

LAWS1230 FINAL EXAM NOTES

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(1) A community legal service or its governing body must have at least one Australian legal practitioner who is:

(a) Employed or engaged by the service or is a member of its governing body;
and

(b) Designated by the governing body as a supervising legal practitioner (and hence principal) for the service and responsible for the service's provision of legal services.

(2) A community legal service contravenes this section if it or its governing body has no supervising legal practitioners for a period exceeding 7 days.

Maximum penalty: 250 penalty units.

LPUL – MONEY MATTERS

Trust and Other Accounts

Note barristers are not mentioned in this section because barristers do not normally hold money for clients.

LPUL s 134(1): If a law practice receives or holds money that is non-trust money (see s 129 **definition**) (other than for the payment of legal costs), it must give the person who provided the money written notice that:

(a) The money will not be treated as trust money; **and**

(b) The money is not subject to the relevant trust money provisions of the LPUL and the Uniform Rules; **and**

(c) A claim against the fidelity fund of this jurisdiction cannot be made in respect of the money.

Civil penalty: 100 penalty units.

LPUL s 135(1): A law practice must deal with trust money in accordance with this Law and the Uniform Rules and not otherwise.

Civil penalty: 50 penalty units.

(2) Trust money held by a law practice may be dealt with only by the law practice or an associate of the law practice.

LPUL s 136(1): A law practice that receives trust money must maintain a general trust account in this jurisdiction.

Civil penalty: 50 penalty units.

(2) A law practice may maintain one or more general trust accounts in this jurisdiction.

Fees and Costs – No Reasonable Prospect of Success

LPUL Application Act s 62: Schedule 2 contains provisions relating to costs in civil claims with no reasonable prospects of success.

- *White Industries (Qld) v Flower & Hart (a firm)* (1998) 156 ALR 169.
- Schedule 2 s 1(1): Applies to proceedings at first instance and on appeal.
 - (2) Applies to legal services provided by both solicitors and barristers.
- Schedule 2 s 2(1): A law practice must not provide legal services on a claim, or defence of a claim, for damages unless a legal practitioner associate responsible for the provision of the services reasonably believes, on the basis of provable facts and a reasonably arguable view of the law, that the claim or defence has reasonable prospects of success.
 - (2) A fact is provable only if the associate reasonably believes that the material available at the time provides a proper basis for alleging the fact.
 - (3) This Schedule applies despite any obligation for a law practice or legal practitioner to act in accordance with the instructions or wishes of the client.
 - (4) A claim has reasonable prospects of success if there are reasonable prospects of damages being recovered on the claim. A defence has reasonable prospects of success if there are reasonable prospects of the defence defeating the claim or leading to a reduction in the damages recovered on the claim.
 - (5) Provision of legal services in contravention of this clause constitutes, for the purposes of this Schedule, provision of legal services without reasonable prospects of success.
- Schedule 2 s 3: This Schedule does not apply to legal services provided as preliminary work for the purpose of a proper and reasonable consideration of whether a claim or defence has reasonable prospects of success.
- Schedule 2 s 4(1): Provision by a law practice of legal services without reasonable prospects of success is capable of being unsatisfactory professional conduct or professional misconduct by a legal practitioner associate of that practice who is responsible for the provision of the service, or by a principal of that practice.
 - (2) A law practice cannot file court documentation on a claim or defence of a claim for damages unless a principal of the practice, or legal practitioner associate responsible for the provision of the legal service, certifies that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or defence has reasonable prospects of success.
- Schedule 2 s 5(1): If it appears to a court in which proceedings are taken on a claim for damages that a law practice has provided legal services to a party without reasonable prospects of success, the court may, of its own motion or on the application of any party to the proceedings, make either or both of the following orders regarding the practice or a legal practitioner associate of the practice responsible for providing the service:

(e) Occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case.

LPUC Barristers Rules 59: A barrister must take steps to inform the opponent as soon as possible after having reasonable grounds to believe that there will be an application on behalf of the client to adjourn any hearing, of that fact and the grounds of the application, and must try, with the opponent's consent, to inform the court of that application promptly.

