

70103 Ethics Law and Justice Notes

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1.	Dal Pont	G E Dal Pont, Lawyers professional Responsibility (67th Ed 2017)
2.	James and Field	Nickolas James and Rachael Field, The New Lawyer (Wiley, 2013)
3.	LLM	Ainslie Lamb, John Littrich and Karina Murray, Lawyers in Australian (Federation. Press, 2015)
4.	B&C	Paula Baron and Lillian Cohen Ethics and legal professionalism in Australia (Oxford 2015)
5.	Bagust (2013)	Joanne Bagust 'The Legal Profession & the Business of Law' (2013) 35 Sydney LR 27 – work based on interviews of 50 lawyers in top 10 firms in Melbourne in 2005-2006

1 Collaboration and Resilience

1.1 Collaboration

Useful ideas from (James and Field)

- Group contract
- specific defined roles from the start
 - (does defined roles mean you get type cast and don't reach your full potential however?)
- good planning
- support each other – good idea but does it happen in practice?
- open communication about issues in particular

1.2 Resilience

- 'legal idiosyncrasies' Jerome Doraisamy, *The Wellness Doctrines for Law Students and Young Lawyers*
 - (1) Perfectionism,
 - (2) Pessimism and
 - (3) Competitiveness
- Lawyers Weekly article:
 - smartphone and remote access means many lawyers working long hours and are expected to keep working those long hours.
 - Billable targets causes stress in trying to meet those targets
 - Competitiveness of law school means the sense of needing to get ahead of everyone else
 - Narrow approach to law school- corporate law touted as the only viable path to law when there are other options
 - Stiff competition. among lawyers.

2 Legal Professional Identity

- Who you want to be in your persona as a lawyer and what type of lawyer
- Professional identity can be considered as your "**self-concept** as a member of the legal profession and your **internalised beliefs and values**, **expectations** and **motives and behaviours** that arise from how you **perceive yourself** in your professional role" (James and Field p. 33)
- It develops during law school ('*particularly mutable and adaptable*') and can be influenced by popular representations such as pop culture (James and Field, p. 34).
- Important to develop a positive PI during law school because it is critical to your happiness (J&F 34).
- Business practices and legal culture may also affect your professional identity as a lawyer (J&F 34).
- Guides your ethical and moral framework

➤ '*It is values such as justice and honesty which distinguished lawyers from mere functionaries*' Greenwood cited in LLM p 272

2.1 Difference Between Barristers and Solicitors

Solicitors	Barristers
Brief barristers	Advocate in court – specialist in running litigation
More office based	Often more specialist advocacy and advice
Day to day client legal matters	
More of the paper work	
Letters	
Only work related to a court proceedings immune from negligence	Most work immune from negligence (due to
Often work in practice teams and can utilise any business structure	Sole practitioners (UBR 12) who work in chambers
Can refuse clients	Cab rank rule
Works directly for client	Works through solicitors for clients

2.2 Professionalism

- Defining attributes of a 'profession' from Dal Pont
 - Special skill and learning (p7)
 - Public service (p8)
 - Autonomy or self-regulation (p12) – *but is in decline based on how regulated the industry is? Perhaps no as this regulation which is largely self-imposed may be a way of staying the pressures of neoliberalism which 'privileges the logic of the market'* Bagust 28 (my words not Dal Ponts or Bagust)
 - '*The key to the integrity of professional practice and work has historically been 'autonomy'; that is, relative or absolute freedom from external authority and having the privilege of peer or self-supervision*' Bagust 28
- Altruism and service
- Standards for entry and adherence (ethics, codes and requirements) "*importance of an ethical framework as one of the characteristics of a profession, arising from the privilege which the monopoly over the provision of legal services confers on the legal profession in its relationship with the community*" LLB 51[4]
- Vocation or calling towards advanced knowledge or training PLUS Ongoing training
- Organisation and recognition
- Responsibility and accountability
- Integrity and excellence
- Professional conduct
- A means of controlling an occupation – Johnson see p LLB 47
- Bagust (2013) 27-28 '*professions are market organisations whose legitimacy rests on a social bargain to exchange the status and privilege they receive from their intellectual and organisational domination of their field for ethical and altruistic service in areas of social concern*'
- A profession is defined as a "*vocation, a calling, especially one requiring advanced knowledge or training in some branch of training*" and as a "*body of qualities or features, as competence, skill etc, characteristic of a profession or professional*" - shorter oxford English dictionary

