

MLL235- LEGAL PRACTICE AND ETHICS
EXAM NOTES

TOPIC 1 – INTRODUCTION: ETHICS, MORALITY & THE LEGAL PROFESSION

What is 'ethics'?

- **Generally:** knowing the difference b/w right & wrong & choosing to do the right thing.
 - The issue with this is that there is no black and white definition
 - However, we need to convince the court, that our definition is the most accurate
 - However, it is not to be mistaken, that ethics should not be taken to be rules.
- **'Ethics' in the legal profession:**
 - separate concept to morals – ethics are grounded in external responsibilities, while morals are a more personal and internal sense of right and wrong, it will affect your conduct, but it does not affect your external responsibilities.
 - values and rules of conduct governing a legal professional's behaviour – *minimum standards which a lawyer must maintain.*
 - *Shallow ethics* – straight forward, simple process of how I can take this situation and make it black and white depending on my client (legal interpretation skill).
- **Enforcement of professional standards:**
 - *Academic and practical requirements to be met before admission.*
 - (completing priestly 11 – legalisation requires it) foundational knowledge (uniform knowledge), which equips you to have the theoretical knowledge
 - It may eventually become routine for practitioner; however, it is very important to note that, what is routine for you is live changing for client.
 - *Continuing Professional Development obligations.*
 - *i.e. Conducted by LIV, go to seminars* (in the area of law you are practising)
 - *If breach:* unsatisfactory professional conduct or professional misconduct.
 - **Consequences?** Loss of right to practice as a lawyer, suspension, reprimand.

Law as a profession

Three core attributes of a profession:

1. Special skill and learning.
2. Public service as principal goal.
3. Autonomous and independent of outside control (conditional on attributes 1 & 2)
 - *Internally controlled, therefore independent, i.e. lawyers oversee the standards/administer the conduct of lawyers)*

Challenges facing the legal profession

- **Traditional core attribute of profession** – public service as primary goal.
- **Number of business-like characteristics today** – e.g. marketing, law firms incorporated entities, non-legal services also offered. This sits inherently at odds with the primary goal of public good
- **Challenges:**
 - Shift in priority from provision of legal advice to making money (e.g. focus on billable hours)?
 - Lack of client loyalty – duty to the court/administration of justice and duty to the client may collide. E.g. client dictates course of matter.

TOPIC 3C- DUTIES OWED TO CLIENTS (CONFIDENTIALITY)

DUTY OF CONFIDENTIALITY

Sourced in:

- Contract – implied in the retainer
- Equity – protects confidential information from unauthorised use or disclosure
- Rule 9.1 SCR

9. CONFIDENTIALITY

9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not:

9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor's law practice; or

9.1.2 a barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,

EXCEPT as permitted in Rule 9.2.

- **Obligation on lawyers not to reveal clients' information** (*Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501) **or misuse it** (*Prince Jeffri Bolkiah v KPMG (a firm)* (1999) 2 AC 222); **broad obligation**
 - The duty lasts beyond the retainer even when the client is deceased
 - **Obligation cannot be reduced by duty owed to another client** (*Hilton v Barker Booth & Eastwood* [2002] Lloyd's Rep PN 500).
 - **Duty owed to former clients and may also be owed to other third parties.**
- **Designed to encourage full and frank disclosure between lawyer and client and maintain public confidence in the legal system.**
 - Even where the client think that a matter is not relevant for it to be disclosed or are too embarrassed to disclose >> should be disclosed b/w lawyer and client

Risks to confidential information:

- Communications by fax.
- Communications by email i.e. *may type the email incorrectly and send to wrong person*
- Mobile phone communications.
- Communication via social media.
- Communication with family and friends.

'Confidential' information?

- **Not all information communicated by client to lawyer is confidential** (*Australian Commercial Research & Development Ltd v Hampson* (1991) 1 Qd R 508).
- No set test – will depend on circumstances.
- **General proposition: information must have been confidential to client at the time it was communicated** (*D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118).
 - Must be facts and circumstances to indicate that the information should be kept confidential and secret (*D & J Constructions Pty Ltd v Head* (1987)).

Test of confidentiality

- **Objective test:** would a reasonable person, in the shoes of the recipient of the information, have realised on reasonable grounds that the information was being provided in confidence (*Mense v Milenkovic* [1973] VR 784).
- Applicant would need to show (*H Stanke & Sons Pty Ltd & Cape Banks Processing Company Pty Ltd v Von Stanke* (2006) 95 SASR 425):
 - information had 'necessary quality of confidence';
 - was imparted in circumstances that import an obligation of confidence; and

- disclosure would be detrimental to the applicant.

