

**Aspects of Professional Responsibility – Legal Ethics in the Practise of  
Criminal Law**

*A paper presented at the Aboriginal Legal Service NSW/ACT Western Zone  
Conference*

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**INTRODUCTION**

1. A recent survey of criminal law practitioners found that 75% have lain awake in bed - worrying about ethical issues.<sup>1</sup>
2. As a solicitor in Western New South Wales with the ALS you are likely to be in your first years of practise, working in a small office and handling a large caseload including many serious matters. No doubt you have all spent time pondering ethical issues.
3. This paper aims to pull together information on key ethical issues that you will all encounter at some point in your practise.
4. There are not always easy answers to the myriad of ethical questions that can arise so the best approach is to understand the principles, why they exist and what your sources of advice are. You are then equipped, as a lawyer, to make decisions applying these ethical principles.

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<sup>1</sup> Well not that recent now, see The ABC Law Report 12 November 2002.  
<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s724128.htm> (accessed 5 March 2010)

5. After outlining the sources of ethical obligations, and including the text of the main ones, this paper looks in particular at privilege, taking instructions, change of instructions, defending the guilty client and particular aspects of the rule in *Brown v Dunn* and privilege.

## **THE NATURE OF LEGAL ETHICS – DUTIES AS RULES**

6. Legal ethics are often understood as a body of rules based on a series of duties; a duty to the law, the Court, the client, our opponent and third parties.
7. In this way of understanding ethics the privilege rule can be seen as a part of our duty to the client, the rule against misleading the Court part of a duty to the Court, the rule against misleading our opponent as part of the duty to them and our duty to the law is that we must never breach it.
8. This concept of duty is an absolutist one that effectively excludes all other moral and ethical considerations, including the lawyer's own personal ethical and moral beliefs. It is in fact ethics as law because our 'ethical' obligations are actually strict legal obligations. The legalised nature of our legal ethical obligations means that there is no doubt that when these come into conflict with our personal morality (whether religious or otherwise), our personal morality is irrelevant. Our legal ethics simply do not permit us to allow personal morality to trump legal ethical obligations.

9. It is perhaps this exclusion of general morality (and its replacement with a system of legalistic rules) that members of the broader community sometimes struggle to accept when it comes to the legal profession.
10. Such as when people are unpersuaded as to why it is acceptable, indeed obligatory in some circumstances, to defend the guilty, even when they may have admitted guilt to the worst of offences. Or when people are shocked that a lawyer can present a defence which they positively believe is untrue and yet not consider themselves a liar.
11. Ironically then it is perhaps in part the very strictness of our 'ethical' obligations which in some ways makes the general community think we are an unethical bunch!
12. The legalistic, or rule based nature of legal ethics, as constituted by the Solicitors Rules, the Bar Rules and other aspects of legislation and common law has led some to deny that the body of rules that constitute our 'professional responsibility' is in fact a body of true ethics at all.<sup>2</sup> Dal Pont for example considers that 'legal ethics' is something else altogether from the body of rules that lawyers generally regard as their ethical code.
13. Our different legal ethical duties do and can conflict with each other and a central role of the body of ethical rules is to manage the conflict between these duties. It is often said that the duty to the Court

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<sup>2</sup> Gino Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (2001)

trumps the duty to the client. It is similarly said that the duty to the law trumps the other two duties.

14. As I will discuss below the idea of duties (to the Court, the client, the opponent, third parties and the law) as the basis of our ethical code is a useful framework analysis but it can be misleading if taken too literally or applied simplistically.
15. The idea of the duty to the Court being superior to the duty to the client can be misleading if for example the Court is in fact urging you to breach a duty to your client. In those circumstances a generalised idea of a superior duty to the Court will not justify a breach of your duty to the client.
16. Similarly, in some circumstances, the law allows you to, indirectly, mislead the Court through tactical objections to evidence that will prevent the Court from seeing the full picture or hearing relevant evidence. In *NSW Bar Association v Thomas [No 2] (1989) 19 NSWLR 193* Kirby P characterised this as a kind of legitimate misleading of the Court.
17. Thus, this concept of duties is not a substitute for detailed knowledge of what the rules allow, or prevent you from doing, in a given circumstance. You should not necessarily too readily accept an assertion that your duty to the Court means you should act to the prejudice of your client. It may be that in certain circumstances your duty to the client is unaffected by your duty to the court.

