

2025

FAMILY LAW CPD SUPER DAY

SESSION 3:

'FAMILY LAW ETHICS'



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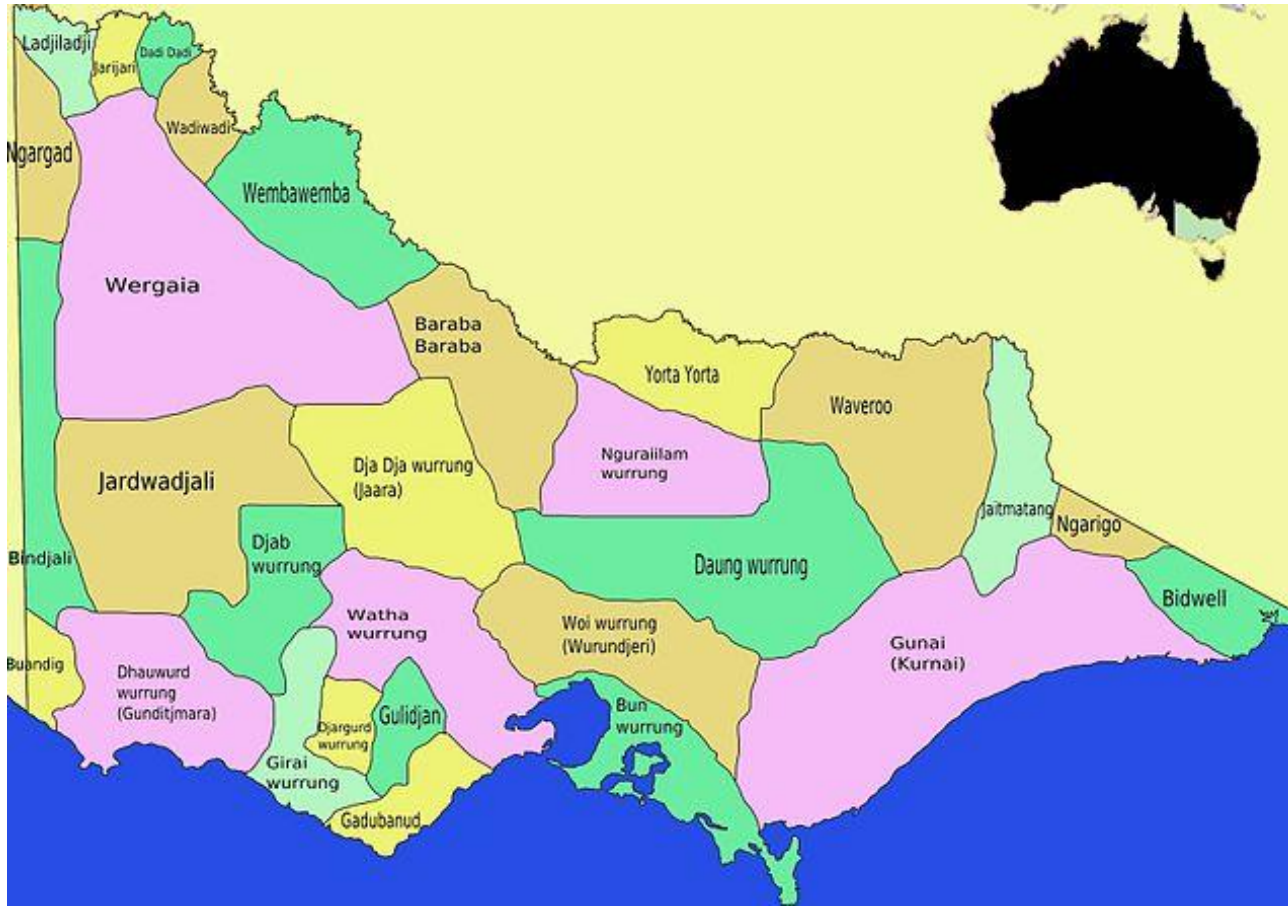
Ethics & Family Law

Family Law CPD Super Day

RACV City Club

27 March 2025

Presented by Trevor McKenna & Mary Anne Ryan



The traditional indigenous name for Melbourne is **Naarm** or **Narm**, which comes from the **Woiwurrung** language of the **Wurundjeri people**, part of the **Kulin Nation**.

Sources of legal ethical obligations

In addition to the **Legal Profession Uniform Law Application Act 2014 (Vic)** the following applies:

Solicitors

- *Legal Profession Uniform General Rules 2015*
- *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*
- *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015*
- *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015*

Barristers

- *Legal Profession Uniform Conduct (Barristers) Rules 2015*
- *Legal Profession Uniform CPD (Barristers) Rules 2015*

Other sources relevant to our obligations

- *Family Law Act 1975 (Cth)*
- *Federal Circuit and Family Court of Australia Act 2021*
- *FCFCA (Family Law) Rules 2021*
- FCFCA Family Law **C**entral **P**ractice **D**irection

Ethics

Professional Responsibility

Honesty

But what about Our Wellbeing?

