

# Ethics part 1

# Examinable law; sources

- Candidates will be expected to have a good understanding of:
  - The Legal Profession Uniform Conduct (Barristers) Rules 2015
  - Ethical obligations particular to civil or criminal proceedings
  - Duties in relation to costs disclosure and conditional costs agreements
- Relevant legislation:
  - Legal Profession Uniform Conduct (Barristers) Rules 2015
  - Legal Profession Uniform Law (Schedule 1 of the Legal Profession Uniform Law Application Act 2014 (Vic)), part 4.3 (Legal Costs) and Part 5.4 (Disciplinary Matters)
  - Civil Procedure Act 2010 (Vic)
- Note, today we will look at the Legal Profession Uniform Conduct (Barristers) Rules 2015 – this is not a full list of provisions

# Legal Profession Uniform Conduct (Barristers) Rules 2015

- R 3 Objects
- The object of these Rules is to ensure that barristers:
  - (a) act in accordance with the general principles of professional conduct,
  - (b) act independently,
  - (c) recognise and discharge their obligations in relation to the administration of justice, and
  - (d) provide services of the highest standard unaffected by personal interest.

# R 4 Principles

- These Rules are made in the belief that:
- (a) barristers owe their paramount duty to the administration of justice,
- (b) barristers must maintain high standards of professional conduct,
- (c) barristers as specialist advocates in the administration of justice, must act honestly, fairly, skilfully, bravely and with competence and diligence,
- (d) barristers owe duties to the courts, to their clients and to their barrister and solicitor colleagues,
- (e) barristers should exercise their forensic judgments and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients, and
- (f) the provision of advocates for those who need legal representation is better secured if there is a Bar whose members:
  - (i) must accept briefs to appear regardless of their personal beliefs,
  - (ii) must not refuse briefs to appear except on proper professional grounds, and
  - (iii) compete as specialist advocates with each other and with other legal practitioners as widely and as often as practicable.

# 20 rules of ethics (ie an incomplete set)

## 1. R 8 General

- A barrister must not engage in conduct which is:
  - (a) dishonest or otherwise \_\_\_\_\_ to a barrister,
  - (b) prejudicial to the administration of justice, or
  - (c) likely to diminish public confidence in the legal profession or \_\_\_\_\_ or
- otherwise bring the legal profession into disrepute.

## 2. R 12

- A barrister must be a sole practitioner, and must not:
  - (a) practise in \_\_\_\_\_ with any person,
  - (b) practise as the \_\_\_\_\_ of any legal practitioner who acts as a legal practitioner in the course of that employment,
  - (c) practise as the \_\_\_\_\_ of any person,
  - (d) be a director of an incorporated legal practice, or
  - (e) practise by or through an unincorporated legal practice.

### 3. R 17 Cab rank principle

- A barrister must accept a brief from a solicitor to appear before a court in a field in which the barrister practises or professes to practise if:
- (a) the brief is within the barrister's \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_,
- (b) the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may, as a real possibility, prevent the barrister from being able to advance a client's interests to the best of the barrister's skill and diligence,
- (c) the fee offered on the brief is \_\_\_\_\_ to the barrister, and
- (d) the barrister is not obliged or permitted to refuse the brief under rule 101, 103, 104 or 105.

## 4. R 21

- Nothing in these Rules shall be taken to oblige a barrister to accept instructions directly from a person who is not a \_\_\_\_\_.



# 5. R 22

- A barrister who proposes to accept instructions directly from a person who is not a solicitor or officer of a government department or agency whose usual duties include engaging lawyers must:
  - (a) inform the prospective client \_\_\_\_\_ of:
    - (i) the effect of rules 11 and 13,
    - (ii) the fact that circumstances may require the client to retain an instructing solicitor at short notice, and possibly during the performance of the work,
    - (iii) any other \_\_\_\_\_ which the barrister believes on reasonable grounds may, as a real possibility, be suffered by the client if the client does not retain an instructing solicitor,
    - (iv) the relative capacity of the barrister in performing barristers' work to supply the requested facilities or services to the client compared to the capacity of the barrister together with an instructing solicitor to supply them, and
    - (v) a fair description of the advocacy experience of the barrister, and
  - (b) obtain a \_\_\_\_\_, signed by the prospective client, that he or she has been informed of the matters in (a) above.

## 6. R 23 Duty to \_\_\_\_\_

- A barrister has an overriding duty \_\_\_\_\_ to act with independence in the interests of the administration of justice.

