



HD APPROVED

LEGAL PRACTICE &
ETHICS

MLP235

COMPREHENSIVE NOTES

-UPDATED FOR 2026-

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Topic 3A – Duties Owed to Clients

The lawyer-client relationship

- Lawyer has concurrent duty sourced in contract, tort law, the fiduciary relationship and equity.
- Duties include:
 - o Competence
 - o Loyalty
 - o Confidence
 - o Others – provide quality client care, promote access to justice and encourage settlement.

The retainer

- Marks the commencement of the duties owed to the client.
- Contract between lawyer and client – sets out the work to be completed.
 - o Identifies the parameters of the relationship and therefore the extent of the duties owed.

Creation of the retainer

- A retainer can be created:

- o expressly – in writing or orally; or
- o by implication – based on the conduct of the parties.
- If created by implication:
 - o Onus on party alleging lawyer-client relationship.
 - o Determined objectively (***Pegrum v Fatharly (1996) 14 WAR 92***).
- It is prudent to make sure the retainer is in writing!

Creation of the retainer – cont.

- To avoid ambiguity, the retainer (as well as being in writing) should:
 - o Identify the **client(s)**.
 - o Set out **the scope** of the retainer.
 - o Outline the services that the lawyer is going to provide.
 - o Outline the costs to be charged and how payment is to be made.
 - o Set out the lawyer's authority to enter into negotiations, etc. on behalf of the client.

Creation of the retainer – cont.

- **Who is the client?**
 - o Joint clients – need *joint* instructions.
 - o Need to clearly identify – e.g. deceased estate, power of attorney.
 - o Individual clients coming to see a lawyer together – beware!

Scope of the retainer

- Terms should be clearly expressed as they will determine the scope of:
 - o lawyer's authority as an agent; and
 - o duties owed by lawyer to client.
- Ambiguity construed in favour of client (***Owners – Strata Plan No 45205 v Andreones [2009] NSWSC 1189***).
- Includes authority to do all things incidental to the purpose of the retainer: ***Polkinghorne v Holland (1934) 51 CLR 143***.
- Implied terms –
 - o Lawyer to protect client interests and exercise reasonable care and skill when carrying out client instructions (***Astley v Austrust Ltd (1999) 197 CLR 1***).
 - o Lawyer to keep communications confidential.

Scope of the retainer – cont.

- Recap: Must be clear so can determine whether acts or omissions fall within or outside retainer.
- Lawyers generally need express authority to –
 - o Compromise a proceeding.
 - o Create contractual obligations on behalf of the client: ***Pianta v National Finance & Trustees Ltd (1964) 180 CLR 146***.
 - o Institute proceedings on behalf of a client: ***Hawkins Hill Gold Mining Co v Briscoe (1887) (NSW) (Eq) 123***.
 - o Incur significant or unusual expenses: ***Schiliro v Gadens Ridgeway (1995) 19 Fam LR 196***.
 - o Ostensible/apparent authority – client will be bound but can take action against lawyer.

Rejecting the retainer

- Different position for barristers and lawyers.
- Barristers – 'cab-rank' principle: must accept brief from any client (***Giannarelli v Wraith (1988) 165 CLR 543***; **rule 17 Legal Profession Uniform Conduct (Barristers) Rules 2015**).
 - o Can refuse if outside capacity or skill, would be unavailable, fee not acceptable, reasonable grounds to doubt fee will be paid, etc. (**rules 17 and 105**).
 - o **Must** refuse if have conflict of interest, confidential information about the other side, etc. (**rules 101, 103, 104 and 105**).
- Lawyers – no obligation to accept instructions.
 - o Can choose not to where cannot competently represent client, promptly advise and act for client, or are not independent.

