Costs, conflicts and canoodling:

Considerations for solicitors in family law proceedings[1]

I INTRODUCTION

Solicitor's costs have long been a prevalent and concerning issue amongst the community. In a 1994 case involving a $500,000 legal bill (around $1.7 million in today's value) for property settlement proceedings, Kirby P made the following remarks:-[2]

> Little wonder that the legal profession, and its methods of charging, are coming under close parliamentary, media and public scrutiny. Something appears to be seriously wrong in the organisation of the provision of legal services in this community when charges of this order can be contemplated, still less made…If such costs, in what was substantially a single matrimonial property case between a married couple, are truly regarded as reasonable, there may be something seriously wrong in the assessment of reasonableness within the legal profession which this Court should resolutely correct.[3]

There is an inherent community concern that solicitor's fees are charged exorbitantly and unjustly. This concern, in part, is fed by a lack of understanding of the profession, legal costs and time management of files. It is equally fed by the sensitive, and in the case of family law, emotive, nature of legal work.

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[1] Notes for a presentation to the Australian Italian Lawyers Association by Federal Circuit Court Judge Grant Riethmuller prepared with the considerable assistance of Georgia Miller, 9 March 2018.

[2] G E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 6th ed, 2017) 468.

[3] *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 at 422.

In Victoria, legal costs are regulated by the Uniform Law.[4] The Uniform Law was introduced to meet community concern; to increase transparency of legal fees and increase competition in what is, in the broader context of society, a rather niche skillset.

Recently Justice Benjamin referred a solicitor's exorbitant legal fees to the Legal Services Council.

Community concern also arises when examining solicitor/client conduct. Just as doctor/patient relationships and student/teacher relationships demonstrate a power imbalance, so too do many solicitor/client relationships. The imbalance arises from the solicitor's knowledge (and therefore power) to influence and control the client's proceedings and the often distressed state of the client in family law proceedings. Accordingly it is important that solicitors not only uphold their fiduciary duties to act in the best interests of the client but also, that they are *seen* to be doing so.

Unlike in other commercial realms, obligations don't always cease at the end of a client retainer. In the interest of ensuring the community hold the legal profession in high professional regard, it is prudent to ensure that conflicts of interest do not arise with current clients, former clients or otherwise between members of the profession. Such conduct may distract a solicitor from faithfully serving the client or bring the profession into disrepute.

II COSTS

(a) COSTS DISCLOSURE REQUIREMENTS

The mandatory disclosure obligations were introduced in the early 1990s in response to community calls for regulation on how solicitors charge their clients. The ability to charge costs, coupled with a solicitor's virtual monopoly on legal services, prompted the need for change in the law to introduce safeguards on the charging of costs by solicitors to clients.[5]

A costs disclosure is a statutory requirement that solicitors provide, to prospective clients, an estimate of their fees and the basis upon which that estimate is calculated. For clarity, a costs

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[4] *Legal Profession Uniform Law Application Act 2014* (Vic) schedule 1 (herein referred to as the "Uniform Law") s 178(1).

[5] Dal Pont, above n 2, 467, 14.05.

disclosure is not a costs agreement and a costs agreement is not a costs disclosure.

(b) WHY SHOULD I DO IT?

Depending on the client and the engagement, the consequences of not providing a costs disclosure could be significant. The client need not pay the costs and the solicitor is precluded from instituting proceedings for recovery of debt. The conduct is also capable of amounting to unsatisfactory professional conduct or professional misconduct.[6]

In *New South Wales Bar Associate v LH (No 2)* [2005] NSWADT 156, a barrister was accused of failing to provide any costs disclosure or amended costs disclosure to his client. The barrister was a private legal practitioner to whom legal aid work had been assigned. He failed to notify Legal Aid NSW of any changes which may affect the grant of legal aid. The Tribunal concluded 'There would be instances where a failure to provide a costs disclosure in writing would not amount to unsatisfactory professional conduct. When dealing with a direct access client, however, this would rarely be the case'[7]. The barrister was found guilty of unsatisfactory professional conduct for (amongst other things) failing to provide a costs disclosure.

Requirements

Today, the Victorian costs disclosure requirements are governed by the Uniform Law[8] following the harmonisation of a uniform national law (ironically, only) by Victoria and New South Wales.[9]

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6 Whether the conduct does actually amount to unsatisfactory professional conduct or professional misconduct turns upon the individual circumstances of the case; *Reynolds v Whittens* (2002) 57 NSWLR 271 at [41] per O'Keefe J.

7 *New South Wales Bar Associate v LH (No 2)* [2005] NSWADT 156 [66].

8 The Uniform Law is part of the *Legal Profession Uniform Law Application Act 2014* (Vic) schedule 1. Note that all Uniform Laws (VIC and NSW) are published on the NSW legislation website.

9 Since the early 2000s policy makes attempted to implement a national regulatory regime for the legal profession. The Model Laws were developed in 2001 and adopted in all jurisdictions (except South Australia) between 2004 and 2008. By the time of the release of the final draft of the Uniform Law in December 2010, enthusiasm for its adoption had diminished and only NSW and VIC introduced the Uniform Law legislation in December 2013 which came into effect in 2014; David Robertson, 'An overview of the

The Uniform Law contains safeguards for clients and attempts to increase competition in the legal services sector by providing for:-

1. Costs disclosure requirements;
2. Disciplinary sanctions for solicitors who charge grossly excessive fees;
3. The prospect of costs agreements being set aside.

Under s 174(1) of the Uniform Law, a solicitor must (as soon as practicable after instructions are initially received) provide the client with information disclosing the basis upon which the solicitor will charge the client and give an indication of the solicitors' fees. If there is a significant change in instructions which affects a solicitors costs, the client must be given a further disclosure in writing which explains the change in quantum and provides the client with sufficient and reasonable information to assess the impact of the change in legal costs and to make an informed decision about the future conduct of the matter.[10] Further, the Uniform Law provides that law practices must 'not act in a way that unnecessarily results in increased legal costs'[11].

In addition, s 174(2) of the Uniform Law provides that a client must be given information about their right to negotiate a costs agreement, to negotiate a billing method, to receive a bill from a practice (and request an itemised bill) and to seek assistance from the LIV in the event of a dispute as to legal costs.

In Lawyers Professional Responsibility (7th edition), Dal Pont provides an example where a costs agreement was cancelled as a result of a solicitors failure to update the costs disclosure.[12] In *Bariamis v Coadys* [2007] VCAT 645 the costs disclosure was $5,000 and the solicitors subsequently charged in excess of $18,000. The Tribunal cancelled the costs agreement.

Where a costs disclosure is given, it must be given in writing and a solicitor must take all reasonable steps to satisfy themselves that the client has understood and given consent to the proposed course of action and costs.

Legal Profession Uniform Law' [2015] (Summer) 36 *Bar News: The Journal of New South Wales Bar Association* 36, 6 – 7.

