

Lawyers, Ethics and Justice Notes

Main sources of ethical obligations

Personal ethics	Own identity, values, experience, skills
Professional conduct principles	“Law of lawyering”: the published rules and regulations that apply to lawyers and the legal profession
Social ethics	General moral theory: philosophical work devoted to understanding what it means for something to be good or right or a duty, esp. in relation to justice, social and environmental responsibility, minimising harm and respecting others

Four major philosophical theories of ethics

Deontological ethics	<ul style="list-style-type: none">• Kant• “Always treat others as they would want to be treated themselves”• ‘Right’ actions and policies are those that primarily respect individual autonomy by promoting fairness.• Categorical imperative (absolute and unconditional requirement) that people never be treated merely as a means to an end, but always as ends in themselves.
Teleological/utilitarian ethics	<ul style="list-style-type: none">• Jeremy Bentham and JS Mill• The good ends of an action can justify the means used to obtain those ends, even if they involve otherwise unfair treatment of individuals or organisations• Rights actions or policies are those that maximise good consequences and minimise bad consequences• Ethical actions are those that produce the greatest good for the greatest number of those affected by a situation
Virtue ethics	<ul style="list-style-type: none">• Aristotle• Shifts the focus of ethical attention from particular conduct and its impact onto the inherent quality or character of the actor.• Right character as a personal virtue: what kind of person should I be in order to be a good person? (# other theories: what is a good action?)
Ethics of care	<ul style="list-style-type: none">• Carol Gilligan• Focuses attention on people’s responsibilities to maintain relationships and communities, and to show caring responsiveness to others in specific situations.• Emphasises the interdependence of humans and the importance of sensitivity and emotional response in ethical action.

3-step process of ethics decision-making

1. Awareness	Be aware of ethical issues that arise in practice, and our own values and predispositions
2. Analysis	Make a choice between the range of standards and values that are available to help resolve those ethical issues
3. Application	Implement that resolution in practice

4 models of lawyering

1. Adversarial advocacy	Lawyers’ duty is to advocate client’s interests as zealously as possible within the bounds of the law (barest obligation to legality)—let the chips fall where they may. Extends beyond adversary role to ensuring client autonomy in a complex legal system as required by the rule of law.
2. Responsible lawyering	Duties of advocacy are tempered by duty to ensure integrity of and compliance with the spirit of the law; to ensure that issues are not decided on purely procedural or formal grounds but substantive merits. Lawyer is responsible to make law work as fairly and justly as possible. May need to act as gatekeeper of law and advocate of legal system against client.
3. Moral activism	Lawyer should take advantage of their position to improve justice in two ways: 1) public interest lawyering and law reform activities to improve access to justice and change the law and legal institutions to make the law more substantively just in the public interest; 2) client counselling to seek to persuade clients of the moral thing to do or withdraw if client wants something else.
4. Ethics of care	Preserving relationships and avoiding harm are more important than impersonal justice. The value of law, legal institutions and institutional roles of lawyers and others are derivative on relationships. People and relationships are more important than institutions such as law. The goal of the lawyer-client relationship (like all relationships) should be the moral worth and goodness of both lawyer and client, or at least the nurturing of relationships and community.

Interviewing skills

J Barkai (1984) ‘Active Listening: One Way to be a Better Advocate, Counsellor and Business Person’ 20 Trial 66.

