

What is Your Legal Ethics IQ?

CPD Legal Studio

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Legal ethical framework

Intrinsic Controls

Personal values and the basic principals of honesty, courtesy, loyalty and competency

Extrinsic Controls

Legal Profession Uniform Law
Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (ASCRs)

Ethical Guidance

Published by each State's Law Institute

Common Law

Disciplinary hearings



A solicitor's core ethical obligations

1. Paramount duty to the court and the administration of justice – this obligation prevails to the extent of any inconsistency with any other duty
2. To act in the best interest of a client
3. To be honest and courteous in all dealings in the course of legal practice
4. To deliver legal services competently, diligently and as promptly as reasonably possible
5. To avoid any compromise of integrity and professional independence
6. To comply with the ASCRs and the law
7. To not engage in any conduct prejudicial to the administration of justice or that will bring the profession into disrepute



Test your Legal Ethics IQ

MinterEllison

Question 1



When do legal ethics not apply to a solicitor:

- A. In court proceedings
- B. In virtual court proceedings
- C. In contract negotiations
- D. When corresponding with opponents that are not legally represented
- E. When playing recreational sport
- F. When corresponding with opposing lawyers in a dispute
- G. In arbitrations
- H. When making telephone calls

Answer

1. Do legal ethics apply to court proceedings, virtual court proceedings, contract negotiations, when corresponding with litigants in person, when corresponding with opposing lawyers, in arbitrations or when making phone calls?

- E – Legal ethics apply to solicitors practising as solicitors
- The **ASCRs** apply to :
 - Australian legal practitioners that practise as a solicitor
 - Australian legal practitioners that practise '*in the manner of a solicitor*'
 - Australian registered foreign lawyers that practise as a solicitor
 - Australian registered foreign lawyers that practise '*in the manner of a solicitor*'

Question 2



Sly Ltd and its directors are being investigated for criminal activity. As the general counsel of Sly Ltd, you have been advising the company and its directors in relation to those activities. An Australian Federal Police officer meets with you and asks you to 'spill the beans' and give them information that you acquired acting for Sly Ltd to help them prove that a crime has been committed. You should:

- A. Tell the police everything as the discussions with the police are protected by legal privilege
- B. Tell them what they want to know as it is their duty to assist the police investigations
- C. 'Zip it' and tell them nothing
- D. Tell them what they need to know on the basis that the police officer keeps the information confidential

Answer

2. Are lawyers able to disclose their client's privileged information to assist police evidence a crime?

- C - 'Zip it' and do not spill 'legally privileged' beans
- **ASCR 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 the client
- Client legal privilege exists for the benefit of a solicitor's clients and not for the benefits of the solicitor
- Breaching legal privilege brings the profession into disrepute and undermines confidence in the courts, law enforcement and criminal justice
- *AB v CD; EF v CD* [2018] HCA 58
 - Lawyer X, a Victorian barrister, had been operating as a police informant including providing information against her client's interest

"EF's actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of EF's obligations as counsel to her clients and of EF's duties to the court."

- Client legal privilege only applies where a solicitor/client relationship exists

Question 3



Can a solicitor's consistent failures to copy opposing counsel/solicitors into correspondence with the court amount to professional misconduct?

Yes or No?



Answer

3. Have you done anything wrong by failing to copy in opposing counsel/solicitor in correspondence to the court?

- **Yes** – particularly if it is a collective pattern of behaviour
- **ASCR 18.5** - requires that a solicitor must not communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless the court has first communicated with the practitioner in such a way or the opponent has consented beforehand
- Ex parte applications are an exception to this rule
- In *Gullquist v Victorian Legal Services Commissioner* [2018] VSCA 259, the solicitor sent five letters to the court while proceedings were on foot. Three of the letters were addressed personally to the magistrate and none of them copied in opposing counsel

Question 4



As in-house counsel for Sly Ltd, you are told in confidence by the CFO that the company is going to pay moneys to a foreign public official to secure a winning tender. A whistle blower whispers to the Australian Federal Police who question you. Can you:

- A. Refuse to answer questions on the grounds of legal privilege
- B. Refuse to answer questions on the grounds of confidentiality
- C. Tell the AFP that the discussion never took place
- D. Cooperate with the AFP and answer their inquiries



Answer

4. As in-house counsel are you able to disclose your employer's confidential information?

- D – cooperate and answer
- **ASCR 9.2** – sets out when disclosure is permitted
- Whilst there is very limited scope for a lawyer to disclose confidential information, in this circumstance a lawyer can disclose the confidential and privileged communication because it is to avoid the probable commission of a serious criminal offence
- As in-house counsel, your employer is your client

Question 5



You are the general counsel for Sly Ltd who is owed \$450,000 by Ooops Pty Ltd. To remain solvent Sly Ltd requires the money to be paid as soon as possible. Which of the following is not a breach of your legal ethical obligations?

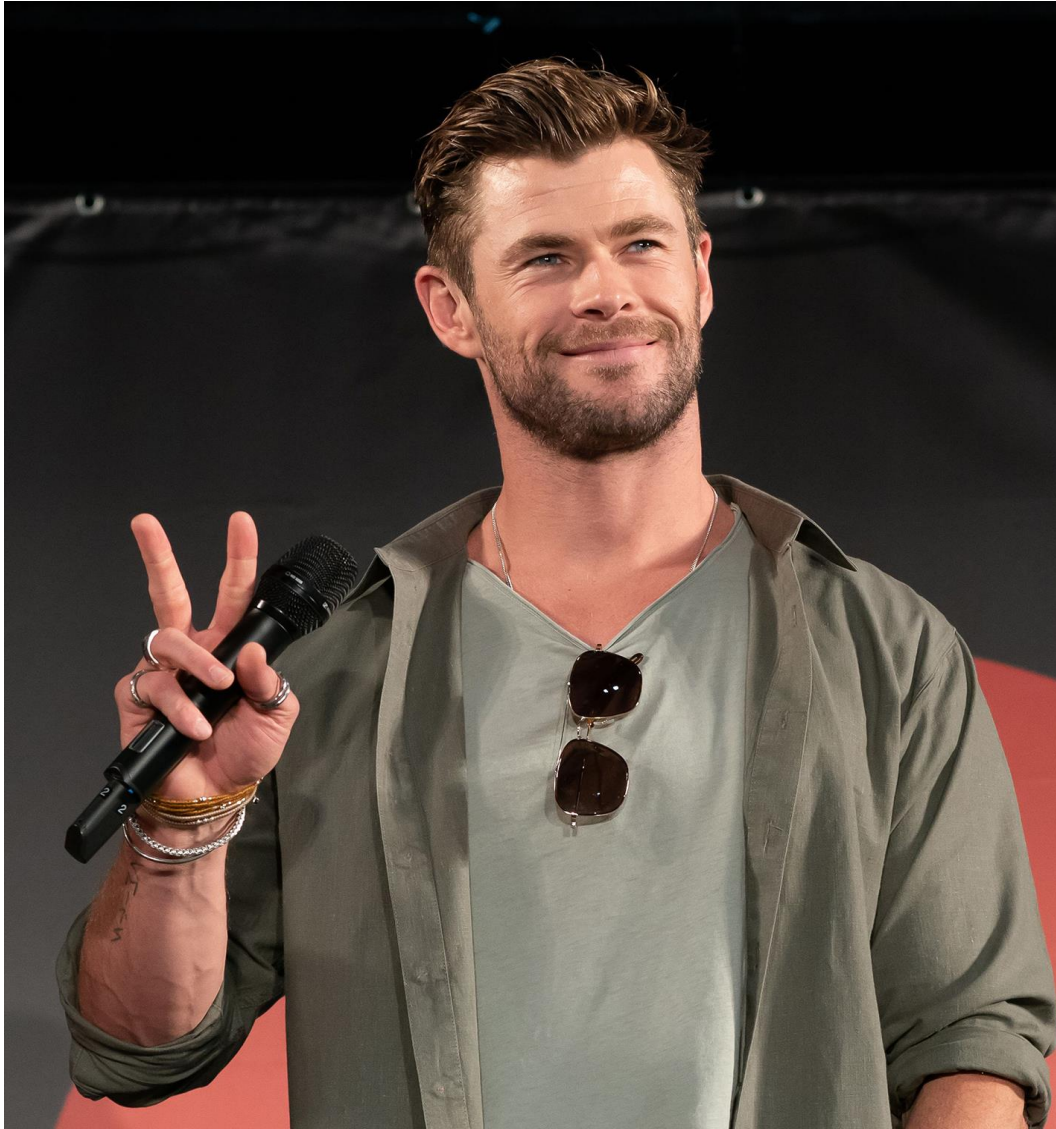
- A. Threatening Ooops Pty Ltd that you have instructions to proceed with 'legal action' when you do not in fact have such instructions
- B. Engaging external lawyers to commence debt recovery
- C. Formatting correspondence to have the appearance of official correspondence from a court when it is not
- D. Calling the general counsel of Ooops Pty Ltd at least 6 times a day demanding payment