[10] Uniform Law ss 174(1)(b), 174(2)(b).

[11] Uniform Law s 173.

[12] Dal Pont, above n 2, 474, 14.45.

Whilst a costs disclosure is prima facie evidence that a costs agreement is fair (see 'Fair and reasonable costs agreements' below), it does not necessarily follow that the client has *understood* the costs disclosure. Accordingly, where there is a charging regime or an unusual billing practice, solicitors are obliged to bring this to the attention of the client and ensure they understand the disclosure.

In *Council of the Queensland Law Society Inc v Roche* [2004] 2 Qd R 574[13], the solicitor's fees were charged on a set hourly fee across the board, for all forms of work and for all solicitors involved. The Court held this kind of costs disclosure required careful explanation to ensure the client gave 'fully informed consent'.[14]

A costs disclosure statement is not always required. For example, if the costs do not exceed $750 (excluding GST and disbursements), a costs disclosure is not required (but the solicitor may choose to provide one).[15] Further, if the costs are unlikely to exceed $3,000[16] a standard costs disclosure form may be used.[17]

Estimating costs in family law

How do you provide a costs estimate where litigation may be necessary and costs may become exorbitant (perhaps as a result of exuberance? In *Casey v Quabba* [2005] QSC 356 at [39][18], a costs disclosure that 'the possible range of fees and costs recoverable will be between nil and $250,000 (approximately)' was held not to be a genuine attempt to provide a costs disclosure.

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13 *Council of the Queensland Law Society Inc v Roche* [2004] 2 Qd R 574, [32].

14 Ibid.

15 Uniform Law sch 4, cl 18(3).

16 Ibid.

17 Uniform Law s 174(5); the standard disclosure form is prescribed by the *Legal Profession Uniform General Rules 2015*, r 72 and is available on the Legal Services Council website: <http://www.legalservicescouncil.org.au/Documents/information-res/form-1-solicitor-standard-costs.docx>.

18 This was a Queensland case so the Model Laws' schema applied whereby lawyers have to provide clients with "a range of estimates" based on the various causes of action available.

It is important for solicitors to stress that a costs disclosure is an *estimate* which can be influenced by many factors.[19] Solicitors must review the currency of an estimate during the course of retainer so as to keep the client informed of any substantial changes to its amount.

An example of how to approach costs in family law proceedings is provided by Victoria Legal Aid.[20] When calculating costs, VLA include professional costs (how much it will cost to represent the client), fees for expert reports and disbursements. 'Fee table 4' provides an example of how the solicitor's professional costs can be broken into 5 stages:-

1. Early intervention; advice, negotiation and dispute resolution
2. Initiating litigation
3. Preparation for trial
4. Trial costs in the federal family courts
5. Appeals in the Family Court

Each stage is subsequently broken down into a subset of the basis upon which costs are calculated.[21]

(c) COSTS AGREEMENTS

A costs agreement is a contract between a solicitor and a client that regulates the amount and manner of payment for the solicitor's costs.

Costs agreements are regulated by s 180(1) of the Uniform Law. The agreements specify the solicitor's entitlement to recover costs

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[19] Uniform Law s 172(2); non-exhaustive factors that can be considered in determining whether the costs disclosure is fair and reasonable.

[20] Victoria Legal Aid, *Fee table 4: Commonwealth family law and child support matters* (28 August 2017) Victoria Legal Aid <https://handbook.vla.vic.gov.au/handbook/24-payments-to-lawyers-and-service-providers/costs-payable-in-commonwealth-family-law-and-child-support-matters/fee-table-4-commonwealth-family-law-and-child-support-matters>.

[21] E.g. Victoria Legal Aid, *Stage 1 – early intervention: advice, negotiation and FDRS* (28 August 2017) <https://handbook.vla.vic.gov.au/handbook/24-payments-to-lawyers-and-service-providers/costs-payable-in-commonwealth-family-law-and-child-support-matters/fee-table-4-commonwealth-family-law-and-child-support-matters/41-lawyer-professional-costs-excluding-icls/stage-1-early-intervention>.

and, in circumstances, limit the recovery to the costs specified in the agreement.

Costs agreement will be declared void if they are not in writing.[22] Whilst it is good practice for a client to sign a costs agreement, there is no specific requirement and the costs agreement can be accepted by conduct other than writing.[23]

'Fair and reasonable' cost agreements

The Uniform Law requires the charging of legal costs to be no more than fair and reasonable costs in all the circumstances, which are proportionately and reasonably incurred and proportionate and reasonable in amount.[24] To determine if costs are 'fair and reasonable' regard may be had to the following factors (non-exclusive):-[25]

1. The level of skill, expertise, specialisation and seniority of the solicitors concerned;
2. The level of complexity or novelty;
3. The labour and responsibility involved;
4. The quality of the work done.

At common law, *fairness* refers to the mode of obtaining the agreement and reflects the requirement that a solicitor does not 'take advantage' of his client by entering into an agreement.[26] The *fairness* requirement is, prima facie, met when a client signs the costs disclosure agreement.[27] Where a client fully understands the nature of the costs agreement, the solicitor has satisfied the 'fairness' requirement.[28]

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[22] Uniform Law ss 180(2), 185(1).

[23] Ibid s 180(3).

[24] Ibid s 170(1).

[25] Ibid s 172(2).

[26] Dal Pont, above n 2, 494; see also *Emeritus Pty Ltd v Mobbs* (1991) NSW ConvR 55-588 at 59,319 per Studdert J; *Bear v Waxman* [1912] VLR 252 at 301-302 per Cussen J; *New South Wales Crime Commission v Fleming* (1991) 24 NSWLR 116 at 123 per Gleeson CJ.

[27] Although see above – signature of agreement by client not always evidence that they have *understood* the agreement.

[28] i.e. the client has a "real and genuine choice" before entering into the agreement; *Re P's Bill of Costs* (1982) 8 Fam LR 489 at 496 per Evatt CJ and Fogarty J.

When does a client fully understand the nature of a costs agreement? That is a case by case question – attention to, and explanation of, any unusual features of the costs agreement – e.g. a set hourly fee for all forms of work, for all solicitors at the practice, will need to be carefully explained.

Reasonableness at common law, refers to the solicitors rate of and approach to charging.[29] It is determined at the time of entering into the agreement, on an objective basis. If a costs agreement vests in the solicitor considerable unilateral discretion as to the charges that can be made it may be unreasonable.

Common forms of charging in costs agreements are based on time charging or based on a scale of costs. The scale of costs is increasingly becoming the preferred method (at least with commentators) as it is more closely related to the actual work done than other methods of charging.[30] In *Athanasiou v Ward Keller (6) Pty Ltd* (1998) 122 NRT 22 charges in excess of the scale (in a case that was not particularly difficult) was a factor in setting aside an agreement.

