# Ethics

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1. Introduction

1.1. The concept of legal ethics

- The term, 'legal ethics' is subjective. Instead, the term 'professional responsibility' is often used.

- Ethics is concerned about what is right, fair and good. Three fundamental values required to practice law ethically include:
  - Respect - Respecting the rights and dignity of others;
  - Justice - Treating others fairly and compassionately; and
  - Honesty and Integrity - Being truthful, honest and loyal in all relationships

- But why act ethically? There are two justifications;
  - Consequences - if you don’t act ethically, there will be consequences (breaking the law, losing public trust, etc).
  - Duty - Because as lawyers, we have a duty to be responsible and to do the right thing.

1.2. Sources of Lawyers’ Professional Responsibility

General Law

- The lawyers’ relationship with clients, court and third parties is covered by general law, which can include contact, tort and equity. Examples include;
  - Tort - duty of care to clients.
  - Fiduciary law - impacts on the retainers that a lawyer can and cannot accept, and the disclosure he or she must make.
  - Contract / Equity - Lies at the core of the lawyer / client relationship. Also prevents lawyer from acting against former clients.
  - Doctrine of professional privilege - applies to challenging ethical issues that impact lawyers.

Statute

- Lawyers are subject to many statutory obligations. In each jurisdiction, legislation has been enacted to regulate the profession, prescribe disciplinary processes, establish parameters for legal practice, and casts on lawyers various obligations to clients.

  - Model Laws Trend (2004): Historically, there was little uniformity between jurisdictions. In 2004, model laws were developed by the Standing Committee of Attorneys-General. These model laws were introduced to;
    - Enable integrated delivery of legal services on an Australia-wide basis;
    - Streamline State and Territory regulation to allow lawyers to practice seamlessly within Australia;
    - To enable Australian law firms to compete nationally and internationally; and
    - TO encourage competition, leading to greater choice and other benefits for consumers.
- Post-Model Laws (2011): Legal Profession National Law was developed, in an attempt to further draft uniform laws regulating the legal profession.

- In 2015, Victoria and New South Wales signed the first Legal Profession National Laws, allowing 75% of Australia’s legal profession to work uniformly.

- To date, other states have yet to indicate they are willing to join the National Laws.

Professional Laws

- Creation of ‘rules’.

  - The first ‘codes of professional ethics’ were adopted in WA and SA in the mid-1980’s.

  - In 1994, the NSW Law Society said that they saw no need for a code, because “the standards of conduct expected of a solicitor are well known and understood by the members of the profession and the public”.

  - However, since then, all Australian states - except Tasmania - have implemented some form of professional conduct rules.

- Moving Towards Uniformity

  - The trend towards uniform laws have influenced the content of professional rules.

  - For example, the Law Council of Australia introduced the *Model Rules of Professional Conduct and Practice*, which were accepted in NT, ACT, NSW, SA, QLD and VIC. TAS and WA chose to follow their own schemes.

- Role of Professional Rules

  - Professional rules serve as a standard of conduct in disciplinary proceedings, as a guide for action in a specific case, and as a demonstration of the profession’s commitment to integrity and public service - *Dal Pont, “What are Rules of Professional Conduct For? [1996] 256-66*

  - They are a “reliable and important indicator of the accepted opinion of the members of the profession” - *Chamberlain v Law Society of the Australian Capital Territory (1993)*

  - The rules provide guidance on issues of professional responsibility, aiding lawyers to answer questions or resolve dilemmas of that kind. They can therefore be used by lawyers to *justify their actions as the professionally correct approach*.

  - The rules are also a *public relations document*, highlighting the seriousness in which lawyers view their professional responsibilities, and helps the community to place trust and confidence in the profession.

  - The rules cannot, however, *supplant legal principles set out in judicial decisions* and they cannot *provide a private cause of action against the lawyer*.

1.3. Ethical Orientations to Legal Practice

Differing Models of Ethical Orientation

- Adversarial Advocate - *Advance your client’s interest with the maximum zeal permitted* by the law. *Pay the barest obligation to legality.*
- Responsible Lawyer - The responsible lawyer is an ‘officer of the court’. Duties to the court and to justice are paramount. Advocates for the client, but overriding duty is to maintain justice and integrity of the legal system. Approaches law work as fair and just as possible.

