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Ethics in Confidentiality and Conflict of Interest

ETHICS SERIES | WEDNESDAY 2 OCTOBER

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Overview

- The duty of maintaining client confidentiality
- Examples of breaches of client confidentiality and future issues
- Conflict Rules
- Examples of conflicts of interests
- Strategies for avoiding conflicts of interest between duties owed to current and former clients

Background

Common issues faced by practitioners

Complaint Issue/s	Complaints
Lack of competence and diligence	34
Other (unusual scenarios)	9
Conflict of interest	8
Act contrary to instruction	8
Bullying/harassment/intimidation	8
Personal conduct/discourtesy/ rudeness	7
Failure to provide cost disclosure	6
Billing dispute	5
Trust account breaches	4
Misleading conduct	2
Delays	2
Failure to communicate	1

Confidentiality

Professional conduct rules

- 9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not:
- 9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor's law practice; or
 - 9.1.2 a barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,
- EXCEPT as permitted in Rule 9.2.
- 9.2 A solicitor may disclose information which is confidential to a client if:
- 9.2.1 the client expressly or impliedly authorises disclosure;
 - 9.2.2 the solicitor is permitted or is compelled by law to disclose;
 - 9.2.3 the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations;
 - 9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence;
 - 9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person; or
 - 9.2.6 the information is disclosed to the insurer of the solicitor, law practice or associated entity.

Confidentiality v client legal privilege

- a confidential communication made between the client and a lawyer; or
- a confidential communication made between two or more lawyers acting for the client; or
- the contents of a confidential document (whether delivered or not) prepared by the client or the lawyer;

for the dominant purpose of the lawyer, or one or more of the lawyers:

- providing legal advice to the client or
- the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

Examples

- *Examples of unsatisfactory professional conduct:*
 - *Council of the Law Society of the Australian Capital Territory v Legal Practitioner 2019133 (Occupational Discipline) [2020] ACAT 54*
- *Professional misconduct:*
 - *Council of the Law Society of NSW v Alkhair [2022] NSWCATOD 11*

Future issues?

- ***Unsatisfactory professional conduct*** includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.
- ***Professional misconduct*** includes unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence.

Conflicts

Conflicts concerning former clients



- 10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients, except as permitted by Rule 10.2.
- 10.2 A solicitor or law practice who or which is in possession of information which is confidential to a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:
 - 10.2.1 the former client has given informed written consent to the solicitor or law practice so acting; or
 - 10.2.2 an effective information barrier has been established.

Conflicts concerning current clients

- 11.1 A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule.
- 11.2 If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the clients' interests are adverse and there is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act, except where permitted by Rule 11.3.
- 11.3 Where a solicitor or law practice seeks to act in the circumstances specified in Rule 11.2, the solicitor or law practice may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:
- 11.3.1 is aware that the solicitor or law practice is also acting for another client; and
 - 11.3.2 has given informed consent to the solicitor or law practice so acting.
- 11.4 In addition to the requirements of Rule 11.3, where a solicitor or law practice is in possession of information which is confidential to a client (the first client) which might reasonably be concluded to be material to another client's current matter and detrimental to the interests of the first client if disclosed, there is a conflict of duties and the solicitor and the solicitor's law practice must not act for the other client, except as follows:
- 11.4.1 a solicitor may act where there is a conflict of duties arising from the possession of confidential information, where each client has given informed consent to the solicitor acting for another client; and
 - 11.4.2 a law practice (and the solicitors concerned) may act where there is a conflict of duties arising from the possession of confidential information where an effective information barrier has been established.
- 11.5 If a solicitor or a law practice acts for more than one client in a matter and, during the course of the conduct of that matter, an actual conflict arises between the duties owed to two or more of those clients, the solicitor or law practice may only continue to act for one of the clients (or a group of clients between whom there is no conflict) provided the duty of confidentiality to other client(s) is not put at risk and the parties have given informed consent.

