

Introduction/Admission to Practice Summary

Legal Ethics and Professional Practice

Definitions:

- Ethics: Derives from the Greek ethos and ethikos; the former means character and the latter means practice or custom of the community; Aristotle defined ethos as being the trustworthiness (or credibility) of the speaker; the modern definition is the science of morals or rules of conduct, or values and rules of individual conduct.
 - o Social ethics: Ground rules that society deems as acceptable.
 - o Applied approach to ethics: Examination of the issues that are the matters for moral judgement.
 - o Process of Ethical Reflection and Decision-Making:
 - Awareness of ethical issues
 - Application of ethical standards or principles
 - Moral imagination and practical implementation
- Professional Ethics: The values and rules of conduct of an occupational group.
- Morals: Derives from the Latin word mores, meaning custom or conventions of a social group; the modern meaning includes distinguishing between right and wrong.
- Values: Principles or qualities which we consider worthy or desirable.
- Beliefs: Acceptance of an idea or statement of fact as being true.
- Conventions: Unwritten rules and practices governing the behaviour of a social or professional group; conventions within the legal profession are usually considered to be the ethical rules of etiquette.

Duties and Responsibilities:

- Duty to the court.
- Duty to the client.
- Duty to the administration of justice.
- Duty to the public.

Professional Rules of Conduct:

- Professional Responsibility:
 - o Special skill and learning:
 - Satisfaction of academic and practical requirements
 - ☞ Academic requirements
 - o Practical training
 - o Regulated via admission requirements
 - ☞ Privilege of a monopoly is granted to those admitted to practice
 - o Public service: a distinguishing feature of any profession
 - Contributes to lawyers' professional identity
 - Special skill and knowledge provides lawyers with a unique capacity to engage in public life and contribute to debate
 - With this capacity comes a special responsibility
 - o Self-regulation or autonomy
- Law Councils Australian Solicitors Conduct Rules 2011 (ASCR).
 - o A breach of the Rules can give rise to disciplinary action.
 - o The Rules set out the ethical and professional obligations of solicitors when dealing with their clients, the courts, their fellow legal practitioners, and other persons, and are referred to throughout this text.
- Legal profession Uniform Conduct (Barristers) Rules 2015.
 - o Barristers owe their paramount duty to the administration of justice.
 - o Barristers must maintain high standards of professional conduct.

- Barristers, as specialist advocates in the administration of justice, must act honestly, fairly, skilfully, bravely, and with competence and diligence.
- Barristers owe duties to the courts, to their clients, and to their barrister and solicitor colleagues.
- 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.
- The provision of advocates for those who need legal representation is better secured if there is a Bar whose members:
 - Must accept briefs to appear, regardless of their personal beliefs.
 - Must not refuse briefs to appear, except on proper professional grounds.
 - Compete as specialist advocates with each other and with other legal practitioners as widely and as often as practicable.

Lying:

- The Australian Solicitors Conduct Rules 2015 state that a solicitor 'must... be honest and courteous in all dealings in the course of legal practice'.

Applying Lawyering Techniques to Ethical Problems:

- Amoral: An indifference to moral responsibility.
- Immoral: A failure to conform to what is generally accepted by a culture as correct behaviour.
- Positivism: The separation of law from personal and cultural norms and its connection to the use of force.
- Deontology: The science of duty or moral obligation; it assumes that there are certain absolute truths arising out of natural law.
- Teleology: The doctrine of final causes, which states that reality is determined by final goals and purposes, rather than mechanical causes.
- Utilitarianism: The ethical view that the right conduct is achieved when an action or result leads to the greatest good for the greatest number of people.

Ethical Obligations of Lawyers in Terms of The Professional Rules of Conduct:

- The lawyer's paramount duty is to the court and the administration of justice, and this duty prevails to the extent of inconsistency with any other duty.

The Amoral Lawyer:

- Wasserstrom:
 - The lawyer-client relationship renders the lawyer at best systematically amoral and at worst more than occasionally immoral in his or her dealings with the rest of mankind.
 - The behaviour of lawyers towards their clients is morally objectionable, because lawyers dominate the relationship and typically treat their clients in both an 'impersonal and a paternalistic manner'.

