

## Topic 2: Overview of LAWYER'S RESPONSIBILITIES: Duty to Obey the Law

### Hierarchy of Duties:



1. Duty to Obey the Law
2. Duty to the Court
3. Duty to the Client
4. Duty to others

### Duty to Obey the law

- The most important, paramount, and obvious duty owed by lawyers is **non-negotiable fidelity to the law**. It informs all other categories of duty.
  - Respect for the rule of law is **at the heart of the lawyer's duties** to the court, clients and third parties and gives substance to what it means to be a 'good lawyer'.
- **HOWEVER**, it is one of the most **difficult ethical duties to perform**
  - There is often commercial pressure to 'sail to close to the line' to serve a C's interests – i.e. taking advantage of ambiguities or a willingness to overlook dubious conduct

### 1. Duty to avoid unlawful conduct as a lawyer ([ASCR 5](#); [BCR 8](#); [Sampson](#)):

- This duty exists while both acting for a client ([Pearce](#)) **AND** in their personal life
- 'Unlawful conduct' includes conduct that:
  - a) **Is dishonest, disreputable or illegal** ([ASCR 5](#); [BCR 8\(a\)](#); [Sampson-dishonesty](#))

#### ACCC v Sampson:

**FACTS:** Solicitor (Sampson) sent thousands of debt collection notices for late fees for returning movies. Notices stated the video store client was **entitled to certain amount of solicitor's costs**, if legal action was taken to recover the **debt, the customer would need to pay additional legal costs** and the notice **looked like a court document** (gave impression could be filed at court, no solicitor's letterhead, only very tiny font read 'this is not a document produced by the court', and that judgment could be made without a formal court order and solicitors could enforce any judgment themselves).

#### **HELD:**

- Solicitor guilty of engaging in **misleading and deceptive conduct**, contravening s 51 Trade Practices Act 1974 (Cth).
- The court found that the following representations by Sampson were misleading and deceptive: That the video store was entitled to recover solicitor's costs (*can't claim that fees are owed as that is the decision for the court and there's no contract between a solicitor and recipient of the letter*), that the customer would incur additional costs of ANY legal action (*if unsuccessful the video store could not recover legal costs and even if successful, a court wouldn't order legal costs for recovery of a small debt unless there were special circumstances*) and that judgment could be obtained without a court order unless the debt was paid in full
- Had to public several corrective notices in newspapers and industry papers, undertake more training and pay costs of 30K for running the action.

#### LSC v Sampson:

**FACTS:** LSC then brought a case alleging that the notices were untrue, misleading and intimidating and breached conduct rule 28 (now rule 34) alleging professional misconduct in relating to wording of notices.

#### **HELD:**

- Conduct was systematic and repeated, and seriously damaged public confidence in the profession indicating she was not a fit and proper person to practice.
- Considered mitigating factors of health problems, dispute with partner in the firm and adverse consequences of VCAT and Fed Court findings.
- Received a reprimand for her professional misconduct and ordered to further undertake ethics and professional responsibility training for 2 years and to pay half the LSC's costs - PC not suspended though

- b) Might bring the profession into disrepute ([ASCR 5.1.2](#); [BCR 8\(c\)](#); [Re B](#))**
- a. [S] must comply with the conduct rules ([ASCR 4.1.5](#))
  - b. [S] must be honest and courteous in all legal dealings ([ASCR 4.1.2](#))
- c) Prejudices or corrupts the administration of justice ([ASCR 5.1.1](#); [BCR 8\(b\)](#))**
- a. [S] must avoid any compromise to their integrity and professional independence ([ASCR 4.1.4](#))
  - b. [L] must not falsely adduce evidence – includes encouraging perjury or coaching a witness
- d) Is likely to diminish the public confidence in the legal system ([ASCR 5.1.1](#); [BCR 8\(c\)](#))**
- a. [B] must not engage in conduct which constitutes discrimination ([BCR 123\(a\)](#)), sexual harassment ([BCR 123\(b\)](#)) or workplace bullying ([BCR 123\(c\)](#))

## **2. Duty to not assist or condone a client breaking the law ([ASCR 3](#); [Segler](#); [BCR 3\(C\)](#))**

- [Lawyer] must not knowingly assist or advise others to break the law.

