

**TURNING A BLIND EYE:  
PROFESSIONAL LIABILITY AND RESPONSIBILITY**

**DEALING WITH CLIENTS:  
WHAT ARE THE LIMITS?**

**FUNDAMENTAL CONCEPTS AND ILLUSTRATIVE EXAMPLES**

**VIRGINIA SHIRVINGTON B.A., LL.B. (SYD)**

**SENIOR ETHICS SOLICITOR  
LAW SOCIETY OF NEW SOUTH WALES**

**February 2001**

## **Turning a Blind Eye: Professional Liability and Responsibility: Dealing with Clients**

Turning a blind eye to fraudulent activities often occurs through ignorance or unsuccessful attempts to balance the various duties which the lawyer owes either because it is too difficult or it conflicts too much with commercial realities.

This paper explores solicitors' participation in fraudulent activities, assisting a client's or a third party's fraudulent activities, reporting serious offences including a discussion of Section 316 of the Crimes Act in the context of the duty of confidentiality to the client and preventing serious offences.

Professional responsibility involves recognising how to balance the various duties owed by lawyers: to the administration of justice, to the Court of which practitioners are officers, to the client, to the public and to the profession.

Professional liability arises from dereliction of any of those duties and may lead to the possible consequences of being complained about, being subject to disciplinary action and/or being sued at law by a client or another party.

The problems inherent in the issues referred to above reflect the problem in trying too hard to look after the client's interests. Many complaints and actions against practitioners arise because the opposite has occurred. In the cases we are dealing with generally the client would not be complaining because the solicitor did something improper but, it is not entirely unheard of for the client to complain because the solicitor has *not* done something improper.

What is "fraudulent activity" for the purposes of this paper, how a lawyer might be described as participating in it, the consequences and what happens where you find out after the event a client has participated in a fraudulent activity are issues to be explored in this paper.

## The Honourable Profession

*“The law should protect the rights and freedoms of members of the community. The administration of the law should be just.*

*The lawyer practises law as an officer of the Court. The lawyer’s role is both to uphold the rule of law and serve the community in the administration of justice.”*

These are the opening words of the Statement of Ethics proclaimed by the Council of the Law Society of New South Wales on 20 November 1994.

Much earlier, Isaacs J made the following statement *in **Incorporated Law Institute of New South Wales -v- R D Meagher (1909) 9 CLR 655 at 681*** which is important in understanding the role of the lawyer in society:

*“... there is therefore a serious responsibility on the court – a duty to itself, to the rest of the profession, to its suitors, and to the whole of the community to be careful not to accredit any person as worthy of public confidence who cannot satisfactorily establish his right to that credential.”*

These comments are mirrored by the later comments of Kirby P speaking of the barrister’s duty of candour to the courts in ***New South Wales Bar Association -v- Thomas (No 2) (1989) 18NSWLJR 193***, a matter involving a failure of counsel to disclose during criminal proceedings how certain statements had been obtained. Kirby P said at p204:

*“The rank of barrister is one of status. With it go obligations which cannot be shaken off or forgotten simply because the holder of the office has not been practising in the daily work of a barrister. If a person does not wish to assume the obligations to the Court of the barrister, that person should not seek admission by the Court as such. Once admitted, the additional duties of invariable candour as well as honesty to a Court prevail.”*

Solicitors, like all members of the community are subject to the law: statute law and the common law. However, the legal profession is in a different position in a two fold way: a breach of the law might bring professional as well as legal sanctions but also, members of the legal profession may be excused from complying with the law as ordinary members of the community must where that is for the proper protection of the client eg where legal professional privilege/client legal privilege applies. This often raises vexed issues and requires lawyers to walk a fine line.

There are many ways in which acting in accordance with the client's wishes, and therefore on the face of it in accordance with the client's interests, will interfere with the due administration of justice referred to by Lord Reid.

As well as being subject to the general law, solicitors as members of the profession are subject to:

- *The Legal Profession Act, 1987* "An Act to regulate the admission and practice of barristers and solicitors" ("the Act")
- *The Revised Professional Conduct & Practice Rules* made by the Council of the Law Society of New South Wales on 24 August 1995 pursuant to its power under Section 57B of *the Legal Profession Act, 1987* ("the Rules")
- The *Statement of Ethics* proclaimed by the Law Society of New South Wales in November 1994, a copy of which is reproduced at the end of this paper

There is a significant body of Common Law authority in relation to the professional obligations of solicitors.

**The Law Society's Role: The Ethics Section and the Ethics Committee**

Ethical dilemmas constantly arise for the profession in dealing with the conflicts between the various duties owed by solicitors. The Ethics Section of the Professional Standards Department of the Law Society of New South Wales, for which I am responsible as Senior Ethics Solicitor, receives well over 2,000 Ethics enquiries per year. Many of these relate to problems concerning confidentiality. On average one enquiry per week will be categorised as “Assisting fraudulent activity” and many others will involve activity which might be described as misleading a client, misleading the court, misleading another practitioner or misleading a third party. Therefore, the issue of turning a blind eye in the context of legal practice and bearing in mind the lawyer’s professional responsibility is very much a live issue.

The functions of the Ethics Section include recognising, considering and acting upon policy issues involving ethical principles affecting solicitors in New South Wales; resolution of disputes involving ethical issues; complaint prevention and education. The Ethics Committee which is a Committee of the Council of the Law Society of New South Wales basically oversees the work of the Ethics Section and matters which are particularly contentious or involve policy are referred to the Ethics Committee. The matters referred from the Ethics Section to the Ethics Committee comprise a small proportion of the Ethics Section’s work.

### **Engaging in Personal Illegal Activity**

Clearly it is professionally improper to break the law in a personal sense. Section 127(1)(b) of the Act defines professional misconduct as including “*conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners*”.

Examples of matters where solicitors’ names have been struck off the Roll of Solicitors following criminal convictions are:

- **Boland**

By order of the Administrative Decisions Tribunal (Legal Services Division) on 22 December 2000 the name of B J Boland was ordered to be removed from the Roll of Legal Practitioners. He had been convicted of the charge of fraudulent misappropriation under Section 178A of the Crimes Act, 1900.