LPUC Barristers Rules 79: A barrister who, as a result of information provided by a client or a witness, is informed during a hearing, after judgment, or while a decision is pending, that the client or witness has:

(a) lied or procured another person to lie to the court (Rule 125 **expanded definition**); **or**

(b) falsified or procured another person to falsify in any way a document tendered to the court; **or**

(c) Suppressed or procured another person to suppress material evidence which there was a positive duty to disclose to the court

must refuse to take further part in the case unless the client authorises them to inform the court of the dishonesty **and** if the client gave such authority, promptly inform the court of the dishonesty, **but** if the client did not give such authority must not inform the court of the dishonesty.

LPUC Barristers Rules 80: A barrister in criminal proceedings (Rule 125: including disciplinary proceedings) whose client confesses guilt to the barrister but maintains a not guilty plea (a) **should** continue to act for the client under, and upon the client's acceptance of, the following constraints (and otherwise should **not** continue to act):

(b) Must **not** falsely suggest that another person committed the offence charged;

(c) Must **not** run an affirmative case inconsistent with the confession;

(d) **Must** ensure that the prosecution is put to proof of its case;

(e) May argue that the evidence as a whole does not prove the client's guilt of the offence charged;

(f) May argue that for some reason of law the client is not guilty of the offence charged; and

(g) May argue that for any other reason not prohibited under (b) or (c) that the client should not be convicted of the offence charged;

(h) Must **not** continue to act if the client insists on giving evidence denying guilt, or requires the making of a statement asserting their innocence.

LPUC Barristers Rules 81: A barrister whose client informs them that the client intends to disobey a court's order (a) **must** advise the client against disobedience and warn the client of the risks, (b) **must not** advise the client how to carry out or conceal disobedience, **and** (c) **must not** inform the court or opponent of the client's intentions **unless** the client has

Breach of fiduciary duty occurs when there is a breach of the duty of trust or loyalty (note the fiduciary duty encompasses the duties of loyalty, confidentiality, and care). Breaches occur when the lawyer uses the client relationship for their own benefit, without the consent of or in conflict with the interests of the client (*Chan v Zacharia*). Remedies available for breach of fiduciary duty include rescission (*Maguire v Makaronis*), accounting for profits (*Warman International Ltd v Dwyer*), constructive trust (*Gemstone Corporation of Australia v Grasso*), and equitable compensation if causation is established (*Youwang v Minter Ellison*).

Equitable Remedy for Breach of Confidence

Equitable remedies may be sought for breach of an equitable obligation of confidence, based on “the notion of an obligation of conscience arising from the circumstances” (*Moorgate Tobacco v Philip Morris Ltd*).

Misleading and Deceptive Conduct

Competition and Consumer Act 2010 (Cth) Sch 2 s 18(1): A person must not, in trade or commerce, engage in conduct that is misleading or deceptive.

- Under Sch 2 s 2, “in trade or commerce” includes “any business or professional activity (whether or not carried on for profit)”, including the provision of legal services.

Breach of Discrimination Legislation

To the extent that misconduct is also a breach of anti-discrimination legislation (such as the *Anti-Discrimination Act 1977* (NSW) or the *Sex Discrimination Act 1984* (Cth)), the party in breach can be held accountable under the legislation.

Liability of Legal Practitioners for Unnecessary Costs

Civil Procedure Act 2005 s 99:

(1) This section applies if it appears to the court that costs have been incurred:

- (a) by the serious neglect, serious incompetence, or serious misconduct of a legal practitioner, or
- (b) improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible.

(2) After giving the legal practitioner a reasonable opportunity to be heard, the court may do any one or more of the following by order:

- (a) disallow the whole or any part of the costs in the proceedings:
 - (i) in the case of a barrister, as between the barrister and instructing solicitor, or as between the barrister and the client, as the case requires, or

Legal Services Commissioner v Huggett: Attempting to procure a falsely witnessed statutory declaration from his clients constitutes professional misconduct.

