ETHICS IN FAMILY LAW – BEYOND LEGAL PRINCIPLES AND INTO VALUE JUDGMENTS

Ethical practice by lawyers is fundamental to the rule of law and access to justice. That applies to practice in every jurisdiction. However, some jurisdictions impose additional ethical requirements which arise from their jurisprudence. That is nowhere more applicable than in family law. The overall discretionary nature of family law and, in particular, its emphasis on the paramountcy of the best interests of the child, create conflicts for practitioners, which can be difficult to resolve. This article considers universal ethical issues and many additional requirements imposed by the family law jurisdiction.

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I. Introduction

1 The law is the means by which a society regulates itself. Whether it be the side of the road on which we drive or the consequences of killing someone, that regulation is fundamental to orderly conduct. Laws are made by the Legislature and defined and enforced by the legal system which comprises the courts and the legal profession.

2 Accordingly, the legal system is in a fundamentally important position in the orderly conduct of a society. In applying the law, the legal system must act without fear or favour and ensure the protection of the rights of each individual. That places a heavy burden on all aspects of the legal system which must clearly define its roles and the way in which it will conduct itself. That definition is often referred to as "professional conduct", which in turn has been referred to as "the law of lawyering".[1]

3 But the rules of professional conduct are only part of the picture for the practising profession. There is an additional aspect to what might

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1 Christine Parker & Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2nd Ed, 2014) at p 6.

be called proper conduct in legal practice. That is the requirement of professional conduct being undertaken in an ethical manner. As Christine Parker and Adrian Evans wrote:[2]

> However, lawyers must also have an ethical perspective on being a lawyer in order to judge what rules should be made (on a professional level) and also to decide (on a personal level) what the rules mean, how to obey them, what to do when there are gaps or conflicts in the rules and whether, in some circumstances, it may even be necessary to disobey a particular rule for ethical reasons …

4 It will be evident from the quotation in the last paragraph that viewing rules of professional conduct from "an ethical perspective" requires personal decision-making over and above the provisions of any particular rule. That requires making decisions of what is right and wrong, particularly in circumstances where that decision potentially requires the disobedience of a rule. In doing that, we must understand our own perspective of the particular situation on which we are making that decision. It follows that we also need to have formed our own view of the potential alternative solutions and have decided on our preferred solution.

5 This article considers the role which ethical practice plays in the administration of justice and in the whole legal system. It considers a number of particular areas in the application of ethical practice both generally and in particular, as they apply to family law. The dilemmas are illustrated by examples from other areas of the law and applied to the practice of family law.

II. Role of value judgments

6 The term "value judgment" may be defined as "a judgment predicating merit or demerit of its subject".[3] By way of example, the statement "murder is a crime" is a statement of fact. The statement "murder should be a crime" is a statement of value or a value judgment.

7 We all make value judgments constantly in our everyday lives. Of immediate relevance is the proposition that value judgments are fundamental to the process of identifying alternative solutions to a particular problem and determining our own preferred solution.

8 While most value judgments we make on a day-to-day basis are relatively straightforward, there are times when a situation poses

2 Christine Parker & Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2nd Ed, 2014) at p 7.

3 *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993) at p 3543.

alternatives which are at least extremely difficult and at times impossible to resolve. Take the classical philosophical problem of being placed in a position in which you are able to save 19 lives on condition that you shoot one person. You do not know the identity of any of the 20 possible victims. Do you shoot? Are you capable of shooting somebody?

9 There are those who would decline to take responsibility for saving 19 lives, usually on the basis that they could not kill anyone. That concept is referred to as "deontological ethics". Others would say that not only are they capable of killing someone but it is the right thing to do because it would save 19 lives. That concept is referred to as "teleological ethics". The problem is open to further complication if you add the proposition that the 20 potential victims are identified. If they included a war criminal you might take the approach of being able to kill. Likewise, you may well be persuaded to kill one person if the victims included somebody who you knew and were close to.[4]

10 Consider this example from family law. The present author suggests that the physical punishment of a child should be a crime. The nature of the punishment of the child should only go to the question of penalty. That is a value judgment on the author's part. That value judgment is not a matter of universal agreement. There are those who regard corporal punishment of a child as being an important part of discipline and therefore the child's upbringing. However, the person who regards corporal punishment of a child as being acceptable must make a value judgment of whether all corporal punishment is permissible or whether it is necessary to draw the line at some point. Is it acceptable to smack a child on the arm with an open hand but unacceptable to punish a child with a knee to the stomach? A rejection of the proposition that all corporal punishment is contrary to the best interests of the child requires a value judgment of what is acceptable.

III. Value judgments and family law

11 The process of decision-making in family law is replete with value judgments. Probably more than any other area of the law, family law is discretionary. In Australia, the law provides:[5]

> In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

4 For a discussion of teleological and deontological ethics as they apply to lawyers' ethics, see Gino Evan Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 6th Ed, 2016) at paras 1.05–1.15.

5 Family Law Act 1975 (Cth) s 60CA.

Likewise, internationally, the United Nations Convention on the Rights of the Child provides:[6]

> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

12 The Australian legislation provides a number of matters which the court is required to consider in determining whether to make any, and if so what, parenting order.[7] The last of those is:

> (m) any other fact or circumstance that the court thinks is relevant.

Accordingly, the court is not required to make any particular order. The court is not required to make any order if it determines that the best interests of the child require that outcome. While the legislation specifies a number of matters which must be considered in that determination, the last of the factors quoted creates a discretion which requires value judgments with regard to whether there is any other such fact or circumstance and if so, how they should be applied.

13 For example, the father of a young child seeks contact following his separation from the child's mother. The evidence establishes that he loves and has never harmed the child in any way. However, the evidence also establishes that he has perpetrated significant family violence against the mother. Given his relationship with the child, is the perpetration of violence against the mother relevant to the question of contact? The present author suggests that it is clearly relevant. Apart from anything else, the violence establishes that the father is an inappropriate role model for the child.

14 The potential for damage to a child arising from family violence between his parents was clearly articulated by the Victorian Law Reform Commission in its report on family violence in the following terms:[8]

> Even if a child or young person is not a direct victim of family violence, witnessing family violence and living in a household where family violence takes place can be extremely harmful.