### **a) Where [C] is actually breaking the law:**

- Mustn't turn a blind eye to apparent illegality – have a positive duty to question [C].
- Counsel [C] against further breaches.
- Avoid personal involvement as = breaching duty to avoid unlawful conduct AND serious consequences will ensue including:
  - Civil liability
  - Disciplinary sanctions
  - Criminal responsibility
  - Blackmail
- If you believe [C] will disregard your advice and persist in breaking the law:
  - Must advise again of your responsibilities
  - Consider current conduct rule regarding confidentiality
  - If your client persists, terminate your retainer ([Segler](#))
- Not counsel C to destroy evidence
- Not counsel C that they're unlikely to be caught ([Segler](#))

### **b) [C] wants to/implies they are going to break the law:**

- Counsel [C] against unlawful conduct
- Don't seek to induce a breach of the law by clients or other people
  - Do not counsel [C] that they are unlikely to be caught ([Segler](#))
  - Do not advise [C] of ways to achieve unlawful purposes
- Don't instruct your agents to break the law
- If you believe they will disregard your advice and break the law:
  - Advise again of your responsibilities
  - Consider your current conduct rule in relation to confidentiality
  - If your client persists, terminate your retainer ([Segler](#))

### LPCC v Segler:

**FACTS:** District Court in QA upheld earlier decision that a client's building registration should remain cancelled. Segler applied for a stay of that order on behalf of his client. Between application for stay and result of application, Segler advised client he could carry out building projects while unregistered as a builder in breach of Builders Registration Act. LPCC alleged Segler encouraged client to breach Act and he deliberately misled and lied to LPCC about matter.

### **HELD:**

- Guilty of professional misconduct and unsatisfactory professional conduct. Segler ought to have known client would rely on his advice. Segler was fully aware Client was not registered and was not entitled to advise a client to break the law merely because of a belief they will not be prosecuted or because they got away with it in the past. Also, deliberately trying to mislead the LPCC fell sort of the conduct of a reasonable legal practitioner.
- Practising certificate suspended for 3 months + ordered to pay costs. Later struck off role of solicitors (further misconduct).

### **a. EXAMPLE: Illegal Transfer of Money (Common Law):**

- Money transferred to [Lawyer] in suspicious circumstances raising questions about bona fides
- Mustn't turn a blind eye to disclosed or even **apparent** illegality => [L] must question [C]
  - Unsatisfactory explanation = [L] must refuse to handle money
  - Must be that you did not know bona fide about the illegality.
- Financial Transactions Reports Act 1988 (Cth)
  - Reporting obligations on lawyers for transactions > \$10,000
- Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)
  - Reporting requirements where Lawyers advance loans or provide other financial services

### **c) Duty to advise where there is Doubtful Legality (i.e. legality is doubtful, but unclear):**

- Permissible 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, allowing them to make an informed choice
  - If [L] fails to do so, [L] will be exposed to liability for negligent advice.

### R v Pearce (Fraudulent tax advice):

**FACTS:** 2 lawyers marketed a tax scheme to clients. The scheme turned out to be fraudulent however they accepted somebody else's advice that it was okay even though had characteristics of tax avoidance scheme.

### **HELD:**

- Both guilty of conspiracy to defraud and received custodial sentences.
- McKechnie J: *"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**"*

### **Duty to the Court:**

- [Lawyer] owes a paramount duty to the court and the administration of justice (ASCR 3.1; BCR 23) which prevails to the extent of inconsistency with any other duty including the duty to clients (Giannarelli per Mason CJ; Randel per Reid LJ)
  - It is a derivative of the lawyer's duty to the efficient administration of justice (Rondel).
  - Duty to the court and administration of justice always trumps the duty to serve the client's interests (Rondel per Lord Denning; Gianarelli)

- However, where a lawyer is negligent in providing advice for settlement, advocate's immunity will not apply (Attwells)

