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# 2024 Intensive Conference

**BRINGING THE BALANCE**

13 – 14 MARCH 2024 | NOVOTEL CANBERRA

The logo for actlaw society, with 'act' in orange, 'law' in white, and 'society' in grey, all on a dark blue background.

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# Ethics for Property

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# Introduction

- Trust is the cornerstone of ethics
- Topics addressed:
  - Our ethical obligations
    - Legal framework
  - Confidentiality (*r 9, SCR*)
  - Conflict of duties (current clients) (*r 11, SCR*)
  - Trust accounting (*s 223, LPA*)
  - Undertakings (*r 6, SCR*)
  - ‘Other fundamental ethical duties’ (*r 4, SCR*)

There may not always be a clear-cut right – or wrong – answer, but there is **only one correct approach** to ethical questions.

# Our ethical obligations: legal framework

- Legislation:
  - Legal Profession Act 2006 (ACT) ('LPA')***
  - Legal Profession (Solicitors) Conduct Rules 2015 (ACT) ('SCR')***
    - 'Uniform', and developed through collaboration between state and territory law societies and the Law Council of Australia
    - New discussion paper expected to be published early this year

# Our ethical obligations: legal framework

- Legislation:

***Legal Profession Act 2006 (ACT)***

**s 388: Unsatisfactory professional conduct**

“In this Act:

unsatisfactory employment conduct, of an employee of a solicitor, means conduct in relation to the solicitor’s practice (whether or not with the knowledge or agreement of the solicitor) that is conduct in relation to which a complaint under part 4.2 (Complaints about Australian legal practitioners and solicitor employees) has been, or could be, made against the solicitor.”

# Our ethical obligations: legal framework

## S 389: Conduct capable of being unsatisfactory professional conduct or professional misconduct

Without limiting section 386 or section 387, the following conduct can be unsatisfactory professional conduct or professional misconduct:

(a) conduct consisting of a contravention of this Act;

Note This Act is defined in the dictionary.

(b) charging of excessive legal costs in connection with the practice of law;

(c) conduct in relation to which there is a conviction for—

(i) a serious offence; or

(ii) a tax offence; or

(iii) an offence involving dishonesty;

(d) conduct of an Australian legal practitioner as or in becoming an insolvent under administration;

(e) conduct of an Australian legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act;

(f) conduct of an Australian legal practitioner in failing to comply with an order of the ACAT made under this Act or an order of a corresponding disciplinary body made under a corresponding law (including but not limited to a failure to pay all or part of a fine imposed under this Act or a corresponding law);

(g) conduct of an Australian legal practitioner in failing to comply with a compensation order made under this Act or a corresponding law.

Note Various provisions of this Act identify particular conduct as conduct that can be unsatisfactory professional conduct or professional misconduct (see eg s 138 (1) (Obligations of legal practitioner partner relating to misconduct—multidisciplinary partnerships)).



# Our ethical obligations: legal framework

- Common law:

***Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750**

Professional misconduct has taken place where:

“the conduct amounts to behaviour that would be reasonably regarded as disgraceful or dishonourable by members of the profession of good repute and competency”

- Common law is important to keep in mind as it applies where a section of the LPA/ a rule is not applicable to a given solicitor.



# Topic 1: Confidentiality

## Rule 9, SCR

- 9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not:
- 9.1.1 a **solicitor who is a partner, principal, director, or employee of the solicitor's law practice**; or
  - 9.1.2 a **barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,**

EXCEPT as permitted in Rule 9.2.

- 9.2 A solicitor may disclose information which is confidential to a client if:
- 9.2.1 the client expressly or impliedly **authorises disclosure**;
  - 9.2.2 the solicitor is **permitted or is compelled by law** to disclose;
  - 9.2.3 the solicitor discloses the information **in a confidential setting, for the sole purpose of obtaining advice** in connection with the solicitor's legal or ethical obligations;
  - 9.2.4 the solicitor discloses the information for the sole **purpose of avoiding the probable commission of a serious criminal offence**;
  - 9.2.5 the solicitor discloses the information for the **purpose of preventing imminent serious physical harm** to the client or to another person; or
  - 9.2.6 the information is **disclosed to the insurer of the solicitor, law practice or associated entity.**

# Topic 1: Confidentiality

- Awareness is crucial
  - Working from home
    - Of course, professional duties still apply at home
    - Be aware of your surroundings
    - Return documents to work and follow document disposal procedures
    - **Lessing** (Canada, 2021)
      - Sending spouse client emails, affidavits and other file materials saw a lawyer disbarred by the Canadian Law Society – he claimed that he was just asking her to print them for his review, but she had evidence of him sending her file materials with covering text like ‘you have to look at this’ ‘can you believe this?’ and ‘bedtime reading’

# Topic 1: Confidentiality

## ***Council of the Law Society of NSW v Alkhair [2022] NSWCATOD 111***

- Mr Alkhair acted for Mr and Mrs Miraki on the purchase of two properties in NSW; to finance these purchases, Mrs Miraki entered into a loan agreement to borrow \$900,000 from Mr Omar El-Cheikh, with Mr Alkhair acting for Mrs Miraki in connection with the loan agreement.
- Mr and Mrs Miraki were respondents in a separate proceeding concerning the loan agreement; the solicitor (Mr Di Mauro) for the plaintiff (Mr El-Cheikh) in that proceeding, and the loan agreement the subject of that proceeding, asked Mr Alkhair the following questions about his services with respect to the loan agreement:
  - *“Who would give you instructions during the transaction?”*
  - *“Were you ever told that Omar did not advance the money?”*
  - *“Was the loan ever questioned?”*
- Mr Alkhair sent responses which amounted to disclosure of confidential information contrary to solicitors’ ethical obligations, particularly rule 9 of the *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015* (NSW).

