



ETHICAL CONSIDERATIONS FOR LAWYERS IN A DIGITAL WORLD

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OVERVIEW

- Lawyers' duty of confidentiality
- Conflict of interest, confidentiality, privacy & LPP
- Ethical use of Electronic Communications and online data
- Ethical use of social media

DUTY OF CONFIDENTIALITY

- Nature of Duty:
 - Lawyer-client relationship is a fiduciary relationship which imposes obligations of trust, integrity and confidence
 - Loyalty lawyers owe to their client places the duty at a high threshold
- Rationale:
 - Encourages full and frank disclosure between client and lawyer
 - Client can seek legal advice without fear of prejudice from subsequent disclosure
- Source of Duty:
 - **Contract** law (implied term of a retainer)
 - **Equity** (protects from unauthorised use or disclosure of confidential information)
 - Test is whether information is public and whether its communication is for a limited purpose
 - Lawyers' **professional rules** of conduct
- Duration:
 - Lawyer's duty does not end with termination of the retainer or death of the client

CONFIDENTIALITY AND PRIVACY

- **Confidentiality** relates to info obtained in confidence (not readily available to public)
- **Privacy** relates to personal info about individuals (whether public available or not)
- Common law recognises entitlements to confidentiality but a “right to privacy” is not yet endorsed
 - In Australian Broadcasting Corporation v Lenar Game Meats (2001) 185 ALR 1, High Court, whilst refraining from recognising a separate right to privacy, left open the possibility of the tort of “invasion”
- Privacy Act 1988 (Cth) sets out “privacy principles” aimed at regulating the use, storage and disclosure of private info
 - Applies to law practices w/annual turnover \$3M or more
 - Prohibits use or disclosure of personal info about individual for purpose other than that for which it was collected, and
 - Requires reasonable steps be taken to protection personal info from loss or misuse

LEGAL PROFESSIONAL PRIVILEGE

- Duty of Confidentiality is distinct from concept of LPP
- LPP is not based on contract, equity or professional rules but rests on broader ground of **public policy**
- LPP is premised upon confidentiality
- Communications protected by confidentiality more extensive than those protected by LPP
- Privileged info is protected from compulsory disclosure (unless LPP is waived or ousted by statute)
- Any loss of privilege does not automatically destroy the obligation of confidentiality if the obligation has arisen independently from LPP

CONFIDENTIALITY AND CONFLICTS OF INTEREST

- **Confidential Information** is not only information that directly relates to your facts, and cause of action of a case. It includes:
 - Info about former client that is directly related to a matter for an existing client
 - Info that is relevant to a competition (eg product pricing or business models)
 - Intimate knowledge of a client, including their personality, business style, strategic thinking etc
- **Conflict of Interest** may arise where a lawyer acts in a case where a lawyer has:
 - information which is confidential to another party
 - Previously advised or litigated for the other party
- Client can consent to lawyer acting in spite of conflict
- Consent should be obtained in writing

CONSEQUENCES OF DISCLOSURE

- Loss of clients
- Embarrassment; reduced respect for the lawyer by listener
- Damage to lawyer's reputation
- Conflict of interest allegations
- Disciplinary sanctions
- Claims for breach of contract
- Injunctive relief disqualifying a lawyer from continuing to act
- Disadvantage to the client by:
 - Inadvertent waiver of any LPP which may have attached
 - Disclosure of information that may have considerable commercial value

FULFILLING THE DUTY

- In Conduct: Lawyers must exercise caution not to inadvertently disclose client's confidential information
 - Avoid indiscreet conversations in social or familial environments, including with your spouse
 - Avoid/ignore gossip even where client not identified/named
 - Avoid indiscreet shop-talk with other lawyers
- In the Office Space:
 - Have an internal policy about use of social media
 - Segregate public and private areas of the office
 - Take care with shared photocopying facilities
 - Ensure client files (including electronic documents) are securely stored
 - Ensure documents that do not need to be maintained are securely destroyed

ELECTRONIC STORAGE SYSTEMS

- “Cloud Computing”
 - Software and data is stored and processed remotely in a cloud provider’s data centre and accessed as a service via the internet.
 - Examples: Drop Box, Google Drive, OneDrive, Airdrop (Apple)
 - Jurisdictional question: where is data stored? (affects search and seizure of data in the investigation of State or Federal offences)
- Pros:
 - Remote access is easy where there is internet
 - Work off one single document at work, home or while travelling
 - Able to sync data off desktop, laptop, smart tablets, and smart phones
- Cons: may present security risks and privacy concerns
 - Risk to confidentiality where service provider can access data on the cloud at any time
 - Hackers could theoretically gain control of huge stores of information
 - Risk where task is outsourced

COMPUTERS AND HARD DRIVES

- Do not stick passwords on laptops
- Use portable drives with password protection
- Change passwords regularly
- Use anti-virus software and firewalls
- Backup your work (duty of care to client)
- Deleting data is not enough – can be forensically restored
- Be careful throwing out old computers which may have valuable information stored on them

EMAILING

- Email communications risk confidentiality
- All emails should be prefaced with a warning that they are confidential and privileged and there is no waiver of privilege re: any inadvertent disclosure
- Consider sending sensitive info in encrypted form
- Alternative information transfer methods should be discussed with client, especially for sensitive info
- If representing an employee, advise them to avoid using workplace email address and system as this can be monitored or accessed by the employer
- Remember to log out of shared computers
- Clients may well expect faster responses from lawyers – but think before you send out that email!
- Take care when importing contacts from email accounts

