COMMON COMPLAINTS FOR

COMMERCIAL LAWYERS

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Introduction

The Legal Services Commission receives around 1,400 new complaints each year[1]. The majority of those complaints relate to "personal" areas of law. Family law, deceased estates, conveyancing, personal injuries and criminal law account for around 53% of all complaints received. In addition, a significant proportion of the almost 14% of complaints relating to "litigation" involve personal disputes.

By contrast, the areas of commercial law and construction law combined account for only around 7% of complaints. Accounting for some contribution from the "litigation" category, commercial complaints are unlikely to exceed around 10% of the complaints the Commission receives in a given year. As a result, it seems commercial lawyers are less likely to have a complaint made about them than lawyers practising in other areas.

But that's not to say commercial lawyers are immune from complaints, or that those complaints made have any less impact on either individual lawyers or their practices.

Duties: The heart of professional conduct

Many of the duties which guide lawyers' professional conduct will be familiar. It is beyond the scope of this paper to discuss – or even list – all of them. For that, I recommend consulting one of the several texts that are readily available[2].

Some (though not all) of the relevant duties are outlined in the Australian Solicitors Conduct Rules 2012 (ASCR) for solicitors, and the Barristers Rule 2011 (BR) for barristers.

The paramount duty to the court and the administration of justice (ASCR rules 3 and 5; BR rule 12 (c)), the duty to act with competence and diligence (ASCR rule 4.1.3) and to act in the best interests of the client (ASCR rule 4.1.1; BR rules 37 – 40) will of course all be familiar.

But those are only a handful of the duties that apply to a lawyer's professional conduct.

For example, ASCR rule 4.1.2 requires a solicitor to be both "honest" and "courteous" in "all dealings" in the course of legal practice. ASCR rules 10, 11 and 12 and BR rules 108 – 114 require lawyers to avoid conflicts of interest (as to which, more later).

These rules of course supplement the Legal Profession Act 2007 (LPA).

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[1] Legal Services Commission Annual Report 2018 – 2019 p.5

[2] For example, G. Dal Pont, "Lawyers' Professional Responsibility", 6th ed.

The LPA enables (indeed, in some cases, requires) the Commission to investigate complaints about lawyers that raise issues of "unsatisfactory professional conduct" or "professional misconduct" as defined.

Unsatisfactory professional conduct is limited to conduct by a lawyer which occurs in connection with the practice of law; that is, conduct which occurs during the course of work usually undertaken by lawyers. This type of conduct includes conduct by a lawyer that "falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner"[3].

Professional misconduct is defined more broadly and may include personal conduct by a lawyer which does not occur in connection with the practice of law, but only if that conduct is so serious that it demonstrates the person is not fit and proper to continue as a member of the legal profession[4].

Section 420 LPA expands on these concepts and provides that certain conduct is capable of amounting to either unsatisfactory professional conduct or professional misconduct.

This conduct includes[5]:

> "conduct consisting of a contravention of a relevant law, whether the conduct happened before or after the commencement of this section;
>
> Note—
>
> Under the Acts Interpretation Act 1954 , section 7 , and the Statutory Instruments Act 1992 , section 7 , a contravention in relation to this Act would include a contravention of a regulation or legal profession rules and a contravention in relation to a previous Act would include a contravention of a legal profession rule under the Legal Profession Act 2004 ."

A "relevant law" is defined[6] as follows:

> "relevant law" means—
>
> (a) this Act; or
>
> (b) a previous Act; or
>
> (c) the Queensland Law Society Act 1952 as in force at any time before the commencement of this paragraph; or
>
> (d) the Trust Accounts Act 1973 as in force at any time before the commencement of this paragraph; or

[3] LPA s.418
[4] LPA s.419
[5] LPA s.420 (1)(a)
[6] LPA Schedule 2

(e) the Personal Injuries Proceedings Act 2002 , chapter 3, part 1, as in force at any time before or after the commencement of this paragraph."

The combination of the section, the Acts Interpretation Act 1954, the Statutory Instruments Act 1992 and the definition of "relevant law" mean that contraventions of the LPA itself, the relevant regulation[7], or the ASCR or BR are all capable of amounting to unsatisfactory professional conduct or professional misconduct.

