

BEST PRACTICE

Ethics - A Guide for Legal Support Staff





ABOUT THIS GUIDE

The Support Staff Community Inc was formed to represent administrative and support professionals within the legal profession. The Community provides support staff professionals within the legal profession a platform for networking and socialising with colleagues, and access to mentors, educational seminars and resources. Membership to the Community is free, and gives legal support staff access to our events and resources, including our Best Practice Guides.

The Support Staff Community's Best Practice guides are designed to provide guidance to support staff in relation to the various aspects of their role. They are prepared by the Management Committee of The Support Staff Community, which is comprised of legal support staff from different areas of law, with different backgrounds and levels of experience.

This guide covers an important topic for all legal staff - ethics. Whilst the rules applicable to ethics apply mostly to lawyers, there are many aspects that are applicable to legal support staff.

gemma
Gemma Berkhout
PRESIDENT



OVERVIEW

Ethics refers to the principles that guide people in choosing what is right and wrong. In law, these principles take the form of certain rules of conduct and legislative instruments that regulate the legal profession in order to ensure that law is conducted properly and to protect public confidence in the legal profession. Any person working within a legal office, including legal support professionals, should ensure that these rules of conduct are followed.

The *Legal Profession Uniform Law (NSW)* and the *Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015* outline the standards that all legal professional staff must consider and apply to their day to day duties.

Whilst ethics underpin all work that legal professionals undertake, there are some significant aspects of practice in which it is particularly important to be aware of your ethical requirements, including:

- Management of legal costs including the handling of trust accounts;
- Maintaining client confidentiality and legal professional privilege; and
- Avoiding conflicts of interest.

SOLICITOR'S DUTIES



At the forefront of ethical practice is the overriding fundamental duty to the court. This must trump the duty to the client in the sense that a lawyer must not act in a way that serves the client's best interests, if doing so would put the administration of justice and the community's confidence in the profession at risk.

A solicitor must also adhere to the following duties, conferred by Part 4 of the Solicitor's Conduct Rules:

- To act in the best interests of a client;
- To be honest and courteous;
- To deliver their services competently, diligently and as promptly as reasonably possible;
- To avoid any compromise to their integrity and professional independence; and
- To comply with the Solicitor's Conduct Rules and the law.

Whilst these duties apply primarily to solicitors, it is important for support staff to be aware of them and to also adhere to those requirements in the course of your role.





COSTS

It is incredibly important for a law practice to adhere to certain rules and codes of conduct that relate to their professional fees and other costs aspects of their practice. You may be involved in the administrative process relating to legal fees and other costs, including:

- Preparing costs agreements;
- Invoicing;
- Handling payments into and out of trust accounts;
- Incurring disbursements; and
- Assisting with costs complaints.

It is therefore important that you are aware of the rules that are relevant to these processes.

FAIR AND REASONABLE COSTS

A lawyer's costs must be fair and reasonable (Section 172 of the *Legal Profession Uniform Law (NSW)*). To determine whether a solicitor's costs are fair and reasonable, they must be considered proportionate and to have been reasonably incurred, and to also be reasonable in amount.

Support staff will sometimes charge for time that they spend working on a matter, particularly if their role includes legal work such as drafting and producing correspondence and documents. If you are charging for time that you spend on matters, you should follow your firm's time recording procedures and always remain mindful that your charges must be fair and reasonable.

COSTS DISCLOSURE

Solicitors are required to disclose their costs to a client. Section 174 of the *Legal Profession Uniform Law (NSW)* requires a law practice to disclose, as soon as practicable after instructions are initially received, information about the basis upon which their legal costs will be calculated and an estimate of their legal costs.

These costs and estimates will usually be set out in the form of a Costs Agreement, which a legal support staff professional will often assist with preparing at the commencement of a matter. You should ensure that these agreements are prepared in accordance with your firm's usual procedures and keep track of when they are signed and returned.

It is also necessary to update the client in the event that there are any changes to the basis that their legal costs will be calculated (such as increased fees), or if there is an update to the estimate of their legal costs. It may assist your supervising solicitor for you to track the status of a client's costs incurred against the estimate that has been initially provided and update them when the costs are beginning to reach that estimate, as it will then be necessary for the estimate to be updated.

TRUST ACCOUNTS

A law firm's trust account holds funds on behalf of their client. Although the funds are in the possession of the firm, they are held on trust for the client and belong to them. Accordingly, there are strict rules and procedures in place for the operation of trust accounts and the handling of these funds. These rules are set out in Part 4.2 of the *Legal Profession Uniform Law (NSW)*, and include the requirements to ensure that trust funds are held exclusively for that client and disbursed only as the client directs (Section 138), and to maintain appropriate trust accounting records (Section 147), among others.

