



LAWS305 LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY

Exam Notes – [REDACTED]

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LAWS305 Ethics

TOPIC 1

The Concept of Professional Responsibility

Ethics

Legislation

- The *Uniform Law* is in force in Victoria, and has been since July 2015. It is Schedule 1 to the *Legal Profession Uniform Law Application Act 2015* (Vic)
- Dal Pont refers to the now repealed Victorian law: *Legal Profession Act 2004* (Vic). These references are out of date
- Dal Pont also refers to an old (2011) draft of the Uniform Law, which he refers to as the 'draft *Legal Profession National Law*' (LPNL), which is a previous version of the *Uniform Law*

Rules

- The current Victorian Rules (as relevant to this unit) are those set out in the Unit Outline (page 10). This includes the *Australian Solicitors' Conduct Rules 2015*
- Dal Pont makes reference to the *Australian Solicitors' Conduct Rules* because at the time the book was published they were already adopted in SA and Qld, so you can rely on references in Dal Pont to these *Rules*

Regulating relationships

- Duty to clients
- Duty to the court
- Duty to the administration of justice
- Duty to the profession
- Duty to the public interest

What do we mean by 'Legal ethics'?

- Ethics and morality?
- 'Legal Ethics' is used in a different sense:
 - professional responsibility, or duty
 - regulatory in nature
 - appeal not to conscience but to sanction
 - despite this it has an ethical dimension
- A working definition: a framework of rules in which lawyers make decisions about how to act
- Duties and obligations are sometimes conflicting
- Rules of Professional Responsibility can help us understand how to prioritise competing or conflicting duties

Concepts of ethics

- Issues of professional responsibility referred to as "ethics"
- "Professional responsibility" conveys with it the notion that professionalism carries with it responsibility and duty

Professionalism

Professional responsibility

What are the hallmarks of a profession?

- Special skill and learning
- Public service: a distinguishing feature of any profession
- Autonomy or self regulation

Law as a profession

- Three core attributes of profession:
 - Special skill and learning;
 - Public service as the principal goal;
 - Autonomy or self-regulation.

Special Skill and learning

- By restricting the legal profession to those who have fulfilled certain academic and practical requirements. This fosters public confidence in the services given. However, there are some areas in the legal practice, such as conveyancing, which are less restrictive.
- Special Skill and Learning:
 - satisfaction of academic and practical requirements
 - Academic requirements
 - Practical training
 - Regulated via admission requirements
 - The privilege of a monopoly is granted to those admitted to practice

Public Service

- Mega law firms are the greatest threat to public service, and the concept of professionalism in general

Public Service

‘Service is the ideal, and the earning of remuneration must always be subservient to this main purpose.’

Re Foster (1950) SR (NSW) 149, 151

‘One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one’s selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or by the discipline of the market.’

Shapiro v Kentucky Bar Association (1988) 486 US 466, 488 (O’Connor J)

- 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 responsibility

Is the public service ideal still relevant?

- professionalism v commercialism
- social service v managerial and entrepreneurial skills
- The market for lawyers is now quite segmented: large firms, corporate clients v small firms or sole practitioners, individual clients
- The business imperative means that many lawyers are driven by firm culture and market forces
- This influences how they discharge their professional responsibilities and view their identity, particularly in an environment where information is confidential

Self-regulation or autonomy

- As a profession calling for requisite skill and learning, and the engagement of public service, law is a profession which merits self-regulation.
- Increasing trend to permit non-lawyers to carry on some legal work, along with the concerns over ideals of public service, has opened to attack the profession’s claim to self-regulation.
- Self regulation is underscored by the (now somewhat eroded) functions of public service
- If lawyers are operating under the commercialism model, the argument for self regulation is weakened
- There is a greater scope for conflict between the profession’s role as advocate for the profession and as regulator of the profession

- Accordingly, the current trend is towards external regulation; disciplinary bodies are independent creatures of statute: in Victoria:
 - the Legal Services Board and Legal Services Commissioner are established by statute (s28 and s48 *Application Act*) and are responsible for handling complaints, investigating and prosecuting disciplinary matters (Chapters 5 and 7 *Uniform Law*) and dealing with regulation of practice generally
http://lsbc.vic.gov.au/?page_id=19

Impact on the profession of changes in the legal landscape

- The governments have generally considered that increased competition for legal services will promote public benefit, such as lower costs.

