per de Jersey CJ.

## Solicitors’ Fiduciary Duties

Duties of practitioners to their clients arise under the common law and in equity.

At common law, the retainer agreement is a contract between the practitioner and the client for the provision of legal services by the practitioner for a fee (*Beach Petroleum v Kennedy*). The practitioner is under a contractual duty to render those services with due care and skill. Failure can result in breach of contract or negligence in tort.

Equity imposes fiduciary obligations on someone who undertakes to act for or on behalf of or in the interests of another person. A solicitor is in a position of confidence and trust vis a vis a client and as such owes a fiduciary duty to the client (*Clark Boyce v Mouat*).

A serious breach of the fiduciary duty is likely to be treated as serious professional misconduct under disciplinary proceedings.

The same conduct may amount to a breach of a fiduciary duty and unsatisfactory professional conduct or professional misconduct. It is therefore essential to have some understanding of the nature of the specific duties arising from the fiduciary obligation owed by a lawyer to a client.

*Rationale for Existence*

Essentially it’s because of the solicitor’s ascendancy over the client, the vulnerability of the client, and the client’s dependence on its solicitor (*LSC v Baker* per Moynihan J @ [22]-[24]).

*“A lawyer’s individual personal responsibility to a client is the essence of the relationship. Lawyers have a position of special influence over clients in the conduct of the client’s affairs and are obliged to serve and protect those interests at all times.”*

*Specific Fiduciary Duties*

Generally: scope will be determined by the terms of the retainer (*Maguire v Makaronis*).

Usual duties include:

* Not to mislead the client;
* To act in the utmost good faith;
* To communicate to the client everything which the solicitors knows that may be of assistance to the client in relation to the retainer and not to withhold information from the client;
* Not to make or attempt to make a personal profit from the solicitor’s position (above reasonable fees);
* To protect the client from the risk of loss;
* To account for moneys entrusted by the client or received for the client;
* Not to assume a position where the solicitor’s duty to the client is in conflict with the solicitor’s own personal interest;
* To avoid concurrent conflicts where the solicitor is acting for two current clients with conflicting interests;
* To avoid successive conflicts where there is a conflict between the duty of loyalty owed to an existing client and an obligation of confidentiality owed to a former client;
* Not to charge for work done whilst acting in conflict.

## Advocates’ Immunity

### History

First Adopted: 1860 *Swinfoen v Lord Chelmsford*

Held: advocate not responsible for errors of law or mistakes of fact which emerged in their presentation of a case (or lacking eloquence / being as astute as they might be expected to be).

### Modern Doctrine of Immunity

Emerging in: *Rondel v Worsley* (House of Lords)

Barrister - immune from suit in order to ensure that they discharged their duty fearlessly and independently

Public policy reasons:

* Apprehension of a negligence action would encourage an overly cautious approach on the part of counsel, who would be inclined to follow up every possible approach, regardless of how fruitless it might appear
* Possibility of being sued would increase a barrister’s zeal for his or her client’s case, potentially increasing the risk of conflict between the barrister’s duty to their client and the court
* Cab rank principle required that barristers were obliged to represent a client
* Immunity for counsel matched the general immunity enjoyed by the other legal actors involved in the litigation – judges, juries and witnesses
* It would be necessary to show that, had the barrister discharged his or her duty to a reasonable standard, a better outcome would have been achieved

### Level of Connection to Litigation Required

*Rees v Sinclair* (NZ) – ‘intimate connection’ test:

Conduct should be so intimately connected with the conduct of the case in court that it can be fairly said to be a preliminary decision affecting the way that the cause is to be conducted with it comes to hearing. (Adopted House of Lords in *Saif Ali v Sydney Mitchell* & HC in *Giannarelli v Wraith*)

The immunity applies both to the work of the advocate in court, and to work performed outside court where it is ‘so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing.’ (*Rees v Sinclair*).

It is difficult to determine where the appropriate dividing line should be drawn between work that was performed in or out of court (or was closely connected to such work), and work that did not hold a sufficient connection

* “Preparation of a case out of court cannot be divorced from presentation in court. The two are inextricably interwoven so that the immunity must extend to work done out of court which leads to a decision affecting the conduct of the case in court. But to take the immunity any further would entail a risk of taking the protection beyond the boundaries of the public policy considerations which sustain the immunity.” (*Giannarelli* per Mason J)

N.B. has been criticised as being too vague and capable of expansion to cover much out of court work.

### Immunity in Australia

Immunity extended to solicitors 1980: *Saif Ali v Sydney Mitchell*

HC affirmed immunity: *Giannarelli v Wraith* (4:3 – however all separate judgements)

Facts: dismissed an appeal that a Victorian barrister was liable in negligence to his client for a failure to advice them that they had a good defence to the proceedings and for failing to object to certain inadmissible evidence tendered by the crown.

Majority: Mason CJ, Wilson, Brennan & Dawson

**1. Risks counsel’s independence judgement:**

If counsel were exposed to liability in negligence the existence of that potential liability would influence the exercise of his independent judgement by making him more mindful of the need to avoid any possibility of liability to his client; thus immunity is needed to:

• Protect the administration of justice: Mason CJ at [13]-[15]

• Ensure the independence of the assistance the courts obtain from advocates: Brennan J at [2]

• Ensure the advocate’s professional judgment (in the efficient conduct of the business of the courts) would be impaired due to the need to present even extremely weak arguments to court: Dawson J at [16]

• Ensure the ability of counsel to speak and act freely is not impeded by the prospect of civil process as a result of their having done so: Dawson at [18]

**2. Risks Finality of Litigation:**

Adverse consequences for the administration of justice which would flow from the re-litigation in collateral proceedings for negligence of issues determined in the principal proceedings

• Especially if able to obtain a more favourable outcome than in the initial litigation (Finality): Mason CJ at [18]

• Necessary finality to conserve public confidence in the administration of justice: Wilson J at [36]

• Bad in a civil case and intolerable after a criminal trial: Dawson at [17]

**3. Current Protections are Adequate:**

Better to rely on the publicity of court proceedings, judicial supervision, appeals, peer pressure an disciplinary procedures to prevent neglect in their performance of counsel’s duty and avoid and injustice: Brennan at [2]

Minority: Toohey with whom Gaudron and Deane agreed (Minority)

Nothing to suggest that there is anything irreconcilable about the duty owed to the client and that owed to the court: Toohey at [38]

[35] it would be a curious result if the Act empowered a barrister to sue for his fees but at the same time precluded the client from raising any defence, set-off or cross-claim based upon the negligence of the barrister in and about the work for which fees had been rendered and were sought to be recovered.

In 2005 HC reaffirmed immunity: ***D’Orta*** (6:1)

**Reasoning**:

**Majority**: (Gleeson CJ, Gummow, Hayne & Heydon JJ), (McHugh J), (Callinan J)

Stated: The duty to the court is paramount. The question of conflicting duties assumes that the only kind of case to be considered is one framed as a claim in negligence. That is not so. The question is whether there is an immunity from suit, not whether an advocate owes the client a duty of care: Gleeson CJ, Gummow, Hayne & Heydon JJ at [26].

**1. Judicial Process as an aspect of Government**

central concern of the exercise of judicial power is the quelling of controversies - Judicial power is exercised as an element of the government of society and its aims are wider than, and more important than, the concerns of the particular parties to the controversy in question: Gleeson CJ, Gummow, Hayne & Heydon JJ at [32].

**2. No Relitigation:**

Underpinning the system is the need for certainty and finality of decisions: Gleeson CJ, Gummow, Hayne & Heydon JJ at [84]. To remove the advocate’s immunity would make a significant inroad about what was earlier described as a fundamental and pervading tenet of the judicial system. That inroad should not be created. There may be those who will seek to characterise the result at which the Court arrives in this matter as a case of lawyers looking after their own, whether because of personal inclination and sympathy, or for other base motives: Gleeson CJ, Gummow, Hayne & Heydon JJ at [34] & [84]; McHugh J at [168]; (Risk of conflicting judgements) Callinan J at [380]

**5. Problems with a risk of conflict with duty to court:**

The administration of justice demands fearless and independent advocates who are not hampered by the discharge of their role by the need to consider whether their conduct might be actionable at: McHugh [192]; and requires freedom of expression and candour in court: Callinan J at [380]

**6. Difficulty in adjudicating cases of negligence:**

The invidiousness of making comparisons between actual and notional reactions by judges and juries to arguments and counsel’s conduct of a case: Callinan J at [380] and the fact that the in-court error, is not always exclusively the error of the advocate and is sometimes, this error is exclusively the error of the court: Callinan J at [369].

**Minority**: Kirby J

**1. No constitutional basis:**

No implication of immunity could be derived from the Constitution as necessarily inherent in the provisions for this country’s’ courts as set out in the majority at [224].

**2. Derogation of rule of law and fundamental rights**: at [314]

**3. Public policy, examined with today’s eyes are also insufficient**: [313].

**4. Suggestion that the immunity attaches to the barrister as a ‘gentlemen**’, a holder of an office who owes a duty to the court, his or her profession and the public, is unpersuasive in contemporary Australia, if it was ever so at [319].

**5. Flood gates and relitigation arguments are unsustained by experience**: at [327]-[328].

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| ***D’Orta***  The Facts:   * + Ryan D'Orta-Ekenaike was charged with rape.   *Trial 1*   * + At the committal proceeding, D entered a plea of guilty, on the advice of his lawyers.   + His solicitor and barrister advised him to plead guilty at his committal hearing, saying that since he had no defence, he would get a custodial sentence if he pleaded not guilty and was subsequently convicted, but only a suspended sentence if he pleaded guilty.   + He followed their advice and was committed for trial.   + At trial, he changed his plea to not guilty; but his earlier guilty plea was led in evidence and he was convicted and sentenced to three years' imprisonment   + The judge at first instance ordered that the claim 'be forever stayed and the Victorian Court of Appeal dismissed an appeal from this order.   + The conviction was quashed on appeal and a retrial ordered.   *Trial 2*   * Voir dire. * Ryan successfully appealed against his conviction on the ground of misdirection by the judge concerning the use the jury might make of the evidence that he had pleaded guilty at the committal stage. * On retrial, the evidence of the guilty plea was not admitted and Ryan was acquitted.   *Trial 3*   * He had been jailed for a number of years and took civil action because he couldn’t work during the time he was in jail. * Also claimed he developed psychotic illness in jail, which ultimately lead to loss of earnings after he got out because it affected his ability to work. * The applicant sued his barrister and solicitor in respect of the advice, alleging that he had suffered and continued to suffer financial and non-financial harm and loss as a result of breaches of duty by his advisers - i.e. Client v Barrister/Solicitor for an action in negligence. * The applicant’s proceeding was permanently stayed by a judge of the County Court of Victoria and leave to appeal was refused by the Victorian Court of Appeal, on the basis of *Giannarelli v Wraith* (1988) 165 CLR 543 – advocate’s immunity from suit.   *HCA*   * The applicant applied to the High Court for special leave to appeal from the Court of Appeal’s decision.   **Issues:**  The High Court in *D'Orta-Ekenaike v Victoria Legal Aid* was faced with three main issues:   1. Whether it should reconsider its decision in *Giannarelli*; 2. Whether the immunity recognised in *Giannarelli* protected solicitor-advocates as well as barristers; and 3. Whether the scope of the immunity recognised in *Giannarelli* -- extending to acts and omissions committed in the conduct of a case in court or in work done out of court which leads to a decision affecting the conduct of a case in court (hereafter 'protected work') -- should be reconsidered.   **Held:**  By a 6:1 majority (Kirby J dissenting) the court held – partly reaffirming and partly extending the decision in *Giannarelli* – that advocates, whether solicitors or barristers, cannot be sued for negligence committed in the course of performing protected work. |

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| ***Symonds v Vass***  Faulty pleadings – withdrawn;  Sued legal advice and procession of the claim and of their retainer and fiduciary duties  Held: Lawyers liable for: (per Ipp JA)   * Failed to obtain a written opinion from counsel as to the plaintiffs’ prospects of success in the proposed proceedings against Egan prior to proceedings being commenced or at all (as promised in the letter of engagement); * Failed to include in the summons and statement of claim certain causes of action; * Failed to seek to amend the pleadings to include such claims until after the hearing had commenced and at a stage when Dowd held that leave should be refused; * Failed to advise with respect to the proper parties to be named in the summons and the statement of claim; * Failed to identify and plead or particularise the nature of the losses suffered by the plaintiffs; * Failed to prepare the available evidence in proper and admissible form; * Took a date for a five week hearing without having sought or obtained an advice on evidence when the plaintiffs’ case was not ready for hearing; * Failed to advise the plaintiffs that the case was not properly prepared for hearing and that an application could be made to vacate the hearing date, or once the hearing had commenced to apply for an adjournment of the hearing.   All of these things were found to be not intimately connected with the conduct of the case in court, so the immunity didn’t apply.  Patten distinguished these circumstances from cases such as [*Boland v Yates*](http://www.austlii.edu.au/au/cases/cth/HCA/1999/64.html) where the solicitors’ failures were protected by the immunity because the work was “intimately connected” with the conduct of the case in court.  Patten found that the problems which arose were not about a decision to conduct the case in a particular way, “but rather from Mr Klotz’s failure to apply his mind to the many difficulties inherent in the case”.  He thought that this fitted Brennan J’s category identified in *Giannarelli* that fell outside the immunity, namely the “failure to carry out preliminary decisions, whether made by the solicitor or by counsel briefed by the solicitor, when that failure impairs the conduct of the case in court …”.  In the Symonds’ case the plaintiffs’ decision to pull out of the action was an act of their own free will. It was, in the judge’s view, an informed decision, free from duress. Their decision was a *novus actus interveniens* and could not be blamed on the solicitors. So the Symonds’ could not recover any damages based on their lost chance of success in the case.  However, it was found that the plaintiffs had been deprived of the benefits they should have received from the fees they paid. Justice Patten ordered DMB to cough-up $140,000 of the $170,000 it had billed the plaintiffs and added interest at 10 percent a year (another $180,000).  In the process “intimately connected” with the conduct of the case in court suddenly seems to require less intimacy.  So the immunity does not protect negligent advocates where the dispute in which they were appearing has not been finalised or “quelled” before it was terminated.  It doesn’t apply to prevent a party in separate litigation from using an advocate’s in-court statements as a weapon against the advocate.  And now that “intimately” has been slightly reworked, the immunity does not apply to a wider variety of pre-trial procedures and process that have been conducted negligently.  The appellants say that, prior to the commencement of the hearing, the respondent, having been instructed to act as their solicitors, did not analyse and prepare the case properly, did not analyse and consider the damages that the appellants were claiming, did not properly plead and particularise the elements of their damages claim, did not properly consider what evidence was necessary to prove their damages, did not have that evidence ready to adduce at trial, and proceeded to trial with the case as to damages inadequately prepared. |

### Immunity abolished in the UK

Immunity for negligence abolished in the UK: Arthur J S Hall v Simon (2002) (7:0)

Main considerations leading to the removal included:

(a) New rules had been introduced in England in 1990 entitling the Court to make cost sanctions against advocates, which rules had not produced any difficulty;

(b) There had been considerable criticism of the rule in Rondel v Worsley by academics and indeed by certain journal articles by individual barristers;

(c) The cab rank rule was not a particularly relevant consideration: it did not often oblige barristers to undertake work which they would not otherwise accept;

(d) The public policy against re-litigation could not support the present breadth of the immunity. In particular, it could not extend to cases where there was no verdict by jury or decision by the Court. In any event the public interest was sufficiently protected by independent powers of the Court to prevent abuse of process. Those powers included the power, in criminal cases, to strike out a negligence claim by an unsuccessful accused against the barrister on the basis that it was a collateral attack on the criminal verdict

(e) The fact that barristers had a conflicting duty to the Court was not a sufficient reason to maintain the immunity. It would never be negligent to comply with any over-riding duty to the Court;

(f) Some of the Lords relied upon the fact that there was no immunity from suit for advocates in the European Union (i.e. basically civil law systems) or in Canada and that, empirically, few problems had emerged there.

(g) The prospect of vexatious suits against barristers could be dealt with by the Court’s powers of summary dismissal;

(h) Removal of the immunity would end an anomalous exception to the basic premise that there should be a remedy for a wrong.

**Criticisms** of the decision include:

1. The case being an inappropriate vehicle for consideration of removal of barristers’ immunity. Some of the Law Lords recognised that assertion by the solicitors that they were entitled to immunity from suit could have been rejected validly on traditional authority because there was not an intimate connection between their allegedly negligent advice on settlement and the conduct of proceedings in Court. A far reaching change such as removal of immunity would be better considered on the facts of a case clearly coming within the core ambit of the immunity.
2. The House of Lords claimed to have acted on an empirical basis: that there were no problems in systems such as Canada or the United States where the immunity was lacking. However, so far as appears from the judgment, the evidential record which entitled these empirical conclusions to be drawn was remarkably thin. Further, the standard of negligence in Canada against advocates is far higher than the ordinary negligence standard adopted by the House of Lords.
3. There was no detailed consideration by the House of Lords of the American legal experience where the immunity has never been established (except for prosecutors in criminal trials). It could be forcefully argued that to remove the immunity is to push English advocates closer to the American model of no cab rank rule, fusion of the profession, unlimited contingency fees and lesser duties to the Court;
4. Although most of the Lords thought that the cab rank rule had little role to play in practice, this may understate its less overt effects: the rule has force not simply because the majority of barristers day in day out are consciously forced to accept a brief for an unpleasant cause or client, but rather because it underpins an accepted culture well-known to barristers and solicitors and explained to clients that the barrister acting for a client or solicitor one day may be acting against that client or solicitor another day; and that there will not usually be that intensely close relationship between barrister and client which inhibits objective judgment and advice and fearless performance of duties to the Court;
5. The duty to the Court issue cannot be disposed of simply on the basis that it would never be negligent to obey an over-riding duty to the Court. What if there is doubt whether the duty to the Court in a particular case requires the barrister to take a course which is harmful to the clients interests? Can the barrister be held liable in negligence to the client if the barrister has mistakenly given preference to the duty to the Court? If so, does this not encourage lesser rather than full compliance with that duty?
6. The Law Lords gave little practical analysis to the problems of re-litigation which will emerge in proving damages in negligence suits against barristers. Where the alleged negligence of the barrister had the effect that a witness was not cross-examined in a particular way or a particular submission was not put to a judge, the best evidence in the barrister’s defence may be to call that witness or judge in the negligence trial. That would present all sorts of difficulties with the immunity which judges and witnesses now share for their participation in legal proceedings.
7. In the criminal context, the majority of the Law Lords thought that there was sufficient protection against the evils of re-litigation by the abuse of process doctrine which ordinarily would require the disappointed accused to exhaust appeal rights before bringing a negligence action against the barrister.
8. There is no analysis in the House of Lords judgment of the consequences of unlimited liability in civil matters where large sums are involved.
9. Perhaps ironically, a somewhat differently constituted House of Lords in the subsequent decision of Darker v Chief Constable, delivered 27 July 2000, has affirmed that all witnesses have absolute immunity from suit from all claims for things said or done by them in the ordinary course of Court proceedings or in the prior preparation of their evidence, including proceedings on the ground of negligence. It was thought that the policy reasons supporting this immunity remained sound.

### Arguments For and Against Advocates’ Immunity

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| **FOR** | **AGAINST** |
| It potentially gives rise to more litigation and is an abrogation of the finality of the court process | An advocate is a professional like any other and should be accountable for their actions |
| Undermines the court’s ability to reach finality on any one issue. | Immunity as it stands is a matter for the court and that is unfair. If we’re going to have it why not have it regulated by an external third party? |
| The removal of immunity would encourage an overly cautious approach by counsel which would not be in the interests of the proper administration of justice.   * Counsel would be inclined to argue even extremely weak points in cases to ensure they are not liable later, which would waste court time: *Rondel*; *Giannarelli* per Mason CJ at [13]-[15], Dawson J at [16]; *D’Orta* per McHugh J at [192].   + E.g. counter to duty to court to only argue actions with evidence: *Flower and Hart case* * Counsel’s ability to speak and act freely in court would be reduced: *Giannarelli* per Dawson J at [18]; *D’Orta* per Callinan J at [380] | When the proceedings relate to earlier proceedings and those proceedings are appealed and overturned, shouldn’t there be recourse for the client against the advocate whose decision has been overturned? |
| The removal of immunity would increase advocates’ zeal for their client’s case and may result in conflicting duties to the client and court: *Rondel*.   * Also reduce the independence of assistance the court receives from advocates: *Giannarelli* per Brennan J at [2]   Counter:  However it has been argued that there is nothing to suggest the duties o the court and client will conflict, because the duty to the court is over-riding: *Giannarelli* per Toohey J at [38] (Minority: with whom Gaudron J and Deane J agreeing); *Arthur*; *Chamberlains*  Counter/Counter:  However it raises the interesting question of whether an advocate would be negligent if they mistakenly gave preference to the duty to the court, and if they were it would practically result in a reduced compliance with that duty. | No case has adequately addressed the consequences of unlimited liability in civil matters dealing with large sums of money. |
| Cab rank principle for barristers means that they are obliged to represent clients, even if they did not wish to accept (i.e. overly litigious clients): *Rondel*.  Counter:  The rule is irrelevant because barrister rarely take work they would not otherwise accept: *Arthur*; *Chamberlains*  Counter/Counter:   * Although this ignores the fact that it does necessarily still occur. | Removal would stop the anomalous exception to the principle that there should be a remedy for a wrong: *Arthur*; *Chamberlain* per Hammond J at [175] |
| Recognising the immunity matches the general immunity given to other participants in court (Judge/Jury/Witnesses): *Rondel*.   * It would create an odd situation if the best evidence to an advocate’s defence was to call a witness/judge: *D’Orta* per Callinan J at [380] * Additionally the negligence is not always the advocate’s fault but sometimes the judges: *D’Orta* Callinan J at [369]   Counter:  However a counter to this is that the other participants in the court don’t owe a duty of care to the client & it erodes the confidence of citizens in the legal profession: *Chamberlain* (Hammond J at [177]) | There is no constitutional basis for the immunity: *D’Orta* per Kirby J |
| Removing the immunity would threaten the finality of decisions, result in a flood of re-litigation and risk public confidence in the administration of justice: *Rondel; Giannarelli* per Wilson J at [36]; *D’Orta* per Gleeson CJ, Gummow J, Heydon J, and Hayne J at [84], McHugh at [168]   * Risk of conflicting judgements: *D’Orta* per Callinan J at [380] * May need to show a better outcome would have been achieved but for negligence: *Rondel* * It would be intolerable to retry a criminal matter: *Giannarelli* per Dawson J at [17] * Difficulties that may arise if able to obtain a better outcome than in the initial litigation: *Giannarelli* per Mason CJ at [78]   + E.g. *Sweeney v Attwood*: prospect of success assessed of $30,000 at 30%, thus got $10,000 awarded: *Maguire v Leather* at [6]. * Judicial Power is for the quelling of disputes, which is a critical aspect of government and overrides the concerns of any particular party: *D’Orta* per Gleeson CJ, Gummow, Hayne, Heydon at [32]   Counter:   * However others have held that the public policy reasons cannot support the breadth of the immunity (i.e. in cases where no verdict or decision has been given): *D’Orta* per Kirby J at [313]. * The court’s powers to prevent abuse of process (summary judgement) are sufficient to avoid re-litigation: *Arthur*; *Chamberlain* * Floodgates argument is no sustained by evidence in other jurisdictions: *D’Orta* per Kirby J at [327-8]; *Arthur* (EU/Canada) * Finality of decisions is not risked because the other party is not affected because it is the advocate not them that is being sued: *Chamberlain*.   Counter/Counter:   * Abuse of processes powers are not totally effective – because still need to hear the matter to throw it out – and the powers only apply in certain situations | The immunity is a derogation of the rule of law (applies equally to all) and fundamental rights: *D’Orta* per Kirby J at [314] |
| Current protections are adequate.   * Publicity of court proceedings, judicial supervision, appeals, peer pressure, disciplinary procedures all prevent neglect by counsel and avoid injustices: *Giannarelli* per Brennan J at [2] | The suggestion that the immunity attaches to the advocate as a ‘gentleman’ is unpersuasive in Australia: *D’Orta* per Kirby J at [319] |
|  | Undesirable consequences of the removal (such as finality/relitigation) can be prevented by the courts powers to control abuse of process: *Chamberlain* per Tipping J. |

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| **Arguments For Immunity** | **Arguments Against Immunity** |
| <3 Clients More   * + Divided loyalty argument – conflict between duties to the court and the client – but there is a dual duty on doctors to their clients and their ethical code as well (though these duties are generally parallel)   + Efficiency – may call 7 witnesses instead of one, shifting the balance of a barrister’s obligation toward the client, not the court   Cab Rank Rule   * + Cab rank rule means that barristers have to take on any client– but compare with a duty lawyer, who is required to take on any case that comes their way   + Won’t take on cases with low probability of success   + Ensure the effective administration of justice   Finality   * + that public confidence in the judicial system may be undermined if decisions are able to be continually reviewed on aspects of advocate’s competence   + efficiency wise, don’t want to keep re-litigating matters   + Floodgates – if there is no immunity for barristers then there will be a lot of actions being brought against barristers   No K’ual basis   * + Client → solicitor → barrister – there is no privity of contract between the client and the barrister, so there is no contractual basis on which to sue a barrister (THEREFORE, must rely upon law of negligence to bring an action)   Witness Analogy   * + All other major players in the courtroom have immunity (e.g. judge cant be sued, jury cant be sued, witnesses cant be sued for defamation) – the basis of an appeal is that the judge erred in law, and judges do not get sued for stuffing up in making their judgment   *D-Orta Reasons*   * McHugh J: in *Hall v Simons* the House of Lords had overestimated the Court’s ability to limit relitigation in a negligence trial. * Callinan J considered that the role of the advocate differed from other professions because “[t]here are few absolute truths in the law and litigation”.   + Parliament has not abolished the immunity | Cf Other Areas   * + Equality before the law or Rule of Law requires that everyone be treated as equals   + Cf other professions - doctors are sometimes faced with a tension between their duties to their patients and their duties to an ethical code, but nobody argued that they should have an immunity from suits in negligence   Floodgates n/a   * + But against the floodgates argument, in the UK and Canada, it has not resulted in opening the floodgates of litigation. There can also be mechanisms to prevent vexatious and frivolous claims   *Courts won’t go crazy suing all*   * + there would be no possibility of the court holding an advocate to be negligent if his conduct was bona fide dictated by his perception of his duty to the court * The public interest is satisfactorily protected by independent principles and powers of the court   + principles of res judicata (if a dispute judged, judgment final and conclusive), issue estoppel and abuse of process as understood in private law should be adequate to cope with the risk of collateral challenges to civil decisions (ie other safeguards exist to prevent an abuse of process)   + Barristers these days can easily get around the cab rank rule by saying that they are booked up, that it’s not their area of expertise or demand a lot of money in trust.   Strengthen Confidence in the System   * + the abolition of the immunity would strengthen it by exposing isolated acts of incompetence at the Bar   + Increase public confidence in the legal profession   + Seems akin to an outcome resulting from Caesar judging Caesar – expressly the reason why an independent tribunal was set up for solicitors, maybes cos more solicitors >> solicitors aren’t immune   + in principle, all who undertake to give skilled advice are under a duty to use reasonable care and skill |
| The differing results in other jurisdictions from Australia appear to rely on differing views of the courts ability to prevent a floodgate of liability. The House of Lords pointed to a number of doctrines that would ensure the public interest is upheld, however McHugh J questioned the court’s ability to limit relitigation in a negligence trial. | |

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| ***D’Orta***  The Facts:   * + Ryan D'Orta-Ekenaike was charged with rape.   *Trial 1*   * + At the committal proceeding, D entered a plea of guilty, on the advice of his lawyers.   + His solicitor and barrister advised him to plead guilty at his committal hearing, saying that since he had no defence, he would get a custodial sentence if he pleaded not guilty and was subsequently convicted, but only a suspended sentence if he pleaded guilty.   + He followed their advice and was committed for trial.   + At trial, he changed his plea to not guilty; but his earlier guilty plea was led in evidence and he was convicted and sentenced to three years' imprisonment   + The judge at first instance ordered that the claim 'be forever stayed and the Victorian Court of Appeal dismissed an appeal from this order.   + The conviction was quashed on appeal and a retrial ordered.   *Trial 2*   * Voir dire. * Ryan successfully appealed against his conviction on the ground of misdirection by the judge concerning the use the jury might make of the evidence that he had pleaded guilty at the committal stage. * On retrial, the evidence of the guilty plea was not admitted and Ryan was acquitted.   *Trial 3*   * He had been jailed for a number of years and took civil action because he couldn’t work during the time he was in jail. * Also claimed he developed psychotic illness in jail, which ultimately lead to loss of earnings after he got out because it affected his ability to work. * The applicant sued his barrister and solicitor in respect of the advice, alleging that he had suffered and continued to suffer financial and non-financial harm and loss as a result of breaches of duty by his advisers - i.e. Client v Barrister/Solicitor for an action in negligence. * The applicant’s proceeding was permanently stayed by a judge of the County Court of Victoria and leave to appeal was refused by the Victorian Court of Appeal, on the basis of *Giannarelli v Wraith* (1988) 165 CLR 543 – advocate’s immunity from suit.   *HCA*   * The applicant applied to the High Court for special leave to appeal from the Court of Appeal’s decision.   **Issues:**  The High Court in *D'Orta-Ekenaike v Victoria Legal Aid* was faced with three main issues:   1. Whether it should reconsider its decision in *Giannarelli*; 2. Whether the immunity recognised in *Giannarelli* protected solicitor-advocates as well as barristers; and 3. Whether the scope of the immunity recognised in *Giannarelli* -- extending to acts and omissions committed in the conduct of a case in court or in work done out of court which leads to a decision affecting the conduct of a case in court (hereafter 'protected work') -- should be reconsidered.   **Held:**  By a 6:1 majority (Kirby J dissenting) the court held – partly reaffirming and partly extending the decision in *Giannarelli* – that advocates, whether solicitors or barristers, cannot be sued for negligence committed in the course of performing protected work. |

### Other Random Info

The adversarial system depends upon the special functions of the advocate in the conduct of proceedings. This has led historically to the immunity of advocates from liability in negligence.

