

Who's better, who's best? best?*

Who is the client? Determining boundaries and appropriate representation in estate planning
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Estate planning solicitors have a particularly difficult and onerous task in assisting clients with intergenerational transfer of family wealth, because the inherent nature of families is that they see themselves as one being.

Yet they are a unit of many individuals who have interests in opposition to the other individuals in the family unit. That dynamic invariably imports conflicts of interests with the potential to derail even the best of advice, and place the advising solicitor at risk.

Accordingly, from the outset it is critical for the solicitor to identify for whom they act and the scope of their retainer. This needs to be articulated to the client both verbally and in writing. It also needs to be addressed with other family members and advisers. Clarity from the outset sets the tone, expectation and direction of the estate planning process.

In determining the boundaries and level of our representation, the starting point is: what are our duties? To that end we are bound and directed by the Australian Solicitors Conduct Rules (ASCR).^{1,2}

The ASCR have been adopted by:³

- South Australia⁴
- Queensland⁵
- New South Wales⁶
- Victoria⁷
- Australian Capital Territory.⁸

According to ASCR Rule 2, “[t]he purpose of these Rules is to assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and these Rules”.

Similar principles apply to non-participating states through the common law and in equity.⁹

Subject to our overarching duty to the court¹⁰ we:

- have an absolute duty to act in the best interests of a client¹¹
- must protect the client’s confidentiality¹²
- must avoid conflicts between current and former clients,¹³ and
- must avoid conflicts between the solicitor, the firm and the client.¹⁴

The tenet underpinning these professional rules is that solicitors must ensure undivided loyalty to their client and that this is achieved by avoiding conflicts of interests, which cannot be “fulfilled for clients who have interests that are, for the purposes of the retainer, in opposition”.¹⁵

While the ASCR do not prohibit a solicitor for acting for multiple parties, they do establish a stringent set of compliance criteria which are exceptionally difficult to meet.¹⁶ The accepted wisdom is that it is “far better for each party to be separately represented and advised from the outset”.¹⁷ This is highlighted by the fact that the duty of confidence to the client includes, information:

- “about the client that a solicitor learns in the professional relationship;
- which the solicitor would not have had but for the relationship;
- of a confidential nature acquired by the solicitor before the relationship of solicitor and client is established; and
- opinions formed by the solicitor about the client’s affairs.”¹⁸

The estate planning/wealth transfer process is even more complicated where there are agents involved, such as adult children giving instructions 'on behalf' of parents or as attorneys; and/or referrers generally, but particularly those who seek to give instructions on behalf of the client, and/or be present or party to communications with the client.

In these arrangements there is often a view by the third party that they have a right or duty to intervene to save the client from the burden of processing the complexities of the issues and work to be done. These dynamics are exceedingly difficult to navigate, but nevertheless must be managed ethically, otherwise the risk of a negligence suit looms long and large over the file.

Where instructions are not taken directly from the client, issues of suspicious circumstances, undue influence, unconscionable conduct, resulting trust; equitable estoppel and disappointed beneficiaries are but a few claims that can upend the plan, while exposing the solicitor to liability and professional sanctions.¹⁹

Queensland solicitors must be particularly careful with any arrangement with referrers. For more details of our duties in that regard please refer to the Queensland Law Society:

- [Guidance Statement No.3](#) – Paying Referral Fees and Rule 12.4.4 Australian Solicitors Conduct Rules 2012 (published 30 June 2015), and
- [Guidance Statement No.4](#) – Receiving Referral Fees and Rule 12.4.3 Australian Solicitors Conduct Rules 2012 (published 30 June 2015).

A clear example of how the dynamics of the referrer relationship can and do result in negligence claims is ***Robert Bax & Associates v Cavenham Pty Ltd*** [2012] QCA 177 (***Bax***).

Bax involved a number of mortgage transactions that went sour. The solicitor argued that he was engaged on a limited retainer basis to merely prepare the mortgage documents and attend to having them stamped. The court held the solicitor liable in negligence where instructions were given by a referrer (the client's bank manager who was also a friend of the solicitor) and not the client directly.

The court found the solicitor could not undertake the retainer "without ascertaining the extent of the risk the client wished to assume in the transactions, evaluating the extent of the risks involved in the transactions and advising in that regard".²⁰ In that context the court found the duty to advise "does not depend on advice or information being specifically sought by the client".²¹

However, contrast ***Bax*** with the decision ***Badenach v Calvert*** [2016] HCA 18 where the High Court found that the limited scope of the retainer did not extend to a duty to provide estate planning advice.

