Conflicts of interest

***Armitage* NZCA**

JV to market timeshares. Leisuretime (one of the parties to the JV) bought out the other's interest in post-dated payments. Leisuretime then told the other party they were in financial difficulty and could no longer meet payment obligations.

There was one solicitor acting to manage money and payments for *both* parties in the joint venture.

Claimed breach of K, breach of fiduciary duty, and breach of duty of care.

- The obligation arising out of the law firm's instructions to act for the JV were of loyalty and good faith to both parties to act in the best interests of the JV.
- **Cannot knowingly advance the interests of one party at the expense of the other.**
    - Once the solicitor knew that LT were in financial difficulties and using payments meant for the other party to stay afloat, was placed in an **actual conflict** and had an obligation to cease making payouts, or cease acting for the JV.
- **Must not allow the performance of obligations to one principal to be influenced by the other.**
    - Must serve both as loyally and faithfully as if they were the only principal.
    - Must not find yourself in the position where you cannot fulfil your duty to one principal without failing obligations to the other.
    - The fact that you cannot fulfil obligations to one without failing the other *does not* excuse liability.
- **Fiduciary obligation to Leisuretime not to disclose confidential info does not excuse breach of duty to other party.**
    - Ordinary course; no obligation to disclose. But once known proceeds were being used for LT, an actual conflict arose

***Clark-Boyce* PC**

Solicitor acted for both parties in a transaction (mother and son). Mother only wanted to be advised on conveyancing of the transaction and its legal ramifications rather than advice on wisdom of the transaction. Gave informed consent of conflict and denied independent advice.

- No general rule of law that a lawyer should never act for both parties where interests may conflict.
- Can act in a potential conflict if both parties give informed consent:
    - Knowledge of conflict between parties; and
    - That the solicitor may be unable to disclose the full knowledge they possess
- Ms Mouat was fully aware of what she was doing and required only advice on conveyancing and legal ramifications. Rejected independent advice. No duty on Mr Boyce to go further and refuse to act for her.
- Because there was no *contractual* duty to advise on wisdom of the transaction, could not claim that he owed a fiduciary obligation to do so.

***Daniels* NZHC**

Solicitor had sex w a client he'd been representing for 4 years. Client was vulnerable due to being a victim of domestic violence, mental health problems etc.

Appealed from Tribunal finding of serious misconduct, questioning remedy of suspension and requesting name suppression. Because he had undertaken not to practice, argued that suspension was unnecessary.

- Suspension serves purpose of general deterrence due to the need to maintain public confidence in the profession.
- Daniels argued that due to acceptance of guilt, remorse etc shouldn't be suspension. But Tribunal had failed to accept his evidence on numerous grounds, so element of dishonesty. Not accepting responsibility and blaming the client was troubling to the Tribunal and some thought he should have been struck off.

Rawleigh

Wife signed a guarantee under undue influence from abusive husband. The guarantee would allow IBM computers into the business. Secretly a plot to get matrimonial property out of NZ - the guarantee would serve no benefit to the wife. The solicitor who witnessed signatures was acting for both parties. Saw husband and wife together and advised them not to sign. Then spoke to both parties individually.

- Solicitor admits that fiduciary duty was breached.
    - Couldn't have acted w/o explaining the conflict, that all info couldn't be disclosed, and the legal effect of that.
- No causation of harm.
    - Wife was going to sign the guarantee irrespective of advice - as demonstrated because she signed despite being advised not to.
- Duty of care
    - No indicators of demeanour at the time to indicate undue influence to the solicitor. No occasion to suggest he needed to do any more than speak to her individually.
    - If raised the standard of care where family members, on the face of it, are willingly seeking legal advice, run the risk of a high threshold that was intrusively probing into people's personal matters. Wives would likely find this offensive.

Russell McVeagh v Tower

Commented [1]: tie into practise scenario

Auckland office was acting for GPG, who were looking to take over Tower. The Wellington office was already acting for Tower in IRD/tax work. Partner in Akl office checked w Wlg office about potential conflict. Decided no conflict because the matters were substantially different. Did not tell Tower they were acting for GPG.

In 1997, tax dispute for Tower was resolved. In September of the same year, GPG presented takeover bid to Tower, who realised that RM had been representing GPG. Applied to disqualify RM from acting due to knowledge of management culture, negotiating style and method of operation.

HC

- No confidential information had been disclosed because there had been an info barrier/Chinese wall.
- But would a reasonable member of the public in full possession of the facts perceive a risk that info would become available?
- Disqualified RM from acting.

CA

Majority

- First inquiry is to duties owed. Are they likely to conflict?
- In absence of risk of disclosing confidential info, no other duty likely to conflict.