An important rule that you may need to know in your role is that if you have issued a bill to a client which is to be paid from funds held in trust, the client has seven days from receipt of your invoice to dispute any charges, before you can transfer those funds. You must not transfer trust funds prior to the expiration of this time.



These rules must be followed diligently, as contravening them may amount to professional misconduct which can result in disqualification of a solicitor from practicing law. You should be aware of the relevant rules and your firm's procedures, before you undertake any tasks relating to a client's trust account.



CONFIDENTIALITY

A duty of confidentiality is inherent in the legal profession and it is fundamental to the relationship that legal professionals have with their clients and the public. It is important for many reasons, including to ensure the effective functioning of the adversarial system, and the promotion of client trust, dignity and autonomy.

RULES OF CONFIDENTIALITY

Duty of confidentiality is conferred by Part 9 of the Solicitor's Conduct Rules, which provides that a solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not a solicitor or employee of the law practice, a barrister, or other person engaged by the practice for the purpose of delivering or administering legal services in relation to the client. It is also common for contracts of employment for roles in the legal profession to contain clauses providing for the protection of client confidentiality.

However, confidentiality may be waived in certain circumstances. These are outlined in Part 9.2 of the *Solicitor's Conduct Rules*, and include where:

- The client authorises disclosure;
- The solicitor is permitted or compelled by law to disclose;
- The disclosure of information occurs in a confidential setting for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations;



- The information is disclosed for the purpose of avoiding the probable commission of a serious criminal offence;
- The information is disclosed to prevent imminent serious physical harm to the client or to another person; or
- The information is disclosed to the insurer of the solicitor or law practice.

The duty of confidentiality continues, even when the retainer is complete.

If you are ever unsure if you should disclose information to someone who is not your client, you should always check with your supervising solicitor.

You should also be mindful of inadvertently disclosing confidential information to those who might view files or documents, including people you invite into the office, when posting photos and videos to social media or when working from home. Ensure that any files or documents containing client names and information are hidden from view in these circumstances.

