

Artificial Intelligence: Ethical & Legal Issues

Likely ethical and legal issues
confronting corporate lawyers
in using AI in practising law

Topics:

- Professional obligations
- Regulatory guidance
- Risks of generative AI
- Governance strategies

The Rise of AI in Legal Work

- Common uses:
 - Contract review
 - Legal research
 - Drafting
 - Litigation analytics
 - Compliance monitoring

Why AI Matters for In-House Lawyers

Benefits:

- Efficiency gains
- Faster contract review
- Automated compliance
- Cost reductions

But it also raises legal and ethical risks.

Professional Duties Still Apply

Lawyers (including in-house counsel) remain bound by:

- *Legal Profession Uniform Law 2014*
- *Australian Solicitors' Conduct Rules 2015*

Key duties:

- Competence
- Confidentiality
- Independence

Key Risk Categories

- Major risks:
 - Confidentiality breaches
 - Loss of privilege
 - AI hallucinations
 - Copyright risks
 - Privacy issues
 - Bias
 - Accountability and supervision

Confidentiality Risks

- Entering sensitive information into AI systems may:
 - Disclose confidential information
 - Risk data leakage
 - Breach professional duties

Legal
Professional
Privilege

Privilege depends on confidentiality.

Risks:

- Disclosure to AI providers
- Data storage by third parties
- Model training using inputs

AI
Hallucinations

Generative AI may produce convincing but false legal information.

All outputs must be independently verified.

Case Study
– Fake
Citations

Lawyers have submitted AI-generated cases that did not exist.

Courts have sanctioned lawyers for failing to verify authorities.

Australian
Incidents

Recent incidents in Australia involved lawyers citing AI-generated cases.

Courts emphasised that lawyers remain responsible for all submissions and other documents submitted to courts.

Copyright and IP Issues

- Potential issues:
 - Training on copyrighted material
 - Ownership of AI outputs
 - Reproduction of copyrighted text

Privacy Risks

- AI systems may process personal information.
- Risks include:
 - Cross-border data transfers
 - Data retention issues
 - Privacy breaches

Australian Regulatory Guidance

- Regulators recommend:
 - Maintain confidentiality
 - Verify AI outputs
 - Supervise AI use
 - Implement internal policies

Governance for In-House Legal Teams

- Recommended safeguards:
 - AI usage policy
 - Data protection rules
 - Verification protocols
 - Vendor due diligence

Conclusions

AI will become integral to practising law in whatever capacity.

Key observation:

- AI can greatly assist legal research and analyses — but it cannot (currently) replace human legal judgment.

Courts, inquiries & investigations: ethical issues

Ethical issues facing inhouse lawyers dealing with courts, investigations and statutory inquiries

Key observation:

- Observe legal requirements but be cognisant of ethical concerns
- Rules may apply to conduct in the course of legal practice and otherwise
- Fundamental duties should guide you

Professional duties and obligations

Inhouse lawyers are bound by:

- *Legal Profession Uniform Law* (or State equivalent)
- *Australian Solicitors' Conduct Rules 2015*

Key duties

- The fundamental duties
- Independence
- Duties to courts/regulators/inquiries

Conduct in the course of practice and outside it

Unsatisfactory professional conduct

Section 296 of the *Legal Profession Uniform Law*:

For the purposes of this Law, **unsatisfactory professional conduct includes** conduct of a lawyer **occurring in connection with the practice of law** that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

Conduct in the
course of
practice and
outside it

Professional misconduct

Section 297(1) of the *Legal Profession Uniform Law*:

For the purposes of this Law, **professional misconduct includes**—

- (a) **unsatisfactory professional conduct** of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
- (b) conduct of a lawyer **whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law** that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.

What is a
“court” under
the Conduct
Rules?

