

# (1) Introduction to Ethics

## Sources of Lawyers Ethics:

There are 2 main sources of ethics in the context of the legal profession:

- **Professional conduct rules:**
  - **Victorian legal profession is regulated by the Legal Profession Uniform Law 2014 (LPUL):** which is a schedule 1 of the Legal Profession Uniform Law Application Act 2014 ('Uniform Law') (and Uniform Rules made under Uniform Law include Australian Solicitors' Conduct Rules (ASCR) and Legal Profession Uniform Conduct (Barristers) Rules (BCR)).
    - The LPUL is the most significant change in legal regulation so far this century
    - Objectives of the LPUL: to promote the administration of justice and an efficient and effective Australian legal progression by ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services (s 3(b) Uniform Law)
    - The framework that will govern Vic Lawyers sits inside the Uniform Act (Schedule 1)
  - **Limitations of the Professional conduct rules:**
    - They have minimal coverage (don't cover every scenario) → complying with them doesn't mean one is behaving as an ethical lawyer.
    - They contain conflicting, and often irreconcilable, rules
    - They focus on technical rather than substantive matters
    - Rules may occasionally need to be disobeyed in order to behave ethically
- **Social Ethics:** Views and values that emerge from general moral theories.
  - Deontological: Kantian ethics; rules-based theory; emphasises fairness; refutes notion that 'the ends justify the means'
  - Teleological: utilitarian; emphasises the greatest good for the most people affected; ends may justify means

## Legal Framework for Lawyers' Ethics

Ethics is governed by a uniform law framework employed by Vic, NSW and WA. It includes:

- **Legislation**
  - Legal Profession Uniform Law Application Act 2014 (Vic) ("LPULAA") – Sch 1 has the Uniform Law ("UL")
  - Civil Procedure Act 2010 (Vic) ("CPA") – Vic only!
  - Criminal Procedure Act 2009 (Vic) ("CrPA") – Vic only!
- **The Uniform Rules**
  - Legal Profession Uniform Law Australian **Solicitors'** Conduct Rules 2015 ("ASCR")
    - **ASCR 3** – Paramount duty to the court and the administration of justice
    - **ASCR 4** - Other fundamental ethical duties
    - **ASCR 5** - Dishonest and disreputable conduct
    - **ASCR 6** – Undertakings
    - **Rule 3:** Fundamental Duties of Solicitors → 3.1 'duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty'
    - **Rule 4** → 4.1.5 'a solicitor must comply with these Rules and the law'
  - Legal Profession Uniform Conduct **(Barristers)** Rules 2015 ("BR")
  - Legal Profession Uniform Admission Rules 2015 ("AR")
  - Legal Profession Uniform General Rules 2015 ("GR") **(Legal Practitioners generally)**
- **Common law**
- **LIV/LSBC Policies and Guidelines**

## Parker and Evans: (Parker and Evans, Inside Lawyers Ethics – Chapter 1 – pages 23 to 25 of 4<sup>th</sup> edition)

- **Three-step method of ethical reasoning**
  - **Awareness of ethical issues and values:**
    - **Aim:** Identify issues, interests and values

