## Contents

### PART A  BACKGROUND

<table>
<thead>
<tr>
<th>Purpose of this Paper</th>
<th>4</th>
</tr>
</thead>
<tbody>
<tr>
<td>About the Professional Ethics Committee</td>
<td>5</td>
</tr>
<tr>
<td>Context – Australian Solicitors’ Conduct Rules</td>
<td>5</td>
</tr>
<tr>
<td>Context – How are the Rules made and what gives them binding force?</td>
<td>6</td>
</tr>
<tr>
<td>Context – Commentary to the Australian Solicitors’ Conduct Rules</td>
<td>10</td>
</tr>
<tr>
<td>Context – Relationship to legislation</td>
<td>11</td>
</tr>
<tr>
<td>Principles to be applied</td>
<td>12</td>
</tr>
<tr>
<td>Stylistic matters</td>
<td>12</td>
</tr>
</tbody>
</table>

### PART B  ISSUES AND CONSIDERATIONS

<table>
<thead>
<tr>
<th>NATURE AND PURPOSE OF THE RULES</th>
<th>13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rule 1 (Application and interpretation)</td>
<td>14</td>
</tr>
<tr>
<td>Rule 2 (Purpose and effect of the rules)</td>
<td>19</td>
</tr>
<tr>
<td>FUNDAMENTAL DUTIES OF SOLICITORS</td>
<td>22</td>
</tr>
<tr>
<td>Rule 3 (Paramount duty to the court and the administration of justice)</td>
<td>22</td>
</tr>
<tr>
<td>Rule 4 (Other fundamental ethical duties)</td>
<td>23</td>
</tr>
<tr>
<td>Rule 5 (Dishonest and disreputable conduct)</td>
<td>26</td>
</tr>
<tr>
<td>Rule 6 (Undertakings)</td>
<td>29</td>
</tr>
<tr>
<td>RELATIONS WITH CLIENTS</td>
<td>33</td>
</tr>
<tr>
<td>Rule 7 (Communication of advice)</td>
<td>33</td>
</tr>
<tr>
<td>Rule 8 (Client instructions)</td>
<td>35</td>
</tr>
<tr>
<td>Rule 9 (Confidentiality)</td>
<td>41</td>
</tr>
<tr>
<td>Rule 10 (Conflicts concerning former clients)</td>
<td>50</td>
</tr>
<tr>
<td>Rule 11 (Conflict of duties concerning current clients)</td>
<td>64</td>
</tr>
<tr>
<td>Rule 12 (Conflict concerning a solicitor’s own interests)</td>
<td>70</td>
</tr>
<tr>
<td>Rule 13 (Completion or termination of engagement)</td>
<td>75</td>
</tr>
<tr>
<td>Rule 14 (Client documents)</td>
<td>77</td>
</tr>
<tr>
<td>Rule 15 (Lien over essential documents)</td>
<td>80</td>
</tr>
<tr>
<td>Rule 16 (Charging for document storage)</td>
<td>83</td>
</tr>
<tr>
<td>ADVOCACY AND LITIGATION</td>
<td>85</td>
</tr>
<tr>
<td>Rule 17 (Independence – Avoidance of personal bias)</td>
<td>86</td>
</tr>
<tr>
<td>Rule 18 (Formality before the court)</td>
<td>89</td>
</tr>
<tr>
<td>Rule 19 (Frankness in court)</td>
<td>90</td>
</tr>
<tr>
<td>Rule 20 (Delinquent or guilty clients)</td>
<td>95</td>
</tr>
<tr>
<td>Rule 21 (Responsible use of court process and privilege)</td>
<td>100</td>
</tr>
</tbody>
</table>
SUMMARY OF POTENTIAL RULE CHANGES FOR CONSULTATION

PART C

Mental wellbeing
Personal relationships with clients
Transfer of practice
Claiming costs in letters of demand
Disclosure of insurer

Definition of

Glossary

Rule 43
Rule 42
Rule 41
Rule 40
Rule 39
Rule 38
Rule 37
Rule 36
Rule 35
Rule 34
Rule 33
Rule 32
Rule 31
Rule 30
RELATIONS WITH OTHER PERSONS

Rule 29 (Prosecutor’s duties) ................................................................. 124
Rule 28 (Public comment during current proceedings) ...................... 122
Rule 27 (Solicitor as material witness in client’s case) ......................... 119
Rule 26 (Communication with witnesses under cross-examination) .... 118
Rule 25 (Integrity of evidence – two witnesses together) ..................... 117
Rule 24 (Integrity of evidence – influencing evidence) ...................... 116
Rule 23 (Opposition access to witnesses) .......................................... 115
Rule 22 (Communication with opponents) ......................................... 109

LAW PRACTICE MANAGEMENT

Rule 41 (Mortgage financing and managed investments) ...................... 156
Rule 40 (Sharing receipts) ................................................................. 154
Rule 39 (Sharing premises) ............................................................... 151
Rule 38 (Returning judicial officers) .................................................. 149
Rule 37 (Supervision of legal services) ............................................. 148
Rule 36 (Advertising) ........................................................................ 147

Rule 35 (Contracting with third parties) ............................................ 146
Rule 34 (Dealing with other persons) ................................................ 142
Rule 33 (Communication with another solicitor’s client) ................... 139
Rule 32 (Unfounded allegations) ....................................................... 138
Rule 31 (Inadvertent disclosure) ........................................................ 136
Rule 30 (Another solicitor’s or other person’s error) ......................... 133

Rule 29 (Prosecutor’s duties) ................................................................. 124
Rule 28 (Public comment during current proceedings) ...................... 122
Rule 27 (Solicitor as material witness in client’s case) ......................... 119
Rule 26 (Communication with witnesses under cross-examination) .... 118
Rule 25 (Integrity of evidence – two witnesses together) ..................... 117
Rule 24 (Integrity of evidence – influencing evidence) ...................... 116
Rule 23 (Opposition access to witnesses) .......................................... 115
Rule 22 (Communication with opponents) ......................................... 109

RELATIONS WITH OTHER PERSONS

Rule 28 (Public comment during current proceedings) ...................... 122
Rule 27 (Solicitor as material witness in client’s case) ......................... 119
Rule 26 (Communication with witnesses under cross-examination) .... 118
Rule 25 (Integrity of evidence – two witnesses together) ..................... 117
Rule 24 (Integrity of evidence – influencing evidence) ...................... 116
Rule 23 (Opposition access to witnesses) .......................................... 115
Rule 22 (Communication with opponents) ......................................... 109

Rule 21 (Contracting with third parties) ............................................ 146
Rule 20 (Sharing premises) ............................................................... 151
Rule 19 (Sharing receipts) ................................................................. 154
Rule 18 (Returning judicial officers) .................................................. 149
Rule 17 (Supervision of legal services) ............................................. 148
Rule 16 (Advertising) ........................................................................ 147

PART C SUGGESTIONS RECEIVED FOR NEW RULES............................ 171

Disclosure of insurer ........................................................................... 171
Claiming costs in letters of demand .................................................. 172
Transfer of practice ............................................................................ 173
Personal relationships with clients ..................................................... 174
Mental wellbeing ................................................................................ 175

SUMMARY OF POTENTIAL RULE CHANGES FOR CONSULTATION ............................................................................ 179
PART A  BACKGROUND

Purpose of this Paper

1. The Australian Solicitors’ Conduct Rules (the “Rules”) were collaboratively developed by all of the Law Societies and other constituent professional bodies of the Law Council of Australia. They were settled and promulgated by the Law Council of Australia (the “Law Council”) in June 2011 as the agreed set of professional conduct rules for all solicitors in Australia. A Commentary to the Australian Solicitors’ Conduct Rules was published by the Law Council in August 2013.

2. The Law Council determined, when promulgating the Australian Solicitors’ Conduct Rules in June 2011 that a period of some years was needed for the Rules to operate in practice before a review could be conducted.

3. The Australian Solicitors’ Conduct Rules have been adopted:
   - in South Australia, effective from July 2011 as the Law Society of South Australia, Australian Solicitors’ Conduct Rules;
   - in Queensland, effective from June 2012, as the Australian Solicitors’ Conduct Rules;
   - in New South Wales and Victoria, effective 1 July 2015, as the Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015; and
   - in the Australian Capital Territory, effective 1 January 2016, as the Legal Profession (Solicitors) Conduct Rules 2015.

4. In March and April 2015, the Law Council authorised some minor variations to the Australian Solicitors’ Conduct Rules. None of these variations affected the substance of any other Rules, apart from the omission of Rule 29.12.5 following the decision in Barbaro v The Queen [2014] HCA 2.1

5. During the period since June 2011 the Law Council of Australia has undertaken a number of public and targeted consultations on the Rules, including statutory consultations pursuant to section 427 of the Legal Profession Uniform Law. These consultations have raised questions about whether substantive changes should be made to a number of the Rules.

6. The Professional Ethics Committee of the Law Council (the “Ethics Committee”) has considered the questions raised and formulated preliminary responses, which are set out in this Consultation Discussion Paper.

7. The Ethics Committee now invites comments to its questions and preliminary responses.

8. This Consultation Discussion Paper has been prepared solely for the purpose of additional consultation. Readers should be aware that this Paper does not necessarily represent the Law Council’s position on any matters discussed herein, or the position of any of the Law Council’s Constituent Bodies.

9. Submissions are invited by 31 May 2018 and may be lodged with the Law Council at ascr@lawcouncil.asn.au

---

1 See page 125
About the Professional Ethics Committee

10. The Professional Ethics Committee was established by the Law Council in November 2009 to progress the development and implementation of the *Australian Solicitors’ Conduct Rules*, as a nation-wide, uniform statement of the professional conduct rules of Australia’s solicitors.

11. The Professional Ethics Committee is an expert advisory Committee of the Law Council of Australia, with membership drawn from each State and Territory Law Society, together with Law Firms Australia. The advice of the Committee represents the collective and considered views of these professional associations. Also, the Committee engages and consults with the Australian Bar Association on ethical issues common to both solicitors and barristers.

Context – Australian Solicitors’ Conduct Rules

12. The *Australian Solicitors’ Conduct Rules* ("the Rules") are a uniform set of ethical and professional principles governing the conduct of Australia’s solicitors especially in their relations and interactions with clients, the courts, fellow legal practitioners, regulators and other persons.

13. As a principles-based framework for conduct, the Rules do not attempt to prescribe in detail how solicitors should act in their day-to-day personal lives and professional practices. Instead the Rules are intended to guide and assist solicitors to act ethically and in accordance with the principles of professional conduct established by the profession and the common law.

14. The Rules set out standards of professional conduct to be “observed or approved of by members of the profession of good repute and competency” and, if breached may require the disciplinary intervention of the Supreme Court. They are not binding on the court, although the court “ordinarily would give careful consideration to treating breaches of its provisions as instances of professional misconduct”.

15. The Rules do not “supplant legal principles as set out in judicial decisions” nor should they be regarded as “exhaustive of lawyers’ ethical responsibilities”. Thus the Rules are subject to judicial decisions about aspects of the professional conduct of legal practitioners and the application of ethical and professional standards in particular situations considered by the courts.

16. The Rules reflect ethical principles developed and settled over many years in consideration of the professional, fiduciary and other duties of solicitors and the common law. To the extent that common law or legislation sets a higher standard of conduct than that required by the Rules, a solicitor is required to comply with that higher standard. Conversely, where the Rules set a higher standard of conduct than prescribed in legislation or under the common law, a solicitor is required to comply with the higher standard set by the Rules.

17. The Rules are intended to have general application, not only to Australian solicitors engaged in private legal practice, but also to Australian solicitors engaged in other forms of legal practice, for example:

- as government lawyers (noting that public service codes of ethical conduct, in addition to statutory obligations, might also apply);

---

2 *Re a Barrister and Solicitor* (1972) 20 FLR 234 at 245 per Fox, Blackburn and Woodward JJ. See [16].

3 Chamberlain v Law Society of the Australian Capital Territory (1993) 43 FCR 148 at 154 per Black CJ.

• as in-house counsel; and
• as providers of legal advice and legal services through community legal assistance services and similar bodies.

18. The Rules also have application to Australian-registered foreign lawyers who, in practising foreign law in Australia, act in the same manner as an Australian solicitor.

**Context – How are the Rules made and what gives them binding force?**

19. Comments received by the Professional Ethics Committee often raise the question about whether the Rules for solicitors derive their binding force when (and because they are) made in a legislative form, or whether they derive their binding force as an exercise in professional self-regulation.

**Legislative basis**

20. The legal profession and other legislation of each State and Territory sets out a process for making legal profession rules applicable in that jurisdiction and the ‘legislative’ character to be ascribed to those rules. There is considerable variance between jurisdictions.

**New South Wales and Victoria**

21. The *Legal Profession Uniform Law* provides that the Law Council of Australia may develop professional conduct rules for solicitors. Proposed (draft) Rules developed by the Law Council are subject to consultation with the Legal Services Council, the Commissioner for Uniform Legal Services Regulation and nominated local regulatory authorities, following which they are approved by the Legal Services Council for public consultation. When the proposed (draft) rules are finalised by the Law Council following public consultations, those proposed (draft) Rules are (if approved by the Legal Services Council) submitted to the Standing Committee of Attorneys-General (who may approve, or veto rules on certain grounds) following which they are “made” by the Legal Services Council and published on the NSW legislation web-site. The rules are statutory rules pursuant to the *Interpretation Act 1987* (NSW).

**Western Australia**

22. The *Legal Profession Act 2008* (WA) provides for legal profession rules (which includes rules of professional conduct) to made by the Legal Practitioners Board. They are declared by the Act to be binding on Australian legal practitioners and locally registered foreign lawyers to whom they apply. They are also declared by the Act to be subsidiary legislation. The current legal profession conduct rules for solicitors in Western Australia are not based on the Australian Solicitors’ Conduct Rules.

**Australian Capital Territory**

23. The *Legal Profession Act 2006* (ACT) provides that the Law Society Council may make rules for or in relation to practice as a solicitor, including conduct rules. Proposed rules must undergo a public consultation process before they are formally “made” by the Law Society Council. The rules are a subordinate law and must be presented by the Minister to the ACT Legislative Assembly, which can resolve to disallow the Rules so made. The rules are

---

5 *Legal Profession Uniform Law* ss 427, 428, 431
6 *Legal Profession Act 2008* (WA) ss 577, 581 and 583
7 *Legal Profession Act 2006* (ACT) ss 580 and 583
published on the ACT legislation register. The current legal profession conduct rules for solicitors in the ACT are based on the Australian Solicitors’ Conduct Rules.

Queensland

24. The Legal Profession Act 2007 (QLD) provides that the Law Society may make rules about legal practice engaged in Queensland by solicitors, including rules dealing with standards of conduct. Proposed rules are required to undergo a consultation processes before being formally made by the Law Society. The making of the rules is notified by the Attorney-General, and that notification is declared to be subordinate legislation. The current legal profession conduct rules for solicitors in Queensland are based on the Australian Solicitors’ Conduct Rules.

Northern Territory

25. The Legal Profession Act 2006 (NT) provides that the Law Society may make rules about legal practice, including conduct rules. Before making rules, the Law Society must undertake consultations. The rules so made must be forwarded to the Minister, who causes them to be Gazetted and must then table them before the Legislative Assembly. The Legislative Assembly may disallow a rule or rules. The current legal profession conduct rules for solicitors in the Northern Territory are not based on the Australian Solicitors’ Conduct Rules.

South Australia

26. The Legal Practitioners Act 1981 (SA) provides that the legal profession rules are the Law Society’s professional conduct rules. These rules are made and published by the Law Society. The current legal profession conduct rules for solicitors in South Australia are based on the Australian Solicitors’ Conduct Rules.

Tasmania

27. The Legal Profession Act 2007 (TAS) provides for a prescribed authority to make legal profession rules. The Law Society is the prescribed authority for this purpose. Before making rules, the Law Society must give a copy of the proposed rules to the Minister and to the Legal Practice Board and undertake public consultations. Once made by the Law Society the rules become statutory rules and subordinate legislation. The current legal profession conduct rules for solicitors in Tasmania are not based on the Australian Solicitors’ Conduct Rules.

Professional obligations

28. Approaching professional rules as if they were legislative rules carries (as many commentators have noted) the risk of “legalising” ethical rules, shifting the focus of attention to interpreting the words, looking for specific exemptions or permissions, rather than focusing on whether a particular course of action would or would not be unprofessional because it offends the principle underlying the rule – leading to an ‘abdication of professional judgment’ and a ‘spiritless compliance’ with ever more prescriptive rules. 

---

8 Legislation Act 2001 (ACT) ss 8, 19, 64, 65
9 Legal Profession Act 2007 (QLD) ss 219, 223 and 225,
10 Legal Profession Act 2006 (NT) ss 689 and 693.
11 Legislation Act (NT) section 63.
12 Legal Practitioners Act 1981, section 5 - definition of legal profession rules
13 Legal Profession Act 2007 (TAS) ss 226 and 229
Another perspective as to the legitimacy of the Rules therefore, is that they are the written expression of the collective judgment of the profession about the standards its members must voluntarily comply with. From this perspective, the Rules can be regarded as an exercise of self-regulation: firstly, by the profession as a whole, as statements of agreed ethical standards of the profession; and secondly, by each member of the profession, as a professional commitment to abide by those ethical standards.

The key point to this perspective is that underlying each rule is an ethical principle to be observed, and that the primary purpose of a rule is to express that ethical principle and to provide guidance to a legal practitioner on how that ethical principle applies in particular circumstances. Seen from this perspective, the publication of the Rules in the form of subordinate legislation might be regarded perhaps not so much as an exercise of legislative power, but perhaps as an acknowledgement by parliament that the rules are as integral to the fabric of the regulatory framework that governs the legal profession as is the statute and other subordinate legislation.

An indication of this perspective can be discerned from, for example, section 6 of the Legal Profession Uniform Law (which applies in New South and Victoria) which defines professional obligations as including:

(a) duties to the Supreme Courts; and
(b) obligations in connection with conflicts of interest; and
(c) duties to clients, including disclosure; and
(d) ethical standards required to be observed—
that do not otherwise arise under this Law or the Uniform Rules.

That the rules should not be approached strictly as legislative rules is also evident from some other considerations:

• unlike statutory rules, non-conformance with a rule is not of itself an offence under legal profession legislation, carrying specified civil or criminal penalties; and
• a breach of a rule does not conclusively constitute unsatisfactory professional conduct or professional misconduct, but is regarded by the legal profession legislation as conduct “capable of constituting unsatisfactory professional conduct or professional misconduct” upon which disciplinary proceedings can be founded.

Unsatisfactory professional conduct is defined to include conduct occurring in connection with the practice of law that falls short of standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. Professional misconduct is defined to include a substantial or consistent failure to reach and maintain a reasonable standard of competence and diligence, and conduct occurring whether or not in
connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.  

34. The definitions found in all legal profession legislation of unsatisfactory professional conduct and professional misconduct are broad statements upon which disciplinary proceedings might be founded, rather than strict or conclusive definitions. As noted, for example, by the ACT Supreme Court in ACT Law Society v Lardner and Andrews (when considering the definitions of “unsatisfactory professional conduct” and “professional misconduct” in the Legal Practitioners Act 1970) “they are not true definitions but rather descriptions or examples of what is intended to be included within the meaning of the terms used.”

35. When the legal profession laws refer to unsatisfactory professional conduct and professional misconduct they invite the disciplinary tribunal or Supreme Court to look beyond whether or not a breach of a particular rule per se has occurred, to whether the breach indicates the practitioner’s conduct has fallen short of excepted standards of conduct or fitness to practice law.

36. It is through the consideration by the tribunals and courts about whether a practitioner’s conduct amounts to unsatisfactory professional conduct or professional misconduct that the common law develops.

37. The concept of professional misconduct was developed at common law well before the introduction of the statutory concepts of unsatisfactory professional conduct and professional misconduct found in present legal profession legislation. The test, established in 1898 by the English Court of Appeal in Allinson v General Council of Medical Education and Registration is that the conduct amounts to behavior that would be reasonably regarded as disgraceful or dishonourable by members of the profession of good repute and competency. In 1927 in Re R; Re A the Supreme Court of South Australia concluded that unprofessional conduct is a wider concept than professional misconduct, not limited to conduct which is “disgraceful or dishonourable” in the ordinary sense of those terms, but includes “…conduct which may reasonably be held to violate, or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession of good repute and competency.”

38. As noted by, for example, Dal Pont the common law test of professional misconduct continues to be developed and applied by the Courts, alongside the legislative statements of unsatisfactory professional conduct and professional misconduct, although this approach is not without its critics.

---

17 Legal Profession Act 2006 (ACT) s387; Legal Profession Act 2007 (QLD) s419; Legal Profession Act 2006 (NT) s465; Legal Profession Act 2007 (WA) s403; Legal Profession Act 2007 (TAS) s421; Legal Practitioners Act 1981 (SA) s69; Legal Profession Uniform Law s297.


19 The legal profession laws do not affect the inherent jurisdiction and powers of the Supreme Court in relation to the control and discipline of lawyers – see Legal Profession Act 2006 (ACT) s462; Legal Profession Act 2007 (QLD) s13; Legal Profession Act 2006 (NT) s554; Legal Profession Act 2007 (WA) s465; Legal Profession Act 2007 (TAS) s510; Legal Practitioners Act 1981 (SA) s88A; Legal Profession Uniform Law s264.

20 [1894] 1 QB 750.

21 Re A; Re R [1972] SASIRP 9 [61].


Professional Ethics Committee view

39. It is from a consideration of the above matters that the Profession Ethics Committee considers the Rules sit alongside a body of Commonwealth, State and Territory legislation (primarily the various pieces of State and Territory legal profession regulatory legislation) that govern aspects of legal practice and the provision of legal services, as well as the common law. This is consistent with the view stated by, for example, Refshauge J in *Commonwealth of Australia v Davis Samuel Pty Ltd and Ors (No 2)* that “an admitted lawyer…owes duties to the Court and is bound by professional obligations which are regulated and enforced by statute, professional associations and professional disciplinary processes.”

Context – Commentary to the Australian Solicitors’ Conduct Rules

40. The Rules are accompanied by a Commentary, the purpose of which is to provide, where thought necessary, guidance on the underpinning concepts and law in support of the Rules, and to identify jurisdictional differences in the common law and legislation that affect the manner in which the Rules might be interpreted and applied in a particular jurisdiction. It is noted that our constituent bodies have produced their own commentary or supportive material to assist practitioners in dealing with ethical dilemmas.

41. The Commentary is not intended to be an exhaustive exposé of the body of law and practice that surrounds the Rules. Instead, the Commentary focuses on some core aspects illustrating the development and application of a particular Rule, and sits along-side the considerable body of information, guidance and expertise developed by Law Societies to assist solicitors when considering how to respond to ethical issues that arise in legal practice.

Context – Relationship to legislation

42. As noted above (paragraphs 20-27) the *Australian Solicitors’ Conduct Rules*, when adopted, become legal profession rules under the legal profession legislation of each jurisdiction.25 *Legal Profession Acts* and the *Legal Profession Uniform Law* provide for the making of legal profession rules about any aspect of legal practice. The power to make rules is not limited to matters for which the relevant Act or Law specifically authorises the making of legal profession rules, although the rules are not effective to the extent of any inconsistency with the relevant Act, Law or regulations.

43. Paragraphs 28-38 (above) explain the relationship and distinction between the *Australian Solicitors’ Conduct Rules* and legislation that govern aspects of legal practice and the provision of legal services. Consistent with the distinct nature of legal profession conduct rules, a breach of a Rule does not of itself amount to a contravention of the legislation so as to automatically attract a legislated penalty or other sanction. Instead a breach of a Rule is declared by legislation to be conduct capable of constituting unsatisfactory professional conduct or professional misconduct, and may result in one or more disciplinary sanctions.

24 [2008] ACTSC 60 [20].
25 In South Australia the *Legal Practitioners Act 1981* applies. In NSW and Victoria the *Legal Profession Uniform Law* applies. In all other jurisdictions a *Legal Profession Act* applies.
Principles to be applied

44. Previous consultations undertaken by the Law Council on the *Australian Solicitors’ Conduct Rules* and the *Commentary* have prompted calls for particular Rules to be amended or expanded to cover new issues encountered in contemporary legal practice, or to overcome current issues in legal practice where the application of the Rules in seen as problematic.

45. The Professional Ethics Committee acknowledges the importance placed by stakeholders on the Rules and how their application might be tailored to particular circumstances, difficulties or preferred outcomes. The Committee is also mindful that the purpose of the Rules is to encapsulate the principles and precepts of ethical, professional legal practice as developed by the profession, courts and disciplinary tribunals to articulate and guide core aspects of professional conduct of legal practitioners.

46. The Ethics Committee suggests that modifications to particular Rules or the creation of new Rules should be made on the basis that there is an underlying ethical principle or matter of professional responsibility that needs to be addressed. Where an issue relates to the application of a particular ethical principle or professional obligation in a particular circumstance, the Committee considers that guidance can be provided through the *Commentary* to the Rules or through the resources of the professional bodies that directly support legal practitioners – i.e. Law Societies and Bar Associations - and, ultimately, the courts. Further, the Committee suggests that proposals for new or modified Rules which are based on public policy considerations that would require a departure from the ethical principles and professional responsibilities set out in the Rules are appropriately matters for parliament, and that proposals relating to the internal organisation and operation of a law practice are appropriately matters for legal practice rules.

47. The need for Rules setting out ethical principles and professional responsibilities arises from the special nature of the relationships between a legal practitioner and the court and between a legal practitioner and a client.

48. As to the special nature of the relationship between the legal practitioner and the court, the Ethics Committee refers to Rule 3 which states that a solicitor’s duty to the court and the administration of justice is paramount and prevails to the extent of any inconsistency with any other duty. In *Lewis v Ogden* Mason, Murphy, Wilson, Brennan and Dawson JJ noted that “it has always been recognised that counsel has an overriding duty to the court, to the standards of his profession and to the public”. The Committee suggests that any proposals for new or modified Rules cannot impinge upon or impede the fulfilment of the paramount duty of the solicitor as an officer of the court and to the administration of justice, in accordance with the duties as expounded by the courts.

49. As to the special nature of the relationship between the practitioner and client, the Ethics Committee notes that the relationship is a professional relationship based on fiduciary, contractual, confidentiality and other legal duties. A former Chief Justice of the Supreme Court of Queensland, the Honourable Paul de Jersey AC QC has observed:

“[The relationship between lawyer and client is] not like the relationship of supplier to consumer, vendor to purchaser. It is a relationship specially characterized by the expectation, and correlative duty, of confidentiality and privilege, and of exemplary

---

professional ethics. The client accepts that the lawyer is to guide the matter appropriately through the legal process or system, and expects the lawyer to do so. That need usually arises from what has been termed an “information asymmetry”. But it does not mean that the delineation of the professional relationship should follow some sort of business model.”

**Stylistic matters**

50. The Law Council has received many comments of a stylistic nature to do with issues such as:
   - numbering;
   - use of capitalisation and conjunctions;
   - adoption of common definitions as between the rules and statutes; and
   - use of words, such as “breach” instead of “contravene”.

51. The Ethics Committee acknowledges the longstanding practice of presenting the *Australian Solicitors’ Conduct Rules* (and prior to that the Law Council’s *Model Rules of Professional Conduct and Practice*) in a statutory format style. The preference for a statutory style of presentation has arisen because, when adopted as legal profession rules by a state and territory, they may become subordinate legislation of the particular jurisdiction. However, this is not the case in all Australian jurisdictions. The *Australian Solicitors’ Conduct Rules* as promulgated by the Law Council do not have statutory force in their own right.

52. The Ethics Committee is mindful that in the wording and presentation of the *Australian Solicitors’ Conduct Rules* there are tensions to be managed in:
   - maintaining textual uniformity considering the various drafting styles, conventions and individual preferences of parliamentary counsel in the various states and territories;
   - presenting the rules in a way that focuses the attention of solicitors on the ethical principles and kinds of conduct consistent with those principles, rather than fostering a statutory interpretation perspective and approach;
   - encapsulating judicial consideration of ethical principles, reflecting the language and style used by the courts; and
   - ensuring the wording and presentation of the rules reflect the legal profession’s own values and principles.

53. It is the Law Council’s intent that the *Australian Solicitors’ Conduct Rules* be adopted by each State and Territory to become a single, uniform set of professional conduct rules applying equally to all Australian solicitors; however, achieving this will require consensus among jurisdictions when adopting the rules, in whatever form of adoption is consistent with jurisdictional legislation and conventions.

54. The Law Council also recognises that a single, uniform set of professional conduct rules applying equally to all Australian solicitors will benefit consumers of legal services, regulators and the legal profession alike.

55. It is a significant benefit to jurisdictions that have already adopted the *Australian Solicitors’ Conduct Rules* that the Law Council has achieved a great degree of consensus across many stakeholders regarding the style and content of the professional conduct rules. The erosion of that significant consensus and uniformity is an important consideration that ought not to be discarded lightly when faced with proposals to amend to the rules based on stylistic preferences.
PART B  ISSUES AND CONSIDERATIONS

How this Part is set out:

- Rule;
- Matter(s) raised;
- Discussion points and response to matters; and
- Key consultation questions and recommendations.

The Rules set out below are those as approved by the Law Council in June 2011 and incorporating variations approved by the Law Council in March and April 2015. Variations to the Rules as originally promulgated in August 2011 are shown in bold.
NATURE AND PURPOSE OF THE RULES

Rule 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.

Note:
For NSW and Victoria, rule 1.1 is as follows:

1.1 These Rules apply as the Legal Profession Conduct Rules under the Legal Profession Uniform Law to solicitors and 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.

Matters Raised

1. Should a separate set of rules, developed by the Law Council of Australia and the Australia Bar Association, be promulgated to apply to Australian-registered foreign lawyers?

2. For rule 1.2, should the definition of “law practice” in the glossary include a “community legal service” and if so, should a definition of “community legal service” be inserted to reinforce application of the Rules to legal assistance practitioners?

3. How do the Rules apply in a jurisdiction in which the legal profession is fused – i.e. in a jurisdiction where a legal practitioner may engage in legal practice in both the manner of a solicitor and the manner of a barrister? Should there be a single set of Rules catering for both capacities in which a legal practitioner might act in a fused jurisdiction?

Discussions Points

In relation to the first matter, the longstanding practice has been to develop a single set of rules for application to those who engage in legal practice in the manner of a solicitor. This would include solicitors engaged in private legal practice; Australian-registered foreign lawyers acting in the manner of a solicitor; solicitors employed as in-house counsel; solicitors engaged in legal practice as government legal officers; and solicitors engaged as employees of agencies and bodies such as legal aid organisations and community legal centres.

As statements of ethical principles, the Ethics Committee considers that a solicitor or Australian-registered foreign lawyer acting in the manner of a solicitor will need to apply the rules, where applicable, to the particular circumstances arising during legal practice. Depending upon the context in which the person engages in legal practice, situations where the principles embodied in some rules apply may arise frequently, whereas in other situations the principles embodied in some Rules may never arise, or arise only infrequently.

The Ethics Committee perceives no utility in attempting to devise separate sets of rules, each of which is dedicated solely to a particular context in which legal services are provided, but that nuances in the application of Rules in specific legal practice contexts would be more appropriately dealt with either in the Commentary or in legal practice rules.
In relation to the second matter, the Ethics Committee proposes that the definition of law practice in the Glossary be amended to include a reference to a community legal service, and that a definition of community legal service be inserted. The Committee notes that there are various definitions of community legal service or community legal centre to be found in legal profession legislation.

**Legal Profession Uniform Law** (applies in NSW and Victoria):

*community legal service* means an organisation (whether incorporated or not) that—

(a) holds itself out as—
   (i) a community legal service; or
   (ii) a community legal centre; or
   (iii) an Aboriginal and Torres Strait Islander Legal Service;

whether or not it is a member of a State or Territory association of community legal centres, and whether or not it is accredited or certified by the National Association of Community Legal Centres; and

(b) is established and operated on a not-for-profit basis; and

(c) provides legal or legal-related services that—
   (i) are directed generally to people who are disadvantaged (including but not limited to being financially disadvantaged) in accessing the legal system or in protecting their legal rights; or
   (ii) are conducted in the public interest.

**Legal Profession Act 2008** (Western Australia)

*community legal centre* means a not-for-profit body, one of the main functions of which is the delivery of free or substantially subsidised legal services to a disadvantaged section of the community or community legal education;

**Legal Profession Act 2007** (Queensland)

*community legal service* means—

(a) an organisation that—
   (i) holds itself out as—
      (A) a community legal service; or
      (B) a community legal centre; or
      (C) an Aboriginal and Torres Strait Islander Legal Service; or
      (D) a family violence prevention legal service; and
   (ii) is established and operated on a not-for-profit basis; and
   (iii) provides legal services that—
      (A) are directed generally to people who are disadvantaged (including being financially disadvantaged) in accessing the legal system or in protecting their legal rights; or
      (B) are conducted in the public interest; and
      (iv) satisfies any other criteria prescribed under a regulation; or

(b) an organisation prescribed under a regulation as a community legal service.

**Legal Profession Act 2006** (Northern Territory)

A body corporate is a complying community legal centre if:

(a) it is funded or expected to be funded to a significant level by donations or grants from government, charitable or other organisations; and
(b) it holds itself out as providing legal services mentioned in paragraph (c), whether or not they are the only services it provides; and

(c) it provides legal services, other than for deriving a profit:

(i) to persons or organisations lacking the financial means to obtain privately funded legal services; or

(ii) to persons or organisations in relation to a legal matter that is expected to raise issues of public interest or to be of general concern to disadvantaged groups in the community; or

(iii) to persons or organisations having a special need because of their location or the nature of the legal matter; or

(iv) to persons having a significant physical or social disability; and

(d) it employs, or under an approval given under section 229, temporarily engages, a qualified legal practitioner who is responsible for the provision of the legal services (the "supervising legal practitioner"); and

(e) it has given the Society the information and fee prescribed by the regulations.

**Legal Practitioners Act 1981** (South Australia)

*community legal centre* means a body that provides legal services to the community, or a section of the community, on a non-profit basis, and includes the Aboriginal Legal Rights Movement, but does not include the Legal Services Commission;

**Legal Profession Act 2007** (Tasmania)

(1) An organisation, whether incorporated or not, is a complying community legal centre for the purposes of this Act if –

(a) it is held out or holds itself out as being a community legal centre (or a centre or establishment of a similar description); and

(b) it provides legal services –

(i) that are directed generally to persons or organisations that lack the financial means to obtain privately funded legal services or whose cases are expected to raise issues of public interest or are of general concern to disadvantaged groups in the community; and

(ii) that are made available to persons or organisations that have a special need arising from their location or the nature of the legal matter to be addressed or have a significant physical or social disability; and

(iii) that are not intended, or likely, to be provided at a profit to the community legal centre and the income (if any) from which cannot or will not be distributed to any member or employee of the centre otherwise than by way of reasonable remuneration under a contract of service or for services; and

(iv) that are funded or expected to be funded to a significant level by donations or by grants from government, charitable or other organisations; and

(c) at least one of the persons who is employed or otherwise used by it to provide those legal services is an Australian legal practitioner and is
generally responsible for the provision of those legal services (whether or not the person has an unrestricted practising certificate).

(2) An organisation, whether incorporated or not, may be prescribed as a complying community legal centre for the purposes of this Act.

The Ethics Committee proposes a generic definition be inserted in the Glossary as follows:

“community legal service” means an organisation or body that is a community legal service, a community legal centre, or a complying community legal centre for the purposes of the legal profession legislation of a jurisdiction.

In relation to the third matter, the Ethics Committee notes that in some jurisdictions the legal profession is “fused” (i.e. a legal practitioner may engage in legal practice in the manner of a barrister and of a solicitor) whereas in other jurisdictions the legal profession is not fused (i.e. a legal practitioner must practice either in the manner of a barrister or in the manner of a solicitor). Even in some jurisdictions where the profession is fused, a legal practitioner might determine and declare to practise only in the manner of a barrister.\footnote{29}

The legal profession legislation in some jurisdictions caters for the differences in the ethical principles that apply when acting in the manner of a barrister or acting in the manner of a solicitor by providing for separate professional conduct rules for barristers and for solicitors, to be developed by their respective professional associations.\footnote{30} In some fused jurisdictions the legal profession legislation does not make such a statutory distinction, but recognition of the differences is nevertheless accommodated and achieved.\footnote{31}

The Professional Ethics Committee and the Australian Bar Association have collaborated on harmonisation of those rules in the Australian Solicitors’ Conduct Rules (rules 17-29) dealing with the ethical principles which apply when a solicitor is acting in an advocacy capacity (and to all intents and purposes is no different in that capacity to a barrister). Other rules, in both the solicitors’ rules and the barristers’ rules, that are specific to the capacity in which the legal practitioner is providing a legal service to a client are dealt with in separate solicitors’ rules and barristers’ rules.\footnote{32}

The Ethics Committee’s view is that in a jurisdiction in which the legal profession is fused, and the practitioner determines to practice in the manner of both a barrister and a solicitor, the legal practitioner will be required to conform with the professional conduct rules applicable to the capacity in which that practitioner holds himself or herself out to the particular client in relation to the particular matter for which the legal practitioner is retained, and the issues at hand.

\footnote{29} As is the practice in Western Australia.
\footnote{30} See for example Legal Profession Uniform Law ss 427(3) and (4) and the Legal Profession Act 2006 (ACT) ss 579 and 580.
\footnote{31} See for example the Legal Profession Act 2006 (NT) s689 and the adoption of the Northern Territory Bar Association Rules into the general legal profession rules at \url{http://www.lawsocietynt.asn.au/for-the-profession/legal-profession-regulation-3/the-legal-profession-act-1.html}.
\footnote{32} See for example the Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015 and the Legal Profession Uniform Conduct (Barristers) Rules 2015, which apply in the Legal Profession Uniform Framework jurisdictions.
### Rule 1  Consultations Questions and Recommendations

1. That a separate set of rules does not need to be promulgated for Australian-registered foreign lawyers, because the existing rules applying to Australian solicitors also apply to Australian-registered foreign lawyers acting in the manner of a solicitor or law practice.

2. That a generic definition of *community legal service* be included in the Commentary as follows:

   “*community legal service*” means an organisation or body that is a community legal service, a community legal centre, or a complying community legal centre for the purposes of the legal profession legislation of a jurisdiction.

3. That there does not need to be a set of combined rules for fused profession jurisdictions. The advocacy and litigation rules to be found in the Australian Solicitors’ Conduct Rules and the Australian Bar Association’s barristers’ rules are recommended for harmonisation. Other rules apply according to the capacity in which a practitioner in a fused jurisdiction holds himself or herself out to the particular client in relation to the particular matter for which the legal practitioner is retained, and the issues at hand.
Rule 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.

Matters raised

1. Should rule 2.1 draw attention to the fact that there are provisions contained within legal profession legislation that set professional duties and obligations that solicitors must observe?

2. That rule 2.3 is redundant because it deals with a matter covered by section 298(b) of the Legal Profession Uniform Law and similar provisions in the legal profession laws of the other States and Territories.

3. In rule 2.3 the word "breached" should be replaced by "contravene".

4. Rule 2.3 purports to provide that a breach of the rules cannot be enforced by a third party. The correctness of this statement is queried.

Discussion points

In relation to the first matter, several submissions have suggested that rule 2.1 should include reference to ‘relevant provisions’ in legal profession legislation as these provisions set ‘standards’ to which legal practitioners must adhere. It has been suggested that doing this might, for example, assist to build awareness of the Legal Profession Uniform Law (NSW and Victoria) and help practitioners to avoid error by lack of awareness of it. Therefore rule 2.1 should state that principles of professional conduct are also established by the Uniform Law.

The Ethics Committee view is that the purpose of the Rules is to set out the core principles of ethical (or professional) conduct of legal practitioners, which have been developed and established by the profession as “the profession’s collective judgment of the standards expected of its members”33 and by the courts in their administration of justice and in exercising their inherent supervisory jurisdiction over the legal profession.

The Rules are an example of professional self-regulation and for this reason do not repeat legislated prescriptions or proscriptions, nor should they be regarded as statute. The Ethics Committee’s view is that the Rules sit alongside legislation. As the Commentary to rule 2 states, if the common law and/or legislation sets a higher standard than the Rules, the solicitor is required to comply with the higher standard and, alternatively, if the Rules set a higher standard than the common law or legislation, it is the Rules that must be observed.

33 The Ethics Committee endorses this observation by G E Dal Pont in Lawyers’ Professional Responsibility, 6th ed., 2017, [1.125].
In relation to the second matter, section 298(b) of the Legal Profession Uniform Law provides that “conduct consisting of the contravention of the Uniform Rules” is conduct capable of constituting unsatisfactory professional conduct or professional misconduct. Included in the Uniform Rules under the Legal Profession Uniform Law are uniform rules designated as “Legal Profession Conduct Rules”. Section 298(b) of the Uniform Law mirrors similar provisions in other legal profession legislation, highlighting that breaches of ethical principles embodied in the Rules may (but do not conclusively) amount to unsatisfactory professional conduct or professional misconduct. Further, while instances of unsatisfactory professional conduct can be dealt with administratively, ultimately these matters can (and matters involving professional misconduct must) be determined by a disciplinary tribunal or by the court.

The Ethics Committee view is that rule 2.3 impresses upon solicitors that a breach of the Rules is a professional conduct matter but its purpose is not to substitute for, nor replicate, section 298(b) of the Legal Profession Uniform Law or similar provisions in other legal profession legislation.

