

LAW4309 Lawyers Ethics in Practice

Topic 1: Introduction and Overview. The ethical decision-making process and four approaches to ethics

3 Step Ethical Decision Making and Action Approach

1. Be aware of the issues → what are you dealing with and whether there is a breach or potential breach of standards
 2. Make a choice and know that there is a choice
 3. Implement the resolution
- Three repetitive themes in ethics:
 - Duty to the court and administration of justice
 - Duties to clients
 - Regulation of the profession

Acts, Regulations and Rules

- Legal Profession Uniform Law Application Act 2014
- Legal Profession Uniform Admission Rules 2015
- Legal Profession Uniform General Rules 2015
- **Legal Profession Uniform Conduct (Barristers) Rules 2015**
- **Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 ("ASCR")**
- Civil Procedure Act 2010 (Vic) ("CPA")
- Evidence Act 2008 (Vic) ("EAct")

Solicitors	Barristers
<ul style="list-style-type: none">• Rules and Compliance VLSBC• Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 – Main one• Legal Profession Uniform Legal Practice (Solicitors) Rules 2015• Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015 (CPD)	<ul style="list-style-type: none">• https://lsbc.vic.gov.au/lawyers/practising-law/professional-obligations/rules-and-compliance#Rulesapplicableto barristers• Legal Profession Uniform Conduct (Barristers) Rules 2015• Legal Profession Uniform Continuing Professional Development (Barristers) 2015

The Soft Law

What does it mean to act ethically?

- Ethics is concerned with deciding what is the good or right thing to do – the right or wrong action; and with the moral evaluation of our own and others' character and actions
- Judging yourself, the environment, the rules and law, the people around us
- Question falls to what does it mean to be a good person?
- Most important moral: honesty → judicial system is a very human system and is reliant on human submissions of honesty and integrity
- "Fit and Proper Person" → The Board will generally consider that a person is not a fit and proper person to engage in legal practice and/or hold a practising certificate in circumstances:
 - involving dishonesty
 - involving prior history of similar offences or other relevant conduct indicating a disregard for the law
 - indicating a material risk of harm to consumers of legal services unless there are mitigating circumstances.
 - Bankruptcy
- The description of "fit and proper person" differs accordingly to the circumstances of each case

General Morality – Understanding Moral Frameworks

Teleological (consequentialism)	<ul style="list-style-type: none">• An act is ‘right’ if it achieves a particular end, e.g. utilitarianism and hedonism• The ends justifies the means
Deontological (Kantianism)	<ul style="list-style-type: none">• Acts are innately ‘right’ or ‘wrong’• E.g. honesty is innately right• Euthanasia is killing somebody however some people may view it as compassion and therefore creates a grey area between what is right and wrong
Virtue Ethics – Aristotle	<ul style="list-style-type: none">• Acts are not the primary issue, since they can rarely be accurately predicted or described as all good or all bad, what is important is the <i>character</i> of the actor• Judge a person on the overall good rather than one act of bad

Legal Ethics

Role Morality: concerned with how we conceive our role as lawyers and how it influences the way we practise law

- It is important lawyers have a subset rule of ethics because they uphold the rule of law

The (limited) Function of Professional Rules

- Legal profession rules serve several useful functions:
 - Sets standards
 - Guide lawyers
 - Demonstrate profession’s integrity
- The rules themselves express ethical principles, they do not replace them
- A more complete ethical approach is often required to *interpret* the rules, *apply* the rules, respond to *gaps* or contradictions and (perhaps) to tell us when to *depart* from the rules
- Limits of professional standards include:
 - Minimal coverage
 - Conflicting rules
 - Focus on technical rather than substantive matters
 - May sometimes need to be disobeyed

Images of Being a Lawyer

Perceptions of Being a Lawyer	
Positive	Negative
<ul style="list-style-type: none">• Contribute to community; legal, economic certainty• Protect civil and human rights• Work for legal aid• Provide access to justice, e.g. via law reform• Pro bono work	<ul style="list-style-type: none">• Expensive• Money focused• Conservative• Poor attitudes• Poor communicators

The Hard Law

What is the “Uniform Law”?

- In Victoria it was introduced by the Legal Profession Uniform Law Application Act (Vic) 2014, (ULAA).
- **Schedule 1** consists of the Legal Profession Uniform Law.
- The ‘**Uniform Law**’ contains common provisions that were intended to be enacted across the country → NSW, VIC & WA on board with Uniform Law
- Objectives of Uniform Law:

s3 ... to promote the administration of justice and an efficient and effective Australian legal profession by - ...
(b) ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services.

Rules Made Under the Uniform Law

Solicitors only:

- Legal Profession Uniform Law **Australian Solicitors’ Conduct Rules 2015 (ASCR)**
- Legal Profession Uniform Legal Practice (Solicitors) Rules 2015
- Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015
- The *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015* cover such matters as the transfer of a solicitor’s practice, debt collection, conducting other businesses, business names, litigation lending and advising in relation to certain loan and security documents.

