



# **Ethics Toolkit**

For registered migration agents

Your guide to help you make  
the best ethical decision

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**Australian Government**

**Office of the Migration Agents Registration Authority**

An Initiative of the Office of the MARA



**Australian Government**  
**Office of the Migration Agents Registration Authority**

Dear Registered Migration Agents,

I am pleased to provide you with the Ethics Toolkit. This has been developed as an initiative of the Office of the MARA by Fragomen Australia. It is a practical resource developed by migration agents for migration agents.

The toolkit has been designed to assist you to:

- provide a model for identifying and solving ethical problems that arise in everyday work;
- understand the benefits of using such a model or framework in decision making;
- understand what constitutes a sound decision in resolving ethical issues;
- understand the effect of good and poor decisions on clients; and
- distinguish between personal values and beliefs and the requirements of the Code of Conduct.

I trust that the Ethics Toolkit will be a practical resource in your day to day work as a registered migration agent. The toolkit is also a resource for CPD and I encourage you to discuss the examples used in it with other agents when you attend Ethics and Professional Practice activities.

The toolkit and the Ethical Deliberation Checklist are also available from the Office of the MARA website at [www.mara.gov.au](http://www.mara.gov.au). Your feedback on the toolkit is welcome at any time. You will find a feedback form on our website. Please email your comments or suggestions to [cpd@mara.gov.au](mailto:cpd@mara.gov.au).

I commend the Ethics Toolkit to you and wish you well in your operations.

Best regards,

A handwritten signature in black ink, appearing to read 'Christine Sykes'.

Christine Sykes  
Chief Executive Officer

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# 1. Introduction

## 1.1. Why is ethics important?

Each day you will be called upon to make decisions about how you should act in particular situations. Each time you ask yourself “what should I do?” or “how should I act?” or “is this right?” you are making an ethical decision.

### Should I take on this client?

- Am I competent enough?
- Do I have an obligation to assist?
- Am I sure that the client understands what I can do for them?
- Does it go against my conscience?

### Who is my client in this matter and what duties do I owe them?

### Is it right for me to tell this client’s employer about their conviction?

### Should I stop acting for this client?

- Why do I want to stop, is it for my own convenience?
- Do I have a conflict of interests that cannot be reconciled?

### What should I do if my client is unlawful?

- Should I inform the Department of Immigration and Citizenship (DIAC)?
- Should I tell the police?

### Is it right for me to lodge this document?

- To what extent should I check the accuracy of what the client is telling me?
- Is it my role to do this?
- Am I satisfied that what I am lodging with DIAC is not false or misleading?

### Is it right for me to seek another extension simply because the client wants to buy more time in Australia?

### Should I use a technicality to help my client?

- Should I be doing everything I can to help the client achieve their objective?

### Is it right for me to take this client from another agent?

### Should I report another agent to the Office of the Migration Agents Registration Authority (the Authority) or to another professional body?

**All these questions have an ethical dimension. How you answer them will have serious ramifications for your clients and for you professionally and personally.**

Your clients place a great deal of trust in you. Obviously, they rely upon you to act competently and to use your best endeavours to help them achieve the result they want. But they also expect that you will act ethically: that you will be honest and fair and that you will act with integrity. Others in the community, including those working at DIAC, the tribunals and courts, and your colleagues, are entitled to expect that you will treat them with respect and dignity and that they can rely on your word as the agent for the client.

Your willingness and ability to act ethically is the measure by which your standing as a migration agent will ultimately be judged. It also affects how the community views the entire migration advice industry. Your reputation is everything, not only to you, but to all migration agents.

**Sir Owen Dixon put it succinctly. He said:**

*“Experience has shown in every age that a profession cannot proceed without high professional standards. Special knowledge is always suspected by those who do not share it. Unless high standards of conduct are maintained by those who pursue a profession requiring great skills begotten of special knowledge, the trust and confidence of the very community that is to be served is lost and thus the function of the profession is frustrated.”<sup>1</sup>*

This is why ethics and ethical decision-making is so important to your work as a migration agent and is worthy of study and deep contemplation.

## 1.2. How this Toolkit might help

This Toolkit is designed to help you answer ethical questions that will arise in your practice as a migration agent. Its purpose is to help you think and act ethically by:

- explaining a little about what we mean by ‘ethics’ and ‘ethical decision-making’
- setting out the framework you will need to make ethical decisions
- helping you to develop a Statement of Ethics by which you can judge your conduct
- suggesting a methodology you might find helpful in approaching ethical decisions
- explaining the key ethical duties as they apply to all migration agents, and
- providing hints, examples and answers to common ethical questions.

The Toolkit has been written by registered migration agents for registered migration agents as well as for those intending to become registered. It has been designed primarily for those of you who may have had little, if any, previous or detailed training in ethics. We hope it will be valuable as a resource you can refer to from time to time as the need arises.

If you are practicing as a lawyer who is also a registered migration agent, you might find the Toolkit useful when reconciling between the different obligations you owe as a result of dual regulation. Whilst we have made some reference to the professional rules governing you as a lawyer, we have assumed that you will turn to those rules and the extensive literature about them for guidance and detailed information.

This Toolkit has also been designed as an aid for those that need to teach ethics to migration agents (and those intending to become migration agents). You may find that some of this material will be covered in Continuing Professional Development (CPD) sessions. Throughout this Toolkit are a number of common ethical questions, including many of those set out in the previous section. One test of how well you understand ethics and whether this Toolkit has been of help will be whether you think about these questions in a different way after you have read it and whether you feel more confident about reaching an ethical answer. As with any other area of learning and professional development, thinking ethically will take time, patience and dedication. It is something that must be experienced as much as learnt.

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## 2. Thinking about ethics

### 2.1. What do we mean by ethics and ethical duties?

Ethics are the principles that govern our behaviour in certain situations. Ethics is fundamentally about relationships and how we treat other people and deal with institutions.

Ethics is not about:

#### 1. Your feelings

Feelings can provide a signpost about whether your conduct is ethical but they cannot determine your decision. You may feel good even though you have done something that is not ethical.

##### **For example**

You might be happy to have been paid for lodging a case that had no hope of success, but does the fact that you are happy make it right?

#### 2. Your religion

Your faith may set high moral standards, but not necessarily the standards that are appropriate when you are acting as someone's migration agent.

##### **For example**

Your religion might tell you that sex before marriage is a sin, but does this mean that you should not include evidence of cohabitation in a partner case simply because your religion tells you it is not right for the couple to cohabit before marriage?

#### 3. Your own views of the world

You may believe that small lies don't matter, but this does not mean it is ethical for you to lie.

##### **For example**

Lying to your partner about whether you ate the last chocolate biscuit in the pack is not the same as agreeing to help a client submit a statement that you know is not true.

When we speak of the ethics of being a migration agent we are generally speaking about professional ethics. Professional ethics reflect what is considered to be correct conduct or practice for a migration agent carrying out their role of providing immigration assistance to clients.

## 2.2. Where do professional ethics come from?

Acting as an ethical migration agent means, at the minimum, acting in accordance with a set of values determined by others including; the courts, the parliament, our colleagues and administered by our regulator(s). These values may be expressed in formal rules such as judgments, laws and professional rules, or in general ethical standards that are understood among migration agents as being 'right'. These rules and standards are our professional ethics and they establish the minimum standard of behaviour expected of you as a migration agent. These will be discussed in a lot more detail later, but for now it is important that you have an understanding of the primary sources of these rules.

### 2.2.1. The Code of Conduct

The Code of Conduct (the Code) imposes obligations on all migration agents. Many of these obligations are 'ethical' in nature or involve ethical considerations because they regulate how migration agents should deal with others.

It must be remembered, however, that the Code is not a 'code' in the true sense of the word. It does not purport to displace other sources of ethical conduct, nor does it purport to exhaustively list the acts and omissions that might constitute unethical conduct.

#### Clause 1.9 states

The Code is not intended to displace any duty or liability that a registered migration agent may have under the common law, or the statute law of the Commonwealth, a State or a Territory, in relation to a matter covered by the Code. The provisions of the Code should be read in the light of this principle.



#### Clause 1.11 states

The Code does not list exhaustively the acts and omissions that may fall short of what is expected of a competent and responsible registered migration agent.

The Code sets out the *minimum* standard of honesty<sup>2</sup> and fair dealing<sup>3</sup> with clients and others.<sup>4</sup> These minimum standards include:

- an obligation to act in the legitimate interests of the client<sup>5</sup>
- an obligation to deal with your client competently, diligently and fairly<sup>6</sup>
- an obligation to maintain confidentiality<sup>7</sup>
- what to do if there is a conflict of interest<sup>8</sup>
- an obligation to have due regard to a client's dependence on your knowledge and experience<sup>9</sup>
- an obligation not to make statements, or to encourage the making of statements, that you know, or believe, are misleading or deceptive,<sup>10</sup> and
- a prohibition against using intimidation or coercion.<sup>11</sup>

In addition to the Code, the *Migration Act 1958* (the Act) and *Migration Agent Regulations 1998* (the Regulations) impose some specific rules that govern your conduct in certain respects. The Act contains a number of offences that criminalise certain actions that would also be seen as unethical. For example: Sections 234 and 234A create criminal offences for providing false documents and false and misleading information relating to non-citizens. Section 245 creates a criminal offence for making false or unsupported statements as to whether or not persons are in a married or de facto relationship.

### 2.2.2. Legal profession rules

More than 26 per cent of migration agents are also Australian lawyers (lawyers admitted to practice in one or more State or Territory of Australia). Most Australian Lawyers are Australian legal practitioners (i.e. admitted lawyers who hold a practicing certificate) and are subject to their own professional rules.<sup>12</sup> Although these rules may not apply to Australian lawyers who do not hold a practicing certificate, their conduct as migration agents may still be relevant to their future admission. For ease of the discussion, we will refer to Australian lawyers who are also registered as migration agents as 'lawyer migration agents'.

When a lawyer migration agent provides a service that involves the giving of immigration assistance the lawyer is also acting as a registered migration agent and must take care to ensure that his or her conduct does not breach obligations under either the Legal Profession Acts or the standards of professional conduct including the Rules or Code of Conduct. In other words, they will have two sets of rules that apply to their conduct and these will not always be consistent with each other.

The various *Legal Professions Acts* of the States and Territories establish the yardsticks against which a legal practitioner's conduct is measured when considering whether a disciplinary issue has arisen. For example, s496 of the *NSW Legal Profession Act 2004* defines unsatisfactory professional conduct as including:

***'conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.'***

And professional misconduct as including:

***'(a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence' and***

***'(b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.'***

This raises a question about whether there is any difference between the ethics of lawyer migration agents and non-lawyer migration agents. On the face of it, it is difficult to see why there should be significant differences in the ethical obligations owed by lawyer migration agents and those owed by non-lawyer migration agents towards their clients. The work is effectively the same, both probably owe the same fiduciary duties<sup>13</sup> and the Code of Conduct imposes the same ethical rules on all migration agents, most of which are not unlike those imposed on lawyers. These similarities were noted by Crennan J in *Woods* where her Honour held that the standard of conduct on a migration agent is generally no less than those of a solicitor.<sup>14</sup>

Despite the similarity between the work of migration agents and lawyer migration agents, there are certainly some differences between the professional rules imposed on lawyer migration agents and the ethical duties of migration agents who are not lawyers.

The first difference is that lawyer migration agents are officers of the court and have sworn an oath to serve the society and to the administration of justice. Those duties are explained to all Australian lawyers when they are admitted to practice.

***'Amongst the obligations you have acquired to this Court are: a duty of full disclosure of the relevant law; a duty of candour not to mislead the Court as to any of the facts, or to knowingly permit your client to do so; a duty to refuse to permit the commencement or continuance of any baseless proceeding; a duty to exercise care before making any allegation of misconduct against any person; a duty not to assist any form of improper conduct; a duty to conduct any proceedings before this Court efficiently and expeditiously.'***<sup>15</sup>

These are not mere words. Admission creates a duty on a lawyer to courts and the administration of justice that is paramount and prevails over any duty to the client or any other person.<sup>16</sup> The practical consequence of this duty is discussed in more detail at **page 88** and elsewhere in this toolkit.

A migration agent has a duty to act in a lawful manner, but they are not officers of the court and owe no specific duty to the administration of justice. This may have some legal consequence on how a migration agent should behave in particular situations, although this is unlikely to occur often and might not affect the way that a migration agent *should* act in those cases.<sup>17</sup>

The second significant difference relates to the area of the professional privilege that attaches to certain information given by a client to a lawyer migration agent in the course of seeking advice or the conduct of the case. This client legal privilege is broader than the general duty of confidentiality that applies to all migration agents. Client legal privilege (professional privilege) is discussed in some detail at **page 67**.

There are some other rules that apply to lawyer migration agents that do not apply to migration agents who are not lawyers, or to lawyers who are not migration agents. In most cases these differences are not as great as may first seem to be the case and often the differences are legal rather than ethical. The toolkit will refer to these differences where they are relevant and will attempt to resolve them to the extent this is possible. This is not to say that the differences are unimportant particularly in the areas of confidentiality or when dealing with courts and tribunals, but in most situations, the fundamental duties owed by all migration agents in their day-to-day work are the same and all migration agents should strive to act as ethically as possible regardless of whether the rules actually require it.

Without doubt, the *importance* of professional ethics to the way that we practice should be no different for a lawyer migration agent, than for a migration agent who is not a lawyer. All migration agents should act in a professional way that serves the interest of their client and the society in which we live. This is essential if migration agents want to be viewed as true professionals.

### 2.2.3. Fiduciary duties

When you agree to provide immigration assistance to another person (the client), you agree to take on a level of responsibility for that person and their immigration affairs. In return, the client becomes dependent upon you in relation to that assistance. This creates a fiduciary relationship that requires you to act in a certain way towards the client having regard to your position of trust and confidence.<sup>18</sup> In order for you to act for the client, it is normally necessary for the client to provide you with certain confidential information and this also creates an expectation that the information will be used only to the client's benefit.

In other words, even without the Code, a migration agent would owe certain obligations to a client. Fiduciary duties are discussed in further detail at **page 48**.

### 2.2.4. Contractual obligations

When you enter into a contract with a client this creates legally binding obligations to perform the contract in a particular way. This includes a duty to perform the contract diligently and with due care and skill. It would generally also imply ethical-type obligations such as confidentiality, even if they are not expressly provided for in the contract.

### 2.2.5. Other laws of the Commonwealth and States and Territories

There are various Commonwealth and State laws that seek to regulate the behaviour of service providers. These include laws such as the *Competition and Consumer Act 2010* (Cth) (formerly known as the *Trades Practices Act 1974*)<sup>19</sup> and the *Contracts Review Act 1980* (NSW). These laws also govern how you must behave towards clients and others. If you are a lawyer you must also carefully consider your obligations under the State and Territory laws that regulate legal practice and the provision of legal services. This is discussed in more detail later.

### 2.2.6. Professional associations

The rules of professional associations such as the Migration Institute of Australia (MIA), or the various Law Societies and Law Councils, may contain statements of ethics that members of the association are expected to uphold. These statements provide guidance as to the ethical behaviour expected of professionals carrying out that work.

### 2.2.7. So is ethics just about rules?

No ethics is not just about rules. In fact, it is commonly said that ethics cannot, or should not, be reduced to rules:

***‘The first, and perhaps the most important, thing to be said about ethics is that they cannot be reduced to rules. Ethics are not what the [person] knows he or she should do: ethics are what the [person] does. They are not so much learnt as lived. Ethics are the hallmark of a profession, imposing obligations more exacting than any imposed by law and incapable of adequate enforcement by legal process. If ethics were reduced merely to rules, a spiritless compliance would soon be replaced by skilful evasion.’<sup>20</sup>***

All migration agents should want to act ethically because they understand and believe it is the right thing to do regardless of whether there is a rule or from where that rule arises. It is important to understand that there is an obligation to act ethically in respect of all aspects of our work. This requires real diligence, reflection and constant self-evaluation. It requires an intimate understanding of the relationships with clients and others and what duties are owed to them and why. It means learning to make the ‘right’ decision when confronted with a choice between acting one way and another, even when the rules are uncertain or there is no rule at all. This obviously requires more than just adherence to a set of rules. It requires each of us to decide that we want to act ethically and to have the courage to live by that choice, even when that is difficult or adverse to our own interests.

But the need for us to want to act ethically does not mean that rules are unimportant. Rules establish the minimum standards of behaviour expected of us. For example, Australian legal practitioners are required to behave in accordance with Rules of Professional Conduct. Many of these rules are based upon and reflect ethical principles, but the rules are not, and cannot be, a complete statement of the ethics of practicing law. Rules assist by providing guidance about how to act in certain situations. They also ensure your clients are protected and act as a yardstick for the regulator when judging whether your actions were acceptable. Rules are therefore an essential part of the process of thinking and acting ethically, and you need to ensure you know them very well. You also need to know how to act if the rule is unclear or there is no rule at all.

#### **For example**

You might ask yourself ‘What should I do in relation to this money my client has given me?’. If you have completed the work and rendered a bill, the money is yours. What you chose to do with it is of no consequence to the client or any other person. But if you receive the money before you complete the work, then what you do with it is both a legal and an ethical question. Legally, you must comply with your contract and with the rules in the Code (or the relevant Legal Profession Act) that deal with the handling of client monies. The money will need to be deposited into the client account (or trust account) and the client advised. If you are thinking about not doing this, then you are really asking yourself, ‘Should I comply with this rule?’. But you are also asking yourself ‘Is it alright for me to deprive this client of their money before I have done what I promised?’. The ethical answer is clear, the rule merely confirms it. But the rule has both identified the issue for you and provided a way of behaving that will be ethical.

## 2.3. What if the rule is not clear or there is no rule?

The main problem for migration agents lies not in accepting that they should follow the rules but in how to do so. Professional rules are often so broad they could cover any and all conduct yet give little guidance about what to do in a particular case.

### **For example**

What does it actually mean to act in the client's lawful interests?<sup>21</sup>

Other rules are so particular that they may only apply to a specific situation and not cover all similar situations.

### **For example**

Clause 2.1A(a) of the Code deals with very specific conflicts of interest between a client and his/her agent.<sup>22</sup>

The other problem is that there may be no clear rule that covers the exact situation you are in.

### **For example**

Whether you can continue to assist a client if you have a reasonably based belief that the client is being dishonest.

This is why it is so important to have:

1. A clear methodology for ethical decision-making so that you can approach an ethical question or issue systematically and consistently, and
2. A good understanding of not only the rules, but the ethical principles on which they are based and the ethical standards by which you can judge your own conduct (a Statement of Ethics).

These are dealt with in chapters 3, 4 and 5.

## 2.4. What if I think the rule is wrong?

Our legal system often separates law from ethics or morals.<sup>23</sup> For example, it is unlawful to possess prohibited drugs for your own use, but is it ‘immoral’? The answer to this will depend on your own view of morality and so the legal system assumes that this is not relevant to the issue – it is the law.

### **For example**

If I run a red light in order to speed a dying child to hospital I am breaking the law.  
But am I acting morally?

The answer is not simple and will depend on many considerations.

- How serious is the child’s condition? (Am I correct on the facts?)
- How much traffic is on the road? (Will I be putting others at risk?)
- Was there another solution? (Could I have called an ambulance?)

### **Would your answer change if I told you the following?**

- There was a serious accident and I killed the child and another person.
- We made it safely to hospital and the child was saved from a life threatening condition.
- We made it safely but it turned out the child just had bad indigestion.

The example shows that how you act may not be judged (by you or others) solely on the basis of whether or not you complied with a rule. In such a situation it might be equally important why you broke the rule and the consequences of what you did.

The fact that there may be instances in your life in which rules appear inappropriate or even contrary to acting ethically, does not diminish the importance of rules and the need to apply them. Clearly the example above does not mean you should not stop at a red light. It does, however, mean that you need to think carefully before you act, and to judge your actions by more than just the rule.

As with rules governing other aspects of our society and our relationships with others, the rules governing the conduct of migration agents provide the starting point for what is professional ethical conduct. They are the minimum standard that is expected of us. Many of our professional rules derive from those that govern the actions of lawyers and have their basis in standards that have been developed over many centuries. Others simply reflect the requirements imposed by the common law on agents and advisers. These rules are not particularly controversial, or morally bereft. There should be no situation in which you would contemplate not following them.

**A good rule of thumb is that you should follow a rule that prevents you from doing something unethical but you should not stop yourself from acting ethically simply because there is no rule compelling you to act that way.**

## 2.5. So how do I act ethically?

You will need to decide for yourself how you will act when confronted with an ethical issue or question. There will be more than one way to approach the task. Whatever the route, the destination should be the same: professional behaviour that treats people in accordance with the duties you owe them.

In order to act ethically you will need a broad range of tools, a genuine desire to do the right thing and a true dedication to the task of achieving it. Hopefully you already have the desire and the dedication. The tools that you will need include:

- a methodology for thinking about ethical issues and reaching ethical decisions
- a clear understanding of the ethical principles you will practice by (a Statement of Ethics) and the framework in which those principles will need to be applied
- a detailed understanding of the ethical standards and professional rules that form the minimum standards of ethical behaviour
- some examples about how this all applies in practice, and
- further reading and resources that might help you.

We hope that this Toolkit gives you these tools, or the way to produce them.