- **Key Question:** what ethical issues have arisen or might arise in the future in this situation?
  - ✓ Being aware of the ethical issues that arise in practice and aware of our own values and predispositions.
  - ✓ Who the stakeholders are, what their different interests are, whether there are any values at stake, lawyer's personal interests, whether there are any conflicts of interests, options available to the lawyer
- **Questions:**
  - ✓ Who are the stakeholders?
  - ✓ What are their different interests & values?
  - ✓ Are any other principles or values at stake?
  - ✓ What are your own interests & values (as the lawyer) in this scenario?
  - ✓ Are there any conflicts between the relevant interests, values of each of these stakeholders?
  - ✓ What options are available to you as a lawyer?
- **Application of ethical standards of principles**
  - **Aim:** Identify and apply appropriate professional standards and ethical principles
    - ✓ Application and choosing between the range of ethical standards, values, or principles that are available to help us resolve those ethical issues.
    - ✓ Which prof conduct principles apply, which general ethical theories apply, particular responsibilities of lawyer, how should conflicts of interest be resolved
  - **Considerations:**
    - ✓ What professional conduct principles (the law of lawyering) might apply to this situation, including any relevant professional code of ethics?
    - ✓ What general ethical principles might apply to this situation? (for example, justice and the public interest, conflicts of interest, respect for the spirit of the law, non-harm and respect for others)?
    - ✓ What are the particular responsibilities of a lawyer in this scenario, because of their role as a lawyer and officer of the court?
    - ✓ If there are conflicts between these various ethical standards and principles that could apply to the situation, how should they be resolved?
- **Practical implementation**
  - **Aim:** Make a judgment about what is the appropriate ethical response and put it into action
    - ✓ What is feasible in the current situation, what practical options are available, what are the likely consequences of the different options, what resources would the lawyer need, how can this be prevented from happening again
  - **Questions:**
    - ✓ How can the ethical thing to do actually be put into action in the current situation?
    - ✓ What is feasible in the current situation? What practical options are available?
    - ✓ What is at stake for the key parties/stakeholders (including ourselves)?
    - ✓ What are the likely consequences of the different options?
    - ✓ What skills would I need?
    - ✓ What arguments or rationalisations will be used to dissuade us from acting on our values
    - ✓ What strategies can we use to counter those rationalisations, keeping in mind what has facilitated us acting on our values in the past.
    - ✓ How can I prevent this happening again?

- **Four approaches to lawyers' ethics:**

APPROACH	DO GENERAL ETHICS APPLY TO LAWYERS?	OBJECTIVE
<b>Adversarial advocate</b>	No. Role defined by adversary framework.	<ul style="list-style-type: none"> <li>- Objective: Advocate client's interests as zealously as possible with the barest obligation to legality.</li> <li>- Advance CL interests with max zeal permitted by law</li> <li>- Predominant view of lawyers' ethics</li> <li>- Advances autonomy in complex legal system</li> <li>- Amoral – based on social role, not morality</li> <li>- Values: partisanship (professionalism) and non-accountability</li> </ul>

<b>Responsible lawyer</b>	No. Role defined by spirit of the law.	<ul style="list-style-type: none"> <li>- <b>Objective:</b> Make law work as fairly and justly as possible.</li> <li>- Act as an officer of the court and guardian of the legal system</li> <li>- Advocate for client but overriding duty to maintain justice and integrity of legal system</li> <li>- Aim for compliance with spirit of law, a fair trial</li> <li>- Independence from powerful clients as well as from state</li> <li>- Values: facilitating administration of justice per law and public interest</li> </ul>
<b>Moral activist</b>	Yes. Social theories of justice are important for lawyers.	<ul style="list-style-type: none"> <li>- <b>Objective:</b> Advance justice through: <ul style="list-style-type: none"> <li>• Public interest lawyering and law reform activities.</li> <li>• Client counselling to seek to persuade clients; or withdraw.</li> </ul> </li> <li>- Always “do good” by following general personal ethical theories</li> <li>- Do good following general theories of ethics, especially justice</li> <li>- Recognises that justice and law may conflict</li> <li>- Taking on ‘worthy causes’</li> <li>- Law reform - public interest lawyering - aimed at social and legal change</li> <li>- Advising and persuading clients on justice</li> <li>- Values: whatever theory of justice/morality is personally preferred</li> </ul>
<b>Ethics of care</b>	Yes. Character, virtue, and relational ethics are important for both lawyers and clients.	<ul style="list-style-type: none"> <li>- <b>Objective:</b> Both lawyer and client to preserve relationships and avoid harm.</li> <li>- Holistic legal practice, harm minimisation is key</li> <li>- Personal and relational ethics</li> <li>- Aimed at personal goodness of both lawyer and client in context of their relationships</li> <li>- Holistic view of clients and their problems</li> <li>- Participatory approaches to lawyering</li> <li>- Non-adversarial dispute resolution</li> <li>- Values: personal and relational ethics</li> </ul>