The Moral Lawyer:

- Shaffer has adopted the care model as one of his models for the lawyer-client relationship. This model involves a moral universe, where any discussion between the two parties has a moral dimension, and moral issues have to be confronted.

Attributes of a Profession:

- Skill based on theoretical knowledge.
- The provision of training and education.
- Testing the competence of members.
- Organisation.
- An ethical code of conduct.

- Altruistic service.

What Is Not Acting as A Professional?

- Courtesy, honesty, integrity, diligence, and candour are all characteristics or attitudes consistent with being a professional.
- The Professional Conduct Rules require that a solicitor must be honest and courteous in all dealings in the course of legal practice.
- A lawyer's professional image and reputation is valuable property.

Codes of Ethics:

- There are different kinds of codes of ethics adopted by different occupations in Australia.
- Some occupations have different codes-one to deal with their aspirations or ideals, and another concerning concrete rules of behaviour.

Monopoly Over Legal Services:

- The government, under legislation, and the courts, by use of their discretion, have granted the legal profession a virtual monopoly over the delivery of legal services.
- The legal profession, like the medical profession, considers that its work is so skilful and important that only qualified lawyers should be able to practise.

Legal Practice Board v Said 08/02/1994 WASC Unreported Supreme Court of Western Australia

FACTS:

- It was alleged that Said was in contempt by virtue of the fact that he purported to act as a legal practitioner. The problem concerned certain clauses in a building contract entered into by Jardim, his de facto wife (Da Silva), and Homestyle Pty Ltd.
- Said examined the contract and decided to invoke its arbitration (mediation) clause.
- Said claimed that the charges which he agrees he made for his services to Jardim and Da Silva were not for legal work, but only for the assistance he was giving them in finding help and in giving instructions to the lawyers concerned.
- Said says that the steps that he took in preparing the documents for use and presentation to the District Court were caused by the necessity of having to take steps to protect his clients during the Christmas break (hard to find a solicitor to represent them, most on holidays) and to prevent judgment being entered by default.

ISSUE:

- Practice without admission as a solicitor.

HELD:

- The account and the letter just reproduced is a clear indication that included in the charges being raised by Said were his fees for the preparation of the document referred to earlier in these reasons and filed in the District Court. I have therefore concluded that the evidence establishes that Said did charge Jardim for his time and services in preparing the District Court documents.
- Said did try to engage a number of solicitors during that period but in my opinion once he could not secure the services of the solicitors he wanted, he decided to act for Jardim himself and so prepared the conditional appearances, the chamber summonses, and the supporting affidavits for use in the District Court.

The Barristers Board v Palm Management Pty Ltd [1984] WAR 101

Supreme Court of Western Australia

FACTS:

- The respondent company offered a service of tax minimisation advice and preparation of all necessary documents to implement the advice in return for a fee. In performing that service the respondent company received instructions to prepare, and did prepare, documents relating to the incorporation of a company, a deed of settlement, a superannuation deed, a trust deed and various documents required to be lodged at the Corporate Affairs Office.
- The second respondent inserted names of parties and like particulars in the documents prepared by the respondent company. The second respondent was a graduate in law but was not a certificated practitioner. He was described as “company lawyer” in the documents required to be lodged at the Corporate Affairs Office.
- It was alleged that the respondent company and the second respondent had breached the *Legal Practitioners Act 1893* and were in contempt of the court pursuant to s 81 of that Act.

ISSUE:

- Practice without admission as a solicitor.

HELD:

- The expression “administration of law” as used in ss 76 and 77 of the Act meant “the practice of law” or “the practice of the law”.
- The respondent company had engaged directly or indirectly in the administration of law by tendering advice and performing work consequent upon the acceptance of that advice relating to important rights of the party advised and had drawn or prepared documents relating to, dealing with or affecting personal estate or an interest therein in breach of ss 76 and 77 of the Act.
- The provisions of ss 7 and 8 of the Criminal Code apply to a breach of the Act punishable by way of contempt proceedings under s 81 of the Act.
- The second respondent had done work of a clerical nature and had not exercised his own judgment as to the appropriate form of words to be used in the documents and, therefore, had not “drawn or prepared” the documents.
- In using the description “company lawyer” in documents intended to be filed in a public registry, the second respondent had made or used words implying or tending to the belief that the second respondent was a practitioner and was recognised by law as such, and was in breach of s 80 of the Act.