1. Sir Owen Dixon in Woinarski, ed., *Jesting Pilate And Other Papers and Addresses by the Rt Honourable Sir Owen Dixon*, Law Book Company Limited, 1965
2. Clause 1.10(b)(iv)
3. Clause 1.10(b)(v)
4. Clause 1.10(c)
5. Clause 2.1(a)
6. Clause 2.1(b)
7. Clauses 3.1 and 3.2
8. Clauses 2.1A and 2.1B
9. Clause 2.4
10. Clause 2.9 and 2.9A
11. Clause 2.15
12. These rules will vary from State to State (and Territory to Territory). The Law Council of Australia's *Draft Australian Solicitor Conduct Rules*, 19 March 2011 (**ASCR**) are intended to apply to all Australian legal practitioners. Please note that this document has been approved by the Law Council of Australia but is subject to formal approval by the Council of Australian Governments (COAG). We will refer to the draft rules in this document as generic statements of the principles that apply (or should apply) to Australian legal practitioners throughout Australia. You should refer to the rules and law in your particular State or Territory where they are inconsistent with the ASCR.
13. These duties are discussed in more detail at 7.1.1
14. *Woods v Migration Agents Registration Authority* [2004] FCA 1622 at [60].
15. The Honourable James Jacob Spigelman, AC, former Chief Justice of the Supreme Court of New South Wales, 'Admission of Legal Practitioners' (speech delivered to newly admitted Legal Practitioners, 19 February 2007).
16. For example see rule 3 of the ASCR which reflects a very long-standing and accepted rule for Australian legal practitioners.
17. The extent of a migration agent's duty to DIAC, the immigration system and the Courts and Tribunals is discussed at page 88.
18. In the article '*Fiduciary Law and Access to Medical Records: Breen v Williams*' (1995) 17 Sydney Law Review 433 Professor Patrick Parkinson notes that a central concept of Australian fiduciary law is that a fiduciary is "one who has either undertaken to act in the interests of another, creates an expectation that he or she will act in the interests of the other, or is under a legal duty to do so from some other source such as statute law" at page 440.
19. See also the fair trading legislation in each of the States and Territories.
20. Sir Gerard Brennan, (Speech delivered to the Bar Association of Queensland Continuing Legal Education Lecture, No. 9/92, 3 May 1992). See also comments by Allan C Hutchinson who argues that the "traditional emphasis on code-based morality breeds a mentality that is more concerned with delineating how far a lawyer can go without engaging in unethical conduct: it tends to privilege social conformity over efforts to build moral character". Allan C. Hutchinson (1998) '*Legal ethics for a fragmented society: Between professional and personal*', International Journal of the Legal Profession, 5: 2, 175 — 192 (185)
21. *Code of Conduct* 2006, clause 1.12
22. Clause 2.1A(a) states that an agent must not accept a person as a client if the agent has had previous dealings with the person, or intends to assist the person, in the agent's capacity as a marriage celebrant.
23. Ysiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* 4th edition (LexisNexis Butterworths Australia 2005) 27.

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### 3. A methodology for acting ethically

A methodology is a system of methods. A method is a particular form of procedure for accomplishing or approaching a task.<sup>24</sup> Your task is to be an ethical migration agent. This means making good ethical decisions in relation to your client, DIAC, the tribunals and courts and any other people or institutions with whom you have relationships.

In order to act ethically and make good ethical decisions you will need a methodology that is appropriate to the ethical principles relevant to the role that you will be performing as a migration agent and to the framework within which ethical decisions must be made. What you will need is a methodology that will help answer the question ‘what should I do?’ by reference to the professional ethics you must practice by.

There is no one ‘correct’ methodology for acting in accordance with our professional ethics, but most methodologies of this type have certain common features that we can borrow from.<sup>25</sup>

#### A methodology for acting ethically

- Recognise an ethical issue when you see it.
- Identify the options available to you.
- Judge the consequences of those options on yourself and others.
- Test the action you are planning to take and reflect on it.
- Explain that action to those affected and to others who may be interested.
- Learn from your action and implement change.

#### 3.1. Recognise an ethical issue when you see it

Broadly speaking, an ethical issue is one that will require you to ask yourself ‘what should I do?’ or ‘how should I act?’ Where the course of action is clear and unlikely to be damaging to anyone, then there is no real ethical issue. What you choose to do is of little interest or concern from a professional point of view. The moment your action or decision might impact on another person with whom you are in working relationship, this involves an ethical issue in the sense that we are interested in.

#### Your Statement of Ethics should help

In the next chapter we will begin work on your Statement of Ethics. This will require you to think very deeply about the ethical principles that will govern your behaviour in certain situations and how you will act towards the people and institutions with whom you interact. This process will help you to identify the areas in which you will need to behave and act ethically. This will allow you to plan ahead and take evasive action where possible, and be in a position to deal with ethical dilemmas when evasive action is not possible.

**For example**

You will discover that many ethical issues are likely to stem from your relationships with clients. Many of these can be overcome by having clear terms in your contract about how you will deal with certain things such as the sharing of confidential information, the use of interpreters, refunds and billing.

## 3.2. Identify the options available to you

To act ethically you must be able to identify as many of the available options as possible so that you can choose the best one. If you fail to identify an available option, this could lead to a bad ethical decision. In most situations there will be at least two options (if there is only one, then you probably don't have a problem) but sometimes there will be many more.

### 3.2.1. Work out the question

The first step in working out the options is to make sure that you have all of the facts and that you are very clear about the issue you are considering. Sometimes a problem that seems to have a number of options really only has one ethical option. Try to frame the question in different ways.

**For example**

A client wants a refund because you have not been able to complete the work due to other commitments. Your contract says that the deposit is 'non-refundable'. You may ask yourself 'why should I not keep this money as I am legally entitled to it?' Try asking yourself 'why should I keep this money when I did not earn it?'

Make sure that by reframing the question you are not simply making it easy for yourself to avoid an ethical issue.

**For example**

A client wants you to lodge a document with DIAC even though you are very suspicious about it. You may ask yourself 'why shouldn't I lodge this document if the client wants me to?' This may avoid the real ethical question which is 'should I be lodging a document I have such doubts about?'

### 3.2.2. Work out what options you really have

The second step is to make sure you understand what options are actually open to you. Where there is a clear professional rule or duty governing a situation then you should normally follow it. This will effectively mean that there is only one option for you in those cases – hopefully you will not be called upon often (or ever) to make a decision where you will act against a clear rule.

#### For example

The rule is that you should never make a statement in support of a visa application you know or reasonably believe to be false. You simply cannot do it regardless of whether this is what the client wants or whether it will be detrimental to the client if you do not do so. There may be an issue about whether you should believe it is false, but once you do the action is clear.

Where there are two clear rules or duties that would appear to conflict then the answer will probably be that you should not be doing whatever you are contemplating.

***‘A rule of thumb which might help is that if the performance of one duty involves a breach of another, then the proposed action should not be undertaken.’<sup>26</sup>***

In such a case your only option may be to do nothing and to cease to assist the client (or clients). This is discussed further in chapter 7. Before deciding that you have no options, it is important that you are correct in assuming that you do have two conflicting duties.

#### For example

You are acting for a husband and wife in relation to partner application and the visa applicant wife asks you not to tell the husband about her bank account in Manila. One option is to tell. Another option is to keep her confidence and do nothing. Another option is to say that you can no longer act for them because your duty of confidentiality to the wife is incompatible with the duty of disclosure to the husband. You cannot decide whether any of these options are really open to you until you understand completely your duties of confidentiality and disclosure and when they apply.

Where there is no clear rule, and no conflict of duties, then you will have more options open to you. This will require you to judge the consequences of your actions on yourself and on others in order to decide what is the right thing to do.

## 3.3. Judge the consequences of those options on yourself and others

In order to work out the consequences of the various options you first need to work out who will be affected. In most cases the people that will be affected, or at least the ones that are of concern, are those with whom you have relationships. This will include:

1. The client,
2. DIAC, the tribunals and courts, and
3. others, including other migration agents, professionals, your employees, employers and partners.

You will need to ask yourself how each of those people or institutions will be affected if you chose one option over another. There are different ways to analyse this, but as a migration agent, you must remember that your overriding duty is to always act in the lawful and legitimate interests of your client.<sup>27</sup> Your first question should always be: 'if I am going to act in a way that is adverse to my client's interests in any way, am I justified in doing so?'

**You should ask yourself some tough questions.**

- Which option will produce the most good for the client even if it will upset another person or cause you discomfort or even loss?
- Will this require me to act in a way that will harm someone else or go against my conscience?
- Is there a way to act that will not damage my client's interests but which will reduce or prevent harm to another person or institution?
- Is there a way to act that will not damage my client's interests and will allow me to act in the way I believe is consistent with the type of migration agent I want to be?



These issues can be even more difficult for lawyer migration agents who have an over-riding duty to the administration of justice. You must therefore consider whether what you are proposing to do would conflict with this duty and, if it would, then you cannot do it even if it would produce the most good for your client.

## 3.4. Test the action you are planning to take and reflect on it

Your role as a migration agent is a very complex and important one. It involves a great deal of competence and trust and the decisions you make are of huge significance to your clients who are relying on you to get it right. Making an incorrect ethical decision could also have a negative impact on you as it could result in disciplinary action or loss of business. This means that your methodology must include adequate scope for reflection and review – prudence is critical.

**In order to test your proposed course of action, ask yourself some questions.**

- Am I feeling uncomfortable with what I am about to do?
- Why am I feeling uncomfortable about this? Is it simply because I am bringing my own feelings, prejudices or personal interests into the decision?
- Why am I making this decision? What is my intention? Is it really driven by my own self-interest or a misguided loyalty? Am I doing this to make more money, impress someone, or to avoid conflict or cause disappointment?
- Would I be happy if this was done to me?
- Would I be comfortable sitting down with a senior migration agent or the Authority and explaining why I did what I am about to do?



If you are unhappy with, or unsure of, any of the answers to these questions, you need to reflect further before you act. If possible you should check your proposed decision with a colleague.

## 3.5. Explain that action to those affected and to others who may be interested

Acting ethically will sometimes cause you to act in a way your client, or another person, will not like and will find difficult to understand. In the worst cases, you may not even be able to say exactly why you did what you did. In other cases it may look like you acted a certain way for your own benefit or without having thought about the consequences.

It is essential that you are able to explain your actions to people if you need to or are required to. Thinking about how you would explain your actions will also help you to check that the proposed course of action is the right one: if you are unable to explain it, how can it be right? If you can't explain it, then it is more likely that you are acting on the basis of your feelings or prejudices or some other impermissible factor. If you can only explain your actions by saying something like 'it's the vibe', or 'what else could I do', or 'I'd do the same if I had my time again', this may indicate that you have not thought about it deeply enough and you should start again.

Being able to justify your actions does not necessarily mean that you 'got it right' or that another person might not disagree with you, or have done things differently. This is one of the problems with ethics: there may be no 'right' answer, only the least wrong one. What you need to be able to do is say to a client 'I cannot do that because . . .', and to the Authority, 'I acted this way because . . .'. In each case you need to be able to provide a coherent and reasoned explanation for what you did.

### **It will help if you keep a record that notes the essentials.**

- What was the issue?
- What did you do to resolve it?
- What options did you think you had and why did you choose the option you did?
- How did you communicate this to the relevant people?

In the next chapter we have provided you with a document that will help you to record everything you need.

Once you have written it down, read it back. Does it make sense to you?

## 3.6. Learn from your actions and implement change

What would be the point of having to do all of this every time you had an ethical issue arise? Surely the better way is to learn from what you have done and implement some changes that will mean that it is less likely that you will have to deal with it again in the future.

In order to learn from your actions you need to have some way of evaluating what happened and whether the option you went with worked. This may require some analysis in each case and may not always be easy.

**For example**

You decided to keep a deposit of \$5000 because your contract said you could even though you did nothing to earn the money. Your client complained to the Authority and started proceedings in the local court to recover the money. You have now spent thousands of dollars and days of your time trying to defend your decision. Do you think that you made the right decision?

Now imagine if you had kept the deposit but you had done a lot of work and could justify it, but the client took the same action anyway?

Either way you may feel that you made the wrong decision by keeping the money, but does it show you how to act ethically?

In the first situation you may have acted unethically by treating the client unfairly, whereas in the second you have clearly not acted unethically and yet the result is the same. The lessons you learn may be to err on the side of caution and return deposits whenever you are unsure, or to take more care to explain the decision to your client. The real test of your conduct, however, lies in how you will explain your decision to the Authority and the client. What will you say about why you kept the money in the first scenario? That you were legally entitled to it even though you did nothing to earn it? This might teach you that although it is not necessary to return a deposit for fear of recrimination, it is not necessarily 'right' to keep it if you have done nothing to earn it.

When you evaluate the results of your action you should do so objectively. There is little point in simply saying that it was another person's fault that things went wrong. You have to assume personal responsibility for the decision that you made whether it was right or wrong. The reaction of others is really just a consequence of your action and should make you reflect on whether the reaction would have been better or different if you had acted otherwise. Blaming the other person for the way they have reacted will not teach you anything and will not benefit you in any way.

**For example**

You decided to tell a sponsor client that a visa applicant client had a criminal record without first checking with the visa applicant. The visa applicant is now asking why you did this. You will learn nothing by saying that this was the visa applicant's fault for being overly sensitive or for not understanding your relationship with their boss.

Once you have evaluated your action you need to ensure you have taken any practical steps you can in order to head off future problems or to deal with them better.

**For example in the above scenarios:**

You might revise your refund policy and the clauses in your contract so that you will only charge for the work that you have done or will explain to a client why you might keep their deposit even if you have done no work.

You might make sure that you have clients sign an authority to release information about their personal circumstances to another client where this is relevant to the interests of the other client.

## 3.7. When things go wrong

Things will occasionally go wrong and you will make a bad decision. When this happens you will be judged as much by how you react and act as by the mistake that you made in the first place – perhaps even more so.

### How would you react?

You have just discovered that a client has become unlawful because you forgot to lodge their review application in time (they have also lost their right of review).

A staff member has just revealed confidential information about a client to another client.



We have included this discussion in the methodology because ‘what you should do’ in these cases are the hardest decisions you will have to make. They are the hardest because they involve admitting that you have done the wrong thing. Acting ethically will mean acting directly against your own interests and against your natural instinct of self-preservation.

When you confront such a situation you will need to revise or strengthen parts of the methodology.

### For example

Instead of asking ‘am I feeling uncomfortable about what I am about to do?’ you should be asking yourself ‘I know that this is uncomfortable for me but what is the right thing to do by my client?’

Instead of thinking about asking for another opinion you should obtain advice yourself about the situation and probably recommend to the client that they also seek independent advice or at least suggest that they think about it.

These revisions to the methodology are necessary because you will probably not be able to make a sound judgment about what is the best thing to do and, even if you can, you will always leave yourself open to criticism on the basis that you were trying to protect your own interests.

Your ability to make a sound judgment will be impaired when you have made a mistake because you will be in panic mode and you will naturally want to protect yourself and your business. You will want the situation to be resolved in a way that is favourable to you. There is nothing wrong with this and it is a natural and normal reaction. What would be wrong would be for you to act without taking these things into account when trying to resolve the issue. This is why you probably need another person to look at the case for you and to see whether you did make a mistake and, if so, how it might be resolved.

The advice might be that you cannot or should not assist the client further. It may be that the best thing you can do at this point is to cease assisting the client and simply have the matter handled by another person. Or it could be that this is not necessary, or that the client will not want it and you will be able to continue to assist. This is why the client may also need independent advice.

Before discussing an error with your client you may wish to check your professional indemnity insurance. Some policies allow the insurer to refuse a claim if the policy holder has made an admission without the consent of the insurer. Obviously, where this is not the case, or where the matter is very urgent, you may need to weigh the risks of litigation against the desirability of being completely honest and open with the client.

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24. The New Oxford English Dictionary

25. We have borrowed from, amongst others: *The Markkula Center for Applied Ethics, Santa Clara University, A Framework for Thinking Ethically*, May 2009, Kenneth S. Pope and Melba J. T. Vasquez, *Ethics in Psychotherapy and Counseling: A Practical Guide* (Jossey-Bass Publishers, 3rd ed, 2007, *The Ethical Deliberation Questionnaire*, Queensland Law Society website)

26. Virginia Shirvington, 'The Ethics of Law – Safeguarding the Moral Principles and Conduct of a Profession' (February 1994) 21 *Law Society Journal*

27. This duty is discussed in more detail at **page 50** and following

## 4. Ethical deliberation checklist

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2. What options do you have?	25
3. What will be the consequences?	26
4. Have you tested the action you are planning to take?	27
5. Explain the decision to others	27
6. Learn from the experience	28

## 4. Ethical deliberation checklist

This checklist is designed to be used in conjunction with the methodology in the previous chapter. It will act as your decision-making record. Before addressing any ethical issue or problem, you should read the relevant parts of this toolkit and any of the recommended reading that you think will assist you.

### 1. Is that an ethical issue you can see?

Have you just asked yourself 'what should I do?'. What is the ethical issue that you think you see?

**The issue that I am concerned about is:**

### 2. What options do you have?

Remember that your options may be limited by the rules that you must abide by.

**The options available to me are:**

### 3. What will be the consequences?

Not all ethical decisions will involve a client, but if the client is involved then the client's interests are primary and any consequences to them will need to be given appropriate weight (lawyers will also need to consider their duties to courts and the administration of justice).

**The consequence of these options are likely to be:**

*To the client:*

*To others (DIAC, the tribunals and the Courts, the community):*

*To myself:*

And I think that the best option is:

#### 4. Have you tested the action you are planning to take?

You need to test the option that you have settled on to see whether it holds up to scrutiny. You will need to ask yourself some (if not all) of the questions in the methodology and you may need to seek the advice of a colleague or other person. Start by asking yourself 'what is motivating me to act this way rather than another?'

**I have tested my proposed action by:**

#### 5. Explain the decision to others

You can further test your decision by explaining it to others (for example the client or the Authority).

**I have acted ethically because:**

## 6. Learn from the experience

This is the chance to learn something valuable from what you are about to do.

**The lesson I have learned from this is:**

**The thing(s) that I will do differently or change is (are):**

## 5. Developing a Statement of Ethics

### 5.1. Drafting your Statement of Ethics

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## 5. Developing a Statement of Ethics

Now that you have a methodology to help you to act ethically and to reach ethical decisions, you will need a clear understanding of the ethical standards by which you will practice. This is what we have referred to as a Statement of Ethics.

A Statement of Ethics summarises the principles that govern your behaviour towards the people and institutions with whom you interact in your practice as a migration agent. It is not meant to replace the Code or the other rules you must abide by, or act as any sort of substitute for them. A Statement of Ethics should be designed as a tool to remind you of the core ethical principles and provide a positive affirmation of how you will apply those principles in a practical way. A Statement of Ethics is a way of giving life to the rules and to provide a starting point by which to measure your actions.

### For example

I will carry out my clients' lawful instructions to the best of my ability and skill however I will not act as a mere mouthpiece and will ensure my actions are always ethical.

In most cases the behaviour required of you is clear and has been expressed in rules that you must abide by. In other cases your behaviour might be governed by more general (but often no less important) ethical principles that are founded in common decency, your important and privileged position in society, or professional standards of practice (as opposed to formal written rules). In these cases it will probably take some time to decide whether and how you will apply them. As a result, your Statement of Ethics may change and develop over time.

### 5.1. Drafting your Statement of Ethics

It is very likely that you already have and act by a Statement of Ethics, but simply have not formulated it and committed it to writing. This is an essential exercise that all migration agents should undertake.

As a starting point you should consider the ethical duties that arise from your relationships with:

1. Your clients,
2. the system, including DIAC, the tribunals and courts and the Authority, and
3. others, including other migration agents, experts, and 'the profession'.

These duties are discussed in some detail in later chapters in the Toolkit and constitute the minimum standards of behaviour. They are generally found in the professional rules that regulate us and also in the common law. You will need to be very familiar with them and how they operate because your Statement of Ethics must be consistent with these duties.

**For example**

You have a fiduciary duty of loyalty to the client. This can be reflected in the statement:

*I will be loyal to my client and will not betray them by acting against their interests.*

You should then consider how you think you *should* act towards each of these people or institutions when there is no rule, the rule is unclear or the rules seem to conflict.

**For example**

I will treat everyone with dignity and respect and will be courteous in my dealings with DIAC, the tribunal and court, and the Authority.

I will respect the laws of the Commonwealth, the States and Territories, and ensure that my clients receive the full benefit of those laws.

My advice to clients will be honest and prudent.

There is some further discussion about these matters later in the Toolkit.

You should also include statements about your own personal behaviour and standards.

**For example**

I will not allow my personal prejudices and feelings to influence my work and will refuse to assist a client if I feel unable to show them complete loyalty and carry out their instructions.

Your Statement of Ethics might be quite long and detailed, or it might be succinct. What is important is that it provides a clear foundation from which you can begin to answer the question ‘what should I do?’. As we have already noted, this is not meant to replace the rules that govern the way you must practice and should operate in conjunction with those rules.

We suggest that you read the rest of the Toolkit and any of the resources you find helpful (your professional association may also have formulated some ethical guidelines or statements<sup>28</sup>) before returning to this section to start developing your own Statement of Ethics. Here is a Statement of Ethics that encapsulates the essentials.