Exceptions to duty of confidentiality

1. client consent;	2. information that is public knowledge;
3. disclosure is compelled by law;	4. criminal matters;
5. client's intention to disobey a court order;	6. defence of disciplinary or legal proceedings;
7. to substantiate entitlement to remuneration;	8. public interest exception; and
9. obtaining advice in relation to legal or ethical obligations.	10. matters incidental to normal conduct of retainer;

EXCEPTION: client gives consent to disclosure of confidential information (rule 9.2.1 SCR).

- 9.2 A solicitor may disclose information which is confidential to a client if:
 - 9.2.1 the client expressly or impliedly authorises disclosure
- Have implied authority to:
 - **make disclosures in the best interests of client for purposes of retainer** (unless authority expressly limited);
 - make disclosures of anything client discloses to partners or employees in the firm;
- expert or barrister – once have authorisation to engage, can disclose (rule 9.1.2 SCR).

EXCEPTION: information is in the public domain.

- Careful – lawyer may know more than what is in public domain OR in public knowledge!
- Need to be very careful that every bits of information is in public domain already expressly or impliedly

EXCEPTION: disclosure compelled by law (rule 9.2.2 SCR – A solicitor may disclose information which is confidential to a client if the solicitor is permitted or is compelled by law to disclose).

- These disclosures compelled by law do not override those which exist because of legal privilege however they do override most of the obligations of confidentiality
- Generally, the statues compel disclosure; common law may but it is rare
- Disclosures are restricted in scope. Mostly related to financial transactions

EXCEPTION: criminal matters – for the purpose of avoiding the probable commission of a serious criminal offence and/or preventing imminent serious physical harm to someone. Disclosures should be restricted to those who need to know. (*the buried body cases*)

In this case, client had murdered lots of people; they had disclosed by the client to their lawyers i.e. where the bodies were buried. The lawyer did not disclose despite the fact that it was a heinous and disturbing crime. . this dilemma has been resolved in Australia for most part by the following rule.

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 205 –

R 9.2 a solicitor may disclose information which is confidential to a client if:

- 9.2.4 the solicitor discloses the information for the sole purposes of avoiding the probable commission of a serious criminal offence;
- 9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person; or

'probable commission' – more likely than not, a general baseline, that crime will be committed, it is looking at the possibility of a crime occurring in future not the past. i.e. prospective outlook

'serious' – be heard by country court at minimum; not insignificant harm. It must be noted that harm should be physical

'imminent serious physical harm' – reasonably proximate to 'now' that the harm will occur

EXCEPTION: client's intention to disobey a court order.

- Need to believe on reasonable grounds client's conduct is a threat to person's safety.

20.3 A solicitor whose client informs the solicitor that the client intends to disobey a court's order must:

- 20.3.1 advise the client against that course and warn the client of its dangers;
- 20.3.2 not advise the client how to carry out or conceal that course; and
- 20.3.3 not inform the court or the opponent of the client's intention unless:
 - (i) the client has authorised the solicitor to do so beforehand; or
 - (ii) the solicitor believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.

EXCEPTION: defence of disciplinary proceedings or legal proceedings.

- If client institutes proceedings against lawyer, then it is deemed that the client has taken to have waived confidentiality in relation to *those matters* (*Benecke v NAB Ltd* (1993) 35 NSWLR 110).
 - **Note rule 9.2.6 SCR –lawyers can disclose relevant confidential information to professional indemnity insurers.** (as it is the insurers that pay where there is a loss; thus lawyer has a stake in knowing some confidential matters'
- If client complains about lawyer, lawyer may need to provide documents and information to LSC.
- Note LSC's broad investigatory powers (Ch 7, *UL*) – e.g. s 371 *UL*.

Legal Profession Uniform Law s321 Waiver of privilege or duty of confidentiality--

- (1) If a client of a law practice makes a complaint about the law practice or a [lawyer](#), the complainant is taken to have waived legal professional privilege, or the benefit of any duty of confidentiality, to enable the law practice or [lawyer](#) to disclose to the appropriate authorities any information necessary for investigating and dealing with the complaint.
- (2) Without limiting subsection (1), any information so disclosed may be used in or in connection with any procedures or proceedings relating to the complaint.

EXCEPTION: disclosure to substantiate claim for remuneration.

- E.g. where account unpaid, lawyer can disclose retainer in order to prove debt.

EXCEPTION: disclosure is in the public interest.

- The lawyer needs to prove that the conduct of client would amount to an indictable offence
 - Onus on lawyer to prove; claiming the confidentiality exemption
- Would not protect from breach of contract in any event.

EXCEPTION: obtaining advice in relation to legal or ethical obligations.**Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015**

- 9.2.3 the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations;

TOPIC 7: COMPLAINTS AND DISCIPLINE**Concept of ‘professional misconduct’**

- ⇒ ‘Professional misconduct’ is a common law concept – that something is done by a lawyer ‘which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency’ (*Allison v General Council of Medical Education and Registration* [1894] 1 QB 750, 763).
- ⇒ Legislation in all jurisdictions provides a non-exhaustive list of conduct that may constitute unsatisfactory professional conduct or professional misconduct.

