LEGAL ETHICS – LPAB Winter 2026

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A solicitor's lien is a legal claim or right against property, entitling the solicitor to keep or access a client's property until the client has paid fees and disbursements. Unless otherwise agreed, it can be exercised at any time while the bill remains unpaid. It is ultimately a protection for the solicitor conferred by the courts — reflecting the courts' interest in ensuring solicitors who have done their work are paid.

3.2 General (Retaining) Lien

Nature: The right to retain client documents (except a will) or money until fees are paid. It is a possessory lien: it does not extend to property not in the solicitor's possession (*Akki v Martin Hall*).

- The most common form of lien in practice.
- Extends to all matters handled for the client under the retainer — not just the specific matter to which the documents relate.
- **Key limitation:** The general lien is merely retaining — the solicitor can refuse to hand over the property, but cannot sell it or apply it in satisfaction of the debt.
- **Possession is essential:** The lien is lost if possession is voluntarily surrendered without reservation (though see Caldwell v Sumpters — conditional delivery preserves the lien).

3.3 Particular (Special) Lien

Nature: An equitable right to have the solicitor's costs of recovery paid from a specific judgment or fund that the solicitor was instrumental in recovering for the client. Per Helsham J in *Stewart v Strevens*: it is 'not a mere lien but a claim to the equitable interference of the court to have the judgment held as security for costs'.

- Unlike the general lien, this lien can be actively enforced — if the money is in the solicitor's hands, they may retain the amount of costs and pay the balance to the client.
- **Scope — important:** Per *Stewart v Strevens*, the particular lien is confined to costs arising from the solicitor-client relationship. A personal loan made to the client alongside the retainer does not form part of the lien.
- *LPUL s 144(2)(a)*: Permits exercise of the lien against trust money held.

Distinction (Stewart v Strevens): General lien = possessory (retain documents/money). Particular lien = equitable (attach the specific proceeds of recovery). A solicitor cannot use either lien to withdraw client trust funds without express or implied authority from the client.

3.4 Conduct Rules rr 14–15 — File Transfer on Termination

- **r 14:** Client documents must be handed over at completion or termination of the retainer as soon as practicable.
- **r 15:** If the solicitor is exercising a lien and a second solicitor takes over, the file must be delivered to the second solicitor if they hold the documents subject to the lien, or agree to pay the outstanding costs.

Practical mechanism — Tripartite Deed: The Law Society's precedent Tripartite Deed is commonly used on file transfer to provide 'satisfactory security' for the former solicitor's costs. As confirmed in *Bechara v Atie*: satisfactory security means 'something of monetary value which will ensure the satisfaction of the possessory lien'. An undertaking from a new solicitor alone does not, without more, satisfy this requirement.

3.5 Three Methods for Clients to Obtain File Release

- **Pay:** Pay the outstanding fees/costs (s 472 LPUL).
- **Court order:** Apply to the court for an order directing release of the documents.

Provision	Subject Matter
r 25 General Rules	Extension of time (up to 42 days max) for s 88 statements
r 26 General Rules	Extension of time (up to 42 days max) for s 91 statements
ss 41 & 42 Legal Practitioners Act 1898	Trust account obligations (cited in *Re Hodgekiss*; now superseded)

KEY CASES & PRINCIPLES

Case	Principle
Allinson v General Council of Medical Education [1894] 1 QB 750	The "peer test": misconduct is conduct that would be reasonably regarded as **disgraceful or dishonourable** by professional brethren of good repute and competency. The foundational test for professional misconduct.
Kennedy v Council of the Incorporated Law Institute of NSW (1939) 13 ALJ 563	Misconduct **need not amount to a criminal offence**; it is sufficient that conduct amounts to **grave impropriety** affecting professional character and indicating a failure to understand or practise the precepts of honesty or fair dealing with courts, clients, or the public.
Qidwai v Brown [1984] 1 NSWLR 100	Where a **respectable minority view** among competent professionals regards the conduct as acceptable, a finding of misconduct cannot be sustained. The peer test requires broad professional reprobation, not merely majority disapproval.
Re Hodgekiss [1962] SR (NSW) 340	Wilful negligence — including conduct so **recklessly careless** that it amounts to wilfulness — constitutes professional misconduct. Intent to do wrong is not required; reckless indifference to professional obligations is sufficient.
Carr v Council of the Law Society of NSW [2020] NSWCA 276	Mere repetition of incidents does not automatically establish PM; the statutory threshold of s 297 must be affirmatively met. Also clarifies that funds deposited into a bank account cannot be "misappropriated" as they become a chose in action belonging to the bank.
Ziems v Prothonotary of NSW (1957) 97 CLR 279	A **criminal conviction does not automatically** render a lawyer unfit to practise. The nature of the offence and its nexus to professional character must be assessed. The Bar is "no ordinary profession."
NSW Bar Association v Cummins (2001) 52 NSWLR 279	Systematic non-compliance with civic/legal obligations (38 years of non-lodgement of tax returns) can constitute PM even outside the course of practice if **sufficiently connected to professional obligations** or revealing character incompatible with practice. Sets out the four interrelated public interests protected by the profession.
Re Davis (1947) 75 CLR 409	Pre-admission dishonesty (concealment of criminal conviction from referees and the Admissions Board) reflects on **fitness to practise**. Absolute candour is required in admission applications.
Prothonotary v Del Castillo [2001] NSWCA 75	Prudent and desirable course is to disclose all prior charges and acquittals when applying for admission. The question of fitness is assessed as at the **present time**, not at the time of the impugned conduct.
Prothonotary of NSW v P [2003] NSWCA 320	Where a practitioner has genuinely rehabilitated following a serious criminal offence (drug importation), and the risk to the public has dissipated, **striking off is not warranted**. The question is present fitness, not past conduct alone.