6 Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3, Art 3(1).

7 Family Law Act 1975 (Cth) ss 60CC(2) and 60CC(3).

8 See Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (February 2006) at para 2.24 and generally ch 2 at pp 15–44.

15 In considering whether to make an order for the alteration of property interests following the breakdown of the marriage, the relevant Australian legislation provides:[9]

> The court shall not make an order under the section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

The process by which the court determines that it is satisfied that it is just and equitable to make an order is a process of exercising value judgments.

16 In that context, consider this example. The parties separate following a marriage of 20 years. They have two teenage children. Throughout their marriage, the husband has been the sole breadwinner and the wife has been the sole homemaker in parent. The evidence establishes that the wife has a severe and chronic gambling addiction. For the last ten years she has spent between $800 and $1000 each week on poker machines at the local casino, a fact which, on the husband's evidence, was fundamental to the breakdown of the marriage.

17 In the property proceedings, the husband argues that the wife's gambling addiction should be regarded as a negative contribution by her, thereby entitling him to a larger proportion of the assets. It is understandable that one's instincts result in sympathy for the husband's assertion. However, consider the question of the source of the funds to enable the wife's gambling. The husband has been the only breadwinner and had control of those funds. It would be perfectly straightforward for him to have cut off that source. Should the required value judgment lead to the conclusion that the husband's failure to deny gambling funds to the wife be regarded as a negative contribution by him? The present author suggests that that argument has considerable merit.

18 The present author expects that readers would have different approaches to the solutions for the above examples. That is the nature of value judgments. They are crucial in all aspects of the practice of family law. It is essential that we all understand that proposition and ensure that we are constantly analysing our own approaches, particularly to ensure that our conclusions are reasoned and free of bias.

IV. Duties and the law

19 Obviously, every lawyer must obey the law and the administration of justice. However, it is difficult for lay people to

9 Family Law Act 1975 (Cth) s 79(2).

comprehend that a lawyer might have a duty which is higher than the duty to the client. But as is well known by lawyers, if there is a conflict between the duty to the court and the duty to the client, the duty to the court takes priority. Chief Justice Mason, a former Chief Justice of the High Court of Australia, set out that priority as follows:[10]

> It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgement in the conduct and management of a case in which he has an eye, not only to his client's success, but also the speedy and efficient administration of justice …

20 As will be demonstrated below,[11] there are instances in family law in which the duties to the court and the child create a priority over the lawyer's duty to the client in some cases concerning the best interests of a child.

21 One of the fundamental manifestations of the priority of the lawyer's duty to the court is the provision that a lawyer is not simply the mouthpiece of the client. The concept has been part of professional conduct responsibilities for some time in Australia and has recently being strengthened by its enactment as subordinate legislation. In 2014, the two most populous Australian states of New South Wales and Victoria enacted legislation, known as the Legal Profession Uniform Law Application Act 2014 ("Uniform Law"), which regulates professional conduct for lawyers in those two states representing more than 70% of the nation's lawyers.[12] Rules made pursuant to that Act applying to barristers, known as Legal Profession Uniform Conduct (Barristers) Rules 2015 ("Barristers' Rules") provide:[13]

> 42. A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensics judgements called for during the case independently, after the appropriate consideration of the client's and instructing solicitor's wishes where practicable.

The same rule applies to solicitors[14] under the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 ("ASCR").

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10 *Giannarelli v Wraith* (1988) 165 CLR 543 at 556.

11 See paras 24–32 below.

12 Legal Profession Uniform Law Application Act 2014 (NSW) First Schedule; Legal Profession Uniform Law Application Act 2014 (Vic) First Schedule.

13 Legal Profession Uniform Conduct (Barristers) Rules 2015, r 42.

14 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 17.1.

22 There are also circumstances in which the lawyer's duty to the court overrides the duty to the client relating to the requirement of total honesty in everything that is put to the court. The essential rule is that the lawyer must not "deceive or knowingly or recklessly mislead the court".[15] In the event that a lawyer does mislead the court, he is required to correct the record "as soon as possible".[16] The present author has an abiding memory of arguing a case on appeal with very strong support from another binding appellate authority. Shortly after returning to Chambers, the author was informed that the authority on which he had relied had been overturned in the last 48 hours. The author arranged for the court before which he had appeared to reassemble and advised them of the new authority. As a result, the weight of authority was against his client's case and the appeal was dismissed.

23 In the criminal jurisdiction, there are clear rules which apply to barristers acting for an accused who instructs that he is guilty of the charge but nevertheless wishes to plead not guilty. The barrister may continue to act for the accused on condition that no aspect of the defence contradicts the basic instruction of guilt. The barrister may put the prosecution to its proof, advance any legal argument supporting an acquittal and may cross-examine prosecution witnesses. However, such cross-examination and other conduct of the trial must not suggest innocence of the accused.[17]

V. Duties in family law

24 A lawyer's duties to the court in family law proceedings are the same as those in other proceedings as discussed above. Further, particularly in the area of confidentiality and privilege, a family lawyer has additional duties to the court arising out of the requirement of the paramountcy of the child's best interests. Those additional duties are discussed below.[18]

25 To what extent must a lawyer conducting litigation in family law take account of the best interests of the subject child? After all, the child is not the lawyer's client and would not normally be relevant in the determination of competing duties to the court and the client. Further, the child often has a legal representative, albeit not on the basis of a traditional lawyer–client relationship.

15 Legal Profession Uniform Conduct (Barristers) Rules 2015, r 24; Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 19.1.

16 Legal Profession Uniform Conduct (Barristers) Rules 2015, r 25; Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 19.2.

