
Australian Solicitors' Conduct Rules 2011 and Consultation Draft Commentary

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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.

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

Solicitors ought to be aware that these *Australian Solicitors' Conduct Rules* are not the sole touchstone for determining a solicitor's ethical obligations.

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, in any instance where there is a difference between the two 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.

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 imposes an objective standard on what is a "fit and proper person".¹ Personal behaviour may impact upon whether the solicitor is a "fit and proper person". The types of factors relevant to such an assessment include, but are not limited to:

- Disregard for the solicitor's legal and civic obligations;²
- A solicitor's medical condition;³
- Lack of integrity;⁴
- Dishonest, deceitful or fraudulent conduct;⁵
- Serious disdain for victims of crime;⁶
- Defiance of the court, the rule of law or process of justice;⁷ or
- Moral blameworthiness.⁸

¹*The Council of the NSW Bar Association v Sahade* [2007] NSWCA 145, at [84]; and *Clough v Queensland Law Society Incorporated; Attorney - General v Clough* [2002] 1 Qd R 116, at [61].

²*NSW Bar Association v Cummins* (2001) 52 NSWLR 279, [29].

³*Legal Profession Complaints Committee v A Practitioner* [2010] WASC 13.

⁴*NSW Bar Association v Young* [2003] (2003) 54 ATR 22, at [11].

⁵*The Council of the NSW Bar Association v Sahade* [2007] NSWCA 145 at [58].

⁶*Legal Services Board v McGrath (No.2)* (2010) 29 VR 325, at [15].

⁷*Attorney - General and Minister for Justice v Gregory* [1998] QCA 409, at [4].

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. Ambiguity will usually be construed strictly against the solicitor.

Solicitors should act prudently in giving undertakings and ensure, as far as possible, they are in writing or confirmed in writing and expressed in clear, precise and unambiguous terms. The means of fulfilment must be in the solicitor's complete control, otherwise the undertakings must be subject to conditions.

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

⁸*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].

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

The common law presumption is that every adult person is competent to make their own decisions. This presumption can be displaced in circumstances such as infancy, old age, mental infirmity, suspicion of undue influence or of fraud, where the client is unable to communicate.⁹

9. CONFIDENTIALITY

- 9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not:
- 9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor's law practice; or
- 9.1.2 a barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,

EXCEPT as permitted in Rule 9.2.

- 9.2 A solicitor may disclose 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*Kanton & Anor v Vosahlo* [2004] VSCA 235, at [3].

- 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, a solicitor should seek express informed consent in writing, in all cases where it is practicable to do so.

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

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 would 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 for lack of evidence, the client admitted to the solicitor he had acted dishonestly.

Subsequently, the solicitor is briefed by a lender which intends advancing money to the former client. The solicitor has a conflict of interests. 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*¹⁰ 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.¹¹

However, solicitors must also consider the decision of Brooking JA in *Spincode*¹² who found that solicitors may have an ongoing equitable duty of loyalty to their former clients. *Spincode* has been followed and applied in a series of decisions of the Supreme Court of Victoria.¹³ Whilst the decision has not been followed in other jurisdictions, solicitors in Victoria in particular should have regard to this 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, a Court may restrain them from acting as part of its supervisory jurisdiction over officers of the Court. That jurisdiction will be exercised where a reasonable, informed member of the public would conclude that the solicitor should be restrained from acting so as to protect the due administration of justice. For a useful discussion of this jurisdiction see *Kallinicos*.¹⁴

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:¹⁵

[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.¹⁶

Classes of information that may be confidential 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, for example in *Yunghanns* case.¹⁷

Whether information falling within the third category can be said to be truly confidential will be a question of fact and is 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, particularly where business practices and strategies are so well-known that they do not constitute confidential information.¹⁸

Examples

- Through the course of representing a business person over several years, a solicitor has become aware of his client’s private financial information. The client’s marriage breaks down and the client’s spouse approaches the solicitor to

¹⁰ *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222.

¹¹ See the authorities cited in the judgment of *Steytler P in Ismail-Zai v Western Australia* (2007) 34 WAR 379, at [20]-[25]; and also Ward J in *Cleveland Investments Global Limited v Evans* [2010] NSWSC 567, at [38]-[50].

