



THE LAW SOCIETY  
OF NEW SOUTH WALES

Practical aspects of ethics – duties,  
conflicts and issues in criminal law  
2018.

***“Maintaining high ethical standards is the hallmark of  
the legal profession”***

# Outline

Part 1: Regulatory environment

Part 2: Duties and obligations

Part 3: Dealing with Court, other solicitors and parties

Part 4: Examples: conflicts, witnesses, instructions, problems, complaints



# Part 1 – Regulatory environment

## The relationship between Ethics and Law

- Dealing with conflicts
- Duties to clients and lawyers
- International Ethics
- Comparison of rules – global ethics



# *Regulatory Framework*

- *NSW Legal Profession Act 2004*
- *Legal Profession Uniform Law (LPUL)*
- *NSW Legal Profession Regulations*
- *LPUL General Rules (regulations)*
- *LPUL Solicitors' Conduct Rules*
- *LPUL Practice (Solicitors) Rules*



# Outline

## Regulation and future direction of ethics

- Legal Profession Uniform Law (LPUL)
- LPUL General Rules 2015 (Regulations)
- LPUL Solicitors' Conduct Rules, 1-43
- LPUL Practice (Solicitors) Rules, 6-11
- International Ethics



# *NSW Legal Profession Uniform Law*

- s.296 - unsatisfactory professional conduct
- s.297 - professional misconduct
- s.298 – conduct that can result in findings of PM/UPC
- Common law – ‘disgraceful & dishonourable’.



# Professional Conduct & Practice Rules – Uniform Law

- Sec 298 (a) breach - Professional Misconduct / Unsatisfactory Professional Conduct
- Sec 298 (b) contravention of the uniform rules



# Part 2 – Duties and obligations

- Fundamental Duties
- Relations with court – formality - frankness.
- Relations with other lawyers - courteous.
- *International Principles on Conduct for the Legal Profession* – International Bar Association





# IBA International principles - #1

## Independence

- A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation.
- A lawyer shall exercise independent, unbiased professional judgment in advising a client, including as to the likelihood of success of the client's case.



# Fundamental duties - ASCR 4

- 4.1 A solicitor must also:
  - 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;
  - 4.1.2 be honest and courteous in all dealings in the course of legal practice;
  - 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;
  - 4.1.4 avoid any compromise to their integrity and professional independence; and
  - 4.1.5 comply with these Rules and the law.



