

NON-BINDING ETHICS RULING (2016) 1

NON-BINDING**ETHICS RULING OF:**

Ethics Committee, Queensland Law Society

PUBLISHED ON:

14 October 2016

CATCHWORDS:

NON-BINDING ETHICS RULING – QUEENSLAND LAW SOCIETY – ETHICS COMMITTEE – CONFLICT – LAWYERS – where Firm A act as agent for Firm C and on behalf of Client A – where Firm A allege Firm B is conflicted and cannot act for Client B in the administration of the will of the deceased – where Client B acts as executrix of the deceased's will – where Firm B previously represented Client B and the deceased separately and jointly in other matters – distinction as to acting in the administration of the deceased's will as opposed to ensuing litigation that may render Firm B material witness.

LEGAL RESOURCES:

Australian Solicitors Conduct Rules 2012

New South Wales Professional Conduct and Practice Rules 2013

Succession Act 1981 (Qld)

Supreme Court Practice Direction No. 8 of 2001

G E Dal Pont, Lawyers' Professional Responsibility (Thomson Reuters, 5th ed, 2013)

Barrak Corporation Pty Ltd v The Kara Group of Companies Pty Ltd [2014] NSWCA 395

Chapman v Rogers [1984] 1 Qd R 542

Grey v City of Marion (2006) 159 A Crim R 357

Jeffrey v Associated National Insurance Co Ltd [1984] 1 Qd R 238

Kallinicos & Anor v Hunt & Ors [2005] NSWSC 1181

MacArthur v Bank of New York (1981) 524 F Supp 1205

R v Forde (1986) 19 A Crim R 1

Vector Gas Ltd v Bay of Plenty Energy Ltd [2010] 2 NZLR 444

Watkins v Christian [2009] QCA 101

1. This is a Non-Binding Ethics Ruling by the Ethics Committee ('the Committee') of the Queensland Law Society. The ruling relates to a dispute between Firm A, as agents for Firm C, on behalf of Client A, and Firm B on behalf of Client B in her capacity as executrix of the estate of the deceased.

The Facts

2. By a letter from Firm A sent in June 2016, this matter was referred to the Queensland Law Society Ethics Committee for a Non-Binding Ethics Ruling. The facts agreed between the parties are as follows:
 - a. In 2001, Firm B acted for the deceased and his then wife (Client B) in the preparation of their wills. The Will of the deceased, was executed in 2001, relevantly appointed Client B as his executrix and stipulated:

"I give all my estate to my wife [Client B]...If this gift does not take effect then I give all of my estate to my daughter [Client A] and to my step-children [C], [D] and [E] as survive me and if more than one then equally."
 - b. Firm B agree that they have previously acted both for the deceased and for Client B jointly in relation to the purchase of properties and the preparation of wills, and separately for Client B in relation to an unrelated debt recovery matter against her son.
 - c. In early 2014, the deceased and Client B separated.
 - d. A few months later, Firm B received instructions from the deceased to act for him in relation to matrimonial proceedings against Client B. The firm then continued to act solely for the deceased, with Client B's informed consent, in relation to the matrimonial proceedings.
 - e. The matrimonial proceedings pertained only to property matters. They did not relate to any custody or other related matters.
 - f. Consent orders in relation to the distribution of property between the parties were made in the Family Court in 2014 but were later subject to amendment by the Court in the same year, to correct a typographical error in relation to the misstatement of a lot number in a property description in the original orders.
 - g. For reasons unknown, the deceased and Client B did not obtain a divorce following their separation.
 - h. The deceased died in 2015. On the basis that a divorce was not obtained, Client B remains the deceased's wife, albeit estranged, and remains the sole executrix and beneficiary of the deceased's estate.
 - i. Firm A's principals, Firm C, have been retained by the deceased's daughter, Client A, in relation to a potential family provision claim. They also anticipate receiving similar instructions from the deceased's son, D. The proceedings are yet to be instituted.

