

LAWS1230 Lawyers, Ethics and Justice

Table of Contents

<i>The Law of Lawyering</i>	2
<i>Behavioural Ethics</i>	4
<i>Community Legal Centres, Clients and Communication</i>	10
<i>The Legal Profession and Entry into the Profession</i>	11
<i>Lawyer’s Accountability – Complaints and Disciplinary Process</i>	18
<i>Fidelity to the Law</i>	22
<i>Access to Justice and the Context of Change</i>	28
<i>Ethics of the Lawyer-Client Relationship</i>	32
<i>Representing and Advising the Client</i>	50
<i>Money Matters</i>	51
<i>Ethics Implementation and Giving Voice to Values (GVV)</i>	61
<i>Client Loyalty and Trust</i>	68
<i>Civility, Courtesy and Ethics Implementation (Law Firm Culture)</i>	78
<i>Conflicting Loyalties</i>	83
<i>Ethics of Negotiation and ADR</i>	106
<i>Criminal and Family Ethics</i>	107
<i>Corporate Ethics</i>	116
<i>Civil Litigation</i>	135

The Law of Lawyering

Field, Duffy and Huggins – Lawyering and Positive Professional Identities (2014)

- Law is a deeply honourable profession, but society often depicts lawyers using animalistic imagery
- Ethics is a bedrock notion to good lawyering as it is the foundational principle on which the operation and development of a positive professional legal identity is based
- Rules provide an objective criterion to measure ethical decision-making, but inadequate on its own
 - Ethics cannot be reduced to mere rules; instead, it is what the lawyer does (Sir Gerrard Brennan)
- 4 main stakeholders of lawyers’ ethical duties: Court, client, colleague and the community
- Ethical principles that drive the duties that lawyers owe:
 - Fidelity
 - Honesty – lawyer must not deliberately lie or mislead (*LSC v Mullins [2006]*)
 - Propriety – fit and proper to warrant the Court’s confidence
 - Competency – if unexperienced, the solicitor should inform their client and point them to an appropriate solicitor (*Vulic v Bilinsky (1983)*)
- Ethical reflection and decision-making:
 - Be aware of the ethical issues that arise in practice, and of our own values and dispositions;
 - Consider the range of standards and values that are available to help resolve those ethical issues and decide between them; and
 - Implement that resolution in practice
- Step-by-step ethical decision-making model

<ul style="list-style-type: none"> ○ Identify the ethical issue ○ Consider the initial options ○ Identify interests ○ Sources of authority ○ Broader ethical considerations 	<ul style="list-style-type: none"> ○ Consultation and guidance ○ Consider the consequences ○ Making a decision ○ Summarise a diary note
--	---

- SR rr 1-6
- BR rr 1-12

Adversarial advocate	<ul style="list-style-type: none"> • Dominant and tradition conception of a lawyer’s ethical role • Lawyer should advance their client’s partisan interests within a complex legal system with the maximum zeal permitted by law
Responsible lawyer	<ul style="list-style-type: none"> • Lawyer as an officer of the court and a trustee of the legal system • Ethics governed by a duty to the administration of justice and service to the public interest • Integrity towards, and compliance with, the spirit of the law
Moral activist	<ul style="list-style-type: none"> • Lawyer as an agent for justice, being impacted by social and political issues of justice and the need to promote substantive justice over formal or procedural justice • Improve justice through public interest lawyering and law reform; and through client counselling (persuade them of the moral thing to do or withdraw if they want something else)

- **Omission bias** invoked to minimise blame of one who didn't engage in an affirmative act
 - Unethical conduct can also be rationalised post-hoc through appeals to different metrics of fairness or to other accepted values e.g. notions of lawyers as zealous advocates, creative interpreters of legal rules, the need to fight against injustice etc.
- **Confirmation bias** helps us remember aspects of the decision/situation that are consistent with an ethical self-image, rather than the details of any ethical lapse
 - **Moral amnesia** – inability to remember or learn from one's own and other's past mistakes and to transfer that knowledge when fresh challenges arise
- Engaging in unethical behaviour can itself change one's perspective on and memory of the relevant ethical standards
- When our behaviour and our beliefs conflict, one way to reduce the resulting discomfort is to change our beliefs to match our behaviour e.g. those who cheat tend to become more lenient in their judgments of cheating, and those who resist cheating become more intolerant of cheating
- Effects of pluralistic ignorance can mean that as no one speaks up about particular unethical behaviour, new norms of ethics begin to emerge that alter attitudes about ethics

Council of the NSW Bar Association v Einfeld [2009] NSWCA 255

- D, an esteemed Federal Court judge, pleaded guilty to perjury and perverting the course of justice
- D guilty of professional misconduct and wasn't a fit and proper person to remain on the Roll
- His character necessitates such orders for the protection of the public (Moffitt P in *Seymour*)
 - When a member of the profession so conducts him or herself as to bring disrepute on to the profession, the administration of justice and the legal system, procedures should be complete in examination of relevant conduct
 - To do less may lead to a view that the system operates w/o full opportunity for the public examination of such wrongful conduct. This is not part of any process of punishment; rather, it is as an aspect of protecting the public and fostering the public interest by maintaining full accountability of those in the profession and involved in the administration of justice

