

Guidance Statement No. 12 – Conflicts of Interest in Criminal and Crime & Corruption Commission Proceedings (Published 6 July 2018)

1. Introduction

1.1. Who should read this Guidance Statement?

This Guidance Statement is for solicitors and law practices.

1.2. What is the issue?

This Guidance Statement considers conflicts of interest regarding multiple co-accused in criminal proceedings, in light of the recent judgment of *R v Pham* [2017] QCA 43 and rule 11 of the *Australian Solicitors Conduct Rules 2012* ('ASCR'). In particular, *Pham* confirms that *"unless there is no possibility of conflict existing or emerging, and such cases will be rare, co-defendants should have separate legal representation."*¹

Additionally, consideration is given to conflicts that may arise through firms representing multiple people being investigated in the same operation by the Crime and Corruption Commission. Of particular focus is the effectiveness of the formerly labelled "Chinese Walls", now referred to as information barriers, in combating such conflicts within legal firms.

1.3. Status of this Guidance Statement

This Guidance Statement is issued by the Queensland Law Society ('QLS') Ethics Centre for the use and benefit of solicitors.

This Guidance Statement does not have any legislative or statutory effect. By having regard to the content of this Guidance Statement it may be easier for you to account for your actions if a complaint is later made to the Legal Services Commission.

This Guidance Statement is not legal advice, nor will it necessarily provide a defence to criminal charges or complaints of unsatisfactory professional conduct or professional misconduct.

This Guidance Statement represents a standard of good practice and is endorsed by the QLS Ethics Committee as representing a standard of good practice, following consultation with the QLS Criminal Law Committee.

¹ *R v Pham* [2017] QCA 43, [60].

2. Ethical principles

ASCR

11. Conflict of duties concerning current clients

- 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 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 confidential information of 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;
 - 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 that the duty of confidentiality to other client(s) is not put at risk and the parties have given informed consent.

3. *R v Pham* [2017] QCA 43

- The facts were that a shipping container holding wooden altars was detected by customs officers as holding 33 kilograms of pure heroin valued at between \$10M and \$20M. Officers substituted an inert white powder, listening, and tracking devices in the altars before resealing them. After being delivered and then transported by the co-accused to a shed near Pham's house, listening devices detected loud noises and conversations consistent with co-defendants Tran and Nguyen dismantling the altars. Police raided the shed finding that the substituted white powder had been removed from the altars, with three pairs of used white gloves located nearby.
- Pham, Tran, Nguyen and another man, Dang, were charged and were represented by the same firm. One solicitor from that firm had carriage of both Pham's and Dang's cases, while another solicitor from the same firm had carriage of Tran's and Nguyen's cases. All four co-defendants were to be tried together.
- On the eve of the trial, the charge against Nguyen was withdrawn, while Dang pleaded guilty on the first day of the trial. The remaining co-accused, represented by the same firm but with different trial counsel, were each convicted after an eight-day trial of attempted possession of a commercial quantity of an unlawfully imported border-controlled drugs.
- Tran gave evidence at the trial that he believed he was helping a friend move furniture, in exchange for \$100, and that Dang had informed him the altars contained tobacco, and on this premise Tran fetched a hammer to dismantle the altars. He claimed to have no knowledge of the heroin. Pham led no evidence, with his counsel arguing Dang had also told him the altars contained tobacco, and that he also had no knowledge of the heroin.
- On appeal, it was argued by Pham that he was deprived of a fair trial because of a conflict of interest. Pham had expressed a lack of confidence in his legal representatives on the eve of the trial. On appeal, he adduced evidence that the firm did not explain their duties to disclose all relevant information; meaning his instructions were disclosed to his co-defendants. His consent was not sought regarding this disclosure. However, he said he was aware another solicitor at the firm was representing Dang. While the arguments advanced regarding this conflict were dismissed by the Court of Appeal, the other judges endorsed McMurdo P's judgment discussing the danger of representing co-accused at both trial and sentence.

