

# The Ethical Lawyer

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LEGAL SERVICES COMMISSION



# What is ethics?

*“In a general sense, ethics is the name we give to our concern for good behaviour. We feel an obligation to consider not only our own personal well-being but also that of others, society as a whole and the natural world.”*

*- Dr Albert Schweitzer*

# What is ethics?

- Ethics revolve around personal values
- Impacted by a range of factors for each individual:
  - Family
  - Social institutions (church, school etc)
  - Peers
  - Societal conditions and transitions
  - Experiences (positive and negative)
- More than just regulations, conduct rules and risk management.

# Where do ethics come from?

- Extrinsic controls
- Intrinsic controls
- Common law
- Moral principles

# The Ethical Lawyer

- Standard for the legal profession is higher than for others
- The law is essential to the functioning of society – creates a duty to ensure public confidence in the law, its institutions and those who administer it.
- Remember - lawyers are officers of the Court.

# What ethical standards apply?

- ❑ Legal Profession Act 2007 (Qld)
- ❑ Australian Solicitor Conduct Rules and the Bar Conduct Rules
  - First duty is to uphold the law and the administration of justice.

# Ethics in practise

## □ Conflict of Duty and Unethical Conduct

- ASCR 4.1.1 / BCR 37 – act in the best interests of the client
- ASCR 7.1 – clear and timely advice to assist a client understand relevant legal issues and to make informed choices
- ASCR 12.1 / BCR 113 and 114 - conflict between duty and interests of practitioner
- ASCR 12.2 / BCR 46 - undue influence

# Ethics in practise

## □ Quality of service, competence and diligence

- ASCR 4.1.2 / BCR 5(c) - honest and courteous
- ASCR 4.1.3 / BCR 5(c) – deliver legal services competently, diligently, and promptly as reasonably possible
- ASCR 7.1 – clear and timely advice to assist a client to understand relevant legal issues and to make informed choices

# Ethics in practise

- Not be a mere mouthpiece
  - ASCR 17.1 / BCR 41

# Ethics in practise

## □ Professional Communication

- ASCR 4.1.2 / BCR 5(c) - be honest and courteous in all dealings in the course of legal practice.
- ASCR 19 / BCR 27 – not to knowingly mislead the court and take any necessary steps to correct any misleading information made to the court
- ASCR 5 / BCR 12 - not engage in conduct demonstrating not a fit and proper person or that would bring the profession into disrepute or diminish public confidence in the profession

# Ethics in practise

## □ Communication with the court

- ASCR 18 / BCR 44 - informal personal familiarity
- ASCR 22.5 / BCR 53 – not communicate with the Court in the absence of an opponent concerning a matter of substance
- ASCR 5 / BCR 12 - not engage in conduct demonstrating not a fit and proper person or that would bring the profession into disrepute or diminish public confidence in the profession

# Ethics in practise

- Avoiding compromise to integrity and professional independence
  - *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54
  - *Charisteas v Charisteas* [2021] HCA 29 – Barrister's communication with the trial judge over an extended period (call, texts, in person) – at [11]:  
*'The apprehension of bias principle is that "a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide". The principle gives effect to the requirement that justice should both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial – that it is conducted by an independent and impartial tribunal.'*
- ASCR Rule 22.5 / BCR 53 – communication with the court in opponents' absence.
  - *Legal Services Commissioner v Trost (No 3)* [2020] QCAT 86

# Ethics in practise

## □ Advocacy and litigation

- ASCR 21.1 - responsible use of court process
- ASCR 21.2 – baseless aspersions and allegations
- ASCR 21.4 – allegations of criminality, fraud or other serious misconduct
- BCR 63 – statements must be able to be supported by fact
- BCR 64 – allegations must have reasonable basis

# Ethics in Family Law

- Ethics remain critical
- Maintain objectivity
- Dealing with persons who may be experiencing significant upheaval
- You hold an important and privileged position

# Unethical Behaviour

- Two reasons for unethical breaches
  - Rational failure - lack of understanding of the rules or practice pressures
  - Moral failure – conduct in the face of the knowledge of the rules and other ethical considerations, and a conscious decision to ignore them.
- Succumbing to pressure to come up with the answer the client wants.

# Ethics in Family Law

- Acting in the client's best interests and avoiding compromise to integrity and independence:
  - Fine line between taking instruction and being a 'mouthpiece' for the client.
  - If a lawyer thinks the client's instructions are absurd or illegal – discuss a different or more reasonable approach or not continue to act.
  - When to question and when to follow instruction – remember the paramount duty is to the Court and the administration of justice!

# Section 60 DFVPA

## 60 Contact by lawyer not prohibited

- (1) A condition mentioned in section 58(d) or (e) that prohibits a respondent from asking someone else to contact or to locate an aggrieved or named person does not prohibit the respondent from asking—
  - (a) a lawyer to contact the aggrieved or named person; or
  - (b) another person, including a lawyer, to contact or locate the aggrieved or named person for a purpose authorised under an Act.
- (2) In this section— **lawyer means a lawyer who is representing the respondent *in relation to a proceeding*.**

# Ongoing Costs disclosure

- Section 315 LPA – obligation for ongoing disclosure of costs
  - ‘Substantial change’
  - When – ‘as soon as reasonably practicable after the law practice becomes aware.’
  - How – same manner as is required for initial disclosure: In writing and expressed in clear, plain language.

# Personal Conduct

Increased focus on the personal conduct of practitioners which reflects on their fitness/suitability to practise

- *Legal Services Commissioner v SD* [2021] QCAT 204
- *Legal Services Commissioner v Ioannides* [2020] QCAT 479
- Unlawful operators

# Skillful evasion?

*'If ethics were reduced to rules, a spiritless compliance would soon be replaced by skillful evasion.'*

*-Sir Gerard Brennan*

# Further information

**Commission's website:** [www.lsc.qld.gov.au](http://www.lsc.qld.gov.au)

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Questions?

