

# TOPIC 3&4: DUTY TO OBEY THE LAW, GENERAL DUTIES TO THE COURT

## I. DUTY TO OBEY THE LAW

### **1. Duty to Avoid Unlawful Conduct as a Lawyer:**

The duty to obey the law is a lawyer's fundamental duty. (*Segler*) When acting for a client or in their personal lives S must comply with the ASCR and the Law (SR 4)

### **2. Duty not to Assist or Condone a Client Breaking the Law:**

Whilst S must follow the clients lawful, proper and competent instructions (SR 8), they are not to act as the mere mouthpiece of the client (ASCR 17). S cannot assist or condone C breaking the law and must advise against unlawful conduct (*Segler*).

Advice where there is doubtful legality:

It is permissible for [L] to provide legal advice in good faith to test the scope of the law, BUT, must inform [C] in writing about the risk of illegality and the moral implications of doing so and allow them to make an informed decision. Failure to do this exposures [L] to liability for negligent advice (*R v Pearce*). Doubtful legality gives bases for professional indemnity insurance.

### **3. Consequences for Breach of Duty to Obey the Law – Client's Unlawfulness:**

- Civil Liability: tort (agent of client); only where lawyer aids client breaches of a fiduciary/trust duty re disbursement or transfer of money is lawyer is personally liable; breach of legislation
- Criminal Responsibility: lawyers who aid and abet client's criminal activity will be liable as parties to the offence or for criminal conspiracy
- Disciplinary Action: action taken by the legal services board (*Segler*)

## II. DUTY TO THE COURT (includes mediation etc)

[L] owes a paramount duty to the court and the administration of justice (SR 3.1/BR 23) which prevails to the extent of inconsistency with any other duty including the duty to the client (*Giannarelli* per Mason CJ; *Rondel* per Lord Reid)

### **1. Duty of candour**

[L] is under a duty of honesty and candour, this duty arises in both [L]'s presentation of the law, and presentation of the facts (SR 19/BR 24, 25, 29).

#### **(a) Presentation of the law**

[L] cannot deceive or knowingly or recklessly mislead the court in respect of the law (SR 19.1/ BR 24; *Kyle*).

- An intention to deceive or dishonesty is a necessary element to mislead the court (*Kyle*)
  - If an innocent misleading statement is made [L] must take all reasonable steps to correct it (SR 19.2/BR 25)
- Must also inform the court of any relevant law or precedent (if court would not otherwise be informed (DR 19.6/BR 29)

## II. DUTY OF CONFIDENTIALITY (CONSIDER ALSO PRIVILEGE)

L owes C a duty not to disclose confidential information under contract, equity and the PR (SR 9.1 BR 114). Here, the [info] is confidential as it was given to L in confidence and imparted in the course of the retainer.

- State how it was breached
- NOTE: the duty not to misuse confidential information survives the retainer (*Bolkiah*)
- L will argue it was a permitted disclosure:

### (a) Consent

Where C has expressly or impliedly (if joint clients both must consent Singla) (SR 9.2.1/ BR 115) consented to disclosure, L may disclose but only for the purpose for which C consents.

### (b) Public knowledge

Confidential information may be revealed where the information is public knowledge; and the purpose served by confidentiality no longer exists (*Tampoe; Trowell*)

- However, caution must be exercised not to give weight to unsubstantiated public information or to disclose more than is publicly available (*Tampoe*)

### (c) Work-related purposes

- L may disclose confidential or privileged information to other lawyers in the firm (SR 9.1.1) unless the information is clearly provided to a L personally and exclusively
- S may disclose confidential or privileged information to B's or other people employed to work for the client (SR 9.1.2) such as the S firm's insurer (SR 9.2.6)
- S may disclose information in a confidential setting to obtain advice about legal or ethical obligations (SR 9.2.3)

### (d) Compelled by law

L may disclose confidential information where is permitted or compelled by law (SR 9.2.2 BR 115) However, statute must show a clear intention to displace it. (*Daniels Corp*)

### (e) Avoid serious criminal offences:

L may disclose confidential information for the sole purpose of avoiding the commission of a serious criminal offence. This avoids future crimes only, not the concealment of past offences (SR 9.2.4).