17 See generally, *Tuckiar v R* (1934) 52 CLR 335.

18 See paras 47–56 below.

26 In *Clarkson v Clarkson*,[19] the petitioning mother of a young child suppressed evidence with regard to her care for the child. Selby J found that the evidence should not have been suppressed and was very critical of the mother for having done so. With regard to the issue of the priority of duties as between the court and the client, his Honour held:[20]

> I have pointed out on a number of previous occasions that matters concerning the welfare of children are not regarded in this jurisdiction as similar to ordinary litigation between the parties. They are, of course, contests between the parties. The rules of procedure and the laws of evidence apply. But the interests of the parties take second place. Regard for the interests of the child is the determining factor. This is what is meant by regarding the interests of the child as the paramount consideration. A proper determination of those interests cannot be made by the application of any supposed principles as to onus of proof or of presumptions which might be thought to apply in other cases. Recognized tactics of advocacy which may be in every way right and proper are not necessarily of assistance in cases of this nature. The task of counsel is a difficult one for, whilst owing a duty to his client – a duty which may be discharged by bringing out the points which indicate that to grant custody or access to his client would be in the interests of the child whilst granting them to his opponent's client would be inimical to those interests – *he must always remain aware that the child's interests come before those of his client*. It is therefore necessary to adduce all available evidence which might have a bearing on the matter. [emphasis added]

27 A lawyer must not express his personal opinion of any issue relevant to the proceedings to the court.[21] The lawyer must advance the client's best case, providing it does not involve illegality or breach of any rule of ethics or conduct. Accordingly, a lawyer is entitled to form a personal view regarding the client's conduct as being unacceptable. The lawyer may disagree with the client's corporal punishment of the child but must leave the finding of that fact, together with its consequence on that the best interests of the child, to the determination of court. As Gino Evan Dal Pont wrote:[22]

> The issue, therefore, concerns the extent to which the interests of the child upset traditional doctrines of partisanship and confidentiality. Selby J suggests that, unlike other lawyers, family lawyers must take account of the interests of the non-client in advising the clients. This raises difficult issues, poignantly illustrated by the example of a client who, seeking a parenting order, has admitted to a lawyer abusing the

19 (1972) 19 FLR 112.
20 *Clarkson v Clarkson* (1972) 19 FLR 112 at 114.
21 Legal Profession Uniform Conduct (Barristers) Rules 2015, r 44.
22 Gino Evan Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 6th Ed, 2016) at para 18.130.

> child in the past. True partisanship dictates that the lawyer suppresses this admission, a course that lawyer–client confidentiality can justify.

28 The present author suggests that the paramountcy principle imposes an additional duty on the lawyer conducting family law proceedings. While the duty to the court always takes priority over all other duties, the lawyer does have an ethical duty to the subject child which may, in some circumstances, conflict with the lawyer's duty to his client. As with all decisions to be made regarding the conduct of proceedings, the limits of such a duty must be decided by the lawyer on a case-by-case basis. Each case must be decided on its own facts and likewise, one's approach to a particular ethical issue must be decided on its own facts.

29 It is possible to formulate a general principle as to which such decisions might be made. The starting point must be the "mouthpiece" rule referred to above.[23] The intent of that rule is that the advocate is required to make independent decisions with regard to the conduct of the proceedings and must act contrary to the specific instructions of the client in some circumstances. The complication of the present issue arises from what is asserted to be the proposition of the additional duty to the best interests of the child which requires acting in the interests of a non-client in priority to the interests of the client.

30 The lawyer's determination of his view of the child's best interests is a value judgment. The limits of that value judgment are the complicated aspect of the determination. While the lawyer must not usurp the role of the court in making the ultimate decision, there are some matters which should be beyond discussion. The pre-eminent issue in that regard must be family violence. Community values are correctly developing to condemn family violence. While that is not a universal view, the present author suggests that proper ethical practice, going beyond the strict rules of professional conduct, requires an advocate to decline instructions which might be seen as excusing or justifying family violence.

31 Nevertheless, it must be acknowledged that, in light of the discussion above[24] with regard to the value judgments involved in corporal punishment of a child, there is a widely held alternative view to that which the present author expressed in the previous paragraph. As the author has indicated, he is opposed to the corporal punishment of a child. In his view, it constitutes a negative aspect of parenting and is family violence. However, declining a client's instructions to lead

23 See para 21 above.
24 See para 10 above.

evidence or make a submission in support of a gentle smack may be seen as qualitatively different. While refusing instructions with regard to corporal punishment by way of punching a child in the stomach is both reasonable and ethical and would, or should, reflect general community attitudes, taking the same approach to a simple smack on the hand is more difficult. While the author would have no problem with advancing the first proposition, despite his personal views, the refusal of the second proposition may well go too far.

32 This example is a perfect illustration of three concepts which are at the heart of this article. The first of those is the proposition that ethical behaviour goes beyond the strict rules binding lawyers to professional conduct. The second is the need to understand the frequency with which the lawyer practising in family law must make value judgments. The third is that the ethical issues which are raised frequently in legal practice, and particularly in the practice of family law, often do not have simple answers. In fact, at times, they have no answer at all. While those propositions often bring considerable complication to family law practice, they also contribute a challenge which makes the jurisdiction different from, and more stimulating than, all others.

VI. Confidentiality and privilege

33 If the lay public believes one thing about a lawyer's responsibilities in acting for a client, it is that whatever is said between them is strictly confidential and cannot be used in any way whatsoever outside that relationship. As a general statement, that proposition is only partly correct in some common law jurisdictions.

34 There are two concepts relevant to this discussion. The first of those is the requirement of confidentiality. The second is legal professional privilege ("privilege"). The present author now considers each of those concepts separately and then discusses their interrelationship. There are several applications of those concepts which are particular to family law and which are considered as the last part of this topic.

A. Confidentiality

35 The duty of confidentiality which the lawyer owes to the client arises in two ways, both of them from the retainer by which the client engages the lawyer. The first is by the contract itself.

36 The second, which is commonly regarded as being the more important consequence of the retainer, is in the fiduciary relationship

which is a concept grounded in equity. The Oxford Dictionary defines "fiduciary" as:[25]

> A person who holds a position of trust with respect to someone else, a trustee.

37 One of the leading judicial pronouncements on the lawyer's duty of confidentiality is in the House of Lords' judgment in *Prince Jefri Bolkiah v KPMG* ("*Bolkiah*") in the following terms:[26]

> Whether founded on contract or equity, the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it by others otherwise than for his benefit. The former client cannot be protected completely from accidental or inadvertent disclosure. But he is entitled to prevent his former solicitor from exposing him to any avoidable risk; and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant.

