

# Lawyer conduct in providing information to Police



## Background

The Royal Commission into the Management of Police Informants has raised ethical questions and highlighted the need for guidance on what is acceptable conduct when dealing with clients and their associates, and what is appropriate and ethical to tell the police in your role as legal adviser (if anything).

## Your overriding duty

You become officers of the court when you are admitted to the legal profession, after swearing an oath or making an affirmation to personally uphold the responsibilities that come with being an officer of the court. As participants in the justice system, you are expected to respect and uphold the law.

By publicly committing to the role of officer of the court, you acknowledge your privileged role within the community and agree to submit yourself to a higher ethical standard of behaviour.

## Being a fit and proper person

After you're admitted, you need to be granted a practising certificate before working as a legal practitioner in Victoria. To be granted a practising certificate, and to have your certificate renewed, you need to be a fit and proper person. Being a fit and proper person has many aspects, including abiding by the Legal Profession Uniform Conduct Rules for barristers and solicitors<sup>1</sup> and holding yourself to a higher ethical standard of behaviour than the

general public. It also means considering not only whether you can do something, but whether you should do it – is it the right thing to do, and does it impact vulnerable consumers?

## Professional conduct rules for lawyers

The Legal Profession Uniform Conduct Rules for barristers and solicitors set out standards of professional conduct. It is your duty as an officer of the court and your obligation as a fit and proper person to know these rules, obey and uphold the law and maintain professional independence and the integrity of the legal profession.

Barristers have an “overriding duty to the court to act with independence in the interests of the administration of justice”. For solicitors, their “duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty”.

All lawyers are also subject to other important obligations to behave honestly, and not to engage in conduct which is dishonest, or which would prejudice or diminish public confidence in the administration of justice or bring the profession into disrepute. Maintaining your clients' confidences, protecting their privileged communications, acting in their best interests and avoiding positions that conflict with your clients' interests are further, separate duties, but also vital ways to achieve the foregoing.

<sup>1</sup> Legal Profession Uniform Conduct (Barristers) Rules 2015; Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

## Duties of confidence and obligations of legal professional privilege

You have a duty of confidentiality to your clients. It is a duty based, in part, on the public policy interest in ensuring that your clients are able to provide full and frank information when seeking legal advice, without fear of subsequent disclosure.

The duty of confidentiality operates in conjunction with the principle of legal professional privilege (also known as client legal privilege), which protects certain communications arising out of the lawyer-client relationship from compulsory disclosure. Legal professional privilege is a protection that is afforded to your client, rather than to you.

Neither the duty of confidentiality nor legal professional privilege are absolute. There are specific and very limited circumstances where you can disclose confidential information obtained in the course of legal practice in a manner that is consistent with your various obligations. More detail on this is provided in the scenarios on page four. However, if you find yourself in a situation where the course of action is unclear you should seek advice, by calling the Law Institute of Victoria ethics hotline or, if you are a member of the Victorian Bar, contacting the Victorian Bar Ethics Committee.

## Avoiding conflicts of interests

You must always act in the best interests of your client. However, there are times when the duty to one client may come into conflict with the duty to another client or a former client. Similarly, there are times where your personal interests may come into conflict with the interests of your client.

### Conflicts of interest between clients

If you are acting for criminal defendants, you must think particularly carefully about the potential for conflicts of interest to occur. Even if a former or existing client is happy for you to act for their associate, you must exercise your independent judgment and carefully consider the possibility for conflicts to arise in deciding whether it is appropriate for you to act for both parties. If that possibility arises when acting for co-defendants, then you **must not** continue to act.

If you develop a close and long-standing relationship with a client, the confidential information you obtain is likely to extend beyond their legal affairs to knowledge about their personality, broader

relationships and financial and business affairs. The closer you are to a client, the harder it will be for you to maintain the level of independence and objectivity required of a legal practitioner, or to demonstrate that you could also act impartially for other individuals who may have competing interests.

### Conflicts between personal interests and those of a client

Lawyers must also stop acting for a client if their personal interests conflict with those of their client to such an extent that they cannot continue to act in the client's best interests. You should cease to act for your client if you are unable to put your clients' interest ahead of your own, for example, if there is the potential for prosecution or harm to yourself.

## What can happen if you breach your legal and professional obligations

If you breach your obligations, we may:

- bring charges against you before VCAT
- issue a reprimand
- interfere with your practising certificate (such as suspending or cancelling it)
- apply to the Supreme Court for you to be removed from the roll of Australian lawyers.



