



# **WIN: WHAT IN-HOUSE LAWYERS NEED PUBLIC SECTOR ESSENTIALS**



Ethics - Cases, Trends and Updates

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This session will cover:

- Ethical Framework
- Materials and Resources
- 5 ASCRs
- 5 case studies of 2014

- 1 Common Law
  - Duty to Court and administration of Justice
- 2 Equity
  - Fiduciary duty
- 3 Legislation
  - *Legal Professional Act 2005 (NSW)*
- 4 Regulation
  - Legal Profession Regulations
  - Australian Solicitors' Conduct Rules

- Same as any other lawyer in NSW
- Corporation is the client - not CEO, CFO, immediate report, board or chair
- Avoid conflict of obligations to corporation and court, eg on discovery
- Role to identify and manage legal risks in corporation's business
- Ensure corporation complies with law
  - governance systems
  - compliance systems
- Don't intermingle legal and commercial or risk advice – LPP implications
- Renew practising certificates – independent legal (not management) advice
- Emails – avoid unnecessary circulation to 3P to maintain LPP

Also:

- 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/statement_of_ethics/index.htm)

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

- Cordery on Solicitors, 8<sup>th</sup> Edition, F. T. Horne (UK text)
- Ethics in Law, Stan Ross, 4<sup>th</sup> Edition (Australian text)

- To court or counterparty
- Personal
- In writing – clear, precise and unambiguous
- Enforceable
- Shouldn't require co-operation of third party
- (Don't give them)

### Rule 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

## Rule 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.
- Not quite US 'gold standard' but 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



- Security for unpaid legal costs over client file
- Be cautious
- Alternative security – can't jeopardise client prospects
- Pay on completion

## 5 Stay out of client matter (ASCR 27)

- Don't give evidence of facts in litigation – only procedural matters
- Don't Certify independence or advice on transactional matters
- Solicitor on record best not to witness affidavits

## 6 Be courteous (ASCR 30-33)

- Business, not personal
- Correspondence to counterparts
- Don't impute motives
- Formal

## **1. *McBride v Christies Australia Pty Ltd* [2014] NSWSC 1729 – 4 December 2014**

- May 2000 bought Albert Tucker painting (Faun & Parrot) at Christies for \$85,000
- Leased
- Forgery – discovered 2010 when selling
- \$118,788.71 losses
- Sued:
  - Christies – M+D, unconscionable conduct, deceit;
  - Sharpe (art adviser) – M+D, breach of FD, contract
  - Alex Holland of HFA (vendor) – M+D

- 10 hearing days; 8 counsel; 2 silk
- 199 page judgment
- for \$118,788.81

<http://www.austlii.edu.au/au/cases/nsw/NSWCSC/2014/1729.html>

Christie 85%, HFA 10% and Sharpe 5%

Ethical issue – Plaintiff's (barrister) evidence

- Chaotic (140); tax treatment
- 4 divergent affidavits, over 12 months (140, 143)
- Accuracy (165); no sense of confidence
- Costs arguments – 1 April 2015

## ***2. Legal Services Commissioner v Luke Grosser VCAT J90/2014***

- Charges of professional misconduct between October 2008 and November 2010 re false claims to academic qualifications, extent of work experience and when applying for NSW admission
- Suppression request – not pursued
- Didn't attend hearing – poor impression
- Misrepresentations included:
  - TER → 79.75 for 97.80
  - B.Sc (Astrophysics) Monash
  - LI.B H1 → H2

- Banned for holding practising certificate for 7 years, \$5,000 fine, costs
- Social media -

<https://twitter.com/parkelawyers/status/557106380872499200>

<https://twitter.com/lukegrosser>

### 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 permission
- Emailed nude photographs
- Emailed photographs with Russian prostitute

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

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



Reviewed all EO/HR evidence in detail

- coarse language
- sexting
- denied 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*

### **4. *Law Society NSW v Arraj [2014] NSWCATOD 117***

Failing to complete MCLE requirements in accordance with undertaking - \$2,000 fine and reprimand

### **5. *LSC v Keough [2010] VCAT 108***

Plagiarism in research paper for Master of Health and Medical Law at UoM which was then published in Journal of Law and Medicine – practising certificate cancelled for 6 months



**QUESTIONS?**





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