**Admission to Practice**

**Academic Requirements**

1. ***Scope***– Admission to practice is premised on the fulfilment of educational requirements. “*those who follow the high calling of a legal practitioner are competent and skilled to advise their clients and to attend to their affairs.”*
   1. ***Legal Practice Board v Ridah*** *(2004)*
2. ***Academic Course*** *–* Need to complete a tertiary academic course in Australia in specified areas of law subjects (11 law subjects) – *s 2.01(1) – s2.04* *Legal Profession (Admission) Rules 2008 (Vic)*
   1. *Academic Requirements* – Illustrates required academic requirements.
3. ***Practical Training***– Need to complete practical requirements which consist of either one year’s articles of clerkship with a lawyer, or a practical legal training course, or a combination of both per 3.01 – 3.04
   1. *Legal Profession (Admission) Rules 2008 (Vic)* rr 3.01, 3.05–3.15 (known as supervised workplace training)
4. ***Fit******and Proper Person*** *–* Power to admit rests with the Supreme Court and that the person is both eligible and a fit and proper person per ***(Vic) s 2.3.6 LPA 2004***
5. ***Definition of Court*** – Page 4
   1. *Anybody described as such*
   2. *Any tribunal exercising judicial or quasi–judicial, functions*
   3. *A professional disciplinary tribunal*
   4. *An industrial tribunal*
   5. *An administrative tribunal*
   6. *An investigation or inquiry established or conducted under statute or by a Parliament*
   7. *A Royal commission*
   8. *An arbitration or mediation or any other form of dispute resolution.*

**Character Requirements**

1. **General Requirements**
   1. *A negative Test –* An applicant will be presumed to be of “good fame and character” and “fit and proper” unless there is evidence of past misconduct
   2. It is possible to be of “good fame and character” but not be “fit and proper”? Yes. ***Victorian Lawyers RPA Ltd v X***.

***Victorian Lawyers RPA Ltd v X***:

1. X pleaded guilty to six accounts of making false accusations of sexual assault. Didn’t appreciate her actions. She also failed to inform the Board of Examiners of the relevant circumstances surrounding the charges she had made and thus seriously misled the Board. The applicant was otherwise found to be a person of good character and reputation:**Held:** her admission was refused because *“one who is not capable of dealing appropriately with awkward facts of this kind in one’s own life (i.e that she has or may have caused great harm to others) cannot be entrusted appropriately to advise clients who are similarly placed.”*

Although the principles of what constitutes “good fame and character” are unclear and undefined, the cases can be divided into four main categories:

* ***Dishonesty*:** includes theft, fraud, forgery, etc, and lack of candour;
* ***Mental illness and/or substance abuse***
* ***Personal moral standards*:** not filed tax returns, use of drugs or alcohol, sexual, activity, criminal offences etc, political activity

1. **Suitability Matters – *s1.2.6 & 2.3.3 LPA***
   1. **Reason for suitability requirements**:
      1. *Ex Parte Lenehan (1948)* and also *Re Application for Admission as a Legal Practitioner (2004)* –
         1. *‘The reason for inquiry into fame and character is that a person admitted to the profession is held out as fit to be entrusted by the public with their affairs and confidence , in whose integrity the public can be confident.’*
   2. *Board of Examiners reviews Fame & Character* – s*2.3.6, 2.3.10 LPA* – An admission board (or like) to advise the court as to an applicant’s fame and character.
   3. They primarily include per s1.2.6 –
      1. ***Good Fame & Character*** – *s1.2.6(a) LPA*
      2. ***Is or has been insolvent*** – *s1.2.6(b) LPA*
      3. ***Guilty of an Offence in Australia or Foreign Country*** – *s1.2.6(c) LPA* – consider nature, time lapsed, age of offence.
      4. ***Engaged in Legal practice in Australia*** – *s1.2.6(d) LPA –* (i) not admitted, no practising certificate (PC), breached a condition of PC.
      5. ***Engaged in Legal practice in Foreign Country*** – *s1.2.6(e) LPA* – not permitted to, permitted but in contravention.
      6. ***Unresolved complaint, investigation, charge or order*** – *s1.2.6(f) LPA* – under Australian law, Foreign law.
      7. ***Any disciplinary complaint in any profession or occupation*** – *s1.2.6(g) LPA* – in Australia, in Foreign country
      8. ***Name removed from a local, interstate, foreign legal roll*** – *s1.2.6(h) LPA* – in Australia, Foreign Country
      9. ***Suspended or cancelled right to practice law in Australia or Foreign country*** – *s1.2.6(i) LPA*
      10. ***Disqualified from managing a corporation*** – *s1.2.6(l) LPA*
      11. ***Suffers mental impairment*** – *s1.2.6(m) LPA*
2. **Good Fame and Character –** *s1.2.6(a) LPA; s2.3.6(1)(a)(ii)*
   1. The reason for inquiry into fame and character is that a person admitted to the profession is held out as fit to be entrusted by the public with their affairs and confidence , in whose integrity the public can be confident
      1. *Ex Parte Lenehan (1948)*
      2. *Re Application for Admission as a Legal Practitioner (2004)*
   2. ***Difference between ‘Fame and Character’*** 
      1. Fame focuses on an applicant’s reputation in the public arena where as ‘character’ involves a more objective evaluation relating to an applicant’s quality, judged by his or her former acts and motives
         1. *Ex Parte Tziniolis*
   3. ***By Previous Behavior*** – The admission Board and the Supreme Court determine an applicant’s good fame and character largely by reference to her/his previous behavior, which require applicants to bring to the attention of the court any matter relevant to their fitness for admission.
      1. S2.3.6 & 2.3.10 LPA Vic
      2. *Law Institute of NSW v Meagher (1909)* – The court must accordingly be confident of an applicant’s good fame and character, and exercises a responsibility to the public and the profession not to accredit persons as worthy of that confidence who cannot establish the right to it

***\*\*Mental Impairment or Infirmity*** – ***s. 1.2.6(1)(m) LPA VIC***

1. ***Mentally Unstable*** – The need to protect the public from “the damage that could be caused by an unsuitable person” is relevant to whether the applicant should or should not be admitted and is material to admission.
   1. Mentally unstable legal practitioner, handling their affairs
      1. *XY v Board of Examiners (2005)*
2. ***Depression*** – *S v Legal Practice Board of WA* the court noted that issues pertaining to an applicant’s mental health warrant inquiry to the extent that these have the capacity of bearing upon the applicant’s fitness to practice.

*S v Legal Practice Board of WA*

Where an applicant suffers depression sufficiently severe and long standing as to potentially lead to the neglect of client affairs could be an issue relevant to his or her fitness. But courts generally try to disassociate from any view that long standing depression coupled with taking anti depression medication of itself would be ground to deny admission

1. ***Alcoholism*** – Alcoholism falls under the definition of s1.2.6(m) as it includes

***‘****whether the person currently has a material mental impairment’*

***\*\*Previous criminal behaviour* –** *s. 1.2.6(1)(c) LPA* ***[\*also 4. Criminal / Dishonesty\*]***

1. ***Relevant to fame and character*** *–* Previous criminal convictions are relevant to an applicant’s good fame and character.
   1. Whether the person has been found guilty of an offence in Australia or a foreign country, and if so –
2. the nature of the offence; and
3. how long ago the offence was committed; and
4. the person's age when the offence was committed;
5. ***Fraud & Misappropriation* –** Some criminality is however, viewed as prima facie evidence of unfitness to practice – mostly involving dishonesty.
   1. *Thomas v Legal Practitioner’s Admission Board –* fraudulent misappropriation of money on a large scale from an employer:
      1. *‘fraudulent misappropriation suggests present unsuitability to practice in which absolute trust must be of the essence’*
6. ***Dishonesty*** –Particularly important is evidence going to an applicant’s honesty given that “the demands of honesty and fair dealing are probably greater in the legal profession than any other profession” per *Fugtniet*

*Frugtniet v Board of Examiners*

The applicant had over 25 years, including shortly before his application for admission, charges and convictions for numerous offences for theft, perjury and fraud.

**Held**: apart from not making a full disclosure, the fact that he was **charged with** **offences of dishonesty over a substantial period of time and being untruthful in cross–examination** led to the conclusion that it would take **many years of blameless conduct before one could have any confidence that he has turned over a new leaf**.

1. ***Length of Time since Prior*** *–* If prior conviction (even dishonesty) occurred when the applicant was very young, and was the result of immaturity and fully disclosed and evidence of restoration of integrity are of value and the court is more inclined to overlook: *Re Owen (2005)*
2. **Charges [not convictions]**
   1. Still required 1.2.6(f) – ‘whether the person is currently subject to an **unresolved complaint, investigation, charge or order** under any of the following (a) this Act or a previous law of this jurisdiction that corresponds to this Act.’

***\*\*Previous improper conduct during court process* *– s. 1.2.6(1)(g) LPA VIC***

1. ***Disciplinary Sanctions***– An applicant’s previous behaviour in the course of litigation is relevant to his or her fame and character especially where that behaviour had it been engaged in by a practicing lawyer would have attracted disciplinary sanction.
   1. ***False Evidence or Statements*** – ‘making false statement or adducing false evidence or false affidavit in legal proceedings is inconsistent with the requirement of integrity and honesty essential for admission.’
      1. *Jackson (previously Subramaniam) v Legal Practitioners Admission Board*

*Jackson (previously Subramaniam) v Legal Practitioners Admission Board*

The applicant in this case had some time ago knowing given false evidence though did not stand convicted of any criminal offence out of the events but her same attitude persisted along with her incomplete disclosure of the events due to which her application was refused.

* 1. ***False Accusations*** – Making baseless and insupportable allegations of serious misconduct on the part of other prior to his or her admission is likely to get refusal of his application
     1. *Wentworth v NSW Bar Association (unreported)*
     2. *Re Bell*
  2. ***Prior Law in Extra–Jurisdiction*** – Where an applicant has been disciplined whilst practicing law elsewhere is directly relevant to his or her fame and character in an application for admission in a new Jurisdiction
     1. *Re Evatt*
  3. ***Prior Employment Anywhere*** –Improprieties in the course of practicing another profession, or pursuing another trade or occupation are also likely to be relevant particularly to the extent that they highlight aspects of the applicant’s character crucial to the practice of law.
     1. *Re Hampton (2002)*

*Re Hampton (2002)*

Applicant’s nursing registration cancelled b/c he dealt inappropriately with female patients and also performed nursing services whilst not registered AND failed to candidly disclose these matters in his first application.

***\*\*\*IMPORTANT\*\*\*Non–disclosure of Prior Impropriety*** – *s2.3.6(1)(a)(ii) LPA*

The court relies heavily on the advice of the admission board in making its determination as to an applicant’s fame and character.

1. ***Good character is more weighted than fame in relation to candour*** – Candid and comprehensive disclosure of relevant information and a demonstration of a proper perspective of duty demonstrates good character.
   1. *Thomas v Legal Practitioners Admission Board*
2. ***Refusing to confess to past errors and recant*** – *Re Davis;* *Ex Parte Lenehan; Wentworth*
   1. *Wentworth v NSW Bar Association* – the plaintiff habitually made “grave allegations” against people w/o proper foundation in a long chain of litigation, which was not consistent with good character
   2. *Dishonesty & denial weighted most heavily –* The Court considers dishonesty most seriously and if a applicant knowingly conceals or denies allegations or attempts to downplay their serious – this is direct evidence of unsuitability.
      1. *Thomas v Legal Practitioners Admission Board*
   3. Although a lack of candour would be bar to admission, full disclosure does not guarantee admission especially if there is consistent history of dishonesty –
      1. *Frugtniet v Board of Examiners*
   4. *Remorse and Co–operation –* The need for remorse, cooperation with the authorities and rehabilitation is highly subjective requirement that is present in both the admission and disciplinary context.
      1. *Arrogance etc –* An attitude of rudeness, arrogance, argumentativeness, or unwillingness to accept that you have done wrong and the unwillingness to change your ways, can lead to being denied admission.
      2. It is inadvisable for an applicant to argue that what they did was correct or was an expression of high ideal or to protect innocence
3. ***CANDOUR – Dishonesty – importance of complete candour and disclosure*** *s2.3.6(1)(a)(ii) LPA*
   1. *Non–Disclosure Prevent Admission –* A failure to disclose certain conduct has the capacity to prevent admission even though the conduct, had it been fully and candidly disclosed, would not necessarily have prevented admission.
      1. ‘Candour’ is crucial because of the heavy reliance placed on an applicant’s assertions and explains why applicants should err on the side of “excessive disclosure”.
      2. **Non–disclosure** is the main basis of substantiating a lack of good fame and character, for it evidences a lack of the candour and honesty the court expects of a practicing lawy – *Law Society Tasmania v Scott*
      3. *Oversights* – Where its oversight or genuine mistake courts might be more inclined to downplay its seriousness. Where the applicant acts in accordance with advice from an informed person in not making a particular disclosure though relevant is unlikely to be decisive
         1. *Re Del Castillo (1998)*
   2. *Full Disclosure demonstrates Fame/Character –* By providing a candid and comprehensive disclosure of relevant information an applicant demonstrates a proper perception of his or her duty, and thereby seeks to demonstrate good character
      1. *Restoring good fame/character –* Its purpose is to assess an applicant’s assertion that he/she has restored good fame and character by subsequent meritorious behaviour.

*Thomas v Legal Practitioners Admission Board*

Appellant had not fully disclosed his misappropriation of funds from an employer. The offence occurred, 7 years earlier when he was 20 years old, can be explained away that he had financial pressures, he pleaded guilty and repaid the stolen money, had since been involved in business handling money.

**Held: these did not outweigh his lack of candour to the court.**

1. **Criminal Convictions of Dishonesty** –
   1. Prior criminal convictions directly relate to an applicants fame and character and are critical to the admissions process in ensuring a full disclosure is made.
   2. *Dishonesty Most Relevant –* Convictions of offences involving dishonesty are particularly relevant.
      1. *Re Davis*

*Re Davis*

The applicant failed to disclose his convictions and induced two solicitors to give him certificate of character without disclosing them he had been convicted of breaking, entering and stealing 12 years earlier.

**Held**: High Court ruled applicant should be struck off because

*‘so obvious a relevant matter when character is under consideration that there can be no room for doubt as to the duty to disclosure to the Both and to the persons from whom he obtained certificates’*

* 1. *Demonstrate a Respect for the Law –* Failure to disclose a conviction are especially probative of an applicant’s character an attitude of candour generally dictates that all convictions be disclosed. Convictions it is believed show disrespect for law which persons admitted to practice are sworn to uphold.
     1. *Prothonotary of the Supreme Court of NSW v Tatar* – the court removed a lawyer from the roll who omitted to disclose upon his admission two recent convictions.

*Prothonotary of the Supreme Court of NSW v Tatar*

The applicants belief that the circumstances surrounding the convictions raised no question regarding **his own fitness or raised no concerned as to his character was enough to demonstrate ‘a basic failure to appreciate the standards of behaviour required of a legal practitioner’.**

**Held**: Supreme Court struck applicant off.

1. **Dishonesty – Criminal Charges** –
2. *Relevant* – Prior criminal charges are relevant to an applicant’s good fame and character and must be fully disclosed.
3. *Incorrectly Laid still relevant* – Although charges may be laid incorrectly, and acquittals must be respected, but the facts which give rise to the charges may bear upon a person’s fitness to practice
   * 1. *Frugtniet v Board of Examiners*
4. The acquittal may be on entirely unmeritorious grounds or it may occur in circumstances which nevertheless reveal untoward collateral behavior on the part of the accused:
   * 1. *Re Del Castillo*
        1. ‘The Supreme Court is clearly entitled to take into account that an applicant had been refused admission or been removed from the roll of practitioners in another relevant jurisdiction. This is relevant to fame and character.’
5. **Academic Misconduct** – s1.2.6(g) & 2.3.3 (1)(ab) *LPA 2004*
   1. *Onus is greater as non–public –* Findings of academic misconduct unlike criminal or most professional disciplinary matters, are not usually on the public recordand applicants therefore carry even grater onus to make full disclosure of such findings especially where they impinge upon issues of honesty.
   2. *No Need to Disclosure All Aspects –* Where the defendant failed to disclose the findings of his academic misconduct and did not adversely affect his fitness to practice or his honesty or trustworthiness.
      1. *Law Society of Tasmania v Richardson* – It was said in this case that an applicant need not disclose “all aspects of his past life that might be open to criticism or arguably amount to examples of imperfections of character or performance
   3. ***\*\*Re OG (A Lawyer)*** –
      1. *Academic misconduct couple with lack of candour –* Applicant had been disciplined arising out of collusion in a non–law subject and there had been no formal determination of a university disciplinary committee and the alleged misconduct was dealt in house
         1. When misconduct is coupled with a failure to disclose the accusations of plagiarism – it is enough to reject admission.
            * *Re OG (A Lawyer); Re Widdison*

* 1. ***Subject of Academic Disciplinary Action – 2.3.3(1)(ab)* LPA –** 
     1. *Full Academic Report –* Victorian Board of Examiners (2009) practice directions requires applicant to furnish a report from all educational institution where they have undertaken tertiary studies disclosing any misconduct while undertaking those studies.

*LPA – 2.3.3 (1) (ab) whether the person is or has been the subject of disciplinary action, however described, arising out of the person's conduct in–*

*(i) attaining approved academic qualifications or corresponding academic qualifications; or*

*(ii) completing approved practical legal training requirements or*

*corresponding practical legal training requirements.*

1. **Political Activity** –
   1. **Re Julius – 1941 –** the holding of extreme political views (membership of the then communist party of Aust) does not make a person unfit for practice provided that in expressing those views a person does not engage in unlawful activity.

\*\***Mitigating Factors –**

1. ***Age of Applicant*** *–* A court may be more influenced in favour of the applicant if the act was committed at a young age and that since that time the applicant’s behaviour has been redeeming.
   1. If prior conviction (even dishonesty) occurred when the applicant was very young, and was the result of immaturity and fully disclosed and evidence of restoration of integrity are of value and the court is more inclined to overlooked.

**Re Rowen**

The applicant was earlier been convicted of numerous offences including burglary at ages 25 and 27. He turned over a new leaf at age 30 and completed a law degree and sought admission aged 38.

**Held**: although there was outright dishonesty re the second conviction, the NZ HC was willing to accept that the applicant’s reformation had been complete in view of the intervening period of positive bahaviour

***Ex Parte Lenehan***

The HC admitted an applicant who had committed a number of dishonest acts that took place 20 years before his application when working as an articled clerk in a law office and fully disclosed his misdeeds.

**Held by HC**: mitigating circumstances include 1. He was surrounded in his initial practice by evil examples, which occurred at an early age; 2. His later employment record was respectable; 3. He completed a satisfactory war service including a promotion.

1. ***External stressors at time of impropriety*** *–* 
   1. External and extreme stressors that are most unlikely to be replicated in legal practice may incline the court not to bar her/his admission.

*Prothonotary v Del Castillo*

The applicant had been tried for murder during the course of the investigation he had lied to police and given false instructions to his lawyer. However, little emphasis of this aspect appears in the court case.

**Held**: Although it was held that the conduct fell below appropriate standards, it was believed that his conduct stemmed from a sudden response to a wholly unforeseen calamity placing extraordinary pressures on him 10 years ago.

* 1. ***Family Breakdown –***

*Re Bell* –

Applicant’s behavior as a litigant – where he threatened judicial officers – in spiteful family law proceedings could be explained by “reacting emotionally and irrationally in milieu of a traumatic family breakdown”.

Held: Court was unwilling to accept that these were statements made by a person who was suitable for admission as a lawyer.

**Re–Admission Application**

***General***

1. ***Scope***– A person who has been struck off and had their practising certificate removed can apply for admission.
2. ***Success*** *–* The probability of success for being readmitted is entirely dependent on the Court believing on ‘solid and substantial grounds’ – per *Re S (a solicitor) –* that the applicant is:
   1. Fit to be granted the privilege and assume the appropriate responsibilities that are granted to a lawyer.
3. ***Onus*** – The onus to be readmitted is a burdensome one as the applicant must ‘displace the decision as to the unfitness which lead to their removal in the first place’ per *Mungar v Legal Practice Board of WA.*

***Factors in Consideration***

1. ***Redemption & Rehabilitation*** *–* The most critical aspect of the applicant’s case is the ability to demonstrate to the Court that they can display sufficient evidence that redeemed their own reputation and in the eyes of the public.
   * 1. *Re a Practitioner;* *Bolton v Law Society*
2. ***Commendable Conduct***– The Court will look for a “sufficient period of commendable conduct’ since the striking off occurred.
   * 1. *Jauncey v Law Society of NSW*
   1. ***Comparison to the reason for striking off***– The Court relevantly considers the axiom ‘[t]he greater the fall from face, the more the ground to recover before the application is restated’
      1. *L v Canterbury District Law Society*
      2. *Dishonesty –* If the applicant is struck off for dishonesty, then the applicant must consequently display evidence of unblemished honesty – usually in circumstances where honesty is paramount.
         1. *Re Reily*; *Mungar v Legal Practice Board of WA*
   2. ***Weight given to regret***– The Court will relevantly provide weight to an applicant who expresses regret for their actions and has understood and accepted their wrongful actions.
      1. *‘acknowledgement of the error does not itself displace unfitness … but it is an indispensable starting point’* per
         1. *Re Dennis*
      2. *Must provide evidence of contrition* – The evidentiary burden still exists since ‘regret is no more than words, which carry little weight if unsupported by evidence and behaviour which reflects that regret’
         1. *Gregory v QLD Law Society*
      3. *Rejection of Regret –* If the applicant fails to acknowledge the seriousness of their prior behaviour or attempts to deflect or downplay the responsibility for it – the Court will immediately look to this as evidence of character and unfitness.
         1. *Watt v Law Society of Canada; Gregory v QLD Law Society*
3. ***Findings of Tribunal who ordered removal*** – Critical to the findings of readmission are the findings of the Court or tribunal that ordered the removal in the first place.
   1. ***Not ‘downplay’ findings*** – The Court will look to previous findings and put them to the applicant. The applicant must not downplay the findings and must explain their conduct and any mitigating instances.
      1. *Bridges v Law Society of NSW*
   2. ***Focus on address of failings*** *–* The applicant must focus [per above] their submissions on evidence of ratification of their failings and deduce evidence which clearly shows that they been rehabilitated.
   3. ***More Serious the failing, Greater the Burden***– [see above] – The more serious the failings of the applicant, the greater the evidentiary burden required by the applicant to show they have overcome such failings.
      1. *Re Harrison*
   4. ***Frequency of Acts & Immaturity*** *–* The Court will look to the findings of the tribunal to seek evidence of whether the reasons for striking off where unique or isolated incidents or where sustained and repeated and the age of the applicant at the time per *Re Harrison.*
      1. *More likely if isolated, immature –* The Court will likely to attribute weight to the application if the incident is isolated and the applicant was immaturity and inexperienced.
         1. *Kriss v Legal Practitioners Board*
   5. ***Other External Stressors***– The Court relevantly considers any external stressors at the time the offence was committed. These may or may not be relevant.
      1. *Age, Family Problems etc* ***[see mitigating factors]***
4. ***Importance of Candour upon Readmission***
   1. *Overcoming failings* – The importance of displaying candour is even more critical since the applicant must overcome those reasons for which they were struck off in the first place.
      * 1. *Kriss v Legal Practitioners Board*
   2. *Lack of Candour –* A relevant lack of candour is direct evidence that the applicant readmission is weak and will undoubtedly sway the Court to rejecting the applicants request for readmission on this basis.
5. ***Time between removal and application* –** The Court will provide appropriate weight to the time between which the applicant has been removed and has applicant for admission.
   1. *Sufficient evidence of Rehabilitation* – The Court will relevantly weight the time between removal and readmission in order to ensure that the applicant has been able to overcome their failings.
      1. *Gregory v QLD Law Society*
   2. *Longer time does not guarantee* – A long time between removal and readmission does not guarantee removal.
      1. *Re Harrison* – 20 years after removal – Court rejected applicant as conduct was in mid–40’s and applicant show repeated, sustained dishonesty over 4 years.
6. ***Readmission Subject to Conditions*** – *s4.4.17(d)* *LPA* –*–* The Court can readmit an applicant unconditionally or with conditions attached to their practising certificate.
7. *Monitoring & Conditions* – Where the Court imposes conditions or undertakings on readmission, they are done to control or monitor the lwayers reason for removal.
8. *Removal of Conditions* – *s4.4.23 LPA* – The applicant can apply to the Court to have the conditions removed and must prove that the circumstances that made the Court impose the condition have been overcome.
   * 1. *Reversal of Reasons* – The applicants case for a removal of the conditions must be

*‘founded upon a reversal of those reasons which had justified the original imposition of the restriction’* – *Taylor v QLD Law Society*

1. ***[see also Disciplinary Actions – VCAT Hearing; Misconduct]***

**Duty to the Court**

**General**

1. ***Order of Duties*** – The obligations of legal practitioners comprise a hierarchy of duties:
   1. ***Duty to the Law***
      1. *Paramount Duty**– PCPR 4 –*The paramount duty is to the Law and to obey the law in the interests of the administration of justice and the respect for the law per *Re B*.
   2. ***Duty to the Court***
   3. ***Duty to Clients***
   4. ***Duty to Others*** *[Practitioners, Community, 3rd Parties]*

**Duty to the Law**

***Client who behaves unlawfully – PCPR 15 [also confidentiality, public interest]***

1. ***Unlawful Conduct*** *–* If a client engages in unlawful conduct the practitioner should counsel the client against it and avoid any personal involvement. *‘Cannot turn a blind eye to disclosed or apparent illegality’*
   1. *Termination of Retainer –PCPR 6.1.3*
      * 1. *Clients acts or omissions provide cause* – If the client is preventing the lawyer from properly performing their duties such as then they can terminate the retainer.
   2. *Disregard Advice –PCPR 15.3 –* If client disregards the advice and thereby contravenes the law or legal obligation to a 3rd party then terminate instructions.
   3. ***False or Misleading Evidence*** – *PCPR 15.1* – a Client who has tendered false and misleading evidence and has informed the lawyer about such evidence must:
      1. *15.1.1A* – Advise the client unless the court is informed of the lie or falsification, the practitioner cannot take any further part of the case.
      2. *15.1.1* – Refuse to take any further part of the case until the client authorises disclosure.
      3. *15.1.2* – Promptly inform the Court of the lie or the falsification upon the client authorising the practitioner to do so.
      4. *15.1.3* – Must not inform the Court of the lie or falsification.
2. ***Unethical instructions*** – *PCPR 6.1.3*
   1. *Make Inquiries –* If the instructions may have ethical consequences for you then you are entitled to make inquiries of the client to establish their bona fides.
   2. *Inquire to 3rd Parties –* If these inquiries do not allay your suspicions you may be justified in making inquiries of other people provided that you do not breach confidentiality
3. ***Illegal transfer of money* – *Financial Transactions Reports Act 1988 (Cth)***
   1. *Need to Inquire* – The lawyer should question the client regarding any large transfers of money and it should raise the suspicion that is stems from criminal activity.
   2. *Decline –* If you suspect it was come by unlawfully and the client is unable to satisfy you otherwise, then you should decline to handle it.
   3. *Report FTRA –* s28(3) of the FTRA requires any cash transactions over $10K
4. ***Clients using false names –*** *PCPR 15.1*
   1. *False names* – Lawyer should inquire about false names – particularly for trust accounts – and ensure that the client is not perverting the course of justice.
5. **Consequences for lawyer of the client’s unlawful acts**
   1. *Professional sanctions*
   2. *Civil Liability* – if they exhibit the requisite knowledge (eg as a third party to a breach of trust),
   3. *Criminal Liability* – Criminally if they aid and abet a criminal act.

