

## LLH302 Exam Notes: Contents

<b>1. Admission</b>	<b>3</b>
Admission Process	3
Specific Concepts	4
Rehabilitation	9
Re-Admission	10
Granting and Renewing Practising Certificates	10
Ongoing Disclosure of Criminal Offences/Charges	10
<b>2. Trust Accounts</b>	<b>11</b>
Introduction	11
Trust Money v Non-Trust Money	12
The Trust Account	13
Receipt of Trust Money	15
Dealing with Trust Money	17
Withdrawing Trust Money	19
Duties to Notify of Irregularities	21
External Examination	21
Role and Powers of QLS	23
Trust Account Discipline	24
<b>3. Duties to Clients</b>	<b>25</b>
Duty to Act in Client's Best Interests (r 4)	25
Duty of Care (r 4)	25
Duty to Communicate and Advise (r 7)	27
Duty to Follow Client Instructions (r 8)	28
Duties under the Australian Consumer Law	28
Identifying the Client	29
Client Capacity	30
Advocates' Immunity	30
<b>4. Confidentiality</b>	<b>33</b>
Duty of Confidentiality (r 9, 20)	33
Inadvertent Disclosure (r 31)	34
Legal Professional Privilege	35
<b>5. Conflicts of Duty</b>	<b>37</b>
Conflicts between Duties to Current Clients (r 11)	37
Acting Against Former Clients (r 10)	39
Information Barriers (aka Chinese Walls)	41
<b>6. Conflicts of Interest</b>	<b>43</b>
Conflicts between Solicitor and Client (r 4, 12)	43
Application of Law to Common Conflict Scenarios	45

<b>7.1. Administration of Justice (General)</b> .....	<b>51</b>
Paramount Duty to the Court and Administration of Justice (r 3) .....	51
Independence (r 17) .....	51
Frankness in Court (r 19) .....	52
Lying, Falsifying Documents, Suppressing Evidence (r 20.1) .....	53
Communications with Opponents (r 22) .....	54
Other Duties (rr 6, 24, 25, 26, 28, 34).....	55
<b>7.2. Administration of Justice (Criminal)</b> .....	<b>57</b>
Prosecutor’s Duties (r 29).....	57
Defending Guilty Clients (r 20.2).....	59
Unlawfully Obtained Evidence (r 29.8).....	61
<b>8. Discipline</b> .....	<b>63</b>
Introduction to the Legal Services Commission .....	63
Disciplinary Proceedings.....	63
Penalties .....	66
Examples of Disciplinary Scenarios .....	67
<b>9. Costs Agreements and Billing</b> .....	<b>69</b>
Disclosure to Client.....	69
Costs Agreements .....	71
Charging Excessive Legal Fees.....	72
Billing Methods .....	72

# 7.1. Administration of Justice (General)

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## Introduction

**KEY DUTY:** This topic covers the paramount duty owed by solicitors to the court and administration of justice.

**OTHER DUTIES:** It also covers a number of specific duties with their foundations in the public interest in the administration of justice, including:

- Duty to be independent of clients
  - Duty to assist the court with facts and law
  - Duties when faced with witnesses who have lied, falsified or suppressed evidence
  - Duty to be honest with opponents
  - Other duties
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## Paramount Duty to the Court and Administration of Justice (r 3)

**ASCR 3:** A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of any inconsistency with any other duty.

**BASIS:** On admission, solicitors become **officers of the court**: LPA s 38(1). As such, solicitors are subject to an overriding duty to the court which is sourced in the public interest: *Giannarelli v Wraith*.

- Premised on idea that public must have faith in systems that surround justice – closely tied to rule of law.
  - Lawyers (**of any age/experience**) must act with integrity and treat system with respect: *Milu v Smith*.
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## Other Rules Which Derogate from Duty to Client

**DUTY TO CLIENT NOT ABSOLUTE:** In addition to Rule 3 and the other Rules explored below, the following rules also encapsulate the concept that lawyers do not have an absolute duty to their clients:

- **Rule 4.1.4:** avoiding compromise to integrity and professional independence.
  - **Rule 5.1.1:** not acting in way prejudicial to public confidence in administration of justice.
  - **Rule 5.1.2:** not acting in way that brings profession into disrepute.
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## Independence (r 17)

**RECALL:** Solicitor obliged to follow only lawful, proper and competent instructions: **ASCR 8.1**.

- See '3. Duties to Clients > Duty to Follow Client Instructions'.

**ASCR 17.1 (NOT ACT AS MOUTHPIECE):** A solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client ... and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's ... instructions where applicable.

