Conflict Averse: managing conflicts of interest and duty at the bar

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It is a serious matter for a barrister to refuse or return a brief, particularly shortly before or during a hearing. This can only occur in limited circumstances. This article discusses one such circumstance: where a barrister has a conflict of interest or duty.

Conflicts of interest or conflicts of interest and duty give rise to several of the circumstances in which barristers must or may return briefs under rules 101 and 105 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Barristers Rules). Barristers' obligations to avoid conflicts of interest are not restricted to those codified in the Barristers Rules. The duty to avoid a conflict of interest is also a fiduciary obligation.[1] These obligations may also be enforced through the courts' inherent power to restrain practitioners in the interests of the administration of justice.[2] This, in turn, requires regard to whether a fair minded reasonably informed member of the public would conclude that the proper administration of justice requires that counsel be prevented from acting, affording due weight to the public interest in a client not being deprived of the counsel of their choice.[3]

Even where the rules are relied upon, their mere applicability in a given situation will not necessarily resolve ambiguity as to the best way forward. The use of the rules calls for caution, judgment and prudence. We set out below some examples of conflicts which could, would or should prompt return of a brief.

Hypothetical 1: a personal costs order

A quintessential circumstance in which a conflict between a barrister's interests and those of their client may arise is where a court foreshadows a personal costs order against the barrister.[4] If, for example, a costs order is to be made payable by either a party or by that party's representatives, a conflict of interest may arise between the party and their representatives as to who is to bear those costs[5] – that is, where costs would inevitably be paid by someone, and where, if it was not the practitioner, it would be their client.

Suppose, for example, a barrister acts for an applicant in migration proceedings, seeking judicial review of a decision under s 476 of the *Migration Act 1958* (Cth) (Act). A judge may foreshadow a finding that the barrister has acted in breach of s 486E of the Act – that is, that they have encouraged the litigant to continue or commence proceedings with no reasonable prospects of success, without proper consideration of prospects of success – and that the barrister should show cause why they should not personally bear the minister's costs of the proceedings under s 486F(1)(a) of the Act. In those circumstances, can the barrister continue to act for the applicant, while also defending themselves against proposed personal costs orders?

The question of conflict when a personal costs order is sought against a practitioner was addressed in *Kalil v Eppinga* and, on appeal, *Muriniti v Kalil*. A personal costs order had been made in the District Court against the defendants' representatives, who (among other things) had continued to act for the defendants in respect of costs after the making of the application, despite repeated urgings from the court to the contrary.[6] Mere (purported) consent to that course by the defendants, without independent legal advice, was incapable of curing that conflict.[7]

The District Court made the personal costs order sought. This was set aside by the Court of Appeal. However, in coming to the conclusion that there was error in making the personal costs order, each of Brereton JA (with whom Macfarlan JA agreed) and Leeming JA expressed the view, consistent with prior authority, that applications for personal costs orders against lawyers should be made with caution in part because of the conflict which inherently results.[8]

In such circumstances, even if independent legal advice were obtained by the client, and if the client were to insist on nonetheless continuing to retain the counsel who was exposed to the potential personal costs order, any resulting conflict between whether counsel or client would bear any resulting costs liability could lead to a circumstance under rule 101(b) where counsel would be required to return the brief in any event. On our hypothetical migration case, counsel could not seek to advance their own interests in resisting the personal costs while also seeking to advance any interest of the client in avoiding costs liability – in other words, it is likely that counsel should return the brief.[9]

Hypothetical 2: confidential information

Other conflicts may arise in relation to confidential information obtained during the course of an earlier matter. The court will

> restrain a legal practitioner continuing to act for a party to litigation if a reasonable person informed of the facts might reasonably anticipate a danger of misuse of confidential information of a former client and that there is a real and sensible possibility that the interest of the practitioner in advancing the case in the litigation might conflict with [the] practitioner's duty to keep the information confidential, and to refrain from using that information to the detriment of the former client.[10]

The relevant 'confidential information' must be identified with precision, not merely in global terms.[11]

The following hypothetical emerges from the facts at issue in *Watson v Watson*.[12] A barrister (H) previously acted for the first and second defendants. Confidential information was disclosed at a conference between H and the first and second defendants. As a result of the disclosure of that information, a conflict arose between the interests of the defendants. H concluded that he could no longer act for both defendants; he continued to act only for the first defendant. The second defendant (now represented by another barrister, T) brought an application seeking to restrain the first defendant from continuing to retain H. Suppose (as the court did) that there is a serious potential conflict between the first defendant and the second defendant as to the evidence each may give; that T's instructions are that the second defendant will give evidence that will give rise to that conflict; and that it is not disputed that this prospective evidence by the second defendant is the confidential information which gave rise to the conflict preventing T from acting in the first place. Should H be permitted to continue to act for the first defendant?

