

AUSTRALIAN SOLICITORS' CONDUCT RULES 2011 AND COMMENTARY

AUGUST 2013



Law Council
OF AUSTRALIA

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FOREWORD

The Australian Solicitors' Conduct Rules have been developed by the Law Council and its constituent bodies as a single, uniform set of professional conduct rules to be adopted by and for each state and territory within the nation.

Their adoption in all jurisdictions will mean that all of Australia's solicitors are bound by a common set of professional conduct rules when dealing with their clients, the courts, their fellow practitioners, regulators and others with whom they have a professional relationship.

For the convenience of practitioners a version of the Rules has been prepared with an accompanying commentary. The Commentary is intended to provide additional information and guidance in understanding how particular Rules might apply in some situations.

The Commentary is not intended to be the sole source of information about the Rules – extensive information is available from Law Societies to assist in understanding the application of the Rules to the variety of situations encountered in legal practice.

Michael Colbran QC

President

July 2013

NATURE AND PURPOSE OF THE RULES

1. APPLICATION AND INTERPRETATION

- 1.1 These Rules apply to all solicitors within Australia, 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

Australian solicitors provide legal services to their clients in a variety of practice contexts. These *Rules* apply to Australian solicitors generally, including solicitors engaged in private legal practice, as in-house counsel, as government lawyers, in legal aid organisations, in community legal centres and in other forms of community-based legal assistance, including legal services provided on a pro bono basis.

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, but cannot be enforced by a third party.

COMMENTARY

General role of the Commentary to the Rules

The Commentary that appears with these *Rules* does not constitute part of the *Rules* and is provided only as guidance. The Commentary is updated periodically. References to case law and legislation are intended to be current at the date of issue of the Commentary.

Solicitors ethical obligations to observe the highest standards

Solicitors ought to be aware that these *Australian Solicitors' Conduct Rules* are not the sole touchstone for determining a solicitor's ethical obligations. Accordingly, reference is made in parts of the Commentary to relevant common law and legislation; but solicitors should note that the Commentary, in providing guidance on the application of various ethical duties, does not seek to include comprehensive reference to relevant common law or legislation.

If the common law and/or legislation in any jurisdiction prescribe a higher standard than these *Rules* then a solicitor is required by these *Rules* to comply with the higher standard. Alternatively, if a *Rule* sets a higher standard than the common law and/or legislation then it is the *Rule* that needs to be observed.

Thus a solicitor is required to observe the higher of the standards required by these *Rules* and the common law and/or legislation, in any instance where there is a difference between them in any jurisdiction.

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.

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

Solicitors should, as a matter of course, consider and advise clients of the possible availability of legal aid where appropriate.

5. DISHONEST AND DISREPUTABLE CONDUCT

- 5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:
- 5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice; or
 - 5.1.2 bring the profession into disrepute.

COMMENTARY

The law requires that an objective standard is used to determine whether a solicitor is a "fit and proper person".¹ 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;²
- Lack of integrity;³
- Dishonest, deceitful or fraudulent conduct;⁴
- Defiance of the court, the rule of law or process of justice;⁵ or
- Moral blameworthiness.⁶

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.

¹ *Council of the New South Wales Bar Association v Sahade* [2007] NSWCA 145, at [84].

² *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279 at [29].

³ *NSW Bar Association v Young* (2003) 54 ATR 22, at [11].

6. UNDERTAKINGS

- 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

Undertakings are usually deemed to be personal unless otherwise stated.⁷ An undertaking binds the practitioner, not as a matter of contract, but as a matter of professional conduct and comity.⁸

Accordingly, solicitors who wish to avoid personal responsibility pursuant to an undertaking must clearly state, in writing, 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.⁹

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.¹⁰ Hence, employees should not be permitted to give undertakings unless clear authorisation is given.

