



## *Lawyers, Clients and the Business of Law*

A Symposium Series hosted by Griffith Socio-Legal Research Centre and the Legal Services Commission

*Conflicts of Interest: Perspectives from diverse legal settings*

A report of the Symposium

15 March 2007

The Symposium was organized by John Briton, Legal Services Commission, Professor Jeff Gddings, Griffith Law School, Nathan, Associate Professor Michael Robertson, Griffith Law School, Gold Coast and Lyn Aitken, Legal Services Commission.

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# 1. Introduction

The symposium series *Lawyers, Clients and the Business of Law* brings regulators together with practising lawyers and legal academics to discuss ethical issues arising in the course of legal practice in Queensland. The second symposium in the series – *Conflict of Interest: perspectives from diverse legal settings* - was held on 15<sup>th</sup> March 2007.

The importance of conflict of interest as an ethical issue that arises in the course of legal practice is widely acknowledged, and this was captured in a recent *Lawyers' Weekly* article. In February 2007, the *Lawyers Weekly* asked general counsel of BHP- Billiton, Telstra and the National Australia Bank what each thought law firms could do better.

John Fast, chief legal counsel of BHP-Billiton, addressed one of the ethical issues that can arise for all firms. He says “The area where I think the biggest difficulties arise is in ...conflicts ... I know that you never want to say no to a big juicy transaction or a client, but in the interests of your relationships ....you’ve just got to accept that sometimes you have to say no, because the interests of your client are more important to your long term relationship than the short term value of an isolated transaction”.

The Symposium sought to present perspectives on conflict of interest from diverse legal settings, inviting presentations by panel members whose experiences ranged from large law firms to community legal settings.

The symposium organisers encouraged attendance from a wide cross-section of the Queensland legal community. There were 50 participants including lawyers in private practice and community legal centres, legal academics, members of the Commission’s staff, staff of the Queensland Law Society, the Queensland Public Interest Legal Clearing House and Legal Aid Queensland.

The organisers developed three scenarios around the workshop topics and circulated them to participants prior to the workshop in order to help focus discussion on the day. They asked three panellists – an academic and two practitioners – to further help stimulate discussion on the day by talking briefly to the issues raised in the scenarios from their particular points of view. The panel comprised:-

Ross Perrett

Brian Bartley

Merran Lawler

Professor Jeff Giddings (Moderator)

Clayton Utz

Brian Bartley and Associates

Griffith Law School

Griffith Law School

The scenarios were developed with the panellists and circulated to all workshop participants in advance of the seminar. The panellists were asked to stimulate discussion by reflecting on the conduct described in the scenarios from their different perspectives. The participants were then asked to work together in small groups to consider the conduct outlined in each of the scenarios. Each of the 6 small groups then reported back to whole group – and this prompted further discussion from the floor.

This report sets out the symposium program, the three scenarios that were circulated in advance, the three panel presentations and reports back from the group discussions.

## **A Summary of Core Principles Related to Conflict of Interest**

This document is provided as an additional resource to assist the discussions at the LSC/GLS symposium on 15 March. Because the law on conflict of interest is substantial, only core principles are included here. The note is drawn mainly from a selection of the case law, the *Solicitors Handbook*, the *Model Rules* of the Law Council of Australia, the QLS's Public Consultation Draft of the *Legal Profession (Solicitors) Rule 2005*, which largely reproduces the Model Rules, and Dal Pont's text on *Lawyers' Professional Responsibility* (2006).

### **Foundation and importance of duty to avoid conflict of interest**

- Fiduciary principle requires undivided loyalty to clients “without being distracted by other interests including personal interests” (*R v Neil*, dal Pont)
- *Solicitors' Handbook*, Par 9: “The Council draws the attention of practitioners to the complexity of the law relating to conflicts of interest and cautions them to be meticulous in their observance of it ... A practitioner should give undivided fidelity to the client's interests, unaffected by any interest of the practitioner or of any other person...”

### **Different categories of conflict of interest**

1. Lawyer-client conflict of interest
2. Current clients' conflict of interest (“concurrent” conflicts)
3. Past client/current client conflict of interest (“successive” conflicts)

#### **(1) Lawyer-client conflict**

- Fiduciary relationship requirement: client entitled to place complete trust in the lawyer who owes corresponding duty of loyalty. Lawyers must “subordinate their own interests to those of the client and avoid acting in situations where self-interest might tempt them to compromise their duty of loyalty” (O'Dair)
- Example of the problem: lawyer “intermingles” personal financial affairs with those of the client (*Law Society of NSW v Harvey*)
- Aspects of duty's operation: borrowing from clients (eg *Model Rule 11*); proscription against secret profits; receiving a benefit under a will (eg *Model Rule 10*); acting for relative; lawyer-client sexual relations; acting in contested matter where one may be material witness (also *Barristers Rule 91* (c))

- Lawyer might still act if client consents, but lawyer must make complete and frank disclosure of all material information to client (*Harvey* case); and client should be advised to get independent legal advice; but no room for discretion where conflict of interest is clear (eg *Model Rule 9*)

### (2) Concurrent conflicts

- “...the fundamental duty to be observed in this case [is] the obligation to provide a client with professional advice and skill uncompromised by the performance of a like duty to another whose interests conflict with those of the client...It is an ethical rule of long standing which goes to the core of the solicitor-client relationship, the maintenance and protection of which is a matter of public interest reflected in the doctrine of professional privilege. It is central to the preservation of public confidence in the administration of justice.” (*Blackwell v Barroile*)
- *Solicitors Handbook*, Rule 9.00: “A practitioner shall not represent or continue to represent conflicting interests in litigation and should only represent both parties in other matters where to do so is not likely to prejudice the interests of either client and both clients are fully informed of the nature and implications of such conflict and voluntarily assent to the practitioner so acting or continuing to act.” (And see *Model Rule 8*)
- Scope of the duty: disqualification extends to whole firm.
- Can solicitor act for more than one party in a matter? *Model Rules* approach (in Rules 8.3 and 8.4, reflecting some case law): there is no blanket prohibition on acting for both parties, provided that:
  - o The practitioner is satisfied that each party is aware of the situation; and
  - o The parties consent; and
  - o Each party is aware that practitioner may be compromised in giving information or advice to either party; and
  - o The practitioner will be obliged to “cease to act for all parties” if obliged to act “in a manner contrary to the interests of one or more of them”

### (3) Successive conflicts

- “The conflict of interest is between the continuing duty of a solicitor, owed to his former client, not to disclose, or use to the latter’s prejudice that which he learned confidentially, and the interest which he has in advancing the case of his new client.” (Ipp J in *Mallesons v Peat Marwick*; and eg *Model Rule 4*).
- Typical scenarios: lawyer acts against former client; lawyer acts for new client in circumstances where former client’s confidences may be compromised (eg *Barristers*

*Rule 91(a)(i)*); second lawyer from same firm acts against first lawyer's former client; firm acts against former client of lawyer who has since joined firm.