Orrong Strategies Pty Ltd v Village Roadshow Ltd [2007] VSC 1

Supreme Court of Victoria

FACTS:

- Ziegler had an and had been admitted to legal practice in Queensland in 1984 and Victoria in 1990. He worked for Orrong, which was Ziegler s private family company. He took out a corporate practicing certificate in Victoria in 1990 and held that certificate at the time of the case. The corporate practicing certificate allowed a lawyer to give legal advice as an employee to their corporate employer. Ziegler was also a tax expert, a Fellow of the Taxation Institute of Australia, and a Chartered Accountant.
- Under an agreement entered into with Village Roadshow Ltd (VRL) in 1993 and modified in 1995, Orrong agreed to provide consultancy services to for five years from 1 July 1996 to 30 June 2001.
- VRL asserted that all of the work carried out or services provided by Orrong pursuant to the agreements constituted engaging in legal practice within the meaning of the Legal Practice Act 1996 (Vic).

ISSUE:

- Burden of proof required in a civil case in which contravention of s314 of the Legal Practice Act 1996 (Vic) was alleged.

HELD:

- Ziegler did not breach his duties as a director or fiduciary of VRL merely because the drafting of and entering into agreements was not approved by VRL members or considered by VRL lawyers.
- Ziegler was acting on behalf of himself and Orrong, and not VRL. The Court reasoned that Ziegler negotiated over a lengthy period with several directors of VRL who should have been well able to look after VRL's interests.

***Cornall v Nagle* [1995] 2 VR 188**

Supreme Court of Victoria

FACTS:

- The defendant was an 'unqualified person' as defined in s90(2) of the Legal Profession Practice Act 1958, having never been admitted to practise as a barrister and solicitor of the Supreme Court of Victoria. On 25 October 1991, McGarvie J ordered, in terms of s90(7) of the Legal Profession Practice Act, that the defendant be restrained from acting or practising as a solicitor or from using a name or title implying that he was qualified to practise as a solicitor or from holding himself out as being qualified to practise as a solicitor.

ISSUE:

- Practice without admission as a solicitor.

HELD:

A person who is neither admitted to practise nor enrolled as a barrister and solicitor might act or practise as a solicitor (and thereby breach the Legal Profession Practice Act 1958 (Vic), s 90(7)) in any of the following ways:

- By doing something which, though not required to be done exclusively by a solicitor, is usually done by a solicitor, and by doing it in such a way as to justify the reasonable inference that the person doing it was a solicitor.
- By doing something that is positively proscribed by an Act or by the rules of court unless done by a duly qualified legal practitioner. In such a case an inference is not necessary that the actor was a solicitor, and indeed it would not matter if the actor stated plainly that he or she was not a qualified lawyer. This does not, however, prevent a solicitor from delegating "purely ministerial" tasks to unqualified persons.
- By doing something which, in order that the public might be protected adequately, is required to be done only by those who have the necessary training and expertise in law, such as giving legal advice as part of a course of conduct and for reward.

***ASIC v Axis International Management Pty Ltd* [2010] FCA 685**

Federal Court of Australia

FACTS:

- The solicitor, Hill, had been a former sole director for the company. Hill had a Bachelor of Laws degree, had been admitted as a barrister and solicitor in Western Australia in December 1999, and had practiced for some time, but did not renew practicing certificate after 30 June 2007.
- There was evidence presented that the corporation and its current sole director did not have the financial capacity to pay the legal fees.

ISSUE:

- Expired practicing certificate.

HELD:

- The Federal Court had the power to exercise its discretion to waive the requirement that a corporation must have qualified legal representation.
- The defendants did not have the financial capacity to employ a qualified legal practitioner.

