

# LAWS1230 Lawyers, Ethics and Justice: Reading notes

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# Week 1, Class 1 – Introduction to Values, Ethics and Legal Professionalism

## The Humanist – Ethics: time to revisit the basics, Gregory D Foster

### What is Ethics About?

- Ethics is ambiguous and poorly defined and understood
- Ethics is about right and wrong
  - 'No man is prejudiced in favor of a thing knowing it to be wrong. He is attached to it on the belief of its being right' - Thomas Paine, The Rights of Man
  - We do not call anything wrong unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow creatures, and if not by opinion by his own conscience
- Ethics is about good and bad; or good and evil – people differ in their opinion of these
- Ethics is about virtue and vice
- Ethics is about benefit and harm – can inflict benefit or harm by the way resources are used
- Ethics is about propriety and impropriety
- Ethics is about principle – fixed, universal rules of right conduct that are contingent on neither time nor culture nor circumstances
- It is about character – the traits, qualities, and established reputation that define who one is and what one stands for in the eyes of others
- It is about example – an established pattern of conduct worthy of emulation
- It is about conscience – the voice of the soul, the pulse of reason etc
  - Conscience stems firstly from the enduring and ever-present nature of social instincts, secondly, from man's apprehension of the approbation and disapprobation of his fellows, and thirdly from the high activity of his mental faculties, with past impressions extremely vivid; and in these latter respects he differs from the lower animals

### What Ethics Involves?

- Ethics involves critical analysis of human acts to determine their rightness or wrongness in terms of two major criteria: truth and justice: Clarence Walton
  - Walton would have us understand, first, that ethics has virtually everything to do with the quality – even more than the content – of our thinking
- Critical thinking differs from impulse, habit, faith and intuition, as it involves systematic, investigation
- Thinking critically is a disciplined pattern of thought or mode of inquiry that requires 3 things, (1) questioning – assertions, opinions, and givens – rather than accepting them at face value, (2) seeking and weighing evidence on all sides of an issue, not just evidence that affirms one's beliefs, and (3) employing rigorous logic to reach defensible conclusions
- The object of critical thinking is to achieve a measure of objectivity to counteract or diminish the subjective bias that experience and socialization bestow on us all
- Walton suggests that we should think critically about human rather than nonhuman – rather than thoughts.
  - We focus on human for two reasons, (1) humans presumably possess abilities – predominantly intellectual – that other living species do not: the ability to make moral judgments, to deal with abstract concepts, to extrapolate from one set of circumstance to another, to exercise free will that surpasses conditioned response; (2) we focus on human is that we expect more of them than we do of other species
- When we seek to determine the rightness or wrongness of something, we should do so with two major criteria in mind: truth and justice – truth is the summit of being, justice is the application of truth to affairs
- Truth often lies in the eye of the beholder – a man with a watch knows the time where as a man with two watches is uncertain of the time
- Trust is the bottom line – truth and justice create the basis for trust and trust is what unites us

## Parker and Evans (1-12): Ethics and Lawyering

### Case Study 1.1 The Case of the Philanthropist QC and the Tobacco Company

- A leading commercial and constitutional barrister was appointed to the board of the fundraising arm of Australia's highest profile cancer hospital
- He appointment was criticized as he had recently defended the British American Tobacco Company in its constitutional challenge to the Australian government's plain packaging legislation for cigarettes. BAT had admitted their products caused health issues unlike the other companies challenging the legislation.
- The legislation was bought in – Australia being the first country to introduce plain packaging
- The QC was actively involved in a number of philanthropic activities
- The QC had also successfully defended BAT in a case against Rolah McCabe who had died of lung cancer
- The important question in 2012 was whether it was proper for the QC to sit on the board of the fundraising arm of the cancer hospital while also actively supporting the interests of tobacco manufacturers
  - The Chief Executive of the cancer hospital argued that the QC had a strong anti-tobacco stance, and that the HC challenge wasn't about smoking, it was about whether aspects of the Tobacco plain packaging Act were inconsistent with the Constitution... it was about intellectual property, appropriation of trademark and potential compensation
  - The key clinical staff involved in the anti-smoking areas were consulted and were respectful of the QCs right to advocate on behalf of his client. They felt it absolutely did not undermine out collective work, which is very strong on tobacco