### **Barrister’s Cab Rank Principle:**

- **A barrister must accept a brief to appear before court in a field they practise in if:**
  - 1. The brief is within their capacity, skill and experience **(17(a) BR)**
  - 2. They would be available to work and are not committed to other engagements which may prevent them from being able to advance CL interests to best of their ability **(17(b) BR)**
  - 3. Fee offered is acceptable **(17(c) BR)**
  - 4. Barrister does not refuse the brief due to confidentiality or conflict rules **(17(d) BR)**
- **Other limitations regarding cab rank:**
  - Cannot set fee higher to deter briefs (18 BR)
  - Cannot require particular practitioners to work with them (19 BR)
  - Barrister not obliged to accept briefs from non-legal practitioners **(21 BR)**
- **Being an ethical lawyer is more than obeying the rules**
  - ‘The first, and perhaps the most important, thing to be said about ethics is that they cannot be reduced to rules. Ethics are not what the [lawyer] knows he or she should do; ethics are what the [lawyer] does. They are not so much learnt as lived. . . . Ethics give practical expression to the purpose for which a profession exists, so a member who repudiates the ethical code in effect repudiates members of the profession.’ (Sir Gerard Brennan, former Chief Justice of the High Court)

- 'Every person is a debtor to their profession and the debt is repaid by honest and liberal practice of the profession.' (Sir Francis Bacon (1561-1626), Lord Chancellor of England)
- 'Modern opportunities to practice 'liberally' include working pro bono publico (for the public good)' (*Chief Justice Murray Gleeson*)

## (2) General Duties

Hierarchy of duties:

1. Duty to obey the law
2. Duty to the court
3. Duty to the client
4. Duty to others

- **Introduction:** Duty to the court is paramount and will surpass all other duties excepting the duty to obey the law (*3.1 ASCR; 23 BR; Rondel, Giannerelli*).
- **Hierarchy of duties:** "The lawyer in the adversary system has several duties which are potentially inconsistent with each other. Firstly, to **act zealously** to advance the interests of the client. Secondly, to **keep confidential** what the client has imparted. Thirdly, to **act with honesty and candour** to the court." (Hon D Ipp, 'Lawyers' Duties to the Court' (1998) 114 LQR 63, 66)
  - **Order:** duty to obey the law – duty to the court – duty to the client – duty to others

### Duty to Obey the Law

- **Introduction:** All lawyers have a duty to obey the law (*4.1.5, 3 ASCR*). This goes above and beyond ordinary citizens and requires upholding the rule of law (*Foster (No 3)*) and fostering respect for the rule of law (*Re B*).
- **The most important, paramount, and obvious duty owe by lawyers is immutable obedience to the law. It informs all other duties.**
  - **ASCR 3.1:** "duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty"
  - **ASCR 5.1.5:** "a solicitor must comply with these rules and the law"
  - Paramount duty (r 3.1), therefore non-negotiable and informs all other duties
  - Requires compliance with the law (r 4.1.5) and upholding the administration of justice (r 3.1; r 8(b) BR)
  - Respect for the law is at the heart of lawyers' duties to the court, clients, and third parties
- **Legal practitioners are actors in the legal system and are therefore especially bound to:**
  - Uphold the rule of law (LSB v Foster (No 3), per Emerton J)
  - Foster respect for the law (Re B, per Moffitt P)
- **Duty to avoid unlawful conduct:** Lawyers possess an immutable duty to avoid unlawful conduct (ASCR 5; BCR 8; Sampson). This duty exists both in their personal life as well as their professional life (Pearce).
  - **'Unlawful conduct' includes conduct that:**
    - **Is dishonest, disreputable, or illegal** (ASCR 5, BCR 8(a); Sampson(dishonesty))
    - **Might bring the profession into disrepute** (ASCR 5.1.2; BCR 8(c); Re B):
      - ✓ [S] must comply with the conduct rules (ASCR 4.1.5)
      - ✓ [S] must be honest and courteous in all legal dealings (ASCR 4.1.2)
    - **Prejudices or corrupts the administration of justice** (ASCR 5.1.1; BCR 8(b))
      - ✓ [S] must avoid any compromise to their integrity and professional independence (ASCR 4.1.4)
      - ✓ [L] must not falsely adduce evidence – includes encouraging perjury or coaching a witness
    - **Is likely to diminish the public confidence in the legal system** (ASCR 5.1.1; BCR 8(c))
      - ✓ [B] must not engage in conduct which constitutes discrimination (BCR 123(a)), sexual harassment (BCR 123(b)) or workplace bullying (BCR 123(c))

