

The logo for actlaw society is displayed in a dark blue rounded rectangle. The word 'act' is in orange, 'law' is in white, and 'society' is in a light grey color. The background of the slide features abstract geometric shapes in red, orange, and teal, with some areas having fine line patterns.

actlaw
society

Ethical Dilemmas

PRESENTED BY ATHOL OPAS | BLACKBURN CHAMBERS

LEGAL PRACTICE MANAGEMENT WORKSHOP 18 - 20 JUNE 2024

DISCUSSION

- Intimate/sexual relationship with client
- Duty to the court and client confidentiality
- Conflict of Interest

RISK MANAGEMENT

Case Study
Non-lawyer staff

Case Study
**Employee
Entitlements**

Case Study
**Sexual
Harassment**

Case Study
Supervision

Case Study
Costs

Case Study

Non-lawyer staff

Council of the ACT Law Society vs an employee of a legal practitioner

- In July 2007, a conveyancing clerk of 22 years experience who worked in local law practice opened a conveyancing file for the purchase of a house in the ACT
- The purchase price of the property was \$360,000.00. The file was opened in the clerk's name
- The purchase came about when a former client of the law practice, L, was introduced to the house by a real estate agent
- L wanted to buy the house but only had approximately \$280,000.00
- L knew the clerk from his time as a client of the law practice, and L would visit her and her family from time to time
- At some point it was agreed between the clerk and L that the clerk would contribute the shortfall so that the property could be purchased

Case Study

Non-lawyer staff

Council of the ACT Law Society vs an employee of a legal practitioner

- L contended that they was not aware of the following:
 - a. the clerk had arranged a mortgage over the house to fund her contribution to the purchase
 - b. the 10% deposit cheque he gave to the clerk to effect the exchange of contracts was paid to the agent and a trust receipt made out to the clerk alone
 - c. the contract listed the clerk as the buyer on the contract
- The clerk did not accept these contentions. They contended the money from L was a gift to her, evidenced in writing
- The total amount L contributed to the purchase was \$280,000.00
- At settlement, the clerk had \$159,625.00 available for drawdown from the bank. They used \$93,977.27 to fund the shortfall owing on the purchase
- The remaining \$65,647.78 was used by them to pay off credit cards and as a fund for other future property expenses

Case Study

Non-lawyer staff

Council of the ACT Law Society vs an employee of a legal practitioner

- From settlement L took occupation of the property and has lived there ever since, only paying for normal up-keep of the property.
- In early 2015 L visited the Public Trustee's office to make a will. The PT's office carried out a title search and it was only then that L contends he first became aware that he was not a registered proprietor on the property.

Case Study

Non-lawyer staff

Council of the ACT Law Society vs an employee of a legal practitioner

DISCIPLINARY ACTION

After many months of contesting the charges brought against her by the Law Society the clerk agreed to the following charges and orders by consent:

- A direct conflict of interest involving a personal interest which conflicted with the duty owed to L as a client of the law practice
- Failing to treat L honestly and fairly
- Failing to advise L to seek independent legal advice
- Charging L's equitable interest in the property by borrowing in excess of what was required to complete the purchase without his knowledge or consent

Case Study

Non-lawyer staff

Council of the ACT Law Society vs an employee of a legal practitioner

ORDERS

The clerk

- Found guilty of unsatisfactory employment conduct pursuant to section 429 of the LP Act
- After 9 December 2016, no solicitor employ or otherwise remunerate the clerk in relation to the solicitor's practice as a solicitor except with the approval of the Law Society

The supervising practitioner

- The practitioner is publicly reprimanded
- Fined \$5,000.00
- Undertake a course in ethics
- Pay the Law Society's costs

Legal Profession (Solicitors) Rules 2006

1 JULY 2006 – 31 DECEMBER 2015

Legal Profession (Solicitors) Conduct Rules 2015

COMMENCED 1 JANUARY 2016



Scenario

Sexual Harassment

- You are a partner/director of a law practice that has seconded one of your employed lawyers to a small corporate client to assist the client's legal team
- It is a secondment contract for 6 months
- 3 months into the secondment you receive a distressed call from the wife of the owner of your client corporation bitterly alleging that your employee is having an affair with the wife's husband
- The wife wants to know what you are going to do about it



