Law Council
OF AUSTRALIA

Australian Solicitors' Conduct Rules—Commentary

1 July 2026

Telephone +61 2 6246 3788
Email mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612
Level 1, MODE3, 24 Lonsdale Street,
Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

Contents

Introduction 3

Nature and purpose of the rules 4

1. Application and interpretation 4
2. Purpose and effect of the rules 7

Fundamental duties of solicitors 14

3. Paramount duty to the court and the administration of justice 14
4. Other fundamental ethical duties 17
5. Standard of conduct—dishonest or disreputable conduct 20
6. Undertakings in the course of legal practice 21

Relations with clients 23

7. Communication of advice 23
8. Client instructions 24
9. Confidentiality 31
10. Conflicts concerning former clients 42
11. Conflict of duties concerning current clients 52

11A. Short-term legal assistance services 66

12. Conflict concerning a solicitor's own interests 71
13. Completion or termination of engagement 78
14. Client documents 84
15. Lien over documents 88
16. Charging for document storage 89

Advocacy and litigation 90

17. Independence—avoidance of personal bias 90
18. Formality before the court 91
19. Duty to the court 94
20. Delinquent or guilty clients 96
21. Responsible use of court process and privilege 99
22. Communication with opponents 101
23. Opposition access to witnesses 102
24. Integrity of evidence—influencing evidence 103
25. Integrity of evidence—two witnesses together 106
26. Communication with witnesses under cross-examination 107
27. Solicitor as material witness in client's case 108

28. Public comment during current proceedings 110
29. Prosecutor's duties 112
Relations with other persons 116
30. Another solicitor's or other person's error 116
31. Inadvertent disclosure 119
32. Unfounded allegations 121
33. Communication with another solicitor's client 123
34. Dealing with other persons 125
35. Contracting with third parties 128
Law practice management 129
36. Advertising 129
37. Supervision of legal services 130
38. Returning judicial officers 131
39. Legal and non-legal services 135
40. Sharing receipts 137
41. Mortgage financing and managed investments 139
42. Anti-discrimination and harassment 140
43. Dealing with the regulatory authority 143
Glossary of terms 147
Historical notes 154

Introduction

The Australian Solicitors Conduct Rules (**ASCR**) are developed by the Law Council of Australia in collaboration with the 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Law Council's Constituent Bodies.

The ASCR comprise an agreed, uniform set of conduct rules setting out ethical principles and professional responsibilities governing the conduct of Australia's solicitors in their relations and interactions with clients, the courts, fellow legal practitioners, regulators, and others with whom solicitors come into professional contact.

This version of the Commentary is based on the Law Council's Rules, effective from 1 July 2026. After the ASCR are developed and settled by the Law Council they undergo rule making processes prescribed in State and Territory legal professional legislation. This may mean some variation in the effective application date of the Law Council's ASCR in individual States and Territories.

In developing this Commentary to the ASCR, the Law Council has responded to calls from public consultations for an expanded Commentary, with more detailed explanations of the principles underpinning the rules, and how particular Rules might apply in a variety of situations encountered in legal practice. The Law Council has also been mindful that the Commentary is of interest to a broader range of people and organisations than only members of the legal profession.

Users of this Commentary should note that the Commentary does not constitute part of, or in any way constitutes additional codification of, the Rules, nor is the Commentary intended to be the definitive or sole source of information about the Rules and their application.

Practitioners are especially reminded to consult their local Law Society for information and guidance on ethical and professional responsibility issues that arise in the course of their legal practice.

Nature and purpose of the rules

1. Application and interpretation

1.1 These Rules apply to all solicitors in the jurisdiction, including Australian-registered foreign lawyers acting in the manner of a solicitor.

1.2 The definitions that apply in these Rules are set out in the glossary.

Commentary

Overview

These Australian Solicitors' Conduct Rules were developed by the Professional Ethics Committee of the Law Council of Australia. The members of the Professional Ethics Committee are experienced legal practitioners drawn from every State and Territory Law Society and Law Firms Australia.

Professional conduct rules express the collective judgment of the legal profession about the standards of professional conduct to be "observed or approved of by members of the profession of good repute and competency".[1] As such, these Rules are an exercise of self-regulation: firstly, by the profession as a whole, as statements of agreed standards of the profession; and secondly, by each member of the profession as a commitment to their peers, their clients, the courts, and to the broader public interest in the rule of law and administration of justice.

The professional commitment to abide by the conduct rules is reinforced by State and Territory legislation, which sets out the authority and processes for developing professional conduct rules, and the formal requirements for those rules to be "made" or become binding under the legal profession law of each State and Territory.

Application

The Australian Solicitors' Conduct Rules have been adopted as the legal profession conduct rules for solicitors in every State and Territory.

The uniform adoption of the Australian Solicitors' Conduct Rules serves the public interest in the reputation of the legal profession and the administration of justice by providing clarity for solicitors, their clients and the courts about the legal profession's expected standards of professional conduct by its members.

Differing forms of legal practice as a solicitor

These Rules apply to all solicitors and Australian-registered foreign lawyers acting in the manner of a solicitor, including those engaged in:

- private legal practice;
- legal practice as 'in-house' (or corporate) counsel;
- legal practice as government legal officers; and

---

[1] *Re a Barrister and Solicitor* (1972) 20 FLR 234 at 245 per Fox, Blackburn and Woodward JJ.

- legal practice by bodies such as legal aid organisations and community legal centres.

The extent to which a particular rule or rules will apply in a given situation will depend upon the circumstances that arise during the course of legal practice for the solicitor providing the legal service. Depending upon the particular context and circumstances, the situations addressed in some rules may arise frequently for solicitors, whereas others may arise only infrequently, or not at all.

Other professional standards

The Australian Solicitors' Conduct Rules are not intended to be an exhaustive code of professional conduct rules for solicitors or for Australian-registered foreign lawyers acting in the manner of a solicitor.

Solicitors practising in specialised areas of law may be required to abide by standards of professional conduct in addition to those prescribed by these Rules.

Example: Family law practitioners

Rule 7.2 requires that a solicitor must inform the client about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the matter.

However, in family law matters relating to parenting proceedings, a lawyer is required to, among other things, endeavour to reach a solution by settlement rather than start or continue legal action, subject to this being in the best interests of the client and any child.[2]

Fused profession jurisdictions

These Rules have been developed as a single set of rules for application to those who engage in legal practice in the manner of a solicitor. In some Australian jurisdictions[3] the legal profession is divided between solicitors and barristers, which means that a legal practitioner in these jurisdictions must practise either only as a solicitor or only as a barrister. In the other Australian jurisdictions[4] the legal profession is fused, which means a legal practitioner may practise as both a solicitor and as a barrister, or make a personal choice to practise only in the manner of a solicitor or only in the manner of a barrister.

A question that arises for legal practitioners in a fused jurisdiction who practise as both a solicitor and a barrister is whether the professional conduct rules for solicitors, or the professional conduct rules for barristers[5], or both, apply in a given situation.

---

2 *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*, Sched 1, Part 2 (Parenting Proceedings) Clause 6 (Lawyers' obligations).
3 Queensland and New South Wales.
4 South Australia, Western Australia, the ACT, Victoria, Tasmania and the Northern Territory.
5 For example, the *Legal Profession Uniform Conduct (Barristers) Rules 2015*.

In some areas of legal practice, such as advocacy and litigation before the courts and tribunals, solicitors and barristers are often in much the same position, and there is a commonality of ethical principles found in both these Rules[6] and the Barristers' Rules.[7]

In other areas of legal practice there are differences in the applicable ethical principles. The barristers' *cab-rank* principle is an example.[8] This principle is that a barrister *must accept* a brief from a solicitor to appear before a court in a field in which the barrister practises or professes to practise if: the brief is within the barrister's capacity, skill and experience; the barrister is available and has capacity to do the work: the fee offered is acceptable; and the barrister is not obliged or permitted to refuse the brief under any of the other Rules. On the other hand, a solicitor is not ethically obliged to accept every request from a client or potential client to provide legal services.

It is beyond the scope of this Commentary to explain which of the Australian Solicitors' Conduct Rules or the Barristers' Rules might apply to situations encountered by a legal practitioner in a fused jurisdiction. Practitioners dealing with such issues should seek further information and guidance from their professional associations.

Interpretation

Words and other expressions used in these Rules generally have the same meaning as they have in the primary legal profession legislation of the State or Territory in which the Rules apply. However, where a word or expression is defined in the Glossary, the Glossary definition applies, because the nature, scope and/or subject matter of the rule or rules that use the particular word or expression differs from the nature, scope and/or subject matter of legislative provisions that use the same word or expression.[9]

---

6 See Rules 17-29 – Advocacy and Litigation.

7 See *Legal Profession Uniform Conduct (Barristers) Rules 2015* made under the Legal Profession Uniform Law.

8 See *Legal Profession Uniform Conduct (Barristers) Rules 2015* - Rules 17-22.

9 See *Forsyth v Deputy Commissioner of Taxation* (2004) NSWLR 132, per Spigelman CJ at [28]; and *Legal Profession Uniform Law*, sections 7(3) and 423(2).

2. Purpose and effect of the rules

2.1 The purpose of these Rules is to assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and these Rules.

2.2 In considering whether a solicitor has engaged in unsatisfactory professional conduct or professional misconduct, the Rules apply in addition to the common law.

2.3 A breach of these Rules is capable of constituting unsatisfactory professional conduct or professional misconduct, and may give rise to disciplinary action by the relevant regulatory authority.

Commentary

Overview

These Rules have been developed to assist practitioners make judgments about whether a particular course of conduct would be ethically or professionally appropriate, by expressing the underlying ethical principle or principles to be observed, and where appropriate, to provide guidance about how that principle or those principles apply in particular circumstances set out in the rule.

The Rules are not intended to be legislative commands and should not be approached by legal practitioners as such. They are intended to be normative statements of what the profession, the courts, clients and the pubic generally expect of legal practitioners.

Nevertheless, the courts and the legal profession laws of every State and Territory express the importance of legal practitioners abiding by the standards of professional conduct set out in these Rules, and provide sanctions and remedies for dealing with the consequences of a failure to abide by the Rules.

Common law principles

As officers of the court, legal practitioners are an essential component to the administration of justice and the rule of law.

Of the legal profession, the Hon. Marilyn Warren AC (former Chief Justice of Victoria) remarked:

> The foundation of a lawyer's ethical obligation is the paramount duty owed to the court. The reasons for this are long-standing. It is the courts who enforce rights and protect the citizen against the state, who enforce the law on behalf of the state and who resolve disputes between citizens, and between citizens and the state. It is the lawyers, through the duty owed to the court, who form the legal profession and who underpin the third arm of government, the judiciary. Without the lawyers to bring the cases before the courts, who would protect the citizen? Who would enforce the law? It is this inherent characteristic of the

duty to the court that distinguishes the legal profession from all other professions and trades.[10]

Consequently, legal practitioners acknowledge and accept "the inherent jurisdiction of the [Supreme Court] as an overriding jurisdiction in connexion with the discipline and control of its officers in proper cases."[11] Many of these Rules express core principles developed and explained by the courts over many years about how legal practitioners should respond to difficult questions that inevitably arise in practising the profession of law.

Example: Mancini v Mancini [1999] NSWSC 800

A practitioner should not act for one party to a matter while in possession of confidential information of another party that may be used in the proceedings. The court may exercise its discretion to restrain the practitioner from acting on professional conduct grounds, or where restraint is required to protect confidential information.

Rule 10.2 reflects the common law principle stated in Mancini v Mancini (and similar cases) that a solicitor or law practice in possession of information which is confidential to a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter except in specifically identified circumstances.

The principles which underpin the Rules also acknowledge and seek to assist legal practitioners navigate the complex mix of other common law principles that necessarily shape the way in which legal practitioners should respond to ethical issues that arise in legal practice. The complexity was explained by Austin J in *Oceanic Life Ltd v HIH Casualty & General Insurance Ltd & Ors*:

> *Where it is alleged that a solicitor has acted improperly in representing more than one client in litigation, a surprisingly large number of principles may be brought into play. The relevant principles may include the law of contract, the law of fiduciary duty, the law which protects confidential information, the law with respect to legal professional privilege, the law with respect to the solicitor's duty to the court and the Court's discretion to supervise the conduct of its officers, and ethical principles developed and applied by a professional disciplinary body. If the solicitor benefits from a gift by the client or through some improvident transaction entered into by the client, principles with respect to undue influence and unconscionable bargains will be relevant…*
>
> *Cases which deal with the solicitor's duty seem to me at times to combine the various elements of principle into an amalgam…*[12]

---

[10] Remarks of the Hon. Marilyn Warren AC Chief Justice of Victoria on the Occasion of Joint Law Societies Ethics Forum Melbourne, 20 May 2010 [3].

[11] *Re an Application by a Solicitor* [1966] 1 NSWR 42, cited in *A Solicitor v the Council of the Law Society of New South Wales* [2004] HCA 1 at [11].

[12] [1999] NSWSC 292 [35-36].

Principles established by these Rules

While a large number of Rules reflect principles of professional conduct established at common law, some Rules reflect principles of professional conduct settled directly by the profession.

> *Example: Advertising*
>
> Rule 36.2 states that a solicitor must not convey a false, misleading or deceptive impression of specialist expertise and must not advertise or authorise advertising in a manner that uses the words "accredited specialist" or a derivative of those words (including post-nominals), unless the solicitor is a specialist accredited by the relevant professional association
>
> *Example: Dealing with other persons*
>
> Rule 34.2 states a solicitor must not seek instructions for the provision of legal services in a manner likely to oppress or harass a person who, by reason of some recent trauma or injury, or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the solicitor at the time when the instructions are sought.

Legislative standards

The Australian Solicitors' Conduct Rules are not the sole touchstone for determining a solicitor's professional obligations. The Rules sit alongside a body of common law, and legislation, which regulates legal practice and the provision of legal services.

Solicitors must always be mindful that where the common law or legislation sets a higher standard than these Rules, a solicitor must comply with that higher standard; and where these Rules set a higher standard than that required by the common law or legislation, a solicitor must comply with the higher standard set out in the Rules.

> *Example: Client advice*
>
> Rule 7.1 provides that a solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement.
>
> Section 174(3) of the Legal Profession Uniform Law requires that a law practice must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs.
>
> As can be seen, the standard set by Rule 7.1 is that the solicitor must provide clear and timely advice to assist a client to understand and make informed choices, whereas section 174(3) sets the higher standard that the law practice must take all reasonable steps to satisfy itself that the client has understood and given consent.
>
> Thus, section 174(3) both reinforces the underlying principle of Rule 7.1 that a client must be given sufficient advice to make an informed decision about the course of

conduct of the matter, and extends the standard by requiring a law practice to take all reasonable steps to satisfy itself that the client has understood the advice.

Unsatisfactory conduct or professional misconduct under statute

Every State and Territory has a statutory scheme for handling complaints and discipline matters, based on the same core concepts of unsatisfactory professional conduct and professional misconduct. Prior to the introduction of these statutory schemes matters involving professional discipline were dealt with exclusively by the Supreme Courts. The statutory disciplinary schemes are now the principal means by which disciplinary-related matters are raised and dealt with, but they have not replaced the inherent jurisdiction of the Supreme Courts to supervise and discipline its officers, including removal from the roll.[13]

The concept of *unsatisfactory professional conduct* is defined in legal profession legislation as including:

> *conduct of a lawyer 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 lawyer.*[14]

The concept of *professional misconduct* is defined in legal profession legislation as including:

(a) unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and

(b) conduct of a lawyer 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 lawyer is not a fit and proper person to engage in legal practice.[15]

In considering, for the purpose of the second limb of the statutory definition of professional misconduct, whether a lawyer is or is not *a fit and proper person to engage in legal practice*, legal profession legislation provides that regard may be had to the matters that would be considered if the lawyer were an applicant for admission to the Australian legal profession or an applicant for the grant or renewal of an Australian practising certificate.[16]

---

[13] See for example section 264(1) of the *Legal Profession Uniform Law* - Jurisdiction of Supreme Courts, which provides:

> (1) The inherent jurisdiction and powers of the Supreme Court with respect to the control and discipline of Australian lawyers are not affected by anything in this Chapter, and extends to Australian legal practitioners whose home jurisdiction is this jurisdiction and to other Australian legal practitioners engaged in legal practice in this jurisdiction.

[14] Legal Profession Uniform Law s. 296 and equivalent provisions in other State and Territory legal profession laws.

[15] Legal Profession Uniform Law s. 297(1) and equivalent provisions in other State and Territory legal profession laws.

[16] *Legal Profession Uniform Law* s. 297(2) and equivalent provisions in other State and Territory legal profession laws.

Among the matters for consideration is whether the applicant is currently of *good fame and character*.[17]

The connection between the Australian Solicitors' Conduct Rules and the statutory definitions of unsatisfactory professional conduct and professional misconduct is made by the legal profession laws declaring that breach of a rule of professional conduct rule is *conduct capable of constituting unsatisfactory professional conduct or professional misconduct*.[18]

It will be noticed that a breach of a professional conduct rule does not automatically mean that a solicitor will be guilty of unsatisfactory professional conduct or professional misconduct, but that a breach is capable of constituting unsatisfactory professional conduct or professional misconduct that may give rise to disciplinary proceedings.

As Dal Pont explains, because professional rules express a collective judgment about the standards expected of its members, they are "a reliable and important indicator of the accepted opinion of the members of the profession" and are "of direct relevance in determining whether disciplinary proceedings should be commenced against a lawyer and in the hearing of those proceedings." [19]

Objective of disciplinary proceedings

The objective of disciplinary proceedings is not punishment, but protection of clients and the public interest in the administration of justice from a legal practitioner who displays a lack of competence or diligence in legal practice, or a legal practitioner who engages in kinds of conduct that call into question the fitness and propriety of that person to continue to be an officer of the court entitled to engage in legal practice.[20]

Thus, a legal practitioner who commits a civil or criminal offence will incur the appropriate civil or criminal penalty for that offence and may also, depending on the circumstances surrounding that offence, incur disciplinary consequences. This is why the legal profession laws applying in all States and Territories include as conduct capable of constituting unsatisfactory professional conduct or professional misconduct, conviction for a serious offence, a tax offence or an offence involving dishonesty.

Professional misconduct at common law

The common law concept of *misconduct* or *professional misconduct* was developed by the courts well before the introduction of a statutory definition of professional misconduct.

The common law test established in 1898[21] is that *unprofessional conduct* is conduct that would be reasonably regarded as disgraceful or dishonourable by members of the profession of good repute and competency. In 1927, the Supreme Court of South Australia concluded that unprofessional conduct is a wider concept than professional misconduct, not limited to conduct which is "disgraceful or dishonourable" in the ordinary

---

17 *Legal Profession Uniform Admission Rules 2015,* Rule 10(1)(f) and *Legal Profession Uniform General Rules 2015,* Rule 13(1)(a).

18 See for example *Legal Profession Act 2007* (Qld) section 420 and accompanying Note.

19 G.E. Dal Pont, *Lawyers' Professional Responsibility* (7th Ed., 2021) at [1.125] referring to *Chamberlain v The Law Society of the ACT*, (1993) 43 FCR 148.

20 *Southern Law Society v Westbrook* (1910) 10 CLR 609 [612].

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

sense of those terms, but includes "…conduct which may reasonably be held to violate, or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession of good repute and competency."[22]

In some circumstances the common law meaning of professional misconduct remains relevant to the question of whether a legal practitioner is a fit and proper person to remain a member of the legal profession. This can include where the particular conduct in question does not fall within the statutory definitions of unsatisfactory professional conduct or professional misconduct, as was the circumstance in *Law Society of the Australian Capital Territory v Burns*[23] or where the legal profession legislation permits the regulatory authority to initiate and prosecute proceedings in the Supreme Court exercising its inherent jurisdiction[24].

In *A Solicitor v the Council of the Law Society of New South Wales*[25] the High Court considered section 127 of the Legal Profession Act 1987 (NSW) which defined *professional misconduct* in essentially the same terms as the present-day statutory definition, and concluded:

> *Professional misconduct may not necessarily require a conclusion of unfitness to practise, and removal from the roll. In that regard, it is to be remembered that fitness is to be decided at the time of the hearing. The misconduct, whether or not it amounts to professional misconduct, may have occurred years earlier. At the same time, personal misconduct, even if it does not amount to professional misconduct, may demonstrate unfitness, and require an order of removal. The statutory definition in s 127 involves both concepts, and, where it applies, must be given effect according to its terms. However, when the Supreme Court is exercising its inherent jurisdiction, it has the capacity to determine, and act on the basis of, unfitness, where appropriate, without any need to stretch the concept of professional misconduct beyond conduct having some real and substantial connexion with professional practice. In a statutory context where the power of removal depends upon a finding of professional misconduct, it may be appropriate to give the expression a wider meaning, similar to that in s 127. There is no such necessity in the present case.*
>
> *Example: Professional misconduct at common law*
>
> In *Council of the Law Society of New South Wales v Kim*[26] the Law Society applied for declarations and orders from the Supreme Court of New South Wales Court of Appeal that the respondent solicitor: is guilty of professional misconduct; is not a person of good fame and character; is not a fit and proper person to remain on the roll of legal practitioners, and that the name of the respondent solicitor be removed from the roll of legal practitioners. In this matter the respondent solicitor conceded that the declarations and order sought by the Law Society should be granted; however, the Court did not consider that the consent of the solicitor was a sufficient basis for determining the application, and that the Court had to satisfy itself that the solicitor is permanently unfit to be enrolled as a lawyer.

---

22 [1927] SAStRp 9; [1927] SASR 58.
23 [2012] ATSC 91.
24 See *Wyvill v Law Society of the Northern Territory* [2019] FCA 2050 [107]
25 [2004] HCA 1 [21].
26 [2017] NSWCA 292.

> Noting the point made by the High Court in *A Solicitor v the Council of the Law Society of New South Wales*, the Court of Appeal said that the definition of professional misconduct now contained in Chapter 5 of the Uniform Law does not necessarily equate to the concept of professional misconduct for the purposes of the exercise of the Court's inherent jurisdiction to discipline legal practitioners.

Inherent jurisdiction of the court

The statutory 'complaints-handling' schemes found in legal profession legislation are not the only means by which a matter may be raised for a disciplinary examination. The inherent jurisdiction of the Court to initiate disciplinary action over one of its officers was exercised in, for example, *Eden King Lawyers Pty Ltd v Makari (No 2)*[27] where the Court identified a possible professional conduct issue (disclosure and misuse of client confidential information) and directed that the solicitor "show cause" as to why the Court should not refer the issue to the Law Society.

[27] [2022] NSWSC 479.

Fundamental duties of solicitors

3. Paramount duty to the court and the administration of justice

3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

Commentary

Overview

Rules 3, 4 and 5 deal with three relationships which give rise to fundamental duties - the solicitor's relationship with the court and the administration of justice, the solicitor's relationship with clients and the solicitor's relationship with the profession itself.

Rule 3—the duty to the court and the administration of justice is the paramount rule.

Admission to the legal profession by a Supreme Court carries with it a set of duties and obligations as an officer of the court. As a participant in the curial process, a solicitor assumes a duty (and a professional outlook) of promoting efficient and effective processes of the court in the exercise of its judicial functions—i.e. *the administration of justice*.

Solicitors will also have a myriad of other professional duties and obligations to their clients and other members of the profession, and statutory obligations to regulatory authorities. For example, the source of the duties and obligations owed to clients may be contractual, tortious, fiduciary and equitable.

Competing duties can create challenging situations for solicitors, but Rule 3 makes it clear that where any of the "other" duties and obligations are inconsistent with the solicitor's duty to the court and the administration of justice, the duty to the court and the administration of justice will always be paramount, even if it may be to the possible disadvantage of a client, or contrary to a client's instructions.[28]

A rationale given for the paramountcy is that the duties owed by lawyers to the court are legal duties imposed by the general law, the underlying purpose of which is to protect the public interest in the due administration of justice. On this basis, the court has an inherent jurisdiction to supervise and, if necessary, to enforce appropriate behaviour by lawyers appearing before it.[29]

Application

Nature of the duties

There is no definitive "list" of all of the duties a solicitor owes to the court and the administration of justice, but they have usefully been categorised as:[30]

a) duty of disclosure to the court.

b) duty not to abuse the court process

---

[28] *Giannarelli v Wraith* [1998] HCA 52, per Mason CJ [11-12].
[29] Hon Justice Ipp, AO QC *Lawyers' Duties to the Court*, (1998) 114 LQR [63].
[30] Ipp, ibid.

c) duty not to corrupt the administration of justice;

d) duty to conduct cases efficiently and expeditiously.

A number of Rules deal with duties recognised as especially important:

- to give effect [only] to a client's lawful, proper and competent instructions (Rule 8).
- to exercise forensic judgment and act independently when representing a client before the court, rather than as the mere mouthpiece of the client (Rule 17.1).
- to not deceive or knowingly or recklessly mislead the court (Rule 19.1).
- to make responsible use of court process and privileges (Rule 21).
- to assist the court with adequate submissions of law to enable the law properly to be applied to the facts (Rule 29.1).
- to not make public comments which may prejudice a fair trial or the administration of justice (Rule 28).

Non-litigious matters

Rule 3 is not limited in its application solely to matters before a court. The principles which underpin the duty stated in Rule 3 also serve as a guide for solicitors in resolving tensions between meeting the objectives of a client and the efficient and effective functioning of the legal system outside of curial proceedings.

As was observed by the Hon. Marilyn Warren AC (former Chief Justice of Victoria):

> *Being admitted means that a lawyer owes a paramount duty to the court in all of their future dealings.*
>
> *In an increasingly commercialised and global world, the career path that some lawyers choose does not involve working in a court room. But this in no way reduces the duty those practitioners owe to the court. They are required to discharge their duty as officers of the court even if that duty comes into conflict with their duty to their client. Part of the duty to the court consists of informing the client that such a duty is, in fact, paramount.*
>
> *…legal practice in the modern law firm provides a very good example of the complexity that now surrounds the duty. Finding the right balance between the duty to the court and to the client is complicated by the ever increasing and evolving commercialisation of the profession.*
>
> *The source of much of the tension between the two duties is the potential for divergent objectives arising from each duty. In particular, a lawyer may be influenced by the financial requirements of the client, which may not correspond with recognised notions of the proper administration of justice.*[31]

A useful example of the application of the principles underpinning the duty to the court and the administration of justice outside of actual litigation before the court is the Queensland Legal Practice Tribunal finding in *Legal Services Commissioner v Mullins* [2006] LPT 012,

---

[31] *The Duty Owed To The Court – Sometimes Forgotten*, Judicial Conference of Australia Colloquium, Melbourne, 9 Oct 2009.

a matter which centred on the conduct of a barrister during a mediation to settle an insurance claim.

The relevance of this decision for solicitors engaged in non-litigious work has been expounded as follows:

> *The Mullins matter also reminds us that the duty to the court and of honesty extends to professional work outside of litigation. Indeed, in our capacity as officers of the court it even extends to our conduct outside our professional lives. Legal practice is becoming increasingly diverse and the skills required of a lawyer are evolving and changing. What constitutes 'legal work' is sometimes a matter of opinion, and the question inevitably arises as to which of the many professional and commercial activities in which lawyers are involved are caught by the duty to the court. Justice Bryne in Mullins was concerned to emphasise the public perception and confidence dimension of the duty; that if a member of the public would think that the conduct was improper, whatever the nature of the work involved, then that needs to give pause to practitioners. In the case of mediations, one thorough analysis of the Mullins matter concludes that 'currently in Australia, legal representatives owe exactly the same duties of honesty and candour in mediation as they owe in litigation before a court of law'.*[32]

[32] Stobbs, Nigel (2014) *Duty to the court and administration of justice: some examples, implications and clarifications*. Precedent, 123, pp. 16-20. (citations omitted).

4. Other fundamental ethical duties

4.1 A solicitor must also:

4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;

4.1.2 be honest and courteous in all dealings in the course of legal practice;

4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;

4.1.4 avoid any compromise to their integrity and professional independence; and

4.1.5 comply with these Rules and the law.

Commentary

Overview

Rule 4, together with Rules 5–6, set out further fundamental ethical duties of solicitors. These fundamental duties are the foundation for subsequent, more specific, rules in the ASCR.

Rule 4 deals with duties which arise from the relationships through which a solicitor provides legal services to his or her clients. The rule requires that a solicitor must remain focused on acting in the best interests of the client the solicitor represents, and in doing so, exemplify the core professional values expected of a solicitor.

Application

Duty of Candour

Although the Rules do not specifically refer to a duty of candour, the concept of "candour", which is defined to mean "frankness, as of speech; sincerity; honesty" [33] and "freedom from bias; fairness; impartiality" is embodied in the underlying principles of a number of rules, such as for example Rule 4.1.2—the duty to be honest and courteous in all dealings in the course of legal practice.[34]

Offensive or provocative language

The alleged use by a legal practitioner of offensive and provocative language towards another legal practitioner and whether such behaviour breached a former Victorian legal profession conduct rule (the principles of which have been incorporated into Rules 4.1.1, 4.1.2 and Rule 5) was considered in *Alan James McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89.

---

[33] Macquarie Dictionary.
[34] See also *Kyle v Legal Practitioners Complaints Committee* (1999) WASCA 115 [12-[13]

On appeal, the Supreme Court of Victoria Court of Appeal[35] agreed that the (former) Rule is directed toward co-operation between practitioners, which is important to promote the efficient operation of the justice system, and the conduct of legal business. The Court held that considering whether there had been a breach of the rule involved inter-related questions about whether the conduct in question was undertaken in pursuit of the legitimate interest of the client, whether the accusations had a reasonable basis and whether the conduct had the potential to undermine the integrity and reputation of the legal profession.

Availability of Legal Aid

Solicitors should in acting in the best interests of their client (Rule 4.1.1), consider and advise clients of the possible availability of legal aid or other forms of legal assistance, where appropriate.[36]

Relationships and professional boundaries

Care needs to be exercised to avoid personal and social relationships adversely influencing a lawyer's professional relationships and independence.

The Final Report of the (Victoria) *Royal Commission into the Management of Police Informants* noted that lawyers have considerable authority and power when representing a client, and that their advice and actions can have a direct and significant influence on a client's future, wellbeing, and outcomes. Further, the Royal Commission said:

> *When lawyers knowingly and deliberately betray their client's trust or act in ways contrary to their interests, it can have a negative impact on the client. It can also, as the Commission's inquiry has shown, have a negative impact on the integrity of the criminal justice system and community confidence in the administration of justice and the legal profession.*[37]

The Royal Commission heard of observations and concerns from within the profession about a lawyer having "personal intimacy with her clients, other people's clients, and police officers—in professional as well as private contexts—which we considered had the potential to give rise to conflicts of interest because her conduct seemed to lack discretion and a sense of what was appropriate."[38]

In *AB and CD, EF and CD* the High Court said:

> *EF's actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of EF's obligations as counsel to her clients and of EF's duties to the court…As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system.*[39]

---

35 57 VR 186, at para.6.
36 See Rule 16A of the South Australian Legal Practitioners Conduct Rules.
37 *Final Report of the Royal Commission into the Management of Police Informants*, [2020] Chapter 15 – Legal profession regulation. [66].
38 Ibid [84].
39 [2018] HCA 58 [10].

As well as the risk of compromising the administration of justice, and of compromising a lawyer's own integrity and professional independence, not maintaining appropriate professional boundaries risks diminishing public confidence in the administration of justice and bringing the profession into disrepute, calling into question whether the lawyer is a fit and proper person to practise law.[40]

[40] *In the Matter of Claire Amy Morel* [2015] SASCFC 20.

5. Standard of conduct—dishonest or disreputable conduct

5.1 A solicitor must not engage in conduct, in the course of legal practice or otherwise, which:

5.1.1 demonstrates that the solicitor is not a fit and proper person to practise law; or

5.1.2 is likely, to a material degree to:

i) be prejudicial to, or diminish the public confidence in, the administration of justice; or

ii) bring the profession into disrepute.

Commentary

Overview

Rule 5 draws together three essential qualities, attitudes and behaviours that a solicitor of good standing and repute commits to and demonstrates:

> He or she is a fit and proper person to practise law, advancing and promoting public confidence in the administration of justice, and upholding the reputation and standing of the legal profession.

Rule 5 requires that a solicitor must not engage in conduct, in the course of legal practice or otherwise, that would call into question the commitment expressed in the Rule.

Application

The law requires that an objective standard is used to determine whether a solicitor is a "fit and proper person".[41] Personal behaviour may impact upon whether the solicitor is a "fit and proper person". Factors relevant to such an assessment include, but are not limited to:

- Disregard for the solicitor's legal and civic obligations;[42]
- Lack of integrity;[43]
- Dishonest, deceitful or fraudulent conduct;[44]
- Defiance of the court, the rule of law or process of justice;[45] or
- Moral blameworthiness.[46]

Solicitors should also have regard to whether any applicable suitability matter or show cause event set out in legal profession legislation is relevant to the satisfaction of this standard.

