

# **Conflict of interest – Practical Aspects**

**Jennie Pakula, Ethics Solicitor, Law Society of NSW**

## ***Fiduciary duties - the foundation of the Conflict of Interest***

- The duty of loyalty to the client.
- The duty of confidentiality.
- The duty to disclose to the client or put at the client's disposal all information within the solicitor's knowledge that is relevant in order to act in the client's best interests.
- The duty not to put your own or anyone else's interests before those of the client.

## ***Revised Professional Conduct & Practice Rules***

- The Rules embody many of the concepts arising out of the case law and the recognised fiduciary duties. They are not exhaustive – the fiduciary duties are not explicitly and fully stated but nonetheless remain binding on NSW solicitors.
- The Rules are binding on all NSW solicitors.
- A breach of the rules is capable of being professional misconduct or unsatisfactory conduct – depends on whether it is conduct that falls within the definitions in the Act or at common law.
- Professional Misconduct includes conduct which would be seen to be disgraceful and dishonourable by the practitioner's peers of good standing and repute, as well as is provided by the Act – s.127.
- Unsatisfactory professional conduct includes conduct (whether consisting of an act or omission) occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner – s.127.
- The Ethics Committee is happy to provide an opinion as to whether a practitioner may be in breach of the rules in particular conduct. If this is in the context of a dispute, the parties must agree on the relevant facts and must agree to be bound by the Committee's decision. The Committee does not give rulings that are binding in any way other than by agreement of the parties.
- For assistance, consult the Law Society website: [www.lawsociety.com.au](http://www.lawsociety.com.au) – Rules and Virginia Shirvington's monthly Ethics columns from the Law Society Journal; or contact the Ethics Solicitors on 9926 0390.

## ● ***Acting against a former client – Rule 3***

### 3. ***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;*

(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.*

- The most common enquiry.
- There is some authority in relation to an enduring *duty of loyalty* (see especially Spincode Pty Limited v Look Software Pty Limited [2001] VSCA 248), although this is fairly limited in its application and tends to arise from a current retainer. In the Spincode case and, more recently, in Village Roadshow Limited v. Blake Dawson Waldron [2003] VSC 505, the conflict arose out of taking a retainer opposing a former client in a closely related transaction. In the latter case, Justice Byrne put it succinctly as “*for a firm of solicitors to take money from a client for erecting a legal edifice, it should not then take a fee from some other to dismantle it.*”
- However, since the decision in Prince Jefri Bolkiah v KPMG (A Firm) [1999] 2 WLR 215 (“Bolkiah”), it is generally agreed that the only fiduciary duty that survives termination of the retainer is the *duty of confidentiality*.
- In order to be restrained, there must be a ‘real and sensible possibility’ of the information being used to the former client’s detriment. Also characterised as a ‘real and not merely theoretical risk’. Note, however, that a stricter standard generally applies to Family Law cases.
- When acting against a former client, assess the nature of the information in your possession. To fall within the rules, it need not be the type of information that is subject to legal professional privilege. It must, however, be confidential information acquired in the course of the solicitor/client relationship. The risk of misuse of confidential information is far higher when the same solicitor is personally involved.
- Assess relevance of the information to the current proceedings. Relevance need not be very direct – it simply needs to be information that can be used to the former client’s detriment and can sometimes be quite general – eg financial concerns that may not be generally known and that may leave the former client vulnerable to certain settlement proposals; or knowledge of a personality and favoured tactics – the ‘getting to know you’ factors – see for example Yunghanns & Ors v Elfic Limited (Unreported, 3/7/09).