The rules however are not the "be all and end all" of professional conduct. Simply because the rules don't specifically proscribe certain conduct does not mean such conduct is acceptable. As is often cited, there is nothing in the ASCR which states a lawyer must not steal client money from the trust account. However, such conduct is most certainly capable of amounting to unsatisfactory professional conduct or (more likely) professional misconduct.

Third party costs complaints

Issues with costs are the largest single source of enquiries by members of the public to the Commission[8]. They represent over 11% of actual complaints made. While the vast majority of these complaints relate to issues between clients and their own lawyers, a significant minority relate to what might be termed third party costs complaints.

These types of complaints typically arise from standard commercial contracts – such as leases and mortgages – where the terms require one party to pay the other party's costs associated with the contract. Other examples include costs for consents to assignment of leases, or costs associated with enforcing a commercial agreement.

While these types of arrangements are far from uncommon, a commercial lawyer must understand that such arrangements impose – on the lawyer – certain obligations beyond merely looking after their own client's interests.

The LPA recognises these arrangements and puts in place mechanisms for third parties to challenge the legal costs charged to them.

[7] Currently the Legal Profession Regulation 2017
[8] LSC Annual Report 2018 – 2019 p.41

The LPA provisions

A starting point for considering these issues is s.301, which defines a number of terms related to what the LPA calls “third party payers”.

Section 301 provides:

> (1) A person is a “third party payer”, in relation to a client of a law practice, if the person is not the client and—
>
> > (a) is under a legal obligation to pay all or any part of the legal costs for legal services provided to the client; or
> >
> > (b) being under that obligation, has already paid all or a part of those legal costs.
>
> (2) A third party payer is an “associated third party payer” if the legal obligation mentioned in subsection (1) (a) is owed to the law practice, whether or not it is also owed to the client or another person.
>
> (3) A third party payer is a “non-associated third party payer” if the legal obligation mentioned in subsection (1) (a) is owed to the client or another person but not the law practice.
>
> (4) A legal obligation mentioned in subsection (1) can arise by or under contract or legislation or otherwise.
>
> (5) A law practice that retains another law practice on behalf of a client is not on that account a third party payer in relation to that client.

The first point to note is that for someone to be a “third party payer”, they must a “legal obligation” to pay all or part of the client’s legal costs. Provided such an obligation exists, the person is a “third party payer”. The LPA then provides for two sub-categories of “third party payer”.

If the obligation is owed directly to the lawyer, the person is an “associated third party payer”. However, if the obligation is owed to the client, the person is a “non-associated third party payer”.

Examples:

1. A young person is charged with drink driving. They consult a lawyer with their parent. The lawyer enters into a costs agreement with both the young person (as client) and the parent on the basis that the parent will pay the young person’s legal costs. The parent is a “third party payer”; and specifically is an “associated third party payer”.

2. A business operator wishes to enter into a lease of premises. The landlord engages a lawyer to act on their behalf. The lease as drafted by the lawyer provides that the business operator is to pay the landlord's legal costs associated with the preparation and execution of the lease. There is no agreement between the lawyer and the business operator. The only obligation is that contained in the lease between the landlord and the business operator. The business operator is a "third party payer"; but in this instance is a "non-associated third party payer".

Importantly, a "legal obligation" can arise outside contractual relationships. For example, in *Legal Services Commissioner v Wright*[9], the Court of Appeal decided that a court order relating to the disposition of property could form the basis of a "legal obligation" sufficient to make a person a "third party payer" within the meaning of the LPA.

Obligations to associated and non-associated third party payers

The main practical difference between an "associated" and a "non-associated" third party payer relates to costs disclosure obligations.

If a law practice is required to make costs disclosure to a client, then the law practice must make the same disclosure to the associated third party payer[10], but only to the extent that the disclosure is relevant to the costs payable by the third party payer. As a general rule, costs disclosure must be provided to all clients unless one of the exceptions set out in s.311 LPA applies.

The associated third party payer also has the same right to obtain reports about legal costs[11] as the client, but again only to the extent that the costs are payable by the third party payer[12].