---

41 *Council of the New South Wales Bar Association v Sahade* [2007] NSWCA 145, at [84].
42 *Council of the New South Wales Bar Association v Sahade* [2007] NSWCA 145, at [84].
43 *NSW Bar Association v Young* (2003) 54 ATR 22, at [11].
44 *Council of the New South Wales Bar Association v Sahade* [2007] NSWCA 145 at [58]. *Borhani v Legal Practitioners Admissions Board [2013] QCA 14.*
45 *Attorney-General and Minister for Justice v Gregory* [1998] QCA 409, at [4].
46 *Re Ziems* (1957) 97 CLR 279, 280; *Law Society of SA v Liddy* [2003] SASC 379, at [10]; and *NSW Bar Association v Cummins* (2001) 52 NSWLR 279, at [29].

6. Undertakings in the course of legal practice

6.1 A solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, unless released by the recipient or by a court of competent jurisdiction.

6.2 A solicitor must not seek from another solicitor, or that solicitor's employee, associate, or agent, undertakings in respect of a matter, that would require the co-operation of a third party who is not party to the undertaking.

Commentary

Overview

Rule 6.1 expresses the principle that if a solicitor gives an undertaking, the solicitor has a professional duty to ensure that the undertaking is honoured and performed in a timely and effective manner.

The duty to honour undertakings and ensure their timely and effective performance is one of the fundamental duties of a solicitor. The context for the rule is the reliance placed by courts, legal practitioners, clients and others on solicitors doing what they have undertaken to do (or to not do) in providing legal services.

Ineffective performance of an undertaking places at risk the achievement of a client's objectives, potentially causing financial or other loss, and can also be detrimental to the proper functioning of the administration of justice. That the obligation of a legal practitioner to perform an undertaking is a solemn obligation of the upmost importance has been stated in many cases including, by way of example, *LSC v Wrightway Legal*[47] where the Queensland Civil and Administrative Tribunal said: "It is central to dealings with legal practitioners. Because of its importance, noncompliance with the clear terms of an undertaking involves a substantial failure to reach or maintain a reasonable standard of competence and diligence and so amounts to professional misconduct."

Application

Responsibility for honouring undertakings

Undertakings are usually deemed to be personal unless otherwise stated.[48] An undertaking binds the practitioner, not as a matter of contract, but as a matter of professional conduct and comity.[49]

The courts have held that a solicitor must not, even on the basis of client instructions, act contrary to the terms of an undertaking: "The correct course of action would have been for him to have applied to either vary the Federal Magistrates Court Order, or…to be released from the undertaking by the Court."[50]

---

47 [2015] QCAT 174 at [26].
48 See G. E. Dal Pont, *Lawyers' Professional Responsibility* (7th ed. 2021) [22.20], [22.45].
49 *Re Vincent Cofini* [1994] NSWLST 25.
50 *Legal Services Commissioner v Wrightway Legal* [2015] QCAT 174 at [33].

Accordingly, solicitors who do not wish to incur personal responsibility pursuant to an undertaking must clearly state that the undertaking is given not personally but on behalf of another person. Any ambiguity in the terms in which an undertaking is given will usually be construed strictly against the solicitor.[51]

Solicitors should act prudently in giving personal undertakings and ensure, as far as possible, they are in writing or confirmed in writing, expressed in clear, precise and unambiguous terms and are given in accordance with the client's instructions. Importantly, for a personal undertaking the means of fulfilment must be in the solicitor's complete control; otherwise the undertaking must be provided or given subject to conditions.

Generally, an undertaking given by a solicitor's employee binds the solicitor whether or not the employee has the proper authority.[52] Hence, employees should not be permitted to give undertakings unless clear authorisation is given.

Solicitors should be mindful of the distinction between the giving of undertakings to other members of the profession and undertakings given to the Court, in particular the importance of only giving undertakings to the Court on the clear instructions of a client.

Undertakings not given in the course of legal practice

Care is needed in giving and honouring undertakings outside of legal practice if the undertaking nevertheless draws in some way upon the person's standing as a legal practitioner. Where a solicitor, having attached his or her professional reputation to an undertaking given otherwise than in the course of legal practice, fails to honour that undertaking, such a breach can have the effect of diminishing public confidence in the legal profession.[53].

---

51 *Auckland Standards Committee 3 of New Zealand Law Society v W* [2011] NZLR 117, at [42].
52 *Burbery Mortgage Finance and Savings Ltd (in receivership) v O'Neill* [1995] ANZ Convey R 387, at 391.
53 See Rule 5.1.2.2.

Relations with clients

7. Communication of advice

7.1 A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement.

7.2 A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the matter.

Commentary

Overview

Rule 7.1 emphasises the important role of the solicitor in providing clarity of information and advice to a client, in a timely way. The solicitor's duty is to assist the client make informed choices, not to substitute the choices the solicitor would have made for those of the client.

Rule 7.2 –reminds solicitors that there are alternatives to resolving disputes through judicial proceedings. A solicitor will need to inform a client that disputes should follow a staged process These are: negotiated settlements between the client and the other party to the disputes; mediation, arbitration and other alternative dispute resolution mechanisms, judicial proceedings.

Application

As noted in the Commentary to Rule 4, solicitors should, as a matter of course in acting in the best interests of their client (Rule 4.1.1) provide their client with all of the information necessary to enable the client to make informed choices as to what course of action is available and in doing so, consider and advise clients of the possible availability of legal aid or other forms of legal assistance where appropriate.

Solicitors in jurisdictions where the *Legal Profession Uniform Law* applies[54] must be mindful of the higher standard set by section 174(3) of the Uniform Law for costs disclosures, which provides:

> If a disclosure is made under subsection (1), the law practice must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs.

[54] New South Wales, Victoria and Western Australia.

8. Client instructions

8.1 A solicitor must only accept and follow a client's lawful, proper and competent instructions.

Commentary

Overview

A solicitor has a duty to act in the best interests of the client in any matter in which the solicitor represents the client.[55] However, a solicitor also has a duty to the court and the administration justice.[56] In *Rondel v Worsley* Lord Reid stated the paramountcy of the latter over the former (in the context of counsel appearing) as follows:

> *Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.*[57]

The paramount duty must prevail, even if the client gives contrary instructions.[58] In *Kyle v Legal Practitioners Complaints Committee* Ipp J said:

> *It is a basic precept of the legal profession that lawyers owe a duty of honesty and candour to the court. It is the general duty of lawyers not to mislead the court by stating facts which are untrue, or misled the Judge as to the true facts, or conceal from the court facts which ought to be brought to the Judge's attention, or knowingly permit a client to deceive the court…Legal practitioners owe this duty when performing any act in the course of practising their profession, not only when making submissions to the court.*[59]

Rule 8 states in effect that in order to fulfil their paramount duty to the court and the administration of justice, solicitors must only give effect to a client's instructions if those instructions are for a lawful purpose, for a proper purpose, and the client is competent (in the sense of having legal capacity) to give those instructions. Fulfilling the lawful and proper purpose requirement requires inquiry, objectivity and professional judgment that the client's purpose and objectives are lawful and proper—when not fulfilled, a lawyer risks being tainted by, or being seen as associated with, the client's illegal or improper purpose. In *Leary v Federal Commissioner of Taxation* Brennan J. said:

> *[T]he field of professional activity is co-extensive with a lawyer's professional duty. That duty is to give advice as to the meaning and operation of the law and to render proper professional assistance in furtherance of a client's interests within the terms of the client's retainer. It is a duty which is cast upon a lawyer, as a member of an independent profession, whether his services are sought with respect to the*

---

55 Rule 4.1.1.
56 Rule 3.
57 [1969] 1 AC 191.
58 *Giannarelli v Wraith* (1988) 165 CLR 52, per Mason CJ at [12].
59 [1999] WASCA 115 [12]-[13].

operation of taxing statutes, the provisions of a contract, charges under the criminal law or any other of the varied fields of professional concern. It is a duty which arises out of the relationship of lawyer and client.

But activities of an entrepreneur in the promotion of a scheme in which taxpayers will be encouraged to participate falls outside the field of professional activity: those activities are not pursued in discharge of some antecedent professional duty.[60]

Application

Lawful and proper purpose

It has long been recognised that determining that a client's instructions are for a lawful and proper purpose is not always a straightforward task. In 1926, in *R. v Tighe & Maher*, Street CJ observed:

It is expected of course of every solicitor that he shall act up to proper standards of conduct, that he shall give his clients sound advice to the best of his ability, and that he shall refrain from doing anything likely to mislead a Court of Justice; but in the course of his practice he may be called upon to advise and to act for all manner of clients, good, bad or indifferent, honest or dishonest and he is not called upon to sit in judgment beforehand upon his client's conduct, nor, because he does his best for him as a solicitor within proper limits, is he to be charged with being associated with him in any improper way.[61]

In 1998, in re *Moage Limited (in liq.)* Burchett J said:

It is the nature of legal practice that solicitors act for all sorts of clients, whose real motives and intentions may be concealed from their advisers. Therefore, if a knowledge of the impropriety of what a client is doing is to be alleged against a solicitor, the allegation should be made in clear terms; the reader of a pleading should not be left to spell out such an allegation by inference from the engagement of the solicitor to act in the client's affairs.[62]

While it is incumbent upon a solicitor to make enquires to establish that the client's instructions are for a lawful and proper purpose[63], the obviousness of the comments by Street CJ and Brennan J. is that the nature and extent of the enquiries that ought to be made necessarily depends upon the facts and circumstances of the client and the matter to which the instructions relate.

From 1 July 2026 the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) and Rules have added extensive "client due diligence" obligations for solicitors and law practices that are a reporting entity under the Act, both before commencing to provide a designated service, and on an ongoing basis during the course of providing a designated service. These obligations include the collection and independent verification of documentary evidence relating to matters such as: the identity

---

60 *Leary v Federal Commissioner of Taxation* (1980) 32 ALR 221, per Brennan J. [239-240].
61 (1926) SR (NSW) 94, [108].
62 *Moage Limited (in liquidation) v Joseph Grant Jagelman & Ors* [1998] FCA 296, [11].
63 See G. E. Dal Pont, *Lawyers' Professional Responsibility* (7th ed. 2021) [19.10]-[19.25].

of a natural person; the existence and beneficial owners of companies; and the existence of a trust and the names of the trustee and of each beneficiary.

The AML/CTF Act also requires solicitors who are reporting entities to have and comply with an AML/CTF program, consisting of a money laundering/terrorism financing and proliferation financing risk assessment, together with policies to identify and appropriately manage and mitigate the risks the reporting entity may reasonably face in providing its designated services, and to ensure that the reporting entity complies with the AML/CTF Act and Rules.[64]

Rule 8 was amended, effective 1 July 2026 to make explicit what is required by the principle that underpins this rule—that a solicitor must be reasonably satisfied (including before accepting instructions from a prospective client, or new instructions from an existing client) that the client's instructions are for a lawful and proper purpose, and that the solicitor must follow only client instructions that are, and continue to be lawful, proper and competent.

Where a solicitor is unable to meet the requirements of Rule 8, grounds may exist for termination of a retainer under Rule 13.

Meaning of "competent"[65]

It is a presumption at common law that every adult person is competent to make their own decisions. Characteristics which may displace the presumption include old age[66], incapacity, mental infirmity, suspicion of undue influence or of fraud, or where the client is unable to communicate.

Accordingly, while a presumption of legal capacity lies at the heart of the solicitor-client relationship, solicitors must be reasonably satisfied that their client has the mental capacity to give instructions, and if not so satisfied, must not act for or represent the client. A failure to be alert to issues of incapacity has the potential to generate liability in negligence.[67]

Complex issues can arise when a solicitor has reason to doubt a client's capacity to give competent instructions. A number of Law Societies have issued guidance on the ethical responsibilities of practitioners when faced with such questions.[68] The *Client Capacity Guidelines: Civil and Family Law Matters* issued by the Law Society of New South Wales for example, provides comprehensive guidance on the very extensive range of issues, considerations and options that are available to a solicitor who, having doubts about a client's capacity to give competent instructions, seeks to act in the best interests of the client.

Where a solicitor is unsure about the appropriate response in a situation where the client's capacity is in doubt, the solicitor can also, pursuant to Rule 9.2.3, seek confidential advice on his or her legal or ethical obligations.

---

64 See AML/CTF Act Part 1A.
65 See G. E. Dal Pont, *Lawyers' Professional Responsibility* (7th ed. 2021) [3.10]].
66 *Kanton v Vosahlo* [2004] VSCA 235, at [3].
67 *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87.
68 See, for example: *Client Capacity Guidelines for civil and family law matters*, published by the Law Society of New South Wales, accessible at: Clients mental capacity.pdf (lawsociety.com.au) and *Client Capacity Statement of Principles with guidelines*, published by the Law Society of South Australia, accessible at Client Capacity statement of principles amended May 2021_jmc edits (informz.net).

The issue of client capacity and reasonableness of instructions brings a number of rules into focus. Rule 4.1.1 requires a solicitor to act in the best interests of a client in any matter in which the solicitor represents the client. Rule 8.1 requires that a solicitor must follow a client's lawful, proper and competent instructions. Also, under rule 9.1 a solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement, subject to the established limited exceptions set out in rule 9.2. Further, Rule 3 states the duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

Where a solicitor is concerned, or not satisfied about their client's capacity, it does not necessarily mean, in practice, that the only appropriate course of action available to a solicitor is to immediately withdraw. Solicitors must always act in the best interests of a client in any matter in which they represent the client.

In *Goddard Elliott v Fritsch*[69] Bell J identified the primary responsibility of a solicitor is to be satisfied that the client has the mental capacity to instruct: "when a client loses mental capacity, their lawyer loses authority to act for and represent them". If the issue cannot be resolved to the reasonable satisfaction of the solicitor, he or she must raise the matter with the court, which then has the final responsibility to determine the issue. His Honour's comments were made in a litigation circumstance where the opportunity was immediately available for the issue of capacity to be put to the court and the solicitor was, in effect, acting as an officer of the court.

Where the question of capacity does not arise directly during the course of court proceedings, the way in which a solicitor should ethically respond is perhaps less clear. In *AEW v BW* Lindsay J (referring to P.L.G. Brereton, "Acting for the incapable—A delicate balance" (2013) 35 Aust Bar Rev 244) noted:

> *A lawyer acting for a person who is, or might reasonably be thought to be, incapable of managing his or her own affairs might be required to confront difficult questions, requiring an exercise of mature judgment, about whether, and when, to decline to act without the appointment of a tutor or to apply for protective orders. A client incapable of managing his or her own affairs is likely, generally, to be incapable of giving instructions, and he or she may not be bound by the steps taken in his or her name.*
>
> *...If there is any reasonable ground for doubt about the capacity of a client then, in a case in which due authority to bind a client does not exist in the form of an enduring power of attorney, the course best taken is generally the prudent one of securing the appointment of a tutor, or the like, and making court approval of a settlement a condition of any settlement.*[70]

Goddard Elliott v Fritsch and *AEW v BW* establish the ethical propriety of a legal practitioner taking steps, perhaps contrary to the client's wishes or understanding, to seek the protective jurisdiction of the court by obtaining the appointment of a third party to act as a guardian/tutor/substitute decision-maker. The principle embedded in Rule 8.1 is consistent with these decisions. Caution is necessary because the courts recognise there is a difference between capacity to manage one's own affairs and capacity to give competent instructions.[71]

---

69 [2012] VSC 87 at [568].
70 [2016] NSWSC 905 [22] and [25].
71 *Goddard Elliott v Fritsch* [2012] VSC 87.

There is some legislative guidance on issues and indicia about capacity, albeit in different contexts. By way of example:[72]

Section 40 of the *Legal Practitioners Act 1981* (SA) provides as follows:

Authority of legal practitioner to act on behalf of person of unsound mind

(1) The authority of a legal practitioner to act on behalf of a person is not abrogated by reason only of the fact that that person becomes of unsound mind.

(2) When the mental unsoundness of a person on behalf of whom a legal practitioner is acting comes to the knowledge of the practitioner, the practitioner's authority to act on behalf of that person ceases, subject to subsection (3), and determines.

(3) Where it is necessary for the purpose of protecting the interests of a person of unsound mind in any legal proceedings or other business, the authority of a legal practitioner, notwithstanding that the practitioner knows of the mental unsoundness of the person on behalf of whom the practitioner is acting, continues for the purpose of completing those proceedings or that business.

Section 7 of the *Mental Health Act 2013* (TAS) provides:

Capacity of adults and children to make decisions about their own assessment and treatment

(1) For the purposes of this Act, an adult is taken to have the capacity to make a decision about his or her own assessment or treatment (decision-making capacity) unless it is established, on the balance of probabilities, that –

(a) he or she is unable to make the decision because of an impairment of, or disturbance in, the functioning of the mind or brain; and

(b) he or she is unable to –

(i) understand information relevant to the decision; or

(ii) retain information relevant to the decision; or

(iii) use or weigh information relevant to the decision; or

(iv) communicate the decision (whether by speech, gesture or other means).

Guidance on capacity

The challenge for the solicitor when a question of capacity arises is to:

- understand what factors might be relevant in triggering in the solicitor's mind a doubt about capacity;
- understand what factors might be relevant in forming a judgment that his or her client lacks the capacity to give proper instructions;

---

[72] See also *Mental Health Act 2015* (ACT), s.7 - *meaning of decision-making capacity; Guardianship and Administration Act 2000* (QLD), s 5 s 6.

- determine how the issue might (or might not) be raised directly with the client;
- identify which third-parties the solicitor might approach for assistance in establishing the reasonable belief about the client's capacity;
- determine the extent to which the solicitor might otherwise disclose confidential information for the sole purpose of establishing a reasonable belief as to the client's capacity;
- identify how the cost of obtaining such assistance might be met; and
- determine whether, and the extent to which, applicable jurisdictional legislation applies.

Competing duties

Circumstances will arise in which a solicitor's legal obligations or duty to the court are in competition with a client's lawful, proper and competent instructions.

Example

A client instructs a solicitor to immediately initiate litigation in Victoria to settle a contractual dispute; however, the *Civil Procedure Act 2010* (VIC) provides as follows:

10 Application of overarching obligations—participants

(1) The overarching obligations apply to—

(a) any person who is a party;

(b) any legal practitioner or other representative acting for or on behalf of a party;

(c) any law practice acting for or on behalf of a party;

(d) .....

14 Legal practitioner or law practice not to cause client to contravene overarching obligations

A legal practitioner or a law practice engaged by, or on behalf of, a client in connection with a civil proceeding must not by his, her or its conduct cause the client to contravene any overarching obligation.

16 Paramount duty

Each person to whom the overarching obligations apply has a paramount duty to the court to further the administration of justice in relation to any civil proceeding in which that person is involved, including, but not limited to—

(a) any interlocutory application or interlocutory proceeding;

(b) any appeal from an order or a judgment in a civil proceeding;

(c) any appropriate dispute resolution undertaken in relation to a civil proceeding.

22 Overarching obligation to use reasonable endeavours to resolve dispute

A person to whom the overarching obligations apply must use reasonable endeavours to resolve a dispute by agreement between the persons in dispute, including, if appropriate, by appropriate dispute resolution, unless—

(a) it is not in the interests of justice to do so; or

(b) the dispute is of such a nature that only judicial determination is appropriate.

In this example, the solicitor would be required to advise the client that the client has an overriding obligation to seek to resolve the contractual dispute by agreement with the other party before initiating court proceedings. The solicitor would need to consider whether seeking to resolve the dispute by agreement would not be in the interests of justice, and whether the dispute is of such a nature that only judicial determination is appropriate.

9. Confidentiality

9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not:

9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor's law practice; or

9.1.2 a barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,

EXCEPT as permitted in Rule 9.2.

9.2 A solicitor may disclose information which is confidential to a client if:

9.2.1 the client expressly or impliedly authorises disclosure;

9.2.2 the solicitor is permitted or is compelled by law to disclose;

9.2.3 the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations;

9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence;

9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person; or

9.2.6 the information is disclosed to the insurer of the solicitor, law practice or associated entity.

Commentary

Overview

Confidentiality is a foundation of the solicitor-client relationship—it provides the assurance for clients to make full and frank disclosures to their solicitor, and for solicitors to give full and frank legal advice and assistance to their clients without fear that what is disclosed and discussed between the client and solicitor will pass beyond them and be disclosed to others.

Rule 9.1 states the basic principle that a solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person. Rule 9.1.1 recognises that in providing legal advice or legal services it may be necessary for the solicitor to collaborate with other members or employees of the law practice. Rule 9.1.2 recognises that in providing legal services to the client, a solicitor may need to arrange for the services of counsel. Rule 9.1.2. also recognises that modern law practices may establish entities separate from the law practice partnership-entity itself, to undertake administrative activities.

The solicitor's duty to protect a client's confidential information has three established sources.

Contractual duty

An obligation to preserve the confidentiality of information imparted between a client and solicitor is an implied term of a contract of retainer.

Equitable duty

The nature of the relationship between a solicitor and client involves the communication of information, in circumstances where the equitable doctrine of confidentiality applies such that the solicitor has a duty to not breach client confidences.

The administration of justice

Preserving the confidentiality of client information is fundamental to the administration of justice. In Baker v Campbell (concerning legal professional privilege) Dawson J said:

> [21]*…the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice. This is why [client legal] privilege does not extend to communications arising out of other confidential relationships such as those of doctor and patient, priest and penitent or accountant and client…The restriction of the privilege to the legal profession serves to emphasize that the relationship between a client and his legal adviser has a special significance because it is part of the functioning of the law itself. Communications which establish and arise out of that relationship are of their very nature of legal significance, something which would be coincidental in the case of other confidential relationships. It has been found necessary that professional guidance in the complex processes of the law should be uninhibited by the possibility that what is said to enable advice to be sought or given might later be used against the person seeking the advice.* [73]

The impact that a failure in the duty of confidentiality can have was illustrated in *AB and CD, EF and CD* where the High Court described the conduct of by a barrister who was, at the time of representing her clients, also acting as a covert police informant against them, as follows:

> *…EF's actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of EF's obligations as counsel to her clients and of EF's duties to the court. Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging EF to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will. As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system...* [74]

---

[73] [1983] HCA 39.
[74] [2018] HCA 58 [10].

Application

What is client confidential information?

What constitutes information that is confidential to a client is not a matter of precise formulation.

In *Babcock & Brown DIF III Global Co-Investment Fund LP and DIF III GP Ltd v Babcock & Brown International Pty Ltd and others*, Riordan J considered that communications (apart from matters of common or public knowledge) between a client and a solicitor for the purposes of obtaining or giving legal advice would have the necessary ingredient of confidentiality against all persons unless, by reason of implied direction or otherwise, the solicitor was authorised to provide the communication to a third party.[75]

In *Legal Practitioners Complaints Committee and Trowell*, the State Administrative Tribunal of Western Australia considered that:

- As a general rule, information about a client's matter communicated to a legal practitioner in a professional capacity, will be presumed to be confidential.
- The duty of confidentiality extends to information about the client's matter learned by the legal practitioner in the professional relationship with the client, including information the practitioner would not have had but for the relationship.
- Once the relationship of lawyer and client is established, the duty of confidentiality extends to information of a confidential nature acquired by the practitioner prior to that.
- The prohibition on disclosing confidential information would generally extend to matters in the public domain—repetition or confirmation by a legal practitioner of information in the public domain may give that information a credible status that it might not otherwise have.
- The duty of confidentiality extends to opinions formed by the legal practitioner about his or her client's affairs.[76]

Information obtained by a solicitor during initial discussions with a potential client remains confidential information and cannot be used for the solicitor's advantage, or for the advantage of other clients, notwithstanding that a retainer does not eventuate.[77]

The question of what is confidential information commonly arises in the context of Rule 10 (Conflicts involving former clients) in considering whether a solicitor or law practice should act for a current client when in possession of information which is confidential to a former client, but is also material to the matter of a current client. For this reason a more detailed discussion of what is client confidential information is contained in the Commentary to Rule 10; however, there are some issues that should be mentioned in this section of the Commentary.

---

75 [2015] VSC 453 [73].
76 [2009] WASAT 42 [366]-[373].
77 *Malouf v Constantinou* [2017] NSWSC 923 [99].

Metadata

Solicitors and law practices need to remain mindful that electronically created files, documents, images, presentations and communications may contain and transmit client confidential information embedded in metadata.

The term metadata does not have a legal definition, although section 172 of the *Telecommunications (Interception and Access) Act 1979* (Cth) provides a negative definition - that a communication for the purposes of that Act does not include:

- information that is the contents or substance of a communication; or
- a document to the extent that the document contains the contents or substance of a communication.

Metadata is generally understood to mean data "hidden" within a document, such as creation date, modification date, author and reviewers, information concerning previous versions, revisions made and comments inserted during drafting and editing, and the date and timestamp of an email. There is a risk that metadata can include client confidential information, such as for example the issues being considered, advice provided or comments relating to the way the client matter is to be handled.

Care needs to be taken when transmitting documents and files to persons or entities to whom client confidential information is not to be revealed, and that steps are taken to ensure that any metadata in documents, files, emails, etc., containing client confidential information is removed.[78]

Technology and outsourcing

It is well understood that the efficiency benefits of outsourcing (for example E-discovery) and cloud computing carries with it risks to fulfilling regulatory and professional obligations of solicitors and law practices, particularly as regards maintaining the confidentiality of client information. Similar risks will also present themselves in the use of social media and technology-based information gathering and decision-making tools.

Professional associations and independent regulatory authorities provide and publish guidance to solicitors and law practices about managing the risks inherent in outsourcing and technology.[79] The guidance and practice notes cover issues such as:

- The inability to contract out of or delegate professional obligations to a third-party.
- The importance of informed client consent to the use of outsourced services and technologies that may involve the collection, storage and transmission of client confidential information.
- Due diligence on the ability of the outsourced provider to perform the work to the required standard of competence and to provide security of client confidential information.

---

[78] See Professional Ethics Committee for the State Bar of Texas. Opinion No 665, December 2016 at URL https://www.legalethicstexas.com/Ethics-Resources/Opinions/Opinion-665.

[79] See for example Practice Notes on Outsourcing, Cloud Computing and Social Media. Office of the Legal Services Commissioner, New South Wales at URL: https://www.olsc.nsw.gov.au/Pages/olsc_education/olsc_education_notes.aspx.

- Understanding the laws and regulatory issues where outsourcing and technology services are provided in jurisdictions outside of Australia, and the implications for the solicitor's or law practice's professional obligations and liabilities.
- Potential conflicts of interest between clients and the need for effective information barriers.
- Internal practice management systems.
- Avoiding compromise to the duty to the court and the administration of justice.

De-personalised confidential information

There will be occasions when a law practice may consider it useful to clients or the public generally to publish case studies on how the law applies in particular circumstances. Further, some law practices, such as community legal centres are contractually required to report to their funders on a wide range of matters, including the types of matters in which legal assistance has been provided. Statutory legal aid commissions regularly publish case studies in annual reports to highlight particular kinds of circumstances in which legal aid funding and services have been provided. Case studies are also an essential element of submissions in law reform work.

Solicitors and law practices that undertake these valuable community activities and services should take care to ensure that they do not disclose any information that is confidential to the client, or which could enable the client to be identified. Prudency would dictate that a solicitor or law practice will, wherever reasonably possible and appropriate, obtain client consent to their matter forming the basis of a de-personalised case study.

Client information in the public domain

It might be assumed that information that is already in the public domain must no longer be client confidential information, and therefore the duty of confidentiality has arguably expired. However, Professor Dal Pont points out that legal practitioners should keep in mind that client information ostensibly in the public domain does not necessarily relieve a legal practitioner from a "remnant of a duty of loyalty".[80]

Professor Dal Pont further explains that a legal practitioner must exercise caution when dealing with information about a client that is in the public domain:

- even though information about the client is already in the public domain, a client may feel betrayed by a legal practitioner speaking publicly as if no duty of confidentiality existed;
- information that is in the public domain may not be entirely accurate;
- for a lawyer to comment on, and confirm, the correctness or otherwise of the information may give the imprimatur of truth;
- in giving weight to what may have been partly unsubstantiated information, the lawyer may have disclosed something confidential;
- a lawyer who opts to correct something that is in the public domain may disclose something confidential; and

[80] G. E. Dal Pont *Lawyers' Professional Responsibility*, (7th ed. 2021) [10.95].

- as a lawyer's knowledge of their client's affairs is likely to be more extensive than published information, there remains a danger of inadvertent disclosure of confidential information.

In *Hilton v Barker Booth and Eastwood (a firm)*, Lord Walker of Gestingthorpe held:

> [34] ….It is a solicitor's duty to act in his client's best interests and not to do anything likely to damage his client's interests, so far as this is consistent with the solicitor's professional duty. To disclose discreditable facts about a client, and to do so without the client's informed consent, is likely to be a breach of duty, even if the facts are in the public domain.[81]

In *Legal Services Commissioner v Tampoe* [2009] LPT 14, a practitioner who gave a media interview about a former client and her family's criminal history and the former client's criminal trial—matters of public knowledge - was found to have breached the duty of confidentiality and was struck off the roll of practitioners.[82]

Exceptions permitting disclosure of confidential information

Because of the fundamental importance of confidentiality in the functioning of the law itself, the circumstances in which a solicitor may disclose confidential client information are limited to three broad categories of disclosure:

- disclosure necessary for the proper functioning of the legal profession and the provision of the legal services and advice sought by the client.
- disclosure compelled or permitted by law.
- disclosure where the public interest in the protection of the community is greater than the public interest in maintaining client confidentiality.

Rule 9.1.1 recognises that, apart from information clearly confided personally and exclusively to the solicitor, a client will be taken to have impliedly authorised the disclosure of confidential information to other solicitors within the law practice to support the provision of legal services. For example, it is usual and accepted professional practice that within a law practice multiple solicitors may contribute to the legal analysis and development of the advice sought by a client. The rule also recognises that law practices—particularly large practices—have a managerial need to ensure the efficient allocation of client work across the law practice.

At a more general level, the disclosure contemplated by Rule 9.1.1 also supports a solicitor's fundamental duty under Rule 4.1.3 to deliver legal services as competently, diligently and promptly as reasonably possible.

Rule 9.1.2 recognises that in delivering or administering legal services to a client, it may be necessary to engage, and therefore provide client confidential information to, individuals and entities outside of the law practice. For example:

- if a client has agreed to obtaining counsel's advice, this would constitute express authority to disclose confidential information[83];

---

81 [2005] 1 All ER 651.
82 See G. E. Dal Pont, *Lawyers' Professional Responsibility*, (7th Ed., 2021) [10.95].
83 G. E. Dal Pont *Lawyers' Professional Responsibility*, (7th Ed., 2021) [10.65].

- similarly, if a client has instructed or agreed to the solicitor obtaining advice or assistance from another law practice, or from an external provider to undertake the work involved in a discovery process, or to provide cloud computing services, this would constitute express authority to disclose confidential information;
- a law practice may have established separate business entities to undertake the administrative tasks and services which are necessarily incidental to providing legal services to the client and to managing the operations of the law practice.

Prudency would dictate that solicitors and law practices ensure clients have given informed consent to the disclosure and use of their confidential information to facilitate the provision of legal services to the client and to enable the ordinary management of the law practice.

Rule 9.2.1 provides that an exception to the confidentiality duty arises where the client expressly or impliedly authorises disclosure. While there appears to be some overlap with Rules 9.1.1 and 9.2.2, Rule 9.2.1 also encompasses situations where disclosure of client confidential information is necessarily incidental to the provision of the legal service sought by the client.

The purpose of the express or implied authorisation exception in Rule 9.2.1 is to enable disclosure of information "precisely so that it can be used or disclosed for its purpose in the representation" and the duty of confidentiality "must be read subject to the lawyer's authority to use and disclose information - albeit for the limited purpose of the retainer—where this is necessary for, or incidental to, the proper and normal conduct of the retainer."[84]

By way of example, a solicitor retained to undertake a property conveyance is at the very least impliedly authorised to communicate such client information to the solicitors for, or the other party to, the transaction; to relevant financial institutions; and to government agencies as is necessary to complete the conveyancing transaction on behalf of the client.

Rule 9.2.2 recognises that a solicitor's common law, contractual or equitable duties to preserve the confidentiality of client information may be displaced by law that permits or compels disclosure.

Disclosure of confidential information to enable the governing body of a legal aid or other legal assistance organisation to discharge its statutory management and accountability obligations is an example of disclosure permitted or compelled by law that would be within the scope of the exception in Rule 9.2.2. However, as a matter of good practice, solicitors should de-identify this information to the greatest extent possible.

Disclosure of client confidential information though the exercise by a legal profession regulatory authority of its investigative powers relating to trust money or complaint investigations is a further example of disclosure compelled by law.

---

[84] G. E. Dal Pont *Lawyers' Professional Responsibility*, (7th Ed., 2021) [10.55].

Disclosure under law and "tipping off" prohibitions

In some circumstances there is an obligation to report the commission of an indictable offence—see the *Crimes Act (NSW) s316(1)* and cognate provisions in other states.

In other circumstances, a solicitor may be under a statutory obligation to disclose what would otherwise be client confidential information and/or documents but is prohibited from disclosing to the client or any other unauthorised person that such an obligation has arisen or has been met. The best-known example of this circumstance is the compound suspicious matter reporting/tipping off offence found in sections 41/123 in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**).

Solicitors must be aware that the AML/CTF Act contains other compound disclosure/tipping off provisions which can apply to any person, including a solicitor who is not a reporting entity under that Act. These are sections 49/123 (notice to a reporting entity or any other person to provide further information or documents) and sections 49B/123 (notice to any person to give information or produce documents the person has, that may assist the AUSTRAC CEO to perform his or her functions, including to obtain or analyse information to support efforts to combat money-laundering, terrorism financing, proliferation financing or other serious crimes). Similar compound disclosure/restriction provisions may apply under other legislation such as, for example, sections 29/45 of the *Crime Commission Act 2012* (NSW) and sections 95/96/151 of the *Corruption, Crime and Misconduct Act 2003* (WA).

