



CONVEYANCING SERIES 2022

Mastering The Essentials

Conveyancing and Conflict

Presented by | Phil Nolan, Risk Manager, LPLC



Quotes

Grub first, then ethics.

- *Bertolt Brecht*



For a lawyer to represent two or more clients with conflicting interests threatens client loyalty.

- *Gino Dal Pont*

Agenda

1. Introduction

2. The rules/legislation

3. The common law

4. Claims

5. Do the right thing

6. Checklist

Introduction

Where do ethics come from?

- Morality
- Professional responsibility
- Honesty
- Integrity
- Utilitarianism



Introduction

Zoom poll

Have you received formal training about identifying and dealing with conflict?

- a) Yes
- b) No



Five key points

- Establish a formal process to deal with potential conflicts
- Know the rules
- Know the common law
- Think about whether there might be community concern about your conduct
- Use a checklist to be aware of conflict issues.



Introduction

Core conflict principles

- No divided loyalties
- No personal gain at client's expense
- No other conflicting duties.

Introduction

Sources of obligations	Consequences of breach
<ul style="list-style-type: none">• Fiduciary duties<ul style="list-style-type: none">- Trust, loyalty, confidence	<ul style="list-style-type: none">• Potential claim• Restraining order
<ul style="list-style-type: none">• Legal profession regulation<ul style="list-style-type: none">- Conduct rules	<ul style="list-style-type: none">• Potential claim• Conduct complaint / disciplinary action
<ul style="list-style-type: none">• Tort<ul style="list-style-type: none">- Duty of care	<ul style="list-style-type: none">• Potential claim
<ul style="list-style-type: none">• Contract<ul style="list-style-type: none">- Engagement terms- Professional indemnity insurance terms	<ul style="list-style-type: none">• Potential claim• Damage to:<ul style="list-style-type: none">- Client relationships- Reputation- Profitability- Personal wellbeing

Quiz

Zoom Q&A

What processes do you have in place in your office to avoid a conflict?



The legislation / rules

Uniform law – see sections **6**, **259** and **423**

Rules:

- Rule 10 – former clients
- Rule 11 – current clients
- Rule 12 – self interest

Sale of Land Act (1962) Vic – Section 29W

Cannot act for both vendor and purchaser under a terms contract.



Rule 10 – former clients

A solicitor and law practice must avoid conflicts between the duties owed to current and former clients.

Example

Firm advised client on investment in a MIS. Client terminated retainer and represented themselves.

New client wanted to acquire a hotel which was an asset of the MIS.

Ethics ruling – the firm has a perceived conflict and should not act.



Rule 11 – concurrent clients

A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients.

Examples

- Vendor and purchaser
- Lessor and lessee
- Lender and borrower

LIV ethics:

'....it is generally not advisable to undertake simultaneous representation....'

Rule 12 – self interest

A solicitor must not act for a client where there is conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor.

Example

JV with client to develop and sell land – financial interest in outcome.

Practitioner buying property from a client.

‘...the practitioner is under a duty to send the client off to get independent advice...’

Common law

Purpose and effect of the rules

'...In considering whether a solicitor has engaged in unsatisfactory professional conduct or professional misconduct, the Rules apply in addition to the common law...'

Examples of common law issues

- Acting without instructions – see Victorian Legal Services Board Commissioner v Logan (Legal Practice) [2017] VCAT 189
- Lender and borrower
- Land developer and purchaser



Some conflict cases

- *Dale v Clayton Utz* (No.2) (2013) VSC 54 at para 146
- *Pyramid Building Society* (in liq) v *Rick Nominees Pty Ltd & Pyramid Building Society* (in liq) v *Meeral Pty Ltd*, unreported SCV (2162 & 2231 of 1992)
- *Commonwealth Bank of Australia & Anor v Smith & Anor* (1991) 102 ALR 453
- *Trade Practices Commission v CC (NSW) Pty Ltd* (No.3) (1994) 125 ALR 94

Some conflict complaints

Concurrent conflict

- *Legal Services Commissioner v Spaulding* (Legal Practice) [2015] VCAT 1243
- *Legal Services Commissioner v Hession* (Legal Practice) [2010] VCAT 1328

Self interest conflict

- *Law Society of NSW v Harvey* [1976] 2 NSWLR 154
- *Guss v the Law Institute of Victoria* [2006] VSCA 88

Exercise – conflict and consent

Background – relevant part of rule 11

Where a solicitor or law practice seeks to act for two or more clients in the same or related matters and where the clients' interests are adverse and there is a potential conflict the solicitor may act where the clients have given **informed consent**.

