

Minimising Complaints & Improving Ethical Standards

Recent years have seen an increased interest in legal ethics both within the profession and amongst the general public. One of the reasons for the increased interest in ethics is the widespread public criticism of the behaviour of lawyers. Many leaders of the profession believe that by raising ethical standards, increasing penalties and by creating more efficient enforcement procedures there will be an improvement in the public perception of lawyers. Various law societies have even tried public relations officers and firms to improve their professional image, but significant public disquiet persists. There can be no doubt that legal ethics is an issue of central importance to the profession.

On an individual level, legal ethics is also of the highest importance. The great majority of us wish to serve our clients and the broader community with the highest ethical standards. There are also pragmatic reasons why ethical considerations should always be foremost in our thoughts. Such an approach will serve to maintain high standards and also reduce the chance that a client may make a complaint. More generally, this also ensures that we maintain high standards of client service which can only be beneficial in the broader sense for our respective practices.

Lawyers – both solicitors and counsel have obligations to their clients but also to other members of the profession, to courts and tribunals and members of the public. These obligations and duties are not mutually exclusive and often must co-exist. With so many competing interests and obligations to serve, knowing the most appropriate option to take is not always easy or clear cut. When considering the topic of professional ethics and how to conduct legal practice in an ethical manner it is of course always appropriate to consider and act in accordance with the relevant rules of practice for solicitors and barristers.

2015 Changes – National Harmonisation

It should be noted that there have been some recent changes in this area, the main focus of which is national harmonisation of ethical rules and guidelines. In 2015, a new framework, known as the Legal Profession Uniform Conduct (Barristers) Rules was introduced. A similar version was introduced in Victoria at the same time and echoes comparable efforts to harmonise legislative and regulatory frameworks on a national basis across a wide range of activities.

Even more recently there has (on a national basis) been an amendment in the area dealt with under NSW bar rule 101A. This concerns barristers who previously sat on courts or tribunals. The rule states that a barrister must refuse a brief to appear before a tribunal if the appearance were to occur less than two years after the barrister ceased to be a member of the tribunal. This represents a change – the rule had previously restricted such appearances for five years rather than just two.

Informal Advice for Practitioners

It is important to note that the NSW Law Society and the Bar Association have schemes and services where you can be provided with expert, practical and confidential guidance to assist in resolving ethical issues and dilemmas, with a view to avoiding complaints from clients, judicial officers or professional colleagues. For barristers the first port of call is the Bar Association, Professional Conduct Department. Someone within that department should be able to either assist with resolution of the issue or provide contact details for the senior counsel serving on professional conduct committees who should be able to provide appropriate advice or guidance.

It should be noted, however, that any decision reached and all responsibility for that decision resides with the individual barrister. The role of advising senior counsel is only to provide an opportunity for discussion and guidance to assist the barrister in reaching a conclusion. No formal advice on the issue will be provided.

The Law Society of NSW also has an Ethics Unit and ethics assistance line to provide solicitors with guidance to resolve ethical issues and dilemmas. The Law Society website notes that “the ethics assistance line provides solicitors with practical and confidential guidance to resolve ethical dilemmas and to help avoid complaints from clients or colleagues”.

While the Professional Conduct Department and Ethics Unit can provide detailed specific advice relevant to individual circumstances it is nonetheless useful to have a look at some key provisions within the NSW bar rules and the equivalent provisions for solicitors.

Bar Rules

Having regard initially to the objects and principles governing the bar rules it is noted by rule 3 that the object of the rules is to ensure that barristers act in accordance with the general principles of professional conduct, act independently, recognise and discharge their obligations in relation to the administration of justice and provide services of the highest standard unaffected by personal interest.

The basic principles are also laid out in Rule 4 where it is stated that barristers owe their paramount duty to the administration of justice, rather than their clients. Nonetheless duties are also owed to their clients and their barrister and solicitor colleagues. It is also noted that as specialist advocates in the administration of justice barristers must act honestly, fairly, skilfully, bravely and with competence and diligence. Moreover, the rule indicates that barristers should exercise their forensic judgements and give their advice independently and for the proper administration of justice, notwithstanding the contrary desires of their clients.

Finally, the rule notes that the provision of advocates for those who need legal representation is better secured if there is a Bar whose members must accept briefs to appear regardless of their personal beliefs, must not refuse briefs except on proper professional grounds and who compete as specialist advocates with each other and with other legal practitioners as widely and as often as practicable.

These two rules contain some very important provisions which are absolutely central to legal practice as a barrister. Perhaps most fundamentally they indicate that our paramount duty is always to the administration of justice itself. A conflict between this duty and our duty to forcefully and energetically represent the interests of our clients is not uncommon. Essentially this means that where candour and honesty is required (for example in the respect of disclosure of material, adverse to the interests of our client) there is no contest. Our duty to the Court and indeed our duty to our professional colleagues must always come first.

The fact that barristers must act independently is heavily emphasised and this is one of the cornerstones of the Bar – one which often has to be explained to members of the public who assume that barristers practice in firms in much the same way as solicitors do.

There is reference to the duty to accept briefs regardless of personal beliefs which is also enshrined in the so-called cab rank rule. Finally, the rule provides for a bar where barristers freely compete with one another and where this competition in and of itself acts as a mechanism to ensure the provision of legal services of the highest standard.