Both the barrister and their instructing solicitor/s have immunity from suit: ***D’Orta-Ekenaike v Victorian Legal Aid***

The issue of advocates’ immunity was examined in Australia by the High Court in ***Giannarelli v Wraith***. The decision was based upon two policy factors –

1. The divided loyalty argument - the possible conflict between the duty to the court and the duty to the client; and
2. That the integrity of the decision of the court may be questioned by proceedings about the advocates’ negligence.

Previously, the immunity extended to all work that was ‘intimately connected’ with litigation (***Giannarelli v Wraith***).

The immunity is retained in Australia, confirmed in ***D’Orta-Ekenaike v Victorian Legal Aid***.

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| ***D’Orta-Ekenaike v Victorian Legal Aid* [2005] HCA 12**   * + Ryan D'Orta-Ekenaike was charged with rape.   **Trial 1**   * + At the committal proceeding, D entered a plea of guilty, on the advice of his lawyers.   + His solicitor and barrister advised him to plead guilty at his committal hearing, saying that since he had no defence, he would get a custodial sentence if he pleaded not guilty and was subsequently convicted, but only a suspended sentence if he pleaded guilty.   + He followed their advice and was committed for trial.   + At trial, he changed his plea to not guilty; but his earlier guilty plea was led in evidence and he was convicted and sentenced to three years' imprisonment   + The judge at first instance ordered that the claim 'be forever stayed and the Victorian Court of Appeal dismissed an appeal from this order.   + The conviction was quashed on appeal and a retrial ordered.   **Trial 2**   * Voir dire. * Ryan successfully appealed against his conviction on the ground of misdirection by the judge concerning the use the jury might make of the evidence that he had pleaded guilty at the committal stage. * On retrial, the evidence of the guilty plea was not admitted and Ryan was acquitted.   **Trial 3**   * He had been jailed for a number of years and took civil action because he couldn’t work during the time he was in jail. * Also claimed he developed psychotic illness in jail, which ultimately lead to loss of earnings after he got out because it affected his ability to work. * The applicant sued his barrister and solicitor in respect of the advice, alleging that he had suffered and continued to suffer financial and non-financial harm and loss as a result of breaches of duty by his advisers - i.e. Client v Barrister/Solicitor for an action in negligence. * The applicant’s proceeding was permanently stayed by a judge of the County Court of Victoria and leave to appeal was refused by the Victorian Court of Appeal, on the basis of *Giannarelli v Wraith* (1988) 165 CLR 543 – advocate’s immunity from suit.   **HCA**   * The applicant applied to the High Court for special leave to appeal from the Court of Appeal’s decision.   **Issues:**  The High Court in *D'Orta-Ekenaike v Victoria Legal Aid* was faced with three main issues:   1. Whether it should reconsider its decision in *Giannarelli*; 2. Whether the immunity recognised in *Giannarelli* protected solicitor-advocates as well as barristers; and 3. Whether the scope of the immunity recognised in *Giannarelli* -- extending to acts and omissions committed in the conduct of a case in court or in work done out of court which leads to a decision affecting the conduct of a case in court (hereafter 'protected work') -- should be reconsidered.   **Held:**   * + By a 6:1 majority (Kirby J dissenting) the court held – partly reaffirming and partly extending the decision in *Giannarelli* – that advocates, whether solicitors or barristers, cannot be sued for negligence committed in the course of performing protected work.   + An advocate’s immunity from suit results from the need for the judiciary to provide finality to disputes and to reinforce a central and pervading tenet of the judicial system that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances.   + The applicant contended that he should have a cause of action against his advocate because of the principle that there should be no wrong without remedy. However, there are examples where participants in the judicial process are given privileges and, to the extent that those privileges offend that principle, they were not challenged.   + In the present case, both the Legal Profession Practice Act 1958, s 10(2) , and common law provided the barrister and the solicitor working for the first respondent with immunity from suit which extended to the advice allegedly given by them.   + considered that the House of Lords had been influenced by art 6 of the European Convention and by judicial perception of social and other changes in the United Kingdom which could not be readily transposed to Australia.   + McHugh J thought that in *Arthur J S Hall v Simons* the House of Lords had underestimated the importance of maintaining confidence in the administration of justice in respect of civil proceedings and had overestimated the Court’s ability to limit relitigation in a negligence trial.   + Callinan J considered that the role of the advocate differed from other professions because “[t]here are few absolute truths in the law and litigation”.   + Advocates should not be singled out for liability when witnesses, jurors and Judges are not   + difficulties in drawing the line between non-negligent and negligent errors of judgment   + Parliament has not seen fit to abolish the immunity |

While the immunity is retained in Australia, it has been abolished in New Zealand and the UK.

**UK position**

The House of Lords in ***Hall & Co v Simons*** abolished the rule giving immunity to advocates in England.

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| ***Hall & Co v Simons* [2000] 3 All ER 673**   * This case involved claims against solicitor firms in 3 separate areas * 2 was for negligent advice on family proceedings * Remaining one was for negligent advice on settlement claim for share of matrimonial home. * **Held:** Immunity for advocates was abolished (by all 7 Lords)   Other Tools to protect abuse of Process   * Such an immunity was not needed to deal with collateral attacks on criminal and civil decisions. Rather, the public interest was satisfactorily protected by independent principles and powers of the court = logic   + principles of res judicata (if a dispute judged, judgment final and conclusive), issue estoppel and abuse of process as understood in private law should be adequate to cope with the risk of collateral challenges to civil decisions (ie other safeguards exist to prevent an abuse of process) * A collateral civil challenge to a criminal conviction would ordinarily be struck out as an abuse of process, but the public policy against such a challenge no longer bars an action in negligence by a client who had succeeded in having his conviction set aside.   Cf Other professions   * Comparison with other professionals was important. Doctors, for example, were sometimes faced with a tension between their duties to their patients and their duties to an ethical code, but nobody argued that they should have an immunity from suits in negligence.   No Floodgates   * experience in other jurisdictions, particularly Canada, tended to demonstrate that it was unduly pessimistic to fear that the possibility of actions in negligence would undermine the public interest in advocates respecting their duty to the court.   + bring to an end an anomalous exception to the basic premise that there should be a remedy for a wrong, and there was no reason to fear a flood of negligence suits against barristers   > Not going to hold everyone negligence   * there would be no possibility of the court holding an advocate to be negligent if his conduct was bona fide dictated by his perception of his duty to the court. * courts would take into account the difficult situations faced daily by barristers working in demanding situations to tight timetables * courts could be trusted to differentiate between errors of judgment and true negligence, and in any event claimants would face the very great obstacle of showing that a better standard of advocacy would have resulted in a more favourable outcome >>> especially given the Judges are very familiar with the legal process, and many are ex-barristers themselves they would be aware of the external pressures and have an inside view as to be able to differentiate between errors of judgment and negligence   Strengthen Public confidence in the system   * far from weakening the legal system, the abolition of the immunity would strengthen it by exposing isolated acts of incompetence at the Bar. * confidence in the legal system would be eroded if advocates, alone among professionals, were immune from liability in negligence. * Lord Steyn: * Rejected the ‘cab rank’ rule as a reason for excluding liability – it is easy for barristers to get around this requirement. * Rejected argument that barristers were afforded the same rights as other judicial officers – as the right was focused on free speech * Rejected collateral attack argument – fear mainly in criminal cases, however this has been sorted out by having appeal, and after the appeal is successful, they still need to prove that he or she has a meritorious claim. Courts set the standard of care, so they can differentiate between true negligence and an error. * The advocates’ duties to court a critical factor, however, other professions must still balance their duties. * Lord Hoffman: Once conviction was set aside, no policy reason to reject right to sue for negligence. * The test of ‘intimately connected’ was not certain, and was difficult to apply |

**New Zealand position**

The immunity has also been abolished in New Zealand, but for different reasons.

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| ***Chamberlains v Lai* [2006] NZSC 70**   * Mrs and Mr Lai were directors of a company * Mr and Mrs Lai claimed damages for professional negligence against Chamberlains, a firm of barristers and solicitors - pleaded in alternative claims based on contract, tort and breach of fiduciary duty * High Court upheld immunity, court of appeal found it was no longer valid * The claim was that there was a breach of fiduciary duty in position as directors * Apparently, the barrister lodged a memorandum which induced the trial judge to find against them and award a great deal of damages * **Held:** The court supported the view of the UK in *Hall & Co v Simons –* the immunity abolished * Although it had previously been justified on the grounds of protecting the judicial process, there was no general rule of law that the opinion of a Court expressed in a judgment could not be questioned in different proceedings. * Public policy is not static. So, for example, the immunities of the Crown have been progressively rolled back in response to changing attitudes as to where the public interest lies.[2](http://www.lexisnexis.com.ezp01.library.qut.edu.au/au/legal/frame.do?reloadEntirePage=true&rand=1256348458917&returnToKey=20_T7681991179&parent=docview&target=results_DocumentContent&tokenKey=rsh-23.851541.79440726" \l "fn-20072NZLR_7-2) And the wide immunity at common law for states and heads of state has been restricted and modified by modern legislation and judicial decisions,[3](http://www.lexisnexis.com.ezp01.library.qut.edu.au/au/legal/frame.do?reloadEntirePage=true&rand=1256348458917&returnToKey=20_T7681991179&parent=docview&target=results_DocumentContent&tokenKey=rsh-23.851541.79440726" \l "fn-20072NZLR_7-3) often under the influence of developing international law. * in principle, all who undertake to give skilled advice are under a duty to use reasonable care and skill. An immunity which shields legal practitioners from liability for breach of that duty is anomalous. No other professional group is immune from liability for breach of duties of care they owe to those they advise, treat or represent. > not in Canada or US or UK * 2 issues: 1. in public interest and 2. whether best left to parliament (different s though) * In England barristers weren’t under contract, thus possibility that the origins of immunity from suit sprung from this and not public policy * Up until 1982 in NZ could practice as both barrister and solicitor * advocate’s duties to the Court can never conflict with the duty to the client because they are the rules by which litigation must be conducted * The immunities of other participants in Court proceedings are not analogous because witnesses and the Judge do not assume duties of care to a party * There was no concern about vexatious claims – judges can consider that, and set limits on negligence claims * Reasons for removing the immunity   + The requirements of justice dictate that a victim of egregious professional incompetence should have a remedy for a loss caused to him or her   + The proposition that the bar and the judiciary should continue to support an immunity of the present character can only, ultimately, further erode the critically important confidence of the citizens of this country in the legal profession.   + From time to time it has been argued that the effect of a no-immunity rule would be to raise professional standards. |

Only acts performed in court are protected by the immunity. The things that occur outside of the courtroom seeking to be protected under the immunity has to be ‘intimately connected’ with what happens within the court. Keep in mind that an advocate can still be sued for the non-essential steps in his or her practice.

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| **Arguments For Immunity** | **Arguments Against Immunity** |
| <3 Clients More   * + Divided loyalty argument – conflict between duties to the court and the client – but there is a dual duty on doctors to their clients and their ethical code as well (though these duties are generally parallel)   + Efficiency – may call 7 witnesses instead of one, shifting the balance of a barrister’s obligation toward the client, not the court   Cab Rank Rule   * + Cab rank rule means that barristers have to take on any client– but compare with a duty lawyer, who is required to take on any case that comes their way   + Won’t take on cases with low probability of success   + Ensure the effective administration of justice   Finality   * + that public confidence in the judicial system may be undermined if decisions are able to be continually reviewed on aspects of advocate’s competence   + efficiency wise, don’t want to keep re-litigating matters   + Floodgates – if there is no immunity for barristers then there will be a lot of actions being brought against barristers   No K’ual basis   * + Client → solicitor → barrister – there is no privity of contract between the client and the barrister, so there is no contractual basis on which to sue a barrister (THEREFORE, must rely upon law of negligence to bring an action)   Witness Analogy   * + All other major players in the courtroom have immunity (e.g. judge cant be sued, jury cant be sued, witnesses cant be sued for defamation) – the basis of an appeal is that the judge erred in law, and judges do not get sued for stuffing up in making their judgment   *D-Orta Reasons*   * McHugh J: in *Hall v Simons* the House of Lords had overestimated the Court’s ability to limit relitigation in a negligence trial. * Callinan J considered that the role of the advocate differed from other professions because “[t]here are few absolute truths in the law and litigation”.   + Parliament has not abolished the immunity | Cf Other Areas   * + Equality before the law or Rule of Law requires that everyone be treated as equals   + Cf other professions - doctors are sometimes faced with a tension between their duties to their patients and their duties to an ethical code, but nobody argued that they should have an immunity from suits in negligence   Floodgates n/a   * + But against the floodgates argument, in the UK and Canada, it has not resulted in opening the floodgates of litigation. There can also be mechanisms to prevent vexatious and frivolous claims   *Courts won’t go crazy suing all*   * + there would be no possibility of the court holding an advocate to be negligent if his conduct was bona fide dictated by his perception of his duty to the court * The public interest is satisfactorily protected by independent principles and powers of the court   + principles of res judicata (if a dispute judged, judgment final and conclusive), issue estoppel and abuse of process as understood in private law should be adequate to cope with the risk of collateral challenges to civil decisions (ie other safeguards exist to prevent an abuse of process)   + Barristers these days can easily get around the cab rank rule by saying that they are booked up, that it’s not their area of expertise or demand a lot of money in trust.   Strengthen Confidence in the System   * + the abolition of the immunity would strengthen it by exposing isolated acts of incompetence at the Bar   + Increase public confidence in the legal profession   + Seems akin to an outcome resulting from Caesar judging Caesar – expressly the reason why an independent tribunal was set up for solicitors, maybes cos more solicitors >> solicitors aren’t immune   + in principle, all who undertake to give skilled advice are under a duty to use reasonable care and skill |
| The differing results in other jurisdictions from Australia appear to rely on differing views of the courts ability to prevent a floodgate of liability. The House of Lords pointed to a number of doctrines that would ensure the public interest is upheld, however McHugh J questioned the court’s ability to limit relitigation in a negligence trial. | |

**Should the ethics of judges be different to that of lawyers?**

Should judges be **perfect**? If not, how close to perfection should they be?

There is a community expectation that judges, who decide right and wrong in a courtroom, to be following the rules that they lay down. They are essentially the maker of laws (in the sense that they interpret the law or make a law where no current statute law exists), and it would be hypocritical of a judge not to be **perfect**. Judges hold a position of high status in society, anything they say or do, they are doing as a “judge” (an authoritative source).

Judges are arbitrarily appointed by group of decision makers, which does not include the public, so the public does not have any input on who should or shouldn’t become a judge.

It is important that judges do not undermine the public confidence in the judicial system. For example, former Federal Court judge Marcus Einfeld signed false statutory declarations to avoid a $77 speeding fine. This does not demonstrate honesty and integrity. In a courtroom, judges require witnesses to speak the whole truth under oath or affirmation, and can punish people for failing to do so. For the public to be aware that a judge has been dishonest themself puts the reputation of judges at risk – people always think that others should practice what they preach.

Although there is an expectation of judges to be impartial, unbiased and be slightly removed, judges are usually called upon to make decisions that reflect ‘community standards’. If the judge is **perfect** and operates in a vacuum, they cannot reasonably be aware of the community standards, as they would not be part of or participating in the community.

**Judicial Ethics – A Discussion Paper by David Wood**

* There appears to be community uncertainty as to the standards of conduct most appropriate to judicial officers.
* With growing pluralism in social values, and greater questioning of figures in authority, there is no longer one simple and widely accepted model of judicial conduct.
* “Judges have to maintain standards which will maintain public confidence in the courts and will ensure judicial impartiality and judicial independence.”
* “A form of life and conduct far more severe and restricted than that of ordinary people is required from judges… The judges have to maintain … a far more rigorous standard than is required from any other class.”
* A more liberal view however – “restrictions on the personal conduct of judges cannot be so onerous as to deprive them of all the fundamental freedoms enjoyed by other citizens. Care must be taken to achieve a balance between the need to maintain the integrity and dignity of the judiciary, and the right of judges to conduct their personal lives in accordance with the dictates of their individual consciences.”
* To simultaneously occupy the roles of the exemplary and the ordinary citizen has all the appearance of an impossible double act.
* Conduct which some commend as civil and courteous, others will denigrate as stiff and formal.
* Conversely, what some condemn as undignified behaviour, displaying lack of respect for judicial office, others will applaud for showing that judicial officers possess a sense of humour and the capacity not to take themselves too seriously.
* Prevailing Australian position is that “upon appointment… a judge is expected to limit involvement in other forms of public life and to conduct his or her private life so as to avoid, as far as is reasonable practicable, involvement in activities which might (or might be seen to) compromise the judge’s or a court’s independent status or the impartial disposition of specific cases or issues. The less involved a judge is in non-judicial activities the less likely it is that the judge will be confronted with determination of a case or an issue in which he or she has some interest.
* The community rightfully expects more than the bare minimum from all its members, in particular, from those in positions of responsibility.
* They do so for the states reason of protecting the public, as well as for other reasons, not usually articulated, like maintaining social prestige and earning capacity.
* Some hold the view that, so long as it is not outlandish, and does not affect his/her capacity to properly carry out his or her responsibilities, “off-the-bench” behaviour simply is not relevant to “on-the-bench” behaviour.
* There is a strong ethical requirement on judicial officers to exercise their own independent judgment, to genuinely act independently.

**Should judicial officers live by the standards of a hypothetical exemplary citizen, so that they can serve as role models for the rest of the community?**

* JJ should conduct themselves in a way which maintains the public’s confidence in the legal system
* Should actions of JJ off the bench have a bearing for JJ on the bench?
* Sols and Barsts have to maintain high standards of conduct in and out of legal practice

**Must their conduct not just satisfy some threshold test of acceptability, but be beyond reproach, capable of withstanding constant public probing?**

* JJ are only human and cannot expect them to be perfect
* But public scrutiny is very high

**What, then, are these standards?**

* Community expects more from those in positions of responsibility
* JJ are held to a standard higher than those of a ‘normal’ citizen

**How close to perfection is exemplary?**

* Perfection is impossible but JJ should have good conduct
* Tact , intellectual rigor, humanity, moral acuity

**You are an experienced Mags Ct advocate and you are not allowed to let your client commit perjury or give evidence that is contrary to the instructions that he or she has given you. But then in a case involving breaking and entering you put the defendant in the witness box and begin to examine him in accordance with the instructions he has given you. He lies. His replies are even more fanciful in cross-examination. How do you respond?**

**Barristers Rules**

***Rule 34 -* A barrister whose client informs the barrister, during a hearing that, upon an issue which may be material the client has lied to the court**:

(a) must refuse to take any further part in the case unless the client authorises the barrister to inform the court of the lie;

(b) **must promptly inform the court of the lie upon the client authorizing the barrister to do so**; but

(c) must not otherwise inform the court of the lie.

* Here, the advocate has become aware that the client has, upon a material issue, lied to the court.
* Unless the client authorises the advocate to inform the court of the lie (which is very unlikely), the Advocate must advise the court that he/she wishes to withdraw as the practitioner representing the defendant, but refuse to give reasons for the request.

**Solicitors Rules**

**15 Delinquent or guilty clients**

15.1 **A solicitor whose client informs the solicitor, before judgment or decision that the client has lied in a material particular to the court or has procured another person to lie to the court or has falsified or procured another person to falsify in any way a document which has been tendered:**

15.1.1 must advise the client that the court should be informed of the lie or falsification and request authority so to inform the court;

15.1.2 must refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie or falsification:

15.1.3 must promptly inform the court of the lie or falsification upon the client authorising the solicitor to do so; but

15.1.4 must not otherwise inform the court of the lie or falsification.

15.2 **A solicitor whose client in criminal proceedings confesses guilt to the solicitor but maintains a plea of not guilty:**

15.2.1 may cease to act, if there is enough time for another solicitor to take over the case properly before the hearing, and the client does not insist on the solicitor continuing to appear for the client;

15.2.2 in cases where the solicitor continues to act for the client:

* + must not falsely suggest that some other person committed the offence charged;
  + must not set up an affirmative case inconsistent with the confession;
  + may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;
  + may argue that for some reason of law the client is not guilty of the offence charged; or
  + may argue that for any other reason not prohibited by (a) and (b) the client should not be convicted of the offence charged.

**How do you respond?**

* + - Ask for short adjournment
    - Tell the judge you are forensically embarrassed
    - Comply with rule 34 (if barrister) or rule 15 (if solicitor)
    - Note that non-compliance could amount to ss 418/419 conduct
    - S 420 states that conduct contravening the legal profession rules can constitute ss 418/419 conduct

**Case on point = NSW Bar Assoc v Punch [2008]:**

* + - Accused told Punch that he was present at the scene of the crime when robbery taking place (i.e. an was part of that robbery)
    - Later, P called 4-5 witnesses who gave evidence that Accused was with them at the relevant time and therefore could not have committed the crime
    - Discipline proceedings brought re: misleading the court
    - P heard accused say he was there and new that the alibi evidence was a lie

# Duty to the Administration of Justice

The responsibilities of a practitioner, particularly those of an advocate, are influenced very much by the adversarial system within which justice is administrated in the common law jurisdictions in Australia. The adversarial system depends upon a very clear understanding of the role of the advocate and the role of the judge.

The function of the judge is to ensure as an impartial umpire that proceedings are conducted fairly and that the rules of law are applied to the circumstances as they arise. For the adversarial system to work effectively, there must be full and frank disclosure of information by the client to the practitioner and the independent and objective presentation of the case by the advocate on behalf of the client to the court. The rules of confidentiality of information and conflict of interest are designed to achieve these objectives.

However, the administration of justice is designed to ensure a fair trial. Therefore, the way in which an advocate conducts a case is constrained by the duties owed to the court and to the administration of justice. While this is true of advocates, the way in which solicitors and other legal practitioners conduct themselves in relation to their clients’ activities are also constrained by these principles. As the administration of justice requires speedy, efficient and expeditious settlement of disputes, the duty to the client may conflict with the achievement of these objectives.

Generally, lawyers must:

1. Advance their client’s interests unhindered by personal beliefs: SR12.1, 12.3, BR 16
2. Not be a mere ‘mouthpiece’ for the client: SR 13.1, BR 20
3. Inform the Court of binding or relevant authorities: SR 14.6, 14.8, BR 27, 29

## Paramountcy of Duty

The duties to the court are superior to the duties to the client (***Gianerrelli v Wraith***). The practitioner must not harm the administration of justice during the promotion of the client’s needs (***White******Industries v Flower & Hart (a firm)*).**

In ***Tuckiar v The King***, the court held that the practitioner’s duty to the court and the client was the same.