Zoom Poll

Do you obtain written consent when complying with rule 11?

- (a) Yes
- (b) No



Exercise – concurrent conflict

Background

You act for a vendor and a purchaser in relation to the private sale of the vendor's principal place. The vendor is overseas, so you have been receiving instructions from the vendor's attorney.

Before the cooling-off period expires, the attorney contacts you and says the vendor mistakenly forgot to mention that they had done some owner-builder works, but that they have spoken to the selling agent who said that they don't need to disclose details about the works in the section 32 statement.



Exercise – concurrent conflict

Zoom Q&A

What would you do next?

What is your position if the purchaser wishes to terminate the contract?



Exercise – conflict between purchaser and nominee

Background

You act for a company purchaser of land. The directors instruct you that they now wish to nominate a third-party individual who has approached them with a generous offer to buy the land from the company.

Zoom poll

Would you act for the nominee?

(a) Yes

(b) No



Did you know?

A deterrent excess is payable where a firm has a claim and the firm acted for multiple parties or interests.

Refer to clause 5.2 of the policy.

<https://lplc.com.au/insurance/solicitors/solicitor-policies>



**Contract for Professional
Indemnity Insurance for
Solicitors (with defence
costs exclusive excess)
2021/2022**




Session break: 3 steps to recharge

1. Get your circulation going

- Stand up and stretch your arms way up high
- Try some jumping jacks
- Bend down and try to touch your toes

2. Reduce eye strain

- Look away from your computer and gaze at an object in the distance  at least 20 seconds
- Adjust your computer display settings – like brightness or contrast

3. Remember to stay hydrated

- Drink a big glass of water
- Have a refill ready for the next part of the session!



Claims

- Acting for a purchaser under a head contract and the same vendor and the purchaser in a sub-sale.
- Acting for multiple parties in a joint venture to develop land.
- Continuing to act for vendor after a sale of land dispute arises and where the vendor alleges that the practitioner is liable for any loss due to their negligence in failing to properly document the transaction.



Claims – intra-family transfer

Typical scenario

- clients in heated agreement about what they want
- high emotions
- cannot understand need for one party to go elsewhere
- Practitioner acted for more than one party
- At least one party was vulnerable



Claims – intra-family transfer

A gift from grandma

Allegations against the practitioner:

- Failed to advise the grandmother to seek independent advice about the agreement
- Failed to properly explain the agreement and its consequences to the grandmother
- Knew or should have known there was a conflict of interest and the grandmother was vulnerable



Claims – acting for vendor and purchaser

Section 32 statement said electricity and water are available but are not connected.

Pre-contractual advice to purchaser?

Lessons

- Disappointed party often alleges the lawyer was not as rigorous as he/she would have been if acting solely for that client, did not inform the client of the risks or preferred the other client's interests.
- Conflict may be incidental to the alleged negligence, but it can muddy the waters.
- Importance of records and file management.

Claims – property development – self interest

Practitioner acted for a land developer for a multi-unit development.

Company engaged the practitioner's spouse to sell the units.

Units were sold and everyone was paid.

Business partners had a falling out and one sued the practitioner alleging the lawyer acting in conflict because the spouse was not a licensed estate agent, so was not entitled to any commission.