Active listening	<ul style="list-style-type: none">• Active listening requires that an attorney listen carefully to his client’s story and respond in a way that makes the client feel that he has been understood; it
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	improves rapport between a lawyer and his client and encourages the client to talk (73) <ul style="list-style-type: none"> • Accuracy: whether the listener correctly identified the content or the feeling expressed by the speaker (78) • Intensity: whether the listener correctly identified the strength or level of the feeling expressed (79) • Form: whether an introductory phrase was used to begin the active listening response; (79) • E.g. “I can understand...”; “It seems that...”; “As I see it...” Attorneys should discontinue the practice of introductory phrases, as they attract attention and seem phony rather than emphatic. (80) 	
Discrimination	The ability to understand cognitively the client’s statement (74)	
Communication	Communicate back to the client what the lawyer has heard from the client (74)	
Analysing client’s statement	<ul style="list-style-type: none"> • Content: comprised of the people, places, things, and experiences that usually are considered facts • Feelings: emotional dimensions of the client’s statement; clients feel unjustly accused, harassed, tormented, or guilty. (75) 	
Roadblocks	<ul style="list-style-type: none"> • Questions: bombarding a client with questions, especially leading questions requiring only one word answers, adversely affects a client’s openness and willingness to communicate (82) • Reassurance: talking about getting over the problem in the future ignores the client’s present state and demonstrates a failure to see the matter from the client’s perspective (82) • Advice: by immediately telling the client how to solve the problem, the lawyer conveys the message that the client is incompetent (83) 	
R Hyams, S Campbell & A Evans, <i>Practical Legal Skills</i> (4 th ed, Oxford University Press, 2013), ch 2.		
First stage: listening	“Listening, at least in the initial stage of any interview, means the interviewer suspending his own preoccupations, suppressing a tendency to anticipate, resisting the temptation to create what may turn out to be pre-emptive hypotheses, and not getting too concerned about what appear to be logical inconsistencies in the client’s story” (18).	
Second stage: questioning	<ul style="list-style-type: none"> • Open and closed questioning: the ‘funnel sequence’—the use of wide, non-specific questions at the beginning, and then precise and explicit questions as the issues are refined and narrowed (23) • Summarising the facts (30) 	
K Lauchland (1996) ‘The Importance of Good Communication’ in K Lauchland & M J Le Brun (eds) <i>Legal Interviewing: Theory, Tactics and Techniques</i> (Butterworths, 1996), ch 3		
Communication facilitators	<ul style="list-style-type: none"> • Intentional listening: non-verbal cues (47) • Body language: eye-contact (48) • Active listening: reflecting and reframing (50-51) • Appropriate questioning: open, closed, narrowing, clarifying, reflective/emphatic, leading, hypothetical, value-laden, neutral (54-55) • Summarising: prompt client, seek clarification, aid recollection, move interview process (56) • Verbal tracking: directing course of conversation (56) 	
Communication blockers	Avoid legal jargon, use plain English (58)	
M. C. Gentile, ‘Values-Driven Leadership Development: Where We Have Been and Where We Could Go’ (2012) 9 <i>Organisation Management Journal</i> 188, pp. 192-194 (192)		
Reframing questions	Traditional approach	GVV approach
Different question	What is the right thing to do in a particular situation?	Once we know what we think is right, how can we get it done?
Different problem focus	It’s the “grey” issues where it’s just not clear what the right thing to do may be.	It’s the so-called “black and white” issues where we know what we think is right but don’t know how to get it done
The “thought experiment”	Persuasion and preaching (thou shalt not)	Asking “what if” you wanted to act on your values; issuing an invitation to create a effective ethical action plan
The importance of rehearsal	Intellectual exercise of analysis only (learn to act)	Voicing those scripts and action plans, out loud, in front of peers (act to learn)
Different type of case study	Long description focusing on senior manager or CEO; conclude with question of what is the right thing to do	Briefer with protagonists at all levels; conclude with question of how to get the right thing done
Prescribing and implementation	Focus on analysis for decision making	Focus on scripting a workable alternative
Different use of research	Knowledge of heuristics and biases to help you recognise them and hopefully avoid them	Knowledge of heuristics and biases enables you to name them and appeal to them, in order to help people view the “ethical” position as more feasible and attractive
Role play flip	Argue for an “ethical” position in the face of resistance from another—the “adversarial role play”	Work as a team, to create the most feasible, credible script and action plan (peer coaching exercise)—the “collaborative peer-coaching role play”

Behavioural ethics

J R Strenlight & J K Robbennolt (2013) 'Behavioural Legal Ethics', *Scholarly Works, Paper 883*, pp. 1107-1156

