

Admission to practice

To be admitted, must comply with requirements of Part 2.2 of Uniform law and Legal Profession Uniform Law Admission Rules 2015.

Admission necessary for administration of justice and to protect consumers of legal services.

Uniform law Part 2.2 - Two limbs:

- Appropriate academic qualifications and practical legal training, and;
- They are fit and proper persons

s16-17 - Three requirements:

- Must be 18 yo
- Must have approved academic qualifications
- Must have completed approved practical legal training

S19 - Must apply to Legal Admission Board for compliance certificate stating that person has fulfilled the above criteria.

Must either do supervised legal training (12 month period supervised, 220 performance criteria) or Practical Legal training (through approved provider).

Character

S16 - Person not related to person must give evidence of character

Character requirements - good fame and character/fit and proper person

- Entrusted with affairs of the public
- Issues with past behaviour used to predict future conduct
- Good fame and character is a negative test - criminal history, dishonesty, political activity

Duty of disclosure - applicants required to disclose matters that are relevant (i.e. Unfavourable) to their good fame and character - **admission rule 17**.

- E.g. Criminal conduct, IVO, infringements, making false stat dec, tac offences, social security offences, etc.
 - **Re Davis** - Mr Davis disbarred from NSW for failing to disclose conviction for breaking and entering recorded 11 years before his application to join the bar. Court found that lack of honesty meant he was not a fit and proper person.
 - **Re Hampton** - Applicant failed to disclose disciplinary finding of inappropriate conduct in his previous employment. Court held lack of honesty as well as past behaviour showing lack of professional judgment.
 - **Re application of Del Castillo** - In application to be admitted in ACT failed to disclose being acquitted of murder (despite lying to police and lawyer). Applicant claimed he received legal advice that he did not need to disclose as he was acquitted. ACT Court refused application. Applied again years later and court was agreeable to claim that his behaviour was out of character because of stress of murder allegations.
- Academic misconduct - **r10(1)(d)** require disclosure of findings in relation to disciplinary proceedings in tertiary institution

Duties to client

Lawyers have fiduciary relationship with clients.

Fiduciary duty of loyalty

Relationship between lawyer and client is fiduciary in nature. Without consent, lawyer cannot:

- profit from relationship without consent from client.
- place themselves in position where there may be conflict of interest

Must therefore maintain confidentiality of information, account for money held on trust for client.

Cannot act against former client where lawyer has relevant confidential information about the client from earlier retainer that could be used against them.

Accepting clients

Solicitors not obliged to act for any client unless they wish
Barristers subject to cab-rank rule

Identifying clients

Must identify client from outset to avoid conflicts of interest and ensure retainer is correct.

Interviewing clients with special needs

Disability = condition, disease, or illness resulting in some kind of limitation or impairment of a person's functional ability when compared to a person without a disability.

Legal competence and cognitive capacity

Some disabilities can affect how lawyer deals with client, obtains instructions, provides advice.

Disability could have significant impact on comprehension

Statutory obligations

1. Duty to obey the law
2. Duty to the court
3. Duty to the client
4. Duty to others

Solicitors Conduct Rules 2015 - r3.1 Solicitor's duty to the court and administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

R4.1.1 - must act in best interests of client

R4.1.2 - be honest and courteous

R4.1.3 - deliver services competently, diligently, and promptly

R4.1.4 - avoid compromise to integrity and professional independence

R7 – Must communicate advice clearly and in timely manner. Must provide alternatives

R8 – Must follow client instructions

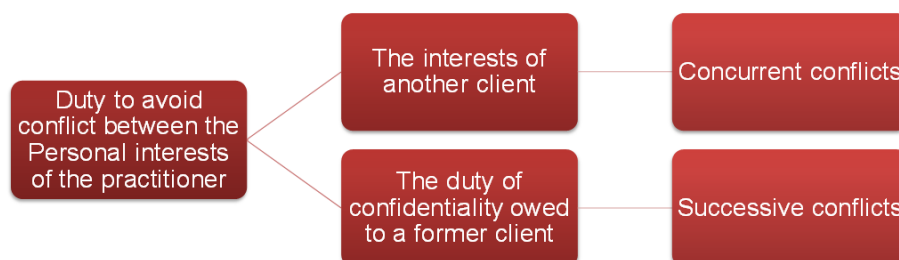
R9 – Confidentiality. See below, above Client legal privilege

Avoiding conflicts of interest

R10-11.

