



THE LAW SOCIETY
OF NEW SOUTH WALES
PROFESSIONAL SUPPORT UNIT

COMPLIANCE REVIEW

APRIL 2016

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CIVIC OBLIGATIONS

Mandatory legal obligations

All principals should personally ensure that their law practice meets its:

- Employee Superannuation Guarantee Levy obligations
- Business Activity Statements obligation
- GST remittance obligations
- PAYG tax instalments obligations

at the time they fall due.

ADT decision – civic obligations

Law Society of New South Wales v Vosnakis [2007] NSWADT 42- In the opinion of the Tribunal, the respondent's failure to comply with his civic obligations to make superannuation payments on behalf of his employees to pay GST and PAYG tax at the time those obligations fell due, are of a nature encompassed by the Chief Justice's definition of the extended meaning of 'professional misconduct'. Not only did these obligations arise in the course of the conduct of his practise, but the failure to meet these obligations in that context render the respondent not a fit and proper person to remain on the roll (paragraph 35).

PRINCIPALS AND STAFF

Workers compensation policy

Suggestion

Your law practice's workers compensation policy should be scrutinized by a principal at least once a year, – ideally at renewal time. This way the principal of the practice will have a firsthand understanding of the law practice's workers compensation policy's limitations and strengths. It also provides a safeguard against the delegation of responsibility for the accuracy of this important document to a non-principal.

CPD obligations¹

A solicitor must complete 10 CPD units in each CPD year including at least one CPD unit in each of the following fields:

- ethics and professional responsibility,
- practice management and business skills,
- professional skills,
- substantive law.

Suggestion

Using the current IT capabilities of the practice, it is suggested that you set up and maintain a central electronic continuing legal education register, with separate sections to record and monitor each component of the mandatory obligations.

Note: it would be useful if the register could be printed as a report to a principal for management and costing purposes, Often the CPD register can be managed (kept up to date on a daily basis) by a more junior staff member, such as administration/secretarial staff reporting to the office manager.

Staff Training – Office and Legal Training

Suggestion

The Law Society provides practical courses to help legal staff improve their administrative skills and knowledge of legal processes www.lawsociety.com.au/ForSolicitors/Education/legaltraining/index.htm the link also provides information about the availability of handbooks and guides such as the Legal Secretary's Handbook.

File reviews – employed solicitors

Suggestion

- Internally publish and implement a system for regularly reviewing employed solicitor's files. **A checklist based system (electronic or paper) is recommended**
- When annotated with your comments, directions and/or suggestions, a copy of the checklist can be used to provide written feedback to solicitors under your supervision
- It is recommended that a copy of each annotated file review checklist is kept on a central file review register maintained by the principal/s
- A sample **file review** checklist (*Annexure A*)

Employment of staff

Division 2 of the Legal Profession Uniform Law (NSW) imposes prohibitions regarding associates, clerks and non-legal partners who are disqualified persons, or persons who have been convicted of a serious offence.

Section 121 provides that a law practice contravenes this subsection if the law practice has a lay associate who any principal or other legal practitioner associate of the law practice knows to be:

- (a) a disqualified person; or
- (b) a person who has been convicted of a serious offence – unless the lay associate is approved by the designated local regulatory authority under subsection (2).

Suggestion

As part of your management processes internally publish and implement your procedures for obtaining relevant information and authorities from further associates of your practice. In addition require all existing staff to advise you should the requirement for disclosure of a serious offence or disqualification arise.

The Law Society of NSW is bound by the Legal Profession Uniform Law (NSW) to retain a register of persons who have been disqualified from being employed by the legal practice. You can access this list at Register of Disqualified Person or by looking at a hard copy of the list held by the Law Society of NSW Library.

ARCHIVED FILES

Storage of archived files (trust property)²

Rule 14 of the Solicitors Practice Rules requires a solicitor with designated responsibility for a client's matter, to ensure that upon completion or termination of the law practice's engagement that the client or former client is given any client documents unless there is an effective lien. A solicitor with designated responsibility or law practice may destroy client documents after a period of 7 years has elapsed since the completion or termination of the engagement, except where there are client instructions or legislation to the contrary.

What happens to archived files when a law practice ceases to provide legal services?