Considerations Sexual

- No prohibition under general law which might confer a private cause of action against the lawyer, other than perhaps tortious assault.
- No professional conduct rules explicitly referring to lawyer-client sexual relations.
- Undesirable and inappropriate:
 - abuse of power-dependency relationship.
 - higher risk of emotional involvement or personal dependence on lawyer (family lawyers).
 - sexual favours to lawyer not declined for fear of lawyer ceasing to represent client.
 - loss of objectivity and independence



**Considerations
Sexual**

“A court, and counsel for opposing parties, are entitled to assume that representation by a lawyer is being made by an objective professional, not by a person who, by reason of a relationship with the client can have a bearing on the issue in the proceeding, will be motivated by subjective considerations, especially in a family law proceeding where counsel is involved in a secret sexual relationship with the client. Integrity and avoidance of questionable conduct require that the existence of such motivation be made known to the court and the other side...”

per Wells JA in Law Society of Newfoundland & Labrador v Regular (2011) 336 DLR (4th) 1 at [85]



**Considerations
Sexual**

ACT Law Society v Steven Stubbs (2010) ACAT 2

Prohibition on lawyers engaging in “...sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced”

Rule 1.8(j) American Bar Association Model Rules 15 August 2001



Scenario

Duty to the Court

- You act for a person pleading on a DUI charge
- Your instructions also include information that the client has antecedent convictions for petty theft and 2 convictions for previous DUI offences
- In court during the proceedings the prosecutor reads the charge and the facts to the court
- The prosecutor does not mention any antecedents
- It is your turn to address the court



**Considerations
Duty to the Court**

Practitioner Rules

Former Rule 18

18.10 - A practitioner will not have made a misleading statement to a court simply by failing to disclose facts known to the practitioner concerning the client’s character or past, when the practitioner makes other statements concerning those matters to the court, and those statements are not themselves misleading.

Current Rule 19

19.2 - A solicitor will not have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by the opponent or any other person.



Scenario

Duty to the Court

- Your employed solicitor T has the conduct of matter before the Childrens Court
- The matter is listed before the Registrar on 2 December 2016
- Unknown to you T does not appear on that day
- The matter is listed before the Registrar again on 6 December 2016
- T appears on 6 December 2016
- The Registrar asks T why he did not appear on 2 December 2016 without warning or explanation



Scenario

Duty to the Court

- T responds “*My child was in hospital and I can produce a medical certificate if necessary*”
- The court was satisfied with that response and no further action was required, including no order for costs.
- The solicitor for the other side (**M**) returns to the office, and during the course of the following week discovers that on 2 December 2016 (when T did not appear) she was in fact at an all day family dispute resolution conference.
- Perplexed, **M** writes to **T** asking for a further explanation.
- You receive **M**’s letter on a Friday and read it. **T** has been is on a couple of days leave and due to return to work on the following Monday?

CONFLICT OF INTEREST

New rules operating differently to the old rules

Rule 10

Conflicts of interest regarding former clients

Rule 11

Conflicts of interest regarding concurrent clients



Scenario
Conflict of Interest

Osferatu & Osferatu [2015] FamCAFC 177
(15 September 2015)

Issue

Whether to restrain a law practice from acting in a family law dispute.

Facts

A solicitor from a law practice (Firm 1) representing a client in litigation moved to another law practice (Firm 2) that was representing the other side in the same litigation.



Scenario

Conflict of Interest

Osferatu & Osferatu [2015] FamCAFC 177
(15 September 2015)

Analysis

3 steps to determining if a law practice should be restrained from acting.