¹² *Spincode Pty Ltd v Look. Software Pty Ltd* (2001) 4 VR 501, 513 fn 26 (Brooking JA).

¹³ *Commonwealth Bank of Australia v Kyriackou* [2008] VSC 146; *Dennis Hangar Pty. Ltd. v Brown* [2007] VSC 495; *GT Corporation Pty. Ltd. v Amare Safety Pty. Ltd.* [2007] VSC 123; *Adam 12 Holdings Pty. Ltd. Eat & Drink Holdings Pty. Ltd.* [2006] VSC 152; *McCann v McCann* [2006] VSC 142; *Discronics Ltd. v Edmonds* [2002] VSC 454; *Sent v John Fairfax Publication Pty. Ltd. and Hills* [2002] VSC 429.

¹⁴ *Kallinicos v Hunt* (2005) 64 NSWLR 561.

¹⁵ *Lightman J In Re Solicitors (A Firm)* [1997] Ch 1 at 9–10.

¹⁶ *Lightman J In Re Solicitors (A Firm)* [1997] Ch 1 at 9–10.

¹⁷ *Yunghanns v Elfic Ltd* (Unreported, Supreme Court of Victoria per Gillard J, 3 July 1998).

¹⁸ For example in *Mintel International* this point was made by Heerey J, albeit in the context of barristers *Mintel International Group Ltd v Mintel (Australia) Pty Ltd* (2000) 181 ALR 78.

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 interest 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 interest. 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 existing 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, 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.

The giving of informed consent has been recognised by the courts to negate what would otherwise be a potential breach of fiduciary duty owed to former clients.¹⁹

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 consent of the former client, the solicitor can divulge the confidential information and therefore have no conflict of interest. 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 to consent.

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

¹⁹ See the analysis in *Maguire v Makaronis* (1996) 188 CLR 449

- (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 advice before providing consent.

The extent to which each of these factors needs to be addressed will depend on the sophistication of the former client.

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

Effective information barriers

Effective information barriers are also discussed in the commentary to Rule 11. Not all firms will be able to satisfy the relevant requirements.

An effective information barrier is also often referred to as a "Chinese Wall". The Law Society of New South Wales in consultation with the Law Institute of Victoria has developed Guidelines²⁰ 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 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 will only be effective where the conflict in question concerns confidential information. The purpose of the barrier is 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 occurred because of 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 meet.

While the cases regularly point out that bringing about an effective information barrier is difficult, in practice they have become more frequent and are regularly employed, but are effectively only practicable in medium to large law practices. The leading case in this area is *Prince Jefri*²¹ which held that an effective information barrier will need to have the following features:

- physical segregation of the personnel involved;
- 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.

An information barrier will only be effective if it eliminates any real and sensible possibility of misuse of confidential information, although in family law the test is likely to be stricter again.²²

It follows that, 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.

Conversely even where all effective measures have been taken, and a technical or inadvertent breach nevertheless occurs and results in a potential (rather than actual) disclosure, the court's general approach is one of extreme caution.²³

²⁰ Law Society of New South Wales, *Information Barrier Guidelines* (16 March 2006) Available at: <http://www.lawsociety.com.au/idc/groups/public/documents/internetcostguidebook/008728.pdf>

²¹ *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 22.

²² *In the Marriage of Thevenaz* (1986) 84 FLR 10 a risk "more theoretical than practical" was held sufficient to disqualify a practitioner from acting. This decision was followed and adopted by the Full Court of the Family Court of Australia in *McMillan v McMillan* (2000) FamCA 1046

Example

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.

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 the room was entered by any unauthorised personnel, it is most unlikely that the information barrier would thereby fail to be effective.

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.

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.²⁴

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 this practice has rightly been described by courts as undesirable there is little guidance on how it will be dealt with in practice.

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 interest 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 legal profession legislation.

²³ *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550, a case in which an unintended, inadvertent breach of an information barrier resulted in the granting of an injunction to restrain a firm of solicitors from continuing to act in the matter.

²⁴ *Bureau Interprofessionnel des vins de Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 (where the information barrier was effective); *Newman v Philips Fox* (1999) 21 WAR 309 (where it was not).