The concept of reasonableness remains problematic in this sphere. What may be the reasonable costs of litigation about a mining tax on behalf of BHP is unlikely to be reasonable in a mum-and-dad contact case. However, there is a market for legal services and just as with choices of car buyers between Holden and Mercedes motor vehicles, consumers have a choice as to whom they engage for the provision of legal services.

The short point is that high charge out rates for clients with modest means will be increasingly at risk of failing to meet statutory costs requirements.

(d) SOLICITORS CHARGING TOO MUCH

In December 2017, Benjamin J delivered judgment in the matter of *Simic & Norton* [2017] FamCA 1007. His Honour took the opportunity to express concerns about the high level of costs charged by the legal profession in family court proceedings.

In the case, the parties had paid a whopping $860,000 in legal fees. Benjamin J asked the Legal Services Commission to investigate whether the fees charged by the law firm were 'fair and

[29] Dal Pont, above n 2, 497, 14.200.

[30] Dal Pont, above n 2, 498, 14.205.

reasonable' and, if not, whether they amounted to professional misconduct on the basis that the letters (sent by the law firms) were 'inflammatory and reflected the anger of the parties'. He said 'solicitors are not employed to act as 'postman' to vent the anger and vitriol of their clients' and reminded the solicitors' of their duty to minimise costs and to reduce conflict.

In *Legal Profession Complaints Committee v O'Hallaran* [2013] WASC 430 a solicitor was alleged to have grossly overcharged his (various) clients from October 2003 to July 2011. He was a sole practitioner in the area of personal injury and many of his clients were from underprivileged backgrounds. Over the period he overcharged at least four clients, $40,000 each. He overcharged one client by 125% totalling $53,293.

Overcharging by a solicitor amounts to professional misconduct as is charging of costs and disbursements where none are properly chargeable. Under the Uniform Law the relevant enquiry is whether the solicitor has charged fees grossly exceeding those that would be charged by solicitors of good repute and competency.[31]

In assessing the severity of the solicitor's professional misconduct, the Court considered that he provided an important service to the public and had represented around 4,000 people over the course of his career. The Court recognised difficult personal circumstances and that his conduct has attracted publicity. It was noted that the solicitor accepted he made a gross error of judgment. Based on the substantial overcharging, the practitioner's name was removed from the roll of legal practitioners.

Another extreme example of overcharging occurred in *Council of the Queensland Law Society Inc v Roche* [2004] 2 Qd R 574, 591 [54] where the bill of costs was almost $620,000 as compared to $240,000 when assessed on an indemnity basis.[32] The disparity demonstrates that the fees charged were exorbitant and well outside those charged by any reasonable practitioner. The solicitor was suspended from practice.

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[31] *Steirn v Spanko Soulos Legal Services Pty Limited and Anor* [2009] NSWSC 1388 18 at [39].

[32] G E Dal Pont, *Contextualising Lawyer Overcharging,* Law Institute of Victoria 2016 National Costs Law Conference, 19 February 2016, 299.

In *New South Wales Bar Association v Amor-Smith* [2003] NSWADT 239 (5 November 2003) [11] the solicitor charged $151,441 for work completed. This was five times the amount assessed by the costs assessor to be fair and reasonable (which was $32,500).[33]

The Australian Law Reform Commission is investigating costs and as part of the review of the family law system, it will investigate whether reforms are necessary to promote 'appropriate, early and cost-effective resolution' of family law disputes.

(e) COSTS LESSONS TO TAKE AWAY

Whilst cost disclosures and costs agreement protect solicitors by providing recourse for payment of fees, costs disclosures more importantly protect clients and maintain positive relations between the profession and the public.

For solicitors, costs disclosures provide a framework for efficacious litigation plans. They require a solicitor to consider the strategy and amount of work involved in representing a client even before the client has signed a retainer. This, in turn, protects the profession as it ensures solicitors are not arbitrarily or unjustly charging clients.

Clients similarly benefit from costs disclosures as they ensure their matters are progressing (not arbitrarily) but on a defined and clear path to resolution. What's more, they demonstrate the proportionality of costs and work performed or time taken to reach resolution. In the event that the client is not satisfied, clients can be assured that they will be provided with the necessary information to dispute or negotiate a bill as proscribed by legislation.

Finally, costs disclosures increase transparency of fees charged in the legal profession. They also provides clients with a level playing field to compare estimates received from multiple law firms. Conversely, this prevents a monopoly of unjustly charging in the legal profession and ensures competition between law firms in similar disciplines.

[33] Ibid.

Costs Checklist

1. **Costs disclosure**
    a. Need to be in writing (if provided), useful for creating litigation plan
    b. 3 kinds
        i. No disclosure – permissible if costs (excluding GST and disbursements) do no exceed $750
        ii. Partial disclosure - permissible (standard costs disclosure) if costs (excluding GST and disbursements) do not exceed $3,000
        iii. Full disclosure of costs and basis on which they are calculated:-
            1. Must be given in all other cases;
            2. If there is a significant change in circumstances, costs disclosure must be updated;
            3. Must provide client with avenues to dispute/negotiate a bill;
            4. A solicitor must be satisfied that the client has read and understood the costs disclosure (clients generally asked to sign disclosure in recognition of understanding).
2. **Costs agreements and fee estimates**
    a. Costs agreements are the costs contracts between you and your client
    b. A costs agreement must be in writing and must contain a fee estimate that is 'fair and reasonable'
    c. In determining a fee estimate, you may take into account your expertise, the level of complexity and the amount of work involved in the file.
    d. If you don't have a costs agreement with your client then you will only be able to charges in accordance with the FC/FCC Itemised Scale of Costs.

III CONFLICTS

Whilst it is easy to recognise a conflict of interest occurring, it is not always as easy to recognise when you yourself are involved in a conflict of interest.

(a) CONFLICTS OF INTEREST

Fiduciary duties and the Uniform Laws prevent solicitors from acting where there is a conflict or an *apparent* conflict. The rules operate to prevent solicitors from being in a position of conflict where a solicitor may be tempted to favour self-interest, thus avoiding even the appearance of conflict.

Unlike other obligations to a client, the duty of confidentiality does not dissolve at the end of a retainer, just as information does not lose its confidentiality merely because the relationship in which it was communicated has expired.[34] Accordingly, confidentiality is protected by rules and procedures that prevent conflict issues.

Former clients

Under the Australian Solicitors Conduct Rules, solicitors are prevented from acting against former clients where the solicitor holds information confidential to the former client that 'might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed'[35].

Where a potential conflict of interests arises in the case of former clients, the conflict will be assessed from the position of a reasonable third party aware of all the facts in dispute under a strict orthodox approach. Under this approach he/she who asserts has to identify the relevant confidential information *with precision* and not just in general terms.

In family law proceedings, the test for conflicts of interest with former clients was enunciated in *Osferatu & Osferatu* (2015) FamCAFC 1755. The Full Court considered the test to be whether the former client *actually* imparted confidential information to the solicitor (or clerk) who is now employed by the solicitors acting on the other side of the litigation.[36] The following considerations will assist in identifying a conflict:-[37]

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[34] Dal Pont, above n 2, 278, 8.10.