Impact of Competition Law

Application of competitive conduct rules

- *Competition and Consumer Act 2010* (Cth) provisions target lawyer practices to prevent them dealing with anti-competitive arrangements, chiefly price fixing and third line forcing.

Direct access to counsel and more flexible business structures

- The traditional professional prohibition on direct access to counsel has been lifted in most jurisdictions, and statute now envisages and regulates incorporated legal practices and multi-disciplinary practices.

Competition in the public sector

- To increase efficiency and competitiveness in the public sector the Australian Government Solicitor (AGS) was established.
- It's financially independent from the Commonwealth, with mechanisms in place to ensure no competitive advantage over competitors due to public ownership.
- Designed to stimulate private and public service providers to contain or reduce costs and increase the quality of their service.

Impact of changes in societal attitudes and perceptions

Consumerism and "Affluenza"

- Rise in consumerism affected profession

Regulatory trend

- Competition policy directed at ensuring that the profession delivers its services like any other business, although there is some regulation that acts to ensure it doesn't behave like any other business.

Impact on ethical behaviour

- Lawyers frequently dissatisfied with their chosen profession, possibly because of the workplace they are in.
- May stem from billing targets – conducive to motivating ethical behaviour

Sources of Lawyers' Professional Responsibility

General Law

- Governs most incidents of lawyers' relationships with their clients, the court and third parties.
- Fiduciary law comes in here, as well as confidentiality which lies at the core of lawyer-client relationships.

Statute

- There are established bodies that govern and regulate the profession, prescribes disciplinary processes, establishes parameters for legal practice, and casts on lawyers various obligations to clients.

Model Laws trend

- Intended to form foundation for “uniform” legislation regulating the legal profession in each Australian jurisdiction.
- Uniformity achieved in:
 - Standards for law degrees and practical legal training
 - A national practicing certificate scheme
 - Rules for trust accounts and fidelity funds
 - Definitions of misconduct
 - The regulation of incorporated legal practices and multi-disciplinary practices
 - Requirements for the disclosure of information on costs to clients
 - The system governing the entitlements of foreign lawyers to practice the law of their home country within Australia

Professional Rules

Promulgation of rules

- Codes of professional ethics adopted by some state law societies, including eventually Victoria.

Tendency towards uniformity

- Trend towards uniformity has influenced the content of professional rules.

Role of professional rules

- They serve as a standard 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.
- Professional rules express the profession’s collective judgment as to the standards expected of its members.
- Professional rules provide guidance on issues of professional responsibility and this aids lawyers to answer questions and resolve any dilemmas of that kind. This especially helps inexperienced lawyers.

The Governance framework

Who comprises the profession?

- All persons ‘admitted to the profession’
- Includes barristers, solicitors, the judiciary
- Lawyers can work in a range of situations:
 - Large firm – incorporated or partnership
 - Small firm
 - Sole practitioner
 - Boutique firm
 - In-house / corporate
 - Government
 - Not for profit / community legal centre

Framework for professional responsibility

- Lawyers’ professional responsibility is regulated in the public interest, and for the protection of the public
- It is a heavily regulated area
- Sources:
 - General law: contract, tort, equity (fiduciary law)
 - Statute: *Legal Profession Uniform Law Application Act 2014* (Vic)
 - Various Rules made under the authority of the *Uniform Law*

Statute Law

- Old law: *Legal Profession Act 2004* (Vic). Now repealed.