⁴ *Council of the New South Wales Bar Association v Sahade* [2007] NSWCA 145 at [58]. *Borhani v Legal Practitioners Admission Board* [2013] QCA 14

⁵ *Attorney-General and Minister for Justice v Gregory* [1998] QCA 409, at [4].

⁶ *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]

⁷ See G. E. Dal Pont, *Lawyers' Professional Responsibility*, 5th ed. 2013, [22.20.5], [22.45]

⁸ *Re Vincent Cofini* [1994] NSWLST 25

⁹ *Auckland Standards Committee 3 of New Zealand Law Society v W* [2011] NZLR 117, at [42]

¹⁰ *Burbery Mortgage Finance and Savings Ltd (in receivership) v O'Neill* [1995] ANZ Convey R 387, at 391

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 litigation.

8. CLIENT INSTRUCTIONS

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

COMMENTARY

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 age¹¹, 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.¹²

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.¹³ Where a solicitor is unsure about the appropriate response in a situation where the client's capacity is in doubt, the solicitor can, pursuant to Rule 9.2.3, seek confidential advice on his or her legal or ethical obligations.

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.

¹¹ *Kanton v Vosahlo* [2004] VSCA 235, at [3].

¹² *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87.

¹³ See, for example, the Client Capacity Guidelines for civil and family law matters published by the Law Society of New South Wales, accessible at: <http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/Protocolsguidelines/Clientcapacityguidelines/index.htm>, and the Law Society of South Australia, accessible at <http://www.lawsociety.sa.asn.au/PDF/ClientCapacityGuidelines.pdf>

- 9.2 A solicitor may disclose confidential client information 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

Where a solicitor relies upon an exception in Rule 9.2, it is for that solicitor to show that circumstances exist to justify making the disclosure.

In respect of the exception in Rule 9.2.1, an implied authorisation to disclose confidential client information can be necessarily inferred from the nature of the retainer, in order to enable a solicitor to carry out the client's instructions.¹⁴ However, a solicitor should seek express informed consent in writing, in all cases where it is practicable to do so.

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 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.

Where a solicitor is retained by an insurer for the insured, the insured may be a client for the purpose of this rule.

Death of client

Upon the death of a client, confidentiality passes to the client's legal personal representatives.

10. CONFLICTS CONCERNING FORMER CLIENTS

- 10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients, except as permitted by Rule 10.2.
- 10.2 A solicitor or law practice who or which is in possession of confidential information of 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 written consent to the solicitor or law practice so acting; or
 - 10.2.2 an effective information barrier has been established.

COMMENTARY

Ongoing duties owed to former clients

After the solicitor-client retainer has ended, a solicitor has a continuing duty to maintain the confidentiality of the former client's information. A solicitor or law practice in possession of confidential information of a former client may be in a position of duty-duty conflict if it would be in the interests of a current client to know or make use of that confidential information.

¹⁴ See G E Dal Pont *Lawyers' Professional Responsibility* 5th ed. 2013 at [10.55]

When taking new instructions, a solicitor or law practice must determine whether it is in possession of any confidential information of a former client that it may have to disclose or make use of in order to fulfil its duties to any existing client. If it is, the question must then be asked whether that information is material to the matter of an existing client. If it is, the solicitor 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.

In *Prince Jefri*¹⁵ the House of Lords held that the fiduciary duty of loyalty ended with the termination of the retainer. This decision has been widely followed in Australia.¹⁶

However, solicitors must also consider the decision of Brooking JA in *Spincode*¹⁷ who envisaged that solicitors may owe an ongoing equitable duty of loyalty to former clients which goes beyond the maintenance of confidential information. *Spincode* has been followed and applied in a series of chiefly Victorian decisions.¹⁸ Whilst the decision has not received wholesale endorsement elsewhere, solicitors should have regard to whether they are subject to an ongoing obligation (see also Rule 2 and the Commentary to Rule 2 above).

