

CONFLICTS OF INTEREST

POTENTIAL CONFLICTS

- Potential for conflict to arise stems from the fiduciary nature of the lawyer-client relationship => C has **a right to undivided commitment** of L (LIV Conflict of Interest Guidelines)
- Duties owed to C aren't only owed by individual S but also by the practice, a rebuttable presumption exists whereby a **conflict involving S will extend to the firm** (LIV Conflict of Interest Guidelines)
- Distinguish conflicts of loyalty from conflicts of interest
 - o Loyalty to social cause, personal issues etc. – need to work way through it

CLIENT VS LAWYER

- S **mustn't act** for C where there is a **conflict between the duty to serve C's best interests and their own interests** (or those of an associate), except as permitted by this rule (ASCR 12.1)
- **Associate:** (ASCR, Glossary of Terms)
 - o Principal of S's practice;
 - o Partner, employee, or agent of S or S's practice;
 - o Corporation or partnership in which the S has a material beneficial interest;
 - o Director, officer, employee or agent of S's incorporated legal practice or of a subsidiary of the incorporated legal practice;
 - o Member of S's immediate family; or
 - o Member of the immediate family of a partner of S's law practice or of the immediate family of a director of the S's incorporated legal practice or its subsidiary
- L mustn't put self in position where there is or may be a **real or sensible possibility** of conflict between their fiduciary duty to C and themselves (*Farrington v Rowe*)
- This is bc **L is considered to be in a dominant position**, where the exercise of undue influence (intentional or otherwise) places their interests in conflict with duties owed to C (LIV Conflict of Interest Guidelines)
- L is forbidden from the **making of secret profits** beyond proper professional fee (*O'Reilly*)
 - o Must disclose any interest (*Harvey*)

FEES AND BILLING

- S mustn't exercise any **undue influence** intended to dispose the C to benefit S in excess of S's **fair remuneration** for legal services provided (ASCR 12.2)
- Presumption of undue influence depends on the circumstances and it is for the lawyer to rebut

REFERRALS

- **Prima Facie:**
 - o L is **forbidden from the making of secret profits** beyond proper professional fee (*O'Reilly*)
 - o B may not make a payment or gift to any person by reason of or in connection with the introduction of professional work by that person to B (BCR 46)
- S **may receive a referral fee** provided C is informed of the fee and that they may refuse referral and they consent (ASCR 12.4.3)

- If referral fee is payable to TP, payment must be disclosed to C (ASCR 12.4.4)

GIFTS

- L is forbidden from the **making of secret profits** beyond proper professional fee (*O'Reilly*)
 - o Gifts of cash should always be refused unless for proper professional fee
- L may be offered gifts by grateful Cs, esp where services have been provided pro bono
 - o Gifts can take many forms, wine – wills
 - o Sometimes bc of genuine gratitude – consider the circs, is it a gift or a bribe?
- Since **acceptance may give rise to a perception of undue influence**, or inducement for special favours, care needs to be taken before accepting them
 - o L should eschew gifts on basis of an appearance that the gift was the product of L's influence
- If at end of relationship – share among employees, tell C this, have a gifts register

FINANCIAL DEALINGS WITH CLIENT

- Generally, L should avoid transactions which involve intermingling personal and client affairs, inc the affairs of companies and ventures in which L has a personal connection (*Harvey*) \
- Independent legal advice and termination of retainer may not overcome the conflict at equity. May get consent but be wary of the power relationship affecting the terms
- **Former Client?**
 - o No general prohibition on Ls dealing with FC bc FDs generally end with the termination of relationship
 - o However, termination of relationship may not conclude FD where C has a reasonable expectation that the relationship persists

BORROWING MONEY

- **S mustn't borrow any money** or assist an associate to borrow any money from (ASCR 12.3)
 - o A C of S/practice; or
 - o A former C of S/practice who has indicated a continuing reliance upon the advice of S/practice in relation to the investment of money UNLESS C is
 - An Authorised Deposit-taking Institution
 - A trustee co.
 - A responsible entity of a managed investment scheme
 - An associate of S and S is able to discharge onus of proving full written disclosure
 - An employer of S
- **Barrister:** mustn't receive any money or prop by way of loan from any C/relative of C/business entity C directs, partners, manages during the course of a retainer C, unless the ordinary business of C/other includes lending money (BCR 48)