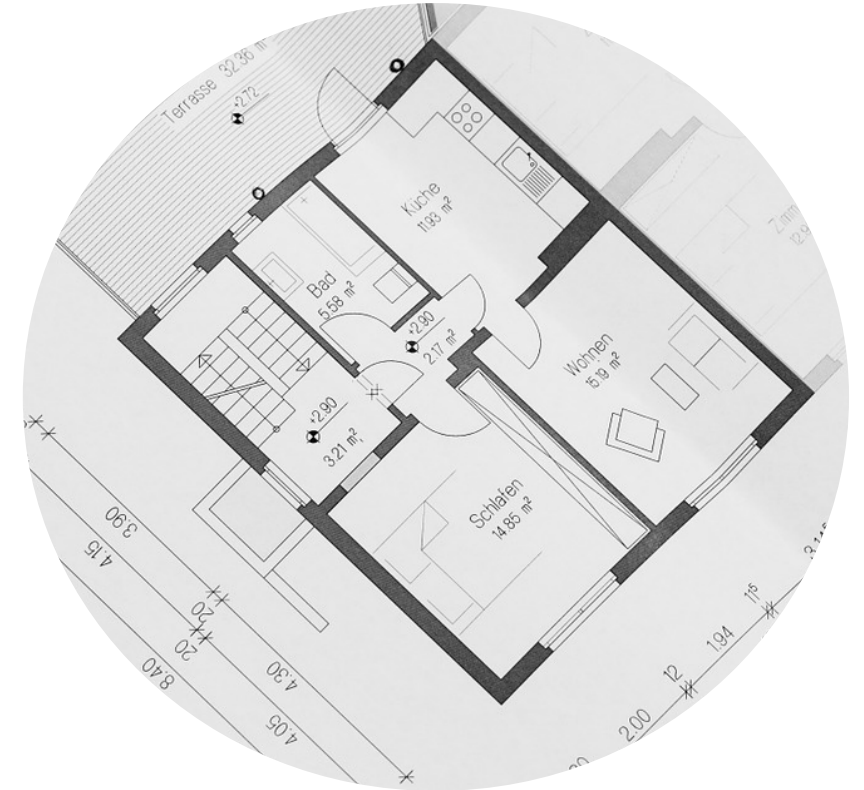


Claims – property development

Acting for a land developer selling off the plan and any other party, especially purchasers, is fraught with risks.

Risks include:

- breach of the duty of loyalty,
- acting in conflict and
- potential allegations by the purchaser that the practitioner favoured the rights of the vendor over those of the purchaser.



Claims – property development

Zoom poll

Is it a breach of the common law obligation to not act in conflict, to act for the developer and purchaser off-the-plan?

- (a) Yes
- (b) No
- (c) Don't know



Claims – property development

Zoom poll

Is it a breach of rule 11, to act to for a developer and purchaser off-the-plan?

- (a) Yes
- (b) No
- (c) Don't know



Conflict – agent v client

Example

Selling agent seeks advice from vendor's practitioner where the agent mistakenly failed to attach an updated OC certificate to the section 32 statement.

Case – *Doerrenberg & Gauci v Prime Estate Pty Ltd* (Civil Claims) [2017] VCAT 2028

Buyer advocate tells purchaser that they received legal advice and contract is in order.

But no advice obtained.

Conflict – do the right thing

There are a number of consequences that may arise in relation to a breach of ethical obligations such as acting in conflict including:

- A finding of unsatisfactory professional conduct
- Breach of the obligation to ensure clients make
- informed choices

Help

If you have an ethical issue about a conflict, contact LIV ethics:

Phone: 03 9607 9336

Email: ethics@liv.asn.au



Conflict – do the right thing

LIV ethics ruling

R4959

A solicitor previously acted for a company subsequently requested to act at a new firm for a shareholder in dispute with the company.

Law Society of NSW ethics committee

A solicitor who was acting for the vendor of a property who then went on to purchase that property, gazumping the intended purchaser in the process.



Conflict – do the right thing

Exercise

You act for a purchaser buying an investment property. The property is unencumbered.

The vendor is self-represented, so the transaction is being done in paper.

The purchaser's lender and their legal representative are based in Queensland.

Settlement is to take place at the vendor's house in Malvern.

The practitioner acting for the lender asks you to act as their agent to attend the settlement.



Conflict – do the right thing

Zoom poll

Have you ever acted as agent for another party to attend settlement on their behalf?

(a) Yes

(b) No



Conflict – do the right thing

Zoom poll

Is there a conflict to also act for the purchaser's lender?