- Serious crime is undefined
- Must be disclosure to the appropriate authorities

### (f) Avoid serious physical harm:

L may disclose to prevent imminent serious physical harm to clients or another (SR 9.2.5; *Bell*)

- Serious harm includes self-harm, must consider the seriousness of the injury, imminence or likelihood of it occurring and absent of other feasible ways to prevent it.

### (g) Disobeying Court Orders:

Confidential information may be revealed where C informs their L/B that they intend to disobey a court order; and L/B reasonably believes C conduct constitutes a threat to a person's safety (SR 20.3; BR 81(c)(2) and 82)

# LAWYER-CLIENT CONFLICTS

## DUTY OF UNDIVIDED LOYALTY

As a fiduciary (*Breen*), a lawyer has a duty of undivided loyalty to act in the best interests of their client (SR 4.1.1), and therefore to avoid acting where there may be a personal conflicts of interest. (SR 12.1).

- On the facts, a conflict has arisen between L's duty to serve the best interest of C [explain interests] and the interests of S in [explaining what S wants]

Barrister: B must protect and promote fearlessly and by all proper and lawful means C's best interest to the best of B's skill, without regard to B's own interests (BR 35). If B believes on reasonable ground that interest of the C conflict with interest of the IS or that C has a claim against IS, must (a) advise IS of this and (b) seek to advise C of this in IS presence (BR 120)

### EXAMPLES:

#### **Borrowing/lending money**

A solicitor must not borrow/lend money from/to a current client, or from/to a former client who has a continuing reliance on the solicitor's advice in relation to the investment of money. (SR 12.3; *Harvey*)

#### **Buying from or selling to a client**

Because the interests of a vendor and purchaser do not wholly coincide, a solicitor proposing either to buy property from, or to sell property to, a client is under a duty to cause the client to obtain independent advice. (*Longstaff*)

- Applies to former C's if the client has a reasonable expectation that the relationship of trust and confidence continues. (*Longstaff*)

#### **Secret profits (referrals etc.)**

The 'no-profit rule' prohibits lawyers from profiting from the fiduciary relationship except for payment of a reasonable professional fee, or with the client's informed consent. (SR 12.1)

- This is also a fiduciary breach. It creates a conflict between the S's interests in securing more referrals from X, and the client's interests in being referred to the most appropriate Y ('no-conflict rule').
- A fiduciary conflict could only be cured by full disclosure and informed consent (including ensuring the client obtains independent legal advice) – ASCR 12.1, 12.4.3.
- BUT: S does not breach SR 12 by giving or receiving a financial benefit from 3rd party for representing C provided C gives informed consent as required by rules 12.4.3 and 12.4.4

#### **Acceptance of gifts**

Since acceptance of gifts may give rise to a perception of undue influence, or inducement for special favours, care needs to be taken before accepting them.

- Gifts of cash should always be refused unless in the form of a proper professional fee.

#### **Drawing a will**

S does not breach SR 12 by drawing a will and appoint S or associate as executor, provided S informed C in writing before C signs, of any entitlement to claim executor commission, any

## CONCURRENT CONFLICTS

S/firm must avoid conflicts between the duties owed to multiple Cs unless an exception applies (SR 11.1/ BR 118-120). This stems from the FD of undivided loyalty and confidentiality owed to each C (*Spincode*)

### Adverse interest conflict

- Hence, where the interests of multiple Cs are adverse to one another, and there is **potential or actual conflict**, solicitor must not act (SR 11.2)
- At the beginning, there are potentially conflicts between [spell out conflict between clients in precise detail].
  - These raise issues of conflicting duties of loyalty and thus administration of justice. (*Spincode*) It is all in relation to the same matter so it is not possible to argue that the firm/lawyers were acting in unrelated matters.
- Once the case develops, it becomes clear there are actual conflicts [spell out conflicts]
- Hence, L should have ceased acting or obtained for informed consent at the beginning (11.3), however, the court would be reluctant to allow L to act anyway. It was dangerous and inadvisable in this situation.

