

Best practice protocol for the conduct of legal practices and solicitors leaving legal practices

(Adopted by the Council of the Law Society of New South Wales on 18 June 2015.)

Preamble

The increasing mobility of solicitors within the profession has led to an increasing number of problems being drawn to the Society's attention involving failure to notify clients that a legal practice has dissolved as well as disputes about notifying clients that a solicitor has left the practice. Additionally concern is being expressed about departing solicitors 'poaching' clients.

There are a number of important issues to recognise:

- Ethical considerations must have at least equal importance as commercial considerations and commercial considerations cannot override ethical implications.
- Unless otherwise specified the solicitor/client retainer is between the legal practice and the client and not between any individual solicitor and the client.
- Only a principal or solicitor/director of a legal practice can act as the solicitor for a client although obviously a principal or solicitor/director can delegate carriage of a client's matter to an employed solicitor and assign the matter to another solicitor or retain direct control.
- It is the decision of the client who will act for the client and this is also true when a solicitor leaves a legal practice. A solicitor acts purely as the client's professional agent.
- A solicitor leaving a legal practice cannot simply take a client's file from the legal practice without the authority of the legal practice and without making appropriate arrangements with the legal practice and without obtaining the client's authority.
- As between employed solicitors and employer there may be express contractual terms and there are implied duties (including the duty of confidentiality owed to clients and to the legal practice).

It is not the Society's function to express a view about the validity of individual restraint of trade clauses which is a matter of law on which the respective solicitors and legal practices should obtain their own advice. The following is designed to reflect appropriate ethical principles and procedures to guide the parties' future conduct. With these points in mind, the Ethics Committee of the Law Society has formulated a protocol.

Protocol

The interests of the client are paramount. The client is free to instruct any solicitor of the client's choice subject to the terms of any current retainer.

Solicitors are bound by any legal obligation arising out of their former contract of employment, partnership agreement or corporate engagement and should not breach ethical obligations (including the duty of confidentiality owed to the client). It is strongly recommended that written agreements be entered into.

Partnership, corporate and employment agreements should contain express provision as to the procedure to be adopted when a legal practice is dissolved or an employee leaves a legal practice in relation to the manner in which the respective parties may inform clients of the change.

In the case of a complete or partial dissolution of the legal practice, partners and directors should be aware of Conduct Rules 14, 15 and 53¹ relating to transfer of a solicitor's practice and comply strictly with them.

¹ Conduct Rule 53 has been replaced by Practice Rule 6 since this protocol was adopted.

After leaving the legal practice, unless otherwise authorised to do so, the solicitor should not initiate contact with clients of the practice. However, this will be affected by issues such as the time which has elapsed since the solicitor's departure and whether the contact relates to the same area of law. The solicitor must always be mindful of any applicable contractual, statutory or fiduciary obligations.

No member, officer or employee of the legal practice should give a client of the legal practice misleading information about the future practice details of the departing solicitor or the reason for or circumstances surrounding the solicitor's departure.

On request by a client the legal practice should provide contact details of a departing solicitor if the departing solicitor has provided the contact details and consented to those details being given out on request.

The departing solicitor cannot take the contents of clients' files or documents, including photocopies, without the agreement of the legal practice and the authority of the client, nor any material such as client lists etc without the agreement of the legal practice. Solicitors should note any obligations to external bodies such as LegalAid.²

Departing solicitors should not mislead clients into believing they have an obligation to instruct them nor should they improperly undermine any existing solicitor/client relationship.

All solicitors should be mindful of the provisions of Rule 33 of the Conduct Rules relating to communicating with another solicitor's client and which provides:

- 33.1 A solicitor must not deal directly with the client or clients of another practitioner unless:
 - 33.1.1 the other practitioner has previously consented;
 - 33.1.2 the solicitor believes on reasonable grounds that:
 - (i) the circumstances are so urgent as to require the solicitor to do so; and
 - (ii) the dealing would not be unfair to the opponent's client;
 - 33.1.3 the substance of the dealing is solely to enquire whether the other party or parties to a matter are represented and, if so, by whom; or
 - 33.1.4 there is notice of the solicitor's intention to communicate with the other party or parties, but the other practitioner has failed, after a reasonable time, to reply and there is a reasonable basis for proceeding with contact.

In keeping with the aim of maintaining professional comity neither the legal practice nor the solicitor should make critical comments of the other to any client.

The legal practice should consider an appropriate protocol regarding the email address and direct telephone number of the departing solicitor. It should incorporate whether they will be closed or redirected, and whether it is appropriate to have a message indicating the departure of the solicitor.

Solicitors are reminded of their obligation to notify the Law Society in writing within 7 days of changing any of their practice details.

² Solicitors should ensure that they also recognise the distinction between solicitor documents and client documents. See *Wentworth v De Montfort* (1988) 15 NSWLR 348.