# IBA International principles - #2.

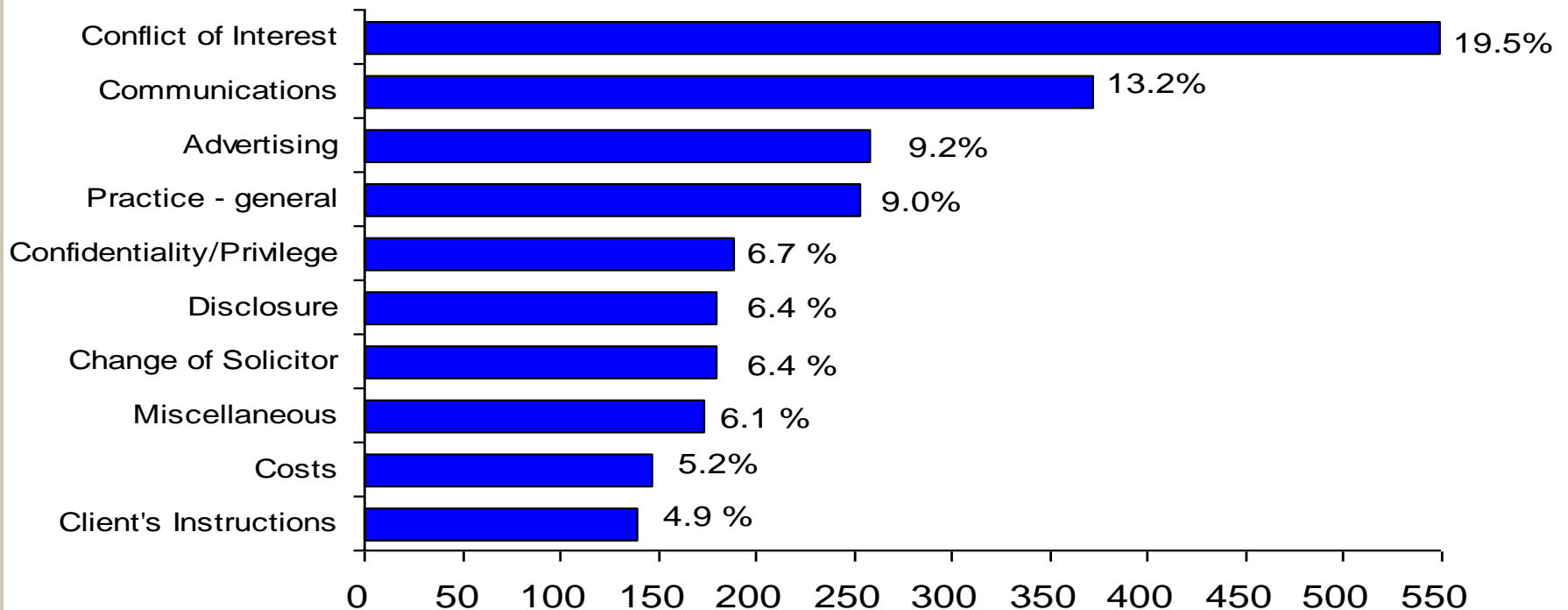
## Honesty, integrity and fairness

A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact.