- Conflict can be actual or apparent (eg, perception of compromise of former client's confidential information)
- Determining whether there is conflict: "...a solicitor is liable to be restrained from acting for a new client against a former client if a reasonable observer, aware of the relevant facts, would think that there was a real, as opposed to a theoretical, possibility that confidential information given to the solicitor by the former client might be used by the solicitor to advance the interests of a new client to the detriment of the old client." (*Carindale Country Club v Astill*). Maybe, mere threat of disclosure of confidential information given by former client is sufficient (to grant relief); not necessary to prove detriment (*Carindale and Newman v Philips Fox*). Thus, court will intervene "unless it is satisfied that there is no risk of disclosure...[but] risk must be a real one, and not merely fanciful or theoretical." (*Bolkiah*)
- A Chinese wall is seen to prevent confidential client information in one part of the firm from passing to another lawyer who is acting for a client, with incompatible interests, in another part of the firm. The wall quarantines sensitive information within segments of the firm (which is otherwise seen to have access to all client files and information). At simplest, it is an information barrier, but court needs to be satisfied that the "wall" will prevent "inadvertent disclosure" of the sensitive information (*Newman*)
- How to erect a Chinese wall: physical separation of firm's departments; an "educational program" in the firm; "strict and carefully defined procedures" to ensure that information will not pass; "monitoring by compliance officers" of wall's effectiveness; and disciplinary sanctions for breach (House of Lords *Bolkiah* case, which has been applied in Australia)

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Note compiled by Michael Robertson, Griffith Law School and QLS Ethics Committee,  
for the LSC/GLS Symposium

## 2. Scenario One

Peter has been practising as a solicitor in a small country town for many years. Because of the drought, business has been down. Given the state of the local economy, he cannot afford to lose too many clients. He is the only solicitor in town and the nearest other solicitor is a few hours' drive away.

Two longstanding clients of his firm, Ken and Gordon, request that he act for them in a conveyance. The conveyance concerns the sale of a portion of Gordon's land to Ken. Because it appears to be straightforward, Peter agrees to act for both of them.

Peter conducts searches and discovers that a building on the land encroaches on another block of land owned by Anna. Anna is another longstanding client who also happens to be Peter's favourite cousin. Peter acted for her when she bought the land, but for some reason he did not detect the encroachment at the time. There is also a small commercial building on the land. Peter knows that he previously acted for two of the tenants when they entered into the lease. He still acts for one but not the other.

Ken, Gordon and Anna request that Peter help them to negotiate a solution. What does Ken do?

1. Does he act for all three and try to mediate the problem? If so, and if he obtains their consent, what form should this consent take?
2. Does he act for only one or two of them?
3. Does he act for none of them, advising that they should advise separately (knowing limited other legal advice is available and that he risks losing them as clients)?
4. Where does Peter go to get advice about what *he* should do?
5. What does Peter do about the tenants?
6. What does he do about his possible negligence in respect of the encroachment?

Scenario compiled by Michael Roessler of the Legal Services Commission; problem adapted from D Lamb, Case Studies in S. Parker and C. Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (Oxford, Clarendon Press, 1995)

## Panel Presentation

### Conflict of interest

**Brian Bartley**

The hypothetical fact situation is quite extreme and so there is an easy answer – Peter bails out and notifies his insurer. That’s the obviously correct answer – but the point of this hypothetical is that it crams into one fact scenario a lot of conflict situations which, in real life, are more likely to arise individually.

1 The common problem of acting for both vendor and purchaser in what starts off looking like a straightforward transaction – it happens commonly enough for a number of reasons:

- small town/relaxed attitudes to legal technicalities– not surprisingly, clients are relaxed about sharing one solicitor who has acted for them both in the past;
- practical difficulties in finding a second solicitor;
- financial considerations for Peter – more difficult to justify, but still a real factor.

2 Then the problem arises when the search results become known. In this case, the results have arrived some time – perhaps a week or so – before settlement. That gives Peter some time to consider his options. But what if the search results arrive on the day of settlement? Time will be of the essence of the contract – how do the parties retain new solicitors, take advice and make decisions in what may well be a matter of hours.

When that happens, it no longer looks very clever to have acted for both parties.

- But that’s rarely predictable in advance – one cant pick the ones where problems will arise.
- So, if this prospect is an inherent risk in any transaction in which a solicitor acts for multiple parties, is it ever acceptable for the solicitor to act for multiple parties?

- 3 Then we have the element of Peter's self interest – he failed to detect the encroachment when his other client, Anna, purchased the adjoining block. To make things worse, Anna is a favourite cousin. Whatever Peter does from here on in, he will find it difficult not to prefer Anna's interests – and even if he does manage to act even-handedly, who is going to believe it? What will be the public perception?

He may be exposed to a claim by Anna if it was his responsibility to check for encroachments when she purchased. That then brings Peter's professional indemnity insurer into the picture – it will want to know about and have input into what Peter does, but it may have little practical opportunity to do much in the time available. Peter's old file (when he acted for Anna) is going to have been archived and may have been destroyed – so how to determine quickly whether Peter has a problem?

- 4 Look at the conflicts we now have:

- Ken v Gordon (vendor and purchaser):
  - Ken needs to know whether he is entitled to rescind the contract and refuse to complete the purchase;
  - Gordon needs to know whether Ken is entitled to do so;
  - Ken needs to know what problems he is buying into if he decides to complete the purchase – he will have to sort things out with Anna – what will that involve? What will it cost him?
  - Perhaps Ken's done a good deal on the purchase of the property and is prepared to take the land with the knowledge that he has to sort out the encroachment – and how easy or difficult that will be will depend largely on Anna's attitude (or perhaps that of Peter's professional indemnity insurer).
  - But Anna's attitude now may change later, unless she is signed up to a binding agreement.
  - Should Ken be asking for a reduction in the contract price from Gordon?

- 5 Then there are the tenants – a former client and a continuing client:

- Should Peter involve them when they know nothing about the problem and have not sought to retain Peter to provide advice?
- Should he differentiate between them and involve only the one who is a continuing client?

6 Mediation looks like the answer – and it might be, in a practical sense, if it results in agreement. But:

- There are lots of interests and the prospect of all the planets lining up at the same time seem remote – particularly when this problem has arisen quickly for everyone and they have had little opportunity to get advice and consider their options.
- In fact, even if a deal is done, there may be problems down the track if someone changes their mind – and complains that they were inadequately advised because Peter was acting for everyone.
- Is Peter really able to mediate? He has acted for both parties to the transaction (which I guess is at least better, in theory, than having acted for only one party and then trying to mediate).
- As well, he has his own concerns about a claim by Anna – and he doesn't want to do the wrong thing by his professional indemnity insurers.

## **Group Discussion reports**

### ***Group One*** (Reid Mortensen, Group Leader)

The group endorsed the approach suggested by Brian Bartley and concluded that Peter should not act for all three in this conveyance.