Termination of retainer

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (SCR)*

SCR 13. COMPLETION OR TERMINATION OF ENGAGEMENT

13.1 A solicitor with designated responsibility for a client's matter must ensure completion of the legal services for that matter UNLESS:

13.1.1 the client has otherwise agreed;

13.1.2 the law practice is discharged from the engagement by the client;

13.1.3 the law practice terminates the engagement for just cause and on reasonable notice; or

13.1.4 the engagement comes to an end by operation of law.

Termination of retainer – cont.

- Normally when matter concludes.
 - o Must retain client documents for 7 years (**rule 14.2 SCR**) – original documents such as Wills, etc. should be retained indefinitely.
- Client can terminate at any time (**rule 13.1.2 SCR**).
- Lawyer needs client consent to terminate or can do so without consent for just cause and on reasonable notice (**rule 13.1.3 SCR**).
 - o Just cause – e.g. cannot properly perform responsibilities because cannot get instructions, etc.; continued representation would mean breach of professional rules.
 - o Reasonable notice – will depend on the facts.

SCR 13. COMPLETION OR TERMINATION OF ENGAGEMENT

13.2 Where a client is required to stand trial for a serious criminal offence, the client's failure to make satisfactory arrangements for the payment of costs will not normally justify termination of the engagement UNLESS the solicitor or law practice has:

13.2.1 served written notice on the client of the solicitor's intention, a reasonable time before the date appointed for commencement of the trial or the commencement of the sittings of the court in which the trial is listed, providing the client at least 7 days to make satisfactory arrangements for payment of the solicitor's costs; and

13.2.2 given appropriate notice to the registrar of the court in which the trial is listed to commence.

13.3 Where a client is legally assisted, and the grant of aid is withdrawn or otherwise terminated, a solicitor or law practice may terminate the engagement by giving reasonable notice in writing to the client, such that the client has a reasonable opportunity to make other satisfactory arrangements for payment of costs which would be incurred if the engagement continued.

Termination of retainer – cont.

- If client standing trial for serious criminal offence, cannot terminate on basis of failure to pay costs unless (**rule 13.2 SCR**):
 - o serve written notice of intention on client;
 - o a reasonable time before commencement of trial;
 - o provide clients with 7 days to make cost arrangements; and
 - o give the court notice.

- If grant of aid to client has been withdrawn, lawyer can terminate upon reasonable notice giving client opportunity to make other payment arrangements.

Document lien

- If retainer terminated, client entitled to 'client documents' (**rule 14.1 SCR**).
 - **Look at:** whether client charged for creation of document and whether document created primarily for client's benefit (***Wentworth v de Montford (1988) 15 NSWLR 348***)
 - E.g. letters from the lawyer to third parties, briefs to counsel, drafted documents such as leases, contracts, etc., but **not** internal memorandums, file notes, letters to client, etc.
- **BUT** if unpaid costs on the file, can exercise a solicitor's/document lien (**rule 15 SCR**).

Document lien – cont.

- However, where documents are essential to prosecution or defence in current proceedings, must deliver documents to client if (**rule 15.1.1 and 15.1.2 SCR**):
 - another lawyer is acting – then must surrender to that lawyer (subject to lien and with reasonable security for costs); or
 - second lawyer agrees to pay or enters into agreement with client to procure payment of costs upon completion of proceedings; or
 - lawyer receives reasonable security for the unpaid costs.
- Can also exercise lien over money held in trust – will discuss in week 6.

Duties owed to clients: Duty of competence

- Under:
 - contract law – implied term of skill and care; and
 - tort law – duty to take reasonable care (negligence).
- **Rule 4.1.3 SCR: a solicitor must deliver legal services competently, diligently and as promptly as reasonably possible.**
- 'Competence' has no legal definition.
 - Examples of conduct potentially falling short of expected level of competency:
 - not advising client about limitation period
 - missing deadline
 - making representations about things that the lawyer cannot control

Duties owed to clients: Duty of competence – cont.