    - Court intervention must be reserved for the reasonable protection of confidentiality, keeping in mind the other party's right to instruct whoever they want to, and solicitor's right to market themselves to the public. Must also consider that there are only a small number of firms in NZ able to perform this kind of work, and conflicts are difficult to avoid.
- So: was confidential info held that, if disclosed, was likely to adversely affect the client?
- Was there a real or appreciable risk of disclosure?
- No real risk of disclosure.

Dissent

- RM had an obligation of loyalty, trust and confidence to Tower. This included a duty to disclose all material info in its possession to its client. Failing to inform Tower that it was going to accept instructions from GPG breached this obligation. If RM could not disclose its intention to Tower (and it's accepted that they could not) then they could not accept instructions from GPG.
- There are other lawyers and firms that could have acted.
- The question of whether real or appreciable risk of disclosure is too restrictive.

Legal professional privilege

Gartside v Sheffield

Solicitor agreed to prepare will. Client wanted it prepared and executed before she passed away. The solicitor failed to do this. Beneficiaries under new will sought to claim damages in negligence because solicitors did not take reasonable care to ensure it was executed in reasonable time. Solicitors moved to strike out because beneficiaries had no duty of care owed to them.

- Solicitors, once accepted instructions, owed a duty of care to beneficiaries of the proposed will.
    - *Ross v Caunters* - can owe duties to third parties if reasonably within contemplation as someone who is so closely/directly affected by acts that can reasonably foresee that the third party could be injured.
    - To deny effective remedy would be to deny solicitors' professional role in community. The public rely on solicitors to prepare their wills, it would be a failure of the legal system not to demand responsibility.

B v Auckland District Law Society

RMac acted for clients investing in bloodstock (mostly so they could avoid tax). When this failed, clients sued RM. Law Society investigating. RM agreed with ADLS to provide documents for the purpose of investigation but they couldn't be shown to anyone else or be copied. Letter to ADLS emphasised importance of confidentiality; highlighted documents were privileged. Documents were shown to another lawyer. A new investigator took over and wasn't advised of this arrangement. Though happy to keep them confidential, RM appealed to NZHC to have them returned.

Some issue that counsel was acting for both RM and Mr Carran.

- Fundamental application of administration of justice relies on privilege. Without it, individuals seeking legal advice would be deterred from full disclosure.
- Balancing two public interests: maintaining the integrity of the legal profession and administration of justice.
- A lawyer must be able to give an absolute, unqualified assurance that info will never be disclosed without consent.
- Law Society argued that privilege was waived for all purposes.
- Look to true construction of the words. Privilege was not fully waived. Save in respect of the *agreed* use, privilege was expressly reserved. That is the end of the matter.

Nicholson v Icepak

Icepak = cool store company. Refrigerator failed, pears ruined. Sued for negligence. State Insurance took over the claim (subrogation). Appointed Mr Chatwin from Tompkins Wake to handle the litigation. TW told Icepak they were acting on their behalf *and* on State Insurance's behalf. Mr Chatwin sent a letter to Icepak declining cover because of an admission of breach of insurance policy made *to* Mr Chatwin.

Icepak complained on basis: solicitor-client relationship and that info was subject to legal professional privilege, and that Mr Chatwin had a conflict of interest.

- As soon as it was apparent that Icepak had breached policy, interests between Icepak and State became unaligned (ie, there became a conflict)
- There was a solicitor-client relationship
    - Even though State was paying the retainer, and Icepak did not get to choose their legal representation, Mr Chatwin was declared as Icepak's solicitor. Once doing this, were acting on their behalf - albeit couldn't be considered *only* Icepak's solicitor.
- Consequently, info disclosed to Tomkins Wake was subject to legal professional privilege
    - This info was given in confidence
    - Even though Icepak had an obligation to *State* to disclose info, didn't include Mr Chatwin when he was giving *Icepak* advice.
- Mr Chatwin's position was one of likely conflict of interest. Once he received info like that he should have advised of a conflict and ceased to act.

Cabinet Office Circular on privilege

How to identify privileged information:

1. Is it labelled or identified by one party as privileged? Not conclusive but helpful
2. Is it a record of legal advice given (as opposed to other types of advice, like policy advice)? If so, attracts solicitor-client privilege
3. Waiver of privilege could be express or implied. Implied waiver may include partial disclosure of legal advice, a partial waiver (ie, see RM v ADLS).
4. For litigation privilege: was it a document or info specifically made for litigation in court? Ie a medical report, business report, statements made in interviews etc *in preparation for trial*.

Barrister's duties

Kiliva

Brothers were jointly convicted of unlawful sexual connection and rape. Appealed against conviction and sentence on the basis of competence of counsel. Claimed counsel had failed to follow their instructions and let them testify - jury didn't hear their side of the story in a case where credibility was in issue.

