

## CHAPTER 2: ETHICS AND LAWYERING

### PHILOSOPHICAL ETHICS

#### Utilitarianism and Consequentialism

- Will the consequence result in more good being done than harm? If so, do it
- Outcome of the greatest happiness for the greatest number
- Focus on consequences/outcome/results
- Moral worth of an action determined by resulting outcome
- Action is justified even if it overrides individual autonomy
- Right action requires us to maximise good

#### Deontological

- Act only according to that maxim whereby you can, at the same time, will that it should become a universal law
- Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end
- Deontology is the science of duty or moral obligations: that is, ethics.
- Founded in Kantian philosophy; deals with first principles
  - First Principles are defined in terms of either rights/duties, though emphasised on rights. Accepting a right(s) will become a maxim, causing it to be universal law.
- Categorical Imperative - To act morally would be to act according to these truths without usually taking into consideration the effects that are produced by such action.
  - i.e. Duty of Truthfulness - have to tell truth to everyone, regardless of person. It is objective.
- Nagel suggests deontology is subjective; he argues that one's agent-relative position will dictate whether an action is ethical based on the moral agent's specific relationship to the principal
- Deontologist either base their actions from God's will (religious) or natural law (how humans behave).
- Essentially, both approaches require each human to be treated as an end, not as a means to an end.

#### Virtue

- Essential element of character, what would a virtuous person do in the situation?
- A good person is one who exhibited the virtues of prudence, justice, temperance and fortitude and courage
- Able to apply their characteristics of above to resolving a dilemma
- No guidance as to how to make a decision of an ethical kind

#### Adversarial advocacy – Client focus, primary purpose. Structure in the law.

- Lawyer should advance their clients' interests
- Two principles – partisanship and non-accountability.
- Partisanship: Lawyers are partisan advocates for their clients. Required to seek to maximise the likelihood a client will prevail. Only within the limits of the law.
- Lawyer puts the client's interests above all else.
- Non-accountability: Lawyer isn't morally accountable for either the means used to advocate or for the ends pursued.
- Amoral approach – client's morals nor the lawyer's morals are relevant. Provides some degree of certainty for lawyers. Doing everything possible within the limits of the law.

#### Responsible lawyer – moderated adversarial approach

- Limits excessive adversarialism – proposes that lawyers behave as officers of the court as well as client advocates. Lawyers owe duties to the court.

- ***Rush v Cavanaugh*** – advocate is required to behave with all due fidelity to the court and client.
- Law of lawyering places limits on lengths to which lawyers may go to achieve clients' objectives
- If a lawyer believes in putting the client's interests first, won't necessarily institute court proceedings or adopt aggressive adversarial tactics.
- Responsible lawyers will: Help clients understand/comply with law, will not unhesitatingly use loopholes and won't say no to those prepared to use economic power to compromise integrity of justice system.

#### Contextual approaches

- Two approaches – appropriate action on the lawyer's part is determined by reference of circumstances of particular case – legal merit. And societal interests:
  - Legal merit: Allows lawyers to exercise discretion in resolving ethical dilemmas.
  - Social interests: Lawyers not imposing values on a client and it requires lawyers to accept personal moral responsibility for the consequences of their professional actions.
    - Assess their obligations in light of all social interests at issue in practice contexts.
    - The less confidence that attorneys have in the justice system's capacity to deliver justice, the greater their own responsibility to attempt some corrective.

#### Moral activist – acting in the public interest, agent of justice.

- An approach that injects morals into the lawyer-client relationship. Disclaims amorality. Lawyers view themselves as co-equal agents of their clients.
- The lawyer is responsible for the consequences of his or her actions.
- Moral activists don't unquestioningly and zealously pursue the client's goals.
- Moral discourse must take place between client and lawyer if there are doubts about the client's cause.
- Advantages: promotes greater awareness of morality of actions, curb excessive adversarialism, lends itself to passion and may lead to innovative outcomes.
- May also mean restrictions on access to justice.
- Can be expensive, takes time, and not all clients will welcome it.

#### Ethics of care – focus on relationships and avoiding harm. Moral orientation of client

- Exchange of moral views mean that lawyers don't have to act in a moral vacuum.
- Lawyer gathers all relevant information from the client and identifies the persons involved. Lawyer's opinion is also included.

## COMMUNICATION SKILLS

### SOCIAL MEDIA

- May it tweet the court, 2013
- Survey of 80 firms showed that 91.3% used social media, *New Lawyer*, Law firms ranked by social media use

#### Benefits of Social Media

- Potent marketing tool, **New Media Strategies, Plaintiffs bar goes digital**
- Can be used as investigative tool, confirmation of facts through social media, **2011 Tech Issue User Beware**

#### Dangers of Social Media

- If a mistake is posted on social media, it stays there permanently, **Lawyers Step In it through social media incompetence**
- Informal platform which may raise risk of breaching professional rules, **The Internet and the Law Avoiding a Grievance in 140 Characters or Less, the Advocate, 2010**
- Cant control what others may post on their page
- Using it incorrectly and posting private comments publicly, **Julian Burnside Apologies to Tony Abbott The Australian, 2011**
- Can be reprimanded by regulatory body for acts on social media, **Bar Counsel, a Word of Caution: Social Media for Lawyers, 2009; Florida Bar v Conway 2008**
- Breaches of confidentiality, **Social Media Issues for Legal Practice 2012**

#### Actions of legal regulators to date

- Law Institute of Victoria released Guidelines on the Ethical Use of Social Media
- Victoria created Social Media Task Force to inform lawyers of best social media practices
- NSW Office of Legal Services Commissioner published draft ethical guidelines for lawyers about social media use: **A Guide on Practice Issues: Social Media 2013**
- UK Bar Standards Board released comment on social media: **Media Comment Guidance 2013**
- UK Law Society released a practice note on social media addressing how it affects lawyer/client relationship, privacy issues and creating a social media policy

## ETHICAL SITUATIONS WHILST USING SOCIAL MEDIA

### Unintended or faulty retainers

- **Mark Et Al**, Some clients believe a retainer exists simply because they are friends with a lawyer on social media
- Unintended retainers may be created by a lawyer answering a question on social media: **Kennedy and Gordon**
  - Unlikely to create retainer if it is a response to a general hypothetical question: **a Primer for taking advantage of technology within ethical guidelines**
- Lawyers intentionally giving legal advice through social media client may assume a retainer has been created, important that lawyer prefaces any comments noting it is not legal advice and do not intend to create a retainer (**Kennedy and Gordon**)

## WHY UNIFORM NATIONAL ETHICAL GUIDELINES ARE NECESSARY. P.165

- Necessity of uniform ethical rules for social media is disputed: **Hanging out your virtual shingle 2011**
- **Taylor, Friending and Following, 2012**: rules would quickly become obsolete

- National guidelines would ensure more lawyers are familiar with the same rules, more opportunity for feedback and modification of guidelines/rules