## THE BASIS OF ETHICAL AND UNETHICAL BEHAVIOUR

18. In researching this paper it struck me that the vast majority of papers, essays, instructions and the like on ethics and criminal law focus on the technical content of the obligations and their application in given circumstances.
19. The rules are presented in most with the implicit proposition that knowledge is the key to lawyer's compliance with ethics. Certainly ethical awareness and understanding is a necessary foundation to ethical conduct. This perhaps reflect the inherently legalistic nature of legal ethics discussed above.
20. However no paper I could find addressed the more difficult question of why some lawyers act unethically and why others don't. What makes a lawyer decide to mislead the Court? To assist his client to craft a false defence? To breach privilege? What are the situations where lawyers may be tempted to act unethically? Conversely, what are the factors that compel lawyers to make the right ethical decisions? A very significant factor must be personal attributes and circumstances. Professional, organisational and personal culture must also play a part. I am sure however that it often has little to do with legal acumen or capacity to understand ethical principles.
21. Perhaps writers and speakers don't like posing these questions in a way that suggests any of their audience are potentially unethical lawyers! So with the caveat that I am sure no one here is a potential unethical lawyer, in my view it is probably useful to reflect for a few moments on

why some lawyers do act unethically, and when we might be tempted, even faintly, to do so.

22. What then could be the risk factors for unethical conduct as a lawyer?

23. Putting aside general bad character, greed and addictions of various kinds (all of which have produced many spectacular ethical breaches), it seems to me that three factors in particular might produce unethical conduct:

- An unchecked and unhealthy desire to win cases. This is seen in the ‘feral’ prosecutor who refuses to disclose relevant exculpatory material, but also in the fervent defender who can’t bear to ‘lose’ and thus can’t resist “shaping” his or her instructions to maximise the chances of an acquittal.
- A desire to help the client. Unchecked and perhaps naive sympathy for a client’s plight may compel a process of reasoning that suggests that a greater right will be achieved, or a greater wrong averted, through a certain ethical breach. This could manifest as a desire to not leave a client unrepresented leading to a lawyer shutting their eyes to a conflict of interest. Or it could manifest in a lawyer coaching an accused who they believe really deserves a break, but who just can’t come up with the “right” instructions.
- Inexperience and/or a lack of knowledge of the ethical rules. Not all the rules are intuitive and a lack of understanding of the rules can lead even the best intentioned lawyer into ethical breach.

24. Perhaps the risk of breach of our ethical obligations is particularly heightened in criminal law where the issues, potential outcomes and personalities are often intense, high stakes and emotional. You will all appear against prosecutors whom it is stomach turning to lose against. You will all no doubt have clients whom you feel deeply sorry for, who you really feel need an ‘even break’ after a luck less life. You may have a client whom you believe is innocent, but who is just not coming up with “the goods” in terms of his or her instructions.
25. Ultimately maintaining ethical standards probably involves balancing dedication to the client (and your own desire to win!) with a strong degree of professional detachment and disinterest.
26. Part of the latter will be your developed ethical awareness and a practised determination to apply your ethics rigorously, even when it compromises your client’s prospects and your own determination to succeed.