EMAIL GUIDELINES

- See Victorian Legal Practitioner's Liability Committee "Email Guidelines" at <http://www.lplc.com.au>
- **Sending Emails**
 - Consider alternatives: face to face; letter; phone call
 - Only put in email what you would write in a formal letter
 - Check subject of email is appropriate
 - Open and check attachments to emails before sending
 - Turn off track-changes; beware of metadata in documents
 - Write separate email to clients and other party to avoid risk of "replying all" by mistake
 - Ensure email addresses include full names in your contacts book
 - Don't cc someone if they are to action something – cc for info only
 - Use bcc for mailing list
- **Receiving Emails**
 - Use "out of office" replies when on leave
 - Check the email even if you are cc'ed in case you need to action

FAXING

- Using fax risks confidentiality – eg:
 - Sending to wrong fax number or location
 - Being viewed by someone else
- Risks are mitigated by informing client when a fax is sent and printing notice of confidentiality on fax cover page

MOBILE PHONE

- Mobile phone communications risk confidentiality
- Can be intercepted
- Calls can be overheard if made in public place
- Avoid communicating highly confidential information via mobile without client-informed consent if done outside of a secure environment

SOCIAL MEDIA

- Examples:
 - Facebook; LinkedIn; YouTube; Instagram; Twitter; MySpace; WAYN; Blogging Forums; dating sites
 - Lawyer Specific: lawyrs.net and Lawlink.com
- Benefits:
 - Social media can be an influential marketing tool at little or no cost
 - Can be used to advertise to potential clients; recruit new staff and network with others
 - Evidence found online can assist in a case (credibility material)
- Dangers:
 - Facebook posts can become evidence! See, eg: *Strauss v Police* [2013] SASC 3 (18 January 2013)
 - Once info placed online/is publically accessible, it may fall outside protection of confidentiality
 - Users cannot control the action of other social media users' photo tagging, comments and blogging
 - Hard to correct a mistake posted online as it may have been viewed by many people or is available permanently (even when deleted)
 - Informal nature of social media communication leads to reduced level of formality and risk of posting something inappropriate or being associated with inappropriate comments posted by others
 - Social media, used inappropriately during a trial, can have serious consequences – including mistrial
- Mitigate risk by:
 - Setting strict privacy settings
 - Not posting or blogging on social media, confidential info or info expressing an opinion on the merits of a potential or current case
 - Advise clients to deactivate their social media sites and avoid posting on the internet anything to do with the litigation
 - However, note your obligation not to be a party to any illegal destruction of evidence!

ETHICAL USE OF SOCIAL MEDIA

- See Guidelines offered in various jurisdictions:
 - **VIC**: “Guidelines on the Ethical Use of Social Media”, Law Institute of Victoria
 - **NSW**: “A Guide to Practice Issues: Social Media” (2013), NSW Office of Legal Services Commissioner
 - **QLD**: “Seven Ethical Sins in Social Media” (2013), QLD Law Society Ethics Centre
 - **WA**: “Social Media Policy”, WA Law Society

ETHICAL SITUATIONS: UNINTENDED RETAINERS

- “Unintended” or faulty Retainers
 - Can arise from providing legal advice on online forums
 - Person may assume a retainer exists because a lawyer can responded to their question
- How to Avoid
 - Don’t provide legal advice on social media
 - Ensure you do not advise where you do not have full instructions/information
 - If providing general advice, state clearly that you do not intend to create a retainer and otherwise qualify the advice
 - Suggest that the person email the lawyer’s firm and set up an appointment to discuss
 - Do a “Fact Sheet” about the law and its application generally for your website rather than individualise advice.

ETHICAL SITUATIONS: DUTY TO THE COURT

- Lawyers duty to the court is paramount, and prevails if inconsistent with other duties (eg duty to client)
- Duty includes to act with candour, honesty and fairness
- Must act with integrity and must not act in a way, in personal or professional life, that reduces public confidence in the administration of justice or bring the profession into disrepute
- DOs AND DON'Ts
 - Do NOT write negative comments about judicial officers or other lawyers
 - Refrain from commenting about the merits of cases that are before the court
 - Do not comment about court proceedings on online blogs
 - **Suggested Test:** Don't post anything on social media you would not be comfortable saying before a crowd [or higher test: before a court]
 - Be careful about photos posted or tagged on social media

ETHICAL SITUATIONS: JUDGES' USE OF SOCIAL MEDIA

- **Judges must:**
 - refrain from acting in a way that will erode public confidence in the judiciary
 - act impartially and appear impartial (and appear to be)
- **Should judges be prevented from using social media?**
 - Should judges be able to “like” people, businesses and charities on Facebook? Or post profiles on LinkedIn?
 - No firm rules around this, but note *Australian Guide to Judicial Conduct (AGJC)*:
 - Judges should not become involved in controversial political debates
 - Judges should not comment
 - Judges should not fundraise
- **Should judges be “friends” with practitioners on social media?**
 - Friendships or past professional association with counsel or solicitor is not generally to be regarded as a sufficient reason for disqualification (AGJC)
 - Note that “friend” no longer has the same meaning it did pre-internet
 - “Friendships” on social media are arguably less threatening to judicial impartiality than friendships in real life

SOURCES

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