Ethical implications

The purpose served by the compound disclosure/tipping off mechanism in the AML/CTF Act is to provide information or enable the creation of intelligence that - at its broadest extent—might be relevant to, or assist in the investigation of, or prosecution of a person for an offence against any law of the Commonwealth, or of a State or Territory, and to do so in a way that does not alert the client or other persons to what is occurring if disclosure would or could reasonably be expected to prejudice an investigation (including an investigation that has not commenced).

Consistent with the decision by the High Court in *AB v CD and EF v CD* [2018] HCA 58, a legal practitioner who discloses client confidential information without a client's knowledge or consent, yet continues to act for the client breaches numerous obligations to the client. These ethical duties and professional responsibilities include (but are not limited only to) the duty to act in the best interests of the client, the duty of confidentiality, the duty of loyalty; and the duty to provide clear and timely advice to assist a client to understand relevant legal issues and make informed choices.[85]

A solicitor who is statutorily compelled to disclose client confidential information without the client's knowledge or consent must cease acting for the client in the matter—see Rule 13 (Completion or Termination of Engagement).

[85] See *Mokbel v The King [2024] VSC 725* [533], [733], [736], [741], [752], [772].

Client legal privilege

Solicitors and law practices will be aware that disclosure of client confidential information compelled by statute does not extend to communications which attract client legal privilege, unless the statute in question clearly intends to abrogate the privilege.

Communications between a client and solicitor that attract client legal privilege have been described as a "subset of confidential communications." [86] Unlike the general duty of confidentiality, which is sourced in an "amalgam" of contract law, equity and professional standards, client legal privilege is a substantive rule of common law that protects from involuntary disclosure communications between a client and solicitor in aid of current or pending litigation, and communications made for the dominant [and innocent] purpose of obtaining and giving legal advice.

While privileged communications are always confidential, not all client confidential information attracts client legal privilege. Nevertheless, solicitors need to be mindful that if a claim to client legal privilege ultimately fails before a court, it does not automatically follow that the duty to protect all and any client confidential information is foregone. In the absence of informed consent by the client, executive government agencies seeking access to client confidential information will need to establish that disclosure is compelled under statutory disclosure or information gathering powers.

In December 2025 the Law Council published a Guidance Note—*Client legal privilege and federal regulators*—to support legal practitioners navigate the tension that may arise when federal regulators seek documents or information that are or might be exempt from production obligations, because those documents and that information are affected by the client legal privilege doctrine. It includes a checklist to assist legal practitioners in responding to federal regulator information requests.

Solicitors should note that the AML/CTF Act contains specific provisions about client legal privilege, and how such claims are to be made. Client legal privilege claims under the AML/CTF Act are particularly complex when the obligation to disclose information or produce documents arises under one of the compound disclosure/tipping off circumstances referred to above. Solicitors who encounter client legal privilege issues under the AML/CTF should consult specific AML/CTF guidance provided by law societies or by AUSTRAC (the Australian Transactions Reports Analysis Centre).

Rule 9.2.3 recognises that it is in the best interests of the profession (and therefore the public interest in the functioning of the legal profession and the administration of justice) that a solicitor should be able to seek confidential advice and counsel from within the profession when difficult questions arise about ethical duties and other professional obligations.

Legal professional associations have established infrastructure and services, with an overriding emphasis on confidentiality, to support legal practitioners resolve ethical, practice management and statutory compliance issues. These services often include dedicated specialist ethics and practitioner support units and strict confidentiality when solicitors seek advice and guidance on resolving ethical problems and legal obligations. Legal profession associations regularly issue guidance notes and formal opinions on

[86] see G. Dal Pont, *Lawyers' Professional Responsibility* (7th Ed., 2021) at [10.40].

ethical, legal and practice management issues raised with them, for the benefit of the whole of the profession and its clients.

Rule 9.2.3 also recognises that a legal practitioner should be able to raise, in a confidential setting with his or her professional colleagues and professional associations, any concerns the practitioner might have about other members of the profession. This is an essential aspect of the independence of the legal profession and its ability to self-regulate in the public interest.[87]

Rule 9.2.4 recognises that a solicitor may (but is not ethically compelled to) disclose client confidential information for the sole purpose of avoiding the probable commission of a serious criminal offence.

A solicitor who forms a view that it is probable that a client will commit a serious criminal offence is immediately faced with an ethical tension "between the interests of the client in preserving confidentiality and encouraging full disclosure to his or her lawyer, and the public interest in protecting members of society from harm".[88]

There is no "bright-line" criteria or considerations about whether the duty of confidentiality or the public interest predominates, nor is there any bright-line criteria for assessing the degree of seriousness of a probable criminal offence.

It is stressed that disclosing confidential client information is a significant professional and moral judgment for a solicitor to make. The gravity of the decision and the consequences of disclosing client confidential information with an improper motive were illustrated by the High Court's condemnation of the conduct of the barrister turned police informant in *AB and CD, EF and CD*.[89]

It is well understood that where a solicitor becomes aware that a client is engaging in unlawful conduct, the solicitor's duty is to counsel the client against that conduct and eschew any involvement in that conduct, whether by assisting or being seen to be condoning that activity.[90] If, despite a solicitor's strong advice to the contrary, a client nevertheless continues to engage in unlawful conduct, the solicitor has justifiable ethical grounds to immediately terminate the retainer—see Rule 13.1.3 - a solicitor or law practice may terminate the engagement for just cause and on reasonable notice.

A similar approach may be taken where a solicitor believes it probable that a client will, despite the solicitor's strong counsel and advice, commit a serious criminal offence, but ultimately, the decision about whether or not to disclose client confidential information is one only the solicitor can make. Nevertheless solicitors faced with this kind of ethical issue are encouraged to seek confidential guidance from their legal profession associations.

Rule 9.2.5 might be said to somewhat overlap Rule 9.2.4; however, Rule 9.2.5 is both narrower and broader in scope. The Rule:

- is narrower in the sense that it does not require a standard that the imminent serious physical harm may constitute a serious criminal offence; and

---

87 See also Rule 32 – Unfounded allegations.
88 G. Dal Pont, *Lawyers' Professional Responsibility* (7th Ed., 2021) at [10.100].
89 [2018] HCA 58
90 see G.E. Dal Pont, *Lawyers' Professional Responsibility* (7th Ed., 2021) [19.10].

- is broader in the sense that it includes imminent serious physical harm to the client, as well as any another person.

Rule 9.2.5 therefore permits a solicitor to disclose client confidential information in order to prevent imminent physical harm to the client or to another person. The Rule is directed at the physical safety of individuals in the community, which is accepted as a public interest that is greater than the public interest in the confidentiality of the solicitor-client relationship.

Rule 9.2.6 recognises that a solicitor should not be restrained by the confidentiality duty from disclosing information in defending a claim of negligence by a client or in complying with the terms of a policy of professional indemnity insurance. Dal Pont notes [91] this complements the common law position that client who institutes proceedings is treated as having waived the right to confidentiality (and legal professional privilege) in relation to the matters put at issue.

Similarly, a client who lodges a formal complaint with a legal profession regulatory authority will (except in Queensland[92]) be regarded as having waived legal professional privilege and confidentiality. Section 321(1) of the Legal Profession Uniform Law provides:

> (1) If a client of a law practice makes a complaint about the law practice or a lawyer, the complainant is taken to have waived legal professional privilege, or the benefit of any duty of confidentiality, to enable the law practice or lawyer to disclose to the appropriate authorities any information necessary for investigating and dealing with the complaint.[93]

However, it is important to note that no such waiver arises from a civil claim or disciplinary complaint made by a non-client.

---

91 Dal Pont *Lawyers' Professional Responsibility* (7th Ed., 2021) [10.90].

92 *Legal Profession Act 2007* (Qld), section 491.

93 See also: *Legal Profession Act 2006* (ACT) [s.470]; *Legal Profession Act 2006* (NT) [s. 563]; *Legal Profession Act 2007* (Tas) [s. 516].

10. Conflicts concerning former clients

10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients.

10.2 A solicitor or law practice who or which is in possession of information which is confidential to a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:

10.2.1 the former client has given informed consent to the disclosure and use of that information; or

10.2.2 an effective information barrier has been established.

Commentary

Overview

Ongoing duty of confidentiality

After the solicitor-client retainer has ended, a solicitor has a continuing duty of confidentiality to maintain confidence over their former client's confidential information. A solicitor or law practice in possession of confidential information of a former client will be in a position of duty-duty conflict where they act on a new matter for a client that is against the former client's interests, the former client's confidential information is relevant to the new matter and there is a real risk of misuse of the former client's confidential information.[94]

When taking new instructions from a client which may be regarded as being against a former client's interests, a solicitor or law practice must determine whether it is in possession of any confidential information of the former client that is material and relevant to the new matter. If it is, the solicitor or law practice can only act, or continue to act, if one of the exceptions in rule 10.2.1 or 10.2.2 applies.

Example

A solicitor acted for an individual in fraud proceedings. After being acquitted by the court for lack of evidence, the client admitted to the solicitor he had acted dishonestly. Subsequently, the solicitor is briefed by a lender that intends advancing money to the former client. The solicitor has a conflict of duties. He/she must preserve the confidentiality of the former client's admission. On the other hand, the solicitor is also duty bound to disclose the risk the information poses to the lender's interests. The solicitor must refuse the subsequent client's instructions in a way that does not compromise the former client's confidential information.

---

[94] See, for example, *Nash v Timbercorp Finance Pty Ltd* [2019] FCA 957 at [62] to [64]; *Dyer v Chrysanthou (No 2) (Injunction)* [2021] FCA 641 at [74] t0 [78]; *Le v Angius* [2022] NSWSC 1150 at [29] to [31]; and *Porter v Dyer* (2022) 402 ALR 659 at [74] to [75].

Law relating to whether there is an ongoing duty of loyalty

The weight of authority in Australia supports the proposition that, once a solicitor's retainer with a client is at an end, the solicitor does not have any continuing equitable or contractual duty of loyalty to their former client.[95]

Beach J in *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* [2014] FCA 1065 conducted a detailed analysis of the controversy over whether a solicitor's duty of loyalty survives the termination of their retainer and observed that "there was no secure foundation in the authorities" for it. [96]

This reflects the English law position and observations of Lord Millett in *Prince Jefri Bolkiah v KPMG:*

> The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.[97]

However, at least in the Victorian Supreme Court, there remains some judicial support for the proposition that a solicitor has an ongoing duty of loyalty to their former client (based upon the ex tempore decision of the Victorian Court of Appeal in *McVeigh v Linen House Pty Ltd* [1999] 3 VR 394; [1999] VSCA 138 and the obiter of Brooking JA in *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501; [2001] VSCA 248) [98] Leaming JA in *Técnicas Reunidas SA v Andrew* [2018] NSWCA 192, referring to *McVeigh v Linen House* and the obiter of Brooking JA in *Spincode*, observed that these decisions are "inconsistent with the weight of Australian authority".[99]

In a 2014 paper, following the decision of Barrett JA (with whom Beazley P and McColl JA concurred) in *Maxwell-Smith v S & Hall Pty Ltd* (2014) 86 NSWLR 481, Ian Dallen noted that: [100]

> ... the weight of authority in Australia continues to be against the Spincode obiter and, as such, the better view is that the fiduciary loyalty does not survive the termination of a retainer. Reflecting the weight of authority, the Spincode obiter has

---

[95] See the observations and authorities cited in the judgments of Steytler P in *Ismail-Zai v Western Australia* (2007) 34 WAR 379, at [20]-[25]; Ward J *in Cleveland Investments Global Ltd v Evans* [2010] NSWSC 567, at [38]-[50]; Barrett JA in *Maxwell-Smith v S & Hall Pty Ltd* (2014) 86 NSWLR 481 at [24]; Beach J in *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* [2014] FCA 1065, at [40] to [89]; Leeming JA in *Técnicas Reunidas SA v Andrew* [2018] NSWCA 192, at [36]; and Anderson J in *Nash v Timbercorp Finance Pty Ltd* [2019] FCA 957 at [122].

[96] *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* [2014] FCA 1065, at [42].

[97] *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 at 235.

[98] See, for example, *ACN 092 675 164 v Suckling* [2018] VSC 620 at [65] and [66] where Riordan J observed "it is plainly unsatisfactory for there to be a divergence in the principles to be applied" between Victoria and other States, albeit his Honour (as a trial judge) regarded himself bound to follow *McVeigh v Linen House* (rather than the Appellate Courts of other States).

[99] Leeming JA in *Técnicas Reunidas SA v Andrew* [2018] NSWCA 192, at [36].

[100] I Dallen, "The Rise of the Information Barrier: Managing Potential Legal Conflicts Within Commercial Law Firms" (2014) 88 ALJ 428 at 434, referencing M Conaglen, Fiduciary Loyalty: Protecting the Due Performance of Non- Fiduciary Duties (Hart, UK, 2010) pp 16-31.

been subject to academic criticism for stretching fiduciary loyalty "too far out of shape in pursuit of an objective that is not one of its core purposes".

Whilst there is only one common law (including equity) in Australia, a solicitor (especially those who practice in Victoria) should be cognisant that the question of whether a duty of loyalty survives termination of the retainer remains an evolving and controversial area of the law.

Inherent jurisdiction to ensure the due administration of justice

A solicitor, as an officer of the court, has a paramount duty to the court to ensure the lawful, proper and efficient administration of justice (see the Commentary on Rule 3).

Arising from this paramount duty, superior courts have an inherent or implied jurisdiction to control and supervise their officers. This supervisory jurisdiction includes the power to restrain a solicitor or law practice from acting for a client in the interests of protecting the integrity of the judicial process and the due administration of justice, including the appearance of justice. This power is regarded as exceptional and one that must be exercised with caution.[101]

As observed by Brereton J in *Kallinicos v Hunt* (2005) 64 NSWLR 561:

> The court always has inherent jurisdiction to restrain solicitors from acting in a particular case, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice … The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice … The jurisdiction is to be regarded as exceptional and is to be exercised with caution.[102]

Solicitors should be cognisant that, in addition to their ongoing duty of confidentiality and irrespective of whether they have an ongoing duty of loyalty, a former client may seek to invoke the court's supervisory jurisdiction to restrain them acting in a matter against the interests of the former client to protect the integrity of the judicial process and the due administration of justice (including the appearance of justice).

Confidential information

The expression "confidential information" is not defined in the Rules. For the purpose of the law imposing constraints upon solicitors acting against the interests of former clients, Lightman J said: [103]

> [t]he law is concerned with the protection of information which (a) was originally communicated in confidence, (b) at the date of the later proposed retainer is still

---

[101] See, for example, *Kallinicos v Hunt* (2005) 64 NSWLR 561 at [76]; *R & P Gangemi Pty Ltd v D & G Luppino Pty Ltd* [2012] VSC 168 at [25] to [30]; *Viscariello v Legal Profession Conduct Commissioner* [2015] SASC 4 at [19] to [20]; *Nash v Timbercorp Finance Pty Ltd* [2019] FCA 957 at [124]; *Le v Angius* [2022] NSWSC 1150 at [32] to [35] and [48].

[102] *Kallinicos v Hunt* (2005) 64 NSWLR 561 at [76].

[103] *Re a Firm of Solicitors* [1997] Ch 1 at 9-10.

confidential and may reasonably be considered remembered or capable, on the memory being triggered, of being recalled and (c) relevant to the subject matter of the subsequent proposed retainer.

There is no one precise formulation for determining whether information is confidential. However, within the context of the relationship between a solicitor and their client, the concept is not to be construed narrowly.[104]

That said, the information must be confidential (as information generally is not protected). Further, the confidential information in question must be identified with precision and not merely in global terms.[105]

Classes of information that may be confidential for the purposes of former client conflicts include:

(a) information of a former client that is directly related to a matter for an existing client, for example information belonging to an insurer concerning a potential claim, in circumstances where the solicitor is asked to accept instructions to act for the claimant;

(b) information of relevance to a competitor, such as product pricing or business models; and

(c) in some circumstances, particularly intimate knowledge of a client, its business, personality and strategies.[106]

Whether information falling within the third category can be said to be truly confidential is a question of fact and likely to depend on the client. Individuals or small organisations may have a close and enduring relationship with a solicitor who will consequently obtain much confidential information concerning these more personal factors, and who would have difficulty demonstrating that he or she could act against that client. This is unlikely to be the case for a large corporation or government body, or where there is regular turnover of management with the passage of time, particularly where business practices and strategies are so well-known that they do not constitute confidential information.[107]

Example

Through the course of representing a business person over several years, a solicitor has become aware of the client's private financial information. The client's marriage breaks down and the client's spouse approaches the solicitor to act for her in the divorce. The solicitor may, because of the information learned about the client in his business, be conflicted from accepting instructions from the wife in the matrimonial matter.

---

[104] *Nash v Timbercorp Finance Pty Ltd* [2019] FCA 957 at [73] to [77].

[105] *O'Brien v Komesaroff* (1982) 150 CLR 310 at 327; *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307 at 314; *Durban Roodepoort Deep, Limited v Mark David Reilly and Glenn Robert Featherby As Administrators of the Deed of Company Arrangement of Laverton Gold NL (Subject to Deed of Company Arrangement) & Ors* [2004] WASC 269 at [69]-[80]; *Nash v Timbercorp Finance Pty Ltd* [2019] FCA 957 at [66]; *Le v Angius* [2022] NSWSC 1150 at [30]- [31] and [44].

[106] See, for example, Yunghanns *v ELFIC Ltd* (SC (Vic) Gillard J, 3 July 1998, (unreported)) [10]-[11].

[107] See, for example, *Mintel International Group Ltd v Mintel (Australia) Pty Ltd* (2000) 181 ALR 78, at [44] (in the context of barristers).

Example

A law practice acted for many years for a small business owned and controlled by an individual whose personality, attitudes and business strategies became well-known to the practice. The business owner's neighbour seeks to brief the law practice in a fencing dispute it has with her. The law practice may have a conflict of duties because it has intimate knowledge of the owner based on its many years of taking instructions from her in relation to the business.

Example

A law practice is on a panel of firms that act from time to time for a local council in planning disputes with developers. The law practice is instructed by a developer in a planning dispute with that council. The law practice has not had any involvement with the council in that dispute. The law practice is unlikely to have a conflict of duties. The council's strategies and decision-making in planning matters are likely to be well-known amongst local developers and would not constitute confidential information.

Materiality and detriment

For a solicitor or law practice to be restrained from acting against a former client on the basis of a possible misuse of confidential information, the "possible misuse" must be sufficiently characterised such that the confidential information might reasonably be concluded to be material (and not remote) to a current client's matter and, if disclosed, the disclosure would be detrimental to the interests of the former client.

Accordingly, the solicitor or law practice must be conscious of the scope of the current retainer and, if necessary, ensure that it is suitably constrained. The duty to act in the best interests of the client is circumscribed by the scope of the retainer. This means that a solicitor or law practice can act for one client while in possession of confidential business information of a competitor of that client, as long as that information does not relate to the current retainer.

The test of materiality is an objective one, namely whether the confidential information might reasonably be expected to be material.

Materiality and "detriment" may arise at any time. A solicitor must continually reassess whether confidential information in the solicitor's possession has become material to an ongoing matter and its disclosure may be of detriment to a former client.

The term "detrimental to the interests of a client" is used in Rules 11 and 11A, in addition to Rule 10.2. The Commentary to Rule 11 includes commentary on the meaning of this term.

Informed consent

A solicitor may undertake a subsequent representation that is against the interests of a former client, where they have obtained the informed consent of the former client or there is no real risk of misuse of the former client's confidential information.

There is no precise formula for determining whether informed consent has been given. In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, the High Court held that whether there has (in fact) been informed consent is "a question of fact in all the circumstances of each case" and the sophistication of the client involved will impact on the level of disclosure required to be given.[108]

In *Spellson v George*, Handley JA noted:

> Consent may take various forms. These include active encouragement or inducement, participation with or without direct financial benefit, and express consent. Consent may also be inferred from silence and lack of activity with knowledge. However, consent means something more than a state of mind.[109]

It is strongly recommended that, even though informed consent might be established in ways other than in writing, solicitors should nevertheless always seek written consent where possible. The onus is on the solicitor to obtain irrefutable evidence of the consent of clients under Rules 10 and 11, and a prudent solicitor should obtain such consent in writing.

The High Court in *Maguire v Makaronis* (1997) 188 CLR 449 observed:

> [if] the appellants were to escape the stigma of an adverse finding of breach of fiduciary duty, with consequent remedies, it was for them to show, by way of defence, informed consent by the respondents to the appellants' acting, in relation to the Mortgage, with a divided loyalty. What is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given. The circumstances of the case may include (as they would have here) the importance of obtaining independent and skilled advice from a third party. On no footing could it be maintained that the appellants had taken the necessary steps of this nature to answer the charge of breach of fiduciary duty. However, it should be noted that, contrary to what appeared to be suggested by the respondents in argument, there was no duty as such on the appellants to obtain an informed consent from the respondents. Rather, the existence of an informed consent would have gone to negate what otherwise was a breach of duty. [110]

Where it is not practicable to obtain informed consent in writing contemporaneously with the client giving their consent, a solicitor should as soon as possible after receiving the informed consent from the client confirm receipt of the consent in writing to the client.

It should also be noted that the fundamental purpose of obtaining informed consent pursuant to Rule 10 (and Rules 9, 11 and 12) of the ASCR is not simply to inform and obtain the client's acquiescence to every action a solicitor might undertake to efficiently

---

[108] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 at [107], [108] (citing *Maguire v Makaronis* (1997) 188 CLR 449 at 466 per Brennan CJ, Gaudron, McHugh and Gummow JJ).

[109] [1992] NSWCA 254 at [40].

[110] *Maguire v Makaronis* (1997) 188 CLR 449 at [43] (per Brennan CJ, Gaudron, McHugh and Gummow JJ). Whilst the High Court was addressing breach of fiduciary duty (see, in this regard, the Commentary to Rule 11), the principle that informed consent would have gone to negate what otherwise would be a breach of duty is the same.

transact legal business, but to also negate what would otherwise be a breach of a fiduciary or other duty owed to the client.

Where a solicitor or law practice seeks the consent of a former client to disclose the confidential information of the former client to another client, what is critical is that the former client is able to make a fully informed decision as to whether or not to consent.

The key matters the former client must be aware of in order to give informed consent are:

(a) the benefits and disadvantages for the former client of consenting to the use of the confidential information;

(b) the benefits and disadvantages for the current client of having use of that information;

(c) that the former client is entitled to refuse consent; and

(d) that the former client may wish to obtain independent legal advice before providing consent.

The extent to which each of these factors needs to be addressed will depend upon the sophistication of the former client. Especially where the client is not sophisticated, the need to stress the importance of seeking independent legal advice is heightened.

In practice, this sort of consent may not be practical to obtain and an information barrier may be the only way to quarantine the former client's confidential information.

Effective information barriers

Effective information barriers are also discussed in the Commentary to Rule 11.

A law practice must have established documented protocols for setting up and maintaining information barriers. Few firms will be able to satisfy the relevant requirements—it is likely to be only larger law practices that will have the capacity to implement the requirements for establishing and maintaining an effective information barrier.

The Law Society of New South Wales, in consultation with the Law Institute of Victoria, has developed Guidelines[111] on information barriers that have been adopted by the law societies of New South Wales, Victoria and Queensland. The Guidelines do not purport to outline the steps that are either necessary or sufficient to create an effective information barrier. This is because the nature and sophistication of the barrier will depend upon what is necessary and appropriate in the circumstances of the law practice and the nature of the confidential information to be protected. Therefore, the focus is not on the reasonableness of the steps taken by the law practice but rather their effectiveness. Solicitors should be aware of the principles the Guidelines have been drafted to address, and seek to ensure that any barrier adopted conforms to those principles and is tailored to the particular circumstances.

[111] Law Society of New South Wales, *Information Barrier Guidelines* (16 March 2006) accessible at: http://www.lawsociety.com.au/idc/ groups/public/documents/internetcostguidebook/008728.pdf.

Judicial recognition of effective information barriers has stemmed from an appreciation that the rule of partnership law that the knowledge of one partner is imputed to all other partners is a legal fiction. Nonetheless, it is for the multi-member law practice to demonstrate that information can be effectively quarantined, and the onus of doing so is not easy to discharge.

Whilst courts take a scrutinizing and cautious approach when assessing whether an information barrier is effective, in practice information barriers have become more common.

An effective information barrier will ordinarily exhibit the following features:

1. The solicitors acting for the new client, and the solicitors who acted for the former client, are identified and required to comply with strict written information barrier (separation) protocols which operate to protect the former client's confidential information and remove the risk of misuse of the former client's confidential information.

2. The solicitors acting for the new client, and the solicitors who acted for the former client, provide an undertaking to the law practice that they will comply with the strict written information barrier (separation) protocols.

3. There are disciplinary sanctions in place for failure to comply with the strict written information barrier (separation) protocols.

4. The physical and electronic matter files and documents are secured so that:
   - only the solicitors acting for the new client can access the current matter files and documents.
   - only the solicitors who acted for the former client can access the former client's matter files and documents.

5. An experienced solicitor within the law practice (a designated compliance officer), with appropriate knowledge of a solicitor's professional and ethical obligations (including confidentiality and conflicts of interest), should oversee the establishment and administration of the information barrier.

6. The law practice should have in place an ongoing education program for all its solicitors regarding the protection of confidential information and the operation of information barriers.

In summary, an information barrier will only be effective if it eliminates any real and sensible possibility of misuse of confidential information[112], although in family law the test is likely to be stricter again. [113]

---

[112] See *Farrow Mortgage Services Pty Ltd (in liq) v Mendall Properties Pty Ltd* [1995] 1 VR 1 at 5; *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 at 237; *Newman v Phillips Fox* (1999) 21 WAR 309 at 322-323; and *Babcock & Brown DIF III Global v Babcock & Brown International Pty Ltd* [2015] VSC 453 at [66] to [69].

[113] *In the Marriage of Thevenaz* (1986) 84 FLR 10 (where a risk "more theoretical than practical" was held sufficient to disqualify a practitioner from acting), followed and adopted by the Full Court of the Family Court of Australia in *McMillan v McMillan* (2000) 159 FLR 1.

Further, where a law practice seeks to act on a new matter for a client that is against a former client's interests and it is established by the former client that the law practice is in possession of their confidential information and that confidential information is relevant to the new matter, the burden of establishing there is no real risk, or sensible possibility, of misuse of confidential information moves to the law practice.[114]

This is a high burden. Indeed, even where all reasonable measures have been taken to establish an information barrier but a technical or inadvertent breach occurs, the information barrier will be found to be ineffective.

Example[115]

A law practice established an information barrier to protect a former client's confidential information. The information barrier included strict separation protocols as well as undertakings, from the partners and solicitors who acted for the former client, to the effect that they would comply with the separation protocols and have no involvement in the new matter. The former client applied to the court to restrain the law practice from acting in the new matter, however the Court (initially) found that the information barrier was effective. Two years after the information barrier was established and the court found the information barrier was effective, a solicitor working on the new matter needed a partner to urgently sign consent short minutes of order relating to certain procedural matters (dates for discovery procedures) and, when they were unable find their supervising partner, asked one of the "screened" partners to sign the minutes and they unwittingly did. While satisfied no confidential information was disclosed by the screened partner when they did this, the Court found that the information barrier was ineffective and granted the former client an injunction restraining the law practice from further acting on the matter.

Meaning of former client

The concept of "former client" has the potential to be very wide-reaching. As the glossary definition notes, the test is not simply whether the solicitor, or a current member of the law practice, has acted for the person. Whilst the definition does not mean that a solicitor who moves to a new law practice is deemed to know all the confidential information in the possession of her or his former practice, where a solicitor moves practices, the confidential client information the solicitor has moves with the solicitor.

In practice, it would be inconsistent with their confidentiality obligations to former clients for "migrating" solicitors to disclose to their new practice the extent and content of the confidential information in their possession. However, where an opponent learns that a migrating solicitor possesses or may possess relevant confidential information, this may form the basis for a successful application to restrain the migrating solicitor's new practice from acting.

---

[114] See *Babcock & Brown DIF III Global v Babcock & Brown International Pty Ltd* [2015] VSC 453 at [66] to [69]; *Nash v Timbercorp Finance Pty Ltd* [2019] FCA 957 at [111]; and *Porter v Dyer* (2022) 402 ALR 659 at [75].

[115] This example is based on the facts in *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2007] NSWSC 350.

Where a migrating solicitor is aware that his/her new practice represents a competitor of a client of the solicitor's old practice, an information barrier may be adequate to quarantine any relevant confidential information.[116]

The question of whether a current member or employee of a law practice is in fact in possession of confidential information is a question of fact determined by establishing what that person actually knows, bearing in mind the matters discussed in the "confidential information" section above.

Confidential information may be imparted without there being a formal retainer. Concerns have been raised in this respect about pre-emptive retention of adverse representation, especially in a field where few solicitors or law practices are able to act. While the courts have rightly described this practice as undesirable, they have supplied little guidance on how to address it.

Example

A solicitor is approached by a potential client. A conference takes place at which the potential client provides confidential information about his/her situation. The solicitor is not formally instructed and does not open a file. The solicitor should record the conference and the matters discussed for conflicts purposes. If in a future matter, the solicitor comes under an obligation to disclose or use that confidential information for the benefit of another client, there will be a conflict of duties unless rule 10.2 applies.

Solicitors who are members of a multi-disciplinary partnership must also consider the clients of other members of that partnership, together with the provisions of the relevant state/territory legal profession legislation.

Amendment to Rule 10.2.1 on 1 April 2022

Rule 10.2.1 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* was amended as from 1 April 2022. Under the amendment, the requirement for informed *written* consent, was replaced by *informed consent*. This change reflects the current law in Australia, which recognises that informed consent may be given in various forms.

Rule 10.2.1 was also amended to clarify that the informed consent to be obtained from a former client is to the disclosure and use of that client's confidential information, and not to the solicitor acting for the current client. This reflects the view that the weight of authority in Australia supports the proposition that, once a solicitor's retainer with a client is at an end, the solicitor does not have any continuing equitable or contractual duty of loyalty to their former client. However, solicitor's in Victoria will need to be mindful that, at least in the Victorian Supreme Court, there remains some judicial support for the proposition that a solicitor has an ongoing duty of loyalty to their former client.

[116] Compare *Bureau Interprofessionnel des vins de Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 (where the information barrier was effective) with *Newman v Philips Fox (a firm)* (1999) 21 WAR 309 (where it was not).

11. Conflict of duties concerning current clients

11.1 A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients.

Duty of loyalty

11.2 If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the clients' interests are adverse and there is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act, except where permitted by Rules 11.3 and 11.4.

11.3 Where a solicitor or law practice seeks to act in the circumstances specified in Rule 11.2, the solicitor or law practice may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:

11.3.1 is aware that the solicitor or law practice is also acting for another client; and

11.3.2 has given informed consent to the solicitor or law practice so acting.

Duty of confidentiality

11.4 In addition to Rule 11.3, where a solicitor or a law practice acts for two or more clients in the same or related matters and the solicitor or law practice is in, or comes into, possession of information which is confidential to one client (the first client) which might reasonably be concluded to be material to the other client's or clients' matter and detrimental to the interests of the first client if disclosed, the solicitor and the solicitor's law practice may not act or continue to act for the other client of clients unless each client's informed consent:

11.4.1 permits the disclosure and use of that information for the benefit of the other client or clients; or

11.4.2 requires the establishment and maintenance at all times of an effective information barrier to protect the confidential information of each client.

Actual conflict arising between current clients in the course of a matter

11.5 If a solicitor or a law practice acts for more than one client in a matter and, during the course of the conduct of that matter, an actual conflict arises between the duties owed to two or more of those clients, the solicitor or law practice may only continue to act for one of those clients (or for two or more of those clients between whom there is no conflict) in the following exceptional circumstances:

11.5.1 any client for whom the solicitor or law practice ceases to act has given informed consent to the solicitor or law practice continuing to act for the remaining clients; and

11.5.2 the duty of confidentiality owed to all of the clients, both those for whom the solicitor or law practice ceases to act and those for whom the solicitor or law practice continues to act, is not put at risk.

Commentary

Overview

Rule 11 deals with concurrent client conflicts, which are also known as duty-duty conflicts. The ethical standard at the heart of Rule 11.1 is a solicitor's duty of "single-minded loyalty" to their client which arises from the fiduciary relationship between a solicitor and their client.

A solicitor or law practice must avoid being in a position where the duties owed to one client are, or may be, in conflict with the duties owed to another client, unless the exceptions under Rule 11 apply to negate the effect of the conflict or potential conflict. The exceptions set out in Rule 11.3, Rule 11.4 and Rule 11.5 reflect the position in equity and at common law.

Rule 11.2 deals with adverse interest conflicts, i.e. the situation where Client A's interests are adverse to Client B's interests in the same or related matters, yet a solicitor or law practice is requested, and seeks to act for both Client A and Client B in that matter or those matters. Rule 11.2 provides that the solicitor or law practice must not act for both Client A and Client B except as permitted by Rule 11.3. The rationale for this is that it would generally not be possible for a solicitor or law practice to discharge their fiduciary duty of loyalty to Client A, while at the same time discharge their fiduciary duty of loyalty to Client B.