## **THE IMPORTANCE OF ADVICE**

27. The importance of seeking advice on ethical issues cannot be overstated. Two legal minds are better than one. If you think you may have an ethical issue don’t try and put it out of your mind or ignore it. You probably do have one.
28. Options for advice include:

- Speak to a colleague, ALS or external, (being conscious always of maintaining privilege of course)
- Do some research (hopefully this paper will point you in the right direction)
- Ring or e-mail the Law society Ethics advice line on (02) 9926 0114 or [ethics@lawsociety.com.au](mailto:ethics@lawsociety.com.au)
- And if a matter arises in the heat of the moment in Court, ask for the matter to be stood down or adjourned for you to consider the issue. (Being mindful of course of the ethical constraints relating to what you can and cannot disclose in open Court).

## SOURCES OF ETHICAL OBLIGATIONS

29. The common law has promulgated many ethical rules and standards for lawyers.

30. For example, In *Giannarelli v Wraith*, in a passage which summarises the duty of the advocate in court, Mason CJ said:

*“The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable*



*aspersions on any party or witness or withhold documents and authorities which detract from his client's case. And, if he notes an irregularity in the conduct of a criminal trial, he must take the point so that it can be remedied, instead of keeping the point up his sleeve and using it as a ground of appeal.*

31. However the Revised Professional Conduct and Practice Rules 1995 (Solicitors' Rules) are made by the Council of the Law Society under the Legal Profession Act 2004 and codify in many respects your legal ethical obligations.
32. You will find these online at the Law Society's Website. They cover a wide range of topics and embody most, if not all, of the main common law authority on various ethical conduct issues.
33. The Rules are divided into five categories under the following headings:
  - Relations with clients
  - Duties to the court
  - Relations with other lawyers
  - Relations with third parties
  - Legal practice

## DUTIES TO THE CLIENT

34. Rule 2 concerns privilege:

### **2. Confidentiality**

*2.1 A practitioner must not, during, or after termination of, a retainer, disclose to any person, who is not a partner or employee of the practitioner's firm, any information, which is confidential to a client of the practitioner, and acquired by the practitioner during the currency of the retainer, unless*

*2.1.1 the client authorises disclosure;*

*2.1.2 the practitioner is permitted or compelled by law to disclose; or*

*2.1.3 the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a felony.*

*2.2 A practitioner's obligation to maintain the confidentiality of a client's affairs is not limited to information which might be protected by legal professional privilege, and is a duty inherent in the fiduciary relationship between the practitioner and client.*

35. Rule 3 concerns acting against a former client:

### **3. Acting against a former client**

*Consistently with the duty which a practitioner has to preserve the confidentiality of a client's affairs, a*

*practitioner must not accept a retainer to act for another person in any action or proceedings against, or in opposition to, the interest of a person —*

*(a) for whom the practitioner or the firm, of which the practitioner was a partner, has acted previously;*

*(b) from whom the practitioner or the practitioner's firm has thereby acquired information confidential to that person and material to the action or proceedings;*

*and that person might reasonably conclude that there is a real possibility the information will be used to the person's detriment.*

36. Rule 9 concerns acting for more than one party:

***9. Acting for more than one party***

*9.1 For the purposes of Rules 9.2 and 9.3 —*

*"proceedings or transaction" mean any action or claim at law or in equity, or any dealing between parties, which may affect, create, or be related to, any legal or equitable right or entitlement or interest in property of any kind.*

*"party" includes each one of the persons or corporations who, or which, is jointly a party to any proceedings or transaction. "practitioner" includes a practitioner's partner or employee and a practitioner's firm.*

*9.2 A practitioner who intends to accept instructions from more than one party to any proceedings or transaction must be satisfied, before accepting a retainer to act, that each of*

*the parties is aware that the practitioner is intending to act for the others and consents to the practitioner so acting in the knowledge that the practitioner:*

- (a) may be, thereby, prevented from —*
  - (i) disclosing to each party all information, relevant to the proceedings or transaction, within the practitioner's knowledge, or,*
  - (ii) giving advice to one party which is contrary to the interests of another;*

*and*

- (b) will cease to act for all parties if the practitioner would, otherwise, be obliged to act in a manner contrary to the interests of one or more of them.*