- Professionalism defined as “the body of quality or features, as competence, skill, etc, characteristic of a profession or professional” - [shorter oxford English dictionary](#)
- Terrell and Wildman ‘rethinking professionalism’ (1992) 42 *Emory Law Journal* 403 said there was more to professionalism than just common decency, attitudes and standards- there was ethic of excellence, integrity, respect for the rule of law, respect for other lawyers, commitment of accountability, adequate distribution of legal services

2.2.1 Law as a profession or a business?

- As a result of client capture they no longer question their client’s objectives
- Central to the debate is does the profit motive compromise ethic obligations
- **Justice Michael Kirby** LLM 49 referred to guys- legal idealism is still alive and that there was still the notion of faithful service beyond pure economic self-interest
- **Kirby J** asserts ‘the bottom line is that law is NOT a business. Never was. Never can be so. It is a special profession. Its only claim to public respect is the commitment of each and every one of us to equal justice under law’. (B & C, 12)
- **LLM 46**- profession has characteristics such as theoretical knowledge, provision of education, ethical code of conduct and ethos of altruistic conduct, but is this representative of the legal profession?
- **Bagust p28** ‘...neoliberalism, which its emphasis on deregulation, entrepreneurialism and the maximisation of profits, has dramatically impacted on workplace relations’
- ‘lawyers working in the Australian legal services market are losing key elements of their professional identity. ... their autonomy, the control they have over the knowledge they command and the ethic of disinterested service that guarantees the provision of full, frank and fearless advice to clients.’ **Bagust 52**
- While research finds ‘specific examples of large corporate law firms that continue to invest in the collective enterprise of the firm and consider ‘ethical lapses’ as threats ... that ethos is changing. In the big firms today, with clients’ resurgent in-house counsel often braced by highly competent, laterally moved, ex-colleagues, it is more likely than not that ‘ethical grey zones’ will be resolved in the client’s favour in order to solidify client relationships.’ **Bagust 46** citing Galanter and Henderson’s research out of the US
- **Hayne J** occupies more middle ground arguing that law is a profession with commercial aspects to its practice (B & C, 12)
- **CJ Bathurst** ‘legal practice has been a commercial enterprise from the time the first legal enthusiast charged money for what had previously been a gentleman’s hobby’ (B&C 12)

Decline in reputation

- Legal profession seen as a monopoly, has exclusiveness and sense of superiority: **LLM 47**
- In late 20th century, there was a change to make law as a business rather than a profession, which led to a decline in public perception of lawyers: **LLM 47**

Law firms operating themselves more like a business

- Reform of corporations law in 20th century transformed small practices into mega corporations leading to corporatisation of legal services: **LLM 71**
- Focus on billable hours at the expense of quality. **CJ de Jersey**, urged young practitioners to not obsess upon the, ‘An unfortunate pre-occupation with so called ‘billable hours’, and the intensely competitive nature of the contemporary profession, [which] can shift the focus from measured professionalism to out and out commercialism. (Cited in B & C, 12)
- **Bagust p27** ‘... corporate lawyers are losing key elements of their professional identity in the impetus to maintain the client list and the profit motive’
- **Bagust 29** ‘corporate law firms are (re)forming themselves into the image of the ever-merging, ‘big business’ clients they serve.’ As such, ... the professional identity of corporate lawyers is changing somewhat from ‘wise counsellor’ to ‘slick marketeer’.
- US research suggest large law firms were incapable of acting autonomously and ‘were in fact largely captive to their clients’ **Bagust 39**
- ‘... the workplace regime which valorises a service ethic where ‘the client is always right’ is functioning not only to diminish the autonomy of lawyers vis-A-vis their powerful corporate clients, but also to impact deleteriously on the ethical standards of legal practice.’ **Bagust 29**
- Interesting it seems client value less of the marketing and more of the traditional practical wisdom’ and judgment. **Bagust 38**
- ‘There is a view among some lawyers that marketing legal services does not quite fit traditional professional ideals. ... a little bit unseemly and taints the image of their practice’ **Bagust 37**