In relation to the third matter, the Ethics Committee notes that the suggestion the word “breached” be replaced with “contravene” has been made in relation to each rule where that word is used. The Ethics Committee considers that the word “breach” is a better descriptor in relation to a failure to maintain an ethical obligation, and is commonly used in disciplinary proceedings, whereas “contravention” is a term associated with the failure to discharge a statutory obligation.

In relation to the fourth matter, the Ethics Committee notes that legal profession rules “are not directly enforceable at the suit of a litigant…[but]…they do illustrate appropriate professional conduct such as the court may enforce in its supervisory power”, including, for example in a matter involving a conflict of interest over confidential information, where the court may use its power of restraint. In exercising its powers of restraint, the court is in effect exercising its inherent jurisdiction to determine which of its officers may represent parties to litigation rather than determining legal issues between parties.

The Ethics Committee also notes that while the Rules are not directly enforceable by a third party, the circumstances surrounding an alleged breach of the Rules can become part of the evidence led by a complainant or party to a complaint or other matter. Further, practitioners must be aware that although a breach of the Rules cannot be enforced by a third party, it can be used in evidence during a civil claim for negligence and therefore could result in civil liability.

The Ethics Committee suggests that an appropriate explanation in the Commentary to the Rules would be desirable.

---

34 See Legal Profession Uniform Law, s 299.
35 See Mancini v Mancini [1999] NSWSC 800 at [6].
36 G E Dal Pont, Lawyers’ Professional Responsibility, 6th ed, 2017, [17.20].
Rule 2 | Consultation questions and recommendations

4. That the Rules do not require inclusion of references to legislative rules. These professional conduct rules are statements of ethical principles and professional duties of solicitors, not statute.

5. That rule 2.3 should be retained and continue to use the word “breach” rather than “contravene”, reflecting the position that the rules are not legislative in nature.

6. That the Commentary should explain that while the Rules are not directly enforceable by a third-party, the circumstances surrounding an alleged breach of a rule(s) can form part of the evidence in a complaint or civil matter.
FUNDAMENTAL DUTIES OF SOLICITORS

Rule 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.

Matters raised

Should rule 3.1 include a reference to the rule of law so as to read: “A solicitor’s duty to the court, the administration of justice and the rule of law is paramount and prevails to the extent of inconsistency with any other duty”.

Discussion points

The expression rule of law embraces a number of principles which seek to promote and reconcile public policy aspirations and objectives. These principles include: that the law must be both readily known and available, and certain and clear; that everyone should have access to competent and independent legal advice; that all people are entitled to the presumption of innocence and to a fair and public trial; and that the Judiciary should be independent of the Executive and Legislature.37

Rule 3 sets out the principle that the paramount fundamental duty of a solicitor is to the court and the administration of justice. This rule is concerned primarily with the role of the solicitor as a participant in the curial process – that is, the rule focuses on the management and conduct of matters to promote efficient and effective processes of the court in the exercise judicial functions (although the principle applies not only in an advocacy context, but to everything a solicitor does in legal practice). From this fundamental duty flows other specifically stated duties, such as the duty to exercise forensic judgment and act independently (rule 17.1); to not deceive or knowingly or recklessly mislead the court (rule 19.1); to not make public comments which may prejudice a fair trial or the administration of justice (rule 28); and to assist the court with adequate submissions of law to enable the law properly to be applied to the facts (rule 29.1).

The Ethics Committee considers that it would not be appropriate to modify rule 3 to include reference to the rule of law as suggested. The Committee’s view is that rule 3 is directed to a specific purpose, being the duties that flow from a solicitor’s position as an officer of the court.

<table>
<thead>
<tr>
<th>Rule 3</th>
<th>Consultation questions and recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.</td>
<td>That rule 3.1 should not be amended to include reference to the rule of law.</td>
</tr>
</tbody>
</table>

**Rule 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.

**Matters raised**

Should this rule explicitly refer to the duty of candour?

**Discussion points**

Rule 4, together with rules 5 and 6, set out the fundamental ethical duties of a solicitor, and are the foundation for other, more specific, rules, such as rule 9 (the duty of confidentiality) and rule 43 (the duty to be open and frank in dealings with regulatory authorities).

The Macquarie Dictionary defines “candour” as “frankness, as of speech; sincerity; honesty”; and “freedom from bias; fairness; impartiality”.

The duty to act with frankness, honesty, fairness and impartiality – the concept of “candour” – is embodied within the meaning and scope of many rules, particularly in relation to a practitioner’s duty to the court and the administration of justice (rule 3) and frankness in court (rule 19). The need for candour is also embodied in:

- rule 4.1.2 - to be honest and courteous in all dealings in the course of legal practice;
- rule 4.1.4 - to avoid any compromise to a solicitor's integrity and professional independence;
- rule 5 - 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 be prejudicial to, or diminish the public confidence in, the administration of justice; or bring the profession into disrepute; and
- rule 7.2 - to inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client.

In *Kyle v Legal Practitioners’ Complaints Committee* Ipp J observed:

> It is a basic precept of the legal profession that lawyers owe a duty of honesty and candour to the court. It is the general duty of lawyers not to mislead the court by stating facts which are untrue, or mislead the Judge as to the true facts, or conceal from the court facts which ought to be drawn to the Judge’s attention, or knowingly permit a client to deceive the court … Legal practitioners owe this duty

---

when performing any act in the course of practising their profession, not only when they are making oral submissions to the court.

However, the duty of candour is not an absolute duty of the practitioner to disclose every known fact. In Kyle Parker J, for instance, drew attention to a distinction in the context of criminal proceedings,\(^{39}\) noting the following passage from *Saif Ali v Sydney Mitchell & Co.*\(^{40}\)

A barrister must not wilfully mislead the court as to the law nor may he actively mislead the court as to the facts; although, consistently with the rule that the prosecution must prove its case, he may passively stand by and watch the court being misled by reason of its failure to ascertain facts that are within the barrister's knowledge.

In *Chamberlain v Law Society of the Australian Capital Territory* Black CJ observed:\(^{41}\)

> …whilst it would obviously be improper to induce an opponent to make a mistake by means of a deliberate misrepresentation, it may, in different circumstances, be quite acceptable to take advantage of an opponent's mistake. In this area a line obviously has to be drawn somewhere and given that it is acceptable, in the context of an adversarial system, to take advantage of a mistake in some circumstances but not in others, some quite fine distinctions may need to be made.

In *Khudados v Hayden* Ward LJ stated the principle as follows:\(^{42}\)

> The question is to what extent if at all a barrister who must promote and protect fearlessly and by all proper and lawful means his lay client's best interests is bound to disclose evidence favourable to the other side. I draw the distinction between evidence favourable to the other side and law in the form of all relevant decisions and legislative provisions which may be unfavourable towards the contention which he argues. It seems to me that the better view is that a barrister would fail in his duty to his own client were he to supplement the deficiencies in his opponent's evidence. The fact that the other side is a litigant in person cannot make any difference as to the manner in which he fulfils his duties to the client, to the other side and above all to the court.

Further, non-disclosure of matters that attract legal professional privilege is acknowledged as serving an important public interest that displaces a duty of disclosure.\(^{43}\) The rationale for client legal privilege was stated in *Baker v Campbell* by Gibbs CJ as:\(^{44}\)

> The privilege is granted to ensure that the client can consult his lawyer with freedom and candour, it being thought that if the privilege did not exist “a man would not venture to consult any skilful person, or would only dare tell his counsellor half his case”.

In *Baker v Campbell*, the High Court (by majority) established that the doctrine of legal professional privilege extends beyond judicial or quasi-judicial proceedings. Deane J, for example held:\(^{45}\)

> Once one recognizes that the principle underlying legal professional privilege is that a person should be entitled to seek and obtain legal advice without the apprehension of being prejudiced by subsequent disclosure of confidential communications and

---

42 [2007] EWCA Civ 1316 at [38] (emphasis in original).
43 *Grant v Downs* (1976) 135 CLR 674.
44 *Baker v Campbell* (1983) 153 CLR 52 at 66, referring also to *Greenough v Gaskell* (1833) 1 My & K 98 at 103; 39 ER 618 at 621.
that the privilege is not confined to such communications as are made in the course of or in anticipation of litigation but extends generally to confidential communications of a professional nature between a person and his lawyer made for the purpose of obtaining or giving legal advice, common sense points to a conclusion that the principle should not be seen as restricted to compulsory disclosure in the course of such proceedings. Indeed, the doctrine of legal professional privilege would represent an aberration of the common law if it withheld from the courts information or documents which were material in the search for truth in circumstances where the disclosure thereof could be compelled as a matter of course by any administrative officer with a relevant and general statutory mandate to require the provision of information or the production of documents.

The Ethics Committee considers that the law does not support the proposition that a general duty of candour exists such as to require that any and all information in the possession of a legal practitioner that is relevant to a matter must be disclosed. The issue is one of context, relevance and circumstances.

The Ethics Committee therefore suggests:

- an explicit reference to ‘candour’ in rule 4 – which is a rule setting out general principles – would imply an absolute duty, which does not reflect the correct legal position;
- such a rule, if included, might be incorrectly and inappropriately taken as setting aside a client’s entitlement to confidentiality as embodied in, say, the principle of legal professional privilege and rule 9; and
- it would, however, assist solicitors if the Commentary included a fuller discussion of the topic of candour.

### Rule 4 Consultation questions and recommendations

8. That rule 4.1 should not include an explicit reference to a duty of candour, but the Commentary to the Rules should include a discussion of this topic.
**Rule 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.

**Matters raised**

1. The heading could be amended to “Standard of conduct”.
2. The rule does not address “dishonest conduct”.
3. Should “in the course of practice” be “in the course of legal practice”?
4. In rule 5.1 the phrase “which demonstrates that the solicitor is not a fit and proper person to practise law” should be deleted.
5. The “or” at the end of rule 5.1.1 should be removed as rules 5.1.1 and 5.1.2 are not in the alternative.
6. The rule could also deal with prohibiting the use of “discourteous/offensive” language towards other practitioners.
7. The Rule should be re-drafted for clarity.

**Discussion points**

In relation to the first matter, the Ethics Committee notes that the heading to rule 5 was deliberately chosen to draw attention to the proscription on dishonest or disreputable behaviour as a fundamental ethical duty. Descriptive headings have been used for a number of rules, and are intended to capture the main matters that are dealt with by the particular rule. The Committee suggests that the heading might be amended to “Standard of conduct – dishonest or disreputable conduct” for greater clarity.

In relation to the second matter, the Ethics Committee notes that “dishonesty” is embraced within the concept of what amounts to a person being a “fit and proper” person and that the existing Commentary contains a discussion of factors relevant to that issue. The Committee welcomes comments on whether any additional commentary on this point may be useful.

In relation to the third matter, the Ethics Committee agrees the suggested change should be made.

In relation to the fourth matter, the comment received is that the phrase “which demonstrates that the solicitor is not a fit and proper person to practise law” should be deleted on the basis that fitness and propriety are addressed in legal profession legislation.

The Ethics Committee considers that while the concept of “fit and proper” is central to rule 5, what constitutes “fit and proper” under rule 5 is not limited to only those factors identified in legal profession legislation.

Legal profession legislation provides, for example, that a person must be a “fit and proper” person in order to be eligible for admission to the legal profession, and sets out certain matters that an
admitting authority may have regard to in making that assessment. Similarly, legal profession legislation provides that a practising certificate must not to be granted or renewed if the practising certificate issuing authority does not regard the person as a “fit and proper” person to hold a practising certificate, and legislation sets out certain matters that the practising certificate authority may have regard to in making that assessment. Legal profession legislation also defines professional misconduct as including conduct that would, if established, demonstrate that the person is not a “fit and proper” person to engage in legal practice and provides that, in making that decision, regard may be had to the matters that would be considered if the person were an applicant for admission or for the grant or renewal of a practising certificate.

While legal profession legislation makes a number of references to “fit and proper”, the legislation does not set out exhaustive and conclusive definitions of that expression, but identifies matters that may be taken into consideration.

The Committee further notes that the power to discipline a legal practitioner (including removing the person from the roll of persons admitted to the legal profession) is an aspect of the inherent jurisdiction of the Supreme Courts, not limited in its exercise to the application of statutorily defined criteria of “fit and proper”. The inherent power is recognised in legal profession legislation for example, section 462 of the Legal Profession Act 2006 (ACT) provides:

462 The inherent jurisdiction and powers of the Supreme Court in relation to the control and discipline of local lawyers are not affected by anything in this chapter, and extend to—
(a) local legal practitioners; and
(b) interstate legal practitioners engaged in legal practice in the ACT.

Thus, while the statutory factors that may be taken into consideration in considering whether or not a person is a ‘fit and proper” person are highly relevant, they are not the only factors that are relevant, nor should they be taken as conclusive of establishing “fit and proper”. As Kitto J. in Ziem v Prothonotary of the Supreme Court of New South Wales noted: “it will generally be agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the line is by no means always an easy task.”

In relation to the fifth matter, the Ethics Committee considers that to delete the “or” would introduce ambiguity by implying both consequences are necessary before a solicitor’s conduct would be regarded as a breach of the rule. Further, the Committee notes that rule 5.1.1 is directed to the duty of a solicitor as an officer of the court, and rule 5.1.2 is directed to the duty of a solicitor as a member of the legal profession. The rule as formulated is intended to draw the attention of solicitors to their responsibilities in both capacities.

In relation to the sixth matter, the Ethics Committee notes that this subject is addressed in rule 4 and does not consider the proposed change to be necessary.

In relation to the seventh matter, the Ethics Committee invites comments on whether the following redraft would improve the clarity of expression of the fundamental principles:

5.1 A solicitor must not engage in conduct, in the course of legal practice or otherwise, which:
5.1.1 demonstrates that the solicitor is not a fit and proper person to practise law; or

46 Legal Profession Uniform Law, section 264(1); Legal Profession Act 2007 (QLD) s13; Legal Profession Act 2007 (NT) s554, Legal Profession Act 2008 (WA) s465 and Legal Profession Act 2007 (TAS) s510.
47 [Chapter 4 – Complaints and discipline].
5.1.2 is likely, to a material degree to:

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

5.1.2.2 bring the profession into disrepute.

<table>
<thead>
<tr>
<th>Rule 5</th>
<th>Consultation questions and recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.</td>
<td>That the heading to the rule should be changed to Standard of conduct – dishonest or disreputable conduct for greater clarity.</td>
</tr>
<tr>
<td>10.</td>
<td>Is further Commentary needed on the issue of dishonesty as an element of fit and proper?</td>
</tr>
<tr>
<td>11.</td>
<td>That rule 5.1 should be amended to replace the expression in the course of practice or otherwise with the expression in the course of legal practice or otherwise.</td>
</tr>
<tr>
<td>12.</td>
<td>That the phrase in rule 5.1 which demonstrates that the solicitor is not a fit and proper person to practise law be retained in the rule.</td>
</tr>
<tr>
<td>13.</td>
<td>Would rule 5 be clearer if reformulated as follows?</td>
</tr>
</tbody>
</table>

**Rule 5 (Standard of conduct – dishonest or disreputable conduct)**

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

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

5.1.2 is likely, to a material degree to:

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

5.1.2.2 bring the profession into disrepute.
Rule 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.

Matters raised

1. It has been commented that the Rules relating to undertakings are particularly important because of the common use of undertakings by lawyers, and should not be confined to undertakings given by a solicitor to another solicitor, but should expressly deal with undertakings given to a court or regulator, as well as undertakings given by an employee or agent of a solicitor.

2. It has been suggested that the phrase "whether or not" be added into the first line of rule 6.1, to read: “A solicitor who has given an undertaking, whether or not in the course of legal practice must honour…”. This would, it is said, expressly cover the situation where a solicitor provides an undertaking to a court or a regulator, and other circumstances where an undertaking is provided that may not strictly be in the course of legal practice. For example, a lawyer in a personal dispute makes an undertaking to a court or an authority to do something a certain way should be bound by that undertaking as though done in the course of legal practice.

3. Rule 6.2 should also refer to solicitors not giving undertakings that would require the co-operation of a third party.

4. Should a solicitor no longer be required to honour an undertaking given in the course of legal practice where the undertaking requires the co-operation of a third party (whether or not given in response to a prohibited request under rule 6.2), and the solicitor can no longer satisfy the undertaking because third party no longer exists, or otherwise can no longer provide the required cooperation?

5. Should a solicitor no longer be required to honour an undertaking given in the course of legal practice where the value of the subject matter of the undertaking is small (e.g. under $1,000) and the recipient cannot be found or unreasonably does not provide instructions? (e.g. a solicitor for a vendor holding $500 in trust after settlement on the undertaking that an appliance will be repaired to the satisfaction of the purchaser after settlement and the purchaser cannot be found or refuses to confirm or otherwise that the appliance has been repaired).

Discussion points

Rule 6 focusses attention on undertakings given or sought by a solicitor during the course of legal practice.

Rule 6.1 emphasises the fundamental ethical duty to ensure the effective and timely performance of an undertaking according to its clear terms, because such conduct is essential to the effective operation of the legal system and community confidence in the legal profession. Ineffective performance of an undertaking can place at risk the achievement of a client’s objectives, potentially causing financial or other losses, and can also be detrimental to the proper functioning of the administration of justice. That the obligation of a legal practitioner to perform an undertaking is a
solemn obligation of the upmost importance has been stated in many cases including, by way of a recent example, LSC v Wrightway Legal 49 where the Queensland Civil and Administrative Tribunal said: “It is central to dealings with legal practitioners. Because of its importance, noncompliance with the clear terms of an undertaking involves a substantial failure to reach or maintain a reasonable standard of competence and diligence and so amounts to professional misconduct.” For these reasons, a solicitor must not, even on the basis of client instructions, act contrary to the terms of an undertaking: “The correct course of action would have been for him to have applied to either vary the Federal Magistrates Court Order, or...to be released from the undertaking by the Court.”50

In relation to the first and second matters, the Ethics Committee notes that the scope of rule 6 is to be determined by two issues: whether the undertaking was given in the course of legal practice, and whether the undertaking was of the kind that attracts the application of the principles expressed by the rule.

The scope of rule 6.1 as presently formulated is not confined to undertakings between solicitors but extends to all undertakings given by a solicitor in the course of legal practice. For example, in Legal Services Commissioner v Piper51 it was held that a solicitor who, in the circumstances, had failed to comply with an undertaking given to the Legal Services Commissioner was guilty of unsatisfactory professional conduct – i.e. guilty of conduct occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

An undertaking, as that term is contemplated by rule 6, might also be given by a solicitor otherwise than during the course of legal practice – for example, if given in circumstances where the solicitor has attached his or her professional reputation to the giving of the undertaking.52 However, not all promises or commitments given by a solicitor will amount to an undertaking within the meaning of rule 6. Legal Services Commissioner v Graham53 is an example where a contract entered into by a legal practitioner outside the course of legal practice was held not to have involved an ‘undertaking’ within the meaning of that term as it is usually and particularly used in the context of ordinary legal practice.

That is not to say that compliance with an undertaking given by a solicitor otherwise than in the course of legal practice is of lesser importance. The breach of an undertaking given by a solicitor to a Court, albeit in a personal capacity, has serious consequences because, as a lawyer and officer of the Court, such a breach diminishes public confidence in legal practitioners and the Court system54. The Ethics Committee’s view is that a breach of an undertaking given by a solicitor outside of the course of legal practice falls within rule 5, rather than rule 6.

Given that the scope of rule 6 is confined to undertakings given or sought in the course of legal practice, and that other undertakings given by solicitors are potentially within the scope of rule 5, the Ethics Committee considers that an amendment to rule 6 to insert "whether or not in the course of legal practice", as suggested is not appropriate, although it might be useful to clarify this distinction in Commentary.

In relation to the third matter, the Ethics Committee notes that rule 6.1 deals with a solicitor giving an undertaking and rule 6.2 deals with a solicitor seeking an undertaking. If an undertaking sought

49 [2015] QCAT 174 at [26].
50 Ibid at [33].
51 [2006] NSWADT 12 at [56]
52 See for example, Kutlin v Auberach (1988) 54 DLR (4th) 552.
53 Legal Services Commissioner v Graham [2013] QCAT 552 at [53].
54 Bain (Deceased) & Bain (No. 3) [2016] Fam CA 662 at [60], [61].
by Solicitor A from Solicitor B is given by Solicitor B but would require the cooperation of a third party, Solicitor B will need to ensure that the undertaking can be performed as required by rule 6.1.

The Ethics Committee suggests that a change to the rule to emphasise this issue might not be the better approach, noting the existing Commentary:

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

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

In relation to the fourth matter, it has been suggested that it would be unfair to hold a solicitor to an undertaking where a third party either no longer exists or otherwise cannot provide the cooperation necessary for the undertaking to be performed. The Ethics Committee notes that the failure to honour an undertaking will have consequences for the party to whom the undertaking was given; what those consequences are will depend upon the nature of the undertaking given (which might be, for example, a contractual promise). As rule 6.1 states, a release from an undertaking given in the course of legal practice can only be granted by the recipient of the undertaking or by a court of competent jurisdiction. The Committee suggests that the issue raised is already contemplated by rule 6.1 – the appropriate course of action for the solicitor is to negotiate the matter with the party to whom the undertaking was given for a release, or to seek a release from a court of competent jurisdiction.

In relation to the fifth matter, it has been suggested that a situation where such an exception would apply is where the solicitor for a vendor in a conveyance is holding $500 in trust after settlement, on the undertaking that an appliance at the property will be repaired to the satisfaction of the purchaser after settlement, but the purchaser either cannot be found or refuses to confirm or otherwise that the appliance has been repaired. It is said that in this situation, the amount involved is small relative to the cost of court proceedings, and it would be uneconomic for the solicitor to institute proceedings for a release by the court.

The Ethics Committee notes that, unless otherwise specifically agreed, undertakings given in the course of legal practice are unconditional and binding. The example provided perhaps simply illustrates the degree of care that must be taken before a solicitor gives an undertaking, and the risks involved, rather than identifying a sound ethical exception to the general principles underpinning rule 6. The Committee welcomes feedback on this issue.
Rule 6  Consultation questions and recommendations

14. That rule 6 relates only to undertakings given or sought in the course of legal practice - the principle that undertakings given outside of legal practice must be honoured is within the principles underpinning rule 5.

15. That the Commentary be revised to clarify the application of the rules relating to undertakings.

16. That rule 6.2 does not need to refer to giving undertakings that would require the cooperation of a third party – this matter is addressed in the Commentary.

17. Would it be ethically sound for a solicitor to no longer be required to honour an undertaking given in the course of legal practice where the value of the subject matter of the undertaking is small and the recipient of the undertaking cannot be found or unreasonably does not provide instructions?
RELATIONS WITH CLIENTS

Rule 7   (Communication of advice)

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

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

Matters raised

1. A number of submissions have been made recommending that rule 7 be amended to state that solicitors have a duty to inform clients of the potential availability of legal aid and other forms of assistance.

2. Further, if the rules do include an obligation on solicitors to advise clients of their rights to apply for legal assistance:
   a) should there be an exception when there is no real possibility that the client is eligible to receive legal assistance?
   b) should this include an obligation to provide assistance reasonably necessary in the making of the application?

Discussion points

Rule 4.1 expresses the duty to act in the best interests of a client in any matter in which the solicitor represents the client. This rule reinforces the principle expressed in rule 7.1 that the client should be provided with clear and timely advice so as to be able to make informed choices about action to be taken during the course of a matter. The provision of advice to a client about the possible availability (if any) of legal aid is one of a number of matters a solicitor may, depending upon the circumstances, be expected to raise with a client in giving clear and timely advice.55

In relation to the first matter, the Ethics Committee suggests that to include a specific reference in rule 7 to legal aid as an ethical obligation is not necessary. Also, such a reference might be seen as limiting the scope of the rule when other forms of legal assistance might also be available (for example, access to pro bono legal assistance).

The present Commentary to rule 4 impresses upon solicitors that they should, as a matter of course, advise clients about the possibility or otherwise of legal aid being available, and the Ethics Committee suggests the Commentary might usefully be expanded to cover also the provision of other forms of legal assistance if appropriate in the circumstances. Alternatively, if it is considered appropriate, the provision of advice about legal aid might be better addressed in a legal practice rule.

55 The Ethics Committee notes that Rule 16A of the Australian Solicitors’ Conduct Rules (SA) deals with legal aid applications, as did rules 45 and 46 of the former Professional Conduct and Practice Rules 2013 (NSW).
In relation to point (b) in the second matter, the Ethics Committee considers that the extent to which a solicitor may reasonably assist in making an application is a matter that the solicitor must determine in light of the circumstances. The Committee therefore does not consider that the rule should be expanded to place a positive ethical duty on all solicitors in all circumstances of the kind suggested.

<table>
<thead>
<tr>
<th>Rule 7</th>
<th>Consultation questions and recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>18.</td>
<td>That rule 7 does not need to include a reference to a duty to inform clients about the availability of legal aid, but the Commentary to rule 4 could be expanded to mention other forms of legal assistance in addition to legal aid.</td>
</tr>
<tr>
<td>19.</td>
<td>That rule 7 should not include a duty on all solicitors in all circumstances to assist a client make an application for legal aid.</td>
</tr>
</tbody>
</table>
Rule 8    (Client instructions)

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

Matters raised

1. Should the rules provide a new exception to the duty of confidentiality where a solicitor reasonably believes the client is not capable of giving 'lawful, proper and competent instructions' and ‘the disclosure is for the purpose of: assessing the client’s ability to give instructions; obtaining assistance for the client in giving instructions; informing the court about the client’s ability to instruct; or seeking the appointment of a litigation representative’?

2. Should the rule set out a procedure to follow in situations where a client becomes unreasonable in his or her further instructions in an ongoing matter?

3. Should the duty to follow a client’s lawful, proper and competent instruction be qualified by reference to a solicitor’s duty to the court, and should rule 8.1 be prefaced with the words “subject to these Rules and the law”?

Discussion points

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

The duty to give effect to a client’s lawful, proper and competent instructions is subject to legislation that provides otherwise. By way of example, a client might instruct a solicitor to immediately initiate litigation in Victoria to settle a contractual dispute; however, section 22 of the Civil Procedure Act 2010 (VIC) places an overarching obligation for reasonable endeavours to be used to resolve a dispute by agreement before commencing litigation, unless it is not in the interests of justice to do so or the dispute is of such a nature as can only be resolved by judicial determination.

In relation to the first matter, it has been suggested that in certain mental health and guardianship matters a solicitor is obliged to act under the client’s instructions even if the solicitor is of the view that those instructions may not be in the client's best interests. For example, a solicitor may observe a client acting in a way that suggests the client is mentally ill, in a situation where the client's instructions are that he or she wishes to be released from a mental health facility immediately.

Another comment has suggested that in circumstances where a solicitor has concerns about a client’s capacity to provide competent instructions, the operation of the rules is likely to result in either the solicitor ceasing to act, or in the appointment of a guardian. This may involve a conflict between the solicitor's duties outlined above where giving effect to a client's lawful, proper or competent instructions may not be in the best interests of the client, and to independently initiate steps toward ascertaining the client’s mental health as a preliminary to seeking the protection of the client under guardianship laws might involve a breach of the duty of confidence.

The Australian Law Reform Commission (ALRC), in its Report Equality, Capacity and Disability in Commonwealth Laws, has recommended that the rules should provide a new exception to the duty of confidentiality (rule 9) where a solicitor reasonably believes the client is not capable of giving lawful, proper and competent instructions and “the disclosure is for the purpose of: assessing the client’s ability to give instructions; obtaining assistance for the client in giving instructions; informing
the court about the client’s ability to instruct; or seeking the appointment of a litigation representative. 56

The Ethics Committee notes the comprehensive analysis of the issues contained in the above Report. The analysis presents in essence two competing perspectives for a solicitor to consider when the issue of client capacity to give competent instructions arises, each of which raises potentially difficult consequences. The first is that where a solicitor believes that the client has diminished capacity to give competent instructions, the solicitor may cease acting for the client, resulting in “disadvantaged clients” “moving from lawyer to lawyer or worse, being unrepresented”. 57 Alternatively, an additional exception to the duty of confidentiality would mean that “lawyers would more readily make applications for the appointment of a substitute decision-maker…without the lawyer first trying to adequately support the client to enable the client to provide instructions themselves”. 58

The present commentary to rule 8 notes that the presumption of legal capacity lies at the heart of the solicitor-client relationship. Solicitors must be reasonably satisfied that a client has the capacity to give instructions and, if not so satisfied, must not act for or represent the client. But that does not necessarily mean, in practice, that the only appropriate course of action available to a solicitor is to immediately withdraw. Solicitors must always act in the best interests of a client in any matter in which they represent the client.

In Goddard Elliott v Fritsch59 Bell J identified the primary responsibility of a solicitor as to be satisfied that the client has the mental capacity to instruct: “when a client loses mental capacity, their lawyer loses authority to act for and represent them”. If the issue cannot be resolved to the reasonable satisfaction of the solicitor, he or she must raise the matter with the court, which then has the final responsibility to determine the issue. His Honour’s comments were made in a litigation circumstance where the opportunity was immediately available for the issue of capacity to be put to the court and the solicitor was, in effect, acting as an officer of the court.

Where the question of capacity does not arise directly during the course of court proceedings, the way in which a solicitor should ethically respond is perhaps less clear. In AEW v BW60 Lindsay J (referring to P.L.G. Brereton, “Acting for the incapable – A delicate balance” (2013) 35 Aust Bar Rev 244) noted:

A lawyer acting for a person who is, or might reasonably be thought to be, incapable of managing his or her own affairs might be required to confront difficult questions, requiring an exercise of mature judgment, about whether, and when, to decline to act without the appointment of a tutor or to apply for protective orders. A client incapable of managing his or her own affairs is likely, generally, to be incapable of giving instructions, and he or she may not be bound by the steps taken in his or her name.

…

If there is any reasonable ground for doubt about the capacity of a client then, in a case in which due authority to bind a client does not exist in the form of an enduring power of attorney, the course best taken is generally the prudent one of securing the appointment of a tutor, or the like, and making court approval of a settlement a condition of any settlement.

57 Ibid, p 222.
58 Ibid.
59 [2012] VSC 87 at [568].
60 [2016] NSWSC 905 [22] and [25].
The Ethics Committee suggests that *Goddard Elliott v Fritsch* and *AEW v BW* establish the ethical propriety of a legal practitioner taking steps, perhaps contrary to the client's wishes or understanding, to seek the protective jurisdiction of the court by obtaining the appointment of a third party to act as a guardian/tutor/substitute decision-maker. The principle embedded in Rule 8.1 is consistent with these decisions and including a specific exception in either rule 8 or rule 9 would, the Committee suggests, be an elaboration of the underlying principles rather than creating a new exception to the duty of confidentiality.

Such a rule can be found in the rules of the New Zealand legal profession, for example, which state that it is permissible for a lawyer to disclose confidential information where “it is necessary to protect the interests of the client in circumstances where, due to incapacity, the client is unable effectively to protect his or her own interests.” Further, rule 8.5 of the New Zealand rules provides that where a lawyer discloses information “it should be only to the appropriate person or entity and only to the extent reasonably necessary for the permitted purpose”.

The Ethics Committee considers the key question is not whether a new “exception” is required, but the extent to which (and in what way) it would be appropriate for a legal practitioner to make enquiries and obtain necessary advice from third-parties (and in doing so, potentially go outside the confidentiality of the client-solicitor relationship required under rule 9) so as to make a judgment about whether or not there are *reasonable grounds* for the solicitor to conclude his or her client *lacks capacity to give proper instructions*, and to then identify the appropriate course of action that follows, which might be to seek the protective jurisdiction of the court.

There is some legislative guidance on issues and indicia about capacity, albeit in different contexts, and some caution is necessary because the courts recognise there is a difference between *capacity to manage one’s own affairs* and *capacity to give competent instructions*.

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

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

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

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

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

---

61 *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rule 2008* (NZ) r 8.4(c).

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

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

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

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

(b) he or she is unable to —

(i) understand information relevant to the decision; or

(ii) retain information relevant to the decision; or

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

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

Section 7 of the *Mental Health Act 2015* (ACT) provides:

**Meaning of decision-making capacity**

For this Act, a person has capacity to make a decision in relation to the person's treatment, care or support for a mental disorder or mental illness (*decision-making capacity*) if the person can, with assistance if needed—

(a) understand when a decision about treatment, care or support for the person needs to be made; and

(b) understand the facts that relate to the decision; and

(c) understand the main choices available to the person in relation to the decision; and

(d) weigh up the consequences of the main choices; and

(e) understand how the consequences affect the person; and

(f) on the basis of paragraphs (a) to (e), make the decision; and

(g) communicate the decision in whatever way the person can.

Sections 5 and 6 of the *Guardianship and Administration Act 2000* (QLD) illustrate the complexity of the issues:

**Acknowledgements**

This Act acknowledges the following—

(a) an adult’s right to make decisions is fundamental to the adult’s inherent dignity;

(b) the right to make decisions includes the right to make decisions with which others may not agree;

(c) the capacity of an adult with impaired capacity to make decisions may differ according to—

(i) the nature and extent of the impairment; and

(ii) the type of decision to be made, including, for example, the complexity of the decision to be made; and
(iii) the support available from members of the adult’s existing support network;
(d) the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent;
(e) an adult with impaired capacity has a right to adequate and appropriate support for decision-making.

Purpose to achieve balance
This Act seeks to strike an appropriate balance between—
(a) the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making; and
(b) the adult’s right to adequate and appropriate support for decision-making.

There have been suggestions put forward about possible formulations of a rule to give effect to a new principle that a solicitor’s duty of confidentiality might be excepted where a client’s capacity is in doubt. For example:

Where the lawyer reasonably believes the client has diminished capacity and is at risk of substantial physical, financial or other harm and the lawyer discloses confidential client information for the purpose of taking reasonably necessary protective action.63

The Ethics Committee notes there are legitimate concerns about the utility of such a rule. The challenge for the solicitor is to:

- understand what factors might be relevant in triggering in the solicitor’s mind a doubt about capacity;
- understand what factors might be relevant in forming a judgment that his or her client lacks the capacity to give proper instructions;
- determine how the issue might (or might not) be raised directly with the client;
- identify which third-parties the solicitor might approach for assistance in establishing the reasonable belief about the client’s capacity;
- determine the extent to which the solicitor might otherwise disclose confidential information for the sole purpose of establishing a reasonable belief as to the client’s capacity; and
- identify how the cost of obtaining such assistance might be met.

The present Commentary to rule 8 states:

Complex issues can arise when a solicitor has reason to doubt a client’s capacity to give competent instructions. A number of Law Societies have issued guidance on the ethical responsibilities of practitioners when faced with such questions. Where a solicitor is unsure about the appropriate response in a situation where the client’s capacity is in doubt, the solicitor can, pursuant to Rule 9.2.3, seek confidential advice on his or her legal or ethical obligations.

The Ethics Committee also notes that the Client Capacity Guidelines: Civil and Family Law Matters issued by the Law Society of New South Wales64 for example, provides comprehensive guidance on the very extensive range of issues, considerations and options that are available to a

solicitor who, having doubts about a client’s capacity to give competent instructions, seeks to act in the best interests of the client.

The Ethics Committee suggests that it would be difficult and perhaps too limiting to devise a specific exception to rule 9 (Client confidentiality) where such an exception is predicated on a solicitor “forming a reasonable belief” that the client is incapable of giving competent instructions. The Committee view is that such an attempt could lead to a lengthy and highly prescriptive rule that attempts to guide solicitors through a highly complex, fact and circumstance sensitive decision-making process requiring the solicitor, ultimately, to exercise mature judgment.

The Ethics Committee considers that the existing rule establishes the appropriate ethical framework and that these additional considerations are best dealt with in guidance set out in the Commentary and other sources such as the Client Capacity Guidelines referred to above or other publications of professional associations.

In relation to the second matter raised, the Ethics Committee notes that as the purpose of the rules is to set out ethical principles, it would not be appropriate to amend the rule to set out procedures that a solicitor should follow if he or she considers a client’s instructions to be unreasonable. The Committee also draws attention to rule 13, which deals with completion or termination of an engagement – one of the grounds for which is termination for just cause and on reasonable notice – and the Commentary which notes that what constitutes just cause is a fact-sensitive question.

In relation to the third matter, the Ethics Committee considers that the issues surrounding a solicitor’s duty to the court when a question of client capacity arises could be better addressed in commentary rather than a modification to the rule, noting that rule 3 (paramount duty to the court and the administration of justice) is also relevant to the issue.

**Rule 8 Consultation questions and recommendations**

20. That rule 8 (and rule 9) does not need be amended to specifically include an exception to the duty of confidentiality where there is some doubt about the client’s capacity to give competent instructions, and that Commentary should include more guidance on this issue.

21. That it is not appropriate that rule 8 set out procedures a solicitor might follow in dealing with a client who gives instructions the solicitor considers to be unreasonable.

22. That rule 8 does not need to be prefaced by the phrase “Subject to these rules and the law” or be qualified by a reference to the solicitor’s duty to the court.
Rule 9  (Confidentiality)

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

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

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

EXCEPT as permitted in Rule 9.2.

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

9.2.1 the client expressly or impliedly authorises disclosure;

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

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

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

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

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

Matters raised

1. Should rule 9 clarify whether de-identified information is permissible within the scope of the rules?

2. Should disclosure of confidential client information by a legal assistance body be permitted where such a disclosure is made pursuant to a contractual obligation (e.g. under a funding agreement) or pursuant to a risk management audit, without the need to obtain the client's informed consent?

3. Should "confidential client information" be defined?

4. Should the Commentary deal with the issue of protecting client confidentiality when using electronic communications?

5. Should rule 9.2.5 be expanded to include circumstances where there is a significant risk of the client being financially exploited? The Commentary could then provide comment as to when it may be appropriate to seek a financial management order on behalf of the client to prevent such exploitation.

6. For rule 9.2.5, should the current exception relating to imminent serious physical harm be expanded to also include psychological harm?
7. Should a new exception be included which acknowledges it would be ethically appropriate for a solicitor to disclose confidential information relating to the circumstances surrounding the preparation of a will, where there is a dispute concerning the validity of the will, but no grant of probate or administration has been made?

**Discussion points**

Confidentiality has always been recognised as the foundation of the solicitor-client relationship – it provides the framework for clients to make full and frank disclosures to their solicitor, and for solicitors to give full and frank legal advice and assistance to their clients without fear that what is disclosed and discussed between the client and solicitor will be further disclosed. The exceptions set out in rules 9.2.1 to 9.2.6 are specific situations in which the profession and the courts have recognised the existence of a weightier public policy consideration.

The Ethics Committee view is that any additional exceptions must address an issue of such significance as to justify a departure from the fundamental right of the client (and corresponding duty of the solicitor) to preserve confidentiality. Also, it considers that the circumstances in which there is to be a departure must be unambiguous.

**The first matter** has been raised with the Ethics Committee by a number of legal assistance bodies. One such body has noted that a core part of the work of a community legal service can include responding to requests from Government or law reform bodies for case examples that illustrate particular issues. The need to provide case studies can also arise as part of the funding processes for publicly-funded organisations and as part of their internal governance processes. The Committee view is that the use of case studies in this manner so as to ensure no possibility of disclosing a client’s confidential information would not breach rule 9. The Ethics Committee suggests it is not necessary to amend rule 9.2 to include this as a specific exception, but that the issue can be addressed in the Commentary.

Further, the Committee notes that where there is a likelihood that a legal assistance body may need to disclose information (even de-identified information) obtained from a client during the course of providing a legal assistance service, it would be prudent that that likelihood and the circumstances be disclosed to clients at the commencement of the engagement so that the necessary client consent (or refusal) can be obtained.

**In relation to the second matter**, the Ethics Committee notes that the duty is to not disclose client confidential information except in the specific circumstances listed in rule 9.2. As the Committee noted in relation to the first matter, if there is a possibility that a legal assistance body may be required to disclose client confidential information pursuant to, for example, a funding agreement, that possibility should be raised with clients at the time of commencing the engagement, when the necessary client consent (or refusal) can be obtained.

It has also been suggested that disclosure of client confidential information to another solicitor, who is external to a community legal centre and has signed a confidentiality undertaking, is permissible under rule 9.1.2, where that disclosure is made to enable an audit to be undertaken of the quality of the legal services provided by the community legal centre. The rationale is that such an audit would be “for the purposes of delivering or administering legal services in the relation to the client”. The Ethics Committee seeks feedback on this issue.
In relation to the third matter, the Ethics Committee considers that what is and is not confidential client information is a fact and circumstance issue. Given this, and the fact that the common law and rules of equity are constantly developing, the Committee does not consider it appropriate to include a definition of "confidential client information" in the rules.

In relation to the fourth matter, when law practices rely on technologies such as cloud-based email services, they are expected to do so having considered things such as: the service providers, especially if the provider is off-shore and subject to different confidentiality and access laws than those in Australia; that the client is made aware of the implications of, and has given informed consent to, the use of the technologies; whether and when encryptions are necessary; and that, amongst other things, policies and practices have been developed around the use of cloud-based services.

The Ethics Committee notes that there is a considerable body of information and guidance available to solicitors from professional associations and that, while it would be unnecessary to reproduce that information, the Commentary should be updated to draw attention to the availability of those resources.

In relation to the fifth matter, the issue raised is whether or not rule 9.2.5 should be expanded to include circumstances where there is a significant risk of the client being financially exploited.