- Proof needs to be fairly specific as to the nature of the information although not, of course, the exact details. Eg., that the solicitor is aware of the client's financial dealings and general financial state for the years 1998 – 2001 or that the solicitor interviewed the client about her plans to expand her business. Details such as the dates, number and approximate length of conferences can be important factors.
- If you are about to change firms and you are aware of the fact that your new firm represents a client opposed to a client of your current firm, plan carefully how you can quarantine any information of which you are aware. See Bureau Interprofessionnel des vins de Bourgogne (the Taltarni Wines case) [2002] FCA 588 and Newman v Phillips Fox (1999) 21 WAR 309 for examples of Chinese walls that did and did not succeed. The issue must be carefully discussed with the new firm from the very beginning of the employment/partnership, and effective barriers put in place to prevent the 'leaking' of information. Some elements of an effective wall are:
  - physical separation of personnel involved;
  - regular educational programme;
  - strict procedures for dealing with any contact between personnel involved or any other crossing of the wall;
  - monitoring by compliance officers;
  - disciplinary sanctions.

It is likely that such a regime is more likely to be implemented successfully in a larger firm.

- Institute firm-wide measures to prevent conflicts from arising in the first place – make sure that you have a conflicts register in place and that it is effective. Make sure all your staff know how to enter the information correctly so that it works properly. Many firms appear to think that it is enough just to lock up the file if a possible conflict emerges. This is a bad idea – check the file to find out what it was about, who acted on it and how relevant it is to the proposed retainer. You either have a conflict or you don't, whether you bury your head in the sand or not!
- If you believe the opposing solicitors have a conflict, raise the issue immediately – leaving it for too long makes it look like a tactic, which may count against the party raising the issue.
- A conflict can be dealt with in a number of ways. You could raise the issue as an interlocutory step in the litigation so that the Court will look into the issues, take evidence, and make a ruling. This is, obviously, the expensive option. An alternative is to seek an opinion of the Ethics Committee. The Committee meets monthly and often considers problems of this nature. The parties should be agreed on the basic facts and should also agree to be bound by the Committee's opinion. The process is that the party initiating the enquiry will write to the Ethics Section and an initial opinion is then given by the solicitor handling the enquiry. Submissions are then sought from the opposing solicitor until there is sufficient information to submit to the Ethics Committee on which it may form an opinion.

## ***Acting for more than one client – Rule 9***

### **9. *Acting for more than one party***

9.1 *For the purposes of Rules 9.2 and 9.3 -*

- *“proceedings or transaction” mean any action or claim at law or in equity, or any dealing between parties, which may affect, create, or be related to, any legal or equitable right or entitlement or interest in property of any kind.*
- *“party” includes each one of the persons or corporations who, or which, is jointly a party to any proceedings or transaction.*
- *“practitioner” includes a practitioner’s partner or employee and a practitioner’s firm.*

9.2 *A practitioner who intends to accept instructions from more than one party to any proceedings or transactions 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, the practitioner must thereupon cease to act for all parties.*

9.3 *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.*

- **This Rule CANNOT CURE A CURRENT MATTER CONFLICT OF INTEREST – nb rule 9.3. There is no basis in any of the authorities to justify the constructions of ‘Chinese walls’ that permit a firm of solicitors to act for more than one client where their interests are inherently opposed. For example, in Blackwell v Barroile (1993) 42 FCR 151, Davies & Lee JJ observed:**

*“A firm is in no better position than a sole practitioner if it purports to act for separate clients whose interests are in contention. If it purports to continue to act for both clients by imposing a qualification on the duties of partnership it thereby denies the respective clients the services the clients have sought from the firm, namely the delivery of such professional skill as the partnership is able to provide. In such circumstances, the appearance provided to the public is that the interests of the solicitors as partners are in conflict with, and may be preferred to, the interest of one or both clients.”*

In Bolkiah, Lord Millet noted:

*“A fiduciary cannot act at the same time both for and against the same client and his firm is in no better position”.*

