

# Ethical Dilemmas: Lawyers, Company Executives, Researchers & Doctors

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**E**VERY PROFESSION has ethical duties that are usually documented in codes of conduct or government regulation. This paper discusses two duties that are shared by all professions. The first is the duty of confidence and exceptions to it. The second is the duty to avoid conflict of interest.

The discussion is conducted by way of examining a fact situation that involves lawyers, company executives, researchers and doctors.<sup>1</sup> It is substantially derived from widely publicised events that have occurred in recent times and from common situations that occur in practice.

Discussions on entitlement to breach confidence and conflict of interest usually focus on the medical profession.<sup>2</sup> It is well established that doctors have duties to the community that sometimes override duties to their patients. However, here the focus is on other professions, particularly the legal profession and company executives.

## The problem

Steve is a junior solicitor working for a large city firm. The firm's biggest client is Yummy-Drugs Ltd., a drug company that has recently withdrawn one of its drugs, Nopaine, from the market because it has discovered that people who have taken the drug will probably suffer from

a crippling arthritic condition in five to ten years time. The only people who know why Nopaine has been withdrawn are solicitors at Steve's firm, senior executives at Yummy-Drugs and a research scientist who discovered the problem. Yummy-drugs has awarded the research scientist a grant of two million dollars to leave the country and research the medical effects of quality wines consumed in large quantities.

The firm has asked Steve to advise it on the following actions:

- Say nothing about the problem with the drug so that litigation against Yummy-Drugs will be deferred;
- Vigorously defend all litigation
- Prolong litigation so as to discourage parties from pursuing their rightful claims;
- Transfer Yummy-Drugs assets to another jurisdiction so that the company will not be able to compensate users of the drug who suffer from the arthritic condition.

Steve's aunt Clarissa has been a client of the firm for many years and she has asked him to draft her will and to include in it a bequest of \$50,000 to Yummy-Drugs Ltd so that it may further its research into painkilling drugs. Clarissa had been taking Nopaine regularly and believes that she has benefited from it.

1. Assume that you are a trusted colleague of Steve's

and that he has asked for your advice on problems that he may have. Advise Steve.

2. Assume that you are a conscientious senior executive of Yummy-Drugs Ltd. and that you want to best serve the interests of (a) yourself; (b) the shareholders; (c) the employees; (d) the directors; (e) the general public. What are your options?

3. Assume that you are the research scientist. You were the principal investigator in the ethically approved trial, the findings of which led to the marketing of Nopaine by Yummy-drugs Ltd. You are a loyal employee of Yummy-drugs Ltd and a conscientious research scientist and you want to serve the interests of the general public. What are your options?

4. Assume that you are Steve's psychiatrist. In confidence, he tells you all his problems including his ethical dilemma over Nopaine. You form the view that he will not tell anyone else about it. What should you do?

## Guidance for Steve: The Rules of Professional Conduct and Practice

These Rules were adopted by the Law Council of Australia in 2002. They are the basis for the Professional Conduct Rules

in every State and Territory in Australia each of which has modified them to varying degrees. Unlike statutory provisions and decisions of judges, the rules do not have the force of law.<sup>3</sup> However, they provide guidance for practitioners as to appropriate professional conduct. Failure to comply with them may result in disciplinary proceedings.

The rules that apply to Steve and his predicaments are as follows:

- Introduction to *RELATIONS WITH CLIENTS*: "Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law."

- Rule 1.1: A practitioner must act honestly and fairly, and with competence and diligence, in the service of a client.

- Rule 3: Duty of confidentiality and exceptions to the duty.

- In rule 3.1.2, the words that are highlighted in this exception have been added to the South Australian and N.S.W. versions:

- "the practitioner is *permitted or* compelled by law to disclose."

- The exception in rule 3.1.6 is only in the S.A. version:

- "in the practitioner's opinion the disclosure of the information is required o prevent imminent serious physical harm to the client or to a third party."

• Rule 8: Acting for More than One Party (whose interests may conflict)

• Rule 9: Avoiding Conflict of Interest (where practitioner's own interest involved)

• Rule 10: Receiving a Benefit under a Will or other Instrument.

• Rule 30.1: A practitioner must not engage in conduct, whether in the course of practice or otherwise, which is:

- Dishonest;

- Calculated, or likely to a material degree, to:

∞ Be prejudicial to the administration of justice;

∞ Adversely prejudice a practitioner's ability to

practice according to these rules

∞ Diminish public confidence in the administration of justice.

**Should Steve say nothing?**

• The consequence of saying nothing is that litigation either does not happen or it is deferred. It is not the business of lawyers or their clients to promote litigation against the clients.

• Saying nothing does not conflict with the introduction to *RELATIONS WITH CLIENTS*, rule 1.1, rule 3 (including the expanded S.A. version) or rule 30.

**Should litigation be vigorously defended?**

• Yes! It has been discovered that some people will *probably* suffer from a crippling arthritic condition. The word *probably* is a version of the word *possibly*.

• It is *also possible* that people will not suffer from a

crippling arthritic condition and that, if they do, there will not be a causal connection between their suffering and the drug.

• If there is litigation, all parties are entitled to vigorously contest it.

**Should litigation be prolonged so as to discourage parties from pursuing their rightful claims?**

• No!

• Introduction to *RELATIONS WITH CLIENTS*

• Rule 30

• *White Industries (Qld) Pty Ltd v Flowers and Hart (a firm)* [1998] 806 FCA (14 July, 1998)

In *White Industries (Qld) Pty Ltd v Flowers and Hart (a firm)*, Flowers and Hart were solicitors who, on the advice of counsel, had commenced and continued proceedings on behalf of their client knowing that there were no or substantially no prospects of success. The predominant, if not the only purpose of doing so was to delay and defer

White Industries (Qld) Pty Ltd in bringing to a conclusion its undoubted claim for moneys due under a building contract. Goldberg J ordered Flowers and Hart to pay the costs of White Industries (Qld) Pty Ltd. His Honour said:

I do not consider that it is a legitimate or appropriate purpose for the institution of a proceeding in this Court that the purpose of the proceeding is to postpone, delay or put a barrier in front of a claim of another party and the payment of an amount due in respect of that claim. The purpose of proceedings in a court of law is to vindicate a claimed right whether, for example, that right be a right to positive relief such as a claim for money due or specific performance of an agreement or whether the right be one to be free from unauthorised governmental interference. It is not part of the legal process in this Court that its process and procedure be used as an instrument of oppression so as to frustrate the bringing, and expeditious disposition of a legitimate claim.

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