**ASCR 17.2 (MAY ACT CONTRARY TO INSTRUCTIONS):** A solicitor will not have breached the solicitor's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's instructions, simply by choosing, contrary to those instructions, to exercise the forensic judgments called for during the case so as to:

- 17.2.1** Confine any hearing to those issues which the solicitor believes to be the **real issues**:
  - Also consider **Rule 23.1**: Solicitor must not open as a fact any allegation which he or she does not then believe on reasonable grounds will be capable of support by the evidence.
- 17.2.2** Present the client's case as **quickly and simply** as may be consistent with its robust advancement; or
  - E.g. *White Industries v Flower & Hart*.
- 17.2.3** Inform the court of any **persuasive authority** against the client's case.
  - This rule is expanded on in Rule 19.6, but 'persuasive authority' generally means an Australian appellate court decision: **MT Wk 11 Tutorial**.

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### *White Industries v Flower & Hart*

#### FACTS:

- Client was a shopping centre developer. Construction of shopping centre was over budget – dispute as to what was due under the contract
- Client was ruthless businessman, long history of litigation, use whatever means he could to win
- Only hope other party had opportunity to get costs was to show solicitors had unreasonably accrued costs
- Other party complained of following solicitor conduct in accruing costs:
  - On advice of QC, they instituted proceedings for fraud and misleading and deceptive conduct when knew there was no evidence this could be sustained – they were just annoyance and delay tactics to exhaust other sides resources; and
  - On advice of QC, delivered 700-page interrogatory to exhaust other side.

#### HELD:

- QC's advice did not absolve them of the obligation to exercise their own independent judgment.
  - However, it was significant in determine whether solicitors had breached duty to court.
- QC's advice was predicated on his assumption there was evidence which would sustain them – for misleading and deceptive conduct (had not been given full brief).
- Solicitors should have looked at whether there was evidence for the action and should have realised the 700-page document was a delay tactic and not keeping with the rule that litigation should be undertaken in an expeditious matter
- This would have been a just cause on which to terminate the retainer because the client was insisting on delay proceedings which are against the administration of justice
- Solicitors' conduct prevented the aims of the judicial system being achieved – the resolution of the dispute as quickly as possible whilst allowing the merits of the case to be effectively disputed
- Goldberg J (trial judge)
  - Time has passed where obstructionist and delaying tactics can be tolerated by the court.
  - Court resources are finite and so are those of litigants
  - If legal adviser instructed to follow such a strategy, legal adviser should inform it is not proper to do so and if they insist – withdraw from acting for that party.

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## Frankness in Court (r 19)

### Assisting the Court with Law

**RATIONALE:** Courts rely on the truth and accuracy of legal materials being presented by lawyers. Lawyers are therefore under a positive duty to assist courts in informing themselves as to the law which applies to a case.

**ASCR 19.6 (During Hearing):** A solicitor must, at the appropriate time in the hearing of the case if the court has not yet been informed of that matter, inform the court of:

**19.6.1** any **binding authority**;

- Requirements:
  - Ratio (not obiter)
  - Higher court in same hierarchy
  - Not dissent
  - On point (same law)

**19.6.2** where there is no binding authority, any **authority decided by an Australian appellate court**; and

- Requirements:
  - Australian appellate court
  - On point (same law)
  - Ratio (not obiter)
  - Not dissent

**19.6.3** any **applicable legislation**,

known to the solicitor and which the solicitor has reasonable grounds to believe to be directly on point against the client's case.

**Authority** – as Rule 19.6.2 refers merely to ‘authority’ (not binding authority), judgments which are not binding may be captured. Authority is not defined in the glossary, so question is whether judgment of a single judge, or obiter dicta, would be considered ‘authority’.

- 2017 Exam: Single dissenting judge of HCA – ‘might depend on whether remaining 6 judges addressed the point and came to different conclusions (that being the authority), or whether they came to their decision on a different point (meaning single judge was only HCA expression) – still probably not enough to amount to ‘authority’.
- Decisions of other State Supreme / District Courts = not captured (as interstate).
- Ratio of other Appellate Court = depends on whether that court was applying same law: [2017 Exam](#).
- Obiter of QCA = not binding and not considered authority ‘decided’ by an appellate court: [Wk 11 Tut](#).

**ASCR 19.8 (Post-Hearing):** Where a solicitor becomes aware of any of the material referred to in r 19.6 after the end of a hearing, but before the decision is handed down, must inform the court (and the other side) by letter providing the relevant case or legislation, and seeking to have the matter relisted for argument arising out of the additional materials.

### Assisting the Court with Facts

**ASCR 19.1 (MISLEADING/DECEIVING COURT):** A solicitor must not deceive or knowingly or recklessly mislead the court.

- Extends to knowingly submitting a false document to the court (e.g. affidavits).
- Duty generally not limited to conduct in court appearances: [LSC v Hackett](#).