There is however no obligation on a law practice to make costs disclosure to a non-associated third party payer.

A third party payer – whether associated or non-associated – has the right to have legal costs assessed[13].

[9] [2010] QCA 321
[10] Section 318 (1) LPA
[11] As to which, see s.317 LPA
[12] Section 318 (4) LPA
[13] Section 335 (2) LPA

This also means a third party payer has the right to an itemised bill. This is because "any person who is entitled to apply for an assessment of the legal costs" is entitled to request an itemised bill[14]. A law practice must comply within 28 days after receiving such a request.

A non-associated third party payer may also, by written request, require a law practice to provide "sufficient information to allow the third party payer to consider making, and if thought fit to make, a costs application"[15]. Just what is "sufficient information" for the purposes of s.335 (7) LPA has not yet been judicially considered so far as I can find. That said, where a law practice is, say, charging pursuant to a costs agreement, it seems logical to expect that, at the very least, the applicable charge-out rates or relevant scale would have to be provided.

Dealing with third party costs complaints

The days of saying to a third party, "That's the bill; just pay it" are gone. It should be apparent that the provision of the LPA encourage a more open and transparent approach around legal costs.

As the old saying goes, an ounce of prevention is worth a pound of cure. With that in mind, one approach may be to head off potential complaints by explaining to third parties up front (perhaps when providing them with the lease or other document) what the costs will be. Where, for example, a fixed fee is being charged, that fee could be stated at the outset. Otherwise, providing a realistic estimate of the expected costs should go a long way towards avoiding problems down the track. Setting out how costs will be calculated may also be appropriate in some cases.

If a dispute actually arises, again transparency around the costs being charged will likely go a long way to resolving it. This might include:

- Explaining what has been charged for, and at what rate;
- Explaining complications or difficulties that required more work than expected; or
- Providing an itemised bill setting out all the work done.

If all else fails, the matter may have to proceed to assessment of costs. Given the cost and time consumed by that process, it should be a last resort.

[14] Section 332 LPA
[15] Section 335 (7) LPA

An ethical issue

An ethical matter to be considered in a third party situation, is that costs are always an indemnity. In other words, neither the client nor the lawyer may profit (or worse, profiteer) at the third party's expense.

Example:

3. A lawyer acting for a landlord has an ongoing agreement with their client to charge $1,000 per lease. The standard lease requires the tenant to pay the landlord's costs. Ordinarily, the lawyer asks the tenant to pay the fixed amount of $1,000. But on this occasion, the lawyer has been "ticked off" by what she sees as unnecessary nit-picking by the tenant's solicitors. The lawyer itemises costs to the tenant (a third party payer) of $1,500 and demands payment. This would be unethical, regardless of the requirement in the lease, as the landlord has never become liable to pay $1,500; only the $1,000.

Navigating the conflict minefield

A lawyer, as any fiduciary, must avoid conflicts of interest. To that end, the ASCR contains no less than three substantial rules – rules 10, 11 and 12 – dealing with various types of conflict. Due to their length, these rules are included as an appendix to this paper. Rather than discuss the "ins and outs" of the rules, this paper will instead concentrate on some commonly encountered types of conflict complaints for commercial lawyer and outline some of the issues involved.

Getting to know you

Although this type of issue arises more frequently with former clients, it can have application to current clients, particularly where a large commercial client might have a number of different businesses associated with them.

Before discussing this topic in more detail, it is necessary to set some parameters. When the Commission deals with a complaint of conflict, it can only do so in terms of the LPA and the consequences the LPA sets out. Those consequences are disciplinary in nature.

The Commission cannot restrain a solicitor from acting for a party on the ground of conflict – only the courts can do that. The tests the Commissioner must apply in deciding on disciplinary action are not the same as the tests the courts will apply in deciding whether to restrain a solicitor from acting. The fact the court has in fact restrained a solicitor from acting does not, *ipso facto*, mean the solicitor must necessarily face disciplinary action over the

matter. This dichotomy between the remedies available to a litigant in court and the disciplinary process under the LPA was alluded to by the Federal Court in *Shaw v Buljan*[16].

