



Legal Ethics

Exam notes

Table of contents

Professionalism & legal practice	3
Professional regulation	5
Lawyers' ethics	11
Duty to the court	14
Confidentiality & client legal privilege	23
Criminal justice	30
Corporate clients	40
Lawyer–client conflicts	42
Client–client conflicts	49
Costs & client money	55
Admission	65
Discipline	69

Professional regulation

Self-regulation

Traditionally, the legal profession regulated itself. Members of the Inns of Court would live together and share a coherent moral view about what it meant to be a lawyer.

Parker and Evans argue that the justification for self-regulation is still founded on this history. **Neither market forces nor governments can inculcate an appropriate ethical code:** ‘ethics must be the concern of sufficiently coherent self-regulating occupations which teach each member to look away from their self-interest and towards the whole professional community’.

Justification of self-regulation

Parker and Evans propose a number of justification for self-regulation:

- Only lawyers are knowledgeable enough about the law to set standards for their own practice — and lawyers *must* be specially trained to ensure that they can benefit others (their clients).
- The state should not be involved in the regulation of lawyers because it is necessary that lawyers remain completely independent of the state, so that they may defend individuals *against* the state.
- The market alone is not enough: market forces might corrupt the rule of law with self-interest.

‘Co-regulation’

Law societies or institutes perform similar functions today. They are professional associations that, among other things, promote standards of professional conduct.

Increasingly, the regulation of the profession has moved away from complete self-regulation. A hybrid has been struck between self-regulation and government regulation: co-regulation.

Today agencies such as the Legal Services Commission investigate and prosecute complaints, set qualification standards for admission and issue practicing certificates.

Co-regulation seeks to regulate the legal profession as if it were an industry: break down monopolies, protect consumers, encourage more competition between service providers. Abel notes that the notion of professionalism is moribund: ‘the lawyer today is an entrepreneur selling his services to an increasingly competitive market’.

The three arguments *for* self-regulation are rejected by Harry Arthurs:

Lawyers' ethics

Four taxonomies

Parker and Evans devise four taxonomies of lawyers' approaches to legal ethics.

	<i>Adversarial advocate</i>	<i>Responsible lawyer</i>	<i>Moral activist</i>	<i>Ethics of Care</i>
Approach	Traditional conception	Officer of the court and trustee of legal system	Agent for justice through law reform, and public interest	Relational lawyering
Social role of lawyers	<ul style="list-style-type: none"> Ethics are governed by role as an advocate in an adversarial setting Focuses on loyalty, partisanship and non-accountability 	<ul style="list-style-type: none"> Ethics are governed by role of facilitating public access to justice Focus on the public interest 	<ul style="list-style-type: none"> Lawyers' responsibilities are defined by reference to general ethics, moral philosophy and notions of justice 	<ul style="list-style-type: none"> The social role of lawyers is irrelevant Lawyers/ everyone should be responsible to people, communities and relationships.
Relationship to client and law	<ul style="list-style-type: none"> Duty to advocate client's interests as zealously as possible within the bounds of the law Minimal obligation to legality Ensures client autonomy and does not impose personal beliefs 	<ul style="list-style-type: none"> Duties of advocacy are tempered by duty to ensure compliance with the 'spirit' of the law Ensure matters are resolved on the merits Lawyer is responsible of make law work fairly May act as gatekeeper to law 	<ul style="list-style-type: none"> Lawyers should improve justice by: engaging in public interest lawyering and law reform to change the law to make it more just; and client counselling to persuade clients to do the moral thing (or withdraw if the client insists) 	<ul style="list-style-type: none"> Preserving relationships and avoiding harm are more important than impersonal disputes People and relationships are more important than institutions such as law Goal of lawyer-client relationship should be moral worth

It should be noted that these taxonomies should be used with care. Individual people do not fall within one or other of the taxonomies, rather they may be used as a shorthand way to describe a lawyer's conduct in a given scenario.

Duty to the court

Paramount duty

As an officer of the court, a lawyer's paramount duty is to the court. Although many practitioners find this difficult to reconcile with an adversarial system where 'the client is king' (Parker and Evans), lawyers' overriding duty is to the court. This duty distinguishes lawyers from other professional business advisors.

This duty is sourced in common law, statute and professional conduct rules.

