Conflicts of Interest

Why is conflict a critical issue for legal services?
What changes are expected for the future?

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“Appellate judges have been described as being like the people who lurk in the hills until the battle is over and then descend and bayonet the wounded”

D Rangiah, Procedural Fairness in the Courtroom (Speech to Federal Circuit Court Conference, 25 January 2017)

1. Context setting

Practitioner must apply their skill but also their knowledge in assisting client: *Newman* [1999] WASC 171, [28]

What about knowledge from previous work/contacts, which could harm those parties?

WA Conduct Rules incongruous in some CLC contexts (choice of lawyer, work-load, group clients)

Additional controls from court oversight and legal practice insurance

Implications for non-compliance: individual practitioner as well as client(s)

Law in this area ‘has developed’ since 2011: *McKay* [2018] FCCA 2287, [25]
2. Obligations for WA lawyers

Regulation of conflict for lawyers and CLCs in WA:

*Legal Profession Act 2008 (WA)*

*Legal Profession Conduct Rules 2010 (WA) (‘Conduct Rules’)*

Court oversight / control of practitioners

Contract – particular retainer(s), insurance

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Summary ‘rule of thumb’

A lawyer cannot legally assist a party if that would entail a ‘real possibility’ of needing to use confidential information of a ‘former client’.

‘Would the fair-minded, reasonably informed, member of the public conclude proper administration of justice prevents the lawyer from acting?’: eg. *Foley* [2016] FCWA 41. [27]
**WA Conduct Rules**

Rules demand confidentiality of client information (current and former)

Rules also require acting in best interests of client (including new)

Key guidance therefore in rule 13 ‘Conflict of interest concerning former clients’

Rule 13: Lawyer must not

‘provide legal services to a person...

if there is a real possibility that the practitioner would be required, in order to act in the best interests of the person...

(a) to use confidential information obtained from a former client to the detriment of the former client; or (b) to disclose to the person confidential information obtained from a former client’.

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**‘Former client’ – more than clients, r13(1)**

Former clients include:

- Parties who previously engaged the lawyer, the lawyer’s ‘law practice’, other ‘law practices’ if the lawyer formerly worked there at the time: r13(1)(a)

- Parties who previously engaged a law practice ‘of which a ... director or employee of the practitioner’s law practice was an associate [incl. employee or agent] at the time of the previous engagement’: r13(1)(a)(iv)

- Parties ‘who provided confidential information to the practitioner, notwithstanding that the practitioner was not formally engaged and did not render an account’: r13(1)(b)
**Key factors**

Restriction only applies where:

- ‘provide legal services’ to new client,
- those legal services involve ‘a real possibility’ that to act in the best interests of new client requires information held from previous matter, and
- the information is confidential information from a former client (either engaged or provided)...
- which would need to be disclosed OR would harm the former client if used.

**Exceptions – r13(3)**

Can act if former client gives informed consent, or effective ‘information barrier’ will prevent misuse.

Neither practical in CLC context.

eg. *Olenghi* [2015] FamCA 304 (CLC prohibited from continuing to represent mother in proceedings because new CLC lawyer had previously acted for the father in the same proceedings, when earlier working in a private law firm)

CLC proposed information barrier (not acceptable to Court):

- the lawyer ‘has not disclosed any information to any person within the’ CLC from previous matter
- the lawyer ‘will have no involvement with the [CLC client] or personnel (including solicitors) involved’
- ‘All relevant parties have filed appropriate undertakings’
- measures ‘to ensure that the electronic file is stored in the office of the wife’s current solicitor [in the CLC] together with password protection and security [and] The hard copy file is also stored in a secure and locked cabinet’.
Application

Compare the proposed new instructions with potential confidential information held
[do NOT disclose to either at this stage, and do not have proposed lawyer examine previous file]

If new instructions cannot feasibly require consideration of any previous issues, OK.
  – Where potential overlap, may be able to assist new party by limiting retainer (clarifying what can and cannot do).
  – Advice / transaction more easily contained than litigation.