[35] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) r 10.2.

[36] *Osferatu & Osferatu* (2015) FamCAFC 1755.

[37] Ibid.

1. Whether the law practice is in possession of information which is confidential to the former client;
2. Whether that information is relevant to a matter in which the firm is proposing to act for another party with an interest adverse to the former client;
3. Whether there is any risk that the information will come into the possession of those persons in the firm working for the other party.

A more general approach has been favoured in family law where a mere evidential onus rests with the former client. In such a case, it may be sufficient that because of a direct relationship between two retainers this may raise the inference that the solicitor is possessed of confidential information capable of being used to the former client's detriment.

A real possibility of disclosure

A *real* possibility of disclosure can be contrasted with a 'theoretical' possibility. To this end, the Court does not act on the basis of mere possibilities in that 'the possibilities must have a degree of reality and a degree of reasonableness and sense'[38]. Given the inherent sensitivity of family law, there has been increasing dicta that the test in family law should be a 'theoretical' risk of misuse of confidential information to justify disqualification.[39]

In *Montague v Montague* [2017] FCCA 2747, Judge Altobelli considered there was no *real* risk that the husband's confidential information would be misused by the wife's solicitor. In this case, the husband's former solicitor was a former employee of the wife's solicitors' firm. Judge Altobelli reached his conclusion based heavily on the fact that the husband's former solicitor was no longer employed by the wife's solicitors' firm.[40]

Detrimental to former client

The requirement that the real possibility of misuse of confidential information be *to the detriment* of the former client protects the

[38] *Wyndham City Council v CSR Ltd* [1998] VSC 156 at [32] per Chernov J.

[39] *Thevenaz v Thevenaz* (1986) FLC 91-748 at 75,447 per Frederico J; *Epstein v Epstein* [2008] FamCA 907 at [10] per Loughnan JR; *Royce v Royce* [2012] FamCA 400 at [16], [52] per Cronin J.

[40] *Montague v Montague* [2017] FCCA 2747 at [7].

solicitors from frivolous applications to disqualify and emphasises the appearance of justice.

In determining whether the information was *to the detriment* of the former client, the Court will consider whether the respective retainers are closely related. It is assumed that more closely related retainers amplify the risk that the solicitors possess confidential information. It has been considered that it's not so much a matter of whether the subject matters are the same, but whether confidential information learned in one would be relevant to the other; *Brookville Carriers Flatbed GP Inc v Blackjack Transport Ltd* (2008) 263 NSR (2d) 272 at [50] per Cromwell JA. Matters are likely to be closely related, for this purpose, where significant issues in one matter arise in the other, or factors significant to one matter are significant to the other.

This would encompass situations where a partner (say, the wife) comes to see you to commence property proceedings and you have formerly acted for the husband's father in the succession planning of his business. An example of this arose in *Nasr v Vihervaara* (2005) 91 SASR 222. The solicitor had previously acted for A in a personal injury claim and currently acted for B in a property boundary dispute whereby the dispute arose as a result of B's alleged de facto relationship with A. The lack of confidential information between the former matters and the current one and A's failure to identify the *confidential* information, led the Court to refuse A's application to have the solicitor disqualified.

Another example where there was no detriment to the former client arose in *Cuoco & Cuoco* [2014] FamCA 611. In that case, the husband and wife had formerly consulted with the solicitors in respect of the restructuring of their family business. They always consulted the solicitors together and both were included in emails from the solicitor. Years later the parties commenced property proceedings. The husband tried to disqualify the wife's solicitor from acting on the basis that the parties had consulted him about the restructuring of the business.

Rees J found there was no basis on which to disqualify the solicitor. The husband was unable to point to information that was confidential to him (of which the wife was not aware).

Confidential information; impressions and personalities

Whilst confidential information is commonly associated with verbal or written communication it may not always be confided to such forms. A previous retainer may leave a solicitor with the impressions of a client's character, personality and attitudes; factors which could subsequently be used to the detriment of the client.

In *Magro v Magro* (1989) FLC 92-005 Rouke J restrained the husband's solicitors from acting in contested property proceedings because the wife had previously retained a solicitor who was now employed by the firm representing the husband. Even though the wife couldn't refer to confidential information exchanged between them (with specificity), the ruling was influenced by a finding that the former retainer would likely have conveyed to the solicitor 'impressions of the wife's personality gained after many hours of confidence, which could be exploited by a skilful advocated presented with those impressions'[41].

However, where information about a client's character, personality and attitudes are obtained otherwise than from a solicitor/client relationship, this does not amount to confidential information and cannot be the basis of a conflict of interest.

In *Daher v Halabi* [2014] FamCA 675 the wife and her brother were partners in a law firm which acted for the wife in parenting proceedings. The husband sought to restrain the firm from acting by reason of having confided in the wife's brother during the course of the marriage. The brother had never acted for the husband as a solicitor. Loughnam J characterised the husband's argument as conflating 'the idea of private confidences with the important legal privilege that attaches to information that is imparted between solicitor and client'[42].

Accordingly, it can be seen that familiar or social interactions are not informed by the same policy imperative as the protection of confidences shared within a retainer. It is unduly restrictive to disqualify solicitors as a result of social relationships.

In *Marriage of Kossatz* (1993) FLC 92-386 the wife sought to disqualify senior counsel acting for her husband in a divorce

[41] *Magro v Magro* (1989) FLC 92-005 at [77]-[191].

[42] *Daher v Halabi* [2014] FamCA 675 at [62].

action because senior counsel had had prior social contact with both parties. She alleged that the senior counsel had obtained knowledge of her character, personality, weaknesses, which could be used to her disadvantage. Mullane J rejected the application noting there was no rule that limited a solicitor's freedom to act against a friend or former friend.[43]

Concurrent clients

Basic fiduciary duties demand that solicitors promote undivided loyalty to their clients. This explains why solicitors should avoid engagements that place their interests on both sides of the fence.

Rule 11 of the Australian Solicitors Conduct Rules applies where a solicitor seeks to act for two or more clients in the same or related matters where the concurrent client interests are adverse and there is a potential conflict of the duties to act in the bests interests of each client. If, in the actual course of concurrent representation, an actual conflict arises between the duties owed, r 11.15 of the Australian Solicitor's Conduct Rules permits a solicitor to continue to act for one of the clients only if the duty of confidentiality to the other client is not put at risk and both clients have given informed consent.

An example of where a solicitor's duty of confidentiality to one client conflicted with the duty to act in the best interest of the client was in *Hilton v Barker Booth & Eastwood* [2002] Lloyd's Rep PN 500. A law firm acted for both client A and client B in a transaction of property. The law firm held confidential information that client A had previously been convicted as a fraudster. The English Court of Appeal explained the conflict as being:-[44]

> …By loyally fulfilling the obligation of confidentiality to [client A], [the solicitors] were simultaneously acting contrary to [client B's] best interests, and by retaining him as their client, they restricted his opportunity to discover the unpalatably facts about [client A] from sources which were not bound by the same obligation of confidentiality.