Conflict of interest = attempting to serve two or more interests which aren't compatible.

Fiduciary duty to avoid conflict between the interests of the client and personal interests of practitioner, and with interests of another client.



E.g. Receiving secret profits, transactions with client outside business rship, borrowing from client, lending to client, transactions with former clients.

Client legal privilege

Privilege subject to **dominant purpose test**:

- Confidential communication that was made for the **dominant purpose** of obtaining legal advice, or for use in current or anticipated litigation - **Esso v Commissioner of Taxation**.

Privilege does not end with retainer.

All privileged information is confidential, but not all confidential info is privileged.

Confidential or privileged info may be revealed if the law would probably compel its disclosure, or if communication is necessary to avoid commission of serious criminal offence.

- E.g. Public interest - **R v Bell** – facilitating criminal or fraudulent activities
 - Public interest in confidentiality must be outweighed by other public interests.
- Client may authorise disclosure – **s122 evidence act**.
- Privilege can be lost if client acting in a way that is inconsistent with exercise of privilege

S118 Evidence Act – Evidence is not to be adduced if the court finds it would result in disclosure of confidential communication between client and lawyer.

What communications can be privileged?

- Copies, translations, and modifications of non-privileged documents in some cases
- Attachments will only attract privilege if they satisfy 'dominant purpose' test independently
- Client's identity is not privileged
- Trust account records are not communications, so not usually privileged

Whistleblowing

No authority yet on whether lawyers have a positive duty to disclose.

- Courts may order lawyer to disclose something as a result of an application
- Where privilege does not apply, there may be a duty to disclose to police, regulator, court, etc.
- **Public Interest Disclosure Act 2013 (Cth)** – To encourage **public officials** (including govt lawyers) to report suspected wrongdoing in public sector.
 - Gives protection to public officials who disclose suspected illegal conduct, corruption, abuses of public trust, deception in scientific research, wastage of public money, danger to health and safety, etc.

Duty to the Court

Conduct Rule 3.1 – 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.

Rondel v Worsley [1969] - as an officer of the court concerned in the administration of justice, a lawyer has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client’s wishes or with what the client thinks are his personal interests. Counsel must not mislead the court.

Categories of duties to the Court

- Efficiency and expeditious conduct (not wasting court’s time)
- Candour (honesty/ frankness)
- Not to interfere with the administration of justice
- No abuse of process

Duties

- **Rule 17** – duty to be independent and avoid personal bias
- **Rule 18** – duty to behave with a level of formality before the court (not to give impression of familiarity or favour with court)
- **Rule 19** – Duty to be frank and honest with court
- **Rule 20** – Delinquent of guilty clients – must either inform client court needs to be informed or refuse to act
- **Rule 21** – Responsible use of court process and privilege
- **Rule 24 – 27** – Duty to the integrity of evidence
- **Rule 28** – duty to not make public comments during the course of proceedings
- **Rule 29** – prosecutors’ duties

Breach of duties

- The Court has an inherent or (in the case of lower courts) implied jurisdiction over officers, and can restrain lawyers from acting if a ‘fair-minded reasonably informed person’ would find it to be ‘subversive to the proper administration of justice’.

Words or actions which interfere with the administration of justice or disregard the court’s authority can lead to severe consequences including findings of contempt or miscarriages of justice.