Definition of “court”

court means—

- (a) any body described as such,
- (b) any tribunal exercising judicial, or quasi-judicial, functions,
- (c) a professional disciplinary tribunal,
- (d) an industrial tribunal,
- (e) an administrative tribunal,
- (f) **an investigation or inquiry established or conducted under statute or by a Parliament,**
- (g) **a Royal Commission,**
- (h) an arbitration or mediation or any other form of dispute resolution.

Conduct
Rules:
fundamental
duties

The paramount duty

Rule 3

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.

Conduct
Rules:
fundamental
duties

Other fundamental ethical duties

Rule 4

- 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.

Conduct
Rules:
fundamental
duties

Standard of conduct

Rule 5

A solicitor must not engage in conduct, in the course of legal practice **or otherwise**, which—

- 5.1.1 demonstrates that the solicitor is not a fit and proper person to practise law, or
- 5.1.2 is likely to a material degree to—
 - (i) be prejudicial to, or diminish the public confidence in, the administration of justice, or
 - (ii) bring the profession into **disrepute**.

Judicial
observations:
fundamental
duties

Duty to the court

Brett v The Solicitors Regulation Authority [2014] EWHC 2974 (Admin), [110] per Lord Thomas

Every lawyer must be alive to the fact that circumstances can arise during the course of any lawyer's professional practice when matters come to [their] knowledge (or are obvious to [them]) which may have the effect of making [their] duty to the court [their] paramount duty and to act in the interests of justice.

In many cases it will be clear what course the lawyer must take, either through the way in which the case is presented or **by withdrawing from acting** for the client. In others it may be more difficult. The lawyer may not be absolutely sure that [their] actions will discharge [their] duty to the court. In such a case, ... a lawyer would be ill-advised if they] did not put the matters before a person more senior ... **or before independent counsel, making full and complete disclosure** to such a person of all the relevant circumstances.

Judicial
observations:
fundamental
duties

Personal responsibility

Gray v Solicitors Regulation Authority Ltd [2022]
EWHC 624 (Admin), [144] per Justice Linden

... the question is always as to the honesty of the solicitor who made the decision to act in the way that they did. The fact that senior counsel or a senior colleague may have approved a given step is not an all-purpose insurance policy: it is merely a potentially relevant factor. ... the weight which it should or will be given will depend on the circumstances, including how well informed the second opinion was. It may be a weighty factor in a borderline case, but it will not be in a case where the decision of the solicitor was clearly wrong. ... **all solicitors would accept that they are personally responsible for the probity of their own conduct.**

Judicial
observations:
fundamental
duties

Integrity

Wingate v The Solicitors Regulation Authority
[2018] EWCA Civ 366, [95]-[101]

As a matter of common parlance and as a matter of law, integrity is a broader concept than honesty. ...

In professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. ...

Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. ... **a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse.**

The duty to act with integrity applies not only to what professional persons say, but also to what they do.

Conduct
Rules:
independence

Independence—avoidance of
personal bias

Rule 17

17.1 A solicitor representing a client in a matter that is **before the court** must not act as **the mere mouthpiece** of the client or of the instructing solicitor (if any) and must exercise the forensic judgments called for during the case **independently**, after the appropriate consideration of the client's and the instructing solicitor's instructions where applicable.

Judicial
observations:
independence

Independence & impartiality

Bell Lawyers Pty Ltd v Pentelow [2019] HCA 29; 269 CLR 333 at [19] citing *McIlraith v Ilkin (Costs)* [2007] NSWSC 1052 at [25]

Where a solicitor represents a litigant, **the court is entitled to expect the litigant to be impartially and independently advised by an officer of the court.**

Indeed, where the court concludes that a solicitor is not in a position to give impartial and independent advice to a party, because of the solicitor's own interest in the outcome, the court has restrained the solicitor from continuing to act ...

Giannarelli v Wraith (1988) 165 CLR 543; [1988] HCA 52 at 556-557 (Mason CJ), regarding counsel being the mere mouthpiece or messenger of the client:

The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary ... the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only on the client's success, but also to the speedy and efficient administration of justice ...

