Approaches to Legal Ethics

- Ethics is not a discrete moral system, not the 'rules' of law, but a method of thinking. There is a tension between ethics and rules – we want to be able to prescribe what standards lawyer should meet while also allowing lawyers to act according to their beliefs.
    - *Littrich and Murray*: ethics are **the moral philosophy/principles adopted as a code or framework of behaviour in a particular context.**
    - **Should lawyer's regulation be principled or rules-based?**
        - *Baron & Corbin*: though principled regulation is desirable, rules-based regulation works best. The chief issue is that lawyers don't strive to achieve standards and that there is no universality to morality nor professionalism – the profession is too diverse, commercial and large to share one standard now.
        - *Bagaric & Dimopoulos*: legal ethics, at its core, is just a set of rules regulating practice, and it is difficult therefore to see it as 'principled' or even ethics, because it is a regularly system. **However, focussing on principles more will improve professional practice.**
    - **Is law founded in morality?**
        - *Rhode, Luban and Cummings*: positive morality is the system of dominant moral values, and critical morality is an examination into those traditions and whether they should be followed. Law is certainly founded on **positive morality**.
        - *Preston*: law is influenced by ethics, and therefore subject to ethical critique. However, it is possible for law to be unethical as acknowledged by society idealising people who resisted laws now seen as unjust – see, e.g., Rosa Parks.
- Professional rules:
    - *Clyne*:
        - A barrister in a matter prosecuted the solicitor for the other side in maintenance and told him that if he stopped representing the wife, he'll drop the maintenance claim. It was completely baseless, but he argued it was not.
        - **Held:**
            - Street J divided the rules of the profession into two classes:
                - <u>Conventional rules</u> – rules intended to regulate professional conduct from time to time;
                - <u>Fundamental rules</u> – rules which are not just law for being written, but which are founded on common decency and fairness.
            - This was a breach of the fundamental rules of the profession.
    - *Clyne* was decided under the common law. Now, this duty to the court is enshrined in SR r 3, and BR r 8 enshrines that a barrister must not act in a way which is dishonest or otherwise discreditable, prejudicial to

justice, or likely to diminish public confidence in the legal profession or administration of justice or otherwise bring the profession into disrepute.

- **What role should a lawyer play?**
  - Parker & Evans identify **4 roles a lawyer can take. Lawyers will often draw on different roles at different times to guide their practice.**
  - Adversarial advocate:
    - A lawyer should be clearly partisan and act in the interests of their client. This role is more clearly justifiable for criminal defence lawyers, but it is doubtful that you could justify this with, e.g., a prosecutor.
    - Tim Dare: adversarial advocacy is often understood to require hyper-zeal. Mere zeal, however, is enough.
    - Markovitz: this is justified because, with the end of historical institutional structures, the greatest loyalty a lawyer has is to their client.
    - If a client seeks to break the law, you should find a way to ensure they're not liable.
  - Responsible lawyer:
    - A lawyer is an advocate, but advocacy should be tempered by your role as an officer of the court. You should help explain the law, present the case, and at the same time be an independent professional.
    - If a client seeks to break the law, you should advise them of your obligations and act against their interests if need be. You should refuse your services to a client who wants to use their economic power to distort the system.
  - Moral activist:
    - Ethical, social and political conceptions of justice should define the responsibilities of a lawyer. So, if a client seeks to break the law, you should not just threaten not to withdraw, but try to make them act ethically.
    - You should use the legal system to pressure the system to become better.
  - Ethics of care:
    - The responsibility of a lawyer is to focus on community ethics above legal ethics.
    - If a client seeks to break the law, you should focus on why they want to, and what that means for them. Perhaps an unjust law should be broken?
- **Ensuring decisions are ethical:**
  - Be conscious of your own actions – don't allow cognitive dissonance to degrade your self-criticism;
  - Understand your relationship to the client – what role do you play in relation to them?
  - Develop a **positive professional identity:** *Field, Duffy and Higgins*.

- Ethical cultures: most legal work is corporate and largely focussed on making good business decisions. In large organisations, peer and employer pressure can cause people to let ethical issues slip, as client needs come above all and firm culture guides individual behaviour.