Barristers only:

- Legal Profession **Uniform Conduct (Barristers) Rules 2015 (BCR)**
- Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015

Legal practitioners generally

- Legal Profession Uniform General Rules 2015
- Legal Profession Uniform **Admission Rules 2015 (Admission Rules)**
- The Legal Profession Uniform General Rules 2015 cover such matters as practising certificates, the structure of legal practices, handling trust money, external examinations, legal costs, PI insurance, Fidelity cover, and external intervention (appointment of supervisors of trust money, managers and receivers)

National Regulatory Bodies

- The **Legal Services Council (LSC)** monitors implementation of the Uniform Law to ensure its consistent application across participating jurisdictions.
- The **Commissioner for Uniform Legal Services Regulation** is the CEO of the LSC and oversees implementation of the dispute resolution and professional discipline elements of the Uniform Law.

Victorian Legal Services Board & Commissioner

- Practising certificates, Trust accounts, Fidelity Fund, Interventions

Constraints on Lawyers that Arise Outside the “Uniform Law”

- General ethics
- General law including:
 - Contract, tort, fiduciary duties, role as trustee
 - Criminal law
 - Competition and Consumer Act 2010 (Cth)
 - Other obligations under statute, e.g. Civil Procedure Act 2010 (Vic)
- Inherent jurisdiction of the Supreme Court

→ Under Uniform Law you are not entitled to damages → thus to be compensated must also bring a civil case separately

Previous Victorian Legislation before Uniform Law (for reference only when reading older cases)

- Legal Profession Practice Acts 1891–1958 (Vic)
- Legal Practice Act 1996 (Vic)
- Legal Profession Act 2004 (Vic) (“Model Law”)

Parker and Evans’ 4 Types of Ethical Approaches

1. Adversarial (zealous) advocate

- Advance your client’s interests with the maximum zeal permitted by the law.

2. Responsible lawyer

- Duties to the court and justice are paramount

3. Moral activist

- The proper priority of lawyers is to improve and reform the law in the interests of justice, e.g. systemic justice

4. Ethics of care

- The justice system is in reality so distorted and compromised (dysfunctional) that the proper and only realistic duty of lawyers is to actively care as best they can for all participants whether clients, witnesses, family members, themselves and even opponents.

Topic 2: Overview of Lawyers’ Responsibilities; Duty to Obey the Law, General Responsibilities to the Court

- Paramount ideas: (**Rule 3 Australian Solicitor Conduct Rules (ASCR)**)
 - Duty to the administration of justice/ duty to the court
 - Duty to obey and uphold the law

Bolitho v Banksia Securities Ltd (No 18) [2021] VSC

- A litigation funder and five lawyers, including two members of counsel, engaged in egregious conduct in connection with a fraudulent scheme intending to claim more than \$19 million in purported legal cost and funding commission from a settlement sum
- The particular duties and obligations breached by Mr O’Byrne SC and Mr Symons of Counsel were:
 - **The paramount duty to the Court to further the administration of justice** under s16 of the **Civil Procedure Act 2010**
- It is of the utmost importance that this Court have available a Bar on which it can rely to perform its duty, so the Court can order its procedures and give its decisions in the confidence that the barristers appearing before it, will not mislead it, will conduct themselves in accordance with the law and discharge their duty even when not subject to scrutiny.
- Significantly, the Civil Procedure Act extends the reach of the paramount duty to other participants in civil proceedings, including parties, litigation funders, expert witnesses, and others who exercise influence over the conduct of litigation
- The overarching obligations imposed by the Civil Procedure Act are non-delegable.

➔ The obligations under s17 of the **Civil Procedure Act 2010** which provides:

- **“Overarching obligation to act honestly**

- A person to whom the overarching obligations apply must act honestly at all times in relation to a civil proceeding”.
- Subjective test: need to show intent, must be deliberate ➔ What must be established is that the person subjectively intended to do the acts which are said to be objectively dishonest by the ordinary standards of reasonable and honest people
- A conclusion that something is said dishonestly cannot be reached if the person whose conduct is in issue believes in the truth of the statement
- A person is deceitful if they know or believe that what they say is false
- Dishonesty encompasses recklessness, which is a statement made not caring whether it be true or false; without an honest belief as to its truth; or an indifference to, or disregard of, whether a statement be true or false.
- A dishonest state of mind may be inferred from wilful blindness or from dishonest or deliberate ignorance.
- **Pereira v Director of Public Prosecutions:** “[A] combination of suspicious circumstances and failure to make inquiry may sustain an inference of knowledge of the actual or likely existence of the relevant matter.”
- Hard to prove because refers to a person’s mental state of mind

➔ The obligations under s21 of the **Civil Procedure Act 2010** which provides:

- **“Overarching obligation not to mislead or deceive**

- A person to whom the overarching obligations apply must not, in respect of a civil proceeding, engage in conduct which is—
 - (a) misleading or deceptive; or
 - (b) likely to mislead or deceive”.
- The issue is whether, tested objectively, the conduct induces or is capable of inducing error.
- Considering its application begins by identifying the conduct that is said to meet the statutory description of ‘misleading or deceptive or... likely to mislead or deceive’
- The court determines the question objectively on the basis of the conduct, rather than its consequences ➔ **BROAD APPLICATION BY THE COURTS**
- **Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd** ➔ silence may be considered a circumstance of conduct that induces or is capable of inducing error.