In this context, it is also relevant to note some apparent divergence between the common law courts and the family law courts when it comes to restraining solicitors from acting.

The family courts seem to have a rather more generous attitude to clients in these types of situations and are more likely (though not certain) to restrain solicitors from acting[17].

That said, let's take the following (simplified) scenario:

> A law firm acts for a property development company in conveyancing matters. The instructions come from the managing director (MD) and he deals exclusively with Partner A in the firm. Subsequently, MD uses social media to disparage a local councillor who is also a client of the firm. The councillor wants to sue for defamation and consults with her usual lawyer, Partner B. Having no experience in defamation litigation, Partner B passes the matter on to Partner C, who sends a "concerns notice"[18] to MD.
>
> MD objects to Partner C acting, since he is also a "client" of the firm. Partner C responds, pointing out the firm never actually acted for MD, only for his company; and accordingly, he had never been a "client" of the firm. Partner C asserts there was accordingly no conflict in terms of rule 11 ASCR; and points out the firm holds no information in the conveyancing files that could possibly be relevant to the defamation claim.
>
> MD complains to the LSC, arguing that while there may not have been a direct conflict of the type specified in rule 11 ASCR, there was still a conflict. MD says the conflict arises because due to his dealings with the firm in the conveyancing matters, Partner A had come to know his negotiating style, personality, psychology and how he reacted to pressure. MD claims these matters are confidential and very relevant to the defamation matter.

Even a cursory examination of the ASCR rules will reveal that one of the key concepts they target is the lawyer's possession of confidential information. A lawyer's possession of information that is not confidential to the client – such as information in the public domain, for example – is unlikely to be able to found an allegation of conflict.

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[16] [2016] FCA 829

[17] See, for example, the principles discussed by the Full Court of the Family Court in *McMillan & McMillan* [2000] FamCA 1046

[18] A process available under the Defamation Act 2005

The other common issue in this scenario is whether any confidential information the lawyer holds is "material" to the other matter.

MD's suggestion that things like his negotiating style, personality, psychology and how he reacts to pressure constitute confidential information is not "black and white".

As Professor Dal Pont notes[19], whether such "getting to know you" factors amount to confidential information will depend on the circumstances of each case, the nature of the relationship, its length and the "link" (if any) between the two retainers.

Inherent personality attributes are generally not considered to be confidential. They will normally be apparent to anyone who happens to have dealings with the person in question. Such matters do not usually arise out of any solicitor-client relationship, but out of the personality of the person in question.

There is Australian authority for the proposition that if such factors can constitute confidential information, "they will rarely do so"[20]. That, of course, is not to say they can never amount to confidential information.

In addition, law firms (particularly those in smaller communities) may face a question of "optics". A firm seen as being "disloyal" to clients may find that doggedly holding on to one client may deter many others from using its services.

Who is my client?

With business and financial arrangements becoming increasingly flexible and increasingly complex, a potential breeding ground for conflict complaints focuses around confusion about who the client actually is.

Examples:

4. A property development comprises a retail area, a commercial tower and a residential tower. Each of the three areas has its own body corporate. A law firm acts for "the development" (in effect, all three bodies corporate). For several years, the three all get along. But recently the residents have become upset at what they see as unfair treatment in favour of the retailers. The residents, through their body corporate, want the retail body corporate to raise its levies to redress what the residents see as an imbalance in funding arrangements. The law firm, on instructions from the retail body corporate, write to the committee of the residential body corporate stating that was not how the development was set up. The firm makes it clear the retail body corporate will resist any attempt to raise levies. The residential body corporate

[19] "Lawyers' Professional Responsibility", 6th ed. at [8.150]
[20] *Ismail-Zai v State of Western Australia* [2007] WASCA 150; *Fonterra Brands v Viropoulos* (2013) ALR 332

complains to the LSC about the law firm's alleged conflict.