Solicitors should also bear in mind that, even where there is no conflict of duties arising out of the potential disclosure of confidential information, a court may, exceptionally, restrain them from acting as part of its inherent supervisory jurisdiction over officers of the Court. That jurisdiction will be exercised where a fair-minded reasonably informed person would find it subversive to the appearance of justice to allow the representation to continue.¹⁹

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:²⁰

"[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 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."

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.²¹

¹⁵ *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222.

¹⁶ See the 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].

¹⁷ *Spincode Pty Ltd v Look. Software Pty Ltd* (2001) 4 VR 501, at 513.

¹⁸ *Commonwealth Bank of Australia v Kyriackou* [2008] VSC 146; *Dennis Hanger Pty Ltd v Brown* [2007] VSC 495; *GT Corporation Pty Ltd v Amare Safety Pty Ltd* [2007] VSC 123; *Adam 12 Holdings Pty Ltd v Eat & Drink Holdings Pty Ltd* [2006] VSC 152; *McCann v McCann* [2006] VSC 142; *Disctronics Ltd v Edmonds* [2002] VSC 454; *Sent v John Fairfax Publication Pty Ltd* [2002] VSC 429.

¹⁹ See generally *Kallinicos v Hunt* (2005) 64 NSWLR 561.

²⁰ *Re a firm of Solicitors* [1997] Ch 1 at 9-10.

²¹ See, for example, *Yunghanns v Effic Ltd* (SC (Vic) Gillard J, 3 July 1998, (unreported)).

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.²²

Examples

- 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.
- 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.
- 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

A conflict arises if confidential information obtained by a solicitor or law practice during the representation of a former client might reasonably be concluded to be "material" to a current client's matter.

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.

Informed written consent

A solicitor may undertake a subsequent representation that is adverse to a former client, in that it involves disclosure of that client's confidential information, provided the former client gives informed written consent for the solicitor to act. Such consent is likely to involve the former client agreeing to allow the solicitor or law practice to disclose its confidential information to his/her detriment and for the benefit of the other client.

²² See, for example *Mintel International Group Ltd v Intel (Australia) Pty Ltd* (2000) 181 ALR 78, at [44] (in the context of barristers).

Example

A solicitor acted for the vendor of a parcel of land. As part of this work, the solicitor learnt from this client that the land was contaminated. A new client seeks to instruct the solicitor in a proposal to purchase the same parcel of land. This client does not know that the land was contaminated. The solicitor is under an obligation to inform the new client of the contamination. If the solicitor obtains the informed written consent of the former client, the solicitor can divulge the confidential information and thereby avoid any conflict of duties. The former client would have to be advised that, among other things, revealing the confidential information may expose the former client to a claim in respect of the contamination.

Care must be taken in obtaining such written consent to ensure that duties to the existing client are not breached. Depending on the circumstances, it may not be possible to identify the existing client or the precise use to which the confidential information will be put.

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 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 (also known as a "Chinese Wall") are also discussed in the Commentary to Rule 1.1. 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 Guidelines²³ 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.

It is important to appreciate that an information barrier can only be effective where the conflict in question concerns confidential information. The barrier aims to ensure that that information is quarantined from those who would otherwise have a duty to disclose or otherwise use it to the benefit of another client.

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.

²³ 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>

While judges regularly remark that erecting an effective information barrier is difficult, in practice they have become more common. An effective information barrier will ordinarily exhibit the following features:

- physical segregation of the personnel involved;
- undertakings not to communicate the relevant confidential information;
- a regular education program;
- strict and carefully defined procedures for dealing with any contact between personnel involved or any other crossing of the barrier;
- monitoring by compliance officers of the effectiveness of the barrier; and
- disciplinary sanctions.

In summary, an information barrier will only be effective if it eliminates any real and sensible possibility of misuse of confidential information²⁴, although in family law the test is likely to be stricter again.²⁵

At least in non-family law matters a minor failure to follow acceptable information barrier procedures may not be fatal to the effectiveness of that barrier.