- Schedule 1 – this is a very important section.
- New law: *Legal Profession Uniform Law Application Act 2014* (Vic), substantive parts of which commenced on 1 July 2015
The result of an attempt at national uniformity, but at present adopted only in Victoria and NSW
- The *Uniform Law* sets out the overall regulatory structure of the profession in Victoria
- Objectives of the law: s 3

Legal Profession Uniform Law

Entry to the profession

- engaging in unqualified legal practice is an offence: s 10
- admission to the profession is regulated: Part 2.2

Conduct of business while in practice

- engaging in legal practice without professional indemnity insurance is an offence: s211
- The charging of legal costs is highly regulated and disclosure of costs estimates must be made in advance: Part 4.3
- Dealing with trust monies: Part 4.2

Professional conduct

- Disciplinary proceedings may be brought against practitioners: Part 5.4
 - Unsatisfactory conduct: s296
 - Professional misconduct: s297
 - What can amount to professional misconduct s 298

Regulation

- Establishes regulatory bodies
- Confers investigative powers

Rules

- Rules of professional conduct have been made under the new *Uniform Law* Part 9.2:
 - *Legal Profession Uniform General Rules 2015*
 - *Legal Profession Uniform Admissions Rules 2015*
 - *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015*
 - *Legal Profession Uniform Conduct (Barristers) Rules 2015*
- The rules set out guidance and obligations about how to act in given circumstances
 - eg: when is it permissible not to maintain client confidentiality? See *Australian Solicitors' Conduct Rules 2015*, Rule 9.1, 9.2

What happens if you don't do the right thing?

- Consequences of a breach of *Uniform Law*: specified in law itself
- General law coexists with and informs the content of the *Uniform Law* and *Rules*
- A breach of the *Uniform Law*, *Rules* or professional obligations found in general law may amount to:
 - Unsatisfactory conduct; or
 - Professional misconduct;

and result in various sanctions, including being 'struck off the roll': *Uniform Law* s 298, s 302

- In addition, a breach of professional obligations may give rise to liability in tort or contract to client

Summary

- Law is a profession with its attendant public service focus
- Commercialism is becoming culturally prevalent
- A lawyer owes duties to the administration of justice, to the client, to the profession and to third parties. These duties can, and regularly do, come into conflict
- The duty to the administration of justice is the paramount duty (important exam answer)
- The practice of law is highly regulated
- The framework of obligations regarding professional conduct is found in general law, statute and rules of conduct

- Breach of the lawyer's professional obligations may give rise to disciplinary proceedings and/or liability to the client in tort or contract

OG case

OG → hadn't admitted/disclosed the issues, which hadn't been full and frank disclosure. Not about the action but actual disclosure.

- OG and GL had a marketing subject together which required them to work on the project together, but also do separate work in relation to a marketing question.
- Handed in each assignment, and the lecturer became concerned with plagiarism.
- Issue went to the board to consider this.
- Spoke to the lecturer, and again asked to speak to the uni again. Received 0 mark for the assessment.
- Uni said they weren't progressing further with the allegations. Wasn't clear who had cheated.
- OG applied for admission to practice – failed to disclose, got admitted to practice.
- GL did advise the legal practitioners board
- OG disbarred from practice.

Admission to Practice

Requirements for admission

- Uniform Law Part 2.1
- Objectives (s 9):
- To ensure, in the interests of the administration of justice ... that legal work is only carried out by those qualified to do so.
- Relationship between admission requirements and disciplinary proceedings
- Supreme Court is the admitting body in each jurisdiction.
- The applicant must apply to the Board for a 'compliance certificate', which specifies that the applicant has met the educational and character requirements. S 19 *Uniform Law* and s 12 *Admission Rules*

Educational requirements

- Admission is premised on the fulfilment of educational requirements.

Academic requirements

- Involves completion of an academic course in Australia, including the equivalent of at least 3 years' full-time study of law, that is recognized in at least one Australian jurisdiction as a sufficient academic qualification to practice law.
- Rules specify the areas of legal knowledge in which an applicant for admission must demonstrate understanding and competence via completing that academic course.
- In response to Priestley report.
- S 17(1)(a) *Uniform Law: s 5 Legal Profession Uniform Admission Rules 2015*: tertiary academic course of at least 3 years' duration in the study of law, which is accredited by the Victorian Legal Admissions Board. Areas of academic knowledge are specified ('Priestly 11'): see *Legal Profession Uniform Admission Rules 2015* Schedule 1.