5. A local entrepreneur becomes aware a large parcel of land is going to be coming on the market shortly. It would be suitable for a shopping centre development and is already zoned appropriately for that purpose. The entrepreneur approaches a local builder who is happy to provide building services for the development in return for a share of the profits. The builder cannot otherwise contribute financially. Since the asking price is likely to be beyond the entrepreneur's means as well, the entrepreneur brings in a finance broker to arrange the necessary finance. All three go to a lawyer for advice about how to set up the project and how to see it through to completion. The lawyer recommends setting up a stand-alone company to be the vehicle for the project, with the three individuals as directors and shareholders of that company. All three agree, and the lawyer establishes the company and drafts a joint venture agreement. Meanwhile the broker has sourced finance from a wealthy individual. The lawyer prepares a loan agreement and mortgage between the company and the financier (who has their own lawyer).

   Eight months down the track, the project is plagued by delays primarily caused by wet weather shutting down construction for six weeks. The loan with the financier was for 12 months, and the entrepreneur is concerned the project won't be finished in time to repay the loan and interest. The entrepreneur asks the lawyer to write to the finance broker to re-finance the loan even though this will cost tens of thousands more in fees and up-front interest. The entrepreneur also instructs the lawyer to write to the builder stating that since the builder is responsible for the delays, he has to pay the additional costs or the entrepreneur will sue. The lawyer sends both letters as instructed. The builder complains to the LSC about the lawyer's alleged conflict.

6. A designer has a concept for a new line of swimwear. After market testing suggests the line will be popular, the designer wants to establish an online store to sell the swimwear as a separate brand under a separate name, distinct from her existing haute couture range. A tech-savvy friend suggests crowd-funding the project. The designer sets up a Go-Fund-Me page and soon has the required funds. The designer engages a lawyer to establish the legal framework for the business and set up the necessary licensing agreements. A series of cyclones during the summer months mean swimwear sales slump; and the business faces competition from overseas "knock-offs". The business collapses. The lawyer receives a letter from a class action law firm alleging the lawyer failed to take sufficient steps to protect the interests of the crowd-funding investors.

The class action firm state they have instructions to bring a class action law suit against the lawyer to recover the crowd-funding investors' losses; and to complain to the LSC about the lawyer's alleged lack of competence and diligence towards those investors.

While these types of arrangements no doubt present challenges for lawyers, steps can be taken to minimise the risk of these types of complaints.

The first and most obvious step is to clearly establish who you act for. Make sure you have a costs agreement and ensure it specifies which client(s) you act for. In example 5 (the joint venture), for instance, if the intention was to act only for the joint venture company and not for the individual joint venture partners, then it could easily have been put in writing in the costs agreement.

And importantly, refer those you don't act for to independent legal advice.

Where a client has complicated membership or funding arrangements, it may be worth contacting the members or funders individually to make it clear who you do – and don't – act for.

In example 4, an arrangement was established that depended on goodwill between the various parties continuing. The lawyer in that instance would been naïve to think such an arrangement could never go "pear-shaped". A lawyer in that position needs to think about how to manage the situation if and when problems arise.

Once problems do arise, the lawyers in examples 4, 5 and 6 would be well advised to cut ties with all the clients. The lure of continued fees may cloud judgment – but the cost and stress of disputation, litigation and complaints to the LSC will soon outweigh them. That may not be the only option; but it may well be the simplest and cheapest.

A big happy family

Family businesses are uniquely ripe for conflict (both legal and personal). Leaving aside the usual business issues, the added layer of sometimes dysfunctional family dynamics can make family businesses particularly fraught with potential issues of conflict.

Here are a few of the complications we have seen at the Commission with family businesses:

- The controlling mind of the business (often a parent or grandparent) is either too feeble to play an active role or lacks the capacity to make business decisions.

- Members of the business disagree on its direction.

- Members of the business feel the founder is disadvantaging or oppressing them by arrangements the founder has put in place.

- One member of the business is the sole "driver", while the other members (often siblings) have no interest in it besides the income it generates for them.

- The founder of the business has involved a new life partner in the business with whom the children of a previous relationship have issues.

- The founder of the business has passed away and left a will which favours some children over others.

Lawyers acting for family businesses with these types of issues need to be acutely aware of the potential for conflict.

Sometimes a lawyer in these circumstances can lose sight of where their duty lies. For example, it is not uncommon for a lawyer to have acted for the founder of the business in both personal (e.g. drawing wills) and business dealings over the years. But where the business is now run, for example, by a company, the mere fact of acting for the founder does not automatically mean the lawyer is also acting for the company.