# Do Mr Alkhair's responses divulge confidential information?

- 1) *"Who would give you instructions during the transaction?"*  
"Navid Miraki was the main point of contact throughout the conveyancing and loan transaction for the Castle Hill Property";
- 2) *"Were you ever told that Omar did not advance the money?"*  
"Neither Mr Miraki or Mrs Miraki ever denied receiving the funds from Omar El-Cheikh under a loan agreement";
- 3) *"Was the loan ever questioned?"*  
"Mr Miraki said that he wanted more time to repay the monies under the loan agreement".

# Topic 1: Confidentiality

- Mr Alkhair was found guilty of professional misconduct; the Tribunal ordered that he is:
  - Publicly reprimanded
  - Fined \$4,000
  - Mandated to undertake further education including passing an appropriate legal ethics course
  - To pay the costs of the Applicant

# Topic 2: Conflict of duties concerning current clients

## Conflict between buyer and seller

The ACT Law Society prefers a 'strict interpretation' of conflict requirements, and provides a guideline that as a general rule, a practitioner or a firm of practitioners should not act:

- “(a) for both buyer and seller in a matter concerning the sale of land or the sale of a business in the Australian Capital Territory (ACT);
- (b) in the course of carrying on practice in the ACT for both buyer and seller in a matter concerning the sale of land or the sale of a business;
- (c) for both mortgagor and mortgagee in a matter concerning the mortgage of land in the ACT excepting discharges of mortgages; or
- (d) in the course of carrying on practice in the ACT for both mortgagor and mortgagee in a matter concerning the mortgage of land;
- (e) for lessor and lessee in a matter concerning the leasing of land in the ACT excepting the surrender of subleases; or
- (f) in the course of carrying on practice in the ACT for both lessor and lessee in a matter concerning the leasing of land.

# Topic 2: Conflict of duties concerning current clients

## Conflict between buyer and seller

Notwithstanding this guideline, a practitioner or a firm of practitioners may act for both parties provided that:

- (a) the parties:
  - (i) are existing clients of the practitioner or of the firm of practitioners for whom the practitioner or the firm (as the case may be) has previously acted;
  - (ii) are related bodies corporate as defined in the Corporations Act; or
  - (iii) are related by blood, adoption or marriage (either de jure or de facto);
- (b) this Guideline is brought to the knowledge of both parties; and
- (c) both parties, with knowledge of this Guideline, instruct the practitioner or the firm of practitioners in writing in the form of the Schedule (below) to act in the matter.”

The Law Society has published a schedule to the Commentary and Guidelines entitled ‘Practitioner Acting for Both Parties in a Conveyancing Matter: Instructions to Practitioner’ which is the form referred to above. This form is to be completed and signed by the parties to authorise the practitioner or the firm to represent both parties.



# Topic 3: Trust Accounting

## *Legal Profession Act 2006 (ACT)*

### **223. Holding, disbursing and accounting for trust money**

(1) A law practice must—

(a) hold trust money deposited in a general trust account of the practice **exclusively for the person on whose behalf it is received**; and

(b) **disburse the trust money only in accordance with a direction given by the person.**

(2) Subsection (1) applies subject to an order of a court of competent jurisdiction or as authorised by law.

(3) The law practice must account for the trust money as required by regulation.

(4) If a law practice that is an Australian legal practitioner who is a sole practitioner, or an incorporated legal practice, contravenes subsection (1) or (3), the practitioner or practice commits an offence.

Maximum penalty: 50 penalty units.

(5) If a law practice that is a law firm, or a multidisciplinary partnership, contravenes subsection (1) or (3), each principal of the practice commits an offence

Maximum penalty: 50 penalty units.

Note For this part, a reference to a law practice includes the principals of the law practice (see s 218 (Liability of principals of law practices under pt 3.1)).

(6) An offence against subsection (4) or (5) is a strict liability offence.