38 There are two matters arising from the quote in the previous paragraph which should be emphasised. The first is that the duty of confidentiality is "unqualified". As discussed below, the development of the duty in Australia now incorporates recognition of necessary exceptions including the public interest.[27] Again, that is of particular relevance in family law. The second matter is the concept to which the present author has already referred that the duty of confidentiality gives rise to the potential of the risk of disclosure which, in turn, is the basis for conflicts of interests.

39 The Barristers' Rules made pursuant to the Uniform Law provide for the duty of confidentiality in the following terms:[28]

> **CONFIDENTIALITY & CONFLICTS**
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> 114. A barrister must not disclose (except as compelled by law) or use in any way confidential information obtained by the barrister in the course of practice concerning any person to whom the barrister owes some duty or obligation to keep the information confidential unless or until:

25 *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993) at p 942.
26 *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 at 235–236.
27 See para 40 below.
28 Legal Profession Uniform Conduct (Barristers) Rules 2015, r 114.

(a) the information is later obtained by the barrister from another person who is not bound by the confidentiality owed by the barrister to the first person and who does not give the information confidentially to the barrister; or

(b) the person has consented to the barrister disclosing or using the information generally or on specific terms.

40 The confidentiality provisions binding solicitors pursuant to the Uniform Law are similar in their statement of the basic rule. However, they include significant exceptions which are in the following terms:[29]

9. CONFIDENTIALITY

9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not:

9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor's law practice; or

9.1.2 a barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,

EXCEPT as permitted in Rule 9.2.

9.2 A solicitor may disclose information which is confidential to a client if:

9.2.1 the client expressly or impliedly authorises disclosure;

9.2.2 the solicitor is permitted or is compelled by law to disclose;

9.2.3 the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations;

9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence;

9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person; or

29 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 9.

9.2.6 the information is disclosed to the insurer of the solicitor, law practice or associated entity.

41 It is immediately evident that the preservation of confidentiality is no longer unqualified as defined by the House of Lords in *Bolkiah*. The present author suggests that the development of the law in this area is entirely appropriate and in accordance with proper community expectations. The basic intent of confidentiality in the lawyer–client relationship is to enable the client to give full and frank instructions safe in the knowledge that potentially damaging material will not fall into the wrong hands. However, there is a tension between that principle and the public interest, the latter giving rise to the exceptions to privilege.

B. Privilege

42 The concept of privilege differs from jurisdiction to jurisdiction. It is not within the scope of this article to refer to individual applications of the concept. In Australia, there is a clear distinction between confidentiality and privilege. That distinction generally emanates from the concept of the compellability of evidence. Facts which are privileged may not be adduced in court proceedings. Confidential facts which are not privileged are compellable. Privileged facts are further protected from disclosure outside of court proceedings by confidentiality. There is a further question as to the disclosure of privileged facts in circumstances other than the inducing of evidence. The present author has been unable to find any authority on this issue. However, he ventures the view that in those circumstances they would be subject to the same discretionary disclosure rules as would other confidential material which is not privileged.

43 The article now turns to the question of the definition of privilege. The first requirement must be that it be within the professional setting of the lawyer–client relationship. In Australia, the law of privilege used to be prescribed by the common law. However, since 1995 in the Commonwealth jurisdiction and progressively in each of the states and territories, privilege has been the subject of legislation. The provisions are essentially the same. The Commonwealth legislation bars the adducing of evidence of a confidential communication between lawyer and client if that communication has been for the "dominant purpose" of the lawyer "providing legal advice"[30] or providing "professional legal services",[31] effectively by acting in litigation.

30 Evidence Act 1995 (Cth) s 118.
31 Evidence Act 1995 (Cth) s 119.

44 There are several matters in the legislation referred to in the previous paragraph which require comment. The first is that all privileged material is confidential, but not all confidential material is privileged. Privilege is a subset of the wider concept of confidentiality. The second matter is that the material must have been disclosed in order to either obtain advice or to conduct litigation. The third matter is that the purpose for which the material was provided must be the *dominant purpose* for providing it.

45 The legislation created a significant change in the test of purpose. Prior to its enactment, the common law provided the test of *sole purpose*.[32] Following the introduction of the legislation quoted above,[33] there was some confusion as to the applicability of the dominant purpose test arising from the legislation and the apparent continuation of the sole purpose test in other areas of the law of evidence. That difficulty was overcome by a decision of the High Court of Australia which affirmed the dominant purpose test in all privileged communications.[34]

46 As with confidentiality, the legislation provides a number of exceptions to the applicability of the law of privilege.[35] Of particular importance to lawyers is the provision relating to "misconduct". For example, evidence relevant to advising the client to disobey the law is not protected by the privilege.[36] The common law privilege against self-incrimination is also protected.[37] The present author will consider the privilege attaching to negotiations below.

VII. Confidentiality, privilege and family law

47 The law of confidentiality and privilege discussed above applies to family law as it does to the general law. However, there are aspects of confidentiality and privilege arising from substantive family law which impose further duties on practitioners practising in that jurisdiction. The article now turns to a discussion of those matters.

48 In the present author's view, a lawyer who discloses the identity of a client commits a breach of confidentiality. That is not a generally held view. Part of the basis for the author's opinion is what else that disclosure conveys. This is particularly relevant in the practice of family

32 *Grant v Downs* (1976) 135 CLR 674.
33 See para 43 above.
34 *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 201 CLR 49.
35 Evidence Act 1995 (Cth) Pt 3.10.
36 Evidence Act 1995 (Cth) s 125.
37 Evidence Act 1995 (Cth) s 128.

law. The lawyer who is known as a specialist practitioner in family law is saying much more than that he is acting for the client. The subtext of that disclosure is that the identified client is experiencing a relationship breakdown. That is a particularly egregious breach of confidentiality.

49 The paramountcy of the best interests of the child creates two additional duties for the family lawyer which are not relevant to other areas of legal practice. The first of those concerns the question of the whereabouts of the child in cases of child abduction and like matters. If, in the course of acting for the client, the client informs the lawyer of the whereabouts of the child, in normal circumstances, that instruction would not only be confidential but would also be privileged. Like all other instructions from a client to his lawyer in the conduct of the family law matter, the information would have been disclosed for at least the dominant purpose, if not the sole purpose, of obtaining advice and/or the lawyer representing the client in litigation.