* basically indicted his client, no disciplinary proceedings but led to the conviction being quashed.

A breach of this duty resulting from inexperience is not a valid defence (*Milu v Smith*).

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| ***Tuckiar v The King* (1934) 52 CLR 335**   * Aboriginal person had been charged with the murder of a policeman * He confessed through an interpreter to the barrister * After interviewing the accused, his counsel in open court said that he was in the worst predicament that he had encountered in all his legal career and asked to go to Chambers * Judge, the Protector of Aborigines and counsel for the defence went into the Judge's Chambers, told the judge that he had confessed & the judge then told the barrister to continue with the trial * After the prisoner was convicted his counsel made a public statement in court to the effect that the accused admitted that the evidence called by the Crown of a confession made by the accused to a witness was correct.   ***HELD***Conviction quashed   * The barrister had both the duty to the client and the court to push for rational arguments and to ensure that the Crown was put to proof * Counsel should not have divulged the information thus acquire * Counsel’s duty to the court and client was the same * Counsel should not deprive Tuckiar of the chance to make arguments for his acquittal * The subsequent action of the prisoner's counsel in openly disclosing the privileged communication of his client and acknowledging the correctness of the more serious testimony against him is wholly indefensible. It was his paramount duty to respect the privilege attaching to the communication made to him as counsel, a duty the obligation of which was by no means weakened by the character of his client, or the moment at which he chose to make the disclosure |

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| ***Milu v Smith & Ors***   * AG was seeking orders that a barristers representing a client in an application for judicial review in the corners court pay their costs on an indemnity basis * The barrister had made serious allegations in relation to both breaches of natural justice and bias on the part of the coroner * Moynihan J stated that any competent barrister would have known that there was no reasonable basis for the review * That meant that the barrister had either ignored his duty to the court or acted recklessly * The fact that he was young, inexperienced and acting in a prob bono capacity did not matter – that didn’t mean that you had a lower obligation to the court. |

### Lawyers as Officers of the Court

The concept of the lawyer as an officer of the court is an acknowledgement of the role that can be described as one of a servant of a public institution. The peculiar feature of counsel’s responsibility is that he owes a duty to the court as well as his client (*Giannarelli v Wraith* per Mason CJ). His duty to the client is subject to his overriding duty to the court. In the performance of that overriding duty there is a strong element of public interest.

A person becomes an officer of the court on being admitted as a lawyer (s 38(i) LPA).

## Right to Representation

There is no right or requirement for a party in judicial proceedings to be represented (***Dietrich v R***). However, there is a right for a fair trial, and where there is no representation, that right may be lost (***Dietrich v R***).

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| ***Dietrich* (1992) 177 CLR 292**   * Dietrich was charged with importing a trafficable quantity of heroin * He applied to Legal Aid for representation, but was declined * He also asked the Minister, but counsel was not provided * He was unrepresented at a jury trial * Dietrich was convicted.   **Held:**   * There is no right to have representation paid for out or public money in a case * However, there is a right to a fair trial * Where someone who, through no fault of their own, does not have counsel, the court can order a stay of proceedings to prevent a miscarriage of justice * HCA ordered a new trial because Dietrich had been convicted without representation – and there had been a miscarriage of justice in this case, as the accused did not receive a fair trial |

## Refusal to Call a Witness

One of the features of the adversarial system is the function of the judge to act as an impartial umpire rather than to intervene in the way the case is presented (***R v Apostilides***).

The Prosecution Guidelines state that the Crown must call all relevant witnesses in a matter (Guideline 37).

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| ***R v Apostilides* (1984) 154 CLR 563**   * Apostilides charged with rape and found guilty * 2 witnesses who were present at the time of rape were not called as witnesses, but copies of statements were made available by the prosecutor to defence counsel * Defendant called these 2 people as witnesses * Defendant was found guilty and convicted them * **Held:** Retrial ordered because the verdict was unsafe or unsatisfactory * The court made some basic propositions: * It is the sole responsibility of the Crown to call their own witnesses when prosecuting * Judge can request the Crown to call a witness, but the Crown is not obliged to call the witness (judge cannot order) * Judge can question Crown as to why they refused to call a key witness and ask them to reconsider their decision not to call a witness * If the Crown still refuses to call a witness, the judge can comment to the jury on the Crown Prosecutor’s failure to call the witness * It is only in exceptional circumstances that can a judge call a witness of their own volition * A failure of the Crown to call a witness will only be grounds to set aside a conviction if it amounts to a miscarriage of justice   + Only a ground to set aside a trial where there has been a miscarriage of justice, on the whole |

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| ***Wragg v Bond* [2009] WASC 383**   * A security guard was alleged to have beaten up a drunken customer at pub in WA after ejecting him because of his behaviour. * At the trial in the Magistrate’s court, the magistrate made minimal intervention during evidence-in-chief of the prosecution. However, during cross-examination, he made considerable interventions, sometimes in a partisan way. * The defendant was convicted of the offence. * He appealed to the Supreme Court on the basis that he did not receive a fair trial.   **HELD**   * The magistrate was overly interventionist. * He was entitled to a fair trial before the magistrate. He did not get one. It was as if there was a second prosecutor in the room. The magistrate's interventions took him metaphorically off the bench and into the battle. The appeal must be allowed and a retrial ordered so that Mr Wragg can secure justice according to law whatever the result of the retrial. * He asked counsel questions that were plainly inappropriate and adversarial. * The magistrate largely led Mr Wragg and his witness through their evidence-in-chief and later complained of repetition when counsel attempted to go into more detail. During the cross-examination of Mr Wragg the magistrate intervened and asked some plainly cross-examining questions of Mr Wragg. * Mr Wragg's case is not that the magistrate was biased but that the magistrate's conduct led to a miscarriage of justice because there was an unfair trial. * The magistrate's conduct actively obstructed counsel. Lawyers who appear in court should not be shrinking violets and should be robust enough to pursue their case with vigour, if necessary, against a degree of antagonism from the bench. * Judicial officers, lawyers and police prosecutors might understand the subtle rules governing examination and cross-examination of witnesses. They might observe that the examinations of Mr Wragg and Mr Prout by the magistrate were non-leading questions in neutral form. So much can be accepted. However, the impression of the trial must be gleaned from the point of view of an impartial lay observer and also from the view point of the person whose trial this was. They would have heard the magistrate take over the questioning of the defence witnesses from counsel and pose questions in cross-examination appropriate from a prosecutor but partisan from a judicial officer. Neither an independent lay observer nor Mr Wragg could have reasonably felt this was a fair trial. * The conviction is quashed, the fine set aside, and the matter remitted to the Magistrates Court for retrial. |

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## General Duty

Although duties to the court often arise in the conduct of litigation, they may also arise in many other areas of legal practice. The most general aspect of the duty is to **obey the law** and to avoid being associated with conduct or practices undermining the law and the justice system.

Therefore, the following cases that involve breaches of the law have led to strike offs:

* + defrauding a bank in relation to deposits for the purchase of property (*Gregory John Casey*);
  + fabrication of evidence (swearing affidavit and drafting pleadings in relation to fabricated letter) (*Karl Storm Jameson*);
  + indecent dealing with a minor (*Pratt*);
  + supply of dangerous drug (*Darveniza*).

## Barristers’ Duties

The preamble to the Barristers Rules confirms that the paramount duty of advocates to the administration of justice.

Cab rank principle

The cab rank principle in Rule 89 requires the barrister to accept a brief if –

* The brief is within the Barrister’s ‘capacity, skill and experience’ (Rule 89(a))
* The barrister is available to work when the brief requires them to work (Rule 89(b))
* The fee is acceptable (Rule 89(c)). However, the barrister cannot set a fee higher than if they would have accepted the brief, to deter the solicitor from offering the brief (Rule 90).

**Briefs must be refused or retained** where –

Confidential Info of another party: The barrister has confidential information about another party to the matter and the information may be helpful to the prospective client’s case (rule 91(a)(i)) and the person entitled to confidentiality has not consented to the information being used for the prospective client (rule 91(a)(ii))

Special Retainer: There is a general or special retainer, giving the right of first refusal of the barrister’s services to another party, and the barrister is offered to appear in the case for the other party (rule 91(b))

They’re a witness

* The barrister has reasonable grounds to believe they are a witness in the case (rule 91(c))
* The brief is for an appeal where the barrister was a witness (rule 91(d))

Their merit will be attacked: The barrister has reasonable grounds to believe that their personal or professional conduct will be attacked in this case (rule 91(e))

Monetary Interest in outcome of the Case: The barrister has material financial or property interest in the outcome of the case, apart from their fee (rule 91(f))

Dispute re amount payable to barrister: The brief is on an assessment of costs, including a dispute as to the propriety of fee paid to barrister or recovery of costs from a former client where the barrister appeared for the client (rule 91(g))

For Arbitration: The brief is a party to an arbitration and the barrister has advised or appeared for an arbitrator in connexion with the arbitration (rule 91(h))

Family Members involved: The brief involves a hearing in front of a barrister’s parent, sibling, spouse, child or member of the barrister’s household (rule 91(i))

No instructing solicitor & they need one: The failure to have an instructing solicitor would seriously prejudice the barrister’s ability to protect the client’s interest (rule 91(j)).

Not Barristers’ Work: Must refer to a solicitor for anything that’s not Barristers’ Work as that term is defined in the Rules (r 81).

Under rule 97, a **barrister may refuse a brief where** –

1. Not offered by solicitor
2. Barrister believes on reasonable grounds the time and effort to prepare brief will prejudice the barrister’s practice or other important professional or personal engagements
3. Barrister doubts on reasonable grounds the fee will be paid reasonably promptly, or in accordance with cost agreements
4. Brief may require cross-examination or criticism of a friend or relative
5. Solicitor does not agree to attendances by instructing solicitor, clerk or client representative to:
   1. Ensure barrister is provided with adequate instructions;
   2. Ensure client adequately understands advice;
   3. Avoid delay in conduct of hearing or compromise negotiations; and
   4. Protecting client or barrister from disadvantage or inconvenience which has a real possibility of occurring;
6. The client is either instructing solicitor, partner, employer or employee of instructing solicitor, and has refused to have an independent instructing solicitor
7. If the barrister is a Special Counsel or Queen’s Counsel, the brief does not require an SC or QC

For **serious criminal offences**:

99. A barrister must not return a brief to defend a charge of a serious criminal offence unless:

(a) the barrister believes on reasonable grounds that -

(i) the circumstances are exceptional and compelling; and

(ii) there is enough time for another legal practitioner to take over the case properly

before the hearing; or

(b) the client has consented after the barrister has clearly informed the client of the circumstances in which the barrister wishes to return the brief and of the terms of this Rule and Rule 100.

*100*. A barrister who holds a brief to defend a charge of a **serious criminal offence** and also any other brief, both of which would require the barrister to appear on a particular day, must return the other brief as soon as possible, unless the barrister became aware of the appearance being required on that day in the first brief after the barrister was committed to appear on that day in the other brief.

Where the **barrister has confidential information from a previous client**:

The barrister must refuse a brief where the barrister has confidential information from a client with different interests from a prospective client where –

* The information may help advance the prospective clients interests (rule 95(a)); and
* The person entitled to confidentiality has not consented (rule 95(b))

Where a **barrister is required to make appearances on the same day in different trials**:

The barrister must not accept briefs where they are required to appear on the same day, and would not likely, in the ordinary course of events, make the second brief, unless –

* there is express consent from the second brief client to do it (rule 96(a)); and
* the instructing solicitor is informed of the barrister’s intention to accept the second brief (rule 96(b))

**BARRISTER PREVIOUSLY A….**

**… judge**

Rule 92 requires a barrister must refuse a brief where:

* The barrister was a member of the court or judicial registrar, or before a court where appeals lay to a court of which the barrister was formerly a member, and –
  + - * + member of court for less than 2 years – appearance would be within 2 years after barrister ceased to member of court in question (rule 92(a))
        + member of court for 2 - 5 years – must refuse within an equivalent period for when barrister was a member of the court (rule 92(b))
        + Member for 5 years or more – must refuse within 5 years after (rule 92(c))

**… member of tribunal**

Rule 93 provides that a barrister must refuse to accept to retain a brief or instructions to appear before a tribunal if –

* The barrister is a *member of the tribunal* (rule 93(a))
* The brief is to appear before such a tribunal which sits in divisions or lists to which its members are assigned and the barrister is a member of the tribunal assigned to a division or list and the brief is to appear in a proceeding in that division or list (rule 93(b)
* The brief is to appear before such a tribunal which – (rule 93(c))
  + which does not sit in divisions or lists to which its members are assigned and the barrister was formerly a member of the tribunal - where the appearance would occur within two years after the barrister ceased to be a member of the tribunal
  + which does sit in divisions or lists to which its members are assigned and the barrister was assigned as a member to a division or list - where the brief is to appear in a proceeding in a division or list to which the barrister was assigned and the appearance would occur within two years after the barrister ceased to be assigned to that division or list.

### Barristers’ Conduct of Proceedings

While an advocate has a duty to advance and protect the client’s interests to the best of the advocate’s skill and diligence in an objective and independent way, the conduct of proceedings is limited in a number of ways.

**Authority**

Under r 27, a barrister must inform the court of:

(a) any binding authority;

(b) any authority decided by an intermediate court of appeal in Australia;

*Legislation:*

(c) any authority, including any authority on the same or materially similar legislation as that in question in the case, decided at first instance in the Federal Court or a Supreme Court, or by superior appellate courts, which has not been disapproved; or

(d) any applicable legislation of which the barrister is aware, and which the barrister has reasonable grounds to believe to be directly in point, against the client’s case.

**Independence**

A barrister must make their own independent and forensic judgements about the case, not merely be a mouthpiece for the client or instructing solicitor’s wishes (although, should have consideration for the desires of the client and instructing solicitor where practicable) (rule 20).

The barrister can, by making independent judgment –

* Confine hearing to issues which barrister believes are the real issues (rule 21(a))
* Present client’s case as quickly and simply as may be consistent with its robust advancement (rule 21(b))
* Inform court of persuasive authority against case (rule 21(c))
* Barrister cannot make submissions or express views on material evidence where those views express the barrister’s personal opinion on the case (rule 22)

**Frankness**

Don’t Mislead the Court

* Barrister must not knowingly make a misleading statement to the court (rule 23)

Correct misleading statements

* Barrister must take all necessary steps to correct misleading statements made to the court (rule 24)

Seeking Interlocutory relief in an Ex parte Application

* Barrister must inform the court in ex parte application matters which – (rule 25)
  1. are within the barrister’s knowledge
  2. are not protected by legal professional privilege; and
  3. the barrister has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.

A barrister who has knowledge of matters which are within Rule 25(c) --

* must seek the client’s consent if matter is protected by LPP and if client refuses, must tell court that cannot assure court all relevant matters have been disclosed (rule 26(b)).

Client Character

* Barrister who knows or suspects that the prosecution is unaware of the client’s previous conviction must not a prosecution witness whether there are previous convictions in the hope of a negative answer (r 32).
* A barrister must inform the court in civil proceedings of a misapprehension by the court as to the effect of an order which the court is making, as soon as the barrister becomes aware of the misapprehension (r 33).

### Guilty or Dishonest Clients

Client says has lied/falsified a document:

Where a client informs a barrister before judgment that the client or a person they have procured –

* has lied, in a material particular to the court;
* or falsified a document tendered;

the barrister must

1. refuse to take any further part in the case unless the client authorises the barrister to inform the court of the conduct; (34(a))
2. promptly inform the court of the conduct upon the client authorising the barrister to do so (34(b));
3. but not otherwise inform the court of the lie or falsification (34(c))

Client confesses guilt, maintains plea of not guilty:

Where the client confesses guilt to barrister but maintains a plea of not guilty, the barrister –

* + *may return* the brief where
    - there is *sufficient time* for another legal practitioner to take over, and
    - *client does not insist* on the barrister appearing in the court (rule 35(a)); or
  + *where the client keeps barrister*, the barrister –
    - must not falsely suggest someone else committed the offence (rule 35(b)(i));
    - must not set up an affirmative case inconsistent with confession (rule 35(b)(ii));

*Argue for the client:*

* + - may argue evidence as whole does not prove client’s guilt (rule 35(b)(iii));
    - may argue that for a reason of law, client is not guilty (rule 35(b)(iv));
    - may argue, for any other reason than would contravene rule 35(b)(i) and (ii), that the client should not be convicted (rule 35(b)(v)).

Client going to disobey Court Order

Where a client tells a barrister they are going to disobey court order, the barrister must –

* + - Advise against that course and warn of dangers (rule 36(a));
    - Not advise the client how to do it (rule 36(b));
    - Not inform court unless:
    - Client consents beforehand (rule 36(c)(i)); or
    - They believe on reasonable grounds that the client is a threat to any person’s safety (rule 36(c)(ii)).

### Responsible Use of Court Process Privilege

Putting it out there

Barristers must take care to ensure that strategic decisions taken by barrister during a case to invoke coercive powers of a court or make any allegation or suggestion against a person are:

* + reasonably justified by the *material available* (rule 37(a))
  + *appropriate for robust advancement* of client’s case (rule 37(b))
  + not done primarily to *harass or embarrass* (rule 37(c))
  + not made primarily to gain some *collateral advantage* for lawyer or client (rule 37(d))

Making Allegations

* Barrister must not make an allegation which barrister does not believe on reasonable grounds will be supported by the evidence available for the client’s case (rule 39)

Cross-examining to suggest bad shit

Barrister must not cross-examine to suggest criminality, fraud, or other serious misconduct unless:

* + Barrister believes on *reasonable grounds* that *material already available* to the barrister provides a proper basis for the suggestion (rule 40(a));
  + In cross-examination going to *credit alone*, barrister believes on reasonable grounds that affirmative answers to the suggestion would *diminish the witness’s credibility* (rule 40(b));
  + Barrister *can use opinion of solicitor* as a reasonable ground for believing that there is a proper basis under rule 40(a) (rule 41)
  + Barrister must make *reasonable enquiries to determine reasonable grounds for belief* under rule 40(a) unless has received and accepted a solicitor’s opinion within rule 41

### Assisting Judge to Identify All Issues in the Case

Counsel has a duty to identify to the judge the relevant issues in a case whether in a jury trial or a non-jury trial (***R v Ion***).

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| ***R v Ion* (1996) 89 A Crim Rep 81**   * + The appellant elected to have two charges of murder tried by a judge alone   + At the trial, very experienced senior counsel appearing for him identified the issues in the case which the judge had to decide as being whether: * the act concerning the death of each of the deceased was done voluntarily by the appellant and with both the basic intention of performing those acts and the specific intention to kill; or * to inflict grievous bodily harm and whether the appellant had established the partial defence of diminished responsibility.   + On appeal, the appellant sought leave pursuant to s 5(1)(b) of the *Criminal Appeal Act 1912* to appeal against a finding of fact by the judge   + The court held:     1. The requirement of leave where the ground of appeal involves a question of fact alone has been ignored in the past. It will be granted only where there is any point, in the sense that, where the appeal is from a judge alone trial, there is some basis shown that the judge has made an appealable error in that finding of fact.     2. The Court of Criminal Appeal has no power to rehear the issues at the trial or to make any finding which could have been made at the trial, and an appeal would be allowed from the judge's finding of fact only if error had been demonstrated in the sense that there was no evidence to support a particular finding, or that the evidence is all one way, or that the judge had misdirected himself or herself, leading to a miscarriage of justice.   *The Appeal*   * It was submitted on the appeal that the judge erred in failing to determine whether the appellant acted either in self-defence or under provocation. It was argued that these two “defences” were sufficiently raised by the evidence and thus that the judge was required to deal with them even though they were never raised expressly as issues at the trial. * **Held:** The principle stated in *Pemble v The Queen* does not apply, and never has applied, in no jury trials. * Trial judges are entitled to rely upon the parties to raise expressly those issues which they seek to have determined in the trial. * If the issue has not been so raised at the trial, the Court of Criminal Appeal will permit it to be raised on appeal only if the appellant satisfies it that the omission to raise it expressly at the trial has led to a miscarriage. * In the end, the accused was convicted |

### Role of Crown Prosecutors

Crown Prosecutors must comply with the Guidelines under the ***DPP Act; r 63 Barristers Rule***, ***retained for Cth = r 64*** >>> ie, not to convict at all costs

**Where does the Crown Prosecutor derive their powers?**

* The Director of Public Prosecutions is in charge of prosecuting all the serious criminal offences in Queensland.: DPP Act, s 10; *Vasta v Clare* [2002] QSC 259.
* The DPP derives its powers from the *Director of Public Prosecutions Act 1984 (*Qld), s 11.
* To assist Crown prosecutors in determining to prosecute or not, a set of guidelines are issued: DPP Act, s 11(1)(a)(i).

***Guidelines for prosecutors:***

These are guidelines not directions. They are designed to assist the exercise of prosecutorial decisions to achieve consistency and efficiency, effectiveness and transparency in the administration of criminal justice. The Director of Public Prosecutions represents the community. The community’s interest is that the guilty be brought to justice and that the innocent not be wrongly convicted.

*Duty to be fair*

The duty of a prosecutor is to act fairly and impartially, to assist the court to arrive at the truth (Guideline 1).

* a prosecutor has the duty of ensuring that the prosecution case is presented properly and with fairness to the accused;
* a prosecutor is entitled to firmly and vigorously urge the Crown view about a particular issue and to test and, if necessary, to attack the view put forward on behalf of the accused; however, this must be done temperately and with restraint;
* a prosecutor must never seek to persuade a jury to a point of view by introducing prejudice or emotion;
* a prosecutor must not advance any argument that does not carry weight in his or her own mind or try to shut out any legal evidence that would be important to the interests of the person accused;
* a prosecutor must inform the Court of authorities or trial directions appropriate to the case, even where unfavourable to the prosecution; and
* a prosecutor must offer all evidence relevant to the Crown case during the presentation of the Crown case. The Crown cannot split its case.

*Duty to be expeditious*

A fundamental obligation of the prosecution is to assist in the timely and efficient administration of justice (Guideline 3).

* cases should be prepared for hearing as quickly as possible;
* indictments should be finalised as quickly as possible;
* indictments should be published to the defence as soon as possible;
* any amendment to an indictment should be made known to the defence as soon as possible;
* as far as practicable, adjournment of any trial should be avoided by prompt attention to the form of the indictment, the availability of witnesses and any other matter which may cause delay; and
* any application by ODPP for adjournment must be approved by the relevant Legal Practice Manager, the Director or Deputy Director.

*Duty to act in the public interest when deciding to prosecute*

The prosecution process should be initiated or continued wherever it appears to be in the public interest (Guideline 4). That is the prosecution policy of the prosecuting authorities in this country and in England and Wales. If it is not in the interests of the public that a prosecution should be initiated or continued then it should not be pursued. The scarce resources available for prosecution should be used to pursue, with appropriate vigour, cases worthy of prosecution and not wasted pursuing inappropriate cases.

It is a two tiered test:-

(i) is there sufficient evidence?; and

* a prima facie face is necessary but not enough
* a prosecution should not proceed if there is no reasonable prospect of conviction before a reasonable jury (or Maggie)

(ii) does the public interest require a prosecution?

* If there is sufficient reliable evidence of an offence, the issue is whether discretionary factors nevertheless dictate that the matter should not proceed in the public interest.
* Discretionary factors may include:-
  + (a) the level of seriousness or triviality of the alleged offence, or whether or not it is of a ‘technical’ nature only;
  + (b) the existence of any mitigating or aggravating circumstances;
  + (c) the youth, age, physical or mental health or special infirmity of the alleged offender or a necessary witness;
  + (d) the alleged offender’s antecedents and background, including culture and ability to understand the English language;
  + (e) the staleness of the alleged offence;
  + (f) the degree of culpability of the alleged offender in connection with the offence;
  + (g) whether or not the prosecution would be perceived as counter- productive to the interests of justice;
  + (h) the availability and efficacy of any alternatives to prosecution;
  + (i) the prevalence of the alleged offence and the need for deterrence, either personal or general;
  + (j) whether or not the alleged offence is of minimal public concern;
  + (k) any entitlement or liability of a victim or other person to criminal compensation, reparation or forfeiture if prosecution action is taken;
  + (l) the attitude of the victim of the alleged offence to a prosecution;
  + (m) the likely length and expense of a trial;
  + (n) whether or not the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
  + (o) the likely outcome in the event of a conviction considering the sentencing options available to the Court;
  + (p) whether the alleged offender elected to be tried on indictment rather than be dealt with summarily;
  + (q) whether or not a sentence has already been imposed on the offender which adequately reflects the criminality of the episode;
  + (r) whether or not the alleged offender has already been sentenced for a series of other offences and what likelihood there is of an additional penalty, having regard to the totality principle;
  + (s) the necessity to maintain public confidence in the Parliament and the Courts; and
  + (t) the effect on public order and morale.
* The more serious the offence, the more likely that the public interest will require a prosecution.

A decision to prosecute or not to prosecute must be based upon the evidence, the law and these guidelines. It must never be influenced by:-

(a) race, religion, sex, national origin or political views;

(b) personal feelings of the prosecutor concerning the offender or the victim;

(c) possible political advantage or disadvantage to the government or any political group or party; or

(d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution.

Decision to stop Prosecuting

A decision to discontinue a prosecution or to substantially reduce charges on the basis of *insufficient evidence* cannot be made without consultation with a Legal Practice Manager: g 18.

*Conduct of a prosecutor*

Any conduct of the Crown Prosecutor must be temperate and any comments to be non-prejudicial: *R v Hay and Lindsay* [1968] Qd R 459.

* “that the words of the Crown Prosecutor, going unchecked, could have had an effect on the minds of the jury as to have induced them not to accept the evidence of the medical witness and could have discredited the whole of the defence.”

***Does a Crown Prosecutor need to be impartial?***

* A decision to prosecute or not to prosecute must be based upon the evidence, the law and these guidelines: g4 (iii); *R v Hay and Lindsay*[1968].

***Independence of the Crown Prosecutor*:**

In *Vasta v Clare* [2002] it was concluded that while a Crown Prosecutor is subject to guidelines furnished by the Director and the role of Crown Prosecutor had a measure of independent discretion it would fall to a prosecutor to act consistently with them when applicable.

***Does a Crown Prosecutor have any shelter within the Act?***

* s 25 DPP has protection of persons executing the Act.