- Ensuring legal practitioners are competent:
 - Academic and PLT admission requirements.
 - Mandatory CPD requirements.
 - Need to remain up-to-date on developments in law.
- **If a lawyer cannot competently complete the work then they should decline it or confine it.**

Duty of care under tort law

- Lawyers can be held to be negligent if fall below requisite standard of care.
 - May also amount to misconduct or unsatisfactory professional conduct.
- Duty to:
 - act in best interests of client
 - disclose all material information

Scope of duty

- Scope of lawyer's duty of care defined by retainer (***Hawkins v Clayton (1988) 164 CLR 539*** (***Hawkins***)).
 - Retainer can be restricted – express terms and seek advice from others.
- Important – can, in rare circumstances, extend to taking positive steps *outside* of retainer.
 - Where is a real and foreseeable risk of economic loss to a client (***Hawkins v Clayton***).
 - E.g. failure to warn of expiry of limitation period, even though retainer previously ended (***Curnuck v Nitschke [2001] NSWCA 176***).

Scope of duty – cont.

- Inexperienced vs sophisticated clients:
 - Scope *may* be broader (so more expected from lawyer) where client at a disadvantage, e.g. lack of education.
 - But still owe duty to sophisticated clients to properly advise.
- Circumstances in which advice is given:
 - Urgent advice – qualify advice provided (e.g. preliminary views); properly inform client of risks.
 - Preliminary advice to prospective clients – possible for duty of care to be imposed even without retainer (***Hedley Byrne & Co Ltd v Heller (1964)***).

Scope of duty – cont.

- The provision of financial or taxation advice?
 - Retainer will generally not extend to financial or taxation advice.
 - May provide advice on, e.g. tax implications – keep it legal!
- No obligation to provide non-legal advice.

Standard of care

- **That of a qualified, reasonably competent and careful lawyer in the practice of their profession (*Hawkins v Clayton (1988)*).**
 - An ordinary, skilled person exercising and professing to have that special skill: ***Rogers v Whitaker (1992) 175 CLR 479***.
 - Not a warranty of perfection: ***Duchess of Argyll v Beuselinck*** [1972] 2 Lloyd's Rep 172.
- Expectation: will possess knowledge of reasonably competent lawyer of well-settled principles of law and applicable court procedure and rules.
 - Higher for accredited specialists/experts in relation to that particular area of law (***Wakim v McNally (2002) 121 FCR 162***; ***Yates Property Corporation v Boland (1998) 85 FCR 84***).
 - Will exercise appropriate supervision over work done by others (***Re a Solicitor [1960] VR 617***).

Standard of care – cont.

- Examples of conduct potentially not to standard –
 - Giving advice falling short of that expected of a reasonably competent lawyer, e.g. outside of area of expertise, providing incomplete advice (e.g. failing to advise on key element of claim), failing to act to protect a client's interests (e.g. lodge caveat).
 - Failure to disclose relevant information to client resulting in loss.
 - Giving advice not qualified to give, e.g. financial advice.
 - Not properly instructing counsel.

Standard of care – cont.

- Lowering the standard of care?
 - Generally, cannot limit liability by lowering standard of care!
 - Better to clearly restrict *scope* of retainer.
 - Cannot unquestioningly rely on counsel's advice – independent judgment required: ***Darvall McCutcheon (a firm) v HK Frost Holdings Pty Ltd (in liq) (2002) 4 VR 570***.
 - Even if solicitor is inexperienced in field and barrister is 'eminent' (***Wakim v McNally (2002)***).

Standard of care – cont.

- S 59 *Wrongs Act 1958* (Vic) (re professionals): not negligent if show acted in manner widely accepted in the field as competent professional practice in the circumstances.
- BUT note that following 'common practice' will not meet standard of care if practice unsound (***Edward Wong Finance v Johnson Stokes & Master*** [1984] 1 AC 296).
 - Prudent lawyer will always take steps to reduce risk.
 - **Test: what would a reasonably competent practitioner do?**

Standard of care – cont.

- Following a client's advice?