1. Is Firm 2 in possession of information which is confidential to the former client (Firm 1 to prove).
2. Is that information, or could it be, relevant to a matter in which Firm 2 is proposing to act for another party with an interest adverse to the former client (Firm 1 to prove)
- 3.
4. Once steps 1 and 2 are satisfied Firm 2, in order not to be restrained from acting, must prove that the information held by them will not come into the possession of the solicitors acting for the client in Firm 2



**Considerations
Conflict of**

Rule 10 – Former Client Conflict

- The old rule 3 prohibiting a practitioner from acting against a former client operates differently in rule 10 of the new rules
- The new sub-rule 10.2 provides two exceptions to the prohibition
- Under the exception a solicitor may act against a former client if the former client has given **informed written consent** to the solicitor or law practice to do so, or an **effective information barrier** has been established



Scenario

Conflict of Interest

Dyer v Chrysanthou (No 2) (Injunction) [2021] FCA 641

Ms Dyer relied upon two alternative grounds on which the Court might restrain a legal practitioner from acting for a person who has retained that practitioner. The first was based on the danger of misuse of confidential information received by Ms Chrysanthou in the context of her dealings with Ms Dyer. The second was based on the need to protect the integrity of the judicial process and the due administration of justice, including the appearance of justice. Whilst these two bases provide distinct justifications for preventing a legal practitioner from acting, there is potential overlap. The fact that confidential information generally is, and might be shown in fact to have been, provided to a legal practitioner in the course of acting for a client is relevant to whether a fair minded reasonably informed member of the public would conclude that the proper administration of justice requires that the legal practitioner be prevented from acting in a situation which might, or might be seen to, be against the former client's interests.



Dyer v Chrysanthou (No 2) (Injunction) [2021] FCA 641

Is the information confidential?

93 The relevant principles were analysed by Anderson J in Timbercorp at [73] to [77] in the following way:

Test of confidentiality

73 The test for whether information is confidential or not is dependent on the source of the duty of confidentiality. At general law, the duty will either arise in contract pursuant to the retainer between the legal practitioner and client, or otherwise pursuant to equitable obligations. However, the difference between these bases often appears to be blurred in practice. The parties did not distinguish between the two in this case.

74 There is no one precise formulation for determining whether information is confidential: Australian Medic-Care Co Ltd (a company incorporated in Hong Kong) v Hamilton Pharmaceutical Pty Ltd (2009) 261 ALR 501; [2009] FCA 1220 at [634]. However, it is clear that, within the context of a relationship of legal practitioner and client, the concept is not to be construed narrowly.

75 To start, unless a relevant exception applies, all communications by a client to the legal practitioner will prima facie be confidential, as explained by Riordan J in Babcock at [83]: In my opinion, communications (other than those about matters of common or public knowledge) between a client and a solicitor for the purposes of obtaining or giving legal advice would have the necessary ingredient of confidentiality against all persons unless, by reason of implied direction or otherwise, the solicitor was authorised to provide the



Considerations Conflict of

Dyer v Chrysanthou (No 2) (Injunction) [2021] FCA 641

Is Ms Chrysanthou in possession of the confidential information?

Ms Chrysanthou said she cannot remember any confidential information being disclosed. She also stated that she has not retained emails that she sent or received and, in relation to some of those emails, that she does not recall receiving or reading those emails. The question, accordingly, arises as to whether she is relevantly in possession of confidential information.

99 The duty of confidentiality attaches to information disclosed to a lawyer within the confines of a lawyer-client relationship. The fact that Ms Chrysanthou does not presently recollect the information does not mean that she is not in possession of confidential information. As Nettle J observed in *Sent* at [89]:

One knows as a matter of experience that when he has advised on documents and transactions, recollections of them, although long faded, may revive in the course of the sort of close and careful study which precedes the trial of an action. And when one has conferred with a client, recollection of things said and done in conference may be revived long after the event when the same or similar things are said or done in another place.

100 Ms Chrysanthou is relevantly in possession of confidential information irrespective of whether or not she presently recalls the content of it.



Considerations Conflict of

Dyer v Chrysanthou (No 2) (Injunction) [2021] FCA 641

Is Ms Chrysanthou acting “against” Ms Dyer in the defamation proceedings in the requisite sense?