In these circumstances the former principal/s of former law practices are responsible for the storage of archived files of the former law practice as they are by definition, the solicitor with designated responsibility³ for a client's matter.

s132 of the Act applies in relation to former law practices and former principals and associates of law practices in relation to conduct occurring while they were respectively law practices, principals and associates in the same way as it applies to law practices, principals and associates, and so applies with any necessary modifications.

What happens when Liquidators are appointed to an Incorporated Legal Practice

If an ILP has given notice to the Law Society of NSW that it will no longer engage in legal practice because managers/ liquidators have been appointed to the company then the company ceases to be an ILP for the purposes of the Act. The ILP is however, a former law practice for the purpose of s132 of the Act.

In these circumstances, it is not the appointed managers or liquidators who have designated responsibility for the storage of archived files of a former ILP it is the former principal/s of the former ILP.

Note: a principal of an incorporated legal practice is an Australian legal practitioner who holds and Australian practising certificate authorising the holder to engage in legal practice as a principal of a law practice; AND is a validly appointed director of the company.

COMMUNICATION

Client identification

Suggestion

Internally publish and implement a “client identification” policy. Your policy should include the following:

(a) Identify and document

- Always identify the client (**including directors, trustees and corporations**)
- *Always* document how the client was identified⁴
- *Always* keep initial identification record on client file
- Obtain 100 points for identification where possible

(b) Also known as (“aka”) details

- Request details of aka’s from each client⁵
- Document request/responses aka’s
- Check for evidence of aka requests/responses in the course of file reviews

(c) “Maiden names” or previous names details

Request details of client’s previous names from each new client⁶

Client’s current contact details

Suggestion

In your **letter to the client confirming instructions** always advise your clients of their obligation to keep the practice informed of their current contact details, including any change of name residential address and telephone numbers.

Work allocation and supervision

Suggestion

- Require all support/administrative staff to explain to your clients or potential clients that they **are not solicitors and cannot provide legal advice** before commencing any communication
- Ensure via internal training seminars, that all staff members are clear about the boundaries of their role, responsibilities and authority. This means (a) There are clear work and file management processes for a systems based approach and (b) If decisions or actions outside their capacity or responsibility are required that a Supervisor is available
- They are capable of doing the work delegated
- There is a **system** for recording the state of play on the file
- An example of a work plan (*Annexure B*)

Pro forma file note

Suggestion

Review your pro forma file notes currently in use. They should include following prompts:

- Date including year
- Identity of the author
- Length of attendance
- Who was present
- Nature of the advice given
- Who will do what by when

Note: Law Cover sells file note pads **at cost** to firms to help them improve the written records on their clients' files. They are available in white, blue and pink. The following link will provide you with the Law Cover file note pad order form. www.lawcover.com.au/risk/default.asp?ContentItemID=66

Complaint handling system

Suggestion

Internally publish and implement a system for handling and documenting complaints received – your system should include the following:

- A complaints **register**
- A senior staff member nominated to maintain the register
- A procedure in place for reporting the complaint to **the principals** at the time the complaint is **received**
- A procedure in place for reporting the **outcome** of the complaint to all principals
- A system in place to review your management systems **against every complaint**
 - At the time the complaint is **first received**
 - **After** the complaint has been dealt with

End of matter strategy

Suggestion

Internally publish and implement an end of matter system – your system should include the following:

- The outcome
- Any further action the client is to take
- What (if anything) the law practice will do next
- How any retained documents will be stored
- An account for any outstanding money
- Issues to be reviewed and when (if necessary)
- If difficulties experienced, what measures, if any, can be implemented to minimize reoccurrence?

CONFLICT OF INTEREST

Conflicts of interest checks procedures

Suggestion

Internally publish and implement a strategy for avoiding a conflict of interest. Your strategy should include the following:

(a) Conflicts policy and procedure

- Record new legal work in an up to date and well maintained file register
- Record completed work in an up to date and well maintained *put away* or *completed* file register
- Utilize your present software capabilities to assist with conflicts searches where possible
- Always document conflicts checks and keep them on the client file
- Report all conflicts or potential conflicts to the principal/s

(b) Always complete conflicts of interest checks:

- Before confirming instructions to clients
- To determine that the partner/principal supervising the matter is unrelated to the client
- When new parties become involved
- Conduct corporate searches where applicable⁷

Giving undertakings⁸:

Suggestion

Internally publish and implement the law practice requirements regarding giving undertakings.

