



THE LAW SOCIETY
OF NEW SOUTH WALES

**PROFESSIONAL ETHICS, TACTICS
AND COMMUNICATIONS WITH CLIENTS**
FREQUENTLY ASKED QUESTIONS

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CONTENTS

Confidentiality	3
Conflicts of interests	4
Duty to client – improper instructions and unlawful activity	5
Duty to disclose unprofessional conduct of colleagues	5
Professional rapport, tactics and communications with colleagues	6
Instructions	8
References	9

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**The following is for guidance only.
Advice should be sought for the reader's particular circumstances.
References to the Rules are to the Conduct Rules 2015**

CONFIDENTIALITY

Q.1 What is the duration of the duty of confidentiality?

A. The duty of confidentiality continues after the solicitor-client retainer has ended. Upon the death of the client, confidentiality passes to the client's legal personal representative. Rule 9.2 sets out the exceptions to this rule.

"Confidential information" is not defined in the Rules but may include:

- information regarding a former client which is directly related to a matter with a current client;
- information relevant to a competitor such as product pricing; and
- in certain situations, particular intimate knowledge of a client, their character, business or strategies.

Q.2 What is the position in relation to confidentiality when: (a) Solicitor A is subpoenaed to give evidence in proceedings where a former client is a party, and (b) Solicitor B (who issued the subpoena) also asks Solicitor A for a statement?

A. Solicitor A cannot be compelled, in these circumstances alone, to provide a statement to Solicitor B. While Solicitor A is required to comply with the subpoena, the mere request for a statement from Solicitor B cannot be enforced.

Rule 9 requires Solicitor A not to disclose any confidential information acquired during the client's engagement, unless the circumstances outlined under Rule 9.2 are satisfied. It would therefore be inconsistent with the confidentiality obligations owed by Solicitor A to the former client to disclose to Solicitor B any of the client's confidential information, unless one of the exceptions had been met (e.g. client consent or court compulsion).

CONFLICTS OF INTERESTS

Q.3 Is there a problem in acting for more than one party in a matter?

A. Although there is no rule prohibiting acting for more than one party in a matter, Rule 11 requires a solicitor to avoid conflicts between the duties owed to two or more current clients. In essence, a solicitor or practice must avoid the position where the duties owed to one client are, or may be, in conflict with duties owed to another client, unless the exceptions under Rule 11 apply. Note that Rule 11 is also triggered by a potential conflict.

In circumstances where a conflict of interests does arise, it cannot be emphasized too strongly that the standards that must be met for a solicitor to continue to act will be very high and difficult to satisfy.

Q.4 Is acting for a vendor and purchaser in a conveyancing transaction prohibited?

A. No, see the answer to the above. By operation of Rule 11, the solicitor could consider obtaining the informed consent of both clients before acting for both parties. However, even with the informed consent, a solicitor must exercise independent judgement to determine whether a conflict is likely to arise even where one does not currently exist. Consideration needs to be given to any divergence in the parties' positions which has arisen or may arise, e.g. has there been a falling out or is it in the interests of one party to delay settlement?

Q.5 Can a solicitor act for a person seeking to challenge a will which the solicitor has drawn?

A. No, as this would generally give rise to the release of confidential information obtained by the solicitor from the testator. The duty of confidentiality owed to a client continues after the solicitor-client retainer has ended. Upon the death of the client, confidentiality passes to the client's legal personal representative. Furthermore, Rule 27 may be relevant. This rule applies when it becomes apparent (or is known) that a solicitor will be required to give evidence material to the determination of contested issues before the court. The solicitor can continue to act for the client (not as an advocate), unless doing so would prejudice the administration of justice. The test to be applied in determining whether continuing to act would prejudice the administration of justice is an objective one.

In addition, Rule 12 requires a solicitor to avoid a conflict between their own interests and those of the client. This may be relevant if the challenge involves consideration of the solicitor's advice. The solicitor should then also consider notifying their insurer.

