



Précis Paper

Legal ethics and responsibilities

A comprehensive discussion aimed at simplifying the various complexities attached with legal ethics. In correspondence with contemporary cases, topics such as 'conflicts of interest' and the role of technology/education form the crux of the discussion.

Discussion Includes

- Introduction to legal ethics
- *Pitcher Partners Consulting Pty Ltd v Neville's Bus Service Pty Ltd* [2019]
- Conflicts of interest
- The role of education
- *Australian Securities and Investments Commission v Hellicar* [2012]
- *Rogic v Samaan* [2018]
- Bilingual lawyers
- The role of technology

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Legal ethics and responsibilities

1. In this edition of BenchTV, Professor Michael Adams (Head of Law School, University of New England) and Malcolm Campbell (Principal lawyer, Coleman Greig Lawyers) discuss the various dimensions of legal ethics such as 'conflicts of interest' and the role of technology/education.

Introduction to legal ethics

2. Spotlight topics, which have received a plethora of Australian media attention, include society's lack of trust in politicians, the Lawyer X Case (covering police-informant relationships) and the Royal Commission into the banking sector. When such news is exposed to the public, the idea of 'ethics' becomes open to opinions and a sophisticated level of debate.
3. Personal ethics and legal ethics are extremely different. The mundane definition of ethics revolves around good conscience, fairness and reasonableness. On the other hand, legal ethics places the idea of good character and the need to be a fit/proper person at the forefront. This fundamental idea is emphasised throughout all the stages of a legal practitioner's career, starting from admission. Unlike day-to-day relationships, a lawyer-client relationships falls under a fiduciary (trust based) framework. Therefore a lawyer must place a client's interests above his or her own, in terms of priority.
4. The 'Lawyer X' case was centred on a barrister who turned into a police informant. Within this process, a range of legally ethical obligations were breached (e.g. client confidentiality). In this case, the barrister was very experienced and hence had no excuse to justify her actions.
5. The Royal Commission into Banking tested professional ethics across many industries and contexts (beyond the legal profession). Though there are large political and corporate forces at play, lawyers always need to acknowledge and remember the strict set of rules that they are bound by. The rule that over-rides all other rules (including the duty to the client) is the 'duty to the court'. Inarguably, the situations that lawyers fall into are unique and tend to enter a grey area where the fine line between right and wrong may not be crystal clear. However, lawyers are still expected to understand who they are acting on behalf of and what obligations they have.

6. Some cases of unethical legal conduct come down to a genuine legal mistake (often stemming from false information/knowledge). Courts and other authorities (e.g. Ombudsman, Law Society of NSW) usually resort to a harsh and narrow disciplinary approach.

Pitcher Partners Consulting Pty Ltd v Neville's Bus Service Pty Ltd [2019]

7. The 'Pitcher case' involved a group of accountants engaging in the exercise of financial projections for a bus company. An error occurred in the calculation of a bus tender, costing \$660 000. This information was intentionally hidden from the affected client, which majorly worsened the situation in addition to the hostility between the parties. The company loss quickly equated to \$5.4 million and the contingent liabilities totalled to a sum of \$3.4 million. Penalty-wise, the defendant had to fork out \$9 million for a mistake which initially costed \$660 000. This huge gap is attributed to the poor corporate behaviour and decisions of the defendant. The defendant also lost their 'professional indemnity insurance', because they acted unethically, even after they had knowledge of the mistake. This goes to prove that a professional should never try to cover up their mistakes by hiding information, as the penalties are drastically high and there is strong reputation-based damage.
8. Ethics is to be viewed as a 'shared responsibility' in legal contexts, which must transcend beyond blame and excuses. A legal environment, which lacks open and honest communication, becomes automatically prone and vulnerable to juniors hiding mistakes due to a fear of internal authoritarian consequences (e.g. fired from that firm). Strong communication creates and sustains a strong legally compliant culture, which is not only beneficial but also mandatory for every firm. In the banking sector, senior staff tended to blatantly ignore the red flags that the juniors were pinpointing.
9. Often lawyers follow their instinct as to what is right for the client. Sometimes this can be wrong. As an officer of the court, lawyers must cross check their decisions against ethical regulations. It is fundamentally a measure of risk minimisation.
10. The 'Pitcher case' re enforced the fact that disobeying legal ethics, will quickly create a confronting snowball effect on those at fault. This is due to the defendant's dishonesty element. On a fundamental level, if an individual's morality is skewed in the wrong direction, the chances of such attitudes resulting in breached legal ethics is high. The most important skill for legal practitioners is to be alert/vigilant at all times. Failure to do so, increases the possibilities of making embarrassing errors