Rule 8 also provides some general guidelines and provides that a barrister must not engage in conduct which is dishonest, prejudicial to the administration of justice or likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.

Delinquent and Guilty Clients

Rules 79 – 82 deal with delinquent and guilty clients.

Rule 79 provides that where a client has lied to the Court or has falsified a document which has been tendered, the barrister must refuse to take any further part in the case unless the client authorises the barrister to inform the Court of the lie.

Rule 80 concerns criminal proceedings where a client professes guilt to the barrister but maintains a plea of not guilty. The barrister can continue to act in the client's defence subject to certain constraints. In particular, the barrister is not permitted to falsely suggest that some other person committed the offence charged and must not set up an affirmative case inconsistent with a confession, however, the barrister must ensure that the prosecution is put to proof of its case and may argue that the evidence as a whole does not prove that the client is guilty of the offence charged. Notwithstanding these provisions the barrister must not continue to act if the client insists on giving evidence denying guilt.

Rule 81 deals with the situation where the client informs the barrister that they intend to disobey a court order. The rule states that the barrister must advise the client against that course and warn the client of its dangers but must not inform the Court or the opponent of the client's intention unless the barrister believes that on reasonable grounds that the client's conduct constitutes a threat to any person's safety.

Finally, Rule 82 states that a barrister whose client threatens the safety of any person may advise the police or appropriate authorities if the barrister believes on reasonable grounds that the risk is genuine.

Solicitors

The Law Society of NSW has published a “Statement of Ethics” the content of which is as follows:

We acknowledge the role of our profession in serving our community in the administration of justice. We recognise that the law should protect the rights and freedoms of members of society. We understand that we are responsible to our community to observe high standard of conduct and behaviour when we perform our duties to the Courts, our clients and our fellow practitioners.

Our conduct and behaviour should reflect the character we inspire to have as a profession.

This means that as individuals engaged in the profession:

- *We primarily serve the interests of justice.*
- *We act competently and diligently in the service of our clients.*
- *We advance our clients’ interests above our own.*
- *We act confidentially and in the protection of all client information.*
- *We act together for the mutual benefit of our profession.*
- *We avoid any conflict of interest and duties.*
- *We observe strictly our duty to the Court of which we are officers to ensure the proper and efficient administration of justice.*
- *We seek to maintain a high standard of integrity, honesty and fairness in all our dealings.*
- *We charge fairly for our work.*

The content of some of the more important NSW Law Society Solicitors Rules should be noted.

Rule 3 echoes similar provisions for barristers and states “a solicitor’s duty to the Court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty”.

Rule 4 outlines other fundamental ethical duties.

4.1 A solicitor must also:

4.1.1 Act in the best interest of a client in any matter in which the solicitor represents the client.

4.1.2 Be honest and courteous in all dealings in the course of legal practice.

4.1.3 Deliver legal services competently, diligently and promptly as reasonably as possible.

4.1.4. Avoid any compromise to their integrity and professional independence and

4.1.5 Comply with these rules and the law.

Rule 7 outlines a requirement to provide clear and timely advice to clients.

7.1 A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement.

7.2 A solicitor must inform the client about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor 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 matter.

Rule 17 provides for the independence of the solicitor who must not act as a mere mouthpiece of the client and must exercise the forensic judgements called for during the case independently after appropriate consideration of the client's instructions where applicable. A solicitor will not have breached their duty by choosing, contrary to those instructions to exercise forensic judgements called for during the case so as to confine the hearing to those issues which the solicitor believes to be the real issues.

Rule 19 concerns solicitors' frankness in court and provides a solicitor must take all necessary steps to correct a misleading statement made in court as soon as the solicitor becomes aware that the statement was misleading. However, a solicitor will not have made a misleading statement to a court simply by failing to correct an error in a statement made by another person or part to proceedings.

Solicitors' Rule 20 deals with delinquent or guilty clients. A solicitor who learns that a client has lied to the Court or procured another person to falsify a document that has been tendered must refuse to take any further part in the case unless the client authorises the solicitor to inform the Court of the lie.

Rule 22 deals with communication with opponents and provides that a solicitor must not make a false statement to an opponent in relation to the case and must take all necessary steps to correct any false statement previously made. In addition, a solicitor must not (outside of an ex parte application or a hearing of which an opponent has had proper notice) communicate in the opponent's absence with the Court concerning any matter of substance unless the Court has first communicated with the solicitor in such a way as to require the solicitor to respond to the Court or the opponent has consented beforehand to the solicitor communicating with the Court in a specific matter notified to the opponent by the solicitor.

Conclusion

Although our clients rightfully expect we will fight for their case competently and forcefully, we must also abide by our duty to the Court and our opponents to be candid, honest and diligent. Our duty is to the administration of justice itself. To do less will ultimately not only reduce public confidence in the administration of justice but will also interfere in the efficient administration and operation of our business as lawyers. Such businesses can ultimately only operate efficiently if we are able to rely on the honesty and integrity of our opponents and they on us.

The terms or words which are repeated time and again in the professional rules for both solicitors and barristers and which resonate through any consideration of professional ethics are “honest”, “candid”, “fairness”, “diligence” and the concept of representing our clients without taking undue advantage of our opponent and/or their client and remembering at all times we ultimately officers of the Court and as such it is up to all of us to act in such a way that promotes proper, fair and efficient administration of justice.

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