***Giving advice***

1. ***Cannot advance an illegal purpose*** *– PCPR 1.*1 – Must not give advice to a client when knowing that the client is requesting the advice to advance an illegal purpose;
   1. *Achieve or Conceal and Illegal Purpose –* Vic Bar 109 – Must not advise a client as to the ways in which an unlawful purpose may be achieved or concealed, propose methods of breaking the law, or advise clients to behave contrary to a court order ();
      1. Requires barristers who apprehend that written advice is being sought for a wider purpose than the affairs of a client to seek and obtain a satisfactory assurance that it will not be used for an improper purpose
2. ***Only Lawful Advice*** *–* A practitioner may advise a client to engage in conduct the lawfulness of which is uncertain, provided:
   1. the advice is given in good faith to test the validity or scope of the law
   2. the client is informed before advice is given of the likelihood and consequences of the conduct being found to be illegal
   3. the client has freedom of choice on what action to take
3. ***Taxation advice***
   1. *No Tax Avoidance –* Practitioners must not advise clients to engage in tax evasion which is the criminal falsification of information provided to the ATO, or the non–disclosure of material information.
   2. *Failure to adequately advise tax minimisation is also a breach –* Conversely, failure to advise of tax minimisation opportunities may, where such advice is within the scope of the retainer, constitute professional negligence practitioners have a positive duty to advise clients of legitimate means of avoiding tax liability
   3. *Commissioner of Taxation v Westraders – Barwick* CJ (a ‘pro–taxpayer”) emphasised the duty of Parliament to specify what was legal or not, and Deane J concurred, equating any effort by a Court to plug loopholes as offensive to the Rule of Law.
4. ***Moral issues in providing legal advice***
   1. Having accepted instructions to act, should a practitioner raise with the client any moral issues associated with those instructions?
   2. It has been suggested that where a course is legal, but morally questionable, practitioners should inform their clients of those moral implications.
5. ***Barrister*** – *[****see cab–rank rule]***
   1. The barrister should frankly disclose to the client and let the client decide if suitable.
6. ***Lawyer*** *– [****see termination of retainer****]* 
   1. may decline to represent a client who proposes a course of conduct that offends the lawyer’s sense of morality.

**Duty to the Court / Duty to Client**

***\*\*General***

1. ***Purpose*** *–* Lawyers duty to the court supersedes all other duties except that of their duty to the law and is a ‘paramount’ duty.
   1. *Giannarelli v Wraith*
2. ***Honesty & Candour*** – *PCPR 30* – There is a duty to act with honesty and candour in all dealings with courts and tribunals and not to:
   1. *30.1.2(a)* – be prejudicial to the administration of justice;
   2. *30.1.2(b)* – diminish public confidence in the administration of justice;
   3. *30.1.2(c)* – adversely prejudice a practitioner's ability to practise according to these rules.
3. ***Courts Inherent Jurisdiction***– The court retains an inherent jurisdiction over its officers, directed at preserving the proper administration of justice.
   1. *Restrain its Officers* – It may for instance restrain lawyer from appearing where it would breach a confidence owed to a former client or a breach of fiduciary duty owed to an existing client
      1. *Holborow v MacDonald Rudder*
   2. *Sanction its Officers* – A lawyer who misleads the Court can be disciplined by the Court and are referred to the Court by a disciplinary body.
      1. *Interference with Justice* – An interference with the administration of justice or a disregard for due process of the Court is a serious punishment through contempt.
         1. *Ex parte Bellanto*
4. ***Officers of the Court*** *–* Lawyers are officers of the court and therefore their paramount duty is to the administration of justice consisting of four components:
   1. **Duty of candour** **in disclosing the law** (to disclose the applicable law and not to mislead about the facts)
   2. **Not to abuse the court process**
   3. **Not to corrupt the administration of justice**
   4. **To conduct cases efficiently and expeditiously**

***Duty of Candour in Disclosing the Law***

1. ***Duty to assist the court in the applicable law*** *–* Lawyers duty is to ‘do right by their clients and right by the court’ per *Lougheed Enterprises v Armbruster*
   1. *Client and Court* – A lawyer is obliged as part of their duty to both the client and the court to put any argument that might reasonably be open to the client.
      1. *Queensland Law Society Inc v Stevens*
   2. *Barristers must not mislead the Court* – Practitioners must not mislead the court as to the law and must ensure that the law is correctly applied by the court Bar Rules 24 and 26.
2. ***Candour in Presentation of the Law***– Lawyers must ensure they *‘do what they can to ensure that the law is applied correctly to the case’* per *Re Gruzman*
   1. ***Independence & Abstraction of Client Control***– Lawyers should be aware of the relevant legal principles and ensure that they do not allow their clients to take over the litigation at the behest of their professional judgement per *Wentworth v Rogers*.
   2. ***Not waste Court time***– A lawyer is not required to make every point conceivable and inconceivable without judgment or discrimination available – per *Ashmore v Corp of Lloyds* – but must rather exercise professional judgment so as *“not to use public time in pursuit of submission which are really unarguable”*
      1. *Richardson v R*
   3. ***Not withhold the Law*** *– PCPR 14.6; 14.8 & Vic Bar R24; R26*– Lawyers must not withhold the law and this persists to final judgement per PCPR 14.8.
      1. *Not withhold authorities –* Lawyers must not withhold authorities which are detrimental to their case but which the law or professional standards require them to produce
         1. *Rondel v Worsley*
      2. *PCPR 14.6 –* Must disclose the law to the Court including:
         1. *14.6.1* – Any binding authority;
         2. *14.6.2* –Any authority decided by the full court of Federal Court of Aust, Court of Appeal of SC or Full Court of SC;
         3. *14.6.3* –Any authority on the same or materially similar legislation as that in question in case including authority decided at first instance;
         4. *14.6.4* –Any applicable legislation.
3. ***Candour in Presentation of Fact [next page]***
4. ***Candour in Presentation of Fact*** – A lawyer must ensure that they are respect and candid in their presentation of Fact per *Re Davis*.
   1. ***Cannot mislead*** – PCPR 14.1 – Lawyers cannot knowingly mislead the Court or provide any evidence meant to mislead. PCPR 14.2 requires them to immediately correct any misleading statements.
      1. *Extends to all representations made in Court including evidence and submissions* – *Rondel v Worsley; Re Gurzman*
   2. ***Barristers cannot mislead***– Practitioners must not be party to the presentation of evidence, or making of allegations, that lack sufficient evidentiary foundation – Bar Rules 31 to 35, 38 and 42
      1. If found out later that a witness lied must tell the court: Bar Rule 29
   3. ***Not******mislead opponents***– English case of *Vernon v Bosley* clearly stated that:
      1. *Not mislead Court or Opponent –* A litigant has a duty not to mislead the court or the opponent
      2. *Candid Disclosure of Evidence –* Where the case has been conducted on the basis of certain material facts which are an essential part of the party’s case and then contradictory facts are discovered before judgment, there is a danger the court will be misled and thus counsel must advise the client that disclosure should be made.
      3. *Withdraw if client unacceptable –* If the client does not accept then withdraw from the case

*Vernon v Bosley*

Plaintiff brought an action for nervous shock, and failed to disclose to the Court before the final order that his condition was not as severe as it really was. Plaintiff was running twin actions for this claim and for a claim to seek custody of children. Psychiatrist in this later case adduced evidence which lead Court to believe condition was not bad.

**Held:** Lawyers mislead the Court by not advising of the real state of the condition.

* 1. ***Limits on Duty & Statements***– *PCPR 14.10; Vic Bar 158* – A lawyer cannot make a misleading statement by failing to disclose facts concerning character or past when a lawyer makes other statements which are not misleading.
     1. *Honest in Positive Statements –* While practitioners are obliged to act honestly in all positive statements made to the court, they are not required to:
        1. *Identify of Witness’ –* disclose the identity of a witness they propose to call who will give evidence adverse to the other side
        2. *Call all Witness’ –* call every witness able to give relevant testimony
        3. *Correct Errors – PCPR 14.3; Vic Bar 21 –* Correct errors of fact made by another party and draw judges attention to these errors.

1. ***Duty not to Abuse Process* –** Lawyer must respectthe law and prevent any abuse of process or procedure.

* 1. ***Insufficient Evidence***– *PCPR 16.3; Vic Bar 35* – A lawyer must not be a knowing party to the presentation of evidence or making of statements for which there is insufficient evidentiary foundation to submit such evidence.
     1. *3rd Parties* – This includes the submission of evidence relating to third parties for which there is no evidence per *Rondel v Worsely*.
  2. ***Baseless aspersions or allegations*** – *PCPR 16.1; Vic Bar 35* – A lawyer must not be party to the presentation of any statement or allegation for which there is insufficient evidence [per above] or which is not appropriate to the advancement of the clients case.
     1. *Clyne v NSW Bar Association*
  3. ***Allegations of Criminality***– Lawyers should not make any allegations of criminal activity – such as fraud – and should not make such claims lightly per *Saltoon v Lake*.
     1. *Large evidentiary burden* – Lawyers must have appropriate evidentiary foundations prior to alleging or pleading fraud and be aware of disciplinary consequences if they are wrong.
        1. *Holborow v McDonald*
     2. *Barristers cannot make allegations lightly – Vic Bar 37* – Cannot make allegations which are ‘scandalous or calculated to vilify insult or insure the commercial or personal reputation of any person or corporation’
  4. ***Frivolous Cases* –** Lawyers must acknowledge their duty to the administration of justice requires efficient and effective resolution of cases with economic efficiency.
     1. *Duty to Inform* – Lawyers must realistically assess client cases and not pursue frivolous cases and if they pursue weak cases – inform the client the case is weak and the likely consequences.
        1. *Steindl Nominees v Laghaifar*
     2. *Speedy & Efficiency* – Lawyers who squander Court time and resources face cost orders and disciplinary procedures for wastage.
        1. *Giannarelli v Wraith; CT Bowring & Co v Corsi Partner*s
     3. *Lawyer imposed Costs Orders* ***–*** Lawyers who instruct their clients to pursue frivolous cases or unduly delay litigation can have Court imposed cost orders.
        1. *White Industries v Flower & Hart*

1. ***\*\*\*Duty not to Corrupt Administration of Justice [next page]***
2. ***\*\*\*Duty not to Corrupt Administration of Justice*** – In combination with the previous duty, a lawyer must not corrupt the course and administration of justice.
   1. ***Client perjury & false statements***– *PCPR R15; Vic Bar 29* –
      1. If a practitioner is informed that the client or their witness has lied to the court in a material particular to the court, or falsified documentary evidence, the practitioner must not inform the court without the client’s consent, but must refuse to take any further part in the case unless the client authorises disclosure
   2. ***Client intending to disobey court order*** *– PCPR 15.3; Vic Bar 30 –*
      1. If a practitioner learns that a client intends to disobey a court order, s/he must advise the client against that course, but must not inform the court without the client’s authority –
   3. ***Contacting opposing party***– *PCPR 25 and Vic Bar 53* –
      1. Practitioners must not confer or deal directly with the opposing party unless the party is unrepresented and consents to the contact –
   4. ***No coaching of witnesses*** *–* *PCPR 17.1 and Bar Rules 44(a)* –
      1. *Advise False Evidence –* Cannot advise or suggest to a witness that false evidence should be given, or suborn a witness.
      2. *Cannot coach or encourage a witness* – PCPR 17.2 – to give evidence different from the evidence the witness believes to be true, advise the answers the witness should give to questions that might be asked
   5. ***Cannot collude with multiple witnesses*** *– PCPR 17.3 and Bar Rules 46* –
      1. No conferring with witnesses together – lawyers should take evidence from lay witnesses separately and to encourage witnesses not to discuss their evidence with others to reduce the risk of contamination and hence their credibility
         1. *Day v Perisher*
   6. ***No communication during cross–examination*** *– PCPR 17.4 & Vic Bar 46–* 
      1. A lawyer isprohibited to confer with any witness (including a client) the lawyer has called on any matter related to the proceedings while that witness remains under cross–examination, unless cross–examiner consents.
   7. ***No witnesses ‘ownership’***– *PCPR 17.5; Vic Bar 47* – No practitioner engaged in a civil or criminal proceeding has the sole right to call or discuss evidence with a witness.
      1. *Can Confer with anyone is willing* – a practitioner may confer with any witness who is willing to do so.
      2. *Cannot prevent or discourage* – lawyer must not prevent or discourage a prospective witness from conferring with the opposition
   8. ***Communications with judges*** *– PCPR 19; Vic Bar 54–56 –* Practitioners must not without consent communicate to the judge a matter of substance in the absence of their opponent to preserve the integrity of the Court.
   9. ***Contacting opposing party*** *– PCPR 18; Vic Bar 53 –* 
      1. *Cannot make false statements to opponent* – PCPR 18.1
      2. *Cannot Communicate in Court if opponent absent [excluding ex parte]* – PCPR 18.5

**Duty to Others**

***Purpose*** *– LPA* s2.2.1 – Provides that the expectation that practitioners will protect the public interest and protect consumers.

1. *Protect Public Interest – 2.2.1(a)* – protect the public interest in the proper administration of justice by ensuring legal work is carried out by those qualified to do so
2. *Protect Consumers – 2.2.1(b) –* to protect consumers by ensuring persons carrying out legal work are entitled to do so.

***Duties to other practitioners –*** *PCPR 18; 21–25; Vic Bar 50–57* – A lawyer must act with honest, fairness and courtesy and adhere to undertakings to promote the efficient administration of justice when dealing with opponents.

1. ***Honesty and accuracy in representations*** *– PCPR 18.1, 18.2; Bar Rules 50, 51* **–**lawyers must be able to rely on the representations and assurances of other lawyers.
   1. *Don’t make false statements – PCPR 18.1 –* They must not knowingly make a false statement to an opponent in relation to the case
   2. *Correct False Mistakes –* *PCPR 18.2* – must take all necessary steps to correct any false statement unknowingly made by the practitioner to the opponent as soon as possible after becoming aware that the statement was false.
      1. *Legal Services Commissioner v Mullins*
2. ***Animosity between clients not to be reflected in professional relations***
   1. *Abstraction of Animosity – PCPR 21 –* Lawyers must not permit any discourtesy that may exist between the parties to seep into their professional relations with one another, even though the client may expect the lawyer to share in their personal acrimony even towards the opposing party’s lawyer;
   2. *Avoid provocative or offensive language toward one another –* *PCPR 21*
3. ***Cannot take advantage of an opponent’s mistake* –** *PCPR 21*
   1. *No positive obligation to correct opponents mistake –* A lawyer is not obliged to assist an opponent, nor correct their apparent mistakes however they must not take advantage of the mistake per *Chamberlain v Law Society of ACT*
   2. *Cannot take advantage – PCPR 21 –* Taking an advantage of a client’s mistake can lead to professional misconduct regardless of how ‘well resource, knowledgable or frequently litigated the opponent is’ per *Chamberlain v Law Society of ACT*.
4. ***Confidential communications***
   1. *Duty of Confidence –* ***[refer duty of confidence]*** *–* Practitioners should not disclose communications with other practitioners or parties that are expressed to be “without prejudice” or are otherwise privileged
      1. *Not read documents – Vic Bar 57* **–**Lawyers who receive a document (by post, fax, or electronically) sent to them by opposing lawyers by mistake, should avoid reading the document and immediately return it to the sender.
      2. *Cannot argue waiver of privilege –* It will not be useful to argue that privilege has been waived.
5. ***Undertakings* – *PCPR 22.1* –** includes undertakings given by an employee of a lawyer
   1. *Honourable in Undertakings –* This duty has an objective element, in that every person who deals with a lawyer must be able to expect that the lawyer will act honourably, and a subjective element, in that any person who accepts an undertaking from a lawyer must be entitled to expect that it will be honoured.
   2. *Wary of undertakings – PCPR 22.2 –* As a general rule, an undertaking should not be given or accepted. There is a great danger that it will become impossible to comply with the undertaking causing the lawyer to be guilty if misconduct and a ruined reputation
   3. *To the Court* – A breach of undertaking to the court may be punishable as contempt.
   4. *To another practitioner* – *PCPR 22.2* – the most common; an undertaking may be personal or on behalf of a client;
      1. If *given personally* it will be enforceable against the giver.
      2. If given *on behalf of the client*, it will be only enforceable against the client. The lawyer must ensure that he/she has explicit instructions to give the undertaking on behalf of the client or else it may be construed as a personal undertaking.
6. ***Second opinions***
   1. *Notification of second opinions –* A lawyer may give a 2nd opinion to a client of another lawyer, however, it is professional courtesy to notify the 1st lawyer beforehand.

***Duties to third parties*** –

1. **Communication with a client of another lawyer – PCPR 26; 28** 
   1. Lawyers are prohibited from communicating, orally or in writing, with a person whom they know is represented by another lawyer which may mislead or intimidate.
2. ***False Statements with Third Parties*** *– PCPR 28 –* It also means a practitioner must not state as true something they believe to be untrue, make statements calculated to mislead the other party or threaten criminal action if a civil matter is not settled.
3. ***Threaten criminal proceedings or media exposure*** *– PCPR 28.3* – Prohibits lawyers from threatening an institution of criminal proceedings in default of satisfying a civil liability to a client.
   1. *Referring of Crimes to Authorities* – There is no permissible restriction on lawyers ‘referring crimes to the appropriate authorities’ instead of threating legal proceedings per *Legal Service Commissioner v Sing*.

**Duties to community**

1. ***General*** *–* This means avoiding insulting, acrimonious or offensive correspondence or correspondence designed to intimidate the other party per PCPR 21.
2. ***Abstraction of Animosity***– PCPR 21 – Resist pressure from clients to put the other side down – clients must know that you act first in the public interest, and that that requires some distance on your part from their animosity.
3. ***Communicate with represented clients*** *– PCPR R25.1.1* **–** A practitioner should not communicate directly with a person known to be represented by another practitioner in the matter without the other practitioner’s consent.
   1. *Permissible if solicitor non–responsive – PCPR R25.1.2* **–** The prohibition does not apply in exceptional circumstances, such as where the practitioner has been trying to get a response from the other party’s practitioner and there has been no response after repeated attempts.

**Disciplinary Procedures**

**Complaints and Discipline** – *4.2 & 4.4 LPA 2004*

1. ***General*** – A complaint can involve
   1. *Civil Complaint – s4.2.1(1)* *LPA*
   2. *Disciplinary Complaint – s4.2.2* *LPA*
   3. *Civil & Disciplinary Complaints – s4.2.3 LPA*
2. **Civil complaint**s – s*4.2.2(2) LPA* – primary related to costs disputes between a lawyer and a client in relation to a legal cost charged.
   1. ***Nature of Complaint*** *– s4.2.2(2) LPA* – May be made about the conduct of a law practice or a legal practitioner;
      1. *s4.2.2(2)(a)* *LPA* – a dispute (costs dispute) between a lawyer and a client in relation to legal cost charged that do not exceed $ 25000;
         1. (i) & (ii) or between a law practice
      2. *s4.2.2(2) (b) LPA* – claim that a person has suffered pecuniary loss as a result of a lawyer’s act or omission other than a loss in respect of which a claim lies against the Fidelity Fund;
      3. *s4.2.2(2)(c)* *LPA* – any other genuine dispute arising out of or in relation to the provision of legal services by a lawyer to a client.
   2. ***Who can complain*** – *Vic ss 4.2.4(1), 4.2.5, 4.2.6 LPA* – Any person who has a civil dispute with a lawyer can make a complaint to the Legal Services Commissioner
      1. *Time Limit* – *s4.2.6 LPA* – Must be made within 6 years
      2. *Costs* – Must be made within 60 days after legal costs were made unless a reasonable cause of delay.
   3. ***Commissioner Must Attempt to Resolve ––*** 
      1. *Can Dismiss Claim as Vexatious – s4.2.10 LPA* – The commissioner may dismiss the complaint if it is vexatious, misconceived, frivolous or lacking in substance.
      2. *Can refer for mediation or costs assessment – s4.3.5(2) LPA* –Commissioner can take appropriate action for medication or arrange a non–binding costs assessment.
      3. *Make an Order – s4.3.17*
         1. *Order the provision of Legal Services*
         2. *Compensation Order –* Not exceeding $25K
         3. *Waive a lien or repay costs*
         4. *Order complainant to pay costs*
      4. *Unable to resolve, refer to VCAT* – *s4.3.6; 4.3.7 LPA* – If the Commissioner is unable to resolve it must notify each party and refer to VCAT.
3. **Disciplinary complaint** –
   1. ***Nature of Complaint*** – *s4.4.1 LPA –* Complaint about the conduct of a lawyer which may amount to
      1. *s4.4.2* – ***Unsatisfactory professional conduct*** – The conduct of the lawyer which *‘falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner’*
         1. *Satisfying Conduct – s4.4.4*
            1. *s4.4.4(a) – Contravention of LPA or Professional Rules*
            2. *s4.4.4(b) – Charing excessive legal costs*
            3. *s4.4.4(c) – (i) Serious offence, (ii) Tax offence,*  ***(iii) Dishonesty***
            4. *s4.4.4(d) – Becoming insolvent under administration*
            5. *s4.4.4(e) – Disqualified from managing any corporation*
            6. *s4.4.4(f) – Failing to comply with any Tribunal order*
            7. *s4.4.4(g) – Failing to comply with Compensation order*
      2. *s4.4.3 –* ***Professional Misconduct*** *–* The conduct of the lawyer is such that it involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence.
         1. *Satisfying Conduct – s4.4.4*
         2. *Failing to comply with condition on practising certificate – s4.4.5*
   2. ***Who can complain*** – *Vic ss 4.2.4(2), 4.2.5, 4.2.6 LPA* – Any person who has a civil dispute with a lawyer can make a complaint to the Legal Services Commissioner
      1. *Time Limit* – *s4.2.6 LPA* – Must be made within 6 years
      2. *Commissioner can investigate without complaint – S4.4.8 –*Commissioner can investigate complaint for unsatisfactory professional conduct or professional misconduct without complaint.
   3. ***Commissioner Must Attempt to Resolve –*** *s4.4.10(3); s4.4.13 LPA*
      1. *Refer to VCAT if ‘reasonable likelihood’ is established –* If satisfied that there is reasonable likely hood that VCAT would find the lawyer guilty of professional misconduct, apply to VCAT for an order.
      2. *‘reasonable likelihood’ – Process – s4.4.13(3) LPA*
         1. (a) apply to VCAT for an order in respect of the lawyer;
         2. (b) reprimand or caution the lawyer (with his or her consent); or
         3. (c ) take no further action if satisfied that the lawyer is generally competent and diligent and not subject of another substantiated complaint within the last five years
      3. *‘no reasonable likelihood’* *– Process – s4.4.13(3) LPA –* 
         1. If satisfied that there is no reasonable likely hood that VCAT would find the lawyer guilty of professional misconduct or unsatisfactory professional conduct take no further action.
4. **Factors to consider** –
   1. ***Frequency of misconduct*** – If the lawyer’s misconduct is a relevantly isolated incident then a less severe disciplinary sanction is typically awarded.
      1. *Attorney–General v Bax*
   2. ***Seriousness of Misconduct*** – The seriousness of the misconduct and the relevant reflection on the lawyers character are important considerations such as assisting inquiries and being honest.
      1. *QLD Law Society v Cummings*
   3. ***Lawyers Attitude*** – If the lawyer assists inquiries, does not attempt to conceal or downplay the seriousness of their misconduct and is open, honest and transparent then this demonstrates that the lawyer is still one of good character and candour.
      1. *NSW Bar v Livesey*
   4. ***Level of appreciation of wrongdoing*** – A disregard for the seriousness of the misconduct and the gravity of any related disciplinary hearings can display the appropriate level of conduct to show that the lawyer is unfit to practice.
      1. *Law Society of NSW v Foreman*
   5. ***Level of Experience*** – The lawyers level of experience can be a conflicting source since a single breach in a very experienced lawyer should not receive disciplinary action – yet it can also suggest that the lawyer should have known better.
      1. *Guss v Law Institute of Victoria*
   6. ***Illness or External Stressors*** – Evidence of illness or external pressure will only rarely mitigate the actions taken by the lawyer. I
      1. *Illness renders unifit –* Illness will excuse the lawyer from practising law per *Legal Practitioners Board v Trumen*
      2. *External Pressure* – ‘Character is not tested by what one does in goods times but in bad’ and is limited to serious misconduct like dishonesty per *Law Society of NSW v Foreman*
         1. *Can displace oversights or neglect – Law Society NSW v Farr*
5. **VCAT Hearing** –
   1. ***Hear the Complaint*** – *s4.4.15 LPA –* VCAT must hear the complaint referred from the Commissioner
   2. ***Completed Hearing*** – Once the hearing is completed and VCAT is satisfied that the lawyer is:
      1. ***Guilty*** – s*4.4.16* *LPA*– Can order anything it sees fit. Can also order
         1. *s4.4.17(a)* *LPA* – Removal
         2. *s4.4.17(b)* *LPA* – Suspension
         3. *s4.4.17(d)* *LPA* – Practicing certificate conditions
         4. *s4.4.19* *LPA* – Reprimand
         5. *s4.4.19* *LPA* – Compensation order
         6. *s4.4.19* *LPA* – Supervision Order
   3. ***Request for Rehearing*** *– s4.4.21 LPA –*Party can request a rehearing of the application if an order against the party is made.
      1. ***Power to Vary*** – *s4.4.23* – VCAT can vary the order, affirm it, remove it or replace the order as it sees fit.

