

NON-BINDING ETHICS RULING (2019) 4

NON-BINDING

ETHICS RULING OF: Ethics Committee, Queensland Law Society

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CATCHWORDS: NON-BINDING ETHICS RULING – QUEENSLAND LAW SOCIETY – ETHICS COMMITTEE – CONFLICT – CONFIDENTIAL INFORMATION – LAWYERS – INFORMATION BARRIERS – whether Firm B is conflicted from acting in an application for further provision of an estate in circumstances where Firm B previously acted for the deceased in the sale of her interest in a property.

LEGAL RESOURCES: *Australian Solicitors Conduct Rules 2012*
D & J Constructions Pty Ltd v Head (1987) 9 NSWLR 118
Darveniza v Darveniza & Drakos as Executors of the Estate of Bojan Darveniza and Ors [2014] QSC 37
In Re A Firm of Solicitors (No. 2) [1997] Ch 1
Information Barrier Guidelines prepared by the Law Society of New South Wales in consultation with the Law Institute of Victoria, and adopted by the Council of the Queensland Law Society
Kallinicos v Hunt (2005) 64 NSWLR 561
Prince Jefri Bolkiah v KPMG (a firm) [1999] 2 AC 222
Queensland Law Society Non-Binding Ethics Ruling (2018) 3
Singer v Berghouse [1994] HCA 40
Succession Act 1981 (Qld)
Village Roadshow Ltd v Blake Dawson Waldron [2003] VSC 505

INTRODUCTION

1. This is a non-binding ethics ruling by the Ethics Committee of the Queensland Law Society.
2. The ruling relates to a dispute between Firm A and Firm B. Firm A act for the executrix of a deceased estate (Client A), while the latter act for a disappointed beneficiary of that estate (Client B). The dispute relates to whether Firm B is conflicted from acting in an application for further provision from the estate in circumstances where Firm B previously acted for the deceased in the sale of her interest in a property.

FACTS

3. Firm B have provided a detailed and extensive statement of the facts, which are largely agreed by Firm A. Because of its length and its reference to accompanying documents, that statement of agreed facts was annexed to the original ruling distributed to the parties. In the interests of preserving privacy, that statement is not attached to this de-identified copy of the ruling. For present purposes, the Committee sets out, by way of background, an abridged version of the agreed facts.
4. The Deceased died in January 2017, leaving a will dated 22 March 2016. Client A was appointed executrix of the will and trustee of the estate.
5. Client B is the only daughter of the Deceased. The will left her a specific gift of “(the Deceased’s) *diamond rings, diamond earrings, her selection from (the Deceased’s) jewellery collection and any memorabilia she wishes to retain.*”
6. Two other smaller gifts were made to friends of the Deceased, with the residue of the estate being left to Client A and another friend as tenants in common in equal shares once a reverse mortgage had been discharged in full.
7. Client B first approached another firm, Firm C to act for her with a view to applying for further provision from the estate. During April to May 2017, correspondence ensued between Firm C and Firm A on behalf of Client A.
8. Firm C advised of Client B’s intention to commence proceedings for an order for provision in the event that a suitable deed of family arrangement was not entered into.
9. In response, Firm A noted that they had become aware that Firm C previously acted for the Deceased as recently as 2014, including in relation to disputed matters in which Firm C acted for the Deceased against other persons. As a result, Firm A contended that Firm C was in receipt of confidential information of their former client (the Deceased) “*which might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed.*” They went on to assert that that Firm C had obtained a detailed understanding of the Deceased’s assets and liabilities, her family relationships and difficulties with those family relationships, as well as of issues concerning her capacity. In particular, Firm A said that they understood that Firm C had obtained the Deceased’s financial records and bank records “*et cetera*”, as well as possessing knowledge of circumstances involving an alleged assault on the Deceased by a family member shortly before the Deceased executed her will.