## Maintaining professional independence

Maintaining a professional relationship with clients is crucial to your ability to meet your paramount duty to the court, and to the administration of justice. Fitness to practise law requires the personal confidence of your clients, fellow practitioners and judges.



**This means you should be vigilant in your dealings with clients and other people with whom your clients associate, and maintain professional boundaries. You should take particular care about forming personal relationships, or socialising, with clients or their associates.**

**You should also be mindful of situations where you could be exposed to information about potential criminal activities from individuals who are not your clients and to whom you do not owe any obligations of confidentiality or privilege.**

It is your obligation to ensure the family members and associates of your clients understand that you are not acting for them, that what they tell you is not covered by legal professional privilege or other professional duties, and therefore you could be compelled to divulge what they tell you to authorities. You leave yourself open to manipulation or misunderstandings by not ceasing conversations where people who are not your client tell you information that may be of interest to authorities.

Not maintaining appropriate boundaries can compromise your independence, and ability to act ethically and in the best interests of your client. It can be extremely hard to demonstrate independence and impartiality from your clients if and when a problem arises. Depending on the particular circumstances, a court may restrain you from acting for a client, or you may be exposed to disciplinary action for unsatisfactory professional conduct or professional misconduct.

You can avoid potential problems by limiting social interactions with your clients, their families and associates. For example, consider:

- Having a coffee to celebrate a win, rather than drinks
- Avoiding meeting in personal places such as homes – stick to neutral locations and professional spaces
- Limiting social engagements with clients, their family members and friends

You must always be clear about who is your client, and what is the scope of your retainer with them, at the start of every conversation.



## The use of lawyers as human sources

Lawyers should not generally be considered appropriate human sources for use by police forces.

However, there are some scenarios where they can, *on an ad hoc basis*, provide information to police.

The below are some scenarios that outline our position on when you can – or should not – provide information to the police. This is not an exhaustive list; please contact us or the LIV ethics hotline or Victorian Bar Ethics Committee if you would like to discuss other scenarios.

### Scenario 1: Information obtained from a client that is privileged or subject to the duty of confidentiality

If you obtain information that may be of interest to the police directly from your client in the course of legal practice, while acting for that client, that information is generally considered privileged and confidential. There is a strong public interest served by maintaining that confidentiality; it ensures that clients can confidently seek and obtain legal advice, which allows for the proper operation of the justice system. The system would be fatally undermined if individuals ceased obtaining legal advice for fear that the content of their instructions could be easily provided to authorities.

There are limited exceptions where you can divulge information obtained from your client as part of privileged and confidential discussions to authorities. For example, if there is an imminent threat of danger to a person, for instance your client has told you they are going to kill or seriously injure someone, you may inform the police. If you do so, you should not continue to act for your client or provide further information to authorities outside the initial report.

## Further information

Dal Pont, G.E Lawyers' Professional Responsibility, 6th edition

### Scenario 2: Information obtained from individuals who are not your clients but with whom you have a personal or professional relationship

If you obtain information from third parties who are not your clients, such as the family members and associates of your clients, you may not necessarily be under any professional obligation to keep this information confidential.

However, if you are mixing socially with your clients and their friends and associates, the professional and personal boundaries may be unclear, and the person providing the information may not necessarily understand that they are **not** engaging with you in a professional capacity. In such cases, there is a risk that a court may find that the person has become your client, in an implied retainer, and therefore you expose yourself to the risk of breaching duties to that client.

Always ensure you are clear when you are talking to people other than your client that you are not acting for them, and the information they tell you is not privileged or confidential.

### Scenario 3: Witnessing, coming across or being the victim of a crime committed by your current or former client

If a crime is committed against you, or you witness a crime occurring, there are no ethical issues preventing you from reporting this to the police. This is so even if the perpetrator is your current or former client. Such conduct does not fall within the lawyer-client relationship, or carry the necessary expectation of confidentiality. You should not continue to act for the client, or resume acting (in the case of a former client).

If you come across information or evidence of a past crime implicating a current or former client, you must consider the scope of your retainer with that client. If the crime is connected in any way with the retainer or information/communications you received during the retainer – or could be perceived to be – ethical issues may arise and before reporting you should call the LIV ethics hotline or, if you are a barrister, contact the Victorian Bar Ethics Committee.