**ASCR 19.2 (CORRECTING OWN MISLEADING STATEMENTS):** A solicitor must take all necessary steps to correct any misleading statement made by the solicitor to a court as soon as possible after the solicitor becomes aware that the statement was misleading.

- Extends to even the most minor misleading statement (MT example of admission stating wrong uni).

**ASCR 19.3 (CORRECTING OTHERS’ MISLEADING STATEMENTS):** A solicitor will not have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by the opponent or any other person.

- BUT: must not adopt or in any way incorporate the misleading statement into solicitor’s own submissions – this will breach Rule 19.2: [MT Wk 11 Tutorial](#).

### Passive Misleading: Civil v Criminal

- Civil – counsel may, short of positively misleading court, put a matter into evidence and omit other matters which are disadvantageous to the client: [Tomblin v Universal Bulb Co](#).
- Criminal – defence counsel may stand by and watch the court be misled by reason of its failure to ascertain facts not within the barrister’s knowledge: [Saif Ali v Sydney Mitchell & Co](#).

## Lying, Falsifying Documents, Suppressing Evidence (r 20.1)

**ASCR 20.1:** If a solicitor, as a result of information provided by the client or client’s witness, learns during a hearing or after judgment or the decision is reserved and while it remains pending, that the client or their witness has:

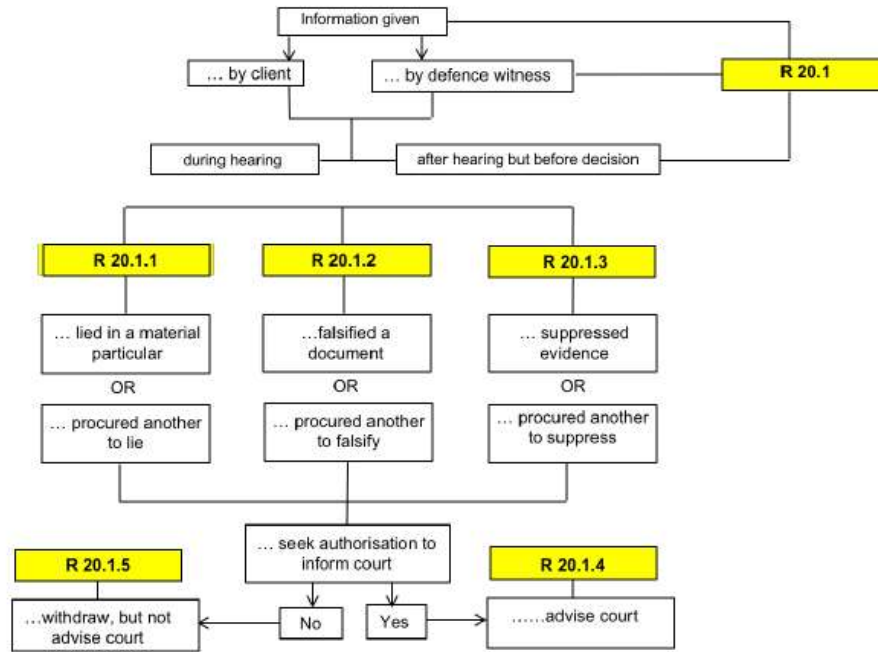
- 20.1.1 Lied in a material particular to the court or has procured another person to lie to the court; or
- 20.1.2 Falsified or procured another person to falsify in any way a document which has been tendered; or
- 20.1.3 Has suppressed or procured another person to suppress material evidence upon a topic where there was a positive duty to make disclosure to the court,

the solicitor MUST:

- 20.1.4 Advise the client that the court should be informed of the lie, falsification or suppression and request authority so to inform the court; and
- 20.1.5 Refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie, falsification or suppression and must promptly inform the court of the lie, falsification or suppression upon the client authorising the solicitor to do so but otherwise may not inform the court of the lie, falsification or suppression.

→ If the client authorises the solicitor to inform the court, it is important that those instructions be taken in writing and signed by the client.

Rule 20.1 Flowchart:



## Communications with Opponents (r 22)

**ASCR 22.1 (FALSE STATEMENTS):** A solicitor must not knowingly make a false statement to an opponent in relation to the case (including its compromise).

- ‘Compromise’ means negotiations for settlement prior to trial.

**ASCR 22.2 (CORRECT FALSE STATEMENTS):** A solicitor must take all necessary steps to correct any false statement made by the solicitor to an opponent as soon as possible after the solicitor becomes aware that the statement was false

**CASE EXAMPLE:** *LSC v Mullins*.

- Important to note that this Rule extends to conduct outside court: *Mullins*.

