



# Duty of Confidentiality

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# Agenda



1. Brief Overview: Duty of Confidentiality (15 minutes)
2. Exceptions to the Duty? (Group Activity)
  - Disclosure to avoid the probable commission of a serious criminal offence (20 minutes)
  - Disclosure to prevent imminent serious physical harm (20 minutes)
3. Wrap Up: Q/A (5 minutes)

# Duty of Confidentiality



As solicitors, we have a fundamental duty to protect clients' information from disclosure. This obligation is said to serve two critical functions:

- **Quality of Representation:** Clients who trust that their confidentiality will be protected are more likely to provide complete and candid information, enabling solicitors to deliver more effective representation.
- **Access to Justice:** When people know their communications with solicitors will remain private, they're more likely to seek legal advice when needed, ensuring broader access to justice.





# What client information is subject to the duty?

The duty of confidence extends to:

- **Information learned through the professional relationship:** information about the client that a solicitor learns during the course of the professional relationship.
- **Information dependent on the relationship:** information which the solicitor would not have obtained but for the solicitor-client relationship.
- **Pre-relationship confidential information:** information of a confidential nature acquired by the solicitor before the solicitor-client relationship is formally established.
- **Professional opinions and assessments:** opinions formed by the solicitor about the client's affairs.
- **Information that is in the public domain:** Repetition or confirmation of information by a solicitor may give that information a credible status, and breaches client confidence.



*Gartside v Sheffield, Young and Ellis [1983] NZLR 37*

# Duration of the duty of confidentiality?

- **Permanent:** The duty continues after termination of the retainer and survives the client's death, with the duty then owed to the legal personal representatives of the deceased.

# Sources of Law for the Duty of Confidentiality

*The duty is absolute: It does not require the weighing of competing interests.*



- **Common Law:** Maintaining confidence is an implied contractual term that includes “all communications made by the client about his affairs, and all information learnt directly or indirectly about the client, in the course of the professional relationship.” *Re a Firm of Solicitors* [1992] 1 QB 959, 970, cited in *Unoil International Pty Ltd v Deloitte Touche Tohmatsu* (1998) 17 WAR 97.
- **Equity:** The equitable doctrine of breach of confidence occurs when a fiduciary “...(mis)uses information that is communicated for the limited purpose of the relationship in question.” *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.
- **Professional Regulation:** Australian Solicitors’ Conduct Rule 9.

# Exceptions to the duty of confidentiality

Australian Solicitors' Conduct Rule 9.2 sets out exceptions to confidentiality. The Law Council of Australia's commentary on this rule groups the exceptions into three categories:

- **Following the Law:** Disclosure compelled or permitted by law.
- **Professional Function:** Disclosure necessary for the proper functioning of the legal profession and for the provision of legal services and advice sought by the client.
- **Public Interest:** Disclosure where the public interest in protecting the community is greater than the public interest in maintaining client confidentiality.





## A note about legal professional privilege (an overlapping concept)

- **If the information is merely confidential**, then the general duty to maintain confidentiality can be overridden by a legally authorised direction to disclose the information.
- **If the information is also privileged**, then a solicitor must not disclose the information unless required to do so under a statute that clearly and unambiguously abrogates the privilege itself. *Baker v Campbell* (1983) 153 CLR 52.
- **Privilege belongs to the client**, who may assert it over confidential solicitor-client communications made for the dominant purpose of obtaining legal advice or litigation purposes. *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49





# Scenario # 1

Assume you're working for a law firm and you've been assigned a case where your client is charged with murder and is currently in a hospital bed recovering from a gunshot wound. When you interview your client, he first tells you that he can't remember any of the events relating to the charge. When you press your client about his recollection, he seemingly goes into a dissociative state. He then reveals detailed information about two other murders he committed – those of two teenage girls who are still officially listed as missing persons.

You return to your firm and advise your colleagues about what your client told you regarding the murder of two teenage girls who are buried at a remote location just outside of Adelaide. In response, one of your colleagues takes it upon themselves to visit the remote location you've described and discovers both girls' bodies. He photographs the crime scene as potential evidence and shares the photos with the firm.

Be prepared to report back with answers to the following questions:

- Does ASCR 9.2 permit disclosure?
- What are your options, and which would you recommend?
- Is absolute confidentiality appropriate when innocent third parties are suffering?



# Scenario # 2

You work for a youth legal service. A 16-year-old client comes to seek advice about obtaining an intervention order against their mother. During the consultation, the client explains that their mother has “failed them in life” and they “want nothing to do with her ever again.”

When you begin exploring the legal options and requirements for an intervention order, the client becomes increasingly distressed. They insist you must help them immediately, stating: “If you can’t help me, I may as well end it.”

You attempt to de-escalate the situation and offer support, but the client abruptly stands up and storms out of your office. As they rush through the premises toward the exit, they shout: “I hate you all!”

The client leaves before you can respond further or assess their safety.

Be prepared to report back with answers to the following questions:

- Does ASCR 9.2 permit disclosure?
- What are your options, and which would you recommend?
- Is absolute confidentiality appropriate in youth legal services dealing with crises?



The background of the image is a vibrant blue, densely populated with numerous speech bubbles of various colors including red, yellow, pink, and white. Each speech bubble contains a large, dark blue question mark, creating a visual theme of inquiry and questions. The bubbles are scattered across the entire frame, some overlapping, which adds a sense of dynamic movement and abundance to the design.

# **Questions & (hopefully) Answers**