Situations may arise when two or more clients whose interests in the same or a related matter are adverse to each other nevertheless wish to retain the same solicitor or law practice. **Rule 11.3** permits a solicitor or law practice to act for each client provided:

- each client is aware that the solicitor or law practice is, or will be, also acting for another client in the same or a related matter; and
- each client has given informed consent to the solicitor or law practice also acting for the other client in the same or a related matter.

Rule 11.4 concerns the potential for confidential information conflicts when acting for concurrent clients in the same or related matters. This type of conflict may arise where a solicitor or law practice, having satisfied the requirements of Rule 11.3 in an adverse interest conflict situation involving Client A and Client B, subsequently comes into possession of confidential information of Client A that is relevant to the matter or matters (and thus would need to be disclosed to Client B), but that disclosure would be detrimental to the interests of Client A.

To avoid the potential for confidential information conflicts, the informed consent obtained from each of the concurrent clients should either:

- permit the disclosure and use of each client's confidential information for the benefit of each client (Rule 11.4.1); or
- require the establishment and maintenance of an effective information barrier to protect the confidential information of each client (Rule 11.4.2).

In the Rule 11.4.1 situation, the one solicitor (or same set of solicitors) is able to act for each client in the same or related matters as the form of each client's consent removes the potential for confidential information conflicts as between those clients.

Importantly, it is only in the Rule 11.4.1 situation (i.e. where the consent permits the sharing and use of confidential information by the solicitor as between the concurrent clients) that the one solicitor (or the same set of solicitors) can act for each client in the same or related matters.

In the Rule 11.4.2 situation, an effective information barrier must be established to protect each clients' confidential information and, as such, the one solicitor (or the same set of solicitors) cannot act for each client in the same or related matters. Rather, for an effective information barrier to be established in relation to the same or related matters, different solicitors within a law practice must act for each client in accordance with strict information barrier (separation) protocols to ensure that the solicitors on each side of the information barrier act separately and independently from each other.[117]

Rule 11.5 deals with the situation where a solicitor or law practice is concurrently acting for both Client A and Client B in a matter, but during the course of that matter an actual duty-duty conflict arises. (Implicit in Rule 11.5 is a starting position that there were no conflicts between Client A and Client B when the solicitor or law practice commenced acting for both Client A and Client B). Rule 11.5 permits a solicitor or law practice to continue to act, for example, for Client A provided that:

- both Client A and Client B have given (or give) informed consent to the solicitor or law practice continuing to act for Client A; and
- the duty of confidentiality to both Client A and Client B is not put at risk.

Application

Informed consent

A solicitor or law practice cannot act for two or more clients with potentially conflicting interests in the same or related matters without the informed consent of each client. As noted by Millett LJ in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222:[118]

> a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest.

There is no precise formula for determining whether informed consent has been given and the sophistication of the client involved will impact on the level of disclosure required to be

---

[117] Information barriers are further discussed below. See also the Commentary to Rule 10 regarding information barriers.

[118] *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 at 234.

given.[119] However, as set out below, there will usually need to be full and frank disclosure of all material facts regarding the proposed simultaneous representation (including how the solicitor or law practice intends to manage the inherent conflict).

The High Court in *Maguire v Makaronis* (1997) 188 CLR 449 observed:

> if the appellants were to escape the stigma of an adverse finding of breach of fiduciary duty, with consequent remedies, it was for them to show, by way of defence, informed consent by the respondents to the appellants' acting, in relation to the Mortgage, with a divided loyalty. What is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given. The circumstances of the case may include (as they would have here) the importance of obtaining independent and skilled advice from a third party. On no footing could it be maintained that the appellants had taken the necessary steps of this nature to answer the charge of breach of fiduciary duty. However, it should be noted that, contrary to what appeared to be suggested by the respondents in argument, there was no duty as such on the appellants to obtain an informed consent from the respondents. Rather, the existence of an informed consent would have gone to negate what otherwise was a breach of duty. [120]

Importantly, in relation to concurrent clients, the law requires that a solicitor's fiduciary duty of single minded loyalty can only be modified by clients, not by solicitors or law practices—hence the use of information barriers alone cannot be relied upon by a solicitor or law practice as amounting to a modification of a solicitor's fiduciary duty owed to each client. Rather, whenever a solicitor or law practice seeks to act for two or more clients with potentially conflicting interests in the same or related matters, they can only do so with the informed consent of each client.[121]

Reflecting the above, Rule 11.3 allows a solicitor or law practice to act where it has a conflict of duties owed to two or more existing clients, but only where the clients are aware that the solicitor or law practice is acting for the other client(s), and have given their informed consent.

In this context, it has been observed that informed consent means consent given in the knowledge that there is a conflict between the parties and that, as a result, the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction, or may be disabled from giving advice to one party that conflicts with the interests of the other.[122]

Informed consent focuses on the understanding of the client, meaning that the conversation between solicitor and client will vary according to the requirements of the client. It is the solicitor, not the client, who is most likely to be alert to the possibility of conflicts of interest and their consequences. A client's informed consent, therefore, is premised upon the solicitor making the client aware of all relevant matters, including (but not limited to):

---

[119] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [107].
[120] *Maguire v Makaronis* (1997) 188 CLR 449 at [43] (per Brennan CJ, Gaudron, McHugh and Gummow JJ).
[121] See the discussion in I Dallen, "The Rise of the Information Barrier: Managing Potential Legal Conflicts Within Commercial Law Firms" (2014) 88 ALJ 428 at 431 to 433.
[122] *Clark Boyce v Mouat* [1993] 3 NZLR 641, at 646.

- the existence or potential existence of a conflict;
- the potential disadvantages of the conflict;
- any advantages of the conflict, to that client or any other client;
- the fact that alternative representation is likely to be available; and
- the manner in which the solicitor intends managing the conflict of interest.

Moreover, especially in the case of an unsophisticated client, a prudent solicitor will urge the client to seek independent legal advice on the matter.

The giving of informed consent

It is strongly recommended, as set out in the Commentary to Rule 10, that even though informed consent might be established in ways other than in writing, a solicitor should nevertheless always seek written consent where possible. The onus is on the solicitor to obtain irrefutable evidence of the informed consent from the clients under Rules 10 and 11, and a prudent solicitor should obtain such consent in writing.

Where it is not practicable to obtain informed consent in writing contemporaneously with the clients giving their consent, a solicitor should as soon as possible after receiving informed consent from the clients confirm receipt of the consent in writing to each of the clients.

It should also be noted that the fundamental purpose of obtaining informed consent pursuant to Rule 11 (and Rules 9, 10 and 12) of the ASCR is not simply to inform and obtain the client's acquiescence to every action a solicitor might undertake to efficiently transact legal business, but to also negate what would otherwise be a breach of a fiduciary or other duty owed to the client.

Acting on a non-exclusive basis

In some circumstances, a solicitor or law practice may seek to act for a client on a "non-exclusive" basis in a transaction.

This situation arises in a limited range of circumstances, for example, where the nature or size of the particular transaction means that only a limited number of law practices can act.

Where a law practice seeks to act on a non-exclusive basis, it may not know whether it will have a conflict of interest, but due to the possibility of a potential conflict arising during the course of the retainer, the law practice seeks informed consent of the client under an expressly limited retainer agreement. This type of retainer is typically limited to sophisticated clients, who can give properly informed consent to the arrangement, particularly in areas where this is a common practice, such as where the solicitor is free to act for multiple creditors in an insolvency. Law practices should ensure that the retainer agreement is drafted to outline the intention that the law practice will act on a non-exclusive basis.

Example

A law practice is briefed to act for a bidder in the sale by tender of a large asset. The law practice wishes to act on a non-exclusive basis. It would need to explain to the bidder that it may currently be acting, or may in the future act, for another bidder to the project, or for another party involved in the transaction, such as the financier of another bidder. The law practice would need to ensure that the client understood that the law practice could not reveal to it confidential information of any other party and had in place information barriers to protect the client's confidential information. If the client consented to this arrangement, the law practice can act on that basis.

Effect of having a conflict of duties

The word "avoid" in Rule 11.1 highlights the fact that a conflict can arise without any fault on the part of a solicitor or law practice. Sometimes, a new development after instructions have been accepted and acted upon will render material to a current client's matter, confidential information of another current client's matter. In these circumstances, the solicitor may have to cease acting for all of the clients, unless the requirements of Rule 11 have been satisfied.

In practice, a breach of Rule 11 may lead to one client seeking to restrain the solicitor or law practice from acting for the other client. Where there is a breach of the solicitor's duties to the client or a real risk of the misuse of confidential information, an injunction will usually be granted. Even absent any such breach or risk, the existence of concurrent retainers presupposes continuing fiduciary obligations to each client, and so may be the basis for an order disqualifying a solicitor or law practice from continuing to act. Further, and in addition, a court may restrain the solicitor or law practice from acting as part of its inherent supervisory jurisdiction over legal practitioners.[123]

When approached, or contemplating whether, to act concurrently for two or more clients in the same or related matters, solicitors and law firms must always first consider the fiduciary duties of loyalty they have or will owe separately to each individual client, requiring that the solicitor and law practice must be in the position of being able at all times throughout the retainers act with "single-minded loyalty" in the best interests of each client, before being able to consider whether to accept instructions to act concurrently for each client.

As noted above, a solicitor or law practice cannot act for two or more clients with potentially conflicting interests in the same or related matters without the informed consent of each client.

A review of the approaches taken by common law jurisdictions to the question of whether and how a law practice can represent concurrent clients reveals the different approaches that can be taken to acting for two or more parties in the same or related matters. The approach of jurisdictions such as the Law Society of Quebec, which only allows concurrent representation of clients if they agree to share all client confidential information; can be contrasted with the position established in other jurisdictions, including the other Canadian provinces, the England and Wales Solicitors Regulatory Authority and Australian courts

---

[123] See *UTi (Aust.) Pty Ltd v Partners of Piper Alderman* [2008] NSWSC 219 (which involved a potential 'current client' conflict). See also the Commentary for Rule 10 regarding **'**The Court's inherent jurisdiction to ensure the due administration of justice'.

which recognize that provided informed consent is given by each client, such consent can be either to share all information or alternatively, to maintain the confidentiality of each client's information through the use of information barriers.

Duties to clients

As the relationship between a solicitor and client is a fiduciary relationship, a solicitor must always act with single-minded loyalty in the interests of the client in any matter in which the solicitor represents the client: see Rule 4.1.1.

Because the duty to act in a client's interests arises in respect of each client of a solicitor or law practice, there are times when the duty to one client comes into conflict with the duty to another client. While solicitors owe duties to clients, law practices must also discharge those duties at the law practice level. Furthermore, principals of a law practice are responsible for ensuring the duties owed to each and every client of the law practice are discharged by their solicitors and employees. It follows that where two law practices merge, or a solicitor moves practices, potential conflicts may arise that must be dealt with in accordance with Rule 11 (in the case of concurrent clients) and Rule 10 (in the case of former clients).

Solicitors must always keep in mind their duty to avoid conflicts of duties between clients. Rules 11.3, 11.4 and 11.5, together with Rule 10.2, deal with particular situations where conflicts of duties arise, or may arise. Each of these Rules sets out the ethical principles that must then be applied if a solicitor (or the solicitor's law practice) is contemplating whether or not to act or continue to act for a client or clients. It cannot be emphasised too strongly that the standards set by the common law (including equity) and by these Rules for a solicitor or law practice to act for or continue to act for a client or clients in a conflict of interest situation are very high and difficult to satisfy.

Issues in concurrent representation

Two or more clients may wish to engage the same solicitor or law practice, or one client may wish to engage that solicitor notwithstanding that the solicitor is already acting in the same or a related matter:

- to minimise cost;
- where each has previously been a client of the solicitor;
- to minimise the cost and inconvenience of travel where geography means that few solicitors are available;
- where the nature of the matter or matters is such that few solicitors or law practices have the necessary skills and experience to handle it or them; and/or
- where the two or more clients appear to have common or identical interests.

However, it should be noted that just because a client consents to a solicitor acting for another client in the same or a related matter, it does not necessarily mean the solicitor can or should accept both retainers, as a conflict may arise and the matter may become contentious. Solicitors must exercise independent judgement to determine whether a conflict is likely to arise, even where one does not presently exist.

Example

The vendor and purchaser of land approach a solicitor to act for them in a conveyance. Ordinarily the solicitor would only be able to act provided the informed consent of both clients was obtained. However the solicitor should be aware of any divergence in the position of the parties. If, for example, there was a falling out between the parties, or if it was in the interests of one to delay settlement, then the solicitor would have to cease acting for both.

Contentious matters

A solicitor with limited experience in a particular area of litigation would be wise to seek advice from a more experienced solicitor on how the litigation may unfold and how, if at all, the interests of their clients may come to diverge.

Example

A law practice is briefed to defend a breach of copyright claim. The defendants are a company and its wholly-owned subsidiary. The claim has been brought against both, because the plaintiff is unaware which of the two published the alleged infringement. The interests of the two companies are clearly aligned and the law practice could act for both, with little risk of a conflict arising.

Example

A regulator brings disciplinary proceedings against the directors of a company. The allegations made against the directors are identical, but in providing instructions to a solicitor, the directors make it clear that they had different roles in the relevant events, and are likely to have different defences. Although there may not be an existing conflict, it is likely that one will develop, and the solicitor will not be able to act for all of the defendants.

Acting for multiple criminal defendants can be particularly challenging ethically because of the potential for conflicts to arise. Criminal defendants rarely have exactly the same involvement in the relevant events, may be relatively inexperienced users of legal services and may be unfamiliar with the justice system, making it especially risky for a law firm or solicitor which is asked or contemplates acting for two or more co-accused in a trial. The courts have strongly discouraged the practice. President McMurdo of the Queensland Court of Appeal, in the case of R v Pham[124] expressly referred to ASCR Rules 11.1, 11.3 and 11.4 and noted the ASCR as recognizing the risks inherent in acting for multiple co-defendants in criminal prosecutions, in support of her ruling in that case. In this case, stating at para 58:

This ground of appeal raises the very real danger of a conflict of duties where a firm of solicitors or a legal practitioner acts for two or more clients in the same or related criminal matters. It has been a longstanding, reasonably common practice for a solicitor's firm or a legal practitioner to act for one or more co-defendants in criminal matters. As the appellant submits and the ASCR recognise, it is a practice fraught with danger.

---

[124] *R. v Pham* [2017] QCA 43 (at para. [58] ff.).

Given the very prescient warnings given by the Court in this case to barristers and solicitors practising in criminal law about the dangers of acting for co-defendants in criminal trials, which are as pertinent to practitioners in other states and territories as they are to Queensland practitioners, a solicitor should have regard to warnings given in this case against acting for co-accused except in the most unusual circumstances.

Criminal law practitioners should also refer to guidance published by law societies about the risks and pitfalls in acting for co-accused. For example, the Law Institute of Victoria has issued "Guidelines in the Representation of the Co-accused".[125]

Typically insurance policies allow insurers to designate and pay a law practice/solicitor to defend an insured policyholder against whom a claim has been made. Accordingly, it is common for a solicitor or law practice to act for both insurer and insured. Although it is only the insured who is a party to the litigation, a conflict may arise if, for example, the insurer subsequently denies liability or if the insured opposes the settlement of a claim that the insurer is authorised by the policy to make.

Example

A solicitor is retained jointly by an insured and its insurer under the relevant insurance policy. During the course of the litigation, the solicitor discovers a defect in the insurance policy that may give rise to a right of the insurer to deny indemnity to the insured. The solicitor would have to cease acting for both parties.

On the other hand, a solicitor acting in litigation where the insurer admits liability and grants indemnity to the insured will normally not have a conflict.

While there have been rare occasions when Courts have allowed a firm, through separate representation, to act on behalf of conflicting parties in a contentious matter,[126] it is unlikely that any Court will agree that a conflict in a contentious matter can be cured by informed consent and information barriers. In such circumstances, a court would be likely to restrain the solicitor from acting for at least one of the parties.

In reality, parties who choose to jointly retain the same solicitor are likely to consent to their confidential information being shared with one another. Solicitors should however be conscious that other confidential information may have been obtained prior to the joint engagement and this information may not be subject to the consent given at a later point in time.

Non-contentious matters

A solicitor or law practice can generally act for two or more clients in a non-contentious matter where those clients have identical interests. Solicitors must, however, be alert to those interests diverging. In appropriate circumstances, it may be possible for the clients themselves to resolve any difference. In other circumstances, independent advice may be necessary. However, if the interests truly diverge, the solicitor cannot continue to act for both clients.

---

[125] Law Institute of Victoria, *Guidelines in the Representation of the Co-Accused* (2002), accessible at: http://www.liv.asn.au/PDF/ Practising/Ethics/2002GuideCoaccused.aspx.

[126] *UTi (Aust.) Pty Ltd v The Partners of Piper Alderman* [2008] NSWSC 219.

Example

A solicitor is briefed by two business colleagues to draw up a partnership agreement. During the course of taking instructions, it becomes apparent that the two disagree over the mechanism for one buying out the other's interest in the partnership. The solicitor can advise the two on the effects of two alternative clauses but cannot advise adopting one over the other. If the clients cannot agree which clause to adopt, the solicitor could refer them to independent advice or may, in certain circumstances, act for one of them, provided that in doing so, the duty of confidentiality to the other client is not put at risk and the clients have given their informed consent - see Rule 11.5. Depending on the level of information the solicitor has been given, it may not be possible to act for either client (because in the circumstances, the solicitor could not maintain the confidentiality of the information).

Confidential information conflict

A conflict may arise where the solicitor's duty to maintain the confidences of one client is inconsistent with the solicitor's fiduciary obligation to act in the best interests of another client. The expression "confidential information" is not defined in the Rules. Its meaning is discussed in detail in the Commentary to Rule 10.

Rule 10 concerns conflicts that involve the confidential information of former clients. Conflicts involving the confidential information of an existing client can be more problematic because the solicitor may be receiving confidential information in an ongoing manner. The solicitor therefore requires a degree of foresight in order to determine if there is any likelihood that confidential information will be imparted by one client that may be material to the interests of another client. If there is any such likelihood, the solicitor may have a confidential information conflict, and could only act in accordance with Rules 11.3 and 11.4.

Meaning of "detrimental to the interests of a client"

The term "detrimental to the interests of a client" is used in Rules 10.2, 11 and 11A.

In the context of Rule 10 (confidential information conflict where the information is that of a former client) the considerable body of common law on this subject is premised upon the claim that the disclosure of the former client's confidential information to another client would be detrimental to the interests of the former client; i.e. the enquiry the court makes in an application to restrain a solicitor or law practice from acting or continuing to act for a client is the impact that the disclosure of the confidential information would have on the interests of the former client whose confidential information it is. As Dal Pont notes:[127]

> The requirement that the real possibility of misuse of confidential information be to the detriment of the former client serves several important functions. It protects lawyers from frivolous applications to disqualify. It guards the public interest that services of lawyers be freely available, which it has been observed "will be unnecessarily intruded upon unless it is shown that disclosure by the solicitor of confidential information will disadvantage the confiding client". It also emphasises

[127] G E Dal Pont, *Lawyers' Professional Responsibility*, 7th ed, 2021, [8.100] (emphasis in original; footnote omitted).

the appearance of justice, for it is difficult to see injustice in permitting representation that will not disadvantage the former client.

In the context of Rule 11, the core conflict is a conflict between competing fiduciary duties. It should be noted that the court may nevertheless exercise a power of restraint pursuant to its inherent jurisdiction to determine which of its officers is to appear before it, by reference whether to a fair-minded reasonably informed person would find it subversive to the administration of justice to allow the representation to continue.[128]

Effective Information Barriers

Effective information barriers are also discussed in the Commentary to Rule 10.

If a solicitor or law practice is in possession of confidential information of one client and would otherwise be obliged to disclose that information, or use it for the benefit of, another client, Rule 11.4.2 allows an effective information barrier to be used, together with obtaining informed consent (Rule 11.4.1), to manage the resulting conflict.

The expression “effective information barrier” is not defined in the Rules. It refers to a concept whereby confidential information is quarantined within part of a law firm. The Law Society of New South Wales, in consultation with the Law Institute of Victoria, has issued Information Barrier Guidelines, which solicitors should consult. The Guidelines have been adopted by the law societies of New South Wales, Victoria and Queensland but are confined in their application to situations covered by Rule 10, namely where a law practice has a conflict involving its duty to preserve the confidential information of a former client. The Guidelines do not address the use of information barriers in concurrent client matters, but the obligation to protect the confidential information of each concurrent client is, in principle, no different to the obligation to protect the confidential information of a former client.[129]

The Guidelines contemplate the necessity to screen certain solicitors within a law practice who have confidential information of a former client. Procedures must be in place, prior to the conflict of duties arising, to ensure the screened solicitors do not disclose any confidential information to those solicitors in the law practice working on the current matter. Where, as contemplated by Rule 11, there is a potential confidential information conflict involving concurrent clients, there will be two or more sets of screened solicitors each working separately and independently for different clients. While obviously this will involve greater administrative complexity than merely an information barrier in a former client situation, the principle remains the same.

Ceasing to act

Rule 11.5 deals with a situation where a solicitor or law practice acts for two or more current clients, in accordance with the requirements set out in Rules 11.1 to 11.4, and an actual conflict arises between the clients.

Except in rare and exceptional circumstances, a solicitor and their law practice should usually cease to act for all clients where an actual conflict arises.

---

[128] See also the Commentary for Rule 10 regarding ‘The Court’s inherent jurisdiction to ensure the due administration of justice’.

[129] *Clark Boyce v Mouat* [1993] 3 NZLR 641, at 646.

An exception to this, as contemplated by Rule 11.5, is where:

1. the client that is to cease being represented by the solicitor or law practice has given (or gives) informed consent to the solicitor or law practice continuing to act for the other client(s); and

2. the confidential information of all clients is able to be kept confidential.

It is likely that in most situations contemplated by Rule 11.5, the solicitor will be unable to continue to act for any of the clients. Unless the conflict is a minor one, or is confined to a discrete issue, it is likely that the solicitor will have acquired confidential information of the one client that it would be impossible to quarantine from the other client(s).

In *Wan v McDonald* (1992) 33 FCR 491 Burchett J drew a distinction between cases where the one solicitor has acted for both clients, and the case where different solicitors in a law practice have acted for each client.[130]

> where the one solicitor, having acted for both parties, seeks to act against one of his former clients, and in the interest of a preferred client, in litigation arising out of the very matter in which he himself acted for both, it could only be in a rare and very special case … that a solicitor could properly be permitted to act against his former client, whether or not any real question of the use of confidential information could arise.

Accordingly, though the circumstances are limited to rare or special cases, the law recognises that there may be circumstances where a solicitor or law practice may continue to act for one of the clients after a dispute arises between the two - this will be mostly restricted to cases where a law practice is sufficiently large to enable an effective information barrier to function. Rule 11.5, however, only permits this possibility if both the former client and the ongoing client have given (or give) their informed consent to this happening.

In *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd* [2002] VSC 324, Habersberger J (although ultimately dismissing an application by an existing client to restrain its firm of solicitors from continuing to act for another concurrent client) stated the relevant test to be applied as follows: [131]

> *[i]n my opinion, in every case involving an application to restrain a solicitor from acting, it is a question of balancing the competing considerations—one party's right to be represented by solicitors of its choosing against another party's right not to have its (former) solicitors acting against it in the same or substantially the same proceeding.*
>
> *Example*
>
> *A solicitor is briefed jointly by two people injured in a workplace accident. A settlement offer is made by the defendant, but the offer is conditional on acceptance by both clients. One client wishes to accept the offer, the other does not.*

---

[130] *Wan v McDonald* (1992) 33 FCR 491, at 513.
[131] *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd* [2002] VSC 324, at [25]

The solicitor has a clear conflict of duties, being likely to be in possession of confidential information of each client relevant to their willingness to settle.

Although the solicitor cannot continue to act, another solicitor of the law practice, who has had no prior involvement with the matter, may be separately able to act for one of the clients if an effective information barrier is established and the consent of each client is obtained.

Amendment to Rule 11 on 1 April 2022

Rule 11 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 was amended as from 1 April 2022 to insert headings and to make changes to Rules 11.1, 11.2, 11,4 and 11.5. Under the amendments, which were not substantive, the Rule was redrafted to simplify in the way it expresses the scope of the duties in contemplation and the ethical principles involved.

11A. Short-term legal assistance services

11A.1 If a solicitor providing short-term legal assistance services forms a reasonable belief that the solicitor cannot screen for conflicts of interest due to circumstances where it is not reasonably practicable as the time required to do so may result in a real risk of the client being denied access to legal assistance, the solicitor must ensure, to the extent reasonably practicable, that—

11A.1.1 the solicitor has disclosed the nature of the services to the client, and

11A.1.2 there is no actual or potential conflict between the duties owed to the client and one or more other clients, and

11A.1.3 the client has given informed consent to the provision of the services.

11A.2 A solicitor must not provide, or continue to provide, short-term legal assistance services to a client if the solicitor:

11A.2.1 is or becomes aware that the interests of the client are adverse to the interests of a current client of the solicitor or the solicitor's law practice, or

11A.2.2 is aware that the solicitor has, or while providing the short-term legal assistance services obtains, confidential information of a current or former client that might reasonably be concluded to be:

11A.2.2.1 material to the client's matter, and

11A.2.2.2 detrimental to the current or former client, if disclosed.

11A.3 A solicitor who is a partner, associate, employee, officer or employer in a law practice through which another solicitor is providing short-term legal assistance services, may act for another client of the law practice whose interests are adverse to the interests of the client receiving the services if:

11A.3.1 each client has given informed consent, and

11A.3.2 measures are in place to ensure confidential information will not be disclosed.

11A.4 In this Rule:

short-term legal assistance services means services offered by a solicitor to a client, whether through a legal assistance service provider or on a pro bono basis, with the expectation by the solicitor and the client that the solicitor will not provide continuing legal advice or representation in the matter.

Commentary

Overview

The context for this Rule is the provision of a limited range of legal services (as opposed to full and ongoing representation) by a solicitor as a legal assistance service, in circumstances where it is not reasonably practicable to screen for conflicts of interest between the client being legally assisted and other current or former clients of the legal assistance provider organisation as the time required to do so may result in a real risk of the client being denied access to legal assistance.

Rule 11A is not directed towards the application of the conflict of interest principles set out in Rules 9 and 10 in the provision of "unbundled" or "limited-scope" legal services generally. "Unbundling" separates the package of legal services that may be required to handle a dispute [or matter] into components, and the client and lawyer agree to what parts of the package the lawyer will provide. [132] In other words, a limited range of legal services is being provided under an agreement negotiated beforehand between the solicitor or law firm and the client.

Also, Rule 11A does not displace the duty to avoid conflicts of interest between clients (including between current clients, and between a current and a former client) in legal assistance matters. Rather, Rule 11A provides guidance about satisfying the duty to avoid conflicts of interest between clients when providing a limited scope legal service in the exceptional situations encountered in the legal assistance sector.

The scope of the Rule is centred on the definition of ***short-term legal assistance services***, which is a service offered by a solicitor to a client, whether through a legal assistance service provider or on a pro bono basis, with the expectation by the solicitor and the client that the solicitor will not provide continuing legal advice or representation in the matter.

The term legal assistance service provider is an umbrella term used in the *National Legal Assistance Partnership Agreement*[133] (Agreement) to refer to individual Legal Aid Commissions, Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services. The Agreement also recognises health justice partnerships and Family Violence Prevention and Legal Services.

In addition to organisations providing government-funded legal assistance under the Agreement, there are many individual legal practitioners, private law firms, professional associations and other organisations and coalitions that provide pro bono legal assistance to individuals and organisations in urgent need pro bono legal assistance.

The Rule has three elements:

1. A reasonable belief (that)
2. Circumstances exist where it is not reasonably practicable to screen for conflicts (because)

---

[132] Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72, 5 September 2014, Vol 2, Ch 19.

[133] https://www.ag.gov.au/system/files/2020-06/National-Legal-Assistance-Partnership-Agreement.pdf

3. The time required to do so may result in a real risk of being denied access to legal assistance.

Consultations leading to the development of Rule 11A identified the exceptional circumstances in which legal assistance services are provided as including:

- the legal assistance services in focus are high-volume and limited in scope to the particular and immediate issue at hand (whereas the underlying premise of Rules 10 and 11 involves both an ongoing relationship and a full range of legal services).
- a significant volume of discrete legal assistance services are provided by legal aid commissions where there has been no prior arrangement to deliver the service, including services to self-representing parties at court on the day that the party has a court appearance.
- the risks to safety involved in obtaining the informed consent of both parties (for example, from a former partner who may have also been legally assisted) where family violence is involved.
- legal assistance services clients are often vulnerable and disadvantaged members of the community who lack sophisticated understanding or comprehension of the legal system.
- the time-sensitivity of the need for legal assistance, which extends to situations beyond the duty-lawyer situation.
- lack of access to technology and advance notice of potential clients in some settings, including for example mental health facilities or prison outreach clinics where use of computers and telephones is prohibited.

Application

Legal assistance service provider

As mentioned above, the term legal assistance service provider is:

- an umbrella term used in the *National Legal Assistance Partnership Agreement*[134] to refer to Legal Aid Commissions, Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services. The Agreement also recognises health justice partnerships and Family Violence Prevention and Legal Services; and
- for the purposes of the Rule, includes individual legal practitioners, private law firms, professional associations and other organisations and coalitions that also provide short-term pro bono legal assistance.

The definition of *short term legal assistance services* makes clear that legal assistance provided from both of the above sources is intended to be within the scope of Rule.

No continuing legal advice or representation in the matter

The second limb of the definition of *short legal assistance services* is that both the client and the solicitor have the expectation that the service to be provided is not part of, or will not lead to continuing legal advice or representation in the matter - i.e. there is a mutual

[134] https://www.ag.gov.au/system/files/2020-06/National-Legal-Assistance-Partnership-Agreement.pdf

expectation that the solicitor will not provide continuing legal services in the matter, nor take carriage of the matter in an ongoing, representative capacity.

Thus, the definition of *short term legal assistance services* excludes limited-scope or unbundled legal services not provided as a legal assistance service, nor does it include situations where there has been a grant of legal aid to enable a legal assistance service provided to provide full representation to a legal aid client.

Rule 11A.1 is the substantive provision of Rule 11A, with two elements:

(i) if solicitor has formed a reasonable belief that because of circumstances it is not reasonably practicable to screen for conflicts of interest as the time required to do so may result in a real risk of the client being denied access to legal assistance;

the solicitor may provide the legal assistance service, provided that

(ii) the solicitor has disclosed the nature of the services to the client, there is no actual or potential conflict of interest, and the client has given informed consent to the provision of the service.

The circumstances in which it would not be reasonably practicable to screen for conflicts of interest will vary according to the setting in which the legal assistance service is to be provided. One example is the combination of lack of access to communications technology and advance notice of potential clients in prison outreach clinics.

The reference to "the time required to do so may result in a real risk of the client being denied access to legal assistance" reflects an immediacy or urgency is attached to the need to provide the legal assistance service. Immediacy or urgency of the need will also vary according to the circumstances. The question could be framed as "what might be the outcome if attending to the client's issue were to be 'put on hold' until all the steps needed to undertake a conflict of interest check were taken within the legal assistance service organisation, or law firm or other organisation providing the pro bono legal service?"

Rule 11A.1 requires that the solicitor form a ***reasonable belief***. A prudent solicitor should ensure that a record is kept as the existence of the circumstances and factors that lead to the reasonable belief that there would be a real risk of the client being denied access to legal assistance.

Rule 11A.2 reflects the general principles in Rules 10 and 11 that a solicitor or law practice should not act for two or more clients in a matter where there is a conflict or potential conflict between the interests of those clients. A conflict may arise because the interests of two current clients are adverse (Rule 11). A conflict may also arise because there is confidential information of a current client (Rule 11) or of a former client (Rule 10) that is material to the matter of the client currently to receive the legal service, which would be detrimental to the interests of the other current client or former client if disclosed.

In the context of Rule 11A the effect of Rule 11A.2 is that where it is not reasonably practicable to undertake a conflict of interest of check prior to providing a legal assistance service, the solicitor must not act, or continue to act for his or her legal assistance client if the solicitor has, or becomes aware of a conflict of interest between his or her legal

assistance client and another client or former client of the solicitor or the solicitor's legal assistance service provider.

Rule 11A.3 embodies the principle in Rules 11.3 and 11.4 that where there is an adverse interest conflict between current clients, a law practice may continue to act for both the clients provided each client has given informed consent and (if necessary) measures are in place to protect confidential information from disclosure.

In the context of the provision of short term legal assistance services, where it is quite possible that the two parties to a dispute may each seek short-term legal assistance, it is prudent practice to inform a client of this possibility before providing the legal assistance service, that the short-term legal assistance service will be provided without disclosure of confidential information to any other person, and that the client consents to the provision of the legal assistance service on this basis.[135]

[135] See for example Legal Aid New South Wales *Client Disclosure Statement* and *Conflict of Interest Policy* at URL: https://www.legalaid.nsw.gov.au/get-legal-help/how-we-provide-our-services

12. Conflict concerning a solicitor's own interests

12.1 A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this Rule.

12.2 A solicitor must not do anything:

(a) calculated to dispose a client or a third party to confer on the solicitor, either directly or indirectly, any benefit in excess of the solicitor's fair and reasonable remuneration for legal services provided to the client, or

(b) that the solicitor knows, or ought reasonably to anticipate, is likely to induce the client or third party to confer such a benefit and is not reasonably incidental to the performance of the retainer.