Conduct
Rules: duty to
the court

Duty to the court

Rule 19

- 19.1 A solicitor must not deceive or knowingly or recklessly mislead the court.
- 19.2 A solicitor must take all necessary steps to correct any misleading statement made **by the solicitor** to a court as soon as possible after the solicitor becomes aware that the statement was misleading.
- 19.3 A solicitor will not have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by the opponent **or any other person**.
- 19.11 A solicitor must inform the court of any misapprehension by the court as to the effect of an order which the court is making, as soon as the solicitor becomes aware of the misapprehension.

Judicial
observations:
duty to the
court

Duty to the court – not to mislead

Brett v The Solicitors Regulation Authority [2014] EWHC 2974 (Admin), [111] per Lord Thomas

- ... misleading the court is regarded by the court and must be regarded by any disciplinary tribunal as one of the most serious offences that an advocate or litigator can commit. It is not simply a breach of a rule of a game, but a fundamental affront to **a rule designed to safeguard the fairness and justice of proceedings**.
- ... our system for the administration of justice relies ... heavily upon the integrity of the profession and the full discharge of the profession's duties ... the privilege of conducting litigation or appearing in court is granted on terms that **the rules are observed not merely in their letter but in their spirit**.

Judicial observations: duty to the court

Duty to the court – misleading by omission, taking independent advice

Brett v The Solicitors Regulation Authority [2014] EWHC 2974 (Admin), [112]-[113]

Where an advocate or other representative or a litigator puts before the court matters **which [they know] not to be true or by omission leads the court to believe something [they know] not to be true**, then as an advocate knows of these duties, the inference will be inevitable that [they have] deceived the court, acted dishonestly and is not fit to be a member of any part of the legal profession.

As conduct that is dishonest, such as misleading the court with such knowledge will inevitably be, is so serious, it is of the utmost importance that in difficult circumstances which can confront any advocate or litigator, that advocate or litigator has at the forefront of [their] mind [their] duty to the court, the necessity to avoid breach of that duty and, if [they have] any doubt as to how to discharge that duty, **by taking independent advice**.

Extended application of duties

Duties to investigations, inquiries & commissions

Extension of rule 19 duties to non-court or tribunal contexts: examples

- Duty to act independently and impartially
- Duty not to deceive
- Duty not to knowingly or recklessly mislead

e.g. pressure from non-legal colleagues more senior management

- to emphasise matters they perceive to be relevant or in your employer's interests
- not to disclose matters/documents

Have regard to fundamental duties: integrity, administration of justice, best interests, personal responsibility

Extended application of duties

Duties to investigations, inquiries & commissions

Extension of rule 19 duties to non-court or tribunal contexts: examples

- Duty to **take all necessary steps** to correct misleading statements by **you**
- Duty to correct misleading statements **by others**?
- Duty to correct misleading statements **by your client/employer**?

e.g. you come into possession of information which makes you suspect incorrect/misleading information has been supplied to a regulator/inquiry by your client/employer, from view regulator/inquiry might be misled

→ Importance of internal policies/guidance

Have regard to fundamental duties: integrity, administration of justice, best interests, personal responsibility

Extended application of duties

Duties to investigations, inquiries & commissions

Extension of rule 19 duties to non-court or tribunal contexts: examples

- Duty to inform regulator/inquiry as to its misapprehension of the legal effect of a statutory direction/notice?

e.g. it becomes apparent the information or documents a regulator/inquiry wishes to obtain are not caught by the exercise of a coercive power to issue statutory notice;

- regulator/inquiry might be misled without that information, or
- absence of information may cause regulator/inquiry not to investigate a damaging matter which it might have otherwise done

→ "Traditional" approaches

→ Obtain independent advice/divergence of views

→ Duty to advise client on what courses are open, having regard to its best interests