which will always be on the court records. Once the calculation mistake was made, If the defendant openly disclosed they knew, then the plaintiff would have had the opportunity to work with the defendant in terms of moving on/rectifying the mistake (e.g. redoing the calculations).

11. Like all professionals, it is common for lawyers to face personal (e.g. paying bills) and professional (e.g. promotions) pressures but honesty and their duty to court must always be first priority. Workplace culture and supervision should aim to target the importance of legal ethical obligations. Junior lawyers who are in autocratic workplaces where questions are not encouraged, are in a terrible situation to begin with. Stopping and thinking about a dilemma, followed by applying a common sense approach in addition to some professional guidance will often lead to positive outcomes.
12. In the 'Pitcher case', the decision was dismissed at the Full Bench of the Federal Court and this in itself teaches cautionary lessons to the legal professional community. For example, admitting a mistake to a client builds trust as it shows honesty. Clients prefer lawyers who deal with issues and mistakes in a constructive manner, instead of being defensive. It also forms the central pillar of effective legal leadership. In the insurance space, there is an effective guidance system where 'asking for help is encouraged', as it is the easiest way to resolve dilemmas.
13. Sole practitioners are known to work in isolation in comparison to other types of legal professionals. They can always turn to the Legal Ethics Committee if they have questions or need clarification in regards to a matter. Like insurance, there are strong support systems in law.

Conflicts of interest

14. Conflicts of interest are well regulated by legal professional rules. The first step to avoid a conflict of interest, is to identify who the immediate client is (e.g. government, business, individual, charity etc.). It is particularly confusing in corporate contexts where there are shareholders, companies, directors and employees. 'Who am I specifically acting for?' is the first question to ask.
15. Conceptually, the notion of conflicting interests is constantly evolving but it generally asks the following question - Can I act for Party A without compromising another party's position (e.g. confidential information about Party B) -? This usually happens when two opposing parties seek the same legal representative (simultaneously or at different points of time). Remembering and keeping track of

former clients is important in this process. There are exceptional/rare circumstances when a legal practitioner can act for two clients but there must be proper disclosure and information barriers.

16. In this case, the solicitor acted for the wife in a property matter. With consent, the lawyer acted for the wife and husband in a conveyance matter, relating to a family law property settlement. After the matters finished, the money was in trust. The lawyer wrote to the husband, explaining that he would distribute the money in a particular way, which was non-compliant with the Family Court order nor the client's interests. The client successfully enforced the Family Court order. The lawyer also had to compensate the client. From a third party point of view, the right and wrong dimensions seem clear and obvious. If the lawyer had taken a moment to approach this from a 'common sense' angle, he would not have went ahead with the poor and non-compliant decision that he made. Essentially, some type of pressure clogged the lawyer's sense of judgement (e.g. time, workload).
17. Economically, a husband and wife choosing the same legal representation seems ideal on a surface level. The potential for conflicting interests to emerge is extremely high in such situations.
18. Senior business executives are at times, reluctant to receive legal advice especially within the sphere of insolvency. Insurance officials and customers really need legal advice for non-civil matters, to know of their personal liabilities. Many individuals fail to understand that any dishonesty in an insurance policy, will by default lead to a self-insured situation. The corporate space is not always about large companies like BHP but even applies to local PTY/LTD companies. A lawyer who is involved in drafting shareholder agreements, needs to be very clear about who they are representing. If not, they are placing themselves in a vulnerable position, if a dispute was to occur.