- **A-G for Qld v Lovitt [2003]** – lawyer overheard calling judge a ‘cretin’ during proceeding

Wasting the court’s time

- Proper administration of justice depends on lawyers exercising independent judgment in conducting and managing cases. However, you do not need to slavishly follow instruction of clients. Do not make arguments that are not arguable or ‘reasonably open’ as you may be find yourself sanctioned for wasting the courts time.
- **Giannarelli v Wraith (1988)** – Counsel must have eye not only to success, but to speedy and efficient administration of justice
- **Rule 17.2** – Disregarding instructions in some respects will not constitute breach of duty to client if done to further efficient administration of justice

Civil and Disciplinary Complaints

Purpose of professional discipline

There are multiple purposes of professional discipline:

- to remove those who are not 'fit and proper' to practise from the profession for public protection (punishment is not the principal aim);
- to deter other lawyers from similar misconduct; and
- to maintain the reputation of the legal profession (this may justify harsh measures)

The issues with too much focus on professional discipline:

- There may be other (potentially more effective) methods of protecting the public;
- Unreasonable public perception;
- Disciplinary proceedings are publicly funded and expensive (although costs may sometimes be recovered);
- May suggest lawyers who are not disciplined are 'paragons of virtue';
- Scope of personal misconduct in contrast to professional misconduct.

Consumer matters

- **Uniform Law s269** – complaints about a lawyer or law practice that is deemed by the local regulatory authority as matter that should be resolved by the exercise of functions related to consumer matters.
- Arguably different from disciplinary matters
- A consumer matter may be about 'costs' – **s269(2) of Uniform Law**
- **S291** – costs disputes can be dealt with by the LSC in the same way as other consumer disputes, if the total of the bill is less than \$100,000
 - **S273** – or the disputed amount is not greater than \$10,000 -

Disciplinary matters

- Concerns conduct that is, the disreputable actions of lawyers as individuals (**Part 5.4 of the UL**)
- **Uniform Law s270** – complaints about lawyers or firms and their conduct which if the conduct concerned were established, would amount to unsatisfactory professional conduct or professional misconduct.
- The role of the Legal Services Commissioner is to oversee implementation of the dispute resolution and professional discipline elements of the Legal Profession Uniform Law

Professional misconduct

Is a common law concept

- **Allinson v General Council of Medical Education and Registration [1894]** – Lopes J "...that which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency"
- **Uniform Law s297** – professional misconduct includes:
 - 1a) Unsatisfactory conduct of a lawyer that includes substantial or consistent failure to reach or maintain reasonable standard of competence and diligence

- illness/ addiction/ stressors

LSC v Brott 2011

- Facts: Not acting on instructions. Pattern of offences spanning 1985- 2008.
- Court held professional misconduct confirmed due to the extended period of behaviour. Struck off and prohibited from re-applying for 8 years

LSC v Turner 2012

- Facts: barrister failed to lodge tax return and became insolvent.
- Held: VCAT issued a fine and allowed Turner to continue practicing
- Mitigating factors: psychological state, remorse, age, rehabilitation, personal situation, commenced rectifying tax issue

LSC v Sampson 2013

- Facts: made false representations by preparing misleading documents (breach of **Rule 28.1**)
- Held to have committed professional misconduct. Ordered to obtain two additional points of CPD points in area of ethics and professional responsibility

Misconduct in Common Law

The common law recognises three categories of breaches of professional standards:

- Serious breaches (**Allinson v General Council of Medical Education and Registration**)
- Isolated or less serious breaches of professional conduct rules
- Breaches of etiquette or rules as between practitioners

Categories of CL misconduct

Most categories have intentional elements involving issues of integrity

- Sexual misconduct
- Gross neglect or delay
- Trust account irregularities
- Deliberate lying and other dishonesty
- Failure to supervise employees/ lack of vigilance of partners' activities
- Committing crimes
- Gross overcharging

Trust account irregularities

Fraudulent misappropriation of client funds is also professional misconduct as common law

- Usually results in disbarment/ cancellation of practicing certificate
- **UL s154** – lawyers are required by law to other lawyers for trust irregularities
- A 'technical' breach of trust account requirements involving no dishonesty may still amount to unsatisfactory professional conduct

Re a Practitioner (1982)

- Court held that whenever a client's money is deliberately used for a purpose other than the purpose for which the client entrusts it to the practitioner, there is an act of dishonesty. Court has a duty to vindicate the inviolability of the trust imposed on a practitioner