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Solicitor acting for more than one client (joint representation) with similar interests

- Rule 5: A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients
- Rule 5.1: Relationship between lawyer and client is of trust and confidence
- Rule 6: In acting for client, a lawyer must, within the bounds of the law and these rules, protect the interests of the client to the exclusion of the interests of third parties
- Rule 6.1: Cannot act for more than 1 client on a matter in any circumstances where more than negligible risk that the lawyer may be unable to discharge obligations
- 6.1.1 can act if prior informed consent of all parties
- 6.1.2 if apparent can no longer discharge obligations, must immediately inform each of the clients of this fact and terminate retainers

LEGAL PROFESSIONAL PRIVILEGE? - *Nicholson v Icepak*

<p>Armitage NZCA</p>	<p>JV to market timeshares. Leisuretime (one of the parties to the JV) bought out the other's interest in post-dated payments. Leisuretime then told the other party they were in financial difficulty and could no longer meet payment obligations.</p> <p>There was one solicitor acting to manage money and payments for <i>both</i> parties in the joint venture.</p> <p>Claimed breach of K, breach of fiduciary duty, and breach of duty of care.</p> <ul style="list-style-type: none"> • The obligation arising out of the law firm's instructions to act for the JV were of loyalty and good faith to both parties to act in the best interests of the JV. • Cannot knowingly advance the interests of one party at the expense of the other. <ul style="list-style-type: none"> ○ Once the solicitor knew that LT were in financial difficulties and using payments meant for the other party to stay afloat, was placed in an actual conflict and had an obligation to cease making payouts, or cease acting for the JV. • Must not allow the performance of obligations to one principal to be influenced by the other. <ul style="list-style-type: none"> ○ Must serve both as loyally and faithfully as if they were the only principal. ○ Must not find yourself in the position where you cannot fulfil your duty to one principal without failing obligations to the other. ○ The fact that you cannot fulfil obligations to one without failing the other <i>does not</i> excuse liability. • Fiduciary obligation to Leisuretime not to disclose confidential info does not excuse breach of duty to other party. <ul style="list-style-type: none"> ○ Ordinary course; no obligation to disclose. But once known proceeds were being used for LT, an actual conflict arose
<p>Rawleigh</p>	<p>Wife signed a guarantee under undue influence from abusive husband. The guarantee would allow IBM computers into the business. Secretly a plot to get matrimonial property out of NZ - the guarantee would serve no benefit to the wife. The solicitor who witnessed signatures was acting for both parties. Saw husband and wife together and advised them not to sign. Then spoke to both parties individually.</p> <ul style="list-style-type: none"> • Solicitor admits that fiduciary duty was breached. <ul style="list-style-type: none"> ○ Couldn't have acted w/o explaining the conflict, that all info couldn't be disclosed, and the legal effect of that. • No causation of harm. <ul style="list-style-type: none"> ○ Wife was going to sign the guarantee irrespective of advice - as demonstrated because she signed despite being advised not to.

	<ul style="list-style-type: none"> • Duty of care <ul style="list-style-type: none"> ○ No indicators of demeanour at the time to indicate undue influence to the solicitor. No occasion to suggest he needed to do any more than speak to her individually. ○ If raised the standard of care where family members, on the face of it, are willingly seeking legal advice, run the risk of a high threshold that was intrusively probing into people's personal matters. Wives would likely find this offensive.
<p>Nicholson v Icepak</p>	<p>Icepak = cool store company. Refrigerator failed, pears ruined. Sued for negligence. State Insurance took over the claim (subrogation). Appointed Mr Chatwin from Tompkins Wake to handle the litigation. TW told Icepak they were acting on their behalf <i>and</i> on State Insurance's behalf. Mr Chatwin sent a letter to Icepak declining cover because of an admission of breach of insurance policy made <i>to</i> Mr Chatwin.</p> <p>Icepak complained on basis: solicitor-client relationship and that info was subject to legal professional privilege, and that Mr Chatwin had a conflict of interest.</p> <ul style="list-style-type: none"> • As soon as it was apparent that Icepak had breached policy, interests between Icepak and State became unaligned (ie, there became a conflict) • There was a solicitor-client relationship <ul style="list-style-type: none"> ○ Even though State was paying the retainer, and Icepak did not get to choose their legal representation, Mr Chatwin was declared as Icepak's solicitor. Once doing this, were acting on their behalf - albeit couldn't be considered <i>only</i> Icepak's solicitor. • Consequently, info disclosed to Tomkins Wake was subject to legal professional privilege <ul style="list-style-type: none"> ○ This info was given in confidence ○ Even though Icepak had an obligation to <i>State</i> to disclose info, didn't include Mr Chatwin when he was giving <i>Icepak</i> advice. • Mr Chatwin's position was one of likely conflict of interest. Once he received info like that he should have advised of a conflict and ceased to act.