Loss of autonomy

- Notes the paradox that corporate lawyers who were once the ‘demigods of the profession’ are at risk if they are not already of becoming the proletariat – losing their autonomy and being at the ‘direction and control of their powerful and savvy corporate clients’
- **Bagust (2013) p27** ‘... in the mature and highly competitive marketplace for legal services, rather than working as autonomous professionals, corporate lawyers are now finding themselves working more and more as functionaries subservient to the dictates of their corporate clients’
- **Bagust p27** ‘...as the balance of power in the corporate legal sector is shifting from law firm to clients, the professional ethics of law firm lawyers are at risk of being compromised’

Too identified with their clients

- Argues legal firms are too close to their clients and it impacts their professional autonomy. This is impacted not only by converting the top end of towns business, the pressure of being ‘a big business themselves (contributing \$11b to economy and \$18b in income in 2007-08 according to ABS 2009 report cited in **Bagust p 31**) but on the relationships between in-house lawyer who have often been poached from the top tier firms. **Bagust 33-36**

Ethics lost to profit motive – Focus on altruism and service is lost

- ‘The work of legal professionals that was once characterised by the provision of frank and fearless advice which transcended self-interest and commercial self-advantage has changed’ **Bagust p31**
- ‘no lawyer ... mentioned a sense of ‘public-mindedness’ in discussing the best lawyers.’ **Bagust 36**
- **Bagust 38-40** cites arguments that rather than acting as ‘trusted business advisor’ and providing a ‘buffer between the illegitimate desires of ... clients and the social interest’, corporate lawyers are now ‘with wealth and status as the basis of their social power... ‘hired guns’, manipulating legislation and procedural tools ... to meet the asocial goals of corporate clients to maximise profits.’
- The capture of corporate law firms by their clients undermines the attributes of a profession. And not only the capture the aspiration of the firms themselves ‘If lawyers are merely hard-pressed, time-constrained technocrats or ‘hired guns’ who are able to exert only limited influence over the means and ends of their own work, then it is highly unlikely that they have the power (or perhaps even the inclination) to stabilise modern society by modifying their corporate clients’ goals or objectives.’ **Bagust 45**

2.3 Types of Lawyers and their Ethical Dilemmas

2.3.1 Corporate lawyers

- Weighing the impact of corporate decisions on the environment
- Reconciling corporate greed and minimising corporation's accountability and liability at the expense of less powerful eg Tax evasion vs minimisations
- Exploited workers
- Working for unethical companies like Big tobacco or Big Pharma
- Pressure and competition mean accept clients regardless of the circumstances; whether this is for the greater social good.
- Presumed that people who control the firm have the greatest income and authority – creates a political hierarchy and potentially structural injustice – unfair/difficult for lower-level lawyers.

2.3.2 In-house lawyers

- In-house lawyers= ethical issues largely stem from their position as an employee
- Pender posits how, *'The in-house legal advisor can no longer function as a "mere legal technician" – an advisor narrowly confined to providing mere black letter legal advice. (They) must serve as both legal advisor and steward for ethical culture and governance, incorporating moral considerations – when and where relevant – in corporate legal representation.'* (Cited in B & C, 130)
- However this ideological approach is refused by the lived reality *'If ethical conduct results in loss of the client, in-house counsel becomes unemployed.'* (Cited in B & C 129)
- May not be required to hold practicing certificates and so not subject to the same ethical framework

Procedural/Operational Challenges

- Ethical challenges: entity theory – who is the client? Who gives instructions/has authority on behalf of the company? The Directors? Are they acting for the collective best interests of the company?
- Independence: their communication of advice with their employer may not privileged if the in-house lawyer is not independent of their lawyer: *Australian Hospital Care Pty Ltd v Duggan (No 2) [1999] VSC 131 at [54] per Gillard J.*
- Impact on termination of retainer- cannot be dismissed under employment laws must follow the rules of the retainer under the UL Law