Peter does have an interest, and that is that he has been negligent concerning his handling of the land for a former client. He may have a personal interest in cloaking his negligence, or at least getting it corrected.

He certainly has a commercial and financial interest in keeping all the clients together. He is not really in a position to give objective and even-handed advice to each and everyone.

Leaving Peter's negligence to one side, the group discussed further the issue of whether he can act for all 3 people in the conveyance. The difficulty here is that everyone involved has interests that are at odds with everyone else's. It is too complex for Peter to act separately for each and every one of the three and look after their interests impartially. The risk of conflicting duties is therefore too large. Peter may act with the informed consent of each of the parties, but the risk that an actual conflict will arise, requiring him to withdraw in the course of the negotiations, is too high.

If he wants to act for both vendor and purchaser, Peter must make full disclosure. Again, even if both vendor and purchaser consent, the risk is that if something goes wrong for one side in the conveyance there will be client interests that actually conflict. Then he must withdraw anyway.

Question 4 - Where does Peter go to get advice? He should consult a counsellor at the Queensland Law Society.

Question 5 - What does he do about the tenants? This may have been thrown in as a red herring. There may not be anything here that could concern the tenants' interests.

Alternatively, when Peter was acting for the tenants maybe he should have arranged a survey of the building which would have revealed that it was not completely on the vendor's title.

That may be negligence, suggesting that he has an interest that should preclude him from acting.

If the tenants know a dispute is brewing between Ken and Gordon, it could be to their advantage. Peter cannot use that information without his present clients' consent. Again this situation is too tangled, indicating that Peter should not be acting for anyone.

***Group Two*** (Pat Mullins Group Leader)

The group first considered the issue of the tenants and, like Group One, thought it was of no real interest, a Red Herring. The issues depend on what he should do. Different practical suggestions were provided as to how to address the issues raised. Counsel or an independent solicitor could seek to assist the parties to reconcile their competing interests. It was thought that mediation was likely to be the best way to attempt to sort it out. The group noted that taking the situation apart bit by bit is not likely to resolve it.

The group considered what steps could be taken to avoid these situations? The reality is that it is awfully difficult to act for multiple parties.

The group also suggested that some country practitioners could make greater use of technology in order to avoid conflict of interest dilemmas whilst ensuring that parties were not left without representation. Problems can arise where there is a culture that potential conflict situations will be all right and "we will sort it out somehow."

It is much easier for a practitioner to send away a client to whom they have no personal ties. Declining to act for a longstanding family friend would be a difficult decision to make and to explain to the friend. It comes down to the workload of small country practices, now a lot lower than it once was. This is directly linked to the whole area of what is fair remuneration for a lawyer. Where we cannot act for 2 or 3 of our clients at the same time, it becomes difficult to say we do not want to act for you anymore. We do not know how people can best stop acting for former clients but the alternative is to act for both parties to a problem.

Relationships are the major factor that drives legal practice in a small town. It is the way they do the work. Realistically, what Peter needs to do is to ask "How can we sort this out for the benefit of all concerned"?

### 3. Scenario Two

Mary is a partner in the large legal firm of Rush & DeLay. For many years she has acted for Lemon Time Pty Ltd, a substantial herb growing, processing and export enterprise. Through her association with the company she has become friends with Joe and Jo-Beth, the husband-and-wife team behind the company. She has been to dinner at their house on a number of occasions.

Joe and Jo-Beth are both getting on in years, and have had enough of the herb business. They have no children, so have decided to sell up and travel around Australia in a Winnebago. Bite Me Inc, a multi-national food conglomerate, makes them a very attractive offer for the business. They feel that they can't refuse it and engage Mary to act for them and Lemon Time on the sale.

As part of the deal, Bite Me Inc will float off the processing and export business from the growing business. To do this, they propose to use two locally incorporated companies – Herbal Gerbil Pty Ltd for the growing business and Pack & Stack Pty Ltd for the processing and export part. Both, however, are new companies created specifically for the transaction. Neither has the capital or the asset backing needed to purchase Lemon Time's factory and equipment. Bite Me's in-house legal team come up with a plan to finance the purchase using a structured finance product offered by US-ury Finance Ltd.

When Mary receives the final contracts for the sale, she notices that the contact for US-ury Finance is Tom, another partner in Rush & DeLay. She speaks with Tom. Because he is in the finance section of the firm on the 35th floor, he has had little to do with Mary, who is on the 41st floor. They have exchanged pleasantries at firm functions and partners' meetings, but given Lemon Time's solid financial position, Mary has never needed to refer any of Lemon Time's work to Tom. Indeed, Tom did not even know that the firm acted for the company.

Mary tells Tom that she thinks US-ury Finance should seek alternative representation for the transaction. Tom responds that he is the company's sole Australian representative, and does all its work nation-wide. He is the only one who's familiar with their particularly convoluted paperwork, and it will cost them "a fortune" to get someone else up to speed. In addition, they are worth \$1 million in fees to the firm every year, and if he refers them elsewhere, they will be "furious" and he might even lose them as a client. He also points out that as US-ury

Finance are financing Herbal Gerbil and Pack & Stack, not Lemon Time, there is no direct conflict.

Mary points out that, while Lemon Time has been a relatively small client, there is big potential in Bite Me Inc, and she wants to use this opportunity to win them (and their \$4 million p.a. in billings) to the firm.

Tom suggests that they use a “Chinese Wall”. He will stay on the 35th floor and act only on behalf of US-ury Finance. He will not speak with Mary about the transaction and will not look at her file. Any necessary correspondence will be in writing, just as if she were an independent solicitor. She will do likewise for Lemon Time. Tom and Mary and the lawyers working for each of them sign undertakings to this effect. Tom argues that, provided they “keep their noses clean”, neither client will even know the other is involved.

The sale settles without incident, and Joe & Jo-Beth set off on their holiday. During the course of the transaction Mary had observed what she believed was a significant problem with US-ury Finance's security documents, but given the Chinese wall arrangements and the fact that she was not acting for US-ury Finance or Bite Me Inc in the transaction, said nothing about this as she thought it inappropriate to do so. Thanks to Mary's skill, knowledge of the Australian food industry, and some tough negotiating on behalf of her clients (Lemon Time and Joe & Jo-Beth), Mary also subsequently wins Bite Me Inc (and its subsidiaries) as a client.

Six months later, Rodney, a director of Herbal Gerbil, comes to see her. He explains that the company has discovered that an error was made by their previous lawyers at settlement, and that they had failed to factor in CGT, GST and FBT liabilities correctly. This means that they overpaid Joe & Jo-Beth by \$600,000. While Rodney recognises that Herbal Gerbil could sue their previous legal firm for the error, the professional indemnity insurer has advised that they would not pay any claim until Herbal Gerbil had exhausted its rights against Joe & Jo-Beth. Rodney asks Mary to pursue recovery from Joe & Jo-Beth, so that they can finalise their claim against the p.i. insurer. Mary advises that she will need a couple of days to think about whether to accept his instructions.