Answer

5. Have you breached your ethical obligations by issuing false correspondence or holding out that you have instructions?

- B - engage external lawyers to pursue the debt
- **ASCR 34.1** – a solicitor must not in any action or communication associated with representing a client make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person
- *Legal Services Commissioner v Sampson (Legal Practice)* [2013] VCAT 1177

Question 6



As inhouse counsel for Sly Ltd, you quietly learn that Sly Constructions is about to sign a major redevelopment deal with Chris Hemsworth to buy out Byron Bay landowners and create a Covid safe bubble for Hollywood A listers. At a dinner party with your friends they say they have heard whispers about this. Do you:

- A. Tell them you're in the know, share the 'goss' and tell them not to tell anyone
- B. Tell them what you know pretending you heard it on the grapevine
- C. Tell them what you know but don't mention it is Chris H that's buying up
- D. Stay silent, pour more wine and change the topic



Answer

6. Are you able to disclose your client's confidential information?

- D – mum's the word
- **ASCR 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 even on confidential terms

Question 7



When can a solicitor interview two or more lay witnesses together:

- A. When the witnesses have knowledge about the same circumstances
- B. When the witnesses work for the same company
- C. When the witnesses do not know each other and are giving different evidence
- D. When the lawyer believes on reasonable grounds that special circumstances require such a conference

Answer

7. When can a solicitor interview two or more lay witnesses together?

- D – believes on reasonable grounds there are special circumstances
- **Rule 25 ASCR** – A solicitor must not confer with one or more lay witness at the same time about any contentious issues and where such conferral could affect evidence to be given by any of those witnesses, unless the solicitor believes on reasonable grounds that special circumstances requires such a conference
- Knowledge of the same facts or working for the same company would not be special circumstances
- *Day v Perisher Blue Pty Ltd* (2005) 62 NSWLR 731

Question 8



Who can draft a witness statement:

- A. The witness
- B. The witness and in-house legal counsel
- C. The witness and external lawyers
- D. The witness, in-house counsel and external lawyers



Answer

8. Who can draft a witness statement?

- **D** - the witness, in-house counsel and external lawyers – so long as the in-house counsel is acting in his or her capacity as a legal advisor and will not be a witness of fact
- **ASCR 24** – A solicitor must not advise or suggest to a witness that false or misleading evidence should be given, nor condone another person doing so. Nor should a solicitor advise what answers the witness should give.
- *Legal Profession Complaints Committee v Caine* [2010] WASAT 178

Question 9



Which of the following is likely to constitute a breach of a solicitors' ethical obligations when issuing correspondence:

- A. **Solicitor's letter says** – *'Do not call me as your call would most certainly not be welcome...you are the most paranoid, pathetic client I have ever encountered...I suggest you get a life'*
- B. **Solicitor's letter written on the client's instructions** – *'I have advised my client to instruct me not to respond to anymore of your correspondence. It just seems to me that every time you have got no work to do you return to [this] file because there is plenty of money there to pay your legal fees...'*
- C. **Solicitor's letter says** – *'First, the first paragraph of your letter is a false assertion... Secondly, such a ground of defence to the winding-up application would be absurd... Fourthly, the attack on [the liquidator's] independence is equally absurd... Fifthly, the vast bulk of the evidence... is nothing short of a gross abuse of process...'*
- D. All of the above

Answer

9. Which examples constitute a breach of one's ethical obligations?

- D – all of the above
- These are all examples that have been considered by tribunals/courts as constituting discourteous conduct and attracting disciplinary penalties
- **ASCR 4.1.2** – requires a solicitor to 'be honest and courteous in all dealings in the course of legal practice'

Question 10



True or false –

In this new Covid world, a statutory declaration or affidavit must *always* be signed in the physical presence of the person who is witnessing the document?



Answer

10. True or false – A statutory declaration or affidavit must always be signed in the physical presence of the person who is witnessing the document?

- False
- General rule:
Purporting to witness a signature where the execution did not take place in the presence of the Respondent was held to be unsatisfactory professional conduct
Legal Services Commission v ZD Bentley [2016] QCAT 185
- However, temporary regulations in response to COVID permit audio-visual witnessing of:
 - **Statutory declarations** in all states except SA and NT
 - **Affidavits** in all states except SA and NT

Question 11



As in-house counsel for a government department, you instruct the external lawyers to act in relation to the purchase of a large parcel of land and to proceed to subdivide the land for future use for affordable housing as well as a new health care facility. The external lawyers complete the purchase but do not take any steps to subdivide the land as they do not see that there is any hurry to do so. Some 12 months go by and the department is now ready to proceed with its projects. The external solicitors have still not effected the subdivision.

Are the external lawyers in breach of the ethical duty to:

- A. Communicate effectively and promptly
- B. Deliver legal services competently and diligently
- C. Deliver legal services as promptly as reasonably possible
- D. All of the above



Answer

11. Can failure to communicate and complete legal work in a timely manner land a solicitor in disciplinary trouble?

- D – all of the above
- **ASCR 4.1.3** - A solicitor must deliver legal services competently, diligently, and as promptly as reasonably possible.
- Legal work is required to be carried out expeditiously
- *Legal Services Commissioner v Galatas (Legal Practice)* [2013] VCAT 214

Question 12



Who is not subject to legal ethical obligations:

- A. Lawyers in private practice
- B. Lawyers supervising junior lawyers or managing a legal team
- C. Foreign lawyers registered in Australia
- D. In-house lawyers
- E. A foreign lawyer employed as a company secretary
- F. Lawyers using social media in their practise of the law



Answer

12. Who is subject to legal ethical obligations?

- E – legal ethical obligations only apply to lawyers
- In-house counsel are regarded by the law in every aspect as a lawyer in private practice, the only difference being that he or she acts for one client
- ACC ‘Ethics for In-house Counsel’ (2018) is a handy resource
- Just because you are supervised or managed by another lawyer, that does not mean you can ignore your ethical obligations
- Australian registered foreign lawyers will have legal ethical obligations where they are practising as a solicitor or *‘in the manner of a solicitor’*
- Legal ethical obligations apply to solicitors even when they are using social media

Question 13



As in-house counsel of either a corporation or a government department, you are very active on your employer's LinkedIn, Instagram and Facebook pages.