11. CONFLICT OF DUTIES CONCERNING CURRENT CLIENTS

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

Commentary

Effect of having a conflict of duties

The word "avoid" highlights the fact that sometimes a conflict will 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 one or more of the clients, unless rule 11.3 applies.

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, a Court may restrain them from acting as part of its supervisory jurisdiction over legal practitioners. That jurisdiction will be exercised where a reasonable, informed member of the public would conclude that the lawyer should be restrained from acting so as to protect the due administration of justice.²⁵

²⁵ For a useful discussion see *Kallinicos v Hunt* (2005) 64 NSWLR 561.

Duties to clients

As the relationship between a solicitor and client is a fiduciary relationship, a solicitor must always act in the best interests of the client in any matter in which the solicitor represents the client: see Rule 4.1.1 and the commentary thereto. Because the duty to act in a client's best 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 observe the discharge of those duties at the law practice level. Principals are also responsible for ensuring the duties owed to each and every client of the law practice are discharged by all solicitors and employees of the law practice. 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 interests between clients, Rules 11.3, 11.4 and 11.5, together with Rule 10.2, deal with particular situations where conflicts of interest arise, or may arise. Each of these *Rules* sets out the ethical principles which 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.

Contentious and non-contentious matters

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
- 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 that the solicitor can or should accept both retainers. Solicitors must exercise their independent judgment to determine whether a conflict is likely to arise, even where one does not presently exist.

Examples

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 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, however 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 unfamiliar with the justice system. The practice has been discouraged by the courts. The Law Institute of Victoria has issued "Guidelines in the Representation of the Co-accused"²⁶

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, it is unlikely that any Court will agree that a conflict in a contentious matter can be cured by informed consent and information barriers. In such circumstances, a court would be likely to restrain the solicitor from acting for at least one of the parties.

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

Non-contentious matters

A solicitor or law practice can generally act for two or more 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 (because in the circumstances, the solicitor could not maintain the confidentiality of the information).

An obvious area where a conflict may arise in a non-contentious matter is where there is a confidential information conflict:

- the solicitor is in possession of confidential information of the first client and under a duty to act in the best interests of both clients. Assuming the confidential information is material and would benefit the latter client, the solicitor would be duty bound to disclose the information to the latter client.
- another is where the business interests of one client are in competition with those of

²⁶ Law Institute of Victoria, *Guidelines in the Representation of the Co-Accused* (2002), Available at: <http://www.liv.asn.au/PDF/Practising/Ethics/2002GuideCoaccused.aspx>

another.

In both cases, Rule 11.3 allows the solicitor or law practice to act provided the clients are aware of the conflict and have given their informed consent to the solicitor acting, notwithstanding the conflict.

In the case of a confidential information conflict, the solicitor or law practice can only act if there is informed consent from each client and an effective information barrier.

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. A degree of foresight is therefore required by the solicitor, 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.

The Privy Council²⁷ said that informed consent means: consent given in the knowledge that there is a conflict between the parties and that as a result, the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction, or may be disabled from giving advice to one party which conflicts with the interests of the other.

Informed consent focuses on the understanding of the client, meaning that the conversation between solicitor and client will vary with the nature of the client. A sophisticated client is likely to understand the ramifications of a conflict of interests, whereas a less sophisticated client may not. In order to give informed consent, the client should be made 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
- the manner in which the solicitor intends managing the conflict of interest

Informed consent means more than the two or more parties agreeing to be represented by the same solicitor. As the cases note, it is the solicitor, not the client, who is most likely to be alert to the possibility of conflicts of interest and their consequences.

Acting on a non-exclusive basis

In some circumstances, a solicitor may seek to act for a client on a "non-exclusive" basis in a transaction. This circumstance is not expressly dealt with in the Rules although it is permitted in the UK as an exception to the principles on conflicts.

Under the England and Wales Solicitors Regulation Authority Solicitors' Code of Conduct 2011,²⁸ if there is a conflict, or a significant risk of a conflict, between two or more current clients the solicitor must not act for all or both of them unless the matter falls within the scope of the limited exceptions set out at Outcomes. In deciding whether to act in these limited circumstances, the overriding consideration will be the best interests of each of the clients concerned and, in particular, whether the benefits to the clients of the solicitor acting

²⁷ *In Clark Boyce v Mouat* [1993] 3 NZLR 641, 646.