Breaky – Ethics Regime Model

- **Moral sensitivity** – psychological qualities that help one become aware of his situation's morally salient features
- **Moral reflectiveness** – psychological qualities that help one accurately judge the moral duties the situation requires of him

Awareness	<ul style="list-style-type: none"> • Realise his situation contains morally salient features and recognise the situation's morally relevant aspects • If one's moral sensitivity failed to alert him to the moral issues, he could say 'it didn't occur to me that there might be a problem here'
Judgment	<ul style="list-style-type: none"> • Correct judgment about what morality requires of him • If one's moral reflectiveness failed to lead him to a correct judgment, he could explain 'it was an error of judgment'
Decision-making	<ul style="list-style-type: none"> • Calls upon one's moral motives, rather than his capabilities – what he wants to do, rather than what he can do

	<ul style="list-style-type: none"> • Moral motives that impel him to prioritise those demands and choose to act on their basis, even in the face of potentially powerful countervailing desires • If one's moral motives failed to impel him to act upon his moral judgment, he could explain 'I knew it was wrong. I just didn't care enough to act on that judgment'
Action	<ul style="list-style-type: none"> • Follow through his decision using his moral character e.g. patience • If one's moral character fails to support him in acting morally, he could explain that failure by saying 'I wanted to do the right thing, but I just wasn't able to follow through'
Achievement	<ul style="list-style-type: none"> • Performing the required moral action and striving to do so as well as possible in the face of challenges • Sometimes, may be judged on the basis of their moral competence – capability to successfully implement his moral decisions and to achieve morally important goals • If one's moral competence fails his attempts to secure a morally important goal, he could say 'I gave it my best, but I just wasn't able to perform at the required level'
Review	<ul style="list-style-type: none"> • Reflects on his decision and its results and warrants inclusion in the moral process • Re-evaluation may occur in time to alter the action; might mitigate some of his action's consequences; may revisit the action by apologising, admitting error etc. • Will help one's behaviour in future cases, providing him with an improved judgment, or prompting him to put in place resources that expand his feasible options

Moral Motives, Capabilities and Obstacles for Professional Ethics

- **Moral sensitivity** – specific awareness when one recognises that her current situation has morally relevant features
 - Obstacles: use of scripts and compassion fatigue
- **Moral reflectiveness** – capacity to uncover the alternative courses of action
 - Obstacles: cognitive distortions, self-serving use of excuses e.g. denial of responsibility
- **Moral motives** – whether they will act upon their considered judgment; includes common morality, desirable role-identity, excellence, covenants, constructed virtues and deserved approbation
 - Obstacles: misplaced loyalties, egoistic desires and subtle forms of value erosion (Luban)
- **Moral character** – role-based cognitive/emotional traits specific to the profession
 - Obstacles: conformity and deference to authority
- **Moral competence** – professionals present themselves as holding standards of competence and expertise, as opposed to laypeople who can sometimes be morally blameworthy if they fail to execute their moral actions
 - Obstacles: may need substantial experience before pursuing one's moral goals
- **Moral reflectiveness** – one's reflections can proceed w/o suffering from the limitations and pressures that constrained her earlier decision-making
 - Obstacles: capacity to engage in reflective review may be thwarted e.g. mental exhaustion from working long hours; rationalisation of future moral failures
- **Generic obstacles:** high levels of stress, substance abuse, compartmentalisation, severe time constraints etc.

- *LPUL* ss 116-118

Hyams, Campbell and Evans – Practical Legal Skills (2013)

- 3-stage process of interviewing to allow you to be in control of the interview, providing you with a safety net and maximising your efficiency in the interview process:
 - Listening to the client's story in its entirety – empathy and sympathy and note inconsistencies
 - Asking questions to obtain a complete understanding of the facts and of the chronology of the story – open and closed questioning, instruction sheets, interpreters and summarising the facts
 - Assessing the options and giving advice
- Ethical issues:
 - Reluctance – how important is it for you to know?
 - Deception and dishonesty – cross-examine your client to root out any untruths; explain that your ethics prevent you from lying to the Court – paramount duty to the Court
 - Unreasonable instructions – you can pursue them as long as it doesn't require you to breach your professional ethics; however, might be wise to advise the client in writing that such action is against your advice

Lauchland – Importance of Good Communication (1996)

- Aim for client satisfaction
- Avoid complaints to the law society/institute
- Don't miss the point
- Establish rapport and build client comfort
- Consider the physical environment
- Use communication facilitators:
 - Intentional listening
 - Body language
 - Active listening
 - Appropriate questioning
 - Summarising
 - Verbal tracking
- Use plain language

Fidelity to the Law

- SR rr 4, 7; 20-28, 30-35
- BR rr 23-26, 49-75, 79

Baron and Corbin – Ethics and Legal Professionalism in Australia (2017)

