



## Where are the rules?

Variety of places but predominantly:

### Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

**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.

**4.1** 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.

**5.1** A solicitor **must not engage in conduct**, in the course of practice or otherwise, which demonstrates **that the solicitor is not a fit and proper person to practise law**, or which is likely to a material degree to:

**5.1.1** be prejudicial to, or diminish the **public confidence** in, the administration of justice; or

**5.1.2** bring the profession into **disrepute**.

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So...

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 [lawyer] knows he or she should do; **ethics are what the [lawyers] 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 skilful evasion**.

Sir Gerard Brennan 'Ethics and the Advocate' (speech delivered at Bar Association of Queensland, Continuing Legal Education Lectures, Brisbane 3 May 1992)

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## Ethics and the role of lawyers

- 'Champion of integrity'
- 'High performance with high integrity'
- 'Ethical corporate culture' (model, promoter, resource)
- 'Reputational risk'
- Managing complaints, whistleblowers and regulators
- Detection and deterrence of wrongdoing

## Context: it's not easy

- Overly technical view of the lawyer
- Complexity and uncertainty (geographic spread, complex business lines)
- The need for the time-poor to focus: focus might be too broad or narrow!
- Whether there is a 'loss frame' and who is in it
- Anxiety about consequences of bad publicity (regulatory, reputational and personal) and human psychology

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## Context: it's not easy

- Urgent need to mitigate on-going risks
- Risk and reward asymmetry
- Loyalty to an instructor and need for buy-in from senior management
- The need to partner with the business and avoid defensive climate.
- These are sometimes our friends
- ... but we are good at this...

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## Enron

- Intimate connection between Enron and legal advisor
- Legal advisor had advised on relevant transactional documents
- Malpractice implications
- Lack of independence



## Hewlett-Packard



## General Motors ignition switch

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**Recall storm engulfs GM**  
Federal inquiries, updated filing broaden scope of switch crisis

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One second before a drunken driver crossed the center line of a rural Pennsylvania highway and slammed into Esther Matthews' 2005 Chevrolet Cobalt, black-box data shows, her car's engine turned off.

Matthews and her 13-year-old granddaughter in the front passenger seat died at the scene. Despite the severity of the April 2009 crash, the Cobalt's airbags never deployed, and investigators hired by the National Highway Traffic Safety Administration in the following days couldn't figure out why.

Lawyers told the family it wasn't worth the time or effort to pursue a case against General Motors because the assembler was weeks away from bankruptcy.

A drunk driver hit her head-on, and that's what we went with," Matthews' daughter-in-law, Leanne Matthews, told *Automotive News*. "We just dropped it."

Matthews and seventh-grader Ellott are two of the 12 fatalities that GM linked to a defective ignition switch.

After complaints and crashes, GM makes a change

The switch from a 2005 Chevrolet Cobalt, left, used a detent plunger and spring that were about 1.6 mm shorter than those used in Cobalts that are not being recalled, right. The longer firm hired by the lawyer for the family of a woman who died in a 2010 crash.

2005 model year  
← 5.9 mm →

New service replacement part

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The nation's largest dealer groups, both public and private, are bulking up — adding stores and grabbing a larger share of U.S. car and light-truck sales.

**Top group add store and sales**

■ The complete list of top groups attached to **PAGE 17**  
■ What if overseas sales we included? **PAGE 8**

**TOP 125 DEALERSHIP GROUPS**

**Automotive**

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## General Motors ignition switch

Two photographs are shown side-by-side. The left photograph shows a woman standing next to a silver car with the driver-side door open. The right photograph shows a woman holding a dark-colored box with white text that reads "VALENT COUNTY DEPT'S OFFICE CONTACT" and "21537-6222". A date stamp "FEB 6:" is visible in the bottom right corner of the right photograph.

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## Volkswagen emissions



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## Ethical advisors.....

Don't:

- Rely on codes of conduct
- Overlook small wrongs
- Dismiss whistleblowers

Do:

- Ask for help and talk it through
- Colleagues
- NSW Law Society Ethics Assistance Line (02) 9926 0114
- Think about potential biases/blindness

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## Motivated blindness



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## Motivated blindness



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## Indirect Blindness



## Indirect blindness

Pill – cost large pharma Company X \$2.50 to make; sold for \$3

- A: Large pharma Company X raised price to \$9/pill
- B: Large pharma Company X sold to small pharma Company Y which, to recoup costs, raised price for \$15/pill



## Outcome Blindness



## Overvaluing Outcomes



## Group-think



**Groupthink** is a phenomenon where people tend to conform with group decisions to avoid feeling outcast, leading to errors in decision making.

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## Loss frame



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## Reward candour



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## Personal do's and don'ts

- Be aware of hidden ethical traps
- Care with your own potential biases
- Recognises a 'loss frame' and make sure you are reporting to someone outside it
- Care with information-gathering – over reliance on others and spotting potential bias in others, needs to be inquisitive not contrarian
- Reward candour



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## Personal do's and don'ts

- What is our role vis-a-vis our clients' objectives and the importance of achieving them ethically?
- Are close calls being scrutinised without blame? What's our culture around reporting incidents/mistakes?
- Do we think enough about reputational issues as well as the law?
- Do we ask our external advisors to think about reputational issues as well as the law?
- Are our lawyers getting their ethics training (YES!)?

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