

LAWS1230

Lawyers, Ethics and Justice

Comprehensive Course Notes

UNSW Faculty of Law

1. Introduction to Lawyers, Ethics and Justice

1.1 Why Ethics Matters in Legal Practice

Lawyers encounter ethical decisions as a routine feature of practice. The rules of professional conduct do not always supply clear answers, and the ability to reason carefully about ethical obligations is a fundamental lawyering skill. The Lawyers, Ethics and Justice course develops frameworks and tools to make ethical decisions under conditions of pressure, fatigue, and competing loyalties.

Three recurring questions frame the course:

- What is the right thing to do in this situation?
- How do we actually get the right thing done, given the situational pressures on lawyers?
- What kind of lawyer do I want to be, and how do my values shape my professional identity?

The 'good lawyer' question has no single answer. A good lawyer must be technically competent, loyal to clients, honest to the court, and attentive to broader duties to the administration of justice and the public interest. These obligations can and do conflict, and the course explores how to navigate those conflicts.

1.2 The Sources of Ethical Obligation

A lawyer's ethical obligations arise from multiple overlapping sources:

- **Legislation:** the Legal Profession Uniform Law (NSW) 2015 (LPUL) and the Legal Profession Uniform Law Application Act 2014 (NSW) (LPULAA) provide the statutory framework for professional regulation in NSW.
- **Professional conduct rules:** the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (ASCR) and the Legal Profession Uniform Conduct (Barristers) Rules 2015 (ABCR or BR) set out the specific professional obligations.
- **General law:** equitable duties of confidentiality and loyalty, contractual obligations under the retainer, and the duty of care in tort supplement the professional rules.
- **Institutional pressures:** the culture of the firm, billing structures, peer expectations, and authority figures shape ethical conduct in practice in ways that formal rules do not capture.

1.3 Key Professional Obligations: An Overview

ASCR r 3.1 - Paramount duty

A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

ASCR r 4.1 - Other fundamental ethical duties

A solicitor must: 4.1.1 act in the best interests of a client; 4.1.2 be honest and courteous in all dealings; 4.1.3 deliver legal services competently, diligently and as promptly as reasonably

possible; 4.1.4 avoid any compromise to their integrity and professional independence; and 4.1.5 comply with the Rules and the law.

ABCR r 8 - General

A barrister must not engage in conduct which is: (a) dishonest or otherwise discreditable to a barrister; (b) prejudicial to the administration of justice; or (c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.

The hierarchy of duties: where duties conflict, the paramount duty to the court overrides the duty to the client. The duty to the client generally overrides personal interests of the lawyer. The ordering is:

1. Duty to the court and administration of justice (paramount).
2. Duty to the client (subject to the paramount duty).
3. The lawyer's own interests (subordinate to both).

1.4 Ethics Frameworks for Decision-Making

Several frameworks for structured ethical reasoning are drawn on throughout this course. They share a common structure but use different language and emphasis:

Framework	Key Steps	Emphasis
Parker and Evans	Identify issue; identify options; identify interests; identify sources of authority; consider broader ethical considerations; seek guidance; consider consequences; decide; summarise reasons.	Comprehensive, multi-source analysis.
Rest (and Breakey)	Awareness; Judgment; Decision-making; Action; Achievement; Review.	Psychological realism and follow-through.
Queensland Law Society	Identification; Application; Practical implementation.	Streamlined, practice-oriented.

These frameworks converge on the importance of first recognising that an ethical issue exists (moral sensitivity), then reasoning carefully about what the rules and broader values require, and finally implementing a decision despite organisational pressures that may push in the opposite direction.

1.5 The Alton Logan Problem: Confidentiality vs Justice

A recurring ethical dilemma involves a defence lawyer who discovers, through a client confession, that an innocent person has been convicted of a crime actually committed by the client. The rules of confidentiality generally prevent disclosure. This dilemma illustrates the core tension between fidelity to the client and the broader duty to justice.

The scenario demonstrates that professional rules are the starting point for ethical reasoning, not the end of it. A lawyer who simply follows the rules without moral reflection may still cause serious injustice. The course equips students to grapple with these dilemmas in a rigorous and reflective way.

