

LAW5015

ETHICS IN LEGAL PRACTICE

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1: INTRODUCTION

Sources governing ethical professional behaviour	<p>GENERAL LAW:</p> <ul style="list-style-type: none"> • Agency, contract, tort, equity, fiduciary obligations, evidence and criminal law
	<p>STATUTE:</p> <ul style="list-style-type: none"> • <u>Legal Profession Uniform Law Application Act 2014</u> (Vic) (AA) • Includes <u>Schedule 1</u> (Legal Professional Uniform Law) (LPUL) • <u>Civil Procedure Act 2010</u> (CPA) • <u>Evidence Act 2008</u> (EA)
	<p>RULES OF CONDUCT:</p> <ul style="list-style-type: none"> • <u>Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015</u> (ASCR) • <u>Legal Profession Uniform Conduct (Barristers) Rules 2015</u> (BR) • <u>Legal Profession Uniform Admission Rules 2015</u> (AR) • <u>Legal Profession Uniform General Rules 2015</u> (GR)
	<p>1.1 FOUR TYPES OF ETHICAL APPROACHES AS PER <i>Parker & Evans</i></p>
Aversarial advocate	<ul style="list-style-type: none"> • Advance client's interest with maximum zeal permitted by the law • Predominant view of lawyers' ethics
Responsible Lawyer	<ul style="list-style-type: none"> • Role as officer of the court and guardian of legal system - personal morals irrelevant • Advocate for client but overriding duty to maintain justice and integrity of legal system • Aim for compliance with spirit of law, a fair trial • Independence from powerful clients as well as from state
Moral Activist	<ul style="list-style-type: none"> • Do good following general theories of ethics, especially justice • Recognises that justice and law may conflict • Taking on 'worthy causes' • Law reform - public interest lawyering - aimed at social and legal change • Advising and persuading clients on justice
Ethics of Care	<ul style="list-style-type: none"> • Personal and relational ethics • Aimed at personal goodness of both lawyer and client in context of their relationships • Holistic view of clients and their problems • Participatory approaches to lawyering • Non-adversarial dispute resolution

2: ADMISSION TO PRACTICE

INTRODUCTION

Purpose: An individual must be admitted to practice and have a practising certificate to act as a legal practitioner – The purpose is to protect the administration of justice and clients, by ensuring that lawyers have the appropriate qualifications, appropriate training and are fit and proper people (**s 15 LPUL**)

Admission: Admission to practice is affected by the Victorian Legal Admissions Board (delegated to the Victorian Legal Admission Committee) and the Supreme Court of Victoria (**Part 2.2. LPUL & Admission Rules**)

Controlling Bodies: A practising certificate is approved by the Victorian Legal Services Board. Others include Legal Services Council, Admissions Committee, VLAC, Supreme Court

2.1 UNAUTHORISED LEGAL WORK

LPUL S 10(1) entity must not engage in legal practice in this jurisdiction unless qualified (penalty 250 PU or 2 yrs imprisonment or both)

s 6

- Entity includes individual, incorporated or unincorporated body, partnership or other org
- Qualified entities' include Aus legal practitioner, law practices and registered foreign lawyers

2.2 ADMISSION REQUIREMENTS: **s 16 LPUL**

s 16(1) Four Requirements

Supreme Court may admit if at least **18 years old** and:

- VLAB has issued a **compliance certificate** which is still in force;
- Not already admitted** to the Aus legal profession;
- Take an **oath or affirmation**

NB: admission effective from the time the person signs the SC roll **s 22(2) LPUL**

2.3 COMPLIANCE CERTIFICATE: **s 17 LPUL**

To obtain a compliance certificate, **X** must have **(1)(a)** attained academic qualifications, **(b)** completed PLT and **(c)** be a fit and proper person

2.4 FIT AND PROPER PERSON CONSIDERATIONS

General rule: An applicant will be deemed fit and proper unless there is evidence to the contrary

LPUL s 17(2): VLAB must have regard to **(a)** any relevant matter, and **(b)** specific matters in **r 10 AR** in determining whether [X] is fit and proper.