The dispute over unpaid taxes is, however, draining resources at Herbal Gerbil. With the world price of dried oregano hitting an all-time low, Bite Me is reluctant to pour further funds into what may be a loser. The day after Rodney consults with Mary, Tom receives a fax from US-ury advising that Herbal Gerbil and Pack & Stack have both defaulted on their finance

arrangements. US-ury instruct Tom to refer the matter to the firm's litigation department for recovery of the outstanding amounts, and to see to the appointment of receivers and to the liquidation of the companies if he consider this to be a prudent option.

Consider Mary's predicament. What, if anything should she have done to avoid being in this position? What should she do now?

Can Mary act for Herbal Gerbil in it's claims against Lemon Time, Joe and Jo-Beth?

Could Mary refer the instructions to another of her litigation partners at Rush & DeLay to act for Herbil Gerbil on those claims?

Can Mary refuse the instructions from Herbal Gerbil and act for her old friends, Joe and Jo-Beth in their defence of any claim?

Can Rush & DeLay act for US-ury Finance in it's claims against Herbal Gerbil and Pack & Stack?

Can Rush & DeLay refuse the instructions from US-ury Finance and act for Herbil Gerbil and Pack & Stack in their defence of US-ury Finance's application to appoint receivers and liquidators?

If you were the Managing Partner of Rush & DeLay, what course would you take?

Scenario compiled by David Edwards of the Legal Services Commission; problem adapted from material in D Lamb, Case Studies in S. Parker and C. Sampford (eds), Legal Ethics and Legal Practice: Contemporary Issues (Oxford, Clarendon Press, 1995)
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## Panel Presentation

### CONFLICTS OF INTEREST

#### Ross Perrett

When dealing with client conflicts of interest, two circumstances commonly arise. Firstly, existing client conflicts, where your firm simultaneously acts for two clients with conflicting interests. The second circumstance is successive representation, where your firm accepts instructions to act for a client against a former client.

The legal position with respect to existing client conflicts is clear.

Lord Millett in the House of Lords decision of *Prince Jefri Bolkiah v KPMG* said that "a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position." A man cannot, without the consent of both clients, act for one client while his partner is acting for another in the opposite interests. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in this situation. That is not to say that such consent is not sometimes forthcoming.

As a solicitor, you are faced with an irreconcilable dilemma. You have, on the one hand, a duty to protect each client's confidences, and on the other hand, you have a duty to reveal to each client everything in your knowledge about the matter the subject of your instructions.

However, the position is not an altogether uncommon one in non-litigious matters (concurrent representation of clients with conflicting interests in litigious matters is prohibited by the Solicitors Handbook). It can arise in connection with major transactions or projects where one firm may, with the client's consent, act for a number of clients with potentially competing interests. Such circumstances can sometimes be managed through revised retainer terms or devices such as Chinese walls.

It must also occur frequently in regional practices, where access to alternate legal advice is more limited.

However, in my presentation today I do not propose to dwell on the issue of existing client conflicts and their management.

Rather, I want to examine the position in relation to successive client representation, and in particular whether solicitors owe any duty to their former client beyond the continuing duty to

preserve the confidentiality of information imparted during the subsistence of the solicitor/client relationship.

If time permits, I will then comment briefly on the use of Chinese walls or separation arrangements, as a mechanism for managing potential client conflicts.

Solicitors are obliged to protect the confidences of their former clients. Do they, however, have a duty which extends beyond that obligation?

Once again, we look to Lord Millett, in *Prince Jefri* for the classic statement of the law on this issue. Having expressed the test in relation to existing client conflicts which I have just referred to, His Honour said this:

*"Where the Court's intervention is sought by a former client, however, the position is entirely different. The Court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence."*

Accordingly, applying the test described by the House of Lords, it is incumbent on a client who seeks to restrain his former solicitor from later acting for another client against the first client's interests to establish:

Firstly: that the solicitor is in possession of information which is confidential to the client;

Secondly: that the information is or may be relevant to the new matter; and

Thirdly: that there is a real risk of disclosure of that information to the new client.

The burden of proof for the first two issues is on the former client, but it is not a heavy one. That the solicitor is in the possession of information confidential to the former client will be readily inferred, and the relevance of that information to the new matter will often be obvious.

Having established that the information is confidential and relevant, the burden of proof shifts to the solicitor to show that there is no risk of disclosure of that information to the new client. In the words of the House of Lords, the risk must be a real one, and not merely a fanciful or theoretical one. However, it need not be substantial. It is in managing this issue of risk that a knowledge of effective Chinese walls becomes relevant. However, before turning to what

constitutes an effective Chinese wall, I would like to examine whether there are other bases for the Court's jurisdiction to restrain a solicitor from acting against a former client.

The first such basis is that, irrespective of the risk of disclosure of confidential information, a solicitor owes a separate and independent equitable duty of loyalty to a former client. That such a duty exists was held by Justice Brooking of the Victorian Court of Appeal in a case of *Spincode v Look Software* in December 2001.

His Honour held that the obligation of loyalty is not observed by a solicitor who acts against a former client in the same or a closely related matter to that in which he previously acted for the client.

This proposition is in stark contrast to the House of Lords in *Prince Jefri*, which held that a solicitor has no obligation to defend or advance the interests of his former client.

The existence of this independent duty of loyalty to a former client has been upheld by the Courts of Victoria in a number of subsequent decisions. It has been expressly rejected in New South Wales. In the only Queensland case that I could find, Justice Dutney, in a 2002 decision of *Flanagan v Pioneer Permanent Building Society* said that he thought the Queensland position was more in step with *Prince Jefri* than with Victoria.

The Supreme Court of the Australian Capital Territory appears to have recognised the existence of a fiduciary duty of loyalty to former clients.

The Federal Court would appear not to have reached a concluded view. In a matter of *Photocure* in 2002 Justice Goldberg, having applied the test in *Prince Jefri*, went on to hold that "even if loyalty to the client was a relevant consideration for the Court, it was not applicable to the case at hand."

It remains a live issue as to whether the duty of loyalty will be embraced beyond Victoria and the Australian Capital Territory. If such a duty exists, it is something which, of course, cannot be remedied by a Chinese wall.

A third basis for the Court's intervention was identified by Justice Brooking in *Spincode*. It is perhaps less controversial. That is, that the Court has an inherent jurisdiction to restrain its officers where the proper administration of justice so requires.

Justice Brooking spoke of the conduct of the solicitors in that case as being so offensive to notions of fairness and justice that they should, as officers of the Court, be brought to heel,

notwithstanding that they have not (assuming the absence of a duty of loyalty) infringed any legal or equitable right.

This additional basis for intervention has gained broader acceptance than the suggested duty of loyalty.

Justice Bereton of the New South Wales Supreme Court in *Kallinicos v Hunt* held that the Court always has an inherent jurisdiction to restrain solicitors from acting in a particular case as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice.