### Cases:

- **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
- The letter gave the overall impression that the people who had not paid their later fees would be subject to impending legal action, and it was intended to cause fear
- **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 MDC:
    - ✓ 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
- **Re Crowley [1999]:**
  - **Facts:** Crown prosecutor, who published confidential DPP documents to son of the accused - asked for \$2 million for these documents
  - **Held:** Sentenced to imprisonment of 15 months and 5 years concurrently and was struck off the role
- **LPCC v Brickhill [2013]:**
  - **Facts:** Corruption and crime commission was investigating conduct. The practitioner:
    - Told former client's wife to destroy computer records
    - Told former client and advised him to transfer properties in which he had an interest
    - Lied about telephone conversations under oath
  - **Held:** He was fined, sentenced to 12 months imprisonment, and was struck off the role
- **R v Linacre [2014]:**
  - **Facts:** Operating Poncy scheme. Taking money from people to repay other people. 21 counts of dishonest, 5 counts of a deficiency in a trust account
  - **Held:** Sentenced to 12 years imprisonment and struck off the role
- **LSC v McKenzie [2021]:**
  - **Facts:** Was in a position where he used his power as a lawyer to intimidate and blackmailed. Lawyer acting as blind mouthpiece for client
  - **Held:** Told client it wasn't blackmail (competence)

- **Duty to not assist or condone a client breaking the law:** [L] must not knowingly assist or advise the client, [C], or anyone else in breaking the law (ASCR 3; BCR 3(c); Segler).
  - Where [C] is actually breaking the law Where the client, [C], is actually breaking the law, [L] cannot turn a blind eye to the illegality, and thus possesses a positive duty to question the conduct. [L] ought to counsel [C] against any further breaches.
  - Additionally, [L] ought to avoid any personal involvement, as any involvement may result in a breach of this duty and attract serious consequences, such as civil liability, disciplinary sanctions, and criminal responsibility.
  - As, OTF, it appears that [C] will disregard [L's] advice, and break the law regardless, it is recommended:
    - a) Advise [C] again of responsibilities
    - b) Consider conduct rules regarding confidentiality
    - c) If client persists, [L] must terminate the retainer (Segler)
- **Duties:**
  - Must comply with this both in the course of legal practice and outside of practice
  - Must comply with the ASCR and BR **(4.1.5 ASCR)**
  - Avoid involvement in unlawful conduct as lawyer
  - Advise clients against same
  - Not advise client of ways to achieve unlawful purposes
  - Cannot engage in illegal conduct simply because it is in CL's interests **(Pearce, Sampson)**
  - Cannot advise CL to break or disregard the law, regardless of whether you think they will not be caught **(Segler)**.
    - Lawyer can be sanctioned for CL's illegal actions **(Segler)**

#### Answers:

- Lawyers owe a paramount duty to the administration of justice, and to comply with the law
- **(ASCR 3, 4.1.5);**
- Lawyers must not engage in conduct that is prejudicial to the administration of justice, or is likely to bring the profession into disrepute (ASCR 5);
- Even if what Jane has done is not a crime, it is certainly a serious breach of procedure;
- Jane's belief in Bob's cause, and about the views of ALU members, is irrelevant – she still
- needs to follow proper procedures.
- **Clients who are breaking the law:**
  - Counsel your client against further breaches
  - Avoid personal involvement
  - If you believe s/he will disregard your advice & break the law:
    - Advise again of your responsibilities
    - Consider the current conduct rule in relation to confidentiality
    - If your client persists, terminate your instructions
    - Consequences of your involvement:
    - Civil liability
    - Disciplinary sanctions
    - Criminal responsibility
    - and especially, blackmail
- **Illegal transfers of money:** Here, the client hands the lawyer a large sum of cash. Thus, (L) should, at least, be suspicious that the money could have been derived from criminal activity **(AKA: MONEY LAUNDERING)**
  - **Must not turn a blind eye to disclosed or apparent illegality, particularly where those transfers are to you or your firm:** As (client's) lawyer, and an officer of the Court, (L) must not turn a blind eye to disclosed or apparent illegality. Arguably, if she implicitly approves her client's possible illegal transactions (by not questioning them), she could be in breach of ASCR Rule 5 (dishonest and disreputable conduct). After questioning the client, if she did not receive a satisfactory explanation, then she should have refused to handle the money. Further, when