12.3 A solicitor must not borrow any money, nor assist an associate to borrow money, from:

12.3.1 a client of the solicitor or of the solicitor's law practice; or

12.3.2 a former client of the solicitor or of the solicitor's law practice who has indicated a continuing reliance upon the advice of the solicitor or of the solicitor's law practice in relation to the investment of money,

UNLESS the client is:

i) an Authorised Deposit-taking Institution;

ii) a trustee company;

iii) the responsible entity of a managed investment scheme registered under Chapter 5C of the Corporations Act 2001 (Cth) or a custodian for such a scheme;

iv) an associate of the solicitor and the solicitor is able to discharge the onus of proving that a full written disclosure was made to the client and that the client's interests are protected in the circumstances, whether by legal representation or otherwise; or

v) the employer of the solicitor.

12.4 A solicitor will not have breached this Rule merely by:

12.4.1 drawing a Will appointing the solicitor or an associate of the solicitor as executor, provided the solicitor informs the client in writing before the Will is signed:

(i) of any entitlement of the solicitor, or the solicitor's law practice or associate, to claim executor's commission;

(ii) of the inclusion in the Will of any provision entitling the solicitor, or the solicitor's law practice or associate, to charge legal costs in relation to the administration of the estate; and

(iii) if the solicitor or the solicitor's law practice or associate has an entitlement to claim commission, that the client could appoint as executor a person who might make no claim for executor's commission.

12.4.2 drawing a Will or other instrument under which the solicitor (or the solicitor's law practice or associate) will or may receive a substantial benefit other than any proper entitlement to executor's commission and proper fees, provided the person instructing the solicitor is either:

(i) a member of the solicitor's immediate family,

(ia) a member of the immediate family of the solicitor's spouse, or

(ii) a solicitor, or a member of the immediate family of a solicitor, who is a partner, employer, or employee, of the solicitor.

12.4.3 receiving a financial benefit from a third party in relation to any dealing where the solicitor represents a client, or from another service provider to whom a client has been referred by the solicitor, provided the solicitor advises the client:

(i) that a commission or benefit is or may be payable to the solicitor in respect of the dealing or referral and the nature of that commission or benefit;

(ii) that the client may refuse any referral, and

the client has given informed consent to the commission or benefit received or which may be received.

12.4.4 acting for a client in any dealing in which a financial benefit may be payable to a third party for referring the client, provided the solicitor has first disclosed the payment or financial benefit to the client.

Commentary

Overview

Rule 12.1 embodies the core principle of any fiduciary relationship, succinctly stated, in the context of legal practice, in *Law Society of NSW v Harvey* [1976] 2 NSWLR 154, that a solicitor shall not in any way whatever, in respect of any transaction in the relations between him and his client, make gain for himself at the expense of his client, beyond the amount of just and fair professional remuneration to which he is entitled.

Because the relationship between a solicitor and client is one of influence, the law presumes undue influence whenever a solicitor benefits from the relationship beyond what is just and fair remuneration for the professional services provided to the client.

Rule 12.2 draws to attention that, especially with an ageing population where issues of capacity to make informed decisions become more problematic, there are potentially more sources of influence that might be brought to bear upon a client to confer a benefit on his or her solicitor beyond what is just and fair remuneration. This rule provides that, in addition, to exerting directing influence upon a client, a solicitors must not use the influence of third parties to in turn influence the client to confer a benefit on the solicitor beyond the amount of just and fair professional remuneration.

Application

Rule 12 follows the structure of other conduct rules by beginning with the statement of general principle, followed by sub-rules dealing with commonly encountered situations, or particularly important exceptions and qualifications. Rule 12.1 reflects the principle stated in, for example, *Law Society of NSW v Harvey* [1976] 2 NSWLR 154, that a solicitor shall not *in any way whatever*, in respect of *any* transaction in the relations between him and his client, make gain for himself at the expense of his client, beyond the amount of just and fair professional remuneration to which he is entitled.

When considering the application of Rule 12, solicitors also need to beat in mind the concomitant duty set out in Rule 8.1 that a solicitor must follow a client's lawful, proper and competent instructions.

Solicitor acting as executor

Solicitors who prepare wills must not put themselves in a position of conflict between their fiduciary duty to the testator and their personal interest. Inclusion of a provision in a will appointing a solicitor as an executor and entitling the solicitor to an executors' commission is an example of such a potential conflict. In these circumstances there is an obligation on the solicitor-executor to demonstrate the testator's fully informed consent to the entitlement to an executors' commission.[136]

A solicitor who has been appointed under a will as both an executor and as solicitor to the estate (for which the solicitor is entitled to charge professional fees) must avoid conflicts between the role as an executor and the solicitor's personal interests arising from the role as solicitor for the estate. The solicitor must carefully and transparently delineate between professional work undertaken as a solicitor for the estate and work undertaken in the role of executor. The fact that a solicitor-executor is entitled under a will to charge for professional work as a solicitor does not justify a claim against the estate for discharging executorial functions calculated by reference to professional costs as if those executorial functions were legal services.[137] A claim for executors' commission must relate to compensation for 'pains and troubles' as executor over and above what is compensated for by professional fees, to avoid the possibility of 'double dipping".[138]

When a will provides for the appointment of an executor also as a trustee, a fiduciary relationship exists between that executor-trustee and the beneficiaries. Fully informed

---

[136] *Szmulewicz v Recht* [2011] VSC 368 at [9] and [44] in relation to a financial benefit that would be obtained by a solicitor-executor under a clause in a will concerning executors commission, where the amount was significantly over and above what may be appropriate for a lay executor, or what the court would award.

[137] *Re Will of Shannon* [1977] 1 NSWLR 201 at [217].

[138] *Re Will and Estate of Foster (dec'd)* [2012] VSC 315, at [29].

consent of the beneficiaries is required to be given to payment of a negotiated amount of executors' commission. In the case of a solicitor who is an executor-trustee this must include full disclosure of any legal fees and disbursements charged, the basis for those fees and disbursements, disclosure that the beneficiaries are entitled to have the court assess the executors' commission and, preferably, that the beneficiaries are advised to seek independent legal advice.[139]

Importance of obtaining fully informed consent

Solicitors should be mindful of the importance of ensuring that fully-informed consent has been given in relation to executor's commissions; in particular, that those from whom such consent is sought are fully-informed and have had an opportunity to obtain independent advice, given the onus on practitioners to be able to positively prove in the event of a dispute over a will and charging provisions that fully-informed consent has been given (see also the comments on the giving of fully-informed consent in the Commentary to Rule 11 set out above).

Solicitors in Victoria should note, and solicitors in other jurisdictions should be mindful of, recent reforms to the *Administration and Probate Act 1958* (Victoria). Section 65B, for example, which provides that a personal representative who is an executor is not entitled to receive payment under a remuneration clause of a Will unless the testator gave written informed consent to the inclusion of the remuneration clause before the Will was executed. In addition, section 65C provides that where there is no remuneration clause in a Will, or where informed consent to a remuneration clause was not given by the testator, or where the remuneration clause makes no relevant provision for the claimed fee or commission—an executor may only receive fees or commission with the informed consent of each interested beneficiary.

Not all States and Territories have amended their succession legislation, as Victoria has done, to express in statute requirements that have applied to solicitors under legal profession ethical rules, but the one critical constant in this changing legislative environment is the need to secure fully informed consent in relation to executor's commissions.

Vulnerability of Clients

Solicitors taking instructions to act in matters where issues of potential conflicts between their own interests and their duty to their client may arise need always to have in mind the potential vulnerabilities of clients, especially in relation to high-risk areas such as administration of estates, debt collection and financial planning/mortgage and finance broking.

In addition to the obligation to secure fully informed consent, relevant factors to be considered by solicitors in the case of such vulnerable clients, in determining whether a solicitor is acting in the client's best interests, would include the quality of the business, the degree of regulation and access to redress.

---

[139] *Walker v D'Alessandro* [2010] VSC 15, at [30].

Solicitors Considering Acting in Family-related Matters

This too is a situation where potential personal conflicts can arise and requires particular attention and consideration to be given to a solicitor's ethical duties when considering representation of a family member.

In *Temby & Anor v Chambers Investment Planners Pty Ltd & Anor*[140], the respondent made application to restrain the applicants' son (a practising solicitor) from representing his parents, arguing that the son could not perform his primary duty to the court if he might be affected by the relationship with his clients (his parents), asserting that he could not give objective and dispassionate advice to his clients because they were his parents. The Court noted that there is a "*comparative dearth of authority*" on lawyers acting for relatives, one reason being that "*at least in modern times…the potential for conflict of interest is so obvious that modern lawyers refer matters involving their relatives to independent solicitors.*" The Court granted the application for restraint after reaching the view "*that a fair-minded, reasonably informed member of the public would consider it appropriate in the interests of justice to restrain [the solicitor] from acting because of the actual or likely conflict of interest arising from him acting for his parents*". The Court also granted the application to restrain the son's law firm from acting for the parents.

The Court also accepted as accurate Dal Pont's summation of the law with respect to lawyers acting for immediate family members[141]:

Especial care should be taken where a lawyer proposes to act in a transaction for herself or himself and a family member or associate. In addition to potentially compromising a lawyer's independent judgment, such a situation is fraught with potential for conflict of interest. The point is well illustrated by Woolley v Ritchie,[142] *where a solicitor acted on his own behalf and for his de facto spouse in real estate transactions. Upon inquiring, the de facto spouse was told by the solicitor that it was unnecessary for her to seek independent legal advice. Salmon J held that the spouse was not fully informed as to the implications of the transactions, which included the transfer of property and a mortgage in her name to a trust. His Honour held that the solicitor was under a duty to ensure that his de facto spouse was fully informed and freely consented, and the solicitor's conflict stemming from his interest in the transactions requiring securing for the spouse independent legal advice.*

Prudent lawyers will not, therefore, act in transactions in which they are personally interested and that involve their spouses, other family members or business partners, unless the other party is separately represented or advised. The need for independent representation or advice in these cases is heightened by the likelihood that the relative or associate places greater trust in the lawyer than a client lacking that association, and that the lawyer may be less scrupulous in matters of full disclosure. The lawyer may be less inclined to advise the relative or associate of the risks of the deal, and the latter may simply assume without inquiring that the lawyer acts in her or his best interests.

---

[140] [2010] FMCA 783.
[141] G E Dal Pont, *Lawyers' Professional Responsibility*, 7th ed, 2021 [6.50] [citations omitted].
[142] [1999] ANZ Conv R 385.

Dal Pont also commented that lawyers:

> *…should be wary of the dangers of representing friends or relatives. In addition to issues of independence and objectivity, lawyers who do so may be tempted to cut corners, accept work beyond their competence, or be less exact with issues of professional responsibility.* [143]

Similar considerations would apply where a solicitor instructs another legal practitioner, where that other practitioner is the solicitor's spouse or other member of the solicitor's family, to act as counsel. Further, Barristers' Rule 105(k) provides that a barrister may refuse or return a brief "where there is a personal or business relationship between the barrister and the client or another party, a witness, or another legal practitioner representing a party."

Operating concurrent businesses

Solicitors who operate other businesses concurrently with their legal practices, should be mindful of the possibility of conflicts arising because of the different business activities. In particular solicitors should ensure that a person can distinguish the non-legal services provided in respect of which the protections of the solicitor-client relationship do not apply. The risk of conflicts is heightened where the solicitor acts for the same client in two or more businesses.

Employees and members of multi-disciplinary partnerships should be aware of the relevant state legislative provisions regulating these partnerships.

Referral fees received by solicitors

Rule 12.4.3 envisages that a solicitor may receive a commission or benefit from a third party to whom he or she has referred a client but only upon the appropriate disclosure to, and informed consent from, the client. There is no precise formula for determining whether a client has sufficient appropriate information upon which to provide informed consent; it is a question of fact in all the circumstances of each case. The information the client requires depends on the nature of the commission or benefit, the sophistication of the client and the nature of any material risks involved. In order to place a client in the position of being fully informed, a solicitor should make the client aware:

- of the nature of the commission or benefit, including how the solicitor's receipt of the commission or benefit may create a potential conflict of interest;
- of the potential disadvantage to the client, arising from the solicitor's receipt of the commission or benefit; and
- that the client may be able to use an alternative solicitor who does not have a potential conflict of interest.

While Rule 12.4.3 does not strictly require it, in addition to making all required disclosures, solicitors are strongly urged to:

- advise of the need for independent advice; and
- obtain in writing the required informed consent to the commission or benefit.

---

[143] Supra at [17.65].

If the solicitor receiving a referral fee is **not** to be representing the person who is referred to another, it is recommended that:

- a standard letter of non-engagement setting out the required disclosures and advice, be provided to the person who is referred to another; and
- written consent to the referral fee be obtained, after that person has had reasonable time to consider the arrangement.

Referral fees paid by solicitors: disclosure required

In the case of the required disclosure under Rule 12.4.4 of the payment of a financial benefit to a third party for a referral, solicitors are strongly urged to make the disclosure in writing.

Referral fees– applicable statute law

In addition to the obligation to satisfy the requirements of Rules 12.4.3 and 12.4.4 in respect of any financial benefit, statute law in some jurisdictions prohibits the payment of referral fees to, and the receipt of benefits from, solicitors (amongst others) in relation to personal injury claims. These statutes include:

- *Legal Profession Act 2006* (Northern Territory) section 293(1),
- *Personal Injuries Proceedings Act 2002* (Queensland); and
- *Civil Liability Act 2002 (Western Australia)* section 20(1)

Solicitors who may have cause to consider the application of Rules 12.4.3 and 12.4.4 in relation to such claims should, in addition to having regard to any applicable statute, apply the higher of the standards as required by Rule 2.2, to the extent that there are differences (if any) between applicable statute law and the Rule (see also the Commentary to Rule 2).

Similar attention is drawn to the effective prohibition on the payment by solicitors of a fee for referrals involving the preparation of any conveyancing instrument under section 29(1) of the *Land and Business (Sale and Conveyancing) Act 1994* (South Australia).

Amendment of Rule 12

Rule 12 was amended to clarify the scope of the Rule and to address a gap in the Rule about improper influence on a third party as well as the client. The main amendments were to:

(i) clarify the expression of the prohibition in Rule 12.2, as a prohibition on the exercise of “undue influence”, by expressing the Rule in a more detailed and precise formulation, as prohibiting acting in a manner calculated to dispose a client or a third party to confer a benefit on a solicitor in excess of fair and reasonable remuneration for the solicitor’s services; and

(ii) to add a further category - a “member of the immediate family of the solicitor’s spouse”—to the categories of excluded persons set out in Rule 12.4.2 from the application of the Rule 12.4.

13. Completion or termination of engagement

13.1 A solicitor with designated responsibility for a client's matter must ensure completion of the legal services for that matter UNLESS:

13.1.1 the client has otherwise agreed;

13.1.2 the law practice is discharged from the engagement by the client;

13.1.3 the law practice terminates the engagement for just cause and on reasonable notice; or

13.1.4 the engagement comes to an end by operation of law.

13.2 Where a client is required to stand trial for a serious criminal offence, the client's failure to make satisfactory arrangements for the payment of costs will not normally justify termination of the engagement UNLESS the solicitor or law practice has:

13.2.1 served written notice on the client of the solicitor's intention, a reasonable time before the date appointed for commencement of the trial or the commencement of the sittings of the court in which the trial is listed, providing the client at least 7 days to make satisfactory arrangements for payment of the solicitor's costs; and

13.2.2 given appropriate notice to the registrar of the court in which the trial is listed to commence.

13.3 Where a client is legally assisted and the grant of aid is withdrawn or otherwise terminated, a solicitor or law practice may terminate the engagement by giving reasonable notice in writing to the client, such that the client has a reasonable opportunity to make other satisfactory arrangements for payment of costs which would be incurred if the engagement continued.

13.4 In subrule 13.1.3 just cause includes:

13.4.1 instructions that require, or any circumstance where continuation of the engagement would cause, a solicitor to breach his or her ethical duties and professional responsibilities,

13.4.2 any circumstances where a solicitor is no longer able to act in the client's best interests,

13.4.3 any circumstance where a client has not provided all information requested of them that is required to fulfil a solicitor's statutory obligations.

Commentary

Overview

Rule 13.1 reflects the principle that a solicitor is not entitled to terminate a retainer at will, but is duty bound to complete the work for which he or she is retained, "even if initially rosy predictions turn sour" [144]. Dal Pont refers to this as the doctrine of entire contract[145] but notes[146] that qualifications or exceptions have been established at general law. These are set out in rules 13.1.1–13.1.4.

Rule 13.1.1 termination by agreement

Freedom of contract dictates that a lawyer and client may terminate an engagement through mutual agreement, including where the retainer agreement stipulates occasions or circumstances whereby a solicitor may terminate the engagement.

Rule 13.1.2 termination by the client

There is an implied term incorporated into every retainer agreement that a client can withdraw at any time without liability for breach of contract. Thus, there is no impediment for a client who loses trust and confidence in a solicitor to terminating the engagement at will.

Rule 13.1.3 termination for just cause and on reasonable notice

Just cause may arise because of actions by the client such as, for example, making material misrepresentations about the facts to the solicitor; by insisting the solicitor commit a breach of the law or professional rules; or by the client signifying a loss of trust and confidence in the solicitor. Just cause will also arise where continued representation of the client would require the solicitor to commit a breach of his or her ethical duties and professional responsibilities.

The "reasonable notice" requirement states the long-standing principle that when a solicitor terminates a retainer for just cause the solicitor is nevertheless required to ensure the client is not disadvantaged.

Rule 13.1.4 termination by operation of law

This ground ostensibly targets death or incapacity of one of more of the parties, or by frustration if, for example, the lawyer is removed from practice.

Rule 13.4 definition of just cause.

This inclusive definition has recently been inserted to make explicit some of the circumstances that accord with the principle underpinning rule 13.1.3. The inclusion of the definition was prompted by new or expanded obligations for solicitors under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) from 1 July 2026.

---

[144] G.E. Dal Pont, *Lawyers' Professional Responsibility* (7th Ed., 2021) [3.205].
[145] ibid [3.195].
[146] Ibid [3.200].

Application

Termination by agreement (Rule 13.1.1)

Termination by agreement can occur through discussions between the solicitor and client during the course of the engagement as issues arise, where an agreed view is reached that the engagement should come to an end.

Another means by which termination by agreement arises is through the inclusion of specific clauses in a retainer agreement setting out circumstances in which the solicitor may terminate the retainer. These may include:

- ethical grounds which require a solicitor or law practice to cease acting such as, for example, a conflict of interest arising;
- circumstances arising such that it would no longer be appropriate to act for the client, or to be able to act in the client's best interests;
- the client has not provided adequate instructions or information to enable the retainer to be performed;
- non-payment of invoices under the terms of the agreement about costs;
- non-payment of agreed advance payments on account of future legal costs, *disbursements or counsel fees.*

Solicitors should give careful consideration to client retainer agreements clearly setting out circumstances in which the solicitor or law practice may terminate a retainer. See for example Rule 12 of the *Legal Profession Uniform Legal Practice (Solicitors) Rules 2025* (applicable in New South Wales, Victoria and Western Australia from 1 July 2026) which provides that a retainer agreement should, in addition to any other provisions relating to termination of a retainer, inform the client to the effect that:

- the solicitor is subject to statutory obligations, including reporting obligations that might include confidential information;
- the solicitor may terminate the retainer (and notify the client) where continuing to act would require the solicitor to breach their ethical duties or professional responsibilities, and
- the law may prohibit the solicitor from providing reasons for terminating the retainer on the above grounds.

Solicitors in other jurisdictions should refer to similar rules in their jurisdictions, or guidance from law societies about retainer agreements.[147]

Termination by the client (Rule 13.1.2)

While there is no impediment to a client terminating the engagement with a solicitor, a client will remain liable for fees and other disbursements as specified in the retainer agreement or costs agreement, and a solicitor may exercise a lien for unpaid legal costs over client documents—see Rule 15.

---

[147] For example, Queensland Law Society Guidance Statement 8 (Termination of Retainer) Law Society of South Australia Ethical Guidance; Law Institute of Victoria Terminating a Retainer.

Termination for "just cause" and on reasonable notice (Rule 13.1.3)

There is no comprehensive definition of what is a "just cause". Whether there is a just cause to terminate is a fact-sensitive question. [148] Solicitors should also consider civil and criminal procedural requirements that may need to be fulfilled before the termination can be justified.

Where the relationship of trust and confidence between solicitor and client has broken down, solicitors should have regard to the principles set by the courts in relating to termination of a retainer before completion of the legal service, and what is embodied in the expression "just cause" in judgments such as, for example, *French v Carter Lemon Camerons LLP.*[149]

An important ground for "just cause" is where continued representation would require a solicitor to commit a breach of professional rules or contravene the law, such as where a client insists that a solicitor undertake a course of action that is for an illegal or improper purpose. This ground for "just cause" is the corollary of ASCR rule 8—a solicitor who cannot give effect to a client's instructions because they are not, or the solicitor cannot establish that they are, lawful, proper or competent, has just cause to terminate the engagement.

Rule 13 was supplemented on 1 July 2026 by the inclusion of a definition of just cause which highlights that just cause includes (but is not limited only to):

- instructions that require, or any circumstance where continuation of the engagement would cause, a solicitor to breach his or her ethical duties and professional responsibilities,
- any circumstances where a solicitor is no longer able to act in the client's best interests—for example, where a solicitor is required to comply with a compound disclosure/tipping off obligation and as a consequence can no longer act in the clients best interest because the solicitor cannot disclose and make use of all knowledge in his or her possession to provide the client with clear and timely legal advice,
- any circumstance where a client has not provided all information requested of them that is required to fulfil a solicitor's statutory obligations—for example, a client has not provided sufficient information or documents to enable a solicitor to meet the solicitor's AML/CTF client due diligence and risk assessment, identification and mitigation obligations.

As mentioned above, there is no comprehensive definition of *just cause*, and whether a solicitor has just cause to terminate an engagement is a fact-sensitive question. The purpose of Rule 13.4 is to make explicit three of the established circumstances that accord with the principle underpinning the rule—a solicitor has just cause to cease acting and terminate a retainer if continuing to act would involve a breach of ethical duties or professional responsibilities; if circumstances arise where the solicitor is unable to continue to act in the client's best interests; or if a solicitor cannot meet their statutory obligations (and the duty under ASCR Rule 8) because the client has not provided the solicitor with required information or documents.

---

[148] *Buxton v Mills-Owen* [2010] EWCA Civ 22 [41], [43].
[149] [2010] EWCA Civ 1180.

Other examples of situations where just cause may exist include where the relationship of trust and confidence between solicitor and client has broken down, where a client commits a significant breach of a costs agreement, where a client makes serious misrepresentations about the facts in a matter, or where continuing to act is likely to have a seriously adverse effect on a lawyers health. Examples of situations where just cause does not exist would include administrative convenience, loss of interest in the matter, or an offer for more remunerative work.[150]

The purpose of the obligation to provide a client with reasonable notice that an engagement is being terminated by a solicitor for just cause is, as mentioned above, to ensure the client is not completely abandoned (or "thrown over") during the course of an uncompleted matter being undertaken by the solicitor. To this end, a solicitor who terminates an engagement for just cause is expected to assist the client where necessary and possible, to arrange alternative legal representation and to facilitate the transfer of the matter to a new solicitor. As Dal Pont explains:

> *A lawyer who opts to terminate the retainer must accordingly take reasonable care to avoid foreseeable harm to the client, including giving due notice to the client, and allowing reasonable time for the substitution of a new lawyer. This aims to ensure that "a solicitor cannot throw his client over at the last moment".*[151]

What constitutes "reasonable notice" will depend on the circumstances. For example, Rule 7.29 of the *Uniform Civil Procedure Rules 2005* (NSW) provides that a solicitor who ceases to act for a party in any proceedings may file a notice of the change with the court and serve the notice of change on the parties, however, before doing so, the solicitor must (except by leave of the court) first serve a notice of intention on the client at least 28 days beforehand (in a case where a trial date has been fixed) or at least 7 days before hand in any other case.

Where a solicitor is faced with a compound suspicious matter reporting/tipping off prohibition under the AML/CTF Act (or a similar compound reporting/tipping off obligation under other provisions of the AML/CTF Act or under other legislation) and cannot because of that, continue to act without breaching the solicitor's ethical duties and professional responsibilities, the solicitor may have no choice other than to immediately terminate the engagement.

However, in these situations a solicitor should distinguish between ceasing to act in the matter (such as ceasing to continue to provide a designated service) in which case notice of ceasing to act in the matter may be immediate, and other procedural requirements that need be undertaken, together with a requirement that the solicitor must nevertheless assist the client, to the extent necessary and possible, to arrange alternative legal representation in relation to the designated service the solicitor was providing.

Termination by operation of law (Rule 13.1.4)

Circumstances such as the death or incapacity of one of more of the parties to a matter or transaction, or the removal of the solicitor from legal practice are examples where an engagement can come to an end by operation of law. The underlying reason is that a

---

[150] See for example, G.E. Dal Pont, *Lawyers' Professional Responsibility* (7th Ed., 2021) [3.205].

[151] G.E. Dal Pont, *Lawyers' Professional Responsibility* (7th Ed., 2021) [3.220] citing *Underwood Son & Piper v Lewis* [1894] 2 QB 306 and *Heslop v Cousins* [2007] 3 NZLR 679.

client has ceased to be an entity legally capable of providing instructions, or the solicitor has ceased to be an entity legally entitled to engage in legal practice. Thus, it is through the operation of a law relating to legal capacity or the operation of a law relating to legal practice that the engagement or retainer cannot continue and is brought to an end.

Limited-scope legal services

The definitions in the Glossary of "matter" and "engagement", when read together, would apply Rule 13 to limited scope representation retainers.

Where a solicitor is providing a limited-scope legal service, a solicitor's responsibilities include:

- an obligation to make an assessment as to whether providing services under a limited scope arrangement is appropriate; and
- an obligation to outline to the client what services will be provided, and what actions the client will need to undertake themselves.

14. Client documents

14.1 A solicitor with designated responsibility for a client's matter, must ensure that, upon completion or termination of the law practice's engagement:

14.1.1 the client or former client; or

14.1.2 another person authorised by the client or former client,

is given any client documents, (or if they are electronic documents copies of those documents), as soon as reasonably possible when requested to do so by the client, unless there is an effective lien.

14.2 A solicitor or law practice may destroy client documents after a period of 7 years has elapsed since the completion or termination of the engagement, except where there are client instructions or legal obligations to the contrary.

Commentary

Overview

The first principle underpinning Rule 14.1 is that client documents remain the property of the client and must be returned to the client at the completion or termination of the engagement between the client and solicitor.

The second principle underpinning Rule 14.1 is that a solicitor has a common law lien over property of the client in his or her possession, which entitles the solicitor to nevertheless retain possession of the documents (or trust money or trust property) until his or her taxable costs have been paid.[152]

Rule 14.2 provides that it is acceptable for a solicitor to destroy client documents 7 years after the engagement was completed or terminated unless there are client instructions or legal obligations to the contrary.

Application

A definition of ***document*** for the purposes of these Rules has been inserted in the Glossary as follows:

"document" means any record of information, and includes:

(a) anything on which there is writing, and

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, and

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, and

(d) a map, plan, drawing or photograph,

---

[152] *In the matter of Mamounia Pty Ltd (In Liquidation) (ACN 007 091 349)* [2018] VSC 65 [24] and [34].

and a reference to a document includes a reference to—

(e) any part of the document, and

(f) any copy, reproduction or duplicate of the document or any part of the document, and

(g) any part of such a copy, reproduction or duplicate.

When is a document a client document?

Whether or not a document is in fact a client document will depend upon the nature of the document, the purposes for which it was created, or the circumstances under which it came into the solicitor's possession. *Wentworth v De Montfort*[153] illustrates the ownership distinctions between various types of documents that may be created during the course of a matter.

The general approach to this question seems to be:

- Documents created prior to the start of a retainer and delivered or sent to a solicitor by the client or a third party during the retainer are held by the solicitor as an agent.
- If a solicitor is only acting as an agent for a client who is his or her principal in the doing of some act, the ordinary rules of agency apply and documents brought into existence of received by the solicitor when acting as an agent belong to the client.
- Documents brought into existence during the retainer will be regarded as documents belonging to the client where they are:
  - prepared by the solicitor for the benefit of the client and which may be said to have been paid for by the client; and
  - prepared by a third party and sent to the solicitor (other than at the solicitor's expense) with the intention that they belong to the client.
- Documents will be regarded as documents belonging to the solicitor where they are:
  - prepared by the solicitor for his or her own benefit or protection, and not regarded as an item chargeable; and
  - sent by the client and intended by the client to belong to the solicitor.

Documents as security for unpaid legal costs

Noting the extensive provisions of the Uniform Law, and the legal profession legislation in the other States and Territories regarding legal costs, costs disclosure, billing and costs assessment, it is prudent that a costs agreement or the terms of the retainer agreement address the question of security for payment of the solicitor's or law practice's costs in providing legal services to the client. It is common practice for a solicitor or law practice to request funds from the client in advance, to be held in trust until the legal services are performed.

Section 206 of the Uniform Law permits a law practice to take reasonable security from a client for legal costs (including security for the payment of interest on unpaid legal costs)

---

[153] *(1988) 15 NSWLR 348* [355]-[366].

and a law practice may refuse or cease to act for a client who does not provide reasonable security. However, particular care should be exercised, and fully informed consent obtained, where security is taken over property that is integral to the client's matter, lest a conflict of interest be found between the interests of the client and the commercial interests of the solicitor in obtaining adequate security for the payment of legal costs.[154]

What is an effective lien?

The common law recognises that a solicitor may have a "retaining" or "general" lien over client documents for unpaid costs. Such a lien entitles a solicitor to resist a claim by the client for delivery of client documents until costs are paid or, in some cases, until security is provided.

The lien secures payment of all assessable professional costs and disbursements properly owing by the client on all the client's files. Although the lien may be claimed for unbilled costs, it is prudent to render a bill and inform the client of the amount claimed, taking care to exclude any costs incurred by the solicitor in assessing costs or in maintaining the claim for the lien.

The client documents subject to the lien are limited to those that are the property of the client and have come into the possession of the solicitor pursuant to the solicitor/client relationship and not for another purpose.

Retention and use of client documents at the end of the retainer

A solicitor is entitled to retain client documents in a client file until a lien is satisfied. However, apart from that, client documents must be returned as soon as reasonably possible when requested to do so by the client. Importantly, the documents or copies cannot be used for unrelated purposes.

In *Eden King Lawyers Pty Ltd v Makari (No 2)* Parker J held:

> *In the present case Ms Gazi may have been entitled to retain the file until her lien was satisfied. Even after that, she was entitled to retain, at her own expense, a copy of the file, so that if a claim was later made against her and an issue arose as to what documents she had on file, she would be able to defend herself. But, otherwise, there was no justification for looking at the file at all. Once the retainer had been terminated, the file should have been packed up and put to one side.*
>
> *I was informed by counsel for Ms Gazi that the original paper file was later returned to Ms Makari. Ms Gazi retained an archive copy. But it is clear from the course of the show-cause proceedings that Ms Gazi had access to the archive file for further purposes of her own, not in any way connected with defending herself against Ms Makari.* [155]

Destruction of client documents

Rule 14.2 provides that a solicitor or law practice may destroy client documents after a period of 7 years has elapsed since the completion or termination of the engagement.

---

[154] *Malouf v Constantinou* [2017] NSWSC 923 [100]–[102].
[155] [2022] NSWSC 479 [21]-[22].

This reflects the general view that after the expiration of 7 years there would no longer be any reasonable likelihood of any further matters arising from the completed retainer. However, this general view is subject to a number of exceptions and considerations.

It is commonly understood that a solicitor or law practice will, as a client service, retain safe custody of documents such as a Will, or documents with long term operation such as, for example, a Trust Deed or a Title Deed. In relation to Wills, it has been recommended that a solicitor should continue to retain other documents on the Will file, on the basis that if there is a question of capacity that ultimately needs to be considered, the evidence needed to help a Court determine that question will most likely be on the Will file itself (e.g., file notes of the solicitor's attendances on the testator).[156]

Regard needs to be had to the application of common law principles to the question of whether or not it is permissible to destroy a client document. In *Public Trustee of Queensland as a Corporation Sole*[157], Daubney J stated that a solicitor to whom a testator entrusts a testamentary document for safekeeping holds that document as bailee. His Honour noted that the existence of the bailment attracts a range of obligations on the bailee (including not to part with possession of the bailed property other than in accordance with the bailor's instructions) and a corresponding range of rights in the bailor.

Regard also needs to be had to provisions in legislation such as, for example, the *Limitation of Actions Act 1958* (Vic) which extend the time for bringing specific kinds of actions beyond the general six year limitation period, in which case the period of retention of client documents would need to have regard to when those specific extended limitation periods expire.

