

LEGAL PROFESSION FINAL EXAM NOTES

1. Introduction - Who, What, and Why Lawyers

- a. Trends in legal profession

2. Duties of a Lawyer

- a. Fundamental duty to client – interests, honest and courteous
- b. Hopeless/ulterior purpose cases
- c. Courts power to make wasted costs order
- d. Duties to third parties
- e. Honesty and integrity - Inadvertent disclosure
- f. Civility and Courtesy – not make tactical allegations of practitioner misconduct
- g. LSC v Winning

3. Becoming a Lawyer (Admission and Certification)

4. Lawyer-Client Relationship (Legislative Guarantees, Acceptance of Work, Contracting)

- a. Legislative guarantees – M&D conduct, unfair terms, consumer guarantees
- b. Advertising
- c. Acceptance of Work – Solicitors and Barristers
- d. Cab Rank Rule
- e. Solicitors Contracts
 - i. Non-engagement
 - ii. Oral contracts
 - iii. Lawyers as agents
- f. Barristers agreements
 - i. Types of barrister agreements
 - ii. Authority of barristers

5. Termination and Liens

- a. Termination by client
- b. Termination by solicitor
- c. Entitlement to fees for part performance
- d. Liens over documents for fees

6. Billing Ethically

- a. Costs disclosure
- b. Exemptions to costs disclosure
- c. Costs agreements
- d. Billing
- e. Costs assessments
- f. ACL

- g. Discipline for billing

7. Professional Discipline

- a. Unsatisfactory professional conduct
- b. Professional misconduct
- c. Sentencing considerations

8. Competent Lawyering

- a. Contract – terms of retainer
- b. Negligence (tort)
- c. Fiduciary duties
- d. Australian Consumer Law
 - i. Consumer guarantees
 - ii. Misleading or deceptive conduct
 - iii. Unfair terms
- e. Limiting liability
 - i. Advocate's immunity
 - ii. Contributory negligence
 - iii. Indemnity insurance
 - iv. Incorporated legal practices (limited liability)
- f. Discipline

9. Duty of Confidentiality and Loyalty

- a. Duty of confidentiality
- b. Exceptions
- c. Legal professional privilege
- d. Acceptable breach of privilege
 - i. Lawyer compelled by law
 - ii. Client waiver of LPP

10. Conflicting Duties and Interests

- a. Duty of loyalty – does not survive retainer
- b. Duty to avoid potential conflict of duty to client and lawyer's personal interest
 - i. Informed consent
- c. Other personal interests that may conflict – personal relationships
- d. Duty to avoid conflict of several clients' interests
 - i. Current clients
 - ii. Former client
- e. Remedies
 - i. Civil remedies
 - ii. injunctions

11. Advocates' Duties and Ethics, Limits of Adversarialism

- a. Excessive adversarialism
 - i. Advise of ADR options
 - ii. Not take advantage of mistakes (disclosure)
 - iii. No tricky tactics

- iv. Not a mere mouthpiece for way client wants to conduct case
- v. No weak or hopeless/ulterior motive cases

- b. Delinquent (lying) clients
- c. Confessions of guilt
- d. Assistance in illegal conduct (disobeying court orders)
- e. Talking to the press
- f. Preparing witnesses – not coach a witness, advise to be misleading
- g. Prosecutor's duties
- h. Honesty and frankness in court
 - i. Submissions on evidence or law
 - ii. Correct own misleading statements
 - iii. Ex parte applications
- i. Responsible use of court process and privilege
 - i. Not abuse court process for ulterior purpose
 - ii. Not allege things with no basis

12. Duties to other Legal Practitioners

- a. Undertakings
- b. Taking advantage of opponent mistake
- c. Aggressive tactics
 - i. Intimidate/harass/embarrass other person
 - ii. No unfounded allegations
- d. No contact with other clients

Final Exam Format

- **One compulsory problem scenario (40 marks)**
 - o One question will be scenario based and *must be answered*
 - o There will be a number of sub-questions related to the scenario
- **Answer one of two questions in short essay style (10 marks)**
 - o Essay style questions don't need introductions and conclusions etc, just be in logical format

(2) Duties of a Lawyer

Come from:

- Legal Profession Act 2007 (Qld)
- ASCR
- Barrister's Rules

DUTY TO THE ADMINISTRATION OF JUSTICE

Duties to the court trump everything else

Paramount duty to the administration of justice – r 3.1 ASCR, 5(a) BR

- **Prescriptive** – be frank, honest, candid, be independent of client or other forces
- **Proscriptive** – not knowingly mislead court
- **Procedural** – assist in the administration of justice (not just win the case at any cost)

Giannarelli v Wraith (1988) – Mason CJ:

Barrister's duty to the court:

- Has an eye not only to his client's success, but also the speedy and efficient administration of justice.
- Selecting and limiting the number of witnesses and questions in cross-examination
- Independent judgment (independent from client's will)
- Administration of justice and conduct and management of the case

DUTY TO THE CLIENT

****ALWAYS ADDRESS - Who is the client? A company is company itself – not a director**

From the rules:

Rule 4.1 ASCR

A solicitor must:

- *act in the best interests of a client in any matter in which the solicitor represents the client;*
- *be honest and courteous in all dealings in the course of legal practice;*
- *deliver legal services competently, diligently and as promptly as reasonably possible;*
- *avoid any compromise to their integrity and professional independence; and*
- *comply with these Rules and the law.*

Rule 17.1 ASCR: A solicitor representing a client in a matter that is before a court must *not act as a mere mouthpiece...*

Rule 7.2 ASCR; Rule 38 BR – inform client of other options (ADR)

A solicitor must inform the client or the instructing solicitor about the *alternatives to fully contested adjudication* of the case which are

reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

Follow instructions

Rule 8.1 ASCR: A solicitor must *follow a client's lawful, proper and competent instructions.*

Vulnerable clients – lawyer must have regard to context in which a acting

Lawyers may have duty to go beyond normal measures to ensure eg. competent instructions – translators etc.

Confidentiality

Rule 9.1 ASCR: A solicitor must *not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person...[except if client authorises]*

Major duties to client

- duty of loyalty
- duty of competence and care
- duty of confidentiality
- duty of honesty and integrity
- duty to **avoid conflicts** (personal and professional)
- duty to account
- duty to be **civil and courteous** [become more of an interest, particularly with disciplinary bodies]
 - o Qld case - Baker Johnson lawyers extremely rude and abusive to employees and clients, received disciplinary charges and removal from the profession
- duty to **advise about alternative dispute resolution** avenues and settlement

Rule 37 Barristers Rule: A barrister must promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence...

From contract, tort and equity:

Solicitors:

Contractual source of duties (solicitors)

Barristers:

Barristers typically do not contract with clients – but still owe duties as matter of law (tort and equity) and ethical rules (**BR 37-40**)

Fiduciary duties:

Lawyer/client = classic fiduciary relationship

Requires strict adherence to **loyalty**

- In making contracts – law presumes lawyers have more power so undue influence
- Onerous requirements to rebut that presumption

COUNSEL PRIVILEGE

Allowing counsel to do their job 'fearlessly'

Counsel (solicitor or barrister) protected from any civil action for reputational damage for statements in court

- Put it to witness that they are lying, bad character etc.
- Make potentially otherwise defamatory statements

But must be balanced -

Bestowed because of professional promise that lawyers will act appropriately and not abuse that privilege

Cannot make outrageously defamatory statements with absolutely no basis and no probative value

Clyne v NSW Bar Association (1960)

Husband and wife divorce litigation, husband wanted wife's solicitor to stop acting for her so wife would stop pursuing litigation. Husband's barrister attacked solicitor of wife, claimed solicitor bribing people, forging things, defamatory on no evidentiary basis.

High Court held: it is the **duty of counsel to speak out fearlessly**, to denounce some person or their conduct, to use such strong terms as appropriate. Person attacked shall have no remedy in the courts (privilege).

BUT **profession seeks to maintain decency and fairness, privilege should not be abused**. This was a case of **damaging irrelevant matter that is unfair and improper**. **Barrister struck off**.