dealing with large sums of money lawyers also have further duties that must be adhered to. Under the *Financial Transactions Reports Act 1988 (Cth)* lawyers must report any cash transactions of \$10,000 or more entered into – failure to do so is an offence

- Money transferred to lawyer in suspicious circumstances raising questions about bona fides
- Lawyer must question client
- Unsatisfactory explanation = lawyer must refuse to handle money
- Lawyers have reporting obligations for payments over \$10,000 (*Financial Transactions Reports Act 1988 (Cth)*)
- Must also report if lawyer advances funds or provides other financial services (*Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)*)
- **Legislation:**
  - Financial Transactions Reports Act 1988 (Cth): Reporting obligations on lawyers for transactions over \$10,000
  - Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth): Reporting requirements where lawyers advance loans or provide other financial services

## Cases

- **LPCC v Brickhill (2013)** – **solicitor engage in illegal and unlawful conduct**
  - **Facts:** The Corruption and Crime Commission was investigating misconduct by staff of City of Sterling – including the practitioner's former client.
  - **Illegal conduct:**
    - The practitioner told former client's wife to destroy computer records
    - The practitioner telephoned former client and advised him to transfer properties in which he had an interest 'to minimize the risk of attention... and to avoid seizure'
    - The practitioner lied about the telephone conversation under oath (not knowing the call had been intercepted)
  - **Held:** He was fined, sentenced to 12 months imprisonment (suspended). Following a report from the State Administrative Tribunal he was struck off by the full bench of the WASC.
- **R v Linacre (2014)** – **solicitor engaged in illegal conduct of misappropriating money**
  - **Facts:** 21 counts of dishonesty (deceiving clients to believe they were lending money secured against mortgages) and 5 counts of a deficiency in a Trust Account (these were used to keep the 'Ponzi' scheme going).
  - **Illegal conduct:** Misappropriated over \$12 million across 12 years while paying ~ 1.8 mill 'interest' but no restitution. He had already been struck off before this sentencing hearing.
  - **Held:** He received a total effective sentence of 12 years' imprisonment.
- **ACCC v Sampson (Sampson case) [2011] FCA 1165** – **solicitor engaged in misleading and deceptive conduct (contravene s52 of Trade Practices Act)**
  - **Facts:** Case brought against solicitor in relation to debt collection notices.
  - **Notices stated:** Video store client was entitled to certain amount of solicitor's costs. If legal action was taken to recover the debt, customer would need to pay additional legal costs. Notice looked like a court document. Judgment could be made without a formal court order and solicitors could enforce any judgment themselves
  - **Held:** The solicitor was found guilty of engaging in misleading and deceptive conduct in contravention of s52 of the *Trade Practices Act 1974 (Cth)*. The Federal Court found that the following representations by Sampson were misleading and deceptive as:
    - That the video store was entitled to recover solicitor's costs.
    - That the customer would incur additional costs of any legal action (this statement was deceptive because):
      - ✓ if unsuccessful the video store could not recover legal costs
      - ✓ if successful a court would not order legal costs for recovery of a small debt unless there were special circumstances (s 105 Magistrates' Court Act).
    - That judgment could be obtained without a court order unless the debt was paid in full.
- **LSC v Sampson (2013):**
  - **Facts:**