Can you:

- A. Post photos of your puppy wearing your employer's logo
- B. Write what you really think about the merits of a court proceeding that your employer is currently involved in
- C. Disclose confidential information of your employer because your username does not disclose who you really are or that you work there
- D. Post legal advice in response to a question about a legal problem that a follower of your employer is facing
- E. 'friend' a person that is legally represented in a current dispute that your employer is involved in



Answer

13. Is a lawyer free to communicate as they wish on social media ?

- A – pets are okay
- The ASCRs apply to lawyers who use social media services in their legal practice
- Most law societies/institutes have Guidelines on the Ethical Use of Social Media intended to ensure that lawyers maintain the legal ethical rules when engaging on social media
- Key areas of risk focussed on include:
 - Reputation
 - Confidentiality
 - Duty to the administration of Justice
 - Inadvertent retainer
- **ASCR 33** - A solicitor must not deal directly with the client or clients of another practitioner unless an exception applies

Question 14



During litigation, you are made aware of correspondence which is detrimental to your client's case. Is disclosing that correspondence a breach of your duty to act in your client's best interests?

Yes or No?



Answer

14. Is disclosing that correspondence a breach of your duty to act in your client's best interests?

- **No**, even if disclosure is not in your client's best interests
- **ASCR 3** – A solicitor's primary duty is to the court and the administration of justice
- A party to a dispute (in circumstances where a disclosure regime has been ordered) has an ongoing obligation of disclosure
- Failure to disclose could amount to misleading the court
- A lawyer must not act dishonestly

Question 15



A day before a hearing, one of your client's witnesses breaks down and tells you that he lied in his statutory declaration and was pressured to do so by his senior manager.

Do you:

- A. make a pact with the witness to never speak of it again
- B. speak with the senior manager to understand the extent of the dishonesty and then speak with counsel
- C. take further advice on the matter
- D. bring it to the attention of the court as soon as possible

Answer

15. What do you do about your lying witness who was pressured by their senior manager?

- C - Take further advice on the matter
- Much will depend on the timing of the witness's breakdown, whether the evidence has already been given in the hearing and whether you have your client's instructions to disclose the falsehood to the arbitrator / judge
- **ASCR 19** – A solicitor must not deceive or knowingly or recklessly mislead the court (particularly ASCR 19.2 requiring a solicitor to '*take all necessary steps to correct any misleading statement...as soon as possible...[after] becoming aware*' of the misleading statement)
- **ASCR 13** - If a client insists that a lawyer breaches the law or professional rules then a lawyer has just cause to terminate the retainer

Question 16



Your primary practice is employment law related legal issues that arise for your employer company or government department. However, with the government's Covid-19 stimulus packages, you have been asked to step in and help the transactions lawyers, who are under resourced and swamped, with the review of funding agreements and construction contracts.

Is your lack of transactional experience in the areas of finance and construction procurement law a defence to any lapse in legal professional ethics?

Yes or No?

Answer

16. Is a lack of experience a defence to any lapse in legal professional ethics?

- No
- Each solicitor has a duty to act with '*candour, honesty and fairness*' applies irrespective of the level of experience of the practitioner
- *Council of the Queensland Law Society Inc v Wright* [2001] QCA 58

Question 17



Sly Ltd has just been served with a multimillion dollar class action. Everyone, including the CEO and the general counsel is feeling the pressure. The general counsel gathers the male lawyers in the team to form a combat team. Tiffany, a senior legal counsel asks to join the combat team and is told to leave the real issues to the boys. A week later Tiffany approaches the general counsel and asks again if she can assist. The general counsel asks her if she really wants to assist, she should get the combat team coffee each morning and just focus on smiling and looking pretty around the office.

Tiffany is upset by this. Is the general counsel:

- A. Entitled to decide who they want on the combat team
- B. Looking after Tiffany's interests so that she does not have to work as hard as the male lawyers as she has children
- C. Under pressure and tired of being harassed by Tiffany
- D. Discriminating against Tiffany



Answer

17. As a solicitor, can you treat people any way you want to?

- D – female lawyers are equal to male lawyers
- **ASCR 42.1** – A solicitor must not in the course of practice engage in conduct that amounts to:
 - Discrimination
 - Sexual harassment
 - Workplace bullying
- *Hickie v Hunt and Hunt* [1998] HREOCA 8 (Commissioner Evatt, 9 March 1998)

Question 18



Since March 2020, the in-house legal teams for many corporations and government departments have been working from home. Those legal teams have been stretched working long hours on complex legal issues never faced before. As senior legal counsel managing a number of large matters with others in the legal team and the business, should you:

- A. Just focus on getting the work you're responsible for done and not waste time with the junior lawyers
- B. Manage your time by instructing the junior lawyers to get their work done and only call you in an emergency
- C. Tell the commercial managers to just get the contracts on the matter signed and out and don't worry about Covid-19
- D. Check in regularly with the junior lawyers and commercial managers and ensure their work is on track, deal with any issues and make sure all is in order
- E. It's nice and quiet at home, you're getting a lot done without interruptions – as for the team....what team?