- Remember the scope of all heads of fiduciary duty – the *Duty of loyalty, duty of disclosure, duty of confidentiality and duty not to favour the interests of any other party*. All of these duties are owed to each client by the firm as a whole, not merely the particular practitioner.
- The conflict of interest can be assessed by looking at the fiduciary duties owed to both clients – can you serve both without compromising either? There is some room for compromise inherent in Rule 9.2(a) but this has to be fairly limited. For example, you may ordinarily advise a person to take a particular course of action as being the most prudent in the circumstances. If you cannot advise that party to take that course because that would be contrary to the interests of the other party, you have a conflict and must immediately withdraw from acting for both.
- A recent example considered by the Ethics Committee: A medium-sized regional firm acted for a lessor in particular leasing matters, including the lease of certain bank premises, and generally. The firm also acted for a plaintiff in a personal injury matter, where the plaintiff was an employee of the bank that was the lessee of the bank premises, and had injured herself trying to open a door that was alleged to be defective. The landlord was joined as the third defendant in the proceedings. The Committee found that if the firm were to continue to act for both parties, there would be compromises in the duties owed to each, particularly the duty of loyalty and duty not to favour the interests of one client over another. Breaches of the other duties in the course of proceedings were also likely to occur.
- If you propose to act for more than one party, you must ensure that there is no inherent conflict of interest arising out of the nature of the transaction. It is important to also try to think ahead of possible situations where a conflict could arise.
- Some current matter conflicts can be dealt with through selective use of independent advice. For example, two parties may approach you to draft a document to record and effect the settlement of a dispute between them, where the terms of the agreement have already been worked out by the clients. It would be prudent to send at least one of the parties, preferably both, away for independent advice as to the effect of the deed.
- If there is some limitation as to the retainer, be explicit as to what it is. The Ethics Committee recently considered a matter where a solicitor's long-standing client and his finance broker brought in a joint venturer to put money into the purchase of a hotel where there was less than three weeks left until completion, time being of the essence. The solicitor was asked to draft certain trust deeds and company minutes to effect the purchase of the interest by the joint venturer. It appeared implicit that a shareholder's agreement would be put in place as soon as possible after completion. Almost immediately after completion, the parties began a bitter dispute and spent the next 6 months undoing the arrangement. The joint venturer complained that the solicitor had a conflict of interest in that he had acted for all parties and continued to act for one after a dispute had broken out. The Committee felt that the problem did not really lie there – he had a limited retainer, possessed no confidential information from the joint venturer and did not really know him, having never taken anything but the most basic instructions. To the extent that the solicitor had acted for both parties, there was no conflict, but he should have explained the limitations on what he was doing, what remained to be done, and the

fact that the joint venturer would need to have independent advice. The situation was unusual in that the parties had imposed extreme time limits on the solicitor.

- ‘Unbundling’ of legal services, ie performing discrete tasks rather than a complete retainer, is an increasing trend, often involving more than one party. Take care to spell out the limitations of the retainer, and what you are and are not doing for the parties.

# ***Conflict of interest between solicitor and client – Rules 10, 11 & 38***

## ***Statement of Principle – Rules 1 - 16***

*Practitioners should serve their clients competently and diligently. They should be acutely aware of the fiduciary nature of the relationship with their clients, and always deal with their clients fairly, free of the influence of any interest which may conflict with a client's best interests. Practitioners should maintain the confidentiality of their clients' affairs, but give their clients the benefit of all information relevant to their clients' affairs of which they have knowledge. Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.*

### ***10. Avoiding a conflict between a client's and a practitioner's own interest***

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

*10.1.1 allow the interest of the practitioner or an associate of the practitioner to conflict with those of the client;*

*10.1.2 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 the client;*

*10.2 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.*

### ***11. Receiving a benefit under a will or other instrument***

*11.1 A practitioner who receives instructions from a person to draw a Will appointing the practitioner an Executor must inform that person in writing before the client signs the Will -*

*11.1.1 of any entitlement of the practitioner to claim commission;*

*11.1.2 of the inclusion in the Will of any provision entitling the practitioner, or the practitioner's firm, to charge professional fees in relation to the administration of the Estate, and;*