- The Legal Services Commissioner (LSC) brought proceedings against Sampson alleging professional misconduct related to the wording of notices of demand.
- The LSC claimed the notices were untrue, misleading, intimidating, and breached Rule 28 of the Professional Conduct and Practice Rules 2005.
- Rule 28 - Communications:
  - **28.1:** A practitioner must not represent anything as true which they know or reasonably believe to be untrue.
  - **28.2:** A practitioner must not make any statement calculated to mislead or intimidate the other person, grossly exceeding the legitimate assertion of the client's rights or entitlements.
  - The equivalent rule is now Rule 34 - Dealing with other persons.
- Tribunal's Findings:
  - To prove a breach of Rule 28.2, the Tribunal applied an objective test: Were the representations likely to mislead or intimidate?
  - The Tribunal concluded that the representations did both.
- Mitigating Factors:
  - Sampson's serious health problems
  - A dispute with her partner in the firm, which intensified in 2009.
  - Adverse consequences from VCAT and Federal Court proceedings.
  - Her previously clean professional record.
  - Her extensive service to the profession and community.
  - Support from colleagues.
  - Repercussions for those who depended on her as the principal of the practice.
- Outcome:
  - The Tribunal concluded that Sampson's conduct was systematic, repeated, and seriously damaged public confidence in the profession, indicating she was not fit and proper to practice.
  - Sampson was reprimanded for her professional misconduct
  - She was ordered to undertake further ethics and professional responsibility training for two years.
  - She was ordered to pay half of the LSC's costs.
  - Her practicing certificate was not suspended.
- **LPCC v Segler (2009) WASAT 205** – **do not support clients who want to break the law (or imply they may do so)**
  - Facts: Lawyer advised client he could carry out building projects while unregistered
  - Held: Found guilty of professional misconduct and unsatisfactory professional conduct
  - Ratio: **Clients who want to break the law (or imply they may do so)**
    - Do not assist them!
    - Do not seek to induce a breach of the law by clients or other people
    - Do not instruct your agents to break the law
- **R v Pearce** (unreported, SC (WA), McKechnie J, 13 July 2004) – **fraudulent tax advice**
  - *"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"*

Paula Baron & Lillian Corbin (2017) The unprofessional professional: do lawyers need rules? [Legal Ethics, 20:2, 155-173](#),

## Duty to the Court

- **Introduction:** Lawyers owe a paramount duty to the court and the administration of justice (ASCR 3.1; BCR 23) which prevails over any other duty to the extent of inconsistency, including the duty to clients (Giannarelli per Mason CJ; Randel per Reid LJ)
- **Overriding duty to the court:** Each lawyer has an overriding duty to the court (**3.1 ASCR; 23 BR; Rondel, Giannarelli**). Duty to the court is made up of several sub-duties.
  - Court has inherent power to impose and enforce duties (**Rondel**)



- Barrister immunity for court work derived from higher duty to the court (*Giannerelli, Attwells*)
- **Cannot engage in conduct in legal practice or otherwise which:**
  - Demonstrates not a fit and proper person - 5.1.1 ASCR
  - Is likely to a material degree to:
    - ✓ Diminish public confidence in the administration of justice - 5.1.2(i) ASCR; 8(b) and 8(c) BR
    - ✓ Bring the profession into disrepute - 5.1.2(ii) ASCR
  - Is dishonest or discreditable - 8(a) BR
- **Barristerial immunity for work done in court** - *Giannerelli, Attwells*
- Cannot criticise the law in a way which undermines public confidence (*Ambarde*)

### Cases:

- *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"
    - "Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case but, 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 or with what the client thinks are his personal interests..."
    - Per Lord Denning at 962-963 - The duty to the administration of justice (to law, to the court) always trumps duty to serve the client's interests: 'The advocate has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice.'
- *Giannarelli v Wraith (1988) 165 CLR 543*
  - **Facts:** Lawyer made a decision not to advance a particular argument because it would unnecessarily prolong the case, client unhappy was unhappy and tried to sue the barrister for negligence
  - **Held:**
    - Counsel's duty to the 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 the client's success with the speedy and efficient administration of justice.
    - 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 against the client's instructions.
- *Attwells v Jackson Lalic Lawyers (2016) 259 CLR 1 [2016] HCA 16*
  - **Held:**
    - Confirmed principle of advocates' 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 advocate's work and the judge's decision."
      - ✓ It does not cover advice that results in compromise or settlement