In considering whether X is fit and proper, their honesty, open candour and frankness in their disclosures will be viewed favourably (**Hughes; Frugniet**). Breach of the duty of candour and admission to practice are incompatible **Re B**

NB: An applicant may apply for a preliminary declaration of suitability regarding matters disclosed by the applicant, which will be binding unless the applicant failed to make a full and fair disclosure (**s 21 LPUL**)

A FACTORS IN DETERMINING FIT AND PROPER PERSON **r 10(1) AR**

(a)	2 x statutory declarations as per r 16
(b)	Disclosure of unfavourable matters as per r 17
(c)	Police report r 18
(d)	Student conduct report r 19
(e)	For foreign lawyers, certificate of good standing r 20
(f)	Demonstrate that they are of good fame and character
(g)	Bankruptcy and insolvency
(h)	Guilty of prior offences, and if so: the nature of the offence, how long ago, age when committed and whether subject to any professional disciplinary action
(i)	Professional disciplinary action
(j)	Unable to carry out requirements of practice
(k)	Sufficient written/spoken English
(l)	Good fame and character / disclosure of unfavourable

[X] must disclose any matter that may adversely reflect on their fame or character **r 17(1) AR**. To demonstrate that they are of good fame and character, they must show they are not of bad character.

- Applicant bears onus to prove that they are currently a fit and proper person, which is assessed on the day of application **VLAB disclosure guidelines**
- Must show that they have awareness of serious of actions **Frugnient; Re OG**

Political activity	Re B (denied admission) <ul style="list-style-type: none"> • Participated in activist causes and received 10 convictions • None were for dishonesty
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	<ul style="list-style-type: none"> Claim that her attitudes had changed was only partly true and she remained prepared to break the law if she thought the cause was worthy enough
Dishonesty	<ul style="list-style-type: none"> Frugniet long history of dishonest conduct involving credit cards, airline tickets, perjury and theft: denied admission Einfeld Federal Court judge speeding ticket. Perjury on stat dec that he wasn't driving at the time - statement reflects a studied, careful and premeditated attempt to influence the outcome of the administration of justice. Prolonged behaviour precludes possibility of mistake: removed from roll Re Davis Failure to disclose conviction of breaking and entering. Failure of disclosure excludes possibility that he had become a man of good character: disbarred Ex Parte Lenehan If the dishonest conduct occurred early in one's life, may be a fit and proper person if they can demonstrate they have subsequently conducted themselves honourably (importance of disclosure): admitted Hinds Breaches of IVO, reputation may be a relevant factor, Hinds clearly ashamed of past behaviour, gave evidence honestly and sincerely, exemplary behaviour for past 7 years: admitted
Criminal History	<ul style="list-style-type: none"> McGrath Possession of child pornography: struck off Ziems Manslaughter is not an automatic bar to admission (however term of imprisonment carries a degree of disgrace) Re Del Castillo Acquitted of murder: failing to disclose even though it was well-known and based on legal advice was a bar to admission Re Thomason John Saunders Obtained fin adv by deception (x 5) – failure to declare income to Centrelink. Despite making genuine efforts to repay overpayment, there was no evidence to demonstrate rehabilitation: denied admission KMB Non-recorded conviction for indecent treatment of a child while working as escort. Sought counselling, since matured and not an ongoing character flaw: admitted
Mental Impairment	<ul style="list-style-type: none"> Skeritt If depression is sufficiently severe and long-standing that it has the potential to lead to the neglect of client affairs may affect admission. Suicide attempt 12 years ago not sufficient. RPA Ltd v X Six false reports of rape, dissociated disorder: denied admission VLAB can require a health report if there is material before the Board which indicates that the applicant has a medical condition that: (AR r 23) <ul style="list-style-type: none"> is characterised by significant disturbance of thought, mood, perception and memory; AND without management, is likely to adversely affect the applicant's legal ability