Practical legal training requirements

- The *Uniform Admission Rules* identified the practical requirements for admission as the successful completion of at least one year's articles of clerkship with a lawyer, a recognized practical legal training (PLT) course, or a combination of the two.
- S 17(1)(b) *Uniform Law: s 6 Legal Profession Uniform Admission Rules 2015* demonstrate competence in areas set out in *Legal Profession Uniform admission Rules 2015* Schedule 2; may be satisfied either by Supervised Legal Practice or Practical Legal Training.

Character-based requirements

- Basic character requirement is good fame and character.

- Reason behind this is that a person admitted to the profession is held out as fit to be entrusted by the public with their affairs and confidences, in whose integrity the public can be confident. Repository of trust.
 - “[The court must] ensure, as far as possible, that the public is protected from those who are not properly qualified, and, ... from those who are not ‘suitable for admission’. *Wentworth v NSW Bar Association* (1992) 176 CLR 239
- In each jurisdiction it is the Supreme Court that admits a person to practice as a lawyer.
- Statute makes provision for an admission board, or the like, to advise the Court as to an applicant’s fame and character. This relates to past behaviour – is there predictive value in past actions?
- Presumption is that moral character is good. Character is assessed by reference to the absence of a negative – ‘bad’ fame or character.
- “Fame and character”:
 - “Fame” focuses on an applicant’s reputation in the public arena, whereas “character” involves a more objective evaluation relating to an applicant’s quality, judged by her or his former acts and motives.
- What sort of conduct has been held to evidence someone not being of good fame and character?
 - Criminal convictions
 - Improper conduct in the curial process
 - Incapacity due to mental health issues
 - Matters involving dishonesty, including academic or prior professional misconduct
 - Failure to disclose relevant matters.
- S 17(2)(b) *Uniform Law*: applicant for admission to legal practice must be a ‘fit and proper person’. In determining whether this requirement is satisfied, the Board must have regard to the matters set out in *Legal Profession Uniform Admission Rules 2015* s 10.
- S 17 Disclosure Statement:
 - (1) An application for a compliance certificate must include a statutory declaration by the applicant disclosing any matter to which a reasonable applicant disclosing any matter to which a reasonable applicant would consider that the Board might regard as not being favourable to the applicant when considering whether the applicant is currently of good fame and character and a fit and proper person to be admitted to the Australian legal profession.
 - (2) It is the duty of every applicant to make a full and complete disclosure of every matter referred to in sub rule (1).
 - (3) Any application including a statutory declaration under sub rule (1) must also include original or certified copies of any available documentary evidence relating to any matter disclosed.

Admission pursuant to the mutual recognition regime

- The *Mutual Recognition Act 1992* (Cth) and its State and Territory equivalents, are designed to establish a legal framework in which there is mutual recognition for each other’s differing regulatory standards for goods and occupations.
- These provisions allow someone who has been admitted in one state to be recognized in another jurisdiction upon notification of their intent to practice in that state.

Factors relevant to “Good fame and character”

Previous criminal behaviour

- Not all criminality prevents admission. This depends on the nature of the crime, how long ago it occurred, and if the applicant has been rehabilitated in the intervening period.
- In applications where the criminal behaviour was dishonest, however, it is likely that the applicant will be refused admission.
- Court may be inclined to overlook a prior conviction, even for dishonesty, where it arose out of events occurring when the applicant was young, and stemmed from immaturity.
- Full disclosure and subsequent evidence of restoration of integrity are of especial value to an applicant in this context.

- Minor blemishes are usually not an issue.
- Positions different when the offence is serious and recent.
- With regards to prior convictions, it is imperative that full disclosure be made. The same goes for criminal charges.
- Criminal matters:
 - Must be disclosed; not an absolute bar to admission as circumstances of offending will be taken into account.
 - Matters involving dishonesty, however, are viewed seriously:
 - Fraudulently misappropriating employer's money: *Thomas v Legal Practitioners Admission Board* [2005] 1 Qld R 331
 - Fraudulently obtaining Austudy benefits while failing to declare income: *Re Application by Saunders* (2011) 29 NTLR 204
 - Theft, perjury and fraud over 25 years: *Frugniet v Board of Examiners* [2005] VSC 332
 - Academic misconduct and defrauding Centrelink, together with older convictions for stealing: *Jarvis v Legal Practice Board* [2012] WASAT 28
 - The passage of time, together with a subsequent unblemished record, may provide evidence of reformed character: *Ex Parte Lenehan* (1948) 77 CLR 403. Candour to the court is of the utmost importance.

