

ETHICS NOTES

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CONFLICTS OF INTEREST

LAWYER-CLIENT CONFLICT

- Conflict between the interests of a client and the personal interests of a lawyer **ASCR r 12.1, LPUCBR rr 120, 105**
- Where a lawyer or associate stands to gain some material benefit in connection with the retainer, apart from the professional fee
- Where the lawyer cannot bring the necessary degree of objective and independent judgment because of the nature of their personal interest in the client or the client's case
- Breach of the fiduciary duty of undivided loyalty to act in the best interests of each client is common
- Potential for conflict arises from the fiduciary natures of the lawyer-client relationship
- Extends to associates of the conflicted lawyer (see **ASCR Glossary**)
- Where a relationship of confidence, influence, control or other superiority exists (such a lawyer-client relationship) that makes it reasonable to presume that a transaction was procured through unconscientious use of power, the law will make a presumption of undue influence **ASCR r 12.2**
 - The strength of the presumption varies according to the degree of dependence or sophistication of the client and is rebuttable by evidence that the transaction was an independent and well understood exercise of free judgment based on complete information
 - The lawyer bears the onus of adducing evidence of this kind, and onus that ordinarily requires that the client have received independent legal advice
- Exceptions to r 12.1 in **ASCR r 12.3** (borrowing from client), **ASCR r 12.4** (drawing a will, giving or receiving a financial benefit)

Informed consent:

- Note ASCR r 12 doesn't codify the law and the exceptions to the rule aren't exhaustive **O'Reilly v Law Society of NSW**
- While solicitors have a professional obligation to avoid conflicts between personal interests and duties to clients, there is no absolute prohibition on a solicitor transacting with a client
- Where there is an apparent conflict, the solicitor must take steps to ensure the client has given fully informed consent to the transaction:
 - Informed consent means consent given by the client in full knowledge of the conflict, any risk to the client arising from the conflict, and what the lawyer will do to ensure the client's interests are fully served or (if it may not be possible to fully serve the client's interests) what detriment the client may suffer as a result of the conflict
 - In most cases (particularly with less sophisticated or more vulnerable clients) informed consent will also require the solicitor to advise the client to obtain independent legal advice, and in some cases to ensure the client obtains the advice
- Avoid conflict of direct financial interests wherever possible – especially financial dealings initiated by the lawyer
- Disclose other conflicts (direct and indirect, financial and social) and only continue with fully informed consent
 - If fully informed consent is not possible, the conflict must be avoided
 - Even when the consent procedure is formally available, its use is unsafe and inadvisable
- Refuse client if serious conflict is unavoidable or send for independent legal advice
- Barristers' further preventative measure **LPUCBR r 120**

O'Reilly v Law Society of NSW

- While solicitors have a professional obligation, enforceable in disciplinary proceedings, to avoid conflicts between personal interests and duties to clients, there is no absolute prohibition on a solicitor, for their own advantage, entering a transaction with a client or former client
- But where there is an apparent conflict between a solicitor's interests and duty, if the conduct is to be excused, the solicitor must have taken steps, with full candour and disclosure to the client, to ensure that the client has given fully informed consent to the transaction
- The burden on the solicitor to establish that the client has given his fully informed consent is a heavy one

Examples:

- Borrowing from clients **ASCR r 12.3, LPUCBR r 48, Harvey v Law Society of NSW**
- Lending to clients **ASCR r 41, O'Reilly v Law Society of NSW**
- Buying from or selling to a client **Re: A Barrister and Solicitor**
 - Because the interests of vendor and purchaser do not wholly coincide a solicitor proposing either to buy property from, or to sell property to, a client is under a duty to cause the client to obtain independent advice
 - Failure to make full disclosure and counsel the client to seek independent advice, may leave the lawyer open to a claim for fiduciary breach or undue influence and threaten the enforceability in validity of the transaction
 - The principle also applies where the lawyer's interest in the transaction is via a relative or associate
- Secret profits **Law Society of the ACT v Lardner, O'Reilly v Law Society of NSW**
 - The no profit rule prohibits lawyers from profiting from the fiduciary relationship except for payment of a reasonable professional fee, or with the client's informed consent
 - **ASCR 12.4.3** is one of the exceptions to **ASCR 12.1** and allows a solicitor to receive a financial benefit from a third party in relation to any dealing in certain circumstances
 - Acting for a client where a financial benefit may be payable to a third party for referring the client provided the solicitor has disclosed the payment of financial benefit **ASCR 12.4.4**
 - Receiving secret commissions is also a criminal offence under **CA s 442A**
- Acceptance of gifts
 - The chief application of the presumption of undue influence is in cases where a solicitor receives a benefit, such as a gift or legacy under the client's will, in addition to their fee and suggests that lawyers should eschew gifts on the basis of an appearance that the gift was the product of undue influence or inducement for special favours (according to Dal Pont)
 - However most gifts are given by clients out of a genuine sense of gratitude – consider the circumstances in which it is given and if there is any suggestion of undue influence or the client seeking special favours then the gift should be eschewed
 - Firms should monitor the receipt of gifts by establishing a gift register and where appropriate ensure gifts are shared equitably within the firm by those who contributed to the handling of the client's case
 - Gifts of cash should always be refused unless in the form of a proper professional fee
- Executor of will
 - Solicitors who prepare wills must avoid any conflict between their fiduciary duty to the testator (will maker) and their personal interest
 - Inclusion of a provision in a will appointing a solicitor as executor and entitling the solicitor to executor's commission creates a potential conflict and the solicitor must demonstrate that the testator gave **fully informed consent** to the entitlement to executor's commission **ASCR r 12.4.1**
- Executor and estate solicitor
 - A solicitor appointed as both executor and solicitor to the estate is entitled to charge professional fees for legal services to the estate (subject to written notification to client under **ASCR 12.4.1**)
 - However, they must avoid conflicts between the two roles by carefully and transparently distinguishing between work undertaken as a solicitor for the estate, and work undertaken as executor
 - A claim for executors' commission must relate to compensation for 'pains and troubles' as executor over and above what is compensated for by professional fees, to avoid the possibility of 'double dipping' **Re Will and Estate of Foster**
 - The fact that a solicitor-executor is entitled under a will to charge for professional work as a solicitor does not justify a claim against the estate for discharging executorial functions calculated by reference to professional costs as if those executorial functions were legal services **Re Will of Shannon**
 - When a will provides for the appointment of an executor also as a trustee, a fiduciary relationship exists between that executor-trustee and the beneficiaries. Fully informed consent of the beneficiaries is required to be given to payment of a negotiated amount of executors' commission. In the case of a solicitor who is an executor-trustee this must include full disclosure of any legal fees and disbursements charged, the basis for those fees and disbursements, disclosure that the beneficiaries are entitled to have the court assess the executors' commission and, preferably, that the beneficiaries are advised to seek independent legal advice **Walker v D'Alessandro**
- Beneficiary under will **ASCR r 12.4.2**
- Lawyer as a witness in client's case **ASCR r 27, LPUCBR r 101(d), (e)**
 - The reason for r 27.2 is that the solicitor would be in a position of apparent conflict between the duty to advance the interests of the client and the duty to the court to give impartial evidence which may prejudice the administration of justice
 - The test to be applied in determining whether continuing to act would prejudice the administration of justice is an objective one –whether a fair minded and reasonably informed member of the public would conclude that the proper administration of justice requires that the solicitor should be prevented from continuing to act for the client, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice
 - In making its determination on whether continuing to act would prejudice the administration of justice, a court must balance this apparent conflict of duties with other considerations affecting the due administration of justice, such as due weight being given to the public interest in a litigant not being deprived of the solicitor of their choice without due cause and the timing of the application, which may be relevant, in that the cost, inconvenience or impracticability of requiring a solicitor or law practice to cease to act may provide a reason for refusing to grant relief

