

Mirror wills – what you should consider if one client wishes to engage you after they split?

We are often instructed to prepare “mirror” wills for couples. It is useful to consider when initially engaged by such clients the following:

- ensure that the clients understand and agree (in writing) that this engagement is a joint retainer and what that entails ie: all instructions from one party are divulged to the other – there are no secrets (and this would extend to post-retainer discussions);
- always give the clients the option of obtaining independent legal advice;
- explain the potential for a conflict of interest, the circumstances where the firm would cease to act for both parties of the relationship;
- the need to cease to act for both should a conflict arise during the engagement;
- the additional cost should a conflict arise resulting in the parties having to engage other solicitors;
- and
- confirmation that the retainer is terminated upon completion of the matter to ensure that the duty of loyalty has come to an end.¹

Unfortunately, it is not uncommon for one of the parties to come back several years later asking that same practitioner to prepare a new will as the relationship has ended. This may not by itself create a conflict of interest.

Rule 10.2 of the *Australian Solicitor Conduct Rules 2012* (‘ASCR’) permits that successive representation if:

- the law practice does not have possession of **confidential information** of the former client;
- that information is not reasonably concluded to be **material** to the matter of the prospective client; and
- would not be **detrimental** to the interests of the former client.

We should remind ourselves that “justice not only must be done but should manifestly and undoubtedly be seen to be done.”²

Assuming that there are no ongoing matters for either party and they have permanently separated, there is nothing that prevents the practitioner from accepting a new retainer from one of the parties to prepare a new will.

It may be more problematic to act for both parties should they separately come back to you as there is a high possibility of confidential information arising that may impact on the other particularly if that matter involves their children or mutual property (see Rule 11 of the ASCR).

Grace van Baarle

Manager, QLS Ethics and Practice Centre and Solicitor
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¹ Jackie Knowlman, ‘Give me 45 minutes and I will make you a better succession lawyer’, (Speech delivered at the 11th Annual Succession Law Conference 2012, Novotel Twin Waters Resort Sunshine Coast, 2 November 2012).

² *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259.