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Professional Identity

Difference between Barristers and Solicitors

Solicitor	Barrister
<ul style="list-style-type: none"> - Provide legal advice - Only work related to court proceedings immune from negligence - Can refuse clients - Arrange witnesses - Conduct legal research - Brief barristers for complicated cases 	<ul style="list-style-type: none"> - Cab rank rule - Advocate in court - running litigation in court or tribunal - Barristers are sole traders that organise themselves into small groups of offices called chambers - 'Client' is the solicitor

Professionalism

- The 'professional responsibility' framework for legal practitioners is defined by a 'duty matrix' – a concurrent set of duties owed by the legal practitioner to the client, the court and the administration of justice/ rule of law, and to other practitioners.
(LLM - Ch 5)
- Defining attributes of a 'profession' (LLM - Ch 6)
 - Special skill and learning
 - Ethical code of conduct
 - Ethos of altruistic service
 - Autonomy or self-regulation

Law as a Profession or a Business

- Kirby J asserts 'the bottom line is that law is not a business. Never was. Never can be so.' (B & C, 12)
- Hayne J occupies more middle ground – arguing that law is a profession with commercial aspects to its practice (B & C, 12)
- De Jersey CJ urged young practitioners to not obsess upon the, 'unfortunate preoccupation with so called 'billable hours'...[which] can shift the focus from measured professionalism to out and out commercialism.' (Cited in B & C, 12)
- Ethics lost due to profit motive: 'The work of legal professionals that was once characterised by the provision of frank and fearless advice which transcended self-interest and commercial self-advantage has changed' (Bagust, 31)

Duty of Candour and Honesty – Generative AI

<i>Dayal</i> [2024] FedCFamC 2F 1166	<ul style="list-style-type: none"> • A list of authorities was submitted by lawyer Mr. B at a Family Circuit Court hearing. • Four of the cases in the list did not exist. • When asked, Mr B informed the court the list had been prepared from LEAP, a legal AI software package
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	<ul style="list-style-type: none"> • Concern had arisen in relation to the veracity of information provided in the list of authorities, a concern had in turn been raised in relation to the competency and ethics of Mr B. • The court gave Mr B a month to submit a written explanation justifying why he should not be referred to the Victorian Legal Services Board and Commissioner for concerns arising from the authorities he submitted during the hearing • The use of AI to assist in the completion of legal tasks must be subject to the obligations of legal practitioners in the conduct of litigation, including the obligation of candour to the court.
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<i>Valu v Minister for Immigration and Multicultural Affairs (No 2) [2025] FedCFamC2 G 95.</i>	<ul style="list-style-type: none"> • The final hearing was adjourned while the Court noted that the judge and his associates had spent considerable time checking the citations and attempting to find the authorities. • The solicitor used ChatGPT. • The submissions contained 17 non-existent cases, replete with names and citations that appear authentic, and 8 fictional quotes from the AAT decision appealed from. • The Court found that the solicitor's conduct fell short of the standard of competence and diligence expected of the solicitor, as well as failing in his duty to the court not to mislead or deceive, and referred his conduct to the Office of the NSW Legal Services Commissioner for consideration.
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<i>Mata v Avianca Inc.</i> , 678 F.Supp.3d 443 (S.D.N.Y. 2023)	<ul style="list-style-type: none"> • Attorneys of a firm relied on generative AI to prepare legal submissions which were filed referring to non-existent cases • Found to have abandoned their professional responsibilities and sanctioned \$5000
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Supreme Court of NSW, <i>Practice Note SC Gen 23: Use of Generative Artificial Intelligence (Gen AI)</i> , 21 November	<ul style="list-style-type: none"> • Gen AI may include 'hallucinations' or selective, irrelevant or incomplete data for New South Wales or Australia • Lack of adequate safeguards, to preserve the confidentiality, privacy or legal professional privilege that may attach to information or otherwise sensitive material submitted to a public Gen AI chatbot • Gen AI must not be used in generating the content of affidavits, witness statements, character references or other material that is intended to reflect the deponent or witness' evidence and/or opinion, or other material tendered in evidence or used in cross examination
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2024	<ul style="list-style-type: none"> • Gen AI must not be used for the purpose of altering, embellishing, strengthening or diluting or otherwise rephrasing a witness's evidence when expressed in written form.
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Types of Lawyers and their Ethical Dilemmas

