Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd

Innovative, Professional and Culturally Proficient Legal Services for Our People

National CLC's Conference
17th – 20th October 201: Hobart

I would like to commence by acknowledging and paying my respects to the traditional custodians of the land upon which we meet today - and also to acknowledge and pay my respects to Elders past and present.

Greetings from …..

Our Chairperson:
Kenny Georgetown

Greetings from ….

Our CEO:
Shane Duffy

The Aboriginal & Torres Strait Islander Legal Service (QLD) Ltd: Our background

We are a non-profit, public benevolent, community-based organisation – funded via the Commonwealth Attorney-General's Department.

We provide criminal, family and civil law assistance throughout Queensland (including the Torres Straits from 1st October 2011). We also have State-wide jurisdiction in the areas of:

- Monitoring Indigenous Australian Deaths in Custody;
- Indigenous Australian Community Legal Education; and
- Law Reform.

Staffing Profile

We have 190 staff spread across 27 offices:

- 83 Legal Practitioners (criminal, civil and family),
- 53 Field or Court Support officers,
- 40 Administration (including finance) staff
- 5 Paralegals
- 5 Prisoner Throughcare officers
- 2 Law Reform and Community Legal Education officers
- 1 Deaths in Custody Monitoring officer(1) and
- 1 National (ATSILS) Legal Secretariat Officer

Office Locations – Southern Queensland

Head Office: North Quay, Brisbane

Regional Offices:

- Beenleigh
- Bundaberg
- Charleville
- Hervey Bay
- Ipswich
- Maroochydore
- Murgon
- Rockhampton
- Southport
- Strathpine
- Toowoomba

Satellite Offices:

- Chinchilla
- Cunnamulla
- Dalby
- Goondiwindi
- Roma
- St George
- Warwick

Office Locations – Northern Queensland

Regional Offices:

- Cairns
- Mackay
- Thursday island
- Townsville
- Mount Isa

Satellite Offices:

- Cooktown
- Palm Island
- Normanton

Gulf, Cape, Torres Strait are covered via charter flights

Challenges and Opportunities in Legal Assistance

"Conflicts of Interest" (arguably better described as 'conflicts of duties') can provide huge hurdles to the provision of legal assistance – especially to legal-aid type agencies/CLC's in remote and regional areas where alternative service providers might not be available. Opportunities can also arise via the utilisation of robust information barriers –

Conflicts of Interest

Legal Practitioners have obligations to:

- Their Clients (past and present);
- The Courts;
- The Administration of Justice generally; and
- Their profession.

Conflicts of Interest

Today I will be focusing upon “client” conflicts – which can arise in three settings:

- Where a client’s interest conflicts with the practitioners
- Where a client’s interest conflicts with the interest of another current client (i.e. in the same matter); and

Conflict with a former client

Assuming that it is generally self-evident when a client's interests conflict with that of the practitioner's - or that dual representation of clients (in a contested matter) is a clear cut conflict – I will be further sharpening the focus today upon conflicts between current and former clients. Hopefully such will be of the

101: Fiduciary Duty

It is well established that legal practitioners owe a fiduciary duty to their clients. Such is also the basis of a conflict of interests situation. There are four elements of the fiduciary duty:

1. The practitioner's duty of loyalty to their client;
2. The practitioner's duty of confidentiality to their client;
3. The practitioner's duty to disclose to their client all information within their knowledge that is relevant in order to act in the client's best interests; and
4. The practitioner's duty not to put their own or anyone else's

101: Distinction: former v. current clients

There is a distinction (as to the basis of a conflict arising) between acting against a former client on the one hand and that of acting for more than one party in the same matter on the other: Lord Millett in *Prince Jefri Bolkian v. KPMG (a firm)* [1992] 2 WLR 215 at 224-225. [See quote overleaf]

101: Distinction: former v. current clients

"… a fiduciary cannot act at the same time both for and against the same client and his firm is in no better position … his disqualification has nothing to do with the confidentiality of client information. It is based upon the inescapable conflict of interest which is inherent in the situation….

Where the court's intervention is sought by a former client, however, the protection is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between a solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to a former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of the information imparted

Conflict with the interests of a former clie

The most common problem in acting against a former client is an inherent conflict between:

1. The practitioner's duty of confidentiality (to the former client); and
2. The practitioner's duty to act in the best interests of their current client, (which might entail a breach of the earlier confidence).

