

# Law Society NT Continuing Professional Development Scheme

## Conflicts of Interest – a refresher for lawyers

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# The rules about conflicts of interest and conflicts of duty fall into 3 main categories.

1. The duty to avoid conflicts between the lawyer's own interest and the interest of the client.
2. The duty to avoid conflicts of interest between current clients of the lawyer or the lawyer's firm.
3. The duty to avoid conflicts of interest between current clients and former clients of the lawyer or the lawyer's firm.

# Sources of rules about conflicts of interest and duty to avoid conflicts

- The general law, particularly fiduciary duties and the law relating to confidential information, and the inherent jurisdiction of the court to supervise its officers.
- Rules intended to regulate the conduct of the profession.

# General law – a superior court has jurisdiction to restrain a lawyer from acting based on:

- Fiduciary duties owed by a lawyer to a client.
- Rules relating to breach of confidence derived from contract and equity.
- A superior court's inherent supervisory jurisdiction over its officers.

# Fiduciary duties

Equity recognizes the relationship between lawyer and client, characterized by trust and confidence, as a fiduciary one giving rise to an obligation of the lawyer to act in the utmost good faith in the interests of his or her client, including (among others):

- Undivided loyalty,
- Duty to avoid conflicts of interest between lawyer and the client,
- Duty to disclose lawyer – client conflict of interest.

# Undivided loyalty

Duty of disclosure includes an obligation to reveal to the client all material information coming into the lawyer's possession concerning the client's affairs: *McKaskell v Benseman* (1989) 3 NZLR 75.

# Duty to avoid conflict between lawyer's own interest and client's interest (cont)

Rules of Professional Conduct and Practice

Avoiding Conflict of Interest Between a Client's and a Practitioner's Own Interest

8.1 A practitioner must not, in any dealings with a client -

8.1.1 allow the interests of the practitioner or an associate of the practitioner to conflict with those of the client;

8.1.2 exercise any undue influence intended to dispose the client to benefit the practitioner in excess of the practitioner's fair remuneration for the legal services provided to the client;

8.2 A practitioner must not accept instructions to act for a person in any proceedings or transaction affecting or related to any legal or equitable right or entitlement or interest in property, or continue to act for a person engaged in such proceedings or transaction when the practitioner is, or becomes, aware that the person's interest in the proceedings or transaction is, or would be, in conflict with the practitioner's own interest or the interest of an associate.

# Duty to avoid conflict between lawyer's own interest and client's interest (cont)

The meeting was held on 25 October. Mr Stone had taken Mr Liddle's matrimonial file to the meeting and placed it on the front table amongst a bundle of other files and papers. In the view of the Ethics Committee he did not have Mr Liddle's express authority to take the file to the meeting and went on to find that it was "wrong and improper for Stone to have taken the file to the meeting without first having obtained the authority of Liddle to do so". Mr Liddle did not authorise the disclosure of anything on the file at the meeting and it is not shown that anything was in fact disclosed. It was the presence of the file itself which caused the complaint and the Ethics Committee's concern. The committee found that "The presence of the file put Liddle under undue and unfair pressure", at the meeting.

*Stone v The Law Society of the NT* (1992) 108 FLR 332 at 339.

# Duty to avoid conflict between lawyer's own interest and interest of client (cont)

Borrowing from a client is forbidden unless the client is recognized by the Law Society as a business entity engaged in money lending: RPCP 10.

Lending to a client is not forbidden but scrupulous conduct is required including

- Full disclosure,
- Independent advice,
- Probably advice to go elsewhere for a better deal.

*O'Reilly v Law Society of NSW* (1988) 24 NSWLR 204.

# Duty to disclose lawyer – client conflict

Where there is any conflict between the interest of the client and that of the solicitor, the duty of the solicitor is to act in perfect good faith and to make full disclosure of his interest. It must be a conscientious disclosure of all material circumstances, and everything known to him relating to the proposed transaction which might influence the conduct of the client or anybody from whom he might seek advice. To disclose less than all that is material may positively mislead. Thus for a solicitor merely to disclose that he has an interest, without identifying the interest, may serve only to mislead the client into an enhanced confidence that the solicitor will be in a position better to protect the client's interest. The conflict of interest may, and usually will, be such that it is not proper, or even possible, for the solicitor to continue to act for and advise his client. A solicitor, who deals with his client while remaining his solicitor, undertakes a heavy burden. Where a solicitor discovers that continuing to act for his client will, or may, bring the interests of his client and his own interests into conflict, it will be a rare case where he should not, at least, advise his client to take independent legal advice.