Legal Services Commissioner v Paul: A prosecutor repeatedly making false statements to NSW Police, which were likely to impact the conduct of serious criminal matters and jeopardise the integrity of the DPP and the criminal justice system, constituted professional misconduct worthy of being struck from the roll.

Legal Practitioners Conduct Board v Morel: An “apparent and continuing failure” to discern the barrier between professional and personal relationships (by forming personal relationships with clients in prison and misrepresenting the reasons for visiting those clients to the authorities) constitutes a basis for disbarment.

In Re Glenn Gould: A barrister returning a brief in a Family Court matter concerning an AVO 3 days before the hearing constitutes professional misconduct.

Prothonotary of the Supreme Court of NSW v Hendrick Jan van Es: Cheating on bar exam and subsequently lying about cheating constitutes professional misconduct worthy of being struck from the roll.

Legal Services Commissioner v Yarwood: Fraudulently passing on stamp duty funds constitutes professional misconduct worthy of being struck from the roll; in this case the court did not accept the argument that the lawyer’s actions were due to his mental illness.

Clyne v NSW Bar Association: Opening a legal case by making serious allegations which are known to be supported by no evidence can constitute professional misconduct.

Legal Practitioners Conduct Board v Jones: Misappropriating from trust accounts, failing to cooperate with the Board, and lying to the Board and police is so serious as to constitute professional misconduct worthy of being struck from the roll despite extremely difficult personal circumstances.

Penalties Theory

Striking from the Roll (*Law Society of NSW v Foreman*):

The legal question as to whether professional misconduct is severe to the extent of striking off a legal practitioner is: “Is the Court, with regard to the circumstances, no longer justified in holding out the legal practitioner as a fit and proper person to be a member of the legal profession?”

Relevant considerations as to what order should be made following a legal practitioner being found to not be a “fit and proper person” include:

- The protection of the public against similar conduct;
- The character of the legal practitioner;
- The effect that an order will have, in the profession and the public, upon understanding of the standard of behaviour required of legal practitioners;
- The effect upon relationships which must exist between legal practitioners; and

- Avoid “tiresome nostalgia for the past”, for in truth law was always a business as well as a profession;
- Avoid exaggeration of the scale of the change (in Australia), and accept that no institution is impervious to change;
- Consider that many changes have been for the better, such as the advent of advertising, paralegals, and joint practices, and abandonment of inflexible billing rules and protectionist ethical rules;
- Acknowledge that many, possibly a majority, of the legal profession remain committed to the ideals of service and dispassionate advice;
- Despite these caveats, some of the issues of professionalism are still very serious, particularly those relating to the growth of giant forms and their assignment of unrewarding work to the best and brightest graduates;
- The revival of the public debate on legal professional ethics also provides an excellent time to urge intensified interest in teaching legal ethics in law schools in a manner that infuses all legal teaching with ethical considerations;
- The courts and bodies supervising professional conduct have a duty to uphold high standards of ethical conduct, rather than becoming involved only in serious cases of professional misconduct;
- Finally, the collection and analysis of data on ethical breaches should be encouraged in order to improve education, the legislation, and instruction from leaders of the profession.

Parker and Evans 2007 Ch 8

Both billable hours and conditional fees are ethically flawed:

- Billable hours are ethically flawed as they incentivise lawyers to pad timesheets, disincentivise speed and efficiency, and promote quantity over quality.
- Conditional or “uplift” fees may distort litigation by giving lawyers a personal interest which may conflict with their duty to the client or their duty to the court.

Fraudulent lawyers are effectively and inappropriately safeguarded by the legal technicality that dishonestly overcharging cannot be legally addressed as theft or fraud.

ACCESS TO JUSTICE

Sourdin 2015

Technological advances in law can be **supportive technology** (support and advise humans), **replacement technology** (replace functions previously carried out by humans), or **disruptive technology** (change the way that humans work and provide for different forms of justice). Most technology-related justice reforms are in the first two categories – the third category is likely to have more significant impact on the operation of the justice system.

Supportive technologies are aimed at increasing understanding of and engagement in the justice system – an obvious example is the wide range of websites and apps available.