Include the following:

- The maintenance of an **undertakings register**⁸ by a senior staff member.
- Requirement that all undertakings are **reported** to the law practice (for recording in the register).
- Requirement that all reported undertakings are **recorded** in the register by a senior staff member.
- Monthly “**undertakings report**” provided to principal/s ideally, the report should be capable of being printed directly from your electronic undertakings register⁹.

FAQ's – conflict of interest (*Annexure C*)

STRATEGIES TO AVOID DELAY

File Management

Suggestion

Internally publish and implement your law practice's strategies to avoid delay.

Your strategies should include the following:

- The use of proper file notes by all staff
- A centralised register of key dates prompting action as these dates approach
- Placing all hard copies of emails on the client file
- Placing all faxed documents (received and sent) on the client file
- Principal or senior delegate of a principal to always open the mail
- Principal or senior delegate of the principal to always distribute the mail
- Method of conducting file reviews and on what basis they will be conducted (for example, checklist based reviews)

Suggested Resources

The following links to *a LSJ* articles may also assist you in further developing your strategy to avoid delay:

“Set some precedents” by Greg Dwyer - August 2003

www.lawsociety.com.au/resources/journal/archives/Issue/028695

“Avoiding a professional negligence claim is as easy as learning your A to Zs”

by Janice Purvis- November 2008

www.lawsociety.com.au/resources/journal/archives/Issue/031374

LEGAL COSTS

Staff in the Legal Costs Unit can provide free and confidential assistance about all aspects of costs to solicitors by telephone, email, written correspondence or in person.

This service operates Monday to Friday, 9am to 5pm. To access assistance call 99260373 or email costs@lawsociety.com.au.

TRUST ACCOUNT MANAGEMENT SYSTEM

General trust account management system

Suggestion

Internally publish and implement your *general trust account* management system

Your system should include the following:

- All **principal/s** to receive, review and sign off on the month end general trust account reports that is, trial balance bank reconciliation and cashbooks.
- Review old balances in the general trust account on a monthly basis
- Review month end general trust account report balances
- Review the reconciled balance of the trust ledger account with the balance of the practice's trust account cash books (Clause 48(2)(b)(i) of the Legal Profession Uniform General Rules 2015)
- A **principal or person authorised to sign trust cheques or to affect trust EFT¹⁰** to always refer to the client ledger **before** signing trust cheques or providing EFT authorization.
- Non principals **authorised** to sign on the trust account could **provide an end of month report to the principal/s** regarding all cheques or EFTs they have signed/authorised in the previous month, for example, cheque number, date, purpose, payee, file number, copy of relevant trust account ledger and the anticipated date of completion of the matter.

Controlled money

Suggestion

Internally publish and implement your controlled money accounts management system – your system should include the following:

- Copies of controlled money month end reports (listing) to be signed by a principal of the practice each month
- Any employed solicitors with carriage of matters involving controlled money to provide an end of month *status report* to a principal documenting:
 - controlled money account balances
 - general progress of their controlled money matters
 - an expected date for finalization of each of their controlled money matters.

Transit money

Section 140 of the Legal Profession Uniform Law (NSW) provides that a law practice must pay or deliver the money as required by the instructions relating to the money within the period (if any) specified in the instructions, or if the period is not specified, then as soon as practicable after it is received. The law practice must record and keep brief particulars sufficient to identify the relevant transaction and any purpose for which the money was received: Section 140(2). The record must be kept for 7 years: Section 140(3).

Transit money received in cash

Section 143(1) of the Legal Profession Uniform Law (NSW) provides that transit money received in the form of cash must be deposited in the general trust account as soon as practicable after receiving it before it is otherwise dealt with in accordance with the instructions relating to the money.

Suggestion

Internally publish your law practice s140 management requirements including the following

- Ensure that all support staff, and/ or agents fully understand the types of transit money **records** that **must** be kept
- At the end of a matter a principal should review randomly selected files to test that the practice's transit money management system is working – query in each case whether sufficient records are retained to discharge your obligations under s140 of the Legal Profession Uniform Law (NSW).