It was noted by one of the contributors that if this amendment was made, it would be appropriate for the Commentary to provide guidance as to when it may be appropriate to seek a financial management order on behalf of the client to prevent this exploitation.

The American Bar Association, in its Model Rules of Professional Conduct, has two provisions in place regarding confidentiality of information and risk of financial harm. Rule 1.6(a) states that “a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)”.

Rule 1.6(b) adds that a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to:

(2) “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

(3) prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services”.

The American rules allow disclosure in these circumstances for clients who seek to use the lawyer’s services to perpetrate a fraud. A 2003 paper notes that the discretionary exception to the general obligation of confidentiality is justified by the need to protect the interests of society and third persons in avoiding substantial financial loss, and to protect the integrity, professional reputation and financial interests of the lawyer, all of which are competing utilitarian rationales.

The American rules addressing financial harm are not of the type contemplated by this question, as they focus on financial harm to third parties as opposed to financial harm to the client. Similarly, the UK Solicitors Regulation Authority Code of Conduct 2011 contains no exception to confidentiality obligations relating to financial harm to the client.

65 There is a more detailed discussion in the Discussion Points to rule 10.
The Ethics Committee notes that the proposed amendment could be problematic because the term ‘financial exploitation’ lacks specificity, and it may be difficult for a solicitor to determine whether the client or a third party is at risk of being financially exploited, and whether that risk arises because of an intent to commit a crime or a fraud.

**In relation to the sixth matter**, the issue is whether or not rule 9.2.5 should be expanded to include imminent serious *psychological* harm in addition to imminent serious *physical* harm. Similar issues about specificity and assessment of risk, as mentioned in relation to the fifth matter, also arise.

The ethics-based exceptions to confidentiality on the basis of harm prevention vary around the world.

The UK Solicitors Regulation Authority *Code of Conduct* does not include an exception for the prevention of either physical or mental harm.67

The American Bar Association rules include an exception for “reasonable certain death or substantial bodily harm”68 but not psychological harm.

The New Zealand rules require a lawyer to disclose confidential information where the lawyer reasonably believes that disclosure is necessary to prevent a serious risk to the health or safety of any person,69 which could be interpreted to include both physical and mental health.

Finally, the Federation of Law Societies of Canada’s *Model Code of Professional Conduct* does have an exception to confidentiality by reference to “serious bodily harm”,70 which was held by the Supreme Court in *Smith v Jones*71 to include psychological harm. In so ruling,72 Cory J referred to the court’s judgment in *R v McCraw* where it was held that:73

> So long as the psychological harm substantially interferes with the health or well-being of the complainant, it properly comes within the scope of the phrase “serious bodily harm”. There can be no doubt that psychological harm may often be more pervasive and permanent in its effect than any physical harm.

The concept of “harm” in Australian Commonwealth criminal legislation can include psychological harm. The *Criminal Code Act 1995* (Cth) defines harm to include “harm to a person’s mental health” (whether temporary or permanent). “Harm to a person’s mental health” is then defined to include significant psychological harm, but not mere ordinary emotional reactions such as those of only distress, grief, fear or anger.74

State and Territory legislation dealing with apprehended, family and domestic violence also includes mental, emotional or psychological harm within the scope of conduct that may give rise to a court making a protection order,75 although there is considerable variation in terminology, with terms such as “emotionally or psychologically abusive”, “mental harm”, intimidation, harassment or offensiveness.

The Ethics Committee is interested in receiving further feedback on Matters 5 and 6, particularly:

---

67 Solicitors Regulation Authority, SRA Code of Conduct 2011, Ch 4.
69 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rule 2008 (NZ) r 8.2(b).
71 [1999] 1 SCR 455.
72 *Smith v Jones* [1999] 1 SCR 455 at [83].
75 See for example, *Crimes (Domestic and Personal Violence) Act 2008* (NSW) s13; *Domestic and Family Violence Protection Act 2012* (Qld) s8; Intervention Orders (Prevention of Abuse) Act 2009 (SA) s8; *Family Violence Act 2004* (Tas) ss7, 9; *Family Violence Protection Act 2008* (Vic) ss 5, 7; *Restraining Orders Act 1997* (WA) s6; *Domestic Violence and Protection Orders Act 2008* (ACT) s13(1)(e); *Domestic and Family Violence Act* (NT) s5.
• the extent to which there have been instances where a client or another person has suffered serious financial or psychological harm that may have been prevented had it been permissible for the solicitor to disclose confidential client information; and
• what criteria, factors or considerations might be relevant to a solicitor forming a view (or reasonable belief) that there is a risk of imminent financial or serious psychological harm to a client or another person, recalling that if there were to be an overriding justification for further exceptions, the circumstances and factors must not be ambiguous.

In relation to the seventh matter, the general principle is that a solicitor may not disclose any information which is confidential to a client, except with the express or implied consent of the client, or by the operation of law, or pursuant to any of the ethically appropriate exclusions set out in rule 9.2. When a solicitor’s client dies, the duty of confidentiality owed to the deceased client passes to the legal personal representative of the deceased client’s estate. Until such time as the legal personal representative is confirmed there is a hiatus in any new client consent to the disclosure of client confidential information.

A solicitor has a general duty following the client’s death to provide the original Will to the named executor(s) for the purpose of applying for probate, and it is accepted that a solicitor may disclose confidential information to the named executor(s) for that purpose.

Also, a solicitor who has possession or control of a Will may be required to allow certain persons to inspect that Will or to be given a copy of the Will (at the person’s expense) where provided for under state or territory legislation.76

It is the grant of probate that generally confirms the appointment of the named executor(s) and confers on the executor(s) the legal authority to administer the estate.77 It is only following the grant of probate that the executor(s) become entitled to the records of the deceased, including information held on the solicitor’s file and are in a position to give or withhold consent to disclosure of what was the client confidential information of the deceased.

The issues that have been raised with the Professional Ethics Committee concern the situation where the validity of the Will is called into question before formal proceedings are commenced (i.e. before the right of representation is granted to an executor or administrator) and the solicitor is in possession of client confidential information as to what has occurred between the solicitor and the client in preparation of the Will. In this situation, there is no client or legal personal representative who can provide the necessary consent to the solicitor to disclose that information. A number of possible scenarios and responses have been identified:

• the solicitor could do nothing at all in response to requests for information, on the grounds that there is no-one to whom the solicitor can properly respond, but simply allow the solicitor’s file to be subpoenaed when proceedings are commenced;
• alternatively, the solicitor may prepare an affidavit if required to do so, concerning the circumstances so that it can be filed in any proceedings;
• if the solicitor is also an attesting witness to the Will, he or she may prepare a more detailed affidavit by attesting witness;
• the solicitor may be approached by any of the parties to give evidence in proceedings as a witness, but is then faced with the situation of deciding how much of the confidential information of the deceased client he or she might be permitted to disclose.

76 See for example Succession Act 2006 (NSW) s54; Succession Act 1981 (QLD) s 33Z; Wills Act 1997 (VIC) s50
77 In some jurisdictions authority to deal with some aspects of an estate, without prior grant of probate, is conferred by statute – see for example s219 of the Transfer of Land Act 1893 (WA) and s111 of the Land Title Act 1994 (QLD).
The issue raised with the Ethics Committee is what, if anything, might a solicitor acceptably disclose before proceedings have been initiated so as to answer questions about the circumstances surrounding the preparation of the Will and its execution when there is no client to provide the necessary consent. The submissions suggest that an additional exception to rule 9.1 might be devised as follows:

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

the information is disclosed only in the form of a copy of the solicitor's file concerning a disputed Will or informal testamentary document of a deceased person, to a person with an interest in whether or not a grant of probate or administration of that Will or informal testamentary document should be made (the copy being provided at the expense of the person seeking it) and, in addition, the solicitor is permitted to give evidence in relation to that question in proceedings for its determination and is also permitted to disclose further information by arrangement between the solicitor and insurer referred to in rule 9.2.6.

Contested proceedings

Submissions on this issue have drawn attention to a Practice Note of the Law Society of England and Wales on Disputed Wills about how a solicitor should, where there are contested proceedings, respond to a request for information about the circumstances surrounding the execution and witnessing of the Will.

The most recent version of the Law Society of England and Wales Practice Note recommends that a solicitor should, when requested, “provide a full statement of evidence as to the preparation of the Will, and the circumstances in which it was executed to anyone who has an interest in the dispute, whether or not you are acting for any of the parties” and that the solicitor should also, “with the consent of any third party personal representatives, make available a copy of requested documents”. The Practice Note goes on to recommend that “[The] quickest and easiest way of complying with such requests will often be to copy the contents of the Will file.” The Practice Note recommendations are subject to an exception that, where there is a possibility of negligence in the preparation of the Will the solicitor should “inform any lay executors and beneficiaries of the Will that they may wish to take independent advice as to whether or not the Will was negligently drafted” and “immediately inform your practice's insurers of the existence of a potential claim.”

An earlier version of the Practice Note of the Law Society for England and Wales was considered by the Court of Appeal of England and Wales in Larke v Nugus where Brandon LJ stated [at 12]:

The recommendation [i.e. the Practice Note] is no doubt of importance, but even if it had not been made certain principles would apply to the matter, and in my judgment the principle which applies is that, when there is litigation about a will, every effort should be made by the executors to avoid costly litigation if that can be avoided and, when there are circumstances of suspicion attending the execution and making of the will, one of the measures which can be taken is to give full and frank information to those who might have an interest in attacking the will as to how the will came to be made. In a case of this kind, where suspicion attaches to the will because certain persons, who have only recently come into the life of the testatrix, take a substantial benefit under the will, then clearly the circumstances in which instructions “for the will were given are of the utmost importance, and it is information as to that matter, even more than information as to the formalities of

---

78 www.lawsociety.org.uk/support-services/advice/practice-notes/disputed-wills/
79 The first version was issued in 1959.
80 Re Moss, Larke & anr v Nugus & anr [200] WTLR 1033.
attestation, that is needed. So I don’t think the matter turns solely on the recommendation of the Law Society; I think it also turns on the principle that I have endeavoured to state.”

The Court of Appeal agreed with the decision in the probate action under appeal that the unsuccessful party should not be ordered to pay costs because the solicitor who had prepared the Will refused to make information available at an earlier stage which, if he had done so, could have avoided the need for a full trial of the probate matter.

The Practice Note of the Law Society for England and Wales has been adopted by the Law Society of Queensland in a Guidance Note for Members: Disputed Wills (Contested Probate Matters).81 There has been developed in England and Wales, and adopted in Australia, a somewhat standardised approach (referred to as a Larke v Nugus letter) to seeking and providing information about the circumstances surrounding the preparation of a disputed Will.

The Larke v Nugus letter relates to information which is sought from a solicitor who took instruction from a Will maker and where allegations arise after the death of the Will maker that he or she either lacked testamentary capacity, or did not sign the Will with knowledge or approval, or the Will was prepared in suspicious circumstances. The provision of information or material in such circumstances is based on the premise that there is a contest or dispute as to who should administer the estate and therefore the parties to the dispute are entitled to the information to better understand the issues. The disclosure can be made only on the limited grounds noted above.

Prior to proceedings being commenced.

The underlying logic of the England and Wales Law Society Practice Note and the decision in Larke v Nugus is that a solicitor who provides information about the circumstances surrounding the execution and witnessing of a Will, in response to a request from a person with an interest in the Will, is essentially providing information that he or she would otherwise eventually have to provide if, for example, he or she is called as a material witness in contested proceedings. Put another way, by not acting early to provide information in response to a reasonably-based request, the solicitor might be seen to be simply delaying disclosure until compelled to do so by the court, potentially at great cost to the estate and other parties in the matter.

The ethical question raised in submissions is how early in the course of dispute might a solicitor provide information about the circumstances surrounding the preparation of the Will, so as to possibly avoid the need for full contested proceedings. The present practice amongst some law firms is to ask the enquirer for particulars of their concerns and then to ask those persons who are affected by the disclosure as to whether they consent on the basis that if consent is not given that can be raised on the question of costs in due course.

The Guidance Note of the Queensland Law Society refers to rule 637 of the Uniform Civil Procedure Rules 1999 (QLD) which enables a person to apply to the registrar of the Supreme Court for a subpoena requiring a person to attend the court for examination in relation to any matter relevant to a proceeding under Chapter 15 – (Probate and administration, trust estates). Disclosure of confidential information at this early stage can avoid the need for (and the costs of) full proceedings, while also carrying for the solicitor concerned the “protection” that the disclosure of client confidential information is “permitted or compelled by law”.

A new exception as proposed, which would enable disclosure before the earliest stage of proceedings, would not be based on the existing exception in rule 9.2.2 (permitted or compelled by law to make the disclosure), but might be derived from the general principle in rule 3 that a solicitor’s

paramount duty is to the court and the administration of justice. While the solicitor can be compelled to disclose client confidential information (other than information to which client legal privilege applies) in response to a subpoena under civil procedure provisions, or as a material witness during the course of contested proceedings, the disclosure of some client confidential information before then might be said to be ethically appropriate where that disclosure is likely to result in people being better informed and may then reduce the prospect of litigation, with the associated advantage of avoiding costs (which could potentially have a significant impact on the value of the estate available for distribution and thus the legacies of any residual beneficiaries). While this view might be said to be consistent with the principle articulated in Larke v Nugus “that every effort should be made by the executors to avoid costly litigation if that can be avoided”, it raises countervailing considerations.

The unauthorised disclosure of client confidential information has long been regarded as a serious professional disciplinary matter, even if the disclosure was well intentioned. Also, the unauthorised disclosure of client confidential information may lead to other consequences such as breach of the contract of retainer, claims for damages in negligence, or further and unforeseen disputation between persons with an interest or perceived interest in the estate, which could increase the prospect of litigation.

Further, such disclosure, having been made otherwise than during the conduct of litigation proceedings, or preliminary to the conduct of the actual proceedings, would lack the requisite intimate connection with the conduct of the cause in Court so as to attract the advocate’s immunity from a negligence action. In Attwells v Jackson Lalic Lawyers Pty Limited the High Court observed:

No doubt an advice to cease litigating which leads to a settlement is connected in a general sense to the litigation which is compromised by the agreement. But the intimate connection required to attract the immunity is a functional connection between the advocate’s work and the judge’s decision.

Alternatively, an exception might be derived from the principle in rule 9.2 regarding implied consent – that is, absent specific instructions to the contrary, a deceased client might be regarded as having impliedly authorised the solicitor to disclose information so that the client’s testamentary intentions are made clear.

The Ethics Committee invites comments on whether it would be appropriate for a specific exemption to be inserted into rule 9 to enable a solicitor who prepares a Will, in respect of which questions are asked about the circumstances surrounding the preparation of that Will, to disclose certain confidential information about the Will before proceedings have been commenced. If so, what would be the ethical principle of such a rule? Would it, for example, require the solicitor to form a belief on reasonable grounds that the disclosure would avoid the need for contested proceedings?

Those comments could address the potential effect of such an exemption on any right of disclosure on the basis of implied authorisation given by the deceased, which is referred to above. Further, if such conduct were to be considered appropriate, what factors might be relevant to the solicitor’s consideration of reasonable grounds?

Rule 9  Consultation questions and recommendations

23. That rule 9 does not need be amended to specifically exempt the use of de-personalised information by legal assistance bodies in case studies.

24. That rule 9.2 should not contain a specific exemption from disclosure of client confidential information by legal assistance bodies when managing funding agreements and that client consent should be obtained.

25. Is disclosure of client confidential information for the purposes of a risk management audit within the scope of rule 9.1.2?

26. That it would not be appropriate to include in the rules a definition of what is and what is not “client confidential information”.

27. That Commentary to rule 9 be revised to draw attention to the availability of resources and guidance on managing risks to maintaining client confidentiality from the use of cloud-based computing and other technology-based communication solutions.

28. To what extent have there been instances where a client or another person has suffered serious financial or psychological harm that may have been prevented had it been permissible for the solicitor to disclose client confidential information?

29. How might “imminent serious financial harm” and “imminent serious psychological harm” be defined or explained, and what circumstances and factors might be relevant in determining whether the client or a third party is at risk?

30. Would it be ethically appropriate for a solicitor to disclose confidential information about a Will if questions are raised about the circumstances surrounding the preparation of that Will. If so, what information might be disclosed? Would the solicitor require a belief on reasonable grounds that the disclosure would avoid the need for contested proceedings? If such conduct were to be considered ethically appropriate, what factors might be relevant to the solicitor’s consideration of reasonable grounds?
Rule 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 information which is confidential to a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:

10.2.1 the former client has given informed written consent to the solicitor or law practice so acting; or

10.2.2 an effective information barrier has been established.

Matters raised

1. Does the obiter of Brooking JA in Spincode Pty Ltd v Look Software Pty Ltd still apply in Victoria?

2. How does rule 10 relate to the provision of discrete legal services to a client, even where no actual conflict of interest exists? Were the rule to provide an exemption where legal advice has been provided in a “discrete” or “unbundled” or “limited representation” setting, would it need to clarify what types of services are exempted? Should a new rule dealing specifically with unbundled legal services be devised?

3. Should rules 10.2.1 and 10.2.2 be separated with “and” instead of “or”?

4. In rule 10.2.1, is "informed written consent" a sufficiently certain concept? Should the reference to “informed written consent” be changed to “informed consent”?

5. Should the concept of an “effective information barrier” be defined?

6. Should rule 10.2.1 be amended to read “the former client has given informed written consent to the disclosure of that information…” rather than the current rule, which is expressed as requiring the former client to give consent to the solicitor or law practice acting for the current client?

Discussion points

A number of submissions received by the Law Council raise combined issues with rules 10 and 11 about the nature of a solicitor’s duty in the face of a conflict between the duties owed to more than one client, including issues around informed consent, information barriers and “unbundled” (or “one-off”, “discrete” or “limited scope” representation) issues.

The Ethics Committee view is that rules 10 and 11 deal with separate circumstances, each of which raises separate legal and ethical issues, and as such each rule must be considered separately.

Purpose and scope of rule 10

Rule 10 sets out principles to be applied when a solicitor or law practice is considering whether or not it should provide legal services to a current client in circumstances where the solicitor or law practice has provided legal services to a former client and holds confidential information of the former client. The rule is about the duty-duty conflict arising when it would be in the interests of the current client to know or make use of the confidential information of the former client.
Rule 10 does not unilaterally proscribe a solicitor or law practice from providing legal services to a current client in a matter where they hold confidential information of a former client material to that matter, nor does it unilaterally permit this. The rule sets out the principle that such conflicts are to be avoided.

The issue which animates the rule is that the solicitor is in possession of information confidential to a former client, and thus owes a duty to the former client to preserve that confidentiality, which duty may be inconsistent with the duty of undivided loyalty to the current client where the confidential information is material to the current client’s matter. In *Hilton v Barker Booth and Eastwood* Lord Walker explained (by way of analogy) the inherent issue with a practitioner creating irreconcilable duties:84

If a house owner contracts to sell his house to one purchaser for £240,000 and then a week later contracts to sell it to another purchaser for £250,000, he assumes two contractual duties which are on the face of it irreconcilable, unless the seller has grounds for rescinding either contract, or can persuade one or other purchaser to release him from his obligation. That is so whether he enters into the second contract with his eyes open, in the hopes of making a larger profit, or whether (rather improbably) he does so inadvertently. It is no answer for him to say to either purchaser: I am sorry, I am obligated to another. His dilemma is his own fault.

The ethical principle that resolves successive duty-duty conflicts is that the solicitor or law practice cannot act for the current client except where the former client has discharged the solicitor or law practice from the duty of confidentiality by giving informed consent (rule 10.2.1), or because the law recognises that the duty to preserve the confidential information of the former client can be discharged by means of an effective information barrier (rule 10.2.2).

**Confidential information**

What constitutes information that is confidential to a client is not a matter of precise formulation. Confidential information might include, for example, legal advice given to the former client, specific information disclosed by the former client for the purposes of obtaining advice, instructions for executing a transaction on behalf of the client, or general information about the client’s business or family circumstances acquired by reason of the solicitor’s relationship with the former client.85 For this reason the expressions *information confidential to the client* and *material to the matter of another client* are not defined in the Rules. The Commentary to rule 10 notes the observation of Lightman J in *Re a Firm of Solicitors*:86

> [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.

As the Commentary notes, 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 might be relevant to the matter being handled for the new client. Confidentiality can apply to a broad range of information and arise in a range of circumstances.

Before material will be recognised as having the character of confidential information, the information must be identified with precision, not merely in global terms.87 The more general the

---

84 [2005] 1 All ER 651; [2005] UKHL 8 at [35].
85 *Legal Practitioners Complaints Committee v Camp* [2006] WASAT 355 at [114].
87 *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307 at 314 per Drummond J.
description of the information in this context, the more difficult it is for the court to satisfy itself that
information so described was imparted or received or retained by a defendant in circumstances
which give rise to an obligation of confidence.88

The point was elaborated by Gillard J in Yunghanns v Elfic Ltd as follows:89

… the degree of particularity of the confidential information must depend upon all the
circumstances. Often it cannot be identified for fear of disclosure. In considering this factor
it must be borne in mind that a solicitor makes notes, forms views and opinions of clients
and observes things that the client may have forgotten or overlooked. In some cases the
circumstances of the retainer and the nature of the legal work will be sufficient to establish
the nature of the confidential information. In this regard the relationship between solicitor
and client may be such that the solicitor learns a great deal about his client, his strengths,
his weaknesses, his honesty or lack thereof, his reaction to crisis, pressure or tension, his
attitude to litigation and settling cases and his tactics. These are factors which I would call
the “getting to know you” factors. The overall opinion formed by a solicitor of his client as a
result of his contact may in the circumstances amount to confidential information that should
not be disclosed or used against the client.

But this does not mean that the so-called “getting to know you” factors should be taken too literally
or applied generically in this regard. As Steytler P explained in Ismail-Zai v Western Australia, in
referring to Gillard J’s remarks in Yunghanns:90

These comments were made in the context of a case where the former client had had a
very close relationship with a firm of solicitors spanning some 30 years. The former client
had initially worked as an employee solicitor for the firm for five years and, subsequently,
the firm had acted for him in many commercial transactions. The firm consequently had
“many opportunities to form opinions as to [the former client’s] modus operandi in business
and legal work” (at 13). The case was consequently unusual. If these so-called “getting to
know you” factors, to the extent that they involve knowledge of the client rather than of
anything imparted in confidence by the client concerning his or her affairs, can constitute
confidential information (a proposition that seems to me, with respect, to be questionable
…), they will only rarely do so … However, the misuse of information of that kind might be
such as to undermine the due administration of justice.

More broadly, it must be understood that it is not information per se that is protected for this
purpose, but confidential information. Information that was once confidential may lose that status
and no longer be confidential, it may no longer be available although it was communicated in the
past, or it may not be material to any use that might now be proposed to be made of information.91

To this end, solicitors must exercise considerable care and prudence in determining whether
information of a former client has the necessary degree of confidentiality and materiality to attract
the operation of the rule. A useful inquiry as to whether or not information should be considered
confidential is whether a reasonable member of the public would determine that the information
disclosed is confidential or is imparted with the reasonable expectation of the confidence of the solicitor.92 It must be borne in mind that the right of confidentiality is that of the client.

88 Independent Management Resources Pty Ltd v Brown [1987] VR 605 at 609 per Marks J.
89 (unreported, Supreme Court of Victoria, Gillard J, 3 July 1998).
92 “Keeping Secrets – or not. When and why client confidences may need to be shared”, Proctor, (August 2012) 32.
The nature of the duty to preserve the former client’s confidential information

In applying rule 10 it has been necessary to discern the relationship with the former client at the time the alleged duty-duty conflict arises. An issue dealt with in some detail in the existing Commentary to rule 10 is the differing views as to the nature of the relationship once the retainer has ended, which gives rise to different principles to be observed by solicitors when a conflict arises between the duties owed to a former client and a current, or potentially new, client.

The relationship between a lawyer and a client is one of the settled categories of relationships that gives rise to fiduciary duties. The special relationship of trust and confidence that arises from the fiduciary relationship entitles the client to the “single-minded loyalty” of their lawyer.

The Ethics Committee considers that the law as it presently stands regards the fiduciary relationship that existed with the former client to have come to an end once the retainer with the former client has finished, although the solicitor’s duty of confidentiality survives the conclusion of the retainer.

In the House of Lords decision in *Prince Jefri Bolkiah v KPMG* Lord Millett observed:

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

The present Commentary to rule 10 notes that the decision in *Prince Jefri* has been widely followed in Australia, except for a number of State Supreme Court decisions (largely in Victoria) which have accepted the obiter of Brooking JA in *Spincode Pty Ltd v Look Software Pty Ltd* that solicitors may owe an ongoing equitable duty of loyalty to former clients that extends beyond the maintenance of confidential information. The latter view can lend support to a general proposition that a solicitor or law firm must not act for a client in any circumstances where the solicitor or law firm has acted for a former client and the interests of the former client are adverse to those of the new client.

In a 2014 paper, Ian Dallen, in highlighting the recent decision of Beach J in *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* notes that:

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

---

95 *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 at 235.
96 See the catalogue of authorities discussed by Beach J in *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* (2014) 228 FCR 252; [2014] FCA 1065.
97 *Commonwealth Bank of Australia v Kyriackou* [2008] VSC 146; *Dennis Hanger Pty Ltd v Brown* [2007] VSC 495; *GT Corporation Pty Ltd v Amare Safety Pty Ltd* [2007] VSC 123; *Adam 12 Holdings Pty Ltd v Eat & Drink Holdings Pty Ltd* [2006] VSC 152; *McCann v McCann* [2006] VSC 142; *Disctronics Ltd v Edmonds* [2002] VSC 454; *Sent v John Fairfax Publication Pty Ltd* [2002] VSC 429.
98 *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501 at [52]–[57].
99 See footnote 58.
academic criticism for stretching fiduciary loyalty “too far out of shape in pursuit of an objective that is not one of its core purposes”.

Dallen also notes that the proposition put forward by Lord Millet in *Prince Jefri* which correlates the end of the fiduciary duty with the termination of the retainer, has been approved by the Federal Court\(^{103}\) and by numerous State Supreme Courts\(^{102}\) in Australia.

The Ethics Committee notes that the recent decision of Beach J in *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd (a decision of the Federal Court of Australia)*\(^{103}\) supports the proposition that the weight of authority since the *Spincode* decision is such that following completion or termination of the retainer with a former client, the fiduciary duty of single-minded or undivided loyalty comes to an end but the duty of confidentiality (i.e. to maintain confidence over the former client’s confidential information imparted during the course of the retainer) continues. This duty of confidentiality is imposed by equity and can also arise in contract as an express or implied term of the retainer.\(^{104}\)

**In relation to the first matter**, the Ethics Committee seeks comment on whether, in the light of this recent Federal Court decision extensively reviewing case law since the obiter of Brooking JA in *Spincode*, Victorian solicitors potentially face conflicting ethical duties between matters involving Federal and State jurisdictions and if so, what might be the nature of the conflicting ethical duties which would arise where a matter involves the State jurisdiction? In other words, does the obiter of Brooking JA in *Spincode* govern a solicitor’s ethical obligations in a former client confidential information matter under State law, but not in a former client confidential information matter under Federal law?

Further, if it is the case that the obiter in *Spincode* still applies in a matter involving State law in Victoria, what is the nature of the ongoing duty? – is it a duty based on ongoing loyalty to a former client:

- to not act in any capacity for a current client without the former client’s consent to the solicitor or law practice so acting, and provided that an effective information barrier is in place?
- to not act for a current client without the former client’s consent to the use of the confidential information?

---

\(^{101}\) See for example, *Bureau Interprofessionnel des vins de Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 at [17], [18] per Ryan J; *PhotoCure ASA v Queen’s University at Kingston* (2002) 56 IPR 96; [2002] FCA 905 at [49]-[61] per Goldberg J.


\(^{103}\) (2014) 28 FCR 252; [2014] FCA 1065

\(^{104}\) Dallen op cit, p 430 referencing (as to the duty on equitable grounds) *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414 at 438 (Deane J); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [30] (Gleeson CJ); see also *Marshall v Prescott* (No 3) [2013] NSWSC 1949 at [150]–[156] and (as to the duty as an express or implied term of contract) see *Parry-Jones v Law Society* [1969] 1 Ch 1 at 7 per Lord Denning MR, at 9 per Diplock LJ.
• if the former client does not consent to the use of the confidential information (or cannot be located to give that consent) to only act for the current client if an effective information barrier is in place that preserves the confidentiality of the former client’s confidential information?

Imputed knowledge

For law firms, another issue that arises in successive duty-duty conflict cases is whether knowledge held by one or more solicitors within the firm is knowledge shared and therefore assumed to be known by all members of the law firm. As Dal Pont notes,105 the partnership law principle that “the knowledge of one partner is to be imputed as the knowledge of the other” led to the starting-point assumption that where one member of a law firm is possessed of client confidential information and so is disqualified from acting for another client where the interests of the clients are adverse, that disqualification extends to the firm generally. Dal Pont also observed that, if applied literally, the doctrine of imputed knowledge “could cripple the conduct of litigation and threaten the mobility of labour within the profession”. 106

The strict application of the doctrine has been judicially discounted. As Ryan J noted in Bureau Interprofessionnel Des Vins De Bourgogne v Red Earth Nominees Pty Ltd,107 “it is now well established that the knowledge of a solicitor joining a new firm should not automatically be imputed or attributed to other lawyers or employees in that firm”. Ultimately, whether an individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case.108 The strict application of the doctrine has, to this end, been replaced at general law by, in effect, a rebuttable presumption, which lies in the law practice to rebut by evidence that there is no real prospect that confidential information will be misused.

For example, in Bureau Interprofessionnel Des Vins De Bourgogne v Red Earth Nominees Pty Ltd109 the practitioner in question took numerous steps to avoid disclosing confidential information to anyone in her new firm, which was acting against a former client of hers. In an affidavit, the practitioner stated: “In my general discussions with Mr Stern and other staff at Corrs, I have been extremely careful to avoid (and have avoided) discussing (or even referring to) any substantive aspect of this matter”. The practitioner also offered to give an undertaking that she had not and would not disclose any confidential information that she may have obtained whilst acting for the former client to anyone, including anyone within her new firm.110

The Ethics Committee observes that the decision in Bureau Interprofessionnel Des Vins De Bourgogne v Red Earth Nominees Pty Ltd highlights an important aspect of maintaining the confidentiality of client information – that the conduct of the solicitor (and employees) in possession of confidential information in avoiding disclosure to anyone else with the law firm is a relevant consideration in deciding whether a duty-duty conflict has arisen.

Information barriers

Information barriers (or “Chinese walls”) have been developed as an accepted means of preventing disclosure of confidential client information within law firms. What constitutes an effective information barrier will depend upon the circumstances of the law practice and the measures employed. In Prince Jeffri Lord Millett opined that an effective information barrier must be “an established part of the organisational structure of the firm, not created ad hoc and dependent on

---

106 Ibid.
107 [2002] FCA 588 at [34].
108 Prince Jeffri Bolkiah v KPMG [1999] 2 AC 222 at 235 per Lord Millett.
110 Ibid, [12].
the acceptance of evidence sworn for the purpose by members of staff engaged on the relevant work”. 111 His Lordship noted that “the court should intervene unless it is satisfied that there is no real risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful and theoretical. But it need not be substantial”. 112

In *Bureau Interprofessionnel Des Vins De Bourgogne v Red Earth Nominees Pty Ltd* 113 Ryan J discussed what is required to discharge the burden of “negativing” risk of disclosure, and referred to *Newman v Phillips Fox*, where Steytler J found that a proposed information barrier was inadequate to eliminate the risk of inadvertent disclosure due to the fact that it was implemented some months after the relevant staff had moved to Phillips Fox, and was unaccompanied by any educational program or procedures, monitoring, record keeping or disciplinary sanctions. Ryan J in *Red Earth Nominees* was satisfied there was no real risk that any relevant confidential information would be disclosed because the practitioner in question had a high degree of independence from the other members in her section, she signed her own correspondence, she did not retain any documents related to her former client, and also because of the measures implemented by the organisation. 114

**Other matters raised in consultations and submissions**

**In relation to the second matter**, raised in consultations and submissions, it has been said that the rules reflect case law derived from litigation experience, rather than experience in providing discrete legal services (such as one-off advice or duty services). Where a law firm or community legal service provides only discrete legal services to a client, this creates a limited retainer and no expectation of ongoing assistance. Accordingly, it is said there is a need for the Rules to recognise different types of legal services and service providers, which would probably require an exemption from the rules for certain types of services.

The concern raised is that rule 10 hinders the provision of “unbundled” legal services, to the disadvantage of those who cannot otherwise afford legal services or qualify for legal assistance. In a recent Report 115 the Productivity Commission referred to “unbundling” (also known as “discrete task assistance or provision”, or “limited scope representation”) as the separation of the package of legal services that may be required to handle a dispute into components:

- general counselling and legal advice;
- preparation and assistance with drafting of documents or pleadings; and
- limited appearance before the court.

One of the barriers to greater use of unbundled legal services identified by the Productivity Commission is the conflict of interest rules, in that “overly strict application of the rules can affect access to important legal advice where there is only a perceived conflict”. 116 It proceeded to note that it “does not consider the risk posed by unbundling to be insurmountable, as evidenced by the fact that some Australian law firms are currently providing discrete task assistance”. 117

Another submission to the Law Council recommends that rule 10 be amended to provide an exemption from needing an information barrier “where the former client has only received discrete services in the past and the solicitor [providing a service to the current client] does not possess

111 *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 at 239.
112 *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 at 237.
113 [2002] FCA 588 at [58].
114 Ibid, [60]. See at [12] for the relevant measures implemented by the organisation.
116 Ibid, p 646.
117 Ibid, p 647.
actual knowledge of confidential information about that former client”. “Discrete service provision” is generally considered to have all of the following characteristics:

- the solicitor is engaged without prior arrangement;
- the solicitor is engaged for a specific task or activity, such as the provision of advice, or advice and advocacy (for instance, drafting a letter, making a phone call, making an application or duty lawyer representation); and
- the engagement ends upon conclusion of the specific task or activity, with no arrangement for further or future service provision by that solicitor or law practice.

The submission proceeds to note that for small scale community legal services and legal aid organisations:

- effective information barriers cannot reasonably be incorporated into the design of discrete service provision;
- it is not practical or even reasonably necessary to obtain consent in the case of one or more current clients where only discrete service provision is contemplated; and
- including an exemption to the Rules proposed would support the objectives of the Rules due to the explicit requirement the solicitor have no actual knowledge of the confidential information of the former client.

The Ethics Committee notes that while, as a general principle, a fiduciary duty involves a duty of undivided loyalty (including the duty to make available to the client all material knowledge in the solicitor’s possession) fiduciary law recognises that the principal can consent to the modification or ouster of those duties by, for example, limiting the scope of the retainer. After all, the extent of a solicitor’s duty to a client is determined by his/her retainer, and so in each case the starting point is to ascertain what the client engaged the solicitor to do or advise upon. As explained by King LJ in Minkin v Landsberg:

It goes without saying that where a solicitor acts upon a limited retainer, the supporting client care letters, attendance notes and formal written retainers must be drafted with considerable care in order to reflect the client’s specific instructions…It may well be that with further passage of time, tried and tested formulas will be devised and used routinely by practitioners providing such a limited retainer service. In the present case the defendant…did not observe best practice having failed to set out with precision the limits of the retainer in the client care letter.

The Ethics Committee notes that specific limited scope retainer rules have been articulated in a number of jurisdictions. For example, the Law Society of Upper Canada Rules of Professional Conduct provide:

**Short-term limited legal services**

(15) In this subrule and subrules (16) to (19)

“pro bono client” means a client to whom a lawyer provides short-term limited legal services;

“short-term limited legal services” means pro bono summary legal services provided by a lawyer to a client under the auspices of Pro Bono Law Ontario’s Law Help Ontario program for matters in the Superior Court of Justice or in Small Claims Court, with the

---

119 Minkin v Landsberg [2016] 1 WLR 1489; [2015] EWCA Civ 1152 at [32] per Jackson LJ.
120 [2016] 1 WLR 1489; [2015] EWCA Civ 1152 at [77].
121 Including Maine, New Hampshire, New York State and California. The American Bar Association’s Model Rule 6.5 has been adopted in 19 US jurisdictions. Rules have also been adopted in a number of Provinces of Canada.
expectation by the lawyer and the client that the lawyer will not provide continuing legal representation in the matter.

(16) A lawyer engaged in the provision of short-term limited legal services may provide legal services to a pro bono client unless

(a) the lawyer knows or becomes aware that the interests of the pro bono client are directly adverse to the immediate interests of another current client of the lawyer, the lawyer’s firm or Pro Bono Law Ontario; or

(b) the lawyer has or, while providing the short-term limited legal services, obtains confidential information relevant to a matter involving a current or former client of the lawyer, the lawyer’s firm or Pro Bono Law Ontario whose interests are adverse to those of the pro bono client.

(17) A lawyer who is a partner, an associate, an employee or an employer of a lawyer providing short-term limited legal services to a pro bono client may act for other clients of the law firm whose interests are adverse to the pro bono client so long as adequate and timely measures are in place to ensure that no disclosure of the pro bono client’s confidential information is made to the lawyer acting for the other clients.

(18) A lawyer who is unable to provide short-term limited legal services to a pro bono client because of the operation of subrule (16) (a) or (b) shall cease to provide short term limited legal services to the pro bono client as soon as the lawyer actually becomes aware of the adverse interest or as soon as he or she has or obtains the confidential information referred to in subrule (16) and the lawyer shall not seek the pro bono client’s waiver of the conflict.

(19) In providing short-term limited legal services, a lawyer shall

(a) ensure, before providing the legal services, that the appropriate disclosure of the nature of the legal services has been made to the client; and

(b) determine whether the client may require additional legal services beyond the short-term limited legal services and if additional services are required or advisable, encourage the client to seek further legal assistance.

The Ethics Committee notes that while these rules provide for limited scope representation, they do not abrogate a lawyer’s ethical obligations where there is a duty-duty conflict or a client confidential information conflict, as explained in the Commentary to the above rules:

Subrules (15) to (19) apply in circumstances in which the limited nature of the legal services being provided by a lawyer significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer’s firm. Accordingly, the lawyer is disqualified from acting for a client receiving short-term limited legal services only if the lawyer has actual knowledge of a conflict of interest between the pro bono client and an existing or former client of the lawyer, the lawyer’s firm or PBLO.

... Appropriate screening measures must be in place to prevent disclosure of confidential information relating to the client to the lawyer’s partners, associates, employees or employer (in the practice of law). Subrule (17) extends, with necessary modifications, the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a current client of the firm in providing short term limited legal services. Measures that the lawyer providing the short-term limited legal services should take to ensure the confidentiality of information of the client’s information include:
• having no involvement in the representation of or any discussions with others in the firm about another client whose interests conflict with those of the pro bono client;
• identifying relevant files, if any, of the pro bono client and physically segregating access to them to those working on the file or who require access for specifically identified or approved reasons; and
• ensuring that the firm has distributed a written policy to all licensees, non-licensee partners and associates and support staff, explaining the screening measures that are in place.

Subrule (18) precludes a lawyer from obtaining a waiver in respect of conflicts of interest that arise in providing short-term legal services.

The Ethics Committee notes that the limited scope representation rules set out above (and in other jurisdictions) do not express a new ethical principle that it is appropriate in these circumstances to exempt a lawyer from the duty to avoid conflicts of interest between a current client and a former client, or the duty to avoid conflicts of interest between two or more current clients. The rules acknowledge that a lawyer may provide limited scope representation, provided those conflicts are managed, and if they cannot be, the lawyer or law practice is required to cease to act.

The Ethics Committee also notes that Australian Solicitors’ Conduct Rule 10 (and Rule 11) require a solicitor or law practice to avoid conflicts. Avoiding conflicts involves a prudent combination of: accurately defining the scope of the retainer agreement (Minkin v Landsberg)\(^\text{122}\); obtaining the informed consent of the former client (if feasible); establishing effective information barriers (Prince Jefri Bolkiah v KPMG)\(^\text{123}\); and establishing appropriate internal arrangements within the law practice (Bureau Interprofessionnel Des Vins De Bourgogne v Red Earth Nominees Pty Ltd)\(^\text{124}\).

The Ethics Committee further notes that while a lawyer or law practice might put these measures in place, the court may nevertheless exercise a power of restraint pursuant to its inherent jurisdiction to determine which of its officers is to appear before it, by reference to whether to a fair-minded reasonably informed person would find it subversive to the administration of justice to allow the representation to continue.\(^\text{125}\)

In response to the matters raised, the Ethics Committee makes the following suggestions:

• Rule 10 and the law underpinning it does not proscribe acting for a current client in a situation where a law practice has provided a legal service to a former client and is, as a result, in possession of confidential information of the former client that may be relevant to the current client.

• Whether information concerning a former client is “client confidential information” is determined according to the facts and circumstances relating to the former client and the legal services provided.

• The duty-duty conflict can be managed through informed consent of the former client – when and how informed consent is obtained is a matter for the law practice and client concerned and could, conceivably, be obtained at the time the legal service was provided to the former client.