In family law proceedings, conflicts between concurrent clients generally arise at the conclusion of property proceedings and the

[43] *Marriage of Kossatz* (1993) FLC 92-386 at [79,990].

[44] *Hilton v Barker Booth & Eastwood* [2002] Lloyd's Rep PN 500 at [39], [40] per Judge LJ.

commencement of implementation. The common scenario occurs when one party's law firm is engaged to conduct the conveyancing of property for both parties. In this case, the law firm equally represents the husband and wife.

This scenario arose in *Laurens & Laurens (No 2)* [2017] FCCA 109 where the wife's solicitor (at the conclusion of family law proceedings) subsequently acted for both parties in the sale of property. The solicitor was found to have received monies in trust and subsequently distributed them contrary to the instructions of the client (the husband). When monies were deposited in trust, the husband instructed the solicitor, initially – not to release funds and subsequently – to release funds in a certain manner. The solicitor a) released the funds contrary to the husband's instructions and b) chose not to comply with the husband's instructions to release the funds in a certain manner. Judge Harland found a clear conflict and made a personal costs order against the solicitor.

A similar scenario arose in *Victorian Legal Services Commissioner v Galatas (Legal Practice)*[45]. The husband's solicitor in property proceedings acted on behalf of both parties for the subsequent sale of property. The solicitor did not obtain the wife's consent prior to making a distribution from trust monies (where the distribution was to pay his legal costs arising from the family law proceedings). The solicitor was ultimately charged with (and pleaded guilty to) professional misconduct.

Protecting confidential information

Information barriers (also known as Chinese Walls) can be useful tools to screen solicitors against client conflicts. In 2006, the Law Society of NSW in consultation with the LIV issued 'Information Barrier Guidelines' which set minimum standards for information barriers, including; that the firm establish documented protocols for creating and maintaining information barriers, that the screen persons be linked and clearly identified, that the screened persons take no part in the matter, and that contact be appropriately limited between screened persons and those involved in the current matter.

[45] *Victorian Legal Services Commissioner v Galatas (Legal Practice)* [2016] VCAT 395.

Information barriers are now legislative means of avoiding a conflict of interest under the Australian Solicitors' Conduct Rules.[46] However they are difficult to implement, particularly for small firms.

In *Dalton & Dalton* (2017) FLC 93-773, the Full Court (Ainslie-Wallace, Ryan and Murphy JJ) considered whether a conflict of interest between a solicitor (Mr Lewers) and a former client (the husband) existed in cases where the solicitor had subsequently undertaken efforts to establish effective information barriers.

The husband had formerly been Mr Lewer's client (during the marriage) and Mr Lewer's had provided advice on his financial affairs and succession planning. Post separation, the wife retained Mr Lewer's firm to represent her in property proceedings. Mr Lewer's provided an undertaking[47] to protect the husband's information, which the trial Judge held would 'eradicate any future risk of misuse of the husband's confidential information'[48].

The Full Court considered whether the firm's information barriers were effective. The undertakings essentially committed that Mr Lewers would not discuss the proceedings with the wife's solicitor or her assistant or otherwise have any involvement with the property proceedings (including viewing correspondence sent/received by the husband's solicitor).

The Full Court concluded that the undertaking 'fell well short' of 'clear and convincing evidence' that there existed effective measures to protect against a real risk of disclosure or misuse.[49] In assessing the conflict from the position of a fictional bystander, the Full Court said:-[50]

> In our view, the fictional bystander would understand that when Mr Lewers affixed his signature, he understood that the husband had raised the issue of his confidential information and asserted that the firm should cease to act. Although the fictional bystander would understand that Mr

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[46] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) r 10.2.2.

[47] *Dalton & Dalton* (2017) FLC 93-773; the undertaking appears at [53] of the Full Court judgment.

[48] *Dalton & Dalton* [2016] FamCA 174 at [42].

[49] Ibid at [56].

[50] Ibid at [59].

> Lewers' involvement was not substantial, in our view the bystander would not have any confidence that Mr Lewers or the firm had acted to protect the husband's confidential information.

Wilmer & Golding (No 2) [2017] FamCAFC 113 is another example of where the Full Court (Strickland, Ryan and Murphy JJ) was not satisfied that the undertakings provided by the solicitor amounted to an effective information barrier. The wife was formerly represented by a solicitor, Ms J. Ms J subsequently closed her sole practice and commenced working with a law firm. The law firm ('B Firm') (and Ms R in particular) represented the husband. The wife sought an injunction restraining Ms R from representing the husband. She further sought an injunction to restrain B Firm from representing the husband.

The trial Judge found the undertaking provided by B Firm was an effective information barrier to protect the wife's confidential information.[51] The undertakings proffered were:-[52]

> a) an irrevocable undertaking of compliance officer, [JT], a partner of [B Firm]
>
> b) an irrevocable undertaking by solicitor with carriage executed by [Ms R];
>
> c) an irrevocable undertaking signed by screened person – [Ms J];
>
> d) an irrevocable undertaking signed by a screened person – [Ms S] (as an assistant to [Ms J]); and
>
> e) an irrevocable undertaking of and limitation of retainer executed by the client of [B Firm] – [the husband].

On appeal, counsel for the wife argued that – after having established that the husband's solicitors were in possession of confidential information – the burden lay with the husband to show no real risk of misuse of information. The wife submitted that the undertakings did not discharge this burden. Importantly, counsel for the wife in summary of argument stated there was no 'clear and convincing evidence' that 'sufficient

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[51] Trial Judge's findings based upon the factors at [32] of Appeal judgment.

[52] *Wilmer & Golding (No 2)* [2017] FamCAFC 113 at [11].

safeguards' were established to protect the wife's information. Specifically for the following reasons:-[53]

> The information contained in the undertaking provide no information or evidence as to what information barrier has been established. The assertions made by [Mr T] are mere conclusions that are not supported by any evidence of:
>
> - What "appropriate steps" have been, or will be, taken to monitor compliance;
> - How any breach or "possible breach" would be addressed;
> - How does the information barrier ensure the protection of the Wife's confidential information to any person employed or "associated" with [B Firm];
> - On what basis [Mr T] could be "satisfied" that no employee working on the current matter has received confidential information from the screen persons. Specifically, what enquiries or investigations were made?
> - Where is the confidential information held and how was it disseminated? What procedures have been implemented to ensure that, other than being satisfied that no confidential information has been received from the screen persons, that other employees cannot access that confidential information so as to avoid a risk of inadvertent disclosure?