- **Hampton**

On 19 January 2001 the ADT (LSD) ordered that the name of M J Hampton be removed from the Roll of Legal Practitioners in New South Wales. He had been convicted at the Downing Centre Local Court on four charges of dishonesty.

- **Pangallo**

The Prothonotary of the Supreme Court of New South Wales commenced proceedings against the solicitor for a declaration that he had been guilty of professional misconduct and that his name should be removed from the Roll of Solicitors on the ground of his conviction of having bribed a public officer.

You may have acted just as improperly as committing an illegal act yourself if you assist a client or another party to do so.

## **The Solicitor/Client Relationship**

The solicitor/client relationship is the basis of professional practice. It is a relationship which obviously brings rewards but which also carries with it onerous responsibilities, risks and pressures.

This paper focuses on the real meaning of the duty to the client, its limitations and where it fits in with the various duties which practitioners owe.

The duty to the client is often described as paramount. This obviously means that in conducting a matter for a client your primary consideration is the client's best interests, not those of the opposing party or anyone else including yourself. However, the duty to the client cannot override the other duties referred to above.

A forceful commentary on the solicitor/client relationship is found in ***Tyrrell -v- Bank of London (1862) 10HLC26*** where at pp 39-40 Lord Westbury said:

*"... there is no relation known to society, of the duties of which it is more incumbent upon a court of justice strictly to require a faithful and honourable observance, than the relation between solicitor and client."*

In ***Rondel -v- Worsley [1969] 1 AC 191 at 227; [1967] All ER 993 at 998*** Lord Reid put the duty to the client and to the Court in perspective:

*"Every Counsel has a duty to his client fearlessly to raise every issue, advance every argument and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce."*

The crucial points in the Statement of Ethics and its acknowledgment of the lawyer's role of upholding the rule of law and serving the community in the administration of justice vis-à-vis the solicitor/client relationship are that lawyers should:

- Serve their clients' interests competently.
- Communicate clearly with their clients.
- Keep the affairs of clients confidential, unless otherwise required by the law.

- Maintain and defend the rights and liberty of the individual.
- Avoid any conflict of interest.

Importantly, in terms of the “balancing act” which must be observed in putting the lawyer’s duties into context, the Statement of Ethics says:

*“In fulfilling this role, lawyers are not obliged to serve the client’s interests alone, if to do so would conflict with the duty which lawyers owe to the Court and to serving the ends of justice.”*

The Rules deal in discrete chapters with: relations with clients; practitioner’s duties to the Court; relations with other practitioners and relations with third parties.

Section 38H of the Act provides that practice as a solicitor is subject to the Rules. Section 57D(4) provides that while a breach of the Rules may not necessarily involve a breach of the Act it may amount to professional misconduct or unsatisfactory professional conduct.

The chapter on relations with clients deals with acceptance of retainer, confidentiality, conflict of interest (acting against a former client, acting for more than one party and avoiding a conflict of interest yourself with the client), termination of retainer, ownership of client’s documents, receiving a benefit under a will or other instrument, borrowing transactions and some more practical provisions relating to file registers etc.

The need for the lawyer to advise the client objectively is reflected in the Advocacy Rules which are part of Rule 23 of the Rules. Rule A18 under the heading “Independence – Avoidance of personal bias” says:

*“A practitioner must not act as the mere mouthpiece of the client or of the instructing practitioner and must exercise the forensic judgments called for during the case*



*independently, after appropriate consideration of the client's and the instructing practitioner's desires where practicable."*

Rule A20 says that:

*"A practitioner must not make submissions or express views to a Court on any material evidence or material issue in the case in terms which convey or appear to convey the practitioner's personal opinion on the merits of that evidence or issue."*

The Advocacy Rules touch upon the possible conflicts between a practitioner's duty to the client, the Court and to other parties. They demonstrate that while you are the client's professional agent and adviser, you play an individual/independent role. This is particularly important where the client may feel that it is in his or her interests to take a step which might be illegal or involve the solicitor in a breach of ethical duties.

It is particularly problematic and increasingly prevalent where a client wishes to mislead another party to secure a benefit.

Blindly following the client's instructions is fraught with risk. This may seem trite to say but observing that in the face of a client exerting significant pressure is not always as simple as it might seem or should be.

As between the solicitor and the outside world the solicitor almost becomes the alter ego of the client but as between solicitor and client there obviously must be a separation of identities.

Street C J in ***Law Society of New South Wales -v- Harvey*** [1976] 2NSWLR154 said of the fiduciary nature of a solicitor's duty to clients:

*"An appreciation of that duty depends not upon some technical construction but upon applying the ordinary concepts of fair dealing between honourable men."*

There is a significant body of case law including “disciplinary” judgments in relation to assisting a client’s fraudulent activity.

### **Assisting Fraudulent or Improper Activity**

The first general point before dealing with this issue is to emphasise that a problem which can generally be described as “*assisting fraudulent activity*” is not confined to being a party together with the client or advising a client how to commit fraud but rather any illegal or improper activity.

“Fraud” by its dictionary definition means “*criminal deception, dishonest artifice or trick*” and therefore might relate to any form of deception. I am not limiting this discussion to matters involving what technically might be classed as “fraud” at law.

The second general point is that each situation must be considered according to its own special set of facts.

#### **Abuse of process/spurious cases**

Assisting a client by bringing a spurious case or a case brought to achieve an ulterior purpose is professional improper and there is an emerging body of case law dealing with costs orders being made personally against practitioners. A good example of these is ***Levick -v- Deputy Commissioner of Taxation***, a judgment of the Full Court of the Federal Court of Australia N1466 of 1999 delivered on 23 May 2000 which summarises earlier authorities. In that case a costs order was made against a solicitor acting for a debtor who raised unarguable points in a Notice of Opposition filed in bankruptcy proceedings and the case deals fully with circumstances in which costs may properly be ordered against a solicitor. The judgment quotes favourably the following comment of Hill J in the original proceedings from which the appeal was brought:

*“It is not as if these arguments would have originated from the client. They clearly originated with the lawyers. It is obvious enough that they were intended to delay as long as possible the making of a sequestration order against Mr Quinn. But it is not necessary to go that far to justify the making of an order that the solicitor pay the costs of the Deputy Commissioner on an indemnity basis occasioned by the raising of these matters. There is, as well, an ethical question which arises where a solicitor or counsel advised their clients to pursue spurious arguments before the Courts.”*

