

Greens List

Ethics in practice

Simon Libbis, Head of Ethics and Practitioner Support

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Lawyers must have an ethical mind

“There can be no higher or stricter requirement of a lawyer than that she or he behave honourably and ethically. And that requires that the values and principles which inform legal ethics are so well understood that they may be said to have shaped the professional lawyer's mind.”

Shaping Legal Minds - The Ethical Mind

The Hon Susan Kiefel AC, Chief Justice of Australia

Queensland Law Society Annual Symposium. 19 March 2021

Ethics are the hallmark of a profession

"The first, and perhaps the most important, thing to be said about ethics is that they cannot be reduced to rules. Ethics are not what the barrister knows he or she should do: ethics are what the barrister does. They are not so much learnt as lived. Ethics are the hallmark of a profession, imposing obligations more exacting than any imposed by law and incapable of adequate enforcement by legal process. If ethics were reduced merely to rules, a spiritless compliance would soon be replaced by skilful evasion."

High Court of Australia Chief Justice Sir Gerard Brennan AC KBE QC in describing the importance of ethics to a meeting of the Queensland Bar Association in 1992.

The importance of ethics in legal practice

“EF's actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of EF's obligations as counsel to her clients and of EF's duties to the court.”

AB (a pseudonym) v CD (a pseudonym) EF (a pseudonym) v CD (a pseudonym) [2018] HCA 58

Ethics scenario based training essential

“Legal ethics education is integral to supporting lawyers’ understanding and application of their ethical duties and obligations in practice, as well as their ongoing professional development. Embedding legal ethics education in lawyers’ continuing professional development, including through the use of practical, scenario-based learning, would support them to understand the common ethical issues that can arise in legal practice and enhance their skills to manage those issues. Strengthening awareness of and access to the various ethical supports that are available to lawyers is also important.”

RCMPI – Final Report Summary – pages 34/36 – 30 November 2020

Australian Solicitors' Conduct Rules 2015

3. PARAMOUNT DUTY TO THE COURT AND THE ADMINISTRATION OF JUSTICE

3.1 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.

4. OTHER FUNDAMENTAL ETHICAL DUTIES

4.1 A solicitor must also:

- 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;
- 4.1.2 be honest and courteous in all dealings in the course of legal practice;
- 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 these Rules and the law.

Legal Profession Uniform Law Application Act 2014 Schedule 1



39 Undue influence

A person must not cause or induce or attempt to cause or induce a law practice or a legal practitioner associate of a law practice to contravene this Law, the Uniform Rules or other professional obligations.

Penalty: 100 penalty units.

Ethics topics to be discussed today

1. Paramount duty to the court and administration of justice
2. Duty of confidentiality and to protect client legal privilege
3. Solicitor as material witness
4. The importance of compliance with an undertaking
5. Inadvertent disclosure of confidential material
6. Ethical negotiations in mediation

**Your ethical
compass**

I just helped the expert prepare her report (1)

The firm of which you are a partner acts for a company A conducting a large-scale e-commerce business in Australia, sourcing products from a range of suppliers in an overseas country. Your client sued three of its former employees claiming declaratory and injunctive relief, damages, delivery up and an account of profits in relation to allegations of misuse of your client's confidential information, being the identity and contact details of certain suppliers of your client's products. Your firm had engaged a businesswoman with relevant industry experience and knowledge and instructed her, by way of letter, to prepare an expert report on business practices in the e-commerce sector concerning the use and treatment of information pertaining to the identities and details of suppliers in the overseas country.

I just helped the expert prepare her report (2)

The file has been handled by a senior associate and it has just come to your attention that the senior associate had several meetings with the expert witness and she was also heavily involved in the drafting the report to be filed with the court.

What is your firm's ethical position? What should you do?

New Aim Pty Ltd v Leung [2022] FCA 722 (23 June 2022)

I want to help my friend who is in trouble (1)

A is a significant client of the law firm of which you are a senior partner and is also a close personal friend. A has been sued for a large debt and an application had been made to the court to freeze some of his monetary assets pending trial. A tells you that he owes the money and has no defence to the claim, but needs to delay it for as long as possible because an immediate judgment would cause him personal and financial ruin and extreme embarrassment. A expresses the hope to you that several major business deals he has underway currently will allow him to pay off the debt in 6 months time.

I want to help my friend who is in trouble (2)

A asks you to act for him and instructs you to take all steps necessary to delay the proceedings including filing a defence denying the debt and delaying the action coming to trial for at least another 6 months. From your knowledge of A's business affairs, you believe that he has a very high chance of paying off the debt in 6 months time.

How should you respond to this instruction? Can you assist your friend in this matter?

Valentini (a pseudonym) v Trustees of the Marist Bros (Costs) (2022) 550 (16 September 2022)

Doctors falling out can have consequences

You act for a private hospital. Two surgeons have been in a lengthy dispute about certain clinical procedures being performed at the hospital. In 2022, Dr A sued a fellow surgeon Dr B for defamation. During these proceedings, Dr C, another senior surgeon at the hospital, produced 77 emails between himself and Dr B, which included disparaging comments about the clinical competence of Dr A. The emails were produced by Dr C under subpoena. Some of the emails disclosed alleged breaches of confidentiality and other hospital rules by Dr C. Upon being provided with these emails, Dr A showed them to his practice manager who sent them to your client's CEO. She used their contents to issue a show cause notice to Dr C regarding his contract.

What is your client's position and how should you advise it to proceed?