- Dealings with former clients **Longstaff v Birtles**
 - There is no general prohibition on lawyers dealing with former clients because fiduciary duties generally end with the termination of the relationship
 - However termination of the relationship may not conclude fiduciary duties where the client has a reasonable expectation that the relationship persists
- Sexual relationships with clients **Bosgard & Bosgard, Legal Practitioners Conduct Board v Morel, R v Szabo**
 - There is no specific prohibition in the rules or general law against sexual relationships with clients
 - However, they **may involve abuse of the power-dependency relationship and lead to a loss of professional independence and objectivity**
 - Should be avoided, especially if initiated after they became a client
 - The American Bar Association's Model Rules prohibit lawyers from engaging in sexual relations with a client unless the sexual relationship existed before the client-lawyer relationship commenced, and the New Zealand professional rules prohibit sexual relationships where the lawyer is representing the client in any domestic relations matter
 - Consider whether consent in this context is 'inherently suspect' and an abuse of power – the client might be harmed

Harvey v Law Society of NSW

- Clients lent money to three companies of which their solicitor was a director and shareholder
 - Details of the speculations were kept from the clients who were mostly inexperienced in matters of investment and business
 - The risk fell on the client – if the venture failed, the client would lose money, not the lawyer
 - The clients trusted the solicitor to recommend good investments
 - The solicitor channelled the money into his own ventures involving speculation in land, failed to provide adequate security, and didn't tell them to obtain independent legal advice
 - The lawyer was struck off for not giving proper advice to the client
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- The solicitor was struck off as he was not a fit and proper person
 - Even independent legal advice and termination of the retainer may not overcome the problem if the solicitor initiated the dealing because the client is still influenced by the initial trust relationship (i.e. danger of undue influence)
 - The solicitor had used his position as a lawyer to channel his clients' money for use as risk capital in speculative land ventures, and that he had recklessly disregarded the need to protect his client's property by failing to provide adequate securities
 - Where there is any conflict between the interest of the client and that of the solicitor, the duty of the solicitor is to act in perfect good faith and to make full disclosure of his interest
 - It 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
 - Lawyer must indicate the risks to client and how they benefit, whether at the expense of the client or not
 - To disclose less than all that is material may positively mislead
 - Thus for a solicitor merely to 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 better to protect the client's interest
 - The conflict of interest may, and usually will, be such that it is not proper, or even possible, for the solicitor to continue to act for and advise his client

O'Reilly v Law Society of NSW

- O'Reilly, a solicitor, and his wife were directors and sole beneficial owners of shares in HMC, a home mortgage lending company
 - HMC rarely used its own money to make loans – it obtained funds from other money lenders and concurrently assigned HMC's rights as mortgagee to the actual lender
 - HMC operated from offices adjacent to O'Reilly's law practice
 - O'Reilly referred clients to a financing intermediary which generated a premium to the intermediary and the guarantee fee to himself
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- A solicitor shall not, in any way, in respect of the subject of any transactions in the relations between him and his client, make gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled
 - The physical proximity of the offices and the fact O'Reilly sometimes referred clients to his own company, and sometimes acted for more than one party in the transaction, created a significant risk that conflicts of interest and duty would occur
 - The attraction of the HMC loans to borrowers was said to be that, unlike other lenders at the time, in the event interest rates increased HMC offered an extension of the repayment term rather than higher instalments
 - It also made interest only loans to people with poor credit ratings
 - Clients trust solicitors to provide them with neutral and beneficial advice
 - If it became common, or even regularly the case, that solicitors made undisclosed private gains, directly or indirectly, from finance companies or other sources with which they were associated, the faith of the community in the integrity and trustworthiness of solicitors would be seriously shaken
 - The risk of a conflict of interest and duty can only be avoided by the most scrupulous conduct on the part of the solicitor
 - Depending upon any special terms of the retainer, such conduct will oblige the solicitor to do at least the following:
 - Disclose the lawyer's interest fully and candidly to the client, preferably in writing
 - Advise and facilitate the provision of independent advice where that is appropriate
 - Advise on and facilitate access to alternative sources of funds, particularly where these may be to the client's advantage
 - O'Reilly should have advised the clients that if they went through the intermediary they would pay a premium on the loan; that if they went directly to the financier they might be able to get a better deal, and that the solicitor would use best endeavours on their half to obtain a better deal

