



Bar Practice Course

Ethics Hypothetical

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Introduction

- The idea of the hypothetical is to encourage contemplation of ethical issues. For many of the hypotheticals there are no easy answers. That is why they are ethical dilemmas.
- The hypotheticals only work with audience participation. Readers are expected to participate.
- Just because the hypotheticals explore the ethical boundaries does not mean that barristers are encouraged to live their professional lives close to those boundaries,
- Bear in mind Uniform Conduct Rules 4(b), 4(c) and 4(d):

4(b). Barristers must maintain high standards of professional conduct.

4(c). Barristers as specialist advocates in the administration of justice must act honestly, fairly skilfully and with competence and diligence.

4(d). Barrister owe duties to the courts, to their clients and to their barrister and solicitor colleagues.

Required Reading

- The hypotheticals – think about the answers to the questions. What would you do? What should you do?
- *Legal Services Commissioner v. Mullins* [2006] LPT 012
- *Bechara v. Legal Services Commissioner* [2010] NSWCA 369
- Bring a copy of the Bar Rules with you.

1. The Incompetent Solicitor

Your written advice as to necessary preparations for hearing of the matter is not acted upon by the solicitor. You discuss this with the solicitor who says that they are not prepared to spend the time and money necessary to find the witness you believe is essential to the success of the proceedings.

Nor has the solicitor issued the subpoena to produce documents you have recommended. What do you do?



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What are your obligations to the client – Uniform Conduct Rule 120:

120. *A barrister who believes on reasonable grounds that the interests of the client may conflict with the interests of the instructing solicitor, or that the client may have a claim against the instructing solicitor, must:*

- (a) *advise the instructing solicitor of the barrister's belief; and*
- (b) *if the instructing solicitor does not agree to advise the client of the barrister's belief, seek to advise the client in the presence of the instructing solicitor of the barrister's belief.*

2. Preparations

- (a) You have been ordered by the court to put on witness statements. The deadline is in 2 days. You have set aside a day to see witnesses, some of whom have travelled from interstate. On the morning the solicitor telephones you. They have found themselves tied up in court on another matter. They ask you to see the witnesses alone and draft the necessary statements. Is this appropriate? [Uniform Conduct Rule 11].

11. *Barristers' work consists of:*

- (a) *appearing as an advocate;*
- (b) *preparing to appear as an advocate;*
- (c) *negotiating for a client with an opponent to compromise a case;*
- (d) *representing a client in a mediation or arbitration or other method of alternative dispute resolution;*
- (e) *giving legal advice;*
- (f) *preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs;*
- (g) *carrying out work properly incidental to the kinds of work referred to in (a)-(f); and*
- (h) *such other work as is from time to time commonly carried out by barristers.*



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- (b) You have identified a crucial witness to your case. You advise the solicitor to obtain a proof of evidence. The solicitor reports back that this key witness cannot be located the best the solicitor can identify is a rumour that the witness may have moved to Queensland.
- Do you check White Pages online to see if you can locate a phone number for the witness in Queensland?
 - Do you call the number you find to check that you have the right person?
- (c) You are conferring with an expert witness. The expert has provided a draft report. There is no problem with the contents but the report is turgidly expressed, poorly structured and highly disorganised. Are you able to discuss with the witness the structure and presentation of the report and advise them as to better presentation? [Uniform Conduct Rule 69]:

69. *A barrister must not:*

- (a) *advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or*
- (b) *coach a witness by advising what answers the witness should give to questions which might be asked.*

The expert has provided an unfavourable opinion outside of the scope of instructions. This secondary opinion is irrelevant to the primary opinion. Can you ask the expert to delete the offending paragraphs?

Having discussed the draft report with the expert witness can you discuss with them whether they have a practice of retaining draft reports on file? Can you suggest that they review their document retention policy?

3. Negotiations

- (a) Mullins – the quadriplegic with cancer. Was what he did wrong? Why?
- (b) You are in the middle of a long and difficult trial. Your relationship with opposing counsel is fractious. You are getting nowhere in settlement discussions. On the other hand, you are very good friends with the solicitor on the other side. You are regularly briefed by that solicitor. Can you call the solicitor to talk about why the case isn't settling? [Uniform Conduct Rule 52]:



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52. *A barrister must not deal directly with a party other than his or her client who is legally represented unless:*

- (a) *the substance of the dealing is solely to enquire whether the person is represented and, if so, by whom;*
- (b) *the legal practitioner representing the party has previously consented; or*
- (c) *the barrister believes on reasonable grounds that –*
 - i. *The circumstances are so urgent as to require the barrister to do so; and*
 - ii. *the dealing would not be unfair to the party*

- (c) Prior to the informal settlement conference/mediation, the solicitor advises that the solicitor/client costs are \$100,000 and that the likely recoverable party/party costs are \$70,000.

You know from previous experience that the opposing party always tries to chisel you down on costs.