# 7. Collateral rules relating to that duty

- 24 A barrister must not deceive or knowingly or recklessly \_\_\_\_\_ the court.
- 25 A barrister must take all necessary steps to correct any \_\_\_\_\_ made by the barrister to a court as soon as possible after the barrister becomes aware that the statement was \_\_\_\_\_.
- ...
- 29 A barrister must, at the appropriate time in the hearing of the case if the court has not yet been informed of that matter, inform the court of:
  - (a) any binding authority,
  - (b) where there is no binding authority any authority decided by an Australian appellate court, and
  - (c) any applicable legislation,
- known to the barrister and which the barrister has reasonable grounds to believe to be \_\_\_\_\_, \_\_\_\_\_ the client's case.

## 8. R 35 Duty to the client

- A barrister must promote and protect \_\_\_\_\_ and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence, and do so without regard to his or her \_\_\_\_\_ or to \_\_\_\_\_ to the barrister or to any other person..

## 9. Collateral rules relating to that duty

- 36 A barrister must inform the client or the instructing solicitor about the alternatives to \_\_\_\_\_  
\_\_\_\_\_ which are reasonably available to the client, unless the barrister 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.
- 37 A barrister must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, sufficiently to permit the client to give proper instructions, including instructions in connection with any compromise of the case.
- 38 A barrister must (unless circumstances warrant otherwise in the barrister's considered opinion) advise a client who is charged with a criminal offence about any \_\_\_\_\_ which in substance holds out the prospect of some advantage (including diminution of penalty), if the client pleads guilty or authorises other steps towards reducing the \_\_\_\_\_ involved in the proceedings.

# 10. Even more collateral rules relating to that duty

- 42 Independence
- A barrister must not act as the \_\_\_\_\_ of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case \_\_\_\_\_, after the appropriate consideration of the client's and the instructing solicitor's wishes where practicable.
- 43 A barrister does not breach the barrister's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's wishes, simply by choosing, contrary to those wishes, to exercise the forensic judgments called for during the case so as to:
  - (a) confine any hearing to those issues which the barrister \_\_\_\_\_,
  - (b) present the client's case as quickly and simply as may be consistent with its robust advancement, or
  - (c) inform the court of any persuasive authority \_\_\_\_\_.

# 11. R 49ff Duty to the opponent

- A barrister must not knowingly make \_\_\_\_\_ to an opponent in relation to the case (including its compromise).
- 50 A barrister must take all necessary steps to correct any \_\_\_\_\_ in relation to the case made by the barrister to an opponent as soon as possible after the barrister becomes aware that the statement was \_\_\_\_\_.
- 51 A barrister does not make a \_\_\_\_\_ to an opponent simply by failing to correct an error on any matter stated to the barrister by the opponent.

## 12. R 57 Efficient administration of justice

- A barrister:
  - (a) must seek to ensure that the barrister does work which the barrister is briefed to do in sufficient time to enable compliance with \_\_\_\_\_,  
and
  - (b) if the barrister has reasonable grounds to believe that the barrister may not complete any such work on time, must \_\_\_\_\_.



## 12. R 69 Integrity of evidence

- A barrister must not:
  - (a) advise or suggest to a witness \_\_\_\_\_ nor condone another person doing so, or
  - (b) coach a witness by advising \_\_\_\_\_.
- 70 A barrister does not breach rule 69 by expressing a general admonition to tell the truth, or by questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not encourage the witness to give evidence different from \_\_\_\_\_  
\_\_\_\_\_.

# 13. Conferring with lay witnesses

- 71 A barrister must not confer with, or condone another legal practitioner conferring with, \_\_\_\_\_  
\_\_\_\_\_ lay witness including a party or client at the same time:
  - (a) about any issue which there are reasonable grounds for the barrister to believe may be contentious at a hearing, and
  - (b) where such conferral could affect evidence to be given by any of those witnesses, unless the barrister believes on reasonable grounds that \_\_\_\_\_.
- 72 A barrister does not breach rule 71 by conferring with, or condoning another legal practitioner conferring with, \_\_\_\_\_ about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.

# 14. Delinquent or guilty clients

- 79 Delinquent or guilty clients
- A barrister who, as a result of information provided by the client or a witness called on behalf of the client, is informed by the client or by the witness during a hearing or after judgment or decision is reserved and while it remains pending, that the client or a witness called on behalf of the client:
  - (a) has \_\_\_\_\_ to the court or has procured another person to \_\_\_\_\_ to the court,
  - (b) has falsified or procured another person to falsify in any way a \_\_\_\_\_, or
  - (c) has suppressed or procured another person \_\_\_\_\_ upon a topic where there was a positive duty to make disclosure to the court,
- must refuse to take any further part in the case unless the client authorises the barrister to inform the court of the lie, falsification or suppression and must promptly inform the court of the lie, falsification or suppression upon the client authorising the barrister to do so but otherwise must not inform the court of the lie, falsification or suppression.