Previous improper conduct in the curial process

- An applicant's previous behaviour in the course of litigation is relevant to fame and character, and this includes making false statements, statutory declarations or affidavits and perjury.
- Giving false evidence, particularly combined with a lack of contrition: *Jackson (previously known as Subramaniam) v Legal Practitioners Admission Board* [2006] NSWSC 1338
- Making unsupported allegations of misconduct: *Wentworth v New South Wales Bar Association* (unreported, CA (NSW) 14 February 1994);
- Threatening conduct to court staff and outstanding contempt matters, showing 'a reaction to an adverse decision which is entirely unacceptable in an officer of the court: *Re Bell* [2005] QCA 151, [12]
- Prior offences relating to political activism, combined with being a party to a bogus bail agreement; *Re B* [1981] 2 NSWLR 372

Previous improper conduct in the course of a profession or employment

- If an applicant has been disciplined whilst practicing law elsewhere, this is directly relevant to their fame and character in an application for admission in a new jurisdiction.
- The same can be considered if an impropriety has occurred in the course of practicing another profession, or pursuing another trade or occupation.

Infirmary

- The need to protect the public from someone severely mentally unstable, or with a heavy past of this instability if not effectively controlled over the past.
- Mental health issues need not be a bar to admission, but they may warrant inquiry if they have the potential to bear on the applicant's fitness to practice: *S v Legal Practice Board of Western Australia* (2004) 29 WAR 173
- Depression is not of itself a matter which would preclude the fulfilment of duties in an honest and competent way; expert evidence would be required if it was alleged that it did.
- In *XY v Board of Examiners* [2005] VSC 250 a history of criminal conduct, mental illness and alcohol abuse arising from childhood sexual abuse did not prevent admission, given that the criminal matters didn't evidence dishonesty, the applicant had an unblemished record for about 8 years, and expert evidence was that she was fit to engage in practice.

Disclosure

- In addition to the above disclosures regarding matters, it is also imperative to disclose prior professional disciplinary proceedings, whether it be in regard to previous employment in the law or in a profession outside of the law.
- Admissions Boards rely upon the matters put before them in assessing suitability.
- **Candour is of the utmost importance**

- A failure to disclose a relevant matter may lead to admission being refused, even if the matter would not have resulted in refusal if disclosed: *Thomas; Re Del Castillo* (1998) 136 ACTR 1; but see also *Law Society of Tasmania v Richardson* [2003] TASSC 9
- Further, there needs to be disclosure of academic misconduct. These are not on the public record and therefore applicants must make sure to disclose such information as not doing so may result in them not being able to be admitted. Not disclosing such information may cast doubt on an applicant's fitness to practice. The subjects need not be law.
- The onus on the applicant is even greater given these matters are not matters of public record; disclosure of academic misconduct, particularly involving dishonesty, is required. See *Re OG (A Lawyer)* (2007) 18 VR 164: a young lawyer had been disciplined for collusion in a non-law subject, and dealt with informally by the university. Nevertheless, coupled with a failure to disclose, the Victorian Supreme Court held this sufficient to revoke his admission.
- The *Uniform Admission Rules* now require the filing of a 'student conduct report' provided by the university, with an application for a compliance certificate: s 19
- Criminal convictions: there is a duty to disclose matters relevant to character; criminal convictions, particularly those involving dishonesty, fall clearly within that ambit: *Re Davis* (1947) 75 CLR 409
- All criminal convictions, not just those involving dishonesty, should be disclosed as a matter of prudence. Failure to disclose demonstrates a failure to appreciate the standards of behaviour required of a legal practitioner: *Prothonotary of the Supreme Court of NSW v Darveniza* (2001) 121 A Crim Rep 542
- Criminal charges should also be disclosed; notwithstanding the fact that no finding of guilt was recorded, the facts giving rise to the charges may themselves be relevant to character: *Re Del Castillo*

