

Conflicts: Some basic principles for family lawyers

The issue of conflicts is one that many practitioners find confusing, and indeed, is one which may require the adjudication of the court.

Put simply, the general principle is that practitioners cannot enter in to, or proceed with an engagement involving a conflict of interest or otherwise retain some benefit or gain obtained by virtue of the fiduciary relationship. Professional Conduct Rule 8 .

The only exception may be where the client has given informed consent after full disclosure. A leading case on these issues is Law Society of NSW v Harvey (1976) 2 NSWLR 154 per Street CJ.

The duty of disclosure invariably requires the practitioner to insist the client receive independent legal advice as a means of ensuring the lawyers interests are not preferred over the clients interests.

The practitioner must remain at arms length from the client, who must be able to have complete reliance on the lawyer’s professional advice. Clients are entitled to expect the practitioner will fulfill their professional responsibility to serve and protect the client’s interests. The practitioner is obliged to avoid transactions which may intermingle their personal affairs with that of the client.

Types of conflict situations are discussed below.

Competing financial interests between lawyer and client

This relates to secret profits and commissions, referral fees from transactions involving loans, investments, financial planning:

Professional Conduct Rules 9 and 10 refer.

- Borrowing from clients. Law Society of NSW v Harvey, where the solicitor’s clients lent money to three companies of which the solicitor was director and shareholder, the court held he failed to provide adequate securities to the clients for the loans.

- Lending to clients. The danger arises where the client defaults or in relation to the interest rate: Maguire v Makronas (1997) 188 CLR 449.

- Lawyer purchasing the clients’ property: the duty to ensure that the clients seek independent legal advice is important for two reasons. The practitioner’s fiduciary responsibility prohibits him from profiting from information derived from the fiduciary relationship. Secondly, the practitioner’s position of influence may lead the client to accept terms and conditions of sale suggested by the practitioner without adequate consideration of the nature of the relationship: Re. a Barrister and Solicitor (1979) 40 FLR 26.

- Transactions with ex-clients: The termination of the lawyer-client relationship may not always excuse the practitioner from conflict. The practitioner must not use confidential information derived from the previous retainer for his own benefit against a former client.

Lawyers acting for themselves, relatives or associates

In Woolley v Ritchie (1999) ANZ Conv R 387 a solicitor acted on his own behalf and for his de facto spouse in real estate transactions. Upon inquiring the de facto was told by the solicitor that it was unnecessary for her to seek independent legal advice. The court held that the solicitor was under



Josephine Stone,
Professional Standards and Ethics

a duty to ensure that his de facto spouse was fully informed and freely consented to the transaction, which included the transfer of the property and mortgage in her name to that of a trust.

Lawyer client sexual relations

A client’s need for legal advice and protection may render them at risk of emotional dependence, particularly in criminal and family law matters, leading to inappropriate sexual conduct. The client may fear that denial of sexual favours will result in the practitioner withdrawing legal representation. Conversely, the practitioner may lose objectivity and independence in the conduct of the case. No Australian jurisdiction has a specific rule prohibiting sexual relations between practitioners and clients, unlike New Zealand and the United States.

eg. Bar Association v Lamb (1972) ALR 285 where a practitioner was found guilty of professional misconduct for engaging in a sexual liason with his client whilst representing her in family law dispute with her former husband. He was fined \$2000, censured

and ordered to pay legal costs of \$15,000.

Lawyers as witnesses

Practitioners must not act in a case in which there is reason to believe that they will be required to give evidence material to the determination of contested issues before the court: Professional Conduct Rule 13.

This principle derives from the difficulty of competing interests of the practitioner, where the duty to the court, or the practitioner's own interest, are not consistent with the duty to the client. The practitioner's objectivity may be queried which may have an adverse effect on the public perception of the practitioner as an individual and the professional as a whole. Also the court may be perceived to place undue weight on the testimony proffered by an officer of the court. *Yamaji v Wespac Banking Corporation* (No 1) (1993) 42 FCR 431.

Acting for more than one client

See Professional Conduct Rule seven.

Practitioners have a duty to give undivided loyalty to the client, which cannot be fulfilled if that duty is owed to two or more parties whose interests diverge. The disparate interests may not become apparent until later in the proceedings and then to change legal representation becomes highly disruptive to the court process.

Mallesons Stephen Jacques v KMPG Peat Marwick (1990) 4 WAR 357 per Ipp J at page 374;

".....it is incongruous to suggest that, in determining whether a conflict of interest may exist, the knowledge and duties of certain partners in a firm of several partners should be divorced from the knowledge of other partners in the rest of the firm and, solely for that purpose, those other partners

should be regarded in effect as separate and independent entities. It would in my view offend against established principle and indeed the public interest in the administration of justice, if a scheme could be constructed whereby a group of partners within a firm was able to represent the prosecutor in criminal proceedings in conflict with the duties owed by other of their partners to the accused person, to the mutual financial profit of all".

In criminal matters there is an incentive to act for multiple parties because more than one accused can be tried during the same trial, thus saving time, money and resources of the fee-paying client, the public defender system and the courts.