Solicitor acting for more than one party but has sought informed consent

- Rule 6.1: Cannot act for more than 1 client on a matter in any circumstances where more than negligible risk that the lawyer may be unable to discharge obligations
- 6.1.1 can act if prior informed consent of all parties
- 6.1.2 if apparent can no longer discharge obligations, must immediately inform each of the clients of this fact and terminate retainers
- Chapter 7 - disclosure

<p>Clark-Boyce</p>	<p>Solicitor acted for both parties in a transaction (mother and son). Mother only wanted to be advised on conveyancing of the transaction and its legal ramifications rather than advice on wisdom of the transaction. Gave informed consent of conflict and denied independent advice.</p> <ul style="list-style-type: none"> • No general rule of law that a lawyer should never act for both parties where interests may conflict. • Can act in a potential conflict if both parties give informed consent: <ul style="list-style-type: none"> ○ Knowledge of conflict between parties; and
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	<ul style="list-style-type: none"> ○ That the solicitor may be unable to disclose the full knowledge they possess ● Ms Mouat was fully aware of what she was doing and required <u>only</u> advice on conveyancing and legal ramifications. Rejected independent advice. No duty on Mr Boyce to go further and refuse to act for her. ● Because there was no <i>contractual</i> duty to advise on wisdom of the transaction, could not claim that he owed a fiduciary obligation to do so.
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Solicitor in a relationship with client or witness

- Rule 5.7: A lawyer must not enter into an intimate personal relationship w a client where to do so would or could be inconsistent with the trust and confidence reposed by the client
- Rule: 5.7.1: must not enter into an intimate personal relationship with a client where lawyer is representing client in any domestic relations matter
- 13.2.4 A lawyer must not, during the conduct of a proceeding, engage in any relationship with a **witness** that may have the effect or appear to have the effect of interfering with the fair disposition of the proceeding.

Daniels	<p>Solicitor had sex w a client he'd been representing for 4 years. Client was vulnerable due to being a victim of domestic violence, mental health problems etc.</p> <p>Appealed from Tribunal finding of serious misconduct, questioning remedy of suspension and requesting name suppression. Because he had undertaken not to practice, argued that suspension was unnecessary.</p> <ul style="list-style-type: none"> ● Suspension serves purpose of general deterrence due to the need to maintain public confidence in the profession. ● Daniels argued that due to acceptance of guilt, remorse etc shouldn't be suspension. But Tribunal had failed to accept his evidence on numerous grounds, so element of dishonesty. Not accepting responsibility and blaming the client was troubling to the Tribunal and some thought he should have been struck off.
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Client terminates retainer

- 4.3: client right to terminate retainer at any time, subject to terms of retainer.
- 4.3.1: termination doesn't affect entitlement to fees for services rendered
- 4.4.1: upon changing lawyers, client has right in person or via new lawyer to uplift all documents...held on client's behalf. Former lawyer must act upon any written request to uplift documents, subject only to a legal lien
- 4.4.4: subject to lien, client's interests come foremost
- 4.5: doesn't prevent terms in retainer for copies, or copies of documents being kept if it's understood may be needed to defend claims against practice

Solicitor terminates retainer

- 4.2: duty to complete retainer, unless:

- a) the lawyer is discharged from the engagement by the client; or
- b) the lawyer and the client have agreed that the lawyer is no longer to act for the client; or
- c) the lawyer terminates the retainer for good cause and after giving reasonable notice to the client specifying the grounds for termination.
- 4.2.1 Good cause includes—
 - (a) instructions that require the lawyer to breach any professional obligation:
 - (b) the inability or failure of the client to pay a fee
 - (c) the client misleading or deceiving the lawyer in a material respect:
 - (d) the client failing to provide instructions to the lawyer in a sufficiently timely way:
 - (e) except in litigation matters, the adoption by the client against the advice of the lawyer of a course of action that the lawyer believes is highly imprudent and may be inconsistent with the lawyer’s fundamental obligations.
- 4.2.3 A lawyer must not terminate a retainer or withdraw from proceedings on the ground that the client has failed to make arrangements satisfactory to the lawyer for payment of the lawyer’s costs, unless the lawyer has—
 - (a) had due regard to his or her fiduciary duties to the client concerned; and
 - (b) given the client reasonable notice to enable the client to make alternative arrangements for representation.
- 4.2.4 A lawyer who terminates a retainer must give reasonable assistance to the client to find another lawyer.

Solicitor declines potential work

- 4 Lawyer as a professional person must be available to the public and must not, without good cause, refuse to accept instructions from any client... for services within the areas of work within the lawyer’s fields of practice
- 4.1: Good cause for refusal: lack of time, instructions outside normal field of practice, could require breach of professional obligation, and unwillingness to pay normal fee
- 4.1.3: Lawyer who had retainer... is entitled to decline instructions from others that would be inconsistent with the lawyer’s obligations under the retainer

Lawyer not giving info about retainer at the start

- 3.4 Lawyer (other than barrister) must provide info to client in writing:
 - (a) the basis on which the fees will be charged
 - (b) the professional indemnity arrangements of the lawyer’s practice.
 - (c) the coverage provided by the Lawyers’ Fidelity Fund
 - (d) the procedures in the lawyer’s practice for the handling of complaints and existence of Law Society
- 7.1 Must take reasonable steps to ensure client understands nature of retainer and keep informed about progress of retainer

Lawyer not giving relevant info to client

- 7 lawyer must promptly disclose to client all relevant info the lawyer has or acquires that is relevant to the matter
- 7.1; Must take reasonable steps to ensure client understands nature of retainer and keep informed about progress of retainer

- 7.2 must promptly answer requests for info
- 7.3 Not required to disclose info to client if:
 - Client has given informed consent to non-disclosure of particular information
 - Disclosure would likely place health or safety of client or other person at risk
 - Disclosure would be breach of law
 - Confidentiality/privilege
 - Info relates to proposed retainer that lawyer has declined
- Must not agree to receive info on basis that it will not be disclosed to client unless client has given informed consent

Solicitor breaches undertaking

- Rule 10.3, lawyers must honour all undertakings given in the course of practice.
- Consider whether undertaking was negligent and consider whether client will take action against lawyer.

<p>Commissioner of IRD v Bhanabhai</p>	<p>- via letter, Mr B undertook to pay GST. Was never paid. Court ordered the sum be paid by Mr B with interest. Mr B alleged that it wasn't a personal undertaking but a professional one; and also that contextually, it should be read ad conditional.</p> <ul style="list-style-type: none"> ● This was a personal undertaking, not on behalf of client company - if given on behalf of client, must be clearly stipulated (<u>Rule 10.3.1</u>) ● Performance of undertaking was, practically, conditional upon 2 contingencies: <ul style="list-style-type: none"> ○ that he remained in control of settlement process and; ○ that security arrangements [w finance company] permitted him to apply sale proceeds to GST liabilities. ● BUT the undertaking didn't say this, it just said GST would be paid. Also, would be no commercial point in solicitor sending the letter if it was an undertaking on client's behalf. ● In light of that, letter is best construed as <i>meaning what it says</i>: personal undertaking to pay GST. No principle of law requiring unconditional undertaking to be read down so as to be conditional upon fulfilment of undertaking being possible.
<p>Cavell Leitch</p>	<p>- Firm undertook not to release any deposits to Warwick without Marac's prior consent. Breached this by releasing some deposits. Application for summary judgment.</p> <ul style="list-style-type: none"> ● [13] no doubt appeal must be allowed. Clearly at least arguable that there was no loss suffered... by breach of undertaking, and that notice given to the firm of assignment was inadequate ● [20] although breach of solicitor's undertaking was serious, it is at least arguable that compensation should bear relationship to actual loss suffered