If new instructions inevitably require consideration of any previous issues, cannot act.

Delineating retainer for new client

One way to limit conflict: prevent real possibility that need to access information in services to new client.

May be able to structure retainer for new client (given lawyer’s fiduciary obligation derives not from status but retainer: *El Sayed* [2015] NSWSCA 26, [67].

Do need, however, to continually monitor as situation may change and conflicts may arise/dissipate: eg. *Commissioner Consumer Protection* [2012] WASC 105, [50]

The acknowledgement from new client can help in showing ‘no real possibility’ of use of previous information: eg. *Oscar No 2* [2013] FamCAFC 197, [2]-[5]
Court control of practitioners

...is in addition to Conduct Rules (although some overlap)

Court will prevent lawyer from acting where...

‘the fair-minded, reasonably informed, member of the public [would] conclude proper administration of justice prevents the lawyer from acting’

[Here] relevant to conflicts, can be:

• Breach of confidence
• Breach of fiduciary duty
• Inherent jurisdiction over officers and controlling process.

Court test

From Osferatu [2015] FamCAFC 177. ‘[T]he current leading case in this area’: McKay [2018] FCCA 2287

‘...the mere fact of access to confidential information is not the test

The consideration should be whether there is a real risk of misuse as opposed to one which is merely fanciful. ...

an applicant seeking to restrain a solicitor from acting must adduce evidence that establishes the confidential information and the risk of the misuse of that information in the circumstances...’
Ismail-Zai -v- WA [2007] WASCA 150; 34 WAR 379

Lawyer had defended person on fraud & stealing charges, and subsequent driving offences, and made mitigation pleas

One year later, lawyers' fees unpaid, and debt collector engaged to obtain money from person

Couple years later, person charged aggravated robbery and violence

Lawyer briefed by the DPP to prosecute, secured conviction.

Earlier fees remained unpaid. Trial judge refused application that prosecutor could not act.

Appealed to Court of Appeal

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**Court of Appeal decision**

Steytler P (Wheeler JA agreed)

48 I am ... unable to see any reason why an ordinary fair-minded citizen, ... having knowledge of all relevant circumstances, should have entertained any reasonable suspicion that justice had miscarried.

49 .... Nor do I consider that any fair-minded observer, knowing of the existence of the debt, would have entertained a reasonable apprehension that, as a consequence, the trial was somehow conducted differently. ...

Heenan AJA

78 ...[I]t has been possible to look at the conduct of the trial retrospectively in order to scrutinise whether or not any impropriety did occur. None has been identified or suggested, and the merest possibility that this might have happened, when all the indications are that it did not, means that no miscarriage of justice has been established.
Observations / implications

‘duty of loyalty does not survive the termination of the retainer’: Ismail-Zai [2007] WASCA 150, [23]

Court more critical/strict where lawyers acting for profit

Litigation more difficult to control future direction (therefore avoid conflict), and courts frequently prevent acting where some previous connection with other side

General knowledge of former client (‘getting to know you’ factors: Yunghanns 1998 VCS) will rarely constitute confidential information preventing lawyer from acting against that person: Ismail-Zai [2007] WASCA 150, [28]-[29]

‘Former clients’ is wider that just people who have been former client of CLC

Scenario One: former client

CLC previously legally assisted for Person A, and that matter finished.

CLC now approached by Person B to assist them in a matter involving Person A.

What factors determine whether CLC can legally assist Person B?

Ismail [2007] WASCA 150

Worth Recycling [2009] NSWCA 354 (law firm prohibited acting in new litigation against former client cos ‘real possibility of misuse’ of confidential info)

Smirke (Jurruru People) [2017] FCA 825 (barrister not prohibited from acting against former client cos no ‘real possibility of misuse’ of confidential info)
Scenario Two: confidential information

CLC holds confidential information which one of its lawyers received from Person A (who was a witness in previous proceedings).

