

### Suitability

<i>Re B [1981] 2 NSWLR 372</i>	
Facts	<ul style="list-style-type: none"><li>-Wendy Bacon was a well-known political activist and journalist</li><li>-Between 1970 and 1981, Bacon participated in a string of activist causes including:<ul style="list-style-type: none"><li>-Repeal of pornography laws;</li><li>-Maintenance of the residential amenity in the Rocks area of Sydney</li><li>-Whitlam's dismissal;</li><li>-The Export of uranium;</li><li>-The treatment of prisoners (especially female prisoners in jail);</li><li>-Police corruption; and</li><li>-Fairly restrictive censorship laws</li></ul></li><li>-Bacon had ten convictions, but none related to dishonesty</li><li>-Bacon lied about a bail application and the origin of where the money was coming from</li></ul>
Issue	-Were Bacon's actions and attitudes incompatible with admission?
Held	<ul style="list-style-type: none"><li>-Actions – no</li><li>-Dishonesty and attitudes – yes</li></ul>
Rationale	<ul style="list-style-type: none"><li>-A particular event surrounding her willingness to lie about a bail application by a friend of hers, was convincing to the court in relation to the issue of honesty</li><li>-Bacon was very candid about all this activity, and much else that was not the result of any prosecution, but was still denied admission</li><li>-The Court found that her claim that her previous attitudes had changed was in essence only partly true, and that she remained prepared to break the law if she thought the cause was worthy enough</li></ul>
KLP	-Authority for the notion that, no matter how worthy a cause, breach of the duty of candour and admission to practice are incompatible

### Dishonesty

<i>Re Davis (1947) 75 CLR 409</i>	
Facts	<ul style="list-style-type: none"><li>-Davis had convictions from 1934 for breaking, entering and stealing</li><li>-In 1946 Davis was admitted on papers which made no mention of the convictions</li><li>-Davis was disbarred after the convictions were discovered and he then appealed to the High Court</li></ul>
Issue	-Was the crime incompatible with admission?
Held	-Yes
Rationale	<p><u>Dixon J:</u></p> <ul style="list-style-type: none"><li>-A conviction for house breaking and stealing is the sort of crime of dishonesty which is incompatible with admission</li><li>-‘The Bar is no ordinary profession or occupation. The duties and privileges of advocacy are such that for their proper exercise and effective performance, counsel must command the personal confidence, not only of law and professional clients but of other members of the Bar and Judges’</li></ul> <p><u>On the Importance of Candour:</u></p> <ul style="list-style-type: none"><li>-‘But a prerequisite, in any case, would be a complete realization by the party concerned of his obligation of candour to the court in which he desired to serve as an agent of justice. The fulfilment of that obligation of candour with its attendant risks proved too painful for the appellant, and when he applied to the Board for his certificate he withheld the fact that he had been convicted’</li></ul>
KLP	-Theft, breaking and entering is an example of a dishonest crime

### Duty to Disclose Material Information

<i>LSC v Winning [2008] LPT 13</i>	
Facts	-Winning, a solicitor made derogatory comments about a Crown prosecutor in a 'private' conversation with the barrister he was instructing, but spoke sufficiently loudly that court staff heard
Issue	-Was this professional misconduct?
Held	-Yes
Rationale	-This was unsatisfactory professional conduct