---

\(^{122}\) [2016] 1 WLR 1489; [2015] EWCA Civ 1152.
\(^{123}\) [1999] 2 AC 222.
\(^{124}\) [2002] FCA 588.
\(^{125}\) See generally Kallinicos v Hunt (2005) 64 NSWLR 561.
• The nature and extent of the duty owed to the client (including any limitations and exclusions) depends upon the terms of the retainer, including, where the retainer is for limited purposes only, the scope of the legal services agreed to be provided. This is a matter of law practice management at the commencement of the retainer more so than one of ethical principles.

• The duty-duty conflict can also be managed through an effective information barrier.

• What constitutes an effective information barrier rests upon the facts and circumstances under which the law practice is organised and managed to avoid any real risk, or sensible possibility, of disclosure of the relevant confidential information.

• One aspect of whether or not there is a real risk, or sensible possibility, of disclosure is whether information is shared within a law practice, or whether it is managed in a way that no person other the person who provided the legal service to the former client has any actual knowledge of or about that service.

The Ethics Committee suggests that the issues raised do not require an express “exemption” as limited scope retainers are currently permitted and used in Australia. Inclusion of a specific rule on limited scope representation would appear to not add any new scope for practitioners to provide unbundled services, but merely draw attention to the existing ability of legal practitioners and law practices to provide unbundled services. The ethical issues addressed in the Law Society of Upper Canada Rules of Professional Conduct (and the rules in other jurisdictions) are encapsulated in the principles underpinning Australian Solicitors’ Conduct Rule 10 (and Rule 11).

The Ethics Committee considers that the most significant impediment to the wider use of limited scope retainers/unbundled legal services appears to be court rules which require practitioners to remain on the record during a matter, despite only providing limited and discrete services throughout the matter. The Legal Profession Uniform Law applying in New South Wales and Victoria, legal profession laws in other jurisdictions and the Australian Solicitors’ Conduct Rules 2015 do not restrict a lawyer from entering into a limited scope retainer with a client. However, Court Rules in various Australian courts, including the Family Court of Australia, state Supreme Courts and intermediate courts, can act as a barrier. For example, current general civil procedure rules that require a solicitor to seek leave to cease to act for a party should be reviewed.

Changes to such court rules would be likely to:

• open up legal services to those who are not be able to afford all costs relating to retaining legal assistance; and
• encourage lawyers to be involved in pro bono legal services that rely on discrete task assistance.

Making such changes accords with the Productivity Commission’s view\(^\text{126}\) that the rules relating to unbundled legal services should address barriers arising from the “inclusion and removal of legal practitioners from the court record”.

The Ethics Committee’s view is that it is the making of changes to particular court rules, rather than the inclusion of a specific conduct rule in the Australian Solicitors’ Conduct Rules which will remove the main impediment to the wider use in Australia of limited scope retainers/unbundled legal services.

**In relation to the third matter**, it has been commented that, given that conflict should be avoided and that clients’ interests should be protected, client consent and effective information barriers are

---

not alternatives. A practitioner or law practice should not simply be allowed to ensure they have effective information barriers without obtaining informed client consent. It has been commented that both these hurdles should be overcome, given the importance of this rule.

The Ethics Committee does not think that both informed consent and an information barrier are always required. Rules 10.2.1 and 10.2.2 deal with a number of possible situations:

- where the former client consents to the disclosure and use of confidential information – in this case rule 10.2.1 applies;
- where the former client consents to the disclosure and use of only some of the confidential information – in this case both rules 10.2.1 and 10.2.2 apply - an effective information barrier is required to preserve the confidentiality of the former client information that is not to be disclosed;
- where the former client does not consent to the disclosure and use of the confidential information – in this case rule 10.2.2 applies - an effective information barrier is required to preserve the confidentiality of the former client information; and
- where the former client cannot be located to provide informed consent - in this case rule 10.2.2 applies - an effective information barrier is required to preserve the confidentiality of the former client information.

The Ethics Committee is mindful that the situations to which rule 10.2 might apply will typically arise only for very large law firms or multi-jurisdictional law firms where it is possible, through information barriers, to effect a separation of the handling of matters for different clients so that there is no possibility of disclosure of the confidential information of the former client.

In relation to the fourth matter, the Ethics Committee notes the observations of the High Court in Farah Constructions Pty Ltd v Say-Dee Pty Ltd127 that the disclosure necessary for informed consent can occur in different ways (and at different times) and can vary depending upon the sophistication of the recipient, so that whether there has (in fact) been informed consent is “a question of fact in all the circumstances of each case”. The Committee considers that, in light of these observations, rule 10.2.1 should make reference to informed consent, rather than informed written consent, and that the Commentary to rule 10 should offer guidance on what is required to obtain informed consent. The Commentary should also alert practitioners to the prudence of obtaining informed consent in writing wherever practicable and appropriate.

In relation to the fifth matter, it was commented that the concept of an “effective information barrier” could be defined either by including it in the definition section, or preferably in guidelines or policy, taking into account what courts have said about effective information barriers. This would, it was commented, provide guidance to practitioners as to how to comply with this rule and to establish effective information barriers.

The Ethics Committee considers there is sufficient material in the Commentary and in guidelines available from Law Societies to provide assistance to practitioners, although the Commentary should be updated to reflect the course of development of the law since the Commentary was first developed in 2013.

In relation to the sixth matter, the Ethics Committee has noted above that the issue which animates the conflict rule is the possession of information that is confidential to the former client and would be detrimental to the interests of that former client if, consistent with the solicitor’s duty to the current client, that information is disclosed and used for the benefit of the current client. Such a conflict is resolved in one of three ways:

---

1. the former client gives informed consent to the disclosure and use of the confidential information to further the matter of the current client; or
2. an effective information barrier is put in place to avoid any real or sensible risk of disclosure; or (if neither of these approaches is available)
3. the solicitor or law practice ceases to act for the current client.

The Ethics Committee considers that a change to rule 10.2.1 as suggested would better express the issue central to the rule – that the informed consent is to the disclosure and use of the confidential information. A possible reformulation might be as follows:

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

   10.2.1 the former client has given informed written consent to the solicitor or law practice so acting disclosure and use of that information; or
   10.2.2 an effective information barrier has been established.
Rule 10 Consultation questions and recommendations

31. Does the obiter in Spincode govern a solicitor’s ethical obligations in a former client confidential information matter under State law in Victoria, and if so, in what ways?

32. Would it be appropriate and necessary to provide an exemption in rule 10 from confidentiality and other duties where legal services are provided on a “discrete” or “unbundled” or “limited representation” basis?

33. Should rule 10.2.1 be revised so as to state the requirement for informed consent rather than informed written consent, given the many forms and circumstances in which informed consent may be obtained?

34. That a definition of “information barrier” not be included in the rules, but the existing materials in the Commentary be updated and expanded.

35. That rule 10 be reformulated as follows:

Rule 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 information which is confidential to a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:

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

10.2.2 an effective information barrier has been established.
Rule 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 or law practice may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:

   11.3.1 is aware that the solicitor or law practice is also acting for another client; and
   11.3.2 has given informed consent to the solicitor or law practice so acting.

11.4 In addition to the requirements of Rule 11.3, where a solicitor or law practice is in possession of information which is confidential to 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; and
   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 the duty of confidentiality to other client(s) is not put at risk and the parties have given informed consent.

Matters raised

1. Is consent of the (first) current client or clients necessary where the proposed (second) current client requires discrete service provision only and the solicitor possesses no actual knowledge of confidential information about another (first) current client or clients with contrary interests in the same or a related matter? Alternatively, should “discrete service provision” be exempt from the operation of rules 10 and 11 entirely?

2. Given the strict prohibition in rule 11.2, should a solicitor or law practice be required to give the client written advice about the conflict that exists between the clients of the law practice (if they are going to deviate from the rule by reference to the exception in rule 11.3) and then obtain the client’s informed written consent allowing the solicitor or law practice to continue to act?

3. For rule 11.3.2, is there a deliberate distinction between "informed consent" and "informed written consent" in rule 10.2.1?

4. For rule 11.3.2, does "informed consent" need to be defined?

5. For rule 11.4, should the phrase "and detrimental to the interests of the first client if disclosed" be deleted?
6. That rule 11 is overly cumbersome and should be redrafted.

Discussion points

Purpose, scope and general principles

Rule 11 deals with concurrent client conflicts, also known as duty-duty conflicts. While there are similarities between principles underpinning rules 10 and 11 about the nature of the relationship, the kinds of conflict that may arise and the ways in which conflicts may be managed, it must be kept in mind that rules 10 and 11 deal with distinctly separate contexts – rule 10 deals with conflicts between duties owed to a current client and a former client, whereas rule 11 deals with conflicts between duties owed to two or more current clients.

The core of the ethical standard underpinning rule 11 is a solicitor's fiduciary duty of undivided loyalty owed to each client. As set out above (see the Discussion Points to Rule 10), the solicitor-client relationship is one of the settled categories of fiduciary relationships recognised by equity and, as such, clients are entitled to the single-minded loyalty of their solicitor throughout the course of the matter. Further, solicitors owe clients various non-fiduciary duties, including a duty not to disclose confidential information given by the client to their solicitor in the course of the solicitor's retainer.\(^\text{128}\)

While fiduciary duty lies at the heart of rule 11, it must also be kept in mind that from a position of informed consent, a client can consent to the modification of the scope of the fiduciary duty, as the scope of the duty a solicitor owes to a client will be shaped by the scope of the solicitor-client retainer for that matter.

Two kinds of conflicts are envisaged under rule 11:

- an adverse interest conflict: a solicitor has a duty to always act in the best interests of a client in any matter in which the solicitor represents the client (rule 4.1.1) and therefore must avoid a situation of acting for two or more clients whose interests diverge. A typical scenario where this kind of conflict may arise is where a solicitor is asked to act for both the vendor and purchaser in a property transaction; and

- a confidential information conflict: a solicitor has a duty to not disclose any information confidential to that client acquired during a client’s engagement (rule 9.1), and so must avoid situations where that confidential information would have to be disclosed to another client because it is material to that other client’s matter and detrimental to the first client if disclosed. A typical example of where this kind of conflict may arise is where a law practice acts for competing bidders seeking to purchase the same asset.

Rule 11 does not unilaterally prohibit a solicitor and a law practice from acting or continuing to act in a situation where there is, or could be, an adverse interest conflict or a confidential information conflict between the duties owed to two or more clients, nor does it unilaterally permit a solicitor or law practice to do so.

The Ethics Committee acknowledges the proposition expressed from time to time that rule 11 should state an absolute prohibition. The view is that because the heart of the conflict is competing fiduciary duties, such a conflict cannot be resolved other than by the solicitor or law practice ceasing to act for each client where their interests are adverse, and especially where the solicitor or law practice is in possession of client confidential information that would have to be disclosed were the solicitor or law practice to continue to act for each client. In most instances a prudent solicitor or law practice, if faced with a concurrent client conflict, or the possibility of such a conflict, would reach the considered conclusion that the concurrently held duties to act in the best interest of each

\(^{128}\) For a summary of a solicitor's fiduciary and non-fiduciary duties, see Dallen, op cit, pp 429-31.
client and to maintain confidentiality cannot be fulfilled, and so would take necessary steps to avoid that situation.

However, the Ethics Committee also acknowledges that fully informed clients may decide that concurrent representation is actually in their best interests. As Dal Pont notes, there are a number of reasons why a fully informed client may nevertheless wish to retain a solicitor or law practice, say, because of cost, the qualifications of the lawyer to undertake the particular work, trust in the lawyer or the unavailability of other solicitors or law firms.

Further, in Clark Boyce v Mouat the Privy Council said:

There is no general rule of law to the effect that a solicitor should never act for both parties in a transaction where their interest may conflict. Rather is the position that he may act provided that he has obtained the informed consent of both to his acting. 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 interest of the other. If the parties are content to proceed upon this basis the solicitor may properly act.

An absolute prohibition would thus remove the possibility in an adverse-interests situation that the clients may give informed consent (rule 11.3), or that in a confidential information conflict situation each client gives their informed consent (rule 11.4.1) and any confidential information material to the matter (or related matters) is protected by an effective information barrier (rule 11.4.2). The operation of an effective information barrier is discussed in the Discussion Points to rule 10.

In relation to the first matter, as discussed in detail in the Discussion Points to rule 10, the proper approach is to develop appropriate procedures and processes within a law practice (including a community legal service, legal aid organisation or other legal assistance service provider) consistent with the ethical principles and common law underpinning rule 11 rather than attempt to identify “exemptions” from the rule.

Importantly, the starting point for dealing with any actual or potential conflicts is the terms and conditions of the retainer between the solicitor and each client. Against this background, where the retainer is for the provision of a discrete service (e.g. legal services on a discrete, unbundled or advice-only-basis), that retainer will conclude and the client cease to be a “current” client on the provision of the service. Any confidential information imparted during the discrete service (if any) can and should be protected by the development of appropriate procedures and processes for delivery of the service.

In relation to the second matter, it has been commented that, given the strict prohibition in rule 11.2, a solicitor or law practice should be required to give the client written advice about the concurrent conflict and then obtain the client’s informed written consent allowing the solicitor or law practice to continue to act. Contributors have noted that, given the importance of avoiding conflict, this amendment is paramount to ensure that clients understand their position, but also to assist the practitioner to assess whether to continue to act. Contributors have also noted the previous Victorian Rules dealing with conflicts stated that the party should be informed in writing of any potential disadvantages to the client and that, while the case law might support a proposition that parties need not always be informed in writing, the fulsome nature of the required informed consent should be emphasised.

129 G E Dal Pont, Lawyers’ Professional Responsibility, 6th ed, 2017, [7.85]
131 Law Institute of Victoria, Professional Conduct and Practice Rules 2005, Schedule Form 1.
The Ethics Committee notes that rules 11.3.1 and 11.3.2 require the solicitor or law practice to ensure the client is aware and has given informed consent. The Committee notes that awareness and informed consent may be obtained in a variety of ways and does not consider it appropriate to specify a precise manner in which the client is to be informed or to signify consent. How this is effected is essentially a matter for the solicitor’s independent judgement, the solicitor bearing the onus of proving that the client gave fully informed consent.

In relation to the third and fourth matters, having regard to the observations of the High Court in Farah Constructions Pty Ltd v Say-Dee Pty Ltd referred to above, the Ethics Committee considers that the reference to “informed written consent” in rule 10.2.1 should be altered to “informed consent” (as in rule 11.3.2) to reflect the common law on informed consent. Further, the Committee does not consider it appropriate to attempt a definition of informed consent; preferring instead that the factors, circumstances and issues involved in informed consent be set out in the Commentary.

In relation to the fifth matter, it was commented that the phrase “and detrimental to the interests of the first client if disclosed” should be deleted, on the basis that, regardless of the effect of the information (i.e. being detrimental or otherwise), a conflict of duties has arisen and the steps that a solicitor or law practice should take are those outlined in the rule. The conflict of duties is said to trigger the steps to be taken, rather than the effect of the conflict.

The Ethics Committee notes that in the context of rule 10 (confidential information conflict where the information is that of a former client) the considerable body of common law on this subject is premised upon the claim that the disclosure of information confidential to one client would be detrimental to the interests of that client were it disclosed to another client; i.e. the enquiry the court makes in an application to restrain a solicitor from acting or continuing to act for a client is the impact that the disclosure of the confidential information would have on the interests of the client (or former client) whose confidential information it is. As Dal Pont notes:

> The requirement that the real possibility of misuse of confidential information be to the detriment of the former client serves several important functions. It protects lawyers from frivolous applications to disqualify. It guards the public interest that services of lawyers be freely available, which it has been observed “will be unnecessarily intruded upon unless it is shown that disclosure by the solicitor of confidential information will disadvantage the confiding client”. It also emphasises the appearance of justice, for it is difficult to see injustice in permitting representation that will not disadvantage the former client.

In the context of rule 11, the core conflict is a conflict between competing fiduciary duties. The Ethics Committee further notes that the court may nevertheless exercise a power of restraint pursuant to its inherent jurisdiction to determine which of its officers is to appear before it, by reference whether to a fair-minded reasonably informed person would find it subversive to the administration of justice to allow the representation to continue. The Ethics Committee suggests that additional commentary might usefully be provided on this issue.

In relation to the sixth matter, the Ethics Committee notes that a number of submissions and commentators have expressed the view that the rule as presently drafted is too lengthy, cumbersome and, in some areas, repetitive. The Committee agrees with comments received that the rule could be simplified in the way that it expresses the scope of the duties in contemplation and the ethical principles involved. Thus:

---

• the rule must embrace the range of duties which might come into conflict, i.e. fiduciary duties, contractual duties, duties of care in tort and duties of confidentiality;
• regardless of which duty is in contemplation, the informed consent of the parties is an essential requirement for the solicitor or law practice to agree to continue to act for the parties concurrently; and
• in a case where the conflict arises or might potentially arise because of the possession of client confidential information, an effective information barrier must be in place.

Having regard to these considerations, the Ethics Committee invites comments on a reformulation of rule 11.

<table>
<thead>
<tr>
<th>Rule 11</th>
<th>Consultation questions and recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>36.</td>
<td>That an exemption from rule 11 would be inappropriate and unnecessary where legal services are provided on a “discrete” or “unbundled” or “limited representation” basis.</td>
</tr>
<tr>
<td>37.</td>
<td>That rule 11.3.2 should not require that informed consent only be given in writing.</td>
</tr>
<tr>
<td>38.</td>
<td>That the reference to “informed consent” in rule 11.3 be retained, noting that it is recommended that rule 10.2.1 be amended to provide for “informed consent”.</td>
</tr>
<tr>
<td>39.</td>
<td>That additional commentary be developed to further explain the concept of “detriment to the interests of a client” and how the court approaches the exercise of the power of restraint pursuant to its inherent jurisdiction to determine which of its officers appear before it.</td>
</tr>
</tbody>
</table>
Rule 11 Consultation questions and recommendations (cont.)

40. That rule 11 be revised as follows:

**Rule 11 (Conflict of duties concerning current clients)**

11.1 A solicitor or law practice must not act where there is an actual or potential conflict between the duties owed to two or more current clients, except where each client has given informed consent to the solicitor or law practice so acting, and:

(i) the solicitor or law practice is able to act in the best interest of each client; and

(ii) where the conflict or potential conflict arises because of the possession of client confidential information which might reasonably be concluded to be material to another client’s current matter, an effective information barrier has been established.

11.2 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 must not continue to act for one of the clients (or a group of clients between whom there is no conflict) unless the duty of confidentiality to the other client(s) is not put at risk and the parties to the conflict have given informed consent to the solicitor or law practice continuing to act for that client (or group of clients).
**Rule 12  (Conflict concerning a solicitor’s own interests)**

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

12.2 A solicitor must not exercise any undue influence intended to dispose the client to benefit the solicitor in excess of the solicitor’s fair remuneration for legal services provided to the client.

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

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

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

UNLESS the client is:

(i) an Authorised Deposit-taking Institution;

(ii) a trustee company;

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

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

(v) the employer of the solicitor.

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

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

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

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

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

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

(i) a member of the solicitor’s immediate family; or

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

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

(i) that a commission or benefit is or may be payable to the solicitor in respect of the dealing or referral and the nature of that commission or benefit;
(ii) that the client may refuse any referral, and
the client has given informed consent to the commission or benefit received or
which may be received.

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

Matters raised

1. Should the rules prohibit lawyers from taking advantage of vulnerable potential clients,
require lawyers to disclose details of referral arrangements, and require a lawyer to cease
acting for a client in a matter involving a third party from whom the lawyer may receive a
fee or other benefit?

2. Should rule 12.2 be amended to read as follows:
A solicitor must not exercise any undue influence on the client, intended to dispose the
client to benefit the solicitor in excess of the solicitor’s fair remuneration for legal services
provided to the client.

3. For rule 12.4.1(i):
   a. Should it be amended to provide more detail about the type/value of the entitlement of
      the solicitor by adding the words “and, if so, details of that entitlement”?
   b. Is the expression “the client signs the Will” too narrow?

4. For rule 12.4.3:
   a. Is there a deliberate distinction between "informed consent" and "informed written
      consent" in rule 10.2.1?
   b. On disclosing the nature of a commission, should the Rule state the disclosure must
      include the amount or the percentage of any relevant commission?

Discussion points

Purpose, scope and general principles

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

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

Rule 12 is directed to reflecting the application of fiduciary duties in the solicitor-client context. It
also highlights that the relationship between a solicitor and client is one of influence, capable of
giving rise to the presumption of undue influence. To this end, rule 12 (and rule 34.2) address
various scenarios where, as between solicitor and client (or potential client), fiduciary law and the
presumption of undue influence can function to constrain solicitor behaviour.
In relation to the first matter raised, the principle embodied in rule 12 has its roots in the fiduciary relationship. As Gibbs CJ explained in Hospital Products Ltd v United States Surgical Corporation:135

A person who occupies a fiduciary position may not use that position to gain a profit or advantage for himself, nor may he obtain a benefit by entering into a transaction in conflict with his fiduciary duty, without the informed consent of the person to whom he owes the duty.

The nature of the fiduciary relationship between a client and solicitor can nonetheless be "moulded and informed by the terms of the contractual relationship",136 i.e. the retainer agreement between the client and the solicitor. Thus, while rule 12.1 recognises that a solicitor should not act for a client where a solicitor has a conflict between the duties owed to the client and the solicitor's own interests, it also recognises the long-established position at law that a client can give informed consent to the solicitor continuing to act.

The Ethics Committee considers that referral fees are a normal aspect of the modern commercial reality of legal practice, where clients often engage a law practice to facilitate an entire transaction. It is thus quite appropriate for a law practice to have business arrangements involving referral fees with providers of other services that are necessary to transact the business for which solicitor has been engaged. The Ethics Committee does not discern any particular ethical justification for a ban on referral fees per se; solicitors must approach the topic mindful of their fiduciary and contractual duties, as well as other professional responsibilities. Those duties and responsibilities are set out in rule 12.4.3 as well as broader responsibilities under rule 3 (the duty to the courts and the administration of justice), rule 4 (to act in the best interests of the client and avoid any compromise to their integrity and professional independence), rule 5 (not to engage in conduct which is likely to a material degree to bring the profession into disrepute) and rule 39 (disclosures required when sharing an office with any other entity or business engaged in another calling).

Another aspect of the first matter raised in comments received by the Law Council is that rule 12 does not replicate rule 33 of the (now repealed) Law Institute of Victoria's Professional Conduct and Practice Rules 2005. The former Victorian rule (at rule 33.1.2) provided that a solicitor must not seek an engagement from a person in relation to a personal injury matter in a manner that is likely to oppress or harass that person, who might reasonably be expected to be at a significant disadvantage at the time the engagement was sought. The concerned organisations suggested that the absence of a similar rule in the Australian Solicitors’ Conduct Rules "may leave vulnerable people open to predatory marketing practices".

The Ethics Committee observes that such conduct, were it to occur, would be a serious breach of a number of rules (including some of those referred to above). Furthermore, the Committee notes that legislation in a number of jurisdictions regulates or specifically prohibits the payment of referral fees to, and the receipt of benefits from, solicitors (among others) in relation to personal injury claims.137

135 Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41 at 67 per Gibbs CJ.
137 See for example Personal Injuries Proceeding Act 2002 (Qld) s 68(1); Legal Profession Act 2006 (NT) s 293(1); Civil Liability Act 2002 (WA) s 20(1); Motor Accidents Compensation Regulation 2015 (NSW) r 24.
The Ethics Committee suggests that the current rules adequately express the legal position and ethical considerations in relation to referral fees. It notes that statutory prohibition on the receipt of certain referral fees by solicitors is an issue to be addressed by solicitors in accordance with local legislation.

In relation to the second matter the Ethics Committee considers rule 12.2 as presently stated prohibits an attempt by a solicitor to exercise undue influence on any person which is intended to dispose the client to benefit the solicitor in excess of the solicitor’s fair remuneration. For example, it would be highly unethical for a solicitor to attempt to influence family members to, in turn, influence the client toward benefiting the solicitor in excess of the solicitor’s fair remuneration. The suggested change to insert the words on the client would, in the Committee’s view inappropriately narrow the scope of the rule. The Committee seeks comments on whether the following reformulation of rule 12.2 might provide greater clarity:

12.2 A solicitor must not exercise any undue influence on the client or a third party, intended to dispose the client to benefit the solicitor in excess of the solicitor’s fair remuneration for legal services provided to the client.

The third matter raised two issues. The first concerns any entitlement that a solicitor, who draws a Will under which the solicitor or an associate is appointed as executor, to receive an executor’s commission. It has been suggested that rule 12.4.1(i) be modified to require details of the type/value of that entitlement to be disclosed.

The Ethics Committee notes that solicitors who undertake a role as executor in addition to providing legal services to an estate must exercise great care to ensure that informed consent has been given to the executors’ commission, that payment of the amount claimed has been authorised, and that proper and appropriate differentiations are made between what is claimed by the solicitor as executors’ commission and what is claimed by the solicitor as fees for legal services in administering the estate.

However, as to the quantum (or value), the Ethics Committee notes that what is an appropriate commission for the ‘pains and troubles’ of carrying out the executorship is not something that can necessarily be known with precision at the commencement of the executorship, and is ultimately either a matter for agreement by the beneficiaries, or a matter for the court to decide. The Committee does not consider it appropriate that rule 12.4.1 be amended to require the quantum (or value) of the executors’ commission to be identified.

Further, the Committee notes that the requirement for informed consent is discussed in the Commentary to rule 12, which sets out guidance on the principles that apply when a solicitor acts as an executor.

The second issue raised is whether the expression “the client signs the Will” is too narrow because Australian law allows a Will to be signed by a person other than the testator, at the testator’s direction. The Ethics Committee agrees that the rule needs to be expressed more broadly and proposes that rule 12.4.1(i) be amended to read:

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

The fourth matter raised two issues in relation to rule 12.4.3. The first is whether or not there is a deliberate distinction between “informed consent” in this rule and “informed written consent” in rule 10.2.1.

---

138 Administration and Probate Act 1929 (ACT) s70; Probate and Administration Act 1898 (NSW) s86; Administration and Probate Act 1958 (Vic) s65; Succession Act 1981 (QLD) s68; Administration and Probate Act (NT) s102; Trustees Act 1962 (WA) s98; Administration and Probate Act 1935 (TAS) s64; Administration and Probate Act 1919 (SA) s70.

139 Noting the judgment in Szmulewicz v Recht [2011] VSC 368.
There is a detailed discussion of the issue of informed consent in the Commentary to rules 10 and 11. Also, the Commentary to rule 12.4.3 notes that, while it is not strictly required, solicitors are strongly urged to “obtain in writing the required informed consent to the commission or benefit”. It is therefore made clear that the distinction between “informed consent” and “informed written consent” in the rules is deliberate. Rule 10.2.1 deals with conflicts concerning former clients, where “consent is likely to involve the former client agreeing to allow the solicitor … to disclose its confidential information to his/her detriment and for the benefit of the other client”.\footnote{Commentary to the Australian Solicitors' Conduct Rules (2013) r 10.} In contrast, rule 12.4.3 does not deal with a situation which is likely to cause detriment to the client, but one which may create a potential conflict of interest and may potentially disadvantage the client.\footnote{Ibid, 21.}

The second issue queries whether, on disclosing the nature of a commission, the rule should require the disclosure to include the amount or the percentage of any relevant commission. The Ethics Committee refers to the Commentary to rule 12.4.3 which notes that:\footnote{Ibid.}

There is no precise formula for determining whether a client has sufficient appropriate information upon which to provide informed consent; it is a question of fact in all the circumstances of each case. The information the client requires depends on the nature of the commission or benefit, the sophistication of the client and the nature of any material risks involved.

### Rule 12 Consultation questions and recommendations

41. Should rule 12.2 be reformulated as follows?

   12.2 A solicitor must not exercise any undue influence on the client or a third-party, intended to dispose the client to benefit the solicitor in excess of the solicitor’s fair remuneration for legal services provided to the client.

42. That the current rules adequately express the legal position and ethical considerations in relation to referral fees and executor’s commissions. Statutory prohibitions on the receipt of certain referral fees by solicitors is an issue of local legislation.

43. That rule 12.4.1 be amended as follows:

   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 is signed.
Rule 13  *(Completion or termination of engagement)*

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

13.1.1 the client has otherwise agreed;

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

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

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

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

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

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

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

**Matters raised**

1. Should the rule set out a procedure to follow in situations where a client becomes unreasonable in their further instructions in an ongoing matter?

2. In rule 13.1, should “designated responsibility” be defined or expanded upon?143

3. Should rule 13.1 include an additional exception where the relationship of trust and confidence between the solicitor and the client has broken down?

4. Should rule 13.3 refer to informing clients of their potential eligibility for legal aid?

**Discussion points**

The first matter was also raised in relation to rule 8 (Client instructions). The suggestion is that it would be useful to provide a procedure to follow that deals with the situation where a client becomes unreasonable in his or her further instructions in an ongoing matter. It was said that guidance about the most appropriate way for the solicitor to end the solicitor-client relationship in these circumstances would be useful, as it could assist in dealing with any subsequent complaint.

---

143 This suggestion was also made in relation to rule 14.1.
In the context of rule 8, the Ethics Committee notes that the professional duty of a solicitor is to give effect to a client’s lawful, proper and competent instructions. Where a solicitor forms a reasonable conclusion that a client’s instructions are not lawful or proper, the solicitor’s first duty is to advise and hopefully persuade the client as to instructions that are lawful and proper.

The long-established principle is that a solicitor is retained to act for the client until the entirety of the matter that is the subject of the retainer is completed. This dictates that the grounds upon which a solicitor may terminate the retainer are limited. Rule 13.1.3 (Completion or Termination of Engagement) sets out the principle that a solicitor may terminate the retainer “for just cause and on reasonable grounds”. What constitutes “just cause and on reasonable grounds” will necessarily depend upon the particular facts and circumstances that have arisen during the course of the retainer.

As discussed in relation to rule 8, as the purpose of the rules is to set out ethical principles, it would not be appropriate to amend the rules to set out procedures that a solicitor should follow if he or she considers a client’s instructions to be unreasonable in their further instructions in an ongoing matter.

The second matter raised is whether or not the term “designated responsibility” in rule 13.1 should be defined or expanded upon. The Ethics Committee considers that the meaning of the phrase “solicitor with designated responsibility” is sufficiently set out in the Glossary as follows:

“solicitor with designated responsibility” means the solicitor ultimately responsible for a client’s matter or the solicitor responsible for supervising the solicitor that has carriage of a client’s matter.

In relation to the third matter, the Ethics Committee notes that a breakdown in the relationship of trust and confidence between the solicitor and the client exemplifies the ethical principle expressed in rule 13.1.3 (that a retainer may be terminated for just cause) rather than identifies a new principle. The Committee suggests the change is not necessary to rule 13.1.3, but the matter could be expanded on in Commentary.

In relation to the fourth matter, the Ethics Committee notes this issue is discussed under rule 4 (other fundamental ethical duties).

### Rule 13 Consultation questions and recommendations

44. That rule 8 should not set out procedures that a solicitor should follow if he or she considers a client’s instructions to be unreasonable in their further instructions in an ongoing matter.

45. That the Commentary should provide more explanation about what termination of a retainer for just cause when there is a breakdown in the relationship of trust and confidence between a solicitor and client.

---

44 See for example, Underwood, Son & Piper v Lewis [1894] 2 QB 306.
Rule 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.

Matters raised

1. In rule 14.1, should "designated responsibility" be defined or expanded upon?

2. Rule 14.1 is ambiguous as to whether it applies to destruction of documents prior to the 7-year mark (with the client's consent).

3. Should rule 14.2 include a qualification that the rule does not apply to permit the destruction of documents in a Will file?

4. Should a rule be adopted that a solicitor must not destroy or move, and must not advise a client to destroy or move, a document where it is likely that legal proceedings will be commenced and the destruction or removal of the document would mean the document would become unavailable or unusable in those likely proceedings?

5. Should a rule be adopted to set out the principle that a solicitor leaving a law practice cannot take a client's documents without the authority of the client and the law practice, and without making appropriate arrangements with the law practice?

Discussion points

In relation to the first matter, the Ethics Committee considers that the meaning of the phrase "solicitor with designated authority" is sufficiently set out in the Glossary. The phrase is defined for the purposes of the rules as:

“solicitor with designated authority” 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.

In relation to the second matter the Ethics Committee considers the rule is clear – that client documents are to be returned to the client or a person authorised by the client, if requested, unless there is an effective lien. If the client does not request the documents be returned, the solicitor must retain them. The Committee also notes that if a client indicates an intention to destroy documents,
a prudent solicitor would advise the client about the possibility of further action arising from the matters dealt with by the retainer, and of the application of statutory limitation periods.

**In relation to the third matter**, the Ethics Committee notes it is a commonly understood principle that a solicitor should always indefinitely retain custody of certain essential documents, including Wills, title deeds, executed contracts, etc. The Committee notes there is a specific professional conduct rule presently in operation in Western Australia\(^\text{146}\) that states:

> A practitioner must not deal with or destroy any title deed, will, original executed agreement or any document or thing held by the practitioner for safe keeping for a client or former client other than in accordance with —
> (a) the instructions of the client or former client; or
> (b) the instructions of another person authorised by law to provide those instructions; or
> (c) an order of a court.

The Ethics Committee invites comments on whether:

- this commonly understood custodial duty should be expressed in a rule or, alternatively discussed in the Commentary; and
- whether the requirement should include documents in a Will file?

**In relation to the fourth matter**, the Ethics Committee notes that the suggestion is that regulation 177 of the (since repealed) *Legal Profession Regulation 2005* (NSW) be incorporated into the rules. Regulation 177 essentially stated in a legislative form the commonly understood position that a lawyer should never advise or assist a client in destroying or removing out of jurisdictional reach documents that are relevant, or might be relevant, in litigation.

The Ethics Committee notes that conduct of the kind described in regulation 177 breaches the solicitor’s paramount duty set out in rule 2 to promote the administration of justice; and goes to the heart of whether the practitioner is a fit and proper person to be a legal practitioner. This principle is stated in rule 5 – 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 be prejudicial to, or diminish the public confidence in, the administration of justice, or to bring the profession into disrepute.

The Ethics Committee considers that the subject matter of regulation 177 does not constitute an ethical principle not already embodied in the rules, but is an illustration of particularly egregious dishonest and disreputable conduct, which would be more appropriately dealt with in the commentary to rule 5, but invites comment on whether or not a specific addition to the rules replicating regulation 177 is necessary.

**In relation to the fifth matter**, it has been commented that complaints commonly arise when a solicitor leaves a law practice, or a law practice is dissolved, and a solicitor takes a client’s documents, particularly documents held in safe custody, without seeking the client’s authority and/or without the authority of the law practice/remaining principals.

The Ethics Committee suggests it would be commonly understood that a solicitor leaving a law practice should not assume any automatic right or entitlement to simply remove a client’s file/documents without the authority of the client and without the authority of the law practice. Whether a solicitor leaving a law practice can remove a client’s file/documents will depend on matters such as the terms of the client retainer agreement, any express instructions from the client.

\(^{146}\) *Legal Profession Conduct Rules 2010*, Rule 28(4).
and, depending on the solicitor’s position within the law practice, the terms of any partnership agreement or contract of employment. Also relevant will be considerations about, for example, whether or not the law practice is holding trust money on the client’s behalf. The Committee’s view is these are matters properly for legal practice rules and/or best practice guidance from professional associations rather than matters for professional conduct rules. The Committee considers that the Commentary could usefully draw attention to these issues, rules and guidance rather than attempting to deal with them in a conduct rule.

**Rule 14  Consultation questions and recommendations**

46. Should rule 14 be amended to include a statement of a solicitor’s duty to not destroy certain documents such as a title deed, will or original executed agreement?

47. Should rule 14 also be expressed as applying to documents in a Will file?

48. Should a specific addition to the rules replicating former regulation 177 of the *Legal Profession Regulation 2005* (NSW) be inserted, to the effect that at a solicitor should never advise or assist a client in destroying or removing out of jurisdictional reach documents that are relevant, or might be relevant, in litigation?

49. Should there be a legal practice rule dealing with the subject of client files and documents when a solicitor leaves a law practice?
Rule 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; or

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

Matters raised

1. Should the word “essential” be removed from the heading and rule 15.1.1?

2. Should the word “surrender” in rule 15.1.1 be replaced with “deliver up”?

3. Is there a conflict between rule 15.1.1(i) and rule 6.2?

4. Should a rule be adopted setting out the principle that a solicitor should not take steps to subvert a valid lien held by another solicitor over client documents?

Discussion points

Rule 15 provides an exception to the principle in rule 14.1 that it is ethically acceptable for a solicitor to retain possession of client documents as security for unpaid legal costs, where the documents concerned are necessary for the client’s defence or prosecution of current proceedings. In these circumstances, it might be said that the interests of the administration of justice are the paramount consideration (rule 2) especially where the situation has urgency, to the solicitor’s entitlement to exercise a lien over client documents to secure unpaid legal costs (rule 14).

In relation to the first matter, the Ethics Committee agrees that the reference to “essential” in the heading of the rule should be omitted.

In relation to the second matter, the Ethics Committee agrees that the word “surrender” in rule 15.1.1 should be replaced with “deliver up”.

In relation to the third matter, the Ethics Committee notes that Rule 6.2 prohibits a solicitor from seeking from another solicitor an undertaking that would require the co-operation of a third party who is not a party to the undertaking. In the Committee’s view, rule 6.2 is engaged when the undertaking, in its terms or to the knowledge of the solicitor seeking it, requires such co-operation.

Rule 15.1.1(i) requires a solicitor (the former solicitor) claiming a lien over essential client documents to surrender those documents to a second (the new) solicitor who undertakes to hold the documents the subject of the lien, and provides reasonable security. If the second solicitor’s continued retention of those documents is subject to their client not giving instructions to deal with the documents otherwise, the undertaking will require the co-operation of a third party who is not a party to the undertaking. It has been suggested that a tension might therefore exist between rule 6.2 and rule 15.1.1(i).
In the Committee’s view, no such tension arises.

The second solicitor who gives an undertaking to hold the documents the subject of the lien should, before the undertaking is given, ensure that arrangements are put in place so that the undertaking can be honoured, without requiring the co-operation of a third party, such as their client. That would require the solicitor to, for instance, secure the client’s irrevocable instructions to retain the documents until the undertaking has been fully honoured or released. Otherwise, the second solicitor is at risk that their client will not co-operate in the retention of the documents and their undertaking will not be honoured, contrary to rule 6.1. Rule 6.1 requires a solicitor who gives an undertaking to honour the undertaking and ensure its timely and effective performance, unless released from it by the recipient or a court of competent jurisdiction.

As to the solicitor who claims the lien over the essential documents, there is no contravention of rule 6.2 because that solicitor has not sought an undertaking, but has merely claimed a lien. Further, on being offered an undertaking by the second solicitor which is not expressed or known to require the co-operation of that solicitor’s client (or any other third party), rule 6.2 is not breached.

The Committee proposes to provide some commentary on these issues.

In relation to the fourth matter, it has been commented that instances have occurred and been the subject of complaints to regulatory authorities where a second (new) solicitor has sought to obtain documents from the opposing party/insurer and/or the Court in order to reconstruct a client file, rather than entering into arrangements of the kind contemplated by rule 15 with the first (former) solicitor.

On one view, conduct of this kind could be said to be contrary to the principles underlying rules 15.1.1 and 15.1.2 that where access is sought by a new solicitor to client documents which are the subject of lien held by the former solicitor for the client, a suitable arrangement is to be put in place involving the former and the new solicitors which addresses the object of the lien held by the former solicitor.

Alternatively, it has been commented that where a valid lien is claimed by a former solicitor over the documents of (for example) a defendant in an action, it would be appropriate for the solicitor of the plaintiff to provide, from the plaintiff’s file, copies of documents that would enable the defendant’s second (new) solicitor to “reconstruct” the defendant’s file, notwithstanding that to do so undermines a valid lien claimed by the defendant’s former solicitor over the defendant’s documents. It is suggested that this course of action would be appropriate because it advances the interests of the plaintiff in having the matter speedily resolved.147

The Ethics Committee invites comments on whether it is ethically appropriate for a solicitor (which might be the new solicitor for the client, or the solicitor for an opposing party), to take steps which would subvert a lien claimed by the former solicitor over client documents? If so, in what circumstances?

Rule 15  Consultation questions and recommendations

50. That rule 15 be amended as follows:

Rule 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 deliver up 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; or

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

51. That there is no conflict between rule 15.1.1(i) and rule 6.2.

52. In what circumstances, if any, might it be appropriate conduct for a solicitor to seek documents from, or to provide documents to, another solicitor where the effect would be to subvert a lien validly claimed by a third solicitor over those documents?
Rule 16  (Charging for document storage)

16.1  A solicitor must not charge:

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

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

UNLESS the client or former client has agreed in writing to such charge being made.

Matters raised

1.  Should the phrase “the storage fee has been disclosed and” be inserted at the end of the Rule, so that the Rules reads: “Unless the storage fee has been disclosed and the client or former client has agreed...”?

2.  For Rule 16.1.1, should the phrase “(either physical, electronic or otherwise)” be inserted so that the Rule reads “for the storage (either physical, electronic or otherwise) of documents, files...”?

3.  Does the charge for retrieval of client documents include transport costs?

4.  Should the reference to “agreed in writing” be replaced with “consented”?

Discussion points

In relation to the first matter, the Ethics Committee notes that it is implicit in the rule that the solicitor will disclose (usually in the retainer agreement) whether or not a fee will be charged and in what circumstances (for example, where the client makes multiple requests for copies of the same documents); however, the actual amount of fee can be subject to many variables, including time and the changing nature of the volume of documents to be stored. The Committee does not propose adopting the suggested change to the rule.

