

# LAW4309 Lawyers ethics in practice

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## Topic 2: Overview of Lawyer's Responsibilities

### Overview of Duties

Duty to disclosure owed to the Court	Don't abuse court processes
Obeys the law	Conduct cases efficiently



Act zealously for client	Keep information confidential	Act with honesty and candour
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### Hierarchy of Duties

1. Duty to the Law
A [legal practitioner] must avoid to be involved in unlawful conduct as lawyer, and advise client against same (e.g., help client to break the law) and advise client of ways to achieve unlawful purposes.
2. Duty to the Court
A [legal practitioner] has a duty of candour (disclosure to court and being honest), duty to not abuse court processes, duty not to corrupt the administration of justice and duty to conduct cases efficiently and expeditiously.
3. Duty to the Client
<p>A [legal practitioner] has a duty of competence and skill.</p> <ul style="list-style-type: none"> <li>Ask: is your legal knowledge current? CPD: renew practise certificate every year.</li> </ul> <p>A [legal practitioner] has a duty of loyalty and trust.</p> <ul style="list-style-type: none"> <li>Fiduciary duty: no conflict and no profit rules.</li> <li>Avoid conflict of interest.</li> <li>Account for client's money.</li> </ul> <p>A [legal practitioner] has a duty of confidentiality.</p>
4. Duty to the Others
<p>Duties to third parties:</p> <ul style="list-style-type: none"> <li>Contractual duties</li> <li>Undertakings – crucial</li> <li>Confidentiality</li> <li>Avoid negligent misstatements</li> <li>Duties to disappointed beneficiaries</li> <li>Statutory duties such as s18(1) Australian Consumer Law: A person must not, in trade or commerce, engage in conduct that is unconscionable... (“unconscionable conduct”)</li> </ul> <p>Duties to other lawyers:</p> <ul style="list-style-type: none"> <li>Professionalism, honesty and courtesy</li> <li>Duty to preserve personal undertakings</li> <li>Duty not to take unfair advantage of another's error</li> <li>Duties in the context of privilege</li> <li>Duty to correct certain mistakes</li> </ul>

## Fundamental Duties of Solicitors

### Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (ASCR)

<b>ASCR 3</b>  Duty to Court	A solicitor's duty to the court and the administration of justice is paramount and <b><i>prevails</i></b> to the extent of inconsistency with any other duty.
<b>ASCR 4</b>  Ethical issue	<p>4.1 A solicitor <u>must</u> also:</p> <p>4.1.1 <b><i>act in the best interests of a client</i></b> in any matter in which the solicitor represents the client,</p> <p>4.1.2 <b><i>be honest</i></b> and courteous in all dealings in the course of legal practice,</p> <p>4.1.3 deliver legal services <b><i>competently, diligently</i></b> and as <b><i>promptly</i></b> as reasonably possible,</p> <p>4.1.4 avoid any compromise to their integrity and professional independence, and</p> <p>4.1.5 comply with these <b><i>Rules and the law</i></b>.</p>
<b>ASCR 5</b>  Standard of conduct	<p>5.1 A solicitor <u>must not</u> engage in conduct, in the course of legal practice or otherwise, which demonstrates that the solicitor is <b><i>not a fit and proper person</i></b> to practise law, <u>or</u></p> <p>is likely to a material degree to:</p> <ul style="list-style-type: none"> <li>• <b><i>be prejudicial</i></b> to, or diminish the public confidence in, the administration of justice, <u>or</u></li> <li>• <b><i>bring the profession into disrepute</i></b>.</li> </ul>
<b>ASCR 6</b>  Undertaking	<p>6.1 A solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, unless released by the recipient or by a court of competent jurisdiction.</p> <p>6.2 A solicitor must not seek from another solicitor, or that solicitor's employee, associate, or agent, undertakings in respect of a matter, that would require the co-operation of a third party who is not party to the undertaking.</p>

### Cases

LPCC v Brickhill (2013)	Breach of duty to court – legal practitioner told their client to “ <b>destroy computer record</b> , transfer properties to minimise the risk of attention and avoid seizure” and lied about telephone conversation under oath.
R v Linacre (2014)	<b>Dishonesty</b> - lawyer obtained a financial advantage by deception, misappropriated over \$12 million money from the investors.
ACCC v Sampson (2011)	<p>Dishonesty/deception – lawyer acting for their video store client in debt collection. The notice the lawyer sent out to the customers contained <b>misleading representation</b>, including:</p> <ul style="list-style-type: none"> <li>- saying the customer will incur legal costs with legal action, which in fact not true.</li> <li>- The video store was entitled to recover solicitor's cost.</li> <li>- notice looks similar in format to a doc filed at court, which in fact cannot be filed.</li> </ul> <p>Lawyer was found guilty of engaging in misleading and deceptive conduct in contravention of s 52 Trade Practice Act.</p>