Ethical duties

- How to maintain professional detachment and objectivity and meet obligations of 'law as a profession' – see *Law v Business above*
- Impact on pressure from company to behave unethically, such as witnessing documents when the persons involved are not there or certifying the document when they haven't been provided the actual document.
- Impact on interests of the company, aka to sign off on legal transaction which may not be in the company's best interests. Be upfront with the client on whether it's an ethical challenge and explain the reality of needing to excuse yourself from acting for them if the position is untenable

Duties to the Court and Gatekeepers

- Impact on duties owed- fundamental duty to the court and administration of justice, and then to the client. No difference between private practitioner and in-house roles- just that in-house act for one client, but they still have the same duties to court and client- affirmed in *Waterford v Commonwealth (1987) 163 CLR 54*
- Hardies Case *Shafron v ASIC [2012] HCA 18* commentators have said 'By designating them (in-house counsel) as corporate officers the High Court has transformed in-house lawyers into gatekeepers responsible for promoting the public interest in corporate compliance with continuous disclosure obligations and prohibitions on misleading conduct' *Michael Legg, Law Society Journal, July 2012*
- "lawyers as gatekeepers" 'The notion of the lawyer as gatekeeper sits uneasily with the traditional solicitor client relationship, even where the solicitor is serving in an in-house legal role. Lawyers owe their clients fiduciary duties which require the lawyer to act in the client's best interests, protect confidentiality and avoid conflicts. This can become problematic where the corporation's and society's interests diverge. Alternatively, the gatekeeper function can result in more robust and independent legal advice as the lawyer is incentivised to prevent breaches of the law by the corporation.'
- Interesting Example: in-house lawyers at British American Tobacco had to explain their "document retention policy" which effectively shredded documents relating to adverse effects of tobacco smoking- Frederick Gulson decided to speak out aloud about this policy and give evidence against the company

Shafron v ASIC [2012] HCA 18

Facts: Shafton helped James Hardie directors helped prepare misleading info on the ability to compensate asbestos victims to ASX and failed to advise the company's board, which breached s 180(1) of Corporations Act 2001 (Cth). Shafron served as company secretary as well as their in-house lawyer. Shafron attempted to argue that, he didn't have obligation's as company secretary as he had his lawyer hat on.

Held

'the High Court distinguished the role of an external adviser who proffered advice and information in response to particular requirements ' from that of senior corporate officers making decisions. But Held: Shafron had substantial input, had duty to protect company with his knowledge. His dual roles as company secretary and in house lawyer were indivisible and his obligations to the corporations act had to be assessed as a whole. He breached his duty of due care and diligence as an "officer" of the corporation

2.3.3 Family lawyers

- The area of law relating to the regulation of domestic or personal relationships and the consequences that flow from the end of such relationships. Family law is concerned with the matters such as the welfare of children, property and maintenance disputes between married or de facto partners, and the legal termination of marital relationships through divorce or annulment. -[LexisNexis, 251](#).
- One of most emotive areas of law and as such people do not always act rationally
 - emotional state of the client – combed with lack of legal knowledge could lead to professional misconduct with lawyer acting on clients wishes vs clients best interests eg a father wishing to give all his assets to his ex-wife following their divorce to support children but later realises rashness of this decision;
 - contain their emotions and personal values when confronted with situations in which they may not approve of their client's wishes People will spend anything but is it reasonable? – lawyers take advantage?
- Family lawyers have an expectation to act in the best interests of the child, whilst also fulfilling their client's needs. (Children usually not clients)
- Lawyers should encourage clients to report child abuse to relevant child authorities if they raise it in consultations with the lawyer, ie positive and active requirement to report child abuse ([Best Practice Guidelines for lawyers doing family law work 2nd edition family law council.](#))
- Getting bail for a violent offender
- Ethical dilemmas around sexual orientation and birth rights of the concerned parties, for example lesbian cases where the birth mother is granted custody regardless of her parental role in the relationship. Additionally, sperm donors are sometimes considered as possessing custody rights in parental separations.
- Maintaining professionalism, detachment and objectivity – and not "taking a side"