Section 296 Uniform Law*296 Unsatisfactory professional conduct*

For the purposes of this Law, *unsatisfactory professional conduct* includes conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

Examples of unsatisfactory professional conduct**Examples of behaviour amounting to ‘unsatisfactory professional conduct’ include:**

- ⇒ Appearing late for a court hearing, or not appearing at all, when the name of the law practice appears on the court file;
- ⇒ Sending documents to the wrong address;
- ⇒ Being rude or aggressive;
- ⇒ Failing to do work that is expected and/or within a reasonable time;
- ⇒ Not informing clients in writing of the potential disadvantages of acting for both the vendor and purchaser to a proposed conveyancing transaction, or both the seller and purchaser in a sale or business transaction;
- ⇒ Not withdrawing from a matter, when acting for both parties in a conveyance or business purchase, or other type of transaction where the lawyer acts for both parties, when a conflict of interest arises;
- ⇒ Failing to communicate effectively and promptly to clients; and
- ⇒ A substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence. (*Source: Marlene Ebejer, Legal Practice and Ethics Q & A, (LexisNexis, 2nd edn, 2016)*)

Section 297 Uniform Law- Professional misconduct

(1) For the purposes of this Law, *professional misconduct* includes—

- (a) unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
- (b) conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.

(2) For the purpose of deciding whether a lawyer is or is not a fit and proper person to engage in legal practice as referred to in subsection (1)(b), regard may be had to the matters that would be considered if the lawyer were an applicant for admission to the Australian legal profession or for the grant or renewal of an Australian practising certificate and any other relevant matters.

Examples of professional misconduct

Examples of conduct held to constitute ‘professional misconduct’ include:

- Lying to or otherwise misleading the court (e.g. *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408);
- Improperly influencing a witness (e.g. *Kennedy v Law Society of New South Wales* (1939) 13 ALJ 563;
- Gross negligence (e.g. *Re Mayes and Legal Practitioners Act* [1974] 1 NSWLR 19);

- Conviction for a serious offence, particularly if that offence involved dishonesty, whether as part of legal practice or otherwise (though circumstances may be taken into account) (e.g. *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279);
- Failure to lodge income tax returns over a lengthy period of time (e.g. *New South Wales Bar Association v Cummins* [2001] NSWCA 284;
- Overcharging (e.g. *Legal Services Commissioner v Bechara* [2008] NSWADT 215);
- Conduct occurring outside of legal practice, which might bring the profession into disrepute (e.g. *Coe v New South Wales Bar Association* [2000] NSWCAS 13).

Section 298 Uniform Law

- **298 Conduct capable of constituting unsatisfactory professional conduct or professional misconduct**

Without limitation, the following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct—

(a) to (j) - see Uniform Law or textbook p. 765 for a summary of the sub-sections.

Disciplinary orders

- **Depends on the seriousness and gravity of the misconduct. Orders extensive, including:**
 - Striking off: lawyer found not to be fit and proper person to remain in practice (e.g. *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279);
 - Suspension: absence of dishonesty (*Law Society of the Australian Capital Territory v Gates* [2006] ACTSC 126; serves to warn others (*Re Drew* (1920) 20 SR (NSW) 463; reform the lawyer (*Re Evatt* (1967) 67 SR (NSW) 236);
 - Reprimand: not so substantial as to merit suspension or striking off but nevertheless a serious matter (*Legal Profession Complaints Committee v Detata* [2012] WASCA 214);
 - Fines;
 - Orders to undertake further profession education;
 - Imposing conditions on the lawyer's practising certificate.

Factors that impact on disciplinary orders

- Frequency of misconduct and prior misconduct findings
 - Where isolated, may justify less severe disciplinary sanction (*Attorney-General v Bax* [1999] 2 Qd R 9).
 - Recurring misconduct reflect lawyer's indifference (*Legal Practitioners Conduct Board v Le Poidevin* (2001) 83 SASR 443).
- Lawyer's attitude
 - Timely guilty plea combined with genuine remorse (*Attorney-General v Bax* [1999]).
- Lawyer's level of appreciation of wrong doing
 - Failure to appreciate seriousness of misconduct
 - indicative of unfitness to practise (*New South Wales Bar Association v Evatt* (1968) 117 CLR 177); and
 - Increases risk of its recurrence (*Legal Profession Complaints Committee v in de Braekt* [2013] WASC 124).
 - Important in the context of lawyer-client financial dealings (*Legal Practitioners Complaints Committee v Lashansky* [2007] WASC 211).
- Lawyer's level of experience
 - May be relevant but "a defect in character such as dishonesty is not something related to experience" (*Legal Practitioner v Council of the Law Society of the ACT* [2014] ACTSC 13).
- Illness and external stressors
 - Mental illness or addiction may mitigate seriousness of misconduct but general reluctance to allow mental illness to excuse dishonest conduct (*Legal Practitioners Conduct Board v Phillips* (2002) 83 SASR 467).