2. Regulatory Framework, Complaints and Discipline

2.1 The Regulatory Architecture in NSW

The NSW legal profession operates under a co-regulatory model involving:

- The Office of the Legal Services Commissioner (OLSC): an independent statutory body that receives all complaints about lawyers, investigates and concludes all consumer complaints, and refers disciplinary matters to the professional bodies or prosecutes them in NCAT.
- The Law Society of NSW: the peak professional body for solicitors. It has significant authority over professional disciplinary matters referred by the OLSC.
- The NSW Bar Association: the peak professional body for barristers, with equivalent disciplinary responsibilities.
- The NSW Civil and Administrative Tribunal (NCAT): the Occupational Division hears and determines all matters involving professional misconduct, and may deal with unsatisfactory professional conduct matters referred by the OLSC.
- The Supreme Court of NSW: retains inherent jurisdiction to supervise its officers, can hear appeals from NCAT, and has power to strike off or readmit practitioners.

The OLSC was introduced in 1994 following a NSW Law Reform Commission report recommending greater consumer protection for legal services. It operates under the LPULAA.

2.2 Types of Complaints

LPUL ss 268-271 - Complaints

A complaint may contain either a consumer matter (s 269) or a disciplinary matter (s 270) or both (s 268(1)). The OLSC may give priority to resolving the consumer matter separately from the disciplinary matter (s 271).

Consumer matters (s 269 LPUL) relate to the provision of legal services, including costs disputes, delays, and failures of communication. These make up approximately two-thirds of all complaints and are investigated and concluded by the OLSC.

Disciplinary matters (s 270 LPUL) involve alleged unsatisfactory professional conduct or professional misconduct. About one-third of all complaints involve disciplinary matters. Most disciplinary matters are referred to the Law Society or Bar Association to investigate and prosecute, but the OLSC may itself initiate and prosecute proceedings in NCAT.

2.3 Unsatisfactory Professional Conduct (UPC)

LPUL s 296 - Unsatisfactory Professional Conduct (UPC)

UPC includes conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

Key features of UPC:

- The applicable standard is the competence and diligence expected of a reasonably competent lawyer.
- The conduct must fall short of that standard.
- The conduct must occur in connection with (not external to) the practice of law.
- What is 'reasonably competent' is judged from the point of view of a member of the public, not peers or professional associations.

2.4 Professional Misconduct (PM)

LPUL s 297 - Professional Misconduct (PM)

PM includes: (1) substantial or consistent unsatisfactory professional conduct involving a substantial or consistent failure to reach or maintain a standard of competence and diligence; and/or (2) conduct (whether or not in connection with the practice of law) that justifies a finding that the lawyer is not a fit and proper person to practise law.

PM is a more serious category than UPC. The key distinction is that:

- UPC involves a single instance of falling short of a standard.
- PM requires either a substantial or consistent failure (indicating a pattern), or conduct so serious it bears on fitness to practise regardless of whether it occurred in connection with legal practice.
- Conduct outside legal practice (e.g., criminal offences, serious personal dishonesty) can constitute PM under the 'fit and proper person' limb.

2.5 Disciplinary Orders for UPC

If the Commissioner finds UPC, it may make the following orders (LPUL s 299(1)):

- Caution or reprimand.
- Require an apology.
- Require the work to be redone at no cost or reduced cost.
- Require training, education, counselling or supervision.
- Impose a fine not exceeding \$25,000.
- Impose conditions on the practising certificate.

2.6 NCAT Orders for PM (s 302 LPUL)

NCAT may make the following disciplinary orders upon finding PM:

- Removal from the Roll of Legal Practitioners: where the lawyer has been so dishonest that they cannot be trusted to practice law. Readmission requires a fresh application and is not guaranteed.
- Suspension or cancellation of the practising certificate, or imposition of conditions: serious, but the lawyer retains some trustworthiness and suspension may assist reform.
- A fine of up to \$100,000 for PM.
- A fine of up to \$10,000 for UPC where NCAT deals with the matter.
- A reprimand: for less substantial breaches that are isolated.