Negligence

- Chapter 3 - lawyers must act competently and in a timely manner, consistently with the terms of the retainer and the duty of reasonable care.
- 2.5 Must not certify truth of any matter to any person unless believe on reasonable grounds that it's true after taking appropriate steps to ensure accuracy.

Solicitor knows client may bring claim against them

- 5.11: once a lawyer becomes aware that a client has/may have a claim against him/her, they should:
 - Tell them to seek independent advice
 - Inform them they can no longer act unless the client gives informed consent after receiving independent advice
- Notify professional indemnity insurer of potential claim

Lawyer communicates directly with another lawyer's client

- 10.2 can't communicate directly w a person you know is represented by another lawyer, unless represented under this rule
- Exceptions
 - 10.2.1: if the matter is urgent and not possible to contact the lawyer or practice
 - 10.2.2: if reasonably believes no longer represented by that lawyer - must notify other lawyer of intention
 - 10.2.3: former client new lawyer to confirm client's instructions and arrange transfer of matters
 - 10.2.4: may recommend direct contact with any other party
 - 10.2.5: where the person consents and reasonable notice given to other lawyer
 - 10.2.6: where communication must be given to that person to be effective

Lawyer knows a person is self represented

- 12 - must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect and courtesy.
- 12.1. When a lawyer knows that a person is self-represented, the lawyer should normally inform that person of the right to take legal advice.

Lawyer instructs witnesses who are lying

- 2. Lawyer is obliged to uphold the rule of law and administration of justice
- 2.1 The overriding duty of a lawyer is as an officer of the court.
- 2.2 A lawyer must not attempt to obstruct, prevent, pervert, or defeat the course of justice.
- 13 Subject to the duty to the court, a lawyer has the duty to act in the best interests of their client
- 13.1 Honesty to the court: lawyers must not mislead or deceive the court
- 13.10 Must not adduce evidence knowing it to be false.
- 13.10.1: if a witness, not being lawyer's client, gives evidence in support of lawyer's client that lawyer knows is false, lawyer must (in absence of retraction) refuse to examine further on that matter. If client, must (in absence of retraction) refuse to act for the client.
- 13.10.2: not cross-examine on anything if not reasonable instructions or credible basis
- 13.10.8: Must not suggest that false or misleading evidence should be given, or that evidence should be suppressed

McLoughlin

- Counsel acted contrary to instructions and deprived client of opportunity of intended defence
- It is not for the court to question counsel's judgment, but no right to disregard instructions. **Duty is to either act on instructions, or cease acting.**
 - If duties to court/professional obligations mean following instructions is incompatible, should advise client that unless instructions are changed, unable to act further. If the issue arises at trial, should inform the Judge and seek leave to withdraw.

Lawyer instructs witnesses generally

- 13.10.2: not cross-examine on anything if not reasonable instructions or credible basis
- 13.10.6: can't stop witness talking to other party
- 13.10.7: must not communicate w client/witness during cross-examination or re-examination... unless good reason exists and consent of other lawyer and judge. (*Usual rules*)
- 13.10.8: Must not suggest that false or misleading evidence should be given, or that evidence should be suppressed

Lawyer instructs expert witness

- 13.10.9: Lawyer who retains expert witness, must take reasonable steps to ensure that expert's independence is reserved, and that they are advised of their duty to the court.
- 13.10.10: lawyer must take reasonable steps to ensure that remuneration of expert witness is not dependent on the outcome of litigation.
- 13.10.11 If an expert witness has, to a lawyer's knowledge, been retained by another party, the lawyer must not, without the prior consent of the lawyer acting for the other party, approach the expert witness.