**Misconduct**

**General**

1. ***Scope*** *–* Lawyers who engage in misconduct are most are in breach of their duty as a legal practitioner and can face disciplinary procedures ***[see Disciplinary Procedures]***
   1. *Course of Practice –* The proper administration of justice requires that the public, courts and tribunals are able to rely on what a lawyer says and does.
      1. *Law Society of NSW v Foreman.*
   2. *Outside of Practice –* Particular types of personal misconduct outside of practice can directly influence a lawyer’s capacity to act and may require disciplinary proceedings.
2. ***Unsatisfactory professional misconduct***– *s4.4.2LPA* –Any conduct in connection with the practicing of law that falls short of the standard of competence and diligence that a member of public reasonably expects.
   1. ***Must be in connection with the ‘practicing of law’***
3. ***Professional misconduct*** *– S4.4.3* – Conduct which involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence.
   1. *S4.4.3(1)(b)* – Conduct inside or outside the practicing of law which justifies the finding that the lawyer is not a ‘fit and proper person’
4. ***Unsatisfactory professional conduct*** & ***Professional Misconduct*** – *s4.4.4* *LPA* –
5. *s4.4.4(a) – Contravention of LPA or Professional Rules*
6. *s4.4.4(b) – Charing excessive legal costs*
7. *s4.4.4(c) –* 
   1. ***s4.4.4(c)(i) – Serious offence*** *– s1.2.1 LPA – Serious offence is an indictable offence in Australia, indictable offence against any other jurisdiction, indictable offence against the law of foreign country which would be indictable in Australia.*
   2. *s4.4.4(c)(ii) – Tax offence*
   3. ***s4.4.4(c)(iii) – Dishonesty –*** Any conduct which is dishonest is conduct which is an offence under this section.
8. *s4.4.4(d) – Becoming insolvent under administration*
9. *s4.4.4(e) – Disqualified from managing any corporation*
10. *s4.4.4(f) – Failing to comply with any Tribunal order*
11. *s4.4.4(g) – Failing to comply with Compensation order*
    1. *s4.4.6 LPA* – **Wilful or reckless failure** to comply with a condition or undertaking on
       1. *a practicing certificate* – *s4.4.6(a) LPA*
       2. *a undertaken given to Court, Tribunal, Commissioner or Board* – *s4.4.6(b) LPA*

constitutes unsatisfactory professional conduct.

**Misconduct in Course of Practice**

1. ***General*** *–* PCPR 1,2 – Act for the client *‘honestly, fairly, in the clients best interests and maintain clients confidences with competence and diligence’*
2. ***Misleading a court or tribunal –*** 
   1. *Knowingly & Deliberately – s4.4.4(c)(ii) LPA –* A lawyer who knowingly and intently deceives a court or tribunal displays ***dishonesty***, and thus commits professional misconduct and will be struck off
      1. *O’Reilly v Law Society of NSW; Council of Queensland Law Society v Wright*
   2. *Recklessly misleading a court* *–* *s4.4.6(b) LPA* – will attract a disciplinary sanction, the severity depending on the degree of recklessness
      1. *Law Society of NSW v McElvenny*

*Law Society of NSW v McElvenny*

Solicitor swore a false affidavit verifying a defense found committed for unsatisfactory conduct. **Held:** Was not ‘professional misconduct’ because ‘he did not deliberately swaer a false affidavit and had no intention to deceive but acted recklessly when he verified the amended defence without even ready it’

1. ***Misleading another client, lawyer or a third party –*** *s4.4.4(c)(iii) LPA* ***–*** 
   1. *Knowingly Making False Statements –* Knowingly making false statements (written or oral) to third parties (including another lawyer, clients or a body), is prima facie evidence of professional misconduct
      1. *Mellifont v QLD Law Society*
      2. *Legal Practitioners Conduct Board v Hannaford*

*Legal Practitioners Conduct Board v Hannaford*

A lawyer received from a client moneys for fees in advance, but did not bring this to the attention of the Legal Aid Commission but instead declared to the Commission that the client had no prospects of private funding. **Held**: The SA Supreme Court stuck him off.

1. ***Misleading a professional body*** *– s4.4.4(c)(iii) LPA – Dishonesty*
   1. *False statements to professional bodies –* Lawyers who make false statements in an attempt to conceal misconduct from investigators, which often sets off a series of subsequent false statements.
      1. *Law Society of NSW v McNamara*
   2. *Original Misconduct less than Misleading Statements –* A lawyer can get struck off for misleading an investigator even though the original misconduct being investigated would not of itself have been sufficiently serious to result in striking off
      1. *Law Society of NSW v McNamara*
2. ***Disrespect to the Court – s4.4.2 LPA –*** *‘in connection with the practicing of law’*
   1. *Contempt of Court* – A lawyer can be struck off for showing contempt of Court per *Prothonotary of Supreme Court of NSW v Costello*
   2. *Grossly Offensive Language* – A lawyer can be significantly reprimanded for the use of offensive or disrespectful language in Court.
      1. *Legal Services Commissioner v Turley*
   3. *Contact with Judge* – Inappropriately contacting or speaking to a judge outside of a matter; using threatening or inappropriate language aimed at swaying a judge is deemed professional misconduct – *Council of NSW Bar v Slowgrove*
3. ***Trust accounting irregularities***
4. *Fraudulent misappropriation* – Fraudulent misappropriation of trust moneys is professional misconduct and criminal offence and will justify an order striking off the lawyer
   1. *Re a Barrister & Solicitor*
5. *Intended Dishonesty in Trust Accounting* – Knowing and intended dishonesty in trust accounting will amount to misconduct and justify striking off
   1. *Personal Use –* The unauthorized use of trust funds to finance the lawyer’s personal ventures, or a scheme to keep a client ignorant as to trust funds held
      1. *Re a Practitioner*
   2. *Continual & repeated misappropriation –* Especially where it occurs persistently over a period of time
      1. Appropriation of trust funds compounds the seriousness by attempting to conceal the conduct, by misleading others (clients, investigators, tribunals or a court)
6. *Mistake & Absent Dishonesty –* A lack of awareness of the statutory requirements for trust moneys, even absent dishonesty, will still amount to professional misconduct but will not amount to striking off.
   1. *Re Robb*
7. *Reasonable Suspicion of other Lawyers – s3.3.22(2) LPA* – A lawyer who has reasonable grounds for suspecting that another lawyer has dealt with trust money in a dishonest or irregular manner, needs to report the facts and circumstances to the relevant professional body
   1. *No loss does not mitigate seriousness –* A lawyer cannot mitigate by the fact that the client did not lose money or have even made money, or that the lawyer intended to make good the defaults.
8. ***\*\*Overcharging*** *– s4.4.4(b) LPA* – ***[see costs disclosures]***
9. *Excessive Overcharging –* The charging of extortionate or grossly excessive costs is professional misconduct or unnecessary increasing the delay on work so to increase his proper costs.
   1. *Baker v Legal Services Commissioner*
10. *The test* – Has the lawyer charged fees grossly exceeding those that would be charged by lawyers of good repute and competency?
    1. *NSW Bar v Evatt*
       1. It is a degree and frequency and the relevant factors include:
          1. *Amount the costs in question* – were, or would be likely to be, taxed or assessed at
          2. *Complexity –* The novelty, complexity of the case
          3. *Experience –* The experience of the lawyer
          4. *Work Quality –* The quality of her/his work
          5. *Time on Matter –* Amount of time spent on the matter, and any cost agreements entered into.
11. ***Impact of cost agreement [see costs agreements]*** *– s4.4.4(b) LPA* *– Overcharging*
12. *Costs agreement does not excuse –* Proof of a cost agreement is no bar to disciplinary proceedings against the lawyer for overcharging if the agreement is ‘so unreasonable’ or ‘excessive’
    1. *Re Law Society of ACT v Roche*
13. *Uninformed Consent –* Clients may not have given fully informed consent to the agreement
    1. *Re Law Society of ACT v Roche*
14. *No win, No Fee basis –* If lawyer acting on a no win no fee basis has a risk of taking years of work and not succeeding and therefore short in covering disbursements.
    1. *Higher Rate Permissible* – It has been suggested that this makes it reasonable for lawyers accepting retainers to charge considerably higher rate than otherwise.
       1. *QLD Law Society v Roche*
          1. *‘Grossly excessively’ –* Even in these cases,fees outside the range chargeable by a reasonable lawyer will result in disciplinary action.
15. ***Delay or neglect*** *– s4.4.3(a) LPA – ‘failure to reach or maintain a reasonable standard of competence and diligence’* –***[see cost disclosures – ‘good faith’]***
16. *Gross Delay or Sustained & Continual Delay –* Gross neglect and delay if sustained or habitual (not a single instance of neglect or delay) can constitute professional misconduct because it endangers client interests and brings the profession into serious disrepute.
17. *Expected response time* – 7 – 10 days more than 14 is too long
    1. *Veghelyi v Council of the Law Society of NSW*;
18. *Substandard Work –* Substandard work consisting of gross neglect and delay in conducting the affairs of a client can be professional misconduct:
    1. *Re Mayes*,
19. *Expect Minimum Competence –* Clients have a right to expect a minimum standard of competence form a lawyer:
    * 1. *Basic Knowledge –* Minimum level means a solicitor needs to maintain a basic knowledge of the law, and keep up to date with developments in his/her field of practice;
20. ***Failure to properly supervise*** *– s4.4.3(a) LPA – ‘failure to reach or maintain a reasonable standard of competence and diligence’; Schedule 4 Legal Professional (Admission) Rules 2008; PCPR 29A(iii)*
21. *Failure to Supervise Juniors –* Serious omissions to properly supervise juniors, or be vigilant to the activities of partners may amount to professional misconduct especially where it concerns trust funds.
    1. *Law Society v NSW v Foreman*

*Law Society v NSW v Foreman*

Clerk employed by solicitor lent money to a company where wife had conflict of interest. Solicitor did not supervise clerks activities and didn’t detect transaction.

**Held:** Solicitior should have supervised theclerk and been aware, satisfied and ensure relevant supervision of the clerk. This amount of professional misconduct.

1. *Activities of Other Partners –* Lawyers must be reasonably aware of partner’s breaches of duties and should investigate individually if there is a breach by one partner and not take verbal assurances.
   1. *Bridges v Law Society of NSW*
2. *Trust accounts of Partners –* Partners must account to other partners of any related trust accounting and will be liable of professional misconduct if they are ignorant or indifferent.
   1. *Re Mayes*

**Misconduct outside the Course of Practice**

1. ***Criminal Conviction*** – A criminal conviction may be *prima facie* evidence of the high level of integrity expected by that of legal professionals.
   1. *Dishonesty – s4.4.4(c)(iii) LPA* – Repeated acts of dishonesty is clearly a ‘probative force’ in a disciplinary matter as it bears directly on a lawyers character that is central to the admission process.
      1. *Bolton v Law Society; NSW Bar v Sahade*
   2. *Does the conviction render the lawyer unfit to practice?*
   3. *Serious Offence – Yes –* ***s4.4.4(c)(i) –*** *s1.2.1 LPA – Serious offence is an indictable offence in Australia, indictable offence against any other jurisdiction, indictable offence against the law of foreign country which would be indictable in Australia.*
      1. *Conclusion as to character* – If the offence does not strike at the heart of the lawyer’s character and does not warrant any conclusion as to the lawyers general behaviour or inherent qualities then the conviction should not.
         1. *Ziems v Prothonotary of Supreme Court NSW*
      2. *Evidence surrounding the conviction*– The tribunal or court will examine the relevant evidence surrounding the conviction and the circumstances of the offence to determine whether the lawyer is fit to practice.
         1. *Ziems v Prothonotary of Supreme Court NSW*; *Re a Solicitior*
      3. *Isolated Incident & Not Premeditated* – If the incident is an isolated incident and the lawyer has not had a repeated string of offences then this does not warrant any conclusion about a lawyers general behaviour or inherent qualities and should not prejudice them to removal from the roll. Particuarly if the offence was not premeditated.
         1. *Ziems v Prothonotary of Supreme Court NSW*

*Ziems v Prothonotary of Supreme Court NSW* [HCA]

Barrister was convicted of motor manslaughter and it was alleged that the barrister was under the influence of alcohol which the barrister denied. Barrister was subsequently disbarred and struck off the roll. Barrister appealed to the disbarment.

**Held:** Offence was not premeditated and there was no evidence to suggest that it struck at the core the barristers character. It was not a reason towards removing the barrister right to remain in the profession once the sentence provided was served.

1. ***Sexual Offences* –** Only sex offences which carry criminal convictions are reviewed by the disciplinary tribunal.
   1. *Child Sex Offences* ***–*** The disciplinary tribunal seeks to strike off criminal sex offences due to the affect that it has on a lawyer to continue to act with public trust and confidence and the effect the continuance has on the profession.
      1. *Law Society of SA v Rodda*
         1. *Loss of trust in Profession* – Court also held fears for the ability of other lawyers in the profession to place trust and confidence in the lawyers ability to continue to practice.
   2. *Repeat Offences –* A lawyer who has repeated sex offences will most likely be struck off because it displays their lack of respect of the law, integrity, trustworthiness and common decency.
      1. *Law Society of SA v Liddy*
   3. *Probability of reoffending, circumstances relevant* – If the tribunal believes the offences was an isolated incident the lawyer won’t reoffend then they might not strike off – *A Solicitor v Law Society of NSW*
2. ***Tax Indiscretions*** – *s4.4.4(c)(ii) LPA* – Tax indiscretions for personal gain are of

*‘no lesser seriousness than defrauding a client, a member of the public or a corporation. The demonstrated unfitness to be trusted in a serious matter is identical’*

* + 1. *NSW Bar v Hamman*

1. *Lawyers cannot flout law* – The serious is upheld with tax evasion because of the public perception that lawyers cannot flout the revenue laws in order to increase their personal revenues.
   1. *NSW bar v Somosi*
2. ***Sexual Relations with Clients* –** Less strict standard applied than to that of doctors.
   1. *Feel short of misconduct –* The High Court has held that sexual relations with a client prior to the completion of matrimonial proceedings, although reprehensible, fell short of professional misconduct showing unfitness to practise
      1. *QLD Bar v Lamb [1972]*
   2. *Practitioner is at Risk –* A sexual relationship with a client could potentially be the subject of disciplinary action under the LPA as:
      1. *involving a conflict of interest* (independent professional judgment being affected by personal interest)
      2. *an abuse of a position of trust*

**Retainer, Authority, Cab–Rank & Termination of Retainer**

**Right to Legal Representation**

1. ***Right******to a Fair Trial*** *–* High Court in ***Dietrich v R***held that Australian law recognises a right to a fair trial and depending on all the circumstances of the particular case, legal representation may mean an accused is unable to receive a fair trial.
   1. *Serious Trial must have Legal Representation –* Accordingly, other than in exceptional circumstances, a serious criminal trial should not proceed without representation.
   2. *Adjournment until Representation is Provided –* In all other cases of serious crimes, the remedy of adjournment should be granted so that representation can be obtained.
   3. *Mistrial if not a fair trial –* In***Dietrich*** the accused was denied counsel for a serious offence and thus a miscarriage of justice occurred because he was convicted without a trial. HC ordered a new trial.
2. s360A *Crimes Act Vic* – overturned ***Dietrich***
   1. **Section 360A**
      1. *Refused Legal Assistance is not grounds for adjournment or stay –* The fact an accused has been refused legal assistance for a trial is not a ground for an adjournment or stay of trial
      2. *Court can order legal assistance –* If a court will be unable to ensure a fair trial unless the accused is legally represented and the accused is in need of legal assistance because he is unable to afford a private practitioner the court may order Victoria legal aid to provide assistance
      3. *Must give Legal Aid opportunity to be heard –* The court must give Victoria Legal Aid an opportunity to appear and be heard before an order is made.

**Retainer**

1. ***Retainer***– Identifies the various aspects of the lawyer–client and fundamentally:
   1. **Primary**
      1. Identifies the client.
      2. Whose instructions the lawyer acts upon.
      3. Prescribes the services expected of the lawyer.
      4. Scope of lawyers responsibilities and duties.
      5. Liability in Tort to the client
   2. **Secondary**
      1. Scope of retainer assist professional liability insurance
      2. Fiduciary duties and duties of confidentiality [implied terms usually]
2. ***No Retainer***– The absence of a retainer infers that the lawyer has no contractual claim to costs and disbursements from an alleged client. This adversely affects any professional indemnity insurance claim.
   1. ***Client is Favoured*** *per* *Griffiths v Evans*

*Griffiths v Evans*

It was held that the words of the client is to be preferred to **the word of the solicitor because the client is ignorant and the solicitor is or should be learned and that a lawyer who** **does not take the precaution of getting a written** retainer had only himself to thank for being at variance with his client over it and must take the consequences.

1. ***Oral Retainer***– The person alleging the existence of a contract bears the onus of proof a lawyer alleging the existence of a retainer that is not in writing must adduce evidence in the form of words and or conduct of the parties sufficient to satisfy a court that the retainer alleged existed – *Comlaw (No 62) v Owens (2003)*
   1. Or, alternatively, was varied in some way
      1. *Symonds v Vass (2007)*
2. ***Implied Terms*** – *[****refer to Tort liability as well****]*
   1. *Best Endeavours* – Use their best endeavours to protect the client’s interest and to exercise reasonable care and skill in carrying out by all proper means the client’s instructions in the matters to which the retainer relates.
      1. *Groom v Crocker; Astley v Austrust Ltd* (1999)
   2. *Proof of Implied Retainer from Facts and Circumstances* – Proof of an implied retainer rests on proof of facts and circumstances sufficient to establish a tacit agreement to provide legal services *Pegrum v Fatharly (1996)*
      1. Its existence is determined by inference from objective facts not merely by the lawyer’s belief as to which clients he or she was acting for per *Burke v LFOT (2000)*

*Pegrum v Fatharly*

The alleged client **bears the onus of proving the retainer where he or she wishes to make the lawyer accountable for breaching a duty, whether legal or equitable**. A client succeeds in substantiating a retainer does not guarantee relief unless they can also establish a casual link between breach and loss the client has suffered.

Held: A solicitor–client relationship did exist.