****Note:** if have evidence to back up what you are saying, you can say it.

Pressing witnesses

If client asks you to make a witness cry because dislike them - abusing administration of justice to purely get revenge for client

- But if it is what you have to do to get evidence from the witness – then you may

Hopeless/Ulterior Purpose Cases

Abuse of court to initiate or pursue hopeless case in civil context

- However case 'without any merit' is high standard
- More likely case thrown out if no merit AND ulterior purpose/collateral advantage (*Williams v Spautz (1992)*)
 - o Very high threshold for cases to be thrown out

Some jurisdictions – lawyers must sign off that case has reasonable prospects of success and that case proportionally worth bringing (compensation would outweigh litigation costs) (Not Qld)

Countervailing argument – policy that may want lawyers to bring test cases, public interest cases

White Industries v Flower and Hart (1999) – contract to build shopping centre. Developer didn't want to pay builder as costs had blown out. Misrepresentation in contract price would be a meritless case. Lawyer said could not get out of the contract but could bring litigation to delay paying. By end of litigation, developer had no money. (Liquidator

waived privilege on advice so the advice became public). Held: **collateral purpose for advantage**. **Never disciplined though (today would not be contentious, would likely be referred to LSC)**.

If legal merit to case – client may have ulterior purpose but that will not be attributed to the lawyer

Sometimes legal ethics can intersect with politicized questions

Eg. Environmental group wanting to challenge Minister decision with standing and legally valid points, although Minister's decision is likely to stand

- Only if hopeless case then may not be allowed to bring action because abuse of process
- There are situations where there is merit to run test case

Class actions - overzealousness

Yarra Australia v Oswal (2013) – Victorian case (see notes below)

Lawyer brought various class actions for purpose of getting fees.

Argued it was improper purpose. Held: **Each case was entirely created for class action, therefore sufficiently improper**.

Don't want to stop lawyers acting in cases where marginal chance of winning for fear of running 'abuse of process' case

Need lawyers to run test cases – without fear of disciplinary or costs orders

If case has merit and not OVERTLY abusive, probably okay

Law will not easily impute responsibility to lawyer (for disciplinary action)

Court's Powers

Where lawyers waste opponent's time

- Wasted costs orders
- Contempt of court
- Professional discipline
- Civil action

COSTS ORDERS

Rule 681 UCPR – Costs of a proceeding, including application in proceeding, **are in discretion of court** but follow the event unless the court orders otherwise

Wasted costs orders:

Rule 690 – court may order **lawyer to repay [PERSONALLY]** to the lawyer's client all or party of any **costs ordered to be paid to another party** if party incurred costs because of the **lawyer's delay, misconduct, or negligence**.

Perpetual Trustee v Cowley (2010)

Lawyer acting for client who had great empathy for. Mortgage dispute, client was lying, produced plainly false documentation. Opponent's

lawyers told the lawyer it was obviously fake. Lawyer refused to believe client was lying. Filled out an affidavit to try to prove client telling truth.

Held: Lawyer was **not lying but willfully blind to the truth, reckless, incurred huge costs in case being run unnecessarily**. Lawyer **ordered to pay all costs**, referred to Legal Commissioner for **disciplinary hearings**.

Yarra Australia v Oswal (2013) Victoria – from above

Under Victorian *Civil Procedure Act 2010* lawyers are under a duty not to run up excessive costs or contribute to delays in deciding disputes.

The submissions and representation must be 'reasonable and proportionate to the complexity and importance of the issues and sums in dispute' (s24(a)). This **obligation was found to be breached**.

CASE FACTS: Security for costs claims. 27 lawyers, 2700 pages of submissions were made to judge. Court found: Each party entitled to representation so not necessarily abusive. But **huge number of pages of largely irrelevant material - was abusive**.

Creative costs order:

- **costs had to be paid by the lawyers**
- lawyers were not allowed to charge client for half time took to prepare those documents and come to court
- cost **penalty on lawyers for overworking the matter**

We are yet to see whether this judgment is followed in Victoria by other cases. In Queensland we do not have a similar provision imposing positive duties ('overriding obligations') on the lawyers in civil proceedings. Should we?

DUTIES TO THIRD PARTIES

Arise from the relationship with client

May arise in certain situations in tort

Hawkins v Clayton (1988) HC Case

Firm of solicitors failed to take reasonable steps to locate an executor (a third party non-client) following the death of a testatrix (a client whose will they prepared and retained for safe keeping) for some six years after the testatrix's death. Held: was negligent. The **solicitors were held to be liable to pay damages for the loss suffered by the executor (who was also a residuary beneficiary) in not being able to manage the estate during the period of delay**.