In relation to the second matter, the Ethics Committee agrees the rule should be amended as suggested.

In relation to the third matter, the Ethics Committee suggests that retrieval costs would include the costs of transport, and proposes that the issue be dealt with in commentary.

In relation to the fourth matter, it has been commented that the requirement for the charge to be agreed to in writing should not be removed, on the basis that there are extensive provisions in legal profession legislation requiring clients to be advised in writing about legal costs, as a consumer protection measure. The Ethics Committee acknowledges the considerations impelling written disclosure (and professional associations in their guidance to practitioners consistently emphasise the prudence of written disclosure) however, the issue raised is not about disclosure, but about how the client signifies consent. While professional guidance strongly encourages consent to be obtained in writing, it is well established law that consent may be manifested in ways other than in writing. The proposed change to the rule is intended to reflect that fact.
Rule 16 Consultation questions and recommendations

53. That rule 16 be amended as follows:

Rule 16 (Charging for document storage)

16.1 A solicitor must not charge:

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

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

UNLESS the client or former client has agreed in writing consented to such charge being made.
ADVOCACY AND LITIGATION

Rules 17 to 29 inclusive set out the ethical principles and considerations that apply when a solicitor is in an advocacy and litigation situation. The Ethics Committee observes that in a litigation context, issues arise for a solicitor in his or her capacity as solicitor on the record for the client, or when the solicitor is undertaking an advocacy role akin to that of a barrister in proceedings.

In response to calls often made that the solicitors’ and barristers’ rules should be uniform, the Ethics Committee has reviewed rules 17-29 of the Australian Solicitors’ Conduct Rules (“the solicitors’ rules”) with a view to them being harmonised with the corresponding Legal Profession Uniform Conduct (Barristers) Rules 2015 (“the barristers’ rules”). The reason for seeking harmonisation is because, as Mason CJ observed in Giannarelli v Wraith,148 “it is the function performed, not the label attached” which is the core issue.

The Ethics Committee notes, however, that in the context of court proceedings a solicitor can be undertaking a role as either the solicitor on the record (i.e. as the client’s principal legal adviser) or as an advocate (i.e. a role akin to the barrister presenting and arguing the client’s case before the court). The advocacy and litigation rules as they apply to solicitors must reflect these distinct roles within the context of the court proceedings.

With these considerations in mind, the Ethics Committee has compared rules 17 to 29 of the Australian Solicitors’ Conduct Rules with the corresponding rules for barristers as they appear in the barristers’ rules. Where appropriate, the Committee suggests the rules be harmonised; however, some differences between the solicitors’ rules and barristers’ rules nevertheless remain, either for the contextual reasons mentioned above, or because the Committee view is that the formulation under the Australian Solicitors’ Conduct Rules is to be preferred.

Rule 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.

Matters raised

For rule 17.1, should the term “forensic judgement” be defined?

Discussion points

The Ethics Committee considers the term “forensic judgment” is contextual to the circumstances and a matter for professional judgment by an advocate in discharging duties to the court and to his or her client. The Committee's view is that a definition is not required, noting also that there is no definition contained in the barristers' rules.

Harmonisation of Solicitors’ Rule 17.1 with the Barristers’ Rules

<table>
<thead>
<tr>
<th>Australian Solicitors’ Conduct Rule 17.1</th>
<th>Australian Bar Association Rule 42</th>
</tr>
</thead>
<tbody>
<tr>
<td>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.</td>
<td>42 A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor 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 wishes where practicable.</td>
</tr>
</tbody>
</table>
Considerations

The Ethics Committee notes that rule 17.1, sitting within the Advocacy and Litigation section of the Rules, is directed at the situation where a solicitor is acting as an advocate before the court and that the rule applicable to a solicitor in that context should be the same as the rule applicable to a barrister, save for the difference that a solicitor undertaking an advocacy role might not have another solicitor as an instructing solicitor. The Committee does not consider that rule 17.1 needs to adopt the precise wording of rule 42 of the barristers’ rules.

Harmonisation of Solicitors’ Rule 17.2 with the Barristers’ Rules

<table>
<thead>
<tr>
<th>Australian Solicitors’ Conduct Rule 17.2</th>
<th>Australian Bar Association Rule 43</th>
</tr>
</thead>
<tbody>
<tr>
<td>17.2</td>
<td>43</td>
</tr>
<tr>
<td>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:</td>
<td>A barrister does not breach the barrister’s duty to the client, and will not have failed to give appropriate consideration to the client’s or the instructing solicitor’s wishes, simply by choosing, contrary to those wishes, to exercise the forensic judgments called for during the case so as to:</td>
</tr>
<tr>
<td>17.2.1 confine any hearing to those issues which the solicitor believes to be the real issues;</td>
<td>(a) confine any hearing to those issues which the barrister believes to be the real issues;</td>
</tr>
<tr>
<td>17.2.2 present the client’s case as quickly and simply as may be consistent with its robust advancement; or</td>
<td>(b) present the client’s case as quickly and simply as may be consistent with its robust advancement, or</td>
</tr>
<tr>
<td>17.2.3 inform the court of any persuasive authority against the client’s case.</td>
<td>(c) inform the court of any persuasive authority against the client’s case.</td>
</tr>
</tbody>
</table>

Considerations

The Ethics Committee notes:

- The opening expression a solicitor will not have breached should be aligned to the barristers’ rules by substituting the words does not breach for will not have breached;

- The solicitors’ rule uses the expression the instructing solicitor’s instructions, simply by choosing, contrary to those instructions whereas the barristers’ rule uses the expression the instructing solicitor’s wishes, simply by choosing, contrary to those wishes. As mentioned in the discussion of rule 17.1 above, the difference in expressions reflect the differing positions and obligations of solicitors and barristers in proceedings. The Ethics Committee further notes that the expression the instructing solicitor’s wishes in the barristers’ rule recognises that:

---

149 Noting the expanded definition of “court” in the Glossary.
a barrister will be required to exercise judgment in presenting and arguing a case notwithstanding the solicitor’s instructions; and

a barrister will be required to exercise judgment in presenting and arguing a case where the instructing solicitor or client has not furnished specific instructions.

The Ethics Committee considers the word *instructions* in rule 17.2 of the solicitors’ rule is appropriate.

**Harmonisation of Solicitors’ Rule 17.4 with the Barristers’ Rules**

Rule 17.4 of the solicitors’ rules is as follows:

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

The Ethics Committee notes that there is no direct equivalently worded rule to this solicitors’ rule in the barristers’ rules, but considers it appropriate that this rule be retained, as expressed, in the solicitors’ rules.

---

**Rule 17 Consultation questions and recommendations**

54. That the expression “forensic judgment” should not be defined.

55. That rule 17 be reformulated as follows:

**Rule 17 (Independence – Avoidance of personal bias)**

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

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

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

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

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

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

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

Matters raised

No substantial matters were raised in relation to rule 18.
Rule 19  (Frankness in court)

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

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

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

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

19.4.1 are within the solicitor’s knowledge;
19.4.2 are not protected by legal professional privilege; and
19.4.3 the solicitor has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.

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

19.5.1 seek instructions for the waiver of legal professional privilege, if the matters are protected by that privilege, so as to permit the solicitor to disclose those matters under Rule 19.4; and
19.5.2 if the client does not waive the privilege as sought by the solicitor:
   (i) must inform the client of the client’s responsibility to authorise such disclosure and the possible consequences of not doing so; and
   (ii) must inform the court that the solicitor cannot assure the court that all matters which should be disclosed have been disclosed to the court.

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

19.6.1 any binding authority;
19.6.2 where there is no binding authority, any authority decided by an Australian appellate court; and
19.6.3 any applicable legislation, known to the solicitor and which the solicitor has reasonable grounds to believe to be directly in point, against the client’s case.

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

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

19.8.1 a letter to the court, copied to the opponent, and limited to the relevant reference unless the opponent has consented beforehand to further material in the letter; or
19.8.2 requesting the court to relist the case for further argument on a convenient date, after first notifying the opponent of the intended request and consulting the opponent as to the convenient date for further argument.
19.9 A solicitor need not inform the court of any matter otherwise within Rule 19.8 which would have rendered admissible any evidence tendered by the prosecution which the court has ruled inadmissible without calling on the defence.

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

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

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

Matters raised

1. The title of the rule should be changed because the rule does not refer to “frankness”, but instead prohibits deception and knowingly or recklessly misleading the court.

2. Rule 19.3 appears to apply where the misleading statement was made by the solicitor’s client. Is that intended? Should the words “other than the client” be added to the end of rule 19.3 so that is reads: “…by the opponent or any other person, other than the client”?

3. It is unclear why a solicitor’s failure to correct an error in a statement by an opponent would not be misleading. It is suggested that if a solicitor knows that a misleading statement has been made to the court, by anyone, the solicitor should be obliged to correct that error. Should rule 19.3 therefore be removed, or amended to include the obligation of correcting any misleading statement made to the court?

4. Should the words “in the hope of” be amended to “in a way that is likely to achieve a negative answer” for rule 19.10?

Discussion points

In relation to the first matter, the Ethics Committee proposes to amend the heading to “Duty to the court”, which is the heading used in the equivalent barristers’ rules.

In relation to the second and third matters, the tenor of the comments made is that rule 19.3 should be reformulated consistent with rule 51 of the barristers’ rules, which reads as follows:

A barrister does not make a false or misleading statement to an opponent simply by failing to correct an error on any matter stated to the barrister by the opponent.

The Ethics Committee notes that rule 19.3 is an exception to rule 19.2 of the solicitors’ rules, which deals with an issue about statements to a court whereas rule 51 of the barristers’ rules deals with exchanges between a barrister and an opponent. The two rules thus deal with different contexts. The Committee further notes that the equivalent of rule 51 of the barristers’ rule is rule 22.3 of the solicitors’ rule, which reads as follows:

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.

Other comments received by the Law Council have suggested rule 19.3 should be amended to make clear the solicitor is not obliged to correct a misleading statement by the client, whereas other comments have suggested that there be no such exclusion, so that a solicitor must correct any misleading statement made by any person.
The Ethics Committee notes that rule 19.3 applies in the context of court proceedings, but has no equivalent in the barristers’ rules. The rule states that a solicitor will not be taken to have made a misleading statement to a court simply by failing to correct an error made by the opponent or any other person during the course of the proceedings. The fact that a solicitor is under no general obligation to correct any misleading statement made by any person reflects the common law position.

A legal practitioner has an obligation to correct any false or misleading statement that he or she has made, as illustrated in *Perpetual Trustee Company Ltd v Cowley*, where Atkinson J noted:150

> A legal practitioner may not intentionally mislead the court. If it comes to the legal practitioner’s attention that he or she has unintentionally misled the court then the duty of the legal practitioner is to inform the court to correct the error … If the solicitor discovers that his or her client has lied to the court or falsified a document that has been made an exhibit then the solicitor must advise the client that the court should be informed…[and] must refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie or falsification.

On the other hand, a legal practitioner is not obliged to correct all errors or mistakes that he or she becomes aware of. In *Chamberlain v Law Society of the Australian Capital Territory* – a case involving procedural and process matters – Black CJ observed that:151

> …it may, in different circumstances, be quite acceptable to take advantage of an opponent’s mistake. In this area a line obviously has to be drawn somewhere and given that it is acceptable, in the context of an adversarial system, to take advantage of a mistake in some circumstances but not in others, some quite fine distinctions may need to be made.

The Ethics Committee further notes that rules 19.6, 19.7, 19.9 and 19.12 deal with specific situations where, broadly speaking, a legal practitioner is aware of an error, and set out the expected conduct in the context of the circumstance in which the particular rule applies.

The Ethics Committee’s view is that Rule 19.3 should be omitted as it has no equivalent in the barristers’ rules, and that Commentary should be developed for the guidance of solicitors on the general question of disclosure and the duty to the court in relation to correcting errors, omissions or false or misleading statements during the course of proceedings.

**In relation to the fourth matter**, the Ethics Committee considers that the expression “in the hope of” is a deliberate focus on intention whereas “in a way that is likely to achieve” is an objective test. The Committee notes that rule 19.10 is on the same terms as rule 33 of the barristers’ rules.

---

150 [2010] QSC 65 at [17], [130].
Harmonisation of Solicitors’ Rule 19.5 with the Barristers’ Rules

<table>
<thead>
<tr>
<th>Australian Solicitors’ Conduct Rule 19.5</th>
<th>Australian Bar Association Rule 43</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>19.5</strong></td>
<td>A barrister who has knowledge of matters which are within rule 27(c):</td>
</tr>
<tr>
<td>A solicitor who has knowledge of matters which are within Rule 19.4:</td>
<td>(a) must seek instructions for the waiver of legal professional privilege if the matters are protected by that privilege so as to permit the barrister to disclose those matters under rule 27; and</td>
</tr>
<tr>
<td><strong>19.5.1</strong></td>
<td>(b) if the client does not waive the privilege as sought by the barrister:</td>
</tr>
<tr>
<td>must seek instructions for the waiver of legal professional privilege, if the matters are protected by that privilege, so as to permit the solicitor to disclose those matters under Rule 19.4; and</td>
<td>(i) must inform the client of the client’s responsibility to authorise such disclosure and the possible consequences of not doing so; and</td>
</tr>
<tr>
<td><strong>19.5.2</strong></td>
<td>(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.</td>
</tr>
<tr>
<td>if the client does not waive the privilege as sought by the solicitor:</td>
<td>(i) must inform the client of the client’s responsibility to authorise such disclosure and the possible consequence of not doing so; and</td>
</tr>
<tr>
<td>(i) must inform the client of the client’s responsibility to authorise such disclosure and the possible consequences of not doing so; and</td>
<td>(ii) must refuse to appear on the application.</td>
</tr>
</tbody>
</table>

Considerations

The Ethics Committee notes the reference in solicitors’ rule 19.5 to knowledge of matters which are within Rule 19.4 should be amended to knowledge of matters which are within Rule 19.4.3, consistent with the reference in barristers’ rule 28 to barristers’ rule 27.

Rule 19.5.2(ii) of the solicitors’ rules should be harmonised with rule 28(b)(ii) of the barristers’ rules. Where a solicitor is acting as the advocate for a client in an interlocutory ex parte application and, despite the solicitor having informed the client of the client’s responsibility to authorise disclosure, the client nevertheless refuses to waive legal professional privilege, the appropriate course of conduct for the solicitor is to refuse to appear on the application.
Rule 19  Consultation questions and recommendations

56. That rule 19.3 should be omitted as it has no equivalent in the barristers’ rules, and that Commentary should be developed for the guidance of solicitors on the general question of disclosure and the duty to the court in relation to correcting errors, omissions or false or misleading statements during the course of proceedings.

57. That rules 19.1 to 19.5 be amended as follows:

**Rule 19  (Frankness in court) (Duty to the court)**

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

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

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

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

19.4.1 are within the solicitor’s knowledge;

19.4.2 are not protected by legal professional privilege; and

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

19.5 A solicitor who has knowledge of matters which are within Rule 19.4.3:

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

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

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

(ii) must refuse to appear on the application.

(iii) must inform the court that the solicitor cannot assure the court that all matters which should be disclosed have been disclosed to the court.
Rule 20  (Delinquent or guilty clients)

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

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

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

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

must –

20.1.4 advise the client that the court should be informed of the lie, falsification or suppression and request authority so to inform the court; and

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

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

20.2.1 may cease to act, if there is enough time for another solicitor to take over the case properly before the hearing, and the client does not insist on the solicitor continuing to appear for the client;

20.2.2 in cases where the solicitor continues to act for the client:

(i) must not falsely suggest that some other person committed the offence charged;

(ii) must not set up an affirmative case inconsistent with the confession;

(iii) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;

(iv) may argue that for some reason of law the client is not guilty of the offence charged; and

(v) may argue that for any other reason not prohibited by (i) and (ii) the client should not be convicted of the offence charged;

20.2.3 must not continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client’s innocence.

20.3 A solicitor whose client informs the solicitor that the client intends to disobey a court's order must:

20.3.1 advise the client against that course and warn the client of its dangers;

20.3.2 not advise the client how to carry out or conceal that course; and

20.3.3 not inform the court or the opponent of the client's intention unless:

(i) the client has authorised the solicitor to do so beforehand; or

(ii) the solicitor believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.
Matters raised

Should rule 20.1 be amended so that it is consistent with proposed barristers’ rule 78?

Discussion points

The barristers’ rule in question is now rule 79, which provides as follows:

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

(a) has lied in a material particular to the court or has procured another person to lie to the court,
(b) has falsified or procured another person to falsify in any way a document which has been tendered, or
(c) 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 refuse to take any further part in the case unless the client authorises the barrister 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 barrister to do so but otherwise must not inform the court of the lie, falsification or suppression.

Rule 20.1 of the solicitors’ rules is as follows:

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.

The Ethics Committee notes that rule 20.1 of the solicitors’ rules uses the expression “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…” whereas rule 79 of the barristers’ rule uses the expression “A barrister who, as a result of information provided by the client or a witness called on behalf of the client, is informed by the client or by the witness during a hearing…” The rule recognises that a solicitor may, as a result of dealings with a client as the client’s solicitor, learn from
sources other than the client or a witness that there has been a lie or falsification of evidence. This can be contrasted with the position of a barrister, who would not be expected to have knowledge of all of a client’s legal affairs and other dealings outside of the context of the litigation. The Committee considers the solicitors’ rule formulation is to be preferred to the formulation in the barristers’ rule.

Rule 20.1.4 of the solicitors’ rule requires that, faced with a situation where a client or witness has lied, falsified, suppressed material evidence, etc, the response expected of a solicitor is to advise the client that the court should be informed of the lie, falsification or suppression and to request authority from the client to so inform the court. The Ethics Committee notes that this requirement is necessarily implied in rule 20.1.5 that the solicitor must 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. To harmonise rule 20.1.5 with rule 79 of the barristers’ rules, the Committee proposes to omit rule 20.1.4 as it merely duplicates what is implicit in rule 20.1.5.

Harmonisation of Solicitors’ Rule 20.2 with the Barristers’ Rules

<table>
<thead>
<tr>
<th>Australian Solicitors’ Conduct Rule 20.2</th>
<th>Australian Bar Association Rule 80</th>
</tr>
</thead>
<tbody>
<tr>
<td>20.2</td>
<td>80</td>
</tr>
<tr>
<td>A solicitor whose client in criminal proceedings confesses guilt to the solicitor but maintains a plea of not guilty:</td>
<td>A barrister briefed to appear in criminal proceedings whose client confesses guilt to the barrister but maintains a plea of not guilty:</td>
</tr>
<tr>
<td>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;</td>
<td>(a) should, subject to the client accepting the constraints set out in (b) - (h) but not otherwise, continue to act in the client’s defence;</td>
</tr>
<tr>
<td>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, and (h) 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.</td>
<td>(b) must not falsely suggest that some other person committed the offence charged, (c) must not set up an affirmative case inconsistent with the confession, (d) must ensure that the prosecution is put to proof of its case, (e) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged, (f) may argue that for some reason of law the client is not guilty of the offence charged, (g) may argue that for any other reason not prohibited by (b) or (c) the client should not be convicted of the offence charged, and (h) 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.</td>
</tr>
</tbody>
</table>
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.

Considerations

The Ethics Committee notes:

- Rule 20.2.1 is directed at the position of the solicitor when acting for a client in criminal proceedings, but not when appearing for the client in criminal proceedings. Rule 20.2.1 reflects the position that a solicitor on the record does not have an unrestrained freedom to simply withdraw, where that course of action would mean a client in a criminal matter would be left without the legal representation of a solicitor. This rule (although textually similar to the opening words of barristers’ rule 80) is directed to a solicitor in a different capacity to a barrister and so should be retained.

- Rules 20.2.2 and 20.2.3 of the solicitors’ rules correspond to rule 80 of the barristers’ rules, dealing with the situation where a solicitor is appearing as the advocate for a client who has confessed guilt to the solicitor, but maintains a plea of not guilty. However, the current solicitors’ rule contains no equivalent to barristers’ rule 80(d) that the barrister must ensure that the prosecution is put to proof of its case.

- Subject to views about whether the equivalent of barristers’ rule 80(d) should be adopted, the Ethics Committee considers that rules 20.2.2 and 20.2.3 of the solicitors’ rules should be harmonised with rule 80 of the barristers’ rules.
Rule 20 Consultation questions and recommendations

58. Should the rules adopt the equivalent of rule 80(d) of the barristers’ rules that requires a legal practitioner, when acting as an advocate, to ensure that the prosecution is put to proof of its case when a client has confessed guilt to the practitioner, but maintains a plea of not guilty?

59. That (subject to acceptance of the above proposition) rules 20.1 and 20.2 be reformulated as follows:

Rule 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; or

20.2.2 may, subject to the client accepting the constraints set out in (i) to (vii) below, but not otherwise, continue to act in the client’s defence and:

(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) must ensure that the prosecution is put to proof of its case;

(iv) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;

(v) may argue that for some reason of law the client is not guilty of the offence charged; and

(vi) may argue that for any other reason not prohibited by (i) and (ii) the client should not be convicted of the offence charged; and

(vii) 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.
Rule 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.

Matters raised

1. In rules 21.1 and 21.2, should the words “take care to” be removed so that the rules read “a solicitor must ensure”?
2. Should rule 21.1.4 be amended to include a reference to third parties?
3. Does the test in rule 21.5 need to be harmonised with the Evidence Act test?
4. Should rule 21.3 be amended to read “A solicitor must not allege, including by making other statements or suggestions, any matter of fact in…”?
5. Should rule 21.8 be extended to include reference to domestic and family violence?

Discussion points

In relation to rules 21.1 and 21.2, it has been suggested that the words “take care to” be removed so that the rule might be seen as placing a positive obligation on a solicitor to ensure the advice to the court to invoke its coercive powers is effected in accordance with the principles underlying rules 21.1.1-21.1.4.

The Ethics Committee suggests that the words “take care to” reinforce, rather than diminish, a solicitor’s responsibilities when tendering advice to their client about invoking the coercive powers of the court. The Committee does not consider the suggested change would add to the substance of the rules, and notes that barristers’ rules 60 and 61 likewise use the expression “take care to”.

In relation to the second matter raised, the underlying principle of rule 21 is that a solicitor’s primary duty is to the court and the administration of justice, and that the processes of the court, including in particular the exercise of the court’s coercive powers, should not be used for an unrelated purpose (such as to gain a collateral advantage).

The Ethics Committee agrees that giving advice to invoke the coercive powers of the court to gain a collateral advantage for a third party would be clearly understood as a serious breach of the principle underscoring the rule and proposes that the rule be amended as suggested, consistent with barristers’ rule 60(d).

In relation to the third matter raised, rule 21.5 states that 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. The same rule is contained in rule 67 of the barristers’ rules.

The suggestion made is that the formulation of rule 21.5 should be harmonised with its relevant counterparts in s 103 of the uniform evidence law.

The Ethics Committee’s view is that rule 21.5 sets out the principle that a solicitor (or barrister) has a duty to assist the court by carefully considering whether there are reasonable grounds to raise an issue about credibility, before the court is called upon to decide whether or not evidence adduced from the question should be admitted. In deciding whether or not there are reasonable grounds, the solicitor must have regard to the matters the court must consider pursuant to the
relevant *Evidence Act*. While the provisions in the Territories, New South Wales, Tasmania and Victoria are uniform, the relevant *Evidence Acts* in other jurisdictions contain different provisions. The Committee also notes that the equivalent rule in the barristers’ rule (rule 67) is identical to solicitors’ rule 21.5 as presently formulated.

The Ethics Committee does not support reformulating rule 21.5 to harmonise the rule with the uniform evidence law. A solicitor must adhere to the principle underlying the rule and in doing so must, as discussed in the commentary to rule 2, necessarily have regard to the provisions of the *Evidence Act* of the relevant jurisdiction governing the conduct of the particular proceedings. The Committee suggests the attention of solicitors could be drawn to this issue in Commentary to rule 21.

**In relation to the fourth matter raised**, it was suggested that the proposed reference to making *other statements or suggestions* is necessary to deal with the possibility that a solicitor may make statements or suggestions that, while falling short of allegations, could be just as damaging.

The Ethics Committee notes, as mentioned above, that the underlying principle of rule 21 relates to the solicitor’s duty – to the court and the administration of justice – not to be party to presenting evidence or making any statement or allegation for which, in the solicitor’s judgment, there is insufficient evidentiary foundation.

Rule 21.3 deals with the duty of a solicitor not to make allegations of fact unless the solicitor believes on reasonable grounds that the factual material already available provides a proper basis to do so. Rules 21.3.1–21.3.4 highlight the kinds of vehicles or mechanisms that might be used in proceedings to make allegations, such as court documents, submissions during a hearing, in the course of an opening address or in the course of a closing address or submission on the evidence.

The Ethics Committee’s view is that the rule 21.3 as currently stated adequately expresses, in the context of rule 21 generally, the application of the principle and that an amendment as suggested is not necessary.

The Ethics Committee also notes that the ethical duty has been legislatively restated in s 19 of the *Civil Procedure Act 2010* (Victoria) which provides that a person who has a paramount duty to the court to further the administration of justice must not make any claim or response in proceedings where the person “does not, on the factual and legal material available to the person at the time of making the claim or responding to the claim, have a proper basis”. This legislative statement does not, however, appear to have been adopted in other jurisdictions.

**In relation to the fifth matter**, rule 21.2 (and its equivalent rule 61 of the barristers’ rules) sets out the principle that a solicitor should not use court privilege to make allegations or suggestions that are not reasonably justified by evidence and appropriate to advancing the client’s case on its own merits, and especially to not make allegations or suggestions that are intended principally to harass or embarrass a person.

Rule 21.8 (and its equivalent rule 62 of the barristers’ rules) draws to the attention of legal practitioners that they must not unfairly question a victim of an alleged sexual assault about prior sexual conduct in order to colour the issue of consent to the act that forms the basis of the complaint.

The Ethics Committee notes the ethical (as well as statutory) restrictions on particular lines or approaches to questioning witnesses necessarily seek a balance with the importance of enabling the questioning of a witness where necessary to challenge the truthfulness, consistency or

---

152 See for example, *Evidence Act 1977* (Qld) s 20; *Evidence Act 1906* (WA) s 25.
accuracy of his or her statements.\textsuperscript{153} This balancing is encapsulated in barristers’ rule 63, which provides as follows:

A barrister does not infringe rule 62 merely because:
(a) the question or questioning challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or
(b) the question or questioning requires the witness to give evidence that the witness could consider to be offensive, distasteful or private.

The Ethics Committee proposes that an equivalent to barristers’ rule 63 should be included in the solicitors’ rules.

Rule 21.8 is a specific application of the general principle in rule 21.2. However, under the uniform Evidence Acts and other legislation, limitations have been placed on inappropriate and offensive questioning under cross-examination in general. For example, under s 41 of the \textit{Evidence Act 1995} (Cth), the court must disallow a question put to a witness in cross-examination, or inform the witness that the question need not be answered, if the court is of the opinion that the question:

a) is misleading or confusing;
b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive;
c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
\textbf{d) has no basis other than a stereotype (for example, a stereotype based on the witness’s sex, race, culture, ethnicity, age or mental, intellectual or physical disability).} \textsuperscript{154}

The Australian Capital Territory,\textsuperscript{155} New South Wales,\textsuperscript{156} and Tasmanian\textsuperscript{157} Acts contain equivalent provisions, and the South Australian \textit{Evidence Act 1929}\textsuperscript{158} contains provisions that are substantially equivalent. The Victorian and Northern Territory\textsuperscript{159} Evidence Acts contain provisions that are substantially equivalent to the Commonwealth Act – with the major difference being that the obligations on the court to intervene, differ depending on whether or not the witnesses is deemed ‘vulnerable’.\textsuperscript{160}

The Western Australian\textsuperscript{161} and Queensland\textsuperscript{162} Evidence Acts contain provisions that are partially equivalent to the \textit{Evidence Act 1995} (Cth).

---

\textsuperscript{153} See G E Dal Pont, \textit{Lawyers’ Professional Responsibility}, 6\textsuperscript{th} ed, 2017, at [17.225].
\textsuperscript{154} \textit{Evidence Act 1995} (Cth), s 41.
\textsuperscript{155} \textit{Evidence Act 2011} (ACT) s 41.
\textsuperscript{156} \textit{Evidence Act 1995} (NSW) s 41.
\textsuperscript{157} \textit{Evidence Act 2001} (Tas) s 41.
\textsuperscript{158} \textit{Evidence Act 1929} (SA) s 25.
\textsuperscript{159} \textit{Evidence (National Uniform Legislation) Act} (NT) s 41.
\textsuperscript{160} \textit{Evidence Act 2008} (Vic) s 41. The court may disallow an improper question or improper questioning put to a witness in cross-examination. The court must disallow an improper question or improper questioning put to a vulnerable witness in cross-examination.
\textsuperscript{161} \textit{Evidence Act 1906} (WA) s 26. Unlike the \textit{Evidence Act 1995} (Cth), this section does not disallow questions which are put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or which have no basis other than a stereotype. The section also does not note that the court should take into account the context in which the question is put.
\textsuperscript{162} \textit{Evidence Act 1977} (Qld) s 21. Unlike the \textit{Evidence Act 1995} (Cth), this section does not disallow questions which are put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or which have no basis other than a stereotype.
The Commonwealth and the majority of the States (apart from Queensland and Western Australia) also have provisions which set out that, in determining whether a question is improper, the court may take into account:

a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality;

b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject; and

c) the context in which the question is put, including:

i. the nature of the proceeding; and

ii. in a criminal proceeding—the nature of the offence to which the proceeding relates; and

iii. the relationship (if any) between the witness and any other party to the proceeding.

In addressing the question of whether or not rule 21.8 should be extended to include reference to domestic and family violence, consideration should be given to:

- whether an amendment is desirable, given that rule 21.8 states that it does not limit the generality of rule 21.2 and so is not to be taken as the only situation in which the general principle applies.

- if an amendment is desirable:
  - should that amendment be limited specifically to domestic and family violence?
  - should the rules reflect the more general but extensive protections outlined in the various Evidence Acts?
  - should an amendment be made jointly with a change to barristers’ rule 62 (which corresponds to solicitors’ rule 21.8)?

- whether, given the range of statutory, common law and ethical issues and contexts involved, would it be more appropriate that the matter be addressed by way of Commentary to rule 21.2.

Necessity

Rule 21.2 outlines the factors that a solicitor must take into account when making allegations or suggestions under privilege against any person. Although this rule affords all witnesses some protection from improper questioning, the specific protections outlined in rule 21.8 demonstrate that there may be a need for specific rules to address protections for specific vulnerable witnesses.

While courts do provide measures of protection for witnesses, including through provisions such as s 41 of the Evidence Act 1995 (Cth) outlined above, such protections are reactive and only come into play after the improper question has been put to the witness.

The recommendation for inclusion of “family and domestic violence” in rule 21.8 comes from the Queensland “Not Now, Not Ever” Report, which notes that the vulnerability of victims and survivors of domestic and family violence needs to be placed at the forefront, and that justice responses

---

163 The list of factors that a court is required to take into account in deciding whether a question is an improper question is not as extensive in the Evidence Act 1977 (Qld) and the Evidence Act 1906 (WA) as the Evidence Act 1995 (Cth).
must adapt to the complexities and sensitivities that govern the lives of those affected by domestic and family violence.\footnote{Special Taskforce on Domestic and Family Violence in Queensland, ‘\textit{Not Now, Not Ever}’ (2015) 13.}

**Specific amendment**

Amending rule 21.8 to include a specific reference to allegations of domestic and family violence would ensure the extension of existing protections outlined in rule 21.8. However, such an amendment might also have undesirable effects, including:

- obscuring the original intention of the rule; and
- overemphasising the importance of protections for witnesses in domestic and family violence cases as compared with other classes of vulnerable witnesses.

The introduction of a specific amendment would also necessitate that the rules define “domestic and family violence”.

**General amendment**

Although the provisions outlined in s 41 of the uniform evidence law do not address protections specifically for domestic and family violence complainants, they do extensively outline what may be considered an improper question, and what factors a court can take into account in determining whether a question is improper. Importantly, the legislation notes that the court may take into account the nature of the offence to which the proceeding relates and the relationship (if any) between the witness and any other party to the proceeding.

As mentioned above, the protections afforded by the uniform evidence law are not replicated in equivalent legislation in every jurisdiction around the country, and where the provisions do exist, the power for the court to intervene only comes into play once the question has been asked.

Amending the \textit{Australian Solicitors’ Conduct Rules} to reflect the protections afforded to witnesses in the uniform evidence law would place responsibility on the solicitor to consider the appropriateness of questions and the vulnerability of witnesses before the question is put to the witness, and would enhance protections to vulnerable witnesses.

**Commentary**

Another way to address the issue is the insertion of Commentary to rule 21.2 to highlight the specific vulnerability of witnesses in cases of domestic and family violence. The Commentary could draw solicitors’ attention to situations where particular care needs to be exercised in the way the proceedings are conducted, referring solicitors to, for example, Chapter 9 of the “Best Practice Guidelines for Lawyers Doing Family Law Work” published by the Law Council of Australia’s Family Law Section, and other guidance materials available from professional associations.

The Ethics Committee view is that addressing the issue by way of Commentary is preferable, and invites comments on the various options outlined above.
Harmonisation of Solicitors’ Rule 21.1 with the Barristers’ Rules

Rule 21.1 of the solicitors’ rules is as follows:

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.

Rule 60 of the barristers’ rules is as follows:

A barrister must take care to ensure that the barrister’s advice to invoke the coercive powers of a court:

(a) is reasonably justified by the material then available to the barrister,
(b) is appropriate for the robust advancement of the client’s case on its merits,
(c) is not given principally in order to harass or embarrass a person, and
(d) is not given principally in order to gain some collateral advantage for the client or the barrister or the instructing solicitor or a third party out of court.

Considerations

The Ethics Committee proposes that rules 21.1.3 and 21.1.4 be harmonised with the equivalent barristers’ rule by substituting the word made in the solicitors’ rules with the word given, and by adopting the recommendation about third parties in relation to the second matter raised in submissions already received.

Harmonisation of Solicitors’ Rule 21.6 with the Barristers’ Rules

Rule 21.6 of the solicitors’ rules is as follows:

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).

Rule 66 of the barristers’ rules is as follows:

A barrister may regard the opinion of the instructing solicitor that material which is available to the solicitor is credible, being material which appears to the barrister from its nature to support an allegation to which rules 64 and 65 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).
Considerations

The Ethics Committee notes that rule 21.6 of the solicitors’ rules and rule 66 of the barristers’ rules are concerned with the weight an advocate can give to the opinions of an instructing solicitor about the credibility of materials relating to allegations of factual matters. While rules 21.3 and 21.4 of the solicitors’ rules (and their counterparts in rules 64 and 65 of the barristers’ rules) deal with factual matters and materials, rules 21.1 and 21.2 deal with matters which are not relevant to the central question in the advocate’s mind about whether to accept the instructing solicitor’s opinion as to the credibility of materials. The Committee therefore proposes that the reference to rules 21.1 and 21.2 be omitted, which will then harmonise rule 21.6 of the solicitors’ rules with rule 66 of the barristers’ rules.

Proposed reformulation of solicitors’ rules 21.1 and 21.6

If the Ethics Committee proposals are adopted, rules 21.1 and 21.6 would read as follows:

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 given principally in order to harass or embarrass a person; and

21.1.4 is not made given principally in order to gain some collateral advantage for the client or the solicitor or the instructing solicitor or a third party out of court.

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).

In addition, a new rule (rule 21.9) would be inserted to harmonise with the barristers’ rule as follows:

21.9 A solicitor does not infringe rule 21.8 merely because:

(i) the question or questioning challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or

(ii) the question or questioning requires the witness to give evidence that the witness could consider to be offensive, distasteful or private.
Rule 21 Consultation questions and recommendations

60. That the words “take care to” be retained in rules 21.1 and 21.2.

61. That rule 21.1.4 be amended to include a reference to third parties.

62. That the Commentary to rule 21 draw solicitors’ attention to the need (in the context of rule 21.5) to have regard to the applicable provisions (if any) of the Evidence Act of the relevant jurisdiction.

63. Should rule 21.8 be amended to include a reference to domestic or family violence as an additional (but not exhaustive) issue where a solicitor must take care in pursuing a line of questioning of a witness? Alternatively, should rule 21.8 be reformulated to express the general principle that care must be taken to not pursue improper lines of questioning, with commentary also developed to highlight specific issues where the principle must be observed, including allegations of sexual assault, indecent assault, and allegations of domestic or family violence?

64. That (subject to responses to question 57 above) rule 21 be reformulated as follows:

Rule 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 given principally in order to harass or embarrass a person; and

21.1.4 is not made given principally in order to gain some collateral advantage for the client or the solicitor or the instructing solicitor or a third party out of court.

21.2-21.5 [no change]

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).

21.7-21.8 [no change]

21.9 A solicitor does not infringe rule 21.8 merely because:

(i) the question or questioning challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or

(ii) the question or questioning requires the witness to give evidence that the witness could consider to be offensive, distasteful or private.
Rule 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.

Matters raised

1. Should a general rule of courtesy, equivalent to the former rule 25 of the Revised Professional Conduct and Practice Rules 1995 (NSW), be included in the Rules?

2. Should a rule prohibiting threats of personal costs orders against opponents without foundation be included in the Rules?

3. Should the Rules be amended to require an equivalent standard as in the Australian Consumer Law as to misleading and deceptive conduct?

4. Should a rule be inserted in relation to disclosure that a solicitor is acting under subrogation along the following lines: “If a solicitor is acting under the right of subrogation, the solicitor must advise the other party that the solicitor is acting for the client under the right of subrogation and provide the name of the insurer”?

5. Should rule 22.1 be amended to insert the words “or recklessly”?

6. Should rules 22.1, 22.2 and 22.3 include the words “or misleading” so as to read: “false or misleading statement”?

7. For rule 22.4, should the term “signified willingness” be replaced with “agreed”? 
8. Is a solicitor required to adhere to the principle in rule 22.5 when using an Online Court system to lodge documents with the court?

9. Does rule 22.8 need to be re-drafted for clarity? It is suggested that the rule appears to require a solicitor to try to inform the court of an application by the client to adjourn a hearing but presumably the court would already know of such an application.

Discussion points

In relation to the first matter raised, rule 25 of the former Professional Conduct and Practice Rules 2013 (NSW) provided:

A practitioner, in all of the practitioner’s dealings with other practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the practitioner’s communications are courteous and that the practitioner avoids offensive or provocative language or conduct.

The Ethics Committee notes that the matters covered by the former NSW Rule are contained in rule 4 (Other fundamental ethical duties) and that rule 22 does not require modification as suggested. However, the Committee considers this issue could usefully be addressed in Commentary to the rule.

In relation to the second matter, the Ethics Committee considers, consistent with the reasoning in Legal Services Commissioner v Sing,165 that solicitors must, given their professional standing, walk a “rather finely drawn line” between making what might be described as a threat as opposed to making a statement that actions will be taken consistent with a client’s rights under the law. It would, for example, be unethical for a solicitor to use his or her position as an officer of the court to make a threat that a personal costs order will be made against the opposing party; a solicitor is in no position to make such an order and should not create the impression that he or she can influence the court to do so. On the other hand, it would not necessarily be unethical for a solicitor to indicate to the opposing party an intention to seek a personal costs order should the matter proceed to court and his or her client secures a favourable outcome.

The Committee therefore does not consider that the rule should be amended as suggested. To do so would also require the addition of circumstances as exceptions to such a general rule and, as the decision in Sing indicates, whether or not the fine line between ethical and unethical conduct has been crossed depends upon all of the circumstances. The Committee considers this issue could usefully be addressed in Commentary to the rule.

In relation to the third matter, the comments received are that rule 22 (and rule 34) sets a lower standard than that prescribed by s 18 of the Australian Consumer Law. This matter is covered in the discussion under rule 34 at page 142 of this Consultation Discussion Paper.

In relation to the fourth matter, see the discussion at page 171 of this Consultation Discussion Paper.

In relation to the fifth matter, the Ethics Committee notes that the equivalent barristers’ rule (rule 49) to rule 22.1 states that a barrister must “not knowingly make a false or misleading statement”. The Committee’s view is that the solicitors’ rule should be harmonised with its barristers’ rule equivalent, noting that it does not consider the addition of the words “or recklessly” would add any benefit to the expression of the rule.

In relation to the sixth matter, the Ethics Committee agrees that the rules should be amended as suggested. This change will harmonise with the relevant applicable barristers’ rules.

In relation to the seventh matter, rule 22.4 states the principle that 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. The suggestion is that the expression “signified willingness” should be replaced with the word “agreed”. The Ethics Committee does not agree that the rule needs to be amended as suggested.

In relation to the eighth matter, the Ethics Committee refers to the use of Online Court systems which enable a solicitor to electronically lodge a “Request” with the court (which might include a request for an adjournment) and which is viewable by all parties. It has been commented that the use of the Online Court in this way might result in a solicitor communicating in the opponent’s absence with the court concerning any matter of substance in connection with current proceedings, without the opponent’s consent being obtained beforehand, pursuant to rule 22.5.2.

