

## Disputes and Ethics Exam Notes

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### Disputes

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## Overarching Obligations

### Overarching Obligations – Part 2.3 of the CPA

- 16 **Paramount duty to court**
- 17 **Act honestly at all times** in relation to a civil proceeding
- s 18 requirement of proper legal basis for claim. Not frivolous or vexatious (*Gibb v Gibb*)
- 19 Only take steps to resolve or determine dispute
- 20 **Cooperate** in the conduct of civil proceeding
- 21 Obligation not to (a) **mislead or (b) deceive**
- 22 Use reasonable endeavours to resolve dispute
- 23 **Narrow the issues** in dispute
- 24 Ensure **costs are reasonable and proportionate** to complexity of the case and amount in dispute
- 25 **Minimise delay**
- 26(1) **Disclose existence of critical docs** (that are or have been in possession) at the earliest reasonable time
- 27(1) **only use documents for valid purpose** in connection with the civil proceeding.

## Conduct Rules

### Fundamental duties of lawyer

- Rule 4 – other fundamental ethical duties. Solicitor must:
  - Act in best interests of client (4.1.1)
  - Be honest and courteous in all dealings in course of legal practice (4.1.2)
  - Deliver legal services competently, diligently and promptly (4.1.3)
  - Avoid any compromise to their integrity and independence (4.1.4)
- Rule 5 – solicitor must not engage in conduct which diminishes public confidence in the administration of justice or bring the profession into disrepute

### Relations with clients

- Rule 7 – lawyer must provide clear and timely advice to clients
- Rule 8 – lawyer must follow a client's lawful, proper and competent instructions
- Rule 13 – completion or termination of engagement
  - Lawyer must ensure completion of the legal services or matter they have been retained for

### Advocacy and litigation

- Rule 17 – independence
- Rule 21 – responsible use of court process and privilege
- Rule 13 – you must complete work you start
  - Unless there is a proper reason
- Rule 17 – independence: Avoid personal interests (**LIKELY ON EXAM**)
  - Came up in *Flower v Heart*
  - Cannot argue that you simply followed client instructions – lawyer must be independent and maintain duty to the court
  - Filtering client's instructions: extracting the lawful parts of the instructions
  - Look at the rule and work it out in bullet point. May not be able to make a full structure
- Rule 21 – Responsible use of Court process and privilege - Comes up in *Flower v Heart*
- Rule 22 – communication with opponents
- Rule 27 – solicitor who becomes a witness cannot be an advocate
- Rule 28 – Public comment during current proceedings
  - Can relate to confidential information
- Rule 34 – Making threats of legal action

## Independence, Candour & Abuse of Process

### Independence (not a mere mouthpiece)

#### Duty of Independence (in presenting a case) – (USR 17)

- **WRITE:** The proper administration of justice depends on the faithful exercise by lawyers of **independent judgement in managing and presenting cases** (Dal Pont).
  - A lawyer should not allow a client to assume control of litigation, act as the mere mouthpiece of the client. Rather, a lawyer is obligated to exercise independent forensic judgments after considering their client's instructions. (r17.1)
  - A lawyer will not breach their duty to a client by acting contrary to instruction to present a matter efficiently, or inform the court of authority against the client's case (17.2)
  - However, this does not mean refraining from pursuing points unlikely to succeed, but rather only forward those that are reasonably arguable. (Dal Pont)
  - **Eg in Flower v Heart - Frustrate court process:**
    - Join all subcontractors to the proceedings to stall for time / delay summary hearing before court
    - senior barristers do not attend a contest mention. Rather, Junior barristers attend and cannot answer courts questions
  - **Independence undermined by a lawyer's has criminal /civil liability:**  
Where it becomes apparent that a lawyer may have criminal or civil exposure on a matter, the need for independence requires the lawyer to withdraw: *Kooky Garments*.
- OTHER EXAMPLES:
  - **Independence threatened by a lawyer's relationships (family, Lover etc)**
  - A lawyer must not appear in a matter where his or her relationship (lover, family) with a client may make it difficult to maintain professional independence and judgement. (*Jackson; Chang*)
  - **Independence undermined where lawyer is a witness**
    - A lawyer must not accept a retainer if there is reason to believe that they will be required to give evidence before the court: r 27 USR; r 101(d) UBR.
    - Rational: To appear as a witness may tend to confuse the lawyer's role to present the case and test the evidence/arguments.

