



SESSION 6: PROFESSIONAL ETHICS

WIN In-House Counsel Day Brisbane 2017

Tuesday, 21 February 2017

Agenda

1	Responsibilities of in-house counsel	2
2	The pitfalls of occupying legal and non-legal roles within a company	4
3	Your duty to the court and the need to maintain independence	9
4	Being aware of your personal conduct and social media footprint	15

1

Responsibilities of In-House Counsel

Remember ...

- Professional ethical standards and disciplinary procedures apply to all lawyers:
 - Australian Solicitors Conduct Rules
 - *Legal Profession Act 2007* (Qld)
- Failure to maintain ethical standards could result in:
 - Loss of a commercial advantage
 - Adverse costs orders
 - Compromise of personal and professional integrity

"an in-house solicitor is, by reason of his or her position, more likely to act for purposes unrelated to legal proceedings than an external solicitor" [Sydney Airports Corp Ltd v Singapore Airlines Ltd [2005] NSWCA 47]

2

Occupying Multiple Roles

Separating Multiple Roles

- In-house counsel rarely act solely as legal advisers
- Especially in smaller companies, they may hold multiple roles, such as acting as both general counsel and company secretary
- **For the purpose of assessing the duty of care and diligence under the *Corporations Act 2001 (Cth)*, can these roles be separated?**

Scenario

- Targaryen Enterprises is liable for compensation claims
- Daenerys is both the company's general counsel and the company secretary
- Daenerys recommends that the Board create a subsidiary to fund the compensation claims and indemnify Targaryen Enterprises for those claims
- The Board accepts the recommendation and releases an inaccurate announcement due to errors in an actuarial report of which Daenerys is aware but does not disclose to the board, and releases limited information about the deed of indemnity between the parent and the subsidiary
- Targaryen Enterprises has legal obligations to make disclosures to the ASX

Is Daenerys liable?

- Is Daenerys an officer of the company in both positions she holds?
- Did Daenerys breach the standard of care and diligence imposed pursuant to section 180(1) of the *Corporations Act*?
- What were the reasons in which Daenerys breached her duty?
 - Failing to inform the board that the actuarial report did not taken into account "superimposed inflation" with respect to the compensation claims
 - Failing to advise, or seek advice for, the board with respect to the level of information to be disclosed about the deed of indemnity

Shafron v Australian Securities and Investments Commission [2012] HCA 18

- *"what responsibilities any officer of a company has in the company concerned will be a question of fact"*
- *"as general counsel and company secretary, responsibilities are wider than administrative and extend to the provision of necessary advice to protect the company from legal risk"*
- *"a reasonable person with his responsibilities would have made sure the board knew of those matters"*

Lessons

- The standard of care owed by an officer extends beyond their statutory functions
- An officer is both a person who holds a formal office in the company and also someone who makes, or participates in making, decisions that affect the whole or a substantial part of the company's business
- Person's occupying twin roles have a high responsibility to protect the corporation from legal risk and the responsibilities of both roles are often indivisible
- A number of steps may reduce these risks, including:
 - Maintaining documentary records, particularly accurate minutes
 - External indicators
 - Carefully drafting job descriptions
- Where there is a separation between general counsel and company secretary, general counsel should rigorously confine their role to providing in-house legal advice of a kind that would be provided by an external lawyer

3

Duty to the Court

Scenario

- Harvey has an imminent court deadline for filing affidavits with significant costs consequences for non-compliance
- Mike wants to swear an affidavit over the phone before boarding a 12 hour flight to a remote location and has a bible to hand to do so. He can arrange a courier from the airport to the office to deliver the affidavit
- **Can Harvey witness the affidavit and file it this afternoon? What if it were accompanied by an affidavit of Harvey deposing to the circumstances and confirming his intimate knowledge of Mike's signature?**

Lessons

Legal Services Commissioner v ZD Bentley [2016] QCAT 185

"..our system depends upon being able to rely upon the fact that an affidavit, which is said to have been sworn by a deponent, has in fact been so sworn, and therefore the role of the witness is fundamental"