### Sources of Ethical Obligation for Lawyers

**Sources of ethical obligation for lawyers – analyze competing interests and principles at stake in each situation and have reasons as to why one should triumph over another or how they can be reconciled**

- Cab rank rule
- Lawyer must represent someone charged with a serious criminal offence if there is no one else available to represent them
- Responsibility to ensuring public policy questions are addressed
- Right to make a living

Usually our ethics are a product of our life, and are shaped by our family and upbringing, but can be at conflict with societal ethics.

Thus two key sources of ethics exist for lawyers besides their own personal beliefs, these are professional conduct and social ethics.

### Professional Conduct

- Professional conduct is the law of lawyering – the published rules and regulations that apply to lawyers and the legal profession
- In Australia these rules and regulations can be found in the legal practice or legal profession statutes in each State, in the various professional associations' self-regulatory professional conduct and practice rules and in the way the general law (particularly contract, tort and equity) applies to lawyers and their relationships with clients
- Much teaching and practical discussion of lawyers' ethics in the legal profession is dominated by legalism. Legalism treats ethics as a branch of law – 'professional responsibility' or 'professional conduct' law
  - The professional conduct approach may cater to the need for certainty, predictability and enforceability in a context where people often consider ethics to be subjective and relative – by definition is abandons ethical judgment for rules

- The law of lawyering is significant as one way in which lawyers' ethics are institutionally enforced or regulated, and can certainly be helpful in guiding behaviors

### **Social Ethics**

- The second source of ethics for lawyers is general philosophical theories of social ethics. Social ethics come from general moral theory or ethical theory – philosophical work devoted to understanding what it means for something to be good or right or a duty
- Particularly relevant for lawyers are theories on justice, social and environmental responsibility, minimizing harm and respecting others
- Some commentators on lawyers' ethics go to the opposite extreme from legalism, and propose that general and abstract moral theories or methodologies should be applied, without elaboration or modification, to the practice of law
  - These theories usually divided into 'deontological' or rule based theories, and 'teleological' or consequentialist theories

### **Deontological v Teleological Theory**

#### **Deontological Theory**

- Deontological ethics and utilitarian ethics are used, respectively, as the main example of each approach e.g. Kant's Categorical Imperative – act only according to that maxim whereby you can, at the same time, will that it should become a universal law. This is similar to the Golden Rule and other religious traditions, which require people to always treat others as they would want to be treated.
- Religious formulations of ethics based on divine command are generally deontological because they set absolute rules that tend to emphasize the idea of fairness as important to deciding individuals rights and entitlements
- According to Kant, 'right' actions or policies are those that primarily represent individual autonomy by promoting fairness. Kantian methods refute the notion that 'the end justifies the means'. Hence it is a categorical imperative that people never be treated merely as means to an end, but always as ends in themselves. Kantian theory argues that the means, since they often involve what happens to individuals, are at least ethically significant as outcomes.

#### **Teleological Approach**

- In a teleological approach, by contrast, right actions or policies are those that maximize good consequences and minimize bad consequences – thus on a teleological approach the (good) ends of action can justify the means used to obtain those ends, even if they involve otherwise unfair treatment of individuals or organizations
- Kantian ethics were a response to utilitarian ethics – a type of consequentialism, developed first by Jeremy Bentham and John Stuart Mill. Utilitarianism proposes that ethical actions are those that produce the greatest good for the greatest number of those affected by a situation. Was particularly created to aid legislators and public policy makers to decide what laws to make

### **Virtue Ethics v Ethics of Care**

#### **Virtue Ethics**

- Virtue ethics shifts the focus of ethical attention from particular conduct and its impact onto the inherent quality or character of the actor. Virtue ethics approaches derive from ancient philosophy and especially Aristotle's emphasis on right character as a personal virtue
- A virtue ethics approach is not necessarily inconsistent with a deontological, consequentialist and ethics of care approaches, but rather asks a different question – What kind of person should I be in order to be a good person? – whereas other theories ask – what is a good action?