Where the lawyer does act for a company, it is important to clearly establish who has authority to give instructions and who does not. This should be outlined in writing from the outset. If, for instance, the company has one director but five other shareholders, it might be prudent to write to the shareholders outlining that only the director can provide instructions to the lawyer; even if the shareholders happen to disagree with the instructions the director is giving.

Where issues of capacity arise, tread carefully! Several disciplinary decisions – including *Legal Services Commissioner v Ford*[21]; *LSC v Given*[22]; *LSC v Madden*[23]; *LSC v Penny*[24]; and *LSC v Ho*[25] – illustrate the potential pitfalls. The cases however also set out the applicable principles and provide some guidance as to best practice in the area.

[21] [2008] LPT 12
[22] [2015] QCAT 225
[23] [2008] QCA 301
[24] [2015] QCAT 108
[25] [2017] QCAT 95

The perils of delay

Delay – like many things in life – is relative. What one person may regard as inordinate and unacceptable delay; another may regard as nothing more than a minor inconvenience. It will come as no surprise then that the Commission receives a wide range of complaints citing delay as an issue. Some clients expect a phone call or email the same day as they contact their lawyer; while others may wait years before raising the issue.

The cases in the disciplinary jurisdiction reflect this relativity. At one end of the spectrum, cases such as *Legal Services Commissioner v Bussa*[26] seem clear and straightforward. In that case, the respondent had failed to prosecute a criminal compensation claim for more than two years (between September 2005 and October 2007). The Tribunal found the respondent had "not done anything" to advance the claim in that time; and had previously been warned about the issue of delay. This was found to be professional misconduct.

Similarly, in *Legal Services Commissioner v Smith*[27] the respondent's conduct involved delays in a client's matter over four years between 2002 and 2006. The Tribunal held this amounted to unsatisfactory professional conduct.

In *Legal Services Commissioner v Smith*[28], the same respondent was again brought before the Tribunal concerning additional delays in the same case. These delays were from 2006 to 2011, making the total period of delay some nine years. This was found to be professional misconduct.

These cases deal with obvious examples of extreme delay over many years. Few would quibble with the notion that such delays are unacceptable.

By contrast however, in *Legal Services Commissioner v Hinschen*[29] the delay related to a much shorter period – between 15 November 2011 and 28 February 2012. Importantly however, there were significant events – including the exchange of offers to settle the matter – occurring during that period, which the respondent failed to deal with. This was found to be unsatisfactory professional conduct.

While the delay in *Hinschen* was relatively short, it was made worse by what was actually happening during the period of delay.

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[26] [2011] QCAT 388
[27] [2011] QCAT 126
[28] [2014] QCAT 518
[29] [2015] QCAT 122

The Tribunal commented:

> "[22] In the circumstances of this case, the actions of Ms Hinschen went beyond delay as Ms Hinschen failed to communicate important offers to her client. The client was denied the opportunity, at the time, to consider those offers to settle the matrimonial proceedings. Ms Hinschen also failed, after requests, to deliver her file to the client so that the client was left in the position of having to deal with the settlement of the matrimonial proceedings without the benefit of the file.
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> …
>
> [26] Ms Hinschen's conduct was not as serious as the conduct considered in the case of *Legal Services Commissioner v Bussa*, but it goes beyond the occasional delay which might be caused by temporary overload situations. It is conduct which falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner. The conduct is unsatisfactory professional conduct as is contemplated by s 418 of the Act."

The lesson here: delay does not have to be years of inaction before it potentially becomes a disciplinary matter. Shorter delays in circumstances where important events are happening on the client's file also have the potential to result in complaints and disciplinary action.

Communication is the key here. If a matter is held up for some reason, explain to the client what is going on and why it cannot be advanced. Give the client options as to how they might be able to advance the matter, and explain the costs of the alternatives.

The worst thing you can do is simply "clam up". If you have a mental block with a matter, seek assistance from a colleague. Sometimes even just talking it out will reveal a way forward.