Q.6 Where there is more than one client, who can access the joint client documents?

A. Each client can access and copy the documents at their own expense. However, the documents can only be released on joint instructions. A solicitor must also consider whether all the documents are joint documents and what is best practice in the circumstances.

Q.7 Can a solicitor accept a gift from a client?

A. Yes, but the solicitor needs to consider the following:

1. Is the gift modest?
2. Is the gift proportionate to the matter and also to what the solicitor knows of the client's affairs?
3. Is the source of the gift legitimate?
4. Could the gift influence the way in which the solicitor carries out the retainer, including their duties as an officer of the court?
5. Is the solicitor complying with all aspects of Rule 12, including maintaining their obligation to have no conflict between their own interests and their client's?
6. Could the solicitor defend a later claim of undue influence?
7. How would the gift appear to a reasonable bystander?

If in doubt, the solicitor should contact the Ethics Department for specific guidance.

DUTY TO CLIENT – IMPROPER INSTRUCTIONS AND UNLAWFUL ACTIVITY

Q.8 Can a solicitor prepare a contract for the sale of land which includes a special condition allowing for a substantial rebate on the purchase price for early or on-time settlement?

A. The Property Law Committee has issued a guideline on rebates
<http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/578591.pdf>.

Q.9 What is the position if the solicitor is acting for the purchaser?

A. Even if the solicitor has not drawn the contract, by acting for the purchaser without properly disclosing the rebate, the solicitor may be assisting the client to mislead the incoming mortgagee and the court.

DUTY TO DISCLOSE UNPROFESSIONAL CONDUCT OF COLLEAGUES

Q.10 What obligation does a solicitor have to report improper conduct on the part of another solicitor to the Office of the Legal Services Commissioner, or to the police or other authority?

A. Except in relation to trust account irregularities, there is no statutory obligation or any rule unique to solicitors requiring a solicitor to report concerns about the professional conduct of another solicitor. Section 154 of the *Legal Profession Uniform Law (NSW)* requires a solicitor to report a possible trust account irregularity (in their own or another firm) to the Law Society.

In some circumstances there is an obligation to report the commission of an indictable offence – see the *Crimes Act (NSW)* s316 (1) and cognate provisions in other states. A solicitor also must report any show cause event in relation to themselves (ss 85 – 92 *Legal Profession Uniform Law (NSW)*).

It may be appropriate to report a matter to the Legal Services Commissioner, after informing the other party and giving that party a chance to explain the conduct.

Q.11 Should a solicitor put the other solicitor on notice of their intention to complain/report?

A. Solicitors have to use their forensic judgement to decide if they should report a matter and should advise their colleague so that the other solicitor can correct or provide a reasonable explanation for the conduct.

The notice to report conduct, however, is sometimes improperly used as a tactic. It should be used as a last resort after the other party has refused to explain the conduct. The Law Society and the OLSC are well aware of solicitors using the threat of reporting conduct as a tactic. A solicitor must not say they are intending to make a complaint unless actually intending to make the complaint – see Rule 32.

PROFESSIONAL RAPPORT, TACTICS AND COMMUNICATIONS WITH COLLEAGUES

Q.12 How far-reaching is the “no contact” rule against communicating with another solicitor’s client?

- A.** The prohibition seeks to protect the benefit a client obtains from obtaining legal representation and to ensure that a solicitor’s expertise cannot be used unfairly in dealing with a layperson. Rule 33 prevents a solicitor from directly dealing with the client of another solicitor without that other solicitor’s consent, except for urgent communications which would not result in unfairness to the other party or to enquire if the party is represented. The prohibition is not limited to contested matters, and includes communications with witnesses when a lawyer knows that the witness is represented. Also, Rule 22.4 applies a similar requirement in relation to an insured. The rule does not prevent social interactions which do not relate to the subject matter of the representation, but great care should be taken in any such communication.