10. Firm C denied that they were in a position of conflict and set out the facts on which they relied in that regard.
11. On 2 June 2017, Firm B wrote to Firm A, advising that they now acted for Client B and that she intended to make application for further provision from her late mother's estate under s 41(1) of the *Succession Act 1981* (Qld) ("Succession Act"). Further correspondence passed between the two law firms, with Firm A providing Firm B with, among others, a copy of the will, a list of the estate's assets and liabilities and copies of relevant tax invoices.
12. On 15 September 2017, Client B filed her application in the District Court of Queensland for further provision. The application and supporting affidavit of Client B were served under cover of Firm B's letter of 13 November 2017.
13. On 23 September 2017, Firm C wrote to Firm A, advising that they had been contacted directly by Client A, requesting a copy of the files where they had acted for the Deceased in respect of a property law settlement of a dispute with her sister. They also confirmed that they had withdrawn from the provision proceedings as a consequence of a perceived conflict. The requested files were subsequently provided to Client A's solicitors, Firm A.
14. In their letter of 19 March 2018, Firm A advised Firm B that Firm C had admitted that they were no longer able to act for Client B on the basis that there was a conflict because the Deceased was a previous client of theirs. Firm A went on to repeat against Firm B the same allegations they previously made against Firm C.
15. By letter to Firm A of 11 April 2018, Firm B confirmed that the Deceased had engaged their conveyancing team in relation to a sale in 2014. They rejected the contention that the conveyancing information could be reasonably considered to be material to Client B's application, and that, if disclosed, it would result in detriment to the executrix in the context of the proceedings. Firm B went on to ask Firm A to further explain their position and provide particulars.
16. In the same letter, the Firm B solicitor with the conduct of the matter, Solicitor B, stated that even if there were the potential to misuse confidential information (which was rejected), an effective information barrier was in place within Firm B's office. Solicitor B noted the she was based in the firm's city office, whereas the conveyancing file had presumably been handled by one of their regional offices. While she periodically visited that office, she said that her contact with the staff at the regional office was infrequent and spasmodic. She did not have physical access to the conveyancing file. Although she was able to access the electronic files of Firm B, her practice was "*not to waste time viewing files over which she has no direct responsibility.*" Besides that geographical separation, there was also structural separation, in that Solicitor B was part of the Firm B's Wills and Estate Team and had no association with the Conveyancing Team; she does not collaborate with the Conveyancing Team "*except on the rare occasion to hand a matter to that team the nature of which is outside her area of expertise.*" Solicitor B added that she had never viewed either the physical or electronic conveyancing file held by Firm B for the Deceased and undertook not to do so.
17. As to the current state of the provision proceedings, the Committee understands that the evidence of Client A by way of reply is still to be filed pending this referral to the Committee and the resolution of

the conflict issue. In the meantime, the parties have continued to exchange contentions on that issue. They consist of a mixture of fact and submissions and are set out in more detail later in this ruling.

THE AUSTRALIAN SOLICITORS CONDUCT RULES 2012 AND THE LEGAL PRINCIPLES

18. In an earlier ruling, the Committee set out the relevant legal principles pertinent to conflicts concerning former clients. For the reader's ease of reference, they are largely reproduced below.¹
19. The starting point for a consideration of the present issues is Rule 10 of the *Australian Solicitors Conduct Rules 2012* ("ASCR"), which provides:

10. Conflicts concerning former clients

*10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients, except as permitted by **Rule 10.2**.*

10.2 A solicitor or law practice who or which is in possession of confidential information of a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:

10.2.1 the former client has given informed written consent to the solicitor or law practice so acting; or

10.2.2 an effective information barrier has been established.

