

LAWYERS' RESPONSIBILITIES

DUTY TO OBEY THE LAW

- ✍ A solicitor's duty to the court and the administration of justice is 'paramount' and prevails to the extent of inconsistency with any other duty (*3.1 ASCR; 8 BR*)
 - Solicitor must comply with these rules *and the law* – *ASCR 4.1.5*
 - Solicitor must avoid any compromise to their integrity and professional independence – *ASCR 4.1.4; BR 8*

This duty requires that lawyers:

- Must act honestly, legally, professionally, so as to not bring the profession into disrepute or jeopardise the administration of justice (*5.1.1 ASCR*) (*r. 4 BR*) → (*ACCC v Sampson*)
 - *LPCC v Segler* – Advised client to continue building when license was invalid & misled the court. Guilty of PM.
- Must not knowingly assist or induce clients or others to breach the law or engage in conduct that is 'dishonesty or illegal' (*5 ASCR; 8 BR*)
- Must not place client's interests above the law
 - Advise clients against involvement in unlawful conduct
 - Not advise clients of ways to achieve an unlawful purpose (*LPCC v Segler*)
 - *LPCC v Segler* – advised client to continue building when license was invalid and misled the court. Guilty of PM.
- Must not criticise law in a manner which undermines its authority or damages public confidence in the law (*5.1.1 ASCR*)

1. Lawyer is Acting Unlawfully

Where the lawyer is misleading and deceptive: *ACCC v Sampson*

- **Facts:** claims that S breached equivalent of *s.18 of ACL* in relation to debt collection notices.
 - S acted for two DVD retailers who were pursuing customers in debt.
 - There were four types of notices issued.
 - The notices stated customer in debt had to cover legal costs and would have to pay more if lodged court proceedings.
 - The letters also looked like the debt collection had been made by a Court
- **Held:** S was found in breach of misleading and deceptive conduct.

Where the lawyer is misleading and deceptive and sanctions apply: *LSC v Sampson*

- **Facts:** there was subsequent action brought by the LSC against S, at VCAT for breaching PCPR 2005 for misleading and deceptive conduct on client's behalf (outdated).
- **Held:** The mental state was unproven, so there was no breach of 28.1 VCAT. Did not conclude that S was not fit and proper for practice, however, she received a serious financial reprimand, covered LSC's costs and compelled to take ethics training.

Where the lawyer creates a fraudulent tax evasion scheme: *R v Pearce*

- **Facts:** fraudulent tax scheme, but their lawyer gave them the all clear.
- **Held:** Both parties charged with federal crimes
 - "I can only think that in the hothouse of the taxation industry you lost your moral compass and direction causing you to play this part in this conspiracy...I suspect that you have been playing the taxation game for so long that your vision as to what is right in the complexities of taxation law and accounts practice has become blurred"

2. Client is Acting Unlawfully

A. WHERE LEGALITY IS UNCERTAIN

The practitioner may advise the client to engage in that conduct, in good faith, to test the validity or scope of the law, provided that the client:

- (i) Is informed in writing of the likelihood and consequences if it is illegal; AND
- (ii) Chooses whether or not to engage in the conduct

B. WHERE ILLEGALITY IS CERTAIN

- Lawyer must not advise a client of ways in which an unlawful purpose may be achieved OR suggest or propose methods of breaking the law (*20.3 ASCR*)
- Cannot advise that they are unlikely to be caught (*Segler*)
- “Lawyers have a duty to foster respect for the law and its administration. It is inimical to the role and function of a legal practitioner that he or she advise or encourage a client to breach the law, regardless of whether the breach might be detected or prosecuted” (*Segler*)

C. WHERE LAW HAS BEEN BROKEN/WILL BE BROKEN

- Lawyer should counsel C against their conduct - making sure not to assist or appear to condone
- Where it becomes clear that C is likely to disregard the legal advice and contravene the law, L should counsel C against that action and then terminate instructions
- Must distinguish defending from aiding and abetting