- (a) Yes
- (b) No
- (c) Don't know

Please also insert any comments in the chat function!



Conflict checklist – 5 crucial items

1. Checked for any conflict at the start of the matter.
2. Continued to be vigilant to identify any conflict during the matter.
3. Considered the rules and common law.
4. Sought advice from LIV ethics when in doubt.
5. Complied with the office policies and procedures about conflict.




What to include in your firm's conflicts policy

- Criteria for accepting new matters, especially if multiple parties/interests are involved
- Who can approve new clients and matters
- Criteria for acceptance of new clients including loyalty-sensitive clients that insist on exclusivity
- Implementation of safeguards such as consents
- Checking for compliance with the conflicts policy
- Writing non-engagement letters to unrepresented parties.

More information about conflict

- Go to the LIV ethics hub.
- Go to the LPLC website and word search 'conflict'.
- Lawyers' professional responsibility, by Gino Dal Pont.
- Law Institute of Victoria – Ethics rulings and guidelines.

ETHICS GUIDELINES

LAW INSTITUTE VICTORIA

Conflict of Interest Guidelines

Solicitors owe duties to clients, the courts and the administration of justice, free from the influence of personal bias. Conflicts arise when these duties diverge.

The Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 address conflict of interest for solicitors in Rules 10, 11, and 12. As noted in the Rule 2.2 they apply in addition to the common law.

Conflicts can be categorised broadly as:

- Actual conflict – the conflict is occurring now;
- Potential conflict – the conflict may occur in the future.

Solicitors should also be aware that a perception of conflict by a former client may prevent a solicitor from continuing to act (this is particularly relevant in family law matters where a "lower threshold" is applied).

1. Conflicts concerning former clients:

A solicitor must be conscious of the duties and obligations owed to both current and former clients. These duties and obligations extend past the contractual obligations of the solicitor's engagement. A conflict of interest will arise where relevant confidential information has been obtained from the former client, or where the solicitor owes a duty of loyalty.

1.1 Relevant Confidential Information:

Client information must be both confidential and relevant. Confidential information may comprise of:

- the facts specific to the client's matter; or
- what is known as "getting to know you factors", for example: the client's personality or attitude to litigation.

There must also be a real and sensible belief (by a former client) or an actual risk that the confidential information will be used to the former client's detriment.

A former client may give informed written consent to a solicitor to allow confidential information to be used to their detriment or the solicitor may establish an effective information barrier to protect the misuse of confidential information (see below under **Imputed Knowledge**).¹

1.2 Duty of loyalty

The principle of the duty of loyalty preserves the client's right to the undivided commitment of the solicitor, by restraining the solicitor from preferring one client over another.

This duty arises where a solicitor intends to or does act against a former client in the same or a related matter. In the absence of relevant confidential information, a solicitor may still not be able to act against a former client due to the application of this principle.

A duty of loyalty may continue after the termination of the client engagement.²

1.3 Perception of conflict (proper administration of justice)

A perception of conflict may arise, even where it is established that confidential information has not been obtained (or the information has subsequently lost its confidentiality) or where there is no real and sensible possibility of the misuse of that information.³ A solicitor may be required to cease acting if a reasonable and informed member of the public, who is properly informed of all the facts, would believe that the proper administration of justice would not be done if that solicitor were to continue to act against the former client.

