

Fact Sheet 11 - Conflict of Interests

July 2015

Lawyers have a duty of care to their clients; their role is to protect their clients' best interests. This includes maintaining the confidentiality of information about a client if the lawyer obtained that information as a consequence of acting for the client. A lawyer can release client information to people who are not members of the lawyer's firm only if:

- the client has authorised the lawyer to provide the information, or
- the lawyer is required by law to provide the information, e.g. in accordance with court orders or valid notice from the Australian Taxation Office, Centrelink or the Australian Securities and Investments Commission.

There are three main areas where lawyers can be faced with a conflict of interests:

- where the client's interests conflict with the lawyer's own interests
- where the interests of one of the lawyer's clients conflict with the interests of another of the lawyer's clients
- where the interests of a current client conflict with the interests of a former client.

Conflict with the lawyer's own interests

Lawyers must keep their own business interests and investments, and the business interests and investments of their associates (e.g. relatives or business partners) separate from the interests of their clients. For example, a lawyer who advises clients to invest in a mortgage company in which the lawyer has a personal interest might be guilty of professional misconduct. Lawyers cannot borrow money from their clients. While they can make loans to clients there may be ethical problems if they do so in some circumstances.

Further, the lawyer must not exercise any undue influence over a client for the benefit of the lawyer and/or their associates. The lawyer is entitled to fair payment for the legal services provided to the client — but no more.

This means that a lawyer cannot draft a will for a client where the lawyer or an associate of the lawyer may receive a substantial entitlement.

If it is apparent that a lawyer's interests will be in conflict with the client's interests, the lawyer must not accept the client's retainer. Similarly, if a close associate of the lawyer stands to gain

from an investment or other transaction by a client then the lawyer should not act for the client in that transaction. A lawyer who has already accepted instructions from a client should terminate the client's retainer as soon as a conflict of interests is apparent.

Conflict with the interests of another client

As long as there is no dispute or disagreement between the parties to a legal transaction, the parties can both instruct the same lawyer. This may be convenient for both parties and it may save them costs. For example, a lawyer might act for the co-executors of a will. However, lawyers should avoid taking instructions from more than one party if there is any potential for a dispute. For example, acting for both the buyer and seller of a property is unwise although permitted.

A lawyer can accept instructions from more than one party to any proceedings or transaction only if each of the clients:

- is aware that the lawyer is intending to act for the others as well
- understands that the lawyer might not be able to give all of the information relevant to the matter to all of the parties
- accepts that the lawyer will not give one client advice that is against the interests of another client, and
- consents to the arrangement.

If it appears to the lawyer, or to any of the parties, that the interests of the parties are in conflict, the lawyer should stop acting for all of the parties. However, a lawyer may continue to act if an effective information barrier has been established.

Conflict with the interests of a former client

A lawyer must not act for a new client against the interests of a former client if:

- the lawyer has confidential information about the former client which is relevant to the new proceedings, and
- it is reasonable for the former client to think there is a real possibility that the information would be used against them.

Unless:

- the former client gives informed written consent to the lawyer acting; or
- an effective information barrier has been established.

Dealing with a conflict of interests

Clients who are concerned about any conflict of interests can first raise their concerns with the lawyer. A client can also seek advice about whether they can apply to the court to have the lawyer withdraw from the matter if a conflict exists. The Commissioner does not have the power to order a lawyer to cease to act.

Lawyers can get advice from their professional bodies, the Law Society of NSW and the NSW Bar Association, if they have any doubts about whether they have a conflict of interests.