The decision

Her Honour stated that **unless there is no possibility of a conflict existing or emerging, and such cases will be rare, co-defendants should have separate legal representation**. The practice was described as being "fraught with danger", with the list of possible conflicts being far from exhaustive, exacerbated by the unpredictable nature of criminal proceedings. Some such conflicts were said to include:

- the possibility that due to varying degrees of culpability being attributed to co-defendants, more dominant co-defendants have an advantage by manipulating less dominant defendants to give instructions to their own detriment;
- where it may conflict with a co-accused's interests for lawyers to advise other co-accused of the value of a guilty plea and cooperation in mitigating during sentencing, in light of a strong prosecution case;

- unanticipated submissions and evidence, prejudicing one or more co-accused are apt to cause conflicts, leading to costly adjournments and mistrials;
- *McMurdo P* held it was not an answer, in these instances of unpredictable conflict, for a solicitor or barrister to simply withdraw when it arises. Not only is this costly, but it undermines public confidence in the legal profession, and in turn the legal system.

Her Honour stated these observations applied to both solicitors and barristers. This means the common practice of a solicitor simply briefing counsel regarding several clients is not a solution. Additionally, having different solicitors from one firm acting for co-accused is also not a solution.

4. In what circumstances can a firm represent two current clients, and avoid conflicts of interest?

The Law Institute of Victoria has released guidelines² relating to the representation of co-accused, stating that a practitioner of a firm cannot act for co-accused in a criminal matter if there is an actual or foreseeable conflict of interest between the clients.

The guidelines state that the practitioner must advise the clients of the risks and consequences of the same firm or practitioner representing co-accused as soon as reasonably practicable, and that the provision of such advice should be recorded in writing. The guidelines also recommend that certain information, adopted by the Law Institute, should be provided to such co-accused advising that if there is or likely to be, conflict regarding the accused's role and culpability in the crime, co-accused should be represented by different solicitors.

As to the use of information barriers, rule 11.4 of the ASCR provides that 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. However, where the firm attempts to act for two or more parties who have, or may have, adverse interests in criminal or similar proceedings, it creates a conflict which it is not likely an information barrier will be able to overcome. It should also be noted that an information barrier may not address the issue of loyalty which is at the heart of the administration of justice for advocates.

It is important to note that the ASCR is not a code and is subject to the development of the common law, including the decision in *R v Pham*. Additionally, the guidelines discussed above from the Law Institute of Victoria note that artificial barriers were not appropriate at curing any actual or foreseeable conflict nor were briefing separate counsel, or having separate solicitors advocate for each co-accused.

5. What are the rules surrounding joint-representation at Crime & Corruption Commission hearings?

This typically occurs at the Queensland Crime and Corruption Commission ('CCC'). While these people are connected through their involvement in the operation, the particular circumstances which give rise to their involvement may be entirely separate. In this situation, the clients have not been charged with offences but due to the prescriptive (as opposed to the proscriptive) nature of the ASCR, the inquisitorial nature of the CCC and the broad powers of the Commissioner, there

² Law Institute of Victoria, 'Guidelines in the Representation of the Co-Accused' (2002) 76(7) *LJ* 25, 25.

should be a similar level of caution (as is in the courts) in the same practitioner or firm representing more than one person.

A person giving evidence at either a public or private CCC hearing may be legally represented. However, the Commissioner released guidelines on 20 March 2017 indicating his reluctance to allow the same practitioner or firm to represent more than one person at a hearing, attributing this to the high potential for conflicts of interest to arise.

In order to represent more than one person, the guidelines indicate the firm or practitioner must lodge written submissions to the Commission demonstrating:

- there is some reasonable purpose for seeking representation of that kind;
- the most senior lawyer involved in seeking to represent the two or more persons is able to assure the Commission that no conflict of interest is present or anticipated; and
- all of the lawyers involved in representing two or more persons give an undertaking, through the most senior lawyer, to inform the Commissioner immediately upon recognising that a conflict of interest has arisen.

In addition, the Commissioner has the discretion to require a legal practitioner provide a statutory declaration to the effect that no conflicts of interest have arisen through their joint representation of persons. Any decision made in regard to the above application may be reconsidered by the Commissioner at any time as fresh evidence comes to light, or the evolving subject matter of the hearing gives rise to a potential conflict of interest.

6. More Information

Solicitors are also referred to:

- Queensland Law Society, *The Australian Solicitors Conduct Rules 2012 in Practice: A Commentary for Australian Legal Practitioners*, Queensland Law Society (2014) 8.
- Justice Philip McMurdo, '[Legal Ethics – Recent Appellate Cases](#)' (Speech delivered at QLS Senior Counsellors' Conference 2017, Law Society House, 1 September 2017).

For further assistance please contact an Ethics Solicitor in the QLS Ethics and Practice Centre on **07 3842 5843** or ethics@qls.com.au.