

Guidance Statement No. 18 – Inadvertent disclosure (Published 20 April 2020)

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?

The purpose of this Guidance Statement is to outline what a practitioner should do if they inadvertently receive confidential information from another solicitor or a third party under the *Australian Solicitors Conduct Rules 2012* ('ASCR') and the common law.

1.3. Status of this Guidance Statement

This Guidance Statement is issued by the Queensland Law Society ('QLS') Ethics and Practice 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 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.

2. Ethical principles

ASCR

Rules 3, 5 and 31 provide:

3. Paramount duty to the court and the administration of justice

- 3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

5. Dishonest and disreputable conduct

- 5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:

5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice;
or

5.1.2 bring the profession into disrepute.

31. Inadvertent disclosure

- 31.1 Unless otherwise permitted or compelled by law, a solicitor to whom material known or reasonably suspected to be confidential is disclosed by another solicitor, or by some other person and who is aware that the disclosure was inadvertent must not use the material and must:
- 31.1.1 return, destroy or delete the material (as appropriate) immediately upon becoming aware that disclosure was inadvertent; and
 - 31.1.2 notify the other solicitor or the other person of the disclosure and the steps taken to prevent inappropriate misuse of the material.
- 31.2 A solicitor who reads part or all of the confidential material before becoming aware of its confidential status must:
- 31.2.1 notify the opposing solicitor or the other person immediately; and
 - 31.2.2 not read any more of the material.
- 31.3 If a solicitor is instructed by a client to read confidential material received in error, the solicitor must refuse to do so.

This Rule imposes a professional obligation not only upon the principals of a legal practice but also on the solicitor within that legal practice who has designated responsibility for a matter.

3. Issue

A solicitor is under a duty to pass on to a client (and use) all information which is material to the client's interests, regardless of the source unless the solicitor subsequently discovers that this information has been obtained accidentally, unlawfully, improperly or surreptitiously.¹ This guidance statement considers what the solicitor should do if they receive such confidential information (or reasonably suspect is confidential information) in this way.

4. Inadvertent disclosure

Rule 31 of the ASCR clearly sets out what you should do if you receive confidential but inadvertently disclosed material the use of which is not otherwise permitted or compelled by law. Inadvertent disclosure occurs where we receive material which we know or *reasonably suspect* to be confidential and we are aware that the material has been disclosed inadvertently. If these circumstances exist then:

- upon receipt you must not use or read the material,
- you must return, destroy or delete the material immediately; and
- you should notify the sender (whether a solicitor or otherwise) of the steps you have taken to prevent inappropriate use of the material.

On occasions, you may only become aware that the material is confidential and has been disclosed inadvertently after you have commenced reviewing in whole or in part the document or material received. In those circumstances, you should notify the sender immediately and follow the above steps. Examples of such documents include advice from counsel, documents addressed to the other side and documents which clearly indicate their confidential nature.²

¹ Law Institute of Victoria, *Inadvertent Disclosure Guidelines* (17 December 2015) <<https://www.liv.asn.au/Professional-Practice/Ethics/Ethics-Guidelines>>.

² *Ibid.*

If after receipt of the confidential but inadvertently disclosed document you are instructed by your client to review it, you must refuse to do so.³ If the clients insists, you may:

- request permission from the other party to use the material; or
- form the view from case law that use is permitted, or preferably obtain a court order to permit use of the disclosed confidential documents;⁴ or
- need to consider whether you are able to continue with the retainer.⁵

You should also consider informing your client that:

- a court may grant an injunction preventing the overt use of any such information and
- a court may grant an injunction prohibiting the solicitor from continuing to act if they are in possession of such confidential information belonging to the other side.⁶

5. Ethical duties to colleagues

A solicitor should not seek to obtain access to information from correspondence and documents which the solicitor knows belong to or are intended for the other side.⁷ A solicitor also has to take reasonable efforts⁸ to preserve confidential information in their possession and to prevent inadvertent or unauthorised access to such information.

For example, practitioners should be mindful that information contained in the metadata of a document sent by another party or practitioner can contain material not intended to be disclosed. A specific attempt to ascertain details such as iterations, contributors or timeframes where doing so would constitute, “a knowing and deliberate attempt by the recipient to acquire confidential and privileged information” should not occur.⁹ Not all metadata in a document will, however, be ‘confidential and privileged information’ and the key to determining whether it is appropriate to view it will be whether or not it can be inferred that it was intended to be viewed by the recipient.¹⁰ Care should also be taken when creating a document to ensure that any readily accessible metadata does not contain confidential or privileged material.