#### Rondel v Worsley:

**FACTS:** Client/claimant had been tried and convicted of perjury, Client tried to sue barrister for negligence claiming he had not asked all As instructed in cross examination and had not put all evidence before the court

#### **HELD:**

- Barristers are immune from negligence suits for their conduct of a case in court. *“As an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession and to the public, which may and often does lead to conflict with his client’s wishes.”*

#### Giannarelli v Wraith:

**FACTS:** Client had been tried and convicted of perjury, C tried to sue barrister for negligence. Said negligent in apparently failing to object to certain inadmissible evidence tendered by the Crown and asked Barrister to do things that he didn't do.

#### **HELD:**

- Counsel's duty to client is subject to the overriding duty to the court. The course of the litigation depends on counsel exercising independent discretion in the conduct and management of the case – balancing their clients success with the speedy and efficient administration of justice.
- Hence, performance by counsel of the paramount duty to the court could require action in a variety of ways to the possible disadvantage of the client and their instructions.

#### Attwells v Jackson Lalic Lawyers:

#### **HELD:**

- Confirmed the principle of barrister's immunity in Australia.
- Immunity applies to negligent acts and omissions
  - Covers conduct and management of a case 'in court'
  - Applied to 'out of court' work that has 'a functional connection between the advocates work and the judge's decision' – if B gives advice to client out of court and has functional connect = protected.
  - It does not cover advice that results in compromise or settlement.

### 1. Duty of Candour (Disclosure to Court):

#### PRESENTATION OF LAW:

#### a) Lawyer must not deceive the court about the law or legal process:

- Lawyer must not **deceive or knowingly or recklessly mislead** the court (ASCR 19.1; BCR 24; R v S(F) – *lawyer deliberately misquoted a case and did not correct it, held they breached their duty of candour*)
- If Lawyer made misleading statement to court, **must positively take all necessary steps to correct** it as soon as possible after becoming aware (ASCR 19.2; BCR 25)
- In course of a trial in **civil proceedings/trials**, lawyers have a positive duty to alert opponent and if necessary inform the court of the opponent's express mistakes contrary to the true position and is believed by the solicitor to have been made by mistake about evidence or law (ASCR 19.12)

#### b) Lawyer has a duty to assist the court

- [L] must prepare their case properly
- [L] must know the relevant law and legal processes

- Be up to date and check primary sources (not rely on textbooks/secondary sources), research properly and maintain up-to-date knowledge (Copeland v Smith – L incorrectly informed the TJ that there was no authority on the point when in fact there was recently recorded case, whole matter had to be re-heard = waste of resources)
- Must inform the court of any misapprehension by the court as to the effect of an order which the court is making, as soon as [L] becomes aware of the misapprehension (ASCR 19.11; BCR 34).

### c) Lawyer has a duty to disclose relevant law

- Must inform, if court hasn't yet been informed of (ASCR 19.6; BCR 29):
  - Any binding authority
  - If no binding authority, any authority decided by an Australian appellate court
  - Any applicable legislation

That L has reasonable grounds to believe to be directly in point, against the C's case
- Need not inform about matters which render evidence inadmissible if court has ruled inadmissible without calling on defence (ASCR 19.10; BCR 32)
- Any solicitor becoming aware of matters within ASCR r 19.6/BCR 29 must be informed to court until final judgement is given (ASCR 19.8; BCR 31)
- Solicitor need not inform court of matters within ASCR 19.6/BCR 29 at a time when the opponent tells the court that their whole case will be withdrawn/consent to final judgment of the client (ASCR 19.7; BCR 30).

### PRESENTATION OF FACTS:

### d) Lawyer has a duty to not mislead the court about the facts:

- Must not deceive or knowingly or recklessly mislead the court (ASCR 19.1; BCR 24)
  - Includes presenting false or misleading evidence
    - Knowingly submit a false document (Kyle v LPCC)

#### Kyle v LPCC:

**FACTS:** Lawyer had submitted a deed and also pleadings to the court which stated that the deed had been signed by both parties. It hadn't – one was forged and Lawyer found out about this a week before trial. His view was that the correct execution of the deed was irrelevant to the pleadings and it would come out in the trial anyway.

