

OVERVIEW - Duties explained, examples and case law:

Duty	What is it?	ASCR or BR	Relevant Cases
Duty to obey the law	<p>Fidelity to the law, paramount and most obvious duty that is non-negotiable. Illegality is not always obvious – commercial pressure to ‘sail close to the line’</p> <p>e.g. sending out threatening letters of demand, coaching Ws, illegal transfers of money</p> <p><u>What if a C wants to break the law?</u> Do not assist them or seek to induce them to breach the law. Do not instruct your agents to break the law, or engage in conduct that breaches a court order</p> <p><u>What should you do?</u> Counsel C against further breaches, avoid personal involvement. If you believe they will disregard your advice, advise again of your responsibilities, consider correct conduct for confidentiality and if they persist, terminate instruction</p> <p><u>Legality doubtful but unclear?</u> Reason for professional indemnity insurance and high fees. Permissible to provide legal advice in good faith, inform C in writing of risk of illegality, C’s choice to take risk.</p> <p><u>Failure to advise of illegality?</u> Exposes lawyer to liability for negligent advice</p>	ASCR 5 BR 8	<p>ACCC v Sampson – alleged S engaged in M & D conduct in debt collection notices. Made representations video store could recover solicitor’s costs, customer would incur additional costs of legal action, judgment could be made without a court order – HELD: S admitted to conduct, breach of s 52 TPA.</p> <p>LSC v Sampson – LSC then brought a case for breach of conduct rules alleging PM – HELD: conduct was systematic and repeated, and seriously damaged public confidence in the profession indicating she was not F and P to practice. Considered mitigating factors of health problems, dispute with partner in the firm and adverse consequences of VCAT and Fed Court findings. Received a reprimand and ordered to undertake ethics trainings for 2 years + costs (PC <u>not</u> suspended)</p> <p>LPCC v Segler – S advised a C he could carry out building projects while unregistered as a builder in breach of the Builders Registration Act. When asked to respond to complaint made against him, S gave a deliberately misleading response – HELD: guilty of PM and UPC. S ought to have known C would rely on his advice. S was fully aware C was not registered. Not entitled to advise a C to act just b/c of a belief they will not be prosecuted. Also, misleading the LPCC fell short of the conduct of a reasonable practitioner. PC suspended for 3 mths + costs. → Number of other issues with trusts and struck off in May 2014</p>
Duty to obey the law – money issues	<p><u>Illegal transfers of money</u> Must not turn a blind eye, if unsure then must ask Qs. If there is an unsatisfactory explanation, the lawyer must refuse to handle the money</p> <p>Financial Transactions Reports Act 1988 (Cth) – reporting obligations on lawyers for transactions >\$10,000</p> <p>Anti-Money Laundering and Counter-terrorism Financing Act 2006 (Cth) – reporting requirements where lawyer advances loans or provides other financial services</p>		R v Pearce – 2 lawyers marketed a tax scheme to Cs. Scheme had characteristics of a tax avoidance scheme – HELD: both guilty and received custodial sentences
Duty to the court - generally	Duty to the court is paramount to other duties		Rondel v Worsley – Claimant was charged and convicted of GBH. Brought negligence action against his lawyer claiming he had not asked all Qs