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28. For example, see the Migration Institute of Australia, *MIA Members' Code of Ethics and Practice* (January 2011)

## Statement of Ethics

Having regard to our special position the reliance of our clients and the wider community on our specialist knowledge we hereby commit ourselves to the following ethical principles:

- I will be accountable to my clients and will carry out their lawful instructions to the best of my ability and skill; however I will not act as a mere mouthpiece for my clients and will ensure my actions are always ethical.
- I will always show loyalty to my clients and will not betray them by acting against their interests.
- I will not allow my personal prejudices and feelings to influence my work and will refuse to assist a client if I feel unable to show them complete loyalty and carry out their instructions.
- I will always act with competence and diligence or not act at all.
- I will always act honestly and in a way that instils a sense of trust in my clients and all those I deal with. I will always treat my clients fairly and ensure that they are comfortable and confident in their instructions.
- I will keep confidential all information provided to me by my clients and will always act with discretion in relation to their affairs.
- I will give my clients the benefit of everything I know that could assist them achieve their objectives.
- I will take responsibility for all my actions and be accountable to my clients for everything I do.
- I will always respect the laws of the Commonwealth, States and Territories, and ensure that my clients receive the full benefit of the law.
- I will be courteous and respectful in dealings with other practitioners, the Authority, DIAC Courts and Tribunals.
- I will exhibit high personal moral and ethical standards and will take care to ensure my decision making is ethical.

## 6. The framework within which ethical principles must be applied

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## 6. The framework within which ethical principles must be applied

In addition to having a methodology for ethical decision-making and knowing what ethical principles you will abide by, you also need to understand the framework within which that methodology and those principles will need to be applied. This is important because this broader framework will influence how you act and approach your ethical decisions.

This means understanding:

- the importance of the immigration system to Australia
- how migration agents are perceived in the community and the history of registration
- that registration as a migration agent is a privilege
- what it means to be a fit and proper person and a person of integrity
- what you do and how important your role is
- the role and tenets of the professional association of which you are a member, and
- what the Authority's role is.

### 6.1. The importance of the migration program to Australia

When considering how you might act in a particular situation, the advice to be given to a particular client, or how you will approach your work as a migration agent, it is important to remember that the work you do is just one part of an entire system that is designed to work for the benefit of Australia. The migration program is the subject of extensive planning and its purpose is to regulate the entry and stay of non-citizens in Australia in a way that will be to the benefit of the society as a whole. This means that there will be people who are simply not eligible for visas and for whom the only answer is that there is nothing that can be done to assist them. This is a difficult aspect of our work and one that places pressure on migration agents to 'try to find a way' to assist all clients. As we have discussed, there is no duty on you to take every case and there will be situations where you will need to say that there is nothing to be done.

### 6.2. How migration agents might be perceived – a bit of history

A random search of words 'migration agent' and 'shark' will give you a not insignificant number of hits. Here is just one comment selected at random that will give you a flavour of what some potential clients think of migration agents.

*‘Unfortunately I have also been less than impressed with our agent, who I feel has shown a severe lack of knowledge with our application. I think you need to talk to several of these agencies first and ask specific questions about the application process regarding your trade or profession. If they just continue with their sales pitch then run a mile, if they show knowledge of previous cases with your trade/profession then they might be worth considering, and remember to check prices as these can vary. I think some agents are professional and knowledgeable while others are greedy sharks after as much of your money as possible.’*

Not all clients feel this way, but it is likely that many Australians have some suspicion about what migration agents do and how they do it. It is very important that we do nothing to feed these suspicions and everything to allay them. This is why you need to know a bit about the recent history of the profession before you can understand why the development of professional ethics for migration agents is so important and why each migration agent needs to play a role.

### 6.2.1. Where did the registration of migration agents come from?

The regulation of the migration industry in Australia is by no means a new concept: provisions aimed at regulating migration advisers were initially introduced over 60 years ago under the *Immigration Act 1948*. The introduction of the *Migration Act 1958* saw further regulation of migration advisers who were licensed upon giving notice to the Secretary of the Immigration Department of their intention to practice. By simply notifying the Secretary of an intention to act as a migration adviser, the migration adviser was allowed to practice, unless the Minister established that they were not fit and proper to continue.

In 1988, the Department of Immigration Local Government and Ethnic Affairs established the Accredited Agent Scheme (‘AAS’) which provided accredited agents with a role in processing applications as part of the Business Migration Program. A visa application certified by an agent accredited under the AAS received priority handling by the Department of Immigration Local Government and Ethnic Affairs however, this was limited to applications under the business migration program.

The move to the current regulatory scheme was borne out of the 1989 codification of migration law, which was the first of many significant legislative amendments to Australia’s migration program. Whilst the 1989 legislation provided for a greater measure of regulatory control over migration advisers, there continued to be reports of unscrupulous and incompetent advisers.

#### **Such conduct reportedly included:**

- agents having been paid to lodge applications and then failing to do so
- lodging applications without paying the prescribed fees thereby invalidating the application
- lodging applications out of time which adversely affected the application
- holding passports as security and then demanding extra payments, and
- agents providing incompetent advice due to a lack of ‘even rudimentary knowledge’ of the Migration Act and Regulations.<sup>29</sup>

In response to increasing concerns about the conduct and competence of persons providing immigration advice and assistance, the Migration Agents Registration Scheme ('MARS') was established in September 1992. The principal object of the MARS was to protect migration advice consumers against professional misconduct and to ensure that consumers could have access to affordable and quality advice. The Scheme also created the Migration Agent's Registration Board to regulate the migration industry, which was in turn administered by the Secretary of the Department of Immigration and Ethnic Affairs (as it then was).

In March 1997, as part of the Commonwealth Legislative Review Program and in response to the above report, the Department of Immigration conducted a further review of the Migration Agents Registration Scheme with a recommendation that the migration advice industry move to voluntary self-regulation through a period of statutory self-regulation. In March 1998, the Migration Institute of Australia was appointed as the Migration Agents Registration Authority (MARA) to administer the relevant provisions of the Migration Act and to undertake the role of the industry regulator.

A further Deed of Agreement was signed between the Australian government and the MIA in 2003 to enable the MIA to continue to carry out the statutory functions of MARA for the period to March 2009, with a further review of the regulation arrangements scheduled to occur by June 2008.

In 2007-08 an External Reference Group chaired by Hon John Hodges conducted a final Review of Statutory Self-Regulation of the Migration Advice Profession that led to the creation of the Authority, which commenced operations on 1 July 2009. We will return to the Authority and what they do in a bit more detail later in this chapter.

### 6.2.2. Where did the Code of Conduct come from?

The Code of Conduct did not emanate from migration agents themselves but was drafted following consultations with a number of industry stakeholders including the Attorney-General's Department, the Department of the Prime Minister and Cabinet, the Trade Practices Commission, the legal profession, the Immigration Advice & Rights Centre, the Refugee Advice and Casework Service and the Australian Council of Social Service.<sup>30</sup>

The Code has been amended a number of times and further changes will be necessary in the future. This is normal and to be expected (in fact encouraged). The Code must be adaptable as it reflects the fact that professional standards can change over time and that it is never possible to foresee everything that might be needed to ensure professional and ethical conduct. For this reason, it is important to see the Code as an attempt to set the minimum standards expected of you. You must comply with it, but where it is vague or silent this does not mean there is no reason to act ethically, nor does it prevent you from setting higher standards upon yourself.

The history of the regulation of migration agents and the development of the Code is important for all agents to bear in mind when considering why we should act ethically. It shows us that if we don't choose to act ethically, others will force us to do so. If self-regulation is the goal, then all migration agents will need to demonstrate that this is deserved.

It is also important to remember that registration as a migration agent is a privilege and not a right, and this privilege<sup>31</sup> brings with it certain responsibilities to act in the way our society expects of us. How these responsibilities interact with our duty to our clients is discussed in more detail in chapter 8.

## 6.3. Fitness, propriety and integrity

A person cannot be registered as a migration agent (or remain registered) if the person is not a fit and proper person to give immigration assistance<sup>32</sup> or not a person of integrity.<sup>33</sup>

The term 'fit and proper person' has been considered by the High Court and at length by various tribunals, including the Administrative Appeals Tribunal ('AAT')<sup>34</sup> in the context of migration agents and others requiring registration.

### **The term has been found to include:**

- honesty, knowledge and ability<sup>35</sup>
- soundness of moral principle and character<sup>36</sup>
- conduct, character and reputation,<sup>37</sup> and
- diligence and professionalism.<sup>38</sup>

It goes without saying that a failure to demonstrate any of these characteristics will mean that you might lose your registration as an agent.

This is important to our understanding of ethics, because your decisions about what you should do in a particular situation will generally be determined by your underlying character. At the same time, those decisions will often be the very things that reveal your true character.

### **For example**

Have you ever received too much change in a shop, or a restaurant bill with some items accidentally missing? What did you do? If you kept the money, or stayed silent, this was dishonest.

Similarly, if you have charged a client for work you have not done, or kept a deposit when you were not really entitled to it, this was dishonest (perhaps even criminal).

You will see that there is a link between determinations of fitness or integrity and ethics, but they are not the same thing. It may be that no one would ever know that you kept the change, or overcharged for work you did not do, and so your fitness or integrity might not be questioned, but this does not make your conduct right: It was still unethical.

This is important when you come to think of the framework in which you make ethical decisions as a migration agent. Those decisions should not be made on the basis that they are only important if the Authority finds out. Good ethical choices are made because they are fundamentally right, not because someone is watching. That said it is worth bearing in mind that unethical behaviour is not likely to go unnoticed for long.

## 6.4. The Authority's role in ensuring migration agents act ethically

The Office of the Migration Agents Registration Authority is empowered by the Act to ensure that:

- consumers understand their rights and agents understand their obligations under the regulatory framework
- only suitable persons are registered as migration agents and unsuitable persons are refused registration or re-registration
- registered agents maintain appropriate knowledge to enable them to provide accurate advice to consumers, and
- all complaints about the services of registered or formerly registered migration agents are appropriately addressed.

Consumer complaints about registered migration agents are investigated by the Authority's Professional Standards and Integrity Section, which is also responsible for deciding actions on complaints and, where appropriate, issuing warnings and sanctions.

Sadly, it is not that uncommon for a complaint to be filed against a migration agent. In 2009-10 there were approximately 500 complaints. Although very few of these resulted in a formal finding against the migration agent or in a warning or sanction the number of complaints should be of concern to all migration agents.

It is worth noting that complaints are not only lodged by unhappy clients. Complaints are also made by DIAC, other migration agents and tribunals and courts. Other professional associations, organisations and Members of Parliament also make complaints against migration agents.

Significantly, in 2009-10, 70.7% of complaints related to the Standards of Professional Conduct set out in Part 2 of the Code. Of these complaints more than 55% per cent related to competence.

- 15.9% related to integrity
- 8.4% related to following a client's instructions
- 4% related to acting in a timely manner
- 3.9% related to prospects of success
- 2.8% related to conflict of interest
- 2.3% related to the provision regarding the submission of an application without documents
- 1.8% related to lodging vexatious applications
- 1% related to the requirement to maintain a professional library
- 2.4% related to advertising (i.e. false or misleading advertising, requirement to include Migration Agents Registration Number, not to imply relationship with DIAC/ the Authority)
- 0.6% related to the obligation not to mislead or deceive the Office of the MARA
- 0.6% related to the provisions to not hold out to procure particular decision
- 0.4% related to the requirement to not imply relationship with the Minister or government
- 0.2% related to the obligation to notify change of registration details.

**Some examples of unethical conduct could include:**

Artificially inflating or 'padding out' a client invoice to reflect work that you have not done for the client.

Holding yourself out to be an expert in an area of which you have little or no experience.

Promising your client that their application will be processed by DIAC within an unrealistic time frame.

Guaranteeing that the application will be approved if you handle it.

Asking a colleague to sign into and attend a Continuing Professional Development seminar on your behalf and then seeking to claim the CPD points.

## 6.5. The role of the Administrative Appeals Tribunal and the Courts

The Administrative Appeals Tribunal (the AAT) has a merits review role over decisions made by the Authority in relation to the registration and discipline of migration agents. The Federal courts can review decisions of the AAT. Few matters make it to the AAT or the Federal courts in any year but the cases are important in helping to frame our understanding of how the Code might be construed and applied and what type of conduct will be seen as unethical or demonstrating that an agent is otherwise not a fit and proper person.

Whilst it may be obvious that criminal convictions and behaviour will likely lead to the AAT and courts<sup>39</sup> finding that an individual is not a fit and proper person for the purposes of registration, an individual's general conduct and demeanour during the course of the Authority investigations may also have some bearing. For example, in the case of *Mottaghi*,<sup>40</sup> the AAT also deemed the individual's 'disparaging attitude' to the MARA (as it then was) and 'indifferent attitude' to the tribunal to be relevant considerations in determining whether the individual was fit and proper person for registration.

Examples of other behaviour which has led the AAT to find that a person is 'not fit and proper' for registration include:

- A series of complaints against a migration agent, including failing to submit supporting documents as provided by client leading to visa refusal, failing to lodge a review application in time, failing to keep clients updated regarding the status of applications, failing to pay money to DIAC which was paid to the agent for the purposes of paying DIAC visa charges.
- Repeatedly lodging applications without the required documentation (in some instances failing to submit key time of application documentation leading to the application being deemed invalid and the client becoming unlawful).
- Not having a sound working knowledge of the Migration Act and Regulations – failing to know or identify whether an occupation was on the Skilled Occupation List, failing to lodge review application within legislative timeframes.
- Encouraging a client to invest \$200,000 in the agent's own business for the purposes of an application for permanent residence under the Business Skills category and then failing to register the client's interest in the business as a shareholder.

- Failing to refund the payments to the client as per the 'no win no fee' provisions in the contract.
- Blatant disregard for or significant degree of indifference to the law.
- Fabricating invoices to falsely lead the client to believe that the migration agent had enrolled the client in a college.
- Failure to respond to repeated requests from the Authority and to requests for information from the agent's clients.
- Orchestrating explicit photographs in support of a RRT application.

## 6.6. The nature of migration agent practice

The nature of your practice can impact on how you approach an ethical decision.

### 6.6.1. Sole practice

If you are one of the 77 per cent of migration agents who work alone, then you are probably at some disadvantage when it comes to acting ethically because you may have no colleagues that you can turn to for guidance or to seek another view about how you should act.

You will have noticed in the methodology that it will be important for you to discuss difficult ethical problems with others. Not doing so could lead to bad ethical choices. If you have not already done so, you will need to develop some strategies to overcome the limitations you may have as a result of being in sole practice.

#### Some options might be

- Join a professional association.
- Form a group of like-minded agents with similar interests and practices (this will involve you overcoming any fear you may have that all other agents are in competition with you and not to be trusted).
- Engage an ethics consultant (a senior migration agent or lawyer) to help you answer any ethical questions that are too hard to handle alone (this will cost you money).
- Enter into a mentoring agreement with an experienced agent.

### 6.6.2. Working with others

If you practice with others, for example in a firm or partnership you may have the advantage of numbers, and the ability to share experiences (always bearing in mind your duties of confidentiality), but you may find that this form of practice will have other impacts on your ability to act ethically.

#### For example

If you are an employee or partner you will have certain obligations and loyalties to your employer or partners. Whilst these are important, they can never override your duty to act ethically. This will be difficult because your loyalty and duty to the people you work with or for, will inevitably impact on your decision-making. You will want to please them and not upset them and act in accordance with their direction. This is no defence to unethical behaviour.<sup>41</sup>

### 6.6.3. Your client base

The type of clients you represent can also impact on your decision-making. Many clients are a pleasure to work for, others can be demanding, difficult, rude, manipulative and in desperate need. These clients all have the capacity to make you feel guilty about acting in a certain way, or not acting in another way.

#### **For example**

A corporate client might use the amount of work they give you as a way of putting pressure on you to cut corners or help them to 'sneak one past' the Department by overlooking something you know is a problem for the case or 'tinkering' with a job description or resume.

A community member or friend might use that relationship as a way of pressuring you to do something that you are not comfortable with. There is always a danger in acting for family and friends because your judgment will be impaired by the relationship and your desire not to upset them. You should consider very carefully whether you can really act in the best interests of friends and family and whether you will be able to be objective.

Desperate clients can affect you emotionally and this can affect your judgment. There is a natural desire to want to help a person who is in need. Your desire to assist a person must not affect the decisions that you make about what is best for them or what is ethical. These cases are difficult because there is a strong temptation to keep trying to assist the person to achieve some outcome. This is not necessarily wrong, but you must constantly remind yourself of your obligation to ensure that the client is not misled about the prospects and that you are not profiting from their desperation.

If you work in the not for profit sector you are much more likely to be helping vulnerable clients in the most difficult of circumstances. The fact that you are not being paid for the work removes any motivation to take advantage of their circumstances, but you still need to take care that your desire to assist them does not affect your ethical standards of behaviour.

## 6.7. What is your role as a migration agent?

This brings us to a discussion about what is possibly the most important aspect of the framework within which you will make ethical decisions: the nature of your work, the relationships involved and the importance of this work to your clients and the community. A sound ethical approach to your work requires you to understand that what you think, say, and do and how you are perceived – are all important to your clients and to the broader community. You must be truly cognisant of the very important role migration agents play in our society and the nature of the work that you are doing.

### 6.7.1. The importance of immigration assistance

Your registration allows you to provide immigration assistance to clients. The scope of this work is really quite broad and includes:<sup>42</sup>

- Advising and assisting a visa applicant, cancellation review applicant, nominator or sponsor in relation to a visa application, nomination, sponsorship or a review process.

- Preparing for proceedings before a court or review authority in relation to the visa application or cancellation review.
- Advising about, preparing, or helping to prepare, a request to the Minister to exercise his or her personal powers.

Quite clearly this work is of great importance to clients and those around them, including their friends and families. It can have an impact on business and the ability of a sponsoring business to fulfil important contracts or supply customers. It is also important to DIAC and the courts and tribunals which all have an interest in ensuring that the system is not abused and that they are able to carry out their functions in as efficient a manner as possible. Your work is also of importance to the Australian community which relies upon the migration system to help build Australia's future through the well-managed movement and settlement of people to fill skills shortages, help reunite families and fulfil Australia's international human rights obligations.

It is for that reason that clients will place a great deal of trust and faith in your ability and in your commitment to do what is in their best interest. At the same time, DIAC, the tribunals and courts will rely upon you to act correctly and not frustrate the process. The Australian community will have an expectation that you will do your part to ensure that the migration system maintains its integrity.

### 6.7.2. Relationships

This is why you need to really understand very clearly the nature and scope of the relationships that you form when you carry out your work as a migration agent. You will have relationships with:

- clients
- DIAC
- the tribunals
- courts
- the Authority
- other migration agents and professionals
- professional associations
- your employer/employees, and
- the community.

Each relationship carries with it certain responsibilities (duties) that will govern how you must act in certain circumstances. At the same time, each relationship also comes with certain expectations about how you *should* or *could* act in those same circumstances. In some situations there will be a conflict between the duties you owe. More commonly there will be a conflict between a duty you owe and an expectation another person might have of you.

Making good ethical choices requires that you understand exactly how those relationships work, what duties arise and what expectations there might be about how you will act. Each of these relationships, the duties and expectations will be discussed in some detail in the following chapters.

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29. Hon G Hand, Minister for Immigration, Local Government & Ethnic Affairs, *Parliamentary Debates* (Hansard), House of Representatives, 27 May 1992 (2937).
30. Ibid at p139.
31. Although lawyers may see registration as a migration agent as an unnecessary burden, few lawyers would argue with the fact that they are in a privileged position in society and that this brings with it responsibilities.
32. Section 290(1)(a) of the Act.
33. Section 290(1)(b) and s303(1)(f) of the Act.
34. Here, the AAT has followed the reasoning of Chief Justice Mason in *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, and the decision of the High Court in *Hughes & Vale Pty Ltd v State of New South Wales* [1955] HCA 28; (1955) 93 CLR 127 at 156.
35. *Hughes & Vale Pty Ltd v NSW (No 2)* (1955) 93 CLR 127 at 156, *Re Lachmaiya & DIEA* (1994) 19 AAR 148 and *Re Lilienthal & MARA* [2001] AATA 797.
36. *Re Peng and DIMA* [1998] AATA 12543, 19 Jan 1998, *Mottaghi and MARA* [2007] AATA 60.
37. *Australian Broadcasting Tribunal v Bond and Ors* [1990] HCA 33; (1990) 170 CLR 321 at 380; *Commissioner for the Australian Capital Territory Revenue v Alphaone Pty Ltd* [1994] FCA 1074; (1994) 34 ALD 324 at 328, followed in *Amin and Migration Agents Registration Authority* [2005] AATA 257 (24 March 2005).
38. *Statos v Tax Agents' Board (NSW)* (1990) 90 ATC 4950 at 4959 [1990] FCA 379.
39. For example, see, *Statos v Tax Agents' Board (NSW)* (1990) 90 ATC 4950, [1990] FCA 379, *Re Peng v Department of Immigration and Multicultural Affairs and AAT* (1998) AATA 12.
40. *Mottaghi v MARA* [2007] AATA 60.
41. In *Liu and Migration Agents Registration Authority* [2004] AATA 1282 (2 December 2004) the AAT rejected an agent's defence against disciplinary proceedings on the basis that he/she was only doing what his/her employer had asked.
42. See s276 *Migration Act* 1958. See also s277 for the definition of 'immigration legal assistance'.

## 7. The client relationship

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## 7. The client relationship

Perhaps the easiest way to start thinking about your ethical duties to a client is to consider carefully the relationship that is formed when you agree to act as a person's migration agent. That relationship is a special one and it has certain distinctive characteristics.