Independence

Public confidence in the legal profession is based on the assurance that lawyers provide independent and unbiased legal advice (Brennan in Australian Law Journal).

Lawyers are under a duty to put forward any argument that might reasonably be available to the client. Lawyers must also 'follow a client's lawful, proper and competent instructions' (USR r 8.1). But lawyers must not slavishly follow their clients' instructions.

This reflected in the Uniform Solicitors Rules and the Uniform Barristers Rules.

Rule 17 (USR)

[17.1] A solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client or of the instructing solicitor (if any) and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's instructions where applicable.

[17.2] A solicitor will not have breached the solicitor's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's instructions, simply by choosing, contrary to those instructions, to exercise the forensic judgments called for during the case so as to:

[17.2.1] confine any hearing to those issues which the solicitor believes to be the real issues;

[17.2.2] present the client's case as quickly and simply as may be consistent with its robust advancement; or

[17.2.3] inform the court of any persuasive authority against the client's case.

Rules 25, 41 and 42 (UBR)

*[25] A barrister has an overriding duty to the court to **act with independence in the interests of the administration of justice.***

...

Confidentiality & client legal privilege

Confidentiality

The relationship between lawyer and client is often said to be one of confidence. **The duty of confidentiality seeks to protect the confidence of the client.** This is in addition to the other fiduciary duties that a lawyer owes a client.

The duty of confidentiality has several sources. In contract, the duty of confidentiality is implied into retainer agreements. In equity, the duty protects the unauthorised disclosure of confidential information. More recent, the duty is sourced from professional conduct rules.

Rule 9 (USR)

[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 [except for colleagues or retained barristers].

Rule 108 (UBR)

[108] A barrister must not disclose (except as compelled by law) or use in any way confidential information obtained by the barrister in the course of practice concerning any person to whom the barrister owes some duty or obligation to keep such information confidential...

A lawyer's duty of confidentiality is not brought to an end when the client's retainer is terminated or with the death of the client. Nor is the duty diminished by a duty of confidentiality owed to another client.

Disclosure

Unlike privileged communications (see below), confidential communications yield to lawful compulsion (USR 9.2.2; UBR 108–9).

Professional conduct rules dictate when confidential information may be disclosed. In general, disclosure is permitted in circumstances in which: the client consents; the lawyer is compelled to disclose; disclosure will prevent a serious criminal offence or 'imminent physical harm'; or for the purposes of obtaining legal advice.

Rule 9 (USR)

9.2 A solicitor **may disclose** confidential client information if:

9.2.1 the client expressly or impliedly authorises disclosure **[client consent]**;

9.2.2 the solicitor is permitted or is **compelled by law** to disclose;

Criminal justice

Criminal prosecution

Prosecutors are a clear example of actors within the legal system that must operate as *responsible lawyers*. Prosecutors have special duties of fairness because as an agent of the State, they have advantages in terms of resources and reputation as compared with their defence counterparts.

Plea discussions

Parker and Evans note that an increasing trend is the use of plea discussions to improve the efficiency of the criminal justice system.

In a plea discussion, the prosecutor and the defence counsel agree to withdraw some charges in exchange for a guilty plea on other charges. When a guilty plea is entered, the trial is dramatically expedited. However, the cost is that the prosecution's case is not properly tested in court, and defendants may feel compelled to enter a guilty plea even if they did not commit the crime.

Specific professional conduct rules

Prosecutors are subject to special conduct rules. This shows that the need for prosecutors to act as *responsible lawyers* is in fact mandated by the profession.

The Uniform Barristers Rules provide for the following as 'prosecutor duties'.

Rules 82–93

[82] A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

[83] A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.

[84] A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

[85] A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.

[85] A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused other than material subject to statutory immunity, unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person.

[86] A prosecutor who has decided not to disclose material to the opponent under Rule 86 must consider whether:

Lawyer–client conflicts

Rationale

The proscription against lawyer–client conflict exists to ensure that lawyer act in the best interests of their clients, without being distracted by other interests including their own personal interests.

Avoiding conflicts is a basic principle of all fiduciary relationships: it the price of being a professional (Dal Pont).

The ‘no conflict’ rule serves a prophylactic function. It aims to get lawyers to avoid situations where the lawyer may be tempted to serve their own interests over that of their clients.

Professional conduct rules

The Uniform Solicitors Rules provide that a solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor.