¹ Rule 10.2, Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015
² Rule 10.2, Law Council of Australia 'Australian Solicitors' Conduct Rules 2011 and Comments', August 2012
³ <https://www.liv.vic.gov.au/ethicsandconduct/ethicsandconduct/CivPDF/10-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-100-101-102-103-104-105-106-107-108-109-110-111-112-113-114-115-116-117-118-119-120-121-122-123-124-125-126-127-128-129-130-131-132-133-134-135-136-137-138-139-140-141-142-143-144-145-146-147-148-149-150-151-152-153-154-155-156-157-158-159-160-161-162-163-164-165-166-167-168-169-170-171-172-173-174-175-176-177-178-179-180-181-182-183-184-185-186-187-188-189-190-191-192-193-194-195-196-197-198-199-200-201-202-203-204-205-206-207-208-209-210-211-212-213-214-215-216-217-218-219-220-221-222-223-224-225-226-227-228-229-230-231-232-233-234-235-236-237-238-239-240-241-242-243-244-245-246-247-248-249-250-251-252-253-254-255-256-257-258-259-260-261-262-263-264-265-266-267-268-269-270-271-272-273-274-275-276-277-278-279-280-281-282-283-284-285-286-287-288-289-290-291-292-293-294-295-296-297-298-299-300-301-302-303-304-305-306-307-308-309-310-311-312-313-314-315-316-317-318-319-320-321-322-323-324-325-326-327-328-329-330-331-332-333-334-335-336-337-338-339-340-341-342-343-344-345-346-347-348-349-350-351-352-353-354-355-356-357-358-359-360-361-362-363-364-365-366-367-368-369-370-371-372-373-374-375-376-377-378-379-380-381-382-383-384-385-386-387-388-389-390-391-392-393-394-395-396-397-398-399-400-401-402-403-404-405-406-407-408-409-410-411-412-413-414-415-416-417-418-419-420-421-422-423-424-425-426-427-428-429-430-431-432-433-434-435-436-437-438-439-440-441-442-443-444-445-446-447-448-449-450-451-452-453-454-455-456-457-458-459-460-461-462-463-464-465-466-467-468-469-470-471-472-473-474-475-476-477-478-479-480-481-482-483-484-485-486-487-488-489-490-491-492-493-494-495-496-497-498-499-500-501-502-503-504-505-506-507-508-509-510-511-512-513-514-515-516-517-518-519-520-521-522-523-524-525-526-527-528-529-530-531-532-533-534-535-536-537-538-539-540-541-542-543-544-545-546-547-548-549-550-551-552-553-554-555-556-557-558-559-560-561-562-563-564-565-566-567-568-569-570-571-572-573-574-575-576-577-578-579-580-581-582-583-584-585-586-587-588-589-590-591-592-593-594-595-596-597-598-599-600-601-602-603-604-605-606-607-608-609-610-611-612-613-614-615-616-617-618-619-620-621-622-623-624-625-626-627-628-629-630-631-632-633-634-635-636-637-638-639-640-641-642-643-644-645-646-647-648-649-650-651-652-653-654-655-656-657-658-659-660-661-662-663-664-665-666-667-668-669-670-671-672-673-674-675-676-677-678-679-680-681-682-683-684-685-686-687-688-689-690-691-692-693-694-695-696-697-698-699-700-701-702-703-704-705-706-707-708-709-710-711-712-713-714-715-716-717-718-719-720-721-722-723-724-725-726-727-728-729-730-731-732-733-734-735-736-737-738-739-740-741-742-743-744-745-746-747-748-749-750-751-752-753-754-755-756-757-758-759-760-761-762-763-764-765-766-767-768-769-770-771-772-773-774-775-776-777-778-779-780-781-782-783-784-785-786-787-788-789-790-791-792-793-794-795-796-797-798-799-800-801-802-803-804-805-806-807-808-809-810-811-812-813-814-815-816-817-818-819-820-821-822-823-824-825-826-827-828-829-830-831-832-833-834-835-836-837-838-839-840-841-842-843-844-845-846-847-848-849-850-851-852-853-854-855-856-857-858-859-860-861-862-863-864-865-866-867-868-869-870-871-872-873-874-875-876-877-878-879-880-881-882-883-884-885-886-887-888-889-890-891-892-893-894-895-896-897-898-899-900-901-902-903-904-905-906-907-908-909-910-911-912-913-914-915-916-917-918-919-920-921-922-923-924-925-926-927-928-929-930-931-932-933-934-935-936-937-938-939-940-941-942-943-944-945-946-947-948-949-950-951-952-953-954-955-956-957-958-959-960-961-962-963-964-965-966-967-968-969-970-971-972-973-974-975-976-977-978-979-980-981-982-983-984-985-986-987-988-989-990-991-992-993-994-995-996-997-998-999-1000>

Reflection

What have you learned from this session and materials that might help you and your colleagues in your work?



FEEDBACK



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