APPENDIX

CONFLICT RULES

Rule 10 ASCR

10 Conflicts concerning former clients

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

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

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

10.2.2 an effective information barrier has been established.

Rule 11 ASCR

11 Conflict of duties concerning current clients

11.1 A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule.

11.2 If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the clients' interests are adverse and there is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act, except where permitted by Rule 11.3.

11.3 Where a solicitor or law practice seeks to act in the circumstances specified in Rule 11.2, the solicitor may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:

11.3.1 is aware that the solicitor or law practice is also acting for another client; and

11.3.2 has given informed consent to the solicitor or law practice so acting.

11.4 In addition to the requirements of Rule 11.3, where a solicitor or law practice is in possession of confidential information of a client (the first client) which might reasonably be concluded to be material to another client's current matter and detrimental to the interests of the first client if disclosed, there is a conflict of duties and the solicitor and the solicitor's law practice must not act for the other client, except as follows:

11.4.1 a solicitor may act where there is a conflict of duties arising from the possession of confidential information, where each client has given informed consent to the solicitor acting for another client;

11.4.2 a law practice (and the solicitors concerned) may act where there is a conflict of duties arising from the possession of confidential information where an effective information barrier has been established.

11.5 If a solicitor or a law practice acts for more than one client in a matter and, during the course of the conduct of that matter, an actual conflict arises between the duties owed to two or more of those clients, the solicitor or law practice may only continue to act for one of the clients (or a group of clients between whom there is no conflict) provided that the duty of confidentiality to other client(s) is not put at risk and the parties have given informed consent.

Rule 12 ASCR

12. Conflict concerning a solicitor's own interests

12.1 A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this Rule.

12.2 A solicitor must not exercise any undue influence intended to dispose the client to benefit the solicitor in excess of the solicitor's fair remuneration for legal services provided to the client.

12.3 A solicitor must not borrow any money, nor assist an associate to borrow money, from:

12.3.1 a client of the solicitor or of the solicitor's law practice; or

12.3.2 a former client of the solicitor or of the solicitor's law practice who has indicated a continuing reliance upon the advice of the solicitor or of the solicitor's law practice in relation to the investment of money,

UNLESS the client is:

(i) an Authorised Deposit-taking Institution;

(ii) a trustee company;

(iii) the responsible entity of a managed investment scheme registered under Chapter 5C of the Corporations Act 2001 (Cth) or a custodian for such a scheme;

(iv) an associate of the solicitor and the solicitor is able to discharge the onus of proving that a full written disclosure was made to the client and that the client's interests are protected in the circumstances, whether by legal representation or otherwise; or

(v) the employer of the solicitor.

12.4 A solicitor will not have breached this Rule merely by:

12.4.1 drawing a Will appointing the solicitor or an associate of the solicitor as executor, provided the solicitor informs the client in writing before the client signs the Will:

(i) of any entitlement of the solicitor, or the solicitor's law practice or associate, to claim executor's commission;

(ii) of the inclusion in the Will of any provision entitling the solicitor, or the solicitor's law practice or associate, to charge legal costs in relation to the administration of the estate; and

(iii) if the solicitor or the solicitor's law practice or associate has an entitlement to claim commission, that the client could appoint as executor a person who might make no claim for executor's commission.

12.4.2 drawing a Will or other instrument under which the solicitor (or the solicitor's law practice or associate) will or may receive a substantial benefit other than any proper entitlement to executor's commission and proper fees, provided the person instructing the solicitor is either:

(i) a member of the solicitor's immediate family; or

(ii) a solicitor, or a member of the immediate family of a solicitor, who is a partner, employer, or employee, of the solicitor.

12.4.3 receiving a financial benefit from a third party in relation to any dealing where the solicitor represents a client, or from another service provider to whom a client has been referred by the solicitor, provided that the solicitor advises the client:

(i) that a commission or benefit is or may be payable to the solicitor in respect of the dealing or referral and the nature of that commission or benefit;

(ii) that the client may refuse any referral, and the client has given informed consent to the commission or benefit received or which may be received.

12.4.4 acting for a client in any dealing in which a financial benefit may be payable to a third party for referring the client, provided that the solicitor has first disclosed the payment or financial benefit to the client.