



# Conflict of Interest Guidelines

**Solicitors owe duties to clients, the courts and the administration of justice, free from the influence of personal bias. Conflicts arise when these duties diverge.**

**The Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 address conflict of interest for solicitors in Rules 10, 11, and 12. As noted in the Rule 2.2 they apply in addition to the common law.**

Conflicts can be categorised broadly as;

- Actual conflict – the conflict is occurring now;
- Potential conflict – the conflict may occur in the future.

Solicitors should also be aware that a perception of conflict by a former client may prevent a solicitor from continuing to act (this is particularly relevant in family law matters where a “lower threshold” is applied).

## 1. Conflicts concerning former clients:

A solicitor must be conscious of the duties and obligations owed to both current and former clients. These duties and obligations extend past the contractual obligations of the solicitor's engagement. A conflict of interest will arise where relevant confidential information has been obtained from the former client, or where the solicitor owes a duty of loyalty.

### 1.1 Relevant Confidential Information:

Client information must be both confidential and relevant. Confidential information may comprise of;

- the facts specific to the client's matter; or
- what is known as “getting to know you factors”, for example: the client's personality or attitude to litigation.

There must also be a real and sensible belief (by a former client) or an actual risk that the

confidential information will be used to the former client's detriment.

A former client may give informed written consent to a solicitor to allow confidential information to be used to their detriment or the solicitor may establish an effective information barrier to protect the misuse of confidential information (see below under **Imputed Knowledge**).<sup>1</sup>

### 1.2 Duty of loyalty

The principle of the duty of loyalty preserves the client's right to the undivided commitment of the solicitor, by restraining the solicitor from preferring one client over another.

This duty arises where a solicitor intends to or does act against a former client in the same or a related matter. In the absence of relevant confidential information, a solicitor may still not be able to act against a former client due to the application of this principle.

A duty of loyalty may continue after the termination of the client engagement.<sup>2</sup>

### 1.3 Perception of conflict (proper administration of justice)

A perception of conflict may arise, even where it is established that confidential information has not been obtained (or the information has subsequently lost its confidentiality) or where there is no real and sensible possibility of the misuse of that information.<sup>3</sup> A solicitor may be required to cease acting if a reasonable and informed member of the public, who is properly informed of all the facts, would believe that the proper administration of justice would not be done if that solicitor were to continue to act against the former client.

<sup>1</sup> Rule 10.2, Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

<sup>2</sup> Rule 10.2, Law Council of Australia "Australian Solicitors' Conduct Rules 2011 and Commentary", August 2013  
[https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/SolicitorsConductRulesHandbook\\_Ver3.pdf](https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/SolicitorsConductRulesHandbook_Ver3.pdf)

<sup>3</sup> Dale v Clayton Utz (No. 2) (2013) VSC 54 at para 146

## 2. Conflict of duties concerning current clients:

The same principles as outlined in paragraphs 1.1, 1.2, and 1.3 of these guidelines apply to conflicts concerning current clients.

There is no general prohibition against acting for multiple clients in the same matter, however it is generally not advisable to undertake simultaneous representation (even in non-litigious matters). Solicitors must assess the potential in the circumstances for the various clients' interests to diverge resulting in an actual conflict of interest.

Acting for multiple parties in criminal law matters is usually not advisable considering the nature of the representation and the likelihood that the clients' interests may diverge at a later date. (refer to LIV *Guidelines in the Representation of the Co-Accused*)

## 3. Conflict concerning a solicitor's own interests:

The same principles as those outlined in paragraph 1 of this guideline apply to conflicts concerning a solicitor's own interests.

A solicitor must act in the best interests of the client and remain independent, unaffected by bias or the solicitor's personal interests. This is because the solicitor is considered to be in a dominant position, where the exercise of undue influence, (intentional or otherwise) places the interests of the solicitor in conflict with the duties owed to the client.<sup>4</sup>

### Imputed Knowledge:

Duties to the client are not only owed by the individual solicitor, but also by the firm. Accordingly, a rebuttable presumption exists whereby a conflict involving an individual solicitor will extend to the firm, unless the firm can provide satisfactory evidence that the presumption should not apply. Such evidence may include the establishment and operation of an effective information barrier.<sup>5</sup>

The requirements of an effective information barrier are onerous and should be constructed with regard to the particular circumstances of each matter and in consultation with the information barrier guidelines.

These principles apply despite the difficulties which may be caused for solicitors moving between firms or where firms amalgamate.

## How can we help you?

Visit the Ethics & Professional Practice Department's website at:

<http://www.liv.asn.au/Professional-Practice/Ethics>

These are guidelines only and do not have the force of law. A solicitor must comply with the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* and the *Uniform Law (Victoria)*

To discuss concerns about conflict of interest contact the Ethics & Professional Practice Department on +61 3 9607 9336.

*Adopted by the Council of the Law Institute of Victoria on 15 September 2016*

<sup>4</sup> Rule 12, Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

<sup>5</sup> Rule 10.2 and 11.4, Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015