

Don't get caught between the devil and the deep blue sea – when duties collide¹

Conflict between duties owed to two or more current clients raise difficult ethical issues. Our duties of confidentiality and acting in the best interests of a client (loyalty) are the two duties that are most likely to collide.² We must remember that we are agents and fiduciaries of our clients.

Although we can accept instructions to act for two or more current clients in the same or related transaction (whether a commercial or personal matter), we must keep in mind the adage that “we cannot serve two masters”.³ Often instructions from multiple clients will occur when there is a “communality of interests”⁴ and the aim is to reduce transactional costs. In such situations we need to scope our retainer to manage potential conflict.⁵

Where, however, there is a “diversity of interests”⁶ or where the interests of clients do not have “communality” then it is for us to take a step back and identify for each client the actual and potential collision in the duties we owe.⁷ This is reflected in the *Australian Solicitors Conduct Rules 2012 (ASCR)*: 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 client⁸, then we must:

- make each client aware that we act for another client; and
- obtain the ‘informed consent’ of each client to act in such circumstances.⁹

This requires that we advise each client of the actual and potential conflict in duties, making certain that we do not prefer one client’s interests over the other. We must ensure that our own commercial interests do not conflict with our obligation to serve the best interests of a client.¹⁰

When we cannot act in the best interests of a client without compromising the interests of the other(s), then we should not act for all. Prudence requires that all the difficulties that the engagement of two or more clients may bring must be raised with each before an engagement commences.

As Lord Walker observed in *Hilton v Barker Booth & Eastwood (a firm)*¹¹:

“[I]f a solicitor is unwise enough to undertake irreconcilable duties it is his own fault, and he cannot use his discomfiture as a reason why his duty to either client should be taken to have been modified.”

¹ From the decision of V.K. Rajah JA in the *Law Society of Singapore v Uthayasurian Sidamaram* [2009] 4 SLR(R) 674, [36] (‘Sidamaram’).

² *Australian Solicitors Conduct Rules 2012* (‘ASCR’) **Rules 9** and **4.1.2**.

³ “No one can serve two masters. Either he will hate the one and love the other, or he will be devoted to the one and despise the other”. Matthew 6:24.

⁴ *Lie Hendri Rusli v Wong Tan & Molly Lim* [2004] 4 SLR(R) 594, [51] (‘Lie’).

⁵ Jackie Knowlman, “Give me 45 minutes and I will make you a better succession lawyer” – paper delivered to the 11th Annual Succession Law Conference 2012, pp. 3 – 6.

⁶ *Sidamaram*, [34].

⁷ *Ibid.*

⁸ **Rule 11.2** ASCR.

⁹ **Rule 11.3** ASCR.

¹⁰ **Rules 12.1** and **4.1.1** ASCR

¹¹ [2005] 1 WLR 56, [46].

Irreconcilable duties create “an intractable catch-22 conundrum”¹² for us. The duties of confidentiality and loyalty (a duty to disclose material information) are uneasy bed fellows when we act for two or more clients in the same or related matters. How do you reconcile the need to disclose an unusual incident in a transaction with the duty to maintain confidentiality?

With multiple clients we are faced with questions such as: *What to disclose? When to disclose? Whom to disclose? How to disclose? What to confirm? How to confirm? What to advise? When to advise?*¹³ These conundrums raise not only ethical but contractual and fiduciary problems. We will need to rely on our own “intuitive common sense”¹⁴ to navigate the problems that multiple representations may cause.

As observed in *Lie Hendri Rusli v Wong Tan & Molly Lim (Lie)*¹⁵:

“Solicitors should not act in a matter where there is or will be a real risk of potential conflicts of interests or actual conflict between different clients in a transaction. **In the final analysis, it is the integrity and common sense of the solicitor that will provide the answer as to whether to proceed in any proposed transaction – a balance between principle and expediency must be struck**” [*emphasis added*].

When striking the balance between principle and expediency, think about the following matters¹⁶:

1. Where clients’ interests lack communality then we should not ordinarily agree to act. It is where there is a diversity of interests that the duties of loyalty and confidentiality are more likely to collide.
2. Inform the client(s) as to the risks and consequences of multiple representations *before* any engagement commences. Identify actual or potential conflict of duties issues. When we seek ‘informed consent’ we must ensure that our disclosure is ‘conscientious, comprehensive and made with complete candour’¹⁷. In many circumstances it may be necessary to recommend the client(s) obtain independent legal advice.
3. We cannot prefer one client’s interests over another. The scoping of the engagement must make it clear that the parties cannot have secrets between them. We need to point out that this may mean that we will need to draw a client’s attention to problems that we would otherwise be obliged to retain confidentiality. All potential pitfalls will be exposed, notwithstanding that this might incur the displeasure of other clients in the transaction.¹⁸
4. Where our own interests become adverse to any client we must withdraw and advise all clients to seek independent legal advice.¹⁹
5. As a practical step, document each stage of the transaction. Confirm all advice in writing. Take appropriate and detailed file attendance notes.
6. Before the commencement of the retainer, scope the terms on which legal services will be delivered.

¹² *Sidambaram*, [35].

¹³ *Lie*, [47].

¹⁴ *Sidambaram*, [40].

¹⁵ *Lie*, [47].

¹⁶ These issues are drawn from guidelines suggested by VK Rajak JA for the Court in *Sidambaram*, [52] – [53].

¹⁷ *Ibid*, [52(b)].

¹⁸ *Ibid*, [52(c)].

¹⁹ **Rule 12.1** ASCR.

7. Professional independence must be maintained. We are not a mere post box for communications. We have responsibilities throughout the retainer.
8. It is a prime duty that we avoid a conflict in our duties – use common sense. Where an actual conflict arises during concurrent representation we should cease to act for all clients. Such a conflict can affect our ability to recover professional costs from the client and the availability of the retaining lien.²⁰
9. Prudence also suggests that we should reflect before accepting multiple engagements in the same or related matter, because:
 - we risk being unable to recover costs for work performed;
 - potential suits or actions for breach of contract, breach of fiduciary duties and negligence;
 - client unhappiness;
 - disqualification from future representation if a dispute arises;
 - the risk of disciplinary action; and
 - the prospect of professional indemnity excesses.²¹

As the court observed in *Sidambaram* the appropriate risk avoidance strategy is – “when in doubt, don’t”.²²

Stafford Shepherd
Senior Ethics Solicitor
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²⁰ Gino Dal Pont, *Lawyers’ Professional Responsibility* (Thomson Reuters, 5th ed, 2013), 241. **Rule 11.5** ASCR is exceptional.

²¹ *Ibid.*

²² *Sidambaram*, [44].