LENDING MONEY

- **ASCR 41** prohibits mortgage financing as part of a legal practice except under a scheme administered by the LIV
- **S shall not**, in any way whatever, in respect of the subject of any transactions in the relations between S and C, **make gain to themselves at the expense of C**, beyond the amount of the just and fair professional remuneration to which he is entitled (*Mahoney J in O'Reilly citing Tyrell*)
- L's position of influence may result in C accepting terms that are suggested by L and not necessarily in their favour

CLIENT'S WILL

- Falls under the broad provision of **ASCR 12.2** – no undue influence to benefit in excess of fair remuneration
- **L as executor**: if L is to draw a will appointing themselves or an associate as an executor, they must inform C in writing before C signs of: (**ASCR 12.4.1**)
 - o (i) any entitlement of L or the firm to claim executor's commission
 - o (ii) any entitlement of L or the firm to charge legal costs for administration of the estate
 - o (iii) C's ability to appoint someone who might not charge
- L as beneficiary: if L is to draw a will or other instrument under which they will receive a substantial benefit, the person instructing the solicitor must be (**ASCR 12.4.2**)
 - o (i) a member of the solicitor's immediate family OR
 - o (ii) a S, or a member of the immediate family of a S, who is a partner, employer or employee of the S

LAWYER BEING A WITNESS IN CLIENT'S CASE

- In case where S/associate will be required to give evidence material to contested issues, S mustn't appear as advocate for C in the hearing but may continue to act for C unless doing so would prejudice the admin of justice (**ASCR 27; BCR 101(d)(e)**)
- The test is whether a **fair minded**, reasonably informed member of public would conclude that the **proper admin of justice** requires that the practitioner should be prevented from acting (*Bradshaw*)

SEXUAL RELATIONSHIPS WITH CLIENTS

- Are **not prohibited** under the general law or professional rules in Australia
- However, may involve **abuse of the power**-dependency relationship and lead to a loss of professional independence and objectivity
 - o There is a possibility that L's personal interests and duty to C will conflict
 - o At least, the relationship **clouds L's judgement** in giving disinterested legal advice and possibly L's personal opinion about what C should do might conflict with what they want/best interests
 - o Also raises the possibility that L might become one of the issues or a W in the case

- If L is **aware of sexual relationship between OP and opponent**
 - o Don't have duty to tell court
 - o Do have duty to tell C, it is an important piece of info, would have to have a conversation about what C wishes to do
 - o Would be hard to appeal on this basis, would have to show that the relationship caused something else that was unjust etc.
- Cases *Bosgard*; *Morel*; *Szabo*; *Bradshaw*

HANDLING L-C CONFLICTS

- It's not so much the fact that a conflict arises, but how L handles it that is legally and ethically crucial
- **Option 1:** avoid or remove the conflict
 - o Don't even get involved in it, no amount of independent advice etc. will help, interests are too adverse
- **Option 2:** for less serious conflicts, fully disclose the conflict to C and obtain C's consent to continue
 - o Advise to obtain independent legal advice
 - o Fully inform per *O'Reilly*
- **Informed Consent:** ASCR 12 doesn't codify the law and the exceptions in the rule aren't exhaustive (see *O'Reilly*; *Harvey*)
- **Barrister** who believes on reasonable grounds that the **interests of C may conflict with the interests of the instructing S**, or that C may have a claim against instructing S, must (**BCR 120**)
 - o (a) advise instructing S of the B's belief; and
 - o (b) if instructing S doesn't agree to advise C of B's belief, seek to advise C in the presence of the instructing S

REMEDIES

- Equitable remedies for breach of FD
 - o Injunction to restrain L (and firm) from continuing to act
 - o An order for compensation if the breach caused loss
 - o An account of profits if the lawyer obtained an unauthorised benefit
 - o Rescission of a transaction entered into in breach of the duty
- An action in tort or contract for breach of the duty of care