- You have knowledge and expertise and are registered as a fit and proper person to help the client.
- The client has little or incomplete knowledge, or is otherwise depending on your expertise to assist them. They will often face language, cultural and gender barriers when trying to deal with the system (and even with you).
- You will probably enter into a legal contract (or in the case of community workers at least some agreement) with the client that will create certain expectations about what you will do, when you will do it and how you will do it.
- In addition to the client with whom you have contracted, you may be deemed to form other client relationships because of the broad definition of who is a client under the *Migration Agents Regulations*.<sup>43</sup> This will force you into a situation of dual representation (having two clients) whether or not you want this to happen.
- The client will provide you with information that is personal and confidential because you need this in order to help them achieve an outcome. In return the client will expect you to keep that confidence and share with them any information that you have that will affect their interests.
- DIAC will deal with you on the basis that everything you do and say on behalf of the client is done on their instructions and that you will relay to the client any information given by DIAC.
- You are likely to be dealing with other people and even other clients in a way that might impact on the client.
- The relationship is likely to end at some point and you will not be able to 'un-know' all of the things that you have learnt about the client.

These characteristics give rise to certain legal duties and are deserving of certain ethical behaviour by you towards the client. As you know, in some cases these duties are imposed by the law, in other cases it is simply the right thing to do, or the preferable thing to do.

### 7.1. Dual representation

Before going further we need to say something about acting for more than one client at the same time in relation to the same matter (dual representation).

Dual representation is something that lawyers are very used to dealing with as it occurs in many cases.

#### For example

If you have ever purchased a house with another person and have had the same lawyer (or conveyancer) act for you, then you have had experience of dual representation.

As a result, the issues associated with dual representation are the subject of clear rules that govern how an Australian legal practitioner should act in these situations. Lawyer migration agents should be aware of these rules and how they must be applied.

Dual representation also occurs in many migration cases.

#### **For example**

If you represent both the visa applicant and the sponsor in relation to a 457 visa, a partner visa, a parent visa etc.

Dual representation occurs even if you do not have a separate contract with each party (for example the 457 visa applicant and the employer sponsor) or if you are only being paid by one party (for example, the sponsoring spouse). In this case, even though you may only have a contractual relationship with the person who is paying your fee, you still owe obligations to the other person. These obligations arise from the law of tort, and the person might be able sue you if you fail to act with the required standard of care even though you have no contract with them. Such a person is also your client for the purposes of the Act and Regulations.

#### **The *Migration Agent Regulations 1998* define a client as**

“any person to whom the agent agrees (whether or not in writing) to provide immigration assistance.”<sup>44</sup>



This would normally include both the visa applicant and the sponsor unless one of those people is not assisted at all, or is assisted by another migration agent. This means that the Code will apply to your conduct in relation to both clients (together and separately). It may also be that you will have fiduciary duties to both of them. From an ethical point of view it should not matter to you who is paying your bill. What is important is the nature of the relationship that you have entered into with each of them and what would be expected of you as a result: what do they understand your position is in relation to each of them and what should they expect as a result?

## 7.2. Doing right by the client

There are obviously strong ethical reasons for doing the right thing for all clients. You have created a relationship in which the client is relying on you to do your best for them and they depend on you to do what you have said.

#### **For example**

- It would not be right for you not to do your best for them, or to somehow profit out of the relationship (beyond your agreed fee).
- It would not be right for you to enter a contract knowing that you do not have the capacity (for whatever reason) to do the work, or that the outcome you have promised is not possible to achieve.
- It would not be right or fair for you to agree to take on a client if you know or suspect that this will mean compromising your duties to another client, or that you will not be able to give your undivided loyalty to the new client or keep their confidence, unless all of the clients are aware of this and agree to it.
- It would not be ethical for you to lie to the client.

You will see that many of these ethical principles are expressed in clear rules that have developed over time and which will be discussed in more detail below.

### 7.2.1. Fiduciary duties

When you agree to act as a migration agent for a client you agree to act in the interests of that person and the client relies upon you to act in their interest. During the relationship you will make decisions, provide advice and exercise power that will affect their interests in a material way. In most cases you are doing more than just agreeing to lodge a form for them, you are ‘representing’ them in the true sense of that term. This is known as a fiduciary relationship.<sup>45</sup>

The relationship between a fiduciary (you) and a principal (the client) gives rise to various fiduciary obligations which are legally enforceable by the client in a Court. In the case of lawyers the principal fiduciary duties to a client are:

- the duty of loyalty,
- the duty of confidentiality,
- the duty to disclose to the client or put at the client’s disposal all information within the lawyers’ knowledge that is relevant in order to act in the client’s best interests, and
- the duty not to put their own or anyone else’s interests before those of the client.

It is not clear whether a migration agent would be found by a court to have exactly the same fiduciary duties as a lawyer, although there are many good reasons why this should be the case. In essence, a migration agent is effectively performing the same role as a lawyer when the agent gives immigration assistance. It might be safest to assume that these duties will apply and act accordingly.

### 7.2.2. Contractual duties

If your client is paying you, then you will have a contract with them that creates legal duties for each of you. The exact nature and extent of these duties will be governed by the terms of the contract. The terms may be written or implied.

It will be implied in the contract (if it is not stated) that you will act in the client’s interest to carry out the work you have agreed and that you will do so in a way that is competent and diligent. The contract will also imply a duty of confidentiality unless that has been excluded or modified.

A contract of this type also imposes an obligation to keep the client informed of everything that you know will be of assistance to them in relation to matters within the scope of what you have agreed to do for them.<sup>46</sup>

### 7.2.3. Tort (negligence)

As you have held out to the client that you are able to do the work, a court will hold you liable for any loss that is caused to a client if you are negligent in the way that you carry out the work. This imposes on you a duty to exercise skill and care.<sup>47</sup>

## 7.2.4. The Code and other rules

By now you will see that the rules that are imposed on you by the Code of Conduct (and by the various legal practice rules) are really a reflection of these fundamental legal duties and obligations. They reflect an attempt to codify and explain these rules in a way that is directly relevant to practitioners. As with any codification, there may be areas where the duties and obligations have not been dealt with as fully or clearly as they could be, or have not been covered at all. It is for this reason that professional rules and codes need to be seen as only the starting point for any ethical decision that you need to make.

Duty	Code of Conduct
Be loyal and act in the client's interest and on their instructions	2.8, 2.17, 2.19, 2.21, 10.1
Act competently, diligently and prudently	2.3, 2.4, 2.5, 2.20(a), 4.1, 4.2, 8.1, 8.2, 2.3A, 2.8, 2.18, 4.6, 6.3, 9.3
Be honest	2.6, 2.7, 2.8, 2.9A, 2.10, 2.12, 2.13, 2.14A, 2.16, 4.5, 5.3(s), financial duties, 10.2, 10.5
Be fair	2.15, 2.20(b)-(d), 3.3, 3.6, 4.5, 5.1, 5.3(b)(c), 6.1, 9.1, 10.4, 10.6, part 11
Make the client aware of everything you know that is relevant to their case	2.8 (c)-(d)
Keep the client's information confidential	3.1, 3.2
Avoid conflicts of interest and conflicts of duty	2.1A, 2.1B, 2.2

## 7.3. Loyalty and acting in the client's interest

Perhaps the hardest ethical issues for migration agents and lawyers alike arise in relation to the duty of loyalty and what it means to act in the client's interests. The duty of loyalty requires you not to do or say anything that would amount to a betrayal of the client. You must not do anything against the client's interests.

In addition to your general fiduciary duty of loyalty, the Code establishes an overriding duty on you to act in the *lawful and legitimate interests* of the client.<sup>48</sup> The Code also requires you to act in accordance with your client's instructions.<sup>49</sup>

The importance of your duty to the client is also recognised in other parts of the Code that make other obligations to act in a certain way subject to the instructions of your client.

#### For example, clause 2.17 of the Code states

If an application under the Migration Act or the Migration Regulations is vexatious or grossly unfounded (for example, an application that has no hope of success) a registered migration agent:

- (a) must not encourage the client to lodge the application; and
- (b) must advise the client in writing that, in the agent's opinion, the application is vexatious or grossly unfounded; and
- (c) if the client still wishes to lodge the application – must obtain written acknowledgment from the client of the advice given under paragraph (b).

#### And clause 2.21 of the Code states

A registered migration agent must not submit an application under the Migration Act or Migration Regulations without the specified accompanying documentation. For example, in a marriage case, threshold documentation would include a marriage certificate and evidence that the sponsor is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, without which assessment of the case could not proceed (unless the agent has a reasonable excuse or the client has requested the agent to act despite incomplete documentation).



The main ethical issues arise when determining how to balance these duties and obligations with your responsibility to act ethically and with your duties to others.

#### For example

What if the client wants you to do something that is unlawful, or not a legitimate use of the migration system?

What if the client wants you to do something unethical?

What if the client wants you to do something against your own conscience?

What if by helping one client you are hurting another?

These questions are difficult because they test the boundaries of the relationship that you have entered into with the client. They also create a legal problem for you because you will need to ensure that you are not accused of failing to carry out the instructions of your client. These are very good reasons why you should establish these boundaries with the client before you agree to act for them. The client should be in no doubt about what you are prepared to do and what you are not prepared to do. As a result they may choose to go elsewhere, but that is better than having them believe that you will do something for them that you cannot or will not in fact do.

### 7.3.1. The lawful and legitimate interests of the client

On the face of it, the Code would appear to allow you to do almost anything for a client provided that it is lawful and done on the client's instructions. Such a view is very much in accordance with the classical view of the role of an advocate:

***An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them to himself, is his first and only duty: and in performing this duty he must not regard the alarm, the torments, the destruction which he brings upon others.<sup>50</sup>***

This view of the relentless advocate who must pay no regard to any interests other than those of his client has been significantly tempered for lawyers by an increasing recognition of their duties to the court and the administration of justice.

Lawyer migration agents have overriding duties to courts (and tribunals) and to the administration of justice. The limits of these duties and how they operate in practice are discussed in more detail later. These overriding duties mean lawyers may not be able to do everything a client asks them to do, even though they also have a duty to act in the best interests of their client.<sup>51</sup> The Law Council of Australia has explained the limit this way:

***Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise a breach of the law.***

Migration agents who are not admitted lawyers are not subject to any express obligation to courts or to the administration of justice,<sup>52</sup> but this does not mean that you can, must, or should do everything that a client asks you to do. Clearly you should not engage in conduct that would breach the law, or defeat the ends of justice and you must act in the lawful and legitimate interests of your client.

So what does it mean to act in the lawful, legitimate, or best interests of a client and how do you balance your ethical obligations and other duties? It is at this point that you need to recall that acting in accordance with the law is not always the same as acting ethically. The fact that a client (or you) *can* legally do something is not the same as saying that they (or you) *should* do it. Here are some basic principles that may help you decide what to do when confronted with this problem.

1. Your client is entitled to competent and independent advice including advice about all lawful options and their consequences. There is no *duty* on you to advise a client about a course of action that is not legal, and you must certainly never encourage or be involved in an unlawful act. You should, however, explain to a client the consequences of a course of action that is not legal if this is an option they are contemplating or have already engaged in.

#### **For example**

You would have no duty to advise a client who is in Australia on a three month visa and has just commenced a de facto relationship that an option would be to simply remain in Australia unlawfully for two years and then seek a partner visa. However, if the client was already unlawful and came to seek advice about the options for a partner visa you would need to explain to them that the regulations permit an unlawful non-citizen to make such an application in certain exceptional circumstances including where the relationship has continued for at least two years.<sup>53</sup> You would also need to fully explain to the client the consequences of remaining unlawful in Australia.

2. Your client is not *entitled* to do anything at all to achieve a result. What a client wants to do, and what they should do, is not the same thing. Whilst you have a duty to do your best for a client, you have *no duty* to suspend your own judgment about whether the client's proposed course of action is appropriate or in their interests.

#### **For example**

A client might ask you to help them apply for refugee status in order to extend their stay in Australia. Although they are legally entitled to make the application, you are under no duty to agree to act for them if you do not believe that this is in their interests or you do not believe it is an appropriate application.

A client might want to lie to DIAC or a tribunal. You must not encourage or assist them by making the statement, but you should also not sit idly by and allow the lie to be advanced. You should warn the client against this course of action and, if they insist on pursuing it, decide whether you should continue to act for them. This is discussed in more detail in the next chapter in relation to the duty of candour.

3. You should be willing and prepared to advise a client about what they *should* do in any given circumstance in order to help the client choose a 'correct' course of action. However, your advice about what the client should or should not do must be based only on the law and your professional experience and not on your own personal feelings or prejudices.

#### **For example**

You should explain to a client that they should reconsider submitting a certain document because you have concerns that it appears irregular or is inconsistent with other instructions they have given to you and so might raise the concerns of the Department and it would not be right to lodge it unless it is genuine. You should not reach this conclusion because you think the client looks dubious or you have an unfounded belief that they cannot be trusted.

4. If you feel that the course of action the client intends to take is inappropriate or against their own interests (or those of another, such as a child) you do not have a duty to assist the client to pursue such a course of action. If the course of action will involve you in acting in breach of another duty or you consider it unethical, then you should not assist the client and may have to cease to act for them.

#### **For example**

If after explaining your concerns about a document, the client insists upon lodging it then you should carefully examine your own state of mind about the document. If you still believe, on proper grounds, that the document is false, then you should not lodge it even if this means losing the client.

5. If the client asks you to act in a way that is contrary to your own conscience or beliefs (even if that is as a result of some personal feeling or prejudice) then you should consider whether you will be able to provide the client with your undivided loyalty and full diligence and, if not, you should not act for the client.

### For example

If you believe that homosexuality is morally wrong, then you should not take on a partner case involving a same sex couple unless you are sure that your beliefs will not impact on your relationship with the client and your diligence to their matter. This is a difficult decision to make, but consider what your client would decide to do if you were honest enough to tell them your beliefs and let them decide whether they wanted you to be their migration agent?

If you feel uncomfortable about lodging a visa application because you think that the applicant is doing so for an illegitimate reason, then you have no duty to do so. There is no obligation to agree to take on a client or to do whatever they ask of you. Subject to your contract, you have the right to refuse to act. Obviously, if you have agreed to act and time is of the essence, then you will need to consider how your decision will impact on the person and take this into account.

## 7.3.2. Factors that may impinge on your duty to act in the client's interests

There could be barriers which may impinge on your ability to carry out your client's instructions. You will need to ensure that you have proper systems in place to overcome any such barriers and to ensure that you are able to communicate without any hindrances.

One obvious barrier is caused by language differences.

### Clause 3.6 of the Code states

A registered migration agent must ensure that clients have access to an interpreter if necessary.



You will be tempted to use the services of friends and family to act as interpreters in order to save costs and make things more efficient. The client might prefer this to occur. You should be careful to ensure that any such arrangement does not impact on your ability to understand the informed instructions of your client. You should ask yourself how you will know whether the interpreting or translation is accurate unless you use a NAATI accredited interpreter. Obviously this will have cost implications and you should ensure that this is clearly explained to the client at the time they sign the statement of services.

### For example

The client has asked her sister to act as the interpreter. You previously acted for the sister and she thinks that you can do no wrong. The client's case is much more difficult and the advice is cautious.

Are you sure that the sister will translate your advice or simply tell the client that you are fabulous and that she is sure that you can help her?

Are you sure that you have done enough to protect the client's interests or are you simply taking the easy way out for your own benefit and convenience?

Other factors such as gender and cultural issues are all matters that might impact on your ability to obtain and act on the client's legitimate instructions. This is particularly a problem in cases involving dual representation.

### For example

You are acting for a husband and wife and their two children who are all unlawful. So far you have only ever met the husband. He instructs you to lodge an application for Australian Citizenship for the eldest child who is now ten years old and to lodge refugee applications for the rest of the family in order to eventually access the Minister. He tells you that he will arrange to obtain his wife's signature for the application as there is no need to explain things to her because she is a woman and will not understand.

Could you lodge an application for the wife without explaining to her the consequences of such an application, including the fact that she and her other child may be required to depart Australia if the request to the Minister is unsuccessful?

How would you ensure that you have complied with clause 2.17 of the Code?

In each case you must make sure that you have the informed and clear instructions of your client (or clients). Without these it is simply impossible to act in their legitimate interests as you cannot know what they are. Obviously a parent can give instructions on behalf of a minor.

Where a client has asked you to deal with another person on their behalf, you must ensure that your ethical obligations to act in their interests are not compromised by the request. You may feel that you should use a qualified interpreter to take any complex instructions or to give complex advice or to sign documents. You might also feel that it is necessary to check instructions with clients if they have been given to you by another client or a third person (at the client's request).

## 7.4. Competence, diligence and prudence

Your client will rely upon you to:

1. be competent by knowing what you are doing,
2. be diligent by doing their case as carefully and quickly as you can, or in accordance with the time-frame that they require, and
3. be prudent by understanding the importance of their case to them and be conservative rather than rash.

Your failure to be competent, diligent or prudent could result in harm to the client. It would not be ethical for you to act for a client if you do not know what you are doing, or you cannot do it in an appropriate time-frame, or you are unable or unwilling to give their case the care it deserves.

Failure to act competently or diligently would also amount to a breach of the Code.

### Clause 2.1A(b) of the Code states

A registered migration agent must always:

- (a) ...
- (b) deal with his or her client competently, diligently and fairly.



Recent statistics indicate that 55.9 per cent of all complaints by clients related to alleged breaches of 2.1A(b)<sup>54</sup> and standards of competence.

### 7.4.1. Competence

Being competent means that you have the necessary ability, knowledge and skill to undertake and complete the client's case. Before agreeing to take on a case, you should ask yourself a number of quite confronting questions.

#### **Do I have the experience to handle this case?**

We all take on cases that are new and involve issues that we have not dealt with before. As you become more experienced, there are less 'new' cases, but there is always something to be learnt. You will never gain experience if you do not try to tackle new cases. Your level of competence will depend on a number of things including:

- your general background and other areas of study
- your level of work experience with immigration cases
- the number of years you have been practicing
- how many cases you have completed
- the amount of continual study and professional development you have undertaken to remain up to date, and
- the abilities of other migration agents you work with.

#### **Will I really be able to gain that experience as I go?**

Experience teaches us how to deal with new matters properly by conducting the required research into the law and policy and by checking with colleagues.

Whether you are able to do this will depend on a number of things including; how complicated the case is (the problem is you may not realise this when you start), its similarity to other cases you have done, your own ability to conduct research and your access to colleagues who are willing and able to advise you.

The fact that you may not be competent to handle all matters means that you will be called on to make a decision in each case whether you should agree to act for the client or refer them to another migration agent. If you decide to take on a case and you handle it incompetently this could result in a negligence action against you. Equally, the client would be able to seek compensation for the fact that you have not fulfilled your contractual obligations. A failure to meet the minimum standards of competence set by the Code could also result in disciplinary action. These are all things that you will want to avoid. But the decision about whether or not to agree to act for a client is as much an ethical one as it is a decision about risk. It is simply not fair to the client (and possibly to yourself) to take on a matter that you are not able to handle.

Clearly the decision is an important one to both the client and yourself (and potentially your employer or business partners) and should be subjected to careful analysis each time. At the beginning you may want to err on the side of caution and only take those cases that you feel confident and comfortable with.

You should always remember you have a legal obligation to maintain and improve your level of competence and maintain a library,<sup>55</sup> and to undertake continuing professional development.<sup>56</sup>

### 7.4.2. Diligence

The law will imply a duty of diligence and a failure to act in a diligent way would be a breach of your contract and could lead to a claim that you were negligent. The Code requires all agents to act with diligence.<sup>57</sup> The Code contains some particular examples.

### Clause 2.7 of the Code states

A registered migration agent must act in a timely manner if the client has provided all the necessary information and documentation in time for statutory deadlines. For example, in most circumstances an application under the Migration Act or Migration Regulations must be submitted before a person's visa ceases to be in effect.



Being diligent will normally include lodging a fully documented application whenever this is possible. If an application does not contain all of the information required for DIAC to make a favourable decision the application may be refused without further notice to you or the client.<sup>58</sup> Where a client is represented by a migration agent, DIAC would be entitled to expect an application to be complete unless there is some good reason why it is not. Not only is it diligent for you to ensure that an application is complete, it also assists DIAC to process applications as efficiently as possible which should improve processing times for all clients.

Being diligent is really as much an ethical matter as a legal one. When you agree to act for the client they will rely on you to carry out the work on their case in a careful and persistent way having regard to their particular circumstances and to any time limits. It is simply right that you should do so. This will require you to consider:

#### **Am I able to give this case the time that it deserves or am I too busy?**

This is always hard to judge. Just when you think that you are too busy to take any more work, a case finishes unexpectedly or a client decides to go elsewhere. If you do not have enough cases this will lead to financial pressures that can affect your ability to service other clients. It might mean having a frank discussion with the client about what they expect and how long they are prepared to wait – it may be that they are happy for you to find time. You may be planning a holiday or business trip and know that you will be away. You might know that you have another important case that will soon require a lot of work. These are things that you should take into account in deciding whether to take a new case.

#### **Do I want to give this case the time that it deserves?**

Do I care about the client and their case? If you don't care about the client at all, then probably the only thing motivating you is money. Money is no doubt important, and there is nothing wrong with wanting to make a profit from your work, but if money is the only thing that motivates your work, then the only interest you are likely to be serving is your own and you will find it hard to show the required level of diligence for the client's case.

If you cannot give a case the diligence it deserves, or if you don't want to, then you should not start on it and you should refer the client elsewhere. Agreeing to take on a case when you do not have the capacity to deal with it is unethical and a breach of the Code.<sup>59</sup>

Once you have agreed to act for a client you must continually remind yourself to be diligent and careful in all of your dealings with the client. This will be assisted by the requirement of clause 2.8(c) of the Code that you keep the client fully informed in writing of the progress of the matter.