### Lawyer/Client Conflict

<i>O'Reilly v Law Society of NSW (1988) 24 NSWLR 204</i>	
Facts	-This was an appeal regarding a solicitor who had been struck off the Roll of solicitors -The misconduct alleged involved: <ul style="list-style-type: none"><li>-Wrongful intermingling of his affairs, and those of his companies, with the affairs of his clients and a want of attention to the stringent duties imposed in such circumstances upon a solicitor;</li><li>-The making of false statements to the Law Society and to the Statutory Committee;</li><li>-Touting for business</li></ul>
Issue	-Was the appeal successful?
Held	-No
Rationale	<u>Just and Fair Professional Remuneration</u> -‘A solicitor shall not, in any way whatever, in respect of the subject of any transactions in the relations between him and his client, make gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled’  <u>Lawyer Client Financial Dealings (Kirby J)</u> -Clients trust solicitors to provide them with neutral and beneficial advice -If it became common, or even regularly the case, that solicitors made undisclosed private gains, directly or indirectly, from finance companies or other sources with which they were associated, the faith of the community in the integrity and trustworthiness of solicitors would be seriously shaken -That would affect adversely honourable members of the profession. It would reflect adversely upon the profession's reputation for integrity. It will therefore not be tolerated by the court -Where a solicitor (personally or through an associated company) enters a transaction of advantage (directly or indirectly) to himself, with a client or former client who does, or may, rely upon him for advice, the solicitor bears a heavy burden to establish that the client has given his fully informed consent to the transaction -Whether a solicitor owes to a former client a duty to make full disclosure, and to advise that the former client obtain independent legal advice, before entering a transaction with him is a question of degree depending on all the circumstances, analogous to the question whether a solicitor, having acted for one side in litigation, can properly act for the other
KLP	-Only just and fair professional remuneration -Outlines the rule and requirement for fully informed consent -Burden of proof on the lawyer

## Real Risk of Disclosure

<i>Village Roadshow v Blake Dawson Waldron [2003] VSC 505</i>	
Facts	<ul style="list-style-type: none"> <li>-Involved an application to restrain the law firm BDW from acting for shareholders who objected to a proposed share buyback by Village Roadshow</li> <li>-It was argued that BDW's representation was in direct conflict with the firm's previous involvement in preparing the trust deed and other documents for Permanent Trustee Company Limited (PTCL), the trustee of the trust deed</li> <li>-An application was made to restrain BDW</li> </ul>
Issue	-Was there a real risk of disclosure?
Held	-Yes
Rationale	-If there is a real risk of disclosure, an injunction will be available

## Family Law Context

<i>McMillan (2000) 26 Fam LR 653</i>	
Facts	-A non-legally qualified law clerk who had previously been employed by the husband's solicitors, and who had in the course of that employment worked on the husband's case, moved to work as a secretary to the wife's solicitor
Issue	-Was there power to restrain the clerk?
Held	-Yes
Rationale	<ul style="list-style-type: none"> <li>-It does not need to be shown that real mischief and real prejudice will follow if the solicitor is allowed to continue to act. It is sufficient if a party swears that he or she has conveyed confidential information to his/her solicitors and he or she believes that information may be used to his/her disadvantage in the proceedings; there only needs to be a theoretical risk of prejudice, there need not be proof of prejudice</li> <li>-It was therefore sufficient in the present case that the husband swore in his affidavit that he had spoken to the employee law clerk by telephone and provided him with instructions as to how he wished his matter to be conducted and the position to be put to the wife</li> <li>-There was at least the theoretical risk that the confidential information given by the husband to the clerk may be disclosed, even inadvertently</li> <li>-It made no difference that the employee was not a qualified lawyer</li> </ul>
KLP	-A court has power to make orders restraining a firm of solicitors from continuing to act for one of the parties to proceedings if it would be likely that those solicitors may have confidential information relating to the other party to the proceedings arising out of a former relationship of solicitor and client with that party which may be used to the advantage of the present client or to the disadvantage of the former client in the current proceedings

<i>Thevenaz (1986) FLC 91-748</i>	
Facts	<ul style="list-style-type: none"> <li>-The solicitor for the wife in an application for a settlement of property, had been a partner in a firm which acted for the parties and had possession of their files, including files relating to matters the subject of the application</li> <li>-The previous matters had been conducted by a solicitor who was no longer associated with the firm</li> <li>-The husband objected to the wife's representation</li> </ul>
Issue	-Should the wife be restrained?
Held	-Yes
Rationale	-The solicitor could not appear for the wife, as he was under a duty to put at his client's disposal his knowledge, which would include the contents of the files in his possession, and there was then a risk that justice might not appear to be done