2.3.4 Government lawyers

- Entity theory: to boss, head of department or government – who is the client? And who is confidentiality and Loyalty owed to
- Conduct must be 'both above reproach and be seen to be above reproach' ([Dal Pont p 442](#))
- Conflict of Interests – adhere to rule of law, no financial interests, loyal to employer
- Separate legal advice from policy or management advice consider For professional privilege for example – what is the dominant purpose
- Professional responsibilities as public servants: focus on values of integrity, impartiality, professionalism and accountability;
- Subject to statutory authority or provisions governing their actions ([Dal Pont 2017 p 452](#))
- Barristers employed don't need to follow cab rank rule or other private practice rules that normally apply ([Dal Pont 2017 p 453](#))
- Duty to foster public interest as they are custodians of administration of justice and administration of government ([Dal Pont 2017 453](#))
- Model litigant duty- must comply with procedure to minimise cost and delay, assist the court to arrive at a proper result ([Dal Pont 2017 454](#))
- Not allowed to publicly criticise judiciary and the government
- Cannot allow executive decisions from govt to cloud their judgment on giving advice
- Must treat the government as a client
- Conflict of interests: if a govt lawyer leaves and goes into private practice and ends up in a court dispute to sue the govt, see rule [10 ASCR](#) on manage conflicts (known as the revolving door problem)

2.3.5 Community lawyers incl. Legal Aid

- Who is more deserving/more in need of help
- Do I do something of value or do I go make the big bucks Typically receive less remuneration than the likes of corporate lawyers etc
- funding & resources.
- Time limits.
- Unreasonable workload catalysed by a shortage of funds.
- Clientele may be unco-operative after feeling used by the system and potentially having not had their claims heard for some time.
- Legal aid lawyers owe duty to client but must also counsel clients to manage scarce legal aid resources. i.e they should make sure they confine their advocacy to key issues: [Kay v R \(1998\) 100 A Crim R 367](#) at 375 per [Smart J.](#)
- Legal Aid Lawyers cannot accept gifts from clients
- CLC lawyers would have the same duty or responsibility - they must case manage their clients according to guidelines on what they will accept- they have more of a leeway in accepting those who are socioeconomically disadvantaged and would need their help

2.3.6 NSW Law Reform Commission (LRC)

- independent statutory body constituted under the [Law Reform Commission Act 1967 \(NSW\)](#).
- expert law reform advice to Government on matters referred ("references") by AG
 - improve, modernise, simplify and consolidate the law - repeal laws unnecessary & obsolete, remove inefficiencies and defects in the law provide improved access to justice
- Anyone can make a submission to the Commission on a reference.
- A project is completed when a final report is tabled in Parliament and made public on our website.

2.3.7 Australian Law Reform Commission (ALRC)

- federal agency under the [Australian Law Reform Commission Act 1996 \(Cth\)](#), and the [Public Governance, Performance and Accountability Act 2013 \(PGPA Act\)](#).
- over 85% of ALRC reports have been either substantially or partially implemented
- part of the Attorney-General's portfolio, but independent of government
- monitors overseas legal systems to ensure Australia compares favourably
- regard to any effect on the costs of access to, and dispensing of, justice.

The ALRC's objective is to make recommendations for law reform that:

- bring the law into line with current conditions and needs, remove defects in the law, simplify the law
- adopt new or more effective methods for administering the law and dispensing justice, and provide improved access to justice.

3 Ethics Morals and Emotions

3.1 Difference between 'morals' and 'ethics'?

1. Difference is morals are more changeable and not universal whereas ethics usually denotes an agreed framework within a particular context.
2. Clearly very closely related as the definition of ethics includes reference to morals – but ethics signals agreement and governance
- Ethics – moral principles adopted as a code or framework of behaviour in a context – [LLM 204](#).
- Oxford dictionary has 'Moral principles that govern a person's behaviour or the conducting of an activity.'
 - Ethics is the capacity to choose those values that are meaningful
 - About answering a practical question is what should I do in the context of this ethical framework
- Legal ethics –understood as professional responsibility & conduct – codified into a set of rules
- Morals – not universal & can differ significantly. Concerned with principles of right & wrong behaviour.
 - **Positive morality** – the dominant moral values of a society
 - **Critical morality** – a systematic examination of moral values and enquiry into whether they should be followed abandoned or changed
- [Preston \(Understanding Ethics 2014\)](#) says law and ethics are related
 - Law development has been influenced by ethics – but ethics are not derived from the law
 - Overwhelming reason for so many laws are ethical ones
 - Law is commonly the public expression and sanction for the morality of society
 - Law should be continually the subject of ethical scrutiny and critique

