

**LEGAL ETHICS &
PROFESSIONAL CONDUCT
SUMMARY**



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TABLE OF CONTENTS

1. General Concepts..... 13

1.1. CONTENT 13

1.2. ETHICS AND MORALITY 13

 1.2.1. Ethics and Morality.....13

 1.2.2. What are ethics?.....13

1.3. CODE OF ETHICS 14

1.4. CORE VALUES OF ACTING ETHICALLY 15

1.5. A PROFESSION 16

1.6. SOURCES OF PROFESSIONAL RULES..... 16

 1.6.1. Common law16

 1.6.2. Statute17

 1.6.3. Professional Rules.....17

2. Admission to Practice..... 18

2.1. EDUCATIONAL REQUIREMENTS 18

2.2. CHARACTER-BASED REQUIREMENTS 18

 2.2.1. Factors relevant to good fame and character19

 2.2.2. Mitigating Factors23

2.3. READMISSION..... 25

3. Trust Accounting 27

3.1. DEFINITION OF TRUST MONEY..... 27

3.2. IRREVOCABLE AUTHORITIES..... 28

3.3. LAWYER'S OBLIGATION RELATING TO TRUST MONEY 28

3.4. DUTIES RELATED TO ACCOUNTING FOR TRUST MONEYS 29

 3.4.1. Records to be kept29

 3.4.2. Duty to give account on request.....29

 3.4.3. Trust account not to be overdrawn29

 3.4.4. Duty to report defalcations29

 3.3.5. False names in trust account.....30

 3.3.6. Use or withdrawal of trust moneys without authority30

3.4. VERIFICATION OF TRUST ACCOUNTS 31

 3.4.1. Audit of trust accounts.....31

 3.4.2. Confidentiality and privilege.....31

3.5. EXTERNAL INTERVENTION OVER TRUST ACCOUNTS 31

 3.5.1. Receivers.....32

 3.5.2. Supervisors.....33

 3.5.3. Managers.....33

3.6. FAILURE TO ACCOUNT 33

4. Responsibility to the client..... 34

4.1. RETAINERS..... 34

 4.1.1. Disclosure of information34

 4.1.2. Terms of the Retainer35

 4.1.3. Parties to the retainer36

4.1.4.	Proof of the Retainer.....	37
4.2.	AUTHORITY OF LAWYERS.....	39
4.2.1.	Agency relationship.....	39
4.2.2.	Actual authority.....	39
4.2.4.	Ostensible authority.....	40
4.3.	LAWYER'S ACCEPTANCE OF WORK	41
4.3.1.	Counsel/ Barrister	41
4.3.2.	Solicitors	42
4.3.3.	Ethical Issues	43
4.4.	TERMINATION OF LAWYER-CLIENT RELATIONSHIP.....	47
4.4.1.	Doctrine of entire contract.....	47
4.4.2.	Duties of lawyers on termination of retainer	48
4.4.3.	Return of brief by counsel.....	49
4.4.4.	Ownership of documents on termination of retainer	49
5.	Lawyer's Duty in Tort.....	50
5.1.	OVERVIEW.....	50
5.1.2.	Identifying the client's Interests and Objectives.....	50
5.2.	SCOPE OF DUTY OF CARE	51
5.2.1.	Scope of duty in the retainer	51
5.2.2.	Liability arising outside the scope of retainer.....	51
5.2.3.	Nature of the client.....	52
5.2.4.	Circumstances in which advice is given	55
5.2.6.	Disclosure of Relevant Information.....	57
5.2.7.	Financial advice.....	57
5.2.8.	Non-Legal advice	58
5.3.	STANDARD OF CARE.....	59
5.3.1.	Relevant standard	59
5.3.2.	Expert evidence.....	59
5.3.3.	Knowledge of the law and procedure.....	60
5.3.4.	Standard not informed by extraordinary foresight.....	60
5.3.5.	Standard not informed by hindsight.....	60
5.3.6.	Raising the standard of care	60
5.3.7.	Reducing the standard of care.....	60
5.3.8.	Giving Settlement advice.....	61
5.3.9.	Giving unqualified advice	62
5.4.	BARRISTER'S IMMUNITY FROM NEGLIGENCE	63
5.4.1.	General rule	63
5.4.2.	Justifications for the immunity.....	63
5.4.3.	Justifications against the immunity	64
5.4.4.	Scope of the immunity	65
5.5.	LIMITING LIABILITY - PROFESSIONAL STANDARDS REGIME.....	66
6.	Conflict of Interests.....	67
6.1.	PROHIBITION AGAINST LAWYER-CLIENT CONFLICT	67
6.1.1.	General principle	67
6.1.2.	Scope of proscription	67
6.1.3.	Informed client consent.....	68

