

# Contents

TOPIC 1: ETHICS, MORALITY AND THE LEGAL PROFESSION.....	7
INTRODUCTION.....	7
ETHICS IN THE LEGAL PROFESSION .....	7
LAW AS A PROFESSION .....	7
CHALLENGES .....	8
SOURCES OF ETHICAL OBLIGATIONS .....	8
COMMON LAW .....	8
STATUTE.....	8
KEY DEFINITIONS.....	9
REGULATORY AUTHORITIES.....	10
LEGAL SERVICES BOARD & COMMISSIONER (LSB + C).....	10
LAW INSTITUTE OF VICTORIA (LIV) .....	11
VICTORIAN LEGAL ADMISSIONS BOARD (VLAB) .....	11
NEW BODIES UNDER THE <i>UL</i> .....	11
TOPIC 3: DUTIES OWED TO CLIENTS .....	12
INTRODUCTION.....	12
DUTIES.....	12
RETAINER .....	14
DOCUMENT LIEN.....	19
DUTY OF COMPETENCE.....	20
GENERAL .....	20
CONTENT OF DUTY.....	21

SCOPE OF DUTY.....	21
STANDARD OF CARE.....	23
DEFENCES.....	25
CONSEQUENCES.....	25
DUTY OF LOYALTY AND TRUST.....	26
SOURCE.....	26
DUTIES.....	26
LAWYER-CLIENT CONFLICTS (INTEREST-DUTY).....	27
CLIENT-CLIENT CONFLICTS (DUTY-DUTY).....	30
INFORMATION BARRIERS.....	34
NO PREVIOUS CLIENT RELATIONSHIP.....	35
PRESUMPTION OF UNDUE INFLUENCE.....	35
CONSEQUENCES.....	36
DUTY OF CONFIDENTIALITY.....	37
SOURCES.....	37
GENERAL.....	37
CONFIDENTIAL INFORMATION.....	38
PRIVACY.....	38
EXCEPTIONS WHERE NO BREACH.....	38
LEGAL PROFESSIONAL PRIVILEGE.....	40
CONSEQUENCES.....	47
TOPIC 4: COSTS.....	49
DUTY TO ACCOUNT.....	49
INTRODUCTION.....	49

UNIFORM LAW .....	49
CONTENT OF DUTY.....	50
CONSEQUENCES UPON BREACH .....	50
COSTS .....	51
GENERAL .....	51
DISCLOSURE OBLIGATIONS .....	51
COSTS AGREEMENTS.....	52
RECOVERY OF COSTS.....	55
consequences.....	56
LIENS .....	56
GENERAL .....	56
RETAINING LIEN .....	57
PARTICULAR LIEN .....	58
CONSEQUENCES.....	59
TOPIC 5: DUTY OWED TO THE ADMINISTRATION OF JUSTICE.....	60
DUTY TO THE COURT .....	60
INTRODUCTION.....	60
INDEPENDENCE .....	60
MISLEADING THE COURT .....	63
COMMUNICATIONS AND RELATIONSHIP WITH JUDGE .....	67
PUBLIC COMMENT DURING PROCEEDINGS.....	67
ABUSE OF PROCESS.....	67
CONSEQUENCES.....	69
EXAMPLES – PROSECUTION AND CRIMINAL DEFENCE LAWYERS .....	70

PROSECUTING COUNSEL.....	70
CRIMINAL DEFENCE LAWYERS .....	73
DUTY TO OBEY AND UPHOLD THE LAW.....	74
GENERAL .....	74
CLIENT’S UNLAWFUL ACTS.....	75
GIVING ADVICE ON UNLAWFUL ACTS.....	76
TOPIC 6: DUTIES OWED TO THE PROFESSION AND OTHER PARTIES .....	78
OVERVIEW.....	78
DUTIES OWED TO NON-CLIENTS.....	78
DUTIES OWED TO OTHER LAWYERS .....	78
BASIS .....	78
PROFESSIONALISM, HONESTY AND COURTESY .....	78
TAKING ADVANTAGE OF OPPONENT’S MISTAKE.....	80
DUTIES OWED TO THIRD PARTIES.....	81
PROFESSIONALISM IN COMMUNICATION .....	81
COMMUNICATIONS WITH CLIENT OF ANOTHER LAWYER (NO CONTACT RULE) .....	81
DUTIES TO UNREPRESENTED PARTIES .....	82
LIABILITY TO THIRD PARTIES .....	82
UNDERTAKINGS .....	84
GENERAL .....	84
STATUTE.....	85
CONSEQUENCES.....	85
AVOIDING CONSEQUENCES .....	86
CONDUCT OF PRACTICE .....	87