The Full Court quoted the following comment of the Sachs J in **Edwards -v- Edwards [1958] P 235** speaking of the jurisdiction to award costs against a solicitor *“No definition or list of classes of improper acts which attract the jurisdiction can, of course, be made; but they certainly include anything which can be termed an abuse of the process of the Court and oppressive conduct generally. It is also from the authorities clear, and no submission to the contrary is made, that unreasonably to initiate or continue an action when it has no or substantially no chance of success may constitute conduct attracting an exercise of the above jurisdiction.”*

Hill J had said *“the jurisdiction is, I think, one that must be exercised sparingly, having regard to all the circumstances of a particular case. It is clear enough that a litigant is entitled to representation to vindicate a particular legal right, or to maintain a legal defence. Should it turn out that the litigation is decided adversely to the litigant it does not follow that costs should, in consequence, be ordered against the legal adviser, be he or she a solicitor or a barrister. Were that the case those seeking to advance legitimate claims, or to pursue legitimate defences might well be deprived of legal representation and access to justice, in consequence, would be impeded.”*

In **White Industries (QLD) Pty Limited -v- Flower and Hart (1998) 156 ALR 169 at 236**, Goldberg J, dealing with abuse of process by bringing or maintaining proceedings on behalf of a client with no or substantially no prospect of success said:

*“There must be something more namely, carrying on that conduct unreasonably. It is not clear what is encompassed by “unreasonably” initiating or continuing*

*proceedings if they have no or substantially no chance of success. It seems to me that it involves some deliberate or conscious decision taken by reference to circumstances unrelated to the prospects of success with either a recognition that there is no chance of success but an intention to use the proceedings for an ulterior purpose or with a disregard of any proper consideration of the prospects of the success.”*

In that case Goldberg J also quoted a decision of the English Court of Appeal in ***Ridehalgh -v- Horsefield* [1994] Ch. 205:**

*“It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the Court. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents. It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it.”*

The conclusion which the Full Court reached in ***Levick*** was that “*What constitutes unreasonable conduct must depend upon the circumstances of the case; no comprehensive definition is possible. In the context of instituting or maintaining a proceeding or defence, we agree with Goldberg J that unreasonable conduct must be more than acting on behalf of a client who has little or no prospect of success. ... We agree it was not necessary in the present case that the lawyers be satisfied that the points **would** succeed; but it was necessary they be satisfied there was a rational basis upon which they might succeed.*”

In ***Anstis and Anstis; and Hill, Doyle & Teague Trading as Turnbull Hill Lawyers* [1999] FamCa 842** (judgment delivered on 3 June 1999) a case in which solicitors

were joined as respondent with their client following their refusal on behalf of the wife in a Family Law matter to hand over passports belonging to the husband Mullane J ordered that the solicitors pay on an indemnity basis a (large) proportion of the husband's costs noting that they "*had knowingly engaged in unlawful and apparently criminal behaviour in withholding the husband's passports*". His Honour noted "*The solicitor has a duty to the Court to promote the interests of justice whilst at the same time attending to the needs of the solicitor's client.*"

### Defrauding the Revenue

Defrauding the revenue or at least attempting to defraud the revenue was "flavour of the month" some years ago. This involved a "side agreement" between a vendor and purchaser that the purchaser would pay the vendor a sum of money (sometimes a significant sum of money) over and above the consideration stated in the contract, thereby reducing the amount which would attract stamp duty.

Alternatively, there might have been an attempt to cloak that sort of transaction in a veil of disclosure by splitting the contract into property and chattels. In the English case of ***Saunders -v- Edwards* [1987] 2 ALL ER 651** a solicitor assisted a client by falsely apportioning the consideration between a house and chattels described in a contract for the sale of land to avoid stamp duty thereby defrauding the revenue. The solicitor was found guilty of professional misconduct.

### Defrauding the Mortgagee

Recently there has been what can be described as a spate of matters involving the inclusion in contracts for the sale of land of special conditions as to the payment of a lower figure on settlement within a particular period (usually the normal period between exchange and settlement) and not really an inducement to settle within a particular time but perhaps a clumsy attempt to defraud the mortgagee who would not normally be told of the special condition.

Both the solicitors for the vendor and the solicitors for the purchaser might be said here to be assisting a fraudulent activity although it may be less direct on the part of the vendor's solicitor.

### **Example 1**

A solicitor acted for the vendor of a property being sold to the present tenant. On returning the duly signed contract to the solicitor the vendor informed the solicitor that although the consideration noted on the contract was \$290,000.00 the real amount she had agreed the purchaser should pay was \$203,000.00 which the vendor described as being to "help [the purchaser] with her bank". The solicitor formed the view that she could not continue to act as this would be assisting a fraudulent activity in that the purchaser's incoming mortgagee would not be informed of the true purchase price. Her real problem was whether she should disclose it to the purchaser's solicitor should the vendor wish to proceed on that basis. The solicitor obviously owed a duty of confidentiality to the vendor but not to the purchaser. As the information the solicitor obtained from her client related to the agreement between vendor and purchaser it seemed it was appropriate and not prohibited for the solicitor to inform the purchaser's solicitor, first notifying her client of her intention to do so. The solicitor could not, without the client's instructions, however inform the purchaser's solicitor of the precise terms of her conversation with her client.

### **Example 2**

A solicitor acting for a vendor was confronted with a request from the purchaser's solicitor that the contract show a purchase price of \$745,000.00 with a special condition for vendor rebate of \$225,000.00. The broker/agent had suggested that a clause could be inserted in the contract (following concern expressed by the solicitor and also his client, the vendor) that the vendor could rescind the contract if it were found that the purchaser had not informed the mortgage of the special condition nor provided any reason which would indicate that the rebate is ethical. The latter

seemed rather curious and it seemed that there would be a great deal of uncertainty in any agreement in those terms.

### **Example 3**

A solicitor wished to know whether he could report the following circumstances to his client's financier or whether he should do so as a matter of ethics.

