



# Referral Fees Guidelines

## Introduction

A solicitor has an ethical obligation not to engage in conduct where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor except in certain permitted circumstances.<sup>1</sup> The purpose of these guidelines is to outline for solicitors their ethical obligations in relation to referral fees being received or paid by a solicitor. Transparency and informed consent are the key requirements. The key requirements are:

- (1) Full disclosure
- (2) Advise the client's right to refuse
- (3) Obtain informed consent, preferably in writing (This will usually require disclosure of the amount.)

## Solicitor receiving a referral fee

A solicitor may receive a financial benefit from a third party in relation to any dealing where the solicitor represents a client, or from another service provider to whom a client has been referred by the solicitor, only if the solicitor advises the client that a commission or benefit is or may be payable to the solicitor in respect of the dealing or referral and the nature of that commission or benefit AND that the client may refuse to accept any such referral.<sup>2</sup>

## Full Prior Disclosure and Informed Consent

Full prior disclosure by the solicitor to the client (preferably in writing) together with informed consent by the client are prerequisites for the operation of this rule. Although there is no precise formula for determining whether a client has sufficient appropriate information upon which to provide informed consent, it is a question of fact in all the circumstances of each case. The information the client requires depends on the nature of the commission or benefit, the sophistication of the client, and the nature of the material risks involved.<sup>3</sup>

The client should be made aware in writing of the precise nature of the proposed commission or benefit, including how the solicitor's receipt of it may create a potential conflict of interest, the potential disadvantage to the client, and the fact that the client may use the services of an alternative service provider who does not have a potential conflict of interest.<sup>4</sup> It would be wise for a solicitor receiving a referral commission or benefit to advise the client of their right to seek independent legal advice before giving informed consent. In addition, case law requires scrupulous disclosure of any fee or commission to be received as a pre-requisite to informed client consent.<sup>5</sup>

## Secret Commissions

In Victoria, it is a crime for an agent, including a solicitor, to corruptly receive or solicit from any person for himself or for any other person any valuable consideration:

- (a) the receipt or any expectation of which would in any way tend to influence him to show or to forbear to show favour or disfavour to any person in relation to his principal's affairs or business; or
- (b) the receipt or any expectation of which would in any way tend to influence him to show or to forbear to show favour or disfavour to any person in relation to his principal's affairs or business;<sup>6</sup>

## Solicitor paying a referral fee

A solicitor may pay a fee to a third party for referring a client to the solicitor provided that the solicitor has first disclosed the payment or financial benefit to the client.<sup>7</sup> Full disclosure must be made to the client before the solicitor commences acting. Preferably, such disclosure should be in writing and

<sup>1</sup> *Legal Profession Uniform Law Australian Solicitors' Conduct Rules* 2015 (Cth) R12.1

<sup>2</sup> *Legal Profession Uniform Law Australian Solicitors' Conduct Rules* 2015 (Cth) R12.4.3

<sup>3</sup> *Law Council of Australia, Australian Solicitors' Conduct Rules Commentary* 2013 pages 21-22

<sup>4</sup> *Ibid*

<sup>5</sup> *Lawyers' Professional Responsibility*, G.E Dal Pont, Thomson Reuters, 6<sup>th</sup> Edition, paragraph 6, 115

<sup>6</sup> *Crimes Act 1958 Vic*, Section 176(1)

<sup>7</sup> *Legal Profession Uniform Law Australian Solicitors' Conduct Rules* 2015 (Cth) R12.4.4

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acknowledged by the client in writing (although client consent is not required by the rule).

A solicitor must consider whether such an arrangement could lead to a conflict between the solicitor's duty of loyalty owed to the client and any obligation owed by the solicitor to the referrer and the self-interest of the solicitor in receiving such referrals.<sup>8</sup>

## How can we help you?

Visit the Ethics & Professional Practice Department's website at:  
<https://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 Act (Victoria) 2014* and the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*.

To discuss concerns about referral fees, contact the Ethics & Professional Practice Department on (03) 9607 9336.

*Adopted by the Council of the Law Institute of Victoria on 27 July 2017.*

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<sup>8</sup> *Queensland Law Society Guidance Statement No. 3 "Paying Referral Fees and Rule 12.4.4 Australian Solicitors' Conduct Rules 2012"* (Published 30 June 2015)