*Law Society of NSW v Harvey* [1976] 2 NSWLR 154 at 170 per Street CJ

# Disclosure of lawyer – client conflict (cont)

## Lawyer negligence

If a lawyer believes he or she may have been negligent in the conduct of the client's affairs the client should be informed of the material circumstances without delay and the client advised to seek independent legal advice (although lawyers should be aware that their professional indemnity policy forbids admission of liability).

Although it will be rarely advisable to continue to act, the client may with fully informed consent instruct the lawyer to continue to do so.

# Disclosure of lawyer – client conflict (cont)

## Australian Bar Association Rule 111

A barrister who believes on reasonable grounds that the interests of the client may conflict with the interests of the instructing solicitor, or that the client may have a claim against the instructing solicitor, must:

(a) advise the instructing solicitor of the barrister's belief;  
and

(b) if the instructing solicitor does not agree to advise the client of the barrister's belief, seek to advise the client in the presence of the instructing solicitor of the barrister's belief.

# Disclosure of lawyer – client conflict (cont)

Rules of Professional Conduct and Practice

Referral Fees - Taking unfair advantage of potential clients -

Commissions

29.1 In the conduct or promotion of a practitioner's practice, the practitioner

must not -

29.1.1 accept a retainer or instructions to provide legal services to a person, who has been introduced or referred to the practitioner by a third party to whom the practitioner has given or offered to provide a fee, benefit or reward for the referral of clients or potential clients, unless the practitioner has first disclosed to the person referred the practitioner's arrangement with the third party;

# Lawyer – client sexual relations

Lawyer – client sexual relations are inadvisable for 3 main reasons:

1. There may be the potential for abuse of vulnerability. This is particularly so in family law matters.
2. The relationship may interfere with the lawyer's objectivity and professionalism.
3. It is conduct warranting criticism but falls short of unprofessional conduct meriting striking off.

*Bar Association of Queensland v Lamb* (1972) A LR 285

# Conflicts of duty concerning current clients

The requirement of undivided loyalty requires a lawyer or a firm to avoid conflicts between duties owed to two or more current clients.

Conflict of duty will not arise if there is (a) identity of interest between clients or (b) the interests are separate but unrelated.

# Conflicts of duty concerning current clients (cont)

The basic principles apply to contentious and non-contentious work and to civil and criminal practise.

## Contentious work

If a lawyer is acting for two or more clients in a proceeding there can be no conflict of interest permitted so careful analysis is required to avoid such a situation.

If a conflict between the interests of clients arises the lawyer will need to withdraw from acting for each client because of the proscription on the use of a client's confidential information.

Fully informed consent (which may require independent legal advice) may overcome conflict but it is unlikely to be adequately informed if a criminal law client.

# Conflicts of duty concerning current clients (cont)

## Non-contentious work

Most problems arise in the performance of non-contentious work. There is no absolute prohibition on acting for multiple clients with conflicting interests but the case law contains frequent comments condemning the practise.

If doing transactional work for multiple parties the lawyer should inquire into the nature and scope of the expected work and clarify the terms of the retainer. Transactions at arms length or involving large sums should be avoided.

If the parties are fully informed of the conflict (which may require independent legal advice) and consent to act the lawyer may continue to act.

# Conflicts of duty concerning current clients (cont)

## Consent to conflict of interest

Obtaining client consent to conflict of interest is fraught with difficulty. The duty of undivided loyalty may require disclosure to the other party of information constituting a breach of confidentiality. So, “consent” in this context will require the client to consent to the lawyer not disclosing all that he or she knows and not giving advice which conflicts with the interests of the other client.

Alternatively, the lawyer may seek to restrict the scope of the retainer and arrange for another lawyer to act in the area of conflict.

A lawyer must cease to act for both parties if an actual conflict of interest arises.

# Conflicts of duty concerning current clients (cont)

## Some examples

Lawyer acting for both parties on a conveyance. Purchaser cannot complete. Lawyer advises that he will cease to act but continues to act for purchaser until new lawyer retained. During this period he becomes aware of purchaser's precarious financial position but does not advise vendor who agrees to give vendor finance secured by (ultimately worthless) second mortgage. Vendor successful in damages claim for breach of fiduciary duty.

*Stewart v Layton* (1992) 111 ALR 687

Client who receives award of damages for personal injury invests in property developer who is the firm's biggest client and with whom the firm's partners were involved. Developer becomes insolvent. Held breach of fiduciary duty.

