Week 1 – Life of a Lawyer

Readings / References

1. Chapter 1 of text book
2. QLS Guidance Statement No. 1 - Undertakings

Lecture

- Lawyers are here to make a case (put forward your client's best case), not decide a case – that is up to the judge.
- It is about shaking up the facts and sorting out what is the relevant information so you can apply the law.
- Special Counsel is sort of a hybrid of barrister / solicitor – they review government law and decisions etc.
- We can start preparing an online portfolio now if we wish as we can start a unit about professional portfolios down the track.

Undertakings by Lawyers

- An undertaking is a promise by a solicitor to the Court, another practitioner, a client or a third party that the solicitor will do or not do something and is given in the course of legal practice.
- Undertakings can be made to each other and to the Court and may be express or implied and may be given orally or in writing.
- They can be given personally or by a member of staff however it is not recommended that employees give undertakings – it should be done by a principal.
- An undertaking will bind the principal if the employee has the authority to give the undertaking on the principal or firm's behalf.
- Undertakings should not be sought that would require the cooperation of a third party who is not a party to the undertaking.
- Undertakings can be given on behalf of a client however you need to be careful of the wording e.g. "I undertake.."
- Once a solicitor's personal undertaking is given
- A solicitor who provides an undertaking must ensure the timely and effective performance of an undertaking unless released by the recipience or by a Court of competent jurisdiction.
- A solicitor is never obliged to give nor accept an undertaking, and they should only be given if they are able to ensure fulfillment and have control in relation to the subject matter.
- Undertakings should be reserved for situations where the other party or their solicitor properly requires an enforceable assurance that the solicitor or firm will act or refrain from acting in an important matter.
- Undertakings do not need a specific form to be binding.

- The word undertaking separates a promise and an undertaking.
- The Law Institute of Victoria has recommended to its members using the phrase "I am instructed that my client undertakes..."

Consequences of breaching Undertakings:

- Undertakings must be observed scrupulously regardless of whether the undertaking was proffered in error or oversight, irrespective of any change in circumstances, no matter how radical, and irrespective of any hardship to the legal practitioner.
- Subject to censure (if formal expression of severe disapproval) if any issues rise.
- The Court will ensure undertakings are complied with from a disciplinary aspect.
- Breaches have been characterised as unsatisfactory professional conduct or professional misconduct, depending on whether the breach is deliberate, reckless or unintentional and whether they breach has been mitigated by appropriate remedial action.
- The breach of an undertaking to the Court is contempt and can lead to contempt proceedings.
- A breach of undertaking can lead to direct enforcement of the solicitor's obligation pursuant to the inherent jurisdiction of the court, either by an order that it be performed or if this is no longer possible by payment of compensation or civil liability in contract or tort, or disciplinary proceedings.

Courtroom Ethics & Practice

- A barrister must not engage in conduct with is:
    - Dishonest or otherwise discreditable to the barrister;
    - Prejudicial to the administration of justice;
    - Likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the profession into disrepute.
- Conduct towards the Court must be exemplary – never deceive or knowingly or recklessly mislead.
- Correct any misleading statement to the Court as soon as possible after becoming aware.
- Be honourable, candid and trustworthy with your opponent. Alert your opponent of mistaken concession about evidence or law and correct false statements as soon as possible.
- Promote and protect fearlessly and by all proper and lawful means the client's best interests without regard to own interest or to any consequences to barrister or any other person.
- Your first duty is to the Court and second is to the client.
- With respect to the witness, ensure all allegations or suggestions are reasonable justified by the available material, are appropriate for robust advancement of case on merits, and are not made to harass and embarrass.
- Do not question sex crime victims to mislead or confuse, or to unduly annoy, harass, intimidate, offend, oppress, humiliate or be repetitive. This applies to sex crimes witnesses only.
- There is a practice direction regarding technology use in Court – allowed to SMS from the bar table, and silent devices are allowed.

- Direct all remarks to the bench and frame requests or questions to the judge indirectly.
- Politely identify accidental slips of obvious omissions.
- Avoid publicly discussing your client's case, part heard cases and interim hearings.
- It is not your role to "correct" your opponent's skills or conduct.
- After 12 years as a barrister you can apply to become Queens Counsel – Supreme Court judges review as to whether you are of good standing

QLS – An Introduction to the Australian Solicitors Conduct Rules

Fundamental duties of solicitors

- Duty to the Court and administration of justice is paramount (Rule 3.1)
- Do not bring the profession into disrepute (Rule 5.1.2)
- Do not diminish public confidence in the administration of justice (Rule 5.1.1)
- Be honest and courteous (Rule 4.1.2)
- Remain fit and proper to practise law (Rule 5.1)
- Comply with the ASCR and the law (Rule 4.1.5)
- Honour undertakings (Rule 6)
- Act in the best interests of a client

Rule 9 – Confidentiality

- Client's confidential information can only be disclosed if:
    - the client expressly or impliedly authorises disclosure;
    - you are permitted or compelled by law to disclose;
    - in a confidential setting for obtaining advice in connection with your legal or ethical obligations;
    - for the sole purpose of avoiding the probable commission of a serious criminal offence;
    - to prevent imminent serious physical harm to client or another person; or
    - disclosed to your insurer, law practice or associated entity.
- In *Committee v Trowell [2009] WASAT 42* duty of confidence found to extend to:
    - Information about the client that a solicitor learns in the professional relationship;
    - Information which the solicitor would not have had but for the relationship;
    - Information of a confidential nature acquired by the solicitor before the relationship of solicitor and client is established; and
    - Opinions formed by the solicitor about the client's affairs.
- Rationale for the duty means to encourage full and frank disclosure and the reminder of duty to serve a client selflessly.
- Contractual Term: unless the retainer expressly modifies, the implied term embraces all communications made by the client about their affairs, and all information learnt directly or

indirectly about the client in the course of the relationship *Re A Firm of Solicitors* [1992] 1 QB 959, 970.