Q.13 If a solicitor is personally a party to the matter or proceedings, can they communicate with the other party without breaching Rule 33?

- A.** Generally, clients may communicate directly with each other without going through their solicitors. There is no specific prohibition on such communication where one party is a solicitor, but doing so may give rise to an argument that the solicitor has (possibly inadvertently) used their skill and expertise as a solicitor to gain an unfair advantage or to exercise undue influence in any such communication. If such communications cannot be avoided it may be desirable to have a third party present. It is generally better to communicate with the other solicitor.

Q.14 What if the solicitor is acting for a client in a matter or proceedings and the opposing party expresses a desire to communicate directly with them?

- A.** The other party’s wishes do not release a solicitor from their overarching duty to comply with the rule. The solicitor should inform the opposing party that they cannot communicate directly with the party unless their solicitor agrees. If the solicitor wishes to proceed with such communication, they will need to contact the opposing solicitor and request consent under Rule 33.

Q.15 A solicitor has been approached by a party who has a solicitor acting in a matter but who wishes to obtain advice about whether or not that solicitor’s advice should be followed, that is, to give a second opinion.

- A.** Care should be exercised in accepting and discharging such a retainer. Rule 33 restricts a solicitor’s ability to deal directly with the client of another practitioner. It would generally be accepted or understood that the Rule would apply to practitioners on opposing sides to a transaction or dispute. However, in circumstances where a client contacts a second practitioner to obtain a second opinion, there is also the potential for the second practitioner to offend this Rule. The general law recognises the need to protect the relationship of trust between a solicitor and a client, and it would be inconsistent with that protection for the second opinion to extend to disparagement of the first solicitor or an attempt to undermine the existing professional relationship.

Q.16 A client is a party in a Family Law matter and wants their solicitor to assert that the opposing solicitor should cease acting because of a conflict of interests. The first solicitor is aware that the main reason that the client wishes the other solicitor to have to withdraw is that he is a good friend of the opponent and is apparently charging costs at a reduced rate. The first solicitor’s client wants the opponent to be put to significant expense. Is it appropriate for the first solicitor to assert a conflict?

- A.** Yes, provided that the solicitor is satisfied that there is a genuinely arguable conflict of interests and lack of independence. If so, the fact that there might also be a tactical advantage to the client does not prevent the argument being made. However, consideration should be given to the provisions of Rule 21, which require a solicitor to take care to ensure that the court’s coercive powers are invoked only on a basis reasonably justified by the available material and not principally to gain some collateral advantage. Rule 32 also prohibits a solicitor from making an allegation of unsatisfactory professional conduct or professional misconduct against another practitioner without a proper basis.

PROFESSIONAL RAPPORT, TACTICS AND COMMUNICATIONS WITH COLLEAGUES (continued)

Q.17 A client is selling property at auction. The contract for sale of land which the solicitor drew has been duly displayed in the auctioneer's office. The client has asked the solicitor at the last minute before the auction to include a clause requiring the purchaser to pay the land tax adjustment. Should the solicitor attempt to obtain instructions from their client to ensure that the auctioneer draws the amendment to the attention of prospective purchasers?

A. Yes. It may be misleading, and a misrepresentation, for the amendment not to be notified. A solicitor's fundamental duty as a solicitor is to the court and the administration of justice (Rule 3) and the obligation to the client is to follow *lawful*, proper and competent instructions (Rule 8).

Q.18 A client has not paid their solicitor's bill. The solicitor has his passport. Can they claim a lien over it?

A. In *Xu v Council of the Law Society of NSW* [2009] NSWCA 430, Handley AJA (with whom Tobias JA agreed) expressed the view that it is possible for a solicitor to enforce a lien over a passport, provided it has been obtained for a legitimate forensic purpose, and as long as it was merely as against the client and not against the Commonwealth (at [54] and [56]).