#### **HELD:**

- Lawyer had asserted what he knew was untrue to be true and there was a deliberate and conscious course of action taken which deliberately mislead the court.
- It was immaterial that it might have come out later
- Liable for unprofessional conduct.

- Includes concealing material facts:
  - [Lawyer] who knows or suspects that prosecution is unaware of Client's previous conviction must not ask prosecution witness whether there are previous convictions in hope of negative answer (ASCR 19.10; BCR 33)

- 'Half-truths' (Meek v Fleming)

#### Meek v Fleming:

**FACTS:** Action brought by M against policeman Fleming where he claimed damages for alleged assault and unlawful imprisonment. Writ was issued in 1958, between that time and when trial took place, Fleming had been demoted from Chief Inspector to station sergeant by a disciplinary board. The D's demotion was known to the defense team including the leading Counsel, and deliberate steps taken to ensure court was not informed of Fleming's demotion, which was a result of involvement in deceiving the court – not in police uniform while all others were, addressed as 'Mr', Plaintiffs and Judge not corrected when they referred to Fleming as Chief Inspector + Fleming lied during cross examination. Defendant's contended all this only went to credit, not issues.

**HELD:** Appeal was allowed and decision was overturned

- **Errors by other parties:**
  - [Lawyer] WON'T have made a misleading statement **simply by failing to correct an error** in a statement made to the court by the opponent or any other person ([ASCR 19.3; BCR 51](#)) = not our job to help other with case
- **Delinquent clients:**
  - Duties to correct false evidence by client or witness ([ASCR 20.1; BCR 79](#)) – positive duty to make disclosure to court of a lie in a material particular, falsification of any document, suppression of material evidence or procurement of another person to suppress material evidence; AND refuse to take any further part in the case UNLESS the client authorises the lawyer to inform the court of the lie, falsification etc (*the lawyer can't break the client solicitor confidentiality – must get client approval*)

#### e) (POSITIVE) Duty to correct innocent misstatements:

- [Lawyer] must correct Lawyer **must positively take all necessary steps to correct** any (accidental) misstatements as soon as possible after becoming aware ([ASCR 19.2; BCR 25](#))
- [Lawyer] must correct false affidavits ([Kyle v LPCC](#)) and if submitted, must notify all parties immediately (even though your client is swearing it).
- **EX PARTE APPLICATIONS:** [Lawyer] has a **positive** duty to disclose all matters which are within their knowledge, including contrary facts to their client, in **ex parte**<sup>1</sup> applications ([ASCR 19.4; BCR 27](#))
  - Duty is even stronger because the other party isn't there, basically have to present both sides of argument
  - Solicitor/Barrister who has knowledge of matters in rule 19.4/27, must seek instructions for the waiver of legal privilege to disclose those matters under rule 19.4/27.
    - If can't, must tell client of client's possible responsibility to authorise such disclosure and possible consequences of not doing so [ASCR 19.5/BCR 28\(b\)\(i\)a](#); **AND**
      - **Solicitor** must inform the court that they can't assure that all matters have been disclosed to the court ([ASCR 19.5](#)); **OR**
      - **Barrister** must refuse to appear on the application ([BCR 28\(b\)\(i\)](#))
- In course of a trial in **civil trials or proceedings:**
  - In course of a trial in civil proceedings/trials, lawyers have a positive duty to alert opponent and if necessary inform the court of the opponent's express mistakes contrary to the true position and is believed by the solicitor to have been made by mistake about evidence or law ([ASCR 19.12; BR 26](#))
  - In course of a trial in civil proceedings/trials, lawyers have a duty not to take unfair advantage of mistakes/obvious errors of another solicitor/other person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact ([ASCR 30](#))

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<sup>1</sup> Ex parte applications request court deal with matter immediately (granted in matters of urgency (family law), where you can't find the other party or where you have grounds to proceed immediately) and with no notice to the other party.