50 In *R v Bell, ex parte Lees*,[38] the Family Court of Australia had previously ordered that the mother have custody of the parties' child. Subsequently, the court discharged that order and provided that the father have the interim custody of the child. Instead of handing the child to the father in accordance with the later order, the mother took the child into hiding. She divulged her address to her solicitor, but refused to provide it to the father. The court ordered the mother's solicitor to divulge the address. The solicitor properly refused to do so on the basis that the mother's instruction with regard to her address was privileged and therefore not compellable. On application to the High Court of Australia for a writ of prohibition by the mother's solicitor seeking to set aside the order, the court considered the question of the duty of disclosure in the context of the lawyer's duty to the client in confidentiality and privilege. Gibbs J (as he then was) identified the duty in the following terms:[39]

> These cases support the view that where one party to matrimonial proceedings has failed to comply with an order giving custody of a child to another party, and has taken the child into hiding, the public interest in securing the welfare of the child, and in ensuring that an order made for securing that welfare is not deliberately flouted, prevails over the competing public interest that confidential communications between solicitor and client should be protected from disclosure in order that members of the public may be free to seek that legal advice without which justice cannot properly be administered. That in my opinion is the correct view. *The privilege, which arises only because the public interest requires it, does not exist*

38 (1980) 30 ALR 489.

39 *R v Bell, ex parte Lees* (1980) 30 ALR 489 at 494.

> *when it is seen that it would be contrary to a higher public interest to give effect to it* … [emphasis added]

51 A further area in which the paramountcy of the best interests of the child is afforded priority in circumstances usually protected by privilege is that of negotiations seeking to settle such proceedings. Normally, such negotiations, provided they are conducted by way of *bona fide* attempt to settle, would be so protected.

52 In *Hutchings v Clarke*, the parties had two children, one of them living with the mother and the other with the father. The trial judge accepted the mother's evidence that the child who was living with the father was doing so because the father would not allow her to have the care of that child. The mother sought the custody of that child in proceedings in the Family Court of Australia. The trial judge admitted evidence by the mother and found that the father had telephoned the mother and offered to surrender his care of the child in favour of the mother. The offer was conditional upon the mother signing "legal documents" granting him "full custody" of the child. During that phone conversation the father admitted to the mother that his motive in requiring the document was to enable him to avoid child support.

53 The father appealed to the Full Court challenging the admission of that evidence on the basis that it was privileged as it was a negotiation seeking to settle proceedings. The court dismissed the father's appeal and held:[40]

> The public interest in encouraging parties to settle their differences is an important one. It is encouraged in provisions such as s. 62(1) of the Act and the need for confidentiality of those discussions is recognised in ss. 18 and 19 of the Act. Hence, the court should be reluctant to override the privilege of parties engaged in such discussions, but as stated earlier, protection of the welfare of the child is another public interest recognised in s. 43(c) of the Act and declared to be the paramount consideration in s. 64(1)(a). This means that the court must give priority to considerations of the welfare of the child in a situation where non-disclosure of the relevant evidence 'might have the result that the child remained in conditions detrimental to his or her welfare' in the words of Gibbs J cited earlier. This balancing of interests can only be performed on a case by case basis and in most cases where negotiations cover details of custody and access issues such as times for access, mode of transportation and the like, the discussion should remain privileged.
>
> However, in a case such as the present where the statement which his Honour found had been made by the father, indicated that he was not genuinely seeking custody of the child but only a formal custodial

40 *Hutchings v Clarke* (1993) FLC ¶92-373 at 79,876.

> position which he, wrongly, thought to be to his financial advantage, a refusal to admit that evidence would have a direct adverse affect on the welfare of the child. In our view his Honour did not err in admitting that evidence in the circumstances of this case.

54 It will be noted that *Hutchings v Clarke* was decided in the absence of any statutory provision creating an exception to the law of privilege. Subsequently, the Commonwealth parliament enacted the Evidence Act[41] which relevantly provides for the protection of privilege to attach to negotiations in which parties to proceedings "attempt to negotiate a settlement all the dispute". The legislation provides for an exemption in circumstances in which:[42]

> (g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence …

55 It is clear that there are circumstances in which the paramountcy of the best interests of the child in family law proceedings takes priority over privilege and confidentiality. The circumstances in which that principle is to be applied must be determined on a case-by-case basis. The determination is by way of exercise of discretion which, in turn, requires the making of value judgments.

56 The obvious difficulty in applying the priority referred to in the previous paragraph is understanding that there are circumstances which arise in the practice of family law when the lawyer for a party to the proceedings has a higher duty to a person other than the client who is not a party the proceedings. That requires an understanding of more than the provisions of the law and their application. A family law practitioner must understand people and their behaviour, particularly at times of stress. That is an important ethical dimension of legal practice in that jurisdiction, something which is not, and cannot be, covered by rules.

VIII. Conflicts of interests

57 Avoiding conflicts of interests is one of the biggest challenges facing lawyers in every day practice. Conflicts arise from that part of the fiduciary relationship between lawyer and client which requires loyalty and the protection of disclosure of confidential information. As discussed below, rules provide for circumstances in which a lawyer may continue to act in an otherwise conflicted situation. However, the

41 Evidence Act 1995 (Cth) s 131(1).
42 Evidence Act 1995 (Cth) s 131(2)(g).

present author suggests that a self-imposed rule of "if in doubt – get out" is a good guide to ethical conduct.

58 Notwithstanding the suggested rule in the previous paragraph, there are understandable reasons for lawyers seeking to continue to act in potentially conflicted situations. Clients are reluctant to instruct a new lawyer when they have a long and positive relationship with their present lawyer. Likewise, a lawyer who is forced to cease to act for a long-standing client because of a conflict of interests may suffer significant commercial loss. Therefore, it is necessary to have rules which govern circumstances in which lawyers may be required to cease to act. The article now proceeds to an examination of those rules.