***Adversarial system and the Administration of Justice:***

The difficulties of the adversarial system in comparison to a Civil jurisdiction where highlighted in the very public Fingleton case, (*Fingelton v R* (2005) 227 CLR 166) where the HCA concluded as a matter of law, the appellant should not have been put to trial. The Qld Court appeal were familiar with the immunity but was able to promulgate that knowledge.

* **Guideline 12 –** The prosecutor should suggest alternative charges.

*Duty to Disclose Info*

The Crown has a duty to make full and early disclosure of the prosecution case to the defence (Guideline 27).

The duty extends to all facts and circumstances and the identity of all witnesses reasonably regarded as relevant to any issue likely to arise, in either the case for the prosecution or the defence.

*Assisting unrepresented accused*

A prosecutor must take particular care when dealing with an unrepresented accused (Guideline 29). There is an added duty of fairness and the prosecution must keep the accused properly informed of the prosecution case. At the same time the prosecution must avoid becoming personally involved.

The prosecutor should not advise the accused about legal issues, evidence or the conduct of the defence. But he or she should be alert to the judge’s duty to do what is necessary to ensure that the unrepresented accused has a fair trial. This will include advising the accused of his or her right to a voir dire to challenge the admissibility of a confession see *McPherson v R* (1981) 147 CLR 512.

*Deciding to call a witness*

* **Guideline 37 –** In deciding whether or not to call a particular witness, the prosecutor must be fair to the accused. The general principle is that the Crown should call all witnesses capable of giving evidence relevant to the guilt or innocence of the accused.
* See further “5.3 Refusal to Call a Witness” on page 162.

*Cross-examining accused re credit*

* **Guideline 40 –** Cross-examination of an accused as to his or her credit must be fairly conducted. In particular, accusations should not be put unless they are based on information reasonably assessed to be accurate and they are justified in the circumstances of the trial.

*Baseless Points of Fact or Law*

A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds can be sustained (Guideline 41).

*Submissions on Sentence*

* **Guideline 44 –** It is the duty of the prosecutor to make a submission on sentence to –
  1. inform the court of all of the relevant circumstances of the case;
  2. provide an appropriate level of assistance on the sentencing range;
  3. identify relevant authorities and legislation; and
  4. protect the judge from appealable error.

## Solicitors’ Duties

NOTE: A solicitor has rights of appearance in the Queensland Supreme Court (s 14(4) LPA).

**General standard of conduct**

A solicitor must not engage in conduct which is –

* Dishonest (rule 30.1);
* Calculated, or likely to a material degree, to:
  + - Be prejudicial to the administration of justice (rule 30.2(a));
    - Diminish public confidence in administration of justice (rule 30.2(b));
    - Adversely prejudice a solicitor’s ability to practice according to these rules (rule 30.2(c)).

**Communications**

A solicitor, in all dealings with other practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensure that they are courteous and devoid of offensive or provocative language or conduct (r 21).

**Independence**

* Solicitor must make own independent and forensic judgements about the case, not merely be a mouthpiece for the client’s wishes (although, should have consideration for the desires of the client and instructing solicitor where practicable) (rule 13.1)

*What they can do*

* Solicitor can, by making independent judgment:
  + Confine hearing to issues which solicitor believes are the real issues (rule 13.2.1);
  + Present client’s case as quickly and simply as may be consistent with its robust advancement (rule 13.2.2);
  + Inform court of persuasive authority against case (rule 13.2.3).

*Don’t give personal opinion*

Solicitor cannot make submissions or express views on material evidence where those views express the solicitor’s personal opinion on the case (rule 13.3).

*Asked to give evidence?*

Where a solicitor is asked to give evidence material to the issues contested, that solicitor must not:

* + Continue to act for a client (rule 13.4.1); or
  + Appear at a hearing for a client (rule 13.4.2).
* Solicitor must not be the surety for the client’s bail (rule 13.5)

**Frankness**

Misleading Statements

* Solicitor must not knowingly make a misleading statement to the court (rule 14.1)
* Solicitor must take all necessary steps to correct a misleading statement to the court where it was established as misleading (rule 14.2)
* Solicitor does not breach this rule where the solicitor does not correct a misleading statement made by opposing counsel or any other person (rule 14.3)

Interlocutory relief in ex parte application

* When seeking interlocutory relief in an ex parte application, solicitor must reveal all facts and legal matters which:
  + Solicitor knows (rule 14.4.1); and
  + Not protected by legal professional privilege (rule 14.4.2); and
  + Solicitor has reasonable grounds to believe would affect the chances of getting relief, either positively or where it would limit the information (rule 14.4.3).
* Where the solicitor has knowledge here, the solicitor must:
  + - * Seek instructions for waiver of legal professional privilege (rule 14.5.1(a)); and
      * Where client does not waive it –
    - Inform client of consequences of a failure to disclose (rule 14.5.2(a)); and
    - Inform court that solicitor cannot assure court all matters that should have been disclosed were disclosed (rule 14.5.2(b)).

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| ***Legal Services Commissioner v Mullins*** [2006] LPT 012   * barrister, is guilty of professional misconduct in connection with negotiations for the compromise of a claim for compensation for personal injuries * respondent knowingly misled an insurer and its lawyers about his client’s life expectancy. * By continuing to call the Evidex reports in aid as information supporting his client’s claim after learning the cancer facts and recognizing their significance for the validity of the life-expectancy assumption, the respondent intentionally deceived the other parties about the accuracy of the assumption   Good Character + penalty   * Despite the stance adopted in resisting this application, the references indicate that there is good reason for optimism that the respondent will not set about deceiving a colleague again. And his misconduct was not designed to derive a personal advantage: an anxiety to advance his client’s interests accounts for his grave misjudgement * misconduct warrants a public reprimand and a substantial fine |

**Advising of Relevant Authorities**

Solicitor must inform, at time of hearing of case and where not so informed of –

*Cases*

14.6.1 any binding authority;

14.6.2 any authority decided by an intermediate court of appeal in Australia;

*Legislation*

14.6.3 any authority on the same or materially similar legislation as that in question in the case, including any authority decided at first instance in the Federal Court or a Supreme Court, or by superior appellate courts, which has not been disapproved; or

14.6.4 any applicable legislation; of which the solicitor is aware, and which the solicitor has reasonable grounds to believe to be directly in point, against the client’s case.

Post Judgment/Decision Reserved & find out about an authority

* After judgment or where decision reserved, solicitor finds out about a matter within rule 14.6 whether existing before or after the argument, solicitor must inform by:
  + - * Letter to court, copied to opponent, and limited to reference (rule 14.8.1); or
      * Requesting court to re-list case for further argument on a convenient date, after notifying opponent of request and consulting opponent about appropriate time (rule 14.8.2);
* Solicitor need not inform on authority where Prosecution has attempted lead evidence that the court ruled was inadmissible, but the authority would have made it admissible (rule 14.9).

**Opposing to withdraw**

The solicitor does not need to inform court where opposing counsel wants to withdraw the claim at point when solicitor became aware of it – if time has passed when solicitor should have informed, then still has to (rule 14.7).

**Client’s character**

Where solicitor makes claims about client’s character, solicitor does not have to disclose facts about the client’s past unless the statements made by the solicitor are misleading (rule 14.10).

**Previous convictions**

Where Crown is unaware of previous convictions, should not ask prosecution witness about prior convictions where hoping for them to say no (rule 14.11).

**Civil proceedings – effect of order**

Solicitor must inform court where it has a misapprehension of the effect of an order as soon as the solicitor becomes aware of it (rule 14.12).

**Guilty or delinquent clients**

Lies/Falsified Document

Where the client has lied or got someone else to lie/falsify documents, the solicitor must:

* + Advise client that court should be informed of lie (rule 15.1.1);
  + Refuse to take part further unless client authorises the solicitor to inform the court of lie or falsification (rule 15.1.2);
  + Must promptly inform court after authorisation given (rule 15.1.3);
  + Must not disclose to court unless given authorisation (rule 15.1.4).

Confession but maintains plea of not guilty

Where the client confesses, but maintains plea of not guilty, the solicitor can:

* + Cease to act where there is enough time for a new solicitor to be appointed, unless client insists solicitor continues (rule 15.2.1);
  + Where solicitor continues to act, the solicitor:
    - Must not falsely suggest some other person did it (rule 15.2.2(a));
    - Must not falsely suggest other person committed offence charged (rule 15.2.2(b));
    - May argue that not enough evidence to convict (rule 15.2.2(c));
    - May argue that by reason of law, client is not guilty (rule 15.2.2(d));
    - May argue that for any reason not excluded by (a) or (b), client is not guilty (rule 15.2.2(e)).

Client intends to disobey court order

Where the client intends to disobey court order, a solicitor must –

* + Advise client against it and warn of the consequences (rule 15.3.1);
  + Not advice client how to carry out course (rule 15.3.2);
  + Not inform court or opponent unless:
    - Client has consented (rule 15.3.3(a)); or
    - Solicitor believes on reasonable grounds that client’s conduct constitutes a threat to their safety (rule 15.3.3(b)).

If a client tells you a story during interviews and changes this immensely when they take the stand, practically the best way to handle this is to ask for a short adjournment immediately to try to sort out the problem.

Responsible use of privilege

A solicitor must take care to ensure that decisions by the solicitor or on the solicitor’s advice to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person:

16.1.1 are reasonably justified by the material then available to the solicitor;

16.1.2 are appropriate for the robust advancement of the client’s case on its merits;

16.1.3 are not made principally in order to harass or embarrass the person; and

16.1.4 are not made principally in order to gain some collateral advantage for the client or the solicitor or the instructing solicitor out of court.

*Document alleging Criminality*

A solicitor must not draw or settle any court document alleging criminality, fraud or other serious misconduct unless the solicitor believes on reasonable grounds that:

16.2.1 factual material already available to the solicitor provides a proper basis for the allegation;

16.2.2 the evidence by which the allegation is made, if the evidence is in written form, will be admissible in the case; and

16.2.3 the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.

16.3 A solicitor must not open as a fact any allegation which the solicitor does not capable support by the evidence on reasonable grounds.

16.4 A solicitor must not cross-examine so as to suggest criminality, unless:

16.4.1 they believes on reasonable grounds that the material already available provides a proper basis for the suggestion; and

16.4.2 in cross-examination going to credit alone, they believe on reasonable grounds that affirmative answers to the suggestion would diminish the witness’s credibility.

16.5 Reasonable grounds includes an instructing legal practitioner’s opinion that material exists which appears to support a suggestion or allegation, except in a closing address or submission on the evidence.

16.6 A solicitor must make reasonable enquiries to the extent which is practicable before the solicitor can have reasonable grounds for holding the belief required by rules 1 6.1, 16.2, 16.3 and 16.4, unless the solicitor has received and accepted an opinion from the instructing legal practitioner within rule 1 6.5.

16.7 A solicitor must not suggest criminality, fraud or other serious misconduct against any person in the course of their address on the evidence unless they believe on reasonable grounds that the evidence in the case provides a proper basis for the suggestion.

16.8 A solicitor who has instructions which justify submissions for the client in mitigation of the client’s criminality and which involve allegations of serious misconduct against another person unable to answer the allegations must seek to avoid disclosing the other person’s identity directly or indirectly unless the solicitor believes on reasonable grounds that such disclosure is necessary for the robust defence of the client.

*Pre-trial Negotiations*

Advocates owe the same duty of candour in pre-trial mediations as to the court: ***LSC v Mullins.***

*Undertakings*

As officers of the court, legal practitioners must honour any undertakings they make, whether to other practitioners or unrepresented persons. It is immaterial whether the word “undertake” is used or whether the undertaking is in writing or not (Solicitors Rules, Rule 27.1).

*Letters of Demand*

Letters of demand must not misrepresent a client’s rights or threaten criminal consequences for non compliance (Solicitors Rules, Rule 28.3). <Practitioner’s> letter amounted, in effect, to extortion and was an abuse of process.

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| ***Legal Services Commissioner v Mullins*** [2006] LPT 012   * barrister, is guilty of professional misconduct in connection with negotiations for the compromise of a claim for compensation for personal injuries * respondent knowingly misled an insurer and its lawyers about his client’s life expectancy. * By continuing to call the Evidex reports in aid as information supporting his client’s claim after learning the cancer facts and recognizing their significance for the validity of the life-expectancy assumption, the respondent intentionally deceived the other parties about the accuracy of the assumption   Good Character + penalty   * Despite the stance adopted in resisting this application, the references indicate that there is good reason for optimism that the respondent will not set about deceiving a colleague again. And his misconduct was not designed to derive a personal advantage: an anxiety to advance his client’s interests accounts for his grave misjudgement * misconduct warrants a public reprimand and a substantial fine |

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| ***NSW Bar Association v Punch* [2008] NSWADT 78**   * John Patrick Punch led alibi evidence from an accused (his client) and four supporting witnesses knowing that evidence to be untrue. * knew his client had been present when an assault and robbery occurred at a house in Roselands because, in a conversation Punch had with his client and a co-accused in the cells of Bankstown Police Station, following service of the brief of evidence the client told Punch he had been present. * Knew this because police investigating a different crime had obtained an order under the *Listening Devices Act 1984* (NSW), permitting a listening device to be placed in the cell in which Punch’s client and his co-accused were placed.   + Sidenote: The tribunal ruled that the *Listening Devices Act 1984* (NSW) did not prohibit the use of the evidence of the conversation in the proceedings before it: *New South Wales Bar Association v Punch* [2006] NSWADT 191. That decision was upheld in the Court of Appeal: *Punch v New South Wales Bar Association* [2007] NSWCA 93   Re Character   * The respondent has not placed before the tribunal any evidence as to the circumstances, which motivated him to lead the evidence in 1995. * not acknowledged that he acted improperly, shown any contrition, led any evidence of rehabilitation. * Evidence on each of these matters would to a greater or lesser extent, be relevant to the question of the respondent’s fitness to practise at the present time   Held:   * The respondent’s misconduct shows that at that time he lacked the qualities of character and trustworthiness which are necessary attributes of a person entrusted with the responsibilities of a legal practitioner * Name removed from the roll |

## Advertising

**Rule 36: Advertising**

* A solicitor must not advertise the solicitor’s expertise or practice if that advertising:
  + 36.1 is false;
  + 36.2 is misleading or deceptive, or likely to mislead or deceive;
  + 36.3 is vulgar, sensational, or otherwise as would bring or be likely to bring a court, the solicitor, another solicitor or the legal profession into disrepute;
  + 36.4 uses the words ‘accredited specialist’ or a derivative of those words, including the associated post-nominals, unless the solicitor is an accredited specialist, in which case the accredited specialist must use those words, or a derivative of those words, including the associated postnominals, in compliance with the agreement entered into by the accredited specialist with the Queensland Law Society concerning the use of those words, or derivates of those words, and the associated post-nominals;
  + 36.5 uses the accredited specialist logo (reproduced below) except as permitted by the agreement entered into by the accredited specialist with the Queensland Law Society concerning use of the logo.

**Advertising personal injuries services**

* PIPA amended by the *Personal Injuries Proceedings (Legal Advertising) and Other Acts Amendment Act 2006* (Qld) (PIPA-2) – came into effect 29 May 2006
* Very stringent guidelines on how personal injuries legal practices can advertise
* Commissioner can receive and investigate complaints of breaches: **s423 LPA**
* Can also prosecute for unsatisfactory professional conduct or professional misconduct for breaches: **s66(3) PIPA-2**
* Note if no section given, is a recommendation/guidelines from the “Guide to Advertising Personal Injury Services” published 15 June 2006

*Substantive rules*

* “advertises” means publishes or causes to be published a statement that may reasonably be thought to be intended or likely to encourage or induce a person [either] to make a claim for compensation or damages under any Act or law for a personal injury [or] to use the services of the practitioner, or a named law practice, in connection with the making of a claim: **s64 PIPA-2**

**What can the advertisement contain?**

* Can only state name, contact details and area of speciality of practitioner or practice: **s66(1)(a)**
  + Not if business names contains prohibited words (ie the No Win No Fee Lawyers)
  + Can include a symbol that the practitioner is an accredited personal injury specialist or list of services provided including PI
* Cannot advertise on no win no fee or other speculative basis: **s66**
* Cannot use photographs, including photographs of practitioners
* Cannot use statements of conditions (eg competitive rates, free initial consult, home consultations by arrangement, we can come to you, personal and thorough service)
* Cannot use logos, slogans or mottos other than names/contact details (ie serving all Qld, call our legal help line, over 20 years experience)

**Methods of advertising**

* **S65** sets out “allowable publication methods” e.g.
  + Printed publication
  + Internet website
  + Directory or database on website
  + Billboards/signage but not on a hospital: **s65(2)(a)**
  + Junk mail/handbills but not delivered to hospital or vicinity of hospital: **s65(2)(b)**
  + On receipt
* Cannot advertise (b/c not an “allowable publication method”):
  + On radio or TV
  + In cinemas or phone messages

**Exceptions: s66(2)(a)**

* Advertising to current clients + persons who make genuine inquiry (**s63 extension**)
* Advertising to persons at the legal practice
* Advertising under order of court
* Advertisement on the website of the practitioner or practice which is limited to a statement about person’s rights under law of negligence + conditions on which practitioner or law practice will provide PI services
* Advertising in a client agreement: **s66(5)**

*LSC approach: p8 of Guidelines*

* The Commissioner will decide each matter on its own individual merits in accordance with the Commission’s Prosecution Guidelines but, as a general rule, the Commissioner:
  + will be disinclined to prosecute practitioners who breach the restrictions on the advertising of personal injury services in minor or merely technical ways in advertisements that were published or caused to be published before the publication of this Guide;
  + the Commissioner will have no such inclination in relation to breaches in advertisements for personal injury services that are published or caused to be published after the publication of this Guide.

## Random Cases

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| ***Queensland Law Society v Carberry* [2000] QCA 450**   * Solicitor charged with:   + Acting in conflict of interest;   + Failing to provide adequate explanations of his dealings when requested by QLS   + Unauthorised withdrawal of funds;   + Failed to maintain adequate trust money records;   + Failing to provide auditor’s report to QLS * Tribunal found that this constituted professional misconduct and suspended him for 12 months. * The QLS appealed to the QCA stating the penalty was too light.   **HELD**   * The Tribunal should have found that Carberry was unfit to practise. * It would be inconsistent with the court's duties to preserve the standards of professional practice not to conclude that what has been found against the respondent demonstrates unfitness to practice (@ [39]). * The orders of the Tribunal that the respondent be suspended from practice for 12 months effective from 1 May 2000 and that he attend and successfully complete a practice management course conducted by the Queensland Law Society Incorporated prior to applying for a practising certificate should be set aside. The name of the respondent should be struck off the Roll of Solicitors of the Supreme Court of Queensland and the respondent should pay the appellants' costs of and incidental to the appeal to be assessed (@ [42]). |

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| ***Bar Association of Queensland v Lamb***   * a solicitor was not disqualified from admission to the Queensland Bar, despite engaging in a "reprehensible" sexual relationship with a client. * *"* the applicant solicitor had had extramarital intercourse with his client in a matrimonial cause, after decree absolute but before questions of custody and maintenance had been determined. * The solicitor sought admission as a barrister, against the opposition of the Bar Association. * The report does not make clear whether the applicant desired to change the nature of his practice, because, as a solicitor, he had found the demands of his clients to be excessive or because, as a barrister, he hoped to increase his scoring rate.   **HELD**   * In any event, the High Court merely observed that his conduct, though "improper" * and "unprofessional", fell short of amounting to unprofessional conduct which would render him unfit to remain a solicitor or become a barrister. |

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| ***Sande***   * Guy was doing conveyancing in QLD and he didn’t have a practising certificate * Sande applied to the Queensland Law Society in December 1993 for a conveyancer’s practising certificate so that he could conduct land transactions in Queensland. * The Law Society refused this certificate, although the refusal was challenged unsuccessfully, in the Administrative Appeals Tribunal. * However, before the AAT decision, Sande opened a conveyancing business on the Gold Coast. Through 1994 he and his company were prosecuted by the Law Society under the *Queensland Law Society Act* for unlawful legal practice, and were convicted. * Sande nevertheless had also begun to apply for admission as a solicitor, albeit subject to conditions that would restrict his work to that which can be undertaken by conveyancers in South Australia or NSW. * The first application was made in July 1994 under the *Mutual Recognition Act* for ‘admission to the roll of conveyancers’ or as a solicitor. * In August, the Supreme Court Registrar refused both applications. This was challenged, first, by an application to the Supreme Court in *Re Sande* (‘*Sande 1A*’).89 Fryberg J refused that application in March 1995. However, the Registrar’s decision was also challenged by federal proceedings for administrative review. At that point, the Law Society again intervened and sought a declaration in the Supreme Court that the Registrar’s decision was correct. * In May 1995 in *Re Queensland Law Society Incorporated* (‘*Sande 1B*’),90 Derrington J refused this declaration simply because, at that stage, to grant it would subvert the application for administrative review. * However, in August 1995 in– the Full Court of the Federal Court dismissed the appeal. * The *Sande 1* series was still underway when, in April 1995, Sande **re-applied** for admission as a solicitor in identical terms to the application in *Sande 1A*. * The Registrar refused this in May 1995, but later that month Sande **applied for admission a third time.** * While these applications were made, Sande was still being paid for conveyancing he was undertaking on the Gold Coast. At that point (before *Sande 1C* was heard), the Law Society sought an injunction to restrain Sande from working as a conveyancer. * In this case, *Queensland Law Society Inc v Sande* (‘*Sande 2A*’),93 it became clearer that **the reason for these repeated applications for admission was that, although Sande knew they were destined to fail, he thought he could take advantage of the ‘deemed registration’ provisions of the *Mutual Recognition Act***.   + These stated that someone was deemed to be registered in an occupation in the State while their application for registration was pending. * Sande repeatedly applied for admission as a solicitor on the understanding that, while any single application before the Registrar was still undecided, he was deemed to be registered as a conveyancer under the *Mutual Recognition Act*. * In June 1995, Thomas J accepted that the second and third applications for admission were being made for an ulterior purpose, and that they were an abuse of the court’s process. * A declaration was made to that effect. Thomas J also restrained Sande from doing any conveyancing work in Queensland (regardless of Sande’s interpretation of the *Mutual Recognition Act*), but gave him the benefit of the doubt on the third application for admission that was still on foot. * The injunction was therefore made conditional on the Registrar’s refusal ofthe third application for admission. * From the proceedings that followed, the Registrar apparently did refuse Sande’s third application for admission. * Sande nevertheless continued to offer conveyancing services in Queensland, and so the Law Society moved to have him cited for contempt. * These proceedings – again came before Thomas J. * He accepted that the Society had proved 14 instances of conveyancing by Sande in breach of the injunction issued in *Sande 2A*, and that there were continuing breaches of the *Supreme Court Act 1867* and the *Queensland Law Society Act*. * Sande was in contempt of court, and given a suspended sentence of three months imprisonment and a $5,000 fine. |

# Discipline

## Role of Legal Services Commissioner

The Legal Services Commissioner (LSC) monitors the conduct of members of the legal profession by receiving complains, investigating them and bringing disciplinary proceedings where appropriate. The Law Society/Bar Association manages the granting, suspending and cancelling of practising certificates. The responsibility of responding to complaints was given to the LSC under the 2004 LPA.

Role in Relation to Complaints

The Commission receives and deals with complaints about the conduct of other people too—people who purport to be lawyers, for example, when they are not. The Commissioner is responsible for ensuring complaints are dealt with thoroughly, fairly and transparently.

Importantly, the Commissioner can also initiate an investigation of his own accord in cases of possible unsatisfactory professional conduct or professional misconduct. The Commissioner also has responsibility for dealing with complaints about, or otherwise investigating possible breaches of the ‘touting’ provisions and the restrictions on the advertising of personal injury services under the *Personal Injuries Proceedings Act 2002* (Qld).

The Commission is the sole body authorised under the Act to receive and deal with complaints about lawyers and law practice employees but we don’t, and can’t deal with all and any complaints we may receive—some complaints are simply beyond the powers given to us under the Act and are beyond our jurisdiction.

We decide how to deal with a complaint based on the nature of the complaint. We try to mediate complaints we assess to be consumer disputes, but we must investigate complaints we assess to be conduct complaints—that is to say, complaints which, if proven, would show that a lawyer's conduct amounted to either unsatisfactory professional conduct or professional misconduct.

We can either mediate or investigate complaints ourselves or decide to refer them for mediation or investigation to the Queensland Law Society or the Bar Association of Queensland.

Importantly, while the Queensland Law Society and Bar Association of Queensland play an important role in investigating complaints, the Commissioner oversees and, where necessary, directs these investigations. If the Commissioner refers a complaint to one of these professional bodies for investigation, they are required to report back to the Commissioner who will then review their findings and recommendations before deciding what action, if any, to take on the complaint. The Commissioner and the Commissioner alone can decide what action to take on a complaint after investigation.

When the evidence warrants it, the Commissioner will initiate disciplinary proceedings in one of two disciplinary bodies; the Legal Practice Committee or, for more serious matters, the Queensland Civil and Administrative Tribunal (QCAT).

The Legal Services Commission:

* answers enquiries about making a complaint against a legal practitioner or law practice employee. We can answer questions about how complaints are dealt with and, if you need assistance, can help you to fill in the complaint form
* receives complaints from legal consumers, other legal practitioners and the Queensland Law Society or Bar Association of Queensland about the conduct of legal practitioners and law practice employees
* decides whether it has legislative authority to deal with a complaint and, if the answer is yes, assesses it as either a consumer dispute or a conduct complaint (see below for the sorts of complaints the Commission does not accept)
* mediates or otherwise tries to resolve consumer disputes or refers them to the Queensland Law Society or Bar Association of Queensland for mediation or resolution
* investigates conduct complaints or refers them to the Queensland Law Society or Bar Association of Queensland for investigation
* initiates investigations of its own accord, in the absence of a complaint, if the Commissioner believes an investigation is warranted
* oversees how the Queensland Law Society and Bar Association of Queensland investigate referred conduct complaints, reviews their findings and recommendations, and decides what further action should be taken
* initiates disciplinary proceedings against legal practitioners if, after investigation, there is a ‘reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct’ and ‘it is in the public interest to do so’. The Commissioner prosecutes them before the Legal Practice Committee or, for more serious matters, the Queensland Civil and Administrative Tribunal (QCAT).