Re: A Barrister and Solicitor

- The lawyer acted for the vendor and was invited by the purchaser, after the exchange of contracts but before completion, to acquire a half share in the property
- The lawyer's acceptance of the invitation without advising the vendor of this interest, or counselling the client to seek independent advice, amounted to a breach of fiduciary duty

Law Society of the ACT v Lardner

- The solicitors referred clients to a company controlled by their associate for the preparation of reports that they would charge to the clients as disbursements without disclosing the association
- This was found to constitute a fiduciary breach as well as misconduct

Longstaff v Birtles

- Solicitors acted in negotiations for client to purchase a hotel, the negotiations were unsuccessful and the retainer was terminated
- Later, the solicitors who were partners in a hotel business venture invited the former clients to buy into the partnership
- The solicitors didn't advise the former clients to obtain independent legal advice
- The deal proved financially disastrous and the former clients sued the solicitors for breach of fiduciary duty
- Mummery LJ upheld the claim and said the source of the fiduciary duty was not only the retainer, but all the circumstances creating the relationship of trust and confidence
- The former clients rightly felt as if there was still a client solicitor relationship (didn't obtain independent advice etc)
- Therefore although the client-lawyer relationship was strictly over, the duty still applied because of the quasi client-solicitor relationship
- As long as a confidential relationship exists a solicitor must not place themselves in a position of potential conflict
- The fiduciary breach resulted from the solicitors continuing to deal with the claimants without insisting that they obtain independent advice
- The decision was influenced by the fact the transaction was closely related to the subject matter of the retainer (note the relationship might not have endured if it were a completely different matter), coupled with the evident trust the claimants placed in the solicitor's business judgment
- Where the relationship between lawyer and former client is at arms length courts have been less willing to cast on lawyers, the consequences of clients poor business decisions

Bosgard & Bosgard

- The solicitor acting for a husband in the children and property matters was in a de facto relationship with the husband and the sole director, sole secretary and sole shareholder of a company that had allegedly lent funds to the husband
- The wife objected to the solicitor acting for the husband on a number of grounds including that the solicitor commenced an intimate relationship with the husband after he retained her to act for him in his family law proceedings, there was a possibility that the company (of which the solicitor was a director) could be joined as a party to the proceedings and called as a witness in the proceedings, and the solicitor was not in a position to act independently of her relationship with the husband
- The court used its inherent jurisdiction to restrain the solicitor from acting in the interests of maintaining the integrity of the justice system due to her being in a relationship with the husband and being a director of a company that had lent funds to him
- There was potential for conflict between the solicitor's interests and her obligations to the Court
- A fair-minded lay observer would conclude that the proper administration of justice and the appearance of justice requires the practitioner to be prevented from acting
- The financial circumstances of the cohabitation between the solicitor and her client will be relevant for the Court to consider in the primary property proceedings, as with the nature of the loan, circumstances of its making, the application of the funds, and whether or not repayment is likely to be demanded.
- The solicitor may be required to give material evidence at a later stage of the proceedings for at least two issues, being the relationship issue and the creditor issue
- It is not hard to see how the paramount duty priority might well be reversed and the solicitor place the love she has for her partner above the duty that she owes to the Court
- In relation to the solicitor's duty to her client, it might likewise suffer from a lack of objectivity, independence and calm rationality in relation to the issues which arise in the proceedings
- The practitioner has potential for a number of conflicts between her interests and the obligations she has to the Court, the application has been brought in a timely fashion, and the Court is not satisfied that, having regard to the length of time to the hearing, alternate arrangements cannot be made for the husband's representation
- Not only must Justice be done, it must also be seen to be done – a lack of objectivity gives rise to the possibility of the integrity of the justice system being undermined
- Note the power a Court has to restrain a solicitor from acting should not be exercised lightly or without caution