The Full Court accepted that the undertakings were insufficient to address that the risk of disclosure was 'real and not theoretical'[54]. Murphy J referred to the undertakings provided in *Bureau Interprofessionnel Des Vins De Bourgogne v Red Earth Nominees Pty Ltd (t/as Taltarni Vineyards)*[55] which was a comprehensive

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53 Ibid at [41].

54 Ibid at [50].

55 [2002] FCA 588; *Wilmer & Golding (No 2)* [2017] FamCAFC 113 [42].

undertakings that set out the processes taken to protect the information. The undertaking in that case was:-[56]

> *"In working on this matter, we have taken the following steps and in relation to which we officially put your client on notice:*
>
> *1. Ms Dufty has not and will not in any way act for, or participate in us acting for, our clients in this matter.*
>
> *2. Our clients will expressly limit our retainer with them, so that we are not in any way obliged to disclose or make use of any confidential information that Ms Dufty may have obtained whilst acting for your client in this matter.*
>
> *3. No other person, legally qualified or otherwise, who previously worked with Ms Dufty whilst acting for your client in this matter, is part of our firm. As a result, Ms Dufty is the only person within our firm who could possibly have obtained any confidential information from your client in relation to this matter.*
>
> *4. Ms Dufty has not disclosed any confidential information which she may have obtained whilst acting for your client in this matter to anyone within our firm. We will be willing to provide affidavits deposing this to be the case. Those within our firm acting for our clients in this matter will provide complementary affidavits deposing that they have not obtained any information in relation to this matter from Ms Dufty.*
>
> *5. Ms Dufty will provide an undertaking that she will not disclose any confidential information that she may have obtained whilst acting for your client in this matter to anyone, including anyone within our firm.*
>
> *6. No documents are retained by Ms Dufty which relate to your client.*

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[56] *Interprofessionnel Des Vins De Bourgogne v Red Earth Nominees Pty Ltd (t/as Taltarni Vineyards)* [2002] FCA 588.

7. Those in our firm acting for our clients in this matter will provide complementary undertakings that they will not obtain any information in relation to this matter from Ms Dufty.

8. Ms Dufty will not share support staff with anyone in this firm acting for our clients in this matter for the duration of the time in which we are retained by our clients in this matter.

9. The file and all documents concerning this matter, for the duration of the time in which we act for our clients in this matter, and all work which will be done by those in our firm acting for our clients in this matter, will be located or done on a separate floor to the one occupied by Ms Dufty.

10. We will instruct that all incoming correspondence in this matter, whether it be in postal, facsimile or email form, will be marked strictly confidential and addressed only to Stephen Stern. Mr Stern will open all correspondence personally.

The mailroom that handles all postal and facsimile correspondence for our firm will be informed of these measures and will be instructed to strictly comply with them and that any incoming correspondence in this matter must not be given to any inappropriate person within our firm.

11. Both Ms Dufty and all those within our firm acting for our clients in this matter will 'lock' their computers whenever they are absent from their respective offices. This will prevent any possibility of any unauthorised person accessing information on their computers in their absence.

12. All documents drafted by our firm in this matter will be subject to restricted access and be password protected, so that only those within our firm acting for our clients in this matter can access them.

All documents printed by this firm in relation to our firm acting for our clients in this matter will

be printed from one identified printer. Ms Dufty will use a separate printer. Those in our firm acting for our clients in this matter will not print any documents on the printer used by Ms Dufty.

All documents and copies of documents in relation to this matter will not be left near printers or photocopiers. Any unwanted documents or copies in relation to this matter will be destroyed.

13. Any hardcopy materials drafted or obtained by us whilst acting for our clients in this matter will be stored solely in, and returned promptly after use to, the office on the separate floor and secured so that access to them will not be permitted without Mr Stern's knowledge.

14. All telephone communication in relation to us acting for our clients in this matter will be conducted so as to minimise the risk of any 'eavesdropping' by anyone else in our firm not acting for our clients in this matter. Doors will be shut whenever such communication occurs and the volume of any calls on 'speaker phone' will be lowered to minimise the risk of being inappropriately overheard.

15. The measures set out in items 1 to 14 inclusive above will be explained to our clients. We will ensure that our clients both understand the reason for, and the vital nature of, these measures and duly complies with them where possible.

We submit that the measures outlined in items 1 to 15 inclusive above conclusively eliminate the any real risk that any confidential information obtained by Ms Dufty from your client could be disclosed. We will consider any other suggestions in this vein which you or your client may make."

(b) CONFLICT LESSONS TO TAKE AWAY

The reputation of the legal profession demands that solicitors not only avoid conflicts of interest but avoid apparent conflicts of interest. It is prudent that solicitors are aware of where conflicts of interests commonly appear and in what form; noting a client

may allege a conflict based on a solicitor knowing the client's style of thinking. By being prepared for these scenarios, able to recognise them, and able to respond, if necessary, with effective information barriers, solicitors are upholding their professional reputation, that of their firm and the profession as a whole.

Checklist

1. **Conflict of interest**
    a. Can occur between a solicitor-client, a former and a current client or two concurrent clients
    b. Not necessary to be an *actual* conflict, can include *apparent conflict* (hint; apply The Age test – how would this look on the front cover of The Age newspaper?)
    c. In the case of conflict between former client and a current client – look at how the retainers are related – the more closely related, the more likely to be a conflict. Would confidential information learned in the former matter, be relevant to the current matter?
    d. What is confidential information?
        i. Includes verbal and written communication with current/former clients
        ii. Doesn't (strictly) include information learned from social or familiar interactions
    e. How to protect confidential information
        i. Information barriers (i.e. Chinese walls) – need to protect the holder of confidential information and anyone closely associated with the holder e.g. assistant
        ii. Don't take the client
    f. What happens if I breach a conflict of interest?
        i. Proscribed in the Uniform Law therefore a statutory breach and can amount to professional misconduct or unsatisfactory professional conduct.

IV CANOODLING

Woody Allen, in his 1975 film Love and Death says: 'Some men are [sexual], and some men don't think about sex at all. They become lawyers.'

(a) WHAT'S THE BIG ISSUE?[57]

Where personal relationships develop between solicitors and their clients the basis of the complaint is (commonly) that the solicitor took advantage of the emotionally vulnerable client. More often than not, the solicitor's defence is that the relationship involved two consenting adults. Accordingly, the difficulty in relationships between solicitors and clients is the potential for the role of lovers and solicitors to conflict.[58]

Historically the matter has been addressed as 'there's nothing unethical' about solicitors having consensual relationships with their clients. Indeed this view attempts to draw support from the High Court's 1972 decision in *Bar Association of Queensland v Lamb.*[59]

The case concerned an application by the Bar Association for special leave to appeal from the Full Court of the Queensland Supreme Court's decision to allow the respondent to be admitted to the Bar. In that case, one issue was that while Lamb had been acting as Mrs Stevens' solicitor in the matter of her contested divorce action, the two had engaged in extramarital intercourse.[60]

The majority (Menzies, Windeyer and Owen JJ with McTiernan J dissenting) upheld the lower court's finding that sexualised solicitor-client relationship are improper and unprofessional (or as described by Windeyer J; 'reprehensible') however such relationships did not of themselves constitute misconduct capable of sustaining a motion to strike off a solicitor or disqualify him from admission to the Bar. In dissent, McTiernan J said the question raised by the application '…admit of serious argument and are clearly of public importance'. The ultimate test applied by the High Court was whether Mrs Stevens had been adversely affected by the relationship. Because the relationship had not caused the marital breakdown, the High Court concluded the conduct was insufficient to warrant disciplinary action.