In order to invoke this inherent jurisdiction the relevant test is whether a fair minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a practitioner be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.

However, His Honour warned that this was an exceptional jurisdiction to be exercised with caution having due regard to the competing public interest in litigants not being deprived of a lawyer of his or her choice.

In the 2004 Queensland decision of *Potts v Jones Mitchell* Justice P D McMurdo was prepared to assume, without deciding, that this third basis of jurisdiction can provide a ground for restraining a lawyer from acting against a former client, even where there is no risk of disclosure of confidential information.

However, His Honour, in applying the test as to whether the Court, in exercising its inherent jurisdiction, should intervene, said that the fair minded, reasonably informed member of the public should be assumed to know the true facts of the matter, including, as His Honour found in that case, that there was no serious possibility that confidential information may be misused.

A note of caution as to the exercise of this jurisdiction was expressed by Justice Heenan of the Supreme Court of Western Australia in *Westgold Resources v St Barbara Mines*. His Honour said:

*"The Court undoubtedly possesses a jurisdiction over solicitors to ensure that the administration of justice is not brought into disrepute by their conduct and to ensure the preservation of the objectivity and integrity of the trial process. What is not entirely clear from the authorities is whether this acknowledged jurisdiction*

*allows restraints to be imposed upon the solicitors where there is no actual or threatened breach of confidentiality, or of a fiduciary responsibility nor of any contractual, tortious or other legal obligation. I include within that range of duties the full scope of the restrictions applying to a person owing fiduciary obligations to avoid any conflict of interest, conflict of duty, conflict of interest or duty, lack of independence or personal interest, actual or perceived, in the issues as stake."*

Having acknowledged that cases dealing with an actual or threatened breach of confidence now fall into a clearly established category where a Court will intervene to protect the confidence, His Honour went on to say this:

*"While the obligations on solicitors are necessarily high, it seems at least doubtful that there can be any justification for a Court to intervene to prohibit proposed activity by a solicitor which does not involve the breach of some contractual, trust, equitable or fiduciary obligation."*

His Honour concluded the jurisdiction of the Court to intervene by way of injunction should only be in aid of recognised rights, duties, obligations or interests and that he doubted very much whether there is any scope for a Court to act to merely entertain a sense of disapproval of the proposed conduct.

So, there are three bases suggested upon which a Court may seek to intervene to prevent a solicitor from acting against the interests of a former client.

The first is to prevent the misuse of confidential information. About that there is no doubt.

The second is the equitable duty of loyalty, which is breached by a solicitor taking up the cudgels against a former client in the same or closely related matter. As best I can determine, this duty has not received any detailed consideration in Queensland. It has strong support in Victoria, but has been rejected in New South Wales.

The third is where a solicitor's conduct is so offensive to notions of fairness and justice, they should be brought to heel in the exercise by the Court of its inherent jurisdiction to control the conduct of its officers, notwithstanding that they have not infringed any legal or equitable right. There can be no doubt as to the Court's inherent jurisdiction to control its officers, but a question arises as to whether that jurisdiction should be exercised in the absence of the actual or threatened infringement or any legal or equitable right or duty.

This is, in my view, much more than an interesting, and perhaps arid academic discussion. It appears to me to be an issue of some practical significance.

Take for example the situation where a practitioner acts for both vendor and purchaser and the transaction goes bad. Can you later act for one of those parties against the other in the subsequent litigation? Justice Brooking considered this possibility in *Spincode*.

Suppose the sale goes off for want of payment of the purchase price on the due date and an argument develops over the delivery of the purchase price to the solicitor. There may be nothing confidential about the facts by which that dispute will be resolved, but can the solicitor, having been retained by both vendor and purchaser to act, and having accepted that retainer, and having acted, then act for one against the other in the resolution of that dispute.

I have no doubt that those circumstances, or circumstances similar to them, arise from time to time.

It was in considering such a scenario that Justice Brooking posed the rhetorical question "How, then do matters stand" and answered himself by saying that it must be accepted that Australian law has diverged from that of England, as expressed in *Prince Jefri*, and that the danger of misuse of confidential information is not the sole touchstone for intervention where a solicitor acts against a former client.

It may well be, as suggested by Justice Brooking, that no experienced solicitor of sound judgment would go over to the other side in the disloyal and unseemly way as occurred in *Spincode*.

However, in Queensland, there is every possibility that the Court would not restrain you from acting in such circumstances, in the absence of a risk of misuse of confidential information. A Court may well follow the position in NSW and find that no equitable duty of loyalty is owed to the former client.

You could not rule out the possibility of being brought to heel by the Court in the exercise of its inherent jurisdiction. However, there is an interesting, and in my view, live issue as to whether, in the absence of any breach of a legal or equitable obligation, the Court would exercise its inherent jurisdiction merely to vindicate its sense of disapproval of the conduct.

The focus of this discussion so far has been on the circumstances in which the Court would intervene.

A further interesting consideration is whether the circumstances in which the Legal Services Commission might intervene are any different to those applicable to a Court. The Commission's powers are enlivened in circumstances where a practitioner engages in conduct that may amount to unsatisfactory professional conduct. The definition of unsatisfactory professional conduct refers to a standard that a member of the public is entitled to expect of their solicitor. Even if the law in Queensland does not impose upon lawyers an equitable obligation of loyalty to their former client, is a member of the public reasonably entitled to expect that their former solicitor will not later act against them in the same or a related matter, thereby potentially invoking the jurisdiction of the Commission?

My time is up, so I will say something only very briefly on the issue of Chinese walls.

The Court will impose a high test as to the adequacy of the wall. The arrangements for establishing a wall should be part of the firm's organisational structure and not established on an ad hoc basis only when an issue arises. For obvious reasons the Courts have held that it will be almost impossible to satisfy the requirements for an effective wall in a relatively small firm, between people who, because of those circumstances, will necessarily be accustomed to working with each other.

An effective Chinese wall will usually involve:

- arrangements for the physical and electronic separation of the competing teams of lawyers;
- an educational program and monitoring by compliance officers as to the operation of the wall and disciplinary sanctions for breach of the wall;
- the informed consent from each client acknowledging the firm's duty of disclosure does not extend to confidential information which would otherwise be liable to disclosure; and
- written confidentiality undertakings by all personnel involved, including word processing and secretarial staff.

In my view the Courts of Queensland are likely to be prepared to accept properly constructed walls, in conjunction with the informed consent of the respective clients and suitably drafted terms of engagement, as an effective device for managing the issue of existing or successive client conflicts.

