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Since these answers were written the law may have changed and/or the subject may have changed. Additionally, the student may have made some mistakes in their answer, despite their good mark.

Therefore DO NOT use this script by copying or simplifying part of it directly for use in your exam or to supplement your summary. If you do so YOUR MARK WILL PROBABLY END UP BEING WORSE!

The LSS is providing this script to give you an idea as to the depth of analysis required in exams and examples of possible structures and hence to provide direction for your own learning. Please do not use them for any other purposes - otherwise you are putting your academic future at risk.

Question 1a

Over the years numerous attempts have been made by the state, professional legal bodies and lawyers to rehabilitate what has often been an unpopular profession in the eyes of the public. Nonetheless, sentiments of the Byzantine era that lawyers guide clients through expense, delay and disappointment until their clients dismiss them or run out of money are still common. If nothing has changed despite people's best efforts to change lawyers' conduct, it can only be concluded that these views are the result of systemic problems. The chief problem for lawyers in this regard is that they act as both the public face of and many people's only conduit to the legal system. While greedy lawyers may always form at least a minority (Fox), the costs and delays associated with the court system generally flow from the system and its structure.

As Fox notes, costs stem primarily from three sources: costs to the government of providing staff and facilities, costs to litigants including lawyers' fees, and cost to the state of supporting the disadvantaged via Legal Aid. The first and last of these are passed on to litigants in the form of court fees and other costs. The result of this is that litigation has become prohibitively expensive for a large proportion of the population. While lawyers are only one part of the problem, they receive much of the blame.

In truth though, to the extent that lawyers are responsible, it is the structure of the profession that is problematic. Lawyers have a monopoly over many types of work and bodies such as the NSW Law Council have been very successful in preventing encroachment on this. Neither these organisations nor legislative instruments, however, set guidelines as to how lawyers should charge, as Fox suggests. Thus, a monopolistic entity can charge whatever it likes for its services without fear of competition entering the

market. In any other industry, simple economics would have rendered this state of affairs unworkable decades ago.

While the issue of costs may be structural – i.e. based on the structure of the courts and the profession – the issue of delays is systematic. The common law adversarial system is based around practices which are monumentally inefficient on a day-to-day basis (Bottomly & Parker). As Bronitt and McSherry point out, this is largely due to the stress on due process in proceeding and is required to maintain fundamental principles of the legal system (esp. the criminal justice system). The result, however, is both increased costs and delays resulting from stringent procedural rules, frequent adjournments and other considerations. The Australian Law Reform Commission's 'Review of the Adversarial System of Litigation' observes that in the adversarial system, the burdens of expense and effort fall squarely on the parties.

The combination of high costs and delays with associated problems such as debt, stress on domestic relationships and mental strain are severe enough when a party is successful at first instance. The near automatic appeals involved in suing a corporation or public entity make the problems all the more acute. The common criticism of the adversarial system (as opposed to an inquisitorial model) that what matters is who has more money and a better lawyer rather than the truth is a by-product of this (Parkinson). All of this translates to tremendous disappointment and disillusionment with the system for a great many laypeople who encounter it.¹

Lawyers, as the ALRC paper clearly states, are the 'gatekeepers to litigation'. The costs of the litigation most obviously manifest as the cost of hiring a lawyer; while after being retained it is their job to guide a client through a system that militates against expedient process and satisfaction. It is understandable that to an extent systemic problems are inevitable. But if systemic problems are the root of Gibbon's repeated sentiments, one would expect the public to perceive the legal system – not lawyers – negatively. The reason that this is quite the opposite is the problem presented in the arts as 'halls of justice painted green' (Hetfield)² – the appreciation of structural effects but not necessarily their causes.

Here, however, lawyers are hardly powerless. As Fox suggests, professional legal bodies could set scales of charges which would force those charging higher fees to question what their services are really worth. They could accede to governments' removal of restrictive practices such as enforced monopolies and the removal of the split profession (as recommended by the NSW Law Reform Commission). Governments can continue to steer prospective litigants into alternate dispute resolution and cheaper tribunals.

At the end of the day, however, the legal profession might charitably be said to be steeped in tradition, or, at worst, in greed. The vigour with which Law Societies and Bar Associations have defended the status quo makes it questionable as to whether lawyers will have the resolve to address structural considerations. Until they do, however, it will be difficult to examine the broader systemic issues of the adversarial system.³

78% (no general comment)

¹ This earned me two ticks and the comment 'Good relating to Q.' [sic]

² This is from a Metallica song. While I still feel that its insertion was a valid example of common perception manifested in the arts, I chose to identify a songwriter rather than the band.