6.2. TRANSACTIONS DEALINGS WITH CLIENTS	69
6.2.1. General rule	69
6.2.2. Borrowings from clients	69
6.2.3. Lending to clients	70
6.2.4. Lawyer's investment in client's enterprise.....	71
6.2.5. Lawyer buying from or selling to a client.....	71
6.2.6. Dealings with other than current clients	71
6.3. Making a Secret Profit.....	72
6.3.1. General fiduciary principle.....	72
6.3.2. Undisclosed referral fees and commissions.....	73
6.3.3. Criminal responsibility.....	73
6.4. UNDUE INFLUENCE.....	73
6.4.1. Presumption of undue influence	73
6.4.2. Gifts from client to lawyer	74
6.5. LAWYER-CLIENT SEXUAL RELATIONS.....	74
7. Concurrent Conflicts.....	75
7.1. NATURE OF CONFLICT.....	75
7.2. SCOPE OF PROSCRIPTION	75
7.3. CONTENTIOUS WORK.....	80
7.4. NON-CONTENTIOUS WORK.....	80
8. Acting against Former Clients.....	83
8.1. INTERESTS THAT IMPACT ON DECISION TO DISQUALIFY	83
8.2. THRESHOLD FOR JUDICIAL INTERVENTAION	85
8.3. NO PRIOR CLIENT-LAWYER RELATIONSHIP	87
8.4. DISQUALIFICATION EXTENDING TO THE FIRM	88
8.5. APPLICATIONS AS ABUSES OF PROCESS	90
9. Recovery of Costs.....	91
9.1. INFORMATION.....	91
9.2. COST AGREEMENTS.....	92
9.3. CONDITIONAL COST AGREEMENTS	93
9.4. BILL OF COSTS	95
9.5. ASSESMENT (TAXATION) OF LEGAL COSTS.....	95
9.6. SECURING THE RECOVERY OF COSTS.....	97
10. Solicitor's Lien.....	100
10.1. GENERAL PRINCIPLES	100
10.2. RETAINING LIEN	100
10.3. PARTICULAR LIEN	103
11. Duty to the Court	106
11.1. LAWYER'S DUTY AND ENFORCEMENT.....	106
11.2. INDEPENDANT JUDGEMENT.....	106
11.3. CANDOUR IN THE PRESENTATION OF THE LAW	107
11.4. CANDOUR IN THE PRESENTATION OF THE FACTS.....	108
11.5. DEALING WITH WITNESSES.....	109
11.6. ABUSE OF PROCESS.....	110