Lawyer instructs another lawyer (eg, barrister)

- 12.2 - when a lawyer instructs a third party... absent an agreement to the contrary, lawyer is personally responsible for their fees, costs and expenses

Lawyer's fees are unreasonable

- 9 A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in [rule 9.1](#).
- 9.1 reasonable fee factors
 - (a) the time and labour expended:
 - (b) the skill, specialised knowledge, and responsibility required to perform the services properly:
 - (c) the importance of the matter to the client and the results achieved:
 - (d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client:
 - (e) the degree of risk assumed by the lawyer in undertaking the services, including the

- amount or value of any property involved:
- (f) the complexity of the matter and the difficulty or novelty of the questions involved:
- (g) the experience, reputation, and ability of the lawyer:
- (h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients:
- (i) whether the fee is fixed or conditional (whether in litigation or otherwise):
- (j) any quote or estimate of fees given by the lawyer:
- (k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and client:
- (l) the reasonable costs of running a practice:
- (m) the fee customarily charged in the market and locality for similar legal services.
- 9.3 To debit fees in trust or get fees in advance, must comply w regulations 9 & 10 of Trust Account Regulations
- 9.4 Upon request, must provide estimate of fees, and must inform client promptly if it looks like fees will exceed estimate
- 9.5 If client could be eligible for legal aid, must inform them of this promptly and whether willing to work on legally aided matters
- 9.6 Must render final account within a reasonable time of concluding the matter. Must have sufficient info to identify the matter, the period it relates to, and time spent
- 9.8 Only in circumstances and accordance w requirements of ss 333-335 of the Act and in these Rules **look at rule for more info**
- 9.11: conditional fee statement

Barrister holds money on behalf of client

- 14.2 A lawyer who holds practising certificate as barrister sole may not
 - c) act as general agent or solicitor in respect of client's affairs
 - e) receive or hold money or other valuable property for or on behalf of another person; or
- Note also some rule about relationships with law firms

Baledrokadroka	<p>B was charged w misconduct under many counts.</p> <ol style="list-style-type: none"> 1. Professional misconduct. Received money from client and used it for private purposes prior to the work being done and an account rendered. <ol style="list-style-type: none"> a. Barristers are not subject to trust fund requirements in the Rules. b. Legal Practitioner's Act: no legal requirement to manage money. Up to the client to enforce the management of their money/decide if they will entrust their money to a barrister. <ol style="list-style-type: none"> i. Now an express bar: Rule 14.2(e). If holding a practitioner certificate, must not receive or hold money/valuable property for or on behalf of another person. 2. Dismissed 3. Practising as a barrister without a practising certificate. <ol style="list-style-type: none"> a. Practiced without a certificate for 3 months. b. Argued that it was only for a short time so wasn't professional misconduct; acknowledged indemnity/insurance ramifications. However, is an offence under Law Practitioners Act and breach of Rules, so serious. c. Received a letter from Law Soc about practicing without certificate and still continued to. Reprehensible and deplorable.
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4. Convicted of DUI and convicted again after licence disqualified. Did not pay fine.
 - a. Two offences occurred within 2 days of each other. Then drove 6-7 weeks later while disqualified.
 - b. Shows contempt of court orders - propensity to flout the law.
 - c. Extremely serious. Repeated, and disregard for court processes.

Decided he was not a fit and proper person and struck him off the roll accordingly for charges 3 and 4.

Duncan Webb article [cited para 15]

- Lawyers are officers of the Court; part of the machinery of justice. Must be seen to uphold the system they are an integral part of.
- Not just refraining from breaking law, but acting consistently with principles of the system. Duty of honouring law goes beyond merely professional activities to anything that undermines the esteem in which the legal system is held.
- If the offence is serious or shows disregard for the law, it may amount to misconduct. In general, if it has an element of moral turpitude to it, then there will be a breach of the duty to uphold the law.