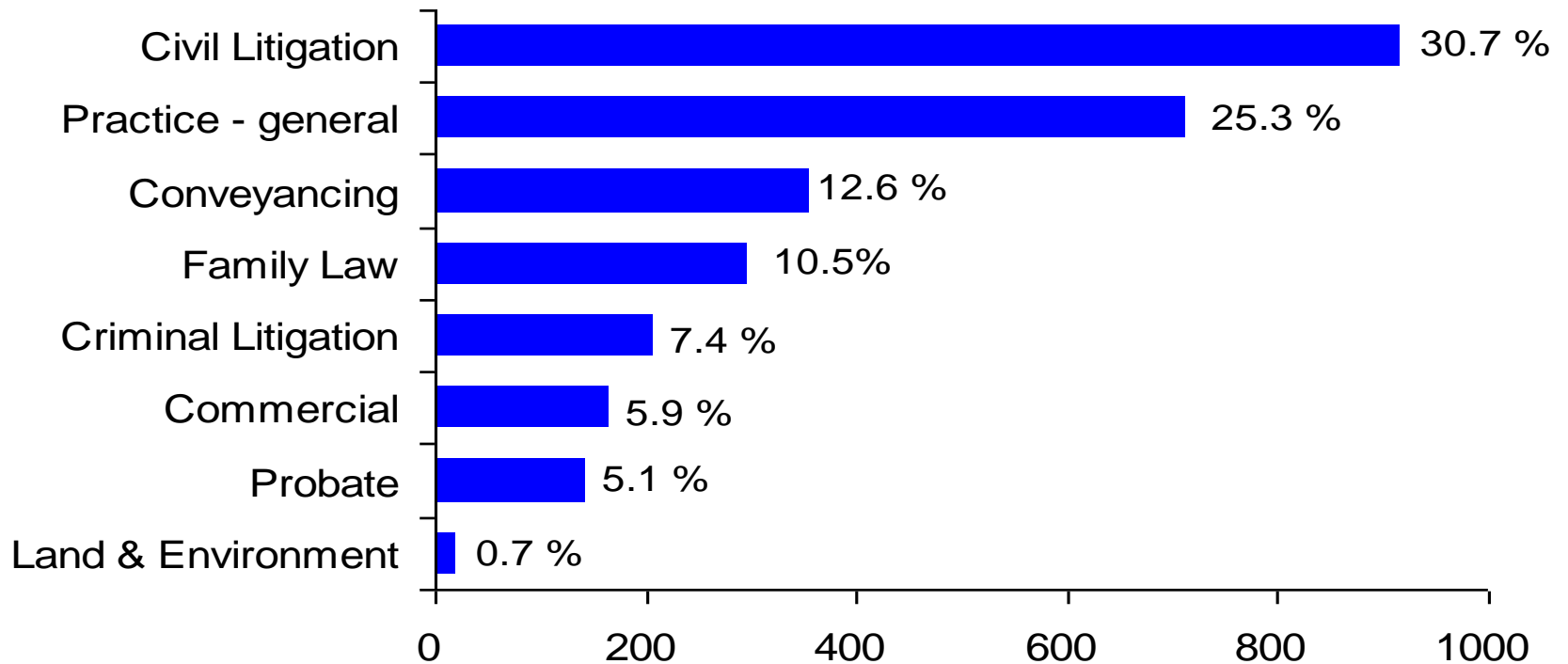
# Ethics Statistics 2016/2017

## Ethics Enquiries - most common issues



# Ethics Statistics 2016/2017

## Ethics Enquiries - area of law



# Statement of Ethics

**We acknowledge** the role of our profession in serving our community in the administration of justice. We recognise that the law should protect the rights and freedoms of members of society. We understand that we are responsible to our community to observe high standards of conduct and behaviour when we perform our duties to the courts, our clients and our fellow practitioners.

**Our conduct** and behaviour should reflect the character we aspire to have as a profession.

**This means** that as individuals engaged in the profession and as a profession:

- ⑩ We primarily serve the interests of justice.
- ⑩ We act competently and diligently in the service of our clients.
- ⑩ We advance our clients' interests above our own.
- ⑩ We act confidentially and in the protection of all client information.
- ⑩ We act together for the mutual benefit of our profession.
- ⑩ We avoid any conflict of interest and duties.
- ⑩ We observe strictly our duty to the Court of which we are officers to ensure the proper and efficient administration of justice.
- ⑩ We seek to maintain the highest standards of integrity, honesty and fairness in all our dealings.
- ⑩ We charge fairly for our work.

Proclaimed by the Council of the Law Society of New South Wales 28 May 2009.



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# Part 3 – Dealing with the Court and other lawyers

- New rules
- Confidentiality
- Dealing with opposing solicitor
- Dealing with clients / multiple clients
- Solicitor - conflicts of interest



# Dealing with other solicitors

- Confidentiality
- Errors of the other solicitor
- Inadvertent disclosure
- Unfounded allegations
- Communications with another solicitors client.





# Mistakes of other solicitor

- 30.1 A solicitor must not take unfair advantage of the obvious error of another solicitor or other person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact.



# ASCR Confidentiality

- 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 who is not:
  - 9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor's law practice; or
  - 9.1.2 a barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,
- EXCEPT as permitted in Rule 9.2.



# ASCR - Confidentiality

- 9.2 A solicitor may disclose confidential client information if:
  - 9.2.1 the client expressly or impliedly authorises disclosure;
  - 9.2.2 the solicitor is permitted or is compelled by law to disclose;
  - 9.2.3 the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations;
  - 9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence;
  - 9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person; or
  - 9.2.6 the information is disclosed to the insurer of the solicitor, law practice or associated entity.



# Confidentiality – inadvertent disclosure

## Confidentiality and Client legal privilege

- Rule 2 and the new Rule 31 LPNL (prohibited)
- Duties of solicitor who disclosed
- DPP –v Kane & ors, unreported 10/9/97  
NSWSC Matter 11386/97
- Kingston –v- State Fire Commissioner [1998]  
TASSC 140



# Inadvertent disclosure

## 31 Inadvertent disclosure

- 31.1 Unless otherwise permitted or compelled by law, a solicitor to whom material known or reasonably suspected to be confidential is disclosed by another solicitor, or by some other person and who is aware that the disclosure was inadvertent must not use the material and must:
  - 31.1.1 return, destroy or delete the material (as appropriate) immediately upon becoming aware that disclosure was inadvertent; and
  - 31.1.2 notify the other solicitor or the other person of the disclosure and the steps taken to prevent inappropriate misuse of the material.