- Duty to the client
- Duty to the law and the Court/administration of justice
- *Victorian Legal Services Commissioner v Lewenberg (Legal Practice)* – criminal lawyer found guilty of professional misconduct
 - While representing a Jewish man who was charged and found guilty of sex offences against children, the lawyer tried to dissuade one of the victims, a Jewish child, to keep silent. He reasoned that one Jew shouldn't help the police to establish guilt against another Jew, no matter what they are accused of, because of a Jewish tradition
 - The tribunal found that his statements would 'to a material degree be prejudicial to the administration of justice and/or to diminish public confidence in the administration of justice'

<p>Duty to the law</p> <p>ASCR rr 3-5</p>	<ul style="list-style-type: none"> • Emerges from the professional obligation to serve the public interest and the professional independence and privilege of self-regulation • Link between the duty and its origins in public service – Mason J in <i>Giannarelli v Wraith</i>: <ul style="list-style-type: none"> ○ The peculiar feature of counsel's responsibility is that he owes a duty to the court as well as to his client ○ His duty to his client is subject to his overriding duty to the court. In the performance of that overriding duty there is a strong element of public interest • May not be able to act in a way that serves the client's best interests if doing so would put the administration of justice and the community's confidence in the profession at risk • As an officer of the court, a lawyer's paramount duty is to the court as part of the duty to the proper administration of justice – they have this additional level of responsibility and that they may not be driven by their client's wishes alone • It is a mistake to suppose that he is the mouthpiece of his client to say what he wants or his tool to do what he directs. He owes allegiance to a higher cause i.e. the cause of truth and justice <ul style="list-style-type: none"> ○ He must see that his client discloses, if ordered, the relevant documents even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court (Lord Denning in <i>Rondel v Worsley</i>)
<p>Duty of candour and frankness</p> <p>ASCR rr 19, 20, 22</p>	<ul style="list-style-type: none"> • Use legal processes in a way that is 'legal, honest and respectful to courts and tribunals' • <i>Legal Services Commissioner v Lim</i> – solicitor failed to file a defence and then filed an affidavit that stated that this was due to an administrative error <ul style="list-style-type: none"> ○ In her affidavit she claimed that the defence was posted to her firm's Sydney agent, but to the wrong address, causing a delay. However, the

- However, a late objection (or withdrawal of express consent) reduces its credibility and that may be taken into account. For example –
 - *In the Marriage of McGillivray and Mitchell (1998)* – “A failure to take the point initially must also cast doubt on the bona fides of any later complaint concerning the existence of confidential information in the practitioner in question, and on the bona fides of any alleged apprehension regarding the possible misuse of such confidential information”
 - *South Black Water Coal Ltd v McCulloch Robertson* – Muir J declined to make an order restraining a solicitor from acting, where the former client had been expressly aware of the conflict for some time and had decided not to object
 - *Bank of Nova Scotia v Imperial Developments (Canada) Ltd and others [1989]* – an injunction was refused where the applicants had “specifically instructed their counsel to withhold the demand for disqualification until after the solicitor had in fact moved to the receiver’s firm

Guideline 4

All screened persons should be clearly identified and the compliance officer must keep a record of all screened persons

- Practitioners should carefully read the section dealing with common questions, including the section headed “What test is applied to an information barrier?” It is essential that any individual actually in possession of relevant confidential information has no contact at all with the current matter. If such contact occurs, the information barrier must fail.
- The “no contact” rule is not limited to partners or legal practitioner directors, as they are not the only staff considered likely to share knowledge. In *Newman v Phillips Fox [1999]* Steytler J expressly considered 2 articulated clerks who were amongst those proposed to be screened by an information barrier. He said they would “as part of their training, no doubt be exposed to a range of different types of work and, consequently, personnel at the firm. They can be expected to mix with other articulated clerks and young practitioners at that firm. They can also be expected, as is the case with other young practitioners, to share experiences and to exchange advice”
- Nor is the “no contact” rule limited to those with legal qualifications. Steytler J also specifically expressed concerns about administrative staff who may have been exposed to confidential information but were not proposed to be screened along with the legally qualified staff
- In *Bureau Interprofessional Des Vin De Bourgogne v Red Earth Nominees Pty Ltd [2002]*, the undertakings offered included an undertaking not to share support staff

Part-time work

- Where the person holding the confidential information is employed part-time, that may be taken into account e.g. *Bureau Interprofessional Des Vins De Bourgogne v Red Earth Nominees Pty Ltd [2002]*
- However it is only relevant to the extent that it reduces the interaction between personnel. It certainly does not, of itself, eliminate the risk
- The greater the number of individuals in a law practice who possess the relevant confidential information, the more difficult it will be to establish an effective information barrier. As a simple question of fact, it is more difficult to screen large numbers of people
- Sometimes, the fact that only one individual possesses relevant confidential information has been a persuasive factor in refusing to grant an injunction. This is most likely to apply where that person has