20. Confidential information is information "*which a) was originally communicated in confidence b) at the date of the later proposed retainer is still confidential and may reasonably be considered remembered or capable, on memory being triggered, of being recalled and c) relevant to the subject matter of the subsequent proposed retainer*".²
21. The term "*former client*" is broadly defined in Rule 44.22 of the ASCR to include, among others, a person that has previously instructed the solicitor or the solicitor's former law practice while the solicitor was at that former practice. It also includes a person who has provided confidential information to a solicitor, notwithstanding that the solicitor was not formally retained and did not render an account.
22. There being no suggestion that Client A, as executrix of the Deceased's estate, has provided her written consent to Firm B acting in the provision proceedings, the question arises as to whether the proposed information barrier is considered to be effective for the purposes of Rule 10.2.2.
23. The leading reference point for such questions is the *Information Barrier Guidelines* ("IBG") prepared by the Law Society of New South Wales in consultation with the Law Institute of Victoria, and adopted by the Council of the Queensland Law Society. It is instructive to highlight a number of the relevant provisions of the IBG.
24. Underlying the IBG is the fundamental principle that the court has an inherent jurisdiction to supervise the conduct of solicitors, as officers of the court, and may, in the interests of justice, restrain a solicitor from acting for a particular client. The relevant test is whether a fair-minded, reasonably informed

¹ See Queensland Law Society Non-Binding Ethics Ruling (2018) 3.

² *In Re A Firm of Solicitors (No. 2)* [1997] Ch 1, 9-10.

member of the public would conclude that the proper administration of justice requires that a solicitor should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice. That jurisdiction is to be regarded as exceptional and to be exercised with caution, with weight given to the public interest in a litigant not being deprived of the solicitor of choice without due cause.³

25. In considering whether an information barrier is effective, the Australian courts in commercial cases adopt the “reasonable and sensible possibility” test: the “tainted” individual must be *effectively* screened from the new matter so that there is *no real and sensible possibility* of misuse of the confidential information.⁴ Any risk warranting the intervention of the courts “*must be a real one, and not merely fanciful or theoretical. But it need not be substantial.*”⁵
26. The burden of establishing that there is no unacceptable risk is upon the law practice:

*Once it appears that a solicitor is in receipt of information imparted in confidence, the burden shifts to the solicitor to satisfy the Court on the basis of clear and convincing evidence that all effective measures have been taken to ensure that no disclosures will occur ...*⁶
27. While the courts may take into account commercial factors such as the inconvenience to a client who is forced to change solicitors mid-case, the ability to instruct a solicitor of choice, and the need for mobility of lawyers, those factors cannot alter the fact that a proposed information barrier is found otherwise to be ineffective.⁷
28. It is also clear from the IBG that the guidelines are intended to apply to all law practices. That said, it is acknowledged that it may be extremely difficult for a small firm to demonstrate compliance with the IBG as a question of fact, particularly the requirement to keep staff and files physically separate. Any resulting hardship is but one factor, but does not outweigh the importance of confidentiality.⁸
29. Guideline 1 provides that the law practice should have established, documented protocols for setting up and maintaining information barriers. Such protocols, which incorporate the IBG, should be part of the practice’s ongoing risk management and complaint prevention process.
30. The law practice should nominate an experienced practitioner with appropriate knowledge of the rules relating to conflicts as its compliance officer. He or she is to oversee each information barrier, monitor compliance and deal with any possible breach of an information barrier.⁹
31. Guideline 3 provides that the law practice should ensure that the client in the current matter acknowledges in writing that the law practice’s duty of disclosure to the client does not extend to any confidential information which may be held within the practice as a result of the earlier matter, and consents to the law practice acting on that basis. In other words, the new client would have to join in such an arrangement and give up his or her right to the information.¹⁰

³ *Kallinicos v Hunt* (2005) 64 NSWLR 561 (Brereton J).

⁴ See IBG, Common Questions 2.5.

⁵ *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, 236-7 (Lord Millett).

⁶ See *ibid*; *Village Roadshow Ltd v Blake Dawson Waldron* [2003] VSC 505 (Byrne J) (emphasis added).

⁷ See IBG, Common Questions 2.8.

⁸ See IBG, Common Questions 2.10.

⁹ See IBG, Guideline 2.

¹⁰ See IBG, Guideline 3; *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118, 122 (Bryson J).