59 The first and most important consideration in determining the circumstances in which a lawyer might be required to cease to act because of a conflict of interests is the test to be applied. That test centres around the degree of risk of the disclosure of confidential information. In Australia, it has been enunciated as follows:[43]

> In my opinion, a solicitor is liable to be restrained from acting for a new client against a former client if a reasonable observer, aware of the relevant facts, would think that there was a real, as opposed to a theoretical possibility that confidential information given to the solicitor by the former client might be used by the solicitor to advance the interests of a new client to the detriment of the old client.

Accordingly, an applicant for an injunction restraining a lawyer from acting is required to establish not only that there is relevant confidential information, but also that there is a real risk of its disclosure if the lawyer were to act in the disputed proceedings. Both of those elements need to be established by the applicant in order to succeed in the application.

60 There are two basic categories in which a lawyer may find himself in a conflicted situation. The first of those is lawyer–client conflict and the second is client–client conflict. The article now turns to a consideration of those categories.

A. Lawyer–client conflict

61 There are many circumstances in which a lawyer might come into conflict with his own client. For example, the lawyer must not have any interest in the subject matter on which he is acting for the client. That might involve a lawyer's interest in an investment company in

43 *Carindale Country Club Estate Pty Ltd v Astill* (1993) 115 ALR 112 at 115, *per* Drummond J in the Federal Court of Australia.

which the client is being advised to invest. At the very least, in such a situation, the lawyer must make a full and frank disclosure to the client and advise him to seek independent advice on whether to make such an investment. However, in the present author's view, even with appropriate disclosure, such an investment is at best unwise. Likewise, a lawyer must not have other than a professional relationship with the client which might be influenced by a power imbalance in the lawyer–client relationship. An example of relevant rules is to be found in the ASCR.[44]

B. Client–client conflict

62 There are two categories of client–client conflict. The first of those is conflict between two present or current clients which is known as "concurrent conflict".[45] The second category is conflict between a current client and a previous client, known as "successive conflict".[46] In both categories, the initial question is the test to be applied in determining whether a conflict exists, such that a court will prevent a lawyer from acting when conflicted. The present author has set out that test above.[47]

(1) Concurrent conflict

63 The most common example of concurrent conflict is acting for two clients in the same matter. At the outset of the proceedings, it may well appear that the clients have the same interest, thereby avoiding any conflict. However, if, at some stage of the proceedings, those interests diverge the lawyer may well be put in the position of having to withdraw from acting for both clients because of the risk of being required to disclose confidential information about one client to the other client.

64 The consequences to the overall proceedings and the respective duties to the court and each client can be very significant. Those consequences include the risk of the lawyer having to pay costs arising from the conflict. As a general proposition, the present author suggests that acting for two clients in the same proceedings usually raises significant ethical issues and should be avoided in other than the most obvious of circumstances.

65 Rule 11 of the ASCR requires that in order to overcome such conflict, both current clients must give "informed consent" and an

44 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 12.
45 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 11.
46 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 10.
47 See para 59 above.

information barrier must be established. Both of those elements are discussed below.

66 Although very uncommon, there is an example of the same firm of lawyers acting for and against the same client.[48] The unusual circumstances of that matter included a very large firm of solicitors practising in two different states, totally unrelated actions and the use of information barriers (discussed below). Accordingly, the solicitors were effectively practising as two separate entities.

(2) Successive conflict

67 Successive conflict is the more common manifestation of client–client conflict. It arises in circumstances in which a lawyer is in possession of confidential information relating to a previous client which is relevant to acting for a present client and in respect of which there is a real risk of being required to disclose that confidential information to the present client. As with concurrent conflict, the basis of successive conflict is the risk of disclosure of confidential information. While the fiduciary duty between lawyer and former client comes to an end with the termination of the retainer, the obligation of confidentiality is ongoing. Reference is also made to the discussion of the possibility of the continuation of a duty of loyalty after the termination of the retainer.[49]

68 Rule 10 of the ASCR requires that in order to overcome the conflict and enable the lawyer to act, either the previous client must give "informed consent" or an information barrier must be established.

(3) Informed consent

69 It will be evident that rr 10 and 11 of the ASCR require informed consent by the client who is at risk of having confidential information disclosed in a conflicted situation. In concurrent conflict that consent is required in addition to the use of an information barrier. In successive conflict, informed consent is required as an alternative to the use of an information barrier. The present author suggests that the whole concept of informed consent entails ethical issues which must be considered. For consent to be informed, there must be a full and frank disclosure. Might such a disclosure require the disclosure of the very information which is confidential and creates the conflict in the first place? Is the lawyer who is potentially conflicted able to advise the client

48 *Australasian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd* [2002] VSC 324.

49 *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501 at 521–522.

with regard to giving informed consent? And should the client from whom informed consent is sought be advised to obtain independent advice with regard to giving that consent? Should the lawyer who gives independent advice to the client against giving consent be permitted to act for the client in place of the original lawyer? Might that second lawyer be similarly conflicted?

C. Information barriers

70 The rules discussed above also contemplate the use of information barriers in some circumstances. Guidelines promulgated by the Law Institute of Victoria,[50] amongst others, require such a barrier to be part of the usual ongoing conduct of the law practice and provide for strict separation of the different areas of the practice to ensure no migration of confidential information from one area to the other.

D. Conflicts of interests and family law

71 The volatility of family law proceedings can give rise to suggestions of conflicts of interests more readily than in other jurisdictions. In Australia, until relatively recently that proposition was recognised by the application of a more stringent test. The essence of that test was that rather than require a real risk of disclosure of confidential information, it was sufficient for a client to demonstrate a theoretical risk of such disclosure upon proof of which the court would grant an injunction preventing the lawyer from acting.

72 That test was first applied in *Thevenaz v Thevenaz*[51] ("*Thevenaz*"). In that matter, a solicitor who had been the partner of a solicitor who had acted for the husband and the wife in a conveyancing transaction shifted to another law firm which acted for one of the parties in that matter in family law proceedings. The essential difference between that test and the test set out above[52] is that the applicant for the injunction only has to establish the existence of relevant confidential information and does not have to establish a real risk of disclosure.