- A good virtue by Aristotle's standards was thus 'phronesis' – practical wisdom and the ability to choose wisely. It sits along side 'sophia' – theoretical wisdom – and other virtues such as courage, generosity, gentleness, honesty about oneself, justice and fairness, magnanimity and fortitude
- Like ethics of care, virtue ethics sees how one relates to others as being central to ethics, but looks beyond this and asks us to consider our identity, character and motivations at a profoundly personal level
- Virtue ethicists assert that intentional, ethically defensible behavior is more likely to emerge from the ongoing process of genuine personal reflection about our virtues (and our lack of some of them) than if we attempt to act without regard to our inner virtues (values)

### **Ethics of Care**

- The ethics of care focuses attention on peoples responsibilities to maintain relationship and communities, and to show caring responsiveness to others in specific situations
- Developed by feminists as a correction to the traditional emphasis in deontological and utilitarian ethical theories on individual rights and duties and formal, abstract universalist reasoning. It has been further developed by theorists beyond feminism who emphasis the interdependence of humans and the importance of sensitivity and emotional response in ethical actions
- Deontological and teleological theories tend to assume that each person decides on their actions individually, in isolation from others, and that the choices they make then impact on others. Where as ethics of care recognizes the importance of modern psychology in understanding the intricacies of human relationships, and would stress that interpersonal skill and sensitivity are crucial tools for ethical decision making

### **An Applied Ethics Approach**

This approach accepts that lawyers must first know where they fit in relation to the social theorists of ethics discussed above but asserts that more is needed, because lawyers must operate as everyday judges inside fairly well-defined roles, as part of the justice system

### **4 Main Ethical Theories**

1. Adversarial advocacy
2. Responsible lawyering
3. Moral activism
4. Ethics of Care

### ***Barristers Rules (1-10)***

2. Purpose of these Rules is to provide the requirements for practice as a barrister and the rules and standards of conduct applicable to barristers which are appropriate in the interests of the administration of justice

4. Object of these Rules is to ensure that all barristers (a) act in accordance with the general principles of professional conduct; (b) act independently; (c) recognise and discharge obligations in relation to the administration of justice; and (d) provide the highest standard of service

10. These Rules are not intended to be a complete or detailed code of conduct for barristers. Other standards for, requirements of and sanctions on the conduct of barristers are found in the inherent disciplinary jurisdiction of the Supreme Court, the Legal Profession Act 2004 (NSW) and in the general law (including the law relating to contempt of court).

### ***Solicitors Rules (1-5)***

2.2 The purpose of these Rules is to assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and these 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

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

#### 4.1 Ethical duties

4.1.1 act in best interests of a client

4.1.2 be honest and courteous in all dealings

4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;

4.1.4 avoid any compromise to their integrity and professional independence; and

4.1.5 comply with these Rules and the law.

5.1 A solicitor must not engage in conduct which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:

5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice; or

5.1.2 bring the profession into disrepute.

## Week 1 Class 2: Intro to Theoretical Frameworks and Concepts

### Interviewing - Hyams

3 Stages to an Interview:

1. Listening to the clients story in its entirety
2. Asking questions to obtain a complete understanding of the facts and of the chronology of the story
3. Assessing the options and giving advice

#### Pre-Interview Tips

- Meet clients in the waiting room and have a relaxed chat and establish a rapport
- Provide your full name, and offer your first name if you are comfortable with them calling that
- Do not assume clients will want to be called by their first name – address with last name
- Do not start any serious discussions about time, cost or the clients problems whilst walking to the interview room
- When they have arrived and you are ready to begin the interview start with “how can I help you today?” or ‘what can I do for you today?’
- Get contact details later in the interview
- Give your client a brief introduction on yourself

#### STAGE 1

- Listen to your clients story – do not jump in and ask questions
- Encourage your client to give you all the details from the beginning to end while you make notes
- Don't interrupt to ask dates, times, street names etc
- Gain a global view of the issue at this stage
- Actively listen and be empathetic e.g. that sounds terrible