*11.1.3 if the practitioner has an entitlement to claim commission, that the person could appoint an Executor a person who might make no claim for commission.*

*11.2 A practitioner who receives instructions from a person to -*

*11.2.1 draw a will under which the practitioner or an associate will, or may, receive a substantial benefit other than any proper entitlement to commission (if the practitioner is also to be appointed executor) and the reasonable professional fees of the practitioner or the practitioner's firm; or*

*11.2.2 draws any other instrument under which the practitioner or an associate will, or may, receive a substantial benefit in addition to the practitioner's reasonable remuneration, including that payable under a conditional costs agreement,*

*must decline to act on those instructions and offer to refer the person, for advice, to another practitioner who is not an associate of the practitioner, unless the person instructing the practitioner is either:*

11.2.3 *a member of the practitioner's immediate family; or*

11.2.4 *a practitioner, or a member of the immediate family of a practitioner, who is a partner, employer, or employee, of the practitioner.*

11.3 *For the benefit of this rule:*

*“substantial benefit” means a benefit which has a substantial value relative to the financial resources and assets of the person intending to bestow the benefit.*

## **12. Practitioner and client - Borrowing transactions**

12.1 *A practitioner must not borrow any money, nor assist an associate to borrow any money from a person -*

12.1.1 *who is currently a client of the practitioner, or the practitioner's firm;*

12.1.2 *for whom the practitioner or practitioner's firm has provided legal services, and who has indicated continuing reliance upon the advice of the practitioner, or practitioner's firm in relation to the investment of money; or*

12.1.3 *who has sought from the practitioner, or the practitioner's firm, advice in respect of the investment of any money, or the management of the person's financial affairs.*

12.2 *This Clause does not prevent a practitioner, or an associate of a practitioner borrowing from a client, which is a corporation or institution described in the Schedule to this Rule, or which may be declared by the Council of the Law Society to be exempt from this Rule.*

12.3 *A practitioner must not maintain a private finance company and invite, directly or indirectly, the deposit of money with the company on the basis of a representation that -*

12.3.1 *the money is repayable at call, or on short notice, if that is not assured when the money is deposited ; or*

12.3.2 *that the deposit of the money is, or will be, secured, unless the money is specifically secured by an instrument identifying the lender, the amount deposited, and the security.*

12.4 *A practitioner must not borrow any money, or permit or assist an associate to borrow any money, from a private finance company which is operated or controlled by the practitioner or the associate of the practitioner.*

12.5 *A practitioner must not cause or permit a private finance company to pay to any depositors of money to the company a rate of interest on their deposits which is less than the rate charged by the company to borrowers.*

### *The Schedule*

1. *A banker duly authorised to carry on banking business.*
2. *An insurance company duly authorised to carry on insurance business.*
3. *A company registered under the Life Insurance Act 1945 of the Commonwealth.*
4. *A building society registered under the Co-operation Act 1923 or listed in the Second Schedule to that Act.*
5. *A building society governed by the Financial Institutions Code 1992.*
6. *A credit union governed by the Financial Institutions Code 1992.*

7. *A trustee company mentioned in the First Part of the Third Schedule to the Trustee Companies Act 1964.*
8. *The Public Trustee.*
9. *A non-bank financial institution which is governed by the Financial Corporations Act 1974 of the Commonwealth or the Financial Institutions Code 1992.*
10. *A company the securities in which are listed on a member exchange of the Australian Associated Stock Exchanges or a foreign company the securities of which are quoted for trading on a stock exchange or in a market for the public trading in securities.*
11. *A government, governmental body, agency, department, authority or instrumentality, whether foreign, federal, state or local.*
12. *A company having the majority of its issued share capital to which voting rights attach owned by any government, governmental body, agency authority or instrumentality, whether foreign, federal, state or local.*
13. *A company related to any of the companies referred to above or a company in which any entity of a type described above has a substantial shareholding as defined in Section 708(i) of the Corporations Law.*
14. *A member of the immediate family of the practitioner or a corporation, partnership, syndicate, joint venture or trust in which, or in the shares in which, the whole of the beneficial interest is presently vested in one or more members of the immediate family.*