Legal Practitioners Conduct Board v Morel

- Ms Morel had personal relationships with 3 different prisoners: McF – stopped acting for him when it became personal (they married but subsequently divorced), S – personal relationship, including after he had absconded from pre-release centre, but she had never acted for him, and personal and professional relationship with P
 - Falsely stated to DCS that she needed to speak with P about an urgent legal matter when her real purpose was a personal visit
 - On another occasion during a phone call which Morel knew (but P didn't know) was monitored, P admitted to a serious assault on another prisoner
 - DCS subsequently banned Morel from visiting P in either a personal or professional capacity, but she continued to represent him
 - Following the conclusion of a disciplinary hearing before the SA Legal Practitioners Conduct Board, and while the Board's decision was reserved, Morel agreed to accommodate another prisoner (Smith) at her residence under the conditions of his home detention order, and later a condition of his parole
- In deciding to strike Morel off the Roll, the SA Full Court said Ms Morel abused the privilege that practitioners have to visit prisoners for purposes of giving legal advice; she used the pretence of the need for legal advice to further her personal relationship with a prisoner
 - Ms Morel'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
 - Ms Morel's conduct represented a serious departure from proper professional standards
 - It is a matter of considerable concern that Ms Morel lacked the basic understanding of legal professional duties to understand the nature of the conduct that she engaged in and the way in which it disadvantaged her client – didn't have the client's best interests at heart
 - Striking off is reserved for the most serious cases of unprofessional conduct, where the court is satisfied the person found guilty of unprofessional conduct is not fit and proper to remain the roll of legal practitioners
 - Suspension is a serious form of discipline which is usually imposed to discipline the legal practitioner, who has committed an act of unprofessional conduct but, who, in the opinion of the court, at the end of the period of suspension, will be a fit and proper person to practise the law
 - Suspension may be appropriate where there is a reasonable prognosis that, with appropriate treatment or supervision the practitioner is likely, within a finite time, to be fit to practice – that cannot be said of this practitioner at this time

R v Szabo

- Defence Counsel had not disclosed to his client that he had had an intimate relationship with the prosecutor
- The relationship wasn't going on at the time of the trial, but it subsequently resumed, and the client found out about it
- This is not a case of actual injustice – the Crown case was strong, the defence was robust and the trial was regularly conducted, no suggestion of improper disclosure of material
- Further, there is no suggestion of any actual, improper disclosure of material by defence counsel to the prosecutor
- But it is a perceived miscarriage of justice
- The convictions were set aside and a retrial ordered

Legal Services Commissioner v El-Hissi

- Case involving conflict between family obligations and professional duties
- Charges included failure to avoid a conflict of interest arising between two clients, allowing interests of his associates (his parents) to conflict with the interests of his client and continuing to act where a material conflict of interest had arisen
- Practitioner reprimanded and Practising Certificate cancelled (unable to reapply for 9 months)

Consequences of breach:

- It is not so much the fact that a conflict arises, but how you handle it that is crucial both ethically and legally – either avoid or remove the conflict, or for less serious conflicts, fully disclose the conflict to the client and obtain the client's consent to continue (this will generally require the client being advised to obtain independent legal advice)
- Equitable remedies for breach of fiduciary duty include an injunction to restrain the lawyer (and the firm) from continuing to act, an order for compensation if the breach caused loss, an account of profits if the lawyer obtained an unauthorised benefit and rescission of a transaction entered into in breach of the duty
- An action tort or contract for breach of the duty of care
- Disciplinary action
- An appeal on the grounds of miscarriage of justice