



# Inadvertent Disclosure

## Summary

The inadvertent or mistaken disclosure of confidential documents to a solicitor in the course of acting for a client gives rise to ethical duties on the part of the solicitor not to make use of the disclosure irrespective of client instructions. Acting in this way is an example of the professional ethical obligations of solicitors supporting the objectives of the proper administration of justice.<sup>1</sup> These ethical obligations are partly set out in Victorian professional conduct rules<sup>2</sup> and common law. In addition, Victorian solicitors have statutory overarching obligations to further the administration of justice in relation to civil proceedings.<sup>3</sup>

## Duty to inform client of all relevant information

A solicitor has several duties in the conduct of a client's matter and should be mindful of client legal privilege.

A solicitor is under a duty to pass on to a client (and use) all information which is material to the client's interests, regardless of the source of that information unless the solicitor knows that the information has been accidentally, unlawfully, improperly or surreptitiously obtained.

## Ethical duties to other side

A solicitor should not seek to obtain access to information from correspondence and documents which the solicitor knows belong to or are intended for the other side.

## Do not read

Where it is immediately obvious to a solicitor that confidential documents have been mistakenly disclosed, the solicitor should not read the documents and should inform the other side of the mistake and make arrangements for the return of the confidential documents. Examples of such documents are advice from counsel, documents addressed to the other side and documents which clearly and immediately indicate their confidential nature.

## Stop reading

If instead, a solicitor only discovers whilst reading a document that confidential information has been mistakenly disclosed, the solicitor should cease reading the document until the solicitor is satisfied of the propriety of continuing. The other side should be notified of the disclosure.

<sup>1</sup> Expense Reduction Analysts Group Pty. Ltd. v Armstrong Strategic Management and Marketing Pty. Ltd. (2013) HCA 46.

<sup>2</sup> Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Rule 31)

<sup>3</sup> Civil Procedure Act 2010 (Section 16)

# ETHICS GUIDELINES

## What to tell your client

- I. The solicitor must inform the client that; a court may grant an injunction preventing the overt use of any information gleaned from the disclosed document; and
- II. a court may grant an injunction prohibiting the solicitor (and possibly counsel) from continuing to act if they are in possession of confidential information belonging to the other side.

Client instructions to use the disclosed material do not override the solicitor's legal and ethical obligations.<sup>4</sup>

## Options for you to consider

With regard to the particular circumstances of each case, a solicitor may:

- I. return the disclosed confidential documents to the other side; or
- II. request permission from the other side to use the document; or
- III. form the view from case law that use is permitted, or preferably obtain a court order to permit use of the disclosed confidential documents.

## How can we help you?

These are guidelines only and do not have the force of law. The information is intended to be a general guide only and is not intended to constitute professional or legal advice and you should rely on your own inquiries and assessment.

The Law Institute of Victoria expressly disclaims any and all liability for any loss or damage arising from reliance upon any information in this document.

A practitioner must comply with the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* and the *Legal Profession Uniform Law (Victoria)* and any other applicable rules or legislation.

To discuss concerns about inadvertent disclosure, contact the Law Institute of Victoria's Ethics Department on 9607 9336.

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<sup>4</sup> Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Rule 31.3)