



Précis Paper

Ethics

A discussion of ethics and professional conduct in the legal profession

1. In this edition of BenchTV, Peter Godkin (Barrister, Elizabeth St Chambers, Sydney) and Dr Yega Muthu (Solicitor, YM Lawyers, Sydney) discuss ethics and professional conduct in the legal profession.
2. The legal practitioner's first duty is to the Court, and second, to the client. Unfortunately those duties do not always run linearly alongside each another.
3. There are other duties that a practitioner has, including:
 - to the administration of justice
 - to the opponent
4. Sometimes, those duties coincide with one another, and so the job of an ethical lawyer becomes a real balancing act between his or her various, and often conflicting, duties.
5. The *Legal Profession Uniform Law 2014* (NSW) is the key piece of legislation in this field. Other relevant legislation includes the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) and the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW).
6. S 296 of the *Legal Profession Uniform Law* refers to unsatisfactory professional conduct and s 297 of the *Legal Profession Uniform Law* refers to professional misconduct.
7. Unsatisfactory professional conduct occurs in connection with the practice of law. Professional misconduct can occur both in connection with the practice of law, and outside

of the practice of law, and involves consistent failure to meet the standard of competence and diligence expected of a lawyer.

8. Pre-requisites for compliance certificates are contained in s 17 of the *Legal Profession Uniform Law*, one of which is the fit and proper person test. Practitioners have to renew their practising certificates annually.
9. S 86 refers to 'automatic show cause events'. Automatic show cause events include bankruptcy-related events, convictions for serious offences, and tax offences.
10. The area is grey when it comes to serious offences. Practitioners are advised to consult the law, even seek legal advice, and generally err on the side of caution, if they are unsure as to whether they have a notifiable automatic show cause event. Alcohol-related driving offences are likely to be show cause events, for example.
11. There is an adjudication body that governs the conduct of solicitors and barristers. The relevant bodies are the Legal Profession Admission Board, and the Bar Association. If the relevant body cannot deal with a matter internally, and it wants to strike a practitioner off the roll, the matter has to go before the Supreme Court. It goes before the Prothonotary of the Supreme Court.
12. The decision in *Prothonotary of the Supreme Court v P* [2003] NSWCA 320 laid down ten important principles against which defendant practitioners' circumstances are now assessed.
13. If a professional body is seeking to strike a person off the roll, the onus is on that person to prove that they are a fit and proper person. Permanent fitness is also looked at – so not fitness at the time of the crime, but fitness at the time when the person is seeking to be readmitted. A conviction is not enough, but it is not irrelevant either. The act or crime is also looked at in terms of whether or not it is 'personally disgraceful'. The trouble is, 'personally disgraceful' is not defined anywhere.
14. Pleading guilty works in favour of a guilty practitioner, as does demonstrating to the Court their remorse. If the act or crime happens in a person's private life, the Court will look at not so much what that person did, but more so whether that act or crime points to a character flaw that would render a practitioner unfit for practice. The Court will look at present fitness, not fitness at the time of the act or crime in question. The attitude of the relevant professional association is also important.
15. Good fame and good character are considered two separate issues. Good fame and good character have legal definitions. Although good fame and good character are interrelated,

and affect one another, the Courts will treat them as separated issues to with which to be dealt.

16. Each case is decided on its own facts. A decision will be based on the subjective features of a particular case, and applying the principles will lead the Court to a considered decision.
17. In a situation in which a practitioner has been instructed by their client to relay something to the Court, and that something is later discovered by the practitioner to have in fact been a lie. Ethical dilemmas arise over the potential conflict between the practitioner's ethical duty to the Court, and his or her duty of care to the client. There is a handy phrase practitioners use in Court - that is, 'Your Honour, my instructions are...'
18. Practitioners need to act with integrity in the keeping of their money and accounts, and in managing numerous briefs at the same time. It is essential to be skilled in those areas.
19. In the case of *Ziems v Prothonotary of the Supreme Court of NSW* [1957] HCA 46; 97 CLR 279, Ziems was charged with manslaughter, and convicted at trial. On appeal in the High Court, the decision turned on whether or not Ziems was a fit and proper person to practise.
20. The High Court held that fit and proper is protective, rather than punitive; its purpose is not to punish a person, it is to protect the profession and the public. Fullagar J held that 'the approach of the Court to disbarment cases should be different in personal misconduct as compared with professional misconduct...the latter must have a much more direct on a man's fitness to practise than the former...and that the Court was bound to examine the position, as a whole, with meticulous care'. Kitto J held that Ziem's behaviour was isolated, not pre-meditated, did not indicate a tendency to vice, violence, or a lack of probity.

What can practitioners do to ensure that they make wise, ethical decisions?

21. If practitioners look after themselves physically, mentally, and spiritually, then they are more likely to make wiser, more ethical decisions.
22. Practitioners should be very cautious about making statements that are not true.
23. It is very important to inform the arbiter of fact and law about potential conflicts of interest.
24. Ultimately, practitioners are required by the legal profession to be honest with the decision-making body.

BIOGRAPHY

Peter Godkin

Barrister, Elizabeth St Chambers, Sydney

Peter was both admitted as a solicitor and called to the Bar in 2014 where he practices in the areas of criminal law, including appeals, equity, property law and human rights law. Peter holds a Juris Doctor from the University of Technology, Sydney, a Masters of Education from Western Sydney University, a Masters in Leadership from the University of Manchester, a Bachelor of Musical Education from the NSW Conservatorium of Music and Fellowship and Licentiate Diplomas (performance) from the Trinity College (London).

Yega Muthu

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Yega trained as a lawyer in England, studying law in Manchester and Staffordshire and training as a barrister in London before spending a year in Malaysia training as a legal advocate. He also obtained a PhD in law focusing on psychiatry law from Macquarie University in 2004 before being admitted to practice as a solicitor in NSW in 2006. Yega was a legal member of the Mental Health Review Tribunal from 2007 to 2012 and has vast experience in dealing with mental health issues. Yega also has substantial experience in the areas of health, human rights, succession, personal injury and criminal law. Aside from litigating, Yega teaches Mental Health Law at Western Sydney University and is widely published in a variety of fields including mental health law and torts.

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Cases

Prothonotary of the Supreme Court v P [2003] NSWCA 320

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Legislation

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