## **Group Discussion reports**

### ***Group one*** (Janine McMaster-Kirkwood, Group Leader)

While we do not live in a perfect world, the practitioners in this scenario have acted most inappropriately. It appears very complicated, which tends to happen, particularly in larger commercial practices. The group looked at the different relationships and where the conflict lay in terms of Mary's predicament. Interestingly, initially when she started to act for Lemon Time there was no conflict. The conflict arose half way through when Mary identified that one of her partners was acting for the subsidiary of the business. It was slightly removed, given the relationship at the time of the conflict. There was a note to inform the alternative litigators and advise them. On the advice of Tom that they could use the Chinese wall rule, the potential conflict was not even disclosed to the clients. Mary conflicts with the purchasers in this particular situation because she wants to attract their legal work to the firm. This could be seen as involving a personal interest where she was acting for them.

Obviously, Mary did act on behalf of Joe & Jo Beth and they were in that company and she could not act for Herbal Gerbil. The group considered Mary could not transfer the matter to another Rush & DeLay partner.

The group also considered that, given that Mary could be a material witness in future proceedings, she could refuse the instructions from Herbil Gerbil. Similarly, Rush & DeLay could not act for Us-ury Finance.

It was clear that the Managing Partner at Rush & DeLay faces major quality control issues. Some staff should lose their positions if this scenario indicates the general approach of the firm on conflict of interest issues.

The group discussed at length mechanisms that might be used to ensure these things do not arise in the future.

### ***Group two*** (David Edwards, Group Leader)

The group agreed on the need for the firm to exercise stricter control. The scenario suggests that the two partners have come to this conclusion themselves and the firm needs to have an effective Chinese walls policy so that when situations arise they know exactly how to act. In terms of the actual conflict situation involving Jo & Jo Beth, the group agreed that, if push came to shove, the firm could not act. There may be an opportunity for the firm to come to

some sort of resolution, if they were quite prepared to return the overpayment. If Joe and Jo-Beth decided that this was not possible, the problem then presents itself.

Once the problem has arisen, the firm has the ability to make every effort in exploring the possible ways of solving the problem. If they were not in a position to achieve a result, it was decided that the firm would have to not act at all.

There was quite a lot of discussion. Typically, most large firms would have in place a policy for this scenario. A compliance officer who is independent of the matter and does not have any involvement with either practitioner would have responsibility for ensuring adherence to these policies. This would include consent forms from both clients, the scope of the wording of matters such as the general obligation of both clients to expressly inform of matters that the practitioners are able to perform for the other party. There would need to be guidelines on communication and a range of processes.

Theoretically, you could put up a Chinese wall but are the interests of each client being set aside for the best interest of the law firm? This also applies once a dispute arises. The firm might seek some sort of limited retainer to try to resolve the issues, but is that a better option for the firm (which wants to hold onto both clients if possible) than it is for the clients themselves?

It may be in this particular scenario one of the really difficult issues is that Mary does not disclose the overpayment. On the other hand, she may not have realised that her clients were getting a really good deal.

Where did Mary get into trouble? When she did not advise her clients that they may be sued later. This is what can be expected when there have been mistakes.

The real issue is the Chinese Wall. Can you act for the vendor and the financier? This is a massive scenario to manage, once you give over to this situation there is no going back.

A further issue is the full disclosure of mistakes made by other partners in the firm.

## 4. Scenario Three

You are a sole practitioner in general practice and have, for many years, acted for a married couple, Trish and Ted, in relation to their conveyancing transactions and various business dealings. You are currently acting for them in relation to a second mortgage on their primary residence. One day, Trish comes to see you. You assume it's about the current matter. However, she is very agitated. She tells you that she is thinking of separating from Ted because he is physically abusive towards her. He has also been borrowing money and spending it without Trish's knowledge. Trish thinks that he has a gambling problem.

You are aware that the couple have two children and there are significant assets involved in the marriage. Trish is distraught and insists that you are the only lawyer she knows and that she will be uncomfortable if she has to go to anyone else for advice.

1. Do you agree to provide advice about separation to Trish? If not, what would you say to her and what, if anything, would you say to Ted?
2. Would you still be able to act for the couple in the current matter (the second mortgage)?
3. Would your responses be any different if you worked in the family law division of a medium sized firm and all dealings between the firm and the couple have been with the commercial division?
4. Would your responses be any different if you used to work at the firm used by the Ted and Trish but have since moved on to another firm, and Trish has approached you for advice one evening at a community legal centre where you work as a volunteer?

Scenario compiled by Merran Lawler of Griffith Law School
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## Panel presentation

### Conflict of interest Merran Lawler

- Observations made reflect personal experiences of working in community legal centres (CLCs) and small rural practices. Those experiences are not exclusive to CLC solicitors or to practitioners working in smaller non-metropolitan settings.
- Significance of the experiences of CLC workers in particular is the frequency and complexity of potential conflicts of interest and the development of appropriate mechanisms to deal with them. Much can be learned from those experiences, not only in terms of the establishment of systems to identify conflicts but also in terms of processes for managing conflicts and the underlying relationships with clients and those seeking legal assistance.
- At the heart of the work of community legal centres is a commitment to “access to justice”. That a conflict of interest has the potential to disqualify at least one party from access to a CLC service therefore raises serious concerns about the quality and the reality of that access.
- From the perspective of “access to justice” then, my observations focus on three broad challenges for the legal system at large and the lawyers who work within it:
  1. That of applying often complex and vague rules/guidelines regulating conflicts of interest in ways which do not unduly exclude people from access to services;
  2. That of managing the processes of exclusion in ways which protect the existing client from harm while maximising the prospects for the other party to seek appropriate legal services; and
  3. That of ensuring that the most needy in society are not disadvantaged by the sometimes deliberate manipulation of conflict of interest rules/guidelines by the other party in a legal matter.

### Seeing “ghosts” where none exist

- Concerned as they are with the promotion of access to justice, CLCs embrace the adage which underscores rules and guidelines in relation to conflicts of interest - “justice must not only be done but be seen to be done”<sup>1</sup>. The appearance of justice (if not its actuality) is achieved by ensuring that a practitioner is not compromised by providing advice to both sides in a legal matter nor of being placed in a position where confidential information may be used against a client.
- Yet in attempting to reconcile that adage with the practicalities of day to day practice, CLC workers are faced with the regular prospect of seeing the ghosts of conflict where none actually exist.
- Typically, in the context of CLC practice, those ghosts arise when a person seeks legal advice from a centre and a cross-check of the computerised records indicate that the other party has previously sought and obtained legal assistance from the same centre.
- Yet, in itself is that a conflict – that the other party’s name appears as someone who has previously obtained legal advice? Potentially, the legal advice related to unrelated matters in which no confidential client information relevant to the current matter was provided. Potentially, the advice was provided many years ago and there are no records (or indeed staff) dating back to that time save for the basic information of the person’s name and broad legal problem at the time.
- The difficulty for CLC workers in this context is in knowing and applying the myriad rules and guidelines which regulate conflicts of interest in an environment that was not anticipated when those rules and guidelines were developed.
- Take for example the following:  
*“A practitioner should not give legal advice to a person where the practitioner knows that the interests of that person are in conflict or likely to be in conflict with the interests of an existing client...”*<sup>2</sup>