*9.3 If a practitioner, who is acting for more than one party to any proceedings or transaction, determines that the practitioner cannot continue to act for all of the parties without acting in a manner contrary to the interests of one or more of them, the practitioner must thereupon cease to act for all parties.*

37. Rule 10 concerns conflicts of interest:

***10. Avoiding a conflict between a client's and a practitioner's own interest***

*10.1 A practitioner must not, in any dealings with a client —*

- 10.1.1 allow the interests of the practitioner or an associate of the practitioner to conflict with those of the client;*

*10.1.2 exercise any undue influence intended to dispose the client to benefit the practitioner in excess of the practitioner's fair remuneration for the legal services provided to the client;*

*10.2 A practitioner must not accept instructions to act for a person in any proceedings or transaction affecting or related to any legal or equitable right or entitlement or interest in property, or continue to act for a person engaged in such proceedings or transaction when the practitioner is, or becomes, aware that the person's interest in the proceedings or transaction is, or would be, in conflict with the practitioner's own interest or the interest of an associate.*

## DUTIES TO THE COURT

38. Rule 17 concerns the preparation of affidavits:

### ***17. Preparation of affidavits***

*17.1 If a practitioner is:*

*17.1.1 aware that a client is withholding information required by an order or rule of a court, with the intention of misleading the court; or*

*17.1.2 informed by a client that an affidavit, of the client, filed by the practitioner, is false in a material particular; and the client will not make the relevant information available, or allow the practitioner to correct the false evidence; the practitioner must, on reasonable notice,*

*terminate the retainer and, without disclosing the reasons to the court, give notice of the practitioner's withdrawal from the proceedings.*

*17.2 A practitioner must not draw an affidavit alleging criminality, fraud, or other serious misconduct unless the practitioner believes on reasonable grounds that:*

*17.2.1 factual material already available to the practitioner provides a proper basis for the allegation;*

*17.2.2 the allegation will be material and admissible in the case, as to an issue or as to credit; and*

*17.2.3 the client wishes the allegation to be made after having been advised of the seriousness of the allegation.*

39. Rule 18 concerns the duty not to influence witnesses:

***18. Duty not to influence witnesses***

*A practitioner must not, in relation to any matter or event which is the subject of adversarial proceedings before a Court, confer with or interview:*

*18.1 the opposing party in the proceedings including a person who may be represented or indemnified in the proceedings by an insurance company; or*

*18.2 where the opposing party, or a prospective opposing party, is a corporation, any person authorised to make admissions on behalf of the corporation, or to direct the conduct of the proceedings; unless —*

*18.3 the other person, if unrepresented by a practitioner, has been fully informed of the practitioner's purpose in conducting the interview, has been advised to seek and has*

*had the opportunity of obtaining independent legal advice;  
or*

*18.4 the practitioner acting for the other person has agreed to the interview on conditions which may include the conduct of the interview in the presence of the practitioners for both parties.*

40. Rule 19 concerns being a witness in your own case:

***19. Practitioner a material witness in client's case***

*A practitioner must not appear as an advocate and, unless there are exceptional circumstances justifying the practitioner's continuing retainer by the practitioner's client, the practitioner must not act, or continue to act, in a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the court.*

41. Rule 20 concerns admissions on guilt from clients:

***20. Admission of guilt***

*20.1 If a practitioner's client, who is the accused or defendant in criminal proceedings, admits to the practitioner before the commencement of, or during, the proceedings, that the client is guilty of the offence charged, the practitioner must not, whether acting as instructing practitioner or advocate —*

*20.1.1 put a defence case which is inconsistent with the client's confession;*

*20.1.2 falsely claim or suggest that another person committed the offence; or*

*20.1.3 continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence.*

*20.2 A practitioner may continue to act for a client who elects to plead "not guilty" after admitting guilt to the practitioner, and in that event, the practitioner must ensure that the prosecution is put to proof of its case, and the practitioner may argue that the evidence is insufficient to justify a conviction or that the prosecution has otherwise failed to establish the commission of the offence by the client.*