#### Filtering: Can a client's goals be filtered so as to always be consistent with the duty to the court?

- **Write:** (I agree with class discussion that) on proper construction of the clients wishes, a lawyer's duty to the client will always be consistent with duty to the court; a lawyer's function as a person trained in the law is to tell the client when they cannot achieve a goal within the law.
  - A request to secure as much compensation as possible can be filtered to 'secure as much compensation as can be awarded before a true construction of the law'.
  - Eg in *Mullins*, the barrister (of his own volition) set out to secure an end that was not seen as a valid goal by the legal system. His **true task** was to secure compensation based on the accurate life expectancy of the client.

# Duty of Confidentiality

## Confidentiality

Only if needed: There are **3 bases of the legal obligation**: contractual (implied term in legal retainer), equitable (action for breach of confidence), and rule 9. **Rule 9 prevails.**

### The Rule

- **RULE 9** : A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement (*r 9.1 USR, r114 UBR*)
  - **Unless internal work for work**: to another solicitor at the law practice (9.1.1) or a barrister or a person engage for the purpose of delivering legal services in relation to the client (9.1.2)
  - **Continues beyond retainer**: The lawyer's duty of confidentiality does not end with the termination of the retainer or by the death of the client.
- **IN HYPO**: Question / Argue if the information is or isn't confidential.
  - Information received in connection with the retained is presumed to be confidential (*Dal Pont*)

### Careful of Disclosure of information that dis not confidential

- Lawyers should be cautious when discussing information they believe is not confidential or is now public knowledge:
  - (1) Information in the public domain may not be entirely accurate. If a lawyer comments on, and confirms, the correctness of the information that may amount to disclosure.
  - (2) Lawyers generally have more extensive knowledge of their client's affairs than the public, creating a danger that they might inadvertently disclose confidential information

### Rational for Duty of Confidentiality

- The duty of confidence encourages **full and frank disclosure between client and lawyer**, ensuring the client can obtain legal advice without fear of being prejudice by disclosure.
- It also assists **dispute settlement**, by allowing the lawyer to gain a realistic appraisal of success.

### Exceptions (9.2)

- Must note that the expiations give you **permission** to disclose, not an obligation.
- The exceptions show a balancing of private confidentiality and the public interest in preventing harm. *Dal Pont* convincingly argues the disclosure must be **limited in scope** to achieve its goal
  - Eg to prevent imminent serious physical harm one must tell someone who can prevent it (police, not leaking to media)
- **Advice on ethical obligations (9.2.3)**
  - solicitor discloses the information
  - in a confidential setting,
  - for the sole purpose of obtaining advice
  - in connection with the solicitor's legal or ethical obligations;
  - **MUST NOTE** in exam: the second lawyer is obliged to keep this information confidential

## ESSAY QUESTIONS

### What is a good Lawyer? System serving vs Non-system serving

#### Competing conceptions of law for profit, or as noble profession

- The legal system is a **for profit system**
- Tension between competing conceptions of law as
  - A **profession**, in which honesty and integrity are paramount; and
  - A **business**, in which the pursuit of profit is the primary object.
  - Eg Partners as entrepreneurs selling their services and seeking out clients

### What is a good Lawyer? System serving v libertarian (or same thing!)

#### **System Serving View**

- Someone who believes in the system and wants to help it do its job
  - Lawyers are invited to accept that the system works; faith in the correct design of the trial
  - Truth and justice as the two goals lawyers help to achieve
- A good lawyer will therefore create ordered society, ensuring knowledge of the legal rights and obligations for the sake of promoting law-abiding conduct
- The fair criminal trial as the source of the paradigm case
  - Prosecutor's job as to assist the court
  - Function of a lawyer as to assist the administration of justice
- Two assumptions of the system serving lawyer as a good lawyer
  - The system must have **laudable/good aims** if the system serving lawyer is to be a good lawyer
  - The systems **actual operation** must be acceptable

#### **A libertarian or non-system-serving**

- People who believe that the system is wrong and subverting it is a morally positive thing to do - To enable the individual to evade state coercion if possible
  - Outright hostility towards taxation
  - Reduce the extent of the state's theft by helping client hold onto what is rightfully his or hers
  - If helping client and preventing the state from detecting this is morally right under this view
- Companies/client often take a cost benefit legal advice:
  - Advice about how likely it is that the client is going to feel the consequence of breaking the law

#### **Can they be the same thing?**

- Perhaps a subversive lawyer who wants to effect change in the law may actually be not too dissimilar to a system based lawyer; the subversive lawyer works within the system to change the system so it functions in a better manner - they want to effect change to make the system better

- (f) recognised as a peak organisation in the field

#### Interveners

- People who have legal interests that are substantially affected by the outcome of the ruling.
  - Court may allow them to have some involvement in the civil proceedings

#### Amicus curiae – ‘a friend of the court’

- A lower category than Interveners (do not have a substantial outcome, legal rights are not affected) eg journalist federation may give advice in a media related case