The solicitor received a sales advice from a real estate agent attaching a copy of the front page of an exchanged contract with a five day cooling off period. He received the contract the day after exchange so it was still within the cooling off period. Contracts were exchanged at a price of \$150,000.00. The next day his client's purchaser attended his office to discuss the exchanged contract which they did in detail. The purchaser advised that he was obtaining finance from a lender through a broker and that he had reached agreement with the agent and the broker that the contract price was to be noted at \$165,000.00 with a rebate clause of \$15,000.00 on completion. In the solicitor's words "*this apparently was agreed to to enable the purchaser to obtain the requisite amount of finance to purchase.*" The broker told the solicitor he had a copy of the contract at \$165,000.00 with a rebate clause of \$15,000.00 on completion and that the purchaser was borrowing 95% of the higher price ie \$6,750.00 more than the actual consideration and that he was awaiting a "valuation". The solicitor informed the broker that the actual contract exchanged was at the lower figure without a rebate clause. On being challenged the broker said that the inflation of the purchase price to be submitted to the mortgagee was "a common practice". The solicitor advised his client as to all the possible ramifications of proceeding with the matter as agreed with the agent and the broker and the client withdrew instructions from him.

The Ethics Committee thought that the solicitor had done all he needed to do by informing the client and the broker (the latter particularly) of the fraudulent and deceptive nature of the proposed agreement and did not need to take the matter any further by reporting it to anyone else. This is always a vexed area.

## **Ethics Column**

In my Ethics Column in the Law Society Journal, August 2000 I wrote about this problem under the heading **“Ethics: A party to misrepresentation – not a proper role for a practitioner”** and I noted the following:

“Stumbling across fraudulent activity is not confined to criminal matters. For the practitioner it can pop up in the most unlikely areas and involve the seemingly most innocent of clients.

Since the beginning of this year the Law Society’s Ethics Committee has received about 30 enquiries mostly in conveyancing and commercial matters involving conduct which would amount to assisting a fraudulent activity. Mainly they concern a probable attempt to deceive a mortgagee about the true purchase price of a property so that the mortgagee has a misleading impression of the client’s equity in the property and the ability to repay the mortgage loan. The issue of defrauding the revenue also arises.

### **“They all do it”**

In one matter both the solicitors for the vendors and the solicitors for the purchasers asked our advice about their future course of action.

The vendors and the purchasers agreed originally that the property in question, a Sydney suburban property, would be sold for about \$250,000 but contracts were exchanged for \$285,000 with a special condition providing for a rebate to the purchasers of \$35,000 for the settlement within the time specified in the contract.

The purchasers’ solicitors were concerned that in completing the purchase and mortgage on behalf of their clients they might be assisting them to



mislead or defraud their mortgagee about the true purchase price of the property. The vendors' solicitors, although less directly involved, had a similar concern that they might be assisting and therefore involving their clients also in assisting the purchasers to mislead or defraud their mortgagee.

The vendors' solicitors, who had been instructed after the real estate agent exchanged contracts, only became aware quite late in the day that this special condition was part of the contract and, because of their natural concern about such a large rebate, immediately made inquiries. The vendors said they had been told by the agent that the rebate clause was included at the agent's request to assist the purchasers obtain finance and were assured it was "common practice" which presumably meant it was ok.

Clearly as things stood the real purchase price on the matter being completed in the time stipulated in the contract was the significantly lower figure. The best gloss which could be put on the situation was that the rebate could be regarded as an inducement or reward for prompt settlement.

The vendors' solicitor, quite rightly, felt that it went beyond that and that the lender should be made aware of the special condition. So the vendors' solicitor obtained his clients' instructions to request a further special condition in the contract whereby the purchasers would warrant that they had already disclosed or would disclose to any incoming mortgagee the provisions of the special rebate condition.

The purchasers rejected that request and told their solicitor that the lender already knew of the condition. But if that were the case, why reject the proposed special condition containing a warranty?

**Leave it to the mortgagee?**

It was quite proper for the vendors' solicitor to request the special condition. This would remove the problem. But, you might be asking, isn't this doing the mortgagee's job for it? Isn't it the only party which might be disadvantaged? Shouldn't it make its own enquiries about the value of the property, the purchasers' equity, their capacity to repay the loan during its currency or in the event of default the lender's ability to recover all monies due to it? This isn't just about protecting the mortgagee (a commercial issue); it's all about not misleading it (an ethical issue). Another factor is that potentially on default the lender might involve the solicitors as well as their clients in any dispute by being joined as parties or in the case of the solicitors by way of complaint about their professional conduct. Not problems to dismiss lightly.

As to the enquiry from the purchasers' solicitor; I did not think the purchasers' solicitors could alert the lender without their client's instructions so the question was whether they should continue acting if the clients were to continue to reject the assertion that the mortgagee should be fully informed. They had a difficulty in being seen to doubt their clients but I thought hopefully the clients might be convinced by the solicitors' insistence that their professional duty required them to ensure the mortgagee was fully apprised of the true position.

### **An appropriate outcome**

Ultimately the vendors' solicitors terminated their retainer having given certain advice to their clients about the ramifications of proceeding with the matter. They were later advised that by mutual agreement the contract was rescinded and the sale would not proceed.

### **A close relationship**

Another solicitor was instructed by a client who had been granted power of attorney by her sister and brother in law. He was instructed to act for the sister/attorney on the sale of property owned by the donors. She had another role – as the purchaser. The problem did not stop with the possible conflict of interest. Contracts were exchanged in early May and following the recent announcement of stamp duty advantages for certain properties which included this property, the client asked the solicitor to ignore the exchanged contract and exchange fresh contracts. Clearly the solicitor's acquiescence would assist in defrauding the revenue.

### **Clear need to disclose**

In a further conveyancing matter involving several million dollars, part of the transaction involved vendor finance for a significant figure. The main mortgage was for a significant proportion of the purchase price. The client was not minded to disclose the vendor finance to the main lender but it appeared this was essential as the lender wanted a warranty there were no other borrowings.

In yet another conveyancing matter a solicitor was acting for the vendor on a sale of property where contracts had been exchanged but the purchaser wanted to rescind and enter into an option agreement. The cooling-off period had not yet expired but the purchaser wanted to keep the bargain on foot to take advantage of those recently announced stamp duty advantages. The solicitors for both parties were concerned it might amount to defrauding the revenue and felt they should not be involved.