“Completed file” destruction policy

Suggestion

Internally publish and implement a “completed file” destruction policy. The following link to an article entitled **Storage of files and documents** by Bruce MacDermott may assist you in developing your completed file destruction policy.

www.lawsociety.com.au/resources/journal/archives/Issue/028747

Disputed monies

Disputed monies held by your practice as stakeholder/ trustee may be paid into the Supreme Court of New South Wales pursuant to Section 95 of the *Trustee Act 1925* (NSW).

SAFE CUSTODY

Safe custody document register¹¹

Suggestion

Internally publish and implement a policy for holding safe custody documents including the following:

- Maintain a centralized safe custody register
- Maintain safe custody documents securely and separate to client file
- Record **all dealings**¹ with safe custody documents in the register
- Keep the register separate and secure from the safe custody documents
- Your method for conducting an annual safe custody audit

Annual safe custody audit

Suggestion

An annual audit will not only assist your law practice in maintaining its safe custody documents securely but will also assist in ensuring that clients documents such as wills are routinely reviewed.

A possible “audit starting point” could be to simply write to clients once their safe custody packets have been held by your practice for more than say, **two** years - requesting them to confirm that their personal details remain unchanged.

If you have not already done so, you might also consider converting your safe custody register to an electronic register. An electronic safe custody register that is capable of generating relevant reports is also available on many of the Society’s examined software packages.

CONFIDENTIALITY

Management system for handling client files or documents

Suggestion:

Internally publish and implement a management system for handling client files and documents.

The management system should include the following:

- Maintain the layout of the office with separate public areas and areas accessible only to staff
- Provide adequately sound proof and private interviewing rooms
- Policy of no file or document to be left in public areas of the office
- Policy of no client files or document to be *left* on desk in the solicitors offices
- Fax documents always to include a cover page bearing **confidentiality** notice¹²
- Policy requiring discrete use of mobile phones in public domains
- Annual review of your confidentiality management system
- Include in the employment contract of each employee an **undertaking by them to keep clients' affairs confidential** which survives both the departure and death of any particular client and the termination of their employment.

Regular training for principal and employees concerning the requirement of confidentiality

Suggestion

You may consider incorporating annual in-house confidentiality training as part of the mandatory education requirement for Ethics and Professional Responsibility.

Suggested Resources

Law Cover's Risk Management: **A checklist to comply with the solicitor's duty of confidentiality**

FAQ's: Confidentiality (*Annexure D*)

LIFE WORK BALANCE

Beaton Consulting¹³ reports that lawyers experience the highest rates of depression out of all the professions in Australia. More information can be found in the following LSJ article: www.lawsociety.com.au/resources/journal/archives/Issue/030778

Policies that encourage balance

- part-time or flexible work hours to accommodate personal circumstances where possible
- access to extended periods of leave if/when necessary

LawCare

LawCare is the Law Society of NSW's confidential counselling service. It aims to help members deal with personal and professional problems that interfere with their work performance and personal life.

A counsellor is available to discuss any personal problem currently affecting your work performance, or threatens to do so in the future. Problems may include anxiety or stress related conditions, alcoholism, drug abuse, gambling addiction, a family or marriage crisis, or career problems.

- LawCare can all assist your family with a wide range of problems.
- LawCare counselling is provided by GPs experienced in dealing with the unique difficulties faced by professionals. You may choose from male or female counsellors.
- Initial assessment and referrals by phone are free of charge. Costs will only be incurred for face-to-face consultations and much of this can be claimed back through Medicare or private health cover for clinically relevant medical conditions.
- Call 0416 200 788 to speak to a counsellor at LawCare.
- Call Life Line for Lawyers on 1800 085 062.

Workplace grievances

Suggestion

Review your internally published procedure for handling workplace grievances. WorkCover's website includes useful information for this purpose, including information for employers in respect of policies to prevent and deal with bullying and harassment. www.workcover.nsw.gov.au

Serious illness

Suggestion

Plan a strategy that would minimize external intervention if you as principal died or became seriously ill. Your strategy should include the following:

- have up to date wills
- have up to date powers of attorney
- have an arrangement in place for the removal and disposal of files and security documents to another practitioner or the client if/when necessary