3.2 Ethical approaches

- a) **Virtue ethics** – places emphasis on character rather than compliance with rules or consequences of actions. If a person focuses on developing a virtuous character they will know what to do in a certain circumstance.
- b) **Deontological ethics** – one that is universal and objective and consistent with ethical rules – it considers the act itself rather than the consequences or intentions eg divine command theory and Kantianism
- c) **Consequentialist ethics** – one that produces the best possible outcomes/consequences. Eg utilitarianism
- d) **Ethics of Care** - concerned with responsibility to maintain relationships & communities & contrasts with the individualistic and abstract nature of the previous approaches eg Feminist ethics

[Parker and Evans \(Inside Lawyers Ethics 2014\)](#) suggest 4 main strands or considerations for an Ethical approach – and which is appropriate may differ depending on the circumstances

1. **Adversarial advocacy** – requirement for lawyers to advocate on their client's behalf within the bounds of the law regardless of outcome or effect on others
2. **responsible lawyer** – accepts that as an officer of the court there is also an obligation to facilitate the administration of justice
3. **Moral activism** – taking the opportunity to improve justice through law reform, public interest law and client counselling
4. **Ethics of care** – an approach that is about preserving relationships with clients, between parties and within communities

3.2.1 Legal Ethics is just normal Ethics

[Mirko Badarac and Penny Dimopoulos, 'Legal Ethics is just normal ethics: towards a coherent system of legal ethics \(2003\) 02\(2\) QUTLGJ 367](#)

- The rules and principles embodied in the rules which form what is known as legal ethics are devoid of an overarching framework
- The dissociation between legal ethics and considered legal theory is the reason for legal industry credibility issues
- there is no difference between business and other activities therefore ethics has a role in legal practice; but one
- Must pick a moral theory and stay with it for it to provide the stability and framework for legal ethics - that appears to be lacking ie can't just pick and choose which theory consequentialist or deontological that suits your intuitive disposition.
- They emphasize 3 moral principles (supported by both consequentialist and deontological theories)
 1. Truth telling
 2. Personal liberty
 3. Maxim of a positive duty

Introduces 3 theories and concludes that as **there is no difference between business and other activities therefore ethics has a role in legal practice** by looking at the below thesis:

1. **Independence theory** – business and ethics do not mix. Friedman – not maximizing profits is akin to stealing from shareholders. Moral rules are about conduct between individuals whereas business including law is self-contained and already governed by other clear and settled principles. Also moral principles are too subjective and imprecise for governing a business. They conclude however that as there is no basis for distinguishing business from other human endeavours this is unsound
2. **Substantive Law** – as law itself is founded on moral principles, ergo the above does not hold, but they argue While there is clearly a link between morality and the law it does not necessarily follow that moral consideration would govern the practice of law as the activities of lawyers is not itself the law ..therefore why should they not be governed by prudential/economic principles like other businesses
3. **The universalizability of moral judgements** – independence theory above is incompatible with a fundamental paradigm of morality. Moral conduct is applicable to all conduct,

What then is the content and nature of ethics in the practice of law

- Morality consists of the principles which dictate how serious conflict should be resolved.
- Not concerned with trivialities.
- Where there is actual or potential conflict between 2 or more parties.

Consequentialist - an act is right or wrong depending on the capacity to maximize a certain virtue

Deontological (non-consequentialist) – not contingent on results but based in the intrinsic features of the behaviour

- Dismiss rights based (deontological) ideals in their purest form as they are difficult as they lack a coherent foundation and fail to provide a mechanism for moving from the abstract to the ideal. Rights theories can however be included by substantiating rights in the context of a consequentialist ethic
- Utilitarianism can explain the existence of rights as bestowing them has been shown to lead to overall be more conducive to overall happiness – but rights do not have a life of their own that is they are derivative not foundational. And because of this they are not as absolute as deontological based rights.
- This approach allows us to rank rights