12.	Duty to obey and uphold the law	112
12.1.	GENERAL PRINCIPLE	112
12.2.	CLIENT WHO BEHAVES UNLAWFULLY	112
12.3.	APPROACH TO GIVING ADVICE	114
13.	Conduct of practice	115
13.1.	LAWYERS ADVERTISING	115
13.2.	CONDUCTING ANOTHER BUSINESS	116
13.3.	MEDIATION BY LAWYERS	117
13.4.	SUPERVISION AND ATTENDANCES	118
14.	Relations with the professions and third parties	119
14.1.	LEGAL DUTIES TO THIRD PARTIES IN TORT	119
14.2.	LEGAL DUTIES TO THIRD PARTIES IN CONTRACT	120
14.3.	LEGAL DUTIES TO THIRD PARTIES IN EQUITY	121
14.4.	LEGAL DUTIES OF THIRD PARTIES UNDER STATUTE	122
14.5.	PROFESSIONAL DUTIES OWED TO OTHER LAWYERS	122
14.6.	PROFESSIONAL DUTIES TO THIRD PARTIES	124
14.7.	PROFESSIONAL DUTIES TO UNREPRESENTED PARTIES	125
15.	Disputes and Discipline	126
15.1.	OVERVIEW	126
15.2.	PROFESSIONAL MISCONDUCT	127
15.3.	DISCIPLINARY ORDERS	129
16.	Types of Misconduct	131
16.1.	MISCONDUCT IN THE COURSE OF PRACTISE	131
16.1.1.	Courts and tribunals	131
16.1.2.	Other lawyers or third parties	131
16.1.3.	Professional bodies	132
16.1.4.	Trust accounting irregularities	132
16.1.5.	Lawyer-client conflict	132
16.1.6.	Client-client conflict	132
16.1.7.	Overcharging	132
16.1.8.	Failure to properly supervise	133
16.2.	MISCONDUCT OUTSIDE PRACTICE	133
16.2.1.	Criminal convictions	133
16.2.2.	Convictions for sex offences	134
16.2.3.	Drug related convictions	135
16.2.4.	Conviction for minor offences	135
16.2.5.	Tax indiscretions	135
16.2.6.	Making misleading statements in court	135
17.	Confidentiality and Privilege	136
17.1.	CONFIDENTIALITY	136
17.2.	PRIVILEGE	138
18.	Lawyer-Client Relationship	144
18.1.	THE IMPORTANCE OF COMMUNICATION	144
18.2.	INTERVIEWING SKILLS	147

19. Social Issues Concerning Lawyers	153
19.1. GENDER INEQUALITY	153
19.2. HEALTH.....	153
20. Regulation and Reform of the Legal Industry	155
21. Negotiation.....	160
21.1. ALTERNATIVE TO ADVERALISM.....	160
21.2. ETHICS IN NEGOTIATION	163
22. Access to Justice.....	166
22.1. RIGHT OF REPRESENTATION.....	166
22.2. PRO BONO.....	167
23. The Adversary System	170
23.1. THE ROLE OF ADVOCATES	170
23.2. PROSECUTOR'S DUTY.....	173
23.2. THE DEFENCE LAWYER'S DUTY.....	175

SAMPLE ONLY

LIST OF RESOURCES

1. Books

Dal Pont, G E, *Lawyer's Professional Responsibility* (4th ed, 2010)

Y. Ross & P. MacFarlane, *Lawyers' Responsibility and Accountability: Cases, Problems and Commentary*, (3rd ed, 2007).

2. Legislation

Civil Law (Wrongs Act) 2002 (ACT)

Court Procedure Rules 2006 (ACT)

Legal Practitioners Admission Rules 2005 (NSW)

Legal Profession Act 2006 (ACT)

Legal Profession Act 2004 (NSW)

Legal Profession Act 2004 (Vic)

Legal Profession Act 2006 (NT)

Legal Profession Act 2007 (Qld)

Legal Practitioners Act 1981 (SA)

Legal Profession Act 2007 (Tas)

Legal Profession Act 2008 (WA)

Legal Profession Admission Rules 2007 (NT)

Legal Profession (Board of Legal Education) Rules 2008 (Vic)

Legal Profession (Admission) Rules (WA)

Legal Profession Regulation 2007 (ACT)

Legal Profession Regulation 2005 (NSW)

Legal Profession Regulation 2007 (NT)

Legal Profession Regulation 2007 (Qld)
Legal Practitioners Regulations 2009 (SA)
Legal Profession Regulations 2008 (Tas)
Legal Profession Regulations 2005 (Vic)
Legal Profession Regulation 2009 (WA)
LPEAC Rules 2004 (SA)
Professional Standards Act 2004 (NT)
Professional Standards Act 2004 (Qld)
Professional Standards Act 2005 (Tas)
Professional Standards Act (Vic)
Professional Standards Act 2004 (SA)
Supreme Court (Legal Admission Rules 2004 (Qld)
Trade Practices Act 1974 (Cth)

3. Other sources

Francis, R D (1994), *Business Ethics in Australia: a practical guide*, Centre for Professional Development, Kew, Victoria.