103 Anderson J observed at [98] that the basis for restraining a legal practitioner from acting was not the fact of direct opposition to the former client per se, but rather *conflict* with the legal practitioner’s duty of confidentiality to the former client (emphasis in original):

Various authorities and commentary contain observations to the effect that a legal practitioner may be enjoined on the basis of a possible misuse of confidential information where the legal practitioner’s new client is to “act against” the former client. That is undoubtedly true but the doctrine extends further. The touchstone of the restraint of a solicitor is not direct opposition to the former client per se, but rather conflict with the legal practitioner’s duty of confidentiality to the client (see Mallesons at 362-3; Sent at [33]), and that such conflict would disadvantage, or operate to the detriment of, the former client (see Carindale at FCR 312-313; ALR 118-19).



**Considerations
Conflict of**

Dyer v Chrysanthou (No 2) (Injunction) [2021] FCA 641

Is there a real risk that the confidential information will be relevant to the defamation proceedings?

107 For the reasons just given and those that follow, I conclude that there is a risk that the confidential information will be relevant to the defamation proceedings. Extensive submissions were made by the parties in relation to the various ways in which the confidential information might be, or is, relevant to the defamation proceedings. In addition to the written submissions, Ms Dyer relied on an analysis of the potential relevance of the information disclosed on behalf of Ms Dyer by Mr Hooke, set out in his reply evidence, to the interrogatories and defence filed in the defamation proceedings (MFI 2). Mr Porter relied on an annexure (Annexure A) to his written closing submissions which addressed by reference to the topics which were discussed at the meeting, documents where information relevant to those topics was in the public domain and containing submissions as to the relevance (or irrelevance) of the information to the defamation proceedings and containing, in relation to some information, the observation that the information would not benefit Mr Porter and so would be unlikely to be misused.



Considerations Conflict of

Dyer v Chrysanthou (No 2) (Injunction) [2021] FCA 641

Is there no risk of misuse of the confidential information?

128 Mr Porter submitted that there is no real risk that the confidential information might be misused. There were two principal bases for this submission. First, he says that Ms Chrysanthou does not recollect anything confidential from the conference on 20 November 2020. I note in this regard that Ms Chrysanthou has not read the affidavits or other evidence or the submissions in these proceedings to the extent that such material purports to reveal the confidential information said to have been given during the conference. Secondly, Ms Chrysanthou has undertaken not to use any such information should she later recollect the existence of such information.

129 As to the first matter, and as Nettle J observed in *Sent* at [88], the difficulty is that recollections are liable to be revived. His Honour's observation was made in relation to a conference which had occurred 14 years earlier in circumstances where the barrister gave evidence that he had no recollection of what was said. Nettle J observed at [89]:

One knows as a matter of experience that when he has advised on documents and transactions, recollections of them, although long faded, may revive in the course of the sort of close and careful study which precedes the trial of an action. And when one has conferred with a client, recollection of things said and done in conference may be revived long after the event when the same or similar things are said or done in another place.



Considerations Conflict of

Dyer v Chrysanthou (No 2) (Injunction) [2021] FCA 641

Is there no risk of misuse of the confidential information?

130 There is a “real and sensible possibility of a revival of recollection” in the present case: *Sent* at [91]. That is, there is a real and sensible possibility that Ms Chrysanthou might at some later time recall matters stated in the conference of 20 November 2020 which she presently does not recollect.

131 As to the second matter, it is not enough – at least in the circumstances of this case – that Ms Chrysanthou give an undertaking to keep confidential any matters she does later recollect. The first reason for that is that there is also a real and sensible risk that Ms Chrysanthou would use confidential information (being information not otherwise in the public domain) obtained during the conference without realising that what was said in the conference was the source of that information. It has long been recognised that a solicitor or barrister who, with the best will in the world, is determined not to make use of a client’s confidential information for the benefit of another, may subconsciously do so: *Carindale* at 313 (Drummond J); *Sent* at [93] (Nettle J); *Farrow Mortgage Services Pty Ltd (in liq) v Mendall Properties Pty Ltd* [1995] 1 VR 1 at 8 (Hayne J). A second reason is that, if she did later recall what was said during the conference...

