

# Issues of conflict for remote legal practitioners

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The purpose of this article is to highlight how remote legal practitioners do and can manage conflicts of interest, while serving the best interests of their client and meeting their legal and ethical obligations.

Conflicts of interest are more likely to occur in remote areas where there is a limited choice of legal practitioners, past associations with others in the community are more likely to have occurred, and parties to a matter are more likely to be known to each other. The personal and professional reputation of practitioners in remote areas is important, as informal community networks are a significant source of work.

The Australian Solicitors' Conduct Rules (Rules) as adopted by the Council of the Law Society of South Australia on 25 July 2011 provide that a practitioner and law practice must avoid conflicts:

- between the duties owed to current and former clients (Rule 10); and
- between the duties owed to two or more current clients – concurrent conflicts (Rule 11);

except where permitted under these Rules.

These Rules are designed to protect the fiduciary relationship of trust and loyalty between a practitioner and their client, to avoid the practitioner breaching their professional standards, and to protect the best interests of the client.

A remote practitioner focusing on risk management while simultaneously being able to meet their professional obligations to their client and the court forces them to take different approaches in making a professional judgment as to whether a conflict of interest exists and whether it can be dealt with. Helen McGowan in her 2015 paper *'Turn away' or 'triage': engaging*

*with conflicts of interest in the bush*<sup>1</sup> opined how her research revealed that remote practitioners are less likely to undertake "threshold" screening for conflicts of interest, and more likely to "triage" the client to determine if there is a "work around" to the conflict:

*"... the more remote the geographical region in which a country lawyer practices, the greater the likelihood that their community and legal system will be under resourced, and the greater the pressure on the lawyer to assist people. Pressure arises for the lawyer when they perceive their professional roles are incompatible. Their primary duty to their administration of justice is incompatible with strict compliance with the professional standard."*

McGowan identifies that a triage assessment is often adopted by remote practitioners regardless of the possibility of a conflict, as well as a positive decision by practitioners to act for a client despite the possibility of a conflict, with a resolution to work around the apparent problems with caution, through the use of information barriers and informed client consent.<sup>2</sup>

In order to meet their obligations under the Rules where is a desire for concurrent representation, a remote practitioner must *as a minimum* advise each client of the intention for them to concurrently act for another client in the same/related transaction, the impact on them of concurrent representation, what happens to confidential information in such situations, what ramifications may arise, and the ground rules of what will happen in the event of a conflict arising, including withdrawal and the additional costs a client will meet. All communications to clients must be in writing.

In all conflicts of interest situations, a remote practitioner must obtain each client's informed consent, ensuring that each client understands the actual and reasonably foreseeable adverse consequences of the retainer including any impairment to the practitioner's duty of confidentiality.

Below is a suggested checklist to assist remote practitioners in ascertaining whether a conflict of interest exists:

## Identify the conflict:

- who is my client
- what am I retained to do
- who may be affected by the retainer if it is undertaken: current clients; current matters; related matters for former clients; partners, family members of former clients

## Considerations: have I considered:

- new client's perspective
- existing client's perspective
- my and the practice's perspective

## Outcomes:

- do not act, or
- act with disclosure and informed consent

## Reflect:

- have the facts changed?
- are any witnesses a former client or related? If yes, begin at step 1; or no.

For further assistance, please contact the Society's Ethics and Practice Unit on 8229 0200. **B**

## (Endnotes)

- 1 Presented at the Conference of Regulatory Officers, Hobart, 6 November 2015
- 2 See also - 2014 report by the Centre for Rural and Regional Law and Practice, Deakin University, *Conflicts of interest in Victorian rural and regional legal practice*, Louise Kyle, Richard Coverdale & Tim Powers