- Barristers - at no stage did clients indicate they wanted to give evidence.
- Advice was given before trial about giving evidence. During the hearing, consulted w clients extensively and advised on risks of giving evidence, cross-examination, and difficulties due to intoxication. Clients decided neither of them would give evidence.
- One client signed a written instruction that they had received advice and accepted it.
- The other client did not, but evidence of *both* barristers was that an oral affirmation had been given to the same effect.
- Barristers had fulfilled their duties to clients and the court.

In effect, must follow client's instructions if given and in accordance w law/duties to the court. Representing client's interests includes giving this kind of advice.

McLoughlin

D was being charged w rape. Denied the offending and claimed an alibi. Counsel interviewed two witnesses who were prepared to give evidence, arranged for their evidence to be given, and notified P. Barrister was appointed but decided to take the issue no further as genuinely believed witnesses were lying. Sought to rely on defence of consent and elected to call no evidence. Did not consult with client, but asked for approval, which was refused.

- Counsel acted contrary to instructions and deprived client of opportunity of intended defence (Chapter 13)
- It is not for the court to question counsel's judgment, but no right to disregard instructions. **Duty is to either act on instructions, or cease acting.**
    - If duties to court/professional obligations mean following instructions is incompatible, should advise client that unless instructions are changed, unable to act further. If the issue arises at trial, should inform the Judge and seek leave to withdraw.

Baledrokadroka

B was charged w misconduct under many counts.

1. Professional misconduct. Received money from client and used it for private purposes prior to the work being done and an account rendered.
    a. Barristers are not subject to trust fund requirements in the Rules.
    b. Legal Practitioner's Act: no legal requirement to manage money. Up to the client to enforce the management of their money/decide if they will entrust their money to a barrister.

        i. Now an express bar: Rule 14.2(e). If holding a practitioner certificate, must not receive or hold money/valuable property for or on behalf of another person.

2. Dismissed
3. Practising as a barrister without a practising certificate.
    a. Practiced without a certificate for 3 months.
    b. Argued that it was only for a short time so wasn't professional misconduct; acknowledged indemnity/insurance ramifications. However, is an offence under Law Practitioners Act and breach of Rules, so serious.
    c. Received a letter from Law Soc about practicing without certificate and still continued to. Reprehensible and deplorable.
4. Convicted of DUI and convicted again after licence disqualified. Did not pay fine.
    a. Two offences occurred within 2 days of each other. Then drove 6-7 weeks later while disqualified.
    b. Shows contempt of court orders - propensity to flout the law.
    c. Extremely serious. Repeated, and disregard for court processes.

Decided he was not a fit and proper person and struck him off the roll accordingly for charges 3 and 4.

Duncan Webb article [cited para 15]

- Lawyers are officers of the Court; part of the machinery of justice. Must be seen to uphold the system they are an integral part of.
- Not just refraining from breaking law, but acting consistently with principles of the system. Duty of honouring law goes beyond merely professional activities to anything that undermines the esteem in which the legal system is held.
- If the offence is serious or shows disregard for the law, it may amount to misconduct. In general, if it has an element of moral turpitude to it, then there will be a breach of the duty to uphold the law.

Immunity

Brief summary on immunity

- Judge immunity
- Witness immunity
- Can now sue expert witnesses *because* they are subject to a contractual relationship & are paid for being witnesses. No justifiable reason to excuse negligence.
- Previously, barristers were also immune - though this began to change in the 2000s.

Insurance

- Personal liability insurance - make a claim once X event occurs (this is the type of insurance you get for your house, car etc)
- Professional indemnity insurance (usually circumstances based). Usually used for professionals who give advice and are at potential risk of claims being made against them. Insurance will cover costs of litigation etc. Usually need to notify insurer of any circumstances which might give rise to a claim.

Arthur JS Hall v Simon

Client sued lawyer for negligence.

- Negligence claim: difference between error of judgment and true negligence. Clients must show that a better standard of advocacy would have resulted in a better outcome (causation).
    - Were the actions taken by the lawyer in the circumstances reasonable/open to them?

***Lai v Chamberlains* (NZSC)**

Claim for damages against a firm for professional negligence. Chamberlains denied negligence: lack of causation and contributory negligence. Also argued immunity - Mr and Mrs Lai sought to strike out immunity defence.

- HC bound by *Rees v Sinclair (CA)*, but both judges expressed reservation about justification for immunity.
    - Salmon J - modern case management means we don't need immunity as much.
    - Laurenson J - public policy no longer justifies immunity in civil cases, but may in family or criminal cases.
- NZCA held 4:1 no longer sufficient justification for barrister's immunity in negligence.
    - Majority: none of the arguments persuasive.
    - Anderson P, dissenting: immunity necessary for due admin of justice for public protection, just like other democratic protections.