Answer

18. Do solicitors have a responsibility to supervise others?

- D – working from home is not a ‘free for all’
- **ASCR 37** - A solicitor with designated responsibility for a matter must exercise reasonable supervision over:
 - solicitors
 - all other employeesengaged in the provision of the legal services for that matter
- This is especially the case for lawyers with restricted practising certificates
- The level of supervision will vary according to the lawyer’s qualification and experience, the type of work conducted by the lawyer and the extent of authority that the lawyer enjoys [see Dal Pont’s *Lawyers’ professional responsibility* at 20.205 and *Legal Services Commissioner v Michael Vincent Baker* [2005] LPT 002 at 008]

Question 19



You act for a company which is the corporate vehicle for a joint venture between two parties who want to run a business which manufactures and exports chocolate milk powder. The product is highly coveted by buyers in Asia because of Australia's reputation for high quality milk, and chocolate.

The director, who you take instructions from, has a falling out with her business partner, and tells you of her plan to move the equipment in the dead of the night to another factory where she will run her own business. She asks you to come help because the equipment is heavy. She promises that you can have some chocolate milk powder once she sets up her factory. What do you do?

- A. Turn up in your favourite workout gear, and help her move the equipment.
- B. Advise the director that what she proposes is theft, and that she would be acting in breach of her director's duties and fiduciary duties, among other things, if she takes the equipment and refuse to assist her.
- C. Don't help her move the equipment yourself but arrange for removalists to turn up to do it.
- D. Take the equipment yourself. You want to make some money producing high quality chocolate milk.



Answer

19. Can you assist your client to commit a crime?

- **B** – If you provide assistance to the director in moving the equipment the company could allege, among other things, that you have knowingly assisted the director to breach her duties to the company.
- Further, as a solicitor you have a duty not to engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to:
 - be prejudicial to, or diminish the public confidence in, the administration of justice; or
 - bring the profession into disrepute.(see **ACSR 5.1**)
- See the case of *R v Forsyth (1990) 20 ATR 1818* which involved an allegation that a barrister had dishonestly advised promoters of a scheme to avoid tax when he must have known that they had as their purpose the defrauding of the Commissioner of Taxation. The barrister was acquitted of the charge on the direction of the judge to the jury at the end of the Crown case on the basis that the barrister's knowledge of the unlawful purpose was not sufficient to found a lawful conviction.

Question 20



As a savvy in-house counsel, you have a state of the art smart phone, tablet and smart watch all allowing seamless and instantaneous connectivity via the cloud. You are managing a large dispute with a large team of internal and external lawyers and commercial people. You create a WhatsApp group so information is exchanged better and faster between the team. Half way through the trial, WhatsApp is hacked and the other side's expert gets all the team's WhatsApp messages.

Is the hacking of a messaging tool by a malicious third party, a defence to a breach of a solicitor's duty of confidentiality?

Answer

20. How do messaging tools affect the duty of confidentiality?

- **No** – A lawyer's obligation of confidentiality extends to all forms of communication and messaging tools.
- **ASCR 9** - A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement.
- Understanding and managing risk to data is now a matter of basic professional competence.
- Law firms must ensure:
 - the security of any messaging tools, data transfer sites, email accounts and cloud services where clients' personal information may be stored or shared;
 - they have a clear firm policies for staff to follow; and
 - staff are trained and kept updated on a data security.
- Law firms may also have statutory obligations under the *Privacy Act 1988* (Cth).

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