PROFESSIONAL DISCIPLINE

Professional discipline under the Legal Profession Uniform Law (LPUL) is a protective, not punitive, jurisdiction: its purpose is to protect the public, maintain confidence in the administration of justice, and uphold the standards of the profession (*Harvey v Law Society of NSW (1975)*; *Clyne v NSW Bar Association (1960)*). The complaint and investigation regime under Chapter 5 of the LPUL provides a structured pathway from initial complaint through preliminary assessment, investigation, possible s 371 notices, and either administrative disposition (s 299) or tribunal proceedings (s 300), with procedural fairness at every stage (*Murray v Legal Services Commissioner (1999)*); the ultimate sanction of removal from the roll is reserved for practitioners who are presently and indefinitely unfit to practise (*Council of the Law Society of NSW v Zhukovska [2020]*).

Legislation Sections Referenced

Provision	Effect / Summary
s 260 LPUL:	**Objectives** (Ch 5 Dispute Resolution + professional discipline) • to provide a framework for timely and effective resolution of disputes between clients and lawyers; • to provide a scheme for discipline in the interests of the administration of justice and for protection of clients and the public; • to monitor, promote and enforce professional standards, competence and honesty of the profession.
s 261 LPUL	References to lawyers Applies to lawyers registered in Australia (inc former lawyers).
s 262 LPUL	Application of this Chapter to conduct of lawyer or law practice Applies to those lawyers everywhere (not only within the jurisdiction).
s 264 LPUL	Jurisdiction of Supreme Courts The Supreme Court retains its inherent jurisdiction and powers to control and discipline Australian lawyers. Nothing in Chapter 5 affects this. Court of Appeal is the appellate jurisdiction for discipline matters.
s 265 LPUL	What is a complaint? any dispute or issue about conduct of a lawyer and/or law practice. The only qualification for making a complaint is that the subject is an admitted legal practitioner.
s 266 LPUL	Who may make a complaint? Any person or body may make a complaint to the Commissioner. DLRAs (Law Society/Bar) may also initiate a complaint containing a disciplinary matter directly; they must notify the Commissioner.
s 267 LPUL	How is a complaint made? Complaint must be in writing; must identify the complainant; must identify the lawyer/law practice; and must describe the alleged conduct.
s 270 LPUL	Disciplinary matters Defines a "disciplinary matter": conduct which, if proved, would amount to unsatisfactory professional conduct or professional misconduct.
s 272 LPUL	Time limits on making complaints

AN ADVOCATE'S DUTY TO THE COURT

An advocate's duty to the court is the expression, in the courtroom, of the broader paramount duty owed to the administration of justice under Bar Rule 4(a).

Six elements constitute this duty:

1. **honesty and candour** — never deceive or mislead; positively correct errors; disclose adverse authority and adverse facts in ex parte applications;
2. **courtesy** — mere discourtesy is not contempt but wilful insult is;
3. **not to frustrate court process** — never engineer a mistrial or use the court's machinery for a collateral purpose;
4. **efficient administration of justice** — prune the case and limit cross-examination to what is reasonably necessary;
5. **responsible use of court process and privilege** — do not invoke coercive powers to harass or to obtain a collateral advantage; and
6. **issues arising in relation to the judiciary** — raise bias points promptly, avoid inappropriate familiarity.

Whenever there is any conflict between the duty to the court and the duty to the client, the duty to the court always prevails.

Legislation & Rules Referenced

Provision	Effect / Summary
Bar Rules r 4(a)	(a) Barristers owe their PARAMOUNT DUTY to the ADMINISTRATION OF JUSTICE. This is the highest duty, above even the duty to the court. A barrister may be called upon to ask the judge to stand aside, or to make a submission that reins in judicial overreach — all in service of the administration of justice.
Bar Rules r 4(b)–(d)	(b) Must maintain high standards of professional conduct. (c) Must act HONESTLY, FAIRLY, SKILFULLY, BRAVELY, and with COMPETENCE and DILIGENCE — six words to memorise. (d) Barristers owe duties to the COURTS (first), to their CLIENTS (second), and to their barrister and solicitor COLLEAGUES (third). Order matters: courts take precedence over clients.
Bar Rules r 4(e)–(f)	(e) Exercise forensic judgements INDEPENDENTLY, for the proper administration of justice, notwithstanding any contrary desires of clients. (f) Must accept briefs regardless of personal beliefs (cab-rank) and compete as widely and as often as practicable.
Bar Rules r 8 (general)	A barrister must not engage in conduct which is: (a) dishonest or otherwise discreditable; (b) prejudicial to the administration of justice; or (c) likely to diminish public confidence in the legal profession, or administration of justice, or otherwise bring the legal profession into disrepute.
Bar Rules r 17 — Cab-rank principle	A barrister MUST accept a brief to appear if: (a) within the barrister's capacity, skill and experience; (b) they are available; and (c) the fee is acceptable — unless an exception under rr 101–105 applies (conflict, confidentiality, already acting for another party, etc.).