- If a client is angry or aggressive say 'I understand you're angry about the situation, Mr \_\_\_\_\_, however I am here to help you and I can't unless you can tell me the whole story'
- Ask the client if they would like a moment, and then offer a tissue or beverage – it is unprofessional to offer personal comfort unless you have an ongoing relationship that would make it appropriate
- Make it clear what you can and cannot do – only act as legal advisor
- Support people can come with mentally disabled clients however the support person must know what they can and cannot do
- Make a mental note to address inconsistency in the clients story at a later stage

## STAGE 2

- Ask open ended questions
- Funnel questions – open wide questions at the beginning and refined and detailed questions towards the end
- Preserve until satisfied
- Need to take full, accurate and comprehensive notes
- Take notes in the questioning time
- Structured file should be made up with time and date, full name, contact details, brief summary of important facts and advice given
- Should have a consistent structure
- Consider if you need an interpreter – should be aware of the difference between interpreters and translators
- Useful to reiterate how you have understood the facts to confirm all is correct, before moving onto the advice stage

## Ethical Matters

- If a client is **reluctant or embarrassed** to delve into a particular issues there is often a good reason – explain why you need certain information rather than bulldozer through
- Is it important to know if they are reluctant to tell you – can you drop the matter?
- Deception and dishonesty may be an issue – should in a way cross examine
- Don't ever carry out deception for your client if they ask you or take unreasonable instructions from them

## How to Develop the Skill of Active Listening

### The Technique

- To employ effectively the technique of active listening, lawyers must develop 2 distinct skills
  1. Discrimination
    - Discrimination is the skill of listening to and judging accurately what a client has said. It is the ability to understand cognitively the client's statement
    - Thus the first step in active listening is to hear and understand the content and the feeling of a client's statement
  2. Communication
    - Lawyer must communicate back the client what the lawyer has understood – this is called the active listening response
- A clients statement can be analyzed either from the perspective of **content** or of **feelings**

### Purpose

- To build rapport with and to obtain information from the client

### Accuracy, Intensity and Form – Three Perspectives

- Accuracy
  - Whether the listener correctly identified the content or the feeling expressed by the speaker

- Intensity
  - o Whether the listener correctly identified the strength or level of the feeling expressed
- Form
  - o Whether an introductory phrase was used to begin the active listening response

#### Avoiding Roadblocks: Questions, Advice and Reassurance

- Avoid saying something that will make the client uncomfortable to open up e.g. don't trivialize what a person says like 'don't worry about it you will get over it'
- Don't bombard them with questions
- 'Explain to me the situation' is better than lots of small questions that are closed
- Help address their current issue not give advice for the future etc.

#### The Importance of Good Communication

- Good communication skills are essential to a client-centred approach to interviewing
- Treat your client as a person not just a legal problem
- Should advise your client so they can make the best possible choice
- Good communication is a two-way process

#### Client Satisfaction

- Try not to take control or ownership of the problem from your client but remain impartial and advise
- Must clearly learn to explain courses of action and your involvement etc
- Communicate their rights etc
- Make sure clients understand consequences

#### Avoiding the Law Society Complaint

- Put advice in writing to clients
- Don't avoid issues that may be embarrassing or sensitive
- QLD has the client care rule which requires lawyers to advise their clients about costs at the initial interview. It also requires that law firms establish a client complaints handling procedure and to advise new clients of that procedure at the first interview

#### Don't Miss the Point

- When you are concentrating on communicating you may miss the significance of what your client is saying and feeling – skills should not act as barrier but rather enhance
- Common errors include rushing into questioning and being insensitive

#### Establishing Rapport and Building Client Comfort

- Be aware of the clients personality
- Create a personal relationship by using their name appropriately
- Consider clients feelings
- Talk casually a bit to build a rapport
- Allow time for the client to become comfortable in the formal environment

#### Physical Environment

- The physical environment is more than just the table and chairs it includes the impressions of colours, textures and noise and the atmosphere created by plants, files and people
- Direct them to the right place to sit and help ease them into the environment – offer a beverage
- Do you want a desk between you and the client or would you rather sit facing each other with no barriers etc
- Consider lighting (windows – sun shining through blinding people)