The Commission does not:

* give legal advice or provide legal representation—complainants need to seek their own legal advice about what civil remedies are available to them (for legal advice, contact Legal Aid Queensland, the Queensland Public Interest Clearing House or the Queensland Law Society referral service).
* accept complaints that are frivolous or vexatious, or complaints that have been dealt with previously when there is no good reason to reconsider the matter.
* accept complaints about the conduct of an individual if, at the time, they were not acting as a legal practitioner or law practice employee but in some other capacity such as an investment adviser, immigration agent or member of parliament.
* accept complaints about decisions of courts or tribunals or review past proceedings in courts or tribunals. The Commission is not an alternative means of appeal. Complainants who are unhappy about decisions of courts or tribunals should seek independent legal advice about their prospects of successfully appealing those decisions in a higher court.
* accept complaints about government legal officers unless the complaint is made by the chief executive officer of the government department or agency that employs them, the Queensland Law Society or the Bar Association of Queensland, or another legal practitioner.
* have power to decide whether legal practitioners have overcharged their clients or alternatively whether their fees were fair and reasonable. For more information go to Complaints about legal costs.
* have power to decide whether legal practitioners have been negligent. The disciplinary scheme under the Legal Profession Act 2007 is not intended to be an alternative forum to the courts for hearing and deciding claims of negligence against lawyers. The Commission might consider taking disciplinary action against legal practitioners who have been obviously and demonstrably negligent but, generally speaking, legal consumers who believe their lawyers have been negligent will have to take them to court to prove they were negligent and should take independent legal advice accordingly. As a rule the Commission will consider taking disciplinary action only after negligence has been proved in a court. Having said that, there are some circumstances in which the Commission might be able to help legal consumers who believe their lawyer was negligent. It might be possible to resolve things to both the consumers and their lawyer’s satisfaction in circumstances in which, for example, the practitioner has made an honest or careless mistake of some kind such as losing a title deed or miscalculating a rates adjustment in a conveyance. In the Commission’s opinion, practitioners in these circumstances should be expected to make good their mistake.

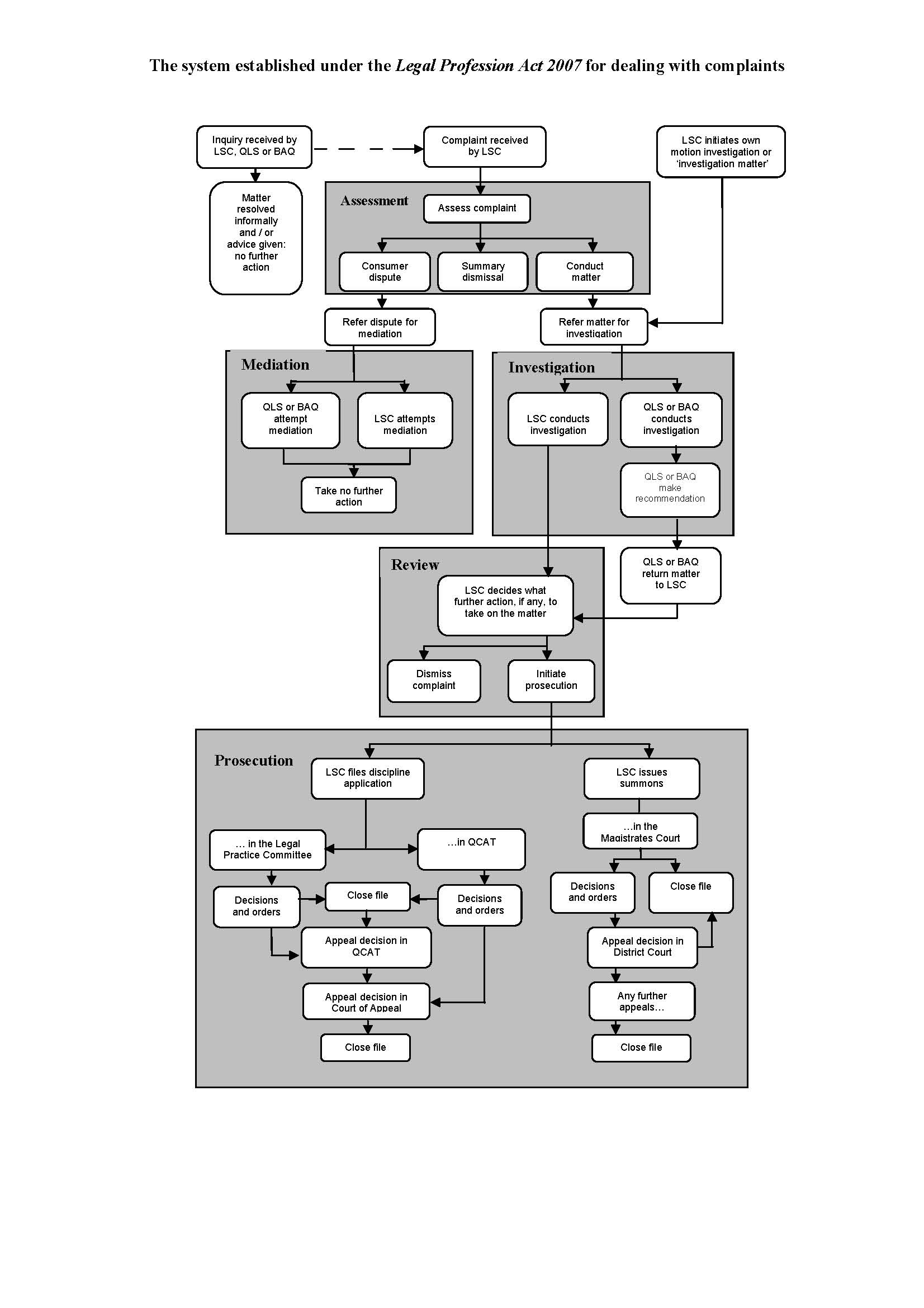
## Who Deals With What

Making a Complaint

* Essentially, anyone who is concerned about the conduct of a legal practitioner or a legal practice employee can make a complaint. This includes:
  + A client;
  + A member of the public;
  + Another legal practitioner;
  + A law practice employee;
  + The QLS;
  + The Bar Association;
  + The LSC.
* However, if the complaint is about a government legal officer, a complaint can only be made by:
  + An Australian legal practitioner;
  + A regulatory authority (aka QLS or Bar Association);
  + The CEO of the agency/department where officer is employed.

Managing a Complaint

* The LSC is generally limited to complaints that have been made within 3 years of the conduct complained of (s 430(1)).
  + There is a discretion to consider complaints occurring outside the timeframe if it is:
    - Just and fair to receive it (s 430(2)(b)(i)); or
    - Involves professional misconduct (distinct from unsatisfactory professional conduct) and it is in the public interest to pursue it (s 430(2)(b)(ii)).
* Complaints can be made to the LSC, the QLS or the BAQ
  + The QLS/BAQ can only give advice and can take no further action, unless they refer the complaint to the LSC.
  + The LSC itself receives complaints, investigates them and brings disciplinary proceedings where appropriate.
  + The LSC’s powers in relation to minor misconduct are limited when it does not refer them to a disciplinary body. Can only go to mediation – that’s it.
  + QLS can make rules about legal practise in QLD, in addition to regulating the granting, suspension and cancellation of practising certificates.
    - It can also intervene in the management of law practises in the case of inadequate practice or financial mismanagement
      * A supervisor, manager or receiver can be appointed to manage the practice
    - QLS does NOT have any prosecutorial rights as these are with the LSC, though it can assist in its investigations.
* The LSC will only refer something on to a disciplinary body where:
  + there is a reasonable likelihood that there will be a finding that either the conduct standards have been breached; and
    - the reasonable likelihood test requires the Commission not to make a discipline application unless there is reliable evidence capable of supporting a finding on the balance of probabilities that a legal practitioner’s conduct amounts to unsatisfactory professional conduct or professional misconduct (Guideline 17)
  + it is in the public interest to proceed.
    - It is well established in law that ‘the object of disciplinary action against legal practitioners is not to exact retribution: it is to protect the public and the reputation of the profession’ (*Baker*).
    - 15 factors LSC will consider: (Guideline 22)
      * seriousness of offence and need to protect public from practitioner;
      * the likely prejudice to public confidence in the integrity of the disciplinary process and to the reputation of the profession if the Commission exercises its discretion not to make a discipline application;
      * prevalence of conduct and need to ‘send a message’ (deterrence);
      * whether conduct raises a matter of law of importance;
      * dishonesty involved or not, or taking advantage of vulnerable clients;
      * whether it was a genuine mistake and unlikely to be repeated;
      * whether the respondent acknowledges his or her error, or has shown remorse or apologised or made good any loss or harm his or her conduct has caused to others;
      * whether the person has cooperated fully and frankly;
      * whether a finding of unsatisfactory professional conduct or professional misconduct would entitle the complainant or others who may have been adversely effected by the conduct to compensation;
      * practitioner’s age, health or infirmity;
      * any previous disciplinary findings against the practitioner;
      * likely length and expense of the hearing;
      * whether practitioner undertakes to self-educate;
      * any grounds for leniency; and
        + voluntarily come forward with relevant evidence of conduct that contravenes the Act but that the Commission has either no knowledge of or insufficient evidence to make a discipline application; and
        + provide the Commission with full and frank disclosure of the conduct in question and any documentary or other evidence that may be available or known to them; and
        + undertake to cooperate throughout the Commission’s investigation and comply with that undertaking; and
        + have not compelled or induced any other person to take part in the conduct in question or been a ‘ringleader’ in instigating the conduct.
      * any other relevant consideration.
    - Generally speaking, the more serious the alleged unsatisfactory professional conduct or professional conduct, the less likely the Commission will exercise its discretion to dismiss a complaint or investigation matter in the public interest (Guideline 23)
* At this point, the LSC can either:
  + Summarily dismiss the complaint; or
    - No further action is taken.
  + Categorise it as a “consumer dispute”; or
    - This is a genuine dispute between a client and a practitioner but which does not constitute a breach of the conduct standards (s 440).
    - Only option is for them to conduct mediation.
    - They can take no further action.
  + Categorise it as a “conduct matter.”
    - Under this limb, the LSC will continue its investigation and will decide what further action, if any, to take on the matter.
    - If it decides to prosecute, it will refer the matter to the Legal Practice Committee or to QCAT, depending on the severity and type of conduct complaint.
    - The LPC or the QCAT will make its decisions and the QLS will prosecute the action.



## Notice to Practitioner

The investigating entity (LSC, QLS or BAQ) is required to give notice to a practitioner whose conduct is being investigated. Section 437 states that the notice must include:

* Notice that a complaint has been made, or that an investigation is being conducted;
* The nature of the complaint/matter;
* Identity of the complainant;
* Action which the investigating entity has taken prior to giving notice to the respondent;
* The respondent practitioner must also be given an opportunity to make submissions and be given a reasonable time in which to do so.

Notice need not be given until the investigating entity has had time to consider the complaint and to seek further details/conduct preliminary enquiries.

### Practitioner’s Response to Notice

The investigating entity may require that the practitioner give a full explanation of the matter complained about, attend a hearing or produce relevant documents (s 443).

A practitioner may refuse to comply with such requirements on the grounds that it would breach the requirement of an indemnity insurance policy or that an explanation would incriminate the practitioner. But if neither of these grounds apply, the practitioner may be fined for refusing to comply.

## Standards of Professional Conduct

The standards of conduct reflect the interest of the client, the interest in ensuring the effective administration of the judicial system and the interest of the community in ensuring a legal profession of integrity.

The court aims to ensure compliance with the values upheld by the legal profession – candour, justice and competency rather than apply a detailed set of rules. However, the LPA does provide guidance as to what conduct constitutes unsatisfactory professional conduct or professional misconduct.

When the LSC receives a complaint about the conduct of a legal practitioner that is not a consumer complaint, it must decide whether the conduct amounts to unsatisfactory professional conduct or is the higher threshold, professional misconduct.

Absence of a conviction does not mean no disciplinary action will be taken: *Re Sawley* (1894) 15 LR (NSW) 147.

### Is this Unsatisfactory Professional Conduct?

Defined non-exhaustively in the LPA s 418 to include “conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.”

* The conduct complained of must happen “in connection with the practice of law”
* Standard is that of a member of the public
* Competence = the ability to do something successfully or efficiently; scope of person’s knowledge or ability;
* Diligence = careful and persistent work or effort

Types of conduct that are likely to be unsatisfactory professional conduct:

* Negligence with no dishonest intent (*Re R and Re A*);
* Acting for both sides in a transaction (*Re A Barrister*);
* Misappropriating money (*Smith*);
* Supplying dangerous drugs (*Darveniza*);
* Misleading conduct (*Clough*);
* Inadequate control of trust money (*Priddle*);
* Lack of diligence (*Ferguson*);
* Using trust money with no authorisation (*Towers*);
* Contravention of a law or rule (s 420(a));
* Charging of excessive legal costs (s 420(b));
* Committing a serious offence, tax offence or offence involving dishonesty (s 420(c));
  + serious offence means an offence whether committed in or outside this jurisdiction that is: (Sch 2 defn)
    - (a) an indictable offence against a law of the Commonwealth or any jurisdiction, whether or not the offence is or may be dealt with summarily; or
    - (b) an offence against a law of another jurisdiction that would be an indictable offence against a law of this jurisdiction if committed in this jurisdiction, whether or not the offence could be dealt with summarily if committed in this jurisdiction; or
    - (c) an offence against a law of a foreign country that would be an indictable offence against a law of the Commonwealth or this jurisdiction if committed in this jurisdiction, whether or not the offence could be dealt with summarily if committed in this jurisdiction.
* Becoming insolvent (s 420(d));
* Being disqualified from managing a corporation (s 420(e));
* Failing to comply with a disciplinary order (eg fine etc) (s 420(f));
* Failing to comply with a compensation order (s 420(g)).

It is a contempt of court by being insulting towards and showing disrespect for a Magistrate: *Attorney-General v Lovitt* [2003] QSC 279. This does not automatically mean disciplinary sanction will follow: not all cases of contempt are the same, and must be judged according to the surrounding circumstances: *Garde-Wilson v Legal Services Board* [2007] VSC 225.

A single transgression such as missing an appointment with another practitioner would be likely to be viewed as no more than a breach of professional courtesy. However, much depends on the circumstances. Missing an important meeting twice, for example, indicates a failure to use reasonable care to maintain the integrity and reputation of the legal profession in dealings with other legal practitioners that warrants a disciplinary response (Solicitors Rules R21). It also constitutes professional negligence and a failure to exercise the expected degree of diligence and competence (*Legal Profession Act 2007* s 418).

### Is this Professional Misconduct?

Professional Misconduct is defined non-exhaustively to include:

* Unsatisfactory professional conduct (above) that is substantial or consistent failure to reach/keep reasonable standard of competence and diligence (s 419)(1)(a)); and
  + So it is unsatisfactory professional conduct + substantial/persistent failure in competence/diligence
  + Competence = the ability to do something successfully or efficiently; scope of person’s knowledge or ability;
  + Diligence = careful and persistent work or effort
* Conduct of a practitioner, whether in connection with law or otherwise, that would show they are not a fit and proper person to practise (s 419(1)(b)).
  + Court can take into account the suitability matters in s 9 LPA (s 419(2)).
    - See “**3.4.1** Suitability Matters in Section 9” on page 86.
  + So this one will catch any conduct of the practitioner – even that occurring in their personal life and wholly unconnected with anything to do with the law.

Types of conduct that is likely to be professional misconduct include:

* Sharing receipts (*Adamson*);
* Influencing witnesses (*Gregory*)
* Overcharging (*Roche; Baker*);
* Indecent assault (*Re A Solicitor*);
* Sexual relationships with clients (*Morel*);
* Inadequate control of trust money (*Williams*);
* Using trust money with no authorisation (*Twohill*);
* Scandalous and obscene submissions (*Turley*);
* Forgery (*Mackereth*);
* Wrongful advice (*Kincard*);
* Failure to manage trust accounts (*Dwyer*);
* Forging documents (*Wherry*);
* Failure to lodge tax (*Cain*);
* Contravention of a law or rule (s 420(a));
* Charging of excessive legal costs (s 420(b));
* Committing a serious offence, tax offence or offence involving dishonesty (s 420(c));
  + serious offence means an offence whether committed in or outside this jurisdiction that is: (Sch 2 defn)
    - (a) an indictable offence against a law of the Commonwealth or any jurisdiction, whether or not the offence is or may be dealt with summarily; or
    - (b) an offence against a law of another jurisdiction that would be an indictable offence against a law of this jurisdiction if committed in this jurisdiction, whether or not the offence could be dealt with summarily if committed in this jurisdiction; or
    - (c) an offence against a law of a foreign country that would be an indictable offence against a law of the Commonwealth or this jurisdiction if committed in this jurisdiction, whether or not the offence could be dealt with summarily if committed in this jurisdiction.
* Becoming insolvent (s 420(d));
* Being disqualified from managing a corporation (s 420(e));
* Failing to comply with a disciplinary order (eg fine etc) (s 420(f));
* Failing to comply with a compensation order (s 420(g)).

A legal practitioner must not act as the mere mouthpiece of the client (Solicitors Rules, R13.1; Barristers Rules, R20). Further, a practitioner must not make an allegation which he or she does not then believe on reasonable grounds will be capable of support by the evidence (SR, R16.3; BR, R39). Instigation of a baseless prosecution designed to undermine or intimidate an opponent would be regarded as fundamentally inconsistent with the trust that needs to be maintained between a practitioner and the court and amount to professional misconduct: *Clyne v NSW Bar Association* (1960) 104 CLR 186. Cf *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* [1999] FCA 773.

### Case Examples

Concealing Client’s Guilt

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| ***In Re Meagher* (1896) 17 NSWR 157**   * Meagher defended a person charged with murder * The person was convicted of that murder * It later turned out that the accused person had confessed his guilt to Meagher * A commission was appointed to investigate the accused’s guilt or innocence, and Meagher was involved in this * Meagher took steps to imply that the accused was not guilty, even though his client had told him otherwise * This became public knowledge * The issue was whether Meagher had the capacity to be and remain a member of the legal profession   **HELD:** Meagher was struck off the Roll   * The test to be applied was whether the practitioner was fit to be on the Roll * There was a 2 step approach in this case –   + Not punishment, but rather reassurance to the public   + Determination of whether the practitioner was a ‘fit and proper person’ |

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| ***NSW Bar Association v Punch* [2008] NSWADT 78**   * John Patrick Punch led alibi evidence from an accused (his client) and four supporting witnesses knowing that evidence to be untrue. * knew his client had been present when an assault and robbery occurred at a house in Roselands because, in a conversation Punch had with his client and a co-accused in the cells of Bankstown Police Station, following service of the brief of evidence the client told Punch he had been present. * Knew this because police investigating a different crime had obtained an order under the *Listening Devices Act 1984* (NSW), permitting a listening device to be placed in the cell in which Punch’s client and his co-accused were placed.   + Sidenote: The tribunal ruled that the *Listening Devices Act 1984* (NSW) did not prohibit the use of the evidence of the conversation in the proceedings before it: *New South Wales Bar Association v Punch* [2006] NSWADT 191. That decision was upheld in the Court of Appeal: *Punch v New South Wales Bar Association* [2007] NSWCA 93   Re Character   * The respondent has not placed before the tribunal any evidence as to the circumstances, which motivated him to lead the evidence in 1995. * not acknowledged that he acted improperly, shown any contrition, led any evidence of rehabilitation. * Evidence on each of these matters would to a greater or lesser extent, be relevant to the question of the respondent’s fitness to practise at the present time   Held:   * The respondent’s misconduct shows that at that time he lacked the qualities of character and trustworthiness which are necessary attributes of a person entrusted with the responsibilities of a legal practitioner * Name removed from the roll |

Failure to Act on Client’s Instructions / Lying About Progress of Case

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| ***In Re R, a practitioner of the Supreme Court and in Re A, a practitioner of the Supreme Court* [1927]**   * 2 practitioners in South Australia were held to be guilty of unprofessional conduct by the Statutory Committee of the Law Society in SA which had jurisdiction to deal with disciplinary matters * Practitioner R neglected to prepare bills of sale for several months without excuse and had concealed the true state of facts from his client and had also received moneys for costs and fees connected therewith and had not returned the same * Practitioner A was instructed to institute an appeal from a conviction, but took no steps to do so in the time allowed, and after the time expired wrote to his client untruly stating that he had instituted the appeal, demanding costs from his client   **HELD::** Both practitioners were found guilty of unprofessional conduct   * NB: unprofessional conduct is wider than professional misconduct * Historically, the question for professional misconduct is whether anything that has been done by the practitioner in the pursuit of his profession would be reasonably regarded as disgraceful or dishonourable by other professionals of good conduct, competency and repute * This test for **professional misconduct** connotes immorality and ethical considerations, and is tested by the standard of others in the legal profession (c.f. LPA which also considers the standards of society) * The question for unprofessional conduct is conduct which may be reasonably be held to violate or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession of good repute and competency * This test for **unprofessional conduct** has less ethical considerations, and assesses the standards of competency * *which may reasonably be held to violate, or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession of good repute and competency’.* |

Acting for Both Sides to a Transaction

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| ***Ex parte Attorney General for the Commonwealth: Re a barrister and solicitor* (1972) 20 FLR 235**   * + - * A solicitor acted for both sides to a sale and purchase of a house       * Order made by the AG to show cause why an order should not be made by the court that he be not entitled to practise as a barrister and solicitor in the ACT, or alternatively, why an order should not be made that his entitlement to practise as a barrister and solicitor in the ACT be suspended for such period as the court may deem fit   **HELD:**   * + - * That reprimand was appropriate:       * the solicitor’s conduct was more than mere negligence, but arose from inexperience, mistakes of law and the general lack of understanding of solicitors’ duties to clients       * He overestimated his ability to be able to separate his interests       * He was clearly negligent – the client’s remedy lay in common law negligence       * He did engage in unprofessional conduct, but it was not of such a degree to justify the suspension or removal from the Roll       * The only relevant question when considering removal from the Roll is whether the legal practitioner who has been charged is a fit and proper person to remain a member of the profession       * Earlier cases are relevant – although behaviour may be viewed differently at different times |

Sharing Receipts

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| ***Solicitors Rule 33***  A solicitor must not, in relation to the conduct of their practice or in the delivery of legal services, share/enter into arrangement to share receipts arising from the provision of legal services with   1. any disqualified person; (defined as:)  * whose name has been removed from and not restored to an Australian roll; * whose practising certificate is cancelled/suspended; * who has been refused a renewal of a practising certificate and has not since been granted one; * who is the subject of an order prohibiting a law practice from employing him/her; and/or * who has been disqualified from managing a legal practice under s133.  1. any person convicted of an indictable offence that involved dishonest conduct, whether or not a conviction was recorded, unless otherwise approved by Council; or 2. any other person which limits or restricts the exercise by the solicitor of authority or responsibility for the management of the practice or the discharge of the solicitor’s professional obligations |

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| ***Adamson v Qld Law Society* [1990] 1 Qd R 498**   * A practitioner had shared receipts with an unqualified person * The scheme was that the unqualified person worked as a conveyancer in her own business and had the practitioner sign off on the work she brought in * The profits were split 75% to 25% * The practitioner knowingly breached one of the QLS rules about the sharing of receipts * The unqualified conveyancer eventually left his business and she took the files and clients * The practitioner then made a complaint to the QLS and covered up his misconduct by making false and misleading statements and they said that the practitioner did not exercise supervision * The practitioner tried to argue that the conveyancer was employed by him, but she was not receiving wages or bonuses for her work – she was getting 75% of the receipts, so it was more like a partnership * The Statutory Committee of the Queensland Law Society Incorporated ordered that the appellant's name be struck off the roll of solicitors and that he pay the costs of the Society. * The allegations brought before the Statutory Committee were that the appellant had shared receipts from his practice with an unqualified person, that he had knowingly breached r 67(1) of the *Rules of the Queensland Law Society*, that he endeavoured to cover up his misconduct by making false and misleading statements to the Society and its officers and that he had failed to exercise satisfactory supervision over the unqualified person who was permitted to perform the duties of a solicitor in relation to the conduct of clients’ affairs. * The Statutory Committee was not satisfied of the allegations concerning unsatisfactory supervision, but was satisfied of the substance of the remaining allegations. * The Committee, in reaching its conclusion that such behaviour constituted professional misconduct, did not give reasons or set out all the facts upon which its conclusion was based.   ***HELD:*** allowing the appeal:   1. That disciplinary proceedings before a professional tribunal could not generally be regarded as criminal proceedings whether or not the tribunal had the power to impose a fine. Consequently the civil standard of proof applied. 2. That the test of professional misconduct was whether the conduct violated or fell short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.   **Tribunal’s Obligation to give Reasons:**   1. The Statutory Committee, in exercising the important a function of striking professionals off the role, had to give reasons where was necessary to enable the matter to be properly considered on appeal.    * The duty arose whenever there was conflicting evidence and whenever the Committee had a view that might help to explain why it concluded that professional misconduct had been established. 2. Having regard to the limited basis on which the findings of professional misconduct had been sustained, the penalty of striking off and of the payment of all of the costs of the Society of and incidental to the proceedings was not warranted but the appellant should have been suspended from practice for twelve months.    * **Conclusion** – the striking off was not warranted, but the practitioner did get a 12 month suspension    * The practitioner was sufficiently punished by paying the Crown costs and costs of appeal |

Nothing in the LPA prevents an ALP from sharing with an ILP receipts, revenue or other income arising from the provision of legal services (s128(1)) (except that they must not be shared with a disqualified person (s128(2))).

‘Disqualified person’ is defined in schedule 2 to the LPA as, inter alia, a person:

* whose name has been removed from and not restored to an Australian roll;
* whose practising certificate is cancelled/suspended;
* who has been refused a renewal of a practising certificate and has not since been granted one;
* who is the subject of an order prohibiting a law practice from employing him/her; and/or
* who has been disqualified from managing a legal practice under s133.