32. The screened person should be clearly identified, with the compliance officer keeping a record of all screened persons.¹¹ Guideline 5 sets out the matters which the screened person's undertaking should address:
- (a) that they will not have, during the existence of the current matter, any involvement with the client or personnel involved with the current matter for the purposes of that current matter;
 - (b) that they have not disclosed, and will not disclose, any confidential information about the earlier matter to any person other than to a person in accordance with the instructions or consent of the client in the earlier matter, a screened person, or the compliance officer; and
 - (c) that they will, immediately upon becoming aware of any breach, or possible breach, of the undertaking, report it to the compliance officer, who will take appropriate action.
33. Personnel involved with the current matter should not discuss the earlier matter with, or seek any relevant confidential information about the matter from, any screened person. Such personnel should provide undertakings confirming that:
- (a) no confidential information about the earlier matter has been disclosed to them;
 - (b) they will not have, during the existence of the current matter, any involvement with a screened person for the purposes of the current matter;
 - (c) they will not seek or receive any confidential information about the earlier matter from a screened person or in any other way; and
 - (d) they will, immediately upon becoming aware of any breach, or possible breach, of the undertaking, report it to the compliance officer who will take appropriate action.¹²
34. Guideline 7 provides that contact between personnel involved in the current matter and screened persons should be appropriately limited to ensure that the passage of information or documents between those involved in the current matter and screened persons does not take place. The commentary on that guideline notes:
- The simplest way of complying with this guideline is by physical separation of offices and staff, whether on separate floors, separate buildings, or even different States. It must always be combined with appropriate separation or restriction of access to electronic information.*
- In D & J Constructions Pty Ltd v Head (1987) 9 NSWLR 11, Bryson J (at 123) pointed out that "wordless communication can take place inadvertently". Without enforced physical separation, staff may communicate inadvertently "by attitudes, facial expression or even by avoiding people one is accustomed to see. In MacDonald Estate, Sopinka J at 269 referred to the likelihood of inadvertent disclosure at "partners' meetings or committee meetings, at lunches or the office golf tournament, in the boardroom or the washroom"....*
- Where geographic separation is not possible, offices containing relevant files should be locked and/or signs should be placed on doors limiting access. In any event, all files should be clearly labeled (sic.) indicating restricted access.*

¹¹ See IBG, Guideline 4.

¹² See IBG, Guideline 6.

The law practice should implement an appropriate system for the use of facsimile machines, photocopiers and printers. For example, the law practice may offer undertakings that separate machines will be used for the current matter; that documents relating to the current matter will not be left unattended on those machines; and that any unwanted copies of documents will be appropriately destroyed.

35. Guideline 10 requires the law practice to have an ongoing education program in place. That should involve education for all personnel about the law practice's protocol for protecting confidential information and for setting up and maintaining information barriers. Additional education should be provided for individuals involved in matters affected by an information barrier, especially as to the arrangements in place for the particular case and sanctions for non-compliance.

ISSUES FOR THE COMMITTEE

36. The parties have agreed the questions for the Committee's consideration as follows:
- (1) *Whether or not [Firm B] have breached Rule 10 Australian Solicitors Conduct Rules 2012 and therefore is conflicted from acting for Client B, the daughter of the deceased in relation to her application for further provision from the deceased's estate in circumstances where [Firm B] have previously acted for the deceased in the sale of her interest in a property in 2014.*
 - (2) *Whether an effective information barrier has been established by [Firm B].*¹³
37. As mentioned already, there is no suggestion that Client A, in her capacity as executrix of the Deceased's estate, has given written consent to Firm B acting in the proceedings. The exception in Rule 10.2.1 is therefore not relevant in this instance.
38. Accordingly, the Committee considers the central issues to be:
- (a) whether Firm B are in possession of confidential information of the Deceased where that information might reasonably be concluded to be material to the provision proceedings and, if disclosed, might be detrimental to the Deceased's interests; and
 - (b) if so, whether Firm B has established an effective information barrier.

The Committee considers each of those questions below.

CONSIDERATION

Whether Firm B possess confidential information material to the provision proceedings and which, if disclosed, might be detrimental to the former client's interests

The former client and the onus of proof

39. It is incumbent on the party who seeks to restrain their former solicitor from acting in a matter for another client to establish "(i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own." That onus is not a heavy one.¹⁴

¹³ Email, Firm B to Firm A dated 19 November 2018 and email Firm A to Firm B dated 22 November 2018.