### **The solution?**

There may be instances where a fairly small rebate for settlement on time is justifiably provided. The rebate itself is not the problem – the possible deception is. Non-disclosure which would amount to misleading conduct

must be avoided at all costs. The Ethics and Property Law Committees have recently warned of the dangers inherent in these sorts of situations. You take a risk in breaching the Fair Trading Act, the Trade Practices Act, the Legal Profession Act and even the Crimes Act. You can't usually make a false step by being candid."

Since then other matters have continued to arise and the issue will be brought to the general attention of the profession again.

### Death of Client in Conveyancing Transaction

A solicitor acting for the vendor on instructions of the donee of his Power of Attorney discovered between exchange of contracts and settlement that the vendor had died. Upon disclosing this to the purchaser's solicitor (with the attorney's instructions) he was informed by the purchaser's solicitor, practising in what the solicitor described as a "*responsible firm*", that the purchaser would like him to disregard the fact of the vendor's death and proceed with the matter as though he were alive.

It emerged that the attorney was also executor of the vendor's will and that the solicitor thought that as far as the beneficiaries were concerned "*there would be no problem*". A number of factors militating against proceeding to completion as though nothing had happened were:

- the Power of Attorney ceased to have effect upon the death of the vendor. Therefore, the former attorney had no right to instruct the solicitor to proceed nor to sign the transfer. Therefore, to produce to the Land Titles Office a transfer purportedly legally signed on behalf of the vendor would, at the very least, be misleading;
- the fact that no-one might ever find out or complain was irrelevant;
- apart from the ethical answer ie that the matter should not be completed as though nothing had happened, there was a practical solution: obtaining an

urgent Grant of Probate (ad colligenda bona defuncti) in respect of that particular asset.

**Assisting fraudulent activity on behalf of one client involving conflict of interest in assisting one client to defraud the other – false attestation/false certification**

In the early 1990's there was a spate of disciplinary matters involving solicitors' false representations as to attestation of signatures on security documents. In some cases these have involved the defrauding of a lending body and in some cases the defrauding of a client by the fellow client/spouse.

### **Disciplinary Judgments**

A helpful summary of some of these matters is found in the 2000 edition of Riley's New South Wales Solicitors' Manual.

One of the matters referred to there relates to a solicitor whose name was ordered to be removed from the Roll of Solicitors where she was found to have prepared or assisted clients to prepare statutory declarations which contained to her knowledge false information as to the source or sources of "deposit gap" borrowings and in many cases witnessed the clients' signatures.

*The judgment of the Solicitors' Statutory Committee in Matter No 5 of 1985 notes "In summary the Solicitor's explanation of her conduct is that she thought the Building Society's requirement for evidence to be put on by Statutory Declaration as to the course of the additional borrowings was a formality, this was confirmed by the managers of the finance companies with whom she dealt and the real estate agent and that at the time she did not believe that she was doing anything wrong. She stated that generally she was acting for young married couples whose main objective was to own their own home and she did not believe it was dishonest to assist them with the preparation and witnessing of the false declarations."*

Counsel for the Law Society submitted *“It is not a matter of special professional knowledge that solicitors must have that there should not be declarations furnished which are not correct. It is really a matter of ordinary honesty which everybody must be aware of.”*

In ***re Mitchell* [1992] 1LPDR 6** the Legal Profession Disciplinary Tribunal found the solicitor had signed his name to a series of documents over a long period of time in the usual form *“signed in my presence by the mortgagees who are personally known to me”* where two of the purported signatories had died and the others did not sign in his presence. The Tribunal was not impressed with the solicitor’s explanation that he did not know that the two deceased signatories had died and said *“It matters not ... the form of the attestation could not be clearer”* and the solicitor was found guilty of professional misconduct.

In ***re Konstantinidis*** the solicitor purported to witness the signatures of a husband and wife on a number of security documents to be submitted for the purpose of obtaining a loan of \$260,000.00. Neither was present at the time the solicitor purported to do so and the Tribunal found him guilty of professional misconduct.

In a similar matter ***re Rigelsford* [1995] LPDR 1** the Tribunal found guilty of professional misconduct a solicitor who gave a lender’s solicitors a certificate falsely asserting he had explained a mortgage to the four guarantors.

In these cases the Tribunal was satisfied that there were reasons why the solicitors should not be deprived of their right to practise by having their names removed from the Roll of Solicitor but that was an outcome which was under consideration and in respect of which the practitioners were at some risk.

Similar matters have been dealt with in the New South Wales Court of Appeal.

In ***Fraser -v- Council of the Law Society of New South Wales* (unreported, CA (NSW) Kirby P, Handley and Cripps J J A, CA 40780/91, 7 August 1992 BC**

**9201695**) the Court substituted a fine of \$7,000.00 for an order from the Tribunal that the solicitor's name be removed from the Roll of Solicitors. The solicitor had knowingly and falsely signed a certificate as a solicitor knowing others would act upon it and had falsely misled a fellow practitioner enquiring about the circumstances in which the certificate was given and further that he failed to appreciate that his misconduct amounted to fraud. The outcome was said by Kirby P to have been the "*result of a momentary lapse*". Handley J A was satisfied that the Court would be justified in "*concluding that this appellant will never again give a false certificate*".

In ***Demetrios -v- Gikas Dry Cleaning Industries Pty Limited (1991) 22 NSWLR 561*** the following quote from the judgment of Mahoney J A summarises the matter:

*"I am conscious that, in a sense, the liability of Mr Demetrios for the loss suffered by the plaintiffs in the two transactions arises by a side wind. It may be said that the reason why the plaintiffs did not receive the monies which Mr & Mrs Kiriakidis had promised to pay them was because the transactions entered into by Mr & Mrs Kiriakidis were hopelessly improvident and because Mr Kiriakidis, having misled his wife, fled the scene. The fraud of which Mr Demetrios was guilty, viz, that relating to the witnessing of Mr Kiriakidis' signature, was collateral to the losses which in any event would have been suffered, even if Mrs Kiriakidis' signature had been properly witnessed by Mr Demetrios."*

#### **Criminal Complicity – Forsyth's Case**

The case perhaps attracting most publicity and commentary about a legal practitioner's criminal complicity with a client involved Victorian barrister Forsyth who was tried in the Supreme Court of Victoria on a charge under the Commonwealth Crimes Act of conspiracy to defraud the Commonwealth. See ***R -v- Forsyth (1990) 20 ATR 1818***. This involved an allegation that F had dishonestly advised promoters of a scheme to avoid tax when he must have known that they had as their purpose the defrauding of the Commissioner of Taxation. The barrister

was acquitted of the charge on the direction of the judge to the jury at the end of the Crown case on the basis that F's knowledge of the unlawful purpose was not sufficient to found a lawful conviction.

