LECTURE 1: Solicitors' duties and the regulation of solicitors

1. A solicitor's duty to the court

Solicitors Rules, rr 17-23A

Summary - Practitioners, in all their dealings with the courts, should act with competence, honesty and candour, be frank in their responses and disclosures to the Court, and diligent in their observance of undertakings which they give to the Court or their opponents.

- 17. if a client is intending to mislead court, must, on reasonable notice, terminate the retainer and, without disclosing the reasons to the court, give notice of withdrawal from the proceedings.
- A practitioner must not draw an affidavit alleging criminality, fraud, or other serious misconduct unless reasonable grounds.
- 18. Duty not to influence witnesses
- 19. Practitioner cannot be a material witness in client's case
- 20. Admission of guilt by client - must not put a defence case which is inconsistent with confession, falsely claim that another person committed the offence.
- 21. Admission of perjury by client - must tell court and if client refuses withdraw from the proceedings immediately, and terminate the retainer.
- 23. Advocacy Rules
  - Efficient administration of justice
  - Duty to client - must seek to advance and protect the client's interests to the best of the practitioner's skill and diligence.
  - Independence - Avoidance of personal bias
  - Frankness in court
  - Delinquent or guilty clients – i.e. if client lied to court must tell
  - Responsible use of court process and privilege
  - Integrity of evidence
  - Duty to opponent
  - Prosecutors duties
- 23A - Where a solicitor appears in a Court and acts an advocate can dress in robes

2. A solicitor's duty to the client

Solicitors Rules, rr 1-12, 38

Summary - should serve their clients competently and diligently aware of the fiduciary nature of the relationship and deal with their clients fairly, free of the influence of any interest which may conflict with a client's best interests. Practitioners should maintain the confidentiality of their clients' affairs, and not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.

- 2. Confidentiality -
- 3. Acting against former client -
- 4. Practitioners employed otherwise than by a practitioner (e.g. by company or non-legal practice or non-practitioner) - must not breach the LPA or these Rules.
- 5. Termination of retainer - must complete work/ service unless
  5.1. both have otherwise agreed;
  5.1.2 client discharges the LP
  5.1.3 LP terminates the retainer for just cause, and on reasonable notice
5.2 cannot terminate retainer and withdraw from proceedings due to client having unsatisfactory arrangements for costs unless give court reasonable notice.

- 6. Legal Aid - Criminal proceeding
- 7 Litigation lending
- 8. **Ownership of clients’ documents** - Termination of retainer – must give back unless claims a lien over them for costs due to the practitioner by the client
- 9. **Acting for more than one party** - must be satisfied, that each is aware and consents knowing there may be a potential conflict and will cease to act if arises.
- 10. Avoiding a conflict between a client's and a practitioner's own interest.
- 11. Receiving a benefit under a will or other instrument
- 12. Practitioner and client - Borrowing transactions not allowed
- **38 Referral fees** /Commissions – not allowed unless disclose to client.

3. **Fiduciary duty**

Law Society of NSW v **Harvey** (1976)-re solicitor using C’s $ to invest in own ventures-HELD

- D stood in fiduciary relationship with his clients which placed special responsibilities.
- Duty to client paramount and cannot be any doubt that solicitor shall not be permitted to make a gain for himself at the expense of his client and an appreciation of that duty depends, not upon technical instruction, but upon applying and understanding the ordinary concepts of fair dealing between honourable men.
- Where there is any such avoidable conflict, the solicitor should act in good faith, consider ceasing to act, disclose everything and advise to seek independent advice.

**Summary of solicitor/client fiduciary duties:**

- Loyalty of service & fair & honest dealing = relationship of trust & confidence.
- Duty of undivided loyalty requires avoidance of any conflict, esp client v own
- Nature & extent of fiduciary duties & obligations will depend on circumstances

4. **The retainer**

**Rule 1 Acceptance of retainer** - must act honestly, fairly, and with competence and diligence and should accept instructions only when the practitioner can reasonably expect to serve the client in that manner and attend to work required with reasonable promptness.

Often implied to deal with all relevant matters, eg where a C is not express re instructions

5. **Regulation of Solicitors**

(a) **Law Society's statement of ethics**

Designed to protect the public as lawyer’s role is to uphold the rule of law/admin of justice (e.g. that must be competent, communicate clearly, treat people with respect, act fairly, etc)

(b) **Control of unqualified persons** Legal Profession Act 2004, ss 14-16

S14-16 contains prohibitions on engaging in legal practice without an appropriate practising certificate and remedies to deal with any breaches, thereby maintaining public confidence.

(c) **Trust accounts** - Legal Profession Act 2004, Chapter 3
Assists with the compliance and holding of trust accounts and allows inspections. For example, s267 to 268 allows the Law Society to appoint an investigator to investigate the affairs of a practice to determine whether it is compliant and to detect and prevent fraud.