¹⁴ *Prince Jefri Bolkiah v KPMG (a firm)* [1998] UKHL 52, 8-9 (Lord Millett).

40. In the present case, the Deceased is the former client of Firm B. It is not contentious that Firm B have never acted for the Deceased's personal representative, Client A. In this instance, she stands in the shoes of the deceased former client. As such, she has authority over the estate, and is to be treated as if she were the former client. Just as the Deceased's interests were that her will be followed, so too does the executrix have responsibility for furthering those interests.
41. It therefore follows that Client A, as executrix of the estate, bears the relevant onus. In the context of the present dispute and ruling, the onus effectively rests with Firm A as the solicitors for Client A in her capacity as executrix of the estate.

The proceedings for further provision

42. Section 41(1) of the Succession Act relevantly provides that if a deceased dies and in terms of the will adequate provision is not made from the estate for the proper maintenance and support of, amongst others, the deceased person's child, the court may, in its discretion, on application by or on behalf of the child, order that such provision as the court thinks fit be made out of the deceased person's estate for such child.
43. The application requires the court to consider a two-stage process.
44. The determination of the first stage (often called the threshold or jurisdictional question) calls for "*an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc. appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.*"¹⁵ The totality of the relevant relationship includes the consideration of factors such as: any sacrifices made or services given by the claimant to or for the benefit of the deceased; any contributions made by the claimant to building up the deceased's estate; and the conduct of the claimant towards the deceased and of the deceased towards the claimant.¹⁶
45. At the second stage, if the court finds that the provision was inadequate, it must then consider what order for provision needs to be made. The determination of that stage (should it arise) involves similar considerations as stage 1, although it involves an element of discretion.¹⁷
46. Section 41(2)(c) of the Succession Act provides that the court may refuse to make an order in favour of any person whose character or conduct is such as, in the opinion of the court, disentitles him or her to the benefit of an order, or whose circumstances are such as make such refusal reasonable.

Firm A's submissions

47. Firm A contend that Firm B is in possession of confidential information of the Deceased where that information might reasonably be concluded to be material to the provision proceedings and detrimental to the interests of the Deceased (and therefore, Client A) if disclosed.

¹⁵ *Singer v Berghouse* [1994] HCA 40, [18] (Mason CJ, Deane and McHugh JJ).

¹⁶ *Darveniza v Darveniza & Drakos as Executors of the Estate of Bojan Darveniza and Ors* [2014] QSC 37, [16] (Martin J).

¹⁷ *Singer v Berghouse* (1994) 181 CLR 201, 210 (Mason CJ, Deane and McHugh JJ).

48. In support of that contention, Firm A set out the relevant evidence at some length. Given its importance to the issues and to understand the context in which those issues arise, it is useful to quote the relevant passages at length:

17. *The applicant [Client B] swears:*

“I took an advance of \$15,000 on my mortgage to purchase a large bus which was transported to my property. I then assisted the deceased to refurbish the bus to make it comfortable for the deceased to live in. The deceased resided in the bus for approximately two years with her nine dogs”

“My relationship with the deceased waxed and waned depending on the extent to which the deceased required my support. Around 2014 the deceased became fixated on getting revenge against her sisters after the disagreement between them in 2012 regarding the house which they owned. I would not indulge the deceased’s obsessive vindictiveness and arranged ... [for] the deceased to see a psychologist”

The deceased “was not taking a mature approach to my gentle but repeated requests to take steps to minimise her dogs’ barking”

“The deceased subsequently left my property and purchased the house in Ipswich which is the major asset of the estate”¹⁸

18. *The evidence on behalf of the executor will assert the following (among other relevant facts):*

“That there were periods of estrangement between the deceased and [Client B] during which they had no contact and did not talk at all”

“That the relationship between the deceased and [Client B] was very strained and had always been that way.”