Wellbeing

Compare our conduct rules with that of other “helping professionals” such as psychologists and general practitioners.

See for example:

- Australia Psychological Society Code clause **B.1.2(e)** that defines professional competence to include *“ensuring that their emotional, mental, and physical state does not impair their ability to provide a competent ... service”*
- AMA Code of Ethics at clause **3.1.4** states professional conduct includes *“tak[ing] responsibility for your own health and well-being including having your own GP”*

Wellbeing

WHO definition of **mental health**:

“Mental health is a state of mental well-being that enables people to cope with the stresses of life, realize their abilities, learn well and work well, and contribute to their community. It is an integral component of health and well-being that underpins our individual and collective abilities to make decisions, build relationships and shape the world we live in ...”

Wellbeing

Some tips for a long, safe and enjoyable legal career

1. Look after your wellbeing
2. Connect with others
3. Grow professionally
4. Give back to others
5. Work life balance
6. Ask for help

Sources: Victorian Legal Services Board + Commissioner Lawyer Wellbeing Hub ([View here](#)), LIV Wellbeing Resources ([view](#)) and LCA Mental Health and Wellbeing in the Legal Profession ([view](#))

Purpose and effect of the Rules

r2 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

- 2.1 The purpose of these Rules is to assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and these Rules.
- 2.2 In considering whether a solicitor has engaged in **unsatisfactory professional conduct** or **professional misconduct**, the Rules apply in addition to the common law.
- 2.3 A breach of these Rules is capable of constituting unsatisfactory professional conduct or professional misconduct, and may give rise to disciplinary action by the relevant regulatory authority.

Unsatisfactory Professional Conduct

“**Unsatisfactory Professional Conduct**” is defined by **s.296** of the Act to include:

- *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.*

Professional Misconduct

“**Professional misconduct**” is defined by **s.297** of the Act to include:

- *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***
- *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.*

Case Scenario 1: Putting Instructions

- In principle agreement reached
- Husband's lawyer proposes to wife's lawyer *conditional terms* for their property settlement.
- **Question:** Does it matter that the lawyer is simply acting on his client's instructions.
- **Question:** Are we bound by our client's instructions?
- **Relevant rules:**
 - **95 & 96** of the *Family Law Act* 1975. See also ss43(ca).
 - Rule **5.1.2** – Standard of Conduct – dishonest or disreputable conduct
 - Rule **34** – Dealing with other persons

Characterisation of conduct

Cases:

- *Legal Profession Board of Tasmania v Williams* [2022] TASSC 46
- *Legal Profession Board of Tasmania v Williams* [2023] TASFC 1
- *Victorian Legal Services Commissioner v Raniga (Corrected) (Legal Practice)* [2024] VCAT 1195

Held

- Complainants / alleged FV victims = vulnerable: *Williams (PJ)* [18]; *Raniga* [18] – [19]
- Goes beyond legitimate advocacy: *Raniga* [20] & prejudicial *Raniga* [17]
- Doesn't matter if acting on client instructions: *Raniga* [21]; *Williams (PJ)* [7]
- Prejudicial to the administration of justice!

Conclusion

In both instances, a finding of Professional Misconduct was made.

As Estcourt J said in his Honour's judgment on appeal in *Williams* at [1]:

"I do not have the slightest doubt that it is professional misconduct for a lawyer to offer to settle a client's dispute with another person on the condition that the other person withdraw a criminal complaint that person has made against the client and which is pending before a court."

AI: Can we delegate to ?

*“Qualified lawyers are admitted to practice law and are ultimately regulated by the Supreme Court. **They remain responsible in relation to how they practice, and that responsibility is not delegable to a computer program, however sophisticated** at the deepest philosophical level, **the rule of law depends on faith in the system with responsible practitioners exercising care, skill and judgment and abiding by their ethical obligations to the Court and the administration of justice.**”*

Source: “Truth Decay and its implications for the judiciary: an Australian perspective,” by The Hon. A S Bell Chief Justice of New South Wales, 2024, page 33, para 89 ([view here](#))

Scenario 2: AI & the time poor lawyer

- Time poor practitioner and the stress of his own health issues.
- Decided to use AI as promoted by reputable legal platform.
- Made use of ChatGPT, inserted some words and the site prepared a summary of cases for him.
- The summary read well, so the practitioner incorporated the authorities and references into his submissions.
- Didn't take the time to check his references.