INFORMED WRITTEN CONSENT

Benefits and disadvantages

- to the former client of giving consent
- to the current client of the consent by the former client

Notice

- to the former client that consent can be refused
- that the former client may wish to obtain independent legal advice before providing consent

INFORMED WRITTEN CONSENT



- Seek consent of a former client and ensure to take care to avoid breaching any duties to the current client.
- Guard against identifying the current client to the former client (although that will inevitably occur), or the precise use to which the confidential information will be put.
- Query whether duties to the current client clash with the requirement to inform the former client of the benefit to the current client in disclosing the confidential information and the disadvantage to the former client of doing so.
- A pre-supposition that, despite the exception, a practitioner or law practice will exercise clear and objective judgment whether it can satisfy the requirements when seeking informed written consent from a former client

EFFECTIVE INFORMATION BARRIERS

Information barriers deal specifically with conflicts concerning confidential information.

Features of an effective information barrier:

- Physical segregation of the personnel involved
- Undertakings not to communicate the relevant confidential information
- A regular education program
- Strict and carefully defined procedures for dealing with any contact between personnel involved or any other crossing of the barrier
- Monitoring by compliance officers of the effectiveness of the barrier
- Disciplinary sanctions

CONCURRENT CLIENT CONFLICTS

Rule 11

11.3

where a solicitor or law practice seeks to act for two or more clients where the clients' interests are **adverse**, can only act if each client is aware of the solicitor acting for the other client/s, and each client has given **informed consent** for the solicitor or law practice to so act.

11.4

a solicitor or law practice must not act where the solicitor or law practice is in possession of confidential information of a current client which might reasonably be regarded as material to another client of the solicitor or law practice, and the disclosure of such information would be detrimental to the first client unless each client has given **informed consent** for the solicitor or law practice to act, and an effective information barrier has been established.

RESTRAIN A PRACTITIONER FROM ACTING

3 traditional sources from which an application to restrain a practitioner from acting might arise

- The duty of confidentiality
- The duty of loyalty
- The proper administration of justice



Example

**Canberra Residential Development Pty Ltd v Brendas [2009]
FCA 1484**

Stone J at [19]

“Once it is accepted that BA is separate from and independent of MV, any basis on which it might be suggested that there would be a breach of a fiduciary duty of loyalty in BA acting for CRD disappears. BA has never acted for CLD; indeed the evidence does not indicate that any employee ever acted for CLD...whatever may be the ambit of the concept of the fiduciary duty of loyalty, there is no relationship between BA and CLD that might give rise to the duty.

Kallinicos test :

...a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice warrants such restraint. The jurisdiction is exceptional and to be exercised with caution [582]

Case Study 1

M acts for E on the preparation of a will. E dies and M is retained to act for the estate. The son S is executor of the estate. The application for probate prepared and filed in anticipation of a grant of probate.

Meanwhile the estate is served with a family provisions claim by a daughter of the first marriage, whom no one knew existed.

M is doing an audit of his firm's security packets system and comes across a packet belonging to the deceased. All the documents have recently been handed over to the executor S. M notices that there was a record of a deed of trust document relevant to estate.

He seeks instructions from S who gives M a copy of the deed. The deed provides that M holds property J as trustee for the deceased and his wife as joint tenants.

M advises S that the affidavit should be amended to include this information in the non-estate assets.

S instructs for this not to be done.

What should M do?

Case Study 2

You are experiencing significant delays in carrying out your client's work due to other work pressures, a lack of knowledge, or lack of diligence to the task – or a combination of all three causes.

What should you do?

Case Study 3

A client fails to honour his agreement to pay \$25000 into trust in anticipation of the estimated costs of representation at a final hearing in 48 hours-time. The client's promises and your warnings about pre-payment have been on foot for the last 2 months. You are prepared for the final hearing.

What should you do?

Case Study 4

A new client wants you to sue a former client.

Can you accept those instructions?

Case Study 4

A new client wants you to sue a former client.

Can you accept those instructions?

Case Study 5

Two families related by blood (the respective husbands are brothers) ask you to act for both families in a transaction where one family is selling a business to the other family.

Can you act?

Case Study 6

Your client wants to have an intimate/sexual relationship with you. It is a potential relationship between two consenting adults. You are attracted to your client's offer.

Should you accept?

Case Study 7

You are the ex-partner of the leader of a notorious local gang. Your ex-husband was jailed for serious offence while you were married to him.