			<p>instructed in CX and had not put all evidence before the court – HELD: Bs are immune from negligence suits for their conduct of a case in court.</p> <p>“...as a officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to conflict with his client’s wishes...”</p> <p>Giannarelli v Wraith – Gs successful in having convictions of perjury overturned on appeal to the HC. Brought an action in negligence against their Bs on grounds they had failed to advise of the good defense. - HELD: Preparing a case should not be divorced from its presentation in the court.</p> <p>“The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary”</p>
Duty of candour	<p><u>Duty not to mislead the court (law and facts)</u></p> <p>Must not deceive the court about the law or legal processes, or facts</p> <p>Must not knowingly or recklessly mislead the court</p> <p><u>Duty to assist the court (law)</u></p> <ul style="list-style-type: none"> • Ls must prepare their case • Must know relevant law and legal processes – be up to date with primary sources • Clarify any misapprehension ASAP <p><u>Duty to disclose the relevant law</u></p> <ul style="list-style-type: none"> • Must inform court of authorities that go against your client • Applies until final judgment given <p><u>Duty to correct innocent misstatements</u></p> <p><u>Positive duties of disclosure</u></p> <ul style="list-style-type: none"> • Must correct own accidental misstatements • Must correct false affidavits • Must disclose contrary facts in ex parte applications • CIVIL – must alert opponent and inform court of opponent’s express mistakes about evidence or law • CIVIL – must not take advantage of mistakes 	<p>ASCR 19.1 BR 24</p> <p>ASCR 19.2 BR 26</p> <p>ASCR 19.11 BR 34</p> <p>ASCR 19.6 BR 29</p> <p>ASCR 19.8 BR 31</p> <p>ASCR 19.2 BR 25</p> <p>ASCR 19.4</p> <p>ASCR 19.12</p> <p>ASCR 30</p>	<p>Kyle v LPCC WA – K submitted deed to court supposedly signed by Mr and Mrs B (his Cs). Mr B has in fact forged his wife’s signature. K not aware at the time, but became aware 7 days before trial and did not disclose. HELD: Intention was irrelevant – still deception. MUST disclose false affidavits ASAP.</p> <p>R v S(F) – lawyer deliberately misquoted a case and did not correct it. HELD: breach of duty of candour</p> <p>Copeland v Smith – counsel incorrectly informed TJ there was no authority on point, when in fact there had been a recently reported case on point. Matter had to be reheard = waste of resources</p> <p>Meek v Fleming – action brought by press photographer M against policeman F for assault and unlawful imprisonment. Deliberate steps taken to ensure court was not informed of F’s demotion, which was a result of involvement in deceiving the court – plain clothed, addressed as Mr, Ps not corrected when referred to as Chief and lied during CX. Ds contended all this only went to credit, not issues. HELD: Appeal allowed – parties who mislead the court cannot be allowed to “keep the spoils so unworthily obtained” as this encourages bad behaviour.</p>

TOPIC 5: RESPONSIBILITIES TO Cs – CONFIDENTIALITY

Main duties owed to Cs:

- **Duty to act competently and diligently**
 - Generally the domain of tort and K, retainer with C and the duty of care. Possibly consumer law
 - Must be knowledgeable in the your area of practice, practice with skill and efficiency
 - Must be able to identify matters outside your competency and bring these to the C's attention
 - Must properly prepare and carry out matters, and be intellectually, emotionally and physically capable of the work
- **Duty of loyalty**
 - Arises from fiduciary nature of r/ship
 - Deal fairly, free from the influence of any interest which may conflict
 - Keep information confidential, avoid COI, disclose and use all material information in the practitioner's possession for the C's benefit, account to the client
- **Duty of confidentiality**
 - Can be part of the duty of loyalty (some overlap)
 - Can extend beyond FD – keep information confidential, even if not in the course of the r/ship or after the r/ship has ended

Other duties (not the focus of the course):

- Duty to represent
- Duty to follow instructions
- Duty to control the conduct of the case
- Duty to promote access to justice
- Duty to promote quality and client care
- Duty to encourage settlement

The duty of confidentiality:

- **Why should people be obliged generally?**
 - Individual autonomy over personal information
 - Respect for the secrets of intimates
 - Pledge of silence
- **BUT, reasons to override all of these** – public safety, disallowing violence to be done to innocent people
- **Rationale for lawyers?**
 - Obligation above and beyond ordinary confidentiality
 - Encourage full and frank disclosure b/w C and L to that the L can act to the best of their ability
 - Fosters trust in Ls and the legal system
 - Reminds Ls of their duty to their Cs
- **The legal foundation of the L's obligation**
 - **General law – action for BOC**
 - **K** - does not arise due to source of information, but b/c of FR. Includes information about the C and opinions formed by the L about the C's affairs
 - **Equity** – protects information that is not public knowledge (inherently confidential) and communicated for a limited purpose. Duty remains until information loses nature of confidentiality (even after retainer has ended)
 - **Conduct Rules**
 - Disciplinary action available if a complaint is made – more targeted and wider than general law
 - **ASCR 9; BR 114 - 122**
 - **CLP**
 - Protection against mandatory disclosure to a 3P with power to compel disclosure (e.g. to a court) if made for the dominant purpose of providing legal advice, or for existing or anticipated litigation
 - Based on public policy – does not depend on contractual, equitable or conduct obligations to Cs
 - Rationale? Encourage honest and complete communication

The meaning of confidentiality:

- **ASCR 9.1** – “any information which is confidential to a C and acquired by the solicitor during the C's engagement”
- **K** – starting point is to say everything b/w L and C is confidential, with some exceptions

- **Equity** – information that is not public knowledge and is communicated for a limited purpose. Continues after retainer unless it loses its confidential nature

When a solicitor can disclose confidential information (ASCR 9.2):

- **9.2.1 – consent**
 - If >1 client need consent from all clients
- **9.2.2 – permitted or compelled by law**
 - e.g. Legal Aid Act states you must give information about what the matter involves
 - Can disclose if necessary to collect fees or defend against a disciplinary complaint (Uniform Law s 321)
- **9.2.3 – sole purpose of obtaining advice re ethical obligations**
 - Can disclose to external 3Ps (e.g. LIV) for this purpose – cannot be trivial and must be in confidential setting
- **9.2.4 – sole purpose of avoiding probable commission of a serious criminal offence**
 - Discretionary – limited to serious criminal offences
 - Does not cover concealment of offences – previous Rules did but Ls were then in a position to blackmail Cs
 - Must disclose to the appropriate authorities – NOT the media
 - C.f. NZ where disclosure is mandatory!!
- **9.2.5 – preventing imminent serious physical harm to a person**
 - Discretionary – limited to serious physical harm. Includes harm to self or others
 - Considerations = seriousness of potential injury, imminence and likelihood of harm occurring and absence of other feasible ways to prevent harm
- **9.2.6 – to the insurer of the solicitor, law practice or associated entity**
 - Practical exception for lawyers

Consequences of unauthorised disclosure:

- Embarrassment
- Loss of Cs
- Damage to lawyers reputation
- COI allegations
- Professional conduct complaints
- Claims of breach of K
- Injunction to disqualify L from continuing to act

Disclosure in the public interest:

- Ethical defence of disclosing in the public interest – lawyer has the burden of proving the defence
- Might also be a breach of K and confidentiality based on the retainer
- Equity defence has not received broad support from the court – no reported cases of successful use of this exception

Legal Practitioners Complaints Committee and Trowell [2009]

- **FACTS –**
Case against Schapelle Corby's lawyers for alleged breaches of confidentiality. Trial for smuggling drugs into Bali in a body board bag was highly televised and reported. T was asked by Cth AG to assist with case in March 2005. During May/June 2005 it was alleged T had disclosed confidential information to the media. Firstly that suggestions had been made that C's defence team bribed Indonesian officials, and that financial assistance should be sought for that purpose. Alleged he criticised Balinese legal team for incompetence, spending insufficient time on appeal etc.
- **HELD –**
T guilty of UPC – serious breaches of confidence. Taking into account 48 references (highly regarded in Perth legal community), and other factors, he was only reprimanded and ordered to pay costs of \$55,000.
 - Duty of confidence was applicable to information about C's case that T learnt due to his professional r/ship with C. And once the r/ship was established, confidentiality also extended to information acquired prior (i.e. included information T received from the Balinese legal team)
 - Also extended to matters in the public domain – repetition or confirmation of information by a L may give that information a more credible status than it otherwise would've had
 - Also to opinions formed by T about the case and his C's affairs
 - T did not have consent to disclose the information – he tried to argue implied consent of doing 'whatever he judged to be in her best interests'. He argued this was to expedite proceedings and distance her from the bribery allegations. Tribunal did not accept this – likely trying to garner media attention for himself