Example

An information barrier requires certain documents to be kept within a locked room to which only certain personnel have a key. If it is discovered that the room was not locked one night, but there is no evidence that any unauthorised personnel entered the room, it is most unlikely that the information barrier would thereby fail to be effective.

However, the court's general approach is one of extreme caution and may result in the granting of an injunction to restrain the law practice from continuing to act for the client. This may be the case where all effective measures have been taken and a technical or inadvertent breach occurs and results in a potential (rather than actual) disclosure.

Example²⁶

A partner of the law practice had, two years before, acted for a client whose confidential information needed to be quarantined from all staff undertaking work for a subsequent client. The quarantine was underpinned by rigorous policies that included the solicitors involved in the earlier retainer providing undertakings and filing affidavits that they would maintain confidences. A solicitor working on the subsequent retainer and whose supervising partner was away, needed a partner to sign a short minute of agreement relating to certain procedural matters (dates for discovery procedures). The 'quarantined' partner unwittingly signed the note. While satisfied no confidential information was disclosed in the transaction, the Court nevertheless granted the earlier client's injunction restraining the law practice from further acting.

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. Although the definition does not mean that the migrating individual 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.

²⁴ *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 22.

²⁵ *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.

²⁶ 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.²⁷

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.

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, except where permitted by this Rule.
- 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 Rule 11.3.
- 11.3 Where a solicitor or law practice seeks to act in the circumstances specified in Rule 11.2, the solicitor 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.
- 11.4 In addition to the requirements of Rule 11.3, where a solicitor or law practice is in possession of confidential information of a client (the first client) which might reasonably be concluded to be material to another client's current matter and detrimental to the interests of the first client if disclosed, there is a conflict of duties and the solicitor and the solicitor's law practice must not act for the other client, except as follows:
- 11.4.1 a solicitor may act where there is a conflict of duties arising from the possession of confidential information, where each client has given informed consent to the solicitor acting for another client;
 - 11.4.2 a law practice (and the solicitors concerned) may act where there is a conflict of duties arising from the possession of confidential information where an effective information barrier has been established.
- 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 the clients (or a group of clients between whom there is no conflict) provided that the duty of confidentiality to other client(s) is not put at risk and the parties have given informed consent.

²⁷ 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 Phillips Fox (a firm)* (1999) 21 WAR 309 (where it was not).

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 that 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 duties owed to another client, unless the exceptions under Rule 11 apply to neutralise 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 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 the fiduciary duty to act in the interests of Client A while at the same time discharge the duty to act in the interests of 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;
- 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; and
- the solicitor or law practice considers it will be able to discharge its duty to act in the best interests of each client.

Rule 11.4 deals with *confidential information conflicts*. A duty-duty conflict to which Rule 11.4 is directed arises when a solicitor or law practice, in acting for concurrent clients is in, or comes into, possession of confidential information of one or other client. 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 may be material to the interests of Client B (and thus would need to be disclosed), but that disclosure would be detrimental to the interests of Client A.

In this situation, Rule 11.4.1 contemplates that a solicitor within the same law practice must not act for Client B unless:

- both Client A and Client B are aware that there is a confidential information conflict;
- each of Client A and Client B has given informed consent to another solicitor within that law practice acting for the other client; and
- each solicitor considers he/she would be able to discharge his/her duties to his/her client.

Rule 11.4.2 contemplates that a law practice may continue to act for both Client A and Client B provided:

- both Client A and Client B are aware that there is a confidential information conflict;
- each of Client A and Client B has given informed consent to another solicitor within that law practice acting for the other client; and
- the law practice can establish an effective information barrier so that the confidential information of Client A is not disclosed to those of the law practice's solicitors who are acting for Client B.

In the case of a solicitor working within a law practice, it should be noted that the requirements of Rules 11.4.1 and 11.4.2 are cumulative.