The Committee notes that the obligation in rule 22.5 is an obligation of conferral before filing documents. The rule serves the very important purpose of both solicitors being aware of and consenting to approaches by each of them to the court which might affect the course of the proceedings. The Committee considers that the commentary to rule 22.5 should highlight the application of the principle in the context of Online Court systems, drawing attention to the need for a solicitor to confer with the opponent, regardless of the means by which documents might be lodged with the court.

In relation to the ninth matter, the comments received are that rule 22.8 appears to require a solicitor to try to inform the court of an application by the client to adjourn a hearing, but presumably the court would already know of such an application.

Rule 22.8 encapsulates the solicitor’s duty to do everything possible to ensure that matters before the court are concluded in a timely and cost-efficient way. Where a solicitor has reasonable grounds to believe that an application for adjournment will be made on a client’s behalf, the solicitor must:

- inform the opponent of that likelihood and the grounds on which it will be made; and
- seek, with the opponent’s consent, to have the application made to the court as soon as possible.

The Committee view is that rule 22.8 deals with the point in time at which the solicitor forms a belief, based on reasonable grounds, that an application for adjournment will be made. It impresses upon the solicitor the importance to the efficient conduct of proceedings that there should be minimal delay in seeking an adjournment to, among other things, not waste the court’s time and resources. Accordingly, the Committee does not believe that the rule as presently drafted is deficient in the way suggested.

---

166 See for example, Virtgel Ltd v Zabousky (No 2) [2009] QCA 349 at [30] per McMurdo P and the discussion in G E Dal Pont, Lawyers’ Professional Responsibility, 6th ed, 2017 [17.245].
Harmonisation of Solicitors’ Rule 22.2 with the barristers’ rules

Rule 22.2 of the solicitors’ rules is as follows:

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.

Rule 50 of the barristers’ rules is as follows:

A barrister must take all necessary steps to correct any false or misleading statement in relation to the case made by the barrister to an opponent as soon as possible after the barrister becomes aware that the statement was false or misleading.

Considerations

The Ethics Committee proposes that rule 22.2 of the solicitors’ rules be harmonised with rule 50 of the barristers’ rules by inserting the expressions: or misleading statement; in relation to the case; and or misleading.

Harmonisation of Solicitors’ Rule 22.3 with the Barristers’ Rules

Rule 22.3 of the solicitors’ rules is as follows:

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.

Rule 51 of the barristers’ rules is as follows:

A barrister does not make a false or misleading statement to an opponent simply by failing to correct an error on any matter stated to the barrister by the opponent.

Considerations

The Ethics Committee proposes that rule 22.3 of the solicitors’ rules be harmonised with rule 51 of the barristers’ rules.

Harmonisation of Solicitors’ Rule 22.7 with the Barristers’ Rules

Rule 22.7 of the solicitors’ rules is as follows:

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.

Rule 56 of the barristers’ rules is as follows:

A barrister must not raise any matter with a court in connection with current proceedings on any occasion to which an opponent has consented under rule 54 (b), other than the matters specifically notified by the barrister to the opponent when seeking the consent of the opponent.
Considerations

The Ethics Committee proposes that rule 22.7 of the solicitors’ rules be harmonised with rule 56 of the barristers’ rules.

Harmonisation of Solicitors’ Rule 33 with the Barristers’ Rules

Rule 52 of the barristers’ rules is as follows:

A barrister must not deal directly with a party other than his or her client who is legally represented unless:
(a) the substance of the dealing is solely to enquire whether the person is represented and, if so, by whom,
(b) the legal practitioner representing the party has previously consented, or
(c) the barrister believes on reasonable grounds that:
   (i) the circumstances are so urgent as to require the barrister to do so, and
   (ii) the dealing would not be unfair to the party.

Considerations

Rule 52 of the barristers’ rules is equivalent in substance to rule 33.1 (and sub-rules 33.1.1-33.1.3) of the solicitors’ rules. However, solicitors’ rule 33 is placed in that Part of the Australian Solicitors’ Conduct Rules that deals with relations with other solicitors and would, in the Committee’s opinion, have application to a solicitor in both a litigation and an ordinary legal practice context. In contrast, barristers’ rule 52 is placed in the set of rules that relate to the duties to the opponent.

The Committee considers there may be potential for confusion by either not replicating rule 33.1 (and sub-rules 33.1.1-33.1.3) of the solicitors’ rules in the Part dealing with Advocacy and Litigation, or by at least including Commentary to solicitors’ rule 22 that draws solicitors’ attention, when in an advocacy setting, to the requirements of rule 33.1. The Committee welcomes views of which approach is preferable.

Harmonisation of Solicitors’ Rules with the Barristers’ Rule 53

Rule 53 of the barristers’ rules is as follows:

A barrister must not confer with or deal directly with any party who is unrepresented unless the party has signified willingness to that course.

Considerations

The Ethics Committee notes that there is no counterpart in the solicitors’ rules to rule 53 of the barristers’ rules, but that such a rule is desirable and appropriate to a solicitor in an advocacy role. Therefore, such a rule should be included in the solicitors’ rules.
Rule 22  Consultation questions and recommendations

65. That commentary explain general principles of professional conduct concerning the need for courtesy and the inappropriateness of making threats about future actions as opposed to making a statement that actions will be taken consistent with a client’s rights under the law.

66. Should solicitors’ rule 33 (about not dealing directly with the client or clients of another legal practitioner) be replicated in rule 22 to highlight that the principle also applies in an advocacy and litigation setting, as well as in general legal practice?

67. That rule 22 be reformulated as follows:

**Rule 22  (Communication with opponents)**

22.1 A solicitor must not knowingly make a false or misleading statement to an opponent in relation to the case (including its compromise).

22.2 A solicitor must take all necessary steps to correct any false or misleading statement in relation to the case 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 does not make a false or misleading statement to the opponent simply by failing to correct an error on any matter stated to the solicitor by the opponent.

22.4 A solicitor must not confer or deal with any party represented by or to the knowledge of the solicitor indemnified by an insurer, unless the party and the insurer have signified willingness to that course.

22.5 A solicitor must not, outside an ex parte application or a hearing of which an opponent has had proper notice, communicate in the opponent’s absence with the court concerning any matter of substance in connection with current proceedings unless:

22.5.1 the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court; or

22.5.2 the opponent has consented beforehand to the solicitor communicating with the court in a specific manner notified to the opponent by the solicitor.

22.6 A solicitor must promptly tell the opponent what passes between the solicitor and a court in a communication referred to in Rule 22.5.

22.7 A solicitor must not raise any matter with a court in connection with current proceedings on any occasion to which an opponent has had proper notice, communicate in the opponent’s absence with the court concerning any matter of substance in connection with current proceedings other than the matters specifically notified by the solicitor to the opponent when seeking the opponent’s consent of the opponent.

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.

22.9 A solicitor must not confer with or deal directly with any party who is unrepresented unless the party has signified willingness to that course.

68. That the Commentary draw attention to the application of the principles in rule 22.5 where solicitors utilise online court systems.
Rule 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 the witness need not agree to confer or to be interviewed or by advising about relevant obligations of confidentiality.

Matters raised

When the Australian Solicitors' Conduct Rules were first promulgated in June 2011, rule 23.2 was as follows:

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.

The original formulation of the rule is textually consistent with rules 74 and 75 of the Legal Profession Uniform Conduct (Barristers) Rules 2015. A minor modification was made to rule 23.2, to substitute the words “he or she” with “the witness”, in response to comments received that the rule as originally formulated was unclear as to whether it was the witness, prospective witness or solicitor who did not need to agree to confer or be interviewed.

The Ethics Committee remains concerned that both of the above formulations of rule 23.2 could leave room for ambiguity. The Committee suggests that one way of dealing with the ambiguity would be to reformulate rule 23.2.

Rule 23 Consultation questions and recommendations

69. That rule 23 be reformulated as follows:

Rule 23  (Opposition access to witness)

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 **does not** breach rule 23.1 simply by:

23.2.1 telling a prospective witness or a witness that he or she need not agree to confer or to be interviewed; or

23.2.2 advising the prospective witness or the witness about relevant obligations of confidentiality.
Rule 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 Rule 24.1 by:

24.2.1 expressing a general admonition to tell the truth;

24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness; or

24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but the solicitor must not encourage the witness to give evidence different from the evidence which the witness believes to be true.

Matters raised

There were no substantial matters raised regarding rule 24. A minor modification for clarity was made to rule 24.2.3 as shown above in bold to add the words “the solicitor”.
Rule 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.

Matters raised

There were no substantial matters raised regarding rule 25.
Rule 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.

Matters raised

There were no substantial matters raised regarding rule 26.
Rule 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.

Matters raised

1. Rule 27.1 implies that it is discretionary for a solicitor to determine whether to appear as an advocate for the client in the hearing in the circumstances outlined in that rule. It is recommended that the word “may not” be amended to “must not”.

2. In relation to rule 27.2, a solicitor, associate or law practice should, as a starting point, withdraw altogether from acting for the client in a situation where the solicitor is, or is likely to be, a material witness. Departure from this starting point should only be permitted where there are “exceptional circumstances” in which the interests of justice justify the solicitor, associate or law practice acting or continuing to act for the client. The rule as currently drafted shifts the onus and permits the solicitor to continue to act unless doing so would prejudice the administration of justice. It has been recommended that the onus be reversed as described above, and that the starting point be a withdrawal to act unless “exceptional circumstances” exist to do otherwise.

Discussion points

There are many occasions where a solicitor knows beforehand, or it becomes apparent during the course of proceedings that he or she may be required to give evidence material to the determination of one or more contested issues before the court. This situation might arise either prior to commencement of proceedings, or during the course of proceedings. The solicitor’s role in the proceedings may be as either the client’s advocate, or as the client’s solicitor on the record. These situations can give rise to a tangle of conflicted duties and interests for a solicitor between:

- the duties as an officer of the court and the solicitor’s personal interest as a witness;
- the duties as an officer of the court and the duty to the client;
- the duty to the client and the duty as a witness to give impartial evidence; and
- the duty to the client and the solicitor’s personal interest as a witness.

Rule 27 deals with the conflict arising out of the position of the solicitor as a witness in relation to the contested matter when the solicitor is also appearing as an advocate in the proceedings (rule 27.1) or the solicitor is the solicitor on the record for the client (rule 27.2).

In relation to the first matter raised, it has been commented that the way rule 27.1 is drafted implies that it is a discretionary decision for the solicitor to determine whether to appear as an advocate for the client in the hearing in the circumstances outlined in that rule. It has been suggested the rule should be re-drafted as an absolute prohibition by replacing the words “may not” with “must not”.
The Ethics Committee notes the following statement by E M Heenan J in *Holborow v MacDonald Rudder*\(^{167}\) at [29]:

> ... it has long been accepted that a legal practitioner, who is likely to be a witness in a case should not act as counsel, or continue to act as counsel if a situation arises where he is unexpectedly required to give evidence. The reason being is that the personal integrity of the practitioner may be put in issue if his credibility is at stake as a witness, and that this will, or may, constitute a personal interest inconsistent with the practitioner's duty to the court or to the client.

The Ethics Committee view is that judicial consideration on the subject matter of rule 27.1 has not gone so far as to declare an absolute prohibition on a solicitor (or barrister) appearing or continuing to appear in a matter where he or she will or may be required to give evidence material to contested matters. Further, the Committee notes that it is ultimately a decision for the court as to whether it should intervene and exercise its power to restrain a practitioner from appearing or continuing to appear. As Heenan J noted in *Holborow v MacDonald Rudder*, that can require consideration of matters such as, for example, whether the credibility of the solicitor would be put at issue. The Committee is concerned that an absolute prohibition could deprive, or unnecessarily complicate proceedings for, the court being called upon to consider whether to exercise its powers. While the Committee acknowledges that solicitors facing the situation where rule 27.1 may apply must give very careful consideration to the matter and exercise abundant caution, it does not consider that rule 27.1 should pre-emptively prohibit a solicitor from appearing or continuing to appear in any circumstances.

**In relation to the second matter**, rule 27.2 deals with the situation where a solicitor who may be required to give evidence material to the determination of the contested issues before the court is also the solicitor on the record (i.e. is named as the party’s legal representative in the documents for the proceedings). This situation can also give rise to potential conflicts between the solicitor’s duty to the client, the solicitor’s personal interests as a witness, the solicitor’s duties as an officer of the court and the duty to give impartial evidence.

The comments made about rule 27.2 have recommended the rule be reformulated to reflect a principle that, in a situation where rule 27.2 applies, a solicitor should withdraw from acting for the client unless exceptional circumstances exist - the concern raised is that rule 27.2 has “shifted the onus” from the previous position under, for example, rule 19 of the (since repealed) *Professional Conduct and Practice Rules (Solicitors’ Rules) 2013* (NSW) and Rule 13.4 of the *Solicitors’ Professional Conduct and Practice Rules 2005* (Vic).

The Ethics Committee considers that rule 27.2 does not need to be reformulated in the way suggested; and that the rule expressly encompasses the ethical principle at issue by proscribing a solicitor from acting if it would “prejudice the administration of justice, whereas the former rule merely referred to “exceptional circumstances”. The existing Commentary to rule 27.2 notes that the jurisdiction of a court to exercise its power to restrain a solicitor or law practice from acting is exceptional and exercised with caution, and that the court will have regard to considerations of the proper administration of justice, including:

- 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 relief.

\(^{167}\) [2002] WASC 265 at [29].
The Ethics Committee considers that the expression “unless exceptional circumstances exist”, which has been suggested should be used in the rule, is too vague. Importantly, the Committee agrees with the observation that that expression does not clearly recognise that curial disqualification of lawyers from acting rests, pretty much in every context, on avoiding some prejudice to the administration of justice.\textsuperscript{168}

The change in formulation to what is now rule 27.2 was recently considered by the New South Wales Court of Appeal in\textit{ Barrak Corporation Pty Ltd v Kara Group of Companies Pty Ltd} where Adamson J observed:\textsuperscript{169}

\begin{quote}
The effect of the amendment is to change the rule from a prohibition qualified where there are "exceptional circumstances justifying the practitioner's continuing retainer by the ... client" (Rule 19) with a qualified permission that allows a solicitor to continue to act for the client unless doing so would prejudice the administration of justice (Rule 27.2). I do not discern any change in the purpose of the provision, which is to protect the administration of justice by circumscribing the circumstances in which a solicitor who is, or may be, required to give evidence in proceedings is permitted to act.
\end{quote}

The Ethics Committee considers that, if an alternative formulation based on the former rule were to be considered, the former rule itself (i.e. the reference to “exceptional circumstances”) should be varied. The Committee invites comments on the following reformulation of the former rule as a possible alternative to the existing rule 27.

\begin{center}
\begin{tabular}{|l|}
\hline
\textbf{Rule 27 Consultation questions and recommendations} \\
\hline
70. Should rule 27 be reformulated as follows: \\
\hspace{1cm} \textbf{Rule 27 (Solicitor as material witness in client's case)} \\
\hspace{1cm} 27.1 A solicitor must not, unless the due administration of justice would warrant otherwise in the solicitor’s considered opinion: \\
\hspace{1.5cm} 27.1.1 appear for a client at any hearing; or \\
\hspace{1.5cm} 27.1.2 continue to act for a client \\
\hspace{1cm} in a case where it is known, or becomes apparent, that the solicitor will be required to give evidence material to the determination of the contested issues before the court. \\
\hline
\end{tabular}
\end{center}

\textsuperscript{168} See for example\textit{ Lyons v Legalese Pty Ltd [2016] SASC 160.} \\
\textsuperscript{169} [2014] NSWCA 395 at [49].
Rule 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.

Matters raised

Some comments received by the Law Council have advocated the deletion of rule 28 on the basis that it unreasonably fetters the ability of legal practitioners and community legal centres to publicly comment on current proceedings where:

- public interest matters are involved, even though it may be highly unlikely that those comments would prejudice a fair trial; or
- a systemic issue exists, but a case will likely settle on confidential terms, in which case the rule could be used as a tool to silence lawyers.

Alternatively, it has been suggested there should be guidance that clarifies the application of this rule, particularly in relation to commentary on public interest cases.

Discussion points

The Ethics Committee considers that rule 28 does not completely prohibit the publication of comments about current proceedings. The principle underpinning the rule is that any comment made by a solicitor about current proceedings should not prejudice a fair trial or the administration of justice. The decision in Legal Services Commissioner v Orchard\[170\] illustrates the degree of personal judgement expected of a solicitor in considering whether or not to publish material. As it accurately reflects this principle, the Committee does not agree that the rule should be deleted.

Harmonisation of Solicitors’ Rule 28 with the Barristers’ Rules

Barristers’ rules 76, 77 and 78 deal with public comments during current proceedings as follows:

76  A barrister must not publish or take any step towards the publication of any material concerning any proceeding which:

(a) is known to the barrister to be inaccurate,
(b) discloses any confidential information, or
(c) appears to or does express the opinion of the barrister on the merits of a current or potential proceeding or on any issue arising in such a proceeding, other than in the course of genuine educational or academic discussion on matters of law.

77  A barrister must not publish or take any step towards the publication of any material concerning any current proceeding in which the barrister is appearing or any potential proceeding in which a barrister is likely to appear, other than:

(a) a barrister may supply answers to unsolicited questions concerning a current proceeding provided that the answers are limited to information as to the identity of the parties or of any witness already called, the nature of the issues in the case, the nature of the orders made or judgment given including

\[170\] [2012] QCAT 583.
any reasons given by the court and the client’s intentions as to any further steps in the case, or
(b) a barrister may, where it is not contrary to legislation or court practice and at the request of the client or instructing solicitor or in response to unsolicited questions supply for publication:

(i) copies of pleadings in their current form which have been filed and served in accordance with the court’s requirements,
(ii) copies of affidavits or witness statements, which have been read, tendered or verified in open court, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection,
(iii) copies of transcript of evidence given in open court, if permitted by copyright and clearly marked so as to show any corrections agreed by the other parties or directed by the court, or
(iv) copies of exhibits admitted in open court and without restriction on access.

78 A barrister:
(a) may if requested advise a client about dealings with the media but not in a manner which is calculated to interfere with the proper administration of justice, and
(b) does not breach rule 76 or 77 simply by advising the client about whom there has been published a report relating to the case, and who has sought the barrister’s advice in relation to that report, that the client may take appropriate steps to present the client’s own position for publication.

The Ethics Committee notes that solicitors’ rule 28 has been drafted to express the underlying ethical principle, where barristers’ rules 76-78 express both the underlying ethical principle and specific rules for specific situations. The Committee considers the solicitors’ rule should remain unchanged, with examples of the application of the rule provided in the Commentary.

**Rule 28 Consultation questions and recommendations**

71. That rule 28 be retained, in its current formulation.

72. That commentary provide examples of the application of rule 28.
Rule 29  (Prosecutor’s duties)

29.1 A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

29.2 A prosecutor must not press the prosecution’s case for a conviction beyond a full and firm presentation of that case.

29.3 A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

29.4 A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.

29.5 A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused other than material subject to statutory immunity, unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person.

29.6 A prosecutor who has decided not to disclose material to the opponent under Rule 29.5 must consider whether:

29.6.1 the charge against the accused to which such material is relevant should be withdrawn; or

29.6.2 the accused should be faced only with a lesser charge to which such material would not be so relevant.

29.7 A prosecutor must call as part of the prosecution’s case all witnesses:

29.7.1 whose testimony is admissible and necessary for the presentation of all of the relevant circumstances;

29.7.2 whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;

UNLESS:

(i) the opponent consents to the prosecutor not calling a particular witness;

(ii) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused;

(iii) the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point already adequately established by another witness or other witnesses; 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; and
    29.12.4 may submit that a custodial or non-custodial sentence is appropriate.
    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.

Matters raised

1. The Australian Solicitors' Conduct Rules should not contain rule 29 as the duties of the Director of Public Prosecutions and his/her staff are adequately dealt with in legislation/guidelines.

2. A number of elements of rule 29 as they relate to the conduct of counsel assisting an investigative body with the powers of a Royal Commission should be removed, consistent with similar comments made in relation to the barristers’ rules. It is suggested that the attempt to adapt rules, which were drafted for the specific purpose of regulating the conduct of a prosecutor in the criminal trial of an accused, is misplaced and that the desired outcome would be better achieved by specific rules tailored to an inquisitorial process. Particular rules variously refer to “a prosecutor”, “the court”, “the accused” and “a finding of guilt”. None of these terms can be meaningfully applied to an investigative body with coercive powers. A separate section of the rules, with the title “Investigative Tribunals” or “Inquisitorial Tribunals” would be appropriate.

3. Is rule 29.12.5 consistent with the view of the High Court majority in Barbaro v R?\textsuperscript{171}

4. As rule 29.8 currently stands, there is no requirement for the prosecutor to tell the opponent of his or her belief that the material was illegally obtained. A third limb should be added to the rule (possible rule 29.8.3) to read: “inform the opponent of the grounds for believing that such material was unlawfully or improperly obtained”.

**Discussion points**

**In relation to the first matter**, the Ethics Committee maintains the view, consistent with the inclusion of similar rules in the barristers’ rules, that it is appropriate to include statements of ethical principles as they apply to solicitors carrying out prosecutorial duties, notwithstanding the existence of legislation or guidelines.

**In relation to the second matter**, the Ethics Committee notes the Australian Bar Association has inserted new rules 96-100 into the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW). The Committee proposes the inclusion of similar rules into the *Australian Solicitors’ Conduct Rules* where a solicitor is appearing as counsel assisting an investigative tribunal (see page 132).

**In relation to the third matter**, the Ethics Committee notes that the Law Council has previously agreed that rule 29.12.5 be omitted as a consequence of the judgment in *Barbaro v R* and notes that some jurisdictions have indicated an intention to amend legislation in response. Where this occurs, solicitors will need to be mindful of the provisions of that jurisdictional legislation.

**In relation to the fourth matter**, the Ethics Committee notes that rule 29.8 refers to material which may have been “unlawfully or improperly obtained”, whereas the equivalent barristers’ rule (rule 91) refers to material that may have been “unlawfully obtained”. The Committee also notes that a requirement to inform an opponent of the grounds upon which a prosecutor believes that material available to the prosecution was unlawfully or improperly obtained is a feature of conduct rules in some, but not all, Australian jurisdictions.

The Ethics Committee considers that the solicitors’ rule should be harmonised with the barristers’ rule.

The Ethics Committee also notes that the roles and duties of prosecuting counsel are in some ways distinct from those of other lawyers. For example, the duty of disclosure that a prosecutor bears derives from “the elementary right of every defendant to a fair trial”, an especially important aspect of which is that a prosecutor must disclose “all material...available to them, or of which they become aware, that could constitute evidence relevant to the guilt or innocence of the accused”.

The Committee also notes the view that the belief that evidence may have been unlawfully or improperly obtained should be disclosed, as it may affect the probity of that evidence and is consistent with the administration of justice to allow the defence the opportunity to challenge the reliability of that evidence or to have it excluded.

On the other hand, it is recognised that a prosecutor may decline to make a disclosure where this would: seriously threaten the integrity of the administration of justice; be contrary to the public interest; threaten the safety of any person; or involve material subject to legal professional privilege. The Ethics Committee further notes that rule 90 of the barrister’s rules makes specific reference to the interests of justice as a key consideration in not informing an opponent of the identity of a witness.

The Ethics Committee acknowledges these competing considerations that must be taken into account in deciding whether or not to disclose to an opponent the grounds for a belief that material

---

173 Ibid, [18.55].
174 Ibid, [18.60].
may have been unlawfully or improperly obtained. The Committee does not consider that a rule based upon a principle of disclosure in all circumstances would be appropriate.

Harmonisation of Solicitors’ Rule 29.6 with the Barristers’ Rules

Rule 29.6 of the solicitors’ rules is as follows:

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.

Rule 88 of the barristers’ rules is as follows:

A prosecutor who has decided not to disclose material to the opponent under rule 87 must consider whether:

(a) the charge against the accused to which the material is relevant should be withdrawn,

and

(b) the accused should be faced only with a lesser charge to which such material would not be so relevant.

Considerations

The Ethics Committee proposes to harmonise the solicitors’ rule with the barristers’ rule by replacing the word “or” at the end of paragraph (a) of rule 29.6.1 with “and”.

Harmonisation of Solicitors’ Rule 29.7 with the Barristers’ Rules

Rule 29.7 of the solicitors’ rules is as follows:

A prosecutor must call as part of the prosecution’s case all witnesses:

29.7.1 whose testimony is admissible and necessary for the presentation of all of the relevant circumstances;

29.7.2 whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;

UNLESS:

(i) the opponent consents to the prosecutor not calling a particular witness;

(ii) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused;

(iii) the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point already adequately established by another witness or other witnesses; 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.

Rules 89 and 90 of the barristers’ rules are as follows:

89 A prosecutor must call as part of the prosecution’s case all witnesses:

(a) whose testimony is admissible and necessary for the presentation of all of the relevant circumstances, or

(b) whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue,

unless:

(i) the opponent consents to the prosecutor not calling a particular witness,

(ii) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused,

(iii) the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point already adequately established by another witness or other witnesses,

(iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable, or

(v) the prosecutor, having the responsibility of ensuring that the prosecution case is presented properly and presented with fairness to the accused, believes on reasonable grounds that the interests of justice would be harmed if the witness was called as part of the prosecution case.

90 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 rule 89 (ii), (iii), (iv) or (v), together with the grounds on which the prosecutor has reached that decision, unless the interests of justice would be harmed if those grounds were revealed to the opponent.

Considerations

The Ethics Committee notes that rule 29.7 of the solicitors’ rules should incorporate both rules 89 and 90 of the barristers’ rules, including rule 89(v) of the barristers’ rules, which is not presently included in solicitors’ rule 29.7.

Harmonisation of Solicitors’ Rule 29.8 with the Barristers’ Rules

Rule 29.8 of the solicitors’ rules is as follows:

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.

Rule 91 of the barristers’ rules is as follows:
A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully obtained must promptly:
(a) inform the opponent if the prosecutor intends to use the material, and
(b) make available to the opponent a copy of the material if it is in documentary form.

Considerations
The Ethics Committee proposes that rule 29.8 of the solicitors’ rules be harmonised with rule 91 of the barristers’ rules by omitting the words “or improperly”.

Harmonisation of Solicitors’ Rule 29.10 with the Barristers’ Rules
Rule 29.10 of the solicitors’ rules is as follows:
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.

Rule 93 of the barristers’ rules is as follows:
A prosecutor must not inform the court or opponent that the prosecution has evidence supporting an aspect of its case unless the prosecutor believes on reasonable grounds that the evidence will be available from material already available to the prosecutor.

Considerations
The Ethics Committee proposes that rule 29.10 of the solicitors’ rules be harmonised with rule 93 of the barristers’ rules by omitting the word “an”.

<table>
<thead>
<tr>
<th>Rule 29</th>
<th>Consultation questions and recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>73.</td>
<td>That the rule should not contain a specific exemption for Directors of Public Prosecutions or their staff.</td>
</tr>
<tr>
<td>74.</td>
<td>That a new rule be adopted in the same terms as rules 96-100 of the <em>Legal Profession Uniform Conduct (Barristers) Rules 2015</em> (NSW) concerning solicitors who appear as counsel assisting an investigative tribunal.</td>
</tr>
<tr>
<td>75.</td>
<td>That Commentary draw attention to the decision in <em>Barbaro v R</em> and that solicitors need to be aware of any jurisdictional legislation enacted in response.</td>
</tr>
<tr>
<td>76.</td>
<td>That it would not be appropriate to amend rule 29.3 to require a prosecutor to, in every case, inform the opponent of the existence of a belief, and the grounds for believing, material available to the prosecution may have been unlawfully or improperly obtained.</td>
</tr>
</tbody>
</table>
Rule 29 Consultation questions and recommendations (cont.)

77. That rule 29 be reformulated as follows:

Rule 29 Prosecutor’s duties

29.1 A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

29.2 A prosecutor must not press the prosecution’s case for a conviction beyond a full and firm presentation of that case.

29.3 A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

29.4 A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.

29.5 A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused other than material subject to statutory immunity, unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person.

29.6 A prosecutor who has decided not to disclose material to the opponent under Rule 29.5 must consider whether:

29.6.1 the charge against the accused to which such material is relevant should be withdrawn; or

29.6.2 the accused should be faced only with a lesser charge to which such material would not be so relevant.

29.7 A prosecutor must call as part of the prosecution’s case all witnesses:

29.7.1 whose testimony is admissible and necessary for the presentation of all of the relevant circumstances; or

29.7.2 whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;

UNLESS:

(i) the opponent consents to the prosecutor not calling a particular witness;

(ii) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused;

(iii) the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point already adequately established by another witness or other witnesses; or

(iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable; or
Rule 29  Consultation questions and recommendations (cont.)

(v) the prosecutor, having the responsibility of ensuring that the prosecution case is presented properly and presented with fairness to the accused, believes on reasonable grounds that the interests of justice would be harmed if the witness was called as part of the prosecution case

provided that the prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within (ii), (iii), or (v) together with the grounds on which the prosecutor has reached that decision, unless the interests of justice would be harmed if those grounds were revealed to the opponent.

29.8 A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully 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; and
29.12.4 may submit that a custodial or non-custodial sentence is appropriate.
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.
Rule 29  Consultation questions and recommendations (cont.)

Investigative tribunals

29.13 Rules 28 and 29.1-29.12 do not apply to a solicitor who appears as counsel assisting an investigative tribunal.

29.14 A solicitor who appears as counsel assisting an investigative/inquisitorial tribunal must fairly assist the tribunal to arrive at the truth and must seek to assist the tribunal with adequate submissions of law and fact.

29.15 A solicitor who appears as counsel assisting an investigative/inquisitorial tribunal must not, by language or other conduct, seek to inflame or bias the tribunal against any person appearing before the tribunal.

29.16 A solicitor who appears as counsel assisting an investigative/inquisitorial tribunal must not argue any proposition of fact or law which the solicitor does not believe on reasonable grounds to be capable of contributing to a finding on the balance of probabilities.

29.17 A solicitor who appears as counsel assisting an investigative tribunal must not publish or take any step towards the publication of any material concerning any current proceeding in which the solicitor is appearing or any potential proceeding in which a solicitor is likely to appear, other than:

(a) a solicitor may supply answers to unsolicited questions concerning a current proceeding provided that the answers are limited to information as to the identity of any witness already called, the nature of the issues in the proceeding, the nature of any orders, findings, recommendations or decisions made including any reasons given by the investigative tribunal, or

(b) a solicitor may, where it is not contrary to legislation, in response to unsolicited questions supply for publication:

   (i) copies of affidavits or witness statements, which have been read, tendered or verified in proceedings open to the public, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection,

   (ii) copies of transcript of evidence given in proceedings open to the public, if permitted by copyright and clearly marked so as to show any corrections agreed by the witness or directed by the investigative tribunal, or

   (iii) copies of exhibits admitted in proceedings open to the public and without restriction on access.
RELATIONS WITH OTHER PERSONS

Rule 30  (Another solicitor’s or other person’s error)

30.1 A solicitor must not take unfair advantage of the obvious error of another solicitor or other person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact.

Matters raised

The rule refers to a solicitor not taking “unfair advantage”. Should the word “unfair” be removed so that the rule stipulates a solicitor should not take any form of advantage of another solicitor’s error?

Discussion points

The Ethics Committee notes that this rule needs to be considered in light of rules 19.11, 19.12 and 22.3, which also deal with obligations on a solicitor in circumstances of error by another:

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

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

22.3 A solicitor will not have made a false statement to the opponent simply by failing to correct an error on any matter stated to the solicitor by the opponent.

The Ethics Committee notes that, as a general principle, a solicitor’s duties are to the client and to the court. “The duty of a legal practitioner is not to his client’s opponent and he is not answerable to his client’s opponent”. Thus, a solicitor does not have a general duty to remedy deficiencies in an opponent’s case.

The UK Solicitors Regulation Authority Code of Conduct 2011 has a rule similar to rule 30 in relation to dealing with third parties, which states that practitioners must not “take unfair advantage of third parties in either [their] professional or personal capacity”.

In consideration of this matter, the Ethics Committee has referred to the case of Chamberlain v Law Society of the Australian Capital Territory, where the appellant, a legal practitioner, was found to have committed professional misconduct by deliberately taking advantage of a mistake made by the Deputy Commissioner of Taxation. The practitioner intentionally took advantage of an obvious error (a misplaced decimal point) in a writ issued against him by the Deputy Commissioner and “deliberately set in train the events and documents which...led to the entry of the consent judgment. He knew the Deputy Commissioner had made a mistake and took unfair advantage of it for his own benefit”.

175 Holborow v Macdonald Rudder [2002] WASC 265 at [30].
176 Solicitors Regulation Authority Code of Conduct, Chapter 11, Relations with Third Parties, O(11.1).
Black CJ considered the notions of fairness and common decency, and explained the drawing of the line between admissible and impermissible taking of advantage of an opponent’s mistake. His Honour said:

Whilst in some circumstances it may be in order to take advantage of a mistake, in other circumstances the attention of the practitioner should be drawn to a mistake or oversight. But, in any event, where there is a mistake that may involve the other practitioner’s client in unnecessary expense or delay the practitioner should not do or say anything to induce or foster that mistake. To induce or foster such a mistake would be detrimental to a relationship characterised by courtesy and fairness that ought to exist between members of the legal profession. A relationship of that nature ... has as its justification not merely in social or ethical mores; it has an additional justification referable to the public interest, in that courtesy and fairness contribute materially to the effective and expeditious performance of legal work ...

Other relevant considerations

The rule reflects a limitation on the duty of an advocate to robustly present a client’s case, rather than an absolute prohibition. Here, as elsewhere in the rules, a balance is struck between the duty of robust advocacy and the limits of acceptable conduct. For instance, rule 34.1.1 allows exaggeration as long as statements do not “grossly” exceed the legitimate assertion of the rights or entitlements of the solicitor’s client, and the Law Council’s Guidelines for Lawyers in Mediations, while warning practitioners to “be careful of puffing”, do not prohibit it.

There is no obligation to correct an opponent’s error (see rule 22.3) provided that a practitioner is not “the moving force in the other side’s misconception“ and that he or she is scrupulous about not endorsing any misunderstanding.

The duties of English solicitors regarding obligations to opponents were articulated in Thames Trains Ltd v Adams, where the issue was whether or not to set aside a consent order recording the terms of settlement between the parties, reached in a telephone call at 11:40am on 25 February 2005. The plaintiff asserted that the defendant’s solicitor was obliged to inform the plaintiff’s solicitor of an earlier offer to settle the matter she had sent by fax at 10:41am the same day, but which the plaintiff’s solicitor had not received and knew nothing of during the settlement discussions at 11:40am. The plaintiff’s solicitor accepted the increased offer and did not inform the defendant’s solicitor about the fax. Upon learning of the fax, the defendant sought to set aside the consent order which had been signed in ignorance of the earlier offer. Nelson J held that the conduct of the plaintiff’s solicitor was not unconscionable, deceitful, or sharp practice, nor was she taking unfair advantage of the other side’s ignorance. His Lordship noted that the defendant’s solicitor “was entitled to stay silent, act in her client’s best interests and accept the increased offer” but that a different outcome may have resulted had the plaintiff asked the defendant’s solicitor a specific question about the earlier transaction.

---

180 Law Council of Australia, Guidelines for Lawyers in Mediations, cl 6.2.
182 Black CJ noted in Chamberlain v Law Society of the Australian Capital Territory (1993) 43 FCR 148 at 155 that “another vice of conduct that induces or fosters a mistake is that it may easily involve, or in practical terms be close to, misrepresentation. In this way such conduct is, of its nature, liable to be in tension with the overriding duty of honesty that practitioners owe to the courts, their clients and to their fellow practitioners.”
184 Thames Trains Ltd v Adams [2006] EWHC 3291 (QB) at [56].
185 Ibid.
The Ethics Committee does not consider that the change recommended to rule 30.1 should be adopted.

**Rule 30  Consultation questions and recommendations**

78. That the word “unfair” not be deleted from rule 30.1.
Rule 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.

Matters raised

1. Should the Commentary be updated to refer to the decision in Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd186 which illustrates the application of the principle?

2. Should rule 31 contain a statement similar to rule 30 that a solicitor must not rely on an inadvertent disclosure to a solicitor by another solicitor to obtain an unfair advantage?

3. Rule 31.3 provides that if a solicitor is instructed by a client to read confidential material received in error, the solicitor must refuse to do so. Should rule 31 go further to expressly state that a solicitor must not disclose such material to the client? Should rule 9 therefore provide a cross-reference to an amended rule 31.3 and provide that a solicitor must keep confidential from the client any material that has inadvertently been disclosed to the solicitor?

Discussion points

Rule 31 provides that confidential information received in error cannot be used by a solicitor to gain an advantage for a client, must not be further read once it is discovered the information was inadvertently disclosed, and must be either returned or destroyed. It encapsulates the equitable principle that it is unconscionable for a solicitor to decline to respect the confidentiality of information received or obtained unsolicited. The purpose of rule 31 is not only to respect the equitable principle, but to also maintain integrity in the legal process without the need to resort to separate litigation to preserve confidentiality that would have existed but for the inadvertent disclosure.187

In relation to the first matter, the Ethics Committee agrees that additional commentary should be developed.

186 (2013) 250 CLR 303; [2013] HCA 46.
In relation to the second matter, the Ethics Committee notes that where material known or reasonably suspected to be confidential is disclosed to a solicitor, rule 31.1 prohibits making any use of the confidential information inadvertently disclosed unless that use is otherwise permitted or compelled by law. Further, such material must be returned, destroyed or deleted, and the other solicitor or person who disclosed the material must be notified. The Committee does not consider that an additional rule about using the material to obtain an unfair advantage is necessary.

In relation to the third matter, the Ethics Committee notes that a solicitor has a duty to treat clients fairly and in good faith, and must act in recognition of the importance of the maintaining trust and openness in the lawyer-client relationship. An important aspect of this trust and openness is that a solicitor should disclose to the client all material facts that come into the solicitor’s possession. While this disclosure would include the fact that confidential information has inadvertently come into the solicitor’s possession, there is an ethical duty not to read or continue to read the confidential material received in error (rule 31.2) even if the solicitor is instructed to do so by the client (rule 31.3). The ethical obligation is to eschew use of the material, and to return, destroy or delete the material and notify the other solicitor or person who disclosed that material (rule 31.1). In these circumstances, the solicitor should explain to the client the legal and ethical principles that prevent further disclosure or use being made of the material. Such a requirement is consistent with rule 7.1 – that a solicitor must provide clear and timely advice to assist a client understand the relevant legal issues and make informed choices about action to be taken during the course of the matter.

The Ethics Committee does not consider that rule 31 needs to be modified in the way suggested, but that rule 31.2 could be clarified to make clear the solicitor may not use such of the material as may have already been read by the solicitor, unless permitted or compelled by law.

---

**Rule 31 Consultation questions and recommendations**

79. That commentary highlight the reference to rule 31.1.3 by the High Court in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*.

80. That the rule does not need to be modified to state that a solicitor must not rely on an inadvertent disclosure to obtain an unfair advantage.

81. That rule 31.2 be modified as follows:

**Rule 31 (Inadvertent disclosure)**

31.2 A solicitor who reads part or all of the confidential material before becoming aware of its confidential status must:

31.2.1 *not disclose or use the material, unless otherwise permitted or compelled by law;*

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

31.2.3 *not read any more of the material.*

---


Rule 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.

Matters raised

There were no substantial matters raised regarding rule 32.
Rule 33  (Communication with another solicitor’s client)

33.1 A solicitor must not deal directly with the client or clients of another practitioner unless:

33.1.1 the other practitioner has previously consented;

33.1.2 the solicitor believes on reasonable grounds that:

(i) the circumstances are so urgent as to require the solicitor to do so; and

(ii) the dealing would not be unfair to the opponent's client;

33.1.3 the substance of the dealing is solely to enquire whether the other party or parties to a matter are represented and, if so, by whom; or

33.1.4 there is notice of the solicitor’s intention to communicate with the other party or parties, but the other practitioner has failed, after a reasonable time, to reply and there is a reasonable basis for proceeding with contact.

Matters raised

1. Should rule 33 be amended to include an exemption in particular circumstances along the following lines?

Solicitors acting on behalf of individuals or small businesses, in disputes with businesses that are legally obliged to give customers access to an internal dispute resolution process or an external dispute resolution service, are able to communicate directly with the business even where a solicitor acts for the business.

2. Should the rule be amended to allow a solicitor to contact a former client to arrange an orderly transfer of the client file?

3. Should rule 33 be expanded to include a rule which would require any solicitor who had communicated directly with the client(s) of another practitioner to notify that practitioner of that communication?

4. Should an additional exception to the prohibition on dealing directly with the client of another solicitor be included – the exception being where a solicitor is required to serve a document or notice (by law or contract) directly on the client of another solicitor?

