

CAN A LAWYER ACT CONTRARY TO A FORMER CLIENT'S INTERESTS?

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It is not uncommon for a law practice to be instructed to act in a new matter – against a former client, or in circumstances where the former client has an adverse interest.

This situation can obviously arise in a litigation context, but may equally be generated out of commercial or 'non-contentious' business.

(From the outset, it is necessary to note an important distinction. We are using the expression 'former client' to identify a client for whom the law practice has previously acted, but does not presently act; that is, all of the former client's files maintained by the law practice have been closed. The situation of conflicts between current, existing clients is a more complicated issue – and is not dealt with in this article).

So, when is the law practice entitled to accept the new instructions and when must it decline to act? This is an area of law which has undergone some change.

The principles

Originally, it was thought that lawyers might owe ongoing duties of loyalty not to act against the interests of their former clients.

The position in New South Wales is now reasonably clear.

Upon termination of a lawyer's retainer – the duty of loyalty owed by the lawyer to the (former) client is at an end; but the lawyer's duty to maintain the confidences of his/her former client continues.

The law firm must keep private and confidential any information which has been entrusted to it by a former client (or entrusted to it in the matter undertaken for that former client). It would be a breach of duty for the law practice to disclose that information or material to a new client or use it for the benefit of a new client.

There have been numerous occasions in which a former client has sought

Snapshot

- Ordinarily (in New South Wales) after termination of a lawyer's retainer, there is no ongoing duty of loyalty owed by the law firm to the former client.
- Whether a law firm can act in a new matter against the interests of a former client depends upon whether the law firm possesses information confidential to the former client; in circumstances where the information might also be material to the new matter.
- One of the key considerations is whether the law firm has established an effective 'information barrier' to prevent the disclosure or misuse of the former client's information.

to restrain their previous lawyers from acting contrary to their interests – for risk or fear that information disclosed to the lawyer by the former client in an earlier matter might be used by the law practice for the benefit of its new client and against the interests of its former client.

In dealing with these circumstances, the Court is obliged to consider three things:

- in the course of acting for the former client, did the law practice receive information which attaches a duty of confidence?
- is the information material to the new matter?
- is there a real risk that the information will be made available to the new client, or to the personnel within the law practice who are acting for the new client?

In relation to this last element, the onus is on the law practice to establish that there is no real risk of the former client's confidential information being disclosed to, or used for the benefit of, the new client.

Information barriers

In considering these issues, the courts have been prepared to examine whether the law practice has a proper and effective 'information barrier' so as to prevent inappropriate use or disclosure of information arising from a former matter.

An information barrier is an established organisational arrangement designed to prevent the passing of information between separate teams or departments.

In 2006, the Law Society of NSW published *Information Barrier Guidelines*, which have been adopted and referred to in various superior court decisions, including a major piece of litigation in the Supreme Court in Victoria last year: see *Babcock & Brown DIF III Global v Babcock & Brown International Pty Ltd* [2015] VSC 612.

The *Information Barrier Guidelines* provide (amongst other things) that:

- there should be established, documented protocols for setting up and maintaining information barriers;
- a compliance officer should be nominated to monitor compliance with each information barrier and deal with any actual or potential breaches;
- the current client should give informed written consent to the law practice acting – on the basis that the law practice's duty of disclosure does not extend to confidential information which may be held within the practice as a result of the earlier matter;
- certain undertakings should be given by 'screened persons' (ie persons who may possess confidential information arising from the earlier retainer);

- contact between staff involved in the new matter and 'screened persons' should be appropriately limited (physical separation of staff, offices and restriction of access to electronic information may be the easiest way to comply with this); and
- ongoing education and training should be provided regarding information barriers.

Practitioners should familiarise themselves with these guidelines, a copy of which can be found at <http://lawsociety.com.au/cs/groups/public/documents/internetcostguidebook/008728.pdf>.

The *Babcock & Brown* judgment provides useful analysis of 'information barrier' principles.

It also demonstrates the extensive burden on all parties who find themselves involved in litigated disputes over conflict/information barrier issues.

Uniform Solicitors' Conduct Rules

The 2015 *Uniform Solicitors' Conduct Rules* broadly adopt these principles.

Rule 10.1 dictates that a law practice must avoid conflicts between the duties

owed to current and former clients, except as permitted by r 10.2.

Rule 10.2 provides:

'A solicitor or law practice who or which is in possession of information which is confidential to 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.'

Summary

In summary, the operable principles are:

- a law practice can, generally speaking, act contrary to the interests of a former client – unless the law practice holds information, confidential to the former client, which might be relevant to the new client or the new matter;
- if such information is held, it may be possible to prevent use and disclosure by an effective 'information barrier' set up by the law firm. In some

circumstances – particularly non-litigious circumstances – the former client's consent may be available); and

- ultimately, if there is any contest over this issue, a court would consider whether there was a real risk of inappropriate use or disclosure of information.

Final issue

As a final note of warning, it is important to recognise that the Court has an inherent jurisdiction to preserve the proper administration of justice, including the appropriate appearance of justice. This is an exceptional jurisdiction, which is to be exercised with caution, but there may well be circumstances where – despite substantial efforts and an effective information barrier – the principles and appearance of justice lead a court to step in and prevent a lawyer acting against the interests of a former client. Ultimately this is a fact specific/circumstantial matter (and family issues or criminal matters are likely to be the subject of particular sensitivities); but it is important for practitioners to maintain objectivity in considering these issues from an overall perspective. **LSJ**

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