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:

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

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. In these circumstances, the obligation is 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 risk of the misuse of confidential information or of a breach of the solicitor's duties to the client, an injunction will usually be granted. Even absent any such 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. As a final resort, a court may restrain them from acting as part of its inherent supervisory jurisdiction over legal practitioners.²⁸

Duties to clients

As the relationship between a solicitor and client gives rise to fiduciary duties, a solicitor must always act 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. Two areas of particular concern involve confidential information and competing business interests. While solicitors owe duties to clients, law practices must also discharge those duties at the law practice level. Furthermore, principals are responsible for ensuring the duties owed to each and every client of the law practice are discharged by its solicitors and employees. It follows that where two law practices merge, or a solicitor moves practices and brings a client with them, conflicts may arise that must be dealt with in accordance with Rule 11.

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 seek to continue to act for a client or clients. It cannot be emphasised too strongly that the standards set by the common law and by these Rules for a solicitor (or law practice) continuing 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 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 an independent judgment to determine whether a conflict is likely to arise, even where one does not presently exist.

²⁸ see *UTi (Aust.) Pty Ltd v Partners of Piper Alderman* [2008] NSWSC 219 (which involved a potential ‘current client’ conflict).

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.

Examples

- 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.
- 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. The courts have discouraged the practice. The Law Institute of Victoria has issued "Guidelines in the Representation of the Co-accused".²⁹

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 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,³⁰ 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.

²⁹ 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>

³⁰ *UTI (Aust.) Pty Ltd v The Partners of Piper Alderman* [2008] NSWSC 219.

Non-contentious matters

A solicitor or law practice can generally act for two or more parties in a non-contentious matter where those parties 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 parties.

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 parties 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(s) is not put at risk and the parties 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.

Awareness and informed consent

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.

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.³¹

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):

- 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.

³¹ *Clark Boyce v Mouat* [1993] 3 NZLR 641, at 646.

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.

Informed consent is also required whenever a solicitor or law practice seeks to act in accordance with Rule 11.4, when there is a confidential information conflict.

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 – sometimes also known as a “Chinese Wall” – 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 not address the use of information barriers in concurrent 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.³² It is therefore necessary to adapt the Guidelines somewhat in applying them to the situation of concurrent clients.

The Guidelines contemplate the necessity to screen certain people 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 these screened people do not disclose any confidential information to personnel working on the current matter. Where, as contemplated by Rule 11, there is a conflict involving concurrent clients, there will be two or more sets of screened people. 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 parties.

³² See *UTI (Aust.) Pty Ltd v Partners of Piper Alderman* [2008] NSWSC 219, at para [39]-[45] where Barrett J applied the principle in former client cases to a situation of a potential conflict between concurrent clients.

Except in rare and exceptional circumstances, a solicitor should cease to act for both parties.

Under Rule 11.5, if a conflict arises between existing clients, a solicitor or law practice cannot continue to act for one of the parties unless both of the parties have given their informed consent to the new arrangement and there is no risk of a conflict involving disclosure of the confidential information of any of the clients.

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 parties. 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* Burchett J drew a distinction between cases where the one solicitor has acted for both parties, and the case where different solicitors in a law practice have acted for the two parties.³³

“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 of this...kind 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 and the ongoing client have given renewed informed consent to the new arrangement, so that the possibility of a new arrangement is subject to the consent of the (now) former client.

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:

“[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.”³⁴

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. 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 member 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.

³³ *Wan v McDonald* (1992) 33 FCR 491, at 513.

³⁴ *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd* [2002] VSC 324, at [25]

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 exercise any undue influence intended to dispose the client to benefit the solicitor in excess of the solicitor's fair remuneration for legal services provided to the client.
- 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 client signs the Will:
- (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; 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 that 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 that the solicitor has first disclosed the payment or financial benefit to the client.

COMMENTARY

Because the relationship between solicitor and client is of a fiduciary character, in dealing with the client the solicitor must not:

1. engage in situations where his or her own interests do or may conflict with the duty owed to the client except with the latter's fully informed consent;
2. profit from the position of solicitor except with the client's fully informed consent.