There are four principal reasons put forward in *Rondel v Worsley* for barrister's immunity, and the reasons they no longer apply.

1. Preventing the fear of subsequent litigation from eroding the barrister's independent duty to the court
2. Avoiding effective re-litigation of controversies already resolved by Court decisions, unsettling public confidence in outcomes and prolonging litigation
3. Recognising that barristers, according to cab-rank rule, can't pick and choose clients - in interests of justice that barristers continue agreeing to represent everyone, however difficult or distasteful the case
4. as an essential part of a wider scheme of immunity which applies to judges, jurors and witnesses in court proceedings

- In effect, in NZ, the cab-rank rule no longer operates due to lawyers' specialisation. Unlikely that lawyers tend to refuse cases out of fear of litigation. No reason why removing immunity would deprive anyone of representation (ie, reasons 1 and 3 no longer relevant)
- Observing rules of practice could never put an advocate at risk of liability in negligence. Cannot be negligent to observe duties to the court.
- As said in *Arthur Hall,* finality in civil litigation can be protected by res judicata, issue estoppel, and the Court's power to protect against abuse of process.
    - In general, a decision of court can only be challenged by appeal. Principles of finality are rules of public policy: fairness to litigants and need to bring litigation to an end. Autrefois acquit and autrefois convict, behind substantive rules of res judicita. Those rules prevent a party to a final judgment challenging the decision in other proceedings between parties or their privies.
    - A claim of negligence is not a claim that the court decided the initial claim incorrectly.
- All who undertake skilled advice and are under a duty of care are in the boat that they may have to go to court over an unmeritorious claim (eg, doctors). Negligence is more than an error of judgment - diametrically different views have (and often are) taken and, even if wrong, do not amount to negligence.
    - No good reason to justify immunity for lawyers but not others who give advice.

These reasons no longer persuade the court. Immunity abolished.

Rule 13.10.9:

- There is a document you should show expert witnesses (Schedule 4 HC Rules), and must swear they have read and understood the document
- Overriding duties to assist court impartially on matters within expertise
- Expert witnesses are NOT an advocate for party who engages the witness
    - Jan 2018, added 2a) and b). If expert engaged under conditional fee agreement, must disclose that to the court and the basis on which they will be paid. Because if your fee is conditional on outcome of the case, there is an actual or perceived potential that evidence will be 'bent' in order to sway the result. This should say that no experts can be under conditional fee agreements.

Costs

Summary

Important to note **THE COURT HAS INHERENT POWER/DISCRETION** to order costs against counsel. This will be ordered if there has been a **serious dereliction of their duty TO THE COURT** (ie, not to the client). Costs orders are compensatory *and* punitive (*Harley*)

Key rules about duties to the court:

- 13; 13.1; 13.10 (***Chua***)
- 13, 13.3 (***Harley***)
- 13.8; 13.81; 13 (***Y v M***)
- 2.1; 2.2

If one of these rules is breached, may be open to order costs.

Cases

Chua - mortgage default. Solicitor filed for an injunction to prevent sale.

- A lawyer's first and foremost duty is to the court. Spurious claims may be viewed as a breach of this duty.
- The lawyer had mislead the Court by trying to get an injunction in a situation where he knew there had already been settlement
- As a consequence, solicitor was jointly and severally liable for costs, and the solicitor was referred to the Law Society

Harley - lawyer pursued a 'hopeless case' in the courts suing FAI and NZLS, despite the client being offered more in settlement by NZLS than was awarded by the court/the debt owed, and despite being warned in lower court that it was unlikely to succeed [against FAI].

- Lower court awarded counsel jointly and severally liable to indemnify former client on grounds of negligence and dereliction of duty to court in pursuing hopeless claim
- Acknowledged counsel gave no detailed consideration to the case/should have realised it was hopeless, BUT it hadn't been struck out by the Court; a few days before trial still hadn't received settlement offer.
- May not have advised client on hopelessness but this is not the same as knowing it's hopeless and going to court anyway (which would be a dereliction of duty to the court)
- ONLY FOR DUTIES TO THE COURT, NOT DUTIES TO CLIENTS

Undertakings

Commissioner of IRD v Bhanabhai - via letter, Mr B undertook to pay GST. Was never paid. Court ordered the sum be paid by Mr B with interest. Mr B alleged that it wasn't a personal undertaking but a professional one; and also that contextually, it should be read ad conditional.

