CONFLICT

OF

INTEREST

Ian Macdonald
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CONFLICT OF INTEREST

1.1 What Is a Conflict of Interest?

A conflict of interest is a situation in which the interests, rights or position of one person come into conflict, challenge or dispute with those of another person. It can arise when a person providing a service, such as a financial counsellor, has a personal interest in a matter which is at odds with the interest of a client with whom they are dealing. It can also arise when the interests of two clients, past or present, of the agency are in conflict with one another.

1.2 Why Does It Matter?

It is important for a financial counsellor to identify and avoid potential or actual conflicts of interest because the canons of conduct for financial counsellors require this. Paragraph 2.2 of the Constitution of the Financial Counsellors’ Association of Western Australia Inc. defines a financial counsellor as a person who carries out certain functions without conflict of interest. The criteria for accredited membership and associate membership of FCAWA require a person to be free of conflict of interest as per the FSRA. This is a reference to the Financial Services Reform Act 2001 of the Commonwealth. This is an Act which amended the Corporations Act 2001 and the Australian Securities and Investments Commission Act 2001, and introduced an Australia-wide system of licensing providers of financial services. Some of the things financial counsellors do in their work fall within the definition of financial services, and an exemption order was made by the Australian Securities and Investments Commission providing that financial counsellors need not hold an Australian Financial Services Licence if they meet certain criteria. One of these is that the financial counselling service must be delivered free of charge to clients, and the financial counselling agency must not derive any financial benefit directly or indirectly from another person or organisation in relation to any action by or on behalf of
the client arising from any aspect of the financial counselling service. There is a similar exemption from credit licensing requirements by the National Consumer Credit Protection Regulations 2010. These are examined in more detail at the end of this paper.

The relevance of this to conflict of interest is to avoid a situation in which the financial interests of the counsellor or the agency are at odds with the interests of the client.

The Financial Counselling Australia Code of Ethical Practice provides in paragraph 2.6 that financial counsellors must identify and resolve conflicts of interest. The detailed provisions of paragraph 2.6 are examined in more detail later in this paper.

2.1 Who Is The Client?

In many cases it is obvious who the client is, because only one person contacts your service, requesting assistance and in dealing with the matter you deal only with that person. However, there are some situations in which this is not so clear.

2.2 Persons Under a Disability

In dealing with some clients it may appear that they suffer from some mental impairment or ill-health. However, the starting point is that there is a presumption of mental competence.

2.3 Presumption of Competence

There is a common law presumption of competence (1) and in Western Australia this is set out in subsection 4 (3) of the Guardianship and Administration Act
1990. Everyone is presumed to be capable of looking after themselves physically, managing their own affairs, and making reasonable judgments about their property and financial affairs unless the contrary is proved to the satisfaction of the State Administrative Tribunal.

The implication of this is that even if a particular client seems less bright than average, or to have a history of making unwise decisions, in the first instance they should be presumed to be capable of making reasonable decisions unless there is evidence that they are not.

2.4 Evidence of Disability

Some things that may at first glance appear to indicate a mental disability may be due to other factors, such as cultural or educational issues, substance abuse, or a condition such as depression. Evidence which points more reliably to mental disability are findings by a competent authority in regard to the client, such as the client being assessed as eligible to receive a Disability Support Pension due to intellectual disability, or a finding by the State Administrative Tribunal of impairment sufficient to found an administration order under the Guardianship and Administration Act. Other pieces of evidence could be a recent medical opinion, or the fact that the client works in supported employment or has a history of hospitalization for mental illness.

2.5 Scale of The Matter

The importance and complexity of the matter is also relevant in assessing what type of approach is appropriate. A person with a relatively minor mental disability may be capable of dealing with a straightforward contract, such as buying food or renting accommodation, but may not be capable of making appropriate decisions in matters of greater complexity, such as understanding their entitlements in a trust or deceased estate, and the merits of pursuing action in regard to such an
issue, or the appropriateness of investing a lump sum in a particular form of investment.

2.6 Client With A Carer

Putting together the considerations outlined above casts some light on the situation in which a person presents as a client, with a carer wishing to speak for them. Who is the client? It is clear that the client is the person for whom things are done, and not the carer. There are only limited circumstances in which the carer can make decisions of a financial nature for the client. These are:

* if the client gave the carer an Enduring Power of Attorney while the client was of full legal capacity, or

* if the carer has been appointed an administrator by the State Administrative Tribunal

2.7 Two or More Persons As The Client

Sometimes two people may come to your office together, and have a common problem. An obvious example of this is a couple who live together and have joint finances. In many circumstances they will both be your clients, and their interests are effectively the same and you can deal with them together.

However, if as the matter goes along a difference arises between the interests of one person and the other, then this leads to a conflict of interest situation for you. One clear example is if you have been dealing with a couple who then separate, and a dispute arises between them as to their respective liabilities for debts, and their claims to different assets. If you have a knowledge of the circumstances of each party, and the strengths and weakness of their position from having dealt with them, then you should cease to deal with both of them. This means that
you should advise both to go to other agencies. It is not acceptable for you to continue to deal with one party against the other, because you would be using against the second person information or materials which you gained from them at a time when you had a counsellor-client relationship with them. This is a clear conflict of interest and to act in that way is unethical.