Rule 12 is directed to reflecting the application of fiduciary duties in the solicitor-client context. It also highlights that the relationship between a solicitor and client is one of influence, capable of giving rise to the presumption of undue influence. To this end, it addresses various scenarios where, as between solicitor and client, fiduciary law and the presumption of undue influence can function to constrain solicitor behaviour.

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.³⁵

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.³⁶ 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'.³⁷

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 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.³⁸

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

³⁵ *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.

³⁶ *Re Will of Shannon* [1977] 1 NSWLR 201 at [217]

³⁷ *Re Will and Estate of Foster (dec'd)* [2012] VSC 315, at [29]

³⁸ *Walker v D'Alessandro* [2010] VSC 15, at [30]

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.

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:

- Section 293(1), *Legal Profession Act 2006* (Northern Territory);
- Section 68(1), *Personal Injuries Proceedings Act 2002* (Queensland); and
- Section 20(1), *Civil Liability Act 2002* (Western Australia).

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).

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 seven (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.

COMMENTARY

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

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 solicitor's 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 legislation to the contrary.

COMMENTARY

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 client⁴¹ on all the client's files. Although the lien may be claimed for unbilled costs,⁴² 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.⁴³

³⁹ For a list of examples of "just cause" see G E Dal Pont, *Lawyers Professional Responsibility*, 5th ed. 2013, at [3.195].

⁴⁰ *Richard Buxton (a firm) v Mills-Owen* [2010] 4 All ER 405, at 417.

⁴¹ *Re Taylor, Stileman & Underwood* [1891] 1 Ch 590, at 596 per Lindley LJ.

⁴² *Re Cao* [1996] ANZ ConvR 321, at 324.

⁴³ *White v Bini* [2003] FCA 669, at [9].

⁴⁴ *Ex Parte Fuller* (1881) 16 Ch D 617, at 619; *Maloney v Marler & Darvell (a firm)* [2004] QCA 310 (solicitors not entitled to a lien over certificates of title held on behalf of investors in their managed investment scheme).

⁴⁵ (1988) 15 NSWLR 348.

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.⁴⁴

Retention of client documents

Rule 14.1 requires client documents to be returned upon completion or termination of the engagement as soon as reasonably possible when requested to do so by the client.

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*⁴⁵ illustrates the ownership distinctions between various types of documents that may be created during the course of a matter.

While Rule 14.2 permits a solicitor or law practice to destroy client documents after a period of 7-years has elapsed since the completion or termination of the engagement, this is subject to any client instructions or legislation to the contrary. Solicitors must also have regard 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*⁴⁶, 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.

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 (preferably in writing). It is advisable that client consent be obtained by including an acknowledgment in standard client agreements, that the file will be destroyed after 7 years.

Also, it is advisable to seek additional guidance from professional associations on issues relating to ownership, retention and destruction of documents where there is uncertainty.⁴⁷

Refer to:

G E Dal Pont, *Lawyers Professional Responsibility*, 5th ed. Ch 16.

G E Dal Pont, *Law of Costs*, 3rd ed. 2013, Ch 26.

15. LIEN OVER ESSENTIAL 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 surrender the documents to the second solicitor:

- (i) if the second solicitor undertakes to hold the documents subject to the lien and with 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.

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

⁴⁶ [2012] QSC 178 [14]

⁴⁷ See for example *Law Institute of Victoria File Ownership, Retention and Destruction Guidelines*, accessible at <http://www.liv.asn.au/PDF/Practising/Ethics/2011FileOwnershipRetention>

⁴⁸ See G E Dal Pont, *Lawyers' Professional Responsibility*, 5th ed, 2013 [16.90], [16.95].