As a matter of good practice, solicitors should adopt a common sense approach of not destroying a former client's documents without the client's consent. Guidelines published by legal profession associations emphasise the advisability of setting out in the terms of engagement and obtaining the consent of the client to the approach that will be taken to the retention, transfer and destruction of client documents.

Destruction of electronic documents

During the 2018–2021 Review of the Australian Solicitors' Conduct Rules attention was drawn to special considerations in the retention and destruction of electronic records:

> Record destruction may be incomplete if solicitors are unaware that practices such as purging or physical destruction of backup tapes, computer and photocopier hard-drives along with the audit records for this activity may be necessary for complete record destruction. Also, the storage of electronic documents may be a more active process than the storage of paper records. Electronic storage may require ongoing software, format and/or hardware upgrades over time to retain the requisite record accessibility. Record storage and destruction risks may extend to third party hosted arrangements.

---

[156] See for example *Guidelines for the Storage, Retrieval, Provision & Destruction of Testamentary & Related Documents*, Law Society of South Australia URL https://www.lawsocietysa.asn.au/Public/Publications/Guidelines/Storage_retrieval_provision_and_destruction_of_testamentary_documents.

[157] [2012] QSC 178.

15. Lien over documents

15.1 Notwithstanding Rule 14, when a solicitor claims to exercise a lien for unpaid legal costs over client documents which are essential to the client's defence or prosecution of current proceedings:

15.1.1 if another solicitor is acting for the client, the first solicitor must deliver up the documents to the second solicitor:

(i) if the second solicitor undertakes to hold the documents subject to the lien and maintains reasonable security for the unpaid costs; or

(ii) if the first solicitor agrees to the second solicitor agreeing to pay, or entering into an agreement with the client to procure payment of, the first solicitor's costs upon completion of the relevant proceedings; or

15.1.2 alternatively, the solicitor, upon receiving reasonable security for the unpaid costs, must deliver the documents to the client.

Commentary

Overview

Reasonable security[158] may include, but is not limited to:

1. (i) an undertaking given by a solicitor;

2. (ii) a deed entered into by the relevant parties, such as the first solicitor, the second solicitor and the client.

Tripartite Arrangements

It is not uncommon for tripartite agreements to be made between solicitors and a client for securing payment of the unpaid costs of the former solicitor holding a lien. [159]

Scope of and limitation or subversion of a lien

Solicitors should refer to guidance materials published by law societies on the scope of liens and circumstances where they may be subverted.[160]

---

[158] See G E Dal Pont, *Lawyers' Professional Responsibility*, 7th ed, 2021 [16.90], [16.95].

[159] The Law Society of NSW has issued a suggested Tripartite Agreement Deed for the guidance of solicitors. See http://www.lawsociety.com.au/ForSolictors/professionalstandards/practicefaqs/index.htm

[160] See, for example, https://www.qls.com.au/Practising-law-in-Qld/Ethics-Centre/Rules-Resources/Can-I-assert-a-lien-over-all-of-the-client-s-files.

16. Charging for document storage

16.1 A solicitor must not charge:

16.1.1 for the storage (either physical, electronic or otherwise) of documents, files or other property on behalf of clients or former clients of the solicitor or law practice (or predecessors in practice); or

16.1.2 for retrieval from storage of those documents, files or other property,

UNLESS the client or former client has consented to such charge being made.

Commentary

Application

Charging a fee for the retrieval of documents held in storage

Solicitors should note the decision in LSC v Rose, [161] where a solicitor was found guilty of unsatisfactory professional conduct for charging a fee for the retrieval of documents held in storage by the solicitor. See also Rule 2 and the Commentary to Rule 2.

Law Society guidance

Solicitors should refer to law society guidance publications dealing with matters such as written disclosure, form of consent and issues relating to electronic document management and destruction.

Amendment to Rule 16 on 1 April 2022

Rule 16 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 was amended as from 1 April 2022 to clarify that the Rule applies to storage of all documents, irrespective of the form of storage; and to clarify that the proviso to the Rule applies in all cases where client consent has been provided, whether or not in writing.

[161] [2007] VCAT 2180.

Advocacy and litigation

17. Independence—avoidance of personal bias

17.1 A solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client or of the instructing solicitor (if any) and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's instructions where applicable.

17.2 A solicitor does not breach the solicitor's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's instructions, simply by choosing, contrary to those instructions, to exercise the forensic judgments called for during the case so as to:

17.2.1 confine any hearing to those issues which the solicitor believes to be the real issues;

17.2.2 present the client's case as quickly and simply as may be consistent with its robust advancement; or

17.2.3 inform the court of any persuasive authority against the client's case.

17.3 A solicitor must not make submissions or express views to a court on any material evidence or issue in the case in terms which convey or appear to convey the solicitor's personal opinion on the merits of that evidence or issue.

17.4 A solicitor must not become the surety for the client's bail.

Commentary

Amendment to Rule 17 on 1 April 2022

Rule 17 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 was amended as from 1 April 2022.to make a minor wording change to Rule 17.2, without changing the substantive Rule, by replacing the words "will not have breached" with "does not breach", harmonizing the wording with the equivalent Barristers' Rule 42.

18. Formality before the court

18.1 A solicitor must not, in the presence of any of the parties or solicitors, deal with a court on terms of informal personal familiarity which may reasonably give the appearance that the solicitor has special favour with the court.

Commentary

Overview

Essential to maintaining public confidence in the judicial system is that justice should both be done and be seen to be done independently and impartially. Solicitors contribute to this public interest objective, as an aspect of their paramount duty to the court and the administration of justice, by taking care to ensure that their conduct does not undermine public confidence in the independent and impartial decision making of the courts.

Rule 18 deals with one sphere—the courtroom—where the manner in which a solicitor conducts his or her role as an advocate and the behaviour of the solicitor should enhance public confidence in the administration of justice.

It is clear that the use by a solicitor of informal personal familiarity in an appearance before the court may reasonably give rise to the perception that the solicitor has special favour with the court and result in an apprehension of bias —because of the previous relationship between the court and the solicitor—that an independent and impartial decision might not be made in the matter currently before the court.

The High Court has recently affirmed the principle of apprehended bias in a case dealing with the equivalent Barrister's Rule (Rule 45) to Rule 18 of the ASCR, where the court said:

> The apprehension of bias principle is that "a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide". The principle gives effect to the requirement that justice should both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial—that it is conducted by an independent and impartial tribunal.
>
> … The hypothetical observer is a standard by which the courts address what may appear to the public served by the courts to be a departure from standards of impartiality and independence which are essential to the maintenance of public confidence in the judicial system. The hypothetical observer is not conceived of as a lawyer but a member of the public served by the courts.[162]

Application

The ethical principle embodied in ASCR Rule 18 is that a solicitor who appears as an advocate before the court has a professional obligation to take care to avoid creating in a lay observer an apprehension of bias in the court in favour of the solicitor.

---

[162] *Charisteas v Charisteas* [2021] HCA 29 at [11] and [21] (references omitted).

The ethical principle to avoid creating an apprehension of bias is also reflected in ASCR Rule 38, which provides, among other things, that a solicitor must refuse to accept or retain a brief or instructions to appear before a court if the appearance would be before a court of which the solicitor is or was formerly a judge.

An example of the effect of behaviour by counsel before a court, creating the impression of familiarity can be found in the cross-examination described by the court in the case of *Wilson v Department of Human Services; re Anna* [2010] NSWSC 1489, where the court found that the informality adopted by counsel was not appropriate and that the practice could cause substantial misperceptions prejudicial to the conduct of a fair trial. Palmer J. said, at [106]–[113]:

> The second matter calling for comment occurred in the conduct of the case in this Court but it is not peculiar to this case—it has been observed by a number of Judges in the Supreme Court and it is currently the subject of discussion between this Court, the Bar Association and the Law Society. I refer to the practice of advocates, which seems to have developed over recent years, of announcing their appearances to the Bench or beginning the examination of witnesses with the salutation *"Good morning, your Honour"* or *"Good afternoon, Mr Smith"*. I am informed that this is a practice which has developed in the Magistrates' Courts. The Supreme Court is of the view that it is a practice which should be abandoned in contentious litigation.
>
> Lest it be thought that this view is the relic of a stilted and now-outdated judicial self-esteem, let me illustrate, by reference to what occurred in this case, how the practice can cause substantial misperceptions prejudicial to the conduct of a fair trial.
>
> Mr Chapman, who is obviously a highly experienced and capable solicitor frequently conducting cases in the Children's Court, routinely greeted me with the salutation of *"Good morning, your Honour"* or *"Good afternoon, your Honour"* each time he announced his appearance at directions hearings and on each day of the trial. In accordance with the usual etiquette of this Court, Mr Moore of Counsel did not. Mr Chapman's apparent familiarity with the Judge could have caused a misapprehension in the mind of Ms Wilson, already distrustful of the judicial system, that Mr Chapman enjoyed a relationship with the Judge which was something more than merely professional. Such a suspicion should never be allowed to arise. A Judge should not feel compelled to allay such a suspicion by rebuking an advocate for misplaced courtesy.
>
> More importantly, Mr Chapman routinely began his cross examination with the salutation *"Good morning, Ms Wilson (or Mrs Wilson)"*. He was met with a stony silence. How could Ms Wilson or Mrs Wilson greet politely the man who was avowedly intent on taking Anna away from them by destroying their evidence? A witness in their position would inevitably feel it to be the most odious hypocrisy to be compelled to return the salutation with a polite *"Good morning, Mr Chapman"*.
>
> … a witness should never be placed in the position of having to greet politely a cross examiner who is an avowed opponent. An advocate should never use this technique to score against a witness. It is far better to avoid the perception that this technique of discrediting a witness is being used unfairly.

For these reasons, the practice of salutations by advocates should be completely abandoned in all Courts in all contentious litigation.

19. Duty to the court

19.1 A solicitor must not deceive or knowingly or recklessly mislead the court.

19.2 A solicitor must take all necessary steps to correct any misleading statement made by the solicitor to a court as soon as possible after the solicitor becomes aware that the statement was misleading.

19.3 A solicitor will not have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by the opponent or any other person.

19.4 A solicitor seeking any interlocutory relief in an ex parte application must disclose to the court all factual or legal matters which:

19.4.1 are within the solicitor's knowledge;

19.4.2 are not protected by legal professional privilege; and

19.4.3 the solicitor has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.

19.5 A solicitor who has knowledge of matters which are within Rule 19.4:

19.5.1 must seek instructions for the waiver of legal professional privilege, if the matters are protected by that privilege, so as to permit the solicitor to disclose those matters under Rule 19.4; and

19.5.2 if the client does not waive the privilege as sought by the solicitor:

(i) must inform the client of the client's responsibility to authorise such disclosure and the possible consequences of not doing so; and

(ii) must inform the court that the solicitor cannot assure the court that all matters which should be disclosed have been disclosed to the court.

19.6 A solicitor must, at the appropriate time in the hearing of the case if the court has not yet been informed of that matter, inform the court of:

19.6.1 any binding authority;

19.6.2 where there is no binding authority, any authority decided by an Australian appellate court; and

19.6.3 any applicable legislation,

known to the solicitor and which the solicitor has reasonable grounds to believe to be directly in point, against the client's case.

19.7 A solicitor need not inform the court of matters within Rule 19.6 at a time when the opponent tells the court that the opponent's whole case will be withdrawn or the opponent will consent to final judgment in favour of the client, unless the appropriate time for the solicitor to have informed the court of such matters in the ordinary course has already arrived or passed.

19.8 A solicitor who becomes aware of matters within Rule 19.6 after judgment or decision has been reserved and while it remains pending, whether the authority or legislation came into existence before or after argument, must inform the court of that matter by:

19.8.1 a letter to the court, copied to the opponent, and limited to the relevant reference unless the opponent has consented beforehand to further material in the letter; or

19.8.2 requesting the court to relist the case for further argument on a convenient date, after first notifying the opponent of the intended request and consulting the opponent as to the convenient date for further argument.

19.9 A solicitor need not inform the court of any matter otherwise within Rule 19.8 which would have rendered admissible any evidence tendered by the prosecution which the court has ruled inadmissible without calling on the defence.

19.10 A solicitor who knows or suspects that the prosecution is unaware of the client's previous conviction must not ask a prosecution witness whether there are previous convictions, in the hope of a negative answer.

19.11 A solicitor must inform the court of any misapprehension by the court as to the effect of an order which the court is making, as soon as the solicitor becomes aware of the misapprehension.

19.12 A solicitor must alert the opponent and if necessary inform the court if any express concession made in the course of a trial in civil proceedings by the opponent about evidence, case-law or legislation is to the knowledge of the solicitor contrary to the true position and is believed by the solicitor to have been made by mistake.

Commentary

Amendment to Rule 19 on 1 April 2022

Rule 19 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 was amended as from 1 April 2022 to clarify, by changing the title of the Rule to "Duty to the Court", that the Rule addresses the ethical duties to the court of a solicitor acting as an advocate.

20. Delinquent or guilty clients

20.1 A solicitor who, as a result of information provided by the client or a witness called on behalf of the client, learns during a hearing or after judgment or the decision is reserved and while it remains pending, that the client or a witness called on behalf of the client:

20.1.1 has lied in a material particular to the court or has procured another person to lie to the court;

20.1.2 has falsified or procured another person to falsify in any way a document which has been tendered; or

20.1.3 has suppressed or procured another person to suppress material evidence upon a topic where there was a positive duty to make disclosure to the court;

must -

20.1.4 omitted

20.1.5 refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie, falsification or suppression and must promptly inform the court of the lie, falsification or suppression upon the client authorising the solicitor to do so but otherwise may not inform the court of the lie, falsification or suppression.

20.2 A solicitor whose client in criminal proceedings confesses guilt to the solicitor but maintains a plea of not guilty:

20.2.1 may, subject to the client accepting the constraints set out in Rules 20.2.2–20.2.8, but not otherwise, continue to act in the client's defence,

20.2.2 must not falsely suggest that some other person committed the offence charged,

20.2.3 must not set up an affirmative case inconsistent with the confession,

20.2.4 must ensure that the prosecution is put to proof on its case,

20.2.5 may argue that the evidence as a whole does not prove that the client is guilty of the offence charged,

20.2.6 may argue that for some reason of law the client is not guilty of the offence charged,

20.2.7 may argue that for another reason not prohibited by Rules 20.2.2 or 20.2.3 the client should not be convicted of the offence charged, and

20.2.8 must not continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence.

20.3 A solicitor whose client informs the solicitor that the client intends to disobey a court's order must:

20.3.1 advise the client against that course and warn the client of its dangers;

20.3.2 not advise the client how to carry out or conceal that course; and

20.4 not inform the court or the opponent of the client's intention unless:

i) the client has authorised the solicitor to do so beforehand; or

ii) the solicitor believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.

Commentary

Amendments to Rule 20 on 1 April 2022

Rule 20 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 was amended as from 1 April 2022. Under the amendments, the following changes were made to Rules 20.1 and 29.2.

Rule 20.1

This Rule, prior to its amendment on 1 April 2022, provided that where a solicitor becomes aware that the client or a witness on the client's behalf has lied, falsified a document tendered, or suppressed evidence, the solicitor has to do two things—firstly to advise the client that the court should be informed [Rule 20.1.4] and, secondly, if the client does not authorise the disclosure, to refuse to take any further part in the case [Rule 20.1.5], and to not inform the court of the lie, falsification or suppression.

The first requirement—a positive ethical obligation to advise the client that the court should be informed of the lie, falsification or suppression—has been omitted under the amendments made on 1 April 2022, as there is no equivalent obligation in Barristers' Rule 79. The rationale for this change is that this ethical requirement is that the first requirement is implicit in the second requirement for the solicitor [Rule 20.1.5], as it is in the equivalent Barristers' Rule and the harmonization of the two Rules would avoid any suggestion that there are intended differences between these equivalent Rules.

Solicitors acting in an advocacy role in particular should always be mindful of the importance of explaining to the client that the court should be informed of the lie, falsification or suppression and request authority to so inform the court.

Rule 20.2

This Rule was amended from 1 April 2022 to harmonise it with the equivalent Barristers' Rule 80, including the addition of the equivalent to Barristers' Rule 80(d), which did not previously appear in Rule 20.2.

21. Responsible use of court process and privilege

21.1 A solicitor must take care to ensure that the solicitor's advice to invoke the coercive powers of a court:

21.1.1 is reasonably justified by the material then available to the solicitor;

21.1.2 is appropriate for the robust advancement of the client's case on its merits;

21.1.3 is not given principally in order to harass or embarrass a person; and

21.1.4 is not given principally in order to gain some collateral advantage for the client or the solicitor or a third party out of court.

21.2 A solicitor must take care to ensure that decisions by the solicitor to make allegations or suggestions under privilege against any person:

21.2.1 are reasonably justified by the material then available to the solicitor;

21.2.2 are appropriate for the robust advancement of the client's case on its merits; and

21.2.3 are not made principally in order to harass or embarrass a person.

21.3 A solicitor must not allege any matter of fact in:

21.3.1 any court document settled by the solicitor;

21.3.2 any submission during any hearing;

21.3.3 the course of an opening address; or

21.3.4 the course of a closing address or submission on the evidence,

unless the solicitor believes on reasonable grounds that the factual material already available provides a proper basis to do so.

21.4 A solicitor must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the solicitor believes on reasonable grounds that:

21.4.1 available material by which the allegation could be supported provides a proper basis for it; and

21.4.2 the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.

21.5 A solicitor must not make a suggestion in cross-examination on credit unless the solicitor believes on reasonable grounds that acceptance of the suggestion would diminish the credibility of the evidence of the witness.

21.6 A solicitor may regard the opinion of an instructing solicitor that material which is available to the instructing solicitor is credible, being material which appears to the solicitor from its nature to support an allegation to which Rules 21.3 and 21.4 apply, as a reasonable ground for holding the belief required by those Rules (except in the case of a closing address or submission on the evidence).

21.7 A solicitor who has instructions which justify submissions for the client in mitigation of the client's criminality which involve allegations of serious misconduct against any other person not able to answer the allegations in the case must seek to avoid disclosing the other person's identity directly or indirectly unless the solicitor believes on reasonable grounds that such disclosure is necessary for the proper conduct of the client's case.

21.8 Without limiting the generality of Rule 21.2, in proceedings in which an allegation of domestic or family violence, sexual assault, indecent assault or the commission of an act of indecency is made and in which the alleged victim gives evidence:

21.8.1 a solicitor must not ask that witness a question or pursue a line of questioning of that witness which is intended:

(i) to mislead or confuse the witness; or

(ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; and

21.8.2 a solicitor must take into account any particular vulnerability of the witness in the manner and tone of the questions that the solicitor asks.

21.9 A solicitor does not infringe rule 21.8 merely because:

21.9.1 the question or questioning challenges the truthfulness of the witness or the consistency or accuracy of a statement made by the witness, or

21.9.2 the question or questioning requires the witness to give evidence that the witness could consider to be offensive, distasteful or private.

Commentary

Amendment to Rule 21 on 1 April 2022

Rule 21 was amended as from 1 April 2022 to harmonise the Rule with the equivalent Barristers' Rules by amending Rules 21.1.3, 21.1.4, 21.6 and including a new Rule 21.1.9; and by amending Rule 21.8 to expand the Rule to include allegations of domestic or family violence.

22. Communication with opponents

22.1 A solicitor must not knowingly make a false or misleading statement to an opponent in relation to the case (including its compromise).

22.2 A solicitor must take all necessary steps to correct any false or misleading statement made by the solicitor to an opponent as soon as possible after the solicitor becomes aware that the statement was false or misleading.

22.3 A solicitor will not have made a false or misleading statement to the opponent simply by failing to correct an error on any matter stated to the solicitor by the opponent.

22.4 A solicitor must not confer or deal with any party represented by or to the knowledge of the solicitor indemnified by an insurer, unless the party and the insurer have signified willingness to that course.

22.5 A solicitor must not, outside an ex parte application or a hearing of which an opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:

22.5.1 the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court; or

22.5.2 the opponent has consented beforehand to the solicitor communicating with the court in a specific manner notified to the opponent by the solicitor.

22.6 A solicitor must promptly tell the opponent what passes between the solicitor and a court in a communication referred to in Rule 22.5.

22.7 A solicitor must not raise any matter with a court in connection with current proceedings on any occasion to which an opponent has consented under Rule 22.5.2 other than the matters specifically notified by the solicitor to the opponent when seeking the opponent's consent.

22.8 A solicitor must take steps to inform the opponent as soon as possible after the solicitor has reasonable grounds to believe that there will be an application on behalf of the client to adjourn any hearing, of that fact and the grounds of the application, and must try, with the opponent's consent, to inform the court of that application promptly.

Commentary

Amendment to Rule 22 on 1 April 2022

Rule 22 was amended as from 1 April 2022 to amend Rules 22.1, 22.2 and 22.3 by replacing each reference to the term "false statement" with the term "false or misleading statement".

23. Opposition access to witnesses

23.1 A solicitor must not take any step to prevent or discourage a prospective witness or a witness from conferring with an opponent or being interviewed by or on behalf of any other person involved in the proceedings.

23.2 A solicitor does not breach Rule 23.1 simply by:

23.2.1 telling a prospective witness or a witness that he or she need not agree to confer or to be interviewed, or

23.2.2 advising the prospective witness or the witness about relevant obligations of confidentiality.

Commentary

Amendment to Rule 23 on 1 April 2022

Rule 23.2 was amended as from 1 April 2022 to harmonise it with the equivalent Barristers' Rules 74 and 75.

24. Integrity of evidence—influencing evidence

24.1 A solicitor must not:

24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or

24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.

24.2 A solicitor will not have breached Rules 24.1 by:

24.2.1 expressing a general admonition to tell the truth;

24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness; or

24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but the solicitor must not encourage the witness to give evidence different from the evidence which the witness believes to be true.

Commentary

Overview

Rules 24 and 25 are conduct rules based on the solicitor's ethical obligations to ensure all relevant evidence is made available for the conduct of the judicial process; and that the solicitor's dealings with witnesses are conducted on a proper professional basis. These Rules are replicated in Rules 68 and 71 of the Barristers Rules respectively.

The importance of the Rules is that a lawyer's role in relation to the taking of evidence is one of protecting the integrity of evidence, given the responsibility of a lawyer, as a participant in the administration of justice, to promote public confidence in the legal process and trust in the legal profession. [163]

Application

Although it is appropriate for a solicitor to prove or to test the evidence that may be given by a witness, nothing is more calculated to subvert the administration of justice than to condone or encourage the giving of false or misleading information by a witness.[164]

In interviewing witnesses and preparing proofs of evidence, solicitors need always to be mindful of not crossing the line between "proofing" a witness and coaching the evidence to be given by the witness, in breach of Rule 24.1.2.

---

[163] G.E. Dal Pont, *Lawyers' Professional Responsibility*, 7th Ed, 2021 [17.150].
[164] *op cit*. at para [17.160] and the cases cited in that paragraph.

The difference between proofing and coaching

The difference between "proofing" and "coaching" of a witness is discussed and has been described in *Majinski v The State of Western Australia* [2013] WASCA 10[165] as follows:

> In *R v Momodou* [2005] 2 All ER 571; [2005] 1 WLR 3442, Judge LJ, in delivering the judgment of the Court of Appeal of England and Wales, said:
>
> There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of the well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness: see *R v Richardson* [1971] 2 QB 484, *R v Arif* The Times, 22 June 1993, *R v Skinner* (1993) 99 Cr App R 212 and *R v Shaw* [2002] EWCA Crim 3004. The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids, any possibility that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so[61].

Whether preparation amounts to 'coaching' is inevitably a matter of degree, and is dependent on the facts: *Re Equiticorp Finance Ltd; Ex parte Brock (No 2)* (1992) 27 NSWLR 391, 395 (Young J). It is clear that the practice of witnesses reading their statements prepared contemporaneously with, or soon after, the incident in respect of which he or she is asked to testify prior to the hearing, or being taken through it by the person to whom it was made, is generally proper: *R v Richardson* [1971] 2 QB 484, [1971] 2 All ER 773(CA); *R v Pachonick* [1973] 2 NSWLR 86; *Worley v Bentley* [1976] 2 All ER 449; *Mancorp Pty Ltd v Baulderstone Pty Ltd* (1991) 57 SASR 87, 92 (Debelle J); see also Heydon J D, Cross on Evidence (8th Aust ed, 2010) [17170].Moreover, it may be appropriate for solicitors or counsel for a party who is being called to give evidence to confer with the witness prior to giving evidence; in *Re Equiticorp Finance Ltd; Ex parte Brock*, Young J noted that:

> It is clear that a witness might confer with his or her solicitor or counsel, or the solicitor or counsel for the party calling the witness, and that during such conference the solicitor or counsel concerned may give the witness advice. That advice may certainly include:
>
> (1) advice that the witness should refresh his or her memory from contemporaneous documents;
>
> (2) directing the witness' mind to the point about which questions may be asked;
>
> (3) giving the witness a sketch of court procedure;
>
> (4) directing the witness' attention to points in his or her evidence which appear to be contradictory or fantastic;
>
> (5) reminding the witness to bring to court all relevant documents;

[165] At paras [29]-[36] (references omitted).

(6) advising the witness as to the manner of answering questions (for example, 'In cross-examination listen to the question, just answer the question asked with as concise an answer as possible'); and

(7) giving advice as to appropriate dress and grooming.

There may be other permitted areas (395).

Indeed, it has to be observed that in some situations, a brief discussion with a witness of his proposed evidence to clarify some point of ambiguity or uncertainty may be desirable in promoting the integrity and accuracy of the trial process: *HKSAR v Tse Tat Fung* [2010] HKCA 156; [2010] HKEC 815 [73].

Questioning of a witness moves beyond 'proofing' to impermissible 'coaching' when the witness' true recollection of events is supplanted by another version suggested by the interviewer or other party, whether by repetitive reading of a statement to the point where their testimony is mere regurgitation or by otherwise influencing the witness: *HKSAR v Tse Tat Fung*; *R v Momodou*. A solicitor or counsel should not advise a witness as to how to answer a question: *Re Equiticorp Finance Ltd; Ex parte Brock*. By way of example, in *Day v Perisher Blue Pty Ltd* [2005] NSWCA 110; (2005) 62 NSWLR 731 the defendant's solicitors prepared an extensive document for the defendant outlining 'possible areas of questioning, (to be passed on to the respective witnesses)' and included suggestions as to appropriate responses which would be in line with the defendant's case [22]. This conduct, alongside the holding of a pre-trial conference by the practitioner in which multiple witnesses jointly discussed evidence to be given at trial, was held to seriously undermine the trial and 'tainted' the defendant's case [182].

As noted by Dal[166] and in the cases cited, a solicitor advocate must not, among other things:

(i) suggest to a prospective witness (whether a client or a third party) evidence that the prospective witness should give;

(ii) encourage or coach a prospective witness to give evidence different to that which the prospective witness believes to be true;

(iii) suggest answers to questions that might be asked of the witness;

(iv) counsel a witness to be forgetful and evasive in giving evidence; or

(v) advise a client or a witness of the consequences of giving particular evidence with the hope or intention of encouraging the witness to illegitimately avoid those consequences.

Rule 24.2 exceptions

This Rule makes it clear that, despite the proscribed practices described above amounting to the coaching of witnesses, Rule 24 does not preclude, among other things, the questioning of the version of evidence to be given by a prospective witness; or drawing the witness' attention to inconsistencies in, or other difficulties with, the evidence.

---

[166] G.E. Dal Pont, *Lawyers' Professional Responsibility*, 7th Ed, 2021 [17.160].

25. Integrity of evidence—two witnesses together

25.1 A solicitor must not confer with, or condone another solicitor conferring with, more than one lay witness (including a party or client) at the same time:

25.1.1 about any issue which there are reasonable grounds for the solicitor to believe may be contentious at a hearing; and

25.1.2 where such conferral could affect evidence to be given by any of those witnesses,

unless the solicitor believes on reasonable grounds that special circumstances require such a conference.

25.2 A solicitor will not have breached Rule 25.1 by conferring with, or condoning another solicitor conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.

Commentary

The ethical principle reflected in this Advocacy & Litigation Rule (to which the equivalent in the Barristers' Rules is Rule 71) is to promote the proper and efficient administration of justice and to minimize the risk of evidence being tainted by collaboration and hearsay, leading to a miscarriage of justice.

Rule 25 provides a limited exception to the basic principle in circumstances where the agreement of multiple clients is required, such as the giving of undertakings or the making of concessions etc. However, *Day v Perisher Blue Pty Ltd*[167] is one example referred to by Dal Pont[168] of the type of circumstance that would occasion a breach the rule. In this case, Sheller JA described the holding of a teleconference of witnesses to discuss the evidence they may give, to try to ensure that they all spoke with one voice, as "improper".[169]

[167] (2005) 62 NSWLR 731.
[168] G.E. Dal Pont, *Lawyers' Professional Responsibility*, 7th Ed, 2021 [17.155].
[169] (2005) 62 NSWLR 731 [30].

26. Communication with witnesses under cross-examination

26.1 A solicitor must not confer with any witness (including a party or client) called by the solicitor on any matter related to the proceedings while that witness remains under cross-examination, unless:

26.1.1 the cross-examiner has consented beforehand to the solicitor doing so; or

26.1.2 the solicitor:

(i) believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require such a conference;

(ii) has, if possible, informed the cross-examiner beforehand of the solicitor's intention to do so; and

(iii) otherwise does inform the cross-examiner as soon as possible of the solicitor having done so.

Commentary

The ethical principle embodied in this Rule is the professional obligation to promote the administration of justice though a fair and impartial trial process by ensuring that the evidence of the witness is full and frank and is not tainted by comments and suggestions to the witness or by coaxing or coaching of the witness, thereby limiting the risk of a possible miscarriage of justice.[170]

The Rule sets out limited exceptions in sub rules 26.1.1 and 26.1.2[171] including an exception if the cross-examiner is informed by the solicitor as soon as possible after having conferred with the witness.

[170] See Dal Pont, *Lawyers' Professional Responsibility*, 7th Ed, 2021 [17.170] and the case of *R v Shepherd* [2001] 1 NZLR 161 referred to in that paragraph.

[171] See *Potier v R* [2015] NSWCCA 130 in which case the Rule was not held to have been breached in the circumstances of that case.

27. Solicitor as material witness in client's case

27.1 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court, the solicitor may not appear as advocate for the client in the hearing.

27.2 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court the solicitor, an associate of the solicitor or a law practice of which the solicitor is a member must not continue to act for the client if doing so would prejudice the administration of justice.

Commentary

Overview

Rule 27.1 is a Rule of strict application that requires the solicitor to not appear as an advocate for the client if the solicitor is required to give evidence that is material to the contested issues.

Rule 27.2 deals with the question of whether or not an associate of a solicitor or the solicitor's law practice may continue to act for the client where a solicitor representing a client is, or is likely to become, a material witness in the client's case. Rule 27.2 requires the solicitor to carefully consider whether or not it is desirable that the solicitor should continue to act. The reason for this is that the solicitor would be in a position of apparent conflict between the duty to advance the interests of the client and the duty to the court to give impartial evidence[172] which may prejudice the administration of justice[173].

The test to be applied in determining whether continuing to act would prejudice the administration of justice is an objective one. [174] The question is whether a fair minded and reasonably informed member of the public would conclude that the proper administration of justice requires that the solicitor should be prevented from continuing to act for the client, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.

In making its determination on whether continuing to act would prejudice the administration of justice, a court must balance this apparent conflict of duties with other considerations affecting the due administration of justice, such as:

- due weight being given to the public interest in a litigant not being deprived of the solicitor of their choice without due cause; and
- the timing of the application, which may be relevant, in that the cost, inconvenience or impracticability of requiring a solicitor or law practice to cease to act may provide a reason for refusing to grant relief. [175]

---

[172] See Ipp J, *Lawyers' Duties to the Court*, 114 LQR at 92.
[173] See for example *Paino v MDN Mortgages Pty Ltd* [2009] NSWSC 898.
[174] See *UTi (Aust) Pty Ltd v Partners of Piper Alderman* [2008] NSWSC 219, at [46-52].
[175] *Bufalo Corporation Pty Ltd v Lend Lease Primelife Ltd* [2010] VSC 672, at [9].

The jurisdiction of a court to exercise its power to restrain a solicitor or law practice from acting is exceptional and is exercised with caution. [176]

Amendment to Rule 27.2 on 1 April 2022

Rule 27.2 was amended as from 1 April 2022 to replace the words “may act or continue to act for the client if doing so would not prejudice the administration of justice” with “must not continue to act for the client if doing so would prejudice the administration of justice.”

This amendment is not considered to be a material change but rather was recommended by the Law Council of Australia to set out the underlying ethical principle more precisely continuing to act for a client in circumstances which would prejudice the administration of justice is not permissible.

[176] *Kallinicos v Hunt* (2005) 64 NSWLR 561, at [76].

28. Public comment during current proceedings

28.1 A solicitor must not publish or take steps towards the publication of any material concerning current proceedings which may prejudice a fair trial or the administration of justice.

Commentary

Rule 28 does not completely prohibit the publication of comments about current proceedings. The principle underpinning the rule is that any comment made by a solicitor about current proceedings should not prejudice a fair trial or the administration of justice. The decision in *Legal Services Commissioner v Orchard*[177] illustrates the degree of personal judgement expected of a solicitor in considering whether or not to publish material.