Guy, M (1990), *Ethical Decision Making in Everyday Work Situations*' Quorum Books, New York pp 14 - 19

LIST OF CASES

<i>Amadio Pty Ltd v Henderson</i> (1998) 81 FCR 149	5.2.5
<i>Austrust Pty Ltd v Astley</i> (1993) 60 SASR 354.	5.2.5
<i>Arthur JS Hall & Co v Simons</i> [2002] 1 AC 615.	5.4.3
<i>Al-Kandari v JR Brown & Co (a firm)</i> [1988] 1 All ER 833.	14.1
<i>Allinson v General Council of Medical Education & Registration</i> [1894] 1 KB 750	15.2
<i>Barry v Butlin</i> (1838) 2 Moo 480	6.4.2
<i>Blythe v Northwood</i> (2005) 63 NSWLR 531	6.2.6
<i>Bolger v Bolger</i> (1985) 82 FLR 46.	10.2
<i>Bolster v McCallum</i> (1966) 85 WN (Pt 1) (NSW) 281	10.2
<i>Brown v Inland Revenue Commissioners</i> [1965] AC 244	3.3.6
<i>Carradine Properties Ltd v DJ Freeman & Co</i> [1999] Lloyd's Law Rep PN 483	5.2.3
<i>Castlereagh Motels Ltd v Davies-Roe</i> (1989) 91 ACTR 1.	6.1.3
<i>Allinson v General Council of Medical Education & Registration</i> [1894] 1 KB 750.	
<i>Chancliff Holdings Pty Ltd v Bell</i> [1999] FCA 1783	5.3.7
<i>Chamberlain v Law Society of ACT</i> (1993) 118 ALR 54	14.5
<i>Cousins v Cousins</i> (unreported, CA(NSW), 18 December 1990).	5.2.8
<i>Curnuck v Nitschke</i> [2001] NSWCA 176	5.2.2
<i>Coshott v Sakic</i> (1998) 54 NSWLR 667	4.1.4.3
<i>Dew v Richardson</i> [1999] QSC 192	5.1.2
<i>Davies v Camilleri</i> (2000) 10 BPR 18	5.2.3
<i>Ex parte Tziniolis</i> (1966) 67 SR (NSW) 44.	2.2
<i>Ex parte Patience</i> (1940) 40 SR (NSW) 96	10.2
<i>Fruehauf Finance Corp Pty Ltd v Feez Ruthning (a firm)</i> [1991] 1 Qd R 558	8.2
<i>Freeman & Lockyer v Buckhurst Park Properties Ltd</i> [1964] 2 QB 480	4.2.2
<i>Frugniet v Board of Examiners</i> [2005] VSC 332	2.2
<i>Frost & Sutcliffe v Tuiara</i> [2004] 1 NZLR 782.	5.2.2

