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Ethical decision-making: a scenario-based look at how the FASEA code could apply in practice

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Deen Sanders

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Deen has more than 20 years of leadership experience in Financial Services and the regulatory environment for the industry, including as key policy maker and influencer in financial services and wealth management regulation. As past CEO/Commissioner of the national standards and professional regulatory system (Professional Standards Authority), he was responsible for oversight of law, audit, engineering and non medical professions in Australia. As inaugural CEO of the Adviser Standards and Ethics Authority he led the new ethics and practice framework for financial advice. He is an expert on financial services regulation and the legislative environment and a key commentator on Government strategies and initiatives for super, investment and wealth management. He has been a participant and/or leader in design and implementation of key law reforms in financial services since Corporations Act. As Chief Professional Officer for the FPA, he wrote the practice standards and advice model for financial planning globally and provided advice to government and industry on business models, compliance and practices of wealth management. With Deloitte he has led strategic campaigns, including ethical leadership, capability and compliance system reforms across multiple clients. As academic and thought leader he leads debate on the Royal Commission and reform consequences and has been a lead futurist on business models and the professional development of the wealth sector, as well as being expert in social finance systems, individual accountability and consumer centric, ethical, professional. He was awarded an Order of Australia Medal in 2017 for his leading academic and regulatory work in the field of professional standards.



Dennis Gentilini

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Dennis is an author, advisor and contributor to discussions on the topics of ethics, governance, conduct and organisational culture. He has had over 15 years experience in the banking and finance industry and currently works in Deloitte's Governance, Regulation and Conduct practice. Dennis is the author of *The Origins of Ethical Failures* and contributes to numerous blogs, newspapers and journals both in Australia and overseas. He is an adjunct fellow at Macquarie University, and honorary fellow at the Centre for Ethical Leadership and holds degrees in banking and finance and psychology.

Financial Planners and Advisers Code of Ethics 2019

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Legislative Instrument registered 11 Feb 2019

The Corporations Act was amended in 2017 to provide for improved standards of **education, training, ethical behaviour** and **professionalism** for relevant providers (financial planners and financial advisers).

Among those changes, section 921E of the Act *now requires all relevant providers to comply with a Code of Ethics* made by the Authority under paragraph 921U(2)(b) of the Act.

Financial Planners and Advisers Code of Ethics 2019

Standard 1	You must act in accordance with all applicable laws, including this Code, and not try to avoid or circumvent their intent.	Standard 2	You must act with integrity and in the best interests of each of your clients.	Standard 3	You must not act in any other manner where you have a conflict of interest or duty.	Standard 4	You must only give advice and financial products to a client if you are satisfied that the client understands your advice, and the benefits, costs and risks of the financial products that you recommend, and you must have reasonable grounds to be satisfied.	Standard 5	You must take into account the broad effects arising from the client acting on your advice and actively consider the client's broader, long-term interests and likely circumstances.	Standard 6	You must give free, prior and informed consent to all benefits you and your principal of receive in connection with acting for the client, including any fees for services that may be charged. If required in the case of an existing client, the consent should be obtained as soon as practicable after you receive any benefits in connection with acting for a client, that derive from a financial product that you provide to the client.	Standard 7	You must ensure that any fees and charges that you receive are reasonable and represent the best interests of your clients.	Standard 8	You must ensure that your records of client information are complete and accurate.	Standard 9	You must ensure that all advice you give, and all products, services and financial products you offer, are offered in good faith and with competence and care.	Standard 10	You must apply a high level of relevant professional care and skill, and apply a high level of relevant professional care and skill, and apply a high level of relevant professional care and skill, and apply a high level of relevant professional care and skill.
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Codes – too little – and maybe too late?

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Commissioner Hayne might be a good litmus test of the community.

On the one hand he sees Industry Codes as being vital, encouraging industry to make them ...

"more than public relations puffs, [and] the promises made must be made seriously."