This is a case which might rightly cause nervousness about advising a client as to the state of the law where the giving of that advice might be said to amount to an encouragement to the client to commit a breach of the law which might in turn involve a charge of conspiracy, as in Forsyth's case, with the client.

The difference between encouraging someone to break the law and explaining what the law is and the consequences of a suggested activity are also reflected in the Advocacy Rules. Rule A34 says:

*"A practitioner whose client informs the practitioner that the client intends to disobey a Court's order must:*

- (a) advise the client against that course and warn the client of its dangers;*
- (b) not advise the client how to carry out or conceal that course; but*
- (c) not inform the Court or the opponent of the client's intention unless:*
  - (i) the client has authorised the practitioner to do so beforehand; or*
  - (ii) the practitioner believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety."*

Rule A43 says:

*"A practitioner must not suggest or condone another person suggesting in any way to any prospective witness (including a party or the client) the content of any particular evidence which the witness should give at any stage in the proceedings."*

However, that is qualified by Rule A44 which says:

*"A practitioner will have not breached Rule A.43 by expressing a general admonition to tell the truth, or by questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not coach or*



*encourage the witness to given evidence different from the evidence which the witness believes to be true.”*

In James Boswell *Journal of a Tour to the Hebrides* , Samuel Johnson opined “A lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge.”

Clearly it is not for a practitioner asked by a client for advice to purport to be the final arbiter of the case. There might be some inaccuracy in this quote from Boswell if it could be inferred that it means that no regard should be had to the likely outcome. This cannot be a logical inference.

Riley’s New South Wales Solicitors’ Manual deals with the case of Forsyth and the various comments of eminent commentators in the chapter “Acting honestly in the service of a client”. McHugh J in his paper “Jeopardy of lawyers and accountants in acting on commercial transactions” delivered to the Perth Summer School 1988, published in Australian Bar Review, vol 5 No 1 March 1989 page 1 refers to conspiracy to defraud and aiding and abetting a breach of the law as the two areas of the criminal law which potentially apply to professional advice. His Honour dealt with the concept of encouragement by practitioners of clients’ unlawful activities and said:

*“In the present context of the relationship between a commercial solicitor or accountant and his client, I think ... that it is unreal to suggest that the professional adviser is not “in any real sense encouraging the client to act or proceed in a particular manner”. ... The lawyer, and in an appropriate case the accountant, has a vested interest in the matter proceeding ... much professional advice in commercial situations extends beyond the field of their legal advice. ... An inference of encouragement would usually be open even when the client simply asks whether a particular course of commercial conduct is lawful. It would be open to a jury to conclude that the client was relying on the lawyer’s advice and was encouraged to*

*carry out the prohibited conduct by reason of it” and further “when the lawyer goes beyond advice and draws documents for the purpose of enabling a client to achieve an objective, it is, I think, almost impossible to contend that the adviser does not aid the commission of any offence which results.””*

Both Davies QC and Gyles QC in their respective papers (“Revenue Offences Generally: Can the Professional Adviser be a Party or Conspirator”, published in the June issue of the Queensland Law Society Journal, vol 19 No 3 June 1989 p207 and “Criminal Liability of Professional Advisers” presented to the Australian Bar Association by a Centennial Conference, 13 July 1988 published in Taxation in Australia, vol 23 No 7, February 1989, p480) did not follow Hugh J’s approach, Gyles QC suggesting that it would mean *“That no citizen could obtain guidance from those qualified to give it as to the lawfulness of a proposed course of action”*.

Clearly significant thought must be given before advising the client as to the reason for the request for advice and the possible repercussions for solicitor and client should that advice be accepted.

#### **Fraudulent insurance claims**

A solicitor had been acting for a short time for two American students who had been injured in a car accident in a hired car driven by one of the clients. It emerged after an insurance claim had been submitted that contrary to what they had stated on the claim form, the vehicle had not been driven by the authorised party. Clearly the solicitor could not continue to act on the basis of the claim submitted but did he have any further obligation? His advice for the clients was that they should withdraw the claim. That probably then relieved him of the dilemma as to whether he should report it.

Clearly, had he continued acting he would have been assisting a fraudulent activity.

## **Blackmail**

A solicitor asked whether he should accede to a client's wishes to write on behalf of the client to a company which was the respondent in a class action (in which the client was not involved) demanding a sum of money in return for the client's non-disclosure of information which could be harmful to the company. The client neither had nor asserted a cause of action against the company. Clearly the threat might involve a breach of the criminal law and a breach of Rule 34.3 of the Rules which provides that a practitioner must not in any communication with another person on behalf of the client *"34.2 make any statement that is calculated to mislead or intimate the other person, and which grossly exceeds the legitimate assertion of the rights or entitlement of the practitioner's client."*

## **Reporting: Section 316 of the Crimes Act, 1900 and Rule 2**

Section 316 of the New South Wales Crimes Act, the statutory "misprision of felony provision" has caused much consternation recently for the Ethics Committee arising particularly from one matter where the solicitor asked how a statutory duty to report under Section 316 was affected by the duty of confidentiality pursuant to Rule 2 (these provisions are referred to above).

The matter in question is described in my Ethics Column in the Law Society Journal in December 1998 which is reproduced at the end of this paper.

## **Fraud**

A solicitor acting for a client in negotiating in respect of alleged debts to various lending bodies made a discovery during the course of independent enquiries suggesting that the client had defrauded the lending institution. He confronted the client who admitted the fraud. The solicitor suggested the client should give himself up to the police. The client, not surprisingly, said he did not wish to do so. The

solicitor told the client he himself might have an ethical obligation to report it and was concerned about whether or not the Crimes Act imposed a statutory obligation on him to do so.

Senior Counsel's advice was that the duty of confidentiality to the client provided the solicitor with the "reasonable excuse" in Section 316(1) of the *Crimes Act* not to disclose.