(d) **Regulations for trust accounts in LPA**

No obligation to run trust accounts, but if do must put in trusts account which has obligations, for eg s.263- duty to report breaches/irregularities to the Law Society.

(e) **External Intervention**

*Chapter 5 ensures that a range of options (s610), are available for intervention* to protect the interests of the general public, clients and lawyers. The Law Society can appoint

- **supervisors under s617** (for example, to deal with trust monies where there has been misconduct to clear balance of trust account)— can be lawyer or accountant,
- **managers under s623** (for example, to run the practice where a solicitor has died) – must hold practising certificate and run practice as if were own, and
- **receivers under s630** (for example, with the specific purpose to recover missing client money where has been misconduct) – usually accountants who can trace the missing funds and become the owner - more powers and appointed by court

*Also later in Act includes enforcement mechanisms,* as it is an offence to fail to assist with complaint investigations (s660) or obstruct or mislead an investigator without reasonable excuse (s674), and professional misconduct to fail to comply with investigatory powers (s671) or obstruct or mislead an investigator without reasonable excuse (s674).

(f) **Issues of codes: best practice for client care, conveyancing**

Checklists for experienced practitioners, but not done to regulate, aim is guidance.

(g) **Solicitors and other lawyers**

*Solicitors Rules, rr 25-31*

**Summary** - In all of their dealings with other practitioners, practitioners should act with honesty, fairness and courtesy, and adhere faithfully to their undertakings, to transact lawfully and competently in a manner that is consistent with the public interest.

- 25 communications are courteous and avoid offensive/provocative language/conduct
- 26 Undertakings - must honour strictly & within the time promised, or reasonable time
- 27 - Undertakings – should not give if don’t think can meet
- 28 Undertakings—should not give if relies on 3rd party unless cooperation guaranteed
- 29. Taking over a matter from another practitioner
- 30. Transfer of a practitioner’s practice
- 31. Communicating with another practitioner’s client

(h) **Solicitors and third parties Solicitors Rules, rr 32-36**

**Summary** – Must conduct their dealings with third parties according to the same principles of honesty and fairness which are required in relations with the courts and lawyers

- 32. **Contracting for services**– personally liable for payment unless other arrangement
33. **Undertakings** - must honour undertakings strictly and within the time promised
34. **Communications** – must not mislead or misrepresent or intimidate
35. **Debt collection** - must not allow the practitioner's business name to be used by a debt collection agent in a manner that is likely to mislead the public
36. Practitioner members of local government councils

(i) **Solicitor’s liability for acts of partner**

S250 to 251 principals are jointly and severally liable for the acts of their current and former

Re Mayes and the Legal Practitioners Act (1974) re trust account depletions –held

- each member of a partnership is equally responsible for complying with the law and that being recklessly careless as to the acts of another when put on notice can =PC
- The existence of a special system cannot relieve partners from personal vigilance.

**Bridges v Law Society of New South Wales (1983)** reinforces this, as it held that

- innocent partner who has knowledge of gross breaches of fiduciary duties regarding trust accounts (here by senior partners and junior challenged them then did nothing) must investigate them and not just rely on the other partners’ oral assurances,
- If does not, it is inevitable, at least in the end, that there will be some participation by all in PC, most likely dishonesty, by making false declarations on practising certs.
- Guilty innocent junior partner guilty of PC and struck off.
- Case also shows there is a duty to report such breaches to the Law Society - s.263 also imposes this obligation, but if report is wrong, not liable for any loss suffered.

(j) **Duty to report offences/bankruptcy**

LPA, Chapter 2, Part 2.4, Division 7 imposes a duty to report bankruptcy, serious offences convictions and charges of certain offences in past 10 years (e.g. tax) – reflects com law:

s66 to 68 allowS the Law Society on becoming aware of a show cause event (essentially one of above) of an LP to investigate, and within a specific period, determine if the applicant or holder is a fit and proper person to hold a certificate

**Murphy v Bar Association** of NSW [2001] - failure to pay tax - held

- Failure to pay tax raises serious issues, but circumstances must be carefully considered before decision can be made that a person is not ‘fit and proper’
- test in determining fitness to practice is whether the indebtedness which led to the bankruptcy was due to dishonest conduct, as opposed to incompetent management of affairs without dishonesty which would not usually mean is not fit and proper.
- It is the dishonesty, not the debt or the bankruptcy, which disentitles to hold cert.

**NSW Bar Association v Cummins** (2001)-barrister not lodged returns 38 years of practice.

- Spigelman CJ at [56] stated there was authority to justify extending the terminology “professional misconduct” to two types of acts not occurring directly in practice:
  - acts may be sufficiently closely connected with actual practice, albeit not occurring in the course of such practice.