Endnotes

1. Rule 6 of the Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015.
2. Under s128 of the Legal Profession Uniform Law (NSW) trust property means property entrusted to a law practice in the course of or in connection with the provision of legal services by the practice for or on behalf of another person, but does not include trust money.
3. Solicitor with designated responsibility means the solicitor ultimately responsible for a client's matter or the solicitor responsible for supervising the solicitor that has carriage of a client's matter. The solicitor with designated responsibility is the principal or principals of the law practice.
4. Suggestion: that each new client complete an information sheet prior to seeing a solicitor take a photocopy of licence or other document used to identify the client keep identification record including information sheet on client file.
5. Request details of aka's at the commencement of the matter – provide a "prompt" for this on client information sheet.
6. Request details of previous names from each new client at the commencement of the matter - provide a "prompt" on the client information sheet. Suggest you use an additional prompt on the client information sheet directing the client to state their "reason for seeing a solicitor".
7. Even if your practice rarely has corporate clients this strategy should be incorporated into your internally published strategy for avoiding a conflict of interest. Doing so acts as a prompt when circumstances require.
8. Solicitors Conduct Rule 6 states – A solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, unless released by the recipient or by a court of competent jurisdiction. A solicitor must not seek from another solicitor, or that solicitor's employee, associate, or agent undertakings in respect of a matter, that would require the co-operation of a third party who is not party to the undertaking.
9. An electronic "undertakings register" could easily be integrated into your current IT systems.
10. The Legal Profession Uniform General Rules 43
 - (1) This clause applies to the withdrawal of trust money from a general trust account of a law practice by electronic funds transfer.
 - (2) An electronic funds transfer must be effected by, under the direction of or with the authority of:
 - (a) an authorised principal of the law practice, or
 - (b) if a principal referred to in paragraph (a) is not available:
 - (i) an authorised legal practitioner associate, or
 - (ii) an authorised Australian legal practitioner who holds an unrestricted practising certificate authorising the receipt of trust money, or
 - (iii) two or more authorised associates jointly.
11. (1) A law practice must maintain a register of safe custody documents.
 - (2) The register of safe custody documents must, in respect of each will, deed, document or other valuable property for which the law practice receives instructions to hold the item in safe custody, record the following:
 - (a) the full name and address of the person who gave the instructions,
 - (b) a short description of the item,
 - (c) the date of receipt of the item by the law practice,
 - (d) the identifier of the safe custody packet, in which the item is held by the law practice.
 - (3) Subrules (1) and (2) do not apply to a barrister except to the extent the barrister holds items in safe custody in the course of the work of a barrister
12. Develop a confidentiality clause on the front page of the fax cover sheet and require all staff to always use a cover page when sending documents by fax.
13. http://www.beatonglobal.com/pdfs/Anxiety_and_depression_in_the_workplace.pdf



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ANNEXURE A:
FILE REVIEW CHECKLIST



FILE REVIEW CHECKLIST

Date:

File Number:

Client

File author:

File reviewer:

	YES	NO	N/A
1. Was the file easily located?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Is the file well organised?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Evidence that all parties have been identified against AML/CTF criteria?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Conflicts search – outset of matter?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Disclosure?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. Costs agreement?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. For transit money received - Are there brief particulars sufficient to identify the relevant transaction and any purpose for which the money was received (clause s140(3)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. Engagement letter?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. Correspondence confirming changes in instructions?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10. Evidence that safe custody documents have been placed into safe custody?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11. Has client been advised of critical dates?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
12. Has client been regularly informed of developments in the matter?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13. Is the file conducted in a timely manner?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
14. Is communication with the client and relevant parties documented?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
15. Are file notes recording instructions clear, legible and showing date and time?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

	YES	NO	N/A
16. Has all incoming correspondence been date stamped?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
17. Has all outgoing correspondence been dispatched date stamped?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
18. Is there evidence that the file author sought assistance where necessary?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
19. If the author is using a checklist matter plan is it being adhered to?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
20. Within law practice guidelines is mail being signed and email being authorised by the principal?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
21. Were client telephone calls and emails returned by close of business of next working day?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
22. Is there evidence of the date and time of the original message?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
23. Is correspondence requiring an acknowledgement responded to within 7 working days?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
24. Are draft documents identified as “drafts”?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
25. Have past file review requirements been actioned?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
26. Does the file reveal evidence of client dissatisfaction?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
27. Are fee estimates being met or exceeded?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

File reviewer's comments:



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ANNEXURE B:
LEGAL MATTER WORK PLAN



LEGAL MATTER WORK PLAN

Date instructed:

Client name:

Type of matter:

Outcome sought (by client):

Main steps to be taken:

Critical dates:

Limitation periods:

Client's concerns:

How and when does the client want to be updated?