### Specific Responsibilities in Civil Matters

#### Negotiation and Alternative Dispute Resolution

<i>Legal Services Commissioner v Mullins [2006] QLPT 12</i>	
Facts	<ul style="list-style-type: none"><li>-Concerned disciplinary proceedings in Queensland against a barrister who had acted on his client's motor vehicle compensation claim</li><li>-In pursuing the claim, the client's solicitor provided a report on his future needs to the defendant's insurer</li><li>-Less than three weeks before the scheduled mediation the client discovered he had cancer and was to receive chemotherapy treatment</li><li>-The barrister initially thought these facts needed to be disclosed to the insurer before the mediation and the mediation was likely to be adjourned</li><li>-The client instructed his lawyers not to reveal these facts unless he was legally obliged to do so and he wanted the mediation to proceed</li><li>-After further consideration the barrister came to the view they were not obliged to disclose the illness at the mediation so long as they did not make positive assertions to mislead the insurer and its lawyers about the client's life expectancy</li><li>-The mediation conference proceeded with no mention of the client's cancer</li><li>-The barrister's outline of argument referred to the damages reports served earlier that assumed a normal life expectancy less 20%</li></ul>
Issue	-Was there professional misconduct?
Held	-Yes
Rationale	-The Tribunal found the barrister intentionally deceived the insurer and its lawyers about the accuracy of the assumption regarding the client's life expectancy
KLP	-Victorian practitioners need to be aware that if these facts were transposed to a mediation subject to the Civil Procedure Act, the relevant practitioners would be at risk of breaching their overarching obligations, particularly the obligations to act honestly at all times and not to engage in misleading and deceptive conduct

### Specific Responsibilities in Criminal Matters

#### General Duties

<i>Giannarelli v Wraith (1988) 165 CLR 543</i>	
Facts	<ul style="list-style-type: none"><li>-Giannarelli was convicted of perjury as a result of evidence given at a Royal Commission</li><li>-They sought to sue their barrister, Wraith for negligence, seeking damages</li></ul>
Rationale	<p><u>Mason J:</u></p> <ul style="list-style-type: none"><li>-The peculiar feature of counsel's responsibility is that he owes a duty to the court as well as to his client</li><li>-His duty to his client is subject to his overriding duty to the court</li><li>-The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client</li><li>-Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case</li><li>-And, if he notes an irregularity in the conduct of a criminal trial, he must take the point so that it can be remedied, instead of keeping the point up his sleeve and using it as a ground for appeal</li><li>-The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary</li></ul>

## Topic 11: Regulation of Lawyers: Complaints, Disciplinary Proceedings and Sanctions

### Personal and Professional Misconduct

<i>NSW Bar Association v Cummins [2001] NSWCA 284</i>	
Facts	-The practitioner was a barrister for 38 years who did not lodge any tax returns relating to his professional practice, or for any other personal income -The barrister consented to the removal of his name from the roll of practitioners
Issue	-Was this misconduct?
Held	-Yes
Rationale	-The barrister's actions were such as to bring the entire legal profession into disrepute. The barrister's complete disregard of his legal and civic obligations with respect to the payment of income tax was such that he must be regarded, at the present time, as permanently unfit to practise -The maintenance of public confidence in the legal profession makes it appropriate for the court to make a formal declaration that the practitioner is guilty of professional misconduct
KLP	-Personal conduct may be regarded as professional misconduct if the conduct: -Is closely related to actual practice; or -Manifests the presence of qualities which are incompatible with the conduct of practice, or the absence of qualities which are essential for that purpose

<i>Legal Services Commissioner v Piva (Legal Practice) [2009] VCAT 1200</i>	
Facts	-A solicitor knowingly withheld a document when giving discovery to the Supreme Court -The document held information against the solicitor's case
Issue	-Was this professional misconduct?
Held	-Yes
Rationale	-The solicitor's practising certificate was cancelled -The solicitor was prevented from reapplying before 2011 (2 years) -The solicitor was ordered to pay the LSC's costs