- Evidence of pressure will not usually mitigate appropriate disciplinary response to proven misconduct, especially if it involves dishonesty (*Legal Practitioners Conduct Board v Hannaford* (2002) 83 SASR 277).
- Testimonials and opinions by third parties
 - Of limited impact unless the evidence goes towards lawyer's good reputation and integrity and the breach is a minor and isolated one. Reason: aim of discipline is to maintain public confidence that lawyers will be trustworthy (*Bolton v Law Society* [1994] 1 WLR 512).
- Loss suffered by others as a result of misconduct
 - That no client suffered (*Law Society of New South Wales v Starky* (unreported, CA(NSW), 1979) or that clients have benefited (*Bolster v Law Society of New South Wales* (unreported, CA(NSW), 1982) has little influence on disciplinary order.
- Loss already suffered by lawyer as a result of misconduct
 - Irrelevant to the aim of protecting the public (*Legal Profession Complaints Committee v Bachmann* [2011] WASC 309).

Disciplinary procedures

- The Uniform Law (UL) contains dispute resolution and complaints provisions
- Making a complaint
 - About conduct of law practices and/or lawyers may be made in writing by any person or body to the Victorian Legal Services Commissioner (LSC) (ss 265 to 267 UL).
 - May be about 'consumer matters' or 'disciplinary matters' (ss 265 to 271 UL).
- Investigation of complaints
 - Consumer matters – LSC not to take action unless at least one of the parties has unsuccessfully attempted to resolve the matter, or it would be unreasonable for complainant to do so (s 286 UL).
 - Disciplinary matters – LSC may investigate all or part of complaint, and appoint suitably qualified person to do so (s 283 UL).

Types of misconduct

- S 296 UL defines unsatisfactory profession conduct to include:
 - Conduct of a lawyer when practising law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.
- 297 UL defines professional misconduct to include:
 - Unsatisfactory professional misconduct of a lawyer where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence, and
 - Conduct of a lawyer that would justify a finding that the lawyer is not a fit and proper person to engage in legal practice.
 - Note also s 298 UL.
- The issue of misconduct and the appropriate sanction for it is determined on the facts of each case (*Ex parte Lenehan* (1948) 77 CLR 403).

Examples of misconduct in the course of practice

- Misleading a court or tribunal
 - lawyer who **knowingly** deceives a court or tribunal commits professional misconduct, and being struck off is a common consequence
- Misleading another lawyer or a third party

Doing so conveys a very poor image of the honesty and integrity of solicitors and brings the profession into disrepute (*Attorney-General*

- Misleading a regulatory body
 - Lawyers obliged to be frank with their regulatory bodies e.g. Law Society, Legal Services Commissioner, and misleading that body is usually misconduct (*Legal Practitioners Conduct Board v Kerin* (2006) SASC 393).
 - *Law Society of New South Wales v McNamara* (1980) 47 NSWLR 72.
- Disrespect to the court or its authority

- Lawyer's conviction for contempt of court can lead to disciplinary consequences (*Ellis v Law Society* [2008] EWHC 561).
- Trust accounting irregularities
 - Fraudulent misappropriation of trust money is professional misconduct and a crime, and usually results in an order striking off the lawyer (*Prothonotary of the Supreme Court of New South Wales v Trimarchi* [2003] NSWCA 385).
 - Betrays trust of individual client as well as impacts on public confidence in the profession (*Re a Practitioner* (1982) 30 SASR 27).
- Lawyer-client conflict; client-client conflict; breach of client confidentiality
 - Breach of these duties can lead to disciplinary consequences.
- Overcharging
 - S 298(d) UL – charging more than a fair and reasonable amount for legal costs in connection with the practice of law is conduct capable of constituting unsatisfactory professional conduct or professional misconduct.
- Delay or neglect
 - Gross neglect and delay can constitute professional misconduct as it endangers client interests and brings the profession into disrepute (*Re Moseley* (1925) 25 SR (NSW) 174).
- Failure to properly supervise
 - Serious omissions to properly supervise employees or be vigilant to activities of partners may amount to professional misconduct, especially over trust funds (see e.g. *Law Society of New South Wales v Foreman* (1991) 24 NSWLR 238; *Bridges v Law Society of New South Wales* [1983] 2 NSWLR 361; *Re Mayes* [1974] 1 NSWLR 19).