

Ethics and working with counsel

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Aims for today's session

1. To provide an ethics update with a discussion of recent cases.
2. To focus specifically on the some of the ethical and professional issues that might arise when working with counsel.

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Regulatory framework

- Legal Profession Uniform Law (**LPUL**)
- Regulates solicitors and barristers
 - Defines unsatisfactory professional conduct and professional misconduct (Part 5.4)
- Legal Profession Uniform Conduct (Barristers) Rules 2015 (**Barristers' rules**)
- Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (**Solicitors' Rules**)

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The different work of solicitors and barristers

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Briefing counsel: the cab rank rule

A barrister must accept a brief from a solicitor to appear in a field in which the barrister practices if (Barristers' rules r 18):

1. It is within their capacity, skill and experience
2. They are available
3. The fee is acceptable

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The cab rank rule (cont.)

Exceptions to the cab rank rule are:

1. A barrister must refuse or return a brief if (Barristers' rules, r 101):

- The barrister has a conflict of interest
- The barrister may be a witness
- The barrister has discussed the facts of the matter with another party with an adverse interest (even if informally)

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The cab rank rule (cont.)

2. A barrister may refuse or return a brief if (Barristers' rules, r 105):

- It is not offered by a solicitor
- If the solicitor does not agree to be responsible for the payment of fees
- If the barrister's advice as to the preparation or conduct of the case has been rejected or ignored by the instructing solicitor or client

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What work can counsel to do?

Work that a barrister can do is set out in rule 11, and includes:

- Appearing as an advocate;
- Negotiating;
- Giving legal advice; and
- Preparing or advising on documents.

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What work can counsel to do? (cont.)

Work that a barrister cannot do is set out in 13:

- Acting as a person's general agent;
- Corresponding in the barrister's name other than with the opponent;
- Acting as a person's only representative in dealings with a court, other than as an advocate;
- Commence or file or serve any process of any court; and
- Place themselves at risk of becoming a witness.

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Competence and diligence

- Solicitors and barristers have duties to carry out work competently, and diligently (Solicitors' rules r 4, Barristers' rules r 4).

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Victorian Legal Services Commissioner v Stirling [2020] VCAT 1117

Charge 1 and 2: delays in drafting

- There was a period of four months in drafting the SOC that was characterised as a delay. VCAT rejected the argument that delay was due to the "exigencies of litigation".
- Additionally, Stirling failed to inform his instructors that new deadlines wouldn't be met.

Charge 3: not attending hearing

- Failure to notify of unavailability and failure to attend hearing

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Victorian Legal Services Commissioner v Stirling [2020] VCAT 1117 (cont.)

"The constant theme underlying the charges in this case is one of delay, failure to respond to communications from his instructors, or to communicate effectively, failure to keep promises and neglect of his client's interests."

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Victorian Legal Services Commissioner v Stirling [2020] VCAT 1117

Charges 1 and 2 were found to constitute unsatisfactory professional conduct.

Charge 3 was found to constitute professional misconduct
"It might be debateable as to the extent this may or may not have disadvantaged the client's interests in a forensic sense, however, this act in itself was unacceptably disrespectful to his client and his instructors, and in all circumstances, warrants a period of disqualification from practice"

Mr Stirling was disqualified for two months.

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Victorian Legal Services Commissioner v Flitner [2021] VCAT 142

Two main issues:

1. Failing to act competently by:
 - failing to discontinue proceedings
 - Failing to notify client of counter-claim
 - Failing to adequately supervise junior staff
2. The mop up: making false statements to the client

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Independence

- Solicitors and barristers have duties to carry out work competently, and diligently (Solicitors' rules r 4, Barristers' rules r 4).

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Independence

A barrister has a duty to promote and protect fearlessly and by proper and lawful means the client's best interests (Barristers' rules, r 35). A solicitor has a similar duty to act in the interests of a client (Solicitors' rules, r 4.1)

BUT

- A barrister's paramount duty is to act with independence in the interests of the administration of justice (Barristers' rules, r 23);
- Barristers and solicitors must act independently, and not as a mere mouthpiece (Barristers' rules r 42; Solicitors' rules r 17.1); and
- Must confine issues/have case ready/present issues succinctly/limit evidence/occupy as little time in court as is reasonably necessary (Barristers' rules r 58; Solicitors' rules, r 17).

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Victorian Legal Services Commissioner v Beling [2017] VCAT 1022

Duty to give competent legal services involves more than merely doing what they say.

Clients had initiated action against the ANZ bank.

Mr Beling did not have experience in the relevant area of law.

Acted for four months. At the end of that time the clients had "had little improved understanding of their legal and strategic position, and had received ambiguous advice which potentially understated their liability for costs"

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Independence

A practitioner must not:

- make allegations or suggestions under privilege unless justified, appropriate, and not for other purpose (B r 61; S r 21.1); or
- allege criminality, fraud or other serious misconduct without a proper basis and instructions (B r 65; S r 21.4).

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Fees

- Fees charged must be fair and reasonable (s 172 LPUL)
- A law practice must disclose (s 174 LPUL):
 - The basis for their fees; and
 - An estimate of the total.
- There is an ongoing obligation to disclose any significant change to the legal costs that will be payable.

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Fees (cont.)

Arya v Donaghey (Legal Practice) [2020] VCAT 923

- Client had engaged a solicitor, but went directly to a barrister for a second opinion
- The barrister did not provide costs disclosure other than his hourly rate
- VCAT determined that the rate and time taken were fair, but nonetheless reduced the fees payable because of failure to comply with disclosure obligations and delay in the provision of advice.

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Misleading the Court

A practitioner must not knowingly or recklessly deceive or mislead the Court (B r 24, S r 22.1)

And must take all reasonable steps to rectify misleading statements (B rr 24, 25; S r 22.2).

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Disclosing matters adverse to clients' interests

In civil trials, practitioners must alert their opponent or inform the Court if an opponent makes an express concession about evidence, case law or legislation by mistake (B r 26; S r 19.12).

Must inform court of any binding authority (or if none, Aus appellate decisions) or **legislation** known to the practitioner which they have reasonable grounds to believe to be directly in point against the client's case (B r 29; S r 19.6)