First, assume you are negotiating on a plus costs basis. Are you entitled to make an “*ambit claim*” opening offer with a quantification of costs at \$120,000?

Second, assume you are negotiating on an all-inclusive basis. You put an all-inclusive offer. You are asked what the costs component is. Are you allowed to say “*around \$120,000*”?

- (d) Before participating in settlement negotiations, you first confer with the solicitor to discuss deductions. The solicitor advises you that costs are \$200,000 and that this amount has to come out of any settlement in the client’s favour. From your own experience and judging by the size of the brief, the solicitor’s costs are grossly excessive – a realistic figure would be closer to \$100,000.

Do you say or do anything or do you leave it for the client to challenge the solicitor’s bill if they wish to do so?

4. Acting On The Client’s Instructions



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In defamation the cause of action dies with you. Your client has been defamed by a newspaper. The defamation is admitted. The newspaper has offered \$100,000 to settle.

You confer with the client. The client insists that he wants at least \$140,000 to settle the case. He gives you instructions to reject the \$100,000.

An hour later your client's wife rings. The client has had a major coronary attack. He is at hospital and doctors are operating. There is only a 10% chance of the surgery saving the client's life. The wife instructs you to accept the \$100,000. Can you accept the offer of \$100,000?

The wife calls again. The surgery has failed. The medical team are about to withdraw life support. Can you accept the offer now?

5. An Unhappy Client

The client rings you direct. She has obtained your number from the NSW Bar Association website.

The client says she is not happy with the solicitor's performance but is thrilled with you as counsel.

The client asks if you can suggest a new solicitor. You are asked not to relay this conversation to the solicitor.

- Do you discuss with the client why they are dissatisfied? Do you reassure the client that the solicitor is competent? (Assume this is your opinion).
- Do you tell the solicitor that the client has called?
- Do you discuss with the solicitor the client's dissatisfaction?
- Do you advise the client of alternate solicitors?

6. Can Your Client Do What You Can't

You're acting for the Plaintiff in a claim for damages. The Defendant is insured. The Plaintiff and Defendant remain friends despite the litigation.

It is a tricky case on liability. You would be considerably assisted by knowing what the Defendant was likely to say in evidence.



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The Defendant's insurer is represented by solicitors and counsel. Clearly you cannot approach or speak to the Defendant (Uniform Conduct Rule 52). However, experience tells you that the insurer was likely to have initially appointed investigators or adjusters to take a statement from their insured.

- Can you ask your client to speak to the Defendant and find out what he might say in Court?
- Can you ask your client to ask the Defendant for a copy of his statement?

7. Joint Advice On Evidence

You are briefed to appear with Senior Counsel. At 9.00 am one morning you receive a phone call from Senior Counsel who says: *"The solicitor is chasing us for a joint advice on evidence. I am in court all day and won't have a chance to look at it. Can you please draft something and I will check it when I get back after 4.00 pm?"*

At 4.30 pm, Senior Counsel calls you, praises you for the quality of the joint advice and says that there are no changes to be made. This advice is emailed off to the solicitor as having come from both counsel (the joint advice on evidence).

Later in the case, Senior Counsel sends you a copy of his account which states (amongst other entries): *"Joint advice on evidence – 1 day - \$5,000"*.

Assume that Senior Counsel is charging by time, rather than by event. Is Senior Counsel overcharging? What (if any) are your obligations? What do you do?

8. Duty To The Court

Note that counsel is entitled to confer with a witness prior to re-examination. The prohibition on speaking to your own witness ends with cross-examination.

You have an expert under cross-examination. You believe the cross-examination has been successful but the expert is very slippery. You have reached the end of your cross-examination and it is 3.40 pm.

If you end the cross-examination your opponent is likely to ask meaningless questions until 4pm and then confer with the witness overnight. You are concerned that the expert will return the next day having had a lengthy conference with opposing counsel to patch up the damage your cross-examination has inflicted.



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On the other hand, if you ask meaningless questions until 4pm and keep the witness under cross-examination overnight, your opponent will not have the opportunity to have a lengthy conference with the expert and will therefore be less effective in repairing the damage. The judge is unlikely to allow anything other than a short adjournment in the morning for your opponent to confer with the witness before re-examination. Can you “*bat for stumps*” by dragging out your cross-examination for twenty minutes? [Uniform Conduct Rule 58]:

58. *A barrister must seek to ensure that work which the barrister is brief to do in relation to a case is done so as to:*

- (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.*

9. The Application To Disqualify

You act for one of two defendants in proceedings. In your view the judge’s conduct of the case has been outrageous with continued interference with the presentation of the defence case. The judge has peremptorily rejected questions in cross-examination and has unfairly restricted the scope of cross-examination. There have been intemperate rumours from the bench demonstrating prejudgment of the issues. You are firmly of the view that your client has not received a fair trial and nor has the co-defendant.