1. ***Multiple Lawyers***– Where multiple persons are involved in instructing the lawyer it is important to be clear regarding the identity of the clients.
   1. Particularly where there may be conflict between two or more persons giving that instruction the lawyer should make it clear for whom he or she acts and actively dispel any impression that he or she has assumed a retainer with any other person in the matter.
2. ***Client Access***– *3.2.3(1) LPA 2004* – Allows a lawyer including counsel to accept instructions in a matter from a client whether or not the client has retained another lawyer in that matter
   1. *No statutory contract* – this does not establish a statutory contract between barrister and solicitor or between barrister and client, the identity of the contracting parties and the terms of the contract are determined upon the circumstances.
      * 1. *Dimos v Hanos* (2001)
   2. *Barristers Rule* – Impose equivalent requirements on barristers who consider that the clients interests dictate that a solicitor be instructed [Vic Bar 168] and so far as record keeping is concerned [*Vic Bar R*174]

**Authority of Lawyers under the Retainer**

***Actual Authority***–

1. *Definition –* A legal relationship between principal and agent created by a consensual agreement to which they alone are the parties
   * 1. *Freeman & Lockyer v Buckhurt Park Properties*
2. *Professional Rules* *– PCPR R12 –* A practitioner has an obligation to follow their client’s instructions and cannot act without their instructions, unless to do so would involve acting unlawfully or would be in breach of their overriding duty to the court:
3. *Scope* – Ascertained through the application of normal contract principles, the express words used and any associated conduct between the parties.
4. *Agent binds principal* – An agent who acts within their actual authority binds the principal as they have provided express authorisation for the agent to act in a particular way which the principal cannot dispute if they have agreed to such conduct.
5. *Lawyer Unsure?* – The lawyer should seek advice from the client as to whether they are within their actual authority and relevantly seek prospective written authority from their client per *Groom v Crocker*
6. ***Implied Authority*** *–* 
   1. *All things ‘incidential to the object of representation’*
      1. An implied authority exists to do all things incidental to the object of the representation
         1. *Polinghorne v Holland*
      2. ‘the general agent of the client in all matters which may reasonably be expected to arise for the decision in this cause’
         1. *Prestwich v Poley*
   2. ***Implied authority to incur costs and disbursements*** *[next page]*
   3. ***Implied authority to incur or receive costs and disbursements***
      1. *Incur Costs* –
         1. *‘Normal’ Costs* – Implied authority to incur ordinary disbursements such as service fees, filing fees, photocopying fees and the like per *Schillro & Gadens Ridgeway*
         2. *Unusual Expenses* – The position is different in the context of unusual expenses per *Re Blyth & Fanshawe*
            * *Adequate Notification –* Must keep the client fully informed of any ‘unusual expense’ and a lawyer must not be satisfied simply by taking his authority to incur such additional expenses.
            * *Realistic Practice* – Discuss and assess with the client major disbursements such as an accountants or valuers fees prior to incurring them per *Schillro & Gadens.*
         3. *Briefing Counsel* – In no manner, unless on an important and urgent basis, should a lawyer pursue a costs agreement without having obtained client instructions or approval.
            * *Schillro & Gadens*
      2. *Receiving Costs –* 
         1. *Transaction Related* – a Lawyer who acts for a client who is reciving money from a third party can have an implied authority to accept a bank cheque for such purposes
            * *Williams v Gibbons*
   4. ***No implied authority to institute proceedings***
      1. *No Implied Authority* – The mere fact that a lawyer is representing a client does not itself confer authority to institute legal proceedings on a client’s behalf
         1. *Hawkins Hill Gold Mining Co v Briscoe*
      2. *Express Authority* – If a client confers on a lawyer express authority to institute legal proceedings – then no additional express authority is required to allow a lawyer to institute such proceedings
         1. *Hawkins Hill Gold Mining Co v Briscoe*
   5. ***No implied authority to make contracts***
      1. *No Implied Authority –* There is no implied authority to make contracts on behalf of a client
         1. *Eccles v Bryant & Pollock*
      2. *Can ‘compromise’* on contracts – A lawyer can compromise and argue terms on behalf of a client if they believe such terms are in the clients best interests UNLESS the client provides clear instructions to the solicitors that they do not want them to act in this capacity
         1. *Thompson v Howley*

**Lawyers Acceptance of Work – Cab Rank Principle [BARRISTER]**

1. ***Practising as a Barrister***– Lawyers who practice solely as barristers are required to accept a brief in any court in which they can practice per *Vic Bar Rule* 86 – termed the ‘cab rank’ principle.
   1. *Rondel v Worsley*
2. ***Not ‘absolutely’ imposing*** *–* In *Giannarelli v Wraith,* Brennan J explained that while the cab rank rule requires that barrister must accept work – they could raise their fees within permissible limits to remove such briefs.
   1. They are also entitled to ‘decline briefs’ in particular circumstances.
3. ***Practising as Barrister & Solicitor***– Lawyers who act as both are not required to accept worth per *Vic Bar Rule* 92(q) and which follows the *Australian Bar Association Model Rules* (1993) r 4.4(u)
4. ***Circumstances in which counsel [barrister] can decline a brief –*** 
   1. *Core Role* – A counsel core role is to ensure the proper administration of justice and no bias or unfair advantage in the administration of justice to ensure it upholds public confidence in the legal system.
   2. *Victorian Bar Rule 92(q) following ABA (1993) r 4.4(u)* – Allow a barrister to reject briefs which would
      1. ‘compromise the barristers independence, involve the barrister in a conflict of interest or otherwise be detrimental to the administration of justice’
   3. *Personal Interests* – Are **not** themselves enough to decline a brief. Practically, counsel should have a frank disclosure with the client in relation to their views and inquire whether they wish to continue. If yes, counsel must represent the client and abstract their personal views.
   4. *Must Decline Briefs* – In certain circumstances, a number of briefs **must be** rejected:
      1. *Confidential Conflicts –*[Vic r 92(a)]*–* Where counsel has information confidential to any person with different interests from those of the proscriptive clients;
      2. *Contested Hearings –*[Vic r 92(i)] –It involves appearance in a contested hearing before counsel’s parents, siblings spouse or child;
      3. *Advising Arbitrators & then party* – [Vic r 92(h)] – Representing a party to an arbitration in any proceedings arising out of the arbitration if counsel have advised the arbitrator;
      4. *Be a witness to the proceeding –* [Vic r 92(c)(d)] – Counsel has reasonable grounds to believe that he or she may as a real possibility, be called as a witness
      5. *Professional Conduct in Question –* The counsel knows or ought to know that his or her personal or professional conduct may be called into question [ABA Vic r 92(e) & r 93];
      6. *Fee Disputes –* Regarding the assessment (or taxation) of costs of counsel’s briefing solicitor that includes a dispute as to the propriety of counsel’s fee concerns recovery of former client of costs in relation to a case – see Vic r 92(g)] and
      7. *Conflict of Interest –* In which counsel has a financial interest in the outcome apart from fee under a conditional costs agreement [Vic r 92(f)].
   5. *May Decline Briefs* – In certain circumstances, a number of briefs **may be** rejected:
      1. *No Fee is available –* Where a proper fee is unavailable [*Vic Bar Rule* 86(c)] or ‘reasonable grounds’ exist to doubt that the fee will be paid – whether promptly or in accordance with costs agreement [*Vic Bar Rule* 96(c), 97]
         1. Can set a higher fee than usual in order to deter the solicitor from continuing to offer the brief [*Vic Bar Rule* 88 see also D’Orta Ekenaike v Victorian Legal Aid];
      2. *Unable to devote time –* Where other professional responsibilities indicate that he or she would be unable to devote adequate time to the matter [*Vic Bar Rule* 96(a)].
      3. *Solicitor does not appear –* Where the instructing solicitor does not agree to requests by counsel regarding appropriate attendances by the solicitor [*Vic Bar Rule* 96(e)];
      4. *Client and solicitor overlap –* Where the prospective client is also the prospective instructing solicitor or a partner or employee of that solicitor [*Vic Bar Rule* 96(f)].
5. ***Barrister acting also as a solicitor –*** 
   1. *Honestly, Fairly and with Competence* – If a solicitor cannot represent the client with honesty, integrity and competence then the barrister should not represent the client – particularly if they are unable to be reasonably prompt in their client dealings [PCPR R2]

*A practitioner should agree to act for a client in a matter only when the practitioner*

*reasonably expects:*

*2.1 to serve the client honestly and fairly, and with competence and diligence; and*

*2.2 to attend to the work required with reasonable promptness.*

* 1. *Lack of Knowledge and Understanding* – Counsel who is inexperienced or who does not have reasonable knowledge of the subject matter should refer the matter to another solicitor who does. The risk is litigation and disciplinary sanctions.
     1. *Un v Schroter*
  2. *Too much work* – A solicitor should avoid situations in which they overload too greatly on work and this prevents them from adequately and accurately undertaking matters for clients.
     1. *Re Nelson*

**Termination of Retainer**

1. ***Completion of Retainer***– The termination of the retainer typically implies that the lawyer has completed the work for which they were retained in accordance with the retainer. They should not terminate unless:
   1. ***PCPR 6.1.3 –*** *By agreement (6.3.1), by discharge (6.3.2), by ‘just cause’ 6.1.3*
2. ***Duration of Retainer***– The lawyer must represent the client with the full weight of contract, equity and tort to protect the clients’ interests by all relevant means available to the lawyer.
3. ***Doctrine of Entire Contract*** – Per 1. above, the lawyer cannot terminate the contract at will – this is due to the doctrine of entire contract which requires the lawyer to undertake their representation of the client until their finish the work for which they were retained.
   1. *Baker v Legal Services Commissioner*
4. ***Cannot Disadvantage the Client by Termination*** *–* The key to termination is that the lawyer cannot terminate a retainer at will and cannot disadvantage the client once retained. The ‘only’ manner in which a lawyer can terminate is with reasonable ‘just cause’ and ‘reasonable notice’.
   1. *The lawyer cannot terminate for:*
      1. More remunerative work
      2. Loss of interest
      3. Excessive Workload
5. ***‘Just Cause’ and ‘Reasonable Notice’*** – A lawyer who terminates a retainer must ensure reasonable care to avoid foreseeable harm to the client including the provision of due notice to the client and allow reasonable time for the substitution of a new lawyer.
   1. *New Lawyer* – PCPR 23 – The terminating lawyer must co–operate with the new lawyer and subject to the satisfaction of any lien the former lawyer may have to turn over to the later all documents of the former client.
   2. Permissible ‘just cause’ – *PCPR 6.1.3*
      1. *Clients acts or omissions provide cause* – If the client is preventing the lawyer from properly performing their duties such as:
         1. *Breaches the retainer* – *Warmingtons v McMurray*
         2. *Refuses to pay costs* *– Super 1000 Pty Ltd v Pacific Securities*
         3. *Make misrepresentations of the matter to the solicitor*
      2. *Legal aid is withdrawn or is terminated and client cannot pay –* PCPR R6.3
      3. *Continued representation would require the lawyer to breach rules through conflict of interest or as a witness*
      4. *Would adversely affect the lawyers health* – *Forney v Bushe*
6. ***Pass documentation to new lawyer* –**
   1. Ownership of documents at PCPR r 7.5 include:
      1. *Documents* ***prepared*** *by a practitioner* – for a client or predominantly for the purpose of the client and for which the client has been or will be charged costs by the practitioner;
      2. *Documents* ***received*** *by the practitioner from a third party* – in the course of the retainer for or on behalf of the client or for the purpose of client’s business and intended for use or information of the client.

**Duties to the Client & Enforcement**

**General**

1. ***General*** *–* Lawyers have a professional responsibility to their clients to utilise care, skill, diligence, competence, honesty, loyalty, integrity and trustworthiness.
2. ***Fairly & Timely***– Lawyers should treat clients fairly, with respect, with acknowledgement of the position there are placed in as the client relies on them heavily to use their experience and skill and a high level of trust.
3. ***Undivided*** ***Loyalty*** – Lawyers provide undivided fidelity to their clients’ interests which is ultimately unaffected by their own interests or by those of any other person(s) or by their own protection of public interest.
4. ***No Prejudice******or Personal Views*** *– PCPR 12.1; 13 –* Advance and protect the clients interest to the best of the practitioners kill and diligence, uninfluenced by the practitioner person view of the client or their activities. ***[see also client conflicts]***
5. ***Core Duties*** – The main duties of a lawyer are:
   1. *Duty of Competence* – Tort and Contract
   2. *Duty of Loyalty* – Fiduciary Law
   3. *Duty of Confidence* – Duty of Confidentiality
   4. *Administration of Justice* – Proper and efficient administration of justice

**Duty to be Competent**

1. ***Competence*** *–* Competence is necessarily phrased in broad terms as: Legal competence is measured by the extent to which an attorney
   1. *Knowledgeable –* Is specifically knowledgeable about the fields of law in which he or she practices;
   2. *Skilled –* Performs the techniques of such practice with skill,
   3. *Efficient –* Manages such practice efficiently
   4. *Relevant* – Identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to clients attention;
   5. *Timely –* Properly prepares and caries through the matter undertaken and
   6. *Capable –* Is intellectually emotionally physically capable.

1. ***Extent to which attorneys maintain qualities*** – Legal competence is measured to the extent to which the attorneys failed to maintain these qualities. It has been judicially recognized that for a lawyer to fit to remain on roll he must make reasonable efforts to keep up with current development in his field of practice.
   1. *Law Society of NSW v Moulton*
2. ***Remedies for Breach* –** 
   1. *Damages –* Damages award depending on whether the breach is for contract or for negligence.
      1. No liability for ‘barristerial immunity’
   2. *Contract* – Restore the client to the original position they would have been in had the retainer been fully performed.
   3. *Tort* – see Tort section

**Duty of Loyalty**  *– PCPR 9.1 & 9.2*

1. ***Duty of Loyalty***– The client–lawyer relationship is one which commands the highest level of fiduciary duty which is unequalled elsewhere in the law.
   1. *Moffat v Wetstein*
2. ***Undivided Loyalty*** *–* Fiduciary principle dictates that lawyers must give undivided loyalty to their clients, without being distracted by other interest including personal interest.
   1. This requires practitioners to avoid conflict between the interests of a client and:
      1. The **personal interests** of the lawyer;
      2. The **interests of another** client – current client (concurrent) and former client (successive) – these are conflict between duties of loyalty and confidentiality
3. ***Duty Beyond Individual Lawyer*** *–* Duty extends beyond the individual lawyer to a partner, employee, or agent of the lawyer or of the lawyer’s firm, a partnership in which the lawyer has a material interest; a director of an incorporated practice; and member of a lawyer’s immediate family
4. ***Profit & Conflict Rules***– A person must not accept – unless they have the express informed consent of the person to whom they owe the fiduciary duty – a position which places themselves in a position of conflict or profit. *[the ‘conflict’ and ‘profit’ rules]*
   1. *Cannot be in a position of* ***conflict*** *between – PCPR 9.1*
      1. Between the duty as fiduciary and his or her own interest or a duty to a third party;
      2. Between the duty as fiduciary or two or more person;
   2. *Cannot* ***profit*** *from* 
      1. A relationship giving rise to fiduciary duties except with the informed consent of the person to whom those duties are owed (the “no profit” rule).
5. ***Boardman v Phipps*** *–* From equity, the leading case of *Boardman v Phipps* provides the leading authority and many cases followed illustrating illegitimate defences:
   1. *Bona Fide –* It is no defence to a fiduciary breach for the lawyer to maintain that he or she acted bona fide or otherwise acted honestly. [*Boardman v Phipps*]
   2. *Client Benefited –* Nor does the fact that the client benefited from the breach that the work was delegated to a staff lawyer [*Re Bannister*]
   3. *No Fee –* or that the client was charged no fee [Sims v Craig Bell & Bond]
6. ***Client Consent*** *–* 
   1. *Client Consent –* A fiduciary owes zealous and loyal representation to the client and it is up to the client – and the client alone – to authorise or consent to a conflict that would otherwise substantiate a fiduciary breach.
   2. *Fully Informed –* The client authorisation is only permitted on the basis they have a full understanding of the nature and the implications of the conflict and on the basis that the lawyer makes a ‘full and true’ disclosure to the client.
      1. *Law Society of NSW v Harvey*
7. ***Remedies*** –
   1. *Restitutionary Relief* ***–*** Account of Profits, Constructive Trust
      1. *Green & Clara v Bestobell Industries Pty Ltd* – where fiduciary has generated a profit or secured property in breach of their fiduciary duties.
   2. *Equitable Compensation*

**Duty of Confidence**

***General***

1. *Purpose* – The duty of confidentiality is primarily encouraged to allow the client to:
   1. Encourage full and frank disclosure;
   2. Foster Trust in lawyers and legal system
   3. Remind lawyers of duty to the clients
   4. Obtain legal advice with prejudice by disclosure – *Fruehauf Finance Corp v Feez*
2. *PCPR R3.1**–* Arises via a term implied into the contract of retainer and equity protects confidential information from unauthorised use or disclosure, and from professional rules.
3. *No Benefit –* The duty requires that a practitioner not use the confidence for his/her own benefit or for the benefit of another client – the ‘no conflict’ rule

***Scope***

1. *Extent of information covered* – The duty of confidentiality covers information received by a practitioner in the course of acting for a client.
2. *Connection to the retainer and receipt of information –* The duty is not premised on the source of the information (it can be conveyed by a third party) but on its connection with the retainer and its receipt in the capacity of a practitioner.
3. *Duration & Survives Termination –* The duty survives termination of the practitioner–client relationship and the death of the client per *Gartside v Sheffield, Young & Ellis*.
   1. *Not Reduced –* The duty is not reduced because of a duty owed to another client.

***The Legal Test***

1. *Test –* whether the information is:
   1. *Public Knowledge* – *Coco v A N Clark Ltd*
      1. Information must be of a confidential or secret nature.
         1. *If the information is known to the relevant trade or industry then it is publicly known even if the public at large remains in ignorance.*
      2. Is the information ..[below].. then it is confidential.
         1. Is it secret in the sense of not being ‘public property or public knowledge’?
         2. Does it have some commercial importance or value?
         3. Has the plaintiff treated the information as confidential and given it as such?
         4. Was it communicated for a limited purpose?
         5. Does the information go beyond what the law regards as employee know–how?
      3. Information may be in written form or it may be merely oral: see *Fraser v Thames Television* [3.13C].

***Exceptions to the duty***

There are seven main exceptions to the requirement that client information be kept confidential:

1. *Client Consent* – *Permissive* ***PCPR 3 &R 3.1.1***– When the client consents (expressly or impliedly) to disclosure.
2. *Implied Consent* – disclose information to other lawyers within the firm (retainer is ordinarily with the firm)
3. *Express Consent* – if a client has agreed for his/her lawyer to seek counsel’s advice.
4. *Public Knowledge – Permissive* ***PCPR R 3.1.4 & 3.1.5****–* Where the information is public knowledge and the purpose served by confidentiality no longer exists.
5. *Mandatory Disclosure Requirements – Mandatory* ***PCPR R 3.1.2*** – Where the duty is expressly overridden by mandatory disclosure requirements – eg disclosure of information under the *Legal Aid Act 1978* (Vic), or under the ATO, ASIC or ACCC legislation.
6. *Substantiate Remuneration* – *Permissive* – Lawyer may disclose confidential information pertaining to the retainer in reasonably seeking to establish or collect the fee in respect to the retainer.
7. *Defense against legal proceedings – Permissive* – A client who instigates legal proceedings against a lawyer for breach of duty is treated as having waived the right to confidentiality by pursing a claim per  *Benecke v National Australia Bank Ltd*
8. *Incidental to normal conduct – Permissive* – Where communication of the confidential information is incidental to the normal conduct of a matter.
9. *Serious Criminal Offences – Permissive* (***PCPR*  R 3.1.3**) – Where communication is necessary for the purpose of avoiding the probable commission or concealment of a serious criminal offence –
10. *Disobeying Court Order or Persons Safety – Permissive* ***PCPR R 15.3*** *and* ***Vic Bar Rule 30*** – Where a client informs their practitioner that they intend to disobey a court order and the practitioner reasonably believes the client’s conduct constitutes a threat to a person’s safety.
11. *Public Interest – Permissive & Difficult Exception* – Where the duty lies in the equitable doctrine of confidence and disclosure would be in the public interest potentially, the most difficult exception.
    1. *Lawyer Conflict –* The Q is the extent to which lawyers should permit client interest to outweigh others’ interests where these conflict? In criminal case, the public interest in protecting members of the community from harm poses moral ethical Qs, or client’s right to confidentiality should yield to an innocent person’s right to freedom.
    2. Statements made to the public cannot assist clients –
       1. *Legal Practitioners Complaints Committee v Trowell –* ‘statements made to the public at large are not generally regarded as the appropriate way of protecting a person’s interests’

***Breach of duty/ and remedies***

1. *Client can sue –* If breach the duty client can sue for breach of contract and fiduciary duty
2. *Injunction –* A threatened or actual breach of confidence: client can seek an injunction to prevent or stop the breach
3. *Damages –* A client may claim damages in respect of a breach that has already occurred.
4. ***See Section on Conflicts between Clients*** 
   1. *Rule 4 – Acting against a Former Client*
   2. *Rule 8.2 – a practitioner must avoid conflict of interest between two or more clients of the practitioner*

***Example***

You are consulted by a client who claims to have been left a large estate under an uncle’s will. A number of relatives get nothing. On examining the will you notice that only one witness has witnessed the willmaker’s signature. [Two signatures are required under the *Wills Act*.] You tell your client that for this reason the will is invalid and that, if the Uncle dies without a valid will, your client will inherit only a small portion of the estate. Your client is annoyed and suggests you put your signature on it. Naturally, you refuse. As your client leaves the office, you ask her what she will do. She says she will obtain another signature and then consult another solicitor. What do you do? Silence or Disclosure?

*Arguments in support of silence*

1. The duty of confidentiality binds you
2. You may be prosecuted for misconduct
3. You are not certain that your client will do anything – if you decided to breach confidentiality your client may deny it all and you could be sued for slander

*Arguments in support of action*

1. The public interest (expressed as the interests of the other beneficiaries) will be prejuduced
2. There could be a fraud on the deceased
3. Your client has no interests at heart except her own and does not deserve the benefit of confidentiality
4. An anonymous letter to the registrar of probates will not hurt!

***\*Differences to Legal Professional Privilege***

1. *Isn’t dependent –* Legal professional privilege does not depend on contractual, equitable or professional duties but on a wider stance of public policy by allowing and promoting the freedom of consultation of legal advisers.
2. *More Extensive* – Communications protected by confidential are more extensive than those that are privilege as privilege is based upon confidentiality.
3. *Isn’t Destroyed* – The obligation of confidence arises, any loss of privilege does not automatically destroy that obligation if it has arisen independently of the privilege
   1. *Director of Public Prosecutions v Kane*

**Duty of Legal Professional Privilege**

1. *Purpose –* Legal professional privilege relates to the confidential passing of communications between a client and their legal professional(s) whether this takes the form of oral or written communications, or some other type, for a dominant purpose in either a current – as per *Baker v Campbell* (1983) 153 CLR 52 – or future – *Nagan v Holloway* [[1996] 1 Qd R 607](http://www.lexisnexis.com.ezproxy.lib.monash.edu.au/au/legal/search/runRemoteLink.do?service=citation&langcountry=AU&risb=21_T5982409253&A=0.1896381212627234&linkInfo=F%23AU%23qd+r%23year%251996%25page%25607%25vol%251%25sel2%251%25sel1%251996%25&bct=A) – litigation proceeding.
   1. *PCPR 3.1.3* – *Compel disclosure by statute*
   2. *PCPR 14 –* *Frankness in Court & waiver of privilege [14.5.2]*
   3. *PCPR 16 – Responsible Use of Privilege*
2. *Scope* – Confidential communications passing between a client and a legal adviser are not required to be given in evidence or disclosed by the client, without the clients consent, and are not required to be given in evidence or disclosed by a legal adviser if
   1. *Giving of Advice –* If the communication is to enable the client to obtain, or the legal adviser to give, legal advice or assistance per *Lawrence v Campbell*
   2. *During Litigation –* If the communication is with reference to litigation that is actually taking place or is in the contemplation of taking place for the client

***\*\*General Function***

1. *Rationale behind Privilege –* Promote public interest by allowing a client to fully divulge all relevant circumstances to their legal adviser so that they are able to adequately understand all the issues and evidence involved in the matter.
   1. Without Privilege – No such a full and frank disclosure, it is clear that all relevant material would not be available and the ability to have a frank and fair trial would be at risk as discussed in *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49.
2. *Must be Lawyer –* To claim privilege, the adviser must be a lawyer admitted to practice per *Glengallan Investments Pty Ltd v Andersen*. It is not enough that someone without formal legal professional qualification is performing the functions of a legal adviser such as a legal aid officer in a prison or a personnel consultant in an industrial dispute *per* *New Victoria Hospital v Ryan*.

***\*\*Must be Confidential***

1. *Must be Confidential* – The communication must be a confidential one. The generally rule is that communications between a client–lawyer relationship are held to be confidential. If communication in question is in the form of a document submitted by a client to his solicitor for use in existing or anticipated litigation, privilege will attach to it only if it comes into existence solely for that prupose.
2. *Communications which* ***are not considered*** *to be confidential include*:
   1. **Where the document is read out in open Court** – *Gotha City v Sotheby's*
   2. **Discussion takes place in the presence of a third party** – *Re Griffin*
   3. **Discussion takes place in the presence of a adverse witness** – *Jamison v GIO*
   4. **The document has been made available to the other party to an action by order of the court** – *Warner v Women's Hospital*
   5. **Evidence may be given of its substance** – *Bruce v Ligar*
   6. **Merely record what took place in open court** – *Nicholl v Jones*
   7. **Judges' chambers** – *Ainsworth v Wilding*
   8. **In an arbitration** – *Rawstone v Preston Corporation*
   9. **In the course of taking depositions in the presence of both parties** – *Visx Inc v Nidex Co*
   10. **Taped recording merely to record conversion** – *Parry v News Group Newspapers Ltd*
3. *Breach of Confidence*
   1. *Injunctive Relief –* Where copies of a privileged document are obtained through breach of confidence by the solicitor the court may grant an injunction to restrain their use in subsequent proceedings or otherwise by an extension of its power to prevent the disclosure of trade secrets.
      1. The application of this principle to the perfidious breach of confidential communications between legal advisers and clients leads to the paradox that, while an injunction may be available in separate proceedings, the court will not prevent the use of such improperly obtained copies as evidence in civil proceedings in which they are incidentally relevant.

***\*\*Examination by the Court***

1. *Power to Inspect –* The court can inspect disputed documents for the purpose of determining whether legal professional privilege has been established and the document should bound by such a privilege as per *Grant v Downs* (1976) 135 CLR 674.
2. *Burden rests with alleging Party –* The burden of establishing that the document is privilege rests on the party alleging that it is and such a burden can be established by referring to the contents of the document and the manner in which the document was created as per *Grant v Downs* (1976) 135 CLR 674.
   1. A challenge to the list of the opponents documents bound by privilege can be made but must show some discrepancy other than merely relying on the affidavit as per *Brookes v Prescot* [[1948] 2 KB 133](http://www.lexisnexis.com.ezproxy.lib.monash.edu.au/au/legal/search/runRemoteLink.do?service=citation&langcountry=AU&risb=21_T5983276206&A=0.9116219511550532&linkInfo=F%23GB%23kb%23year%251948%25page%25133%25vol%252%25sel2%252%25sel1%251948%25&bct=A).

***\*\*Advancement of Evidence***

Evidence is not advanced on the objection of the client if the Court finds that the advancement of such evidence would result in the disclosure of

1. **Confidential information between the client and their lawyer**;
2. **Confidential information made between two or more lawyers acting for a client**;
3. **The contents of a document which is confidential and prepared by the client or lawyer**.

where the lawyer is providing advice for the client as per *Baker v Campbell* (1983) 153 CLR 52.