Scenario 2: AI Hallucinations

The other party filed their outline of submissions with the Court and noted at [21] that:

*The applicant's submissions ... refer to "Murray v Luton [2001] FCA 1245", "Mackinlay v MIMA [2002] FCA 953", "Bavinton v MIMA [2017] FCA 712", "Gonzalez v MIBP [2018] FCA 211", "Seng v MIAC [2013] FCA 1279", "Kahawita v MIEA [1993] FCA 870", "MIAC v Thiyagarajah [2016] FCA 19", "Heath v MIMA [2001] FCA 700", "Mitsubishi Motors Australia Ltd v AAT [2004] FCA 1241", "MIMA v Ameer [2004] FCA 276", "Woods v MIMA [2001] FCA 294", "MIAC v Wu [2015] FCA 632", "Drummond v MIMA [2008] FCA 1774", "Walters v MIBP [2016] FCA 953", "Lao v MIMA [2002] FCA 1234", "Alfaro v MIBP [2016] FCA 1156" and "Wai v MIBP [2016] FCA 1157", **but none of these decisions exist. They also** in paras 1.2, 2.2, 3.1, 4.1, 5.1, 5.2, 6.1 and 6.2 **provide alleged quotes from the Tribunal's decision which also do not exist.***

Scenario 3: Communications with Court

In response to the practitioner emails the Court without including the Applicant and said (at [5]):

“I am forwarding herewith an amended submission for the Applicant ... I acknowledge the errors identified by the respondent ... These errors were unintentional, and I deeply regret them Despite these mistakes, they do not affect the substantive issues raised ... I do apologise for submitting this late amended submissions.

Your assistance in this matter is very much appreciated”

The Court accepted the practitioner did not intend to exclude his opponent from the email to the Court (at [25]).

Scenario 2 & 3: Conclusion

Valu v Minister for Immigration and Multicultural Affairs (No 2) [2025] FedCFamC2G 95

- Submissions falls short of standard of competence and diligence that the client was entitled to expect (at [18])
- Failed to meet practitioner's duty to the Court including to ensure the Court is not deceived or mislead, even if unintentionally: **r 19.1** of the Conduct Rules (at **[18]**)
- Email to Court contrary to **r 22.5** of the Conduct Rules not to communicate with the Court about matters of substance in the absence of the opponent (at **[19]**).
- A referral was made to the OLSC New South Wales (at **[35] – [38]**)

Scenario 4: AI Platforms in Family Law

Handa & Mallick [2024] FedCFamC2F 957

- The Husband's solicitor tendered a list of cases that was prepared using a legal practice management platform that utilizes AI.
- Neither the judge nor chambers were able to locate the cases listed.
- When asked to do so, Solicitor was unable to produce copies of cases.

Dayal [2024] FedCFamC2F 1166 at [19]

“The question for me is whether I should make a referral to the Victorian Legal Services Board and Commissioner, being the independent statutory authority and officer in Victoria whose role and functions include ensuring the effective regulation of the legal profession and the maintenance of high ethical and professional standards”

Scenario 4: Conclusion

- Technology is an integral part of efficient modern legal practice ...
- Whilst the use of AI tools offer opportunities for legal practitioners, it also comes with significant risks (at [10])
- Guidelines have been issued by each of the Supreme Court of Victoria and County Court of Victoria (at [14] – [15])
- Those guidelines reflect the responsible use of AI by practitioners in litigation by reference to the duties of legal practitioners generally (at [16])
- AI and large language models create unreasoned output and they are not a legal research tool (at [15])
- **Outcome** (at [19] – [21]): Referral made as in the public interest – not the role to determine if there should be any further investigation or action taken.

FYI – Other AI Cases

- ***DPP v Khan* [2024] ACTSC 19** – From [39] – [42]: Letter of referee that appeared to have been crafted using a large language model ([view here](#)) – issue for Court was the weight to be attached to the document.
- ***Finch v The Heat Group Pty Ltd* [2024] FedCFamC2G 161** – From [39] – [42]: Use of AI by self-represented litigant ([view here](#)). The 24 cases produced were fictional.
- ***MATA v. AVIANCA INC* (2023) 22-cv-1461 (PKC)** ([download here](#)) referred to by Judge A Humphries in *Dayal* [2024] FedCFamC2F 1166

AI Implications & Considerations

- It is but one of many tools lawyers can utilise
- Exercise caution
- Don't rely solely on it – use your own smarts!
- The need to verify
- If in doubt – ask for assistance
- Disclosure of confidential information
- From a **professional standpoint**: Reputation among your colleagues and the bench!