- Permissible to provide legal advice in good faith to test scope of the law
- Inform client in writing about risk of illegality
- Client's choice whether to take risk
- Failure to advise client of risk of illegality exposes lawyer to liability for negligent advice

### Duties to the Court

Duty of Candour	Duty not to corrupt the administration of justice	Duty not to abuse court processes	Duty to conduct cases efficiently and expeditiously
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Duty of Candour	Presentation of Law	
	Duty not to mislead the court	<p>A solicitor must not deceive or knowingly or recklessly mislead the court. (ASCR 19.1)</p> <p>A solicitor who knows or suspects that the prosecution is unaware of the client's <i>previous conviction</i> must not ask a prosecution witness whether there are previous convictions, in the hope of a negative answer (ASCR 19.10)</p>
	Duty to assist the court	<p>A solicitor must prepare their case properly and know the relevant law and legal processes including check primary sources and keep their knowledge up to date. (Copeland v Smith)</p> <p>A solicitor must inform the court of any <i>misapprehension</i> by the court. (ASCR 19.11)</p>
	Duty to disclose relevant law	<p>A solicitor must inform the court of <u>any binding authority</u> and <u>any applicable legislation</u>, known to the solicitor and which the solicitor has reasonable grounds to believe to be directly in point, against the client's case. (ASCR 19.6)</p> <p>A solicitor need not inform the court of matters within Rule 19.6 at a time when the opponent tells the court that the opponent's whole case will be withdrawn (ASCR 19.7)</p>
	Presentation of Facts	
	Duty not to mislead the court about fact	<p>A solicitor must not deceive or knowingly or recklessly mislead the court (ASCR 19.1)</p> <p>They must not knowingly submit a false document (Kyle v LPCC)</p>
	Duty to correct innocent misstatements	<p>A solicitor must take all necessary steps to correct any misleading statement made by the solicitor to a court. (ASCR 19.2)</p> <p>...and must correct false affidavit (Kyle v LPCC)</p> <p><b>Half-truths</b> – Lawyers must eschew statements or conduct that are half-truths or otherwise leave the court with an incorrect impression Meek v Flemming</p>
Ex parte applications		
This duty is reflected in ASCR 19.4.		

### Topic 3: Civil matters, negotiation and ADR

Civil Procedure Act 2010 = CPA

#### "Civil proceeding"

#### Overarching purpose

The overarching purpose of CPA and the rules of court in relation to civil proceedings is to facilitate the **just, efficient, timely and cost-effective resolution** of the real issues in dispute. (s 7(1))

Duties to the court ↑
<b>The overarching obligations*</b> OOs do not override duties to the court (s 15)
<b>Other inconsistent obligations ↓</b> (e.g., act in accordance with clients' instructions) OOs can override other obligations (s 13)

#### Paramount Duty

Each person to whom the overarching obligations apply has a **paramount duty** to the court to further the administration of justice in relation to any civil proceeding (s.16 CPA)

The overarching obligations are subject to the paramount duty (s.12 CPA)

#### Overarching obligations

Who bound by the OOs?	Per s 10(1) CPA: (a) A party to proceedings (b) A legal practitioner or other representative acting on behalf of a party (c) A law practice acting on behalf of a party (d) A litigation funder, insurer or any other person who has influence over the proceeding while providing financial assistance to the party.	
	Per s 10(3) CPA, an expert witness. (OOs in s 18, 19, 22, 26 not applied)	
Is OOs apply?	The OOs apply to [dispute] because this concerns an aspect of a <b>civil proceeding</b> in a court (s 11 CPA). (a) Interlocutory proceedings (b) Appeals from an order or judgement (c) Any <b>ADR</b> undertaken in relation to a civil proceeding	
Which OOs ?	S 17	must act <b>honestly</b> at all times
	S 18	must not make claim/response that: (a) is frivolous (b) is vexatious (c) is an abuse of process or (d) not have a proper basis, based on the available factual and legal materials.
	S 19	only take steps that is <b>necessary</b> to solve the dispute
	S 20	<b>cooperate</b> in the conduct of civil proceedings
	S 21	not to <b>mislead or deceive</b>