Bribe Witness

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| ***Attorney General and Minister for Justice v Gregory* [1998] QCA 409**   * The practitioner was found guilty of contempt of the District Court by deliberately seeking to influence a Crown witness, in the trial of the accused for whom the practitioner acted   + He walked over to two important witnesses during adjournment outside court room and spoke to a man about how woman’s evidence was crucial   + When the man said jokingly “is there $10K in it for us?” another jokingly said “that’s an idea” then Gregory said “ We can arrange something” * **Held:** The only appropriate order was that he should be struck off from the roll of solicitors * de Jersey CJ   + Principal consideration – holding out to the public as persons fit to practice as solicitors only those who may reasonably be expected to display appropriately high standards of integrity and competence   + Attempting to suborn witness is striking at the heart of the judicial process, whether on the spur of the moment or pre-meditated, and will constitute unfitness to practice   + It shows the absence of critically important qualities – honesty, objectivity, respect for the court and respect for the process   + Striking off will always occur, unless exceptional circumstances * White J (with whom McMurdo P agreed)   + Governing principle – protection of the public and the standing of the profession   + Tribunal not to consider issues of punishment   + Encouragement of a witness to engage in perjury goes right to the heart of the administration of justice   + A practitioner of mature age and 10 years experience even without a great deal of litigation work, who makes such a basic error of judgement is not a fit and proper person to practice     - An understanding that a witness’ evidence should have integrity and be honest does not come through experience – it is a fundamental part of our legal system   + Evidence of taking medication for anxiety not sufficient   + Leave open possibility of him reapplying when he can prove to the satisfaction of the court that his state of health and other factors make him fit to practice |

Not Disclosing Indictable Offence

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| ***Re Petroulias* [2004] QCA 261**   * Concerned an application for registration as a solicitor in Qld under Mutual Recognition Act on the part of a person who was registered in Victoria as a solicitor. * The decision turned very much upon the failure by the applicant to disclose that he had being charged with indictable offences under the *Crimes Act (Cth)* in relation to tax matters. * the application P signed the notice under s 19(2)(d) of the Act which affirmed that he was not the subject of disciplinary proceedings in any state, including any preliminary investigations or action that might lead to disciplinary proceedings * however, had been convicted of 3 indictable offences at time of application, and law Institute of Victoria commencing an investigation as to whether P conducted himself unsatisfactorily because of the charges brought against him   Held   * The court placed considerable emphasis upon the need for the disclosure of the circumstances that could possibly be relevant to an application to be registered. * The court decided that whatever it might be in the sense of technicalities, the failure to disclose this significant information justified a refusal to register this person as a solicitor. * McMurdo P: court retains inherent jurisdiction to determine who is entitled to be admitted to the legal profession <> and so the registrar could not simply register P   + Court here was not reviewing decision of registrar, it is a fresh exercise of the court’s inherent jurisdiction   + Court is guardian of legal profession |

Supplying False and Misleading Material to Court

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| ***Clough v Queensland Law Society Inc; Attorney-General v Clough* [2000] QCA 254**   * The practitioner acted on behalf of the client in the claim for damages in the District Court * allegations were made against the practitioner that he attempted to further the case of the client by unfair and dishonest means * the statements of loss and damage prepared and delivered were false and misleading (omitted reference to earnings through self employment and so put across idea that person had not worked since accident)   **HELD**   * Practitioner suspended from practice for the period of 12 months, prior to applying for a new practising certificate had to attend a legal education program in civil litigation * All involved in proceedings entitled to expect that practitioners will comply with rules of the court * Supplying false and misleading material was also to fall of the standards of professional conduct to a substantial degree – it was a failure to maintain reasonable standard of competence and diligence * This was more than mere negligence, it was unprofessional conduct * Muir J – legislative provisions are not the exhaustive of power of court to approach issues of professional responsibility – common law concepts remain relevant * The basic question is always whether person is a fit and proper person to practice in interests of public and maintenance of legal profession |

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| ***Legal Services Commissioner v Voll* [2008] LPT 001**   * A dispute arose as to whether a solicitor had, in fact, sent an important letter advising the clients that they needed to be at court. * The clients denied receiving the letter. * The clients sent a fax to the solicitor on 10/09 advising they would be in Sydney from 12 Sept until 02 Oct. * Solicitor said he rung the clients after receiving the fax, but there was no diary note or any other record of that phone call. The clients denied this.   **HELD:**   * The bald assertion of fact with no supporting evidence put the telephone call into a unique position in the case. * The clients were keen to progress the case so it would be highly unlikely that they’d go to Sydney if they knew they had to be in court. * Solicitor only mentioned phone call for the first time in his second affidavit. * The finding that that conversation did not occur reflects seriously on the solicitor’s credibility. * Conduct involved a substantial and consistent failure to reach or keep a reasonable standard of competence and diligence, and trust. * Amounted to professional misconduct |

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| ***Marcus Einfeld***  Three NSW Supreme Court of Appeal judges made orders and declarations that Einfeld, 70, currently serving a two-year jail sentence for perjury and perverting the course of justice, should be struck from the legal roll of practitioners.   Einfeld's lawyer said his client would never apply to the court to be reinstated.   The NSW Bar Association took action to have Einfeld removed from the roll and this morning outlined a number of other offences they allege Einfeld has committed.   Barrister Christine Adamson SC said Einfeld thought himself "above the law” and "displayed extraordinary hubris” in his conduct. He had sworn false statutory declarations in 1999 and 2003, it was alleged, when Einfeld said a visiting academic and a doctor were driving his car at the time photographs were taken capturing the offences.   But, the court heard, neither professor Nadine Levick nor Dr Timothy Oliver, were in the country at the time.   Further, the witness signatures on the declarations were forgeries.   "It may indicate Einfeld has a complete disregard for the law,” Ms Adamson said.   The NSW Bar Association also argued that Einfeld had used his skill as a barrister to write a lengthy and detailed statement that he gave to police when confronted with the allegation he had given false testimony in the Local Court in 2006.   "The details he added to the web of lies which he had constructed to give verisimilitude to the statement shows a cynical preparedness to use the court system and its attendant fact-finding processes to his own advantage,” the bar association said in its written submissions.   Einfeld did not admit to all the facts alleged to the court but did not submit any evidence in relation to the allegations.   Acting chief justice of the NSW Supreme Court James Allsop ordered Einfeld pay the costs of the hearing.   The judges reserved judgment on whether the facts alleged by the NSW Bar Association had occurred and whether Einfeld should have put on evidence if he believed he was innocent of the allegations. |

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| ***NSW Bar Association v Punch* [2008] NSWADT 78**   * John Patrick Punch led alibi evidence from an accused (his client) and four supporting witnesses knowing that evidence to be untrue. * knew his client had been present when an assault and robbery occurred at a house in Roselands because, in a conversation Punch had with his client and a co-accused in the cells of Bankstown Police Station, following service of the brief of evidence the client told Punch he had been present. * Knew this because police investigating a different crime had obtained an order under the *Listening Devices Act 1984* (NSW), permitting a listening device to be placed in the cell in which Punch’s client and his co-accused were placed.   + Sidenote: The tribunal ruled that the *Listening Devices Act 1984* (NSW) did not prohibit the use of the evidence of the conversation in the proceedings before it: *New South Wales Bar Association v Punch* [2006] NSWADT 191. That decision was upheld in the Court of Appeal: *Punch v New South Wales Bar Association* [2007] NSWCA 93   Re Character   * The respondent has not placed before the tribunal any evidence as to the circumstances, which motivated him to lead the evidence in 1995. * not acknowledged that he acted improperly, shown any contrition, led any evidence of rehabilitation. * Evidence on each of these matters would to a greater or lesser extent, be relevant to the question of the respondent’s fitness to practise at the present time   Held:   * The respondent’s misconduct shows that at that time he lacked the qualities of character and trustworthiness which are necessary attributes of a person entrusted with the responsibilities of a legal practitioner * Name removed from the roll |

Overcharging – “No Win No Fee”

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| ***Baker v Legal Services Commissioner* [2006] QCA 145**   * Solicitor Baker was struck off by the Legal Practice Tribunal over several cases of his overcharging * 4 retainers:  1. **Nutley** – about negligence for a doctor – based on speculative fees of ‘no win, no fee’ – on a successful conclusion.    * Held: Baker attempted to charge on the basis that there was professional fees incurred, despite the fact that no ‘successful conclusion’ was reached.    * Therefore, no right to claim fees had been created. 2. **Jorgensen** – case where there was suing employer for workplace injury on ‘no win, no fee’, and the litigation would not cost Jorgensen anything. Settlement was reached for $10,000, which the firm suggested she take; firm claimed over $19,000 from the client in costs    * Held: Baker, as partner in charge, was guilty of professional misconduct – as it was the firm who suggested she take the settlement, it was a breach of fiduciary duty to suggest she take it where it would mean it would cost her more money. 3. **Robertson** – involved in negligence case – she was a pedestrian struck by a driver. Retained Baker Johnson lawyers, which also subsequently retained the other party and therefore couldn’t represent either. They sent her a bill. Contract also included stipulation about ‘successful conclusion’. The bill was grossly overstated for the cost of the events, and some things hadn’t been provided at all.    * Held: As it was on a ‘no win no fee’ basis, Baker could not claim anything back from Robertson 4. **Hajistamoulis** – agreed to a ‘no win, no fee’ – Baker Johnson still sent her an invoice for charges.    * Held: This was misleading or false. However, Baker was responsible for this on other grounds – namely failure to supervise.  * Held also, practitioner must supervise and is liable for any legal and fiduciary duties that are avoided by employees (whether legally qualified or not) * Held that where conflict arose between his client’s interests and his own, he preferred his own * **Conclusion:** The Legal Practice Board’s decision to strike Baker off the Roll was upheld by the Queensland Court of Appeal |

Conviction of an Offence

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| ***Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279**   * After his day’s activities in court, he got involved not on his initiative in a fight in the hotel, he ended up being attacked and punched and was advised to go to the hospital by the police * He left the hotel, and within an hour of driving his car he collided with a motorcycle by being on the wrong side of the road, the driver of the cycle died and the barrister was charged with manslaughter * Seamen had thrown beer bottles against a wall and said disgusting things to 2 women, Ziems led him by the hand then copped a punch * There was some evidence but not conclusive at the time that he was under influence of alcohol, but he gave evidence that he was not intoxicated and that he was suffering from the shock and concussion as a result of the fight * he was convicted of manslaughter and sentenced for 2 years imprisonment * he was removed from the Barristers Roll in NSW and eventually ended up appealing the matter in the High Court   **Held:**   * The majority of the High Court allowed the appeal to the extent that he was suspended from practice during the continuance of his imprisonment rather than being struck off   Fullager J   * Must look at every fact that throws light on whether a good and proper person, 288 – look beyond just the fact of the conviction itself * concerned not only with the standing of a member of the profession within a community but also the consequences of potential disbarment to the individual concerned. * The conviction was deprived of practical significance given that: * Appellant was placed at a material disadvantage by the Crown’s decision to call a witness who said that Ziems was not intoxicated * Trial judge misdirected jury * Probable that blows were the material contributing factor to the accident   Kitto J   * + In the present case, it was the conviction not the conduct that led to disbarment (SC probs should have had better reasoning – in any event, I think that if it did look at the conduct it would have come to the same conclusion, at least if it were tried today)   + Okay because:   + Not a conviction of a premeditated crime   + Does not indicate a tendency to vice or violence.   + has neither connexion with nor significance for any professional function.   + Such a conviction is not inconsistent with the previous possession of a deservedly high reputation (??wtf – purely 1950s Judge? Born in 1903, different era)   + In the circumstances of this case the barrister may have had something to drink, he appeared to be under effect of blows that he received, one of these factors might have aggravated another factor, he might not be totally fit to drive a motor car at the time, perhaps he should not have allowed himself to become involved in a fight with a drunk person, but putting it all together Fullagar J said ‘but to say that it follows from this that he ought to be disbarred would appear to me an untenable proposition’. * The appellant (Ziems) was affectively suspended from practice while he was in prison because of an ordinary operation of a legal system, in this case criminal liability, and that is separate from the disciplinary proceedings * It is not a necessary conclusion that he his not a fit and proper person due to manslaughter: Kitto J   Peculiar Position of a Barrister in the Legal System   * The answer must depend upon one's conception of the minimum standards demanded by a due recognition of the peculiar position and functions of a barrister in a system which treats the Bar as in fact, whether or not it is also in law, a separate and distinct branch of the legal profession. A barrister is more than their client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. They are, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with their fellow members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations. If a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of those privileges and in the effective discharge of those responsibilities, they are not a fit and proper person to remain at the Bar: Kitto J   Dissent (Dixon CJ and McTiernan J)   * held guilty of a grave crime deserving of severe and degrading punishment * no doubt of the moral blameworthiness of the conduct of a man who drives a motor car while under the influence of liquor, a consideration brought home by the fact that he caused the death of a fellow creature * Dixon CJ’s approach is the focus upon the standing of the member of the legal profession on the one hand and before the public on the other. * When a barrister is justly convicted of a serious crime and imprisoned the law has pronounced a judgment upon him which must ordinarily mean the loss by him of the standing before the court and the public * If counsels are to adequately perform their functions and serve the interests of their clients, they should be able to command the confidence and respect of the court and of fellow barristers and of professional and lay clients * The conviction included a loss of standing before the court and the public, and so could not longer be entrusted with the duties, privileges and responsibilities of an advocate * Perhaps conviction for some minor offences would not require striking off |

Sexual Relationships with Clients

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| ***Morel* (2004) 88 SASR 401**   * Ms Morel was admitted to practice in 1987 * She was a mature age graduate, having commenced studies for her law degree when aged 32 years * She took employment with the Legal Services Commission and then with Aboriginal Legal Rights Movement * She developed a criminal law practice, attended Yatala Prison and other correctional institutions * Morel became involved with 3 of her clients who were prisoners * Conflict of interest arose from personal relationships – she used her legal position to maintain contact with her clients/partners and said that they were subject to legal professional privilege * Conversations were being monitored – one client made admission to a very serious crime during the phone conversation * Legal Practitioners Disciplinary Tribunal (LPDT) made a finding that the respondent solicitor was guilty of unprofessional conduct * The application was made by the Legal Practitioners Conduct Board for an order that the name of Claire Morel be struck off the roll of Legal Practitioners   **Issue:** Whether unprofessional conduct sufficient to warrant removal from roll?  **Held:** found not to be fit and proper   * Client’s position compromised by their personal relationship * Concealed the relationship to the board, showing insufficient insight into her behaviour * a personal relationship to interfere with her professional duties to a client who was charged with serious criminal conduct * legal advice not independent * matter of considerable concern that Ms Morel lacked the basic understanding of legal professional duties to understand the nature of the conduct that she engaged in and the way in which it disadvantaged her client * starting undertaking psychiatric treatment, though 50 and late in the piece so unlikely to have much of an effect * Even if the deception and dishonesty were occasioned by Ms Morel's borderline personality condition, the misconduct is serious   Re reinstatement   * if Ms Morel is serious about seeking readmission to practise the law she will also need to ensure that she has had access to the services of a professional mentor of the type suggested by Ms Tiggeman. Ideally that would be in conjunction with some employment in legal practice. Her being struck off does not preclude her from making an application to the Tribunal |

Assaults (Failing to Disclose)

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| ***A Solicitor v Law Society of NSW* (2004) 204 ALR 8**   * A admitted as a solicitor in NSW in 1987. * In 1997 committed 4 offences of aggravated indecent assault on two daughters of the person who he was living with * In 1998 after pleading guilty he was sentenced for 3 month imprisonment but appealed to the District Court against the sentence and in May 1998 the appeal was allowed and the sentence was deferred on condition that the appellant would enter into a period of good behaviour for 3 years – largely because the judges at that stage regarded the offences to be isolated * Then the victim of one of the offences made further allegations against the defendant * After pleading not guilty he was convicted of aggravated indecent assault * He appealed to the District Court and the District Court quashed the conviction and the sentence * Two charges of professional misconduct   + For original charges   + For not disclosing later charges   Court of Appeal NSW   * took a very strict view of events * that there were aspects in the appellant’s conduct in 1997, the activities that constituted indecent and aggravated assault, that disclosed what the Court of Appeal described as qualities of character which were incompatible with the qualities of legal practice and that the conduct constituted a serious breach of trust on the appellant’s part given the paternal like role he had with the victims * So the Court of Appeal eventually decided that the appellant was guilty of professional misconduct in two respects:   1. That he was convicted in 1998 for aggravated indecent assault   2. That he failed to disclose to the Law Society that he has being convicted in 2000 of further charges of aggravated indecent assault * Second determination by the Court of Appeal was that he was not a fit and proper person to be a legal practitioner * the court of appeal held that the “qualities of character which were incompatible with the conduct of legal practice” was that “the conduct constituted a most serious breach of trust on the [appellant's] part given the paternal like role he had with the victims.   High Court   * Personal misconduct, even if it does not amount to professional misconduct, may demonstrate unfitness, and require an order of removal. * Fitness is to be decided at the time of the hearing. The misconduct, whether or not it amounts to professional misconduct, may have occurred years earlier.   *Here…*   * The personal misconduct (child abuse, abuse of trust of parental position etc) was so far removed from conduct as a legal professional to be irrelevant * However, the failure to disclose being charged with offences was professional misconduct – it was a breach of duties of candour to the Law Society of NSW * Should note isolated nature of original convictions * Appellant was not removed from the Roll but was **suspended** * The Court of Appeal gave insufficient weight to the isolated nature of the 1998 convictions and the powerful subjective case made on behalf of the appellant, including evidence of the appellant's character and rehabilitation and the extensive support he was receiving from his family * Although the 2000 convictions were ultimately set aside, the failure to disclose them was said to be a breach of the appellant's duty of candour to his professional association. As part of the investigation, he was engaged in correspondence with the law society. * Frankness required the disclosure of the convictions and sentence, even if he regarded them as unjust, and hoped (or even expected) that they would be overturned on appeal * Courts in this respect have statutory jurisdiction, they also have an inherent jurisdiction and, most important, that the statutory jurisdiction does not in fact oust the inherent jurisdiction of the Supreme Court.   + The inherent jurisdiction basically raises the question whether a person is fit a proper person to be a member of a legal profession   + The statutory jurisdiction of course is restricted by the terms of the provisions of the legislation whatever they might be |

Violent Activities

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| ***Law Society of SA v Le Poiden***   * Law society sought to have a practitioner struck off for being guilty of offences of threatening to endager life and for committing common assault * The court said that there was no doubt that the practitioners actions departed from what could be expected from a member of an honourable profession * He was not struck off but was suspended for two years – he had not been guilty of dishonesty. * The remark was made that he obviously had an issue with his temper and so he should ‘guard his tongue and watch his conduct’ |

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| ***Law Society of New South Wales v McKean***   * Practitioner was struck off * Had been convicted of two counts of maliciously inflicting bodily harm with intent * Stabbed his de facto wife and one of her children * The judge found no provocation * The solicitor spent 3 years in goal and had long-term and ongoing psychiatric treatment |

Drug Dealing, Money Laundering, False Statements Thereof

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| ***Barrister’s Board v Darveniza* [2000] QCA 243**   * Defendant was a barrister in Qld for 2-4 years standing * The issue of his continuation on the roll arose because of information he failed to disclose to the Bar Association of NSW (who he got his Certificate of Practice from) * He was convicted by a magistrate after summary trial of 2 offences of supplying dangerous drugs * He was fined, with a further order that no conviction be recorded – the view was taken that these were not particular serious examples of the offences in question * A Certificate of Admission in NSW was based upon the failure to disclose these convictions and the statement to the effect that he ceased the illegal drugs activities (but this was a lie, he was still involved in drugs) * In addition, he offered money laundering services to various people   **HELD:**   * (lead judgement – Thomas J) – the barrister be struck off – this was the only appropriate order * Conduct which undermines trustworthiness of barrister very damning * It suggests a lack of integrity and a suggestion that the practitioner cannot be trusted to deal fairly within the legal system (i.e. with courts, other practitioners, clients etc) * Lack of trustworthiness can come from private life as well as practice of law * Barrister’s conduct showed a serious disrespect for law and was enough to demonstrate that his character was not fit for practice * Plus money laundering could readily transgress into his professional activities |

Relationship Between Defence Counsel and Prosecutor

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| ***Michael Carl Szabo* [2000] QCA 194**   * Szabo was convicted of burglary and rape * Szabo appealed to the Court of Appeal on the ground of miscarriage of justice involving a number of claims, including a ground regarding the relationship between the defence counsel and the prosecutor * The defence counsel and the prosecutor have been in a relationship for a period of 11 months, living effectively as de facto partners * This relationship terminated a few months before the commencement of the trial * Immediately after the trial finished, defence counsel and the prosecutor occupied the same room in the motel where the proceedings were taking place and their relationship was resumed a few months later * The accused was not informed of this set of circumstances and one of the grounds of appeal was the failure on the part of defence counsel to advice his client of his relationship with the prosecutor   **Held:**   * Appeal allowed, conviction set aside and a retrial * The question was whether, notwithstanding the apparently robust defence, would a fair minded informed observer nevertheless entertain a reasonable suspicion or apprehension that the defence counsel may not have done so * Counsel’s failure to disclose the relationship created a reasonable apprehension or suspicion that the independence of counsel may have been compromised * Therefore, the conviction was quashed * It will not always mean that married persons cannot oppose each other in court – not necessarily true that would not be zealous for client, some risk of improperly looking at each other’s briefs if they live together (but no more than counsel in same chambers) * Ethical duty on counsel to disclose, and then leave it up to the client to assess the risk * Duty does not arise for counsel in the same chambers – a greater suspicion arises from sexual intimacy than friendship. The assumption is that persons are more likely to do each other a favour if they are in a sexual relationship. * It is important to maintain independence and impartiality of barristers who play a vital role in the administration of justice   Various Tests  Held: By de Jersey CJ — The test is whether the circumstances of the case would engender reasonable suspicion or apprehension in a fair-minded, informed observer as to whether defence counsel necessarily acted with fearless independence in promoting the client's cause. The failure to disclose lead to a reasonable apprehension.  Davies JA — The test to be applied is whether a fair-minded person, in the position of either the appellant or a member of the public, might reasonably apprehend that, because of defence counsel's relationship with the prosecutor or its consequences, the appellant was deprived of a fair trial.  Thomas JA — The question is whether, with knowledge of all relevant circumstances, an ordinary fair-minded citizen in the position of the appellant would entertain a reasonable suspicion that justice had miscarried. Such a conclusion however does not necessarily follow from the mere fact that the Crown prosecutor and defence counsel have an association or even a sexual relationship. All relevant circumstances have to be considered, including the conduct displayed by defence counsel which might feed or rebut any suspicion of unfairness. |

This can be contrasted with ***Bar Association of Queensland v Lamb***.

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| ***Bar Association of Queensland v Lamb* [1972] ALR 285**   * + extramarital intercourse with his client, after the decree absolute, but before questions of custody and maintenance had been determined.   + The lawyer maintained a sexual relationship with a client   HELD:   * + although the lawyer’s conduct was dishonourable and reprehensible, he did not engage in unprofessional conduct showing an unfitness to practise   + The High Court did not feel it necessary to refuse to admit the barrister as a member of the Bar   + Considerations – * Power imbalance * Psychological issues or vulnerability on the part of the client * Dependence on practitioner/ taking advantage * Breach of trust? * Whether practitioner should suggest client gets independent legal advice |

*In BAQ v Lamb [1972] ALR 285, the HCA held that a legal practitioner, who had maintained a sexual relationship with a client, did not engage in unprofessional conduct showing an unfitness to practise. Yet in the case of medical practitioners this has always been a ground for a finding of unprofessional conduct. Is the distinction justified?*

This position is to be contrasted with medical practitioners, where having a sexual relationship with a patient has always been a ground for unprofessional conduct. This is probably because of the power a medical practitioner can have over a patient’s body.

It was suggested, however, that in special cases like family law cases, an obligation should be imposed on the lawyer to not get involved in a relationship with the client because of the emotional vulnerability at this period of hardship.

Reasons why sexual relations with a client are inappropriate**:**

* The client is sometimes in a vulnerable position both emotionally and economically and easily coerced or unduly influenced into a sexual relationship
* Lawyers need to remain detached and objective in representing a client
* Sexual relations with a client can lead to incompetent legal services

*ARGUMENTS AGAINST:*

* Solicitor’s judgment will be clouded
* There will be no impartiality or independence if a person is in asexual relationship with the client they are representing.
* There will be no detachment and the chances of the advice being given as going further than legal advice are extremely high.

**Sol r 13 Independence – avoidance of personal bias**

13.1 A solicitor must not act as the mere mouthpiece of the client or of the instructing legal practitioner and must exercise the forensic judgments called for during the case independently, after appropriate consideration of the client’s and the instructing solicitor’s wishes, where practicable

*ARGUMENTS FOR:*

Any misconduct in this light may not affect your ability to act as a professional barrister

Misappropriation of Money

As an offence involving dishonesty, the misappropriation of money is an offence which may constitute unprofessional conduct: s 420(1)(c)(iii) LPA 2007. In ***QLS v Smith*** (2000), a practitioner was struck off following a string of misappropriation offences, despite these offences not occurring in the course of the practice of law – key issue was that they were offences involving dishonesty, suggesting the solicitor was not a fit and proper person.

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| ***Queensland Law Society Inc v Smith* [2000] QCA 109**   * The practitioner in this case had a background of incidents of professional misconduct as well as personal misconduct (on the assumption that it is appropriate to make this distinction) * Several years earlier he had been suspended from practice by the Law Society, first of all for providing information about the proceedings to the client, and secondly voluntary mixing his affairs with those of the client with the result of a loss to the client * Subsequent events were unrelated to his professional practice, he was convicted for dishonestly applying to his own use a sum of $12,000 which was property of another for the purpose of purchasing three amusement machines which were to be placed in a shopping centre * He was later convicted on three charges for misappropriating amounts totalling $156,000 for an ostrich farming scheme which he made optimistic representations about, when the scheme had no real prospects of success * He was sentenced to 3 years jail and was suspended after 1 year   **HELD**   * The practitioner was struck off of the roll of solicitors * The common law was originally concerned with the issue whether a person is a fit and proper person to be admitted and whether such a person should remain on the roll * The offences he committed were not offences related to the practice of the profession – the money was not misappropriated in the course of the practice of the law * The money which has been dishonestly misappropriated was not client’s money – it was a third party’s money * There was clearly a contemplation in the legislation that the commission of offences, serious offences generally and the offences relating to legislation about legal profession (e.g. trust accounts) may well in appropriate circumstances constitute conduct unacceptable for the purpose of the act in accordance with various interpretations of professional misconduct * These offences in particular were strongly in favour of the conclusion that Smith was not a fit and proper person to be a legal practitioner – offences of dishonesty * The conduct revealed was sufficiently serious to require removal of the respondent's name from the roll in the interests and protection of the public. It revealed him to be unfit to be held out to members of the public as an officer of the court. |

Instituting Claims with no Legal Foundation (Ulterior Motive)

The concept of abuse of process in this context involves a party using court proceedings and procedures for a purpose unrelated to the objectives which the court process is designed to achieve. The proceedings were not brought to vindicate any legal right – their sole purpose was delay as an end in itself and that constituted an abuse of process.