However, despite this, you suspect the trial judge is likely to let your client off (albeit probably on misconceived grounds). The other defendant looks likely to get potted.

Counsel for your co-defendant makes an application to the judge to disqualify himself or herself. The application is on the basis of demonstrated bias.

Your professional opinion is that the judge has shown bias against your co-defendant. However, the judge is also likely to find in favour your client. Do you join the application for disqualification or do you stay silent?

What do you do if in the course of the application the judge directly asks you – “*Have I been biased in the hearing of this matter?*”

10. How Far To Go For Information You Want?

It is Friday. You have a big case listed for Monday and are engaged in settlement negotiations.



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Your opponent's enthusiasm for settlement creates the suspicion in your mind that he is jammed. It would strengthen your hand in the negotiations to know your opponent's position.

- Do you directly ask your opponent? If so, do you expect them to answer truthfully?
- You have a vague recollection that your opponent was involved in a long running and yet unresolved commercial matter in Canberra. You are friends with one of the other counsel appearing in that case. Do you ring them to find out if that case is re-listed for hearing on Monday?
- Can you ask your instructing solicitor to ring your opponent's clerk under the pretext of having a brief for Monday to check your opponent's availability?

11. Duty Verses Collegiality

Your solicitor has asked you to appear as a call-over to ensure that a week-long trial (for which you are briefed) is set down at the earliest date convenient to you. The client is desperate to have the matter heard as soon as possible.

Your opponent is a colleague against whom you regularly appear. There have been previous occasions where she has co-operated in meeting your convenience in the listing of matters.

Your opponent doesn't have a week available for another two months. Both you and the Court are able to have the matter heard in a month.

- What do you do at the call-over?

12. Misleading the Court

You are appearing on an interlocutory application. Your opponent hands up a one page extract from a High Court decision. Your opponent tells the Court that one particular paragraph supports a legal proposition for which your opponent contends.

You win the application. Upon returning to chambers you look at the High Court decision. Having had a chance to read the decision in full you determine that the extract handed up to the

Judge was not the ratio of the case. Rather, it is obiter dicta comment from Justice Kirby in a dissenting judgment.

- What (if anything) do you do?



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13. Judicial Conflict

Prior to the hearing commencing the judge calls you and your opponent to chambers. The judge discloses that her daughter and your opponent's daughter are in the same debating team at high school. The judge does not believe this is a conflict but is disclosing for abundant caution.

- Do you object to the judge hearing the case?
- Is this an issue on which you take your client's instructions?

14. The Inattentive Opponent

After lunch you are leading evidence in chief from your key witness in a commercial case. Your opponent doesn't appear to be paying much attention and from time to time appears to drop off to sleep. There are no objections when you ask leading questions and adduce hearsay evidence. Your opponent is being instructed by an inexperienced paralegal. Walking back to Court at the end of the lunch adjournment you had observed your opponent in the hotel across from the Court. There was a large number of empty glasses on the table. You suspect that your opponent has been drinking.

- What (if anything) do you do?

15. The Injudicious Judicial Question

You appear for the insurer in a personal injury claim. You are cross-examining the Plaintiff. Midway through your cross-examination the judge interrupts with a question:

"Madam, I see from the reports tendered that you have been in receipt of social security benefits for the past four years. I also see that you have been working as an escort. Were you paid cash for the escort work and did you declare those earnings to Centrelink?"

Your opponent does not object immediately to the judicial question. Your insurer client would clearly be delighted if the Judge made adverse credit findings against the Plaintiff on the basis that she had committed social security fraud.

- What (if anything) do you do in response to the question?



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16. Can You Avoid Hearing What You Don't Want To Hear?

Uniform Conduct Rules 29 and 31 impose a duty to advise a Court as to unfavourable authorities.

You have run a case brilliantly. Your opponent has just concluded submissions and could find no authority in support of his arguments. The Court adjourns for lunch prior to you making submissions. The Judge is not a noted legal researcher.

Over lunch you are regaling a colleague (barrister B) with your heroic efforts in the case. Your colleague says:

"Maybe you shouldn't be so confident... I think a Judge in the Supreme Court said something about that issue last week... On reflection, maybe you don't want me to tell you any more."

- What (if anything) do you say then?
- What if you are barrister B? Do you tell your colleague about the case that may destroy their prospects?

17. Conflicting Duties

You act for a Plaintiff. The case has been lost, principally because the Plaintiff's evidence did not come up to proof. Having appeared at trial you are again retained to appear on the costs argument which has been separately listed. The Defendant is seeking indemnity costs and a personal costs order against the solicitor pursuant to the provisions of the *Legal Profession Uniform Law*.

The solicitor instructs you to oppose the indemnity costs application and to oppose any costs order against the solicitor personally as it is the client's fault that the case was lost. The judgment reflects that the loss was entirely attributable to lies the client told the court. He had told you and your solicitor the same lies.

- Do you appear on the costs application?
- What submissions do you make on the costs application?