Example	Content
Illegal transfer of money	<ul style="list-style-type: none"> • Must not turn a blind eye to disclosed or apparent illegally • Money transferred to lawyer in suspicious circumstances raises questions about bona fides → lawyer may question client and refuse to handle money if not satisfied • <i>Financial Transactions Reports Act 1988</i> (reporting rules); <i>Anti- Money Launder Legislation</i> (reporting requirements)
Suspicion that client uses premises for illegal purposes	<ul style="list-style-type: none"> • Lawyer can continue to act but if lawyer knows or receives instruction about illegality, he cannot act in any way so as to further that purpose. • E.g. ought not to prepare relevant documents
Client acting amorally	<ul style="list-style-type: none"> • JH made building products from asbestos. AAR knew this and restricted company so that funds were shifted to Netherlands and out of reach of claimants. AAR were asked why they facilitated this and they responded that they were advising their client on the letter of the law, no more and no less. (<i>James Hardie Case</i>)

3. Limit on ‘Lawful’ Advice

- A lawyer must not give advice that s/he knows, or has reasonable grounds to believe, has been requested to advance an illegal purpose; (*R v Pearce*)
 - *R v Pearce*: lawyers were marketing a tax scheme, which looked like tax evasion scheme.
 - There was finding of breach for doing so. “I suspect that you have been playing the taxation game for so long that your vision as to what is right in the complexities of taxation law and accounts practice has become blurred”

Lawyer must not advise clients as to the ways in which:

- An unlawful purpose may be achieved or concealed;
- Propose methods of breaking the law; or
- Advise client to behave in breach of court dates

- ✎ It remains legitimate for a lawyer to advise on the legal aspects of questionable context **BUT** never to recommend how to act unlawfully so as to avoid lawful sanction. Law evolves and is open to interpretation – lawyers can advise about alternative interpretative approaches

4. Consequences for Breach

Area	Consequence
Civil liability	Tort (agent of client) – only where lawyer aids breaches of fiduciary/trust duty ACCC v Sampson <ul style="list-style-type: none"> • Facts: Lawyer sent notices on behalf of clients for outstanding charges. Comprised of misleading and deceptive conduct pursuant to s. 52 TPA • Held: Admitted contraventions and consented to orders restraining contravening activity
Criminal liability	Lawyers that aid and abet client’s criminal activity will be liable as parties to the offence or for criminal conspiracy
Disciplinary sanctions	Can be found guilty of professional misconduct or unsatisfactory professional conduct

DUTY TO THE COURT

- ✎ A solicitor’s duty to the court and the administration of justice is ‘paramount’ and prevails to the extent of inconsistency with any other duty (**3.1 ASCR; 8 BR**)
 - **ASCR 4.1.1:** Solicitor must act in the best interests of a client in any matter in which the solicitor represents the client;
 - **ASCR 4.1.2:** Solicitor must be honest and courteous in all dealings in the course of legal practice;
 - **ASCR 4.1.3:** Solicitor must deliver legal services competently, diligently and as promptly as reasonably possible;
 - **ASCR 4.1.4; BR 8** – Solicitor must avoid any compromise to their integrity and professional independence
 - **ASCR 4.1.5** – Solicitor must comply with these rules *and the law*
- ✎ Barrister has an overriding duty to the court to act with independence in the interests of the administration of justice (**23 BR**)
- ✎ A lawyer owes a general duty to the court that overrides their duty to clients (**Mason J in Giannarelli and Rondel**)
 - **Gianarelli:** Client was convicted of purgery. Clients claimed barrister was negligent as he failed to advise client of defence and failed to object to inadmissible evidence, which was essential to P’s case. **Mason J** made comments on duty to Court against duty to client. There was advocate’s immunity and B not guilty.
- ✎ The duty to the administration of justice (to law, to the court) always trumps duty to serve the client’s interests (**Rondel v Worsley**)
- ✎ However, where a lawyer is negligent in providing advice for settlement, advocate’s immunity will not apply; **Attwells (2016)**
- ✎ This should rarely conflict with duty to obey the law because the duty is owed to the community broadly and the court is the caretaker of the law (**Jutice Ipp**).