Firm A and Firm C's Position

3. Firm C has formed the view that Firm B should immediately cease acting for Client B in relation to the matter on the basis that there is a conflict of interest. That position has been communicated to Firm B.¹

¹ by means of facsimile.

4. Firm A and Firm C contend that a conflict of interest exists between Firm B and Client B in relation to the *administration* of the deceased's estate. The basis is that Client B is the executrix of an estate that is to be administered pursuant to the terms of a will which predates an order of the Family Court made by consent between Client B and the deceased dealing with their matrimonial property.
5. It is further contended that a solicitor or solicitors from Firm B are likely to be called to give evidence as a material witness(es) in relation to:
 - a. the instructions given concerning, and the execution of, the deceased's Will;
 - b. the intended outcome of the orders of the Family Court (which were obtained by consent); and
 - c. the advice given to the deceased after the provision of the Family Court orders in relation to the preparation and execution of a new will as a result of those orders.
6. It is the submission of Firm A and Firm C that the Non-Binding Ethics Ruling from the Committee will recommend that Firm B cease acting for Client B on the basis of the conflict.

Firm B's Position

7. Firm B contends that the conflict as asserted does not exist and has stated that it wishes to continue acting for Client B in the *administration* of the deceased's estate.
8. Firm B does not provide a basis upon which it forms the view contained in its request for a Non-Binding Ethics Ruling, other than to point to rule 27.2 of the *Australian Solicitors Conduct Rules 2012* as sufficiently addressing the conflict in such a way that Firm B may continue to act for Client B in her *administration* of the deceased's estate.

Question to be Answered

9. Ultimately the Committee has been asked to consider whether or not Firm B is conflicted from acting for Client B in relation to the *administration* of the estate of the deceased pursuant to his Will made in 2001, in circumstances where that firm has acted for:
 - a. the deceased and Client B in relation to the preparation of their 2001 Wills;
 - b. the deceased and Client B in relation to certain property transactions;
 - c. Client B in relation to litigation against her son; and
 - d. the deceased in relation to a property settlement between the deceased and their current client, Client B.
10. The question that has not been asked, and is the more pertinent question in the Committee's view, is whether, having regard to the circumstances outlined in the preceding paragraph, Firm B is conflicted from acting for Client B in relation to the litigation of Client A's (and potentially D's) family provision application against the estate, as distinct from the administration of the estate of the deceased.
11. In any event, it is agreed between the parties that the basis upon which Firm B might be conflicted is on the basis that a solicitor or solicitors from Firm B will likely be called to give evidence as a material witness(es) should the matter proceed to trial.

Reasoning Adopted

12. Firm B acting for Client B in her capacity as the executrix of the estate for the purposes of its due *administration* is a separate matter that does not involve *litigation*.

The administration of an estate is a largely clerical process which is, in most cases, uncontentious, often times mundane, and usually uncontroversial. In this case, based upon the information provided, the administration of the estate, without intending to provide an exhaustive list, might include tasks such as:

- a. obtaining a common form Grant of Probate from the Supreme Court of Queensland;
 - b. attending to the transmission of properties either to the executrix, or, in the alternative, to the beneficiary as devisee/legatee;
 - c. collecting various bank accounts and other liquid assets;
 - d. attending to notifications of various government instrumentalities of the death of the deceased;
 - e. maintaining an estate trust account;
 - f. providing executrix's accounts to the beneficiaries where required;
 - g. attending to payment of liabilities; and
 - h. accounting to the beneficiaries, including beneficiaries who might be added to the Will by way of court order.
13. Acting for an executor in relation to the defence of the family provision application against one or more applicants is an entirely different matter. In contrast to the *administration* of the deceased's estate, the *litigation* involves compliance with Supreme Court Practice Direction No. 8 of 2001² and the usual duties that a solicitor owes to the court and to the administration of justice.
14. For the reasons outlined above, and notwithstanding the fact that the parties have not requested it, as a starting point the Committee takes the view that the *administration* of the estate and the *litigation* of the family provision application by Client A (and perhaps her stepbrother) ought to be distinguished and treated as two distinct issues.
15. Relevant to the determination to be made by the Committee is rule 10 of the *Australian Solicitors Conduct Rules 2012* – Conflicts concerning former clients and rule 27 of the *Australian Solicitors Conduct Rules 2012* – Solicitor as material witness in client's case.
16. Rule 10 relevantly states:

“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.”