Legal Services Commissioner v Robin Carl Tampoe [2009]

- **FACTS –**
Involved another lawyer. Alleged breach of DOC by publicly disclosing and commenting on confidential information. Acted for C, also received instruction from her family acting as her agents. Information was from a conversation with C's sister in Indonesia about past criminal convictions in the family. T disclosed information in a TV interview, and further commented stating the sister had lied to him. T accepted BOC but argued at the time he believed the information was public knowledge. Also made comments on TV in June 2008 including statements such as: "...family are the biggest pile of trash I have ever come across in my life". Also referred to the "Baggage Handler Defence" and threatened to "take it away"
- **HELD –**
Guilty of PM – struck off the roll + ordered to pay costs. T knew, or ought to have known the information was confidential. Hard to think of a worse breach of confidence than disclosure on national TV. Tribunal particular concerned about comments re defence – T was representing to the public that criminal defence lawyers will fabricate a defence for their clients and take it away. This was likely to bring profession into disrepute and undermine confidence in the criminal justice system.

Client Legal Privilege:

- **What is it?**
Protects from mandatory disclosure all confidential communications b/w lawyer and client made for the dominant purpose of (i) legal advice or (ii) in preparation for litigation that is in reasonable contemplation (> mere possibility)
- **Communications?** Includes documents, photos, copies. NOT generally non-privileged documents attached to privileged documents. Does not cover clients' identity or trust account details
- **Confidentiality vs CLP**
Confidentiality is much broader than CLP – which only extends to specific communications made for specific purposes.
CLP is absolute and unqualified c.f. balancing in confidentiality with PI (Deane J, AG(NT) v Maurice)
 - **Confidentiality** – obligation owed by a L to his/her C enforceable via the disciplinary system or CL of equity/K
 - **CLP** – protection available to the C (not the L) against ordinary legal processes in order to prevent them from having to disclose information that they would otherwise have been under a legal obligation to disclose
- **Evidence Act 2008 – ss 117 - 134**
 - Legal advice – s 118
 - Litigation – s 119
 - Unrepresented parties – s 120
 - Loss of CLP – ss 121 – 126
 - Journalist privilege + identity of informants – s 126K
 - Religious confession privilege – s 127
 - Privilege against self-incrimination – ss 128, 128A
 - PII – matters of the State – s 130
 - Evidence of settlement negotiations – s 131
 - Extended to pre-trial stages – s 131A

- **Determining the dominant purpose (Esso v Crm Taxation)**
 - Why was the document brought into being? For the dominant purpose of obtaining legal advice or preparing for litigation? It is a Q of fact to be determined objectively
 - Must be the prevailing and most influential purpose – not enough to just be one purpose
 - If communication would have been made irrespective of obtaining legal advice, CLP does not attach
 - Some parts of a doc may be privileged, while others are not
 - Concerned with substance and not form

- **Exceptions/loss of CLP:**
 - **Consent – EA s 122** – includes express and implied
 - **Statute can compel disclosure (Daniels Corporation v ACCC)** – very rare, must be a clear intention to displace CLP. Even if ousted, generally for a limited purpose.
 - **Furtherance of fraud or commission of an offence – EA s 125** – includes criminal fraud and fraud in general - conduct which is dishonest or deceptive, or a deliberate misuse of power. CLP still attaches to conduct that is unethical but not fraudulent
 - **To collect fees or defend against disciplinary complaint – Uniform Law s 321** – only if necessary
 - **Inconsistent or unfair conduct by the C – EA s 122** – has C waived CLP either expressly or impliedly?