- Keep the office door closed for privacy
- May record the conversation or ask assistant to note take – however it is advised that one does not do this on the first interview
- Be flexible

#### Non-verbal Cues

- Uh-huh, ahh, mmhm, I see, right
- Tell me more about that
- Is there anything else
- Leaning forward, nodding your head
- Eye contact
- Open body position

#### Active Listening In Practice

- Two techniques which can be used to great effect when trying to demonstrate your empathy are:
  - o Reflecting: a statement of question which reflects back to the client her or his own words
  - o Reframing: a statement or question which acknowledges the emotional or other content of what the client has said and expresses that in your own words
- Appropriate questioning
  - o Open: tell me about it... tell me everything
  - o Closed: what date? Was it or was it not x?
  - o Narrowing: tell m more about the car? Concentrate on...
  - o Clarifying: Is it correct that... did you just say that...
  - o Reflective/empathetic: so you feel... was that painful?
  - o Leading: then you went down the road? You were born on 15 July 19..?
    - Should avoid leading questions ... unless summarizing
  - o Hypothetical: if you could get an early settlement, then...?
  - o Value-laden: How fast...? Was it big?
  - o Neutral: what speed? What size was it?

#### Summarizing

- Can be used to prompt a client, to seek clarification of points, to aid your recollection, or to move the interview process from one stage to the next
- If the client is having problems continuing the story or is not forthcoming or is going off on tangents it may be useful to interrupt and summarise and ask them to continue from there
- May summarise to get the right order of events
- If the story is long and complex you may summarise as you go

#### Verbal Tracking

- You can direct the conversation by using verbal and non-verbal cues, summarizing, questioning, commenting etc
- Client will track your cue so it is important to watch your cues
- Avoid conversation blockers – use plain English, don't ignore emotions, provide appropriate facilities etc

#### **Parker and Evan's 3-Step Ethical Decision-Making Process**

- Awareness of the existence of an ethical issue and our own values/predispositions
- Choose between range of available standards/values to resolve ethical issues
- Implementation

## Ethics audit

### Identity

- **What ethical issues have arisen?**
  - Who and what are all the stakeholders (include yourself!)
  - What are the value and interests of each stakeholder?
  - Which values and interests are in conflict and which are in agreement

### Apply

- **What ethical standards or principles could/should/must be used to resolve the ethics issue(s)?**
  - What does the “law of lawyering” say? What are the obligations here (Codes, Leg, Cases)?
  - What general ethics principles might apply? e.g. access to justice, no harm
  - Which rules or standards must be given priority by you and those involved?

### Implement

- **How can the ethical (and legal) solutions be put into action in the current situation**
  - What is required? What are the options?
  - What are the likely consequences of each options for the various stakeholders (including you) (this assessment includes the costs of neglecting core values)
  - What persona or organisational resources do you and the stakeholders need to access to do the right thing? What skills would you and the other stakeholders need here?
  - How can you best reach an ethical outcome, that accords with your values and professional responsibilities, while also being as satisfactory as possible to those involved?

### Reflect

- **Did you achieve a satisfactory, ethical outcome?**
  - What were the enablers and disablers at play? (immediate and structural)
  - What skill did you practise? What would you do differently next time?
  - How might you prevent these sorts of issues from recurring? (specific, concrete solutions)
  - How might the stakeholders prevent these issues coming up again (see above)
  - How does the incident relate to your professional identity and values?

## Week 2 Class 1 – Imagining Lawyers, Ethics and Justice

### Key Regulatory Framework

Legal Profession Act 2004 (NSW) – we are governed at a state level

Solicitors Rules

Barristers Rule

Court Procedural Rules

Legal Profession Regulation 2005 NSW

Common Law

Models laws proposed at a federal level

### C Menkel Meadow (2001) ‘Law and Popular Culture: Can they do that? Legal Ethics in Popular Culture: of characters and acts’

- Consider the following questions...
  - What was your first image of a lawyer and where did it come from?
    - Atticus Finch