***\*\*Police Search Warrant***

In *Baker v Campbell*, it was stated by Murphy J – supported by Dawson J – that

*‘individuals should be able to seek and obtain legal advice and legal assistance for innocent purposes, without the fear that what has been prepared soly for that advice or assistance may be search or sized under warrant. Denying the privilege against a search warrant would have a minimal effect in securing convictions but a major damaging effect on the relationship between the legal profession and clients’*

Thus, as further stated by Murphy J

*‘parties should be able to prepare for litigation without that preparation being subject to search and seizure. This protection should apply not only to client–lawyer communications but also to preparation by a litigant in person, and the communications between the litigant and others.’*

***\*\*Re communication or Reformulation***

The re–formulation or reproduction in another document of an original communication that is subject to legal professional privilege does not deprive the second document of the protection notwithstanding that the copied or subsequent document was not specifically created for the dominant purpose of “the obtaining legal advice or for use in litigation” has also been recognised in *State Bank of South Australia v Smoothdale (No 2) Ltd* and.

In See *Spotless Group Ltd v Premier Building & Consulting Group Pty Ltd* [2006] VSCA 201, the Court stated taht

*‘the relevant communication where privileged information is “re–communicated”, as it were, is not the fact or circumstance of the reformulation or re–communication but rather the communication giving rise to the privilege in the first instance.’*

***\*\*Some other examples of communications that have been ruled privilege include:***

1. ***Communications between a party and their respective legal counsel*** – *Macedonia Pty Ltd v FCT* (1987) 18 ATR 929
2. ***Communications between numerous legal advisers of the client (i.e. between internal partners of a firm) where assistance is required in determining the advice*** – *Hughes v Biddulph*(1827) 4 Russ 190
3. ***Notes and minutes of a meeting made by a client*** – *Grant v Downs* (1976) 135 CLR 674
4. ***Communications passed between the party’s solicitor and a third party***– *Macedonia Pty Ltd v FCT* (1987) 18 ATR 929
5. ***An accused person cannot access documents subject to privilege***– *Carter v Managing Partner*

***\*\*Advice Privilege [also see Extent of Privilege below]***

1. *Purpose –* The rule is most commonly applied between client and legal adviser. Both the lawyers advice is privileged and also the instructions to the lawyer are privileged per *Bolton v Corporation of Liverpool*.
2. *Applies to –* Advice privilege only to communications between the client and the legal adviser, to documents evidencing such communications, and to documents which were intended to be such communications even if not in fact communicated as suggested in the English case of *Three Rivers District Council v Governor and Company of the Bank of England*.
3. *Definition of Advice* ***–*** Advice extends beyond judicial or quasi judicial proceedings and its not simply a rule of evidence per *Baker v Campbell.* However, it does not extend to material which has its existence apart from the advising process as per *Baker v Campbell.*

***\*\*Third Parties***

It is only in relation to litigation privilege that communications extend to third parties. However, where the third party was the agent of lawyer or the client, the advice privilege may apply as per the decision of *Pratt Holdings Pty Ltd v DCT* [2004] FCAFC 122.

A third party, having as its dominant purpose the obtainment of legal advice not related to litigation is privileged

1. Where a client directs a third party to prepare and make it on the clients behalf to a legal adviser per *Pratt Holdings Pty Ltd v Commissioner of Taxation*
2. Where a client directs or authorises a third party to prepare it for the dominant purpose of its being communicated by the client to a legal adviser per *Pratt Holdings Pty Ltd v Commissioner of Taxation*
3. Where it is prepared for passing between legal adviser and third party where the third party is an “agent” of the client for communication with the legal adviser per *Pratt Holdings Pty Ltd v Commissioner of Taxation*

***\*\*Litigation Privilege – ‘reasonably possible’ [also see Extent of Privilege below]***

1. *Litigation must be a ‘reasonably’ possibly –* For a claim by a client of legal privilege under litigation privilege, there must be a reasonable contemplation of a litigation action forthcoming. In *Mitsubishi v Victorian Workcover Authority* [2002] VSCA 59 it was commented at 17

*‘As a matter of ordinary language the word “likely” imports only that the occurrence under consideration “is a real chance or possibility, not that it is more likely than not”: Marks v. GIO Australia Holdings Ltd. and cases there cited; Boughey v. The Queen; and see Czarnikow Ltd. v. Koufos (a case concerning “reasonable contemplation” of damage). In Australian Safeway Stores Goldberg, J. concluded that the concept of anticipated proceedings involved the notion of a reasonable probability or likelihood that such proceedings would be commenced, but it will be apparent that I respectfully disagree with his Honour's elucidation of that notion as being that ‘more probably than not they will be commenced’*

1. *‘Mere Apprehension’ is not enough –* Thus, a mere ‘apprehension’ of litigation is not enough to establish that a reasonable contemplation existed nor is a “vague apprehension” per *United States of America v Philip Morris Inc*.
2. *Real Prospect of Litigation –* There must be a real prospect of litigation as distinct from a mere possibility so that a vague apprehension of litigation will not suffice though it is not necessary that there be a high probability approaching certainty nor that there be a decision to commence proceedings per *Mitsubishi Electric Australia Pty Ltd v Victorian Work Cover Authority* and *ACCC v Australian Safeway Stores Pty Ltd*

***\*\*Dominant Purpose – COMMON TO BOTH ADVICE AND LITIGATION***

A “dominant” purpose is that which was the ruling, prevailing or most influential purpose per *Mitsubishi v Victorian Workcover Authority*.It is one which is of greater importance than any other and it is more than the primary or a substantial purpose. It must be clearly paramount as stated in *Waugh v British Railways Board*.

Where two purposes are of equal weight, neither is dominant. If the decision to bring the document into existence would have been made irrespective of any purpose of obtaining legal advice, the latter purpose cannot be dominant per *Commissioner of Taxation (Cth) v Pratt Holdings Pty Ltd*.

In *Mitsubishi v Victorian Workcover Authority* [2002] VSCA 59 at [10] the Court stated

*‘In its ordinary meaning “dominant” indicates that purpose which was the ruling, prevailing, or most influential purpose. Barwick, C.J., … distinguished “dominant” from “primary” and “substantial”. Lord Edmund–Davies in Waugh, in adopting the test propounded by Barwick, C.J., was of the view that the element of clear paramountcy should be the touchstone. That, as it seems to me, shows the meaning of “dominant”.’*

In *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49 it was stated by the High Court that

*‘The fact that a report which is prepared for a dominant purpose, which is a legal purpose, and for a subsidiary purpose as well does not mean that, if the dominant purpose did not exist, the report would nevertheless still have come into existence ... it might be the dominant purpose which alone accounts for the existence of the report.*

***\*\*Extent of Privilege – COMMON TO BOTH ADVICE AND LITIGATION***

1. *Applies to* – Legal privilege relates to advice from a legal practitioner in a particular jurisdiction in which the client is seeking advice from. It is a legal professional right that cannot be abolished in any circumstances except where the express and unmistakable language of the Statute provides for it as stated in *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* [(2002) 192 ALR 561](http://www.lexisnexis.com.ezproxy.lib.monash.edu.au/au/legal/search/runRemoteLink.do?service=citation&langcountry=AU&risb=21_T5982409253&A=0.8363911948953426&linkInfo=F%23AU%23alr%23year%252002%25page%25561%25decisiondate%252002%25vol%25192%25sel2%25192%25sel1%252002%25&bct=A).
2. *Not limited to quasi–judicial proceedings –* Subject to any statutory provisions – as seen in *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 above – the privilege applies to all forms of disclosure and is not just limited to judicial and quasi–judicial proceedings as per *Baker v Campbell* (1983) 153 CLR 52.

Some other examples include:

1. ***Matters which the same lawyer is advising two parties or where a disclosure is made to person with a common interest in the proceeding or impending proceeding***– *Baker v Campbell* (1983) 153 CLR 52.
2. ***Client Privilege*** – Legal professional privilege also belongs to the client and any person with a ‘common interest’ in the litigation.
   1. The privilege can only be waived or claimed, as relevant, by the client and not by the lawyer unless instructions by the client as per *Baker v Campbell* (1983) 153 CLR 52.
3. ***Copies of Documents*** – A photocopy of a document is privileged pas per *Commissioner, Australian Federal Police v Propend Finance Pty* Ltd (1997) 188 CLR 501.
4. ***Notes made of a privileged document***– If notes are made regarding a privileged document and the note satisfies the dominant purpose test then the note is privileged as per *Kennedy v Lyell* [(1883) 23 Ch D 387](http://www.lexisnexis.com.ezproxy.lib.monash.edu.au/au/legal/search/runRemoteLink.do?service=citation&langcountry=AU&risb=21_T5983276206&A=0.9648987240580735&linkInfo=F%23GB%23ch+d%23year%251883%25page%25387%25decisiondate%251883%25vol%2523%25sel2%2523%25sel1%251883%25&bct=A).
5. ***Search Warrants*** – If legal professional privilege attaches to documents held by a firm then those documents cannot be made the subject of a warrant – as per *Baker v Campbell* (1983) 153 CLR 52 – and the question of privilege should be addressed by the person issuing the warrant *Arno v Forsyth* (1986) 9 FCR 576.

The privilege covers communications between a clients agent and legal advisors as per *Wheeler v Le Marchant* [(1881) 17 Ch D 675](http://www.lexisnexis.com.ezproxy.lib.monash.edu.au/au/legal/search/runRemoteLink.do?service=citation&langcountry=AU&risb=21_T5982409253&A=0.6830533525910031&linkInfo=F%23GB%23ch+d%23year%251881%25page%25675%25decisiondate%251881%25vol%2517%25sel2%2517%25sel1%251881%25&bct=A).

***\*\*Exceptions – COMMON TO BOTH***

1. *Disclose of communication looses privilege –* Where a client or party or party disclose, by purpose or consent, confident communications then the privilege is generally lost as per *Baker v Campbell* (1983) 153 CLR 52. It does not extend to material which has an existence apart from the advice process as per *Baker v Campbell* (1983) 153 CLR 52. Legal professional privilege can be waived at any time by the client.
2. This infers that the privilege cannot operate beyond the reach of the law documentary or other material which has an existence apart from the process of giving or receiving advice or the conduct of litigation as per *Grant v Downs* (1976) 135 CLR 674.

**There is no privilege for:**

1. Documents which are the means of carrying out, or are evidence of, transactions which are not themselves the giving or receiving of advice or part of the conduct of actual or anticipated litigation.
2. Communications which would otherwise be privileged lose their immunity disclosure if they amount to a participation in a crime or a fraud.
3. Documents were the client has expressly waived the privilege.

as per *Baker v Campbell* (1983) 153 CLR 52.

***\*\*3 Main Exceptions***

1. ***To commit a crime generally***

There is a presumption that there is no intention to interfere with basic common law doctrines unless the words of the statute expressly or necessarily require that result as per *Potter v Minahan* (1908) 7 277. If a client seeks advice from a lawyer intended to assist in the commission of a crime or engagement of fraud, the legal adviser being ignorant of the purpose of the advice, the communication between the two attracts no privilege.

* 1. This is regardless of whether the legal adviser knows of the unlawful purpose being intended or not as per *Baker v Evans* [(1987) 77 ALR 565](http://www.lexisnexis.com.ezproxy.lib.monash.edu.au/au/legal/search/runRemoteLink.do?service=citation&langcountry=AU&risb=21_T5983276206&A=0.906566362220013&linkInfo=F%23AU%23alr%23year%251987%25page%25565%25decisiondate%251987%25vol%2577%25sel2%2577%25sel1%251987%25&bct=A).
  2. It includes the furtherance of some illegal activity that the client is intending or is engaged upon as per *Baker v Campbell* (1983) 153 CLR 52
  3. The person alleging the illegal activity bears the proof that such an illegal activity was occurring in order to be sufficiently capable of removing the privilege as per *Baker v Evans* [(1987) 77 ALR 565](http://www.lexisnexis.com.ezproxy.lib.monash.edu.au/au/legal/search/runRemoteLink.do?service=citation&langcountry=AU&risb=21_T5983276206&A=0.906566362220013&linkInfo=F%23AU%23alr%23year%251987%25page%25565%25decisiondate%251987%25vol%2577%25sel2%2577%25sel1%251987%25&bct=A).

As stated by Stephen J in *R v Cox*, it this wasn’t the case then a man intending to

*‘commit murder or treason might easily take legal advice for the purpose of enabling himself to do so with impunity and to frustrate criminal purposes’*

If a party is alleging that legal privilege doesn’t attach, this party must displace the privilege by demonstrating more than a mere allegation of fraud or crime or illegal purpose. In *AFP v Propend Finance Pty Ltd*  –

*‘the person alleging that legal professional privilege is lost for illegality must state clearly the charge of illegality made for the purse of show, with some precision, what it is’*

Additionally, it was also stated in *O'Rourke v Darbishire*, provide

*‘something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact’*

The party should also show that the communication in question was brought into existence in preparation for or in furtherance of, or a party to that crime or fraud as suggested in the case of *Plumb v Monck and Bohm*. When this exception is raised the court will be more ready to permit cross–examination of the party asserting the privilege as stated in *Re Compass Airlines Pty Ltd*. The fraud need not be that of either client or lawyer; it may be that of a third party.

1. ***Facts discovered during the client–lawyer relationship***

*Must disclose clients address*

A solicitor is obliged to give to the court any information (including the client's address) which will enable the court to discover the whereabouts of a ward of court whose residence is being concealed from the court per *Ramsbotham v Senior*.

*Must disclose child whereabouts*

Equally, no privilege exists to protect a solicitor from the obligation to disclose the whereabouts of a child in relation to whom an order for custody had been made under the Family Law Act 1975 per *R v Bell; Ex parte Lees*.

The privilege is one granted by the law to the client. A client who by his or her conduct is guilty of great impropriety in concealing the court's ward thereby becomes disentitled to the privilege.

1. ***Waiver of Legal Privilege***

Privilege is that of the client but can be waived expressly or by implication in respect to particular issues or a specific document. A waiver will occur if there has been a disclosure by a party which is generally inconsistent with the privilege of holding it as per *Mann v Carnell* (1999) 201 CLR 1.

*“What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.”*

*Implied Waiver*

Most typically, arguments relating to implied waiver consider the conduct which is inconsistent with the continuance of privilege as per *Mann v Carnell* (1999) 201 CLR 1.

The question of inconsistency is determined by the court by an objective consideration. In *Mann v Carnell* (1999) 201 CLR 1 it was stated

*“What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.”*

A wavier can also be implied in circumstances where it makes it unfair or misleading to maintain privilege as per *Benecke v National Bank* [(1993) 35 NSWLR 110](http://www.lexisnexis.com.ezproxy.lib.monash.edu.au/au/legal/search/runRemoteLink.do?service=citation&langcountry=AU&risb=21_T5983276206&A=0.6729586184234809&linkInfo=F%23AU%23nswlr%23year%251993%25page%25110%25decisiondate%251993%25vol%2535%25sel2%2535%25sel1%251993%25&bct=A).

***Some examples of non–privilege include:***

1. ***If a communication is made in the presence of third party***–  *Re Griffin* (1887) 8 LR (NSW) L 132
2. ***Matters that occur in open Court***– per *Nicholl v Jones (1865) 2 H & M 588*
3. ***If a communication is made available to another before privilege is claimed*** – *Warner v Women’s Hospital*[1954] VLR 410
4. ***An accused person cannot access documents subject to the privilege*** – *Carter v Managing Partner, Northmore, Hale Davy & Leake* (1995) 183 CLR 12
5. ***Physical objects other than documents*** *–* as per *Baker v Campbell* (1983) 153 CLR 52.
6. ***Whereabouts of a child the subject of a custody proceeding*** – *Re Bell; Ex Parte Lees* (1980) 146 CLR 141

***\*\*Third Parties – LITIGATION ONLY***

Privilege regarding communications with third parties are subject to the dominant purpose test being satisfied as stated in *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49 and the “possibility” of litigation per

Communications passing between third parties and the lawyer or client can attract legal professional privilege if they communications are made in contemplation of existing or anticipated litigation and for use in that litigation per *Baker v Campbell*.

Privilege will generally not apply to communications which have come from the third party unsolicited. The communication must have been requested, or there must be an actual or contemplated legal relationship between client, lawyer and third party per *Visy Industries Holdings Pty Ltd v ACCC*.

***Confidence***

It is important to emphasise that the privilege is that of the client or those with common interest in the litigation.

The protection by common interest privilege of documents in the hands of someone other than the client must pre–suppose that third party has a relationship with the client and transaction in question which in relation to the advice or other communications brings that third party within that ambit of confidence which would prevail between the legal adviser and his immediate client.

***Third party communications not related to legal advice***

It is only in relation to litigation privilege that communications extend to third parties. However, where the third party was the agent of lawyer or the client, the advice privilege may apply as per the decision of *Pratt Holdings Pty Ltd v DCT* [2004] FCAFC 122.

A third party, having as its dominant purpose the obtainment of legal advice not related to litigation is privileged

1. Where a client directs a third party to prepare and make it on the clients behalf to a legal adviser per *Pratt Holdings Pty Ltd v Commissioner of Taxation*
2. Where a client directs or authorises a third party to prepare it for the dominant purpose of its being communicated by the client to a legal adviser per *Pratt Holdings Pty Ltd v Commissioner of Taxation*
3. Where it is prepared for passing between legal adviser and third party where the third party is an “agent” of the client for communication with the legal adviser per *Pratt Holdings Pty Ltd v Commissioner of Taxation*

***Third party communications related to legal advice***

A classic statement of when third party communications are privileged is that of Lockhart J in *Trade Practices Commission v Sterling*:

1. **Authorised communication through agents** – Any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance; notwithstanding that the communication is made through agents of the party and the solicitor or the agent or either of them. – *Smith v Daniell*
2. **Any document prepared with a view to its being used as a communication of this class, although not in fact so used** – *Southwark and Vauxhall Water Co v Quick*
3. **Communications between the various legal advisers of the client –** for example between the solicitor and his partner or his city agent with a view to the client obtaining legal advice or assistance – *Hughes v Biddulph*
4. **Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged –** or containing a record of those communications, or relate to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation on his behalf. – *Greenough v Gaskell*
5. **Communications and documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced** – for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence – *Wheeler v Le Marchant*
   1. **This includes communications where a party to litigation or potential litigation provides a witness statement to an opposing party** – such a circumstance will not destroy the confidentiality for prievelege *ACCC v Australian Safeway Stores Pty Ltd*.
   2. **This includes where an expert is compellable to testify at the instance of one party even though the expert has advised the other in relation to the litigation** – *Harmony Shipping Co SA v Davis*
6. **Communications passing between the party and a third person (who is not the agent of the solicitor to receive the communication from the party) if they are made with reference to litigation either anticipated or commenced –** and at the request or suggestion of the party's solicitor; or, even without any such request or suggestion, if they are made for the purpose of being put before the solicitor with the object of obtaining his advice or enabling him to prosecute or defend an action – *Wheeler v Le Marchant*
7. **Knowledge, information or belief of the client derived from privileged communications made to him by his solicitor or his agent** – *Kennedy v Lyell*

***Public Interest***

The Court will not compel the disclosure of information which would damaging to a recognised public interest as per *Sankey v Whitlam* (1978) 142 CLR 1.

Public interest privilege fall into two classes as per *Commonwealth v Northern Land Council* (1993) 176 CLR 604 – typically:

1. *Class claims* – the documents belong to an identified class and the disclosure of such document would damage public interest
2. *Content Claims* – the risk of injury is on the basis of the content contained within the documents.

In such circumstances the Court can expressly limit the sensitivity of the material and ensure that it is not available for public viewing as per *Warner–Lambert Co v Glaxo Laboratories* Ltd [[1975] RPC 354](http://www.lexisnexis.com.ezproxy.lib.monash.edu.au/au/legal/search/runRemoteLink.do?service=citation&langcountry=AU&risb=21_T5984595294&A=0.01840711990182875&linkInfo=F%23GB%23rpc%23year%251975%25page%25354%25sel1%251975%25&bct=A).

It extends to documents, oral evidence and real evidence as per *Sankey v Whitlam* (1978) 142 CLR 1

***\*\*Without prejudice communications***

In *Field v Commissioner for Railways* (1957) 99 CLR 285 the High Court stated

*‘the purpose is to enable parties engaged in an attempt to comprise litigation to communicate with one another freely and without the embarrassment which the liability of their communications might be put in evidence subsequently might impose upon them.’*

It seems that while the words have traditionally been used to indicate this fact, they do themselves confirm upon the document an immunity from the court as per *Bentley v Nelson* [1963] WAR 89 (FC).

The accepted notion now is that it is necessary to have regard to the dispute and relevant negotiation and to examine the nature of the communication contained in the document. If the parties have expressly excluded content from the admissibility of the Court then such a contention would be upheld , but if the parties have no expressly stated the degree to which the “without prejudice” negotiations extend then it possible that they may be admissible as per *Field v Commissioner for Railways* (1957) 99 CLR 285.

**Duty to Communicate**

1. ***Professional Rules*** *– PCPR R12 & 39.1 –* Lawyers have a professional and legal obligation to communicate and provide specified information to their clients.
   1. PCPR 39.1 – *‘A practitioner in the course of engaging in legal practice must communicate effectively and promptly with client of the practitioner’*
2. ***Provide Assistance and Understanding*** *–* Assist the client to understand the issues in the case; clients possible rights and obligations; available alternatives;
3. ***Informed Decisions*** *– critical duty –* Duty to provide the client will all the necessary information to make an informed decision about offers of settlement of the case. *The client should be the one in control of the settlement process.*
   1. **Must provide all information to the client and three main ways per *Joseph Guss v Law Institute of Victoria*** 
      1. ***Alternative Dispute Resolution*** *– Vic Bar r199 –* Lawyers and clients may want to consider alternative means of dispute resolution other than litigation in court –such as mediation, arbitration or restorative justice processes (that might be less expensive, less time consuming and more likely to resolve the underlying conflict in a way that meets both parties needs); This could encourage broadly ethics of care approach of lawyering,
      2. ***Candid Disclosure –*** Lawyers and clients might be expected to have certain legal and/or ethical obligation to truthfulness in litigation ;
      3. ***Approach litigation reasonably and fairly –*** Also it might be expected that lawyers and clients should be legally and/or ethically obligated to use the processes of litigation fairly, not to invoke court processes unreasonably or for improper purposes, and not to unreasonably waste the court’s time and run up costs for the other side.
4. The ***Family Law Act 1975*** (**s 14D, s 62B)** requires practitioners to inform clients of the legal and possible social effects of proposed proceedings including the consequences for children.

