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Ethics in practice for government lawyers

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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 skillful 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.

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.

Custodians of public trust

“Government lawyers arguably have a greater responsibility than their private sector counterparts to foster integrity, for they are custodians of the public trust not only in the legal profession and the administration of justice, but also in the administration of government.....in line with the foregoing, government lawyers’ conduct must both be, and be seen to be, above reproach. It is critical that the government should, in all its legal endeavours, be seen to uphold the law.”

Lawyers’ Professional Responsibility, G E Dal Pont, 7th edition Thomson Reuters [13.80]

Upholding the rule of law is essential

“In all of the examples discussed the (government) client is subject to the rule of law. This obviously affects the duties and responsibilities of the lawyer instructed to act for the government. An instruction given to such a lawyer to do something that is unlawful, or to assist in something that is unlawful is not an instruction that the client can give in accordance with the law. The lawyer acting for the government cannot accept such instructions. By definition the person purporting to give the instructions does not have authority to do so. The responsibility of the lawyer to the client is to take whatever steps may be appropriate and to give such advice as may be necessary in order to have the instructions changed or varied.”

The Duties of Lawyers Acting for Government, Selway (1999) 10 Public Law Review 114.

Government lawyer role (1)

“Government lawyers are advisers to the government but not part of it. The role is fundamental to the rule of law. While closely associated with government, government lawyers remain fundamentally separate from it and provide the first check on any abuse of executive power.

This interpretation of the role is equally true for all those government lawyers who work as part of a statutory body and who may define themselves as a member of that particular organisation”

Remarks to the Government Lawyers Conference

The Hon. Marilyn Warren AC, Former Chief Justice of Victoria

Friday 23 June 2017

Government lawyer role (2)

“Ultimately there is one point I particularly want to make. The role of the government lawyer is important. It matters. Governments may make ‘political’ mistakes with legal consequences.

The role of the government lawyer is to provide strong, sometimes courageous, accurate and independent legal advice.”

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Victorian Government Lawyers and Ethics

1. Public Administration Act 2004 (Victoria)
2. “Safeguarding Integrity” – IBAC guide to the integrity system in Victoria (December 2016)
3. Individual statutory provisions for various government agencies, e.g. Legal Aid Act 1978 (s 16)
4. Revised Model Litigant Guidelines for the State of Victoria (March 2011)
5. Individual codes of conduct or policies published by Victorian government departments and agencies, including the VPS Code of Conduct published by the VPSC.

Ethical Guidance for government clients

GUIDE TO ETHICAL OBLIGATIONS OF GOVERNMENT LAWYERS – FOR NON-LAWYER COLLEAGUES

- Lawyers' Ethics Statement
- Role of government lawyers
- Duties of lawyers
- Common issues government lawyers face
- Key takeaways

Government Solicitor's Committee, The Law Society of NSW, March 2021

Ethics issues we will discuss today

- Paramount duty to the court and administration of justice
- Duty of client confidentiality
- Duty to avoid conflict of interest
- Ethical duty to maintain integrity and independence
- Ethical duties in dealing with unrepresented persons
- Who is my client – from whom do I take instructions?

**Your ethical
compass**

The overarching obligations apply to all

You are a solicitor acting in a litigated matter on behalf of the State and a request has been made by the Plaintiff's solicitors to discover a list of documents that the plaintiff describe as being 'critical documents.' You have provided detailed advice to your client which ultimately agrees with the Plaintiff's position that the documents are critical pursuant to s26 *Civil Procedure Act 2010* (Vic) and therefore discoverable. Despite the advice your client refuses to instruct you to discover the documents.

What should you do?

Model litigant obligations come to mind!

You are a solicitor acting in a litigated matter on behalf of the State and you have drafted the State's defence. The rules provide that you are to admit an allegation in circumstances where you know the allegation to be true. You know from the records that the allegation that the State owed the Plaintiff a statutory duty of care is true, however for policy reasons your client wants you to 'not admit' the allegation which has the effect of putting the plaintiff to proof. This approach is inconsistent with your obligations under *Civil Procedure Act 2010* (Vic), which among other things include, to narrow the issues in dispute and to ensure costs are reasonable and proportionate.

When filing the defence, you are instructed to sign a proper basis certificate, what should you do?

It sounds very much like a costs try-on....