- This was a personal undertaking, not on behalf of client company - if given on behalf of client, must be clearly stipulated (Rule 10.3.1)
- Performance of undertaking was, practically, conditional upon 2 contingencies:
    - that he remained in control of settlement process and;
    - that security arrangements [w finance company] permitted him to apply sale proceeds to GST liabilities.
- BUT the undertaking didn't say this, it just said GST would be paid. Also, would be no commercial point in solicitor sending the letter if it was an undertaking on client's behalf.
- In light of that, letter is best construed as *meaning what it says*: personal undertaking to pay GST. **No principle of law requiring unconditional undertaking to be read down so as to be conditional upon fulfilment of undertaking being possible.**

Cavell Leitch - Firm undertook not to release any deposits to Warwick without Marac's prior consent. Breached this by releasing some deposits. Application for summary judgment.

- [13] no doubt appeal must be allowed. Clearly at least arguable that there was no loss suffered… by breach of undertaking, and that notice given to the firm of assignment was inadequate
- [20] although breach of solicitor's undertaking was serious, it is at least arguable that compensation should bear relationship to actual loss suffered

Essay question

Question will ask you to write an essay addressing the 3 following points/themes:

1. Explain how FPP standard relates to the theory of virtue ethics
2. Look at what the purpose(s) of a fit and proper person requirement
3. Look at whether the FPP is fit for purpose.

Purpose of the essay:

- Demonstrate understanding of the basic ideas of virtue ethics, and how this theoretical philosophical idea is has direct tangible practical application via the Lawyers and Conveyancers Act 2006 and cases dealing with lawyers/aspiring lawyers and whether they are sufficiently fit and proper to act as lawyers.

- Engage critically with the degree to which the FPP requirement makes sense in theory, and how well it works in practice

- Develop a critical argument about how well the FPP requirement works/how much sense it makes, incorporating reference to a legal theoretical concept (virtue ethics) and modern legislative and/or case law sources.

I don't have a rigid marking rubric. That is, it is fine to stick closely to the readings and discussion we had in class on virtue ethics and fit and proper person, but I am equally open to hearing your thoughts based on other current events, news sources etc

Section 55 - Fit and proper person

Considerations under s 55(1):

A. whether the person is of **good character**:
B. whether the person has, at any time, been **declared bankrupt or been a director of a company that has been put into receivership or liquidation**:
C. whether the person has been **convicted of an offence** in New Zealand or a foreign country; and, if so,—
    a. (i) the nature of the offence; and
    b. (ii) the time that has elapsed since the offence was committed; and
    c. (iii) the person's age when the offence was committed:
D. whether the person has **engaged in legal practice in New Zealand when not admitted** under this Act or a corresponding law, or not holding an appropriate New Zealand practising certificate, as required by law:
E. whether the person has practised law in a foreign country—
    a. (i) when not permitted by or under the law of that country to do so; or
    b. (ii) if permitted to do so, in contravention of a condition of the permission:
F. whether the person is subject to—
    a. (i) an unresolved complaint under a corresponding foreign law; or
    b. (ii) a current investigation, charge, or order by a regulatory or disciplinary body for persons engaging in legal practice under a corresponding foreign law:
G. whether the person—
    a. (i) is a subject of current disciplinary action in another profession or occupation in New Zealand or a foreign country; or
    b. (ii) has been the subject of disciplinary action of that kind that has involved a finding of guilty, however expressed:
H. whether the person's name has been removed from a foreign roll, and that person's name has not been restored:
I. whether the person's right of practice as a lawyer has been cancelled or suspended in a foreign country:
J. whether the person has contravened, in New Zealand or a foreign country, a law about trust money or a trust account:
K. whether the person is subject to an order under this Act or a corresponding law disqualifying the person from being employed by, or a partner of, a lawyer or an incorporated law firm:
L. **whether, because of a mental or physical condition, the person is unable to perform the functions required for the practice of the law.**

Woolley - "The problem of disagreement in legal ethics theory"