### **38. Referral fees - Taking unfair advantage of potential clients - Commissions**

- 38.1 *In the conduct or promotion of a practitioner's practice, the practitioner must not -*
- 38.1.1 *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; or*
  - 38.1.2 *seek instructions for the provision of legal services in a manner likely to oppress or harass a person who, because 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 practitioner at the time when the instructions are sought.*
- 38.2 *A practitioner must not act for a client in any dealing with a third party from whom the practitioner may receive, directly or indirectly, any fee, benefit or reward in respect of that dealing unless:*
- 38.2.1 *the practitioner is able to advise and, in fact, advises the client free of any constraint or influence which might be imposed on the practitioner by the third party;*
  - 38.2.2 *the practitioner's advice is fair and free of any bias caused by the practitioner's relationship with the third party; and*
  - 38.2.3 *the nature and value of any fee, benefit, or reward which may be received by the practitioner, are fair and reasonable, having regard to objective commercial standards, and are disclosed fully in writing to the client before the dealing is commenced.*

- Some common examples that arise in practice include a client who wishes to give a generous gift, an opportunity to purchase a property from a client, entering into business arrangements with clients, even taking an interest in a client's business.
- Extremely important never to let your own interests conflict with your client's interests – Law Society of NSW v Harvey [1976] 2 NSWLR 154. This principle is fundamental to the relationship of solicitor and client.
- Beware appearances – any appearance of undue influence, let alone its existence, must be avoided at all costs.
- Consider options according to the seriousness of the conflict or potential conflict:
  - If it's just a referral fee or some arrangement of that nature, disclosure may be the answer. See especially Rule 38.
  - A more complex matter where your interest may be peripherally involved should be handled by ensuring the client gets independent advice.
  - Where you stand to receive a major benefit, for example a gift from the client or a substantial bequest in a will, another solicitor must act.
  - Where there is some suggestion of undue influence or if you have information that gives you a special benefit derived from your fiduciary position, it may be better to refrain from entering into the transaction at all. A recent example in the Ethics Committee was that of a solicitor who was acting for the vendor of a property who then went on to purchase that property himself, gazumping the intended purchaser in the process.
  - Cordery on Solicitors says: *"The mere relationship of the parties renders the solicitor almost incapable of receiving a gift in addition to his proper remuneration."*

## 19. *Practitioner a material witness in client's case*

*“A practitioner must not appear as an advocate and, unless there are exceptional circumstances justifying the practitioner's continuing retainer by the practitioner's client, the practitioner must not act, or continue to act, in a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the court.”*

- A variety of the conflict between solicitor and client – First, that it's a pressure on the duty of loyalty that may lead a solicitor to modify his/her evidence if it doesn't favour the client; second, that the solicitor may effectively have an interest in the outcome of the litigation (particularly if, for example, the solicitor's negligence may have given rise to the litigation); third, that it may involve the solicitor in a conflict of duty to the client and duty to the court.
- Blanket prohibition on the solicitor/advocate giving any evidence – see also Bar Rule 87(c):

*“A barrister must refuse a brief or instructions to appear before a court if ... the barrister has reasonable grounds to believe that the barrister may, as a real possibility, be a witness in the case.”*

- Otherwise, must cease acting if the evidence is 'material to the determination of contested issues' or 'of a controversial kind'. Such evidence would not include non-controversial matters, eg. an affidavit attesting to the investigations undertaken by a solicitor when bringing an action against the Nominal Defendant.
- The 'exceptional circumstances' justifying the solicitor continuing to act may include such factors as the commercial complexity of the matter, or the special needs of the client for example, language needs or financial circumstances.