- Australian Solicitors Conduct Rules:
 - rule 3.1: *A solicitor's duty to the court and the administration of justice is paramount*
 - rule 19.1: *A solicitor must not deceive or knowingly or recklessly mislead the court*
- Uniform Civil Procedure Rules 1999 (Qld) rule 432 – *an affidavit must be signed by the person making it **in the presence of** the person authorised to take the affidavit*
- Oaths Act 1867 (Qld) section 41 – *a person's affidavit may be taken by... a person authorised to administer an oath under the law of the place in which the affidavit is taken*

4

Independence of In-House Counsel

Scenario

- Francis is the general counsel for a big newspaper
- Zoe finds details for a big news story through illegal email hacking of an anonymous blogger, but can also find details for the big news story on the public domain
- Application by anonymous blogger for injunctive relief to prevent the publication of the story
- Court asks Francis how the details for the story were initially obtained
- **Should he admit to hacking a private email, deny the hacking allegation as baseless or make no concession or denial?**

Lessons

Alastair Brett v Solicitors Regulation Authority [2014] EWHC 2974 (Admin)

"misleading the court ...is one of the most serious offences that an advocate or litigator can commit"

- Australian Solicitors Conduct Rules:
 - rule 4.1.4 – *A solicitor must avoid any compromise to their integrity and professional independence*
 - rule 17.1 – *A solicitor representing a client that is before the court must not act as the mere mouthpiece of the client*
 - rule 19 – *A solicitor must not deceive or knowingly or recklessly mislead the court*
 - rule 20.1 – *A solicitor who learns that the client or a witness for the client has suppressed or procured another person to suppress material evidence on a topic where there was a positive duty to make disclosure to the court, must advise the client that the court should be informed, and **refuse to take any further part in the case unless the client authorises the solicitor to inform the court***

5

Social Media

Scenario

- You are in-house counsel for a company which has recently released a controversial new health product
- Competitor company is about to publish an article which makes damaging accusations about the legitimacy of your company's health product and you instruct external solicitors "All Talk & Co" to file an injunction to prevent its publication. They are unsuccessful and the article is published.
- You share the article and comment:
 - *"This so-called Judge is absolutely clueless, cannot believe he let this ridiculous information be published. Of course this smoothie can reduce stress and cure tinea, we have alternative facts to prove it! I haven't been doing really good in the legal practice for 15 years to watch All Talk & Co screw up injunctive proceedings. As if I hadn't worked enough late hours for my a**hole boss so they had enough evidence to win. Let's hope that someone says "You're fired."*

Lessons

- See:
 - ***In the Matter of Peshek No 6201779, Comm No 09 CH 89***
 - ***Legal Services Commissioner v Paric [2015] VCAT 1533***
- Australian Solicitors Conduct Rules:
 - rule 3.1: *A solicitor's duty to the court and the administration of justice is paramount*
 - rule 4.1.2: *A solicitor must be honest and courteous in all dealings in the course of legal practice*
 - rule 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*
 - rule 28.1: *A solicitor must not publish or take steps towards the publication of any material concerning current proceedings which may prejudice a fair trial or the administration of justice*

Lessons ctd.

- Misrepresenting legal qualifications

- See:
 - ***Legal Services Commissioner v Karakoulakis [2016] VCAT 1504***
"...actions affect the trust and respect the community has for the legal profession as a whole"

 - ***Legal Services Commissioner v Grosser [2014] VCAT 1533***
"...conduct suggests that he is on a different plane in terms of character and morality, to the vast majority of practitioners"

 - ***Legal Services Commissioner v El Foster [2016] QCAT 101***
"Truth and honesty in dealing with other practitioners and clients is a core responsibility for legal practitioners and a central basis upon which the profession operates"

Lessons ctd.

- Statements made publicly in a professional capacity
- Social media is not private
 - It negatively impacts your professional integrity
 - It negatively impacts your company's image
 - It cannot ever be deleted

Law Institute of Victoria 'Guidelines on the Ethical use of Social Media'
(published 29 November 2012)

Key Tips for In-House Counsel



Any questions?