*Farrington v Rowe McBride* [1985] 1 NZLR 83

# Conflicts of duty concerning current clients (cont)

Lawyer acting for mortgagor (mother) and guarantor (son). Lawyer had explained nature of the transaction to the mother and advised her to seek independent legal advice. She declined and signed a form of declinature. She was aware of the risk and declined advice. Held no breach of duty.

*Clark Boyce v Mouat* [1993] 3 NZLR 641

Lawyer drawing will for elderly client in a Salvation Army nursing home. Salvation Army is lawyer's major client and will leaves bulk of estate to Salvation Army Property Trust. Lawyer failed to make proper inquiries as to testamentary capacity, including whether she appreciated who had claims on her bounty and was able to evaluate those claims. Will set aside.

*Dickman v Holley* [2013] NSWSC 18

# Conflicts of duty concerning current clients (cont)

## Rules of Professional Conduct and Practice

7.2 A practitioner who intends to accept instructions from more than one party to any proceedings or transaction must be satisfied, before accepting a retainer to act, that each of the parties is aware that the practitioner is intending to act for the others and consents to the practitioner so acting in the knowledge that the practitioner:

- (a) may be, thereby, prevented from -
- (i) disclosing to each party all information, relevant to the proceedings or transaction, within the practitioner's knowledge, or,
- (ii) giving advice to one party which is contrary to the interests of another; and
- (b) will cease to act for all parties if the practitioner would, otherwise, be obliged to act in a manner contrary to the interests of one or more of them.

7.3 If a practitioner, who is acting for more than one party to any proceedings or transaction, determines that the practitioner cannot continue to act for all of the parties without acting in a manner contrary to the interests of one or more of them, the practitioner must thereupon cease to act for all parties.

# Conflicts of duty concerning current clients (cont)

Australian Solicitors' Conduct Rules

11.4 In addition to the requirements of Rule 11.3, where a solicitor or law practice is in possession of confidential information of a client (the first client) which might reasonably be concluded to be material to another client's current matter and detrimental to the interests of the first client if disclosed,

there is a conflict of duties and the solicitor and the solicitor's law practice must not act for the other client, except as follows:

- 11.4.1 a solicitor may act where there is a conflict of duties arising from the possession of confidential information, where each client has given informed consent to the solicitor acting for another client;
- 11.4.2 a law practice (and the solicitors concerned) may act where there is a conflict of duties arising from the possession of confidential information where an effective information barrier has been established.

11.5 If a solicitor or a law practice acts for more than one client in a matter and, during the course of the conduct of that matter, an actual conflict arises between the duties owed to two or more of those

clients, the solicitor or law practice may only continue to act for one of the clients (or a group of clients

between whom there is no conflict) provided that the duty of confidentiality to other client(s) is not put at risk and the parties have given informed consent.

# Conflicts of duty concerning former clients

Some aspects of the fiduciary relationship survive the formal termination of the relationship, most notably the duty of confidentiality.

Any disqualification will apply to both the individual lawyer and his or her firm because of the presumption of imputed knowledge. This means that all the lawyers in a law practice are presumed to have the knowledge of all the other lawyers in the practice.

It is beyond doubt that a lawyer who has personally acquired relevant confidential information about a client cannot act against the former client.

# Conflicts of duty concerning former clients (cont)

The conflict may arise in the following situations:

1. A lawyer acting against a former client.
2. A different lawyer of the firm acts against the former client of another lawyer.
3. The firm acts against a former client of a lawyer subsequently employed by the firm.

# Conflicts of duty concerning former clients (cont)

The issue commonly arises in an application to a superior court to restrain a lawyer acting for a party.

There are 3 grounds on which an injunction may be sought:

1. Breach of confidence arising from the law of contract and equity.
2. The lawyer's fiduciary duties in accordance with equitable principles.
3. A superior court's inherent supervisory jurisdiction over its officers.

*Kallinicos v Hunt* (2005) 64 NSWLR 561, *Spincode v Look Software* (2001) 4 VR 501

# Conflicts of duty concerning former clients (cont)

During the subsistence of a retainer the court's jurisdiction is based on the fiduciary obligation of the lawyer and the obligation to avoid acting for clients with competing interests .

Once the retainer is at an end the jurisdiction is not based on any conflict of interest but on the protection of the confidences of the former client: *Kallinicos and Bolkiah, Prince Jefri v KPMG* [1999] 2 AC 222 but contra *Spincode v Look Software*.

Unless the lawyer can show there is no "real risk of the misuse of confidential information" or if the client shows there is a "real and sensible possibility of that misuse" the lawyer will be restrained: *Spincode v Look Software*

# Conflicts of duty concerning former clients (cont)

However, in addition the court has an inherent jurisdiction to restrain lawyers from acting in a particular case as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice.

