



Guidelines for the Representation of Co-Defendants In Criminal Proceedings

1. A solicitor or law practice (which includes Victoria Legal Aid¹) must not act for two or more clients who are defendants in the same criminal proceedings if there is an actual or foreseeable conflict of interest between the clients.²

2. An actual or foreseeable conflict of interest cannot be cured by:

- (a) creating artificial barriers so that each defendant client is represented by a different solicitor of the firm; or
- (b) by the briefing of separate counsel or a separate solicitor advocate for each defendant client.

3. While there is no prohibition on a solicitor acting for co-defendants, there can be a greater potential in criminal proceedings for conflicts of interest to arise, and such conflict is more likely to be latent. Acting for co-defendants may affect the conduct of the defence of each. A solicitor may hesitate to mention the good character of one defendant in case it raises doubts about the character of the other defendant(s). It may be difficult to canvass different verdicts for each.³

Co-defendants often have different levels of involvement in the matter and may seek to shift blame. They may have different motivations, histories and levels of intelligence. Some may want to plead guilty to get a reduced sentence, and in fact a solicitor may be obliged to inform a client of the benefits of an early plea or of

informing on a co-defendant.⁴ It may not be possible to properly discharge ethical duties because of these differences, and the courts have discouraged the practice of multiple representation.⁵

4. While rule 11.3 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules* permits a solicitor or law practice to act for current clients in the same or related matters, in certain circumstances and where each has given informed consent, it would seem that the rule is better directed to civil litigation and is far less relevant to criminal matters. In criminal matters client consent to the potential or present conflict may carry little weight, as many defendants are unable to fully appreciate the nature and repercussions of conflicts of interests and therefore unable to give informed consent. Such consent focuses on the understanding of the client, and a prudent solicitor will urge an unsophisticated client to seek independent legal advice.⁶ It is the solicitor's responsibility to ensure that the client understands the risks involved and agrees to the multiple representation.

The Law Institute of Victoria has prepared an Informed Consent Guideline which should be read in conjunction with this guideline.

5. A subsequent divergence between client interests may have serious repercussions for the defendants and the administration of justice as the solicitor must cease acting for each

¹ *Legal Aid Act 1978* (Vic) section 16(2)(a)

² *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Cth) r 11.1

³ *Lawyers' Professional Responsibility* G.E. Dal Pont Thomson Reuters, Sixth Edition, 2017, p265

⁴ Queensland Law Society *The Australian Solicitors Conduct Rules 2012 in Practice: A Commentary for Australian Legal Practitioners* 1st Edition, 2014, p45

⁵ Law Council of Australia, *Australian Solicitors' Conduct Rules Commentary* August 2013, p16

⁶ *Ibid*, p17

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defendant. Further, there may be grounds for setting aside a conviction for a miscarriage of justice.⁷

6. In the event that a solicitor agrees to act for two or more clients who are defendants in the same criminal proceedings, the solicitor should (as part of obtaining informed consent⁸) advise the clients as soon as is reasonably practicable in relation to the risks and consequences that may flow if a conflict subsequently arises in the course of the proceedings, and should record the fact of such advice in writing.

7. In compliance with paragraph 6, a solicitor may provide defendant clients with a copy of the following information.

Information for those jointly charged (co-defendants)

This notice provides important information if you have been charged with another person(s) for the same crime. If this is your situation, then you need to make a decision about which solicitor will represent you in court.

You may all be represented in court by the one solicitor or firm of solicitors only if there is no current or likely future conflict of interest between you and any other person who has been charged with you.

In making this decision you need to consider that if you are found guilty, the court has to decide whether you played a major or a minor role in the crime to determine your penalty.

If there is likely to be an argument between you and any other person charged with you about your role in the crime, then you should be represented in court from the start of your case by a different solicitor or firm of solicitors to any other person charged with you.

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 Application Act 2014* and the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* and any other applicable rules or legislation.

To discuss concerns about representing defendants contact the Ethics & Professional Practice Department on (03) 9607 9336.

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

⁷ *Lawyers' Professional Responsibility*, G.E. Dal Pont Thomson Reuters, Sixth Edition, 2017, p147

⁸ Refer to the LIV "Informed Consent Guidelines"