²⁸ Solicitors Regulation Authority, Handbook, Chapter 3 Conflicts – Note: the SRA Code of Conduct 2011 forms part of the Handbook, which came into operation 18 April 2012 and is available at: <http://www.sra.org.uk/solicitors/handbook/code/part2/rule3/content.page>

for all or both of the clients outweigh the risks. Outcome 3.6 of the SRA Code of Conduct provides that where there is a client conflict²⁹ and the clients have a substantially common interest³⁰ in relation to a matter or an aspect of it, a solicitor can only act if:

- a) the solicitor has explained and reasonably believes the clients understand the relevant issues and risk;
- b) all the clients have provided informed consent in writing to the solicitor acting;
- c) the solicitor is satisfied that it is reasonable for the solicitor to act for all the clients and that it is in their best interests; and
- d) the solicitor is satisfied that the benefits to the clients of doing so outweigh the risks;

The practice arises in certain areas of the law, particularly where the nature or size of the particular transaction means that there are a limited number of law practices which 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. There is no reason why a client, especially a sophisticated one, could not give informed consent to such 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.

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 to 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 own confidential information. If the client consented to this arrangement, the law practice could 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 it has 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. They are only expressed to apply in the situation covered by Rule 10, namely where a law practice has a conflict involving its duty to preserve the confidential information of a former client. It is therefore necessary to adapt them somewhat in order for them to apply 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 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

²⁹ **client conflict** is a defined term for purposes of Chapter 3 of the SRA Handbook that means any situation where a solicitor owes separate duties to act in the best interests of two or more *clients* in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict.

³⁰ **Substantially common interest** is a defined term for the purposes of Chapter 3 of the *SRA Code of Conduct*, means a situation where there is a clear common purpose in relation to any matter or a particular aspect of it between the *clients* and a strong consensus on how it is to be achieved and the *client conflict* is peripheral to this common purpose.

actual conflict arises between the parties.

Except in rare and exceptional circumstances, a solicitor should cease to act for both parties.³¹

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* a distinction was drawn by Burchett J 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. Burchett J stated:

[w]here 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 of not any real question of the use of confidential information could arise.³²

This indicates that, even though the circumstances may be limited, the law recognises that there are some circumstances where a solicitor or law practice may continue to act for one of the clients after a dispute arises between the two; and that this will be mostly restricted to cases where a law practice is sufficiently large to enable an effective information barrier to be operated with another solicitor acting for the continuing client than the solicitor who acted for the now former client. 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 former client.

In *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd* [2002] Habersberger J stated:

[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.³³

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 interest and is likely to be in possession of confidential information of each client, relevant to their willingness to settle. Although the solicitor could not continue to act, another member of their law practice, who has had no prior involvement with the matter, may be separately able to act for one of the clients if there was an effective information barrier put in place and the consent of both clients obtained.

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.

³¹ See *Wan v McDonald* (1992) 33 FCR 491, at [51]

³² *Ibid*

³³ *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd* [2002] VSC 324, at [25]

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- 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:

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- (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.

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Commentary

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

Form of disclosure and consent to financial benefit

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 be obtained after that person has had reasonable time to consider the arrangement.

Informed consent

There is no precise formula for determining whether a client has sufficient appropriate information upon which to provide informed consent; it will be 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;
- that the client may be able to use an alternative solicitor who does not have a potential conflict of interest; and
- that the client should seek independent advice if unsure about what to do.

Benefits payable: disclosure required

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

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.³⁴ Lawyers should also consider civil and criminal procedural requirements which may be required to be fulfilled before the termination can be justified.

G E Dal Pont in his work "Lawyer's Professional Responsibility" (4th Edition) sets out in paragraph [3.195] examples of what has been held to constitute a just cause.

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?

At general law, a solicitor has a *retaining* or *general* lien over client documents for unpaid costs. An effective 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 client³⁵ on all the client's files. Although the lien may be claimed for unbilled costs,³⁶ it would be prudent to render a bill and inform the client of the amount claimed,

³⁴*Richard Buxton (a firm) v Mills-Owen* [2010] 4 All ER 405, 417.