	<ul style="list-style-type: none"> • Note: The mental impairment consideration extends to applicants with issues relating to alcohol or substance abuse
Academic Misconduct	<ul style="list-style-type: none"> • Re OG Deliberately misrepresented the circumstances under which he was awarded a zero mark for an assignment at law school: struck off <ul style="list-style-type: none"> ◦ NB: AR s 19(2) requires disclosure about whether or not a person has been subject to disciplinary action arising out of attaining academic qualifications or completing an approved PLT • Richardson Finding of misconduct allowing a student to copy an assignment though he had thought his actions were permissible. Uni ignored the penalty. Failure to disclose was an error of judgment: not removed from roll • Re Liveri submitted a published article with only minor amendments, and insisted it was an accident. Lack of insight, mature age of 25-27. Rehabilitation. denied admission • Re AJG Copied PLT assignment. Appropriate response to stress is to seek an extension, not to plagiarise: denied admission

2.5 PRACTISING CERTIFICATE

Admission does not entitle you to engage in legal practice. Must obtain PC from VLSB (**part 3.3 LPUL**)

VLSB must not **grant or renew a PC** unless satisfied that the person is fit and proper **s 45(2) LPUL & GR r 13**

Conditions LPUL s 47	<p>(1)(a)(i) principal (ii) employee (iii) corporate legal practitioner, (iv) government legal practitioner; or (b) barrister only; or (c) CLC volunteer and pro bono only and (2) authorised/not authorised to receive trust monies</p>
First practising certificate	<p>A condition of first PC is an undertaking of <u>supervised legal practice</u> (s 49 LPUL; Admission Rules r 14)</p> <ul style="list-style-type: none"> • If PLT completed by 12 months supervised training in legal workplace = FT supervised legal practice is 18 months s 49(1)(a) LPUL • If PLT course (e.g Leo Cussen) = FT supervised legal practice is 2 years s 49(1)(b) LPUL <p>Failure to supervise can be a disciplinary matter Foreman</p>
Renewal	<p>VLSB must not renew a PC unless satisfied [lawyer] is a fit and proper person (LPUL s 45(2)) & GR r 13</p>
Show cause events	<p>General: There are two kinds of show cause events - automatic and designated s 85 LPUL. A lawyer must disclose [conduct] as it is an automatic/ designated show cause event per s 86/90 LPUL.</p> <ul style="list-style-type: none"> • must explain why despite [conduct] they are fit and proper (s 87 LPUL (within 7 days of SCE s 88)) by completing s 88 notice • VLSB may vary, suspend, cancel, refuse to renew or add conditions to the

	<p>PC (s 89 LPUL).</p> <p>Automatic show cause events s 86:</p> <ul style="list-style-type: none"> (a) Bankruptcy; (b) conviction for serious offence or tax offence; (c) event specified in uniform rules <p>Designated show cause events s 90:</p> <ul style="list-style-type: none"> (a) Allegations of engaging in legal practice outside conditions; providing legal services not permitted by law; failing to have insurance (if req; (iv) some other matter specified in uniform rules
Revocation or termination of PC	<p>Revocation: s 23 LPUL: The SC may order the removal of a lawyer's name from the roll on:</p> <ul style="list-style-type: none"> • its own motion; or • on the recommendation of the VLSB; or • or on the recommendation of VCAT <p>Suspend/cancel/vary: s 76 LPUL: VLSB may vary, suspend or cancel a certificate in accordance with Div 3 (contravention of condition, recommendation of local regulatory authority or LSB believes they are unfit to fulfil the requirements) or Div 4 (show cause events)</p>