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<sup>1</sup> See Shirvington, V (2006) “*Ethics and Conflicts of Interest and Duties*” The Law Society of New South Wales at 16

<sup>2</sup> Queensland Law Society, “The Solicitors Handbook” at 9-1

- In the context of CLC practice, few of the people who access and obtain services would receive ongoing “casework” or other forms of assistance. Often the advice is an isolated service. Where a one-off instance of advice was provided to a person six months ago, would that person qualify as “an existing client” such to exclude the person now seeking advice? If no records exist (and there is no “corporate memory” of the former “client” because of high staff turnover) how can the practitioner know whether the interests of that former client would be in conflict with those of the newer client? Even where records exist, how can the principal solicitor of a CLC make a meaningful assessment about the potential conflict in circumstances where those records were made by a volunteer who recorded no more than basic information or in circumstances where the advice given was limited (at least in the written record) to “referral to a private solicitor” or “see Legal Aid”.
- Moreover, in the context of CLCs where advice is often given in high volume, time limited settings (such as evening advice sessions staffed by a CLC employee and five or six volunteers) there is little or no opportunity to conduct the necessary research (both of records and of relevant law) to ascertain whether the conflict is genuine or simply a spectre.
- Frequently, the practice in CLCs is to err on the side of caution and to exclude the later person in order to ensure that “justice is not only done but is also seen to be done”.
- Yet, in ensuring the appearance of justice, the potential is that people are excluded from access to CLC services unnecessarily.
- Greater clarity in terms of conflict of interest guidelines and rules would assist CLC workers in delivering services which give effect to not only the appearance of justice but the potential for it to be accessed by CLC clients.

#### Promoting access to justice while excluding access to services

- Often the greatest difficulty, at least for CLC workers in terms of conflicts of interest is not in the recognition of a conflict but in the process of managing it. By this I don’t mean how to continue acting by erecting information barriers and Chinese walls (prospects which due to limited resources are simply beyond the ability of CLCs to embrace). Rather the management of the conflict situation refers to the way in which CLC staff communicate with a person who is to be excluded from access to a service.

- An effective management process is crucial to ensure
  - (a) the protection of the “existing” client both in terms of protection of their identity (in circumstances where the revelation of that identity constitutes a breach of confidentiality) and in terms of their safety (particularly in situations where the client has sought advice around issues of domestic violence or family law and even a “hint” that there is a conflict may result in further violence);
  - (b) the opportunity to explore alternative forms of accessible assistance an excluded person may pursue; and
  - (c) the safety of the CLC staff member who needs to communicate the decision to exclude.
  
- This third aspect is particularly concerning in an environment where only limited justification can be given to the excluded party (“we have an ethical dilemma” or “we have a conflict”) and the person has extremely limited prospects of being able to access services elsewhere. The situation is exacerbated where the person has attempted unsuccessfully to access services elsewhere.
  
- CLCs have developed a range of mechanisms which assist in dealing with these potentially volatile situations. Ensuring that the principal solicitor handles the communications with the excluded person, taking more concrete steps than simply providing a list of alternative sources of assistance (such as actually making an appointment at another CLC for the person) and providing alternative explanations (“I’m sorry that’s just not the sort of situation we can assist you with” or “Unfortunately, we don’t have any staff with the necessary experience in that area”) are all effectively used to exclude access to services while continuing to encourage the excluded person to seek access elsewhere.
  
- Other mechanisms are potentially less effective and more problematic. Adopting a position of seeing the person regardless but confining the solicitor’s role to “giving legal information” rather than “legal advice” potentially exposes the solicitor to risks if the person construes the information as advice (a sometimes very fine distinction exists between the two).
  
- The skill (which unfortunately is not taught either at university or in continuing legal education) is in balancing the practitioner’s imperative (“I can’t act, I have a conflict”) with the needs of the person seeking assistance (“I need your help”) in a way allows the

practitioner to fulfil ethical duties while not exacerbating the person's sense of frustration with and isolation from the legal process.

### The practice of “conflicting out”

- CLC staff are occasionally confronted with the situation of a person who is unable to access services from any one of a range of legal providers (including the CLC) because the other party has engaged in a deliberate process of seeking basic assistance from each of the providers in order to create conflicts of interest. This is particular true in relation to rural and regional services where the pool of available service providers is small – so for example, a person may seek initial advice from the only CLC in the region, the local Legal Aid office advice service, the two different firms of practitioners in town and the one telephone advice line that is available. In effect, the person “covers the field” in order to prevent the other party from obtaining local (and sometimes) any assistance. Often, the party engineering the situation is in a position to pay for their own legal services but acts first to exclude the other person from accessing any free legal services.
- The situation needs to be distinguished from those instances where large companies or government departments engage the full range of top tier firms in any number of legal matters which then effectively prevents those firms from offering pro bono services to potential clients in dispute with the companies or government departments. While that situation is not necessarily one which is “engineered” in order to create conflicts of interest, the unintended result is the same – that individuals are unable to access free services because of a conflict. Significantly, some work has been done (and continues to be done) on limiting the impact on pro bono services of large scale engagement of multiple law firms<sup>3</sup>
- CLCs have not yet developed comprehensive mechanisms to deal with the deliberate “conflicting out” activities. While specialist services directed towards specific sections of the population (eg., women's legal services which can provide initial advice to a woman whose husband has accessed every other service in town) address some of the difficulties, it remains true that unscrupulous parties are able to successfully manipulate

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<sup>3</sup> See for example the work of the National Pro Bono Resource Centre in developing protocols with Commonwealth agencies.

conflict of interest rules in order to prevent a person from gaining access to services and potentially access to justice.

## **Discussion Group Reports**

### ***Group one*** (John Stannard leading, Michael Roessler reporting)

Initially, the issues looked fairly clear but upon consideration it became more complicated. Essentially the answer to the question as to whether the practitioner should act for Trish is no. Potentially, the practitioner could try and assist Trish, but the only way they could do so would be on an information basis only rather than providing actual legal advice. However, there are too many risks in doing that so the prudent approach would be to say they cannot act because of potential conflict with Ted, later down the track.

Potentially, the practitioner could argue that they can act for Trish with Ted's consent but that would involve Ted being informed of the situation which he knows nothing about and, of course, there is the concern of his reputed tendencies for violence against Trish.

In any event, the practitioner would question Trish as to whether she and Ted have had counselling and if not try and encourage her to get some professional advice in that regard. However despite her pleas for the practitioner to act for her, there is no way that a possible conflict may not arise and therefore it is in Trish's interests and those of the practitioner that they decline to act for her and inform her to get separate independent legal advice.

As to whether the practitioner should act for both Trish and Ted in the ongoing second mortgage matter, this depends on the stage the matter is at. If, say, all the documents have been signed by them and therefore there is no legal basis for them to get out of the loan if the only things you are required to do is to complete the process by finalising the settlement then that may be ok. It should be remembered that the practitioner has no proof that Ted either has a gambling problem or, if he does, that he intends to use it for gambling.