Section 316(1) says:

*"(1) If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for two years."*

Rule 2 of the Revised Professional Conduct & Practice Rules provides:

**"2 Confidentiality**

*2.1 A practitioner must not, during, or after termination of, a retainer, disclose to any person, who is not a partner or employee of the practitioner's firm, any information, which is confidential to a client of the practitioner, and acquired by the practitioner during the currency of the retainer, unless -*

*2.1.1 the client authorises disclosure;*

*2.1.2 the practitioner is permitted or compelled by law to disclose; or*

*2.1.3 the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a felony.*

*2.2 A practitioner's obligation to maintain the confidentiality of a client's affairs is not limited to information which might be protected by legal professional privilege, and is a duty inherent in the fiduciary relationship between the practitioner and client."*

The New South Wales Law Reform Commission released a report in 2000 in which the majority of the Commissioners have suggested the repeal of Section 316(1) removing the primary offence but maintaining the compounding offence extending it to covering persons who offer or promise to provide or provide an advantage to another person in consideration for the concealment of information about a serious offence.

Clause 5A of the *Crimes (General) Regulation, 1995* prescribes "a legal practitioner" for the purposes of Section 316(4), the effect of which is that no prosecution for an offence can be commenced against a legal practitioner without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the sub-section was obtained by the person in the course of practising or following a profession, calling or vocation.

If Section 316(1) is repealed then the difficult question still remains as to whether ethically the concealment of a crime would be proper or whether to disclose it would involve a breach of the duty of confidentiality. This obviously raises fundamental ethical/public policy concepts to which this paper does not extend.

Members of the Ethics Committee felt a significant amount of discomfort when receiving Senior Counsel's advice, subsequently expressing the view "reasonable excuse" within the meaning of Section 316(1) should be confined to information

which is privileged at law from compulsory disclosure rather than that subject merely to the ethical/fiduciary duty of confidentiality, the latter obviously extending to anything which a client tells a solicitor during the course of the retainer.

In the case in question the particular client ultimately “gave himself up” to the police an outcome which would have saved the solicitor and the Ethics Committee a good degree of anxiety had it occurred in the first place although it perhaps would have deprived the Committee of the opportunity of looking extensively into this issue.

### **False Declaration**

In another matter a solicitor was instructed to act in a conveyancing matter on behalf of a married couple who were purchasing a property.

In her initial interview with both clients they informed her that “the bank” had advised them that they would qualify for the both the First Home Purchase Stamp Duty Scheme and the First Home Purchase Grant Scheme and enquired whether she would lodge the relevant forms on their behalf.

While obtaining pro forma applications in the outer office the solicitor was informed by a secretary that one of the other partners of the firm had previously acted for the husband in a Family Law/De Facto Property matter which involved real property either being transferred from the husband or being sold. She therefore informed the clients that she believed that the firm had previously acted for the husband and he was not eligible under either scheme as he had previously owned property.

The husband said *“Yes, but we have been told that we qualify for it by the bank. I want to make the application.”*

The solicitor handed an application form to the husband and the wife indicating that in her view they could not make the declaration and noting that there were penalties for making a false declaration. The husband asked what the penalties were and she

indicated there were fines and other penalties applicable and further said *“I then advised that I was of the view that they would not qualify for the Scheme but if they wished to seek further information they should do so from the Office of State Revenue.”*

Prior to the scheduled date for settlement, a completed application form was returned to the firm which did not come to the solicitor’s notice until at least 14 days later as she was on holidays for a period of time. She says that the application form was not submitted but she remains concerned that *“the male client has obviously made a false declaration”*.

Ironically, the clients complained to the Legal Services Commissioner about failings in the solicitor’s provision of service to them including her refusal to submit the application form to the Office of State Revenue.

She sought the Society’s advice as to whether she had a duty under the Crimes Act to report the false declaration made by the husband in the application for the First Home Owner Grant Scheme.

Section 44 of the First Home Owner Grant Act, 2000 says:

***“ 44. Knowingly giving false or misleading information***

*A person must not:*

- (a) make a statement, orally or in writing, to an authorised officer, or*
- (b) give information, orally or in writing, to an authorised officer knowing that it is false or misleading in a material particular. Maximum penalty: 100 penalty units.”*

“Authorised officer” means, according to Section 33 of that Act:

*“A person who is an authorised officer for the purposes of the taxation laws, as referred to in section 68 of the Taxation Administration Act 1996, is taken to be an authorised officer for the purposes of this Act.”*

Section 11(1) of the First Home Owner Grant Act, 2000 provides that:

*“An applicant for a First Home Owner Grant is ineligible for the grant if the applicant or the applicant’s spouse has, before 1 July 2000, held:*

- (a) a relevant interest in residential property in New South Wales, or*
- (b) an interest in residential property in another State or a Territory that is a relevant interest under the corresponding law of that State or Territory.”*

The Committee felt that this being such a vexed legal as well as ethical/professional problem the firm should obtain its own independent legal advice, inclining to the view that the making of the false declaration by the client amounted to a serious indictable offence pursuant to Section 316 of the Crimes Act but that the solicitor could not report the offence because of the restrictions imposed by Rule 2 which the Committee agreed, in its present form, is unclear and perhaps should be revised.

## **Prevention**

### **Anticipated perjury**

A solicitor was drawn into a conversation at Court with a witness who was to be called by the other party and who made comments suggesting to the solicitor that the witness was going to commit perjury. He wanted to know if he should tell anyone. While he could not turn a blind eye to the commission of perjury, on the other hand no offence had been committed.



## Client Threatening Harm

Contrast this with the situation where a client or other party threatens to harm a third party where a solicitor may be able to prevent the harm and where the threat of harm overrides the duty of confidentiality.

There may be situations where to do otherwise would play heavily on the solicitor's conscience and where for example the threat is one of death or severe physical harm, a solicitor would hardly be successfully complained about or sued by a client where there was reasonable apprehension that the client would carry out the threat.