42. Rule 21 concerns admissions of perjury:

***21. Admission of perjury***

*If a practitioner's client admits to the practitioner, during or after any proceedings, while judgment is reserved, that the client has given materially false evidence or tendered a false or misleading document in the proceedings, the practitioner must —*

*21.1 advise the client that the Court should be informed of the false evidence, and request the client's authority to inform the Court and correct the record; and*

*21.2 if the client refuses to provide that authority, withdraw from the proceedings immediately, and terminate the retainer.*



43. Rule 22 concerns bail:

**22. Bail**

*22.1 A practitioner must not promote, or be a party to, any arrangement whereby the bail provided by a surety is obtained by using the money of the accused person, or by which the surety is given an indemnity by the accused person or a third party acting on behalf of the accused person.*

*22.2 A practitioner must not become the surety for the practitioner's client's bail.*

44. Rule 23 applies a large part of the Bar Rules (Articles 15-72) to solicitors acting as advocates.

45. Article 15 concerns the efficient administration of justice and states:

*A.15. A practitioner must ensure that:*

*(a) the practitioner does work which the practitioner is retained to do, whether expressly or impliedly, specifically or generally, in relation to steps to be taken by or on behalf of the client, in sufficient time to enable compliance with orders, directions, rules or practice notes of the court; and*

*(b) warning is given to any instructing practitioner or the client, and to the opponent, as soon as the practitioner has reasonable grounds to believe that the practitioner may not complete any such work on time,*

*A.15A. A practitioner must seek to ensure that work which the practitioner is retained to do in relation to a case is done so as to:*

*(a) confine the case to identified issues which are genuinely in dispute:*

*(b) have the case ready to be heard as soon as practicable;*

*(c) present the identified issues in dispute clearly and succinctly*

*(d) limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case; and*

*(e) occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case.*

*A.15B. A practitioner must take steps to inform the opponent as soon as possible after the practitioner has reasonable grounds to believe that there will be an application on behalf of the client to adjourn any hearing, of the fact and the grounds of the application, and must try with the opponent's consent to inform the court of that application promptly.*

46. Articles 18, 19 and 20 concern the avoidance of bias and state:

*A.18. A practitioner must not act as the mere mouthpiece of the client or of the instructing practitioner and must exercise the forensic judgments called for during the case*

*independently, after appropriate consideration of the client's and the instructing practitioner's desires where practicable.*

*A.19. A practitioner will not have breached the practitioner's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing practitioner's desires, simply by choosing, contrary to those desires, to exercise the forensic judgments called for during the case so as to:*

*(a) confine any hearing to those issues which the practitioner believes to be the real issues;*

*(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 against the client's case.*

*A.20. A practitioner must not make submissions or express views to a court on any material evidence or material issue in the case in terms which convey or appear to convey the practitioner's personal opinion on the merits of that evidence or issue.*

47. Articles 21-31 concern frankness in Court. Articles 21 -23 states:

*A.21. A practitioner must not knowingly make a misleading statement to a court on any matter.*

*A.22. A practitioner must take all necessary steps to correct any misleading statement made by the practitioner to a court as soon as possible after the practitioner becomes aware that the statement was misleading.*

*A.23. A practitioner will not have made a misleading statement to a court simply by failing to correct an error on any matter stated to the court by the opponent or any other person.*

48. Article 25 concerns authorities and legislation relevant to issues to be determined:

*A.25. A practitioner must, at the appropriate time in the hearing of the case and if the court has not yet been informed of that matter, inform the court of:*

*(a) any binding authority;*

*(b) any authority decided by the Full Court of the Federal Court of Australia, a Court*