CLC now approached by Person B to assist them in a matter involving Person A.

What factors determine whether CLC can legally assist Person B?

*Oscar (No 2) [2013] FamCAFC 197* (CLC lawyer asked by father to advise him re DV proceedings, lawyer had previously acted Independent Children’s lawyer, disclosed and father understood and continued)

*Mckay [2018] FCCA 2287* (lawyer for party changes firms and continues to act for mother in ongoing proceedings; new firm used to employ father in these proceedings; lawyer not prohibited from continuing)

Scenario Three: ‘migrating’ lawyer

CLC employs new lawyer, who came from a law firm which acts for Person A in current litigation.

CLC now approached by Person B, who is involved in that litigation, to represent them.

What factors determine whether CLC can legally assist Person B?

*Olenghi [2015] FamCA 304*
Conduct rules and law

The WA Conduct Rules
- Gazetted 2010
- Latest update 2013

Courts can adjudge lawyers’ conduct separately from rules, but sometimes refer to them

Post 2010, judges still refer to previous cases (incl Ismail-Zai 2007) as relevant: eg Director of Public Prosecutions [2012] WASC 459, [53]-[54] & [67]

Prudent advice – adopt the most conservative approach

3. Australian Conduct Rules

Australian Solicitors’ Conduct Rules 2011
- Been adopted in ACT, NSW, Qld, SA & Vic
- eg. Legal Profession Uniform Law (Victoria and NSW, 1 July 2015)
Uniform rules

Largely similar to (WA) Conduct Rules
But tighter in relation to ‘former clients’:
‘... that the fiduciary duty of loyalty ended with the termination of the retainer...’ has been widely followed in Australia.

However, solicitors must also consider the decision of Brooking JA in Spincode [2001] VSCA 248 who envisaged that solicitors may owe an ongoing equitable duty of loyalty to former clients which goes beyond the maintenance of confidential information. ... Whilst the decision has not received wholesale endorsement elsewhere, solicitors should have regard to whether they are subject to an ongoing obligation...’

LCA Commentary to the Australian Solicitors’ Conduct Rules (2013), 9.

4. Contractual modification

Contract (or client instructions) cannot remove conduct rules
But can impose additional limitations:
• NACLC Risk Management Guide
• Insurance
• Your CLC’s policies/procedures
6.7.10

One starting point to identify conflicts of interest involving former clients is to ask the following questions:

- does the centre have any confidential information about the former client?
- is it relevant or possibly relevant to the new matter?

If you answer ‘yes’ to each of these questions, your centre has a conflict and cannot act in the new matter against the former client.
6.7.11

...Confidential information gained in the course of acting for a client in an earlier matter can sometimes go beyond the strict confidential information disclosed in the course of the matter, to include what can be described as ‘getting to know you’ factors

Insurance and CLCs

May be influenced by Victorian law, therefore more risk averse (ie. impose more restrictions on acting) than WA law

Implications of no insurance...no coverage...no practice certificate?

“You know that road. You know exactly where it ends. And I know that's not where you want to be”
5. Take aways - 1

1. Check your CLC policies/procedures, insurance, NACLC Risk Management Guide, WA Conduct Rules, and follow the most restrictive.

2. Keep comprehensive database of ‘other parties’ (incl. opposing litigants, witnesses) – will be necessary for future conflict checks.

3. While determining potential conflict or arrangements, do not breach confidences of either party (former client or potential new client).

Take aways - 2

4. If possible overlap, may need to involve lawyer unconnected to either former or new instructions to assist.

5. If can feasibly provide legal assistance for new client without requiring previous information, structure new retainer accordingly.

6. When hiring new lawyers, check at least (1) all previous litigation they’ve done, and (2) all current litigation of your CLC whether their law practice is involved.

May see future development/clarification of WA CLCs and ‘law practice’; greater national cohesion; clarity of ‘former client’?