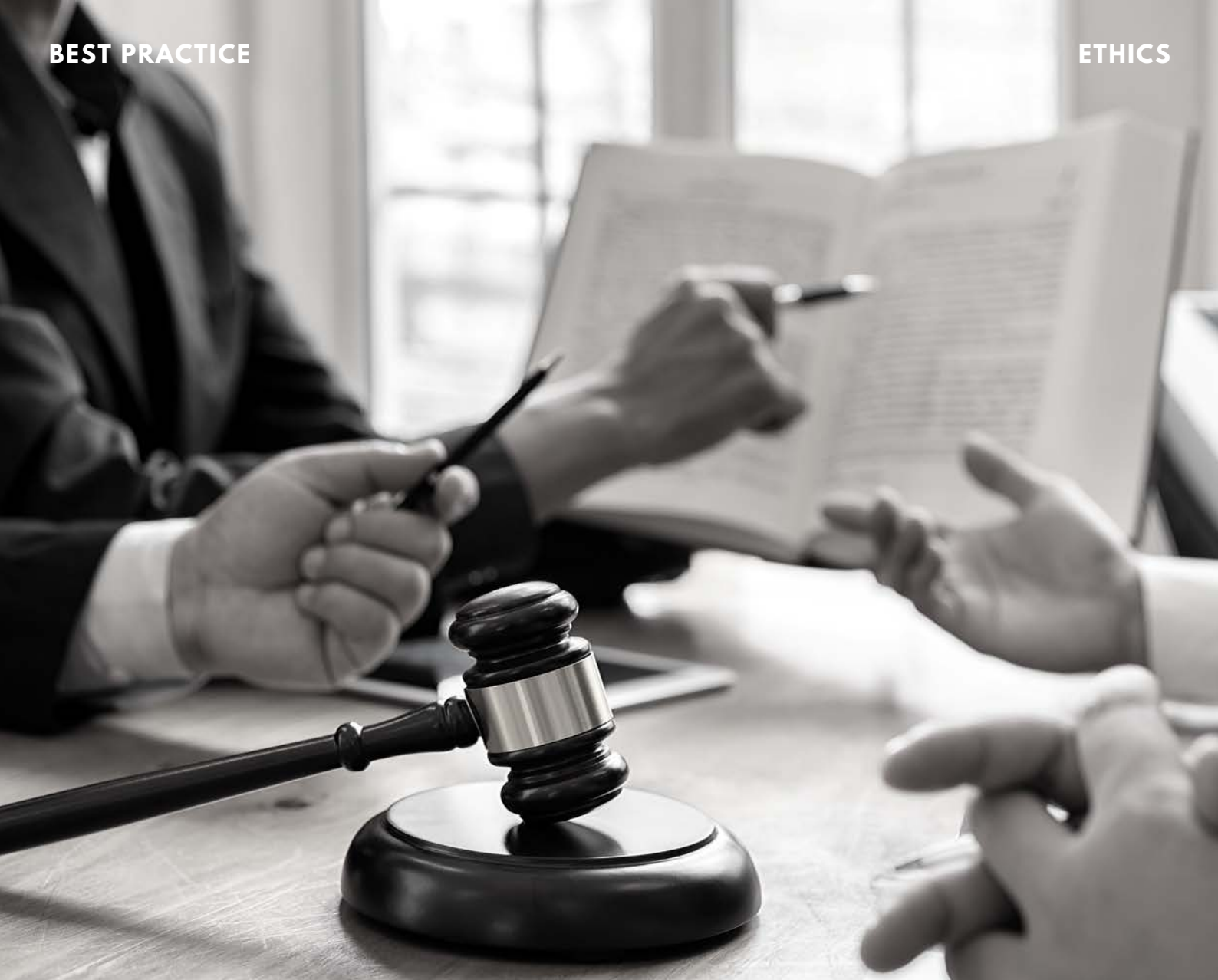
INADVERTANT DISCLOSURE



Sometimes, a legal professional may receive confidential information that has been sent to them inadvertently either by the other party or by their client. When this occurs, solicitors have a duty to the third party and must:

- Return, destroy or delete the material immediately upon becoming aware that disclosure was inadvertent; and
- Notify the other solicitor or person of the disclosure and the steps taken to prevent inappropriate misuse of the material.

If you ever suspect that you have inadvertently disclosed confidential information to another person, you should notify your supervisor and immediately take steps to rectify the error. Subject to the nature of the disclosure, this may include recalling an email and/or contacting the person to whom the disclosure was made.



LEGAL PROFESSIONAL PRIVILEGE

Legal professional privilege applies to any confidential communication between a lawyer and the client, the dominant purpose of which is to provide or obtain legal advice or to be used in litigation. It exists to ensure that a client maintains trust in the confidentiality of their communications with their lawyer.

There are some exceptions to legal professional privilege, including statutory exclusions, illegal conduct and where privilege has been waived.

STATUTORY EXCLUSION

There are some laws that abrogate legal professional privilege, such as the *Ombudsman Act 1976 (Cth)*, *Crimes Act 1914 (Cth)*, *Law Enforcement Integrity Commissioner Act 2006 (Cth)* and the *Inspector-General of Intelligence and Security Act 1986 (Cth)*.

ILLEGAL CONDUCT

Legal privilege does not apply to communications for the purpose of facilitating illegal or improper conduct.

WAIVER OF PRIVILEGE

Waiver of privilege can be express or implied. Where the waiver has been implied, it does not matter whether the party intended to waive privilege or not.

It is therefore necessary to ensure that privileged material is not inadvertently disclosed to another person other than your client. In your role, this may include:



- Ensuring that communications to and from your client in relation to the litigation are not inadvertently sent to the other party;
- When you are disclosing or exhibiting emails that your client has forwarded to you as part of the proceedings, redacting any portion of the forwarded email that contains advice or instructions to or from your client;
- If you are required to disclose your tax invoices to any party aside from your client, ensuring that any detailed commentary in relation to communications with your client is removed or redacted.

In the event that privileged information is disclosed, the person who has made the error must act promptly in realising and rectifying the error. It is possible for a party to enforce privilege where it has been inadvertently waived, by way of an injunction of the Court or through other Court processes.

If you suspect that you have accidentally provided privileged information to a person other than your client, you must let your supervising solicitor know as soon as possible.





CONFLICTS OF INTEREST

There are three categories of conflict that may occur for lawyers. To some degree, these conflicts may also apply to the support professionals who assist on the matter.

1. CONFLICT WITH THE LAWYER'S PERSONAL INTERESTS

A lawyer owes a fiduciary duty to their client, allowing the client to place complete trust in them. The lawyer must place their own interests aside and avoid acting when their own interests may tempt them to compromise this duty. Some examples of this kind of conflict include:

- Receiving a benefit under a will;
- Borrowing from clients;
- Acting for a relative or friend; or
- Acting in a matter in which they are a witness.