<i>Gosling v Gaskell</i> [1987] AC 575	14.2
<i>Griffiths v Evans</i> [1953] 1 WLR 1424.	4.1.4.2
<i>Groom v Crocker</i> [1939] 1 KB 194	4.1.2.2
<i>George v Pottinger</i> [1969] Qd R 101	4.2.2.2
<i>Giannarelli v Wraith</i> (1988) 165 CLR 543	5.4.1; 5.4.4
<i>Goldsworth v Brickell</i> [1987] 1 All ER 853	6.4.1
<i>Heydon v NRMA Ltd</i> (2000) 51 NSWLR 1.	5.2.2; 5.3.7
<i>Hawkins v Clayton</i> (1988) 164 CLR 539.	5.2.1; 5.2.2
<i>Holdway v Acuri (No 2)</i> [2007] QSC 378	5.3.7
<i>Hall v Foong</i> (1995) 65 SASR 281	5.3.9
<i>Hedley Byrne & Co Ltd v Heller & Partners Ltd</i> [1964] ACT 465.	14.1
<i>Jennings v Zilahi-Kiss, Zilahi-Kiss & MK Tremaine & Co Pty Ltd</i> (1972) 2 SASR 493	5.3.4
<i>Kennedy v Council of the Incorporated Law Institute of New South Wales</i> (1939) 13 ALJR 563	11.5
<i>Kooky Garments Ltd v Charlton</i> [1994] 1 NZLR 587	11.2
<i>Law Society of NSW v Harvey</i> [1976] 2 NSWLR 154.	6.2.1
<i>Lonstaff v Birtles</i> [2002] 1 WLR 470	6.2.6
<i>Legione v Hateley</i> (1983) 152 CLR 406	4.2.4
<i>Little v Spreadbury</i> [1910] 2 KB 658	4.2.2.2
<i>Littler v Price</i> [2005] 1 Qd 275	5.2.5
<i>May v Mijatovic</i> [2002] 26 WAR 95	5.2.4
<i>Maguire v Makaronis</i> (1997) 188 CLR 449	6.2.3
<i>Marriage of Kossatz & Kossatz</i> (1993) FLC 92-386	8.3
<i>Mallesons Stephen Jaques v KPMG Peat Marwick</i> (1990) 4 WAR 357	8.4
<i>Murphy v Liesfield</i> [1930] VLR 142	4.1.4.2
<i>O'Reilly v Law Society of New South Wales</i> (1988) 24 NSWLR 204.	6.1.3
<i>Orzulak v Hoy</i> (1989) Aust Torts Reports 80 – 293	5.2.7
<i>People v Belge</i> (1975) 372 NYS 2d 798	17.1
<i>Prothonotary v Del Castillo</i> [2001] NSWCA 75	2.2.2.2
<i>Pianta v National Finance & Trustees</i>	4.2.2.2
<i>Polkinghorne v Holland</i> (1934) 51 CLR 143.	4.2.2
<i>Pegrum v Fatharly</i> (1996) 14 WAR 92.	4.1.4.3
<i>Queensland Law Society Inc v Stevens</i> (1996) 17 Qld Lawyer Reps 27	11.2

<i>R v Noble</i> (2000) 117 A Crim R 541	11.5
<i>R v Neil</i> (2002) 218 DLR (4 th)	7.3
<i>Re Farmer</i> (1997) 950 P 2d 713	5.3.3
<i>Re Bell</i> [2005] QCA 151	2.2.1.2
<i>Re a Firm of Solicitors</i> [1992] 1 All ER 353	8.1
<i>Re Hampton</i> [2002] QCA 129.	2.2.1.3
<i>Re Davis</i> (1947) 75 CLR 409	2.2.1.5
<i>Re Gruzman</i> (1968) 70 SR (NSW) 316	11.4
<i>Re a Solicitor</i> (1991) 104 FLR 212	3.3
<i>Re Sawley</i> (1894) 15 LR (NSW) 147	16.1.1
<i>Re a Barrister and Solicitor</i> (1979) 40 FLR 26.	10.3
<i>Re B</i> [1981] 2 NSWLR 372	2.2.2.1
<i>Re Veron</i> (1966) 84 WN (Pt 1) (NSW) 136	16.1.7
<i>Re Owen</i> [2005] 2 NZLR 536	2.2.2.1
<i>Re a Practitioner</i> [2004] WASCA 283	16.2.3
<i>Re Romer & Haslam</i> [1893] 2 QB 286.	4.4.1
<i>Rosin v MacPhail</i> (1997) 142 DLR (4 th) 304	8.2
<i>Robins v Goldingham</i> (1872) LR 13 Eq 440	10.2
<i>Rogers v Whitaker</i> (1992) 175 CLR 479	5.3.1
<i>Ross v Caunters</i> [1980] Ch 297.	14.1
<i>R v Cox and Railton</i> (1884) 14 QBD 153.	17.2
<i>Southern Cross Commodities Pty Ltd (in liq) v Crinis</i> [1984] VR 697.	17.2
<i>Schiliro & Gadens Ridgeway</i> (1995) 19 Fam LR 196	4.2.2.2
<i>Stringer v Flehr & Walker</i> (2003) Aust Torts Reports 81-718.	4.1.4.3
<i>Samper v Hade</i> (1889) 10 LR (NSW) 270	5.1.2
<i>Spector v Ageda</i> [1973] Ch 30	5.2.6
<i>Southern Law Society v Westbrook</i> (1910) 10 CLR 609.	5.2.7
<i>Siskamanis v Pandeli Barbayannis & Co</i> (unreported FC(Vic), 25 March 1993).	5.3.7
<i>Seamez (Australia) Pty Ltd v McLaughlin</i> [1999] NSWSC 9.	5.3.8
<i>Sent v John Fairfax Publication Pty Ltd</i> [2002] VSC 429	8.2
<i>State ex rel Wal-Mart Stores Inc v Kortum</i> (1997) 559 NW 2d 496.	8.2
<i>Soia v Bennett</i> [2003] WASC 158	10.2
<i>Shand v MJ Atkinson Ltd (in liq)</i> [1966] NZLR 551	10.2