ADVERTISING .....	87
SOLICITING WORK.....	87
PRACTICE NAMES AND STATIONERY .....	87
BUSINESS STRUCTURES.....	88
TOPIC 7: COMPLAINTS AND DISCIPLINE .....	89
INTRODUCTION.....	89
DISCIPLINARY PROCEDURES.....	89
DEFINITION OF UPC & PM .....	91
AT COMMON LAW .....	91
STATUTE .....	92
TYPES OF MISCONDUCT.....	93
IN THE COURSE OF PRACTICE.....	93
OUTSIDE PRACTICE.....	96
DEFENCES.....	98
DISCIPLINARY ORDERS .....	98

# TOPIC 1: ETHICS, MORALITY AND THE LEGAL PROFESSION

## INTRODUCTION

### ETHICS IN THE LEGAL PROFESSION

- Separate to morals
- **Values and rules of conduct governing a legal professional's behaviour**
  - o Prescribed in rules that set out responsibilities and conduct to avoid
- Professional standards are enforced by:
  - o Admission requirements
  - o CPD obligations
    - Must continue to uphold ethics and be competent
    - Must do an ethics CPD each year
  - o UPC or PM if regulations are breached

### LAW AS A PROFESSION

3 attributes:

- Special skill and learning
- Public service as principal goal
  - o NOT monetary gain
  - o Advancing justice and access to legal services
    - Competition in pricing helps this
  - o **Collective reputation and confidence is crucial**
- Autonomous and self-regulatory
  - o Shifts:
    - More difficult in the wake of non-lawyers being permitted to provide some services
    - Trend for these functions to be transferred to governmental entities instead
    - Self-regulation inconsistent with competition
    - Autonomy spells absolute power with accountability
  - o Reality:
    - Courts have authority to regulate officers of the court
    - Legislation regulates lawyers
    - Potential conflict in that professional bodies are both representative body and regulator
    - Power to make disciplinary determinations now lies in VCAT

## CHALLENGES

- Shift in priority from public service provision of legal advice to making money
  - o Temptation to accommodate a client's demands in order to retain the business, even where:
    - Case is hopeless; or
    - In breach of duty to the court and administration of justice
  - o Requires more contextual professional rules rather than one-size-fits-all
  - o Competition policy encourages lawyers to deliver services like any other business, but still subject to considerable regulation
- Move for some routine legal tasks to be carried out by non-lawyers
- Effect on ethical behaviour:
  - o Organizational reward structures are not constructed to reinforce ethical conduct

## SOURCES OF ETHICAL OBLIGATIONS

### COMMON LAW

- Relationship with clients:
  - o Contract (retainer – includes confidentiality)
  - o Tort (contract attracts a duty of care under negligence, and competence)
  - o Fiduciary law (best interests of client, position of trust)
  - o Equity (confidentiality post-contract, legal professional privilege)
- Relationship with the courts:
  - o Paramount duty to the court – officers of the court (can be restrained from acting)
- Relationship with TPs:
  - o Contract (where failed to indicate contracting as agent)
  - o Tort
  - o Equity in certain circumstances (non-disclosure of confidential settlement information for the other side)

### STATUTE

- *Legal Profession Uniform Law (Legal Profession Uniform Law Application Act 2014 (Vic) sch 1)* ('UL')
  - o Prescribes disciplinary processes, sets parameters for legal practice and imposes duties to clients including trust accounting and costs disclosures
  - o Rules are binding on lawyers except to the extent they are inconsistent with legal profession legislation
- Delegated legislation:
  - o ***Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*** ('SCR')
    - Minimum standards expected for professional conduct

