

'Undivided loyalty' – the perception and the reality

by Stafford Shepherd



Consider the following situations:

- A suburban solicitor has represented a husband and wife in a cottage conveyance. Now the couple have separated, and it is not amicable.
- A medium-sized Brisbane firm has represented a community organisation and several of its local branches. Now there is a dispute between the organisation and one of its branches that may lead to litigation.
- A regional solicitor negotiates a contract for the sale of a business between two of her biggest clients; a year later they accuse each other of negotiating in bad faith.

Each of these situations could create a conflict for us – impairing the loyalty to a particular client. The consequences of permitting a conflict to arise could be an action for professional negligence or breach of retainer and an unwanted disciplinary investigation. Rule 11 of the *Australian Solicitors Conduct Rules 2012* (ASCR) is concerned with the management of conflicts concerning current clients.

Whether practising as a sole practitioner, a member of a medium-sized practice or a national or international practice, our lives are replete with potential conflicts of duties. We must learn to identify the situations and to anticipate potential problems. Some basic rules may help:

1. Do not think of a *conflict* of duties, but of *potential* duties. Look at what we are being asked to do from the point of view that there is – or could be – a conflict in duties, rather than from the perspective that there is not.
2. Think not of conflict, but rather of 'impaired loyalty'. Although the fundamental ethical duties in Rule 4 ASCR and the concurrent conflict rule in Rule 11 ASCR do not use these words, they encapsulate what is a core responsibility to "act in the best interests of a client". Our question should be: "Is there any way, through my representation, in which my loyalty to the client may be impaired?"
3. We need to remember, that although a large percentage of conflicts may never eventuate, it is not possible to predict the one that will. The only way for us to protect the interests of all clients – and our own – is a basic rule – we must avoid conflicts before the duties owed to two or more clients collide (Rule 11.1 ASCR).

When clients ask us to represent them in the same or related matters, then we need to openly and fully explain how our primary responsibility of loyalty will be impaired. This disclosure must be meaningful and comply with Rule 11 ASCR. At a minimum, we must advise each client of:

- the intention for us to act for another client at the same time in the same or a related transaction, and
- obtain each client's informed consent to so acting (this means each client must understand the actual and reasonably foreseeable adverse consequences of the representation – including any impairment to our duty of confidentiality).

We should:

- ensure all our communications to our clients are in writing, explaining the impact upon them of concurrent representation
- obtain the consent of each client in writing
- address what happens to solicitor-client confidences in such concurrent representation situations
- spell out specific ramifications arising from multiple representations in an 'if/then' format
- address the ground rules of what will happen in the event of a conflict arising, including withdrawal and the additional costs a client will have.

Agree with the clients in advance how confidential information will be treated. The best position would be to agree – as part of your retainer – that, among multiple clients, there shall be no confidences or secrets. Also spell out to the client that if he or she insists on revealing to us a confidence, then the consequence is that we must withdraw.

Remember, our client's 'informed consent' cannot cure all conflicts. If we adopt these steps, then our client will know and appreciate the risks arising from concurrent representation.

Review of the Australian Solicitors' Conduct Rules

On 1 July 2012 the *Australian Solicitors Conduct Rules 2012* commenced in Queensland. During 2016 and 2017 the Law Council of Australia's (LCA) Professional Ethics Committee undertook a review of the ASCR. The LCA has released a consultation

paper entitled 'Review of the Australian Solicitors' Conduct Rules'. The review paper can be found qls.com.au/Knowledge_centre/Ethics/Review_of_the_Australian_Solicitors_Conduct_Rules.

The QLS Ethics Centre, on behalf of the Ethics Committee and the Queensland Law Society, invites members and interested parties to provide submissions with respect to the consultation paper by 31 May 2018. In particular, the committee seeks comments on the review of Rule 9 (Confidentiality) and Rule 11 (Conflict of duties concerning current clients). Submissions may be lodged at ethics@qls.com.au.

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Lecture two

Thursday 10 May
Law Society House, Brisbane
Di Fingleton

Lecture three

Wednesday 25 July
Law Society House, Brisbane
Justice Andrew Greenwood, Federal Circuit Court of Australia

Lecture four

Thursday 25 October
QUT Gardens Theatre foyer
Chief Justice Susan Kiefel AC, High Court of Australia