In an earlier edition of Riley's New South Wales Solicitor's Manual the position was put most succinctly in the following terms:

*"It might be argued ... that a solicitor who is informed by a client of the client's intention to perform an illegal act should be discharged from any continuing contractual duty to maintain the client's confidence if the solicitor's silence would enable the illegal purpose to be accomplished. Thus, a solicitor, who is told by the client for whom the solicitor is acting in a Family Law dispute that the client intends to kill the client's spouse, should not be bound to maintain the confidentiality of that communication if the solicitor has a real apprehension that the client will implement that professed intention."*

This is unfortunately not an uncommon enquiry made to the Ethics Section and the appropriateness of the solicitor reporting the possible crime is heavy notwithstanding the obvious detriment the disclosure of the making of the threat will have on the client's matter. It could be argued that this is in the client's interests by preventing the client from doing something which will have severe consequences not only for another party but also for the client.

## Conclusion

Clearly you cannot advise how to circumvent the law. Advising as to how the law applies to a particular situation may even of itself be fraught with difficulty. There are many ways in which acting in accordance with the client's wishes and therefore on the face of it the client's interests will interfere with the due administration of justice resulting in possible disciplinary action against a legal practitioner. You cannot plead independence to suit your own case and pretend that the advice is being given in a vacuum.. The cases referred to above indicate the very fine line over which it is easy to fall in assisting a client's fraudulent activity. You do not need to be actively assisting or to be getting a direct benefit to incur a liability. Turning a blind eye will not save you.

### The Law Society of New South Wales

## Statement of Ethics

The law should protect the rights and freedoms of members of the community. The administration of the law should be just.

The lawyer practises law as an officer of the Court. The lawyer's role is both to uphold the rule of law and serve the community in the administration of justice.

### ***In fulfilling this role, lawyers should***

- Serve their clients' interests competently
- Communicate clearly with their clients
- Treat people with respect
- Act fairly, honestly and diligently in all dealings
- Pursue an ideal of service that transcends self-interest
- Work with their colleagues to uphold the integrity of the profession and honourable standards and principles
- Develop and maintain excellent professional skills
- Act frankly and fairly in all dealings with the Courts
- Be trustworthy

- Keep the affairs of clients confidential, unless otherwise required by the law
- Maintain and defend the rights and liberty of the individual
- Avoid any conflict of interest

In fulfilling this role, lawyers are not obliged to serve the client's interests alone, if to do so would conflict with the duty which lawyers owe to the Court and to serving the ends of justice.

Proclaimed by The Law Society of New South Wales – 20 November 1994

### **Ethics Column – LSJ December 1998**

ALTHOUGH THE DUTY OF confidentiality to the client is regarded as the cornerstone of the solicitor/client relationship, it is not inviolable. The Ethics Committee has recently grappled with the dilemma facing a solicitor who was caught between the legal practitioner's duty of confidentiality to a client and the responsibilities of a good citizen to report a crime.

#### **After the event**

Imagine you are acting in a straightforward civil matter. What do you do if you happen to obtain information suggesting your client might be guilty of some sort of fraud – such as dishonestly obtaining money by deception, or obtaining property with intent to defraud by a false pretence?

You could find yourself in a serious position.

We know that lawyers practising in criminal law can represent a client they know to be guilty as long as they do not mislead the court. But the conflict between the duty of candour to the court and the duty of confidentiality, competence and diligence to the client does not only surface in criminal matters.

Rule 2 in the Revised Professional Conduct and Practice Rules says you must maintain the client's confidentiality. Section 57D(4) of the Legal Profession Act 1987 makes failure to comply with Rule 2 capable of being professional misconduct or unsatisfactory professional conduct.

But you may have a conflicting statutory duty of disclosure imposed by s.316 of the Crimes Act.

**Rule 2.1 says:**

"A practitioner must not, during, or after termination of, a retainer, disclose to any person, who is not a partner or employee of the practitioner's firm, any information, which is confidential to a client of the practitioner, and acquired by the practitioner during the currency of the retainer, unless -

- 2.1.1 the client authorises disclosure;
  - 2.1.2 the practitioner is permitted or compelled by law to disclose; or
  - 2.1.3 the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a felony.
- 2.2 A practitioner's obligation to maintain the confidentiality of a client's affairs is not limited to information which might be protected by legal professional privilege, and is a duty inherent in the fiduciary relationship between the practitioner and client."

Section 57D(1) of the Legal Profession Act makes rule 2 binding on the solicitor. The consequences of being guilty of professional misconduct or unsatisfactory professional conduct are that a complaint may be made against you and disciplinary action may flow. At the most serious end of the scale, a finding of professional misconduct might result in an order striking your name off the roll.

Section 316(1) of the Crimes Act says: "If a person has committed a serious offence and another person knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for two years."

The Crimes Act defines "serious offence" in s.311(1) as an "offence punishable by imprisonment or penal servitude for 5 years or more or for life".

So there are serious consequences if you ignore a clear obligation to disclose under s.316.

There are also serious consequences if you breach the duty of confidentiality and are not protected by rule 2.1.3.

Recently, a solicitor facing this dilemma sought the Society's guidance. The Ethics Committee considered it such a serious matter that it sought senior counsel's advice.

Coincidentally, two other solicitors also approached me with similar problems involving possibly very serious offences.

All three solicitors said that they had encouraged or at least advised their clients to give themselves up to the police. All three clients initially rejected that advice

although one solicitor later said that his client had decided to do so. In none of the cases would the client authorise the solicitor to disclose the offence and thereby let them off the rule 2 hook.

The first step for a solicitor in this situation is to consider whether the elements of the offence seem to be made out and therefore that the provisions of s.316 apply.

In the original case, it was only the client's confession to the solicitor on being confronted which provided the solicitor with the requisite belief that the serious offence had been committed.

The next step is to determine whether the duty imposed by rule 2 amounts to a "reasonable excuse" within the meaning of s.316, enabling the solicitor not to disclose.

Senior counsel felt that, although the information which the solicitor had obtained fell within s.316, it was also information confidential to the client within rule 2. Therefore the solicitor had a reasonable excuse within s.316 not to disclose it.

#### **Before the event**

What if the client tells the solicitor about an offence that the client intends to commit? This may be quite different. See my Ethics columns of March 1998, November 1997 and December 1996.

It is quite possible that criminal and disciplinary sanctions will be applied where you conspire with, assist or counsel a client over future offences such as tax evasion or other frauds on the Commonwealth or state revenue authorities.

#### **Take advice**

The Ethics Committee seeks to bring this problem to your attention. It recommends you obtain advice (either your own or the Society's guidance) if you are faced with this scenario.