- o **Rule 8.1 SCR:** a solicitor must follow a client's lawful, proper and competent instructions.
- o **BUT** need to inform client of risks associated with course of conduct (***Credit Lyonnais SA v Russell Jones and Walker (a firm) [2003] Lloyds Rep PN 7***). Otherwise, may have breached duty of care.
 - If client decides to proceed anyway and instructs the lawyer accordingly, lawyer is not responsible for client's actions and any resulting losses/harm.
 - '[A] person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong.' (*Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1997] AC 191*)

Immunity for 'in court' acts or omissions

- Barristers immune from action by clients for professional negligence relating to work in conducting litigation: *Giannarelli v Wraith* (1988) 165 CLR 543; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.
- Applies to negligent acts and omissions.
- Limited to in court work – connection needed.
- Can apply to solicitor acting as advocate or instructing counsel.

Breach of duty of competence

- Damages award:
 - o In contract – difference in position from if retainer had been performed.
 - o In tort – putting client in position would have been in had tort not been committed.
 - Causation: would client have behaved the same way even if there was no breach? (*Berry v Kanakis* (2002) NSW ConvR 56-022).
- Disciplinary action – misconduct or unsatisfactory professional conduct.
- Maintenance of professional indemnity insurance (s 211 *UL*).
 - o Normally indemnifies against loss occurring as a result of negligence by lawyer.
 - o Some exceptions, e.g. fraud by lawyer.

Topic 3B – Duties Owed to Clients (*Conflicts of interest*)

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 of loyalty – cont.

- 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*).
 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***).

Duty of loyalty: key duties – cont.

- Both key duties are strictly applied – why?
 - o Make sure lawyers protect client interests above own interests.
 - o Status as a professional = notion of public service.
 - o 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.

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.

- If personally involved in dealing, cannot provide disinterested advice.
- Ongoing clients – risky trying to separate out one particular transaction (*O'Reilly v Law Society of New South Wales (1988) 24 NSWLR 204*).
- Cannot actively seek to deal with client(s) as 'non-lawyer': *Law Society of New South Wales v Harvey (1976) 2 NSWLR 154*.

(a) Lawyer-client (interest-duty) conflict – con't.

- Extends:
 - o to avoidance of appearance of conflict (*Spector v Ageda (1973) Ch 30*)
 - o beyond individual lawyer – reference to 'associates' in rule 12.1 SCR.
- **Includes, e.g., personally lending money to clients, borrowing money from clients, buying property from clients, selling property to clients.**
- Be wary of acting for yourself and a family member or associate – may compromise independent judgment and is potential for conflict of interest (*Woolley v Ritchie [1999] ANZ Conv R 385*).

(a) Lawyer-client (interest-duty) conflict – cont.

- If a conflict arises, need to make full disclosure (*Law Society of New South Wales v Harvey (1976)*).
- **Exception to no conflict rule – where client gives informed consent for lawyer to continue to represent them.**
 - o 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*).
 - o 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.*' Street CJ in *Law Society of New South Wales v Harvey [1976]*
- **Should:**
 - o get consent in writing; and
 - o insist client obtain independent legal advice on conflict.
- Heavy onus on lawyer to prove full disclosure and informed consent.
 - o Risk of transaction being set aside, order for compensation, etc.
 - o Also: possible disciplinary consequences.

Lawyer-client (interest-duty) conflict – BORROWING MONEY

SCR 12. CONFLICT CONCERNING A SOLICITOR'S OWN INTERESTS

- 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.

EXAMPLE: borrowing money from clients.

- Interests of borrower (lawyer) and lender (client) conflict.
- Very hard to provide disinterested advice!
- Informed client consent on basis of independent legal advice required.

EXAMPLE: lending money to clients.

- No specific prohibition in rules but best to avoid – note disparity between interests of lender (lawyer) and borrower (client).
- Would need to:
 - o fully disclose interest;
 - o strongly advise client to obtain independent legal advice; and
 - o advise client of other funding options.
- If fail to do so, court may set aside transaction (*Maguire v Makaronis (1997) 188 CLR 449*).