“That the relationship between the deceased and [Client B] was not good and they actually avoided each other when the deceased lived on the bus”

“That the deceased purchased the bus and the contract was at all times with her”

“That [Client B] merely loaned money to the deceased for the purchase of the bus and expected that it be repaid (in other words that [Client B] did not purchase the bus)”

“The deceased tried to be away from [Client B’s] property as often and as long as possible”

*“That the deceased moved out of the bus as soon as she could and before settlement of the sale of her property returning to live with others” **[Firm B acted in the sale]***

*“That the deceased repaid [Client B] for the bus loan from monies obtained from her house sale settlement arising from her dispute with her sisters” **[Firm B acted in the sale]***

*“That at the most the deceased lived in the bus for approximately nine months and the [Deceased] moved out of the bus as soon as she was able, purchasing a new house using monies obtained from house sale settlement arising from her dispute with her sisters” **[Firm B acted in the sale]***

¹⁸ Firm A’s Outline of Submissions, undated, [17].

“That [Client B] did not know when the deceased’s house sale settlement occurred but heard that it had occurred from an acquaintance she saw at the shops” [Firm B acted in the sale]
*“That [Client B] demanded the return of the bus money from the deceased and accused the deceased of holding onto it for unreasonable length of time as [Client B] believed settlement had occurred” [Firm B acted in the sale]*¹⁹

49. Firm A also pointed to a file note of a conversation on 29 May 2014 between a solicitor of Firm C and a lady from Firm B (presumably the conveyancing clerk with the conduct of the matter), in which the latter confirmed that she had received correspondence from the agent with regards to the “dispute” (meaning that between the Deceased and her sisters).²⁰
50. Based on the above evidence, Firm A submit that:
- (a) Firm B are in possession of confidential information of the Deceased where that information might reasonably be concluded to be material to Client B’s matter;²¹
 - (b) the dispute between the Deceased and her sisters is in issue in the present provision proceedings, and is directly relevant, as Client B maintains that the Deceased was acting unreasonably in her dealings with her sisters and needed to consult a psychologist as a result;²²
 - (c) the Firm B conveyancing file will contain material relevant to the issues in dispute in the proceedings, such as the Form 24 Property Information form, which will show the dates of settlement and possession and will be relevant to whether the Deceased unreasonably withheld repayment from Client B;²³and
 - (d) the conveyancing file will also assist in determining the length of time the Deceased actually lived in the bus and when she moved away (relevant to the nature and duration of any estrangement between Client B and the Deceased; whether there was a reconciliation before the Deceased’s death; and the level of contribution made by Client B to the Deceased’s welfare).²⁴
51. Firm A also submit that there will also be knowledge of the conveyancing matter and of the dispute involving the Deceased’s sisters gained from conversations by Firm B employees during the conduct of the conveyancing matter. That would include conversations with the Deceased and third parties to the transaction, such as Firm C (the Deceased’s other solicitors in the dispute), the solicitors retained by the Deceased’s sister, real estate agents and the like.²⁵

Firm B’s submissions

52. Firm B submit that Firm A’s allegation, that Firm A has breached Rule 10.2 of the ASCR, should be dismissed because any information contained on the conveyancing file concerning the Deceased’s family circumstances was either not:

¹⁹ Firm A’s Outline of Submissions, undated, [17]-[18].

²⁰ Statement of Facts, dated 12 November 2018, Annexure 14(e).

²¹ Firm A’s Outline of Submissions, undated, [20].

²² Ibid [24]-[25].

²³ Ibid [26]-[28].

²⁴ Ibid [29]-[30], [34].

²⁵ Ibid [36]-[37].