### 7.4.3. Prudence

Being prudent involves more than just being careful about the work you do for the client. It involves having regard to the consequences of what you are doing and taking the time to make sure you are not putting the client on a course of action that they will regret later. Your clients will rely on your advice to make decisions that will affect their lives in a significant way.

**These decisions will nearly always involve a choice between alternatives:**

- Do I make an application or not?
- Do I choose this application or that one?
- Do I choose that pathway or this one?
- Do I seek review or not?

Ultimately your client will have to decide what to do and instruct you accordingly, but how you give the advice, and the confidence with which you express the likely outcome, is critical to the choice that the client will make. This is because the client is relying on you and trusts you not to mislead them.

In many situations it will simply not be possible to know the outcome because it will depend upon many things that are either unpredictable or changeable. In such cases you should be prudent in your advice so that the client can make a sensible decision.

**For example**

The client wants to make an application for a parent visa that may well fail because of a health concern. The client is from an Electronic Travel Authority (ETA) eligible country and has been visiting Australia for many years. The prudent course of action for the client might be to refrain from lodging the parent application and continue visiting on a tourist visa. The enthusiasm you show for the parent application will influence their choice.

The need to be prudent is an aspect of your duty to be fair and to provide a client with full and frank advice and is discussed in further detail below.

## 7.5. Honesty and trustworthiness

Your client will expect you to be honest and rely upon you to be trustworthy.<sup>60</sup>

Honesty is a fundamental ethical value upon which our society and our legal system operates. Being honest is morally correct and it could never be right to lie to a client, a DIAC officer, a tribunal member, judge or any other person.<sup>61</sup>

Your relationship with your client is fundamentally one of trust. You rely upon the client being truthful to you about their situation and, in return, the client relies on you being truthful about the legal position they are in. This may involve you having to tell a client something they do not want to hear. There is simply no excuse for being dishonest with a client, even if you think that this is what they want you to do. We will discuss later what you should do if you think that a client is lying to you (or to someone else).

Helping a family member, friend, or community member is sometimes seen as equally, if not more, important than being truthful. You are likely to have heard people say that ‘blood is thicker than water’;<sup>62</sup> that it is ‘OK’ to lie to the Government; or that a ‘white lie’ cannot hurt anyone. You must guard against these values becoming part of the way that you carry out your role as a migration agent. It does not matter that you are a friend or relative of the client.

If you lie, you are not a fit and proper person or a person of integrity. There are many cases where lying has resulted in professionals such as Australian legal practitioners, migration agents, tax agents or accountants losing their privilege to be registered.

Your duty to act honestly is reflected in specific requirements in the Code that require you to tell your client of certain things and events,<sup>63</sup> to provide them with honest and frank advice,<sup>64</sup> to deal with their money in a transparent way, and even to advertise to them in a particular way.<sup>65</sup>

These provisions are important, but acting honestly is a fundamental ethical principle that should need no rules to enforce it.

#### **For example**

If whilst waiting in line at your local coffee shop you notice that \$50 has fallen out of the wallet of a person ahead of you, surely honesty would demand that you tell them of this and not simply keep the money and celebrate your good fortune?

Similarly, you should not need an Ethics Toolkit or case studies to understand that it is wrong to deceive a client or steal from them.

## 7.6. Fairness

Dealing with the immigration system can be a daunting and confusing process for many clients, particularly those who are unfamiliar with Australia’s laws and for whom English is not their first language. Throughout the migration process, your clients will be relying on your knowledge and expertise and perhaps as important, they will be relying on you to act fairly towards them.

#### **Clause 2.1(b) of the Code states**

A registered migration agent must always deal with his or her client competently, diligently and fairly.



This is a broad statement and would include being fair to clients in respect of the advice you give, the fees you charge and in your other dealings with them.

### 7.6.1. Advice

Clients have different needs when it comes to advice on their prospects or on the matter generally. Some clients have researched their cases thoroughly and will often seem to know as much or more than you about a particular issue. Others have no idea of the system or how it operates. Regardless of how sophisticated a client is, or thinks they are, you should treat them fairly by giving them an honest opinion about their prospects or their proposed course of action.

The Code provides some guidance about what you are required to do, although it is limited to certain specific circumstances.

#### Clause 2.6 states

To the extent that a registered migration agent must take account of objective criteria to make an application under the Migration Act or Migration Regulations, he or she must be frank and candid about the prospects of success when assessing a client's request for assistance in preparing a case or making an application under the Migration Act or Migration Regulations.



#### Clause 2.7 states

A registered migration agent who is asked by a client to give his or her opinion about the probability of a successful outcome for the client's application must not hold out unsubstantiated or unjustified prospects of success when advising clients on applications under the Migration Act or Migration Regulations.

But this does not mean that you only need to be frank and candid in relation to the 'objective criteria', or if the client asks you for your opinion. This is a situation in which the Code prescribes the minimum requirements for ethical behaviour. It would not be ethical for you to say that because a client did not ask for your opinion about the probability of success, you did not provide it to them, even though you knew that the application was likely to fail.

#### For example

If a client came to see you and asked you to lodge an application for a parent visa because they wanted to be in Australia with their daughter as soon as possible, it would not be fair if you failed to tell them of the waiting times for the visa even if they met the objective criteria and had strong prospects of success (or did not even ask you about that). In this case, fairness towards the client would dictate that you told them about the likely delays, regardless of whether or not you were instructed to do so and regardless of whether or not it would constitute a breach of the Code if you did not tell them.

Similarly, if a client was intending to make a tourist visa application, it would not be fair if you knew but failed to tell them that their application was unlikely to succeed because the refusal rate from their country was very high even though this is not an 'objective criteria' of the visa (although you would have to be careful how you expressed this and that you were correct).

## 7.6.2. Fees

Questions about fees are perhaps more likely than others to raise ethical considerations and 'dilemmas' for migration agents. This is probably because it is an area of natural conflict of interests between yourself and the client: your desire and need to be paid as much as possible for the work and their desire to pay as little as they can. It is also an area where there is likely to be both a legal answer (what the contract provides) and an ethical one (what fairness would dictate).

### For example

Your business is doing badly and you need to make some money. You have contracted with a client that you will be paid \$10,000 for a 456 visa, but is it ethical to charge this amount for an application you believe to be straightforward and perhaps could be completed in a couple of hours? Are you really charging this fee because it is fair or justified or because you need money and are taking advantage of the client. Your contract might state that the client must pay a non-refundable deposit, but is it ethical to keep this money if you have not done any of the work?

The Code provides limited guidance probably because the ethics of the situation cannot easily be reduced to rules. The Code resorts to a mixture of broad statements and very specific rules.

### Clause 5.1 states

There is no statutory scale of fees. However, a registered migration agent must set and charge a fee that is reasonable in the circumstances of the case.

### And Clause 5.3 states

A registered migration agent must not carry out work in a manner that unnecessarily increases the cost to the client.

### And then Clause 5.5 states

A registered migration agent must be aware of the effect of section 313 of the Act, and act on the basis that:

- (a) the agent is not entitled to be paid a fee or other reward for giving immigration assistance to a client unless the agent gives the client a statement of services; and
- (b) a statement of services must set out:
  - i. particulars of each service performed; and
  - ii. the charge made in respect of each such service.



Arguably both of the situations in our example could be reasonable in the circumstances of a particular case and an agent may not have conducted unnecessary work and provided a statement, but is it ethical?

Ethical issues can also arise in relation to over-servicing of clients. Does the client really need the service you are suggesting to them or is it simply a way of maximising the money that you will be able to charge?

A lack of clear rules in this area means that fees are an area in which you will often ask yourself 'what should I do?'

### What would you do?

You assisted a client to obtain a student visa. She was very difficult to deal with and now wants you to help her with an 885 application. You really don't want to do the matter and don't have the time. In order to dissuade her, and also because you know she is wealthy, you treble your standard fee. Your difficult client has now agreed to pay what is by all accounts a very large amount of money.



Should you take the money?

Should you have asked for it in the first place?

### 7.6.3. Other dealings

There will be other circumstances in which you will be called upon to make a decision about how you will treat your client and you will ask yourself 'what should I do?'. In these cases you could do worse than start by asking 'is this fair to the client?'

#### For example

Your client has decided to go to another agent and wants the documents from their file. You are upset and annoyed that they have gone elsewhere and you wonder whether you should make it difficult for the client to retrieve their documents (perhaps you could say that you are out of the office for a few days?). Is this ethical? Why are you doing this?

## 7.7. Confidentiality and discretion

Confidentiality lies at the heart of the relationship of trust between a client and their migration agent. It is essential, not only from a legal perspective but also from a broader ethical one, because it provides the basis on which a client can feel safe in divulging all of the necessary information to their adviser, regardless of how personal and potentially damaging it might be. This is what allows the migration agent to do their job and provide full and complete advice and assistance.

***Unless high standards of conduct are maintained by those who pursue a profession requiring great skill begotten of special knowledge, the trust and confidence of the very community that is to be served is lost and thus the function of the profession is frustrated.<sup>66</sup>***

The importance of confidentiality is recognised in a number of areas, not just law. Doctors, accountants, bankers, clergy and psychologists all operate on the basis that they must keep secret any information provided to them by their patients, clients or practitioners. The privilege of non-disclosure to which a person may be entitled will vary depending on the exact nature of the relationship. The clients of a migration agent are entitled to expect that their information will be kept confidential and the clients of a lawyer migration agent may also be protected by professional privilege (this is discussed in more detail below).

The duty of confidentiality owed by a migration agent arises from the contract, the fiduciary relationship and the Code (and in the case of a lawyer, the relevant professional rules and the law relating to professional privilege). The *Privacy Act 1988* also imposes prohibitions on disclosure of information in some circumstances.

### The Code states

- 3.1 A registered migration agent has a duty to preserve the confidentiality of his or her clients.
- 3.2 A registered migration agent must not disclose, or allow to be disclosed, confidential information about a client or a client's business without the client's consent, unless required by law.



The Code does not define 'confidential information'. In our view, confidential information includes any personal information about a client or their affairs, including information that is already public but which would be embarrassing or detrimental to the client in some way if the migration agent disclosed it. A prudent and ethical migration agent will start from an assumption that everything that a client tells them is confidential unless the client has clearly indicated otherwise.

The Code also does not say when the obligation ends or whether it extends to former clients. There is no doubt that for lawyers the duty to maintain the confidence continues after the client-lawyer relationship has ended. The general laws of contract and fiduciary duty are also likely to apply to all migration agents so as to extend the obligation of confidentiality to include former clients.

#### Are there situations in which I can or should breach a confidence?

You can breach a client's confidence with their written consent<sup>67</sup> and may in fact need to do so in order to provide them with the best possible advice and assistance.

You should breach a client's confidence when you are required to do so by law, provided that you are sure that the law does in fact require this.

You may be able to breach a client's confidence to defend yourself against a complaint made by the client, however you should think very carefully before doing so and it would be wise to seek independent counsel and check how this might affect your professional indemnity insurance policy.

If the information becomes public then it is unlikely to still be confidential, although you should still exercise discretion in relation to that information.

You may be able to breach a client's confidence in order to prevent a serious criminal offence,<sup>68</sup> although this area is fraught with problems even for lawyers and you should think very carefully before doing so. You should not do so without seeking advice.

### 7.7.1. Consent

The Code allows you to disclose confidential information if you have the written consent of your client to do so. Lawyer migration agents need to be aware that this is more restrictive than the rule that would allow them to breach confidentiality where they have the implied consent of the client.<sup>69</sup> Your duty of confidentiality under the law of contract and your general fiduciary duty can also be limited by the express informed consent of the client.

There will be a number of common situations in which you may need to release confidential information, and you may wish to obtain the consent of clients in advance by including appropriate terms in your contract.

### **For example**

Sharing information with other clients: This may be necessary when you act for more than one client in relation to an application. For example, it may be necessary to disclose confidential information about one client to another during a 457 visa application where you act for both the employing sponsor and the visa applicant.

Sharing information amongst staff in your office: If you employ or engage any staff or contractors to assist you then it is likely that you will need to disclose confidential information to those people. (Lawyers should also refer to the discussion about imputed knowledge below).

Sharing information with your employer in the situation where you are working as an in-house migration agent and assisting other employees of the organisation with their visas.

Sending information to another migration agent where the client has decided to change agents or you have referred the case to someone else.

Providing the client's information to a third party in order to seek a further opinion or information relevant to the case.

Needing to communicate about the case with others because of your own legal situation. For example, having to discuss the matter with an insurer.<sup>70</sup>

Ethically, you should always examine why you are seeking the client's consent to disclose their personal confidential information and whether that is itself in breach of another duty or may be otherwise unethical. For example, is it simply for your own commercial expediency or is it genuinely required in order to complete the work?

### **The consent should be 'informed'**

Although the Code does not state that the consent must be 'informed' the fact that it must be in writing would seem to imply that this is what is intended. In any event, to properly discharge your fiduciary and contractual duties to the client, their informed consent to any disclosure of information would be required. This means that the client must have all of the information required to make an informed decision about whether or not to allow you to disclose the information. This would include knowing why it might be necessary to release the information.

### **The consent should be ongoing**

Where you have obtained the client's consent to disclose confidential information you should still always question whether what you are proposing to do with the information is ethical (and legal). What is your purpose in using the information in this way? Even if you have obtained the consent of the client at the beginning of a matter to release any or all information to another person, that consent may not be sufficient to deal with facts that have arisen after the consent was signed, or where the exact nature of the information was not known at the time that the consent was signed. Even if it is legally sufficient it might not be ethical for you to simply release the information on the basis of the original consent.

### What would you do?

A client may have signed a general consent to release information to their partner, but what if the client was suddenly diagnosed with a serious illness? Would it be right to simply release that information to the client's partner without checking first with the client to make sure that it was still alright to do so?



### 7.7.2. Compelled by law

The Code provides that a migration agent can release confidential information if they are required to do so by law. This requires some clarification.

- The law must actually require the disclosure. You should be very careful to ensure that any request you have received to provide information about a client is lawful and extends to the information being sought. There may be criminal or other sanctions if you fail to comply with a request, but this does not mean that your obligation to the client to try to maintain confidentiality is any less.
- Information provided to a lawyer migration agent may be protected by professional privilege which is likely to override the request. This is discussed in more detail below in the section on legal professional privilege.

#### For example

The law will require disclosure of confidential information by a migration agent is when a court issues a subpoena for a file or to appear at a hearing and provide evidence about a matter. Other examples include a request for information by DIAC under s18 of the Migration Act, or a request for a file issued by the Authority pursuant to s305C of the Migration Act, or a request made by another regulator pursuant to their statutory powers of investigation.

### 7.7.3. In order to defend yourself

If a client makes a complaint about you to DIAC or to the Authority (or elsewhere), it is likely that the client will have disclosed something of the matter as the basis of the complaint. It is not clear whether the fact that a client has made a complaint means that you can breach their confidentiality in order to defend yourself. The Authority is also likely to ask you for a copy of the client file, or for certain documents from that file. It is clear that you must comply with the Authority's request for the file, or documents, and that a breach of confidentiality is permitted (in fact required) in this circumstance.

Lawyer migration agents may also face restrictions on the information that they can release under their rules. The proposed Legal Profession National Law follows the current Queensland approach whereby a client does not waive legal privilege or their right to confidentiality simply by lodging a complaint, but if the client refuses to waive these rights in order to allow the lawyer to defend themselves then this would be a matter that would be taken into account in deciding whether or not to dismiss the complaint.

If a client complains about you to the Authority, the safest approach may be to seek their consent to release information to the Authority and, if they refuse, raise this with the Authority and seek their guidance on how to proceed.

This area becomes even more complicated when the complaint does not come from the client but from another person such as a DIAC officer or a court or tribunal. In this case the client has clearly not waived their right to confidentiality and you may need to seek their consent in order to defend yourself if it involves disclosing confidential information.

There is no specific exception that states a migration agent can disclose confidential information to an insurer. However, there will be times when the insurance policy will require disclosure (the most obvious and straight forward example being when a claim for compensation is made) and to not provide adequate disclosure will put the migration agent's entitlement to indemnity under the policy at risk. In such circumstances the migration agent will need to consider the particular circumstances faced, make an assessment as to what the agent needs to disclose and if necessary seek independent advice.

This is an area that is fraught with danger and you would be wise to seek further counsel before choosing to act one way or the other.

#### 7.7.4. Information that is no longer confidential

In the same way, information that has otherwise become public is unlikely to still be 'confidential' (although it will remain personal and so could be subject to the provisions of the *Privacy Act 1988*). There may be some exceptions to this where the information has been released accidentally or as a result of your negligence or that of another person in which case you should continue to treat the information confidentially.

Even where a client has chosen to make information 'public', there may continue to be contractual obligations prohibiting release of the information, and lawyers may still have a duty not to reveal it.

All migration agents should continue to act with discretion in relation to client information, regardless of whether it has been made public. This is an example of the difference between acting in accordance with the law and acting ethically.

#### 7.7.5. Criminal acts

There is a strong ethical argument that confidential information should be released if it will prevent the commission of a serious crime, particularly if it will prevent harm or the potential of harm to another person. However whether a migration agent can do so legally is not at all clear.

There is also an ethical argument for requiring migration agents to disclose information that conceals a past crime, but the legal basis for any such disclosure and how it would provide a defence to a breach of the duty of confidentiality under the Code is uncertain.

A strict reading of the Code would suggest that disclosure of confidential information would only be allowed if the law *required it*, not merely because the migration agent believed it would be the ethical thing to do. There are specific laws that require the disclosure of information to authorities but these are limited in scope.

The strict wording of the Code may cause a problem for lawyer migration agents for whom the ethical duties in this area are also unclear but would seem in most cases to permit lawyer migration agent to disclose information to prevent the commission of a serious criminal offence or to prevent harm to the client or another person.<sup>71</sup>

### What would you do?

A client who is applying for a partner visa tells you that they intend to remove a child of the relationship from Australia without the knowledge of the sponsoring spouse. The client does not have a court order permitting the removal. Should you report the possible offence?

Another client is applying for an ENS visa and is working in contravention of their current student visa. Should you report the offence?

A client has just been refused a protection visa and tells you that she is going to kill herself? Should you tell someone about it? Can you? Is this confidential information in the first place?



### 7.7.6. Client professional privilege

The rules about confidential information are somewhat different for lawyer migration agents because of the additional protection afforded to a client's legal communications under the right of professional privilege.

***In civil and criminal cases, confidential communications passing between a client and a legal adviser need not be given in evidence or otherwise disclosed by the client and, without the client's consent, may not be given in evidence or otherwise disclosed by the legal adviser if made either (1) to enable the client to obtain, or the adviser to give, legal advice, or (2) with reference to litigation that is actually taking place or was in the contemplation of the client.<sup>72</sup>***

As a general rule, confidential information between a client and their lawyer given for the purpose of obtaining advice or representation from the lawyer is protected by professional privilege. This would include advice relating to the giving of immigration assistance, provided that this included advice about the legal rights of the client.<sup>73</sup> It would normally not include facts such as the client's address<sup>74</sup> and identity, and instructions to complete a visa form (instructions to do something do not necessarily amount to advice).<sup>75</sup> It does not extend to information that is related to an illegal improper purpose.<sup>76</sup> The fact that the same advice may be given by non-lawyers does not mean that it cannot be subject to professional privilege when communicated to a lawyer who is also a migration agent.<sup>77</sup>

Where a lawyer communicates the information to another person in their practice, for example a secretary or employed migration agent, the privilege extends to these people.

It is important to remember that the privilege belongs to the client and can only be waived by the client. Where the client has made a complaint against a lawyer which has involved a disclosure of the advice, this would amount to a waiver of the privilege of that information.

The right of professional privilege does create a difference between the level of protection that will be afforded to communications between a lawyer migration agent and their clients and those between a non-lawyer migration agent and their clients.

Provided that the information is protected by professional privilege:

- a lawyer will not be compelled to provide privileged information to the Authority during an investigation,<sup>78</sup>
- a lawyer will not be compelled to provide privileged information to DIAC pursuant to s18 of the *Migration Act 1958*,<sup>79</sup> and
- the RRT (and MRT) cannot ask an applicant about their communications with their lawyer without first warning the person that they have no obligation to disclose the information which is protected by privilege.<sup>80</sup>

By contrast, even if the information is confidential:

- a migration agent will be compelled to provide it to the Authority during an investigation provided that the request is authorised by the law,
- a migration agent will be required to provide information to DIAC pursuant to a request under s18 of the Act, and
- an applicant before the RRT or MRT is not permitted to refuse to answer a question on the basis of 'privilege', and there is no obligation on the tribunal to provide any warning.<sup>81</sup>

### 7.7.7. The Privacy Act 1988

The *Privacy Act 1988* regulates the collection, handling, storage and use of information by Commonwealth Government departments and agencies about individuals.<sup>82</sup> Importantly, the *Privacy Act* was significantly amended in 2000 to include provisions regulating the handling of personal information and sensitive information by private sector organisations and to introduce 'National Privacy Provisions'.<sup>83</sup>

National Privacy Provisions will apply to businesses (including non-profit organisations) with an annual turnover of more than \$3 million and to health service providers. Small businesses with a turnover of less than \$3 million will be exempt, although such businesses can opt-in to be covered by the Act. If your business is subject to the *Privacy Act 1988* you will need to ensure that you have appropriate systems in place to comply with the National Privacy Provisions.

