

Week 1: Framework of Lawyering and Regulation of the Profession

Terminology and the Nature of Legal Ethics

Legal ethics are defined by the Queensland Law Society as principles and values that, working alongside conduct rules and common law, regulate the behavior of a lawyer to ensure right conduct in daily practice. This field is often referred to as the "**Law of Professional Responsibility**" or the "**Law of Lawyering**". These are sometimes considered "minimum standards of conduct" because there is a high level of generality despite the extreme diversity of legal practice, they do not cover every specific situation, and the underlying values are not always measured by the same standard.

Sources of Professional Regulation

The law of lawyering is derived from several primary sources:

- **General Law:** This includes **Contract law** (the retainer), **Tort law** (negligence), and **Equity** (fiduciary duties and confidentiality).
- **Statute:** Key legislative frameworks include the **Legal Profession Uniform Law**, the **Australian Consumer Law**, and **Corporations Law**.
- **Professional Conduct Rules:** Specific rules governing daily behavior.
- **Criminal Law:** Lawyers are subject to criminal sanctions in certain situations.
- **Inherent Jurisdiction:** The **Supreme Court** maintains an inherent jurisdiction to supervise lawyers as officers of the Court.

The Move Toward a National Framework

The Australian legal profession has transitioned from state-based regulation and admission at Federation toward a unified national framework. Significant milestones in this process include the **1992 Mutual Recognition Acts**, the **1998 National traveling practising certificate scheme**, and the **2004 Model Law scheme**. In 2009, COAG established the **National Legal Profession Taskforce** with four key goals: establishing a national profession, reducing regulatory burdens, enhancing consumer protection, and maintaining the profession's independence. National Laws were introduced in 2011, followed by the **Uniform Laws** in New South Wales and Victoria in 2015, and Western Australia in 2022.

Regulatory Bodies and Legislation

The **Legal Profession Uniform Law 2014 (NSW)** is a primary source of regulation, establishing frameworks for accreditation, admission, legal practice, and the disciplinary regime. Several bodies oversee this framework:

- **Legal Services Council:** Responsible for monitoring the overall operation of the Uniform Framework and making **Uniform Rules** regarding admission, practice, conduct, and continuing professional development. Their objectives include ensuring consistency, efficiency, and the protection of law practice clients.
- **Law Council of Australia:** This is the peak national representative body for 90,000 Australian lawyers. While it is **not part of the formal regulatory framework** under uniform law, it collaboratively developed the **Australian Solicitors' Conduct Rules (ASCR)**, which have been adopted by NSW, Victoria, and WA.
- **Legal Profession Admission Board (LPAB):** This board determines the eligibility (age, academic prerequisites, and practical legal training) and suitability ("**fit and proper**") of individuals seeking admission to the profession in NSW.
- **Office of the Legal Services Commissioner (OLSC):** An independent statutory body that handles complaints about lawyers under a system of **co-regulation**. It oversees investigations, resolves

consumer matters, and initiates disciplinary proceedings in the **NSW Civil and Administrative Tribunal (NCAT)**.

Disciplinary Categories and Standards

The Legal Profession Uniform Law identifies different levels of misconduct and dispute:

- **Consumer Matters (Section 290):** These may be resolved through fair and reasonable determinations such as cautions, apologies, retraining, or compensation.
- **Unsatisfactory Professional Conduct (Section 296):** This is a less serious category involving conduct in connection with legal practice that falls short of the standard of competence and diligence expected by the public.
- **Professional Misconduct (Section 297):** This more serious category includes a substantial or consistent failure to maintain professional standards or conduct that demonstrates a lawyer is not a **fit and proper person** to practice. Disciplinary orders from these findings can include **striking off the roll, suspension, fines, reprimands**, or compensation payments.

Theoretical Ethical Frameworks

Applied legal ethics draws from three primary normative theories:

- **Deontology (Kant):** Focuses on binding duties that are **intrinsically right**, regardless of the consequences. It emphasizes universal rules and human rights.
- **Teleology / Utilitarianism (Bentham):** Asserts that the **end justifies the means**. Right actions are those that maximize the "greater good" or positive effects like happiness and welfare.
- **Virtue Theory (Aristotle):** De-emphasizes rules and looks instead at the **inner character and motivations** of the individual. To possess a virtue is to have a complex mindset that signifies the core essence of the person.

The Inescapable Ethical Dilemma

A fundamental difference between law and ethics is that law has the power to **finalise debate** and provide resolution, whereas ethical norms remain open to ongoing opposing views. Lawyers operate within a permanent ethical bind because they are simultaneously **officers of the court** (with a duty to seek justice) and representatives of their **clients** (with a duty to win for the client).

Parker and Evans' Four Ethical Approaches

To navigate these dilemmas, lawyers often adopt one of four main ethical approaches:

1. **Adversarial Advocate:** The lawyer's primary duty is to advocate for the client's interests as vigorously as possible within the law, putting aside community concerns or the interests of justice.
2. **Responsible Lawyering:** The lawyer acts as an officer of the court and a trustee of the legal system. They prioritize the **public interest**, ensuring the law works fairly and not searching for loopholes to assist a client.
3. **Moral Activism:** Lawyers act as agents for **justice through law reform** and public interest litigation. They may counsel clients on the moral dimensions of their actions, though this carries the risk of the lawyer's personal morality overriding the public interest.
4. **Ethics of Care:** This model prioritizes **preserving relationships and avoiding harm** over impersonal justice. It involves a "cooperative approach" where the client is seen as a whole person.