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[57] Lynda Crowley-Cyr & Carol Caple, *Sex with Clients and the Ethical Lawyer,* James Cook University Law Review, 8th ed (2001).

[58] Australian Solicitors Conduct Rules rr 12.1, 12.2.

[59] [1972] ALR 285.

[60] The relationship had begun after the client's divorce was granted but before custody and maintenance matters were determined.

(b) THE BAN ON SEX[61]

There is currently no specific rule prohibiting solicitors from engaging in sexual relationships with their clients. However, under the Uniform Law there is a general rule prohibiting solicitors from acting where there is a conflict between the duty to serve the best interests of the client and the personal interests of the solicitor or an associate of the solicitor.

The introduction of a specific 'no sex' ban has been topical in the past. In 2001, Lynda Crowley-Cyr & Carol Caple, wrote a journal article titled 'Sex with Clients and the Ethical Lawyer'. At the time of the 2001 article, the general rule against conflicts of interests were contained within the specific state/territory conduct rules and provided (for example) that 'a practitioner shall give undivided fidelity to his client's best interests unaffected by any interest of the practitioner or of any other person or by the practitioner's perception of the public interest'. They canvassed the arguments in support of and against the implementation of a specific rule. In favour of the rule, they considered two underlying assumptions. The first concerned the client's vulnerability and is known as the power imbalance theory.[62] The second assumption is that the emotional intimacy assumed with a sexual relationship impairs a solicitor's decision-making capacity.[63] They also considered questions of consent and the role of solicitors as fiduciaries. Crowley-Cyr and Caple also noted that such regulation would infringe the solicitor's right to sexual privacy and followed the reasoning in *Lamb.*

In 2004, Attorney-General Rob Hills requested the LIV to investigate the need for an ethical rule to deal with the situation although no new rule was subsequently created.

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61 Ysiaha Ross, 'Professional code should ban sex with clients', *The Australian* (online), 19 October 2007 <https://www.theaustralian.com.au/business/legal-affairs/professional-code-should-ban-sex-with-clients/news-story/11deeb53a0b293a902ff5d048e3595ad?sv=8b35e0cfa2ff2f6e7c4ef3a42de10ab5>.

62 Crowley-Cyr & Caple, above n 56, 70, 4.

63 Ibid 71, 5.

(c) HOT AND ON THE CLOCK[64]

In 2013 a Minnesota solicitor was suspended after having an affair with a client and billing her for the time they spent having sex. The solicitor was representing a client in a divorce and when asking her about her sexual relationship with her former partner, he suggested she have sex with him. She agreed and he billed a number of their liaisons as 'meetings'. When their relationship ended, the client tried to suicide and while recovering in hospital, revealed the affair. The solicitor 'unconditionally' admitted the whole affair.

Since the 1990s, the Minnesota Rules of Professional Conduct has provided 'A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced. For purposes of this paragraph: 'sexual relations' means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts of the lawyer'.[65] This rule does not prohibit a solicitor from engaging in sexual relations with a client of the solicitors firm provided the solicitor has no involvement in the performance of the legal work.[66]

The solicitor was disbarred and wasn't eligible for reinstatement for 15 months.

In *Legal Practitioners Conduct Board v Morel* (2004) 88 SASR 401 a criminal solicitor formed personal relationships with imprisoned clients on three separate occasions. The relationships were found to have adversely impacted upon her representation of at least one of those clients as explained by Bleby and Gray JJ:-

> [The solicitor's] unprofessional conduct allowed her client to make recorded admissions of serious criminal conduct during a telephone conversation. The client was unaware that the conversation was monitored. At the time [the solicitor] was aware of the monitoring. At the very least this led to an inappropriate disclosure and possibly to a loss of legal professional privilege with respect to an admission. As

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[64] Kevin Spak, 'Lawyer bills client for sex', *Newser* (online) 18 January 2013 <http://www.newser.com/story/161231/lawyer-bills-client-for-sex.html>.

[65] *Minnesota Rules of Professional Conduct 2015* (MN) r 1.8(j)(1).

[66] Ibid 1.8(j)(3).

> the result of this unprofessional conduct the client was left without independent legal advice about important matters concerning his liberty…

The solicitor also lied to the Department for Correctional Services with a view to obtaining legal visiting rights for the ulterior purpose of furthering a personal relationship. As a result, the Court found she was unfit to practice law and removed her name from the roll.

Whilst there is no specific rule in Australia that prevents solicitors from having sexual relationships with their client, the New Zealand rules prohibit entry into an intimate personal relationship with a client 'where to do so would or could be inconsistent with the trust and confidence reposed by the client'[67]. In adherence to this rule, in 2011 the New Zealand High Court upheld the three-year suspension of a solicitor who had engaged in sexual intercourse with a client in circumstances amounting to an abuse of trust and confidence.[68]

In *Bosgard & Bosgard* [2013] FamCA 308 which concerned property proceedings, the wife filed an application seeking to restrain the husband's solicitor (Ms B) from acting for the husband. Ms B was in a de facto relationship with the husband and was the sole director and sole shareholder of a company which is a creditor of the husband. The Court's focus was on whether Ms B could act with objectivity and independence given her vested interest in the outcome of the proceedings.

In considering the question before him, Fowler J considered this a matter where Ms B may be required to give material evidence at a later stage in the proceedings (as a creditor for the husband with a present debt). Fowler J considered the solicitor's duty to her client and overriding duty to the Court. In assessing the evidence he considered:-

> [35] Given the history of the relationship between the husband and the solicitor and the proclamation of the love attendant upon it, is not hard to see how that priority might well be reversed and the solicitor place

[67] Lawyers and Conveyances Act (Lawyers: Conduct and Client Care) Rules 2008 (NZ), rr 5.7, 5.7.1.

[68] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.

the love she has for her partner above the duty that she owes to the Court.

…

[39] The Court is assisted in the administration of justice where the litigants and legal practitioners focus on the issues of importance to that process. It is assisted where there is a focus on objectivity among legal practitioners and a capacity for them to be independent of their clients in the fulfilment of both their duty to the Court and their duty to clients. A lack of such focus and objectivity gives rise to the possibility of the integrity of the justice system being undermined.

It was ordered that the solicitor forthwith cease acting for the husband in the proceedings.

