

SVENSON
BARRISTERS



Practical legal ethics

*LEARNING FROM OTHER PRACTITIONERS
EXPERIENCES: DECISIONS INVOLVING LEGAL
PRACTITIONERS' ETHICAL AND PROFESSIONAL
OBLIGATIONS*

MARCH 2018

Who you will hear from



What we will cover

- 1. ACTING AGAINST FORMER CLIENTS**
- 2. USING CONFIDENTIAL INFORMATION RECEIVED BY MISTAKE**
- 3. ONGOING DISCOVERY OBLIGATIONS**
- 4. THE DUTY NOT TO MISLEAD THE COURT (FREEZING ORDERS)**
- 5. ETHICS IN COMMUNICATIONS**
- 6. IMMUNITY UPDATE**

Introduction

Justice D A Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63

NRMA v Heydon & Ors (1999) case no Comm D 50257/95
Heydon v NRMA & Ors [2000] NSWCA 374

Acting against former clients

**YOU'RE
OUT!**

Conflict Of Interest



Spincode v Look Software [2001] VSCA 248



*Dealer Support Services v Motor Trades Association
of Australia [2014] FCA 1065*

Using confidential information received by mistake



Protecting Privilege: Let's (not) Be Reasonable



*Expense Reduction Analysts Group Pty Ltd v
Armstrong Strategic Management and Marketing
Pty Ltd [2013] HCA 46*



*DC Payments Pty Ltd v Next Payments Pty Ltd [2016]
VSC 315*

Duties owed to the Court

General Law Duties:

- Duty of disclosure
- Duty not to abuse Court Process
- Duty not to corrupt administration of Justice
- Duty to conduct cases efficiently and expeditiously

Civil Procedure Act Duties

- Ss. 7 and 9 – Overarching purpose – “just determination”
- S. 21 - Overarching obligation not to mislead or deceive
- S. 26 – Overarching obligation to disclose existence of documents

Australian Solicitors' Conduct Rules

Rule 3.1 – duty to the Court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty

Rule 19 – Frankness in Court

19.1 must not mislead

19.2 must correct any misleading statement as soon as possible after the solicitor become aware that the statement was misleading (see also rule 22.2 re correction of statements to opponents that are realised to be false)

19.4 and 19.5 - ex parte applications

Players v Clone [2016] SASCFC 134

“The Lessee will upon expiration or earlier determination of the Lease transfer to the Lessor any Liquor Licenses or gaming machine Licenses held in respect of the premises for ~~nil~~ consideration.”

Players v Clone

- Did Clone breach an obligation to discover hotel licence copy?
- Did Clone breach an obligation to disclose to Players the production to the Court by the Liquor and Gambling Commissioner?
- Did Clone mislead the Court and Players by failing to inform them of the existence of the hotel licence copy and/or prosecuting a case on the false premise that the provenance of copies of the agreement to lease was unknown?
- Did Clone mislead the Court of Appeal by submitting in substance that the two copies admitted into evidence were the only copies of the agreement in existence?

Boreh v Djibouti & Ors [2015]

EWHC 769

- Freezing and Proprietary injunction
- Terrorist attack in Djibouti on evening of 4 March 2009
- Conviction based on transcripts of telephone conversations on afternoon of 5 March 2009 purportedly referring to attack
- In fact, transcripts were of conversation on afternoon of 4 March 2009 and could not have referred to attack.
- Conviction unsafe

Boreh v Djibouti & Ors

- October 2012 – Proceedings issued
- April 2013 – injunctive relief sought and undertakings given pending contested hearing
- 25 August 2013 – Mr Gray learns of the real time of the conservation:
“Many people would not have checked and disaster would most certainly have followed”
- 26 August 2013 – *“...having reviewed the evidence we can get away with the date error.”*
- 10 and 11 September 2013 – contested hearing

Ethics in Communications

See Rule 22 (Uniform Rules)

Legal Services Commissioner v Mullins [2006] LPT 12

- Duty to Disclose in Mediations

Legal Services Commissioner v Garrett [2009] LPT 12

- Solicitor liable for following advice of Counsel

Is there a duty of candour in mediations?

- What should you do when you become aware of inconsistent facts?
- How do you deal with your client?



Client Privilege exposed

Kaye v Woods (No. 2) [2016] ACTSC 87

- Concealment of adverse medical report
- S 125 – *Evidence Act* – *loss of privilege* – *misconduct*

*Can conduct of Solicitors overturn their client's
Legal Professional Privilege?*



Advocates Immunity

Goddard Elliott v Fritsch [2012] VSC 87

- Bad settlement advice held to be immune from suit.

Attwells v Jackson Lalic Lawyers Pty Limited [2016] HCA 16

- No immunity for settlement advice.

Kendirjian v Lepore [2017] HCA 13

- Failure to communicate offer of compromise and poor trial result held to be outside protection of advocates immunity.

Immunity abrogated?

S 263(1) LPUL – Suspension of immunity for Chapter 5 Actions

Compensation orders (Ch 5 Pt 5.5): s 308 LPUL:

- (2) Order that the Law practice pay compensation:
 - (a) by the LSBC —\$25 000; or
 - (b) by the tribunal—\$25 000 or a greater amount agreed.

Avoiding claims

*Council of the New South Wales Bar Association v Berwick
(No.2) [2017] NSWCATOD 133*

- Are you proficient in this area of law?
- Have all necessary preliminary steps been taken prior to trial?
- Immunity no bar to VLSC investigation/determinations.

QUESTIONS