- ➔ Individual lawyers don't think about legal ethics theoretically, but they do think about them normatively
- ➔ Democratic society considering the role it wants lawyers to play
- ➔ Ethical theory = essentially different methods of moral reasoning. In individual decisions, people are strongly influenced by unconscious cognitive processing and the circumstances in which moral dilemma can arise. In essence, lawyers will choose ethical theory that best fits with their morals
- ➔ When regulating behaviour of lawyers, need to consider procedural legitimacy in making that decision, and what that decision says about the type of lawyer they want society to have. Punishing for some types of wrongdoing and not others is a decision of broad normative significance.
- ➔ Loosely three ethical conceptions of the lawyer's role:
    - ◆ Standard conception. Resolutely advocating for client's interests within the bounds of the law. Lawyer's role follows legitimacy and authority of system of laws as a mechanism for resolving disputes about the right way to live in society. Duty to represent client's interests & to respect legal system
    - ◆ Dworkinian conception. Simon: Act for client but paramount obligation for morality of the law. Must take actions in any given case that are likely to promote justice. Instinctively rely on principles, policies and informal norms. Tanovich: Procedural and substantive elements - correct resolution is fair, responsible and non-discriminatory.
    - ◆ Ordinary morality. Fulfilling legal obligations may require actions judged wrong by ordinary morality. Requirements of law cannot excuse immoral conduct. Presumption in favour of following law but rebutted by morality considerations if there is a conflict.
- ➔ Daniel Bibb example. Charged w/ investigating possible wrongful convictions of two men. After investigation, convinced of innocence, but DA refused to drop charges, so Bibb decided to "throw" the case.
    - ◆ Brad Wendel = morally obligated to pursue prosecution. To throw the case demonstrates disrespect for the legal system and thus fellow citizens.
    - ◆ David Luban = strongly defends this decision; morality
    - ◆ William Simon = Wendel's critique is an undesirable authoritarian approach to legal ethics
- ➔ Eg: putting forward inference that D didn't know goods were stolen bc put them in back seat instead of boot, but knowing real reason is because they didn't have keys to the boot
    - ◆ Dworkinian/Simon - unethical and amounts to false assertion. Not consistent with achieving just result
    - ◆ Ordinary morality; required to protect client's human dignity (a principle of ordinary morality)
- ➔ Lack of ethics cases - law societies tend not to punish unless really wrongful conduct. Rules tend to be more aspirational. So lawyers can't rely on doctrines to figure out the correct course of action.
- ➔ How people behave is a product of cognitive capacity, emotional functioning, cultural background, personality traits, and circumstances.
    - ◆ Situational decision making to some extent influences behaviour/decisions. Still room for morality, but not necessarily all decisions are made on this basis:
        - statistically, best correlation to behaviour is situation. Eg Milgram experiment: electric shocks for incorrect answers. 63% kept shocking until demonstrable pain. When the test taker was enthusiastically consenting/agreeing, this went

up to 90%, and when disagreeing, went down to 10%. Relatively robust across cultures and circumstances.
        - In Princeton, on the way to a presentation, came across an individual in distress - those in a hurry, only 10% stopped. In moderate hurry 45% stopped. And in no hurry, 63% stopped. Being told they were presenting on Good Samaritan parable made no difference in behaviour.
        - “Mood effect” dime experiment. Finding a dime and then someone dropping paper - of 16 who found a dime, 14 stopped. Of 25 who didn’t, only 1 stopped
    - Moral reasoning
        - Most ethical theory is based on moral reasoning. While moral reasoning is a part of decision making in legal ethics, it is also part of the problem.
    - Affective moral decision making
        - Jonathon Haidt - How we respond to moral dilemmas is to some degree determined by unconscious responses. Intuition - “automatically and effortlessly” reach moral judgments based on facts as we perceive them.
        - Reason provides ex post facto explanations for our moral conclusions to allow social communication on how moral problems should be solved - they are not utilised as a means to making the decision in the first place.
        - Haidt experiment - introduce associations of disgust to a word through hypnosis. When given moral hypotheticals including that word, stronger moral reaction - to the point of perceiving morally neutral hypotheticals as wrongful.
        - Lawyers intuitively drawn to different ethical theories may automatically feel disgust when people go against them (ie, when Bibb chooses to throw the case). Moral emotions and intuitions motivate individuals to choose a normative framework.
    - Dan Ariely - unethical or dishonest behaviour is opportunistic, but dishonest behaviour is also strongly limited by social need to project an image of ourselves as an honest person. Someone who has the choice to cheat a little or a lot will usually still choose to only cheat a little - gains an advantage, but doesn’t create an image of dishonesty. Create a sense of ourselves, through behaviour or actions, that we want to maintain. Self-identity will restrain tendency towards unethical behaviour.

Mark Thomas “Disclosable but not Necessarily Fatal? Welfare Overpayments in the Uncertain Landscape of Fitness for Practice”

- ➔ Admission to legal practice = range of ill-defined terminologies (eg, “fit and proper person”; “moral character”; “good character”). Widest scope of judgment - and thus rejection - possible.
- ➔ In practice, major categories of conduct leading to refusal of admission: past illegal conduct; financial malfeasance; misconduct in the bar admission process; political beliefs and conduct; emotional or mental instability; and academic misconduct.
- ➔ Demonstrating appropriate character requirements and disclosure are claimed to:
    - protect reputation of legal profession by excluding those who may raise public concern as to ethical standards of profession;
    - to protect public from applicants whose history suggests lack of honesty or integrity;
    - to foster public confidence in the system;
    - to provide judiciary and professional colleagues with confidence in honesty and trustworthiness of new lawyers.

- All on the basis that past behaviour is a good predictor for future behaviour. Can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law (McChrystal on the American Bar Association's "good moral character" test)
- Lack of clarity, absence of underlying rationale re: what is precisely being assessed; value-laden nature of the inquiry, fluidity of concept, and lack of rational connection between conduct and likelihood of future ethical violations.
- Screening has been described as meritless; unrealistic and perverse; giving little recognition to forgiveness and redemption, and disproportionately impacting on some racial and socio-economic groups.