² Or District Court as the case might be.

17. Rule 27 relevantly states:

“27. Solicitor as material witness in client’s case

27.1 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court, the solicitor may not appear as advocate for the client in the hearing.

27.2 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court the solicitor, an associate of the solicitor or a law practice of which the solicitor is a member may act or continue to act for the client unless doing so would prejudice the administration of justice.”

18. According to Professor Dal Pont:³

“A lawyer must not accept a retainer if there is a reason to believe that he or she will be required to give evidence material to the determination of contested issues before the court. If this becomes apparent during the course of the proceedings, the lawyer should withdraw, and arrange for an independent lawyer to take over the matter.”

19. The statement made by Professor Dal Pont is justified by a number of decisions of the courts, both in Queensland and further afield, and is further justified by the professional rules outlined in the preceding paragraphs. Five reasons are given by Professor Dal Pont as the grounds upon which his statement can be justified, namely:⁴

- a. for the lawyer to appear as a witness confuses a lawyer’s role. The lawyer’s role is to present the case and test evidence and arguments. Conversely, a witness’ role is to provide sworn testimony of facts within his or her personal knowledge or expertise. There is also the risk that by appearing as a witness, the lawyer may be placed in a position where his or her duty to the court and his or her own interests are in conflict with the duty to the client;
- b. by appearing as a witness, the lawyer may have his or her independence queried. That may have a deleterious effect on public opinion of trials and the profession more broadly;⁵
- c. the lawyer’s effectiveness as an advocate could be impaired if his or her credibility as a witness is impeached;⁶
- d. the finder of fact may place undue weight on the testimony of an officer of the court;⁷ and
- e. finally, perhaps not relevant to civil proceedings, in a criminal matter the lawyer acting as a witness could produce a miscarriage of justice sufficient to substantiate an appeal against a conviction.⁸

20. Professor Dal Pont justifies extending the application of this rule to solicitors who instruct counsel, referring to the decision of *Jeffrey v Associated National Insurance Co Ltd*⁹ and

³ G E Dal Pont, *Lawyers’ Professional Responsibility* (Thomson Reuters, 5th ed, 2013) [17.45].

⁴ Ibid.

⁵ *Jeffrey v Associated National Insurance Co Ltd* [1984] 1 Qd R 238, 245 (Thomas J);
Vector Gas Ltd v Bay of Plenty Energy Ltd [2010] 2 NZLR 444, [149] (Wilson J).

⁶ *R v Forde* (1986) 19 A Crim R 1, 12 (Kaye J).

⁷ *MacArthur v Bank of New York* (1981) 524 F Supp 1205, 1209-11.

⁸ *Grey v City of Marion* (2006) 159 A Crim R 357, [31].

⁹ [1984] 1 Qd R 238, 245 (Thomas J).

quoting Campbell C.J. who believed it:

“... unwise for a solicitor, who is not himself appearing as an advocate or an instructing solicitor in court but who is aware that it is likely that he will be called as a material witness... to continue, either personally or through his firm, to represent the client if this can be reasonably avoided.”¹⁰

21. Justice Brereton of the New South Wales Supreme Court helpfully summarised the authorities as they were at the date of that judgement noting at [76]:

“During the subsistence of a retainer, where the court’s intervention to restrain a solicitor from acting for another is sought by an existing client of the solicitor, the foundation of the court’s jurisdiction is the fiduciary obligation of a solicitor, and the inescapable conflict of duty which is inherent in the situation of acting for clients with competing interests [citation omitted].

