

Russell Kennedy's Pro Bono
Online CLC CPD Series 2022
- Live Legal Ethics -

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Approaches to (or methods of) ethical thought

1. Ethics is not first about your feelings or doing what your gut tells you...
2. Ethics is about *thinking* through an ethical challenge, according to several methods of thought, derived from moral philosophy:
 - Kantian,
 - Consequentialism,
 - Virtue ethics* (including Confucian Teaching)
 - Religious conviction or experience.

Ask yourself at the end of this session: **which method most attracts you?**

'Necessity'

Consequentialism ('teleology')

- 'Right' or morally good actions or policies are those that bring about better *consequences** than any of the other realistic alternatives.
- Otherwise known as 'maximising the public good', consequential methods suggest that **the 'utility' of an action or policy**, even if it might subordinate individual autonomy, is justified because it produces the **'greatest good for the greatest number'**. Politicians often publicly justify their decisions on consequentialist grounds.
- To take an obvious case: a consequential approach might justify, for example, the laws that prohibit a driver holding a mobile phone in a car;
- **and is there a case, on consequentialist grounds, for mandating a zero alcohol level for drivers?**

'Fairness'

The Kantian (or 'deontological') method

- 'Right' actions or policies are those that primarily enhance and respect individual autonomy by treating persons as 'ends' rather than 'means'.
- The deontological approach emphasises the rightness of 'process', rather than the ultimate consequences.
- **Kantian methods are concerned to refute the notion that 'the end justifies the means'** – arguing that the means, since they often involve what happens to individuals, are at least as important as outcomes.
- Kantian ethicists are therefore usually wary of consequential approaches - and many lawyers are inherently Kantian in their approach.
- Kantian ethics suggest that **individuals' human rights cannot be sacrificed to larger national or consequential policies, or 'the greater good'**, particularly when the 'greater good' is not agreed or will likely remain imperfectly known and when consequences can rarely be accurately predicted.
- **Work up as an example here re the anti-Vaxer lockdown arguments against mandatory vaccination, especially those related to individual mental health**

'Virtue' (or character): the strongest method

Virtue Ethics-1

- The categorisation of an act as ethical or unethical is not determined by its impact as such, but by the **quality or character of its actor**.
- Virtue ethics is enjoying a radical return to favour in public ethics because of the emphasis on nobility of motive.
- Virtue ethics derive from Aristotle's classical emphasis on *right character* as a personal virtue.