- (a) sufficiently identified by Firm A to enable the Committee to decide the matter;
 - (b) confidential at the time the instructions regarding the conveyance were given;
 - (c) material to Client B's application for further provision; or
 - (d) capable of use to the detriment of the Deceased nor prone to misuse by Client B in her application.²⁶
53. It is also submitted by Firm B that any information contained in the conveyancing file in relation to the Deceased's assets and liabilities:
- (a) has lost any character of confidentiality at the time Client B commenced her application; or
 - (b) is not:
 - (i) material to Client B's application for further provision; nor
 - (ii) detrimental to the Deceased nor prone to misuse by Client B in her application.²⁷

The Committee's view

54. As mentioned already, Firm B contend that whatever the situation initially, the information which they now hold is no longer of a confidential nature, by reason of subsequent events which have, over time, either diminished, or detracted from, the confidential nature of the information, or due to the lack of specificity attached to the claim of confidentiality.
55. There are a number of factual disputes between the parties which call for a detailed examination and analysis. Without having the benefit of perusing the relevant files and hearing evidence as to the dealings with the relevant information, it is difficult, if not impossible, for the Committee to form a definitive or concluded view on this issue. As is made clear by the Protocol for Non-binding Ethical Rulings, it is beyond the Committee's charter to make determinations as to factual disputes; it has no power to take, or compel the giving of, evidence from the parties or third parties.
56. That is not to say, however, that the Committee is unable to express its present views based on the material currently before it. Indeed, it is hoped that any preliminary views it might express may nevertheless be of assistance to the parties in considering and formulating their future course of action. With that in mind, the Committee makes the following observations and comments.
57. Based on the material before it, the Committee's preliminary view is that Firm B's files are likely to contain confidential information: which could be relevant to the provision proceedings; the disclosure of which has not been consented to by the former client's personal representative; and which could, if disclosed, be detrimental to the interests of the former client's personal representative in her upholding the will. The Committee has come to that preliminary view for the following reasons.
58. There appears little doubt that during the course of their earlier conveyancing retainer, Firm B obtained information in the Form 24 Property Information form which was not then publically available and which confirmed key dates in the life of the transaction. That information was, and is, relevant to issues in the present proceedings, in that it concerns: the fact of, and period of, estrangement between the Deceased and Client B; how that estrangement manifested itself; the fact of the Deceased's wider dispute with her siblings; and the financial contribution made to the Deceased by

²⁶ Firm B's Submission, dated 4 February 2019, page 15.

²⁷ Ibid page 16.

Client B, the circumstances under which, and the purpose for which, that payment was made, and the Deceased's delay in repaying that amount, leading to a demand for repayment by Client B. While some of that information may have been able to be derived from the undertaking of relevant searches, it seems likely that at least some of it would not be publically available and would retain (or would have retained) its confidential nature until disclosed.

59. In particular, some aspects of the information on Firm B's conveyancing file would likely to have only been known to the Deceased. In those circumstances, one would expect that at least the instructions given by the Deceased to Firm B at the time of the conveyancing matter would most likely have been confidential. While that previously confidential information might well be disclosed (or indeed, have already been disclosed) during the course of the provision proceedings, there is no suggestion that that confidentiality was lost entirely at the time that Client B first retained Firm B in those proceedings. At the time of retaining Firm B in the provision proceedings, the instructions would most likely have still been confidential and would (to borrow the court's language in *Re A Firm of Solicitors (No. 2)*²⁸) reasonably be considered remembered, or capable of being recalled, on the person's memory being triggered.
60. In circumstances where the confidential information is relevant to the issues in the present provision proceedings, the Committee has proceeded on the basis it is likely that the disclosure of that information would be detrimental to the interests of Client A, the Deceased's personal representative, in upholding the will.
61. Having regard to the above considerations, the Committee's preliminary view is that it is more likely than not that Firm B would fall within the opening words of Rule 10.2 of the ASCR. Absent informed written consent by the Deceased's personal representative to Firm B acting in the provision proceedings, the question arises as to whether Firm B can demonstrate that it has established an effective information barrier in this instance, as contemplated by the exculpatory proviso in Rule 10.2.2 of the ASCR.

Has an effective information barrier been established?