**\*\*Duty to Administration to Justice**

1. ***Purpose*** *–* ***See Duty to the Court section* [see *Duty not to Corrupt Administration of Justice]***
2. ***Provide accurate fee account*** *–* ***See Costs Disclosure***
3. ***Duty to Encourage Settlement*** *–* 
   1. *Purpose* – All lawyers have a duty to the proper and efficient administration of justice and not to extend trial lengths in the interest of economic gain.
   2. *Client Interests* – Per *Berjaya Group Pty Ltd v Ariff* – lawyers should act as ‘moderating influences’ in the interests of justice and ensure that the best outcome for the client is at the forefront of settling a dispute.
   3. *Reasonable Alternatives –* Provide the client with reasonable alternatives as to the nature of the dispute and if mediation and arbitration are the best remedies then such alternative dispute resolution should be explored.
   4. *PCPR r 12.3 –*

*‘A practitioner must seek to advance and protect the client's interests to the best of the practitioner's skill and diligence, uninfluenced by the practitioner's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the practitioner or any other person, and always in accordance with the law including these rules.’*

**Lawyers Duty to Clients in Tort**

***General***

1. *Purpose –* Negligence will cause concurrent **liability in tort** and **contract (retainer)**, and may be liable in tort independently of an action in contract
   1. *Henderson v Merrett Syndicates Ltd* (HofL)
   2. *Astley & Ors v Austrust* (HCA)
2. *Contract –* The law implies into contracts for services a promise to exercise reasonable care and skill
   1. The existence of concurrent liability in tort and contract may be ‘untidy’ but it is not objectionable because tortious duty is imposed by law and contractual duty by the will (express of implied) of the parties:
      1. *Henderson v Merrett Syndicates Ltd (HofL)*
      2. *Astley & Ors v Austrust (HCA)*
3. *Retainer* – Whoever is listed in the retainer agreement is a party to the contract with the client and is therefore relevantly liable.
   1. *Vicarious Liability –* Solicitors are vicariously liable in tort for negligent work done for a client by an employee in the course of employment.
   2. *Joint Tortfeasors –* Solicitors remain liable, jointly and severally with other involved professionals (eg accountants) for any loss occasioned by bad advice
4. *Appointing counsel*:
5. *Duty of Care when appoint Counsel –* A solicitor’s duty of care does not end when appointing a counsel in the case.
6. *Solictor cannot blindly follow counsel* – A solicitor lacking specialist expertise in a field is entitled to rely more heavily on counsel’s advice, but cannot blindly follow the advice.
   * 1. *Turn their mind to the case –* The solicitor must still turn her or his mind to the issue under consideration and exercise independent judgment – *Yates Property Corporation (in liq) and Anor v Boland*
7. *Standard is raised for Expert Solicitors –* Solicitors with expertise in the area of law concerned cannot rely on counsel to the same extent as solicitors lacking that expertise – *Yates Property Corporation (in liq) and Anor v Boland*
8. *Solicitors can be joint tortfeasors of barristers –* If barrister makes error solicitor does not loose liability – *Yates Property Corporation (in liq) and Anor v Boland*

***Differences between Tort and Contract***

1. *Limitation Period –* 
   1. *Tort* – the 6 yr limitation period does not commence until the plaintiff first becomes aware of the damage (the date of ‘discoverability’).
   2. *Contract* – the time runs from the date of breach (date of damage)
   3. ***Effect*?** – A disgruntled client could have more time to act if they can rely on a duty of care and not just the contract (of retainer)
2. Examples *– Will Drafting*
   1. When a Will is badly drafted and a beneficiary misses out, they have 6 years (under the statute of limitations) from the date of signing the Will to sue in contract
      1. However **there is more time in tort**, where the limitation period only runs from the date of death, because that is the date on which the damage ‘occurs’.
   2. *Damage required –* An action in contract lies in respect of the breach *per se*, whereas tortious liability does not arise in the absence of damage
   3. *Different Damage Assessment –* Damages are often assessed on a different basis and damages in tort may include exemplary and punitive damages

***Contributory negligence***

1. *Tort –* Contributory negligence by a client may result in an apportionment of damages in tortuous claim
2. *Contract –* However, apportionment does not apply to contractual claims and client is entitled to recover the whole of the damage suffered: Astley and Ors v Austrust

***Tort Liability***

1. *Failure to maintain standard –* Lawyers who fail to attain a standard of competence expected by law may be liable in tort because lawyers are assumed to owe a duty of care in tort.
2. *Retainer establishes duty –* The retainer establishes the existence of the relationship that has given rise to the duty and its terms determines the scope of the lawyer’s tortious duty of care
3. *Negligence Burden –* To show negligence [**see next page also**]
   1. *Determine the scope* – Must ascertain the scope of the duty of care as determined by the terms of the retainer (in tort it is not limited to scope of retainer)
      1. *Hawkins v Clayton* – The law of negligence has been broadened and the duty of care may require the taking of positive steps beyond the specifically agreed professional task or function to avoid a real and foreseeable risk of economic loss being sustained by the client. Also depends on proximity and what is reasonable.
      2. *A less sophisticated client is deemed to have a wider retainer than a client who is extremely sophisticated and knowledgable*.
         1. *Sophisticated –* Able to protect their own interests, Court less inclined to adopt an expansive view of the scope of the lawyers duty of care.
            1. *Scottsdale Homes Pty Ltd v Gemkip Pty Ltd*
         2. *Unsophisicated –* Clients who are uneducated or commercially unsophisticated increase the burden of care owed in tort because of their lack of comprehension.
            1. *Davies v Camilleri*
   2. *Standard Owed to the Client –* Ascertain whether or not in acting as he/she did, the lawyer has fulfilled the requisite standard of care.
      1. **The relevant standard**: is that of a qualified, competent and careful lawyer in the given circumstances in the practice of his or her profession: *Hawkins v Clayton* per Deane J; *Rogers v Whitaker*
         1. The standard of care dictates that a lawyer is expected to possess the knowledge held by the reasonably competent lawyer of well settled principles of law and the relevant procedure and rules of court applicable to the clients needs.
      2. *Higher Standard* – A lawyer who holds him or herself out as an expert in a field of practice will be subjected to a higher standard: *Yates v Boland*
      3. *Lower Standard – Impact of Advice* Urgent advice or advice with hard time pressure can influence the scope of the dtuy of care.

*May v Mijatovic*

Injunction sought at extremely short notice. Failed for client and was forced to pay damages. The client sued solicitor for damages.

**Held:** Need to strike a ‘balance between a lawyer acting with little time and not acting with due care to expose a client to liability’. If a lawyer cannot complete the task within the time due to experience etc – tell the client this – otherwise expose the client to ‘real and foreseeable loss’. Naturally, the standard is lower.

**Solicitor was negligent – not for mistake in relation to the clients instructions – but in not advising the client of the risks of loss from such little time.**

***Liability to 3rd parties – i.e not to client***

1. *Purpose* – Liability to third parties may arise under statute, or tort – not limited to person with retainer, others may also suffer damages (not contract here)
2. *Misleading and Deceptive Conduct –* Under the *Trade Practice Act* or *Fair Trading Act* a practitioner may be liable to third parties for misleading and deceptive conduct.
3. *Reasonable Care to avoid acts or omissions –* There is a duty to take reasonable care to avoid acts or omissions which a practitioner could reasonably foresee would be likely to harm another person
   1. *Circumstances of liability –* A reasonable expectation in a third party in circumstances where it’s reasonable for the third party to rely on that expectation.
      1. *Reasonable Expectation of Liability –* A practitioner who creates a reasonable expectation in a third party in circumstances where it is reasonable for the third party to rely on that expectation assumes a tortious responsibility to that person – *Hawkins v Clayton* and *Van Erp.* 
         1. Test:
            * Assuming a responsibility to 3rd party
            * The 3rd party relies in something lawyer does;
            * The lawyer has relationship of control over third party.
4. *Third Party Examples* –
   1. *If solicitors* ***advise a person*** *whom they know, or should know, will place reliance upon it then a duty of care will arise* – *Hedley Byrne v Heller*; *MacPherson & Kelley v Kevin J Prunty & Assocs*
      1. Example – Providing information to opposing clients (eg, conveyancing solicitors acting for vendors but purchasers (may be unrepresented) ask for information regarding the property such as the amount of rates and solicitor provides written but erroneous information to the purchaser → solicitor will owe a duty
   2. *Liability to an executor of a will (he administers for the beneficiaries*) – *Failure to notify executor of a will*
      1. *Lack of Notification about Will –* A solicitor was held to be liable in tort to an executor for loss suffered by reason of the solicitor’s failure to locate and notify the executor of the will or its contents. 6 years later, assets were in state of disrepair – *Hawkins v Clayton*
   3. Duties may be owed to **beneficiaries** directly: A solicitor who accepts instructions to make a will owes a duty of care to the proposed beneficiaries to carry out the testator’s instructions with due diligence – *Hill v Van Erp*

*Hill v Van Erp (1997) 142 ALR 687*

Hill (a solicitor) was instructed to prepare a will for his client (a Mrs Currey), leaving a house jointly to her son and to her friend, Mrs Van Erp. At the signing of the will, he allowed the husband of Mrs Van Erp to witness the will. This act voided the will because of the rule that an ‘interested party’ (as defined) cannot be a witness. Mrs Van Erp sued the solicitor because, as usually happens in these matters, the error could not be remedied!

**Held:** The HCA endorsed the principle of proximity as applying to this situation and found Hill liable to Mrs Van Erp in negligence.

* 1. *Duty to other’s client* – A duty is owed to lawyers opposing clients to provide accurate and timely information when it is requested. If the representing solicitor provides false or inaccurate information which is relied upon by the other party then they are liable in tort – *LT King v Besser*

*L T King v Besser*

King, a financial advisor, invested money into Besser’s (ran financial schemes) scheme, based on information provided to him by his own solicitor (Minters) who sought for the information from Besser’s solicitors. Besser’s solicitors provided incorrect and deceptive information (assured Minters that Besser had $900,000 in his account, but in fact only had an uncleared cheque for that amount which bounced ) which King relied on.

King sued Besser’s solicitor for deceptive and misleading conduct (s 52 TPA).

*Q: Was Besser’s solicitor’s advice trade or commerce for the purposes of TPA? Is a solicitors activity commercial or legal (intellectual advice – not covered by TPA).*

**Held**: **Here was yes, because it was pre–litigation, hence not communication about litigation i.e not giving advice**

1. *Statutory liability*
   1. *TPA* & *Fair Trading Act* – Lawyers may also be potentially liable for breaching the statutory prohibition of misleading and deceptive conduct in the conduct of “trade or commerce”: TPA s 52; and Fair Trading Act 1999 (Vic) s 9. – usually for third parties
   2. *Partnership Act –* Liability may also arise under the *Partnership Act 1958* (Vic) s14 and s16 for loss resulting from wrongful acts or omissions of a partner acting in the ordinary course of business of the firm.
2. **Exemption clauses** –
   1. Liability cannot be excluded by such clauses : s 7.2.11(2) LPA i.e cannot modify the tortuous duty by terms of the retainer.

**Liability in tort – BARRISTERS**

1. *Barristerial Immunity –* Barristers and solicitor advocates (who do court work) have immunity from being sued in negligence
   1. ***Court work*** – preparation of court documents, court proceedings
   2. ***Covers tort and contract*** – i.e complete immunity
2. **Rational for immunity**: – *Rondel v Worsley* [1969] 1 AC 191 per Lord Reid which was applied in *Giannarelli v Wraith* in the Australian High Court

‘It is impossible to expect an advocate to prune his case of irrelevancies against a client’s wishes if he faces an action for negligence when he does so. Prudence will always be prompting to ask every question and produce every piece of evidence that his client wishes, in order to avoid the risk of getting involved [in an action against him/herself]… it is difficult and it needs courage in an advocate to disregard irrelevancies which a forceful client wishes him to pursue.’

* 1. *Threat from Public Interest & Administration of Justice –* Unsuccessful litigants could bring an action to show that ‘but for’ their barristers negligence, they would have obtained a more favourable result which would create significant difficulties in the administration of justice per *Giannarelli v Wraith* per Wilson & Deane JJ
  2. *Good Advocacy–* a case is cut down to its essentials; it is more manageable and more likely to be justly decided by judge or jury.
  3. *Time* (and consequently the cost) – is greatly diminished otherwise barristers will compromise their duties to the court to please their clients – need to go against client’s instructions

1. *Cannot attempt to avoid negligence –* Barristers need to take a case – cannot refuse a case to avoid negligence
   1. ***See Cab–Rank rule*** **[above]**
2. *Boland v Yates –* Referred to again by the High Court in 1999 in *Boland v Yates*
   1. Court found no negligence, therefore did not find it necessary to comment on the question of immunity.
   2. Kirby J was prepared to express a view about the immunity:
      1. *Conduct in Court –* It was appropriate for the immunity to cover barristers and solicitor–advocates but would have confined *Giannarelli* on the basis that it concerned criminal proceedings and the alleged negligent conduct was in the course of conducting a case in court.
      2. *Only Immunity in Court & Nowhere Else –* Immunity should be limited to court room and not to other activities.

**Special Duties in Criminal | Civil Context**

**Duties of Prosecution Counsel**

1. ***Duties of prosecution counsel*** – *PCPR 20.1–20.4, 20.10 and 20.12, Vic Bar R134–164*
2. ***Duty of fairness and impartiality* –** PCPR 20.1; BR 134 –Prosecutors are representing the State and must act with fairness and detachment / impartiality and with the objective of establishing the truth in accordance with the procedures and standards required by law.
   1. *Sex Offences* – Particularly in sex offence cases where the jury may already be prejudiced against the defendant.
3. ***Avoidance of Bias against the Accused*** *– BR18; PCPR 20.3 –* Prosecutors must avoid giving their own reaction to the evidence led on behalf of the accused as these are irrelevant. Such as
   1. On personal opinions or convictions on issues of fact;
   2. On the credibility of witnesses and
   3. On the guilt and character of the accused
4. ***Cannot press ‘hard’ for a conviction –*** *PCPR 20.2;**BR135* ***–*** The prosecutor must not press too hard for a conviction
5. ***Must believe on reasonable grounds*** *–* PCPR r 20.4;BR 137 ***–*** The rules preclude prosecutors from arguing any proposition of fact or law that they do not believe on reasonable grounds is capable of contributing to a finding of guilt and of carrying weight
6. ***Must not ignore credible evidence*** – *PCPR 20.1–20.7; BR141* – Prosecutors must not ignore credible evidence which could be of importance to the accused’s case
7. ***Sole discretion to call prosecution witness –*** *PCPR 20.7 –*A prosecutor has sole discretion about who to call as prosecution witnesses. Only in exceptional circumstances may a trial judge call a person to give evidence and a judge cannot direct the prosecutor to call a witness – *R v Apostilides*
8. ***Relevant Witness Testimony –*** *PCPR 20.7;* Bar Rule 139 *–*Consistent with 7 above, requires a prosecutor to call all witnesses whose testimony is admissible and necessary for the presentation of the full picture
9. ***Duty of disclosure –*** *PCPR 20.5 & 20.6; BR 141* – Prosecutors must disclose any relevant and credible evidence that the jury could reasonably regard as credible and that could be of importance to the accused’s case, such that could constitute relevance to the guilt or innocence of the accused.
   1. *Miscarriage of Justice –* if not disclose it can result in miscarriage of justice

**Duties of Defence Counsel**

1. ***Protect Client from Conviction*** – Bar Rule 149 – The duty of the defence is to protect the client from conviction except by a *competent tribunal* and upon *admissible evidence* *sufficient to support a conviction*
   1. *Tuckiar v the King*

*Tuckiar v the King*

During the trial of a person, the accused admitted to his lawyer that he had committed the murder. In open court counsel said he wanted to discuss with the judge ‘the worst predicament that he had encountered in his legal career’. Sentenced to death.

Held: HC quashed the verdict. The court did not understand why counsel found himself in so great a predicament. He had a duty to press the arguments for acquittal from any charge which evidence fails to establish that he committed.

1. ***Guilt and innocence*** – *PCPR 15.1, 15.2* – Whether guilty or not, an accused is at law entitled to an acquittal from any charge which the evidence fails to establish the accused committed – *Tuckiar v the King*
   1. *Client Admission of Guilt*– *PCPR 1; 13.3; 15.2* – If the client confesses guilt of a crime to the defence during the proceedings, then barrister must continue to act and do all they can ‘honourably’ do in the clients defence.
      1. *Tuckiar v the King*
      2. *Cannot falsely suggest any person*– PCPR 15.2 – If a client has confessed to a crime then if the lawyer continues to act then they must
         1. 15.2.1 – not suggest that some other person did it or
         2. 15.2.2 – structure a case which is inconsistent with the confession.
      3. *Must argue on evidence alone* – Defence counsel cannot falsely attribute guilt per – PCPR 15.2.2(a) – but rather:
         1. *Put**prosecution to proof – 15.2.2(d)*
         2. Argue some reason of law why client is not guilty [insanity] – *15.2.2(d)*
         3. Argue any other reason why no conviction – *15.2.2(e)*
2. ***Exception*** *– PCPR 15.3* ***–***  If the client intends to disobey the Courts orders then the lawyer must advise the client against such actions and inform the Court only if the:
   1. *15.3.3(a)* – client authorises it
   2. *15.3.3(b)* – reasonably threat to a person’s safety.

**Lawyer–Client Conflicts**

**General *– PCPR 9.1 ‘Avoiding Conflicts’***

1. ***Purpose***– A basic fiduciary duty which applies to the lawyer client relationship is such that lawyers must provide their ‘undivided loyalty’ to their clients “without being distracted by other interests including personal interest”
   1. *R v Neil*
   2. *PCPR 9.1* – *Avoiding Conflict of Interest (where practitioner's own interest involved)*
2. ***Not to deal or transact with client*** *–* A lawyer who deals or transacts with a client, other than solely within the scope of the retainer, may prima facie place him/herself in a position of conflict between interest and duty
   1. *Law Society of NSW v Harvey*
3. ***Public Confidence*** *–* The public perception that lawyers can use their privileged position to their own advantage lowers not only
   1. *Public Respect –* for the profession – per *O’Reilly v Law Society of NSW*
   2. also public confidence in the legal system *Australian Securities Commission v Bell*.
4. ***Duty of Loyalty*** *–* Fiduciary principle dictates that lawyers must give undivided loyalty to their clients, without being distracted by other interest including personal interest. This requires practitioners to avoid conflict between the interests of a client and:
   1. The personal interests of the lawyer;
   2. The interests of another client both in the:
      1. **Current Client (concurrent); and**
      2. **Former Client (successive)**

Because of the duties of loyalty and confidentiality.

1. ***Extends beyond individual Lawyer*** *– PCPR 9.2 ‘or the interest of an associate’*
   1. Duty extends beyond the individual lawyer to:
      1. a partner; or
      2. employee; or
      3. agent of the lawyer or of the lawyer’s firm; or
      4. partnership in which the lawyer has a material interest; or
      5. director of an incorporated practice; and
      6. member of a lawyer’s immediate family.
2. ***Seek independent advice* –** Where the possibility of conflict is evident, the lawyer should encourage their clients to seek independent and impartial advice – *Wolley v Ritchie & Maher v Millennium Markets*
   1. ‘Merely advising the clients of the opportunity to seek independent advise does not protect the lawyer from a fiduciary breach’
      1. *Brott v Maher*
3. ***Barrister’s duty to inform client of conflict*** – A barrister, who believes on reasonable grounds that the interests of the client may conflict with the interests of the instructing solicitor, or that the client may have against the solicitor must advise the solicitor and client.
   1. *Vic Bar Rules 73*

**Informed Client Consent**

1. ***The role of consent*** *–* Essential to inform client consent or authority is “full candour and appropriately complete disclosure to the client by the lawyer per **O’Reilly v Law Society of NSW**.
   1. PCPR 8.3 – *Acting for more than one party*
   2. PCPR 9.2 – *Avoiding conflict of interest*
   3. PCPR 12.1 – *Duty to the client*
2. ***Must not yet be in a position of conflict*** *–* This provision is applicable only when the solicitor is not yet in a position where they are obliged to act against the interests of one of the parties – they are already at that stage then it won’t help.
3. ***‘Arm the Client with Knowledge’***– Disclosure is directed at placing the client in a position to determine whether or not (continue to) to retain the lawyer in the matter.
   1. *Lack of Client Knowledge implies Lack of Authority –* Where the client lacks the knowledge of the existence or the scope or the implication of the conflict a client cannot be said to give informed consent or authority to the (continuing) representation.
      1. *Castlereagh Motels v Davies Roe*
   2. *Onus rests on Lawyer to Inform –* The lawyer carries this onus because he or she is better positioned than the client to appreciate both the existence of a conflict and its likely scope and implications.
      1. *Sims v Craig Bell & Bond*
   3. Further Street CJ in *Law Society of NSW v Harvey* said

*‘the disclosure must be conscientious disclosure of all material circumstances and everything known to the practitioner relating to the proposed transaction which might influence the conduct of the client or anybody from whom he might seek advise.’*

1. ***Recommend Independent Advice*** – A prudent lawyer will therefore insist that the client receive independent legal advice on the matter if there is any inclination to continue the representation.
   1. *Mitigate**Liability & Reduce Conflict –*Such advice serves to reduce the scope for the lawyer’s own influence in a client’s decision to continue conflicted representation and has the benefit of being supplied by a person with no conflicting interest in the matter
      1. *Law Society of NSW v Harvey; Maher v Millennium Markets Pty Ltd*
   2. *Standard is Heightened –* The standard is heightened for transactions in which lawyers are personally interested such as spouses, family members, business partners unless the other party is relevant separately represented or advised.

***Woolley v Ritchie***

Held that a solicitor was under a duty to ensure that his de facto spouse **was fully informed and freely consented** and the solicitor’s conflict steaming from his interest in the transaction required securing for the spouse independent legal advise. Solicitor should not have acted on his own behalf and for his de facto spouse in real estate transaction.

**Types of Conflicts**

Practitioner/client conflict can arise in the following ways:

1. ***Transacting with a current client outside of the professional relationship*** – Practitioners should avoid transactions which involve intermingling personal and client affairs, including the affairs of companies and ventures in which the practitioner has a personal connection
   1. ***Law Society of NSW v Harvey***
2. ***Transactions with former clients*** – *Allowed –* Generally, practitioners are free to transact with former clients.
   1. *No Fiduciary Prohibition* – There is no fiduciary prohibition on lawyers dealing with former clients, as the fiduciary duties end with the termination of the retainer.
      1. *Blythe v Northwood*
         1. Solicitor explained a mortgage to a client but took no further part in transaction. Was not held liable for not disclosing his interest in the company to which client on–lent money.
3. ***Borrowing from clients*** *–* It is prohibited (subject to some exceptions) for a practitioner to directly or indirectly borrow from a client of the lawyer’s firm, or a former client who has indicated continuing reliance on the advice of the lawyer; or knowingly permit or arrange a client loan to associated persons or entities.
   1. **PCPR, R11.1; 8.6 *Law Society of NSW v Harvey***
      1. *Lawyers should*
         1. Disclosure the interest fully and candidly to the client in writing; and
         2. Advise and facilitate the provision of independent advice; and
         3. Advise on, and facilitate access to, alternative sources of funds which may be to clients advanced.
   2. **Except** if the client is a financial institution: **PCPR R11.2**
      1. 11.2(i) – Bank,
      2. 11.2(ii) – Trust Company etc
   3. *Failure to Disclose Interests* –
      1. Failure to fulfill these disclosure requirements gives rise to a fiduciary breach, and scope for the court to set aside the transaction.
         1. *High Court’s in Maguire v Makaronis*
4. ***Lending to clients*** *– PCPR R11.3 –* Scrupulous care is required to avoid a conflict where a practitioner or associated person or entity lends money to a client –
   1. ***O’Reilly v Law Society of NSW***
      1. *Lawyers should*
         1. Disclosure the interest fully and candidly to the client in writing; and
         2. Advise and facilitate the provision of independent advice; and
         3. Advise on, and facilitate access to, alternative sources of funds which may be to clients advanced.
      2. *Law Society of NSW v Moulton*
         1. Where a lawyer intends to use a client’s money to finance a business the lawyer is carrying on, it is difficult to see how the client can be adequately protected and advised without independent advised
   2. ***If lawyer does transact*** *–* The lawyer must – *PCPR 11.3(a)*
      1. Complying member of *Managed Mortgages Section of RPA*
      2. Discloses the interest fully to the client, in writing;
      3. Advise client to seek independent advice.
5. ***Buying or Selling to a client (eg property)*** *– PCPR 9 –*  the lawyer’s fiduciary responsibility prohibits her/him profiting from information or opportunity derived by reason of the fiduciary position
   1. *Longstaff v Birtles*
      1. The duty to ensure that the client seek independent advise regarding the dealing is specifically important for two reasons
         1. *Fiduciary Responsibility –* lawyers fiduciary responsibility prohibits him or her profiting from information or opportunity derived by reason of fiduciary position per *Boardman v Phipps*; and
         2. Position of Influence – the lawyers position of influence may lead the client to accept the terms and conditions of the transaction as suggested by the lawyer
   2. *Permitted only if:*
      1. Make full disclosure and encourage the client to seek independent advice [PCPR 11]
         1. *Nenegoiate Terms* – the lawyer’s position of power is removed with independent advice and terms can be renegotiated.
   3. *Unconscientious Use of Position –* 
      1. *Marcolongo v Mattiussi* – Young J stated

*‘whether there has been an unconscientious use by the solicitor of their position of advantage in circumstances where the person in the position of the client was reasonably expecting a person in the position of a solicitor to act solely on their behalf’*

* 1. *Failure to Disclose Interests* –
     1. Failure to make full disclosure and to counsel the client to seek independent advice may open the lawyer to a claim for fiduciary breach or undue influence and potentially threaten enforceability and validity of the transaction.
        1. *Talbot & Olivier v Shann (2005)*

1. ***Receiving a Higher Fee, Referrals & Commissions*** –A lawyer, per their fiduciary duties, must not profit from the fiduciary position with the relevant candid and informed consent of the person to whom the fiduciary duties are owed placing the clients’ interests above their own.
   1. *Council of QLD Law Society v Roche* –
      1. Lawyer favoured own economic gain over that of client
      2. Didn’t encourage independent advice.

*Council of QLD Law Society v Roche*

Practitioner negotiated a substantial increase in fees with an existing ‘no win, no fee’ client in a personal injury matter, the court the practitioner guilty of professional misconduct for preferring his own interest to that of his client. He had breached the fiduciary obligation to the client by failing to inform the client of the way the client’s rights under the fee agreement and the fees payable would change. It was said that he should advised the client to seek independent advise before making the client sign the new agreement even though the client gave the evidence he would have not sought the independent advise.

