

advantages and drawbacks of the available options and giving opinions as to the preferable course BUT does not include legitimate pressure or persuasion on behalf of the lawyer

- Lawyer's knowledge and understanding of processes for alternative dispute resolution will feed into their assessment of their usefulness
 - Should not be assumed that every form of alternative dispute resolution is appropriate for every client/every dispute

Duty of care in settlement advice

- Obligation to warn of risks, correct unrealistic expectations and encourage the client in the direction the lawyer believes to be in the client's best interest: *Masters v Dobson Mitchell & Allport* [2014]
- Lawyer must exercise reasonable care and skill and may place legitimate pressure on clients to settle
- It is the client who must decide whether to compromise or to litigate, and bear the consequences of the decision
- Courts inquire into whether the settlement advice was within the range that, in the circumstances, could reasonably and properly be given
- Not construed strictly or with benefit of hindsight

LIMITING LIABILITY

Professional indemnity insurance

- Lawyers are generally indemnified from loss stemming from their negligence by the terms of their professional indemnity insurance, which they must maintain as a condition of holding a practicing certificate

TOPIC 3B – DUTIES OWED TO CLIENTS CONFLICTS OF INTEREST

FIDUCIARY DUTY - DUTY OF LOYALTY

- Fiduciary nature of lawyer-client relationship – lawyer in position of trust (can affect legal status of client), client reliant on lawyer's skill and knowledge
- MUST always act in best interests of client: **rule 4.1.1 SCR**
- Central fiduciary duty = undivided loyalty
 - Duty to act in good faith
 - Duty of confidentiality
 - Duty to avoid conflict of interest
- Two key duties:
 1. Lawyers must not, without informed consent of client, place themselves in a position where there may be a **conflict** between their duty as a fiduciary and their own interests (*direct conflict: duty-interest*) or those of a third party (*indirect conflict: duty-duty*)
 - Where conflict exists, human nature is to look after yourself

2. Lawyers must not **profit** from the fiduciary relationship except with the client's informed consent – presumption of undue influence
- Note that these are proscriptive rather than prescriptive (*Breen v Williams* (1996) 186 CLR 71)
 - Proscriptive = prohibited
 - Both key duties are strictly applied
 - Make sure lawyers protect client interests above own interests.
 - Status as a professional = notion of public service
 - Public perception that lawyers use privileged position to own advantage lowers public respect for profession and public confidence in the legal system
 - BUT client can consent to behaviour that is otherwise 'in breach' if it is informed consent

Informed consent

- Client can give informed consent or authority to lawyer acting, or continuing to act, in a matter involving a duty-interest conflict
- Essential to informed consent or authority is 'full candour and appropriately complete disclosure to the client by the lawyer': *O'Reilly v Law Society of NSW* (1988) 23 NSWLR 204
 - Full disclosure allows client to properly decide – *informed consent means that the client understands that there is a conflict between the parties and that as a result, the solicitor may be disable from disclosing to each party full knowledge/advice: Clark Boyce v Mouat* [1993]
 - Cannot just disclose 'of an interest' without identifying the interest
- A prudent lawyer will ALSO **instruct a client to seek independent legal advice on the matter** → serves to reduce the scope for the lawyer's own influence in a client's decision to continue conflicted representation, and has the benefit of being supplied by a person with no conflicting interest in the matter
 - ^^^ Why a partner, associate or employee of the conflicted lawyer is presumed to be incapable of giving independent legal advice
 - Lawyer carries onus because they are better positioned that client to appreciate the existence of conflict and its likely implications

1. CONFLICTS OF INTEREST

- Two types:
 - a) **Direct conflicts** – conflict between acting in the best interests of the client and the lawyer seeking to protect or advance their own interests (see rule 12 *SCR*).
 - b) **Indirect conflicts** – conflict between concurrent or successive clients (see rules 11 and 10 *SCR*, respectively).

A) LAWYER-CLIENT (INTEREST-DUTY) CONFLICT

12. CONFLICT CONCERNING A SOLICITOR'S 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.

- A lawyer who deals or transacts with a client, other than explicitly for the purposes of the retainer, may prima facie place themselves in a position of conflict between interest and duty
- By becoming personally interested in a dealing, lawyers place it out of their power to give the disinterested advice expected of them
 - Lawyer's personal interests often do not coincide with interests of their client
- Ongoing clients – risky trying to separate out one particular transaction (*O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204 – **page 222**)
 - Court held that a lawyer bears a heavy burden of showing that fully informed consent has been given to any transaction
- Cannot actively seek to deal with client(s) as 'non-lawyer': *Law Society of New South Wales v Harvey* (1976) 2 NSWLR 154
- Extends:
 - To avoidance of appearance of conflict (*Spector v Ageda* (1973) Ch 30)
 - Beyond individual lawyer – reference to 'associates' in rule 12.1 SCR → *Who are associates? See below*
 - Includes, e.g., personally lending money to clients, borrowing money from clients, buying property from clients, selling property to clients
- If a conflict arises, need to make full disclosure (*Law Society of New South Wales v Harvey* (1976)).
- A lawyer may deal with a client provided that they have, with full candour and disclosure, taken steps to ensure that the client has **given fully informed consent to the transaction**
- Exception to no conflict rule – INFORMED CONSENT that lawyer can continue to represent client
 - **Full and frank disclosure** about nature and extent of lawyer's interest and implications of conflict, otherwise, not informed consent (*see authorities in footnote 10 – TB p. 220*)
 - Street CJ in *Law Society of New South Wales v Harvey* [1976] - The disclosure '*must be a conscientious disclosure of all material circumstances, and everything known to him relating to*

the proposed transaction which might influence the conduct of the client or anybody from whom he might seek advice. To disclose less than all that is material may positively mislead. Thus for a solicitor to merely disclose that he has an interest, without identifying the interest, may serve only to mislead the client into an enhanced confidence that the solicitor will be in a position to better protect the client's interest.'

- Should:
 - GET CONSENT IN WRITING; and
 - Ensure client obtains INDEPENDENT LEGAL ADVICE on conflict
- Lawyer bears heavy onus on lawyer to prove full disclosure and informed consent.
 - Risk of transaction being set aside, order for compensation, etc.
 - Also: possible disciplinary consequences
- Risks are having a transaction being set aside/an order for compensation/account of profits/sanction

Proscription extends beyond individual lawyer

- Where an individual lawyer cannot act because of a conflict between interest and duty, conflict is not avoided by another person in the lawyer's firm/someone known to them
- *Australian Solicitors' Conduct Rules* glossary extends proscription to associates
 - a) A partner, employee or agent of lawyer/firm
 - b) A corporation/partnership in which the lawyer has a material beneficial interest
 - c) A director of the practice/subsidiary (incorporated legal practices)
 - d) Member of the lawyer's immediate family
 - e) Member of the immediate family member of a partner/director of the lawyer's law practice
 - **"Immediate family"** means the spouse (which expression may include a de facto spouse or partner of the same sex), or a child, grandchild, sibling, parent or grandparent of a solicitor (*ASCR*)
- Barristers' rules require a barrister who believes on reasonable grounds that a client's interests may conflict with those of an instructing solicitor to advise solicitor of their belief

Acting for a family member

- Be wary of acting for yourself and a family member or associate – may compromise independent judgment and is potential for conflict of interest
- Still have to act in best interests of client
- **Woolley v Ritchie [1999] ANZ Conv R 385** – Lawyer acted on his own behalf and for his de facto spouse in real estate transactions. The lawyer told the de facto spouse that it was unnecessary for her to seek