Discussion points

Rule 33 states the longstanding principle that it is extremely unprofessional for a legal practitioner to contact an opposing party – i.e. the client of another legal practitioner - directly when he or she knows that the opposing party is represented by another lawyer. To do so is not just a matter that goes against expectations of professional behaviour, it can pose particular risks for the lawyer concerned.\(^{190}\) The rule is an essential requirement for the proper administration of justice. Its rationale is the protection of the other party to a dispute. A legal practitioner who directly contacts an opposing party might “secure damaging admissions, or access to privileged material, or undermine the opponent's trust in that person's lawyer”.\(^{191}\)

In relation to the first matter, the comments that have been received state that the prohibition on communication with the other solicitor’s client is a problem in consumer matters where a solicitor (often a solicitor in a Community Legal Centre (CLC)) is acting for an individual consumer (or small business person) against a large institution such as an insurer or a bank. It has been commented that many large businesses have industry codes that are legally enforceable by consumers and


\(^{191}\) Legal Services Commissioner v Bradshaw [2008] LPT 9, [26].
small businesses, and provide access to industry ombudsman schemes at no cost to the “consumer”. Industry ombudsman/dispute resolution schemes have the power to make decisions that are binding on the industry member if necessary and, in the case of the Financial Services Ombudsman, the Ombudsman can hear a dispute even after legal proceedings have been issued and judgment entered. Access to these schemes often requires the “consumer” to raise the issue with the business in the first instance. Many consumers can follow these processes on their own, possibly after receiving advice. However, some disadvantaged consumers need assistance, which is often provided by CLC lawyers. It is said that a problem arises where a lawyer is representing the business, for example writing a letter of demand or issuing legal proceedings; in most cases the lawyers have instructions in relation to debt recovery and are said to be unaware of obligations of their client under industry codes, and may also be unaware of the consumer’s right to access an ombudsman scheme. Therefore, raising the dispute with the business’ solicitor can increase costs considerably (costs the consumer often cannot afford), and is unlikely to be an effective way to reach a resolution. While referral of the consumer to a non-lawyer for assistance is an option, this is not always possible and can cause delay, which for over-stretched community services means that others may miss out on help. Therefore, the suggestion is that the Rule should be amended to allow solicitors acting on behalf of individuals or small businesses in dispute with traders, who are legally entitled to have access to the trader’s internal dispute resolution process or external dispute resolution service, to communicate with the trader even where a solicitor acts for the trader.

The Ethics Committee is concerned that the call to modify the longstanding “no-contact” principle does not raise a new issue of ethical conduct to be addressed. The Committee is also concerned that the rationale proffered is based, in part, on a claim that solicitors acting for financial institutions might not possess sufficient legal knowledge to advise their clients of industry codes and avenues of legal redress available to their customers. Further, the Committee notes that as a general principle, where a plaintiff engages the services of a law practice, it cannot be presumed that the plaintiff would nevertheless wish for direct contact with the defendant. The Committee does not consider there are grounds to warrant modification of an important ethical principle intended to, among other things, ensure that a client, no matter how sophisticated, is entitled to the protection afforded by legal representation. The Committee acknowledges the difficulties raised in the comments, but considers the calls for modification to the rule are to address matters unrelated to an important ethical principle governing the conduct between practitioners. The Committee suggests this issue might be more appropriately addressed in either consumer legislation or in the terms of engagement between the financial institution and their solicitors.

In relation to the second matter, the Ethics Committee is of the view that the issue raised is primarily one as between the former client and his or her new solicitor. Further, if the former solicitor approaches the former client at the request of the new solicitor, it would be the case that the former solicitor is acting within the scope of rule 33.1.1.

In relation to the third matter, the Ethics Committee is of the view that it would normally be expected as a matter of professional courtesy that a solicitor, having communicated directly with a client of another solicitor, as permitted under the rule, would notify the other solicitor of that communication. The Committee does not consider that this needs to be explicitly stated in the rule, but could be addressed in the Commentary.

In relation to the fourth matter, the Ethics Committee is of the view that a requirement to serve a document pursuant to a law or contractual obligation does not amount to a “dealing” under rule 33. The Committee does not consider that a change to the rule as suggested is necessary.
Rule 33  Consultation questions and recommendations

82. That rule 33 should not provide an exemption to the ethical prohibition on a solicitor directly contacting the client of another solicitor, where the client of that other solicitor is a financial institution.

83. That rule 33 should not need to state an exemption to allow a solicitor to contact a former client to arrange an orderly transfer of the client file.

84. That commentary explain the expectation that a solicitor, having communicated directly with a client of another solicitor, as permitted under the rule, would notify the other solicitor of that communication.

85. That rule 33 does not need to be amended to include a new exception where a solicitor serves a document on a client of another solicitor pursuant to a law or contractual obligation.
RELATIONS WITH OTHER PERSONS

Rule 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.

Matters raised

1. Should rule 34.1.1 be amended to require an equivalent standard as in the Australian Consumer Law relating to misleading and deceptive conduct? That is, should the phrase “which misleads or intimidates the other person” be replaced “which is reasonably likely to mislead or intimidate the other person”?

2. For rule 34.1.2 (and rule 31.1.1):
   a) Does the phrase “the other person” need clarification?
   b) Does the phrase “threaten the institution of criminal or disciplinary proceedings” need clarification or expansion?
   c) Why is rule 34.1.2 limited to “civil liability”?
   d) Should rule 34.1.2 be expanded to also prohibit securing, as a term of settlement, an agreement not to institute criminal or disciplinary proceedings in respect of civil liability?

3. Should rule 34 be expanded to provide that “a solicitor representing a defendant must not deal directly with a victim or complainant”?

4. Should the word “proceedings” in rule 34.1.2 be replaced with “complaint”?

Discussion points

In relation to the first matter, comments have been made to the effect that rule 34.1.1 sets a lower standard of behaviour and provides weaker protection of consumers than the Australian Consumer Law, which prohibits a person in trade or commerce from engaging in conduct “that is misleading or deceptive or is likely to mislead or deceive”. It is said this risks giving the wrong impression to the public that lawyers have a lower obligation than others in relation to misleading or deceptive conduct because rule 34.1.1 refers to a 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”. In other words, it is suggested that a solicitor might make an assertion

192 Competition and Consumer Act 2010 (Cth), Sch 2, s 18.
in a communication that is misleading or intimidating, but that conduct would not amount to a breach of the rule unless, in doing so, the communication grossly exceeded the legitimate assertion of the rights or entitlements of the solicitor’s client. On this basis, it is said that rule 34.1.1 appears to permit a greater range of (mis)behaviour than under the Australian Consumer Law and, for example, permits a solicitor to engage in conduct that is likely to mislead but falls short of being grossly excessive.

The Ethics Committee notes the Australian Consumer Law can apply to a solicitor in relation to communications with a third party, per Australian Competition and Consumer Commission v Sampson where it was accepted, by consent, that the respondent solicitor had (in sending out letters of demand on behalf of clients) “engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of section 52 of the Trade Practices Act 1974 (Cth).”

The Ethics Committee also notes that the Australian Consumer Law will apply to a solicitor in relation to the legal services provided to a client, alongside other legal and ethical duties. For example, in Burrell Solicitors Pty Ltd v Reavill Farm Pty Ltd the failure of a solicitor/law practice to provide a client costs estimates on a reasonable basis, and to fail to provide updated estimates was held to breach the relevant Legal Profession Act, as well as the Australian Consumer Law (and the predecessor Fair Trading Act and Trade Practices Act), the contract of retainer between the law practice and client and the fiduciary duties owed to the client.

The Ethics Committee considers that rule 34 sits alongside fundamental duties in rule 4 (duties to be “honest in all dealings in the course of legal practice” and to “avoid any compromise to their integrity and professional independence”), rule 5 (not to engage in dishonest or disreputable conduct such as conduct likely to a material degree to bring the profession into disrepute) and rule 12 (to avoid conflicts between a client’s interests and the solicitor’s own interests). Thus rule 34, in its entirety and in conjunction with other rules, addresses a broader range of legal duties and ethical behaviours than the relevant provision in the Australian Consumer Law.

The Ethics Committee draws attention to the Commentary to rule 2, which states:

"If the common law and/or legislation in any jurisdiction prescribe a higher standard than these Rules then a solicitor is required by these Rules to comply with the higher standard. Alternatively, if a Rule sets a higher standard than the common law and/or legislation then it is the Rule that needs to be observed. Thus, a solicitor is required to observe the higher of the standards required by these Rules and the common law and/or legislation, in any instance where there is a difference between them in any jurisdiction."

The Ethics Committee believes that the rules referred to above (dealing with a broad range of ethical professional duties) should not be replaced with a rule that paraphrases the Australian Consumer Law. As indicated in paragraphs 42-49 in the Background section of this Consultation Discussion Paper, the relationship between a solicitor and client is not simply like the relationship between supplier and vendor, but goes further to include a fiduciary and contractual relationship. The Committee suggests it would be more appropriate to draw attention in Commentary to the point that the behaviour to which rule 34.1.1 is addressed also includes behaviour “which is likely to mislead or deceive” as provided for by, and in the circumstances where, the Australian Consumer Law applies.

---

194 [2016] NSWSC 303 [6], [180].
The Committee also believes the rule might be more clearly expressed as follows:

34.1 A solicitor must not in any action or communication associated with representing a client:

34.1.1 make any statement to another person:
   (i) which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor’s client; and
   (ii) which is likely to mislead or deceive or intimidate 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.

In relation to matter 2(a), comment has been received that it is not clear in Rules 34.1.1 and 34.1.2 to whom the reference to “the other person” relates. The Ethics Committee view is that the reference is clearly to the person to whom the impugned communication is directed and that the rule requires no clarification.

In relation to matter 2(b), it has been commented that it is not clear what conduct would “threaten the institution of criminal or disciplinary proceedings”, what that would actually involve, and that if there is something specific that the rule maker has in mind, perhaps that could be expanded upon or clarified. The Ethics Committee considers that it may be useful to develop some commentary on this issue, noting the detailed examination of the ethical issues in Legal Services Commissioner v Sing discussed earlier in relation to rule 22.

In relation to matter 2(c), the Ethics Committee notes that the expression “civil liability” is used because that is the basis upon which the ethical principle is founded – i.e. conduct by a legal practitioner that involves an attempt to pressure an opponent to settle a civil dispute by threatening to institute criminal or disciplinary proceedings. The Committee notes that this issue does not arise in the context of a criminal prosecution.

In relation to matter 2(d), the Ethics Committee considers that it may be useful to develop commentary on this issue.

In relation to the third matter, it has been commented that such a principle might assist to protect victims, relatives of deceased victims or complainants from inappropriate approaches, and that such a principle applies under the advocacy and litigation rules. The Ethics Committee notes that rule 23, provides:

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 the witness need not agree to confer or to be interviewed or by advising about relevant obligations of confidentiality.

Rule 23 – which applies in an advocacy and litigation context, is based upon the long-standing principle of the common law that there is, and can be, no embargo on lawyers interviewing complainants – expressed as the principle that there is “no property in a witness”. The underlying rationale is that a restriction on interviewing witnesses or potential witness could deprive the court

of access to evidence. Therefore, a lawyer may confer with any witness willing to see him or her, so that the court has access to all relevant evidence.

However, it is well recognised that a lawyer for the defendant must take considerable care in interviewing complainants and should always, as a matter of professional courtesy and care, notify the prosecutor or counsel for the plaintiff in advance of any intention to seek to interview a witness. Where the complainant is not represented, it is recognised that the lawyer for the defendant should conduct any interview in the presence of an independent and reputable person. Further, professional obligations to exercise considerable care toward complainants in matters not involving litigation would be implicit in upholding the principles underlying rule 34.1.

The Ethics Committee suggests this issue might be appropriately dealt with in commentary to rules 23 and 34.1.

In relation to the fourth matter, the Ethics Committee is advised that it has been argued that the scope of rule 34.1.2 is perhaps limited only to the actual institution of a criminal proceedings or a disciplinary investigation. The Committee notes that the scope of the rule is not intended to be limited in this way and invites comments on whether rule 34.1.2 should be amended as follows:

34.1.2 threaten the institution of a criminal or disciplinary proceedings complaint against the other person if a civil liability to the solicitor’s client is not satisfied; or

Rule 34  Consultation questions and recommendations

86. That rule 34.1 be substituted as follows:

34.1 A solicitor must not in any action or communication associated with representing a client:

34.1.1 make any statement to another person:

(i) which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor’s client; and

(ii) which is likely to mislead or deceive or intimidate the other person;

34.1.2 threaten the institution of a criminal or disciplinary complaint against the other person if a civil liability to the solicitor’s client is not satisfied; or

34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.

87. That commentary clarify:

(a) the reference in rules 34.1.1 and 34.1.2 to “the other person”;

(b) what is meant by the phrase “threaten the institution of criminal or disciplinary proceedings”; and

(c) that the rule would also prohibit securing, as a term of a settlement, an agreement not to institute criminal or disciplinary proceedings in respect of civil liability.

88. That commentary to rules 22 and 34.1 provide discussion on adhering to professional obligations when interviewing or communicating with opponents.

196 See for example G E Dal Pont, Lawyers’ Professional Responsibility, 6th ed, 2017, [17.175].
Rule 35  (Contracting with third parties)

35.1 If a solicitor instructs a third party on behalf of the client, and the solicitor is not intending to accept personal liability for payment of the third party's fees, the solicitor must advise the third party in advance.

Matters raised

1. Should the rule be amended so that a solicitor who accepts personal liability must inform the third party?

2. Should the rule be amended so that if the solicitor does not accept personal liability for payment of the third party’s fees, the solicitor must not only inform the third party but also inform the third party of the arrangement intended to be made for the payment of the fees?

Discussion points

In relation to the first matter, if the solicitor accepts personal liability for payment of the third party’s fees, the Ethics Committee considers that it is implicit that the solicitor should inform the third party, and it is not necessary to amend the rule to include such an obligation. The Commentary to the rule could be amended to further clarify the rule if necessary.

In relation to the second matter, the Ethics Committee considers that arrangements for the payment of fees of a third party where a solicitor does not accept personal liability are a matter between the third party and the instructing client. The Committee's view is that the solicitor’s ethical duty is to advise the third party that the solicitor is not accepting responsibility for the payment of the fees and to ensure that the client is aware of his or her liability to do so. However, the Committee does not agree that the solicitor’s ethical duty should extend to an obligation to negotiate the payment arrangement between the client and third party unless the solicitor has been instructed to do so.

Rule 35  Consultation questions and recommendations

89. That commentary to rule 35 should state that if a solicitor accepts personal liability for payment of a third party’s fees, the solicitor should inform the third party of that.

90. That commentary to rule 35 should state that where a solicitor does not intend to accept personal liability for payment of a third party’s fees, the solicitor should inform the client of the client’s liability to pay those fees.
LAW PRACTICE MANAGEMENT

Rule 36 (Advertising)

36.1 A solicitor or principal of a law practice must ensure that any advertising, marketing, or promotion in connection with the solicitor or law practice is not:
   36.1.1 false;
   36.1.2 misleading or deceptive or likely to mislead or deceive;
   36.1.3 offensive; or
   36.1.4 prohibited by law.

36.2 A solicitor must not convey a false, misleading or deceptive impression of specialist expertise and must not advertise or authorise advertising in a manner that uses the words “accredited specialist” or a derivative of those words (including post-nominals), unless the solicitor is a specialist accredited by the relevant professional association.

Matters raised

Given that all the matters mentioned in this rule are covered already by civil and criminal law, is there a need for the provisions on advertising to be included in the rules?

Discussion points

This rule is necessary because it addresses the ethical principles concerning the use of advertising, marketing and promotion by solicitors.

As noted above in rule 2.1, the purpose of the rules is to assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and the rules. Solicitors are reminded in the Commentary to rule 2 of the need to have regard to any applicable jurisdictional statutes, such as those that have been referred to in relation to rule 36 above.

Breach of a rule may also have different consequences than a contravention of legislation which addresses the same conduct. A breach of a rule is conduct capable of constituting unsatisfactory professional conduct or professional misconduct, and may result in one or more disciplinary sanctions.

The Ethics Committee considers that rule 36 should remain in the rules.

<table>
<thead>
<tr>
<th>Rule 36 Consultation questions and recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>91. That rule 36 be retained, in its present formulation.</td>
</tr>
</tbody>
</table>
Rule 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.

Matters raised

There were no substantial matters raised regarding rule 37.
Rule 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.

Matters raised

Comments received in relation to rule 38 suggest that the opportunity to harmonise the different timeframes between the solicitors’ and barristers’ rules should be explored. The comments noted that the overarching consideration is that legal practitioners not appear before a court where their relationship with the court may be perceived as inconsistent with the impartial administration of justice, and that the difference between the time periods that apply to barristers and solicitors unnecessarily implies differences in the integrity and status of the two branches of the profession.

Discussion points

Rule 101 of the Legal Profession Uniform Conduct (Barristers) Rules 2015 provides:

A barrister must refuse to accept or retain a brief or instructions to appear before a court if:

(a) …….
(n) the brief is to appear before a court of which the barrister was formerly a member or judicial registrar, or before a court from which appeals lay to a court of which the barrister was formerly a member (except the Federal Court of Australia in case of appeals from the Supreme Court of any State or Territory), and the appearance would occur within 5 years after the barrister ceased to be a member of the court in question where the barrister ceased to be a judge or judicial registrar after the commencement date of this rule.

The Ethics Committee notes that the present difference in time periods is a reflection of the development of the barristers’ rules, which had previously set a range of time periods depending upon which court the barrister, who was formerly a judicial officer, was intending to appear. The barristers’ rules settled upon a period of five years in all circumstances, whereas the time period in the solicitors’ rules of two years has remained unchanged.

The Ethics Committee also notes that solicitors (and barristers) generally are increasingly taking on appointments to administrative tribunals and roles as magistrates, where these appointments may be on a part-time or sessional basis to a particular panel or division of a tribunal. In these situations, a solicitor can be in the position of occupying a role as a judicial officer as well as engaging in legal practice.

The Ethics Committee notes that the ethical principle underlying rule 38 is that a legal practitioner (however described) should not appear as an advocate before a court where his or her former relationship with the court may be perceived as inconsistent with the impartial administration of justice. A similar principle would apply in relation to appearing in a court (or tribunal) where the practitioner is a current member. The preclusion period of the rule serves the purpose of assisting to protect the integrity of the courts and tribunals; however, it has been suggested there is now a competing public interest in facilitating the availability of members of the legal profession for appointment to tribunals on a part-time or sessional basis.
The Ethics Committee supports the current 2 year limitation period in rule 38 (rather than the longer period set by the barristers’ rules), but notes that the decision to allow a practitioner to appear will always be a matter for the court or tribunal. The Committee also notes that tribunals may develop best practice guidelines for the appointment of members of tribunals and that these might also deal with appearances before the tribunal of previous members.

**Rule 38 Consultation questions and recommendations**

92. That rule 38 retain its present formulation, including that a period of two years must elapse before a former judicial officer who is practising as a solicitor, should appear before a court of which that solicitor was a member. This moratorium period is always subject to the views of the court.
Rule 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.

Matters raised

Rule 39.1 deals with a solicitor or law practice sharing premises with any other entity or business engaged in another calling. Comments received by the Law Council on this rule:

1. queried whether there is any regulatory difference between this situation and the situation of incorporated legal practices and multi-disciplinary practices that deliver both legal and non-legal services, and that a regulatory risk analysis might reveal greater risk and uncertainty to consumers seeking services from law practices that deliver multiple services;

2. queried whether the words “take all reasonable steps to” should be replaced with “must ensure that the client is informed”, so as to read “…the solicitor, or law practice (as the case requires) must ensure that the client is informed”. This would then be phrased as a positive obligation placed on the solicitor;

3. identified as important that in shared premises, arrangements are in place to keep confidential information secure and that appropriate “barriers” are in place between the multiple businesses; and

4. queried whether the rule would apply to a law practice that operates a virtual office/web-site.

Discussion points

The Ethics Committee notes that the principle underlying the rule is that a client must be fully informed of which services are, and are not, being provided as a legal service. Clients need to be aware that services provided as legal services attract particular rights, remedies, protections and expectations of professional conduct under legal profession law, and that services not provided as legal services may not attract those same rights, remedies and expectations.

In relation to the first matter, the Ethics Committee notes that legal profession legislation dealing with incorporated legal practices and multidisciplinary partnerships (in NSW and Victoria, a multidisciplinary partnership is within the scope of the definition of unincorporated legal practice under the Uniform Law) contain statutory disclosure obligations that include:

- a statement setting out the services to be provided by the entity;
- whether or not all of the services are to be provided by an Australian legal practitioner; and
- a statement that the legislation applies to the provision of legal services but not to the provision of the non-legal services.

The Ethics Committee suggests that rule 39 could benefit from some commentary to highlight the statutory disclosure obligations that apply to services provided by these entities.
In relation to the second matter raised, the Ethics Committee does not consider there is any significant distinction between the phrase “take all reasonable steps” and the word “must” to warrant a change to the rule. In *Law Society of the Australian Capital Territory v Lardner*\(^{197}\) the law firm involved used the services of a separate entity with which it had a close working connection (operating from the same premises) to undertake calculations and provide “economic loss reports” in personal injury matters, but the fact that these services were being provided by a separate entity was not disclosed to the clients. The Supreme Court said:\(^{198}\)

> It is not really disputed that the content of the fiduciary duty owed by the solicitors to the clients was such that the clients should have been told of the close connection between the firm and Macquarie Reporting Services and of the interest of the members of the firm in the continuing financial viability of Macquarie Reporting Services …

> It is clear that to the ordinary client, unaware of the relationship between the firm and its service providers, Mr Davis would have appeared to be employed by the firm much in the role of a managing clerk. If any member of the firm intended to make use of Mr Davis’ services through engaging Macquarie Reporting Services and paying for them by way of disbursement, charged to the client, the client should have been told so, and express instructions obtained to that end. It is hardly necessary to add that the solicitor should not have accepted such instructions unless the client was told of the firm’s interest in Macquarie Reporting Services and some explanation of how it was that engaging Macquarie Reporting Services was reasonably necessary for the conduct of the client’s case.

The Ethics Committee proposes that the rationale for the rule be set out in commentary.

**In relation to the third matter,** the Ethics Committee notes that the duty of confidentiality in rule 9 prohibits a solicitor from disclosing any information which is confidential to a client and acquired by the solicitor during the client’s engagement to any person who is not 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. The Committee does not consider there is a need to replicate rule 9 in rule 39.

**In relation to the fourth matter,** the Ethics Committee notes that legal services are increasingly capable of being provided outside of physical business premises – i.e. through a virtual office/web site. Nevertheless, the same underlying principle of rule 39 applies - that a client must be fully informed of which services are, and are not, being provided as a legal service. The Committee suggests that a definition of “office” or explanation via commentary may be required to clarify that rule 39 applies to a virtual office/web site and invites comments on an appropriate definition/explanation.

### Rule 39 Consultation questions and recommendations

93. That commentary should draw attention to the specific statutory disclosure obligations of incorporated legal practices and multidisciplinary partnerships (in NSW and Victoria, a multidisciplinary partnership is within the scope of the definition of *unincorporated legal practice* under the Uniform Law) when providing services that are legal services and services that are not legal services.

94. That the Commentary explain the underlying rationale of rule 39.

---

\(^{197}\) [1998] ACTSC 187  
\(^{198}\) *Law Society of the Australian Capital Territory v Lardner* [1998] ACTSC 187 at [22], [28].
Rule 39  Consultation questions and recommendations (cont.)

95. That the rule does not require amendment to incorporate the confidentiality principles in rule 9.

96. Should the Glossary contain a definition of “office” as follows?

    Office…is not limited to physical business premises and includes the media through which a law practice provides legal services to clients away from a central, physical location.
Rule 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 found guilty of an indictment offence that involved dishonest conduct, whether or not a conviction was recorded.

Matters raised

1. Rule 40.1 refers to receipts arising from the provision of legal services by solicitors. It has been suggested that this should be broadened to include receipts arising in connection with the provision of legal services.

2. Rule 40.1.2 when originally promulgated was as follows:

   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…

   40.1.2 any person convicted of an indictment offence that involved dishonest conduct, whether or not a conviction was recorded.

The rule was modified in March 2015 to substitute the words found guilty for convicted, so that rule 40.1.2 would read as follows:

   40.1.2 any person found guilty of an indictment offence that involved dishonest conduct, whether or not a conviction was recorded.

It has been commented that rule 40.1.2 under either of the above formulations would not ensure the rule covers the situation where a person enters a guilty plea of his or her own accord.

Discussion points

In relation to the first matter, the Ethics Committee notes that rule 40 recognises the move away from the traditional prohibition on legal practitioners sharing the receipts of their legal practice, subject to the exceptions in rules 40.1.1 and 40.1.2. The traditional prohibition had a statutory as well as professional conduct basis, and extended beyond receipts strictly attributable only to the legal service provided by the practitioner, to include receipts arising from any business usually carried on by a solicitor in conjunction with his or her practice. The Committee invites comments on whether the proposed change is desirable.

In relation to the second matter, the Ethics Committee considers the scope of the rule needs to encompass both a formal finding of guilt, or the acceptance of a guilty plea, whether or not a conviction was recorded. The rationale for this view is that the principle underlying the rule is that a solicitor should not have in his or her employ, or share profits with a person found – either by way

200 Legal Profession Practice Act 1958 (Vic) s 94 (repealed), considered in Beneficial Finance Corporation Ltd v Conway (No 2) [1971] VR 594. See also Legal Profession Act 1987 (NSW) s 48 (repealed) (“A barrister or solicitor may share with any other person the receipts of a business of the kind ordinarily conducted by a barrister or solicitor, except to the extent (if any) that the regulations, barristers rules, solicitors rules or joint rules otherwise provide”).
of conviction or by the person’s own admission – to have been involved in dishonest conduct. Honesty and trustworthiness are vital to community confidence in the legal profession.

Further, the Ethics Committee notes that in the legal profession legislation of all jurisdictions,\textsuperscript{201} except South Australia,\textsuperscript{202} a reference to a conviction includes a finding of guilt, or the acceptance of a guilty plea, whether or not a conviction is recorded. This approach of not using a conviction per se as the sole test is, in the Committee’s view, consistent with the reasoning of the majority of the High Court in \textit{Ziems v Prothonotary of the Supreme Court of New South Wales},\textsuperscript{203} that while the fact that there has been a conviction is a matter of considerable importance, the core issue is whether or not the underlying conduct that leads to the conviction would justify a finding of unfitness.

The Ethics Committee view is that rule 40.1.2 should be harmonised with the statutory definitions used in the majority of jurisdictions, as follows:

\begin{verbatim}
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…

40.1.2 any person:

(i) who has been found guilty of an indictable offence; or

(ii) who has had a guilty plea accepted in relation to an indictable offence

that involved dishonest conduct, whether or not a conviction was recorded.
\end{verbatim}

\begin{table}[h]
\centering
\begin{tabular}{|l|}
\hline
\textbf{Rule 40} \hspace{2cm} \textbf{Consultation questions and recommendations} \\
\hline
97. Should rule 40.1 be amended as follows? \\
\hline
\textbf{Rule 40} \hspace{2cm} \textbf{(Sharing receipts)} \\
\hline
40.1 A solicitor must not, in relation to the conduct of the solicitor’s practice, or the delivery of legal services, share, or enter into any arrangement for the sharing of, the receipts arising from, or in connection with, the provision of legal services by the solicitor, with:

40.1.1 any disqualified person; or

40.1.2 any person:

(i) who has been found guilty of an indictable offence; or

(ii) who has had a guilty plea accepted in relation to an indictable offence

that involved dishonest conduct, whether or not a conviction was recorded. \\
\hline
\end{tabular}
\end{table}

\textsuperscript{201} \textit{Legal Profession Uniform Law,} s 6, \textit{Legal Profession Act 2006 (ACT)} s 13(1); \textit{Legal Profession Act 2006 (NT)} s 15(1); \textit{Legal Profession Act 2007 (Qld)} s 11(1); \textit{Legal Profession Act 2007 (Tas)} s 11; \textit{Legal Profession Act 2008 (WA)} s 10(1).

\textsuperscript{202} \textit{Legal Practitioners Act 1981 (SA)} s 5 (“conviction” includes a formal finding of guilt).

\textsuperscript{203} (1957) 97 CLR 279.
Rule 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 association and where no claim may be made against a fidelity fund.

Matters raised

Rule 41 should be omitted because a professional association intends to lobby for the repeal of the existing prohibition in primary legislation on a law practice conducting a managed investment scheme or mortgage financing arrangement as part of a law practice.

Discussion points

Legislation (or rules) in each jurisdiction prohibit the conduct by a law practice of managed investment schemes or engaging in mortgage financing as part of their law practice, except where these activities are regulated under a scheme administered by the relevant professional association. The Ethics Committee notes that most jurisdictions have been gradually winding up these arrangements where they have been conducted as part of a law practice, and that specific transitional arrangements are in place in some jurisdictions.

The Ethics Committee notes that the principals and legal practitioner associates of a law practice might operate a managed investment scheme or engage in mortgage financing as a separate business activity outside of their legal practice, and financial services legislation will regulate those activities.

The Ethics Committee’s view is that rule 41 is only necessary so long as transitional arrangements are in place (or are extended by legislative change). Because transitional arrangements are still in place, the Committee’s view is that rule 41 should remain.

<table>
<thead>
<tr>
<th>Rule 41 Consultation questions and recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>98. That rule 41 be retained.</td>
</tr>
</tbody>
</table>
Rule 42   (Anti-discrimination and harassment)

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.

Matters raised

1. The word “sexual” in rule 42.1.2 should be replaced with “unlawful” in order to encompass the broad range of forms of unlawful discrimination and unlawful harassment, and not unnecessarily limit the impugned conduct only to sexual harassment.

2. The matters dealt with in rule 42.1.1 and 42.1.2 seem to be duplicative of existing laws. For example, rule 42.1.1 may be considered unnecessary because of the comprehensive anti-discrimination laws that exist at both the state and Commonwealth levels, with which all solicitors must be bound in any event.

Discussion points

The principle underlying rule 42 is that a solicitor has an ethical duty to not engage in conduct that is discriminatory, harassing or bullying in nature.

In relation to the first matter, the Ethics Committee notes that the expression “sexual harassment” is defined in the glossary as “harassment that is unlawful…” and that the word “unlawful” therefore does not need inclusion in rule 42.1.2. However, the Committee supports the recommendation to omit the word “sexual” in rule 42.1.2 so that the rule is not interpreted as limiting the nature of harassment that is ethically inappropriate solely to sexual harassment but to include other forms of unlawful harassment. It also proposes that, if the change is adopted, a consequential change would be made to the definition of sexual harassment in the glossary.

In relation to the second matter, the Ethics Committee again refers to rule 2.1 and the purpose of the rules, being to assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and the rules. Rule 42 sets out the ethical principles to be applied concerning discrimination and harassment, rather than the kinds of discrimination and harassment dealt with by jurisdictional legislation. Practitioners are reminded in the Commentary to rule 2 of the need to have regard to any applicable jurisdictional legislation.

Breach of a rule may also have different consequences than contravention of legislation which addresses the same conduct. A breach of a rule is conduct capable of constituting unsatisfactory professional conduct or professional misconduct, and may result in one or more disciplinary sanctions.
Proposed reformulation of rule 42

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.

Proposed reformulation of definition

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

Rule 42 Consultation questions and recommendations

99. That rule 42 be retained in the Rules.
100. That rule 42 be amended as follows:

   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.

101. That the definition in the Glossary be reformulated by omitting the word “sexual”.
Rule 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.

Matters raised

1. Rule 43.2 should include the requirement to provide documents to the regulator. This could be achieved by simply adding the words “or documents” to the current requirement in the draft rule for “comments or information”.

2. Is the rule (and in particular rule 43.2) necessary given that solicitors are subject to statutory information and document disclosure requirements under legal profession legislation?

Discussion points

In relation to the first matter, the Ethics Committee agrees that rule 43.2, if retained, should, refer to “or documents” to avoid doubt, provided that disclosure of documents or any other client confidential information is made pursuant to one or more of the exceptions to maintaining confidentiality provided for in rule 9.2.

In relation to the second matter, the Ethics Committee invites submissions of whether the whole of the rule, or rule 43.1 only, should remain.

Rule 43  Consultation questions and recommendations

102. That rule 43.2 be amended as follows:

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, documents 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.

103. Should rule 43 be omitted in its entirety or, alternatively, should rule 43.2 be omitted?
Glossary  (Terms used in these Rules)

For the purposes of these Rules, the following definitions also apply in addition to the definitions in section 6 of the Uniform Law.

"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.

Note:

For NSW and Victoria, the definition of associate in the Glossary of Terms to the Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015 is:

associate in reference to a solicitor means:

(a) a principal of the solicitor’s law practice,
(b) a partner, employee, or agent of the solicitor or of the solicitor's law practice,
(c) a corporation or partnership in which the solicitor has a material beneficial interest,
(d) in the case of the solicitor’s incorporated legal practice, a director, officer, employee or agent of the incorporated legal practice or of a subsidiary of the incorporated legal practice,
(e) a member of the solicitor’s immediate family, or
(f) 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.

Note:
For NSW and Victoria, the definition of Australian practising certificate in section 6 of the Legal Profession Uniform Law is:

*Australian practising certificate* means—
(a) a practising certificate granted to an Australian lawyer under Part 3.3 of this Law as applied in a participating jurisdiction; or
(b) a practising certificate granted to an Australian lawyer under a law of a non-participating jurisdiction entitling the lawyer to engage in legal practice;

“Authorised Deposit-taking Institution” has the same meaning as an Authorised Deposit-taking Institution within the meaning of the Banking Act 1959 (Cth).

Note:
For NSW and Victoria, the definition of authorised ADI in section 128(1) of the Legal Profession Uniform Law is:

*authorised ADI* means an ADI authorised to maintain trust accounts to hold trust money under section 149
"case" means:

(a) the court proceedings for which the solicitor is engaged; or

(b) the dispute in which the solicitor is advising.

"client" with respect to the solicitor or the solicitor’s law practice means a person (not an instructing solicitor) for whom the solicitor is engaged to provide legal services for a matter.

"client documents" means 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;  
(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:

---

Note:

For NSW and Victoria, the definition of law practice in the Glossary of Terms to the Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015 is:

law practice means:
(a) an Australian legal practitioner who is a sole solicitor,
(b) a partnership of which the solicitor is a partner,
(c) a multi-disciplinary partnership,
(d) an unincorporated legal practice, or
(e) an incorporated legal practice.

Note:

For NSW and Victoria, the definition of managed investment scheme in section 6 of the Legal Profession Uniform Law is:

managed investment scheme has the same meaning as it has in the Corporations Act;
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.

Note:

For NSW and Victoria, the definition of unincorporated legal practice in section 6 of the Legal Profession Uniform Law applies:

unincorporated legal practice means an unincorporated body or group that satisfies the following criteria—

(a) it is—

(i) a partnership; or

(ii) an unincorporated body or group, or an unincorporated body or group of a kind, approved by the Council under section 114 or specified in the Uniform Rules for the purposes of this definition;

(b) it has given notice under section 104 that it intends to engage in legal practice in Australia and that notice is still operative;

(c) the legal services it provides or proposes to provide are not limited to either or both of the following services—

(i) in-house legal services for the unincorporated body or group;

(ii) services that are not legally required to be provided by an Australian legal practitioner and that are provided by an officer or employee who is not an Australian legal practitioner;

(d) it is not excluded by the Uniform Rules from being an unincorporated legal practice—

but does not include—

(e) a law firm; or

(f) a community legal service; or

(g) an incorporated legal practice;

“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.

Note:
For NSW and Victoria, this definition is to be found in section 297 of the Legal Profession Uniform Law.

“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.

**Definition of court**

**Matters raised**

Should the definition of “court” be harmonised with the definition used in the barristers’ rule?

**Discussion points**

<table>
<thead>
<tr>
<th>Australian Solicitors’ Conduct Rule</th>
<th>Australian Bar Association Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;court&quot; means:</td>
<td>&quot;court&quot;:</td>
</tr>
<tr>
<td>(a) any body described as such;</td>
<td>means any body described as such</td>
</tr>
<tr>
<td>(b) any tribunal exercising judicial,</td>
<td>and all other judicial tribunals,</td>
</tr>
<tr>
<td>or quasi-judicial, functions;</td>
<td>and all statutory tribunals and</td>
</tr>
<tr>
<td>(c) a professional disciplinary</td>
<td>all investigations and inquiries</td>
</tr>
<tr>
<td>tribunal;</td>
<td>(established by statute or by a</td>
</tr>
<tr>
<td>(d) an industrial tribunal;</td>
<td>Parliament), Royal Commissions [the</td>
</tr>
<tr>
<td>(e) an administrative tribunal;</td>
<td>Criminal Justice Commission/ICAC</td>
</tr>
<tr>
<td>(f) an investigation or inquiry</td>
<td>or equivalent], arbitrations</td>
</tr>
<tr>
<td>established or conducted under</td>
<td>and mediations.</td>
</tr>
<tr>
<td>statute or by a Parliament;</td>
<td></td>
</tr>
<tr>
<td>(g) a Royal Commission;</td>
<td></td>
</tr>
<tr>
<td>(h) an arbitration or mediation or</td>
<td></td>
</tr>
<tr>
<td>any other form of dispute resolution.</td>
<td></td>
</tr>
</tbody>
</table>

The Ethics Committee notes that all of the elements of the definitions are common to both sets of rules, apart from the reference to “any other form of dispute resolution”. The Committee considers the expression to “any other form of dispute resolution” lacks specificity and should be omitted, but that the remainder of the solicitors’ rule definition should be retained.
Definition of court

Consultation questions and recommendations

104. That the definition of “court” be amended as follows:

“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.

Definition of solicitor

“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.

Matters raised

Should the definition of solicitor follow the same form as the definition of barrister to make clearer distinctions between rules which apply to solicitors and rules which apply to barristers?

Discussion points

The definition of solicitor in the Glossary is a descriptive definition and can be said to reflect the principle set out in Giannarelli v Wraith204 that “it is the function performed, not the label attached” which is the core issue. Thus, the definition refers to an Australian legal practitioner or Australian-registered foreign lawyer who practices in the manner of a solicitor.

The Ethics Committee notes:

• the ethical principles underlying some of the rules would have application to a legal practitioner regardless of the manner in which he or she practices, for example, the fundamental duty rules 3-6;
• some of the advocacy and litigation rules (rules 17-26) recognise that solicitors can and increasingly do undertake legal work traditionally associated with the work of barristers;
• on the other hand, the barristers’ rules effectively prohibit barristers from undertaking legal work traditionally associated with the work of a solicitor or law practice;

204 (1988) 165 CLR 543 at 559.
• some rules would apply only to situations arising for a legal practitioner who practises in the manner of a solicitor or in a law practice, for example, rule 10.2.2 (use of information barriers) and rule 37 (supervision of legal services);

• similarly, some barristers’ rules would only apply to a legal practitioner who practises in the manner of a barrister, for example, rule 12 (barrister must be a sole practitioner) and rule 17 (the cab-rank principle).

The barristers’ and solicitors’ rules reflect a traditional distinction between the nature of legal practice and ethical principles between legal practitioners who choose to practise as a barrister and those who choose to practise as a solicitor. While these distinctions are no longer made in most jurisdictions in relation to the basis of admission to the legal profession, legal profession legislation relating to the extent of the right to engage in legal practice does, necessarily, need to make such distinctions, reflecting the fact that there are significant differences between the manner of legal practice as a barrister and the manner of legal practice as a solicitor.

Further, in most jurisdictions professional conduct rules now have a statutory foundation, in the sense that legal profession legislation sets out processes for developing, consulting and making legal profession rules for barristers and for solicitors, identifying who may develop those rules and identifying the legal practitioners to whom the rules apply.

The Ethics Committee’s concern is to avoid a situation whereby there may be doubt as to whether a barristers’ rule or a solicitors’ rule applies. The overlap between rules developed by the Australian Bar Association to apply to those who choose to practise as a barrister and rules developed by the Law Council of Australia to apply to those who choose to practise as a solicitor should not create a situation whereby a choice might be able to be made between which of two rules might apply.

To help avoid a situation where there may be confusion as to whether a barristers’ rule or a solicitors’ rule applies, it has been suggested that there should be a change to the definition of “solicitor” in the glossary which reflects harmonisation with the definition of “barrister”.

Definition of solicitor
Consultation questions and recommendations

105. That the definition of “solicitor” be amended as follows:

“solicitor” means:

(a) an Australian legal practitioner whose Australian practising certificate is not subject to a condition that the holder is authorised to engage in legal practice as or in the manner of a barrister only; or

(b) an Australian registered foreign lawyer who practises as or in the manner of a solicitor.

---

205 See for example, the Legal Profession Uniform Law, s47(1)(b) and the definitions of solicitor and of barrister in s6; the definition of unrestricted practising certificate in the Legal Practitioners Act 1981 (SA) s5; Legal Profession Act 2008 (WA) s3; Legal Profession Act 2006 (NT) s4; Legal Profession Act 2007 (Tas) s4; and Legal Profession Act 2006 (ACT) s35(1)(c).

206 In particular, the advocacy and litigation rules.
Definition of workplace bullying

Matters raised

The definition should be amended to include a reference to Commonwealth legislation because the *Fair Work Act 2009* (section 789FD) sets out a legislative test of when a worker is bullied at work.

Discussion points

The Ethics Committee agrees that the definition should be amended to read “bullying that is unlawful under the applicable state or territory anti-discrimination or human rights legislation or constitutes bullying at work under Commonwealth legislation.”