ASIC has just sent me a Section 33 Notice

Five years ago you acted for a property investor who bought and sold two substantial commercial properties in different locations. The conveyancing process was straightforward, but during each transaction, your client sought from you taxation legal advice about the transaction and you prepared detailed letters of advice for him. You have not heard from your client in the intervening five years, but you have just been served with a Section 33 Notice by ASIC to produce to it your client files for these transactions. You cannot now locate your client and it appears that he may have moved his business interests overseas.

How should you respond to ASIC?

I watched my client tear up the draft letter

You have been asked by Alan who is a senior manager of a small company to advise him about leaving his employment as his CEO has been trying his best to force him out of his job to make way for a member of his family. Alan has drafted a letter of resignation and asks for your legal advice on it. You advise Alan that it will be better for him financially if his employment is terminated by the company. Alan accepts your advice and tears up the letter in your presence. A few weeks later, Alan's employment is terminated, and you commence FWC proceedings against the company for unfair dismissal. The employer produces a copy of Alan's letter of resignation which has apparently been downloaded from Alan's work computer which he used to write it. Counsel advises that you will be required to give evidence for Alan.

Can you continue to act for Alan in the FWC proceedings?

The undertaking wording was not clear!

You were retained by a client to sell a lot on plan of subdivision with an owners corporation. You gave a written undertaking to the purchasers' solicitor not to disburse funds in your trust account to your client until the issue of "payment to the maintenance fund" was resolved. The purchasers' solicitor understood the words "payment to the maintenance fund" to reflect an agreement by you to retain \$60,000 in trust to cover the purchasers' liability to the owners corporation for levies. However, you had intended those words to refer only to a single contribution of \$2000 to the maintenance fund, and on that basis, you are now holding only a balance of \$2000.40 in your trust account ledger for the vendor.

What is your ethical position?

Can I use inadvertently disclosed material?

You are acting for a company whose business is regulated by a statutory body. In the course of litigation in the SCV between your client and the statutory body several legally privileged documents have been disclosed inadvertently to your firm in the course of compliance with an order for discovery made by the trial judge. Your counsel has advised you that the contents of some of these documents give rise to a claim by your client against the statutory body of malfeasance in public office and your client is desirous of pursuing that claim. The statutory authority maintains that you are obliged to return the documents without copying them and it seeks an undertaking that you will not make use of them in the litigation.

What is your ethical position?

EPA Victoria v 82M Pty Ltd (No. 3) (2022) VSC 504

The fine line of ethical negotiations

You attend a SCV mediation in a large commercial dispute in which you act for the defendant and a day has been allocated. There has been much discussion during the course of the day and at about 4pm your last offer of \$650,000 has produced a counteroffer of \$850,000. You tell your client that you think the plaintiff will take \$700,000 if he is convinced that it will be your final offer. Your client tells you that he would be very pleased to get out of the case for \$700,000 if he can do so.

1. Is there any problem if you tell the mediator – “\$700,000, but that’s our final offer or the case can go to trial?”; or
2. What if your client says – “alright, tell them \$700,000 is my final offer although I’d pay a bit more to get rid of it if I need to.”

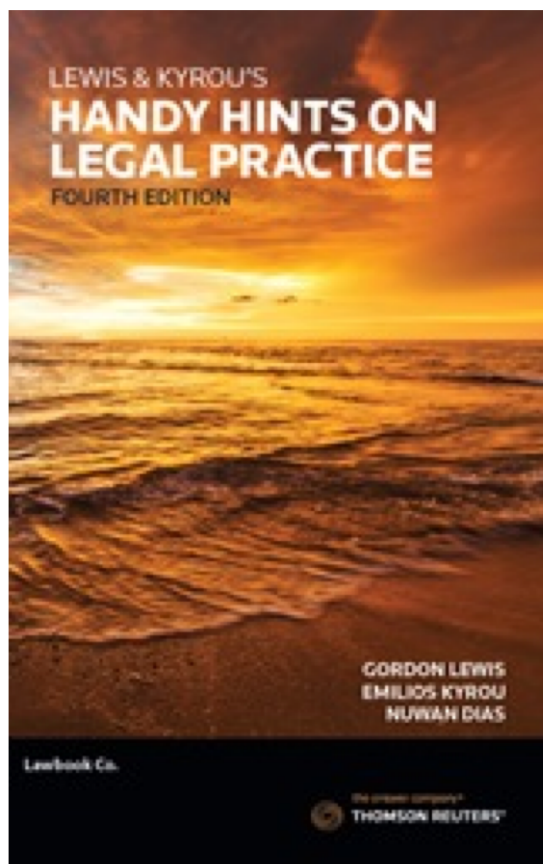
Some useful resources on ethics

- *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*
<https://legislation.nsw.gov.au/view/html/inforce/current/sl-2015-0244>
- Law Institute of Victoria [*Ethics website*](#)
- *Lawyers Professional Responsibility*, 7th edition, G E Dal Pont, Thomson Reuters (available at [Law Books](#))
- *Lawyer Discipline*, 1st edition, G E Dal Pont, Lexis Nexis (available at [Law Books](#))
- *Handy Hints on Legal Practice*, 4th edition, G Lewis, E Kyrrou, N Dias, Thomson Reuters (available at [Law Books](#))

Some useful resources on ethics

www.legislation.nsw.gov.au/regulations/2015-244.pdf

www.liv.asn.au/Ethics



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Thank you for being part of our ethics conversation today

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