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| ***White Industries v Flower & Heart (Qld) Pty Ltd***   * + Caboolture Park,(Flower & Hart’s client) filed an application supported by a statement of claim claiming damages against White for conduct alleged to have contravened s 52 TPA arising out of a building contract between White & Caboolture Park   + After consulting a Queen’s Council, a partner M at Flower & Heart advised CP that although the claim was weak, proceedings could be brought against White to obtain a better bargaining position   + This course of procedure was referred to as “a temporary bargaining stance”. “I do have to make it clear however that you could not win any litigation if put to the test”.   + CP instituted a claim, the claim was dismissed and costs were awarded to White   + As CP insolvent, White sought to recover costs on an indemnity basis against Flower & Heart   + White alleged that the claim against them was commenced and continued in the knowledge that it had no worthwhile prospects of success and was commenced for the ulterior purpose of delaying action by White against CP to recover monies repayable under the building contract and putting the applicant under pressure to comprise such claim   + White alleges that this conduct was in breach of the duty which Flower & Hart owed to the court   + Mr Meadows, partner of Flower & Hart, had carried out substantial work for Caboolture Park and knew that the MD always took an optimistic view of litigation.   **HELD:**   * + Practitioners have a duty to the court to ensure that the court’s process is not abused and used for improper or ulterior purposes.   + The concept of abuse of process in this context involves a party using court proceedings and procedures for a purpose unrelated to the objectives which the court process is designed to achieve. The proceedings were not brought to vindicate any legal right – their sole purpose was delay as an end in itself and that constituted an abuse of process (64)   + It is not necessary before a finding can be made that proceedings were instituted or continued for an improper purpose that it be found that the proceedings are based on a cause of action that is not arguable. The power to prevent an abuse extends to proceedings that raise a prima facie case; *Williams v Spautz*   + Flower & Hart breached the duty it owed to the Court to conduct proceedings before the Court with propriety, not to be a party to an abuse of process and not to obstruct or defeat the administration of justice   + In order to fix liability for costs to solicitor there must be more than unreasonably initiating or continuing proceedings that have substantially no chance of success – it is where there is deliberate or conscious decision to use proceedings for an ulterior purpose with a disregard of any proper consideration of the prospects of success   Re Counsel’s Advice   * + M could not shelter behind advice received from counsel, especially where the limits of the factual basis for such advice were set by the contents of the brief provided by the appellant to counsel   + As a solicitor, Meadows was obliged to make his own independent assessment of whether proceedings should be instituted without further investigation, or delivery of a full brief to counsel |

In ***White Industries***, the following factors were in play in finding an improper purpose:

1. Dishonesty
2. Not making allegations for strategic reasons when you have insufficient foundation
3. Conflict of duty between client and the court
4. Commencing proceedings without evidence
5. Furthering a client’s case dishonestly
6. Abuse of process
7. Using delaying tactics and unnecessary expenditure

This judgement links with Justice Ipp’s Article, where he stated that practitioners cannot act as a mere mouthpiece for the client, as there is a dual duty to the court as well as the client (Solicitors Rule 2.1, 12.1, 12.2,13.1, 13.2 and 16.1 – 16.6).

Further, the practitioner must be independent and can confine issues to what a solicitor believes to be the **real** issues in the case (Barristers Rule 21(a) and (b), 20, 22, 37, 38, 39 and 42).

**PROBLEM:. Your client has instructed you to commence proceedings against another corporation which operates a business in the same general area as your client’s business, wants to acquire it. Your client has now given you specific instructions:**

Consider rules 12-20 SR. Also consider r 5 UCPR.

* Sols must retain their independence – must not act as a mere mouthpiece of the client: r 13 SR

**To commence proceedings to seek compensation for the damage caused to your client as a result of the other corporation’s misleading statements**

* r 16 SR – abuse of process – “reasonably justified on the material available to the sol”
* Must not do this if purpose is to gain some collateral advantage

**To allege that the chief executive officer of the other corporation engaged in fraudulent and dishonest conduct**

* r 16.2 SR – abuse of process – “reasonably justified on the material available to the solicitor”
* Must not do this if purpose is to gain some collateral advantage
* Fraud is a serious allegation
* Costs will be on an indemnity basis if fraud is not made out
* This would be an abuse of process

**To delay proceedings by way of seeking adjournments for the purpose of obtaining further information**

* Abuse of process - *White Industries*; *Williams v Spritz*
* Courts may only adjourn if purpose of adjournment is not deceitful

**To prepare affidavits for signature by your client’s employees**

As long as don’t suggest the content, then no breach of r 17.2. Will be satisfactory if a summary of the client’s facts.

**To advise your client’s employees what evidence to give and how it should be given**

* R 17.2 SR – cannot coach witnesses

17.2 A solicitor must not suggest to or condone another person suggesting in any way to any

prospective witness (including a party or the client) the content of any particular evidence

which the witness should give at any stage in the proceedings.

Falsely Swearing an Affidavit

**Coe v NSW Bar Association [2000] NSWCA 13**

* In NSW a barrister was struck off for falsely swearing an affidavit with intent to mislead the family court in a matter in which he was a PARTY (NB: this is personal because although it relates to the law, it’s not in his capacity as a lawyer).
* The court said that it was dishonest and that he should have known better

**NB** a similar charge was bought against Bill Clinton re Monica Lewinski – Clinton finally admitted that he had made false statements to the Arkansas bar that were prejudicial to the administration of justice.

Understating Taxes

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| **NSW Bar Association v Hammond [1999] NSWCA 404**   * Practitioner was struck off after showing prolonged dishonesty for personal gain * Despite showing genuine contrition the court said that he should be struck off but that the door to readmission is never closed |

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| ***Legal Services Commissioner v Hope* [2010] QCAT 184**   * 3 separate charges of failing to pay superannuation contributions, which slightly exceeded $10000. * Practitioner had no previous adverse findings by a disciplinary body. * He cooperated fully with the LSC and was contrite. * **HELD**   + The respondent’s offending occurred over a relatively short period of time in a long legal career during which there had been no previous adverse findings against him by any disciplinary body. The misconduct had a direct connection with health problems leading to a deterioration in the respondent’s financial position. He has cooperated fully with the disciplinary body and taken certain steps in an attempt to rectify the financial loss suffered by the three employees as a result of his failure to meet his statutory obligations. The Tribunal accepts that the offending, in those circumstances, is properly categorised as *unsatisfactory professional conduct* and that the penalty sought by the applicant (with which the respondent agrees) is, in those circumstances, appropriate. * **Mitigating Factors were:**   + Poor health and the time and thereafter;   + Deteriorating financial position as a result of his health;   + Conduct occurred in isolation (a small time when considering the length of his career);   + Full cooperation;   + Paid the money he was supposed to pay earlier. |

One more case overleaf…

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| ***Legal Services Commissioner v Bradshaw* [2009] LPT 021**   * Disciplinary proceedings brought against a barrister. * Mr Bradshaw failed to lodge tax returns for the years ended 30th of June 1999 through to 30th of June 2005, conduct for which he was convicted of offences against the *Taxation Administration Act* in April 2008. * **HELD**   + Conduct like that brings the legal profession into disrepute. It also demonstrates that the practitioner involved has a lack of respect for duties imposed on citizens under the law (@ 4).     - In respect of the tax returns and the fact that he allowed the matter to proceed to the stage of a conviction, does constitute unprofessional conduct (WTF – there is no such thing as unprofessional conduct.) |

Mental Illness

Must be used carefully to obtain mitigation

**Re Legal Practitioner Act 1981; The Law Society of South Australia v Murphy**

* Practitioner admitted unprofessional conduct which involved:
  + Failure to follow trust fund procedures
  + Failure to repay from requests to the complaints committee and overcharging
* The practitioner said that his conduct could be partly blamed on depressive illness
* He asked that his request to never practise law be taken over a disbarment
* This was refused – judge said that the acts that he carried out where of a nature that required being disbarred and that there was nothing in the condition that suggested that it was of a short term nature.

**Law Society of Tasmania v Schouten**

* Man failed to lodge his tax returns
* Had reports to show that he was in a state of inertia and that he had a mental block from being able to carry out the tasks required to complete the returns
* After undergoing therapy it was found that he, with medical assistance, improved his capacity to overcome the inertia and was at the present time, not permanently unfit for practice

**HELD**

* There was no finding of professional misconduct
* However his right to practice was restricted

Substance Abuse

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| **David Quick QC (In South Australia)**   * QC addicted to heroin * Missed a mediation as a result of the addiction * Whilst in intensive care he missed a court appearance * In 2001 he informed the board of his habit and provided an undertaking not to take cocaine or other illicit drugs * He then breached that 10 times before September of the following year * He voluntarily ceased practice but continued to do legal work for the defence force * Two doctors and a psychologist testified and submitted reports which said that he was making great progress towards solving his problem   **HELD**   * The offence was victimless – despite it being obvious that he had breached various laws under the Controlled Substances Act (Ann note: Maybe because he was never charged – it always just him admitting it???) * He hurt no one but himself – so the offences were not ones of an infamous nature * The tribunal referred to a number of references that stated that he was hardworking, diligent, honest and reliable. * The tribunal accepted that the cocaine usage was out of character * They emphasised his willingness to be rehabilitated and that he reported himself * There was an argument that his actions reflected poorly on the profession but it was **held** that he had already removed himself from practice for 12 months and could evidence that he was on the road to recovery. * He was allowed to return to practice as soon as he got back from an overseas stint as an academic. |

### Mitigating Factors

Certain mitigating factors will justify a reduction in the severity of the sanction imposed these include:

* **Age at which the misconduct occurred and any subsequent redemption**
  + If the improper act was committed at a young age, and since that time the applicant’s behaviour has been redeeming, then this is likely to be a good thing.
  + *Lenehan*
    - Committed a number of dishonest acts relating to misappropriation of money 20 years before admission whilst working as an articled clerk.
    - Did not disclose at admission.
    - Employment record for last 20 years has been respectable.
    - Admission had been denied in two previous attempts.
    - **HELD:**
      * Admitted.
      * Present case discloses early manhood under bad influences without proper guidance and a fully adult life of seemingly correct and exemplary conduct.
  + *Re B*
    - Applicant had during her university days been convicted for various offense including obscene publication, trespass, damage to property and using obscene words
    - She had also published material that evidenced her defiance of the law
    - This alone would not have been enough to prevent her admission however right before admission she was a party to a dummy bail agreement where she pledged money of a prisoner pretending that it was her own
    - HELD
      * She was not admitted – Held that the question was whether a person who aspires to serve the law can be said to be fit to do so when it is demonstrated that in the zealous pursuit of political goals she will break the law
* **External stressors at time of impropriety**
  + That the applicant was subject to external stressors that are not likely to appear in the legal environment may allow for admission despite otherwise unfavourable acts.
  + *Prothonontary v Del Castillo*
    - Applicant had been tried for murder but found not guilty
    - Had lied to his solicitor and given a series of bad instructions
    - He had also lied to police
    - Rejected by ACT admission board but allowed in NSW
    - HELD
      * Conduct stemmed from an unforeseeable set of circumstances which placed extraordinary pressures on him nearly ten years ago.
  + *Re Bell*
    - Although there were external pressures, the same types of pressures would occur in legal practice, so rather than mitigating, it actually shows an unfitness to practice.
* **Lapse of time between impropriety and admission**
  + Mere passage of time would not ordinarily, without more, show a fitness to practice (*Re Liveri*).
  + Not necessarily a mitigating factor.
* **Otherwise of good fame and character**
  + The cases clearly demonstrate that even a single course of conduct, limited to a certain period and never again repeated can still impede admission (*Thomas v Legal Practitioners Admission Board*)
* **Contrition**
  + Being remorseful can only go some way to repairing prior impropriety (*Re Liveri*)
  + That the applicant cooperated with police, repaid the money and pleaded guilty is not enough to outweigh the initial impropriety (*Thomas v Legal Practitioners Admission Board*).
* **No temptation to reoffend**
  + Will be difficult to overcome the initial impropriety (*Thomas v Legal Practitioners Admission Board*).
* **Character references from others**
  + Helpful but not enough to outweigh (*Thomas*).
* **Mental illness**
  + Must be used carefully to mitigate
* **Poor health at time of impropriety (*Hope*)**
* **Deteriorating financial position due to bad health (*Hope*)**
* **Conduct occurred in isolation, uncharacteristic (*Hope*)**
* **Full cooperation with investigative/prosecuting authorities (*Hope*)**
* **Repayment of lost money (*Hope*)**

### Penalties

**S456** LPA outlines the penalties that pertain to a breach.

The consequences from a finding of unsatisfactory professional conduct or professional misconduct include:

* Removal from the Roll: s 456(2)(a) LPA
* Practising Certificate suspended: s 456(2)(b)
* Practising Certificate cancelled
* Publicly reprimanding the practitioner: s456(2)(e) LPA by LPT or s 458(2)(a) if by LPC
* Practitioner pay a penalty or compensation
  + a monetary fine (s 456(4)(a) (LPT - not more than $100,000) or s 458(2)(b) (LPC – not more than $10,000)),
  + a compensation order (s456(4)(b) (LPT) or s 458(2)(c) (LPC)), or
  + a costs order (s 462(1); *White Industries (Qld) Pty Ltd* [1998] FCA 806).
* Notices not to employ: s 456(2)(e) LPT or 458(4) LPC
* Take a further course of legal education: 456(4)(c) LPT
* Practice be inspected for a time
* *Contempt of Court***:** Misconduct may in certain circumstances constitute contempt. For example, Salvator Di Carlo, Barrister-at-law, was held in custody for several hours in November 2005 for making irrelevant comments and showing no respect for the Court.

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| **Section 456 LPA**   1. If, after the tribunal has completed a hearing of a discipline application in relation to a complaint or an investigation matter against an Australian legal practitioner, the tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, the tribunal may make any order as it thinks fit, including any 1 or more of the orders stated in this section. 2. The tribunal may, under this subsection, make 1 or more of the following in a way it considers appropriate--    1. an order recommending that the name of the legal practitioner be removed from the local roll;    2. an order that the practitioner's local practising certificate be suspended or cancelled;    3. an order that a local practising certificate not be granted to the practitioner before the end of a stated period;    4. an order that--       1. imposes stated conditions on the practitioner's practising certificate granted or to be issued under this Act; and       2. imposes the conditions for a stated period; and       3. specifies the time, if any, after which the practitioner may apply to the tribunal for the conditions to be amended or removed;          1. an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner;          2. an order that no law practice in this jurisdiction may, for a period stated in the order of not more than 5 years-- 3. employ or continue to employ the practitioner in a law practice in this jurisdiction; or 4. employ or continue to employ the practitioner in this jurisdiction unless the conditions of employment are subject to conditions stated in the order.    1. The tribunal may, under this subsection, make 1 or more of the following--       1. an order recommending that the name of the practitioner be removed under a corresponding law from an interstate roll;       2. an order recommending that the practitioner's interstate practising certificate be suspended for a stated period or cancelled under a corresponding law;       3. an order recommending that an interstate practising certificate not be, under a corresponding law, granted to the practitioner until the end of a stated period;       4. an order recommending-- 5. that stated conditions be imposed on the practitioner's interstate practising certificate; & 6. that the conditions be imposed for a stated period; and 7. a stated time, if any, after which the practitioner may apply to the tribunal for the conditions to be amended or removed.    1. The tribunal may, under this subsection, make 1 or more of the following--       1. an order that the legal practitioner pay a penalty of a stated amount, not more than $100000;       2. a compensation order;       3. order that the practitioner undertake and complete a stated course of further legal education;       4. an order that, for a stated period, the practitioner engage in legal practice under supervision as stated in the order;       5. an order that the practitioner do or refrain from doing something in connection with the practitioner engaging in legal practice;       6. an order that the practitioner stop accepting instructions as a public notary in relation to notarial services;       7. an order that engaging in legal practice by the practitioner is to be managed for a stated period in a stated way or subject to stated conditions;       8. an order that engaging in legal practice by the practitioner is to be subject to periodic inspection by a person nominated by the relevant regulatory authority for a stated period;       9. an order that the practitioner seek advice from a stated person in relation to the practitioner's management of engaging in legal practice;       10. an order that the practitioner must not apply for a local practising certificate for a period.           1. the tribunal may make any number of orders mentioned in any or all of subsections (2), (3) and (4).           2. The tribunal may make ancillary orders, including an order for payment by the practitioner of expenses associated with orders under subsection (4), as assessed in the order or as agreed.           3. The tribunal may find a person guilty of unsatisfactory professional conduct even though the discipline application alleged professional misconduct. |

### Remedies

Rules of law remain relevant particularly in the context of what remedies are available to secure the interest that has been affected by the alleged conduct of the practitioner these include:

* Common law actions of damages to compensate for a loss sustained by a client as a result of the practitioner’s negligence – an issue linked with compulsory professional indemnity insurance
* The statutory claims of clients who have suffered financial loss as a result of financial dishonesty on the part of practitioners through the fidelity guarantee fund
* Criminal proceedings under the general criminal law particularly in relation to unacceptable personal conduct on the part of practitioners
* Criminal proceedings under the criminal law related specifically to offences against the legislation that governs the legal profession
* Proceedings before the Supreme Court in the exercise of its inherent jurisdiction over members of the legal profession
* Disciplinary proceedings in accordance with the legislation that regulates the legal profession

The remedies and standards are set by the Supreme Court in exercise of its inherent jurisdiction or in accordance with the LPA.

### Tabular Summary of Disciplinary Cases

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Case** | **Year** | **Juris.** | **Conduct** | **Qld Classification** | **Punishment** |
| Meagher | 1896 | NSW | Lying to Commission | - | Struck Off |
| Re R & Re A | 1927 | SA | Negligence | Unsatisfactory Professional Conduct | Public Reprimand |
| Ziems | 1957 | HCA | Manslaughter | - | Suspended |
| Lamb | 1972 | HCA | Relations with Clients | - | - |
| Re a Barrister | 1972 | FC | Acting both sides | Unsatisfactory Professional Conduct | Public Reprimand |
| Adamson | 1990 | QCA | Sharing Receipts | Professional Misconduct | Suspended 12 Mth |
| A-G v Gregory | 1998 | QCA | Influencing Witness | Professional Misconduct | Struck Off |
| Smith | 2000 | QCA | Misappropriated Money | Unsatisfactory Professional Conduct | Struck Off |
| Darveniza | 2000 | QCA | Supply Dangerous Drugs | Unsatisfactory Professional Conduct | Struck Off |
| Clough | 2000 | QCA | Misleading Conduct | Unsatisfactory Professional Conduct | Suspended 12 Mths |
| Priddle | 2001 | QCA | Inadequate Control Trust Money | Unsatisfactory Professional Conduct | Suspended |
| Roche | 2003 | QCA | Overcharging | Professional Misconduct | Suspended 12 Mth |
| A Solicitor | 2004 | HCA | Indecent Assault | Professional Misconduct | Suspended |
| Morel | 2004 | SASC | Relationships with Clients | Professional Misconduct | Struck Off |
| Williams | 2005 | QCA | Inadequate Control Trust Money | Professional Misconduct | Suspended |
| Twohill | 2005 | LPT | Use Trust Money – No Authorisation | Professional Misconduct | Pecuniary Penalty |
| Ferguson | 2005 | LPT | Lack Diligence | Unsatisfactory Professional Conduct | Pecuniary Penalty |
| Towers | 2006 | LPT | Use Trust Money – No Authorisation | Unsatisfactory Professional Conduct | Struck Off |
| Baker | 2006 | QCA | Overcharging | Professional Misconduct | Struck Off |
| Turley | 2008 | LPT | Scandalous & Obscene submissions | Professional Misconduct | Public Reprimand |
| Mackereth | 2008 | LPT | Forgery | Professional Misconduct | Struck Off |
| Kincard | 2008 | LPT | Wrongful Advice | Professional Misconduct | Public Reprimand |
| Dwyer | 2009 | LPT | Failure to Manage Trust Accounts | Professional Misconduct | Public Reprimand |
| Wherry | 2009 | LPT | Forging Documents | Professional Misconduct | Struck Off |
| Cain | 2009 | LPT | Failure to Lodge Tax | Professional Misconduct | Public Reprimand |

# References to Cases

Cases

***A Solicitor v Law Society of NSW*** 202

*Adamson* 41, 110, 191, 195, 198, 217

***Apostilides*** 162, 224

Arthur J S Hall v Simon 145

*Attorney-General v Lovitt* 191

***Bacon*** 89

***Baker*** 41, 108, 109, 110, 112, 115, 132, 187, 191, 199, 217

**Baker v Johnson** 108

***Baker v Legal Services Commissioner* [2006] QCA 145** 41

*Beach Petroleum NL v Kennedy* 116

*Bonds & Securities v Glomex Mines* 126

*Cain* 191, 217

***Carberry*** 182

***Chamberlains v Lai*** 155

***Citicorp Australia Ltd v O’Brien*** 117

*Clark Boyce v Mouat* 120

*Clough* 190, 197, 217

*Clyne* 108, 192, 225

**Clyne v New South Wales Bar Association** 108

**Coe v NSW Bar Association** 210

***Cohen*** 98

*Commissioner of Taxation v Pratt Holdings Pty Ltd* 123, 124

*Council of the Queensland Law Society Inc v Wakeling* [2004] QCA 42 35

*Crowley v Murphy* 120

***D’Orta*** 148, 149, 150, 152, 153

*Darveniza* 164, 190, 204, 217

**David Quick QC** 212

***Dean Phillip Bax*** 101

***Dietrich*** 161

*Dwyer* 191, 217

*Esso Australia Resources Ltd v Commissioner of Taxation* 120, 123

***Ex parte Attorney General for the Commonwealth: Re a barrister and solicitor*** 194

*Ferguson* 37, 190, 217

*Fingelton* 173

***Flanagan v Pioneer Permanent Building Society Ltd*** 133, 134

*Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* 192

***Fruehauf Finance Corporation Limited v Feez Ruthning*** 129

***Gaffney v Cranston McEachern*** 119

*Gainers Inc v Pocklington* 116

*Garde-Wilson v Legal Services Board* 191

***Gianerrelli v Wraith*** 160

***Giannarelli v Wraith*** 76, 140, 141, 143, 152, 153, 161, 224, 226

*Grant v Downs* 120

*Gregory* 164, 191, 196, 217

*Hedley Byrne v Heller* 74

*Hill v Van Erp* 118

***Holdway v Acuri*** 119

*Hospital Products* 120

***In Re R, a practitioner of the Supreme Court*** 194

***Island Link Pty Ltd v Thynee & Macartney*** 119

***Kearney v Attorney-General (NT)*** 124

*Kincard* 191, 217

***Lamb*** 182, 205, 206, 217

***Le Poiden*** 204

***Legal Practitioners Complaints Committee v Clark*** 131

***Legal Services Commission v Twohill* [2005] LPT 001** 36

***Legal Services Commissioner v Bradshaw*** 211

***Legal Services Commissioner v Clair* [2008] LPT 8** 35

***Legal Services Commissioner v Ferguson* [2006] LPT 007** 37

***Legal Services Commissioner v Hope*** 210

***Legal Services Commissioner v Madden (No 2)*** 132

***Legal Services Commissioner v Mullins*** 176, 179

***Legal Services Commissioner v Towers*** 112

***Legal Services Commissioner v Towers* [2006] LPT 003** 37

*Little v Ryland* 118

***Luadaka v Dooley*** 119

*Mackereth* 191, 217

***Maguire v Makaronis*** 127

***Maher v Millennium Markets*** 127

***Mallesons Stephen Jacques v KPMG and Louis James Carter*** 130

***Marcus Einfeld*** 157, 198

***McKean*** 204

***Meagher*** 193, 217

***Michael Carl Szabo*** 204

***Milu v Smith*** 160, 161

*Morel* 191, 202, 217

***Mullins*** 179

**NSW Bar Association v Hammond** 210

***NSW Bar Association v Punch*** 180, 193, 199

*Olympic Holdings v Lochel* 117

***Perham v Connolly*** 119

***Petroulias*** 197

***Pott v James Mitchell*** 133, 137

*Priddle* 38, 190, 217

***Prince Jefri Bolkiah v KPMG*** 128, 136

*Prothonontary v Del Castillo* 100, 213

**Prothonotary of the Supreme Court of New South Wales v Tatar** 103

***Queensland Law Society Inc v Smith*** 207

***Queensland Law Society Inc v Wakeling* [2004] QCA 42** 35

***Queensland Law Society v Cummings* [2004] QCA 138** 39

***Queensland Law Society v Priddle* [2002] QCA 297** 38

***Queensland Law Society v Roche* [2004] Qd R 574** 40, 112

***R v Ion*** 169

*Rakusen v Ellis, Munday & Clarke* 116, 128, 136

*Re A Barrister* 190

*Re A Solicitor* 191

***Re AJG*** 92

*Re B* 85, 100, 212

*Re Bell* 87, 100, 213

*Re Davis* 87, 90, 97, 103

*Re Foster* 52

***Re Hampton*** 90, 97, 98

***Re Humzy-Hancock*** 95, 96

**Re Legal Practitioner Act 1981; The Law Society of South Australia v Murphy** 211

***Re Lenehan*** 90

***Re Liveri*** 87, 91, 99, 100, 213

*Re Margolis* 74

***Re OG*** 87, 88, 93, 96

*Re Owen* 98

***Re Sande* [1996] 1 Qd R 671** 66

*Re Sawley* 190

*Rees v Sinclair* 140

***Richardson*** 95, 96

**Roche** 40, 108, 109, 112, 191, 217

*Rondel v Worsley* 140, 145

*S v Legal Practice Board of WA* 99

*Saif Ali v Sydney Mitchell* 140, 141, 223

***Sande*** 66, 67, 182

**Schouten** 211

*Southern Equities Corporation Ltd (in Liq) v Arthur Andersen and Co* 124

*Spector v Ageda* 126

***Spincode Pty Ltd v Look Software Pty Ltd*** 131, 137

*Sweeney v Attwood* 119, 149

*Swinfoen v Lord Chelmsford* 140

***Symonds v Vass*** 144

***The Law Society of New South Wales v Harvey*** 126

***Thomas v Legal Practitioners Admission Board*** 91, 96, 100, 213

*Towers* 37, 190, 217

***Tuckiar v The King*** 160

*Turley* 191, 217

*Twohill* 36, 191, 217

*Underwood, Son and Piper v Lewis* 106

***Valencia v Wlodarcyzk*** 119

***Victorian Lawyers RPA Ltd v X*** 90

***Village Roadshow v Blake Dawson Waldron*** 133

***Voll*** 116, 198

*Vulic v Bilinsky* 118

***Walker v Richards & Ors*** 119

***Wentworth*** 98

*Wherry* 191, 217

***White Industries*** 160, 192, 207, 208, 209, 214

***White******Industries v Flower & Hart (a firm)*** 160

*Williams* 35, 38, 91, 191, 207, 209, 217

***Williams v Queensland Law Society* [2005] QCA 388** 38

***Woolworths Ltd v Shine Lawyers*** 138

***Wragg v Bond*** 162

*XY v Board of Examiners* 84, 99

***Ziems v Prothonotary of the Supreme Court of New South Wales*** 200

*Ziems v Prothonotary of the Supreme Court of NSW* 74

# Appendix 1: Fitzgerald J’s Article

As a guest lecturer, I am uncertain of the overall course content or where this lecture fits in, and so will seek to briefly establish my own context.