= LSC v MULLINS NEXT PAGE =

FACTS:

- Mullins (a barrister) was briefed in relation to settlement negotiations for a client, White, who had been involved in a motor accident - quadriplegic as a result of the accident
- Had a reduction of life expectancy of 20%
- Later White was diagnosed with cancer - significantly reduced W's life expectancy even further
  - This would reduce the amount of money he would get as his life expectancy was shorter

INSTRUCTIONS:

- W insistent he didn't want this disclosed if he didn't have to
- M's first instinct that he should tell the other side
- Mullins asked senior counsel whether he was obliged to disclose – there was a miscommunication and the barrister advised he did not have to disclose
- On this basis he did not disclose the addition information
- During settlement Mullins continued to rely on documents about quantum with misleading info

HELD:

- **Mullins should have disclosed**
- The instructions were competent, they were also lawful as the technical requirements of under the legislation had been complied with (no positive legal obligation to reveal the recent medical information), but the instructions were not proper
- Mullins not obliged to follow clients instructions under Rule 8 as Rule 22 extended outside the court to negotiation proceedings – legal consequences which attach to deception about material facts extend outside the courtroom
- Although M had asked council and followed councils advice, he should have exercised own independent ethical judgement and decided it was wrong not to disclose (*White Industries v Flower & Hart*)
- M not entitled to enter into negotiations as if it was a morals free zone – there is a general understanding good faith applies
- ASCR 22 talks about communication with opponents and specific bit at end that solicitor must not make false statement to opponent including in compromise (stuff that happens before trial inc. negotiations); must take all necessary steps to correct misleading info
- When M became aware of cancer diagnosis and implications, the statement became incorrect had he should have, at that stage (ASAP) corrected the now false statement – should have recalculated quantum for damages
- He got a \$25,000 fine (lightened because made attempt to seek correct position)

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## Other Duties (rr 6, 24, 25, 26, 28, 34)

### Undertakings

**ASCR 6.1:** A solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, unless released by the recipient or by a court of competent jurisdiction.

- Extends to oral and written undertakings, whether or not the word 'undertake' is used.
- Extends to personal undertakings of the solicitor ('I will') and representational undertakings ('my client will').
- **KEY:** a solicitor will be held personally liable for a breach of an undertaking by themselves or their client unless personal liability is expressly disclaimed in the undertaking.
  - Consequences of a breach may be an adverse costs order or disciplinary sanction.
- **Authority:** solicitors should have their client's express irrevocable authority to give the undertaking on the client's behalf. This should be in writing (although not mandatory). An undertaking given without authority is unenforceable.

## Integrity of Evidence – Coaching Witnesses

**ASCR 24.1 (COACHING WITNESSES):** A solicitor must not:

- 24.1.1 Advise a witness to give false/misleading evidence nor condone another person doing so; or
- 24.1.2 Coach a witness.

**ASCR 24.2 (ALLOWED COACHING):** A solicitor will not have breached rule 24.1 by:

- 24.2.1 Expressing a general admonition to tell the truth;
  - 24.2.2 Questioning and testing in conference the version of evidence to be given by a prospective witness;
  - 24.2.3 Drawing witnesses attention to inconsistencies with evidence, short of encouraging witness to give evidence different to what they believe to be true.
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## Two Witnesses Together

**ASCR 25.1:** Solicitor must not confer with one or more lay witnesses (including party or client) at the same time:

- 25.1.1 about issue which may be contentious at a hearing; or
  - 25.1.2 where conferral could affect evidence given by those parties, unless solicitor believes on reasonable grounds that special circumstances require such conference.
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## Communication with Witness under Cross-Examination

**ASCR 26.1:** A solicitor must not confer with any witness (including a party or client) called by the solicitor on any matter related to the proceedings while that witness remains under cross-examination UNLESS:

- 26.1.1 The cross-examiner consents; or
  - 26.1.2 The solicitor:
    - (i) reasonably believes special circumstances exist (e.g. delinquent client who has lied, but should get consent of cross-examiner, being careful not to disclose confidential info); and
    - (ii) has, if possible, informed the cross-examiner before; or
    - (iii) otherwise does inform asap.
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## No Public Comment

**ASCR 28.1:** A solicitor must not publish or take steps to, any material concerning current proceedings which may prejudice fair trial or the admin of justice.

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## Dealing with Other Persons (Prohibited Tactics)

**ASCR 34.1:** A solicitor must not in any action or communication associated with representing a client:

- 34.1.1 make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person;
- 34.1.2 threaten the institution of criminal or disciplinary proceedings against the other person if a civil liability to the solicitor's client is not satisfied; or
- 34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.
  - o It is permissible to take advantage of a solicitor's own skill or experience over the opposing solicitor. It may, in fact, be a breach of the solicitor's duty to act in their client's best interests (r 4) to not put their client's case as robustly as possible.

**ASCR 21.4:** Solicitor must not cross-examine so as to suggest criminality, fraud or serious misconduct unless there are reasonable grounds for believing there is a proper basis for the allegation.

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