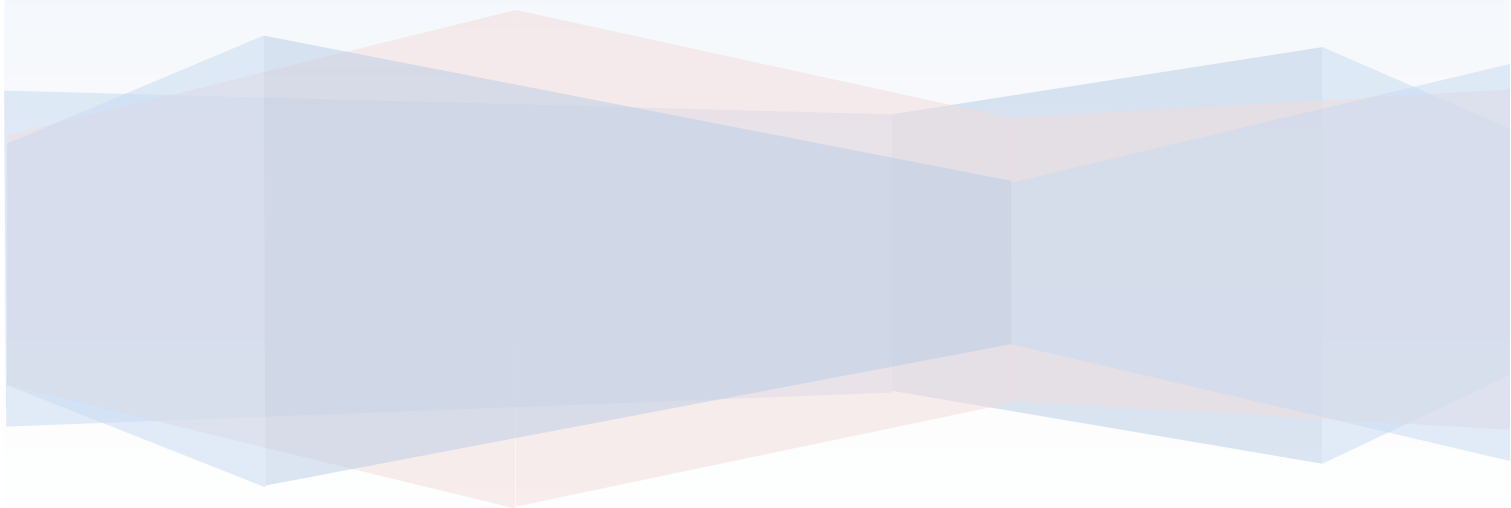


Legal Ethics & Professional Responsibility



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Fundamental Duties to the Client

- (ASCR r 8, *Barristers Rules* r 35): A lawyer's duty is to advance and protect and promote the client's interests. The relationship is one of trust and confidence.
- ASCR r 3.1; *Barristers Rules* r 4(a), 23: The lawyer's duty to the client must ordinarily give way to the lawyer's duty to the administration of justice.
- A lawyer's role is to give advice and provide representation on matters within the retainer; but ultimately to act on instructions so long as those instructions are not unlawful or contrary to rules.
- ASCR r 4: A solicitor must also:
 - 4.1.1: Act in the best interests of a client in any matter in which the solicitor represents the client;
 - 4.1.2: Be honest and courteous in all dealings in the course of legal practice;
 - 4.1.3: Deliver legal services competently, diligently and as promptly as reasonably possible;
 - 4.1.4: Avoid any compromise to their integrity and professional independence;
 - 4.1.5: Comply with these Rules and the law.

Duty of Competence

- Remedy for breach is founded in negligence.
- *Rogers v Whitaker* (1992) 175 CLR 479: Standard required of a practitioner is 'that of the ordinary skilled person exercising and professing to have that special skill.'
- *Law Society of NSW v Moulton* [1981] 2 NSWLR 736: Lawyers fit to remain on the roll 'must make reasonable efforts to keep up with current developments in his field of practice'.
- In *Groom v Crocker* [1939] 1 KB 194, 222: The duty of a solicitor to protect the client's interest was held to extend at least to the following:
 - to carry out instructions in the matters to which the retainer relates by all proper means;
 - to consult with the client on all questions of doubt which do not fall within the express or implied discretion left to the solicitor; and
 - to keep the client informed to such an extent as may be reasonably necessary, and to comply with reasonable requests from the client for information about [his] affairs.

Standard of Care

- A lawyer is expected to possess the knowledge held by the reasonably competent lawyer of well-settled principles of law, relevant procedure and rules of court as applicable to the client's needs.
- The standard might potentially be raised for lawyers holding out themselves as having particular expertise, but will not be lowered.
- *Ashby v Russell* [1997] ANZ ConvR 321:
 - Solicitor held liable in negligence to client where he:
 - Failed to take proper instructions from his client;
 - Failure to advise of the effect of a pre-existing injury on a subsequent personal injury claim;
 - Failed to advise that the client may be liable for costs if Supreme Court awarded below the jurisdictional limit for damages in that court;
 - In respect of a cause of action, a lawyer is required to take steps to ascertain the relevant facts, and form a view about whether a cause of action exists;
 - A lawyer must explain and advise upon the legal consequences of each step in the litigation to the client.

Timeliness

- A failure to complete tasks or give advice on time, or in sufficient time to allow a client to give instructions, may constitute negligence.

Qualifying Advice

- *Hall v Foong* (1995) 65 SASR 281:

- Solicitor gave advice that a contract for purchase of property was void, as a result of which the purchaser did not complete the purchase and was sued.
- Counsel had given different advice to the solicitor; and there was a recent decision contrary to the solicitor's advice. The solicitor's failure to qualify his advice with these matters was held to constitute negligence.

Bolam Test

- *Bolam* Test: The 'parameters of professional opinion' test has been introduced into the legislation for civil liability (in Victoria the *Wrongs Act 1958*). In effect it provides a defence to an action for professional negligence if the professional acted in a manner regarded by peer professional opinion as competent professional practice.

Barristers' Immunity

- Barristers (and solicitors) are immune from negligence for in court work.
- This is based on a public policy position which is designed to benefit not counsel but the administration of justice: see *Giannarelli v Wraith* (1988) 165 CLR 543:
 - The work is peculiar: it is based on an independent judgment of how to conduct the case, with regard to the paramount duty to the court and duty to the client.
 - There is public interest in the administration of justice in finality in determining claims; this gives rise to confidence in the resolution of disputes.
- *D'Orta-ekenaike v Victoria Legal Aid* (2005) 223 CLR 1: This immunity has been (controversially) upheld in Australia.
- Barristers and solicitors may be liable in negligence, as well as in contract, for work not related to court work.