⁴⁹ The Law Society of NSW has issued a suggested Tripartite Agreement Deed for the guidance of solicitors. See <http://www.lawsociety.com.au/ForSolicitors/professionalstandards/practicefaqs/index.htm>

COMMENTARY

Reasonable security⁴⁸ may include, but is not limited to:

- (i) an undertaking given by a solicitor;
- (ii) a deed entered into by the relevant parties, such as the first solicitor, the second solicitor and the client.⁴⁹

16. CHARGING FOR DOCUMENT STORAGE

16.1 A solicitor must not charge:

16.1.1 for the storage 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 agreed in writing to such charge being made.

COMMENTARY

Solicitors practising in Victoria should note the decision in *LSC v Rose*,⁵⁰ 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.

⁵⁰ *Legal Services Commissioner v Rose* (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 will not have breached 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.

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.

19. FRANKNESS IN 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 must:
- 19.5.1 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.

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 advise the client that the court should be informed of the lie, falsification or suppression and request authority so to inform the court; and
 - 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 cease to act, if there is enough time for another solicitor to take over the case properly before the hearing, and the client does not insist on the solicitor continuing to appear for the client;
- 20.2.2 in cases where the solicitor continues to act for the client:
- (i) must not falsely suggest that some other person committed the offence charged;
 - (ii) must not set up an affirmative case inconsistent with the confession;
 - (iii) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;
 - (iv) may argue that for some reason of law the client is not guilty of the offence charged; and
 - (v) may argue that for any other reason not prohibited by (i) and (ii) the client should not be convicted of the offence charged;
- 20.2.3 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
- 20.3.3 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.

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 made principally in order to harass or embarrass a person; and
- 21.1.4 is not made principally in order to gain some collateral advantage for the client or the solicitor or the instructing solicitor 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:
- any court document settled by the solicitor;
 - any submission during any hearing;
 - the course of an opening address; or
 - 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 21.1, 21.2, 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 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.

22. COMMUNICATION WITH OPPONENTS

- 22.1 A solicitor must not knowingly make a false 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 statement made by the solicitor to an opponent as soon as possible after the solicitor becomes aware that the statement was false.
- 22.3 A solicitor will not have made a false 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.

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 will not have breached Rule 23.1 simply by telling a prospective witness or a witness that he or she need not agree to confer or to be interviewed or by advising about relevant obligations of confidentiality.

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 must not encourage the witness to give evidence different from the evidence which the witness believes to be true.

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.

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.

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 may act or continue to act for the client unless doing so would prejudice the administration of justice.

COMMENTARY

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.

Rule 27.2 deals with the question of whether or not a solicitor 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 evidence⁵¹ which may prejudice the administration of justice.⁵²

The test to be applied in determining whether continuing to act would prejudice the administration of justice is an objective one.⁵³ 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.⁵⁴

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.⁵⁵

⁵¹ See Ipp J, *Lawyers' Duties to the Court*, 114 LQR at 92.

⁵² See for example *Paino v MDN Mortgages Pty Ltd* [2009] NSWSC 898.

⁵³ See *UTI (Aust) Pty Ltd v Partners of Piper Alderman* [2008] NSWSC 219, at [46-52].

⁵⁴ *Buřalo Corporation Pty Ltd v Lend Lease Primelife Ltd* [2010] VSC 672, at [9].

⁵⁵ *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.

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 circumstance;
- 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; or
- (iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable,
- 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) or (iv) together with the grounds on which the prosecutor has reached that decision.
- 29.8 A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully or improperly 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;
 - 29.12.4 may submit that a custodial or non-custodial sentence is appropriate; and
 - 29.12.5 may inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant decisions.
- 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.

RELATIONS WITH OTHER SOLICITORS

30. ANOTHER SOLICITOR 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.

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 notify the opposing solicitor or the other person immediately; and
 - 31.2.2 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.

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.