*of Appeal of a Supreme Court or a Full Court of a Supreme Court;*

*(c) any authority on the same or materially similar legislation as that in question in the case, including any authority decided at first instance in the Federal Court or a Supreme Court, which has not been disapproved; or*

*(d) any applicable legislation; which the practitioner has reasonable grounds to believe to be directly in point, against the client's case.*

49. Article 27 states:

*A.27. A practitioner who becomes aware of a matter within Rule A.25 after judgment or decision has been reserved and while it remains pending, whether the authority or*

*legislation came into existence before or after argument, must inform the court of that matter by:*

*(a) a letter to the court, copied to the opponent, and limited to the relevant reference unless the opponent has consented beforehand to further material in the letter; or*

*(b) requesting the court to relist the case for further argument on a convenient date, after first notifying the opponent of the intended request and consulting the opponent as to the convenient date for further argument.*

50. Article 29 and 30 concern client's character:

*A.29. A practitioner will not have made a misleading statement to a court simply by failing to disclose facts known to the practitioner concerning the client's character or past, when the practitioner makes other statements concerning those matters to the court, and those statements are not themselves misleading.*

*A.30. A practitioner who knows or suspects that the prosecution is unaware of the client's previous conviction must not ask a prosecution witness whether there are previous convictions, in the hope of a negative answer.*

51. Article 32 concerns client who admit they have lied to you:

*A.32. A practitioner whose client informs the practitioner, during a hearing or after judgment or decision is reserved and while it remains pending, that the client has lied in a material particular to the court or has procured another person to lie to the court or has falsified or procured*

*another person to falsify in any way a document which has been tendered:*

*(a) must refuse to take any further part in the case unless the client authorises the*

*practitioner to inform the court of the lie or falsification:*

*(b) must promptly inform the court of the lie or falsification upon the client authorizing the practitioner to do so; but*

*(c) must not otherwise inform the court of the lie or falsification.*

52. Article 33 concerns clients who confess guilt:

*A.33. A practitioner retained to appear in criminal proceedings whose client confesses guilt*

*to the practitioner but maintains a plea of not guilty:*

*(a) may cease to act, if there is enough time for another practitioner to take over the case properly before the hearing, and the client does not insist on the practitioner continuing to appear for the client;*

*(b) in cases where the practitioner continues to act for the client:*

*(i) must not falsely suggest that some other person committed the offence charged;*

*(ii) must not set up an affirmative case inconsistent with the confession; but*

*(iii) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;*

*(iv) may argue that for some reason of law the client is not guilty of the offence charged; or*

*(v) may argue that for any other reason not prohibited by (i) and (ii) the client should not be convicted of the offence charged.*

53. Article 34 concerns clients who tell you they intend to disobey a Court order:

*A.34. A practitioner whose client informs the practitioner that the client intends to disobey a court's order must:*

*(a) advise the client against that course and warn the client of its dangers;*

*(b) not advise the client how to carry out or conceal that course; but*

*(c) not inform the court or the opponent of the client's intention unless:*

*(i) the client has authorised the practitioner to do so beforehand; or*

*(ii) the practitioner believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.*

54. Articles 35-40 concern making allegations in proceedings against third parties:

*A.35. A practitioner must, when exercising the forensic judgments called for throughout the case, take care to ensure that decisions by the practitioner or on the practitioner's advice to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person:*

*(a) are reasonably justified by the material already available to the practitioner;*

*(b) are appropriate for the robust advancement of the client's case on its merits;*

*(c) are not made principally in order to harass or embarrass the person; and*

*(d) are not made principally in order to gain some collateral advantage for the client or the practitioner or the instructing practitioner out of court.*

*A.36. A practitioner must not allege any matter of fact in:*

*(a) any court document settled by the practitioner;*

*(b) any submission during any hearing;*

*(c) the course of an opening address; or*

*(d) the course of a closing address or submission on the evidence; unless the practitioner believes on reasonable grounds that the factual material already available provides a proper basis to do so.*