# Topic 3: Trust Accounting

- Be careful where multiple obligations apply!
- In this case, an undertaking conflicted with client instructions, leading to a breach of trust accounting duties

## ***Council of the Law Society of the ACT v LP082023 (Occupational Discipline) [2023] ACAT 63***

- Mr JR was the owner of a property in the ACT (the Property) and continued to own the Property for the duration of his relationship with Ms GS.
- JR and GS separated and a family law property dispute arose between them, for which:
  - JR engaged Firm A
  - GS engaged Firm B
- Firm B lodged a caveat over the Property on behalf of GS.
- Separately to the family law dispute, JR engaged the Respondent for the sale of the Property.
  - The Respondent contacted Firm B to request that the caveat be withdrawn to complete the sale

# Topic 3: Trust Accounting

## ***Council of the Law Society of the ACT v LP082023 (Occupational Discipline) [2023] ACAT 63***

- Firm B sent correspondence outlining that it would remove the caveat if the Respondent's firm would disburse the proceeds as below:
  1. In payment of the amount required to discharge the home loan secured by way of registered mortgage;
  2. In payment of legal costs and expenses of the sale;
  3. In the usual adjustment for rates;
  4. The sum remaining to be held in the trust account of [their law firm] pending Court Order or joint written instructions from [GS and JR].
- The Respondent replied to that correspondence by sending the following email:

“Dear Colleagues

We confirm that the net proceeds of the sale shall be retained in our trust account to accord with the terms of agreement for withdrawal of the caveat outlined below.

Kindly provide confirmation of registration of the withdrawal of caveat in due course

We will book settlement accordingly.

Kind regards,”

# Topic 3: Trust Accounting

## *Council of the Law Society of the ACT v LP082023 (Occupational Discipline) [2023] ACAT 63*

- The caveat registered by GS was withdrawn and settlement of the Property occurred the next day.
- Funds totalling \$317,117.77 were received into the Respondent's trust account (Trust Account) Following settlement
- Around 6 weeks after settlement, JR brought to the Respondent's attention:
  1. An electricity bill of \$2,123.05 from ActewAGL for supply to the Property, and
  2. A Child Support Agency bill of \$13,002.93 which was incorrectly part-paid (\$3,000) by Firm A out of funds in its trust,

and asked that funds from the Respondent's trust account (Trust Account) be disbursed to pay the electricity bill and replace the \$3,000 paid by Firm A.

- The Respondent then paid, or caused to be paid from the Trust Account:
  - \$2,123.05 for the electricity bill, and
  - \$3,000.00 to Firm A.
- The Respondent did not seek instructions from GS for the payment of either of these sums and was not directed to pay either amount by GS.

# Topic 3: Trust Accounting

## *Council of the Law Society of the ACT v LP082023 (Occupational Discipline) [2023] ACAT 63*

- Later, the Respondent paid, or caused to be paid:
  - \$9,908.03 from the Trust Account to Services Australia in relation to a Child Support Register Notice for unpaid child support owing by JR to his first wife with respect to children of that earlier marriage.
- Again, the Respondent did not seek instructions from GS for the payment of either of these sums, and was not directed to pay either amount by GS.

# Do these disbursements constitute a breach of trust accounting obligations?

- 1) \$2,123.05
- 2) \$3,000.00
- 3) \$9,908.03

## 223. Holding, disbursing and accounting for trust money

(1) A law practice must—

- (a) hold trust money deposited in a general trust account of the practice **exclusively for the person on whose behalf it is received**; and
- (b) **disburse the trust money only in accordance with a direction given by the person.**

# Topic 4: Undertakings

## Rule 6, SCR

6.1 A solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, unless released by the recipient or by a court of competent jurisdiction.

6.2 A solicitor must not seek from another solicitor, or that solicitor's employee, associate, or agent, undertakings in respect of a matter, that would require the co-operation of a third party who is not party to the undertaking.

- Avoid making undertakings on behalf of clients – clients can and do change their minds
- Completion of an undertaking must be in your control
  - ***Council of the Law Society of New South Wales v Downey [2023] NSWCATOD 162***
    - The Respondent was fined for breaching an undertaking to provide an original lease to another party within 7 days of settlement
    - These documents were not in the possession or control of the Respondent when the undertaking was made
    - This is professional misconduct
- Revisiting the trust account breach case...



# Did the disbursements violate the undertaking? Why/ why not?

- 1) \$2,123.05
- 2) \$3,000.00
- 3) \$9,908.03

## Rule 6

6.1 A solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, unless released by the recipient or by a court of competent jurisdiction.

6.2 A solicitor must not seek from another solicitor, or that solicitor's employee, associate, or agent, undertakings in respect of a matter, that would require the co-operation of a third party who is not party to the undertaking.

# Quick review: ‘Other fundamental ethical duties’

## Rule 4, SCR

4.1 A solicitor must also:

4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;

4.1.2 be honest and courteous in all dealings in the course of legal practice;

4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;

4.1.4 avoid any compromise to their integrity and professional independence; and

**4.1.5 comply with these Rules and the law.**

- ***Council of the Law Society of New South Wales v Sideris [2024] NSWCATOD 3***
  - Acted for Mother-in-Law, who resided in an aged care facility operated by the Salvation Army
    - Best not to act for family!
  - Use of profane language: e.g. ‘please do not treat me like a peasant’; ‘I was a lawyer when you were in nappies so I suggest you grow up or we can really have a fight’; ‘for a f\*\*\*\*\* lousy \$100,000 you want to screw an old lady over’
  - ...And a breach of Rule 33, which directs that solicitors should not correspond directly with another lawyer’s client.

# Questions

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# Let's keep in touch



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