Client Legal Privilege

- Note that the common law term for this is *legal professional privilege*. Client legal privilege is derived from the Uniform Evidence Law.
- This is narrower but much stricter than confidentiality.
- *AG (NT) v Maurice* per Deane J: **advances and safeguards the availability of full and unreserved communication between a citizen and their lawyer; guarantees they will speak fully and frankly, and is therefore a precondition to informed and competent representation of client interests, and a bulwark against tyranny and oppression.**
- **Meaning of communication or document is very broad – includes emails, letters, most forms of document communication.**
- But note – what is protected? E.g. a copy of a document might be privileged; not the original.
- **IN-HOUSE LAWYERS:**
    - They are now clearly bound by confidentiality, and the test now takes two steps: **first**, whether they were acting independently as a lawyer, not employee, and **second**, whether the dominant purpose test can be satisfied regarding the communication in question. *Archer*: not a two-pasrt test but instead part of the dominant purpose test to ask about independence.
- **OBLIGATIONS ARISING FROM CLP:**
    - SR r 21.2 – a solicitor must make sure that allegations or suggestions made under privilege are justified, are appropriate for robust advancement of the case, and are not made to harass or embarrass a person.
    - SR r 21.1: a solicitor must ensure that their advice to invoke the coercive powers of a court are reasonably justified by the material then available.
    - BR r 60: a barrister must ensure the use of coercive court powers is reasonably justified by the material available to them.
    - SR r 21.1
- **EFFECT OF A BREACH OF CLP:**
    - SR r 31:
        - **If you suspect confidential information is disclosed inadvertently, you must return, destroy or delete it immediately upon becoming aware that disclosure was inadvertent, and notify the other side of the disclosure and steps taken.**
        - **If you read it and realise its confidential, you must stop reading and let the other side know.**
        - **A client can't compel a lawyer to read confidential material.**
- **Common Law:**
    - This has a wider scope than the *Evidence Act 1995* (NSW). It applies to use of information outside of the court as evidence, too – so, e.g., the process of discovery.

- *Esso*: confidential communications between a client and lawyer attract privilege when for the **dominant purpose of providing legal advice** (*advice privilege*) or **used in existing or reasonably anticipated legal proceedings** (*litigation privilege*).
    - Cf. historical rule in *Grant v Downs*, **sole purpose**. The modern test is much wider.
- *Glencore v Commissioner of Taxation*:
    - ATO received information about Glencore from the Paradise Papers. Glencore argued it was privileged and could not be used. It was the kind of information which would traditionally be privileged.
    - **Held per the full court:**
        - The documents are in the public domain and so no equitable breach of confidence arises.
        - CLP is a shield, not a sword, and cannot be used to force documents to be returned. *Armstrong* is only evidence that documents can be rescinded as a matter of case management, all other remedies must be founded in equity.

- **Evidence Act:**
    - The *Evidence Act 1995* (NSW) prevents admission of privileged information in court as evidence. It has a narrower remit than the common law.
    - S 118: no adduction of evidence if on objection by a client the court finds it would result in disclosure of a confidential communication between client and lawyer, between 2+ lawyers acting for the client, or the contents of a confidential document prepared by the client, lawyer or another person, **for the dominant purpose of the lawyer providing legal advice to the client.**
    - S 119: no adduction of evidence if on objection by a client the court finds it would result in disclosure of a confidential communication between the client and another person, or lawyer acting for the client and another, or the contents of a confidential document that was prepared, **for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding, or an anticipated or pending Australian or overseas proceeding where they are or may be, or were or might have been a party.**
- **WAIVER:** *Expense Reduction Analysts v Armstrong*:
    - Marque received 13 privileged documents amidst 60,000 by accident in discovery from NRF. NRF requested a return. Marque claimed waiver.
    - **Held per French CJ, Kiefel, Bell, Gageler and Keane JJ:**
        - **Privilege can be waived in certain cases, where clients act in a way inconsistent with objecting.** The **speed of response** here meant the privilege was not waived.