2.8 The Absent Client

On some occasions people will come to your service, or simply telephone, with a question on behalf of a friend. At other times a person will see you and insist they speak for other people, perhaps other members of the family. It is wise never to go along with this. If you deal with a third person, who will relay your information or suggestions to a client whom you never see or speak to, it is almost inevitable there will be distortions of what they have said and what you say. With the best will in the world third parties will put their own interpretation on matters. If the client is too busy to be able to see you the matter cannot be very important to the client. If the client is prevented by distance or health or shortness of time from seeing you then at the very least you should insist the client speak to you by phone, and give you something in writing perhaps by fax or e-mail, with a scanned signature of the absent client. If none of these things are possible then it is likely that the wisest course is to say that in these circumstances you cannot act for or deal with that person. In all cases it is vital that you are entirely sure that you are really dealing with the client.

2.9 Duty to a Previous Client

Another situation of conflict can arise if you are dealing with a person and it become evident that you have already dealt as a counsellor with another person in relation to the same or an over-lapping matter. An example of this would occur if you were dealing with a woman and had assisted her with financial matters, and the counselling relationship was concluded. Later on a man comes to the
agency as a client concerned with the same financial matters, and in your dealing with him you discover that he has been a partner of the woman concerned. If you go on and deal with his matter a conflict would arise because you already have information or materials relating to the woman which you obtained from her when you had a counsellor-client relationship with her. In those circumstances, if is necessary for you to advise the man that a check of the records of the agency has shown that the agency has dealt with the woman previously, that a conflict of interest has arisen, and that you are not able to act for him for that reason. In those circumstances you would refer him to another agency.

It is desirable that every agency has a system in place to enable a thorough check of existing files to ensure there is no conflict with a prospective new client.

3. **Conflict With Legal Duty**

Another type of conflict of interest arises when it becomes evident that client is acting illegally, or in a way which you or your agency view as immoral or improper. Whilst in a general way your duty is to do your best for the client and to be non-judgmental, you are certainly not obliged to act in a way that is contrary to your or your agency’s standards, and you are certainly not obliged or entitled to act illegally. In a situation like this I suggest it is appropriate to advise the client that the way in which the client is acting is unlawful or contrary to your or your agency’s ethical standards, and for that reason you will no longer deal with that person. I suggest that in those circumstances you would make notes of your having advised the client of this and return to the client those portions of the file which the client owns. This does not include your file notes. They belong to your agency.
4. **Subpoenaing of Files**

One way in which the conflict between the client’s interest and the law can become acute is if the client is investigated or prosecuted for criminal activity, such as social security fraud and your file is subpoenaed. As a counsellor you have no privilege of non-disclosure. Your obligation of confidentiality is an ethical one but does not confer any legal status on you different from that which applies to any other citizen. If a government agency exercising power under the Act that controls it (an example of this could be Centrelink, Child Support Agency or Australian Taxation Office) required you to give information or produce documents relating to the client’s affairs then you are legally compelled to do so, and the fact that you have a counsellor-client relationship does not affect this legal obligation. Similarly if a Court issues a subpoena to you you are in the same position as any other citizen, and have no privilege against disclosure. It is therefore desirable to let a client know that whilst you will generally preserve the client’s confidentiality this is not absolute, and to advise the client that there could be circumstances such as those mentioned above where you would be forced to give information or produce documents to a government agency or a Court. One way of dealing with this with a client is to include reference to it in a letter of engagement which is discussed later in this paper.

5. **Conflict of Interest and Funding**

Under the heading Why Does It Matter? earlier in this paper I have briefly touched on the issue of the financial counselling exemption from the requirement to hold a financial services licence. The exemption is dependent upon the service being free to clients, and the agency not receiving any financial benefit directly or indirectly from actions of the client. The full text of the ASIC exemption from the requirements to hold an Australian Financial Services Licence can be found by searching for CO 03/1063 on the ASIC website. There is similar relief for counsellors from the requirement to hold an Australian Credit Licence. This is
contained in Regulation 20 (5) of the National Consumer Credit Protection Regulations 2010.

The requirement that, to qualify for the exemption, the service must be free is clear. It rules out the possibility of the agency charging an “administration fee”, or any other financial contribution, however small.

The requirement that the agency does not receive any financial benefit in relation to any action by or on behalf of the client is less clear.

Certainly it rules out anything like a “spotter’s fee” paid to the counsellor or agency for referring the client to a business organization. It emphasizes that funding to a financial counsellor or agency must be free of strings in relation to action by or on behalf of a client. Incentive payments made to a counsellor or agency that are contingent upon some action by the client are also ruled out by the terms of the exemption.

6. Letter of Engagement

One way to set out clearly for clients and indeed to give some legal framework to your relationship with the client, is to use a letter of engagement or service contract. This can set out exactly what your service does and does not do, and can also deal with issues like the ownership of different parts of the file, the way in which the counselling relationship will come to an end, provisions such as that if the client fails to respond to your letters for a particular time then the file is closed and your dealing with the client ceases. It can make clear to the client that your service is normally confidential but there are some circumstances where you may be obliged by law to provide materials: for example, to a Court in response to a subpoena.
NOTES:

1. Hassard v Smith (1872) 6 IR Eq 429

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