73 The test referred to in the previous paragraph has recently been set aside by the Full Court of the Family Court of Australia in favour of the real risk test.[53] The present author respectfully disagrees with the decision to move away from the test of a theoretical risk. Proceedings in

50 Information Barrier Guidelines (adopted by the Council of the Law Institute of Victoria on 20 April 2006).
51 (1986) FLC ¶91-748.
52 See para 59 above.
53 *Osferatu v Osferatu* (2015) 301 FLR 295.

family law are different and are usually conducted in a highly emotionally charged atmosphere. In *McMillan v McMillan*,[54] in adopting the decision in *Thevenaz*, the Full Court held that it did so "for the reasons related to the sensitive nature of the jurisdiction".[55] In the author's view, that is the more appropriate approach in family law proceedings.

IX. Self-represented litigants in family law

74 One of the most difficult aspects of family law practice is acting against a self-represented litigant or litigant in person. Practitioners must be particularly cautious in those circumstances. There are various rules requiring practitioners to take particular care to ensure that a self-represented litigant is not given the impression that the lawyer is acting for him. Two examples of appropriate rules are to be found in Singapore[56] and in the Uniform Law[57] in Australia.

75 The best and most practical mode of conduct for a lawyer, and particularly an advocate, who is opposed to a self-representative litigant, is to be very circumspect in all dealings with him. If possible, there should be a witness present during all communications, particularly at court, and detailed notes should be taken of what takes place. In that context, it is difficult for an advocate to negotiate with a self-represented litigant and then be required to cross-examine him. Drawing the line between what might and might not be used in such a cross-examination can be very problematic, particularly for the other litigant. Outside the court sitting, all communications between a lawyer and an opposing self-represented litigant should be in writing.

76 The Full Court of the Family Court of Australia has set out guidelines for judges in conducting cases in which at least one party is self-represented.[58] While the guidelines are for judges, lawyers should use them as a guide to their own ethical conduct.

X. Family law advocacy

77 Advocates in family law must be particularly cautious with regard to how they conduct themselves. It is essential to remember that many litigants in family law are victims of family violence with

54 (2000) FLC ¶93-048.
55 *McMillan v McMillan* (2000) FLC ¶93-048 at 87,733.
56 Legal Professional (Professional Conduct) Rules 2015 (S 706/2015) r 8(2).
57 Legal Profession Uniform Conduct (Barristers) Rules 2015, r 53.
58 *Re F: Litigants in Person Guidelines* (2001) FLC ¶93-072 at [253].

significant resultant psychological consequences. Aggressive cross-examination is to be eschewed at all times in favour of an approach which is considerate of parties' emotional traumas experienced as a result of the breakup of their relationship. In that respect, Parker and Evans[59] have provided an excellent analysis of the alternative ways of conducting litigation. The present author suggests that their category of "adversarial advocate" is to be avoided at all times. Their category of "ethics of care" should be considered as a benchmark. The issue is well illustrated by provisions of the Family Law Act, which mandate and empower judges to disallow "offensive, scandalous, insulting, abusive or humiliating" questioning of witnesses in family law proceedings.[60] In the author's view, practitioners in all jurisdictions should observe the principle of not harassing witnesses unless it is clearly in the interests of justice to do so. That is a particularly important proposition in family law proceedings.

XI. Value judgments and ethical conduct in practice

78 Some circumstances in which lawyers question how they should behave involve serious threats to the life or safety of a named person. That is particularly relevant in family law where one party can make such a threat to the other party or one of their children. A second area of difficulty occurs with a client gives information to his lawyer but specifically instructs that it is not to be disclosed. Thirdly, there is the question of child abduction. The article turns to a consideration of those issues.

A. Threats to life or safety

79 Many lawyers have experienced a client threatening to kill or seriously injure his former partner and/or one or more children of the relationship. By way of example of the tension referred to in the previous paragraph from the present author's own experience in practice, the author was conducting negotiations with his opponent at the door of the court seeking to settle a property dispute in a family law matter. There had been serious family violence by the husband towards the wife, as a result of which the husband had been denied any contact or communication with the parties' young children. The author received an offer from the lawyer for the wife which he decided should be strongly recommended to his client. Upon making that recommendation, the husband aggressively said to the present author, "I don't care. She can

59 Christine Parker & Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2nd Ed, 2014) at p 32.

60 Family Law Act 1975 (Cth) s 101(1); see also ss 101 and 102.

have the whole lot as far as I'm concerned. In fact, I'm going to burn down the house one night when she and the children are in it".

80 The present author suggests that there is the clearest public interest in his being able to disclose that information to the wife's lawyer and the police. That is a value judgment which he expects would be the subject of almost universal agreement.

81 The example referred to in the previous paragraph is taken from the present author's own experience as a barrister approximately 30 years ago. That was before the enactment of any rule which included the exceptions to confidentiality which are now in the legislation. We regarded the basic concept by which we were all bound as being legal professional privilege. It was a situation which was urgent and included a threat against human life. The value judgment in that situation was quite straightforward. The present author could not countenance the possibility of staying quiet in the client's interest while putting three lives at risk. Without disclosing precisely what had been said, the author informed the opponent that he should ensure that the house was insured. The author also recommended then, at least for the time being, neither the opponent's client nor the children should live in it.

82 Consider the above fact situation occurring today. In all circumstances, such a threat would be both privileged and confidential in the wider sense. Accordingly, superficially the lawyer may not disclose that information. However, upon further examination, it should be evident that at least in the Australian context, the information may be disclosed in accordance with rules. The present author refers to the rules quoted above.[61] The lawyer must disclose the threat to the police and should communicate with his opponent in a similar manner to that described in the previous paragraph. In the author's view, that is the only basis on which a lawyer might be considered to have acted ethically.

B. Non-disclosure

83 Beyond the area of threats to life and safety, lawyers sometimes receive a disclosure of a relevant fact by the client. It may be accompanied by instructions that it is not to be disclosed. A typical example of the situation is the non-disclosure of a relevant asset in property proceedings. However, other non-disclosures include taxation matters and contributions on behalf of the other party. Of course, it is a fundamental rule of practice in all jurisdictions that a lawyer must not mislead the court. Failure to disclose a relevant fact is therefore a

61 See para 40 above and rr 9.2.4 and 9.2.5 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

fundamental breach of duty. However, a lawyer's actions in this circumstance are different from the disclosure obligations in the situation of the threat to life for safety.