Legal Practice Board v Giraudo [2010] FCA 685

Supreme Court of Western Australia

FACTS:

- In 2001 and 2002 Adrian Domney conducted an automotive repair business. There were two separate disputes at this time relating to the business, both of which resulted in proceedings in the Local Court. Mr Domney was assisted in regard to these proceedings by Clinton Giraudo, the respondent. Mr Giraudo is not, and has never been, a legal practitioner. The Legal Practice Board (the Board) alleges that the assistance provided by Mr Giraudo involved doing things that can only be lawfully done by a duly certificated legal practitioner and that his conduct was, therefore, in contempt of court.
- Mr Giraudo accepts that he prepared court documents and letters for Mr Domney, but says that this was only done as a secretary or scribe. He says that he gave no legal advice and that it was Mr Domney who controlled what was put in writing. He also accepts that he attended conferences with Mr Domney and others, but says that he did so only in a clerical capacity. He says that he became an employee of the business and wrote letters and attended conferences in that role.

ISSUE:

- Practice without admission as a solicitor.

HELD:

- Mr Giraudo was found to be contempt of court for providing legal assistance in Local Court proceedings despite not being a legal practitioner, in breach of the (WA) Legal Practitioners Act 1893 ss 76 and 77.

Ley v Kennedy (Finance) Pty Ltd 21/05/1975 NSWCA Unreported

New South Wales Court of Appeal

FACTS:

- Court considered whether they should allow Mr Ley to represent himself when he is not qualified at law. He often read from cue cards that were disconnected and had no relevance to the law or case at hand.

HELD:

- It was deemed to be within the court's power to make appropriate orders to protect the interests of that party and those who are involved in the litigation by or with him and to prevent the improper waste of public time and money.

Admission and Practice

- The actual act of admission is done by the Supreme Court, which may admit any person who meets the requirements of the admission rules, pays the admission fee, and takes the oath or makes an affirmation required by the court. The applicant then signs the roll of practitioners.
- Depending on the particular jurisdiction, the applicant signs as a barrister and solicitor, as a barrister, as a solicitor, or as a legal practitioner; and in all jurisdictions the practitioner becomes an officer of the court.

Educational and Practical Training Requirements:

- Obtain a law degree or complete at least three years of legal study recognised in an Australian jurisdiction as being sufficient for admission.
- An additional requirement in all jurisdictions is practical training. This usually means one to two years' experience working in private or public legal practice after completing a practical legal training program.
- As an alternative to attending a practical training course, students can do at least one year of articles.

Horak v Secretary of Law Institute of Victoria 25/10/1991 VSC Unreported **Supreme Court of Victoria**

FACTS:

- The Solicitors Board refused Horak's application for an employee's practicing certificate. His practicing certificate had been cancelled in 1989, and he only had the right to apply for a full practicing certificate after two years as an employee solicitor.
- He was allowed to apply to be admitted as an employee solicitor as of 1 January 1994. His professional problems were related to his intimate relationship with one Mrs Reid.

ISSUE:

- Expired practicing certificate.

HELD:

- The sentence imposed by the Board was entirely appropriate.
- The court accepted an undertaking by the appellant that he not practise as a barrister (and deleted that part of the Board's order that he not be allowed to practise).

Evatt v NSW Bar Association 15/12/1981 NSWCA Unreported **New South Wales Court of Appeal**

FACTS:

- The Court of Appeal ordered that E, a barrister, be suspended from practice for 2 years for professional misconduct.
- The High Court varied this order by setting aside the suspension and ordering that E's name be removed from the roll of barristers.
- One year later, E applied for readmission. In support of the application, affidavits were filed by a number of reputable professional persons as to the change in character, personality and attitudes.

ISSUE:

- Readmission

HELD:

- It was not open to E to seek to place qualifications upon the High Court's finding that he was not a fit and proper person to be a barrister, nor was it open to the court to go behind the findings.
- The onus was on the applicant to prove that in the interval, there had been such a change in him as to convert him from an unfit person to a fit and proper person to be readmitted.
- In the absence of any objective proof of a change in his standards of conduct and having regard to the nature and gravity of the misconduct, and to the finding of the High Court and also in the shortness of time since disbarment, E had not discharged the onus of proving that he was now a fit and proper person to be a barrister.