### Sanctions

<i>Legal Services Commissioner v Brott (Legal Practice) [2011] VCAT 110</i>	
Facts	-Brott had four charges against him of instituting proceedings without seeking client instructions
Issue	-Was this professional misconduct?
Held	-Yes
Rationale	-Brott was referred to be struck off the roll of practitioners and ordered not to re-apply for a certificate until 2019 (8 years)

### Dishonesty

<i>Legal Services Commissioner v PFM (Legal Practice) [2013] VCAT 827</i>	
Facts	-PFM provided a forged transcript to their employer and some marks were exaggerated -One of the law firms found out and reported him -There was evidence that he provided false documentation for the investigation -PFM expressed remorse
Issue	-What was the order?
Held	-PFM could not be granted a practising certificate for 7 years

<i>Law Society of NSW v Foreman (1991) 24 NSWLR 238</i>	
Facts	<ul style="list-style-type: none"> <li>-Foreman worked in a law practice with Harding</li> <li>-Harding had breached multiple duties, relating to the handling to trust money, conducting affairs properly and maintaining the requisite level of supervision over the firm's matters</li> <li>-Foreman failed to supervise Harding or look into his breaches</li> </ul>
Issue	-Was this professional misconduct?
Held	-Yes
Rationale	-Foreman was fined \$2,000

### Sexual Misconduct

<i>A Solicitor v Law Soc NSW (2004) 216 CLR 253</i>	
Facts	<ul style="list-style-type: none"> <li>-The appellant, was convicted of four counts of aggravated indecent assault</li> <li>-The appellant was initially sentenced to three months' imprisonment, however following a successful appeal that sentence was quashed</li> <li>-In May 2000, one of the victims made further allegations of a similar nature against the appellant - The appellant denied the allegations</li> <li>-He was later convicted of the further charges and sentenced to two years' imprisonment</li> <li>-On appeal the convictions were quashed</li> <li>-In May 2001 the respondent law society began disciplinary proceedings, seeking a declaration that the appellant was guilty of professional misconduct</li> <li>-The conduct relied upon was that for which he was convicted in February 1998</li> <li>-He failed to disclose the conduct to the law society</li> </ul>
Issue	-Was this professional misconduct?
Held	-Yes
Rationale	<ul style="list-style-type: none"> <li>-The duty of a legal practitioner to be candid in their dealings with their professional association is a professional duty</li> <li>-The breach of this duty amounts to professional misconduct</li> <li>-The appellant's professional obligations to the Law Society of New South Wales required him to disclose facts that were material to the respondent's decision about what, if any, action would be taken against him</li> <li>-The fact that his convictions for aggravated indecent assault were quashed was no excuse</li> </ul>
KLP	<ul style="list-style-type: none"> <li>-The term "professional misconduct" should not be interpreted as being limited to misconduct by a professional person</li> <li>-The fact that a person engages in misconduct in the course of professional practice does not necessarily mean that it amounts to professional misconduct</li> <li>-Equally, the fact that the misconduct under consideration was not engaged in directly in the course of professional practice is not decisive; the misconduct may be so connected to such practice as to amount to professional misconduct</li> </ul>

### Mental Illness

<i>Legal Services Commissioner v Johnson (Legal Practice) [2012] VCAT 1731</i>	
Facts	<ul style="list-style-type: none"> <li>-Johnson had committed acts amounting to professional misconduct</li> <li>-He claimed that at the time, he was involved in charged family law matters and suffered mental health issues</li> </ul>
Issue	-Was this professional misconduct?
Held	-Yes, but the mental health impairment was a factor to be considered
Rationale	<ul style="list-style-type: none"> <li>-His practising certificate was cancelled and he was barred from re-applying for two and a half years</li> <li>-He was not struck off the rolls as this suggests he is permanently unfit to practice (mental illness was a mitigating factor)</li> </ul>