You are acting for the State in a litigated matter and your client is prepared to settle a matter in the plaintiff's favour on a plus costs basis. You attend the mediation in the hopes of settling the matter and the plaintiff informs you that their costs to date are \$250,000. The matter does not settle on the day of mediation, however it settles six weeks later by way of offer of compromise on a plus costs basis (to be taxed in default of agreement). Upon request the plaintiff then provides you with a claim for costs and the plaintiff's costs have increased by \$470,000 to \$720,000. The Plaintiff tells you that they do not record time and cannot provide itemisation of their professional fees. You strongly suspect that the plaintiff's fees are deliberately inflated.

What should you do?

My child has read senior counsel's opinion

You are a solicitor working for a State Government Department. During the various pandemic lockdowns you worked from home using a laptop provided by your employer and shared a printer with your family including your spouse and 3 children aged 8 to 16 years. You shared a study with your spouse, but you each tried very hard to keep a “clean desk” policy as far as paper documents are concerned. During the last lockdown, you were working on some very sensitive legal issues for your employer where an urgent response was required. You printed an opinion from senior counsel and put it down when you stepped out and took a phone call. It appears that your eldest child read the opinion as he is doing legal studies at school.

What is your ethical position and what steps might you take?

If the documents are not produced, prosecute them!

You are a senior legal officer in a statutory authority responsible for licence compliance in your industry. Your client authority has the power to demand production of a range of documents from businesses within the regulated industry for various purposes including random audit compliance. Your employer has sent a statutory demand to Company A for production of certain documents within 14 days. Failure to comply with such a demand is an offence punishable with a fine. Company A's lawyers have sent most of the documents demanded, but have claimed legal professional privilege in respect of three of them. You believe that the claim is genuine. Your client's compliance manager instructs you to make a further demand for the three documents and, if they are not forthcoming within 7 days, to institute a prosecution against Company A.

What is your ethical position?

Integrity under fire

Your are a senior solicitor in a government department. A senior manager in your department, Alex, seeks your advice regarding a difficult situation in which he has found himself. Alex tells you that he has been directed by a senior executive to implement a government program which he thinks is illegal. Alex has raised his concerns with the senior executive and was told that, if he does not carry out the direction, he will be transferred to another department and can forget about advancing his career in government service. You look closely at the direction and form the strong legal opinion that Alex is correct in his conclusion that the proposed program is illegal in its present form.

What are your ethical obligations upon learning about this matter?

Should I buy into policy issues?

You are a senior legal officer in a Victorian Government department. You do most of the legal work on your department's commercial agreements. You have been working very hard on a very complex agreement proposed with a major Australian company for a project of obvious political importance to the Government. The relevant Minister's office is keeping a very close watch on the project. Through all the commercial and legal complexities, you have begun to think that under the agreement the Government will be carrying all the risk involved in the project. Policy-making is not in your job description.

What should do you do, bearing in mind that the Government thinks that all that now remains to be done is to settle the legal formalities?

Guide to Ethical Issues for Government Lawyers, The Law Society of NSW, 2015 - page 45

Can I advise an unrepresented person?

You are a solicitor in a Commonwealth Government Regulatory agency compliance area and receive a telephone call from Carlos who is the owner of a hospitality business who has been served with a statutory Compliance Notice. Carlos wishes to discuss with you various aspects of the Compliance Notice. Carlos has not yet engaged a solicitor as he is concerned about the cost. Some of Carlos' questions are factual and can be answered easily by you. However, as the conversation proceeds, Carlos begins to speak about some legal issues and asks you to explain various aspects of the relevant law to him and how they might impact on his business. Carlos makes it clear to you that he does not intend to engage a solicitor as he feels he can handle the issue himself. You feel that you could assist Carlos with some simple explanations of the legal issues to help him.

Can you discuss any of these legal issues with Carlos?

I have some suspicions which trouble me

You are a Fair Work Ombudsman solicitor dealing with an unrepresented business owner Samantha attempting to obtain a ***Statement of Agreed Facts*** from her. You suspect that some of Samantha's admissions to you are not genuine and are more directed towards resolving the matter quickly. You ask a colleague to assess the matter and he agrees that your suspicions may be correct. It would be in Samantha's best interests to be absolutely honest with the FWO as this may affect what is finally determined about her. You have asked Samantha if she wants to obtain legal assistance, but she has declined saying: *"A lawyer will only drag it out and I really want to get it behind me as soon as possible so I can sleep at night."*

What is your ethical position given your suspicions?

I've just been served with a subpoena!