*Kallinicos v Hunt* at [76] and cases referred to there including *Grimwade v Meagher* [1995] 1 VR 446 and others.

The test is whether a “fair minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice”: *Kallinicos* at [76].

# Conflicts of duty concerning former clients (cont)

In exercising this discretionary jurisdiction based on its inherent jurisdiction the court will give due weight to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause: *Kallinicos* at [76].

The timing of the application may be relevant, in that cost, inconvenience or impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief: *Kallinicos* at [76].

# Conflicts of duty concerning former clients (cont)

## Confidential information

The types of confidential information protected will depend on the facts of each case and are treated “not as a matter of form but of substance”: *Rakusen v Ellis* quoted by Bryson J in *D & J Constructions v Head* (1987) 9 NSWLR 118 at 122.

In an appropriate case, impressions of character, personality and attitudes e.g. to risks of litigation and so on may be relevant confidential information: *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357.

# Conflicts of duty concerning former clients (cont)

Although there is no separate principle for family law matters possibly a stricter approach is taken because of the more extensive category of relevant facts: *D & J Constructions v Head* (1987) 9 NSWLR 118 at 123, *Grieves v Tully* [2011] FAMCA 617.

Usually the fact that a lawyer had acted against a corporate client would not prevent the lawyer from acting against an employee of the corporation but in a case where the lawyer had repeated exposure to the employee so as to come to understand strengths, weaknesses, attitudes and ways of thinking there may be a restraint: *Macquarie Bank v Myers* [1994] 1 VR 350.

# Conflicts of duty concerning former clients (cont)

## The presumption of imputed knowledge

The presumption that the knowledge of one lawyer is the knowledge of all lawyers in the firm is inconvenient in modern legal practise, particularly with large firms and the mobility of lawyers, because a firm may be unable to act against a party even if the lawyers acting against the party are far removed from the lawyer in the firm having the confidential information.

The courts have taken different approaches and the prior strict approach has been modified. In *Unioil v Deloitte Touche Tohmatsu* (1997) 17 WAR 98 Ipp J held on the particular facts of the case that the presumption was rebuttable and the knowledge of the lawyer could not be imputed to the firm. He reversed his earlier approach in *Mallesons v KPMG* (1990) 4 WAR 357. See also *Newman v Phillips Fox* (1999) 21 WAR 309 at 316 – 7.

# Conflicts of duty concerning former clients (cont)

This changed approach is now reflected in the Australian Solicitors' Conduct Rules, which are yet to be adopted in the Northern Territory.

The NT Rules of Conduct and Practice currently provide:

## 3 Restraint on Acting Against a Former Client

Consistently with the duty which a practitioner has to preserve the confidentiality of a client's affairs, a practitioner must not accept a retainer to act for another person in any action or proceedings against, or in opposition to, the interest of a person -

- (a) for whom the practitioner or the firm, of which the practitioner was a partner, has acted previously; and
- (b) from whom the practitioner or the practitioner's firm has thereby acquired information confidential to that person and material to the action or proceedings; and

that person might reasonably conclude that there is a real possibility the information will be used to the person's detriment.

# Conflicts of duty concerning former clients (cont)

Australian Solicitors' Conduct Rules:

10 Conflicts concerning former clients

10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients, except as permitted by Rule 10.2.

10.2 A solicitor or law practice who or which is in possession of confidential information of a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:

- 10.2.1 the former client has given informed written consent to the solicitor or law practice so acting; or
- 10.2.2 an effective information barrier has been established.

# Conflicts of duty concerning former clients (cont)

Both the NSW Law Society and the Law Institute of Victoria have published Information Barrier Guidelines.

Both are lengthy documents of 30 or so pages. The NSW version contains 10 guidelines including:

- Established, documented protocols for setting up information barriers,
- Compliance officers,
- Written consent from client that duty of disclosure does not extend to confidential information held in respect of the earlier client,
- The identification of “screened persons”,
- Limitation of contact and communication between “screened persons “ and those currently acting against the former client,
- Steps to protect the confidentiality of correspondence and communications, and
- An ongoing education program.

# References

G E Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand*, 5<sup>th</sup> ed, LBC.

The Law Society of New South Wales, *Information Barrier Guidelines*,  
[www.lawsociety.com.au/idc/groups/public/.../008728.pdf](http://www.lawsociety.com.au/idc/groups/public/.../008728.pdf)