In these circumstances, it may be possible for the lawyer to continue acting, however they must disclose the conflict to the client and advise the client to obtain independent legal advice.

You will note from the above that acting for a relative or friend may constitute a conflict of interest. In circumstances where you are asked to provide family members or friends with legal advice, you should advise that you are not qualified as a lawyer, and so cannot provide legal advice, and refer them to a lawyer or service who may be able to adequately assist.

2. CONFLICT WITH THE INTERESTS OF OTHER CLIENTS (CONCURRENT CLIENTS)

Rule 11 of the Solicitor's Conduct Rules states that lawyers must avoid conflicts between the duties owed to two or more current clients.

Solicitors may act for concurrent clients in certain circumstances, but in order to do so:

- They must be confident that they are acting in the best interests of each client;
- That must protect all of the clients confidential information;
- The clients, who have been made aware of the situation, must have given their informed consent for the solicitor to act for the other clients concurrently; and
- The clients must be informed that if a conflict arises, the solicitor may only continue to act for one of the clients.



There are certain areas of law where a conflict of interest may be more detrimental than others. For example, it may be perfectly acceptable for a solicitor to act for both parties in a simple conveyancing transaction. However, it would be inappropriate for a solicitor who is acting in family law proceedings to act for both parties to the matter.

2. CONFLICT WITH THE INTERESTS OF OTHER CLIENTS (SUCCESSIVE CLIENTS / FORMER CLIENTS)

A successive conflict is where a lawyer represents a client in a matter that may be adverse to the interests of a former client, without gaining informed consent or creating an effective information barrier. This may include:

- where a lawyer is acting against a former client;
- where a lawyer has confidential information pertaining to the client obtained in the course of another matter;
- where a second lawyer from the same firm acts against the first lawyer's former client; or
- where a firm acts against a former client of a lawyer who has since joined the firm.

In these cases, for the conflict to exist, there must be a real risk that disclosure of confidential information will be exchanged for the benefit of one client against another. Perhaps one of the most common occurrences of this in law firms is where a lawyer joins a firm where they act for the other party to proceedings in which their former firm acted for a client. Establishing a "Chinese wall" to prevent the disclosure of information may be satisfactory in order to continue to act, however the Court in these circumstances must be satisfied that no inadvertent disclosure of sensitive information may occur.



MAINTAINING A CONFLICTS REGISTER AND UNDERTAKING CONFLICT CHECKING

As lawyers are required to avoid acting in circumstances where they may be a conflict of interest, it is necessary for law practices to maintain a record of their clients and for conflict checking processes to be put in place. The exact process will vary from firm to firm, but will generally include:

Taking the full names of all of the interested parties (whether they are individuals or companies), including your client, the other party and any other person who might be involved.

- Ensure that you obtain the full names and the correct spelling to ensure that any potential conflict can be correctly identified;
- Undertaking an electronic or manual search of your client records database; and
- Making a record of all clients and potential clients who contact your firm, even if that contact has only been an initial inquiry or one-off advice.

In some cases, if a solicitor has taken information from a potential client which presents a conflict relating to an existing client, it may then become necessary for them to cease acting for their existing client, which is not ideal.

It is therefore imperative that these conflict searches are undertaken prior to any substantive information is provided by the client or advice is given to them.

Often, a client will phone a law office seeking advice on an urgent basis and asking to speak to a solicitor straight away. They will also often be reluctant to provide you with information relating to their matter. However, it is imperative that you stress to them that they will be unable to provide any detailed information to the solicitor, or obtain any substantive advice, prior to providing either you or the solicitor with these details.

After you have conducted a conflict search, you will need to alert your supervising solicitor if there are any potential conflicts of interest. From there, the supervising solicitor will need to assess the nature of the conflict and determine whether they are able to act in the matter or not.



QUESTIONS & CONCERNS ABOUT ETHICS

Ethical dilemmas may arise for solicitors where the rules are not clear about what is required to be done in the specific circumstances of the issue at hand. It may then be necessary for your solicitor to consult with others to obtain assistance in determining how they should proceed, including their Managing Partners, Risk Managers and/or the Ethics team at the Law Society of NSW.

If you are ever concerned or uncomfortable about anything your supervising solicitor has asked you to do, you should ask for clarification about your task and what it is that they have asked you to do. If you remain uncomfortable despite further clarification, you should consult a superior (for example, the managing partner or your firm's HR representative), or refer to the Ethics team at the Law Society of NSW for direction and advice.