EXAMPLE: buying property from or selling property to client.

- Interests of vendor and purchaser do not align – client to obtain independent legal advice (*Longstaff v Birtles [2002] 1 WLR 470*).
- Lawyer in position of influence – may be liable for fiduciary breach or undue influence (*Talbot & Olivier v Shann [2005] WASCA 34*).
 - o Transaction may be invalid or unenforceable!
- Same applies where is associate of lawyer involved in transaction with client (*Sewell v Zelden [2010] NSWSC 1180*).

(a) Lawyer-client (interest-duty) conflict – cont.

• Former clients?

- o No prohibition on dealing with former clients as fiduciary duties end with termination of retainer. (Note ongoing obligations regarding confidential information.)
- o Still prudent to disclose and suggest independent legal advice – need to dispel any suggestion that acting for client.

(a) Lawyer-client (interest-duty) conflict – cont.

- **Rule 12.4 SCR** sets out circumstances in which rule 12 will not be breached:

- o where draft Will appointing lawyer as executor (**rule 12.4.1**) – provided advise of entitlement to commission;
- o where draft Will or other instrument under which lawyer will receive substantial benefit (**rule 12.4.2**) – provided client is family member or colleague (or family member of colleague);
- o where receive commission *from* third party (**rule 12.4.3**) – provided disclose and obtain client’s consent to receipt (independent legal advice may be necessary) ;
- o where pay commission *to* third party (**rule 12.4.4**) – provided first disclose to client.

(b) Client-client (duty-duty) conflict

- **Remember:** undivided loyalty by lawyer to client is required (must also avoid *appearance* of disloyalty).
- Need to give full and effective representation to clients – may not be possible where 2+ clients with conflicting (or potentially conflicting) interests: *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83.
- Two types:
 - o **Conflict between two concurrent clients.**
 - o **Conflict between a former and a current client.**

Concurrent Clients

- Example of conflict – duty to act in best interests of client and disclose all relevant information and competing duty not to disclose confidential information.
- No outright prohibition on acting for concurrent clients.

SCR 11. CONFLICT OF DUTIES CONCERNING CURRENT CLIENTS – ASCR

- 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.

The lawyer must cease to act for all parties if an actual conflict arises during the course of the conduct of the matter. If a lawyer determines that he or she cannot continue to act without acting contrary to the interests of one or more of the parties - [LIV advises consider dropping both]

• **Client consents to conflict:**

- o Clients need to understand existence and possible consequences of the conflict (*Marron v J Chatham Daunt Pty Ltd [1998] VSC 110*).
- o Prudent to recommend independent legal advice regarding the conflict.
- o **Important!** Lawyer still to make independent judgment about whether can truly act in best interests of both parties.

Concurrent Clients – cont.

- Contentious work: cannot represent parties in litigation who do not share the same interests.
 - o Be wary of joint representation of co-accused, etc.
- Non-contentious work: should not act when is even the slightest **possibility** that there may be a potential conflict (*Clark v Baker (1987) 4 BPR 9,476*).
 - o E.g. acting for vendor and purchaser, lessor and lessee, lender and borrower.
 - o Should disclose potential for conflict and consequences.
 - o If **actual** conflict arises, cannot act without consent but continuing to act on the basis of client 'consent' is risky.
- **Do not assume** that certain clients have complimentary interests (e.g. spouses).

Successive Clients

- Fiduciary duties end when retainer ends (so no continuing duty of loyalty to former clients) but duty of confidentiality continues.
- Focus here: potential breaches of confidence owed to former client (*Prince Jefri Bolkiah v KPMG (a firm) (1999) 2 AC 222*).

SCR 10. 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.

Successive Clients – cont.

- Key example of potential client-client successive conflict: where lawyer retained to act against former client.
 - o Need to protect and encourage confidential disclosures by client to lawyer: *Re a Firm of Solicitors [1995] 2 All ER 482*.