**Further information on the application of the Privacy Act 1988 and the National Privacy Provisions can be found on the websites of the Office of the Australian Information Commissioner. See: <http://www.privacy.gov.au/aboutus> and <http://www.oaic.gov.au/>.**

## 7.8. Complete disclosure

The duty of complete disclosure is another of the essential characteristics of the client relationship. It means that you will not hide anything relevant from a client, and you will ensure that they have all the information in your possession necessary to make informed choices and give you their instructions.

In addition to the general fiduciary duty of disclosure, the Code also imposes certain specific obligations to disclose certain things to the client that might affect them.<sup>84</sup>

### **For example**

Clause 2.2 requires a migration agent to disclose a financial benefit that may flow to the agent as a result of advice of a non-migration nature (for example, a commission or bonus).

The ethical issue arises when you have confidential information that has been given to you by another person, normally a client, and that information might be relevant to another client's case. The question becomes 'should I and can I provide this confidential information to my client?'

### What would you do?

You act for a husband (the sponsor) and wife (the visa applicant) in relation to a partner application. The visa applicant wife tells you that she has a 12 year old child to another father but she does not want to include the child in the application and does not want to tell her husband about the child. Should you tell?

You act for a 457 visa applicant who has just informed you that he has a criminal record but that he does not want to tell the sponsoring employer who is one of your long-standing and best paying clients. Should you tell?

You act for a student in relation to the cancellation of his student visa. You speak to a long-term acquaintance at the college who tells you 'off the record' and 'confidentially' that the school often makes mistakes in its student records. Should you tell your client?



In the first two examples, there is a potential conflict of duties between your duty to one client to keep their information confidential and your duty to the other client to make them aware of any information that you have which might be relevant to their case. In the third example there is no conflict of duties because you owe no duty to your acquaintance at the college to keep a confidence, but there is an ethical dilemma in that you might prefer not to break such a confidence if you can avoid it as it is likely to damage your relationship with your acquaintance and could get them in trouble.

In each example the first question is whether the information is relevant to the conduct of the client's case.

- Will the existence of the child affect the husband's case and your ability to pursue his instructions and legitimate interests in respect of the case?
- Will the existence of the criminal record affect the employer's case and your ability to pursue its instructions and legitimate interests in respect of the case?
- Does the information about the school make any difference to the student's case?

If the answer to this question is 'yes', then in the first two examples you have a conflict of duties and you cannot act further unless the client who owns the information is willing to disclose it, or allow you to disclose it, to the other client. What you should, or must, do next is discussed in more detail in the next chapter.

In the third example your duty to your client would outweigh any ethical imperative to keep your acquaintance's confidence, and certainly any self-interest you have in maintaining that relationship. You would have no choice but to tell the client what has been said and to use that information to the best of your ability.

If you decide that keeping the information confidential would not affect your ability to act for both clients in relation to the case, then the second question is whether the information or your actions might otherwise damage the interests of the clients and so breach your general fiduciary duty not to act in a way that would cause your client harm. This is more complicated because it requires you to consider how extensive you see your duty to your client.

- Should you tell the husband about the child because he might be upset about it later? Or want to help if he knew? Or might decide not to sponsor his wife if he found out she lied to him? Could your duty extend to these things?
- Should you tell the employer because they would want to know if an employee had a criminal record even if that record was minor and would not affect the visa application?
- Should you tell the student about the school's reputation even if this will not help his case in any way?

To answer this question ethically you will need to ask yourself what it is that you have really agreed to do for the client. What is the scope of the contract and what would the client believe it to be? This may be more than what is contained in the contract. If the relationship is a deep and ongoing one, perhaps covering many matters, then far more information relating to other clients could be relevant to the client's legitimate interests, and the potential for conflict (and perhaps the consequences of revealing or not revealing it) are obviously greater. If you have held out that you will be all things to the client; protector, advocate, friend and 'partner', then you must be prepared to act in accordance with the spirit of that relationship. This may necessitate taking a broad view of the information that could be relevant to the client and to their interests.<sup>85</sup> This issue is discussed in more detail in the next chapter.

These examples highlight the importance of seeking informed consent to disclose all information at the beginning of each case involving dual representation.

### 7.8.1. Imputed knowledge

Where there is more than one lawyer working in a firm of lawyers there is a presumption that all of the lawyers in the firm are in possession of all of the confidential information relating to clients. Unlike the Code which requires all migration agents to keep information confidential to themselves,<sup>86</sup> the professional rules for lawyers specifically allow for the sharing of confidential information without the need for formal consent from the client.<sup>87</sup>

Although this aspect of migration practice has not yet been considered by a court, there are good reasons for assuming that the principle of imputed knowledge would be applied in much the same way. Put simply, it means that your staff, partners and colleagues are all taken to know what you know about a client and vice versa. This means that you cannot resolve a conflict of duties involving confidentiality and the duty of disclosure simply by having another migration agent in the office deal with the matter. This issue tends not to cause major problems for most migration agents (given the high proportion of sole practitioners in the industry), but migration agents acting for companies may need to give consideration to this.

The issue of imputed knowledge does raise a separate need for appropriate information barriers to be put in place in order to prevent an authorised disclosure of confidential information of a former client when acting for another client. An information barrier does not remove the duty of undivided loyalty owed to all current clients. In situations where this will cause a conflict, an information barrier will not assist and a migration agent will only be able to continue to act with the clear consent of all affected clients (see the discussion on the duty of loyalty).

**An example of how an information barrier might be constructed can be found in "Information Barrier Guidelines" on the Law Society of New South Wales website [www.lawsociety.com.au](http://www.lawsociety.com.au) <sup>88</sup>**

## 7.9. A duty to avoid conflicts of interests and conflicts of duties

You must never allow your interests to conflict with those of your client in a way that would affect the client's legitimate interests. You must also never allow your duties towards two clients to conflict. There are two main ways in which a conflict of interests or duties can occur:

- Your personal interests conflict with those of the client, and
- Your duty to advance or protect the interests of one client conflicts with your duty to advance or protect the interests of another client or former client.<sup>89</sup>

As we have seen, these duties are founded in the very nature of our fiduciary and contractual relationship with the client and are reflected in legal practice rules and the Code and breaches are taken extremely seriously by courts and regulators. This is because the duties go to the core of the relationship with the client. You simply cannot be acting in the client's interest if you are trying to look after your own. Equally, it is impossible for you to serve the best interests of two clients where those interests actually or potentially clash. No person can serve two masters without compromising the interests of one for the other.

Australian legal practitioners should refer to their rules and the extensive case law in this area. The area of conflicts of duty with former clients and conflicts of duty between current clients is dealt with in rules 10 and 11 of the Law Council of Australia's draft Australian Solicitor Conduct Rules.

### 7.9.1. What are conflicts of interests?

#### The Code states:

2.1A A registered migration agent must not accept a person as a client if the agent would have any of the following conflicts of interest:

- (a) the agent has had previous dealings with the person, or intends to assist the person, in the agent's capacity as a marriage celebrant;
- (c) the agent is, or intends to be, involved with the person in a business activity that is relevant to the assessment of a visa application or cancellation review application;
- (d) there is any other interest of the agent that would affect the legitimate interests of the client.



Clause 2.1A(a) and (c) are clear and leave little room for uncertainty. You can't be involved as a marriage celebrant or in a business deal that relates to the client's application (you would want to think very long and hard about becoming involved with a client in any business deal, even if it did not relate to the client's application).

Clause 2.1A(d) would clearly cover any other conflict between your personal interest and that of a client.

### **For example**

You will receive a commission from a certain health insurance provider if you recommend them to a client. You recommend this even though that health insurance is not really appropriate for the client's needs.

Your employment contract requires you to complete 25 visas applications a month. You know that you will not make this unless you lodge a few more applications so you encourage clients to lodge applications that are unlikely to succeed.

Although it is not completely clear, it would seem that clause 2.1A(d) could also cover a conflict of duties between clients which affect the 'legitimate interests of the client'. For example, a conflict between the duty of disclosure to one client and the duty of confidentiality to another client. Such an interpretation would be consistent with your general ethical and legal duties towards all clients and is, therefore, the preferred way of proceeding.

For lawyers, the duty to avoid such a conflict is clear and also extends to the potential and not just actual conflicts. Ethically all migration agents should avoid situations which could give rise to a conflict of interests.

Clause 2.2 imposes an obligation on you to disclose to a client any financial benefit that you will receive as a result of any advice of a 'non-migration nature', although it is hard to know what type of advice would be of a 'non-migration nature' when it is given in the context of the provision of immigration assistance. Again, this is a situation where you may choose to act ethically rather than within the strict interpretation of the Code and make a disclosure of any such benefit.

### **For example**

A client seeks your advice regarding the transfer of money to Australia. You then recommend a specific foreign exchange service from which you will receive a referral fee.

## **7.9.2. Commercial conflicts**

There is a need to distinguish between a genuine conflict of interest or duties and what might be described as a 'commercial conflict of interests'.

If you act for businesses you will find they can develop quite jealous and proprietorial attitudes towards you and may not be happy if they discover you are doing the same work for another company, particularly in their industry. Even though a fiduciary cannot do anything to directly harm a client's interests, there is no duty on a fiduciary to act solely in the best interest of the principal.<sup>90</sup> This would seem to place some limits on the duty of loyalty that a fiduciary may have towards a principal, especially where the 'conflict' arises only because of commercial competition between the clients.

There is certainly nothing in the Code or the rules for lawyers that specifically prohibit a migration agent acting for two clients with competing commercial interests. The real problem arises if you obtain confidential information from one that needs to be disclosed to the other. This aspect of a breach of duties has already been dealt with.

Whilst a commercial conflict of loyalty might not be a conflict of duties in a legal sense, you would be wise to heed the concerns of any client for whom this might be important or else face the possibility of losing them and the income they generate.

### 7.9.3. How can I avoid a conflict of interests or duties?

You will have realised that a conflict of interests or duties is most likely to occur when you provide immigration assistance:

- to more than one client at the same time in relation to the same application (for example a husband and wife in a partner visa application, or a sponsoring employer and a visa applicant employee),
- to more than one client at the same time in relation to different applications but where the interests of those clients might conflict (for example, where one employer client is seeking to sponsor the employee of another employer client, or where you may be acting for a child whose parents are unlawful), and
- against a former client (for example, where a spouse seeks assistance to withdraw sponsorship of a partner application before the grant of the permanent partner visa when the agent acted for the visa applicant in relation to the temporary visa).

Clearly it is not always possible to avoid a conflict of interests or duties. Even if you acted for only one client at any time, you would still face potential conflicts in relation to your own interests and also in relation to former clients. This is obviously not practical or realistic. You will always have more than one client in your practice at any one time and will often be providing dual representation to clients in relation to the one application. In many cases this may be necessary or desirable and in the client's best interests.

#### **For example**

It is often more convenient for a company and an employee to engage the same migration agent to deal with a 457 visa application or an ENS. Having two migration agents will lead to additional expense and inconvenience. Similarly, it is generally the case that both parties to a partner application, a parent application or any other sponsored visa will use the same migration agent for both the sponsorship application and the visa application. In all of these cases the migration agent has two clients<sup>91</sup> and a conflict of interests and duties is always possible even though the relevant interests (in respect of the migration outcome) of both clients are the same at the time the matter is commenced.

Acting for two clients in relation to one transaction does not create a conflict of the same type as those facing lawyers (or others) dealing with parties on opposing sides of a matter or transaction. In those cases the interests are more obviously in conflict, or potentially in conflict. In migration cases the 'parties' are on the same side of a transaction with DIAC, yet their interests are not the same in all respects.

The fact that conflicts might arise means that you need to be careful and take steps to limit the possibility in all cases.

### You should

1. Disclose, disclose, disclose. It is essential that you disclose the fact that you will be acting for more than one client in relation to the same transaction (or with possibly conflicting interests) and have them sign an informed consent that clearly sets out how the matter will proceed when it comes to the conflict or potential conflict.
2. Conduct 'conflict checks' each time you take on a new client to make sure that there is no conflict with any current client or former client.
3. Make sure that information about clients is stored in a way that it cannot be given to another client (even accidentally) without the consent of the owner of the information.
4. Avoid collecting information that is not necessary to the work you are doing.
5. Limit the scope of the work that you are doing for the client to ensure that it is limited to what the client wants and needs in order for you to provide the assistance.
6. Review the circumstances of your employment contract before it is signed to ensure that there is adequate protection for you in being able to deal with any conflict that might arise.

### 7.9.4. Can a client consent to a conflict of interest?

The general law and the various rules for Australian legal practitioners permit a lawyer to continue to act despite a conflict of interest provided the client:

1. is aware of the exact nature of the conflict and why it affects them, and
2. has provided informed consent (preferably in writing).

The Code does not specifically provide for the situation where the client wants the migration agent to continue to act in the matter despite a conflict of interest or duty, other than in relation to the duty of confidentiality.<sup>92</sup> In fact, clause 2.1A appears to present a complete bar to acting in any situation where there is a conflict of interest of the type listed in that clause. Does this mean that you cannot act for two clients in any situation where there would be a conflict of interests regardless of their consent?

A careful consideration of the terms of clause 2.1A(d) may provide some further guidance. That provision prevents a migration agent from acting for a person if there is 'any other interest of the agent that would affect the *legitimate interests* of the client'. Provided the client has waived the conflict then it seems arguable that they would no longer be able to claim that it is in their legitimate interests to expect you to abide by any duty they have waived: they have accepted that your interests do not conflict with theirs.

This is a difficult area both legally and ethically. Before agreeing to act or continue to act in cases where there is an actual conflict of interest you should carefully analyse your motives for asking the client to waive their rights to ensure that your motives are ethically sound (you can apply the methodology and the checklist) and that you fully understand the risks of following this course of action.<sup>93</sup> You must then make sure that the client(s) provides a fully informed written consent.

What amounts to informed consent has been the source of much argument and debate. From an ethical point of view the answer is quite simple: the client must have genuinely understood how the conflict affects their interests and your ability to advance or protect their interests and have made a free and truly voluntary waiver of those interests or your duty.

### For example

Your duty to make a sponsor aware of all relevant information that could affect their interests may require you to disclose the confidential information of the visa applicant client (for example, a medical condition). Here, you need to disclose confidential information of one client to another in order to fulfil your duties. There is nothing that prevents the visa applicant client from consenting to a disclosure of this information provided the person understands what the information is and that they have the right to keep it confidential. The visa applicant would also need to know what consequences were likely if the information was not disclosed, and that you would not be able to continue to act for them unless it was disclosed.

## 7.9.5. What do I do if a conflict of interests arises?

The Code also prescribes clear rules about what you must do if a conflict has arisen (or would arise).

### Clause 2.1B of the Code states

If it becomes apparent that a registered migration agent has a conflict of interest mentioned in clause 2.1A in relation to a client, the agent must, as soon as practicable taking into account the needs of the client, but in any case within 14 days:

- (a) tell the client about the conflict of interest; and
- (b) advise the client that, under the Code, the agent can no longer act for the client; and
- (c) advise the client about appointing another registered migration agent; and
- (d) cease to deal with the client in the agent's capacity as registered migration agent.



### Clause 2.1D of the Code states

A registered migration agent who has ceased to act for a client in accordance with paragraph 2.1B (d), must, as soon as practicable, but in any case within 14 days, inform the Department that he or she is no longer acting for the client.

This seems clear, but have you ever thought about how you would handle it if you did have a conflict of interest or duties?

### For example

You are acting for a couple in relation to a partner application when the visa applicant tells you 'confidentially' that he is having an affair with another man and hopes to leave the sponsor as soon as the visa is approved. Assuming that you decide that you now have a conflict of duties (you should tell the sponsor but you cannot), and that this came within clause 2.1A(d) of the Code, what would you do?

How would you tell the sponsor that you are unable to act in the matter any further without telling the sponsor why (which would breach the visa applicant's right of confidentiality) or even hinting at the problem (which would also potentially breach the visa applicant's right of confidentiality)?

How do you think that the sponsor might react?

## Does this mean that I must lose both clients?

The Code clearly states that you will not be able to act for a client with whom you have a conflict of interest. If you assume that this extends to the situation involving a conflict between two clients, then the same rule would apply and you would be forced to cease acting for both clients unless they consent to you continuing to act.

Even if you have a conflict of interests that cannot be resolved, this may not mean that you will 'lose' both clients. Whilst you will not be able to act for those clients in relation to the matter in which the conflict has arisen, this would not, of itself, stop you from acting for one or both of them again in another matter in which there was no conflict. Whether this is possible will depend on what the conflict was about.

### For example

If you had a conflict of duties in relation to a husband and wife because the wife would not allow you to disclose confidential information, and you had to cease acting for both, would not mean that you could not act for the husband in relation to the sponsorship of his brother.

## 7.10. Ending a client relationship

Just as there are ethical issues in relation to the formation and conduct of a client relationship, there are also potential ethical issues in ending one.

### 7.10.1. When can I end the relationship?

A client relationship will normally end once you have completed the agreed work. You will find that there are situations in which it will end before the work is completed.

### For example

The client decides not to go ahead with the application or with your services. The client may simply have changed their mind about the application, may have received a second opinion, or may think that you are not doing your work properly.

You decide you do not want to work for the client any more. The client may not have paid their first bill, may be very slow in providing documents, or may be just too difficult or rude to deal with.

You cannot work for the client any more. You may have decided to retire, sell the business or you have been suspended or deregistered.

Your contract should contain clauses about when the relationship will be finished, when you will be paid and in what circumstances it may be terminated by either you or the client. This will clarify the legal position about what should happen in any of the situations listed above.

Part 10 of the Code also has rules about the circumstances in which you can end a client relationship before the work has been completed.

### Clause 10.1 of the Code states

A registered migration agent must complete services as instructed by a client unless:

- (a) the agent and client agree otherwise; or
- (b) the client terminates the agent's instructions; or
- (c) the agent terminates the contract and gives reasonable written notice to the client.



This is similar to rules for lawyers which generally permit termination of an engagement for just cause and on reasonable notice.<sup>94</sup>

## 7.10.2. Should I end the relationship?

The question of when and whether you should end the relationship is often an ethical decision. It has the potential to impact on the client and others and often involves a weighing up of competing interest, duties and ethical considerations.

### For example

You are assisting the client with a review application before the RRT. They have paid you in full and have promised to provide documents to you that will support their case. You have already requested two extensions of time and now the hearing is only a week away. You feel very uncomfortable with the client's case as it is pretty hopeless without the documents they say they have. Can you stop acting for the client and should you?

The client makes racist comments to you or your staff or colleagues that you do not agree with and which are offensive. What can and should you do?

The answer to the first question may depend upon what has gone before. If you have told the client clearly and on more than one occasion that the document is essential and that you would not be prepared to continue to act for them unless that document was produced then you would have every right to say to them that you do not wish to continue. But would this be the right thing to do? Clearly you will need to balance a number of considerations:

1. Why are you doubtful about the client's case? Is the document really as vital as you believe or is it the case that this provides you with an excuse to get out of a matter you should not have taken on in the first place? If you truly have a reasonable suspicion that what they are saying is false then you may not be able to act further (this is discussed in more detail in the next chapter).
2. Will the client be disadvantaged if you do not represent them further? Do you feel that the client is relying on you for assistance? Does the client have psychological issues that might account for what is going on or make it harder for them to represent themselves?
3. Will the Tribunal be inconvenienced if you suddenly withdraw? Will this mean that the client will just have another reason for seeking an extension? Is that why the client is acting this way?
4. Do you intend to refund some of the fees that have been paid if you decide to withdraw and not attend or are you thinking that you might be able to keep the fee and not have to do the work?

The second question will also require you to balance a number of different considerations:

1. Whilst everyone is entitled to have their own opinions, they have no entitlement to force them upon others. It may be that the client would stop making the comments if you simply made it clear that you did not agree with them or ask the client to keep the comments to themselves.
2. You have no duty to sit idly by whilst your client expresses racist views. In fact, you have a duty to stop them if they might offend your staff or colleagues. This is so even if it means that you might lose the client. If the client refused to stop you would be entitled to say that you no longer wished to act for them (you would want to ensure that your contract has a general termination provision).
3. You certainly should never join in with the client. This may be the impulse reaction if you are concerned that the client may go elsewhere or are trying to impress them.

As you can see, each case will be different. Try applying the methodology to these questions to see if it helps you reach answers that you are comfortable with.

### 7.10.3. How should I end the relationship?

How you end the relationship is important. The Code establishes the appropriate procedure if you need to end the relationship early for your own reasons.

#### Clause 10.1A of the Code states

For paragraph 10.1(c), a written notice must state:

- (a) that the agent ceases to act for the client; and
- (b) the date from which the agent ceases to act; and
- (c) the terms of any arrangements made in respect of appointing another registered migration agent.



#### Clause 10.1B of the Code states

Within 7 days of giving the written notice, the agent must:

- (a) update the client's file to reflect the current status of each case or application undertaken by the agent for the client; and
- (b) deliver all documents to which the client is entitled to the client or to the appointed registered migration agent; and
- (c) ensure that all financial matters have been dealt with as specified in the contract.



In most cases these rules are not controversial and require little ethical deliberation, but what would happen if you were simply unable to comply?

### What would you do?

You have a practice with 300 current clients at various stages of the application process and some with reviews to the tribunals. Changes to the GSM rules have meant that your business is no longer commercially viable and you will need to close as there is no-one who will purchase the business.

What obligations do you think that you owe to the clients?

How would you deal with these?

How do these obligations fit with any obligations you have to your staff, your shareholders or other directors?