# 15. Collateral to this rule

- 80 A barrister briefed to appear in criminal proceedings whose client confesses guilt to the barrister but maintains a plea of not guilty:
- (a) should, subject to the client accepting the constraints set out in (b)–(h) but not otherwise \_\_\_\_\_,
- (b) must not falsely suggest that some other person committed the offence charged,
- (c) must not set up an affirmative case inconsistent with the confession,
- (d) must ensure that the prosecution is \_\_\_\_\_,”
- (e) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged,
- (f) may argue that for some reason of law the client is not guilty of the offence charged,
- (g) may argue that for any other reason not prohibited by (b) or (c) the client should not be convicted of the offence charged, and
- (h) \_\_\_\_\_, if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client’s innocence.

## 16. R 83 Prosecutor's duties

- A prosecutor must \_\_\_\_\_, must seek impartially to have the whole of the relevant evidence \_\_\_\_\_, and must seek to assist the court with \_\_\_\_\_, to enable the law properly to be applied to the facts.

# 17. Collateral to this rule

- R 84 A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case. ...
- R 87 A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute \_\_\_\_\_ other than material subject to statutory immunity, unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person.

# 18. 101 Briefs which must be refused or must be returned

- A barrister must refuse to accept or retain a brief or instructions to appear before a court if:
  - (a) the barrister has information which is confidential to any other person in the case other than the prospective client, and:
    - (i) the information may, as a real possibility, be material to the prospective client's case, and
    - (ii) the person entitled to the confidentiality has not consented to the barrister using the information as the barrister thinks fit in the case,
  - (b) the client's interest in the matter or otherwise is or would be in conflict with the barrister's own interest or the interest of an associate, ...
  - (k) there are reasonable grounds for the barrister to believe that the failure of the client to retain an instructing solicitor would, as a real possibility, seriously prejudice the barrister's ability to advance and protect the client's interests in accordance with the law including these Rules,
  - (l) the barrister has already advised or drawn pleadings for another party to the matter, or
  - (m) the barrister has already discussed in any detail (even on an informal basis) with another party with an adverse interest in the matter the facts out of which the matter arises.

# 18. 105 Briefs which may be refused or returned

- A barrister may refuse or return a brief to appear before a court:
  - (a) if the brief is not offered by a solicitor,
  - (b) if the barrister considers on reasonable grounds that the time or effort required for the brief threatens to prejudice the barrister's practice or other professional or personal engagements,
  - (c) if the instructing solicitor does not agree to be responsible for the payment of the barrister's fee,
  - (d) if the barrister has reasonable grounds to doubt that the fee will be paid reasonably promptly or in accordance with the costs agreement, ...
  - (g) if the barrister's advice as to the preparation or conduct of the case, not including its compromise, has been rejected or ignored by the instructing solicitor or the client, as the case may be, ...
  - (j) if the barrister, being a Senior Counsel, considers on reasonable grounds that the brief also requires the services of a junior counsel and none has been briefed, ...
  - (l) where the brief is to appear before a judge whose personal or business relationship with the barrister is such as to give rise to the apprehension that there may not be a fair hearing,



# 19. 113 Devilling

- 112 A barrister must not hand over a brief to another barrister to conduct the case, or any court appearance within the case, unless the instructing solicitor has consented to that course.
- 113 A barrister does not breach rule 12 by carrying \_\_\_\_\_ given to the barrister by another barrister, or by giving such a task to another barrister, so long as:
  - (a) the barrister who was briefed to do the work takes \_\_\_\_\_ for the work,
  - (b) the work is delivered under the name of the barrister who was briefed,
  - (c) the arrangement between the barristers does not go beyond an ordinary devilling or reading arrangement and in particular does not involve any standing retainer or employment terms, and
  - (d) the arrangement between the barristers does not provide and is not intended to enable the barrister giving the task to make a profit from the other barrister's work, over and above \_\_\_\_\_ for supervision of and responsibility for the other barrister's work.

## 20. 114 Confidentiality and conflicts

- 114 A barrister must not disclose (except as compelled by law) or use in any way confidential information obtained by the barrister in the course of practice concerning any person to whom the barrister owes some duty or obligation to keep the information confidential unless or until:
  - (a) the information is later obtained by the barrister from another person who is not bound by the confidentiality owed by the barrister to the first person and who does not give the information confidentially to the barrister, or
  - (b) the person has consented to the barrister disclosing or using the information generally or on specific terms.
- 115 A barrister must not disclose (except as compelled by law) or use confidential information under rule 114 (b) in any way other than as permitted by the specific terms of the person's consent.
- 116 A barrister does not breach rules 114 and 115 simply by showing briefs to or disclosing information contained in a brief to the barrister's instructing solicitor in the matter, to a member of the barrister's staff for the purposes of that person undertaking clerical or administrative work in relation to the matter, or to a reader or to another barrister doing work as permitted by rule 113.