The Test

A legal practitioner must not act for a new client against a former client if:

- The practitioner has confidential information about the former client (which remains confidential); and
- Which is relevant to the new proceedings; and
- Where it is reasonable for the former client to think that there is a real possibility that the

… The Test

The risk must be a real and sensible one – not merely fanciful or theoretical.

BUT the risk need not be substantial (nor "probable").

See *Bolkiah's* case at 528.

Breaking the “Test” down

Whilst this test refers to the belief of “the former client” (which would be a subjective test) – in practice an objective “reasonable observer” test is applied – with that person standing in the shoes of the former client in terms of being in possession of all relevant background information.

Breaking the “Test” down

“Confidential Information”

- The information must have been originally communicated in confidence;
- It must also remain confidential at the material time; and
- It must be relevant to the new matter.

Breaking the “Test” down

“a real possibility” (of detrimental use)

“real” – a precise definition is impossible, but case authorities assist: *“real prospect”; “sensible possibility”;*

“not fanciful or theoretical”; “significant possibility”.

“possibility” – a lower evidentiary threshold than “probability” - provides greater fairness to the former client re surmounting the evidentiary onus.

Breaking the “Test” down

“might be used..”

Disclosure or use of the information includes “inadvertent” disclosure. Accordingly the courts will also assess the potential for inadvertent disclosure in assessing whether there is a “real possibility” that confidential information might be used. Such in essence turns upon the individual circumstances of the case e.g. the nature of the matter (for example: the greater sensitivity often relating to Family Law matters might mean a higher likelihood of the

Breaking the “Test” down

“used to their detriment”

Relating to the concept of “justice being seen to be done” is the acceptance that if the information is not detrimental to the former client – then no injustice can fairly be said to flow from a practitioner subsequently appearing against a former client.

The requirement of “detriment” also safeguards against frivolous objections or the ability for clients to have their “lawyer of choice” not unfairly curtailed

Breaking the “Test” down

… detriment

The extent (if any) to which the earlier and subsequent cases (retainers) are related is arguably the core focus of a court in determining the likelihood of detriment (and indeed, “real possibility of use”). For example:

- Is a significant issue in the earlier case relevant to the latter?
- Are there common witnesses involved (interviewed by the lawyer)?
- Is knowledge of the former client’s trial strategies or business practices relevant?
- What was ehe duration and extent of intimacy/association with the former client?
- What is the likely prejudice should a conflict subsequently arise?

Breaking the “Test” down

…detriment

Note of caution: totally unrelated matters can still potentially support a disqualification. For example:

- A court could determine that a practitioner has acquired detrimental knowledge which is relevant – notwithstanding that the cases themselves are entirely contrasting.
- Similarly, in those situations where a court concludes that knowledge of a former client’s personality or attitudes is relevant in terms of constituting confidential information – the fact the retainers are unrelated is less

Breaking the “Test” down

The onus of proof

The conventional view is that the onus rests upon the former client to identify the relevant confidential information with a degree of particularity – as opposed to simply raising a general objection or relying upon mere conjecture. Indeed, information once confidential may no longer be so; or even be in existence any more; or have any relevance to the current case. Specificity makes such clearer.

Food for thought: does the heightened sensitivities associated with

Caution: The State of Victoria (exceptior

Judicial pronouncement in Victoria suggests that a practitioner might be disqualified from acting against a former client even in the absence of any proof of the use of confidential information by virtue of a continuing fiduciary obligation (e.g. “loyalty”) subsisting beyond the end of the retainer (as per the USA); or via an implied term in the contract of retainer. See Brooking JA in *Spincode Pty Ltd v. Look Software Pty Ltd. (2001) 4 VR 501 at 522.* That said some Victorian judges have endorsed the *Bolkiah* test.

Conflicts checks

It is thus essential (indeed, required) that law firms establish effective conflict checking systems.

Importantly, a check must be carried out at the point of initial contact and prior to the taking of any instructions (or imparting of any legal advice).

Further checks should be conducted before any new file is opened and should a new party become involved

Concluding Comments

Time constraints has necessitated a fairly basic coverage of what can be a highly complex subject. When in doubt:

1. Speak to senior colleagues;
2. Speak to your Principal Legal Officer; and
3. If necessary – seek a ruling from your governing body (e.g., your local Law Society).

Note: Principal Legal Officers must ensure appropriate induction; ongoing training and (verifiable) conflict procedures are in place.

If you have any questions but we're out of time; or would like me to send you any materials: please do not hesitate to contact me: (07) 3025 3888, or via: andrew.hackett@atsils.org.au

Thankyou – Andrew Hackett – Director of Criminal Law