Once a retainer is at an end, however, the court’s jurisdiction is not based on any conflict of duty or interest, but on the protection of the confidences of the former client (unless there is no real risk of disclosure) [citation omitted].

After termination of the retainer, there is no continuing (equitable or contractual) duty of loyalty to provide a basis for the court’s intervention, such duty having come to an end with the retainer [citations omitted].

However, the court always has 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 [citations omitted].

The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should 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 [citations omitted].

The jurisdiction is to be regarded as exceptional and is to be exercised with caution [citations omitted].

Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause [citation omitted].”¹¹

22. Justice Brereton then went on to note:

“It is generally undesirable for a practitioner who is aware that he is likely to be called as a witness, other than in relation to formal or non-contentious issues, to continue to act. If a practitioner’s credibility is at stake as a witness, his personal integrity may be put in issue and that may constitute a personal interest inconsistent with the practitioner’s duty to the court or to the client.”¹²

23. The Committee acknowledges that the rule being considered in the above-mentioned decision was rule 19, a predecessor to rule 27 of the New South Wales *Professional Conduct and Practice Rules 2013* (“the New South Wales Solicitors’ Rules”). The New South Wales Court of Appeal¹³ considered the difference between the predecessor rule 19 and rule 27 of the New South Wales Solicitors’ Rules, which is almost identical to rule 27

¹⁰ *Chapman v Rogers* [1984] 1 Qd R 542, 545 (Campbell C.J.).

¹¹ *Kallinicos & Anor v Hunt & Ors* [2005] NSWSC 1181, [76].

¹² *Ibid* [87].

¹³ *Barrak Corporation Pty Ltd v The Kara Group of Companies Pty Ltd* [2014] NSWCA 395 (Adamson J.).

contained in the *Australian Solicitors Conduct Rules 2012*. Adamson J, with whom Barrett JA and Sackville AJA agreed, observed:

*"It is necessary to emphasise the risk posed to the administration of justice in New South Wales by solicitors remaining on the record when they are, or may be, witnesses in proceedings. This risk is heightened when they have a personal interest in the outcome of litigation beyond recovery of their fees."*¹⁴

Adamson J went on to note:

"As referred to above, rule 19 was modified after the proceedings in the Court below had been determined. The present rule, rule 27.2 of the Solicitors' Rules, provides:

'In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court the solicitor, an associate of the solicitor or a law practice of which the solicitor is a member may act or continue to act for the client unless doing so would prejudice the administration of justice.'

*The effect of the amendment is to change the rule from a prohibition qualified where there are 'exceptional circumstances justifying the practitioner's continuing retainer by the... client' (Rule 19) with a qualified permission that allows a solicitor to continue to act for the client unless doing so would prejudice the administration of justice (Rule 27.2). I do not discern any change in the purpose of the provision, which is to protect the administration of justice by circumscribing the circumstances in which a solicitor who is, or may be, required to give evidence in proceedings is permitted to act."*¹⁵

Reasons

24. A search of the Supreme Court registry via the e-courts portal for the surname of the deceased (and Client B) does not reveal any current applications, claims or caveats on foot in that name that are relevant to this matter. There is no contention that the Will made in 2001 is not the deceased's last will, nor is there any suggestion that the deceased and Client B were divorced. There is, however, a suggestion that the property settlement orders in the Family Court were final orders and as such, Client B should not inherit anything from the estate of the deceased. It is likely that Client A and her stepbrother will bring proceedings in a court of appropriate jurisdiction pursuant to section 41 of the *Succession Act 1981* (Qld).
25. The question put to the Committee about whether or not Firm B is conflicted from acting for Client B in the *administration* of the estate can be answered quite simply. The *administration* of an estate, as referred to earlier, does not involve contested proceedings, unless the validity of the Will is being called into question and a solemn form application for probate is being made. If it were the case that Firm A and Firm C on behalf of Client A intended challenging the validity of the will by caveating against a common form grant, then, depending on the issues raised in those proceedings, Firm B could be conflicted from acting for the reasons which are discussed below in relation to the family provision application by Client A. If, however, the administration of the estate of the deceased extends only to tasks such as:
 - a. obtaining a common form Grant of Probate from the Supreme Court of Queensland;

¹⁴ Ibid [47].