- Moral Activist - The proper priority of lawyers is to improve and reform the law in the interests of justice. The moralistic lawyer focuses on public interest lawyering, law reform activities.

- Ethics of Care - The justice system is so dysfunctional, that the proper and only realistic duty of lawyers is to actively care as best they can for all participants. The lawyer and client preserve their relationships and avoid harm.

1.4. Teaching Ethics in Legal Education

Valuable Concepts - In practice, a lawyer must use all three.

- Rules - Knowledge of the rules, understanding of when they apply. The black letter rules, and their application. But being an ethical lawyer is more than obeying the rules. Ethics are not what the lawyer knows he should do; but ethics are what a lawyer does - Brennan J, HCA.

- Skills - Professional element, recognise and resolve ethical dilemmas.

- Judgement - Collection of approaches, oriented towards virtue-based conception of lawyering. Questions the scope and utility of rules, and uses discretionary decision making.
2. Overview of Lawyers’ Responsibilities

2.1. Duty to Obey and Uphold the Law

**Lawyers should avoid involvement in unlawful conduct**

- As participants in the administration of justice, lawyers must foster respect for the law and its administration - *Re B per Moffitt P*.

- This duty is more extensive than the duty for ordinary citizens, because it includes a responsibility for the legality of the conduct of others in certain circumstances.

- Lawyers may criticise the law, but must not do so in a manner that undermines the law or public confidence in it.

- The duty to the law is reflected in the rules of professional conduct.

- **Re Crowley (2009) WASAT 205**

  - Facts: Crowley (a lawyer) was employed by the Commonwealth DPP to prosecute Alan Bond. He needed obtain the consent of the Cth AG to proceed. Crowley then contacted Alan Bond’s son and offered to give him confidential documents if John paid $2m. John Bond said no, and instead gave the documents to the Federal Police.

  - Issue: Prospector was involved in unlawful conduct. What are the implications?

  - Decision: Crowley found guilty on two charges and imprisoned for 15 months. The trial judge said there ‘was no worse offence a prospector could commit than to sabotage a prosecution’. The offences ‘struck at the heart of the administration of justice and it was obvious that Crowley was not a fit and proper person to remain a member of the legal profession’. The WA Court system also barred his licence, and struck him off the Court list.

- **LPCC v Segler [1999] WASCA 164**

  - Facts: Segler (a lawyer) successfully sued his former landlord for recovery of a rental bond and obtained a court order for $500 to be paid within 7 days. The following day, he wrote to the landlord and demanded payment within 1 day, and made threats to refer the matter to the DPP, accusing him of criminal offence of perjury.

  - Issue: Was Segler guilty of unsatisfactory conduct?

  - Decision: Yes. Segler had sent a letter containing threats and inappropriate and intimidating demands. ‘Threatening criminal proceedings when there is no basis is unacceptable, and it amounts to unprofessional conduct’.


  - Facts: Sampson (a lawyer) acted for video stores to recover debts from hirers. She sent 20,000 notices to clients, threatening that not paying the fine would incur additional expense (legal costs, etc). Many clients raised concerns about the notices, claiming they were misleading.

  - Issue: Was the notice misleading conduct? Were the representations misleading?
Decision: Yes, the representations were misleading. She claimed many things, such as that state laws would prohibit the client from bringing legal action, etc. She was forced to contribute $30,000 to the ACCC’s court costs and post corrective notices in newspapers.

‘Lawyers need to be careful when sending notices or letters of demand which cross the line, of being misleading or intimidating’.

Statute: Sampson was in breach of r 28 of the Professional Conduct and Practice Rules 2005, which provides that (28.1) a practitioner must not make a representation to another person that the practitioner knows is not true, or (28.2) make a statement that is calculated to mislead or intimidate the other person. (Also ASCR r. 34, Dealing with Other Persons).