- Some conduct not expressly prohibited is still unethical (not exhaustive of a lawyer's ethical responsibilities) (*Dow Chemical Canada Inc v Nova Chemicals Corp*)
    - Codifies many ethical obligations
    - Provides a standard of conduct in disciplinary proceedings
      - Relevant to whether to bring proceedings
    - Failure to follow may amount to UPC or PM
  - *Legal Profession Uniform General Rules 2015 ('UGR')*
    - Additional rules relating to grant or renewal of practising certificates
  - *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015*
    - Covers transfer of solicitor's practice, acting on instructions, debt collection agencies, conflicts with other business interests etc
  - *Legal Profession Uniform Admission Rules 2015*
  - *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015*
  - *Legal Profession Uniform Conduct (Barristers) Rules 2015 ('BR')*
  - *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015*
- Role of the rules:
  - **Rules not binding on a court but may assist to determine what the profession expects of its lawyers (act as guidelines)**
    - Court may refer to them to determine:
      - Standard of care in tort
      - Reasonable expectations in cases of alleged conflict of interest
      - Breach of confidentiality
    - **Rules do not supplant judicial decisions, or provide a private cause of action against a lawyer.**
    - Abiding by the rules is a defence to misconduct (*Brown v Inland Revenue Commissioners*)
  - Provides guidance to lawyers on issues of professional responsibility
  - Public relations document that highlights the serious nature of professional responsibility
    - Standards imposed exceed those that can be imposed externally

## **KEY DEFINITIONS**

- Must not engage in legal practice unless a qualified entity (UL s 10)
  - Qualified entity = Australian legal practitioner or law practice (UL sch 1 s 6)
    - Australian legal practitioner = Australian lawyer who holds a current Australian practising certificate



- Australian lawyer = someone admitted to the Australian legal profession in Victoria or any other jurisdiction
      - Law practice = sole practitioner, law firm, community legal service, incorporated legal practice and unincorporated legal practice
- Legal services = work done or business transacted in the ordinary course of legal practice
- Lawyer vs. barrister:
  - Lawyers
    - Generalists
    - Can appear in court
    - Bulk of work is behind the scenes, drafting documents and communicating with clients and TPs
  - Barristers
    - Specialists in advocacy
    - Normally sole practitioner
    - Client goes to lawyer and lawyer goes to barrister – barrister’s client is usually the lawyer
- Participating jurisdictions = Vic and NSW

## **REGULATORY AUTHORITIES**

### **LEGAL SERVICES BOARD & COMMISSIONER (LSB + C)**

- LSB:
  - UL Pt 3, Div 2
  - Objectives (s 30 *Uniform Law Application Act*)
  - Independent statutory authority responsible for regulating the legal profession in Victoria
  - Responsibilities include:
    - Handling issuing and renewal of practising certificates
    - Monitoring trust accounts
    - Prosecuting breaches of the *Uniform Law Application Act*
  - Can delegate responsibilities – e.g.:
    - LIV for CPD
    - Victorian Bar for barrister practising certificates
- Commissioner
  - Is the CEO of the LSB
  - Manages complaints against legal practitioners
  - Educative role

### LAW INSTITUTE OF VICTORIA (LIV)

- Professional association for lawyers
- Provides services such as bookshop, library and CPD events
- Is responsible for the specialist accreditation scheme
  - o Must sit an exam to become an accredited specialist
- Have input in the rules via giving comments

### VICTORIAN LEGAL ADMISSIONS BOARD (VLAB)

- UL Pt 3, Div 1
- Manages admission to practice by providing compliance certificates to the Supreme Court

### NEW BODIES UNDER THE *UL*

- Directed at ensuring uniformity in core aspects
- Bodies:
  - o Legal Services Council (LSC):
    - Monitors implementation of the *UL*
    - Ensures consistency in application
    - Sets all the rules
  - o Commissioner for Uniform Legal Services Regulation
    - CEO of LSC
    - Supports the Council in performing functions
    - Oversees implementation of dispute resolution and discipline elements of *UL*
  - o Admissions Committee
    - Part of the LSC
    - Develops admission rules for use by VLAB

# TOPIC 3: DUTIES OWED TO CLIENTS

## INTRODUCTION

### DUTIES

Source:

- Contract (retainer)
- Torts
- Fiduciary (special relationship of trust)
- Equity

Duties:

- Duty to be competent
  - Contract
    - Implied term of due skill and care
  - Tort
    - Negligence – standard of care of a reasonably competent lawyer
  - Statute
    - Misleading and deceptive conduct s 18 ACL – representing they have the skill to undertake a matter
- Duty of loyalty and trust (i.e. avoid conflict of interest)
  - Sourced primarily in fiduciary law (equity)
    - Goes beyond tortious standard of care and contract
  - 2 main duties (*Moss v Moss (No 2)*):
    - Avoid conflicts of interest without informed consent (no conflict rule)
      - Lawyer-client conflicts
      - Client-client conflicts
    - Not profit from relationship without informed consent (no profit rule)
      - Presumption of undue influence if profit above fees
        - Presumed that benefit secured is a result of abuse of confidence
          - Remedy is to set aside gifts or other benefits above reasonable fee
          - Presumption rebutted by evidence of independent and well-understood act of client in a position to exercise free judgement with complete information
  - Strict. Still applies where:
    - Did not impede loyal performance of duties
    - Lawyer acted bona fide (*Boardman v Phipps*)
    - Client benefits from the breach (*Boardman v Phipps*)

- Client charged no fee (*Sims v Craig Bell & Bond*)
  - Client may have acted in the same way (no causation) (*Brickenden v London Loan & Savings Co*)
    - However, courts reluctant to intervene where client's loss was due to her own decision to take the risk (*Swindle v Harrison*)
- Duty of confidentiality (i.e. confidentiality and legal professional privilege)
  - Sources:
    - Contract (implied term in retainer)
    - Equity (survives the retainer – SCR r 9.1)
    - Maintaining legal professional privilege
- Duty to account (trust accounting obligations)
- Duty to promote quality and client care
  - **SCR r 7:**
    - **Must provide clear and timely advice to help client understand issues**
    - **Make informed decisions**
    - **Advise on ADR options unless client is already aware**
  - **SCR r 4.1.2 – be honest and courteous**
  - Quality assurance certification possible
  - Clear channels of communication to reduce expectation gaps
- Duty to promote access to justice
  - Produce best quality justice at lowest possible cost (see topic 4)
    - Power to set aside unreasonable and unfair costs agreements
    - Formalities for bill of costs
    - Time restrictions on lawyers recovering costs
    - Right to have costs reviewed by independent person
    - Limited scope representation (*Re Seare*)
  - Cut-price legal work – problems with:
    - Link between cost and quality
    - Unprofessional to increase proper costs to client
    - Compromise in standards to accommodate lower fees
  - Pro bono work (*WAFI v Minister for Immigration*)
    - Not mandatory
    - Legal aid work at reduced rates is similar
  - Breach does not normally result in legal liability
- Duty to encourage settlement
  - Duties:
    - **SCR r 7.2 – must inform client about alternatives reasonably available, unless solicitor believes on reasonable grounds client already knows and can make decisions about their best interests in relation to the litigation**

- E.g. recommending mediation after advising of purpose and benefits (*Frost v Wake Smith & Tofields Solicitors*)
- *Civil Procedure Act 2010 s 22* – lawyers must use reasonable endeavours to resolve dispute unless not in interests of justice
  - May legitimately put pressure on client to settle (*Marriage of Anderson*)
  - What is legitimate depends on strength of the case and assessing client’s best interests (*Webb v MacDonald*)
    - Coercion is not OK
  - Advice to compromise is not negligent merely because a court considers a more favourable outcome would or might have prevailed in court
  - Pressuring the client to settle is unlikely to result in disciplinary sanction (*New South Wales Bar Association v Bland*)
- Consequences of breach:
  - Court may take into account failure to mediate in costs orders

## RETAINER

- Commencement:
  - Marks the beginning of duties owed
  - Does not require money to change hands
- Content:
  - Contract setting out work to be completed by the lawyer for the client
    - Must feature all formalities for contract (offer, acceptance, etc)
      - Lack of consideration still gives rise to tortious and equitable duties
  - Identifies the parameters of the relationship and extent of duties owed
    - **Duty of care not owed outside scope of retainer**
- Creation:
  - Expressly
    - Written
    - Oral
  - Implicitly
    - Party seeking to rely on lawyer-client relationship has the onus for proof of existence and content
      - Difficult to ascertain terms and scope
    - Determined objectively (*Pegrum v Fatharly*)
      - Words or conduct must indicate an agreement to provide legal services
      - Reasonable expectations of alleged client are relevant (*Teltschik v Williams & Jensen PLLC*)