- Duration and priority of the duty is not brought to an end by the termination of the retainer or death of the client, nor is the duty reduced by a duty owed to another client *Hilton v Barker Booth & Eastwood* [2005] 1 All ER 651.
- Limits and exceptions to the duty of confidence:
    - Sometimes expressed to be absolute;
    - Disclosure may be permitted in a number or circumstances; and
    - Disclosure when permitted should only be to the extend reasonably necessary to accomplish one of the purposes specified in the rule.
- Compared to legal professional privilege:
    - Distinct from confidentiality;
    - Privilege does not depend on a contractual, equitable or professional duty – it rests on ground of public policy;
    - Confidential communications are more extensive than those that are privileged;
    - Premised upon confidentiality;
    - Privileged information is protected from compulsory disclosure unless ousted or waived; and
    - Non-privileged confidential information must yield to compulsion.
- Identity is confidential but not ordinarily privileged: *Z v NSW Crime Commission* (20007) 231 CLR 75, [4]. However an exceptional case – nature of retainer – so intertwined with communications that to disclose identity would be disclosure of the communication – identity may then be privileged: Ibid at [12].
- Rule 30 – another solicitor or another person's error
    - Rule 30.1 – do not take unfair advantage of the obvious error of another, if to do so would obtain for a client a benefit, which has no supportable foundation in law or fact.
    - Where the omission is inadvertent then there is an ethical responsibility upon us to disclose to the other solicitor the error they have made.
    - Our duty to fearlessly represent our client is not unlimited. The client does not have the right in this situation to take unfair advantage of the obvious error to obtain a benefit which has no supportable foundation in law of fact.
    - If confronted by this dilemma we should inform our client of the inadvertent omission and urge our client to provide instructions to us to permit us to reveal to the other solicitor, the mistake. We are permitted only to follow "lawful, proper and competent instructions" (Rule 8.1). We need to counsel our client as to the potential consequences of attempting to take unfair advantage of the inadvertent omission (the potential for indemnity costs in a rectification action and possibly engaging in misleading or deceptive conduct). A client who refuses to provide instructions to permit correction of the obvious error should be informed that we cannot be a party to that behaviour and will need to withdraw from representation (we can terminate the engagement for just cause and on reasonable notice – Rule 13.1.3). Do we need the client's instructions to inform the other solicitor of the drafting error? Rule 9 provides that any information which is confidential to a client and acquired by us

during the client's engagement must not be disclosed unless permitted by the rule. Rule 9.2.1 permits us to disclose confidential client information if "the client expressly or impliedly authorises disclosure". The American Bar Association in Informal Opinion 86-1518 (ABA Committee on Ethics and Professional Responsibility, Informal Op.86-1518 (1986)) has ruled:

    - When the lawyer for A has received for signature from the lawyer for B the final transcription of a contract from which an important provision previously agreed upon has been inadvertently omitted by the lawyer for B, the lawyer for A, unintentionally advantaged, should contact the lawyer for B to correct the error and need not consult A about the error.
    - The best course would be to have a conversation with the client as to the risks of non-disclosure and to obtain express authorisation.
    - If we are forced to withdraw, we are bound by our duty of confidence even after the engagement has been terminated.
    - We cannot permit a client to take advantage of an inadvertent drafting error of the other solicitor. This is consistent with the purpose of contract law, which is reinforced by Rule 30 and our fundamental duties.

- Rule 31 – inadvertent disclosure where material is reasonable suspected to be confidential and known to be disclosed inadvertently:
    - Rule 31.1 – upon receipt the recipient must not use the material; return, destroy or delete material immediately; and notify the send of steps taken to prevent further disclosure.
    - Rule 31.2 – only after review, in whole or in part, the recipient must notify the sender immediately and not review further.
    - Rule 31.3 – and the recipient is instructed by a client to review, the recipient must refuse.

The New Lawyer – chapter 1

- The Office of Parliamentary Counsel is responsible for drafting and publishing the laws of the Commonwealth of Australia. They draft Bills for introduction into the Parliament, and a wide range of subordinate legislation such as regulations and proclamations for Government agencies. They also publish the authorised, up to date version of Commonwealth laws. They also provide other services including training in understanding the legislative process and in drafting legislative and other instruments.

Tutorial – Monday, 11 March

- What's the legal question, is usually expressed as a question.
- Additional marks will typically given in the last section of assessment #1. Show how it applies to you and what you will take on board moving forward.
- Second assessment involves making a problem-solving model, then writing about it – your approach to legal problem solving. Look at the IRAC rule. Work out what your client wants and the best way to deal with your client.
- Not a lot of referencing for assessment #1 as we are just using one case – if you include a quote from the judge ensure you use quotation marks. Refer to what page you include an extract from if you include one. You may need to reference for the admission process.
- No task sheet for assessment #1.

- Australian Guide to Legal Referencing (4th edition) is the referencing system to use.
- Go to the law library to get in the habit.
- Judgements may have short headnote that gives a brief explanation of the case – this will often be a pointer towards the legal question.
- Think about the weaknesses in your own case, not just your own arguments against their case.
- The legal forecast – review website.
- George Pell appeal – two arguments. The first is that the defendant had his opportunity to argue his case and the jury has found him guilty. The other opinion is that the appeal is the end of the legal testing, not the end of the hearing. Note that he was convicted without any corroborative evidence.

Assume nothing, consider the rules, make your connections, find out what is missing.