DUTY OF HONESTY AND INTEGRITY

Truthfulness - Guilty Clients

- Can defend guilty client – but cannot run a positive defence
- Do not have to tell court that client has criminal history

Must correct half truths or untruths

- Correct affidavit of documents

Rule 19.2 ASCR: A solicitor must take all necessary steps to correct any misleading statement made by the solicitor to a court as soon as

possible after the solicitor becomes aware that the statement was misleading.

Receiving misdirected sensitive information

ASCR Rule 31.1 Unless otherwise permitted or compelled by law, a solicitor to whom **material known or reasonably suspected to be confidential is disclosed by another solicitor**, or by some other person and who is aware that the disclosure was inadvertent **must not use the material and must:**

- **return, destroy or delete** the material (as appropriate) immediately upon becoming aware that disclosure was inadvertent; and
- **notify the other solicitor** or the other person of the disclosure and the steps taken to prevent inappropriate misuse of the material.

Rule 31.2 A solicitor who **reads part or all of the confidential material before becoming aware of its confidential status must:**

- **notify the opposing solicitor** or the other person immediately; and
- **not read any more** of the material.

Rule 31.3 If a solicitor is instructed by a client to read confidential material received in error, the solicitor must refuse to do so.

Expense Reduction v Armstrong (2013) HC Case

Paralegals did not designate privilege properly over documents, accidentally disclosed. Plainly privileged and maybe relevant.

Opponent argued was not clear that privileged, argued there was a waiver. High Court held: **should have observed ethical responsibility to send back and not read**. They had realised they shouldn't have had the set of documents. It was a **further professional wrong to argue this case all the way to the HC**. It was a further professional wrong to argue this case all the way to the HC.

Integrity in Personal Life

LSC v Anderson (2015) – **solicitor used dead client's MCG**

membership, went to AFL grand final. Had not broken the law, but received professional sanction. Held: **Got something from client's life, used it to further his own personal interests, was dishonest**, used in an inappropriate way. Reprimanded and fined \$10,000. **Being dishonest in your personal life can be relevant to lawyer's ethical duties**.

DUTY OF CIVILITY AND COURTESY

Rule 4.1.2 ASCR: be honest and courteous in all dealings

Rule 5.1 ASCR: requires a solicitor to not engage in conduct which is likely to be prejudicial to, or diminish the public confidence in the administration of justice or bring the profession into disrepute.

Eg. Using allegations of ethical breaches as tactical weapon in litigation – unethical (unless reasonable grounds)

Unfounded allegations - ASCR Rule 32.1

A solicitor must not make an allegation against another Australian legal practitioner of unsatisfactory professional conduct or professional misconduct unless the allegation is made bona fide and the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it.

DUTIES TO THE PUBLIC

Debated whether lawyers owe duties to the public.

Examples of “duties to public”:

- Prosecutorial duties – not to convict at any cost
- Duty of DPP/government to the public – to be ‘model litigants’
 - o Not taking purely technical points when no prejudice has been suffered - eg. serving a document one day late and doesn't cause any actual prejudice
 - o Act consistently
 - o Avoid undue delay
 - o Not requiring other party to prove facts that commonwealth knows are true - eg on which day the Parliament was convened – obvious things that Cth deemed to know
 - o Nevertheless properly testing claims against it
 - o If legitimate defence – then perfectly entitled to defend
 - o Don't cave in to spurious demands
- Lawyers engaging in pro bono legal work
- Duty to obey and uphold the law
- Duty to improve or reform the law – no proactive duty
- **Promotion of access to justice**
 - o No proactive duty
 - o Although rules about when must take on all willing clients

LSC v Winning (2008)

Lawyer lost temper in court, said abusive and defamatory things in and out of court toward DPP. No courtesy and civility as expected from practitioner. Overheard police saying would raid bikie clients. Told bikies that they were going to be raided. Police heard this conversation over bugged phone. LSC argued it was a breach of ethics to tell clients about impending police raid of premises.

Court held: Lawyer did not know had drug money, firearms etc, was just telling them to get rid of those things if they did have them.

Nothing wrong or unethical with what he had done. No duty to assist the police or to refrain from frustrating a police investigation.