Rule 12 (USR)

[12.1] A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this Rule.

[12.2] A solicitor must not exercise any undue influence intended to dispose the client to benefit the solicitor in excess of the solicitor's fair remuneration for legal services provided to the client.

As set out in r 12.1, the proscription against lawyer–client conflicts extends to a conflict with the interests of ‘an associate of the solicitor’. ‘Associate’ is given a very broad definition.

Glossary of Terms (USR)

"associate" in reference to a solicitor means:

- (a) a partner, employee, or agent of the solicitor or of the solicitor's law practice;*
- (b) a corporation or partnership in which the solicitor has a material beneficial interest;*
- (c) in the case of the solicitor's incorporated legal practice, a director of the incorporated legal practice or of a subsidiary of the incorporated legal practice;*
- (d) a member of the solicitor's immediate family; or*
- (e) a member of the immediate family of a partner of the solicitor's law practice or of the immediate family of a director of the solicitor's incorporated legal practice or a subsidiary of the incorporated legal practice.*

Client–client conflicts

Concurrent client conflicts

For a lawyer to represent two or more clients with conflicting interests impinges on the duty of loyalty that the lawyer owes to both clients.

In this situation, the lawyer will invariably fail to fulfil the requisite duty to at least one of their clients.

In addition to fiduciary liability, lawyers will also be liable in tort for negligence if they fail to meet the standard of due care and skill. The fact that a lawyer has taken on two clients is no excuse:

If a solicitor is unwise enough to undertake irreconcilable duties...it is his own fault, and he cannot use his discomfiture as a reason why his duty to either client should be taken to have been modified (Hilton v Barker (UK), Lord Walker).

Acting for two or more clients with adverse interests

The Uniform Solicitors Rules prohibit solicitors from acting for two or more clients in the same or related matters where those clients' interests are adverse unless each client is aware of the conflict and has given their informed consent.

Rule 11 (USR)

[11.1] A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule.

[11.2] If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the clients' interests are adverse and there is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act, except where permitted by Rule 11.3.

[11.3] Where a solicitor or law practice seeks to act in the circumstances specified in Rule 11.2, the solicitor may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:

[11.3.1] is **aware that the solicitor or law practice is also acting for another client;** and

[11.3.2] has **given informed consent** to the solicitor or law practice so acting.

Dal Pont argues that the wording of r 11.3 suggests that the clients' informed consent alone is not enough to 'cure' the conflict: the solicitor must also discharge their 'duty to act in the best interests of their client[s]'. Even with client consent, lawyers should not act unless, in their judgment, the concurrent retainers do not preclude their ability to filter the 'best interests' of each client.

Admission

Requirements for admission

In addition to educational, academic and practical legal training (PLT) requirements (s 17(a)–(b), LPUL), aspiring lawyers must also meet the character-based requirements of being a **‘fit and proper person’** to be admitted (s 17(c)).

Character-based requirements are justified on the basis that lawyers must be of good fame and character if the public are to have confidence in the profession as a whole.

Fit and proper person

Section 17 of the Legal Profession Uniform Law creates as a prerequisite for the issue of a practicing certificate that the applicant ‘is a fit and proper person to be admitted to the Australian legal profession’ (s 17(c)).

In considering whether a person is ‘fit and proper’, the Board of Examiners **‘may have regard to any matter relevant to the person’s eligibility or suitability for admission’ and must have regard to the matters specified in the Admission Rules.**

This statutory directive gives the Board of Examiners wide discretion as to what it considers and how much weight it accords to relevant considerations.

The Admission Rules provide that the Board of Examiners **must** consider the following factors:

Rule 10 (UAR)

*(1) For the purposes of section 17(2)(b) of the Uniform Law, the following matters are specified as **matters to which the Board must have regard** –*

(a) any statutory declaration as to the person's character, referred to in rule 16;

(b) any disclosure statement made by the person under rule 17;

(c) any police report provided under rule 18;

(d) any student conduct report provided under rule 19;

(e) any certificate of good standing provided under rule 20;

*(f) **whether the person is currently of good fame and character**; [see below]*

(g) whether the person is or has been a bankrupt or subject to an arrangement under Part 10 of the Bankruptcy Act or has been an officer of a corporation that has been wound up in insolvency or under external administration;