3. DUTY TO OBEY THE LAW

	<p>Per ASCR r 3 and BR 4(a) a lawyer's paramount duty is to the court and the administration of justice. It is rooted in the rule of law and is paramount, coming before all other duties (duty to the Court, to the client, to others etc.) <i>Giannarelli v Wraith; Yara</i></p>
<h4>3.1 DUTY TO AVOID UNLAWFUL CONDUCT (LAWYER'S DUTY)</h4>	
	<p>The legal profession requires a high standard of integrity, as such lawyers must not engage in illegal conduct (Gregory).</p> <p>Lawyers are required to act honestly, legally and professionally, so as to not bring the profession into disrepute or jeopardise the administration of justice (Sampson; ASCR r 5; BR r 8).</p>
Gregory	<p>Fraudulent tax advice, lack of candour by maintaining innocence at trial and never admitting fault. Convicted of conspiring to dishonestly cause a risk of loss to Cth and sentenced to 2 years + 12 month good behaviour</p>
Sampson	<p>misleading and deceptive conduct contrary to s 52 TPA re debt collection notices</p>

	that looked like a court document. Amount to professional misconduct but not suspended										
R 5 Dishonest and disreputable conduct	<table border="1"> <tr> <td>5.1</td><td>A solicitor must not engage in conduct, in the course of legal practice or otherwise, which -</td></tr> <tr> <td>5.1.1</td><td>demonstrates that the solicitor is not a fit and proper person to practise law, or</td></tr> <tr> <td>5.1.2</td><td>is likely to a material degree to -</td></tr> <tr> <td>I.</td><td>be prejudicial to, or diminish the public confidence in, the administration of justice, or</td></tr> <tr> <td>II.</td><td>bring the profession into disrepute.</td></tr> </table>	5.1	A solicitor must not engage in conduct, in the course of legal practice or otherwise, which -	5.1.1	demonstrates that the solicitor is not a fit and proper person to practise law, or	5.1.2	is likely to a material degree to -	I.	be prejudicial to, or diminish the public confidence in, the administration of justice, or	II.	bring the profession into disrepute.
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3.2 DUTY TO ADVISE CLIENTS AGAINST UNLAWFUL CONDUCT (CLIENT CONDUCT)

The lawyer's duty is twofold - cannot knowingly [assist/induce] a breach of the law (**ASCR r 4.1.5**) (**Segler**).

A KNOWLEDGE OF BREACH OF THE LAW

If [lawyer] is aware [client] is acting unlawfully, s/he should advise against it and remind them of his/her professional responsibilities. While [lawyer] cannot breach confidentiality unless someone is in imminent danger, s/he should cease acting for [client] if they persist in breaking the law (**ASCR r 20, BR rr 79-82, Segler**).

Ask	<ul style="list-style-type: none"> Is the lawyer assisting or inducing the client to break the law? (Segler) Is the lawyer instructing their agents to break the law? Is the client lying to the Court? Does the client have unlawful objectives?
Affirmative Defence	[lawyer] cannot mislead the court or put on an affirmative defence as they are aware [client] is guilty (ASCR r 20, BR r 80) (i.e. confessing guilt to lawyer but maintaining plea of NG)
Mouthpiece	Must not act as a mere mouthpiece for client (ASCR r 17; BR 42)

B CLIENT MISLEADING THE COURT / LYING TO THE COURT

X is aware that [client] lied to the court when [conduct]. Therefore, **X** must advise them that they should tell the truth and encourage them to inform the Court. **X** should also refuse to continue to act unless [client] authorises them to inform the court (**ASCR Rule 20; BR Rule 79**)

NB: APPLIES WHEN DURING HEARING OR AFTER JUDGMENT IS RESERVED AND PENDING

REMEMBER: **CPA s 21** not to mislead or deceive

C IF LEGALITY IS DOUBTFUL, BUT UNCLEAR?

If the legality of the situation is in doubt, the Guidelines permit the provision of legal advice in good faith to test the scope of the law – They also suggest that the lawyer inform the client about the risk of illegality **in writing**. It is the client's choice whether to take risk

Failure to advise	Failure to advise the client of the risk of illegality exposes the lawyer to liability for negligent advice Pearce (<i>fraudulent tax advice</i>); FCT v Westraders
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3.3 CONSEQUENCES

Segler; Sampson	Civil liability, disciplinary sanctions (i.e professional misconduct in Sampson), criminal responsibility (Gregory)
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