What the Law Practice will do and when:

Alternative scenarios if any:

Cost estimate:

Payment arrangements:



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ANNEXURE C:
FAQ'S: CONFLICT OF INTEREST



FAQ'S: CONFLICT OF INTEREST

Q. Is there a problem in acting for more than one party in a matter (incl. conveyancing matters)?

A. There is no absolute rule against acting for more than one party.

Q. Can I act for a person seeking to challenge a will which I have drawn?

A. Generally, no as that would potentially involve using confidential information obtained from the testator which vests on his or her death in the executor. This is similar to a breach of Rule 10 where the former client is still alive.

Q. Can I act for family and friends?

A. The problem is that you need to avoid any compromise to your integrity and provide independent objective advice in accordance with rule 4.1.4 of the Solicitors Conduct Rules. This will always be a challenge when dealing with a family member or a friend.

Relationships between you and a relative or friend will lack the professional distance you have with other clients, and this emotional connection could cloud your judgement.

Solicitors must maintain a degree of professional detachment from their client's cause. Where close friends and family are concerned solicitors of course are not detached.

Q. Would I have a conflict of interest in acting for a client where the opponent was previously a client of a firm in which one of my partners or employees previously practised? Does it matter that the partner/employee had no involvement in the matter?

A. Basically it all depends on the precise circumstances. Generally it is probable that the firm in this situation would have a conflict of interest and there may need to be an exploration of the extent to which the partner/employee was involved in the relevant matter while at the previous firm. If the opposing client accepts that that solicitor had no involvement then that party may accept that there is no conflict of interest but without that exploration the perception probably is that the solicitor may have been privy to confidential information which might be used to the opponent's detriment. See LS J Ethics articles under the category "Conflict of duties and interest".

Q. Does it make any difference if the employee is not a solicitor?

A. A conflict of interest can still arise where a paralegal not a solicitor has confidential information.

Q. Can I accept a gift from a client?

A. This may involve the appearance of undue influence which must be avoided. See Rule 4.1.4 of the Solicitors Conduct Rules which states that "a solicitor must avoid any compromise to their integrity and professional independence."



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ANNEXURE D:
FACT SHEET: CONFIDENTIALITY



FACT SHEET: CONFIDENTIALITY

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

A. Rule 9 of the Solicitors Conduct Rules makes it clear that the duty of confidentiality survives the termination of the retainer, that is, there is a duty to keep confidential information obtained from or on behalf of a former client in the same way that the duty is owed to a current client.

Q. How does the death of the client affect the duty of confidentiality owed in respect of information obtained from or on behalf of that client?

A. Upon the death of a client the duty of confidentiality becomes owed to the client's legal personal representative without whose authority (subject to compulsion of law) any confidential information obtained from or on behalf of the deceased cannot be divulged.

Q. What is your position where you are subpoenaed to give evidence in proceedings in which a former client is a party and asked to give a statement to the solicitor at whose request the subpoena was issued?

A. It is common for a solicitor who was previously acting in a matter to be subpoenaed to give evidence in proceedings in which the former client is a party. The duty of confidentiality owed to the former client requires you not to volunteer any confidential information. However, you can be compelled by the Court to divulge information which is merely confidential but not that which is privileged from compulsory disclosure.

Generally, the solicitor for the party at whose request the subpoena has been issued will ask you to provide a statement or affidavit, usually to enable a decision to be made as to whether to call you to give evidence. As there is no property in witnesses there is no problem with your communicating with that solicitor but you need to bear in mind the duty reflected in Rule 9. The appropriate course is to say to the solicitor who has had the subpoena issued that you will seek the authority of the former client to disclose information. If that is not forthcoming then you will still need to answer the subpoena as it is a direction of the Court but on being asked to answer particular questions you must submit to the jurisdiction of the Court and it is up to the legal representatives of the party seeking the information in evidence and of the former client to make submissions to the Court as to whether or not you can answer the question.

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