Mitigating factors

- Age at which misconduct occurred and subsequent redemption → the younger the age, often far better the outcome; redeeming behaviour reflective of remorse.
- External stressors at the time of impropriety
- Against the nature of the conduct will be weighed:
 - If the conduct was committed at a young age
 - Passage of time with good record
 - Acting under 'bad' influences
 - Redeeming behaviour; remorse and contrition; subsequent respect for and compliance with the law
 - Disclosure of matters to allow the Court to consider the circumstances; an attitude of candour
 - The circumstances of the conduct: e.g. unusual stressors leading to behaviour: see *Prothonotary v Del Castillo* [2001] NSWCA 75 but compare with *Re Bell*

Requirements for Practice

Entitlement to practise law premised upon practising certificate

- Beyond admission to practice, the prerequisite to practice as a lawyer is the issue of a practicing certificate.
- Statute prohibits a person who does not hold a current practising certificate from practising law.
- That an uncertificated person describes himself or herself in other than an expressly legal title is no defence to a charge of practising as a lawyer, if he or she in fact performs lawyers' work.

Practice by interstate lawyers

- Legal professional legislation entitles a holder of a practising certificate issued in one Australian jurisdiction to practise in another Australian jurisdiction using that certificate without the need to be admitted to practice or to hold a practising certificate in that other jurisdiction.

Prohibition on unqualified legal practice

- It is prohibited for a 'qualified entity' to engage in legal practice (s 10 *Uniform Law*); penalty 250 penalty units or 2 years' imprisonment, or both.

- Qualified entity (s 6 *Uniform Law*) means one of:
- An *Australian legal practitioner*, which in turn means an *Australian lawyer* who holds a current practising certificate, issued by the relevant professional body (in Victoria, the Law Institute of Victoria). An *Australian lawyer* is a person admitted to the legal profession in Victoria or another state or territory.
- A law practice (see definitions)
- Other specified entities, including an Australian-registered foreign lawyer.

Topic 2

Lawyer/Client Relationship

Duty to Client – Retainer

Retainer as a Contract

- ‘Retainer’ is the term used to describe a contract between a lawyer and client for the provision of legal services, and so must be proved like any other contract.
- No retainer unless the elements of a contract are present
- Retainer is central to various aspects of the lawyer-client relationship.
- Retainers are central to various aspects of the lawyer-client relationship:
 - Identifies the client;
 - Describes the services to be delivered by lawyer;
 - Identifies who is instructing the lawyer; and
 - Outlines scope of lawyer’s authority and duties.
 - Also defines the scope of matters covered by professional indemnity insurance
 - It can act to limit the lawyer’s liability in tort (but a clear and explicit clause to this effect should be included; and any areas where it might not be clear whether the lawyer is acting should be dealt with in a clause which suggests the client take advice from elsewhere on matters outside the retainer
 - Note, however, that it may be necessary to go beyond the specifically agreed professional task where needed to ‘avoid a real and foreseeable risk of economic loss being sustained’ by the client: see
 - In *Hawkins v Clayton*, solicitors retained custody of a will for 6 years after the testatrix’s death and did not locate the executor. The solicitors were found to be liable in tort to the executor. The executor could recover damages for the deterioration of the house and its contents, loss of rent, loss of income derived from the house, and penalty for late lodgement of a return for death duty

Terms of A Retainer

Express Terms

- Usually express terms are (or should be) documented in writing, in which case their scope is determined, like any other contract, on a process of construction.
- But unlike ordinary contracts between arm’s length parties, an ambiguity in those terms that generates a dispute will likely be construed contra proferentem (that is strictly) against the lawyer, at least for the typical (inexperienced) lay client.
- It is usually the lawyer who drafts the retainer and so, it is reasoned the lawyer should not by virtue of her or his often stronger position receive the benefit of an ambiguous expression.

Express Terms should Define:

- Who are you acting for?
- What is the scope of the work?
 - These will define the duties you owe and to whom to you owe them
- How are you entitled to charge costs and seek payment for disbursements?

Implied Terms

- Various terms are implied into the retainer as a matter of law, giving effect to the nature of the relationship.
- Because a term implied in law is presumed to form part of the contractual relationship, the onus of establishing that the term is modified or ousted in a particular retainer lies on the lawyer.