Ethical blind spots	Impedes our ability to perceive and thoughtfully consider the ethical tensions we inevitably face (1117)
Idealistic self	The self that "places principles and values above practical considerations and seeks to express the person's sense of true self" (1118)
Pragmatic self	The self that is "primarily guided by practical concerns" and is likely to seize opportunity, act impulsively, and focus on the pragmatics of the situation (1118)
Slippery slope	<ul style="list-style-type: none"> Psychologist Stanley Milgram's experiment to administer increasingly severe shocks to another person (1118-9) Boiling frogs (1119)
Ethical fading/moral disengagement	<ul style="list-style-type: none"> Decision-makers do not see the moral components of an ethical decision, not so much because they are morally uneducated, but because psychological processes fade the ethics from an ethical dilemma (1120) E.g. euphemisms (1122)
Advantageous comparisons	Imagining instances of behaviour that are worse than the act at issue, used to case a particular decision in a more positive light (1122)
Outcome bias	Decisions are seen as more unethical when they result in observable harm and when they harm identifiable victims (1122-3)
Loss/Gain	Decision-makers are more likely to engage in a range of unethical behaviours when facing a decision that is framed as a loss than when the same decision is framed as a gain (1123); e.g. one can own up to one's unethical decision and face the negative consequences now, or keep quiet and face a possible and uncertain loss sometime in the future (1124)
Lawyer's own interest	Tendency to conflate what is fair or ethical with what serve's one's own interest (1129)
Confirmation bias	Lead us to interpret new information in ways that favour our existing beliefs (1129)
Illusion of objectivity	Belief that we make decisions based on objective criteria (1130)
Conflict	Can be between lawyer and client, multiple clients, between current and future/former clients (1132)
Anchors	Provide a starting point for judgment. Adjustments are then made away from the anchor, but these adjustments are often insufficient and often result in judgments that are skewed toward the starting point (1132)
Insinuation anxiety	Client does not want to signal distrust of advisor (1133)
Disclosure	May give lawyer ethical credentials in their mind and 'licence' them to behave unethically later (1133)
Omission bias	Tendency to prefer options that entail inaction to options that require action (1134)
Acting unethically indirectly	Acting through an agent: lawyers more likely to endorse unethical action suggested by someone else (1134-5)
Adversarial system	Adversarial, competitive and partisan mindset results in many ethical issues (1137)
Tolls of law practice	<ul style="list-style-type: none"> Time pressure, lack of sleep, cognitively taxed, deprived of food (1141) Economic pressures (1142) Status and power makes people more attuned to rewards, feel more entitled, more overconfident (1143-4)
Lawyers as social actors	<ul style="list-style-type: none"> Influence by other people; e.g. partners, colleagues, superiors (1145) Diffusion of responsibility (1149)
Pluralistic ignorance	Mistakenly believing that others do not share one's understanding or perception of the world (and thus have better grasp of the situation) (1148)
Illusion of transparency	Tendency to overestimate our ability to accurately read others' emotional states and their ability to read ours (1148)
Interpersonal ethics blind spots	Others' unethical behaviour are more noticeable than their ethical ones (1150)
Actor-observer bias	Attributing others' moral failings to flaws in their dispositions, but attributing our own missteps to situational factors (1150)
Motivated blindness	Not acknowledging unethical behaviour of others when doing so would harm our own interests (1151)
Moral licencing	Let others off the hook because we are aware of other instances in which they have acted ethically (1151)
Illusion of courage	People thinking they will take socially risky actions, when they in fact do not

Cases

Council of the NSW Bar Association v Einfeld [2009] NSWCA 255

- Facts:** Einfeld, a retired judge and QC. In August 2006, Einfeld contested a \$77 speeding ticket by claiming he had lent his car to an old friend, Professor Teresa Brennan, at the time it was caught by a speed camera. He gave evidence under oath in the Local Court and he also signed a statutory declaration to that effect. However, it was later revealed that Professor Brennan had been killed in a road accident in the United States in February 2003, and that Einfeld was aware of it. When challenged by a journalist concerning Brennan's death, Einfeld claimed that he had lent his car on that day to a different Teresa Brennan, whom he claimed also lived in the USA, and who had also died. In August 2006, Einfeld produced a detailed 20-page statement describing the fictitious second Teresa Brennan and his supposed dealings with her. On 29 March 2007, Einfeld was arrested by the NSW police. He was charged with 13 offences, including perjury, perverting the

