

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

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2024 Intensive Conference

BRINGING THE BALANCE

13 – 14 MARCH 2024 | NOVOTEL CANBERRA



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Legal Ethics Hypothetical

PANEL DISCUSSION

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A cocktail of conundrums 1

1. Harry is an experienced bartender but has never run his own business before. Harry hosts a YouTube channel, 'Classic Cocktails', providing cocktail-making tips for home bartenders. Harry shot to cocktail fame after revealing his invention, the 'Canberra Colada', a delicious fruity beverage with a unique combination of locally distilled rums and other secret ingredients.
2. Megan is a chef and recently sold her restaurant for a tidy sum and is cashed up and looking to reinvest in another local hospitality business.
3. Megan and Harry decide to open a bar and restaurant called 'Tuggeranong Tiki' overlooking beautiful Lake Tuggeranong in the ACT.
4. The first six months of trading go well. Harry places stock orders and manages the bar. Megan operates the point of sale (POS) system, manages food staff and handles the business' accounts. Harry's Canberra Coladas are a hit with customers and the business turns a tidy profit.
5. Soon after, things turn sour (not just the cocktails). Customer numbers and stock orders have increased but business takings have declined, despite the busier summer cocktail season. POS records show strong EFTPOS sales but a reduction in cash sales.

¹ Hypothetical scenario prepared for ACT Law Society ethics hypothetical CPD, 14 March 2024. This scenario is fictitious and is not based on real events or real people.

6. Meanwhile, Megan hosts her own podcast 'Sipping Secrets' promoting local distillers and brewers. Megan records a podcast episode about locally produced spirits, interviewing local distillers who Harry uses to buy alcohol for his cocktails including for the Tuggeranong Tiki. The podcast is due to be aired in a bit over week's time. A local distiller mentions the upcoming podcast episode to Harry who is worried that podcast listeners may figure out his secret recipe for the Canberra Colada and Harry's other cocktail inventions.
7. Harry confronts Megan. Harry accuses Megan of pocketing cash sales and revealing his secret cocktail recipes. Megan denies both, saying that customers are increasingly using credit cards over cash. She points out that, in her podcast, she doesn't actually say what ingredients Harry uses in his cocktails, only which local alcohol suppliers the bar buys from. Megan offers to provide the podcast for Harry to listen to, but Harry says he isn't interested.
8. You are a local solicitor operating a law practice, Lakeside Lawyers.
9. Harry comes to see you late one Friday afternoon, demanding immediate legal action to stop Megan from airing her Sipping Secrets podcast and claiming that Megan is stealing cash from the Tuggeranong Tiki register.
10. You previously acted for Megan's restaurant in various legal matters, including a dispute with her landlord about a profit share arrangement in which the landlord accused Megan of underreporting profits. The landlord dispute settled, but Megan said to you something about keeping two sets of books. You haven't spoken with Megan since she sold her restaurant.

11. Before the conference, you told Harry you'll need \$4,000 up front for costs to get things started. At the conference, Harry hands you an envelope containing \$4,000 in cash saying "That ought to be enough to get things moving". You agree to act for Harry and you tell him that should cover costs to get things started.
12. Due to a nationwide telecommunications outage, your computer system is down, so you are unable to print your usual fee schedule and cost agreement for Harry to sign. You place the \$4,000 cash in a locked draw in your office and head home for the weekend.
13. On Monday, you telephone a barrister friend who offers to help apply for an urgent ex parte interim injunction to stop the Sipping Secrets podcast episode going to air. The barrister estimates his fees at \$6,000 for the interim injunction. You instruct him to proceed to draft the application and say that you will prepare Harry's affidavit. You forget to mention the barrister's fees to Harry as you are focused on the injunction.

14. You call Harry back into your office to affirm an affidavit explaining his discussion with the local distiller who tipped Harry off about the upcoming Sipping Secrets podcast. Harry's affidavit includes:

"x. On 13 November 2023, I spoke with Jody Barnes who operates Red Hill Rum which supplies rum to my cocktail bar. Ms. Barnes and I had a conversation, words to the effect:

Jody: Megan interviewed me yesterday for her next podcast. She is going to tell listeners what alcohol you put in your Canberra Colada cocktails!
She told me it'll air on Friday week.

Me: I can't believe it. That recipe is meant to be a secret.

Jody: I know!"

15. Harry tells you about his discussion with Megan about the podcast but you don't include that in Harry's affidavit. You mention Harry's discussion with Megan to the barrister who agrees no need to include it in Harry's affidavit.

16. The next day, you and Harry drive together in your car from your office at Belconnen to meet with the barrister in Civic. You file the urgent ex parte injunction application with Harry's affidavit and the matter is called before a duty judge that afternoon. As the injunction application is heard ex parte, there is no appearance for Megan who doesn't know about the application.