Character Based Requirements:

- Previous criminal behaviour
- Previous improper conduct
- Infirmary
- Non-disclosure of previous impropriety
- Mitigating factors

Re B [1981] 2 NSWLR 372

New South Wales Court of Appeal

FACTS:

- Wendy Bacon, a well-known activist and journalist, applied for admission to the bar. With her application, she submitted a number of very favourable references from well-regarded members of the public and the profession. She also included in her application all information concerning former arrests and convictions for her political activities.
- The objections to her admission by the Prothonotary and the Bar Association were based on her political and social activism. The main reason for her admission being refused by the court related to her action in standing bail for a prisoner (SS).
- Bacon claimed that the bail moneys were obtained by way of a loan from a close friend of both SS and Bacon, VA, who had recently inherited the money. The court found that a third friend and barrister, L, had conveyed the funds from SS's Melbourne sources to Sydney, in order to be used for SS's bail application. Bacon did not call any of the relevant parties – SS, VA or L – as witnesses to support her claim.

ISSUE:

- Good fame and character.

HELD:

- B was dishonest concerning the bail incident.

Wentworth v NSW Bar Association 14/02/1994 NSWSC Unreported

New South Wales Supreme Court

FACTS:

- Wentworth's application for admission was opposed by the Bar Association.
- Campbell J, in the lower court, found that she was not of good character. The judge also found that she lacked an understanding of what the proper conduct was in relation to the making of applications constituting abuses of the process of the court, and that that situation was unlikely to change.

ISSUE:

- Good fame and character.

HELD:

- The court stated that it had the discretion to decide whether an applicant was suitable for admission to the profession, and that this went beyond good fame and character.
- Wentworth to pay the respondent's cost of the appeal.

Morrissey v NSW Bar Association [2006] NSWSC 323

New South Wales Supreme Court

FACTS:

- The applicant was a very skilled legal practitioner in the State of Virginia and had come to Australia to seek a new life. He did some university and government legal work, finished the course at the College of Law, and then applied for admission. He had very favourable affidavits from leading legal academics and prominent members of the Australian profession, but had failed to give full disclosure to his referees of his legal problems in Virginia.
- These problems included several contempt convictions, a conviction for violating two disciplinary rules, for which he had his licence suspended for six months, and later a conviction of assault and battery for which he was disbarred in December 2001.
- His application before the Admission Board was not with full disclosure and he attempted to remedy these omissions before the court. He admitted most of the events, but emphasised that there were political reasons involved. Although there were political problems, he still did not give an accurate account of the findings of the courts in Virginia, especially revealing his history of violent physical encounters.

ISSUE:

- Good fame and character.

HELD:

- Application rejected.
- It is possible that if appropriate disclosure had been made his transgressions in Virginia could have been put behind him and his determination to commence a new career free of political difficulties and the misjudgements of youth accepted.

Re Davis (1975) 75 CLR 409

High Court of Australia

FACTS:

- It was discovered a year after he was admitted as a barrister that Davis had not revealed in his application that he had been convicted of breaking, entering, and stealing when he was 21 years old. The conviction had occurred 12 years before he applied for admission.
- Since that time, Davis had no other breaches of conduct that affected his good fame and character.

ISSUE:

- Good fame and character.

HELD:

- Davis was not a fit and proper person to be made a member of the Bar.
- The Bar is no ordinary profession or occupation. The duties and privileges of advocacy are such that, for their proper exercise and effective performance, counsel must command the personal confidence, not only of lay and professional clients, but of other members of the Bar and of judges. It would also seem to go without saying that conviction of a crime of dishonesty of so grave a kind as housebreaking and stealing is incompatible with the admission to the Bar.

Re: Application by Hinds [2003] ACTSC 11

FACTS:

- An Aboriginal applicant was admitted even though he had a history of criminal convictions. These included two for drunken driving, making a false complaint, and convictions for breaching five domestic violence orders.
- He admitted all his convictions and fully cooperated with the court. He had a record of community activities and had no convictions since 1996.