	SR	BR
Breach of rules		
	2.3 A breach of these Rules is capable of constituting unsatisfactory professional conduct or professional misconduct, and may give rise to disciplinary action by the relevant regulatory authority, but cannot be enforced by a third party.	
Paramount duty		
	3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.	4 (a) barristers owe their paramount duty to the administration of justice; (d) barristers owe duties to the courts, to their clients and to their barrister and solicitor colleagues; 23. A barrister has an overriding duty to the court to act with independence in the interests of the administration of justice.
Best interest of client		
	4.1.1 [A solicitor must] act in the best interests of a client in any matter in which the solicitor represents the client	35. A barrister must promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person
Duty to be honest, courteous, and be competent		
	4.1.2 [A solicitor must] be honest and courteous in all dealings in the course of legal practice, 4.1.3 [A solicitor must] deliver legal services competently, diligently and as promptly as reasonably possible,	4 (c) barristers as specialist advocates in the administration of justice, must act honestly, fairly, skilfully, bravely and with competence and diligence;
Independence		
General duty	4.1.4 [A solicitor must] avoid any compromise to their integrity and professional independence	4 (e) barristers should exercise their forensic judgments and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients
Not mere mouthpiece	17.1 A solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client or of the instructing solicitor (if any) and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's instructions where applicable.	42. A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's wishes where practicable.
Exercising forensic judgment	17.2 A solicitor will not have breached the solicitor's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's instructions, simply by choosing, contrary to those instructions, to exercise the forensic judgments called for during the case so as to: 17.2.1 confine any hearing to those issues which the solicitor believes to be the real issues,	43. A barrister does not breach the barrister's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's wishes, simply by choosing, contrary to those wishes, to exercise the forensic judgments called for during the case so as to: (a) confine any hearing to those issues which the barrister 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

Legal Profession Uniform Law

The Legal Profession and the Regulatory System

3 Objectives

The objectives of this Law are to promote the administration of justice and an efficient and effective Australian legal profession, by—

- (a) providing and promoting interjurisdictional consistency in the law applying to the Australian legal profession; and
- (b) ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services; and
- (c) enhancing the protection of clients of law practices and the protection of the public generally; and
- (d) empowering clients of law practices to make informed choices about the services they access and the costs involved; and
- (e) promoting regulation of the legal profession that is efficient, effective, targeted and proportionate; and
- (f) providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained.

10 Prohibition on engaging in legal practice by unqualified entities

- (1) An entity must not engage in legal practice in this jurisdiction, unless it is a qualified entity.
- (2) Penalty: 250 penalty units or imprisonment for 2 years, or both.
- (3) An entity is not entitled to recover any amount, and must repay any amount received, in respect of anything the entity did in contravention of subsection (1). Any amount so received may be recovered as a debt by the person who paid it.
- (4) Subsection (1) does not apply to an entity or class of entities declared by the Uniform Rules to be exempt from the operation of subsection (1), but only to the extent (if any) specified in the declaration.

32 Business structures

Legal services may be provided under any business structure, subject to the provisions of this Law and the Uniform Rules.

33 Obligations not affected by nature of business structures

- (1) An Australian legal practitioner must comply with this Law, the Uniform Rules and his or her other professional obligations, regardless of the business structure in which or in connection with which the practitioner provides legal services.
- (2) A law practice must comply with this Law, the Uniform Rules and its other professional obligations, regardless of the business structure in which or in connection with which the law practice provides legal services.

Requirements of Entry to Profession

9 Objectives

The objectives of this Part are—

- (a) to ensure, in the interests of the administration of justice, that legal work is carried out only by those who are properly qualified to do so; and
- (b) to protect clients of law practices by ensuring that persons carrying out legal work are entitled to do so.

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- (3) Subsection (1) does not apply to an entity or class of entities declared by the Uniform Rules to be exempt from the operation of subsection (1), but only to the extent (if any) specified in the declaration.

11 Prohibition on advertisements or representations by or about unqualified entities

- (1) An entity must not advertise or represent, or do anything that states or implies, that it is entitled to engage in legal practice, unless it is a qualified entity.
Penalty: 250 penalty units.
- (2) A director, partner, officer, employee or agent of an entity must not advertise or represent, or do anything that states or implies, that the entity is entitled to engage in legal practice, unless the entity is a qualified entity.
Penalty: 50 penalty units.

12 Entitlement of certain persons to use certain titles, and presumptions with respect to other persons

(1) Titles

This section applies to the following titles—