* 1. *Making of Wills & Higher Fees* – *PCPR R10*
     1. PCPR 10.1 – Requires lawyers to disclose to the client in writing any fee or commission they will claim under the will and inform the client that they could appoint another executor.
     2. PCPR 10.2 –prevents a lawyer from drafting a will under which the practitioner or the practitioners firm or associate will or may receive a substantial benefit in addition to reasonable remuneration
  2. *Referrals & Commissions – PCPR 33*  *–* A conflict of interest could be created where a lawyer accepts an undisclosed benefit for referring a client to a third party [see *Maher v Millennium Markets]*
     1. *Criminal Liability – Crimes Act Vic 1958 s175(1) & s176(1)* – makes it a crime for an agent [including a lawyer] to receive or solicit from a person valuable consideration.
     2. Rule 33.2 –

*A practitioner must not act for a client in any dealing with a third party from whom the practitioner may receive, directly or indirectly, any fee, benefit or reward in respect of that dealing unless:*

*33.2.1 the practitioner is able to advise and, in fact, advises the client free of any constraint or influence which might be imposed on the practitioner by the third party;*

*33.2.2 the practitioner's advice is fair and free of any bias caused by the practitioner's relationship with the third party; and*

*33.2.3 the nature and value of any fee, benefit, or reward, which may be*

*received by the practitioner, are:*

*(a) fair and reasonable, having regard to objective commercial standards; and (b) are disclosed fully in writing to the client before the dealing is commenced.*

*Maher v Millennium Markets*

Solicitor received a fee from a third party to arrange the sale of the clients properties. Solicitors interests in the properties meant he did not explain fully his obligations to the clients.

**Held:** Solicitor should have either ensured that the clients were independently advised as to the potential conflict of interest implicit in the fee agreement or at the very least personally advised them explicitly on the issue. Solicitor liable.

1. ***Practitioner as witness*** *–* Practitioners should avoid acting in cases where they may be required to give evidence material to the determination of contested issues, e*g*, when a solicitor is present when an informal interview occurs between his client and an investigating police officer
   1. ***See Termination of Retainer*** –
      1. *Permissible ‘just cause’* – *PCPR 6.1.3*
      2. *Reject brief if the Barrister may be a witness to the proceeding –* Counsel has reasonable grounds to believe that he or she may as a real possibility, be called as a witness [Vic r 92(c)(d)];
2. ***Intimate personal relationships with clients*** – Fiduciary law is directed at preserving economic interest, and so does not generate liability for non–financial loss arising out of lawyers taking advantage of clients’ vulnerability: ***Breen v Williams***
   1. *PCPR 9 – Avoiding Conflicts & PCPR 13 – Avoidance of Bias* 
      1. There are no rules barring intimate personal relations – can involve a conflict of interest because objectivity and independent professional judgment is affected by personal interest – *R v Szabo*

*R v Szabo* [2000] QCA 194

Criminal case a defense counsel was in an *interrupted* phase of a relationship with a crown prosecutor in the same case. **Held:** The defendant succeeded in an appeal against conviction because he could show that he may not have received independent legal advice – permitting a reasonable suspicion of a miscarriage of justice.

**Concurrent Conflicts**

***General***

1. ***Purpose*** *–* The duty of undivided loyalty cannot be fulfilled if it is owed to two or more parties whose interests are in opposition. The presence of conflicting duties between the two parties undermines the ability to adequately provide the requisite degree of loyalty to each.
   1. ***Concurrent interests*** – The representation of multiple clients with conflict interests whereby the fiduciary duties owed to each party is put in question and require lawyers to withdraw themselves from one party unless cured by client consent per PCPR 8.4.
      1. Concurrent conflicts can arise in **contentious** [litigation] and **non–contentious work** [transactional] but a stricter rule applies to contentious work.
      2. *‘Require Alertness’* – Potential of consequences regarding conflicts mean that lawyers must be ‘alerted to the possibility of conflict arising’
         1. *Council of Law Institute Vic v Solicitor*
   2. ***No conflicts with separate clients and separate interests*** *–* No such problem arises where there is an identity of interests or separate clients with unrelated interests, and for this reason there is no outright legal or professional prohibition on concurrent representation
2. ***Must Avoid Conflict*** *–* A lawyer must avoid conflict of interest between two or more clients – PCPR **8.2**
   1. Applies to:
      1. ***Entire firm*** – irrespective of its size: *Mallesons Stephen Jaques v KPMG; Village Roadshow Ltd v Blake Dawson Waldron*
         1. ***Client retain the firm not an individual lawyer*** *–* *Kelly v Jowett*
         2. ***Entire Firm owes the Fiduciary Duty*** *– Mallesons Stephen Jaques v KPMG; R v Neil*
            1. *Partners of the Firm* – knowledge of one partner is the knowledge of the other because partners are obliged to seek advice from one another; associate and employees.

*Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd*

Firm acted for a client in one proceeding in Qld and against the client in unrelated proceedings in Victoria. The proceedings were ‘entirely and truly unrelated’ and handled by differences offices of the firm. Coupled with assurances that appropriate safeguards were in place.

**Held**: Court was **satisfied and rejected an application to restrain the firm** from continuing to act conditional on the basis the Melbourne Office did not seek information from the Brisbane office about the proceeding.

1. ***Risk is Borne by Solicitor –*** If a solicitor is unwise enough to undertake irreconcilable duties, it has been judicially observed

“it is his own fault, and he cannot use his discomfiture as a reason why his duty to either client should be taken to have been modified.’

* + 1. *Hilton v Barker Booth*

1. ***\*\*Duty of Consent & Prevention*** – PCPR 8.3 – The lawyer must inform the client and ensure that each client is aware that the lawyer is intending to act for the other party and consents to the lawyer so acting in the knowledge that the lawyer
   1. Must ensure that – PCPR 8.3(a)
      1. *Prevent disclosure to other party –* May be thereby prevented from disclosing to each party all information relevant to the matter within the lawyers’ knowledge or giving advise to one party that is contrary to the interests of another; and
      2. *Terminate retainer if Contrary Interests –* Will cease to act for all parties if the lawyer would otherwise be obliged to act in a manner contrary to the interests of one or more of them.
   2. *Disclose nature of personal relationships –* If representing lawyers for each party are ‘parents, children, siblings or spouses’ in a contentious matter then the clients must be informed and only after client consultation should the matter proceed.
2. ***Limitations on Client Consent*** *–* The nature of fiduciary relationships relevant places restraints on the degree to which a client can consent to the modification or ‘removal’ of such duties.
   1. *Marron v J Catham Daunt Pty Ltd*
   2. *Limiting the Scope of the Retainer –* By limiting the scope of the retainer, the lawyer can seek to entirely avoid the conflict that may otherwise arise.
      1. *Client must be aware* – of the limitations on the retainer scope, and is relevantly position to obtain independent legal or financial advice on the matters outside the scope.
   3. *Consent to existing or future conflict* – The client can consent to the concurrent conflict whether from the outset or when the conflict arises at a later point.
      1. *Lawyer bears onus* – The lawyer always bears the onus of proving that each client has consented to the multiple representation with a full understanding of the existence and potential ramifications of the conflict of interest.
         1. *Marron v J Chatham Duant Pty Ltd*
      2. *Lawyer should encourage independent advice* – If the lawyer requests consent then they should also encourage the client to seek independent advice on the matter.
         1. *Clark Boyce v Mouat*
   4. *Independent professional judgement* – A lawyer should not be entirely driven by their clients demands and must assess – on a true and correct basis – whether it is in the clients’ interests to proceed with concurrent representation with the risk – despite how minimal – of a conflict.
      1. Factors include:
         1. *Client’s sophistication* – More sophisticated means the client is more able to make decisions by themselves.
         2. *Reliance* – A less sophisticated client will rely more on a client views.
         3. *Independent Advice* – A lawyer should always encourage independent legal advice to the client no matter how sophisicated per *Mantonella Pty Ltd v Thompson*

**Contentious Matters**

1. ***Scope*** *–* A lawyer cannot represent parties in litigation that **do not share the same interests or the outcome of the litigation whether criminal or civil**. This is because one client suffers at the others expense and the duty of loyalty cannot be satisfied.
   1. *Re a Firm of Solicitors*
      1. *\*\*Particularly in criminal Cases*
2. ***Risk of acting*** *–* A lawyer must accept the inherent risk of acting for both parties and in deciding to accept a retainer – the lawyer must be prepared to accept the risk of negotiating both sides to the litigation.
   1. *Continued Representation* – Must accept that the Court may seek to restrain the use of confidential between the clients and the risk of negligence, cost and delay.
   2. **PCPR 8.1B**
      1. *Material Conflict –* Lawyers only have to withdraw if there is a *material* conflict – **PCPR Rule 8.1B(i)**; and
      2. *Reasonable Belief –* The practitioner *reasonably**believes* that such a conflict is likely to arise – **Rule 8.1B(ii)**
3. ***Criminal Matters*** *–*A lawyer should never represent both parties to contentious criminal matter.
   1. *Joint Representation* **–** It is permissible to represent multiple parties of the same matter in joinder to
      1. *Reduce Costs*
      2. *Strategic legal advantages in plea bargins etc*
   2. *Risks –* The cases not adequately separated could mean that possibility of different verdicts for the defendant may be left unexplored. Such as:
      1. *Raising individual issues of character –* It may restrict the lawyer from raising issues of character of one defendant for fear of casting doubt over the character of the other.
      2. *Individual Defendants Interests Diverging –* It is difficult to determine early how the interests of each defendant may diverge during the course of the proceedings.
      3. *Clients want reduced costs and forego strategic –* Client consent to the conflict carries little weight especially in criminal cases due to criminal defendant’s lack of appreciation of the complexities of conflicts and their possible impacts.
   3. *Victorian Ethical Guidelines in the Representation of the Co–accused* – Expressly prohibited a lawyer from acting for two or more co–accused in the same criminal proceeding if there is an ‘actual or foreseeable conflict of interest between the clients’

**Non–Contentious Matters**

1. ***Scope*** *–* Important that lawyers consent the latent ability for conflicts between clients in transactional work – at a high level than that for contentious work.
2. ***Inherent Risks*** *–* While there is no *general* rule against acting for two or more parties in non–contentious matters, there are inherent risks in doing so including those in the **PCPR 8.1B**
   1. *Material Conflict –* Lawyers only have to withdraw if there is a *material* conflict – **PCPR Rule 8.1B(i)**; and
   2. *Reasonably Belief –* The practitioner *reasonably**believes* that such a conflict is likely to arise – **Rule 8.1B(ii)**
3. ***Risks vs. Benefits*** – A decision to represent more than one party in a non–contentious matter involves the dangerous balancing of the risks with the benefits:
   1. *Unforeseen Conflict –* A conflict may arise that was unforeseen at the start of the matter – in complex commercial negotiations the emergence of conflicts is actually likely.
   2. *Increased Delay, Expense –* If a conflict arises, one party will have to seek independent representation and incur additional expense, delay and inconvenience.
4. ***Strict Client Retainer Agreement*** *–* If you prepare a document which creates rights and obligations between clients, you will be unable to act for any client in a subsequent dispute over its terms –
   1. *Yunghanns & Ors v Elfic Ltd & Ors*
5. ***Transactional Restrictions*** – The PCPR at 8.5 provides express restrictions on when a practitioner must not act or ‘intend’ to act:
   1. *Acting for vendor and purchaser* **–** *PCPR Rule 8.5.1 & 8.5.2 & 8.5.5 –* prohibits multi–party representation in the sale or purchase of land or a business; leasing and lending transactions unless:
      1. each party is informed beforehand in writing of potential disadvantages, and
      2. each party signs an acknowledgment (Schedule, Form 1) – but, do we always read what we sign?

*Stewart v Layton*

Lawyer represented both vendor and purchaser. Purchaser ran into financial difficultly and failed to complete settlement. Lawyer did not reveal situation to the vendor and vendor was forced to ‘vendor finance’ over a second property for the Purchaser. Purchaser then went bankrupt and left debt to vendor.

**Held:** Lawyer was responsible and in breach of fiduciary duty to the vendor.

* 1. *Acting for lessor and lessee – PCPR 8.5.3*
  2. *Acting for lender and borrower* – PCPR 8.5.4 – conflict may arise where the lawyer has information relevant to the interests of one client that is confidential to the other client.
     1. *Farrington v Rowe McBride & Partners –* the lawyer may discover information relevant to the risk the lender is undertaking, or the borrowers shaky financial position which cannot be disclosed to the lender without breaching the confidence (and loyalty) owed to the borrower.

**Successive Conflicts – Acting against a Former Client**

***General***

1. ***Purpose*** *–* A lawyer may owe duties to a former client and an existing client whose interest’s conflict and therefore are termered ‘successive conflicts’.
   1. *Duty of Confidentiality Survives –* The duty of confidentiality survives – whether imposed by contract or in equity – and does not dissolve once the retainer ends as the information does not lose its confidential nature simply because the retainer has been completed.
      1. *Wan v McDonald*
2. ***Acting against a Former Client*** *– [****Judicial Intervention next page****] –* A fiduciary cannot act at the same time both for a client and against the client.
   1. *Prince Jefri Bolkiah v KPMG*
   2. *Spincode Pty Ltd v Look Software Pty Ltd* – ‘Danger of misuse of confidential information is not the touchstone for invention when a solicitor acts against a former client.’ Per Young J.
3. **Acting for More than One Party** – a
   1. *‘a solicitor who tries to act for both parties puts himself in a position that he must be* ***liable to one or the other whatever he does****..* ***it would be his fault for mixing himself with the transaction in which he has two entirely inconsistent interests and solicitors who try to act for both [parties] appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them****. The principle behind the law in this area is that ‘no man can serve two masters’*
      1. *Moddy v Cox*
4. ***Lawyer Acting as a Witness*** – Lawyer who acts as a witness will have a conflict of interest in their capacity as a legal adviser per *Corporate Systems Publishing v Lingard*
   1. *Cannot be called where ‘Real Possibility’* – A solicitor cannot act where there is real possibility that they may be a witness
      1. *Clay v Karlson*
   2. *Forced to Defend Conduct* – The solicitor – in their capacity as a witness – would be forced to defend conduct and their independence to the client is in question.
      1. *Afkos Indutries v Pullinger Stewart*
5. **Family law matters [see later after judicial intervention]**
6. **See Judicial Intervention [next page]**

***Judicial Intervention [note:family law matters differ see later]***

1. ***The Tests*** – [**see next page for breakdown**]
   1. *World Medical Manufacturing Corporation v Phillips Ormonde & Fitzpatrick & Anor*
      1. **Key**:
         1. ***Possession of Confidential Information*** *–* Is the solicitor in possession of information provided by the former client which is confidential and which the former client has not consented to disclose? AND
         2. ***Relevant Information*** *–* Is or *may* the information be relevant to the new matter in which the interests of the other client is or *may* be adverse to the interests of the former client? [*emphasis added*]
      2. **Yes?**
         1. Is the risk a ***Real risk* [see next page]** which is real and not merely fanciful nor theoretical that there will be disclosure?
      3. **Yes?** *Are there Mitigating Factors?*
         1. *Chinese Walls –* Heavy evidential burden rests on the solicitor to establish that there is no risk of disclosure and this may be established, in very exceptional cases, by the provision of ‘Chinese walls’. – i.e somehow removed the risk
      4. **Should a permanent injunction be granted?**
         1. Efficient and Effective Administration of Justice &
         2. Public Confidence
      5. ***Costs Award*** – Costs are awarded against the firm.
   2. ***Spincode*** – *A solicitor may be restrained from acting against a former client on three independent bases:*
      1. **The danger of misuse of information**;
         1. *Misuse of Information – [i and ii above] –* Where confidential information has been communicated by a client to a solicitor and is relevant to litigation in which that client is later engaged, the potential for misuse must always be considered. There is no necessity to conclude that harm is an inevitable consequence stemming from that misuse.
      2. **The breach of the duty of loyalty; and**
         1. *Disclosure of Confidence – [real risk] –* A court will restrain a solicitor from acting against a former client not only to prevent the disclosure of confidences, but also to ensure that the solicitor's duty of loyalty to the former client is respected.
            1. *Fiduciary survives termination –* The duty of loyalty cannot be treated as extinguished by the termination of the period of a solicitor's retainer.
      3. **The desirability of restraining solicitors as officers of the court.**
         1. A solicitor may be prevented from acting against a former client on the basis of their position as an officer of the court.
         2. fundamental power of the court to control its officers and the need for the public to have faith in the justice system.
            1. *Pessimi Exempli* Test– that is, if Courts did not hold such actions to account then it would be the worst possible example of judicial inaction over its officers.

***\*\*Point [i & ii] – ‘Confidential and Relevant Confidential’ [\*\*see also duty of confidence]***

1. ***Threshold*** –Threshold for judicial intervention primarily in former client conflict cases focuses on the requirement to uphold the duty of confidentiality of information which was passed during the course of the retainer.
   1. *The person who assets bears onus*–The former client bears the onus of providing the assertion per *Prince Jefri Bolkiah v KPMG.*
2. ***‘Relevant Confidential Information’*** *– PCPR 4 (a) – Per Re a Firm of Solicitors*
   1. Originally communicated in confidence
   2. Remains confidential and may reasonable be considered remembered or capable of being recalled
   3. Relevant to the subject matter of the proposed retainer.

***\*\*Point [iii] – ‘Real and not fanciful risk’***

1. ***A Real Risk – PCPR 4 and Vic Bar R92 [see Retainers]*** *–* A lawyer possessed with ‘relevant confidential information’ cannot act against a former client. Drummond J in
   1. *Carindale Country Club v Astill* –
      1. *‘from acting for a new client against a former client if a reasonable observer, aware of all the facts, would think there is a* ***real, as opposed to a possible chance****, that confidential information given to the solicitor by the former client* ***might be used by the solicitor to advance the new clients interests to the detriment of the old’***
   2. *‘Possibility’ – PCPR 4(b) –* Possibility and not ‘probability’ of misuse of confidential information that provides the means for judicial intervention and disqualification
      1. *Euiticorp Holdings Ltd v Hawkins.*
   3. *‘A Real Risk’* – *PCPR 4(b) –* The Court will not intervene unless the risk is real and ‘mere’ or ‘theoritical’ risks are not acted upon as the possibilities must ‘have a degree of reality and a degree of reasonableness and sense’ per *R v Parsons.*
      1. *Inadvertent Disclosure –* The real possibility of misuse of confidential must be related to the ‘inadvertent disclosure’ of such information or the ‘sub–conscious’ use of it. That is, the real risk that the information may be utilised against the duty of confidentiality.
         1. *ACRD Ltd v Hampson.*
      2. *Can change sides if can prove No Real Risk –* ‘A lawyer can change sides and act against a former client where the lawyer is able to establish that there is not a real and substantial risk of misuse of confidential information.’
         1. *Photocure ASA v Queens University at Kingtson*
   4. *‘To the Detriment*’ – The real possibility of misuse of confidential information must be to detriment of the former client. This protects lawyers against frivolous claims and ensure that
      1. *‘that disclosure by the solicitor of confidential information with disadvantage the confiding client*’
         1. *Cardinal Country Club Estate v Astill*
      2. *\*\*Proximity of Retainers –* ***[see next page]***
      3. *Proximity of Retainers – Sent v John Fairfax Publication; Village Roadshow v Blake Dawson*
         1. *‘Closely Related Retainers’* – The degree to which retainers are closely related are of significant importance and the more a retainer is related the more likely there is a real chance of misuse and disclosure being related.
            1. *Matters are likely to be closed related* – where ‘significant’ issues in one matter arise in another.
         2. *‘Unrelated Retainers’* – Where retainers are unrelated, then a disclosure to the detriment of the former client is much less likely.

***\*\*[Point iii] – Chinese Walls – LIV Ethics Guidelines regarding Information Barriers***

1. ***Extension to the Firm*** – A lawyer in the possession of confidential information is prohibited from acting against a former client where the information has a ‘real risk’ of prejudicing the client. *This extends to the members of the lawers firm also possessed with said information*.
   1. *Re a Firm of Solicitiors*; *Mallesons Stephen Jaques v KPMG*
2. ***Disqualification of Firm*** *– ‘knowledge of one partner is imputed to another’* – PCPR 4 – thus inferring that the prohibition of a lawyer infers that the firm is also prohibited per PCPR 4.1.
   1. *‘partner, director or employee of the practitioner or of the practitioners firm’*
3. ***Burden Shifts to Solicitior*** *–* 
   1. ‘once it appears that a solicitor is in **receipt of information imparted in confidence, the burden shifts to the solicitor to satisfy the Court on the basis of clear and convincing evidence that all effective measures have been taken to ensure that no disclosures will occur’**
      1. *Village Roadshow v Blake Dawson Waldron*
4. ***Chinese Walls | Information Barriers*** *– [****see effective implementations next page****]*
   1. *‘Presumption of Imputed Knowledge’* – The presumption of imputed knowledge in large intrastate and interstate firms and even multi–national firms is no longer a practical reality.
      1. *Mallesons Stephen Jacques v KPMG*
   2. *Test of Information Barriers* –
      1. *Real and Sensible Possibility –* The “**real** **and sensible possibility**” test is now favoured by the Australian courts in commercial cases
         1. *Mallesons Stephen Jacques v KPMG; Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd*
   3. *Small vs. Large Firms –* 
      1. *Small Firms –* 
         1. *LIV Guidelines 2.10 – Difficult for a Small Firm –* Difficult for a small firm to demonstrate compliance with the guidelines as a question of fact, particularly the requirements to keep staff and files physically separate.
            1. *Firm takes the risk –* While the courts acknowledge the hardship this may cause for litigants, particularly in rural areas or in specialized areas of law with limited numbers of practitioners, that hardship is but one factor and it does not outweigh the importance of confidentiality.
   4. *Effective Implementations of Barriers require* –
      1. *Documented Protocols in Place**–* The law practice should have established, documented protocols for setting up and maintaining information barriers. In all matters the law practice should carefully control access to any client information by personnel in the law practice in view of the possible requirement for an information barrier in the future.
         1. *Prince Jefri Bolkiah v KPMG*
      2. *Nomination of Compliance Officer* – Nomination of a compliance officer experienced in law relating to confidentiality, conflict of interest and information barriers who will undertake continual monitoring.
      3. *Disclosure of Prior Matter –* Should ensure that the client in the current matter acknowledges the firms duty of disclosure does not extend to any confidential information from earlier matters and consents on this basis.
         1. *‘Informed Consent’ –* *Village Roadshow v Blake Dawson*
      4. *Record of Access –* All screened persons should be clearly identified and compliance officer must keep a record.
         1. *‘No Contact Rule’* – *Newman v Phillips Fox*
      5. *Not discuss matter with or seek any relevant confidential information* – Persons involved in the matter should not seek confidential information or receive any confindential information about the earlier matter and will notify of breach.
         1. *‘Undertakings of Confidence’ – Newman v Phillips Fox; Prince Jefri Bolkiah v KPMG*
      6. *Protect confidentiality of all correspondence of earlier matter –* The law firm should ensure that all documentation related to the earlier matter is protected and stored in a secure place – preferably offsite.
      7. *Ongoing Education & Discipline* – Ensure that all staff are constantly trained and aware of their ongoing obligations in relation to the matter and their involvement in it and the duty of confidentiality.
5. ***Rebut the Presumption through Effective Controls above*** *–* 
   1. *Overcome Presumption* – Through clear and convincing evidence, the presumption can be rebutted through the relevantly evidenced measures that have been taken to ensure that no disclosure will – now or in the future.
      1. ***Newman as Trustee of Estate v Phillips Fox***

***\*\*[Point iv] – Grant Injunction***

1. ***Inherent Jurisdiction*** *[****permit injunction****] –* The Court has the inherent jurisdiction to determine which of its officers are allowed to represent parties to argue cases before it per *Grimwade v Meagher*.
   1. ***\*\*Test*** *–* *‘Whether a fair–minded reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.’*
      1. *Newman v Phillips Fox;* *Asia Pacific Telecommunications*
2. Factors influencing – ***[see also Spincode at start]***
   1. ***Interests of the Public*** *–* The integrity of the legal profession and the perception of that integrity by the public is in large measure a consequence of the fidelity which a legal practitioner shows to his client and conduct which has a tendency to jeopardise that perception to faithful commitment to the interests of the client should be prevented.
      1. *‘Justice should not only be done, but should appear to be done’* – *Wan v McDonald*
   2. ***Efficient & Speedy Resolution*** *–* Considerations in relation to delay and cost arising from a change in representation may influence the Court as to whether the interests of justice truly require a change.
      1. *Speculative Misuse –* If a change in representation would adversely and significantly affect the client then it may cast doubt on the Courts decision to intervene particularly if the misuse is only speculative.
         1. *Re a Firm of Solicitors*
      2. *Significant Misuse* – If the misuse of confidential is significant then judicial speediness and efficiency do not outweight the importance of the duty of confidentiality.
         1. *Magro v Magro*
   3. ***The Confidential Information available to the practitioner which could assist the case against the former client***
      1. *Carindale Country Club Estate v Astill*

***Family law matters –\*\* stricter approach***

1. ***Key Issue*** *–* The issue in family law proceedings is whether the former client actually imparted confidential information to a person now employed by solicitors acting for the other side – *McMillan,* FCFCA, 2000.
2. The approach of the Family Court differs from the general approach in two respects:
3. ***Former Client Affidavit*** *–* The burden of proving possession of confidential information is discharged by the former client simply swearing that the practitioner received confidential information
4. ***Real Risk of Disclosure*** *–* While the general approach is that there must be a real risk of disclosure, the Family Court will intervene to restrain a practitioner from acting even if there is only a theoretical risk that confidential information could be used against the former client
   1. *Bracewell v Southall; Murray v Macquarie*
5. *Access doesn’t constitute disqualification –* the mere fact that someone had access to confidential information is not sufficient to ground a restraining order.