ISSUE:

- Good fame and character.

Jackson v Legal Practitioners Board [2006] NSWSC 1338

Supreme Court of New South Wales

FACTS:

- There had been criminal proceedings against Jackson. It was alleged she had made a false statutory declaration and had given false evidence that she was the driver of a motor vehicle at the time of a red-light camera offence that had occurred 10 years before her application for admission.
- Jackson had been acquitted on one of the two counts in an appeal, and the Crown decided not to seek a re-trial of the second count. Jackson had not provided the board with information about the Criminal Appeal.
- The board found that Jackson had given glaringly improbable evidence at the criminal hearing, and held that Jackson lacked candour and was not of good fame and character.

ISSUE:

- Good fame and character.

HELD:

- Johnson J said she was technically correct that she had no conviction in law, but pointed out that she could have been tried again. He also said that the matter was not a mere traffic offence, but concerned interference with the administration of justice.
- Thus, Jackson's characterisation of the traffic matter in her disclosure to the Board fell short of the requirements for proper and full disclosure.

Skerritt v Legal Practice Board of Western Australia [2004] WASCA 28

Supreme Court of Western Australia – Court of Appeal

FACTS:

- An applicant who had been denied admission by the board was admitted. He had admitted a conviction for stalking and had once, many years ago, tried to commit suicide.

ISSUE:

- Good fame and character.

HELD:

- The court said the latter event should not be a barrier to his admission and sent the matter back to the board for a rehearing. He was then admitted.

Mutual Recognition

- Australian mutual recognition scheme derives from an intergovernmental agreement executed by the Commonwealth, State and Territory Heads of Government in May 1992.
- The purpose of the scheme is to promote the freedom of movement of goods and service providers in a national market by recognising in each State and Territory the regulatory standards adopted elsewhere in Australia for the sale of goods and registration of occupations.
- In relation to occupations, the mutual recognition principle is that a person who is registered in one State or Territory (a jurisdiction) for an occupation is entitled, after notifying the local registration authority of another jurisdiction, for the equivalent occupation to be registered in that other State for the equivalent occupation and, pending such registration, to carry on the equivalent occupation in the other jurisdiction.
- For legal practitioners, this principle applies both to the requirement of admission by a court and to the requirement to obtain a practising certificate. A practitioner entitled to practise in one jurisdiction is therefore entitled to practise in another jurisdiction upon giving the required notice.
 - o It is not necessary for a practitioner applying for registration in another State to comply with any formalities related to registration requiring personal attendance.
 - o The practitioner must however pay the necessary fees in the second jurisdiction and comply with laws in that jurisdiction regarding professional indemnity insurance, fidelity arrangements and trust accounts.
- The Law Council of Australia has sought to achieve mutual recognition with other countries, for example, American lawyers can obtain 90-day visas to give legal advice in Australia on United States law.

- Australian law degrees are now recognised in California, but it is still necessary to pass the Californian bar exam in order to be admitted.
- In New York, Australian lawyers can only sit the bar exam after completing a one year master's degree.

Re Tkacz [2006] WASC 315

Supreme Court of Western Australia

FACTS:

- Prior to undertaking his legal studies, the applicant was convicted and fined for an offence involving dishonesty. A subsequent appeal against conviction was dismissed.
- The applicant was later admitted as a legal practitioner in New South Wales. He then applied for admission to practice in Western Australia, pursuant to the Mutual Recognition Act 1992 (Cth) s19, and corresponding State Legislation.
- The Legal Practice Board of Western Australia indicated that, having regard to the applicant's earlier conviction, it was not prepared to issue him with a practicing certificate.

ISSUE:

- Mutual Recognition

HELD:

- The Court applied the Mutual Recognition Act 2001 (WA), but still examined the application in detail, finding that reciprocal admission is not automatic.
- The Court allowed the admission for an applicant who had been admitted in New South Wales, even though he had a conviction for corruption while being a public officer.