Lawyers should advise clients against unlawful conduct

- Lawyers should COUNSEL CLIENTS against breaching the law and avoid PERSONAL INVOLVEMENT themselves.
- If you suspect that the client will disregard your advice and break the law, it is recommended that the lawyer;
  - Advise the client against engaging in unlawful conduct.
  - Consider the current conduct rule in relation to confidentiality; and
  - If your client persists, terminate your instructions - LPCC v Segler (2009)
- Consequences of involvement could include fines, being suspended or dis-barred, or prosecution.
- CIVIL LIABILITY:
  - Fiduciary or trust breaches: Lawyers who carry out client instructions that involve a FIDUCIARY or TRUST BREACH may be found personally liable if they possessed the requisite knowledge that the property was being transferred in breach. This civil liability is personal and unlimited.
  - Giving poor or incorrect legal advice: In giving advice, the lawyer may be liable in tort as an agent of the client for misrepresentation under statute for misleading and deceptive conduct.

Criminal LIABILITY:

- Aiding criminal actions: If a lawyer aids or abets a client’s criminal actions, he will be criminally responsible for those acts as a party to the offence. However, courts have noted that merely giving advice is usually insufficient to attract criminal sanction - Commissio v United Telecasters Sydney [1999], where a lawyer who simply gave advice as to the ‘likely’ consequences of defamation was found incapable of being an accessory to the eventual act of defamation.

Examples:

- Illegal transfer of money. Where money is handed to the lawyer in suspicion that it stems from criminal activity, the lawyer should question the client regarding its source. If the lawyer is not satisfied with the result of that questioning, the lawyer should decline to handle the money. There is also a duty imposed by the Financial Transactions Reports Act 1988 (Cth) to report cash transactions of $10,000 or more entered into by lawyers - s 15A(1).
- **Client using false names.** A lawyer should enquire where he or she suspects that a client has given a false name for a trust account, as this might have been done to conceal money for an unlawful purpose. Similarly, allowing a client to plead to a criminal charge in a false name may lead to the lawyer being convicted for attempting to pervert the course of justice.

- **Knowledge that client is using premises for illegal purposes.** Lawyer not allowed to act in any way that furthers that purpose. For example, cannot prepare a lease of those premises for use for an illegal or unlawful purpose - *ACT Law Society Ruling, Illegal or Unlawful Use of Premises, June 1985*

  **Lawyers must not advise clients of ways to achieve an unlawful purpose.**

- **Lawyers MUST NOT tender advice to a client that he or she knows is attempting to achieve an illegal purpose. Furthermore, a lawyer MUST NOT advise the client as to ways in which an unlawful purpose may be ACHIEVED or CONCEALED.**

  - If a client threatens to disobey a court order, the solicitor must;
    - Advise the client against that course and warn the client of its dangers - ASCR 20.3.1
    - Not advise the client how to carry out that action - ASCR 20.3.2
    - But no need to inform the court unless i) the client has authorised the solicitor to do so, or ii) the solicitor believes that the clients’ conduct constitutes a threat to a persons safety - ASCR 20.3

2.2. Legislation and Rules

- **Fundamental Duties of Solicitors - ASCR rr 3-6**

  - **ASCR 3 - Paramount Duty to the Court and the Administration of Justice** - A solicitors duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

- **Advocacy & Litigation - ASCR rr 17-29**

  - **ASCR 17 - Avoidance of Personal Bias** - Solicitor must exercise his duties independently, and must not make submissions to court on the basis of his/her personal opinion.

  - **ASCR 18 - Formality Before the Court** - Solicitor must not deal with a court on terms of informal personal familiarity which may give the appearance the solicitor has special favour with the court.

  - **ASCR 19 - Frankness in Court** - Solicitor must not deceive or knowingly or recklessly mislead the court. Must take steps to correct any misleading statements he has made to the court (but not required to correct opponents’ errors). If seeking *ex parte* relief, solicitor must disclose all factual or legal matters within the solicitors’ knowledge. Also professional privilege.

  - **ASCR 20 - Client Lies / Client Guilty** - If solicitor learns that client or witness has lied, falsified a document, or suppressed evidence, the solicitor must advise the client that the court should be informed of the lie, and refuse to take any further part in the trial unless the client comes clean. **If a client pleads not guilty, but tells solicitor he is guilty, the solicitor is entitled to stop acting for the client.**

  - **ASCR 21 - Responsible Use of Court Process & Privilege** - Solicitor must take care to ensure that his advice to the court is reasonably justified by the material, is appropriate for the robust advancement of the clients case, and is not made to harass, embarass, or gain an ‘out of court’