17. The barrister tells the judge that the balance of convenience favours granting an interim injunction to stop Megan's podcast being broadcast, as the podcast would reveal Harry's secret Canberra Colada recipe which is Tuggeranong Tiki's best seller and a valuable trade secret.
18. The barrister doesn't tell the judge about Harry's discussion with Megan about the podcast.
19. The judge grants the interim injunction and makes other orders including re-listing the injunction for further hearing in a few weeks.
20. On the way back to your Fyshwick office, you stop in Braddon to buy petrol after noticing your car is almost out of fuel. Your credit card is declined. Harry offers to loan you the \$120 for the petrol, which you reluctantly accept, saying that you'll take that off Harry's bill later.
21. During the drive back to your office, you remark to Harry that it is lucky that the judge granted the injunction or otherwise everyone would know his secret recipe. Harry says that he hasn't actually listened to the podcast and reminds you that Megan told him that the podcast didn't actually say what was in the recipe, just who his local alcohol suppliers are.

22. You arrange for the interim injunction to be served on Megan, who telephones you saying she cannot believe that you are acting against her. She thought you were her solicitor!
23. You direct your junior employed solicitor, Naomi Newlaw, to draft a letter to Megan, instructing the solicitor:

“Now that we’ve got the injunction, we need to now write a letter telling Megan that she has to stop stealing cash from the bar. Can you do that?”

24. Naomi, who is inexperienced and somewhat literally minded, writes a draft letter to Megan saying:

“We act for your business partner, Harry Highpance. We are instructed that you have been stealing cash from the business trading as Tuggeranong Tiki. We hereby demand that you immediately cease stealing cash from the business and that you account for all cash which you have stolen. We reserve the right to refer the matter to police.”

25. Naomi provides the draft letter to you for you to review. As you are anxious for the letter to go out ASAP, so you tell Naomi:

“I don’t have time to read it now. Just send it if you’re happy with it.”

26. Naomi signs and sends the letter to Megan.
27. A couple of days later, Naomi comes to your office and says that she attended a Canberra Lawyers cocktail party the night before. She says she was confronted by a senior local solicitor, Barry Brewhouse, who had clearly consumed too many pina coladas. Barry stood over Naomi and spoke to her in a loud and aggressive tone, slurring his words:

“Megan saw me today. What the heck are you doing? You’re out of line sending her that letter calling her a thief. Your firm are idiots. You should go work someplace else.”

28. Naomi is upset about her confrontation with Barry. You ask to see the file copy of Naomi’s letter to Megan and, upon reading it, you are alarmed about references to “stealing” which wasn’t quite what you intended the letter to say.
29. You check your firm’s accounting records and see that work-in-progress has reached \$8,000. Additionally, you have received the barrister’s invoice for \$6,000. You send a tax invoice to Harry for \$12,000 after discounting the invoice including to allow for Harry’s loan for petrol. On the invoice, you ask Harry to pay \$8,000 after deducting the \$4,000 in cash. You don’t include any other information or document with the invoice apart from your email requesting prompt payment.

30. Harry calls you to express shock at your invoice, saying that he thought the \$4,000 would cover his costs. You explain that that was just to get things started, but more work had to be done including briefing counsel and applying for the injunction. Harry says he still isn't happy with the invoice and will have to think about it.
31. You direct your firm's accounts manager to deposit the \$4,000 cash into your firm's Office Account as payment of your fees, per your invoice.
32. About a week before the case is due back in Court, you receive a call from a Canberra Monthly journalist seeking a comment for an article about the case involving a dispute between the owners of Tuggeranong Tiki over the Sipping Secrets podcast. You say:

“Megan is just trying to exploit Harry's secret Tuggeranong Tiki recipe for her podcast side-hustle. I have no other comment to make.”

33. Some weeks later, you receive a letter from the ACT Law Society saying that it has received complaints from:
- (a) Harry – complaining about your costs; and
 - (b) Megan (via Barry Brewhouse) - complaining about:
 - your office acting for Harry, given that you previously acted for Megan in relation to her restaurant;
 - your office holding and potentially using confidential information about her restaurant legal issues;
 - Naomi’s letter;
 - the injunction which Megan claims was unnecessary because the podcast wouldn’t have revealed Harry’s secret recipe; and
 - your comment to Canberra Monthly about Megan’s “side-hustle”.

34. The Law Society requires a complete written explanation about all facts relevant to these complaints.
35. You prepare a draft written response to the Law Society. You are unsure about whether it would be necessary to tell the Law Society about what was said in Court when your barrister applied for the injunction. You recall that Harry's affidavit failed to mention his discussion with Megan about what was in the podcast, but the judge seemed satisfied enough by Harry's affidavit.
36. As regards costs, you say that the amount charged is fair and reasonable and you gave Harry a hefty discount which he should be happy with. You also think that it isn't necessary to tell the Law Society about Harry paying for your petrol which your deducted from his invoice.
37. To be continued...



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