33. COMMUNICATION WITH ANOTHER SOLICITOR'S CLIENT

- 33.1 A solicitor must not deal directly with the client or clients of 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 dealing would not be unfair to the opponent's client;
 - 33.1.3 the substance of the dealing 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 contact.

RELATIONS WITH OTHER PERSONS

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 which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person;
 - 34.1.2 threaten the institution of criminal or disciplinary proceedings 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.

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.

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 body.

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); and
- 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.

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.

39. SHARING PREMISES

- 39.1 Where a solicitor or law practice shares an office with any other entity or business engaged in another calling, and 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 law practice, including (if applicable) that the services provided by the other entity are not provided by the law practice.

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 the provision of legal services by the solicitor, with:
- 40.1.1 any disqualified person; or
 - 40.1.2 any person convicted of an indictable offence that involved dishonest conduct, whether or not a conviction was recorded.

41. MORTGAGE FINANCING AND MANAGED INVESTMENTS

- 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 body and where no claim may be made against a fidelity fund.

42. ANTI-DISCRIMINATION AND HARRASSMENT

- 42.1 A solicitor must not in the course of practice, engage in conduct which constitutes:
- 42.1.1 discrimination;
 - 42.1.2 sexual harassment; or
 - 42.1.3 workplace bullying.

43. DEALING WITH THE REGULATORY AUTHORITY

- 43.1 Subject only to his or her duty to the client, a solicitor must be open and frank in his or her dealings with a regulatory authority.
- 43.2 A solicitor must respond within a reasonable time and in any event within 14 days (or such extended time as the regulatory authority may allow) to any requirement of the regulatory authority for comments or information in relation to the solicitor's conduct or professional behaviour in the course of the regulatory authority investigating conduct which may be unsatisfactory professional conduct or professional misconduct and in doing so the solicitor must furnish in writing a full and accurate account of his or her conduct in relation to the matter.

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.

Note: Upon the death of a client, a solicitor's duties under these Rules pass to the client's legal personal representatives.

“client documents” means documents to which a client is entitled.

“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.

“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.

“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; or
- (d) 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.

“legal services” means work done, or business transacted, in the ordinary course of legal practice.

“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.

“mortgage financing” means facilitating a loan secured or intended to be secured by mortgage by –

- (a) acting as an intermediary to match a prospective lender and borrower;
- (b) arranging the loan; or
- (c) receiving or dealing with payments under the loan,

but does not include:

- (d) providing legal advice, or preparing an instrument, for the loan;
- (e) merely referring a person to a prospective lender or borrower, without contacting the prospective lender or borrower on that person's behalf or facilitating a loan between family members; or
- (f) facilitating a loan secured by mortgage:
 - (i) of which an Australian legal practitioner is the beneficial owner; or
 - (ii) held by an Australian legal practitioner or a corporation in his, her or its capacity as the trustee of any will or settlement, or which will be so held once executed or transferred.

“multi-disciplinary partnership” means:

- 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.

“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.

“principal” means a solicitor who is the holder of a principal practising certificate, within the meaning of legal profession legislation.

“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 or any jurisdiction (whether or not the offence is or may be dealt with summarily);
- (b) an offence against the law of another jurisdiction that would be an indictable offence against a law of this jurisdiction (whether or not the offence could be dealt with summarily if committed in this jurisdiction); or
- (c) an offence against the law of a foreign country that would be an indictable offence against a law of the Commonwealth or this jurisdiction if committed in this jurisdiction (whether or not the offence could be dealt with summarily if committed in this jurisdiction).

“sexual harassment” means harassment that is unlawful under the applicable state, territory or federal anti-discrimination or human rights legislation.

“solicitor” means:

- (a) an Australian legal practitioner who practises as or in the manner of a solicitor; 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. 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.

ATTACHMENT A: PROFILE OF THE LAW COUNCIL OF AUSTRALIA

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel, President-elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC
- Mr Justin Dowd
- Dr Chris Kendall

The Secretariat serves the Law Council nationally and is based in Canberra.



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