Sex with peers

In *R v Szabo* [2001] 2 Qd R 214; (2000) 112 A Crim R 215 (CA) the appellant had been convicted and sentenced on rape charges. He subsequently discovered that his counsel and the prosecutor had had an on-off sexual affair. He appealed on the grounds of alleged impropriety.

The defence counsel, Mr H and the Crown prosecutor, Ms B, were in a de facto relationship for 11 months; six of which they had been residing together as a couple. The relationship ended in January 1999 but resumed the following July. The present trial took place in April 1999 at which time Mr H said he was not in a relationship with Ms B.

On appeal, the evidence showed that Mr H and Ms B only a few days after the trial, spent the weekend together at a Queensland beach, staying in a motel room booked for two in the name of 'H'. Further, in the week of the appellant's trial, Mr H and Ms B booked into separate rooms at the same hotel. At one stage Ms B obtained the key to Mr H's unit. Mr H agreed that Ms B visited for communication on normal matters of contact between a prosecutor and counsel although he could not recall giving Ms B permission to collect his keys.

On the facts, the appeal was allowed, the conviction set aside and a retrial ordered.

Sex with the judge

Kennedy & Cahill (1995) FLC 92-605 (the Full Court: Barblett DCJ, Baker and Burton JJ) was a hearing for property proceedings between a husband and a wife. After the trial, the solicitors for the husband became aware that the trial Judge was having an 'intimate personal relationship' with the wife's solicitor (Mr A). At no time during the hearing was this disclosed by the trial Judge or the wife's solicitor.

The appellant applied to set the orders aside and for the matter to be remitted for hearing before another Judge. The focus on appeal was whether the trial Judge should have declined to hear the matter based on a reasonable apprehension of bias.

Whilst Mr A asserted he had ceased acting for the client prior to trial, his firm (of which he was the senior of two family law solicitors) was still engaged to represent the wife. He provided the other family law solicitor with advice on procedure and evidence if and when required.

At the time of the appeal, the relationship between Mr A and the trial Judge was still continuing and was described (by Mr A) as 'a serious and close personal relationship'.

The Full Court held they had an obligation to uphold justice being seen to be done. The fact that neither Mr A nor the trial Judge disclosed the relationship and the fact that a reasonable apprehension might not have brought an impartial and unprejudiced mind to the decision making process, caused a miscarriage of justice.

(d) COMPARE WITH RULES IN MEDICAL PROFESSION

Doctors are required to promote good care for patients and protect doctors and patients by (amongst other things) not establishing or pursuing a sexual, exploitative or other inappropriate relationship with anybody under their care.[69]

The Medical Board of Australia provides guidelines of 'understanding and defining sexual boundaries' which includes sexual misconduct (engaging in sex with a current patient, someone closely related to a patient or a former patient), engaging

[69] Medical Board of Australia, 'Good Medical Practice: A Code of Conduct for Doctors in Australia' (March 2014) 18, 8.2.

in sexual behaviour (words or conduct that is intended to arouse or gratify sexual desire), sexual exploitation and sexual harassment.[70]

The law was developed to address issues of power imbalance, the patient's trust in a doctor and to avoid the prospect of the doctor's loss of objectivity.

The Medical Board of Australia provides 'Warning signs' for 'the beginning of a sexual relationship between a doctor and a patient' which include:-[71]

1. Patients requesting or receiving non-urgent appointments at unusual hours or locations, especially when other staff are not present
2. Inviting each other out socially
3. A doctor revealing intimate details of his or her life, especially personal crises or sexual desires or practices, to patients during a professional consultation
4. Patients asking personal questions, using sexually explicit language or being overly affectionate
5. Patients attempting to give expensive gifts.

Doctors have mandatory reporting requirements for 'notifiable conduct' which includes engaging in sexual misconduct in connection with the practice of the profession. In the case of serious unprofessional conduct, the Medical Board of Australia has the power to suspend registration and/or refer a matter to a tribunal or Court where a medical practitioner's registration may be cancelled.

In *Re a Psychologist* [2009] TASSC 70 the parties were the psychologist and the patient respectively. The patient consulted with the psychologist as a result of ongoing anxiety arising from a motor vehicle accident in July 1996. She saw the psychologist (as a patient) from 1997 to mid-1999 on 57 occasions. 'At the conclusion of the last appointment he and she kissed each other passionately. They commenced a sexual relationship about two weeks later'[72]. They commenced living together in November

[70] Medical Board of Australia, 'Sexual Boundaries Guidelines for Doctors' (28 October 2011) 2.

[71] Ibid 4, 9.

[72] *Re a Psychologist* [2009] TASSC 70 [2].

2000 and married on 4 March 2001. They separated in mid-2004.

The patient (who became the wife) complained to the Medical Board of Australia about the psychologist's conduct following their engagement as patient-psychologist. It was alleged that the post mid-1999 relationship amounted to an inappropriate sexual relationship with a former client under the Psychologists Code of Conduct.

Ultimately the Supreme Court quashed the decision because the Board switched from considering the allegations as a breach under the Code to considering them as professional misconduct without adequately bringing the switch to the (unrepresented) psychologist's attention.

Justice Blow referred to the discussion by Harper J in *Morris v Psychologists Registration Board*, unreported, SCV, 19 December 1997:-

> In my opinion the fact that the professional relationship had ended at the time the sexual relationship commenced is not of itself determinative. The appropriate test must be whether a sexual relationship would exploit the client or put the health of the client at risk…
>
> In my opinion to confine the concept of exploitation to duress, manipulation, coercion or pressure would be to abrogate the therapist's responsibility to make a professional decision to refrain from submitting to the wishes of the client or even a former client.

Recently in *Medical Board of Australia v Alkazali (Review and Regulation)* [2017] VCAT 39, VCAT ordered the deregistration of a general practitioner with a long history of asking vulnerable patients for sex. These proceedings concerned Alkazali's actions of asking a female patient for sex over the phone and in dozens of text messages while offering to help her get a disability pension for schizophrenia. The evidence before the tribunal included text messages from Alkazali to the patient:-

> "But good dr needs good girl to play with,"
>
> "Do you want to be mine… will get u form done perfectly good regardless u answer,"

"U will get pension for sure."

VCAT considered Alkazali showed a 'demonstrable lack of insight and genuine remorse' for his offence. His registration was cancelled for at least 18 months after which time he will have to pass the 'good and proper person test'. In addition, VCAT recommend that if he were successful in obtain re-registration, it be subject to conditions including regular auditors and restraints on how he communicate with patients.

V Conclusions

There is no doubt that there is far more freedom of personal conduct uncensored by social opprobrium. Sex out of wedlock passes without remark. Personal autonomy unconstrained by pressure or protection of family and friends is at historic heights.

However, for the more vulnerable these social shifts have also removed informal protections and supports. The result for solicitors is far greater scrutiny of their conduct as professionals in their dealings and as to efficacy of their work.