However, if the matter is at the stage where it is possible for Trish to pull out of the deal, should the practitioner continue to act for both? The answer has to be no. The practitioner knows that Trish does not wish to proceed with the loan so how can they possibly continue to act on her behalf to make it happen. The problem is that if the practitioner refuses to act for both parties then Ted is going to want to know why. To tell him would breach confidentiality with Trish. What should the practitioner tell him? That they cannot act for ethical reasons?

Ted then goes and makes a complaint to the Legal Services Commission about the failure of the practitioner to act on his behalf.

Would it be any different if the practitioner worked in a medium sized firm in a different section of the firm to that which had provided the commercial law-related advice? No, the group considered that Chinese walls may well work in a commercial situation but not in a family law or personal situation where practitioners are dealing with strong emotional issues and where the parties have much higher expectations that they will be dealt with fairly.

If the practitioner worked as a volunteer in a community legal centre would you be giving Trish legal advice or just basic information? If it was possible to clearly pigeon hole the material given to her as 'information' only that may be ok as opposed to giving 'legal advice' which could perhaps turn into a potential problem. However, it can be difficult to define which is which. The prudent thing to do in this situation would be for the practitioner to decline to see her and get someone else to take their place.

**Group 2** (Neil Watt, Group Leader)

The group agreed substantially with what has previously been said. In relation to whether anything should be said to Ted, the answer is NO.

Would the practitioner be able to act for the family in relation to the current matter? The new knowledge may heighten the duty of care thus increasing the possibility of negligence claims in the future. Would the responsibilities be different in a medium size firm? Probably not.

The reality is that in a CLC situation, if a potential conflict arose, it would most likely be quite easy to refer the client to another lawyer.

In summary: When in doubt – GET OUT

**From discussion**

In regard to physical abuse, participants agreed on the need to be aware and conscious of Trish's vulnerability and to provide her general advice but not specific advice.

One participant questioned whether it was important to consider whether or not the practitioner should provide advice. There is no way you can say anything to Ted – you cannot buy into it, you must continue in the commercial transaction. It was then suggested

that the disclosure might mean that the practitioner no longer had instructions to proceed with this transaction.

Another practitioner emphasised the need to advise Trish to get proper legal advice. Trish could be told, “Now I am aware of the information you have given me that Ted is a gambler, I clearly need to advise you to go and get independent legal advice.”, It would obviously be important to make diary notes of all conversations and have that as a record.

One participant considered the solution was simple – hand the matter over to another volunteer.

Participants then considered what constitutes confidential information as well as the most appropriate manner in which to discharge the duties owed to Ted.

Animated discussion continued for more than a quarter of an hour after the designated finishing time of the symposium, indicative of the interest generated by the scenarios.

## 5. SUMMARY

Conflicts of interest have long created challenges for legal practitioners. The principles governing conflict of interest developed at a time when legal practice was very different. Sole practitioners and small, general practice firms predominated. Ross identifies reasons for the greater prevalence of such conflicts in modern legal practice<sup>4</sup>:

1. The development of national and multi-national legal firms;
2. Increased mobility of partnerships & individuals within the profession;
3. The growth of specialisation in legal practice;
4. Problems when firms seek to enter into a merger;
5. Changes in the lawyer-client relationship. It has become more adversarial. 'Today, lawyers must anticipate claims, litigation and possible disciplinary proceedings from their clients.'

Other factors contributing to conflicts of interest include developments in the range of services provided by law firms, extending beyond standard models of advice and representation. With the tendering out of government legal work, major national law firms may be acting for government or statutory authorities on certain matters and for major corporate and private clients seeking to challenge government decisions & actions in other matters.

The symposium presenters highlighted a range of issues, both in relation to the particular scenarios and in respect of the legal and policy frameworks that should be used to address these issues. The importance of effective systems to alert practitioners to both actual and potential conflicts was emphasised. Of course, practitioners need to do more than be aware of conflict concerns. In addition to knowledge of how interests can diverge, practitioners need processes in place to identify when they should cease to act as well as how to effectively address actual conflicts that arise. The symposium discussions highlighted the need for practitioners to understand the risks they and their clients face if unforeseen circumstances create difficulties.

The variety of insights from participants indicated that practical considerations can make application of the conflict of interest rules difficult. Different contexts will impact on the

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<sup>4</sup> Y. Ross, *Ethics in Law* 2005 (4<sup>th</sup> ed.) 414-417

approaches taken by practitioners. In rural communities, there may be very few sources of legal advice and representation. This inevitably tempers the practical application of conflict of interest principles. Legal aid services, including those focussed on the provision of information and advice rather than representation, are also likely to regularly face conflict of interest difficulties. Certain areas of law are dominated by a small number of highly specialised practitioners, working for a small number of major clients.

The encroachment of commercial imperatives on professional practice has been a recurring theme in this symposium series. Are we expecting too much of practitioners? Some participants were concerned that the economics of legal practice mean some practitioners cannot afford to take a 'safety first' approach. If there is only limited work available, practitioners may well be minded to take matters on despite their potential to generate conflicts between clients.

Participants also considered whether it is unrealistic to expect Chinese Walls to effectively remedy concerns arising from practitioners acting for a party where they or their office have knowledge of another party involved in the same matter. Some serious doubts were expressed, suggesting that effective Chinese Walls necessarily rely on well-developed and closely monitored systems to quarantine different practice sections. As discussion related to Scenario 2 highlighted, an unforeseen turn of events can have great potential to create serious conflict issues, by which time remedial action may be out of the question.

The symposium was successful in raising a range of issues for discussion by a cross-section of interested people who contributed a range of insights. The discussion continued well after the allocated finish time, indicating a high level of engagement. Long may these discussions continue.

Professor Jeff Giddings  
**Griffith Law School**

## APPENDIX 1.

## Program



### *Lawyers, Clients and the Business of Law*

A Symposium Series hosted by Griffith Law School and the Legal Services Commission

Conflict of interests: *Perspectives from diverse legal settings*

### Program

- 3.30 – 4pm    **Registration with coffee available**
- 4pm            **Welcome**  
John Briton, Legal Services Commissioner
- Opening address**  
The Honourable Kerry Shine MP, Attorney-General and Minister for Justice
- Moderator and welcome on behalf of Griffith Law School**  
Professor Jeff Giddings, Griffith Law School
- 4.15 – 4.45    **Perspectives on contemporary topics by panel members**  
                  - *Conflict of interests*
- Panel members**
- |               |                              |
|---------------|------------------------------|
| Ross Perrett  | Clayton Utz                  |
| Brian Bartley | Brian Bartley and Associates |
| Merran Lawler | Griffith Law School          |
- 4.45 – 5.45    **Group discussions**
- 5.45 – 6.00    **Coffee break**
- 6.00 - 7pm     **Report back and general discussion on topics**
- 7pm            **Close**