In managing the many different relationships of the interested parties, practitioners can find themselves falling prey to pressure. The decision of ***Provident Capital Ltd v Papa*** [2013] NSWCA 36 (***Papa***) provides an example of the dangers of being pressured, by clients into being a mere scribe.

Papa involved a client "simply" wanting to have loan documentation witnessed and the solicitor did so without anything further. Mrs Papa defaulted on the loan, and the matter went pear-shaped.

The Court of Appeal held that the solicitor had a duty to go beyond the mere paperwork and advise on the practical implications of the loan agreement. It was a salutary reminder that the requirement

to seek independent legal advice and other advice is not a mere check-box exercise, which ought to be simple and cheap.

When there are third parties involved in the process, it is also imperative the solicitor advise the client as to the impact of loss of confidentiality and the risk of lost legal professional privilege, generally, but specifically if the matter should find itself in litigation. Otherwise, you might find you have bet your life for the estate plan will cut you just like a knife (to paraphrase the great Pete Townsend).²²

*Apologies to the Who – *Who's Better, Who's Best* album.

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Footnotes

¹ As they are referred to in Queensland. References to the ASCR in this article are to the Queensland ASCR.

² ASCR 4.1.5.

³ Review of the Australian Solicitors' Conduct Rules 1 February 2018, Law Council of Australia @ page 5; see also qls.com.au/Knowledge_centre/Ethics/ASCR_2012.

⁴ Effective from July 2011 as the Law Society of South Australia, Australian Solicitors' Conduct Rules.

⁵ Effective from June 2012, as the Australian Solicitors' Conduct Rules.

⁶ Effective 1 July 2015, as the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

⁷ Effective 1 July 2015, as the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

⁸ Effective 1 January 2016, as the Legal Profession(Solicitors) Conduct Rules 2015.

⁹ See *Lawyers' Professional Responsibility* third edition, GE Dal Pont, Thomson Lawbook Co.

¹⁰ ASCR rule 3.1.

¹¹ ASCR rule 4.1.1.

¹² ASCR rule 9 – which survives the termination of the retainer and the death of the client. See *Hilton v Barker Booth & Eastwood (a firm)* [2005] 1 All ER 651, 665 [44] cited in 'Thinking about ethical leadership' presentation, by Stafford Shepherd, Principal Ethics and Practice Counsel, QLS Ethics and Practice Centre, QLS solicitor Support Pty Ltd, 21 August 2020 at the University of the Sunshine Coast.

¹³ ASCR rules 10 and 11.

¹⁴ ASCR rule 12.

¹⁵ *Lawyers' Professional Responsibility* third edition, GE Dal Pont, Thomson Lawbook Co. at [7.30] citing at footnote 12 *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 at 90 per Richardson J; *Haira v Burberry Mortgage Finance & Savings Ltd (in receivership)* [1995] 3 NZLR 396 at 405 per Richardson J.

¹⁶ A wider exposition on these principles was given in the presentation at the University of the Sunshine Coast, 'Thinking about ethical leadership', by Stafford Shepherd, Principal Ethics and Practice Counsel, QLS Ethics and Practice Centre, QLS solicitor Support Pty Ltd, 21 August, 2020.

¹⁷ *Ibid.*

¹⁸ As above, citing *Legal Practitioners Complaints Committee v Trowell* [2009] WASAT 42; see also *matter of Hutchinson v Timmins: Estate of Kevin Henry Fox (Deceased)* [2018] NSWSC involving an application to restrain a solicitor from acting in an estate dispute. For a discussion on the case see the writer's article: 'Conflicts of interest', *QLS Proctor* September 2019.

¹⁹ See *The Estate of Tucker, Deceased*, [1962] SASR 99; *Re Estate Sharman*; *Ex parte Versluis* [1999] NSWSC 709; *Vernon v Watson*; *Estate Clarice Isabel Quigley dec'd* [2002] NSWSC 600; *Legal Profession Conduct Commissioner v Brook* [2015] SASCFC 128; *Legal Services Commissioner v Ho* [2017] QCAT 95; *Legal Services Commissioner v Ronald Aubrey Lawson* [2019] QCAT 100; *Legal Services Commissioner v Slipper* [2019] QCAT 146.

²⁰ *Robert Bax & Associates v Cavenham Pty Ltd* [2012] QCA 177 at [54].

²¹ *Ibid* at [56].

²² Again, apologies to the Pete Townsend of the Who and the song *You Better You Bet*.