The equivalent Barristers' Rules to Rule 28 appear in Rules 76–78 of the Barristers' Rules, which include examples of the types of publication of documents or information about current or forthcoming proceedings which are not prohibited by the Rules; and similarly would not be prohibited by Rule 28 where a solicitor is acting as an advocate. For solicitors, such circumstances would include that:

(a) a solicitor may supply answers to unsolicited questions concerning a current proceeding provided that the answers are limited to information as to the identity of the parties or of any witness already called, the nature of the issues in the case, the nature of the orders made or judgment given including any reasons given by the court and the client's intentions as to any further steps in the case, or

(b) a solicitor may, where it is not contrary to legislation or court practice and at the request of the client or instructing solicitor or in response to unsolicited questions supply for publication:

  (i) copies of pleadings in their current form which have been filed and served in accordance with the court's requirements,

  (ii) copies of affidavits or witness statements, which have been read, tendered or verified in open court, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection,

  (iii) copies of transcript of evidence given in open court, if permitted by copyright and clearly marked so as to show any corrections agreed by the other parties or directed by the court, or

  (iv) copies of exhibits admitted in open court and without restriction on access.

(c) a solicitor may if requested advise a client about dealings with the media but not in a manner which is calculated to interfere with the proper administration of justice, and

[177] [2012] QCAT 583.

(d) a solicitor does not breach Rule 28 simply by advising the client about whom there has been published a report relating to the case, and who has sought the solicitor's advice in relation to that report, that the client may take appropriate steps to present the client's own position for publication.

Examples of conduct by solicitors that would similarly be prohibited by Rule 28 would include the publication of any material concerning any proceeding which:

(a) is known to the solicitor to be inaccurate,

(b) discloses any confidential information, or

(c) appears to or does express the opinion of the solicitor on the merits of a current or potential proceeding or on any issue arising in such a proceeding, other than in the course of genuine educational or academic discussion on matters of law.

29. Prosecutor's duties

29.1 A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

29.2 A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.

29.3 A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

29.4 A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.

29.5 A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused other than material subject to statutory immunity, unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person.

29.6 A prosecutor who has decided not to disclose material to the opponent under Rule 29.5 must consider whether:

29.6.1 the charge against the accused to which such material is relevant should be withdrawn; or

29.6.2 the accused should be faced only with a lesser charge to which such material would not be so relevant.

29.7 A prosecutor must call as part of the prosecution's case all witnesses:

29.7.1 whose testimony is admissible and necessary for the presentation of all of the relevant circumstances,

29.7.2 whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;

UNLESS:

i) the opponent consents to the prosecutor not calling a particular witness,

ii) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused,

iii) the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point already adequately established by another witness or other witnesses;

iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable, or

v) the prosecutor, having the responsibility of ensuring that the prosecution case is presented properly and presented with fairness to the accused, believes on reasonable grounds that the interests of justice would be harmed if the witness was called as part of the prosecution case,

provided that the prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within (ii), (iii), (iv) or (v) together with the grounds on which the prosecutor has reached that decision, unless the interests of justice would be harmed if those grounds were revealed to the opponent.

29.8 A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully obtained must promptly:

29.8.1 inform the opponent if the prosecutor intends to use the material; and

29.8.2 make available to the opponent a copy of the material if it is in documentary form.

29.9 A prosecutor must not confer with or interview any accused except in the presence of the accused's legal representative.

29.10 A prosecutor must not inform the court or an opponent that the prosecution has evidence supporting an aspect of its case unless the prosecutor believes on reasonable grounds that such evidence will be available from material already available to the prosecutor.

29.11 A prosecutor who has informed the court of matters within Rule 29.10, and who has later learnt that such evidence will not be available, must immediately inform the opponent of that fact and must inform the court of it when next the case is before the court.

29.12 A prosecutor:

29.12.1 must correct any error made by the opponent in address on sentence;

29.12.2 must inform the court of any relevant authority or legislation bearing on the appropriate sentence;

29.12.3 must assist the court to avoid appealable error on the issue of sentence; and

29.12.4 may submit that a custodial or non-custodial sentence is appropriate.

29.13 A solicitor who appears as counsel assisting an inquisitorial body such as the Criminal Justice Commission, the Australian Crime Commission, the Australian Securities and Investments Commission, the ACCC, a Royal Commission or other statutory tribunal or body having investigative powers must act in accordance with Rules 29.1, 29.3 and 29.4 as if the body is a court referred to in those Rules and any person whose conduct is in question before the body is an accused referred to in Rule 29.

Commentary

Overview

Rule 29.7 requires that, as part of the prosecution's case, a prosecutor must call all witnesses whose testimony is admissible and necessary for presentation of all relevant circumstances, or whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue.

Rule 29.7 provides four (4) exceptions, each of which is identical to the exceptions in the equivalent Barristers' Rule 89. However, Barristers' Rule 89 also provides an additional exception where:

> the prosecutor, having the responsibility of ensuring that the prosecution case is presented properly and presented with fairness to the accused, believes on reasonable grounds that the interests of justice would be harmed if the witness was called as part of the prosecution case.

Rule 29.7 was amended on 1 April 2022 to adopt this exception.

Where one or more of the above exceptions (apart from the first exception) is applied, Rule 29.7 requires that the prosecutor must inform the opponent as soon as practicable of the identity of any witness the prosecution does not intend to call, and to provide the opponent with the grounds for not calling the witness. Barrister's Rule 90 contains the same condition, with the proviso that disclosure is not required *where the interests of justice would be harmed if those grounds were revealed to the opponent*. This additional qualification is now included in Rule 29.7

Rule 29.8 refers to material which a prosecutor believes on reasonable grounds may have been "unlawfully or improperly" obtained whereas the equivalent Barristers' Rule (Rule 91) refers to material that may have been "unlawfully obtained". Rule 29.8 was amended from 1 April 2022 to harmonise it with Barristers' Rule 91.

Rule 29.12 focusses upon the role of a prosecutor in matters relating to sentencing, including that a prosecutor must inform the court of any relevant authority or legislation bearing on the appropriate sentence, and may submit to the court that a custodial or non-custodial sentence is appropriate. In *Barbaro v The Queen* the High Court considered the practice of prosecutors expressing views to the court about the available range of sentences that could be imposed. The High Court held that such views were statements of opinion, advancing "no proposition of law or fact which a sentencing judge may properly

take into account in finding the relevant facts, deciding the applicable principles of law or applying those principles to the facts to yield the sentence to be imposed." [178]

Amendment to Rule 29 on 1 April 2022

Rule 29.7 was amended as from 1 April 2022 to harmonise it with the equivalent Barristers' Rules.

[178] [2014] HCA 2 [7].

Relations with other persons

30. Another solicitor's or other person's error

30.1 A solicitor must not take unfair advantage of the obvious error of another solicitor or other person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact.

Commentary

Overview

Rule 30, like rules 19.11, 19.12 and 22.3, addresses the obligations on a solicitor in circumstances of error by another solicitor or other person:

19.11 A solicitor must inform the court of any misapprehension by the court as to the effect of an order which the court is making, as soon as the solicitor becomes aware of the misapprehension.

19.12 A solicitor must alert the opponent and if necessary inform the court if any express concession made in the course of a trial in civil proceedings by the opponent about evidence, case-law or legislation is to the knowledge of the solicitor contrary to the true position and is believed by the solicitor to have been made by mistake.

22.3 A solicitor will not have made a false or misleading statement to the opponent simply by failing to correct an error on any matter stated to the solicitor by the opponent.

As a general principle, a solicitor's duties are to the client and to the court. "The duty of a legal practitioner is not to his client's opponent and he is not answerable to his client's opponent".[179] Thus, as a general principle, a solicitor does not have a duty to remedy deficiencies or errors in an opponent's case. [180]

However, in *Chamberlain v Law Society of the Australian Capital Territory*, the appellant, a legal practitioner, was found to have committed professional misconduct by deliberately taking advantage of a mistake made by the Deputy Commissioner of Taxation. The practitioner intentionally took advantage of an obvious error (a misplaced decimal point) in a writ issued against him by the Deputy Commissioner and "deliberately set in train the events and documents which...led to the entry of the consent judgment. He knew the Deputy Commissioner had made a mistake and took unfair advantage of it for his own benefit".[181]

Black CJ considered the notions of fairness and common decency, and explained the drawing of the line between permissible and impermissible taking of advantage of an opponent's mistake. His Honour said, at [155]:

---

[179] *Holborow v Macdonald Rudder* [2002] WASC 265 at [30].
[180] See *Thames Trains Ltd v Adams* [2006] EWHC 3291.
[181] *Chamberlain v Law Society of the Australian Capital Territory* (1993) 43 FCR 148 [178] [166].

> *Whilst in some circumstances it may be in order to take advantage of a mistake, in other circumstances the attention of the practitioner should be drawn to a mistake or oversight. But, in any event, where there is a mistake that may involve the other practitioner's client in unnecessary expense or delay the practitioner should not do or say anything to induce or foster that mistake. To induce or foster such a mistake would be detrimental to a relationship characterised by courtesy and fairness that ought to exist between members of the legal profession. A relationship of that nature … has as its justification not merely in social or ethical mores; it has an additional justification referrable to the public interest, in that courtesy and fairness contribute materially to the effective and expeditious performance of legal work …*

The UK Solicitors Regulation Authority Code of Conduct 2011 has a rule similar to rule 30 in relation to dealing with third parties, which states that practitioners must not "take unfair advantage of third parties in either [their] professional or personal capacity".[182]

Other relevant considerations

Rule 30 reflects a limitation on the duty of an advocate to robustly present a client's case, rather than an absolute prohibition. Here, as elsewhere in the rules, a balance is struck between the duty of robust advocacy and the limits of acceptable conduct. For instance, rule 34.1.1 allows exaggeration as long as statements do not "grossly" exceed the legitimate assertion of the rights or entitlements of the solicitor's client. The Law Council of Australia's *Guidelines for Lawyers in Mediations*, while warning practitioners to "be careful of puffing", do not prohibit it.[183]

There is no obligation to correct an opponent's error (see rule 22.3) provided that a practitioner is not "the moving force in the other side's misconception"[184] and that the practitioner is scrupulous about not endorsing any misunderstanding.[185]

The duties of English solicitors regarding obligations to opponents were articulated in *Thames Trains Ltd v Adams*,[186] where the issue was whether or not to set aside a consent order recording the terms of settlement between the parties, reached in a telephone call at 11:40am on 25 February 2005. The plaintiff asserted that the defendant's solicitor was obliged to inform the plaintiff's solicitor of an earlier offer to settle the matter she had sent by fax at 10:41am the same day, but which the plaintiff's solicitor had not received and knew nothing of during the settlement discussions at 11:40am. The plaintiff's solicitor accepted the increased offer and did not inform the defendant's solicitor about the fax. Upon learning of the fax, the defendant sought to set aside the consent order, which had been signed in ignorance of the earlier offer. Nelson J held that the conduct of the plaintiff's solicitor was not unconscionable, deceitful, or sharp practice, nor was she taking unfair advantage of the other side's ignorance. [187]

---

[182] Solicitors Regulation Authority Code of Conduct, Chapter 11, Relations with Third Parties, O(11.1).

[183] Law Council of Australia, *Guidelines for Lawyers in Mediations*, cl 6.2.

[184] *Legal Practitioners Complaints Committee v Fleming* (2006) 48 SR (WA) 29; [2006] WASAT 352 at [66] per Chaney J.

[185] Black CJ noted in *Chamberlain v Law Society of the Australian Capital Territory* (1993) 43 FCR 148 at 155 that "another vice of conduct that induces or fosters a mistake is that it may easily involve, or in practical terms be close to, misrepresentation. In this way such conduct is, of its nature, liable to be in tension with the overriding duty of honesty that practitioners owe to the courts, their clients and to their fellow practitioners".

[186] [2006] EWHC 3291 (QB), approved in *Thompson v Arnold* [2007] EWHC 1875 (QB).

[187] *Thames Trains Ltd v Adams* [2006] EWHC 3291 (QB) at [56].

His Lordship noted that the defendant's solicitor "was entitled to stay silent, act in her client's best interests and accept the increased offer" but that a different outcome may have resulted had the plaintiff asked the defendant's solicitor a specific question about the earlier transaction.[188]

[188] *Ibid.*

31. Inadvertent disclosure

31.1 Unless otherwise permitted or compelled by law, a solicitor to whom material known or reasonably suspected to be confidential is disclosed by another solicitor, or by some other person and who is aware that the disclosure was inadvertent must not use the material and must:

31.1.1 return, destroy or delete the material (as appropriate) immediately upon becoming aware that disclosure was inadvertent; and

31.1.2 notify the other solicitor or the other person of the disclosure and the steps taken to prevent inappropriate misuse of the material.

31.2 A solicitor who reads part or all of the confidential material before becoming aware of its confidential status must:

31.2.1 not disclose or use the material, unless otherwise permitted or compelled by law,

31.2.2 notify the opposing solicitor or the other person immediately, and

31.2.3 not read any more of the material.

31.3 If a solicitor is instructed by a client to read confidential material received in error, the solicitor must refuse to do so.

Commentary

Rule 31 was directly considered and applied by the High Court in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* - a matter involving the mistaken disclosure of privileged information and the failure of the unintended recipient to return the information. Commenting on the ethical obligations of solicitors in such circumstances the Court said[189]:

> The position of solicitors who are in receipt of privileged documents has another dimension. Rule 31 of the Australian Solicitors' Conduct Rules, which were adopted by the Law Council of Australia, deals with the duty of a solicitor to return material, which is known or reasonably suspected to be confidential, where a solicitor is aware that its disclosure was inadvertent. It involves notifying the other solicitor of the disclosures and returning that material…
>
> Such a rule should not be necessary. In the not-too-distant past it was understood that acting in this way obviates unnecessary and costly interlocutory applications. It permits a prompt return to the status quo and thereby avoids complications which may arise in the making of orders for the rectification of the mistake and the return of documents.
>
> This approach is important in a number of respects. One effect is that it promotes conduct which will assist the court to facilitate the overriding purposes of the [Civil

[189] [2013] HCA 46, [65]-[67] (references omitted).

Procedure Act]. It is an example of professional, ethical obligations of legal practitioners supporting the objectives of the proper administration of justice.

Amendment to Rule 31 on 1 April 2022

Rule 31 was amended as from 1 April 2022., by inserting a new sub-paragraph in Rule 31.2 to clarify that a solicitor may not use such of any inadvertently disclosed confidential material as may have already been read by the solicitor, unless permitted or compelled by law.

32. Unfounded allegations

32.1 A solicitor must not make an allegation against another Australian legal practitioner of unsatisfactory professional conduct or professional misconduct unless the allegation is made bona fide and the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it.

Commentary

The fundamental ethical principles set out in Rules 3, 4 and 5 are that a solicitor's paramount duty to the court and the administration of justice requires that a solicitor to be honest and courteous in all of his or her dealings in the course of legal practice, and to ensure that he or she does not engage in conduct that is likely to a material degree to be prejudicial to, or diminish the public confidence in, the administration of justice, or bring the profession into disrepute.

Rule 32 expresses the principle that these considerations also apply to a solicitor who makes misconduct allegations against another solicitor. Unlike clients or other complainants who are not legal practitioners, a legal practitioner who contemplates making a complaint against another legal practitioner must be mindful of his or her professional obligations about making such allegations:

- the threshold in Rule 32 of the Australian Solicitors' Conduct Rules is that the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it.
- the threshold in Rule 60 of the Barristers' Rules and Rule 21.1 of the Australian Solicitors' Conduct Rules is that a legal practitioner must take care to ensure that the practitioner's advice to invoke the coercive powers of a court is reasonably justified by the material then available to the practitioner.
- the threshold in Rule 61 of the Barristers' Rules and Rule 21.2 of the Australian Solicitors' Conduct Rules is that a legal practitioner must take care to ensure that a decision to make allegations or suggestions under privilege against any person are reasonably justified by the material then available to the legal practitioner.

The meaning and application of these standards (in the context of the Barristers' rules) was explained in *Council of the New South Wales Bar Association v de Robillard*[190]:

> [166] …did the respondent have reasonable justification; was there available factual material to provide a proper basis; and did the respondent believe on reasonable grounds that the allegations could be made?
>
> [181] We have considered the evidence, both documentary and oral, provided by the respondent in this matter and can see no particular piece of evidence which would satisfy us the respondent could reasonably have made the serious allegation set out in the Originating Process which sought orders against Mr Wells; in the Points of Claim document he signed; and the supporting written submission. Further we have considered all the evidence collectively and concluded that when all is considered in

[190] [2021] NSWCATOD 207.

the one exercise, there was still not a reasonable and proper basis for the claims/allegations to be made against Mr Wells.

[182] We are satisfied the Barristers Rules, which are applicable to the consideration of the Application before us, make clear the care required by a barrister in seeking to invoke the coercive powers of a court. The same is true where a barrister is to make allegations or suggestions under privilege against any person and where he/she is required to believe, on reasonable grounds, that the factual material already available provides a proper basis for making a serious allegation. We are satisfied the respondent knew of the seriousness of the allegations he was making, in the documents he settled and signed in the proceeding which sought an order against Mr Wells.

[221] In our view, the seriousness of the conduct engaged in by the respondent is underscored by the inevitable consequence of the allegations and joining of Mr Wells as a defendant, namely, that he would need to cease acting for his client in the matter, who was also a defendant. A barrister who acted with even a basic level of care would understand the outcome of his or her actions and the prejudice to the solicitor and his or her clients, if the allegations were made and not well founded.

[224] Rules 60(a) and 61(a) of the Barristers Rules each concern, in the first instance, the obligation on a barrister to exercise care. Care which is to ensure that the invocation of the coercive powers of a court, or decisions to make allegations or suggestions under privilege against any person, are reasonably justified by the material then available to the barrister.

[225] The obligation is to “ensure” that the conduct did occur. It thus requires a high standard of care and is only qualified if the conduct is reasonably justified by reference to available material, a test not satisfied by what the barrister may believe or suspect, but on objective grounds.

33. Communication with another solicitor's client

33.1 In representing a client, a solicitor shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another practitioner unless:

33.1.1 the other practitioner has previously consented;

33.1.2 the solicitor believes on reasonable grounds that:

i) the circumstances are so urgent as to require the solicitor to do so; and

ii) the substance of the communication would not be unfair to the opponent's client;

33.1.3 the communication is solely to enquire whether the other party or parties to a matter are represented and, if so, by whom; or

33.1.4 there is notice of the solicitor's intention to communicate with the other party or parties, but the other practitioner has failed, after a reasonable time, to reply and there is a reasonable basis for proceeding with the communication.

Commentary

Overview

Rule 33 precludes a solicitor from contacting an opposing party directly about the subject matter when the solicitor knows that party is legally represented. Rule 33 is an essential requirement for the proper administration of justice. Its rationale is the protection of the other party to a dispute. A legal practitioner who directly contacts an opposing party might "secure damaging admissions, or access to privileged material, or undermine the opponent's trust in that person's lawyer": *Legal Services Commissioner v Bradshaw*.[191]

Application

Dealing with financial institutions when acting for a borrower /debtor

Situations arise where a solicitor, (usually) from a legal assistance organisation may wish to make direct contact, on behalf of a legally assisted person, with a financial institution rather than the solicitor representing the institution in a debt recovery matter. Nevertheless, the principle expressed by the rule applies in these situations.

It is noted that many businesses now subscribe to industry-specific self-regulatory codes of conduct, or are otherwise required under law, to provide internal dispute resolution processes, which can be availed of to try to settle disputes before the need arises to contact the legal practitioner representing the business. Internal dispute resolution services are not usually staffed by lawyers, and legal assistance service providers acting for a client are not precluded from contacting these internal dispute resolution services.

---

[191] [2008] LPT 9, [26].

Given the ethical principle reflected in Rule 33, the appropriate way of resolving these debt payment matters would appear to be though either consumer legislation; through financial services ombudsman schemes; through the internal debt management and dispute resolution processes of the financial institution or in the terms of engagement between the financial institution and their solicitors.

Transfer of client files to a new solicitor

Where a client has changed solicitors, it should be noted that Rule 31 would not preclude the former solicitor from contacting the former client at the request of the new solicitor to arrange the orderly transfer of the client's file to the new solicitor.

Communication between solicitors

It should be noted that, as a matter of professional courtesy, a solicitor, having communicated directly with a client of another solicitor, as permitted under the rule, would notify the other solicitor of that communication.

Serving documents on a client of another solicitor

Where a solicitor serves a document on a client of another solicitor pursuant to a law or contractual obligation, it is considered that such contact with the client of the other solicitor would not amount to a "dealing" under Rule 33.

Second Opinions

Rule 33 as it presently stands, although not expressly dealing with communications relating to the provision of second opinions, would not exclude a client from seeking a second opinion. However, it should be noted that the circumstances in which this occurs, for example outside formally accepting instructions to provide a second opinion on the client's matter, could raise ethical issues.

Amendment to Rule 33 on 1 April 2022

Rule 33 was amended as from 1 April 2022 to remove a possible ambiguity about what is meant by the term "dealing".

34. Dealing with other persons

34.1 A solicitor must not in any action or communication associated with representing a client:

34.1.1 make any statement to another person:

i) which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and

ii) which misleads or intimidates the other person,

34.1.2 threaten the institution of a criminal or disciplinary complaint against the other person if a civil liability to the solicitor's client is not satisfied; or

34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.

34.2 In the conduct or promotion of a solicitor's practice, the solicitor must not seek instructions for the provision of legal services in a manner likely to oppress or harass a person who, by reason of some recent trauma or injury, or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the solicitor at the time when the instructions are sought.

Commentary

Reference in Rules 34.1.1 and 34.1.2 to "the other person"

The term "the other person", where used in Rule 34, is a reference to the person to whom the impugned communication is directed.

Meaning of the phrase "threaten the institution of a criminal or disciplinary complaint"

For a detailed examination of the ethical issues involved and the scope of this phrase, see *Legal Services Commissioner v Sing*[192] (similar considerations apply in relation to rule 22).

In that case, de Jersey CJ said, at [30]:

> *There is a continuum applicable to practitioners, with legitimate pressure at the one end, and improper intimidation at the other. It may, in any particular case, be difficult to delineate the precise point at which any application of pressure becomes improper. That is why practitioners must be extremely careful before resorting to any even arguably threatening conduct. They are well advised to err on the side of caution, as in all aspects of their professional approach. With the increasingly intense demands of clients, and the high level of competition which these days characterises the practice of the law, practitioners will inevitably be asked to stretch the limits of their consciences: they must be steadfast not to yield to that temptation.*

[192] [2007] 2 Qd R 158; [2007] LPT 4.

Consistent with the reasoning in that case, solicitors must, given their professional standing, walk a "rather finely drawn line" between making what might be described as a threat as opposed to making a statement that actions will be taken consistent with a client's rights under the law. It would, for example, be unethical for a solicitor to use his or her position as an officer of the court to make a threat that a personal costs order will be made against the opposing party; a solicitor is in no position to make such an order and should not create the impression that he or she can influence the court to do so. On the other hand, it would not necessarily be unethical for a solicitor to indicate to the opposing party an intention to seek a personal costs order should the matter proceed to court and his or her client secures a favourable outcome.

As the decision in *Sing* indicates, whether or not the fine line between ethical and unethical conduct has been crossed depends upon all of the circumstances. But if there is any doubt, solicitors must err on the side of caution (see also *Council of the Law Society of New South Wales v Hammond* [193] and *Quinlivan v Legal Profession Complaints Committee*.[194])

Prohibition on seeking settlement agreement not to institute criminal or disciplinary proceedings in respect of civil liability

On the same basis as outlined above, Rule 34 would also prohibit securing, as a term of a settlement, an agreement not to institute criminal or disciplinary proceedings in respect of civil liability. The ethical principle upon which Rule 34 is founded applies to conduct in relation to a civil liability—i.e. it prohibits conduct by a legal practitioner that involves an attempt to pressure an opponent to settle a civil dispute by threatening to institute criminal or disciplinary proceedings. This issue does not arise in the context of a criminal prosecution.

Application of the Rule in situations where a solicitor, representing the defendant, has occasion to contact a victim, relatives of a deceased victim or a complainant

Practitioners should note the long-standing principle of the common law that there is, and can be, no embargo on lawyers interviewing complainants—expressed as the principle that there is "no property in a witness". The underlying rationale is that a restriction on interviewing witnesses or potential witness could deprive the court of access to evidence. Therefore, a lawyer may confer with any witness willing to see him or her, so that the court has access to all relevant evidence.

However, it is well recognised that a lawyer for the defendant must take considerable care in interviewing complainants and should always, as a matter of professional courtesy and care, notify the prosecutor or counsel for the plaintiff in advance of any intention to seek to interview a witness. Where the complainant is not represented, it is recognised that the lawyer for the defendant should conduct any interview in the presence of an independent and reputable person.[195] Further, professional obligations to exercise considerable care toward complainants in matters not involving litigation would be implicit in upholding the principles underlying rule 34.1.

---

[193] [2021] NSWCATOD 52, at [64].
[194] [2012] WASCA 263 at [53].
[195] See for example G E Dal Pont, *Lawyers' Professional Responsibility*, 7th ed, 2021 [17.175]

Amendment to Rule 34 on 1 April 2022

Rule 34.1 was amended as from 1 April 2022 to clarify the types of conduct subject to the Rule.

35. Contracting with third parties

35.1 If a solicitor instructs a third party on behalf of the client, and the solicitor is not intending to accept personal liability for payment of the third party's fees, the solicitor must advise the third party in advance.

Commentary

Accepting personal liability for payment of third-party fees

Rule 35.1 requires a solicitor to notify a third party in advance if the solicitor is not intending to accept personal liability for payment of the third-party's fees.

Solicitors should similarly let the third-party know if the solicitor is accepting personal liability for payment of the fees.

Where the solicitor is not accepting responsibility for the payment of the fees, although the solicitor has an ethical to ensure that the client is aware of his or her liability to do so. the solicitor's ethical duty does not extend to an obligation to negotiate the payment arrangement between the client and third party unless the solicitor has been instructed to do so.

Law practice management

36. Advertising

36.1 A solicitor or principal of a law practice must ensure that any advertising, marketing, or promotion in connection with the solicitor or law practice is not:

36.1.1 false;

36.1.2 misleading or deceptive or likely to mislead or deceive;

36.1.3 offensive; or

36.1.4 prohibited by law.

36.2 A solicitor must not convey a false, misleading or deceptive impression of specialist expertise and must not advertise or authorise advertising in a manner that uses the words "accredited specialist" or a derivative of those words (including post-nominals), unless the solicitor is a specialist accredited by the relevant professional association.

Commentary

Relevant legislation

A solicitor should also have regard to the legislation regulating advertisements in his or her practice area and jurisdiction, for example:

- Misleading or deceptive conduct legislation in the applicable jurisdiction including the *Competition and Consumer Act 2010* (Cth) applicable both federally and, through adopting Acts of the various jurisdictions (in particular, see Australian Consumer Law, s 18, found in Sch 2 to the *Competition and Consumer Act 2010* (Cth).
- Personal injury legislation and regulations in the applicable jurisdiction: see for example *Personal Injuries Proceedings Act 2002* (Qld).
- Direct-marketing legislation in the applicable jurisdiction, for example, the *Spam Act 2003* (Cth).

Accredited specialist

The entitlement to refer to specialist accreditation, awarded by professional bodies attaches to solicitors and not to law practices.

37. Supervision of legal services

37.1 A solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter.

Commentary

Supervision by practitioners not holding a principal practicing certificate

Where supervision of solicitors is undertaken by another more senior solicitor, who is not a principal but is, say another employee solicitor, the supervision by that solicitor must itself be supervised by a principal.

Meaning of the phrase "solicitor with designated responsibility"

The phrase "solicitor with designated responsibility" appears in Rule 13 in addition to Rule 37 and its meaning is set out in the Glossary as follows:

"Solicitor with designated responsibility" means the solicitor ultimately responsible for a client's matter or the solicitor responsible for supervising the solicitor that has carriage of a client's matter.

38. Returning judicial officers

38.1 A solicitor who is a former judicial officer must not appear in—

i) any court if the solicitor has been a member thereof or presided therein, or

ii) any court from which appeals to any court of which the solicitor was formerly a member may be made or brought,

for a period of two years after ceasing to hold that office unless permitted by the relevant court.

NOTE

Rule 38 is currently under review. The following formulation of Rule 38 is applicable in South Australia.

38.1 In this rule:

court does not include a tribunal.

former rules means the rule or rules of conduct (however described) in force immediately before the commencement of these Rules governing the right of a solicitor to appear before a court of which the solicitor was a judge, justice, magistrate, coroner, master, prothonotary, registrar or other judicial officer, or any person acting in any of those offices.

judge includes a judge, justice, magistrate, coroner, master, prothonotary, registrar or other judicial officer, or a person acting in any of those offices, but does not include person appointed as a judge before the commencement of these Rules.

tribunal means a tribunal constituted by or under an Act or a disciplinary tribunal.

38.2 A solicitor must refuse to accept or retain a brief or instructions to appear before a court if:

38.2.1 the appearance would be before a court:

i) of which the solicitor is or was formerly a judge; or

ii) from which appeals lie to a court of which the solicitor is or was formerly a judge; and

38.2.2 the appearance would occur less than 5 years after the solicitor ceased to be a judge of the court.

38.3 A solicitor must refuse to accept or retain a brief or instructions to appear before a tribunal that does not sit in divisions or lists of matters to which its members are assigned if:

38.3.1 the solicitor is a full time, part time or sessional member of the tribunal, or

38.3.2 the appearance would occur less than 2 years after the solicitor ceased to be a member of the tribunal.

38.4 A solicitor must refuse to accept or retain a brief or instructions to appear before a tribunal that sits in divisions or lists of matters to which its members are assigned if:

38.4.1 the appearance would be in a proceeding in a division or list to which the solicitor is assigned as a member of the tribunal, or

38.4.2 the appearance would be in a proceeding in a division or list to which the solicitor was assigned and the appearance would occur less than 2 years after the solicitor ceased to be assigned to the division or list.

38.5 The former rules continue to apply to a solicitor who was, before the commencement of these Rules, appointed as a judge, justice, magistrate, coroner, master, prothonotary, registrar or other judicial officer, or a person acting in any of those offices.

38.6 For the purposes of subrule 38.2.1(ii), an appeal is not to be considered to lie to the Federal Court of Australia from the Supreme Court of a State or Territory.

38.7 This rule does not apply in respect of a tribunal if a provision of an Act or a statutory instrument made under an Act prohibits a member or former member of the tribunal from representing a party before the tribunal or prohibits any such representation within a certain period after ceasing to be a member or in certain circumstances.

Commentary

Overview

Essential to maintaining public confidence in the judicial system is that justice should both be done and be seen to be done independently and impartially. Solicitors contribute to this public interest objective, as an aspect of their paramount duty to the court and the administration of justice, by taking care to ensure that their conduct does not undermine public confidence in the independent and impartial decision making of the courts.

Rule 38 deals with the situation where a solicitor who was formerly a judicial office holder (or a tribunal member in the version of Rule 38 applicable in South Australia) having returned to the practising legal profession, seeks to appear in a matter before the court of which he or she was formerly a judicial officer, or a tribunal member.

In these situations, an apprehension can arise—because of the previous relationship between the court and the former judicial officer or tribunal member—that an independent and impartial decision might not be made in the matter currently before the court or tribunal.

The High Court has recently affirmed the principle of apprehended bias:

The apprehension of bias principle is that "a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide". The principle gives effect to the requirement that justice should both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial—that it is conducted by an independent and impartial tribunal.

The 'hypothetical observer' is a standard by which the courts address what may appear to the public served by the courts to be a departure from standards of impartiality and independence which are essential to the maintenance of public confidence in the judicial system. The hypothetical observer is not conceived of as a lawyer but a member of the public served by the courts.[196] The principles established by the High Court about apprehended bias are equally applicable to former members of administrative and other tribunals.[197]

Application

The ethical principle embodied in ASCR Rule 38 is that a legal practitioner who has returned to the practising legal profession from a judicial, court or tribunal role has a professional obligation to take care to avoid creating an apprehension of bias against the court or tribunal by declining to accept a brief or instructions to appear before a court or tribunal of which he or she was formerly a member, or before an inferior court from which appeals may lie to the court of which the legal practitioner was formerly a member.

The ethical principle to avoid creating an apprehension of bias is also reflected in ASCR Rule 18, which states that a solicitor must not, in the presence of any of the parties or solicitors, deal with a court on terms of informal personal familiarity which may reasonably give the appearance that the solicitor has special favour with the court.

Similarly, ASCR Rule 22.5 states that a solicitor must not communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless required to do so by the court, or where the opponent has consented beforehand.[198]

While Rule 38 is focussed on former judicial officers and former tribunal members, solicitors who previously held such positions will be aware that other capacities from which they have returned to the practising legal profession may also, indirectly, give rise to concerns of apprehended bias in matters currently before a court or tribunal.[199]

Rule 38 protects public confidence in the independent and impartial administration of justice and the review and decision-making function of tribunals, by setting periods of time

---

[196] *Charisteas v Charisteas* [2021] HCA 29 at [11] and [21] (references omitted).