His Honour went on to note, however, that a court may decline to enforce such a lien "... if its exercise would deprive an impecunious client of his liberty. In such a case the Court might, for example, order the solicitor to deliver the passport to the Court that would be considering the clients' bail application subject to his lien." (at [57]).

Whilst the above appears to represent the balance of authority, those views are subject to considerable uncertainty. Basten JA in the same case said (at [20]) that it should not "...be assumed that the solicitor's lien necessarily extends to permit retention of a passport, obtained from a client for a specific purpose." Indeed, although Handley AJA appears to have expressed a somewhat different view to Basten JA in the very same matter, he appeared to at least partially endorse Basten JA's analysis (see [57]). Moreover, in *Commissioner of Taxation v American Express Wholesale Currency Services Pty Limited* [2010] FCAFC 122 at [44], Dowsett J (who was himself in the minority) doubted the correctness of the decision in *Xu*, by reference to the High Court case of *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at [17], and the English case of *The Odessa* [1916] 1 AC 145 at 158-9.

Accordingly, solicitors should be cautious before choosing to assert a lien over any passport, including an Australian passport, and should not do so unless the passport was obtained for a legitimate forensic purpose.

Solicitors should also be aware of s32 of the *Australian Passports Act 2005* and s21 of the *Foreign Passports (Law Enforcement and Security) Act 2005* regarding offences of possession or control of another person's travel documents.

Q.19 How do I avoid subverting another solicitor's lien?

A.

- The new solicitor should first discuss the matter with the old solicitor.
- If the tripartite agreement is available, the new solicitor should make no alternative attempts to obtain the file unless the old solicitor refuses to enter into the agreement. The Committee notes that it may not be available where, for instance, the new solicitor is prohibited by law to enter into the agreement, eg Legal Aid Commission, or it does not provide reasonable security.
- Disbursements should generally be reimbursed to the old solicitor irrespective of the payment of legal fees. The Committee notes that this is covered by the tripartite agreement.
- It is not appropriate to subpoena the file of the old solicitor to circumvent a lien.
- A solicitor should not attempt to undermine the valid lien of another solicitor in any circumstance.
- If the old solicitor refuses to enter into a tripartite agreement when it is available, the new solicitor may seek documents from an insurer, prosecutor or the court when that action is in the client's best interests.

INSTRUCTIONS

Q.20 An elderly client wants their solicitor to draft an amended will. However, in the solicitor's conversation with her she was confused and her attention was wandering. Can the solicitor draft the will?

A. The capacity to instruct underpins all solicitor-client relationships. A solicitor must not act if they are not reasonably satisfied that the client has the mental capacity to give instructions (see *Goddard Elliot (a firm) v. Fritsch* [2012] VSC 87). The Law Society has issued detailed guidelines on how to manage such situations <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/023880.pdf>

Q.21 What constitutes informed consent and why is it important?

A. With rare exceptions, a solicitor owes a fiduciary obligation to the client. The solicitor is under an obligation not to promote the solicitor's "personal interests by making or pursuing a gain in circumstances in which there is 'a conflict or a real or substantial possibility of a conflict' between personal interests of the solicitor and those to whom the duty is owed, unless the client gives informed consent to the solicitor's actions"¹. The requirements for informed consent will depend on the circumstances of each case but the following are usually important ingredients:

21.1 *client must have the appropriate knowledge*

The client must have "knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of others"².

21.2 *complete information must be provided*

There must be conscientious disclosure of all material circumstances, and everything known to the solicitor relating to the proposed action, which might influence the conduct of the client or anybody from whom he might seek advice³.

21.3 *the information must be provided to the client*

For a fiduciary to avoid liability, it must "make full disclosure to the person to whom the duty is owed"⁴.

21.4 *some persons can't give consent*

Informed consent must be given by the persons adversely affected by the breach of fiduciary duty, but must be given by all those persons and all must be sui juris.⁵

21.5 *there is no need to state the obvious*

Disclosure of a conflict is not required where the nature of the solicitor's interests is "apparent on the face of the transaction", "obvious" or "mutually understood and accepted"⁶. However, it is recommended that the solicitor err on the side of caution and provide more information than strictly necessary rather than less.