### 7.10.4. Which documents are the clients and which are mine?

Your client will give you certain documents that you will need in order to complete the work for them. These documents belong to the client and they are entitled to have them back when they ask for them. The Code requires you to give them to the client within seven days of being asked.<sup>95</sup>

When you do the work as the client's agent you will produce certain documents such as drafts and copies of the application forms and submissions. Once the client has paid for these documents then they belong to the client and you must give them to the client if requested.<sup>96</sup>

If the client asks for a copy of the application during the process then you must give it to them and charge a reasonable amount for the copies.<sup>97</sup>

The rules about all of this are clear and not particularly controversial. The only ethical question is whether it could ever be ethical to unreasonably delay providing the documents.

#### For example

The client has decided to go to another agent and has asked for their documents. You have seven days to hand them over, but do you really need that long or are you just trying to make it difficult for the client because they have decided to go to another agent?

### 7.10.5. Liens

Where the 'ethics' of this area become more difficult is when you try to understand why you should hand over documents that belong to the client when the client still owes you money and you may never see it once you let the documents go.

This is an area where you must succumb to the rule even though it does not seem fair or just. Put simply, unless you are a lawyer, the Code prohibits you from claiming a 'lien' over documents that belong to the client. This is when you hold onto any document for which the client has not paid and is not otherwise already entitled to. But what would these documents be and what value would they have to the client?

### **You cannot hold**

Any document that was part of the 'application' because clause 3.3 of the Code requires you to give a copy to the client. This would include DIAC correspondence such as the refusal or grant letter.

Any document that the client gave to you because these belong to the client.

A passport, because this belongs to the Government that issued it and the Code prohibits you from withholding it.

What would be left on your file? Your file notes and scribbles. What value do you think the client would put on them?

In case you are thinking this is very unfair, you would only have yourself to blame if you were not paid for the work that you had done. You should have taken money into the client account and ensured that there was a provision in your contract to allow you to charge the client for work that you had done up until the point that the contract was terminated.

You should be aware that the right of lawyers to claim a lien is also limited by their practice rules. A lien would normally entitle a lawyer to hold a document that a client needed in order to defend or prosecute their case provided that another lawyer has taken steps to ensure that the outstanding costs will be paid or the lawyer has received some other form of security.<sup>98</sup>

If you take over a case from another migration agent you should ask the client whether they owe the other agent any money. In fact you may want to ask the other migration agent whether the client owes them any money (for your own protection as much as anything else). The other migration agent may need an appropriate authority to release this information and you would be concerned if your new client refused a request to sign such a document.

If money is owed to the other migration agent you might want to ask the client to pay this before you take the matter. If the client explains that there are reasons why they should not pay, you might want to satisfy yourself that this is fair. Whilst there may be no legal obligation to do these things, it is part of our general ethical obligation to our colleagues to treat all people with courtesy and fairness.<sup>99</sup> This is dealt with further in chapter 9.

### **7.10.6. Advising DIAC**

If you cease to act for a client at some point you should advise DIAC and any Tribunal of this fact. Best practice would dictate that you do this by having the client complete a new form 956. If this is not possible, you should advise DIAC of the contact details you have for the client always remembering your duty of confidentiality.

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- 43. See s3(1) *Migration Agent Regulations 1998*.
  - 44. *Migration Agent Regulations 1998*, Reg 3(1).
  - 45. See the discussion of Mason J in *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64 at [67] –[70].
  - 46. *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, 170 (Street CJ).
  - 47. The general principle in common law is that a duty of care is owed only if the defendant ought reasonably to foresee that his or her conduct may be likely to cause loss or damage to the plaintiff or a class of persons to which the plaintiff belongs see *Chapman v Hearse* (1961) 106 CLR 112 at 120-1; [1962] ALR 379.
  - 48. Clause 1.12 and 2.1.
  - 49. Clause 2.8(b).
  - 50. *Proceedings in the House of Lords, Trial of Queen Caroline* (Duncan Stevenson & CO, 1820 ed) Vol 2 p 7.
  - 51. ASCR rule 4.1.1.
  - 52. There may be some general duty to the administration of the immigration system that arises from the act of registration, and this is discussed in more detail later. There is also the generally accepted standard that you should act with courtesy and honesty.
  - 53. You will also need to be mindful of s233(1)(c) and s233(2) of the Migration Act 1958 which deal with offences relating to harbouring illegal entrants.
  - 54. See OMARA's Annual Report 2009-10 at page 34.
  - 55. Clause 2.5.
  - 56. See s290A *Migration Act 1958* and Reg 6 *Migration Agents Registration Regulations 1998*.
  - 57. Clause 2.1.
  - 58. Migration Act s63(1).
  - 59. Clause 2.1(b) and 2.3.
  - 60. Others including DIAC, the tribunals and other migration agents will also rely upon you to be honest and trustworthy and this is discussed later.
  - 61. ASCR – 19.1 and 19.2.
  - 62. Meaning family comes above all others.
  - 63. For example the obligations in clauses 2.1B(a), 2.2(b), 2.8(d).
  - 64. Clause 2.6 and 2.7.
  - 65. Clauses 2.10 – 2.14A.
  - 66. Sir Owen Dixon in Woinarski, ed., *Jesting Pilate And Other Papers and Addresses by the Rt Honourable Sir Owen Dixon*, Law Book Company Limited, 1965 (192).
  - 67. This is different for Australian legal practitioners who act on an implied authorisation rather than require a written one, see ASCR 9.2.2.
  - 68. ASCR 9.2.4.
  - 69. ASCR 9.2.4.

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70. The ASCR specifically permit this for lawyers – rule 9.2.6.
71. ASCR rules 9.2.4 and 9.2.5.
72. JD Heydon Cross on Evidence 7th Australian edition pages 798-9.
73. In *Baker v Campbell* (1983) 153 CLR 52, the High Court extended the concept of professional privilege to include 'non-judicial' and 'quasi-judicial' contexts which in our opinion would include the giving of legal advice about a person's immigration status and options and it may include the giving of assistance. See *Attorney-General (NT) v Maurice* (1996) 161 CLR 457 at 487.
74. A telephone number given for the purpose of obtaining legal advice in relation to Federal Court proceedings might be privileged even if the client is unlawful. See; *MIMIA v Hamdan* [2005] FCAFC 113.
75. *Commissioner of Taxation v Coombes* [1999] FCA 842.
76. *R v Bell*; Ex parte Lees (1980) 146 CLR 141.
77. *Joel v Migration Agents Registration Authority* [2001] FCA 1919 at [34].
78. op cit.
79. *Hamdan*[2005] FCAFC 113.
80. *SZHWY v MIAC* [2007] FCAFC 64.
81. *SZKTQ v Minister for Immigration & Anor* [2008] FMCA 91 at [39].
82. See LexisNexis, Butterworths *Australian Administrative Law*, Chapter 8 Privacy, (at service 155)[850].
83. See *Privacy Amendment (Private Sector) Act 2000* (Cth). This added 10 National Privacy Principles to Sch 3 of the Privacy Act, effectively endorsing the privacy rights contained within the *International Covenant on Civil and Political Rights* (1966).
84. For example clause 2.1B requires you to disclose a conflict of interest and clause 2.2 requires you to disclose certain financial benefits.
85. Even if you limit this to the narrower concept of the client's 'matter'.
86. It is for this reason that you would be wise to always obtain consent to disclose information to other employees, contractors or advisers.
87. For example ASCR rules 9.1.
88. Law Society of New South Wales (in consultation with the Law Institute of Victoria)16 March 2006, Information Barrier Guidelines <http://www.lawsociety.com.au/idc/groups/public/documents/internetcostguidebook/008728.pdf>.
89. This is sometimes referred to as an indirect conflict of interest.
90. *Pilmer v Duke Group Ltd* at [74] and *Breen and Williams* at 107 affirmed in *Friend v Booker & Anor* [2009] HCA 21 at [84].
91. The *Migration Agent Regulations 1998*, Reg 3(1) define client in this way.
92. Clause 3.2 provides that a client may provide written consent for a migration agent to disclose confidential information.
93. One risk is that the Authority or a court read clause 2.1A(d) in a restrictive way and find that a client cannot consent to a conflict of interest.
94. For example, ASCR rule 13.13.
95. Clause 10.2.
96. Clause 10.5.
97. Clause 3.3.
98. ASCR rule 15.
99. Clause 4.5 creates an obligation to act with fairness, honesty and courtesy when dealing with other registered migration agents, but it is not clear that this would extend to helping them collect a debt.

## 8. Your relationship with DIAC and the immigration system

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## 8. Your relationship with DIAC and the immigration system

The Government and DIAC have the right and responsibility to ensure that the migration program is managed in a lawful, appropriate and effective way. This means that applications will and should be refused if they do not meet the legal requirements. When this happens you should remember that DIAC is simply carrying out its role and that the decision is not a personal one.

DIAC staff are expected to act within their own ethical and legal frameworks and receive training about how to behave and interact with agents. This is an ongoing process. By treating DIAC staff with the same respect and dignity you would hope for in return, the overall level of communication and depth of relationship between agents and DIAC staff can only improve. This is of benefit to all agents and their clients.

It is also worth remembering that, unlike the criminal law, immigration law is not inherently adversarial and should not be approached in that way. Your role is to assist clients to achieve a legitimate outcome within the system and the laws laid down by the Government of the day, not to set out to defeat those rules. This does not mean that you should not take on difficult cases, do your best for your clients or challenge DIAC's interpretation or policy where necessary. It does mean that you should think carefully before trying to 'mould' your client's circumstances to fit the rules and ensure that you are not trying to defeat the system by illegitimate means.

All migration agents, in fact all residents of Australia,<sup>100</sup> are under a duty not to breach the laws of Australia. We must not act unlawfully. This obligation is clear and is reflected in various provisions of the criminal law, the *Migration Act* and the Code. There is no doubt that you must not:

- lodge a document that you know or reasonably believe to be false<sup>101</sup>
- certify a document under regulation 2.15(5)(b)(iv) as a true copy of the original document without sighting the original document
- help a client falsify a claim,<sup>102</sup> or
- assist a client to find work when they do not have permission to work.<sup>103</sup>

You cannot do these things regardless of whether your client wants you to or whether it would achieve the outcome they want.

### 8.1. Should I not trust my client?

Many migration agents will say that it is not their role to investigate their own client and that they should be able to rely on what the client tells them. As we have discussed, a migration agent's role is more complex than this. We are not mere mouth pieces for our clients, nor mere channels by which the client can submit or say anything in support of their case.

Leaving aside the ethics of lodging material that you suspect might not be true, there is a fundamental question of what you are doing for the client if you do not have the courage or the tenacity to raise with them an issue that may be contrary to their interests.

In our work we all become aware that some societies place less importance on formal documentation as a means of 'proving' facts. Often the document is simply a way of officially recording what someone has told them. The 'truth' is what has been said and the potential for the document to mislead is not of concern. We also become quite used to the fact that clients may embellish their claims or provide accounts that are inconsistent with what they said previously or what another person has told you. This will have an impact on how you deal with the possibility that what you have been told might be untrue or that a document you have been given might be false or not reliable.

The fact that you think there are concerns about a document or claim means that DIAC and a tribunal are likely to have the same concern. You are obliged to raise this with the client so that they can understand the problems that may arise if they pursue that course of action. So what should you do?

1. You should not turn a blind eye to something that is obvious.

#### **For example**

A migration agent once received a number of business skills cases from an associate overseas. The first three or four were refused on the basis that they contained false documents. The migration agent continued to receive and lodge more applications from the same referral source without doing anything to raise a concern about the integrity of the documents. There is no excuse for this. It is no defence to claim that it is not your role to check in such circumstances.

2. You should not assume that your client is being dishonest. Sometimes truth is indeed stranger than fiction.

#### **For example**

A client once insisted that they were awarded a degree from a particular university even though a DIAC officer had evidence that the degree was a forgery. It transpired that the client's brother had taken a short-cut (and the money) when he was asked to obtain the transcript on behalf of the client. Rather than travel to the University and ask for an official copy of the degree, he had one made by a local forger. It turned out that the client had in fact been awarded the degree, even though the document he submitted was false.

3. You should raise your concerns with your client and give them a chance to explain. It may be that you are mistaken and that they are telling you the truth.

#### **This can be difficult**

It is not easy to suggest to someone that they may be lying. It has the potential to undermine the client's faith in you and you in them. You should be tactful in your approach. It is perhaps best to explain how the issue might be dealt with by DIAC or the tribunal and see what the client says or how they react. Often the client will simply withdraw the document or statement or they may obtain something else that will support it.

4. If however it is clear to you that they are lying you should counsel the client about the consequences of continuing.

### Some people lie

Sometimes the client (or a witness) will simply tell you that they are lying or you will reach a view that this is probably (if not certainly) the case. You should explain to the client how you are feeling and that they will need to change their position or you will have to stop acting for them or refuse to submit the document or statement.

5. You must not act contrary to the law and you should probably not act further for the client.

### What would you do?

You have explained to the client that a particular document is troubling you deeply and that you are not comfortable submitting it. They tell you that they will submit it themselves so that you do not have a problem with clause 2.9 as you will not have made any statement on their behalf.

Should you agree to this course of action?

Should you keep acting for the client?

What do you do if later an officer from DIAC calls you and asks you questions about the document?



## 8.1.1. What if I find out later that something was false?

Another question that is often asked by migration agents is whether they have a duty to tell DIAC or a Tribunal if they subsequently discover that the client has lied or submitted a false document or that the agent has accidentally misled DIAC or a tribunal.

### What would you do?

You assisted a client to obtain an entertainment visa. On that application the client stated that they had no criminal record. That visa was granted. Six weeks later the client asks you to help them with a GSM application. At the time of applying for a criminal record, the client explains that she has been to prison on two occasions for fraud. When you raise the problem the client says not to worry about the application because they will go to another agent and lodge another temporary visa application which will not require her to disclose it. Should you tell DIAC about the wrong information that was contained in the entertainment visa application or the fact that the person intends to make another false statement?



Clearly the former client would have an obligation to DIAC under s105 of the Act to correct incorrect or false information provided in the visa application. There is no corresponding obligation in the Act on the agent to correct that information.

Similarly there is no obligation in the Code to do so. Clause 2.9 the Code only requires that an agent not make statements or encourage the making of statements which he or she knows or believes to be misleading or deceptive. There is no duty to correct something that is incorrect or false.

A second problem is that if the former client was to make another visa application involving a false statement this would be a serious criminal offence under the Act and this is something that you could prevent. So would it be ethical to advise DIAC about the former client's criminal record and the lie on the application form or about what you think the former client is about to do?

One view is that it might be ethical for you to tell DIAC that it had been misled in the first application (it is consistent with your obligation to be truthful), and certainly to try to stop another serious crime being committed (this is consistent with your general duties to your community). But you could not do so if this meant breaching the confidentiality of the client otherwise than as permitted under the Code. As you know, a breach of confidentiality is permitted by clause 3.2 of the Code only if it is 'required by law'. So what law would require you to tell DIAC? Unless there was one, you could not tell DIAC even though you (and others) might think that this is the right thing to do.

### 8.1.2. Are a lawyer's duties the same?

As we have discussed, it is very unclear when a lawyer would be permitted to breach the confidentiality of a client in order to report a past crime. There would probably not be such a case and there would be no additional duty on lawyer migration agent to correct the past falsehood.<sup>104</sup>

Similarly, it is unclear whether a lawyer can and should breach a confidence to prevent the commission of a crime. Most lawyers would probably not think so unless the crime was likely to cause serious physical harm as opposed to financial or communal harm (such as a fraud).

Lawyer migration agents have a duty of honesty and candour to courts and tribunals which goes beyond those imposed on them by the law or the Code. This duty stems from the fact that they are officers of the court and subject to the court's jurisdiction. In practice this duty means that a lawyer:

- must not deceive or knowingly or recklessly mislead a court or tribunal and correct any misleading statement immediately upon becoming aware of it<sup>105</sup>
- must not make submissions or express views to a court or tribunal on any material evidence or issue in the case in terms which convey or appear to convey the lawyer's personal opinion on the merits of that evidence or issue<sup>106</sup>
- must not continue to act for a client who has lied to a court or tribunal or procured another person to do so unless the client has corrected the lie or allowed the lawyer to do so, and
- must comply with any particular rules or standards regarding communication with witnesses, integrity of evidence, publication of evidence, etc.

These rules are important to lawyer migration agents because they determine how a review matter should be conducted and how to act in the case of an ethical dilemma.

### For example

It is clear that a lawyer migration agent could not continue to act for a client before the RRT if he or she knows that a client has lied and refuses to correct the lie. It is not clear that a migration agent who is not a lawyer would have the same duty, although it is hard to see how a migration agent could continue to effectively assist the person in proceedings where they might be called upon to make a comment. Certainly the migration agent could not repeat a falsehood.

It is also clear that if a lawyer migration agent discovers that they have inadvertently misled a tribunal, they must correct the error as soon as it is discovered even if this means breaching the confidence of the client. This would not extend to having to inform DIAC of such an error, although this would normally be done.

## 8.2. What about other conduct that is not unlawful but not popular?

All migration agents also have an ethical duty to treat people with respect and dignity and to refrain from any act that would bring the reputation of the profession into disrepute.<sup>107</sup> These duties should govern the way that you behave when dealing with DIAC officers, the Minister's office and the tribunals (and courts if you are involved with them).

What is less clear for many migration agents (and others) is whether there is any other duty owed to DIAC, or to the immigration system more generally, that could or should override your duties to the client, or otherwise determine how you must act in a particular situation where the proposed action is not unlawful but may be contrary to the public interest, or the interests of the Government.

### Do you think you have a duty to

1. Report a person who is unlawful to DIAC?
2. Tell a client that it would be better for them to leave Australia rather than remain unlawful even if by staying they will be able to apply for a visa?
3. Refrain from challenging a DIAC officer about their interpretation of the regulations or their insistence on applying policy without regard to the facts of the case?



There is nothing in the *Migration Act* or the Code that refers to an overriding duty to DIAC or the immigration system, and there are certainly no specific obligations of the type listed above. On the other hand, there are clear duties towards a client that would require you to act in a certain way (including the duty to act in their legitimate interest and to keep their information confidential). Unless there is some other duty that would override or conflict with these duties, then your duty to the client would prevail and you would answer these questions by reference to the ethical principles and methodology we have examined already.

## 8.3. Might registration as a migration agent create a duty to DIAC and the system?

The very act of registration as a migration agent may create a general duty to act in an honest and a reputable way in our dealings with DIAC.

The Administrative Appeals Tribunal (AAT) has found that migration agents do owe some duties to the Commonwealth and its agencies. In *Re Peng*,<sup>108</sup> Deputy President McMahon, in considering what it meant for a migration agent to be a 'fit and proper person to give immigration assistance', interpreted the word 'assistance' as encompassing not only work done for a client, but also the help given to DIAC in the administration of the immigration system. The Deputy President referred to the requirement to demonstrate fitness and integrity as involving an element of 'mutuality' which requires an agent to ensure the 'open, honest and efficient administration of immigration matters' in which the agent is involved. This concept received some judicial support by Wilcox J in *Lilienthal*.<sup>109</sup>

In *Re Mottaghi*,<sup>110</sup> Deputy President Jarvis agreed that there was a mutuality of obligations but that it was perhaps better founded in the public interest objectives of the Act and in achieving its proper implementation, rather than in the word 'assistance':

***Having regard to the public interest in the proper execution of the functions of registered migration agents, their responsibility to assist the Department to carry out its function, the cases suggest that the standard of conduct that applies to lawyers should also apply to registered migration agents and the provision of the prescribed Code of Conduct requiring them to maintain the reputation and integrity of the migration advice profession, I think that registered migration agents should also display the characteristics referred to by Justice Heyden, to which I referred in the preceding paragraph [good manners, abstention from anger or malice or personal attack...and respect for other organs of government or other decision-making bodies] in their dealings with the Department and with other organisations, including MARA and this Tribunal.***

A similar duty of 'honest dealings' with government has been found to apply to taxation agents. In *Re Michael Stasos*,<sup>111</sup> Hill J found that registration of a person as a tax agent conferred 'a virtual monopoly' in the delivery of taxation services (subject to the rights of lawyers and accountants) and that this 'privilege' carried with it a consequential set of obligations and responsibilities which extended to dealings with the Australian Taxation Office and its officers.

***In addition to the tax agent dealing with his client, he [referring to Mr Stasos] will, almost invariably have dealings with officers of the Australian Taxation Office and perhaps the boards or tribunals to which I have already referred. Those dealings must be able to be carried on in an atmosphere of mutual trust. The Commissioner and his officers must be able to accept that, to the best of the ability of the tax agent, returns have been prepared which are true and accurate. This is particularly so now that the Commissioner has proceeded to a system of self assessment, with inaccuracies only coming to light in case of random audit or, presumably, other information coming to the hands of the Commissioner.***

***The Commissioner and his officers must be able, also, to accept the word of a tax agent when acting for a taxpayer in negotiations, and a fortiori in matters proceeding in a Board, the Administrative Appeals Tribunal or indeed a court it is imperative that the honesty and integrity of the tax agent not be called into doubt. So it is that it is a requirement, not only of initial registration, but of remaining on the register that a tax agent be a fit and proper person to perform the duties of a tax agent and bear the responsibilities that come with those duties.<sup>112</sup>***

There is no doubt that you owe a duty of honest dealings in the sense that you must not make or encourage a statement that you know to be false. This is made clear in the Code.<sup>113</sup> It is also clear that you should treat DIAC officers and tribunal members with respect and dignity. But is this the same as a duty to ‘uphold the integrity of the immigration system’?<sup>114</sup>

All of these cases discussed above involved conduct that was dishonest or disreputable and so it may be that this general ‘duty’ of honest dealings is really no more than a reflection of the requirement that we be fit and proper persons, and persons of integrity. There is certainly no suggestion in any of these cases that you should breach your duty of confidentiality to report a client to DIAC or that you should not pursue a case fully because it is outside DIAC’s policy, exploits a ‘loophole’, or tests the limits of the law. Further there is no suggestion that you should refrain from criticising DIAC, the Minister or the system if it is done as part of your overriding duty to act in the lawful and legitimate interests of your client.

