



## **Guidelines for Legal Practitioners Bidding for Legal Work or Engaging with Legal Brokers**

The purpose of this Guideline is to provide practitioners with a starting point for seeking general information. It is not an exhaustive statement of all the relevant ethical obligations that might apply to specific circumstances.

If you need advice that addresses a specific set of facts, please contact Ethics and Practice at the Society on 82290229.

### **Introduction**

Bidding for legal work and engaging with legal brokers raises the following ethical issues that require consideration by legal practitioners before participation.

### **Confidentiality**

1. The bidding practitioner should satisfy themselves that the prospective clients have provided consent to the broker passing on their confidential information to the bidders and to the successful law practice.
2. The bidding practitioner should also satisfy themselves that the broker demonstrates an understanding of the importance of confidentiality and will act accordingly.

### **Disclosure**

3. The bidding practitioner should explore what, if any, aspects of the arrangement between them and the broker needs to be disclosed to the client. For example, if the arrangement involves the payment of a fee by the lawyer to the broker this will need to be disclosed to the client.
4. South Australian Legal Practitioners Conduct Rule 12 prohibits a practitioner from acting where there is a conflict between the duty to serve the best interests of the client and the interests of the lawyer. However, SALPCR12.4.4. states the following:

*A solicitor will not have breached this Rule merely by acting for a client in any dealing in which a financial benefit may be payable to a third party for referring the client, provided that the solicitor has first disclosed the payment of the financial benefit to the client.*

5. It is further strongly recommended that such disclosure is made in writing.
6. Practitioners should also be aware that in SA there is an effective prohibition against the payment of a fee by solicitors for referrals involving the preparation of any conveyancing instrument under the section 29(1) of the *Land and Business (Sale and Conveyancing) Act 1994* (South Australia).



### **Conflict**

7. The bidding process will usually not permit a proper conflict check to be performed prior to its commencement and so the successful law practice will need to have in place an effective process by which a conflict check can be done immediately the client's identity is provided and before the practice receives any further confidential information about the matter.
8. The bidding practitioner should ensure that any personal interests they have in respect of the arrangement with the broker do not conflict with their duty to act in the clients' best interests. If the arrangement involves a payment to the broker by the practitioner, then this must be disclosed to the client so the client can provide informed consent to that lawyer acting despite the presence of a personal potentially competing interest (see above).
9. The practitioner should ensure that they comply with their fiduciary obligations and take instructions exclusively from the client once they are engaged, not the broker.
10. The practitioner should also ensure that the arrangement between the practitioner and the broker does not affect any legal advice or services provided to the client or allows the broker to exert any influence over the conduct of the matter.

### **Profit sharing**

11. Any fee paid by the practitioner to the broker should be calculated on a flat rate basis and not be related in any way to the amount that the client ends up paying in legal fees to the successful bidder. A fee that comprises a percentage or portion of the fees paid by the client could breach profit sharing requirements and indicate undue influence over the provision of legal services by a third party. A pre-set flat fee calculated without regard to what the client will be billed is safest.

### **High Risk Features**

12. Practitioners should be on the lookout for the following:
  - Divided loyalties between the client and the broker.
  - Possible conflicts of interest with current and former clients that do not crystallise until after the practitioner's bid is successful.
  - Potential of infringement of fee sharing prohibitions if broker is rewarded based on % of fees.
  - Undermining of lawyer's independence and obligation to be forensic.
  - Not to allow broker to affect or influence advice to client.
  - Lawyer to only take instructions from the client.
  - No ongoing involvement by or updates provided to the broker after the successful practitioner has been instructed by the client. The best and safest arrangements are those in which the broker or referrer withdraws completely from the relationship after the practitioner has been instructed.



**Further information:**

- **See also Gino Dal Pont, *Lawyers' Professional Responsibility*, 7<sup>th</sup> Ed**, from para 20.55 and particularly para 20.70 regarding restrictions on methods of soliciting work and also para 6.110 regarding undisclosed referral fees and commissions – this resource can be accessed via the Society's Law Library.

**Purpose of these guidelines**

It is important to stress that these Guidelines are not rules of conduct and do not have the force of law. They are for the purpose of highlighting issues and considerations relating to practitioners adopting cloud computing for their law practice. A failure to comply with the recommendations in these Guidelines does not of itself constitute misconduct on the part of a legal practitioner. It is where a practitioner has demonstrably breached his or her obligations that the issue of misconduct arises.

The Guidelines merely assist in identifying risky practices and providing solutions for practitioners. If you have any questions about these Guidelines, please call Ethics and Practice on 8229 0229.

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