The role of education

19. Education is another major factor. It is applicable to people of all contexts (e.g. local cafe owner, CEO of a multinational corporation etc.). A lawyer should never assume that the client knows the ins and outs of their role (e.g. obligations, liabilities). In-house lawyers are employees of their clients, so their predicament is heavily complicated, but they still need to exercise professional courage to identify conflicts of interest, followed by appropriately acting on it.

Australian Securities and Investments Commission v Hellicar [2012]

20. Mr Shafron (general counsel of James Hardie) was dealing with the company's corporate relocation to the Netherlands, but was affected by an infamous media release relating to asbestos claims. The case went through the Supreme Court, Court of Appeal and the High Court. Mr Shafron was an experienced and respected legal professional who was in the role of company secretary and general counsel. In general board meetings, nobody makes the active switch when speaking about different company matters (e.g. "I'm now speaking as a lawyer"). The controversial words 'fully funded' were in that troublesome media release. The case demanded the intensive involvement of actuaries.
21. It is immensely difficult to decode what roles individuals like Mr Shafron are playing at certain times. The consequences for such individuals are mostly worse than those who are strictly lawyers, because the negative effects of non-compliance or poor decision will affect the business in more than one way. Career-wise, Mr Shafron lost his professional accreditation and his reputation was severely damaged, on top of a financial penalty/fine. In terms of pressures faced, Mr Shafron was in a position where if he disclosed that he wants to act as a lawyer providing advice, this might have temporarily stunted his corporate voting powers.
22. The media publicity, scale and consequences were all large in that case, but looking into more localised examples, it is clear that local clubs, sports organisations and churches looking to form committees are inclined to invite lawyers onto their board, but that does not necessarily mean that all the legal obligations and content is entirely understood. A lawyer appointed as a board member will inevitably act as a board member instead of their main profession as a lawyer, due to the overarching contextual relevance. A line needs to be drawn to explain that it is not ideal for the lawyer of an organisation to also be a board member, due to natural conflicts of interest.

Rogic v Samaan [2018] NSWSC 1464

23. This case involved a solicitor who was fluent in Serbian. The client he was attending to was also Serbian. The solicitor decided to translate the Serbian conversation into English for documentation purposes. This way of practising the law was not permitted, in accordance with Rule 5 of the Legal Professional Uniform General Rules. The process of translation was heavily criticised for 2 main reasons:
 - I. It was never disclosed that the affidavit was a product of translation. It is a presumption that an English affidavit is accurately reflective of English

speech. Attempting to document conversations is already hard in light of the emotions and intentions associated with it, but when it is translated the question of accuracy becomes more crucial.

- II. Being bilingual is not the same as being a professional translator. Logically, the expertise levels are different. Even if the intention was not to manipulate the client, a translation is not legally accepted. Paragraph 158 of that case communicates that a translator has to be qualified on a tertiary level.

Bilingual Lawyers

24. Bilingual lawyers who translate affidavits/other legal documents and are caught will become witnesses, which creates a conflict of interest predicament. A number of firms use the linguistic diversity of their lawyers as a marketing point, but when the time comes to draft legal documents like a will, the lawyer must disclose that they are not in a position to interpret and explain English documents in another language (even if they are familiar with it).

The role of technology

25. Technology aids all professionals and creates business efficiencies across the board, and the legal profession is no exception. However, it is littered with risks, from an ethical lens. Emails and subject lines for example, cause confusion especially when the wrong emails are sent to the wrong people. Though it is a human tendency, lawyers should still be cautionary about it. This can be done through double-checking for example. Email disclaimers about content privilege is also a safe precautionary measure to take. Ensuring that email signatures are consistent through making appropriate through making necessary changes on phones, I-pads, computers and other devices used to access work emails.
26. Email scammers who circulate false and virus-infested URL links, usually do such activities in bulk. Two factor authentication methods tend to work best to counter this alarming issue. Verifying emails through a simple phone is also recommended as a primary precautionary solution. Conflict of interest checks can be automated but it is still in a legal practitioner's best interest to conduct a thorough manual check, just to be sure. All the key players (e.g. shareholders) should be checked instead of just the direct former clients. Ultimately, it comes down to having a proper system in place which leaves behind a recognisable paper trail.
27. The verification of identity is relevant to all areas of law in the 21st century, but it is paramount in property matters. Verification also helps in conducting background

checks on new clients. This should be embedded explicitly in the firm's policies/constitution. When an abstract entity like a company is a client, a lawyer consistently needs to check where and from who are the instructions coming from. Credibility, relevance and timing should be assessed at all stages of the process.

