



10 April 2013

KINGSFORD
LEGAL CENTRE

Ms Jill Anderson
National Association of Community Legal Centres
By email: Jill.Anderson@clc.net.au

Dear Jill,

Australian Solicitors' Conduct Rules and Commentary- Consultation with Legal Assistance Services Peak Bodies

Thank you for the opportunity to provide comments on the Law Council of Australia's Consultation Paper to the NACLC working group.

Kingsford Legal Centre ('KLC') is very pleased that these issues are being discussed and considered by the Law Council. KLC has long been concerned about how some of the ethical duties of solicitors are understood and applied in our type of legal practice, a community legal centre (CLC). We applaud the engagement of NACLC with the Law Council on these issues and call for input from CLCs. We will also make specific comments on some of the matters raised in the Consultation Paper.

1. Definition of "community legal service"

We believe that the Australian Solicitors' Conduct Rules should include a definition of 'community legal service'. The inclusion of a definition will be especially important if the Rules and Commentary are also changed to include special provisions to clarify the application of the conflict rules to "one-off advice" situations.

2. Communication of advice- Rule 7.1

Issue raised- This Rule does not require a solicitor make any reference to the possibility that legal aid/assistance may be available. The Rules should place a positive obligation on solicitors to inform clients about eligibility for legal aid/assistance, and to assist the client in the making of an application for legal aid/assistance.

KLC strongly agrees with this statement. While CLCs promote their services actively, many clients will not be aware of the diversity of legal services they can access. This requirement would increase accessibility of the law and lawyers to disadvantaged clients.

We note the Law Council's response that the Solicitor Conduct Rules are statements of principles, and are not intended to be legal practice rules. The Law Council also states that solicitors would be expected to alert clients to the possibility of eligibility for legal aid/assistance because of their obligations to act in the best interests of a client.

In practice, however, we do not believe that many practitioners outside of the community legal services sector will inform clients of the availability of community legal services as a matter of course. As a minimum, the Commentary for the Rules in relation to Rule 4.1.1 (acting in the best interests of a client) should include a reference to advising a client of the availability of community legal services in appropriate cases.

3. Confidentiality- Rule 9

Issues raised:

- *Discussing cases with a community-based Board of Management*
- *Obtaining client consent in relation to "cross checks"*
- *Use of case studies*

In relation to the first issue, we agree with the Law Council's response that disclosure of confidential client material to a Board of Management will usually fall within the permitted exceptions in the Rules. In most circumstances it will be sufficient to provide the Board with de-identified information about the client case in question.

The second issue relates to clients' confidential information being viewed by third parties during "cross-checks". We agree that it is not possible to obtain prior consent from all clients in relation to this, as most of our clients are one-off "Advice-only" clients. Given that the third-parties who conduct the cross-checks are always legal practitioners, and that the cross-checks are conducted for the sole purpose of making sure that the legal practice complies with its ethical obligations, we propose that an amendment to Rule 9.2.3 of the Rules could be made. Rule 9.2.3 currently provides an exception where "the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations". The Rule could be amended to also include circumstances where the solicitor is disclosing information for the sole purpose of ensuring compliance with legal and ethical obligations.

The third issue relates to the use of case studies. We agree with the Law Council's view that the presentation of de-identified information should be permissible within the scope of the Rules. We rely on de-identified case studies regularly in our training materials, publications and funding reports and applications. We do not believe that we are breaching our ethical duties by using de-identified case studies.

4. Conflicts- Rules 10 and 11

Numerous issues were raised in relation to current Rules on managing conflicts of duties. We will discuss the two issues that arise most commonly for us at KLC.

The issue that comes up most regularly at KLC is how to juggle our obligations to our local community to provide free legal advice to all those who need it with our ethical obligations not to provide assistance where there is a conflict of interest. Like other CLCs the vast majority of our work is providing “one-off” advices to people in our catchment area on a wide range of legal matters.

We welcome the Committee’s view that particular rules could be developed to apply in an “advice-only context”. We agree that the rules about conflict have developed largely in the context of ongoing casework for clients. Some of the difficult decisions we need to make on an almost daily basis are whether we can book a client for an advice appointment in cases where we have advised against them in the past or we have given one-off advice to the “other party” in the past. KLC does not take the approach that we will not provide an appointment if we have at any time in the past advised the other party, then we cannot make an appointment. We take into account issues such as:

- Whether we still hold the former client’s records, or if they have been destroyed;
- Whether the solicitor who advised the other party in the past is still employed at the Centre;
- Whether it would be reasonable for the former client to expect that we would never advise against them. This could involve consideration of whether the other party has received advice from us on more than one occasion;
- Whether the current appointment is about a different or related matter;
- How long ago we advised the other party.

We agree that either the Rules, or the Commentary to the Rules should specifically refer to situations where a solicitor of the CLC can advise against a former “advice-only” client, as the issue arises frequently for community legal services. We agree that Rules 10 and 11 should not apply to advice only services unless the practitioner has actual knowledge of a conflict of interest.

We recognise that working out whether a conflict of interest arises in a particular matter will be different depending on the type of advice that is sought. For example, different CLCs may be more likely to find a conflict of interest in “advice-only” clients where both the respondent and applicant in Apprehended Violence Order proceedings have approached it for advice. However a CLC might be less likely to find that there is any conflict of interest where a person who has come for advice about, say, a motor vehicle accident, was the other party in a previous advice about a

completely different matter. KLC is fortunate in that we have a referral protocol with our neighbouring CLCs for conflict matters. We are able to refer people in our catchment area to other local CLCs for advice when we feel we have a conflict. Unfortunately most CLCs in rural, regional and remote areas do not have this option.

We support the recognition by the Law Council that 'access to legal representation is an important consideration in the administration of justice'. (p16) We would add that access to legal advice is also an important consideration in the administration of justice. As KLC is a metropolitan CLC clients may have greater access to legal services. However in rural and remote areas, access to legal advice is even more difficult and this issue is particularly pressing.

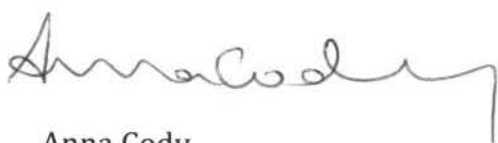
Circumstances where a conflict check will not be possible

In most circumstances we are able to conduct conflict checks before we provide legal advice. This is not possible when we visit prisons. We frequently attend community legal education sessions at the prisons in our local catchment area, and are approached by inmates who need legal advice. We cannot conduct a conflict search from the prison. It may be difficult or time-consuming to make contact with the prisoner at a later time, especially considering the frequency with which prisoners are moved around to different prisons.

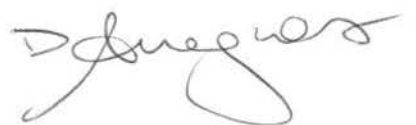
For these circumstances, where it is not possible to conduct a conflict search and the expectation of the client is not that of on-going representation, we prefer an amendment to the Rules in similar wording to Rule 6.5 of the American Bar Association Model Rules.

Yours Sincerely,

KINGSFORD LEGAL CENTRE



Anna Cody
Director



Dianne Anagnos
Acting Principal Solicitor