



ETHICS (RULE 57) CPD

WIN In-House Counsel Day Sydney 2017

Wednesday, 22 February 2017

Agenda

1. Ethical Framework - (10 mins)

2. Materials - (5 mins)

3. Topics - Conflicts, Confidentiality, Courtesy - (10 mins)

4. Recent Misconduct Cases - (15 mins)

5. Conflicts Exercise - (10 mins)

Ethical Framework

1. Common Law

- Duty to Court and Administration of Justice

2. Equity

- Fiduciary Duty

3. 'Uniform' Legislation

- Legal Professional Uniform Law (NSW)

4. 'Uniform' Regulation

- Legal Profession Uniform Regulations 2015
- Australian Solicitors' Conduct Rules 2015

Ethical Framework

Foundation Issues

- Same for all lawyers in NSW – private, corporate, government, pro-bono
- Who is the client? Answer determines retainer, confidentiality, LPP etc.
- Ensure client complies with law in governance and compliance systems
- Separate legal, commercial and risk advice – LPP implications
- Renew practising certificates – independent legal (not management) advice
- Communications (emails) – avoid unnecessary circulation to third party to maintain LPP on legal advice

Ethical Framework

Conflicts of duty and loyalty of solicitor

- legal professional privilege - scrutinise
- advising employees when conflict with employer
- opinion shopping – 2nd or 3rd opinions with different observations
- properly and fully brief external solicitors or counsel
- discovery compliance
- swearing affidavits and statutory declarations
- treatment of whistle blowers

Materials

- Law Society of NSW website:

<http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/index.htm>

http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/statement_of_ethics/index.htm

<http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/Protocolsguidelines/index.htm>

<http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1048069.pdf>

- Cordery on Solicitors, 8th Edition, F. T. Horne (UK text)
- Riley Looseleaf Service

Topics - #1 - Confidentiality

ASCR 9: Confidentiality

- Not disclose confidential client information to third party – survives retainer
- Now permitted to disclose confidential client information in limited circumstances:
 - compelled by law (9.2.2)
 - the solicitor seeks advice in connection with the solicitor's legal or ethical obligations (9.2.3)
 - information disclosed to the insurer of the solicitor, law practice or associated entities (9.2.6)
- Potential breach of employment contract, ASCR and fiduciary duty

Topics - #2 - Conflicts

ASCR 10: Conflicts concerning former clients

- Must avoid conflicts between current and former clients where confidential information held (10.1)
- Two new exceptions to acting against a former client (10.2):
 - the former client has given informed written consent; or
 - an effective information barrier has been established.
- Almost US 'written waiver' standard - meets local market expectations
- ASCR supplements common law and existing case law – *Mallesons v. KPMG Peat Marwick* (1990) 4 WAR 357
- Difference between legal and commercial conflict

Topics - #3 – Courtesy and Respect

ASCR 30-33: Relations with other solicitors

- Business not personal
- Objective not subjective
- Correspondence to counterparts - 'your client' not 'you'
- Don't impute motives
- Formal
- Overnight test

Recent Misconduct Cases #1

***Law Society of NSW v Hocking* [2017] NSWCATOD 19**

- Action against solicitor for misconduct including gross overcharging, misleading clients and misappropriating trust funds.
- Previously struck off the role in 1968 for similar misconduct.
- Misconduct took place between July 2009 and January 2014 and including:
 - deducting fees from dividends to clients in the Sons of Gwalia case without clients' authorisation (approx. \$187,512.30);
 - in some cases 'whole dividend was appropriated on account of costs and disbursements;
 - misappropriating money owed to barristers briefed to appear in a defamation case against Fairfax Media and used money to pay down office overdraft account
- Struck off and ordered to pay Law Society's costs.

Recent Misconduct Cases #2

Victoria LSC v Lewenberg No 2 (Legal Practice) [2016] VCAT 556

- Solicitor guilty of two counts of professional misconduct for suggesting that Jewish community members should not assist authorities in the criminal prosecution of other community members.
- In September 2011, solicitor appeared on behalf of David Cyprys, who was charged and convicted of a number of sexual offences against children from the Orthodox Jewish community.
- Victoria Police had been assisted in their investigation of the accused by a member of the Jewish community, known by the pseudonym AVB.
- During the hearing in the Melbourne Magistrates' Court, Mr Lewenberg expressed to the accused's father his disappointment that a Jew had assisted the authorities in the prosecution of another Jew.

Recent Misconduct Cases #2 (cont.)

- ***Victoria Legal Services Commissioner v Lewenberg No 2 (Legal Practice)***
[2016] VCAT 556
- In finding Mr Lewenberg guilty of professional misconduct, Judge Pamela Jenkins stated:

'... for the Respondent, as a legal practitioner, to suggest that members of the Jewish community or indeed any community or religious affiliation, should close ranks and decline to assist in the prosecution of criminal charges of this nature is truly shocking.'
- Solicitor reprimanded, practising certificate suspended for 15 months, and he has to complete further training in legal ethics and professional responsibility as directed by the Commissioner. He has also been ordered to pay the Commissioner's costs in the amount of \$55,455.41

Recent Misconduct Cases #3

LSC v PLP (Legal Practice) [2014] VCAT 793

Male partner of small law firm propositioned female law graduate on 11 separate occasions – on one of those occasions no less than 78 times

- Law graduate undertaking Grad Diploma of Legal Practice
- Filmed her without her permission
- Emailed nude photographs of himself
- Emailed photographs with Russian prostitute

Earlier EO claim in HR Division of VCAT – *GLS v. PLP [2013] VCAT 221* – A\$100,000 damages awarded against solicitor

Publicity around EO claim alerted the LSC to take action – can factual findings in EO case support professional misconduct?

Recent Misconduct Cases #3

LSC v PLP (Legal Practice) [2014] VCAT 793 (cont.)

VCAT Reviewed all EO/HR evidence in detail and brought own disciplinary action

- coarse language and sexting
- denied sending naked photos, received on her phone
- physical touching and intimidation
- false imprisonment – locked in board room
- denied everything but gave no evidence
- claimed Asperger's Disorder – was 'on the spectrum'

Disqualified by VCAT (but there's more ...)

Recent Misconduct Cases #3

- Solicitor appealed and succeeded

PLP v. McGarvie and VCAT [2014] VSCA 253

- Penalty manifestly excessive because
 - fined \$100,000 in HR/EO VCAT;
 - sole practitioner, cancelling practising certificate casts significant financial burden; and
 - beyond range and manifestly excessive.

Conflicts Exercise - *Hypothetical*

- A large US IT company decides to lease its A-Pac HQ on NSWG land that is being rehabilitated and redeveloped in inner Sydney
- Firm A acts for the US IT company, Firm B for NSWG
- After 12 months, the parties have developed a draft terms sheet, and confidential negotiations continue, but slow progress
- No binding agreement
- Unexpectedly Firm B receives a confidential RFT from the large US IT company's procurement division in Singapore to tender for legal services for the removal of the large US IT data services to a new HQ in south western Sydney.
- This occurs 2 days before a proposed all-day meeting of NSWG and the large US IT company to settle terms on the NSWG land.
- What does Firm B do?

Conflicts Exercise - *Hypothetical*

- Does Firm B tell its client (NSWG)?
- Is it entitled to?
- If so, when does it – before or after the all-day terms meeting?
- Does the timing matter?
- Does Firm B owe any duty of confidentiality to the large US IT company?
- Why or why not?
- If the US IT company has been double dealing, does NSWG have any redress?
- If so, what?

Questions