³⁵*Re Taylor, Stileman & Underwood* [1891] 1 Ch 590, 596 per Lindley LJ.

³⁶*Re Cao* [1996] ANZ ConvR 32,1, 324 per Beazley J.

taking care to exclude any costs incurred by the solicitor in assessing costs or in maintaining the claim for the lien.³⁷

The client documents subject to the lien are limited to those which 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.³⁸

However, in Queensland the common law of bailment prescribes that a solicitor must never destroy a former client's documents. Rule 14.2 prescribes that a solicitor may destroy a former client's documents after 7 years. Therefore a solicitor practising in Queensland should never destroy a former client's documents, without the client's consent (preferably in writing).

Refer to:

Lewis & Kyrou, *Handy Hints on Legal Practice*, 3rd Edition, 2004, pp 109-110.

G E Dal Pont, *Lawyers Professional Responsibility*, 4th Edition 2010, Chapter 16.

G E Dal Pont, *Law of Costs*, 2nd Edition, 2009, Chapter 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.

Commentary

Reasonable security 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. Such tripartite deeds may be suggested in appropriate form by the relevant professional body.

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,

³⁷*White v Bini* [2003] FCA 669, at [9].

³⁸*Ex Parte Fuller* (1881) 16 Ch D 617, 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).

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*, where a solicitor was found guilty of unsatisfactory conduct, for charging a fee for the retrieval of documents held in storage by the solicitor.³⁹ See also Rule 2 and the commentary to Rule 2.

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³⁹ *Legal Services Commissioner v Rose* (2007) VCAT 2180

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.

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- 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:

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- 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:
 - 21.3.1 any court document settled by the solicitor;
 - 21.3.2 any submission during any hearing;
 - 21.3.3 the course of an opening address; or
 - 21.3.4 the course of a closing address or submission on the evidence,unless the solicitor believes on reasonable grounds that the factual material already available provides a proper basis to do so.
- 21.4 A solicitor must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the solicitor believes on reasonable grounds that:
 - 21.4.1 available material by which the allegation could be supported provides a proper basis for it; and
 - 21.4.2 the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.
- 21.5 A solicitor must not make a suggestion in cross-examination on credit unless the solicitor believes on reasonable grounds that acceptance of the suggestion would diminish the credibility of the evidence of the witness.
- 21.6 A solicitor may regard the opinion of an instructing solicitor that material which is available to the instructing solicitor is credible, being material which appears to

the solicitor from its nature to support an allegation to which Rules 21.1, 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

Where a solicitor representing a client is, or is likely to become, a material witness in the client's case, a solicitor should 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 advice (see Ipp J, *Lawyers' Duties to the Court*, 114 LQR at 92).

The test to be applied in determining whether continuing to act would prejudice the administration of justice is an objective one. 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 has to balance this apparent conflict of duties with other considerations such as:

- due weight is to be 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.⁴⁰

⁴⁰ *Bufalo Corporation Pty Ltd (rec & mngr apptd)(in liq) v Lend Lease Primelife Ltd (formerly Primelife Corporation Limited)* [2010] VSC 672, at [9]

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;

⁴¹ *Kallinicos v Hunt* (2005) 64 NSWLR 561, at [76]

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- (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

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- 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.

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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.

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 legislations

A reasonable solicitor should also have regard to the legislation regulating advertisements in his or her practice area and jurisdiction, for example:

- Misleading and deceptive legislation in the applicable jurisdiction e.g. *Competition and Consumer Act 2010 (Cth)* and Fair Trading Acts of various jurisdictions;
- Personal injury legislation and regulations in the applicable jurisdiction e.g. *Workers Compensation Act 1987(NSW)*; *Personal Injuries Proceedings Act 2002 (QLD)*; the *Legal Profession Regulation 2005 (NSW)*(clause 24); and
- Direct-marketing legislation in the applicable jurisdiction e.g. *Spam Act 2003 (VIC)*

Accredited specialist

“Accredited specialist” accreditations attach 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) 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 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 56,000 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 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

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