Scenario 5: s102NA & General Non Compliance



- An omnishambles of a case (at [40])
- Unacceptable risk case.
- Mother only spending supervised time
- Order made under s102NA
- 2 months pre trial – mother's solicitor ceases acting.
- Mother's soli sends letter stating she needed to make another application under 102NA due to XXN ban
- On the Friday eve of trial mother applies to vacate 4 day trial listing.

Scenario 5: *Gifford & Savea (No 2)* [2024] FedCFamC1F 435

Justice Riethmuller found:

- The mother is not well educated, obtaining information about the scheme was not simple, so it would be hard to be critical of her.
- Mother's former lawyer could have done more to assist.
- Father (and ICL) failed to comply with trial directions.
- Undefended hearing not possible. Striking the matter out would not be appropriate. No alternative but to adjourn the trial

Gifford & Savea (No 2) [2024] FedCFamC1F 435

Justice Riethmuller said at [33]: The **conduct of the practitioners** and parties in this case is a matter of great concern, in failing to take any proactive steps, such as:

- (a) the mother's solicitors failing to provide her with the relevant forms to apply under the funding scheme or, at the very least, the phone number or contact details of who she must contact under the scheme; and
- (b) the father's solicitor's failure to file his material or seek a variation of the directions which has resulted in the case being unable to proceed and has wasted four hearing days, when there are a large number of cases where all of the families involved in those cases are anxiously waiting dates to come before the Court.

Scenario 5 Conclusion: s67 FCFCOA Act Frustrated

- Overarching purposes in section 67(1) and (2) FCFCOA Act frustrated (TM Note – see also s95 & 96 of Family Law Act)
- The issue of costs was raised with the Court noting solicitors have failed to fulfil their obligations under s.68(2) of the FCFCOA Act
- Justice Riethmuller considered requiring the mother's former lawyers to show cause why they should not pay costs, and restrain Father's solicitors from charging fees.
- **Outcome:** On this occasion the Court declined to do so.

Venter (No 6) [2024] FedCFamC1F 94 & Venter (No 2) [2024] FedCFamC1F 862

- Complex litigation involving bankrupt husband and wife and a small payday lending business.
- Series of declarations of trust and “side agreements” that wife contends she and the husband are beneficial owners and agreements are shams.
- **Issues:**
 - **Disclosure:** 96,000 documents disclosed by wife on the eve of the listed trial.
 - **Duty of solicitor** in the context of disclosure obligations (No 6 at [43] - [51])
 - The issue of **Privilege:** (No 6 at [157]) and see No 2 at [247])
 - Adjournment
- **Flow on effects** (No 6 at [60] – [69])
 - Application to restrain wife from instructing current and former solicitors and counsel
 - 2 law firms and 6 barristers restrained

Venter (No 6) & Venter (No 2): Privilege

Venter (No 6) at [157] Lawyers should have immediately

- “(a) informed the solicitors acting on behalf of the party holding the privilege;
- (b) provided the documents to the solicitors acting on behalf of the party holding the privilege requesting whether privilege was claimed;
- (c) advised the client to destroy the documents in their possession and ensure all copies were destroyed;
- (d) ensured that any practitioner who had seen the document ceased acting; and
- (e) set up an information barrier and undertakings to ensure that the confidential information is not provided to the practitioners continuing to act.”

Venter (No 6) & Venter (No 2) on Privilege

Venter (No 2) at [247]

If a document on its face appears to be protected by legal professional privilege, then it should not be read, it should be returned to the owner of the document immediately, all copies destroyed, and an enquiry should be made of other side if the document is relevant to an issue in the proceedings and if so whether privilege is claimed or waived. When claiming privilege, it is imperative that the description of the document provides sufficient detail to identify that the claim has a proper basis.

Venter (No 2) [2024] FedCFamC1F 862

- A finding the conduct was “at times improper and unreasonable” (at [213] & [244]).
- The conduct caused significant costs to be incurred unnecessarily and caused delay in the proceedings and a waste of Court resources (at [213]).
- Costs awarded against wife’s lawyers and counsel jointly and severally
- \$1.7M costs to be paid (at [234] – [241])
- Referral made in respect of the practitioners and their conduct (at [249] – [250]).

Conclusion

Venter (No 2) [2024] FedCFamC1F 862 at [246]

The administration of our justice system depends upon the integrity of legal practitioners and an understanding of basic principles in the litigation process. Lawyers have obligations to the courts, to their clients and to their opponents, to ensure that their clients understand and comply with their obligations to disclose information and documentation that is relevant to an issue in the proceedings in a timely manner. If the client rejects advice to do so, then the legal practitioner has no option but to withdraw ...