[197] Conduct Guide for AAT Members, Administrative Appeals Tribunal. URL: https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Conduct-Guide-for-AAT-Members.pdf. See also A Guide to Standards of Conduct for Tribunal Members, Administrative Review Council. URL: https://www.ag.gov.au/legal-system/publications/administrative-review-council-guide-standards-conduct-tribunal-members.

[198] See *Charisteas v Charisteas* [2021] HCA 29.

[199] See for example *T and L* [2000] FamCA 351 concerning a former judicial office holder who became a special counsel to a private law practice.

(generally referred to as ‘moratorium periods’) which the legal profession considers a fair-minded lay observer would accept as an appropriate period that should elapse before a legal practitioner, having been a judicial office holder or a tribunal member should seek to appear as a solicitor before his or her former court or tribunal.

The moratorium periods set out in Rule 38 do not operate as blanket prohibitions in every case. Where, for example, a court or tribunal is satisfied that no issue of apprehended bias arises, a blanket moratorium period should not, of itself, be a reason to proscribe a solicitor from appearing.

Increasingly, solicitors are taking on roles as registrars, prothonotaries and tribunal members, in many cases on a short-term, temporary, or sessional basis. In these situations, proximity, the nature and frequency of duties performed, and time will be relevant considerations as to whether a fair-minded lay observer might reasonably apprehend that a judge might not bring an impartial mind to the resolution of an issue because of the former association with a registrar, prothonotary or other court officer.

Rule 38 therefore acknowledges that courts have an inherent jurisdiction to decide whether or not an individual solicitor may appear in a matter before the court, notwithstanding that the Rule sets a moratorium period. Where, for example, a court determines that an appearance by a former judicial office holder before the expiration of a moratorium period would not create a perception of apprehended bias in the mind of a fair-minded lay observer, the court will decide whether or not the appearance is appropriate. Rule 38 expresses a similar principle in relation to former members of administrative and other tribunals.

Amendment to Rule 38 on 1 April 2022

Rule 38 was amended as from 1 April 2022 to harmonise the Rule with the equivalent Barristers’ rules, recognising the increasing movement of practitioners between judicial, tribunal and legal practitioner roles. The change brought the general moratorium period for retiring judges who resume legal practice as a solicitor into alignment with the 5-year period applying in the equivalent Barristers’ Rule to retiring judges seeking to return to the practicing profession as a barrister.

Rule 38 is undergoing further review, principally to review the application of the rule in the circumstances of former court officers (such as Registrars) and former members of tribunals where the roles occupied by those solicitors were for a fixed-term, or were on a short-term of sessional basis.

The 1 April 2022 version of Rule 38 is currently in force in South Australia.

39. Legal and non-legal services

39.1 Where a solicitor or law practice:

39.1.1 shares an office with or is otherwise affiliated with an entity or business engaged in another calling to provide services other than legal services to a client, and

39.1.2 a client is receiving services concurrently from both the law practice and the other entity,

the solicitor, or law practice, as the case requires, must take all reasonable steps to ensure that the client is clearly informed about the nature and the terms of the services being provided to the client by the solicitor or law practice, including (if applicable) that the services provided by the other entity are not provided by the solicitor or the law practice as legal services.

Commentary

Overview

There is no general prohibition on a law practice employing people qualified in other areas to provide adjunct services to clients of the law practice. Incorporated legal practices and unincorporated legal practices (also known as multi-disciplinary partnerships) are alternative business structures intended to facilitate provision of legal and non-legal services through a single entity.

The ethical principle underlying Rule 39 is that where a client is concurrently receiving legal services and other services the client must be made aware of which services are to be provided as a legal service, and which services are not being provided as a legal service.

Application

Rule 39 was amended from the 2015 version of the ASCR to recognise that legal and non-legal services can be provided to a client in ways other than the law practice and another entity or business sharing a physical office.

In recent years the concept of 'joined-up' services and their delivery has gained momentum. Research undertaken by the Law Council in 2018 pointed to a growing recognition of the desirability and demand to link legal services with other services under a holistic, interconnected and client-centric view of the needs of a person who seeks legal services. Also, the scope for converging different services is enhanced when information technology systems can interact with each other, and businesses and professions have the ability to meld legal and other professional services within multi-disciplinary structures.

Rather than being limited only to commercially oriented needs delivered through large multidisciplinary organisations, the linking of provision of legal and other services is equally relevant for improving access to justice for the more vulnerable, disadvantaged and marginalised individuals in Australia.

By way of example, the emergence of socio-legal clinics and health justice partnerships recognise that the vulnerable and disadvantaged often present with multi-faceted issues, both legal and social, and are best assisted by a point of service that can address not only legal issues, but can also provide care and support to address social issues (such as housing or tenancy instability) that precipitate or arise from legal issues.

Clients must be made aware that services provided as legal services attract particular rights, remedies, protections and expectations of professional conduct under legal profession law, and that services not provided as legal services may not attract those same rights, remedies, protections and expectations[200].

Amendment to Rule 39 on 1 April 2022

Rule 39 was amended as from 1 April 2022 to extend the scope of the Rule set out in Rule 39.1.1 to any entity or business that not only shares an office but also to any affiliated entity or business of the solicitor or law practice.

The Glossary was also amended to include a definition of "office" as follows:

> *Office*…is not limited to physical business premises and includes the media through which a law practice provides legal services to clients away from a central, physical location.

[200] See the disclosure obligations in *Legal Profession Uniform Law* s.107 and *Legal Profession Uniform General Rules 2015* r31 where legal and non-legal services are provided through incorporated and unincorporated legal practices.

40. Sharing receipts

40.1 A solicitor must not, in relation to the conduct of the solicitor's practice, or the delivery of legal services, share, or enter into any arrangement for the sharing of, the receipts arising from, or in connection with, the provision of legal services by the solicitor, with:

40.1.1 any disqualified person; or

40.1.2 any person:

i) who has been found guilty of an indictable offence; or

ii) who has had a guilty plea accepted in relation to an indictable offence that involved dishonest conduct, whether or not a conviction was recorded.

Commentary

Overview

The principle underlying Rule 40 is that a solicitor should not have in his or her employ, or share profits with a person found—either by way of conviction or by the person's own admission—to have been involved in dishonest conduct. Honesty and trustworthiness are vital to community confidence in the legal profession.

The origin of the Rule goes back to the time when solicitors were prohibited from sharing receipts from their law practice with persons who were not legal practitioners, and served the purpose of prohibiting a law practice from having persons proven to be dishonest being partners and principals.

Application

The introduction of incorporated and unincorporated legal practices marked a move away from the previous position when it became possible to share the profits of an incorporated or an unincorporated legal practice with shareholders or partners who are not themselves legal practitioners. The introduction of incorporated and unincorporated legal practices also enabled such law practices to provide legal and non-legal services. Rule 40 was amended from 1 April 2022 to recognise that a law practice's receipts can arise from any business of a kind ordinarily conducted by a law practice, and not strictly related to the provision of legal services.

Legal profession legislation in all jurisdictions contains provisions which prohibit a law practice from having a lay associate known to be disqualified person or a person who has been convicted of a serious offence, unless specific regulatory authority or court approval has been obtained. [201]

[201] See for example Part 3.9 of the *Legal Profession Uniform Law*.

Amendment to Rule 40 on 1 April 2022

Rule 40.1.2 was amended to ensure that the scope of the rule encompasses both a formal finding of guilt for an indictable offence, and the acceptance of a guilty plea, whether or not a conviction for an indictable offence was recorded.

41. Mortgage financing and managed investments

Omitted

Commentary

Rule 41 was omitted from the Rules with effect from 1 April 2022. The former Rule provided:

> 41.1 A solicitor must not conduct a managed investment scheme or engage in mortgage financing as part of their law practice, except under a scheme administered by the relevant professional association and where no claim may be made against a fidelity fund.

Omission of Rule 41 from 1 April 2022

Prohibitions on a solicitor conducting a managed investment scheme or engaging in mortgage financing as part of their law practice, and the exceptions to these prohibitions are now dealt with by legislation or legal practice rules of each jurisdiction - see for example section 258 of the *Legal Profession Uniform Law* and Division 1 of Part 4.6 of the *Legal Profession Uniform General Rules 2015*. Consequently, Rule 41 was no longer necessary and has been omitted from the Rules.

42. Anti-discrimination and harassment

42.1 A solicitor must not in the course of, or in connection with, legal practice or their profession, engage in conduct which constitutes:

42.1.1 discrimination,

42.1.2 sexual harassment,

42.1.3 any other form of harassment, or

42.1.4 workplace bullying.

Commentary

Overview

Rule 42 was amended as from 1 April 2022 to:

- clarify that Rule 42 applies to conduct that occurs in any setting connected to the practice of law or the legal profession;
- ensure that professional disciplinary bodies can appropriately respond to matters concerning sexual harassment as either unsatisfactory professional conduct or professional misconduct; and
- express the profession's collective view that discrimination and harassment (and, in particular, sexual harassment) are unacceptable conduct when occurring in any situation connected to the practice of law.

In addition, the Glossary definition of "sexual harassment" was amended from:

> "***sexual harassment***" means harassment that is unlawful under the applicable state, territory or federal anti-discrimination or human rights legislation.

to:

> "***sexual harassment***" means an unwelcome sexual advance, request for sexual favours, or otherwise engaging in other unwelcome conduct of a sexual nature to the person harassed in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

The impetus for the amendments to Rule 42 and the definition of "sexual harassment" was the Law Council's *National Round Table Addressing Sexual Harassment*; which led to the development and release on 23 December 2020 of the Law Council's *National Action Plan to Reduce Sexual Harassment in the Australian legal profession* (**National Action Plan**).

In developing the National Action Plan, strong support was shown for revising Rule 42 to better express the profession's view that the ethical proscription of discrimination and harassment must apply beyond the confines of a legal practice workplace, to any setting or situation connected with the practice of law.

Rule 42 as previously promulgated referred to discrimination, sexual harassment and workplace bullying "in the course of practice". Also, the definition of "sexual harassment" was limited to harassment that was "unlawful" under the applicable state, territory or federal anti-discrimination or human rights legislation.

Concerns had been expressed that the expression "in the course of practice" placed a limitation on the scope of the Rule to discrimination and sexual harassment only where there is a clear connection with a legal workplace or other setting in which legal services are being provided, and thus excluding conduct that occurred outside of a legal workplace or legal practice setting, such as, for example, casual after-work drinks or a legal industry networking function, where there is nevertheless a connection with legal practice and the legal profession.

Concerns had also been expressed that the limitation in the former Rule 42 in turn placed a limitation on the application of the statutory concept of unsatisfactory professional conduct and the first limb of the statutory definition of professional misconduct,[202] with the result that the gravity of conduct occurring outside a legal workplace or legal practice setting fell to be considered only in terms of whether the conduct was of such gravity as to conclude that the perpetrator could no longer be considered a fit and proper person to engage in legal practice.

The interaction of the statutory concepts of *unsatisfactory professional misconduct* and *professional misconduct*, and professional misconduct at common law was later explored in *Council of the New South Wales Bar Association v EFA* in the context of what the Tribunal found to be "unwelcome conduct of a sexual nature" which occurred at a dinner for barristers' clerks. [203]

Following public consultations on the proposed reformulation of Rule 42, the Law Council determined that Rule 42 should clearly express the profession's view that discrimination and harassment, particularly sexual harassment, are unacceptable conduct for members of the legal profession in any context connected with legal practice and the legal profession. This accords with the fundamental duty of a solicitor set out in Rule 5 that a solicitor must not engage in conduct, in the course of legal practice or otherwise, which is likely, to a material degree to bring the profession into disrepute.

Application

The terms "harassment", "sexual harassment" and "workplace bullying" in the Rule are defined in the Glossary:

> "***harassment***" means harassment that is unlawful under the applicable state, territory or federal anti-discrimination or human rights legislation.
>
> "***sexual harassment***" means an unwelcome sexual advance, request for sexual favours, or otherwise engaging in other unwelcome conduct of a sexual nature to the person harassed in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

---

[202] These terms and the common law meaning of professional misconduct are discussed at pages 11-14 of this Commentary.

[203] [2021] NSWCATOD 21.

"***workplace bullying***" means bullying that is unlawful under the applicable state or territory anti-discrimination or human rights legislation or constitutes bullying at work under Commonwealth legislation. If no such legislative definition exists, it is conduct within the definition relied upon by the Australian Human Rights Commission to mean workplace bullying. In general terms, it includes the repeated less favourable treatment of a person by another or others in the workplace, which may be considered unreasonable and inappropriate workplace practice.

The revised Rule 42 will ensure that where a legal profession regulatory authority establishes that a solicitor has engaged in discrimination, sexual harassment, other forms of harassment, or workplace bullying, the regulatory authority is able to respond according to the gravity of the conduct.

43. Dealing with the regulatory authority

43.1 Subject only to his or her duty to the client, a solicitor must be timely, open, and frank in his or her dealings with a regulatory authority.

Commentary

Overview

Legal profession regulation across Australia follows a co-regulatory approach, to which the courts and tribunals, the profession itself and the regulatory authorities in each State and Territory contribute. These Rules are themselves an example of professional self-regulation.

When inquiries are made by a regulatory authority about matters relating to a solicitor's own conduct, or the quality or cost of the legal services provided or the conduct of the solicitor's legal practice, the solicitor has a duty to ensure that the matters are responded to in a timely fashion, and with openness and frankness. The duty not only arises under this Rule but is an aspect of a solicitor's duty as an officer of the court.

Example Johns v Law Society of New South Wales [1982] 2 NSWLR 1

[An inquiry into matters that may require further investigation] places upon solicitors as members of the profession, some obligation to assist an inquiry into their own conduct and that of other solicitors, rather than the solicitor, whose conduct is subject to inquiry, adopting a stance, as in adversary criminal litigation, that no obligation lies on him to assist the inquiry. The obligation to inform and assist has always been regarded as resting upon a solicitor or barrister whose conduct is the subject of an inquiry whether by the court or the committee, as appears in the court's observations on numerous occasions…[204]

Example Legal Practitioners Complaints Committee and Richardson [2006] WASAT 251

It has long been accepted that a legal practitioner has a duty to respond to enquiries by a professional disciplinary body, and that a failure to do so amounts to unprofessional conduct.

A practitioner's obligation to respond to a professional disciplinary body is a serious obligation. If the public is to continue to have faith in the extent to which the legal profession regulates its member's professional conduct, then it must be satisfied that practitioners respond in a timely manner, produce any documents requested, and otherwise give full co-operation to any enquiry into their conduct by the Committee.

Example The Council of the Law Society of the Australian Capital Territory v LP 12 [2028] ACTCA 60

It is inappropriate to attempt to confine the scope of the inquiry by semantic or obfuscatory argument. This is a case in point. It involves a simple complaint, which should be addressed on its merits. The respondent claims that he has a "defence on

[204] NSW Supreme Court (Court of Appeal), per Moffitt, P.

the merits". He should advance it. Even in the absence of a "defence on the merits", a confrontational and obstructive approach to disciplinary proceedings, and taking technical issues in an endeavour to bring the complaint to a conclusion otherwise than on the merits, is inappropriate and inconsistent with a practitioner's obligation to provide reasonable assistance in the conduct of such an inquiry, by reason of their position as officers of the court.

Application

Subject only to his or her duty to the client

The opening words of the Rule are a reminder that, while solicitors are expected to be open and frank in responding to inquiries made by regulatory authorities, they must nevertheless take care to uphold their duty under Rule 9 (Confidentiality) to not disclose client confidential information, particularly where that information may attract client legal privilege, except where one of more of the exceptions set out in Rule 9.2 apply. The most significant of these exceptions is: where the client expressly or impliedly authorises disclosure; or where the solicitor is permitted or compelled by law to disclose.

The fact that a client may have raised a matter in a complaint which then becomes the subject of inquiries by a regulatory authority should not of itself be taken as bringing the exceptions to disclosure of confidential information set out in Rule 9.2 into operation. Solicitors must have regard to any applicable jurisdictional legislation relating to disclosure of client confidential information.

The *Legal Profession Uniform Law*, and the legal profession legislation in some other jurisdictions specifically provides that where a client of a law practice makes a complaint, the client is taken to have waived legal professional privilege, or the benefit of any duty of confidentiality.

Example Legal Profession Uniform Law, section 321

(1) If a client of a law practice makes a complaint about the law practice or a lawyer, the complainant is taken to have waived legal professional privilege, or the benefit of any duty of confidentiality, to enable the law practice or lawyer to disclose to the appropriate authorities any information necessary for investigating and dealing with the complaint.

(2) Without limiting subsection (1), any information so disclosed may be used in or in connection with any procedures or proceedings relating to the complaint.

Example Legal Profession Act 2007 (Qld), section 492

(1) This section applies if a person signs a document waiving the person's legal professional privilege, or the benefit of a duty of confidentiality, about a matter (the waived matter) relating to the subject of a complaint or an investigation matter.

(2) An Australian legal practitioner can not refuse to disclose to the commissioner or relevant regulatory authority any information about the waived matter on the grounds of legal professional privilege or the duty of confidentiality.

(3) However, the Australian legal practitioner may refuse to disclose the information on the grounds that it might tend to incriminate the practitioner.

Timely, open, and frank

The legal profession laws of every State and Territory set out a similar process for dealing with complaints, beginning with a preliminary assessment by the designated regulatory authority. If the regulatory authority proceeds to investigate the complaint the solicitor will usually then be given at least a summary or details about the complaint and an opportunity to respond. Following this, the designated regulatory authority may make further requests for information.

Failing to properly respond to such requests can have significant consequences, as illustrated in *Law Society of South Australia v Jordan*[205], where it was found:

> *A picture emerges…of an apparent failure to treat the Board's letters seriously. It is no excuse that there were numerous complaints. The Board had a statutory obligation to investigate them. My assessment is that replying to them, or replying sooner than Mr Jordan did, would not have imposed a great burden upon Mr Jordan. After all, he was being asked to do no more than to comment on allegations by his clients. He did not have to present a complete defence to the allegations. A prompt and reasonable response might, indeed, have led to the resolution of some of the matters. To the extent that matters were outstanding by the time Mr Jordan had to consider how he would face the charges before the Tribunal, they were outstanding because of his own failure to respond.*

The solicitor's interests.

A corollary of the duty to be timely, open, and frank in dealing with a regulatory authority is the entitlement of a solicitor to have his or her interests protected. The principle was stated in *Johns v Law Society of New South Wales*[206] as follows:

> *However, despite the investigative nature of proceedings before the committee when questions are referred to it by the Law Society, and despite the non adversary nature of disciplinary proceedings before the court, a solicitor or barrister should be made aware of precisely what is put against him before a decision is come to or an order made adverse to him.*

The legal profession legislation in every State and Territory contains safeguards of the interests of the solicitor, one the most important of which is procedural fairness.

Section 319(1) of the Legal Profession Uniform Law, for example,[207] provides:

> (1) The rules of procedural fairness, to the extent that they are not inconsistent with the provisions of this Law or the Uniform Rules, apply in relation to—
>
> (a) the investigation and determination of complaints by the designated local regulatory authority; and

---

[205] [1998] SASC 6809.
[206] [1982] 2 NSWLR 1, per Moffitt, P.
[207] There will be variations across other jurisdictions in the extent and the way procedural fairness protections are set out in the legal profession legislation of those jurisdictions.

(b) the making of other decisions by the designated local regulatory authority in respect of complaints; and

(c) the procedures of the designated local regulatory authority in respect of complaints and any associated matters.

Glossary of terms

associate in reference to a solicitor means:

(a) a partner, employee, or agent of the solicitor or of the solicitor's law practice;

(b) a corporation or partnership in which the solicitor has a material beneficial interest;

(c) in the case of the solicitor's incorporated legal practice, a director of the incorporated legal practice or of a subsidiary of the incorporated legal practice;

(d) a member of the solicitor's immediate family; or

(e) a member of the immediate family of a partner of the solicitor's law practice or of the immediate family of a director of the solicitor's incorporated legal practice or a subsidiary of the incorporated legal practice.

associated entity means an entity that is not part of the law practice but which provides legal or administrative services to a law practice, including but not limited to:

(a) a service trust or company; or

(b) a partnerships of law practices operating under the same trading name or a name which includes all or part of the trading name of the law practice.

Australian legal practitioner means an Australian lawyer who holds or is taken to hold an Australian practising certificate.

Australian practising certificate means a current practising certificate granted under the legal profession legislation of any Australian jurisdiction.

Australian-registered foreign lawyer has the same meaning as set out in legal profession legislation.

Australian roll means a roll of practitioners maintained under the legal profession legislation of any Australian jurisdiction.

Authorised Deposit-taking Institution has the same meaning as an Authorised Deposit-taking Institution within the meaning of the *Banking Act 1959* (Cth).

barrister means an Australian legal practitioner whose Australian practising certificate is subject to a condition that the holder is authorised to engage in legal practice as or in the manner of a barrister only.

case means:

(a) the court proceedings for which the solicitor is engaged; or

(b) the dispute in which the solicitor is advising.

client with respect to the solicitor or the solicitor's law practice means a person (not an instructing solicitor) for whom the solicitor is engaged to provide legal services for a matter.

client documents means a document of a client

community legal service means an organisation or body that is a community legal service, a community legal centre, or a complying community legal centre for the purposes of the legal profession legislation of a jurisdiction.

compromise includes any form of settlement of a case, whether pursuant to a formal offer under the rules or procedure of a court, or otherwise.

corporate solicitor means an Australian legal practitioner who engages in legal practice only in the capacity of an in-house lawyer for his or her employer or a related entity.

costs includes disbursements.

court means:

(a) any body described as such;

(b) any tribunal exercising judicial, or quasi-judicial, functions;

(c) a professional disciplinary tribunal;

(d) an industrial tribunal;

(e) an administrative tribunal;

(f) an investigation or inquiry established or conducted under statute or by a Parliament;

(g) a Royal Commission;

(h) an arbitration or mediation or any other form of dispute resolution.

current proceedings means proceedings which have not been determined, including proceedings in which there is still the real possibility of an appeal or other challenge to a decision being filed, heard or decided.

discrimination means discrimination that is unlawful under the applicable state, territory or federal anti- discrimination or human rights legislation.

disqualified person means any of the following persons whether the thing that has happened to the person happened before or after the commencement of this definition:

(a) a person whose name has (whether or not at his or her own request) been removed from an Australian roll and who has not subsequently been admitted or re-admitted to the legal profession under legal profession legislation or a corresponding law;

(b) a person whose Australian practising certificate has been suspended or cancelled under legal profession legislation or a corresponding law and who, because of the cancellation, is not an Australian legal practitioner or in relation to whom that suspension has not finished;

(c) a person who has been refused a renewal of an Australian practising certificate under legal profession legislation or a corresponding law, and to whom an Australian practising certificate has not been granted at a later time;

(d) a person who is the subject of an order under legal professional legislation or a corresponding law prohibiting a law practice from employing or paying the person in connection with the relevant practice;

(e) a person who is the subject of an order under legal profession legislation or a corresponding law prohibiting an Australian legal practitioner from being a partner of the person in a business that includes the solicitor's practice; or

(f) a person who is the subject of any order under legal profession legislation or corresponding law, disqualifying them from managing an incorporated legal practice or from engaging in partnerships with certain partners who are not Australian legal practitioners.

document means any record of information, and includes:

(a) anything on which there is writing, and

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, and

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, and

(d) a map, plan, drawing or photograph,

and a reference to a document includes a reference to—

(e) any part of the document, and

(f) any copy, reproduction or duplicate of the document or any part of the document, and

(g) any part of such a copy, reproduction or duplicate.

engagement means the appointment of a solicitor or of a solicitor's law practice to provide legal services for a matter.

employee means a person who is employed or under a contract of service or contract for services in or by an entity whether or not:

(a) the person works full-time, part-time, or on a temporary or casual basis; or

(b) the person is a law clerk or articled clerk.

employer in relation to a corporate solicitor means a person or body (not being another solicitor or a law practice) who or which employs the solicitor whether or not the person or body pays or contributes to the solicitor's salary.

former client for the purposes of Rule 10.1, may include a person or entity that has previously instructed:

(a) the solicitor;

(b) the solicitor's current law practice;

(c) the solicitor's former law practice, while the solicitor was at the former law practice;

(d) the former law practice of a partner, co-director or employee of the solicitor, while the partner, co-director or employee was at the former law practice,

or, has provided confidential information to a solicitor, notwithstanding that the solicitor was not formally retained and did not render an account.

harassment means harassment that is unlawful under the applicable state, territory or federal anti-discrimination or human rights legislation.

immediate family means the spouse (which expression may include a de facto spouse or partner of the same sex), or a child, grandchild, sibling, parent or grandparent of a solicitor.

instructing solicitor means a solicitor or law practice who engages another solicitor to provide legal services for a client for a matter.

insurance company includes any entity, whether statutory or otherwise, which indemnifies persons against civil claims.

law practice means:

(a) an Australian legal practitioner who is a sole solicitor,

(b) a partnership of which the solicitor is a partner,

(c) a multi-disciplinary partnership,

(d) a community legal service,

(e) an unincorporated legal practice, or

(f) an incorporated legal practice.

legal costs means amounts that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services including disbursements but not including interest.

legal profession legislation means a law of a State or Territory that regulates legal practice and the provision of legal services.

managed investment scheme has the same meaning as in Chapter 5C of the *Corporations Act 2001* (Cth).

matter means any legal service the subject of an engagement or required to be provided by the solicitor or the solicitor's law practice to fulfil an engagement and includes services provided for:

(a) a case;

(b) a dealing between parties that may affect, create or be related to a right, entitlement or interest in property of any kind; or

(c) advice on the law.

multi-disciplinary partnership means:

(a) a partnership between one or more solicitors and one or more other persons who are not solicitors, where the business of the partnership includes the provision of legal services in this jurisdiction as well as other services;

but does not include:

(b) a partnership consisting only of one or more solicitors and one or more Australian-registered foreign lawyers.

office is not limited to physical business premises and includes the media through which a law practice provides legal services to clients away from a central, physical location.

opponent means:

(a) the practitioner appearing for a party opposed to the client of the solicitor in question; or

(b) that party, if the party is unrepresented.

order includes a judgment, decision or determination.

party includes each one of the persons or corporations who or which is jointly a party to any matter.

practitioner means a person or law practice entitled to practise the profession of law.

professional misconduct includes:

(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 solicitor is not a fit and proper person to engage in legal practice.

prosecutor means a solicitor who appears for the complainant or Crown in criminal proceedings.

regulatory authority means an entity identified in legal profession legislation which has responsibility for regulating the activities of solicitors in that jurisdiction.

serious criminal offence means an offence that is:

(a) an indictable offence against a law of the Commonwealth, a State or a Territory (whether or not the offence is or may be dealt with summarily), or

(b) an offence against a law of a foreign country that would be an indictable offence against a law of the Commonwealth, a State or a Territory if committed in Australia (whether or not the offence could be dealt with summarily if committed in Australia).

sexual harassment means an unwelcome sexual advance, request for sexual favours, or otherwise engaging in other unwelcome conduct of a sexual nature to the person harassed in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

solicitor means:

(a) an Australian legal practitioner whose Australian practising certificate is not subject to a condition that the holder is authorised to engage in legal practice as or in the manner of a barrister only; or

(b) an Australian registered foreign lawyer who practises as or in the manner of a solicitor.

solicitor with designated responsibility means the solicitor ultimately responsible for a client's matter or the solicitor responsible for supervising the solicitor that has carriage of a client's matter.

substantial benefit means a benefit which has a substantial value relative to the financial resources and assets of the person intending to bestow the benefit.

trustee company is as defined in relevant jurisdictional legislation: the *Trustee Companies Act 1964* (NSW), the *Trustee Companies Act 1968* (QLD), the *Trustee*

Companies Act 1984 (VIC), the *Trustee Companies Act 1988* (SA), the *Trustee Companies Act 1953* (TAS), the *Trustee Companies Act 1987* (WA) and the *Trustee Companies Act 1947* (ACT).

unsatisfactory professional conduct includes 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.

workplace bullying means bullying that is unlawful under the applicable state or territory anti-discrimination or human rights legislation or constitutes bullying at work under Commonwealth legislation. If no such legislative definition exists, it is conduct within the definition relied upon by the Australian Human Rights Commission to mean workplace bullying. In general terms, it includes the repeated less favourable treatment of a person by another or others in the workplace, which may be considered unreasonable and inappropriate workplace practice. It includes behaviour that could be expected to intimidate, offend, degrade or humiliate.

Historical notes

Rule 1

Amended 1 April 2022 to recognise that not all States and Territories had then adopted the ASCR as the conduct rules applicable in that State or Territory. The ASCR have now been adopted nationally.

Rule 2.3

Amended 1 April 2022 to correct a potential confusion. Conduct that constitutes a breach of a rule could, in some circumstances, also give rise to a civil liability.

Rule 5

Amended 1 April 2022 to clarify and improve the structure of the Rule

Rule 6

Amended 1 April 2022 to clarify the distinction between undertakings in the course of practice, and personal or private undertakings by a legal practitioner not connected with legal practice, which come within Rule 5.

Rule 8

Amended 1 July 2026 to clarify that the duty to only give effect to lawful, proper and competent instructions is an ongoing duty to be satisfied before accepting instructions to provide a legal service, and on an ongoing basis during the course of providing those legal services. See also concurrent amendment to Rule 13—failure by a client to provide relevant information or documents is grounds for termination of a retainer for "just cause".

Rule 10

Amended 1 April 2022 to align the Rule with the common law that protects the confidential information of a former client. In Victoria, consideration must be given to the obiter in the *Spincode* case that a solicitor may owe an ongoing duty of loyalty to a former client. Also aligns with the common law that consent can be signified in ways other than writing.

Rule 11

Amended 1 April 2022 to clarify the distinction between the duty of loyalty to a current client, and the concurrent duty to protect the confidential information of that current client.

Rule 11A

Amended 1 April 2022 to provide guidance to solicitors providing short-term legal assistance services on the application of the principles of Rule 10 and Rule11 in situations where it is not reasonably practicable to screen for conflicts of interest without a real risk arising of the client being denied legal assistance.

Rule 12.2

Amended 1 April 2022 to clarify and address a gap in the Rule about improper influence being exerted on a on a third party, as distinct from the client.

Rule 12.4.1

Amended 1 April 2022 to recognise that in some situations a third-party is legally authorised to sign a Will.

Rule 12.4.2

Amended 1 April 2022 to address a gap in familial relationships that should be considered as the "family" of the solicitor for the purposes of the Rule.

Rule 13.4

Amended 1 July 2026 to insert an inclusive definition of "just cause" illustrating circumstances that may arise under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) and similarly under other legislation, which require that a solicitor terminate a client engagement as a matter of ethical duty and professional responsibility.

Rule 14.2

Amended 1 April 2022 to acknowledge that an obligation not to destroy documents can arise under general law as well as statute.

Rule 15

Amended 1 April 2022 to correct the terminology used in the Rule.

Rule 16

Amended 1 April 2022 to modernise the Rule and recognise that client consent may be signified in ways other than writing.

Rule 17.2

Amended 1 April 2022 to harmonise with the equivalent Barristers' rule.

Rule 19

Amended 1 April 2022 for clarification.

Rule 20.2

Amended 1 April 2022 to harmonise with the equivalent Barristers' rules.

Rule 21.1

Amended 1 April 2022 to harmonise with the equivalent Barristers' rules.

Rule 21.8

Amended 1 April 2022 to modernised the rule in light of the significance of taking care in questioning alleged victims during proceedings about family and domestic violence issues.

Rule 21.9

Amended 1 April 2022 to harmonised with the equivalent Barristers' rules.

Rule 22.1–22.3

Amended 1 April 2022 to correct omissions from previous rules.

Rule 23

Amended 1 April 2022 to clarify and harmonise with the equivalent Barristers' rules

Rule 27.2

Amended 1 April 2022 to emphasise that the administration of justice must be considered where a solicitor, law practice or associate continues to act in the case where the solicitor is, or it is apparent that the solicitor will be, required to give evidence material to the contested issues before the court.

Rule 29.7

Amended 1 April 2022 to harmonise with the equivalent Barristers' rules.

Rule 31.2

Amended 1 April 2022 to clarify that a solicitor must not disclose or use any inadvertently disclosed confidential material that the solicitor has read, unless permitted or compelled by law.

Rule 33

Amended 1 April 2022 to address a possible ambiguity about what is meant by "dealing".

Rule 34

Amended 1 April 2022 to clarify the kinds of conduct subject to the Rule, and lower the threshold of conduct threatening to making a criminal or disciplinary complaint.

Rule 38

Under review as at July 2026. Attempted harmonisation with the equivalent Barristers' rules, while recognising the increasing movement of solicitor practitioners between judicial, court officer, tribunal and legal practitioner roles.

Rule 39

Amended 1 April 2022 to modernise the Rule in recognition of greater use of co-joined services by affiliated providers, not necessarily located in the same physical premises.

Rule 40

Amended 1 April 2022 to address a potential gap that the former rule would not cover the situation where a guilty plea was accepted, whether or not a conviction was recorded.

Rule 41

Omitted from 1 April 2002 in recognition that prohibitions and restrictions on solicitor's and Law practice's involvement in mortgage financing and management investment schemes are now dealt with by legislation or, where applicable, legal practice rules.

Rule 42

Amended 1 April 2022 to ensure that the scope of conduct declared by the Rule as unethical extends beyond just conduct occurring in a legal practice workplace.