In *Watson v Watson*, Santow J found that H could not continue to act for the first defendant. His Honour concluded that information known by H regarding the second defendant's prospective evidence may as a real possibility be helpful to the first defendant because H, representing the first defendant, could cross-examine the second defendant armed with what was told to H by the second defendant at their conference with the first defendant.

Santow J considered whether the reasoning which would lead to the disqualification of H as the first defendant's counsel would *also* lead to the disqualification of T as the second defendant's counsel in circumstances where the solicitor (G) who had instructed H on behalf of both defendants was now retained only by the second defendant and was instructing T. G had been present at the critical conference.

Santow J noted that, just as H could be expected to cross-examine the second defendant on their confidential and conflicting evidence, T could be expected to cross-examine the first defendant on that discrepancy between their accounts, potentially using information derived from G about what had occurred at the conference between H and the defendants. It could be inferred that such information would include what the first defendant had said at that conference regarding the confidential information, and that that confidential information was in turn potentially helpful to the second defendant's case.

Santow J acknowledged that, unlike H, T had never acted for anyone but the second defendant – 'and is thus in that sentence not changing sides' – but that he had nonetheless derived information of a confidential nature 'just as if he had acted for both parties or successive parties and got it that way'.[13] Given that the application before his Honour only related to H, Santow J restricted himself to express 'a serious concern that [T] too suffers from a conflict of interest which would preclude him continuing to act for the Second Defendant'.[14]

Of course, each defendant had been present at the conference in question, and each might convey that information to any new legal representative. It would not be a unique situation for a party to know information which would ordinarily be thought to be confidential about another party. However, it is apparent from his Honour's reasoning that the source of the information is relevant: specifically, where information is derived from a client, the possession of that information does not give rise to a breach of duty or of the professional rules. In *Watson*, the difficulty was that the source of the information for H (and, potentially, for T), was a pre-existing relationship of client and legal adviser.

Watson v Watson is a potentially instructive parable. It represents a conservative approach to these questions, but does not demonstrate a difference of principle from more recent cases like *Porter v Dyer*. It is merely a different articulation of what may amount to a 'real and sensible possibility'[15] of conflict. As Beach J has observed,

> [t]here are differences in emphasis in the authorities as to the degree of risk, the onus of proof and what needs to be shown by the former client before any evidentiary onus shifts to show that there is no real risk.[16]

Conflicts regarding confidential information hence do not solely arise where counsel has acted for one party, and has then proceeded to act for another. Instead, confidential information could potentially

contaminate counsel's ability to act even where, like T in *Watson v Watson*, the barrister themselves has only enjoyed a direct legal relationship with one party. Rule 101(a) thus requires caution and vigilance as to the nature and source of confidential information which counsel will invariably encounter in the course of their work, and as to whether (independent of whether counsel is required to return their brief) potential conflicts must be drawn to a client's attention and instructions sought as to whether, as a matter of prudence, counsel should continue to act. BN

ENDNOTES

1 For the role of fiduciary obligations as a basis upon which to cease to act, see e.g., *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307. There is some controversy as to whether there is a duty of loyalty to a former client which survives termination of a prior retainer, extensively discussed in *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* (2014) 228 FCR 252.

2 See the summary of principle in *Dyer v Chrysanthou* (No 2) (Injunction) [2021] FCA 641 at [133]-[138] affirmed on appeal in *Porter v Dyer* [2022] FCAFC 116 at [107]-[118] (Lee J; Besanko and Abraham JJ relevantly agreeing at [1]).

3 *Sent v John Fairfax Publication Pty Ltd* [2002] VSC 429 at [113]; *Dealer Support Services Pty Ltd v Motor Trades Association of Australia* (2014) 228 FCR 252 at [94]-[95].

4 See e.g., *Civil Procedure Act 2005* (NSW) s 99; Migration Act 1958 (Cth) s 486F.

5 See e.g., *Muriniti v Kalil* [2022] NSWCA 109 at [9] and [46]-[49] (Brereton JA; see also Leeming JA at [5]).

6 *Kalil v Eppinga* [2020] NSWDC 407 at [41] and [121].

7 *Kalil v Eppinga* [2020] NSWDC 407 at [49].

8 *Muriniti v Kalil* [2022] NSWCA 109 at [9] and [46]-[49]; see also at [66]-[67] (Brereton JA).

9 And, for completeness, the barrister should generally notify their insurer.

10 *Sent v John Fairfax Publication Pty Ltd* [2002] VSC 429 at [33]; see also *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357 at 362-363; *Porter v Dyer* [2022] FCAFC 116 at [74].

11 *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307 at 314 ; *Porter v Dyer* [2022] FCAFC 116 at [75.

12 *Watson v Watson* (unreported, Supreme Court of New South Wales, Santow J, 25 May 1998).

13 Ibid.

14 Ibid.

15 *Sent v John Fairfax Publication Pty Ltd* [2002] VSC 429 at [33].

16 *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* (2014) 228 FCR 252 at [34].