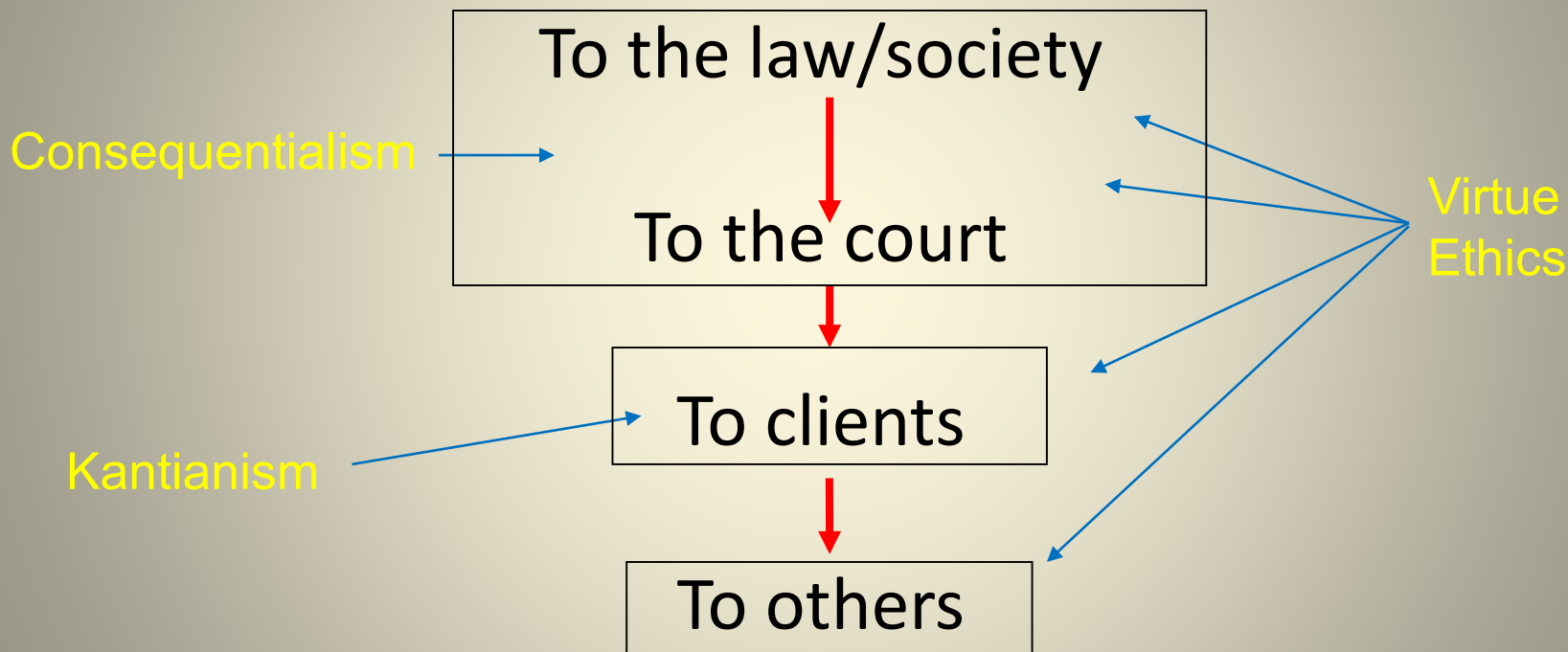
'Virtue' or Character

Virtue Ethics-2

- This third approach transcends both Kantian and Consequentialist approaches because it is simply unconcerned with 'what may happen to...' - which can rarely (if ever) be accurately predicted - and examines how an individual is motivated at a profoundly personal level.
- Thus, if the actor is 'good', so also will be 'the act'.
- Goodness depends on possessing 'the virtues', for example: **courage, honesty, gentility, benevolence, compassion, integrity, thoughtfulness, respect and resolve.**
- Notions of good and bad, noble and ignoble, deplorable and admirable populate virtue ethics, rather than whether someone is 'for or against' a rule, or considers an action or policy 'permissible or obligatory', etc.
- Confucian Teaching, which emphasises respect, responsibility and filial devotion - is increasingly seen as allied to Virtue Ethics.

Obligations of legal practitioners and underlying ethics systems

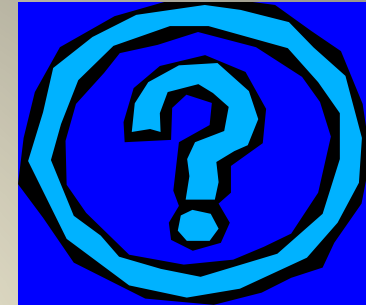
In general terms, the formal obligations of legal practitioners comprise a hierarchy of duties:



Note: the duty to clients is third on the list!

Scenario 1

- You are representing a new client who has moved from NSW - an older male who says he will plead not guilty to a sexual assault.
- He tells you he has heard about the Nicola Gobbo Royal Commission in Victoria and he knows that lawyers have to keep silent about anything they find out about their clients' behaviour.
- Before you can say anything, he smiles as he says that he has 'hurt' several young boys and girls in NSW, but he is protected because it has all been covered up by the organisation he was a part of.
- He also says that he is looking forward to seeing what Victoria has to offer.
- You are too surprised to say anything and adjourn the interview for the following week.
- What professional conduct rule(s) might apply here....
- What underlying ethical approach is affecting your decision?
- Should you contact police ?





Scenario 2

- Several years previously your parents lost their home in a bushfire on the fringes of Melbourne and one of your younger siblings was severely burnt. Their pets were destroyed, along with all your childhood possessions. As a result, you became passionate about doing something to halt climate change, and begin applying your IT skills to assist climate activists.
- One activist is charged with damaging mining equipment at AGLs *Loy Yang* brown coal mine in the Latrobe Valley. You are a part of small team of legal advisors sent to the Valley to advise local activists.
- It occurs to you that AGL may know from their own medical experts, that continued mine emissions are causing multiple cancer clusters in the Valley, and that their may be documents proving that knowledge, which will help to defend your activist client.
- You hack AGLs files on its own server, to see what can be discovered...
- **What professional conduct rule(s) might apply here....**
- **Should you hack the files?**
- **What underlying ethical approach is affecting your decision?**

Scenario 3

You are the lawyer for a mother of three small children in a divorce. Your client has previously shown you some old photographs of bruises and marks on the children that she, unconvincingly, claims were inflicted not by their father, but by her new boyfriend.

One of the children now has recurring headaches. Your client now instructs you to stop all legal proceedings as she intends to return to the children's father with their children.

You believe her decision puts her children at risk and transgresses her responsibility to them as a parent; but your client informs you, as she leaves your office, that your legal responsibility is over and she will not be seeing you again.

- Discuss which underlying approach should govern your decision.
- Would you break the rule about client confidentiality and inform the relevant welfare department of your fears?

For reflection: Has your view about your own preferred ethical approach been confirmed, or varied, by these scenarios?

Current and emerging ethical issues in a CLC setting

- **Conflicts of interest**
 - between different CLC's (especially in Family Law/Family Violence cases), when a volunteer or consultant works in more than one CLC, or simultaneously in both a CLC and a private firm
 - specialist CLCs who practice in the finance and environmental fields and take on seconded solicitors from major law firms - because those secondees may have divided loyalties, even if they do not have access to confidential information at either work site.
- **Artificial Intelligence** algorithms will be increasingly used to suggest and/or manage both in person and online defences of relatively minor offences in drug and traffic cases, and over time will tend to minimise or even exclude human lawyers' expertise and judgment.

Managers of CLCs must be very alert to these challenges, to prevent ethics complaints to the Victorian Legal Services Commissioner and related negative impacts on CLC PI cover.

Prevention and harm minimisation can focus on:

- creation of an CLC conflicts' register for all solicitors, in each CLC;
- improving the quality of supervision of volunteers;
- early identification of emerging issues and accessible policy statements;
- ethics' identification training, with case/ scenario discussions – see for example, Parker and Evans, *Inside Lawyers' Ethics*, Cambridge UP, South Melbourne, 2014; Stuart Rachels, *The Elements of Moral Philosophy*, 8th Edn, McGraw Hill, New York, 2014.