However his support is tempered by a preference for enforceability, famously noting, in the context of codes of ethics, that.....

"It is laws, and not codes of ethics, that are the proper repositories for basic norms of conduct."

What is ethics?

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Voting time

Moral theories

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Utilitarianism

Jeremy Bentham
1748-1832

*"...the greatest
happiness of the
greatest number is the
foundation of morals
and legislation."*

Moral theories

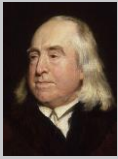
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Voting time

Moral theories

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Utilitarianism

Jeremy Bentham
1748-1832

"...the greatest happiness of the greatest number is the foundation of morals and legislation."



Deontology

Immanuel Kant
1724-1804

"...a lie is a lie, and is in itself intrinsically base [evil] whether it be told with good or bad intent."

Heinz dilemma

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A woman was on her deathbed. There was one drug that the doctors thought might save her. It was a form of radium that a druggist in the same town had recently discovered. The drug was expensive to make, but the druggist was charging ten times what the drug cost him to produce. He paid \$2,000 for the radium and charged \$20,000 for a small dose of the drug. The sick woman's husband, Heinz, went to everyone he knew to borrow the money, but he could only get together about \$10,000 which is half of what it cost. He told the druggist that his wife was dying and asked him to sell it cheaper or let him pay later. But the druggist said: "No, I discovered the drug and I'm going to make money from it." Should Heinz break into the laboratory to steal the drug for his wife?

Heinz dilemma

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Voting time

But in the real world (voluntary)

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Case Study B, FASEA Code of Ethics 2019:

Bob, a senior financial planner employed by a large financial institution, advises a number of clients. He recommends strategies or investments that are, in fact, too risky for his clients' circumstances and risk profiles. He conducts transactions in his clients' names without their authority. He charges an "ongoing advice fee" without providing any ongoing advice. His files are inadequately kept, but he blames this on the poor systems provided by his principal (the financial institution).

But in the real world...

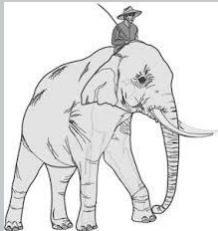
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Voting time

We are intuitive

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The FASEA Code of Ethics - Context

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A Code of Ethics is meant to be a process of debate and discussion *between and within a professional community*, after which is agreed a framework of normative ethical behaviour, that validates the delivery of professional services and ensures a focus on client protection and outcomes.

Dr Deen Sanders OAM

It is important to recognise the proper place of the proposed Code of Ethics. Codes of ethics are not laws. Codes of ethics are important to fostering public confidence and practitioner integrity in a profession. They are composed by industry practitioners according to agreed industry processes.

Commissioner Kenneth Hayne

The FASEA Code of Ethics

Standard 1 You must act in accordance with all applicable laws, including this Code, and not try to avoid or circumvent their intent.	Standard 7 The client must give free, prior and informed consent to all benefits you and your principal will receive in connection with acting for the client, including any fees for services that may be charged. If required in the case of existing client, the consent should be obtained as soon as practicable after Code commences. Except where expressly permitted by the Corporations Act 2001, you may not receive any benefits, in connection with acting for a client, that derive from a third party other than your principal. You must satisfy yourself that any fees and charges that the client must pay to you or your principal, and any benefits that you or your principal receive, in connection with acting for the client are fair and reasonable and represent value for money for the client.
Standard 2 You must act with integrity and in the best interests of each of your clients.	Standard 8 You must ensure that your records of clients, including former clients, are kept in a form that is complete and accurate.
Standard 3 You must not advise, refer or act in any other manner where you have a conflict of interest or duty.	Standard 9 All advice you give, and all products you recommend, to a client must be offered in good faith and with competence and be neither misleading nor deceptive.
Standard 4 You may act for a client only with the client's free, prior and informed consent. If required in the case of an existing client, the consent should be obtained as soon as practicable after the Code commences.	Standard 10 You must develop, maintain and apply a high level of relevant knowledge and skills.
Standard 5 All advice and financial product recommendations that you give to a client must be in the best interests of the client and appropriate to the client's individual circumstances. You must be satisfied that the client understands your advice, and the benefits, costs and risks of the financial products that you recommend, and you must have reasonable grounds to be satisfied.	Standard 11 You must cooperate with ASIC and monitoring bodies in any investigation of a breach or potential breach of this Code.
Standard 6 You must take into account the broad effects arising from the client acting on your advice and actively consider the client's broader, long-term interests and likely circumstances.	Standard 12 Individually and in cooperation with peers, you must uphold and promote the ethical standards of the profession and hold each other accountable for the protection of the public interest.