Conflicts concerning own interests

- 12.1 A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this Rule.
- 12.2 A solicitor must not exercise any undue influence intended to dispose the client to benefit the solicitor in excess of the solicitor's fair remuneration for legal services provided to the client.
- 12.3 A solicitor must not borrow any money, nor assist an associate to borrow money, from:
- 12.3.1 a client of the solicitor or of the solicitor's law practice; or
- 12.3.2 a former client of the solicitor or of the solicitor's law practice who has indicated a continuing reliance upon the advice of the solicitor or of the solicitor's law practice in relation to the investment of money,
- UNLESS the client is:
- (i) an Authorised Deposit-taking Institution;
 - (ii) a trustee company;
 - (iii) the responsible entity of a managed investment scheme registered under Chapter 5C of the *Corporations Act 2001* (Cth) or a custodian for such a scheme;
 - (iv) an associate of the solicitor and the solicitor is able to discharge the onus of proving that a full written disclosure was made to the client and that the client's interests are protected in the circumstances, whether by legal representation or otherwise; or
 - (v) the employer of the solicitor.

12.4 A solicitor will not have breached this Rule merely by:

- 12.4.1 drawing a Will appointing the solicitor or an associate of the solicitor as executor, provided the solicitor informs the client in writing before the client signs the Will:
- (i) of any entitlement of the solicitor, or the solicitor's law practice or associate, to claim executor's commission;
 - (ii) of the inclusion in the Will of any provision entitling the solicitor, or the solicitor's law practice or associate, to charge legal costs in relation to the administration of the estate; and
 - (iii) if the solicitor or the solicitor's law practice or associate has an entitlement to claim commission, that the client could appoint as executor a person who might make no claim for executor's commission.
- 12.4.2 drawing a Will or other instrument under which the solicitor (or the solicitor's law practice or associate) will or may receive a substantial benefit other than any proper entitlement to executor's commission and proper fees, provided the person instructing the solicitor is either:
- (i) a member of the solicitor's immediate family; or
 - (ii) a solicitor, or a member of the immediate family of a solicitor, who is a partner, employer, or employee, of the solicitor.
- 12.4.3 receiving a financial benefit from a third party in relation to any dealing where the solicitor represents a client, or from another service provider to whom a client has been referred by the solicitor, provided the solicitor advises the client:
- (i) that a commission or benefit is or may be payable to the solicitor in respect of the dealing or referral and the nature of that commission or benefit;
 - (ii) that the client may refuse any referral, and
- the client has given informed consent to the commission or benefit received or which may be received.
- 12.4.4 acting for a client in any dealing in which a financial benefit may be payable to a third party for referring the client, provided the solicitor has first disclosed the payment or financial benefit to the client.

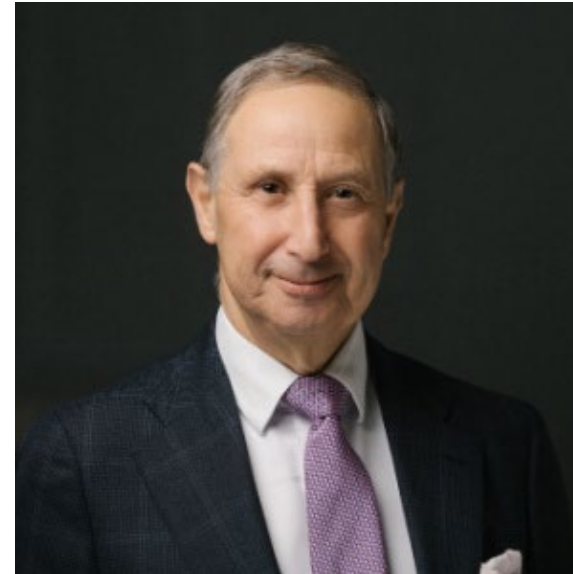


Questions?

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