84 In the Australian context, the lawyer must advise the client that he may not accept an instruction not to disclose the material fact and that it must be disclosed. In the event that the client persists with the instruction not to disclose, the lawyer's duty requires him to withdraw from acting for the client. In no circumstance may the lawyer disclose the fact.[62]

C. Removing child from jurisdiction

85 The issue of a client disclosing an intention of removing a child of the relationship from the jurisdiction without the knowledge or consent of the other parent to his lawyer is more vexed than the above examples. If that removal were a criminal offence (which is not the case in Australia) then the rules referred to earlier clearly apply as such offence would be serious. In the absence of an offence, there are competing issues which must be considered.

86 First, any disclosure of the client's intent by the lawyer would be a breach of confidentiality. However, in light of the discussion above with regard to a lawyer's particular duties to the child in family law proceedings,[63] it is strongly arguable that the public interest and the best interests of the child would take priority over the potential breach of confidentiality. The present author has been unable to locate any authority on this proposition.[64]

D. Alton Logan[65]

87 This is one of the most all-encompassing and, in a sense, difficult ethical questions which the present author has ever encountered. Alton Logan was arrested and charged with a murder in Illinois, USA, in February 1982. He was convicted at trial. He succeeded

62 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 20.

63 See paras 47–56 above.

64 See generally para 82, n 61 and para 84, n 62 above.

65 There is no reported case relevant to the present issues in the matter of Alton Logan. There are numerous commentaries online. For present purposes, the present author relies on the following: Alton Logan & Berl Falbaum, *Justice Failed – How Legal Ethics Kept Me in Prison for 26 Years* (Counterpoint, 2017); and "26-Year Secret Kept Innocent Man in Prison: Lawyers Tell 60 Minutes They Were Legally Bound from Revealing Secret" *CBS 60 Minutes* (6 March 2008) <https://www.cbsnews.com/news/26-year-secret-kept-innocent-man-in-prison/> (accessed 30 April 2018).

on appeal and was convicted on a second trial. He unsuccessfully appealed against that second conviction. There have been many arguments advanced for the proposition that the conviction should have been set aside as being unsafe. Those matters are not relevant here.

88 There were two alternatives sentences for murder in Illinois. The first of those was the death penalty which was only enforced if the jury which convicted decides on its application unanimously. The jury decided by ten votes to two that the death penalty should be applied, thereby avoiding Logan's execution. As a result, the other alternative sentence of life in prison was ordered.

89 At the same time as the Logan trials were being heard, two attorneys were acting for Andrew Wilson, who was also convicted of murder and sentenced to life imprisonment. During a conversation between Wilson and his attorneys, Wilson admitted that he had committed the murder for which Logan had been convicted. However, Wilson claimed privilege in respect of that conversation, thereby preventing the attorneys from disclosing it. Nevertheless, Wilson agreed to swear an affidavit with regard to those facts and authorised the attorneys to retain it. He instructed them that they could disclose the contents of the affidavit upon his death.

90 Wilson lived for a further 26 years during which time Logan remained in prison. Upon Wilson's death, the attorneys disclosed the contents of the affidavit and after a significant further time, Logan was released from prison.

91 In Illinois, there was no exception to client privilege. The attorneys received advice with regard to their ethical obligations and concluded that they could not divulge the affidavit or its contents. Of course, if Wilson had instructed his attorneys that the information was never to be made public, it would be likely that Logan would have remained in prison for the rest of his life.

92 The attorneys for Wilson faced some very difficult decisions. Intuitively, most people would conclude that it was a blight on the legal system for Logan to remain in prison in those circumstances. For that to have continued for 26 years makes the point even stronger. Public sentiment would be overwhelmingly in favour of an exception to privilege in those circumstances. However, the attorneys saw the breach of privilege as a fundamental breach of their legal and ethical obligations which might well have resulted in the disbarment from practice. Further, disclosure may well have exposed their client, Wilson, to the death penalty. There is strong support for the view.

93 Interviewed in the CBS programme referred to above,[66] the attorneys were asked what course they would have taken if Logan had been sentenced to death. They responded, "[we] would've found a way". They expressed a similar sentiment in the book, *Justice Failed – How Legal Ethics Kept Me in Prison for 26 Years*.[67] That proposition begs the obvious question: How does one make a value judgment that the death penalty would justify breaching confidentiality while 26 years in jail would not?

XII. Conclusion

94 Ethical issues pose some of the most difficult questions which practitioners are required to answer. They require the making of value judgments which challenge the very core of how we see ourselves as lawyers and what we seek to achieve in practice. They involve decisions which, at times, are literally of life or death.

95 How do we resolve these complex questions of what is right and wrong? What process do we go through in determining our values? The present author finds himself asking:

(a) Can I live with myself if I make a particular decision?

(b) Am I putting the lives or safety of individuals at risk?

(c) Am I breaching my duty to the court by failing to disclose confidential instructions?

(d) What might be the reaction to a particular decision if it appears on the front page of the newspaper tomorrow morning?

96 The family law jurisdiction constantly challenges our basic values, particularly in circumstances of the best interests of children, probably to a greater degree than any other area of the law. The exercise of discretion which involves the constant making of value judgments can affect the most vulnerable in our society for the rest of their lives. By way of example, consider an allegation of sexual abuse of a child. The consequences of an erroneous finding, whether affirmative or negative as to the occurrence of the abuse, can be disastrous, particularly for the child but also for others involved in the care of the child or who have been deprived of such care as a result of such wrong finding.

97 Whether it be confidentiality, privilege, conflicts of interests, overly zealous conduct of proceedings or so many other factors, family

66 See n 65 above.

67 Alton Logan & Berl Falbaum, *Justice Failed – How Legal Ethics Kept Me in Prison for 26 Years* (Counterpoint, 2017) at p xvii.

lawyers are constantly directly affecting people's lives. We all have different ways of examining our values. However, we must always keep in mind that we carry a very large responsibility in the decisions we make. Ultimately, unethical practice in all areas, but particularly family law, goes to the heart of access to justice and the rule of law. That in turn goes to the role of the courts and their lawyers in the administration of democracy. We must be ever vigilant in ensuring the highest of standards.