Alice Woolley "Tending the Bar: The Good Character" Requirement for Law Society Admission

- "Fit and proper person" requirement
  - Assertion that good character requirement is necessary for maintenance of legal profession's reputation - an attempt to ensure lawyers look good to the public and can maintain regulatory autonomy and economic monopoly? But as long as the requirement *does* fulfil purposes of protecting the public and promoting ethical conduct, then it is normatively justifiable.
  - Premise that 'character' is a measure of ethics. But impossible to prove that conduct flows from character.
- Virtue ethics -
  - a person of good character will have virtues that orient them towards conduct consistent with the maintenance of those virtues. A person with virtue of honesty will tend to choose conduct consistent with honesty.
  - However, not enough to value honesty, must also have the practical judgment/phronesis to know how to weigh honesty and pursue it consistently with other virtues, like compassion.
  - Eschews the notion of specific rules as source of ethical guidance, but that the virtues of character will lead to ethical action.
- Social psychology - circumstances
  - Situations and circumstances, not character, that dictates how people behave.
  - Overwhelming empirical evidence - it is the pressures, culture and temptations of legal practice that will dictate the ethics of practice. Assessments of character are simply labels applied based on random observation of acts - they have no predictive force.
- But to some extent, it is acknowledged that trends of past behaviour can be indicators of future behaviour. Given consistency in human behaviour, if a lawyer has misappropriated the trust fund, it is likely they will do it again. Indications of honesty in spousal relationship won't negate that.
- Virtue ethics acknowledges situational differences and that this will always be a judgment at the time - simply argues that the judgment will be based on a weighing up of different virtues (phronesis). Virtues motivate ethical decisions, but it is through judgment of circumstances that decisions are made.
  - Electric shock example from Milgram's experiment: electric shocking doesn't mean the person had no virtue of compassion, but that the virtues of respect for authority, trust, honouring commitments and appreciating knowledge were more important. That's why the decision changed down both ends of the scale when the facts changed; to reflect the different virtues in each situation.

Commented [2]: Ironic given the state of the legal profession as it is. Perhaps more of the focus should be on law firms creating positive working environments rather than gate keeping the profession in an effort to make lawyers feel "lucky" to be part of it.

- ➔ “Good character” relies on a traditional virtue-based understanding of character - global character traits that will determine conduct with cross-situational consistency. But it is the character - as possessing virtues and the capacity to exercise them in legal practice - that is primarily relevant. The definition is currently too general. Orients inquiry away from specific concerns with the ability to practise law ethically towards a general analysis of whether the applicant is virtuous.

Deborah L Rhode “Virtue and the Law: the Good Moral Character Requirement Occupational Licensing, Bar Regulation, and Immigration Proceedings”

- ➔ In an era of mass incarceration and widespread racial bias… such character exclusions should be a matter of public concern. Racial and ethnic minorities are disproportionately likely o have run-ins w criminal law, pay a special price.
- ➔ Experiment: Columbia study
  - ◆ Participants filling out questionnaire when they heard a loud crash and a woman’s cries of pain next door. 70% offered to help when working alone, but when a confederate was there and ignored the cries, only 7% intervened
- ➔ Mainstream view: situational factors and character traits are intricately related. By probing for reasons why an individual might cheat in some instances but not others, can often find a reliable pattern of conduct, but you need a considerable amount of info about past actions before you can make these assumptions safely.
- ➔ Character changes are not static. Character can be cultivated and can change over time.
- ➔ Two purposes of character inquiry: predictive use; symbolic - aspirational norms and serves reputational interests.

Class notes

- *Why is a certain character trait good? Is it always good? What makes it good aside from being socially approved?*
  - ***When you start to break this down, does this go back to utilitarian/deontological arguments?***

Virtue ethics is based on the idea that conduct flows from character. But social psychology research says it is situations and circumstances not character, which dictate how people behave (eg, how much money you have will depend on whether you give money to a homeless person, whether you are in a rush will impact whether you help someone pick up the books they have dropped).

- *So importance of culture within law firms and the legal profession?*
- *Bad apple vs problems with the barrel*

Guest lecture with Goddard J - Rules of ethics a ‘quid pro quo’ for opportunity to practise a lucrative profession reserved for lawyers?