## **(b) Duty of Honesty & Candour**

- **Introduction:** The duty of candour includes the presentation of law AND presentation of facts
- **Presentation of Law:**
  - **Duty not to mislead the court about the law:**
    - A lawyer must not deceive the court about the law or legal processes
    - A lawyer also must not knowingly or recklessly mislead the court (*ASCR 19.1; BR 24*)

- **Duty to assist the court:**
    - Lawyers must prepare their case properly
    - Lawyers must know the relevant law and legal processes
      - ✓ Lawyers must check primary sources
      - ✓ Lawyers must keep knowledge up-to-date (*Copeland*)
    - Lawyers must assist the court: clarify any apparent misapprehensions (*19.11 ASCR; 34 BR*)
  - **Duty to disclose relevant law (even if it goes against CL's case) (*19.6 ASCR; 29 BR*)**
    - No need to do this if OP withdraws or consents to final judgment (*19.7 ASCR; 30 BR*)
    - **If become aware of relevant law after trial but while judgment reserved/pending**, must still inform the court (*19.8 ASCR; 31 BR*)
    - Must inform court of authorities that go against your client
      - ✓ Any binding authority;
      - ✓ If no binding authority, any authority decided by an Australian appellate court;
      - ✓ Any applicable legislation (*19.6; BR 29 ASCR*)
    - Applies until final judgment is given (*19.8; BR 31 ASCR*)
- **Presentation of Facts:**
- **Duty not to mislead the court about facts:**
    - **Must not deceive or knowingly or recklessly mislead the court (*ASCR 19.1; BR 24*)**
      - ✓ Presenting false or misleading evidence
      - ✓ Concealing material facts
    - **Must not knowingly submit a false document (*Kyle v LPCC (1999)*)**
    - **'Half-truths' and errors by other parties (*Meek v Fleming [1961]*)**
      - ✓ Won't have made a misleading statement by failure to correct another's erroneous statement: **ASCR 19.3, BR 51**
      - ✓ Note duties to correct false evidence by client or witness: **ASCR 20, BR 79**
  - **Duty to correct innocent misstatements (*19.1 ASCR, 24 BR*)**
    - **Where mistakes are made, must take all reasonable steps to correct them as soon as practicable (*19.2 ASCR; 25 BR*)**
    - Not misleading to simply fail to correct OP's error (*19.3 ASCR*)
    - Where party has deliberately misled the court in a material matter, and that deception has probably tipped the scales in their favour, judgement can be overturned (*Meek*)
    - **Cannot take unfair advantage of an obvious error if to do so would obtain for CL a benefit which has no foundation in law or fact (*30.1 ASCR, Chamberlain*)**
- **Positive duties of disclosure:**
- **Must correct own accidental misstatements (*ASCR 19.2, BR 25*)**
  - **Must correct false affidavits (*Kyle v LPCC, 1999*)**
  - **In civil trials:**
    - Positive duty to alert opponent and inform court of opponent's express mistakes about evidence or law: **ASCR 19.12**
    - Duty not to take advantage of mistake: **ASCR 30**
- **Ex parte applications:** This duty is reflected in *ASCR 19.4*. Higher standard of candour required.
- **Legal practitioners must disclose to the court all factual and legal matters that:**
    - The practitioner knows about (*19.4.1 ASCR; 27(a) BR*); and
    - Are not protected by legal professional privilege (*19.4.2 ASCR; 27(b) BR*); and
    - The practitioner has reasonable grounds to believe would support an argument against CL's case (*19.4.3 ASCR; 27(c) BR*)
  - **Matters protected by privilege:** where the matter is protected by privilege, the practitioner should seek instructions to waive privilege, and if waiver is refused should inform the court that they cannot properly disclose (*19.5 ASCR; 28 BR*)