Should you disclose this in your application for renewal of your practising certificate in response to the requirement to be of good fame and character?

Case Study 8

AllGood Law (AGL) makes an offer of employment to Solicitor B. Solicitor B currently works as an employed solicitor in EvenBetter Law (EBL). Solicitor B has 2 years post admission experience.

EBL is currently acting for Sam suing AGL for negligence. AGL has referred the claim to its professional indemnity insurer, who have appointed solicitors to defend against the claim.

B has (according to him) had no involvement in Sam's claim against GL. B has informed the principals of EBL (his current employer) of his acceptance of AGL's offer of employment, and handed in his 2 weeks-notice.

Yesterday, EBL's principal litigator contacted AGL's principal, claiming that the employment of Solicitor B is a blatant conflict of interest and that unless AGL withdraws the offer, EBL will apply to the Supreme Court citing the conflict of interest and for the Supreme Court to exercise its inherent jurisdiction to restrain AGL from employing Solicitor B.

Case Study 9

You are a legal practitioner director of an ILP law practice called Law Practice A.

Your law practice is well regarded as commercial and small business specialists (transactional & litigators), but you are also well-regarded in wills and estates work and commercial and industrial law. You have 6 legal practitioner directors in your practice and 20 employed solicitors in various stages of their experience.

In 2013 your own former law practice and another law practice (referred to as Law Practice B) merged to become Law Practice A.

In 2010, before the merger, Jack sought and received advice from Law Practice B about the making of a will, which culminated in a will being signed by Jack and retained by Law Practice B in its secure documents system. In the merger the security packet containing Jack's will became part of the security packets held by the merged Law Practice A.

You do not know Jack, and have information whatsoever about Jack's will.

Case Study 9 (cont'd)

Early in 2016 Mary, a business partner of Jack in a franchise business for a large fast-food outlet, sought your advice about partnership issues with Jack.

You have never acted for Mary. A conflicts check does not reveal that Jack was a former client, so you take Mary's instructions. During the course of the year you continue to guide Mary, unknown to Jack.

At the end of 2016 Jack attends Law Practice A to revise his will. He consults the same lawyer he saw some 6 years ago at Law Practice B who is now a partner. This lawyer does not do a conflict check, and therefore is unaware that the firm is acting for Mary. A new will is prepared and retained by the solicitor in the secure documents system.

In early 2017 the issues become untenable for Mary and she instructs you to write to Jack issuing ultimatums regarding financial and other management issues.

Jack gets you letter of demand and hits the roof, wanting to know why his lawyers are threatening him and acting against him.

What do you do?

Case Study 10

You act for Mr and Mrs Jones selling a residential property to Mr and Mrs Brown. Following completion of the conveyance you receive a call from Mr Brown who says he is so impressed with the way you dealt with the rather difficult transaction with the Jones', he would like you to act for he and his wife who own a business that is under threat from creditors.

Are you at liberty to act?

What if one of the creditors are Mr and Mrs Jones?

Case Study 11

You act for a well-known luxury brand, managing its trade marks in Australia. An Asian manufacturer competitor approaches you. Its products are “similar looking” to known luxury brands, under what they refer to as “alternative branding” The Asian manufacturer wants you to handle their contentious trade mark matters.

Can you act?

If your answer is “No”, why?

If you conclude you can act what safeguards might you put in place?

Case Study 12

An overseas law firm asks you to advise a client on local legal issues. They insist on signing your costs agreement – in their firm’s – not the client’s name. The firm says their client wishes to remain anonymous (at least for now) and will not disclose identity. All communications will be through their firm.

Can you act?

Who is your client?

Are there any available safeguards in acting ?

Case Study 13

A partner in your law firm has been asked by a large potential client to join their board of directors. One of the first decisions for the board will be deciding which firm to retain to handle a major dispute with a supplier. The supplier has just served proceedings on the company and it could be a significant piece of work for the firm to handle.

Is this an issue for the partner ?



Law Society of the Australian Capital Territory
Level 4, 1 Farrell Place, Canberra City ACT 2601
Phone 02 6274 0333 | memberconnect@actlawsociety.asn.au

actlawsociety.asn.au