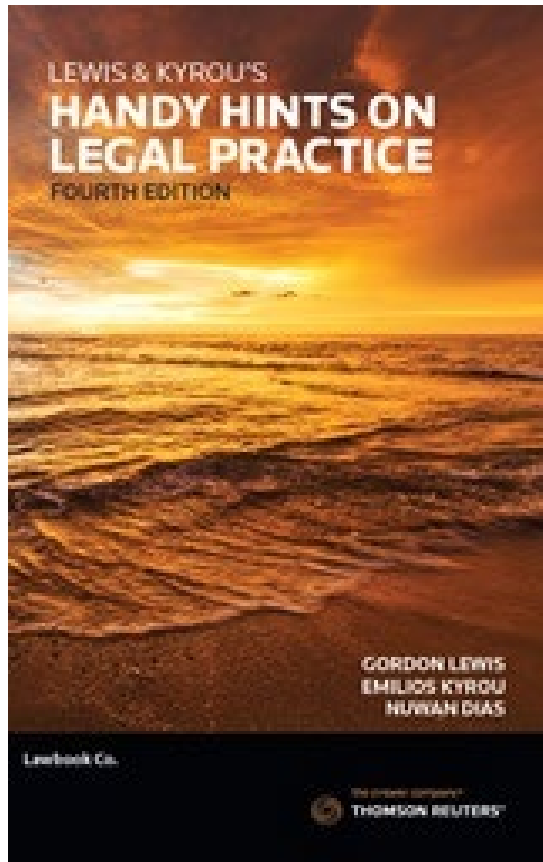
One of the NDIA's agency's Partners in the Community receives a subpoena requesting documentary information about a participant in the scheme.

An employee of the partner organisation contacts you as an NDIA solicitor and asks for advice about what they should do in response to receipt of the subpoena.

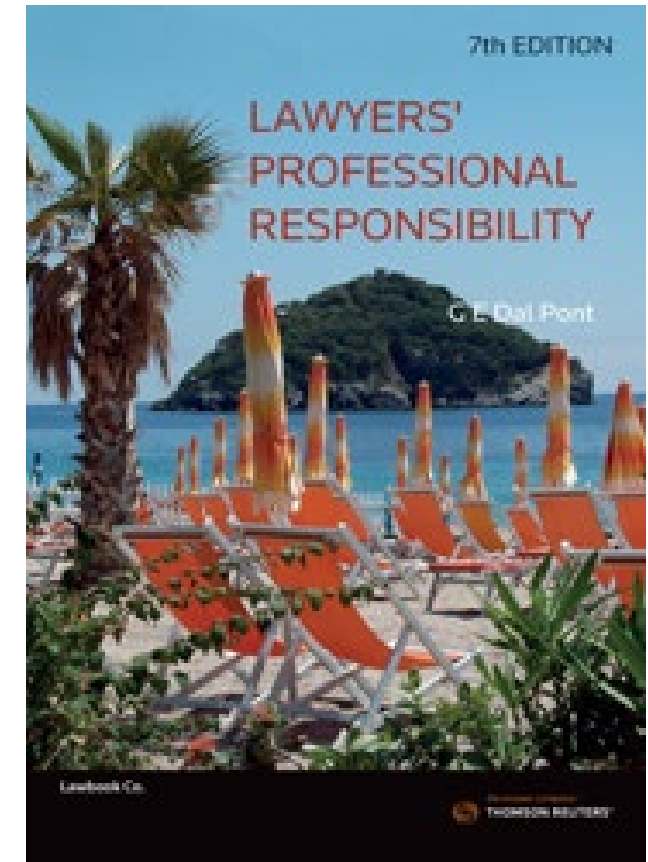
1. Give the employee some public domain literature about subpoenas;
2. Give the employee some "informal" oral legal advice to assist them;
3. Provide the employee with written legal advice about what to do; or
4. Decline to comment and suggest they seek their own legal advice.

Some useful resources on ethics

- [Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015](#)
- [Law Institute of Victoria Ethics website](#)
- *Lawyers Professional Responsibility*, 7th edition, G E Dal Pont, Thomson Reuters (available at Law Books [here](#))
- *Lawyer Discipline*, 1st edition, G E Dal Pont, Lexis Nexis (available at Law Books [here](#))
- *Handy Hints on Legal Practice*, 4th edition, G Lewis, E Kyrou, N Dias, Thomson Reuters (available at Law Books [here](#))



- *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*
<https://legislation.nsw.gov.au/view/pdf/asmade/sl-2015-244>
- *Law Institute of Victoria Ethics website: Ethics & Practice Support Services*
(liv.asn.au)
- *Lawyers Professional Responsibility*, 6th edition, G E Dal Pont, Thomson Reuters
- *Lawyer Discipline*, 1st edition, G E Dal Pont, Lexis Nexis



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[Ethics & Practice Support Services \(liv.asn.au\)](http://liv.asn.au)

Thank you for listening.

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