Case name	***Summary***	***Thoughts***

Johnston	Clients were longstanding family friends of J. Gave two advances to him to purchase shares and property, as per advice from solicitor. Neither purchase was completed. The clients were not advised to obtain independent advice; did not provide proper advice on risks; there was no documentation; a 'misleading/rosy' picture of the investments was presented; a conflict between clients and between clients and the solicitor were not disclosed; and there was a lack of candour to the Standards Committee. Johnston had "broken almost every rule one could imagine in representing a client wishing to make a financial investment". In order to strike off from roll, uses considerations from *Dorbu*: ● Risk of reoffending ● Need to maintain reputation and standards of the legal profession ● Whether a lesser penalty would suffice Further factors discussed in *Hart* included: ● Nature and gravity of the charges - significant factor because point to fitness to remain in practice. ● Proven or admitted dishonesty charges are especially persuasive ● History of similar behaviour/disciplinary history, or whether this is a stand-alone offence? Goes towards likelihood of repetition. Result: struck off. This was repeated and serious offending where the solicitor put his own interests before the client's. Nothing less than striking off would be sufficient.	
L v Canterbury DLS	L was guilty of 92 charges of negligence and incompetence. Disciplinary Tribunal ordered that L could not act as a solicitor on his own account (ie, required supervision) because this was to such a degree/frequency that it brought the profession into disrepute. Applied for revocation of that order. ● Considered L's personal characteristics relating to the disqualification. There was an element of dishonesty about them (ie, in one he put incorrect names on a document knowing them to be incorrect), and a lack of frankness re: his own shortcomings. He still lacked insight and was incapable of recognising his flaws. ● The decision was not penal: it was made in order to protect the reputation and standing of the legal profession.	
Poananga	Forged client's signatures for legal aid forms and witnessed statutory declarations that she knew to be false because she forged the signatures on it. Often had consent from applicants to do so.	

	Used law from Daniels: ● Striking off is a last resort penalty. The lease restrictive penalty needs to be applied: if suspension will suffice to properly reflect the seriousness of the offending, then that is the sanction that ought to be imposed ● Members of the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly serious breaches of expected standards by members of the profession Penalty should be directed at one of two purposes: to prevent the offending/behaviour; the other is to maintain the reputation of the lawyer's profession. Struck off.	
Pou	Pou used his supervisor's account (while working as an RA) for personal printing and looked at some adult websites. University found out about the printing and fined him $300. When Pou applied for certificate from Law Society, they talked to University and found out about this misconduct. Pou had not declared this when applying to the Bar (ie, in the section where you declare convictions and "anything else the Law Society should know about"). President of Law Society interviewed Pou: ● Found Pou evasive and difficult to extract an answer from and that his explanation was unsatisfactory (ie, said both that incident slipped his mind *and* that he didn't think it was relevant because he thought the statutory declaration only applied to convictions). ● Pou said his recollection of the meeting was that it went well, and that at the end of the meeting the President had said "thank you for the meeting, thanks for your openness". ○ President doesn't recall this but is not disputing it. Law Society did not give certificate. Conduct raised serious doubt as to whether he could be trusted to perform his duty when he is unlikely to be subject to scrutiny and the convictions arose when he was not under scrutiny. Legal profession is an honourable and trusted profession, membership is a privilege. Dishonesty including failure to disclose previous conviction is something which cannot be countenanced. On application to HC, ● decided that it was "troubling" that he didn't disclose when answered the general question on the form, and ● he was remiss in allowing other pressures [of admission] to distract him from his obligation of candour. ● The smallness of the amount not relevant/helpful ● But: his subsequent good performance [Waitaingi	Context: Pou = young Māori man; President = Pakeha, older. A lot of the "evasive" body language, such as shifting and not making eye contact, could have been due to cultural misunderstandings? *Problem with general terms like 'fit and proper person' - tendency to fill this in with own subjective interpretations of what a lawyer might look like. Scope for bias.* *as a lawyer you do things that are unsupervised, you do make decisions you do deal with money and you have privilege that protects your communication which further limits what people can look at when scrutiinishing your conduct because of privilege*

	Tribunal, law firm] means HC thinks he redeemed himself. ● Declared to be of good character.	
Owen	In his 20s, Owen obtained a long list of convictions (arson, burglary, cultivating cannabis, driving while disqualified). In his 30s, put this behind him and studied law. No longer drinks or does drugs, works as an employment advocate, and has good references. ● Central question: would admission undermine the collective reputation of the legal system? ● When viewed alongside positive achievements (LLB, socially responsible work, persevered even when difficult to gain employment) and complete 180, the convictions were of historical significance only ● Satisfied he was of reformed character - Dean of Law's evidence quite important ● More difficult question - **would members of the public share that view?** Decided they would	Allowing lawyer to be admitted is not just a grant of that status but to a degree represents its assurance to the profession and the community at large that persons who are admitted are fit and proper to assume the responsibilities and privileges that go with being a lawyer. So court has to pay careful attention he expectations of the community at large and of the legal profession as to the standards assumed to be possessed by a person being a lawyer.