In family law matters the Family Law Rules provide that a practitioner shall not in any proceedings represent or act for any 2 or more parties having adverse interests in the proceedings: O37, R2

The exception appears to be joint applications for dissolution or nullity of marriage: s44(1A) *Family Law Act*.

Acting against a former client

Professional Conduct Rule three.

The duty of confidentiality survives the termination of a retainer: *Prince Jefri Bolkiah v KPMG* (1999) 2



WLR 215.

There are three main scenarios:

- Where the same practitioner acts against a former client.
- Where a different practitioner acts against the former client of a solicitor from the same firm.
- Where the firm acts against a client of a practitioner now employed by the firm (the migratory lawyer).

The conflict is this: the practitioner's continuing duty to a former client not to disclose confidential information imparted during the retainer or use that information against the former client and the duty owed to the new client to advance that client's interests.

The continuing obligation of confidentiality has in recent times been referred to as a duty of loyalty (not to be confused with a continuing fiduciary relationship) and is discussed in a number of cases.

eg. *Spincode Pty Ltd v Look Software Pty Ltd* (2001) VSC 287

Re A Firm of Solicitors (1996) 3 WLR 16

Fordham v Legal Practitioners Complaints Committee (1997) 18 WAR 467.

The test was espoused as follows:

".....a solicitor is liable to be restrained from acting from a new client against a former client if a reasonable observer, aware of all the relevant facts, would think that there is a real, as opposed to a theoretical possibility, that confidential information given to the solicitor by the former client might be used by the solicitor to advance the interests of the new client to the detriment of the old client" per Drummond J in *Carindale County Club Estate Pty Ltd v Astill* (1993) 115 CLR 112 at 118.

What are the relevant facts?

Continued page 24

Conflicts: Some basic principles for family lawyers...cont.

In Family Law matters, where litigants are emotionally more sensitive, the category of relevant factors may be more extensive than that generally considered in other types of litigation eg. impressions formed during the retainer of the former client's personality may carry greater significance than in other fields : *Gagliano v Gagliano* (1989) FLC.

Also, in this jurisdiction, a theoretical possibility of misuse of confidential information may suffice to justify disqualification.

eg *Thevanaz v Thevanez* where the court restrained the wife's solicitors continuing to act because that solicitor had previously been in partnership with another solicitor, Mr H, who had previously handled conveyancing transactions for the husband and wife jointly.

eg *Magro v Magro* (1989) FLC where the court restrained the husband's solicitors from continuing to act because his firm had now employed a solicitor who had previously acted for the wife in the current proceedings even though

he had no involvement with the file in the new firm.

eg In the marriage of *Griffis* (1991) 14 Fam LR 782

eg *McMillan v McMillan* (2000) Fam Ca 1046 where the court restrained the wife's solicitors from acting on her behalf because a non-legally qualified law clerk, who had previously worked for the husband's solicitors and been involved in the file whilst at that firm, had moved to work for the wife's solicitors whilst the matrimonial proceedings were still on foot.

Other situations which cause conflict

- Whilst not specifically forbidden, practitioners should be very wary of acting for a husband and wife jointly in consent property orders. The parties should always be advised to seek independent legal advice and that in the event of a dispute the practitioner cannot act for either of them.

- A practitioner who has mediated at a legal aid conference

should not then subsequently act for either party, or grandparents.

- Practitioners who have acted for one of the parties in a prior financial dealing, such as in a conveyancing matter, should not act. This may include a prior litigation matter with financial implications, such as a work health claim.

- Litigation or court matters may have an impact on a seemingly non-related subject matter eg where a practitioner has acted for one of the parties in a criminal matter, should be wary of acting for the other party in a matrimonial dispute, particularly if issues of parenting suitability may be apparent eg drug dealing, prostitution, assault, theft.

The Law Society offers advice and rulings in relation to ethical matters, including conflict issues. A Ruling has no force at law and cannot be used in litigation, but does provide a measure of protection from a complaint to a practitioner who has acted in accordance with the Ruling.

A new military court

By **Cristy Symington, Military Justice Implementation Team**

In a significant milestone for military justice, in October the Australian Military Court was established and the inaugural military judges were sworn in. The new court provides members of the Australian Defence Force with an even more transparent and impartial military justice system reflecting world's best practice.

The Australian Military Court replaces the system of individually convened trials by Court Martial or Defence Force Magistrate. The court will be a 'service tribunal'

under the *Defence Force Discipline Act 1982*. It is an important part of the military justice system, which contributes to the maintenance of military discipline within the Australian Defence Force.

Establishing the court is one of many reforms to the military justice system. The enhancements ensure a modern and effective approach to military justice, while striking an appropriate balance between effective discipline to allow Australian Defence Force personnel to operate safely and effectively,

and protecting individuals and their rights.

Brigadier Ian Westwood AM was sworn in as the first Chief Military Judge at a ceremony in Canberra on October 3. He has 24 years of military law experience gained through full-time Army service. He was admitted to the Supreme Court of New South Wales in 1978 and appointed to the Australian Army Legal Corps in 1983. Brigadier Westwood, who resides in Canberra, is responsible for ensuring the orderly and expeditious discharge