- Disciplinary action
- An appeal on the grounds of miscarriage of justice

LEGAL PRACTITIONERS CONDUCT BOARD V MOREL (2004) SASC

- M had personal relationships with 3 different prisoners (she worked very closely with prisons)
- McF: stopped acting for him when it became personal (and they married)
 - o McF still had seven years to go in prison, the relationship ended while McF was still in prison
- P: personal relationship and acting for him until calls and visits banned by DCS
 - o She didn't tell anyone bc thought would lose credibility if had 'fallen' for a prisoner a 2nd time
 - o Made false statement to DCS that needed to speak to C about urgent legal matter when real purpose was personal visit
 - o On another occasion during phone call which she knew was monitored, P admitted to assault on another prison
 - o DCS subsequently banned M from vising P in either personal or professional capacity, she continued to represent him
 - o In 1999 DCS reported her to the conduct board and M withdrew from acting with P and he represented himself
- S: personal, including after he absconded from pre-release centre
 - o Following the disciplinary hearing and while decision was still reserved, < agreed to accommodate S at her home whilst under home detention
 - o Bc M had never acted for S she considered there was nothing wrong with this arrangement
 - o In 2003, S escaped from custody and went to her house, she tried to get him to turn self in and then called the police
- She agreed that she had created dependencies in S and P and there were dangers in having relationships with Cs
- HELD: **struck off the role**
- Conduct involved a **substantial and recurrent** failure to meet the standard of conduct observed by competent legal practitioners of good repute
- M **abused the privilege that practitioners have to visit prisoners** for purposes of giving legal advice
 - o Used the pretence of the need for legal advice to further her personal relationship with a prisoner
- The **trust and confidence that the public has in the profession has been put in jeopardy**
- M's dishonest and selfish conduct was the result of a **lack of awareness of her basic professional duties and obligations**
- Her subsequent conduct with S, although not the subject of any charge, demonstrates her **ongoing naivety and continuing lack of awareness** of professional obligations
- What makes her **unfit to practise** is an **apparent and continuing failure to discern the barrier between professional and personal relationships**, to the detriment of her clients and her integrity as a legal practitioner

BOSGARD & BOSGARD (2013) FAM CA

- Court used the inherent jurisdiction to restrain a S from acting for husband in children and prop matters where S was

- In a de facto relationship with H; and
- The sole dir, secretary and SH of co. that had allegedly lent funds to husband
- W objected to S acting for H on number of grounds
 - The relationship commenced after S was retained
 - There was a chance that the co. could be joined in the proceedings – S may be a witness
 - S couldn't be independent of relationship with H
- **HELD:** S may be required to give material evidence at later stage of proceedings for at least two issues (relationship and creditor)
- Regarding paramount duty owed to court: it's not hard to see how that priority might well be reversed and S place the love she has for her partner above the duty she owes to the court

R V SZABO (2001)

- Crim case, D counsel had been in an intimate relationship with the prosecutor, didn't disclose this to client
- **HELD:** this isn't a case of actual injustice. P case was strong the defence was robust and the trial was regularly conducted. There's no suggestion of any actual, improper disclosure of material by D to P
- But it was a **perceived miscarriage of justice**, so the convictions were set aside and retrial ordered

LEGAL SERVICES COMMISSIONER V BRADSHAW (2008) LPT

- B helped wife who has a P in an action – B said he wasn't acting as a B but only as a husband?
- **HELD:** Irrelevant that not charging fee, obvs acting as a B in the circumstances
- Charged with lack of competence and diligence; communicating directly with opponent's C; acting in a matter in which had a direct financial interest; likelihood of being witness in matter
- Also described himself as S when he was a B, filed a statement saying matter was ready to go to trial when it wasn't, filed a statement of client which irrelevant and improper information
- The test is **whether a fair minded, reasonably informed member of public would conclude that the proper admin of justice requires that the practitioner should be prevented from acting**
- Publicly reprimanded and required to undergo 10 hours of professional development on ethics and practice management

LONGSTAFF V BIRTLES (2002)

- S acted in negotiations for purchasers of a hotel, the negotiations were unsuccessful and the retainer was terminated
- Later, Ss, who were partners in a hotel business venture, invited the FCs to buy into the partnership
- Didn't advice to FC to get independent legal advice
- The deal proved to be financially disastrous and FCs sued Ss for BoFD