FASEA's Code of Ethics – Explanatory Statement

Standard 1 You must act in accordance with all applicable laws, including this Code, and not try to avoid or circumvent their intent.	This Standard requires, as an ethical duty, that you comply with your legal obligations and not seek to avoid them. This is a minimum ethical obligation
Standard 2 You must act with integrity and in the best interests of each of your clients.	You act in a client's best interests if what you do—the advice you give, the products and services you recommend—are appropriate to meet the client's objectives, financial situation and needs, taking into account the client's broader, long-term interests and likely future circumstances. The test is, in short: will your advice and recommendations improve the client's financial well-being? You are not relieved of the ethical duty merely because the client does not provide enough information, even when asked.
Standard 3 You must not advise, refer or act in any other manner where you have a conflict of interest or duty	The primary ethical duty in this Standard is that, if you have a conflict of interest or duty, you must disclose the conflict to the client and you must not act.

Scenario

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Jack Junior and Carol are lucrative, popular and easy clients. You have enjoyed access to new high income clients through Jack's connections and fun social events. Jack's family is a complicated dynasty with siblings drawn to risky activities, and elderly members prone to long lives and early dementia. Carol is an only child. They have three young children of their own.

Carol takes a primary role in the management of the SMSF and investment decisions. Jack Junior joins trustee meetings whenever he needs to and has more wealth in the SMSF, but you can tell he has lost interest and relies on Carol to stay across the detail.

They come to you and tell you that their marriage is breaking down. Whilst relatively amicable at this point, they want to put plans in place to separate their finances.

You want to keep them both as clients. Jack Junior is a significant business client for you, and Carol is an easy client with whom you have a good relationship.

Scenario

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Would keeping them both breach any of the Ethical requirements?

Is there a process you could institute to keep them both as clients?

Whichever decision is taken, what ethical challenges can you see arise in future dealings?

Code Monitoring

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Enforcement of the Code of Ethics

Not a crime or civil penalty

Failure to comply with the Code is not a criminal offence, and section 921E of the Act is not a civil penalty provision.

Monitoring bodies' role

Under Division 8B of Part 7.6 of the Act, all relevant providers must be covered by a compliance scheme approved by ASIC. Monitoring bodies have the power to investigate breaches and potential breaches of the Code, and impose sanctions set out in their compliance schemes if they determine that a breach has occurred. Potential sanctions that a compliance scheme may provide cover the spectrum from a warning or reprimand through to exclusion from coverage of the monitoring body's compliance scheme.

Its not just FASEA's ethics

Commissioner Hayne called for genuine changes in behaviour

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Hayne challenges the industry to embed changes in behaviour that will prove resistant to the subtle decay of rules based compliance systems in a commercial environment.

Requirements to disclose any lack of independence

Management of any ongoing fee arrangements with clients

Addressing conflicts of interest and conflicted remuneration

Requirements for registration and discipline that will radically accelerate professionalisation

Impacts:

Wide approval and adoption of Codes will **defy traditional approaches to compliance.**

There will be no formal compliance program that can properly control and monitor the broad behaviours captured by a code.

Institutions will instead need to increase focus on ethics, professionalism, individual accountability and culture to avoid breaches of codes.

Deloitte.

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