³ 'Good technique, addressing the question and using sources'

Question 2

Both of Archie's clients as well as the one for whom he acts in the ACT Magistrate's Court raise ethical issues and issues of professional responsibility. It is most useful to consider them separately.

Greg (of Slap-Dash Builders)

Greg's frank admissions that he plans to cut corners which will render the preschool unsound and use asbestos sheeting present issues of confidentiality. Ordinarily, there is no way that Archie could disclose privileged information, as per the NSW Law Society's Model Rules, rule 3.1 and reinforced in decisions such as *Tuckiar*. However, here there is an exception.

Rule 3.1.3 states that the practitioner may disclose information that he would probably be compelled to disclose by law for the purpose of avoiding the commission of a serious criminal offence.

Nevertheless, the lawyer has a general duty to zealously serve a client's interests competently and fairly (rule 1). Corporate contracts are also very likely to be of high value to the firm. I would therefore advise Archie to first discuss with Greg that what he is planning to do is unsafe and illegal and urge him to not go forward in that manner. If he would not listen to Archie, a more senior member of the firm could discuss it with him and explain the consequences of his actions. If this were unsuccessful, however, Archie would have little option but to inform either the police or the building authorities that Greg planned to use asbestos.

Acme Holdings

Bob the Builder's solicitor's question puts Archie in a difficult position. While he is authorised to offer \$900,000, there is a general duty to act zealously to protect the best interests of the client (Ipp J, Model Rules 1, 12). The difference between \$650,000 and \$900,000, as would be the difference if he negotiated to halfway (i.e. \$775,000). It is clearly in the client's interest to pay less – but it is also in the client's interest to avoid going to court.

I would therefore advise Archie to attempt to avoid the question and renegotiate up from \$650,000, but if pressed he may have no other option but to admit that he is authorised to pay \$900,000 to avoid his client having to go to court.

The Client at the Magistrate's Court

1. The ACT Supreme Court Decision

While failure to disclose facts in court is not misleading per Model Rule 14.10, failure to disclose authority is. While Archie has to advocate zealously in his client's best interest, Rule 14.6.2 states that he must inform the court of a full Supreme Court decision even if it goes against his client's case.

Here there may be a temptation to consider it the other party's problem and remain silent. However, if the case is appealed it could come to light, leading to disciplinary trouble in future for Archie. The language of *Giannarelli v Wraith* makes it clear that the performance of paramount duty to the court may force a practitioner to act in a number of ways detrimental to their client. Such a duty is stated as paramount in all authority from the Model Rules to Ipp J's commentary and judgments such as Mason CJs in *Giannarelli*.

Thus, I would advise Archie that he has little option but to follow the procedure set out in rule 14.8 – either to send a letter to the court advising them of the decision, or to request re-listing for further argument.⁴

2. The Witness

Archie's duty to the court is absolutely paramount in this situation (*Giannarelli v Wraith*). As per *Nix v Whiteside*, the gist of the Model Rules on 'delinquent or guilty clients' are not discretionary – Archie MUST NOT be a party to perjurious testimony. Given the lack of discretion proscribed in Rule 15.1 and the courts' dim view of such conduct, he should follow the procedure set out in that rule:

- i. Advise the client to inform the court
- ii. Refuse to take part if he does not
- iii. Inform the court if the client authorises him to do so
- iv. Not do so if the client does not

If the client does not authorise Archie to inform the court of the witness's false statement, he is forced to withdraw, but may not inform the court (*Tuckiar*) despite a tendency towards courts demanding the full truth in matters (*Vernon v Bosley No. 2*).

There is an ethical issue here – if Archie withdraws, the court will suspect at least the gist of the reason why. Archie should raise this with the client when urging him to report the perjury in accordance with his need to serve his client's best interests (Rule 12.1); but should not hesitate to withdraw if the client will still not authorise him to disclose the perjury to the court.

70% ('a sound paper, issues clearly and amply discussed')

⁴ The reference to authority is ticked, but the words 'a letter to' and 'decision or' are encompassed in a circle – they were on consecutive lines, I have no idea what they are supposed to refer to unless I have made a procedural mistake here.