21.6 *the onus of establishing informed consent resides with the solicitor*

The onus of proving informed consent lies on the person who is seeking to establish that fact, namely the solicitor⁷.

Q22 What is the role of independent legal advice in the context of informed consent?

A. GE Dal Pont, in *Lawyers' Professional Responsibility*, 5ed, 2013, explains the rationale and requirements for independent advice:

"..a lawyer in making the...disclosure [required for informed consent] lacks distance from the conflict, which may dictate that even with the best intentions the disclosure may not properly avoid bias. Also, lay clients may place trust in the superior legal knowledge of their lawyer, and may be willing to accept the lawyer's assurances simply because it is the lawyer who has given them. A prudent lawyer will, therefore, insist that the client receive independent legal advice on the matter if there is any inclination to continue the representation. Such advice serves to reduce the scope of the lawyer's own influence in a client's decision to continue conflicted representation, and has the benefit of being supplied by a person with no conflicting interest in the matter".⁸

It has been said that "no hard and fast rule has been laid to establish the requisite content, scope and effect of the independent advice"⁹. However guidance can be obtained from the High Court's comment that independent advice "must be that of some independent person who is not connected with the donee in business or in any other confidential way and he has a knowledge of all the material facts and he, in fact, advises the donor on all matters which might affect his consideration in determining whether to make a gift".¹⁰

REFERENCES

- 1 *Pilmer v Duke Group Ltd (In liq)* [2001] HCA 31; (2001) 207 CLR 165 at 199 [78]. See also *Chan v Zacharia* [1984] HCA 36; (1984) 154 CLR 178 at 198 per Deane J; *Warman International Ltd v Dwyer* [1995] HCA 18; (1995) 182 CLR 544 at 558 per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ; *Breen v Williams* [1996] HCA 57; (1996) 186 CLR 71 and *Howard v Commissioner of Taxation* [2014] HCA 21.
- 2 *Clark Boyce v Mouat* [1994] 1 AC 428 at 435-6, cited with approval in *David Alan Thomson v Golden Destiny Investments Pty Limited* [2015] NSWSC 1176, [83].
- 3 *Law Society of NSW v Harvey* [1976] 2 NSWLR 154, 170F - 171B; *O'Reilly v Law Society of NSW* [1988] NSWLR 204, 208G; GE Dal Pont, *Lawyers' Professional Responsibility*, 5ed, 2013, [6.25].
- 4 *Walker v D'Álessandro* [2010] VSC 15 at [27] - [28] citing Meagher Gummow and Lehane, *Equity Doctrines and Remedies*, 4th edition, [5-115] p 179.
- 5 *Saffron v Cowley; estate of Saffron* [2012] NSWSC 1108.
- 6 *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189 at 212B. This comment was made in the context of a director's obligation of disclosure. Although both fiduciaries, a director's obligation may be different to a solicitor's obligation. See, for instance, the lesser requirement of full disclosure in *Buttonwood Nominees Pty Ltd v Sundowner Minerals NL* (1986) 10 ACLR 360, 362. However *Woolworths Ltd v Kelly* was cited with approval in the solicitor-client conflict decision of *David Alan Thomson v Golden Destiny Investments Pty Limited* [2015] NSWSC 1176, [86].
- 7 See *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* [1929] HCA 24; (1929) 42 CLR 384, 398 (Isaacs J) cited with approval in *David Alan Thomson v Golden Destiny Investments Pty Limited* [2015] NSWSC 1176, [85].
- 8 At [6.30].
- 9 *White v Willis* [2014] NSWSC 1160, [99].
- 10 *Jenyns v Public Curator Qld* [1953] HCA 2; (1953) 90 CLR 113 Dixon CJ, McTiernan and Kitto JJ at 131.

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