Corporate lawyers	<ul style="list-style-type: none"> • Reconciling corporate greed and minimising corporation's accountability and liability at the expense of less powerful eg. tax evasion • Working for unethical companies like Big Tobacco or Big Pharma • Pressure and competition mean accepting clients regardless of the circumstances; whether this is for the greater social good. • Presuming that people who control the firm have the greatest income and authority – a political hierarchy
In-house lawyers	<ul style="list-style-type: none"> • Pender posits how, 'The in-house legal advisor can no longer function as a "mere legal technician" – an advisor narrowly confined to providing mere black letter legal advice. (They) must serve as both legal advisor and steward for ethical culture and governance, incorporating moral considerations – when and where relevant – in corporate legal representation.' (Cited in B & C, 130) • However, this ideological approach is refuted by the lived reality 'If ethical conduct results in loss of the client, in-house counsel becomes unemployed.' (Cited in B & C 129) • May not be required to hold practicing certificates and so not subject to the same ethical framework • Some things may not be in the company's best interests. Be upfront with the client on whether it's an ethical challenge and explain the reality of needing to excuse yourself from acting for them if the position is untenable • Impact on duties owed- fundamental duty to the court and administration of justice, and then to the client. <ul style="list-style-type: none"> ○ No difference between private practitioner and in-house roles- just that in-house act for one client, but they still have the same duties to court and client- affirmed in Waterford v Commonwealth (1987) 163 CLR 54 • Hardies Case Shafron v ASIC [2012] HCA 18 commentators have said 'By designating them (in-house counsel) as corporate officers the High Court has transformed in-house lawyers into gatekeepers responsible for promoting the public interest in corporate compliance with continuous disclosure obligations and prohibitions on misleading conduct' (Michael Legg, Law Society Journal. July 2012) <ul style="list-style-type: none"> ○ 'Lawyers as gatekeepers': sits uneasily with the traditional solicitor-client relationship, even where the solicitor is serving in

	<p>an in-house legal role.</p> <ul style="list-style-type: none"> ○ Need to always maintain legal professionalism and do not place commercial interests above it. ○ Lawyers owe their clients fiduciary duties which require the lawyer to act in the client's best interests, protect confidentiality and avoid conflicts. <ul style="list-style-type: none"> ■ This can become problematic where the corporation's and society's interests diverge. ○ Alternatively, the gatekeeper function can result in more robust and independent legal advice as the lawyer is incentivised to prevent breaches of the law by the corporation. <div style="border: 1px solid black; background-color: #d9ead3; padding: 5px; text-align: center;"> <i>Shafron v ASIC</i> [2012] HCA 18 </div> <ul style="list-style-type: none"> ● Shafron helped James Hardie directors prepare misleading info on the ability to compensate asbestos victims to ASX and failed to advise the company's board, which breached s 180(1) of the Corporations Act 2001 (Cth). ● Shafron attempted to argue that his advice was in the capacity of general counsel and not in the capacity of company secretary ● The High Court held that his dual roles as company secretary and in-house lawyer were indivisible and his obligations to the Corporations Act had to be assessed as a whole. ● Found to have breached his duty of due care and diligence as an 'officer' of the corporation
Family lawyers	<ul style="list-style-type: none"> ● One of most emotive areas of law and as such people do not always act rationally <ul style="list-style-type: none"> ○ emotional state of the client – combined with lack of legal knowledge could lead to professional misconduct with lawyer acting on client's wishes vs clients best interests ● Family lawyers have an expectation to act in the best interests of the child, whilst also fulfilling their client's needs. (Children usually not clients) ● Maintaining professionalism, detachment and objectivity
Government lawyers	<ul style="list-style-type: none"> ● Barristers employed don't need to follow cab rank rule or other private practice rules that normally apply (Dal Pont 2017 p 453) ● Duty to foster public interest as they are custodians of administration of justice and administration of government (Dal Pont 2017 453) ● Model litigant duty- must comply with procedure to minimise cost and delay, assist the court to arrive at a proper result (Dal Pont 2017 454) ● Not allowed to publicly criticise judiciary and the government