62. Once it appears that a solicitor is in receipt of information imparted in confidence, the burden shifts to him or her to satisfy the court, on the basis of clear and convincing evidence, that all effective measures have been taken to ensure that no disclosures will occur.
63. In the present instance, the Committee is unconvinced that Firm B have taken all effective measures to ensure that no disclosures will occur. Indeed, it considers that the steps taken by Firm B fall well below what would be expected of them under the IBG; the steps taken are both insufficient and inadequate.
64. Firm B is silent on whether they have established documented protocols for the setting up and maintaining of information barriers (IBG Guideline 1). Nor is there any suggestion that they have nominated an appropriately qualified and experienced practitioner as their compliance officer

²⁸ See paragraph [20] above.

(Guideline 2). There is no reference to Firm B having an ongoing education program in place (Guideline 10).

65. It does not appear that Client B has been asked to acknowledge in writing that the firm's duty of disclosure to her does not extend to any confidential information which Firm B may hold as a result of the earlier matter. In other words, she has not effectively "joined" in the arrangement and given up her right to the information as anticipated by Guideline 3.
66. The undertaking provided by Solicitor B of Firm B is inadequate. It does not bind the firm nor those involved in the current proceedings. Nor does it bind the key people within the property team. In short, it fails to specifically identify those "screened" people (Guidelines 4 and 5) and obtain appropriate undertakings from them (Guideline 6). Significantly, Solicitor B states that she is able to access the electronic conveyancing file, but has no intention of doing so. She only visits the regional office periodically and has no association with the Conveyancing Team and rarely collaborates with them.
67. It follows from what has been said that the Committee considers Firm B seriously lacking in their approach to these issues, such that the "information barrier" they claim to have established is patently inadequate and ineffective.

Discretionary and commercial factors: should Firm B continue to act?

68. As mentioned already, underlying the IBG is the fundamental principle that the court has an inherent jurisdiction to supervise the conduct of solicitors as officers of the court. In considering whether to exercise that jurisdiction and restrain a solicitor from acting, the court adopts the test of whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that the solicitor should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice.
69. Without in any way intending to pre-empt the court's determination, the Committee believes that a conservative and cautious approach to this issue is warranted, having regard to the following matters. The matter is clearly highly contentious and emotion charged. Several factual disputes remain unresolved, some of which touch upon disagreements between Client B and her late mother. Given the history of the matter to date, it is unlikely that the disputes will be satisfactorily resolved in the short to medium term, without the court's intervention. There has already been a significant delay in advancing the provision proceedings, with no real progress having been made since they were commenced some 18 months ago. Given the modest state of the Deceased's estate, the current conflict dispute over representation has the potential to over-shadow, and become disproportionate to, the substantive provision proceedings. To put it bluntly, the fight between the lawyers risks becoming *the* issue, distracting the parties from what should be their principal focus – whether Client B is adequately provided for under the Deceased's will. Having regard to those factors, the Committee believes that the hypothetical, fair-minded and reasonably informed observer would conclude that it is in the best interests of justice that Firm B cease to act in the matter.
70. In coming to that view, the Committee appreciates the competing public interest principle, that a litigant should not be deprived of representation of his or her own choice. However, it considers that in this case that factor is outweighed by the other competing factors outlined above. In saying that,

the Committee notes that there are a number of other law practices that could readily assume Client B's representation, free of the burden of the conflict and representation issues. The transfer to a new lawyer should not be too onerous, given that the matter has effectively been in abeyance for the past 18 months, with material by way of response apparently ready to be served once the conflict issue is resolved. Fortuitously, that should avoid unnecessary duplication and minimise the cost consequent upon the change of representation.

CONCLUSION

71. To summarise the Committee's position:

- (a) While the Committee is presently unable to express a concluded opinion on whether Firm B are in possession of confidential information of the Deceased where that information might reasonably be considered material to the provision proceedings, its preliminary view is that Rule 10 of the ASCR is more likely than not to apply in this instance.
- (b) Firm B are not saved by the exculpatory proviso in Rule 10.2.2 of the ASCR, in that the Firm B information barrier is ineffective, having regard to the IBG.
- (c) Although it is ultimately a matter for the court exercising its inherent jurisdiction to determine whether Rule 10 has been breached, the Committee urges Firm B, and Firm A, to be conscious of the various discretionary and commercial factors highlighted here, in the best interests of their clients.