### Class Actions

#### Supreme Court Act 1986 (Vic) \* **NOT THE SUPREME COURT RULES\***

##### Threshold requirements (s 33C) – what’s needed to be included in the pleadings

- 7 or more people required
- Must all have claims against the same person
- Must arise out of the same or similar related circumstances
- Must give rise to substantial common questions of law or fact
  - Common issue must be more than trivial (*Wong v Silkfield*)
  - Court uses its discretionary powers
- Each applicant does not need to have a claim against each respondent (*Cash Converters*)
- 
- S 33C (2)(b) – A group proceeding may be commenced whether or not the proceedings:
  - are concerned with separate contracts or transactions between the defendant and individual group members; or
  - involve separate acts or omissions of the defendant done or omitted to be done in relation to individual group members.

##### Originating Process (s 33H)

- Commenced by writ, which must describe or otherwise **identify** group members
- Specify nature of claim, and the common questions of law or fact

##### Notice to Group Members

- s 33X – Notice must be given for commencement and any application for dismissal
- s 33Y – Court must approve notice method (press ad, TV, radio etc)

##### Case Management (practice note No 10 of 2015)

- Conference will be fixed by the judge to whom the proceeding is assigned
  - Provides guidance to the group, communication with group members and opting out etc

##### Opt out Procedure

- s 33E – In unless you opt out, consent not required
- s 33 J – Court must set a date before which a member may opt out
  - Trial must not start before this date
  - Person who opts out taken to have never been a member

##### Lead Plaintiff

- s 33ZD – cost paid by lead plaintiff or defendant but not a group member
- Choice of lead plaintiff is important as they have a lot to loose, also make the decisions on behalf of all

##### Defendant’s Options – Defensive Strategies

- Declass under s 33N; where
  - The costs are likely to be lower if separate proceedings
  - All the relief sought can be obtained in separate proceedings

## Costs

- **EXAM: Also Consider Summary Judgment and Security for costs**
- American Rule – Each party pays for their own proceedings
- English Rule – loser pays rule (called cost shifting) (Aus)

Basic rule - costs follow the event

### Court's Power

- Costs are at the discretion of the court – s24 *Supreme Court Act 1986*
  - Court will exercise its discretion in accordance with r63.02 *Supreme Court Rules*

### Exceptions to the Basic Rule

- Delay in proceedings, canvassing unnecessary behaviour, **turned down a favourable settlement offer**

### Winning party can recover some of their:

- Legal costs – cost of lawyer
  - *Chorley Principal* – Lawyers can recover self-represented costs
- Disbursements – Lawyers costs to 3<sup>rd</sup> parties

### When and how?

- Costs orders usually made at the end of proceedings
- Courts make an order and the parties are left to comply by themselves
- If they cannot agree, they get their costs **'Taxed'**

### 63.28 Bases for taxation are:

(a) **Standard** basis (default 63.30)

(b) **Indemnity** basis (if other party has acted in bad faith/bad tactics) – Courts will depart for the standard basis where there is a special or unusual feature of litigation (*Foundation Selected Meats*) 63.30.1

(c) **Any other basis the court may see fit** 63.28(c)

### 63.30 – Standard Basis

All costs reasonable incurred and of reasonable amount (Start at zero and work up)

- 63.31 sets standard basis of taxation as the default

### 63.30.1 – Indemnity Basis

All costs allowed unless they are for an unreasonable amount have been unreasonable incurred (start at all costs and work down)

### 63.23 – Costs against lawyers

Where a lawyer has caused costs to be incurred improperly or without reasonable cause or failure to act with competence, court may order:

- (a) Costs between solicitor and client be disallowed
- (b) The solicitor pays the costs the client has been ordered to pay to the other party
- (c) The solicitor pays any or all costs payable by any other party
  - *White Industries v Flower & Heart* - delay

### What if one plaintiff wins, and the other loses. Joinder

Who pays the costs of the successful defendant?

- **Bullock Order** – allows successful plaintiff to include the costs of the successful defendant in its costs. Eg unsuccessful defendant pays both the successful defendant and plaintiff costs; When the joinder is reasonable
  - *Eg Gold v Vaggelas*
- **Sanderson Order** – requires the unsuccessful defendant to pay a successful defendant directly (removes liability from the plaintiff)

### **Key Cases:**

- *Fountain Selected Meats* – Courts can order indemnity based taxation



- White Industries v Flower & Hart - If a party instructs its legal advisers to adopt [delaying tactics] the legal adviser should inform the party that it is not proper to do so. If the party insists, then the legal adviser should withdraw from acting for that party
- Yara - Too much court material, lawyers order to pay 50% of added costs