When acting in this way you must remember that the Code does have a general requirement that you must ‘take all reasonable steps to maintain the reputation and integrity of the migration advice profession’. This duty to other migration agents is discussed further in the next chapter. It is also important to remember that there is a big difference between constructive criticism of the Department, the Minister or the system and engaging in a personal attack on an individual officer or staff member who is simply doing their job.

### 8.3.1. Independence

Lawyers guard their independence with great fervour. It is seen as essential to the administration of justice and courts will protect it with the full force of the law. Lawyers are used to defending their action against criticism that it is contrary to public policy or the interest of society to be constantly challenging law and policy.

It is true that lawyers have a duty to the administration of justice which means that they must not act in a way that would be prejudicial to, or diminish the public confidence in, the administration of justice.<sup>115</sup> Significantly, even this 'higher' ethical standard does not mean a duty to a particular Department, Minister or their policies. On the contrary, the duty to the administration of justice may require appropriate criticism and challenge those institutions.

Nothing in the duties of a lawyer would seem to create any obligation to act differently in any of the specific situations listed on **page 86**, although they might impact on how this was done (for example, the decision to criticise DIAC or the Minister might be handled in a way so as not to attract criticism of the client or the profession, although this would be the same for migration agents).

You will need to decide for yourself how you deal with these situations, but once you decide to assist a client you should do your best to achieve their legitimate interests. You should not shirk from challenging DIAC or its policies simply because you think that this will upset the case officer and so ruin your reputation or 'friendship' with them.

There can be no doubt that your role is to assist the client to pursue their lawful and legitimate interest. Testing the law or pushing the boundaries of DIAC's policy is not an 'exploitation' or 'abuse of the system', nor is it unethical of itself. It is possible that unethical behaviour could result from such cases and you need to guard against this whether you are a lawyer or not.

#### **For example**

Where a case is outside of policy or testing the limits of the law, it is crucial that the client be fully informed of this and how it could impact on their case. They should also be informed of all of the possible consequences and alternatives. It would be unethical to pursue a course of action only to benefit yourself from more fees and without regard to the interests of the client.

## 8.4. Inappropriate behaviour

It goes without saying that you should not offer an inducement to a DIAC officer, tribunal member or other official in order to try to advance your own interests or those of your client. This conduct can amount to corruption and is not ethical.

In the course of your dealings with DIAC officers and other officials you may form a camaraderie or even friendship. This should never be abused either by asking that person to do something that they should not do or by suggesting to clients that you have a relationship that would allow you to achieve a particular result.

Such conduct is unethical and can also be a breach of the Code.

#### Clause 2.12 of the Code states

A registered migration agent must not, when advertising, imply the existence of a relationship with the Department or the Authority, for example by using terms such as:

- (a) Australian Government registered; or
- (b) Migration Agents Registration Authority registered; or
- (c) Department registered.

#### Clause 2.14 of the Code states

A registered migration agent must not portray registration as involving a special or privileged relationship with the Minister, officers of the Department or the Authority, for example to obtain priority processing, or to imply that the agent undertakes part or full processing for the Department.



It would also be unethical for you to try to intimidate or coerce a DIAC officer or any other person to do something that was not appropriate, to refrain from doing something that was required of them, or to achieve a result.<sup>116</sup>

#### For example

It could be unethical to tell a DIAC officer that your client is likely to kill themselves unless their visa is approved in order to have the case officer decide the application in your client's favour or deal with it quickly in circumstances where you had no evidence of this and no reason to believe it was true. Even if you had evidence of this, or believed it to be true, you would need to consider carefully before telling the case officer about this.

Similarly, once a decision has been made, there is generally little utility in continuing to canvass the issues with the case officer unless there has been a clear mistake. Where this occurs there are appropriate channels for seeking review or trying to have the mistake corrected. Regardless of how bad you believe the decision to be, it is not ethical to try to intimidate an officer into changing the decision or abusing them personally. Leaving aside the fact that it is simply not appropriate to act in this way, it is important to remember that you will act for many clients and that it may not be in the interest of those other clients for you to create a poisonous relationship with the Department over a single case. This does not mean that you cannot or should not complain or argue as forcefully as you can for a particular client. Rather, it means that you should always consider the whole framework within which you are working and conducting your business.

## 8.5. Appearing before the tribunals and courts

You may have cause to assist with the review of a refusal or cancellation decision. This could involve merits (administrative) review through the Migration Review Tribunal<sup>117</sup> (MRT), the Refugee Review Tribunal<sup>118</sup> (RRT) or the Administrative Appeals Tribunal<sup>119</sup> (AAT), or alternatively judicial review through the Federal Magistrates Court or the High Court.<sup>120</sup>

Given the inquisitional nature of the MRT and RRT, agents have a limited role in a tribunal hearing itself.<sup>121</sup> However depending on the circumstances of the matter, during the course of a hearing a tribunal Member may consider it appropriate to allow the agent to present arguments or address the tribunal. Whilst there are no such restrictions on representation for agents in the case of the AAT proceedings,<sup>122</sup> as with any other matter, before taking on such a matter you will need to consider if you have the necessary knowledge and skill to undertake and complete the client's case.

In all dealings with the tribunals, you should act in accordance with the Code even though it does not specifically refer to the tribunals or may refer to 'the Department'. Any conduct that the tribunal deems to fall short of this standard or in breach of the Code may be referred to the Authority for investigation. You should ensure that you treat the tribunals and courts with the respect that they deserve as institutions and you should not abuse their processes for your own ends or those of your client.<sup>123</sup>

### 8.5.1. Delays and abuse of process

When dealing with a client 'competently, diligently and fairly' this would generally mean having their case processed in the most efficient way possible and in a way that will maximise their prospects of success. This will generally be achieved by ensuring that the case is presented to a tribunal in a way that makes it easy for the tribunal to understand your client's arguments. Although there is no specific rule, this would include:

- confining the case to the issues which are in dispute
- providing the material and arguments to the tribunal in a format that is easy to follow and directed to the issues and in sufficient time for the tribunal member to be able to assess and analyse it (in some cases it may be possible to approve the case on the papers and so avoid the need for a hearing), and
- limiting the evidence to that which is reasonably necessary to advance the client's case (taking care not to provide information that might cause a problem for the client).

Migration agents should comply with any directions issued by the Principal Member of the RRT and MRT pursuant to sections 353A and 420A of the Act and by the President of the AAT.

It would not generally be ethical for a migration agent to abuse the tribunal process by seeking delays in order to advance their own interests or for their own convenience. You should be aware that tribunal members do speak to each other and that it will be noticed if such conduct becomes a pattern. If nothing else, this is wrong because it has the possibility of adversely affecting your clients by making the tribunal suspicious of your actions.

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- 100.** We use this term in its broadest sense to include all residents of Australia whether temporary or permanent and including all Australian Citizens.
- 101.** See clauses 2.9 and 2.19 of the Code.
- 102.** This is an offence under s234 of the *Migration Act* 1958.
- 103.** This could assist an offence by the client under s245EA.
- 104.** ASCR – 9.2.4 and 9.2.5.
- 105.** ASCR – 19.1.
- 106.** ASCR – 17.3.
- 107.** Clause 2.23 of the Code compels agents to ‘take all reasonable steps to maintain the reputation and integrity of the migration advice profession’.
- 108.** *Re Peng and Department of Immigration and Multicultural Affairs* [1998] AATA 12 at [26].
- 109.** *Lilienthal v Migration Agents Registration Authority* (2002) 117 FCR 558 at [24].
- 110.** *Re Mottaghi and Migration Agents Registration Authority* [2007] AATA 60 at [55].
- 111.** *Re Michael Stasos v Tax Agents’ Board* [1990] FCA 379 at [47] – [58].
- 112.** *Ibid* at [50] and [51].
- 113.** Clause 2.9.
- 114.** A duty of this sort does appear to exist in New Zealand where Immigration Advisers have an obligation to “uphold the integrity of New Zealand’s immigration system and the Immigration Advisers Authority” see *Licensed Immigration Advisers Code of Conduct 2010* at clause 2.1(f).
- 115.** ASCR rule 5.1.1.
- 116.** Clause 2.15.
- 117.** *Migration Act* 1958 Pt 5 Divs 2-9, Pt 6 Divs 1, 2.
- 118.** *Ibid* Pt 7 Divs 1-10.
- 119.** *Ibid* Pt 5 Div 9, Pt 7 Div 8. ss 134(7), 500(1).
- 120.** *Ibid* Pt 8 Divs 1, 2.
- 121.** See *Migration Act* 1958 ss366A and 427(6).
- 122.** See *Administrative Appeals Tribunal Act* 1975 s32.
- 123.** See here, the Migration Institute of Australia, *MIA Members’ Code of Ethics and Practice* (January 2011), and in particular ‘Section C: Relations with Review Tribunals’, which has an overarching statement of principle that “Agents should act with honesty and respect in all dealings with Review Tribunals”.

## 9. Your relationship with others

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## 9. Your relationships with others

In the course of practicing as a migration agent you will also have relationships with other people and institutions. These will also involve a need to act ethically.

### 9.1. Practitioners and the profession

Part 4 of the Code purports to regulate the relationships between migration agents, but one wonders why it is even needed when the matters covered should form the basis of normal relations between professionals. It would be a sad reflection of the levels of our ethics if we really required these rules to tell us how to act towards others doing the same work as us. For example, you would think that it goes without saying that it is right to act with ‘fairness, honesty and courtesy’ when dealing with another migration agent,<sup>124</sup> or that one agent should try to honour an undertaking made to another.<sup>125</sup>

There are, however, more difficult questions that you will need to consider:

#### What do you think?

Is it alright to offer a second opinion or better or different services?

Clause 4.3 prohibits a migration agent from poaching a client by “offering services that the first agent cannot or does not intend to provide”. Does this really mean that you should not tell a potential client that there is another better way of doing something or that you can do it cheaper or offer extra services?

Is it alright to undercut the price of other agents?

Healthy competition is not only acceptable but encouraged, but at what point does your behaviour become unethical because it is designed to damage another agent or drive them out of business?

Do you have a responsibility to report another agent who you believe is doing the wrong thing?

What if you discover that a client’s interests have been damaged by the agent’s conduct or you have noticed that there is a serious pattern of the same type of damaging behaviour? Do you have a duty to the profession and to future clients to report the migration agent?



The answers to these questions will obviously depend on the facts of the particular situation but they raise real ethical dilemmas.

Would it really be ethical for you to report another agent? Possibly, particularly if you had clear evidence of the conduct and you knew it was ongoing. But you should always ask yourself what is motivating your actions. Is it for the 'right' motive? It would not be ethical to report the other agent in order to obtain a benefit by taking their clients or driving the agent out of business, but if this is the outcome should that really stop you from taking action if the circumstances warranted it? One approach might be to contact the agent and tell them your concerns and ask them what they intend to do about it. This would be fair to the other agent. Another might be to tell the client to take action against the agent and then check with them that this had been done, but is this really just doing the same thing through another person? If so, is that not cowardly rather than ethical?

Try answering these questions by reference to the methodology and see how you go.

## 9.2. Employees, employers and partners

Part 8 of the Code regulates the relationships between a migration agent and his or her employees. As with Part 4 of the Code (relating to relationships with other agents), the behaviour prescribed by the Code is obvious and clear. There are, however, more difficult ethical questions you may need to consider.

### What would you do?

You have discovered that a colleague has just breached the confidentiality of a client.

What will you do about it?



## 9.3. Advertising

The Code also lays down certain rules about advertising.<sup>126</sup> These are clear and not particularly controversial.

One area that does cause an ethical issue is the confusion that many clients have about the difference between a migration agent who is not a lawyer and a migration agent who is also a lawyer. You would be aware that it is illegal for people to engage in legal practice, or hold out that they are entitled to do so, without holding a current practising certificate.<sup>127</sup> When it comes to advertising and your behaviour you should make sure that you do not give the impression to a person that you are a lawyer if you are not and you should take positive steps to dispel them of that impression even if you did nothing to encourage it.

### For example

You should not call yourself a 'legal representative' or use 'law' or 'legal' in your advertising in order to give the impression you are a lawyer, even if it is strictly not illegal. Such conduct is not ethical if it is designed to leave potential clients with a false impression.

<sup>124</sup>. Clause 4.5.

<sup>125</sup>. Clause 4.6.

<sup>126</sup>. Clauses 2.10 – 2.14.

<sup>127</sup>. For example, see s14 and s15 of the *Legal Profession Act 2004* (NSW).

## 10. Further reading

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# 10. Further reading

This document incorporates the ideas of many authors. We have cited those we have quoted directly or whose ideas we did not sufficiently modify to call them our own. You can read more on the following topics:

## Confidentiality

Dr Paul Finn, 'Professionals and Confidentiality' (1992) 14 *Sydney Law Review* 317

Law Society of New South Wales (in consultation with the Law Institute of Victoria), *Information Barrier Guidelines* (16 March 2006) <<http://www.lawsociety.com.au/idc/groups/public/documents/internetcostguidebook/008728.pdf>>

Virginia Shirvington, 'Going behind clients' instructions' (May 1998) 36 *Law Society Journal* 32

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Virginia P Shirvington, 'Ethics and Conflicts of Interest and Duties' Law Society of NSW, (April 2006) <<http://www.lawsociety.com.au/idc/groups/public/documents/internetcostguidebook/026415.pdf>>

## Ethics

Bagaric, Mirko; Dimopoulos, Penny, 'Legal Ethics Is (Just) Normal Ethics: Towards a Coherent System of Legal Ethics' (2003) 3 *Queensland University of Technology Law & Justice Journal* 367

Allan C. Hutchinson, 'Legal Ethics for a Fragmented Society: Between Professional and Personal' (1998) 5:2 *International Journal of the Legal Profession* 175

The Markkula Center for Applied Ethics, Santa Clara University, *A Framework for Thinking Ethically*, May 2009 <<http://www.scu.edu/ethics/practicing/decision/framework.html>>

Ysiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (LexisNexis Butterworths Australia, 4th ed, 2005)

## Fiduciary Relationships

Samantha Hepburn, "Breen v Williams" (1995-1996) 20 *Melbourne University Law Review* 1201

## Fit and Proper Person

Debra Mullins, 'Warts and all: the impact of candour in assessing character for admission to the legal profession' (2009) 28 (2) *University of Queensland Law Journal* 361-369.

## Industry Codes of Conduct

Migration Institute of Australia, *MIA Members' Code of Ethics and Practice* (January 2011)

New Zealand Immigration Advisers Authority, *Licensed Immigration Advisers Code of Conduct* (2010)

## Legal Professional Standards

Law Council of Australia, *Draft Australian Solicitor Conduct Rules* (19 March 2011)

Dr Simon Longstaff, 'The lawyer's duty to the community' (2003) *St James Ethics Centre* <<http://www.ethics.org.au/ethics-articles/lawyers-duty-community>>

Steve Mark, 'The Office of the Legal Services Commissioner: Consumer Protection' (January/February 2009) 90 *Precedent* 12-16. <<http://search.informit.com.au/fullText;dn=20092084;res=AGISPT>> ISSN: 1449-7719>

Ysaiah Ross and Peter MacFarlane, *Lawyers' Responsibility and Accountability in Australia: Cases, Problems & Commentary* (LexisNexis Butterworths Australia, 3rd edition 2007)

## Privacy

Office of the Federal Privacy Commissioner, *Guidelines to The National Privacy Principles*, (September 2001) <<http://www.privacy.gov.au/materials/types/guidelines/view/6582>>

## Professions

Australian Council of Professions Discussion Paper, *Professional Services, Responsibility and Competition Policy* (August 2003) <<http://www.professions.com.au/profcomppublic.html>>

The Honourable Murray Gleeson AC, former Chief Justice of the High Court, 'Are the Professions worth keeping?' (Speech presented to the Greek-Australian International Legal & Medical Conference, 31 May 1999)

John L Pinnix (Editor-in-Chief), C. Lynn Calder (Associate Editor) & Tatia L Gordon-Troy (Managing Editor), *Ethics in a Brave New World: Professional Responsibility, Personal Accountability and Risk Management for Immigration Practitioners*, American Lawyers Association, 2004

Virginia Shirvington, 'A Decade of Ethical Dilemmas: and the Journey Continues' (December 2003) 41 (11) *Law Society Journal* 38-39

Virginia Shirvington, 'Conflicting loyalties', (October 2002) 40 (9) *Law Society Journal* 38-39

## Regulation of Migration Agents

Commonwealth of Australia, 2007–08 *Review of Statutory Self-Regulation of the Migration Advice Profession – Final Report* (May 2008)

Parliament of the Commonwealth of Australia, Joint Standing Committee on Migration, *Protecting the Vulnerable? The Migration Agents Registration Scheme*, Australian Government Publishing Service Canberra, May 1995

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# Cases

## Conflicts of Interest

*Law Society of NSW v Harvey* [1976] 2 NSWLR 154

## Duty of Care

*Benson v MacLachlan t/as Sterling Conveyancers* [2001] NSWCA 263

*Hawkins v Clayton* (1988) 164 CLR 539

*Woods v MARA* (2004) [2004] FCR 1622

## Fiduciary Relationships

*Breen v Williams* (1996) 186 CLR 71

*Friend v Booker & Anor* [2009] HCA 21

*Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64

*Pilmer v Duke Group Ltd (In Liq)* [2001] HCA 31

## Fit and Proper Person

*Alexander Pty Ltd and Tax Agents Board of Victoria* [1999] AATA 821; (1999) 43 ATR 1163; 99 ATC 2338 (3 November 1999)

*Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750

*Australian Broadcasting Tribunal v Bond* [1990] HCA 33, 170 CLR 321

*Clyne v The New South Wales Bar Association* [1960] HCA 40; (1960) 104 CLR 186

*Davies v Australian Securities Commission and Companies Auditors and Liquidators Disciplinary Board* [1995] FCA 1496; (1995) 131 ALR 295, (1995) 18 ACSR 129 (30 August 1995)

*Feng and MARA* [2002] AATA 709

*Gardener and Australian Prudential Regulation Authority* [2009] AATA 990 (24 December 2009)

*Hakaoro and Minister for Immigration and Multicultural Affairs* [1998] AATA 228 (2 April 1998)

*Hanna v Migration Agents Registration Authority* [1999] FCA 1657

*Harnett v Migration Agents Registration Authority* (2004) FCR 50

*Hughes & Vale Pty Ltd v State of New South Wales* [1955] HCA 28; (1955) 93 CLR 127

*Lilienthal v Migration Agents Registration Authority* [2001] AATA 797

*Mottaghi v Migration Agents Registration Authority* [2007] AATA 60

*The New South Wales Bar Association v Evatt* [1968] HCA 20; (1968) 117 CLR 177

*Re Peng v Department of Immigration and Multicultural Affairs and AAT* (1998) AATA 12

*Rozsy v Migration Agents Registration Authority* [2008] AATA 434 (26 May 2008)

*Russell v Migration Agents Registration Authority* [2008] AATA 22 (10 January 2008)

*Re SRH and Controller-General of Customs* (1995) 21 AAR 401

*Statos v Tax Agents' Board (NSW)* (1990) 90 ATC 4950

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*Volonski and Migration Agents Registration Authority* [2010] AATA 765 (6 October 2010)

*Walsh v Law Society of NSW* [1999] HCA 33

## Legal Professional Privilege

*Attorney-General (NT) v Maurice* (1996) 161 CLR 457

*Baker v Campbell* (1983) 153 CLR 52

*Commissioner of Taxation v Coombes* [1999] FCA 842

*Joel v Migration Agents Registration Authority* [2001] FCA 1919

*MIMIA v Hamdan* [2005] FCAFC 113

*R v Bell; Ex parte Lees* (1980) 146 CLR 141

*SZHWY v Minister for Immigration and Citizenship* [2007] FCAFC 64

*SZKTQ v Minister for Immigration & Anor* [2008] FMCA 91

## Migration Agents Registration Scheme

*Cunliffe and Anor v Commonwealth of Australia* [1994] HCA 44; (1994) 182 CLR 272

*Shi v Migration Agents Registration Authority* [2008] HCA 31

*Vasilopoulos and Migration Agents Registration Authority* [2005] AATA 368

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# Legislation

*Legal Profession Act 2004* (Vic), *Legal Profession Regulations 2005* (Vic) & *Professional Conduct and Practice Rules 2005* (Vic)

*Legal Professional Conduct Rules* (2010) (WA)

*Legal Profession (Solicitors) Rules 2007* (September 2007) (ACT)

*Legal Profession (Solicitors) Rules 2007* (July 2007) (QLD)

*Privacy Act 1988* (Cth)

*Rules of Practice 2008* (April 2008) (TAS)

*Rules of Professional Conduct & Practice* (March 2003) (SA)

*Rules of Professional Conduct and Practice* (January 2002) (NT)

*Revised Professional Conduct & Practice Rules* (August 1995) (NSW)