28. In this day and age, lawyers are encouraged to maintain a strong and interactive social media presence and keeping a 'professional' mindset is the best way to eliminate potential risks. A major risk arises in the written posts and comments which are public, and hence, open to virtual criticism if the content is written loosely or controversially. One of the worst mistakes a lawyer can make, is revealing confidential client information on social media platforms like Facebook or LinkedIn. Personal career-related promotions (e.g. dealing with a high profile) should be done cautiously, carefully and sensitively. In some cases, re trials have had to take place due to leaked information and pre-biased juries. This can even lead to a threatened career in many ways.
29. Revealing client information does not always mean listing the names and specific details. It can be as simple as making implications, which then allow people to 'connect the dots'. Even making negative posts, which accuse a client or firm, is accompanied with a plethora of consequential problems. Any firm (regardless of size) is advised to have a strict social media policy as a base-level benchmark.

BIOGRAPHY

Professor Michael Adams

Head of school – School of law – University of New England – Parramatta

Professor Michael Adams is an internationally recognised specialist in corporate law, governance, securities markets regulation, and legal education (especially e-learning). Michael has been writing, teaching and regularly presenting on all these topics for over 20 years. He is a Fellow of the Australian College of Educators (FACE), as well as the Australian Academy of Law (FAAL), and is also a Fellow of the Governance Institute of Australia (FGIA & UK FCIS). He is the co-author of ten books and 30 chapters, 50 articles and over 250 conference/seminar presentations. In 2000 he was the recipient of the Australian University Teacher of the Year, for Law and Legal Studies, as well as 2005 CSA President's Award.

Malcolm Campbell

Principal commercial lawyer – Coleman Greig Lawyers - Parramatta

Malcolm Campbell is a Principal Lawyer and integral member of Coleman Grieg's Commercial Advice team boasting over 19 years' experience across business, commercial, workplace and estate planning law. Through his successful representation of a diverse and growing list of businesses, associations and organisations, Malcolm has developed a comprehensive understanding of the challenges faced by those operating within today's commercial landscape. His wide-reaching experience allows Malcolm to quickly develop a strong understanding of his client's needs, get to the core issues and put in place well thought out and effective strategies to help them achieve their objectives in a timely, effective and commercially sound manner.

Through his utilisation of a down-to-earth, people centric approach, Malcolm ensures that his clients receive practical 'real world' guidance and solutions, regardless of the matter at hand. With professional qualifications spanning a range of commercially-relevant areas including economics, law and corporate governance. Malcolm's clients regularly benefit from his eclectic knowledgebase. He is also a Fellow of the Governance Institute of Australia (FGIA). Having recently amalgamated his own firm Dooley & Associates Solicitors with Coleman Greig Lawyers. Malcolm possesses an in-depth knowledge of the unique challenges faced by businesses – particularly those located within the Greater Western Sydney region. As both Public Officer and Secretary of the Sydney Hills Business Chamber, Malcolm has a vested interest in delivering strong outcomes for local businesses, both through his role as a commercial lawyer and via his ongoing involvement in the local business community.

Malcolm is an engaging speaker, regularly presenting webinars, seminars and workshops to a wide range of audiences, from not-for-profit organisations and charities through to top tier firms and peak body groups such as LawCover, the College of Law and Legalwise CPD seminars.

For over ten years Malcolm has been an active supporter of the Save Our Sons charity, a role which has seen him help raise public awareness and much needed funding for research on Duchenne Muscular Dystrophy

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Cases

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Australian Securities and Investments Commission v Hellicar [2012] HCA 17

Laurens & Laurens (No 2) [2017] FCCA 109

Pitcher Partners Consulting Pty Ltd v Neville's Bus Service Pty Ltd [2019] FCAFC 119

Rogic v Samaan [2018] NSWSC 1464

Legislation

Rule 9-12 of *Legal Professional Uniform General Rules 2015*