*A.37. A practitioner must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the practitioner believes on reasonable grounds that:*

*(a) available material by which the allegation could be supported provides a proper basis for it; and;*

*(b) the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.*



*A.38. A Practitioner must not make a suggestion in cross-examination on credit unless the practitioner believes on reasonable grounds that acceptance of the suggestion would diminish the witness's credibility.*

*A.39. A practitioner may regard the opinion of the instructing practitioner that material which is available to the practitioner is credible, being material which appears to the practitioner from its nature to support an allegation to which Rules A.36 and A.37 apply, as a reasonable ground for holding the belief required by those rules (except in the case of a closing address or submission on the evidence).*

*A.40. A practitioner who has instructions which justify submissions for the client in mitigation of the client's criminality and which involve allegations of serious misconduct against any other person not able to answer the allegations in the case must seek to avoid disclosing the other person's identity directly or indirectly unless the practitioner believes on reasonable grounds that such disclosure is necessary for the robust defence of the client.*

55. Articles 43-50 concern leading evidence and dealing with witnesses:

*A.43. A practitioner must not suggest or condone another person suggesting in any way to any prospective witness (including a party or the client) the content of any particular evidence which the witness should give at any stage in the proceedings.*

*A.44. A practitioner will not have breached Rule A.43 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 coach or encourage the witness to give evidence different from the evidence which the witness believes to be true.*

*A.45. (deleted)*

*A.46. A practitioner must not confer with, or condone another practitioner conferring with, more than one lay witness (including a party or client) at the same time, about any issue:*

*(a) as to which there are reasonable grounds for the practitioner to believe it may be contentious at a hearing; or  
(b) which could be affected by, or may affect, evidence to be given by any of those witnesses.*

*A.47. A practitioner will not have breached Rule A.46 by conferring with, or condoning another practitioner conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.*

*A.48. A practitioner must not confer with any witness (including a party or client) called by the practitioner on any matter related to the proceedings while that witness remains under cross-examination, unless:*

*(a) the cross-examiner has consented beforehand to the practitioner doing so; or*

*(b) the practitioner:*

*(i) believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require such a conference;*  
*(ii) has, if possible, informed the cross-examiner beforehand of the practitioner's intention to do so; and*  
*(iii) otherwise does inform the cross-examiner as soon as possible of the practitioner having done so.*

*A.49. A practitioner must not take any step to prevent or discourage prospective witnesses or witnesses from conferring with the opponent or being interviewed by or on behalf of any other person involved in the proceedings.*

*A.50. A practitioner will not have breached Rule A.49 simply by telling a prospective witness or a witness that the witness need not agree to confer or to be interviewed.*

56. Articles 51 to 58 concern your duty to your opponent:

*A.51. A practitioner must not knowingly make a false statement to the opponent in relation to the case (including its compromise).*

*A.52. A practitioner must take all necessary steps to correct any false statement unknowingly made by the practitioner to the opponent as soon as possible after the practitioner becomes aware that the statement was false.*

*A.53. A practitioner does not make a false statement to the opponent simply by failing to correct an error on any matter stated to the practitioner by the opponent.*

*A.54. A practitioner must not deal directly with the opponent's client unless:*

*(a) the opponent has previously consented;*

*(b) the practitioner believes on reasonable grounds that:*

*(i) the circumstances are so urgent as to require the practitioner to do so; and*

*(ii) the dealing would not be unfair to the opponent's client;*

*or*

*(c) the substance of the dealing is solely to enquire whether the person is*

*represented and, if so, by whom.*

*A.55. (deleted)*

*A.56. A practitioner must not, outside an ex parte application or a hearing of which the opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connexion with current proceedings unless:*

*(a) the court has first communicated with the practitioner in such a way as to require*

*the practitioner to respond to the court; or*

*(b) the opponent has consented beforehand to the practitioner dealing with the court*