<i>Taylor v Schofield Peterson</i> [1999] 3 NZLR 434	7.4
<i>Thomas v Legal Practitioners Admission Board</i> [2005] 1 Qd R 331	2.2.1.5
<i>Thomson v Howley</i> [1977] 1 NZLR 16	4.2.2.2
<i>Veghelyi v Council of the Law Society of New South Wales</i> (unreported, CA(NSW), 7 August 1992).	16.1.3
<i>Wan v McDonald</i> (1992) 105 ALR 473	8.1
<i>Wentworth v de Montford</i> (1988)15 NSWLR 348	4.4.4
<i>Wroe v Seed</i> (1863) 4 Giff 425	3.4.2
<i>XY v Board of Examiners</i> [2005] VSC 250	2.2.1.4
<i>Yonge v Toynbee</i> [1910] 1 KB 215	4.1
<i>Yates Property Corporation v Boland</i> (1998) 85 FCR 84.	5.3.7
<i>Yamaji v Wespac Banking Corp (No 1)</i> (1993) 115 ALR 235	8

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1. General Concepts

1.1. CONTENT

- The *Legal Profession Act* is a national model adopted by all States and Territories to facilitate a national practice. Changes have also been made to the existing rules to meet the requirements of the new Act and the Legal Services Board, the Legal Services Commission, and the entire infrastructure required to give effect to the Act.
- A legal practising certificate issued by one State or Territory will be recognised by all the others. This will elevate the issue of having to be admitted in each State that a practitioner wishes to undertake practice.

1.2. ETHICS AND MORALITY

1.2.1. Ethics and Morality

- Ethics: refers to the character and practice or custom of the community. It is the science or study of morality or rules of conduct.
- Professional ethics: the values and rules of conduct of an occupational group.
- Morals: are customs or conventions of a social group, distinguishing between right and wrong.
- Values: principles or qualities which we consider worthy or desirable
- Beliefs: acceptance of an idea or statement of facts as being true
- Conventions: unwritten rules and practices governing the behaviour of a social or professional group.

1.2.2. What are ethics?

- Ethics may be defined as a set of principles or standards governing the conduct of a person or members of a profession or organisation.
- Legal ethics conveys the notion that professionalism carries with it responsibility and duty.
- Francis (1994)¹ proposes the following as a definition of ethics:

¹ Francis, R D (1994), *Business Ethics in Australia: a practical guide*, Centre for Professional Development, Kew, Victoria.

‘Ethics may be regarded as knowing what is right, doing what is right, and feeling what is right...Ethics...concerns explicit codes of conduct as well as value systems. Perhaps a useful definition in this context is that ethics is a highly explicit codified form of behaviour designed to produce particular ends and act in accordance with particular values.’

- The courts have also noted that:

‘Unless lawyers display the overriding duty of honesty that they owe to the courts, their clients and to their fellow practitioners, public and judicial confidence in the proper administration of justice would be undermined.’²

1.3. CODE OF ETHICS

- A code of ethics is a set of behavioural guidelines that members of a profession or an organisation are required to observe in the course of their work practice. These guidelines prescribe responsibilities that employees must undertake, conduct they must avoid and situations in which they must not become involved.
- Benefits of a code of ethics:
- Publicly expresses an organisation’s commitment to a high standard of ethical behaviour and social responsibility of employees
 - Codifies the minimum acceptable standard of ethical behaviour by employees
 - Codifies obligations which employees owe to colleagues, clients and the community
 - Protects the reputation of the vast majority of employees who conduct themselves in an ethical manner by applying sanctions to the minority who do not.



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² *Incorporated Law Institute of NSW v Meagher*