**Costs Disclosures**

**General**

1. ***Scope*** *–* Legal work must be costed in accordance with script specified scales for both litigious and non–litigious work and is protected under Part 3.4 of the LPA 2004.
2. ***Costs Disputes*** – The relevant test in relation to costs disputes was provided in *Law Society of NSW v Foreman* where Kirby J stated the test is generally
   1. ‘whether the lawyer has charged fees grossly in excess of those which would be charged by lawyers of good repute and competency’

**Costs Disclosure Requirements**

1. ***Clear & Transparent Disclosure*** – *s3.4.15 LPA* – The key of cost disclosure agreements is that they are communicated to the client in
   1. *S3.4.15(1)* – Clear and understandable language
   2. *S3.4.15(2)* – Transparent format so a client is able to reasonable ascertain the costs of contentious or non–contentious legal advice.
2. ***How and when must disclosure be made?*** – *3.4.11 LPA*
   1. Disclosure requirements must be met before a lawyer is retained to provide legal services per 3.4.11(1)
      1. *Genuine Disclosure ­*– Costs approximations with large ranges [$0 to $250K] are not ‘genuine attempts to inform the client as required by legislation’ per *Casey v Quabba*
   2. *Non–English Speaking –* Arrangement for the disclosure of fees to poor English speaking clients must be ensured per  *Smirnios v Bryne (No 2)*
3. ***When is disclosure not required*** – *3.4.12 LPA –* 
   1. Disclosure requirements are not required when:
      1. *Less than $750 – 3.4.12(1)(a) LPA –* legal costs (excluding disbursements) do not exceed $750
      2. *Disclosure of costs in last 12 months – 3.4.12(1)(b) LPA –* the client (i) has received disclosure in the previous 12 months; and (ii) has agreed in writing to waive right to disclosure, and the (iii) principal of the law practice decides, on reasonable grounds, that further disclosure is not warranted.
      3. *Class Clients – 3.4.12(1)(c) LPA –* the client is
         1. an Australian law practice
         2. a public company or its subsidiary
         3. a foreign company or its subsidiary
         4. a *Corporations Act* registered Australian body
         5. a financial services licensee
         6. a minister of the Crown, government department or public authority
      4. *Tender Process – 3.4.12(1)(d) LPA –* the legal costs are agreed as a result of a tender process
      5. *Pro Bono – 3.4.12(1)(e) LPA –* the client is not required to pay the legal costs or they will not otherwise be recovered by the law practice, for instance for pro bono work
4. ***Information to be disclosed*** – **s3.4.9 LPA** – The information to disclose to a client includes:
   1. ***Legal Costs Calculation*** *– s3.4.9(1)(a) LPA –* The basis on which the legal costs will be calculated, (whether a scale or equivalent applies to any costs);
   2. ***Right to Negotiate Costs & Ongoing Obligations*** *– s3.4.9(1)(b)(i);s3.4.16 LPA –* The clients right to negotiate costs agreement, to receive a bill from law practice, (request of itemized bill), and be notified of any substantial changes to the matter.
   3. ***Range of total legal costs*** *– s3.4.9(1)(c)(i) LPA –* If reasonably practicable an estimate of total legal costs, or otherwise a range of estimate and explanation of the major variable that will effect calculation;
   4. ***Billing Intervals*** *– s3.4.9(1)(e) LPA –* Details of intervals at which the client will be billed;
   5. ***Interest Rates –*** *s3.4.9(1)(f) LPA –* The rate of interest if any that the practice charges on overdue costs;
   6. ***Litigious Cost Breakdown*** *– s3.4.9(1)(g) LPA –* If litigious matter, an estimate of the range of costs that may be recovered if the client is successful in litigation, and that client may be ordered to pay if un–successful;
   7. ***Progress Reports –*** *s3.4.9(1)(h); s3.4.18 LPA –* The client’s right to progress reports.
   8. ***Dispute Procedures*** *– s3.4.9(1)(j) LPA –* The avenues open to client in case of dispute in relation to costs (such as cost assessment, and setting aside of costs agreement that is not fair and reasonable)
   9. ***Not all costs may be covered –*** A statement that court order for payment of costs in favor of client may not necessarily cover all the client’s legal costs
   10. ***Uplift Fees –*** *s3.4.14* *LPA* – Must provide the uplift fee to the client.
5. ***What if another firm is retained?* –** *s3.4.10 LPA*
   1. *Engage another practice –* Practitioners must disclose to their client that they may retain another law practice (i.e. a barrister or agent). When a practitioner does retain another law practice they must disclose to the client:
      1. the basis of the fees to be charged by the other law practice
      2. an estimate of total costs or,if not practicable, a range of estimates of total costs and an explanation of the variables that will affect its calculation
      3. details of billing intervals of the other law practice
6. ***\*\*Disclosure prior to Settlement?*** 
   1. *Settlement Legal Costs* – *s3.4.13 LPA* – Before a settlement is executed, a reasonable estimate of the legal costs payable by the client and any reasonable contribution from the other party.
   2. *Draw attention to legal aid* – Lawyers should draw relevant client attention to legal aid per PCPR 39.2
      1. *David Truex Solicitior v Kichin*
   3. *False Statements –* ***[see misconduct in the course of practice]***
7. ***Disclosure of Commission***
   1. *Comission – PCPR 10.1 –* Must inform the client that the lawyer is entitled to claim a commission that they could appoint as executor someone who might make no claim for commission
      1. *Re Smith; Re McClung*
8. ***Failure to Disclose [breach] –*** *3.4.17 LPA –* 
   1. Failure to fulfil the costs disclosure requirements include:
      1. *Client does not pay costs – 3.4.17(1) LPA –* The lawyer cannot maintain proceedings for their recovery unless those costs have been taxed or assessed
      2. *Lawyer cannot recover– 3.4.17(4) LPA –* The amount of costs the lawyer recover may be reduced by an amount proportionate to the seriousness of the failure to disclosure.
      3. *Disciplinary Proceedings – 3.4.17(6) LPA –* Disciplinary proceedings can be brought against the lawyer and/or the firm.

**Standard Costs Agreement**

1. ***Standard Costs Agreement*** *– 3.4.26LPA –* A costs agreement can form part of the retainer but does not have too. Must meet both:
   1. *General law requirements*
   2. *Any formality requirements imposed by statute*
   3. *Enforced in the same manner as a contract – s3.4.30 LPA*
2. ***What is required in a Costs Agreement?*** –*s3.4.30 LPA*
   1. *State who cost agreement is between* ***–*** *s3.4.26(1) LPA –* must state that the agreement is between a client and a firm etc
   2. *Evidenced in writing – s3.4.30(2) LPA*
   3. *State conditions – s3.4.30(4) LPA*
      1. Offer to enter costs agreement – *s3.4.30(4)(a) LPA*
      2. *Client may accept in writing or by other conduct – s3.4.30(4)(b) LPA*
      3. *Type of Conduct that will constitute acceptance – s3.4.30(4)(c) LPA*
3. ***Void on Uncertainty*** – *3.4.31(1) LPA –* A costs agreement will be void if it is so obscure, or so unclear, that a precise meaning cannot be adduced from it and it is unenforceable on the grounds of uncertainty.
   1. *McInnes v Twigg*
4. ***Effect of Costs Agreement*** – If the costs agreement clearly stipulates the payment requirements then there is no possibility that the lawyer can subsequently claim costs on a *quantum meruit* basis per *Equuscorp Pty Ltd v Wilmoth Field*
   1. *No Agreement –* If there is no agreement in place then this does not expressly deny the lawyer any claim but rather forces the lawyer to seek costs on a *quantum meruit* basis to be quantified as necessary by the Court.
   2. *Cannot exceed reward* – *3.4.31(3)LPA* – Cannot recover any amount in excess of the amount that the lawyer would have been entitled to recover if the costs agreement had not been void and must repay any excess.

**Contingent Costs Agreement**

1. ***Contingent Costs Agreement*** *– 3.4.27LPA –* A contingent costs arrangement is based on the reward of payment to the lawyer only if a specified event occurs – usually litigation success.
   1. *Three Types*
      1. *Conditional* – Lawyer takes fee in event of a successful defined action
      2. *Uplift* – Lawyer receives, in addition to their normal fee, an agreed flat amount or ‘uplift’ of their normal fee.
      3. *Percentage – Denied under statute by 3.4.29* – Lawyer receives fees a percentage of the total amount secured
2. ***Rationale & Problems*** – The rationale of such costs agreements are that:
   1. *Incentive*– They act as an incentive for the lawyer to make a realistic prospect of success and to purse a strong case for the client.
   2. *\*\*Conflict of Interests*– The lawyer may settle at a time that suits the lawyer and maximums the fees they are able to recoup instead of maintaining the clients’ interests.
      1. *Wallersteiner v Moir; Trendtex Trading Corp v Credit Suisse*
3. ***What is required in a Conditional Costs Agreement?***
   1. *Circumstances and matter it relates to* – *3.4.27(3)(a) LPA*
   2. *Provide for the relevant disbursements to be paid regardless of the outcome* – *3.4.27(3)(b) LPA*
   3. *Clear writing, Plain language & Signed* – *3.4.27(3)(c) LPA*
   4. *Provide that client has been informed of the right to seek independent legal advice* – *3.4.27(3)(d) LPA*
   5. *Cooling off period of 5 business days* – 3*.4.27(3)(e) LPA*
4. ***Lawyer must explain and ensure clients understands –*** PCPR 2A3 – Lawyer must ensure they explain:
   1. The conditional costs agreement the client is signing
   2. That the client understands clearly
   3. That the client signs that they understand
5. ***Uplift Fee*** – *3.4.28* –
   1. *Must be separately identified* – *S3.4.28(4)(b) LPA –* Calculation of the uplift fee must be separately identified in the agreement.
   2. *Must contain an estaimte of the uplift fee* – *S3.4.28(3)(a) LPA –*
      1. Range of estimates of the upload fee; and
      2. Major variables that will affect it.
   3. *Maximum Uplift Fee – S3.4.28(4)(b) LPA* – Uplift fee arrangements cannot provide for a payment premium which exists 25% of the costs payable on the successful outcome of the matter
6. ***Reasonable and Fair Agreement*** – *s3.3.32(1) LPA* – Determining whether the agreement was one which is reasonable and fair – the following can be regarded:
   1. *s3.3.32(2) LPA* –
      1. *Induced to enter agreement* – *s3.3.32(2)(a) LPA*
      2. *Guilty of Unsatisfactory Professional conduct* – *s3.3.32(2)(b) LPA*
      3. *Law practice failed to make any disclosures* – *s3.3.32(2)(c) LPA*
      4. *Circumstances of the parties when the agreement was made – s3.3.32(2)(d) LPA*
      5. *Circumstances of the parties after the agreement was made – s3.3.32(2)(e) LPA*
      6. *When and how the agreement came into effect and the nature of the legal services provided – s3.3.32(2)(f) LPA*
      7. *Billing agreement changes circumstances of the legal services provided – s3.3.32(2)(g) LPA*
7. ***‘Fairness’ in respect to the agreement*** – Fairness refers to the mode of obtaining the agreement and reflects the requirement that a lawyer
   1. *No Advantage –* ‘does not take advantage of the relationship between the client and himself or receive any benefit from an agreement to which the client has been induced to enter by reason of his reliance upon the lawyer’
      1. *Emeritus v Mobbs; Brown v Talbot & Olivier*
      2. *Clear Disclosure & Understanding* – It is critical to a reasonable and fair costs agreement that the client clearly understands it and illustrates this understanding in writing and by signing the agreement per *Council of QLD Law Society v Roche*
   2. Lawyers must ensure that they
      1. *Articulate and carefully explain*
         1. *Stoddart v Jovetic*
      2. *Detail the level of work involved* – This must be ‘scaled’ to the sophistication of the client and their relevant understanding.
         1. *Computer Accounting & Tax v Bowen Buchbinder*
            1. *Court won’t tolerate ‘wilful client ignorance’* –

Particuarly in experienced business clients per *Cerini v McLeods*

* + 1. Justify the reasons for the costs
       1. *Council of QLD Law Society v Roche*
    2. Remove ‘vague’ language such as ‘unusal costs’
       1. *Re Blyth and Fanshawe*
    3. Provide a detailed fee structure
       1. *Council of QLD Law Society v Roche*

1. ***Reasonableness [next page]***
2. ***Reasonableness –*** Agreement is an unreasonable one if its terms or effects are unreasonable to the client per *Stoddary v Jovetic*
   1. *Determined at the time of entering the agreement* – Considered on an objective basis with regard to all the circumstances
      1. *Schiliro & Gaens Ridgeway*
   2. *Time Charging –* Time charges have a distinct potential to result in overcharging and as a result they must be closely examined per *Law Society of NSW v Foreman*
      1. *Re Morris Fletcher & Co v Bill stated*
         1. *Size of Firm –* Time charging was normal among large commercial firm but not necessarily for other firm
         2. *Higher Bill Rates –* There was a risk that time charging might result in a higher bill than the tasks performed basis
         3. *Task–based Charing –* Task based charging was a conventional and traditional method of charging by lawyers
         4. *Federal Court Scale –* The federal court scale which applied in the litigation was limited to the amount chargeable by reference to the tasks performed regardless of the time spent on the tasks.
3. ***Consequences ‘unfair or unreasonable’ agreements*** –
   1. *Tribunal refer to VCAT – s3.4.32(1) LPA –* VCAT will determine the fair and reasonable legal costs by reference to an applicable scale or remuneration order in relation to the agreed worked per s3.4.32(4).
   2. *Fit and Reasonable Costs* – *3.4.32(5)LPA –* VCAT can determine the conduct of the lawyer, level of experience, professional of work per *3.4.32(5)*
   3. *Regard to Other Matters – 3.4.32(7) LPA –* 
      1. *Compliance of Lawyer –* Whether the lawyer complied with any relevant legislation or professional rules;
      2. *Costs Disclosures –* Any costs disclosure made by the lawyer or the failure to make required disclosure;
      3. *Advertisements –* Any relevant advertisement as to the lawyers cots or skills
      4. *Skill of Lawyer –* The skill labour and responsibility displayed on the part of the lawyer;
      5. *Scope of Retainer and work completed* – The retainer; whether the work done was within the scope of the retainer & it’s quality.
      6. *Complexity*– The complexity novelty or difficulty of matter;
      7. *Location of work –* The place where and circumstances in which the work was done (overseas, interstate etc)
      8. *Time pressure –* The time within which the work was required to be done;
      9. *Any other relevant matter*.

**Alternative Dispute Resolution**

***General***

1. ***Scope*** *–* A lawyers resolution in ADR and mediation is to assist lcients, provide practical and relevant legal advice on the procedural process and assist in preparing draft terms and conditions of settlement.
   1. *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*
      1. *‘subject oneself to the process of negotiation or mediation, to have an open mind in the sense of a willingness to consider such options for the resolution of the dispute may be propounded by the opposing party or by the mediator and a willingness to give consideration to putting forward options for resolution of the dispute’*
2. ***Independent Discretion*** *– PCPR – 12 & 13 –* duty on practitioner to exercise an independent discretion as to which argument and which evidence is best brought before the court
   1. *PCPR 12.6 –* 
      1. *Must Inform Client of ADR Possibility –* A practitioner must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication of the case
      2. *Unless Client already understands of ADR –* unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.
3. ***Advantages*** – The strengths behind the ADR process are clear –
   1. *Enable fast dispute resolution*
   2. *Decrease Court & procedural process*
   3. *Economically efficient*
   4. *Accessibility* – Mediation can be conducted at short notice, produce timely decisions and be less formal than a Court room
   5. *Voluntary* – Parties that engage in mediation, want to engage in it (unless its Court annexed mediation) – inferring that each party freely choose to participate and to either reach an agreement or not.
   6. *Confidential*– It’s important to remember that the Court room is a public place and that all cases disclose information. Mediation is very useful in circumstances where the parties do not want information to be released to the public and they can freely argue without their interests and feelings being viewed by the public.
4. ***Problems*** – The main problems with the ADR process include –
   1. *Competitive* – Mediation is competitive in nature and based upon parties want to achieve an outcome. If the parties do not approach the mediation in this manner then no resolution can be reached because each is too competitive and this results in no resolution.
   2. *Co–operative* – mediation which is competitive in nature is based upon the parties attempting to extract a benefit from the other in return for not taking the action to Court. Mediation which is competitive tends to be more difficult to resolve since the parties are not intent on co–operative with the other unless a benefit is provided to them
   3. *Balance of Power* – Mediation is voluntary; it can favour the party who has the apparent stronger argument, better evidence and the power relationship that pre–exists between the parties to dispute. If a party in mediation is a less powerful entity, then it is often contended that this party will accept a less than satisfactory outcome or have a less than satisfactory outcome forced upon it.
5. ***Bound to Mediate*** – Equity is unlikely to order specific performance of an agreement to mediate because the supervision of such performance is impossible per *Hooper Bailie Associated Limited v Natcon Group Limited*
   1. *Must include condition precedent* – In order to mediate, contracts must include a condition to mediate and force both parties to through the ADR process. The Court can also enforce this process which it usually does.
      1. *Scott v Avery; Elizabeth Bay Developments Pty Ltd v Boral Building Services Ltd*
   2. *Without Prejudice –* Communications that are made during the mediation which are ‘without prejudice’ cannot be used in Court proceedings unless both parties have agreed. ***[see legal privilege, public interest page]***
      1. *Volpes v Permanent Custodians Ltd*
6. ***Types of ADR*** –
   1. ***Determinative* –** Determinative ADR processes are usually held in front of a third party who makes a decision on the dispute after hearing and assessing the arguments and evidence of the parties.
      1. *Enforceable Determinations* – Parties present arguments and evidence to a dispute resolution mediator who makes a determination which is binding.
         1. Enforceable processes can be through adjudication, arbitration (where the arbitrator makes a binding decision) or via a private ruling (such as a tax office private ruling). All enforceable determinations can be appealed to a Court if a party to the proceedings believes an error of law has been made.
      2. *Non–enforceable Determinations* – Non–enforceable determinations are processes in which a party can present a dispute to a dispute resolution mediator who makes a determination on the basis of the arguments and evidence presented before them, but does not provide a binding ruling
         1. Non–enforceable determinations can be useful to the parties to assess how a Court would view the arguments and evidence presented before it and reduces the overall cost of litigation if a non–binding ruling is passed which satisfies both parties.
   2. ***Facilitative*** *–* Facilitative ADR processes involved a third party who provides guidance and assistance in the management of the ADR process.
      1. *Conciliation* – Conciliation is a process whereby the parties use the assistance of an impartial third party to identify the issue in dispute, develop options and attempt to motivate the parties to a resolution.
      2. *Facilitation* – Facilitation is a process whereby both parties use the assistance of an impartial third party to identify their core issues with one another and attempt to resolve these issues. [non–binding]
      3. *Mediation* – Similar to facilitation, mediation is the process in which the parties to a dispute use an impartial third party to consider their issues and reasoning behind the dispute, and attempt to consider alternatives to litigation and/or resolve the dispute in its entirety.
      4. *Ombudsman* – In Australia, the ombudsman provides another impartial third party body who can investigate and attempt to resolve complaints against an institution by a customer, client and employee.
7. ***Duties during ADR processes*** – *Law Council of Australia Guidelines for Mediations*
   1. ***Duty of confidentiality******[see confidentiality]***
      1. *Non–disclose* – any information during mediation unless parties agree
      2. Same obligations in mediation as in Court *– Vic Bar r199*
   2. ***Never false or misleading statements*** –*– PCPR 18; Vic Bar 53 –* 
      1. ***[see candour in presentation of fact]***
      2. ***Williams v Commonwealth Bank of Australia***
         1. ‘Where parties are dealing at arms' length in a commercial situation in which they have conflicting interests it will often be the case that one party will be aware of information which, if known to the other, would or might cause that other party to take a different negotiating stance. This does not in itself impose any obligation on the first party to bring the information to the attention of the other party, and failure to do so would not, without more, ordinarily be regarded as dishonesty or even sharp practice’.
   3. ***Good Faith***– Lawyers and clients must act, at all times, in good faith and attempt to achieve settlement of the dispute.
      1. *Act in good faith –* Lawyer must approach ADR in good faith and with an open and transparent mind.
      2. ***Western Australia v Taylor***provided the relevant list of indicators as to whether a tribunal had been carried out in Good Faith
         1. Unreasonable delay in initiating communications in the first instance
         2. Failure to make proposals in the first place
         3. The unexplained failure to communicate with the other parties within a reasonable time
         4. Failure to contact one or more of the parties
         5. Failure to follow up a lcak of response from the other parties
         6. Failure to take reasonable steps to facilitate and engage in discussions between the parties
         7. Failing to respond to reasonable requests for relevant information within a reasonable time
         8. Stalling negotiations by unexplained delays
         9. Unnecessary postponement of meetings
         10. Adopting a rigid non–negotiable position
         11. Failure to make counter proposals
         12. Failure to do what a reasonable person would do the in the circumstances.
      3. ***Avoid ‘Puffery’ –*** Exaggerations with no legaleffect
         1. *Lack of disclosure –* Silence or lack of disclosure over a claim that, notwithstanding such omission the truth has been told
         2. *Misrepresentations* – made in negotiations as to finance available or to the availability of a party to “complete the deal”
         3. *False variations of agreement –* Representations as to a particular situation when a side letter has varied that situation
         4. *Attempt to ‘force’ settlement –* Representations made that a party should “sign now” as there are other parties willing and anxious to enter into the transaction under negotiation
   4. ***When to Mediate***– Timing is a relevant consideration in the mediation process and is typically highly correlated to settlement. Factors for lawyers to consider when to mediate include:
      1. *before proceedings are commenced;*
      2. *after pleadings have closed, but before the costs of discovery are incurred;*
      3. *before an action is set down for trial and trial costs are incurred; and*
      4. *after a trial and before judgment.*
   5. ***Selecting Mediator*** – The relevant skill, experience, qualifications, expertise of subject matter, role and style of mediation are critical.
   6. ***Briefing & Preparing Client***– Lawyers primary task is to help prepare clients for a mediation by:
      1. *Risk analysis*
      2. *Explaining the nature & possible outcomes of mediation –*
         1. Include discussion of risks
         2. Nature of ‘without prejudice’ communications
         3. Differences of Forum – its not the advocacy skills that are required but rather mediation and negotiation skills.
      3. *Identify the relevant interests*
      4. *Identify the terms of settlement*
      5. *Develop strategies to achieve successful outcome & also sensitivity analysis.*
   7. ***Settlement*** *–* PCPR 39 – Must communicate with clients as to the suitability of any settlements including [39.2] an estimates of the relevant cost factors *[see Costs Disclosures]*
      1. ***Legal Services Commission v Mullins***
         1. Barrister provided:
            1. information not correct and
            2. Failed to disclosing the fact relating to the clients state of health though crucial for negotiation the barrister intentionally deceived the representatives of the Insurance co about the accuracy of the assumption
      2. ***Williams v Commonwealth Bank***
         1. Settlement called off because the bank ‘gagged’ an employee and effectively stopped an employees statement from relieving the truth of what happened.
8. *Trade Practices Act – s52 [see fair trading next page as well]*
   1. ***S52*** *– A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*
   2. ***Williams v Commonwealth Bank of Australia***
      1. *Public Interest in ensuring no Court interruption –* s52 of the *Trade Practices Act* dealing with claimed misrepresentations made in the course of settlement negotiations whether in an ordinary commercial context or in the context of a litigious process indicate that the courts are well aware of the need not to be over zealous in interfering with settlement processes because of the public interest which there is in negotiations leading to agreement.
9. *Fair Trading Act 1999 (Vic)*
   1. s9(1) – *A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*
   2. ***Relevant Effect* –** The relevant effect of the fair trading in line with s52 of the TPA as another avenue to explore for the client.