---

**Definition of workplace bullying**

Consultation questions and recommendations

106. That the definition of “workplace bullying” be amended as follows:

“workplace bullying” means bullying that is unlawful under the applicable state or territory anti-discrimination or human rights legislation or constitutes bullying at work under Commonwealth legislation. If no such legislative definition exists, it is conduct within the definition relied upon by the Australian Human Rights Commission to mean workplace bullying. In general terms, it includes the repeated less favourable treatment of a person by another or others in the workplace, which may be considered unreasonable and inappropriate workplace practice. It includes behaviour that could be expected to intimidate, offend, degrade or humiliate.
Disclosure of insurer

Matters raised

Should the Rules require lawyers to advise the other party if the solicitor is acting under the right of subrogation and, if so, the identity of the insurer? Lawyers acting for an insurer under a right of subrogation pursuant to an insurance policy do not regularly inform debtors (commonly clients of community legal centres (CLCs)) that an insurance company is involved. This can mean that debtors may not be advised that they have rights, such as the right to make a complaint to the Financial Ombudsman Service (a less costly dispute resolution forum compared to a court). The recently revised General Insurance Code of Practice, via cl 8.10, obliges subscribing insurers to be identified in any communication with debtors, as well as the nature of any claim.

Discussion points

Rule 9 (Confidentiality) is also relevant to this Question.

The right of subrogation is, in the case of indemnity insurance, an inherent right of the insurer to enforce and have the benefit of all of the rights of the insured in the subject matter of the loss. The insurer’s right of subrogation arises upon entering into the contract of insurance with the insured, and is entitled to be exercised upon the payment by the insurer in respect of the loss. However, it is the party who has actually suffered the loss who is entitled to bring an action against the party whose actions resulted in the loss. An insurer exercising rights of subrogation against third parties therefore must do so in the name of the insured.

The underlying objective of subrogation is that a wrongdoer who has caused a loss to an insured should not benefit by escaping liability on the basis that the insured’s losses have been made good by the insurer. The courts are traditionally reluctant to compel disclosure to a plaintiff of details of a party’s insurance cover, the justification being that “the existence of policies of insurance held by a party or the details of such policies will not normally be relevant to the proof of any cause of action pleaded against that party”. Similarly, there is equal reluctance to permit a defendant to access a plaintiff’s insurance policies except where that policy is relevant to an issue in the proceedings.

The view of the Ethics Committee is that the existence of insurance is a generally a matter relevant only to the insurer and insured and, unless there are clearly permissible or compulsory grounds for disclosure of that relationship, a solicitor would not be entitled to make such a disclosure without contravening the duty of confidentiality. The Committee does not consider the basic duty of confidentiality should be set aside solely on the basis that that disclosure might inform or alert a third party about matters or options that are not relevant to the conduct of the proceedings pursuant to which the insurer is exercising the right of subrogation. The ability of a defendant to satisfy an award of damages arising from the court’s decision on the substantive issue of liability is such an example.

______________________________

207 State Government Insurance Office (Qld) v Brisbane Stevedoring Pty Ltd (1969) 123 CLR 228 at 240–3 per Barwick CJ.
208 Graham v Entec Europe Ltd [2003] EWCA Civ 1177 at [37] per Potter LJ.
210 Ibid.
The Ethics Committee notes that the Insurance Council of Australia’s General Insurance Code of Practice (2014) commits subscribing insurers to assisting those individuals against whom an insurer is seeking recovery for damages or loss caused by them, where the individuals claim hardship in meeting the insurer's demands for recovery. However, the Committee does not consider the existence of the Code of Practice provides a basis upon which a solicitor may be ethically required to disclose that an insurer has exercised its rights of subrogation in relation to the matter being handled by the solicitor. The Committee’s view is that such a disclosure can only be made if the client expressly or impliedly authorises the disclosure (rule 9.2.1) or the solicitor is permitted or is compelled by law to make the disclosure (rule 9.2.2).

Consultation questions and recommendations

107. That a solicitor cannot disclose that an insurer has exercised its rights of subrogation in relation to the matter being handled by the solicitor, unless the client expressly or impliedly authorises the disclosure, or the solicitor is permitted or is compelled by law to do so.

Claiming costs in letters of demand

Matters raised

It has been recommended that the Australian Solicitors’ Conduct Rules should clearly state that a lawyer must not make any statement in a letter of demand that is likely to mislead the recipient to believe that legal costs or other recovery costs are legally payable unless those costs are legally recoverable based on a reasonable contract or trading terms, and the letter refers to those terms. The commenters have said that, in their experience, lawyers or law firms that act on behalf of debt collectors or mercantile agents regularly seek payment of additional costs on top of the initial debt.

Comments from CLCs say they have been lodging complaints about this conduct for many years, and debt collection lawyers now tend to use terms such as “request” rather than “demand”, or to simply advise that “our costs are $x”. The commenters say that, despite guidance being issued by professional bodies and regulators, recipients of such correspondence continue to believe that these costs are legally payable, and while they are unaware of how many lawyers engage in this practice, the fact that some send out many thousands of letters per year means that the problem is widespread. While this problem may be addressed, in part, by reflecting the Australian Consumer Law wording in relation to misleading and deceptive conduct, the commenters believe that the Rules should prohibit any mention of costs where those costs are not legally recoverable, and that where recovery costs are payable in accordance with an agreement between the parties, the letter of demand should identify the basis for any claim above the original debt.

Discussion points

Applicable ethical principles are set out in several rules, including:

- rule 4.1.1, that a solicitor be honest and courteous in all dealings in the course of legal practice;
- rule 5.1.2, that a solicitor not engage in conduct which is likely to a material degree to bring the profession into disrepute; and
- rule 34.1.1, that a solicitor not, in any action or communication associated with representing a client, 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.
As mentioned in the discussion on rule 34, solicitors must ensure their communications on behalf of clients satisfy the principles set out in the *Australian Consumer Law* where that legislation prescribes a higher standard than the rules.

The Ethics Committee notes there is a considerable amount of guidance from professional associations and regulatory authorities on the topic of referring to costs in letters issued on behalf of clients in relation to debt recovery matters. However, it does not consider a specific rule prohibiting any mention of costs is an appropriate response to matters complained of; failure to conform with the principle underlying rule 34 or the guidance materials already available raises a compliance issue rather than a question about whether a new ethical principle should be set down. However, the Committee considers the inclusion of Commentary to rule 34 could usefully draw solicitors’ attention to the issues and guidance already available.

---

**Consultation questions and recommendations**

108. That the ethical duty to not mislead a person into believing legal costs or other debt recovery costs are payable is embodied in the principles underpinning a number of rules, including: to be honest and courteous in all dealings in the course of legal practice; to not bring the profession into disrepute; and to not make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the client, and which misleads or intimidates the other person. A separate and specific ethical rule about claiming legal costs in letters of demand is not required, but further attention should be drawn to this kind of conduct in commentary to the rules.

---

**Transfer of practice**

**Matters raised**

It is noted that the Rules do not include provision for Transfer of a Practitioner’s Practice (as did, for instance, rule 24 in the Law Institute of Victoria’s now superseded *Professional Conduct and Practice Rules 2005*).

**Discussion points**

The Ethics Committee considers the issues raised are more appropriately matters for *Legal Practice Rules*.

---

**Consultation questions and recommendations**

109. That the responsibilities and expectations of solicitors when transferring their law practice to another law practice are matters for legal practice rules rather than rules relating to ethical principles.

---

211 See page 143
Mental wellbeing

Matters raised

It has been recommended that the rules deal with whether a lawyer has an ethical duty to report a fellow practitioner who is suffering from a mental impairment.

Discussion points

Background

Almost half (45%) of all Australians aged 16-85 years, will at some point in their lifetime experience a mental illness,\(^\text{213}\) and people who work in law firms have been found to suffer higher rates of depression than those in other professions.\(^\text{215}\)

The Victorian Legal Services Board (\textit{Mental Health Policy–V1}) considers a lawyer to have a mental impairment if he or she has a medical condition that:

\begin{itemize}
  \item is characterised by significant disturbance of thought, mood, perception or memory (including alcoholism and drug dependence); and
  \item without management, has and continues to, or is likely to continue to, adversely affect the lawyer’s capacity to engage in legal practice.
\end{itemize}

Currently, the Rules contain no obligation to report a fellow practitioner who is suffering from a mental impairment that may, or is, adversely affecting that practitioner’s ability to engage in legal practice. The reporting of a fellow practitioner in such circumstances might, however, be consistent with the overriding duty to the court and the administration of justice (see rule 3.1).

An ethical duty to report a fellow practitioner who is suffering from a mental impairment (as defined by the VLSB) would:

\begin{itemize}
  \item protect the community from the potential unsatisfactory professional conduct or professional misconduct which may arise from the practitioner’s mental impairment;
  \item ensure protection of the integrity of the legal profession and its reputation with the public; and
  \item enable the practitioner to receive assistance and support.
\end{itemize}

The professional conduct rules in some other jurisdictions provide for obligations to report mental impairment.

Obligation to Report Mental Impairment - Canada

The Federation of Law Societies of Canada’s Model Code of Professional Conduct imposes obligations on practitioners, beyond simply reporting the misconduct of another lawyer. It states, in rule 7.1-3, that:

\begin{quote}
Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society … (e) conduct that raises a substantial question about the lawyer’s capacity to provide professional services …”
\end{quote}


The Commentary to the rule states:

Unless a lawyer who departs from proper professional conduct or competence is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules.

Obligation to Report Mental Impairment - The United States of America

The American Bar Association’s Standing Committee on Ethics and Professional Responsibility issued a Formal Opinion in 2003 on a Lawyer’s Duty to Report Rule Violations by Another Lawyer who may Suffer from Disability or Impairment. Under rule 1.16(a)(2) of the Model Rules of Professional Conduct, a lawyer must not undertake or continue representation of a client when that lawyer suffers from a mental condition that “materially impairs the lawyer’s ability to represent the client.”

This Formal Opinion notes that this requirement:

… reflects the conclusion that allowing persons who do not possess the capacity to make the professional judgments and perform the services expected of a lawyer is not only harmful to the interests of clients, but also undermines the integrity of the legal system and the profession.

As noted above, a lawyer with knowledge that another lawyer’s conduct has violated the Model Rules in a way that “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects” must inform the appropriate professional authority. The Formal Opinion notes that a lawyer’s failure to withdraw from representation while suffering from a condition materially impairing her ability to practice (as required by rule 1.16(a)(2)) would ordinarily raise a substantial question, requiring reporting.

Consideration of an ethical duty to report mental impairment necessarily invites the consideration of whether or not, in a broader sense, there is an ethical obligation to report a fellow practitioner’s unsatisfactory professional conduct or professional misconduct, regardless of whether mental impairment or some other kind of behaviour is involved.

Reporting misconduct by lawyers

Any person can make a complaint about the misconduct of a solicitor. Dal Pont notes in his book, Lawyers’ Professional Responsibility, that there is scope for lawyers to report other lawyers’ misconduct, and refers to a Western Australian State Administrative Tribunal decision where it was said that:

… it is essential to the maintenance of professional standards and the confidence of the public in the (largely) self-regulated legal profession, that where professional standards are not met, and the matter cannot be resolved, the issue be referred to the appropriate authority”, and that “practitioners have a professional obligation to do so.”

Unless a lawyer who departs from proper professional conduct or competence is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules.

Obligation to Report Mental Impairment - The United States of America

The American Bar Association’s Standing Committee on Ethics and Professional Responsibility issued a Formal Opinion in 2003 on a Lawyer’s Duty to Report Rule Violations by Another Lawyer who may Suffer from Disability or Impairment.216

Under rule 1.16(a)(2) of the Model Rules of Professional Conduct, a lawyer must not undertake or continue representation of a client when that lawyer suffers from a mental condition that “materially impairs the lawyer’s ability to represent the client.”

This Formal Opinion notes that this requirement:

… reflects the conclusion that allowing persons who do not possess the capacity to make the professional judgments and perform the services expected of a lawyer is not only harmful to the interests of clients, but also undermines the integrity of the legal system and the profession.

As noted above, a lawyer with knowledge that another lawyer’s conduct has violated the Model Rules in a way that “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects” must inform the appropriate professional authority. The Formal Opinion notes that a lawyer’s failure to withdraw from representation while suffering from a condition materially impairing her ability to practice (as required by rule 1.16(a)(2)) would ordinarily raise a substantial question, requiring reporting.

Consideration of an ethical duty to report mental impairment necessarily invites the consideration of whether or not, in a broader sense, there is an ethical obligation to report a fellow practitioner’s unsatisfactory professional conduct or professional misconduct, regardless of whether mental impairment or some other kind of behaviour is involved.

Reporting misconduct by lawyers

Any person can make a complaint about the misconduct of a solicitor. Dal Pont notes in his book, Lawyers’ Professional Responsibility, that there is scope for lawyers to report other lawyers’ misconduct,217 and refers to a Western Australian State Administrative Tribunal decision where it was said that:218

… it is essential to the maintenance of professional standards and the confidence of the public in the (largely) self-regulated legal profession, that where professional standards are not met, and the matter cannot be resolved, the issue be referred to the appropriate authority”, and that “practitioners have a professional obligation to do so.”

Lawyers’ obligation to report unsatisfactory professional conduct or professional misconduct

The Law Council of Australia’s superseded Model Rules of Professional Conduct and Practice included a requirement for practitioners to:

... promptly disclose to the practitioner’s professional regulatory body the occurrence of any conduct which is contrary to Rule 30.1 and any conduct or event which may reasonably be regarded as adversely prejudicing a practitioner’s ability to practise according to these rules.

Whether such an obligation applied to lawyers reporting the conduct of other lawyers was unclear, and it was arguable that the obligation was restricted to self-reporting.

The 2007 Australian Law Reform Commission (ALRC) Report, Discovery in Federal Courts, notes that:

In a self-regulated profession, another way of ensuring that misconduct is reported to relevant disciplinary bodies is imposing mandatory reporting obligations on lawyers. In the ALRC’s preliminary view, imposing mandatory obligations on lawyers to report the misconduct of other lawyers would assist in the better enforcement of legal ethical obligations.

The ALRC report also notes, however, that there are difficulties associated with imposing such reporting obligations on lawyers, in particular with respect to the need to support and, in some cases, protect lawyers who make such reports, and mechanisms for safeguarding against vexatious reports.

In circumstances where the introduction of such a reporting obligation would dictate that a failure to report could itself amount to misconduct, Dal Pont notes that if there is to be an enforceable duty of this kind, the following at least must be clear:

• the level of proof that attracts the reporting obligation;
• what comes within and falls outside the duty to report; and
• the moment at which the duty is triggered.

Obligation to report unsatisfactory professional conduct or professional misconduct in other jurisdictions

In the United States, the United Kingdom and New Zealand professional conduct rules require lawyers to report to the appropriate professional authority where, respectively, they consider that another lawyer’s conduct:

• constitutes a violation of the rules of professional conduct that raises a “substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”;
• constitutes "serious misconduct" and
• where there are reasonable grounds to suspect the other lawyer is guilty of misconduct.

---

219 Rule 30.1 stated that a practitioner must not engage in conduct which is dishonest; calculated, or likely to a material degree, to: a) be prejudicial to the administration of justice; b) diminish public confidence in the administration of justice; and c) adversely prejudice a practitioner’s ability to practice according to the rules.
221 Ibid, 148.
222 Ibid, 147.
224 Subject to any legal professional privilege.
225 American Bar Association, Model Rules of Professional Conduct, r 8.3(a).
226 Solicitors Regulation Authority, SRA Code of Conduct 2011, O 10.4.
227 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (NZ) rr 2.8, 2.9.
The Ethics Committee invites comments on these issues. In particular, the Committee notes:

- it has long been the practice that where a practitioner has an apprehension that a fellow practitioner might be suffering a mental impairment, professional associations enable those matters to be raised on a confidential basis and dealt with under the pastoral care programs of professional associations;
- the rules of other jurisdictions are based upon there being an observed breach of an ethical duty or professional obligation, but not on a mere apprehension that a fellow practitioner might be suffering a mental impairment that might, if not addressed, lead to a breach of a duty or obligation;
- if there is an ethical duty for a practitioner to make an intervention on the grounds that another practitioner may be suffering from a mental impairment, at what point in time should that intervention occur;
- what form of intervention would be appropriate; whether the most appropriate initial response is to immediately inform a regulatory authority, or whether it should, in the first instance, be a matter for the practitioner’s professional association; and
- whether such an obligation, if it exists, should be limited only to mental impairment, and not to other matters such as, for example, an apprehension about alcohol or drug abuse.

**CONSULTATION QUESTIONS AND RECOMMENDATIONS**

111. Where a solicitor forms a view that a fellow practitioner might be suffering a mental impairment, does that solicitor have an ethical duty to respond. If so, should that be a matter to be raised initially, and within a confidential setting, with the relevant professional association and addressed under a pastoral care program, or should the appropriate ethical duty be to report the issue to a regulatory authority?
SUMMARY OF POTENTIAL RULE CHANGES FOR CONSULTATION

Set out below are the possible reformulations of existing Rules that might be recommended to the Law Council for adoption, as referred to throughout this Consultation Discussion Paper, for which the Professional Ethics Committee is seeking consultation comments.

Rule 5  (Standard of conduct – dishonest or disreputable conduct)

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>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:</td>
<td>5.1 A solicitor must not engage in conduct, in the course of legal practice or otherwise, which:</td>
</tr>
<tr>
<td>5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice; or</td>
<td>5.1.1 demonstrates that the solicitor is not a fit and proper person to practise law; or</td>
</tr>
<tr>
<td>5.1.2 bring the profession into disrepute.</td>
<td>5.1.2 is likely, to a material degree to:</td>
</tr>
<tr>
<td></td>
<td>5.1.2.1 be prejudicial to, or diminish the public confidence in, the administration of justice; or</td>
</tr>
<tr>
<td></td>
<td>5.1.2.2 bring the profession into disrepute.</td>
</tr>
</tbody>
</table>

Rule 10  (Conflicts concerning former clients)

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>10.2 A solicitor or law practice who or which is in possession of information which is confidential to a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:</td>
<td>10.2 A solicitor or law practice who or which is in possession of information which is confidential to a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:</td>
</tr>
<tr>
<td>10.2.1 the former client has given informed written consent to the solicitor or law practice so acting; or</td>
<td>10.2.1 the former client has given written consent to the disclosure and use of that information; or</td>
</tr>
<tr>
<td>10.2.2 an effective information barrier has been established.</td>
<td>10.2.2 an effective information barrier has been established.</td>
</tr>
</tbody>
</table>
### Rule 11 (Conflict of duties concerning current clients)

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
</table>
| **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. | **11.1** A solicitor or law practice must not act where there is an actual or potential conflict between the duties owed to two or more current clients, except where each client has given informed consent to the solicitor or law practice so acting, and:  
(i) the solicitor or law practice is able to act in the best interest of each client; and  
(ii) where the conflict or potential conflict arises because of the possession of client confidential information which might reasonably be concluded to be material to another client’s current matter, an effective information barrier has been established. |
| **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. | **11.2** 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 must not continue to act for one of the clients (or a group of clients between whom there is no conflict) unless the duty of confidentiality to the other client(s) is not put at risk and the parties to the conflict have given informed consent to the solicitor or law practice continuing to act for that client (or group of clients). |
| **11.3** ... | **11.3** ... |
| **11.4** ... | **11.4** ... |
| **11.5** ... | **11.5** ... |
## Rule 12 (Conflict concerning a solicitor’s own interests)

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>12.1 …</td>
<td>12.1 …</td>
</tr>
<tr>
<td>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.</td>
<td>12.2 A solicitor must not exercise any undue influence on the client or a third-party, intended to dispose the client to benefit the solicitor in excess of the solicitor’s fair remuneration for legal services provided to the client.</td>
</tr>
<tr>
<td>12.3 …</td>
<td>12.3 …</td>
</tr>
<tr>
<td>12.4 A solicitor will not have breached this Rule merely by:</td>
<td>12.4 A solicitor will not have breached this Rule merely by:</td>
</tr>
<tr>
<td>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:</td>
<td>12.4.1 drawing a Will appointing the solicitor or an associate of the solicitor as executor, provided the solicitor informs the client in writing before the Will is signed:</td>
</tr>
<tr>
<td>(i) of any entitlement of the solicitor, or the solicitor’s law practice or associate, to claim executor’s commission;</td>
<td>(i) of any entitlement of the solicitor, or the solicitor’s law practice or associate, to claim executor’s commission;</td>
</tr>
<tr>
<td>(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</td>
<td>(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</td>
</tr>
<tr>
<td>(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.</td>
<td>(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.</td>
</tr>
</tbody>
</table>
### Rule 15 (Lien over essential documents)

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>15.1</strong> 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:</td>
<td><strong>15.1</strong> 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:</td>
</tr>
<tr>
<td><strong>15.1.1</strong> if another solicitor is acting for the client, the first solicitor must surrender the documents to the second solicitor:</td>
<td><strong>15.1.1</strong> if another solicitor is acting for the client, the first solicitor must surrender deliver up the documents to the second solicitor:</td>
</tr>
<tr>
<td>(i) if the second solicitor undertakes to hold the documents subject to the lien and with reasonable security for the unpaid costs; or</td>
<td>(i) if the second solicitor undertakes to hold the documents subject to the lien and with reasonable security for the unpaid costs; or</td>
</tr>
<tr>
<td>(ii) if the first solicitor agrees to the second solicitor agreeing to pay, or entering into an agreement with the client to procure payment of, the first solicitor’s costs upon completion of the relevant proceedings; or</td>
<td>(ii) if the first solicitor agrees to the second solicitor agreeing to pay, or entering into an agreement with the client to procure payment of, the first solicitor’s costs upon completion of the relevant proceedings; or</td>
</tr>
<tr>
<td><strong>15.1.2</strong> alternatively, the solicitor, upon receiving reasonable security for the unpaid costs, must deliver the documents to the client.</td>
<td><strong>15.1.2</strong> alternatively, the solicitor, upon receiving reasonable security for the unpaid costs, must deliver the documents to the client.</td>
</tr>
</tbody>
</table>

### Rule 16 (Charging for document storage)

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>16.1</strong> A solicitor must not charge:</td>
<td><strong>16.1</strong> A solicitor must not charge:</td>
</tr>
<tr>
<td><strong>16.1.1</strong> 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</td>
<td><strong>16.1.1</strong> for the storage (either physical, electronic or otherwise) of documents, files or other property on behalf of clients or former clients of the solicitor or law practice (or predecessors in practice); or</td>
</tr>
<tr>
<td><strong>16.1.2</strong> for retrieval from storage of those documents, files or other property, UNLESS the client or former client has agreed in writing to such charge being made.</td>
<td><strong>16.1.2</strong> for retrieval from storage of those documents, files or other property, UNLESS the client or former client has agreed in writing consented to such charge being made.</td>
</tr>
</tbody>
</table>
### Rule 17 (Independence – Avoidance of personal bias)

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>17.1</strong> ...</td>
<td><strong>17.1</strong> ...</td>
</tr>
<tr>
<td><strong>17.2</strong> 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:</td>
<td><strong>17.2</strong> A solicitor does not breach the solicitor's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's instructions, simply by choosing, contrary to those instructions, to exercise the forensic judgments called for during the case so as to:</td>
</tr>
<tr>
<td>17.2.1 confine any hearing to those issues which the solicitor believes to be the real issues;</td>
<td>17.2.1 confine any hearing to those issues which the solicitor believes to be the real issues;</td>
</tr>
<tr>
<td>17.2.2 present the client's case as quickly and simply as may be consistent with its robust advancement; or</td>
<td>17.2.2 present the client's case as quickly and simply as may be consistent with its robust advancement; or</td>
</tr>
<tr>
<td>17.2.3 inform the court of any persuasive authority against the client's case.</td>
<td>17.2.3 inform the court of any persuasive authority against the client's case.</td>
</tr>
<tr>
<td><strong>17.3</strong> 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.</td>
<td><strong>17.3</strong> 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.</td>
</tr>
<tr>
<td><strong>17.4</strong> A solicitor must not become the surety for the client's bail.</td>
<td><strong>17.4</strong> A solicitor must not become the surety for the client's bail.</td>
</tr>
</tbody>
</table>
### Rule 19 (Frankness in court) (Duty to the court)

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>19.1 ....</td>
<td>19.1 ....</td>
</tr>
<tr>
<td>19.2 ....</td>
<td>19.2 ....</td>
</tr>
<tr>
<td><strong>19.3</strong> 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.</td>
<td><strong>19.3</strong> 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.</td>
</tr>
<tr>
<td><strong>19.4</strong> A solicitor seeking any interlocutory relief in an ex parte application must disclose to the court all factual or legal matters which:</td>
<td><strong>19.4</strong> A solicitor seeking any interlocutory relief in an ex parte application must disclose to the court all factual or legal matters which:</td>
</tr>
<tr>
<td>19.4.1 are within the solicitor’s knowledge;</td>
<td>19.4.1 are within the solicitor’s knowledge;</td>
</tr>
<tr>
<td>19.4.2 are not protected by legal professional privilege; and</td>
<td>19.4.2 are not protected by legal professional privilege; and</td>
</tr>
<tr>
<td>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.</td>
<td>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.</td>
</tr>
<tr>
<td><strong>19.5</strong> A solicitor who has knowledge of matters which are within Rule 19.4:</td>
<td><strong>19.5</strong> A solicitor who has knowledge of matters which are within Rule 19.4:</td>
</tr>
<tr>
<td>19.5.1 must seek instructions for the waiver of legal professional privilege, if the matters are protected by that privilege, so as to permit the solicitor to disclose those matters under Rule 19.4; and</td>
<td>19.5.1 must seek instructions for the waiver of legal professional privilege, if the matters are protected by that privilege, so as to permit the solicitor to disclose those matters under Rule 19.4; and</td>
</tr>
<tr>
<td>19.5.2 if the client does not waive the privilege as sought by the solicitor:</td>
<td>19.5.2 if the client does not waive the privilege as sought by the solicitor:</td>
</tr>
<tr>
<td>(i) must inform the client of the client’s responsibility to authorise such disclosure and the possible consequences of not doing so; and</td>
<td>(i) must inform the client of the client’s responsibility to authorise such disclosure and the possible consequences of not doing so; and</td>
</tr>
<tr>
<td>(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.</td>
<td>(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.</td>
</tr>
<tr>
<td>19.6-19.12 ....</td>
<td>19.6-19.12 ....</td>
</tr>
</tbody>
</table>
**Rule 20 (Delinquent or guilty clients)**

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>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:</td>
<td>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:</td>
</tr>
<tr>
<td>20.1.1 has lied in a material particular to the court or has procured another person to lie to the court;</td>
<td>20.1.1 has lied in a material particular to the court or has procured another person to lie to the court;</td>
</tr>
<tr>
<td>20.1.2 has falsified or procured another person to falsify in any way a document which has been tendered; or</td>
<td>20.1.2 has falsified or procured another person to falsify in any way a document which has been tendered; or</td>
</tr>
<tr>
<td>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;</td>
<td>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;</td>
</tr>
<tr>
<td>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</td>
<td>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</td>
</tr>
<tr>
<td>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.</td>
<td>20.1.4 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.</td>
</tr>
<tr>
<td>20.2 A solicitor whose client in criminal proceedings confesses guilt to the solicitor but maintains a plea of not guilty:</td>
<td>20.2 A solicitor whose client in criminal proceedings confesses guilt to the solicitor but maintains a plea of not guilty:</td>
</tr>
<tr>
<td>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;</td>
<td>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; or</td>
</tr>
<tr>
<td>20.2.2</td>
<td>in cases where the solicitor continues to act for the client:</td>
</tr>
<tr>
<td>--------</td>
<td>----------------------------------------------------------------</td>
</tr>
<tr>
<td>(i)</td>
<td>must not falsely suggest that some other person committed the offence charged;</td>
</tr>
<tr>
<td>(ii)</td>
<td>must not set up an affirmative case inconsistent with the confession;</td>
</tr>
<tr>
<td>(iii)</td>
<td>may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;</td>
</tr>
<tr>
<td>(iv)</td>
<td>may argue that for some reason of law the client is not guilty of the offence charged; and</td>
</tr>
<tr>
<td>(v)</td>
<td>may argue that for any other reason not prohibited by (i) and (ii) the client should not be convicted of the offence charged;</td>
</tr>
</tbody>
</table>

| 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. |

<table>
<thead>
<tr>
<th>20.2.2</th>
<th>may, subject to the client accepting the constraints set out in (i) to (vii) below, but not otherwise, continue to act in the client's defence and:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>must not falsely suggest that some other person committed the offence charged;</td>
</tr>
<tr>
<td>(ii)</td>
<td>must not set up an affirmative case inconsistent with the confession;</td>
</tr>
<tr>
<td>(iii)</td>
<td>must ensure that the prosecution is put to proof of its case;</td>
</tr>
<tr>
<td>(iv)</td>
<td>may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;</td>
</tr>
<tr>
<td>(v)</td>
<td>may argue that for some reason of law the client is not guilty of the offence charged; and</td>
</tr>
<tr>
<td>(vi)</td>
<td>may argue that for any other reason not prohibited by (i) and (ii) the client should not be convicted of the offence charged; and</td>
</tr>
<tr>
<td>(vii)</td>
<td>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.</td>
</tr>
</tbody>
</table>

| 20.3   | ... |

| 20.3   | 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. |
## Rule 21 (Responsible use of court process and privilege)

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>21.1 A solicitor must take care to ensure that the solicitor's advice to invoke the coercive powers of a court:</td>
<td>21.1 A solicitor must take care to ensure that the solicitor's advice to invoke the coercive powers of a court:</td>
</tr>
<tr>
<td>21.1.1 is reasonably justified by the material then available to the solicitor;</td>
<td>21.1.1 is reasonably justified by the material then available to the solicitor;</td>
</tr>
<tr>
<td>21.1.2 is appropriate for the robust advancement of the client's case on its merits;</td>
<td>21.1.2 is appropriate for the robust advancement of the client's case on its merits;</td>
</tr>
<tr>
<td>21.1.3 is not made principally in order to harass or embarrass a person; and</td>
<td>21.1.3 is not made principally in order to harass or embarrass a person; and</td>
</tr>
<tr>
<td>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.</td>
<td>21.1.4 is not made principally in order to gain some collateral advantage for the client or the solicitor or the instructing solicitor or a third party out of court.</td>
</tr>
<tr>
<td>21.2-21.5 [no change]</td>
<td>21.2-21.5 [no change]</td>
</tr>
<tr>
<td>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).</td>
<td>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).</td>
</tr>
<tr>
<td>21.7-21.8 [no change]</td>
<td>21.7-21.8 [no change]</td>
</tr>
<tr>
<td>21.9 A solicitor does not infringe rule 21.8 merely because:</td>
<td></td>
</tr>
<tr>
<td>(i) the question or questioning challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or</td>
<td></td>
</tr>
<tr>
<td>(ii) the question or questioning requires the witness to give evidence that the witness could consider to be offensive, distasteful or private.</td>
<td></td>
</tr>
</tbody>
</table>
**Rule 22 (Communication with opponents)**

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>22.1 A solicitor must not knowingly make a false statement to an opponent in relation to the case (including its compromise).</td>
<td>22.1 A solicitor must not knowingly make a false or misleading statement to an opponent in relation to the case (including its compromise).</td>
</tr>
<tr>
<td>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.</td>
<td>22.2 A solicitor must take all necessary steps to correct any false or misleading statement in relation to the case made by the solicitor to an opponent as soon as possible after the solicitor becomes aware that the statement was false.</td>
</tr>
<tr>
<td>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.</td>
<td>22.3 A solicitor will not have made does not make a false or misleading statement to the opponent simply by failing to correct an error on any matter stated to the solicitor by the opponent.</td>
</tr>
<tr>
<td>22.4-22.6 [no change]</td>
<td>22.4-22.6 [no change]</td>
</tr>
<tr>
<td>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.</td>
<td>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 of the opponent.</td>
</tr>
<tr>
<td>22.8 [no change]</td>
<td>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.</td>
</tr>
<tr>
<td>22.9 A solicitor must not confer with or deal directly with any party who is unrepresented unless the party has signified willingness to that course.</td>
<td>22.9 A solicitor must not confer with or dealing directly with any party who is unrepresented unless the party has signified willingness to that course.</td>
</tr>
</tbody>
</table>
### Rule 23 (Opposition access to witnesses)

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>23.1</strong> 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.</td>
<td>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.</td>
</tr>
</tbody>
</table>
| **23.2** A solicitor will not have breached Rule 23.1 simply by telling a prospective witness or a witness that the witness need not agree to confer or to be interviewed or by advising about relevant obligations of confidentiality. | 23.2 A solicitor will not have does not breach rule 23.1 simply by:  
23.2.1 telling a prospective witness or a witness that he or she need not agree to confer or to be interviewed; or  
23.2.2 advising the prospective witness or the witness about relevant obligations of confidentiality. |

### Rule 27 (Solicitor as material witness in client’s case)

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
</table>
| **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. | 27.1 A solicitor must not, unless the due administration of justice would warrant otherwise in the solicitor’s considered opinion:  
27.1.1 appear for a client at any hearing; or  
27.1.2 continue to act for a client  
in a case where it is known, or becomes apparent, that the solicitor will be required to give evidence material to the determination of the contested issues before the court. |
| **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. |  |
### Rule 29 (Prosecutor's duties)

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>29.7.1 whose testimony is admissible and necessary for the presentation of all of the relevant circumstances;</td>
<td>29.7.1 whose testimony is admissible and necessary for the presentation of all of the relevant circumstances;</td>
</tr>
<tr>
<td>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;</td>
<td>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;</td>
</tr>
<tr>
<td>UNLESS: (i) the opponent consents to the prosecutor not calling a particular witness;</td>
<td>UNLESS: (i) the opponent consents to the prosecutor not calling a particular witness;</td>
</tr>
<tr>
<td>(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;</td>
<td>(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;</td>
</tr>
<tr>
<td>(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</td>
<td>(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</td>
</tr>
<tr>
<td>(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.</td>
<td>(iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable, or</td>
</tr>
<tr>
<td>No.</td>
<td>Text</td>
</tr>
<tr>
<td>-----</td>
<td>------</td>
</tr>
<tr>
<td>29.13</td>
<td>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.</td>
</tr>
<tr>
<td>29.14</td>
<td>A solicitor who appears as counsel assisting an investigative/inquisitorial tribunal must fairly assist the tribunal to arrive at the truth and must seek to assist the tribunal with adequate submissions of law and fact.</td>
</tr>
<tr>
<td>29.15</td>
<td>A solicitor who appears as counsel assisting an investigative/inquisitorial tribunal must not, by language or other conduct, seek to inflame or bias the tribunal against any person appearing before the tribunal.</td>
</tr>
<tr>
<td>29.16</td>
<td>A solicitor who appears as counsel assisting an investigative/inquisitorial tribunal must not argue any proposition of fact or law which the solicitor does not believe on reasonable grounds to be capable of contributing to a finding on the balance of probabilities.</td>
</tr>
<tr>
<td>29.17</td>
<td>A solicitor who appears as counsel assisting an investigative tribunal must not publish or take any step towards the publication of any material concerning any current proceeding in which the solicitor is appearing or any potential proceeding in which a solicitor is likely to appear, other than:</td>
</tr>
</tbody>
</table>

(v) the prosecutor, having the responsibility of ensuring that the prosecution case is presented properly and presented with fairness to the accused, believes on reasonable grounds that the interests of justice would be harmed if the witness was called as part of the prosecution case provided that the prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within (ii), (iii), or (iv) or (v) together with the grounds on which the prosecutor has reached that decision, unless the interests of justice would be harmed if those grounds were revealed to the opponent.
(a) A solicitor may supply answers to unsolicited questions concerning a current proceeding provided that the answers are limited to information as to the identity of any witness already called, the nature of the issues in the proceeding, the nature of any orders, findings, recommendations or decisions made including any reasons given by the investigative tribunal, or

(b) A solicitor may, where it is not contrary to legislation, in response to unsolicited questions supply for publication:

(i) copies of affidavits or witness statements, which have been read, tendered or verified in proceedings open to the public, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection,

(ii) copies of transcript of evidence given in proceedings open to the public, if permitted by copyright and clearly marked so as to show any corrections agreed by the witness or directed by the investigative tribunal, or

(iii) copies of exhibits admitted in proceedings open to the public and without restriction on access.
### Rule 31 (Inadvertent disclosure)

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>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:</td>
<td>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:</td>
</tr>
<tr>
<td>31.1.1 return, destroy or delete the material (as appropriate) immediately upon becoming aware that disclosure was inadvertent; and</td>
<td>31.1.1 return, destroy or delete the material (as appropriate) immediately upon becoming aware that disclosure was inadvertent; and</td>
</tr>
<tr>
<td>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.</td>
<td>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.</td>
</tr>
<tr>
<td>31.2 A solicitor who reads part or all of the confidential material before becoming aware of its confidential status must:</td>
<td>31.2 A solicitor who reads part or all of the confidential material before becoming aware of its confidential status must:</td>
</tr>
<tr>
<td>31.2.1 notify the opposing solicitor or the other person immediately; and</td>
<td>31.2.1 not disclose or use the material, unless otherwise permitted or compelled by law;</td>
</tr>
<tr>
<td>31.2.2 not read any more of the material.</td>
<td>31.2.2 notify the opposing solicitor or the other person immediately; and</td>
</tr>
<tr>
<td>31.3 If a solicitor is instructed by a client to read confidential material received in error, the solicitor must refuse to do so.</td>
<td>31.3 If a solicitor is instructed by a client to read confidential material received in error, the solicitor must refuse to do so.</td>
</tr>
</tbody>
</table>
### Rule 34 (Dealings with other persons)

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
</table>
| **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;  
34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person. |  
34.1 A solicitor must not in any action or communication associated with representing a client:  
34.1.1 make any statement to another person:  
(i) which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor’s client; and  
(ii) which is likely to mislead or deceive or intimidate the other person;  
34.1.2 threaten the institution of a criminal or disciplinary complaint against the other person if a civil liability to the solicitor’s client is not satisfied; or  
34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person. |
| **34.2** In the conduct or promotion of a solicitor’s practice, the solicitor must not seek instructions for the provision of legal services in a manner likely to oppress or harass a person who, by reason of some recent trauma or injury, or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the solicitor at the time when the instructions are sought. |  
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. |
### Rule 40 (Sharing receipts)

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>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:</td>
<td>40.1 A solicitor must not, in relation to the conduct of the solicitor’s practice, or the delivery of legal services, share, or enter into any arrangement for the sharing of, the receipts arising from, or in connection with, the provision of legal services by the solicitor, with:</td>
</tr>
<tr>
<td>40.1.1 any disqualified person; or</td>
<td>40.1.1 any disqualified person; or</td>
</tr>
<tr>
<td>40.1.2 any person found guilty of an indictable offence that involved dishonest conduct, whether or not a conviction was recorded.</td>
<td>40.1.2 any person:</td>
</tr>
<tr>
<td></td>
<td>(i) who has been found guilty of an indictable offence; or</td>
</tr>
<tr>
<td></td>
<td>(ii) who has had a guilty plea accepted in relation to an indictable offence that involved dishonest conduct, whether or not a conviction was recorded.</td>
</tr>
</tbody>
</table>

### Rule 42 (Anti-discrimination and harassment)

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>42.1 A solicitor must not in the course of practice, engage in conduct which constitutes:</td>
<td>42.1 A solicitor must not in the course of practice, engage in conduct which constitutes:</td>
</tr>
<tr>
<td>42.1.1 discrimination;</td>
<td>42.1.1 discrimination;</td>
</tr>
<tr>
<td>42.1.2 sexual harassment; or</td>
<td>42.1.2 sexual harassment; or</td>
</tr>
<tr>
<td>42.1.3 workplace bullying.</td>
<td>42.1.3 workplace bullying.</td>
</tr>
</tbody>
</table>
## Rule 43 (Dealing with the regulatory authority)

<table>
<thead>
<tr>
<th>Current rule</th>
<th>Possible reformulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>43.1  Subject only to his or her duty to the client, a solicitor must be open</td>
<td>43.1  Subject only to his or her duty to the client, a solicitor must be open and frank</td>
</tr>
<tr>
<td>and frank in his or her dealings with a regulatory authority.</td>
<td>and frank in his or her dealings with a regulatory authority.</td>
</tr>
<tr>
<td>43.2  A solicitor must respond within a reasonable time and in any event</td>
<td>43.2  A solicitor must respond within a reasonable time and in any event within 14 days</td>
</tr>
<tr>
<td>(or such extended time as the regulatory authority may allow) to any</td>
<td>(or such extended time as the regulatory authority may allow) to any requirement of</td>
</tr>
<tr>
<td>requirement of the regulatory authority for comments or information in</td>
<td>the regulatory authority for comments, documents or information in relation to the</td>
</tr>
<tr>
<td>relation to the solicitor’s conduct or professional behaviour in the course</td>
<td>solicitor’s conduct or professional behaviour in the course of the regulatory</td>
</tr>
<tr>
<td>of the regulatory authority investigating conduct which may be unsatisfactory</td>
<td>authority investigating conduct which may be unsatisfactory professional conduct or</td>
</tr>
<tr>
<td>professional conduct or professional misconduct and in doing so the solicitor</td>
<td>professional misconduct and in doing so the solicitor must furnish in writing a full</td>
</tr>
<tr>
<td>must furnish in writing a full and accurate account of his or her conduct in</td>
<td>and accurate account of his or her conduct in relation to the matter.</td>
</tr>
<tr>
<td>relation to the matter.</td>
<td></td>
</tr>
</tbody>
</table>
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 Law Firms Australia, which are known collectively as the Council’s Constituent Bodies. The Law Council’s Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

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

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. 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 members, led by the President who normally serves a 12-month term. The Council’s six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

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