### Confidential information conflict

On top of this, L must not act for multiple Cs where L possesses relevant and confidential information to one C which might be material and detrimental to another C. (SR 11.4)

- State what the info is
- Thus, to continue acting, L must have obtained informed consent (see above) AND an effective information barrier has been established (SR 11.4):
  - Size of firm/personal relationships (*Macdonald Estate*)
  - Evidence of structural separation and independent operation, reinforced by carefully documented procedures, recurring educative programs, compliance monitoring and sanctions in the event of breach. (*Bolkiah; LIV Guidelines*)
  - Extensive undertakings will also be necessary and courts are unlikely to accept 'walls', screens, barriers and electronic procedures created ad hoc for particular litigation (unlikely to change cultural norms)

### What if a law practice finds itself acting concurrently for and against the same client in unrelated matters?

*Tasman Liquor*: Deacons Brisbane acted for Tasman Liquor, while Deacons Melbourne office acted against them in Victoria. Allowed because:

- the proceedings were unrelated (therefore no adverse interest conflict) and handled in different state offices
- there was currently no confidential information obtained by Deacons Brisbane that could be used against TLT in the Melbourne proceedings, and
- assurances were given by Deacons that appropriate safeguards would be put in place to prevent any breach of confidence in the future.

### Multi-party representation (where there is no conflict)

- While there is no general rule against acting for two or more parties in non-contentious matters there are inherent risks in doing so that should be balanced against any benefits to the clients.

## TOPIC 12: TRUST ACCOUNTING

Along with duties of confidentiality, loyalty and avoiding conflicts of interest, a fiduciary has a duty to account for their client's money. L is a trustee of money or other property received on behalf of a client, and have corresponding duties under the UL and PR enlivening the duty to account (See UL Part 4.3). The duty of confidentiality applies to information about money received on trust, as does the duty of care held to the standard of the ordinary qualified, competent and careful lawyer.

### Why do practitioners hold money on behalf of clients?

- Purchase and sale of property
- Deceased estates
- Mortgage and other investments
- Settlement of civil or statutory claims
- Receiving money on account of professional fees and disbursements

### Uniform Law Objective:

To ensure that trust money is held by law practices in a manner that protects the interests of the persons for whom or on whose behalf it is held. Principles of trust accounting legislation:

- Separation of practitioners and C money
- Designation of C money as trust money
- Demarcation/Identification of C's money and each transaction in relation to that money
- Precise record keeping which facilitates supervision and identification of irregularities
- External auditing, professional and criminal sanctions for breach

### I. IS IT TRUST MONEY?

#### What is Trust money (s 129 UL):

Money entrusted to a law practice in the course of or in connection with the provision of legal services, and includes:

- (a) money received by the practice on account of **legal costs in advance** of providing the services; and
- (b) controlled money – e.g. Money from ANZ that ANZ has specified be paid into a specific ANZ trust account
- (c) money received subject to instructions to **deliver to another party** ('transit money')
- (d) money received by the practice, that is the subject of a power, exercisable by the practice or an associate of the practice, to deal with the money for or on behalf of another person

Examples:

- Payment to solicitor for services rendered by a barrister IS trust money (s129(1)(d); s 133)
- Payment for future legal services by solicitor/barrister IS trust money (s 129(1)(a), (d))

What is NOT Trust Money (s.129(2) UL):

- (a) remuneration for services performed as a legal practitioner
- (b) MIS or mortgage financing undertaken by the practice
- (c) as part of a financial service for which an AFSL is required
- (d) for investment purposes