# Inadvertent disclosure

31.2 A solicitor who reads part or all of the confidential material before becoming aware of its confidential status must:

- 31.2.1 notify the opposing solicitor or the other person immediately; and
- 31.2.2 not read any more of the material.
- 31.3 If a solicitor is instructed by a client to read confidential material received in error, the solicitor must refuse to do so.
- *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46 (6 November 2013) at 64 to 67 – Solicitors' responsibilities



# Unfounded allegations

- 32.1 A solicitor must not make an allegation against another Australian legal practitioner of unsatisfactory professional conduct or professional misconduct unless the allegation is made bona fide and the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it.



# Part 4 – Conflicts

## - concerning a solicitor's own interests

- 12.1 A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this Rule.
- 12.2 A solicitor must not exercise any undue influence intended to dispose the client to benefit the solicitor in excess of the solicitor's fair remuneration for legal services provided to the client.
- 12.3 A solicitor must not borrow any money, nor assist an associate to borrow money





# ASCR - Conflict concerning a solicitor's own interests

- 12.4.3 receiving a financial benefit from a third party in relation to any dealing where the solicitor represents a client, or from another service provider to whom a client has been referred by the solicitor, provided that the solicitor advises the client:
  - (i) that a commission or benefit is or may be payable to the solicitor in respect of the dealing or referral and the nature of that commission or benefit;
  - (ii) that the client may refuse any referral, and the client has given informed consent to the commission or benefit received or which may be received.
- 12.4.4 acting for a client in any dealing in which a financial benefit may be payable to a third party for referring the client, provided that the solicitor has first disclosed the payment or financial benefit to the client.



# ASCR 6 - Undertakings

- > 6.1 A solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, ***unless released by the recipient or by a court*** of competent jurisdiction.
- > 6.2 A solicitor ***must not seek*** from another solicitor, or that solicitor's employee, associate, or agent, undertakings in respect of a matter, that would require the co-operation ***of a third party*** who is not party to the undertaking.



# IBA International principles - # 6.

## Lawyers' undertaking

A lawyer shall honour any undertaking given in the course of the lawyer's practice in a timely manner, until the undertaking is performed, released or excused.



# ASCR- Solicitor as material witness in client's case

- 27.1 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court, the solicitor may not appear as advocate for the client in the hearing.
- 27.2 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court the solicitor, an associate of the solicitor or a law practice of which the solicitor is a member may act or continue to act for the client unless doing so would prejudice the administration of justice.



# Communication with opponents- ASCR 22

practitioner must ensure that:

- 22.1 A solicitor must ***not knowingly make a false statement*** to an opponent in relation to the case (including its compromise).
- 22.2 A solicitor must take all necessary steps to correct any false statement made by the solicitor to an opponent as soon as possible after the solicitor becomes aware that the statement was false.
- 22.3 A solicitor will not have made a false statement to the opponent simply by failing to correct an error on any matter stated to the solicitor by the opponent.
- 22.4 A solicitor must not confer or deal with any party represented by or to the knowledge of the solicitor indemnified by an insurer, unless the party and the insurer have signified willingness to that course.
- 22.5 A solicitor must not, outside an ex parte application or a hearing of which an opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:



# Communication with opponents

- 22.5.1 the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court; or
- 22.5.2 the **opponent has consented beforehand to the solicitor communicating** with the court in a specific manner notified to the opponent by the solicitor.
- ***22.6 A solicitor must promptly tell the opponent what passes between the solicitor and a court in a communication referred to in Rule 22.5.***
- 22.7 A solicitor must not raise any matter with a court in connection with current proceedings on any occasion to which an opponent has consented under Rule 22.5.2 other than the matters specifically notified by the solicitor to the opponent when seeking the opponent's consent.
- 22.8 A solicitor must take steps to inform the opponent as soon as possible after the solicitor has reasonable grounds to believe that there will be an application on behalf of the client to adjourn any hearing, of that fact and the grounds of the application, and must try, with the opponent's consent, to inform the court of that application promptly.