*in a specific manner notified to the opponent by the practitioner.*

*A.57. A practitioner must promptly tell the opponent what passes between the practitioner*

*and a court in a communication referred to in Rule A.56.*

*A.58. A practitioner must not raise any matter with a court in connexion with current*

*proceedings on any occasion to which the opponent has consented under Rule A.56(b), other than the matters specifically notified by the practitioner to the opponent when seeking the opponent's consent*

## **SCENARIOS**

### **ONE - TAKING INSTRUCTIONS/THE GUILTY CLIENT**

57. Your client is charged with assault causing actual bodily harm. He is alleged to have punched a man outside a nightclub. The prosecution case is that the man was found unconscious around the corner in a lane way. The prosecution can prove that he left the club with the victim and that the victim was found there unconscious approximately 30 mins later. When you take instructions the client tells you, unprompted, that he bashed the victim because they argued in the club about money.

- What advice do you give the client?
- What defences can you run at the hearing of the matter?
- You are making closing submissions and the Magistrate asks you, “look counsel, are you running a positive defence, does your client say he didn’t do it or not?” What do you do?

## **TWO - CHANGE OF INSTRUCTIONS**

58. Your client is charged with car stealing. He has given you instructions that he denies the theft and was never in the car. He claims that the identification evidence of the police officer to the effect that he saw your client seated behind the wheel at a traffic light is incorrect. The police officer has been called and you have suggested in cross-examination they were mistaken and your client did not drive the car. Additional evidence is then served to the effect that a DNA sample matching your client has been found on a cigarette butt that was in the car. The Court refuses your application to exclude the evidence and you are simply given a short adjournment. Your client then says that he lied to you before and that in fact he did drive the car but did not know at the time it was stolen.

- Can you stay in the matter?
- Can you run the new defence?
- What do you do?

## **THREE - WITHDRAWING**

59. Your client is charged with a DV offence. He confesses the offence to you and indicates that he wants to plead guilty. He also says to you that he knows the victim will not attend Court but he wants to accept responsibility for the offence. You sign him up for a plea of guilty and the matter is adjourned for plea. When you return to Court on the next

occasion he tells you that he now wants to plead not guilty and fight the matter. The matter will be adjourned for hearing.

- Do you have to withdraw?
- How do you withdraw?
- What advice do you give?

#### **FOUR - THE RULE IN BROWN V DUNN AND PRIVILIGE**

60. Your client is charged with fraud. The allegation is that he defrauded his employer by cashing cheques named to other people. His instructions to you have been throughout that another employee must have taken the cheques and cashed them. That is the version you have put to the witnesses. The accused gets in the box and gives evidence that his employer asked him to cash the cheques and give him the money. The Magistrate becomes enraged and demands to know whether these have been your instructions throughout.

- What do you do?
- What advice do you give the client?
- Can you stay in the matter?

#### **FIVE - PRIVILIGE**

61. Your client is charged with break and enter. The prosecution disclose the brief and you see the main witness against him is an uncharged co-accused who the police have not charged on the basis he made full admissions and undertook to be a witness. You arrive at Court

on the hearing day and realise as the witness is giving evidence that you represented the person 5 years before in circumstances where you negotiated a plea deal for the then client under which he got a suspended sentence in return for giving evidence against a co-accused. You have not told you client that you have remembered this.

- Do you stay in the matter?
- Do you cross-examine?
- Do you use the information?
- Do you tell you client?

## **SIX – ACTING FOR MORE THAN ONE ACCUSED**

62. You are doing a circuit in a remote area, you are the only lawyer. Two accused are charged with house breaking, they both want to plead guilty. There is no apparent conflict. You enter the pleas. When you take instructions on mitigation it becomes apparent that one client is suggesting the other client was the instigator and main player in the crime. The other client does not say that and says it was a mutual plan.

- What do you do?
- Do you withdraw from one, or both?
- What do you tell the Court?