Much of your law course is concerned with substantive law, a body of rules, mostly made by legislatures and courts, which broadly give effect to community values and community interests, or at least the values and interests of influential community groups.

In societies like ours, public institutions or organisations called courts have primary responsibility for the enforcement of rights and obligations derived from the substantive law and the resolution of disputes, and additional rules govern the procedures used by the courts to perform that task. An elite group of citizens, the lawyers, are given special privileges in connection with the legal system administered by the courts, and, correlatively, have professional responsibilities related to the performance of their functions.

Those responsibilities have two major facets; a lawyer has responsibilities to his or her client, the principal for whom he or she is the agent or functionary in the legal system’s operations; and responsibilities to the system itself, or perhaps more accurately to the community to which the legal system belongs, to preserve and improve that system and to contribute to its efficient and effective operation.

There is a tension between those two aspects of a lawyer’s responsibilities; one is directed to the private interests of the client, the other to the public interest in the continuation and proper operation of a community asset, the legal system. That tension, and the practical difficulties which it produces, sometimes including direct competition between a client’s interests and a lawyer’s responsibilities to the community which is the source of the lawyer’s privileges, has led to a further body of rules which govern lawyers’ conduct.

There has been much criticism of lawyers and the legal system in recent times. There is also much debate regarding the professional duties of lawyers and the need to maintain ethical legal practices in the era of competition policy and economic rationalism. Justice Michael Kirby has recently drawn attention to the work of American scholar and Dean of Yale Law School, Anthony Kronman1[[1]](#footnote--1)8 which paints a bleak outlook for the future integrity of the legal profession.1[[2]](#footnote-0)9 In summarising Kronman’s book, Justice Kirby notes:

*"The role of the lawyer in the old days involved compassion for the client’s entire predicament, tempered by detachment and also a measure of concern for the public good...*

*... The old days of complete honesty with the courts and candour and honour in dealing with each other has given way to a more ruthless effort to win cases because large profits hang upon them, essential to the lawyer’s ‘business’... The lawyer becomes too much caught up in the client’s speculation. Whereas, in the past, the advocate would conceive his or her role as being, akin to the judge, the maintenance of detachment, a shift to the business definition of the law embroils the lawyer in the client’s cause."*2[[3]](#footnote-1)0

Whether or not this is an unduly pessimistic view, the rules which govern lawyers’ conduct, and to which I will shortly return, do not exhaust a lawyer’s social or professional responsibilities, but define minimum standards of behaviour. Membership of a profession, or any privileged social position, carries with it intangible obligations to the community, especially to those who are underprivileged and marginalised, and to one’s fellow practitioners, and their reasonable requirements or expectations. "Ethics" consists of more than rules with legal consequences and, in one sense, can extend to professional conventions which are not all necessarily of fundamental and enduring importance and might not always be compatible with the public interest.

My concern today is with the rules which govern the behaviour of lawyers, or more specifically, that major segment of the rules which is concerned with the responsibility of lawyers in, or in connection with, the conduct of litigation. Those rules have developed in relation to the adversarial process which is common in our courts, and it is in the context of adversarial proceedings that the rules fall for discussion today. It is beyond the scope of this discussion to consider whether or not a different approach, with perhaps different rules governing lawyers’ conduct, might be preferable, or what might lie in the future.

The rules which a lawyer must observe in connection with the operations of the courts are essentially based on moral values of fairness and honesty (which includes, but is not necessarily restricted to, candour), with superadded obligations of diligence and competence. Honesty and fairness must be extended to client, adversary and court, and diligence and competence are owed to at least client and court. However, diligence in the pursuit of a client’s interests is not an absolute requirement; it is qualified by overriding duties to assist the court to perform its public functions effectively and efficiently,2[[4]](#footnote-2)1 and to maintain and enhance public confidence in the justice system.2[[5]](#footnote-3)2 Efficiency in the operation of the legal system is increasingly seen as a matter of importance, as courts are, somewhat belatedly, recognising that individual litigants’ interests must be accommodated to the public interest in the effective use of scarce public resources. And public confidence in the justice system is essential to continued community acceptance that disputes should be resolved through organised social processes rather than individual action.

In the context of the competition between the private interests of a lawyer’s client and the lawyer’s responsibilities to the community, the basic principles of honesty, fairness, diligence, competence and proper use of the court system, upon which the rules which govern lawyers’ conduct are based, can overlap and, sometimes, conflict. The rules derived from the principles can therefore be influenced by circumstances; for example, whether the curial proceeding is civil or criminal and, in criminal proceedings, perhaps by whether the lawyer is representing the prosecution or the defence. As is the case whenever interests or values conflict, circumstances can determine what weight is to be given to each factor and, hence, how the conflict is to be resolved.

In consequence, while there are sometimes rules which clearly and directly apply to lawyers’ behaviour, frequently what is permissible can raise issues which are complex. For example, to take the duties of honesty and fairness, there is a clear obligation not to mislead, and it is possible to mislead by conduct. Silence or a statement which is incomplete - as well as untrue - might impermissibly mislead. Conversely, however, although there might also be an independent duty of full disclosure of some information or material, there are also situations in which it might be legitimate not to volunteer what an opponent does not know or might even obviously have overlooked.

It will assist you if you remember two points concerning judicial statements, which are the main source of the rules. One is that what is said by a judge must be read and understood by reference to the circumstances of the particular dispute. The other, which gives that point particular significance for present purposes, is that judicial pronouncements on broad moral or ethical issues involving "notions of fairness and justice"2[[6]](#footnote-4)3 often involve subjective assessments of what is permissible and impermissible, without always explaining in full detail why particular conduct fell on one side of the line or the other. The judicial process in relation to such issues is dynamic, with outcomes influenced by an accretion of previous decisions, which provide both specific answers to some questions and a guide to what solutions are appropriate to other problems.

In these circumstances, two points merit emphasis. One is that there is a need for careful thought in any situation in which conduct might involve a possible breach of the rules governing lawyer’s conduct. The other is that it is desirable not only to be familiar with the rules but to understand and commit to the underlying principles; to develop a state of mind, or attitude, which embraces the principles and seeks an ethical outcome by their intuitive, as well as rational, application.

What I propose to do is to take you briefly to some cases and other judicial statements in speeches and lectures, especially those which are more recent; it is they which provide the best indicia of the current state of the continuing organic development of the material rules.

**HONESTY**

*Meek v Fleming* [1961] 2 Q.B. 366 provides an example of the application of the duty not to actively mislead the court.

A police inspector, who had been demoted at the time of giving evidence, was present in plain clothes. His status was material to his credibility. His counsel addressed him as "Mr" throughout the trial, and he was never asked his rank in evidence in chief; when he was cross-examined as to whether he was a chief inspector he lied, causing the judge to refer to him as inspector or chief inspector. In the English Court of Appeal, Holroyd Pearce L.J. said at (p 375):

*"I appreciate that it is very hard at times for the advocate to see his path clearly between failure in his duty to the court, and failure in his duty to his client. I accept that in the present case the decision to conceal the fact was not made lightly, but after anxious consideration. But in my judgment the duty to the court was here unwarrantably subordinated to the duty to the client ... It was argued that the defendant was justified in that a party need not reveal something to his discredit but that does not mean that he can by implication falsely pretend (where it is a material matter) to a rank and status that are not his, and, when he knows that the court is so deluded, foster and confirm that delusion by answers such as the defendant gave."*

In *Saif Ali v Sydney Mitchell & Co*. [1980] A.C. 198, a case concerning the immunity of barristers from suit for negligence, Lord Diplock said (at pp 219-220):

"*The rules which may appear to conflict with the interests of the client are simple to state, although their application in borderline cases may call for a degree of sophistry not readily appreciated by the lay client, particularly one who is defendant in a criminal trial. A barrister must not wilfully mislead the court as to the law nor may he actively mislead the court as to the facts; although, consistently with the rule that the prosecution must prove its case, he may passively stand by and watch the court being misled by reason if its failure to ascertain facts that are within the barrister’s knowledge."*

In *Ziems v Prothonotary* (1957) 97 C.L.R. 279, Fullagar and Taylor JJ., also supported the proposition that, as a general rule, the duty of candour or honesty does not impose a positive duty on counsel to call witnesses that may assist the other party’s case (at p 293).

In *Vernon v Bosley* (1996) T.L.R. 737, the plaintiff sued for damages for psychiatric injuries sustained by witnessing the unsuccessful rescue attempts of his two daughters after the car in which they were travelling drove into a river. A psychiatrist and psychologist gave evidence on behalf of the plaintiff. After the trial was complete but prior to the delivery of judgment, the same experts gave differing evidence in other unrelated court proceedings, stating that the plaintiff’s prognosis had greatly improved. The legal representatives for the plaintiff failed to reveal the altered position to the defendant and the court. On appeal, a majority of the Court of Appeal found that where a case was conducted on the basis of certain material facts essential to the case, which had been discovered to be significantly different prior to judgment, the failure of the litigant to correct the court’s appreciation of the facts would be misleading the court. The majority found that it was the duty of every litigant mot to mislead the court or his opponent. A litigant might mislead the court by giving evidence that he knows to be untrue, or by leading the court to believe or rely upon a state of affairs, which was known to be untrue or altered. Such a duty continued until the judgment in a matter had been given.

**FAIRNESS**

An exception to this rule applies to the Crown Prosecutor, to whose office a special duty to act fairly (to the accused) attaches.

In *Whitehorn v R*. (1983) 152 C.L.R. 657, Deane J said (at p 664) that all material witnesses who are necessary for the presentation of the whole picture by the Crown should be called unless valid reasons exist, such as in the interests of justice, for not calling them. Material witnesses generally include all eyewitnesses of "any events that go to prove the elements of the crime charged and will include witnesses, notwithstanding that they give accounts inconsistent with the Crown case." Deane J also pointed out that prosecutors do not have to call such witnesses if they judge them to be "unreliable, untrustworthy or otherwise incapable of belief."

In *R. v Apostilides* (1984) 154 C.L.R. 563, the High Court had to deal with the failure of the prosecution to call two important witnesses to circumstances surrounding an alleged rape. The two witnesses were a couple who had been present at the house and saw the initial stages of the sexual advances made by the accused. The prosecutor gave no reason for his actions, but did make available to the defence copies of the statements made by the witnesses. The defence decided that it had to call those witnesses, which allowed the prosecutor the advantage of cross-examining them.

The High Court held that, although the prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown, the prosecutor's decision, when viewed against the conduct of the trial taken as a whole, gave rise to a miscarriage of justice.

*Kennedy v Cahill* (unreported, Full Family Court, 1 February 1995) is an unusual disclosure case. It was held that a solicitor should have made disclosure to the other party of a matter known to the solicitor and the Judge; namely, that they were involved in an intimate relationship. Disclosure was called for even though, by trial, the solicitor was acting only in an advisory capacity, with another solicitor from his firm having the carriage of the proceeding.

**ATTACKS ON OTHER LAWYERS**

In *Giannarelli v Wraith* (1988) 165 C.L.R. 543, another barrister’s negligence case, Mason CJ referred to disclosure in a wider context. His Honour said (at p 556):

"*The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client’s case. And, if he notes an irregularity in the conduct of a criminal trial, he must take the point so that it can be remedied, instead of keeping* ***the point up his sleeve*** *and using it as a ground for appeal."*

*Clyne v NSW Bar Association* (1969) 104 C.L.R. 186 demonstrates the serious possible consequences of casting unjustifiable aspersions on any party or witness, one of the matters referred to by Mason CJ in *Giannarelli*; in *Clyne* an opposing lawyer was the target.

Clyne was struck off as a barrister for his conduct in making extravagant, unsupported allegations against the solicitor for the other party in litigation. The allegations included that the solicitor:

. was in ‘financial difficulties’ due to his partner’s defalcations

. had signed a false affidavit on the wife’s behalf

. had deliberately protracted the litigation to increase costs

. was conducting proceedings that were hopeless to his knowledge.

More broadly, Clyne alleged in court that the solicitor had engaged in *‘fraud, perjury and blackmail.’*

The High Court said (at p.196) that there is no misconduct in acting for a client *"who has a perfectly good cause of action but is inspired by ill-will towards the defendant"*, but (at pp.200-201) added that *"from the point of view of a profession which seeks to maintain standards of decency and fairness, it is essential that the privilege ... is not abused ... It is obviously unfair and improper in the highest degree for counsel, hoping that, where proof is impossible, prejudice may suffice, to make such statements unless he definitely knows that he has, and definitely intends to adduce, evidence to support them. It cannot, of course, be enough that he thinks that he may be able to establish his statements out the mouth of a witness for the other side."*

(After being struck off Mr Clyne went on to become one of Australia’s most prodigiously litigious individuals, with no fewer than 14 reported decisions involving him and the Deputy Commissioner of Taxation or the Commissioner for Taxation. See, for example *Clyne v Deputy Commissioner of Taxation (Cth)* (1981) 150 C.L.R. 1; *Clyne v Deputy Commissioner of Taxation (No 3)* (1984) 154 C.L.R. 589; see also *Clyne v Director of Public Prosecutions* (1984) 154 C.L.R. 640.)

**DUTY TO MAKE PROPER USE OF THE COURT SYSTEM**

The recent huge increases in courts’ workloads without a correlative increase in their resources has meant that the duty of the lawyer to make proper use of the court system (including a duty to have regard to its limited resources) has come to the fore recently.

For example, this duty partly underlies the duty of counsel not to extend cross-examination unduly nor to pursue irrelevant lines of inquiry. In *Wakeley v R* (1990) 93 ALR 79, the High Court said in a unanimous judgment (at p 86):

*"It is the duty of counsel to ensure that the discretion to cross-examine is not misused. That duty is the more onerous because counsel’s discretion cannot be fully supervised by the presiding judge. Of course, there may come a stage when it is clear that the discretion is not being properly exercised. It is at that stage that the judge should intervene to prevent both an undue strain being imposed on the witness and an undue prolongation of the expensive procedure of hearing and determining a case. But until that stage is reached - and it is for the judge to ensure that the stage is not passed - the court is, to an extent, in the hands of cross-examining counsel"*

The duty to make proper use of the court system extends to counsel attending court at the set time. If legal representatives fail to fulfil this duty, costs may be awarded against them personally: see, for example, *National Australia Bank v Skaventos & Anor* (unreported, SA S. Ct, 7 December 1967).

An extreme example of a breach of this duty is to be found in the recent case of *R. v Wilson and Grimwade* (unreported, Vic. C.C.A., 22 April 1994), in which the conduct of counsel significantly contributed to a 22 month long re-trial in proceedings relating to fraud involving two defendants. Some 676 days passed from arraignment to verdict. The Crown called 87 witnesses, tendered 777 documentary exhibits of innumerable pages and read aloud to the jury, over a period of 10 calendar weeks, 2,780 pages of transcript evidence given by the defendants at the initial trial. The day of the verdict was the 294th sitting day in the 96th week and 23rd month after the jury’s empanelment. The Victorian Court of Criminal Appeal condemned the Crown’s conduct as deplorable (see p 35). The Court concluded (at p 46):

*"Before parting with the case we wish to say that our decision is in no respect to be understood as providing passport to those who would seek to benefit from a wayward criminal trial. This case is in our experience unique. We hope and expect that no other will approach it in its abnormal characteristics. The learned trial judge was not know at the outset that the re-trial would assume the shape it did. It became increasingly plain, however, that the proceeding was becoming distorted. Despite dismayed expressions of urgency, no correspondingly urgent action was taken with a view to arresting the distortion. A firm and resolute management of the trial, and a strong co-operative effort by judge and counsel, were imperative if it was to continue as a proper trial. All counsel were given the opportunity in this Court to comment on, or defence, the conduct of counsel at the trial. For the most part they were content merely to pass the responsibility to counsel for other parties. Counsel in future faced with a long and complex trial, criminal or civil, will co-operate with their utmost exertion to avoid a mockery of the system of justice. If not, they must expect to receive, with the sanction of this Court, appropriate regimentation by the judge- perhaps of a kind not hitherto experience - designed to avoid the unhappy result that befell this trial."*

The Court allowed the appeal against conviction and did not order another re-trial.

The duty to make proper use of the court system also manifests itself in the duty of counsel, if an irregularity is noted at trial, (eg., admission of inadmissible evidence, defect in summing up to jury) to take the point so it can be remedied instead of keeping the point up his sleeve and using it as a ground of appeal: reference was earlier made to what was said by Mason CJ in *Giannarelli v Wraith* (1988) 165 C.L.R. 543 (at p 556).

In criminal proceedings, however, failure of counsel to take a point at trial is not always fatal - it may give way to the paramount interest in ensuring a fair trial of the accused and that there is no substantial miscarriage of justice. In civil proceedings the duty to take objection is very strictly enforced: it is extremely rare that an appeal is allowed against the admission of evidence or a defect in summing up (to a civil jury) if counsel did not object at the trial (see, for example, *Singleton v French* (1986) 5 NSWLR. 425 at pp 439-440).

**COMPETENCE/DILIGENCE**

In a speech entitled "The Independence of the Bench; the Independence of the Bar and the Bar’s Role in the Judicial System",2[[7]](#footnote-5)4 Mason CJ said:

*"... in the adversary system of justice, the judicial process depends for its efficacy on the* ***competent presentation*** *by the advocates of each case. The capacity of the court to arrive at the correct decision and to do so reasonably promptly turns on the skill of counsel in formulating the issues, marshalling and presenting the evidence, analysing the facts and the relevant principles, and , when appropriate, identifying the facts relevant to the exercise of a discretion. Ability, experience and familiarity with the way in which the court operates all play a part in the performance of this essential function."2[[8]](#footnote-6)5*

The importance of the duty of competence is demonstrated by a decision of the New South Wales Court of Appeal, *R. v Birks* (1990) 19 NSWLR 677, where it was held that "flagrant incompetence" by defence counsel could be a ground for allowing an appeal against conviction. The Court also said (at p. 685) that it is impossible and undesirable to attempt to define cases of flagrant incompetence, but when they arise they will attract appellate intervention.

The barrister in *Birks* was very inexperienced. In a case concerning allegations of non-consensual vaginal, oral, and anal intercourse, he failed to put to the complainant a crucial allegation that no anal intercourse occurred; neither did he cross-examine her in relation to her account of how she sustained her facial injuries (at p 680). The prosecutor cross-examined the appellant extensively about his counsel’s failure to cross-examine and the inferences that could thereby be drawn - for example, that the appellant’s instructions to his counsel might have been the reason for this failure. Defence counsel later realised his error, but through inexperience did not take steps to remedy the situation. After the jury retired, he made a statement to the judge whereby he declined redirections but ultimately agreed that he was applying for the jury to be discharged. With considerable misgivings, the judge declined to discharge the jury.

It was held a serious miscarriage of justice had occurred and the appeal was allowed.

The duty to competently present material also applies to civil matters: see, for example, *Chouman v Margules* (unreported, NSW CA, 24 June 1993).

**DILIGENCE**

Competence and diligence go hand in hand. Skill must be exercised, forcefully where necessary, although diligence does not carry with it a right to be offensive or rude.

In *R. v Lars, da Silva and Kalanderian* (1994) 73 A Crim R 91, counsel repeatedly engaged in inappropriate behaviour. One of his exchanges with the trial judge was as follows (see pp 136-137):

"HIS HONOUR: We got to 12.15 without a performance today, it was pretty good wasn’t it, let’s go on.

O’LOUGHLIN: Yes, well that was with respect for you with a fortuitous insult without any justification whatsoever you go out of your way to insult me and I object to it.

WITNESS: Sir, I’m not insulting you at all.

HIS HONOUR: He’s not talking to you he’s talking to me you know. It’s my turn now it’s not yours.

O’LOUGHLIN: I might be worried about ...

HIS HONOUR: I haven’t had my turn today yet you can get one in the morning, and in the afternoon we’ve got one this morning, well carry on Mr O’Loughlin. You said a while ago you wouldn’t quarrel with anybody today I thought that was a grant ... [not transcribable] ... but we didn’t get very far, go on.

O’LOUGHLIN: I can see it’s Friday and you’ve got to have your moment of little ...

HIS HONOUR: Yes well you go on Mr O’Loughlin.

O’LOUGHLIN: ... at my expense but with the football match on Sunday perhaps we can - we’ll get some enjoyment ...

HIS HONOUR: Yes up Saints.

O’LOUGHLIN: .... out of that when we watch how the referee performs on that occasion."

The N.S.W. Court of Criminal Appeal said (at pp 130-131):

*"Counsel however have, no less than does a judge, an obligation to comport themselves with dignity and courtesy. They have, and should when occasion demands be never afraid to exercise, the right to object and firmly to press an objection in the event of perceived unfairness or unjudicial behaviour. They have nevertheless an obligation to contribute to the seemly progress to the trial, and the right to object strongly and forcefully is never to be understood as conferring or embracing a right to be rude or offensive. ... Our concern in emphasising the obligation of counsel to behave in a seemly fashion is a concern for the dignity of the trial process, which dignity is an important aspect of the adversarial process by which in our community justice is sought to be achieved. A trial which degenerates into a slanging match does nothing to inspire confidence generally in the justice system and puts at risk the achievement of justice in the instant case."*

This is an area of some difficulty for young lawyers. It will often be a matter for wholly subjective assessment whether the strong and forceful presentation of a client’s case - which is entirely legitimate - went beyond proper bounds. It is probably preferable to proceed with diffidence where that is practical, but, even as a young lawyer, you can reasonably expect judicious behaviour from judges and insist - within reason - on presenting your client’s point of view. Not only legal practitioners but judges have an obligation to maintain and enhance public confidence in the court system.

Further, the system’s reputation is not so fragile that it is at ready risk, whether from intermittent confrontation between lawyers and judges in the hurly-burly of a trial or criticism of judges’ decisions. Indeed, excessive sensitivity with respect to such matters is counter-productive.

That was recognised by Mr Justice Black, in the US Supreme Court, in *Bridges v California*, 314 U.S. 252, at pp 270-1 (1941), when he said:

*"... the assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect.* (See David Pannick, *Judges*, Oxford University Press, 1987, p 131.)"

In a more recent Australian authority, *Attorney-General for New South Wales v Mundey* [1972] 2 NSWLR 887, Hope JA put the matter in these terms (at p 908):

*"The truth is of course that public institutions in a free society must stand upon their own merits; they cannot be propped up if their conduct does not command respect and confidence; if their conduct justifies the respect and confidence of a community, they do not need the protection of special rules to shield them from criticism. Indeed informed criticism, whether from a legal or social or any other relevant point of view, would be of the greatest assistance to them in the performance of their functions.*

*It is implicit in all this that courts, and those who man them, should not, in a democracy, be treated as in a separate category, different from every other public institution. We do not scruple to criticise, in sweeping terms, royalty, religious figures, and politicians, among others in public life. If Courts and Judges are to be respected, they, like everyone else, must earn respect. Public criticism helps keep institutions, and people, ‘up to the mark’."*

I would merely emphasise to you, as young lawyers, that nothing in those remarks ordinarily warrants disrespect or discourtesy.

Let me conclude by returning to the organic development of ethics to which I earlier referred. Times change, and social and professional mores change with them. Thus, for example, solicitors now have much more freedom to advertise; for example, rules and rulings are now no longer so concerned with prohibiting solicitors' signs that are "gaudy, unreasonably or unnecessarily large or otherwise in bad taste ... " (former Ruling 1.10)

However, there is probably still some way to go before some of the more extreme advertising techniques employed by US lawyers are used by their Queensland counterparts.

For example, attorneys in Honolulu have issued customised condoms advertising their services. In Birmingham, Alabama, a lawyer promoted his business with bumper stickers that warn following drivers: "Back off! My lawyer is Robert Norris." Potential customers received a hard sell that told them, with commendable honesty:

*"Attention, accident victims. We are greedy lawyers. Greedy to get you as much as we can as fast as we can, because the more you get, the more we get."*

I hope that, attractive as such a proposition might be to some potential clients, your course in Professional Responsibility will persuade you to a very different, and somewhat loftier, attitude.

1. 18 AT Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession*, Harvard University Press, Cambridge, Massachusetts, 1993. [↑](#footnote-ref--1)
2. 19 M.D Kirby, “Legal Professional Ethics in Times of Change” (1996) 14 *Australian Bar Review* 170. [↑](#footnote-ref-0)
3. 20 *Id.* at 172. [↑](#footnote-ref-1)
4. 21 cp. *Sali v SPC Ltd* (1993) 67 A.L.J.R. 841; 116 ALR 625. [↑](#footnote-ref-2)
5. 22 cf. *R. v Lars, da Silva and Kalanderian* (1994) 73 A Crim R 91. [↑](#footnote-ref-3)
6. 23 See, for example, the modern cases on unconscionability in the High Court, beginning with *Muschinski v Dodds* (1985) 160 C.L.R. 583. [↑](#footnote-ref-4)
7. 24 1993) 10 *Australian Bar Review* 1. [↑](#footnote-ref-5)
8. 25 *Id.* at 5. [↑](#footnote-ref-6)