¹⁵ Ibid [48], [49].

- b. attending to the transmission of properties either to the executrix or, in the alternative, to the beneficiary as devisee/legatee;
- c. collecting various bank accounts and other liquid assets;
- d. attending to notifications of various government instrumentalities of the death of the deceased;
- e. maintaining an estate trust account;
- f. providing executrix's accounts to the beneficiaries where required;
- g. attending to payment of liabilities; and
- h. accounting to the beneficiaries, including beneficiaries who might be added to the Will by way of court order,

then it is difficult to see how Firm B could possibly be conflicted from continuing to act to administer the estate and assist the executrix to complete her executorial duties.

26. The question that the Committee believes should have been asked is whether Firm B is conflicted from acting for Client B in relation to the defence of a family provision application claim by Client A and her stepbrother. It is common ground that:
 - a. Firm B acted for the deceased, with the permission of Client B, in relation to the property settlement as a result of their separation;
 - b. Firm B acted for the deceased and Client B in relation to the preparation of their wills, in particular the Will of the deceased made in 2001;
 - c. Firm B has acted for the deceased and Client B in relation to other transactions; and
 - d. Firm B has acted for Client B in relation to litigation against her son.
27. Whether the court decides to exercise its jurisdiction to restrain Firm B from acting for Client B in the litigation which is almost certain to ensue, is a matter for it, after considering the nature of the allegations and the material issues in dispute. Without the benefit of the relevant pleadings, it is both premature and difficult for the Committee to express any view on the matter, apart from reiterating the considerations taken into account by the courts. The caution with which the courts approach such questions was highlighted by the Queensland Court of Appeal in *Watkins v Christian*,¹⁶ with Muir JA (with Fraser JA and White J agreeing) commenting on the "folly of attempting to decide"¹⁷ such a question "before the relevant facts can be ascertained":

"...it is unnecessarily speculative to attempt to predict before a defence has been filed, what witnesses will be called and the materiality of their evidence".¹⁸
28. For completeness, the Committee also draws Firm B's attention to rule 10 of the *Australian Solicitors Conduct Rules*. By acting in the litigation for Client B, Firm B would be attempting to uphold the terms of the deceased's Will. It is possible that the information held by Firm B is of the type considered by rule 10. Although Client B is the executrix of the estate of the deceased and is the personal representative of the deceased on the one hand, her position in relation to the access of such information also presents a potential conflict, especially in circumstances where that information could be detrimental to the deceased. It would be an absurdity if Client B could give informed consent to herself to access documents detrimental to the deceased. While the implementation of an information barrier might assist, the Committee considers that it is preferable that it be avoided where there is an alternative path

¹⁶ [2009] QCA 101.

¹⁷ *Ibid* [38].

¹⁸ *Ibid* [40].

free of any potential conflict. On that basis, the Committee suggests that the parties may wish to consider whether it is prudent in all of the circumstances¹⁹ to appoint an *ad litem* executor for the purposes of conducting the litigation, free of any potential conflict.

29. The Committee concludes:

- a. Firm B is not conflicted from acting in the *administration* (as that word has been defined in these reasons) of the estate of the deceased and assisting Client B with due administration of the estate.
- b. While noting the cautious approach adopted by the courts in such matters, it is premature at this stage, before proceedings have been instituted and the issues distilled, to make any determination as to whether a solicitor or solicitors from Firm B will be called as witnesses, whether their evidence will be material, and if so, whether they should withdraw as solicitors for Client B.
- c. The parties may wish to give due consideration to the appointment of an *ad litem* executor to avoid any perceived or actual conflict. Consideration must be made having first considered all of the circumstances in the litigation, details of which are not available for consideration by the Committee at this time.

¹⁹ Which are not available to the Committee at present.