# ASCR 23 – opposition access to witnesses

- 23.1 A solicitor must not take any step to prevent or discourage a prospective witness or a witness from conferring with an opponent or being interviewed by or on behalf of any other person involved in the proceedings.
- 23.2 A solicitor will not have breached Rule 23.1 simply by telling a prospective witness or a witness that he or she need not agree to confer or to be interviewed or by advising about relevant obligations of confidentiality.



# ASCR 24 – Integrity of evidence – influencing evidence

## 24.1 A solicitor must not:

24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or

24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.

24.2 A solicitor will **not have** breached Rules 24.1 by:

24.2.1 expressing a general admonition to tell the truth;

24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness; or

24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not encourage the witness to give evidence different from the evidence which the witness believes to be true.





# ASCR 25 – Integrity of evidence – two witnesses together

25.1 A solicitor must not confer with, or condone another solicitor conferring with, more than one lay witness (including a party or client) at the same time:

25.1.1 about any issue which there are reasonable grounds for the solicitor to believe may be contentious at a hearing; and

25.1.2 where such conferral could affect evidence to be given by any of those witnesses, unless the solicitor believes on reasonable grounds that special circumstances require such a conference.

25.2 A solicitor will not have breached Rule 25.1 by conferring with, or condoning another solicitor conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.



# ASCR 26 – Communication with witnesses under cross examination

26.1 A solicitor must not confer with any witness (including a party or client) called by the solicitor on any matter related to the proceedings while that witness remains under cross-examination, unless:

26.1.1 the cross-examiner has consented beforehand to the solicitor doing so; or

26.1.2 the solicitor:

- (i) believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require such a conference;
- (ii) has, if possible, informed the cross-examiner beforehand of the solicitor's intention to do so; and
- (iii) otherwise does inform the cross-examiner as soon as possible of the solicitor having done so.



# ASCR 29 – prosecutors duties

- 29.1 A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.
- 29.2 A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.
- 29.3 A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.
- 29.4 A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.



# ASCR 34 - dealing with other persons

- 34.1 A solicitor must not in any action or communication associated with representing a client:
  - 34.1.1 make any statement **which grossly exceeds the legitimate assertion** of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person;
  - 34.1.2 threaten the institution of criminal or disciplinary proceedings against the other person if a civil liability to the solicitor's client is not satisfied; or
  - 34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.
- 34.2 In the conduct or promotion of a solicitor's practice, the solicitor must not seek instructions for the provision of legal services in a manner likely to oppress or harass a person who, by reason of some recent trauma or injury, or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the solicitor at the time when the instructions are sought.



# NSW and ASCR Rule 42 – Anti- discrimination and Harassment

42.1 A solicitor must not in the course of practice, engage in conduct which constitutes:

42.1.1 discrimination;

42.1.2 sexual harassment

42.1.3 workplace bullying – “bully by proxy”



# ASCR- Dealing with the Media

## 28 Public comment during current proceedings

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.



# IBA - Dealing with the Social Media

- Independence
- Integrity
- Responsibility- *To understand use;*  
*To clarify use;*  
*To use appropriately;*  
*To adhere to practice promotion, advertising and solicitation rules, codes and legislation in use; and avoid Conflicts of interest*
- Confidentiality
- Maintaining public confidence
- Policy



# In Conclusion...

- **Combine understanding of Ethics with practical approach**
- **Often the threshold problem is knowing what the appropriate ethical principle is**
- **Often knowing it doesn't provide the ready answer**
- **Don't be afraid to admit ignorance**
- **The most competent practitioners often make mistakes**
- **Rarely are 2 dilemmas identical**
- **And remember ... CONTACT your Law society !**
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