6. Waiver of client legal privilege

The context in which mistaken disclosure occurs is of importance. In *Expense Reduction*,¹¹ the High Court noted that the material containing the privileged documents inadvertently disclosed only “came into possession of the Armstrong parties as a result of the process of court-ordered discovery.”¹² It was noted that the courts should not be concerned with the correction of an error unless there is a dispute. In the case of inadvertent disclosure, “this should not often arise”¹³ as

³ Stafford Shepherd, ‘What is inadvertent disclosure?’, *Queensland Law Society* (Web Page, 2 April 2015) <http://www.qls.com.au/Knowledge_centre/Ethics/Resources/Inadvertent_disclosure/What_is_inadvertent_disclosure>.

⁴ Law Institute of Victoria, *Inadvertent Disclosure Guidelines* (17 December 2015) <<https://www.liv.asn.au/Professional-Practice/Ethics/Ethics-Guidelines>>.

⁵ Queensland Law Society, *Guidance Statement No. 8 – Termination of a retainer* (31 August 2017) <http://www.qls.com.au/Knowledge_centre/Ethics/Guidance_Statements/Guidance_Statement_No_8_-_Termination_of_a_retainer>.

⁶ Law Institute of Victoria, *Inadvertent Disclosure Guidelines* (17 December 2015) <<https://www.liv.asn.au/Professional-Practice/Ethics/Ethics-Guidelines>>.

⁷ *Ibid.*

⁸ G E Dal Pont, *Lawyers’ Professional Responsibility*, (Thomas Reuters, 6th edition, 2017) 360 [10.145].

⁹ *Ibid* 419 [11.295].

¹⁰ For example, viewing the ‘Properties’ of a document, often used to record authorship and copyright ownership, would not ordinarily be considered confidential, but the circumstances of each disclosure will need to be considered.

¹¹ *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management & Marketing Pty Ltd* (2013) 250 CLR 303.

¹² *Ibid* 319 [43].

¹³ *Ibid* 320 [50].

Rule 31 states so clearly what a solicitor should do if they receive such material which is known or reasonably suspected to be confidential.

The Court determined that privilege had not been waived, ordered that the privileged documents be delivered to the appellants and all copies deleted and written confirmation of compliance be provided. The Court also noted the following:

- their decision is predicated on the philosophy described in r 5 of the *Uniform Civil Procedure Rules 1999* (Qld) that the purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense;
- such a mistake which occurred in the course of discovery needs to be corrected and the parties continue with their preparation for trial;
- the fact of mistake was not disputed by either party though the respondent claimed waiver;
- there was no delay (of time) of any significance in the appellant advising the respondent of the mistake;
- the respondent would not appear to be prejudiced in returning the material; and
- any allegation of waiver was “going to turn on a legal, technical argument tangential to the main proceedings, and should not have been made”¹⁴ in this instance.

Rule 31 does not confine itself to material that may be subject to client legal privilege but extends to information and material that is confidential to a client.

Waiver of privilege is:

- an intentional act done with knowledge;
- where the person abandons a right (or privilege) by acting in a manner inconsistent with that right (or privilege);
- expressed or implied;
- in some cases, imputed by law with the consequence that privilege is lost even though this was not the intention of the party losing privilege – this occurs where the actions of that party are plainly inconsistent with the maintenance of confidentiality which privilege is intended to protect;¹⁵
- not immediate purely because a privileged document is disclosed.¹⁶

In *Glencore*,¹⁷ the High Court noted that client legal privilege:

- is a rule of substantive law and not merely a rule of evidence;¹⁸
- is an important common law immunity from compulsion to produce documents that evidence confidential communications about legal matters between lawyers and clients;¹⁹
- promotes the public interest because it encourages the client to retain a lawyer and enables the client to make full and frank disclosure of all relevant circumstances to the lawyer;²⁰
- is not in itself a right that may found a cause of action²¹ which can be asserted in order for relief in the nature of an injunction (to restrain the use of and recover privileged

¹⁴ Ibid 324 [63].

¹⁵ Ibid 315 [30].

¹⁶ Ibid 317 [36].

¹⁷ *Glencore International AG v Commissioner of Taxation* [2019] HCA 26.

¹⁸ Ibid [21], [23].

¹⁹ Ibid [23].

²⁰ Ibid [27].

²¹ Ibid [12].

documents) to be granted²² - once privileged communications have been disclosed, the juridical basis for relief in equity is confidentiality.²³

7. More Information

Solicitors are also referred to the Queensland Law Society, *The Australian Solicitors Conduct Rules 2012 in Practice: A Commentary for Australian Legal Practitioners*, Queensland Law Society (2014).

For further assistance, including difficulties you may be experiencing as either a supervisor or as a practitioner who is being supervised, please contact an Ethics Solicitor in the QLS Ethics and Practice Centre on **07 3842 5843** or ethics@qls.com.au or a QLS Senior Counsellor.²⁴

²² Ibid [36], [40].

²³ Ibid [34].

²⁴ Queensland Law Society, 'QLS Senior Counsellors' (Web Page) <http://www.qls.com.au/Becoming_a_member/Member_benefits/Professional_benefits/QLS_Senior_Counsellors>.